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Correspondence should be addressed to:

Sydney Law Review
Sydney Law School
Building F10, Eastern Avenue
UNIVERSITY OF SYDNEY NSW 2006
AUSTRALIA

Email: sydneylawreview@sydney.edu.au

Website and submissions:

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Government Purchasing and the Implementation of Modern Slavery Legislation

Ingrid Landau* and John Howe†

Abstract

Under the *Modern Slavery Act 2018* (Cth), the Australian Government is required to report annually on how it is managing modern slavery risks in its own operations and supply chains. While underexamined in the literature to date, this feature of the Act is significant for its potential impact on Federal Government procurement processes and, through these, on business practice. In this article we examine the Australian Government's recent efforts to integrate modern slavery considerations into its public procurement framework from a labour regulation and compliance perspective. We begin by contextualising these developments within the broader literature on government purchasing, labour standards and human rights. We identify two sets of regulatory challenges that arise when seeking to use public procurement to advance labour rights globally, and we provide a preliminary assessment of the Australian Government's modern-slavery-related procurement initiatives in light of these challenges.

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* Senior Lecturer, Department of Business Law and Taxation, Monash Business School, Monash University, Victoria, Australia.

Email: ingrid.landau@monash.edu; ORCID iD: <https://orcid.org/0000-0002-4328-6147>.

† Professor and Director, Melbourne School of Government, University of Melbourne, Victoria, Australia. Email: j.howe@unimelb.edu.au; ORCID iD: <https://orcid.org/0000-0002-3432-8296>.

I Introduction

The Australian Government has committed to a global leadership role in combating modern slavery.¹ The mainstay of these efforts, the *Modern Slavery Act 2018* (Cth) (*'Modern Slavery Act'*), requires large Australian organisations to report annually on measures they have taken to identify and address risks of modern slavery in their operations and supply chains. While modelled on a similar legislative initiative in the United Kingdom (*'UK'*), the Australian statute goes further in several respects. Among its innovative features is its application to the Australian Government itself, with the Act being 'the first and only legislation of its kind in the world to require a government to report on modern slavery risks across its procurement and investment activities'.² While underexamined in the literature to date, this feature of the *Modern Slavery Act* is significant for its potential impact on Federal Government procurement processes and, through these, on business practice. The Australian Government is the largest procurer in the Australian market, entering over 84,050 contracts in the 2020–21 financial year, with a total value of \$69.8 billion.³ The application of the *Modern Slavery Act* to the Australian Government may also prompt innovation and reflection with respect to the use of public procurement as a means through which to promote respect for a broader set of labour and human rights.

In this article we contextualise, and engage in a preliminary assessment of, the Australian Government's efforts to use its purchasing power to address modern slavery from the standpoint of labour regulation and compliance. We also consider what this approach reveals to us about how the Federal Government conceptualises its regulatory role within the context of public procurement and labour governance. We argue that the Government's approach to integrating modern slavery

¹ See, eg, Jason Wood MP, Assistant Minister for Customs, Community Safety and Multicultural Affairs, 'Australian Government a World Leader in Eradicating Modern Slavery' (Media Release, 1 June 2020) <<https://minister.homeaffairs.gov.au/jasonwood/Pages/australian-government-world-leader-eradicating-modern-slavery.aspx>>.

² Australian Government, *Commonwealth Modern Slavery Statement 2019–20* (Commonwealth of Australia, 2020) 3 (*'Commonwealth Modern Slavery Statement 2019–20'*). The *Modern Slavery Act* (2015) (UK), on which the Australian Act was modelled, does not apply to public procurement. However, the United Kingdom (*'UK'*) Government voluntarily published its own Modern Slavery Statement in March 2020 and from 2021, UK ministerial departments are required to publish their own annual statements: Home Office (UK), *Home Office Modern Slavery Statement 1 April 2020–31 March 2021* (August 2021) 3. The *Modern Slavery Act 2018* (NSW) imposes modern slavery reporting requirements on government agencies (including local councils) and state-owned corporations. This Act commenced operation on 1 January 2022 (following the passage of the *Modern Slavery Amendment Act 2021* (NSW)). Australian state and territory procurement regimes are not examined in this article. For a discussion of the potential application of Western Australia's new procurement debarment regime to human rights, see Fiona McGaughey, Rebecca Faugno, Elise Bant and Holly Cullen, 'Public Procurement for Protecting Human Rights' (2022) 47(2) *Alternative Law Journal* 143.

³ Australian Government, *Commonwealth Modern Slavery Statement 2020–21* (Commonwealth of Australia, 2021) 14 (*'Commonwealth Modern Slavery Statement 2020–21'*). State and territory governments are excluded from the reporting requirement: *Modern Slavery Act 2018* (Cth) s 8 (*'Modern Slavery Act'*). Local government authorities are not required to report, but the Australian Border Force encourages local government entities to voluntarily comply with the Act where they have the capacity to do so: Australian Government Department of Home Affairs, *Modern Slavery* (Web Page) <<https://www.homeaffairs.gov.au/criminal-justice/Pages/modern-slavery.aspx>>.

considerations into its purchasing practices, largely by way of its modern slavery ‘*Procurement Toolkit*’,⁴ may open up opportunities for procurement officers within various departments and agencies to adopt innovative approaches to managing modern-slavery-related risks in goods and services they procure. However, it is unclear to what extent such opportunities will be taken up given countervailing pressures within the broader organisational and regulatory frameworks in which these officers operate. More broadly, we argue that the Australian Government’s approach appears to underestimate two regulatory challenges associated with the integration of social considerations into government purchasing practices within the context of a highly decentralised procurement system. The first of these challenges goes to the regulation of procurement officers’ decision-making. Specifically, we question the extent to which procurement officers will exercise their discretion to effectively integrate modern slavery considerations into procurement decision-making given the emphasis within government procurement on cost minimisation, and time and resource constraints. The second regulatory challenge goes to what is needed to influence business practices within global supply chains. To be effective, business compliance with modern-slavery-related performance obligations in government contracts needs to be monitored and cases of non-compliance appropriately responded to and, where necessary, sanctioned. We suggest that when considered in light of previous studies of regulatory design and effectiveness, the Government’s approach risks relying too heavily on self-evaluation and self-reporting to secure broad, meaningful and sustained change in business behaviour.

In Part II of this article, we locate the Australian Government’s recent modern slavery procurement initiatives within the broader literature on government purchasing, labour standards and human rights. We also position these efforts within the context of growing global momentum towards socially responsible public procurement. Drawing on insights from the regulatory governance literature, in Part III we identify two distinct sets of regulatory challenges that, we argue, are often overlooked and/or conflated in academic and policy discourse on the use of public procurement to advance labour rights globally. In Part IV we describe how the Australian Government has integrated modern slavery considerations into its procurement processes. In Part V we critically assess this approach, drawing on our discussion in Part III. We also suggest how the Government’s approach could be adjusted and developed to encourage greater accountability for modern slavery risks by its suppliers. In Part V, we summarise our conclusions and identify areas for further research.

⁴ Australian Government, *Addressing Modern Slavery in Government Supply Chains: A Toolkit of Resources for Government Procurement Officers* <<https://modernslaveryregister.gov.au/resources/>> (‘*Procurement Toolkit*’).

II Public Procurement, Labour Standards and Human Rights

Public procurement is the purchasing by government from private sector contractors of goods and services that government needs.⁵ These goods and services are diverse: ranging from large infrastructure and defence projects through to the purchasing of information and communication technology ('ICT') equipment, vehicles, office stationery, uniforms and facilities and property management services. Public procurement has long been recognised as a means through which to promote and achieve social objectives. In the realm of labour standards, it has been used as a regulatory tool to support compliance with existing obligations imposed by labour law, as well as a means through which to promote desired labour practices above minimal standards.⁶ Rationales for the integration of labour considerations into government purchasing decision-making include recognition of government's responsibility to ensure public money is spent in a way that maximises public benefit and policy coherence. As significant purchasers, governments can use their substantial economic power to leverage change in corporate behaviour, an approach that can be more politically palatable and feasible than the use of law to impose universally applicable standards.⁷ Attaching labour-related criteria to public procurement is also consistent with the notion of public authorities as 'model employers'.⁸ While the use of state purchasing power to pursue social objectives via public procurement is not without its critics,⁹ it is widely recognised as a legitimate means through which governments may seek to bring about greater organisational commitment to the realisation of certain labour standards.

Although the attachment of labour-related objectives to public procurement contracts has a long history, most political and legal efforts in this regard have focused on effecting change in working conditions in domestic jurisdictions.¹⁰ An example of such an initiative in Australia is the former Howard Coalition Government's linkage of building and construction funding to a sector-specific code

⁵ Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement and Legal Change* (Oxford University Press, 2007) 3.

⁶ See, eg, Catherine Barnard, 'To Boldly Go: Social Clauses in Public Procurement' (2017) 46(2) *Industrial Law Journal* 208, 211–12; McCrudden (n 5); John Howe, "'Money and Favours": Government Deployment of Public Wealth as an Instrument of Labour Regulation' in Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O'Donnell (eds) *Labour Law and Labour Market Regulation* (Federation Press, 2006) 167.

⁷ John Howe, 'The Regulatory Impact of using Public Procurement to Promote Better Labour Standards in Corporate Supply Chains' in Kate Macdonald and Shelley Marshall (eds) *Fair Trade, Corporate Accountability and Beyond: Experiments in Globalizing Justice* (Ashgate, 2010) 329, 330.

⁸ McCrudden (n 5); John Howe, 'Government as Industrial Relations Role Model: Promotion of Collective Bargaining by Non-legislative Measures' in Breen Creighton and Anthony Forsyth (eds) *Rediscovering Collective Bargaining: Australia's Fair Work Act in International Perspective* (Routledge, 2012) 182.

⁹ See, eg, Sasha Holley, Glenda Maconachie and Miles Goodwin, 'Government Procurement Contracts and Minimum Labour Standards Enforcement: Rhetoric, Duplication and Distraction?' (2015) 26(1) *Economic and Labour Relations Review* 43; Albert Sanchez-Graells, 'Regulatory Substitution between Labour and Public Procurement Law: The EU's Shifting Approach to Enforcing Labour Standards in Public Contracts' (2018) 24(2) *European Public Law* 229.

¹⁰ Olga Martin-Ortega and Claire Methven O'Brien, 'Advancing Respect for Labour Rights Globally through Public Procurement' (2017) 5(4) *Politics and Governance* 69, 70.

of workplace practice.¹¹ Between 2009 and 2014, the former Rudd Labour Government also used procurement to promote labour-related objectives, with the Fair Work Principles tying Federal Government procurement decisions to compliance with the main federal labour law (the *Fair Work Act 2009* (Cth)) and requiring additional minimum requirements for cleaning services, and clothing, textile and footwear manufacturers.¹² Scholarly analysis (in Australia and internationally) has similarly tended to focus on the use of procurement to pursue labour objectives at the national or local level.¹³

However, several developments are prompting activists, scholars and policymakers to pay closer attention to the question of how national governments can use their purchasing power to influence working conditions abroad, as well as at home. The first of these is the increasingly globalised economy in which government purchasing takes place. Governments, like private entities, purchase many goods and services that are produced by way of global supply chains. Particularly where these chains extend into so-called ‘developing’ countries, there is a significant risk of labour rights abuses taking place in the production or delivery of these goods and services. In recent years, media reports have exposed linkages between public contracts, and serious labour and human rights abuses in a range of sectors, including electronics and ICT, textiles and apparel, healthcare, infrastructure and agriculture.¹⁴

At the global level, the United Nations (‘UN’) Human Rights Council’s adoption of the *UN Guiding Principles on Business and Human Rights* (‘*UNGP*’)¹⁵ in 2011 has prompted a resurgence of interest in the concept of socially responsible procurement. These authoritative principles have become the global standard on the expected roles of states and businesses in relation to human rights. Guiding Principles 4–6 address the ‘state-business nexus’: that is, the requirements on States to ensure protection and respect of human rights in their roles as economic actors.¹⁶ Guiding Principle 6 of the *UNGP* provides that, in fulfilling their duty to protect

¹¹ *Building and Construction Industry Improvement Act 2005* (Cth). This approach is continued in the current *Building and Construction Industry (Improving Productivity) Act 2016* (Cth).

¹² These principles were repealed by the Abbott Coalition Government on 1 July 2014: Joint Select Committee on Government Procurement, Parliament of Australia, *Buying into Our Future: Review of Amendments to the Commonwealth Procurement Rules* (Report, June 2017) 36–7 [4.3]–[4.7] (‘*Buying into Our Future Report*’); Senate Finance and Public Administration References Committee, Parliament of Australia, *Commonwealth Procurement Procedures* (Report, July 2014) 71 [5.51].

¹³ See, eg, Barnard (n 6); McCrudden (n 5); Holley, Maconachie and Goodwin (n 9); John Howe and Ingrid Landau, ‘Using Public Procurement to Promote Better Labour Standards in Australia: A Case Study of Responsive Regulatory Design’ (2009) 51(4) *Journal of Industrial Relations* 574.

¹⁴ See, eg, Martijn Boersma, *Do No Harm? Procurement of Medical Goods by Australian Companies and Government* (Report, Australian Nursing and Midwifery Federation and the Australia Institute, March 2017); Claire Methven O’Brien, Nicole Vander Meulen and Amol Mehra, *Public Procurement and Human Rights: A Survey of Twenty Jurisdictions* (Report, International Learning Lab on Public Procurement and Human Rights, July 2016).

¹⁵ United Nations (‘UN’) Office of the High Commissioner for Human Rights, *Guiding Principles on Business and Human Rights: Implementing the United Nations ‘Protect, Respect and Remedy’ Framework* (HR/PUB/11/04, 2011) (‘*UNGP*’) endorsed by UN Human Rights Council, Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, 17th sess, 33rd mtg, Agenda Item 3, A/HRC/RES/17/4 (6 July 2011).

¹⁶ Ibid 6–8 (Guiding Principles 4–6).

against human rights abuses by third parties, ‘States should promote respect for human rights by business enterprises with which they conduct commercial transactions’.¹⁷ ‘States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies ... including, where appropriate, by requiring human rights due diligence.’¹⁸ They should also ‘exercise adequate oversight in order to meet their human rights obligations’ where they have privatised the delivery of public services (whether by way of contract or legislation).¹⁹ Finally, States should ensure policy coherence across all governmental departments, agencies and other state-based institutions that ‘shape business practices’.²⁰ There has been, to draw on the words of the UN Working Group on Business and Human Rights in 2018, ‘slow progress’ by States in integrating human rights concerns into public procurement.²¹ Nonetheless, civil society organisations around the world are increasingly using the *UNGP* as a launching pad from which to call for state action in this regard.²²

Political support for the integration of social considerations into public procurement at the global level has also come by way of the global community’s adoption of the 2030 Sustainable Development Goals in 2015. Goal 12.7 specifically calls for the implementation of sustainable public procurement policies and action plans.²³ In addition, global leadership groups such as the G7 and the G20 have emphasised the joint responsibilities of government and business to foster the implementation of labour, social and environmental standards in supply chains and encourage best practice.²⁴

The low-profile, but highly influential, Organisation for Economic Co-operation and Development (‘OECD’) is also emphasising ‘the growing expectation that governments uphold RBC [responsible business conduct] commitments in their role as an economic actor’.²⁵ In 2017, then Secretary-General of the OECD, Angel Gurría, observed:

Until only a few years ago, public procurement was perceived as an administrative, back-office function. Today however, it is seen as a crucial

¹⁷ Ibid 8 (Guiding Principle 6).

¹⁸ Ibid 6 (Guiding Principle 4).

¹⁹ Ibid 8 (Guiding Principle 5).

²⁰ Ibid 10 (Guiding Principle 8).

²¹ UN Secretary-General, *The Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises*, 73rd sess, Agenda Item 74(b), UN Doc A/73/163 (16 July 2018) 21 [82] <<https://digitallibrary.un.org/record/1639520>>.

²² See, eg, Australian Human Rights Commission, *Implementing the UN Guiding Principles on Business and Human Rights in Australia: Joint Civil Society Statement* (August 2016).

²³ *Transforming Our World: The 2030 Agenda for Sustainable Development*, GA Res 70/1, 70th sess, Agenda Items 15 and 116, UN Doc A/RES/70/1 (21 October 2015, adopted 25 September 2015) <<https://digitallibrary.un.org/record/3976972>>.

²⁴ G7 Summit, ‘Leaders’ Declaration’ (7–8 June 2015) 4–5 <https://sustainabledevelopment.un.org/content/documents/7320LEADERS%20STATEMENT_FINAL_CLEAN.pdf>; G20 Summit, ‘Leaders’ Declaration: Shaping an Interconnected World (7–8 July 2017) 4–5 <<https://www.consilium.europa.eu/en/press/press-releases/2017/07/08/g20-hamburg-communique/>>.

²⁵ Organisation for Economic Co-operation and Development (‘OECD’), *Integrating Responsible Business Conduct into Public Procurement* (22 December 2020) 16 (citations omitted) <<https://doi.org/10.1787/02682b01-en>>.

pillar of services delivery for governments and a strategic tool for achieving key policy objectives: from budget accountability ... to tackling global challenges such as climate change, and promoting socially responsible suppliers into the global value chain.²⁶

Adopted in 2015, the *OECD Recommendation of the Council on Public Procurement* focuses on the strategic and holistic use of public procurement.²⁷ This instrument acknowledges the validity of ‘secondary policy objectives’, and calls on adhering States to recognise that the pursuit of such objectives should be balanced against the primary procurement objective of ‘delivering goods and services necessary to accomplish government mission in a timely, economical and effective manner’.²⁸ In 2019, the OECD launched a new programme focusing on the integration of responsible business conduct into public procurement policies and processes.²⁹ Drawing on the concept of risk-based due diligence in the *OECD Guidelines for Multinational Enterprises*,³⁰ this programme focuses on implementing due diligence in public procurement to ensure that purchasing decisions are not linked to adverse impacts on human rights, labour rights and the environment, and extending due diligence actions along the supply chain.³¹

III Public Procurement as Regulation

Despite growing interest in leveraging State purchasing power to augment existing efforts to address labour and human rights violations in global production networks, most academic scholarship on the subject focuses on the desirability or legality of such measures within national, regional or global frameworks.³² Regulatory frameworks in the European Union (‘EU’) have received particular attention, in light of revisions to EU directives in 2014 that have broadened the scope for inclusion of social considerations in state purchasing.³³ Efforts have also been made to map

²⁶ Angel Gurriá, ‘Strategic Public Procurement: Procuring Sustainable, Innovative and Socially Responsible Solutions’ (Opening Remarks at the Joint OECD–European Commission Conference on Strategic Public Procurement, 2 June 2017) <<https://www.oecd.org/about/secretary-general/strategic-public-procurement-procuring-sustainable-innovative-and-socially-responsible-solutions.htm>>.

²⁷ OECD Directorate for Public Governance and Territorial Development, *OECD Recommendation of the Council on Public Procurement* (2015) <<https://www.oecd.org/gov/public-procurement/recommendation/>>.

²⁸ Ibid arts I, V.

²⁹ OECD, *Public Procurement and Responsible Business Conduct* (Web Page) <<https://www.oecd.org/gov/public-procurement/procurement-and-rbc/>>.

³⁰ OECD, *OECD Guidelines for Multinational Enterprises* (OECD Publishing, 2011) <<http://mneguidelines.oecd.org/guidelines/>>.

³¹ OECD, *Public Procurement and Responsible Business Conduct* (n 29).

³² See, eg, Maria Anna Corvaglia, *Public Procurement and Labour Rights: Towards Coherence in International Instruments on Public Procurement* (Hart Publishing, 2017); Olga Martin-Ortega and Claire Methven O’Brien (eds) *Public Procurement and Human Rights: Opportunities, Risks and Dilemmas for the State as Buyer* (Edward Elgar, 2019).

³³ See, eg, Albert Sánchez Graells (ed) *Smart Public Procurement and Labour Standards: Pushing the Discussion after RegioPost* (Bloomsbury, 2018); Laurens Ankersmit, ‘The Contribution of EU Public Procurement Law to Corporate Social Responsibility’ (2020) 26(1) *European Law Journal* 9; Gale Raj-Reichert, Cornelia Staritz and Leonhard Plank, ‘Conceptualizing the Regulator-Buyer State in the European Union for the Exercise of Socially Responsible Public Procurement in Global Production Networks’ (2022) 60(3) *Journal of Common Market Studies* 759.

existing initiatives,³⁴ and to present policy options for using procurement to protect and promote labour standards and human rights, largely based on what are perceived to be best practice initiatives.³⁵ Questions of optimal regulatory design to ensure the effective implementation of procurement criteria remain underexamined in both the domestic or international context.³⁶

In giving greater focus to the issue of regulatory design in procurement, we draw on scholarship from the field of regulatory governance. More specifically, we adopt a labour regulation and compliance perspective that conceives of regulation broadly, as involving

the sustained and focused attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes, which may involve mechanisms of standard-setting, information gathering and behaviour modification.³⁷

Such a perspective recognises that a range of public and private actors have the capacity to influence labour standards and that such influence may be exerted through various modes of intervention.³⁸ These modes include, for example, law, but also self-regulation, private agreement, financial incentives, and the implementation of non-government standards and accreditation schemes. The inclusion of the term ‘compliance’ indicates that our focus is not only on the regulators and the nature of the regulation, but also on the challenges of securing compliance (that is, achieving the policy outcomes at which the regulation is directed), on the efforts made by regulatory authorities to elicit compliance, and on how the regulation is responded to and implemented by those individuals and organisations to which it is directed.³⁹ Viewed from this perspective, the linking of public procurement with the goals of the *Modern Slavery Act* is a form of state-based regulation. The OECD’s growing interest in the use of public procurement as a means of promoting secondary policy objectives, as noted above, also reinforces this view of social procurement as a distinctive form of public regulation.

We suggest that, in considering the potential or actual regulatory impact of these types of initiatives, there are two distinct sets of regulated actors and entities that merit attention. The first of these is public procurement officers and agencies, and the second is businesses looking to provide goods or services to the government

³⁴ See, eg, Methven O’Brien, Vander Meulen and Mehra (n 14); National Agency for Public Procurement, *Mapping Initiatives for Ethical Public Procurement in Europe* (Report 2017:6, November 2017).

³⁵ See, eg, Robert Stumberg, Anita Ramasastry and Meg Roggensack, *Turning a Blind Eye? Respecting Human Rights in Government Purchasing* (Report, International Corporate Accountability Roundtable, September 2014).

³⁶ Cf Isabelle Glimcher, *Purchasing Power: How the US Government can use Federal Procurement to Uphold Human Rights* (Report, NYU Stern Center for Business and Human Rights, September 2020); Howe and Landau (n 13).

³⁷ Julia Black, ‘Critical Reflections on Regulation’ (2002) 27 *Australian Journal of Legal Philosophy* 1, 26.

³⁸ Peter Drahos and Martin Krygier, ‘Regulation, Institutions and Networks’ in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 1, 18. See also Christopher Arup, Peter Gahan, John Howe, Richard Johnstone, Richard Mitchell and Anthony O’Donnell (eds) *Labour Law and Labour Market Regulation* (Federation Press, 2006).

³⁹ See generally Christine Parker and Vibeke Lehmann Nielsen (eds) *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011).

and relevant intermediaries. Below, we elaborate on the different challenges associated with regulation of these two sets of actors in the Australian context.

A *Regulating Public Procurement Decision-Making*

Discussion and analysis of the attachment of labour and human rights standards to public procurement overwhelmingly considers the issue as one of government regulation of the private sector. This overlooks the significant challenges associated with regulation *inside* government.⁴⁰ These challenges, which we outline briefly below, go largely to the question of regulating the exercise of discretion within the context of a highly decentralised procurement system that promotes a range of potentially competing values and objectives.

Since the late 1980s, the Australian Government has adopted a decentralised approach to government purchasing. Whole-of-government coordinated procurement arrangements remain in certain areas: such as accommodation, cleaning, security services, and stationery and office supplies.⁴¹ It is also possible for entities to enter into ‘cooperative procurements’.⁴² Beyond these limited areas, individual non-corporate Commonwealth entities (‘NCCes’) are responsible for developing their own procurement policies, procedures and systems and conducting individual procurements. NCCes, of which there are around 100, may have a central procurement team that manages all procurement activities for the NCCe however they may also devolve procurement to specialist subject matter procurement teams. According to the Government, this high degree of decentralisation distinguishes its procurement activities from many large businesses where centralised procurement teams are used to manage purchases and supplier relationships across all elements of the business. It also means that the ‘processes, relationships and timeframes involved in procurements ... vary considerably between NCCes with limited formal avenues for coordination or collaboration’.⁴³

Decentralisation does not mean deregulation. Regulatory scholars have documented and examined the exponential growth in regulation by government of government itself that has accompanied processes of decentralisation and outsourcing in recent decades.⁴⁴ In the realm of public procurement, devolution of responsibility for the production and delivery of public services has been accompanied by a proliferation of standards to govern the decision-making and conduct of public entities and officers, and mechanisms to monitor and secure compliance.

⁴⁰ Christopher Hood, Oliver James, George Jones, Colin Scott and Tony Travers, *Regulation Inside Government: Waste-Watchers, Quality Police, and Sleazebusters* (Oxford University Press, 2003); Martin Lodge and Christopher Hood, ‘Regulation Inside Government: Retro-Theory Vindicated or Outdated?’ in Robert Baldwin, Martin Cave and Martin Lodge (eds) *The Oxford Handbook of Regulation* (Oxford University Press, 2010) 590.

⁴¹ Non-corporate Commonwealth entities (‘NCCes’) must use coordinated procurements unless they have been granted an exemption: see *Public Governance, Performance and Accountability Act 2013* (Cth) s 8 (‘PGPA Act’); *Commonwealth Procurement Rules 1 July 2022* (No 2) (Cth) rr 4.11–4.12 (‘CPR’).

⁴² CPR (n 41) rr 4.13–4.15.

⁴³ *Commonwealth Modern Slavery Statement 2020–21* (n 3) 13.

⁴⁴ Hood et al (n 40) 3–4.

At the Commonwealth level, government procurement is governed by the *Public Governance, Performance and Accountability Act 2013* (Cth). The main source of official guidance, issued under the Act by the Australian Government Department of Finance, is found in the *Commonwealth Procurement Rules 1 July 2022 (No 2)* (Cth) ('CPR')⁴⁵ and the *Public Governance, Performance and Accountability Rule 2014* (Cth). Officials⁴⁶ from relevant entities (NCCs and prescribed corporate Commonwealth entities) must comply with the CPR, and with five 'procurement-connected policies'.⁴⁷ 'Accountable authorities' must establish their own appropriate internal control systems consistent with the framework offered in the CPR.⁴⁸ These frameworks should provide primary operational instructions to relevant entity officers in carrying out their procurement-related duties, in a way that is tailored to the entity's specific circumstances and needs.⁴⁹

The CPR are divided into two parts, supplemented by appendices. Division 1 sets out the rules that apply to all procurements undertaken by relevant entities.⁵⁰ The core objective of the CPR is to ensure relevant entities achieve 'value for money' in the conduct of procurement activity.⁵¹ Procurement officers must be satisfied, after reasonable enquiries, that the procurement achieves this outcome.⁵² The CPR make clear that price is not the sole factor when assessing value for money,⁵³ and require procurement officers to consider 'relevant financial and non-financial costs and benefits'.⁵⁴ Where the procurement is above \$4 million (or \$7.5 million for construction services),⁵⁵ officers are also required to consider the economic benefit of the procurement to the Australian economy.⁵⁶ Procurement officers should ensure that procurements 'encourage competition and be non-discriminatory', 'use public resources in an efficient, effective, economical and ethical manner that is not inconsistent with the policies of the Commonwealth'; 'facilitate accountable and transparent decision making'; 'encourage appropriate engagement with risk'; and 'be commensurate with the scale and scope of the business requirement'.⁵⁷

Division 2 lists additional rules that apply when the expected value of procurement is at or above one of three thresholds: \$80,000 for general procurement by a non-corporate Commonwealth agency; \$400,000 for the procurement of construction services by a prescribed corporate Commonwealth agency; or

⁴⁵ The CPR are a non-disallowable legislative instrument issued by the Finance Minister under s 105B(1) of the *PGPA Act* (n 41).

⁴⁶ As defined in s 13 of the *PGPA Act* (n 41).

⁴⁷ CPR (n 41) r 2.2. An 'official' is defined in s 13 of the *PGPA Act* (n 41). Procurement-connected policies, of which there are currently five, are explicitly intended to use the Government's economic influence to drive policy outcomes by placing additional requirements on Commonwealth agencies' procurement activities.

⁴⁸ *PGPA Act* (n 41) s 16.

⁴⁹ CPR (n 41) r 2.13.

⁵⁰ Ibid r 3.5.

⁵¹ Ibid r 4.4.

⁵² Ibid.

⁵³ Ibid r 4.5.

⁵⁴ Ibid. A non-exhaustive list of costs and benefits is enumerated in rr 4.5(a)–(f).

⁵⁵ Except procurements covered by Appendix A and procurements from standing offers: ibid r 4.7.

⁵⁶ Ibid.

⁵⁷ Ibid r 4.4.

\$7.5 million for the procurement of construction services by a prescribed non-corporate Commonwealth agency.⁵⁸ Broadly speaking, Division 2 requires that procurements must be conducted by ‘an open approach to the market’, except under specific circumstances and imposes additional requirements.⁵⁹ Procurements that are subject to the rules in both Divisions are referred to as ‘covered procurements’.⁶⁰ Procurements with an estimated value above a reporting threshold must be publicly reported via AusTender, the Australian Government’s procurement information system.⁶¹

Monitoring and enforcement of Commonwealth public procurement legislation and policy is overseen by several different authorities. The *Government Procurement (Judicial Review) Act 2018* (Cth) establishes an independent complaint mechanism for certain government procurement processes. It vests the Federal Court of Australia and the Federal Circuit Court of Australia with jurisdiction to consider applications, grant injunctions and/or order the payment of compensation in relation to contravention of the relevant *CPR*, so far as they relate to covered procurements. A complaint must be initially lodged with the ‘accountable authority’ of the relevant Commonwealth entity,⁶² who is responsible for investigating the complaint and preparing a report of the investigation.⁶³ Certain complaints concerning the procurement process may be lodged with the Procurement Coordinator⁶⁴ and the Commonwealth Ombudsman.⁶⁵ For officers undertaking procurement-related activities, non-compliance with legislative and policy requirements in relation to procurement may result in the imposition of criminal, civil and/or administrative sanctions under the *Criminal Code Act 1995* (Cth), the *Crimes Act 1914* (Cth) and the *Public Service Act 1999* (Cth).⁶⁶ The National Auditor-General also plays a role in overseeing Commonwealth public procurement processes by way of conducting performance audits of Australian Government programs and entities, and reporting to the Australian Parliament.⁶⁷

As noted above, the principal source of regulatory standards for procurement officers — the *CPR* — promote a range of objectives, predominant of which is achieving value for money. While compliance with the *CPR* is mandatory for procurement officers, many terms within the *CPR* are broadly defined, and the rules are a mix of steps and criteria officers *must* take or apply, and those they *should* take. Moreover, procurement officers are often required to make ‘reasonable enquiries’ to satisfy themselves as to whether specified criteria have been met, some of which are

⁵⁸ Ibid rr 3.5–3.6.

⁵⁹ Ibid r 10.3.

⁶⁰ *Government Procurement (Judicial Review) Act 2018* (Cth) s 5.

⁶¹ *CPR* (n 41) r 7.18.

⁶² *Government Procurement (Judicial Review) Act 2018* (Cth) s 18. The ‘accountable authority’ has the same meaning as in the *PGPA Act* (n 41) s 12.

⁶³ *Government Procurement (Judicial Review) Act 2018* (Cth) s 19. The *CPR* make clear that relevant entities should aim to resolve complaints internally, when possible, through communication and conciliation: *CPR* (n 41) r 6.8.

⁶⁴ See generally Department of Finance (Cth), *Procurement Coordinator* (Web Page, 28 January 2020) <<https://www.finance.gov.au/government/procurement/procurement-coordinator>>.

⁶⁵ *Ombudsman Act 1976* (Cth) ss 5, 7.

⁶⁶ *CPR* (n 41) r 2.14.

⁶⁷ *Auditor-General Act 1997* (Cth) ss 17–19.

expressed in non-exclusive terms. For example, under the *CPR* eligibility requirements, or ‘conditions for participation’, r 10.19 provides:

Officials **must** make *reasonable enquiries* that the procurement is carried out considering relevant regulations and/or regulatory frameworks, *including but not limited to* tenderers’ practices regarding:

- a. labour regulations, including *ethical employment practices*;
- b. workplace health and safety; and
- c. environmental impacts.⁶⁸

The language used in the *CPR* leaves procurement officers with significant discretion in their decision-making: that is, they are free to make a choice among a range of possible courses of action or inaction,⁶⁹ and certain phrases — such as ‘ethical employment practices’ in r 10.19 — are open to interpretation. Discretion is present not only regarding the ultimate choice of which business is chosen as the successful tender, but also to issues such as the specific requirements for the tender and the relative weighting of criteria.⁷⁰ It is well-established in legal, regulatory and sociological scholarship that such discretion is not exercised in a vacuum. It is influenced by bureaucratic and organisational cultures,⁷¹ with regulatory institutions providing incentives and disincentives for people to act in certain ways.⁷² Broader political and economic pressures, moral and social norms and officials’ own attitudes to their powers also all play a role.⁷³ In addition, ‘the manner in which the decisions of officials are scrutinised shapes discretion’.⁷⁴ It is also the case that discretion may not be exercised in practice, and that ‘what may be discretionary from an external, legal point of view, may be anything but discretionary from the internal point of view of officials within the system’.⁷⁵

While empirical studies on public procurement decision-making remain rare, it has been widely and consistently observed in recent years that the overall effect of the Federal Government’s regulatory framework on public procurement, along with consistent pressure on departmental and agency budgets, has been to foster a procurement culture that prioritises cost and risk minimisation. While, in theory, the paramount objective of value for money considers both financial and non-financial considerations, in practice this requirement is interpreted narrowly with price being

⁶⁸ *CPR* (n 41) r 10.19 (emphasis in bold in original; emphasis in italics added).

⁶⁹ Vijaya Nagarajan, *Discretion and Public Benefit in a Regulatory Agency: The Australian Authorisation Process* (ANU Press, 2013) 130, citing Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press, 1969).

⁷⁰ For a discussion of the challenges that the discretionary nature of decision-making in public procurement processes poses for anti-corruption efforts, see Olivia Dixon, ‘The Efficacy of Australia Adopting a Debarment Regime in Public Procurement’ (2021) 49(1) *Federal Law Review* 122.

⁷¹ Julia Black, ‘Managing Discretion’ (Conference Paper, Australian Law Reform Commission Conference, June 2001) 2.

⁷² Keith Hawkins, ‘The Use of Legal Discretion: Perspectives from Law and Social Science’ in Keith Hawkins (ed), *The Uses of Discretion* (Oxford University Press, 2001) 11–46.

⁷³ DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford University Press, 1986) 12–13.

⁷⁴ Nagarajan (n 69) 160.

⁷⁵ Galligan (n 73) 13.

the primary determinant of procurement decisions.⁷⁶ Studies on strategic procurement in Australia also support this conclusion. Thurbon, for example, reports of ‘strong attitudinal barriers’ to more strategic approaches to public procurement in Australia, including a high level of risk aversion.⁷⁷ This risk aversion manifests itself in a privileging of procedure over outcome in tendering processes, and a tendency for officials to avoid early discussions with potential suppliers on innovative ways to meet the Government’s needs due to considerations around probity, fairness, transparency and even allegations of corruption.⁷⁸ These challenges are not confined to Australia, with the OECD recently observing the need for cultural change if ‘traditionally risk-averse’ officials are to be expected to effectively integrate social considerations into public procurement.⁷⁹

B Regulating Business

A government may include labour-related performance standards in their public procurement for symbolic reasons. They may also do so to encourage businesses to behave responsibly without imposing any requirements on them to do so. Most commonly, however, such regulatory interventions are intended to influence conduct. The Australian Government’s modern-slavery-related procurement initiatives are intended ‘to leverage the Government’s unique position to influence the conduct of suppliers and market practices to drive positive change’.⁸⁰ This raises the important question of regulatory effectiveness: that is, the extent to which the intervention impacts upon the conduct of regulatory targets in the intended way. Below, we elaborate briefly on these challenges, which we organise according to the three basic elements of an effective regulatory regime: standard setting, monitoring and enforcement.⁸¹

In seeking to promote respect for labour and human rights through public procurement, a government may attach prescriptive, principles-based, or process-based performance standards. Prescriptive standards involve regulatory specification of the required outcomes: for example, requiring a supplier to demonstrate compliance with certain laws setting minimum standards in the *Fair Work Act 2009* (Cth). A principles-based approach articulates outcomes to be achieved, but at a higher, more generalised level than prescriptive rules, thus providing greater regulatory flexibility:⁸² for example, a requirement that a regulated entity adopt ‘ethical employment practices’. Process-based standards involve

⁷⁶ See, eg, *Buying into Our Future Report* (n 12) 36–7 [4.3]–[4.7]; Senate Finance and Public Administration References Committee, Parliament of Australia, *Commonwealth Procurement Procedures* (Report, July 2014) 32–40 [4.7]–[4.39].

⁷⁷ Elizabeth Thurbon, ‘Public Purchasing and Innovation: The Australian Case’ in Veiko Lember, Rainer Kattel and Tarmo Kalvet (eds) *Public Procurement, Innovation and Policy: International Perspectives* (Springer, 2014) 35, 41.

⁷⁸ *Ibid* 48.

⁷⁹ OECD, *Responsible Business Conduct in Government Procurement Practices* (Concept Note, June 2017) 6 <<https://mneguidelines.oecd.org/Responsible-business-conduct-in-government-procurement-practices.pdf>>.

⁸⁰ *Commonwealth Modern Slavery Statement 2019–20* (n 2) 6.

⁸¹ Black, ‘Managing Discretion’ (n 71) 23.

⁸² Julia Black, Martyn Hopper and Christa Band, ‘Making a Success of Principles-Based Regulation’ (2007) 1(3) *Law and Financial Markets* 191, 191.

requiring regulated entities ‘to tailor regulation to their individual circumstances’ by way of adopting suitable processes and systems, ‘while holding them accountable for the adequacy and efficacy of their internal control systems’.⁸³ For example, a company may be required to put in place processes to identify and act upon actual and potential risks to workers in its operations, supply chains and the services it uses, and to report on how it is doing so. This ‘meta-regulatory’ approach, in which suppliers are required to provide evidence of their own self-monitoring processes, is a common method of promoting compliance with human rights-related performance criteria in public contracts in EU member-states.⁸⁴ It is also used by the United States (‘US’) Federal Government to prevent human trafficking and forced labour in relation to federal contracts.⁸⁵

Having set relevant standards, a government authority must then monitor supplier performance and respond to non-compliance, including by way of sanctions. There must be processes in place for obtaining credible and accurate information about the nature and extent of compliance or non-compliance and for feeding that information back into the overall regulatory regime.⁸⁶ In the absence of appropriate monitoring and enforcement mechanisms, businesses will respond by engaging in only superficial changes.⁸⁷ This basic proposition is supported by decades of research into business compliance behaviour.⁸⁸ It also finds support in the rich multidisciplinary literature on transnational private regulation.⁸⁹ The latter scholarship is highly relevant to this discussion because of the similarities it shares with socially responsible public procurement: that is, both involve the use of contractual mechanisms as a means to push standards through supply chains, and similar dynamics of enforcement: namely, rewarding compliance and withdrawing orders from recalcitrant suppliers.

With respect to monitoring of supplier compliance with performance standards attached to a public contract, there are two broad issues that must be addressed: how monitoring is undertaken and by whom. Compliance with prescriptive rules can be assessed by a regulator analysing the congruence between the performance standard and the regulated entity’s outputs.⁹⁰ With process-oriented regulation, where businesses are given significant latitude to determine the way in which regulatory goals are achieved, the task of assessing compliance is something quite different. The task for regulators is to assess and evaluate the validity and

⁸³ Sharon Gilad, ‘It Runs in the Family: Meta-Regulation and Its Siblings’ (2010) 4(4) *Regulation and Governance* 485, 485.

⁸⁴ National Agency for Public Procurement (n 34).

⁸⁵ See below Part V.

⁸⁶ Colin Scott, ‘Analysing Regulatory Space: Fragmented Resources and Institutional Design’ (2001) (Summer) *Public Law* 329, 330–1.

⁸⁷ See, eg, John Braithwaite, ‘Rewards and Regulation’ (2002) 29(1) *Journal of Law and Society* 12; Robert Howse, ‘Retrenchment, Reform or Revolution? The Shift to Incentives and the Future of the Regulatory State’ (1993) 31(3) *Alberta Law Review* 455.

⁸⁸ See generally Parker and Lehmann Nielsen (n 39).

⁸⁹ ‘Transnational private regulation’ refers to the ‘structure of oversight in which non-state actors (for profit companies, non-profit organisations or a mix of the two) adopt and to some degree enforce rules for other organisations, such as their suppliers or clients across national borders’: Tim Bartley, *Rules without Rights: Land, Labour and Private Authority in the Global Economy* (Oxford University Press, 2018) 7.

⁹⁰ Gilad (n 83) 487–8.

effectiveness of systems companies have in place.⁹¹ It is important to recognise that this approach requires regulators to do much more than simply review paper systems. It involves a regulator ‘actively challenging the enterprise to demonstrate that its systems work in practice, scrutinising its risk management measures and judging if the company has the leadership, staff, systems and procedures to meet its regulatory obligations’.⁹² Monitoring of supplier compliance with stipulated requirements can be undertaken directly by the State, but it can also be undertaken by way of ‘enrolling’ or collaborating with non-State actors who possess various forms of regulatory capacity.⁹³ In the context of labour regulation, such third parties include, for example, trade unions, commercial auditors and non-governmental organisations (‘NGOs’).

The final element in the effective regulation of public procurement criteria is enforcement. It is generally accepted in the regulatory governance literature that to achieve the desired outcomes, regulatory systems need to include processes by which regulated entities and actors are held accountable to norms, standards, or principles.⁹⁴ Acknowledging the nature of government procurement, enforcement should be cooperative and responsive. But the threat of sanction for failure to meet stipulated conditions is necessary to ensure that businesses take their obligations seriously and do not simply respond to the attraction of government business by engaging in ‘cosmetic’ or ‘creative’ compliance.⁹⁵ The regulatory enforcement pyramid, presented by Ayres and Braithwaite, best illustrates this approach.⁹⁶ The pyramid represents the gradual escalation of enforcement activity in response to non-compliance. Most non-compliance is amendable to resolution by way of negotiation, persuasion and problem-solving. Persistent non-compliance, however, attracts increasingly severe regulatory responses, culminating in the most extreme form of sanction. In the public procurement context, the application of this model would mean that there must be a set of enforcement measures that can be used to hold contractors accountable to the standards required under an existing contract. These enforcement measures may start with negotiations between the parties, but should progress to warnings and then to more extreme forms of sanction such as cancellation of the contract and/or disbarment from the public procurement regime. There should also be a process governing the exercise of discretion by public

⁹¹ Ibid.

⁹² Neil Gunningham ‘Strategizing Compliance and Enforcement: Responsive Regulation and Beyond’ in Christine Parker and Vibeke Lehmann Nielsen (eds) *Explaining Compliance: Business Responses to Regulation* (Edward Elgar, 2011) 199, 212. See also Gilad (n 83).

⁹³ Julia Black, ‘Enrolling Actors in Regulatory Systems: Examples from UK Financial Services Regulation’ (2003) (Spring) *Public Law* 63; Peter Grabosky, ‘Using Non-Governmental Resources to Foster Regulatory Compliance’ (1995) 8(4) *Governance* 527. On the enrolment of third parties in labour regulation specifically, see, eg, Janice Fine and Jennifer Gordon, ‘Strengthening Labor Standards Enforcement through Partnerships with Workers’ Organisations’ (2010) 38(4) *Politics & Society* 552.

⁹⁴ Scott (n 86) 331.

⁹⁵ Christine Parker and John Howe, ‘Ruggie’s Diplomatic Project and its Missing Regulatory Architecture’ in Radu Mares (ed) *The UN Guiding Principles on Business and Human Rights: Foundations and Implementation* (Koninklijke Brill, 2012) 273, 286–9.

⁹⁶ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992) 35–36.

procurement authorities concerning what action should be taken in relation to supplier non-compliance with stipulated requirements and in what circumstances.

IV Leveraging Public Procurement to Address Modern Slavery – The Australian Government’s Approach

This section examines how the Australian Government has introduced modern slavery considerations into its procurement functions. Following a brief overview of the first two Modern Slavery Statements published by the Australian Government, we explain how it has relied on the existing *CPR* to integrate modern slavery concerns. We also discuss the suite of resources produced by the Australian Government to assist Commonwealth procurement officers identify and respond to modern slavery risks in existing and future procurements.

A The Australian Government’s Modern Slavery Statements

The *Modern Slavery Act* has been the key driver for the Australian Government’s integration of modern slavery concerns into its procurement activities. This statute requires large businesses and other entities operating in the Australian market with an annual consolidated revenue of AU\$100 million or above to produce an annual statement outlining actions they have taken to identify and address risks of modern slavery in their operations and supply chains (‘a Modern Slavery Statement’).⁹⁷ The Minister is also required to submit a Modern Slavery Statement on behalf of the Australian Government.⁹⁸

Modern slavery is defined in the *Modern Slavery Act* to include trafficking in persons, slavery, servitude, forced marriage, forced labour, debt bondage, the worst forms of child labour, and deceptive recruiting for labour or services.⁹⁹ Modern Slavery Statements must address seven mandatory criteria. A statement must:

- ‘identify the reporting entity’ and
- describe its ‘structure, operations and supply chains’;
- ‘describe the risks of modern slavery practices in the operations and supply chains’;
- describe actions taken ‘to assess and address those risks’;
- describe how the entity assesses the effectiveness of its actions;
- ‘describe the process of consultation with any entities that the reporting entity owns or controls’; and
- provide any other relevant information.¹⁰⁰

⁹⁷ *Modern Slavery Act* (n 3) s 13.

⁹⁸ *Ibid* s 15.

⁹⁹ *Ibid* s 4.

¹⁰⁰ *Ibid* s 16(1)(a)–(g).

The reporting requirements in the *Modern Slavery Act* are heavily influenced by the concept of human rights due diligence in the *UNGP*. Human rights due diligence involves businesses taking a risk-based approach to identifying and managing actual and potential adverse impacts on all internationally-recognised human rights.¹⁰¹ However, the scope of the *Modern Slavery Act* has the effect of significantly narrowing this concept to apply only to practices that constitute modern slavery under the Act.

The *Modern Slavery Act* is a disclosure-based form of regulation. It does not mandate certain minimum standards of performance. Rather, it requires entities to produce and report information on their management of modern slavery risks. It is assumed that this process will stimulate internal processes within firms to identify and address risks of modern slavery in their own operations and supply chains. It is also assumed that the information disclosed will be used by the market, consumers and other actors.¹⁰²

The Australian Government has published two Modern Slavery Statements (2019–20 and 2020–21). In both statements, the Government expresses its commitment to ‘lead by example’ in addressing modern slavery risks in its global operations and supply chains.¹⁰³ Both statements are structured according to the *Modern Slavery Act*’s seven reporting criteria. The *Commonwealth Modern Slavery Statement 2019–20* details the initial risk scoping exercise undertaken by the Government in line with its own guidance to reporting entities,¹⁰⁴ and identifies four areas of procurement considered to have a high risk of modern slavery. These high risk areas are textiles, construction, cleaning and security services, and Australian Government investments.¹⁰⁵ The Statement discusses these risks at a general level. It also identifies five areas in which the Government has taken action:

- building a whole-of-government framework to guide and coordinate the Government’s response and foster information sharing and collaboration;
- raising awareness of modern slavery risks among key government officials, including through tailored training;
- establishing plans and processes to ensure the Government can effectively respond to modern slavery cases;

¹⁰¹ See *UNGP* (n 15) 17–24 (Guiding Principles 17–21).

¹⁰² For a discussion of the regulatory approach underpinning the *Modern Slavery Act* (n 3), see Jolyon Ford and Justine Nolan, ‘Regulating Transparency on Human Rights and Modern Slavery in Corporate Supply Chains: The Discrepancy between Human Rights Due Diligence and the Social Audit’ (2020) 26(1) *Australian Journal of Human Rights* 27, 30–32; Ingrid Landau and Shelley Marshall, ‘Should Australia be Embracing the Modern Slavery Model of Regulation?’ (2018) 46(2) *Federal Law Review* 313.

¹⁰³ The Hon Jason Wood MP, ‘Assistant Minister for Customs, Community Safety and Multicultural Affairs’ Foreword’ in *Commonwealth Modern Slavery Statement 2019–20* (n 2) 3; The Hon Jason Wood MP, ‘Foreword: Assistant Minister for Customs, Community Safety and Multicultural Affairs’ in *Commonwealth Modern Slavery Statement 2020–21* (n 3) 7.

¹⁰⁴ See Department of Home Affairs (Cth), *Commonwealth Modern Slavery Act 2018: Guidance for Reporting Entities* <<https://www.homeaffairs.gov.au/criminal-justice/files/modern-slavery-reporting-entities.pdf>>.

¹⁰⁵ *Commonwealth Modern Slavery Statement 2019–20* (n 2) 16.

- embedding modern slavery considerations within existing procurement and contracting practices; and
- equipping procurement officers to assess and address modern slavery risks and engage with suppliers.¹⁰⁶

In its *Commonwealth Modern Slavery Statement 2020–21*, the Government elaborates on the modern slavery risks within its four priority sectors. It also considers modern slavery risks in the procurement of ICT hardware. The Government outlines the actions it has taken to address these risks during the relevant reporting period, including by way of agency-specific initiatives. According to the Statement, the Government focused in the second reporting period on collaboration with industry and civil society experts to build a deeper awareness and understanding of the nature of modern slavery risks in its identified high-risk areas of procurement.¹⁰⁷

The *Commonwealth Modern Slavery Statement 2020–21* explains the Government's 'continuous improvement' approach to addressing modern slavery risks in its operations and supply chains.¹⁰⁸ It identifies four 'phases of action', covering the first six years of reporting.¹⁰⁹ Following a 'Foundation Phase' in 2019–20, the Government has now moved into a two-year 'Discovery Phase', in which it is undertaking 'targeted supply chain mapping and risk assessment to increase visibility and awareness of ... modern slavery risks'.¹¹⁰ This will be followed by a two-year 'Implementation Phase', in which action will be taken 'to implement resources and recommendations made during the Discovery Phase'.¹¹¹ NCCs will 'consider mitigation strategies and targeted action around supplier engagement in high-risk procurements', and the Government will consider 'feasible options for remediation'.¹¹² The sixth year will consist of a 'Review Phase' in which the Government considers the 'overall effectiveness' of its approach and plans for the future.¹¹³ The 2020–21 Statement also explains how the Government intends to evaluate the effectiveness of its actions in future reporting periods.¹¹⁴

B *Integrating Modern Slavery Considerations into the CPR*

As explained in its initial *Modern Slavery Statement*, the Australian Government has sought to integrate modern slavery considerations into its procurement processes through existing rules in the *CPR*. Specifically, it encourages procurement officers to consider modern slavery in the context of the general prohibition on entities seeking to benefit from supplier practices that may be dishonest, unethical or unsafe (r 6.7 in div 1) and the need for officers to make reasonable enquiries that

¹⁰⁶ Ibid.

¹⁰⁷ *Commonwealth Modern Slavery Statement 2020–21* (n 3) 10.

¹⁰⁸ Ibid 34.

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid.

¹¹³ Ibid.

¹¹⁴ Ibid 36–8.

procurement is carried out considering relevant regulations and/or regulatory frameworks (r 10.9 in div 2).¹¹⁵

Rule 6.7 in div 1 states that '[r]elevant entities **must** not seek to benefit from supplier practices that may be dishonest, unethical or unsafe.'¹¹⁶ The Commonwealth-provided model contract clauses (mandatory for procurements under \$200,000) include a clause requiring the supplier to 'comply with, and ensure its officers, employees, agents and subcontractors comply with, the laws from time to time in force in any jurisdiction in which any part of the Contract is performed'.¹¹⁷ An additional model clause requires supplier compliance with 'Commonwealth Laws and Policies', and for the supplier to 'provide such reports and other information regarding compliance as reasonably requested by the Customer or as otherwise required by a relevant law or policy'.¹¹⁸

Covered procurements must also comply with r 10.19, which we discussed above in Part III(A) as an example of the discretion granted to procurement officers by the drafting of the *CPR*. This rule requires officials to consider 'regulations and/or regulatory frameworks' relevant to a procurement 'including, but not limited to, tenderers' practices regarding labour regulations, including ethical employment practices'.¹¹⁹ The Australian Government Department of Finance guidance document elaborating upon this rule explains that officials should determine how best to satisfy this rule depending on their procurement requirements.¹²⁰ They should use their own judgement when determining what constitutes a relevant regulation and/or regulatory framework and, where unsure, seek advice internally or externally (for example, from subject-matter experts or other procuring officials).¹²¹ Labour and human rights regulatory standards fall within the scope of this rule. The guidance leaves it open to officials to determine how they go about meeting r 10.19. It offers several options. Officials could require potential suppliers to certify that they comply with the regulations and/or regulatory frameworks; require successful suppliers to provide assurance of their compliance (such as through an independent audit report); and/or undertake their own investigations to confirm that potential or preferred suppliers comply.¹²²

¹¹⁵ *Commonwealth Modern Slavery Statement 2019–20* (n 2) 13.

¹¹⁶ See *CPR* (n 41) r 6.7 (emphasis in original). That rule also says:

This includes not entering into contracts with tenderers who have had a judicial decision against them relating to employee entitlements and who have not satisfied any resulting order. Officials should seek declarations from all tenderers to this effect.

¹¹⁷ Department of Finance (Cth), *Commonwealth Contract Terms v 6.1* (19 November 2020) 3 [C.C.21] <https://www.finance.gov.au/sites/default/files/2020-11/Commonwealth_Contract_Terms_v6.1_19_November%202020.pdf>.

¹¹⁸ *Ibid* 4 [C.C.22].

¹¹⁹ *CPR* (n 41) r 10.19.

¹²⁰ Department of Finance (Cth), *Consideration of Relevant Regulations and/or Frameworks* (August 2020) 2 [7] <<https://www.finance.gov.au/sites/default/files/2020-08/consideration-of-relevant-regulations-andor-frameworks.pdf>>.

¹²¹ *Ibid* 2 [7]–[8].

¹²² *Ibid* 2 [9].

C *The Modern Slavery Procurement Toolkit*

The Australian Government has produced ‘a suite of resources to assist Commonwealth procurement officers [to] identify and respond to modern slavery risks in current and future procurements, as well as influence change in the private sector’.¹²³ These resources, which consist of a risk screening tool, a supplier questionnaire and modern slavery model contract clauses, are assembled along with ‘Tender Guidance’ in the Australian Government’s *Addressing Modern Slavery in Government Supply Chains: A Toolkit of Resources for Government Procurement Officers* (*Procurement Toolkit*).¹²⁴ In this section, we briefly explain how these various tools are intended to be used in each of the three main stages of the procurement process: planning (qualification or eligibility to tender for a government contract); selection and award of tender; and management and enforcement of the procurement contract. While these resources provide guidance on addressing modern slavery in procurement, they also leave procurement officers with significant discretion throughout the various stages of the procurement process.

Stage 1: Planning

The *Procurement Toolkit* recommends that procurement officers begin by assessing the risk of modern slavery in new procurements and existing contracts and considering how these can be mitigated through the procurement process.¹²⁵ A ‘Risk Screening Tool’ is provided to assist officers to assign a modern slavery risk classification to the procurement being undertaken.¹²⁶ It is recommended that this initial risk assessment be conducted ‘as far down the supply chain as possible’, and at the very least, at the ‘Tier One’ level.¹²⁷ The Tender Guidance enumerates a range of ways in which modern slavery considerations can be factored into the preparation of procurement documentation, emphasising that the actions taken by procurement officers should be proportionate to the modern slavery risk level identified.¹²⁸ These include stipulating ‘conditions related to modern slavery mitigation, remediation and due diligence in their conditions for participation’ (‘COP’) or as conditions precedent to the contract.¹²⁹ Such conditions may only be included in the COP where they are directed at ensuring that a potential supplier has ‘the legal, commercial, technical and financial abilities’ to meet the procurement requirements.¹³⁰ The *Procurement Toolkit* suggests a potential COP to the effect that ‘the supplier meets all labour laws and standards in the jurisdiction in which they operate’.¹³¹

¹²³ *Commonwealth Modern Slavery Statement 2019–20* (n 2) 6.

¹²⁴ *Procurement Toolkit* (n 4). The Tender Guidance was produced by the Australian Border Force in consultation with the Commonwealth Modern Slavery Statement Interdepartmental Committee: at 9. The Committee is comprised of senior procurement officers and legal representatives from a range of NCCes.

¹²⁵ *Ibid* 9.

¹²⁶ *Ibid* 6–8.

¹²⁷ *Ibid* 9. A Tier One supplier is ‘[a] manufacturer who provides products directly to a company without dealing with a middleman or other manufacturers’: *ibid* 20.

¹²⁸ *Ibid* 9–10.

¹²⁹ *Ibid* 10.

¹³⁰ *Ibid*.

¹³¹ *Ibid*.

Modern slavery considerations may also be included ‘in the specifications or [Statement of Requirements] where the risks are relevant to the subject matter of the contract ... and proportionate to the risk profile of the procurement.’¹³² The *Procurement Toolkit* notes that officials *may* specify ‘compliance with particular technical, labour or employment standards (for example the International Labour Organisation’s Labour Standards).’¹³³ For any such requirement included in the Statement of Requirements, consideration should be given to what evidence will be required to prove compliance.¹³⁴

Where procurements are deemed to have a high risk of modern slavery, procurement officers are advised to ‘consider requiring suppliers to complete a *Modern Slavery Supplier Questionnaire* as part of the application process’.¹³⁵ This questionnaire is described as a tool to ‘facilitate collaborative two-way engagement between government agencies and suppliers’¹³⁶ and is not to be used as a basis for excluding potential suppliers from participating in the tender process or against them in the evaluation stage.¹³⁷

Stage 2: Evaluation, Selection and Contract Negotiation

Procurement officers are advised to develop and adopt evaluation methodologies that ‘ensure that modern slavery issues contribute in a meaningful way to the evaluation process’.¹³⁸ Procurement officers *should* evaluate the potential suppliers’ compliance with any modern slavery COP and/or any draft conditions of the contract or relevant specifications.¹³⁹ It is also advised that procurement officers ask suppliers ‘to explain any costs that appear to be abnormally low’.¹⁴⁰ Where the supplier’s answers ‘are not satisfactory or give rise to ... concerns, procurement officers should discuss this further with the supplier’.¹⁴¹

Procurement officials ‘*should* consider whether specific terms and conditions should be included in the contract to manage modern slavery associated risks’.¹⁴² In addition to the Australian Government’s standard contract terms, the Government has produced three sets of draft modern slavery clauses.¹⁴³ These draft clauses have ‘graduating obligations [short form, standard, and long form] that agencies can select from depending on the modern slavery risk profile of the particular procurement’.¹⁴⁴ The short form option is recommended for contracts where the risks of modern

¹³² Ibid.

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ Ibid.

¹³⁶ Ibid 12.

¹³⁷ Ibid 10.

¹³⁸ Ibid 11.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid (emphasis added).

¹⁴³ Australian Government, ‘Draft Modern Slavery Clause Options for Commonwealth Entities’, *Resources* (October 2020) <<https://modernslaveryregister.gov.au/resources/>> (‘Draft Modern Slavery Clause Options’).

¹⁴⁴ *Procurement Toolkit* (n 4) 21.

slavery in the relevant supply chain is assessed as low.¹⁴⁵ It imposes two basic obligations on the supplier:

- (i) to ‘take reasonable steps to identify, assess and address risks of [m]odern [s]lavery practices in the operations and supply chains used in the provision of the [g]oods and/or [s]ervices’;¹⁴⁶ and
- (ii) as soon as ‘reasonably practicable’ after becoming aware of any modern slavery practices in the operations and supply chains used in the performance of the contract, to ‘take all reasonable action to address or remove these practices, including where relevant by addressing any practices of other entities in its supply chain’.¹⁴⁷

The standard option imposes additional obligations. Suppliers are required to ensure that ‘[p]ersonnel responsible for managing the operations and supply chains used in the performance of the contract have undertaken suitable training to be able to identify and report modern slavery’.¹⁴⁸ Suppliers are required to prepare, implement, and comply with a ‘Modern Slavery Risk Management Plan’.¹⁴⁹ This plan ‘should at a minimum detail’:

- (a) ‘the [s]upplier’s steps to identify and assess risks of [m]odern [s]lavery practices in the operations and supply chains used in the performance of the [c]ontract’;
- (b) ‘the [s]upplier’s processes for addressing any modern slavery practices of which it becomes aware’;
- (c) ‘the content and timing of [modern slavery] training’; and
- (d) details of the grievance mechanism available to [p]ersonnel.¹⁵⁰

Suppliers must not require personnel to pay recruitment fees, nor destroy or retain exclusive possession of travel or identity documents of personnel, and must ensure personnel can access a grievance mechanism.¹⁵¹ Finally, suppliers must ‘take all reasonable steps’ to remediate any adverse impacts caused or contributed to by the supplier from modern slavery practices in its operations and supply chains, in accordance with the standards outlined in the *UNGP*.¹⁵²

The long form clause is advised as appropriate for procurements assessed as having a higher risk of modern slavery.¹⁵³ Procurement officers are advised to use these clauses for high value and/or high modern slavery risk procurements over

¹⁴⁵ Australian Government, ‘Draft Modern Slavery Clause Options’ (n 143) 1.

¹⁴⁶ Ibid Option 1 – short form cl X.2.

¹⁴⁷ Ibid cl X.3.

¹⁴⁸ Ibid Option 2 – standard form cl X.3. ‘Personnel’ is defined to include any person who is an officer, employee, contractor (including subcontractor) or agent of the Supplier involved in providing the Good and/or Services: ibid Option 2 – standard form cl X.1.

¹⁴⁹ Ibid Option 2 – standard form cl X.4.

¹⁵⁰ Ibid.

¹⁵¹ Ibid Option 2 – standard form cl X.7.

¹⁵² Ibid Option 2 – standard form cl X.6(b).

¹⁵³ Ibid 1.

\$200,000.¹⁵⁴ This clause builds on the obligations in the standard clause, but provides the customer with a right to review and suggest amendments to the supplier's Modern Slavery Risk Management Plan. It also requires the supplier to notify the customer of any modern slavery practices it becomes aware of and to consult with the customer concerning actions taken.¹⁵⁵

Procurement officers are encouraged 'to consider using the strongest modern slavery clauses in all procurements in order to drive increased awareness and accountability for modern slavery risks by all suppliers'.¹⁵⁶ They are also encouraged 'to foster continuous improvement' in suppliers' practices regarding modern slavery by including further requirements at contract renewal and review stages.¹⁵⁷

Stage 3: Contract Management

The *Procurement Toolkit* makes clear that the main purpose of the modern slavery clauses is to provide 'an opportunity for agencies to monitor supplier actions systematically as part of established contract management processes, and to use the potential material breach of contract to initiate dialogue and engagement with the supplier'.¹⁵⁸ Procurement officers are encouraged to foster collaborative relationships,¹⁵⁹ and to 'work in partnership with suppliers to monitor compliance and provide support when needed'.¹⁶⁰ They are also advised to monitor supplier compliance through processes such as 'regular contract management meetings, audits and the use of key performance indicators'.¹⁶¹ The guidance cautions that any such measures be 'proportionate and relevant to the risk classification of the procurement'.¹⁶²

The right of termination should only be exercised in relation to material breach of a modern slavery contract clause where the supplier has repeatedly and deliberately disregarded the terms of the clause/s, and demonstrates no intention of engaging with the Government entity to remedy the breach.¹⁶³

V Prospects and Limitations of the Australian Approach

Through its application to the Australian Government, the *Modern Slavery Act* has prompted the Commonwealth to regularly collate information on the scope of its operations and supply chains, as well as on relevant procurement policies and practices, and to present this in an accessible form.¹⁶⁴ It has also, to some degree,

¹⁵⁴ *Procurement Toolkit* (n 4) 21.

¹⁵⁵ Australian Government, 'Draft Modern Slavery Clause Options' (n 143) Option 3 – long form drafting notes.

¹⁵⁶ *Procurement Toolkit* (n 4) 21.

¹⁵⁷ *Ibid* 11.

¹⁵⁸ *Ibid* 21.

¹⁵⁹ *Ibid* 11.

¹⁶⁰ *Ibid*.

¹⁶¹ *Ibid*.

¹⁶² *Ibid*.

¹⁶³ *Ibid* 21.

¹⁶⁴ See, eg, *Commonwealth Modern Slavery Statement 2019–20* (n 2), *Commonwealth Modern Slavery Statement 2020–21* (n 3).

enlivened those *CPR* that require procurement officers to consider the presence of unlawful and/or egregious labour practices among its suppliers that may otherwise have been overlooked or tolerated. Procurement officers can now avail themselves of the *Procurement Toolkit*, which provides advice, tailored to the public procurement context, on identifying, assessing and responding to modern slavery risks during the tendering and contract management processes. Model clauses are available for adaptation and inclusion within government contracts. Efforts are also underway to improve procurement officers' awareness of modern slavery and modern slavery risks in the goods and services they purchase. These are all positive developments.

However, we suggest that from a labour regulation and compliance perspective, the steps taken by the Australian Government to date may be limited in important respects. We raise three sets of concerns below. These go to: the scope of the Government's efforts; the extent to which the measures suggested in the *Procurement Toolkit* will be effectively implemented given the broad (almost unfettered) discretion given to procurement officers, alongside limited expertise and resourcing; and finally, the limited attention paid to questions around how compliance with these clauses are to be monitored and enforced.

Before proceeding, it is important to emphasise that the discussion below does not apply to the Government's coordinated procurement arrangements. As explained above, coordinated procurement arrangements exist in relation to a limited number of goods and services, including property services (which encompasses cleaning and security services). Some of these arrangements impose additional labour-related performance criteria, as well as additional monitoring and compliance-related measures.¹⁶⁵ While the design and implementation of these arrangements merit further analysis from a labour regulation perspective, this task is beyond the scope of this article.

A Scope

The Australian Government's focus on modern-slavery-related risks within its supply chains, while understandable in the context of the *Modern Slavery Act*, is limited in scope in at least two significant ways. First, it does not appear to adequately acknowledge, or seek to address, the broader conditions that enable severe forms of labour exploitation to exist in the first place. With the exception of the general prohibition on recruitment fees and on the retention or destruction of identity documents in the standards and long form model clauses,¹⁶⁶ the Government does not appear to be taking additional steps to identify or address broader labour rights violations or poor working conditions in its supply chains, despite the fact that these factors are widely acknowledged to heighten worker vulnerability to extreme

¹⁶⁵ See, eg, the Commonwealth's discussion of the extent to which it considers that its 'Property Services Coordinated Procurement Arrangements' mitigate modern slavery risks: *Commonwealth Modern Slavery Statement 2019–20* (n 2) 20–1; *Commonwealth Modern Slavery Statement 2020–21* (n 3) 25.

¹⁶⁶ *Ibid* Option 2 – standard form cl X.7.

forms of labour exploitation.¹⁶⁷ The initiatives certainly do not, as Prime Minister Scott Morrison claimed in 2020, evince a commitment on the part of the Australian Government to ‘ensuring our procurements and purchases promote supply chains that protect the rights of workers from the first to the last’.¹⁶⁸ While it could be argued that compliance with broader labour rights is addressed through cls 6.7 and 10.19 of the *CPR* (see above Part IV(A)), these clauses are unlikely to be sufficient to prompt procurement officers to identify or seek to mitigate broader labour and human rights risks when engaging in transactions with the private sector.

Second, the exclusive focus on modern-slavery-related risks falls short of meeting the expectations of the international community when it comes to measures adopted by States to address potential and actual human rights abuses in public procurement. As noted in Part II above, the *UNGP* set forth expectations concerning state action in relation to all internationally-recognised human rights. To date, and despite continuing to profess commitment to the *UNGP*, the Australian Government has taken a very selective approach to the human rights that it is asking its suppliers to take seriously. If it is to align its practices with international standards in this area, the Australian Government will need to expand its responsible procurement policies and practices to address other human rights risks in its operations and supply chains.

B Regulatory Discretion

The Australian Government’s approach to the integration of modern slavery considerations in its procurement is striking for the broad degree of discretion it affords entities covered by the *CPR* and procurement officers. Use of the *Procurement Toolkit* is encouraged, but optional. The Toolkit itself makes it clear that it is up to procurement officers to determine not only the extent to which they take modern slavery considerations into their decision-making, but how they do so, what specific standards they require, and how any such standards are monitored and enforced. There are no minimum mandatory requirements, even when the procurement is deemed high risk of modern slavery. There is not even any explicit prohibition on engaging suppliers that are not in compliance with their reporting obligations under the *Modern Slavery Act*.¹⁶⁹

This broad discretion leaves scope for public procurement officials to tailor contracts to specific contexts and suppliers, and to experiment and innovate. It is hoped that such innovation takes place, and that mechanisms exist through which such approaches can be disseminated to other procurement officers, and learnings extrapolated. However, it may also lead to ineffectiveness, with procurement officials choosing to ignore the *Procurement Toolkit* or engage with it only in a cursory fashion. We suggest that competing priorities faced by procurement officers

¹⁶⁷ For a brief discussion of an alternative ‘labour regulation’ approach, see, eg, Landau and Marshall (n 102) 330–4.

¹⁶⁸ Scott Morrison, ‘Prime Minister’s Foreword’ in *Commonwealth Modern Slavery Statement 2019–20* (n 2) 1.

¹⁶⁹ See further Australian Government, *Australian Government Response to the Recommendations of the Final Report of the Inquiry into Establishing a Modern Slavery Act in Australia: Hidden in Plain Sight* (October 2020) 26.

and broader contextual considerations, as we have outlined in Part III(A), will, in practice, significantly constrain the exercise of this discretion.

To illustrate, the guidance to procurement officials on r 10.19 advises that where a procurement officer determines that a certain labour regulation and/or regulatory framework is relevant and will apply throughout the contract, officials should reference the specific regulations and frameworks in the contract documentation.¹⁷⁰ They should also satisfy themselves that these standards are being met.¹⁷¹ The measures taken should be necessary and appropriate, and ‘the level of assurance necessary will depend on the likelihood and impact of the regulation or regulatory framework not being met throughout the life of the contract’.¹⁷² Procuring authorities thus appear at first glance to have the discretion to both stipulate relevant labour and human rights criteria in contracts where relevant, and to impose more demanding monitoring requirements where the risk of non-compliance is considered high. However, the guidance advises that ‘officials should be mindful of minimising red tape and additional costs to suppliers bidding for government contracts’.¹⁷³ It also emphasises in bold type that: **‘Paragraph 10.19 of the CPRs does not require comprehensive compliance auditing that would add materially to the cost for taxpayers.’**¹⁷⁴ In light of this guidance, we suggest, procurement officers will opt for minimal forms of verification, such as requiring suppliers to certify that they comply and self-reporting any instances of non-compliance. We discuss the inadequacies of these approaches below.

C Expertise and Resourcing

To be meaningfully implemented, the measures proposed by the Government require procurement officers within NCCEs to have commitment, expertise, and adequate resourcing. The *Procurement Toolkit* presumes that procurement officers will have the necessary expertise to carry out the risk assessment process, as well as to make decisions on important questions such as what conditions relating to modern slavery mitigation, remediation and due diligence (if any) should be included in the COP, as conditions precedent to the contract or in the Statement of Requirements. Procurement officers are also expected to respond appropriately and in an effective and collaborative manner to any suspected or self-reported incidences of modern slavery.¹⁷⁵

The Australian Government has recognised the need to enhance procurement officers’ awareness of modern slavery and their capacity to make more informed contracting decisions. It has developed two online modern slavery training modules for procurement officers that are being integrated into NCCE learning platforms.¹⁷⁶ Individual NCCEs have also taken their own educational initiatives: the Australian Taxation Office, for example, has developed a ‘Modern Slavery Help Card’ for its

¹⁷⁰ Department of Finance (Cth), *Consideration of Relevant Regulations and/or Frameworks* (n 120) 2 [11].

¹⁷¹ *Ibid* 2 [12].

¹⁷² *Ibid*.

¹⁷³ *Ibid* 3 [13].

¹⁷⁴ *Ibid* 3 [14] (emphasis in original).

¹⁷⁵ *Procurement Toolkit* (n 4) 11.

¹⁷⁶ *Commonwealth Modern Slavery Statement 2020–21* (n 3) 29.

procurement officers and the Australian Government Department of Infrastructure has produced a ‘modern slavery FAQ and Quick Reference Guide’.¹⁷⁷ However, it is unclear whether these resources will be sufficient to equip procurement officers with the expertise necessary to implement the measures proposed in the *Procurement Toolkit* effectively. The Government has also not indicated whether any additional time or resourcing has been provided to procurement officers to effectively implement these new expectations.¹⁷⁸

The question of appropriate expertise is particularly salient in light of the requirement in the standard and long form draft clauses for suppliers to develop and implement Modern Slavery Risk Management Plans.¹⁷⁹ From a regulatory perspective, this process-oriented approach to setting and monitoring modern-slavery-related performance criteria in public contracts has advantages.¹⁸⁰ It recognises the heterogeneity and complexity of businesses and the industries in which businesses engage, and that detailed prescriptive rules may be ill-suited to the complexity of organisations and their supply chains, and to regulatory problems.¹⁸¹ It does not require the regulator to have a precise understanding of what outcomes it is seeking or exactly what action is required.¹⁸² Rather, the approach capitalises on a business’s inherent capacity to regulate itself and its superior access to business-specific information. Importantly, it also recognises and promotes continuous improvement of organisations in terms of understanding and responding to risks of modern slavery in their operations and their supply chains.

However, the effectiveness of this process-oriented approach is contingent upon appropriate oversight of a plan’s quality and implementation by the relevant regulator. Under the Australian Government’s approach, the relevant regulators are the procurement officers located in various NCCs. It is open for these officers simply to accept any plan submitted to them as adequate evidence of compliance. Hopefully, some attempt will be made to assess the validity and effectiveness of a supplier’s Modern Slavery Risk Management Plan. But it is unclear how this is to be done or against what criteria. Given limited expertise, time and resources, there is a high risk of these officers adopting a tick-the-box approach to these plans. This would be a highly undesirable outcome as it would encourage the adoption by suppliers of cosmetic forms of compliance.¹⁸³

The risks inherent in implementing a compliance-plan approach in contexts in which the regulator may lack expertise, knowledge and/or commitment, is well-exemplified by the US Government’s experience implementing the anti-trafficking

¹⁷⁷ Ibid 32–3.

¹⁷⁸ On the importance of adequate resourcing for the effectiveness of labour-related procurement initiatives, see Sanchez-Graells (n 9).

¹⁷⁹ See above nn 149–50, 155 and accompanying text.

¹⁸⁰ See above Part III(B).

¹⁸¹ Gunningham (n 92) 212.

¹⁸² Gilad (n 83) 486–7.

¹⁸³ See further Ford and Nolan (n 102); Ingrid Landau, ‘Human Rights Due Diligence and the Risk of Cosmetic Compliance’ (2019) 27(1) *Melbourne Journal of International Law* 221; Genevieve LeBaron and Andreas Rühmkorf, ‘Steering CSR Through Home State Regulation: A Comparison of the Impact of the UK *Bribery Act* and *Modern Slavery Act* on Global Supply Chain Governance’ (2017) 8(S3) *Global Policy* 15.

provisions in the *Federal Acquisition Regulation* ('*FAR*').¹⁸⁴ The US Government requires all relevant agencies to insert a clause — in contracts for work performed inside or outside the US — that effectively prohibits contractors and their subcontractors, employees and agents from engaging in human trafficking and other certain prohibited practices such as the use of forced labour, confiscation of employee identity or immigration documents, and use of misleading or fraudulent recruitment or employment practices.¹⁸⁵ Contractors are required to notify the relevant agency's Contracting Office and the Inspector General of any credible allegation of violations, and take steps to remedy them.¹⁸⁶ Where contracts are performed outside the US and exceed US\$550,000 in value (but excluding contracts for the purchase of commercially available off-the-shelf items), a contractor is also required to submit a compliance plan to the agency's Contracting Officer.¹⁸⁷ Minimum requirements for such plans include an awareness programme to inform contractor employees about the requirements; a process for employees to report suspected violations without fear of retaliation; a plan to ensure compliance with required recruitment and wage protections; a housing plan (if appropriate); and procedures to prevent agents and subcontractors from engaging in trafficking at any tier, and to monitor, detect and terminate them if they have violated the policy.¹⁸⁸

Inquiries by the US Government Accountability Office and the Inspector General of the Department of Defence have found significant problems with the implementation of the combatting trafficking in persons rules in the *FAR*.¹⁸⁹ A 2020 inquiry into the extent to which Department of Defence contracts in Kuwait complied with these rules, for example, found that contracting personnel did not consistently confirm that contracts included the required clauses or had the requisite contract oversight plans.¹⁹⁰ While suppliers to the US Government were required to meet national labour law requirements regarding wages, housing and safety standards, the contracting organisations lacked any process for determining what these were, let alone ensuring contractors complied with these standards.¹⁹¹

Limitations arising from the lack of expertise (and potentially commitment) of procurement officers with respect to modern slavery can be overcome to some degree by the engagement of assistance from third parties. As we noted in Part III above, third parties in this context may include NGOs, commercial advisory and

¹⁸⁴ *Federal Acquisition Regulation*, 48 CFR §22.17 (2022) ('*FAR*').

¹⁸⁵ *Ibid* §22.1705(a)(1). The relevant clause is found at §52.222-50.

¹⁸⁶ *Ibid* §52.222-50(d)–(e).

¹⁸⁷ *Ibid* §52.222-50(h).

¹⁸⁸ *Ibid* §52.222-50(h).

¹⁸⁹ See, eg, United States ('US') Government Accountability Office, *Human Trafficking: DOD Should Address Weaknesses in Oversight of Contractors and Reporting of Investigations Related to Contracts* (Report to Congressional Committee, GAO-21-546, August 2021) <<https://www.gao.gov/assets/gao-21-546.pdf>>.

¹⁹⁰ Inspector General, US Department of Defence, *Evaluation of DoD Efforts to Combat Trafficking in Persons in Kuwait DODIG-2019-088* (11 June 2019) i <<https://media.defense.gov/2019/Jun/20/2002147915/-1/-1/1/DODIG-2019-088.PDF>>. This inquiry was prompted by revelations that employees of a Department of Defense contractor that operated food services for US and Coalition personnel at certain military bases in Kuwait had not received the legally mandated minimum monthly salary, been required to pay exorbitant recruitment fees and to work 7 days a week, 12-hour workday schedules with continuous overtime, and lived in sub-standard housing.

¹⁹¹ *Ibid*.

audit firms, and trade unions. Contracting authorities could engage third parties with appropriate expertise to help develop guidelines, templates, tools and training to support procurement officers assess supplier performance against the performance standards.¹⁹² They could also engage them to review compliance plans and/or to advise on monitoring, non-compliance, and corrective actions. In a welcome development in this context, the Australian Government has indicated in its second *Modern Slavery Statement 2020–21* that it is collaborating with the *Cleaning Accountability Framework*, an Australian multistakeholder initiative directed at securing decent work in property services,¹⁹³ and Electronics Watch, an international multistakeholder initiative that works with public sector organisations to promote and protect the rights of workers in the electronics industry.¹⁹⁴ To date, this collaboration appears to be largely focused on gaining a better understanding of modern slavery risks in the relevant sectors and the provision of recommendations for areas of improvement and remediation. However, the *Cleaning Accountability Framework* has also helped develop educational resources on modern slavery risks for procurement officers.¹⁹⁵ This type of engagement may go some way in assisting procurement officers to use the *Procurement Toolkit* effectively.

D Monitoring and Enforcement

We have emphasised the importance of monitoring and enforcement to an effective regulatory regime. If the Australian Government is serious about including modern-slavery-related obligations in purchasing contracts, it should put in place monitoring and compliance mechanisms to secure their observance. Failure to do so renders any such clauses mere window-dressing. Laxity in enforcement may also be counterproductive — by leaving companies that do invest in compliance feeling at a competitive disadvantage vis-à-vis others seen to be ‘getting away with it’.¹⁹⁶

Monitoring and enforcement of labour and human rights requirements in public procurement contracts is often weak. A 2016 survey of public procurement and human rights in 20 countries, for example, found that ‘systematic and comprehensive monitoring of the performance of public contracts with regard to respect for human rights amongst government suppliers was not identified in any surveyed jurisdiction’.¹⁹⁷ According to a 2019 survey of 28 countries by the OECD, only half of survey respondents had provisions within their frameworks that allowed

¹⁹² The US Government, for example, has engaged non-profit labour organisation Verité to assist with the development of guidance and training material for public contractors in relation to human trafficking and forced labour: *Responsible Sourcing Tool* (Web Page) <<https://www.responsiblesourcingtool.org/pages/partnerinfo>>.

¹⁹³ *Commonwealth Modern Slavery Statement 2020–21* (n 3) 26, 43. See also *Cleaning Accountability Framework, About the Cleaning Accountability Framework* (Web Page, 2022) <<https://www.cleaningaccountability.org.au/about-us/>>.

¹⁹⁴ *Commonwealth Modern Slavery Statement 2020–21* (n 3) 28, 43. See also *Electronics Watch* (Web Page) <<https://electronicswatch.org>>.

¹⁹⁵ *Commonwealth Modern Slavery Statement 2020–21* (n 3) 4.

¹⁹⁶ Gunningham (n 92) 125.

¹⁹⁷ Methven O’Brien, Vander Meulen and Mehra (n 14) 10. See also Walter Kahlenborn, Christine Moser, Joep Frijdal and Michael Essig, *Strategic Use of Public Procurement in Europe: Final Report to the European Commission* (MARKT/2010/02/C, 2011) 135–7; National Agency for Public Procurement (n 34) 37.

for action to be taken against suppliers if their supply chains infringe responsible business conduct objectives.¹⁹⁸ While we are not aware of studies in Australia, findings by the National Auditor-General into other social procurement initiatives in Australia indicates monitoring of supplier performance with stipulated requirements is often limited or absent. For example, a recent National Auditor-General report into Australian Government requirements for NCCs to apply mandatory minimum targets for Aboriginal and Torres Strait Islander participation in major procurements found that the ineffective monitoring was a key factor undermining the effectiveness of the initiative.¹⁹⁹

It is thus perhaps unsurprising to find that the Australian Government's modern-slavery-related procurement initiatives place insufficient emphasis on monitoring and enforcement. We have already raised concerns over the extent to which effective monitoring of any contractual requirements concerning compliance with labour and human rights frameworks imposed under *CPR* r 10.19 is likely to take place. Given the clear emphasis placed on cost considerations, procurement officers are likely to opt for cost-neutral forms of monitoring, such as requiring suppliers to monitor themselves and report any instances of suspected non-compliance in their operations or supply chains.

The modern slavery model clauses also promote self-monitoring and self-reporting. All model clauses require suppliers to take all reasonable action to address or remove modern slavery practices that they become aware of in their own operations or supply chains. Where the long form model clause is used, a business is also required to report any such practices to the relevant contracting authority and to consult with them concerning remediation.²⁰⁰ While the *Procurement Toolkit* observes that procurement officers may choose to undertake additional monitoring of suppliers' compliance by way of measures such as regular contract management meetings and audits,²⁰¹ it is unclear what motivation procurement officers would have to schedule such meetings, how any additional information provided by the supplier would be verified, how audits would be used in this context or what key performance indicators would be useful and appropriate.

Reliance on the terms of the model clauses (without additional monitoring efforts) will undoubtedly appeal to many procurement officers due to the absence of burden these clauses place on the officers as regulators. However, they are an inadequate means of obtaining information on supplier compliance. They do little,

¹⁹⁸ OECD, *Integrating Responsible Business Conduct into Public Procurement* (n 25) 54.

¹⁹⁹ Australian National Audit Office, *Aboriginal and Torres Strait Islander Participation Targets in Major Procurements: Across Entities* (Performance Audit, Auditor-General Report No 25, 2019–20, 20 February 2020) 6, 8 [9], 8 [11], 33.

²⁰⁰ Australian Government, 'Draft Modern Slavery Clause Options' (n 143) Option 3 – long form cl X.8(a).

²⁰¹ See above n 161 and accompanying text. Despite its entrenchment in corporate practice, labour rights advocates and scholars have long questioned the appropriateness of the commercial audit as a means through which to assess working conditions. It is seen as a blunt instrument, incapable of achieving the level of worker engagement and understanding necessary to reveal a full or true account of working conditions, or of addressing the underlying causes of labour exploitation. It is also criticised for providing 'an illusion rather than a reality of effective global supply chain governance': Genevieve LeBaron, Jane Lister and Peter Dauvergne, 'Governing Global Supply Chain Sustainability through the Ethical Audit Regime' (2017) 14(6) *Globalizations* 958, 972.

if anything, to promote continuous improvement among suppliers with respect to how they go about identifying and managing labour rights risks in their own activities and supply chains. It also risks fostering a ‘don’t ask, don’t tell’ mentality, as the public procurement officers will only be aware of what the suppliers choose to disclose.²⁰² It is also unclear as to how procurement officers are expected to know whether the actions that a supplier reports they have taken in response to any instance of modern slavery identified are sufficient or what constitutes an adequate timeframe for progress. We note in this context that a US Government Accountability Office inquiry into implementation of the *FAR* in the Department of Defence found that, despite being required to do so, the overwhelming majority of procurement officers interviewed as part of the investigation had not conducted regular monitoring, evaluation or oversight of contractor compliance with human trafficking requirements. The reasons cited for failure to do so included a lack of awareness of their responsibilities and related guidance; a lack of adequate know-how; and/or the attachment of low prioritisation to these responsibilities.²⁰³

It is unrealistic to expect procurement officers to engage in their own on-the-ground monitoring of contractor practices. But there are examples from Australia and internationally of ways in which monitoring of labour-related performance criteria in public contracts can be undertaken meaningfully if the requisite government commitment is present. One possible approach would be to entrust supplier monitoring and oversight to a specialised state agency. The Australian Building and Construction Commission, for example, is responsible for monitoring and enforcing compliance with the *Australian Code for the Tendering and Performance of Building Work 2016* (Cth),²⁰⁴ notwithstanding that ‘funding entities’ — the Departments, agencies and other government bodies procuring the construction work — are responsible for applying the Code to their purchasing. Under the *Workplace Gender Equality Procurement Principles*, non-public sector employers with 100 or more employees in Australia who wish to contract with the Australian Government must obtain a letter from the Workplace Gender Equality Agency to demonstrate that they are compliant with the *Workplace Gender Equality Act 2012* (Cth).²⁰⁵ The Australian Government could also take a broader and strategic approach by implementing a monitoring program targeted at suppliers within sectors identified as high risk.²⁰⁶ Monitoring could be undertaken by qualified government monitors or by third parties with relevant expertise, capacity and independence. These third parties would also be well-positioned to play a role in working with suppliers and other entities within their supply chains to develop and implement appropriate remediation and preventative measures.²⁰⁷ As noted above, the Australian Government is engaging with the *Cleaning Accountability Framework* and Electronics Watch to gain a better understanding of modern slavery

²⁰² Sariana García-Ocasio, ‘How Tolerant is Zero Tolerance: The Loopholes in Anti-Trafficking Federal Contract Regulations’ (2014–2015) 44(3) *Public Contract Law Journal* 551, 563.

²⁰³ US Government Accountability Office (n 189) 13–15.

²⁰⁴ *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) s 16.

²⁰⁵ Department of Prime Minister and Cabinet (Cth), *Workplace Gender Equality Procurement Principles and User Guide* (1 August 2013) <<https://www.wgea.gov.au/sites/default/files/documents/PMC-WGE-Procurement-Principles.pdf>>.

²⁰⁶ Glimcher (n 36) 10.

²⁰⁷ *Ibid.*

risks in two of its priority sectors and to advise on appropriate mitigation and remediation strategies. Both these multistakeholder initiatives have developed collaborative regulatory schemes directed at enabling ongoing and effective monitoring of working conditions within suppliers throughout the relevant supply chains.²⁰⁸ It remains to be seen whether the Australian Government, or individual NCCEs, will choose to formally participate in these schemes.

With respect to enforcement, the *Procurement Toolkit* emphasises that contract termination should be considered as a matter of last resort.²⁰⁹ This approach is broadly consistent with what is considered good practice in regulatory compliance and transnational private governance scholarship. Simply exiting the commercial relationship where cases of non-compliance are discovered can impact negatively on the intended beneficiaries of such initiatives. Rather, regulators (and those with economic leverage) should build trust with suppliers and use their commercial relationships to promote continuous improvement in supplier behaviour.²¹⁰ Relational contracting (distinct from a formalistic approach to contract management emphasising monitoring of compliance with performance standards) is also often encouraged in government procurement as a way of achieving performance of long-term contracts.²¹¹

However, there are risks associated with this approach which may undermine the effectiveness of the outcomes sought to be achieved. A risk of regulatory capture, if not corruption, may arise from the formation of collaborative relationships with suppliers in circumstances where procurement officers hold significant discretion and there may be imbalance in access to relevant information and resources between purchaser and supplier. It is also questionable to what extent procurement officers have the resources and/or expertise to take steps beyond a standardised model of contract management.

VI Conclusion

In this article, we have contextualised and described the Government's modern-slavery-related procurement response over the first two *Modern Slavery Act*

²⁰⁸ See Sarah Kaine and Michael Rawling, 'Strategic "Co-Enforcement" in Supply Chains: The Case of the Cleaning Accountability Framework' (2019) 31(3) *Australian Journal of Labour Law* 305; Michael Rawling, Sarah Kaine, Emmanuel Josserand and Martijn Boersma, 'Multi-Stakeholder Frameworks for Rectification of Non-Compliance in Cleaning Supply Chains: The Case of the Cleaning Accountability Framework' (2021) 49(3) *Federal Law Review* 438; Björn Skorpen Claeson 'Making Rights Effective in Public Procurement Supply Chains: Lessons from the Electronics Sector' in Olga Martin-Ortega and Claire Methven O'Brien (eds) *Public Procurement and Human Rights: Opportunities, Risks and Dilemmas for the State as Buyer* (Edward Elgar, 2019) 192; Olga Martin-Ortega, 'Public Procurement as a Tool for the Protection and Promotion of Human Rights: A Study of Collaboration, Due Diligence and Leverage in the Electronics Industry' (2018) 3(1) *Business & Human Rights Journal* 75.

²⁰⁹ *Procurement Toolkit* (n 4) 21.

²¹⁰ See, eg, Richard M Locke, *The Promise and Limits of Private Power: Promoting Labour Standards in a Global Economy* (Cambridge University Press, 2013).

²¹¹ See, eg, John Alford and Janine O'Flynn, *Rethinking Public Service Delivery: Managing with External Providers* (Palgrave Macmillan, 2012) 85; Nestor M Davidson, 'Relational Contracts in the Privatization of Social Welfare: The Case of Housing' (2006) 24(2) *Yale Law & Policy Review* 263, 302–10.

reporting periods. We have also sought to evaluate this response from a labour regulation and compliance perspective. Our analysis has revealed that the Act has compelled the Australian Government to begin to engage with modern slavery risks in its own operations and supply chains. In the Australian context, where successive federal governments have largely been oblivious to the risks of labour and human rights violations when procuring goods and services beyond our own shores, this is a significant step in the right direction.

Our analysis has identified promising elements of the Government's approach, when considered from a regulatory perspective. We have also identified features of the Government's response that may limit its potential effectiveness. To date, there is little evidence to suggest that the Government's procurement-related initiatives are intended to address, or capable of addressing, labour rights violations or poor workplace practices within its operations and supply chains that may render workers vulnerable to extreme forms of labour exploitation or slavery. The regulatory framework also appears to leave broad discretion to procurement officers with respect to the regulatory standards themselves, as well in deciding how to monitor for compliance and how to address infractions when identified. The effectiveness of these initiatives is thus highly contingent on the degree of commitment and resources invested at departmental and individual procurement officer level. There also appears to remain considerable space for modern-slavery-related considerations to be subsumed within, or overlooked by, procurement officers with limited resources and under pressure to minimise public expenditure and the burden placed on suppliers.

We have also suggested that the Government's approach elides the significant challenges associated with monitoring and compliance of business practice in contexts in which the primary regulators are public procurement officials with limited expertise and resources in labour and human rights matters. Drawing on insights from labour regulation and compliance, we have emphasised the importance of engagement and collaboration with external stakeholders, including with respect to monitoring compliance and remediation. In this respect, it will be interesting to see the extent to which the Australian Government and/or individual NCCs formalise and continue their engagement with third parties such as the *Cleaning Accountability Framework* and Electronics Watch throughout the implementation and evaluation phases of their modern slavery response.

We conclude with a brief reflection on the role of state purchasing in promoting and securing respect for labour rights transnationally. In the realm of labour regulation, it has been observed that in the 21st century, attention may broaden from a focus on the State as rule-maker and 'model employer' to encompass its role as 'model buyer'.²¹² Yet while there is a rich interdisciplinary literature on the conditions under which businesses may successfully leverage their purchasing power to improve working conditions in their global supply chains, much less consideration has been given to precisely what constitutes a model state purchaser. For example, important questions remain as to the extent to which governments are

²¹² Jimmy Donaghey, Julianne Reinecke, Christine Niforou and Benn Lawson, 'From Employment Relations to Consumption Relations: Balancing Labor Governance in Global Supply Chains' (2014) 53(2) *Human Resource Management* 229, 247.

willing and able to coordinate efforts to leverage their significant purchasing power in the context of highly decentralised public procurement systems. Another important question concerns the desirability and feasibility of public procurement authorities adopting the types of regulatory techniques (such as social auditing) that are prevalent in the private sector.

From an empirical perspective, understanding how those responsible for implementing and enforcing rules exercise their functions is central to an understanding of how a regulatory system operates.²¹³ Yet little is known about how procurement officers manage the multiple demands upon them in practice, or how they seek to manage contractual relationships in cases of suspected supplier non-compliance with labour and human rights performance obligations. There is also very limited empirical study of the impact of different approaches on supplier practice and, ultimately, on working conditions. It is our hope that the Government's recent modern-slavery-related procurement initiatives prompt greater engagement by policymakers and scholars with these types of questions.

²¹³ Black, 'Managing Discretion' (n 71) 3.

Immigration Amnesties in Australia: Lessons for Law Reform from Past Campaigns

Sara Dehm* and Anthea Vogl†

Abstract

In the wake of the COVID-19 pandemic, there have been growing calls to regularise the status of the over 64,000 undocumented people currently living in Australia without regular immigration status. Australia has previously had three legal immigration amnesties in 1974, 1976 and 1980. Yet, the history of these amnesties is little known. This article draws on newly-released and previously unexamined historical materials, including archival government documents and contemporaneous jurisprudence, to present an original account of Australia's three past immigration amnesties as novel moments of executive power and decision-making in the realm of migration law. In doing so, it analyses their legislative context, their implementation and effectiveness in practice, and their legal legacies. Finally, the article addresses the lessons of these past immigration amnesties for current law reform and regularisation efforts, and for Australian migration law today.

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* Senior Lecturer, Faculty of Law, University of Technology Sydney, New South Wales, Australia. Email: sara.dehm@uts.edu.au; ORCID iD: <https://orcid.org/0000-0002-5504-4639>.

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† Senior Lecturer, Faculty of Law, University of Technology Sydney, New South Wales, Australia. Email: anthea.vogl@uts.edu.au; ORCID iD: <https://orcid.org/0000-0001-6327-0524>.

I Introduction

Legal immigration amnesties are mechanisms by which States allow people within their territory, who either do not have lawful migration status or have breached immigration regulations, to regularise their status without risk of punishment or deportation. A little-known aspect of Australia's legal and immigration history is its past use of legal immigration amnesties in 1974, 1976 and 1980. Each amnesty was implemented via executive action and allowed certain non-citizens living in Australia without state authorisation to apply for permanent residence. These three past amnesties occurred under both Labor and Liberal federal governments, and each enjoyed enthusiastic bipartisan support. Each amnesty was explicitly promoted as a way to remedy the issue of people living in Australia without state authorisation or lawful immigration status as humanely as possible, and to avoid further exploitation and uncertainty as a result of this status. Further, in language that seems at odds with contemporary practices of punitive border control and migration management, successive Australian Government Immigration Ministers stressed during each amnesty campaign that any so-called 'illegal immigrants' who came forward would be treated sympathetically, and applicants did not need to fear arrest or deportation. As then Immigration Minister Ian Macphie said of the 1980 Regularisation of Status Program ('ROSP'), the amnesty offered a chance to 'clean the slate, to acknowledge that no matter how people got here they are part of the community'.¹ Amnesties frequently aim to serve the political and policy objective of ensuring as many people as possible within a state's territory have regular immigration status. While successive governments promoted Australia's past immigration amnesties on this basis, none were able to fully resolve the 'problem' of undocumented migration.² This suggests that past amnesties are best seen as regular, humane and cyclical legal measures and policy responses to allow significant numbers of undocumented people access to legal pathways to permanency.

The labour shortage impact of the COVID-19 pandemic has highlighted the centrality of undocumented workers to Australia's essential industries, and to the agricultural sector in particular. At the same time, national border closures in response to COVID-19 have limited non-citizens' ability to depart Australia once their visas have expired. As a result, the pandemic has clearly shown the need for, and benefits of, a new immigration amnesty in Australia, with calls for implementing an immigration amnesty gaining momentum.³ Although exact numbers are unknown, the Australian Government estimates that there are over 64,000 people

¹ 'New Amnesty for Illegal Immigrants', *The Canberra Times* (Canberra, 20 June 1980) 3.

² Kelly Bauer, 'Extending and Restricting the Right to Regularisation: Lessons from South America' (2019) *Journal of Ethnic and Migration Studies* 4497, 4499 <<https://doi.org/10.1080/1369183X.2019.1682978>>. In this article, we use the term 'undocumented' to refer to people living in Australia without state authorisation, that is, without any lawful or regular immigration status in Australia, even if they may in fact possess a range of different identity documents such as refugee identity cards, passports from their home states or driver's licences. For a discussion of such terminology, see Anne McNevin, *Contesting Citizenship: Irregular Migrants and New Frontiers of the Political* (Columbia University Press, 2011) 19–20.

³ See, eg, Jill Margo, 'Is There a Case for a Pandemic Migration Amnesty?', *Australian Financial Review* (online, 3 July 2021) <<https://www.afr.com/policy/health-and-education/is-there-a-case-for-a-pandemic-migration-amnesty-20210630-p585qq>>.

living without lawful immigration status in Australia.⁴ Support for an immigration amnesty has come from diverse sources, including a cross-section of parliamentarians, the Australian Government's National Agricultural Labour Advisory Committee,⁵ labour and migration experts,⁶ Victorian Farmers Federation representatives,⁷ agricultural sector unions, and undocumented workers themselves.⁸ In 2021, for example, a National Party of Australia parliamentarian stated that the pandemic provides 'that perfect moment in history' for an amnesty that 'we will never revisit, where we can get this right'.⁹

Despite the legal and political prominence of Australia's past amnesties at the time of their implementation, they have been subject to surprisingly little scrutiny within both legal and historical scholarship on immigration law and policy in Australia.¹⁰ In this article, we examine these past amnesties in order to draw out lessons for law reform today. To do so, we provide an original account of the significance of these amnesties as forms of executive decision-making in the area of migration law and policy. We draw on newly-released and previously unexamined historical materials, including archival documents of the then Australian Government Department of Immigration and contemporaneous media reporting, that shed light onto Australia's history of immigration amnesties. The amnesties were also subject to judicial consideration. Most notably, the 1977 High Court of Australia decision in *Salemi v MacKellar (No 2)*¹¹ and the 1982 Full Federal Court of Australia

⁴ Department of Immigration and Border Protection (Cth), *BE17/172 – Visa Overstayers for the Financial Year – Programme 1.2: Border Management* (Budget Estimates Hearing, Question Taken on Notice, 22 May 2017).

⁵ National Agricultural Labour Advisory Committee, *National Agricultural Workforce Strategy: Learning to Excel* (December 2020) 190–1 <<https://www.agriculture.gov.au/ag-farm-food/agricultural-workforce/nawaw#national-agricultural-labour-advisory-committee>> ('*National Agricultural Workforce Strategy Report*').

⁶ See, eg, Joanna Howe, Stephen Clibborn, Alexander Reilly, Diane van den Broek and Chris F Wright, *Towards a Durable Future: Tackling Labour Challenges in the Australian Horticulture Industry* (University of Adelaide Law School and University of Sydney Business School, January 2019); Joanna Howe, 'Out of Limbo and into the Light: A Case for Status Resolution for Undocumented Migrant Workers on Farms' (2021) 43(4) *Sydney Law Review* 433 ('Out of Limbo and into the Light'); Bassina Farbenblum and Laurie Berg, Submission No 75 to the Joint Standing Committee on Migration, *Inquiry into the Working Holiday Maker Program* (5 August 2020); Sara Dehm and Claire Loughnan, 'A COVID "Vaccine Passport" May Further Disadvantage Refugees and Asylum Seekers', *The Conversation* (online, 25 February 2021) <<https://theconversation.com/a-covid-vaccine-passport-may-further-disadvantage-refugees-and-asylum-seekers-155287>>.

⁷ Kath Sullivan, 'Illegal Worker Amnesty Ruled Out by Government Infuriating Farmers Calling for an Industry Clean Out', *ABC News* (online, 20 October 2020) <<https://www.abc.net.au/news/2020-10-20/government-rules-out-worker-amnesty/12784968>>.

⁸ United Workers Union, 'High Risk Situation on Our Farms: New Research Released on the Risks for Undocumented Workers in COVID-19 Pandemic' (Media Release, 20 May 2020) <<https://unitedworkers.org.au/media-release/high-risk-situation-on-our-farms-new-research-released-on-the-risks-for-undocumented-workers-in-covid-19-pandemic/>>.

⁹ Jess Davis, 'Calls for Amnesty for Undocumented Workers, as New Report Recommends "One-Off" Visas in Agriculture', *ABC News* (online, 5 March 2021) <<https://www.abc.net.au/news/2021-03-05/covid-19-vaccine-calls-for-amnesty-for-undocumented-workers/13218382>>.

¹⁰ The scant scholarship on Australia's past immigration amnesties is mostly contemporaneous: David S North, 'Down Under Amnesties: Background, Programs and Comparative Insights' (1984) 18(3) *International Migration Review* 524; Colbert Rhodes, 'Amnesty for Illegal Aliens: The Australian Experience' (1986) 5(3) *Policy Studies Review* 566.

¹¹ *Salemi v MacKellar (No 2)* (1977) 137 CLR 396 ('*Salemi*').

decision in *Minister of Immigration and Ethnic Affairs v Haj-Ismail*¹² considered the legality of departmental decision-making in relation to the final two amnesties. These two cases illuminate the nature and limits of executive power vis-à-vis non-citizens that were critical to the operation and implementation of Australia's past amnesties. Taken together, these materials offer a necessarily State-centric account of the framing and objectives of each amnesty campaign and their public reception.¹³ They nonetheless allow us to present the specific bureaucratic and governmental aspects of this history, which can directly inform contemporary immigration amnesty efforts. These efforts are made all the more urgent by the uneven effects of COVID-19 on the lives of temporary and undocumented migrants in Australia. We thus argue that the legislative context, implementation and effectiveness of Australia's past amnesties and their legal legacies are instructive for contemporary regularisation initiatives, and further, that the COVID-19 pandemic has reinforced the need for a new immigration amnesty in Australia.

This article has three further parts. In Part II, we examine immigration amnesties as specific legal mechanisms. We then set out the contemporary legislative framework and its capacity to enable regularisation of status in Australia and analyse recent calls for an immigration amnesty in Australia. In Part III, we offer a detailed account of Australia's past three legal amnesties, outlining their legal basis, their political motivations and effectiveness, as well as the key associated judicial challenges and legal legacies. Finally, in Part IV we draw out four important legal lessons and themes from Australia's past experiences with immigration amnesties. These include: the need for amnesties to be informed by a social, rather than strictly legal, conception of citizenship; understanding amnesties as operating primarily within the realm of executive power; the criteria and design that influenced the amnesties' uptake and success; and immigration amnesties as an alternative to Australia's current approach of detection and deportation of unlawful non-citizens. Given recent calls for amnesty have once again brought the idea within the realm of political and legal possibility, we argue that taking these lessons from Australia's past immigration amnesties seriously can enhance and bolster contemporary law reform efforts to regularise the status of undocumented people in Australia today.

II What is a Legal Immigration Amnesty and Why is it Currently Needed in Australia?

In this Part we present the growing evidence that an immigration amnesty is a viable, necessary and desirable legal and policy response to the uncertainty, exploitation and suffering experienced by undocumented people in Australia today. In particular, we explain how and why immigration amnesties have arisen as a legal and political response to the complex and intersecting challenges created by the COVID-19

¹² *Minister of Immigration and Ethnic Affairs v Haj-Ismail* (1982) 57 FLR 133 ('*Haj-Ismail*').

¹³ On the state-centricity of official documents, see Natalie Harkin, 'Intimate Encounters Aboriginal Labour Stories and the Violence of the Colonial Archive' in Brendan Hokowhitu, Aileen Moreton-Robinson, Linda Tuhiwai-Smith, Chris Andersen and Steve Larkin (eds), *Routledge Handbook of Critical Indigenous Studies* (Routledge, 2020) 147.

pandemic both for Australia's workforce of temporary migrant labour and for non-citizens living in Australia more generally.

A *Immigration Amnesties as Legal Mechanisms*

While amnesties take a range of forms and serve multiple ends,¹⁴ in general, legal immigration amnesties are mechanisms by which governments allow people within their territory without lawful migration status to come forward and regularise their status without risk of punishment or deportation. United States ('US') immigration law scholar Linda Bosniak defines amnesties broadly as 'policies that lift or eliminate the illegality of status imposed on [undocumented people] and that incorporate them into the body politic'.¹⁵ While some definitions focus on the 'illegality' of so-called 'unauthorised non-citizens' and others emphasise the exclusionary nature of migration laws that make people illegal,¹⁶ all immigration amnesties involve the change of status for particular groups of non-citizens. Although legal amnesties are usually considered to be wide-sweeping measures, they may apply to limited subsets of non-citizens, and outcomes for non-citizens may range from temporary reprieves from deportation (such as the US Deferred Action for Childhood Arrivals program)¹⁷ to facilitating more formal pathways to permanency and citizenship.¹⁸ Amnesties may also be referred to as 'legalisation' or 'regularisation' programs, and common criteria delimiting eligibility for amnesty include duration of one's residence within a state or participation in the labour market.¹⁹ And, as Levinson notes, they are 'usually implemented in concert with the internal and external strengthening of migration controls'.²⁰

The legal definition of an immigration amnesty has, to date, only been considered in one Australian High Court case. In *Salemi*, Jacobs J defined an immigration amnesty as 'at the least a promise that a deportation order would not be made against a qualifying person within the time during which he was a prohibited immigrant'.²¹ Jacobs J reasoned that there were two forms an amnesty could take under the then version of the *Migration Act 1958* (Cth) ('*Migration Act*'): either granting a permanent entry permit to a non-citizen, or sparing a person from the making of a deportation order.²² Similarly, Murphy J in *Salemi* detailed the 'honourable history [of amnesties] in European civilization' and noted that they can

¹⁴ The idea of amnesty exists in other contexts 'from transitional justice to draft avoidance to parking and library fines': Linda Bosniak, 'Amnesty in Immigration: Forgetting, Forgiving, Freedom' (2013) 16(3) *Critical Review of International Social and Political Philosophy* 344, 345 ('Amnesty in Immigration').

¹⁵ Linda Bosniak, 'Arguing for Amnesty' (2013) 9(3) *Law, Culture and the Humanities* 432, 433.

¹⁶ George Lakoff and Sam Ferguson, 'The Framing of Immigration', *Rockridge Institute* (online, 25 May 2006) <<https://web.archive.org/web/20081021045141/http://www.rockridgeinstitute.org/research/rockridge/immigration.html>>.

¹⁷ US Citizenship and Immigration Services, *Consideration of Deferred Action for Childhood Arrivals (DACA)* (Web Page, 24 August 2022) <<https://www.uscis.gov/DACA>>.

¹⁸ Amanda Levinson, *The Regularisation of Unauthorized Migrants: Literature Survey and Country Case Studies* (Centre on Migration, Policy and Society, University of Oxford, 2005) 4.

¹⁹ *Ibid.*

²⁰ *Ibid.* 2.

²¹ *Salemi* (n 11) 453.

²² *Ibid.*

be ‘directed generally to all persons or particularly to certain groups’ and ‘may be conditional or unconditional’.²³ Murphy J thus characterised ‘the power to amnesty or pardon’²⁴ as an executive power, generally applicable to political infractions or ‘crimes against the sovereignty of the State’.²⁵

As States increasingly equate orderly migration programs and effective border control with the exercise of state sovereignty, governments generally consider amnesties when other internal and external migration controls have failed.²⁶ Mármora outlines four broad reasons for States to implement regularisation programs: ‘to gain more awareness and control over irregular migration’; ‘to improve the social situation of migrants’; ‘to increase labour market transparency’; and/or in response to foreign policy goals or agreements.²⁷ In practice, these motivations overlap, as is evident in the recent turn to regularisation in Australia.

In spite of Australia’s own past immigration amnesties, regularisation programs initiated in overseas jurisdictions are generally cited as examples in research and policy addressing the possibility of a current immigration amnesty in Australia.²⁸ We do not examine international comparators in detail here; however, we note that in the US in particular, the idea of amnesty has ‘structure[d] ... debates over irregular immigration’ in a way that has not been the case in Australia.²⁹ Further, from 1986–2002, the US and European Union implemented at least 78 amnesty programs, with most EU countries having implemented more than one regularisation program per decade.³⁰ Spain in particular has implemented six regularisation programs between 1986 and 2005.³¹ A common theme among these comparators is the centrality of each State’s specific geography, history and domestic migration program in shaping the politics, design and success of amnesty campaigns. These factors, alongside the economic and social significance of people living without status, demonstrate the national specificity of immigration amnesties. This also reinforces the benefits of looking to lessons from Australia’s own history of immigration amnesties when considering contemporary calls for a new immigration amnesty.

B *Australia’s Legislative Framework and Contemporary Calls for Amnesty*

Recent engagement with the need for an immigration amnesty in Australia has focused on two groups of undocumented people in particular: unlawful non-citizens

²³ Ibid 455.

²⁴ Ibid 456.

²⁵ Ibid 455, quoting *Burdick v United States*, 236 US 79, 95 (1915).

²⁶ Levinson (n 18) 5.

²⁷ Ibid 5–6, citing Lelio Mármora, ‘International Migration Policies and Programmes’ (International Organization for Migration, 1999).

²⁸ See, eg, Howe et al (n 6) 35.

²⁹ Bosniak, ‘Amnesty in Immigration’ (n 14) 345.

³⁰ Bauer (n 2) 4499; Alessandra Casarico, Giovanni Facchini and Tommaso Frattini, ‘The Economics of Immigration Amnesties’, VoxEU: CEPR [Centre for Economic Policy Research] Policy Portal (Column, 28 June 2018) <<https://voxeu.org/article/economics-immigration-amnesties>>.

³¹ Albert Sabater and Andreu Domingo, ‘A New Immigration Regularization Policy: The Settlement Program in Spain’ (2012) 46(1) *International Migration Review* 191.

living in the community as the result of overstaying previous visas, and refugee applicants living in the community whose status has lapsed, or who do not have pathways to permanent residency under the *Migration Act*.

Australia has had a legislatively mandated ‘universal’ visa system since 1994. This means that, under the *Migration Act*, all people deemed Australian non-citizens are required to hold a valid visa while in Australia.³² Any non-citizen without a valid visa is classified as an ‘unlawful non-citizen’ and ‘must’ be taken into immigration detention.³³ The Act has a very broad definition of immigration detention, including ‘being in the company of, or restrained by’ an authorised Commonwealth officer or being held in a detention centre established under the Act, a state prison, a police station or another place specified by the Minister.³⁴ The Act also empowers the Minister to grant a person in immigration detention a temporary or substantive visa, even if the person is statutorily prohibited from applying for one.³⁵ In addition, as we discuss below, the Act limits the Minister’s discretion to grant visas outside of existing visa categories and places a statutory bar on visa applications made by specific subclasses of unlawful non-citizens.³⁶ This means, on the face of it, while the *Migration Act* affords the Minister a discretion to grant certain visa classes to unlawful non-citizens, it does not provide a broad ministerial power to permanently regularise undocumented people.

In 2017, the Australian Government Department of Immigration and Border Protection estimated the number of undocumented people in Australia to be at least 64,000 people,³⁷ approximately 6,000 of whom had lived in Australia for over a decade.³⁸ Precise and up-to-date numbers are not available; however, other estimations range up to 90,000 people.³⁹ Similarly, there is no precise account of the composition of this group, though in 2017 the Government identified the main nationalities of undocumented people as including nationals from Malaysia (14.6%), China (10.1%), US (8%) and the United Kingdom (‘UK’) (5.7%).⁴⁰ In 2013, the Department reported agriculture, forestry and fishing, construction, hotel accommodation and hospitality as the most common industries of work for people without lawful status in Australia.⁴¹

³² *Migration Act 1958* (Cth) ss 13, 14 (*‘Migration Act’*).

³³ *Ibid* ss 14, 189.

³⁴ *Ibid* s 5 (definition of ‘immigration detention’).

³⁵ *Ibid* s 195A. The discretionary grant of short-term bridging visas to those defined as ‘unlawful non-citizens’ is one way that the Minister may, in practice, temporarily regularise status. While this does temporarily ‘lift’ unlawful status, it does not operate by way of right or application as per systematic immigration amnesties.

³⁶ *Ibid* ss 29, 48. Note that the bar does not apply to applications made for a limited number of visa subclasses, including protection-related visas (but see section s 46A).

³⁷ Department of Immigration and Border Protection (Cth) (n 4).

³⁸ Maani Truu, ‘The Group of Migrants in Australia Likely to Be Most Impacted by Coronavirus’, *SBS News* (online, 20 April 2020) <<https://www.sbs.com.au/news/the-group-of-migrants-in-australia-likely-to-be-most-impacted-by-coronavirus>>.

³⁹ Malcolm Rimmer and Elsa Underhill, ‘Temporary Migrant Workers in Australian Horticulture: Boosting Supply but at What Price?’ in Massimo Pilati, Hina Sheikh, Francesca Sperotti and Chris Tilly (eds), *How Global Migration Changes the Workforce Diversity Equation* (Cambridge Scholars Publishing, 2015) 143, 145.

⁴⁰ Department of Immigration and Border Protection (Cth) (n 4) 2.

⁴¹ Howe et al (n 6) 36, citing Department of Immigration and Citizenship (Cth), ‘Fact Sheet 87: Initiatives to Combat Illegal Work in Australia’ (Factsheet, Commonwealth of Australia, 2013).

The recent emergence of amnesty as a policy option has focused on the risks faced by undocumented people who are currently in the workforce, and specifically on those in the agricultural sectors. One of the findings of Howe, Clibborn, Reilly, van den Broek and Wright's 2019 report into addressing labour challenges in the horticultural industry is that the industry has a 'structural reliance' on undocumented migrant workers as a key source of labour.⁴² Again, the precise scope and extent of undocumented work is not known. Researchers have suggested that undocumented workers comprise at least a third of the sector,⁴³ with Howe and colleagues citing growers and industry association officials who estimate up to 80–90% of their workforce are unlawful.⁴⁴ Undocumented workers are highly vulnerable to exploitation and have limited capacity to seek assistance or redress due to their irregular status.⁴⁵ The high risks of exploitation identified in relation to this group of workers extends to undocumented people in the workforce more generally, and successive governments and multi-agency government initiatives have failed to address these issues or even to successfully detect undocumented people.⁴⁶

It is in response to the systematic exploitation and harm faced by undocumented workers, and the failure of existing regulatory and enforcement strategies, that recent recommendations for immigration amnesty have emerged. For the agricultural sector in particular, amnesty calls are also motivated by concerns that deportation or removal of undocumented workers will further affect the limited supply of labour. While Howe and colleagues' report does not directly recommend amnesty, it presents amnesty as an example of a 'different regulatory approach' to address the challenges presented by undocumented workers.⁴⁷ By contrast, in late 2020, a Government Advisory Committee convened by the Australian Government Department of Agriculture to develop a 'labour strategy for Australian agriculture' made a direct recommendation for a 'one-off regularisation of the undocumented workers in the country'.⁴⁸ The recommendation, which privileges the language of regularisation over amnesty, was made as part of the Australian Government's *National Agricultural Workforce Strategy Report*. The Report provides very little detail as to what the regularisation would involve or to whom it might apply. It does, however, present it as a means to eliminate the 'unscrupulous and unethical practices' that labour hire companies use to employ and exploit undocumented

⁴² Howe et al (n 6) 35. Our reference to 'undocumented people' is distinct from Howe et al's focus on 'undocumented workers', with the latter category including both visa overstayers and visa holders who are working without formal work rights or in breach of work rights.

⁴³ Rimmer and Underhill (n 39) 143. Howe notes that at least 30,000 horticultural workers are not accounted for in official labour statistics and there is 'increasing recognition' that the bulk of this group are undocumented workers: Howe, 'Out of Limbo and into the Light' (n 6) 438.

⁴⁴ Howe et al (n 6) 39.

⁴⁵ Bassina Farbenblum and Laurie Berg, 'Migrant Workers' Access to Remedy for Exploitation in Australia: The Role of the National Fair Work Ombudsman' (2017) 23(3) *Australian Journal of Human Rights* 310.

⁴⁶ This includes the limited success of the specialist multi-agency taskforce, known as Taskforce Cadena, which aimed to disrupt illegal work, exploitation of undocumented worker and visa fraud: see generally 'Taskforce Cadena', *Australian Border Force* (Web Page, 16 November 2021) <abf.gov.au/about-us/taskforces/taskforce-cadena>.

⁴⁷ Howe et al (n 6) 45.

⁴⁸ *National Agricultural Workforce Strategy Report* (n 5) xiv. See also xxvii (Recommendation 25).

people.⁴⁹ A peak Australian union that advocates for an amnesty for undocumented farmworkers has expressed a similar rationale for an amnesty,⁵⁰ including a suggestion that amnesties should be available where visa conditions are breached due to exploitation or pressure from an employer.⁵¹ More recently, Howe has argued in favour of status regularisation specifically for undocumented migrants working in the Australian horticulture industry, as a one-off means to address both the ‘labour crisis’ on Australian farms and to ‘remove the susceptibility of this group to exploitation’.⁵² She notes that both issues have been exacerbated by the COVID-19 pandemic due to the effects of international, state and territory border closures on labour supply and undocumented workers’ mobility.⁵³

Notably, the *National Agricultural Workforce Strategy Report* explicitly put forward regularisation as part of the public health response to COVID-19. It presents public health concerns for undocumented people and the broader public as a core reason for an amnesty, stating that:

the current pandemic provides a unique chance to design a one-off regularisation program for social health reasons. It is a potentially dangerous situation for the Australian public to have 60,000 to 100,000 overseas workers avoiding contact with clinics and hospitals.⁵⁴

As noted in the Introduction to this article, prominent calls for amnesty have also come from National Party parliamentarians. To date, lawmakers advocating in favour of amnesty have not provided a clear sense of to whom the amnesty would apply or how it would operate, but it is clear their position reflects both the agricultural industry’s structural reliance on an undocumented workforce, and the exacerbation of existing labour supply issues as a result of the pandemic.⁵⁵ Notably, most proposals for immigration amnesties have been light on detail. For example, they have not been accompanied by legislative or policy proposals as to how amnesties would operate — including what kinds of immigration pathways they would provide and to whom they would apply.⁵⁶

⁴⁹ Ibid xiv.

⁵⁰ United Workers Union (n 8).

⁵¹ Senate Education and Employment References Committee, Parliament of Australia, *A National Disgrace: The Exploitation of Temporary Work Visa Holders* (Report, 17 March 2016) 212–13; Shop, Distributive and Allied Employees’ Association, Submission No 58 to Senate Education and Employment References Committee, Parliament of Australia, *Inquiry into the Impact of Australia’s Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders* (21 September 2015, authored by Joanna Howe).

⁵² Howe, ‘Out of Limbo and into the Light’ (n 6) 434–5.

⁵³ Ibid 438–9.

⁵⁴ *National Agricultural Workforce Strategy Report* (n 5) 190. The Committee’s concerns about the exclusion of people without regular status from COVID-19 public health measures have been echoed by scholars, advocates and the United Workers Union in particular, which has highlighted lack of status as a barrier to accessing vaccination, registration for QR check-ins, and treatment and/or access to quarantine in the case of infection: Davis (n 9).

⁵⁵ Australia’s peak farming body, the National Farmers’ Federation, predicted a shortage of approximately 26,000 agricultural workers in March 2021, which is the peak of season: Norman Hermant, ‘Asylum Seekers Put Their Hands Up to Fill Labour Shortage in Regional Victoria’, *ABC News* (online, 3 January 2021) <<https://www.abc.net.au/news/2021-01-03/yarck-asylum-seekers-employed-to-pick-cherries/12998264>>.

⁵⁶ One significant exception is a ‘skeletal framework’ proposed by Howe for the one-off regularisation of horticultural workers using the existing Temporary Activity (Subclass 408) visa but amending

Amnesty as a potential political and legal solution also pertains to asylum seekers and refugees, who have lived for extended periods in the Australian community either on continual temporary visas or without regular status at all.⁵⁷ A complicated regime of post-arrival policies aimed at refugee deterrence has created a population of refugees and asylum seekers who cannot access either permanent residency or citizenship, but who also cannot return ‘home’ or to their country of persecution. The key factor giving rise to both a permanent temporariness and precarity was the reintroduction of temporary protection as part of sweeping changes made to the *Migration Act* in late 2014.⁵⁸ Both Temporary Protection Visas (‘TPVs’) and Safe Haven Enterprise Visas (‘SHEVs’) were introduced at this time. These visas last only three and five years respectively and must be renewed on an ongoing basis. While refugees holding SHEVs have some conditional — and to date broadly unattainable — pathways to permanency, this is for the most part a permanently temporary population.⁵⁹ The group to which these policies apply has been labelled the ‘legacy caseload’ by successive Liberal federal governments, and includes people who have lived in the community for up to 10 years.⁶⁰

As with people living without documentation in Australia more broadly, the need for regularisation — and with it access to health services — has been exacerbated for asylum seekers and refugees during the COVID-19 pandemic. The need for regularisation is particularly acute for members of this group who are living in the community without lawful status, due to delays in the renewal of their bridging visas or refusals of bridging visas without clear reasons. As the Refugee Council of Australia notes, this group includes asylum seekers who have made every effort to maintain a lawful status and engage in the Government processes and have been forced into an irregular status, with no rights or entitlements.⁶¹ This group also includes asylum seekers living in community on ‘final departure’ visas prior to deportation.⁶² The size of this population shifts regularly, however as of June 2021,

eligibility requirements to include applicants who do not currently hold a valid visa, but who can provide evidence ‘of having worked in the horticulture industry for a period of six months’: Howe, ‘Out of Limbo and into the Light’ (n 6) 445–7.

⁵⁷ For a detailed account of this history, see Anthea Vogl, ‘Crimmigration and Refugees: Bridging Visas, Criminal Cancellations and “Living in the Community” as Punishment and Deterrence’ in Peter Billings (ed), *Crimmigration in Australia: Law, Politics, and Society* (Springer, 2019) 149.

⁵⁸ *Migration and Maritime Powers Legislation Amendment (Resolving the Asylum Legacy Caseload) Act 2014* (Cth).

⁵⁹ As at January 2022, 18,810 refugees had been granted TPVs or SHEVs: Department of Home Affairs (Cth), *The Administration of the Immigration and Citizenship Programs: Addendum — March 2022 (Data to January 2022)* (March 2022) <<https://immi.homeaffairs.gov.au/programs-subsite/files/addendum-march-22.pdf>>.

⁶⁰ See, eg. Australian Human Rights Commission, *Lives on Hold: Refugees and Asylum Seekers in the ‘Legacy Caseload’* (July 2019) 7 <<https://humanrights.gov.au/our-work/asylum-seekers-and-refugees/publications/lives-hold-refugees-and-asylum-seekers-legacy>>.

⁶¹ Refugee Council of Australia, ‘Leaving No-One Behind: Ensuring People Seeking Asylum and Refugees are Included in COVID-19 Strategies’ (online, 9 April 2020) <<https://www.refugeecouncil.org.au/priorities-covid-19/>>.

⁶² Ibid. Recent research has demonstrated that these asylum seekers regularly fall out of regular status due to the complex processes involved in the grant and renewal of bridging visas valid for as short as three or six months: Liberty Victoria, *Bridging the Department’s Visa Blindspot* (Report, Rights Advocacy Project, December 2020) 9–10.

there were 2,281 asylum seekers who arrived by boat as part of the ‘legacy caseload’ residing without a valid visa in the community.⁶³

Like undocumented workers, refugees and asylum seekers without permanent status are at high risk of systemic labour exploitation.⁶⁴ This is particularly so for people living in the community without a valid visa or regular migration status.⁶⁵ Organisations such as the Refugee Council of Australia have recommended creating pathways to residency for refugees and asylum seekers who fill agricultural labour shortages exacerbated by COVID-19.⁶⁶ Providing such pathways would address similar issues to those identified in respect of long-term undocumented people — not least their exploitation at work and exclusion from the COVID-19 public health response by virtue of their lack of status.

Implementing a new immigration amnesty was not a policy approach favoured by the Morrison Liberal Government, which resolutely rejected an immigration amnesty as a response to the issues outlined above. Michael Pezzullo, Secretary of the Department of Home Affairs, told a Senate Estimates hearing in March 2021 that an amnesty would ‘undermine the integrity’ of Australia’s visa system and ‘create an incentive for people to get themselves smuggled into Australia’ or overstay their visa.⁶⁷ A similar preoccupation with the ‘pull’ factors of unauthorised migration is evident in the Department’s formal statement on the issue, in which it said that ‘[b]road regularisation of the status of unlawful non-citizens may perversely encourage non-compliance with migration law’, and that ‘[d]espite the closure of the Australian border, pull factors encouraging illegal immigration are still relevant’.⁶⁸

The absence of any discussion of Australia’s past amnesties in contemporary discourse is surprising.⁶⁹ In Part III below, we turn to Australia’s own experience with immigration amnesties. Although contemporary calls for an amnesty are situated in their own distinct context, we draw attention to how they nonetheless echo issues associated with historical amnesties. In drawing on historical and

⁶³ Department of Home Affairs (Cth), Australian Government, ‘Illegal Maritime Arrivals on Bridging E Visa’ (30 June 2021) <<https://www.homeaffairs.gov.au/research-and-stats/files/illegal-maritime-arrivals-bve-30-jun-2021.pdf>>. See also Louise Boon-Kuo, *Policing Undocumented Migrants: Law, Violence and Responsibility* (Routledge, 2017).

⁶⁴ See especially Caroline Fleay and Lisa Hartley ‘“I Feel Like a Beggar”: Asylum Seekers Living in the Australian Community without the Right to Work’ (2016) 17(4) *Journal of International Migration and Integration* 1031.

⁶⁵ John van Kooy and Dina Bowman, ‘“Surrounded with so Much Uncertainty”: Asylum Seekers and Manufactured Precarity in Australia’ (2019) 45(5) *Journal of Ethnic and Migration Studies* 693; Laurie Berg, Sara Dehm and Anthea Vogl, ‘Refugees and Asylum Seekers as Workers: Radical Temporariness and Labour Exploitation in Australia’ (2022) 45(1) *University of New South Wales (UNSW) Law Journal* 35.

⁶⁶ Nick Bonyhady, ‘MPs Back Proposal to Give Refugees Residency for Fruit Picking’, *The Sydney Morning Herald* (online, 14 September 2020) <<https://www.smh.com.au/politics/federal/mps-back-proposal-to-give-refugees-residency-for-fruit-picking-20200914-p55ved.html>>.

⁶⁷ Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, Canberra, 22 March 2021, 190–1 (Michael Pezzullo).

⁶⁸ Davis (n 9).

⁶⁹ Cf Susan Love, ‘Migrant Amnesties: What Has Australia Done in the Past?’, *FlagPost* (online, 29 April 2021) <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2021/April/Migrant_amnesties>.

archival materials to give an account of Australia's past three amnesties (in 1974, 1976 and 1980), we trace the legislative framework enabling these campaigns and analyse their political motivations, institutional implementation, effectiveness and legal legacies.

III Australia's Past Legal Immigration Amnesties

Australian migration law was comprehensively reformed in 1958 in order to better regulate the sizable immigration into Australia after World War Two. Under the new *Migration Act 1958* (Cth), any non-citizen (then referred to as either an 'alien' or an 'immigrant') was required to hold a valid entry permit in order to 'legally' enter Australia.⁷⁰ These entry permits functioned to authorise a person's presence in Australia either permanently or for a specific period of time. Section 6(2) of the *Migration Act* empowered an 'officer' to grant an entry permit to an 'immigrant'; and s 6(5) specified that an entry permit could be granted to an 'immigrant' before or after they entered Australia.⁷¹ Moreover, s 6(1) deemed any 'immigrant' in Australia without a valid entry permit to be a 'prohibited immigrant'.⁷² Once a person was a 'prohibited immigrant', the Immigration Minister had the power to order their deportation.⁷³ The Minister also had 'absolute discretion' to cancel any temporary entry permits.⁷⁴ However, the Act stipulated that a person could cease to be a 'prohibited immigrant' in two specific circumstances: either through the grant of an entry permit,⁷⁵ or at the expiry of a five-year period after the time in which they become a 'prohibited immigrant' provided that the Minister had not issued a deportation order in that time.⁷⁶

In practice, this legislative framework — and s 6(5) of the *Migration Act* in particular — was interpreted to empower the Minister to change the status of a 'prohibited immigrant' through authorising the granting of an entry permit.⁷⁷ Although the *Migration Act* has today become 'one of the most complex and frequently amended pieces of basic legislation',⁷⁸ the Act initially remained relatively stable during its first two decades of operation and was only amended a few times.⁷⁹ This meant that the above provisions remained in place for the duration of the 1970s, that is, for the relevant periods discussed below.

⁷⁰ *Migration Act* (n 32) s 5(1), as enacted.

⁷¹ *Ibid* s 6(2), 6(5), as enacted.

⁷² The concept of a 'prohibited immigrant' was repealed in 1983: see *Migration Amendment Act 1983* (Cth) s 9.

⁷³ *Migration Act* (n 32) s 18, as enacted.

⁷⁴ *Ibid*.

⁷⁵ *Ibid* s 10, as enacted.

⁷⁶ *Ibid* s 7(4), as enacted.

⁷⁷ Desmond Storer, 'Out of the Shadows: A Review of the 1980 Regularisation of Status Programme in Australia' (Working Paper, International Labour Organization, June 1982) 21.

⁷⁸ James Jupp, *Immigrant Nation Seeks Cohesion: Australia from 1788* (Cambridge University Press, 2018) 128.

⁷⁹ For amending legislation, see *Migration Act 1964* (Cth); *Migration Act 1966* (Cth); *Migration Act 1973* (Cth).

A *The 1974 Dispensation*

Australia's first immigration amnesty was in 1974 following the election of the Whitlam Labor Government that saw radical changes to Australia's migration law and policy. Whitlam's most well-remembered legacy in the area of immigration law is his Government's formal ending of the racist White Australia Policy. Legally, the dismantling of the White Australia Policy involved legislative reform efforts to remove overt discrimination from immigration laws, most notably in relation to immigration selection criteria and citizenship requirements. Less well remembered are the Whitlam Government's reforms that sought to make travel to Australia easier through the introduction of the so-called 'easy visa' system in 1973. Alongside this reform, perhaps counterintuitively, the Whitlam Government also announced a 21% reduction of Australia's permanent immigration intake in December 1972 over high unemployment concerns amid a global recession.⁸⁰ By making temporary travel to Australia easier while making it harder to permanently migrate to Australia, the number of undocumented people living in Australia increased significantly over the course of the early 1970s. By 1975, immigration officials estimated this population to have reached between 35,000 and 45,000 people.⁸¹

Concerned that this increased population of undocumented people would lead to pervasive labour exploitation, the Whitlam Government initiated Australia's first formal amnesty program. On 26 January 1974 (officially deemed 'Australia Day' to mark the anniversary of the British invasion and colonisation of Australia), Immigration Minister Al Grassby announced a 'special dispensation' for people living in Australia 'illegally' and 'who claimed to be suffering from exploitation' as a result of their status.⁸² The amnesty would be open for 6 months, from late January until the end of June 1974, and the main eligibility criteria was that a person had to have been living in Australia for three years or more and was of 'good character'.⁸³ At the time, Minister Grassby urged anyone who had entered or remained in Australia 'illegally' to apply for the amnesty, stating that they should not fear arrest and that their cases would be considered 'sympathetically'.⁸⁴ He noted that '[i]f they have been good citizens in their time here I am prepared to grant permanent residence and this can lead to their becoming Australian citizens.'⁸⁵

Despite the novelty and openness of the initiative, the amnesty campaign was not particularly successful. By late March 1974, only around 176 people had applied, many of whom had arrived in Australia as 'stowaways on ships'.⁸⁶ By the end of the amnesty period, the Department had received 367 applications, all of which were approved.⁸⁷ For example, in April 1974 a spokesperson for the Department expressed their surprise that more people had not come forward, stating that it was

⁸⁰ Jenny Hocking, *Gough Whitlam: His Time* (Melbourne University Press, 2013).

⁸¹ Storer (n 77) 8.

⁸² 'Dispensation for Illegal Immigrants' (1974) 45(2) *Australian Foreign Affairs Records* 114.

⁸³ '176 Take Up Amnesty Offer', *The Canberra Times* (Canberra, 25 March 1974) 3.

⁸⁴ *Ibid.*

⁸⁵ Extract from Minister's Australia Day Message (National Archives of Australia ('NAA'): A446, 1974/95281).

⁸⁶ '176 Take Up Amnesty Offer' (n 83).

⁸⁷ Memo from Murphy to Kern, 17 June 1980 (NAA: A463, 1978/1653).

‘remarkable really that all those people who have come forward were people who were not being exploited, although the amnesty is intended to help illegal immigrants who may be exploited’.⁸⁸ This lack of uptake stemmed from a range of factors, including that the campaign was ‘brief and not well publicized’.⁸⁹ The campaign’s short duration meant that there was little opportunity for the news of successful applications to be publicised and to encourage other people to apply, and the Department did not pursue an active media or community engagement strategy to promote the amnesty or counter community suspicion of the government’s motives. In his 1984 study of Australia’s past amnesties, North noted that ‘[s]everal of the ethnic organizations distrusted the Department of Immigration ... and told potential applicants not to apply’.⁹⁰

B *The 1976 Amnesty*

Following the 1974 amnesty’s low uptake, a subsequent amnesty was initiated two years later, this time under the newly-elected Fraser Coalition Government in 1976. The political commitment to implementing a second amnesty was made during the final week of the 1975 double dissolution election campaign. On 7 December 1975, then Caretaker Prime Minister Fraser announced his intention to initiate an amnesty for certain ‘prohibited immigrants’ in early 1976 should his government win the election.⁹¹ This focus on immigration law and policy was noteworthy, given that the election campaign concentrated on constitutional and economic issues in the wake of OPEC (‘Organization of the Petroleum Exporting Countries’) crisis, Australia’s mounting debt and inability to obtain international finance under the previous Whitlam Government.

Following the election of the Fraser Government, the newly-appointed Minister for Immigration and Ethnic Affairs, Michael MacKellar, quickly set about defining the scope and terms of the new amnesty. In his January 1976 submission to Cabinet, MacKellar proposed that the scope of the new amnesty should be as broad as possible, and ‘relate to overstayed visitors’.⁹² However, he also noted that ‘should others come forward I will look at each case as sympathetically as possible’.⁹³ Although the Minister acknowledged concerns that an amnesty program may make ‘control of future temporary entrants more difficult and may generate pressure for further amnesties in the future’, he submitted that the alternate options of either ‘mount[ing] a campaign of detection and deportation’ or letting ‘the existing situation persist’ had major ‘drawbacks’, particularly the former as it would require ‘increased resources in manpower’.⁹⁴ Interestingly, a key government apprehension in relation to the amnesty option was that it might prompt ‘resentment’ among Australian citizens who had been unsuccessful in the past in their attempts to assist

⁸⁸ ‘Illegal Migrants Live in Holroyd’, *Broadcaster* (Fairfield, NSW, 30 April 1974) 1.

⁸⁹ North (n 10) 525.

⁹⁰ *Ibid.*

⁹¹ ‘Fraser Promises Migrant Amnesty’, *The Sydney Morning Herald* (Sydney, 8 December 1975) 9.

⁹² Memo to Cabinet from Minister for Immigration and Ethnic Affairs, dated January 1976 and circulated to Cabinet on 6 January 1976 (NAA: A10756, LC79).

⁹³ *Ibid.*

⁹⁴ *Ibid.*

or sponsor close relatives to migrate to Australia, with the Minister noting that the '[c]ontinued rejection of such sponsorships in the face of an amnesty to persons who, in many cases knowingly contravened immigration controls, will exacerbate the deep disappointment of such persons'.⁹⁵

Like the earlier amnesty, the 1976 amnesty also was announced on 26 January 1976.⁹⁶ The amnesty applied to any person who had arrived in Australia prior to 31 December 1975 and applied for legal status within the stipulated amnesty period. Yet, unlike the 1974 amnesty, this second amnesty would only be open for a three-month period, until 30 April 1976. Publicly, the Immigration Minister stressed that the amnesty was a 'genuine offer' that was intended to 'give security to the many people currently living under a cloud in this country'.⁹⁷ In his press release, MacKellar stated that

[i]n making this offer, the Government realized that many people who were potentially good citizens had come to Australia as visitors in the mistaken hope that it would be easy to obtain resident status once they were here. This hope had not been realized and they now found themselves technically without legal status in Australia. The Government has recognised their problem and has acted humanely to resolve it.⁹⁸

In February 1976, the Immigration Minister clarified that convictions for minor offences, such as traffic offences, working illegally or using false names, did not disqualify a person from the amnesty.⁹⁹ In addition, he stated that the Department was not checking tax records for non-compliance issues.¹⁰⁰

The 1976 amnesty was publicly justified on basis of 'rectifying' the consequences of 'the Labor party's easy-visa system', with the Minister stating that an amnesty was the 'only effective and humane way to overcome this situation', which had created a substantial undocumented population in Australia.¹⁰¹ That said, the Government stressed that the amnesty would not be repeated, even if it would not necessarily be followed by a more concerted 'campaign to try to find' anyone remaining without authorisation in Australia.¹⁰² Notably, the Labor Party, in opposition, heavily criticised the Government's amnesty campaign on the basis that the amnesty period was too short.¹⁰³ In a proposed motion calling on the House to express its 'serious concern and deplore ... the action of the Government in its implementation of the Amnesty for Illegal Immigrants', Ted Innes (MP for Melbourne, and former National President of the Electrical Trades Union) called for the amnesty to be extended to a period of 12 months.¹⁰⁴ He also called on the Government to clarify the conditions surrounding the amnesty and 'appoint an

⁹⁵ Ibid.

⁹⁶ Michael MacKellar, Minister for Immigration and Ethnic Affairs 'Amnesty for Prohibited Immigrants' (Press Release, 25 January 1976, NAA: A10756, LC79).

⁹⁷ '270 Seek Amnesty', *The Canberra Times* (Canberra, 28 January 1976) 3.

⁹⁸ MacKellar (n 96).

⁹⁹ 'Minor Offences Not to Affect Amnesty', *The Canberra Times* (Canberra, 6 February 1976) 8.

¹⁰⁰ 'Amnesty Response "Good"', *The Canberra Times* (Canberra, 2 February 1976) 8.

¹⁰¹ 'Early Action Promised on Immigrant Amnesty', *The Canberra Times* (Canberra, 6 January 1976) 4.

¹⁰² 'Amnesty for Illegal Immigrants Ending', *The Canberra Times* (Canberra, 28 April 1976) 10.

¹⁰³ Commonwealth, *Parliamentary Debates*, House of Representatives, 17 February 1976, 27 (Ted Innes).

¹⁰⁴ Ibid.

independent committee of appeal comprised of representatives of our ethnic communities to investigate cases where amnesty has been refused'.¹⁰⁵

Despite this, the 1976 amnesty had little formal involvement of ethnic community groups. While some groups did approach the Department to request a 'bulk supply of forms',¹⁰⁶ similar to the 1974 amnesty, there was also much reported fear and suspicion of the Department on the part of undocumented people. According to Department officials, it was common for undocumented migrants to send friends with legal status to the Department to collect application forms on their behalf 'because they feared arrest if they went themselves'.¹⁰⁷ By March 1976, the Minister felt compelled to rebuke the notion circulating within the community that the amnesty was a 'trick', stating that such claims were 'cruel' to those who could benefit from amnesty: 'any organisation advising migrants not to take advantage of the amnesty would have it on their conscience for the rest of their lives. The amnesty would allow people to live a full and complete life and have the rights and privileges involved'.¹⁰⁸

Nonetheless, the limited government outreach to community organisations meant that the final uptake of the amnesty remained low, even though there was a significant increase in applicants in comparison to the previous campaign. Departmental figures show that a total of 8,614 people sought legal status in the amnesty period, with the vast majority of them (63%) residing in NSW.¹⁰⁹ The main nationalities of these applicants were Greek (1,283 applicants), followed by the UK (911 applicants), Indonesia (748 applicants) and China (643 applicants).¹¹⁰ North notes that if these amnesty applicants were representative of the undocumented population in Australia at the time, then 'one would conclude that the population was roughly half from Europe and half from Asia and the Pacific Islands'.¹¹¹ In total, 7,861 applications were approved, 22 were refused and a further 722 lapsed or were dealt with under other policies such as for overseas students applying for permanency.¹¹²

A significant legacy of the 1976 amnesty was the judicial confirmation of the legal basis for ministerial amnesties under the existing legislation. This occurred in the prominent case of Italian citizen and journalist Ignazio Salemi, who sought judicial review of the ministerial decision to refuse his application for permanency under the 1976 amnesty.¹¹³ At the time, Salemi was a leading organiser within an Australian-Italian migrant organisation, the Federation of Italian Migrant Workers and their Families ('FILEF').¹¹⁴ Salemi had arrived in Australia to build the FILEF

¹⁰⁵ Ibid.

¹⁰⁶ '270 Seek Amnesty' (n 97).

¹⁰⁷ 'Amnesty Response "Good"' (n 100).

¹⁰⁸ 'Amnesty Granted: Argentine Is Now Legal Migrant', *The Canberra Times* (Canberra, 6 March 1976) 15.

¹⁰⁹ North (n 10) 526.

¹¹⁰ Ibid 527.

¹¹¹ Ibid.

¹¹² Memo from Murphy to Kern (n 87).

¹¹³ *Salemi* (n 11).

¹¹⁴ 'The Liberal Immigration Policy Is One of Intimidation against People with Progressive Ideas', *Tharunka* (Sydney, 6 October 1976) 9 ('The Liberal Immigration Policy').

welfare office in October 1974 and was granted a three-month temporary entry permit (that was later extended until July 1975).¹¹⁵ Notably, Salemi was a member of the Italian communist party, a political organisation with then over 1.7 million members and a considerable presence in the Italian Parliament. In April 1976, Salemi submitted an amnesty application to the Department of Immigration and Ethnic Affairs, after having lived in Australia unauthorised for around half a year.¹¹⁶ Despite seemingly meeting the criteria, Salemi's application was refused on technical grounds, and he was instead issued with a deportation order under s 18 of the *Migration Act*.¹¹⁷

The Minister's decision to refuse amnesty to Salemi attracted public outcry, with the decision seen by migrant community groups and trade unionists as a 'double-cross'.¹¹⁸ For instance, at a public meeting, attended by then Opposition leader Gough Whitlam and Australian Council of Trade Unions ('ACTU') President Bob Hawke, the Government's decision to refuse amnesty to Salemi was deemed a 'despicable and dishonest act'.¹¹⁹ Salemi appealed the Minister's decision to the High Court, but he was ultimately unsuccessful and deported in October 1977.¹²⁰ Even though the High Court noted in obiter dicta that Salemi appeared to meet the amnesty criteria,¹²¹ the Government initially maintained otherwise. However, by 1977, following the publication of a Commonwealth Ombudsman report that was critical of the Government's decision, MacKellar publicly admitted in Parliament that the decision to refuse to extend amnesty to Salemi was motivated by the fact that Salemi was a communist.¹²²

The High Court's *Salemi* decision is best remembered for its judicial consideration of ministerial deportation powers. In *Salemi*, the statutory majority (Stephen, Jacobs and Murphy JJ dissenting) upheld the Commonwealth's position that principles of natural justice did not apply to non-citizens in relation to deportation orders issued under the *Migration Act*, and that the Act did not oblige the Minister to afford Salemi an opportunity to be heard before exercising deportation powers.¹²³ In his leading judgment, Gibbs J reasoned that the broad nature of ministerial power is tied to security considerations:

Reasons of security may make it impossible to disclose the grounds on which the executive proposes to act. If the Minister cannot reveal why he intends to make a deportation order, it will be difficult to afford the prohibited immigrant a full opportunity to state his case ...¹²⁴

Following the introduction of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and legislative amendments to the relevant deportation powers under

¹¹⁵ 'Migrant Amnesty Doublecross: Deportation Deadline Set for Ignazio Salemi', *Tribune* (Sydney, 11 August 1976) 10 ('Migrant Amnesty Doublecross').

¹¹⁶ 'The Liberal Immigration Policy' (n 114).

¹¹⁷ *Salemi* (n 11) 448; Simone Battiston, 'Salemi v MacKellar Revisited: Drawing Together the Threads of a Controversial Deportation Case' (2005) 28(84) *Journal of Australian Studies* 1, 1.

¹¹⁸ 'Migrant Amnesty Doublecross' (n 115).

¹¹⁹ *Ibid.*

¹²⁰ Battiston (n 117) 1.

¹²¹ *Salemi* (n 11) 406 (Barwick CJ).

¹²² 'MacKellar: It's Because Salemi's a Communist', *Tribune* (Sydney, 14 September 1977) 11.

¹²³ *Salemi* (n 11) 404 (Barwick CJ), 421 (Gibbs J), 460 (Aickin J).

¹²⁴ *Ibid* 421.

the *Migration Act*, in *Kioa v West* the High Court found that *Salemi* no longer provided authority for the application of procedural fairness to non-citizens being deported under the existing statutory scheme.¹²⁵ As a result, the majority's reasoning in *Salemi* in relation to the nature of ministerial deportation powers has not left a lasting impact on contemporary interpretations of Australian migration law or the scope of the common law duty of procedural fairness.¹²⁶

For current purposes, a more pertinent aspect of the High Court's *Salemi* decision relates to its ruling on the legal nature of immigration amnesties. Here, the Court unanimously held that the series of ministerial press releases announcing the scope of the 1976 amnesty were not ministerial instruments made under the *Migration Act*, as per the plaintiff's submissions.¹²⁷ Instead, the Court characterised the press releases as merely reflecting government policy, meaning that the Minister was not legally bound by the offer to grant an amnesty to all prohibited immigrants as a result of these press releases, even if they met all the eligibility criteria for the amnesty as stipulated in these press releases. In his leading judgment, Gibbs J reasoned that

there is no principle of law that requires a Minister, who has decided as a matter of policy that a permit should be granted to a particular person or to every person who is a member of a certain class, to ensure that a permit is granted to that person or to any person who proves to be a member of that class. The Minister is free to change his policy, or his decision in a particular case, at any time before it is implemented and a permit is granted.¹²⁸

As Aickin J stated in his reasoning, the announcement of an immigration amnesty was a 'political and not a legal promise'.¹²⁹ The ministerial press releases were 'not intended to be self-executing, but to induce' undocumented people to submit applications to the Department for assessment.¹³⁰ Barwick CJ similarly noted the political nature of legal immigration amnesties. The Chief Justice reasoned that although the ministerial decision to refuse amnesty to Salemi had given the applicant 'ground for a sense of grievance and disappointment', the Minister was not bound by the 'unguarded and perhaps unwise generality' of the amnesty as governments were free to change their policies or not implement a particular policy in its entirety.¹³¹ As a result, Barwick CJ opined that while it was 'regrettable' that the Minister did 'not wish to extend the amnesty to the applicant', this did not however give rise to a 'legitimate expectation' in law of a grant of a permanent entry permit.¹³²

In their dissenting opinions, Murphy, Jacobs and Stephen JJ held that procedural fairness did apply to the ministerial exercise of deportation powers, even as they concurred that press releases did not necessarily constitute ministerial instruments. For instance, in finding that Salemi had a legitimate expectation that

¹²⁵ *Kioa v West* (1985) 159 CLR 550, 578 (Mason J), 599 (Wilson J), 624 (Brennan J).

¹²⁶ For the current expression of the duty, see *Minister for Immigration and Border Protection v SZSSJ* (2016) 259 CLR 180.

¹²⁷ *Salemi* (n 11) 396, 413.

¹²⁸ *Ibid* 416.

¹²⁹ *Ibid* 459.

¹³⁰ *Ibid*.

¹³¹ *Ibid* 406.

¹³² *Ibid*.

the amnesty criteria would be honoured in relation to his application, Stephen J reasoned that a ‘fair reading’ of the press releases was that they induced ‘prohibited immigrants’ to present themselves to immigration authorities, and acted as an assurance that there was no ‘risk of arrest and deportation ... because the Minister had determined not to deport but instead to permit future lawful residence’.¹³³ Jacobs J noted that, as the amnesty was ‘expressed to be ... “a genuine offer”, “an open and honest invitation”’, Salemi was ‘entitled to know’ the reason why his application for amnesty was refused and given an opportunity to ‘displace that reason’.¹³⁴ In contrast, Murphy J’s dissenting judgment was broader in its assessment of the legal status of the immigration amnesty and its implications. For Murphy J, amnesties were issued pursuant to the power of the executive arm of government. This meant that

the announced amnesty should be regarded as emanating from the Executive Government duly exercising its power [with] [t]he effect ... that persons who fulfil its conditions are not to be treated as prohibited immigrants, not to be prosecuted, and not to be deported on that account’.¹³⁵

The Minister therefore had no power to issue a deportation order as Salemi, in Murphy J’s reasoning, was no longer a prohibited immigrant and ‘[e]very court [was] bound to take account of and give effect to the amnesty’.¹³⁶

The case usefully highlights how the 1976 amnesty in practice was largely defined through ministerial press releases, rather than any formal legal instruments. This was so much so that the very criteria of the amnesty were primarily communicated to the public via ministerial statements and press releases, and mainly publicised via the press. This shows how this amnesty operated profoundly within the realm of executive decision-making and that procedural fairness rights did not extend to those who applied for amnesty under the program.

C *The 1980 Regularisation of Status Program (‘ROSP’)*

Australia’s third — and to date final — broad immigration amnesty came in 1980. In spite of an earlier government commitment that there would no further amnesty,¹³⁷ on 19 June 1980, the new Immigration Minister, Ian Macphree, announced the Liberal Government’s new six-month amnesty, or ROSP.¹³⁸ At the time, government figures estimated that 60,000 people could benefit from the regularisation program, roughly around the same number of people estimated to benefit from any contemporary amnesty if implemented today.¹³⁹ In his press release, Macphree stressed that the ROSP’s underlying intention was to deal ‘humanely with the problem of illegal immigration’ while also seeking to curb such unauthorised

¹³³ Ibid 439.

¹³⁴ Ibid 453.

¹³⁵ Ibid 456.

¹³⁶ Ibid (citations omitted).

¹³⁷ ‘No New Migrant Amnesty’, *The Canberra Times* (Canberra, 27 May 1978) 8.

¹³⁸ See above n 1 and accompanying text.

¹³⁹ ‘New Amnesty for Illegal Immigrants’ (n 1).

migration in the future.¹⁴⁰ The program's main function was to effectively 'clean the slate, to acknowledge that no matter how people got here they are part of the community'.¹⁴¹ In language reminiscent of the two earlier amnesties, Macphee stressed that the ROSP would also 'offer illegal immigrants in Australia every chance to emerge from a life of fear, uncertainty and risk of exploitation'.¹⁴² Yet, the Minister asserted the need for a 'much stricter' approach in the future, stating that the ROSP would be accompanied by 'tougher new migration laws that will effectively rule out future amnesties'.¹⁴³ The new legislation would also significantly restrict the categories of persons in Australia who would be eligible for ministerial change of status in the future.¹⁴⁴

The Government's motivation for the amnesty was part of an explicit government strategy to increase 'legal migration' and curtail 'illegal migration'.¹⁴⁵ At the time, it was estimated that the number of people living unauthorised in Australia was growing by approximately 7,000 people per year.¹⁴⁶ Notably, unlike the 1976 campaign that promised that there would be no concerted effort to find and deport any persons who did not apply for the amnesty, in his 1980 announcement, the Minister threatened to deport anyone who remained in Australia unauthorised and who had not applied for amnesty after the end of the amnesty period on 1 January 1981.¹⁴⁷ Indeed, the amnesty was also accompanied by a slight increase of 13,000 places in the official migration program (to a total of 95,000 places) in order to facilitate family reunion, without needing to resort to remaining in Australia unauthorised.¹⁴⁸

The 1980 ROSP was a much broader and more sustained campaign than the earlier two amnesties. For the 1980 amnesty, there were two main categories of eligibility:

1. Anyone who was 'illegally' in Australia at the time of the amnesty, provided they had entered Australia prior to 1 January 1980; and
2. Anyone who was 'lawfully' in Australia at the time of the amnesty, provided they had formally applied for permanent residency on or before 18 June 1980.¹⁴⁹

That said, departmental documents suggest that the Department was prepared to, and in fact did, adopt a flexible interpretation in relation to these categories. For example, the Department was prepared to consider a person who had arrived after 1 January 1980 and who was in Australia 'illegally' at the time of the amnesty eligible to apply

¹⁴⁰ Ian Macphee, Minister of Immigration and Ethnic Affairs, 'Latest Changes Complete Immigration Package' (Press Release, 19 June 1980, NAA: M651, 31).

¹⁴¹ 'New Amnesty for Illegal Immigrants' (n 1).

¹⁴² Macphee (n 140).

¹⁴³ 'New Amnesty for Illegal Immigrants' (n 1).

¹⁴⁴ Macphee (n 140).

¹⁴⁵ 'New Restrictions on Migrants: Amnesty Over', *The Australian Jewish News* (Melbourne, 23 January 1981) 2.

¹⁴⁶ Stephen Mills, 'Amnesty Offered to Illegal Migrants', *The Age* (Melbourne, 20 June 1980) (NAA: M651, 31).

¹⁴⁷ *Ibid.*

¹⁴⁸ *Ibid.*

¹⁴⁹ 'Regularisation of Status Program: Some Questions and Answers' (NAA: M651, 31).

for the amnesty if: they were married to an Australian citizen; their children were Australian citizens; or they were a minor with parents who were Australian citizens.¹⁵⁰ Family applications would be considered as a unit.

The amnesty included specific approval criteria as well as ‘certain explicit exceptions’.¹⁵¹ In addition to the above eligibility categories, a person could not have any serious health issue nor a serious police record. This discriminatory health exception was justified on the basis that people with serious health issues would be a ‘permanent drain on welfare resources’.¹⁵² Additionally, there were broadly three groups of people who were ineligible to apply for the amnesty: international students and their immediate families; persons issued with deportation orders under the *Migration Act* and their immediate families; and diplomats and officials of other States.¹⁵³ In addition, the Department clarified that the amnesty would not apply to refugees or asylum seekers who would still be eligible for permanent residence status through the ‘established processes’.¹⁵⁴

The shift in terminology towards ‘regularisation of status’ was important and politically revealing. The Fraser Government was careful not to call the 1980 program an ‘amnesty’ because the Government had stated that the 1976 amnesty was to be the last one. That said, the 1980 campaign was widely referred to as an amnesty in mainstream media and public discourse. For example, an editorial in *The Age* welcomed the new ‘amnesty’ as a ‘humane and realistic’ initiative that would benefit the community, the Government and the individuals themselves, stating that it will ‘mean that thousands of people who have been leading secret and clandestine lives will be free to come out into the open and declare themselves’.¹⁵⁵ The amnesty also enjoyed bipartisan support. A few weeks prior to the Government’s announcement of the 1980 ROSP, Labor leader Bill Hayden had already publicly committed to supporting a new amnesty, prompting Moss Cass (then Labor immigration opposition spokesperson) to subsequently stress that the amnesty was ‘a Labor initiative’.¹⁵⁶ Likewise, in the previous year, certain community groups had renewed their calls for another amnesty. For example, the Ethnic Communities’ Council of NSW in March 1979 had urged the Government to initiate a new amnesty in order to ‘alleviate the personal stress on illegal immigrants who were unable to come forward and claim Australian citizenship for fear of deportation’.¹⁵⁷

This meant that, in general, many migrant groups openly welcomed the amnesty while also calling for increased pathways to permanent residency. For example, the Family Reunion Group Organising Committee emphasised the need to make legal family reunion easier in the wake of the amnesty, noting that many people became ‘unlawful’ in order to remain with family in Australia.¹⁵⁸ At the same time, other migrant groups continued to express suspicion about the Government’s

¹⁵⁰ Ibid.

¹⁵¹ Ibid 2.

¹⁵² Mills (n 146).

¹⁵³ ‘Regularisation of Status Program: Some Questions and Answers’ (n 149).

¹⁵⁴ Ibid 6.

¹⁵⁵ ‘Editorial: New Chance for Illegal Migrants’, *The Age* (Melbourne, 23 June 1980) (NAA: M651, 31).

¹⁵⁶ ‘New Amnesty for Illegal Immigrants’ (n 1).

¹⁵⁷ ‘Amnesty Call for 50,000’, *The Canberra Times* (Canberra, 19 March 1979) 3.

¹⁵⁸ ‘Amnesty or Deportation?’, *Tribune* (Sydney, 25 June 1980) 7.

intentions behind the new amnesty. A 1980 newspaper article in Sydney's *Tribune* stated that migrant groups were 'worried' that the latest amnesty may be a 'trick' to facilitate deportations, claiming that 10 people had been deported after applying under the 1976 amnesty.¹⁵⁹ In response, in July 1980, Prime Minister Fraser personally sought publicly to reassure migrant communities that the regularisation program was not 'a trap to lure [people] into the open so that they can be seized, jailed and deported' and that the government was 'not engaged in some sort of massive deportation exercise'.¹⁶⁰ Acknowledging that to do so would be 'neither effective nor just', Fraser stated that '[r]eaching people who are eligible to apply is a very complex task and it requires the fullest possible support from other sections of the community'.¹⁶¹ By the end of the amnesty period on 31 December 1980, it was reported that 11,042 applications had been received, covering over 14,000 people.¹⁶² Although this was just under a quarter of the initially estimated 60,000 undocumented people in Australia at the time, the Government declared the program to have been successful.¹⁶³ By October 1981, 9,734 applications had been processed, of which 217 were deemed ineligible and 8 were rejected.¹⁶⁴

One legal legacy of the 1980 ROSP, like the earlier 1976 amnesty, was the expansion of the emerging Australian jurisprudence on amnesties, in particular through the prominent case of Syrian academic and community leader, Haydar Haj-Ismaïl (also known as Aboud Aboud). Haj-Ismaïl had arrived in Australia in November 1972 on a temporary entry permit, and soon commenced postgraduate studies in philosophy. In 1975, he was joined in Australia by his wife and daughter. By 1980, Haj-Ismaïl was active in the Syrian Social Nationalist Party. Although Haj-Ismaïl spent periods of his next decade in Australia without valid status, his application for permanent residency under the 1976 amnesty was rejected on the basis that the Department considered him to be at the time lawfully in Australia as a 'temporary entry private student'.¹⁶⁵ Following the announcement of the 1980 ROSP, parliamentarian Harry Edwards wrote to the Immigration Minister on Haj-Ismaïl's behalf to request that the family be granted permanent residency. This representation prompted the Minister in September 1980 to personally allow the family to be considered eligible on the basis of academic achievements, length of stay in Australia and future employment prospects, even though they did not technically meet all the ROSP criteria.¹⁶⁶

Despite the Minister's initial representation, in June 1981 the Minister reversed his approval and issued a deportation order for Haj-Ismaïl and his family on the basis of an adverse Australian Security Intelligence Organisation ('ASIO')

¹⁵⁹ Ibid.

¹⁶⁰ 'Amnesty Not a Trap: PM', *The Canberra Times* (Canberra, 28 July 1980) 7.

¹⁶¹ Ibid.

¹⁶² 'Last Minute Rush: Migrant Amnesty Ends Tonight', *The Canberra Times* (Canberra, 31 December 1980) 6; Joint Standing Committee on Migration Regulations, Parliament of Australia, *Illegal Entrants in Australia — Balancing Control and Compassion* (First Report, September 1990) 35.

¹⁶³ 'New Restrictions on Migrants: Amnesty Over' (n 145).

¹⁶⁴ Joint Standing Committee on Migration Regulations (n 162) 35.

¹⁶⁵ Quoted in *Haj-Ismaïl v Minister of Immigration and Ethnic Affairs* (1981) 56 FLR 67, 70.

¹⁶⁶ Ibid.

security assessment that was not made available to Haj-Ismaïl at the time.¹⁶⁷ Haj-Ismaïl challenged the decision to refuse him status and the deportation order. In the first instance, the Federal Court held that the Minister's decision was affected by an error of law,¹⁶⁸ and that Haj-Ismaïl was entitled to an opportunity to be heard prior to any further decision or deportation order given the special circumstances of the case, namely that he was an overseas student who had a legitimate expectation of completing his studies in Australia.¹⁶⁹ Despite this, Ellicott J affirmed the principle set out by the High Court in *Salemi* that 'prohibited immigrants' were not entitled to natural justice in ordinary circumstances.¹⁷⁰ This reasoning was upheld by the Full Federal Court on appeal, with Davies J for the majority affirming that there was no standing right to be heard in relation to an application for a permanent residency permit under the amnesty program, and that there was nothing in the Minister's representations to Mr Haj-Ismaïl to alter that position.¹⁷¹

This case is noteworthy for its affirmation of the unfettered ministerial discretion that applied to both the grant *and* refusal of permanent residency under the ROSP. Notably, there was no submission made to the Court that but for Haj-Ismaïl's special circumstances there was any general right to be heard in relation to an application under the ROSP. Indeed, Davies J in the Full Court stated that '[t]he large number of applications involved, their geographical diversity and the general nature of the decision to be made makes it clear that Parliament did not intend that there should be any such general right.'¹⁷² Despite this, in a subsequent review of the ROSP commissioned by the International Labour Organization, Storer noted that the lack of a publicised system of appeal for reviewing refused amnesty applications contributed to the 'personal fear and suspicion' and 'distrust' of authorities within migrant communities.¹⁷³ Storer thus recommended that an open system of appeal — 'possibly in the form of a tribunal of prominent people who would hear problems or cases of dispute [and make] these judgments open to public scrutiny'¹⁷⁴ — 'would help encourage illegal immigrants to apply for amnesty'.¹⁷⁵

The most significant legal legacy of the 1980 amnesty, however, was substantial legislative reform of the *Migration Act* constraining the Minister's discretions in relation to change of status. Although moves to reform and tighten exit and entry rules were already evident following the 1976 amnesty, the 1976 reforms were limited in scope. In contrast, the legal reforms introduced through the *Migration Amendment Act (No 2) 1980* (Cth) following the 1980 ROSP were much more extensive and considerably tightened the power of the Minister to regularise a person's status as a result of the insertion of a new section, namely s 6A.¹⁷⁶ Under the new s 6A, a person could only be granted an entry permit after their entry into

¹⁶⁷ Ibid 77–8. The adverse information was based on police suspicion that he was connected to 'violent incidents' within 'the Arabic community': ibid 74.

¹⁶⁸ Ibid 89.

¹⁶⁹ Ibid 91.

¹⁷⁰ Ibid 84, 91.

¹⁷¹ *Haj-Ismaïl* (n 12) 154.

¹⁷² Ibid 159.

¹⁷³ Storer (n 77) 61.

¹⁷⁴ Ibid 52.

¹⁷⁵ Ibid 64.

¹⁷⁶ *Migration Amendment Act (No 2) 1980* (Cth) s 6A.

Australia if they fulfilled set conditions. These included, for example, that they had been granted territorial asylum or refugee status; were a close relative of an Australian citizen or entry-permit holder; or there were 'strong compassionate or humanitarian grounds' for doing so.¹⁷⁷ In effect, the insertion of s 6A took away the previous broad ministerial discretion to regularise status or initiate a legal immigration amnesty. The amending legislation also included a transitory provision that recognised the validity of applications for entry permits made under the 1980 ROSP, provided that they had been submitted before 1 January 1981.¹⁷⁸ At the time, Minister Macphree warned that these new restrictions would be 'strictly enforced' in order to crack down on 'back-door migration' and 'queue-jumpers', and that anyone who 'broke the law by overstaying their visas would be deported'.¹⁷⁹ These legislative changes were in line with the Government's pledge that there would be no further amnesties following the 1980 campaign.

The following decade saw numerous unsuccessful calls for the implementation of a new immigration amnesty. For instance, in 1985 there was a parliamentary committee review of the departmental costs of controlling 'prohibited immigration' and the Human Rights Commission (a distinct statutory body that existed from 1981 to 1986) submitted to the Committee that the Government should adopt guidelines to allow undocumented people 'who ha[d] integrated into Australian society to remain in the country'.¹⁸⁰ Then deputy chairman of the Commission, Peter Bailey, emphasised that 'the removal of immigrants after they ha[d] set up their life and established families was, in some ways, a denial of basic human rights for them and their children'.¹⁸¹ Despite such legal arguments, the 1980s marked a rapid and largely bipartisan shift in rhetoric around undocumented people in Australia, including the potential of immigration amnesties more generally. Notably, in the lead up to the 1988 Bicentenary, then Labor Minister for Immigration and Ethnic Affairs Chris Hurford sought to quell rumours of another possible immigration amnesty by asserting that undocumented people were 'queue-jumpers' who had 'mostly broken specific promises not to stay in Australia'; and that there was 'no earthly chance' of an immigration amnesty for people who 'flout Australia's migration laws with impunity'.¹⁸² This increasing government hostility towards unauthorised migration saw a succession of significant law reforms over the 1980s and early 1990s that included the introduction of Australia's universal visa system in 1994 mandating that every non-citizen in Australia must have a valid visa.¹⁸³ Such changes not only further tightened official pathways to permanency for undocumented migrants, but also failed to address the phenomenon of an again growing undocumented population in Australia.

¹⁷⁷ Ibid.

¹⁷⁸ Ibid s 11.

¹⁷⁹ "'Tough" on Illegal Immigrants', *The Canberra Times* (Canberra, 19 January 1981) 7.

¹⁸⁰ 'Amnesty Call for Illegal Residents', *The Canberra Times* (Canberra, 23 May 1985) 15.

¹⁸¹ Ibid.

¹⁸² Chris Hurford, Minister for Immigration and Ethnic Affairs 'No Amnesty for Illegal Immigrants' (News Release, 6 June 1986), republished in 57(6) *Australian Foreign Affairs Record* (June 1986) 548–9.

¹⁸³ For a general overview of some of these changes, see Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (Federation Press, 2011) esp 148–55.

IV Legal Lessons from Past Amnesties

Although the legacies of Australia's past immigration amnesties are multifaceted, in this Part, we analyse four aspects of these past campaigns that are relevant to immigration law reform today. These lessons highlight the possibilities and challenges surrounding contemporary calls for a further immigration amnesty.

A *Amnesties Informed by a Social Conception of Citizenship*

One of the most prominent aspects of Australia's past amnesty campaigns is that each amnesty was underpinned by what we identify as a politics of social citizenship, rather than a strict conception of citizenship as legal status. Social citizenship, as a normative approach to the politics of national membership, is based on the idea that 'living in a society over time makes one a member and being a member generates moral claims to legal rights and to legal status'.¹⁸⁴ There is a rich literature on diverse forms of citizenship, examining in particular the extent to which '[n]ew connections among citizenship elements suggest that we have moved beyond the idea of citizenship as a protected status in a nation-state, and as a condition opposed to the condition of statelessness'.¹⁸⁵ We contend that a normative conception of social citizenship, defined by membership, participation and presence within territory, was central to how successive governments advocated for and promoted immigration amnesty. This social conception of citizenship is a factor that plainly distinguishes the politics of membership during the past immigration amnesties from the politics of citizenship in contemporary Australian politics.

Each historical amnesty was promoted on the basis of the social contribution of undocumented migrants living in Australia *in spite of* their unlawful state, alongside the State's responsibility for their welfare based on their continued presence within Australian territory. Each immigration amnesty campaign recognised and accepted that people could fall into unlawful status for a range of reasons, including through no fault of their own and not as a means to deliberately 'exploit' Australia's immigration laws. By contrast, citizenship as legal status is at the centre of more recent Australian governments' refusal to implement an amnesty to regularise the status of undocumented people. The shift in rhetoric and policy following the 1980 ROSP documented above saw bipartisan support for the view that those without status were 'deliberately deceiv[ing] the immigration authorities' and that the Government could not 'condone people being encouraged to flout Australia's migration laws with impunity'.¹⁸⁶ The Morrison Liberal Government similarly made clear that any form of amnesty would 'undermine the integrity of this government's strong visa system',¹⁸⁷ and incentivising irregular non-citizens to

¹⁸⁴ Joseph Carens, *The Ethics of Immigration* (Oxford University Press, 2013) 159–60.

¹⁸⁵ Aihwa Ong, 'Mutations in Citizenship' (2006) 23(2–3) *Theory, Culture & Society* 499, 499 (citations omitted); Linda Bosniak, *The Citizen and the Alien* (Princeton University Press, 2008).

¹⁸⁶ Hurford (n 182).

¹⁸⁷ Evidence to Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia Canberra, 22 March 2021, 191 (Michaelia Cash).

come forward with the promise of a permanent status would be a ‘perverse distortion’ of Australia’s immigration program.¹⁸⁸

This is a classic anti-amnesty stance that maintains what is needed is ‘not regularization of [irregular] immigrants but a renewed commitment to rounding them up and ejecting them, and to tightening the borders against future illegal entrants and visa violators’.¹⁸⁹ A critical observation drawn from the historical and archival materials is that such an approach to the politics of immigration and citizenship within the executive government is a political and practical barrier to amnesty. While we are not arguing that an immigrant’s ‘time and ties in the receiving society’ is the only basis upon which to justify or argue for amnesty, we note the centrality of this idea in the historical campaigns.¹⁹⁰

B *Understanding the Legal Basis of Immigration Amnesties in Australia*

Attending to Australia’s past immigration amnesties enables a more nuanced understanding of the changing nature of executive power vis-à-vis non-citizens within the context of Australia’s migration law. Our analysis of Australia’s past amnesties has demonstrated that these campaigns were all initiated pursuant to the then ministerial discretion powers under the *Migration Act*. For at least its first three decades, the Act explicitly provided the Minister with a largely unfettered power to regularise the status of non-citizens. This meant that each amnesty’s initiation, duration and scope were entirely subject to ministerial discretion and government policy.

Today, the Minister’s power to regularise the status of ‘unlawful non-citizens’ has become much more limited and restricted to specific circumstances. These include, for instance, the power to issue any visa, either permanent or temporary, to a non-citizen in immigration detention,¹⁹¹ or to substitute a ‘more favourable decision’ in the place of an adverse tribunal migration decision if the Minister thinks it is ‘in the public interest to do so’.¹⁹² This statutorily-delimited avenue for ministerial discretion is intended

to balance what is an otherwise inflexible set of regulations to allow the minister a public interest power to grant a visa in individual circumstances which the legislation had not anticipated and where there were compelling, compassionate and humanitarian considerations for doing so.¹⁹³

The *Migration Act* also stipulates that the ministerial public interest powers are non-compellable and non-reviewable.¹⁹⁴

¹⁸⁸ Evidence to Senate Legal and Constitutional Affairs Legislation Committee (n 67) 192 (Michael Pezzullo).

¹⁸⁹ Bosniak ‘Amnesty in Immigration’ (n 14) 344–5.

¹⁹⁰ *Ibid* 345.

¹⁹¹ *Migration Act* (n 32) s 195A.

¹⁹² *Ibid* s 417.

¹⁹³ Kerry Carrington, ‘Ministerial Discretion in Migration Matters: Contemporary Policy Issues in Historical Context’ (Current Issues Brief No 3 2003–04, Parliamentary Library, Parliament of Australia, September 2003) 1.

¹⁹⁴ *Migration Act* (n 32) s 195A.

In practice, however, the high volume of requests for ministerial ‘intervention’ in recent decades has led to this becoming a ‘God-like’ area of executive decision-making.¹⁹⁵ The wide ministerial powers within the current *Migration Act* fail to provide adequate transparency or accountability for discretionary decision-making. This critique has been especially relevant to the use (and abuse) of executive discretions in relation to onshore asylum seekers in Australia.¹⁹⁶ Notably though, the trend of widening executive power has generally not been mirrored in relation to the granting of visas. While ministerial public interest powers are intended as a kind of ‘safety net’ for individual decision-making, they appear unable to provide an adequate response to systemic phenomena such as the growth of the undocumented population in Australia. This is particularly the case as, under the present Act, the Minister is not authorised to regularise the status of non-citizens unless certain jurisdictional facts exist, such as they are being held in immigration detention, they have had their visa automatically cancelled on particular grounds, or they are the subject of a negative migration decision at a tribunal level.¹⁹⁷

Amnesties thus raise the question of place of ministerial discretion within Australia’s migration law. We suggest that one of the advantages of the now repealed s 6(5) of the *Migration Act* — that operated for the duration of Australia’s three legal amnesties — was that it implicitly recognised the benefits of empowering the Minister to change the status of people who had become unauthorised within Australia (for example, as a result of a failure to understand visa restrictions or an inability to meet strict migration criteria). Indeed, in its April 1985 report, *Human Rights and the Migration Act 1958*, the Human Rights Commission stated that change of status provisions were a ‘welcome amelioration of the stringency of entry conditions’ found elsewhere in the Act, and called for the ‘reinstatement’ of a broad ‘amnesty provision’.¹⁹⁸ Storer’s study shows that the harder legislative pathways to permanency are, the more likely it is that people will remain in Australia unauthorised, resulting in a growing undocumented population.¹⁹⁹ In this sense, the declaration that the 1980 ROSP would be the last amnesty and the corresponding legislative amendments that removed the earlier broad change of status ministerial power has contributed to the creation of new groups of undocumented people.

As noted, unfettered ministerial power to regularise the status of non-citizens gave the executive government control over the scope and duration of each amnesty campaign. The *Migration Act* does not currently make any mention of immigration amnesties or regularisation of status programs. During all three past campaigns, the Act did not specify the eligibility details, operation or scope of any of these amnesties. To our knowledge, the only mention of ‘regularisation’ in the history of the *Migration Act* appeared in 1981 after the 1980 ROSP as a transitional provision

¹⁹⁵ Liberty Victoria, *Playing God: The Immigration Minister’s Unrestrained Power* (Report, Rights Advocacy Project, 2017).

¹⁹⁶ Joyce Chia and Savitri Taylor ‘A Masterclass in Evading the Rule of Law: The Saga of Scott Morrison and Temporary Protection Visas’ (2021) 44(3) *University of New South Wales (UNSW) Law Journal* 1114.

¹⁹⁷ See eg *Migration Act* (n 32) ss 195A, 417, 501C.

¹⁹⁸ Human Rights Commission, *Human Rights and the Migration Act 1958* (Report No 13, April 1985) xiii [16].

¹⁹⁹ Storer (n 77) 32.

for removing the ministerial discretion to initiate future amnesties and ensuring that no subsequent amnesties could be implemented without the approval of Parliament.²⁰⁰

Revisiting the history of Australia's past immigration amnesties thus invites a reconsideration of the place of executive action in Australia's immigration laws. Ministerial discretion allowed each past amnesty to be implemented efficiently and flexibly, largely with bipartisan support. This accords with the conception of amnesties as fundamentally exercises of executive mercy and pardon, in spite of existing legal frameworks.²⁰¹ While unfettered executive power has, in more recent history, rarely been exercised to facilitate access to permanent residency or secure migration status, we note the centrality of executive action in most amnesty campaigns, including Australia's, and the challenges of enacting amnesty in the absence of provisions enabling such executive authority under the current Act.

C *Legal Criteria and Design of Amnesties*

There are a range of factors that shape the design of immigration amnesties, including the criteria for eligibility, the type of immigration status offered, as well as the duration and publicity of the campaign itself. Research on immigration amnesties across jurisdictions demonstrates that the campaigns that successfully achieve regularisation for identified groups rely on careful promotion, community engagement and publicity, do not have onerous evidentiary requirements (for example, proof of length of residence) and are characterised by clear, objective eligibility criteria.²⁰² In her in-depth analysis of regularisation programs across nine countries, Levinson identifies 'lack of publicity, having overly strict requirements that limited migrant participation ... and lack of administrative preparation' among 'the most common reasons for program failure or weakness'.²⁰³

Australia's first campaign ran for only six months and, as noted earlier, was 'brief and not well publicized'.²⁰⁴ The same can be said of each subsequent amnesty. The second campaign in 1976 lasted just three months, with the 1980 ROSP lasting six months in total. While the Government expressed surprise at the minimal uptake, especially in relation to the 1974 and 1976 campaigns, this lack of uptake reflects the limited time for undocumented communities to learn about the campaigns, let alone for Government to actively promote or foster trust in these campaigns. Applicant numbers, however, rose steadily across the campaigns: 176 in 1974; 8,614 in 1976; and over 14,000 in 1980. This is, in part, attributable to undocumented communities becoming familiar with the idea of amnesty over time and the 'success' of applicants in previous campaigns fostering increased trust in the campaigns. The increased uptake in 1980 is also a function of the substantial broadening of eligibility, whereby, for example, persons with status who had arrived before

²⁰⁰ *Migration Amendment Act (No 2) 1980* (Cth) (n 176) s 11.

²⁰¹ Though for a critique of this framing, see Bosniak, 'Amnesty in Immigration' (n 14).

²⁰² See, eg, Doris Meissner, David North and Demetrios Papademetriou, 'Legalization of Undocumented Aliens: Lessons from Other Countries' (1987) 21(2) *International Migration Review* 424.

²⁰³ Levinson (n 18) 6.

²⁰⁴ North (n 10) 525. See also text accompanying n 84.

1 January 1980 were eligible to apply (the amnesty period began in mid-1980). By comparison, the key criterion of the 1974 amnesty was a minimum of three years' presence for eligibility.²⁰⁵

The promotion of amnesty campaigns among affected populations is also critical to their success and, similarly, requires time. Information, consultation and outreach regarding campaigns is required to build trust and support among migrant and undocumented communities.²⁰⁶ Historical and archival materials relating to Australia's past amnesties confirm that promotion of the 1974 and 1976 campaigns was limited and less effective, with media at the time reporting fear and suspicion of the Department among undocumented people. Indeed, there were concerns that the offer of amnesty was a 'trick' to detect unlawful migrants once they had come forward.²⁰⁷ While members of the Government attempted to discredit such claims, Australia's past experience underscores the need for a clear and thoughtful community engagement, outreach and promotion strategy, informed by affected groups and their representatives themselves. By contrast, during the 1980 amnesty the Department 'mounted a substantial and highly successful publicity campaign', which included targeting foreign language press and radio, and the translation of amnesty information into 48 languages.²⁰⁸ As well, the Department's field staff were encouraged to share applicants with 'interesting case histories' with departmental publicists and once the amnesty was underway, the media strategy concentrated on 'heart-warming human interest stories' rather than a 'discussion of immigration policy'.²⁰⁹ However, while Storer notes the considerable media budget to support the ROSP, a survey of a broad range of ethnic community organisations following the ROSP suggested that still not enough time and effort was spent on outreach to grassroots and ethnic organisations, that translations lacked accuracy and that there was not sufficient clarity regarding eligibility criteria including the effect of criminal records and 'times of eligibility'.²¹⁰

Alongside effective outreach, the political rhetoric and framing of both the idea of amnesty and undocumented people generally were significant factors in how the amnesties operated. The 1974 amnesty stipulated only those of 'good character' ought apply and each amnesty established exclusion criteria for 'criminal' non-citizens.²¹¹ In 1976 and 1980, however, Ministers MacKellar and Macphree made it clear that minor criminal offences and misdemeanours would not affect eligibility²¹² and each campaign emphasised that cases would be treated 'as sympathetically as possible' and eligibility criteria would be given a broad interpretation.²¹³ As well, alongside formal eligibility criteria, we note that each amnesty was unambiguously

²⁰⁵ See above n 83 and accompanying text. The cost of applying was also accessible; in 1980, an application cost approximately \$100 covering a \$50 application fee and required tests: Stephen Mills, 'Thousands of Migrants Ignore Amnesty Offer', *The Age* (Melbourne, 30 October 1980) (NAA: M651, 31).

²⁰⁶ Meissner, North and Papademetriou (n 202).

²⁰⁷ See above n 107–8 and accompanying text.

²⁰⁸ North (n 10) 530.

²⁰⁹ *Ibid* 530–1.

²¹⁰ Storer (n 77) 34.

²¹¹ See above nn 83–5 and accompanying text.

²¹² See above nn 99, 151 and accompanying text.

²¹³ See, eg, above nn 84, 92, 150 and accompanying text.

framed as a mechanism to end exploitation of non-citizens' labour and as motivated by concerns about existing inhumane conditions and the welfare of undocumented persons.²¹⁴ This language of 'humanity' can be contrasted with — and sat ambivalently alongside — the framing of amnesties as a precursor to stronger immigration enforcement, and a last chance to regularise before a shift to immigration control and deportation.²¹⁵ Such ambivalent framing can be seen in past campaigns, with notions of good character and the good migrant, versus 'criminal' non-citizens, persisting.²¹⁶ As well, a 'promise' of migration controls following the amnesty period featured strongly in the 1980 campaign, and as we note, has effectively limited the possibility for further regularisation programs. However, during each amnesty, the Government also emphasised that the campaigns aimed to 'allow people to live a full and complete life and have the rights and privileges involved'²¹⁷ — and, as a consequence, offered unqualified permanent status to (almost all) people who applied.

D *Amnesties as a Humane and Effective Legal Response*

A final key lesson from Australia's past amnesties is that amnesties ought to be seen as a more humane and less costly response to unauthorised migration in direct comparison to two alternate options: either accepting the status quo of a large undocumented population in Australia, or adopting a large-scale detection and deportation model. In particular, Minister MacKellar acknowledged in the lead up to the 1976 amnesty that the detection and deportation approach would be costly and require 'increased resources in manpower'.²¹⁸ Indeed, departmental data shows a sharp decline in deportations during both the 1976 and 1980 amnesty campaigns.²¹⁹

In contrast, it is clear that in the intervening four decades since the 1980 ROSP, Australia has come to embrace a detection and deportation model in relation to undocumented people.²²⁰ The *Migration Act* currently states that all 'unlawful non-citizens' must be detained in immigration detention and places an obligation on the Minister to remove an 'unlawful non-citizen' from Australia 'as soon as reasonably practicable'.²²¹ As a consequence, the Department allocates significant financial funds to visa compliance, immigration detention and deportations, including raids on workplaces and private residences in order to locate 'unlawful non-citizens' and detect unauthorised work. In 2019–20, for example, the Department reported 14,809 'location events' in relation to apprehending people deemed 'unlawful non-citizens' and 2,394 'location events' relating to 'illegal

²¹⁴ See, eg, above nn 82, 97, 140 and accompanying text.

²¹⁵ See, eg, above nn 101, 141–3 and accompanying text.

²¹⁶ Note too contemporaneous rhetoric about boat people and fear of 'invasion' and floods of arrivals from Indochina: see, eg, Klaus Neumann, *Across the Seas: Australia's Response to Refugees: A History* (Black Inc, 2015) ch 5.

²¹⁷ 'Amnesty Granted: Argentine Is Now Legal Migrant' (n 108).

²¹⁸ Memo to Cabinet from Minister for Immigration and Ethnic Affairs (n 92).

²¹⁹ North (n 10) 534.

²²⁰ Cf Australia's long history of forcible deportations: Glenn Nicholls, *Deported: A History of Forced Departures from Australia* (UNSW Press, 2007).

²²¹ *Migration Act* (n 32) s 198.

workers'.²²² In addition, in recent decades, the number of people forcibly deported from Australia has grown steadily, rising to around 10,000 persons per year from 2000 onwards.²²³ For example, in 2019–20, 10,505 people deemed 'unlawful non-citizens' were returned from the Australian community or removed from onshore detention.²²⁴ Such removals can entail an elaborate process, with the Department formalising a 13-week schedule for a person's removal.²²⁵ While the Act allows for the Commonwealth to recover the cost of removal (including the cost of immigration detention) from a deported person,²²⁶ in practice, the likelihood of such debt recovery is slim.

Writing in a US context, Koh argues for the need to 'downsize' the contemporary deportation state by 'scaling back the size and scope of the governmental infrastructure that has made mass detention and deportation possible'.²²⁷ Koh defines the 'deportation state' to consist of a 'federal administrative infrastructure for enforcing the immigration laws through deportation and detention'.²²⁸ Koh draws particular attention to the massive expansion of funding, staff and bureaucratic infrastructure that has not necessarily resulted in increased immigration compliance, but instead stigmatises people and subjects them to dehumanising treatment. Koh thus shows that the 'deportation bureaucracy has evolved into a regime that wields disproportionate levels of power over its subjects, and its operative realities raise extensive fairness concerns'.²²⁹

Although Koh traces the particular historical developments and current immigration enforcement practices in the US, her critique of the deportation state is salient in an Australian context too, particularly when she writes that:

this growth in the deportation state has yielded questionable results. The dominant tools used by immigration enforcement — quasi-criminal measures like physical incarceration, with attendant costs leading to family separation, displacement, and distrust in government — have led to harms exacted upon immigrant communities, especially communities of color.²³⁰

Similarly, Turnbull notes in a UK context that immigration detention 'primarily targets poor, racialized men and women and is reflective of systemic inequalities along interconnected lines of race, gender, sexuality, class, ability, and religion'.²³¹ Likewise, the Australian apparatus of immigration enforcement and

²²² Department of Home Affairs (Cth), *2019–20 Annual Report* (2020) 239.

²²³ Glenn Nicholls, 'Gone with Hardly a Trace: Deportees in Immigration Policy' in Klaus Neumann and Gwenda Tavan (eds), *Does History Matter? Making and Debating Citizenship, Immigration and Refugee Policy in Australia and New Zealand* (ANU Press, 2009) 9, 16.

²²⁴ Department of Home Affairs (Cth), *2019–20 Annual Report* (n 222) 93.

²²⁵ Department of Home Affairs (Cth), *Removal from Australia — Notifying Stakeholders of the Removal* (Procedural Instruction, 13 September 2018).

²²⁶ *Migration Act* (n 32) ss 210, 215, 262.

²²⁷ Jennifer Lee Koh, 'Downsizing the Deportation State' (2021) 16(1) *Harvard Law and Policy Review* 85, 88.

²²⁸ *Ibid* 85.

²²⁹ *Ibid* 98.

²³⁰ *Ibid* 89.

²³¹ Sarah Turnbull, 'Racial Innocence, Liberal Reformism, and Immigration Detention: Towards a Politics of Abolition' in Kelly Struthers Montford and Chloë Taylor (eds), *Building Abolition: Decarceration and Social Justice* (Routledge, 2021) 29 (Abstract).

deportation disproportionately affects migrant communities of colour undertaking so-called ‘unskilled work’. Critiquing the present detection and deportation model — both in terms of economic cost and impact on non-citizens — and holding onto other models for understanding legal belonging beyond formal citizenship, thus, provides further grounds for embracing regularisation campaigns. Amnesty politics, at its most radical, has the capacity to illuminate or underscore ethical arguments for racial justice and migrant justice, including through the abolition of immigration detention, the ‘deportation state’ or even (the policing of) state borders more generally.

V Conclusion

The COVID-19 pandemic has clearly shown the need for a new immigration amnesty in Australia. The pandemic’s constraints on international travel exacerbated existing and chronic labour shortages and frustrated the capacity of non-citizens to leave or travel within Australia. This includes the over 64,000 undocumented people who have lived in the Australian community for extended periods. To date, successive Australian governments’ responses to the specific effects of COVID-19 on temporary visa-holders have been limited, and primarily addressed to those who have some form of regular status that is due to expire. The initial response has included the introduction of a temporary ‘COVID-19 pandemic event’ visa.²³² The visa was available to non-citizens who are unable to depart Australia due to COVID-19 *or* who are currently working in an identified ‘critical sector’, and is valid for 90 days or 12 months respectively. While a necessary and immediate response, the COVID visa was a stop-gap measure. It temporarily ameliorated the situation facing non-citizens *with* lawful status and did not address the predicament facing undocumented people, which includes the ongoing barriers they face in accessing healthcare and vaccination programs.

In this article, we have looked to Australia’s past immigration amnesties as a valuable and underexplored legal resource for contemporary regularisation campaigns and reforms. As we have noted, the absence of any discussion of Australia’s past amnesties in contemporary calls for regularisation is surprising. Acknowledging that such contemporary calls take place in their own political context, we have nonetheless suggested that attention to Australia’s past amnesties can constructively inform present efforts and arguments in favour of a new amnesty. In drawing on historical materials, including a number of newly-released archival government documents, we have given a clear account of Australia’s past legal amnesties in 1974, 1976 and 1980, as well as traced the key jurisprudence and legal legacies that followed on from these campaigns. Legal challenges brought by people excluded from amnesty highlight the scope and nature of the amnesties’ operation, the limits of executive power in relation to each campaign and the inevitable intersection between law and politics in the awarding (and withholding) of amnesty at the time. In both the *Salemi* and *Haj-Ismail* cases, untested national security

²³² Temporary Activity visa (Subclass 408) (COVID-19 Pandemic event). Note Howe’s proposal for the use of this visa as a means of regularisation for horticultural workers: above n 52 and Howe, ‘Out of Limbo and into the Light’ (n 6).

concerns and the use of wide statutory deportation powers trumped each applicant's access to amnesty. Ultimately, we suggest that in order for a contemporary amnesty to be successfully implemented, it must be informed by a social conception of citizenship, grapple with the nature of executive discretion, and adopt an inclusive criteria and consultative process for engaging migrant communities. It must also be presented as a humane and effective legal response to the harmful practices associated with the prevailing detection and deportation model for addressing the presence of undocumented people in Australia today.

The Complexity of Corporate Law

Stephen Bottomley*

Abstract

Many claims have been made about the complexity of Australian corporate law, prompting a succession of inquiries and legislative reforms. Despite this attention, there has been little examination of the idea of complexity itself. It is assumed that we know what it is and what causes it. Looking behind those assumptions, this article draws on the work of complexity theorists to analyse why our system of corporate law is complex and to argue for realistic expectations in efforts to address the ‘complexity problem’.

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* Emeritus Professor, ANU College of Law, Australian National University, Canberra, Australian Capital Territory, Australia.
Email: stephen.bottomley@anu.edu.au; ORCID iD: <https://orcid.org/0000-0003-2727-7168>.
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Ideas thus made up of several simple ones put together, I call complex; such as are beauty, gratitude, a man, an army, the universe ...¹

I hold it equally impossible to know the parts without knowing the whole, and to know the whole without knowing the parts in detail.²

I Introduction³

The Australian system of corporate and financial services law is complex. To most observers this is an unremarkable observation, in two senses. First, no one disagrees with it; academics, judges, corporate regulators, law reformers and legal practitioners have made the same point, in different ways, for many years.⁴ Second, having made the point, few people then remark on it; the observation is repeated rather than analysed. It serves as a brief introduction to more detailed arguments about the need for law reform, legislative simplification, increased regulatory enforcement or resourcing, and more (or less) freedom from regulatory control for specified categories of actors in the corporate world. Our attention is thus drawn to the proposals and inquiries that are said to follow from the apparently self-evident claim about corporate law's complexity.

There is no shortage of reform activity here. The 'complexity problem' (my term) has prompted or featured in several inquiries into the operation of corporate and financial services law in Australia since the early-1990s. The most recent of these (at the time of writing this article) is the Australian Law Reform Commission ('ALRC') review of the legislative framework for corporate and financial services

¹ John Locke, *An Essay Concerning Human Understanding* (Kay & Troutman, 1847) bk 2, 110. Noting the gendered language of Locke's time, I have borrowed the use of this quote from Melanie Mitchell, *Complexity: A Guided Tour* (Oxford University Press, 2009) 3.

² Blaise Pascal, *Thoughts*, tr WF Trotter [trans of: *Pensées* (1670)] in CW Eliot (ed) *The Harvard Classics* (PF Collier and Son Company, 1910) vol 48, 31. I have borrowed the use of this quote from Sean Snyder, 'The Simple, the Complicated, and the Complex: Educational Reform through the Lens of Complexity Theory' (Education Working Papers No 96, Organisation for Economic Co-operation and Development, 2013) 11.

³ The underlying argument in this Introduction is adapted from JB Ruhl, 'Law's Complexity: A Primer' (2008) 24(4) *Georgia State University Law Review* 885.

⁴ See, eg, Sir Anthony Mason, 'Corporate Law: The Challenge of Complexity' (1992) 2(1) *Australian Journal of Corporate Law* 1, 1 (referring to the 'Byzantine complexity' of the corporations legislation); Ian Ramsay, 'Corporate Law in the Age of Statutes' (1992) 14(4) *Sydney Law Review* 474, 476 (describing '[t]he Australian tradition' of 'complex and detailed' corporate law statutes); Cally Jordan, 'Unlovely and Unloved: Corporate Law Reform's Progeny' (2009) 33(2) *Melbourne University Law Review* 626, 627 (describing the *Corporations Act* 2002 (Cth) ('*Corporations Act*') as '[c]omplex, ungainly, badly drafted, internally inconsistent and conceptually troubled'); Justice Steven Rares, 'Competition, Fairness and the Courts' (FCA) [2014] *Federal Judicial Scholarship* 10, [61] (referring to the 'discordant patchwork' in the *Corporations Act*); *Oreb v Australian Securities and Investments Commission* [No 2] (2017) 247 FCR 323, 337 [54] (Rares, Davies and Gleeson JJ noting the 'over complex verbiage' of the *Corporations Act*); Australian Law Reform Commission ('ALRC'), *Legislative Framework for Corporations and Financial Services Regulation: Initial Stakeholder Views* (Background Paper FSL1, June 2021) 1 [5] (noting that '[t]here has been a level of consensus amongst stakeholders that the law is "too complex" and in need of simplification').

regulation that commenced in September 2020.⁵ The terms of reference for that review emphasise the need to ‘simplify financial services laws’,⁶ and direct the Commission’s attention to several earlier reports and inquiries in which the complexity of different aspects of the corporate and financial services system has been a concern. These include the Final Report of the Royal Commission into Misconduct in the Banking Superannuation and Financial Services Industry in 2019;⁷ the 2017 Treasury review of the enforcement regime of the Australian Securities and Investments Commission (‘ASIC’);⁸ and the 2014 inquiry into the financial system in Australia.⁹ Predating these inquiries, though not referred to in the ALRC’s terms of reference, was the work of the 1993 Corporations Law Simplification Taskforce.¹⁰

When significant and official consequences follow on from the claim about complexity, such as calls for greater resourcing of enforcement or formal inquiries into legislative reform, then it is appropriate to reconsider the claim so that we can be sure that there is a clear understanding about its meaning and implications. Sometimes, apparently non-controversial propositions require closer scrutiny. In the United States, Ruhl makes the same point, referring to the legal system at large:

[W]hen one claims that Proposition X [such as the need for legislative reform] follows from the fact that the legal system is complex ... one necessarily must develop or adopt a theory of what complexity is, otherwise how can we conclude that it is *complexity* that leads to the truth of the proposition?¹¹

In law, as in other disciplines, the way in which a problem is defined will determine or, at least, shape the solutions that are applied to it. Assuming for the moment that complexity is always a problem (more on this later), a definition that focuses on legal

⁵ ALRC, *Review of the Legislative Framework for Corporations and Financial Services Regulation* (Web Page) <<https://www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/>>. See also ALRC, *Interim Report A: Financial Services Legislation* (Report No 137, November 2021) (‘*Interim Report A*’).

⁶ ALRC, *Review of the Legislative Framework for Corporations and Financial Services Regulation: Terms of Reference* (Web Page) <<https://www.alrc.gov.au/inquiry/review-of-the-legislative-framework-for-corporations-and-financial-services-regulation/terms-of-reference/>>.

⁷ *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 494–6 (‘*Banking Royal Commission Final Report*’) (noting the need to simplify financial services laws).

⁸ The Treasury (Cth), *ASIC Enforcement Review* (Taskforce Report, December 2017) 95 (noting the complexity of the penalties framework in the *Corporations Act* (n 4)).

⁹ The Treasury (Cth), *Financial System Inquiry* (Final Report, November 2014) noting the complexity of the financial system.

¹⁰ In 1993, the Commonwealth Attorney-General established the Corporations Law Simplification Program, one aim of which was to rewrite the corporations legislation to make it ‘easier to understand’ Parliamentary Joint Committee on Corporations and Financial Services, *Report on the Draft Second Corporate Law Simplification Bill 1996* (Report, November 1996) 1.1 <https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/1996-99/2nd_simp/report/c01#introduction>. This resulted in the *First Corporate Law Simplification Act 1995* (Cth). The Program ceased operation before the Second Corporate Law Simplification Bill 1996 could be passed, when responsibility for corporate law reform was moved from the Attorney-General’s Department (under a different Attorney-General) to the Commonwealth Treasury, which then initiated the Corporate Law Economic Reform Program in 1997, adopting some of the reform proposals that had been developed, but not initiated, by the Simplification Program.

¹¹ Ruhl (n 3) 886 (emphasis in original).

technicalities or procedural inefficiencies will likely lead to equally technical or procedural solutions that may not work as hoped or intended. Legal problems are not, however, always solely the product of technical or procedural issues. Factors outside the parameters of standard legal analysis can also be influential. By adding a non-legal perspective to the analysis of corporate law's complexity we may produce better solutions or, as this article will argue, better expectations of the legal solutions that are applied.

Pause a moment to reconsider the opening statement to this article: our system of corporate and financial services law is complex. Notice that it contains two claims and sets of assumptions. There is the claim that corporate and financial services law constitutes a 'system', and it is assumed that we know and agree on what that system is — what holds it together, what its component parts and boundaries are, how it operates and so forth. Next, there is the claim about the system's complexity, with the assumption that those involved in the system (or those who simply observe it) also generally understand what this means. We know what complexity is, what causes it and what problems it causes, and we agree that it should be addressed (although there may be debate on how that should be done). The purpose of this article is to explore the idea of systemic complexity that underlies these claims and assumptions.¹² The article has three aims: first, to demonstrate why corporate law is complex; second, to explain that this complexity is an integral feature of the corporate law system; and third, to argue that, consequently, efforts to remove complexity are misconceived and that simplification programs should necessarily have restricted expectations.

Three points of clarification are necessary before proceeding. First, for brevity's sake, and because claims about complexity predate concerns about financial services regulation, I will refer generally to 'corporate law', by which I mean the law covered by the *Corporations Act 2001* (Cth) ('*Corporations Act*').¹³ This includes financial services law as well as the law relating to takeovers, managed investments, corporate insolvency, and the general law governing the incorporation, capacity and governance of corporations. Second, nothing in this article denies that our corporate law system *is* complex; to the contrary, the article argues that complexity is an integral feature of this system. Nor does the article deny that this complexity creates costs and problems that need attention. The argument, instead, is that it is important — and useful — to be clear about what complexity means in this context and what might and can be done about it. Third, this is a conceptual, not a technical inquiry. The article does not, for example, delve into the definition of 'financial product' in ch 7 div 3 of the *Corporations Act*. That definition, currently spanning 10 sections with specific inclusions and exclusions, is undoubtedly complicated; the question here is whether something further is involved by describing it as complex and, if so, what that 'something' is.

¹² The complexity of corporate law rules is discussed in Stephen Bottomley, 'Corporate Law, Complexity and Cartography' (2020) 35(2) *Australian Journal of Corporate Law* 142. This present article takes a broader perspective, looking at the complexity of the context within which those rules operate.

¹³ While this article takes as its point of reference the law governing corporations and financial services in Australia, the arguments are likely applicable in comparable common law jurisdictions.

The remainder of this article proceeds as follows. In Part II, I examine the idea of complexity, looking at a body of scholarship that falls under the broad label ‘complexity theory’. This also involves exploring what it is for something to be a ‘system’; as will be seen, complexity theory and systems theory are closely connected. In Part III, I bring these broader ideas to bear on the complexity of the corporate law system. I argue that corporate law’s complexity is comprised of three dimensions: (1) corporate and financial practices; (2) the rules and standards that apply to those practices; (3) the regulatory processes by which those rules and standards are implemented and enforced. Corporate law’s complexity lies in the way in which these three dimensions interact. In Part IV, I describe some of the implications that follow from the application of this analysis for corporate law reform. In the Part V conclusion, I argue that we should be realistic in our expectations for ‘reducing’ complexity, noting that a similar message has been often repeated by scholars in the socio-legal and critical legal studies traditions.

II The Idea of Complexity

The claim that our corporate law system is complex usually has a normative purpose, pointing to concerns about systemic inefficiency, regulatory ineffectiveness, legal incomprehensibility, and/or procedural inconsistency. Several implications or consequences are said to follow. First, the legislative system should, and can, be simplified and clarified. Framed against a dichotomy between complexity/obfuscation and simplicity/clarity, the argument is that we should aim for the latter because this accords with the rule of law principle that those who are subject to laws should be able to understand those laws.¹⁴ This, in turn, will increase the prospect for regulatory compliance. Conversely, ‘the greater the complexity of legislation and the rules that it embodies, the less clear it is likely to become and the greater the challenges for achieving compliance’.¹⁵ Complexity also creates and reinforces a reliance on professional expertise to navigate the system, thereby adding to the cost of regulatory compliance.¹⁶ This ties in with Coffee’s critique of the role that lawyers, auditors and other securities-related experts play as ‘gatekeepers’ to the daily operation of the corporate law system.¹⁷

None of these arguments can be dismissed. They raise important points, but they often rely on unexplored and possibly reductive assumptions about what complexity is, what causes it (for example, overly detailed rules)¹⁸ and its adverse consequences. On the latter point, it is not axiomatic that complexity always has

¹⁴ See, eg, Justice Nye Perram, ‘The Perils of Complexity: Why More Law is Bad Law’ (2010) 39(4) *Australian Tax Review* 179, 186.

¹⁵ Andrew Godwin, Vivienne Brand and Rosemary Teele Langford, ‘Legislative Design: Clarifying the Legislative Porridge’ (2021) 38(5) *Company and Securities Law Journal* 280, 281.

¹⁶ See generally Hadfield noting that ‘[a]s the complexity of law and procedure increases, the total cost of resolving a matter goes up’: Gillian K Hadfield, ‘The Price of Law: How the Market for Lawyers Distorts the Justice System’ (2000) 98(4) *Michigan Law Review* 953, 965. See also Hui Xian Chia and Ian Ramsay, ‘Section 1322 as a Response to the Complexity of the *Corporations Act 2001* (Cth)’ (2015) 33(6) *Company and Securities Law Journal* 389, 393.

¹⁷ John C Coffee Jr, *Gatekeepers: The Professions and Corporate Governance* (Oxford University Press, 2006).

¹⁸ Godwin, Brand and Teele Langford (n 15) 282.

adverse outcomes. In some situations, complexity can be beneficial. For example, complex systems may be the product of policies intended to encourage broad inclusivity of interests and diversity of viewpoints.¹⁹ Equally, simplicity may reduce the capacity of a system to respond to legitimate and unique questions raised by individual cases; as Harris notes, '[t]here may be a trade-off between fairness and simplicity'.²⁰ Implicit in all this is the point that complexity and simplicity are not intrinsically good or bad. Neither are they mutually exclusive; a system can be complex in part and simple in other aspects. As one analysis puts it, 'there is an inseparable relationship between simplicity and complexity' such that both can be found in different parts and in different stages of a system's operations.²¹ Nevertheless, the usual response is that complexity should be removed or, at least, reduced. The implication is that complexity is an ancillary and remediable feature of the corporate law system. The history of repeated efforts to reduce that complexity suggests that this may not be a useful perspective.²² There is a persistence to complexity in the corporate law system that needs explanation.

This article treats the claim about corporate law's complexity as descriptive rather than normative. The starting proposition is that complexity, to one degree or another,²³ is an integral property of the corporate law system. I begin by describing the idea of complexity in general terms, relying on a diverse body of writing that falls under the general label of 'complexity theory'. At the outset, it should be emphasised that complexity theory is not a single body of ideas; nor is it a theory in the sense of providing a predictive model against which hypotheses can be tested. It does not lead to definitive or predictable solutions such that we can say 'to achieve outcome X, do Y'. Instead, the work of complexity theorists aims to provide 'a framework for understanding' the social world.²⁴ The first step in explaining that framework is to consider the other claim that was identified in the introduction to the article: that corporate law constitutes a 'system'.

A What is a System?

In complexity theory, discussion about complexity is intertwined with understandings of what constitutes a system. As Byrne and Callaghan summarise it,

¹⁹ Mark Chinen, 'Governing Complexity' in Jamie Murray, Thomas Webb and Steven Wheatley (eds), *Complexity Theory and Law: Mapping an Emergent Jurisprudence* (Routledge, 2019) 151, 156. See also Chia and Ramsay noting that '[c]omplex legislation may be necessary in order to achieve fair outcomes in a highly complex modern economy': Chia and Ramsay (n 16) 393.

²⁰ Neville Harris, 'Complexity: Knowing it, Measuring it, Assessing it' in Jamie Murray, Thomas Webb and Steven Wheatley (eds), *Complexity Theory and Law: Mapping an Emergent Jurisprudence* (Routledge, 2019) 47, 58. See also Peter H Schuck, 'Legal Complexity: Some Causes, Consequences, and Cures' (1992) 42(1) *Duke Law Journal* 1, 8.

²¹ M Pina e Cunha and A Rego, 'Complexity, Simplicity, Simplexity' (2010) 28(2) *European Management Journal* 85, 93.

²² See above n 10 for a summary of that history.

²³ As noted by Smith, 'complexity falls along a spectrum': Henry Smith, 'Property Beyond Flatland' (Harvard Public Law Working Paper No 21–36, December 2021) 3.

²⁴ David Byrne and Gill Callaghan, *Complexity Theory and the Social Sciences: The State of the Art* (Routledge, 2014) 8.

‘when we talk about complexity we are talking about systems’.²⁵ Like other complex systems, the corporate law system is both typical and unique. It is typical because it is one of many systems that comprise the modern social world.²⁶ Think, for example, of systems in other branches of law such as family law or international law or, moving outside the law, the education system, the health system, the financial system and so on. At the same time, the corporate law system is unique because, like other systems, it has its own structures, elements and dynamics, and therefore its own type of complexity. I come back to the particular qualities of the corporate law system in Part III. Before that, I consider more generally what are the ‘typical’ features of a system.

There are many ways of approaching this inquiry. Indeed, one writer warns that ‘[t]here is a risk when discussing complexity theory to tie oneself in knots over definitions of what is meant by “the system” and thus never get to the substance of applying the theory’.²⁷ This risk is exacerbated by the wide range of available theories about social systems, some with lengthy pedigrees.²⁸ In the interests of getting to the substance of corporate law’s complexity, I rely on the useful distillation of systems thinking presented by Anabtawi and Schwarcz.²⁹ While their focus is on the financial system, they explain that any system, whether it is biological, physical or social, has three essential attributes.³⁰ First, it must be composed of elements. For example, the elements of the financial system include the various firms (investment banks, insurance companies, index funds, and so on) that trade in financial products, as well as the legal rules that regulate that activity, among other things. Second, these elements must be interconnected and, as another complexity theorist notes, ‘[m]any of the interconnections in systems operate through the flow of information’.³¹ Third, a system must have a function (or purpose) that is distinct from its elements. Although Anabtawi and Schwarcz (in common with other writers) refer to function or purpose in the singular, one of the points I will make later about the corporate law system is that it has multiple functions (or, more precisely, there are several functions that are attributed to it).

²⁵ Ibid 3. The reverse proposition is not necessarily true, however. Not all systems are complex; some are ‘simple’, others are random or chaotic: see R Keith Sawyer, *Social Emergence: Societies as Complex Systems* (Cambridge University Press, 2005) 3.

²⁶ Byrne and Callaghan (n 24) 8.

²⁷ Thomas E Webb, ‘Asylum and Complexity: The Vulnerable Identity of Law as Complex System’ in Jamie Murray, Thomas Webb and Steven Wheatley (eds), *Complexity Theory and Law: Mapping an Emergent Jurisprudence* (Routledge, 2019) 66, 68.

²⁸ Three well-known examples are: Emile Durkheim, *The Rules of Sociological Method* (Free Press, 8th ed, 1966); Talcott Parsons, *The Social System* (Free Press, 1951); Niklas Luhmann, *Social Systems* (Stanford University Press, 1995).

²⁹ Iman Anabtawi and Steven L Schwarcz, ‘Regulating Ex Post: How Law Can Address the Inevitability of Financial Failure’ (2013) 92(1) *Texas Law Review* 75. As an aside, there are alignments between the complexity theorist’s understanding of a system and the regulatory theorist’s understanding of ‘regulatory space’: Michael Leach, ‘Complex Regulatory Space and Banking’ in Jamie Murray, Thomas Webb and Steven Wheatley (eds), *Complexity Theory and Law: Mapping an Emergent Jurisprudence* (Routledge, 2019) 170, 172–3.

³⁰ Anabtawi and Schwarcz (n 29) 78.

³¹ Donella H Meadows, *Thinking in Systems: A Primer* (Earthscan, 2009) 188.

Importantly, the implication from the second and third of these attributes is that a system cannot properly be understood by focusing exclusively on one or other of its elements. This is because:

[i]n a system, the state of each element is conditional on the states of the others. Restricting our level of analysis to the elements would ignore each element's effects on the other elements. More broadly, we would miss the connections between each element and the system of which they were a part.³²

We cannot, for example, hope to understand the operation of the corporate law system simply by reading the text of the *Corporations Act*. At the same time, while the individual elements cannot tell us about the system as a whole, it is the case that some elements in a system can be more important or integral than others. An element is integral to a system 'if removal of that element would alter the system's behavior in some salient way'.³³ Typically, in a system that involves the use and application of laws, the law will be an integral element in the sense just described.

The final observation here is that a system can itself be an element in another larger system. Thus we can think of the corporate law system as an element within a larger financial, economic or social system.

This brief description of systems thinking has already encroached onto the terrain of complexity; as noted, the two ideas are closely related. Nevertheless, it is useful to examine the idea of complexity separately.

B *What is Complexity?*

As noted in the Introduction to this article, although corporate lawyers have commented on corporate law's complexity for some time, there has been little analysis of what that idea means. This may be because the origins of that analysis lie outside the law in the natural sciences, especially biology and physics. Nevertheless, other non-science disciplines have caught on. In his overview, Erdi notes that nearly every discipline of inquiry has turned its attention to complexity such that we find references to 'computational complexity, ecological complexity, economic complexity, organizational complexity, political complexity, social complexity' and so on.³⁴ This is a reminder that complexity is found everywhere and it suggests that there may be insights from other inquiries into the phenomenon that can usefully be applied in a legal context.

Within the parameters of this article, it is neither possible nor useful to delve into the many dimensions of complexity theory, nor the diverse ways in which complexity has been defined. As is often the case with emerging areas of knowledge, there are disagreements about key concepts; as one commentator has observed, '[t]here is then, unsurprisingly, no agreement on how to conceptualize, define or

³² Anabtawi and Schwarcz (n 29) 79 (citations omitted).

³³ Ibid 81.

³⁴ Peter Erdi, *Complexity Explained* (Springer, 2008) 4.

measure complexity.³⁵ In what follows, I describe just some aspects of complexity theory. This selective approach is justified on the grounds that my aim is to identify those aspects of the complexity literature that can assist in understanding the challenges of complexity in the corporate law system.

Complex systems exhibit five interrelated and overlapping features (among others):³⁶

(1) Non-linearity: Complex systems are comprised of non-linear relationships. It is easier to understand non-linearity by looking at the opposite idea. In linear relationships, the elements connect with each other in a direct and causal link, so that a change in one element will produce predictable changes in other elements located further along the causal chain. This is reflected in the formal hierarchical understanding of law, which assumes that changes to legal rules will have intended and observable effects on the behaviour of those affected by those rules (I return to this idea in the corporate law context later in this article). By contrast, in non-linear relationships a change in one part of the system may have unpredictable or disproportionate effects on other elements.³⁷

(2) Emergence: The nature and properties of a complex system are generated, or ‘emerge’, as a result of the non-linear interactions between the elements of the system.³⁸ The idea of emergence has two important features, the first of which takes us back to the previous description of what constitutes a system. At the macro level, a system has properties or capacities that differ from those of its constituent elements (that is, the whole is not simply the sum of its parts). There are various ways of describing this difference.³⁹ In some accounts, a system’s emergent properties are said to be irreducible to the properties of its elements. Alternatively, the system’s properties are described as novel, in that they are not held by any of the elements. The second feature is that ‘complex structures are not designed as such’.⁴⁰ That is, systems are not built from the outside in or from the top down. A system emerges, continuously, from the many changing interactions between its different elements.

³⁵ Steve Maguire, ‘Constructing and Appreciating Complexity’ in Peter Allen, Steve Maguire and Bill McKelvey (eds), *The Sage Handbook of Complexity and Management* (Sage, 2011) 79, 83. See also Jamie Murray, Thomas Webb and Steven Wheatley, ‘Encountering Law’s Complexity’ in Jamie Murray, Thomas Webb and Steven Wheatley (eds), *Complexity Theory and Law: Mapping an Emergent Jurisprudence* (Routledge, 2019) 3, 4 (arguing there is ‘no agreed-on final definition’ of complexity).

³⁶ This is not an exhaustive list. Most analyses have a longer list of complexity attributes, but all include the features listed here.

³⁷ Chaos theory, with its well-known reference to the relationship between the flap of a butterfly’s wings and subsequent weather events on the other side of the globe, is an extreme illustration of a non-linear relationship.

³⁸ Murray, Webb and Wheatley, ‘Encountering Law’s Complexity’ (n 35) 3; Byrne and Callaghan (n 24) 22. Again, this is a bare description. Emergence has generated a field of study replete with its own categories, distinctions (eg between strong and weak emergence) and debates: see, eg, Peter Allen, Steve Maguire and Bill McKelvey (eds), *The Sage Handbook of Complexity and Management* (Sage, 2011).

³⁹ Sawyer (n 25) 4.

⁴⁰ Julian Webb, ‘Law, Ethics and Complexity: Complexity Theory and the Normative Reconstruction of Law’ (2004) 52(1) *Cleveland State Law Review* 227, 232.

(3) Unpredictability: According to Harris, ‘what characterises a system as complex is the propensity for unpredictable outcomes to arise from the operation of its internal dynamics’.⁴¹ This is not to say that complex systems are inherently unpredictable so that one can never foresee outcomes. Instead, ‘[c]omplex orders are frequently held to have a degree of stability, but to be periodically subject to unpredictable developments in which self-organizing processes will reformulate the system and its structure’.⁴² Put another way, there can be degrees of unpredictability in a system.⁴³ One constraint on the range of outcomes produced by a system is found in the concept of ‘path dependence’, describing the way in which past actions and practices in a system can shape future decisions and outcomes.⁴⁴ This still leaves open the possibility of there being more than one possible future development: ‘the precise behaviour of a complex system may be very difficult to predict, even while keeping the system within certain bounds’.⁴⁵ At the same time, path dependence can also explain why, in the absence of some reason to change, a system will sometimes persist with less-than-desirable options.⁴⁶

(4) Boundaries: A complex system has boundaries that distinguish it from the rest of the world and from other systems with which it interacts. Two points need emphasis. First, a system’s boundaries are not fixed and objectively determined; they are defined, instead, by the continuous interactions between the elements of the system.⁴⁷ Second, in complexity theory a boundary does not work simply to separate a system from its surrounds. Instead, the boundary connects the system with its environment. As Zeleny puts it, boundaries ‘are not “perimeters” but functional constitutive components of a given system’.⁴⁸ A complex system is therefore said to be ‘organisationally open’ in the sense that it interacts with and responds to its environment, and ‘operationally closed’ in the sense that it maintains its own internal processes and organisation.⁴⁹ As a consequence, the impetus for change in a complex system can be internal or external.

(5) Self-organisation: There is no ‘controlling power or central control’ that determines the operation of a complex system; rather, the system is organised through ‘the actions and interactions of micro-level component elements’.⁵⁰ This does not mean that the system is able to operate without constraint. There are, for

⁴¹ Harris (n 20) 51.

⁴² Stephen Kemp, ‘Unpredictability and Nonlinearity in Complexity Theory: A Critical Appraisal’ (2009) 11(1) *Emergence: Complexity and Organisation* 84, 89.

⁴³ *Ibid* 90.

⁴⁴ See, eg, Oona A Hathaway, ‘Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System’ (2001) 86(2) *Iowa Law Review* 601.

⁴⁵ Eve Mitleton-Kelly, ‘Ten Principles of Complexity and Enabling Infrastructures’ in Eve Mitleton-Kelly (ed), *Complex Systems and Evolutionary Perspectives on Organisations: The Application of Complexity Theory to Organizations* (Pergamon Press, 2003) 23, 39.

⁴⁶ John Bell, ‘Path Dependence and Legal Development’ (2013) 87(4) *Tulane Law Review* 787, 790–1.

⁴⁷ See, eg, Webb (n 27) 69–70.

⁴⁸ M Zeleny, ‘On the Social Nature of Autopoietic Systems’ in Kenneth Boulding and Elias Khalil (eds), *Evolution, Order and Complexity* (Routledge, 1996) 122, 133, quoted in Byrne and Callaghan (n 24) 32.

⁴⁹ Minka Woermann, ‘Complexity and the Normativity of Law’ in Jamie Murray, Thomas Webb and Steven Wheatley (eds), *Complexity Theory and Law: Mapping an Emergent Jurisprudence* (Routledge, 2019) 234, 236.

⁵⁰ Murray, Webb and Wheatley, ‘Encountering Law’s Complexity’ (n 35) 8.

example, boundary and path dependence limitations (as noted above). The idea of ‘self-organisation’ has implications for legal systems, which often emphasise the central authority of a public regulatory agency, such as ASIC. The insight here is that while such agencies can exert control, this is simply one input into the overall functioning and definition of the system. A controlling agent, like ASIC, does not sit above or outside the system, and ‘cannot be separated from the system’.⁵¹

To repeat, these five features are characteristics of all complex systems. The next task is to take these features, together with the attributes of a system described earlier, and explain how corporate law can accurately be described as a complex system.

III How Corporate Law is Complex

What do we mean when we say that the corporate law system is complex? Sometimes we may be referring to the law itself: the wide scope of the *Corporations Act*, the dense and technical drafting of particular sections in that Act, or the arcane reasoning of a particular judicial decision. At other times we may be describing the way in which the law is, or is not, implemented and enforced. Complexity, then, can apply to the substance and form of the law as much as to processes by which it is developed and put into practice. Looking at this ‘substance and process’ perspective more closely, we can see that the complexity of the corporate law system has three interconnected dimensions. Each dimension simultaneously contributes to corporate law’s overall complexity while also demonstrating features of complexity in its own right. In this Part of the article, I describe these three dimensions separately and then draw them together to explain how corporate law operates as a system.

A *Dimension 1: Complexity in Corporate Structures, Markets and Practices*

The first dimension is the institutions, investment products, transactions, markets and practices to which corporate law applies. The complexity here is easily observed in the financial services industry. Schwarcz, writing in the immediate aftermath of the 2008–09 global financial crisis (‘GFC’), usefully analyses this under three headings.⁵² There is the complexity of the assets underlying modern investment products. For example, mortgage loans are packaged in a variety of ways, each presenting its own types and level of risk, and requiring different modelling and analysis. Next, there is the complexity of the financial products that are built on those assets, exemplified by the esoteric range of mortgage-backed securities that gained notoriety in the GFC. In some cases, the complexity of these products has tested the capacity of professional advisors tasked with providing clients clear advice about

⁵¹ Geert R Teisman, Lasse Gerrits and Arwin van Buuren, ‘An Introduction to Understanding and Managing Complex Process Systems’ in Geert Teisman, Arwin van Buuren, and Lasse Gerrits (eds), *Managing Complex Governance Systems: Dynamics, Self-Organization and Coevolution in Public Investments* (Routledge, 2009) 1, 9.

⁵² Steven Schwarcz, ‘Regulating Complexity in Financial Markets’ (2009) 87(2) *Washington University Law Review* 211.

their investment ramifications.⁵³ While the investment products that were so deeply implicated in the GFC may no longer be in favour, other investment complexities have emerged, including the use of blockchain and smart contracts to create and trade ‘smart securities and derivatives’.⁵⁴ Last, there is the complexity of the financial markets in which these products are traded. Schwarcz notes that these markets are typically characterised by the use of intermediaries and indirect forms of investment.⁵⁵ This gives rise to myriad interactions between analysts, advisers, brokers, dealers, lawyers, insurers, underwriters, clients, investors of different types, proxy advisory services, regulators, corporations, securities exchanges, and (increasingly) self-learning automated trading systems.⁵⁶ And, again, blockchain offers the possibility of augmenting (and perhaps even displacing) the role of traditional exchange-based clearance and settlement processes.⁵⁷ Financial market complexity also includes the diversity of ways in which information is formulated, transmitted and received by these participants.⁵⁸ The Australian financial system has therefore been described as ‘a complex adaptive network’.⁵⁹

While complexity is readily apparent in the financial sector, the same is also true of ‘everyday’ corporate structures and practices. Consider the diversity of corporate types and structures to which the *Corporations Act* applies: public and proprietary; holding and subsidiary; listed and unlisted; profit and not for profit; trading, nominee and shell companies; business operations that are local, national, or international. Large corporate structures demonstrate complexity internally and through the creation of corporate groups and conglomerates. Indeed, the archetypal hierarchical corporate structure with designated lines of control and clear divisions of operational responsibility has given way to corporate models based on networks, both within and between individual corporations.⁶⁰ As Anidjar argues, this structural complexity requires the law to follow ‘a firm-specific perspective’.⁶¹ The practices and actions of corporate actors within these structures adds to this picture. One illustration of this is found in the extent to which courts must go to unravel complex business transactions when deciding cases about breach of directors’ duties. A stark example is found in Austin J’s judgment of nearly 200 pages in *ASIC v Rich*.⁶²

⁵³ See, eg, the description of ‘synthetic collateralised debt obligations’ in *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)* (2012) 301 ALR 1.

⁵⁴ Primavera De Filippi and Aaron Wright, *Blockchain and the Law: The Rule of Code* (Harvard University Press, 2018) ch 5.

⁵⁵ Schwarcz (n 52) 231.

⁵⁶ On the latter point, see Dirk A Zetzsche, Ross P Buckley, Janos N Barberis and Douglas W Arner, ‘Regulating a Revolution: From Regulatory Sandboxes to Smart Regulation’ (2017) 23(1) *Fordham Journal of Corporate and Financial Law* 31, 95.

⁵⁷ De Filippi and Wright (n 54).

⁵⁸ See, eg, *Banking Royal Commission Final Report* (n 7) vol 1, 473.

⁵⁹ The Treasury (Cth), *Financial System Inquiry* (n 9) 8.

⁶⁰ John Braithwaite, *Regulatory Capitalism: How it Works, Ideas for Making it Work Better* (Edward Elgar, 2008) 1–3.

⁶¹ Leon Anidjar, ‘Corporate Law and Governance Pluralism’ (2022) 35(2) *Canadian Journal of Law and Jurisprudence* 283, 283.

⁶² *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1. In *The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9)*, Owen J begins his judgment by acknowledging that ‘[t]hese reasons can only be described as a megillah. I am uneasy about that (at least in relation to length)’: (2008) 70 ACSR 1, 12 [4]. See also Rares J’s observation in *Wingecarribee Shire Council*

Further complexity results from competing understandings of these corporate and market practices. What, from one perspective, might be applauded as an example of entrepreneurial spirit or necessary risk-taking can simultaneously be decried from another perspective as short-termism or strategic regulatory avoidance. Often these judgments will correlate with positions or roles in the corporate sector. Thus, we might expect to see different assessments expressed by regulators, directors (and peak bodies, such as the Australian Institute of Company Directors), shareholders (and peak bodies such as the Australian Shareholders' Association), professional advisors, and so on. This is evident, for example, in the continuing debate about the role of proxy advisory firms. Proxy advisors provide advice to clients (usually large investors such as superannuation funds) on how to vote at the general meetings of listed companies on critical issues such as directors' remuneration and board appointments. These large investors will hold shares in multiple companies, making it difficult to become familiar with the details of each company's meeting agenda during the few months of the annual general meeting season. On one view, typically expressed by superannuation peak bodies, proxy advisors add to the efficient operation of the investment market by reducing the costs of researching individual company agendas and by acting as 'information agents'.⁶³ The opposing view, typically expressed by peak bodies representing directors and executives, is that proxy advisors have an impact on company operations that lacks accountability and transparency.⁶⁴ But the diversity of views often goes further than simple distinctions between shareholders and directors. For example, not all shareholders necessarily hold the same views about appropriate shareholder behaviour (compare, for example, the investment practices of private equity funds and day traders). Attitudes towards shareholder activism are another example. In some assessments, shareholder activists are a resource-consuming, self-interested diversion from the proper purpose of corporate decision-making; for others, they are a necessary element in the pursuit of better corporate accountability.

B *Dimension 2: Complexity in Rules and Standards*

The second dimension is the usual point of reference when the corporate law system is described as complex. This dimension is comprised of the rules, doctrines, standards and norms that are applied to the structures and practices discussed above. Beginning with those created by legislation or judicial decision, there are bespoke corporate law rules and doctrines (most fundamentally, the ideas of separate corporate legal status and shareholder limited liability). Added to this, corporate law borrows and adapts principles from other areas of law, particularly contract, equity, and criminal law. Additionally, some knowledge of constitutional law,

v Lehman Brothers Australia Ltd (in liq) that '[t]he preparation of these reasons has taken longer than I had intended because of the detail and complexity of the parties' cases and the issues that required resolution.' (n 53) 325 [1245].

⁶³ See Stephen Choi, Jill Fisch and Marcel Kahan, 'The Power of Proxy Advisors: Myth or Reality?' (2010) 59(4) *Emory Law Journal* 869.

⁶⁴ In response to these latter concerns, the Federal Treasurer tabled regulations in 2021 that would impose obligations on proxy advisors; see *Treasury Laws Amendment (Greater Transparency of Proxy Advice) Regulations 2021* (Cth). The Regulations were disallowed in the Senate in February 2022: Commonwealth, *Parliamentary Debates*, Senate, 10 February 2022, 230, 232.

administrative law and (in a global context) private international law is also necessary. The perception of complexity is reinforced by the different ways in which the legislative and judicially created rules interact. Many areas of corporate practice are governed predominantly by legislative rules, which may either be statutory creations (for example, laws defining and prohibiting insider trading)⁶⁵ or be a modification of pre-existing general law doctrine (for example, the corporate contracting assumptions in the *Corporations Act*)⁶⁶. Other areas are governed by a combination of the two sources, in either of two ways: in some places the legislation supplements the general law, filling in gaps or adding new rules (for example, the law on corporate contracting), while in other areas both sources of law can operate simultaneously (for example, the fiduciary and statutory law on directors' duties). The result is that corporate law, considered simply as a body of State-made rules, satisfies each of the four criteria of legal complexity identified by Schuck: density, technicality, differentiation, and indeterminacy or uncertainty.⁶⁷ Corporate law is 'dense' in that its rules are 'numerous and encompassing', and they 'seek to control a broad range of conduct' that can lead to conflicts between rules and 'their animating policies'.⁶⁸ The rules require '[technical] expertise on the part of those who seek to understand and apply them'.⁶⁹ Corporate law rules are 'institutionally differentiated',⁷⁰ being located in primary and delegated legislation, securities exchange listing rules, accounting and audit standards, and regulatory guides. Finally, the rules demonstrate a degree of 'indeterminacy';⁷¹ many areas of the *Corporations Act* rely on broad or open-textured standards, rather than prescriptive detail.⁷²

In addition to the complexity criteria identified by Schuck, corporate law rules (particularly those in legislative form) also exhibit normative complexity.⁷³ Considered as a whole, the *Corporations Act* seeks to promote a variety of norms and ideals: economic efficiency and market competition, wealth and profit maximisation (either long- or short-term), investor protection, equality of opportunity, fairness, accountability, good faith conduct, and absence of self-interest. Sometimes these norms are set out expressly, either in 'objects' or 'purpose' sections (for example, *Corporations Act* s 602, describing the purposes of the takeovers provisions as including a 'reasonable and equal opportunity' for participation as well as the maintenance of 'an efficient, competitive and informed market') or in substantive sections (for example, s 181, the directors' duty to act in good faith, and s 232, the members' right of action for conduct that is oppressive, unfairly prejudicial or unfairly discriminatory). At other times they are implicit (for

⁶⁵ See, eg, *Corporations Act* (n 4) ss 1042A–1043O.

⁶⁶ *Ibid* ss 128–30.

⁶⁷ Schuck (n 20) 3.

⁶⁸ *Ibid*.

⁶⁹ *Ibid* 4.

⁷⁰ *Ibid*.

⁷¹ *Ibid*.

⁷² For example, the directors' duties sections in the *Corporations Act* (n 4) that rely on standards of 'good faith', 'proper purpose' and 'best interests': see ss 180–1.

⁷³ Eric W Orts, 'The Complexity and Legitimacy of Corporate Law' (1993) 50(4) *Washington and Lee Law Review* 1565, 1587ff. Normative complexity is a feature of regulatory systems in general: see, eg, Benedict Sheehy and Donald Feaver, 'Designing Effective Regulation: A Normative Theory' (2015) 38(1) *University of New South Wales (UNSW) Law Journal* 392.

example, *Corporations Act* pt 2G.2, dealing with meetings of members, can safely be characterised as being concerned with accountability). This normative complexity arises from the accretion of different legislative and regulatory policies over time, developed in response either to the crisis of the day or to the demands (actual or perceived) of diverse stakeholders with divergent or competing concerns.⁷⁴ It is exacerbated by the indeterminate nature of many of these norms and the possibility of contestation when different norms are applied to the same rules. Contestation arises because there is no general agreement on which, if any, of the various norms should have precedence. An example is found in the longstanding debate about whether mandatory disclosure rules, intended to promote informed decision-making and market integrity, impede economic efficiency.⁷⁵ This contest between normative frameworks was apparent in the lead up to the 2021 amendments to the continuous disclosure provisions in ch 6CA of the *Corporations Act*.⁷⁶ Chapter 6CA requires a disclosing entity to notify the market operator of information that is not otherwise generally available and which would have a material effect on the price or value of that entity's securities if it were available. The ostensible purpose of the requirement is to promote the accountability of managers to shareholders and to enhance market integrity by ensuring, so far as possible, that investors can make investment decisions on the basis of accurate information. Prior to the 2021 amendments, contravention could attract civil penalties as well as possible criminal sanctions. Enforcement required ASIC to determine what an objective reasonable person would be taken to expect regarding material effect. Between May and September 2020, early in the COVID-19 pandemic, these provisions were temporarily modified by legislative Determinations that replaced the objective standard with a test based on the knowledge, recklessness or negligence of a disclosing entity or an involved person as to whether information would have a material effect on the price or value of securities.⁷⁷ In place of the reasonable person test, the modifications thus introduced a subjective test, removing the previous no-fault element. The rationale for this modification was the need for business certainty: the fast-changing context of the pandemic created uncertainty in determining whether a piece of information would have a material effect on price or value, requiring a temporary relaxation of the rules.⁷⁸ Soon after, in December 2020, the Parliamentary Joint Committee on Corporations and Financial Services, in its inquiry into class actions and litigation

⁷⁴ See, eg, Donald Feaver and Benedict Sheehy, 'Designing Effective Regulation: A Positive Theory' (2015) 38(3) *University of New South Wales (UNSW) Law Journal* 961 ('Designing Effective Regulation'). To be clear, the reference here to 'stakeholder' interests is not limited to the so-called stakeholder theory of corporate governance that calls on directors to recognise the impact of their decisions on interests beyond those of shareholders, such as employees (see, eg, Stephen Bottomley, Kath Hall, Peta Spender, and Beth Nosworthy, *Contemporary Australian Corporate Law* (Cambridge University Press, 2nd ed, 2021) 64). Here I use the term to include the sometimes-competing interests of different types of shareholders.

⁷⁵ See, eg, Mark Blair 'The Debate Over Mandatory Corporate Disclosure Rules' (1992) 15(1) *University of New South Wales (UNSW) Law Journal* 177; Robert Bushman and Wayne R Landsman 'The Pros and Cons of Regulating Corporate Reporting: A Critical Review of the Arguments' (2010) 40(3) *Accounting and Business Research* 259.

⁷⁶ *Treasury Laws Amendment (2021 Measures No 1) Act 2021* (Cth).

⁷⁷ See *Corporations (Coronavirus Economic Response) Determination (No 2) 2020* (Cth); *Corporations (Coronavirus Economic Response) Determination (No 4) 2020* (Cth).

⁷⁸ Explanatory Statement, *Corporations (Coronavirus Economic Response) Determination (No 2) 2020* (Cth).

funding, recommended that these modifications be made permanent.⁷⁹ This recommendation was not prompted by the ongoing problems of the COVID-19 context, but instead by a concern that '[c]laims for a breach of continuous disclosure laws underpin many shareholder class actions. Shareholder class actions are generally economically inefficient and not in the public interest'.⁸⁰ The alleged inefficiency of shareholder class actions was said to be evidenced by increased D&O insurance premiums, difficulties in filling board positions, and risk-averse board decision-making.⁸¹ In August 2021, the *Corporations Act* was amended along the lines set out in the earlier Determinations.⁸²

In this example, we see how legislative change was shaped by competing normative frameworks — a debate between the ideas of market integrity, business certainty and economic efficiency. None of these narratives was intrinsically more correct or valid than the others. Instead, the point is that the emergence and development of rules is shaped by continuing contestation between different normative perspectives within shifting economic and social contexts. A critical aspect of this second dimension is that corporate and market activity is governed and regulated by more than State-generated rules. There is also a web of non-State, or industry-made, codes,⁸³ standards and norms. The significance of industry codes was noted by the Banking Royal Commission, which took the view that they 'occupy an unusual place' in prescribing norms for corporate behaviour and 'pose some challenge to the understanding that the fixing of generally applicable and enforceable norms of conduct is a public function to be exercised, directly or indirectly, by the legislature'.⁸⁴ In part, that challenge was said to arise from 'the broad range of provisions contained in industry codes', with different degrees of enforceability.⁸⁵ Contrary to this perspective, the regulatory theory literature suggests that, rather than being 'unusual', the place of industry codes in setting and enforcing norms of conduct has become the norm. Indeed, according to some analyses, this mix of State and non-State rules signals a shift from the 'regulatory State' to 'regulatory capitalism', a term that encapsulates the idea that in addition to the regulatory State much regulatory activity is conducted by and between private organisations, non-governmental organisations ('NGOs') and markets.⁸⁶

⁷⁹ Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Litigation Funding and the Regulation of the Class Action Industry* (Report, December 2020) xxxi (recommendation 29).

⁸⁰ *Ibid* xx.

⁸¹ *Ibid* 320–2.

⁸² See Explanatory Statement (n 78).

⁸³ For example, the ePayments Code: Australian Securities and Investments Commission ('ASIC'), *ePayments Code* (Web Page, 2 June 2022) <<https://asic.gov.au/regulatory-resources/financial-services/epayments-code/>>. The ASIC has power to approve codes of conduct relating to financial services licensees and issuers of financial products: *Corporations Act* (n 4) s 1101A. Approval is not mandatory. See generally Gail Pearson, 'The Place of Codes of Conduct in Regulating Financial Services' (2006) 15(2) *Griffith Law Review* 333.

⁸⁴ *Banking Royal Commission Final Report* (n 7) vol 1, 105.

⁸⁵ *Ibid*. The Commission went on to recommend that the law should provide for the establishment and imposition of mandatory codes in the financial services industry (recommendation 1.15), and that breach of enforceable provisions within those codes should constitute a breach of the law (108–12).

⁸⁶ See, generally, Braithwaite (n 60); David Levi-Faur, 'Regulatory Capitalism' in Peter Drahos (ed), *Regulatory Theory: Foundations and Applications* (ANU Press, 2017) 289.

Adding even further to this complexity is the emergence of regulation *without* rules. In describing the first dimension above, I noted the growing impact of automated trading systems and blockchain in the operation of financial markets. This digital technology can also play a role in regulating conduct within those markets — doing what rules do. Along with the transposition of legal rules into digital code, we see the emergence of regulation *by* digital code, or as De Filippi and Wright put it, a shift ‘to “code as law”, relying on technology, in and of itself, to both define and implement state-mandated laws’.⁸⁷ Brownsword summarises the situation this way:

With rapid developments in AI, machine learning, and blockchain, a question that will become increasingly important is whether (and if so, the extent to which) a community sees itself as distinguished by its commitment to governance by rule rather than by technological management.⁸⁸

Furthermore, these technologies interact with each other, creating ‘amplification effects’ that increase their social impact and prompt the growth of further technologies.⁸⁹

The final point to emphasise about this second dimension is that being complex is not the same thing as being complicated.⁹⁰ Corporate law rules are often complicated, conceptually or structurally, or both. A complicated rule or set of rules (for example, determining whether there is a voidable transaction for the purposes of the liquidation process)⁹¹ can be analysed, parsed, broken down into its component parts and then reassembled, perhaps even represented in a flow chart of the type ‘if A then B, if not-A then C (and so on)’. This is a technical exercise and will likely require the application of specialised knowledge, training and experience, but it also usually only needs to be done once; after the rule is understood and applied to a problem, that rule knowledge can then be applied in solving new problems with some degree of predictability. Complexity resists this type of approach. The dynamic interconnections and the moving parts that comprise a complex system cannot be reduced to the linear logic of a summary or a flow chart. For the most part, when we seek to simplify rules, we are addressing their complicatedness, not the overall complexity of which they are a part. To repeat an earlier point, simplification can be a valuable exercise and for everyday purposes it may not matter whether the task is framed as tackling complexity or complicatedness. But, beyond the everyday, the distinction is important, lest it be assumed that addressing problems of legislative drafting necessarily leads to a less complex system. The desired outcomes — clarity of expression, certainty of application, and predictability of outcome — are not determined solely by how complicated the rules are. Those goals are also affected by the complexity of the whole system. Put another way, an uncomplicated set of rules may still be part of a complex system.

⁸⁷ De Filippi and Wright (n 54) 199.

⁸⁸ Roger Brownsword, *Law 3.0* (Routledge, 2021) 35.

⁸⁹ Andrew Godwin, Pey Woan Lee and Rosemary Teele Langford, ‘Introduction to Technology and Corporate Law’ in Andrew Godwin, Pey Woan Lee and Rosemary Teele Langford (eds), *Technology and Corporate Law* (Edward Elgar, 2021) 1, 1–2.

⁹⁰ Smith makes the same point, referring to property law in the United States: Smith (n 23) 2.

⁹¹ *Corporations Act* (n 4) pt 5.7B div 2 (ss 588FA–FJ).

C *Dimension 3: The Complexity of Regulatory Practices*

The third complexity dimension consists of the processes for implementing and enforcing the rules and standards that comprise the second dimension. This is corporate law's regulatory architecture. It operates along three scales: between formal and informal, public and private, general and specific. These scales interact so that, for example, we can compare processes that are formal, public and specific (such as court action initiated by ASIC to enforce civil penalty provisions against directors of a particular company) with the informal, private and general enforcement of a code of conduct across an industry. It is important to note that the distinction between what is formal and informal, public and private, or general and specific is blurred; these are sliding scales, not defined categories. Enforceable undertakings are an example. An enforceable undertaking is a written agreement given to ASIC by a person regarding compliance with any matter for which ASIC has authority.⁹² On the one hand, this is intended as a method of negotiated compliance that avoids the expense of court action and so might be classified as an example of informal enforcement. On the other hand, an enforceable undertaking has formal status; it is legally binding and breach of any of its terms can result in an application by ASIC for a court order.⁹³ Enforceable undertakings illustrate a further point: the different types of regulatory action do not typically occur in isolation from each other. To take an obvious example, the possibility of prosecution will affect the way in which informal compliance is negotiated and settled.⁹⁴ Similarly, repeated instances of specific enforcement may be escalated to more generalised forms of regulatory intervention.

As with the normative complexity found in dimension 2, the implementation and enforcement of corporate law rules exhibits regulatory complexity. There are multiple regulatory objectives and modes that underline the unpredictability and non-linearity of the system, including: compliance, deterrence (both general and specific),⁹⁵ monitoring and surveillance, disclosure oversight, supervision, licensing and registration, investigation, negotiation, civil penalty and criminal law enforcement, compensation for loss, investor and consumer protection, education and guidance. One reason for this diverse list is the broad coverage of the *Corporations Act* which, as noted in the introduction to this article, spans the regulation of financial services, takeovers, corporate insolvency, managed investments, and the general law governing the incorporation, capacity and governance of corporations.⁹⁶ There is an evident challenge for ASIC in balancing

⁹² *Australian Securities and Investments Commission Act 2001* (Cth) s 93AA.

⁹³ *Ibid* ss 93AA(3)–(4).

⁹⁴ This calls to mind the well-known metaphor of 'bargaining in the shadow of the law': see Robert H Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88(5) *Yale Law Journal* 950.

⁹⁵ General deterrence describes the impact of possible regulatory enforcement on potential offenders; specific deterrence refers to the effect of enforcement action brought in specific instances of wrongdoing.

⁹⁶ This distinguishes ASIC from corporate regulators in jurisdictions such as the US: see, eg, Zehra G Kavame Eroglu and KE Powell, 'Role and Effectiveness of ASIC Compared with the SEC: Shedding Light on Regulation and Enforcement in the United States and Australia' (2020) 31(1) *Journal of Banking and Finance Law and Practice* 71.

and effectively pursuing these different objectives, in light of shifting public and political expectations, budgetary constraints and external regulatory scrutiny.⁹⁷ The difficulties were highlighted in the findings of the Banking Royal Commission, which emphasised the need for ASIC to '[separate], as much as possible, enforcement staff from non-enforcement related contact with regulated entities.'⁹⁸

Still focusing on ASIC's role, a noticeable feature of this third dimension is the grant and flexible exercise of discretionary regulatory power.⁹⁹ As summarised extra-curially by Justice Weinberg:

Where it appears to ASIC that there has been corporate misconduct, it may adopt any one of a number of different approaches. At one extreme, it can take enforcement action, which is designed to punish wrongdoers, and thereby protect other investors through deterrence. Alternatively, it may opt for less coercive, and more prophylactic measures.¹⁰⁰

There is nothing untoward about this; as Schmidt and Scott remind us, 'discretion is an essential feature of delegation to government departments and agencies'.¹⁰¹ They go on to point out that discretionary decision-making by regulators is fundamental in shaping our understanding of the law and its effects.¹⁰² This discretion operates at the agency level, for example when ASIC decides how to prioritise its scarce resources across its various functions (such as surveillance, administrative enforcement, prosecution), and at the level of individual agency officers, who decide how to implement agency policy in specific cases.¹⁰³ At the same time, the discretionary exercise of regulatory power — whether it be aligned with ideas such as 'responsive regulation'¹⁰⁴ or dictated by the need to deploy scarce budgetary

⁹⁷ Since June 2021 external scrutiny of ASIC has been the responsibility of the Financial Regulator Assessment Authority, which in November 2021 announced that it would undertake 'a targeted assessment of ASIC's effectiveness and capability in strategic prioritisation, planning and decision-making, ASIC's surveillance function, and ASIC's licensing function': Financial Regulator Assessment Authority, *Scope of Assessment of the Australian Securities and Investments Commission* (Web Page) <<https://fraa.gov.au/consultations/scope-assessment-australian-securities-and-investments-commission>>.

⁹⁸ *Banking Royal Commission Final Report* (n 7) vol 1, 446. See also ASIC Commissioner Sean Hughes, 'ASIC's Approach to Enforcement after the Royal Commission' (Speech, 36th Annual Conference of the Banking and Financial Services Law Association, Gold Coast, Queensland, 30 August 2019) <<https://asic.gov.au/about-asic/news-centre/speeches/asic-s-approach-to-enforcement-after-the-royal-commission/>> (noting the establishment of the Office of Enforcement within ASIC in response to the Royal Commission Report).

⁹⁹ Rebecca Schmidt and Colin Scott, 'Regulatory Discretion: Structuring Power in the Era of Regulatory Capitalism' (2021) 41(3) *Legal Studies* 454.

¹⁰⁰ Justice Mark Weinberg, 'Some Recent Developments in the Corporate Regulation — ASIC from a Judicial Perspective' (Paper presented to Monash University Law School, 16 October 2013) 1 [3].

¹⁰¹ Schmidt and Scott (n 99) 454.

¹⁰² *Ibid* 459.

¹⁰³ See, eg, Paul Daly, 'The Inevitability of Discretion and Judgement in Front-Line Decision-Making in the Administrative State' (2020) 2 *Journal of Commonwealth Law* 99.

¹⁰⁴ The idea of responsive regulation is that, as is appropriate to the situation, a regulator should begin with interventions that encourage compliance, before escalating to more coercive responses; see Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992). There are differing assessments about ASIC's capacity to be a 'responsive regulator': see, eg, George Gilligan, Helen Bird and Ian Ramsay, 'Civil Penalties and the Enforcement of Directors' Duties' (1999) 22(2) *University of New South Wales (UNSW) Law Journal* 417; Michelle Welsh, 'Civil Penalties and Responsive Regulation: The Gap between Theory and

resources in a way that meets public expectations — introduces a measure of uncertainty into the regulatory framework.¹⁰⁵ This uncertainty is exacerbated by the low visibility of many aspects of the legal processes that comprise this third dimension. While judicial decisions are made in public, the details of out-of-court settlements are often confidential. Statutory reform takes place via public Parliamentary processes but, in contrast, delegated legislation, which ranges from regulations made under the parent statute to legislative instruments made by ASIC, largely escapes broad public scrutiny.

D Corporate Law as a Complex System

Thus far I have argued that the complexity of the corporate law system can be understood as having three dimensions: its structures, markets and practices; its rules and standards; and its regulatory practices. The complexity of the corporate law system is the product of the non-linear and changing interactions between the many elements that make up each of these three dimensions. Importantly, this means that the system's complexity is not confined to the text of the *Corporations Act*. The statute contributes to, but is not the sole cause of, complexity in the corporate law system. This is not to downplay the importance of those rules; as Anabtawi and Schwarcz emphasise, in the corporate or financial system the legal rules are an integral element and for that reason they require attention in understanding the dynamics of the system and in addressing concerns about its complexity.¹⁰⁶ This is why the ALRC inquiry is a welcome step.¹⁰⁷ However, this cannot be the limit of our attention. Anabtawi and Schwarcz explain the point as follows:

Analytical legal scholarship typically identifies a particular problem and uses a certain approach to solve it. Limiting the scope of a project in this way has the advantage of making it more tractable. The disadvantage of focusing narrowly on a specific problem, however, is that it sets aside the broader context in which that problem exists. By screening out related elements of the system, as well as the system's interconnections, traditional legal scholarship is often forced to treat law's dynamic effects, to the extent it does so at all, discretely.¹⁰⁸

The risk is that the law (conceived as a body of rules) is then treated as the dominant or causal element, rather than being simply an integral element, in the sense described earlier.¹⁰⁹

It is difficult to measure and control the extent or amount of complexity in the corporate law system. This is because complexity is an intrinsic quality that

Practice' (2009) 33(3) *Melbourne University Law Review* 908; Dimity Kingsford Smith, 'A Harder Nut to Crack: Responsive Regulation in the Financial Services Sector' (2011) 44(3) *University of British Columbia Law Review* 695; Vicky Comino, 'James Hardie and the Problems of the Australian Civil Penalties Regime' (2014) 37(1) *University of New South Wales (UNSW) Law Journal* 195; *Banking Royal Commission Final Report* (n 7) vol 1, 433.

¹⁰⁵ This is so even with the publication of regulatory guidelines.

¹⁰⁶ Anabtawi and Schwarcz (n 29) 81.

¹⁰⁷ The ALRC emphasises that '[l]egislative complexity is a concept at the heart of this inquiry': ALRC, *Interim Report A* (n 5) 52.

¹⁰⁸ Anabtawi and Schwarcz (n 29) 83 (citations omitted).

¹⁰⁹ See above text accompanying n 33.

emerges from the many interactions within that system. It is possible to identify certain factors within the system that are likely to contribute to greater (or reduced) complexity, but we cannot determine the extent to which systemic complexity will change if those factors are addressed. This observation is relevant to the current ALRC inquiry which, in its first Interim Report (*‘Interim Report A’*), presents a detailed empirical analysis of legislative complexity in the *Corporations Act*, based on a number of metrics, defined as ‘potential quantitative measures of the complexity of a legislative feature’.¹¹⁰ These metrics include the word length of sections; the number of sub-sections, paragraphs etc in a section; the number of conditional statements (for example, ‘if’ or ‘but’) and indeterminate terms (for example, ‘reasonable’ or ‘fair’) in a section; and the number of exemptions or exclusions that apply to a section. All these things are measurable, and have the potential to add to difficulty in using the legislation (noting that there is a range of users). But whether they can be used as levers to reduce complexity is a different question. Caution must be exercised in constructing elaborate metric analyses of complexity, as appears to be the case in the ALRC *Interim Report A*, lest this lead to overly optimistic diagnoses about the possibility of reducing systemic complexity as opposed to complicatedness.¹¹¹

A further feature of corporate law’s complexity is that each of the three dimensions operates and develops (or emerges) in its own way. Corporate practice (dimension 1) changes constantly, in response to its own internal dynamics (for example, market competition), external factors (for example, changes in macro-economic or political conditions) and changes in the other two dimensions (for example, new regulatory policies). By comparison, the law, and the processes by which it is put into effect (dimensions 2 and 3) develop more slowly and in different ways. Judicial development is sporadic, depending on factors such as the capacity and willingness of parties to pursue litigation, the quality of lawyers and arguments, and the inclination of judges to change or develop the law. Legislative development is also irregular, but for different reasons, being dependent (among other factors) on the prevailing political appetite for corporate law reform, and the power of interest groups in pushing for, shaping or resisting legal change.¹¹² Implementation and enforcement policies and practice also change over time¹¹³ in response to factors such as budget constraints, external reviews and recommendations (such as the Banking Royal Commission), and financial crises (such as the 2008–09 GFC). In this way, each of these three dimensions contributes

¹¹⁰ ALRC, *Interim Report A* (n 5) 100.

¹¹¹ In its second Interim Report, the ALRC notes that ‘it is difficult to estimate with any precision the true cost of the current complexity of the regulatory regime’: ALRC, *Interim Report B: Financial Services Legislation* (Report No 139, September 2022) 27.

¹¹² As a recent example, the *Treasury Laws Amendment (2021 Measures No 1) Act 2021* (Cth) amended the operation of the continuous disclosure requirements in ch 6CA of the *Corporations Act* (n 4) in response to concerns that the previous provisions were ‘a key factor driving the increasing prevalence of shareholder class actions’: Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Litigation Funding and the Regulation of the Class Action Industry* (n 79) 322.

¹¹³ Compare the findings of Bird et al in 1999 that ASIC favoured penal over civil enforcement: Helen Bird, David Chow, Jarrod Lenne and Ian Ramsay, ‘ASIC Enforcement Patterns’ (Research Paper No 71, Faculty of Law, The University of Melbourne, 2004), with the observations in the Banking Royal Commission’s 2019 report that ASIC was over-reliant on enforceable undertakings and infringement notices: *Banking Royal Commission Final Report* (n 7) vol 1, 433.

to the overall complexity of the corporate law system and, indeed, its status as a system.

While each of these dimensions is a system in its own right, they also interact as part of the larger corporate law system. Indeed, the effectiveness of corporate law as a regulatory system depends critically on how the dimensions interact and align at any given time. As Feaver and Sheehy observe, '[r]egulation fails ... when the linkages between components of a regulatory system are mismatched or incoherently aligned.'¹¹⁴ The process of interaction is continuous, not static. This means that what may appear to be an effective alignment at one time will require reassessment as elements within the three dimensions change. A recent example illustrates this point. It concerns shifts in the methods by which ASIC seeks compliance with the requirements of the *Corporations Act* — that is, the interaction between the first and third dimensions described above. Studies show that in the late 1990s, ASIC relied predominantly on penal sanctions to enforce the law.¹¹⁵ By the 2010s, a different approach was apparent, with limited levels of criminal enforcement. Instead, ASIC varied its enforcement strategies in different areas. In the financial services area ASIC relied on administrative outcomes such as infringement notices or bans from engaging in certain activities, as well as enforceable undertakings and negotiated settlements.¹¹⁶ Then, in 2019, ASIC adopted a new enforcement policy under the banner 'why not litigate?'.¹¹⁷ Under this approach, if ASIC was satisfied that a breach was more likely to have occurred than not, and the facts of the case showed that pursuing the matter would be in the public interest, then ASIC would ask: why not litigate this matter? This shift in policy was prompted by a pointed critique made during the Banking Royal Commission by Commissioner Hayne, who stated that instead of asking how instances of misconduct might be resolved by agreement, the regulator should ask 'why it would not be in the public interest to bring proceedings to penalise the breach'.¹¹⁸ The new approach did not last long. In the midst of the economic disruption caused by the COVID-19 pandemic, it was replaced with an enforcement strategy that focused on assisting economic recovery.¹¹⁹ In this changed context, ASIC announced that it would 'employ the full scope of [its] regulatory toolkit in a targeted and proportionate way to enforce the law',¹²⁰ adding that its enforcement approach would be 'responsive to changes in [its] regulatory environment'.¹²¹ In these statements, ASIC encapsulated a key characteristic of the corporate law system: the emergence of varying enforcement strategies in response to unforeseen, or unpredictable, changes in other parts of the system. Finally, notice

¹¹⁴ Feaver and Sheehy, 'Designing Effective Regulation: A Positive Theory' (n 74) 994.

¹¹⁵ See generally Bird et al (n 113).

¹¹⁶ Ian Ramsay and Miranda Webster, 'ASIC Enforcement Outcomes: Trends and Analysis' (2017) 35(5) *Company and Securities Law Journal* 289; George Gilligan and Ian Ramsay, 'Is There Underenforcement of Corporate Criminal Law? An Analysis of Prosecutions under the *ASIC Act* and *Corporations Act*: 2009–2018' (2021) 38(6) *Company and Securities Law Journal* 435.

¹¹⁷ Hughes (n 98).

¹¹⁸ *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Interim Report, September 2018) vol 1, 277.

¹¹⁹ See Ronald Mizen, 'ASIC Dumps "Why Not Litigate" Policy as Frydenberg Resets Path', *Australian Financial Review* (online, 26 August 2021) <<https://www.afr.com/politics/federal/asic-dumps-why-not-litigate-as-frydenberg-resets-path-20210825-p58lyx>>.

¹²⁰ ASIC, *ASIC Corporate Plan 2021–25: Focus 2021–22* (August 2021) 15.

¹²¹ *Ibid.*

that this complexity analysis works quite differently compared to the standard analysis of the corporate law and financial services regulatory process, which posits the relationship between the three dimensions as hierarchical, sequential and linear (or, with slightly more nuance, circular). In that analysis, events and practices in the corporate world prompt the creation or reform of laws, whether judicial or legislative. Those laws are intended to address identifiable problems or achieve ascertainable goals. The persons (natural or legal) to whom those laws are directed respond by adjusting their behaviour accordingly. This may mean compliance or non-compliance. In the latter case, the relevant regulatory agency then takes steps to enforce the law to either encourage compliant behaviour or to impose sanctions or prosecute for non-compliance. The success and regulatory value of the laws is then judged by the extent to which they produce compliant behaviour in the target community. If deemed necessary, there is further law reform and the process is repeated.

For many decades, scholarship in the sociology of law, critical legal studies, jurisprudence, law and history, and behavioural economics has demonstrated the many ways in which this linear model does not explain why some law reform initiatives succeed while others fail, nor why some receive ready support but others are left aside. This is not the place to summarise or rehearse all of the insights in that diverse literature, but the following brief points are relevant to the present analysis. The process by which laws ‘emerge’ is political,¹²² in the broad sense that it is defined by relations of power and influence. Public choice theory, to take just one conceptual framework as an example, explains how legislation is used by special interest groups to promote their own agendas.¹²³ The passage of a law reform measure can be the outcome of ‘rent-seeking’ by interest groups, or vote trading by legislators, or both.¹²⁴ Nor do laws always have solely instrumental purposes; legislation can also have a symbolic status, reinforcing certain ‘values, ideals and ways of thinking about government and society’.¹²⁵ Then there are difficulties in determining whether a law has been effective. The effects of a given rule may be indirect or quite unintended, even if they are nevertheless beneficial.¹²⁶ All this tells us that the causal links in the linear chain are not as clear and predictable as the traditional model assumes. What the formal linear model misses, and what the study

¹²² See above nn 38–40 and accompanying text.

¹²³ The classic exposition of public choice theory is James M Buchanan and Gordon Tulloch, *The Calculus of Consent* (University of Michigan Press, 1962). See also Geoffrey Brennan and James M Buchanan, *The Reason of Rules* (Cambridge University Press, 1985).

¹²⁴ The term ‘rent-seeking’ is used to describe the way in which small groups with strong interests in a particular issue will devote their scarce resources lobbying to secure positive political outcomes, relying on the ‘rational ignorance of the general population amongst whom the cost will be distributed’: see Emanuel V Towfigh and Niels Petersen, ‘Public and Social Choice Theory’ in Emanuel Towfigh and Niels Petersen (eds), *Economic Methods for Lawyers* (Edward Elgar, 2015) 121, 132–3.

¹²⁵ Roger Cotterrell, *The Sociology of Law* (Butterworths, 2nd ed, 1992) 102. Arguably the statutory derivative action, found in *Corporations Act* (n 4) pt 2F.1A, is an example. Though it is rarely used, it nevertheless reinforces ideas of accountability and contestability in corporate governance: see generally Stephen Bottomley, *The Constitutional Corporation: Rethinking Corporate Governance* (Ashgate, 2007).

¹²⁶ For a classic analysis, see John Griffiths, ‘Is Law Important?’ (1979) 54(2) *New York University Law Review* 339.

of complexity adds, is that legal and regulatory systems are comprised of constantly interconnecting, adapting and changing relationships and feedback loops.

These interactions occur in many ways: formally and informally, regularly (such as everyday market trading) and sporadically (in special situations, such as a company takeover, or in unexpected situations, such as the GFC). They can be bilateral or multilateral. They involve individuals and organisations, rules and norms, from the public and private spheres. They involve decision-making by human actors and, increasingly, advanced algorithms. And, in all, they continuously shape the emerging corporate law system.

This interactional complexity resists depiction in the form of a diagram or flow chart. That would unhelpfully attempt to impose a static representation on what is a dynamic system. It would require, at least, a series of constantly updated diagrams. Equally, as Meadows has noted,

there is a problem in discussing systems only with words. Words and sentences must, by necessity, come only one at a time in linear, logical order. Systems happen all at once. They are connected not just in one direction, but in many directions simultaneously.¹²⁷

Instead, we understand this complexity through experience and observation, by example and, often, with the benefit of hindsight.

IV Implications for Corporate Law Reform

What are the implications of the preceding analysis for corporate law reform? Here I list three, and they are framed as broad lessons, rather than specific instructions. This is a necessary consequence of looking at corporate law through the lens of complexity theory, where non-linearity, unpredictability and self-organisation are key features. Complexity theory does not lead to definitive or predictable solutions, in the sense of saying ‘if you want to achieve outcome X, then do Y’. Acknowledging the interactional complexity between the three dimensions helps us to understand, but not necessarily predict, the often disjointed process and outcomes of corporate law reform.

The first implication begins by recognising that complexity in the corporate law system will not be eliminated. Complexity theory tells us that complexity, in its many forms, is not an incidental or severable feature of the corporate law system; instead, it is an integral quality of that system. This is not a startling conclusion. Despite the frequency with which the opening observation in this article has been repeated (that our system of corporate law is complex), there is also recognition that complexity is endemic to that system. This was acknowledged in the *Banking Royal Commission Final Report*, which noted that ‘financial services laws will always involve a measure of complexity’.¹²⁸ This does not mean, however, that we should simply accept the problems caused by complexity — the opaque financial products, overly complicated rules and diversity of regulatory techniques. The critical

¹²⁷ Meadows (n 31) 5.

¹²⁸ *Banking Royal Commission Final Report* (n 7) vol 1, 491. See also Chia and Ramsay (n 16) 391, observing that corporate law is ‘inescapably complex’.

implication is that we should be clear in our diagnoses and realistic about the possible outcomes. This may be why the Commonwealth Attorney-General's Department instructs agencies and drafters to 'reduce' complexity, rather than eliminate it.¹²⁹ This suggests an acknowledgment that some degree of complexity is necessary or unavoidable, and that the task is to find the optimal or necessary degree of complexity to achieve the system's aims.¹³⁰

This takes us to the second implication: if the goal is to reduce the problems caused by complexity, the questions then become 'how', 'where', and 'by how much'? The difficulty in answering these questions is evident in the proposition that we can distinguish between necessary and unnecessary complexity, with the goal of acknowledging the former and removing the latter. As defined by the ALRC, '[n]ecessary complexity is that which is required to achieve the desired outcomes of the legislation. Unnecessary complexity is that which is not essential to achieve those outcomes'.¹³¹ This suggested distinction implies an agreed criterion by which we can identify and explain why a given complex feature of the corporate law system is unnecessary. It is easy to think of possible criteria; for example, compliance rates might be used, so that complexity would be unnecessary if it clearly impeded the capacity of corporate actors to comply with the rules. Cost efficiency could be another criterion (be it the costs of regulation, or the costs of compliance). Other criteria can readily be added to the list, and that is the problem. Leaving aside methodological difficulties in measuring compliance or cost (or any other chosen factor), the earlier discussion about normative complexity in Dimension 2 explained there is no single yardstick and, therefore, no way to definitively determine what is necessary and what is not. Once again, however, the implication is not that nothing can be done, but, instead, that we should clearly identify which criterion is being used *and* (importantly) acknowledge that the impact of competing criteria may affect or thwart the intended outcomes.

The third implication is contained in the 'where' question noted in the previous paragraph. To repeat an earlier point, complexity does not reside in any particular element of the corporate law system. Each of the three dimensions described in Part III embodies its own complexities, and the interactions between those dimensions produce further complexity. The implication, then, is that in assessing and deciding what to do about complexity we should not assume that the answer lies solely in redrafting legislative rules and structures or reprioritising regulatory strategies. To be clear, legislation and regulatory practice do require constant attention; as emphasised previously, they are integral elements in the system. However, the argument in this article is that this alone will not reduce the overall complexity of the system, certainly not in a completely predictable way. We see an example of this in the idea that the *Corporations Act* should be redrafted to make it more 'user friendly', so that those at whom legislative obligations are aimed

¹²⁹ Attorney-General's Department (Cth), *Reducing the Complexity of Legislation* (Web Page) <<https://www.ag.gov.au/legal-system/access-justice/reducing-complexity-legislation>>.

¹³⁰ Harris (n 20) 53.

¹³¹ ALRC, *Legislative Framework for Corporations and Financial Services Regulation: Complexity and Legislative Design* (Background Paper FSL2, October 2021) 5 [22].

(the ‘rule targets’) can know what their legal position is.¹³² Note that there is a conflation here: it is assumed that the rule targets are the users of the Act, but it is by no means clear that this is always (or mostly) the case. There are rule users (for example, regulators) who are not rule targets. Similarly, the directors at whom the directors’ duties sections are aimed may rarely consult the legislation directly in order to determine their legal position. This is not necessarily because the legislation is difficult to understand (if anything, the principles-based drafting of the directors’ duties sections in the Act is a model of simplicity)¹³³; it is because prudent directors rely on professional advice to understand the application of the rules to their particular situation. In practice, a rule in the Act may have many ‘users’, including professional advisers, regulators and enforcers, rule targets, and judges. Further, the ways in which each of these users engages with the text of the Act will be affected or shaped by the actions and practices of the other users. Again, while clear, accessible rule-drafting is important, it should not be assumed that simplicity is the necessary antidote to complexity.

V Conclusion

In one of the prefatory quotes to this article, the philosopher John Locke observed complexity in things as diverse as ‘beauty, gratitude, a man, an army, [and] the universe’.¹³⁴ Noting the gender-specific referencing of the time, it is safe to assume that Locke could not have contemplated the complexity of the corporate and financial markets system in the early 21st century. Nevertheless, even in the technologically and economically less developed time in which Locke wrote those words, the challenges of thinking about complexity were readily apparent. Complexity is not a modern invention, although it is manifested in many more ways than was the case in Locke’s time. The modern corporate law system is a cogent example of this.

To conclude where the article began: our system of corporate and financial services law is complex. It can now be seen that this claim is a tautology, because complexity is an intrinsic part of corporate law’s status as a system. It is important to re-emphasise, however, that the purpose of this article is not to dismiss efforts to simplify our system of corporate law, to make it more comprehensible, and to make its application more predictable. It *is* important and necessary to review legislative complexity, as the ALRC has been doing. This article’s purpose, instead, is to emphasise that these goals must be bounded by realistic expectations and considered in a broader system-wide context. That realism comes from an understanding of the nature of the system within which corporate law rules operate, and the causes of its complexity. But realism does not mean certainty or predictability. That is not the nature of complex systems. At best, we should aim to be realistic in the uncertainty of our reformist aims.

¹³² See, eg, Ross Grantham, ‘To Whom Does Australian Corporate and Consumer Legislation Speak?’ (2018) 37(1) *University of Queensland Law Journal* 57.

¹³³ For example, the requirement in *Corporations Act* (n 4) s 181(1)(a) to act ‘in good faith in the best interests of the corporation’.

¹³⁴ Locke (n 1).

Choice of Law Rules in Australia for Resulting and Constructive Trusts

Ying Khai Liew*

Abstract

It is both surprising and troubling that Australia's choice of law rules for resulting and constructive trusts are fundamentally unsettled. A key reason for this unsatisfactory state of affairs is that the choice of law discussion has not proceeded on the basis of a holistic understanding of domestic law. Rejecting the suggestion that the *lex fori* ought always to apply to equitable claims, this article takes the view that the development of choice of law rules is closely informed by a proper understanding of domestic law. It proposes a structured understanding of domestic law by drawing on the different ways in which resulting and constructive trusts are informed by the plaintiff's and defendant's pre-trial rights and duties. The article then demonstrates how this understanding can lead to a systematic development of the choice of law rules that apply to resulting and constructive trusts.

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* Associate Professor, Melbourne Law School, University of Melbourne, Victoria, Australia.
Email: ying.liew@unimelb.edu.au; ORCID iD: <https://orcid.org/0000-0002-6024-3579>.

I Introduction

Resulting and constructive trusts arise by operation of law in certain predefined situations. A resulting trust arises when property is voluntarily transferred to a defendant from a plaintiff directly or where the plaintiff provides the purchase money, in circumstances where the defendant is not intended to obtain the beneficial interest in the property. Constructive trusts, on the other hand, arise in a wide variety of situations. For example, they arise where there is an informal, non-express agreement that the defendant will hold the plaintiff's property on trust; where the parties enter into a specifically enforceable contract for sale; where a defendant-fiduciary obtains a gain in breach of a duty owed to the plaintiff-principal; and where the plaintiff successfully makes out a proprietary estoppel claim against the defendant. Whenever they arise, resulting and constructive trusts generate a similar legal consequence: they grant the plaintiff an equitable proprietary interest in property whose legal title is in the defendant's name, thus allowing the plaintiff to compel the defendant to transfer the property to the plaintiff.

It is both surprising and troubling that the choice of law rules that apply to a resulting or constructive trust dispute are fundamentally unsettled.¹ Many civil law jurisdictions do not recognise the concept of a trust — those that do usually only recognise express trusts and not resulting and constructive trusts.² Even between common law jurisdictions, conceptions of these trusts often vary considerably.³ In a cross-border dispute, then, vastly different results may ensue depending on which law is applied. Without a concrete and justifiable set of choice of law rules, there is extant uncertainty for the parties involved. That uncertainty is even more troubling in view of the proprietary consequences at stake in resulting and constructive trust disputes.

When it comes to express trusts, the choice of law rules are straightforward: Australia, being a Contracting State to the *Hague Convention on the Law Applicable to Trusts and on Their Recognition* ('*Hague Trusts Convention*'), will apply the rules found in the Convention.⁴ Unlike England,⁵ however, Australia has not chosen to extend the scope of the Convention 'to trusts declared by judicial decisions', as allowed for by art 20.⁶ This means that the choice of law rules for resulting and constructive trusts are not to be found in the Convention, but are governed by the

¹ This article deals with cases where a resulting or constructive trust is alleged to arise between the plaintiff and the defendant. It does not consider claims made against third parties who are said to be under an obligation to return the property to or to compensate the plaintiff on the basis that the property was burdened by a prior resulting or constructive trust. In those circumstances, it seems clear that the *lex situs* ought generally to apply, since this best accords with the third party's expectations in acquiring the property: see *Akers v Samba Financial Group* [2017] AC 424, 449–50 [39] (Lord Mance JSC).

² See Ying-Chieh Wu, 'Constructive Trusts in the Civil Law Tradition' (2018) 12(3) *Journal of Equity* 319.

³ See, eg, Ying Khai Liew, *Rationalising Constructive Trusts* (Hart Publishing, 2017) 245–50.

⁴ *Hague Convention on the Law Applicable to Trusts and on Their Recognition*, signed 1 July 1985, [1992] ATS 2 (entered into force 1 January 1992) ('*Hague Trusts Convention*').

⁵ See *Recognition of Trusts Act 1987* (UK) s 1(2).

⁶ Even so, English courts have scarcely made reference to the *Hague Trusts Convention* in resulting and constructive trusts disputes: see Lord Collins of Mapesbury and Jonathan Harris, *Dicey, Morris & Collins on the Conflict of Laws* (Sweet & Maxwell, 15th ed, 2018) 1522–3 [29–084].

common law. Due to the paucity of decided cases, no clear rules emerge, a state of affairs that has been described as both ‘surprising’⁷ and ‘unfortunate’.⁸

Direct academic consideration of the matter has also been relatively sparse, with discussions tending to suffer from either over-inclusion or under-inclusion. Over-inclusion is detected in suggestions that a single choice of law rule should apply across all resulting and constructive trusts disputes, with little consideration for any potential qualitative differences between instances of those trusts.⁹ On the other hand, under-inclusion — a far more common phenomenon — occurs where commentators address the matter in a piecemeal fashion, cherry-picking specific instances in which those trusts arise and treating each instance in isolation.¹⁰

A key reason for this unsatisfactory state of affairs is that the choice of law discussion has not proceeded on the basis of a holistic understanding of domestic law. It is common knowledge that the precise nature, content, and ambit of resulting and constructive trusts in Australian domestic law are far from settled. Without a systematic understanding of domestic law as a solid foundation, any discussion from the choice of law perspective rests on shaky ground.

This article aims to fill that gap. Part II begins by addressing three analytical building blocks. The first provides a rejection of the suggestion that the *lex fori* ought always to apply to equitable claims. Second, it explains how a sound understanding of domestic law impacts on the development of choice of law rules. Third, it identifies what, precisely, is being characterised in resulting and constructive trusts disputes. It will be seen that the subject matter differs, depending on the type of trust in question. Parts III and IV then deal with resulting and constructive trusts respectively, drawing on the third building block in Part II to provide a systematic approach towards the choice of law question.

II Building Blocks

Three building blocks call for discussion before we are in a position to deal directly with the choice of law rules for resulting and constructive trusts.

A A ‘Lex Fori Only’ Approach?

The first is a ground-clearing exercise. It concerns the rule, which is often said to apply in Australia, that the *lex fori* invariably applies whenever an equitable right or

⁷ Dyson Heydon and Mark Leeming, *Jacobs’ Law of Trusts in Australia* (LexisNexis, 8th ed, 2016) 626 [28–21].

⁸ Harold Ford, WA Lee, Michael Bryan, Ian G Fullerton and John Glover, *Ford & Lee: The Law of Trusts* (Thomson Reuters, 2012) [25.7210]. See also Mapesbury and Harris (n 6) [29–076].

⁹ See, eg, Adeline Chong, ‘The Common Law Choice of Law Rules for Resulting and Constructive Trusts’ (2005) 54(4) *International and Comparative Law Quarterly* 855; Lachlan Forrester, ‘Resulting Trusts in the Conflict of Laws: An Australian Perspective’ (2021) 17(2) *Journal of Private International Law* 193.

¹⁰ See, eg, Jonathan Harris, ‘Constructive Trusts and Private International Law: Determining the Applicable Law’ (2012) 18(10) *Trusts & Trustees* 965 (‘Constructive Trusts and PIL’); Ford et al (n 8); Mapesbury and Harris (n 6).

remedy is at stake.¹¹ The apparent rationale for this rule, according to the cases that have affirmed it, is that equity ‘acts *in personam*’ and therefore forum courts necessarily ‘ha[ve] jurisdiction over persons within and subject to its jurisdiction to require them to act in accordance with the principles of equity administered by the court wherever the subject matter and whether or not it is possible for the court to make orders in rem in the particular matter’.¹² If the ‘*lex fori* only’ approach applies, ‘[t]his would be tantamount to saying that there is no choice of law applicable to equitable claims.’¹³

To the extent that this ‘*lex fori* only’ approach applies, Australia is unique among Commonwealth jurisdictions: courts in other jurisdictions, such as New Zealand, Singapore and England, have given up this approach and seek instead to identify the underlying obligation or relationship giving rise to the equitable dispute at hand and to apply the relevant law governing that obligation or relationship.¹⁴ Certainly, Australian courts have carved out an exception for express trusts.¹⁵ But in relation to resulting and constructive trusts, or indeed other equitable doctrines closely related to them (such as fiduciary law), Australian courts have at best gone so far as to hold that the ‘*lex fori* only’ approach is of ‘general’ application, to which ‘specific exceptions’ apply.¹⁶ Those exceptions are stated in circumscribed terms, the most oft-quoted of which comes from the Federal Court of Australia in *Paramasivam v Flynn*:

where the circumstances giving rise to the asserted duty or the impugned conduct (or some of it) occurred outside the jurisdiction, the attitude of the law of the place where the circumstances arose or the conduct was undertaken is likely to be an important aspect of the factual circumstances by reference to which the Court determines whether a fiduciary relationship existed and, if so, the scope and content of the duties to which it gave rise.¹⁷

¹¹ See, eg, *The Prince's Case* (1610) 8 Co Rep 1, 77 ER 481; *National Commercial Bank v Wimborne* (1978) 5 BPR 11,958, 11,982 (Holland J) (‘*Wimborne*’); Peter Young, Clyde Croft and Megan Smith, *On Equity* (Thomson Reuters, 2009) 113 [2.390].

¹² *Wimborne* (n 11) 11,982 (Holland J). See also *The Prince's Case* (n 11); *United States Surgical Corporation v Hospital Products International Pty Ltd* (1982) 2 NSWLR 766, 798 (McLelland J) (‘*Hospital Products*’); *OZ-US Film Productions Pty Ltd (in liq) v Heath* [2000] NSWSC 967, [13] (Young J) (‘*OZ-US*’); *Piatek v Piatek* (2010) 245 FLR 137, 160–1 [117] (Douglas J) (‘*Piatek*’).

¹³ *Mapesbury and Harris* (n 6) [34–084] n 422.

¹⁴ See, eg, *Schumacher v Summergrove Estates Ltd* (2014) 3 NZLR 599, 607 [37] (Miller J); *Rickshaw v Baron von Uexkull* (2007) 1 SLR(R) 377 (‘*Rickshaw*’); *Macmillan Inc v Bishopsgate Investment Trust plc (No 3)* [1996] 1 WLR 387, 391–2 (Staughton LJ) (‘*Macmillan*’); *Mapesbury and Harris* (n 6) [29R–075]; Tiong Min Yeo, *Choice of Law for Equitable Doctrines* (Oxford University Press, 2004).

¹⁵ See, eg, *Augustus v Permanent Trustee Co (Canberra) Ltd* (1971) 124 CLR 245 (‘*Augustus*’); *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1987) 10 NSWLR 86, 192 (McHugh JA) (‘*Heinemann Publishers*’); *Paramasivam v Flynn* (1998) 90 FCR 489, 502–3 (Miles, Lehan and Weinberg JJ) (‘*Paramasivam*’). In any event, express trusts now fall within the ambit of the *Trusts (Hague Convention) Act 1991* (Cth).

¹⁶ See, eg, *Hospital Products* (n 12) 796–9 (McLelland J); *OZ-US* (n 12) [17]–[22] (Young J); *Paramasivam* (n 15) 503 (Miles, Lehan and Weinberg JJ); *Heinemann Publishers* (n 15) 192 (McHugh JA); *Murakami v Wiryadi* (2010) 268 ALR 377, 402–3 [129], 404 [139]; (Spigelman CJ, McCall JA agreeing at 408 [166], Young JA agreeing at 408 [167]) (‘*Murakami*’); *Nicholls v Michael Wilson & Partners Ltd* (2010) 243 FLR 177, 240–2 [339]–[346] (Lindgren AJA) (‘*Nicholls*’); *Piatek* (n 12) 160–2 [117]–[119] (Douglas J).

¹⁷ *Paramasivam* (n 15) 503 (Miles, Lehan and Weinberg JJ).

There are good reasons why the '*lex fori* only' approach should not apply to resulting and constructive trusts. In the first place, distinguished commentators who have subjected the pedigree of the '*lex fori* only' approach to close scrutiny have all concluded that it finds no good basis in the cases as a general proposition applicable to all equitable disputes.¹⁸ Other respectable commentators have also pointed to the practical problems that may arise should this approach apply generally to equitable claims.¹⁹ Those problems include, for example, causing uncertainty, encouraging forum shopping and producing unfairness due to its potential to attract liability in the forum over an act that is lawful in the foreign jurisdiction in which it occurred.

To these reasons, it can be added that the '*lex fori* only' approach rests on a dubious rationale. The 'equity acts *in personam*' maxim, on which the approach rests, as mentioned earlier, is at best a 'vague generalisation'²⁰ and at worst a 'highly dubious proposition'.²¹ This has led to the observation that 'no phrase has been more misused', because it has often been 'divorced ... from its historical context'.²² This is particularly relevant in the context of resulting and constructive trusts, because the maxim fails to reflect the fact that these trusts indisputably generate proprietary effects.²³ This is not simply a reference to the fact that all trusts require property,²⁴ although this much is true; it is also seen in the fact that the practical effect of the imposition of resulting and constructive trusts is, in most if not all cases, to allow the plaintiff-beneficiary to call for the property held by the defendant-trustee.²⁵

It might be thought to be possible to justify the '*lex fori* only' approach as an application of the forum's public policy; however, this too does not withstand scrutiny. Chen has attempted such a justification in relation to fiduciary

¹⁸ See, eg, RW White, 'Equitable Obligations in Private International Law: The Choice of Law' (1986) 11(1) *Sydney Law Review* 92; Laurette Barnard, 'Choice of Law in Equitable Wrongs: A Comparative Analysis' (1992) 51(3) *Cambridge Law Journal* 474; Martin Davies, Andrew Bell, Paul Le Gay Brereton and Michael Douglas, *Nygh's Conflict of Laws in Australia* (LexisNexis, 10th ed, 2019) 554–9 [21.11]–[21.17].

¹⁹ See, eg, Joseph Story, *Commentaries on the Conflict of Laws* (Little, Brown and Co, 6th ed, 1865) §§ 544–6; Robert Stevens, 'Resulting Trusts in the Conflict of Laws' in Peter Birks and Francis Rose (eds), *Restitution and Equity, Vol 1: Resulting Trusts and Equitable Compensation* (Mansfield Press, 2000) 147, 154–5; Davies et al (n 18) 554 [21.10]; Adrian Briggs, 'The Unrestrained Reach of an Anti-Suit Injunction: A Pause For Thought' [1997] (1) *Lloyd's Maritime and Commercial Law Quarterly* 90, 95; Richard Garnett, 'Identifying an Asia-Pacific Private International Law of Trusts' in Ying Khai Liew and Matthew Harding (eds), *Asia-Pacific Trusts Law, Vol 1: Theory and Practice in Context* (Hart Publishing, 2021) 381, 392; Yeo (n 14) [2.10]; Ford et al (n 8) [25.4010].

²⁰ Justice PW Young, 'Equity', *New South Wales Bar Association Bar Practice Course* (Web Page, August 2007) 3 <https://nswbar.asn.au/docs/professional/prof_dev/BPC/course_files/Equity%20-%20Young%20J.pdf>.

²¹ *Macmillan Inc v Bishopsgate Investment Trust plc* (No 3) [1995] 1 WLR 978, 989 (Millet J).

²² John McGhee (ed), *Snell's Equity* (Sweet and Maxwell, 33rd ed, 2016) 100 [5–018], citing *Tyler v Court of Registration* (1899) 175 Mass 71, 76. See also Adrian Briggs, *The Conflict of Laws* (Oxford University Press, 3rd ed, 2013) 68–9; Stephen Lee, 'Restitution, Public Policy and the Conflict of Laws' (1998) 20(1) *University of Queensland Law Journal* 1, 6–7.

²³ See, eg, *Murakami* (n 16) 402 [128] (Spigelman CJ, McColl JA agreeing at 408 [166], Young JA agreeing at 408 [167]); *OZ-US* (n 12) [14]–[15] (Young J); Ford et al (n 8) [1.090].

²⁴ Cf Chong (n 9) 873–6.

²⁵ This point is made in William Swadling, 'The Fiction of the Constructive Trust' (2011) 64(1) *Current Legal Problems* 399, although the present author disagrees with the conclusion that the constructive trust is a fiction.

obligations.²⁶ Whether or not one agrees with his argument, it is clear that fiduciary obligations are simply a subset of the law of equity. Moreover, a fiduciary relationship is not a precondition for a resulting or constructive trust to arise. Indeed, more generally, it is analytically difficult to mount a convincing argument that there is something distinct about *equity*, or, more specifically, about resulting and constructive trust disputes, that automatically warrants the protection of some fundamental value or rule of law of the forum such that the application of foreign law ought invariably to be excluded.²⁷

Finally, it should be noted that in the specific context of constructive and resulting trusts, there has only been one resulting or constructive trust case, *Murakami v Wiryadi*, in which a court has discussed the potential applicability of the ‘*lex fori* only’ approach in a way that affected the outcome of the case.²⁸ In that case, the Court applied the proper law of the parties’ marital *contract*, which was Indonesian law, instead of the *lex fori*.²⁹

For all these reasons, therefore, the ‘*lex fori* only’ approach must be rejected in favour of a more nuanced approach.

B *The Relationship between Domestic Law and Choice of Law Rules*

The second building block concerns the relationship between domestic law and choice of law rules. It is trite that the exercise of characterisation is approached functionally,³⁰ by applying what Kahn-Freund has labelled an ‘enlightened *lex fori*’.³¹ That is, courts are not ‘constrained by particular notions or distinctions of the domestic law of the *lex fori*, or that of the competing system of law’, but have regard to both in order ‘to strive for comity between competing legal systems’.³²

One consequence of this approach is that choice of law rules can, and often do, reflect unique categories of case, in that they need not mirror the forum’s categories of associated substantive rules. But it is also true to observe that the state

²⁶ Ben Chen, ‘Historical Foundations of Choice of Law in Fiduciary Obligations’ (2014) 10(2) *Journal of Private International Law* 171.

²⁷ See Joanna Langille, ‘Frontiers of Legality: Understanding the Public Policy Exception in Choice of Law’ (2022) *University of Toronto Law Journal* (advance) <<https://doi.org/10.3138/utlj-2021-0085>>.

²⁸ *Murakami* (n 16) 406 [149] (Spigelman CJ, McColl JA agreeing at 408 [166], Young JA agreeing at 408 [167]).

²⁹ *Ibid.*

³⁰ See, eg, Yeo (n 14) [3.08]–[3.09]; George Panagopoulous, *Restitution in Private International Law* (Oxford University Press, 2000) 33; Zheng Sophia Tang, Yongping Xiao and Zhengxin Huo, *Conflict of Laws in the People’s Republic of China* (Edward Elgar Publishing, 2016) 30 [2.30], 284 [10.08]; Weizuo Chen and Gerald Goldstein, ‘The Asian Principles of Private International Law: Objectives, Contents, Structure and Selected Topics on Choice of Law’ (2017) 13(2) *Journal of Private International Law* 411, 421; Walter Wheeler Cook, ‘Logical and Legal Bases of Conflict of Laws’ (1942) 33(5) *Yale Law Journal* 457, 468–70; *Wight v Eckhardt Marine GmbH* [2004] 1 AC 147, 152–3 [12] (Lord Hoffmann); Adrian Briggs, ‘Misappropriated and Misapplied Assets and the Conflict of Laws’ in Simone Degeling and James Edelman (eds), *Unjust Enrichment in Commercial Law* (Lawbook Co, 2008) 53, 57–8 (‘Misappropriated and Misapplied Assets’).

³¹ Otto Kahn-Freund, *Collected Courses of the Hague Academy of International Law: General Problems of Private International Law (Volume 143)* (Brill, 1974) 377.

³² *Macmillan* (n 14) 407 (Auld LJ).

of understanding of domestic law will have a significant impact on the forum's development of choice of law rules where those rules are fundamentally ambiguous. After all, choice of law rules are rules of the forum³³ and so, in determining the applicable choice of law rules, judges are unlikely to approach the matter completely detached from their view of the related domestic law.

A striking example of this is found in the choice of law rules for restitution, the status of which is fundamentally unsettled. In England, until the matter was superseded by the *Rome II Regulation on the Law Applicable to Non-Contractual Obligations*,³⁴ the common law rules were ambiguous and in an 'embryonic state';³⁵ in Australia, the position is even more tenuous.³⁶ One significant contributing factor to this state of affairs in Australia is the ambiguity of the *domestic* law of restitution and unjust enrichment. As observed in *Nygh's Conflict of Laws in Australia*:

One of the key challenges in identifying a choice-of-law rule for restitution is that the contours of that 'subject' are still very much a matter for lively debate. Some commentators contend that the myriad areas touched by this branch of the law may be explained by unifying, overarching principles, whilst others regard the 'subject' as a collection of disparate doctrines with no necessary underpinning or unifying meaning ... This taxonomical debate has obvious implications for the articulation of any choice-of-law rule, including whether or not there should be one or more choice-of-law rules for restitution to reflect the wide variety of situations in which what are now recognised as restitutionary claims arise.³⁷

As can be seen, the state of domestic law in Australia directly impacts on the development of associated choice of law rules.

The same can be said about resulting and constructive trusts: a proper understanding of domestic substantive resulting and constructive trusts rules may well have a positive impact on the development of the related choice of law rules,³⁸ where there is much uncertainty — in Australia as well as in other jurisdictions.³⁹ Specifically, a sound understanding of domestic law will allow judges to identify the 'issue' to be categorised accurately so that the choice of law aspect will receive proper treatment.

³³ *The Ship 'Sam Hawk' v Reiter Petroleum Inc* (2016) 246 FCR 337, 385 [182] (Allsop CJ and Edelman J) ('*Sam Hawk*'); *Macmillan* (n 14) 407 (Auld LJ).

³⁴ *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the Law Applicable to Non-Contractual Obligations (Rome II)* [2007] OJ L 199/40 ('*Rome II Regulation*').

³⁵ European Union Committee, *The Rome II Regulation: Report with Evidence* (House of Lords Paper No 66, 8th Report of Session 2003–04) 44 [144], 56 [199], cited in Mapesbury and Harris (n 6) [36–007]. See also Briggs, 'Misappropriated and Misapplied Assets' (n 30) 60.

³⁶ See Davies et al (n 18) 551 [21.5]–[21.9].

³⁷ *Ibid* 551 [21.5].

³⁸ See Chong (n 9) 861.

³⁹ See Ying Khai Liew, 'Trusts Choice of Law Rules in Asia-Pacific: Adapting to the Future' in Ying Khai Liew and Ying-Chieh Wu (eds), *Asia-Pacific Trusts Law, Vol 2: Adaptation in Context* (Hart Publishing, 2022, forthcoming).

C *The Matter Being Characterised*

The third preliminary point concerns identifying what, precisely, is being characterised. At present, it is clear that ‘resulting trusts’ and ‘constructive trusts’ do not represent unique categories of choice of law rules. Since ‘the courts should identify and apply the law which governs the *issue or issues* that fall for decision’,⁴⁰ the question arises: what is the subject matter — the ‘issue’ — that requires classification in relation to resulting or constructive trusts?

One possible answer is that it is the trust *as a remedy* that is classified, rather than the events to which they respond. This is the argument made by Chong in what, to date, represents the most careful and considered attempt to identify the choice of law rules applicable to resulting and constructive trusts.⁴¹ She writes:⁴²

It is suggested that the better approach is to focus on the response and to characterize the response; in other words, to classify trusts claims by reference to the underlying nature of constructive and resulting trusts. This method goes against conflicts orthodoxy. However, in view of the uncertainty plaguing the proper classification of trusts claims, choosing to characterize the response is the obvious alternative to choosing to characterize the cause of action, on which there is no consensus.

Chong ultimately suggests that resulting and constructive trust disputes should attract the *lex situs*, essentially because trusts always involve property.⁴³

Chong’s analysis might find particular support in Australia, specifically in relation to constructive trusts, where there is a tendency to view these trusts as discretionary remedies. The source of this tendency is various High Court of Australia obiter dicta,⁴⁴ which suggest, for example, that ‘[o]rordinarily relief by way of constructive trust is imposed only if some other remedy is not suitable’,⁴⁵ and that ‘[a] constructive trust ought not to be imposed if there are other orders capable of doing full justice’.⁴⁶ On this understanding, there is a ‘dissociation of liability and

⁴⁰ *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 519 [20] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ) (*‘John Pfeiffer’*) (emphasis added). See also *Sweedman v Transport Accident Commission* (2006) 226 CLR 362, 426–7 [116] (Callinan J) (*‘Sweedman’*), citing with approval *Macmillan* (n 14) 407 (Auld LJ); *Piatek* (n 12) 159 [111] (Douglas J); *‘Sam Hawk’* (n 33) 385 [182] (Allsop CJ and Edelman J); Davies et al (n 18) 362–3 [14.7]; Reid Mortensen, Richard Garnett and Mary Keyes, *Private International Law in Australia* (LexisNexis, 4th ed, 2018) 195–6 [7.13]–[7.14].

⁴¹ See generally Chong (n 9).

⁴² *Ibid* 861.

⁴³ *Ibid* 873–880. See also Jack Wass, ‘The Court’s In Personam Jurisdiction in Cases Involving Foreign Land’ (2014) 63(1) *International Comparative Law Quarterly* 103, 110.

⁴⁴ For an extensive review and refutation of these obiter dicta, see Ying Khai Liew, ‘Constructive Trusts and Discretion in Australia: Taking Stock’ (2021) 44(3) *Melbourne University Law Review* 963 (*‘Constructive Trusts and Discretion’*).

⁴⁵ *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 172 [200] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) (*‘Farah Constructions’*).

⁴⁶ *John Alexander’s Clubs Pty Ltd v White City Tennis Club Ltd* (2010) 241 CLR 11, 45 [128] (French CJ, Gummow, Hayne, Heydon and Kiefel JJ). See also *Bathurst City Council v PWC Properties Pty Ltd* (1998) 195 CLR 566, 585 [42] (Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269, 300 [91] (Gummow, Hayne, Heydon, Kiefel and Bell JJ) (*‘Bofinger’*); *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1, 32 [74] (Gageler J).

remedy',⁴⁷ by which it is meant that the constructive trust response is applied flexibly, 'unguided by any explicit doctrinal justification'.⁴⁸ If so, then the only sensible approach is to characterise constructive trusts as remedial responses for choice of law purposes.

However, this approach is misleading and ought to be avoided. From the perspective of domestic law, although it is correct to say that constructive (and, to the same extent, resulting) trusts are legal responses,⁴⁹ in most instances they are not *freestanding* responses such that they are simply options in an arsenal of remedies from which judges can pick and choose in any given case.⁵⁰ Instead, in most instances these trusts, as remedies or responses, share an intimate analytical relationship with the parties' pre-trial rights and duties that lead to their award, such that those rights and duties must be factored in to the choice of law discussion.

From the perspective of private international law, characterising resulting and constructive trusts as remedial responses is likely to lead to the application of a single, overarching connecting factor, for example, the *lex situs*, as Chong suggests,⁵¹ or the *lex fori* if constructive trusts are treated strictly as *remedies* and therefore as part of 'procedural' (as opposed to 'substantive') law. The problem here is that a blanket rule is not nuanced enough to get to the 'issue' raised by resulting and constructive trust disputes. As previously noted, resulting and constructive trusts are usually not imposed as freestanding remedies. Moreover, not all resulting and constructive trusts are qualitatively similar, given that different trusts respond to different types of rights and duties, as will be explained below.

An alternative answer to the question 'What is being characterised?' is found in the approach taken by other Commonwealth courts, which, as previously mentioned, is to characterise the underlying obligation or relationship, or 'source of the obligation'.⁵² Thus, in cases of a 'factual matrix [whose] legal foundation is premised on an independent established category such as contract or tort, the appropriate principle in so far as the choice of law is concerned ought to be centred on the established category concerned'.⁵³ This answer fares better, for it allows for a more nuanced approach that takes into account the different circumstances in which these trusts may arise.

Ultimately, however, this approach does not provide specific guidance as to how courts should ascertain and characterise the underlying obligation or relationship. Unlike nominate concepts such as 'sale' or 'loan', which are shorthand

⁴⁷ Pamela O'Connor, 'Happy Partners or Strange Bedfellows: The Blending of Remedial and Institutional Features in the Evolving Constructive Trust' (1996) 20(3) *Melbourne University Law Review* 735, 751. See also David Wright, 'Third Parties and the Australian Remedial Constructive Trust' (2014) 37(2) *University of Western Australia Law Review* 31.

⁴⁸ O'Connor (n 47) 750.

⁴⁹ Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26(1) *University of Western Australia Law Review* 1, 19.

⁵⁰ See Liew, 'Constructive Trusts and Discretion' (n 44) 972–4.

⁵¹ See also Harris, 'Constructive Trusts and PIL' (n 10) 966.

⁵² *Ibid* 967.

⁵³ *Rickshaw* (n 14) 407 [81] (Andrew Phang Boon Leong JA), approving the approach suggested in *Yeo* (n 14). See also *Nicholls* (n 16) 241–2 [345] (Lindgren AJA).

for predefined underlying obligations or relationships,⁵⁴ resulting trusts and constructive trusts cannot be unpacked so straightforwardly. Neither does the paucity of case law assist: thus far, it can only be stated with certainty that a resulting or constructive trust ‘arising from’⁵⁵ a contractual relationship will attract the proper law of the contract. Indeed, phrases such as ‘source of’, ‘premised on’, and ‘arising from’ do not have any core meaning from which firm guidance can be sought.

It is suggested that there is no one-size-fits-all answer to the question of what is being characterised. Instead, the correct approach depends on the type of claim in question.

To elaborate, we can begin by observing that substantive pre-trial rights (and their correlative duties) can be analysed as ‘primary’ or ‘secondary’.⁵⁶ Primary rights exist ‘in and per se’;⁵⁷ that is, they arise upon the occurrence of pre-determined, real-world events that do not involve the breach of a pre-existing right. An example is a contractual right, which arises in response to the juristic act of entering a contract, an act which is not a breach of any right and therefore not wrongs-based. Secondary rights, on the other hand, arise where the defendant breaches a primary duty owed to the plaintiff. For example, a right to damages for breach of contract is a secondary right that arises due to the defendant’s breach of the plaintiff’s primary right through violation of a contractual term.

The dichotomy of primary and secondary rights allows us to distinguish between three types of remedies claimed by plaintiffs.

First, in a claim for the enforcement of a primary right, the remedy asked for by the plaintiff is a ‘replicative’ remedy. This is a remedy that simply restates and enforces the plaintiff’s primary right against the defendant; it does not function to correct the consequences of the defendant’s breach. Actions for specific performance or for a debt due are examples of this: the remedy compels the defendant to do as promised in the parties’ primary contractual relationship.

Second, some claims are for a remedy that enforces the plaintiff’s secondary rights. Here, a plaintiff seeks a ‘reflective’ remedy, the content of which is best calculated to correct the effects of the defendant’s wrongdoing. In relation to some of these claims, courts exercise limited remedial discretion to determine the appropriate content of the remedy; at other times, no discretion is exercised because, by way of precedent, a particular wrong will invariably attract a particular remedy because it best corrects the effect of the wrong. In either case, the content of the remedy does not simply replicate the content of the plaintiff’s primary right: it is targeted at correcting the consequences of the defendant’s wrongdoing. A claim for damages in tort or for breach of contract are examples: the amount of damages awarded is calculated to reflect the plaintiff’s secondary right to compensation.

⁵⁴ Respectively, ‘transfer of property for value’ and ‘binding agreement to repay’.

⁵⁵ *Murakami* (n 16) 404 [141] (Spigelman CJ, McColl JA agreeing at 408 [166], Young JA agreeing at 408 [167]). See also *Paramasivam* (n 15) 503 (Miles, Leane and Weinberg JJ).

⁵⁶ See, eg, *Hardwick Game Farm v Suffolk Agricultural Poultry Producers Association* [1966] 1 WLR 287, 341 (Diplock LJ); John Austin, *Lectures on Jurisprudence*, ed Robert Campbell (John Murray, 5th ed, 1885) 762; Donal Nolan and Andrew Robertson, ‘Rights and Private Law’ in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing, 2014) 1, 19.

⁵⁷ Austin (n 56) 762.

The third type of remedy claimed by plaintiffs is a claim for a 'transformative' remedy. Here, courts exercise wide-ranging discretion to determine the remedy, taking into account considerations extraneous to the parties' pre-trial rights and duties. Thus, the parties' pre-trial rights and duties do not logically inform the awarded remedy in a direct way, and the remedy radically transforms the parties' rights and duties. Statutory provisions to the effect that courts may provide a remedy where it is just to do so having regard to all the circumstances of the case are examples.⁵⁸ The plaintiff has no substantive right to the remedy. At best, the plaintiff has a right that the court considers his or her case according to the provision. The remedy therefore transforms the plaintiff's pre-trial right, in the sense that the source of the award is the court's exercise of wide-ranging discretion, rather than any substantive right of the plaintiff.

Parts III and IV below will demonstrate that this trichotomy provides invaluable guidance in determining what precisely is characterised in a resulting or constructive trust dispute. In a nutshell, the analysis is as follows. First, in a claim for a trust of a replicative nature, it is the primary relationship and the events that give rise to it that present the 'issue' that calls for classification. Second, in a claim for a trust of a reflective nature, where the primary relationship whose breach gives rise to the plaintiff's secondary right can be characterised according to a pre-existing choice of law category, then that category will apply; if it cannot, then the case falls to be treated as a tort. Third, in a claim for a transformative trust, the trust falls to be characterised as a remedy and the *lex fori* will apply.

III Resulting Trusts

In domestic law, resulting trusts are commonly said to fall into two groups, 'presumed resulting trusts' and 'automatic resulting trusts', following Megarry J's decision in *Re Vandervell's Trustees Ltd (No 2)*.⁵⁹ Presumed resulting trusts include cases where A makes a voluntary transfer of property to B, and where A provides the purchase money for property vested in B. Automatic resulting trusts include resulting trusts that arise over incompletely disposed beneficial interests under express trusts. It is immediately clear that the two phrases are not merely descriptive, but also imply a particular conception of why those trusts arise.⁶⁰ To adopt normatively neutral descriptors, the labels 'apparent gifts' for presumed resulting trusts and 'failing trusts' for automatic resulting trusts will be employed, as Lord Millett has done extra-judicially.⁶¹

Resulting trusts are replicative in nature. This is because the relevant rights and duties under the trusts arise from the occurrence of real-world events that do not involve wrongdoing. Thus, what is required for choice of law purposes is a close examination of the circumstances that give rise to the parties' primary relationship.

⁵⁸ There are many such provisions in the statute books, but two examples are: *Frustrated Contracts Act 1978* (NSW) s 15 and *Bankruptcy Act 1966* (Cth) s 30(1)(b).

⁵⁹ *Re Vandervell's Trustees Ltd (No 2)* [1974] Ch 269, 289.

⁶⁰ *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] AC 669, 708 (Lord Browne-Wilkinson) ('*Westdeutsche Landesbank*').

⁶¹ Lord Millett, 'Pension Schemes and the Law of Trusts: The Tail Wagging the Dog?' (2000) 14(2) *Trust Law International* 66, 73.

A *Failing Trusts*

There is an absence of case law on the choice of law rules applicable to failing trusts. However, commentators generally agree that these should be governed by the law applicable to the relevant express trust.⁶² The reason for adopting this test is often said to be that the law that governs the failure of an express trust should also determine the consequences of that failure.⁶³ This is an argument based on coherence between failure and consequence, and is well-taken. But there is also an additional, important point that can be made in support of this approach. It is that a failing trust resulting trust arises in response to the settlor's intentions in so far as the original express trust does, such that the same law ought to govern both trusts.

To explain this point, it should be noted that in *Re Vandervell's Trustees Ltd (No 2)* Megarry J thought that these resulting trusts arise 'automatically', by which his Honour meant that '[w]hat a man fails effectually to dispose of remains automatically vested in him',⁶⁴ regardless of intentions. This implies that the only requirement for these trusts to arise is that the settlor does not make sufficient provision to exhaust the trust assets. But this does not paint a complete picture of the necessary conditions for the resulting trust to arise.

First, it is also a requirement that the settlor must not have 'expressly, or by necessary implication, abandoned any beneficial interest in the trust property',⁶⁵ thereby disqualifying himself or herself from benefitting from any surplus. Otherwise, no resulting trust will arise, with the property being held *bona vacantia*.⁶⁶

Second, the settlor also must not have explicitly provided that the trustee will benefit from any surplus, otherwise the trustee will take the surplus and no resulting trust will arise. An explicit provision is required because it is only natural to presume that a person designated as 'trustee' — who occupies an office that involves acting for the benefit of another⁶⁷ — is intended not to benefit from the trust property, unless there is express evidence to the contrary.

These two further conditions are often taken for granted, but they indicate the crucial point that the resulting trust arises as a necessary implication of the settlor's intentions; that is, that the settlor has left himself or herself as the only remaining candidate who may take any outstanding interest in the property. The source of the resulting trust is therefore the very intention of the settlor that constituted the express trust in the first place. Since the resulting trust, as much as the express trust that fails,

⁶² Whether under the *Hague Trusts Convention* (n 4) or common law, this generally entails an application of the law expressly or impliedly selected in the trust deed, or else it is determined by way of a close connection test.

⁶³ See, eg, Stevens (n 19) 157; Jonathan Harris, *The Hague Trusts Convention* (Hart Publishing, 2002) 126–7; Harris, 'Constructive Trusts and PIL' (n 10) 967; Mapesbury and Harris (n 6) [29–082]; David Hayton, Paul Matthews and Charles Mitchell, *Underhill and Hayton: Law Relating to Trusts and Trustees* (LexisNexis, 19th ed, 2016) 1360 [100.67].

⁶⁴ *Re Vandervell's Trustees Ltd (No 2)* (n 59) 289.

⁶⁵ *Westdeutsche Landesbank* (n 60) 708 (Lord Browne-Wilkinson).

⁶⁶ *Ibid.*

⁶⁷ Derwent Coshott, 'To Benefit Another: A Theory of the Express Trust' (2020) 136 (April) *Law Quarterly Review* 221, 221.

responds to the settlor's intentions, it follows that both trusts ought to be governed by the same law.

Against this, it has been argued that the settlor's intention does not provide a justification, because otherwise the law applicable to the express trust would also have to be applied to other forms of resulting trusts that are 'apparently based on the settlor's assumed intentions'.⁶⁸ It is true that resulting trusts of whatever variety arise in response to the (presumed or actual) intentions of the settlor or transferor (A). More precisely, they all respond to A's unilateral negative intention; that is, that the recipient (B) was not intended to take the beneficial interest in the property.⁶⁹ However, context matters. For failing trusts, that negative intention and the positive intention to create the (failed) express trust are two sides of the same coin. Resulting trusts arising from apparent gifts, on the other hand, are different: they arise in a context where B was never a trustee at all; indeed, B would take the property absolutely unless a resulting trust arises. Therefore, there is no express trust whose applicable law can be extended to cover these resulting trusts. Instead, it is necessary to investigate what underlying issue is raised by these resulting trusts in order to determine the applicable choice of law rules. To this matter the discussion now turns.

B Apparent Gifts

The first point to make is that some commentators have argued that the presumption that arises in apparent gift cases is a presumption that A had *positively intended* and declared an express trust for himself or herself.⁷⁰ This view has gained some traction in Australia.⁷¹ It stands in contrast to the view that the presumption is that A did not intend to benefit B.⁷² The latter is clearly preferable for historical, taxonomical, coherency and normative reasons, all of which have been extensively discussed elsewhere.⁷³ One of those points is particularly pertinent for the present discussion. It is that the positive intention analysis unjustifiably conflates express trusts with resulting trusts: it allows for apparent gifts cases that are proved by way of the presumption to be recognised as resulting-express trusts. This state of affairs is both confusing and misleading. From the perspective of domestic law, the law would fail

⁶⁸ Harris, *The Hague Trusts Convention* (n 63) 126.

⁶⁹ *Anderson v McPherson (No 2)* [2012] WASC 19, [103] (Edelman J) ('*Anderson*'); Ford et al (n 8) [24.040]; Ying Khai Liew, 'Trusts: Modern Taxonomy and Autonomy' (2021) 35(1) *Trust Law International* 27, 36–40 ('Taxonomy and Autonomy').

⁷⁰ See generally John Mee, 'Presumed Resulting Trusts, Intention and Declaration' (2014) 73(1) *Cambridge Law Journal* 86; William Swadling, 'Explaining Resulting Trusts' (2008) 124 (January) *Law Quarterly Review* 72; Heydon and Leeming (n 7) 205–6 [12–01].

⁷¹ See, eg, *Bosanac v Federal Commissioner of Taxation* (2022) 96 ALJR 976, 997 [104] (Gordon and Edelman JJ) ('*Bosanac*'); *Anderson* (n 69) [106] (Edelman J); *Tonna v Mendonca* [2019] NSWSC 1849, [465] (Ward CJ in Eq). See too, in English law, *Air Jamaica Ltd v Charlton* [1999] 1 WLR 1399, 1412 (Lord Millett); *Lavelle v Lavelle* [2004] EWCA Civ 223, [13]–[14] (Lord Phillips MR); *Twinsectra v Yardley* [2002] 2 AC 164, 190 [92] (Lord Millett); *Patel v Mirza* [2017] AC 467, 536–7 [238] (Lord Sumption JSC, Lord Clarke JJC agreeing); *Marr v Collie* [2018] AC 631, 647–8 [54] (Lord Kerr JSC); *Prest v Petrodel Resources Ltd* [2013] 2 AC 415, 429 [49] (Thorpe LJ); PJ Millett, 'Restitution and Constructive Trusts' (1998) 114 (July) *Law Quarterly Review* 399, 401.

⁷² See *Bosanac* (n 71) 983 [13] (Kiefel CJ and Gleeson J); *Hodgson v Marks* [1971] Ch 892, 933 (Russell LJ); Robert Chambers, 'Is There a Presumption of Resulting Trust?' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing, 2010) 267, 276.

⁷³ Liew, 'Taxonomy and Autonomy' (n 69) 32–6.

to distinguish between trusts arising as a result of a settlor's successful exercise of power to create a trust, and trusts arising despite the lack of an exercise of such a power. From the private international law perspective, it would lead to the mistaken conclusion that apparent gifts resulting trusts should be treated as express trusts for choice of law purposes.⁷⁴ As discussed earlier, unlike in the failing trusts context, apparent gifts resulting trusts do not arise from an express trust relationship, and so this approach must be rejected.

According to most commentators⁷⁵ and Commonwealth authorities, including one in Australia,⁷⁶ the *lex situs* should apply, because 'rights in property are ultimately at stake'.⁷⁷ But this position is not universally accepted: notably, the Court of Appeal of England and Wales in *Lightning v Lightning Electrical Contractors Ltd*⁷⁸ and the New South Wales Court of Appeal in *Damberg v Damberg*⁷⁹ both applied the *lex fori* as opposed to the *lex situs* to apparent gifts resulting trusts. Although the reason for applying the *lex fori* was not explicitly stated in these cases, it has been argued that the courts had operated under the assumption that the *lex fori* would apply because the claims were inherently equitable.⁸⁰ But, as discussed earlier, the '*lex fori* only' approach ought not apply to resulting and constructive trusts.

Disputes concerning apparent gifts resulting trusts are functionally property disputes, and therefore the *lex situs* ought to apply.⁸¹ To make this point, it is necessary to emphasise that resulting trusts arise in response to A's *unilateral* negative intention: it is A and A alone whose lack of intention to benefit B gives rise to a resulting trust. The trust has nothing to do with B, whose consent, agreement, or acquiescence has no implication on whether a resulting trust arises. It follows that a resulting trust is not concerned with any fault on B's part, as demonstrated by the fact that B's ignorance of the receipt of property will not prevent a resulting trust from arising.⁸² Since personal liabilities do not arise unless a recipient has knowledge of the circumstances surrounding the transfer,⁸³ it follows that an apparent gift resulting trust is not at all concerned with making B do something *equivalent* to giving up property to A. Rather, it arises precisely to compel B to give

⁷⁴ Hayton, Matthews and Mitchell (n 68) 1360–1 [100.69].

⁷⁵ Yeo (n 14) [6.05]–[6.08]; Mapesbury and Harris (n 6) [29–077], [29–081]; Chong (n 9) 877; Stevens (n 19) 154; Jonathan Harris, 'The Trust in Private International Law' in James Fawcett (ed), *Reform and Development of Private International Law: Essays in Honour of Sir Peter North* (Oxford University Press, 2002) 187, 187, 212.

⁷⁶ *Whung v Whung* (2011) 258 FLR 452, 486 [198] (O'Reilly J). See also *Martin v Secretary of State for Work and Pensions* [2009] WLR (D) 346; *Ross v Ross* (1892) 23 OR 43; *McNeil v Sharp* [1921] 62 SCR 504; *Chartered Trust Co v Benjamins* [1965] SCR 251.

⁷⁷ Mapesbury and Harris (n 6) [29–081].

⁷⁸ *Lightning v Lightning Electrical Contractors Ltd* [1998] NPC 71 ('*Lightning*').

⁷⁹ *Damberg v Damberg* (2001) 52 NSWLR 492 ('*Damberg*').

⁸⁰ See Davies et al (n 18) 835 [34.46] (commenting on *Damberg* (n 79)); *Lightning* (n 78)).

⁸¹ Modified as necessary in certain cases depending on the precise nature of the property in question: see Davies et al (n 18) ch 32.

⁸² See, eg *Re Vinogradoff* [1935] WN 68; *Port of Brisbane Corporation v ANZ Securities Ltd* (No 2) [2003] 2 Qd R 661, 678–9 [31] (McPherson JA).

⁸³ Ying Khai Liew and Charles Mitchell, 'The Creation of Express Trusts' (2017) 11(2) *Journal of Equity* 133, 142–8; Liew, 'Constructive Trusts and Discretion' (n 44) 976–7. A claim based on knowledge is a knowing receipt claim, and for choice of law purposes the claim would be characterised as a tort: see discussion below at nn 147–156 and accompanying text.

up property to A. It then becomes clear that this resulting trust is ultimately a property dispute and ought to be treated as such for choice of law purposes.

Before moving on, it is worth considering Forrester's criticism that the *lex situs* is too 'rigid and does not adequately give effect to the reasonable expectations of the parties'.⁸⁴ This criticism is, unfortunately, based on a fundamental misunderstanding of the nature of resulting trusts. As discussed in the preceding paragraph, a resulting trust responds to A's unilateral intention, and therefore is not *relationship*-based, nor does it generate *expectations* between two parties. Thus, the 'rigidity' in applying the *lex situs* is hardly unjustified if any proposed flexibility does not accord with the true nature of a resulting trust. Indeed, this is precisely the criticism that can be levied against Forrester's own suggested choice of law rule for apparent gift resulting trusts. He proposes that these trusts should be governed by the proper law of the relationship leading to the claim, whereby the court should consider 'the *situs* of the trust assets, the place of residence of the trustee and beneficiary, and the place of the transfer of money used for the purchase price' in determining the law with the closest connection to the resulting trust.⁸⁵ It is not obvious that the uncertainty of this approach is justified, in view of the true nature of resulting trusts. More worryingly, Forrester's suggestion presupposes that a resulting trust already exists — this much is clear where he speaks of the 'trustee' and 'beneficiary' — when, in fact, the existence of the resulting trust can only be determined after the applicable law is first ascertained. In sum, there seems to be no good reason to doubt the application of the *lex situs* in relation to apparent gift resulting trust cases.

IV Constructive Trusts

Constructive trusts arise in a wide variety of distinct circumstances, and therefore, unlike resulting trusts, constructive trusts are not susceptible to any unitary rationale.⁸⁶ But it does not follow that it is necessary — or, indeed, appropriate — to undertake a choice of law analysis on an ad hoc basis without having regard for the law of constructive trusts as a whole. An ad hoc approach risks inconsistent and unprincipled results because, when considered in a vacuum, the nature of constructive trusts is elusive. This poses difficulties for determining the real issue at stake. As observed in *Nygh's Conflict of Laws in Australia*:

The matter is rendered particularly complex because ... a constructive trust which, to an Australian (or perhaps New South Wales) lawyer's eyes will be unmistakably 'equitable', may be, to an English lawyer's eyes, restitutionary whilst to a lawyer from a civil law system, a constructive trust, so-called, may

⁸⁴ Forrester (n 9) 210.

⁸⁵ Ibid 220.

⁸⁶ See Gbolahan Elias, *Explaining Constructive Trusts* (Oxford University Press, 1990); Liew, *Rationalising Constructive Trusts* (n 3); Ben McFarlane, 'Constructive Trusts Arising on a Receipt of Property *Sub Conditione*' (2004) 120 (October) *Law Quarterly Review* 667; Simon Gardner, 'Reliance-Based Constructive Trusts' in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing, 2010) 63.

well not exist at all but may have a functional equivalent which, in civil law terminology, is not regarded as either equitable or restitutionary.⁸⁷

The discussion below will demonstrate how analysing constructive trusts in the light of the trichotomy discussed above — by categorising claims as claims for either replicative, reflective, or transformative remedies — can lead to a proper and systematic understanding of the choice of law rules for constructive trusts. While it is impossible exhaustively to discuss every situation in which constructive trusts have arisen, the discussion aims to cover as many as possible.

A Replicative Constructive Trusts

There are several established situations in which replicative constructive trusts arise. In each of these situations, the plaintiff makes a claim for a constructive trust that restates and enforces his or her primary right arising from a non-wrong event that arose from the moment the relevant events occurred. For choice of law purposes, it is the primary right-duty relationship and the event giving rise to it that calls for characterisation. Six such situations are discussed below.

First, there is a group of doctrines that may be labelled ‘agreement-based constructive trusts’.⁸⁸ It includes secret trusts,⁸⁹ mutual Wills,⁹⁰ the doctrine in *Rochevoucauld v Boustead*,⁹¹ and the doctrine in *Pallant v Morgan*.⁹² These doctrines have in common the events of promise and reliance, of a particular kind: B informally promises to hold property on trust for A or for C, and A acts in some way that provides B an advantage in acquiring the property — in most cases, by transferring the legal title to B — in reliance on B’s promise. From the moment those events occur, primary rights and duties arise, placing the parties in a constructive trust relationship. A plaintiff’s claim for a constructive trust remedy in these cases is conceptually akin to a declaration that that relationship had arisen pre-trial.

The trusts would be express trusts but for the lack of compliance with the formalities required for creating a valid and enforceable express trust.⁹³ Indeed, the

⁸⁷ Davies et al (n 18) 549–50 [21.2].

⁸⁸ See Ying Khai Liew, ‘Making Sense of Agreement-Based Constructive Trusts in the Commercial Context’ (2022) 4 *Journal of Business Law* 330.

⁸⁹ *Blackwell v Blackwell* [1929] AC 318; *Voges v Monaghan* (1954) 94 CLR 231. Typically, A names B as apparent legatee in A’s Will, leaving the Will unchanged in reliance on B’s informal promise to hold the legacy for the benefit of C.

⁹⁰ *Birmingham v Renfrew* (1937) 57 CLR 666. Typically, A dies leaving property in A’s Will to B in reliance on B’s promise to leave the property at B’s death to C.

⁹¹ *Rochevoucauld v Boustead* [1897] 1 Ch 196, 206 (Lindley LJ). See, eg, *ISPT Nominees Pty Ltd v Chief Commissioner of State Revenue* (2003) 53 ATR 527, 602–3 [329] (Barrett J) (‘*ISPT Nominees*’); *Ciaglia v Ciaglia* (2010) 269 ALR 175, 192 [72] (White J). Typically, A relies on B’s informal promise to hold A’s land on trust for A by transferring the legal title to that land to B.

⁹² *Pallant v Morgan* [1953] 1 Ch 43. See, eg, *Comlin Holdings Pty Ltd v Metlej Developments Pty Ltd* [2018] NSWSC 761, [189]–[190] (Parker J). See also Ying Khai Liew and Cristina Poon, ‘The “*Pallant v Morgan* Equity” in Australia: Substantive or Superfluous?’ (2021) 29(1) *Australian Property Law Journal* 74. Typically, one party (B) who is interested in purchasing a property informally promises to cede some part of the property yet to be acquired to another competitor (A), and A relies on that promise by refraining from attempting to procure the property.

⁹³ See *Property Law Act 1958* (Vic) s 53(1)(b); *Civil Law (Property) Act 2006* (ACT) s 201(2); *Conveyancing Act 1919* (NSW) s 23C(1)(b); *Law of Property Act 2000* (NT) s 10(1)(b); *Property*

trusts are functionally akin to express trusts, in that they respond to a positive intention to subject B to duties under a trust. It follows that the choice of law rules applicable to express trusts should apply here.⁹⁴ This would entail an application of the rules under the *Hague Trusts Convention*, should the circumstances fall within its scope. In particular, art 3 requires that the trust be ‘evidenced in writing’; this would exclude purely oral agreements, but include those in relation to which there is writing, even if not signed as required under domestic law.⁹⁵ Should the constructive trust fall outside the scope of the Convention, the common law rules for express trusts should apply; but the differences are slight, if any: ‘the Convention is regarded as consistent with the common law on almost all points’.⁹⁶

Situations two and three can be dealt with together. In one situation, where parties enter into a specifically enforceable contract for sale, the seller, B, holds the property on constructive trust for the buyer, A, until legal title to the property is conveyed.⁹⁷ In another situation, where B agrees to convey future property to A and A has provided valuable consideration, a constructive trust arises for A’s benefit if and when B eventually acquires the property.⁹⁸

It seems clear that these situations should be categorised as contracts for choice of law purposes. This outcome is easy to explain in relation to the former situation. Not only is it consistent with case law,⁹⁹ it also rightly reflects the fact that, in this context, the primary relationship is a contractual relationship, with the constructive trust a feature of equity’s concurrent jurisdiction at play. This is why the entering into a valid common law contractual relationship is a precondition for equity to intervene at all. In relation to the latter situation, although a purported assignment of future property is wholly void, where B provides valuable consideration then the assignment is ‘regarded in equity as a contract’¹⁰⁰ and thus binding on the basis that ‘equity considers as done that which ought to be done’.¹⁰¹ Here, again, the primary

Law Act 1974 (Qld) s 11(1)(b); *Law of Property Act 1936* (SA) s 29(1)(b); *Conveyancing and Law of Property Act 1884* (Tas) s 60(2)(b); *Property Law Act 1969* (WA) s 34(1)(b).

⁹⁴ As suggested by a majority of commentators: see, eg, Mapesbury and Harris (n 6) [20–085]; David Hayton, ‘The Hague Convention on the Law Applicable to Trusts and on Their Recognition’ (1987) 36(2) *International and Comparative Law Quarterly* 260, 264; Harris, *The Hague Trusts Convention* (n 63) 130.

⁹⁵ See above n 93.

⁹⁶ Garnett (n 19) 382. See also *Augustus* (n 15) 252 (Walsh J); *Ballard v AG (Vic)* (2010) 30 VR 413, 418 [22] (Kyrou J); *Chellaram v Chellaram (No 2)* [2002] 3 All ER 17 (Ch D).

⁹⁷ *Holroyd v Marshall* (1862) 11 ER 999; *PSAL Pty Ltd v Raja* [2016] WASC 295, [69] (Pritchard J); *ISPT Nominees* (n 91) 598–601 [307]–[325] (Barrett J). See also *Stern v McArthur* (1988) 165 CLR 489, 522–4 (Deane and Dawson JJ); PG Turner, ‘Understanding the Constructive Trust between Vendor and Purchaser’ (2012) 128 (October) *Law Quarterly Review* 582, 596–600.

⁹⁸ *Holroyd v Marshall* (n 97); *Tailby v Official Receiver (Trustee of the Property of HG Izon, a bankrupt)* (1888) 13 App Cas 523, 530 (Lord Herschell) (‘Tailby’); *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296, 403 [504] (Finn, Stone and Perram JJ) (‘Grimaldi’); *Palette Shoes Pty Ltd (in liq) v Krohn* (1937) 58 CLR 1, 26 (Dixon J) (‘Palette Shoes’).

⁹⁹ See *Murakami* (n 16) 404 [141] (Spigelman CJ, McColl JA agreeing at 408 [166], Young JA agreeing at 408 [167]); *Luxe Holding Ltd v Midland Resources Holding Ltd* [2010] EWHC 1908 (Ch).

¹⁰⁰ *Tailby* (n 98) 543.

¹⁰¹ *Ibid* 546, quoted in *Palette Shoes* (n 98) 26.

relationship is — at least functionally — treated as a contract, which suggests that the choice of law rules applicable to contracts ought to apply.¹⁰²

The fourth and fifth situations can also be taken together. The fourth is the rule in *Corin v Patton*: a constructive trust arises in A's favour when B does everything necessary to effect a transfer of property to A and equips A to achieve the transfer of legal title, despite the fact that the legal transfer has not yet occurred.¹⁰³ The fifth situation is the 'common intention constructive trust', which arises to give effect to two parties' express or implied common intention concerning their beneficial interests in a property — usually a family home — where the plaintiff has detrimentally relied on that common intention.¹⁰⁴

It is submitted that both situations ought to attract the choice of law rules applicable to property disputes. In relation to the rule in *Corin v Patton*, this doctrine can be understood essentially to be concerned with identifying the precise point in time at which B successfully and finally exercises his or her power to transfer property to A such that it is beyond recall. As Mason CJ and McHugh J commented in *Corin v Patton*:

Just as a manifestation of intention plus sufficient acts of delivery are enough to complete a gift of chattels at common law, so should the doing of all necessary acts by [B] be sufficient to complete a gift in equity. The need for compliance with subsequent procedures such as registration, procedures which [A] is able to satisfy, should not permit [B] to resile from the gift.¹⁰⁵

Thus, this doctrine is ultimately concerned with determining rights in property, and the *lex situs* ought to apply. In relation to the common intention constructive trust, some commentators suggest that the choice of law rules for property¹⁰⁶ ought to apply, while others suggest that the trust should be treated as an express trust.¹⁰⁷ The latter approach can find support in *Allen v Snyder*, where Glass JA analysed the common intention constructive trust as 'an express trust which lacks writing' and was of the view that it shared the same rationale as the doctrine in *Rochevoucauld v Boustead*.¹⁰⁸ However, the property characterisation provides a more realistic view of the doctrine. For the purposes of inferring common intention, it is enough simply for the plaintiff to have contributed in a way that facilitated the acquisition of the property¹⁰⁹ or that improved the property. This approach is not comparable to the kind of evidence necessary to demonstrate an intention to create an express trust: contributions or improvements alone would not indicate any intention to assume duties and create rights under a trust. The common intention constructive trust can also be contrasted with the agreement-based constructive trust, in relation to which

¹⁰² That is, the proper law of the contract will apply: this may be expressly or impliedly chosen by the parties, otherwise it is the law with the closest connection to the contract.

¹⁰³ *Corin v Patton* (1990) 169 CLR 540; also commonly known as the rule in *Re Rose* following the decision in *Re Rose (deceased)* [1952] Ch 499. See *Sydney Futures Exchange Ltd v Australian Stock Exchange Ltd* (1995) 56 FCR 236, 270 (Gummow J).

¹⁰⁴ *Allen v Snyder* (1977) 2 NSWLR 685, 690 (Glass JA, Samuels JA agreeing at 697); *Austin v Keele* (1987) 10 NSWLR 283, 290–1 (Lord Oliver for the Court) (Privy Council).

¹⁰⁵ *Corin v Patton* (n 103) 558.

¹⁰⁶ Mapesbury and Harris (n 6) [29–077]; Harris, 'Constructive Trusts and PIL' (n 10) 967.

¹⁰⁷ Hayton, Matthews and Mitchell (n 63) 1366 [100.83]; Hayton (n 94) 265.

¹⁰⁸ *Allen v Snyder* (n 104) 692. See also Ford et al (n 8) [22A.420].

¹⁰⁹ *Allen v Snyder* (n 104) 690 (Glass JA).

courts have insisted that the relevant intention must be firmly expressed: for example, that the parties' beneficial interests must be 'sufficiently defined',¹¹⁰ or that 'an assurance' as opposed to a mere 'friendly gesture' is necessary.¹¹¹ Only firmly expressed intentions approximate, in a functional sense, to the intention necessary for creating an express trust. Therefore, it is submitted that the common intention constructive trust doctrine is functionally a doctrine governing property disputes, which ought to attract the *lex situs*.

Finally, in the sixth situation, a constructive trust may arise in A's favour when B receives property mistakenly transferred from A, for example where B acquires knowledge of the mistake while the property remains in hand.¹¹² It might be thought that mistaken transfers, being the archetypal restitution claim for unjust enrichment, should attract the choice of law rules for restitution or unjust enrichment. But such an analysis, while now straightforward in English law due to the *Rome II Regulation*,¹¹³ is rendered complicated under Australian law for two reasons.

First, the High Court of Australia has rejected unjust enrichment as a principle capable of direct application in domestic law.¹¹⁴ This view complicates matters at the private international law level, as discussed earlier.¹¹⁵ Certainly, the ambiguous state of domestic law does not make it impossible for Australian courts to recognise restitution or unjust enrichment as a choice of law category. However, it makes it significantly more unlikely, given the difficulty of identifying when precisely a dispute raises such an issue.

Second, even if it is accepted that restitution or unjust enrichment has its own set of choice of law rules, it is not at all obvious what connecting factor it would entail. In England, before this area of law was superseded by the *Rome II Regulation*, the connecting factor was the law of the place where the enrichment occurred.¹¹⁶ In Australia, obiter dictum in one case suggested that the applicable law for unjust enrichment 'is the law of the place with which the obligation to make the payment has the closest connection'.¹¹⁷ But the accuracy of this statement is questionable given that the passage purported to follow the connecting factor applied in a High Court decision that, when closely examined, was concerned not with restitution by way of unjust enrichment, but restitution by way of a statutory right to indemnity.¹¹⁸

¹¹⁰ *Bannister v Bannister* [1948] 2 All ER 133, 136.

¹¹¹ *Pallant v Morgan* (n 92) 46.

¹¹² *Wambo Coal Pty Ltd v Ariff* (2007) 63 ACSR 429, 437 [42] (White J); *Westpac Banking Corporation v Ollis* [2007] NSWSC 956, [18]–[26] (Einstein J).

¹¹³ See Mapesbury and Harris (n 6) r 257; but cf Briggs, 'Misappropriated and Misapplied Assets' (n 30).

¹¹⁴ *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560; *Muschinski v Dodds* (1985) 160 CLR 583, 617 (Deane J) ('*Muschinski*').

¹¹⁵ See above text accompanying n 39.

¹¹⁶ *Davies et al* (n 18) 551 [21.5]. This was said to be subject to two exceptions: if the restitutionary obligation arose in connection with a contract then the proper law of the contract would apply; or if it arose in connection with a transaction involving land then the *lex situs* would apply: Mapesbury and Harris (n 6) [36–008].

¹¹⁷ *Benson v Rational Entertainment Enterprises Ltd* (2018) 355 ALR 671, 689 [103] (Leeming JA); Sherborne suggests that the 'proper law of the restitutionary obligation' ought to apply, although there is no Australian authority for this proposition: Andreas Karl Edward Sherborne, 'Restitution in the Conflict of Laws: Characterization and Choice-of-law in Australia' (2017) 13(1) *Journal of Private International Law* 1, 25–8. Moreover, the Sherborne article predates the decision in *Benson*.

¹¹⁸ *Sweedman* (n 40).

In the mistaken payment case, there is no obligation to make payment in the first place for this connecting factor to apply coherently. Thus, in the absence of clarity, the surer path may well be to treat the case as one of property, attracting the *lex situs*, on the basis that this area of law functions to determine the circumstances in which B ought to (re)transfer property in B's name to A.

B *Reflective Constructive Trusts*

In certain other situations, constructive trusts are reflective in nature; that is, they enforce the plaintiff's secondary rights. Such claims are wrongs-based: there is always a pre-existing relationship between the parties, the primary duty of which the defendant has breached. The remedy imposed aims to correct the effects of the defendant's wrongdoing. To determine the applicable choice of law rules, a two-step analysis is apposite.¹¹⁹ If the primary relationship in relation to which the defendant breached a duty can be categorised within a pre-existing category of choice of law rules, then those rules should apply because the primary relationship is the source of the plaintiff's secondary right. After all, the secondary duty is but 'a rational echo of the primary [duty], for it exists to serve, so far as may still be done, the reasons for the primary [duty] that was not performed when its performance was due'.¹²⁰ However, it may be that the primary relationship is not susceptible to being so categorised. They should then attract a tort classification, because the law of tort functions to identify wrongs; namely 'secondary obligations generated by the infringement of primary rights'.¹²¹ In Australia, this classification entails an application of the *lex loci delicti commissi*.¹²²

One situation in which reflective constructive trusts may be imposed is where a fiduciary makes a gain in breach of his or her fiduciary duty: a constructive trust may arise over the gains in favour of the principal. It is first necessary to distinguish between two types of cases. In one type of case, the principal has a 'proprietary base'¹²³ or a 'pre-existing proprietary right to the profits'.¹²⁴ This includes cases where the gains represent the original or traceable proceeds of the principal's property, and cases where the gains represent the proceeds of the exploitation of an opportunity that ought to have been exploited in favour of the principal. In another type of case, the gains represent 'extant property which a delinquent fiduciary ... has derived on their own account as a result of their wrongdoing'.¹²⁵ In that type of case — where the gains are typically bribes or secret commissions — any constructive

¹¹⁹ For a similar view, see Briggs, 'Misappropriated and Misapplied Assets' (n 30) 77.

¹²⁰ John Gardner, 'What is Tort Law For? Part 1: The Place of Corrective Justice' (2011) 30(1) *Law and Philosophy* 1, 40. See also Mapesbury and Harris (n 6) [36-070].

¹²¹ Robert Stevens, *Torts and Rights* (Oxford University Press, 2009) 2.

¹²² *John Pfeiffer* (n 40) 535-6 [72]-[74] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ); *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491. Note, also, that whenever an application of the *lex loci delicti commissi* points to a foreign legal system, the entirety of that legal system, including its choice of law and renvoi rules, will apply (the 'double renvoi' approach): *Neilson v Overseas Projects Corporation of Victoria Ltd* (2005) 223 CLR 331 ('Neilson').

¹²³ Peter Birks, *An Introduction to the Law of Restitution* (Oxford University Press, rev ed, 1989) 388.

¹²⁴ Roy Goode, 'Proprietary Liability for Secret Profits: A Reply' (2011) 127 (April) *Law Quarterly Review* 493, 494.

¹²⁵ *Grimaldi* (n 98) 360 [256] (Finn, Stone and Perram JJ).

trust imposed is transformative in nature, because the principal will not have had a pre-trial substantive *right* that a fiduciary should receive a bribe or secret commission for the principal.¹²⁶ The latter type of case is dealt with in Part IV(C).

In the former type of case, the constructive trusts are not transformative in nature, because the High Court has held on multiple occasions that constructive trusts invariably arise, with little remedial discretion exercised.¹²⁷ Instead, they are reflective in nature, arising in response to breaches of fiduciary duties. Here, the two-step analysis discussed in the preceding paragraph can be applied. In the vast majority of cases, where a fiduciary duty arises out of a contractual relationship, the choice of law rules applicable to contracts will apply.¹²⁸ But a fiduciary relationship may also arise from a non-contractual relationship.¹²⁹ In this context, the Federal Court of Australia has suggested that the *lex fori* should always apply, subject to the court making ‘reference’ to ‘the attitude of the law of the place where the circumstances arose or the conduct was undertaken’.¹³⁰ However, as discussed earlier, this ‘*lex fori* only’ approach must be rejected. The better approach is to apply the choice of law rules for tort, in recognition of the fact that what is claimed is a reflective constructive trust to correct the consequence of the fiduciary’s breach of duty owed to the principal.¹³¹

Another situation in which reflective constructive trusts may be imposed is where proprietary estoppel arises. Where B induces A to assume that B will cede an interest in property he or she owns to A, and A detrimentally relies on that promise, courts exercise remedial discretion whereby a constructive trust or a lesser remedy may be imposed to correct the detriment or loss suffered by A.¹³² Again, the two-step analysis is apposite here.

In many cases the primary relationship between the parties can be said functionally to be one of contract. This characterisation would not reflect domestic common law, but the wider choice of law category that takes into account a civilian understanding of ‘contracts’ where offer, acceptance, and consideration are not necessary ingredients. Thus, where A’s induced assumption arises from a direct and express promise by B to A, the law applicable to the ‘contract’ would apply.

But induced assumptions may also arise from encouragement or acquiescence by B.¹³³ The appropriate analysis here is that the primary duty B has is

¹²⁶ See Joanna Bird, ‘Bribes, Restitution and the Conflict of Laws’ [1995] *Lloyd’s Maritime and Commercial Law Quarterly* 198.

¹²⁷ *Black v S Freedman & Co* (1910) 12 CLR 105 (‘*Black*’); *Chan v Zacharia* (1984) 154 CLR 178, 199 (Deane J); *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 107–8 (Mason J).

¹²⁸ *Paramasivam* (n 15) 503 (Miles, Leane and Weinberg JJ); *Murakami* (n 16) 403 [132] (Spigelman CJ, McColl JA agreeing at 408 [166], Young JA agreeing at 408 [167]). This is the proper law of the contract.

¹²⁹ See, eg, *Bulun Bulun v R & T Textiles Pty Ltd* (1998) 86 FCR 244.

¹³⁰ *Paramasivam* (n 15) 503 (Miles, Leane and Weinberg JJ).

¹³¹ See *Traxon Industries Pty Ltd v Emerson Electric Co* where French J applied the law of the place of the conduct giving rise to a breach of fiduciary duty, as opposed the place where the duties arose: (2006) 230 ALR 297, 309–10 [59] (‘*Traxon*’). See also Yeo (n 14) [7.24]–[7.72], ch 8.

¹³² See, eg, *Giumelli v Giumelli* (1999) 196 CLR 101; *Sidhu v Van Dyke* (2014) 251 CLR 505 (‘*Sidhu*’).

¹³³ See, eg, *McNab v Graham* (2017) 53 VR 311, 345–6 [111] (Tate JA); *Sidhu* (n 132) 511 [1] (French CJ, Kiefel, Bell and Keane JJ).

a duty to act reliably in relation to induced assumptions; and where B fails to do so, A suffers detriment — detriment having been defined as being ‘that which would flow from the change of position if the assumption were deserted that led to it’.¹³⁴ B then comes under a secondary duty to correct the consequences of the wrongdoing, in line with the aim of proprietary estoppel, which is to avoid detriment.¹³⁵ Since the primary relationship under which B incurs a duty to act reliably does not fit within any pre-existing category of choice of law rules, it is appropriate to characterise the case as a tort.¹³⁶

The same analysis can be applied to a number of other situations where it has been suggested (although with serious doubt cast in each case) that a constructive trust may arise. One of these is where a constructive trust arises to compel a thief to hold stolen property for the benefit of the victim.¹³⁷ Another is where a constructive trust arises to prevent a killer from benefiting from his or her victim’s property, to which the killer would otherwise have been entitled.¹³⁸ A third situation is where a constructive trust arises in relation to gains made in breach of confidence.¹³⁹ In each of these cases, if constructive trusts do indeed arise, they are reflective in nature because they arise due to the breach of a primary duty by the defendant. Unless the primary relationship can be said to arise out of a contractual relationship, as is often the case in relation to confidence,¹⁴⁰ these should all be characterised as a tort for choice of law purposes.¹⁴¹

Finally, something can be said about the so-called ‘*Barnes v Addy* liabilities’;¹⁴² namely, knowing receipt and knowing assistance. These accessory

¹³⁴ *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641, 674 (Dixon J) cited with approval in relation to equitable estoppel (which includes proprietary estoppel) in *Sidhu* (n 132) 528 [80] (French CJ, Kiefel, Bell and Keane JJ).

¹³⁵ *Walton Stores (Interstate) v Maher* (1988) 164 CLR 387, 404 (Mason CJ and Wilson J), 416 (Brennan J); *Commonwealth v Verwayen* (1990) 170 CLR 394, 412 (Mason CJ), 429 (Brennan J), 454 (Dawson J), 487 (Gaudron J), 500 (McHugh J).

¹³⁶ Note that Mapesbury and Harris suggests that property choice of law rules ought always to apply, on the basis that ‘[t]he doctrine has evolved to grant interests in land, or the right to use or occupy land, or to compensate for detrimental reliance on the encouragement or acquiescence of the defendant that the claimant would have rights over land.’: Mapesbury and Harris (n 6) [36–095]. However, this is to overlook the fact that the doctrine can, and has been, applied to other types of property, for example: cash; furniture; chattels (*Re Basham (Deceased)* [1986] 1 WLR 1498, 1500 (Mr Edward Nugee QC)); profits arising from a development (*Lloyd v Sutcliffe* [2007] EWCA Civ 153); beneficial interests under a trust (*Strover v Strover* [2005] EWHC 860 (Ch)); patents (*Yeda Research and Development Co Ltd v Rhône-Poulenc Rorer International Holdings Inc* [2008] 1 All ER 425, 434 [22] (Lord Hoffmann)); and publishing licences (*Motivate Publishing FZ LLC v Hello Ltd* [2015] EWHC 1554 (Ch), [61] (Birss J)).

¹³⁷ *Black* (n 127). Cf Robert Chambers, ‘Trust and Theft’ in Elise Bant and Matthew Harding (eds), *Exploring Private Law* (Cambridge University Press, 2010) 223.

¹³⁸ *Re Stone* [1989] 1 Qd R 351, 352 (McPherson J); *Ekert v Mereider* (1993) 32 NSWLR 729, 733 (Windeyer J). Cf Ian Williams, ‘How Does the Common Law Forfeiture Rule Work?’ in Birke Häcker and Charles Mitchell, *Current Issues in Succession Law* (Hart Publishing, 2016) 51, 56–62.

¹³⁹ *Australian Broadcasting Corporation v Lenah Game Meats* (2001) 208 CLR 199, 246–7 [102] (Gummow and Hayne JJ), 320 [311] (Callinan J). Cf Matthew Conaglen, ‘Thinking about Proprietary Remedies for Breach of Confidence’ [2008] (1) *Intellectual Property Quarterly* 82.

¹⁴⁰ Yeo (n 14) [8.76]–[8.77].

¹⁴¹ See *Traxxon* (n 131).

¹⁴² *Barnes v Addy* (1874) LR 9 Ch App 244.

liabilities give rise to personal, as opposed to proprietary, remedies,¹⁴³ and therefore are distinguishable from the other (proprietary) constructive trust doctrines discussed in this article. Nevertheless, it has become fashionable in Australia to speak of these liabilities as being part of the law of ‘constructive trusts’. This is due in no small part to the fact that knowing recipients and assistants are often referred to as persons ‘liable as ... constructive trustee[s]’;¹⁴⁴ and moreover, the High Court has said, in obiter dicta, that ‘the term “constructive trust” may be used not with respect to the creation or recognition of a proprietary interest but to identify the imposition of a personal liability to account upon a defaulting fiduciary’.¹⁴⁵ For the sake of completeness, therefore, a number of brief comments follow.

First, it is clear that these liabilities are wrongs-based.¹⁴⁶ Knowing recipients incur personal liability for breaching a primary duty not to retain proceeds of a trustee’s or fiduciary’s breach of duty with knowledge of the breach; and knowing assistants incur personal liability for breaching a primary duty not to assist knowingly in a trustee’s or fiduciary’s breach of duty. In particular, the High Court has explicitly rejected the strict liability, unjust enrichment analysis of knowing receipt liability.¹⁴⁷ For this reason, the English approach of characterising knowing receipt claims as concerning restitution on the basis that the claim is ‘the counterpart in equity of the common law action for money had and received ... [b]oth can be classified as receipt-based restitutionary claims’ does not apply in Australia.¹⁴⁸

Second, although some commentators have argued to the contrary, as a matter of Australian authority, a recipient or assistant is liable in respect of his or her own wrongdoing, as opposed to the liability being duplicative of the trustee’s or fiduciary’s liability.¹⁴⁹ For this reason, knowing receipt and knowing assistance liabilities cannot be characterised as express trusts or contracts for choice of law purposes, since these liabilities do not find their source in the original trust or contractual relationship which the trustee or fiduciary had breached.

Ultimately, then, a tort characterisation is again appropriate:¹⁵⁰ this recognises that the recipient’s or assistant’s liability arises due to their wrongdoing.

¹⁴³ Liew, ‘Constructive Trusts and Discretion’ (n 44) 975–7.

¹⁴⁴ See, eg, *Grimaldi* (n 98) 439 [667] (Finn, Stone and Perram JJ).

¹⁴⁵ *Bofinger* (n 46) 290 [47] (Gummow, Hayne, Heydon, Kiefel and Bell JJ).

¹⁴⁶ Charles Mitchell, ‘Dishonest Assistance, Knowing Receipt, and the Law of Limitation’ [2008] Conv 226, 226–7; Joachim Dietrich and Pauline Ridge, *Accessories in Private Law* (Cambridge University Press, 2016) 221–3; *Farah Constructions* (n 45) 158–9 [156] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *Grimaldi* (n 98) 362–3 [267] (Finn, Stone and Perram JJ). Cf Charles Mitchell and Stephen Watterson, ‘Remedies for Knowing Receipt’ in Charles Mitchell (ed), *Constructive and Resulting Trusts* (Hart Publishing, 2010) 115.

¹⁴⁷ *Farah Constructions* (n 45) 156–8 [150]–[155] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

¹⁴⁸ *El Ajou v Dollar Land Holdings plc* [1993] 3 All ER 717, 736 (Millett J).

¹⁴⁹ *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427, 457–8 [106] (Gummow ACJ, Hayne, Crennan and Bell JJ); Dietrich and Ridge (n 146) 228–9. Cf Steven Elliott and Charles Mitchell, ‘Remedies for Dishonest Assistance’ (2004) 67(1) *Modern Law Review* 16; *Ultraframe (UK) Ltd v Fielding* [2005] EWHC 1638 (Ch), [1600] (Lewison J).

¹⁵⁰ See also *OJSC Oil Company Yugraneft v Abramovich* [2008] EWHC 2613 (Comm); *Fiona Trust & Holding Corporation v Privalov* [2010] EWHC 3199 (Comm), [142]–[181]; Ford et al (n 8) [25.7410]; Yeo (n 14) [7.24]–[7.72].

C *Transformative Constructive Trusts*

Finally, certain constructive trusts are transformative in nature; that is, their imposition follows from the court's exercise of a wide-ranging remedial discretion, taking into account considerations extraneous to the plaintiff's and defendant's pre-trial rights and duties. These are often labelled 'remedial constructive trusts'. It is of foremost importance to note that what calls for characterisation here is squarely the constructive trust as a *remedy*, as distinct from the claim from which the discretion to impose the remedy arises. Where the imposition of a transformative constructive trust is an option open to the court, its availability presupposes that the plaintiff has had a successful claim against the defendant: it is only where this is so that the question of the appropriate *remedy* will arise. This is unlike the replicative and reflective constructive trusts discussed earlier, where the remedy is inextricably linked to the plaintiff's pre-trial rights and therefore an analysis of those rights is indicative for choice of law purposes.

Consider two examples. The first is what may be labelled the 'joint endeavour doctrine':¹⁵¹ where two parties have contributed towards, or pooled resources for the purposes of, a joint endeavour that has prematurely and unforeseeably failed or terminated without any attributable blame, a remedial constructive trust may be imposed at the court's discretion to prevent the defendant from unconscionably retaining the benefit of the property contributed by the plaintiff.¹⁵² The second is in the context of bribes and secret commissions received by an errant fiduciary — the liability in relation to which, as mentioned above in Part IV(B), cannot be sourced in any substantive *right* of the principal to such gains.

In both situations, the claim itself is a separate matter from the imposition of a remedial constructive trust, and this is obvious from the fact that a successful claim is a precondition for the court's consideration for imposing such a trust. One way to understand this is to observe that a successful plaintiff will at a minimum obtain a personal remedy against the defendant; the separate question then arises as to whether the imposition of a constructive trust is, in addition, appropriate. It is only in answering this question that third-party considerations come into the picture: 'the legitimate claims of third parties [must not be] adversely affected';¹⁵³ a constructive trust will only be imposed if 'no third party issue arises'.¹⁵⁴ For choice of law purposes, then, the applicable law that determines whether a remedial constructive trust will be imposed is separate from the question of what choice of law rules should apply to determine whether the plaintiff successfully establishes his or her claim. This is consistent with the transformative nature of these constructive trusts: because their imposition is not significantly informed by the parties' pre-trial rights and duties, nothing is gained from characterising the

¹⁵¹ See generally Ying Khai Liew, 'The "Joint Endeavour Constructive Trust" Doctrine in Australia: Deconstructing Unconscionability' (2021) 42(1) *Adelaide Law Review* 73.

¹⁵² *Muschinski* (n 114) 620 (Deane J).

¹⁵³ *Ibid* 623.

¹⁵⁴ *Grimaldi* (n 98) 423 [583] (Finn, Stone and Perram JJ). See also *Suzlon Energy Ltd v Bangad* [2014] FCA 1105, [75] (Rares J); *Disctronics Ltd v Edmonds* [2002] VSC 454, [213] (Warren J).

plaintiff's claim-right. Instead, the question is which choice of law rule ought to apply to the constructive trust as a remedy.

On one view, it might be said that the *lex causae* should apply. On this view, remedial constructive trusts are classified as 'substantive' (thus attracting the *lex causae*) as opposed to 'procedural' (thus attracting the *lex fori*). In support of this view, Yeo has suggested that only a 'thin line' separates remedial and non-remedial ('institutional') constructive trusts, and therefore both should be regarded as 'substantive law, even if the trust is labelled in domestic law as remedial'.¹⁵⁵ Garnett, too, has written that this view is supported by the fact that a constructive trust 'is closely linked to the rights and liabilities of the parties as it involves the imposition of an interest over property and has limited relevance to the conduct of court proceedings'.¹⁵⁶ In addition, there are a number of decisions in Commonwealth jurisdictions that expressly adopt or assume the classification of constructive trusts as substantive.¹⁵⁷

It seems right that transformative constructive trusts are substantive as opposed to procedural in nature. This obviously follows if the concept of 'procedural' law is narrowly confined to those rules that concern court proceedings or the administration of justice:¹⁵⁸ transformative constructive trusts have nothing to do with such rules.

Nevertheless, the *lex fori* ought always to apply. Harris has argued that this sort of approach 'ignore[s] the law applicable to the underlying obligation' and 'distort[s] the nature of the property rights that would or would not be created by that law'.¹⁵⁹ But his argument glosses over the fact that transformative constructive trusts do not relate to any 'underlying obligation' in the same way as replicative and reflective constructive trusts do. When the distinctively transformative nature of remedial constructive trusts is borne squarely in mind, three reasons can be found for applying the *lex fori*.

The first reason is that the award of remedial constructive trusts falls within the 'formative jurisdiction' of the forum court, which arguably provides a *lex fori* exception to matters of substance. This is based on Kahn-Freund's distinction between 'declaratory' and 'formative' proceedings.¹⁶⁰ In declaratory proceedings, the aim of a judgment is 'to enforce rights and obligations' and the judge 'does not

¹⁵⁵ Yeo (n 14) [4.86].

¹⁵⁶ Richard Garnett, *Substance and Procedure in Private International Law* (Oxford University Press, 2012) 306 [10.21]. See also the Australian High Court decision in *John Pfeiffer* (n 40) 543 [99] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ): 'matters that affect the existence, extent or enforceability of the rights or duties of the parties to an action are matters that, on their face, appear to be concerned with issues of substance'.

¹⁵⁷ See, eg, *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd* [1981] Ch 105; *Bank of Ireland v Bell* [2010] EWHC 1872 (Comm); *Murakami* (n 16); *To Group Co Ltd Xiamen King v Eton Properties Ltd* [2010] HKCFI 236, [107].

¹⁵⁸ This is Garnett's thesis: see Garnett (n 156). See also *John Pfeiffer* (n 40) 543[99] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).

¹⁵⁹ Harris, 'Constructive Trusts and PIL' (n 10) 968.

¹⁶⁰ Kahn-Freund (n 31) 349–59. While this distinction is not explicitly recognised in the case law at present, Yeo has argued that this provides a reasonable explanation for why English courts never apply foreign law in certain claims (eg, divorce, custody, and guardianship) although these are not classified as public policy matters, or mandatory rules, or procedural issues: Yeo (n 14) [1.83].

create any new rights'; in formative proceedings, the judgment 'create[s] such rights and obligations afresh', and the judge's 'function is not declaratory, but creative, constitutive, formative.'¹⁶¹ This distinction indicates that replicative constructive trusts are declaratory, while claims for transformative constructive trusts are formative. Kahn-Freund also clarifies that '[a] judge does not ... take "formative" action if he enforces a right whose *content or extent* is, according to the foreign law which he applies, subject to judicial discretion.'¹⁶² This indicates that reflective constructive trusts, which may well allow for the exercise of discretion to determine the content of the remedy, are declaratory rather than formative. Kahn-Freund argues that formative proceedings invariably require the application of the *lex fori*. He explains that '[a] judge derives his powers [to create new rights] from the "judicial mandate", and the mandate derives wholly from the *lex fori*. No foreign law can add to or subtract from it'.¹⁶³ Moreover,

[a] court cannot change the rights and obligations of the parties without a specific mandate to do so. Failing it, the court has no jurisdiction. The facts which permit a court to act or compel it to do so circumscribe its jurisdiction, not the rights of the parties. Hence they cannot be determined by a foreign law...¹⁶⁴

If Kahn-Freund is right, then the availability of transformative constructive trusts falls to be determined by the *lex fori*.

The second reason for applying the *lex fori* is that the decision whether to impose a transformative constructive trust is invariably accompanied by the exercise of wide-ranging remedial discretion. It is trite that Australian courts will not exercise jurisdiction over 'matters largely for the discretion of [foreign] courts', that is, those matters 'involving a very large measure of discretion'.¹⁶⁵ Remedies involving the exercise of such discretion are to be distinguished from those remedies of the *lex causae* that arise as a question of 'fact',¹⁶⁶ which forum courts can ascertain and award to a successful plaintiff. For example, the determination of a sum payable under a contract that a foreign law requires to be determined 'according to the requirements of good faith, ordinary usage being taken into consideration' and 'having regard to all the circumstances of the case'¹⁶⁷ is ascertainable and can be awarded in the forum. This distinction suggests that those constructive trusts that are replicative and reflective in nature can be treated as questions of 'fact' to which a foreign law may apply, depending on the applicable choice of law rules. Conversely, a transformative constructive trust, even if it may be awarded under a foreign *lex causae*, cannot be awarded in the forum, due to the extensive discretion it entails. If so, then *in effect* the availability of transformative constructive trusts is a matter to which the *lex fori* will always apply.

¹⁶¹ Kahn-Freund (n 31) 350.

¹⁶² Ibid 352 n 788 (emphasis added).

¹⁶³ Ibid 352.

¹⁶⁴ Ibid 355.

¹⁶⁵ *Phrantzes v Argenti* [1960] 2 QB 19, 35 (Lord Parker CJ). See also *Re Paulin* [1950] VLR 462, 465 (per Sholl J); *Neilson* (n 122) 392–3 [191] (Kirby J).

¹⁶⁶ *Kornatzki v Oppenheimer* [1937] 4 All ER 133, 138–9 (Farwell J).

¹⁶⁷ Ibid 138.

The third reason is that judges always take third-party considerations into account in determining whether to impose transformative constructive trusts.¹⁶⁸ Specifically, judges ask themselves whether it is appropriate to grant priority to the plaintiff to the detriment of a defendant's potential or actual creditors.¹⁶⁹ It is trite that the question of priority between creditors attracts the *lex fori*.¹⁷⁰ A key case reflecting this rule is *The Halcyon Isle*,¹⁷¹ a Privy Council decision that has been explicitly approved in Australia.¹⁷² One of the principles emerging from that case is that, in relation to claims by creditors against a debtor who has a limited fund insufficient to fulfil all the debts, the *lex fori* applies to determine priorities even though the creditors' claims might have attracted a different *lex causae*. Although, in *The Halcyon Isle* itself, there were indeed multiple creditors whose priorities would have attracted the laws of multiple jurisdictions had the *lex fori* rule not applied, this fact was not expressed to be a precondition. Rather, the *lex fori* applied because it fell to the forum courts to achieve 'evenhanded justice between competing creditors'.¹⁷³ The principle appears to be of application given that remedial constructive trusts are transformative in nature *precisely* because courts take into account the potential claims of other third parties over the property in which the plaintiff claims a proprietary interest. Therefore, the *lex fori* should apply.

If the above analysis is correct, then this also provides a stark warning to Australian courts in their development of the law of constructive trusts. Courts have demonstrated an increasing tendency of 'repackaging' replicative and reflective constructive trusts as transformative constructive trusts, by suggesting that replicative and reflective constructive trusts arise only as a consequence of a court's exercise of wide-ranging discretion following its creative or formative jurisdiction.¹⁷⁴ That approach is misleading and does not reflect the reality in which constructive trusts operate.¹⁷⁵ If taken seriously, it would eventually lead to the application of the *lex fori* in circumstances where different choice of law rules would otherwise apply. In substance, this would be to backslide into the '*lex fori* only' approach towards equitable claims, which was discussed above in Part II(A). For the reasons given in that earlier discussion, this approach ought to be rejected. Thus, in developing domestic laws, judges ought to be circumspect in extending the application of transformative constructive trusts, reserving the imposition of this sort of constructive trust for exceptional cases.

¹⁶⁸ Every single significant case relating to the imposition of remedial constructive trusts in Australia has emphasised the importance of third-party considerations: see Liew, 'Constructive Trusts and Discretion' (n 44) 997–9.

¹⁶⁹ See, eg, *Muschinski* (n 114) 623 (Deane J); *Grimaldi* (n 98) 422–3 [583] (Finn, Stone and Perram JJ).

¹⁷⁰ See, eg, *Ex Parte Melbourn* (1870) LR 6 Ch App 64; *Cook v Gregson* (1854) 61 ER 729; *The Colorado* [1923] P 102, 109 (Scrutton LJ).

¹⁷¹ *Bankers Trust International Ltd v Todd Shipyards Corp (The Halcyon Isle)* [1981] AC 221 ('*The Halcyon Isle*').

¹⁷² '*Sam Hawk*' (n 33).

¹⁷³ *The Halcyon Isle* (n 171) 230–1 (Lord Diplock).

¹⁷⁴ See Liew (n 44).

¹⁷⁵ *Ibid.*

V Conclusion

The Introduction to this article notes that certain commentators aspire towards a single choice of law approach for resulting and/or constructive trusts — that is, that disputes ought to be governed by a single rule.¹⁷⁶ Those holding this view might object to the pluralistic approach suggested in this article. But this article provides solid ground to refute such overly-inclusive accounts. Since what ultimately matters is that choice of law rules properly reflect the issue of the dispute in question, it is to the issue that we must look. A proper understanding of domestic law reveals that resulting and constructive trusts do not raise any unitary issue, but a plurality of issues — hence, the plurality of approaches.

But this is not to say that those rules are to be determined on a case-by-case basis with no overarching logic. As observed in this article, at the level of domestic law, resulting and constructive trusts can be categorised as ‘replicative’, ‘reflective’, and ‘transformative’ — a distinction that depends on whether courts are concerned with giving effect to the plaintiff’s primary right or secondary right, or with awarding a remedy that is not logically informed by such pre-trial rights at all. This trichotomy is capable of informing the choice of law rules that ought to apply to resulting and constructive trusts. In relation to those trusts that are replicative in nature, the ‘issue’ that calls for classification is to be found in the primary right-duty relationship between the parties and the events that give rise to it. Thus, for example, should the relationship arise from what is functionally a contract, express trust, or property relationship, then the relevant category of choice of law rules ought to apply. In relation to those trusts of a reflective nature, the primary relationship whose breach gives rise to the plaintiff’s secondary right should first be examined to see if it fits within a pre-existing choice of law category. Only where it does not should the case attract the choice of law rules applicable to tort claims, because the function of the law of tort is to identify wrongs. Finally, because transformative trusts are imposed as a remedy without being directly informed by the parties’ pre-trial rights and duties, they fall to be characterised as a *remedy*, to which the *lex fori* ought always to apply.

¹⁷⁶ See above n 9.

Case Note

LibertyWorks Inc v Commonwealth: The Implied Freedom of Political Communication and the Constitutionality of Australia's Foreign Influence Legislation

Rachael L Li*

Abstract

In *LibertyWorks Inc v Commonwealth*, the High Court of Australia considered a key aspect of Australia's counter foreign interference legislation — the foreign influence transparency scheme — and whether it was unconstitutional on the basis that it violated the implied freedom of political communication. The seven-member bench delivered five separate judgments. The Court upheld the impugned provisions of the *Foreign Influence Transparency Scheme Act 2018* (Cth), albeit tempered by two compelling dissents. In this case note, I argue that the legislation in its current form is likely to face a future challenge because its operative provisions go beyond the legitimate object of improving the transparency of foreign influence relationships. As the dissenting judgments reveal, the legislation establishes a scheme that confers broad discretions on administrative officials to collect and store information on a private register from which a limited subset of information is made available on a public website. I argue that the discrepancy between the two repositories of information reveals a legislative scheme that ostensibly promotes the benign object of transparency, but ultimately serves the more insidious function of government surveillance.

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* LLB candidate (Syd). Email: rachael.louise.li@gmail.com. ORCID iD:  <https://orcid.org/0000-0002-3636-3511>.

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I Introduction

The decision of the High Court of Australia in *LibertyWorks Inc v Australia* is the first to consider the constitutionality of Australia's foreign influence transparency scheme ('the Scheme'), which was introduced by the Turnbull Government in December 2017.¹ In 2019, LibertyWorks Inc ('LibertyWorks'), a Queensland non-profit think-tank, co-hosted the Conservative Political Action Conference ('CPAC') with the American Conservative Union ('ACU') in Sydney. Prior to the event the Attorney-General's Department asked LibertyWorks to consider whether it had registration obligations under the *Foreign Influence Transparency Scheme Act 2018* (Cth) ('*FITS Act*').² Afterwards, the Department issued a notice requiring LibertyWorks to produce information to enable it to determine whether registration obligations applied. LibertyWorks disputed the validity of the notice and refused to comply. In 2020, LibertyWorks mounted a constitutional challenge against select provisions of the legislation on the ground that they infringe the freedom of political communication implied under the *Australian Constitution* ('the implied freedom'). The High Court upheld the validity of the impugned provisions by a 5:2 majority comprising Kiefel CJ, Keane and Gleeson JJ, who issued a joint judgment, and Edelman J and Steward J who issued separate judgments. Gageler J and Gordon J dissented in separate judgments, holding that the provisions were invalid. While the legislation survived the challenge on this occasion, the *LibertyWorks* decision provides insight into its shortcomings and has broader implications for assessing the constitutionality of foreign influence laws in the future.

In this case note, I argue that the *FITS Act* is likely to face a future challenge because the provisions that establish a non-public register and confer broad discretions on officials to collect and share scheme information are disproportionate to the legitimate object of improving the transparency of foreign influence relationships.³ I evaluate two aspects of the Scheme that may provide fertile ground for a challenge.

The first aspect concerns the disconnect between two repositories of scheme information: a private register maintained by the Secretary and a public website that contains a far more limited subset of the information kept on the private register. The High Court was divided on the question of whether a gap exists between the two repositories and, if so, how much weight to accord to that disconformity when ascertaining the burden on the implied freedom. In this case note, I explain the significance of the split decision and argue that the view of the dissenting judges should be preferred.

The second aspect of the Scheme concerns the ambit of the Secretary's powers to deal with scheme information and, specifically, the Secretary's discretion

¹ *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490 ('*LibertyWorks*').

² Ibid 498 [5]; *Foreign Influence Transparency Scheme Act 2018* (Cth) ('*FITS Act*').

³ On the increasing conferral of broad discretionary powers on the executive, see Gillian Triggs, 'Overreach of Executive and Ministerial Discretion: A Threat to Australian Democracy' (2017) 7(1) *Victoria University Law and Justice Journal* 8, 8–10; Margaret Allars, 'The Rights of Citizens and the Limits of Administrative Discretion: The Contribution of Sir Anthony Mason to Administrative Law' (2000) 28(2) *Federal Law Review* 187, 189–90; Sir Anthony Mason, 'Administrative Review: The Experience of the First Twelve Years' (1989) 18(3) *Federal Law Review* 122, 128–30.

to disclose information for myriad purposes including for enforcement related activities. As these questions were left unanswered by the plurality,⁴ I extend the analysis of the dissenting judges, with a view to underscoring the incongruity between the Scheme's ostensible purpose of promoting transparency and its true underlying function of surveillance.

In Part II, I provide an overview of the implied freedom. In Part III, I canvass the salient features of the legislative scheme. In Part IV, I set out the background to the constitutional challenge. In Part V, I analyse the split decision, discuss insights to be gleaned from the joint judgment and explain why it is incomplete in light of the dissenting judgments. In Part VI, I offer a novel analysis of ss 52 and 53 of the *FITS Act* that reveals a worrying shift in purpose from transparency to surveillance.

It is worth mentioning that the decision raises three additional issues that may affect the development of the implied freedom jurisprudence but are beyond the scope of this case note: first, the doctrine of prior restraint;⁵ second, the expansion of the concept of agency through 'arrangements';⁶ and third, Steward J's doubts about the existence of the implied freedom.⁷

II The Implied Freedom of Political Communication

The freedom of political communication is implied by necessity from the system of representative and responsible government provided for by ss 7, 24, and 128 of the *Australian Constitution*.⁸ In *Lange v Australian Broadcasting Corporation*, the High Court unanimously held that the implied freedom is an 'indispensable incident'⁹ of that system because the free flow of political communication within the community enables electors to exercise a free and informed choice.¹⁰ As Mason CJ explained in

⁴ *LibertyWorks* (n 1) 511 [89] (Kiefel CJ, Keane and Gleeson JJ).

⁵ The American doctrine of 'prior restraint' is likely to feature more in future decisions concerning the implied freedom. Gageler J and Gordon J both referred to the concept when characterising the 'freezing' effect of the Scheme on political communication: see *LibertyWorks* (n 1) 512 [94]–[96], 513–14 [99]–[100] (Gageler J), 531 [179] (Gordon J); cf 540 [219] (Edelman J).

⁶ The definition of 'on behalf of' may amount to overreach because it includes acting under 'an arrangement of any kind': see *FITS Act* (n 2) ss 10 (definition of 'arrangement'), 11(1)(a)(i); cf United States' *Foreign Agents Registration Act of 1938* 22 USC § 611(c) (1938) ('*FARA*'). Steward J and Edelman J both expressed concerns about the legislature using this definition to extend the traditional scope of agency and suggested that it may not be adequate in its balance because it imposes scheme obligations on persons who are not agents for a foreign principal in any true sense of the word: see *LibertyWorks* (n 1) 534–5 [196], 538 [211], 538–9 [213], 539[215]–[216] (Edelman J), 549 [268], 550 [274]–[275], 554 [295] (Steward J). There is no exemption for scholastic and scientific pursuits; cf *FARA* (n 6) § 613(e). One implication is that Australian academics who collaborate with scholars who are affiliated with a foreign political organisation may be liable to register: see Professor Anne Twomey, Submission No 82.1 to Parliamentary Joint Committee on Intelligence and Security ('PJICIS'), Parliament of Australia, *Review of the Foreign Influence Transparency Scheme Bill 2017* (13 June 2018).

⁷ *LibertyWorks* (n 1) 546 [249] (Steward J). His Honour stated that 'with the greatest of respect, it is arguable that the implied freedom does not exist', and suggested that he would welcome, on another occasion, a full argument challenging its existence.

⁸ *Australian Constitution* ss 7, 24, 128. For commentary on the implied freedom, see generally James Stellios, *Zine's The High Court and the Constitution* (Federation Press, 7th ed, 2022) 598–603.

⁹ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 559 ('*Lange*').

¹⁰ *LibertyWorks* (n 1) 520 [131] (Gordon J); *Clubb v Edwards* (2019) 267 CLR 171, 295 [356] (Gordon J) ('*Clubb*'); *Unions NSW v New South Wales (No 2)* (2019) 264 CLR 595, 661 [181]

Australian Capital Television Pty Ltd v Commonwealth, ‘individual judgment, whether that of the elector, the representative or the candidate ... turns upon free public discussion ... of the views of all interested persons ... and on public participation in that discussion’.¹¹ The implied freedom covers a range of communications including non-verbal conduct,¹² matters concerning the social and economic features of Australian society,¹³ and the exercise of public powers at any level of government in any part of the country.¹⁴ Unlike the First Amendment to the *United States Constitution*,¹⁵ it does not confer personal rights on individuals; rather, it operates as a restriction on legislative and executive power.¹⁶ The freedom is not absolute; it is limited to what is necessary for the effective operation of the constitutionally prescribed system of government.¹⁷

The current test endorsed by the majority of the High Court¹⁸ for determining whether a law impermissibly burdens the implied freedom, is set out in *Lange*,¹⁹ as refined in *Coleman*,²⁰ *McCloy v New South Wales*,²¹ and *Brown v Tasmania*.²² The test comprises two steps. The first step involves asking whether the law effectively burdens the implied freedom in its terms, operation, or effect. If the question is answered in the affirmative, the second step is engaged and asks: first, whether the law serves a legitimate purpose that is compatible with the maintenance of the system of representative and responsible government; and second, whether the law is reasonably appropriate and adapted to advancing that purpose. The latter inquiry involves asking whether the law is suitable, necessary, and adequate in its

(Edelman J) (*Unions NSW (No 2)*); *Brown v Tasmania* (2017) 261 CLR 328, 359 [88] (Kiefel CJ, Bell and Keane JJ), 430 [312] (Gordon J) (*Brown*); *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 94 [203] (Keane J) (*Murphy*); *McCloy v New South Wales* (2015) 257 CLR 178, 279 [301] (Gordon J) (*McCloy*); *Tajjour v New South Wales* (2014) 254 CLR 508, 557 [55], 558 [59] (Hayne J) (*Tajjour*); *Monis v The Queen* (2013) 249 CLR 92, 136 [84] (Hayne J) (*Monis*); *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 244 [178] (Gummow and Hayne JJ) (*Mulholland*); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138 (Mason CJ) (*ACTV*); *Unions NSW v New South Wales* (2013) 252 CLR 530, 548 [17] (French CJ, Hayne, Crennan, Kiefel and Bell JJ), 575 [122] (Keane J) (*Unions NSW (No 1)*); *Coleman v Power* (2004) 220 CLR 1, 48–9 [89] (McHugh J), 77 [195] (Gummow and Hayne JJ), 120–1 [320] (Heydon J) (*Coleman*).

¹¹ *ACTV* (n 10) 139 (Mason CJ).

¹² *Levy v Victoria* (1997) 189 CLR 579, 595 (Brennan CJ), 641 (Kirby J) (*Levy*).

¹³ *Hogan v Hinch* (2011) 243 CLR 506, 544 [49] (French CJ).

¹⁴ *Lange* (n 9) 571; *Levy* (n 12) 643–4 (Kirby J).

¹⁵ *United States Constitution* amend I.

¹⁶ *LibertyWorks* (n 1) 513 [99] (Gageler J), 543 [233] (Edelman J), 547 [257] (Steward J); *Comcare v Banerji* (2019) 267 CLR 373, 394–6 [19]–[20] (Kiefel CJ, Bell, Keane and Nettle JJ), 434 [135] (Gordon J) (*Comcare*); *Lange* (n 9) 560; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 168 (Deane J); *Cunliffe v Commonwealth* (1994) 182 CLR 272, 327 (Brennan J); *ACTV* (n 10) 150 (Brennan J).

¹⁷ *Lange* (n 9) 561; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 50 (Brennan J), 76 (Deane and Toohey JJ), 94 (Gaudron J); *ACTV* (n 10) 142 (Mason CJ), 150 (Brennan J), 169 (Deane and Toohey JJ), 185 (Dawson J), 217 (Gaudron J), 234 (McHugh J).

¹⁸ *LibertyWorks* (n 1) 504 [45]–[46], [48] (Kiefel CJ, Keane and Gleeson JJ), 521 [134] (Gordon J).

¹⁹ *Lange* (n 9) 561–2, 567–8.

²⁰ *Coleman* (n 10) 51 [95]–[96] (McHugh J), 77–8 [196] (Gummow and Hayne JJ), 82 [211]–[213] (Kirby J).

²¹ *McCloy* (n 10) 193–5 [2]–[4] (French CJ, Kiefel, Bell and Keane JJ).

²² *Brown* (n 10) 363–4 [104] (Kiefel CJ, Bell and Keane JJ), 375–6 [155]–[156] (Gageler J), 398–9 [237], 413 [271], 416 [277] (Nettle J), 431–3 [315]–[325], 478 [481] (Gordon J).

balance — this is known as the structured method of ‘proportionality analysis’.²³ The burden is assessed by reference to the effect of the law *generally*, rather than the particular case.²⁴ The level of justification required depends on the nature and extent of the burden imposed.²⁵

The implied freedom has been posited as a ground for challenging the constitutionality of legislation in myriad spheres including electoral law,²⁶ registration of political parties,²⁷ prohibitions on political donations from property developers,²⁸ caps on electoral communication expenditure by third-party campaigners,²⁹ protest activities,³⁰ preaching on public roads without council permission,³¹ distributing pamphlets containing insulting words,³² habitual consorting with convicted offenders,³³ offensive use of the postal service,³⁴ advertising certain legal services,³⁵ and entering hunting areas without a licence.³⁶ In *LibertyWorks*, the implied freedom was invoked to challenge the *FITS Act*, a federal law that purports to promote transparency of foreign influence activities in Australia.

III The Legislative Scheme

The *FITS Act* was introduced at a time when the Australian Security Intelligence Organisation (‘ASIO’) explicitly warned that Australia was experiencing undisclosed foreign influence activity on an unprecedented scale.³⁷ It is part of a trio

²³ *LibertyWorks* (n 1) 504 [46], 504 [48] (Kiefel CJ, Keane and Gleeson JJ), 535–6 [200]–[201] (Edelman J), 545 [247] (Steward J); *McCloy* (n 10) 193–5 [2], 217 [79] (French CJ, Kiefel, Bell and Keane JJ); *Brown* (n 10) 368 [123] (Kiefel CJ, Bell and Keane JJ), 416–7 [278] (Nettle J); *Unions NSW (No 2)* (n 10) 615 [42] (Kiefel CJ, Bell and Keane JJ), 638 [110] (Nettle J), 653–4 [161] (Edelman J); *Clubb* (n 10) 200–2 [70]–[74] (Kiefel CJ, Bell and Keane JJ), 264–5 [266] (Nettle J), 311 [408], 330–1 [463] (Edelman J); *Comcare* (n 16) 400 [32] (Kiefel CJ, Bell, Keane and Nettle JJ), 442 [165], 451 [188] (Edelman J).

²⁴ *LibertyWorks* (n 1) 521 [135] (Gordon J); *Wotton v Queensland* (2012) 246 CLR 1, 31 [80] (Kiefel J); *Unions NSW (No 1)* (n 10) 554 [36] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *Brown* (n 10) 360 [90] (Kiefel CJ, Bell and Keane JJ); *Clubb* (n 10) 192–3 [35] (Kiefel CJ, Bell and Keane JJ).

²⁵ *LibertyWorks* (n 1) 521 [136] (Gordon J); *Monis* (n 10) 146–7 [124] (Hayne J); *Tajjour* (n 10) 580 [151] (Gageler J); *McCloy* (n 10) 238–9 [150]–[152] (Gageler J), 259 [222], 269–70 [255] (Nettle J); *Brown* (n 10) 367 [118], 369 [128] (Kiefel CJ, Bell and Keane JJ), 378–9 [164]–[165], 389–90 [200]–[201] (Gageler J), 460 [411], 477–8 [478] (Gordon J); *Clubb* (n 10) 299–300 [369] (Gordon J).

²⁶ *Day v Australian Electoral Officer* (SA) (2016) 261 CLR 1; *Murphy* (n 10); *Langer v Commonwealth* (1996) 186 CLR 302.

²⁷ *Mulholland* (n 10).

²⁸ *Spence v Queensland* (2019) 268 CLR 355; *McCloy* (n 10).

²⁹ *Unions NSW (No 1)* (n 10); *Unions NSW (No 2)* (n 10).

³⁰ *Brown* (n 10); *Clubb* (n 10).

³¹ *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1.

³² *Coleman* (n 10).

³³ *Tajjour* (n 10).

³⁴ *Monis* (n 10).

³⁵ *APLA Ltd v Legal Services Commissioner* (NSW) (2005) 224 CLR 322.

³⁶ *Levy* (n 12).

³⁷ Australian Security Intelligence Organisation (‘ASIO’), *ASIO Annual Report 2017–18* (2018), 3, 9, 25 (‘*ASIO Annual Report 2017–18*’); PJCS, Parliament of Australia, *Advisory Report on the Foreign Influence Transparency Scheme Bill 2017* (Advisory Report, June 2018) 2–5 (‘*FITS Bill Advisory Report*’).

of reforms³⁸ underpinning Australia's counter foreign interference strategy, which, as the then Prime Minister explained, is built on four pillars: sunlight, enforcement, deterrence and capability.³⁹ The Scheme⁴⁰ aims to expose activities to 'sunlight',⁴¹ in order to give the public and policymakers 'proper visibility' of foreign influence and 'any underlying agenda'.⁴² This is echoed in the Revised Explanatory Memorandum, which states that 'it is difficult to assess the interests of foreign actors when they use intermediaries to advance their interests'.⁴³ As the then Attorney-General explained, transparency of foreign influence protects the integrity of Australian government institutions by reducing the risk of foreign interests prevailing over domestic interests:

[E]ven more dangerous and potentially even more damaging than traditional espionage is the practice that traditional spying now morphs into a massively broad and inventive range of covert hidden foreign influence, or hidden foreign influence, in our democratic systems. ... [W]hat can cause immense harm are [sic] foreign influence cloaked in the disguise of a purely or uniquely Australian veneer or foreign advocacy channelled by and through a recognised and seemingly independent Australian voice, which might be paid for or directed by foreign principals in a way that is hidden from sight.⁴⁴

Accordingly, the object of the *FITS Act* is 'to provide for a scheme for the registration of persons who undertake certain activities on behalf of foreign governments and other foreign principals, in order to improve the transparency of their activities'.⁴⁵ A person becomes liable to register if they undertake a registrable activity on behalf of a foreign principal.⁴⁶ A 'person' is defined broadly to include an individual, body corporate, body politic, partnership, association, and organisation, whether or not resident in, or carrying on business in, Australia.⁴⁷ A 'foreign principal' includes, for the purposes of the *LibertyWorks* decision, a

³⁸ See also *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth) and *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth). For criticism, see Michael Head, 'Australia's Anti-Democratic "Foreign Interference" Bills' (2018) 43(3) *Alternative Law Journal* 160; Hannah Ryan, 'National Security: The Constitutional Cost of Combatting Espionage and Foreign Interference' (2018) 47(1) *Law Society of New South Wales Journal* 73.

³⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2017, 13145–9 (Malcolm Turnbull).

⁴⁰ See *FITS Act* (n 2) ss 10 (definition of 'scheme'), 71; *Foreign Influence Transparency Scheme Rules 2018* (Cth) ('*FITS Rules*'); *Foreign Influence Transparency Scheme (Disclosure in Communications Activity) Rules 2018* (Cth) ('*FITS Disclosure Rules*').

⁴¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2017, 13146, 13148 (Malcolm Turnbull). The 'sunlight' metaphor derives from an essay by Louis D Brandeis, a former Justice of the United States Supreme Court, in which Brandeis states, 'Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants': see Louis D Brandeis, 'What Publicity Can Do', *Harper's Weekly* (20 December 1913) 10, quoted in *LibertyWorks* (n 1) 514 [104] (Gageler J).

⁴² Commonwealth, *Parliamentary Debates*, House of Representatives, 7 December 2017, 13148 (Malcolm Turnbull).

⁴³ Revised Explanatory Memorandum, *Foreign Influence Transparency Scheme Bill 2017* (Cth) 2 [3]. See also 72 [401].

⁴⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 26 June 2018, 6398 (Christian Porter).

⁴⁵ *FITS Act* (n 2) s 3.

⁴⁶ *Ibid* s 18(1)(a).

⁴⁷ *Ibid* s 10 (definition of 'person').

foreign political organisation that exists primarily to pursue political objectives.⁴⁸ ‘Registrable activity’ comprises several categories,⁴⁹ including ‘communications activity’,⁵⁰ which is defined broadly as the production or distribution of information to the Australian public for the purpose of political or governmental influence.⁵¹ The words, ‘for the purpose of’, mean to undertake an activity whose sole, primary or substantial purpose is to influence any of several types of processes,⁵² including a ‘federal government decision’ on any matter, whether it is an administrative, legislative, or policy matter.⁵³ Persons who are liable to register must apply to the Secretary of the Attorney-General’s Department.⁵⁴

Registrants have a suite of responsibilities including ongoing reporting⁵⁵ and recordkeeping obligations.⁵⁶ Additionally, any person who undertakes a communications activity, whether or not a registrant, must make a disclosure at the time of the communication in accordance with the *Foreign Influence Transparency Scheme (Disclosure in Communications Activity) Rules 2018* (Cth) (*FITS Disclosure Rules*).⁵⁷ Penalties for non-compliance range from 60 penalty units to five years’ imprisonment.⁵⁸ As at the time of writing, there are 110 registrants, 294 foreign principals, and 459 unique activities.⁵⁹

Under the Scheme, the Secretary has broad powers to obtain ‘scheme information’.⁶⁰ Applications for registration ‘must be accompanied by any information or documents required by the Secretary’.⁶¹ If the Secretary ‘reasonably

⁴⁸ Ibid s 10 (definitions of ‘foreign principal’ and ‘foreign political organisation’). Note: There are four categories of ‘foreign principal’: (a) foreign government; (b) foreign government related entity; (c) foreign political organisation; and (d) foreign government related individual.

⁴⁹ Ibid ss 20, 21(1), 22, 23.

⁵⁰ Ibid s 21(1) table, item 3. The *LibertyWorks* decision is concerned with ‘communications activity’ in Australia for the purpose of political or governmental influence. The other categories of ‘registrable activity’ include: parliamentary lobbying on behalf of a foreign government (s 20); parliamentary lobbying, general political lobbying, or disbursement activity, for the purpose of political or governmental influence (s 21(1) table, items 1, 2, 4); activities undertaken by former Cabinet Ministers on behalf of a foreign principal (s 22); and activities undertaken by recent designated position holders on behalf of a foreign principal (s 23). These other provisions were not the subject of the challenge in *LibertyWorks*.

⁵¹ *FITS Act* (n 2) s 13(1).

⁵² Ibid s 12(1). Note: The categories of processes which may be the subject of influence include: (a) a process in relation to a federal election; (b) a process in relation to a federal government decision; (c) proceedings of a House of Parliament; (d) a process in relation to a registered political party; (e) a process in relation to a member of the Parliament; (f) a process in relation to a candidate in a federal election; and (g) processes in relation to registered political campaigners.

⁵³ Ibid ss 12(1)(b), (4). Examples of federal government decisions include decisions made by the Executive Council, the Cabinet or a committee of the Cabinet, a Minister, a Commonwealth entity, a Commonwealth company, and an individual in the course of performing their functions in relation to an aforementioned body: *ibid* s 12(3).

⁵⁴ Ibid s 16.

⁵⁵ Ibid s 34(1).

⁵⁶ Ibid s 40.

⁵⁷ Ibid s 38(1); *FITS Disclosure Rules* (n 40) rr 5–7.

⁵⁸ *FITS Act* (n 2) pt 5.

⁵⁹ Attorney-General’s Department (Cth), *Transparency Register* (Web Page, December 2022) <<https://transparency.ag.gov.au/>>. Registrants include Tony Abbott, Alexander Downer, Brendan Nelson, Kevin Rudd, and Malcolm Turnbull.

⁶⁰ *FITS Act* (n 2) s 50. See also ss 16(2)(d), 34(3)(d), 35(3)(d), 36(3)(d), 37(3)(d), 39(2)(d), 45(2), 46(2).

⁶¹ Ibid s 16(2)(d).

suspects' that a person is liable to register, they may issue a notice requiring the person to provide any information and documents to 'satisfy the Secretary as to whether the person is liable to register'.⁶² Additionally, if the Secretary 'reasonably believes' that a person, whether or not a potential registrant, has information or documents relevant to the Scheme, they may issue a notice requiring the person to produce them.⁶³

Importantly, there are two repositories of scheme information. First, the Secretary is required to keep a (non-public) register,⁶⁴ which must include the names of the registrant and foreign principal, registration and renewal applications, any accompanying information, records of communications between the person and the Department, and any other information or documents the Secretary considers appropriate.⁶⁵ Second, there is a website on which certain information from the Secretary's register is made publicly available as required by the *FITS Act* and *Foreign Influence Transparency Scheme Rules 2018* (Cth) ('*FITS Rules*'); namely, the names of the registrant and foreign principal, and a description of the registrable activities.⁶⁶ The website does not include information that is 'commercially sensitive', affects 'national security', or is of a kind prescribed in the Rules (the *FITS Rules* and *FITS Disclosure Rules*).⁶⁷ Notably, the preceding terms are not defined in the legislation,⁶⁸ although the Department indicated that it may seek guidance from law enforcement agencies when determining their meaning.⁶⁹

Scheme officials are empowered, pursuant to s 52 of the *FITS Act*, to communicate scheme information for the purposes of performing their functions under the Scheme.⁷⁰ Additionally, the Secretary is empowered to disclose scheme information to certain persons for 'other purposes' under s 53, including the enforcement body for enforcement related activity,⁷¹ an Australian police force and any 'authority of the Commonwealth, a State or a Territory' for the protection of public revenue or security,⁷² and other persons for any other purposes prescribed by the Rules.⁷³

IV The Constitutional Challenge

The material facts of the case are as follows. LibertyWorks is a think-tank incorporated in Queensland. It aims to promote increased individual rights and freedoms in public policy. The ACU is an American corporation that aims to

⁶² Ibid ss 45(1)–(2).

⁶³ Ibid ss 46(1)–(2).

⁶⁴ Ibid s 42(1), *FITS Rules* (n 40) rr 6, 6A.

⁶⁵ *FITS Act* (n 2) s 42(2).

⁶⁶ Ibid s 43(1); *FITS Rules* (n 40) r 6.

⁶⁷ *FITS Act* (n 2) s 43(2).

⁶⁸ See *FITS Bill Advisory Report* (n 37) 139 [6.55]–[6.57].

⁶⁹ See Attorney-General's Department (Cth), Submission No 5.1 to PJCIS, Parliament of Australia, *Review of the Foreign Influence Transparency Scheme Bill 2017* (31 January 2018) 42 [40].

⁷⁰ *FITS Act* (n 2) s 52.

⁷¹ Ibid s 53(1) table, item 1.

⁷² Ibid s 53(1) table, items 2, 3; *Australian Security Intelligence Organisation Act 1979* (Cth) s 4 (definition of 'security').

⁷³ *FITS Act* (n 2) s 53(1) table, item 4.

influence politics in the United States from a classical liberal perspective. In 2018, LibertyWorks approached the ACU and they agreed to collaborate as co-hosts on a CPAC event in Australia that was held in August 2019. That month, prior to the event, the Department asked LibertyWorks to consider whether it had registration obligations under the *FITS Act*. In October 2019, the Secretary issued a notice under s 45 of the *FITS Act* requesting information and documents in order to determine whether LibertyWorks is liable to register.⁷⁴ A freedom of information request revealed that Shadow Attorney-General, Mark Dreyfus, had prompted the enquiry.⁷⁵ The President of LibertyWorks was threatened with six months' imprisonment for refusing to comply.⁷⁶ The Department later decided not to pursue the matter.

The challenge brought by LibertyWorks was confined⁷⁷ to the provisions of the *FITS Act* that impose registration obligations⁷⁸ in respect of 'communications activities'.⁷⁹ The parties agreed that, subject to the validity of the legislation, LibertyWorks has registration obligations because it undertakes communications activity on behalf of the ACU.⁸⁰ They also agreed that the legislation burdens the implied freedom,⁸¹ and that its legitimate purpose is to promote transparency of intermediary relationships.⁸² LibertyWorks' main contention was that the impugned provisions go beyond the legislative object.⁸³ It argued that registration is unnecessary because there is a compelling alternative: namely, the disclosure obligation under s 38 coupled with the *FITS Disclosure Rules*, which prescribe the content and form of disclosure required for different communications activities.⁸⁴ Thus, registration contributes nothing more.⁸⁵

⁷⁴ *LibertyWorks* (n 1) 498 [5] (Kiefel CJ, Keane and Gleeson JJ), 551 [281] (Steward J).

⁷⁵ See Joe Kelly, 'How Labor's Top Lawyer Mark Dreyfus Steered Bureaucrats against ex-PM Tony Abbott', *The Australian* (online, 31 January 2020) <<https://www.theaustralian.com.au/nation/politics/how-labors-top-lawyer-mark-dreyfus-steered-bureaucrats-against-expm-tony-abbott/news-story/fdc9cea0e0db084adaeabd2a29119830>>.

⁷⁶ *FITS Act* (n 2) s 59(1). See also Joe Kelly, 'High Court to Rule on Foreign Influence Laws', *The Australian* (online, 5 February 2020) <<https://www.theaustralian.com.au/nation/politics/high-court-to-rule-on-foreign-influence-laws/news-story/4ae9371cac2830c4457e9a265970fe70>>.

⁷⁷ *LibertyWorks* (n 1) 503 [40]–[42], 505 [52] (Kiefel CJ, Keane and Gleeson JJ), 518–19 [124] (Gordon J); *LibertyWorks Inc*, 'Plaintiff's Submissions', Submission in *LibertyWorks Inc v Commonwealth*, Case No S10/2020, 22 September 2020, 7 [18] ('LibertyWorks Submissions').

⁷⁸ *FITS Act* (n 2) ss 16, 18.

⁷⁹ *Ibid* s 21(1) table, item 3.

⁸⁰ *LibertyWorks* (n 1) 505 [51] (Kiefel CJ, Keane and Gleeson JJ); *LibertyWorks Submissions* (n 77) 6 [17]; Commonwealth of Australia, 'Respondent's Submissions', Submission in *LibertyWorks Inc v Commonwealth*, Case No S10/2020, 21 October 2020, 3–4 [4] ('Commonwealth Submissions').

⁸¹ *LibertyWorks* (n 1) 505 [54] (Kiefel CJ, Keane and Gleeson JJ); *LibertyWorks Submissions* (n 77) 14–15 [32]; Commonwealth Submissions (n 80) 9 [17].

⁸² *LibertyWorks* (n 1) 505 [53], 505 [55] (Kiefel CJ, Keane and Gleeson JJ); *LibertyWorks Submissions* (n 77) 15–16 [34]–[36]; Commonwealth Submissions (n 80) 12 [22]–[23].

⁸³ *LibertyWorks Submissions* (n 77) 17 [42], 18–9 [46]–[49], 20 [55]–[56]; *LibertyWorks* (n 1) 505 [53], 508 [73] (Kiefel CJ, Keane and Gleeson JJ).

⁸⁴ *FITS Act* (n 2) s 38; *FITS Disclosure Rules* (n 40) rr 5–7.

⁸⁵ *LibertyWorks Submissions* (n 77) 18 [46]; *LibertyWorks Inc*, 'Plaintiff's Outline of Oral Submissions', Submission in *LibertyWorks Inc v Commonwealth*, Case No S10/2020, 2 March 2021, 4 [18]–[19].

V Understanding the High Court's Split Decision

In *LibertyWorks*, the High Court issued a joint judgment and four separate judgments. The judges agreed that the impugned provisions burden the implied freedom, and that a legitimate purpose of the legislation is to promote the transparency of activities undertaken by intermediaries on behalf of foreign principals.⁸⁶ The key issue was whether the burden is justified. The plurality considered the burden to be modest, and upheld the provisions.⁸⁷ Edelman J considered that the provisions have a significant deterrent effect and impose a deep burden but ultimately held that this was justified.⁸⁸ Steward J reached the same conclusion,⁸⁹ but intimated that he might have invalidated the provision concerning an 'arrangement',⁹⁰ had it been properly challenged.⁹¹ Gageler J and Gordon J dissented in separate judgments but reached the same conclusion, notwithstanding Gageler J's objection to structured proportionality.⁹² Their Honours each characterised the Scheme provisions as a 'prior restraint' on political communication,⁹³ and held that they impermissibly burden the implied freedom.

A The Majority: Inadequacy of Mere Disclosure

The majority judgments in *LibertyWorks* contain important insights, but they are limited insofar as they overlook the discrepancy between the two repositories of information. The key insight from the joint judgment is that disclosure obligations, without registration obligations, are inadequate. For the plurality, the most contentious aspect of proportionality analysis was the question of reasonable necessity;⁹⁴ namely, whether there is an equally practicable, obvious, and compelling alternative.⁹⁵ The plurality, along with Edelman J, rejected *LibertyWorks*' submission that the disclosure obligation under s 38 is sufficient.⁹⁶ Their Honours reasoned that disclosure might be restricted to a small group, for example, a private social media group, or a newspaper in a foreign language.⁹⁷ If some recipients were to further disseminate the communication to others, without alerting them to the relationship between the original intermediary and the foreign

⁸⁶ *LibertyWorks* (n 1) 507 [62], 510 [85] (Kiefel CJ, Keane and Gleeson JJ), 514 [102] (Gageler), 532 [184] (Gordon J), 537–8 [207]–[208] (Edelman J), 548 [261] (Steward J).

⁸⁷ *LibertyWorks* (n 1) 508–9 [74] (Kiefel CJ, Keane and Gleeson JJ).

⁸⁸ *Ibid* 534 [194]–[195], 535 [198], 540–1 [222]–[224] (Edelman J).

⁸⁹ *Ibid* 545 [246], 556 [305] (Steward J).

⁹⁰ *FITS Act* (n 2) s 11(1)(a)(i).

⁹¹ *LibertyWorks* (n 1) 545–6 [248] (Steward J).

⁹² *Ibid* 512 [93] (Gageler J); *Tajjour* (n 10) 579–81 [148]–[152] (Gageler J); *McCloy* (n 10) 231–4 [129]–[138], 238–9 [150]–[152] (Gageler J); *Brown* (n 10) 389–91 [200]–[206] (Gageler J); *Clubb* (n 10) 225 [161]–[162] (Gageler J); *Comcare* (n 16) 408–9 [53]–[54] (Gageler J). Cf *LibertyWorks* (n 1) 504 [46], 504 [48] (Kiefel CJ, Keane and Gleeson JJ).

⁹³ *LibertyWorks* (n 1) 512 [94] (Gageler J), 531 [179] (Gordon J).

⁹⁴ *Ibid* 509–10 [78]–[84] (Kiefel CJ, Keane and Gleeson JJ).

⁹⁵ *Lange* (n 9) 567–8; *Unions NSW (No 1)* (n 10) 556 [44] (French CJ, Hayne, Crennan, Kiefel and Bell JJ); *McCloy* (n 10) 217 [81] (French CJ, Kiefel, Bell and Keane JJ); *Brown* (n 10) 371–2 [139] (Kiefel CJ, Bell and Keane J); *Monis* (n 10) 214 [347] (Crennan, Kiefel and Bell JJ); *Tajjour* (n 10) 550 [36] (French CJ); *Clubb* (n 10) 186 [6] (Kiefel CJ, Bell and Keane JJ), 264–5 [266(3)], 265–6 [267]–[268], 269–70 [277] (Nettle J), 337 [478]–[480] (Edelman J); *Comcare* (n 16) 401 [35] (Kiefel CJ, Bell, Keane and Nettle J).

⁹⁶ *LibertyWorks* (n 1) 509–10 [78]–[84] (Kiefel CJ, Keane and Gleeson JJ), 545 [242] (Edelman J).

⁹⁷ *Ibid* 510 [81] (Kiefel CJ, Keane and Gleeson JJ).

principal, such information might become influential in political discourse without the original source being revealed.⁹⁸ The plurality emphasised the important role played by ‘members of the commentariat’, particularly journalists, who are most capable of scrutinising and exposing the interests of foreign participants in domestic political affairs.⁹⁹ Registration ensures that they are alerted to the presence of foreign influence and enables the public to be informed in a way that cannot be achieved by mere disclosure to recipients.

The plurality and Edelman J characterised the Scheme as serving a ‘powerful protective purpose’¹⁰⁰ of the ‘highest public policy’;¹⁰¹ namely, to promote transparency as a means of reducing the risk that undisclosed foreign principals will exert influence on the integrity of Australia’s political and governmental processes.¹⁰² Their Honours explained that the Scheme does not operate directly on communications, nor does it prohibit or regulate their content; it is content-neutral and non-discriminatory.¹⁰³ When assessing the extent of the burden, the plurality considered two counterfactuals that illustrate the kinds of political communication that are *not* burdened.¹⁰⁴ First, the Scheme does not affect persons who bear no relation to a foreign principal and who engage in political communication on their own behalf. For example, if LibertyWorks had organised the CPAC event without entering into an arrangement with the ACU, then it would not have registration obligations. Second, foreign principals need not register if they communicate directly with the Australian public; it is only when communication occurs through an intermediary that the source becomes obscured. Their Honours accepted that the registration requirement might have some deterrent effect, but held that this only applies to a ‘small subset of political communication’ and affects a ‘very small proportion of persons’.¹⁰⁵ The plurality concluded that *both* disclosure and registration are necessary for achieving the legislative object.¹⁰⁶ Edelman J and Steward J reached the same conclusion.¹⁰⁷

The key limitation of the joint judgment is that it overlooks a fundamental aspect of the *FITS Act*; namely, the existence of two repositories of scheme information. It is not that the plurality failed to advert to the issue;¹⁰⁸ rather, they consciously refrained from investigating the question. In one sense, the restrained nature of the joint judgment is appropriate. As the plurality noted, it is sound judicial practice to only decide on questions for which there exists a state of facts that make it necessary to determine the rights of the parties and where such a case has been put

⁹⁸ Ibid 510 [82] (Kiefel CJ, Keane and Gleeson JJ).

⁹⁹ Ibid 510 [83] (Kiefel CJ, Keane and Gleeson JJ).

¹⁰⁰ Ibid 510 [85] (Kiefel CJ, Keane and Gleeson JJ).

¹⁰¹ Ibid 545 [244] (Edelman J).

¹⁰² Ibid 507 [61]–[62] (Kiefel CJ, Keane and Gleeson JJ).

¹⁰³ Ibid 507 [66] (Kiefel CJ, Keane and Gleeson JJ).

¹⁰⁴ Ibid 507 [64]–[65] (Kiefel CJ, Keane and Gleeson JJ).

¹⁰⁵ Ibid 509 [74] (Kiefel CJ, Keane and Gleeson JJ).

¹⁰⁶ Ibid 510 [84] (Kiefel CJ, Keane and Gleeson JJ).

¹⁰⁷ Ibid 534 [194]–[195], 535 [198] (Edelman J), 545 [246], 556 [305] (Steward J).

¹⁰⁸ See Transcript of Proceedings, *LibertyWorks Inc v Commonwealth* [2021] HCATrans 35, 603–6 (Kiefel CJ).

to all parties for a considered response.¹⁰⁹ Accordingly, the plurality confined their reasons to the ‘outer limits of the plaintiff’s case’,¹¹⁰ which did not advance any argument about the Secretary’s powers constituting overreach.¹¹¹ Indeed, the parties proceeded on the footing that the Secretary’s powers are limited by the legislative object.¹¹² This explains why the plurality expressly acknowledged that the joint judgment does not address questions about whether the Secretary’s information-gathering powers may be used for purposes beyond the objects of the *FITS Act*.¹¹³ Notwithstanding their fidelity to the conventional principles of judicial practice, the plurality missed an important opportunity to shed light on the role of statutory interpretation in mediating between the executive government and the people, by both enabling and constraining the exercise of discretionary powers by public officials.

B *The Dissenters: A ‘Secret Register’*

The dissenting judgments of Gageler J¹¹⁴ and Gordon J¹¹⁵ highlight the significance of the disconnect between two distinct repositories of scheme information — the first, a private register kept by the Secretary, and the second, a public website.¹¹⁶ During oral argument, the Court queried whether there exists a gap between the two, and if so, the extent of that gap, and the burden it imposes on political communication.¹¹⁷ The joint judgment, with which Steward J agreed,¹¹⁸ noted the existence of the two repositories, but did not consider whether there was a disconnect.¹¹⁹ By contrast, Gageler J and Gordon J each expressed grave concerns about the disconnect.¹²⁰ Gageler J accepted that the object of improving the transparency of foreign influence activities justifies the creation of a public system of registration.¹²¹ However, his Honour took issue with the creation of a ‘secret register’ from which a far more limited subset of information is published on the website.¹²²

Similarly, Gordon J held that the provisions go well beyond the legitimate purpose of minimising the risk of foreign principals exerting undisclosed influence on Australian political processes.¹²³ Her Honour explained that the statutory text evinces a clear legislative intention to create two repositories that ‘do *not* mirror each

¹⁰⁹ *LibertyWorks* (n 1) 511 [90] (Kiefel CJ, Keane and Gleeson JJ); *Lambert v Weichelt* (1954) 28 ALJ 282, 283 (Dixon CJ); *Duncan v New South Wales* (2015) 255 CLR 388, 410 [52].

¹¹⁰ *LibertyWorks* (n 1) 511 [87] (Kiefel CJ, Keane and Gleeson JJ).

¹¹¹ *Ibid* 511 [87]–[89] (Kiefel CJ, Keane and Gleeson JJ).

¹¹² *Ibid* 511 [87] (Kiefel CJ, Keane and Gleeson JJ).

¹¹³ *Ibid* 510–11 [86] (Kiefel CJ, Keane and Gleeson JJ).

¹¹⁴ *Ibid* 515 [107]–[108], 516–7 [115]–[116] (Gageler J).

¹¹⁵ *Ibid* 519–20 [129], 522 [138], 527 [159] (Gordon J).

¹¹⁶ *FITS Act* (n 2) ss 42–3.

¹¹⁷ *LibertyWorks* (n 1) 541 [225] (Edelman J); Transcript of Proceedings, *LibertyWorks Inc v Commonwealth* (n 109), 738–40 (Edelman J).

¹¹⁸ *LibertyWorks* (n 1) 545 [246] (Steward J).

¹¹⁹ *Ibid* 502–3 [36]–[37] (Kiefel CJ, Keane and Gleeson JJ).

¹²⁰ *Ibid* 516–17 [115]–[117] (Gageler J), 519–20 [129]–[130], 526 [155]–[156], 527 [159], 527 [161], 527–8 [164] (Gordon J).

¹²¹ *Ibid* 514–15 [105] (Gageler J).

¹²² *Ibid* 516–17 [115]–[116] (Gageler J); see also 515 [107] (Gageler J). See *FITS Act* (n 2) ss 16(2)(d), 34(3)(d), 39(2)(d), 42–3.

¹²³ *LibertyWorks* (n 1) 519 [126]–[128], 530 [175], 532 [184], 533 [187] (Gordon J).

other'.¹²⁴ Separate provisions deal with the information to be included on the register and the website.¹²⁵ The latter is identified with precision,¹²⁶ whereas the former includes 'any other information or documents the Secretary considers appropriate'.¹²⁷ Gordon J provided examples of information that must be placed on the register but not on the website, in order to illustrate the potentially 'significant divergence' between the two.¹²⁸ First, the Secretary may require a registrant to provide any information that would help them understand the intermediary relationship.¹²⁹ This could include contemporaneous records of meetings, financial transactions, and correspondence. Every document accompanying an application for registration must be placed on the register,¹³⁰ but only certain information needs to be placed on the website.¹³¹ Second, the Secretary may place on the register any information that is relevant to the management and administration of the Scheme.¹³² This might include an email from Person A to the Secretary, providing information about Person B, who Person A suspects is undertaking registrable activities.

It is necessary to address Edelman J's reasoning because his Honour turned his mind to the issue of a disconnect between the two repositories, but reached a conclusion different from the dissenters. Edelman J acknowledged that the larger the gap, the more significant the burden: 'it is not difficult to draw an inference that people will be substantially less likely to communicate if the effect of doing so is that a large private dossier about them will be compiled and maintained by government'.¹³³ However, his Honour queried whether there was any gap at all here,¹³⁴ and held that any discrepancy could be justified based on administrative necessity:

this gap is no more than the concomitant of the administrative process that is necessary for appropriate information to be made available to the public. The information ... on the register provides the substratum for the information ... on the public website ... For the website to serve its intended function as a clear and transparent repository, it cannot simply be the site of an information dump. An administrative process is necessary to filter the relevant information ...¹³⁵

Edelman J's justification for the disconnect is unpersuasive because it overstates the logistical burden of organising information on a public register. Notably, the *FITS Act* was modelled on the United States' *Foreign Agents Registration Act of 1938* ('*FARA*').¹³⁶ The Act was developed after close consultation with the American counterparts of the Attorney-General's Department.¹³⁷ Under the *FARA*, however,

¹²⁴ Ibid 527 [160] (emphasis added) (Gordon J). See also 530 [174] (Gordon J).

¹²⁵ *FITS Act* (n 2) ss 42–3.

¹²⁶ Ibid ss 43(1)(a)–(b), (2A); *FITS Rules* (n 40) r 6.

¹²⁷ *FITS Act* (n 2) ss 42(2)(g), 3(c); *LibertyWorks* (n 1) 526 [155]–[156] (Gordon J).

¹²⁸ *LibertyWorks* (n 1) 529 [168] (Gordon J). See also 529 [169]–[172].

¹²⁹ *FITS Act* (n 2) s 16(2)(d).

¹³⁰ Ibid s 42(2)(b).

¹³¹ Ibid s 43(1).

¹³² Ibid ss 42(2)(g), (3)(c); Revised Explanatory Memorandum (n 43) 120 [674].

¹³³ *LibertyWorks* (n 1) 542 [226] (Edelman J).

¹³⁴ Ibid 542 [227] (Edelman J) cf 516–17 [112]–[117] (Gageler J), 529 [168]–[172] (Gordon J).

¹³⁵ Ibid 542 [229]–[230] (Edelman J).

¹³⁶ *FARA* (n 6) §§ 611–21.

¹³⁷ See *FITS Bill Advisory Report* (n 37) 33 [2.108], 35 [2.115], 162 [7.22]; Attorney-General's Department (Cth), Submission No 5 to PJCS, Parliament of Australia, *Review of the Foreign*

all information provided to the Attorney-General *must* be made freely available to the public through an electronic database that is searchable and sortable.¹³⁸ Moreover, registers under other Commonwealth legislation are made public in their entirety.¹³⁹

As Gageler J explained, the disconnect between the ‘secret register’ and the public website highlights the problem inherent in the structure of the Scheme, which is not that the discretions to collect and share information are overly broad, but that they exist at all.¹⁴⁰ His Honour considered that a scheme narrowly tailored to the legislative object would not feature a secret register:

The information to be required from registrants and the information to be made available to the public would be one and the same ... There would be no occasion for the discretionary collection and dissemination of information for other governmental purposes.¹⁴¹

This is supported by the Revised Explanatory Memorandum, which states that ‘[t]o achieve the transparency objective of the scheme, it is essential that information be made publicly available.’¹⁴² Similarly, Gordon J held that the public website is directed at a legitimate purpose, but that the Secretary’s register is not, because there is no rational connection between a non-public register (which is ‘in darkness, not sunlight’), and the object of minimising the risk of undisclosed influence.¹⁴³

VI Open Question: The Ambit and Purpose(s) of the Secretary’s Powers

The extent of the disconformity between the ‘secret register’ and the public website turns on the ambit and purposes of the Secretary’s powers to obtain,¹⁴⁴ store,¹⁴⁵ and disseminate¹⁴⁶ scheme information. The broader the discretion, the wider the gap between the two repositories. As the plurality noted, the *LibertyWorks* decision leaves unanswered ‘large questions’ about the scope of the Secretary’s powers and whether they are confined by the *FITS Act*’s transparency object, or whether they might extend beyond this purpose.¹⁴⁷ The plurality, with whom Steward J agreed, declined to address the question because the parties proceeded on the footing that

Influence Transparency Scheme Bill 2017 (January 2018) 6 [13]; Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 87 of 2017–18, 16 March 2018) 8. See also Malcolm Turnbull, ‘Transcript of Joint Press Conference: Foreign Interference; Foreign Donations; Same-Sex Marriage; Citizenship’ (Media Release, 5 December 2017) 2.

¹³⁸ *FARA* (n 6) §§ 616(a), (d)(1). Section 616(a) relevantly provides: ‘The Attorney General shall retain in permanent form one copy of all registration statements ... and the same shall be public records and open to public examination and inspection ...’.

¹³⁹ See, eg, *Commonwealth Electoral Act 1918* (Cth) ss 287N, 287Q; *Competition and Consumer Act 2010* (Cth) ss 152BCW(3), (5).

¹⁴⁰ *LibertyWorks* (n 1) 516–17 [115]–[116] (Gageler J).

¹⁴¹ *Ibid* 517 [117] (Gageler J).

¹⁴² Revised Explanatory Memorandum (n 43) 121 [676].

¹⁴³ *LibertyWorks* (n 1) 520 [130], 533 [189] (Gordon J).

¹⁴⁴ *FITS Act* (n 2) ss 16(2)(d), 34(3)(d), 35(3)(d), 36(3)(d), 37(3)(d), 39(2)(d), 45(2), 46(2).

¹⁴⁵ *Ibid* ss 42–3.

¹⁴⁶ *Ibid* ss 52, 53(1).

¹⁴⁷ *LibertyWorks* (n 1) 511 [89] (Kiefel CJ, Keane and Gleeson JJ).

the Secretary's powers are necessarily limited.¹⁴⁸ Only two judges adverted to the issue. Gageler J queried the extent to which the Secretary's powers are limited by the legislative object, whereas Edelman J held that they are heavily confined by it.¹⁴⁹

In light of the implications of their Honours' reasoning, Gageler J's view should be preferred. In Part VI(A)–(B), I argue that: first, the burden imposed by the legislation is potentially severe due to the ill-defined boundaries of the Secretary's powers to obtain and store scheme information; and second, the *FITS Act* operates under the guise of the legitimate object in s 3 and its purpose shifts from transparency to surveillance on the proper construction of the Secretary's powers to disseminate scheme information. I conclude that the Secretary's discretions, when construed in their entirety, are not reasonably appropriate and adapted to advance the legislative object.

A *Statutory Interpretation: Theory versus Practice*

The Secretary's powers to obtain and store scheme information go beyond the object of improving transparency. As Gageler J explained, when the Act is considered as a *whole*, the Secretary's discretions are not confined by the legislative object:

The [Commonwealth's] submission overstated the extent to which applicable principles of statutory interpretation confine the discretions by reference to the stated object ...¹⁵⁰

...

The factors to which the Secretary can have regard in exercising the discretions cannot be confined... to the exclusion of reference to the structure of the scheme of registration of which the discretions form part.

Notwithstanding the limitation of its object to improvement of transparency, no part of the design ... is to confine collection of information from registrants to that to be made publicly available on the website. The discretion to require information ... is rather designed to facilitate each of the forms of use and disclosure of information included on the register for which the *FITS Act* provides. Publication of information on the website is just one of them.¹⁵¹

Indeed, the architecture of the Scheme is such that the Secretary's discretion to obtain information is designed to facilitate various forms of use, including disclosure to enforcement bodies for enforcement related activities.¹⁵² Publication of certain information on the website is but one form of use. Gordon J also noted that powers to collect and share information are 'ordinarily ... "limited by the purpose for which the power was conferred"'.¹⁵³ Here, however, the Act expressly defines a wider set of purposes for which the Secretary may lawfully communicate scheme information.¹⁵⁴

¹⁴⁸ Ibid 508 [70], 511 [87] (Kiefel CJ, Keane and Gleeson JJ), 545 [246] (Steward J).

¹⁴⁹ Ibid 516 [110], 516 [112]–[113] (Gageler J); cf [220], [227] (Edelman J).

¹⁵⁰ Ibid 516 [110] (Gageler J).

¹⁵¹ Ibid 516 [112]–[113] (Gageler J).

¹⁵² Ibid 516 [113]–[114] (Gageler J).

¹⁵³ Ibid 525–6 [154] (Gordon J), quoting *Johns v Australian Securities Commission* (1993) 178 CLR 408, 423 ('*Johns*').

¹⁵⁴ *FITS Act* (n 2) s 53(1).

In direct contrast, Edelman J considered that the Scheme would not result in a large dossier of information being held on a government register because the Secretary's powers are constrained by principles of statutory interpretation:¹⁵⁵

An answer to any such challenge ... is that well-established principles of interpretation require the Secretary's power to be heavily confined. Even if the provisions did not require that confinement, as open-textured provisions with distributive application, the scope of any application which would not be reasonably necessary for the purposes of the *FITS Act* would be disappplied to that extent...¹⁵⁶

...

If 'the general character of the statute' reveals that 'powers were intended to be exercised only for a particular purpose, then the exercise of the powers not for such purpose but for some ulterior object will be invalid'.¹⁵⁷

Edelman J concluded that the Secretary can only collect information that is reasonably necessary for assessing whether registration is required, and for keeping information on the register accurate; any request beyond this is *ultra vires*.¹⁵⁸ His Honour is technically correct insofar as the *Acts Interpretation Act 1901* (Cth) requires the Court to adopt the interpretation that would best achieve the legislative purpose.¹⁵⁹ However, his Honour's analysis is unrealistic because it assumes that the Secretary and their delegates will undertake the requisite analysis, on every occasion, to appropriately qualify their discretion by reference to the legislative object. Even if the Secretary's information-gathering powers are, in theory, qualified by the objects clause, this is unlikely to occur in practice, at least not consistently.

The salient provisions concerning the collection and storage of scheme information are ss 16(2)(d), 42, 45 and 46 of the *FITS Act*. First, under ss 45 and 46, the Secretary may request information from a potential registrant whom the Secretary reasonably suspects might be liable to register,¹⁶⁰ and from any person whom the Secretary reasonably believes possesses information 'relevant to the operation of the scheme'.¹⁶¹ As the Parliamentary Joint Committee on Intelligence and Security ('PJCIS') noted, the scope of 'relevant' information is not defined in the statute, and is likely to be interpreted liberally by the Department, given the broad framing of the legislative object.¹⁶² Second, s 16(2)(d) requires applications for registration to be accompanied by 'any information or documents required by the Secretary',¹⁶³ but neither the Act nor the Rules specify what information may be

¹⁵⁵ *LibertyWorks* (n 1) 540 [220]–[221], 542 [227] (Edelman J); cf 516 [110] (Gageler J).

¹⁵⁶ *Ibid* 540 [220] (Edelman J), citing *Clubb* (n 10) 317–18 [424].

¹⁵⁷ *LibertyWorks* (n 1) 540 [220] (Edelman J), citing *Brownells Ltd v Ironmongers' Wages Board* (1950) 81 CLR 108, 120 (Latham CJ); *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170, 186–7 (Gibbs CJ); *Walton v Gardiner* (1993) 177 CLR 378, 409 (Brennan J); *Johns* (n 153) 424 (Brennan J), 436 (Dawson J), 453 (Toohey J), 458 (Gaudron J), 468 (McHugh J); *Katsuno v The Queen* (1999) 199 CLR 40, 57 [24] (Gaudron, Gummow and Callinan JJ); *Smethurst v Commissioner of the Australian Federal Police* (2020) 272 CLR 177, 208–9 [55]–[56] (Kiefel CJ, Bell and Keane JJ), 240 [151]–[152] (Nettle J).

¹⁵⁸ *LibertyWorks* (n 1) 540 [221] (Edelman J).

¹⁵⁹ *Acts Interpretation Act 1901* (Cth) s 15AA.

¹⁶⁰ *FITS Act* (n 2) ss 45(1), (2).

¹⁶¹ *Ibid* ss 46(1), (2).

¹⁶² *Ibid* s 3; *FITS Bill Advisory Report* (n 37) 140 [6.59]–[6.60], 149 [6.91].

¹⁶³ *FITS Act* (n 2) s 16(2)(d).

required.¹⁶⁴ Third, under s 42, the Secretary must keep a non-public register, which includes ‘any other information or documents the Secretary considers appropriate’.¹⁶⁵ The Revised Explanatory Memorandum states that this provision is intended to capture information that might not relate to a registrant, but is nevertheless ‘relevant to the scheme’s management and administration’.¹⁶⁶ However, the text and structure of the Act does not necessitate such a narrow interpretation of s 42(3)(c). When construed in light of the previous provisions, it supports a broad construction of the Secretary’s powers to obtain and store information on the non-public register.

As to the practical administration of the Scheme, it is apt to note that two former Prime Ministers, Malcolm Turnbull and Kevin Rudd, both of whom are registrants,¹⁶⁷ have questioned the Department’s broad interpretation of its powers.¹⁶⁸ Malcolm Turnbull queried ‘whether the legislation’s objective can be achieved with a lighter, simpler regulatory burden’.¹⁶⁹ Kevin Rudd described the Department’s interpretation as ‘sweeping’, ‘expansive’, ‘absurd’,¹⁷⁰ and a ‘waste of both officials’ time and taxpayer funds’.¹⁷¹ He also criticised the discrepant interpretations adopted by the current and former Department Secretaries regarding the ambit of their information-gathering powers.¹⁷² Another former Prime Minister, Tony Abbott, who is also a registrant,¹⁷³ warned that it is easy for the bureaucracy to turn ‘well-intentioned government policy into something which turns out to be radically different to what their ministers intended’.¹⁷⁴

¹⁶⁴ *FITS Bill Advisory Report* (n 37) 131 [6.28], 275 [10.159].

¹⁶⁵ *FITS Act* (n 2) s 42(3)(c).

¹⁶⁶ Revised Explanatory Memorandum (n 43) 120 [674].

¹⁶⁷ See Attorney-General’s Department (Cth), ‘Malcolm Turnbull’, *Transparency Register* (Web Page, 4 August 2021) <<https://transparency.ag.gov.au/Registrants/Details/0b09120d-8aea-cb11-814e-0050569d2348>>; Attorney-General’s Department (Cth), ‘Kevin Rudd’, *Transparency Register* (Web Page, 7 October 2022) <<https://transparency.ag.gov.au/Registrants/Details/4612496a-b15b-cb11-8147-0050569d2348>>.

¹⁶⁸ See Daniel Hurst, “‘Such a Difficult Website’: Malcolm Turnbull’s Tech Troubles with Foreign Influence Register He Created”, *The Guardian* (online, 28 October 2021) <<https://www.theguardian.com/australia-news/2021/oct/28/such-a-difficult-website-malcolm-turnbulls-tech-troubles-with-foreign-influence-register-he-created>>.

¹⁶⁹ See Anthony Galloway, ‘Not Intended or Contemplated’: Turnbull Says Foreign Influence Laws Need Review’, *The Sydney Morning Herald* (online, 6 August 2021) <<https://www.smh.com.au/politics/federal/not-intended-or-contemplated-turnbull-says-foreign-influence-laws-need-review-20210805-p58g20.html>>.

¹⁷⁰ See Katharine Murphy, ‘Kevin Rudd to Register under Foreign Influence Scheme but Labels Government Guidance “Absurd”’, *The Guardian* (online, 24 December 2020) <<https://www.theguardian.com/australia-news/2020/dec/24/kevin-rudd-to-register-under-foreign-influence-scheme-but-labels-government-guidance-absurd>>.

¹⁷¹ See Daniel Hurst, ‘Kevin Rudd Registers Interviews with BBC and Radio NZ but Insists “I Am Not a Foreign Agent”’, *The Guardian* (online, 21 January 2021) <<https://www.theguardian.com/australia-news/2021/jan/21/kevin-rudd-registers-interviews-with-bbc-and-radio-nz-but-insists-i-am-not-a-foreign-agent>>.

¹⁷² *Ibid*; Murphy (n 170).

¹⁷³ See Attorney-General’s Department (Cth), ‘Anthony John Abbott’, *Transparency Register* (Web Page, 8 March 2022) <<https://transparency.ag.gov.au/Registrants/Details/55c28318-f308-cb11-8143-0050569d617d>>.

¹⁷⁴ See Janet Albrechtsen and Joe Kelly, ‘Tony Abbott Declares: I’m Not an Agent of Foreign Influence’, *The Australian* (online, 1 November 2019) <<https://www.theaustralian.com.au/nation/>>.

B *Shift in Purpose: From Transparency to Surveillance*

The Secretary's powers to disseminate scheme information amount to legislative overreach because they operate as an illegitimate surveillance mechanism. The purpose of the *FITS Act*, as stated in the objects clause, is to improve the transparency of activities undertaken by intermediaries,¹⁷⁵ yet the practical effect of s 53 is to enable government surveillance. Where the meaning of a specific provision is plain and unambiguous, an objects clause cannot override it.¹⁷⁶ As Cole JA stated in *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd*, 'whilst regard may be had to an objects clause to resolve uncertainty or ambiguity, the objects clause does not control clear statutory language, or command a particular outcome of exercise of discretionary power'.¹⁷⁷ Section 53 of the *FITS Act*, when construed in light of s 52, reveals ulterior purposes for which the Secretary may communicate scheme information. The subtle augmentation of the legislative purpose is potentially insidious. Indeed, Gordon J warned that '[t]he burden is significant or severe because "[t]he finger of government levelled against" registrants "is ominous"; "the spectre of a government agent will look over the shoulder" of those who register under the scheme'.¹⁷⁸

The salient provisions concerning the legislative object are ss 52 and 53(1). Section 52 ('authorisation—purposes of the scheme') empowers scheme officials to communicate scheme information for the purposes of performing functions or exercising powers under the Scheme. By contrast, s 53 ('authorisation—other purposes') empowers the Secretary to disclose scheme information for a range of 'other purposes' including 'enforcement related activity', 'protection of public revenue', and 'protection of security', pursuant to the table in s 53(1). There is no requirement that these additional purposes advance the transparency object. Notably, the definition of 'enforcement related activity' includes the conduct of surveillance, monitoring, and intelligence-gathering activities.¹⁷⁹ Once the purpose is engaged, the Secretary is permitted to share the information with a host of enforcement bodies, including the police, Director of Public Prosecutions, Immigration Department, regulatory bodies, and crime and corruption commissions.¹⁸⁰ As the PJCIS noted, the definition of 'enforcement body' captures a broad range of agencies at all levels of government; it includes *any* agency 'to the extent that it is responsible for administering, or performing a function under, a law that imposes a penalty or sanction'.¹⁸¹

politics/tony-abbott-declares-im-not-an-agent-of-foreign-influence/news-story/da7994187fc74acd6797c3d5918b77a0>.

¹⁷⁵ *FITS Act* (n 2) s 3.

¹⁷⁶ *Lynn v New South Wales* (2016) 91 NSWLR 636, 647 [54] (Beazley P; Gleeson JA agreeing) ('Lynn'); *Australian Building and Construction Commissioner v Powell* (2017) 251 FCR 470, 480 [48]; *National Disability Insurance Agency v WRMF* (2020) 276 FCR 415, 447–8 [145].

¹⁷⁷ *Minister for Urban Affairs and Planning v Rosemount Estates Pty Ltd* (1996) 91 LGERA 31, 78 (citations omitted) (Cole JA), followed in *CSL Australia Pty Ltd v Minister for Infrastructure and Transport (No 3)* (2012) 297 ALR 289, 314 [99] (Robertson J); *Lynn* (n 176) 647 [54] (Beazley P; Gleeson JA agreeing).

¹⁷⁸ *LibertyWorks* (n 1) 531 [179] (Gordon J), quoting *United States v Rumely*, 345 US 41, 57 (1953).

¹⁷⁹ *FITS Act* (n 2) s 53(1) table, item 1; *Privacy Act 1988* (Cth) s 6(1) (definition of 'enforcement related activity').

¹⁸⁰ *FITS Act* (n 2) s 53(1).

¹⁸¹ *FITS Bill Advisory Report* (n 37) 144 [6.73]. See also 144 [6.74]. See also Attorney-General's Department (Cth), Submission No 5.1 to PJCIS (n 69) 42 [41].

Additionally, item 4 of the table empowers the Secretary to communicate scheme information for any other purpose prescribed by the Rules.¹⁸² As the PJCIS noted, the legislation does not specify any matters that the Secretary must consider as a precondition to exercising their powers.¹⁸³ Moreover, the ‘other purposes’ are prescribed not in the primary legislation, but in secondary legislation in the form of Rules,¹⁸⁴ which are subject to even less scrutiny than regulations.¹⁸⁵ While the Revised Explanatory Memorandum states that this will be ‘kept narrow’¹⁸⁶ and limited to necessary matters, it provides no specific examples of how the Government envisages the power will be exercised.¹⁸⁷ Nothing in the Act requires that the rule-making power be limited to a ‘narrow’ prescription of additional purposes.¹⁸⁸ The PJCIS stated that significant matters such as this should be prescribed in the primary legislation unless there is a sound justification for using delegated legislation.¹⁸⁹ The Australian Information Commissioner also noted that where individual privacy is affected, it is more appropriate to stipulate in the primary legislation the requirements for exercising discretionary powers to deal with personal information.¹⁹⁰

There are two potential responses available to the Commonwealth — neither of which are satisfactory. First, it might be argued that ultra vires exercises of power can be dealt with by way of judicial review of administrative action. This was suggested by the plurality.¹⁹¹ The problem with this is that an individual whose information has been shared with government authorities is unlikely to even know that the Department has authorised such a communication in the first place.¹⁹² They would be in no position to bring such an action. Second, it might be argued that s 53 can be salvaged by reading down or severance. As to reading down, the Secretary’s powers to disseminate scheme information for ‘other purposes’ might be limited to circumstances where those purposes are incidental to the primary purpose of promoting transparency. During the hearing, Gageler J asked the Solicitor-General whether the Secretary could collect information for governmental purposes other than ensuring the transparency of intermediary relationships. The Solicitor-General explained that s 53 does not change the purpose for which information may be gathered, but merely extends the way it may be used in

¹⁸² *FITS Act* (n 2) ss 53(1) table, item 4, 71(1).

¹⁸³ *FITS Bill Advisory Report* (n 37) 142 [6.69].

¹⁸⁴ On the proliferation of delegated legislation, see generally Denise Meyerson, ‘Rethinking the Constitutionality of Delegated Legislation’ (2003) 11(1) *Australian Journal of Administrative Law* 45, 50–1.

¹⁸⁵ *FITS Bill Advisory Report* (n 37) 131 [6.28], 146 [6.82], 149 [6.91]; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest No 1 of 2018, 7 February 2018) 66 [1.223], 66–7 [1.226]–[1.230]; Department of Parliamentary Services (Cth) (n 137) 11.

¹⁸⁶ Revised Explanatory Memorandum (n 43) 138 [780].

¹⁸⁷ *Ibid* 137–8 [779]–[780].

¹⁸⁸ Senate Standing Committee for the Scrutiny of Bills (n 185) 67 [1.228].

¹⁸⁹ *FITS Bill Advisory Report* (n 37) 149 [6.91]; Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia (n 185) 66 [1.223], 67 [1.230].

¹⁹⁰ Office of the Australian Information Commissioner, Submission No 17 to PJCIS, Parliament of Australia, *Review of the Foreign Influence Transparency Scheme Bill 2017* (23 January 2018) 6.

¹⁹¹ *LibertyWorks* (n 1) 508 [70] (Kiefel CJ, Keane and Gleeson JJ).

¹⁹² On the limits of judicial review, see generally Allars (n 3) 192.

circumstances where an ‘*incidental consequence*’¹⁹³ of the information acquired for the transparency purpose is that it happens to be relevant to one of the ‘other purposes’.¹⁹⁴ The problem with this answer is that it places too much faith in the ability of the Secretary and their delegates to undertake a complex analysis of their broadly-defined discretions every time they exercise those powers. Even the High Court cannot agree on the scope of the Secretary’s powers. As to severance, the problem, as identified by Gageler J, is that it requires the Court to engage in the legislative process.¹⁹⁵ As Gordon J explained, the gap between the two repositories cannot be bridged by limiting the information gathered by the Secretary to what appears on the public website because this would require the Court to redesign the architecture of the entire scheme.¹⁹⁶

The political climate in which the *FITS Act* was conceived, and in which it continues to operate, also supports the contention that s 53 operates as a surveillance mechanism. Since 2016 ASIO has repeatedly warned that almost every sector of Australian society is a potential target of extensive and sophisticated foreign interference.¹⁹⁷ In 2021, ASIO stated that espionage and foreign interference will become Australia’s principal security concern over the next five years.¹⁹⁸ In recent years, several high-profile politicians including Sam Dastyari,¹⁹⁹ Kristina Keneally,²⁰⁰ Malcolm Turnbull,²⁰¹ and Julie Bishop,²⁰² have been linked to Chinese political donors. In 2019, the Senate established the Select Committee on Foreign Interference through Social Media ‘to inquire into ... the risk posed to Australia’s democracy by foreign interference through social media’.²⁰³ More recently, in 2020

¹⁹³ Transcript of Proceedings, *LibertyWorks Inc v Commonwealth* (n 109) 2890 (emphasis added) (SP Donaghue QC, Solicitor-General of the Commonwealth).

¹⁹⁴ Ibid 2891–2 (SP Donaghue QC, Solicitor-General of the Commonwealth). See also *LibertyWorks* (n 1) 511 [88]–[89] (Kiefel CJ, Keane and Gleeson JJ).

¹⁹⁵ *LibertyWorks* (n 1) 517 [116] (Gageler J).

¹⁹⁶ Ibid 519–20 [129]–[130], 533 [188] (Gordon J).

¹⁹⁷ ASIO, *ASIO Annual Report 2016–17* (2017), 3, 4, 12, 23; ASIO, *ASIO Annual Report 2017–18* (n 37) 3, 25, 27; ASIO, *ASIO Annual Report 2018–19* (2019) 26; ASIO, *ASIO Annual Report 2019–20* (2020) 4, 23, 25; ASIO, *ASIO Annual Report 2020–21* (2021) 20, 43 (*ASIO Annual Report 2020–21*).

¹⁹⁸ *ASIO Annual Report 2020–21* (n 197) 4; ASIO, *Director General’s Annual Threat Assessment* (9 February 2022) <<https://www.asio.gov.au/resources/speeches-and-statements/director-generals-annual-threat-assessment-2022>>.

¹⁹⁹ See Anna Henderson and Stephanie Anderson, ‘Sam Dastyari’s Chinese Donations: What are the Accusations and is the Criticism Warranted?’ *ABC News* (online, 5 September 2016) <<https://www.abc.net.au/news/2016-09-05/sam-dastyari-chinese-donations-furore-explained/816588>>; Lucy Sweeney, ‘Sam Dastyari Resigns from Parliament, Says He Is “Detracting from Labor’s Mission” amid Questions over Chinese Links’, *ABC News* (online, 12 December 2017) <<https://www.abc.net.au/news/2017-12-12/sam-dastyari-resigns-from-parliament/9247390>>.

²⁰⁰ See Anthony Galloway, ‘Labor’s Kristina Keneally Met with Head of United Front Group’, *The Sydney Morning Herald* (online, 20 October 2021) <<https://www.smh.com.au/politics/federal/labor-s-kristina-keneally-met-with-head-of-united-front-group-20211020-p591k2.html>>.

²⁰¹ Henry Belot and Matthew Doran, ‘Malcolm Turnbull Dined with Wealthy Chinese Donor Days after Company Gave \$40k to Queensland LNP’, *ABC News* (online, 24 November 2017) <[https://www.abc.net.au/news/2017-11-24/malcolm-turnbull-dined-with-liu-xiaodong-after-\\$40k-donation-lnp/9187476](https://www.abc.net.au/news/2017-11-24/malcolm-turnbull-dined-with-liu-xiaodong-after-$40k-donation-lnp/9187476)>.

²⁰² Gina McColl and Philip Wen, ‘Foreign Minister Julie Bishop’s Links to Chinese Political Donors’, *The Sydney Morning Herald* (online, 25 August 2016) <<https://www.smh.com.au/politics/federal/foreign-minister-julie-bishops-links-to-chinese-political-donors-20160823-gqzaay.html>>.

²⁰³ Parliament of the Commonwealth of Australia, *Senate Journals*, 5 December 2019, 1127. See also 1128. Note that the Committee produced an interim report in December 2021 but was unable to

the Morrison Government introduced the *Australia's Foreign Relations (State and Territory Arrangements) Act 2020* (Cth), which empowers the Minister for Foreign Affairs to invalidate or prohibit the negotiation of foreign arrangements between State or Territory entities and foreign entities, where such an arrangement would be inconsistent with Australia's foreign policy.²⁰⁴ In 2021, this legislation was used to cancel four arrangements between the Victorian Government and China.²⁰⁵ At the time of writing, the Minister is considering whether to cancel a 99-year lease of Darwin Port granted in 2015 by the Northern Territory government to a Chinese state-owned corporation.²⁰⁶ In light of this political context, it is unsurprising that the Department has adopted a broad approach to the collection and dissemination of information under the *FITS Act*, even where the connection to the transparency purpose is rather tenuous.

VII Conclusion

The High Court's split decision in *LibertyWorks* illustrates the difficulties that arise when applying the implied freedom jurisprudence to Australia's foreign influence legislation. While the majority upheld the impugned provisions on this occasion, the compelling dissents indicate that the *FITS Act* may not survive a future challenge unless its provisions are more closely tailored to its legitimate object. At present, the Secretary's powers to collect and disseminate scheme information are ill-defined and amount to overreach due to their underlying surveillance function. Statutory interpretation plays an important role in modern bureaucracies where broad discretions are increasingly delegated to the executive. If the Foreign Influence Transparency Scheme were to be reconsidered, the High Court is likely to clarify its interpretation of the ambit of the Secretary's powers, which will in turn determine the proper weight to be placed on the disconformity between the two repositories of scheme information.²⁰⁷

complete its inquiry and final report due to the prorogation of Parliament and the 2022 Election: see Select Committee on Foreign Interference through Social Media, Parliament of Australia, *Progress Report* (21 April 2022) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Interference_through_Social_Media/ForeignInterference/Progress_Report>.

²⁰⁴ *Australia's Foreign Relations (State and Territory Arrangements) Act 2020* (Cth) ss 22, 24, 35, 36. See also Commonwealth, *Parliamentary Debates*, House of Representatives, 3 September 2020, 6489 (Christian Porter).

²⁰⁵ Tim Callanan, 'What is China's Belt and Road Initiative and What Were the Four Deals the Federal Government Tore Up?', *ABC News* (online, 22 April 2021) <<https://www.abc.net.au/news/2021-04-22/what-was-in-victoria-belt-and-road-deal-with-china/100086224>>.

²⁰⁶ See Benjamin Herscovitch, 'Relations with China Still on Edge Despite Leaders' Meeting', *The Sydney Morning Herald* (online, 15 November 2022) <<https://www.smh.com.au/world/asia/relations-with-china-still-on-edge-despite-leaders-meeting-20221115-p5byfo.html>>; James Massola, 'Port of Darwin Lease to be Reviewed: Anthony Albanese', *The Sydney Morning Herald* (online, 8 June 2022) <<https://www.smh.com.au/politics/federal/port-of-darwin-lease-to-be-reviewed-anthony-albanese-20220608-p5as1e.html>>; Jano Gibson, 'Consider Reclaiming Darwin Port from Chinese Company Landbridge, Committee Advises Federal Government', *ABC News* (online, 17 March 2021) <<https://www.abc.net.au/news/2021-03-17/government-urged-consider-reclaiming-ownership-darwin-port/13256968>>.

²⁰⁷ Future developments may inform the drafting of a similar scheme in the United Kingdom, known as the 'Foreign Influence Registration Scheme' (FIRS). The FIRS was supposed to be introduced in May 2022 as part of the National Security Bill 2022 (UK) that is currently before the UK Parliament, but it was omitted at the last minute and recently introduced by way of amendment: see United Kingdom, *Parliamentary Debates*, House of Commons, 16 November 2022, vol 722, col 722–93;

United Kingdom, *Parliamentary Debates*, House of Commons, 6 June 2022, vol 715, col 568–640. See also Home Office (UK), *Legislation to Counter State Threats (Hostile State Activity): Government Consultation* (Consultation Paper, 13 May 2021) 31–5 <<https://www.gov.uk/government/consultations/legislation-to-counter-state-threats>>. In Canada, Bill S-237 is currently before the Parliament of Canada. If it becomes law, individuals acting on behalf of a foreign principal will be required to file a return when they undertake specific actions with respect to public office holders, and also establish a public registry in which all returns must be kept: Bill C-237, *An Act to Establish the Foreign Influence Registry and to Amend the Criminal Code* (2nd sess, 44th Parl, 2022) cls 5–6 (First Reading, 24 February 2022) <<https://www.parl.ca/legisinfo/en/bill/44-1/s-237>>.

Book Review

Copyright, Creativity, Big Media and Cultural Value: Incorporating the Author

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Jane C Ginsburg*

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Copyright, Creativity, Big Media and Cultural Value is a wide-ranging work of immense erudition and archival research, combining several historical studies of the 'incorporation' of the author in different sectors of the 'creative industries'.¹ The book's subtitle, '*Incorporating the Author*', astutely encompasses multiple meanings, whose implications the book works through. These include the author as an initiating participant in a larger economic structure (Chapter 3 (print publishing)). But also, the author as a bit player enveloped by a larger economic structure (Chapter 5 (film industry)). And the author (or performer) as an autonomous object of economic value (Chapters 6 (recording artists and industry) and 7 (contemporary creators of literature, music and art)), as Bowrey explores the evolution from copyright to brand.

The book offers 'a business history of copyright'² whose 'aim is to critically examine [through review of contracts and business correspondence] the role of authorship and its connection to copyright in the emergence of concentrated

* Morton L Janklow Professor of Literary and Artistic Property Law, Columbia University School of Law, New York, USA. Email: ginsburg@law.columbia.edu; ORCID iD: <https://orcid.org/0000-0001-9718-8932>.

¹ Kathy Bowrey, *Copyright, Creativity, Big Media and Cultural Value: Incorporating the Author* (Routledge, 2021) 3.

² Ibid.

corporate control'.³ It also presents a contentious critique of international copyright: far from realising the humanistic universality to which copyright's natural rights advocates aspire, international copyright instead enabled Britain to 'throttle' independent publishing in the Empire's domains, Bowrey claims.⁴ International copyright 'remains imperial by design',⁵ and, Bowrey urges, when authors work with publishers to achieve copyright law reform, they are 'helping sustain ongoing imperial power imbalances into the 21st century'.⁶

Bowrey sets the stage for her examinations of the creative industries by summarising theories of authorial property, particularly as they emerged during Romanticism. Consistent with her focus on 'business history', she also sketches the emergence of 'the author as businessman'⁷ in the 19th century, a general description that serves as a prelude to the next Chapter's analysis of how three authors in the emerging genre of detective fiction managed (or failed to manage) their copyrights. In Chapter 3, we learn of the publishing trajectories of two now-obscure writers, the pseudonymous Hugh Conway (*Called Back* (Arrowsmith, 1884)) and Fergus Hume (*The Mystery of a Hansom Cab* (Kemp & Sons, 1886)), as well as of the immensely successful Arthur Conan Doyle (whose *Study in Scarlet* (Ward Lock & Co, 1887) initially lagged behind the sales of Doyle's predecessors). Bowrey accounts for the divergent outcomes by examining the rise of the mass market for literature, the concomitant expansion of the late 19th-century publishing industry, and, especially, Doyle's and his agent's understanding that the object of commercial value was no longer the individual book, but the series of future works developed from recurring characters. Holmes, Watson, and other characters

provided a hook that could sustain a multi-vocal and inter-generational conversation between Doyle, his publishers, and multitudes of readers, theatre goers, film and television audiences across the globe. The form and content of his stories produced a copyright value that exceeded confinement to any particular material form or cultural product.⁸

Bowrey explains that as Doyle would sell rights to as-yet unwritten works, 'the literary property could only be defined with reference to the recurring fictional characters, and the author's name'.⁹ Inquiring, 'How did Doyle understand his copyright?',¹⁰ Bowrey responds that Doyle's great, and profitable, insight was to treat his literary property like a trademark. Foreshadowing her concluding chapter on authorship as a brand, Bowrey assesses:

[What] accounted for his early success ... was his recognition of the commercial value of the ephemeral properties associated with the story — the author's name, story titles, characters, stock elements. Though not directly protected by copyright law, these characteristics were integral to the

³ Ibid 1.

⁴ Ibid 7.

⁵ Ibid.

⁶ Ibid.

⁷ Ibid 22.

⁸ Ibid 32

⁹ Ibid 55

¹⁰ Ibid 57.

generation of a reliable, distinctive identity that enhanced recognition of the author's name and creations in a mass market flooded with cheap literature.¹¹

Doyle 'played the publishing game to benefit from the greatly expanding opportunities for exploitation of copyright.'¹² Those opportunities not only traversed different media, but also, and especially, international borders. Bowrey's next, and perhaps most controversial, chapter accordingly turns to 'Imperial copyright and its costs' (Chapter 4).¹³

Colonial sensitivities (resentments?) pervade this chapter; its Australian author's perception of international copyright far darker and insidious than the European, and even American, celebration of the *Berne Convention*.¹⁴ In the European and American view, international copyright agreements advance 'the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works';¹⁵ uniformity furthers authors' rights by facilitating international trade. For national copyright markets to play by the same rules is a good thing, enlarging authors' audiences, while pervasively consecrating creators' fundamental literary and artistic property rights. In this bracing chapter, Bowrey tells a different story. She recounts the deprivation of 'copyright sovereignty',¹⁶ which reduced Canadian publishers to serving as 'agents of British firms'.¹⁷ Bowrey charges that in accounts of Australian publishing history,

the international copyright infrastructure is always taken as a given without any discussion of power asymmetries, how they came about and how they continue to be justified. The enduring rhetoric of the universal right of authors fabricated in the late 19th century masks contemporary recognition of how historical disadvantage is perpetuated.¹⁸

Bowrey berates 'celebrity authors', such as Peter Carey and Richard Flanagan, for serving as shills 'fronting campaigns to retain the imperial status quo',¹⁹ '[t]hey have no special insight into copyright in general and advocacy of the universal right of authors stems from an anachronistic imperial confection.'²⁰

At the same time, however, Bowrey also illustrates how international copyright could bolster national cultural and commercial interests. British authors and publishers lamented cheap, unauthorised, American editions, but their appeals to universal morality would have gained them few adherents had American authors, publishers and public figures not perceived the self-interest in enlisting in the international copyright cause. As Catherine Seville has also shown in her account of

¹¹ Ibid.

¹² Ibid 60–1.

¹³ Ibid 69.

¹⁴ *Berne Convention for the Protection of Literary and Artistic Works*, as amended, opened for signature 24 July 1971, 1161 UNTS 3 (entered into force 15 December 1972), as amended on 28 September 1979: <<https://wipo.lex.wipo.int/en/text/283693>> ('*Berne Convention*').

¹⁵ Ibid Preamble.

¹⁶ Bowrey (n 1) 76.

¹⁷ Ibid 94.

¹⁸ Ibid 95.

¹⁹ Ibid 103. See also at 99.

²⁰ Ibid 104. See also at 99.

the tortuous route of the United States ('US') to protecting foreign copyrights,²¹ pirated editions of British authors undersold copyright-protected editions of American authors, with deleterious consequences both economic and cultural. While Bowrey contends that international copyright kept the colonies under British cultural control, she nonetheless brings to the fore American sources who saw international copyright as the means of cultural emancipation from the former Motherland. The unfair competition from cheap copies of British works overexposed American readers to 'feudal ideas and superstitions and survivals of which we [Americans] have been striving for a century to rid ourselves'.²² Even preachers railed that foreign books were 'both cheap and bad ... [leading to] the failure of that lawful pride in American institutions and principles which alone can preserve the freedom of our republic'.²³ Of course, lofty republican sentiments enhanced the 'missionary'²⁴ rhetoric of international copyright advocacy, but US publishers principally sought to open protected markets abroad while leveling price competition at home. Bowrey's next chapter, on films as 'work[s] of industrial authorship' (Chapter 5) and their international marketing, introduces nuances into an expected tale of US cultural hegemony.

Chapter 5 first takes us through the legal doctrine of dramatisation and film rights in literary works, emphasising the initial uncertainty of authorial control over film adaptations of books and plays given silent films' absence of appropriated dialogue. That changed with the 1908 Berlin revision of the *Berne Convention*, whose art 12 (now art 14(1)) explicitly extended authors' rights to 'cinematographic adaptations'. National laws followed suit. But authors of adapted works soon came to be displaced by screenwriters, who were employees of the film production company. Films, as 'work[s] of industrial authorship', enrol multiple creators, few of whom own copyrights in their own right. Rather, copyright vests in (or is presumed to be transferred to) the corporate entity film producer, a legal manoeuvre that facilitates the film's domestic and international commercialisation. 'With the shift to international corporatism, authors came to be excluded from the most important sites where the broader terms of their participation in the new cultural markets was being determined.'²⁵ In this instance, the author is 'incorporated' to the vanishing point.

Copyright was not the only attribute concentrated in the film production companies; before effective antitrust enforcement, the practice of blind and block booking enabled these, predominantly American, companies to control which and what kinds of films movie theatres in the US and Australia could show. But the tale takes a different turn with the advent of Australian censorship and Australian film editors' responses: to meet government demands, but also to satisfy the 'local box

²¹ Catherine Seville, *The Internationalisation of Copyright Law: Books, Buccaneers and the Black Flag in the Nineteenth Century* (Cambridge University Press, 2006).

²² Bowrey (n 1) 8, quoting Brander Matthews, 'Analysis of Book Titles Published in the USA, 1882–1886' in 'Will Copyright Raise the Price of Books?' (1887) *Century Magazine* republished in 21 January 1888 (No 834) *The Publishers' Weekly* 77.

²³ Bowrey (n 1) 82, quoting Reverend Henry van Dyke, *The National Sin of Literary Piracy* (Scribner, 1888).

²⁴ Bowrey (n 1) 81, quoting George Haven Putnam, *The Question of Copyright* (GP Putnam's Sons, 1891).

²⁵ Bowrey (n 1) 135.

office', they cut, re-edited and retitled the 'flag-waving out of American pictures',²⁶ and thus diluted 'the American imagery and ideals screened across the British Empire'.²⁷ Nonetheless, the vertical and horizontal integration of the film industry, and the cooperation (or 'industry collusion'²⁸) of trade associations 'expanded the global footprint of Hollywood while standardising international terms of trade'.²⁹

Chapter 6 turns to the recording industry, chronicling its emergence through the participation of international opera star Dame Nellie Melba. It 'offers a critical feminist reading of the history of the international recording industry and the role of intellectual property rights in supporting innovation'.³⁰ The critical feminist perspective comes from ascribing the rise of the recording industry to Melba's extraordinary celebrity, enlisted by the Gramophone Company in its successful (and occasionally underhanded) campaign to persuade Melba to become a recording artist. According to Bowrey, Gramophone sought to capitalise on Melba's audience appeal and artistic credibility because 'association with her would provide the Company with a valuable means of communicating the artistic merit of the sound technology to an international market from a London base'.³¹ By contrast, 'conventional histories of the sound recording industry ... present the view that the industry developed from the creativity and efforts of male protagonists, including composers, music publishers, men of science and entrepreneurs'.³² The story of Melba's dealings with the recording company, including her savvy exploitation of her fame to dictate economically and artistically advantageous contract terms, makes for the most engaging reading of the book.

The chapter's second strand, the role of intellectual property rights, addresses a paradox: performers had no copyrights in their performances. Their compensation depended on contractually-negotiated fees for service. Nor, at the outset, were sound recordings copyright-protected. That Parliament, in s 19(1) of the 1911 Imperial *Copyright Act* extended the subject matter to 'records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical works'³³ owes much to the Gramophone Company's rhetorical assimilation of recording artists' performances to intellectual creations. As one of the Company's executives testified to the parliamentary committee considering copyright law reform, 'the saleability of the phonogram depends almost exclusively on the reputation of the artiste who *created* the record, and on its setting and quality'.³⁴ And, returning to the feminist legal history that informs this chapter, the 'artistes' who enabled the record producers to recast a 'contrivance' — a product previously seen as a mere technological output — as equivalent to a musical work were Melba and other female performing artists.

²⁶ Ibid 134, quoting Graham Shirley, Interview with Ken Hall (2 August 1976).

²⁷ Bowrey (n 1) 134.

²⁸ Ibid 135.

²⁹ Ibid.

³⁰ Ibid 141.

³¹ Ibid 158.

³² Ibid 143.

³³ *Copyright Act 1911* (Imp) 1 & 2 Geo 5, c 46, s 19(1).

³⁴ Bowrey (n 1) 174, quoting Minutes of Evidence to Law of Copyright Committee 1909 (Mr John Drummond Robertson on behalf of the Gramophone Co Ltd) (emphasis in original).

In this advocacy [for a sound recording copyright], the Company leans heavily on the contributions of their female performers, helping further blur the distinction between a technology company and a creative endeavour. ... [A]n association with artistes is highly influential in reconceiving the technology company's inventorship into a contribution equivalent to authorship.³⁵

Many factors contributed to the recording industry's becoming a "vested interest", alongside the large music publishers',³⁶ but, Bowrey contends, 'without it having first established mutually beneficial relationships with celebrity artistes such as Melba, it is doubtful that the industry or the [Gramophone] Company would have achieved this result'.³⁷ I know too little about the history of the recording industry to question this conclusion, but Bowrey's alternative narrative of the rise of the recording industry is coherent, and at the least compels us to take into consideration the influence of players beyond the (male) inventors and dealmakers who, according to Bowrey, feature in the standard accounts. The chapter concludes with a much less sanguine view of the role of women in today's recording industry, in which women are vastly underrepresented at all levels: as performing artists, as songwriters, and as producers.

The final chapter (Chapter 7) elucidates the copyright attitudes of three leading contemporary creators in literature, music and visual art. Titled 'Why Margaret Atwood, Radiohead and Banksy are not anti-copyright', the chapter identifies these creators as critics of the cultural industries, yet cognisant of 'the ongoing importance of copyright to artists, in the face of commodity culture'.³⁸ A work of authorship may be more than 'a commodity with a money value, to be bought and sold like a potato',³⁹ but neither is it a free gift, even in a supposedly frictionless digital world. Margaret Atwood lowered the debate from lofty philosophical heights to more mundane considerations: 'if works of art are gifts and nothing but, how are their creators to live in the physical world, in which food will sooner or later be needed by them?'⁴⁰ Atwood's rhetorical query echoes the sardonic rejoinder of 18th-century English author Catharine Macaulay to Lord Camden's insistence, in his speech in *Donaldson v Beckett*,⁴¹ that glory should be the sole reward of authorship. As Macaulay wryly observed in her defence of copyright, the need to pay the 'sordid butchers and bakers ... are evils which the sublime flights of poetic fancy do not always soar above'.⁴²

Ironically, rather than becoming submerged by 'commodity culture', creators' 'copyright position has begun to function more as a brand'.⁴³ Harking back to her description of Arthur Conan Doyle's relationship to copyright, Bowrey observes that 'authorship is also starting to be described as a creation without any

³⁵ Bowrey (n 1) 175.

³⁶ Ibid.

³⁷ Ibid 176.

³⁸ Ibid 189 (referring to Margaret Atwood).

³⁹ Ibid 196, quoting Margaret Atwood, 'Introduction' in Lewis Hyde, *The Gift: How the Creative Spirit Transforms the World* (Canongate Books, 2012) ix.

⁴⁰ Ibid.

⁴¹ *Donaldson v Beckett* (1774) 1 ER 837 (HL).

⁴² Catharine Macaulay, *A Modest Plea for the Property of Copy Right* (R Cruttwell, 1774) 15.

⁴³ Bowrey (n 1) 190.

fixed content, merely a branding choice that assembles fans for particular commercial purposes'.⁴⁴ 'Copyright branding'⁴⁵ encompasses decisions, such as those recording artists like Radiohead make, about whether to distribute works according to traditional revenue models, or for free, or for 'tips' (pay what you want), or to bundle content with fan merchandise, or some combination of all of these. According to Bowrey, 'copyright exclusivity is no longer thought as essential to the terms of cultural and economic exchange'.⁴⁶ In fact, however, as Bowrey subsequently demonstrates, copyright's conferral of control — including the determination whether or not, or how, to exercise exclusive rights — remains fundamental.

In support of the assertion that exclusivity no longer is essential, Bowrey summons the example of Banksy, but her analysis illustrates the opposite. One might think a 'guerilla artist' like Banksy resists traditional copyright constructs. But if Banksy's unsigned ephemeral art might seem copyright-irrelevant, 'a product of illegality and vandalism, and sitting outside of commodity relations',⁴⁷ Bowrey explains that contemporary means of mass reproduction and dissemination capture the work in commercialisable form, thus returning copyright, and trademark, to the calculus. As Banksy's 'labour is appropriated and reappropriated by others he periodically intervenes and asserts himself back into the terms of exchange to disrupt the orderly reproduction of commodity relations and the predictability of commercial calculations underlying transactions'.⁴⁸ Bowrey characterises this disruption as 'a political act — not merely a branding technique'.⁴⁹ This anarchic conduct nonetheless is a carefully curated branding practice, and it relies on the copyrights that become enforceable when third parties memorialise otherwise ephemeral creations. As Bowrey recognises, in the digital era 'the distribution choices available to artists ... permit far quicker, more reflexive decision-making in building, refreshing and renewing these relationships [with their audiences] — *if the artist has retained control of their copyright*'.⁵⁰

While much of the book details detrimental dealings between authors and corporate exploiters, Bowrey concludes more hopefully that 'all creators have travelled more comfortably, commercially, and in artistic terms, where they have exercised a higher degree of agency and considered the terms of the incorporation of their authorship into commodity relations'.⁵¹

⁴⁴ Ibid.

⁴⁵ Ibid 202–5.

⁴⁶ Ibid 205.

⁴⁷ Ibid 207.

⁴⁸ Ibid 210.

⁴⁹ Ibid.

⁵⁰ Ibid 211 (emphasis added).

⁵¹ Ibid.

Book Review

We, The Robots: Regulating Artificial Intelligence and the Limits of Law by Simon Chesterman
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John Zerilli*

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The preface to Simon Chesterman's *We, The Robots*¹ signals its intended readership: those concerned with regulating the activities of artificial intelligence ('AI'). But with a subtitle like '*Regulating Artificial Intelligence and the Limits of Law*', the book was always going to entice the technologically savvier members of the legal profession — practitioners, scholars, judges, etc — and so not just the regulators. Unfortunately, however, practitioners and scholars, and possibly even the regulators themselves, are likely to hanker for more direction than the author provides. Many of Chesterman's discussions have a whiff of ambivalence about them and conclude at just the point where a keen observer of the subject would like to know more. For example, in winding up a lengthy discussion on negligence,² Chesterman states that 'for the purposes of tort liability [the process by which AI systems make decisions] raises the question of whether an autonomous system's behaviour could itself constitute a new intervening act that avoids liability'.³ Tantalisingly, that is just

* Chancellor's Fellow in AI, Data, and the Rule of Law, University of Edinburgh, Scotland; Research Associate, Oxford Institute for Ethics in AI, University of Oxford, England.
Email: john.zerilli@ed.ac.uk; ORCID iD:  <https://orcid.org/0000-0002-7010-2278>.

¹ Simon Chesterman, *We, The Robots: Regulating Artificial Intelligence and the Limits of Law* (Cambridge University Press, 2021).

² Ibid 88–91.

³ Ibid 90–1.

how the discussion began: 'In relation to causation, in some circumstances AI systems ... may constitute an intervening act in their own right.'⁴

This is what you get, I suppose, when a book offers a *tour d'horizon* — and make no mistake, the book is a masterful catalogue of practically every issue that has been raised in the past six years of law and technology scholarship. In the fever of cataloguing, however, answers are either not forthcoming, underspecified, or indeterminate. To be fair to Chesterman, perhaps this is because he is ever mindful of his target audience: the civil servant exercised by the practical imperatives of government policy. But occasionally too, things get bundled together that should probably be kept separate. For instance, when talking about the due process requirements of outsourcing to AI, he cites jurisdictions that have banned the use of AI for facial recognition.⁵ But because the discussion in this part of the book is meant to connect with what elsewhere in the book he calls 'matters of legitimacy' — functions which it is not immoral to outsource to AI provided that due process measures are in place to ensure human accountability — it is slightly confusing to see outright bans on facial recognition systems being mentioned here. Limits on the use of AI strike me as fitting more naturally in discussions of what instead he calls 'matters of morality' — applications of AI that are inherently, deontically, objectionable, and which ought to be seen as posing 'red lines'.

So much for general appraisal and criticism. I also have a somewhat more specific complaint, and this is that I was not convinced by Chesterman's argument that our systems of civil liability must inevitably produce 'accountability gaps'. To his credit, Chesterman does emphasise a number of times, particularly in the later chapters of the book, that our current civil liability regimes 'will cover the majority, perhaps the vast majority, of AI activities in the private sector',⁶ and I fully agree. Curiously, however, the chapter that examines this issue at length (Chapter 4) reads — and concludes — with somewhat less conviction. For instance, he writes that 'the speed, autonomy, and opacity of AI systems will give rise to accountability gaps ... future cases will arise where there is a harm not attributable to a person or a company'.⁷ As an example he gives: 'the death of a child hit by an unidentified drone ... or killed in error by a lethal autonomous weapon'.⁸ But in neither of these two cases does it seem to me that we should be in any doubt about the law's resourcefulness, even as it stands.

The first case is equivalent to a hit and run where no one is around to witness it and the defendant remains unknown. That is not a case of the law running out, or an accountability gap, so much as a case of our not knowing to *whom* the law applies — a situation hardly unique to cases involving AI systems. In the second case, in which someone is killed in error by a lethal autonomous weapon system ('LAWS'), again, nothing Chesterman had to say on the topic convinced me that the principles of tort, soundly applied, would produce accountability gaps. On the contrary, I am inclined to think someone can almost always be held liable, even in cases illustrating

⁴ Ibid 88.

⁵ Ibid 190–1.

⁶ Ibid 187. See also earlier in the book, eg, at 38.

⁷ Ibid 112–13.

⁸ Ibid 113.

the ‘problem of many hands’, so long as someone is at fault somewhere in the chain of events (and often enough, even when *no* one is at fault in the chain of events). Moreover, I remain to be convinced that it makes sense to think of the interstitial crevices of unsettled law as the sorts of things that give rise to ‘accountability gaps’. At least, I am not sure we should worry about them for AI more than we usually would without AI.

Every case will obviously come down to its own facts, and it is trite to point out that sometimes claimants simply do not deserve to win (whether in virtue of their contributory negligence or something else). But after all the evidence is in, are we really meant to doubt that someone somewhere in the chain will be held liable, when they *ought* to be, either through the application of product liability principles, vicarious liability, non-delegable duties, apportionment and contribution principles, the maxim *res ipsa loquitur*, and of course, the principles of causation and remoteness of damage? That last principle, in particular, can do quite a lot of heavy lifting. People worry that because machine learning algorithms *learn* to do things for themselves, including any errors, this somehow raises the prospect of a danger being inherent in the software for which no human can be identified as responsible. Chesterman seems worried by this too, because he notes more than once that the autonomy of an AI might make *it*, as opposed to its *manufacturer*, responsible for harm. But this has long struck me as a non-starter. Even the intervening actions of third parties do not break the causal nexus between tortfeasor and claimant harm so long as the intermediary’s intervention was (roughly) of such a kind as to be reasonably foreseeable in all the circumstances. So why should it be different when the intermediary is an artificial agent — indeed one designed or developed by the defendant for commercial gain?

Take the example of an autonomous vacuum cleaner. As the programmer, you want it to avoid bumping into furniture. So, the reward function might be something like, ‘avoid the sensors at the front of the vacuum cleaner coming within a certain proximity of objects’. To the householder’s dismay, the system learns to maximise its reward in a most unorthodox way, by simply travelling *backwards*. In this manner, the vacuum cleaner fully maximises its rewards, despite bumping into furniture left, right, and centre, simply because its sensors are positioned at the front of the device! To my mind, this is just the *kind* of thing that could go wrong with a machine-learning-driven vacuum cleaner, and which falls unquestionably within the field of its manufacturer’s reasonable foresight.

I do not doubt that incremental adjustments here and there will be required to our civil liability regimes, such as an amendment allowing software to be considered a ‘product’ under the *Consumer Protection Act 1987* (UK). But these are changes one would expect in the ordinary course of legal evolution anyway. Indeed, they are already in the wings: we do not need AI to educe these developments, although it may well precipitate them.

Standing back from all this and reflecting for a moment on the common law, perhaps the more pertinent question is whether the legerdemain of our judges *should* be relied upon to accommodate technological innovation. One drawback of squeezing all we can out of existing legal doctrines is complexity — the United Kingdom’s common law of privacy bears witness to the messiness that has been

tolerated out of deference to extant legal categories. But arguably this is not half as bad as what happens in rights discourse, where there seems to be genuine difficulty in applying the legal equivalent of Ockham's Razor to declarations of rights (the difficulty that, in pressing as much consequence as one can out of, say, the right to life, one brings about an unprincipled and potentially self-defeating inflation of the right, to say nothing of conceptual confusion). In matters of doctrine and doctrinal evolution, by contrast, a kind of theoretical parsimony is arguably exactly what is called for. To take only one example, the tort of injurious falsehood started off as an action against allegations of false title to land — hence its early name, 'slander of title' — but its scope soon extended to encompass all manner of aspersions cast on a claimant's goods and business dealings, to the point where it could even be brought for plainly defamatory imputations, as well as for a kind of passing-off ('reverse passing-off'). Conceptual confusion did not inevitably result.

Chesterman is on firmer ground when he notes the difficulties attending any attempt to prosecute war crimes committed through LAWSs. But this raises other issues. Chesterman thinks that 'some decisions over life and death require that a human soul grapple with them'⁹ because it is important for humans to be accountable for them.¹⁰ Indeed, he thinks this consideration has precedence over any argument seeking to justify the use of LAWSs on the basis of their superior performance. If that is the background assumption — that someone *must* be accountable for mishaps involving LAWSs come what may — then yes, difficulties in tracing responsibility along the chain of command will be a decisive consideration in any decision to deploy them. But what if that is the wrong assumption? Wouldn't the fact that LAWSs might eventually be much less prone to misidentify targets then count for more than being able to pin the blame on someone? Given the choice between a high probability of being killed by someone that has wrestled with their conscience, and a low probability of being killed by a piece of kit, is it not rational to plump for the latter? Perhaps in time, we might even come to see accidental death by LAWSs as akin to death by natural causes — acts of God, earthquakes, or volcanic eruptions, say — for which no one need be blamed.

For sheer breadth of coverage, Chesterman cannot be faulted. As I said before, there is scarcely an issue that has been discussed among the cognoscenti of law and technology over the past few years that does not receive even a touch of Chesterman's prodigious learning. But if I were to sum up my estimate of the book it would be that, for all its deft integration of material, it lacks a satisfying, cohesive theoretical vision to contain what Tennyson, speaking of the common law, once described as 'that wilderness of single instances'.¹¹

⁹ Ibid.

¹⁰ Ibid 104.

¹¹ Alfred Lord Tennyson, 'Aylmer's Field' in *The Works of Alfred Lord Tennyson* (Wordsworth Editions, 2008).