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# Parliaments, Proportionality and Facts

Gabrielle Appleby\* and Anne Carter†

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## Abstract

One of the key doctrinal developments of the High Court of Australia in relation to its constitutional limitations jurisprudence is the structured test of proportionality. In recent cases involving the implied freedom of political communication, the Court has indicated that its constitutional adjudicative function will be informed by the extent to which a parliament has, or has not, considered issues of proportionality. In this article, we examine these developments through the parliamentary institutional lens: we ask what the implications are for Australian parliaments if the Court adopts an approach to proportionality reasoning that is sensitive to parliamentary fact-finding and deliberations. We explore how the Court's restraint in applying the proportionality test might have two, interrelated, consequences. The first is the type of factual material that the political branches should be seeking when they make determinations about whether a law is 'reasonably necessary' to achieve a stated objective, and whether the regime has struck the most appropriate 'balance' between competing claims on the public good; and how parliamentarians should deliberate about that material. The second is whether evidence could be led in court to satisfy the judiciary that a parliament has considered the relevant facts, and deliberated appropriately about them, and, if so, the process that should be adopted for leading such evidence.

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## I Introduction

There is an emerging uncertainty in the High Court of Australia's jurisprudence on the implied freedom of political communication about the extent to which a parliament needs to produce evidence to support its decisions about the proportionality of particular legislative measures.<sup>1</sup> A number of recent cases illustrate the potential importance of evidentiary questions when applying proportionality analysis to determine whether laws that burden the implied freedom are justified.<sup>2</sup> Moreover, they demonstrate that there remain significant unanswered questions about the relationship between courts and parliaments with respect to these questions. Specifically, there is a lack of clarity about the degree to which the High Court, in performing its duty to determine constitutional facts, will be informed in its analysis by the factual material that was before a parliament, the extent of factual inquiries that parliament itself undertook during its deliberations, and extent and nature of those deliberations.

The High Court has not, so far, developed a consistent, or at least explicit, framework for when or how to evaluate the fact-finding and deliberations undertaken by a parliament. In this article, we examine this question through an iterative cross-institutional lens. That is, we investigate the potential implications for Australian parliaments if the High Court adopts an approach to proportionality reasoning informed by the fact-finding and deliberative processes of parliament, and how development of parliamentary practice might then affect the development of the Court's approach.

This article draws together two areas of scholarly inquiry. First, it examines the nature of the proportionality inquiry undertaken by courts. Specifically, it looks at the extent to which this inquiry requires courts to make findings of fact, and whether parliamentary fact-finding and deliberation might inform that inquiry. Our analysis of the High Court's current position reveals that the issue of how courts are to make the necessary factual determinations, and how they should treat fact-finding and deliberations of a parliament, is unresolved. This question relates directly to the issue of whether there is, or ought to be, a level of judicial restraint or deference to the decision-making processes of the political branches. The Court itself continues to reject any role for 'deference' in the Australian constitutional context,<sup>3</sup>

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<sup>1</sup> In this article, we refer to 'parliament' in the sense of any parliament of the Commonwealth, a State or Territory whose legislation is subject to a constitutional challenge.

<sup>2</sup> In this article, we focus on cases concerning the implied freedom of political communication. We note that similar questions of fact arise in relation to the freedom of trade, commerce and intercourse in s 92 of the *Australian Constitution*, where three justices of the High Court have recently endorsed the use of structured proportionality testing: see *Palmer v Western Australia* (2021) 95 ALJR 299. In the s 92 context it has been more common for the High Court to remit questions of fact to the Federal Court of Australia pursuant to s 44 of the *Judiciary Act 1903* (Cth). See, eg, *Palmer v Western Australia* (No 4), where Rangiah J heard evidence regarding the reasonable need for and efficacy of community isolation measures contained in Directions made pursuant to the *Emergency Management Act 2005* (WA): *Palmer v Western Australia* (No 4) [2020] FCA 1221.

<sup>3</sup> See, eg, *Unions NSW v New South Wales* [No 2] (2019) 264 CLR 595, 617–18 [48]–[52] ('*Unions NSW* [No 2]'). See also Murray Wesson, 'Unions NSW v New South Wales [No 2]: Unresolved Issues for the Implied Freedom of Political Communication' (2019) 23(1) *Media and Arts Law Review* 93; Caroline Henckels, 'Proportionality and the Separation of Powers in Constitutional Review:

and we explore the extent to which this is maintainable in the light of more recent indications that a parliament's fact-finding processes and deliberations may inform the Court's decision-making in this area.

Second, the article draws from theories about the interrelationship between parliaments and the courts, particularly with respect to their institutional roles under, and obligations to, the *Australian Constitution*. We suggest that, even under a position accepting the supremacy of judicial review as we have in Australia, there is nonetheless a responsibility on parliaments to engage with the Constitution. This includes an obligation to consider whether proposed legislation breaches constitutional norms and to engage with the various fact-finding and deliberative elements of the proportionality inquiry.

We then explore what this means for the relationship between the courts and parliaments by developing a 'spectrum of inter-institutional relations'. This spectrum is firmly situated in the Australian constitutional context and the High Court's understanding of its institutional role, including its ultimate responsibility for determining constitutional meaning and thus determining the facts on which that must be determined, and its scepticism towards the idea of deference in the Australian constitutional framework. The spectrum, which is both relational and iterative, consists of five different positions at which a court *may* engage with parliamentary fact-finding and deliberations. At one end of the spectrum there is what we term 'full restraint', where a court accepts or gives conclusive weight to the decisions of a parliament — that is, their fact-finding and the deliberations about those facts. At the opposite end of the spectrum is what we term 'no restraint', where a court places no weight on the views of the relevant parliament and proceeds instead to form its own view on all of the relevant factual matters (including conducting its own fact-finding), and conducts no review of the quality of parliamentary fact-finding or deliberation. Both of these extreme positions are problematic in terms of the High Court's role in the Australian constitutional system. The first gives conclusive force to the parliament, which in effect dilutes constitutional judicial review of any strength and is inconsistent with the Court's constitutional duties. The second, conversely, involves the Court substituting its own views for those of the parliament, which also misunderstands its role in a constitutional system in which political constitutionalism remains an informing foundational principle.

Between these two extremes are the positions we label 'non-evaluative restraint', and 'process evaluation', and 'process evaluation + unreasonableness review', where a court gives some consideration or weight to the views of the parliament and the fact-finding and deliberative processes it has followed. Under 'non-evaluative restraint', the mere fact that the legislature has engaged with the relevant question is sufficient, whereas under 'process evaluation', a court engages

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Examining the Role of Judicial Deference' (2017) 45(2) *Federal Law Review* 181. In a similar fashion, the High Court has eschewed the concept of 'deference' in administrative law, although commentators have argued that evidence of deference exist in the case law: Stephen Gageler, 'Deference' (2015) 22(3) *Australian Journal of Administrative Law* 151; Janina Boughey, 'Re-Evaluating the Doctrine of Deference in Administrative Law' (2017) 45(4) *Federal Law Review* 597. Cf the vast literature from other jurisdictions, such as the UK, which is discussed further below in the text accompanying n 27.

with the substance of the parliament's fact-finding and deliberative processes. 'Process evaluation + unreasonableness review' differs from this position only insofar as it requires judicial review of the substantive outcome of the political decision-making process to check for 'unreasonableness'. Following from 'process evaluation + unreasonableness review' there are a number of options a court may make take depending on the nature of the process undertaken by the relevant parliament and a court's evaluation of this process and the substantive outcome.

In addition to contributing to an understanding of the possible approaches, we also develop a normative claim about the point on the spectrum that best reflects the appropriate relationship between the High Court and parliaments in the Australian context. Our normative position is informed by our understanding of the High Court's role and the inter-institutional obligations of the political branches, as well as the normative desirability of greater and more responsible legislative engagement with these questions, and finally by the High Court's current approach to these questions.

The article is organised into four main parts. Part II is focused on the judicial approach, and it examines the nature of the proportionality inquiry that has been adopted by a majority of the Australian High Court. It confirms that the High Court's legal conclusion about proportionality is underpinned by various questions of fact. But the question of how these facts should be determined, and the relevance of parliamentary fact-finding and deliberation to judicial determination of these facts, has not been definitely settled. In Part III, the focus shifts to parliaments, and we review the relevant literature on departmentalism, how this intersects with different theories about the supremacy of judicial review, and how this informs the appropriate role of parliaments in terms of assessing the proportionality of legislation. In Part IV we turn to the substantive contribution of the article, as we set out a spectrum of inter-institutional relations. We delineate the role of the courts at each position on the spectrum, and also discuss the potential consequences that flow from the various positions. In Part V, we develop a normative claim about where the High Court ought to position itself on this spectrum. Ultimately, we contend that this spectrum can provide guidance on the weight that the Court should give to the parliamentary process. In this way, it will help to clarify the Court's fact-finding role when applying tests of proportionality, and will both clarify and incentivise parliamentary engagement with constitutional questions of proportionality.

## **II The Courts: Proportionality, Fact-Finding and Deference**

In this Part we set out the structured test of proportionality that has now been endorsed by a majority of the High Court and identify the role of facts within this test. This leads to the question of how courts should go about determining such facts, and the extent to which courts can or should be informed and their decisions influenced by deliberations undertaken by parliaments as to these matters. The Australian High Court's recent jurisprudence reveals a growing awareness of the fact-sensitive nature of the proportionality inquiry, but leaves significant unanswered questions about the way that a court should engage with parliamentary

deliberations about such facts. To understand the dynamics of this interface between the courts and parliaments, we draw upon two conceptual frameworks: the role of democratic and empirical institutional competency and the distinction between ‘first-order reasons’ and ‘second-order reasons’ for institutional restraint. Here we explain these two key frameworks, and then return to them in Part IV of this article as a basis for explaining our spectrum of inter-institutional relations.

While the High Court had previously prevaricated about the proper place of ‘structured proportionality’ in constitutional review, in late 2015 a slim majority of four justices in *McCloy v New South Wales* endorsed a three-part test in the context of assessing limitations on the implied freedom of political communication.<sup>4</sup> This test developed the second limb of the *Lange* test. The first limb of the *Lange* test, as it was in 2015, provided that an initial question be asked: ‘First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect?’<sup>5</sup> If the answer was yes to this question, the second limb of the *Lange* test asked:

if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.<sup>6</sup>

In *McCloy*, French CJ, Kiefel, Bell and Keane JJ, writing jointly, revised the second limb of that test to include what is now referred to as ‘proportionality testing’.<sup>7</sup> This new test involved, as part of asking whether the law is ‘appropriate and adapted’, analysing whether the impugned law is:

*suitable* — as having a rational connection to the purpose of the provision;  
*necessary* — in the sense that there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom;  
*adequate in its balance* — a criterion requiring a value judgment, consistently with the limits of the judicial function, describing the balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom.<sup>8</sup>

Since *McCloy*, this structured approach to proportionality has continued to be endorsed by a majority of the Court, with Nettle J and Edelman J recently confirming support for the test.<sup>9</sup> Given this majority support, it is this test of

<sup>4</sup> *McCloy v New South Wales* (2015) 257 CLR 178 (‘*McCloy*’).

<sup>5</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 (citation omitted) (‘*Lange*’).

<sup>6</sup> Ibid 567. In *Coleman v Power*, the second question in *Lange* was modified by replacing the phrase ‘the fulfilment of’ with ‘in a manner’: see *Coleman v Power* (2004) 220 CLR 1, 50–51 [93]–[96] (McHugh J), 78 [196] (Gummow and Hayne JJ).

<sup>7</sup> *McCloy* (n 4) 195 [2] (French CJ, Kiefel, Bell and Keane JJ).

<sup>8</sup> Ibid (emphasis in original).

<sup>9</sup> See *Clubb v Edwards*; *Preston v Avery* (2019) 267 CLR 171, 264–9 [266]–[275] (Nettle J), 329–45 [461]–[500] (Edelman J). Note that in *Comcare v Banerji*, proportionality reasoning was applied by the joint judgment of Kiefel CJ, Bell, Keane and Nettle JJ, with Edelman J agreeing with this approach: *Comcare v Banerji* (2019) 267 CLR 373, [32] (Kiefel CJ, Bell, Keane and Nettle JJ); [188] (Edelman J).

structured proportionality that forms the focus of our analysis in this article, although we suggest that similar issues will arise however the test of validity is framed.<sup>10</sup>

The High Court's adoption of structured proportionality testing reflects a growing global spread of proportionality, although in Australia it has emerged in a context that is less explicitly rights-based.<sup>11</sup> While there are some Australian modifications, the three-part test adopted in *McCloy* contains the same analytical structure as the European test, first developed in Germany and now adopted across a variety of jurisdictions.<sup>12</sup> While the spread of proportionality has been accompanied by a wealth of academic scholarship, until recently there has been relatively little interest in the necessity of 'fact-finding' within this test.

Yet, on closer examination, it is apparent that at each of the three stages of suitability, necessity and adequate balancing, a court must proceed on the basis of certain empirical assumptions.<sup>13</sup> In other words, underpinning a court's legal conclusion about whether a particular measure meets the proportionality test, there are various questions of fact. The relevant facts will include, for instance, facts about the purpose underpinning the law, how the law operates in practice, its likely consequences or effects, the availability of alternative measures, and their efficacy. These are the *substantive* constitutional facts that will affect how courts determine the constitutional questions required of it in the *Lange/McCloy* test.<sup>14</sup> How these facts should be ascertained by courts remains unclear, and the Australian High Court has not articulated, or followed, a consistent approach to this issue.

The problem of ascertaining facts invites consideration of a further question, which is the focus of this article: in determining whether the proportionality test has been met, how much weight should courts give to parliaments and their fact-finding and deliberations on these questions? If a court does give weight to parliamentary fact-finding and deliberations, further questions arise about how the court will be satisfied that the parliament itself has engaged with the relevant factual issues. These might be understood as questions of *procedural* fact.

Two recent cases from the High Court demonstrate the current lack of clarity in this area.<sup>15</sup> In *Unions NSW v New South Wales [No 2]*, as foreshadowed above,

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<sup>10</sup> See, eg, Anne Carter, *Proportionality and Facts in Constitutional Adjudication* (Hart Publishing, forthcoming) ch 6.

<sup>11</sup> For some introduction to this literature, see Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (Cambridge University Press, 2012); Moshe Cohen-Eliya and Iddo Porat, *Proportionality and Constitutional Culture* (Cambridge University Press, 2013); Grant Huscroft, Bradley W Miller and Grégoire Webber (eds), *Proportionality and the Rule of Law: Rights, Justification, Reasoning* (Cambridge University Press, 2014); Vicki C Jackson, 'Constitutional Law in an Age of Proportionality' (2015) 124(8) *Yale Law Journal* 3094.

<sup>12</sup> Anne Carter, 'Proportionality in Australian Constitutional Law: Towards Transnationalism' (2016) 76 *Heidelberg Journal of International Law* 951.

<sup>13</sup> See, eg, Carter, *Proportionality and Facts in Constitutional Adjudication* (n 10); Anne Carter, 'Constitutional Convergence? Some Lessons from Proportionality' in Mark Elliott, Jason NE Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart Publishing, 2018) 373, 380–2.

<sup>14</sup> See above n 8 and accompanying text.

<sup>15</sup> While we focus on these two recent cases, we note the relevance of facts to the Court's inquiry, and the level of deference that ought to be accorded to the political branches' processes and deliberations



the failure of the New South Wales ('NSW') Government to undertake further enquiries about whether third-party campaigners could reasonably present their campaigns within the revised limit of \$500,000 ultimately proved critical.<sup>16</sup> While noting that a parliament generally does not need to provide evidence 'to prove the basis for the legislation which it enacts', the joint judgment in *Unions NSW [No 2]* observed that the position with the implied freedom was different, and a parliament was required to demonstrate that any effective burden on the freedom was justified.<sup>17</sup> The NSW Government's failure to prosecute further enquiries, which had been recommended by the Joint Standing Committee on Electoral Matters, meant that NSW had not justified the revised limit on expenditure.<sup>18</sup> As Nettle J remarked, '[i]t is as if Parliament simply went ahead and enacted the *Electoral Funding Act* without pausing to consider whether a cut of as much as 50 per cent was required'.<sup>19</sup> The case raises not only the more general question of how the High Court engages with the fact-finding processes and deliberations of the political branches, but also whether these branches have a burden of justification that they must meet procedurally to satisfy a future court on judicial review.

This lack of parliamentary deliberation, in circumstances where there had been a specific parliamentary recommendation for greater consideration, can be contrasted with the subsequent 2019 case of *Clubb v Edwards; Preston v Avery*.<sup>20</sup> In that case, the High Court had before it various evidentiary materials that demonstrated the factual basis upon which the Victorian Parliament and subsequently Tasmanian Parliament had each deliberated and ultimately legislated to provide safe access zones around abortion clinics. These included, for example, second reading speeches and debates, a Statement of Compatibility tabled by the Victorian Parliament, evidence from a psychologist regarding the effect of harassment on those seeking access to abortions, and other experiential evidence provided to the High Court by an amicus curiae.<sup>21</sup> This material indicated that the zone of 150 metres was chosen after consultation with the relevant stakeholders, and that the introduction of the safe access zones would have a positive effect on patient and staff wellbeing.

The High Court majority relied on these materials in deciding that the burdens imposed by the Victorian and Tasmanian legislation could be justified.<sup>22</sup> However, there was little express clarification of whether such evidence of parliamentary

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have been considered in earlier cases, eg, *ACTV v Commonwealth* (1992) 177 CLR 106, and in the context of s 92, *Castlemaine Tooheys v South Australia* (1990) 169 CLR 436.

<sup>16</sup> *Unions NSW [No 2]* (n 3).

<sup>17</sup> Ibid 616 [45] (Kiefel, Bell and Keane JJ). See also at 631–2 [94] (Gageler J), 650 [151] (Gordon J).

<sup>18</sup> Ibid 618 [53] (Kiefel, Bell and Keane JJ). See also at 633 [100] (Gageler J), 648–51 [145]–[153] (Gordon J).

<sup>19</sup> Ibid 641 [117].

<sup>20</sup> *Clubb v Edwards; Preston v Avery* (n 9).

<sup>21</sup> See, eg, ibid 472–3 [83], 473 [86], 509 [276], 510 [279], 511 [281], [283].

<sup>22</sup> In *Preston v Avery*, all judges were satisfied that the burden imposed by the Tasmanian Act was justified: *Clubb v Edwards; Preston v Avery* (n 9) [102] (Kiefel, Bell and Keane JJ); [213] (Gageler J); [325] (Nettle J); [387] (Gordon J); [501] (Edelman J). In *Clubb v Edwards*, a majority of the Court was satisfied that the burden imposed by the Victorian Act was justified: *Clubb v Edwards; Preston v Avery* (n 9) [128] (Kiefel CJ, Bell and Keane JJ); [294] (Nettle J). Note that the other judges in *Clubb v Edwards* decided there was no burden on the facts, and so avoided the need to determine validity: *Clubb v Edwards; Preston v Avery* (n 9) [153] (Gageler J); [349] (Gordon J); [443] (Edelman J).

deliberation is always required. Unlike in *Unions NSW [No 2]*, where a number of members of the Court emphasised that it was for the defendant to demonstrate that a law was appropriately justified (including by adducing relevant evidence),<sup>23</sup> in *Clubb v Edwards* these issues were largely unarticulated. For the joint judgment, the lack of evidence produced by the claimant Ms Clubb about the efficacy of on-site protests was used as a means to distinguish *Brown v Tasmania*.<sup>24</sup> Nettle J, who engaged most extensively with the factual material, took the view that notions of burden of proof and persuasion are ‘largely misplaced’ in this context.<sup>25</sup>

*Clubb v Edwards* and *Unions NSW [No 2]* demonstrate that the question of the extent to which the High Court, in assessing proportionality, will probe a parliament’s own deliberations of the relevant issue remains largely unarticulated under the Court’s current approach. For instance, these cases raised, but left largely unanswered, whether there is a burden of justification that a parliament must meet on passing such measures, and present these procedural facts to the High Court, and how the Court can and should treat parliamentary materials. In other jurisdictions where proportionality testing is used, largely in the context of rights protection, the relationship between the courts and parliaments is often approached through the framework of ‘deference’ or ‘restraint’. In broad terms, this refers to the process of the courts giving weight, or latitude, to the decisions of other branches of government.<sup>26</sup> Elsewhere, the question of whether and how courts ought to afford such weight have been the subject of lively and extensive academic debate.<sup>27</sup> From this literature it can be seen that there are a number of different grounds upon which courts may assign weight to the decisions of governments, including both normative and empirical grounds.<sup>28</sup>

Normative reasons reflect the legislature’s democratic authority, which suggests it is in a more appropriate institutional position than the courts to investigate and determine contested questions of policy and to make the necessary value judgments. Empirical deference, on the other hand, reflects the legislature’s particular institutional competence or expertise to determine the factual issues raised by proportionality.<sup>29</sup> This has a number of aspects. The first is that the legislature’s inquisitorial powers mean that it might be able better to inform itself of the facts relevant to assessments of proportionality. The second is that the legislature might

<sup>23</sup> See above n 17–18 and accompanying text.

<sup>24</sup> *Clubb v Edwards*; *Preston v Avery* (n 9) 203–4 [81] (Kiefel CJ, Bell and Keane JJ) citing *Brown v Tasmania* (2017) 261 CLR 328.

<sup>25</sup> *Ibid* 270 [277]. See also 292 [347] (Gordon J).

<sup>26</sup> See, eg, Cora Chan, ‘A Preliminary Framework for Measuring Deference in Rights Reasoning’ (2016) 14(4) *International Journal of Constitutional Law* 851, 854; Jeff A King, ‘Institutional Approaches to Judicial Restraint’ (2008) 28(3) *Oxford Journal of Legal Studies* 409.

<sup>27</sup> See, eg, Murray Hunt, ‘Sovereignty’s Blight: Why Contemporary Public Law Needs the Concept of “Due Deference”’ in Nicholas Bamforth and Peter Leyland (eds), *Public Law in a Multi-Layered Constitution* (Hart Publishing, 2003) 337, 340; TRS Allan, ‘Human Rights and Judicial Review: A Critique of “Due Deference”’ (2006) 65(3) *Cambridge Law Journal* 671; King (n 26), Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009) ch 7.

<sup>28</sup> For an explanation of this distinction, drawing upon the work of Robert Alexy: see Caroline Henckels, *Proportionality and Deference in Investor-State Arbitration: Balancing Investment Protection and Regulatory Autonomy* (Cambridge University Press, 2015) 35–7; Henckels (n 3) 192–5.

<sup>29</sup> Henckels (n 28) 35–7; Henckels (n 3) 192–5.

be able to seek the views and assistance of relevant experts and expertise to inform that decision-making. The third is that the legislature might institutionally be better suited to the polycentric decision-making often required in policy judgments around necessity and balancing.

Another distinction that can assist in understanding the inter-relationship between courts and parliaments in the context of deference is the idea of ‘first-order reasons’ and ‘second-order reasons’ for institutional restraint. Chan, writing in the context of the *Human Rights Act 1998 (UK)*, has explained these in terms of a distinction between the substance or merits of a decision (first-order reasons) and concerns of institutional competence or democratic legitimacy (second-order reasons).<sup>30</sup> Second-order reasons indicate that, even if a parliament did not get the merits or substantive issues correct (in the court’s view), nonetheless the court should still defer to parliament because of its democratic and empirical institutional competence.<sup>31</sup> Chan argues that with both types of reasons, if the court is to exercise institutional restraint, it should only do so if the reasons are supported by evidence. In other words, institutional competence and legitimacy should not simply be assumed, but before exercising restraint the court should review the degree to which the legislature actually has the specific competence or expertise to decide a particular issue.<sup>32</sup>

In Australia, despite the similarities in inquiry and institutional settings, the concept of ‘deference’ has been rejected by the High Court on the basis of the responsibilities of the judicial role. In *McCloy*, the plurality explained its understanding of the judicial role in the following terms:

The courts acknowledge and respect that it is the role of the legislature to determine which policies and social benefits ought to be pursued. This is not a matter of deference. It is a matter of the boundaries between the legislative and judicial functions.<sup>33</sup>

In *Unions NSW [No 2]* this approach was confirmed, and the High Court expressly rejected the submission by NSW that the capping of electoral expenditure is ‘reserved to the Parliament and not subject to scrutiny by the Court’.<sup>34</sup> As Wesson explains, although the Court correctly rejected this form of ‘submissive deference’, by rejecting *any* role for deference, it may have ‘overstepped’ the mark.<sup>35</sup> As the deference literature from other jurisdictions illustrates, when allocating weight to decisions made by governments, there are a range of different approaches that courts may take.<sup>36</sup> One concern arising from the High Court’s outright rejection of deference is that there has been little space — academically and judicially — to

<sup>30</sup> Cora Chan, ‘Proportionality and Invariable Baseline Intensity of Review’ (2013) 33(1) *Legal Studies* 1, 12.

<sup>31</sup> For further discussion, see Cora Chan, ‘Deference, Expertise and Information-Gathering Powers’ (2013) 33(4) *Legal Studies* 598.

<sup>32</sup> Chan, ‘Proportionality and Invariable Baseline Intensity of Review’ (n 30) 12; Carter, ‘Constitutional Convergence?’ (n 13) 392.

<sup>33</sup> *McCloy* (n 4) 220 [90].

<sup>34</sup> *Unions NSW [No 2]* (n 3) 617 [48] (Kiefel, Bell and Keane JJ). See also at 617 [51] and *Clubb v Edwards; Preston v Avery* (n 9) 200 [66] (Kiefel, Bell and Keane JJ): ‘The issue for the courts is not to determine the correct balance of the law; that is a matter for the legislature. The question is whether the law can be seen to be irrational in its lack of balance in the pursuit of its object.’

<sup>35</sup> Wesson (n 3) 102.

<sup>36</sup> Kavanagh, *Constitutional Review under the UK Human Rights Act* (n 27) 171–2.

consider how the Court can or should be informed by and evaluate parliamentary fact-finding and decision-making processes. It is this inquiry that we turn to next.

### III Parliaments, the Courts and the *Australian Constitution*

Unlike in the US, Australian constitutional scholars have not engaged in heated debates over the legitimacy of judicial supremacy. Since before Fullagar J's observation in the *Communist Party Case* that the principle in *Marbury v Madison* was 'axiomatic',<sup>37</sup> it had long been accepted that the ultimate arbiter of constitutional meaning is the High Court of Australia.<sup>38</sup> The reasons for this must be multi-factorial, including that our colonial heritage, which was never discarded through revolutionary schism, already accepted a settled role for courts in determining validity of legislative enactments. This was able to continue into independence under a constitutional document that gave little power to the judiciary to determine highly contested rights-based issues, where contentious policy questions require balancing of rights against each other, and against other government objectives. Indeed, in more contemporary Australian debates over a bill of rights, concerns about the appropriateness of judicial engagement in such exercises have given rise to claims of 'undemocratic' or 'unelected' judges and counter-majoritarianism, an issue that had previously not garnered much attention.<sup>39</sup>

Perhaps because judicial supremacy has never really been under any threat in Australia, there has been little, if any, serious commentary agitating for a separate, and possibly duelling interpretative authority located in the political branches of government. In the US, by contrast, under what is known as 'departmentalism', or 'coordinate construction',<sup>40</sup> scholars and practitioners have advanced a theory in which each branch of government — judicial, executive and legislative — engages in its own autonomous interpretative struggle with the Constitution. At their core, departmentalists believe that each branch has a separate and independent obligation to the Constitution, and that each branch has its own institutional authority to interpret it unshackled by the interpretations of other branches. Of course, departmentalists exist in different guises, or, as some might say, at different levels of extremity: some would argue that the interpretations of the political branches should receive equal institutional respect to those of the judicial branch, setting the branches up for an ongoing constitutional power struggle.<sup>41</sup>

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<sup>37</sup> *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262 (Fullagar J) ('*Communist Party Case*').

<sup>38</sup> In this article, we do not seek to challenge or critique this orthodox understanding of the High Court's function as the ultimate arbiter of constitutional meaning.

<sup>39</sup> Such debates draw their foundation from the *Engineers Case*, which set a path for a legalistic approach to the jurisdiction of the Court in the *Australian Constitution*, particularly as it relates to federal boundaries: *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('*Engineers Case*'). See, eg, James Allan, 'Siren Songs and Myths in the Bill of Rights Debate' (Senate Occasional Lecture, 4 April 2008) 3; Augusto Zimmermann, 'Eight Reasons Why Australia Should Not Have a Federal Charter of Rights' (Summer 2008/09) 79 *National Observer* 34.

<sup>40</sup> See, eg, Keith E Whittington, 'Extrajudicial Constitutional Interpretation: Three Objections and Responses' (2002) 80(3) *North Carolina Law Review* 773.

<sup>41</sup> Cornelia TL Pillard, 'The Unfulfilled Promise of the Constitution in Executive Hands' (2005) 103(4) *Michigan Law Review* 676, 678.

Even if one rejects this extreme positioning, there are two key insights that emerge from theories of departmentalism that are instructive in the Australian context. On the one hand, it must be true — and we see it manifest, for instance, in the oath of Ministers and parliamentarians — that each branch has independent obligations to act in accordance with the *Australian Constitution*. As a factual matter, we know that as executive officers and parliamentarians go about their day-to-day business of developing, legislating and implementing policies, they engage regularly in statutory interpretation and, somewhat less regularly, but still often enough to be significant, in constitutional interpretation. Often these engagements will be ungoverned by judicial precedential authority, and often they will never be challenged in the courts. In these areas, at least, the political branches not just do, but must, engage in constitutional interpretation outside the immediate precedential guidance of the courts, and often it is their interpretation that will be, de facto, the final word on the issue. Where there is judicial authority, the legislature must navigate that precedent, which might provide greater or lesser certainty to guide their actions, and they should consider constitutional risk as part of their broader deliberations.<sup>42</sup>

On the other hand, a second insight from departmentalism, which has been developed for instance by Tushnet,<sup>43</sup> and Waldron,<sup>44</sup> is that the non-judicial branches bring a unique institutional perspective to the task of constitutional interpretation. This pulls us in a slightly different direction, revealing that there should be a more complicated relation between the branches than simply accepting the supremacy of judicial review or asserting autonomous, unrelated departmentalism. This is not just about the spaces in constitutional law where the political branches are de facto the ultimate arbiter of the Constitution because the court has not entered that space, or where there is constitutional uncertainty so that there is no clear guide for their actions. Rather, it involves spaces in which judicial and political branches are *both* operating, but where questions of interpretation arise that might be better suited to the institutional competencies of one branch than another. Lazarus and Simonsen explain that it is in these spaces that the possibility arises that the branches might engage in such a way as to complement and enhance the institutional strengths of each other.<sup>45</sup>

It is those points of inter-institutional intersection that, we think, require greater study. In this article, we look at one example of that intersection: where the Australian High Court has developed constitutional doctrines, such as proportionality, that require consideration of facts and evidence in order to reach a

<sup>42</sup> See further, Gabrielle Appleby and Anna Olijnyk, 'Parliamentary Deliberation on Constitutional Limits in the Legislative Process' (2017) 40(2) *University of New South Wales (UNSW) Law Journal* 976; Gabrielle Appleby and Anna Olijnyk, 'Executive Policy Development and Constitutional Norms: Practice and Perceptions' (2020) 18(4) *International Journal of Constitutional Law*.

<sup>43</sup> Mark Tushnet, 'Interpretation in Legislatures and Courts: Incentives and Institutional Design' in Richard W Bauman and Tsvi Kahana (eds), *The Least Examined Branch: The Role of Legislatures in the Constitutional State* (Cambridge University Press, 2006) 355.

<sup>44</sup> Pillard (n 41) 679.

<sup>45</sup> Liora Lazarus and Natasha Simonsen, 'Judicial Review and Parliamentary Debate: Enriching the Doctrine of Due Deference' in Murray Hunt, Hayley J Hooper and Paul Yowell (eds) *Parliaments and Human Rights: Redressing the Democratic Deficit* (Hart Publishing, 2015) 385, 386.

conclusion.<sup>46</sup> In other jurisdictions, proportionality has tended to arise predominantly in a rights setting, whereas in Australia, it has arisen in relation to structural limitations such as the implied freedom of political communication, s 92 of the *Australian Constitution*, and characterisation of federal purposive powers.<sup>47</sup> In this article, we consider the Court's implied freedom jurisprudence, where the proportionality doctrine is at its most developed. As we have explained in Part II, in this area the High Court's jurisprudence recognises the tension involved: that it remains the Court's role to be the final arbiter of constitutional validity, but that its role is not to supplant the legislature's judgment relating to what are ultimately policy judgments, which are better suited to the legislature's institutional competencies.

Where the judicial and political branches are operating in the same constitutional space such as this, if exercising appropriate inter-institutional respect, they can also work to reinforce the strengths of each other's position. For instance, in relation to proportionality, it has been said that judicial review of legislative rights-choices can enhance the legislature's 'culture of justification'.<sup>48</sup> This promotes the openness of the legislature's decision-making to the public, thus producing a more transparent and accountable relationship between the legislature and the people.<sup>49</sup>

In the remainder of this article, then, we consider two key questions that arise in relation to the inter-institutional relationships between the High Court and parliaments around facts and proportionality. The first is: what does the High Court's claim to exercise restraint mean? What level of scrutiny will, or should, the High Court engage in to maintain its proper role while providing inter-institutional respect for the legislature's role? The second is: within that proper role, how can the High Court best promote a culture of justification in the legislature and in this way improve the foundations of representative and responsible government? To answer these questions, we develop a spectrum of inter-institutional relations, which provides a model for analysing the various ways in which courts and the parliaments might intersect.

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<sup>46</sup> Other areas in which such consideration of facts and evidence can arise include considerations around defence and emergency powers, for instance. See further discussion in PH Lane, 'Facts in Constitutional Law' (1963) 37(4) *Australian Law Journal* 108; Susan Kenny, 'Constitutional Fact Ascertainment (With Reference to the Practice of the Supreme Court of the United States and the High Court of Australia)' (1990) 1(2) *Public Law Review* 134; Bradley Selway, 'The Use of History and Other Facts in the Reasoning of the High Court' (2001) 20(2) *University of Tasmania Law Review* 129; JD Heydon, 'Constitutional Facts' (2011) 23 *Samuel Griffith Society Proceedings* 85; Gabrielle Appleby, 'Functionalism in Constitutional Interpretation: Factual and Participatory Challenges: Commentary on Dixon' (2015) 43(3) *Federal Law Review* 493.

<sup>47</sup> And possibly also ch III: see further Gabrielle Appleby and Stephen McDonald, 'Punishment and Chapter III of the *Constitution*' in John Griffiths and James Stellios (eds) *Current Issues in Australian Constitutional Law: Tributes to Professor Leslie Zines* (Federation Press 2020) 64; Gabrielle Appleby, 'The 2018 Australian High Court Constitutional Term: Placing the Court in its Inter-Institutional Context' (2021) 44(1) *University of New South Wales (UNSW) Law Journal* 267.

<sup>48</sup> Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10(1) *South African Journal of Human Rights* 31, 32.

<sup>49</sup> Ibid; David Dyzenhaus, 'Law as Justification: Etienne Mureinik's Conception of Legal Culture' (1998) 14(1) *South African Journal of Human Rights* 11; Moshe Cohen-Eliya and Iddo Porat, 'Proportionality and the Culture of Justification' (2011) 59(2) *American Journal of Comparative Law* 463.

## IV Proportionality on a Spectrum of Inter-Institutional Relations

In this Part, we set out in detail a spectrum of approaches, arguing that there is, or should be, an intersection between the roles of the courts and parliaments in proportionality analysis.<sup>50</sup> This intersection may be both relational and iterative, depending on the position on the spectrum. What we mean by relational and iterative is that how a parliament engages in its own institutional space with proportionality analysis can impact on how courts themselves perform the relevant proportionality analysis. How a court approaches proportionality testing and its response to a parliament's engagement might then, iteratively, affect future parliamentary engagement. In developing this spectrum, we draw upon some comparisons with other jurisdictions where, in the context of proportionality testing, this interrelationship has been more explicitly analysed.

Any inter-institutional relationship between the courts and parliaments will raise complex questions of the extent to which the judicial branch can inquire into the proceedings and deliberations of the legislative branch, and the extent to which it can take evidence of, and probe, what has occurred in a parliament. These are the procedural questions of fact that we refer to above. Of course, procedural questions such as this raise questions of parliamentary privilege. It is not possible in this article to provide a full analysis of this issue, but we rely on that performed by Kavanagh in the United Kingdom ('UK') context.<sup>51</sup> She draws the helpful distinction between the 'quality of the substantive reasons' offered by MPs during parliamentary debate, and the 'quality of the decision-making process in Parliament'.<sup>52</sup> We agree with Kavanagh that a focus on the quality of decision-making *process* of a parliament, and not the substantive decision of a parliament itself, allows courts to avoid parliamentary free speech issues under art 9 of the *Bill of Rights 1689* and to avoid intruding into matters covered by parliamentary privilege.<sup>53</sup> Below, we will further explain how this is achieved across the different positions on our spectrum of approaches.

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<sup>50</sup> Analogies might be drawn between the spectrum we develop, and the scrutiny spectrum that has been developed by the United States ('US') Supreme Court in its rights jurisprudence, from 'rational basis' scrutiny, through 'intermediate scrutiny' and 'strict scrutiny'. Levels of scrutiny will depend on the nature of the right that has been impugned. While there are similarities in the analysis, particularly as it focuses on the interrelationship between the Court and the legislature, the American jurisprudence has taken a different approach to proportionality testing, and we have limited our comparative analysis in this piece to those jurisdictions where the proportionality approach is more aligned with that of the High Court in *McCloy*. See also Paul Yowell, 'Proportionality in United States Constitutional Law' in Liora Lazarus, Christopher McCrudden and Nigel Bowles (eds), *Reasoning Rights: Comparative Judicial Engagement* (Hart Publishing, 2014) 87. However, as we explain in the conclusion to this article, in the UK context Lazarus and Simonsen have argued that the spectrum should be developed further (beyond that which we can do in this article) with an eye to the nature of the right that the measure impugns: Lazarus and Simonsen (n 45). In that respect, the US tiered approach may usefully inform the development of scrutiny standards.

<sup>51</sup> Aileen Kavanagh, 'Proportionality and Parliamentary Debates: Exploring Some Forbidden Territory' (2014) 34(3) *Oxford Journal of Legal Studies* 443.

<sup>52</sup> *Ibid* 465.

<sup>53</sup> *Ibid*. Kavanagh provides a detailed exploration of the constitutional restrictions on judicial review of the former given the operation of parliamentary privilege under art 9 of the *Bill of Rights 1689*.





the normative superiority of the legislature. The court makes no inquiry into the procedural or the substantive decisions of parliament, thus raising no questions of parliamentary privilege.

## **B     *Position 2: Non-Evaluative Restraint***

Under this position, the judiciary is concerned with whether there is *some* evidence that the legislature itself has engaged in relevant fact-finding and deliberations, but the court continues to exercise considerable restraint. The extent of evidence relates only to the fact of some fact-finding and deliberation and the court is not concerned with reviewing the legislature's first order reasons (relating to the merits of the particular case). The court exhibits a continued acceptance of the democratic institutional superiority of the legislature, but subjects the empirical and institutional superiority of the parliament to some, albeit very limited, review. This might even be described as 'tick-a-box' review.<sup>57</sup>

Under this position, the court must have some evidence before it to satisfy itself that there has been some legislative fact-finding and deliberation with respect to the relevant proportionality inquiries. This will need to be made available to the court by way of evidence of the public deliberations of the parliament, for instance in:

- explanatory memorandum, second reading speeches and debate in the parliament;
- the work of parliamentary committees that support the Houses and parliamentarians (including submissions and evidence received by these committees and their reports),<sup>58</sup> and
- other material considered by the parliament (such as, rights-related statements of compatibility, reports of other bodies such as anti-corruption commissions, law reform bodies or royal commissions).

The court does not, however, evaluate the actual evidence that was before the legislature or the substance of the legislative deliberations. It does not, therefore, inquire into the substance of the parliamentary decision-making, thus avoiding inquiring into parliamentary deliberations in a way that would pose difficulties for parliamentary privilege. The court is not even, at this position on the spectrum, concerned with whether *all* relevant facts and expertise were considered by the legislature, or with whether the legislature's final decision suffers from unreasonableness or irrationality. Under this position, therefore, the courts are looking for a very low level of justification from parliaments: that it has engaged in the processes at all.

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<sup>57</sup> Or what Kavanagh refers to as 'slapdash debate' or 'rhetorical or superficial nods' in parliamentary debates: Kavanagh, 'Proportionality and Parliamentary Debates' (n 51) 472.

<sup>58</sup> While committees are not 'parliament', they are established by parliaments to support parliamentary work, are staffed by parliamentarians, have their terms of reference set by the Houses and their work (through reports) is made available to parliamentarians. Determining the extent to which the work of committees actually supports the work of parliamentarians is difficult. It would require investigating the extent to which their work is read and relied upon. There are studies that look at the extent to which committee reports are cited in debate over Bills to determine their impact; but this is unlikely to reflect actual levels of reliance. See further, eg, Sarah Moulds, *Committees of Influence: Parliamentary Rights Scrutiny and Counter-Terrorism Lawmaking in Australia* (Springer, 2020).

Under this type of review, the actual restraint afforded may differ across the three stages of proportionality testing. As explained in Part II above, the nature of the inquiries (and the types of factual determinations required) are different at the various stages of the proportionality inquiry. This means that the level of restraint may differ in relation to the different stages of the inquiry. For instance, if there is some evidence of parliamentary deliberation about the suitability of a law, but no evidence that questions of reasonable necessity and balancing of means and ends were considered at all, the court might exercise restraint in terms of the first stage, but not the second and third stages of proportionality.

### **C     *Position 3: Process Evaluation***

Under this position, the court undertakes a robust procedural review of the legislative process (namely, the extent to which a parliament itself has considered the relevant inquiries in the proportionality analysis). That is, the court scrutinises the empirical and institutional claims to competence of the legislature, the second-order reasoning. In Hunt's words, the respect of the court must be 'earned' by the parliament.<sup>59</sup> The court will consider whether the legislature has gone through a robust and thorough process in which all relevant facts and expertise were before the legislature to inform its decision-making.

The distinction articulated by Kavanagh, that we referred to above, between the 'quality of the substantive reasons' offered by MPs during parliamentary debate, and the 'quality of the decision-making process in Parliament' is particularly helpful to understanding Position 3.<sup>60</sup> This position requires an evaluation only of the quality of parliament's decision-making process; that is, its fact-finding processes and the processes it has deployed in its deliberations. It does not require an evaluation of the merits of the analysis contained in the deliberations or whether the outcome of those deliberations reasonably follows from these processes.<sup>61</sup> Because the decision-making process is the concern of the court, Kavanagh argues that it will avoid judicial intrusion into areas protected by parliamentary privilege.<sup>62</sup>

This position requires the court to have the extensive evidence before it of two matters:

- (a) Evidence of the public deliberations of the parliament to understand the full scope of the legislative inquiry and deliberation (including the materials noted above on page 273 in relation to Position 2). In a case before the court, this material is likely to be led by government parties, as they will have better knowledge of and access to it.<sup>63</sup>
- (b) Other evidence that enables the court to evaluate the robustness of the parliamentary inquiries, remembering that the court is evaluating the processes and form, but not the substance, of any deliberations. The

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<sup>59</sup> Hunt, 'Sovereignty's Blight' (n 27) 340.

<sup>60</sup> See above n 52 and accompanying text.

<sup>61</sup> See further Kavanagh, 'Proportionality and Parliamentary Debates' (n 51) 465, 476.

<sup>62</sup> *Ibid.*

<sup>63</sup> See further Appleby, 'Functionalism in Constitutional Interpretation' (n 46) 498–9.

types of questions the court might ask, for example, could include: how thorough were the parliamentary investigations and deliberations? Were there other relevant facts that were overlooked by the parliament? Or is the parliament's interpretation of the evidence disputed by other experts whose views were not considered by the parliament? The type of evidence that would help the court answer these inquiries might be led, for instance, by non-government parties to the litigation or amicus, to demonstrate that the parliament did (or did not) have all the relevant facts and expertise before it.<sup>64</sup>

This represents a much more robust scrutiny of second-order reasoning than evident in Position 2, particularly with respect to the asserted empirical superiority of parliament. The court remains, however, restrained as to its review of the democratic superiority of parliament, as well as undertaking no review of the merits of the decision (the first order reasoning of parliament). As with Position 2, the actual judicial restraint that is afforded to parliament may differ across the three stages of proportionality testing. Again, this will depend on evidence of the robustness of the legislative deliberative process relevant to each stage of the inquiry.

Position 3 on the spectrum therefore involves a higher level of scrutiny than Positions 1 and 2, but it is still process-driven. In this way, it brings to the fore the possibility of a productive iterative inter-institutional relationship between the courts and parliaments. It gives the courts a role in what Curtin has referred to in the European Union context as 'prodding' parliaments:

Courts ... have some role to play in prodding parliaments (and executive actors) to be more open and responsive. Both sets of actors—courts and parliaments—have distinctive but complementary roles to play in ensuring that systems of representative democracy are not further hollowed out or blacked out ...<sup>65</sup>

Lazarus and Simonsen have referred to a similar idea in the UK context under the rubric of 'deference', noting its ability to create an iterative relationship that enhances democratic processes:

[R]igorous and respectful judicial examination of democratic processes enhances constitutional dialogue, increases the opportunities for judicial deference, heightens the transparency with which deference is exercised and therefore makes it more likely that deference will be accorded *where it has shown to be justified*.<sup>66</sup>

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<sup>64</sup> Amicus curiae may, for instance, have 'expertise, knowledge, information, or other insight which is not available to the parties': Susan Kenny, 'Interveners and Amici Curiae in the High Court' (1998) 20(1) *Adelaide Law Review* 159, 170. See also George Williams, 'The Amicus Curiae and the Intervener in the High Court of Australia: A Comparative Analysis' (2000) 28(3) *Federal Law Review* 365; Rosalind Dixon, 'The Functional Constitution: Re-Reading the 2014 High Court Constitutional Term' (2015) 43(3) *Federal Law Review* 455, 471; Appleby, 'Functionalism in Constitutional Interpretation' (n 46) 501–3.

<sup>65</sup> Deidre Curtin, 'Challenging Executive Dominance in European Democracy' (2014) 77(1) *Modern Law Review* 1, 31.

<sup>66</sup> Lazarus and Simonsen (n 45) 385 (emphasis added). See also Kavanagh, referring to the incentive this jurisprudence can create for Parliaments to take rights seriously: 'Proportionality and Parliamentary Debates' (n 51) 479.

In the Australian context, Appleby and Howe have explored the idea of ‘prodding’ in relation to the High Court’s decision in *Williams v Commonwealth (No 1)*.<sup>67</sup> They have suggested, in particular, that there might be a shift in the Australian judiciary’s embrace of a function of ‘prodding’ the Parliament to achieve stronger scrutiny and accountability, and that this might assist the functioning of a system of representative and responsible government.<sup>68</sup>

The form of process review that is proposed under this position has many similarities with the review that is evident in decisions of the European Court of Human Rights (and other European trans-national and domestic courts) and has been referred to as a ‘procedural approach’, particularly evident in proportionality analysis.<sup>69</sup> In that context, while not abandoning substantive review, the courts appear to also be incorporating procedural review into their reasoning (and we explore the possibility of a combined approach in Position 4, discussed below).

*Evans v United Kingdom* was a challenge under the *European Convention on Human Rights* (including the right to life and right to private and family life) to a UK law that allowed a man to withdraw his consent to his former partner’s use of embryos that had been created jointly by them.<sup>70</sup> The Grand Chamber of the European Court of Human Rights held that there had been no violation of the Convention, observing that it was ‘relevant’ to their inquiry that the legislation

was the culmination of an exceptionally detailed examination of the social, ethical and legal implications of developments in the field of human fertilisation and embryology, and the fruit of much reflection, consultation and debate.<sup>71</sup>

This became a vital part of the Court’s acceptance that the UK Parliament had fallen within the appropriate margin of appreciation afforded to domestic legislatures.

The European Court of Human Rights has also used a failure of deliberation as a basis for finding a violation of Convention rights. In *Hirst v United Kingdom (No 2)*, the Court was asked to assess the compatibility of a blanket ban on prisoners voting against the right to free elections.<sup>72</sup> The Court observed that there was no evidence that the UK Parliament ‘ever sought to weigh the competing interests or to assess the proportionality’ of the blanket ban on the right of convicted prisoners to vote.<sup>73</sup> The Grand Chamber noted that the issue had been considered by a multi-party Speaker’s Conference on Electoral Law in 1968 and a Working Group, and that Parliament had, by its vote, ‘implicitly affirmed the need for continued

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<sup>67</sup> *Williams v Commonwealth (No 1)* (2012) 248 CLR 156. See Gabrielle Appleby and Joanna Howe, ‘Scrutinising Parliament’s Scrutiny of Delegated Legislative Power’ (2015) 15(1) *Oxford University Commonwealth Law Journal* 3, 11.

<sup>68</sup> Appleby and Howe (n 67) 11.

<sup>69</sup> Patricia Popelier, ‘The Court as Regulatory Watchdog: The Procedural Approach in the Case Law of the European Court of Human Rights’ in Patricia Popelier, Armen Mazmanyan and Werner Vandenbruwaene (eds), *The Role of Constitutional Courts in Multilevel Governance* (Intersentia, 2012) 249. For some discussion of how this compares to the approach of the UK domestic courts, see Kavanagh, ‘Proportionality and Parliamentary Debates’ (n 51) 446–7, 472–8.

<sup>70</sup> *Evans v United Kingdom* [2007] 1 Eur Court HR 353.

<sup>71</sup> *Ibid* 384 [86].

<sup>72</sup> *Hirst v United Kingdom (No 2)* [2005] IX Eur Court HR 187.

<sup>73</sup> *Ibid* 215 [79].

restrictions on the voting rights of convicted prisoners'.<sup>74</sup> Notwithstanding this, however, the Court was not satisfied that there had been any substantive deliberation by the Parliament about the 'continued justification in light of modern-day penal policy and of current human rights standards for maintaining such a general restriction'.<sup>75</sup> Accordingly, the Court held that there had been a violation of the applicant's Convention rights.

More recently, in 2013, the European Court of Human Rights in *Animal Defenders International v United Kingdom* upheld a UK blanket ban on political advertising in the broadcast media as a proportionate restriction of the freedom of expression.<sup>76</sup> This was so even when it affected the ability of NGOs (non-government organisations), such as Animal Defenders International, to communicate with the public. In coming to this decision, the Court gave significant weight to the legislative deliberation about the issue. In its most explicit explanation of what type of legislative deliberation would inform its inquiries, the Court said:

The prohibition was ... the culmination of an exceptional examination by parliamentary bodies of the cultural, political and legal aspects of the prohibition as part of the broader regulatory system governing broadcasted public-interest expression in the United Kingdom and all bodies found the prohibition to have been a necessary interference with Article 10 rights.<sup>77</sup>

In particular, the Court in *Animal Defenders International* emphasised the 'particular competence of Parliament and the extensive pre-legislative consultation on the Convention compatibility' that the UK Parliament had undertaken, which helped to explain the degree of deference that the domestic courts had afforded to the legislative prohibition.<sup>78</sup> The Court also noted that the proportionality of the prohibition had been extensively debated before the domestic courts, both of which had carefully addressed the relevant Convention case law and principles.<sup>79</sup> Ultimately, the Grand Chamber attached 'considerable weight to these exacting and pertinent reviews, by both parliamentary and judicial bodies'.<sup>80</sup>

The European Court of Human Rights thus appears increasingly comfortable with affording a level of restraint where there is evidence of robust parliamentary review (coupled with other factors in its decision-making process). It also appears comfortable with the onus on the legislature to demonstrate that it has undertaken this review before it passes legislation. It is not reticent in explaining that this occurs, and in elaborating on what it considers appropriate deliberation. It is important to note that even within the Court this is still not a universally accepted approach. The two dissenting judgments in *Animal Defenders International* made it clear that while

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<sup>74</sup> Ibid.

<sup>75</sup> Ibid.

<sup>76</sup> *Animal Defenders International v United Kingdom* [2013] II Eur Court HR 203 ('*Animal Defenders International*').

<sup>77</sup> Ibid 236 [114].

<sup>78</sup> Ibid 236 [115].

<sup>79</sup> Ibid.

<sup>80</sup> Ibid 236 [116].

procedural review might inform substantive review by the Court, it should not replace it.<sup>81</sup>

Two main questions have arisen in relation to this procedural trend in the jurisprudence of the European Court of Human Rights. The first is what is the appropriate standard against which legislative process should be measured? What criteria should a court adopt when it engages in procedural-based review? Lazarus and Simonsen point out that this is a fundamental question that must be answered if the judicial review is to enhance democratic deliberation by the legislature. They explain that '[t]he clearer the criteria and the better the reasoning used by the courts when taking a view on the democratic deliberative process, the greater the potential for focused democratic dialogue between the arms of state.'<sup>82</sup> In a similar vein, Kende has also warned that too minimalistic a model, or standard, of process review may lead to a form of 'tick-a-box' review.<sup>83</sup> For instance, if legislatures start to adopt a 'boilerplate' model of deliberation that has been approved by the Court,<sup>84</sup> this would again undermine the objectives of procedural review.

The second question is the extent to which a procedural-based review model can adequately protect rights without being coupled with robust substantive review.<sup>85</sup> Many scholars have accepted this concern, and proposed models of review that, therefore, require the relevant court to engage in both procedural and substantive review of the proportionality analysis.<sup>86</sup> We turn to consider this combined model of review below when we explain Position 4 on our spectrum.

### *Potential Consequences of Position 3*

When a court engages in process evaluation, a number of different consequences might arise. These potential consequences depend on the court's findings in relation to the legislature's process, but also the court's appetite to undertake a full evaluation of the inquiries if it has found that the parliamentary deliberations on the substantive issues are lacking.

In relation to Position 3, there would appear to be three options available to a court if it is not satisfied with parliament's legislative fact-finding and deliberations. The first is that the court could engage in its own substantive merits deliberation of the proportionality of the measure, informing itself as necessary (and where available) of relevant constitutional facts, in order to determine whether —

<sup>81</sup> Ibid 249 [2] (Judges Ziemele, Sajó, Kalaydjieva, Vučinić and De Gaetano); 257–8 [6] (Judges Tulkens, Spielmann and Laffranque). For further consideration of the decision, see Robert Spano, 'Universality or Diversity of Human Rights? Strasbourg in the Age of Subsidiarity' (2014) 14(3) *Human Rights Law Review* 487; Jeff King, 'Deference, Dialogue and Animal Defenders International', *UK Constitutional Law Blog* (Blog Post, 25 April 2013) <<https://ukconstitutionallaw.org/2013/04/25/jeff-king-deference-dialogue-and-animal-defenders-international/>>.

<sup>82</sup> Lazarus and Simonsen (n 45) 393.

<sup>83</sup> Mark Kende, 'Can "Semi-Procedural Review" Help Solve the Problems of Constitutional Theory?', *JOTWELL* (Blog Post, 4 December 2013) <<https://conlaw.jotwell.com/can-semi-procedural-review-help-solve-the-problems-of-constitutional-theory/>> (reviewing Ittai Bar-Siman-Tov, 'Semi-Procedural Review' (2012) 6(3) *Legisprudence* 271).

<sup>84</sup> Ibid.

<sup>85</sup> See further Bar-Siman-Tov (n 83).

<sup>86</sup> See, eg, Lazarus and Simonsen (n 45); Bar-Siman-Tov (n 83).

despite failings in the legislative process — the legislature has nonetheless come to a constitutionally satisfactory conclusion as to proportionality. If the legislature's decision accords with the court's position, it would be left to stand. If it does not, the court would strike the relevant legislative provisions down as invalid. Under this position, the court conducts a review of the legislature's process, and if it finds that insufficient, conducts its own independent assessment of the merits of the structured proportionality test. The difficulty with this option (which is returned to below), is that the court may not be able to access the necessary constitutional facts to perform its own independent assessment of the merits.

This then gives rise to a possible second option: what happens if the court is unable to be satisfied of proportionality because of a lack of sufficient evidence available to it? In practice, this is more likely to be the case where the parliament has not engaged in a robust investigative and deliberative exercise. In such a scenario, we suggest, the court may invalidate the provision. It would appear to be for this reason that the High Court found invalid the provision in *Unions NSW [No 2]*. The Court's decision appears based not simply on the fact that the Parliament had not engaged in a further inquiry — that is, that the Parliament has met the burden of proving fact finding and deliberation has occurred — but because it was not able to access the necessary evidential material that such a further inquiry would have produced.<sup>87</sup>

The third option is that if the court is not satisfied that the legislature has engaged in a robust fact-finding and deliberative process, the court may invalidate the provision without itself undertaking a substantive deliberation of the merits involved. If the court were to take this option it would create not just an incentive for parliament to engage in fact-finding and deliberation, but a burden to do so. Because there is no judicial conclusion on the substantive merits, it would appear that a judicial finding of invalidity on this basis does not prevent a future parliament from re-enacting the same provision, with a more robust and informed deliberation as to its justification.

#### **D     *Position 4: Process Evaluation + Unreasonableness Review***

Position 4 is closely related to Position 3, but it contains an extra evaluative step by the court. It is also, as we argue in Part V below, the most normatively defensible position, at least in the Australian constitutional context. Under this position, as with Position 3, the court undertakes a robust scrutiny of the legislature's processes and fact-finding, ensuring that claims as to institutional and empirical legitimacy of the legislature are made out in a particular case. In other words, these claims to legitimacy must be supported by evidence, meaning that as with Position 3, the court will require extensive evidence to be satisfied that the parliament has undertaken a sufficiently comprehensive process.

In contrast to Position 3, there is also what might be described as a 'backstop' of judicial review of the outcome of the legislature's fact-finding and deliberation against a standard of unreasonableness. The court does not end its inquiry after the

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<sup>87</sup> *Unions NSW [No 2]* (n 3): see nn 17–18 and accompanying text.

review and evaluation of the parliament's processes (as it does in Position 3). It also asks whether, based on all of the relevant facts and information, the parliament's decision was nonetheless reasonable. This is not a review, in Kavanagh's words, of the 'quality of the substantive reasons' that informed the parliament's decisions, but, rather, a fresh review of the reasonableness of the final decision.<sup>88</sup> As for the standard of the review to be applied, the court might helpfully draw upon the standards developed in relation to unreasonableness in administrative law.<sup>89</sup>

As with Positions 2 and 3, we may see judicial restraint differing across the three stages of proportionality testing, depending on the quality of the deliberative process relevant to each stage of the inquiry.

#### *Potential Consequences of Position 4*

As explained above, under Position 4 the court undertakes an extra evaluative step, whereby it examines the substantive outcome of the legislature's decision-making against a standard of unreasonableness. There are a number of different consequences that might flow from Position 4, which arise depending on the court's findings in relation to whether both stage one (process evaluation) and stage two (reasonableness) have been met.

The first option (*robust parliamentary process not affected by unreasonableness*) is where the court is satisfied that the parliament undertook a robust process (that is, conducted relevant inquiries and considered all relevant facts) and, based on that process, did not make an unreasonable decision. In this scenario, satisfied of both the first and second order reasons for restraint, the court will not interfere with the resulting parliamentary decision.

The second option (*robust parliamentary process but affected by unreasonableness*) is where the court is satisfied that the parliament undertook a robust process, but nonetheless made an unreasonable decision. In this scenario, satisfied of the second order reasons, but not the first order reasons, the court will find the legislative provisions invalid. The legislature has an opportunity to reconsider the issue, but will not be able to come to the same policy choice, as it has been found to be affected by unreasonableness.

The third option (*insufficient parliamentary process*) is where the court is not satisfied that the parliament undertook a robust process. In this scenario, the court is left in the same position as it was under Position 3. That is, it might nonetheless go onto consider the merits of the proportionality questions, and determine whether the final parliamentary decision was nonetheless constitutionally permissible. It might find the provision invalid simply on the basis of insufficient process. Or, as is more

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<sup>88</sup> See Kavanagh, 'Proportionality and Parliamentary Debates' (n 51) 476.

<sup>89</sup> In particular, the standard of *Wednesbury* unreasonableness: a decision that is so unreasonable no reasonable person could arrive at it (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 230). The subsequent development by the High Court of the ground in *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332, 367, to include decisions that lack evident and intelligible justification, should, however, be approached with caution as it would likely take the Court into a review of the substantive reasoning process of the Parliament. Review, rather, should be limited to a backstop review of the unreasonableness of the final result.



likely, it might take the second option outlined above, that is, where it will attempt to undertake its own evaluation of the proportionality test, but where there is insufficient evidence available to it, it may find the provision invalid. This would not necessarily preclude parliament from re-enacting that provision following a more robust process that is informed by the necessary evidence to justify the provision.

## **E     *Position 5: No Restraint***

The final position, of no restraint, reflects no acceptance by the court of the democratic and empirical institutional superiority of parliaments. As such, the court affords legislative deliberation no inter-institutional respect at any stage of the inquiry. Instead, the questions to be answered under structured proportionality testing are to be determined by the court alone. It might be that the court is informed in answering those questions by evidence that has been led before parliament (particularly if the court is able to gain only limited access to relevant facts to inform itself about these matters), but the court will exercise no restraint with respect to the consideration of that evidence by the parliament itself.

## **V     The Normative Claim**

In this Part of the article we develop our main normative claim, outlining where we think the Australian High Court ought to position itself on our spectrum of inter-institutional relations. In the previous Part we outlined the major features of each of these positions, and here we explain why Position 4 ('Process Evaluation + Unreasonableness Review') is the most desirable and defensible position for the High Court. This position is the approach most consistent with the Court's constitutional obligations, as well as the Court's understanding of judicial power and its limits.

The High Court, as is well-known, is the final arbiter of the *Australian Constitution*. As well as being a final court of appeal, its task is to settle constitutional disputes and to provide authoritative guidance on the interpretation of the *Constitution*. In addition, however, as we have explained in Part III, when viewed from a broader inter-institutional context, the Court's obligations also include a role in 'prodding' the political branches to meet their own constitutional commitments.<sup>90</sup>

In Australia, of course, any discussion of the High Court's institutional role must also be informed by the Court's jurisprudence on the protections that must be afforded to courts under ch III of the *Australian Constitution*. Although some separation between the branches was envisaged by the framers of the *Constitution*, the High Court has interpreted the separation between the judicial and political branches of government particularly strictly. This interpretation prohibits, subject to certain exceptions, any 'mingling' of judicial and non-judicial functions.<sup>91</sup> In the context of proportionality review in Australia, there has also been the concern that

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<sup>90</sup> See above nn 65–7 and accompanying text.

<sup>91</sup> See Rebecca Welsh, 'A Path to Purposive Formalism: Interpreting Chapter III for Judicial Independence and Impartiality' (2013) 39(1) *Monash University Law Review* 66, 72.

such an inquiry will invite judicial incursion into the ‘merits’ of legislative design, which is considered to be outside the accepted limits of the judicial role.<sup>92</sup>

In assessing whether burdens on the implied freedom can be justified, the Court has an obligation to make a finding about whether a challenged measure meets the second *Lange* question.<sup>93</sup> As the Court has recently confirmed, the answer to this question is determined by applying the three stages of a structured ‘proportionality testing’.<sup>94</sup> As we have explained in Part II, this requires the Court to make certain findings of ‘constitutional fact’. It has long been accepted that the High Court alone has the duty to find these facts, and that a government cannot “‘recite itself’ into power’ by conclusively declaring the existence of such facts.<sup>95</sup> For instance, High Court Justice Kenneth Hayne, writing extra-curially, has emphasised the need for the Court to identify and find the relevant constitutional facts.<sup>96</sup> Deference, he suggested, can be used to ‘paper over the fact that the courts are unable or unwilling to identify the relevant facts’.<sup>97</sup> This need to make findings of constitutional fact raises, as we have explained in Part II of this article, the question of what weight, if any, the Court should put on parliament’s own investigations and deliberations on these questions.

When we consider the various points on the spectrum in the light of the High Court’s constitutional obligations, it is fairly easy to dismiss the positions at both extremes. For example, under Position 1 (‘full restraint’), the Court simply accepts at face value the parliamentary choice. In other words, it does not scrutinise, at all, whether a parliament itself undertook any deliberations or was informed by evidence in reaching its conclusion. It simply accepts the legislative choice without question. This position would, effectively, deprive the Court of any meaningful review function as it would be acting as a mere ‘rubber stamp’ for parliamentary decisions. This is, patently, not what is contemplated by the division of powers between the three arms of government in the *Australian Constitution*.

For similar reasons, we suggest that Position 2 (‘non-evaluative restraint’) is also untenable. Although the Court under this position has *some* review function, its scrutiny of parliament’s choices is minimal. The High Court under this position would inquire into whether Parliament has conducted any deliberations, but the *mere fact* of deliberation would be the end of the matter. Although this position appears to require some review, in reality it is likely to be a very weak check on parliaments, and would therefore also appear inconsistent with the Court’s constitutional obligations. This would, effectively, amount to a parliament ‘reciting itself into power’ and would deprive the Court of any meaningful review function.

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<sup>92</sup> See, eg, Dawson J’s criticism along this line of reasoning in *Cunliffe v Commonwealth* (1994) 182 CLR 272, 357.

<sup>93</sup> See the text accompanying above n 6 for the wording of the second *Lange* question, as reformulated in *McCloy*.

<sup>94</sup> See, eg, *Brown v Tasmania* (n 24) 368 [123] (Kiefel CJ, Bell and Keane JJ); *Clubb v Edwards; Preston v Avery* (n 9) 199–202 [61]–[74].

<sup>95</sup> *Communist Party Case* (n 37) 206.

<sup>96</sup> Hayne (n 56).

<sup>97</sup> *Ibid* 88.

At the other end of the spectrum, it is also easy to dismiss Position 5 as inappropriate. Under this position, it will be recalled, the Court exhibits no restraint and places no weight on the legislature's own assessment of proportionality. In other words, under this position, the High Court itself assesses the merits of the legislative choice without regard for the parliament's own assessment or deliberation on the matter. This position, we suggest, not only appears to overstep the limits of the Court's constitutional role, it is inconsistent with the Court's previous application of the test, in which the legislature's processes have had varying implications for the Court's decisions.

Between these two extremes, however, the position is more nuanced. Positions 3 and 4 both involve the Court undertaking a substantive review of parliament's fact finding and deliberative processes. Therefore, the High Court will require evidence to scrutinise parliamentary assessment of the proportionality of the legislative measure, and whether this deliberation was informed by appropriate facts. For the Court to undertake this type of review function, it must itself be informed by appropriate evidence. In other words, the High Court cannot properly evaluate a parliament's processes without some information concerning the facts and circumstances underpinning the legislation. Under both of these positions, then, the Court is not simply accepting that parliaments have superior competence and capacity to answer the relevant questions, but it must be satisfied that this is the case. This resonates with the position taken by Chan that where a court chooses to defer for either first order or second order reasons, it may only do so when there is evidence to justify that deference.<sup>98</sup>

We do not seek to prescribe, here, the types of criteria the High Court might apply to reviewing the processes of parliaments, and what procedural evidence must be led to satisfy the Court of the parliamentary processes. We would, however, say that the criteria adopted by the Court and how these are applied will be important in terms of how parliaments respond. This should be done keeping in mind the objective we set out above: of encouraging parliaments to better engage with their constitutional responsibilities, and to better justify to the public as well as the court the reasons for their decision-making. The Court must not adopt an approach that enables parliaments to respond in a highly formalised manner, as this would risk emasculating rather than deepening parliamentary deliberation. The Court must instead develop criteria that encourage parliaments to engage in holistic and rigorous fact-finding and deliberative processes. In terms of evidence of these processes, we know that the High Court will look at the extent to which governments and parliaments have documented their processes,<sup>99</sup> and that relevant evidence might consist of explanatory memoranda, statements of compatibility, second reading speeches and committee reports. It is also apparent that the Court will be assisted by external sources, such as expert reports and other data.

Both Positions 3 and 4, we suggest, are preferable to the positions at either extreme of the spectrum because they involve robust review of parliamentary

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<sup>98</sup> Chan, 'Proportionality and Invariable Baseline Intensity of Review' (n 30) 12.

<sup>99</sup> See further Justin Gleeson, 'After Dinner Speech' (Speech, Gilbert + Tobin Constitutional Law Conference, 12 February 2016) <[http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/justin\\_gleeson\\_sc\\_-\\_after\\_dinner\\_speech.pdf](http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/justin_gleeson_sc_-_after_dinner_speech.pdf)>.

deliberations. For instance, under each position the High Court must be satisfied on the evidence that a parliament has undertaken a thorough fact-finding and deliberative process. The difference between these two positions is not always clear, and there is likely to be some overlap. Under Position 3, the Court must review parliamentary process as an initial step. If this process is robust, this will be the end of the Court's inquiry. If the process is found to be lacking, however, the Court may undertake a further substantive inquiry. Under Position 4, in contrast, the High Court is required to exercise what might be described as the 'judicial backstop'. This is an extra evaluative step whereby the Court considers whether a parliament's decision, based on all of the facts and evidence, was reasonable. If the decision was reasonable (even if the Court itself would have determined the matter differently), the Court will not interfere with a parliament's findings. In other words, it will be satisfied that the legislative measure meets the proportionality test. It is Position 4, we suggest, that is most consistent with the High Court's obligations to interpret the *Australian Constitution* — including to make the relevant findings of constitutional fact — and is also within the accepted understandings of the limits of the judicial role.

## VI Conclusion

The proposal in this article has been prompted by various indications in the High Court's recent implied freedom of political communication cases that the legislature's fact-finding inquiries and deliberations about the proportionality of legislative measures might bear on how the Court itself determines these issues. While the Court has eschewed a doctrine of deference, the reality of its exercise of restraint in the face of parliamentary decisions begs a number of questions as to the precise relationship between the two constitutional branches in relation to proportionality testing.

In this article, we have formulated a spectrum of positions that might reflect the inter-institutional relationship between the courts and parliaments. We have argued that the most appropriate position for the High Court on this spectrum is one that involves the Court reviewing the robustness of a parliament's inquiries into and consideration of the proportionality tests, while also having a responsibility to test the reasonableness of the final parliamentary decision. Drawing on the position developed in the UK by Kavanagh, we have argued that limiting its review to the processes undertaken by the legislature allows the Court to take into account a parliament's actions without reviewing the substantive deliberations themselves, thus leaving intact the sanctity of parliamentary privilege.

What we have not done in this article, and will require further development, is to articulate the standards or criteria against which the High Court will assess parliamentary processes of fact-finding and deliberation. There has been some work done on this in the UK, for instance, with Lazarus and Simonsen proposing criteria that include:

- whether a parliament can demonstrate engagement with the otherwise unrepresented voices of the minority;
- the quality of the consideration given to the views of rights-bearers in the course of the parliamentary debate;

- whether there was evidence presented to the legislature of the necessity of the measure that restricts or violates rights; and
- a consideration of the nature of the right that the measure impugns.<sup>100</sup>

Kavanagh is less prescriptive, advocating for standards that reflect the concepts of focus, deliberation and participation.<sup>101</sup> As we flag above, any criteria must be carefully developed so as to deepen and not formalise, judicialise, or emasculate legislative deliberation. The criteria must be substantive, and go to the breadth and depth of the legislature's fact-finding and deliberative processes, not simply to whether they have spoken to the various stages of proportionality in the language adopted by the courts.

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<sup>100</sup> Lazarus and Simonsen (n 45) 394–401.

<sup>101</sup> Kavanagh, 'Proportionality and Parliamentary Debates' (n 51) 463.



# Taking Seriously the Free Exercise of Religion under the Australian Constitution

Benjamin B Saunders\* and Dan Meagher†

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## Abstract

This article argues that the current (or at least assumed) approach to interpreting the s 116 free exercise of religion clause in the *Australian Constitution* needs to be reconsidered. There is a widespread belief that ‘for’ connotes a narrow and binary purpose test when employed in s 116. That test is drawn from a rationale that relates to the specific context of the establishment clause. However, unlike establishment, a binary test of purpose is insufficient to do justice to the complex ways in which law may interact with the free exercise of religion. We suggest that the relevant test for the free exercise clause must consider the legal and practical effect of a law to ascertain whether it has a constitutionally obnoxious purpose. We outline an analytical framework to assess whether a law that infringes the free exercise clause is constitutionally justified, which considers whether the law is appropriate and adapted to serve a legitimate end. This framework provides the tools needed to perform a justification analysis that transparently ventilates and evaluates the competing rights and interests in play in a manner that is sufficiently context-sensitive. Importantly, it builds on the High Court of Australia’s existing free exercise jurisprudence and reflects orthodox constitutional principle.

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## I Introduction

It is well known that the few rights contained in the *Australian Constitution* have been interpreted narrowly by the High Court of Australia.<sup>1</sup> Among the casualties of the Court's narrow approach is s 116, the provision that purportedly protects the free exercise of religion ('the free exercise clause'). In 1981, Stephen J wrote that s 116 'is a constitutional provision of high importance';<sup>2</sup> however, that promise that has not been realised in the course of its interpretation. Section 116 provides as follows:

The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth.

Several tendencies are evident in the few High Court cases that have considered the free exercise clause. The prohibition contained in s 116 is 'not, in form, a constitutional guarantee of the rights of individuals', but a limitation on federal legislative power.<sup>3</sup> There is a widely held assumption that 'for' connotes a purpose test which is narrow and binary when employed in s 116. That is, s 116 will only invalidate laws that have the purpose of establishing a religion, imposing a religious observance, or prohibiting the free exercise of religion.<sup>4</sup> But laws which have the effect of inhibiting the free exercise of religion will not infringe s 116, provided that was not their purpose.<sup>5</sup> It has also been held that freedom of religion is not absolute, but may be limited by other considerations or interests,<sup>6</sup> such that in practice other interests will readily prevail over the free exercise of religion. Finally, the free exercise clause does not protect a person from being required to do something which is forbidden by his or her religion.<sup>7</sup>

In this article we argue that the current (or at least assumed) approach to interpreting the free exercise clause needs to be reconsidered. That approach has made the clause of little or no effect in practice, having never been invoked to invalidate a Commonwealth law, and thereby affording little protection to the free exercise of religion.<sup>8</sup> The principal source of this narrowness is the purpose test, which has been drawn from a rationale and conception which relates to the establishment clause and is assumed to apply to the interpretation of the free exercise

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<sup>1</sup> George Williams, 'Civil Liberties and the *Constitution* — A Question of Interpretation' (1994) 5(2) *Public Law Review* 82, 90.

<sup>2</sup> *A-G (Vic) (Ex rel Black) v Commonwealth* (1981) 146 CLR 559, 610 ('*DOGS Case*').

<sup>3</sup> *Ibid* 605, 609 (Stephen J), 615–16 (Mason J), 652–3 (Wilson J).

<sup>4</sup> *Hoxton Park Resident Action Group Inc v Liverpool City Council* (2016) 344 ALR 101, 121 [96], 122 [105], 130 [145] (Beazley P, Basten JA and Macfarlan JA agreeing) ('*Hoxton Park*'); Luke Beck, *Religious Freedom and the Australian Constitution: Origins and Future* (Routledge, 2018) 97; Carolyn Evans, 'Religion' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 1033, 1048–9; Suri Ratnapala and Jonathan Crowe, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 3<sup>rd</sup> ed, 2012) 411.

<sup>5</sup> *Kruger v Commonwealth* (1997) 190 CLR 1 ('*Kruger*').

<sup>6</sup> *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116 ('*Jehovah's Witnesses Case*').

<sup>7</sup> *Krygger v Williams* (1912) 15 CLR 366, 369 ('*Krygger*').

<sup>8</sup> Carolyn Evans, *Legal Protection of Religious Freedom in Australia* (Federation Press, 2012) 87.



clause. However, despite the common use of the term ‘for’ in both clauses, there are fundamental differences between establishment and free exercise.

First, it is either the case or it is not that a religion is established by law as the national or state religion. There are not degrees of establishment. By contrast, the free exercise of religion may be infringed to a greater or lesser extent; there are degrees of infringement of freedom of religion. Second, freedom of religion is a fundamental human right, whereas the prohibition on establishment is not for a rights-protective purpose.<sup>9</sup> The free exercise clause is concerned with ‘the impact of a law on the fundamental human rights of individual citizens’, while the establishment clause is concerned with the relationship between religion and the state.<sup>10</sup> These considerations support an ‘assertive reading’ of the free exercise clause.<sup>11</sup>

Third, as noted in *Adelaide Company of Jehovah’s Witnesses v Commonwealth* (‘*Jehovah’s Witnesses Case*’), freedom of religion is not absolute, but must accommodate, and sometimes give way to, other rights and interests. It cannot be the case that: on the one hand, any invocation of religion exempts a person from obedience to the law; or on the other, any invocation of a competing interest overrides religion. Identifying precisely this middle ground, and how religion may be balanced against other legitimate interests, is a matter of controversy.<sup>12</sup> This is not the case for establishment, which is an absolute prohibition that does not permit of exceptions: there are no countervailing considerations that may make it legitimate to establish a religion as the national religion in certain circumstances.

There are thus fundamental differences between laws establishing a religion and laws that infringe the free exercise of religion. This suggests that it is not appropriate to apply an interpretive test, in relation to the free exercise clause, that is drawn from considerations relating to the establishment clause. Whether a binary test of purpose is appropriate in relation to establishment, it is not a suitable test for the free exercise clause. Unlike establishment, there are questions of balance, judgement and proportionality that apply in relation to the freedom of religion. It might be, for example, that a law infringes the free exercise of religion in order to further a legitimate purpose or interest, but does so in an excessively burdensome way. A simplistic binary test of purpose is insufficient to do justice to the complex ways in which law may interact with the exercise of religion.

We argue that a satisfactory test for whether legislation impermissibly infringes the free exercise clause must take this into account, and ought not to be the same as the test which applies in relation to the establishment clause. In order to do so, we build on the insights of Gaudron J and Gummow J in *Kruger v Commonwealth* who considered that the reasonably appropriate and adapted test was apposite in the free exercise context.<sup>13</sup> To suggest that a proper justification analysis

<sup>9</sup> *DOGS Case* (n 2) 603 (Gibbs J).

<sup>10</sup> Alex Deagon, ‘Liberal Assumptions in Section 116 Cases and Implications for Religious Freedom’ (2018) 46(1) *Federal Law Review* 113, 123.

<sup>11</sup> Peter Hanks, Frances Gordon and Graeme Hill, *Constitutional Law in Australia* (LexisNexis, 4<sup>th</sup> ed, 2018) 683.

<sup>12</sup> See, eg, Expert Panel, Parliament of Australia, *Religious Freedom Review* (Report, May 2018) ch 4.

<sup>13</sup> *Kruger* (n 5) 131–2 (Gaudron J), 160–1 (Gummow J).

should be undertaken in this s 116 context is not novel. But identifying important strands of proportionality-style reasoning in the High Court's *existing* free exercise jurisprudence that has been hitherto overlooked is novel. That is the significance of our account. Our analysis then moves to outline frameworks of justification that provide the analytical tools to transparently determine whether a law that infringes the free exercise clause is constitutionally justified; and does so in a manner that is sufficiently context-sensitive.

In Part II we examine the early cases on the free exercise of religion, arguing that the first case to be decided in relation to the free exercise clause, *Krygger v Williams*,<sup>14</sup> has been taken to stand for a much narrower proposition than the facts and ratio decidendi of the case warrant. *Krygger* in fact stands for the proposition that s 116 does not protect the free exercise by a person of an activity that could not possibly be forbidden by the doctrines of his (or her) religion. Griffith CJ's more contentious views in that case about the scope of s 116<sup>15</sup> must be understood in that light.

We also examine the *Jehovah's Witnesses Case*, and note that the Court did not adopt a binary purpose test. Rather, Latham CJ considered that the purpose of a law was one factor that may be taken into account in determining whether the law infringed s 116, but not the sole factor.<sup>16</sup> Further, Latham CJ also recognised that freedom of religion is not absolute and there might be competing interests that counterbalance, and potentially override, religion, which invites a judgment as to the weighting of different rights and interests in relation to the free exercise of religion, rather than a binary question of legislative purpose.<sup>17</sup>

Part III considers the principal case that has been taken to be authority for use of the purpose test in the context of s 116: *Attorney-General (Vic) (Ex rel Black) v Commonwealth* ('*DOGS Case*').<sup>18</sup> That decision concerned the establishment clause rather than the free exercise clause, and those judges who did adopt a narrow and binary test of purpose did so on the basis of reasoning that reflects the nature of establishment rather than free exercise.<sup>19</sup> Those considerations do not readily translate to the interpretation of the free exercise clause.

The significance of *Kruger* is considered in Part IV. In that case, the High Court left the door open to considering, when determining legislative purpose, the practical effect of a statute, such that the purpose of a statute as determined solely from its terms cannot be considered the determinant of constitutional validity. Indeed, the only judges who gave the relevant test any consideration made clear that if determined facts were before the Court, it would be necessary to consider the legal operation *and* practical effect of a law to ascertain whether it had a purpose that was constitutionally obnoxious.<sup>20</sup>

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<sup>14</sup> *Krygger* (n 7).

<sup>15</sup> *Ibid* 369.

<sup>16</sup> *Jehovah's Witnesses Case* (n 6) 132.

<sup>17</sup> *Ibid* 126–33.

<sup>18</sup> *DOGS Case* (n 2).

<sup>19</sup> *Ibid* 579, 582 (Barwick CJ).

<sup>20</sup> *Kruger* (n 5) 131–2 (Gaudron J), 160–1 (Gummow J).

Finally, in Part V we outline analytical frameworks of justification that would allow judges to consider and reconcile — in a principled, transparent manner — religious freedom and other legitimate interests and legislative goals that necessarily arise in the free exercise context. In the context of its recent jurisprudence on the implied freedom of political communication, the High Court has adopted two different approaches to justification: calibrated scrutiny and structured proportionality. We consider that both recognise the constitutional necessity of a justification analysis that is appropriately context-sensitive and case-specific. They provide frameworks to assess constitutional justification having regard to the extent of the impact on religious free exercise, the importance of the law's purpose and whether the measures adopted to secure it are reasonable and proportionate in the relevant (factual and legal) circumstances. Our account is consistent in this regard with arguments made by other scholars that the High Court may or should adopt the reasonably appropriate and adapted test when applying the free exercise clause.<sup>21</sup> In doing so, it ensures that the free exercise of religion under the *Australian Constitution* is taken seriously.

## II Free Exercise Jurisprudence: Insights and Oversights

In this Part, we consider the early cases on the free exercise clause, namely *Krygger* and the *Jehovah's Witnesses Case*. Neither of these cases held that improper purpose is the 'touchstone for invalidity' under s 116.<sup>22</sup> We argue that *Krygger* has been taken to stand for a much broader proposition than the decision warrants, and that its correct interpretation is a much narrower one. We also argue that the *Jehovah's Witnesses Case* contains important observations that demonstrate an awareness of how competing rights, interests and values may be legislatively implicated in the free exercise context.

### A *Krygger v Williams: Requiring a Man to do Something Not Forbidden by his Religion*

The first case to consider s 116 was *Krygger*, which concerned an alleged conscientious objection to compulsory military service.<sup>23</sup> The *Defence Act 1903* (Cth) ('*Defence Act*') required all male inhabitants of Australia who had resided in Australia for six months to attend military training. Mr Krygger refused to participate in this training on the basis that this was contrary to his religious beliefs and, as a consequence, was convicted of an offence under the Act in the Ballarat Court of Petty Sessions. His appeal to the High Court included grounds that the

<sup>21</sup> Leslie Zines, *The High Court and the Constitution* (Federation Press, 5<sup>th</sup> ed, 2008) 571; Nicholas Aroney, Peter Gerangelos, Sarah Murray and James Stellios, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015) 354; George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2<sup>nd</sup> ed, 2013) 269; Luke Beck, 'Clear and Emphatic: The Separation of Church and State under the Australian Constitution' (2008) 27(2) *University of Tasmania Law Review* 161, 184–5; Luke Beck, *Australian Constitutional Law: Concepts and Cases* (Cambridge University Press, 2019); Deagon (n 10) 136.

<sup>22</sup> Luke Beck, 'The Case against Improper Purpose as the Touchstone for Invalidity under Section 116 of the *Australian Constitution*' (2016) 44(3) *Federal Law Review* 505, 508.

<sup>23</sup> *Krygger* (n 7).

relevant provisions of the *Defence Act* were contrary to s 116 of the *Australian Constitution* and therefore invalid.<sup>24</sup>

In one of the most dismissive judgments in the Court's history, Griffith CJ and Barton J rejected Mr Krygger's claim that s 116 exempted him from compulsory military service under the *Defence Act*. Their Honours' reasons, which were delivered on the day of the hearing, barely extended to two pages apiece, and they did not even consider it necessary to hear the respondent's argument.<sup>25</sup> Barton J thought that the appellant's argument was 'as thin as anything of the kind that has come before us'.<sup>26</sup>

In the course of this judgment Griffith CJ made the following comments about the scope of the free exercise clause:

It may be that a law requiring a man to do an act which his religion forbids would be objectionable on moral grounds, but it does not come within the prohibition of sec. 116, and the justification for a refusal to obey a law of that kind must be found elsewhere. The constitutional objection entirely fails.<sup>27</sup>

These comments have led many to view this case as standing for a very narrow view of s 116. In the *Jehovah's Witnesses Case*, Latham CJ held that

it was held in *Krygger v. Williams* that a person who is forbidden by the doctrines of his religion to bear arms is not thereby exempted or excused from undergoing the military training and rendering the personal service required by the *Defence Act* 1903-1910; and that the provisions of the Act imposing obligations on all male inhabitants of the Commonwealth in respect to military training do not prohibit the free exercise of any religion, and, therefore, are not an infringement of s. 116 of the Constitution.<sup>28</sup>

Other commentators interpret the case in a similar fashion.<sup>29</sup> According to Pannam, on Griffith CJ's interpretation, the only thing which could infringe s 116 'would be a denial of the right to attend a religious ceremony or attaching some penalty to the exercise of this right'.<sup>30</sup> In the words of another commentator, '[f]or the early High Court, religion began and ended at the church door'.<sup>31</sup>

These interpretations, however, misunderstand the true ratio decidendi of the decision. *Krygger* in fact stands for a much more limited, and uncontentious, proposition, namely that s 116 does not protect the free exercise by a person of an activity that *could not possibly* be forbidden by the doctrines of his (or her) religion. An examination of the legislation and their Honours' reasons explains why this is so.

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<sup>24</sup> Ibid 368.

<sup>25</sup> Griffith CJ commenced his judgment by stating: 'We heard Mr. McArthur [counsel for the respondent] not because we had any doubt about the matter, but because the appellant seems to treat the matter as a more serious one than I am disposed to do': *Krygger* (n 7) 369.

<sup>26</sup> *Krygger* (n 7) 373.

<sup>27</sup> Ibid 369.

<sup>28</sup> *Jehovah's Witnesses Case* (n 6) 133.

<sup>29</sup> See Gonzalo Villalta Puig and Steven Tudor, 'To the Advancement of Thy Glory? A Constitutional and Policy Critique of Parliamentary Prayers' (2009) 20(1) *Public Law Review* 56, 61–2.

<sup>30</sup> Clifford L Pannam, 'Travelling Section 116 with a US Road Map' (1963) 4(1) *Melbourne University Law Review* 41, 68.

<sup>31</sup> Joshua Puls, 'The Wall of Separation: Section 116, the First Amendment and Constitutional Religious Guarantees' (1998) 26(1) *Federal Law Review* 139, 142, citing Pannam (n 30) 68.

As noted above, the *Defence Act* contained a requirement that all male inhabitants of Australia who had resided in Australia for six months must render the 'personal service' required by the Act, but it also contained provisions accommodating those with conscientious objections. The Act provided that those with religious and conscientious beliefs that did not allow them to bear arms were to be trained, as far as possible, in non-combatant duties, and during a time of war were to be placed in non-combatant roles. Although exempt in this way from combat roles and training, persons with conscientious or religious objections were nevertheless required to undergo training (in non-combatant duties),<sup>32</sup> and in a time of war would be allotted non-combatant duties, such as in the medical corps.

These provisions enable the reason for their Honours' dismissiveness to be more readily appreciated. If Mr Krygger's religious objections were based on pacifist convictions, then those objections could only extend to being trained in and participating in *combatant* duties. Mr Krygger had objected to military training on the basis that this was contrary to the 'Word of God', citing Matthew 5:39: 'if thine enemy smite thee on the one cheek turn to him the other also',<sup>33</sup> which thus proscribes violence and retaliation. However, being trained in a non-combatant role such as a medic could not possibly be against those convictions: he would be trained 'not to take life but to save it'.<sup>34</sup> As Griffith CJ said: 'The real objection taken by the appellant is not to being trained so as to become efficient for taking life, but to being trained so that in time of war he may be competent to assist in saving life, and that is called a conscientious objection.'<sup>35</sup>

Given the accommodation afforded to such objectors, 'to base a refusal to be trained in *non-combatant duties* upon conscientious grounds is absurd'.<sup>36</sup> Barton J's reasons were to like effect.<sup>37</sup> Accordingly, *Krygger* does not stand for the proposition that, as later put by Latham CJ, 'a person who is forbidden by the doctrines of his religion to bear arms is not thereby exempted or excused from undergoing the military training'.<sup>38</sup> Rather, it stands for the proposition that, where a person's religion could not be construed so as to forbid him or her from undergoing training in non-combatant duties, s 116 does not operate to prevent that person from being required to undergo such training. That is unlikely to be a contentious proposition.

Given that this was the basis of their Honours' dismissiveness, it is difficult to understand Griffith CJ's observation that 'a law requiring a man to do an act which his religion forbids ... does not come within the prohibition of sec. 116'.<sup>39</sup> Indeed, on this interpretation it is difficult to see what substantive operation the free exercise clause would have. Arguably, the better view would be to see this observation as irrelevant to the question at hand, and, given that it did not attract the support of the other member of the Court, to regard it as entirely obiter dicta. As Griffith CJ himself said immediately prior to this statement, '[t]o require a man to do a thing which has

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<sup>32</sup> *Krygger* (n 7) 370 (Griffith CJ), 371–2 (Barton J).

<sup>33</sup> *Ibid* 367.

<sup>34</sup> *Ibid* 370 (Griffith CJ).

<sup>35</sup> *Ibid*.

<sup>36</sup> *Ibid* 371 (emphasis added).

<sup>37</sup> *Ibid* 372–3.

<sup>38</sup> *Jehovah's Witnesses Case* (n 6) 133.

<sup>39</sup> *Krygger* (n 7) 369.

nothing at all to do with religion is not prohibiting him from a free exercise of religion.<sup>40</sup> Rather than standing for a broad proposition about the narrowness of the free exercise clause, *Krygger* is best seen as reflecting the idiosyncrasies of the appellant's refusal to attend military training in non-combatant duties.

## **B     Jehovah's Witnesses Case: *Balancing Religion with Other Legitimate Interests***

The *Jehovah's Witnesses Case* concerned the banning or prohibiting of the incorporated association the Jehovah's Witnesses during the Second World War.<sup>41</sup> The Jehovah's Witnesses believed and publicly taught that all earthly political governments were agents of Satan; as such, they remained neutral and would not interfere in war between nations. The Governor-General made a declaration that certain bodies including the Jehovah's Witnesses were 'prejudicial to the defence of the Commonwealth and the efficient prosecution of the war'<sup>42</sup> and confiscated their property. The Jehovah's Witnesses brought an action claiming, among other things, that the regulations which authorised those actions were contrary to s 116 of the *Australian Constitution*.<sup>43</sup>

The High Court unanimously held that s 116 did not prevent the Commonwealth from enacting laws to restrain the activities of a body whose existence is 'prejudicial to the defence of the Commonwealth or the efficient prosecution of the war', where the activities of the body are founded upon the religious views of its members. The most nuanced and considered judgment was delivered by Latham CJ, who noted that s 116 is an overriding provision which 'prevails over and limits all provisions which give power to make laws'.<sup>44</sup> Latham CJ noted the key difficulty that exists in relation to the protection of the free exercise of religion:

Can any person, by describing (and honestly describing) his beliefs and practices as religious exempt himself from obedience to the law? Does s. 116 protect any religious belief or any religious practice, irrespective of the political or social effect of that belief or practice?<sup>45</sup>

That is, were there to be an absolute protection for religious freedom such that the holding of sincere religious belief exempts a person from obedience to any law, atrocities such as robbery and murder (practices of the Thugs of India), and immolating a widow upon her husband's funeral pyre (a Hindu practice) could be perpetrated in the name of religion and the result would be anarchy.<sup>46</sup> On the other hand, s 116 is necessary to protect the religion of minorities, especially unpopular minorities, given that the majority can look after itself.<sup>47</sup>

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<sup>40</sup> Ibid 369.

<sup>41</sup> *Jehovah's Witnesses Case* (n 6).

<sup>42</sup> Ibid 118.

<sup>43</sup> Ibid 119.

<sup>44</sup> Ibid 123.

<sup>45</sup> Ibid 126.

<sup>46</sup> Ibid 125, 131.

<sup>47</sup> Ibid 124.

Latham CJ examined the United States ('US') jurisprudence, noting that those cases held that the protection accorded to religion is not absolute, and 'did not involve a dispensation from obedience to a general law of the land which was not directed against religion'.<sup>48</sup> As such, freedom of religion must be balanced in relation to other legitimate interests and legislative goals. According to Latham CJ, the approach of the US courts was to consider whether 'the freedom of religion has been *unduly* infringed by some particular legislative provision',<sup>49</sup> which strikes an appropriate balance between according 'a real measure of practical protection to religion' and not 'involving the community in anarchy'.<sup>50</sup>

Latham CJ considered that it would be desirable to adopt such an approach in Australia, however, it was possible to decide the case on a narrower basis. Section 116 existed within the context of a Constitution that necessarily assumes the continued existence of the community, which therefore enables the Commonwealth to legislate to defend both external and internal threats to its existence:

It is consistent with the maintenance of religious liberty for the State to restrain actions and courses of conduct which are inconsistent with the maintenance of civil government or prejudicial to the continued existence of the community.<sup>51</sup>

Latham CJ also noted that the word 'for' 'shows that the purpose of the legislation in question may properly be taken into account in determining whether or not it is a law of the prohibited character'.<sup>52</sup>

The remaining judges were content to decide the case on a similar basis, holding that freedom of religion is not absolute, that society has the right to protect itself from threats to its existence, and that the enactment of laws which preserve the safety and continued existence of the nation are not an infringement of s 116.<sup>53</sup> Section 116 therefore needs to be read within the context of the *Australian Constitution* as a whole.

The *Jehovah's Witnesses Case* recognises that the free exercise of religion is not absolute, but competing rights, interests and values exist alongside freedom of religion. This is consistent with the recognition under international human rights law that the exercise of religion may be limited. However, by contrast with the approach taken in relation to s 116, international law imposes a very high threshold on the imposition of limitations on the manifestation of religion,<sup>54</sup> allowing such limitations in narrowly prescribed ways; namely, where they are 'necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others'.<sup>55</sup>

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<sup>48</sup> Ibid 129.

<sup>49</sup> Ibid 131 (emphasis in original).

<sup>50</sup> Ibid.

<sup>51</sup> Ibid.

<sup>52</sup> Ibid 132.

<sup>53</sup> Ibid 149–50 (Rich J), 154–5 (Starke J), 157 (McTiernan J), 159–60 (Williams J).

<sup>54</sup> See also Human Rights Committee, *General Comment 27: The Right to Freedom of Movement (Article 12)*, 67<sup>th</sup> sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999) [11], [14]; Human Rights Committee, *General Comment 34: Freedoms of Opinion and Expression (Article 19)*, 102<sup>nd</sup> sess, UN Doc CCPR/C/GC/34 (12 September 2011) [22].

<sup>55</sup> *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 18(3); Nicholas Aroney and Benjamin B Saunders,

Navigating the difficulties thrown up by free exercise requires charting a middle ground between adequately protecting freedom of religion, especially the rights of minorities, and also not providing religious adherents with a general dispensation from obedience to the law. Latham CJ's judgment in the *Jehovah's Witnesses Case* shows one way this might be achieved: namely, by following the US, which, as noted above, asks whether a legislative provision *unduly* infringes the free exercise of religion. This invites questions of proportionality — a consideration of the policy goal to be achieved by the legislation and the extent of its impact on free exercise of religion.

However, in the circumstances of the case it was unnecessary to lay down detailed prescriptions about how to balance religion against other legitimate interests. Given the wartime context, the issue for the judges was the safety and very existence of the Commonwealth, which represents the most extreme example of a legitimate countervailing interest. It is not surprising that the concern to defend against threats to the continued existence of the Commonwealth readily prevailed over religious freedom. The *Jehovah's Witnesses Case* 'stands only for the narrow proposition that a person cannot seek to overthrow the constitutional system of government in the name of religion', which is hardly a surprising result.<sup>56</sup> In those circumstances, there was no need to consider whether the regulations unduly infringed the free exercise of religion or engage in a balancing of religion in relation to other interests. The *Jehovah's Witnesses Case*, therefore, does not directly speak to how religious freedom may be balanced against legitimate interests that are of less pressing concern than the continued existence of the nation. It should also be noted that the decision is not an endorsement of the view that other legitimate interests necessarily, and in all cases, prevail over religion.

The decision also demonstrates the contrast between the establishment and free exercise clauses of s 116. Unlike freedom of religion, the prohibition on establishment is an absolute prohibition, not permitting of exceptions. There are no countervailing rights or interests that might make establishment legitimate. As a result, the appropriate test for determining whether legislation infringes the establishment clause ought to be very different from that which determines whether the free exercise clause has been infringed.

### III The *DOGS Case* and the Purpose Test

The *DOGS Case* is significant. It was, for example, cited by Brennan CJ in *Kruger* as authority for the purpose test to be used in the free exercise context.<sup>57</sup> In the *DOGS Case*, the High Court held that legislation that provided financial assistance to non-government schools, including religious schools, in the Australian States, the Australian Capital Territory and the Northern Territory, did not infringe the

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'Freedom of Religion' in Matthew Groves, Janina Boughey and Dan Meagher (eds), *The Legal Protection of Rights in Australia* (Hart Publishing, 2019) 285, 287–90; Paul M Taylor, *Freedom of Religion: UN and European Human Rights Law and Practice* (Cambridge University Press, 2005) 292–338.

<sup>56</sup> Stephen McLeish, 'Making Sense of Religion and the Constitution: A Fresh Start for Section 116' (1992) 18(2) *Monash University Law Review* 207, 209.

<sup>57</sup> *Kruger* (n 5) 40, 160, citing *DOGS Case* (n 2) 579, 615–16, 653.



establishment clause in s 116.<sup>58</sup> The Court held that establishing a religion meant constituting a religion or religious body as an officially recognised state church or religion.<sup>59</sup>

Although it has been cited as authority for a narrow and binary test of purpose, the *DOGS Case* does not, in fact, provide a clear majority in favour of such a test. Only Barwick CJ, Mason J and Wilson J expressly adopted this purposive interpretation of the establishment clause.<sup>60</sup> Gibbs J considered that any legislation that ‘has the purpose *or effect* of setting up any religion or religious body as a state religion or a state church’ would infringe s 116.<sup>61</sup> Stephen J considered that establishing means ‘the constituting of a religion as an officially recognized State religion’,<sup>62</sup> and noted that the establishment clause ‘does not describe a prohibited law’s impact upon the citizen but its effect upon religion’,<sup>63</sup> thus arguably directing attention to the effect, rather than the purpose, of a law. Aickin J agreed with both Gibbs J and Mason J,<sup>64</sup> despite the differing interpretations adopted by those judges, and Murphy J dissented, arguing for a much broader conception of establishment as enshrining a broad principle of freedom of and from religion.<sup>65</sup>

Another important aspect of the *DOGS Case* is that the decision concerned the establishment clause rather than the free exercise clause, and the reasoning in favour of the purposive interpretation specifically reflects the nature of establishment. In an important passage, Barwick CJ said that

in the interpretation and application of s. 116, the establishment of religion must be found to be the object of the making of the law. Further, because the whole expression is ‘*for establishing any religion*’, the law to satisfy the description must have that objective as its express and, as I think, single purpose.<sup>66</sup>

Immediately following this text, Barwick CJ explained the logic of this test:

[i]ndeed, a law establishing a religion could scarcely do so as an incident of some other and principal objective. In my opinion, a law which establishes a religion will inevitably do so expressly and directly and not, as it were, constructively.<sup>67</sup>

This interpretation of s 116 is consistent with his Honour’s view that establishing a religion means ‘the entrenchment of a religion as a feature of and identified with the body politic’,<sup>68</sup> thus placing the Commonwealth under an obligation ‘to patronize, protect and promote the established religion’.<sup>69</sup> Following such an interpretation, it would not be possible to establish a religion by accident, or as incidental to the fulfilment of some other legislative purpose; the legislature would need to expressly

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<sup>58</sup> See also *Hoxton Park* (n 4).

<sup>59</sup> *DOGS Case* (n 2) 582 (Barwick CJ), 597 (Gibbs J), 605 (Stephen J), 616 (Mason J), 653 (Wilson J).

<sup>60</sup> *Ibid* 579, 615–16, 653.

<sup>61</sup> *Ibid* 604 (emphasis added).

<sup>62</sup> *Ibid* 605.

<sup>63</sup> *Ibid*.

<sup>64</sup> *Ibid* 635.

<sup>65</sup> *Ibid* 623.

<sup>66</sup> *Ibid* 579 (emphasis in original).

<sup>67</sup> *Ibid*.

<sup>68</sup> *Ibid* 582.

<sup>69</sup> *Ibid*.

establish a religion in this sense. By way of example, the statute establishing the Christian religion in England provided: 'be it enacted, by authority of this present Parliament, that the king, our sovereign lord, his heirs and successors, kings of this realm, shall be taken, accepted, and reputed the only supreme head in earth of the Church of England'.<sup>70</sup>

Barwick CJ's view of establishment has the consequence that it is either the case or it is not that a religion is established as the national or state religion: there are not degrees of establishment. It is true that a combination of statutes, taken together, may yield the conclusion that a religion is established; establishment therefore 'has no single characteristic but, rather, is the sum total of all the mutual relations for the time being existing according to law between Church and State'.<sup>71</sup> However, it is the totality of the arrangements that constitutes establishment, and one or more of those arrangements taken in isolation do not amount to partial establishments of religion. Thus, forms of public recognition or support for religion, such as funding for religious schools and parliamentary prayers, which do not have the purpose of identifying a religion with the body politic,<sup>72</sup> are not partial establishments of religion. Those who advocate for a more separationist approach to the establishment clause, especially that it should prevent all forms of governmental support for or involvement in religion,<sup>73</sup> are urging a fundamentally different conception of establishment than that adopted by the High Court in the *DOGS Case*.<sup>74</sup>

In sum, according to Barwick CJ's approach, a religion is either established or it is not, and a law establishing a religion will do so 'expressly and directly'.<sup>75</sup> The purpose test, which invites the Court to determine whether a law, alone or in combination with other laws, evidences a purpose of establishing religion, is consistent with this view of establishment. This, however, is not the case with respect to the free exercise clause. Unlike establishment, the free exercise of religion may be limited in many ways and to different degrees. The free exercise of religion may be affected by a law that infringes upon a person's beliefs or conscience, 'inhibits their acts of worship or of religious speech, press, or association',<sup>76</sup> commands them to do, or not do, something that conflicts with the demands of their faith, or by singling out in a discriminatory way 'their activity, organization, or property for duties or exclusions that the government has not imposed on other similarly situated individuals or groups'.<sup>77</sup> Further, laws that are not specifically intended to limit the free exercise of religion may, nevertheless, have such an impact.

This suggests that the considerations that have led the High Court to adopt a binary purpose test for the establishment clause are not apposite in relation to the free exercise clause. A more satisfactory test for the free exercise clause would recognise that laws may curtail freedom of religion even if that is not their purpose

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<sup>70</sup> *Act of Supremacy 1534*, 26 Hen VIII, c 1.

<sup>71</sup> *DOGS Case* (n 2) 607 (Stephen J).

<sup>72</sup> *Ibid* 582 (Barwick CJ).

<sup>73</sup> See, eg, Beck, 'Clear and Emphatic' (n 21).

<sup>74</sup> See, eg, *DOGS Case* (n 2) 623 (Murphy J).

<sup>75</sup> *Ibid* 579.

<sup>76</sup> John Witte Jr and Joel A Nichols, *Religion and the American Constitutional Experiment* (Oxford University Press, 4<sup>th</sup> ed, 2016) 118.

<sup>77</sup> *Ibid*.

and consider the differing extents to which the free exercise of religion may be affected by legislation. Something of the difference between the matters to which the establishment and free exercise clauses are directed was captured by Gibbs J when his Honour noted that ‘the establishment clause imposes a fetter on legislative power, and unlike the words which forbid the making of any law prohibiting the free exercise of any religion, does not do so for the purpose of protecting a fundamental human right’.<sup>78</sup>

Another important feature of the reasoning in the *DOGS Case* is that the interpretation of s 116 was determined by reference to, and in contradistinction to, the US equivalent, with several judges highlighting the difference in wording between s 116 and the First Amendment. The First Amendment to the *United States Constitution* provides that ‘Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof’. The equivalent clauses of the *Australian Constitution* provide that ‘[t]he Commonwealth shall not make any law for establishing any religion, ... or for prohibiting the free exercise of any religion’. The use of the word ‘respecting’ in the First Amendment, while s 116 uses the narrower term ‘for’, was considered to be an important difference by Barwick CJ, Mason and Wilson JJ, who thought that the latter term conveyed purpose.<sup>79</sup>

There are two problems with this reasoning. First, the word ‘for’ has a wide range of meanings, which include ‘in respect of or with reference to’ as well as purposive meanings,<sup>80</sup> and is therefore capable of bearing a meaning equivalent to the word ‘respecting’ as employed in the *United States Constitution*.<sup>81</sup> The view of Barwick CJ, Mason and Wilson JJ is only a valid interpretive technique if the framers of the *Australian Constitution* drafted s 116 with the *United States Constitution* in mind, and consciously adopted more restrictive wording. That, however, is unlikely to be the case. Following an analysis of the drafting and adoption of s 116, Beck has recently argued that

the precise language of section 116 was not the result of a careful drafting choice. Indeed, neither Clark nor Higgins were particularly thoughtful in their choice of language, and neither the 1891 Australasian Convention nor the 1897–8 Federal Convention carefully considered and debated the precise language of the provision. The language used in section 116 is rather haphazard.<sup>82</sup>

Second, even if this reasoning has any validity in relation to the establishment clause, it is inapplicable in relation to the free exercise clause. The US First Amendment prohibits Congress from making any law ‘prohibiting the free exercise’ of religion, while s 116 prohibits the Commonwealth from making any law ‘for prohibiting the free exercise of any religion’. The difference in wording is so slight, such that a sharp contrast cannot be drawn between the two clauses.

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<sup>78</sup> *DOGS Case* (n 2) 603.

<sup>79</sup> *Ibid* 579, 615–16, 653.

<sup>80</sup> *The Australian Oxford Dictionary* (Oxford University Press, 2<sup>nd</sup> ed, 2004) 486, listing over 20 definitions.

<sup>81</sup> *DOGS Case* (n 2) 622 (Murphy J), quoting *Lamshed v Lake* (1958) 99 CLR 132, 141 (Dixon CJ).

<sup>82</sup> Beck, *Religious Freedom and the Australian Constitution* (n 4) 97. See also Beck, ‘The Case against Improper Purpose as the Touchstone for Invalidity’ (n 22) 514.

A final aspect of the decision in the *DOGS Case* worth noting is the interrelation between the four clauses of s 116, which contrasts with the position in the US. An important difference between the US and Australian provisions is that s 116 is, in its terms, more extensive than the equivalent provisions in the *United States Constitution*, containing a prohibition on imposing religious observances.<sup>83</sup> As a result, given the more extensive interpretation afforded to the establishment clause, measures that in Australia would infringe the religious observance clause of s 116, in the US would be held to infringe the establishment clause. This has implications for the interpretation and interrelation of the four clauses of s 116. As Wilson J noted, if the establishment clause is to be understood as erecting a 'wall of separation'<sup>84</sup> between church and state similar to the US approach, the effect would be to swallow the other clauses of s 116, 'leaving nothing to be contributed by the remaining clauses'.<sup>85</sup>

#### IV The Significance of *Kruger*

*Kruger* involved a challenge to ss 6, 7, 16 and 67 of the *Aboriginals Ordinance 1918* (NT), which was made pursuant to powers conferred by the *Northern Territory Acceptance Act 1910* (Cth).<sup>86</sup> This Commonwealth law was enacted pursuant to the 'territories power' in s 122 of the *Australian Constitution*. The impugned sections authorised the Chief Protector of Aborigines in the Northern Territory

at any time to undertake the care, custody, or control of any aboriginal or half-caste, if, in his opinion it is necessary or desirable in the interests of the aboriginal or half-caste for him to do so, and for that purpose may enter any premises where the aboriginal or half-caste is or is supposed to be, and may take him into his custody'.<sup>87</sup>

In addition, the Chief Protector was authorised to keep any Aboriginal or half-caste

within the boundaries of any reserve or aboriginal institution or to be removed to and kept within the boundaries of any reserve or aboriginal institution, or to be removed from one reserve or aboriginal institution to another reserve or aboriginal institution, and to be kept therein'.<sup>88</sup>

It was, moreover, an offence for an Aboriginal or half-caste to resist this containment or refuse to be removed to facilitate it.<sup>89</sup>

The plaintiffs said that the forcible removal and detention of Aboriginal children in the Northern Territory between 1925 and 1960 was undertaken pursuant to the *Aboriginals Ordinance 1918* (NT). But they argued, unsuccessfully, that its key sections were invalid for breaching a range of constitutional principles including the separation of powers, legal equality, freedom of movement and association and

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<sup>83</sup> The First Amendment contains establishment and free exercise clauses, and art VI states that 'no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States', in similar terms to the fourth clause of s 116: 'and no religious test shall be required as a qualification for any office or public trust under the Commonwealth'.

<sup>84</sup> *DOGS Case* (n 2) 654–5.

<sup>85</sup> *Ibid.*

<sup>86</sup> *Kruger* (n 5) 33.

<sup>87</sup> *Aboriginals Ordinance 1918* (NT) s 6(1).

<sup>88</sup> *Ibid* s 16(1).

<sup>89</sup> *Ibid* s 16(2).

the free exercise of religion.<sup>90</sup> The gist of the s 116 argument was that the forcible removal and detention made it impossible for those Aboriginals affected to undertake the free exercise of their religion. While that argument did not succeed, the Court's free exercise reasoning in *Kruger* is significant.<sup>91</sup> It offers the most detailed contemporary treatment of the free exercise clause and, at first, appears to adopt the same narrow, binary purpose test that is applied in the establishment context. Yet there were two specific aspects of the case that, necessarily, qualify its significance for our free exercise jurisprudence.

### A *The Territories Power Context and Absence of Determined Facts*

The first aspect that qualifies the significance of *Kruger* was the threshold issue of whether s 122 was subject to s 116 and its directive that the Commonwealth shall make no law 'for prohibiting the free exercise of any religion'. Dawson J (with whom McHugh J agreed) held that it was not.<sup>92</sup> Both judges, as a consequence, did not consider the free exercise issue. Dawson J did, however, add that 'if I am wrong in that conclusion, I would agree with Gummow J, for the reasons given by him, that the 1918 Ordinance contains nothing which would enable it to be said that it is a law for prohibiting the free exercise of any religion'.<sup>93</sup> Therefore, there was limited consideration of s 116, which qualifies the significance of *Kruger* for purposes of the free exercise clause.

The second, more important, issue concerned the manner in which *Kruger* was framed for consideration by the High Court. Relevantly, there was no determination of facts before the Court capable of substantiating the plaintiff's argument that the *effect* of the 1918 Ordinance was to prohibit the free exercise of their religion. That was procedurally unusual, as Dawson J observed:

Brennan CJ, whilst recognising that, as a general rule, it is inappropriate to reserve any point of law for the opinion of the Full Court before a determination of the facts which evoke consideration of that point of law or of the facts on which the answer to the question reserved may depend, held that the manifest preponderance of convenience required such a course to be taken in these cases.<sup>94</sup>

This was, arguably, critical for the determination of the free exercise issue. Without facts, the only possible way of discerning the law's purpose was to consider the *terms* of the 1918 Ordinance, which authorised the removal and detention of any 'Aboriginal or half-caste'. And as Brennan CJ noted, 'this [wa]s a power which in terms [wa]s conferred to serve the interests of those whose care, custody or control might be undertaken. It [wa]s not a power to be exercised adversely to those individual interests'.<sup>95</sup> That is, the terms of the impugned sections disclosed a purpose that was not constitutionally obnoxious, even if, '[i]n retrospect, many would say that the risk of a child suffering mental harm by being kept away from its

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<sup>90</sup> *Kruger* (n 5) 3–6.

<sup>91</sup> Ibid 40 (Brennan CJ), 86 (Toohey J), 134 (Gaurdon J), 161 (Gummow J).

<sup>92</sup> Ibid 60 (Dawson J), 142 (McHugh J).

<sup>93</sup> Ibid 60–1 (Dawson J).

<sup>94</sup> Ibid 48–9 (footnote omitted).

<sup>95</sup> Ibid 35–6.

mother or family was too great to permit even a well-intentioned policy of separation to be implemented'.<sup>96</sup> It explains why (and how) Brennan CJ dismissed the free exercise issue as follows: 'To attract invalidity under s 116, a law must have the purpose of achieving an object which s 116 forbids. None of the impugned laws has such a purpose'.<sup>97</sup> As noted, one authority cited for this proposition was the judgment of Barwick CJ in the *DOGS Case*.<sup>98</sup> Yet, as we explained above, the narrow and binary test of purpose that Barwick CJ applied there was limited to the specific context of the establishment clause.<sup>99</sup> That being so, it is far from clear that Brennan CJ was proposing that the same kind of purpose test was to be applied to the free exercise clause, though in the specific *legal* context in *Kruger* it was sufficient to identify the law's constitutionally permissible purpose.

The absence of determined facts was central also to the free exercise reasoning of the rest of the Court in *Kruger*. Toohey J, for example, said

[i]t may well be that an effect of the Ordinance was to impair, even prohibit the spiritual beliefs and practices of the Aboriginal people in the Northern Territory, though this is something that could only be demonstrated by evidence. But I am unable to discern in the language of the Ordinance such a purpose'.<sup>100</sup>

Gummow J recognised the law's 'effect, as a practical matter',<sup>101</sup> but held that 'there is nothing apparent in the 1918 Ordinance which suggests that it aptly is to be characterised as a law made in order to prohibit the free exercise of any such religion'.<sup>102</sup> And Gaudron J, to similar effect, said 'the question whether the Ordinance authorised acts which prevented the free exercise of religion involves factual issues which cannot presently be determined'.<sup>103</sup> So, without determined facts before them, it was only possible for Brennan CJ, Toohey J, Gaudron J and Gummow J to consider the *legal effect* of the Ordinance in order to assess its compatibility with the free exercise clause. In other words, the *terms* of the law had to disclose the constitutionally obnoxious purpose.

## **B Free Exercise as a Constitutional Guarantee**

### *1 Determining a Law's Practical Operation*

The analysis above raises the important question that if facts were available in *Kruger* to demonstrate the asserted practical effect of the law, what test might the Court have applied? Gaudron J was unequivocal: 'The use of the word "for" indicates that purpose is the criterion and the sole criterion selected by s 116 for invalidity'.<sup>104</sup> Yet her Honour stated that save for the establishment clause — for the

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<sup>96</sup> Ibid 40.

<sup>97</sup> Ibid (footnote omitted).

<sup>98</sup> Ibid, where the relevant authority is cited at n 188 of the judgment.

<sup>99</sup> See Part III above.

<sup>100</sup> *Kruger* (n 5) 86.

<sup>101</sup> Ibid 161.

<sup>102</sup> Ibid.

<sup>103</sup> Ibid 132.

<sup>104</sup> Ibid 40, 132.

reasons we detailed above<sup>105</sup> — ‘s 116 is not, in terms, directed to laws the express and single purpose of which offends one or other of its proscriptions. Rather, its terms are sufficiently wide to encompass any law which has *a* proscribed purpose.’<sup>106</sup> As a consequence, Gaudron J rejected the view that s 116 applies ‘only to laws which, in terms, ban religious practices or otherwise prohibit the free exercise of religion’.<sup>107</sup> In doing so, her Honour noted that as the Commonwealth has no power to legislate with respect to religion, a law which, in terms, prohibits the free exercise of religion would be invalid on orthodox characterisation grounds.<sup>108</sup> That being so — and if it is to perform a meaningful role — these ‘textual’ and ‘contextual’ considerations provide ‘powerful support for the view that s 116 was intended to extend to laws which operate to prevent the free exercise of religion, not merely those which, in terms, ban it’.<sup>109</sup> Moreover, there is a ‘need to construe constitutional guarantees liberally, even limited guarantees of the kind effected by s 116’<sup>110</sup> and ‘it is inconsistent with established principle to interpret constitutional guarantees “pedantically” so that they may be circumvented by legislative provisions which purport to do indirectly what cannot be done directly’.<sup>111</sup> The upshot for Gaudron J is that ‘s 116 extends to provisions which authorise acts which prevent the free exercise of religion, not merely provisions which operate of their own force to prevent that exercise’.<sup>112</sup>

## 2 *The Methodological Significance of the Analogy with Section 92*

Of equal significance, in our view, were the brief and more circumspect observations made in this regard in *Kruger* by Gummow J (with whom Dawson J agreed if s 122 was subject to s 116). Gummow J said ‘[t]he use of the preposition “for” in the free exercise clause “directs attention to the objective or purpose of the law in issue”’.<sup>113</sup> But in this context “[p]urpose” refers not to underlying motive but to the end or object the legislation serves’.<sup>114</sup> Purpose is, then, an objective concept; and whether a law has a constitutionally obnoxious purpose (among others that may be legitimate) may only become apparent once the application of interpretive principle has determined a statute’s legal and practical operation.<sup>115</sup> That is the doctrinal significance of the following statement regarding the free exercise clause:

It may be that a particular law is disclosed as having a purpose prohibited by s 116 only upon consideration of extraneous matters indicating a concealed means or circuitous device to attain that end, and that it is permissible to apply s 116 in that fashion. But these can only be matters for another day.<sup>116</sup>

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<sup>105</sup> See Part III above.

<sup>106</sup> *Kruger* (n 5) 133 (emphasis in original).

<sup>107</sup> *Ibid* 131.

<sup>108</sup> *Ibid*.

<sup>109</sup> *Ibid*. See also *Hoxton Park* (n 4) 118–9 [83]–[84] (Beazley P).

<sup>110</sup> *Kruger* (n 5) 131 (footnotes omitted).

<sup>111</sup> *Ibid*.

<sup>112</sup> *Ibid* 132.

<sup>113</sup> *Ibid* 160.

<sup>114</sup> *Ibid* (footnote omitted).

<sup>115</sup> *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 57 (Brennan J).

<sup>116</sup> *Kruger* (n 5) 161 (Gummow J) (footnote omitted).

As noted, the absence of determined facts made it a matter ‘for another day’. Importantly for present purposes, Gummow J cited relevant passages from two cases as authority for the above proposition: *Cole v Whitfield* and *Castlemaine Tooheys Ltd v South Australia*.<sup>117</sup> The cited passage from *Cole v Whitfield* rejected earlier s 92 doctrine that drew an ‘unsatisfactory’ distinction ‘between burdens which are direct and immediate (proscribed) and those that are indirect, consequential and remote (not proscribed)’.<sup>118</sup> Further, the Court considered it problematic that the earlier doctrine looked ‘to the legal operation of the law rather than to its practical operation or its economic consequences’, which opened the way ‘to circumvention by means of legislative device’.<sup>119</sup>

The relevant pages cited from *Castlemaine Tooheys* consider the problem of how the High Court should approach legislation ‘which attempts on its face to solve pressing social problems’,<sup>120</sup> but in its practical operation offends the s 92 guarantee. The majority held that the freedom of interstate and intrastate trade protected by s 92 of the *Australian Constitution* ‘must submit to such regulation as may be necessary or appropriate and adapted either to the protection of the community from a real danger or threat to its welfare or to the enhancement of its welfare’.<sup>121</sup> The Court held that such laws would not infringe s 92, provided they satisfied the following test: ‘legislative measures which are appropriate and adapted to the resolution of those problems would be consistent with s. 92 so long as any burden imposed on interstate trade was incidental and not disproportionate to their achievement’.<sup>122</sup>

The doctrinal and methodological significance of these passages for the free exercise clause is clear. A constitutional right, freedom or principle cannot be circumvented by legislative device. To that end, the High Court must examine a statute’s legal operation, as well as its practical effect, in order to determine whether it has a constitutionally obnoxious purpose.<sup>123</sup> ‘A law may be found to be enacted for the prohibited purpose by reference to its meaning or by reference to its effect’.<sup>124</sup> This interpretive proposition — made by Brennan J in the s 92 context — was endorsed by Gummow J in *APLA Ltd v Legal Services Commissioner (NSW)* when his Honour observed that ‘in speaking in this context of the object or purpose of the law in question, what is posited is an objective inquiry answered by reference to the

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<sup>117</sup> *Kruger* (n 5) 161 n 632 citing *Cole v Whitfield* (1988) 165 CLR 360; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 (‘*Castlemaine Tooheys*’).

<sup>118</sup> *Cole v Whitfield* (n 117) 401 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

<sup>119</sup> *Ibid.*

<sup>120</sup> *Castlemaine Tooheys* (n 117) 169 CLR 436, 472 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

<sup>121</sup> *Ibid.*

<sup>122</sup> *Ibid* 473.

<sup>123</sup> See James Stellios, *Zines’ The High Court and the Constitution* (Federation Press, 6<sup>th</sup> ed, 2015) 613.

<sup>124</sup> *Nationwide News Pty Ltd v Wills* (n 115) 57 (Brennan J). See also *Hoxton Park* (n 4) 122 [104]–[105] (Beazley P); *Street v Queensland Bar Association* (1989) 168 CLR 461, 487–8 where Mason CJ stated in the context of s 117 of the *Australian Constitution* that:

It would make little sense to deal with laws which have a discriminatory purpose and leave untouched laws which have a discriminatory effect...An examination of the effect of the relevant law is both necessary to avoid depriving s. 117 of practical effect and consistent with its emphasis upon the position of the individual.



meaning of the law or to its effect'.<sup>125</sup> Should this orthodox interpretive process identify a prohibited purpose, the statute may still be valid if the impact on the constitutionally protected activity (that is, interstate free trade, free exercise of religion) 'is incidental and not disproportionate to the achievement of those [other, legitimate] objects'.<sup>126</sup> The citation of these authorities by Gummow J in *Kruger* is significant, suggesting that applying such an approach to the free exercise clause of s 116 would be appropriate. In this suggestion, we see that the Court's *existing* free exercise jurisprudence contains important strands of proportionality-style reasoning.

*Kruger* is significant, then, for the free exercise clause, but probably not for the reasons hitherto assumed.<sup>127</sup> It does favour a purpose test in order to determine when a law is for prohibiting the free exercise of any religion. But it is not authority for the proposition that the test endorsed is the same (narrow and binary) one used in the establishment context. Indeed, only two of the six judges (Gaudron J and Gummow J) in *Kruger* gave any consideration at all to the kind of purpose test to be applied in the free exercise context; and both made clear that — if determined facts were before the Court — it would be necessary to consider the legal operation *and* practical effect of a law to ascertain whether it had a purpose that was constitutionally obnoxious. This approach to the characterisation of laws said to infringe the free exercise clause is orthodox and, as a consequence, takes seriously the 'fundamental human right' that this limitation on Commonwealth legislative power operates to protect.<sup>128</sup> In doing so, it provides, in our view, an appropriate and principled way to determine whether a purpose of a Commonwealth law is to prohibit the free exercise of any religion.

Even so, as Gaudron J and Gummow J both recognised, a law that infringes the free exercise clause (on their interpretive approach) may still be valid. That is appropriate, of course, as the constitutional protection offered to religious free exercise cannot always trump other competing rights and interests. That was Latham CJ's important insight in the *Jehovah's Witnesses Case*. Yet how a court might consider and reconcile these competing rights and interests — once a law is found *prima facie* to offend the free exercise clause — was not explained in that case and only touched on in *Kruger*. It is to this important doctrinal and methodological issue that we now turn.

## V Constitutional Justification

In this Part, we consider analytical frameworks of justification that could transparently ventilate and evaluate the competing rights and interests in the free exercise context. Currently, there is no settled test for determining whether a law is

<sup>125</sup> *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 394. See also *Brown v Tasmania* (2017) 261 CLR 328, 432 (Gordon J) ('*Brown*'); Beck, 'The Case against Improper Purpose as the Touchstone for Invalidity' (n 22) 523–7.

<sup>126</sup> *Castlemaine Tooheys* (n 117) 474 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

<sup>127</sup> See, for example, Beck and Evans, who assumed that *Kruger* decided that only the purpose, not the effect, of a law is relevant to a free exercise inquiry pursuant to s 116: Beck, *Religious Freedom and the Australian Constitution* (n 4) 96–7; Evans (n 4) 1048.

<sup>128</sup> *DOGS Case* (n 2) 603 (Gibbs J).

invalid under the free exercise clause.<sup>129</sup> But if a law is found to infringe the free exercise clause on the interpretive approach we endorsed in Part IV, the Commonwealth must offer another, legitimate purpose that, in the relevant context, justifies the infringement. As the High Court has noted in the context of the implied freedom, ‘the identification of the statutory purpose...is arrived at by the ordinary processes of statutory construction’.<sup>130</sup> ‘The object or purpose will sometimes be stated in the text of the law and will sometimes emerge from the context’.<sup>131</sup> In terms of contemporary interpretive principle, the statutory object or purpose ‘refer[s] to the intended practical operation of the law or to what the law is designed to achieve in fact’.<sup>132</sup> In order to assess the merit or otherwise of that justification, the High Court requires an analytical framework.

### A *The Need for a Justification Analysis Framework*

A justification analysis framework must, in our view, identify the extent of the infringement, assess the importance of the law’s purpose and determine whether the measures adopted to secure it are constitutionally justified in the circumstances and in light of the right infringed. Importantly, also, the judicial reasoning to that end must be context-sensitive (factual, legal, historical) and undertaken in a manner that transparently ventilates and evaluates the competing rights and interests in play.

In *Kruger*, Gaudron J and Gummow J each provided important doctrinal insights that may assist in this regard. Gaudron J, for example, analogised the free exercise clause with the implied freedom of political communication and considered that the latter’s reasonably appropriate and adapted test was apposite in the former context as well.<sup>133</sup> Relevantly, her Honour noted that if the Commonwealth in *Kruger* were to argue that the law’s

purpose of protecting and preserving Aboriginal people was unconnected with the purpose of prohibiting the free exercise of religion, a question might arise...whether the interference with religious freedom, if any, effected by the Ordinance was appropriate and adapted or, which is the same thing, proportionate to the protection and preservation of those people.<sup>134</sup>

Gummow J, on the other hand and as noted above, cited seminal s 92 jurisprudence by way of doctrinal analogy. Yet, importantly, in the pages his Honour cited from *Castlemaine Tooheys*, the High Court adopted and applied a similar (reasonably appropriate and adapted) test in that constitutional context as well:

[T]he validity of the 1986 legislation rests on the proposition that the legislative regime is appropriate and adapted to the protection of the

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<sup>129</sup> Beck, ‘Clear and Emphatic’ (n 21) 184.

<sup>130</sup> *Unions NSW v New South Wales* (2013) 252 CLR 530, 557 [50] (French CJ, Hayne, Crennan, Kiefel and Bell JJ) (‘*Unions NSW*’).

<sup>131</sup> *McCloy v New South Wales* (2015) 257 CLR 178, 232 [132] (Gageler J) (‘*McCloy*’).

<sup>132</sup> *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 266 CLR 428, 459 [72] (Gageler J).

<sup>133</sup> *Kruger* (n 5) 133–4; On the capacity of the implied freedom of political communication to provide protection for communication regarding freedom of religion or belief, see Paul T Babie, ‘The Ethos of Protection for Freedom of Religion or Belief in Australian Law’ (2020) 47(1) *University of Western Australia Law Review* 64, 80–3.

<sup>134</sup> *Kruger* (n 5) 134.

environment in South Australia from the litter problem and to the conservation of the State's finite energy resources and that its impact on interstate trade is incidental and not disproportionate to the achievement of those objects.<sup>135</sup>

We consider that, when determining whether a law infringes the free exercise of religion protected by s 116, there is a strong case for applying a test modelled on the reasonably appropriate and adapted test applied in these other constitutional contexts.<sup>136</sup> That proposition, as noted above, is not novel. Yet the extent to which such an approach is embedded within the Court's existing free exercise jurisprudence does not appear to have been fully appreciated. Such a test could be used to identify and assess whether a Commonwealth law that prohibits the free exercise of any religion is, nevertheless, constitutionally justified and therefore valid.

To adopt such an approach would involve a departure from a focus on the purpose of the law as evident solely from its terms. Consistent with much of the authority on s 116, the Court would be permitted to examine both the purpose and the practical effect of the law to determine if the law prohibits the free exercise of religion. This would recognise that the free exercise of religion is not absolute, but (as with freedom of interstate trade, commerce and intercourse) 'must submit to such regulation as may be necessary or appropriate and adapted either to the protection of the community from a real danger or threat to its welfare or to the enhancement of its welfare'.<sup>137</sup>

## **B     *Towards a Suitable Test of Justification in the Free Exercise Context***

The High Court requires a suitable test of justification in order to determine whether a law is appropriate and adapted to serve a legitimate end notwithstanding its detrimental effect on the free exercise of religion. This would involve considering the extent of the impact of the burden on the free exercise of religion and whether the means adopted by the law are proportionate to the end sought to be achieved.<sup>138</sup> Where the legislation has a 'direct and substantial' impact on the free exercise of religion, a convincing justification will be required.<sup>139</sup>

This is similar to the approach employed by the High Court when considering whether a law infringes the implied freedom of political communication. As established in *Lange v Australian Broadcasting Corporation*,<sup>140</sup> and modified in

<sup>135</sup> *Castlemaine Tooheys* (n 117) 473–4 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

<sup>136</sup> In its most recent s 92 decision, the High Court stated that 'reasonable necessity' was the relevant test to be applied when undertaking the justification analysis necessary to assess whether a law that burdened s 92 was, nevertheless, valid for pursuing a legitimate (non-discriminatory) purpose. Three judges (Kiefel CJ and Keane J, Edelman J) said that the justification analysis should be undertaken using the framework of structured proportionality. Two judges (Gageler J and Gordon J) said the test of 'reasonable necessity' should not be supplemented or supplanted by structured proportionality: see *Palmer v Western Australia* (2021) 388 ALR 180, 193 (Kiefel CJ and Keane J), 246–8 (Edelman J), 212–16 (Gageler J), 225–9 (Gordon J) ('*Palmer*').

<sup>137</sup> *Castlemaine Tooheys* (n 117) 472 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ).

<sup>138</sup> See *Stellios* (n 123) 613.

<sup>139</sup> *McCloy* (n 131) 214 [70] (French CJ, Kiefel, Bell and Keane JJ).

<sup>140</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*').

*Coleman v Power*<sup>141</sup> and *Brown v Tasmania*,<sup>142</sup> the question whether a law infringes the implied freedom is determined by the following questions:

1. Does the law effectively burden the freedom in its terms, operation or effect?
2. If “yes” to question 1, is the purpose of the law legitimate, in the sense that it is compatible with the maintenance of the constitutionally prescribed system of representative government?
3. If “yes” to question 2, is the law reasonably appropriate and adapted to advance that legitimate object?<sup>143</sup>

In considering the application of the reasonably appropriate and adapted test in the context of the free exercise of religion, it is useful to consider the judicial exegesis and disagreement regarding that test, which has arisen recently in the implied freedom context. Since the decisions in *Kruger* and *Castlemaine Tooheys*, the High Court has considered, in some detail, how best to understand and apply the reasonably appropriate and adapted test. It has done so primarily in the context of the implied freedom.<sup>144</sup>

As outlined above, there are two prior questions that must be answered in the affirmative before the reasonably appropriate and adapted test needs to be applied. On the approach taken to the implied freedom, s 116 would effectively be burdened if a law limits *any* instance of religious free exercise.<sup>145</sup> If so, then it is likely the High Court will require that a purpose be offered for the law that is legitimate in the sense of being compatible with the constitutional protection extended to the free exercise of any religion. An illegitimate (constitutionally obnoxious) purpose would, arguably, be one whose sole aim was to undermine the constitutional protection offered to religious free exercise.<sup>146</sup> Examples may include a law that simply banned a particular religious faith, disqualified its adherents from voting, or made them ineligible for otherwise available government services. On the other hand, Latham CJ in the *Jehovah's Witnesses Case* suggested that legitimate purposes included the ‘maintenance of civil government’<sup>147</sup> and the suppression of ‘propaganda tending to induce members of the armed forces to refuse duty’.<sup>148</sup> Other examples could include general criminal laws that target acts that are violent, abusive or otherwise harmful; and measures that are taken to secure public health, safety and order.<sup>149</sup>

<sup>141</sup> *Coleman v Power* (2004) 220 CLR 1.

<sup>142</sup> *Brown* (n 125) 364 (Kiefel CJ, Bell and Keane JJ).

<sup>143</sup> *McCloy* (n 131) 194 [2] (French CJ, Kiefel, Bell and Keane JJ).

<sup>144</sup> But note also the disagreement as to the relevant test of constitutional justification to be applied in the context of s 92 in *Palmer* (n 136) and in the context of the federal franchise in *Murphy v Electoral Commissioner* (2016) 261 CLR 28 (‘*Murphy*’).

<sup>145</sup> See *Monis v R* (2013) 249 CLR 92, 143–6 (Hayne J); *Unions NSW* (n 130) 555 [40] (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

<sup>146</sup> On when (and why) a purpose will be illegitimate in the context of the implied freedom see *Unions NSW* (n 130) 557–60 [50]–[60].

<sup>147</sup> *Jehovah's Witnesses case* (n 6) 131.

<sup>148</sup> *Ibid* 133.

<sup>149</sup> See eg. *Attorney-General (SA) v Adelaide City Corporation* where a council by-law that sought to protect the unimpeded use of public roads was held to be valid notwithstanding that its operation burdened the free speech and religious free exercise rights of the applicants: *Attorney-General (SA) v Adelaide City Corporation* (2013) 249 CLR 1.

It is only upon finding that a law's effective burden on religious free exercise is done in furtherance of a legitimate purpose (in the relevant constitutional sense) that one turns to the third question. In terms of this question in the implied freedom context, a majority of the High Court — Kiefel CJ, Bell J, Keane J, Nettle J and Edelman J — has adopted structured proportionality as the appropriate framework to apply the reasonably appropriate and adapted test. The latest manifestation of that test (and framework) is stated in the following terms:

The third step of the ... test is assisted by a proportionality analysis which asks whether the impugned law is 'suitable', in the sense that it has a rational connection to the purpose of the law, and 'necessary', in the sense that there is no obvious and compelling alternative, reasonably practical, means of achieving the same purpose which has a less burdensome effect on the implied freedom. If both these questions are answered in the affirmative, the question is then whether the challenged law is 'adequate in its balance'. This last criterion requires a judgment, consistently with the limits of the judicial function, as to the balance between the importance of the purpose served by the law and the extent of the restriction it imposes on the implied freedom.<sup>150</sup>

One important benefit of this framework is that it transparently ventilates and evaluates the competing rights and interests in order to assess whether a law that burdens freedom of communication is, nevertheless, constitutionally justified. Relevantly, as the judgment of Kiefel CJ, Bell and Keane JJ in *Clubb v Edwards* explained:

[A] structured proportionality analysis provides the means by which rational justification for the legislative burden on the implied freedom may be analysed, and it serves to encourage transparency in reasoning to an answer. It recognises that to an extent a value judgment is required but serves to reduce the extent of it. It does not attempt to conceal what would otherwise be an impressionistic or intuitive judgment of what is 'reasonably appropriate and adapted'.<sup>151</sup>

This account of (and justification for) structured proportionality is offered as a suitable framework to apply the reasonably appropriate and adapted test. It could do likewise to consider and reconcile in a principled, transparent manner religious freedom and the other legitimate interests and legislative goals that necessarily arise in the free exercise context as Latham CJ noted in the *Jehovah's Witnesses Case*. But does structured proportionality provide the analytical tools to ensure that the intensity of the justification analysis undertaken is tailored according to the *extent* to which a Commonwealth law burdens the free exercise of religion? This is one important reason why Gageler J and Gordon J have rejected the use of structured proportionality in the context of the implied freedom, and indeed Australian constitutional law more generally.<sup>152</sup> Gageler J, for example, considers inapposite its 'one size fits all' framework where the 'standardised criteria ... of "suitability" and "necessity" are ... applied to every law ... irrespective of the subject matter of the law and no matter how large or small, focused or incidental, that restriction on

<sup>150</sup> *Clubb v Edwards* (2019) 267 CLR 171, 186 [6] (Kiefel CJ, Bell and Keane JJ). See also at 264–9 [266]–[275] (Nettle J), 329–35 [461]–[471] (Edelman J) ('*Clubb*').

<sup>151</sup> *Ibid* 202 [74] (Kiefel CJ, Bell and Keane JJ). See also 330–4 (Edelman J).

<sup>152</sup> See, eg, *Brown* (n 125) 376–9 (Gageler J), 462–8 (Gordon J).

political communication might be'.<sup>153</sup> As a consequence, Gageler J and Gordon J state that the focus (and strictness) of the justification analysis 'needs to be "calibrated to the nature and intensity of the burden"'.<sup>154</sup> The core idea is that not every law that burdens the relevant constitutionally-protected activity (for example, political communication, religious free exercise) 'needs to be subjected to the same intensity of judicial scrutiny'.<sup>155</sup> This is an important criticism that has merit to the extent that structured proportionality is incapable of being applied in a context-sensitive and case-specific manner.

We consider that Gageler J and Gordon J are right to emphasise that the *extent* to which a law burdens political communication (or religious free exercise) must be the focus and primary determinant of how the relevant justification analysis is undertaken. And the terms in which structured proportionality is stated (above) do not, at least obviously, make clear how (and where) this bedrock analytical concern is embedded. So, an important benefit of calibrated scrutiny is that the critical, threshold assessment — that is, the extent to which an impugned law burdens the constitutionally-protected activity — orients the justification analysis from the outset and informs it throughout in a manner that cleaves to the specific context of the case. 'The answer to the initial question of burden within the restated analytical framework accordingly informs the intensity of the scrutiny appropriate to be brought to bear in answering the ultimate question of justification'.<sup>156</sup> In *Brown*, for example, Gageler J held that the terms and operation of the law imposed 'a significant practical burden on political communication'.<sup>157</sup> Consequently, 'the impugned provisions demand[ed] very close scrutiny'.<sup>158</sup>

The requisite [justification] analysis therefore appropriately proceeds to an examination of whether the impugned provisions might be explained as having a compelling purpose, and then to an examination of whether the burden they impose on political communication in pursuit of such a purpose might be justified as no greater than is reasonably necessary to achieve such a purpose.<sup>159</sup>

In this way, the essence of calibrated scrutiny is that '[e]ach case is fact-specific; each analysis is necessarily case-specific'.<sup>160</sup> Yet, importantly, Stone has recently argued that structured proportionality is capable of being applied in a similarly context-sensitive manner:<sup>161</sup> 'the variable intensity with which proportionality can be applied is one of the more commonly remarked upon features of the test'.<sup>162</sup>

Precisely because proportionality is variable in its intensity, proportionality need not remove the element of judgment that was previously evident in the *Lange* [reasonably appropriate and adapted] test. On the contrary, under

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<sup>153</sup> *McCloy* (n 131) 235 [142].

<sup>154</sup> *Brown* (n 125) 378 [164] (Gageler J), quoting *Tajjour v New South Wales* (2014) 254 CLR 508, 580[151] (Gageler J); 460 [411] (Gordon J) quoting *Tajjour* at 579 [147].

<sup>155</sup> *Brown* (n 125) 378 [164] (Gageler J); *Clubb* (n 150) 299–300 [369]–[371] (Gordon J).

<sup>156</sup> *Ibid* 378 [165].

<sup>157</sup> *Ibid* 390 [203] (Gageler J).

<sup>158</sup> *Ibid*.

<sup>159</sup> *Ibid* 391 [206] (Gageler J).

<sup>160</sup> *Clubb* (n 150) 309 [403] (Gordon J) (footnote omitted).

<sup>161</sup> Adrienne Stone, 'Proportionality and Its Alternatives' (2020) 48(1) *Federal Law Review* 123.

<sup>162</sup> *Ibid* 137 (footnote omitted).

proportionality it is for the judge to determine whether, in all the circumstances, an available alternative means should have been preferred in light of those alternatives and the deference due to legislative judgment. Similarly, the balancing element of the test might be applied in a way that allows for the protected constitutional requirement to be subject to quite high costs before invalidity is found, or it could be applied more strictly so that invalidity follows from relatively minor costs.<sup>163</sup>

If so, then structured proportionality can be applied in a manner that ensures that the relevant justification analysis undertaken is context-sensitive and case specific. The intensity of the judicial scrutiny *can* be tailored according to the extent to which a Commonwealth law burdens the free exercise of religion.<sup>164</sup> The reasoning of the joint judgment of Kiefel CJ, Bell and Keane JJ in *Brown*, arguably, supports this proposition. There, it was found that the practical operation of the impugned law indirectly burdened political communication but did so to a ‘significant extent’.<sup>165</sup> So, ‘[g]enerally speaking, the sufficiency of the justification for such a burden should be thought to require some correspondence with the extent of that burden’.<sup>166</sup> Within the framework of structured proportionality, the joint judgment in *Brown* tested the ‘sufficiency of the justification’ primarily through its assessment of whether the legislative measures adopted were ‘reasonably necessary’ in the circumstances.<sup>167</sup> This inquiry — and analytical focus — bears a close similarity to the calibrated scrutiny approach of Gageler J detailed above.

Relevantly, the assessment of whether the measures were ‘reasonably necessary’ was made in light of the impugned law’s purpose (to exclude and deter persons from entering forestry land to protest) and the significant extent to which it infringed political communication in order to further it. Relevant also was the history of (political) protest activity in the area to which the law applied and the apparent effectiveness of another law (with the same purpose) that applied to the same area, but was far less restrictive of the implied freedom.<sup>168</sup> This led Kiefel CJ, Bell and Keane JJ to conclude that ‘[t]he measures adopted by the [law] to deter protesters effect a significant burden on the freedom of political communication. That burden has not been justified’.<sup>169</sup> Their Honours did so, arguably and importantly, pursuant to an analysis that was context-sensitive (factually, legally and historically) and that transparently ventilated and evaluated the competing rights and interests in legislative play.

This is not to deny that important differences exist between calibrated scrutiny and structured proportionality. As Stone notes, for example, Gageler J’s analysis in *Clubb* ‘identifies, in concrete ways, factors that will be relevant to the calibration of scrutiny in future similar cases’.<sup>170</sup> In doing so, this ‘moves somewhat in the direction of a more “rule-like” approach’.<sup>171</sup> That is important, as flexibility

<sup>163</sup> Ibid 138–9.

<sup>164</sup> See Rosalind Dixon, ‘Calibrated Proportionality’ (2020) 48(1) *Federal Law Review* 92, 114–16.

<sup>165</sup> *Brown* (n 125) 367 [118] (Kiefel CJ, Bell and Keane JJ).

<sup>166</sup> Ibid (footnote omitted).

<sup>167</sup> Ibid 371 (Kiefel CJ, Bell and Keane JJ).

<sup>168</sup> Ibid 371–3 (Kiefel CJ, Bell and Keane JJ).

<sup>169</sup> Ibid 374 [152] (Kiefel CJ, Bell and Keane JJ).

<sup>170</sup> Stone (n 161) 149–50.

<sup>171</sup> Ibid 151.

and context-sensitivity in constitutional doctrine and method is not always or inherently a virtue:

[R]ules provide a greater measure of predictability in their application which in turn provides greater guidance to courts, legislators and citizens. Rules may be especially important where constitutional review is highly diffuse because they provide more guidance to lower courts.<sup>172</sup>

That certainty, or at least predictability of outcome, is important from a rule of law perspective and especially so to those seeking to rely upon on their rights to religious free exercise.<sup>173</sup> But for *Nettle J*, an advocate of structured proportionality, the move towards a more rule-like approach is problematic. These factors ‘substitute for principles of analysis capable of general application facts which in some contexts may but in others should not lead to the conclusion that an impugned law is appropriate and adapted to the achievement of a legitimate purpose’.<sup>174</sup> Yet these differences have not proven decisive in the context of the implied freedom.<sup>175</sup> The important point for present purposes is that the manner in which calibrated scrutiny and structured proportionality have been applied in the High Court demonstrates that either framework is capable of satisfactorily performing the required justification analysis in a free exercise context.

Consider *Krygger*, for example. Let us assume that on the facts the relevant law — which compelled all males who had resided in Australia for six months to attend military training — *did* require the appellant ‘to do an act which his religion forbids’<sup>176</sup> such as, for example, where the appellant’s religion prohibited participation in any form of military or war-related training. How might the application of a justification analysis have played out in that scenario?<sup>177</sup> On the assumed facts, the practical operation of such a law would effectively burden the religious free exercise rights of those for whom to do so is contrary to the tenets of their religious faith. Section 116 is, then, *prima facie* infringed. Yet the purpose of such a law — which Griffith CJ said was for ‘the defence of his country’<sup>178</sup> through an adequately trained and prepared armed forces — was legitimate in the relevant constitutional sense. Indeed, Griffith CJ suggested that such a purpose ‘is almost, if not quite, the first duty of a citizen, and there is no room for doubt that the legislature has power to enact laws to provide for making citizens competent for that duty.’<sup>179</sup> Is such a law ‘reasonably appropriate and adapted’ to advance this purpose? To legally compel a person to do something that is forbidden by their religion imposes a significant practical burden on their free exercise rights. So, to apply calibrated scrutiny, such a law must have a ‘compelling purpose’ (which it may have on the

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<sup>172</sup> Ibid 150–1.

<sup>173</sup> Thanks to one of the referees for drawing this point to our attention.

<sup>174</sup> *Clubb* (n 150) 263 [265] (*Nettle J*).

<sup>175</sup> Notwithstanding the ongoing disagreement in the High Court as to whether the reasonably appropriate and adapted test ought to be applied using calibrated scrutiny or structured proportionality, the recent cases where it is discussed have all been decided unanimously: *Murphy* (n 144); *Brown* (n 125); *Clubb* (n 150); *Comcare v Banerji* (2019) 267 CLR 373.

<sup>176</sup> *Krygger* (n 7) 369 (Griffith CJ).

<sup>177</sup> Thanks to one of the referees for suggesting we undertake this analysis.

<sup>178</sup> *Krygger* (n 7) 370.

<sup>179</sup> Ibid.



Griffith CJ account) and go no further than is ‘reasonably necessary’ to secure it.<sup>180</sup> Under structured proportionality, the law must be ‘suitable’ (its obligation has a clear rational connection to its purpose), ‘necessary’ (there being no obvious and compelling alternative in the relevant context) and ‘adequate in its balance’. The law in *Krygger* carved out exemptions for conscientious objectors whose beliefs did not allow them to bear arms. But the exemption (as noted above) still required those persons to train in non-combatant duties. Under either approach, then, the critical issue would likely be whether this kind of law — which imposed an obligation, but provided a partial form of exemption — was ‘reasonably necessary’ or ‘necessary’ to secure its otherwise legitimate purpose.

Reasonable judicial minds may well differ as to that answer and so as to whether, on the assumed facts, the *Krygger* law would be constitutionally justified (pursuant to calibrated scrutiny or structured proportionality) and valid as a consequence. That is to be expected. A constitutional rights case (like *Krygger*) will often raise a number of complex issues the resolution of which may ultimately require a judge to make difficult (evaluative) judgments. Yet what is important for present purposes is that on either approach the constitutional justification of laws that effectively burden religious free exercise rights can be tested through an analysis that is sufficiently context-sensitive and case-specific. Both frameworks, in our view, provide the analytical tools necessary to ensure a justification analysis that transparently ventilates and evaluates the competing rights and interests in legislative play.

## VI Conclusion

The High Court of Australia’s jurisprudence on the free exercise of religion clause in s 116 is both minimal and doctrinally under-developed. These characteristics are likely related. Yet, it may also reflect the happy circumstance that in Australia many religious faiths have, for the most part, co-existed peacefully and legislation targeting religion has been rare. But when the latter has occurred, most notably during wartime, the absence of an analytical framework has not facilitated the kind of principled balancing of religion and other interests that Latham CJ observed in the *Jehovah’s Witnesses Case* was inevitable in the free exercise context.

However, as we have detailed, the High Court’s free exercise — and related — jurisprudence is not bereft of important doctrinal insights and, importantly, does not stand for a broad proposition regarding the narrowness of its scope. Of particular significance is the test applied to determine when a Commonwealth law is *for* prohibiting the free exercise of any religion. Our analysis has demonstrated the fallacy of the assumption that it mirrors the narrow and binary test of purpose that is used in the establishment context. Indeed, in *Kruger* — the only contemporary High Court case on the free exercise clause — the judges who considered the relevant test made clear that, ordinarily, one must determine the legal operation *and* practical effect of a law to ascertain whether it has *a* constitutionally-obnoxious purpose.

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<sup>180</sup> See *Brown* (n 125) 389–91 (Gageler J).

Finally, we offered analytical frameworks that judges could use to assess whether a law that infringes the free exercise clause is, nevertheless, constitutionally justified. We did so by building upon the important doctrinal insights made in this regard by Gaudron J and Gummow J in *Kruger*. In that case, it was considered that the reasonably appropriate and adapted test (used to apply the implied freedom and s 92) was apposite in the free exercise context as well. Our analysis, then, suggests that this test could be applied using either the framework of calibrated scrutiny or structured proportionality. Those frameworks provide the analytical tools needed: to perform a justification analysis that transparently ventilates and evaluates the competing rights and interests in legislative play; and to ensure that it is done in a manner that is sufficiently context-sensitive.

In *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)*, Mason ACJ and Brennan J said that '[f]reedom of religion, the paradigm freedom of conscience, is of the essence of a free society.'<sup>181</sup> If so, then the free exercise of religion under the *Australian Constitution* must be taken seriously. To that important end, we have offered a doctrinal account and methodological framework that builds on the High Court's existing free exercise jurisprudence and reflects orthodox constitutional principle.

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<sup>181</sup> *Church of the New Faith v Commissioner of Pay-Roll Tax (Vic)* (1983) 154 CLR 120, 130.

# Misfeasance in Public Office: Raw Statistics from the Australian Front Line

Kit Barker\* and Katelyn Lamont†

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## Abstract

This article responds to recent suggestions that the number of claims for the tort of misfeasance in public office is increasing. It provides a full review of litigation statistics in Australia since the cause of action was revived in the 1950s, detailing the various types of claim litigated and the most common reasons why they tend to fail. It also seeks an explanation as to why it is that litigants are increasingly pressing their claims in the face of very poor chances of success. Although these reasons are complex, we suggest that the surge in litigation can be understood as part of a broader pattern in which private enforcement techniques are increasingly being used in recent years as a reaction to the failure of public systems. If this is so, then the phenomenon seems likely to continue until such time as the current balance of public and private interests in cases involving harmful maladministration is fully reconsidered.

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The report of my death has been grossly exaggerated.<sup>1</sup>

## I Introduction

The tort of misfeasance in public office attaches liability to public officers where they purposely use their public powers to harm private citizens, or, more commonly, perhaps, where they consciously overstep the boundaries of those powers knowing that doing so is likely to cause harm.<sup>2</sup> It has long been noted that the tort is both peculiar, in so far as it is one of our few ‘public law’ torts;<sup>3</sup> and that it is very difficult to prove in practice. Whilst it provides a historic mechanism via which citizens harmed by abuses of public power can obtain compensation and perhaps also play a personal role in holding State actors to account,<sup>4</sup> it has yielded very few victories for plaintiffs since its revival in the second half of the 20<sup>th</sup> century. In fact, despite having been summoned ingeniously by courts from a shallow precedential grave precisely in order to respond to the expanded powers of the administrative state,<sup>5</sup> its success-rate has to date been pretty abysmal. In 2008, the Law Commission of England and Wales was so sceptical of the tort’s practical utility that it proposed to abolish the cause of action altogether in favour of a more radical set of measures designed to increase state liability for maladministration in both public and private law.<sup>6</sup> That more radical regime never came to light in England and Wales;<sup>7</sup> nor has

<sup>1</sup> This much-loved quotation of Mark Twain (appearing in Albert Bigelow Paine, *Mark Twain: A Biography; the Personal and Literary Life of Samuel Langhorne Clemens* (Harper & Brothers, 1912)) is not quite accurate, although it nicely captures his wit. Twain’s verbatim response to the newspaper report of his death, itself published in the *New York Journal* (2 June 1897) was that it was ‘an exaggeration’. We reproduce the embellished version here for its poetic flourish.

<sup>2</sup> For a more detailed account of the tort’s elements, see Part IV below.

<sup>3</sup> Mark Aronson, ‘Misfeasance in Public Office: A Very Peculiar Tort’ (2011) 35(1) *Melbourne University Law Review* 1, 2. On the tort’s ‘public law’ character, see also *Pyrenees Shire Council v Day* (1998) 192 CLR 330, 376 [124] (Gummow J) citing Robert Sadler, ‘Liability for Misfeasance in a Public Office’ (1992) 14(2) *Sydney Law Review* 137, 138; Prue Vines, ‘Misfeasance in Public Office: Old Tort, New Tricks?’ in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Lawbook Co, 2011) 221, 231, 240; Donal Nolan, ‘A Public Law Tort: Understanding Misfeasance in Public Office’ in Kit Barker, Simone Degeling, Karen Fairweather and Ross Grantham (eds), *Private Law and Power* (Hart Publishing, 2017) 177. The distinction between public and private law can be cast in many ways, but, on our view, misfeasance is a public law wrong because it enforces primary rights and duties existing between the State (acting through its public officers) and the citizen, not rights and duties between private citizens.

<sup>4</sup> On the competing forms of accountability at stake, see Ellen Rock, ‘Misfeasance in Public Office: A Tort in Tension’ (2019) 43(1) *Melbourne University Law Review* 337; Ellen Rock, *Measuring Accountability in Public Governance Regimes* (Cambridge University Press, 2020).

<sup>5</sup> On one view, the tort dates back to at least 1364: RC Evans, ‘Damages for Unlawful Administrative Action: The Remedy for Misfeasance in Public Office’ (1982) 31(4) *International and Comparative Law Quarterly* 640, 640. However, others suggest that the 20<sup>th</sup> century ‘recognition’ of the tort was based on very shallow foundations: CS Phegan, ‘Damages for Improper Exercise of Statutory Powers’ (1980) 9(1) *Sydney Law Review* 93, 99–103.

<sup>6</sup> Law Commission, *Administrative Redress: Public Bodies and the Citizen* (Law Com CP No 187, 2008) esp 74–5 [4.88]–[4.92], 78 [4.105]. Compensation was proposed in both spheres where the statutory regime was intended to benefit a plaintiff and the defendant was at ‘serious fault’: 75 [4.95].

<sup>7</sup> The Law Commission’s final report was hampered by objection and lack of access to relevant information about the costs of litigation against government. It ultimately recommended only that governments properly record and publish this information: Law Commission, *Administrative Redress: Public Bodies and the Citizen* (Law Com No 322, 2010) 69 [6.14], [6.17].

there been any movement toward anything akin to it in Australia. In fact, Australian legislatures have, if anything, set the law in precisely the opposite direction, closely curtailing the State's civil liability for excess and error in the use of public power, and carving out new statutory liberties and immunities.<sup>8</sup>

The extraordinary feature of the tort that forms the focus of this article is the increased regularity with which it is currently being litigated, despite its minimal chances of success. The rise in litigious energy has been noted by a number of commentators,<sup>9</sup> but to date no systematic analysis has been conducted across a broad timeframe, which has made it impossible to assess the true extent of the phenomenon, or its full implications. On the face of things, the upswing appears paradoxical. Why would claims surge in this way when they apparently offer so little promise? Are litigants simply uninformed of the risks? Are they stubbornly vexatious in their interactions with the State, or driven by factors more emotive than rational? Are they, as some have suggested, reacting intelligently to recent restrictions on other causes of action in respect of state maladministration, tactically tacking claims for misfeasance on to their pleadings in an attempt to make liability stick, gain procedural advantage, or unlock access to awards of exemplary damages?<sup>10</sup> Or is the growth in litigation we are witnessing symptomatic of more deep-seated, tectonic shifts in law enforcement patterns? Does it, perhaps, signal a transition to a legal world in which private parties seek out — and are increasingly accorded — a more active role in enforcing public laws and public standards when public systems fail?

Here, we take a closer look at the statistics surrounding the misfeasance action since it was first seriously put to work in Australia in the late 1950s. We investigate the true extent of the current litigation 'boom' and speculate further on why it might be that litigants are increasingly pressing their claims in the face of very poor odds. One possibility, we shall suggest, is that the current trend may indeed signal a reversion to private enforcement initiatives in respect of harmful public wrongs. We say 'reversion,' because of course private proceedings were for a very long period of history the only real means via which rights, either private or public, were enforced, for lack of state policing and enforcement processes.<sup>11</sup> On this

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<sup>8</sup> Although there is no consistent pattern, most Australian jurisdictions have, since 2002, introduced significant statutory restrictions on the civil liability of public authorities, some of which go beyond those previously existing at common law. See generally Mark Aronson, 'Government Liability in Negligence' (2008) 32(1) *Melbourne University Law Review* 44; Justine Bell-James and Kit Barker, 'Public Liability for Negligence in the Post-Ipp Era: Sceptical Reflections on the 'Policy Defence'' (2016) 40(1) *Melbourne University Law Review* 1.

<sup>9</sup> The most recent Australian study reported 79 cases between 2002 and 2010: Vines (n 3) 222–3. The 'growing frequency' of claims since 2003 has also been reported in Canada and England: Erika Chamberlain, *Misfeasance in a Public Office* (Thomson Reuters, 2016) 3.

<sup>10</sup> Vines (n 3) 222. See similarly in Canada, Erika Chamberlain, 'What is the Role of Misfeasance in Public Office in Modern Canadian Tort Law?' (2009) 88(3) *Canadian Bar Review* 575, 577–8 (misfeasance claims may offer better prospects of discovery, are less likely to be struck out and can offer some advantages in a small number of cases in which negligence claims might fail).

<sup>11</sup> On the late development of public prosecution, for example, see Yue Ma, 'Exploring the Origins of Public Prosecution' (2008) 18(2) *International Criminal Justice Review* 190. On the use of private tort actions to challenge public action prior to the advent of judicial review, see Ellen Rock and Greg Weeks, 'Monetary Remedies for Public Law Wrongs: Australia's Resistant Legal Landscape' (2018) 41(4) *University of New South Wales (UNSW) Law Journal* 1159, 1167–8.

understanding, the current escalation of litigation is a product of two, catalytic forces — the increasing pervasiveness of state regulatory powers in modern Australian society and the absence of other, satisfactory, public means of redress for harm caused by their excess.<sup>12</sup> Increased recourse to the tort should therefore, we argue, be understood against the backdrop of a broader framework in which new emphasis is being accorded in recent years to private initiative in the enforcement of public laws when public systems fail.<sup>13</sup>

Part II sets out the parameters of our study, its methodology and limits. Part III presents an overview of the main results. In Part IV, we reflect further upon the more difficult question of what these results may mean. Part V tapers our conclusions to a point.

## II Methodology

Our study set out to identify all recorded misfeasance cases pleaded in Australia over a 70-year period from the end of 1950 to the end of the year 2020, using a combination of the LexisNexisAdvance and AustLII databases as our primary resource. We recorded the incidence of cases across the period, the stage of litigation that each case reached, its final result (where available) and its subject matter. This enabled us to determine and compare litigation and success rates across the period and across different types of case. Where (as was overwhelmingly the case) claims failed, we recorded the reasons. We also recorded the type of damage alleged to have been suffered in consequence of the relevant abuse of power, any concurrent claims brought in the same proceeding, and whether or not the plaintiff was legally represented. All results were then entered into our own spreadsheet database. In analysing the data and suggesting inferences that might be drawn from it, we have not had recourse to formal statistical tools, so we cannot claim any definitive statistical proof that the thesis advanced in Part IV about possible causes of the rise in litigation is correct. Without access to further data that lies beyond the limited scope of the study, it is impossible to be sure of all the hidden variables. We therefore present our final thesis with caution — as a credible suggestion, not a final proof.

### A Limitations

The number of cases returned by our search parameters was small — just 204 in total.<sup>14</sup> Some of them (about 11%) did not result in any final judgment and were either discontinued, or settled. These cases are included in our tallies of case types litigated but otherwise excluded from our result sets. We have also not attempted more generally to investigate the shadowy life of informal dispute resolution

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<sup>12</sup> As early as *Tampion v Anderson*, Smith, Pape and Crockett JJ cited with approval the view that the tort ‘has ... been revived by reason of concern regarding the inadequacy of the remedies usually resorted to by the citizen injuriously affected by administrative action’: *Tampion v Anderson* [1973] VR 715, 720 (*‘Tampion’*). Other remedial options have not improved much since then.

<sup>13</sup> See below Section IVB.

<sup>14</sup> The term ‘misfeasance’ was entered in the catchwords/case summary field in LexisNexis Advance and in the general search field of the Cases and Legislation Databases in AustLII. Results were then filtered and refined manually to eliminate duplication and irrelevance.

processes surrounding misfeasance claims, or the reach of other systems (internal complaints and review processes, administrative appeals, ombudsmen, discretionary compensation schemes, ex gratia payments and the like)<sup>15</sup> into which plaintiffs' grievances may have been channelled. This gives the study a formal orientation that will be unappealing to many realists and it necessarily means that the data used are selective.<sup>16</sup> In focusing exclusively on recorded litigation outcomes, it certainly does not tell the whole modern story of public misfeasance. While we hope that the information it presents will be useful to litigators, we therefore recognise that it is really only a starting point for much-needed, further qualitative investigation of the modern phenomenon of litigation surrounding public maladministration.

There was also a risk that the online databases we accessed might not provide a complete set of cases,<sup>17</sup> and/or that the proportion of cases uploaded to them might have increased over time.<sup>18</sup> The latter risk in particular had the potential to result in time-bias and the skewing of some results: if early cases were uploaded to the databases less consistently than later ones, this could result in the study exaggerating the extent to which misfeasance litigation had increased across the period as a whole. To mitigate this risk, we cross-checked the results of our primary data set against a secondary one comprising only officially reported cases, on the hypothesis that reported cases are more likely to have been uploaded consistently, notwithstanding the year in which they were decided. The results from the two data sets point reassuringly to the same underlying trends. We are therefore reasonably confident that the results of our primary analysis are robust and the trends to which it points are real.

## **B     *Method: Coding and Result Sets***

Cases returned by our search were coded in accordance with a number of different criteria, which we set out below. Our source for most of this information is the text of finalised court judgments.<sup>19</sup>

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<sup>15</sup> For a useful overview of the discretionary schemes operating in Australia, see Janina Boughey, Ellen Rock and Greg Weeks, *Government Liability: Principles and Remedies* (LexisNexis Butterworths, 2019) ch 10.

<sup>16</sup> On selectivity and its impact on the inferences that can be drawn from litigation, see Daniel Klerman and Yoon-Ho Alex Lee, 'Inferences from Litigated Cases' (2014) 43(2) *Journal of Legal Studies* 209.

<sup>17</sup> A more robust investigation of the relationship between case reporting and database uploads is warranted, but is beyond the resources of our current study. If cases have been missed, they are likely to be unreported, unsuccessful cases, struck out an early stage of proceedings. The existence of any such cases would mean that our overall litigation numbers were a bit low and the stated rate of success a little high.

<sup>18</sup> Our limited investigations suggest that efficiency has increased as electronic databases have developed.

<sup>19</sup> Court judgments are not written for the purposes of recording all possible information, so some data may be missing on account of matters being resolved prior to trial, or judges choosing not to record or decide matters they consider less important. Nevertheless, we expect that this effect is limited, since our focus is on matters important to most cases.

## 1 *Stage of Proceeding*

First, each case was categorised according to the most advanced stage to which it progressed in the court system, namely:

1. Strike-Out ('SO') proceeding;<sup>20</sup>
2. Trial; or
3. Appeal.

## 2 *Positive or Negative Result*

Every case with a recorded final result was then classified as 'successful' or 'unsuccessful' overall; note being taken of the stage of proceeding at which the result was ultimately reached.<sup>21</sup> The latter, more fine-grained analysis allowed the creation of a secondary, more detailed results-set in which cases were coded as having been:

### Unsuccessful

1. Struck out;<sup>22</sup>
2. Unsuccessful at trial with no appeal;
3. Unsuccessful at trial and unsuccessful after appeal; or
4. Successful at trial but unsuccessful after appeal.

### Successful

5. Successful at trial with no appeal;
6. Successful at trial and successful after appeal; or
7. Unsuccessful at trial but successful after appeal.

This more granular set of analytics provides a rough proxy for the amount of time, complication and expense likely to have been involved in a plaintiff litigating the claim through to its final result. Unsuccessful claims struck out at an early stage generally involve less time and expense than either successful or unsuccessful claims determined at trial or (most expensively and protractedly of all) on appeal.

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<sup>20</sup> This category includes cases in which the defendant applied to have the claim dismissed, or where a plaintiff applied unsuccessfully to amend pleadings to include a misfeasance claim and the matter never proceeded to trial.

<sup>21</sup> Where a case was appealed several times, only the ultimate result after *all* appeals was recorded.

<sup>22</sup> 'Struck out' was defined broadly to include cases in which:

- (i) pleadings were struck out; or
- (ii) an initial decision not to strike out was reversed on appeal; or
- (iii) there was an appeal from an initial strike-out decision resulting in another decision to strike, summary dismissal of the claim, or summary judgment against the plaintiff; or
- (iv) the claim was struck out with leave to re-plead, but it was never re-pleaded and never went to trial; or
- (v) a court determined, on the hearing of a preliminary question, that the case could not continue; or
- (vi) proceedings were stayed, or the claim withdrawn on the basis that a stay would otherwise be granted.



### 3 *Reasons for Failure*

Wherever a claim failed, the reason or reasons for the failure were recorded within one of the following categories:

1. Pleadings — the plaintiff's pleading was defective in form, or disclosed no known cause of action.
2. Public officer not proven — the plaintiff failed to prove that the defendant was a public officer.
3. Excess of power not proven — the plaintiff failed to prove that the defendant was acting in excess of the powers of his or her office, or otherwise in breach of the public duties attached to it.
4. Mental elements not proven — the plaintiff failed to prove one or more of the required mental elements of the tort.
5. Damage not proven — the plaintiff failed to prove that he or she had been caused any damage.
6. Other — the plaintiff failed for reasons not falling within any of the other categories.

The required, substantive elements of the tort, which so often proved a stumbling block for plaintiffs, are discussed further in Part IV below. Where multiple reasons were cited for a claim failing, all of them were recorded without our attempting to determine which was ultimately conclusive. Our analysis therefore simply identifies the most commonly cited reasons for failure across all unsuccessful cases.

### 4 *Case Type (Subject Matter)*

Cases were further coded by reference to their subject matter:

1. Planning and property development — cases concerning actions or decisions of government officers or ministers in respect of planning, building and development matters.
2. Employment — cases in which an employee (or independent contractor) alleged illegality on the part of a public employer in relation to the termination of an employment contract, or the award of a contract for services under a public tendering process.
3. Immigration — cases involving immigration detention, or other harm suffered in consequence of alleged illegalities on the part of an officer resulting in the denial or termination of citizenship or visa applications.
4. Investigation — cases involving alleged abuse of powers on the part of regulatory agencies, the police or other persons acting under statutory authority in the conduct of prejudicial public investigations, prosecutions, or trials.
5. Licensing — cases, outside the planning and property development category, alleging public impropriety in the withholding, suspension or cancellation of a licence, or in enforcement action associated with the

absence of a licence in respect of otherwise prohibited activity. A particularly high-profile example is the recent case in which the Federal Agriculture Minister was held liable for misfeasance in issuing an illegal ban on the export of livestock to Indonesia.<sup>23</sup>

6. Policing — cases not falling within the investigations category involving alleged abuses of power by members of the police force, predominantly in the context of arrest and detention.
7. Taxation — cases involving the alleged mishandling of a citizen's tax affairs.
8. Welfare — cases involving the denial of citizens' claims to public welfare entitlements such as Centrelink benefits, or disability payments.
9. Other — cases falling outside the above categories, for example claims against judicial officers, prison officers, or livestock inspectors.

These categories are porous and prone to overlap in some instances. To keep matters as simple as possible, we were nonetheless strict in assigning each case to only one category — the one that, in our view, best represented the case's essential characteristics.

## 5 *Damage Pleaded*

Note was also taken of the type of harm alleged to have been suffered by the plaintiff in each case, damage being assigned to one of the following categories:

1. Pure economic loss (not consequential on personal injury or property damage).
2. Personal injury (other than mental injury).
3. Mental injury (psychiatric damage going beyond pure distress).
4. Property damage.
5. Loss of liberty.
6. Reputational harm.
7. Distress.
8. Other.
9. Unclear.

One of the reasons for recording information of this type was to enable us to investigate the accuracy of an interesting suggestion, to which we return in Part IV; namely, that recent increases in misfeasance litigation may be attributable to post-2002 restrictions in Australia on damages for personal injury in negligence cases.<sup>24</sup> Where a claim alleged more than one type of damage, all pleaded heads were recorded.

<sup>23</sup> *Brett Cattle Co Pty Ltd v Minister for Agriculture* (2020) 274 FCR 337 ('Brett').

<sup>24</sup> Vines (n 3) 222, esp n 9. The suggestion is framed in cautious terms, emphasis also being placed by the author on the specific restrictions on public body liability for negligence referred to above in n 8.

## 6 *Representation*

Given the large number of cases that are struck out before ever reaching trial, we also considered it important to note whether or not the plaintiff was legally represented, or acting in person, so that we could examine the relationship, if any, between rates of representation and success. Cases were accordingly coded in one of the following ways:

1. Plaintiff self-represented
2. Plaintiff legally represented;<sup>25</sup> or
3. Information unavailable.

## 7 *Concurrent Claims Pleaded*

Misfeasance claims are almost always combined with other causes of action in the same proceedings. We therefore noted any and all concurrent claims together with their outcomes (where available).<sup>26</sup> Such claims fell into the following, main categories:

1. Administrative law (applications for judicial review and claims for associated administrative law remedies).
2. Claims based on the (now defunct) ‘*Beautesert* principle’ (tortious liability for the inevitable, harmful consequences of positive, intentional and unlawful acts).<sup>27</sup>
3. Negligence at common law.
4. Breach of statutory duty.
5. Breach of contract.
6. Malicious prosecution.
7. Trespass to the person (assault or battery).
8. Trespass to goods.
9. Trespass to land.
10. False imprisonment.
11. Defamation.
12. Inducement of breach of contract.
13. Conspiracy.
14. Injurious falsehood.
15. Other.

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<sup>25</sup> Cases were coded in this way if the plaintiff was represented at any stage of the proceeding.

<sup>26</sup> Note that we have not examined here non-concurrent claims arising out of the same subject matter, such as where an administrative law claim is brought prior to the tort claim (see, eg, *Ruddock v Taylor* (2005) 222 CLR 612). Such non-concurrent claims are not readily identified using our search methods, and are beyond the scope of this project.

<sup>27</sup> *Beautesert Shire Council v Smith* (1966) 120 CLR 145, 156 (‘*Beautesert*’) (an action on the case). The action was rejected by the High Court in *Northern Territory v Mengel* (1995) 185 CLR 307 (‘*Mengel*’).

### III Results

Consistently with accounts to date,<sup>28</sup> our results confirm that the number of cases in which the tort of misfeasance has been pleaded in Australia since 1950 is extremely small in comparison both to other tort claims, and administrative law claims for judicial review.<sup>29</sup> We found a total of 204 cases. Of the 179 instances in which a final outcome was recorded, only nine (5%) were ultimately successful.<sup>30</sup> Of these nine, six succeeded at trial and were never appealed by the defendant, but a further three prevailed only after an appeal.<sup>31</sup> These low litigation and success rates are consistent with patterns reported in other common law jurisdictions.<sup>32</sup> In eight of the nine successful cases, the plaintiff also succeeded in establishing at least one, alternative private or public law claim (usually more).<sup>33</sup> It may also be significant that in only one successful case to date has the plaintiff been self-represented.<sup>34</sup> Indeed, although the number of claims brought by both represented and unrepresented litigants has increased dramatically, the success rate of represented plaintiffs is some four times that of unrepresented plaintiffs — a matter to which we return further below.

#### A Trends in Litigation and Success Rates

Although the number of recorded claims is small in absolute terms, with no more than 11 cases in any single year,<sup>35</sup> there has been a rapid escalation in litigation rates across the period from a very low initial baseline. Some 96% of all cases have occurred between 1991 and 2020. The number has increased at a fairly consistent rate across this thirty-year period, with 21% of cases occurring in the ten-year period between 1991 and 2000; 37% between 2001 and 2010; and 39% between 2011 and the end of 2020. Another way of representing this increase is to observe that the total

<sup>28</sup> See above nn 3–5.

<sup>29</sup> A search of the LexisNexisAdvance database conducted on 4<sup>th</sup> Dec 2020 disclosed more than 350 pleaded negligence cases and over 1300 claims for judicial review in 2019 alone.

<sup>30</sup> *Brett Cattle* (n 23); *Nyoni v Shire of Kellerberrin* (2017) 248 FCR 311 ('*Nyoni*'); *Cunningham v Traynor* [2016] WADC 168 ('*Cunningham*'); *South Australia v Lampard-Trevorrow* (2010) 106 SASR 331 ('*Trevorrow*'); *Cornwall v Rowan* (2004) 90 SASR 269 ('*Cornwall*'); *Gallo v Schubert* [2004] VCC 36 ('*Gallo*'); *De Reus v Gray* (2003) 9 VR 432 ('*De Reus*') (misfeasance was established at first instance in respect of one defendant, De Reus, and the jury's determinations on liability were not challenged on appeal — the successful appeal related to the jury's global assessment of damages for negligence and trespass to the person); *Tomkinson v Weir* (1999) 24 SR (WA) 183 ('*Tomkinson*'); *Farrington v Thomson* [1959] VR 286 ('*Farrington*'). In one recent case, *Ea v Diaconu*, the New South Wales Court of Appeal reversed a first instance decision to dismiss the claim, on the basis that the uncertain point of law it raised should not have been dealt with summarily: *Ea v Diaconu* (2020) 102 NSWLR 351 ('*Ea*'). The case was set down for directions in February 2021. As at 31 August 2021, it was still proceeding in the absence of settlement.

<sup>31</sup> *Trevorrow* (n 30); *Cornwall* (n 30) (both appeals by the State against liability at first instance); *Nyoni* (n 30) (plaintiff failed at trial, successful on appeal).

<sup>32</sup> See Chamberlain, *Misfeasance in a Public Office* (n 9).

<sup>33</sup> Successful concurrent claims included trespass to the person, land, or goods, false imprisonment, malicious prosecution, defamation and negligence.

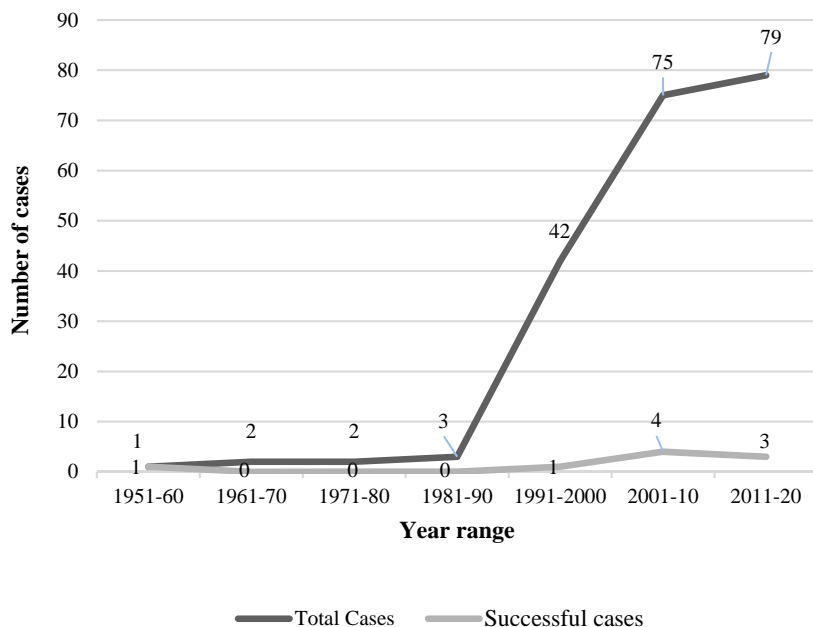
<sup>34</sup> *Nyoni* (n 30). In *Cornwall* (n 30) the plaintiff (Rowan) was self-represented at trial until 7 October 2001 (*Rowan v Cornwall (No 5)* (2002) 82 SASR 152, 158), but represented thereafter.

<sup>35</sup> This number was reached in 2012, 2014, 2016 and 2020.

number of cases recorded in each of the last three decades has been, respectively 14, 25 and 26 times the rate in the prior ten-year period (1981–90). Litigation seems, therefore, to have really taken off in the late 1980s; and to have been on a steep upward trajectory ever since, with a significant slowing in the rate of increase in the last decade.

By stark contrast, success rates have remained both low and stagnant, with a maximum rate of about 5.3% in the first decade of the new millennium and an average over the last thirty years of only about 3.8%. Before that, there is only one recorded successful case, *Farrington v Thomson*,<sup>36</sup> which is often heralded as the beginning of the modern misfeasance story and which was decided very early on, in December 1958. The startling divergence between litigation and success rates across the whole period is illustrated graphically in Figure 1 below, where the steepness of the climb in case numbers contrasts dramatically with a virtual flatline in positive outcomes for plaintiffs.

**Figure 1:** Misfeasance litigation and success rates by 10-year period: 1951–2020



## B Unsuccessful Cases

95% of all cases with a recorded result therefore failed. Of these, some 59% were struck out before ever reaching trial. A further 20% failed at trial and were never appealed. Some 14% failed at trial and then again on appeal. A small proportion —

<sup>36</sup> *Farrington* (n 30).

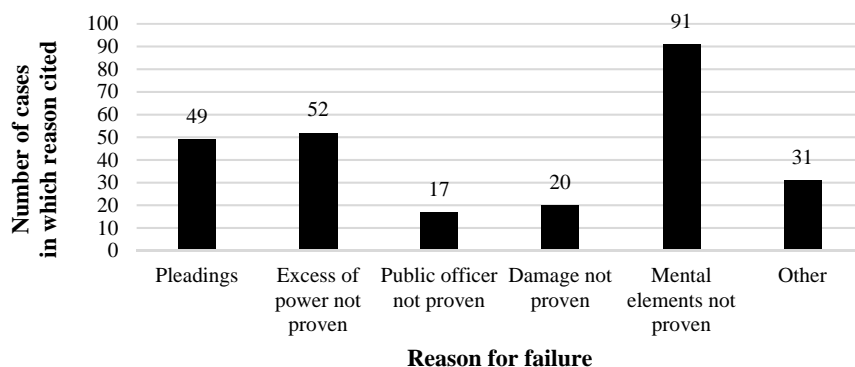
about 2% — succeeded initially, only to be reversed. As a proportion of unsuccessful cases, those that were struck out account for an arresting 62%.<sup>37</sup>

The death of most misfeasance claims is, therefore, as swift as it is (almost) assured, although there are undoubtedly some cases that are permitted to continue for a while, with plaintiffs (usually self-represented ones) being allowed by sympathetic judges to make repeated amendments to their pleadings before the proceedings are ultimately terminated.<sup>38</sup>

### C *Reasons for Failure*

The reasons for failure in unsuccessful misfeasance in public office cases between the end of 1950 and the end of 2020 are summarised below in Figure 2.

**Figure 2:** Reasons for failure in unsuccessful cases



The most commonly cited reason for a claim failing was the fact that the plaintiff failed to prove (or properly to plead facts that might prove) the required mental elements of the tort. This defect was cited in 54% of all unsuccessful cases and it was the *only* reason given for the claim failing in about one fifth of them. As we discuss further in Part IV below, the threshold requirements of the tort in Australia remain high, with it probably being necessary to prove, at a minimum, that a public officer subjectively adverted both to the possibility that his or her actions were unlawful in the relevant sense and that they might cause the plaintiff harm. The seriousness of the required imputation (which is effectively that the officer knowingly caused damage by acting in ‘deliberate’ or ‘conscious’ excess of power)<sup>39</sup> also triggers the operation of stricter evidential requirements in meeting the civil standard of proof under the rule in *Briginshaw v Briginshaw* and its modern statutory

<sup>37</sup> This casts doubt on a suggestion made by Chamberlain that misfeasance claims are less likely than other claims to be disposed of summarily on account of the uncertainties surrounding the tort’s parameters: Chamberlain, ‘What is the Role of Misfeasance in Public Office in Modern Canadian Tort Law?’ (n 10) 577.

<sup>38</sup> See, eg, *Henderson v Commissioner of Taxation* (2006) 62 ATR 116 (‘Henderson’).

<sup>39</sup> *Plaintiff M83A/2019 v Morrison (No 2)* [2020] FCA 1198, [96], [99] (Mortimer J) (‘*Morrison (No 2)*’).

equivalents.<sup>40</sup> The gravity of misfeasance as a wrong therefore ironically makes it harder to persuade a court that it ever actually occurred. Judges are slow to attribute bad faith to public officers doing a difficult job,<sup>41</sup> not least, perhaps, because they are themselves occasionally targeted by such claims.<sup>42</sup>

The second most commonly cited reason for failure (featuring in 31% of unsuccessful cases) was the plaintiff's failure to prove any unlawful excess of public power. The fact that claims are regularly defective in this regard may either reflect the fact that excesses of power are genuinely rare,<sup>43</sup> or the fact that the legality of many discretionary decisions is hard for plaintiffs (or even sometimes officials) to judge without benefitting from the determination of a court or administrative tribunal. Where the boundaries of legal discretion are ambiguous and subject to final confirmation only on judicial review, it is easy to see how a complainant might perceive those bounds to have been exceeded, when it is later determined by a judge that this is not, in fact, the case.

The third most common reason for a claim being rejected (29% of unsuccessful cases) related to some fatal defect in the plaintiff's pleadings. The high incidence of technical problems of this type may be connected, we suspect, to the significant proportion of unsuccessful cases (40%) in which plaintiffs are self-represented and therefore potentially lack access to legal advice. It may also, perhaps, be connected to the remaining uncertainties about the exact parameters of the tort to which we allude in Part IV below.

The vast majority of unsuccessful cases (84%) failed for either the first or second reason — lack of proof of the required mental elements, or lack of proven illegality — or for both reasons. There is, however, no single problem that blights all claims. In 12% of cases, plaintiffs failed to prove (or properly allege) that they had suffered any damage. Indeed, claims were often criticised by courts as being either too vague about damage, or as omitting to refer to it at all.<sup>44</sup> Sometimes the damage of which plaintiffs complained seems to have been more in the nature of harm to a common, public interest, than to any private interest of their own.<sup>45</sup> Sometimes the damages claimed were either nominal,<sup>46</sup> or a staggering, arbitrary sum bearing closer resemblance to a punitive award than any true calculation of injury personally suffered.<sup>47</sup> Although there has been some debate about the logic of the damage

<sup>40</sup> *Briginshaw v Briginshaw* (1938) 60 CLR 336. See, eg, *Hamilton v New South Wales* [2020] NSWSC 700 ('*Hamilton*'); *Mullett v Nixon* [2016] VSC 512 ('*Mullett*'); *New South Wales v Roberson* (2016) 338 ALR 166; *Commonwealth v Fernando* (2012) 200 FCR 1 ('*Fernando*').

<sup>41</sup> Mark Aronson, 'Misfeasance in Public Office: Some Unfinished Business' (2016) 132 (July) *Law Quarterly Review* 427, 435 (an 'implicit belief in the benignity of government').

<sup>42</sup> *Hammond v New South Wales* [2013] NSWSC 1930; *Fleet v Royal Society for the Prevention of Cruelty to Animals NSW* [2005] NSWSC 926; *Mentyn v Attorney-General* [2004] TASSC 5 ('*Mentyn*'). Judicial immunity usually puts an end to the suit.

<sup>43</sup> For our doubts in this regard, see Part IV(A) below.

<sup>44</sup> See, eg, *Grass v Slattery* (2018) 162 ALD 276 ('*Grass*') (no evidence of damage admitted).

<sup>45</sup> *Bill v Northern Land Council* [2018] FCA 1823 (common interests of traditional landowners).

<sup>46</sup> See, eg, *Lymberopoulos v Police* [2006] SASC 360.

<sup>47</sup> *Roads and Maritime Services v Young* [2018] NSWSC 1867 (\$80 million); *Nyoni v Shire of Kellerberrin* [2019] FCA 530 (\$100 million); *Mentyn* (n 42) (\$1 million); *Henderson v Bakharia* [2001] QSC 370 (\$3 million).

requirement in light of the tort's public law character,<sup>48</sup> it is clearly part of Australian law and it is therefore pretty unlikely that plaintiffs (at least legally represented ones) are unaware of it. It may instead be that they look past the requirement, compensation for harm being just one motivation for their claim and the vindication of their public rights and the enforcement of an officer's public duties being a more pressing personal concern. This is certainly a credible explanation of one of the tort's earliest cases, *Ashby v White*, where the plaintiff's complaint related to the denial of his public voting rights and no personal damage was either alleged, or suffered.<sup>49</sup> It seems possible, therefore, that the 'public law' character of the tort is leading some plaintiffs mistakenly to assume that personal damage is inessential to their claim and need not be alleged, or particularised. Damage will also be especially hard to prove where the alleged illegality is of a purely procedural kind, since the officer may in such cases have made the same decision even without the irregularity.

In a further 10% of cases, plaintiffs failed to prove that the defendant was a public officer, or that he or she was exercising any relevant public power. This was a particular problem in employment cases, as we note further below. In the remaining 18% of cases, claims failed for 'other' reasons, which included:

- evidential defects;<sup>50</sup>
- the fact that a plaintiff was attempting to use the litigation collaterally to attack a prior criminal conviction;<sup>51</sup>
- failure to establish facts that might make the State vicariously liable;<sup>52</sup>
- an immunity protecting the officer in question;<sup>53</sup>
- lack of court jurisdiction;<sup>54</sup>
- the expiry of a limitation period;<sup>55</sup> or

<sup>48</sup> See, eg, Nolan (n 3) 199–200 (suggesting that the requirement is best understood as a standing rule for suit in respect of a public wrong and can therefore be more liberally constructed). Note that the damage requirement was at one time waived in cases involving the violation of constitutional rights in *Watkins v Secretary of State for the Home Department* [2005] QB 883, but that stance was reversed on appeal: [2006] 2 AC 395 (HL).

<sup>49</sup> *Ashby v White* (1703) 92 ER 126. The plaintiff's preferred candidate was, in fact, elected.

<sup>50</sup> See, eg, *New South Wales v Hunt* (2014) 86 NSWLR 226 ('Hunt').

<sup>51</sup> *Re Western Australia; Ex parte Vella (No 2)* [2012] WASCA 272.

<sup>52</sup> *Mbugua v Commonwealth* (2012) 78 SR (WA) 154; *Ogawa v Parker* [2008] FCA 388, [30] (Logan J) (obiter dicta); *Mickelberg v Western Australia* [2007] WASC 140 ('Mickelberg'); *Griffiths v Ballard* [2005] NSWSC 1350 ('Griffiths'); *Holloway v Tasmania* (2005) 15 Tas R 127 ('Holloway'); *Hart-Roach v Public Trustee* [1998] WASC 34. Although vicarious liability is sometimes doubted, it is now regularly conceded, or considered possible, given the right legal conditions: see, eg, *Morrison (No 2)* (n 39) [3] (conceded); *Mengel* (n 27) (conceded at initial trial: *Northern Territory v Mengel* (1992) 109 FLR 411, 420, see also at 347 — possible where de facto authority); *Frangieh v Deputy Commissioner of Taxation* (2018) 343 FLR 1, 31 [150] (White JA) (obiter dicta); *Grass* (n 44) 279 [1] (conceded); *Okwume v Commonwealth* [2016] FCA 1252, [209], [211] (Charlesworth J) (obiter dicta) ('Okwume'); *Porter v OAMPS Ltd* (2005) 215 ALR 327, 353, [108] (Goldberg J) (obiter dicta) ('Porter').

<sup>53</sup> *Keenhilt Pty Ltd v Byron* [2008] QSC 70 (tax officer); *Griffiths* (n 52) (witness); *Wentworth v Wentworth* (2001) 52 NSWLR 602 (judicial officers); *Tampion* (n 12) (public inquiries). See also the cases cited above at n 42.

<sup>54</sup> *Croker v Commissioner of Taxation* [2006] FCA 372 ('Croker') (claim related to State, not Commonwealth officers).

<sup>55</sup> *New South Wales v Mulcahy* [2006] NSWCA 303 ('Mulcahy'); *Thompson v Macedon Ranges Shire Council* [2006] VSC 458; *Sita Queensland Pty Ltd v Queensland Transport* [1998] QSC 130 (limitation period for judicial review exceeded, no separate misfeasance claim ultimately lodged).



- the fact that making out the claim might require the plaintiff to rely on evidence of his or her own illegal actions.

The last of these problems is atypical, but colourfully illustrated by the facts of *Emanuele v Hedley*, where the plaintiff's claim against the police for entrapment would potentially have required him to disclose his own attempts to bribe one of the officers in question.<sup>56</sup>

## D Case Types

Misfeasance cases are factually extremely diverse — indeed, 23% of the cases in our study fell outside any of the more specific ‘nominate’ categories identified above (see pp 321–2). This reflects the reality that allegations of abuse of power now span a very large number of discrete areas of governmental function, without being clustered in one particular sphere.

The largest nominate group by far (28% of cases) concerned official ‘investigations’. Examples of alleged abuses in this context included:

- the unlawful restriction of a surgeon's registration following official complaints about his work;<sup>57</sup>
- illegal phone-taps or unlawful searches by the police during criminal investigations;<sup>58</sup>
- improprieties on the part of the Australian Securities and Investments Commission (‘ASIC’),<sup>59</sup> the New South Wales Independent Commission Against Corruption (‘ICAC’),<sup>60</sup> or Australian Competition and Consumer Commission (‘ACCC’)<sup>61</sup> investigators during their inquiries into corruption or corporate wrongdoing;
- the prejudicial use of fabricated or illegally-obtained evidence or the violation of other procedural justice norms by investigators and prosecutors;<sup>62</sup> malicious prosecutions by individual officers,<sup>63</sup> their prejudicial misbehaviour in court proceedings;<sup>64</sup> and

<sup>56</sup> *Emanuele v Hedley* (1998) 179 FCR 290 (‘*Emanuele*’).

<sup>57</sup> *Morris v St Vincent's Health Australia Ltd* [2020] VSC 690.

<sup>58</sup> *Flanagan v Commissioner of the Australian Federal Police* [1996] FCA 1210 (phone-tapping); *Pinfold v New South Wales* [2009] NSWSC 1240 (execution of search warrant).

<sup>59</sup> *Porter* (n 52).

<sup>60</sup> *Obeid v Lockley* (2018) 98 NSWLR 258 (‘*Obeid*’); *Kazal v Independent Commission Against Corruption* [2019] NSWSC 556. See similarly *Allen v Corruption and Crime Commission of Western Australia* [2011] WASC 327.

<sup>61</sup> *Pro Teeth Whitening (Aust) Pty Ltd v Commonwealth* [2015] QSC 175 (‘*Pro Teeth Whitening*’).

<sup>62</sup> *Grimwade v Victoria* (1997) 90 A Crim R 526 (false/illegal evidence); *Emanuele* (n 56) (entrapment); *Woodroffe v National Crime Authority* [2000] FCA 1052 (invalid warrant); *Cannon v Tahche* (2002) 5 VR 317 (‘*Cannon*’) (withholding information at trial); *Holloway* (n 52) (procedural unfairness); *Duke v New South Wales* [2005] NSWSC 632 (‘*Duke*’) (planting of evidence); *Mulcahy* (n 55) (fabricated evidence); *Mickelberg* (n 52) (fabricated/false evidence); *Poynder v Kent* (2008) Aust Torts Reports ¶81–984 (‘*Poynder*’) (intimidation); *Noye v Robbins* [2010] WASC 83 (scapegoating); *Hunt* (n 50) (fabrication of evidence). Only some allegations were ultimately made out.

<sup>63</sup> *Martens v Stokes* [2013] 1 Qd R 136; *Calabro v Western Australia (No 3)* [2014] WASC 84; *Mullett* (n 40); *Flowers v New South Wales* [2019] NSWSC 1467 (‘*Flowers*’); *XYZ v New South Wales (No 2)* [2019] NSWDC 32; *Hamilton* (n 40) (claim by spouse of alleged victim for related psychiatric harm).

<sup>64</sup> *Ea* (n 30).

- (in one case) the failure of an official to report suspected child abuse.<sup>65</sup>

The harm alleged in such cases usually includes reputational damage on the part of the person being investigated, economic loss, loss of liberty (in cases involving physical detention), psychological damage and distress.

The next largest nominate categories — all of roughly equivalent size and constituting between 8% and 10% of the total number of reported cases — involved ‘employment’, ‘immigration’, ‘planning and property development’ and ‘policing’. ‘Policing’ cases typically alleged abuses of police powers during arrest and detention, or their use for illegitimate collateral purposes such as intimidation, humiliation, or harassment. The most recent example involved (unsubstantiated) allegations that officers in New South Wales had used their powers to intimidate the brother-in-law of a fellow officer.<sup>66</sup> Other claims (this time, substantiated) involved an illegal strip search by Victorian police,<sup>67</sup> and the widely reported tasering and illegal detention of a law professor and his wife by officers in Western Australia.<sup>68</sup> The damage alleged in such instances typically includes physical and mental injury, as well as loss of liberty and associated economic loss; and actions are therefore often combined with claims for trespass to the person, goods or land, false arrest and false imprisonment. If one counts all of the cases in our study in which the police were named as defendants to a misfeasance action (across all of our categories), they collectively accounted for about a quarter of all cases. The number of cases targeting the police is therefore greater than our single, nominate ‘policing’ category itself suggests. A full breakdown of case types, together with their respective success rates, appears below in Figure 3. The extent to which litigation is increasing across the different classes is shown below in Figure 4.

Figure 3 yields some interesting findings concerning relative success rates across the different case types. For example, although licencing cases constitute only about 7% of claims overall, their success rate is about four times the average for a misfeasance claim. They account for three of the nine successful cases in Australia to date: *Farrington*,<sup>69</sup> *Nyoni v Shire of Kellerberrin*,<sup>70</sup> and *Brett Cattle Co Pty Ltd v Minister for Agriculture*.<sup>71</sup> The rate of success in policing cases is about the same and accounts for another four positive outcomes.<sup>72</sup> The remaining two successes fall into the miscellaneous ‘other’ category,<sup>73</sup> where the success rate is slightly below the overall average of 5%. By contrast, the investigations category has failed to yield a single successful case, despite constituting by far the largest nominate group.<sup>74</sup>

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<sup>65</sup> *TB v New South Wales* [2009] NSWSC 326.

<sup>66</sup> *Doueihi v New South Wales* [2020] NSWSC 1065.

<sup>67</sup> *De Reus* (n 30).

<sup>68</sup> *Cunningham* (n 30).

<sup>69</sup> *Farrington* (n 30).

<sup>70</sup> *Nyoni* (n 30).

<sup>71</sup> *Brett Cattle* (n 23).

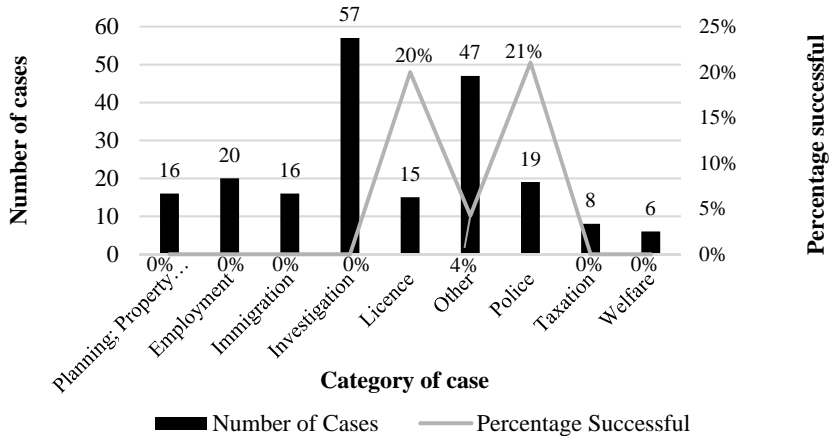
<sup>72</sup> *Cunningham* (n 30); *Gallo* (n 30); *De Reus* (n 30); *Tomkinson* (n 30).

<sup>73</sup> *Cornwall* (n 30) (malicious misinformation in withdrawal of funding from plaintiff’s women’s shelter); *Trevorrow* (n 30) (unlawful removal of indigenous children from parents in breach of natural justice).

<sup>74</sup> This broadly mimics the pattern in such cases in negligence: *Sullivan v Moody* (2001) 207 CLR 562 (‘Sullivan’); *Stewart v Ronalds* (2009) 76 NSWLR 99; *N v Poole Borough Council* [2020] AC 780 (UKSC). See, however, *New South Wales v Spearpoint* [2009] NSWCA 233 (claim not struck out);

The planning and property development, employment, immigration, taxation and welfare classes are similarly moribund.

**Figure 3:** Case types with success rates



Our data do not disclose any particular reason for failure as being markedly more common in one type of case than another, with the possible exception of employment cases. Here, claims failed 38% of the time at least in part because the defendant was not (or was not properly alleged to be) a public officer, or because he or she was not exercising any public power when engaged in the acts complained of. This is about three times the rate of failure for this type of reason that applies to unsuccessful claims as a whole. The fact that claims fail so often for this reason in employment cases seems to point to a significant confusion among litigants about the tort's scope and rationale, which (at least on the current law) is confined to the misuse of powers that an official enjoys by virtue of his or her public functions, not the abuse of contractual or other powers that are equally available to private parties.<sup>75</sup> Litigants should therefore be clear that the mere fact that one is wronged by a public employer does not necessarily mean that the employer has engaged in misfeasance in public office. Claims for breach of contract, the tort of inducing a breach of contract, interference with contractual relations, conspiracy, or intimidation are more appropriate causes of action in respect of pure economic losses sustained in contractual and employment disputes and are, in fact, often also pleaded.

The different litigation rates across the nominate categories are similarly hard to explain without further qualitative investigation. Some intelligent speculation is nonetheless possible as to why claims involving investigations, policing and immigration are popular. Interactions between citizens and

*McColley v Commonwealth* [2014] ACTCA 21 (leave to appeal granted); *Fuller-Wilson v New South Wales* (2018) Aust Torts Reports ¶82–413 (claim not struck out).

<sup>75</sup> *Skinner v Commonwealth* [2012] FCA 1194; *McGuirk v University of New South Wales* [2010] NSWSC 1471; *Leerdam v Noori* (2009) 255 ALR 553; *Cannon* (n 62). For signs of a possible change in this approach, see further below n 102 and accompanying text.

prosecuting authorities or the police are often personal, face-to-face and threatening to a plaintiff's liberty, dignity and reputation. They are therefore prone to generating a keen sense of grievance and the desire for personal vindication, even where an official's intervention is perfectly legal, responsible and well-motivated. State actions in the immigration context are also highly emotive and have become increasingly fraught, controversial and politicised in recent years.<sup>76</sup> The fracas came to a head recently in unsuccessful proceedings brought on behalf of some 1600 immigration detainees against Federal Ministers, alleging unlawful manipulation of their visa arrangements designed to facilitate their involuntary transfer to Nauru under Australia's offshore processing arrangements.<sup>77</sup> As Figure 4 (below) illustrates, immigration cases are a recent phenomenon, with 94% of all claims occurring since the year 2000 and litigation rates increasing sixfold in the period 2001–10 (and then again by another 50% in the last decade). Although absolute numbers of cases are still very small, this is about three times the average rate of increase across all categories in the same period.

Meaningful alternative remedies for plaintiffs in the immigration category are also particularly limited, which could provide an additional incentive for the turn to the tort. In contrast to European jurisdictions, human rights legislation coverage in Australia is patchy,<sup>78</sup> and weak in so far as it gives no private action for damages.<sup>79</sup> Administrative law remedies are often invoked, but suffer the same remedial disadvantage. We return to these observations in Part IV(B), where they feed into our more general thesis about drivers of the current misfeasance litigation boom.

As things stand, the statistics suggest that claims are increasing significantly across the board, the surge in litigation is greater in some nominate areas than in others, but, for the most part (and with the exception, noted above, of employment cases), claims tend to fail for similar reasons across all categories, with the tort's mental elements providing the most serious, repeated obstacle to success.

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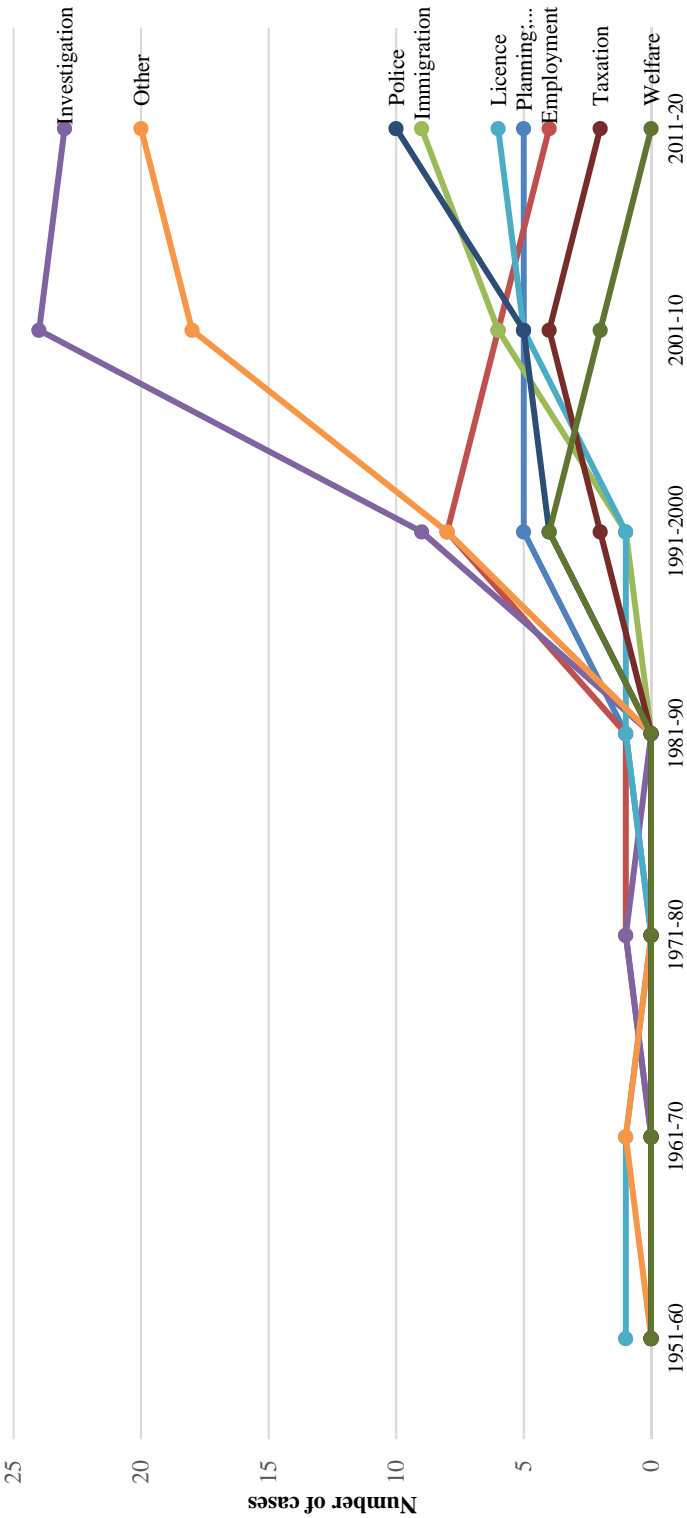
<sup>76</sup> The scandal of Australia's offshore detention and processing of asylum-seekers in secretive, primitive conditions is well known and has been through two iterations since 2000: see (on the first iteration) Angus Francis, 'Bringing Protection Home: Healing the Schism between International Obligations and National Safeguards Created by Extraterritorial Processing' (2008) 20(2) *International Journal of Refugee Law* 273; (on the second iteration) Madeline Gleeson, *Offshore: Behind the Wire on Manus and Nauru* (NewSouth Publishing, 2016).

<sup>77</sup> *Morrison (No 2)* (n 39).

<sup>78</sup> State legislation currently only exists in the ACT (*Human Rights Act 2004* (ACT)), Victoria (*Charter of Human Rights and Responsibilities Act 2006* (Vic)) and Queensland (*Human Rights Act 2019* (Qld)) and at Federal Level (in a limited form that is non-binding on the executive) under the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

<sup>79</sup> It is possible that there is a loophole in the *Human Rights Act 2004* (ACT) in cases of unlawful arrest, detention and conviction, but this seems unlikely: Boughey, Rock and Weeks (n 15) 214.

**Figure 4:** Litigation increases across different case types over time: 1951–2020



## E *Concurrent Claims Pleaded*

The overwhelming majority of misfeasance claims (some 98%) are brought alongside other causes of action. Furthermore, in all but one case in which the plaintiffs succeeded in proving misfeasance,<sup>80</sup> they also succeeded in establishing another public or private law claim. Many of the concurrent claims pleaded have lower mental thresholds, but they are not free of their own complications. While it is true that one or more concurrent claims succeeded whenever a misfeasance claim did, it is certainly not the case that they necessarily (or even regularly) succeeded when the misfeasance claim failed. In fact, they were also overwhelmingly unsuccessful — failing in 73% of such cases. Of the 16 instances in which we were able to determine that a concurrent claim succeeded,<sup>81</sup> administrative law accounted for 11; and tort or contract claims sounding in damages accounted for only five.<sup>82</sup> This means that in only about 3% of cases in which the plaintiff's misfeasance claim failed, did he or she clearly obtain monetary compensation on some other legal ground in the same proceeding. Figure 5 below provides a summary of the most common concurrent claims, showing both the total number of cases in which they were pleaded, and that number as a percentage of the total number of misfeasance claims.

Administrative law claims for judicial review featured in 16% of cases and were the *only* other claim pleaded in about 6% of cases. This is symptomatic of the fact that in many harmful encounters between citizens and state power, the citizen's objective is not simply (or even perhaps primarily) to obtain compensation, but also to challenge the validity of an adverse decision in the hope that the decision-maker may then change it. All the other concurrent claims advanced potentially sounded in damages, although the *Beauesert* principle did not succeed in any case we examined and was ruled out by the High Court in *Northern Territory v Mengel* in 1995.<sup>83</sup> It is now only ever pleaded by the unwary.<sup>84</sup>

Negligence was overwhelmingly the most common concurrent claim, featuring in 44% of cases. It offers the obvious attraction that an officer need not have adverted to the possibility of any overreach of public power to be liable, but a negligence claim is still subject to a variety of restrictions, both common law and statutory, that regularly blunt its efficacy as a compensation tool. This is especially so in cases in which maladministration has resulted in a pure economic loss, which was alleged in some 60% of cases.<sup>85</sup> Like the tort of misfeasance, negligence requires proof of damage, which means that in any case in which the misfeasance claim failed

<sup>80</sup> *Nyoni* (n 30) (note, however, that the plaintiff succeeded against another party for trespass to land).

<sup>81</sup> In an additional 14 cases, leave to re-plead (or otherwise proceed with) one or more alternative claims was granted, but we were unable to determine whether those claims ever went on to trial.

<sup>82</sup> *Okwume* (n 52) (false imprisonment); *Fernando* (n 40) (false imprisonment); *Zreika v New South Wales* [2011] NSWDC 67 ('*Zreika*') (false arrest and trespass to the person); *Brady v Official Trustee in Bankruptcy* [2002] FCA 363 (conversion); *Martin v Tasmania Development & Resources* (1999) 163 ALR 79 (breach of contract).

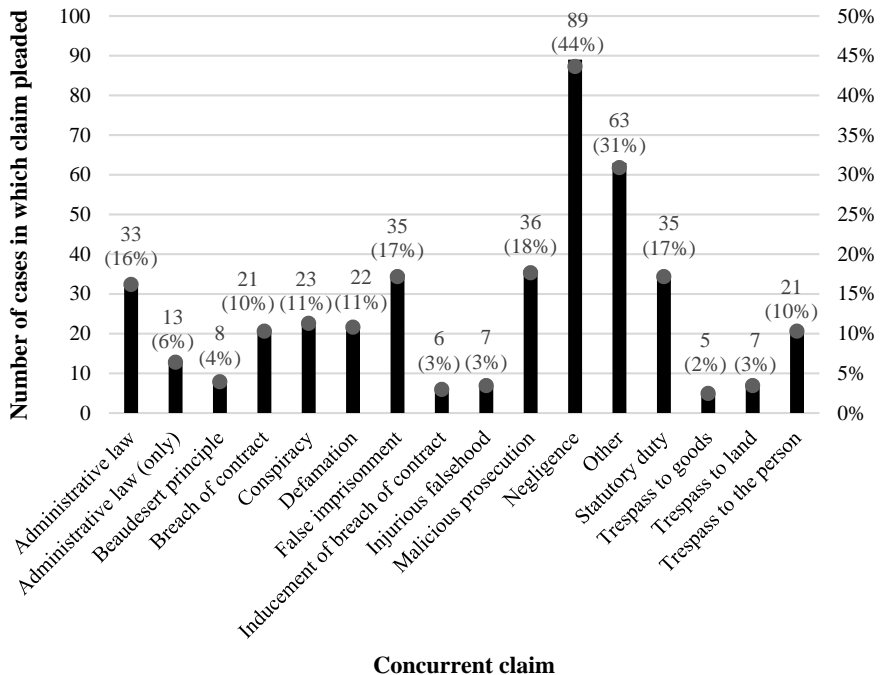
<sup>83</sup> *Mengel* (n 27).

<sup>84</sup> Plaintiffs still occasionally (fruitlessly) plead a cause of action that is close to the principle. See, eg, *Queensland Nickel Pty Ltd v Commonwealth* (2016) 339 ALR 83, 96 [49] (Dowsett J).

<sup>85</sup> Pure economic loss accounted for 122 out of a total of 271 (45% of) heads of damage across all recorded cases.

for this reason, the negligence claim inevitably did so too. Duties of care are also restricted in investigations and policing contexts on public policy grounds where they are judged by a court to be inconsistent with the intended design of the statutory framework within which an officer is operating.<sup>86</sup> Problems also arise wherever legislation was intended to benefit the public as a whole, not a specific class of vulnerable individuals to which a plaintiff belongs.<sup>87</sup> All negligence claims are also now subject to the statutory restrictions referred to earlier in this article.<sup>88</sup>

**Figure 5:** Concurrent claims pleaded



The relatively large quotas of false imprisonment (17%), malicious prosecution (18%) and defamation claims (11%) are explained by the significant number of ‘policing’ and official ‘investigations’ cases. Claims for false imprisonment and trespass to the person are the ones that most regularly succeed in policing and investigations cases, neither action requiring proof of carelessness on the part of the official concerned, or actual damage. But the number of successes is still vanishingly small in absolute terms.<sup>89</sup> Claims for breach of statutory duty are

<sup>86</sup> *Sullivan* (n 74); *Halech v South Australia* (2006) 93 SASR 427.

<sup>87</sup> *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 564 [39] (Gleeson CJ) (ministerial power under s 189 of the *Fisheries Management Act 1994* (NSW) not a power to protect a specific class). Cf *Crimmins v Stevedoring Industry Finance Committee* (1999) 200 CLR 1 (power under *Stevedoring Industry Act 1956* (Cth) s 18 was a power to protect a specific class).

<sup>88</sup> See above nn 8, 24 and accompanying text.

<sup>89</sup> We found six cases in which false imprisonment was established: *Hamilton v New South Wales* (No 13) [2016] NSWSC 1311 (*‘Hamilton (No 13)’*); *Okwume* (n 52); *Zreika* (n 82); *Goldie v*

quite common (17% of cases) and evenly distributed across the different types of case, but are even more difficult to get off the ground. Although one plaintiff in our study was granted leave to re-plead a claim of this type and take it to trial,<sup>90</sup> there was not a single instance within the study's parameters in which the action succeeded.

'Other' concurrent causes of action comprise a farrago. They include claims for the deliberate infliction of psychiatric harm under *Wilkinson v Downton*,<sup>91</sup> intimidation, breach of fiduciary duty, deceit, conversion, abuse of process, misleading and deceptive conduct, interference with contractual relations and unconscionable conduct. The overall pattern is one in which regular factual overlap occurs between the misfeasance tort and other public and private law causes of action. In some instances, this overlap could explain the discontinuance of a misfeasance claim, or a prudent initial decision never to try to plead it. In one case, a claim was struck out in part because it was thought simply to re-plead other causes offering the same remedial advantages, the court emphasising the importance of keeping the various torts 'distinct' in the name of 'coherence'.<sup>92</sup> The extent and regularity of overlap also illustrates (if any illustration is really needed) the far-reaching ambit of state regulatory power in the modern age, with official powers bearing upon virtually all aspects of modern life and potentially impinging on the entire range of interests (person, property, liberty, dignity, confidentiality, privacy, financial welfare and so on) that private law now protects.

## IV Reflection: What Does it All Mean?

There are many fascinating features of the data from our study that command further qualitative investigation — for example, the apparent disparity in success rates as between different, nominate types of case. It is impossible to address them all in this article and here we confine ourselves to some further reflection on the two questions that prompted our closer examination of the field: why is it that success is generally so rare and (most puzzlingly) why is that litigation is continuing to spike in spite of that fact?

### A *Why is Success so Rare?*

The main, formal reason why claims fail before courts is as plain as day: the demanding mental elements of the tort. Commentators have often pointed accusingly at these, but our study highlights the true size of the obstacle they present in practice. They have mutated throughout the tort's history and are not yet set in stone. In the

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*Commonwealth* (2002) 117 FCR 566; *Tomkinson* (n 30) and two others in which it was left open to the plaintiff to re-plead the claim (*Duke* (n 62)) or take it to trial (*Sadiqi v Commonwealth* (No 3) [2010] FCA 596). Trespass to the person was found in five cases: *De Reus* (n 30); *Zreika* (n 82); *Cunningham* (n 30); *Hamilton* (No 13) (n 89) and *Gallo* (n 30). Trespass to land was found in one case: *Farrington* (n 30) (and by a separate defendant in *Nyoni* (n 30)).

<sup>90</sup> See *Rogers v Legal Services Commission of South Australia* (1995) 64 SASR 572.

<sup>91</sup> *Wilkinson v Downton* [1897] 2 QB 57.

<sup>92</sup> *Hamilton* (No 13) (n 89) [226] (Campbell J). See further Aronson, 'Misfeasance in Public Office: Some Unfinished Business' (n 41) 434–5.



beginning, there is good reason to believe that liability was at least sometimes strict,<sup>93</sup> as it still is in some cases in civilian systems.<sup>94</sup> In the revived 20<sup>th</sup> century form of the tort, this possibility disappeared. An intention to injure the plaintiff ('targeted malice') was considered sufficient to render an official liable,<sup>95</sup> but the idea that harmful public illegality or excess of power could, of itself, trigger liability was never seriously contemplated in modern conditions. This is no doubt because of the serious repercussions this might have for the finances of the burgeoning administrative State and the perceived potential that such liability might have for driving officials out of public service, or causing them to engage in defensive administrative practice.

Some liberalisation occurred with the recognition that a second version of the tort exists according to which it is sufficient to prove that an official's acts were unlawful and that he or she was recklessly indifferent to (actually adverted to, but deliberately ignored) both: (i) the possibility that the acts might be illegal in the relevant sense; and (ii) the fact that they might cause the plaintiff harm.<sup>96</sup> There has been some uncertainty in Australia about the second of these elements, with courts occasionally suggesting that it is sufficient for harm to be foreseeable, not actually adverted to, at least when the official knew his or her acts to be illegal.<sup>97</sup> However, the New South Wales Court of Appeal has recently taken the view that Australian authority is sufficiently unclear on the point to justify it adopting the more 'principled' position that the official must advert to the possibility of *both* excess of power *and* harm.<sup>98</sup> The logic of this additional stricture is highly questionable in our view (it is stricter even than in cases of deceit and surely unnecessary to avert

<sup>93</sup> Evans (n 5) 642, 647–9. See also David Mullan, 'Roncarelli v Duplessis and Damages for Abuse of Power: For What Did it Stand in 1959 and for What Does it Stand in 2009' (2010) 55(3) *McGill Law Journal* 587 (advocating a return to strict liability combined with appropriate immunities and limitations on liability).

<sup>94</sup> On the French approach, see Duncan Fairgrieve and François Lichère, 'The Liability of Public Authorities in France', in Ken Oliphant (ed), *The Liability of Public Authorities in Comparative Perspective* (Intersentia, 2016) 155.

<sup>95</sup> *Mengel* (n 27) 345 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ), 357 (Brennan J), 370 (Deane J). The term 'targeted malice' stems from *Bourgoin v Ministry of Agriculture, Fisheries and Food* [1986] QB 716, 776.

<sup>96</sup> *Mengel* (n 27) 357 (Brennan J) (reckless indifference), 370–1 (Deane J) (reckless indifference or deliberate blindness). The level of risk that needs to be adverted to in each regard is still not clearly determined: Aronson, 'Misfeasance in Public Office: Some Unfinished Business' (n 41) 435–6.

<sup>97</sup> The suggestion stems from an obiter dicta passage in the plurality judgment in *Mengel* (n 27) 347 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ), where their Honours were prepared to proceed on the basis that it is sufficient to prove that harm was foreseeable where the defendant knew the act was beyond power. Decisions following this approach include: *Sanders v Snell* (1998) 196 CLR 329, 345 [38] (Gleeson CJ, Gaudron, Kirby and Hayne JJ) ('*Sanders*'); *Trevorrow* (n 30) 388 [263]–[264] (Doyle CJ, Duggan and White JJ); *Moder v Commonwealth* (2012) 261 FLR 396, 414 [67] (Margaret Wilson AJA); *Deputy Commissioner of Taxation v Frangieh (No 3)* (2017) 321 FLR 1, 20–1 [101] (Harrison AsJ).

<sup>98</sup> *Obeid* (n 60) 293–7 [153]–[172] (Bathurst CJ), following the UK approach: *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 (HL), 196 (Lord Steyn), 222–3 (Lord Hutton), 197 (Lord Hope).

defensive practice),<sup>99</sup> but the weight of recent authority seems to favour it.<sup>100</sup> The result is that, in the absence of any clear indication by the High Court, the tort's mental elements may now be interpreted more restrictively than some Australian courts were previously hinting.<sup>101</sup> Other expansions in the tort's scope — for example, the recent suggestion that it may capture abuses of an official's public position (the influence or factual opportunity that it brings), as well as the abuse of particular statutory or prerogative powers attached to that position<sup>102</sup> — do little to mitigate the difficulties created by this primary obstacle, which continues to dominate the landscape like Mount Doom.<sup>103</sup>

There are other feasible explanations for the absence of litigant success. The most optimistic (or perhaps naïve) of these, to which we previously alluded, is that excesses of public power are very rare. However, one only has to look to the volume of successful claims for judicial review of administrative action to have serious doubts about this line of thinking.<sup>104</sup> It is far more likely, in our view, that official illegalities are unwitting, than that they occur only very infrequently. Some cases that might succeed in misfeasance may not feature in the records because litigators, aware of the tort's stringencies, choose to pursue other remedies. Residual uncertainties about the tort's exact scope and rationale may also have prompted claims that had little or no chance of success.<sup>105</sup> There is certainly some evidence for this, we suggested above, in employment cases.

Relatedly, the fact that such a high proportion of litigants lack legal representation could be important. This feature of misfeasance claims has hitherto attracted little attention. On our reckoning, some 36% of plaintiffs represent themselves,<sup>106</sup> and the rate at which litigation has increased over the last 20 years is

<sup>99</sup> Cf *Obeid* (n 60) 293–4 [157] (where it is suggested that actual advertence to the risk of harm is required to prevent over-deterrence). Over-deterrence cannot be an issue where officers actually know they are acting beyond power — this is precisely the sort of behaviour than needs to be discouraged, whether consequent harm is actually foreseen or only reasonably foreseeable.

<sup>100</sup> Ibid 293–53 [153]–[172]; *Brett Cattle* (n 23) 406 [280] (Rares J); *Grass* (n 44) 313 [172] (Bromwich J); *Lock v Australian Securities and Investments Commission* (2016) 248 FCR 547, 580–1 [141] (Gleeson J); *Fernando* (n 40) 25 [115] (Gray, Rares and Tracey JJ); *Repacholi Aviation Pty Ltd v Civil Aviation Safety Authority* [2009] FCA 1487, [164] (McKerracher J); *Poynder* (n 62) 62, 520–1 [120]–[121] (Osborn AJA); *Rush v Commissioner of Police* (2006) 150 FCR 165, 197–8 [121] (Finn J); *Holloway* (n 52) 135 [9] (Evans J); *Cornwall* (n 30) 324–5 [212] (Bleby, Besanko and Sulan JJ); *Perrett v Williams* [2003] NSWSC 381, [522] (Wood CJ); *Cannon* (n 62) 333 [40]; *Sanders v Snell (No 2)* (2003) 130 FCR 149, 174 [95] (Black CJ, French and von Doussa JJ).

<sup>101</sup> See above n 97.

<sup>102</sup> *Pro Teeth Whitening* (n 61) [31]–[36]; *Nyoni* (n 30) (special leave denied: Transcript of Proceedings, *Shire of Kellerberrin v Nyoni* [2018] HCATrans 27); *Ea* (n 30) 361 [50]–[51], 363 [56]–[57] (Payne JA); 366 [75]–[76] (White JA); 382 [145] (Simpson AJA).

<sup>103</sup> JRR Tolkien, *The Lord of the Rings* (George Allen & Unwin, 1983) 262.

<sup>104</sup> Reliable empirical data on the frequency of excesses of power is hard to find, but one study of 714 Federal Court cases in the period 1984–94 found judicial review to have been granted in more than 40% of the study sample: Robin Creyke and John McMillan, 'Judicial Review Outcomes — An Empirical Study' (2004) 11(2) *Australian Journal of Administrative Law* 82, 82.

<sup>105</sup> There is a fair amount of 'unfinished business' in describing the tort's precise parameters: Aronson, 'Misfeasance in Public Office: Some Unfinished Business' (n 41).

<sup>106</sup> Public information on rates of self-representation in Australian courts is elusive, but the Australian Productivity Commission data suggests that rates vary dramatically as between different courts, tribunals and types of matter: Productivity Commission (Cth), *Access to Justice Arrangements* (Inquiry Report No 72, September 2014) Appendix F. The proportion of self-represented litigants in

higher among unrepresented than represented litigants. In a good number of cases, claims have been struck out as being vexatious, or (in extreme cases) the individuals concerned have been barred from initiating further proceedings without the leave of the court.<sup>107</sup> The significant smattering of vexatious complainants attests perhaps to the emotive nature of interactions between citizens and bureaucratic state agencies. It is nonetheless difficult to be sure of the precise impact of legal representation and broader litigant profile on success rates. On the one hand, it seems entirely logical that expert representation would be material to a claim's success and our statistics do show clearly higher success rates for represented than unrepresented litigants (about 5.5% as opposed to a mere 1.4%). But it is also possible that one of the reasons unsuccessful litigants so often lack legal representation is that their claims are devoid of substantive merit and they would therefore have failed even with the best legal advice. It is an exceptional lawyer indeed who can turn a pig's ear into a silk purse and it may be that legal representation features self-selectively in more viable cases. While our statistics suggest that litigants in person are pretty common in unsuccessful cases and very rare in successful ones, we cannot therefore be certain of the extent to which lack of representation in itself accounts for the high failure rate and no correlation can be formally proven by our statistics. It is also unclear to us whether the percentage of litigants that are deemed vexatious is significantly higher in misfeasance cases than any other category of civil claim, although in Canada specific concerns about vexatious litigation in misfeasance cases have recently resulted in the enactment of new requirements that litigants obtain court permission before their actions are allowed to proceed, which attests to this possibility.<sup>108</sup>

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Australian federal courts fell between 2008 and 2011 to only 6% (at 997), and in civil matters in the Victoria Court of Appeal, the rate of self-representation between 2003 and 2011 rose from about 10% to a little over 20% (at 1003). In family law proceedings (especially divorce), self-representation is very common, greatly exceeding the rate in misfeasance litigation.

<sup>107</sup> See, eg, *Chandrasekaran v Royal Australian and New Zealand College of Psychiatrists* [2019] FCA 1687; *Mathews v Cooper* [2017] QCA 322; *Attorney-General (SA) v Kowalski* [2014] SASC 1; *Chan v Sellwood* [2009] NSWSC 1335 (and see *Attorney General (NSW) v Chan* [2011] NSWSC 1315 — declaration as vexatious litigant); *Croker* (n 54) (and see *Attorney General (NSW) v Croker* [2010] NSWSC 942, *Soden v Croker (No 2)* (2016) 334 ALR 540 — declarations as vexatious litigant); *Henderson* (n 38); *Scott v Pedler* (2004) 80 ALD 283; *Mentyn* (n 42); *Richards v Victoria* [2003] VSC 368 (plaintiff diagnosed in 2002 with delusional disorder — unclear whether proceedings vexatious); *Blair v Howat* [2001] FCA 156.

<sup>108</sup> A 2008 inquiry into vexatious litigants conducted in Victoria was unable to quantify their number, citing lack of empirical research: Law Reform Committee of Victoria, *Inquiry into Vexatious Litigants* (Parliamentary Paper No 162, December 2008) 29. In terms of the numbers of declared vexatious litigants in Australian jurisdictions who are barred from bringing claims without leave, however, the numbers, while small, are reported as increasing, with a noticeable increase in declarations since the year 2000: at 31–3. One study suggests that 45 such declarations were made Australia-wide between 1970 and 2008: Grant Lester and Simon Smith, 'Inventor, Entrepreneur, Rascal, Crank or Querulent?: Australia's Vexatious Litigant Sanction 75 Years On' (2006) 13(1) *Psychiatry, Psychology and Law* 1, 17 cited in Nikolas Kirby, 'When Rights Cause Injustice: A Critique of the *Vexatious Proceedings Act 2008* (NSW)' (2009) 31(1) *Sydney Law Review* 163, 163. For the new Canadian restrictions on misfeasance actions designed to combat vexatious litigation, see the *Crown Liability and Proceedings Act 2019*, SO 2019, c 7, sch 17, s 17. Our thanks to Jason Neyers for drawing our attention to this development.

## **B     *Why is Private Litigation Increasing? A Reinvigoration of Private Enforcement?***

This brings us to the key question as to why, given very poor success rates, the tide of misfeasance litigation continues to swell. The rise we have identified (see Figure 1, above) certainly looks dramatic, even accounting for its low initial base. The likelihood is that there is no single explanation and it may be that slightly different factors — beyond the grasp of the limited statistical tools used in our study — are driving numbers in the different, nominate classes of case. We have mentioned some of the particular, socio-political factors that may explain the spike in immigration cases, for example, in Part III(D) above. The particularly sharp recent increase in cases being brought against the police might also be accounted for by broader contextual factors to which we cannot speak without drilling down in a much more detailed way into the empirical experience of litigants and policing policy and culture.

Beyond the specific categories however, what general considerations might explain the overall increase in litigation rates? One interesting possibility mooted by Vines is that the shift is an intelligent one, made by enterprising litigators, to avoid the strictures introduced during the civil liability reforms of 2002–04 upon other civil causes of action for governmental maladministration, in particular the law of negligence. She points both to the specific statutory restrictions on civil claims against public bodies; and (less definitively) to the more general limitations on recoverable damages in personal injury cases, which include prohibitions in some jurisdictions on exemplary damages awards.<sup>109</sup>

Our findings do not strongly support the suggestion that restrictions on personal injury claims have made much difference to the litigation surge. It is true that almost all cases featuring claims for physical or mental injury have occurred since 2002 and that such claims have risen dramatically in this period.<sup>110</sup> This is striking. A slightly higher than average proportion of these cases involve legally represented plaintiffs (70% as opposed to about 63%), which might indeed suggest that there is some additional legal intelligence now involved in the direction of claims of this type. But the overall volume of post-2002 cases alleging personal injury of some sort still only accounts for about 17% of the total number of cases in this more recent period (and only about 7% of all cases in Australia to date).<sup>111</sup> Personal injury claims are also unaffected by the statutory reforms in several jurisdictions when the injury was intended.<sup>112</sup> Moreover — and this is perhaps the

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<sup>109</sup> Vines (n 3) 221–2. For restrictions on exemplary awards, see *Civil Liability Act 2002* (NSW) s 21; *Personal Injuries (Liabilities and Damages) Act 2003* (NT) s 19; *Civil Liability Act 2003* (Qld) s 52(1).

<sup>110</sup> We found no cases of physical injury prior to 2002 and 15 since. We also found one clear case of alleged mental injury prior to that date (*Toomer v Commonwealth Bank of Australia* (Federal Court of Australia, Goldberg J, 26 February 1998)) and 14 cases since.

<sup>111</sup> Cases involving economic loss are overwhelmingly still the dominant group (some 60% of all cases). Cases involving deprivation of liberty (23%), and reputational harm (18%) are the next most common. Other types of loss feature in between 5 and 7% of cases.

<sup>112</sup> See, eg, *Civil Liability Act 2002* (NSW) ss 11A(1), 3B(1)(a); *Wrongs Act 1958* (Vic) s 28C(2)(a); *Civil Liability Act 2002* (WA) s 3A(1) item 1; *Civil Liability Act 2002* (Tas) s 3B(1). The New South Wales, Western Australia and Tasmania legislation also excludes special public liability restrictions in such cases.

clinch point — overall litigation rates seem, if anything, to have increased slightly faster between the end of the 1980s and the year 2000 than in the subsequent decade, as illustrated graphically in Figure 1, above. This does not mean that the reforms of 2002–03 restricting other causes of action and remedies have had no effect at all. They may have steered some legally-represented litigants toward misfeasance in some instances in some jurisdictions, but it seems unlikely that they are the main, or even a very significant driving force in respect of the phenomenon as a whole.

Another possibility raised by Chamberlain in the context of similar phenomena in Canada and the United Kingdom ('UK'), is that large volumes of litigation are simply to be expected in the early years of any new tort, while its parameters are tested.<sup>113</sup> In Australia, the High Court has addressed the tort's elements only twice: in *Mengel* in 1995,<sup>114</sup> and in *Sanders* in 1998.<sup>115</sup> Its precise contours are yet to be finalised.<sup>116</sup> This might indeed cause some confusion and encourage the addition of misfeasance to other claims in a pioneering spirit, but it seems unlikely that uncertainties about the wrong's exact parameters would themselves be the main cause of ever-larger numbers of claims — if they were, one would expect some stabilisation, or reduction of litigation as the weight of legal authority increased and some of the uncertainties were settled. There is little evidence of this in our study. The increased awareness among litigators of the tort's possibilities stemming from the gradual accretion of case law in the mid-1990s may have played some part in the acceleration, but that also seems unlikely to tell the full story, or to explain why so many cases are pursued in the face of what must now be known by most lawyers to be very poor odds. It is possible that the rise in claims is part of a larger narrative about 'compensation culture' and the targeting of the 'deep pockets' of the State by civil claimants, but the empirical evidence for such a culture in Australia is very thin<sup>117</sup> and the recent statutory reforms to which we have referred seem likely, in any event, to have killed it off as far as public authority liability is concerned. It might also be that readiness to litigate has been increased by greater rights-consciousness among citizens flowing from the deeper penetration into Australian society of civil and human rights discourse. The first human rights provisions (to be labelled such, anyway) were introduced in Australia in 2004.<sup>118</sup> But if this is another current affecting the direction of litigator attitudes, our study

<sup>113</sup> Chamberlain, *Misfeasance in a Public Office* (n 9) 9.

<sup>114</sup> *Mengel* (n 27).

<sup>115</sup> *Sanders* (n 97).

<sup>116</sup> Aronson, 'Misfeasance in Public Office: Some Unfinished Business' (n 41) 428.

<sup>117</sup> For an example of a judicial view that such a culture had developed in Australia, see JJ Spigelman, 'Negligence: The Last Outpost of the Welfare State' (2002) 76(7) *Australian Law Journal* 432. In fact, this picture appears to have been subject to much media and insurance industry distortion and not to be supported by the evidence: Kylie Burns, 'Distorting the Law: Politics, Media and the Litigation Crisis: An Australian Perspective' (2007) 15(2) *Torts Law Journal* 195. Similar claims made by conservatives in the UK were also debunked: House of Commons Constitutional Affairs Committee, *Compensation Culture: Third Report of Session 2005–2006* (House of Commons Paper No 754–I, Session 2005–06) 13 [31]. It has astutely been pointed out that the term 'compensation culture' is too often used for rhetorical purposes without clearly defining what is meant: James Goudkamp, 'The Young Report: An Australian Perspective on the Latest Response to Britain's "Compensation Culture"' (2012) 28 *Journal of Professional Negligence* 4, 16–17.

<sup>118</sup> *Human Rights Act 2004* (ACT). Anti-discrimination statutes have of course been around for much longer.

found no explicit evidence of it, other than a few cases in which allusion to the human rights context has been made,<sup>119</sup> or where an interference with such rights has unsuccessfully been pleaded as a cause of action.<sup>120</sup>

We suggest that all of these explanations are likely to be partial at best and none really gets to the root of the issue. Our suggestion is that there are greater forces at work and that the rise in private litigation is most likely to be a product of the failure of public systems in recent decades to deal properly with the growing, modern problem of public maladministration. Unlike Vines' thesis (which leaves unexplained the high rates of increase before 2002), and Chamberlain's thesis (which ought to have seen a plateau in case numbers over time), this view is consistent with (albeit certainly not proven by), the continued, documented escalation of litigation since the late 1980s. It is a view that has also been voiced by some judges.<sup>121</sup> Conclusive proof of the thesis would require additional, qualitative work, as well as an exhaustive empirical review of all alternative mechanisms that exist for the resolution of private citizens' disputes with the State. We nevertheless present it as a credible possibility, perhaps as a catalyst for further work of this type.

In our view, then, the rise in litigious activity is likely to be the product of two, catalytic factors. On the one hand, statutory regulatory powers have continued to increase markedly since the 20<sup>th</sup> century, while the amount of public funding available to those who are charged with the tricky responsibility of executing discretionary administrative functions has remained stable, or shrunk in increasingly tight public finance conditions.<sup>122</sup> This is likely, we speculate, to have resulted in more error and greater harm being caused to the private interests of those who are impacted by public powers. On the other hand, despite numerous calls for more generous public or private solutions for those whose interests are detrimentally affected by public maladministration,<sup>123</sup> little has been done to provide for victims. Australian governments have, we observed above, reined in the State's civil liabilities and courts have (unsurprisingly, perhaps) remained reluctant to take the liberalising steps that governments will not.<sup>124</sup> Suggestions for viable public law solutions, such as providing compensation for the violation of human rights norms,<sup>125</sup> as a discretionary remedy in administrative law,<sup>126</sup> or through the creation

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<sup>119</sup> *Morrison (No 2)* (n 39); *Scott v Secretary, Department of Social Security* (1999) 57 ALD 627; *Scott v Secretary, Department of Social Security* (2000) 65 ALD 79.

<sup>120</sup> *Flowers* (n 63); *Barlow v Law Society of the ACT* [2015] ACTMC 8.

<sup>121</sup> See above n 12.

<sup>122</sup> On the rise of regulation, see below n 128. As to public funding, the Australian Bureau of Statistics reports relatively stable public sector surpluses until 2008/9, but substantial deficits thereafter until 2018–19; and a further plummeting since the onset of the recent coronavirus COVID-19 outbreak. The figures do not show how the funding has been distributed, of course, as between different departments. See Australian Bureau of Statistics, *Government Finance Statistics* (Catalogue Nos 5519.0.55.001 17 March 2004 to 5519.0.55.001 2 March 2021).

<sup>123</sup> Calls started early in the UK: see, eg, JUSTICE-All Souls Committee, *Administrative Justice: Some Necessary Reforms* (Clarendon Press, 1988).

<sup>124</sup> See Rock and Weeks (n 11). As the authors suggest at 1185, this means that further progress will almost certainly have to be legislative.

<sup>125</sup> Jason Varuhas, *Damages and Human Rights* (Hart Publishing, 2016).

<sup>126</sup> This has been a popular suggestion. See, eg, Peter Cane, 'Damages in Public Law (1999) 9(3) *Otago Law Review* 489, 505. It was at one time favoured by Carol Harlow, *Compensation and Government Torts* (Sweet and Maxwell, 1982) esp Part 3. See also Michael Fordham, 'Reparation for

of general (or sector-specific) statutory schemes that redistribute the risk of public failing to the public, rather than leaving it to fall on particular individuals,<sup>127</sup> have all fallen on fallow ground.

The result is that we have, as a society, unwittingly created all the conditions of a perfect storm — rising pressures of underfunded public agencies and increased instances of regulatory intrusion (and failure) have met uncompromising, vested governmental opposition to the idea that the State should be exposed to greater financial responsibility for the consequences of failure. The State has been ambivalent about witnessing discretionary statutory powers grow in the hands of its officers,<sup>128</sup> but has been unable or unwilling, for prudential reasons, to bear the cost of the consequences of administrative illegality for individual, private interests. Such paucity of funding as exists is best preserved, governments tend to think, for frontline public services, rather than for compensating the victims of excesses of public power, unless the latter are so visible as to command the immediate sympathy of voters. As public finances plummet further in the wake of the economic turmoil caused by the current COVID-19 pandemic, even less policy space is likely to be devoted to remedying the damage caused by administrative failing, particularly where the damage is purely economic in nature. Anyone expecting a change in government attitudes in the immediate future should therefore probably prepare themselves for a bitter disappointment.

In these circumstances, private litigation could be all that is left to the increasingly frustrated citizen. All other avenues of recourse may have been explored, but have failed. Although there are no comprehensive empirical studies that map this phenomenon, we came across some clear examples. In *Cunningham v Traynor* for instance, the plaintiffs were ultimately awarded large sums of damages for their abuse and malicious prosecution by the police, but their legal action appears to have been a measure of last resort.<sup>129</sup> Media reports suggest that they had sought several times to resolve matters informally; sought an apology to no avail; received no vindication through the police's own internal investigations process; and had

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Maladministration: Public Law's Final Frontier' (2003) 8(2) *Judicial Review* 104; Michael Fordham, 'Monetary Awards in Judicial Review' [2009] (January) *Public Law* 1; Law Commission Public Law Team, 'Monetary Remedies in Public Law' (Discussion Paper, 11 October 2004).

<sup>127</sup> Carol Harlow, *State Liability: Tort Law and Beyond* (Oxford University Press, 2004) (favouring statutory compensation and ex gratia payment schemes for 'abnormal loss' with 'botheration payments' in suitable instances). In Australia, there are now a number of poorly-advertised discretionary ex gratia compensation arrangements in place, including the Commonwealth Scheme for Compensation for Detriment Caused by Defective Administration: Boughey, Rock and Weeks (n 15) 298–302. Such schemes are a last resort and provide no right to compensation.

<sup>128</sup> On the rise, causes and costs of regulation in Australia (with a focus on economic regulation), see Regulation Taskforce 2006, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business* (Report to the Prime Minister and the Treasurer, January 2006); Chris Berg, *The Growth of Australia's Regulatory State* (Institute of Public Affairs, 2008). Although conservative governments have sought to reduce bureaucracy, it gathers a momentum of its own. On the growth of public powers, see also Administrative Review Council, *Federal Judicial Review in Australia* (Report No 50, September 2012) 29–31 [2.18]–[2.25].

<sup>129</sup> *Cunningham* (n 30).

been unable to persuade the Crime and Misconduct Commission to reopen the investigation and clear their names.<sup>130</sup>

Violations of public rights — the rights that all citizens have that public officers observe the limits of their powers — are hence occurring without full public recognition or consequence and without their effects being visibly addressed. Private litigation in such circumstances becomes a mechanism via which control over the enforcement of important public duties and standards can be taken back into the hands of affected citizens. Indeed, from this standpoint, the recent rise in misfeasance litigation is not something that should be understood in isolation, but ought rather to be connected to rises in rates of private litigation in public law more generally. For example, although we do not claim that there is any causal connection between the two phenomena, the acceleration of misfeasance claims seems to us to parallel the dramatic recent growth in the last 5–10 years of private prosecution in criminal cases in the UK.<sup>131</sup> There, the pressures on state funding of the public prosecution system and the consequent narrowing of the criteria according to which public prosecutors are prepared to take a claim forward are reported to have resulted in an explosion of individuals and private institutions embarking on their own prosecutions.<sup>132</sup> This is permitted and, indeed, sometimes supported<sup>133</sup> by the State in the public interest and is a classic example of recourse to private initiative in public matters by way of reaction to the failure of public mechanisms. Indeed, in those jurisdictions in which private prosecution remains a possibility, private prosecution is rationalised in precisely these terms, as a constitutional safeguard against state neglect.<sup>134</sup>

Not everyone supports the private enforcement of public law norms. It breaks away from the Blackstonian orthodoxy that public wrongs are wrongs to the community and should therefore be enforced publicly by the State, not left to the

<sup>130</sup> Rebecca Turner, 'Couple Tasered by Police in Freemantle Fight to Keep Damages', *ABC* (online, 15 May 2018) <<https://www.abc.net.au/news/2018-05-15/couple-tasered-by-police-in-fremantle-fight-to-keep-damages/9762182>>; David Weber, 'Corruption Watchdog Admonished over Case of Wrongfully Tasered Couple', *ABC* (online, 12 October 2017) <<https://www.abc.net.au/news/2017-10-12/ccc-urged-to-reinvestigate-case-of-tasered-perth-couple/9044348>>.

<sup>131</sup> In 2014 in *R (Virgin Media Ltd) v Zinga*, Lord Thomas CJ signalled 'an increase in private prosecutions at a time of retrenchment of state activity': [2014] 1 WLR 2228, 2232 [10] ('*Virgin Media*'); see also at 2244 [55]. Concerns over the recent growth of Post Office prosecutions in particular spurred a 2020 report: House of Commons Justice Committee, *Private Prosecutions: Safeguards* (House of Commons Paper No HC 497, Session 2019–21). The Report refers at 13 [25] to evidence presented by the Private Prosecutors' Association of the increased incidence of private prosecutions as a means of filling the public gap. Another report describes the increase since 2015 as 'exponential' and attributes it to the dramatic cuts in the budget of 2010: AnotherDay, *The Rise of Private Prosecutions* (February 2020) foreword, 2 <<https://www.another-day.com/resources/new-guide-the-rise-of-private-prosecution>>.

<sup>132</sup> The narrowing of the criteria was the focus of the proceeding in *R (Gujra) v Crown Prosecution Service* and there survived legal challenge: [2013] 1 AC 484 ('*Gujra*'). See also the sources cited at n 131; C Lewis, G Brooks, M Button, D Shepherd and A Wakefield, 'Evaluating the Case for Greater use of Private Prosecutions in England and Wales for Fraud Offences' (2014) 42(1) *International Journal of Law, Crime and Justice* 3.

<sup>133</sup> *Virgin Media* (n 131) (support permissible provided products of the prosecution inure to public, not private benefit).

<sup>134</sup> See, eg, *Jones v Whalley* [2007] 1 AC 63, 79 [43] (Lord Mance); *Gujra* (n 132) 496 [28] (Lord Wilson JSC); 504 [68] (Lord Neuberger PSC); 517–18 [115] (Lord Mance JSC).



vagaries of individual interest.<sup>135</sup> But the Blackstonian paradigm has never been a fully accurate depiction of our law enforcement processes either historically, or in the modern day. There are a good number of instances in which public law is once more (or still) enforceable at the suit of affected private citizens.<sup>136</sup> The tort of public nuisance provides one, clear example. Competition law provides another, where public norms designed to create fair public markets are enforceable both at the instance of the State and individual litigants.<sup>137</sup>

In the United States ('US'), private litigation has spearheaded a number of important advances in civil rights protections since the 1960s and, it is argued by at least one commentator, now constitutes an important constitutional mechanism, substituting for deficient public agency enforcement of public laws in an environment that is so deeply riven in its attitudes towards governmental regulation as to otherwise face political stalemate.<sup>138</sup> The phenomenon is on the rise in that jurisdiction. It has hence been reported that a staggering 97% of all enforcement actions initiated in respect of the breach of federal regulatory provisions in the US between 2000 and 2010 were filed by private parties, not by government agencies.<sup>139</sup> Until very recently, perhaps the best known and most controversial example of reinvigorated private enforcement was the US federal law that openly incentivises individuals to detect, report and prosecute frauds against the State in exchange for a share of the litigation proceeds — a modern equivalent of the ancient action *qui tam*.<sup>140</sup> But the prominence of this example has now been overtaken by the introduction of highly controversial legislation in Texas that effectively delegates the enforcement of laws restricting abortion rights to private citizens, paying the latter a bounty for every successful prosecution.<sup>141</sup>

In Australia, attitudes toward the private enforcement of public law norms remain much more guarded. This is not without good reason, because history is full of examples of private abuses of prosecutorial power and there is a good, basic, logical and deontic case for thinking that actions that protect the public interest ought in principle to be brought by representatives of that interest. Mindful of the risks, a recent UK Justice Committee Report has highlighted the need for additional safeguards to deal with the recent rush of private prosecutions.<sup>142</sup> Nonetheless, the

<sup>135</sup> William Blackstone, *The Oxford Edition of Blackstone's: Commentaries on the Laws of England: Book IV: of Public Wrongs* (Oxford University Press, 2016) 2–3 [4].

<sup>136</sup> For a critical survey, see Kit Barker, 'Modelling Public and Private Enforcement: The Rationality of Hybridity' (2018) 37(1) *University of Queensland Law Journal* 9.

<sup>137</sup> Ibid 12–13. Private enforcement has historically been dominant in the US and public enforcement in Europe. See further Donald Baker, 'Private and Public Enforcement: Complements, Substitutes and Conflicts' in Ariel Ezrachi (ed), *Research Handbook on International Competition Law* (Edward Elgar Publishing, 2012) 238.

<sup>138</sup> Sean Farhang, *The Litigation State: Public Regulation and Private Lawsuits in the US* (Princeton University Press, 2010) esp chs 4–6.

<sup>139</sup> Ibid 11.

<sup>140</sup> *False Claims Act*, 31 USC §§ 3729–3733 (2009) esp § 3730(d).

<sup>141</sup> The legislation, known as the 'Texas Heartbeat Law' or 'SB 8', came into effect on 1 September 2021 and controversially survived a recent interlocutory application before the US Supreme Court to restrain its application on the ground of unconstitutionality: *Whole Woman's Health v Jackson*, 594 US (2021).

<sup>142</sup> House of Commons Justice Committee, *Private Prosecutions: Safeguards* (House of Commons Paper No HC 497, Session 2019–21).

basic point is that we are mistaken if we assume that public actions alone can, or should necessarily, cope with public wrongs in all instances. Cases of misfeasance may be one instance in which there is a credible danger that public enforcers (typically, the police) may be captured and culturally disinclined to pursue state officials (including their colleagues) for overstepping the boundaries of their public powers. The absence of proper public machinery providing compensation for the harmful consequences of excesses of state power also provides a good reason for allowing citizens to resort to their own enforcement initiative, when their private interests have been detrimentally impacted. Occasional abuses of this private enforcement system are, on this logic, an acceptable risk and can be reined in by proper court supervision and by weeding out querulous complainants through appropriate controls on vexatious litigation.

While we are not necessarily advocating the view that private enforcement is a better solution to the problems of misfeasance than proper public enforcement and redress, we must recognise that there may be special reasons for allowing it where public systems fail to deliver. It also seems likely that private litigation in respect of alleged misfeasance on the part of public officers will continue to rise, even in the face of such poor prospects, as long as current legal conditions prevail. The increase in such actions is a symptom of rising pressure within the legal system as whole, when other possible outlets via which public standards can be enforced and victims of maladministration can be compensated have effectively been stopped up or ignored for decades. Misfeasance litigation has, on this view, become a pressure release valve in the system and highlights the potential constitutional importance of private rights of action — even those offering little chance of success — when public systems designed to address the problem are perceptibly falling short of the mark.

## V Conclusions

Public maladministration is an ongoing problem and, if the recent revival of the old criminal action for misconduct in public office in some Australian jurisdictions means anything, it may well be on the rise.<sup>143</sup> This study has set out some of the raw statistics surrounding modern misfeasance litigation in tort law in Australia, while calling for further, qualitative research to be done to help us understand them more fully. We cannot prove the exact cause or mix of causes underpinning the recent increase in litigation rates, but it seems unlikely to be explicable by any single factor. It is more likely the product of a variety of complex considerations, both legal and socio-political.

When seeking an understanding of the current uplift and determining what it may mean, it is also important, we have suggested, not to view the statistics in isolation. They form part of a broader historical picture in which there has been an irregular ebb and flow in the use of private enforcers in public law, for the

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<sup>143</sup> The revival is reported not just in those Australian jurisdictions that retain the common law crime, but also in the UK and Hong Kong: David Lusty, 'Revival of the Common Law Offence of Misconduct in Public Office' (2014) 38(6) *Criminal Law Journal* 337. The UK Law Commission reported that claims in that jurisdiction rose from 2 in 2005 to 135 in 2014: UK Law Commission 'Misconduct in Public Officer: Issues Paper 1, The Current Law' (Issues Paper, 20 January 2016) 5 [1.15].

advancement and protection of both public and private interests. The flow has generally been from private enforcement to public enforcement as the sophistication of public machinery has increased, but the pattern is by no means linear, or in just one direction. The recent increases in misfeasance cases must be understood against the backdrop of a more extensive set of developments in which private enforcement techniques are once more being put into operation in public law in an attempt to meet some of the inadequacies of public systems of accountability and redress. In this regard, the fact that private litigants are increasingly prepared to pursue state officers for excesses of public power against all the odds should serve as a salutary wake-up call to policymakers and legislators. Until more is done to reduce the incidence of public maladministration and to address and redress the personal fallout it causes, private tort actions for misfeasance seem likely to continue and, in all possibility, to increase further in number.

It may be, of course, that governments are perfectly awake, just not listening. They may well take the view that Australian taxpayers cannot afford to pay for the private consequences of public illegalities and that, in current economic circumstances, the very idea should be buried even before it sees the light of day. Our view is that ultimately society cannot afford *not* to address the fallout of excesses of public power *if* it remains committed to high levels of regulatory intrusion, however benevolent the administrative intention. Revised attention to the provision of meaningful statutory redress in some of the key areas of pressure that we have identified, such as policing, botched licensing decisions and perhaps even official investigations, would certainly help to ease some of the pressure and reduce the current litigation problem.<sup>144</sup> At some stage, however, there will need to be a more general reckoning that better reconciles the current imbalance of public and private interests across the various domains of public administration. Until such time, we will probably continue to see litigants expressing their hopes and frustrations by throwing themselves headlong against the battlements, mostly to no avail, but with the occasional, important success.

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<sup>144</sup> For early suggestions favouring this more specific approach in the field of licensing and policing, see PP Craig, 'Compensation in Public Law' (1980) 96 (July) *Law Quarterly Review* 413, 451–5.



# *Paid Period Leave for Australian Women: A Prerogative Not a Pain*

Gabrielle Golding\* and Tom Hvala†

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## *Abstract*

This article explores a contentious question: should Australian women be entitled to paid menstrual leave under the *Fair Work Act 2009* (Cth) (*'Fair Work Act'*)? It argues that women who menstruate are not necessarily 'ill' or 'injured' for the purpose of accessing personal/carer's leave under the *Fair Work Act*. Rather, menstruation is a natural part of being female. This article then outlines the benefits of a statutory leave provision allowing for paid menstrual leave, which is preferable to one implemented under a workplace policy. Arguments commonly raised concerning the potential impacts of a menstrual leave scheme on gender equality are assessed, as are approaches taken to menstrual leave internationally. Ultimately, it is recommended that a statutory paid menstrual leave scheme should be introduced in Australia, the impact of which will be to place those who menstruate on a level playing field in the workplace.

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## I Introduction

This article explores a pertinent question for working women in Australia:<sup>1</sup> should there be a legislative entitlement to paid menstrual leave under the *Fair Work Act 2009* (Cth) ('*Fair Work Act*')? This question has become the subject of popular consideration for many Australian news outlets,<sup>2</sup> as well as more broadly, with a number of international jurisdictions having legislated in favour of an entitlement to paid menstrual leave.<sup>3</sup> However, there is presently sparse academic commentary regarding the entitlement in the Australian context.<sup>4</sup> Here, we seek to bridge that gap, investigating the merits of recognising a legislative entitlement to paid menstrual leave for women in Australia. Ultimately, our recommendation is that a legislative entitlement should be recognised in Australia. As to the precise form of that entitlement, we recommend introducing one day's (that is, 7.6 hours') paid menstrual leave per calendar month each year. This is a recommendation only; its length, coverage, method for implementation, and perspectives of other key stakeholders (particularly employers), would need to be the subject of more detailed consideration. That detail is beyond the scope of the present exercise, in which we are presenting a case for paid menstrual leave to be recognised as a statutory entitlement in Australia.

<sup>1</sup> In this article we refer to women who experience menstruation, including those who menstruate, but do not identify as female. For ease of reference, we use 'women' and 'female' throughout, acknowledging that menstruators will not necessarily identify as such. See further, Joan Chrisler, Jennifer Gorman, Jen Manion, Michael Murgo, Angela Barney, Alexis Adams-Clerk, Jessica Newton and Meaghan McGrath, 'Queer Periods: Attitudes toward and Experiences with Menstruation in the Masculine of Centre and Transgender Community' (2016) 18(11) *Culture, Health & Sexuality* 1238. We equally acknowledge that there are women who do not experience menstruation. Our aim is not to create a division between those who menstruate and those who do not; it is to place menstruators on an equal footing.

<sup>2</sup> See, eg, Bianca Farnakis, 'Should Period Leave Be on the Agenda?', *9Honey* (Web Page, 15 August 2020) <<https://honey.nine.com.au/latest/paid-period-leave-indian-company-zomato-introduces-should-australia/256bcc43-178e-45f8-9faa-c8724d095c5e>>; '40% of Women Are Taking Days Off. Should We Have Paid Period Leave?', *Triple J Hack* (online, 8 August 2018) <<https://www.abc.net.au/triplej/programs/hack/should-we-have-paid-period-leave/10090848>>; Caitlin Fitzsimmons, 'Menstrual Leave the New "Woke" Workplace Right', *The Sydney Morning Herald* (online, 18 August 2019) <<https://www.smh.com.au/business/workplace/menstrual-leave-the-new-woke-workplace-right-20190815-p52hlc.html>>; Jacqueline Howard, 'Employer's Paid Period Leave Policy in Australia Stirs World Debate', *CNN* (online, 4 October 2018) <<https://edition.cnn.com/2018/10/03/health/period-leave-australia-explainer-intl/index.html>>; Christina Cavaleri, 'A Number of Women Want Employers to Allow "Period Leave"', *Nova FM* (online, 30 May 2017) <<https://www.novafm.com.au/lifestyle/health-beauty/number-women-want-employers-allow-period-leave/>>; Ashleigh Davis, 'Women with Period Pain Should Have 12 Days of Paid Leave Every Year for Severe Cramps, Equality Group Argues', *Daily Mail* (online, 27 May 2017) <<https://www.dailymail.co.uk/news/article-4545448/Women-period-pain-paid-leave-argues-group.html>>.

<sup>3</sup> See, eg, our later discussion as to international approaches in Part V.

<sup>4</sup> Cf in the American context: Jessica Barnack-Tavlaris, Kristina Hansen, Rachel Levitt and Michelle Reno, 'Taking Leave to Bleed: Perceptions and Attitudes toward Menstrual Leave Policy' (2019) 40(12) *Health Care for Women International* 1355; in a general workplace context: Rachel B Levitt and Jessica L Barnack-Tavlaris, 'Addressing Menstruation in the Workplace: The Menstrual Leave Debate' in Chris Bobel, Inga Winkler, Breanne Fahs, Katie Hasson, Elizabeth Kissling and Tomi-Ann Roberts (eds) *The Palgrave Handbook of Critical Menstruation Studies* (Palgrave MacMillan, 2020) 561; Lara Owen, 'Menstruation and Humanistic Management at Work: The Development and Implementation of a Menstrual Workplace Policy' (2018) 25(4) *e-Organizations & People* 23.

While menstruation is a natural part of women's lives and signals good reproductive health, its broader impacts on workforces are significant. Those impacts are not just individual, but also societal. Worldwide studies spanning thousands of female participants demonstrate this impact. Recent research has shown that 90% of 21,573 women surveyed in Australia experienced debilitating pain from their periods, causing 40% of those women to take days off work or study to cope, or to hide symptoms while attending their workplace or university, making their experience even worse.<sup>5</sup> In early 2019, Dutch researchers found that menstrual symptoms account for an average of nine days of lost productivity a year, primarily because of presenteeism (defined as 'productivity loss while present at work or school').<sup>6</sup> That study, of 32,748 women in The Netherlands between 15 and 45 years of age, found that women took an average of one day of sick leave each year because of menstruation and were less productive for a further 23 days. Nevertheless, when women 'called in sick' because of menstrual symptoms, only one-in-five told their employer or school of the real reason for their absence.<sup>7</sup> In England, a 2018 report by Public Health England showed women's concerns about period pains and periods are their third largest reproductive health concern (after avoiding unwanted pregnancies and their sex lives).<sup>8</sup> The impacts of menstruation on the workforce are revisited later in Part II.

For now, with these impacts in mind, this article's central thesis is that women in Australia should be afforded a legislative entitlement of one day (that is, 7.6 hours) of paid menstrual leave per calendar month. Our reasons for this suggestion are manifold. Primarily, women experiencing the often-debilitating effects of menstruation are neither ill nor injured — as required by the *Fair Work Act* in order to access 10 days' paid personal/carer's leave in Australia.<sup>9</sup> Menstruation is simply a part of being female, as opposed to an illness or injury. Critics may argue that recognising a legislative entitlement is a step away from achieving gender equality in the workplace;<sup>10</sup> a point that we expand upon later in

<sup>5</sup> Mike Armour, Kelly Parry, Narendar Manohar, Kathryn Holmes, Tania Ferfolja, Christina Curry, Freya MacMillan and Caroline A Smith, 'The Prevalence and Academic Impact of Dysmenorrhea in 21,573 Young Women: A Systematic Review and Meta-Analysis' (2019) 28(8) *Journal of Women's Health* 1161 <<https://doi.org/10.1089/jwh.2018.7615>>.

<sup>6</sup> Mark Schoep, Eddy Adang, Jacques Maas, Bianca De Bie, Johanna Aarts and Theodoor Neiboer, 'Productivity Loss Due to Menstruation-Related Symptoms: A Nationwide Cross-Sectional Survey Among 32,748 Women' (2019) 9(6) *BMJ Open*, 1 <<https://doi.org/10.1136/bmjopen-2018-026186>>.

<sup>7</sup> Ibid.

<sup>8</sup> Public Health England, *What Do Women Say? Reproductive Health is a Public Health Issue* (2018) <<https://www.gov.uk/government/publications/reproductive-health-what-women-say>>.

<sup>9</sup> *Fair Work Act 2009* (Cth) ss 12 ('definition of paid personal/carer's leave'), 96–7 ('*Fair Work Act*'). For an insight into this issue as it concerns women undergoing IVF treatment, see: Thomas Hvala, 'In Vital Need of Reform: Providing Certainty for Women Undergoing IVF Treatment' (2018) 41(3) *University of New South Wales Law Journal* 901.

<sup>10</sup> It has been argued that menstrual leave policies brand all menstruating women as ill, thereby perpetuating sexism, potentially leading to an increase in the potential for bias in the hiring and promotion of women: see, eg, Peggy Maguire, Teresa Keating, Kristin Semancik and Vanessa Moore, *Policy Brief: Women and Menstruation in the EU* (European Institute of Women's Health, 2018) 3 <<https://eurohealth.ie/policy-brief-women-and-menstruation-in-the-eu/>>. See also, Kylie Lang, 'As a Working Woman in Australia I'm Insulted by this Crazy Plan', *Courier Mail* (online, 2 June 2017) <<https://www.couriermail.com.au/rendezview/as-a-working-woman-in-australia-im-insulted-by-this-crazy-plan/newsstory/4fedf54e5722d1e5812da901a9da10f7>>; Barkha Dutt, 'I'm a Feminist. Giving Women a Day Off for Their Period Is a Stupid Idea', *Washington Post* (online,

Part IV. Nevertheless, it is counterintuitive and contradictory to expect women to rely on a limited amount of paid personal/carer's leave to deal with symptoms that are part of a biological process. It is also inadequate for individual employers to decide whether or not it is appropriate to mandate an entitlement to such leave in a workplace policy or enterprise agreement. Women would stand to benefit from a clearly understood legislative framework, which they can rely on universally, if needed, without fear of judgment, discrimination or prejudice. With that requirement in mind, any legislative change must also be met with adequate cultural and social acceptance of the entitlement.

The following analysis focuses on the experiences of women with severe period pain,<sup>11</sup> heavy menstrual bleeding,<sup>12</sup> and endometriosis,<sup>13</sup> as these conditions are synonymous with menstrual pain. We acknowledge that there may be other significant health considerations for women who menstruate.<sup>14</sup> Indeed, these conditions may be so severe that they constitute a 'personal illness' or 'personal injury' for the purpose of accessing paid personal/carer's leave.<sup>15</sup> The basis for our recommendation of a legislated day (that is, 7.6 hours) of menstrual leave per calendar month, which would be available to women regardless of whether their menstrual pain is attributable to a diagnosable condition, is not to diminish the health concerns associated with these conditions. The point is this: the allowance of one day of menstrual leave per calendar month would ease the heavy burden that women already experience simply because of being female.

In explaining our recommendation, this article discusses four important considerations. In Part II, we explore various reasons why women experiencing menstruation are not necessarily ill or injured for the purpose of accessing personal/carer's leave under the *Fair Work Act*, with the added suggestion that it would be inadequate to suggest that they are. Part III then considers the impact of amending the *Fair Work Act* to introduce a paid menstrual leave provision, including commentary regarding its potential impact and efficacy. We suggest that absent a legislative right, an allowance for menstrual leave in individual workplace policies is at least a progressive step in the right direction. In Part IV, we consider whether a

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3 August 2017) <[https://www.washingtonpost.com/news/global-opinions/wp/2017/08/03/im-a-feminist-but-giving-women-a-day-off-for-their-period-is-a-stupid-idea/?noredirect=on](https://www.washingtonpost.com/news/global-opinions/wp/2017/08/03/im-a-feminist-but-giving-women-a-day-off-for-their-period-is-a-stupid-idea/?hpid=hp_hp-top-table-main-menstrual-leave%3Ahomepage%2Ft-1&hpid=hp_hp-top-table-main-menstrual-leave%3Ahomepage%2Ft-1)>; Priyanka Chaturvedi, 'Menstrual Leave Will Exclude Women Even More from Workplaces', *Indian Express* (online, 17 July 2017) <<https://indianexpress.com/article/opinion/menstrual-leave-will-exclude-women-even-more-from-workplaces/>>.

<sup>11</sup> This is also referred to as 'dysmenorrhea', which is the medical diagnosis for painful menstruation: *Macquarie Dictionary* (online at 13 September 2021) 'dysmenorrhea'.

<sup>12</sup> Heavy blood loss is defined as blood loss of more than 80 ml per menses: see, eg, Sioban Harlow and Sara Ephross, 'Epidemiology of Menstruation and Its Relevance to Women's Health' (1995) 17(2) *Epidemiologic Reviews* 265, 267, citing Leif Hallberg, Ann-Marie Högdaahl, Lennart Nilsson and Göran Rybo, 'Menstrual Blood Loss — A Population Study: Variation at Different Ages and Attempts to Define Normality' (1966) 45(3) *Acta Obstetrica et Gynecologica Scandinavica* 320.

<sup>13</sup> Endometriosis is defined as a chronic gynaecological condition of uncertain aetiology characterised by menstrual irregularities, in which tissue outside the uterus responds to hormones used during the menstrual cycle, typically causing bleeding and swelling: see, eg, Kate Seear, 'The Etiquette of Endometriosis: Stigmatisation, Menstrual Concealment and the Diagnostic Delay' (2009) 69(8) *Social Science & Medicine* 1220, 1220.

<sup>14</sup> For example, premenstrual syndrome, adenomyosis, menorrhagia, premenstrual dysphoric disorder, chronic pelvic pain and polycystic ovary syndrome.

<sup>15</sup> *Fair Work Act* (n 9) ss 96–7.



legislative paid menstrual leave scheme will undermine or help achieve gender equality for women in Australia. We discuss notions of substantive equality, with reference to Australia's human rights obligations. We acknowledge and accept that this is a vexed debate on which reasonable minds may differ. That said, placing women on an equal footing by adopting a substantive approach to achieving gender equality, coupled with education about the necessities and benefits of such a scheme, would help empower women and their experience in the workplace. Part V compares Australia's position with international jurisdictions that have introduced some form of menstrual leave. We use these comparisons to highlight the costs and benefits of such schemes as they exist elsewhere internationally. We finish with a series of conclusions and recommendations, suggesting that legislated paid menstrual leave in Australia ought to be a prerogative, not a pain.

## II Not Ill or Injured: Why Sick Leave is Inadequate

Menstrual-related pain affects a large number of women in Australian workplaces. While not all women experience discomfort, the physical and psychological impacts of dysmenorrhea, heavy menstrual bleeding and endometriosis can be immense. Part II(A) explores those physical and psychological impacts. Part II(B) considers how menstrual-related pain impacts the ability to perform work. Part II(C) explains why existing personal leave provisions under the *Fair Work Act* are insufficient, and suggests that experiences of menstrual-related pain do not neatly fall within the 'illness' or 'injury' qualification for taking personal/carer's leave under s 97 of the *Fair Work Act*. Part II(D) emphasises that suggestions to the contrary undermine the hard-fought gains that feminism has achieved in respect of disassociating women's bodies from notions of physical inferiority. Parts II(E)–(F) consider the practical impacts of Australia's existing approach to leave associated with menstrual symptoms, including the non- and under-diagnosis of menstrual-related pain, as well as the difficulty of raising such issues at work, respectively.

### A *Physical and Psychological Impacts of Menstrual-Related Pain*

Many women experience pain while menstruating. Menstrual-related pain is one of the most common causes of pain in women of reproductive age.<sup>16</sup> Internationally, between 34% and 94% of women experience pain during menstruation.<sup>17</sup> In Australia, 88% to 92% of women aged 18 to 25 experience dysmenorrhea<sup>18</sup> and

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<sup>16</sup> See, eg, Michelle Gagnon and Randa Elgendy, 'Comorbid Pain Experiences in Young Women with Dysmenorrhea' (2020) 60(8) *Women & Health* 946, 946.

<sup>17</sup> See, eg, Mark Schoep, Theodoor Nieboer, Moniek van der Zanden, Didi Braat and Annemiek Nap, 'The Impact of Menstrual Symptoms on Everyday Life: A Survey Among 42,879 Women' (2019) *American Journal of Obstetrics & Gynecology* 569e1, 569e1, citing Denise Jamieson and John Steege, 'The Prevalence of Dysmenorrhea, Dyspareunia, Pelvic Pain, and Irritable Bowel Syndrome in Primary Care Practices' (1966) 87(1) *Obstetrics and Gynecology* 55; Vincenzo de Sanctis, Ashraf Soliman, Heba Elsedfy, Nada Soliman, Rania Soliman and Mohamed el Kholy, 'Dysmenorrhea in Adolescents and Young Adults: A Review in Different Countries' (2016) 87(3) *Acta Biomed* 233.

<sup>18</sup> Armour et al (n 5) 11, citing Asvini Subasinghe, Lina Happo, Yasmin Jayasinghe, Suzanne Garland and John Wark, 'Prevalence and Severity of Dysmenorrhoea, and Management Options Reported by Young Australian Women' (2016) 45(11) *Australian Family Physician* 829.

22.5% of women experience heavy menstrual bleeding.<sup>19</sup> It is estimated that up to 10% of women experience endometriosis worldwide.<sup>20</sup> Between 7% to 11% of women in Australia have a formal diagnosis of endometriosis,<sup>21</sup> amounting to as many as 700,000 women.<sup>22</sup> The main symptom of endometriosis is pain, which may occur throughout the menstrual cycle, during bowel and bladder movements, or during sexual intercourse.<sup>23</sup> Between 2016 and 2017, 34,200 women were hospitalised in Australia due to endometriosis, for which nearly 80% of hospitalisations were among females aged 15 to 44.<sup>24</sup>

The physical symptoms of menstrual pain can be limiting. Physical symptoms arising from period pain, such as back pain and headaches, are experienced by one-in-two women.<sup>25</sup> In addition to lethargy and fatigue, women who experience heavy menstrual bleeding can also encounter problems with flooding, clots and soiling, being confined to bed, as well as mood changes.<sup>26</sup> These symptoms can be debilitating — over 38% of women complete fewer activities during menstruation, due to their menstrual symptoms.<sup>27</sup> For some women who experience both heavy bleeding and menstrual pain, their only option is to not make any plans during their menstrual period.<sup>28</sup>

The psychological impacts of menstrual-related pain are similarly prohibitive. Women with endometriosis report feeling upset, angry, depressed, weak, powerless, helpless, hopeless and defeated, as well as disappointed, frustrated and exhausted.<sup>29</sup> Women who report severe menstrual pain are also more likely to feel depressed.<sup>30</sup> Women's psychological experience of menstruation is also contextual.<sup>31</sup> Levitt and Barnack-Tavlaris note that the negative psychological

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<sup>19</sup> Edith Weisberg, Kevin McGeehan and Ian Fraser, 'Effects of Perceptions of Menstrual Blood Loss and Menstrual Pain on Women's Quality of Life' (2016) 21(6) *European Journal of Contraceptive & Reproductive Health Care* 431, 431.

<sup>20</sup> Jessica Fourquet, Lorna Báez, Michelle Figueroa, Ivan Iriarte and Idhaliz Flores, 'Quantification of the Impact of Endometriosis Symptoms on Health-related Quality of Life and Work Productivity' (2011) 96(1) *Fertility and Sterility* 107, 107.

<sup>21</sup> Australian Institute of Health and Welfare, *Endometriosis in Australia: Prevalence and Hospitalisations* (Report, August 2019) 3 <<https://www.aihw.gov.au/getmedia/a4ba101d-cd6d-4567-a44f-f825047187b8/aihw-phe-247.pdf.aspx?inline=true>>; Susan Treloar, Daniel O'Connor, Vivienne O'Connor and Nicholas Martin, 'Genetic Influences on Endometriosis in an Australian Twin Sample' (1999) 71(4) *Fertility and Sterility* 701.

<sup>22</sup> Department of Health (Cth), *What We're Doing About Endometriosis* (Web Page, 7 September 2021) <<https://www.health.gov.au/health-topics/chronic-conditions/what-were-doing-about-chronic-conditions/what-were-doing-about-endometriosis>>.

<sup>23</sup> See, eg, Seear (n 13) 1220, citing Robert Phillips and Glenda Motta, *Coping with Endometriosis: A Practical Guide* (Avery, 2000).

<sup>24</sup> Australian Institute of Health and Welfare (n 21) 6.

<sup>25</sup> Schoep et al (n 17) 569e4.

<sup>26</sup> See, eg, Weisberg, McGeehan and Fraser (n 19) 431, citing Mark Shapley, Kelvin Jordan and Peter Croft, 'Increased Vaginal Bleeding: The Reasons Women Give for Consulting Primary Care' (2003) 23(1) *Journal of Obstetrics and Gynaecology* 48.

<sup>27</sup> Schoep et al (n 17) 569e2.

<sup>28</sup> Weisberg, McGeehan and Fraser (n 19) 434.

<sup>29</sup> Maryam Moradi, Melissa Parker, Anne Sneddon, Violeta Lopez and David Ellwood, 'Impact of Endometriosis on Women's Lives: A Qualitative Study' (2014) 14(1) *BMC Women's Health* 123, 129.

<sup>30</sup> Weisberg, McGeehan and Fraser (n 19) 434.

<sup>31</sup> See below nn 117–31 and accompanying text.

impacts arising from menstruation are compounded by society's perception of menstruation, which in-turn has physical symptoms.<sup>32</sup>

## **B     *How Menstrual-Related Pain Affects the Performance of Work***

The physical and psychological effects of menstrual-related pain can affect every aspect of women's lives, including work. While many women with endometriosis can realise long-term career aspirations by compensating for endometriosis-related difficulties,<sup>33</sup> some women are forced to work part-time and, in some instances, give up their job entirely.<sup>34</sup> Women with endometriosis also demonstrate a lower likelihood of working in their desired profession, as well as greater health-related limitations in career decision-making compared with women who do not have the condition.<sup>35</sup> These potential outcomes may also have financial repercussions. Women with menstrual-related issues report a loss of, or decrease in, income, due to working part-time, taking time off, or losing the opportunity to work because of scheduling laparoscopic surgery.<sup>36</sup>

These impacts can disrupt workplace productivity, which carries an economic cost. For instance, Schoep and colleagues' analysis indicates that menstrual-related symptoms are a key cause of employee absenteeism.<sup>37</sup> Close to 14% of women report absenteeism during their menstrual periods.<sup>38</sup> The mean absenteeism due to a woman's menstrual cycle is 1.3 days per year.<sup>39</sup> When absent from work, only one-in-five women disclose the reason for taking leave.<sup>40</sup> Moreover, menstrual-related symptoms constitute 24% of total absenteeism for women working and studying.<sup>41</sup>

Statistics regarding presenteeism are similarly concerning. Over 80% of women report presenteeism and 23.2 days per year of decreased productivity because of their periods.<sup>42</sup> Presenteeism relating to menstruation results in an average productivity loss of 33%, amounting to 8.9 days of total lost productivity per year.<sup>43</sup> Evidently, 'menstruation-related absenteeism, and to a greater extent, presenteeism, are widespread in the general female population'.<sup>44</sup> Unsurprisingly, in

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<sup>32</sup> Levitt and Barnack-Tavlaris (n 4) 561.

<sup>33</sup> Marita Lina Sperschneider, Michael Hengartner, Alexandra Kohl-Schwartz, Kirsten Geraedts, Martina Rauchfuss, Monika Woelfler, Felix Haeberlin, Stephanie von Orelli, Markus Eberhard, Franziska Maurer, Bruno Imthurn, Patrick Inesch and Brigitte Leeners, 'Does Endometriosis Affect Professional Life? A Matched Case-control Study in Switzerland, Germany and Australia' (2019) 9(1) *BMJ Open* 1, 9.

<sup>34</sup> Jean A Gilmour, Annette Huntington and Helen V Wilson, 'The Impact of Endometriosis on Work and Social Participation' (2008) 14(6) *International Journal of Nursing Practice* 443, 445.

<sup>35</sup> Sperschneider et al (n 33) 6.

<sup>36</sup> Moradi et al (n 29) 130.

<sup>37</sup> Schoep et al (n 6).

<sup>38</sup> *Ibid* 1.

<sup>39</sup> *Ibid*.

<sup>40</sup> *Ibid* 8.

<sup>41</sup> *Ibid* 6.

<sup>42</sup> *Ibid* 1.

<sup>43</sup> *Ibid*.

<sup>44</sup> *Ibid*.

Australia, the total economic cost of endometriosis and chronic pelvic pain in the reproductive aged population averages \$6.5 billion each year.<sup>45</sup>

### C *Why Existing Personal Leave Provisions are Insufficient*

Section 97 of the *Fair Work Act* permits an employee to take paid personal or carer's leave if the leave is necessary 'because the employee is not fit for work because of a personal illness, or personal injury, affecting the employee'. There is minimal authoritative guidance on what may constitute an illness or injury for the purpose of this provision. However, the Fair Work Ombudsman notes that personal leave can be taken for stress and pregnancy-related illnesses.<sup>46</sup> In response to queries regarding whether menstruation-related pain is a valid reason for taking personal leave, Australia's Minister for Health, Greg Hunt, has clarified that '[w]hat we need to do is ensure that it is treated to the same level as any other condition which would force any person to miss time from school, to miss time from work'.<sup>47</sup> Although the symptoms and their impact on women's work may constitute an 'illness' or 'injury', menstrual-related pain does not necessarily constitute a valid reason for taking personal leave in accordance with the *Fair Work Act* for additional theoretical and practical reasons, which we expand on below.

### D *Existing Personal Leave Provisions are Inadequate from a Feminist Perspective*

From an overarching feminist perspective,<sup>48</sup> it is dubious to characterise women's menstruation as an illness or injury. Such characterisations undermine the hard-fought achievements of feminism, which include disassociating women's reproductive and bodily functions from connotations of disease that have served to perpetuate idealised views of humanity based on men's bodies. Comparing menstruation to an illness 'can have problematic consequences by medicalising a common physiological feature of women's lives'.<sup>49</sup> Goldblatt and Steele observe that:

Medicalisation can also lead to protective responses that reinforce stereotypes of women as weak, incapable and deficient. While menstruation may co-exist with medical conditions such as endometriosis, in most cases period pain, heavy bleeding, tiredness and impact on mood are part of many women's

<sup>45</sup> Mike Armour, Kenny Lawson, Aidan Wood, Caroline Smith, Jason Abbott and Praveen Thumbikat, 'The Cost of Illness and Economic Burden of Endometriosis and Chronic Pelvic Pain in Australia: A National Online Survey' (2019) 14(10) *PLoS One* 1.

<sup>46</sup> Fair Work Ombudsman (Cth), *Paid Sick & Carer's Leave* (Web Page) <<https://www.fairwork.gov.au/leave/sick-and-carers-leave/paid-sick-and-carers-leave>>.

<sup>47</sup> *Triple J Hack* (n 2).

<sup>48</sup> An intersectional feminist perspective is relevant, but beyond the scope of this article: see further Chris Bobel, *New Blood: Third-Wave Feminism and the Politics of Menstruation* (Rutgers University Press, 2010). For further theoretical engagement in relation to the feminist debates about the question of whether menstrual leave will benefit women: see, eg, Marian Baird, Elizabeth Hill and Sydney Colussi, 'Mapping Menstrual Leave Legislation and Policy Historically and Globally: A Labour Entitlement to Reinforce, Remedy or Revolutionize Gender Equality at Work?' (2021) 42(1) *Comparative Labor Law and Policy Journal* (forthcoming).

<sup>49</sup> Beth Goldblatt and Linda Steele, 'Bloody Unfair: Inequality Related to Menstruation — Considering the Role of Discrimination Law' (2019) 41(3) *Sydney Law Review* 293, 306.

normal experience of menstruation and should be recognised as a facet of female biology that needs to be accommodated by society.<sup>50</sup>

As such, suggesting that women use personal leave for menstrual-related pain, at best, demonstrates a lack of understanding of the extent to which such symptoms affect women (as distinct from men). At worst, it tacitly reinforces stereotypes that women's issues are not worthy of proper consideration and that women have no choice but to conform to pre-existing frameworks ill-equipped to cater to their needs.

## E *The Practical Difficulty of Undiagnosed Menstrual Conditions*

There are practical difficulties that also undermine the application of existing personal leave provisions to menstrual-related pain. The underlying causes of women's menstrual pain are routinely undiagnosed. Painful menstruation that is not attributable to a well-defined pathology occurs in 45% to 93% of females.<sup>51</sup> Similarly, half of women who experience heavy menstrual bleeding have no evidence of underlying pathology.<sup>52</sup> Thus, it is difficult to attribute menstrual pain to an illness or injury where no such medical diagnosis applies. Furthermore, even where a diagnosis or pathological explanation is available, diagnosis of menstrual-related conditions is often significantly delayed.<sup>53</sup>

There are various reasons for non-diagnosis and delay in diagnosis, which further undermines any suggestion that menstrual pain should fall within the scope of personal leave. Women with dysmenorrhea may not seek help,<sup>54</sup> or refrain from consulting their doctor.<sup>55</sup> They may even perceive problematic menstrual symptoms as 'part and parcel' of female life and not a valid reason for obtaining medical advice, in which the 'legitimate' or 'virtuous' response to menstrual pain is to demonstrate

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<sup>50</sup> Ibid citing Maguire et al (n 10).

<sup>51</sup> See, eg, Gagnon and Elgendy (n 16) 946, citing Margaret Burnett, Viola Antao, Amanda Black, Kymm Feldman, Andrew Grenville, Robert Lea, Guylaine Lefebvre, Odette Pinsonneault and Magali Robert, 'Prevalence of Primary Dysmenorrhea in Canada' (2005) 27(8) *Journal of Obstetrics and Gynaecology Canada* 765; Vincenzo De Sanctis, Ashraf Soliman, Sergio Bernasconi, Luigi Bianchin, Gianni Bona, Mauro Bozzola, Fabio Buzi, Carlo De Sanctis, Giorgio Tonini, Franco Rigon and Egle Perissinotto, 'Primary Dysmenorrhea in Adolescents: Prevalence, Impact and Recent Knowledge' (2015) 13(2) *Pediatric Endocrinology Reviews* 512; Stella Iacovides, Ingrid Avidon and Fiona Baker, 'What We Know about Primary Dysmenorrhea Today: A Critical Review' (2015) 21(6) *Human Reproduction Update* 762.

<sup>52</sup> Weisberg, McGeehan and Fraser (n 19) 431.

<sup>53</sup> For instance, the diagnostic delay of endometriosis is 6.7 years on average, but is often longer, including up to 24 years in some instances: Kelechi Nnoaham, Lone Hummelshoj, Premila Webster, Thomas d'Hooghe, Fiorenzo Nardone, Carlo Nardone, Crispin Jenkinson, Stephen Kennedy and Krina Zondervan, 'Impact of Endometriosis on Quality of Life and Work Productivity: A Multicenter Study across Ten Countries' (2011) 96(2) *Fertility and Sterility* 366, 370; Elaine Denny, 'Women's Experiences of Endometriosis' (2004) 46(6) *Journal of Advanced Nursing* 641, 644; Moradi et al (n 29) 126.

<sup>54</sup> Schoep et al (n 17) 569e1, citing Ann Hewison and Olga van den Akker, 'Dysmenorrhea, Menstrual Attitude and GP Consultation' (1996) 5(8) *British Journal of Nursing* 480; Symphorosa Chan, Ka Wah You, Pm Yuen and Daljit Sahota, 'Menstrual Problems and Health-seeking Behaviour in Hong Kong Chinese Girls' (2009) 15(1) *Hong Kong Medical Journal* 18; Chen, Kristine Kwekkeboom and Sandra Ward, 'Beliefs about Dysmenorrhea and their Relationship to Self-management' (2016) 39(4) *Research in Nursing and Health* 263.

<sup>55</sup> Seear (n 13) 1225.

stoicism.<sup>56</sup> It may be that women lack the requisite health information,<sup>57</sup> or experience difficulty distinguishing between normal and abnormal menstruation.<sup>58</sup> Women may also delay seeking medical advice due to social sanctioning processes associated with the disclosure of menstrual-related problems.<sup>59</sup> In addition, despite being described as ‘intense’ or ‘overwhelming’, severe menstrual pain has the potential to be trivialised or normalised by medical professionals.<sup>60</sup> As a result, women may not obtain a diagnosis because of moving between doctors or in and out of medical care.<sup>61</sup> Women’s friends and families may also tell them that their pain and bleeding is ‘normal’.<sup>62</sup> This multitude of factors may explain why some women may not obtain the requisite medical certificate to take personal leave for their menstrual pain pursuant to s 107 of the *Fair Work Act*, which is required if requested by an employer.

## F *The Practical Difficulty at the Workplace Level*

Women may encounter various repercussions at the workplace level, even where personal leave is used for menstrual pain. Women experience difficulty managing full-time employment when unable to take personal leave for menstrual pain in workplace environments that do not accommodate their needs.<sup>63</sup> Women may be perceived as ‘malingerers’, as there are no readily observable signs of menstrual pain from co-workers’ perspectives: ‘there’s nothing to show there’s no scar, there’s no spots there’.<sup>64</sup> Women whose employers are not sympathetic to menstruation-related pain report more negative experiences, including threats of losing their jobs.<sup>65</sup> As Levitt and Barnack-Tavlaris state, ‘the social unacceptability of the discussion of menstrual symptoms can result in societal pressure to keep menstrual distress a secret from co-workers’.<sup>66</sup> Where using personal leave for menstrual-related health issues is permitted, given that personal leave is limited to 10 days each year, women risk using up their personal leave, to then use and exhaust their annual leave.<sup>67</sup> Moreover, whether because of exhausting leave or difficulty in taking leave itself, some women are forced to go to work despite severe symptoms.<sup>68</sup> Clearly, Australia’s existing personal leave provisions are inadequate. As Schoep and colleagues note, the prevalence of menstrual-related symptoms in the general

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<sup>56</sup> Miriam Santer, Sally Wyke and Pam Warner, ‘Women’s Management of Menstrual Symptoms: Findings from a Postal Survey and Qualitative Interviews’ (2008) 66(2) *Social Science & Medicine* 276, 276.

<sup>57</sup> Moradi et al (n 29) 133.

<sup>58</sup> Seear (n 13) 1220.

<sup>59</sup> Ibid 1221.

<sup>60</sup> Denny (n 53) 641.

<sup>61</sup> Lenore Manderson, Narelle Warren and Milica Markovic, ‘Circuit Breaking: Pathways of Treatment Seeking for Women with Endometriosis in Australia’ (2008) 18(4) *Qualitative Health Research* 522.

<sup>62</sup> Moradi et al (n 29) 127.

<sup>63</sup> Gilmour, Huntington and Wilson (n 34) 447.

<sup>64</sup> Ibid 445 quoting a participant in their qualitative study.

<sup>65</sup> Moradi et al (n 29) 131.

<sup>66</sup> Levitt and Barnack-Tavlaris (n 4) 566, citing Ingrid Johnston-Robledo and Joan Chrisler, ‘The Menstrual Mark: Menstruation as Social Stigma’ (2013) 68(1–2) *Sex Roles* 9.

<sup>67</sup> Moradi et al (n 29) 130; Sperschneider et al (n 33) 8.

<sup>68</sup> Moradi et al (n 29) 131.

population, coupled with the number of women seeking a different approach, reflect the need for change.<sup>69</sup>

### III A Matter for Statute or Workplace Policy?

In terms of implementing substantive change, the strongest option would be for the Australian Parliament to create a uniform legislative standard allowing for the leave under the *Fair Work Act*. It is now commonplace to speak of an ‘age of statutes’, whereby ‘[i]t is statute which, more often than not, provides the rights necessary to secure the basic amenities of life in modern society’.<sup>70</sup> A regulatory approach that prioritises law reform is preferable for multiple reasons; namely, it provides certainty, applies universally, mandates compliance and is responsive to the high risk, impact and importance of women’s menstrual health.<sup>71</sup> There is precedent in respect of legislative and policy reform. Australia already provides for statutory entitlements in respect of pregnancy and childbirth,<sup>72</sup> as well as breastfeeding,<sup>73</sup> which are predominantly women’s issues. Menstrual leave is comparable, as it is also a gendered issue, but distinct, in that an overwhelming number of women remain disproportionately disadvantaged without it. We can learn from the initial struggles associated with implementing these other pre-existing entitlements.<sup>74</sup> As a dedicated legislative entitlement, ideally articulated in the National Employment Standards,<sup>75</sup> paid menstrual leave would become a universal entitlement, applying nationally, without inconsistencies based on where a female employee works. Such approaches are preferred in contrast to anti-discrimination law, which has a limited impact.<sup>76</sup> We recommend that the provision be paid in light of the gender-based inequality women experience — discussed in detail below in Part IV. Parliament also finds itself in the unique position of being able to conduct a broad survey of problems in the entire field of which they are a part.<sup>77</sup> For that reason, Parliament would be best placed to bring about change to employment law frameworks based on a whole-of-society approach, along with the rigour of subjecting the proposal to parliamentary debate.

<sup>69</sup> Schoep et al (n 6) 8.

<sup>70</sup> *Buck v Comcare* (1996) 66 FCR 359, 365 (Finn J).

<sup>71</sup> Australian Government, *Best Practice Regulation Handbook* (2007) 67. For further discussion of best practice approaches to regulation: see, eg, Arie Freiberg, *Regulation in Australia* (Federation Press, 2017).

<sup>72</sup> See generally *Fair Work Act* (n 9) pt 22, div 5 (parental leave and other related entitlements, contained under the National Employment Standards).

<sup>73</sup> Breastfeeding is a protected ground of discrimination under the *Sex Discrimination Act 1984* (Cth) s 7AA. Making an employee feel uncomfortable about breastfeeding, or not providing adequate facilities or breaks, may constitute discrimination, and may also be a breach of work health and safety laws relating to eliminating and minimising safety risks of psychological injury: Australian Human Rights Commission, *Supporting Working Parents: Pregnancy and Return to Work National Review* (Report, July 2014) 125.

<sup>74</sup> See generally Marian Baird, ‘The State, Work and Family in Australia’ (2011) 22(18) *The International Journal of Human Resource Management* 3742.

<sup>75</sup> Fair Work Ombudsman (Cth), *National Employment Standards* (Web Page) <<https://www.fairwork.gov.au/employee-entitlements/national-employment-standards>>.

<sup>76</sup> Goldblatt and Steele (n 49).

<sup>77</sup> Paul Atiyah, ‘Common Law and Statute Law’ (1985) 48(1) *Modern Law Review* 1, 6.

Without diminishing that ultimate goal, we acknowledge that the legislative process may instead form a roadblock in achieving that aim. The litany of other potential bills that Parliament must consider, along with the potential for parliamentary debate to hinder progress rather than empower it, are not to be discounted. As Reiter has said, '[w]e have only a very limited knowledge of what demands are likely to be met with legislative responses'.<sup>78</sup>

With that possibility in mind and given the often cumbersome pace of legislative reform, two options provide an immediate action point for companies already amenable to introducing a paid menstrual leave provision: workplace policies and enterprise agreements. Workplace policies are not necessarily blunt or merely aspirational instruments. They have the potential to give rise to contractual entitlements for employees,<sup>79</sup> which, if breached, could result in damages for breach of contract.<sup>80</sup> Alternatively, an employer may, with the agreement of its employees, include a menstrual leave scheme as a clause within its enterprise agreement, should one apply, the contravention of which could sound in a civil penalty for a breach of s 50 of the *Fair Work Act*. At the time of writing, only a limited number of enterprise agreements include a paid menstrual leave provision for women who require additional leave.<sup>81</sup>

In fact, an Australian employer, the Victorian Women's Trust, has implemented a paid menstrual leave policy, which we discuss further below.<sup>82</sup> It goes without saying that the more common and accepted such policies become, the greater impetus there will be for other employers, even legislators at some later point, to follow suit. While there are arguments that such entitlements may generate an unconscious bias against hiring women, or that women may even take advantage of the policy,<sup>83</sup> the potential benefits of implementing such policies significantly outweigh those costs. That said, those potential benefits will only come to fruition

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<sup>78</sup> Barry Reiter, 'The Control of Contract Power' (1981) 1(3) *Oxford Journal of Legal Studies* 347, 365.

<sup>79</sup> As to the interrelationship between workplace policies and employment contracts: see, eg, Anna Chapman, John Howe and Susan Ainsworth, 'Organisational Policies and Australian Employment Law: A Preliminary Study of Interaction' (Working Paper No 53, Centre for Employment and Labour Relations Law, University of Melbourne, 2015) 5–8; Mark Giancaspro, 'Do Workplace Policies Form Part of Employment Contracts? A Working Guide and Advice for Employers' (2016) 44(2) *Australian Business Law Review* 106.

<sup>80</sup> See the various circumstances presented in Giancaspro (n 79) in which a policy document is deemed to be contractual.

<sup>81</sup> See *NT Working Women's Centre Enterprise Agreement* (2019) cl 27.2; *RMIT Student Union Enterprise Agreement* (2020) cl 5.3.12. See also *University of Western Sydney Students' Association* (2006) cl 6.10; *Southern Cross University Lismore Campus Student Representative Council Agreement* (2005) cl 6.2; and *Student Associations of the Australian National University Enterprise Agreement* (2020) cl 20.3.1, which provides for additional personal leave for menstruation.

<sup>82</sup> Other Australian companies to recently introduce a paid menstrual leave policy at the time of writing include Future Super and Modibodi: Housnia Shams, 'Menstrual Leave Adopted by More Australian Businesses as Debate Grows Around Policy', *ABC News* (Web Page, 24 June 2021) <<https://www.abc.net.au/news/2021-06-24/menstrual-leave-australia-womens-health-employment-workplace/100235920>>. Beyond Australia, other organisations that have chosen to implement menstrual leave include Coexist (in the United Kingdom), Culture Machine and Gozoop (in India). For brief commentary on those policies: see, eg, Levitt and Barnack-Tavlaris (n 4) 562.

<sup>83</sup> Howard (n 2).



provided adequate education, accompanied by cultural shifts within workplaces and society more broadly, are prioritised.<sup>84</sup>

As to the content of a menstrual leave policy at the workplace level, there is the attraction of its flexibility in respect of its terms, operation and implementation. An employer can select what it wishes to include and exclude in the policy document. That flexibility may also accommodate women experiencing the symptoms of menopause,<sup>85</sup> for example. It may even go further to grant a more generous entitlement, beyond one day per calendar month, or perhaps the ability to perform work from home,<sup>86</sup> or varying their workdays or hours if they have temporary debilitating pain or require rest. In essence, paid menstrual leave is one of the options available to women, but not the only one.

Various other practical considerations are worth noting here. Acknowledging the inherently gendered and private nature of menstruation, mechanisms for confidential disclosure are necessary. Such clauses may include an undertaking from the employer that ‘no adverse action will be taken against an employee if their attendance or performance at work suffers as a result of taking menstruation leave’, which is similar to domestic violence leave clauses that have been successfully implemented and used in Australia.<sup>87</sup> Flexible work arrangements that incorporate awareness into an employer’s organisational processes, training and other human resources structures are also recommended.<sup>88</sup> Further, it is important to acknowledge that women’s experiences of menstrual-related health conditions are diverse. For women with endometriosis, Denny highlights that ‘[a]s with other disabling and long-term illnesses, all aspects of a woman’s life, and of those around her, are affected by endometriosis, although experience is diverse and can range from minor irritation to a life totally overwhelmed [by] pain’.<sup>89</sup> Evidently, not all women experience menstrual pain consistently, nor are the symptoms or extent of menstrual-related pain experienced by all women in the same way. However articulated, we recommend a policy that is non-prescriptive in the way it defines menstrual-related pain and its symptoms.

Despite these potential benefits, the possibility that such policy-based entitlements could be curtailed at the discretion of the employer presents some risk.

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<sup>84</sup> This suggestion aligns with what the Victorian Women’s Trust suggests contributed to the successful implementation of its menstrual leave policy: Casimira Melican and Grace Mountford, ‘Why We’ve Introduced a Menstrual Policy and You Should Too’, *Victorian Women’s Trust* (Blog Post, 23 May 2017) <<https://www.vwt.org.au/blog-menstrual-policy/>>.

<sup>85</sup> That is the approach taken in the Victorian Women’s Trust’s template policy: Victorian Women’s Trust, *Menstrual Policy: Policy Template* (Web Page) <<https://www.vwt.org.au/menstrual-policy-2/>>.

<sup>86</sup> Again, that is the approach taken in the Victorian Women’s Trust’s template policy: *ibid*.

<sup>87</sup> Levitt and Barnack-Tavlaris (n 4) 568. For instance, *Fair Work Act* (n 9) s 106C imposes confidentiality obligations on employers, in which employers must treat information, such as notice and evidence of, family violence confidential ‘as far as it is reasonably practicable to do so’. See further Alice de Jonge, ‘Corporate Social Responsibility through a Feminist Lens: Domestic Violence and the Workplace in the 21<sup>st</sup> Century’ (2018) 148(3) *Journal of Business Ethics* 471, 481; Jan Breckenridge, Jesse Cale, Shabnam Hameed, Luke McCaskie and Stacy Tzoumakis, *Implementation of Domestic Violence Clauses — An Employer’s Perspective* (Report, Gendered Violence Research Network, University of New South Wales, November 2015) 8, 12.

<sup>88</sup> de Jonge (n 87).

<sup>89</sup> Elaine Denny, ‘I Never Know from One Day to Another How I Will Feel: Pain and Uncertainty in Women with Endometriosis’ (2009) 19(7) *Qualitative Health Research* 985, 985–6.

In essence, the nature and content of any such policy, if implemented, will be at the whim of the employer, the actual benefit of which depends on the employer's prerogative.<sup>90</sup> The management of a workforce is dictated by the employer's capacity to create and implement workplace policies and require employees to adhere to such policies.<sup>91</sup> As Levitt and Barnack-Tavlaris have described, there are no reliable methods of measuring a workplace menstrual leave policy's efficacy because 'there is often little public data and limited access to human resources policies and procedures which companies typically do not make publicly available'.<sup>92</sup>

Despite these difficulties, if one takes the view that an employer-based menstrual policy may still have benefits even if, at first, only for a minority of women in Australia, it is helpful to consider what to include in it. The Victorian Women's Trust has developed a template, which introduced a menstrual leave scheme into its workforce in May 2016.<sup>93</sup> The impetus for the template policy came after the Trust conducted an online survey of 3,400 people across Australia and globally, as well as 22 discussion groups across the State of Victoria, regarding their experiences with menstruation and menopause. The results of that survey were published in a book titled *About Bloody Time: The Menstrual Revolution We Have To Have*.<sup>94</sup> One notable result was that 58% of respondents who menstruated said that a day off to rest would make their period a better experience every month.<sup>95</sup> 24% of those surveyed also said that being able to ask for what they need from their employer would make their period a better experience.<sup>96</sup> Apart from the option of taking a days' paid leave, the Trust's policy and corresponding template allow for the possibility of working from home, or the opportunity to stay in the workplace under circumstances that encourage the comfort of the employee (for example, resting in a quiet area).

With the successful implementation of this policy in mind, it is now opportune to consider a pertinent question that finds itself consistently at the centre of the menstrual leave debate: is gender equality undermined when women are afforded menstrual leave, or does it lead to women's empowerment?

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<sup>90</sup> See further, *Malik v Bank of Credit and Commerce International SA (in liq)* [1998] AC 20, 46, where it was held that 'a balance has to be struck between an employer's interest in managing [its] business as [it] sees fit and the employee's interest is not being unfairly and improperly exploited' (Lord Steyn). See also Douglas Brodie, 'Mutual Trust and the Values of the Employment Contract' (2001) 30(1) *Industrial Law Journal* 84, 93, 99, in which the author agreed with this curtailing of the employer's managerial prerogative.

<sup>91</sup> For further explanation of this concept: see, eg, Carolyn Sappideen, Paul O'Grady, Joellen Riley, Geoff Warburton and Belinda Smith, *Macken's Law of Employment* (Lawbook, 8<sup>th</sup> ed, 2016) 144–6 [4.480].

<sup>92</sup> Levitt and Barnack-Tavlaris (n 4) 562.

<sup>93</sup> Melican and Mountford (n 84); Victorian Women's Trust (n 85).

<sup>94</sup> Karen Pickering and Jane Bennett, *About Bloody Time: The Menstrual Revolution We Have to Have* (Victorian Women's Trust, 2019).

<sup>95</sup> Melican and Mountford (n 84).

<sup>96</sup> *Ibid.*

## IV Helping or Hindering Gender Equality?

The introduction of a statutory paid menstrual leave scheme can be rationalised in relation to contemporary understandings of gender equality. This Part considers:

- (A) Australia's approach to gender equality, which appears to be stagnating;
- (B) societal perceptions of menstruation as being inherently gendered;
- (C) why a paid menstrual leave statutory scheme may bring about gender inequality; and
- (D) compelling reasons why a paid statutory menstrual leave scheme constitutes an effective mechanism for achieving gender equality.

### A *Australia's Stagnating Approach to Gender Equality*

Gender equality in the workplace is achieved 'when people of all genders have equal rights, responsibilities and opportunities'.<sup>97</sup> This aspiration has become widely accepted as a political goal over the last decades, and many countries and transnational institutions have committed themselves to this objective,<sup>98</sup> including Australia. For instance, the *Workplace Gender Equality Act 2012* (Cth) sets out to promote and improve gender equality, removing barriers to women's workforce participation by, among other things, implementing reporting requirements for Australian workplaces.<sup>99</sup> The *Fair Work Act* similarly seeks to achieve pay equity between men and women by allowing an individual or group of workers in the same sector to apply for an order from the Fair Work Commission providing them with equal remuneration for work of equal or comparable value.<sup>100</sup>

Despite these frameworks, gender equality in Australia remains illusory. The Australian Human Rights Commission notes that:

Women experience inequality in many areas of their lives. At work, women face a gender 'pay gap' and barriers to leadership roles. Many encounter reduced employment opportunities because of the time they give to family and caring responsibilities.<sup>101</sup>

As at September 2021, women in Australia took home on average \$261.50 less than their male counterparts each week, representing a 14.2% 'pay gap', which has remained largely stagnant for the past two decades.<sup>102</sup> If anything, gender equality in Australia appears to be slipping backward. Once ranked 15<sup>th</sup> on a global index

<sup>97</sup> 'Gender Equality: What Is It and Why Do We Need It?', *Victorian Government* (Web Page, 30 March 2021) <<https://www.vic.gov.au/gender-equality-what-it-and-why-do-we-need-it>>.

<sup>98</sup> Emanuela Lombardo, Petra Meier and Mieke Verloo, 'Stretching and Bending Gender Equality: A Discursive Politics Approach' in Emanuela Lombardo, Petra Meier and Mieke Verloo (eds), *The Discursive Politics of Gender Equality: Stretching, Bending and Policy-making* (Routledge, 2009) 1.

<sup>99</sup> *Workplace Gender Equality Act 2012* (Cth) s 2A.

<sup>100</sup> *Fair Work Act* (n 9) pt 2-7.

<sup>101</sup> 'Gender Equality', *Australian Human Rights Commission* (Web Page) <<https://humanrights.gov.au/quick-guide/12038>>.

<sup>102</sup> 'Australia's Gender Pay Gap Statistics', *Workplace Gender Equality Agency* (Web Page, 27 August 2021) <<https://www.wgea.gov.au/data/fact-sheets/australias-gender-pay-gap-statistics-2020>>.

measuring gender equality in 2006, Australia was ranked 50<sup>th</sup> in 2021.<sup>103</sup> Australia is ranked 70<sup>th</sup> globally for women's economic participation and opportunity.<sup>104</sup>

The causes of gender inequality in Australia, particularly as it concerns women's participation in the workplace, are complex. Women are underrepresented in various male-dominated industries.<sup>105</sup> Women constitute a disproportionate number of part-time workers in low-paid industries and insecure work. For instance, 43% of working women are employed part-time compared to 16% of men.<sup>106</sup> Vulnerable workers, particularly casuals and those in the gig economy,<sup>107</sup> face ongoing challenges, of which women are clearly a part. Indeed, many menstruating workers undertaking precarious work will not have access to the proposed leave entitlement if implemented in the National Employment Standards. This vulnerability is beyond the scope of this article, but remains an issue for further consideration, particularly as women comprise a significant proportion of Australia's casual workforce.<sup>108</sup>

In addition, women typically bear the brunt of unpaid domestic labour. In 2016, women spent, on average, between 5 and 14 hours each week completing unpaid domestic housework, whereas men spent less than 5 hours each week.<sup>109</sup> These inequalities appear to be deeply entrenched in Australian society. Baxter and Hewitt note that, in contrast to the United States, 'Australian men and women are more strongly tied to a traditional (male breadwinner, female homemaker) division of domestic labour that is both based on and determined by Australian women's disproportionate share of part-time employment'.<sup>110</sup> Australian women also routinely experience workplace sexual harassment — almost two in every five women — which leads to financial, social, emotional, physical and psychological harm.<sup>111</sup>

The imperative for improving gender equality in Australia has increased in light of the Coronavirus (COVID-19) pandemic, where preliminary analysis indicates that gender-based inequalities have increased because of the pandemic.

<sup>103</sup> World Economic Forum, *The Global Gender Gap Report 2021* (Report, 31 March 2021) 10.

<sup>104</sup> Ibid 18.

<sup>105</sup> Australian Human Rights Commission, *Women in Male-Dominated Industries: A Toolkit of Strategies* (Report, Australian Human Rights Commission, 21 May 2013); Workplace Gender Equality Agency (Cth), *Gender Segregation in Australia's Workforce* (Fact Sheet, April 2019) <<https://www.wgea.gov.au/publications/gender-segregation-in-australias-workforce>>.

<sup>106</sup> Australian Bureau of Statistics, *Gender Indicators, Australia* (Catalogue No 4125.0, 15 December 2020).

<sup>107</sup> For further commentary on the plight of vulnerable workers and the lack of access to entitlements: see, eg, Judy Fudge, 'Beyond Vulnerable Workers: Towards a New Standard Employment Relationship' (2005) 12 *Canadian Labour and Employment Law Journal* 151; Ian Campbell and Robin Price, 'Precarious Work and Precarious Workers: Towards an Improved Conceptualisation' (2016) 27(3) *Economic and Labour Relations Review* 314.

<sup>108</sup> See, eg, Geoff Gilfillan, *Characteristics and Use of Casual Employees in Australia* (Research Paper Series 2017–18, Parliamentary Library Statistical Snapshot, Department of Parliamentary Services (Cth), 19 January 2018) <[https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/pubs/rp/rp1718/CasualEmployeesAustralia#\\_Toc504135069](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1718/CasualEmployeesAustralia#_Toc504135069)>.

<sup>109</sup> Australian Bureau of Statistics, *Census National 2016* (Web Page) <<https://www.abs.gov.au/websitedbs/D3310114.nsf/home/2016+Census+National>>.

<sup>110</sup> Janeen Baxter and Belinda Hewitt, 'Negotiating Domestic Labor Women's Earnings and Housework Time in Australia' (2013) 19(1) *Feminist Economics* 29, 48.

<sup>111</sup> Australian Human Rights Commission, *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces* (Australian Human Rights Commission, 5 March 2020) 10, 13.

Referred to as a ‘triple-whammy’, during the pandemic, women have been more likely to lose their jobs and experience disruption due to increased childcare and other responsibilities, but less likely to receive government support.<sup>112</sup> Furthermore, employers’ expectations regarding employees’ productivity levels have remained static despite increased care burdens.<sup>113</sup> Women have also been exposed to greater infection risks and psychological stress during the pandemic, given that more women compared to men are employed in essential jobs.<sup>114</sup> In a post-pandemic world, Craig and Churchill suggest that ‘without direct public policy attention and support to the care economy, both paid and unpaid, [Australia is] likely to see wider rather than narrower gender disparity’.<sup>115</sup>

Government action is needed in order to improve the position of women in Australian society. Inaction has economic consequences. The Australian Government’s Workplace Gender Equality Agency has observed that:

Modelling shows that in the most negative scenario, in which women experience disproportionate unemployment during COVID-19 and no action is taken to account for this, global GDP would be \$1 trillion (USD) lower in 2030 than if COVID-19 had the same effect on men’s and women’s employment.<sup>116</sup>

With this understanding of Australia’s status quo of gender inequality in mind, the following discussion considers societal perceptions of menstruation, which, in part, contribute to the current state of gender inequality in Australia.

## **B      *Societal Perceptions of Menstruation are Inherently Gendered***

Society’s perception of, and attitude toward, menstruation is inherently gendered and, as with other reproductive health-related concerns, presents a barrier to gender equality and the empowerment of women. Bobel and Fahs note that ‘[m]enstruation is ... deeply gendered and coded as women’s experience and also expansive and transgressive in its gender politics’.<sup>117</sup> Newton adds that the negative perception of menstruation by society has a historical basis:

One idea that can be found in many places and historical eras is that menstruating women have been seen, and are seen, to be both polluted and polluting, and their menstrual blood seen as dangerous. Menstrual blood was often marked down as needing to be expelled from the body because it would cause the woman harm if retained. It has also been viewed as a sign of women’s inherent sinfulness and subsequent subordination to men.<sup>118</sup>

<sup>112</sup> Danielle Wood, Kate Griffiths and Tom Crowley, *Women’s Work: The Impact of the COVID Crisis on Australian Women* (Research Report, Grattan Institute, 7 March 2021) 3. See also Linda Carli, ‘Women, Gender Equality and COVID-19’ (2020) 35 (7–8) *Gender in Management: An International Journal* 647.

<sup>113</sup> Lyn Craig and Brendan Churchill, ‘Working and Caring at Home Gender Differences in the Effects of Covid-19 on Paid and Unpaid Labor in Australia’ (2020) 27(1–2) *Feminist Economics* 310.

<sup>114</sup> Ibid.

<sup>115</sup> Ibid 3234.

<sup>116</sup> Workplace Gender Equality Agency (Cth), *Gendered Impact of COVID-19* (Web Page, October 2020) <<https://www.wgea.gov.au/topics/gendered-impact-of-covid-19>>.

<sup>117</sup> Chris Bobel and Breanne Fahs, ‘The Messy Politics of Menstrual Activism’ in Bobel et al (eds), *The Palgrave Handbook of Critical Menstruation Studies* (Palgrave Macmillan, 2020) 1001, 1009.

<sup>118</sup> Victoria Newton, *Everyday Discourses of Menstruation* (Palgrave Macmillan, 2016) 19.

Recourse to feminist theory is central to understanding society's perception of menstruation.<sup>119</sup> Beauvoir's theory of the woman as 'Other' is particularly useful.<sup>120</sup> Speaking broadly, Beauvoir contends that '[h]umanity is male, and man defines woman, not in herself, but in relation to himself; she is not considered an autonomous being'.<sup>121</sup> As explained by Kissling, '[t]he social construction of menstruation as a woman's curse is explicitly implicated in the evolution of woman as Other'.<sup>122</sup> This subordination of women as a result of their menstruation is predominantly a cultural creation, regulated and maintained by law, customs, and institutions.<sup>123</sup> While no single theory presents a complete explanation for the positioning or treatment of any group in society, Beauvoir's work presents a useful framework for understanding how society's perception of menstruation continues to disadvantage women in contemporary contexts — particularly as 'contemporary expressions of women's experiences and attitudes appears to confirm that Beauvoir's is a common attitude that has changed little in the intervening half-century'.<sup>124</sup>

The social stigma surrounding menstruation remains immense and requires women to navigate contradictory societal attitudes.<sup>125</sup> Young notes that '[o]n the one hand, for a culture of meritocratic achievement, menstruation is nothing other than a health biological process that should not be thought to distinguish women and men in our capacities and behavior'.<sup>126</sup> On the other hand, 'strong social pressures and our own internalized sense of decency tell us that we must vigilantly guard against revelation of our bleeding, especially in public and to strangers'.<sup>127</sup> The narratives women adopt regarding menstruation are 'overwhelmingly negative'.<sup>128</sup> Fahs explains that present schemas regarding menstruation are heavily skewed toward negative emotions.<sup>129</sup> As such, women often describe their menstruation in highly emotional terms, including embarrassment, shame, annoyance and irritation, or with highly distant and practical language.<sup>130</sup> Such perceptions of women are instilled in individuals from a young age.<sup>131</sup>

<sup>119</sup> For a discussion of menstrual activism: see, eg, Chris Bobel and Breanne Fahs, 'From Bloodless Respectability to Radical Menstrual Embodiment: Shifting Menstrual Politics from Private to Public' (2020) 45(4) *Journal of Women in Culture and Society* 955.

<sup>120</sup> See also Sophie Laws, *Issues of Blood: The Politics of Menstruation*, ed Jo Campling (Palgrave Macmillan, 1990).

<sup>121</sup> Simone de Beauvoir, *The Second Sex* (Vintage, 2011) 5.

<sup>122</sup> Elizabeth Kissling, *Capitalizing on the Curse: The Business of Menstruation* (Lynne Rienner, 2006) 4.

<sup>123</sup> *Ibid.*

<sup>124</sup> Iris Marion Young, *On Female Body Experience: "Throwing Like a Girl" and Other Essays* (Oxford University Press, 2005) 100.

<sup>125</sup> Ingrid Johnston-Robledo and Joan Chrisler, 'The Menstrual Mark: Menstruation as Social Stigma' in Bobel et al (eds), *The Palgrave Handbook of Critical Menstruation Studies* (Palgrave MacMillan, 2020) 181; Ingrid Johnston-Robledo, Kristin Sheffield, Jacqueline Voight and Jennifer Wilcox-Constantine, 'Reproductive Shame: Self-Objectification and Young Women's Attitudes toward Their Reproductive Functioning' (2007) 46(1) *Women & Health* 25.

<sup>126</sup> Young (n 124) 106.

<sup>127</sup> *Ibid.* 107.

<sup>128</sup> Breanne Fahs, 'There Will Be Blood: Women's Positive and Negative Experiences with Menstruation' (2020) 7(1) *Women's Reproductive Health* 1, 13.

<sup>129</sup> *Ibid.* 11.

<sup>130</sup> *Ibid.*

<sup>131</sup> See, eg, Tomi-Ann Roberts, Jamie Goldenberg, Cathleen Power and Tom Pyszczynski, "'Feminine Protection': The Effects of Menstruation on Attitudes towards Women' (2002) 26(2) *Psychology of*

### C *A Paid Menstrual Leave Statutory Scheme May Undermine Gender Equality*

The introduction of a paid menstrual leave statutory scheme carries the weight of such prejudices, which have the potential to hinder gender equality as much as help it. Such discussions are emblematic of broader feminist debates regarding sexual difference theory, in which questions of whether biological differences mandate the different treatment of women (and men) are contentious.<sup>132</sup> Commenting specifically on the utility of a menstrual leave policy, Leahy speculates that '[t]his policy could be seen either as a positive recognition of the realities of everyday life as a menstruating woman, or as a regressive return to the dark days when women were discriminated against on the basis of biology'.<sup>133</sup>

Leahy is not alone in this view; the potential for negative consequences arising from the introduction of a paid menstrual leave policy has been widely noted.<sup>134</sup> Such concerns are legitimate for both individual women and the status of women more generally. Women with endometriosis have found their illness disbelieved or trivialised by employers and peers, which, in turn, compounds related difficulties, particularly in workplaces where personal leave is limited to the statutory minimum.<sup>135</sup> As referenced in Part III, the disclosure of menstrual pain has, for Australian women, led to reprimand and accusations of seeking to 'get out of things'.<sup>136</sup> Consequently, the use of menstrual leave may elicit responses of objectification, sexism or discrimination, whether explicit or implicit, from women's supervisors or colleagues.<sup>137</sup>

The discussion of menstruation in the workplace may enliven various prejudices, which potentially disadvantage women more generally and thus undermine gender equality movements. Women's absence from work fosters stereotypes that women are less worthy and reliable employees.<sup>138</sup> In addition, gender-based benefits create a perception that women are more expensive employees, which may reduce an individual woman's prospects of being hired.<sup>139</sup> As well as disadvantaging women, a menstrual leave entitlement may be perceived to disadvantage men.<sup>140</sup> Women may actively avoid using the leave in order to gain

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*Women Quarterly* 131; Gordon Forbes, Leah Adams-Curtis, Kay White and Katie Holmgren, 'The Role of Hostile and Benevolent Sexism in Women's and Men's Perceptions of the Menstruating Woman' (2003) 27(1) *Psychology of Women Quarterly* 58.

<sup>132</sup> See, eg, Bobel (n 48) 154–70.

<sup>133</sup> Carla Leahy, 'Does Gender Equality Suffer When Women Get Menstrual Leave?', *The Conversation* (online, 3 March 2016) <<https://theconversation.com/does-gender-equality-suffer-when-women-get-menstrual-leave-55710>>.

<sup>134</sup> See above n 10.

<sup>135</sup> See, eg, Denny (n 53) 646.

<sup>136</sup> Seear (n 13) 1224.

<sup>137</sup> Levitt and Barnack-Tavlaris (n 4) 568.

<sup>138</sup> Eric Patton and Gary Johns, 'Women's Absenteeism in the Popular Press: Evidence for a Gender-Specific Absence Culture' (2007) 60(11) *Human Relations* 1579.

<sup>139</sup> Annalisa Merelli, *Italy's Paid Menstrual-leave Bill Would Come with a Big Cost to Women* (Web Page, 30 March 2017) <<https://qz.com/944210/italys-paid-menstrual-leave-bill-would-come-with-a-big-cost-to-italian-women/>>.

<sup>140</sup> Levitt and Barnack-Tavlaris (n 4) 569.

workplace advancement.<sup>141</sup> Conversely, using the leave provision may exacerbate misconceptions that women are less career-focused.<sup>142</sup> Similar to perceptions of women using personal leave, the medicalisation of menstruation by virtue of introducing a paid leave provision ‘may perpetuate the idea that menstruation is “debilitating” for all or most women, and thus women are not capable of working (efficiently or at all) whilst menstruating’.<sup>143</sup> It is clear that ‘[e]nshrining menstrual leave as a normal part of organisational policy creates the impression that all women experience period pain so crippling that ordinary work functioning is impossible. But menstrual experiences are not uniform.’<sup>144</sup>

While discouraging, the advent of any progressive reform necessitates negative speculation. Such concern is not insurmountable, as evidenced by the introduction of other gender-based legislative instruments in Australia, such as the *Sex Discrimination Act 1984* (Cth).<sup>145</sup>

#### **D     *Why a Paid Menstrual Leave Statutory Scheme Will Assist Gender Equality***

While the abovementioned concerns demonstrate a need to proceed with caution, various considerations support the introduction of a paid menstrual leave statutory scheme. First, it is important to recognise that the ways in which a menstrual leave scheme may undermine women’s workplace participation is yet to be researched in an Australian context.<sup>146</sup> Further research is needed in order to understand if, and to what extent, women may be disadvantaged. Second, although imperfect, Australia’s existing anti-discrimination law frameworks prohibit discrimination on the basis of gender, including in relation to menstruation.<sup>147</sup> Third, regardless of negative effects, the introduction of a menstrual leave scheme will likely have as many, if not more, positive consequences. A paid menstrual leave statutory entitlement may provide women requisite time to cope with symptoms and improve overall wellbeing.<sup>148</sup> Regardless of how many women use the entitlement, such schemes can reduce stigma and encourage more open discussion about menstruation.<sup>149</sup> A paid menstrual leave statutory scheme may also normalise menstruation, thus destigmatising conversations regarding women’s menstruation and fertility more broadly.<sup>150</sup>

Fourth, and most importantly, the introduction of a paid menstrual leave statutory scheme will improve the status of Australia’s gender equality movement.

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<sup>141</sup> Ibid, citing Rose Grose and Shelly Grabe, ‘Sociocultural Attitudes surrounding Menstruation and Alternative Menstrual Products: The Explanatory Role of Self-Objectification’ (2014) 35(6) *Healthcare for Women International* 677.

<sup>142</sup> Merelli (n 139).

<sup>143</sup> Levitt and Barnack-Tavlaris (n 4) 570.

<sup>144</sup> Leahy (n 133).

<sup>145</sup> Margaret Thornton, ‘The Political Contingency of Sex Discrimination Legislation: The Case of Australia’ (2015) 4(3) *Laws* 314; Margaret Thornton and Trish Luker, ‘The *Sex Discrimination Act* and Its Rocky Rite of Passage’ in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU Press, 2010) 25.

<sup>146</sup> Levitt and Barnack-Tavlaris (n 4) 561.

<sup>147</sup> Goldblatt and Steele (n 49).

<sup>148</sup> Levitt and Barnack-Tavlaris (n 4) 561.

<sup>149</sup> Ibid 567.

<sup>150</sup> Ibid.



The notion of gender equality, and how it might be achieved, is contentious, and has 'been expressed by many words and undergone various changes as a travelling concept in [a] global process'.<sup>151</sup> Gender equality has a variety of meanings, relating to different political histories, contexts, struggles and debates.<sup>152</sup> Formal gender equality, which treats men and women the same regardless of their gender, is limited in its ability to genuinely improve the position of women in Australian society. Put simply, '[i]n a social and employment context designed by men for men, treating women as if they were men cannot provide genuine equality'.<sup>153</sup> Fredman highlights that such approaches perpetuate 'powerful conformist pressures', in which the question of 'who are women equal to?' leads to the answer: 'equal to man'.<sup>154</sup> Speaking of this notion of 'sameness', MacKinnon observes that '[c]onced is the substantive way in which man has become the measure of all things. Under the sameness standard, women are measured according to our correspondence with man. ... Gender neutrality is thus simply the male standard'.<sup>155</sup> Such concepts influence understandings of gender equality in Australia, particularly in its workplaces, which 'still operate on the assumption that the "normal" employee is a full-time worker with no caring responsibilities or that they have someone to fulfil those responsibilities for them'.<sup>156</sup> As a result, a nuanced understanding of gender equality requires a movement away from formal equality:

It must allow for a transformation of the existing gender order which offers opportunities for new and progressive ways of understanding the meaning of gendered identities and the organisation of work, family and intimate relationships.<sup>157</sup>

By extension, the introduction of a paid menstrual leave statutory scheme would assist substantive gender equality by actively redressing the disadvantage women experience because of menstruation.<sup>158</sup> It would accommodate difference and achieve structural change,<sup>159</sup> as well as enhance women's voices and increase their participation in the workforce.<sup>160</sup> Although it is unclear whether a paid menstrual provision would reduce stigma, prejudice or gender-based stereotyping, it provides a more nuanced approach that, as opposed to the status quo, acknowledges broader social contexts in which women are systemically disadvantaged and discriminated against because of their gender.

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<sup>151</sup> Lombardo, Meier and Verloo (n 98) 1.

<sup>152</sup> Ibid 7.

<sup>153</sup> Beth Gaze, 'The *Sex Discrimination Act* at 25: Reflections on the Past, Present and Future' in Margaret Thornton (ed), *Sex Discrimination in Uncertain Times* (ANU Press, 2010) 107, 115.

<sup>154</sup> Sandra Fredman, 'Substantive Equality Revisited' (2016) 14(3) *International Journal of Constitutional Law* 712, 719.

<sup>155</sup> Catharine A MacKinnon, *Feminism Unmodified: Discourses on Life and Law* (Harvard University Press, 1987) 34.

<sup>156</sup> Gaze (n 153) 121.

<sup>157</sup> Angelique Bletsas and Sara Charlesworth, 'Gender Equality and Decent Work in Australia' (2013) 48(1) *Australian Journal of Political Science* 44, 46, citing Vlasta Jalušić, 'Stretching and Bending the Meaning of Gender in Equality Policies' in Emanuela Lombardo, Petra Meier and Mieke Verloo (eds), *The Discursive Politics of Gender Equality: Stretching, Bending and Policy-making* (Routledge, 2009) 56.

<sup>158</sup> Fredman (n 154) 713.

<sup>159</sup> Ibid.

<sup>160</sup> Ibid.

The introduction of domestic violence leave in Australia is a useful point of reference. Since its introduction in 2010, more than one million workers now have access to domestic violence leave entitlements,<sup>161</sup> albeit by way of enterprise agreements. Menstrual leave and domestic violence leave are largely analogous: menstruation-related pain and domestic violence are gendered issues in that they both predominantly affect women and limit their workforce participation to Australia's economic detriment.<sup>162</sup> While aspects of domestic violence leave developments can also be distinguished — such provisions apply to men, are unlikely to be used monthly, and impact a smaller number of Australian workers — the rationale used to support the introduction of domestic violence leave similarly applies to menstrual leave.<sup>163</sup>

Characterising the introduction of a menstrual leave scheme as a gender equality priority has benefits for other stakeholders invested in women's workplace participation, including employers and the broader Australian public. As highlighted by the Workplace Gender Equality Agency, gender equality improves national productivity and economic growth.<sup>164</sup> From an employer's perspective, a menstrual leave provision increases organisational performance and enhances organisational reputation, in-turn improving companies' ability to attract and retain talent.<sup>165</sup> Employers who introduced domestic violence leave provisions have reported positive impacts in their workplaces, including a more positive and supportive work environment,<sup>166</sup> and increased awareness and recognition of domestic violence as a workplace and social issue.<sup>167</sup> Further research as to how a menstrual leave scheme will impact gender equality, coupled with the potential economic gains for all stakeholders, is needed.

The introduction of a paid menstrual leave statutory scheme, as it relates to substantive equality, is supported from a human rights perspective. The *Convention on the Elimination of All Forms of Discrimination against Women* ('CEDAW') requires signatories, including Australia, to take:

all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.<sup>168</sup>

Winkler and Roaf highlight that '[t]he framework of human rights and substantive equality requires guaranteeing women the exercise and enjoyment of

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<sup>161</sup> Marian Baird, Ludo McFerran and Ingrid Wright, 'An Equality Bargaining Breakthrough: Paid Domestic Violence Leave' (2014) 56(2) *Journal of Industrial Relations* 190, 190.

<sup>162</sup> de Jonge (n 87) 477, citing Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (Report, 2015) [2.3].

<sup>163</sup> de Jonge (n 87) 471.

<sup>164</sup> 'Workplace Gender Equality', *Workplace Gender Equality Agency* (Web Page) <<https://www.wgea.gov.au/about/workplace-gender-equality>>.

<sup>165</sup> *Ibid.*

<sup>166</sup> Breckenridge et al (n 87) 11–12.

<sup>167</sup> *Ibid.* 12.

<sup>168</sup> *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981) art 3 ('CEDAW').

human rights on the basis of equality'.<sup>169</sup> This same commitment is also mandated by General Recommendation 25 of the Committee on the Elimination of Discrimination against Women:

It is not enough to guarantee women treatment that is identical to that of men. Rather, biological as well as socially and culturally constructed differences between women and men must be taken into account. Under certain circumstances, non-identical treatment of women and men will be required in order to address such differences.<sup>170</sup>

Other international bodies, including the International Labour Organization, also adopt this approach.<sup>171</sup> Consequently, the introduction of a menstrual leave provision will help to fulfil Australia's human rights obligations, furthering the aims of the *CEDAW* in respect of substantive equality. Apart from recognising a paid statutory menstrual leave scheme to meet Australia's international obligations under the *CEDAW*, Part V below explains that Australia is out-of-step with other jurisdictions that have already adopted menstrual leave schemes.

## V Internationally Out-of-Step

Australia's current approach — or lack thereof — to paid menstrual leave is out-of-step with other countries, particularly in Asia, where such an entitlement has been recognised in statute in several jurisdictions. Notwithstanding its recognition in those jurisdictions, our research indicates that the level of uptake of the entitlement in its various iterations has been relatively low.<sup>172</sup> Nevertheless, it is our view that with necessary societal and attitudinal shifts, Australia has great potential to move towards a widely accepted and unashamedly utilised paid menstrual leave statutory scheme.

Despite the stagnation of Australia's progress toward achieving gender equality highlighted above, societal attitudes regarding menstruation appear to be shifting. A primary example of this shift is that in late 2018, with effect from 1 January 2019, the Commonwealth, state and territory treasurers unanimously agreed to remove the Goods and Services Tax ('GST') that had applied to 'feminine hygiene products' since the GST's introduction in 2000.<sup>173</sup> This reflects an important attitudinal repositioning in the Australian context, whereby women are no longer effectively punished by having to pay GST for feminine hygiene products, arising

<sup>169</sup> Inga T Winkler and Virginia Roaf, 'Taking the Bloody Linen out of the Closet: Menstrual Hygiene as a Priority for Achieving Gender Equality' (2014) 21(1) *Cardozo Journal of Law & Gender* 1, 2, 37.

<sup>170</sup> Committee on the Elimination of Discrimination against Women, *General Recommendation No 25, on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Special Measures*, UN GAOR, 30<sup>th</sup> sess, UN Doc A/59/38 (2004) [8].

<sup>171</sup> See, eg, International Labour Organization, *Gender Equality at the Heart of Decent Work* (Report, 2009) <<https://www.ilo.org/gender/Events/Campaign2008-2009/lang&ndash%3ben/lang--en/index.htm>>.

<sup>172</sup> For a historical and global 'mapping' of menstrual leave legislation: see, eg, Baird, Hill and Colussi (n 48).

<sup>173</sup> *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ss 38–47; *A New Tax System (Goods and Services Tax) (GST-free Health Goods) Determination 2018* (Cth) (including the corresponding Explanatory Statement to that Determination); Lauren Cook and Joseph Ayoub, 'Removing GST on Feminine Hygiene Products', *FlagPost* (Blog Post, 29 November 2018) <[https://www.aph.gov.au/About\\_Parliament/Parliamentary\\_Departments/Parliamentary\\_Library/FlagPost/2018/November/Removing\\_GST\\_on\\_feminine\\_hygiene\\_products](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/FlagPost/2018/November/Removing_GST_on_feminine_hygiene_products)>.

out of the mere fact they menstruate. With this legislative reform as a starting point, reference to existing paid menstrual leave statutory schemes in other jurisdictions provides useful context for the implementation of a statutory scheme in Australia.

In 1947, Japan passed a law allowing for women with painful periods, or whose job might exacerbate period pain, to take time off.<sup>174</sup> This law was developed in response to a surge in women joining the Japanese workforce after World War II, coupled with American occupation forces advising the country to provide women with days off during menstruation.<sup>175</sup> Article 68 of the *Labour Standards Act 1947* (Japan) now provides that '[w]hen a woman for whom work during menstrual periods would be especially difficult has requested leave, the employer shall not have the said woman work on days of the menstrual period.'<sup>176</sup> Importantly, while this law requires that women who experience especially difficult menstruation be allowed to take leave, it does not mandate that companies must provide paid or unpaid leave, or extra pay for women who choose to work during menstruation.

Since its implementation, a 1986 study showed that the number of Japanese women making use of the entitlement declined from 20% in 1960 to 13% in 1981.<sup>177</sup> That study indicated that societal pressures drove the reason for this decline in uptake, with Japanese citizens disapproving its use.<sup>178</sup> Due to a lack of publicly available data, the present use of menstrual leave among Japan's menstruating population is unclear.<sup>179</sup>

In Indonesia, under art 81 of the *Labour Act No 13 of 2003* (Indonesia), women are entitled to two days' paid menstrual leave per month. However, this entitlement has historically been poorly enforced, even since its inception.<sup>180</sup> Since 2001 in South Korea, women are entitled to paid menstrual leave under art 73 of the *Labour Standards Act* (South Korea), as well as a guarantee of additional pay if they do not take the menstrual leave to which they are entitled. However, this scheme has been heavily criticised by men who view it as a form of reverse discrimination.<sup>181</sup> Uptake of the entitlement in South Korea is also falling. A 2013 survey showed that

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<sup>174</sup> See, eg, Justin McCurry and Stewart Leavenworth, 'Period Policy in Asia: Time Off "May Be Seen as a Sign of Weakness"', *The Guardian* (online, 4 March 2016) <<https://www.theguardian.com/lifeandstyle/2016/mar/04/period-policy-asia-menstrual-leave-japan-women-work>>. See generally, Izumi Nakayama, *Periodic Struggles: Menstruation Leave in Modern Japan* (PhD Thesis, Harvard University, 2017).

<sup>175</sup> Alice Dan, 'The Law and Women's Bodies: The Case of Menstruation Leave in Japan' (1986) 7(1–2) *Health Care for Women International* 1, 8.

<sup>176</sup> *Ibid* 9.

<sup>177</sup> *Ibid*.

<sup>178</sup> *Ibid* 9–11.

<sup>179</sup> Levitt and Barnack-Tavlaris (n 4) 562.

<sup>180</sup> Mari Pangestu and Medelina Hendytio, 'Survey Responses from Women Workers in Indonesia's Textile, Garment, and Footwear Industries' (Working Paper, World Bank, November 1999) <<https://elibrary.worldbank.org/doi/abs/10.1596/1813-9450-1755>>.

<sup>181</sup> Jung Min-ho, Kim Bo-eun and Bahk Eun-ji, 'Menstrual Leave — An Entitlement Men Reject', *Korea Times* (online, 30 October 2012) <[http://www.koreatimes.co.kr/www/news/culture/2014/04/399\\_123535.html](http://www.koreatimes.co.kr/www/news/culture/2014/04/399_123535.html)>.

23.6% of South Korean women used the leave, but by 2017 that rate had fallen to 19.7%.<sup>182</sup>

Taiwan has also embraced a similar type of paid menstrual leave. Women can take three days off a year — over and above the 30 days' half-pay sick leave that all workers are permitted to take. From 2002, art 14 of the *Gender Equality in Employment Act* (Taiwan) has provided women three days' menstrual leave per year. Those three days are not calculated toward the 30 days of the employee's 'common sick leave', in effect, providing women up to 33 days of 'health-related leave' per year. However, a 2011 study exposed flaws in Taiwan's paid menstrual leave scheme.<sup>183</sup> Many participants in the study reported that they did not understand the regulations around menstrual leave, including how to apply for it and how to use it. Participants also reported that they seldom used menstrual leave because: the regulations were not flexible; no one they knew had applied for it; there were other types of leave that might otherwise apply; nobody could cover their jobs while they took leave; and the organisation for which they worked needed medical certificates on application for menstrual leave.<sup>184</sup>

In 2015, the Vietnamese Government issued a new decree to ensure greater rights for female employees. That regulatory change under *Decree No 85/2015/ND-CP* (Vietnam) came into effect on 15 November 2015.<sup>185</sup> Under those regulations, female employees now receive more health benefits, greater representation in unions and rights of unilateral termination of labour contracts. In particular, under art 7(2)(a) female employees are entitled to receive paid menstrual leave, which equates to 30 minutes per day and for a minimum of three days each month. Difficulties associated with the enforcement of this regulation present a major problem in Vietnam, where many women work in informal sector occupations and few resources are allocated for labour inspections.<sup>186</sup> With this monitoring largely lacking, the onus for compliance falls primarily on individual companies, which do not always meet their legal obligations.<sup>187</sup> Despite there being sparse research on this subject, the few available studies suggest that Vietnamese women working in large factories or offices cannot always be confident that their legal rights, including those with respect to paid menstrual leave, will be respected.<sup>188</sup>

There are also now five Chinese provinces — Qinghai, Shanxi, Hubei, Anhui and Ningxia — allowing women to take leave for painful periods, with the threat

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<sup>182</sup> Julia Hollingsworth, 'Should Women Be Entitled to Period Leave? These Countries Think So', *CNN* (online, 21 November 2020) <<https://edition.cnn.com/2020/11/20/business/period-leave-asia-intl-hnk-dst/index.html>>.

<sup>183</sup> See generally Chueh Chang, Fen-Ling Chen, Chu-Hui Chang and Ching-Hui Hsu, 'A Preliminary Study on Menstrual Health and Menstrual Leave in the Workplace in Taiwan' (2011) 30(5) *Taiwan Journal of Public Health* 436.

<sup>184</sup> *Ibid.*

<sup>185</sup> Dezan Shira & Associates, 'Improved Rights for Female Employees in Vietnam: Decree 85', *Vietnam Briefing* (online, 21 December 2015) <<https://www.vietnam-briefing.com/news/improved-rights-female-employees-decree-85.html/>>.

<sup>186</sup> See, eg, Marian Baird and Michele Ford, 'International Standards on Women at Work: Vietnam', *Investing in Women* (Web Page, July 2017) <[https://investinginwomen.asia/wp-content/uploads/2018/01/FS\\_IS-and-Vietnamese-legislation.pdf](https://investinginwomen.asia/wp-content/uploads/2018/01/FS_IS-and-Vietnamese-legislation.pdf)>.

<sup>187</sup> *Ibid.*

<sup>188</sup> *Ibid.*

that employers will be penalised if they do not permit that time off.<sup>189</sup> Notwithstanding the recognition of the entitlement, coupled with the fact that Chinese labour laws prohibit gender discrimination in the hiring process,<sup>190</sup> a report published by Human Rights Watch in April 2018 indicated that discriminatory job advertisements based on gender in China are increasing, attempting to avoid hiring those who menstruate.<sup>191</sup> For example, the Report found several advertisements that said ‘men only’, ‘men preferred’, or ‘suitable for men’. In other cases, the company preferred female applicants to be ‘married with children’.<sup>192</sup>

Beyond Asia, since 2015 Zambia has had a statutory entitlement for all women to take a day off each month for menstrual leave, known as ‘Mother’s Day’ because discussing periods is taboo. Lawmakers have made it clear that Mother’s Day is only intended for those who are actually ill: ‘If you absent yourself yet you are found in a disco house, then it will not be taken as Mother’s Day’.<sup>193</sup> Critics of Zambia’s paid menstrual leave scheme have suggested that the ambit of ‘Mother’s Day’ is too broad; they say the legal definition is not precise enough, leaving women to take the day when they want without having to provide any medical justification.<sup>194</sup>

In Mexico, only women working in the Federal Court are eligible for one day of menstrual leave if they experience physical complications. However, the policy does not state if this day is offered per year or per month.<sup>195</sup> Currently, the entitlement is not available to women more broadly. In Chile, a bill, which was introduced in 2017 but is yet to be enacted, proposes to allow women paid leave if they have been diagnosed with endometriosis and/or dysmenorrhea.<sup>196</sup>

In Europe, there have been no successful implementations of any legislative schemes permitting paid menstrual leave. Attempts at such schemes were made in

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<sup>189</sup> Kelsey Cheng, ‘Chinese Province Orders All Companies to Grant Women ‘Period Leave’ for Menstrual Pain’, *Daily Mail* (online, 9 April 2019) <<https://www.dailymail.co.uk/news/article-6899255/Chinese-province-orders-companies-grant-women-period-leave-menstrual-pain.html>>.

<sup>190</sup> Sadie Yang and Ao Li, ‘Legal Protection against Gender Discrimination in the Workplace in China’ (2009) 17(2) *Gender and Development* 295.

<sup>191</sup> Brian Stauffer, ‘Only Men Need Apply’: *Gender Discrimination in Job Advertisements in China* (Report, Human Rights Watch, 23 April 2018) <<https://www.hrw.org/report/2018/04/23/only-men-need-apply/gender-discrimination-job-advertisements-china>>.

<sup>192</sup> *Ibid.*

<sup>193</sup> Kennedy Gondwe, ‘Zambia Women’s “Day Off for Periods” Sparks Debate’ *BBC News* (online, 4 January 2017) <<https://www.bbc.com/news/world-africa-38490513>> quoting Zambia’s Labour Minister, Joyce Nonde-Simukoko.

<sup>194</sup> *Ibid.*

<sup>195</sup> ‘Mexico: Agreement on Menstrual Leave Policy for Public Servants in Mexico’, *MH Hub* (Web Page, 30 June 2017) <<https://mhhub.org/hive/policy/menstrual-leave/recMpMmKwVUJsgWWd/>>.

<sup>196</sup> ‘Menstrual Law in Chile’, *MH Hub* (Web Page, 31 August 2017) <<https://mhhub.org/hive/policy/menstrual-leave/recT8pla1LMHmAV6K/>>.

Russia in 2013,<sup>197</sup> and later in Italy in 2017.<sup>198</sup> However, both failed after being subject to substantial criticism. For example, in Russia, the proposed bill was the subject of commentary by Mikhail Degtyaryov, a member of the Liberal Democratic Party of Russia, who wrote on his website that '[t]he pain for the fair sex is often so intense that it is necessary to call an ambulance', sparking outrage from Russian feminist groups,<sup>199</sup> and ultimately, disbandment of the bill.

Despite its failure in Italy, a positive outcome emerged from the Bill, which proposed to allow three days' paid leave per month for Italian women experiencing debilitating symptoms while menstruating.<sup>200</sup> An increased focus on the debilitating impacts of women's menstruation in the European Union ('EU') evolved, leading to the preparation of the 2018 *Policy Brief: Women and Menstruation in the EU*.<sup>201</sup>

While not directly related to paid menstrual leave, it is worthwhile mentioning here that Scotland has recently become the first country to make period products free. The *Period Products (Free Provision) (Scotland) Act 2021* (Scot) became an Act on 12 January 2021, imposing a legal duty on local authorities to ensure that free items, such as tampons and sanitary pads, are available to 'everyone in Scotland who needs them'.<sup>202</sup> New Zealand has also acted to make period products free in all schools.<sup>203</sup> Following suit, in 2020 Victoria became the first Australian state or territory to provide free pads and tampons in all government schools, installing dispensing machines for those products in each public school.<sup>204</sup> South Australia has similarly passed the Statutes Amendment (Free Menstrual Hygiene Products Pilot Program) Bill 2020 (SA), which allows free access to pads and tampons for all female students in public schools who are in year five and above. The New South Wales Department of Education has also just announced that it will trial a program to hand out free pads and tampons in its public schools.<sup>205</sup> Moreover, this year, Isobel Marshall was named the 2021 Young Australian of the Year in

<sup>197</sup> Damien Gayle, 'Russian MP Accused of Sexism for Proposing Law Giving Women Two Paid Days off a Month When They Are on Their Period', *Daily Mail* (online, 2 August 2013) <<https://www.dailymail.co.uk/news/article-2382637/Russian-MP-proposes-law-giving-women-period-2-paid-days-work.html>>. Curiously, post-World War I, some factories in Russia implemented some of the World's first menstrual leave schemes. Those policies were only in use for five years during the 1920s when female workers requested that they be stopped because they were not necessary and resulted in employers favouring 'cheaper' and 'more reliable' male staff (sometimes even the termination of the female employees in order to replace them with men): see, eg, Melanie Ilic, 'Soviet Women Workers and Menstruation: A Research Note on Labour Protection in the 1920s and 1930s' (1994) 46(8) *Europe-Asia Studies* 1409.

<sup>198</sup> Anna Momigliano, 'Italy Set to Offer 'Menstrual Leave' for Female Workers', *The Independent* (online, 25 March 2017) <<https://www.independent.co.uk/news/world/europe/italy-menstrual-leave-reproductive-health-women-employment-a7649636.html>>.

<sup>199</sup> Gayle (n 197).

<sup>200</sup> Momigliano (n 198).

<sup>201</sup> Maguire et al (n 10).

<sup>202</sup> Explanatory Notes, *Period Products (Free Provision) (Scotland) Bill* (SP Bill 45) <<https://www.parliament.scot/bills-and-laws/bills/period-products-free-provision-scotland-bill>>, para 9. See also *Period Products (Free Provision) (Scotland) Act 2021* (Scot) s 1.

<sup>203</sup> See, eg, 'Free Period Products in Schools to Combat Poverty', *New Zealand Government* (Web Page, 3 June 2020) <<https://www.beehive.govt.nz/release/free-period-products-schools-combat-poverty>>.

<sup>204</sup> See, eg, 'Free Pads and Tampons in All Government Schools', *Premier of Victoria* (Web Page, 28 July 2020) <<https://www.premier.vic.gov.au/free-pads-and-tampons-all-government-schools>>.

<sup>205</sup> See, eg, 'Free Hygiene Products for School Students', *NSW Government* (Web Page, 29 March 2021) <<https://education.nsw.gov.au/news/latest-news/free-hygiene-products-for-school-students>>.

recognition of her work to fight menstrual stigma and period poverty.<sup>206</sup> Evidently, attitudes toward menstruation are starting to evolve in a positive direction, particularly in educational contexts, which has clear benefits for young adults in Australia.

## VI Conclusion and Recommendations

Societal attitudes regarding menstruation are improving in Australia. Developments in the understanding and support of women and families encountering domestic violence provide a positive precedent for introducing a paid menstrual leave scheme, as does the removal of GST in respect of women's menstrual items, and the provision of free sanitary products to school-aged girls in a number of states. As such, we share a healthy level of optimism surrounding Australia's capability to achieve further progress, particularly as it relates to learning from international jurisdictions where statutory menstrual leave schemes exist, but are rarely used due to social stigma or for fear of negatively impacting a woman's position at work. Australia must learn from what has not been successful elsewhere, particularly as shame and stigma regarding paid menstrual leave remains one of the largest jigsaw pieces in the paid menstrual leave puzzle.

Our answer to the vexed question of whether there should be an entitlement to paid menstrual leave for Australian women in the workplace is a resounding 'yes'. That answer is, of course, coupled with the recommendation that if such a scheme were to be implemented in Australia, it must be supported by significant educational and cultural shifts, so as to facilitate women's access to the entitlement without discrimination or accompanying uncertainty at work. Such considerations sit within broader substantive gender equality debates in which, while ultimately beneficial to women, the introduction of a paid menstrual leave provision is not without considerable apprehension. It remains to be seen whether the Australian Government's renewed interest in the prevention of gender-based violence and improved status of women in the workplace, in response to allegations in 2021 of sexual assault and sexual harassment in the Australian Parliament, will be sustained.

To that end, in the words of Winkler, 'we must be very careful not to impose the burden of transforming societal norms on individuals alone who are often in the most [marginalised] or vulnerable situations. Such transformation requires us all to contribute to broader societal change'.<sup>207</sup> People's negative perceptions of menstruation improve when people develop their knowledge about menstrual-related conditions.<sup>208</sup> We conclude by extending Seear's recommendation for raising awareness regarding endometriosis to menstrual-related issues more broadly, including in relation to the introduction of a paid menstrual leave statutory scheme:

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<sup>206</sup> See, eg, 'Isobel Marshall: Social Entrepreneur — Young Australian of the Year 2021', *Australian of the Year Awards*, (Web Page, 2021) <<https://www.australianoftheyear.org.au/recipients/isobel-marshall/2276/>>.

<sup>207</sup> Inga Winkler 'Introduction: Menstruation as Fundamental' in Bobel et al (eds), *The Palgrave Handbook of Critical Menstruation Studies* (Palgrave MacMillan, 2020) 1, 12.

<sup>208</sup> Gayoung Moon, Inkyung Kim, Habhin Kim, Suwan Choe, Soyeon Jeon, Jeonghun Cho, Sujeong Hong and Jisan Lee, 'How Can We Improve Knowledge and Perceptions of Menstruation? A Mix-Methods Research Study' (2020) 20(1) *BMC Women's Health* 214.



There needs to be a very well-resourced campaign in this respect, one that is not simply reliant upon the efforts of volunteers and advocates to generate awareness. A much more comprehensive strategy for raising the public profile of both menstrual pain and the condition could be devised, in consultation with government, social scientists, clinicians, patients, advocacy groups, health communicators and media strategists. There is an urgent need for a dedicated community ...<sup>209</sup>

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<sup>209</sup> Seear (n 13) 1226.



# *Before the High Court*

## A “Rational and Humane Criminal Code”? *Bell v Tasmania* and the Reach of Honest and Reasonable Mistake of Fact

Andrew Dyer\*

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### *Abstract*

In *Bell v Tasmania*, the appellant (‘Bell’) was convicted of the Tasmanian offence of supplying a controlled drug to a person aged under 18 years. Bell claimed that he believed on reasonable grounds that the person to whom he supplied the drug was 20 years old. However, the trial judge refused to leave honest and reasonable mistake with the jury because, even if Bell’s asserted belief had been accurate, he would still have been committing a (much less serious) offence: supplying a controlled drug to ‘another person’. This column argues that the High Court of Australia should uphold Bell’s submission that the trial judge was wrong to withhold honest and reasonable mistake of fact from the jury. A person should not be convicted of a crime that s/he reasonably believed her or himself not to be committing. That is so even if s/he is intentionally committing some lesser crime. The High Court should reverse its past decisions that hold otherwise.

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## I Introduction

In *R v Prince*,<sup>1</sup> the accused had been convicted of the statutory offence of unlawfully taking an unmarried girl who was under the age of 16 years out of her father's possession and against his will. But the jury had also found it possible that Prince believed on reasonable grounds that the girl, Annie Phillips, who 'looked very much older'<sup>2</sup> than 16 and had told him that she was 18,<sup>3</sup> was 16 years or older. The question for the 16 judges who sat in the Court for Crown Cases Reserved in *Prince* was simple. Should Prince have been judged on the facts that he reasonably believed to exist?<sup>4</sup> Or was he rightly convicted of an imprisonable offence that he had reasonably thought he was not committing? Fifteen judges found that Prince had been rightly convicted, Bramwell B holding that, even if the facts had been as Prince thought they were, he would still have been doing something 'wrong'.<sup>5</sup> 'I do not say illegal', Bramwell B continued, 'but wrong.'<sup>6</sup> In other words, because Prince would still have been taking the girl from her father without his consent, he would have been acting immorally. The lone dissident, Brett J, thought that the honest and reasonable mistake of fact defence<sup>7</sup> operated more broadly than this. For Brett J, Prince should have been excused, because, if the facts had been as he reasonably thought they were, he would have been guilty of 'no criminal offence at all'.<sup>8</sup>

Nearly 80 years later, in *Bergin v Stack*, the High Court of Australia accepted that Brett J's approach was 'to be regarded as stating a *minimum* requirement'.<sup>9</sup> For an accused to be able to rely on honest and reasonable mistake of fact, Fullagar J held, his or her claimed belief must have been in circumstances that, if they had existed, 'would have meant that no offence was being committed'.<sup>10</sup> More recently,

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<sup>1</sup> *R v Prince* (1875) LR 2 CCR 154 ('*Prince*').

<sup>2</sup> Ibid 155.

<sup>3</sup> Ibid 156 (Brett J).

<sup>4</sup> See Rupert Cross, 'Centenary Reflections on *Prince's Case*' (1975) 91(4) *Law Quarterly Review* 540, 540.

<sup>5</sup> *Prince* (n 1) 174. Seven other judges concurred in Bramwell B's judgment at 173 (Kelly CB, Cleasby, Pollock and Amphlett BB, Grove, Quain and Denman JJ).

<sup>6</sup> Ibid 174. See also 179 (Denman J).

<sup>7</sup> At the time *Prince* was decided, honest and reasonable mistake of fact was a true defence: that is, something for the accused to prove. See, eg, *Sherras v De Rutzen* [1895] 1 QB 918, 921 (Day J); *Bank of New South Wales v Piper* [1897] AC 383, 389 (Privy Council); *Maher v Musson* (1934) 52 CLR 100, 105–6 (Dixon J), 109 (Evatt and McTiernan JJ). It is now well-established, in code and common law jurisdictions alike, that if there is evidence of honest and reasonable mistake of fact, the Crown must disprove this ground of exculpation: see, eg, *Brimblecombe v Duncan* [1958] Qd R 8, 12–15 (Philp J, Matthews J agreeing at 16), 22–3 (Stanley J); *He Kaw Teh v The Queen* (1985) 157 CLR 523, 534–5 (Gibbs CJ, Mason J agreeing at 546), 558–9 (Wilson J), 573–5 (Brennan J), 591–4 (Dawson J) ('*He Kaw Teh*'); *Attorney-General's Reference No 1 of 1989*; *R v Brown* [1990] Tas R 46, 55–61 (Neasey J) ('*Brown*').

<sup>8</sup> *Prince* (n 1) 170.

<sup>9</sup> *Bergin v Stack* (1953) 88 CLR 248, 262 (Fullagar J, Williams ACJ agreeing at 253, Taylor J agreeing at 277) (emphasis in original) ('*Bergin*').

<sup>10</sup> Ibid.

in *CTM v The Queen*, six Justices made obiter dicta statements confirming this proposition.<sup>11</sup>

In *Bell v Tasmania*,<sup>12</sup> the appellant ('Bell') asks the High Court to overrule *Bergin*.<sup>13</sup> According to Bell, for a person to be acquitted on the basis of honest and reasonable mistake, it should be unnecessary for the relevant belief to have been in a state of affairs that, if they had existed, would have rendered his or her conduct 'non-criminal'.<sup>14</sup> He submits that, instead, it should be enough that the accused might have believed on reasonable grounds that s/he was not committing *the particular offence at issue*.<sup>15</sup> This submission raises important questions about criminal responsibility. In this column, I argue that the High Court should uphold it.

In the 20<sup>th</sup> century, the law relating to honest and reasonable mistake of fact developed in important respects. All such developments were protective of individual liberty. Some reflected a view that 'there should be a close correlation between moral culpability and legal responsibility'.<sup>16</sup> Undoubtedly, it is 'a large step'<sup>17</sup> for the High Court to set aside one of its past decisions, especially one that it has recently 'taken up'<sup>18</sup> (even if, as here, only in obiter dicta). Nevertheless, in *Bell (HCA)*, it is a step that the Court should take. Such a ruling would continue the criminal law's progress away from 'the objective standards of early law'.<sup>19</sup> Moreover, the decisions that Bell asks the Court to reconsider were perhaps not as carefully considered as they could have been. The facts in *Bergin* and *CTM* did not highlight, as the facts in *Bell* do, the injustice that the impugned rule can produce.

## II The Proceedings So Far

Following an interaction between Bell and a girl aged 15, Bell was charged with rape<sup>20</sup> and supplying a controlled drug to a child<sup>21</sup> (that is, a person aged under 18 years).<sup>22</sup> The trial judge, Blow CJ, left with the jury the offence of having sexual intercourse with a person under the age of 17 years,<sup>23</sup> as an alternative to the rape charge. Bell admitted that he had had sexual intercourse with the complainant and

<sup>11</sup> *CTM v The Queen* (2008) 236 CLR 440, 447 [8], 453–4 [27] (Gleeson CJ, Gummow, Crennan and Kiefel JJ), 491 [174] (Hayne J), 497 [199] (Heydon J) ('*CTM*'). See also *R v Reynhoudt* (1962) 107 CLR 381, 385–6 (Dixon CJ), 389 (Kitto J), 395–6 (Taylor J), 399 (Menzies J), 408, 410 (Owen J) ('*Reynhoudt*').

<sup>12</sup> *Bell v Tasmania* (High Court of Australia, Case No H2/2020) ('*Bell (HCA)*').

<sup>13</sup> Chauncey Aaron Bell, 'Appellant's Submissions', Submission in *Bell v Tasmania*, Case No H2/2020, 24 July 2020, [29]; Chauncey Aaron Bell, 'Appellant's Further Submissions', Submission in *Bell v Tasmania*, Case No H2/2020, 29 March 2021, [13] ('*Bell Further Submissions*').

<sup>14</sup> *CTM* (n 11) 497 [199] (Heydon J).

<sup>15</sup> *Bell Further Submissions* (n 13) [23].

<sup>16</sup> *Wilson v The Queen* (1992) 174 CLR 313, 334 (Mason CJ, Toohey, Gaudron and McHugh JJ).

<sup>17</sup> Transcript of Proceedings, *Bell v Tasmania* [2021] HCATrans 5, 881 (Kiefel CJ) ('*Transcript of Proceedings* (2021)').

<sup>18</sup> *Ibid* 885 (Kiefel CJ).

<sup>19</sup> *Thomas v The King* (1937) 59 CLR 279, 308 (Dixon J) ('*Thomas*').

<sup>20</sup> Contrary to *Criminal Code Act 1924* (Tas) sch 1 ('*Tasmanian Criminal Code*') s 185(1).

<sup>21</sup> Contrary to *Misuse of Drugs Act 2001* (Tas) s 14 ('*Misuse of Drugs Act*').

<sup>22</sup> *Ibid* s 3(1) (definition of 'child').

<sup>23</sup> Contrary to *Tasmanian Criminal Code* (n 20) s 124(1).

injected her with methylamphetamine; but he said that the intercourse was consensual and that the complainant had told him, and he believed, that she was 20 years old.<sup>24</sup> Blow CJ directed the jury that, if it were to consider the alternative charge, it had to acquit the accused if it thought it possible that he believed on reasonable grounds that the complainant was aged at least 17.<sup>25</sup> But his Honour refused to leave honest and reasonable mistake of fact with the jury on the drugs charge. As the Chief Justice explained:

When a person has sexual intercourse with a young person under the age of 17 years, and holds an honest and reasonable but mistaken belief that that young person has attained that age, that person engages in conduct which, if the belief were true, would be wholly innocent. That is not the case when someone supplies a controlled drug to a child whilst holding an honest and reasonable but mistaken belief that the child is someone who has attained the age of 18 years. That is because the supply of a drug to someone who has attained that age is not an entirely innocent act, but an offence contrary to s 26 of the *Misuse of Drugs Act* [supplying a controlled drug to another person].<sup>26</sup>

His Honour pointed to the wording of s 14 of the *Tasmanian Criminal Code*, which provides that:

Whether criminal responsibility is entailed by an act or omission done under an honest and reasonable, but mistaken, belief in the existence of any state of facts the existence of which would excuse such act or omission, is a question of law, to be determined on the construction of the statute constituting the offence.<sup>27</sup>

If Bell's alleged belief had been accurate, Blow CJ observed, this would not have 'excuse[d]' his act of drug supply.<sup>28</sup> That act would still have been a criminal act — the summary offence<sup>29</sup> created by s 26. Moreover, Blow CJ continued, 'leading common law cases ... support the view'<sup>30</sup> that honest and reasonable mistake of fact only operates to excuse the accused who believes in a state of affairs that, if they had existed, would have rendered his or her conduct non-criminal.

The jury convicted Bell of supplying a controlled drug to a child, but did not reach a verdict on the rape count.<sup>31</sup> At a retrial, a second jury found him not guilty of rape, but guilty of the alternative sexual charge.<sup>32</sup> Evidently, it considered that the Crown had proved that Bell did not believe on reasonable grounds that the complainant was aged at least 17. It nevertheless remains possible that the first jury would have seen things differently, and would therefore have acquitted him of the

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<sup>24</sup> *Bell v Tasmania* (2019) 279 A Crim R 553, 556–7 [11] ('*Bell (TASCCA)*').

<sup>25</sup> See *Tasmanian Criminal Code* (n 20) ss 14, 14B.

<sup>26</sup> *Tasmania v Bell* [2019] TASSC 34, [8] ('*Bell (TASSC)*').

<sup>27</sup> *Tasmanian Criminal Code* (n 20) s 14.

<sup>28</sup> *Bell (TASSC)* (n 26) [11]. See also at [4].

<sup>29</sup> *Misuse of Drugs Act* (n 21) s 18.

<sup>30</sup> *Bell (TASSC)* (n 26) [13].

<sup>31</sup> *Bell (TASCCA)* (n 24) 557 [12].

<sup>32</sup> *Ibid.*

drugs charge had Blow CJ left honest and reasonable mistake with it.<sup>33</sup> In the Tasmanian Court of Criminal Appeal ('TASCCA'), Bell claimed that Blow CJ had erred by not doing so.

Brett J took the most liberal approach in the TASCCA. According to his Honour, the facts of the present case showed the injustice that can be caused by the rule that Blow CJ applied. The offence with which Bell had been charged is a very serious offence, punishable by up to 21 years' imprisonment.<sup>34</sup> The offence that Bell said he thought he was committing is a much less serious offence, punishable by up to four years' imprisonment.<sup>35</sup> Why should a person be convicted of a significantly more serious offence than that which s/he reasonably believed her or himself to be committing?<sup>36</sup> Is there not a mismatch between culpability and liability in such circumstances? Nevertheless, Brett J felt constrained by authority to dismiss the appeal.<sup>37</sup> As his Honour noted, in cases such as *Bergin*, 'Australian judges' have 'cited with approval' Brett J's contention in *Prince* that, for the accused to be able to rely on honest and reasonable mistake of fact, his or her mistake must be such as to render him or her guilty of no criminal wrongdoing.<sup>38</sup>

Likewise, Martin AJ (with whom Pearce J agreed)<sup>39</sup> observed that 'the essential principle as stated by Fullagar J' in *Bergin* 'has not been overruled' and, in fact, 'was confirmed by the majority in *CTM*'.<sup>40</sup> Moreover, his Honour, unlike Brett J,<sup>41</sup> thought that Blow CJ had been right to hold that the word 'excuse' in s 14 of the *Tasmanian Criminal Code* 'means excused from any criminal offence'.<sup>42</sup> Martin AJ did seem to accept that it might be problematic to convict a person of a major offence when that person reasonably believed that s/he was committing a minor offence.<sup>43</sup> But, despite the 'significant disparity'<sup>44</sup> between the maximum penalties for the s 14 and s 26 offences, his Honour held that the Chief Justice had been right to treat the accused's asserted belief as being irrelevant to his guilt of the former crime.<sup>45</sup>

On 5 June 2020, Bell and Gageler JJ granted Bell special leave to appeal to the High Court against his conviction for the s 14 offence. '[O]n one view', Bell J said, the appellant was 'seeking a somewhat modest result'<sup>46</sup> — a result that would

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<sup>33</sup> Ibid [14] 557.

<sup>34</sup> *Misuse of Drugs Act* (n 21) s 14.

<sup>35</sup> Ibid s 26.

<sup>36</sup> *Bell (TASCCA)* (n 24) 561–2 [30]–[31], 563 [33], 564 [37] (Brett J). See also on this point Paul A Fairall and Malcolm Barrett, *Criminal Defences in Australia* (LexisNexis Butterworths, 5<sup>th</sup> ed, 2017) 70 [2.42].

<sup>37</sup> *Bell (TASCCA)* (n 24) 564 [37]–[38].

<sup>38</sup> Ibid 563 [33] quoting Fairall and Barrett (n 36) 70 [2.42].

<sup>39</sup> *Bell (TASCCA)* (n 24) 554 [1].

<sup>40</sup> Ibid 568 [56].

<sup>41</sup> Ibid 562–3 [32].

<sup>42</sup> Ibid 568 [57].

<sup>43</sup> Ibid 570 [68].

<sup>44</sup> Ibid 570 [69].

<sup>45</sup> Ibid 571 [70].

<sup>46</sup> Transcript of Proceedings, *Bell v Tasmania* [2020] HCATrans 77, 226–8 ('Transcript of Proceedings (2020)').

prevent ‘absolute liability [from] attach[ing] ... to an element of criminal liability, namely, the age of the recipient of the drug’.<sup>47</sup> In my view, this is the correct view. Insofar as criminal law principle is concerned, the step that Bell is asking the High Court to take is a small one — which, moreover (as argued below in this column), would expand on 20<sup>th</sup> century legal developments regarding criminal responsibility.

There is a complication, however. When *Bell (HCA)* came on for hearing on 3 February 2021 before Kiefel CJ, Gageler, Keane, Edelman and Steward JJ, various Justices seemed to think that the source of the ‘defence’ of honest and reasonable mistake of fact in Tasmania is not s 14 of the *Tasmanian Criminal Code*, but the common law.<sup>48</sup> On this view, which Steward J appeared to believe<sup>49</sup> was reflected in Tasmanian authority,<sup>50</sup> if the ‘statute constituting the offence’<sup>51</sup> does not exclude honest and reasonable mistake expressly or by necessary implication,<sup>52</sup> ‘the common law [relating to honest and reasonable mistake] comes into operation’.<sup>53</sup> This, then, raises the question of what the common law is. More particularly, it raises the question of whether the common law, as stated in *Bergin* and *CTM*, should be changed in the manner advocated by Bell. Indeed, the same question seemingly arises even if s 14 creates the ‘defence’, because, as Burbury CJ stated in *R v Martin*, ‘the content ... of mistake of fact as a defence recognised by the *Code* must ... be ascertained from the common law *as judicially determined from time to time*’.<sup>54</sup>

Because of the importance of this question — that is, because, in this respect, the step that Bell is asking the Court to take is *not* a modest one — Kiefel CJ adjourned proceedings, to enable the State and Territory Attorneys-General to intervene should they wish to do so.<sup>55</sup>

### III Why the Appeal Should be Allowed

#### A Three 20<sup>th</sup> Century Developments

In the 20<sup>th</sup> century, the law concerning the common law ‘defence’ of honest and reasonable mistake of fact became more favourable to the accused. Indeed, one of these liberalising developments seems to have occurred in *Bergin* itself.

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<sup>47</sup> Ibid 397–8.

<sup>48</sup> Transcript of Proceedings (2021) (n 17) 196–202, 206–8 (Kiefel CJ), 710–14 (Keane J), 143–159, 299–307 (Steward J).

<sup>49</sup> Ibid 299–307.

<sup>50</sup> See *Brown* (n 7) 55–6, 61 (Neasey J, Nettleford, Cox, Underwood and Wright JJ agreeing at 63).

<sup>51</sup> *Tasmanian Criminal Code* (n 20) s 14.

<sup>52</sup> *R v Martin* [1963] Tas SR 103, 149 (Neasey J) (‘*Martin*’).

<sup>53</sup> Transcript of Proceedings (2021) (n 17) 206–7 (Kiefel CJ). See also *Criminal Code Act 1924* (Tas) s 8.

<sup>54</sup> *Martin* (n 52) 110 (Burbury CJ) (emphasis added). See also at 111; *Brown* (n 7) 56. As we have seen, in *Bell (TASCCA)* (n 24) Brett J, who appeared to consider that s 14 is the source of honest and reasonable mistake in Tasmania (at 558 [16]), construed that section as he did primarily because of ‘the weight of [common law] ... authority’ (at 564 [37]) and despite his doubts as to the correctness of such a construction: at 562–3 [32].

<sup>55</sup> Transcript of Proceedings (2021) (n 17) 986–94.



The first noteworthy development is suggested by the inverted commas around the word ‘defence’ in the immediately prior paragraph.<sup>56</sup> Until the High Court’s decision in *He Kaw Teh v The Queen*,<sup>57</sup> it seemed that, where honest and reasonable mistake of fact applied and was raised by the accused, it was for the accused to prove on the balance of probabilities that s/he had the relevant exculpatory belief.<sup>58</sup> In *He Kaw Teh*, the High Court unanimously held that this approach was no longer justified. Once there is evidence of honest and reasonable mistake, their Honours held,<sup>59</sup> it is for ‘the prosecution to establish ... [the defendant’s] guilt’<sup>60</sup> by proving beyond reasonable doubt that s/he made no such mistake. And, in *R v Brown*, the TASCCA accepted that the same applied ‘to all crimes under the *Criminal Code* and to which the *Criminal Code* applies’.<sup>61</sup> As Neasey J explained, because the ‘defence’ in Tasmania was ‘in essence the common law defence, the relevant onus of proof also fell to be determined according to the existing common law’.<sup>62</sup>

Two other developments are of greater significance to Bell’s argument in the High Court.

We have seen that, in *Prince*, eight judges held that the accused’s honest and reasonable mistaken belief that Annie Phillips was 18 years old did not excuse him, because Prince had ‘knowingly done a wrongful act, viz. taking the girl away from the lawful possession of her father against his will’.<sup>63</sup> In *Bergin* however, as suggested above, the High Court seemed to accept the more liberal rule stated by Brett J. An accused would not be prevented from relying on honest and reasonable mistake of fact simply because, if his or her belief were accurate, s/he would still have been acting immorally. Rather, Fullagar J suggested that an accused would be acquitted on this basis if, however morally dubious his or her conduct was, s/he believed on reasonable grounds that s/he was committing ‘no offence’.<sup>64</sup> Indeed, as early as 1889, in *R v Tolson*,<sup>65</sup> some judges had indicated their support for Brett J’s rule — or even the rule for which Bell now contends in *Bell (HCA)*. For Stephen J (with whom Grantham J agreed), Brett J in *Prince* had established ‘unanswerably’ that implied in every English criminal charge was the principle that the accused would be excused if s/he had a reasonable belief that s/he was committing no criminal offence.<sup>66</sup> Elsewhere in his judgment, Stephen J expressed the principle even more broadly. ‘I think it may be laid down as a general rule’, his Honour said, ‘that an alleged offender is deemed to act under that state of facts which he in good

<sup>56</sup> See, eg, *CTM* (n 11) 446 [6] (Gleeson CJ, Gummow, Crennan and Kiefel JJ).

<sup>57</sup> *He Kaw Teh* (n 7).

<sup>58</sup> See, eg, *Reynhoudt* (n 11) 389 (Kitto J), 395–6 (Taylor J), 399–400 (Menzies J), 408, 410 (Owen J); *Martin* (n 52) 123 (Burbury CJ), 142–3 (Crawford J), 154–5 (Neasey J).

<sup>59</sup> *He Kaw Teh* (n 7) 534–5 (Gibbs CJ, Mason J agreeing at 546), 558–9 (Wilson J), 573–5 (Brennan J), 591–4 (Dawson J).

<sup>60</sup> *Woolmington v Director of Public Prosecutions* [1935] AC 462, 481.

<sup>61</sup> *Brown* (n 7) 61.

<sup>62</sup> *Ibid* 55.

<sup>63</sup> *Prince* (n 1) 179.

<sup>64</sup> *Bergin* (n 9) 262.

<sup>65</sup> *R v Tolson* (1889) 23 QBD 168 (‘*Tolson*’).

<sup>66</sup> *Ibid* 190.

faith and on reasonable grounds believed to exist when he did the act alleged to be an offence'.<sup>67</sup> As the Attorney-General of Queensland has noted, intervening in *Bell (HCA)*, s 24(1) of the *Queensland Criminal Code*<sup>68</sup> gives effect to this broader approach.<sup>69</sup> The Attorney-General has persuasively argued that, when drafting s 24, Sir Samuel Griffith was influenced by s 420 of the Draft Code of Criminal Law for England, one of whose drafters was Stephen J.<sup>70</sup>

The other noteworthy development, most evident in the majority's approach in *Thomas v The King*,<sup>71</sup> is a hostility to attempts to attach a culpability requirement only to some actus reus elements of particular offences.

In *Tolson*, the accused fell 'within the very words of the statute', which made it a felony for a person 'being married, [to] marry any other person during the life of the former husband or wife'.<sup>72</sup> That said, a jury had found that, when she married for a second time, Mrs Tolson reasonably believed that her first husband was dead.<sup>73</sup> A majority of the Court for Crown Cases Reserved held that this belief excused Mrs Tolson. 'At common law', Cave J announced, 'an honest and reasonable belief in the existence of circumstances, which, if true, would make the act ... an innocent act has always been held to be a good defence.'<sup>74</sup> Yet, in *R v Wheat*, the Court of Criminal Appeal thought that Cave J had stated the principle 'too widely'.<sup>75</sup> That Court held that if the appellant had believed on reasonable grounds, though wrongly, that he was divorced at the time of his second marriage, he would still have been guilty of bigamy.<sup>76</sup> Mrs Tolson, Avory J stated, did not intend to marry during her husband's life.<sup>77</sup> But the person who remarries when reasonably believing her or himself to be divorced *does* intend to perform this act.<sup>78</sup>

As Latham CJ noted in *Thomas*,<sup>79</sup> however, the act of bigamy, in fact, is marrying someone in circumstances where: (a) the accused is married; and (b) his or her former wife or husband is alive. If it is an excuse reasonably to believe that circumstance (b) does not exist, why should the position be different if the accused reasonably believes in the absence of circumstance (a)?<sup>80</sup> For, as Dixon J showed, if an absolute liability standard applied to *either* circumstance (a) or (b), some morally innocent actors would be convicted of a serious offence.<sup>81</sup> The aversion to liability

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<sup>67</sup> Ibid 188.

<sup>68</sup> *Criminal Code Act 1899* (Qld) sch 1 ('*Queensland Criminal Code*').

<sup>69</sup> See, eg, Attorney-General (Qld), 'Submissions for the Attorney-General for the State of Queensland (Intervening), Submission in *Bell v Tasmania*, Case No H2/2020, 27 April 2021, [17] ('A-G (Qld) Submission') quoting *Anderson v Nystrom* [1941] St R Qd 56, 70 (Philp J).

<sup>70</sup> A-G (Qld) Submission (n 69) [27], [33]–[34].

<sup>71</sup> *Thomas* (n 19).

<sup>72</sup> *Tolson* (n 65) 171 (Wills J).

<sup>73</sup> Ibid 181 (Cave J).

<sup>74</sup> Ibid.

<sup>75</sup> *R v Wheat* (1921) 2 KB 119, 126.

<sup>76</sup> Ibid 125.

<sup>77</sup> Ibid.

<sup>78</sup> Ibid.

<sup>79</sup> *Thomas* (n 19) 292.

<sup>80</sup> Ibid.

<sup>81</sup> Ibid 302, 309–11.

without culpability, his Honour observed, ‘is deeply embedded in our criminal law’.<sup>82</sup> It is submitted that the same aversion — which admittedly has been perceived more readily by some judges<sup>83</sup> than others<sup>84</sup> — should lead the High Court in *Bell* (*HCA*) to hold that Blow CJ misdirected the jury about the culpability requirement for the s 14 offence. That said, it is necessary to deal with two counterarguments.

## **B Two Arguments in Favour of Dismissing Bell’s Appeal**

I noted above that, when granting Bell special leave to appeal, Bell J observed that, according to Blow CJ’s direction at trial, the ‘under the age of eighteen years’ element of the s 14 offence was an absolute liability element.<sup>85</sup> According to that direction, the Crown needed only to prove that Bell intentionally supplied the drug<sup>86</sup> to a person who was *in fact* under the age of 18. It must be conceded that there is an obvious difference between such an approach and that which Latham CJ and Dixon J condemned in *Thomas*.<sup>87</sup> Under Blow CJ’s approach, there is no danger of convicting a person who is morally innocent. Rather, a person who fully intended to commit a lesser crime is convicted of a more serious crime, the *actus reus* of which s/he unwittingly performed. This is justified, the Attorney-General of Tasmania submits, because once a person engages in criminal activity, s/he ‘run[s] the risk’ of committing a greater crime than s/he intended.<sup>88</sup>

The Tasmanian Attorney-General here refers to some remarks of Brett J in *Prince*,<sup>89</sup> but not all of the examples with which his Lordship illustrates the principle just noted support the Attorney-General’s submission. Take, for instance, the person who ‘strikes with a dangerous weapon, with intent to do grievous bodily harm, and kills’.<sup>90</sup> In many jurisdictions, this person will be convicted of murder<sup>91</sup> though s/he displays no subjective fault concerning the result (death) that s/he has caused. But s/he certainly displays objective culpability. S/he surely ought to have foreseen that death might result from his or her conduct. It follows that, whether such a person’s ‘change of normative position’ justifies his or her being held liable for murder,<sup>92</sup> such a case is different from that of *Bell* (*HCA*). In the latter case, if the accused

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<sup>82</sup> Ibid 300.

<sup>83</sup> See, eg, *Reynhoudt* (n 11) 387 (Dixon CJ), 389 (Kitto J); *He Kaw Teh* (n 7) 529–30 (Gibbs CJ), 583–4 (Brennan J), 590–1, 594 (Dawson J).

<sup>84</sup> See, eg, *Reynhoudt* (n 11) 394–5 (Taylor J), 402 (Menzie J), 405–6 (Owen J).

<sup>85</sup> Transcript of Proceedings (2020) (n 46) 30–40.

<sup>86</sup> See *Tasmanian Criminal Code* (n 20) s 13(1); *Vallance v The Queen* (1961) 108 CLR 56, 64 (Kitto J), 68–9 (Taylor J), 71–2 (Menzie J).

<sup>87</sup> As noted by Ashworth, who nevertheless disapproves of holding a person liable for a much more serious offence than s/he reasonably believed her or himself to be committing: Andrew Ashworth, ‘Should Strict Criminal Liability be Removed from All Imprisonable Offences?’ (2010) 45 *Irish Jurist* 1, 13–14.

<sup>88</sup> Attorney-General (Tas), ‘Submissions of the Attorney-General for the State of Tasmania (Intervening), Submission in *Bell v Tasmania*, Case No H2/2020, 27 April 2021, [17].

<sup>89</sup> Ibid citing *Prince* (n 1) 169–70.

<sup>90</sup> *Prince* (n 1) 169.

<sup>91</sup> See, eg, *Crimes Act 1900* (NSW) s 18(1)(a).

<sup>92</sup> See generally Andrew Ashworth, ‘A Change of Normative Position: Determining the Contours of Culpability in Criminal Law’ (2008) 11(2) *New Criminal Law Review* 232.

might have believed on reasonable grounds that the complainant was 20 years old, he displayed neither subjective nor objective blameworthiness. The supply of drugs *to a child* lay ‘outside the scope of foreseeable risk’.<sup>93</sup> Why should a person be held responsible for a crime that s/he reasonably believed her or himself not to be committing?<sup>94</sup> If s/he intended to commit some other crime,<sup>95</sup> that merely establishes that s/he should be held liable for that other crime.<sup>96</sup>

Another argument might be used to defend Blow CJ’s approach in *Bell* (TASSC). During the hearing on 3 February, Edelman J said to counsel for Bell:

[O]ne of the examples that is given in ... it might be *Prince’s Case*, is a situation where a person is charged with an offence of sexual assault on a girl under the age of 10 ... and defends that with, hypothetically, a defence that he thought the girl was 11 or 12. You are not suggesting, are you, that that would suffice to establish an excuse?<sup>97</sup>

Edelman J’s memory was accurate. In *Prince*, Blackburn J, with whom nine other judges concurred, noted that the Act in question made it a felony for a man to have carnal knowledge of a girl ‘under the age of ten years’, and a misdemeanour for him to have carnal knowledge of a girl ‘above the age of ten years, and under the age of twelve years’.<sup>98</sup> His Lordship then pointed out that, if honest and reasonable mistake were available as a defence to the former charge, the man who had carnal knowledge of a nine-year-old girl, reasonably believing her to be ten, would be guilty of neither the felony nor the misdemeanour. He would lack the mens rea for the felony. He would not have performed the misdemeanour’s actus reus. Parliament could not have intended to allow for so ‘monstrous’ a result, his Lordship thought.<sup>99</sup>

This “knock-out” argument<sup>100</sup> seems not to assist the Crown in *Bell* (HCA). If the s 26 offence prohibited the supply of a controlled drug to ‘a person aged eighteen years or above’, and if honest and reasonable mistake were available to someone charged with the s 14 offence, a person who supplied a controlled drug to someone whom s/he might reasonably, but mistakenly, have believed was 18 or over would be guilty of no offence. But s 26 instead prohibits the supply of a controlled drug ‘to another person’. Therefore, if honest and reasonable mistake is a ‘defence’ to the s 14 charge, and if a person might reasonably have believed that s/he was supplying drugs to a person aged 18 or over, s/he would still clearly be guilty of the s 26 offence. Indeed, it could be argued that Blackburn J’s argument works both ways. By drafting ss 14 and 26 in the way it did, it might be said that the Tasmanian

<sup>93</sup> Ibid 252.

<sup>94</sup> Or, for an unforeseeable result. See, eg, New South Wales Law Reform Commission, *Complicity* (Report No 129, December 2010) 159–61 [5.79]–[5.83].

<sup>95</sup> See *Reynhoudt* (n 11) 400 (Menzies J).

<sup>96</sup> It is worth noting that, where the Crown must prove subjective fault in respect of all circumstance elements of an offence, its failure to prove such fault concerning one of those circumstances will cause the prosecution to fail. This is so even if the fault that the accused has displayed in respect of the other elements makes him or her guilty of a lesser offence. See, eg, *ibid* 387 (Dixon CJ).

<sup>97</sup> Transcript of Proceedings (2021) (n 17) 591–4, 598–600.

<sup>98</sup> *Prince* (n 1) 171.

<sup>99</sup> *Ibid*. See also *Tasmania v QRS* (2013) 22 Tas R 180.

<sup>100</sup> Cross (n 4) 542.

Parliament failed, by necessary implication, to exclude honest and reasonable mistake in relation to the former offence.

### C *The Constitutional Consideration*

What about the argument that the High Court must be slow to depart from its earlier decisions and that, even if the *Bergin* rule is unjustified, the Court should exercise restraint? It is true that there were no dissenting reasons in *Bergin* and that, in *CTM*, six Justices accepted the correctness of the rule stated in that earlier case.<sup>101</sup> This factor points towards restraint.<sup>102</sup> But, while it might be difficult to argue that the *Bergin* rule has ‘led to considerable inconvenience’,<sup>103</sup> it is hard to see how it has ‘achieved ... [any] useful result’.<sup>104</sup> What is ‘useful’ about a rule that attaches liability to accused persons for crimes that they reasonably supposed themselves not to be committing?<sup>105</sup> Further, it is less easy than it was in a case such as *Miller v The Queen*<sup>106</sup> to say that the relevant rule has been ‘carefully worked out in a significant succession of cases’<sup>107</sup>; and that rule has certainly not been acted on to the extent that the *Miller* rule had been.<sup>108</sup> Concerning the former of these considerations, it is noteworthy that in *Bergin* the offence that the respondent intended to commit (selling liquor outside lawful trading hours for a club)<sup>109</sup> was of comparable seriousness to the offence with which he was charged (selling liquor without a licence).<sup>110</sup> Accordingly, the facts did not bring into focus the unjust consequences that can be caused by the rule stated in that case. And, as indicated above, in *CTM* the *Bergin* rule was not squarely at issue. Further, and returning to *Miller*, the injustice liable to result from any decision by the Court to follow *Bergin* seems less ‘abstract’<sup>111</sup> than that identified by the appellants in that case. The High Court has before it a man who might have been convicted of a much more serious offence than the one he reasonably thought himself to be committing.

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<sup>101</sup> *CTM* (n 11) 447 [8], 453–4 [27] (Gleeson CJ, Gummow, Crennan and Kiefel JJ), 491 [174] (Hayne J), 497 [199] (Heydon J).

<sup>102</sup> See, eg, *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ) (*‘John’*).

<sup>103</sup> *Ibid.* Though maybe the appellant in *Bell (HCA)* would disagree.

<sup>104</sup> *Ibid.*

<sup>105</sup> See Gageler J’s comments in *Magaming* about another established rule that facilitates penal severity: *Magaming v The Queen* (2013) 252 CLR 381, 408 [82].

<sup>106</sup> *Miller v The Queen* (2016) 259 CLR 380, 399–400 [39] (French CJ, Kiefel, Bell, Nettle and Gordon JJ), 418 [106]–[107] (Gageler J) (*‘Miller’*).

<sup>107</sup> *John* (n 102) 438 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ).

<sup>108</sup> In fact, in some of the cases where the *Bergin* rule has been applied, it was probably inapplicable: see, eg, *R v Iannazzone* [1983] 1 VR 649, 655–6; *R v Dib* (2002) 134 A Crim R 329, 337 [35], 344 [76]. Cf *Miller* (n 106) 400 [39] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).

<sup>109</sup> *Bergin* (n 9) 262.

<sup>110</sup> *Ibid.* 255.

<sup>111</sup> *Miller* (n 106) 400 [39] (French CJ, Kiefel, Bell, Nettle and Gordon JJ).

## IV Conclusion

Commenting on the majority's decision in *Tolson*, Dixon J said that '[i]t is difficult to see how, consistently with any humane or liberal system of law ... any other conclusion could be reached.'<sup>112</sup> And when re-reading some of his Honour's judgments, for the purposes of writing this column, I was struck once more by his abhorrence of guilt without blameworthiness.<sup>113</sup> In this, Sir Owen Dixon was right. It is unknown whether, had his Honour sat in *Bergin*, Dixon CJ would have assented to the view stated there.<sup>114</sup> But, whatever he would have held, the current High Court should allow the appeal in *Bell (HCA)*. If Bell's account is possibly true, he did act culpably. Nevertheless, his liability should match the culpability he displayed. He should not be convicted of a crime that he had good grounds for believing he was not committing.

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<sup>112</sup> *Thomas* (n 19) 302.

<sup>113</sup> See especially *ibid* 299–304, 309–11; *Proudman v Dayman* (1941) 67 CLR 536, 540 (Dixon J) ('*Proudman*'); *Reynhoudt* (n 11) 386–7 (Dixon CJ).

<sup>114</sup> Sir Owen Dixon never directly considered the point. Cf *Proudman* (n 113) 540–1 (Dixon J). That said, in *Reynhoudt*, his Honour, referring to the offence of assaulting a police officer in the execution of his duty, said that 'it seems to me that the general doctrine that a guilty mind is needed is not satisfied ... by a mere reliance on the intent necessary to the assault independently of the additional elements of the crime': *Reynhoudt* (n 11) 387 (Dixon CJ). Cf *Prince* (n 1) 176.

# Case Note

## *Mabo* and the Valuation Vibe: Substantive Equality in the Timber Creek Compensation Case

Thomas Dews\*

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### *Abstract*

The High Court of Australia's decision in *Northern Territory v Griffiths* (2019) 269 CLR 1 ('the Timber Creek compensation case') provided long-awaited judicial guidance on the operation of the compensation provisions of the *Native Title Act 1993* (Cth). It is now clear that compensation for extinguished native title rights and interests incorporates awards for: economic loss; simple interest on that economic loss; and cultural loss. The cultural loss component of the High Court's judgment has been widely praised. Yet there is a gap in the literature in respect of the Court's analysis of the economic value of extinguished native title. Additionally, as compensation for invalid future acts was not argued before the Court, the applicable principles in that area are not yet clear. Accordingly, this case note focuses on those elements of the Timber Creek litigation. It contends that, viewed through the lens of substantive equality, the High Court's economic valuation of the claimants' native title rights and interests is open to criticism. That said, the judgment is a step towards achieving substantive equality in native title, particularly when viewed in the light of recent native title jurisprudence. It is, however, open to question as to whether substantive equality can be achieved without further judicial guidance on the compensation payable for invalid future acts.

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## I Introduction

The concept of ‘equality’ has been the subject of varying interpretations in native title jurisprudence and commentary despite widespread recognition of its central importance both at common law and in statute.<sup>1</sup> While the *Native Title Act 1993* (Cth) (*‘Native Title Act’*) purports to address ‘the consequences of past injustices’,<sup>2</sup> many scholars argue that native title is ‘inferior’ to other real property interests, by reference to the *Native Title Amendment Act 1998* (Cth) (*‘Ten Point Plan’*)<sup>3</sup> and a series of High Court of Australia decisions of the late 1990s and early 2000s, such as *Fejo (on behalf of Larrakia People) v Northern Territory*,<sup>4</sup> *Members of the Yorta Yorta Aboriginal Community v Victoria*<sup>5</sup> and *Western Australia v Ward*.<sup>6</sup> These statutory and case law developments arguably cemented in real property a discriminatory perception of Indigenous uses of land relative to western ideals.<sup>7</sup> Yet a series of more recent High Court decisions, including *Akiba v Commonwealth*,<sup>8</sup> *Karpany v Dietman*<sup>9</sup> and *Western Australia v Brown*,<sup>10</sup> have offered hope of realising the spirit of equality envisaged in *Mabo v Queensland (No 2)*<sup>11</sup>. In contrast to earlier cases, these decisions arguably represent a move towards substantive equality by demonstrating a better understanding of Indigenous law and custom, and therefore positing a much stronger conception of native title rights and interests.<sup>12</sup>

However, the monetary value of native title rights relative to other real property interests remained unanswered until the High Court’s decision in *Northern Territory v Griffiths*<sup>13</sup> (*‘Timber Creek (HCA)’*). In this case, the Court considered

<sup>1</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 16 November 1993, 2877 (Paul Keating, Prime Minister); Richard Bartlett, *Native Title in Australia* (LexisNexis Butterworths Australia, 4<sup>th</sup> ed, 2019) 17–34; Sean Brennan ‘Native Title and the “Acquisition of Property” under the *Australian Constitution*’ (2004) 28(1) *Melbourne University Law Review* 28, 29, 35; Jonathon Hunyor, ‘Dancing with Strangers: Native Title and Australian Understandings of Race Discrimination’ in Sean Brennan, Megan Davis, Brendan Edgeworth and Leon Terrill (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 99, 110–11. See also *Mabo v Queensland* (1988) 166 CLR 186 (*‘Mabo No 1’*); *Western Australia v Commonwealth* (1995) 183 CLR 373 (*‘Native Title Act Case’*).

<sup>2</sup> *Native Title Act 1993* (Cth) (*‘Native Title Act’*) Preamble.

<sup>3</sup> Bartlett (n 1) at 56–70 cites amendments that provided for the automatic extinguishment of native title by certain leases: see *Native Title Act* (n 2) ss 23A–23JA, and the reduced application of the right to negotiate: see, eg, *Native Title Act* (n 2) ss 26A–26D.

<sup>4</sup> *Fejo (on behalf of Larrakia People) v Northern Territory* (1998) 195 CLR 96 (*‘Fejo’*).

<sup>5</sup> *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422 (*‘Yorta Yorta’*).

<sup>6</sup> *Western Australia v Ward* (2002) 213 CLR 1 (*‘Ward’*).

<sup>7</sup> Hunyor (n 1) 112; Shireen Morris, ‘Re-evaluating *Mabo*: The Case for Native Title Reform to Remove Discrimination and Promote Economic Opportunity’ (2012) 5(3) *Land, Rights, Laws: Issues of Native Title* 1; Bartlett (n 1) 56–70; Asmi Wood, ‘Native Title’ in Larissa Behrendt, Chris Cunneen, Terri Libesman and Nicole Watson (eds) *Aboriginal and Torres Strait Islander Legal Relations* (Oxford University Press, 2<sup>nd</sup> ed, 2019) 167, 174.

<sup>8</sup> *Akiba v Commonwealth* (2013) 250 CLR 209 (*‘Akiba’*).

<sup>9</sup> *Karpany v Dietman* (2013) 252 CLR 507.

<sup>10</sup> *Western Australia v Brown* (2014) 253 CLR 507.

<sup>11</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (*‘Mabo (No 2)’*) 30, 58 (Brennan J), 109 (Deane and Gaudron JJ).

<sup>12</sup> See, eg, Sean Brennan, ‘The Significance of the *Akiba* Torres Strait Regional Sea Claim Case’ in Sean Brennan, Megan Davis, Brendan Edgeworth and Leon Terrill (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 29.

<sup>13</sup> *Northern Territory v Griffiths* (2019) 269 CLR 1 (*‘Timber Creek (HCA)’*).



the compensation provisions of the *Native Title Act* for the first time, providing a direct, uncompromising answer to what equality requires in this context. Limited only by the mandate to provide compensation on ‘just terms’,<sup>14</sup> the High Court was presented with an opportunity to continue the recent trend towards substantive equality.

This case note considers whether the High Court’s approach to native title compensation in *Timber Creek (HCA)* achieves substantive equality for native title relative to other real property interests. Compensation for extinguished native title was claimed on a bifurcated basis, requiring separate assessments of economic loss, interest on that economic loss, and cultural loss. An additional claim for general law damages was made for certain acts that were invalid for the purposes of the *Native Title Act*’s ‘future acts’ regime<sup>15</sup> and, as such, did not extinguish native title. This was not argued before the High Court.

The cultural loss component of the judgment and its implications for native title have, unsurprisingly, been the subject of considerable critical analysis and appraisal.<sup>16</sup> Yet there is a gap in the literature in respect of the High Court’s analysis of economic loss and the lack of clarity on compensation for invalid future acts. In my view, these two aspects are just as significant for the future of native title compensation and are, consequently, the subject of this case note. The interest claim also raises some considerations of substantive equality,<sup>17</sup> but is beyond the scope of this case note. Further, while scholars have questioned the adequacy of compensation for incursions to Indigenous land rights awarded solely in monetary form,<sup>18</sup> this case note does not engage with that discussion.

This case note argues that, viewed through the lens of substantive equality, the methodology applied to the valuation of economic loss has both positive and negative implications for future claimants. In *Timber Creek (HCA)*, the High Court adopted a modified *Spencer v Commonwealth* approach to valuation of the extinguished rights of the Ngaliwurru and Nungali peoples of Timber Creek, envisaging a hypothetical negotiation for a sale by a ‘willing but not anxious vendor’ to a ‘willing but not anxious purchaser’,<sup>19</sup> adapted to the unique nature of native title. This approach attributed economic value only to the legal content of the rights. It relied upon heavily criticised native title jurisprudence, leading to some disappointing outcomes for the native title holders in this case. However, considered

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<sup>14</sup> *Native Title Act* (n 2) s 51(1).

<sup>15</sup> *Ibid* pt 2 div 3.

<sup>16</sup> See Brendan Edgeworth, ‘Valuable, Invaluable or Unvaluable? The High Court on Native Title Compensation’ (2019) 93(6) *Australian Law Journal* 442; Justice Michelle Gordon, ‘The Development of Native Title: Opening Our Eyes to Shared History’ (2019) 30(4) *Public Law Review* 314.

<sup>17</sup> *Timber Creek (HCA)* (n 13) 66–85 [108]–[151] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>18</sup> See, eg, Sam Adkins, Bryn Gray, Kimberly Macnab and Gordon Nettleton, ‘Calculating the Incalculable: Principles for Compensating Impacts to Aboriginal Title’ (2016) 54(2) *Alberta Law Review* 351; Brenda L. Gunn, ‘More Than Money: Using International Law of Reparations to Determine Fair Compensation for Infringements of Aboriginal Title’ (2013) 46(2) *University of British Columbia Law Review* 299; Peter Genger, ‘What is Authentic and Meaningful Compensation in the Eyes of Indigenous Peoples?’ (2018) 38(2) *The Canadian Journal of Native Studies* 65.

<sup>19</sup> See, eg, *Timber Creek (HCA)* (n 13) 56–7 [84], 61 [96] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) citing *Spencer v Commonwealth* (1906) 5 CLR 418, 432, 440–41 (‘*Spencer*’).

in light of more recent cases, the judgment contains some positive statements of principle for substantively equal native title valuation following extinguishment.

Additionally, since compensation for invalid future acts which do not extinguish native title was not argued before the High Court, this case note contends that the *Timber Creek* litigation does not provide much-needed guidance in that respect. The appropriate remedy for non-adherence to the procedural rights contained within the *Native Title Act*'s future acts regime remains unclear.

I first provide a definition of substantive equality in the context of native title. Next, I briefly recount the history of the *Timber Creek* litigation. I then closely examine the High Court's approach to economic loss to ascertain whether the decision constitutes a step towards achieving substantive equality for valuation of native title relative to other real property interests. Finally, I consider the unresolved issue of compensation for invalid future acts.

## II Substantive Equality in Native Title

Principles of equality and non-discrimination are at the heart of native title in Australia by virtue of the *Racial Discrimination Act 1975* (Cth) ('*RDA*'), which guarantees the equal treatment of all property interests before the law.<sup>20</sup> Yet equality can be separated into two categories, 'formal' and 'substantive', neither of which are mandated by the statute. Hunyor succinctly distinguishes the two, writing:

An approach of 'formal equality' prohibits all racial distinctions and requires identical treatment. 'Substantive equality' permits (even requires) distinctions where such differential treatment is justified by differing circumstances or where it reduces existing inequalities in public life.<sup>21</sup>

Thus, while formal equality is simply akin to procedural equality or equal 'treatment', substantive equality is more nuanced and directed. Sadurski writes that substantive equality in judicial decision-making should be guided by 'fairness and distributive justice with respect to a group most victimised by the rest of the community'.<sup>22</sup> This kind of deliberation incorporates a distinct practical element, as Bartlett notes:

Genuine equality before the law requires that regard be had to the particular *effect* of the law in order to determine if there is a denial or abridgement of a protected right. It is not enough to apply the same principles without regard to their effect.<sup>23</sup>

Watson also argues that the idea of substantive equality imports a 'recognition of cultural difference which is not founded in disadvantage',<sup>24</sup> that is, 'incorporation of Indigenous world views and experiential knowledge'.<sup>25</sup> It follows

<sup>20</sup> *Racial Discrimination Act 1975* (Cth) ('*RDA*') s 10(1). See also Bartlett (n 1) 346–7.

<sup>21</sup> Hunyor (n 1) 100.

<sup>22</sup> Wojciech Sadurski, '*Gerhardy v Brown* v the Concept of Discrimination: Reflections on the Landmark Case That Wasn't' (1986) 11(1) *Sydney Law Review* 5, 8.

<sup>23</sup> Bartlett (n 1) 347 (emphasis added).

<sup>24</sup> Nicole Watson 'Racial Discrimination and the Law' in Larissa Behrendt, Chris Cunneen, Terri Libesman and Nicole Watson (eds) *Aboriginal and Torres Strait Islander Legal Relations* (Oxford University Press, 2<sup>nd</sup> ed, 2019) 217, 225.

<sup>25</sup> *Ibid* 230.

that deficit-based characterisation of native title rights as ‘weak’ or ‘inferior’ to western uses of land due to mere cultural difference is offensive to notions of substantive equality. Rather, what is required is a characterisation of native title that acknowledges historical context and cultural difference.

The *Native Title Act* resonates with these ideas. Its Preamble recognises the progressive, non-consensual dispossession of Indigenous Australians of their lands and the consequent need for compensation.<sup>26</sup> The Act therefore provides for compensation where native title has been extinguished.<sup>27</sup> Moreover, the Act seeks to facilitate economic participation for native title holders through, for example, the future acts regime.<sup>28</sup> As such, it is both retrospective and forward-looking in its aim for equal standing between holders of native title and other interests. In light of these elements, the *Native Title Act* can be understood as a ‘special measure’ under the *RDA*,<sup>29</sup> which arguably permits characterisation of the Act with substantive, rather than merely formal, equality in mind.<sup>30</sup>

The High Court has cited this understanding of substantive equality in the native title context, particularly in early cases. For example, in *Mabo (No 1)*<sup>31</sup> Deane J identified that s 10 of the *RDA* ‘is to be construed as concerned not merely with matters of form, but with matters of substance, that is to say, with the practical operation and effect of an impugned law’.<sup>32</sup> *Mabo (No 2)* was similar in its recognition that the doctrine of *terra nullius* perpetuated systemic discrimination against Aboriginal people and thus required abolition.<sup>33</sup> Additionally, in *Western Australia v Commonwealth*, the Court held that s 10 of the *RDA* mandated protection of native title in a manner equal to western private property rights, despite its roots in traditional laws and customs outside of the common law.<sup>34</sup>

At a broad level, substantive equality in native title therefore demands that courts recognise and address historical injustices. It is achieved by having regard to the practical effect of laws, in the light of a proper appreciation of existing inequalities and divergent worldviews. In contrast, formal equality merely ensures that all are afforded the same treatment before the law, irrespective of these differences. Judicial appreciation of substantive equality was occasionally demonstrated in early cases such as *Mabo (No 1)*, *Mabo (No 2)* and the *Native Title Act Case*. However, scholars such as Bartlett suggest that, in tandem with the Ten Point Plan, native title jurisprudence of the late 1990s and early 2000s indicates that the High Court may have misunderstood the spirit of substantive equality expressed

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<sup>26</sup> *Native Title Act* (n 2) Preamble.

<sup>27</sup> *Ibid* pt 2 div 5.

<sup>28</sup> *Ibid* pt 2 div 3.

<sup>29</sup> *RDA* (n 20) s 8(1); *Native Title Act* (n 2) Preamble.

<sup>30</sup> *Morris* (n 7) 10. For another example of the concept of a ‘special measure’, see *Gerhardy v Brown* (1985) 159 CLR 70 and the commentary of Bartlett (n 1) 16.

<sup>31</sup> *Mabo (No 1)* (n 1).

<sup>32</sup> *Ibid* 230.

<sup>33</sup> *Mabo (No 2)* (n 11) 30, 58 (Brennan J), 109 (Deane and Gaudron JJ).

<sup>34</sup> *Native Title Act Case* (n 1). See also Bartlett (n 1) 142, 369.

in the early cases.<sup>35</sup> These developments inform evaluation of *Timber Creek* in its proper context,<sup>36</sup> and are considered below.

### III *Timber Creek: The Facts*

The Ngaliwurru and Nungali Peoples ('the Claim Group') are the Traditional Owners and native title holders of the township and land surrounding Timber Creek in the Victoria River region of the Northern Territory. The town itself comprises an area of approximately 2,362 hectares.<sup>37</sup> In *Timber Creek*, the Claim Group sought compensation for the extinguishment of native title over approximately 127 hectares, or 6% of the total area, as a consequence of 53 acts attributable to the Northern Territory Government between 1980 and 1996 ('compensable acts'). The compensable acts largely consisted of public works (including, for example, the construction of roads, a school, and a water tank), development leases leading to a grant of freehold title, Crown leases, and freehold grants to government authorities (for example, the NT Housing Commission) where public works were later constructed.<sup>38</sup> Some took place in close proximity to sacred sites.<sup>39</sup> The extinguished native title comprised various non-exclusive rights and interests, including rights of access, subsistence, and the practice and protection of culture in accordance with the traditional laws and customs of the Claim Group.<sup>40</sup>

The Claim Group also claimed compensation for three additional acts throughout 1998 and 1999, comprising grants of freehold interest by the Northern Territory and subsequent improvements on the land. Those acts were accepted by the parties to have been invalid future acts for the purposes of the future acts regime ('the invalid future acts').<sup>41</sup> The invalid future acts did not extinguish native title.<sup>42</sup>

Section 51(1) of the *Native Title Act* establishes 'an entitlement on just terms to compensate the native title holders for any loss, diminution, impairment or other effect of the act on their native title rights and interests'.<sup>43</sup> Section 51(4) provides that regard may be had to State or territory compulsory acquisition legislation in determining 'just terms'.<sup>44</sup> In the *Timber Creek* litigation, the *Lands Acquisition Act* (NT) was therefore a relevant, but not mandatory, consideration. Section 51A provides that compensation must not exceed the equivalent of the freehold value of

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<sup>35</sup> Bartlett (n 1) 71–92.

<sup>36</sup> For the implications of differing conceptualisations of native title for compensation, see Paul Burke, 'How Can Judges Calculate Native Title Compensation?' (Discussion Paper, Native Title Research Unit, Australian Institute for Aboriginal and Torres Strait Islander Studies, 2002) 11–17.

<sup>37</sup> *Griffiths v Northern Territory (No 3)* (2016) 337 ALR 362 ('*Timber Creek (FCA)*') 370 [33] (Mansfield J).

<sup>38</sup> *Ibid* 369–71 [32]–[40] (Mansfield J); *Northern Territory v Griffiths* (2017) 256 FCR 478 ('*Timber Creek (FCAFC)*') 485–8 [9]–[13] (North ACJ, Barker and Mortimer JJ); *Timber Creek (HCA)* (n 13) 30–1 [6] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>39</sup> See, eg, *Timber Creek (HCA)* (n 13) 91 [174] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>40</sup> *Timber Creek (FCA)* (n 37) 376 [71(3)] (Mansfield J); *Timber Creek (FCAFC)* (n 38) 492 [33] (North ACJ, Barker and Mortimer JJ); *Timber Creek (HCA)* (n 13) 32 [10] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>41</sup> *Timber Creek (FCA)* (n 37) 443–4 [449]–[450] (Mansfield J).

<sup>42</sup> *Ibid* 443 [450]. See *Native Title Act* (n 2) s 240A.

<sup>43</sup> *Native Title Act* (n 2) s 51(1).

<sup>44</sup> *Ibid* s 51(4).

the land (or waters),<sup>45</sup> however s 53 allows for an amount exceeding the freehold value to be awarded if the freehold value would not constitute just terms pursuant to a compulsory acquisition under s 51(xxxi) of the *Australian Constitution*.<sup>46</sup> Section 53 has been described as a ‘shipwrecks clause’:<sup>47</sup> that is, it ensures the constitutional validity of the *Native Title Act*’s compensation provisions.<sup>48</sup> The *Native Title Act*’s future acts regime does not itself provide for compensation for invalid future acts that do not extinguish native title.<sup>49</sup> Yet the shipwrecks clause also provides for constitutional ‘just terms’ compensation where ‘the doing of any future act’ would result in the compulsory acquisition of native title.<sup>50</sup>

The Claim Group framed their argument for ‘just terms’ compensation for the compensable acts under the heads of economic loss, interest, and non-economic or intangible loss. This framework itself was not contested.<sup>51</sup> For the invalid future acts, the Claim Group sought general law compensation on the grounds that an injunction preventing those acts could have successfully been sought pursuant to the future acts regime.<sup>52</sup> That regime importantly confers certain procedural rights upon native title holders.<sup>53</sup> The Claim Group alternatively argued that compensation was payable for ‘wrongful occupation and use of the land’ in the form of trespass.<sup>54</sup> They did not make submissions as to compensation payable under s 53.<sup>55</sup>

At first instance, Mansfield J of the Federal Court of Australia made an *in globo* award for economic loss due to the compensable acts comprising 80% of the value of the freehold (\$512,400), simple interest on that amount until the date of judgment (\$1,488,261), and \$1.3 million for non-economic loss, termed ‘solatium’.<sup>56</sup> Solatium is an element of compulsory acquisition compensation for subjective, non-tangible disruption to a person’s life flowing from the non-voluntary nature of their surrender of rights.<sup>57</sup> For the invalid future acts, Mansfield J also awarded damages for 80% of the market value of the lots on which the three acts took place.<sup>58</sup> On appeal, the Full Court of the Federal Court (North ACJ, Barker and Mortimer JJ) upheld the amount awarded for solatium. However, the Full Court reduced the economic loss component to 65% of the freehold value, largely by virtue

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<sup>45</sup> Ibid s 51A(1).

<sup>46</sup> Ibid s 53(1)(b).

<sup>47</sup> See, eg, *Timber Creek (HCA)* (n 13) 44–5 [49] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>48</sup> Ibid; Bartlett (n 1) 735.

<sup>49</sup> *Timber Creek (FCA)* (n 37) 443 [450] (Mansfield J).

<sup>50</sup> *Native Title Act* (n 2) s 53(1)(a).

<sup>51</sup> *Timber Creek (FCA)* (n 37) 371 [42] (Mansfield J); *Timber Creek (FCAFC)* (n 38) 495 [40]–[42] (North ACJ, Barker and Mortimer JJ); *Timber Creek (HCA)* (n 13) 33–6 [11]–[18] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>52</sup> *Timber Creek (FCA)* (n 37) 443–4 [450] (Mansfield J). This argument has been successful since the *Timber Creek (HCA)* judgment was delivered: see, eg, *Kaurareg Native Title Aboriginal Corporation RNTBC v Torres Shire Council* [2019] FCA 746.

<sup>53</sup> See n 28 and accompanying text.

<sup>54</sup> *Timber Creek (FCA)* (n 37) 444 [450]. See also at 444 [454].

<sup>55</sup> See Ngaliwurru and Nungali Peoples, ‘Submissions of the Appellant (D3/2018)/First Respondent (D1 & D2/2018)’, Submission in *Northern Territory v Griffiths (on behalf of the Ngaliwurru and Nungali Peoples)*, Case D1/2018, 4 May 2018, [27] (‘Claim Group Submissions’).

<sup>56</sup> *Timber Creek (FCA)* (n 37) 446 [466] (Mansfield J).

<sup>57</sup> *Timber Creek (HCA)* (n 13) 118–9 [272] (Edelman J).

<sup>58</sup> *Timber Creek (FCA)* (n 37) 405 [232], 441 [429], 442 [434], 445 [463] (Mansfield J).

of the inalienability of the native title rights,<sup>59</sup> and accordingly the simple interest component was decreased.<sup>60</sup> The Full Court rejected Mansfield J's award of damages for the invalid future acts.<sup>61</sup>

The Claim Group, the Northern Territory and the Commonwealth each appealed to the High Court of Australia on a number of bases. This case note is concerned with the Claim Group's argument that the economic value of the rights was equivalent to the freehold, and the opposing argument of the Northern Territory and the Commonwealth that 50% was appropriate.<sup>62</sup> The Full Court's rejection of Mansfield J's award for invalid future acts was not agitated in the High Court,<sup>63</sup> however this case note argues that it also has implications for substantive equality in native title valuation. It is considered separately in Part V.

The High Court majority, comprising Kiefel CJ and Bell, Keane, Nettle, and Gordon JJ, found the economic loss for extinguishment of the rights due to the compensable acts to be 50% of the freehold value, and accordingly reduced the award for simple interest.<sup>64</sup> However, their Honours upheld Mansfield J's first instance award for non-economic loss, instead terming it 'cultural loss'.<sup>65</sup> Gageler J provided a separate opinion regarding the calculation of economic loss, but otherwise agreed with the majority.<sup>66</sup> Edelman J also reached the same amounts albeit for different reasons.<sup>67</sup> Thus, the total amount awarded for the extinguishment of the Claim Group's native title rights was \$2,530,350.<sup>68</sup>

#### IV *Timber Creek*: Towards Substantive Equality?

The High Court in *Timber Creek* was presented with an opportunity to ascertain the economic value of the Claim Group's extinguished rights in a manner that achieved substantive equality for native title valuation compared with other real property interests. While some native title compensation claims have come before lower courts, the claimants have either failed to prove that native title existed,<sup>69</sup> or have consented to determinations.<sup>70</sup> The High Court was 'in uncharted waters';<sup>71</sup> and international authority from similar jurisdictions (such as Canada) is sparse.<sup>72</sup> Additionally, the *Native Title Act* provisions are broad, requiring only that compensation for extinguishment of native title be provided on 'just terms'.<sup>73</sup> There was therefore scope for judicial delineation of principles that recognised the historical

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<sup>59</sup> *Timber Creek (FCAFC)* (n 38) 519–20 [129]–[139] (North ACJ, Barker and Mortimer JJ).

<sup>60</sup> Ibid 589 [465] (North ACJ, Barker and Mortimer JJ).

<sup>61</sup> Ibid 587 [448] (North ACJ, Barker and Mortimer JJ).

<sup>62</sup> *Timber Creek (HCA)* (n 13) 34–6 [16–17] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>63</sup> Claim Group Submissions (n 55).

<sup>64</sup> *Timber Creek (HCA)* (n 13) 29–30 [3] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>65</sup> Ibid 46 [54], 86 [154], 109–10 [237] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>66</sup> Ibid 111–12 [240]–[250] (Gageler J).

<sup>67</sup> Ibid 113–148 [251]–[360] (Edelman J).

<sup>68</sup> Ibid 110 [238] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>69</sup> See *Jango v Northern Territory of Australia* (2006) 152 FCR 150.

<sup>70</sup> See *De Rose v South Australia* [2013] FCA 988.

<sup>71</sup> Edgeworth (n 16) 442.

<sup>72</sup> See Adkins et al (n 18).

<sup>73</sup> *Native Title Act* (n 2) s 51(1).

context of dispossession, had regard for the practical effect of western valuation laws, and appreciated Indigenous cultural differences in respect of land use.

## A *Economic Loss: The Methodology*

The High Court majority set out a methodology that was, on its face, entrenched in notions of substantive equality. Their Honours framed their approach to compensation for the extinguishing acts in terms of the *Native Title Act*'s role in ameliorating the effects of colonial dispossession.<sup>74</sup> Importantly, the majority also noted that the *Native Title Act* establishes a compensation system for addressing these consequences 'in a practical way'.<sup>75</sup> However, this task is fundamentally complex because 'the Act seeks to deal with concepts and ideas which are both ancient and new; developed but also developing; retrospective but also prospective'.<sup>76</sup>

The majority identified s 51(1) as the 'core' compensation provision.<sup>77</sup> Significantly, their Honours then stated that 'just terms' comprised compensation for both 'the physical or material aspect (the right to do something in relation to land) and the cultural or spiritual aspect (the connection with the land)'.<sup>78</sup> Moreover, their Honours considered that the effect of each act will be unique and 'fact specific' according to 'the native title holders' identity and connection to the affected land'.<sup>79</sup> However, the task does not require that 'the consequence directly arise from the compensable act'; rather, it is necessary to assess compensation holistically 'in the particular context of the *Native Title Act*, the particular compensable acts and the evidence as a whole'.<sup>80</sup> Finally, the majority explained the operation of the freehold cap contained in s 51A,<sup>81</sup> concluding that ss 51(1) and 51A require that 'the compensation payable to the native title holders is to be measured by reference to, and capped at, the freehold value of the land *together with* compensation for cultural loss'.<sup>82</sup> In this sense, the *Native Title Act* permits an economic loss claim for an amount equivalent to the freehold value in addition to a further amount for cultural loss. This clarification is important, as both legislators and academics had previously questioned the capacity for a native title compensation award to constitute 'just terms' without an element for cultural loss.<sup>83</sup>

Lawyers and anthropologists have praised the High Court's cultural loss award, particularly for its endorsement of Mansfield J's methodology.<sup>84</sup> In

<sup>74</sup> *Timber Creek (HCA)* (n 13) 39 [26] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>75</sup> *Ibid* 39 [27].

<sup>76</sup> *Ibid*.

<sup>77</sup> *Ibid* 43 [41] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>78</sup> *Ibid* 43 [44] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>79</sup> *Ibid* 44 [46].

<sup>80</sup> *Ibid*.

<sup>81</sup> *Ibid* 45–6 [50]–[54] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>82</sup> *Ibid* 46 [54] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ) (emphasis added).

<sup>83</sup> *Parliamentary Debates* (Keating) (n 1); Burke (n 36); Wanjie Song, 'What's Next for Native Title Compensation: The *De Rose* Decision and the Assessment of Native Title Rights and Interests' (2014) 8(10) *Indigenous Law Bulletin* 11; Adkins et al (n 18); Jude Mannix and Michael Hefferan, 'New Dimensions in Land Tenure — The Current Status and Issues Surrounding Native Title in Regional Australia' (2018) 24(3) *Australasian Journal of Regional Studies* 284.

<sup>84</sup> See, eg, Edgeworth (n 16); Gordon (n 16); Cath McLeish, 'Compensation Awarded in Australian First' (April 2019) *Land Rights News (Northern Edition)* 11; Pamela Faye McGrath, 'Native Title

formulating the award for cultural loss, His Honour had correctly referred to the evidence of significant and ongoing ‘spiritual hurt’ suffered by the Claim Group as a result of extinguishment.<sup>85</sup> Having regard to that evidence, the Court was of the view that his Honour’s award was not manifestly excessive.<sup>86</sup> In upholding Mansfield J’s award, the High Court prioritised the worldview of the Ngaliwurru and Nungali peoples in a way that meets international standards for monetary compensation for incursions of Indigenous rights to land.<sup>87</sup> This component of the judgment will have many positive implications for future compensation outcomes.<sup>88</sup> However, relatively little attention has been directed to the question of whether the High Court’s analysis of economic loss also meets the requirements of substantive equality in native title valuation. This is explored below.

## **B      *Economic Loss: The Analysis***

This case note contends that the High Court’s valuation of economic loss did not achieve substantive equality for the Claim Group’s native title rights in *Timber Creek*. The majority approached the task as if it were a compulsory acquisition of real property, adopting a modified *Spencer* approach to valuation. This test envisages a hypothetical negotiation for a purchase of rights by a willing but not anxious purchaser from a willing but not anxious vendor,<sup>89</sup> adapted in order to ‘accommodate the unique character of native title rights and interests and the statutory context’.<sup>90</sup> In applying this modified test, the majority made an ‘evaluative judgment’ of the economic value of the non-exclusive rights held by the Claim Group based on a comparison to full exclusive native title,<sup>91</sup> which is given the proxy value of the freehold, being the estate which confers ‘the greatest degree of power that can be exercised over the land’.<sup>92</sup> Ultimately, the Court accepted that the non-exclusive rights of the Claim Group were worth 50% of the economic value of the freehold estate.<sup>93</sup>

Cath McLeish, a senior lawyer at Northern Land Council who assisted in the case, considered this part of the decision to be disappointing.<sup>94</sup> A close examination of the practical effects of the application of the modified *Spencer* test (as

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Anthropology after the Timber Creek Decision’ (2017) 6(5) *Land, Rights, Laws: Issues of Native Title* 1; Sandra Pannell, ‘Framing the Loss of Solace: Issues and Challenges in Researching Indigenous Compensation Claims’ (2018) 28(3) *Anthropological Forum* 255; Mannix and Hefferan (n 83).

<sup>85</sup> See, eg, *Timber Creek (HCA)* (n 13) 86 [155] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). See also *Timber Creek (HCA)* (n 13) 108–9 [233]–[234] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>86</sup> *Ibid* 109–10 [235]–[237] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>87</sup> Garrick Small and John Sheehan, ‘The Metaphysics of Indigenous Ownership: Why Indigenous Ownership is Incomparable to Western Conceptions of Property Value’ in Robert A Simons, Rachel M Malmgren and Garrick Small (eds), *Indigenous Peoples and Real Estate Valuation* (Springer, 2008) 103; Genger (n 18); Burke (n 36); Özlem Ülgen, ‘Aboriginal Title in Canada: Recognition and Reconciliation’ (2000) 47(2) *Netherlands International Law Review* 146; Adkins et al (n 18); Gunn (n 18). See also *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) art 28.

<sup>88</sup> McGrath (n 84); Pannell (n 84).

<sup>89</sup> *Spencer* (n 19) 432, 440–41.

<sup>90</sup> *Timber Creek (HCA)* (n 13) 50 [66] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>91</sup> *Ibid* 51 [70] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>92</sup> *Ibid* 50 [67].

<sup>93</sup> *Ibid* 66 [107] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>94</sup> McLeish (n 84) 11.



substantive equality requires) reveals that the Claim Group were afforded mere formal equality by the High Court in their analysis of economic loss. This is so for the following reasons.

## 1 *Legalism in the Act of Translation*

The High Court in *Timber Creek (HCA)* showed a formalistic interpretation of what the *RDA* requires in valuing the economic worth of the Claim Group's native title rights. Consequently, the modified *Spencer* test attributed little economic value to the practical exercise of the rights, focusing on their legal content in a manner that denied substantive equality. The majority, in stating that the *RDA* requires 'parity of treatment',<sup>95</sup> noted that:

There is nothing discriminatory about treating non-exclusive native title as a lesser interest in land than a full exclusive native title or, for that reason, as having a lesser economic value than a freehold estate. To the contrary, it is to treat like as like.<sup>96</sup>

However, substantive equality in native title valuation is not concerned with mere 'treatment'. Rather, it requires examination of the practical effect of the law in question in order to discern whether the *outcome* would result in a characterisation of native title as inferior relative to other interests.<sup>97</sup> Central to this exercise is the effective completion of the act of 'translation', which addresses the incommensurability of Indigenous and western land usage by having regard to both perspectives.<sup>98</sup> In *Timber Creek (HCA)*, however, the modified *Spencer* test failed to account adequately for the perspective of the Claim Group, focusing solely on the *legal content* of the non-exclusive rights when compared to the freehold, which confers the greatest power, in theory, to grant rights and interests and exclude others from the land.<sup>99</sup> Having regard to its effect, this legalism disregarded practical aspects of the exercise of the rights that were translatable to western notions of economic value.

Due to this formalistic understanding of equality, the majority attributed economic value solely by reference to the 'limited'<sup>100</sup> legal content of the Claim Group's non-exclusive native title.<sup>101</sup> Indeed, while the rights were 'perpetual and objectively valuable in that they entitled the Claim Group to live upon the land and exploit it',<sup>102</sup> they did not extend to commercial purposes and were essentially 'usufructuary, ceremonial and non-exclusive'.<sup>103</sup> They did not include any 'entitlement to exclude others from entering onto the land and no right to control the conduct of others on the land'.<sup>104</sup> In this sense, they were 'considerably less

<sup>95</sup> *Timber Creek (HCA)* (n 13) 53 [76] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>96</sup> *Ibid* 53 [74].

<sup>97</sup> See above nn 20–25 and accompanying text.

<sup>98</sup> *Burke* (n 36) 11–12.

<sup>99</sup> See above n 92 and accompanying text.

<sup>100</sup> *Timber Creek (HCA)* (n 13) 51 [69] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>101</sup> The Court relied on *Ward* (n 6) in maintaining an inherent difference in economic value between exclusive and non-exclusive native title. That position is examined below.

<sup>102</sup> *Timber Creek (HCA)* (n 13) 51 [69] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>103</sup> *Ibid* 65 [106] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>104</sup> *Ibid* 51 [69] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

extensive than full exclusive native title'.<sup>105</sup> Moreover, the Claim Group could not 'grant co-existing rights and interests in the land',<sup>106</sup> and their native title rights were highly susceptible to extinguishment by other grants, irrespective of the likelihood of those grants in fact being made.<sup>107</sup> The prior valuations of 80% and 65% of the economic value of the freehold were therefore so manifestly excessive within the framework for valuation of non-native title rights that they constituted an 'error of principle'.<sup>108</sup> The majority implied that the rights may have been worth less than 50%, however this amount was accepted because no lower figure was argued.<sup>109</sup> This analysis was deficit-based: it focused on the theoretical limitations of the rights when compared with the freehold.

This focus on 'parity of treatment'<sup>110</sup> through the adapted *Spencer* approach did not attribute any economic value to the 'secular, economic, and pragmatic aspects of Indigenous connections to land',<sup>111</sup> which are increasingly being accepted by legal scholars and other academics.<sup>112</sup> The High Court in *Timber Creek (HCA)* acknowledged evidence of these aspects, but their Honours considered that it was relevant only to cultural value. In this sense, it was impermissible to also consider it in the assessment of economic value.<sup>113</sup> For example, the Court recognised the authority that the Claim Group exercised in respect of the land around Timber Creek in that the rights and interests contained the right to protect certain areas.<sup>114</sup> Additionally, the Court found that the Claim Group's authority to exclude people from certain areas, such as the proposed site for a diamond mine, was respected by non-Indigenous people.<sup>115</sup> This was evidence of secular and pragmatic components of the Claim Group's native title rights that were capable of translation to western notions of, for example, control of access to land. Yet the majority did not look to the exercise of the Claim Group's rights when translating their economic value. Instead, the Court focused solely on their legal content and thus the theoretical limitations inherent to their non-exclusive nature.

The majority's approach to valuation was contrary to that of Mansfield J. Having received the Claim Group's evidence of land usage at first instance, his Honour found that exclusivity and non-exclusivity made little difference to the exercise of the rights of the Claim Group. The extinguished rights were 'in a practical sense very substantial',<sup>116</sup> and were 'in a practical sense exercisable in such a way as to prevent any further activity on the land, subject to the existing tenures'.<sup>117</sup> Consequently, Mansfield J considered that their value, when compared to the

<sup>105</sup> Ibid 54 [76] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>106</sup> Ibid 65 [106] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>107</sup> Ibid 55 [81] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>108</sup> Ibid 66 [106] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>109</sup> Ibid 66 [107] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>110</sup> See above nn 95–6 and accompanying text.

<sup>111</sup> Sean Brennan, 'Native Title in the High Court of Australia a Decade after *Mabo*' (2003) 14(4) *Public Law Review* 209, 214. See also Brennan (n 1) 37.

<sup>112</sup> See, eg, Gordon (n 16) 324; Brennan (n 111) 214; Bruce Pascoe, *Dark Emu* (Magabala Books, 2014); Bill Gammage, *The Biggest Estate on Earth: How Aborigines Made Australia* (Allen & Unwin, 2012).

<sup>113</sup> *Timber Creek (HCA)* (n 13) 56 [83] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>114</sup> Ibid 92–4 [180] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>115</sup> Ibid 94 [182]–[183] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>116</sup> *Timber Creek (FCA)* (n 37) 404 [231] (Mansfield J).

<sup>117</sup> Ibid 404 [232] (Mansfield J).

freehold, should not be significantly reduced.<sup>118</sup> His Honour appears to have recognised the flaws of a native title valuation exercise grounded in legalism, noting the danger of abstracting the rights from their ‘true’ and ‘real’ characteristics.<sup>119</sup>

The Full Federal Court, in obiter dictum, empathised with these difficulties.<sup>120</sup> Yet in focusing on the idea that ‘Aboriginal rights and interests in land have dimensions remote from the notions enshrined in Australian land law’,<sup>121</sup> their Honours did not attempt to translate the practical elements of the Claim Group’s rights to notions of western land usage. Instead, the Full Court rejected Mansfield J’s assessment and approach,<sup>122</sup> speculating that his Honour had thereby impermissibly double-counted the value of cultural aspects in his assessment of economic value.<sup>123</sup> The High Court majority reaffirmed this rejection.<sup>124</sup> Yet a broader reading of Mansfield J’s reasoning indicates that this is doubtful: in fact, his Honour’s analysis avoided a deficit-based translation of the rights removed from their context.<sup>125</sup>

Later in the High Court judgment, the majority reinforced their formalistic understanding of the requirements of the *RDA*, stating:

There is no disparity of treatment if the economic value of native title rights and interests is assessed in accordance with conventional tools of economic valuation adapted as necessary to accommodate the unique character of native title rights and interests and the statutory context.<sup>126</sup>

As such:

The proper comparison was not between the native title rights and interests and the rights and interests which comprise an estate in fee simple, but between the native title rights and interests and the rights and interests of a full exclusive native title.<sup>127</sup>

These references to the peculiarities of the Claim Group’s extinguished native title rights, and the need to value them accordingly, appear to demonstrate an understanding of the dictates of substantive equality. Yet they are contestable in two respects. First, the comparison between exclusive and non-exclusive native title was artificial in this case, because the non-exclusive native title rights contained substantive characteristics that were likened to those seen in exclusive native title.<sup>128</sup> Second, the analysis is in fact based on a comparison between the limited legal content of non-exclusive native title and the extensive rights of the freehold estate.<sup>129</sup> The majority intend to take account of ‘the unique character of native title rights and

<sup>118</sup> Ibid 404–5 [232] (Mansfield J).

<sup>119</sup> Ibid 402 [212]–[213] (Mansfield J).

<sup>120</sup> The Full Court consequently questioned the appropriateness of the bifurcated approach: see *Timber Creek (FAFC)* (n 38) 520–2 [140]–[144] (North ACJ, Barker and Mortimer JJ). This was rejected by the High Court: see *Timber Creek (HCA)* (n 13) 58 [86] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>121</sup> *Timber Creek (FAFC)* (n 38) 521 [144] (North ACJ, Barker and Mortimer JJ).

<sup>122</sup> Ibid 508–9 [82]–[84] (North ACJ, Barker and Mortimer JJ).

<sup>123</sup> Ibid 514 [111] (North ACJ, Barker and Mortimer JJ).

<sup>124</sup> *Timber Creek (HCA)* (n 13) 65 [105] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>125</sup> See, eg, *Timber Creek (FCA)* (n 37) 402 [214] (Mansfield J).

<sup>126</sup> *Timber Creek (HCA)* (n 13) 53–4 [76] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>127</sup> Ibid 54 [76] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>128</sup> See above nn 110–19 and accompanying text.

<sup>129</sup> See above nn 97–107 and accompanying text. See also *Timber Creek (HCA)* (n 13) 58–9 [87], 65–6 [104]–[106] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

interests',<sup>130</sup> however are prevented from doing so through relying on the legal content of other real property interests and western ideals of land usage as an indicator of economic value.

This discussion reveals an implicit tension in the judgment: the majority defer to Mansfield J's first-hand consideration of the evidence of non-economic loss, but reject his Honour's view of the practical, non-cultural realities of the exercise of the rights of the Claim Group.<sup>131</sup> Thus, the majority in *Timber Creek (HCA)* appear to have overlooked the 'peculiar features'<sup>132</sup> of the Claim Group's native title rights through the legalistic translation exercise in the modified *Spencer* test, and therefore translated their economic value in a manner inconsistent with substantive equality.

## 2 *Extinguishment and Compensation: A Reliance on Ward*

The legalism inherent to the modified *Spencer* approach to economic valuation in *Timber Creek (HCA)* largely derives from the 'inconsistency' test for extinguishment expounded in late 1990s and early 2000s native title jurisprudence, including *Fejo*<sup>133</sup> and *Ward*.<sup>134</sup> The alignment of the extinguishment doctrine with the compensation arena prevented substantively equal valuation of the native title rights of the Claim Group in this case.

Like the approach to economic valuation in *Timber Creek (HCA)*, the test for extinguishment established in *Fejo* and *Ward* failed to account for the very real possibility of ongoing practical connections to country and seemingly placed native title in an inherently weak position as against the grant of other real property interests.<sup>135</sup> For Bartlett, the test represented a 'judicial denial of equality',<sup>136</sup> in its emphasis on the *sui generis* nature of native title rights in a manner which in fact established their 'unique susceptibility to extinguishment' as against other interests.<sup>137</sup> Bret Walker SC argues that *Fejo* in particular denied the qualities of 'title' to native title,<sup>138</sup> and in a scathing critique writes that the extinguishment principle represents 'a triumph of logic and a denial of human experience'.<sup>139</sup> Watson further asserts that *Fejo* and *Ward* are symbolic of the High Court's inability to recognise cultural differences in an 'affirmative and ongoing way'.<sup>140</sup>

<sup>130</sup> *Timber Creek (HCA)* (n 13) 50 [66], 53–4 [76] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>131</sup> *Ibid* 65–6 [106] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>132</sup> Tina Jowett and Kevin Williams, 'Jango: Payment of Compensation for the Extinguishment of Native Title' (2007) 3(8) *Land, Rights, Laws: Issues of Native Title* 1, 10, quoting *Western Australia v Thomas* (1996) 133 FLR 124, 192.

<sup>133</sup> *Fejo* (n 4).

<sup>134</sup> *Ward* (n 6).

<sup>135</sup> Sean Brennan, 'Native Title Extinguishment Law in the High Court' (2014) 25(1) *Public Law Review* 8, 9, 12.

<sup>136</sup> Bartlett (n 1) 72.

<sup>137</sup> *Ibid* 73.

<sup>138</sup> Bret Walker, 'The Legal Shortcomings of Native Title' in Sean Brennan, Megan Davis, Brendan Edgeworth and Leon Terrill (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 14, 17–18.

<sup>139</sup> *Ibid* 18.

<sup>140</sup> Watson (n 24) 229.

In this sense, the repeated citing of *Ward* by the majority in *Timber Creek (HCA)* is concerning for substantive equality as it imports the legalism inherent to the extinguishment doctrine to the *Native Title Act*'s compensation requirements, which had been formulated in ambiguously broad terms by the legislature.<sup>141</sup> Consequently, the necessary act of translation to ascertain economic value was not carried out in a manner alert to the secular realities of the Claim Groups' native title rights. The majority stated:

It is plain from the holding in *Ward* that, because the non-exclusive native title rights and interests in that case did not amount to having 'lawful control and management' of the land, the native title holders were not to be assimilated to 'owners' but could at best be regarded as 'occupiers' and thus could be compensated only at the lesser rate applicable to occupiers.<sup>142</sup>

Edelman J took a slightly different approach: his Honour appeared to examine the extent to which the native title rights burden or encroach upon the use of the fee simple in a practical sense.<sup>143</sup> However, the citing of *Ward* had a similar effect to that of the majority's analysis, postulating a theoretical 'difference of "kind"'<sup>144</sup> between exclusive and non-exclusive native title rights. In Edelman J's view, this expressly precludes consideration of whether any 'right to control access is included within the so-called "bundle of rights" held by the native title claimants',<sup>145</sup> and his Honour thereafter attributes the Claim Group's use of the land solely to cultural value.<sup>146</sup> Despite the thinly veiled jab at *Ward*'s 'bundle of rights' construction of native title, Edelman J's analysis seemingly contains an unresolved methodological tension. On the one hand, the economic value of extinguished native title should be ascertained, at least to some extent, by reference to the Claim Group's practical exercise of their native title rights (in the sense of their burden on the fee simple). On the other hand, the *Ward* approach dictates that value should be determined completely in accordance with their non-exclusive legal content.

The pervasiveness in *Timber Creek (HCA)* of *Ward*'s discriminatory distinction between owners and occupiers is a stark reminder of a view seen in the late 1990s and early 2000s that Indigenous uses of land were inferior.<sup>147</sup> Its presence in the compensation context undermines the efforts of both the majority and Edelman J to attribute value to the perpetual nature of the Claim Group's interests in the land, but for irreversible extinguishment.<sup>148</sup> This fact is highly significant: as Burke argues, '[n]ative title is an ancient title compared to a freehold title which needs only to have been owned for an instant before full market value is payable upon acquisition.'<sup>149</sup> However, the alignment of native title compensation law with extinguishment principles largely disregards any value attributable to historical

<sup>141</sup> Burke (n 36) 17–18. See also *Timber Creek (FCAFC)* (n 38) 521 [142] (North ACJ, Barker and Mortimer JJ).

<sup>142</sup> *Timber Creek (HCA)* (n 13) 53 [75] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>143</sup> *Ibid* 124–8 [288]–[301] (Edelman J).

<sup>144</sup> *Ibid* 114 [256] (Edelman J).

<sup>145</sup> *Ibid*.

<sup>146</sup> *Ibid* 123 [285] (Edelman J).

<sup>147</sup> See Bartlett (n 1) 277–8, 280–81.

<sup>148</sup> See, eg, *Timber Creek (HCA)* (n 13) 51 [69] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), 127 [300] (Edelman J).

<sup>149</sup> Burke (n 36) 15.

occupation independent from cultural use. Therefore, the practical effect of the High Court's entwining of the *Spencer* test and *Ward* was, to adopt McLeish's position, disappointing. It prevented adequate translation of the evidence of the Claim Group's secular authority over the land, and as such failed to achieve substantive equality.

### 3 *Wider Implications: A Positive Outlook for Future Claims?*

Despite the flaws identified above, there are some positive statements of principle that can be drawn from the economic loss component of the *Timber Creek (HCA)* judgment. These may offer hope for future claimants in terms of achieving a substantively equal valuation of their native title rights when compared with other real property interests.

First, the High Court's acknowledgement that even non-exclusive native title rights have some economic value is important. The significance of this recognition is not diminished by the fact that in this case, their 'limited' nature resulted in a reduced award. The majority noted that the native title rights of the Claim Group 'had a recognisable economic worth',<sup>150</sup> and stated that generally, extinguishment of exclusive native title attracts the full value of the freehold.<sup>151</sup> The certainty that more extensive rights will attract higher compensation in respect of economic loss will have positive implications for future native title compensation applications, even if the combined effect of ss 51 and 51A of the *Native Title Act* appears to limit that economic value to that of the freehold estate.<sup>152</sup> Furthermore, that limit is also not necessarily set in stone: the Claim Group did not advance any entitlement to compensation pursuant to the constitutional 'shipwrecks clause'<sup>153</sup> contained in s 53 of the *Native Title Act*.<sup>154</sup> It therefore remains theoretically possible that extinguished native title rights in a future compensation claim could be given a higher value than the freehold estate under that provision.<sup>155</sup>

These implications are evident when considered in light of significant recent native title jurisprudence such as *Akiba*<sup>156</sup> and subsequent Federal Court native title determinations, which have moved away from the 'frozen rights' interpretation of native title propounded in the late 1990s and early 2000s. Early cases such as *Ward*<sup>157</sup> and *Yorta Yorta*<sup>158</sup> established a narrow conceptualisation of native title rights that have been described as 'frozen'<sup>159</sup> or 'berry picking' rights,<sup>160</sup> that is, limited only to practices that can be proved to have survived colonisation and

<sup>150</sup> *Timber Creek (HCA)* (n 13) 57 [85] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>151</sup> Ibid 29 [3](1) (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>152</sup> Ibid 44–5 [48]–[51] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>153</sup> Ibid 45 [49] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ). Edelman J describes that provision as a 'safety net' at 137 [330]: quoting Explanatory Memorandum, Native Title Amendment Bill 1997, 224 [24.10].

<sup>154</sup> See Claim Group Submissions (n 55) [27]. See also nn 46–8 and accompanying text.

<sup>155</sup> See, eg, Aaron Moss and William Isdale, 'Where to Next? Native Title Compensation following *Timber Creek*', *AUSPUBLAW* (Blog Post, 3 April 2019).

<sup>156</sup> *Akiba* (n 8).

<sup>157</sup> *Ward* (n 6).

<sup>158</sup> *Yorta Yorta* (n 5).

<sup>159</sup> Bartlett (n 1) 72, 295.

<sup>160</sup> Noel Pearson, 'Promise of Mabo Not Yet Realised', *The Australian* (29 May 2010).

dominated by the spiritual element of native title.<sup>161</sup> The frozen rights interpretation significantly reduces the potential for any future practical or economic benefit to claimant groups.<sup>162</sup> In *Timber Creek (HCA)*, the particularised and largely ‘frozen’ 2006 native title determination of the Claim Group also limited the compensation payable under the adapted *Spencer* approach.<sup>163</sup> The judgments of the majority and Edelman J reflect this outcome: both argued that the practical content of the rights was largely cultural,<sup>164</sup> with the minor exception of rights to live off the land.<sup>165</sup>

In recent cases such as *Akiba*, the High Court has avoided over-specifying rights, even accepting that native title is not fundamentally incompatible with western notions of resource exploitation. For some scholars, this signifies a ‘turn towards greater moderation and realism in the judicial treatment of native title’<sup>166</sup> and an application of ‘the standard fundamentally determined by the dictates of equality’.<sup>167</sup> In *Akiba*, the Court rejected the notion that ‘the right to take for any purpose resources in the native title areas’ should be read down to exclude commercial rights,<sup>168</sup> and subsequent Federal Court native title determinations have followed this development. For example, in *Willis (on behalf of the Pilki People) v Western Australia (No 2)*, McKerracher J also found that the native title rights of the Pilki People included ‘the right to access and take for any purpose the resources of the land and waters’.<sup>169</sup> Cases such as these have two significant implications for compensation. First, as stated by the majority and Edelman J in *Timber Creek (HCA)*, commercial rights have, of themselves, significant economic value under the adapted *Spencer* test.<sup>170</sup> Second, a broader framing of rights increases what could possibly be the subject of compensation.<sup>171</sup> In line with the practical approach to extinguishment taken in *Akiba*,<sup>172</sup> these kinds of conceptualisations of native title could allow for more emphasis to be placed on the exercise of the rights in question when translating their economic value, contrary to the legalistic approach in *Timber Creek (HCA)*.

The second positive statement of principle that future claimants can take from the adapted *Spencer* exercise in *Timber Creek* is that inalienability is irrelevant in ascertaining economic value. Inalienability is a significant barrier to achieving

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<sup>161</sup> See, eg, Paul Finn, ‘A Judge’s Reflections on Native Title’ in Sean Brennan, Megan Davis, Brendan Edgeworth and Leon Terrill (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 23, 27.

<sup>162</sup> Morris (n 7) 3–4.

<sup>163</sup> Burke (n 36) 36; Bartlett (n 1) 748.

<sup>164</sup> *Timber Creek (HCA)* (n 13) 56 [81] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), 123 [285] (Edelman J).

<sup>165</sup> Ibid 51 [69] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), 391 (Edelman J).

<sup>166</sup> Brennan (n 12) 29.

<sup>167</sup> Bartlett (n 1) 109.

<sup>168</sup> See, eg, *Akiba* (n 8) 218 [5], 224 [21] (French CJ and Crennan J).

<sup>169</sup> *Willis (on behalf of the Pilki People) v Western Australia (No 2)* [2014] FCA 1293, [3] (emphasis added). For a similar and more recent example, see *Fulton (on behalf of the Mambali Amaling-Gan, Murungun Igalumba, Murungun Milgawirri, Budal Yuwaran and Guyal Bardi Dumnyun-Ngatanyana Estate Groups) v Northern Territory* [2020] FCA 1271, [9](b) (White J).

<sup>170</sup> See, eg, *Timber Creek (HCA)* (n 13) 65 [106] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ), 391 127 [299] (Edelman J).

<sup>171</sup> See Brennan (n 12) 34–7.

<sup>172</sup> Brennan (n 12).

substantial equality for native title, with Morris noting that it is ‘ill-suited to economic development in the modern Australian economy’ and contradictory to the special measures contained in the *Native Title Act*.<sup>173</sup> The assumption that native title is inalienable has not been challenged since *Mabo (No 2)*, despite its justifications having been described as ‘circular’<sup>174</sup> and symbolic of the continued pervasion of the ‘noble savage’ and paternalism in native title jurisprudence.<sup>175</sup> In *Timber Creek (HCA)*, however, the majority held that inalienability was irrelevant to economic valuation of native title on the basis of statutory interpretation of s 51A of the *Native Title Act*, read in light of its explanatory memoranda: ‘Just as the inalienability of full exclusive native title is deemed to be irrelevant to the assessment of its economic value, so too must it follow that the inalienability of non-exclusive native title is irrelevant to its economic value.’<sup>176</sup>

Edelman J took a similar position, finding that inalienability was irrelevant to economic value because the adapted *Spencer* approach focused on what a willing but not anxious purchaser would pay to extinguish, rather than acquire, the native title rights.<sup>177</sup> The High Court’s delineation of this principle, and its emphatic rejection of the Full Court’s opinion that inalienability on its own reduced the economic value of native title rights,<sup>178</sup> are symbolically important. It resists a framing of native title rights that is both frozen and inferior, instead placing native title on more equal footing with other real property interests in the compensation context. Therefore, while the High Court’s approach to the compensable acts is, in some respects, disappointing for the *Timber Creek* claimants, the judgment contains some positive statements of principle that clarify the relevance of inalienability, as well as indicating increased potential for compensation of broader native title rights like those in *Akiba*.

## V Unanswered Questions: The Invalid Future Acts

Having considered the implications of the modified *Spencer* approach in *Timber Creek (HCA)* in respect of the compensable acts, this case note now returns to the claim for damages for the invalid future acts. This issue was not agitated in the High Court.<sup>179</sup> The resulting lack of clarity in this area is significant for substantively equal valuation of native title rights compared to other real property interests.

Since its enactment in 1993, the *Native Title Act* has sought to address inequality and promote economic participation for native title holders, having regard to the effects of non-consensual use and dispossession of land.<sup>180</sup> The future acts

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<sup>173</sup> Morris (n 7) 1.

<sup>174</sup> Ibid 11. See also at 6.

<sup>175</sup> Ibid; David Yarrow, ‘The Inalienability of Native Title in Australia: A Conclusion in Search of a Rationale’ in Sean Brennan, Megan Davis, Brendan Edgeworth and Leon Terrill (eds), *Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 60, 69; Kent McNeil, ‘Self-Government and the Inalienability of Aboriginal Title’ (2002) 47(3) *McGill Law Journal* 473.

<sup>176</sup> *Timber Creek (HCA)* (n 13) 64 [101] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

<sup>177</sup> Ibid 122 [283] (Edelman J).

<sup>178</sup> *Timber Creek (FCAFC)* (n 38) 513–17 [109]–[122] (North ACJ, Barker and Mortimer JJ).

<sup>179</sup> See n 63 and accompanying text.

<sup>180</sup> See nn 26–30 and accompanying text.



regime is central to that effort,<sup>181</sup> providing for the right to negotiate in certain circumstances<sup>182</sup> and for the making of Indigenous Land Use Agreements ('ILUAs').<sup>183</sup> ILUAs are now routine in many remote commercial and government projects and often provide economic benefits to Traditional Owners, such as monetary compensation, employment and education schemes, in exchange for use of land in which native title rights exist.<sup>184</sup> Invalid future acts may also be validated pursuant to the terms of an ILUA in return for compensation.<sup>185</sup> These procedural rights conferred by the *Native Title Act* are central to ensuring equal treatment of native title rights compared with other real property interests.

The relevant provisions of the *Native Title Act* and the arguments of the Claim Group in *Timber Creek* have been described above.<sup>186</sup> At first instance, Mansfield J awarded general law damages for the invalid future acts, comprising 80% of the market value of the land on which the invalid future acts took place.<sup>187</sup> It is not clear whether this was made on the basis of relief for the tort of trespass, or as an alternative to injunctive relief under the future acts regime.<sup>188</sup> The Full Federal Court rejected the award on the basis of this lack of clarity.<sup>189</sup>

Yet the Full Court also noted that the issue of compensation under the *Native Title Act* for invalid future acts remains unaddressed, and highlighted the consequent need for applicable principles.<sup>190</sup> This was especially so in the present circumstances, where an ILUA had not been instituted following the invalid future act.<sup>191</sup> It is therefore surprising that the Claim Group in *Timber Creek* did not advance any entitlement to compensation in the High Court, either based on the general law or the shipwrecks clause in s 53 of the *Native Title Act*. While it is not clear whether the acts in this case enlivened the right to negotiate, the rights conferred by the future acts regime had been in operation since 1993, five years prior to the first invalid act. Given that the existence of native title over the relevant lots was not contested,<sup>192</sup> it is likely that such grants would today take place pursuant to an ILUA or otherwise be the subject of compensation.<sup>193</sup> Yet having not been argued in the High Court, there is currently no certainty for future claimants that compensation may be available for non-adherence to those procedures. As the Full Federal Court recognised, some indication of the applicable principles in these circumstances would therefore have been useful, particularly in light of their purpose.

There is consequently an uncomfortable temporal disjuncture in the native title compensation exercise post-*Timber Creek* (HCA). On one hand, the case purports to clarify the compensation payable to native title holders under the *Native*

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<sup>181</sup> Bartlett (n 1) 63, 543–4, 589, 600–3; Gunn (n 18) 302; Song (n 83) 12.

<sup>182</sup> *Native Title Act* (n 2) pt 2 div 3 sub-div P.

<sup>183</sup> Ibid pt 2 div 3 sub-divs B–D.

<sup>184</sup> Bartlett (n 1) 690–91. See, eg, the Ord Final Agreement ILUA: Bartlett (n 1) 703.

<sup>185</sup> Ibid 695–6.

<sup>186</sup> See nn 49–50, 52–55 and accompanying text.

<sup>187</sup> *Timber Creek* (FCA) (n 37) 443–5 [449]–[462] (Mansfield J).

<sup>188</sup> Ibid 445 [459]–[462] (Mansfield J).

<sup>189</sup> *Timber Creek* (FCAFC) (n 38) 586–7 [446]–[448] (North ACJ, Barker and Mortimer JJ).

<sup>190</sup> Ibid 587 [447]–[448] (North ACJ, Barker and Mortimer JJ).

<sup>191</sup> Ibid.

<sup>192</sup> *Timber Creek* (FCA) (n 37) 443 [450] (Mansfield J).

<sup>193</sup> *Timber Creek* (FCAFC) (n 38) 587 [447] (North ACJ, Barker and Mortimer JJ).

*Title Act* for economic loss due to acts extinguishing native title from 1975 onwards: that is, following the enactment of the *RDA*. On the other hand, the case appears to do so based on an economic valuation of traditional laws and customs which, by legal definition, have largely remained incapable of change since before British sovereignty. Further, the law as it presently stands does not clarify the value of rights to economic participation contained in the future acts regime, which have operated since 1993. The task is conceptually stuck between the two worlds. This can be contrasted with the High Court's judgment in respect of cultural loss: there, the majority joined the past and the future through, for example, permitting consideration of the consequences of extinguishment for 'future descendants' of the Claim Group.<sup>194</sup>

Thus, in the lack of delineation of principles in respect of compensation for lost *Native Title Act* procedural rights, there remains some doubt as to whether the compensation landscape post-*Timber Creek (HCA)* provides for substantively equal valuation of native title when compared with other real property interests. It is clear that the value attaching to lost *Native Title Act* procedural rights requires judicial clarification in the future.

## VI Conclusion

*Timber Creek (HCA)* is a landmark case for native title. While it is largely accepted that the award for cultural loss achieves substantive equality, the same cannot be conclusively stated in respect of the High Court's modified *Spencer* approach to economic valuation of the Claim Group's rights in this case. The Court's commitment to legalism came at the expense of considering the secular and pragmatic realities of the Claim Group's exercise of their native title rights in this case, and the alignment of economic value with the stringent extinguishment doctrine represented by *Ward* is concerning.

The case also leaves doubt as to the amount payable for invalid future acts, having not been argued in the High Court. *Timber Creek (HCA)* fails to secure substantive equality for native title compensation in these respects.

However, there are some important positives to be drawn from the decision which, in the context of recent cases, place native title on more equal footing with other real property interests. The potential for broader, *Akiba*-like rights to attract significant awards for compensation is clear from this decision, and the rejection of inalienability as a relevant factor to economic value is symbolically important. Overall, then, there are shortcomings in the test applied in relation to the rights of the Ngaliwurru and Nungali peoples. However, considered in tandem with the award of compensation for cultural loss, the decision in *Timber Creek (HCA)* is a step towards securing substantive equality for native title compared to other real property interests.

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<sup>194</sup> *Timber Creek (HCA)* (n 13) 107–8 [228]–[231] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

# Review Essay

## *The Legal Profession in the Digital Age*

*The Impact of Technology and Innovation on the Wellbeing of the Legal Profession* by Michael Legg, Prue Vines and Janet Chan (eds) (2020), Intersentia, 340 pp, ISBN 9781780689555

Salvatore Caserta\*

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### *Abstract*

New technologies have made their way into legal practice. *The Impact of Technology and Innovation on the Wellbeing of the Legal Profession*, a collection of essays edited by Michael Legg, Prue Vines, and Janet Chan, provides an overview of the changing conditions under which law is practised in Australia and beyond, and of the impact that these changes may have on the wellbeing of the legal profession.

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## I Introduction

Where is the legal profession heading? Are innovation and new technologies changing the conditions under which law is practised in Australia and beyond? Will the gig economy, artificial intelligence, and the new organisational structures facilitated by technology aid the legal profession in exiting the hole in which it seems to have sunk during the last decades in terms of life-quality, wellbeing, and work satisfaction? These and other related compelling questions are addressed in *The Impact of Technology and Innovation on the Wellbeing of the Legal Profession*, a volume edited by Michael Legg, Prue Vines and Janet Chan.<sup>1</sup> The book is structured in twelve engaging, well-written, and well-researched chapters. It provides an original narrative on the Australian legal profession by joining two, often surprisingly, separated academic discourses: the one on the wellbeing of lawyers and the one on the impact of technology on legal work.

## II Overview

Chapter 1 of the book, the introduction, presents in a concise, effective way the main dynamics characterising the contemporary changing field of lawyering and how these are altering legal practice.<sup>2</sup> The chapter begins by recapitulating the well-known stories of the expanding nature of the legal field and its globalisation, with a glimpse of how the ongoing global COVID-19 pandemic is creating a range of additional stressors for lawyers. The chapter then presents some relevant aspects of the impact of digital technology on legal work. Here, it is compellingly argued that the digitalisation of law has not revolutionised the legal field, as far too often it is argued by law and technology scholars. Rather, the claim is that the availability of new digital solutions provides lawyers with opportunities to become more efficient and to increase revenue; a fact that the authors consider to have a potentially positive impact on the overall wellbeing of the legal profession.

The authors, however, are also not blind to the fact that the digitalisation of law may have negative repercussions, for instance, by decreasing the need of certain professional figures (such as junior lawyers) or by pushing lawyers to work around the clock. New technologies are also facilitating the rise of new business structures for practising law, such as incorporated legal practices, listed law firms, and multidisciplinary practices. An emergent example is the virtual law firm; a technology-based firm that provides access to a network of lawyers who can be located almost anywhere and often use alternative fee arrangements as new ways of practising law. Finally, the introduction claims that the dynamics of the gig economy may bring significant innovation in the market of legal service providers and the ways in which legal work is performed. The focus is on what has come to be known as ‘NewLaw’, which the authors note can take different forms. It can be a dispersed

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<sup>1</sup> Michael Legg, Prue Vines and Janet Chan (eds) *The Impact of Technology and Innovation on the Wellbeing of the Legal Profession* (Intersentia, 2020).

<sup>2</sup> Michael Legg, Prue Vines and Janet Chan, ‘The Changing Field of Lawyering and its Impact on Practice and Wellbeing’ in Michael Legg, Prue Vines and Janet Chan (eds) *The Impact of Technology and Innovation on the Wellbeing of the Legal Profession* (Intersentia, 2020) 3.

law firm that assists individual lawyers conduct their individual practices by providing regulatory and administrative support. Alternatively, NewLaw may take the shape of a legal marketplace providing an online platform to connect lawyers and clients. NewLaw firms can also be tech-enabled labour hire services, typically providing more junior or less experienced lawyers to law firms and corporate clients on an as-needed basis.

The remainder of the book is divided into two parts. Part II, 'Change, Stress and Wellbeing', provides the readers with several empirical studies on the wellbeing of different categories of lawyers. Part III, 'Technology, Innovation and the Structure of Legal Practice', has a more direct focus on the impact of technology on lawyers, law firms, and organisational structures.

The empirical chapters in Part II provide a (rather grim) picture of the Australian legal profession. In Chapter 2, Prue Vines and Alex Steel present the result of a survey of law students and draw general conclusions on why they are prone to depression and stress.<sup>3</sup> They point to the fact that this inclination may be due to law students' characteristics; more specifically, their tendency to use external, rather than internal, motivating factors. The survey also shows that younger students are more autonomous, a factor that according to the authors would suggest that they may be more resilient during their career. In Chapter 3, Suzanne Poynton and Janet Chan discuss the results of a survey of Australian lawyers concerning the relationship between distress, satisfaction, and work-related aspects.<sup>4</sup> They conclude that several variables, such as 'effort-reward imbalance', 'over-commitment', and 'work-family conflict' are the main triggers of depression, stress, and anxiety in lawyers. In Chapter 4, Alison Wallace and Imogen D'Souza analyse data from a large national study of Australian lawyers to explore mental health issues and the extent of bullying and sexual harassment among lawyers.<sup>5</sup> They show that a significantly large number of lawyers has been bullied (46%) and has experienced sexual harassment (one in five).<sup>6</sup> Chapters 5 and 6, authored by Janet Chan and Holly Blackmore and by Colin James, Caroline Strevens, and Rachel Field respectively, analyse the impact of neoliberalism on public sector lawyers and academics.<sup>7</sup> Chapter 5 suggests that public sector and community lawyers suffer similar negative psychological symptoms as those working in the private sector due to the commodification, economisation, and increased competition. The former, however,

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<sup>3</sup> Prue Vines and Alex Steel, 'Student Attitudes to Legal Education: Revisiting the Pointers to Depression and Anxiety?' in Michael Legg, Prue Vines and Janet Chan (eds) *The Impact of Technology and Innovation on the Wellbeing of the Legal Profession* (Intersentia, 2020) 31.

<sup>4</sup> Suzanne Poynton and Janet Chan, 'The Paradox of Satisfaction and Distress Among Lawyers: Implications for a Changing Field' in Michael Legg, Prue Vines and Janet Chan (eds) *The Impact of Technology and Innovation on the Wellbeing of the Legal Profession* (Intersentia, 2020) 57.

<sup>5</sup> Alison Wallace and Imogen D'Souza, 'Stress, Bullying and Harassment in the Legal Profession: A Risky Business' in Michael Legg, Prue Vines and Janet Chan (eds) *The Impact of Technology and Innovation on the Wellbeing of the Legal Profession* (Intersentia, 2020) 77.

<sup>6</sup> Ibid 88–90.

<sup>7</sup> Janet Chan and Holly Blackmore, 'Public Sector Lawyering Stress and Wellbeing: Neoliberalism at Work?' in Michael Legg, Prue Vines and Janet Chan (eds) *The Impact of Technology and Innovation on the Wellbeing of the Legal Profession* (Intersentia, 2020) 105; Colin James, Caroline Strevens, and Rachel Field, 'Law Teachers Speak Out: What do Law Schools Need to Change?' in Michael Legg, Prue Vines and Janet Chan (eds) *The Impact of Technology and Innovation on the Wellbeing of the Legal Profession* (Intersentia, 2020) 131.

score better in terms of job satisfaction than their private sector counterparts, most likely due to the meaningful, socially oriented nature of their job. Chapter 6 presents the qualitative results of national surveys conducted in the United Kingdom ('UK') and in Australia on law teachers' experience of wellbeing and stress. While the authors report that the majority of respondents in both countries were overall satisfied with their work, they were also critical of the 'neoliberal' turn of their universities, which they perceived as detrimental, not only to law teachers, but also to the student experience and their university's performance.

The Part III chapters have a more direct focus on innovation and technology. In Chapter 7, Jennifer Robbennolt examines the connection between ethics and professionalism in legal practice and the wellbeing of lawyers. She suggests that these two concerns are related, with one influencing the other and vice versa.<sup>8</sup> She also identifies several factors that influence both ethics and wellbeing, such as the adversarial nature of legal practice, time and financial pressures, as well as the leadership and culture of legal workplaces. In Chapter 8, Margaret Thornton discusses how the growth of the gig economy is likely to affect lawyers' wellbeing.<sup>9</sup> She argues that NewLaw firms, by refusing to use traditional hierarchical structures and time-based billing, seem to fare better in terms of job satisfaction among their lawyers; suggesting that what she labels the 'uberisation' of legal practice may impact positively on the overall wellbeing of the legal profession. But as she also points out, the dynamics of the gig may have negative repercussions, as they are likely to put lawyers in a position of having to overwork and do not create the possibilities and incentives for them to progress in their careers. In Chapter 9, Tahlia Gordon discusses the changes created by legislation passed in New South Wales, which allowed law firms to incorporate their practices and to receive financing by non-lawyers.<sup>10</sup> Gordon welcomes this innovation as having the potential to increase the health and wellbeing of lawyers. However, Gordon also notes that the same developments may have a negative influence on lawyers, especially as they pose threats to the professional and ethical obligations of lawyers and will likely foster bureaucratisation. In Chapter 10, Felicity Bell, Justine Rogers and Michael Legg discuss the potential impact of artificial intelligence on legal work.<sup>11</sup> They focus on wellbeing and professionalism from two conflicting perspectives: the traditional model of the profession as a calling and the more modern commercialistic focus of the profession as a business. Through these two models, they explain that artificial intelligence may enhance those aspects of professionalism associated with wellbeing, such as engagement in meaningful work and serving the community,

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<sup>8</sup> Jennifer K Robbennolt, 'Behavioural Legal Ethics and Attorney Wellbeing in Contemporary Practice' in Michael Legg, Prue Vines and Janet Chan (eds) *The Impact of Technology and Innovation on the Wellbeing of the Legal Profession* (Intersentia, 2020) 155.

<sup>9</sup> Margaret Thornton, 'Is "Uberisation" the Path to Lawyer Wellbeing?' in Michael Legg, Prue Vines and Janet Chan (eds) *The Impact of Technology and Innovation on the Wellbeing of the Legal Profession* (Intersentia, 2020) 177.

<sup>10</sup> Tahlia Gordon, 'Do Law Firm Structures Matter? Incorporated Legal Practices and the Health and Wellbeing of Lawyers' in Michael Legg, Prue Vines and Janet Chan (eds) *The Impact of Technology and Innovation on the Wellbeing of the Legal Profession* (Intersentia, 2020) 199.

<sup>11</sup> Felicity Bell, Justine Rogers and Michael Legg, 'Artificial Intelligence and Lawyer Wellbeing' in Michael Legg, Prue Vines and Janet Chan (eds) *The Impact of Technology and Innovation on the Wellbeing of the Legal Profession* (Intersentia, 2020) 239.

through increased efficiency and being able to promote access to justice more widely. Yet, artificial intelligence may also exacerbate existing pressures in the profession such as increasing competitive tensions and giving rise to greater precarity of employment. In Chapter 11, Michael Legg and Justine Rogers assess different fee arrangements in light of lawyers' wellbeing. They argue that the classic billable-hour has adverse effects on wellbeing, due to its focus on performance monitoring.<sup>12</sup> The chapter then considers alternative fee arrangements as the future for legal practice, although they are clear that those alone cannot provide the panacea for the evils of the legal profession.

The book ends with some concluding remarks by Richard Collier in which the connection between legal practice and legal academy is drawn.<sup>13</sup> By relying on the experience of the UK, Collier acknowledges that for both the professional and the academic lawyer the identification with a professional ideal can harm not only the person, but also the profession and academy themselves. He concludes by noting that, while there seems to be a move to address the wellbeing of legal academics, the road is still long and its systemic nature must be recognised in order to come up with long-term solutions that would be able to address the problems in a satisfactory way.

### III The Legal Profession in the Digital Age

This book provides an interesting and timely contribution to the discussion of the legal profession in the digital age. It does so from the relatively unexplored, but meaningful, perspective of lawyers' wellbeing and the extent to which it may (or may not) be impacted by technological changes. It makes two important contributions. First, the book provides a comprehensive, empirically grounded, and up-to-date overview of Australian lawyers' wellbeing in contemporary society. Importantly, the empirical analysis is not limited to the usual suspects of the legal field (BigLaw lawyers), but it also covers those sectors of the profession that often remain unexplored, such as academics, public sector lawyers, and law students. Although it is not entirely clear to what extent these findings are generalisable to other jurisdictions, this is a valuable contribution. This is particularly true in the light of the fact that the collective findings of the first five chapters clearly show that the identity and wellbeing crisis of the legal profession is systemic. Frankly, nobody would be surprised to read that the more commodified and business-oriented lawyers fare poorly in terms of wellbeing, work-life balance, and so on.<sup>14</sup> It is, however, surprising, and rather troubling, to discover that stress, anxiety, dissatisfaction, bullying, and marginalisation hit hard also those sectors of the profession that, at least on paper, have chosen a more community oriented, socially meaningful professional path. It is even more concerning to find out that it involves even law

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<sup>12</sup> Michael Legg and Justine Rogers, 'Lawyers' Fee Arrangements and their Wellbeing' in Michael Legg, Prue Vines and Janet Chan (eds) *The Impact of Technology and Innovation on the Wellbeing of the Legal Profession* (Intersentia, 2020) 267.

<sup>13</sup> Richard Collier, 'Reflections on the UK Experience of Legal Academic Wellbeing and the Legal Professions: Moving Across Silos' in Michael Legg, Prue Vines and Janet Chan (eds) *The Impact of Technology and Innovation on the Wellbeing of the Legal Profession* (Intersentia, 2020) 267.

<sup>14</sup> A situation that has been explored extensively in the literature: see, among many others, Anthony T Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (Belknap Press, 1993).

students — a fact that reveals that there is something inherently flawed in the way in which legal studies are structured and organised. More generally, the findings of the first part of the book reveal that the hyper-competitive, neoliberal spirit of our contemporary society has managed to colonise all forms of legal practice, from teaching to research, from public sector law to the classic forms of advocacy. These findings are important. A broad and widespread neoliberal turn of the legal profession, such as the one portrayed by this book, is likely to generate new, and reinforce already existing, forms of inequality and stratification among classes of lawyers, with negative consequences for the overall wellbeing of the legal profession.

The second important contribution of the book is that it provides a comprehensive overview of the issues that are presently salient given the growing use of technology in legal practice. These issues are: the future of professionalism in an increasingly commodified market of legal service providers; the geographical distribution of legal practice; the changing organisational structures of the legal service ecosystem; and the conceptual relationship between technology and professional expertise. Such dynamics are often said to challenge classical sociological conceptions on the agency and the form of the law, and, as such, they may be deemed responsible for disrupting long-established processes.<sup>15</sup> By providing a comprehensive and empirically grounded analysis of such developments, the authors meaningfully contribute to existing debates on the relationship between the legal profession and technology. Particularly significant, in my view, is the transversal discussion on the changing nature of professionalism in a technological world and the extent to which the existing developments are altering power and organisational structures within the profession. Although from different perspectives, all the chapters in Part III of the book address the evergreen question of the sociology of the legal profession; that is, whether the practice of law is a vocation or a mere business, and whether the recent technological developments are leaning in favour of one or the other. As expressed by Evetts, the big question here is whether new technologies are pushing the legal profession toward the classic form of occupational professionalism, characterised by autonomy and collegiality, or whether they are fostering organisational professionalism, which is constituted by a discourse of control imposed by managers in work organisations incorporating rational-legal forms of authority and hierarchical structures of responsibility and decision-making in work procedures and practices.<sup>16</sup> There are no easy answers to these compelling questions, and indeed the suggestions emerging from these chapters are interlocutory. The merit of the book is, however, to bring these issues to the table.

A couple of critical remarks are also worth noting. The first concerns the structure of the book. The second is more substantial and concerns the lack of overarching conceptualisation of the role of technology in law. As to the first point, there seems to be a disconnect between the two parts of the book. The empirical

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<sup>15</sup> Julian Webb, 'Information Technology and the Future of Legal Education: A Provocation' (2019) (Special Issue: Law & Human Dignity in the Technological Age) *Griffith Journal of Law & Human Dignity* 72.

<sup>16</sup> See, Julia Evetts, 'Professionalism: Value and Ideology' (2013) 61(5–6) *Current Sociology* 778 <<https://doi.org/10.1177%2F0011392113479316>>.



chapters reporting the wellbeing of the Australian legal profession seem unlinked from the overarching discussion on innovation and technology characterising the book. Because of this disconnect, these chapters do not assess whether technological developments in legal practice are likely to foster or hinder the overall wellbeing of the legal profession. Rather, they are limited to explore the status quo of the wellbeing of the legal profession with no direct link to technology. Considering the overall scope of the book, some reflections upon the theme would have been appropriate.

Most importantly, the book does not frame the role of technology in legal practice in an entirely satisfactory way. Because of this, various chapters end up with interlocutory considerations that either provide an almost apologetic portrayal of new technologies as positive forces able to improve the wellbeing of the legal profession or merely list a number of negative consequences that derive from the application of such technologies to the practice of law. At times, they do both things at the same time, leaving the reader somewhat confused about what kind of impact technology and innovation are actually having on the wellbeing of the legal profession. It is of course possible that the application of new technologies to law may have both positive and negative effects. However, a more theoretically grounded analysis would have allowed the authors to provide a more comprehensive, and perhaps coherent view of these developments.

It has been acknowledged — and I believe that the authors of the chapters in this book would agree — that technological developments are produced within specific social, political, ideological, and economic contexts, and are not the product of universal and abstract rules of progress.<sup>17</sup> If this is true, any work seeking to explore the role of emerging technologies in a given field is compelled to explore the politics and the societal dynamics behind the usage of these technologies. Surprisingly, however, the book refrains from doing so, although some considerations on the political and societal implications of the applications of new technologies in law emerge here and there in the narratives provided by the authors.

To corroborate my critique, I will provide a couple of examples of the usefulness of a more precise theoretical framework. Let us for a moment consider that the application of new technologies to legal practice is a manifestation of what has been labelled ‘digital capitalism’.<sup>18</sup> That is, the digitalisation of the legal field is part of the broadest, latest transformation of the capitalist system of production in which digital technologies constitute ‘the central production and control apparatus of an increasingly supranational market system’.<sup>19</sup> Seen from this perspective, the entrance of new technologies in legal practice, together with some of the findings of this book, become more intelligible. The digitalisation of the legal field, in fact, mainly fosters already existing profit-driven processes of outsourcing, automatisisation, dispersion, and commodification. In other words, digitalisation is further accelerating the economisation and commodification of the practice of law, whereby lawyers are decreasingly disinterested brokers in society and defenders of

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<sup>17</sup> Raymond Williams, *Television: Technology and Cultural Form* (Routledge, 3<sup>rd</sup> ed, 2003).

<sup>18</sup> As I have recently argued: Salvatore Caserta and Mikael Rask Madsen, ‘The Legal Profession in the Era of Digital Capitalism: Disruption or New Dawn?’ (2019) 8(1) *Laws* 1.

<sup>19</sup> Dan Schiller, *Digital Capitalism: Networking the Global Market System* (MIT Press, 1999) xiv.

the public good, and increasingly service providers at the cutting edge of the capitalist economy. Such digitalisation of legal practice will hardly bring about positive outcomes for the wellbeing of the legal profession.

Such theoretical framing allows us also to suggest that, rather than disrupting the legal field, the entrance of new technologies in legal practice is strengthening the power of dominant actors in the field; that is, the power of corporate elite large law firms. These firms are, to date, the main investors in legal technologies, as only they can afford the costly and time-consuming development of artificial intelligence solutions and big data.<sup>20</sup> The consequence is that sole, small, and medium size law firms are so far excluded from potential advantages, remaining inevitably behind. This, in turn, generates new forms of stratifications of the legal profession, while at the same time altering the spatial and temporal flows of practice by delocalising and relocating legal work. Existing cleavages between transnational law firms operating a 24/7 business culture through systems of governance that combine local and global elements of business oversight,<sup>21</sup> and the offshoring of shared service centres have been, in fact, reinforced by technological developments.<sup>22</sup> At the same time, new cleavages are arising. While a minority of firms are using technology to reduce bureaucracy in their internal structures and to provide a more meaningful work environment to their lawyers, a large majority is using technology solutions to create new forms of internal hierarchies and, ultimately, maximise revenue. A new, related trend is firms opening alternative delivery solutions teams or offices in less costly locations. These are staffed with contract attorneys, paralegals, and information technology experts, who execute repetitive tasks through more efficient methods thanks to extensive use of technology. Such dynamics are strengthening existing forms and generating new forms of inequality among classes of lawyers, contributing to an overall lack of wellbeing of the legal profession as a whole.

In sum, *The Impact of Technology and Innovation on the Wellbeing of the Legal Profession* constitutes a meaningful and valuable contribution to the field of the sociology of the legal profession in the digital era. It provides the basis for future works that build upon its findings, further deepen the analysis and provide ever more compelling accounts.

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<sup>20</sup> Robert Ambrogi (2019), 'Legal Tech for the Legal Elite: Observations of Two Conferences', *Above the Law* (online, 4 February 2019) <<https://abovethelaw.com/2019/02/legal-tech-for-the-legal-elite-observations-of-two-conferences/>>.

<sup>21</sup> John Flood, 'Megalawyering in the Global Order: The Cultural, Social and Economic Transformation of Global Legal Practice' (1996) 3(1/2) *International Journal of the Legal Profession* 169.

<sup>22</sup> Julian Webb, 'Legal Technology: The Great Disruption?' (2020) University of Melbourne Legal Studies Research Paper No 897 <[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3664476](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3664476)>.

# *Review Essay*

## *Futures of Antitrust*

*Radical Markets: Uprooting Capitalism and Democracy for a Just Society* by Eric A Posner and E Glen Weyl (2018), Princeton University Press, 368 pp, ISBN 9780691177502

**Tim Rogan\***

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### *Abstract*

Recent developments in American antitrust scholarship anticipate two broad responses to the advent of ‘big tech’; namely, a return to the ‘structure, conduct and performance’ analyses of market power characteristic of the mid-century Harvard School, and a newly uncompromising application of the Chicago School’s emphasis on price-based consumer welfare and allocative efficiency. In Australia, as in the United States, both responses have antecedents in extant competition law and policy and each is broadly conceivable as a response to concerns about stalled reforms and stagnant productivity growth. This essay examines each incipient response to the rise of the ‘tech titans’ and explores the futures each response anticipates for Australian competition law and policy.

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## I Introduction

Recent controversy in American antitrust scholarship, responding to the advent of ‘big tech’ and renewed fears of ‘secular stagnation’ in advanced economies since 2008, reveals two emergent challenges to the Chicago School paradigm that predominated in the late 20<sup>th</sup> century, focusing competition law and policy on consumer prices and allocative efficiency in the United States (‘US’) and beyond.

Lina Khan proposes a renewed emphasis on competitive process and market structure to enable antitrust to recognise and respond to the anti-competitive effects of low pricing and vertical integration at Amazon.com.<sup>1</sup> Khan’s analysis recalls the so-called ‘structure, conduct and performance’ or Harvard School approach, which informed mid-century American antitrust policy and has shaped the creation and refinement of competitive conduct rules in Australia.<sup>2</sup>

Meanwhile Eric A Posner and E Glen Weyl, in *Radical Markets: Uprooting Capitalism and Democracy for a Just Society*, sharpen the Chicago School’s focus on consumer welfare and allocative efficiency with newly unrelenting resolve.<sup>3</sup> They seek radically to augment and extend the use of price signals to remove obstacles to allocative efficiency, including in the new markets for ‘data-as-labor’ operating unrecognised under the business models of Google and Facebook.

This review essay examines the emergence of these two critiques of the extant paradigm in American antitrust law and policy and considers some implications for Australian competition law and policy.

## II The Harvard School and the Chicago School

The Harvard School informed antitrust law and enforcement policy in the US in the 1950s and 1960s.<sup>4</sup> It posited a relationship between market structure and business performance, holding that businesses performed more effectively — allocating resources, undertaking investments, innovating, and keeping prices in reasonable proportion to costs — when subject to effective competition. Its proponents accepted that business performance was not amenable to direct objective measurement and thus lay effectively beneath judicial scrutiny. Accordingly, law and enforcement policy focused on market structure, accepting that there was ‘an element of faith in the proposition that maintaining competition substantially improves the efficiency of resource use’.<sup>5</sup> The Harvard School’s emphasis on market structure was a key

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<sup>1</sup> Lina M Khan, ‘Amazon’s Antitrust Paradox’ (2017) 126(3) *Yale Law Journal* 710.

<sup>2</sup> *Ibid* 745.

<sup>3</sup> Eric A Posner and E Glen Weyl, *Radical Markets: Uprooting Capitalism and Democracy for a Just Society* (Princeton University Press, 2018).

<sup>4</sup> See generally Arlen Duke, *Corones’ Competition Law in Australia* (Lawbook, 7<sup>th</sup> ed, 2019) [1.210], noting in particular that the Harvard School was an important influence on the *Report of the Attorney-General’s National Committee to Study the Antitrust Laws* (1955).

<sup>5</sup> ES Mason, ‘Preface’ to Carl Kaysen and Donald F Turner, *Antitrust Policy: An Economic and Legal Analysis* (Harvard University Press, 1965) xx.

reference point for the uptake of competition law around the world in this period, including for early interpreters of part IV of the *Trade Practices Act 1974* (Cth).<sup>6</sup>

The Chicago School formed contemporaneously with the Harvard School, but rose to influence only in the 1980s, in the aftermath of a crisis in US economic performance. Its proponents argued that competition law should focus exclusively on the efficient allocation of resources and use prices as means of gauging whether and where inefficiencies occurred. It was only where market power enabled firms to price above cost (causing purchasers willing to pay prices above cost but below the price imposed to leave the market, and output to drop below socially optimal levels) that such power inhibited efficiency: this was the Chicago School's key contention. In other circumstances, large or vertically-integrated enterprise could actually foster efficiency. The Chicago School was much less hostile to mergers and vertical integration than the Harvard School, arguing that in many cases such arrangements enabled producers to operate more efficiently by achieving economies of scale or controlling opportunism. The Chicago School has informed the evolution of the *Trade Practices Act 1974* (Cth), including the construction of misuse of market power provisions, notably in the High Court of Australia's treatment of predatory pricing in *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission*<sup>7</sup> and of vertical integration in *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd*.<sup>8</sup> The Chicago School's emphasis on consumer welfare has also affected understandings of the 'public benefit' that particular parts of the *Competition and Consumer Act* are designed to achieve.<sup>9</sup>

### III Productivity Problems, Corporate Concentration and the Advent of 'Big Tech'

Continued malaise in productivity growth in the aftermath of the financial crisis of 2008 has precipitated fears that the advanced industrial economies are confronting a period of 'secular stagnation'.<sup>10</sup> The neoliberal compact designed to rescue capitalism in the wake of the crisis of the 1970s — involving deep-reaching deregulation, privatisation, reduction of trade barriers, reduction of the power and influence of labour unions etc — disinhibited inequality on the promise of renewing growth in overall living standards.

That renewal has not materialised. The financial crash of 2008 was the climax of a credit boom of historic dimensions. Household debt in the US doubled between

<sup>6</sup> See *Re Queensland Co-operative Milling Association Ltd* (1976) 25 FLR 169, 188–9, quoting at 188 the *Report of the Attorney-General's National Committee to Study the Antitrust Laws* (1955).

<sup>7</sup> *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374, 430 [162], 433 [167], 440 [191] (Gaudron, Gummow and Hayne JJ). See also at 478 [312] (McHugh J), citing Robert H Bork, *The Antitrust Paradox: A Policy at War with Itself* (Basic Books, 1978) 195.

<sup>8</sup> See, eg, *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd* (2001) 205 CLR 1, 14 [20] (Gleeson CJ, Gummow, Hayne and Callinan JJ).

<sup>9</sup> See, eg, *Qantas Airways Limited* [2004] ACompT 9, [163]–[191], concerning authorisations under the *Trade Practices Act 1974* (Cth) ss 88 and 90.

<sup>10</sup> See, eg, Lawrence H Summers, 'The Age of Secular Stagnation: What It Is and What to Do About It' (2016) 95(2) *Foreign Affairs* 2.

1985 and 2007. As economists including Summers and Krugman have pointed out, an expansion of credit of these proportions should have pushed the economy beyond the limits of its capacity, triggering inflation and interest-rate hikes.<sup>11</sup> The boom that ended in 2008 generated no such excess. Instead, it underwrote a ‘great moderation’. Prodigious borrowing was necessary to put enough money in consumers’ pockets to keep economic activity at normal levels — to stabilise the status quo. The rich enjoyed better access to credit than the rest — more than 50% of US household debt is owned by the top quintile, less than 5% by the bottom quintile — and so inequality of income widened.

Redistribution of income through the tax system could reverse that trend in inequality, but it would not solve the underlying problem of how to get overall living standards rising again. The continual expansion of credit is not a sustainable way of getting economies growing. Recovering the rate of improvement in living standards by reference to which our expectations have been set, means returning to something like the productivity gains of our recent past. At their peak, rates of growth in output per hour worked in the UK and the US exceeded 3%. After 1970 the long-term average dropped below 2% and since 2008 the situation has deteriorated sharply: in the US, labour productivity growth averaged 1.3% per year between 2004 and 2012;<sup>12</sup> in the UK, between 2010 and 2015 it grew at 0.2% per year.<sup>13</sup> Inequality, in other words, may be incidental: the major economic problem is flatlining productivity.

Against this backdrop and in the context of low growth in real wages, corporate profits and concentrations of corporate power have attracted increasing scrutiny. In March 2016, *The Economist* declared: ‘Profits are too high. America needs a dose of competition’.<sup>14</sup> Monopoly power has not been without apologists.<sup>15</sup> But the appearance of books, such as the venture capitalist Peter Thiel’s *Zero to One*,<sup>16</sup> bespeaks a defensive awareness that the impetus towards a new wave of antitrust enforcement action comparable to the episodes associated with Theodore Roosevelt and the breakup of Standard Oil or the progressive lawyer (and later US Supreme Court justice) Louis Brandeis is growing.<sup>17</sup>

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<sup>11</sup> See, eg. Paul Krugman, ‘Bubbles, Regulation, and Secular Stagnation’, *The New York Times* (online, 25 September 2013) <<https://krugman.blogs.nytimes.com/2013/09/25/bubbles-regulation-and-secular-stagnation/>>; Lawrence H Summers, ‘Have We Entered an Age of Secular Stagnation? IMF Fourteenth Annual Research Conference in Honor of Stanley Fischer, Washington DC’ (2015) 63(1) *IMF Economic Review* 277.

<sup>12</sup> Robert J Gordon, *Is US Economic Growth Over? Faltering Innovation Confronts the Six Headwinds* (National Bureau of Economic Research (‘NBER’) Working Paper 18315, August 2012) 13 <<https://www.nber.org/papers/w18315>>.

<sup>13</sup> McKinsey Global Institute, *Solving the United Kingdom’s Productivity Puzzle in a Digital Age* (Discussion Paper, September 2018) 3, 7.

<sup>14</sup> Quoted in Khan (n 1) 804.

<sup>15</sup> Peter Thiel with Blake Masters, *Zero to One: Notes on Startups, or How to Build the Future* (Crown Business, 2014); Robert D Atkinson and Michael Lind, *Big is Beautiful: Debunking the Myth of Small Business* (MIT Press, 2019).

<sup>16</sup> Thiel (n 15).

<sup>17</sup> Daniel A Crane, ‘How Much Brandeis Do the Neo-Brandeisians Want?’ (2019) 64(4) *The Antitrust Bulletin* 531.

These developments help to explain why questions about antitrust law and policy, long the preserve of esoteric discussion among technocrats, are becoming matters of increasing public concern.<sup>18</sup> They also explain why the established Chicago School paradigm in antitrust law and enforcement appears to be shifting. If patterns of corporate concentration, excessive profits and especially the arrogation of market power by the ‘tech titans’ Google, Amazon and Facebook have gone unchecked, is competition law and policy, as presently constituted, fit for purpose? Khan on the one hand, and Posner and Weyl on the other, agree that it is not, and agree that how and why it is unfit for purpose are matters best appreciated by reference to the business models of the new tech titans themselves. They begin from the shared premise that reform is necessary, but their prescriptions for reform vary dramatically.

#### IV Amazon and the Case for Renewed Emphasis on Competitive Process and Market Structure

In ‘Amazon’s Antitrust Paradox’, Khan argues that the Chicago School’s emphasis on price as an index of consumer welfare, and as the only metric of harm relevant to answer the question whether market power is excessive, had denuded antitrust law of any power to reckon with Amazon’s dominance.<sup>19</sup> Laws against predatory pricing had been rendered impracticable of enforcement by interpretations requiring plaintiffs to prove recoupment. Laws limiting vertical integration — derided by Chicago scholar and judge Robert Bork as laws ‘against the creation of efficiency’<sup>20</sup> — had been truncated during Ronald Reagan’s presidency by guidelines narrowing the circumstances in which vertical mergers should be challenged, with rejection of vertical tie-ups growing extremely rare. Both developments were the consequence of acceptance of the proposition that the arrogation and exercise of market power could not harm consumers and justify antitrust intervention unless it resulted in higher consumer prices.

Khan argues that this approach to antitrust law was misconceived in its own terms. Even ‘if one believes that antitrust should promote only consumer interests’, an exclusive focus on prices as indices of those interests was misguided, because ‘consumer interests include not only cost but also product quality, variety and innovation’.<sup>21</sup> Protecting consumer interests thus understood required ‘a much thicker conception of “consumer welfare” than what guides the current approach’.<sup>22</sup> In any event, increasing evidence indicates that the ‘consumer welfare frame has led to higher prices and few efficiencies’.<sup>23</sup> More broadly, Khan argues that the ‘undue focus on consumer welfare is misguided’.<sup>24</sup> Congress had passed antitrust laws ‘to promote a host of political economic ends — including our interests as workers,

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<sup>18</sup> Khan (n 1) 803. See also Anne Case and Angus Deaton, *Deaths of Despair and the Future of Capitalism* (Princeton University Press, 2020) 228–9.

<sup>19</sup> Khan (n 1).

<sup>20</sup> Bork (n 7) 234 quoted in Khan (n 1) 735.

<sup>21</sup> Khan (n 1) 737.

<sup>22</sup> Ibid.

<sup>23</sup> Ibid 739. See also 739 n 148.

<sup>24</sup> Ibid 737.

producers, entrepreneurs, and citizens'.<sup>25</sup> A focus on consumer welfare, moreover, 'mistakenly supplants a concern about process and structure (i.e. whether power is sufficiently distributed to keep markets competitive' with a calculation regarding outcome.<sup>26</sup>

Khan argues that 'the rise of dominant internet platforms freshly reveals the shortcomings of the consumer welfare framework and that it should be abandoned'.<sup>27</sup> Instead of this focus on consumer welfare, Khan proposes a return to the credo that '[a]ntitrust law and competition policy should promote not welfare but competitive markets'.<sup>28</sup> To this, Khan advocates a renewed focus on 'competitive process and market structure' — not 'a strict return to the structure-conduct-performance paradigm', but renewed analysis of process and structure as offering 'better insight into the state of competition' than 'measures of welfare'.<sup>29</sup>

## V 'Data-as-Labour' and the New Chicago School

Adherents of the Chicago School have conceded the inadequacies of antitrust law, but ascribed them to enforcement difficulties.<sup>30</sup>

In *Radical Markets: Uprooting Capitalism and Democracy for a Just Society*,<sup>31</sup> Posner and Weyl radicalise the Chicago School approach to argue that the inadequacies of antitrust law stem not from exigencies of enforcement, but from unwillingness to apply the logic of the consumer welfare paradigm unremittingly. Posner and Weyl accept, and indeed warn with alarm, that allocative inefficiencies persist and portend potentially grave consequences for capitalism and democracy. They insist that Chicago School antitrust is the right cure, but argue that it has been inadequately applied — including to curb the market power of Google, Facebook and Amazon.

Posner and Weyl begin from the proposition that price is the most effective means of allocating capital to its most productive use. Second-price auctions are Posner and Weyl's model allocative mechanism. In a second-price auction, bids are sealed so that no one participant knows what any other is offering. The highest bidder pays what the second-highest bidder was willing to pay. The method was once used by Goethe to sell a poem — he wrote a number on a piece of paper sealed inside an envelope and then asked his publisher to make an offer for the poem. Goethe would sell at his own nominated price if the publisher outbid him, but would hold onto the poem otherwise. Such an auction is now used by Google and Facebook to sell advertising space. Advertising on Google and Facebook is sold by staging second-price auctions in the microseconds between click and loaded result. Each time a query is entered into Google, an algorithm takes the sealed bids that advertisers have made for placement of their advertisement amid results of specific keywords,

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<sup>25</sup> Ibid.

<sup>26</sup> Ibid.

<sup>27</sup> Ibid 738.

<sup>28</sup> Ibid 737.

<sup>29</sup> Ibid 745.

<sup>30</sup> Richard A Posner, 'Antitrust in the New Economy' (2001) 68(3) *Antitrust Law Journal* 925, 933.

<sup>31</sup> Posner and Weyl (n 3).



ranking the ads according to their quality and relevance, and allocating the available slot to the top-ranked bidder. The prevailing advertiser pays not what they bid, but what the next-highest bidder for the same keyword was offering. A similar mechanism is used by Facebook.

Whoever prevails in a second-price auction is likely to pay less than they would have, so the mechanism has advantages for advertisers. Facebook and Google have their own reasons for favouring this procedure. They could make more money on each individual ad by making the highest bidder pay what they bid, but the tech titans are playing a longer game. The amount the second-priced bidder is willing to pay represents the opportunity cost of the winner's triumph. The winner, in effect, declares to the vendor, 'I can make better use of this ad space than anyone else. Make me prove it. Take my money, the cash value of the use the next-highest bidder proposed. Force me to go and make that money back and more.' If a seller (such as Google or Facebook, in the market for online advertising) cares whether scarce resources are put to good use, a second-price auction offers reassurance. Google and Facebook care about how advertising space on their platform is used. They want advertisers to reach consumers with precision. They want users to feel that they are being informed, not harassed. They believe that the pollution of their platforms with junk would make the virtual ecosystems they support less habitable, and they do not want users seeking out other virtual worlds.

Having explained the superior allocative efficiency of adequately designed price mechanisms by reference to second-price auctions, Posner and Weyl proceed to point out a number of sectors of modern capitalist economy in which allocative efficiencies are left unrealised by unwillingness to name and honour prices, and suggest that implementing second-price auctions in these sectors could save capitalism. The first is the labour market. Some (few) workers are fortunate enough to be able to name their price and refuse to work for less, but most have to accept what is offered. Posner and Weyl propose that labour markets be reconstituted as second-price auctions, with the aid of the tax system.<sup>32</sup> In their model, individuals will put a price on their labour. I declare that my services can be retained, say, for \$500 per day. That price becomes the basis upon which my income tax is assessed. In that regard, I have an incentive to keep my price low: if I declare that I am worth \$10,000 per day, I will be taxed as though I earned that much, even if in fact I earn scarcely that much in a month. I have a countervailing incentive to fix a high price, in that I will only have to work for employers willing to pay that price. (In Posner and Weyl's market utopia, everyone will receive some kind of universal basic income, which tax savings and additional income will modify but not displace). It will be possible, in other words, to price one's self out of the daily grind. But the tax system will disincentivise that, because society does not want human capital sitting idle. Others will set low rates for their labour and pocket tax savings. But the low-bidding individuals concerned risk being press-ganged into unattractive forms of work. In a labour market run as a second-price auction, an offer for your services that exceeds the price you have named is an offer you cannot refuse. Society is compensated for lower tax receipts by increased labour force participation.

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<sup>32</sup> Ibid ch 5.

Posner and Weyl also propose to use second-price auctions as a basis to reconstitute property markets.<sup>33</sup> A system of land tax can be implemented on the basis of self-assessed property prices. Low prices will attract low tax bills — and high prices, heavier taxes. The catch is that any price you name is one you have to accept, whenever a buyer comes along offering more. Every home would thus be permanently up for sale.

Most contemporary competition policy regimes recognise that efficiency is only one economic objective to which others must yield according to properly constituted canons of social choice duly exercised. For example, even in agitating for more consistent application of competition principles to Australian societies, the *Hilmer Report* recognised that seeking ‘to facilitate effective competition to promote efficiency and economic growth’ must accommodate ‘situations where competition does not achieve efficiency or conflicts with other social objectives’.<sup>34</sup> Posner and Weyl insinuate that those other social objectives (that is, objectives other than efficiency) are luxuries we can no longer afford. Land and labour must now be recognised as base commodities indistinguishable from any other article of commerce, priced for efficient allocation without any sentimental regard for their social and human significance.

## VI How ‘Big Tech’ Business Models are Reshaping Antitrust

What these rival programmes have in common and what sets them apart both from each other and from what they see as the regnant antitrust paradigm is best illustrated by reference to their respective analyses of the nature and the wider economic import of the power that the tech titans (Google, Facebook and Amazon) wield.

The proposition that big tech abuses market power appears counterintuitive from within a consumer welfare paradigm. Google (not only search, but also Google Maps and Gmail and Google Scholar) is free to use, so too Facebook. They charge the consumers of their services nothing. Amazon is not free, but it is cheaper than any alternative. If abuse of market power only becomes apparent when prices rise, how could these companies be said to be abusing their dominance? Rocketing share prices may or may not presage a recoupment of losses on below-cost prices in the future, but antitrust as presently constituted will not intervene unless and until recoupment can be proven.

Khan argues that Amazon’s business model confounds an antitrust paradigm in which price rises are the only available metrics of abuse of dominance.<sup>35</sup> Amazon’s below-cost pricing of e-books lay beyond the reach of antitrust regulators because Amazon’s pricing trends are obscure (making a recoupment analysis of the kind required under extant predatory pricing jurisprudence unworkable). Antitrust’s capacity to protect Amazon’s competitors from predatory pricing and consumers from future price rises was accordingly doubtful. Amazon’s dominance in e-book sales and the pressure this placed on publishing houses was jeopardising the

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<sup>33</sup> Ibid ch 1.

<sup>34</sup> Frederick Hilmer, *National Competition Policy* (Report, August 1993) (*‘Hilmer Report’*) xvi.

<sup>35</sup> Khan (n 1) 755.

traditional publishing model in which best-selling titles cross-subsidised riskier books. This trend risked adversely affecting the quality and diversity of e-books available to consumers. This was the category of non-price concern that Khan argued antitrust had once harboured (if implicitly), but which had been driven out by the Chicago School's price-focused consumer welfare model.

Khan further argues that the integration of Amazon's business across distinct business lines in retail and delivery is anti-competitive in ways current antitrust doctrine cannot recognise. Amazon's dominance as a platform is such that competitors in manifold product lines are effectively forced to 'ride Amazon's rails' and market their products through Amazon.<sup>36</sup> Third party sellers bear the risk of innovation. Amazon uses data gathered from this position to identify profitable product lines and then replicates them at prices below those offered by competitors, capturing revenue without incurring the costs of identifying opportunities.<sup>37</sup> Meanwhile, Amazon also used its dominance in retail to leverage discounts out of logistics and delivery providers, UPS and FedEx. These companies hiked prices for independent sellers to recover margins squeezed by Amazon. This, in turn, gave Amazon's upstart logistics arm an opportunity to capture market share from UPS and FedEx by offering independent sellers better prices. The consequence of these developments is that Amazon 'increasingly controls the infrastructure of online commerce'<sup>38</sup> — the platform where buyers and sellers meet and the logistics networks that deliver orders. Unless and until consumers face demonstrably higher prices, antitrust regulators informed by the Chicago School's traditional consumer welfare focus are unperturbed by this. Khan argues that antitrust doctrine should look beyond price — and should look, specifically, at the structure of the markets reshaped by Amazon and the competitive process operating in those markets — to determine whether Amazon's conduct is anti-competitive.

Posner and Weyl analyse the other giants, Google and Facebook.<sup>39</sup> Governments have struggled to bring Google and Facebook within the remit of competition policy because they do not charge users for their services. As Posner and Weyl see it, however, the users of Google and Facebook's services are not buyers, but sellers. What looks like a market for search and social networking — the users getting bargains, the tech firms dispensing convenience for free, the only ones really losing out being the advertisers who pay above the odds for their slots — is actually a market for data rigged to favour Facebook and Google. Unwitting sellers (that is, users, or 'data-workers' as Posner and Weyl refer to them, borrowing the term from the writer Jaron Lanier)<sup>40</sup> get ripped off by the big tech firms, who pay them nothing for their 'labour', or for the data it produces. You might argue that data-workers are getting payment-in-kind for their services: search, navigation and social networking applications function as a form of remuneration. And it is generally supposed that your data or mine, taken in isolation, do not have very much value. For basic machine-learning purposes, once you have 10,000 people's data, each additional individual's cache adds little value. Marginal valuation determines

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<sup>36</sup> Ibid 780.

<sup>37</sup> Ibid 782.

<sup>38</sup> Ibid 780.

<sup>39</sup> Posner and Weyl (n 3) ch 5.

<sup>40</sup> Ibid 208.

the price: the buyer will pay, for each additional increment of a given commodity, no more than the marginal value of that additional increment. That is why water (very useful, not very valuable) and diamonds (mostly useless, highly valued) command such different prices. In the case of data used to teach machines, the marginal theory of value dictates that each individual's data has negligible value: it is only at scale that data becomes lucrative.

From this perspective, good search functionality and a convenient way of keeping in touch with friends may look like fair remuneration for the data you provide. It is no longer clear, however, that the value of data accumulates in this way. In the machine-learning processes that generate transformative artificial intelligence capability, the marginal value of each additional increment of data may become very valuable indeed. Posner and Weyl give the example of speech-recognition software.<sup>41</sup> Decades-old programmes can recognise speech with 95% accuracy, which may sound impressive, but is effectively useless — the time taken to go through and correct a 95%-accurate text negates the advantage of dictating in the first place. Getting closer to complete accuracy requires a vast upscaling of the dataset from which the machines learn. Given that each additional step at this stage portends potentially huge increases in utility, each additional dataset that becomes available for processing adds high marginal value — and is worth a lot more to the data-masters than the free use of some app (even a handy one) is to the users. The holy grail in machine-learning is to understand action, which is orders of magnitude more complex than recognising faces. The value of data in that endeavour does not diminish at the margins; on the contrary, it appreciates.

Posner and Weyl believe that our failure to appreciate the value of our data is depressing living standards. As long as the price of data-as-labour is suppressed, its potential productive capacity will be dissipated in the form of inflated profits for the big tech firms. Like landowners leaving blocks undeveloped as prices rise around them, the tech firms have secured control of vast reserves of data and now they are sitting on them, capitalising on gains in their value. They claim that the tech firms are the ones in the best position to do the innovative work of making this data into a new source of economic vitality. Posner and Weyl think it is time to make them prove it. As things stand, the value we as users place on our data is effectively zero. In accordance with the principles of the second-price auction, this is the price the tech companies pay. Posner and Weyl want us to raise our reserve. This would not spontaneously enrich individual households, nor eliminate inequality overnight. But it could make a substantial dent in the productivity problem. Suppose that industries reliant on data grew to 10% of the economy over the next 20 years (the current figure is about 2%), and that firms began to pay something like 30% of their revenue to data-labourers (Facebook's current wage bill is 5% of its revenue; most firms pay more like 60% of revenue to workers). Posner and Weyl calculate that these changes would 'increase the size of the economy by about 3% and transfer about 9% of the economy from the owners of capital to those of labor'.<sup>42</sup> The median income for a

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<sup>41</sup> Ibid 228–9.

<sup>42</sup> Ibid 247.

household of four data-labourers would rise ‘by more than \$20,000, as much as during the thirty years following the world wars’.<sup>43</sup>

These calculations are provisional, but the logic behind them is unmissable. Posner and Weyl are proposing that in order to unlock a new round of productivity gains and ward off the political problems that follow from stagnation, we should apply the second-price auction mechanism to reappraise what everything is worth to us — the data we sell for a song; security of tenure in our homes; the sweat of our brows — in order to price it and put it up for sale. They also propose that we use the same principles to reform democracy. Attributing equal value to all votes is not an optimal way of allocating scarce resources between rival public goods like sanitation or defence, because it ignores the intensity with which some people hold certain preferences. A system under which voters could store up ‘voice’ for crucial votes by opting out of ballots on issues of lesser concern to them would improve on this.<sup>44</sup> Applying second-price principles, voters wishing to wield more voice in a given case would have to pay a social cost. Posner and Weyl put forward a formula to quantify that cost: the number of votes stockpiled for the future should be the square root of the number of votes foregone today — one vote foregone yields one for later; 16 votes foregone yields 4 votes for later; four hundred votes foregone yields twenty, and so on.<sup>45</sup>

The idea here, as with Posner and Weyl’s other proposals, is to use the second-price auction to ensure that resources gravitate towards their most productive uses, advancing the utilitarian ideal of securing ‘the greatest good for the greatest number’. To make the weightless world work properly, they believe, nothing can be allowed to interrupt the movement of capital towards its most prolific applications. Every sentimental obstruction must be put aside. The result might well be a dispersal of the market power the tech giants have accumulated, but it would also put the family home up for permanent auction and leave anyone and everyone liable to be press-ganged into whatever work needed doing. Posner and Weyl sum all this up mildly: their purpose is to ‘fix the bugs in the market’s code and enable it to generate more wealth that is distributed more fairly’.<sup>46</sup> But at least some of the practices they see as ‘bugs’, others will recognise as bulwarks against the degradation of human beings into articles of commerce.<sup>47</sup>

Responses to the advent of ‘techno-feudalism’ and the challenges of poor productivity growth in American antitrust thinking can thus be seen to be diverging. From a common premise — namely, that the extant antitrust paradigm is inadequate to the task of tackling these problems — Khan, on the one hand, and Posner and Weyl, on the other, set off in different directions. Khan’s approach has evidently found favour with the current US administration. Posner and Weyl’s book

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<sup>43</sup> Ibid.

<sup>44</sup> Ibid ch 2.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid 286.

<sup>47</sup> Cf, eg, Michael J Sandel, *What Money Can’t Buy: The Moral Limits of Markets* (Farrar, Strauss & Giroux, 2012).

meanwhile has drawn comparisons with Milton Friedman,<sup>48</sup> the economist whose simplification of neoliberal orthodoxy became the lodestar for reformers like Ronald Reagan and Margaret Thatcher.

## VII Implications for Australian Competition Law and Policy

Australia's *Competition and Consumer Act* aims 'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'.<sup>49</sup> A working hypothesis as to how competition enhances the welfare of Australians was articulated in the *Hilmer Report*, the influential 1993 report recommending the implementation of a national competition policy that significantly extended the scope for competitive markets in Australia. 'The relationship between competition and community welfare', the report stated, 'can be considered in terms of the impact of competition on economic efficiency and other goals'.<sup>50</sup> Competitive rivalry can be seen to enhance technical, allocative and dynamic efficiency (by stimulating improvements in managerial performance, or allocating resources to their highest-valued uses, or incentivising investment). Efficiency increases. The productive base of the economy grows, returns to producers increase and real wages rise. The quality of goods and services improves. Innovation is encouraged, bringing forth new jobs and new industries. The economy grows more robust and resilient and 'better able to adjust to changes in global economic conditions'.<sup>51</sup>

This conception of how competition augments welfare attests to the continuing influence of Harvard School thinking on Australian competition law and policy. It also expressly recognises that efficiency in the allocation of resources may yield to other social imperatives. This might indicate that competition law and policy in Australia is better placed to recognise and respond to the anti-competitive features of the new economy than American antitrust, where the influence of the Chicago School has been more pronounced. At the same time, interpretations of the *Competition and Consumer Act* in general, and the misuse of market power provisions in particular, have proven appreciably receptive to the influence of developing American antitrust jurisprudence. And where Khan would have antitrust return to its modern roots in the Harvard School's emphasis on structure and process, Posner and Weyl's work indicates other ways forward, to still more trenchant focus on achieving allocative efficiency through price signals.

The aim of the *Hilmer Report* and the National Competition Policy it designed, was 'to maintain and improve living standards' in a period of perceived adversity.<sup>52</sup> The result of those reforms is said to be an 'impressive surge in

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<sup>48</sup> See Kenneth S Rogoff quoted at 'Radical Markets: Uprooting Capitalism and Democracy for a Just Society', *Princeton University Press* (Web Page, 2021) <<https://press.princeton.edu/books/hardcover/9780691177502/radical-markets>>.

<sup>49</sup> *Competition and Consumer Act 2010* (Cth) s 2.

<sup>50</sup> *Hilmer Report* (n 34) 3.

<sup>51</sup> *Ibid* 4.

<sup>52</sup> *Ibid* 1.

productivity'<sup>53</sup> in 1990s Australia which added 2.5% to GDP by 2005.<sup>54</sup> But since that time productivity growth in Australia, as elsewhere, has abated.<sup>55</sup> This deterioration 'coincided with a stalling in Australia's microeconomic reform effort'.<sup>56</sup> A mining investment boom and favourable movements in Australia's terms of trade have muted the effect of this decline in productivity growth upon living standards. But of those two tailwinds, one has subsided and the other is intrinsically cyclical. In this context, it would be surprising if new queries about the adequacy of Australian competition law and policy to the task of renewing productivity growth were not soon being posed. It would be consistent with past experience if American antitrust informed any major renovation of Australian competition law and policy. Neither Khan nor Posner and Weyl cover the field of possible innovations,<sup>57</sup> but between them they may indicate how the extant antitrust paradigm is being tested and what may replace it.

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<sup>53</sup> Organisation for Economic Co-operation and Development ('OECD'), *OECD Reviews of Regulatory Reform: Australia 2010* (2010) 14 cited in Ian Harper, Peter Anderson, Su McCluskey and Michael O'Bryan, *Competition Policy Review* (Final Report, March 2015) 19 ('*Harper Report*').

<sup>54</sup> Productivity Commission (Cth), *Review of National Competition Policy Reforms* (Report No 33, 2005) xviii, cited in *Harper Report* (n 53) 16.

<sup>55</sup> See *Harper Report* (n 53) 19.

<sup>56</sup> *Ibid.*

<sup>57</sup> Other approaches are exemplified by European competition law and policy: see Yane Svetiev, *Experimentalist Competition Law and the Regulation of Markets* (Hart Publishing, 2020).

