

volume 41 number 1
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julius stone address 1

Inside and Outside Global Law

– *Hans Lindahl*

articles

Litigants and Legal Representatives: A Study of Special Leave
Applications in the High Court of Australia

– *Pam Stewart and Anita Stuhmcke* 35

The Principle of Legality: Protecting Statutory Rights from
Statutory Infringement?

– *Bruce Chen* 73

An Empirical Investigation of 20 Years of Trade Mark Infringement
Litigation in Australian Courts

– *Vicki T Huang* 105

before the high court

Comcare v Banerji: Public Servants and Political Communication

– *Kieran Pender* 131

book review

Markus D Dubber, *The Dual Penal State: The Crisis of Criminal
Law in Comparative-Historical Perspective*

– *James Monaghan* 149

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Sydney Law Review

Law Publishing Unit

Sydney Law School

Building F10, Eastern Avenue

UNIVERSITY OF SYDNEY NSW 2006

AUSTRALIA

Email: sydneylawreview@sydney.edu.au

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*Julius Stone Address**

Inside and Outside Global Law

Hans Lindahl†

Abstract

Protracted and bitter resistance by alter-globalisation and anti-globalisation movements around the world shows that the globalisation of law transpires as the globalisation of inclusion and exclusion. Humanity is inside and outside global law in all its possible manifestations. How is this possible? Conceptually: how must legal orders be structured such that, even if we can now speak of law beyond State borders, no emergent global legal order is possible that can include without excluding? Normatively: is an authoritative politics of boundaries possible, which neither postulates the possibility of realising an all-inclusive global legal order nor accepts resignation or paralysis in the face of the globalisation of inclusion and exclusion? In the spirit of Julius Stone's approach to jurisprudence, addressing these urgent questions demands integrating doctrinal, sociological, and philosophical perspectives and insights concerning the law.

I Introduction

Globalisations take place as the globalisation of inclusion and exclusion. This is more than an incidental empirical finding that calls for analysis and explanation. It highlights the political and ethical stakes of globalisation processes. 'They don't represent us!' and 'Another world is possible!' are the rallying cries to dogged, sometimes desperate, resistance by alter-globalisation movements. Slogans like 'Taking back control of the UK', '*Remettre la France en ordre*' or 'Make America Great Again' are exemplary for the irruption of anti-globalisation movements, populist or otherwise, into institutional politics in the United States ('US') and many European countries; countries that vigorously pushed globalisation. However different their political stances, both alter-globalisation and anti-globalisation movements contest the dynamic of global inclusion and exclusion into which all of us are drawn, in one way or another.

* Julius Stone was Challis Professor of Jurisprudence and International Law at the University of Sydney from 1942 to 1972. He is recognised internationally as one of the premier legal theorists. In 1999, the Julius Stone Institute of Jurisprudence was established at the University of Sydney Law School: see further <<https://sydney.edu.au/law/our-research/research-centres-and-institutes/julius-stone-institute-of-jurisprudence.html>>.

† Chair of the Philosophy of Law, Tilburg University; Chair of Global Law, Queen Mary University of London, <www.hanslindahl.org>. I appreciate helpful comments by Minka Woermann, Lukasz Dziedzic, Ferdinando Menga, and Bert van Roermund to a preliminary version of this Address. A version of this address was originally presented as the annual Julius Stone Address in Jurisprudence delivered at the University of Sydney Law School, Sydney, Australia, 3 September 2018.

This current state of affairs is the concern that animates this Julius Stone Address. My aim is to reflect on conceptual and normative issues germane to legal inclusion and exclusion, and on how these issues impinge on emergent global legal orders. After all, the notion of the global seems to hold promise of an all-inclusive order. So also global law, which, in its strongest sense, would be universal law: law that holds everywhere, at all times, and for everyone. If, then, we define emerging global law as that class of legal orders that raise or aspire to raise a claim to global validity — while also operating more or less autonomously with respect to State law — my conceptual question reads as follows: is a global or globalising legal order possible that could include without excluding? If no such legal order is possible, and such is my thesis, why is this the case? How are legal orders structured such that, even if we can now speak of law beyond State borders, no emergent global legal order can include without excluding? This conceptual question leads to a normative query: is there a robust sense of authority available to the process of drawing the boundaries that include in and exclude from legal orders, global or otherwise? In other words, is an authoritative politics of boundaries possible that neither postulates the possibility of realising an all-inclusive global legal order nor accepts resignation or paralysis in the face of the globalisation of inclusion and exclusion? Positing that this concept of authority turns on what I call ‘restrained collective self-assertion’, this Address concludes by arguing that a double asymmetry governing struggles for representation and recognition can lead beyond current manifestations of global inclusion and exclusion, even if not beyond global inclusion and exclusion as such.

II Disambiguating the Inside/Outside Distinction

The conceptual and normative questions I just posed seem either to trade on metaphor or to be non-starters. For how can we at all speak of inclusion and exclusion in a non-metaphorical sense if, by definition, emergent global legal orders are not structured in terms of the distinction between the domestic and the foreign?

This concern reveals the extent to which territoriality has been decisive in the conceptualisation of legal orders in the framework of the so-called ‘Westphalian paradigm’.¹ Of central importance to this paradigm is the State’s claim to exclusive territoriality organised in terms of the domestic/foreign distinction. In turn, all and sundry commentators take for granted that the distinction between the domestic and the foreign is synonymous with the distinction between, respectively, inside and outside. The literature invariably assumes that, in contrast with State law, globalising legal orders organise themselves in such a way that the distinction between inside and outside loses empirical and conceptual purchase. This distinction is a merely contingent feature of some legal orders, not a feature that is constitutive for legal orders in general, or so we are repeatedly told. The literature seeks to capture this spatial transformation with references to a ‘global perspective’, the global ‘scale’ of

¹ I refer to the ‘so-called’ Westphalian paradigm because careful historical analysis shows that ‘much of the significance attributed to the Westphalia treaties [is, as suggested by Heinz Duchardt,] a *Hineininterpretierung*’: Randall Lesaffer, ‘The Westphalia Peace Treaties and the Development of the Tradition of Great European Peace Settlements Prior to 1648’ (1997) 18 *Grotiana* 71, 94. In particular, ‘the idea of sovereign equality between all European states is an unwarranted extension of the internal [German] arrangements’: at 94.

law, ‘supra-territoriality’, ‘deterritorialisation’, ‘delocalisation’, ‘spaces of flows’, and some such.²

Whatever its merits, this story conceals an ambiguity that is of crucial importance for a proper understanding of legal globalisations. In effect, I propose to discern two forms of the inside/outside distinction. The first is the distinction between the domestic and the foreign. There need be no quarrel here: this is undoubtedly a contingent feature of legal orders. But a second form of the distinction largely escapes the attention of the literature: the distinction between the claim to a legal collective’s *own* space and *strange* places — places which appear through behaviour or situations that challenge how a collective draws boundaries in the space it calls its own.

These two forms of the inside/outside distinction are not identical nor are they reducible to each other. Consider the World Trade Organization (‘WTO’). Like a State, the WTO configures itself as a spatial unity — even if in a very different way — namely as a global market. Unlike a State, the WTO organises itself as a unity of legal places — a global market — in a way that supersedes the domestic/foreign distinction associated with States or with (mega-)regional orders such as the European Union (‘EU’) and the *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*.³ Yet this does not mean that the WTO has moved beyond the inside/outside distinction in the second sense noted above. Indeed, global activists continuously challenge it as highly exclusionary in its operation. The creation of a world market marginalises other kinds of places as unimportant, yet these are places that activists deem important, intimidated by obstreperous behaviour that contests the normative criteria governing how the WTO organises itself as a global market.

Think, for example, of direct action oriented to realising food sovereignty by La Via Campesina, the International Peasants’ Movement, a social movement that brings together over 200 million peasants and 182 organisations from 81 countries around the world. One of these organisations, the Karnataka State Farmers’ Association (‘KRRS’), has mobilised to occupy and destroy fields of genetically modified organism (‘GMO’) crops owned by Monsanto in India. Their direct action resists the commodification of seed in a global market with a view to preserving and revalorising Indian peasant ways of life. By going inside Monsanto’s fields, the KRRS attempt to leave the WTO, adumbrating a place that is *outside* the WTO, even though not in the sense of a ‘foreign’ place. It is a *strange* place, a place that, from

² See, eg William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press, 2009); Boaventura de Sousa Santos, *Toward a New Legal Common Sense: Law, Globalization, and Emancipation*, (Butterworths, 2nd ed, 2002); Manuel Castells, *The Rise of the Network Society* (Wiley-Blackwell, 2nd ed, 2010); Günther Handl, Joachim Zekoll and Peer Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Martinus Nijhoff Publishers, 2012).

³ *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, signed 8 March 2018, [2018] ATNIF 1 (entered into force 30 December 2018; 14 January 2019; some signatories still to complete their ratification processes). This Agreement incorporates the provisions of the *Trans-Pacific Partnership Agreement*, Australia–Brunei Darussalam–Canada–Chile–Japan–Malaysia–Mexico–New Zealand–Peru–Singapore–United States–Vietnam, signed 4 February 2016, [2016] ATNIF 2 (not yet in force).

the KRRS's perspective, refuses normative integration into the differentiation and interconnection of places that the WTO calls its *own* space: a global market. By engaging in direct action, the KRRS resist their inclusion in a global market, an inclusion that excludes them from traditional forms of farming on their community lands. When struggling to achieve food sovereignty for their communities, the KRRS are both inside and outside the WTO (and India).⁴

Or consider the *Rome Statute*,⁵ which established the International Criminal Court ('ICC') to investigate and prosecute 'the most serious crimes of concern to the international community', as its Preamble puts it; namely genocide, crimes against humanity, war crimes, and the crime of aggression.⁶ By regulating the investigation and prosecution of these crimes, the parties to the Statute express their resolve 'to guarantee lasting respect for and the enforcement of international justice'.⁷ One may grant that the WTO has an outside, in the sense of a strange place. But surely the *Rome Statute* is an example of an emergent global legal order that has an inside, but no outside. Who could oppose the punishment of these heinous crimes, regardless of where they take place on the face of the Earth, without denying their own humanity?

Well, on occasion the victims themselves. In an early case, the ICC moved to exercise its subsidiary jurisdiction with respect to the crimes committed by the Lord's Resistance Army ('LRA') against members of the Acholi community in Northern Uganda. Strangely (from the perspective of the ICC and the international criminal law movement), the Acholi community, members of whom were victims of these atrocities, vigorously opposed this move. The community argued that restorative justice, not criminal justice, should apply to those participants in the LRA who happened to be members of the Acholi community. In their depositions to the ICC, one of the Acholi Elders asserted that '[t]he court system is justice through punishment. The offender and offended are put aside. This leads to polarisation which will lead to death.'⁸ In the words of a member of the Acholi community, '[i]n traditional Acholi culture, justice is done for *ber bedo*, to restore harmonious life'.⁹ Yet the ICC shrugged off the Acholi's demand, holding that criminal justice must trump restorative justice because the latter is traditional and local, whereas the former is modern and universal. The ICC collapsed global justice into criminal justice, literally excluding a part of humanity from other forms of justice by including it where criminal justice holds sway. In effect, Acholi land is not simply

⁴ For a detailed analysis of the interaction between the KRRS and the WTO, see Hans Lindahl, *Authority and the Globalisation of Inclusion and Exclusion* (Cambridge University Press, 2018).

⁵ *Rome Statute of the International Criminal Court*, opened for signature 17 July 1998, 2187 UNTS 90 (entered into force 1 July 2002) ('*Rome Statute*').

⁶ For a detailed analysis of this case, see Hans Lindahl, 'The *Rome Statute*: Global Justice and the Asymmetries of Recognition' (2019) 25(2) *Indiana Journal of Global Legal Studies* 671.

⁷ *Rome Statute* Preamble.

⁸ Cited in Sarah M H Nouwen and Wouter G Werner, 'Monopolizing Global Justice: International Law as Challenge to Human Diversity' (2015) 13(1) *Journal of International Criminal Justice* 157, 165–6.

⁹ Liu Institute for Global Issues, Gulu District NGO Forum and Ker Kwaro Acholi, *Roco Wat I Acoli: Restoring Relationships in Acholi-Land — Traditional Approaches to Justice and Reintegration* (2005) 14 (citation omitted) <https://sppga.ubc.ca/wp-content/uploads/sites/5/2016/03/15Sept2005_Roco_Wat_I_Acoli.pdf>.

one place in the unity of interconnected places that constitutes the ICC's jurisdiction. What, for the Acholi, defines their land as the place of their community — namely, where restorative justice ought to reign — does not simply coincide with what determines it as a place for the *Rome Statute* and the ICC, where criminal justice ought to carry the day. Humanity is inside and outside the *Rome Statute*.

The point I seek to make about the WTO and the *Rome Statute* would also hold, I conjecture, for *lex sportiva*, *lex digitalis*, the new *lex mercatoria*, and whatever other candidates for the status of emergent global legal orders we could imagine. In particular, I conjecture that it would also hold for a global order of human rights law, were it ever enacted. Humanity is inside and outside global law in all its possible manifestations. In fact, the spatial dynamic of inclusion and exclusion also holds for classical international law, even though it covers the whole face of the Earth, as resistance by many indigenous peoples to an 'internal' right of self-determination (that is, self-determination within and as part of Nation States) makes all too clear. The Aboriginal Tent Embassy on the lawn opposite Old Parliament House in Canberra is a case in point.¹⁰

In conclusion, although not all legal orders are *bordered*, hence organised in terms of the distinction between the domestic and the foreign, I surmise that all legal orders, global or otherwise, are spatially *limited*, in the sense of a bounded configuration of ought-places that excludes other possible ways of organising ought-places into a spatial unity. Borders are indeed a contingent feature of certain legal orders; limits, to the contrary, are a necessary feature thereof — or so I conjecture. Whereas only borders separate space into the domestic and the foreign, *all* spatial boundaries can appear as limits of a legal order. No global legal order can avoid closing itself by way of limits that separate and join an inside and an outside. Global law cannot be law unless it is local law.

The English word 'space', when interpreted as the Cartesian notion of an infinite, three-dimensional extension, distorts the nature of a space of action. Branch notes that

the modern conception sees space — particularly land areas — as a surface that is homogeneous and geometrically divisible and on which different areas or places differ only quantitatively, not qualitatively. This stands in stark contrast to the medieval view of the world as a series of unique places, connected by routes of travel rather than by geometric relationships.¹¹

¹⁰ See Gary Foley, Andrew Schaap and Edwina Howell (eds), *The Aboriginal Tent Embassy: Sovereignty, Black Power, Land Rights and the State* (Routledge, 2013).

¹¹ Jordan Branch, *The Cartographic State: Maps, Territory, and the Origins of Sovereignty* (Cambridge University Press, 2014) 55. The attraction that this cartographic notion of space exercises on modern political theory is highlighted by the fact that even Moore's powerful defence of territoriality interprets territory as a 'specific geographical area': Margaret Moore, *A Political Theory of Territory* (Oxford University Press, 2015) 39. Consequently, the putative unity of territory as a space of action, and the distinction between its borders and limits, remains beyond the purview of her account of jurisdictional authority. Likewise, if territoriality is no more than a geographical area, then the connection between collectivity and place is external and, as such, in need of justification. As will be shown in the Part III of this article, when discussing collective action, this justification comes too late: there is an *internal* relation between collectivity and the claim to an own place, even if this claim is defeasible.

While cartographic technologies certainly transform our understanding of space, as concerns political power they primarily open up new ways for representing and organising a *space of action*, hence a unity of ought-places with an inside and an outside in which the quantitative determination of places is always at the service of their qualitative determination. Political power cannot be exercised over extension because extension is not a space in which we can live and act. Likewise, however different the relation of power to place in a medieval community as compared to the cartographic State, a ‘series’ or ‘list’ of ‘unique places’ presupposes an organising principle that groups together a series of places into a whole in the form of a space of action that joins and separates an inside and an outside. The word ‘room’, in the sense of a legal order as making room for action, is much closer to the mark, a meaning that resonates with the German noun for space, *Raum*. For a room is a place that draws its sense from being an inside vis-à-vis an outside. Although I refer hereinafter to legal space and spatiality, it is in the sense of law’s roominess or spaciousness and lack thereof — of action that is literally emplaced, misplaced, or displaced.

III Collective Action

Justifying this strong claim about the limits of legal orders requires drastically reconsidering the state-centred concept of law that has governed Western jurisprudential thinking during the last centuries. While States will certainly continue to be of central importance into the future, a more general concept of legal order is required that does justice to our current condition of global legal pluralism.¹² The key issue for this more general concept of legal order is the problem of legal boundaries, which jurisprudence typically dismisses as an issue for legal sociology. Instead of joining the traditional jurisprudential fray about the relation between law and morality, I propose to shift the debate, focusing on a particularly pressing jurisprudential question in our contemporary situation: how are legal orders structured, such that they include and exclude?

I submit that describing legal orders, global or otherwise, as a species of collective action explains why their basic function is to include and exclude. To assert that legal orders are a species of collective action is to aver that participation in a legal order involves taking up a group or first-person plural perspective. Legal orders involve an explicit or implicit reference to a ‘we’ in the form of a ‘we together’, rather than a ‘we each’.¹³ I pick out only those features accruing to collective action that explain why legal orders organise themselves as an inside vis-à-vis an outside.

To begin with, legal orders, like other forms of collective action, have a point: that which our joint action is/ought to be about, for example realising ‘free’ global

¹² See Ralf Michaels, ‘Global Legal Pluralism’ (2009) 5 *Annual Review of Law and Social Science* 243; Paul Schiff Berman, *Global Legal Pluralism: A Jurisprudence of Law Beyond Borders* (Cambridge University Press, 2012).

¹³ Margaret Gilbert, *On Social Facts* (Princeton University Press, 2nd ed, 1992) 168. I make no effort hereinafter to offer a full analysis of legal order as such, nor do I offer a taxonomy of legal orders that distinguishes between, say, States and other kinds of legal order.

trade (the WTO)¹⁴ or investigating and prosecuting ‘the most serious crimes of concern to the international community’¹⁵ (the *Rome Statute*). Point functions as the cynosure for participants in joint action, even though it has a core of irreducible opaqueness, such that we never fully know what we are doing together. Point is spelled out in directed or relational obligations that, when taken together, constitute its default setting. For example, the ‘most-favoured-nation clause’ requires each country participating in the WTO to offer the same trading terms to all other WTO countries.¹⁶ Collective action gives rise to what counts as justified mutual expectations about the deportment of those involved in joint action, such that participant agents expect, or are deemed to expect, of each other that they will do their part in pulling off the joint act. These reciprocal expectations (about which more in Part VI below) grant standing to participant agents to rebuke those who disappoint their expectations. As concerns legal orders, the default setting of joint action is what jurisprudence calls a legal system, that is, a unity of rules.

The articulation of the point of collective action via directed or relational obligations has its counterpart in the emergence of a four-dimensional pragmatic order. Legal positivism has accustomed us to interpret legal orders as systems of rules, largely neglecting an analysis of law as a pragmatic order. Even when jurisprudence views legal order as a specific normative practice, it pays insufficient attention to the perspective of agents whose behaviour is regulated by legal rules. From this agent-centred perspective, a legal order is a four-dimensional order of action that determines who ought to do what, where, and when.¹⁷ A legal order distinguishes and interconnects certain places, subjects, times, and act contents. It also welds these four kinds of normative relations into the dimensions of a single order of action, such that certain acts by certain persons are commanded, allowed, or disallowed at certain times and in certain places. In fact, distinguishing between these four dimensions is the outcome of an abstractive process of what manifests itself to actors as a single, concrete order of action. For example, the WTO not only organises itself as a global market, but also as a collective with a history of its own, in which a series of trade negotiations — oriented to progressively lowering customs tariffs and other trade barriers, and to opening and keeping open services markets — connects past, present, and future into a single, and meaningful, temporal arc. The WTO is a space–time. Additionally, it creates certain subjectivities, such as Member States, various councils and committees, dispute settlement panels and an Appellate Body. The WTO also spells out what kinds of acts should take place, such as lowering customs tariffs. The WTO can only organise itself as a space–time by organising itself as a specific configuration of subjectivities and act-contents; conversely, the WTO cannot configure subjectivities and act-contents without

¹⁴ ‘The [WTO] system’s overriding purpose is to help trade flow as freely as possible — so long as there are no undesirable side effects — because this is important for economic development and well-being.’: WTO, *Understanding the WTO: Who We Are* (2019) <https://www.wto.org/english/thewto_e/whatis_e/who_we_are_e.htm>.

¹⁵ *Rome Statute* Preamble.

¹⁶ *General Agreement on Tariffs and Trade 1947* art I, incorporated by reference into *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1868 UNTS 186 (entered into force 1 January 1995) annex 1A.

¹⁷ The fourfold distinction between jurisdiction *ratione materiae*, *ratione temporis*, *ratione loci*, and *ratione personae*, is but one of the manifestations of the four dimensions of law as a pragmatic order.

organising itself as a space–time.¹⁸ By setting the boundaries of who ought to do what, where, and when, the rules of legal orders determine the boundaries of (il)legality, that is, of legal (dis)order. Conversely, legal orders establish what counts as (il)legality or (dis)order by drawing the spatial, temporal, subjective, and material boundaries of behaviour.

Crucially, collective action necessarily includes and excludes. The point of joint action determines what is important to joint action and what is not, hence what kinds of places, times, subjectivities, and act-types are included therein, such that other practical possibilities — other possible combinations of these four dimensions of behaviour — are marginalised as inconsequential. For example, the *Rome Statute* only regulates the who, what, where, and when related to the four crimes that fall within its jurisdiction; everything else (including other crimes) is marginalised as unimportant thereto. Those possibilities for acting jointly that are excluded as unimportant belong to the domain of what remains, at least for the time being, as legally *unordered*. What is included in the perspective of a collective self is deemed to be our own space, our own history, and so on; what is excluded therefrom becomes the domain of what counts as a group's other. The emergence of a limited pragmatic order and the emergence of the distinction between a collective self and other-than-self are two sides of the same coin.

The unordered is a wellspring of marginalised practical possibilities that can irrupt into collective action, challenging what counts as (il)legal behaviour, hence questioning how it draws the fourfold boundaries that constitute it as a pragmatic order. Those challenges expose certain spatial, temporal, subjective, and material boundaries as marking the limit of a legal order. When, for example, the KRRS entered the fields of Monsanto to destroy GMO crops, they did more than resist their inclusion in the unity of ought-places that configures the WTO as a global market. They also opposed the temporality of global trade, forfending the temporal rhythm of traditional farming techniques. Likewise, they contested the kinds of subjectivities and ways of acting presupposed by trade in a global market, asserting the importance for their communities of being farmers who sow the seed they have themselves harvested and saved for future planting. When a collective's joint action and its fourfold boundaries are contested, its other appears as strange, that is, as resisting intelligibility on the basis of how the collective structures reality. Limits are the limits of intelligibility.

Legal orders structure the real as either legal or illegal. I dub 'strange' behaviour or situations the domain of a-legality, where the 'a' of a-legality does not refer to legal disorder, which is intelligible in the form of illegality, hence as a negative determination of legality. Instead, it refers to another legal order that organises the legal/illegal distinction differently, hence structures reality in a way that is unintelligible for the order it questions. A-legality refers to an emergent normative order that is strange by dint of challenging how a given legal order draws

¹⁸ For a detailed analysis of legal orders as four-dimensional pragmatic orders, see Hans Lindahl, 'Boundaries and the Concept of Legal Order' (2011) 2(1) *Jurisprudence: An International Journal of Legal and Political Thought* 73.

the spatial, temporal, subjective, and material boundaries through which it configures what counts as (il)legal behaviour.¹⁹

We can now turn to a second constitutive element of legal orders: authority. Three features of collective action explain why it often takes on the form of authoritatively mediated collective action. First, questions are bound to arise as to the point of joint action, that is, about what it is that we are doing/ought to do together. Second, it may be contentious whether or not we are actually acting together in a way conducive to realising the point of joint action; hence whether, in a changing context of action, corrective steps are necessary to ensure that we succeed in pulling it off. Third, collectives often need to deal with disobedient participants. A variety of groups may or may not introduce authorities to deal with these problems; for instance, a group of musicians may or may not have a conductor. Regardless of how other kinds of groups solve these problems, legal orders belong to the class of collective action in which authorities, acting on behalf of the group as a whole, address these three problems in a way that is binding for participants. Indeed, authorities issue the rules that constitute the default setting of joint action; they check along the way whether collective action is on course; they uphold action in line with the default setting thereof. In short, the exercise of authority in legal orders involves articulating, monitoring, and upholding joint action. In so doing, authorities exercise normative power: they determine the normative status of the participants in joint action by establishing who ought to do what, where, and when. Importantly, the authoritative mediation of joint action is hybrid in character: it involves an assessment, both normative and factual, about a collective and the context of joint action. Authorities articulate, monitor, and uphold what our joint action is/ought to be about.

Admittedly, this is a strictly functional interpretation of authority: authority is what it does. Yet this stripped-down, functional approach has the advantage of revealing the internal connection between authority and the dynamic of inclusion and exclusion. What is most fundamentally at stake in authority as the exercise of normative power is the basic function of legal ordering, namely, to include in and exclude from joint action by setting the limit between collective self and other-than-self.

Let me briefly highlight three implications of the model of law outlined heretofore, all of which shed light on global legal pluralism. First, the model explains why the ‘overlap’ of legal orders is possible. Indeed, legal orders can share a physical space, while also organising it differently in terms of their respective points of joint action, that is, organising this space as different unities of ought-places. The claim to exclusive jurisdiction by Nation States is, historically speaking, but one of the many ways of organising legal spatiality, of which overlapping orders are the rule, not the exception.

Second, while I have focused on the differentiation of space into distinct legal orders, viewing these as a species of collective action entails that global legal

¹⁹ See Hans Lindahl, *Fault Lines of Globalization: Legal Order and the Politics of A-Legality* (Oxford University Press, 2013); Hans Lindahl, ‘A-Legality: Postnationalism and the Question of Legal Boundaries’ (2010) 73(1) *Modern Law Review* 30.

pluralism concerns all four dimensions of action. It would be reductive to approach the globalisation of legal orders only in terms of their spatiality. The emergence of global legal orders involves the emergence of a plurality of pragmatic orders, each of which articulates time, space, subjectivities, and act-types in a distinctive way.

Third, there are weak and strong forms of global legal pluralism. The former refers to the coexistence of a plurality of legal orders in a given physical space and calendar time, a coexistence that takes shape in the distinction between the first-person plural perspective of a given collective and the group perspectives of other groups: a collective self and its others. Strong global legal plurality manifests itself in the experience of the limits of a legal order. Resistance by the KRRS and Acholi to the WTO and the jurisdiction of the ICC, respectively, are exemplary for this strong sense of global legal pluralism: the conflictual relation between collective self and the other (in ourselves) as strange. The qualification 'in ourselves' is important because it shows that the strange is already always within and not simply outside: if the foreign need not be strange, so also the strange need not be foreign.²⁰

IV Struggles for Representation

If, as my analysis of collective actions suggests, inclusion and exclusion are the key function of legal order, then struggle — struggle about inclusion in and exclusion from a collective — is coeval with legal order in general, and emergent global legal orders in particular. 'They don't/can't represent us!' 'Take back control of our country!' 'We are the 99%' '*Que se vayan todos!*' (They must all leave!). These are some of the cries of opposition to the dynamic of inclusion and exclusion accruing to once resplendent, now tarnished globalisations. Implicitly or explicitly, all these cries of resistance censure representation when challenging the terms of inclusion and exclusion. Why? How are representation and the operation of inclusion/exclusion related to each other, such that challenges to globalisation processes by alter- and anti-globalisation movements are, in effect, struggles about representation?

Addressing this question demands shifting from a structural to a genetic account of collective action, and therewith to inclusion and exclusion as a dynamic or process. For the analysis I offered heretofore of collective action took for granted

²⁰ It will not work, therefore, to interpret and defend global pluralism as the cornerstone of an agonistic politics in terms of what Mouffe calls a multipolar agonistic world. 'Once it is acknowledged that there is no "beyond hegemony", the only conceivable strategy for overcoming world dependence on a single power is to find ways to "pluralize" hegemony. And this can be done only through the recognition of a multiplicity of regional powers.': Chantal Mouffe, *On the Political* (Routledge, 2005) 118. A first inconvenience of this interpretation of global pluralism is its State-centredness. Second, and more fundamentally, a multipolar agonistic world, as Mouffe describes it, is a plurality of unities, not the pluralisation of unity itself. Hers is a reductive reading of political agonism in a global setting that ends up aligning the distinction between the domestic and the foreign with the distinction between the own and the strange, thereby running the risk of hypostasising collective identities. By contrast, my strong reading of global legal pluralism makes room for the emergence of globalising normative orders that are *transversal*, as one might put it: the strange within ourselves joins forces with others elsewhere to intimate novel ways of acting and living jointly in a global setting. The La Via Campesina is an excellent example of globalisation as transversalisation. See also Chantal Mouffe, *Agonistics: Thinking the World Politically* (Verso, 2013).

that the WTO, the international community of States that ratified the *Rome Statute*, and even the KRRS or the Acholi, already exist as collectives. How does the first-person plural perspective of a ‘we together’ emerge in the first place? What does it mean to speak of *emergent* global legal orders?

This question allows me to introduce a fundamental feature of collective action that I have kept in reserve up to now: representation. The unity implied in the group perspective of a ‘we together’ is always and necessarily a represented unity, regardless of whether the group has two or two billion participants. As Waldenfels points out, we cannot say ‘we’; someone has to act or speak on behalf of a group, and not simply as an aggregation of agents, but rather as a whole or unity.²¹ Collective acts are acts imputed or ascribed to the collective as its acts, whether by participants or by third parties. Paradoxically, the agency of collective agency is most accurately formulated in the passive form, rather than the active form favoured by English grammar. For, strictly speaking, it is not the collective that, for instance, enacts rules, but rather rules that are deemed to be enacted by the collective (as a unity). Precisely because unity is always and necessarily a represented unity, a collective emerges as an *us* before becoming a *we*: no group gets off the ground unless someone convokes two or more agents to view themselves as a collective self. Prioritising ‘us’, namely the grammatical objective case of ‘we’, highlights a fundamental passivity governing the emergence of a group, a passivity that usually gets lost in references to the democratic *self*-constitution of a collective. A theory of collective action must begin as a theory about collective passion.

The convocation to collectivity, like all acts of representation, has two faces. Borrowing a distinction introduced by Goodman in his groundbreaking book, *Languages of Art*, representation is indissolubly representation *of* (something) and representation *as* (this or that).²² Defined thus, representation concerns the human relation to reality in general. Its scope is vast, including language, art, religion, science, the economy, politics, law, and technology.²³ As concerns collective action, whoever claims to represent a collective asseverates *that* there is a collective (representation *of*) and *what* joins together its participant agents (representation *as*). Regarding legal orders as a species of collective action, representation is at work when, for example, someone posits a default setting of joint action and attributes it to a collective as its own act. Importantly, the dynamic of representation ensures that there is no direct access to what constitutes us as a unity; our access to ourselves is always mediate or indirect: we represent ourselves as *this* — rather than *that* — unity. More precisely: someone represents us as this — and not that — unity, even when that someone is me.

²¹ Bernhard Waldenfels, *Verfremdung der Moderne: Phänomenologische Grenzgänge* (Wallstein Verlag, 2001) 140.

²² Nelson Goodman, *Languages of Art: An Approach to a Theory of Symbols* (Hackett Publishing, 1976). Phenomenologists will immediately recognise in this distinction the dynamic of what Husserl called ‘intentionality’, which Heidegger later qualified as ‘understanding’. For an excellent analysis of scientific theories and models as representations, see Bas C van Fraassen, *Scientific Representation: Paradoxes of Perspective* (Clarendon Press, 2008).

²³ The cartographic technologies instrumental to the mapping of State territories are, of course, a salient example of representation in its twofold sense. As a representational form, cartographic technologies allow us to see something as this, while not seeing it as that.

The representational character of collective action ruins all attempts, whether by communitarianism or by a range of anti-globalisation movements, to postulate direct access to an original unity and identity that could conclusively dispel doubts about what is truly our own — authentic — way of being. Certainly, representation must claim to be able to articulate who and what we really are about; yet this articulation is premature and contestable, which means that collectives are always more and other than as represented in the default setting of joint action.

Here, then, is the internal connection between representation and the operation of inclusion/exclusion. To represent is to include in, and to exclude from, joint action by revealing us as this (rather than as that) collective, for example as economic actors engaged in furthering free global trade rather than as farmers who aspire to realising food sovereignty. As a result, representation ensures that collectives are doubly contingent: it is contingent that we are and what we are as a collective. In particular, contingency permeates the closure that separates a collective inside from its outside: we represent ourselves as *this* interconnected distribution of ought-places, rather than *that* one. Collectives are never simply in-place: they are ever vulnerable to a-legal behaviour that challenges their claim to a space of their own. By creating the distinction between legal emplacement and misplacement, representation elicits displacements that challenge the commonality of the space claimed by a collective. That they are never simply in-place also means that collectives are here *and* elsewhere, that no given spatial closure exhausts how they can emplace themselves.

Notice, therefore, the ambiguity of representational acts. On the one hand, no collective, no first-person plural perspective could emerge in the absence of representational acts that seize the initiative to claim that a manifold of individuals exist as a collective and as this collective. On the other hand, representation also entails that collectives are irreducibly contingent because there is no direct access to an original unity that could dispel controversy as to whether a collective really exists and what constitutes it as a unity. As a result, the representation of collective unity is always also its *misrepresentation*; an opening up of a domain of practical possibilities and a closing down of other ways of being together; an integrative and disintegrative act. We are never fully ‘we together’; we are always also ‘we each’.

This insight casts new light on the ontology of collectives, their way of being. Theories of collective action have fought a successful battle against methodological individualism, demonstrating that collectives have an existence irreducible to that of their participants, even though the existence of groups depends on the acts of the agents that compose them. Well and good. Yet the contingency of collectives points to two further features of the ontology of social collectives in general, and of legal orders in particular. Indeed, the default setting of the point of joint action at any given point in time is a response to the hybrid question, ‘What is/ought our joint action to be about?’ Collectives cannot but respond time and again to this question by setting the boundaries of (il)legality because questionability is a constitutive element of the mode of being of collectives. Collectives are constitutively exposed to a-legal challenges by the other (in themselves). Certainly, the hybrid question about who we are/ought to be only bursts into the open when the unity of the collective is challenged. But every collective act is a response to this question, even

when the rules that make up the default setting of the point of joint action are followed more or less as a matter of course in the warp and woof of the everyday. Accordingly, responsiveness, as much as questionability, belongs to a collective's ontology: every representational act, including the 'first' act that gets a collective going, has a responsive structure. To represent ourselves as this or as that, even if otherwise than before, is to respond to the question 'What is our/ought our joint action to be about?' The responsive structure of representation gives the lie to political Cartesianism, namely the assumption that collective self is prior to other-than-self, ensuring that collectives are ec-centric, that they begin elsewhere than in themselves.²⁴

These considerations explain what I called the *dynamic* of inclusion and exclusion. Paradoxically, the first act that gets a collective going must come second if it is to be the first act. The 're' of representation presupposes an original collective, yet an original collective to which there is no direct access because it is only present through its representations. This holds for the WTO and the *Rome Statute*. It also holds for alter-globalisation movements when they claim to do no more than 'retake' the space that has been taken from them: 'taking back what is ours'.²⁵ Likewise, despite the promises by those who support the United Kingdom leaving the EU ('Brexiters') to 'take back control', by French politician Marine Le Pen to '*Remettre la France en ordre*', and by American President Donald Trump to 'Make America great again', the representational character of such promises ensures that there is no return to an original, pristine unity that is itself beyond question. To represent the original unity is to change it, hence to forfeit what would ground a legal order as being indisputably 'ours'.²⁶

If representation entails that there is no direct access to an original collective unity, so also it entails that there is no direct access to the a-legal challenge to which representation responds. By establishing what our joint action is/ought to be about, representational acts indirectly indicate how the jointness of (presupposed) joint action is questioned. A collective self-representation is always also a representation of the other, and vice versa. Here again, contingency kicks in: why assume that we

²⁴ I borrow Plessner's thesis about 'eccentric positionality', giving it a collective reading. See Helmuth Plessner, *Die Stufen des Organischen und der Mensch: Einleitung in die Philosophische Anthropologie* (de Gruyter, 1965).

²⁵ Marina Sitrin and Dario Azzellini, *They Can't Represent Us! Democracy from Greece to Occupy* (Verso, 2014) 11.

²⁶ The absence of an original unity does not mean, however, that anything holds with representational acts, as though it makes no difference whether a collective is represented in one way or another. Were such the case, then there would be no *re*-presentation, but rather the pure presentation or *creatio ex nihilo* of collectivity. The presupposition that there is a collective and what joins its members together must have some purchase on social and natural reality if representational acts are to succeed. Kant was well aware of this problem in the *Critique of Pure Reason* when postulating a transcendental principle of homogeneity, which 'is necessarily presupposed in the manifold of possible experience . . . for in the absence of homogeneity, no empirical concepts, and therefore no experience, would be possible': Immanuel Kant, *Critique of Pure Reason* (Norman Kemp Smith trans, Macmillan Education, 1987) A 654 [trans of: *Kritik der Reinen Vernunft* (first published 1781)]. Transposed to the social domain, this means that representation must be able to reveal a manifold that is 'intrinsically organized to a minimal degree, since it must be at least *organizable*': Cornelius Castoriadis, *Philosophy, Politics, Autonomy*, edited by David Ames Curtis (Oxford University Press, 1991) 89.

are being challenged in this way, rather than that? At stake in the representation of collective unity is never only the appropriate response among a range of possible responses to a given challenge to collective unity, for no challenge is given directly and of itself. Because every representation is an indirect response to what a challenge is about, no representation can exhaust the nature of the challenge, either normatively or factually. Representation includes and excludes *us*; it also includes and excludes the *other*. Both collective self and other are inextricably caught up in the operation of inclusion and exclusion deployed by the interplay between question and response. Collectives are always in excess of their representations; so also the a-legal challenges to which they respond.

In short, collectives cannot but incessantly represent themselves and other-than-self because no representation can be definitive for either pole of intersubjective relations. Representation entails that the ‘inter’ of intersubjectivity refers to an in-between beyond the definitive control of either collective self or other-than-self, such that the boundaries of legal orders are never simply ours nor theirs, hence constitutively unstable. Questions about who we are/ought to be, and about the other (in ourselves) as other than us, only admit of provisional responses.

This explains why legal order is a process, a legal order-*ing*: always an order-in-the-making, never a definitive state; always an *ordo ordinans*, never an *ordo ordinatus*, even when, in conditions of relative stability, representation primarily reproduces the extant order. The ‘re’ of representation means that we (are deemed to) present ourselves *anew* as this or that unity, where ‘anew’ hovers somewhere between pure repetition and pure innovation, always introducing a difference, however minimal, into collective identity over time.²⁷

Allow me to summarise these considerations on the internal relation between representation and the operation of inclusion/exclusion as follows:

Thesis 1: The unity of a collective is putative.

Thesis 2: There is, strictly speaking, no unity, only a process of unification.

Thesis 3: There is, strictly speaking, no plurality, only a process of pluralisation.

Thesis 4: Unification and pluralisation are the two faces of the single process of representation.

These four theses about representation explain the dynamic of inclusion and exclusion that drives emergent global legal orders, including the WTO and the *Rome Statute*. They explain, in particular, why global law pluralises humanity in the process of unifying it, hence why humanity is necessarily both inside and outside global law. Those who claim to represent humanity when enacting a global legal order, whatever its point, cannot but represent humanity as this or as that, differentiating it with respect to itself in the process of identifying what is to count as humanity for the purposes of that legal order. Emergent global legal orders can take up a first-person plural perspective *on* humanity, not the perspective *of* humanity.

²⁷ Ferdinando Menga draws on the concept of ‘expression’, as elaborated in Heidegger’s early work, Merleau-Ponty, and Waldenfels, to illuminate the structure and dynamic of (political) representation. See Ferdinando Menga, *Ausdruck, Mitwelt, Ordnung: Zur Ursprünglichkeit einer Dimension des Politischen im Anschluss an die Philosophie des frühen Heidegger* (Wilhelm Fink, 2018) 33–80.

V Participation is Representation

These four theses also explain why alter- and anti-globalisation movements take aim at representation when they cry out ‘They don’t/can’t represent us!’; ‘Take back control of our country!’; ‘We are the 99%’; ‘*Que se vayan todos!*’ (They must all leave!). They decry the misrepresentations that take place, whether by inclusion or by exclusion, in the course of legal globalisations, demanding that representation give way to participation. For a wide range of alter- and anti-globalisation movements, the contradiction between representation and democracy bursts into full view with the globalisation of inclusion and exclusion.

This [historical epoch] is marked by an ever increasing global rejection of representative democracy and, simultaneously, a massive coming together of people who were not previously organized, using direct democratic form to begin to reinvent ways of being together.²⁸

They fustigate representation as an act whereby individuals or groups arrogate to themselves the power to rule over others, creating a cleavage between those who rule and those who are ruled — *transitive* power, as one might call it. By contrast, democratic self-rule is power that we exercise over ourselves by participating directly in collective decision-making. Democracy consists in the exercise of *intransitive* or reflexive power, power over ourselves: collective self-rule, hence a collective self-binding. Rancière, the French political philosopher, argues in a particularly trenchant intervention that representation is ‘by rights, an oligarchic form [of government], a representation of minorities who are entitled to take charge of public affairs’.²⁹ “Representative democracy”, he adds, ‘might appear today as a pleonasm. But it was initially an oxymoron’.³⁰ There is no doubt that, for him, like for many other political theorists and activists, representative democracy remains an oxymoron: democracy, if it is to mean collective self-rule, can only pass muster as participative or direct democracy.³¹

At bottom, alter- and anti-globalisation movements censure the mode of authority they associate with representation. In a minimalistic characterisation, authority is factually contextualised normative power; that is, power to change the normative status of its addressee(s). Therefore, those movements argue, representational authority is the expression of domination exercised through unilateral acts of inclusion and exclusion imposed on their addressees. Against representational authority, these movements appeal to participative authority, to participation in democratic decision-making as the condign mode of collective self-rule and self-binding.

The analysis of representation outlined above and in Part IV accounts for the worry voiced by alter- and anti-globalisation movements when they point out that

²⁸ Sitrin and Azzellini, above n 25, 6.

²⁹ Jacques Rancière, *Hatred of Democracy* (Steve Corcoran trans, Verso, 2007) 53 [trans of: *La Haine de la Démocratie* (first published 2005)].

³⁰ Ibid 53.

³¹ Arendt, for example, contrasts party democracy to worker council democracy, asserting that ‘the issue at stake [is] representation versus action and participation’: Hannah Arendt, *On Revolution* (Penguin Books, 1973) 273.

representation deploys transitive power: power by some over others. Because the unity of a collective is a represented unity, someone must *take* the initiative to speak and act on behalf of the whole, a taking that is always more or less unauthorised, always more or less forceful, when representing unity thus and not otherwise. This taking is also a *taking place*, a spatial closure that includes in and excludes from what the representational act deems to be a collective's own space. It is no coincidence that one of the emblematic movements against the globalisation of capitalism calls itself 'Occupy Wall Street'. By *occupying* Wall Street, the movement understands itself as retaking or reclaiming the space from which they have been dispossessed by capitalist place taking. The movement forces a closure, which it claims to be legitimate by dint of retaking place.

Thus, my account of representation fully acknowledges the misrepresentations wrought by emergent global legal orders, which alter- and anti-globalisation movements denounce.

Yet there is more to representation than only an act of (spatial) misrepresentation and domination of the many ('We are the 99%!') by the few. For the one, representation, as transitive power, has a positive function: there can be no intransitive power, no power over ourselves, unless someone seizes the initiative to act and speak on behalf of us. For the other, it would be reductive to equate representation with transitive power. To represent, as argued heretofore, is to represent a multitude of agents as a *whole*, that is, a group to whom the representative claims to belong. Representation has an intransitive or reflexive purport. The intransitivity of power is built into the thesis that representation is necessary because someone must say 'we' on behalf of *we* — not of *they*. The 100% of 'We are the 99%' is not simply a quantitative aggregate of individuals; it is a qualitative integrate, a putative unity of individuals. Authority is representational authority. Taken together, the transitive and intransitive dimensions of authority evince its irreducibly ambiguous status, for there can be no authoritative representation of commonality, of what joins us together, without an element of forceful, even violent, marginalisation.

By this analysis, the conceptual opposition between participative and representative democracy, between direct and indirect democracy, is specious. Consider, to this effect, the 'crisis of representation' as diagnosed by an activist from the Solidarity Health Clinic in Thessaloniki, in the midst of the social upheaval caused by the austerity measures forced upon Greece by the EU:

We are very used to delegating responsibility to somebody else and giving them the power to make decisions over what is happening. We don't think of that as democratic. We don't want to have representatives, we want to represent ourselves.³²

Notice how this comment inadvertently confirms that participation is representation, while also revealing the intransitivity or reflexivity of representation: 'we want to represent *ourselves*'.

Mine is not a philippic against participation, nor am I suggesting that its votaries are callous or naïve. Far from it. The point is, instead, that participation, like

³² Sitrin and Azzellini, above n 25, 52.

all other vehicles for representing collective unity, deploys the *forceful* dynamic of inclusion and exclusion. By playing off participation against representation, the activist's comment conceals the ambiguity that accrues to participation, and precisely because participation deploys both transitive and intransitive power. We cannot participate in representing ourselves, other than by representing ourselves as this, not as that, hence by marginalising, more or less forcefully, at least some claims as to what joins us together, even when representation takes place through participatory processes. Participation misrepresents collective unity in the process of representing it.

More radically, the call for direct democracy through participation elides the twofold alterity at work in collective self-rule. On the one hand, someone must seize the initiative to represent us, summoning us to view ourselves as a group that would rule over itself. On the other, that we are a collective and what we are as a collective has its inception elsewhere, namely, in the a-legal challenge to which the representation of collective unity is a response. At the beginning and as the beginning was a-legality.

Thus, the activist's defence of a model of authority based on the supposed immediacy of collective self-rule falls prey to political Cartesianism, as does Rancière's. For it makes no sense to claim that representative democracy is an oxymoron: representation is a *conditio sine qua non* of democracy, even if not its condition *per quam*. Democracy is the form of government in which the exercise of authority acknowledges and seeks to deal with the irreducible contingency of all representations of collective self and other-than-self. In other words, democracy seeks to deal with the fact that representations of collective self and other-than-self are always also, to a lesser or greater extent, misrepresentations thereof. The crisis of representation unleashed by globalisation is a struggle for, not against, representation, that is, a struggle about whether we are a collective and what we are/ought to be as a collective. This is nothing other than a struggle about the terms of authoritative inclusion in and exclusion from globalising legal orders.

VI Struggles for Recognition

A further step in the direction of a robust concept of authority involves reconstructing struggles for representation as struggles for recognition. In effect, the normative dimension of struggles for representation comes into view when interpreted as struggles for the collective recognition of an identity/difference violated or threatened by inclusion in and exclusion from a legal order. Moreover, as will transpire, the ambiguity we have discovered in representational processes — namely that representation is always also misrepresentation — returns unabated in struggles for recognition.³³

³³ Recognition is never only a normative category; it is also cognitive, which means that recognition, like representation, is a hybrid category. A systematic account of the cognitive and normative dimensions of representation, recognition, and authority falls beyond the scope of this Address. See Paul Ricœur, *The Course of Recognition* (David Pellauer trans, Harvard University Press, 2005) [trans of: *Parcours de la Reconnaissance* (first published 2004)].

By entering into and destroying the fields of GMO crops owned by Monsanto, the KRRS claim that their community is misrecognised by the WTO, holding that the recognition of their identity/difference demands that they be excluded from this emergent global legal order. So also the Acholi Elders demand that restorative justice be applied to certain members of the LRA. They claim that criminal justice under the *Rome Statute* misrecognises their community's identity/difference, pressing the ICC to recognise their community by excluding it from the Court's jurisdiction. Misrecognition need not take place through inclusion in a legal order. It can also arise through exclusion. A good example is the GMO dispute in the WTO, which turns largely on the conflict between a permissive approach favoured by the US and the precautionary principle favoured by the EU. Under the US approach, restrictions on food products are only justified when they produce scientifically proven risks; under the EU approach restrictions are called for in situations of uncertainty and potentially serious risks. By opposing the application of the permissive principle in global trade, the EU holds that the point of joint action by the WTO excludes a principle important to the EU's identity/difference.³⁴ Likewise, Member States may resist the ICC's move to exercise subsidiary jurisdiction, arguing that the Court's assertion of jurisdiction misrecognises their identity/difference by refusing to give legal force to how they have transposed international criminal law into domestic law.

In short, what I earlier called a-legal behaviour consists in a demand for recognition that challenges the jointness of joint action, thereby sparking a struggle about inclusion in and exclusion from a legal order in which the collective's identity and the identity of whoever raises the demand for recognition are put to the test. When confronted with a demand for recognition, a collective must respond by setting, in one way or another, the boundaries of what is to count as (il)legality, hence the limit between collective self and other-than-self.

The question about the authoritativeness of a politics of boundaries in a global setting can be formulated thus: is there an *unconditional* criterion that could settle how collectives ought to respond to demands for recognition when articulating, monitoring, and upholding joint action?

One answer to this question, the answer that has occupied centre stage in recent normative theory, assumes that a demand for recognition is a demand for inclusion in the form of *reciprocal* recognition within the unity of a legal order. So construed, struggles for recognition involve the emergence of a relation between self and other that, if all parties act in good faith, transforms an initial condition of misrecognition into a relation of reciprocal recognition as equal and free participants in joint action. This approach assumes that each of the parties engaged in a struggle for recognition can transform its self-understanding through a new default setting of joint action to which all affected parties can commit because this setting allows each of them to view her/himself as equal yet different to the other participants in joint action. When viewed as a process of legal ordering that takes place in struggles for recognition, a politics of boundaries is authoritative if there is recognition of 'the

³⁴ Mark A Pollack and Gregory C Schaffer, *When Cooperation Fails: The International Law and Politics of Genetically Modified Foods* (Oxford University Press, 2009).

other *as one of us* [by] the flexible “we” of a community that resists all substantive determinations and extends its permeable boundaries ever further’.³⁵ Collectives are limited, but limits can be rendered ever more inclusive in the process of articulating, monitoring, and upholding the jointness of joint action. A-legality, strangeness, is provisional.

Accordingly, the champions of the principle of reciprocal recognition acknowledge the contingency of collectives while also asserting that a normatively robust concept of authority demands overcoming contingency. An authoritative politics of boundaries is necessary because of the contingency of collectives; an authoritative politics of boundaries is possible because the ‘demand (*Anspruch*) to complete inclusion’ is inherent to rational struggles for recognition.³⁶ A legal order is unconditionally authoritative if and only if it has an inside, but no strange outside — by virtue of having integrated normative plurality into the unity of a single legal order. *E pluribus unum*. Legal globalisation can and should be a process of *universalisation*, even if progress is inchmeal and the arrival of a global legal order with an inside, but no outside, must be postponed indefinitely in historical time.

This account of recognition will not work. To begin with, theories of reciprocal recognition fail to adequately describe the dynamic of representation at work in processes of recognition. To recognise is to recognise something or someone *as this* or *as that*. Recognition, Bedorf notes, has a triadic structure: ‘the two-part relation, *x recognizes y*, describes the relation only partially. Instead, it is a triadic relation in which *x recognizes y as z*’.³⁷ The ‘re’ of recognition deploys the same dynamic as the ‘re’ of representation: a collective identity is never given directly to recognition. Strictly speaking, recognition is a process of identification and differentiation: whoever recognises posits an identity between what is recognised and how it is recognised, thereby differentiating it from what becomes its other. As a result, what is identified in recognition is always more and other than how it is identified (for example, as *z* rather than as *w*).

Collective self-recognition deploys this process of identification/differentiation. Paraphrasing Bedorf, collective self-recognition does not have the form ‘we recognise ourselves’; it deploys a triadic relation: ‘we recognise ourselves as *z* (rather than as *w*)’. In particular, we recognise ourselves as this spatial unity (rather than that one). The (spatial) self-identification — hence self-inclusion — that takes place in self-recognition is also always a (spatial) self-differentiation — hence a self-exclusion. Recognition differentiates a collective with respect to *itself* in the very move by which it posits its identity (in time), such that the collective is never only here and now, but also elsewhere and ‘elsewhen’. For instance, the WTO recognises itself as a collective capable of ensuring food safety by relying on scientific risk analyses. But this self-recognition introduces a difference into the

³⁵ Jürgen Habermas, *The Inclusion of the Other: Studies in Political Theory* (Ciaran Cronin and Pablo de Greiff, Polity Press, 2005) xxxv–xxxvi (emphasis in original) [trans of: *Die Einbeziehung des Anderen: Studien zur Politischen* (first published 1996)].

³⁶ Jürgen Habermas, *The Postnational Constellation: Political Essays* (Max Pensky trans, Polity Press, 2001) 148 [trans of: *Die Postnationale Konstellation: Politische Essays* (first published 1998)] (translation modified).

³⁷ Thomas Bedorf, *Verkennende Anerkennung: Über Identität und Politik* (Suhrkamp, 2010) 122 (Hans Lindahl translation in text accompanying n 37).

WTO's identity — a non-identity in identity — because participants in the WTO, for example, the EU, will complain that the default setting of food safety gives insufficient weight to the precautionary principle. The same would hold for Member States which complain that the ICC has excluded their transposition of international criminal law into domestic law from the operation of the principle of complementarity under the *Rome Statute*. They cry out: 'Not in our name! We are misrecognised because what we view as important has been *excluded* from joint action.'

Analogous problems regard collective recognition of the other as other. Indeed, the 're' of recognition ensures that other-differentiation goes hand in hand with other-identification, in that the other is recognised as one of us. For instance, the KRRS's direct action challenges their identification as subject to — hence as included in — the WTO. The same holds for the Acholi, who challenge their identification as a community subject to — thus included in — the *Rome Statute*. They cry out: 'Not in our name! We are misrecognised because, having been *included* in joint action, we can no longer act in accordance with what we view as important to us.' Liberal political theory has been overwhelmingly concerned to secure a greater inclusiveness for collectives, warning against the untoward 'othering' and exclusion of individuals or groups.³⁸ But this is only part of the problem, even if the part that has received most, if not all, normative attention; the second part is an untoward 'selving'. For what about those cases in which 'inclusiveness and belongingness' are lived as the problem, not the solution to the problem?

This brings us to a second, related difficulty confronting theories of reciprocal recognition, namely, their reductive reading of how boundaries do their work of including and excluding. Recognition of the other through a new default setting of joint action requires that a demand for recognition confront a collective with practical possibilities of its own that it has unjustifiably excluded from joint action. For example, the WTO might interpret the KRRS's direct action as evidencing a disparity — a non-identity — between its aspiration to protect and preserve the environment, as laid out in the Preamble to the *WTO Agreement*,³⁹ and its default setting of free global trade. It would then move to restore its collective identity, recognising the KRRS through an environment-friendly default setting of global trade. Yet is the demand for recognition of the KRRS only or even primarily about protecting and preserving the environment? That their demand registers as such with the WTO merely shows how the WTO frames what counts for it as a *justified* demand for recognition. Yet there are facets of the demand for recognition of the way of life of Indian farmers to which the WTO remains normatively indifferent because they are in excess of the practical possibilities available to a collective oriented to furthering free global trade — they remain strange to it, recalcitrant to integration into the WTO's collective identity.

³⁸ See, eg, John A Powell and Stephen Menendian, 'The Problem of Othering: Towards Inclusiveness and Belonging' (2016) 1 *Othering & Belonging: Expanding the Circle of Human Concern* 14 <http://www.otheringandbelonging.org/wp-content/uploads/2016/07/OtheringAndBelonging_Issue1.pdf>.

³⁹ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1868 UNTS 186 (entered into force 1 January 1995).

A comparable quandary confronts Acholi resistance to international criminal justice under the *Rome Statute*. The principle of complementarity is the vehicle by which the *Rome Statute* seeks to accommodate a certain measure of normative pluralism in the workings of international criminal justice. It stipulates that the ICC may only exercise its jurisdiction if Member States are unable or unwilling to investigate and prosecute the aforementioned crimes. But the recognition of otherness for which complementarity makes room is limited by the point of joint action, as stipulated in the Preamble of the *Rome Statute*: ‘punishing the most serious crimes of concern to the international community as a whole’. Nouwen and Werner note that the principle of complementarity ‘creates space for an alternative forum of criminal justice to that of the ICC, but not to an alternative conception of justice: for the purposes of complementarity, the domestic justice would have to be criminal justice’.⁴⁰ Like with the KRRS, so also the Acholi demand for recognition is excessive with respect to the possibilities of collective self-identification and self-recognition afforded by the *Rome Statute*.

This insight bears directly on the ontology of collectives: collectives exist in the modes of a *finite* questionability and a *finite* respons-a-bility. This means that a double asymmetry plays out in struggles for collective recognition. The other’s demand for recognition is asymmetrical with respect to a collective’s response because it is not merely a claim to inclusion in relations of legal reciprocity as a way of redressing the violation of its identity/difference. To a lesser or greater extent, demands for recognition are in excess of the possibilities available to the group perspective opened up by the point of joint action. In turn, the response governed by that group perspective is asymmetrical with respect to the question because it frames the demand of the other in ways that render it amenable to a response in the terms of (transformed) relations of reciprocity available to joint action. There is always at least a minimal gap between the question to which a collective responds — What is/ought *our* joint action to be about? — and the question addressed to it by a demand for recognition. Collectives frame their responses to demands for recognition in such a way that they can recognise themselves when transforming the default setting of their joint action with a view to recognising the other (in themselves). Recognition is always also *mis*recognition.

Notice that this double asymmetry is not an argument against reciprocity as such. As adverted heretofore, the directed or relational obligations of participants in joint action articulate what are represented as reciprocal expectations between them. The claim to commonality intrinsic to joint action asserts that a legal order has instituted or can institute relations of reciprocity between the members of the collective. Yet this claim has a normative blind spot that reciprocity cannot suspend because it conditions the possibility of reciprocity. Acts of recognition that institute relations of reciprocity in response to a demand for recognition are exposed to being a form of domination *because* they articulate, monitor, and enforce what are represented as relations of reciprocity.

Back to the four theses about representation listed above in Part IV. Theories of reciprocal recognition will have no difficulty in taking on board Thesis 1 about

⁴⁰ Nouwen and Werner, above n 8, 174.

putative unity and Thesis 2 about unification, while emphatically jettisoning Thesis 3 about pluralisation. This enables those theories to endorse an interpretation of globalisation according to which boundaries do more than simply include and exclude; they already include what they exclude, for otherwise boundaries could not be extended to integrate what they had unjustifiably marginalised from joint action. So far so good. Yet the double asymmetry between question and response shows that the logic of boundaries is more complex than envisaged by those theories. Yes, boundaries include what they exclude; but they also exclude what they include. Such is the upshot of the KRRS and Acholi opposition to their inclusion in the WTO and the *Rome Statute* respectively. Against theories of reciprocal recognition, I insist on Thesis 4: there is no unification without pluralisation. The double asymmetry between question and response has its correlate in the complex logic of boundaries, which *include by excluding and exclude by including*.⁴¹

Thus, it is not enough to have introduced the notion of limits when making sense of how boundaries do their work of including and excluding. An additional category is required to account for the complex logic of boundaries. Demands for recognition reveal boundaries as fault lines, not only as the limits of joint action, to the extent that those demands are beyond a collective's practical possibilities. As limits, boundaries can be transformed to include in or exclude from the compass of joint action. Limits speak to the domain of the unordered which, when it irrupts into a legal order in the form of a demand for recognition, is *orderable* for that order. As fault lines, boundaries intimate ways of acting and being together that refuse integration into the joint action they challenge. Fault lines signal the domain of the unordered insofar as it is *unordered* for a legal order. Emergent global legal orders have fault lines as well as limits. In this they are no different to other legal orders.

Let me conclude this section by taking a stand against two competing, but ultimately similar, approaches to the authoritativeness of an authoritative politics of boundaries in a global setting: communitarianism and universalism. They compete because the former recoils from globalisation, whereas the latter embraces it. Yet this opposition presupposes a more fundamental agreement. Both are monistic: the former by postulating a multiplicity of unities; the latter, an all-encompassing unity. Moreover, both seek to domesticate the irreducible double contingency of collectives: communitarianism would *restore* an original collective unity in the face of a-legal challenges; universalism would *create* it. Against communitarianism, I submit that there is no direct access to an original identity and unity that could conclusively settle how the boundaries of (il)legality should be posited. No collective is or can be identical to itself, nor simply different from its others. Universalism is certainly prepared to acknowledge the contingent inception of collectives, yet claims that contingency can be overcome. Against universalism, the complex logic of boundaries shows that contingency is a constitutive element of all

⁴¹ This use of the concept 'complex' shows some affinities with the philosophical concept of complexity and its implications for identity/difference and inclusion/exclusion, although I will not attempt to explore relevant points of similarity and difference here. For a careful study of these themes, see Minka Woermann, *Bridging Complexity and Post-Structuralism. Insights and Implications* (Springer, 2016).

legal orders, global or otherwise.⁴² Strangeness, in the form of a-legal challenges insofar as they refuse accommodation in a given legal order, will not disappear, not even in the indefinitely long run. A politics of boundaries that would conceptualise authority in terms of the discursive universalisability of the limits of legal orders or of their dialectical universalisation is a totalising endeavour that morphs into an imperial politics of boundaries.

Against both views, Thesis 4 suggests that the authoritativeness of an authoritative politics of boundaries turns on interpreting inter-subjectivity as the *entwinement* of collective self and other, where entwinement concerns an in-between — an *interaction* — that eludes the definitive control by either self or other-than-self because the boundaries of legal orders include what they exclude and exclude what they include. Entwinement precludes both a simple plurality of unities, as in communitarianism, and an all-encompassing unity in plurality, as in universalism. Entwinement — more precisely: *entwining*, understood as the ongoing process of a co-original unification and pluralisation that takes place in the encounter between collective self and other — is the primordial condition of global legal pluralism.⁴³

If, then, contingency is an ineradicable feature of legal orders, if humanity is always inside and outside global law, is a normatively robust concept of authority available that does not accept resignation or paralysis in the face of the globalisation of inclusion and exclusion?

VII Restrained Collective Self-Assertion

While I have sought to reveal the difficulties encountered by the attempt to conceptualise authority in terms of reciprocal recognition, acknowledging this difficulty need not require abandoning the concept of recognition in our quest for a normatively robust concept of authority. What I have in mind is an authoritative politics of boundaries that takes shape through responses which recognise the other (in ourselves) as one of us and as other than us. I call this ‘asymmetrical recognition’. Its first aspect speaks to collective self-assertion; the second, to collective self-restraint. A theory of asymmetrical recognition interprets an authoritative politics of boundaries as restrained collective self-assertion.

First, some words about collective self-assertion. I draw to this effect on Ricœur’s magnificent analysis of self-recognition, whereby a person recognises ‘that he or she is in truth a person “capable” of different accomplishments’.⁴⁴ To recognise oneself is to assert oneself as *capable*, as an agent to whom beliefs, intentions, and actions can be attributed and imputed, and, consequently, who can be held

⁴² A view vigorously defended by Ferdinando G Menga, ‘Was Sich der Globalisierung Entzieht: Die Unaufhebbare Kontingenz bei der Stiftung von Weltordnungen’ in Dietmar Koch, Michael Ruppert, and Niels Weidtmann (eds), *Globalisierung – Eine Welt?* (Attempo-Verlag, 2015) 64.

⁴³ My interpretation of entwinement is inspired by Merleau-Ponty’s notion of chiasm. One of the final working notes of *The Visible and the Invisible*, with the heading ‘Chiasm me — the world; me — the other’, reads as follows: ‘Begin with this: there is no identity, nor non-identity, nor non-coincidence, there is an inside and an outside that turn around each other.’: Maurice Merleau-Ponty, *Le Visible et l’Invisible* (Gallimard, 1964) 317 (Hans Lindahl translation in this footnote).

⁴⁴ Ricœur, above n 33, 69.

responsible for them. Although Ricœur discusses self-recognition with regard to individual persons, it is also, with some caveats, applicable to collectives. To the extent that they succeed, collective self-representations allow individuals to recognise themselves as *capable* of acting together with others with a view to realising the point of their joint action. To paraphrase Ricœur, collective self-recognition involves the attestation ‘that [we are] in truth a [group] “capable” of different accomplishments’.

The notion of capability is of particular importance because it allows me to deepen the notion of power deployed in authority. Thus far, I have been content to sketch out a minimalistic interpretation of authority as normative power, that is, power to change the normative status of individuals or groups, exercised by officials in the course of articulating, monitoring, and upholding joint action. This is, however, the surface phenomenon of power. The elementary attestation of individual power that attaches to personal self-recognition — ‘I can’ (*je peux*), as Ricœur puts it, in the footsteps of Husserl and Merleau-Ponty — has its counterpart in the attestation of collective power that accrues to collective self-recognition: *we can*. The rousing ‘Yes, we can’ of Barack Obama’s victory speech, delivered in Chicago on 4 November 2008, is exemplary for the summons to a range of individuals to recognise themselves as a group, that is, to understand themselves as capable, as empowered, to act as a unit in the face of adversity. It also is at stake in the self-recognition of the WTO and other emergent global legal orders. For instance, having acknowledged that ‘all peoples are united by common bonds, their cultures pieced together in a shared heritage, and concerned that this delicate mosaic may be shattered at any time’, the Preamble to the *Rome Statute* proclaims a proud ‘we can’: we, the international community, are capable of punishing those who commit these heinous crimes. This fundamental sense of power as collective self-assertion is also at work in the self-recognition of alter-globalisation movements, which share the following conviction when defying the globalisation of capitalism: ‘we can govern ourselves’.⁴⁵ In each of these cases, participants assert themselves as a group, recognising themselves as members of a collective capable of realising the point of joint action. Collective self-assertion — the attestation that ‘we can’ preserve or maintain ourselves as the collective we really are in the face of challenges to what joins us together — is the core of collective self-recognition.

These considerations allow me to formulate the concept of authority germane to collective assertion. It consists in the capacity to posit, in a concrete situation, a representation — a default setting — of joint action that enables a wide range of individuals, in hindsight and for the time being, to recognise themselves as who they really are as a collective, motivating them to act jointly in a way that addresses — without exhausting — a challenge to collective unity. This is the deep structure of power in its traditional, minimalist definition as the power to change an addressee’s normative status by establishing who ought to do what, where, and when.

Let me unpack this characterisation of authority as collective self-assertion. Because there is no original unity to which the members of a collective have direct access, representational acts can surprise us, leading us to understand ourselves

⁴⁵ Sitrin and Azzellini, above n 25, 10.

otherwise than before, opening up new practical possibilities for acting jointly of which we were nescient, yet which we, its members, can recognise, in hindsight, as our own joint possibilities. In this paradoxical mode of an originating representation, an authoritative politics of boundaries can innovate on collective unity, including the other (in ourselves) *as one of us*. This entails that authority begins as an act of *transitive* power: someone must *seize* the initiative to represent us otherwise, if we are to recognise ourselves in a way that allows for including the other (in ourselves) as one of us. Yet what begins as an act of transitive power, appears *ex post* as the *intransitivity* of representation, to the extent that its addressees can recognise themselves therein. In a periphrasis, the intransitivity of representation only appears after the deed — *après coup* as Derrida would put it⁴⁶ — if and to the extent that its addressees recognise themselves in a default setting of joint action because it articulates who they ‘really’ are, even though they had never ‘thought of themselves’ in this way. A collective asserts itself if those over whom power is exercised recognise themselves as ruling over themselves when someone, acting on their behalf, sets the limits of inclusion in and exclusion from joint action. So conceived, an originating representation of who we are re-novates, as one might put it, all four dimensions of a pragmatic order: it retrojects into the past what is actually a collective unity that has yet to come in the form of a novel default setting of who ought to do what, where, and when.⁴⁷

Yet representational re-novations are never innocent undertakings, even when imbued with the best of intentions. There is always an element of misrepresentation when representational acts innovate on collective unity to deal with a demand for recognition of the other (in ourselves). As a result, this representational act is more or less forceful and will appear to some or even many of its addressees as the expression of domination, of someone ruling over us rather than we ruling over ourselves. I want to characterise this ambiguous nature of the authoritativeness of an authoritative politics of boundaries as ‘innovative transgression’.

Crucially, the authoritativeness of innovative transgression does not deploy a dialectic, as assumed by theories of reciprocal recognition. Innovative transgressions do not extend the limits of collectives ever further in the direction of an ‘all-inclusive’ legal order. They posit spatial closure *otherwise*. For, as noted earlier, representation ensures that inclusion is also always, to a lesser or greater extent, the other’s exclusion because the other (in ourselves) is included as one of us. Innovative transgressions are authoritative to the extent that they offer a situationally fitting response to a demand for recognition, one that addresses the demand without being

⁴⁶ I draw here on Derrida, who radicalises Freud’s notion of *Nachträglichkeit* (the *après coup*) as a ‘supplement of origin’ or an ‘original representation’: Jacques Derrida, *L’Écriture et la Différence* (Seuil, 1967) 314.

⁴⁷ By foregrounding the transitive and intransitive dimensions of power, this approach to authority parries the central difficulty in Kantian-inspired approaches that seek to reconstruct authority in terms of the categorical imperative. For the authoritativeness of authority begins *earlier* than with a retrospective justification, through the test of universalisability, of what could be called, borrowing Kantian terminology, a ‘maxim’ for collective action. Authority has already begun to do its work when someone seizes the initiative to represent what we are/ought to be about as a collective in a way that both motivates us to act jointly and is attuned to the factual context in which joint action is to take place.

able to exhaust it. To put it with Waldenfels, an authoritative response has the structure of an 'open linkage' (*Anknüpfung*), which plays into the situational possibilities opened up by a demand for recognition.⁴⁸ The linkage between question and response deployed in struggles for collective recognition is open in a twofold sense: the question concerning what our joint action is/ought to be about remains open because the response to the other (in ourselves) does not exhaust it; the response to the other (in ourselves) remains open because other responses were possible.

So much for the authoritativeness of an authoritative politics of boundaries in which a collective asserts itself by setting boundaries that include the other (in ourselves) as one of us. But because boundaries cannot include without excluding what they include, the question arises whether and how recognition of the other as other than us is at all possible. This is the bailiwick of collective self-restraint. In what way is the authoritativeness of an authoritative politics of boundaries dependent on the exercise of collective self-restraint in the face of demands for recognition?

There are, as far as I can see, at least three modes of collective self-restraint, all of which consist in strategies that defer acts of setting the boundaries of (il)legality: deferral of collective self-assertion by deferral to the other (in ourselves). In each of these three modes, a collective exposes its contingent existence by exposing itself to the other (in itself), allowing the other to challenge that it is and what it is as a collective before asserting itself anew as a collective, where the 'anew' regards a response that hovers between pure repetition and pure innovation.

The first mode of collective self-restraint concerns all those mechanisms through which a collective defers a decision about the default setting of (il)legality; they are strategies for the deferral of collective self-assertion. The deferral of a decision about the default setting of joint action stages a struggle between competing representations of what is common to joint action, with a view to securing either inclusion in or exclusion from joint action. Much of democratic decision-making as we know it, as well as, say, the review of judicial and administrative decisions, falls within the compass of this strategy of deferral of collective self-assertion. So also do all those initiatives oriented to organising decision-making through participation as well as through what has been called 'democratic experimentalism'.⁴⁹ A further example is the strategy of constitutional courts, in the face of constitutional conflict, to 'play for time' by postponing the unity of their legal order to give the highest court of the other legal order the opportunity to sort out what counts as the unity of the latter's legal order.⁵⁰ While this struggle can take place within the institutional

⁴⁸ Bernhard Waldenfels, *Order in the Twilight*, (David J Parent trans, Ohio University Press, 1996) 18 [trans of *Ordnung in Zwilicht* (first published 1987)] (translation altered).

⁴⁹ Michael C Dorf and Charles F Sabel, 'A Constitution of Democratic Experimentalism' (1998) 98(2) *Columbia Law Review* 267.

⁵⁰ This strategy is at the heart of how the European Court of Justice and the Supreme Court of Ireland dealt with the constitutional conflict that arose between the EU and the Irish Republic on the occasion of the status of abortion in the well-known *Grogan* case: *Society for the Protection of Unborn Children Ireland Ltd v Grogan* [1990] 1 CMLR 689; *Society for the Protection of Unborn Children Ireland Ltd v Grogan* (C-159/90) [1991] ECR I-4685. See Hans Lindahl, 'Discretion and Public Policy: Timing the Unity and Divergence of Legal Orders' in Sacha Prechal and Bert van Roermund

structures of authority, the deferral of collective self-assertion can also segue into, and accommodate to a certain extent, para-institutional forms of representing collective unity.

A second mode of collective self-restraint is deferral *to* the other (in ourselves) as a mode of deferral of collective self-assertion. I have in mind a range of mechanisms for negotiating conflicts between legal orders. Each of these mechanisms abstains from regulating a certain class of behaviour — abandoning it, as it were, to regulation by another legal order as a form of recognition of the other as other. Examples include: the doctrines of standard of review and the margin of appreciation developed by, the WTO and the European Court of Human Rights respectively; limited autonomy regimes; mutual recognition in global trade law; subsidiarity and complementarity; safe harbour agreements; the recognition of foreign judgments; treaties between a State and indigenous peoples; and, more generally, the mechanisms for dealing with conflict of laws developed by international private law. An extreme mode of deferral to, within this second mode of collective self-restraint, is, of course, secession.

The third mode of collective self-restraint is also a mode of deferral *to* the other as the deferral *of* collective self-assertion. Whereas the second mode concerns techniques for resolving conflict between legal orders, this one involves suspending the application of legal norms that are not only applicable, but ought to be applied to an individual case. I have in mind acts of collective self-restraint that endure contingency by suspending the application of a general rule with a view to preserving the strange as strange when such application would destroy or threatens to destroy the other's identity/difference.⁵¹

In each of these three modes of collective self-restraint, deferral must operate within the cincture of collective self-assertion. *Restrained* collective self-assertion, yes; but collective *self-assertion* nonetheless. To assert that authority is representational authority is to aver that, ultimately, authority turns on the representation of collective *unity*, even when such unity is deferred. This means that, even in asymmetrical recognition, there will be an excess in demands for recognition that falls beyond the compass of collective recognition of the other (in ourselves) as other than us if a collective is to be able to recognise and assert itself in its responses. The 'and' of asymmetrical recognition — recognising the other (in ourselves) as one of us *and* as other than us — is conjunctive, which is why I refer to restraint as a qualification of collective self-assertion. Restrained collective self-assertion can temper, but not revoke, the finite questionability and finite responsiveness of collectives, nor, consequently, can it revoke the irreducibility of normative plurality to the unity of a legal order. In other words, a-legality is not reducible to (il)legality. Even if it affords a robust concept of authority, restrained collective self-assertion

(eds), *The Coherence of EU Law: The Search for Unity in Divergent Concepts* (Oxford University Press, 2008) 291, 303–8.

⁵¹ The Supreme Court of Canada's famous *Reference on the Secession of Quebec* [1998] 2 SCR 217 ably illustrates, I believe, this mode of collective self-restraint. For an extended analysis of the Reference along these lines, see Hans Lindahl, 'Recognition as Domination: Constitutionalism, Reciprocity and the Problem of Singularity' in Neil Walker, Jo Shaw and Stephen Tierney (eds), *Europe's Constitutional Mosaic* (Hart Publishing, 2011) 205.

cannot fully control nor neutralise the in-between that joins and separates collective self and other-than-self. The double asymmetry between question and response cannot be overcome.

This finding suggests an answer to our earlier question about an unconditional criterion by which to assess the authoritativeness of an authoritative politics of boundaries. The question is all the more urgent if, as argued heretofore, the demand to ‘complete inclusion’ ultimately plays into the hands of imperialism and domination. The alternative I have in mind is the demand to posit the boundaries that establish who ought to do what, where, and when in a way that acknowledges that, even when exercising self-restraint, even when transforming itself in response to demands for recognition, a (global) collective continues to have an outside — the domain of the strange — that eludes its normative control. The unconditional imperative that governs an authoritative politics of boundaries is this: set collective boundaries in such a way that they do not eliminate the strange (in ourselves). This is how collectives can assume responsibility for their finite questionability and responsiveness, and hence for their irreducible contingency.⁵²

VIII Asymmetrical Responses

Have we reached an impasse that entrenches emergent global legal orders, in particular those orders associated with the globalisation of capitalism? Not at all. I have argued insistently — perhaps obsessively — that there is no unification without pluralisation because I want to hold open a politics of boundaries against all attempts to close it down by monistic strategies, whether communitarian or universalist. Instead of domesticating or overcoming the double asymmetry of question and response, the task for a theory of authority in a global setting is to explore how the dynamic sparked by this asymmetry might lead beyond the current patterns of global inclusion and exclusion, even if not beyond global inclusion and exclusion as such. I can do no more, in this Address, than paint the broad strokes of how this double asymmetry might propitiate change.

I begin with the asymmetrical response of emergent global legal orders to challenges to their unity, focusing on the Acholi and the KRRS. In what way might restrained collective self-assertion provide normative guidance to how the ICC and the WTO should respond to the challenges raised by the Acholi and the KRRS?

The third form of collective self-restraint, outlined in Part VII above, best captures, I think, what is at issue in an asymmetrical response to resistance by the Acholi community to the ICC’s investigation and prosecution of crimes committed

⁵² I am inclined to view this imperative as a politically defensible interpretation of what, according to Levinas, is the ethical injunction with which the other confronts me, and for whom I am responsible: ‘you shall not kill’. ‘Defensible’, I say, because I am sceptical of the move to simply play off responsibility for the other against (collective) self-assertion. But I will leave it at that in this Address, for reasons of space. For a succinct presentation of Levinas’ ideas on this topic, see Emmanuel Levinas and Richard Kearney, ‘Dialogue with Emmanuel Levinas’ in Richard A Cohen (ed), *Face to Face with Levinas* (State University of New York Press, 1986) 13. See also Derrida’s critique of Levinas in ‘Violence et Métaphysique: Essai sur la Pensée de Emmanuel Levinas’ in Jacques Derrida, *L’Écriture et la Différence* (Seuil, 1967) 117.

by members of the LRA who belonged to the community. Instead of defenestrating the demand for recognition as ‘local’ and ‘traditional’, the ICC could and should have considered the possibility of suspending its criminal jurisdiction to make room, literally, for the application of restorative justice. By doing so, the ICC would indirectly recognise the Acholi as other than the international community, which is itself no less local and traditional than the Acholi community. Had the ICC held back the application of the complementarity principle to the benefit of restorative justice, it would have engaged in a form of restrained collective self-assertion that recognises the other as other than the international community, which governs itself through the *Rome Statute*. But prior to the decision to suspend its jurisdiction, holding back to hold out, the ICC would have needed to engage in a careful assessment of the situation to ascertain whether restorative justice would be capable, in Drumbl’s words, of dealing with the ‘complexities of reintegration in situations of mass atrocity’.⁵³ Were the ICC to determine, after consultation with the Acholi Elders and others, that restorative justice would not be able to adequately address those complexities, it would have to assert its criminal jurisdiction. For otherwise, it would traduce its mandate, as per the Preamble to the *Rome Statute*, to ‘guarantee lasting respect for and the enforcement of international justice’. Its restraint would cease to be a form of collective self-assertion. But, from the Acholi’s perspective, what could ultimately justify the ICC’s decision to impose criminal justice on them if not a *petitio principii*?

Now I turn to the KRRS, which confronts procedural and substantive problems in its attempt to have its demands for recognition acknowledged by the WTO. Procedurally, the WTO reserves standing to participate in struggles for the representation of collective unity to its Member States, largely excluding subnational social movements like the KRRS, or transnational and even global social movements like the La Via Campesina from that struggle. Substantively, as we have seen, the WTO can transform itself when responding to demands for recognition by the KRRS and like-minded social movements, but it can only do so by framing their demands for recognition, if at all, in a way that allows it to recognise and assert itself as what it is/ought to be about: a collective oriented to promoting ‘free’ global trade. In short, the first mode of collective self-restraint by the WTO is quite limited in its scope.

As concerns the second mode of collective self-restraint, a potential candidate for responding to the KRRS’s demand for recognition is the Special Safety Measure (‘SSM’) advocated by developing countries during the Doha round of WTO negotiations regarding the global agricultural trading system. This SSM would allow these countries to cap agricultural imports to protect their rural populations in the event of abnormal surges of imports or abnormally cheap imports. But even if it were adopted, this mechanism would not be a fitting response to the demand for recognition by the KRRS and other movements that compose the La Via Campesina. On the one hand, collective self-restraint by the WTO would remain within the logic of a global ‘market-oriented agricultural trading system’, which is precisely what these movements seek to thwart.⁵⁴ On the other hand, the beneficiaries of such an SSM would be developing countries, whereas the La Via Campesina includes a fair

⁵³ Mark A Drumbl, *Atrocity, Punishment, and International Law* (Cambridge University Press, 2007) 148.

⁵⁴ WTO, *Agreement on Agriculture*, Preamble <https://www.wto.org/english/docs_e/legal_e/14-ag.pdf>.

share of movements in developed countries. While the WTO may be prepared to address demands for recognition between groups of Member States, as reflected in the distinction between least-developed, developing, and developed States, the way in which it articulates, monitors, and upholds the point of joint action hinders recognising demands for recognition by transnational social movements that cut across that distinction.

It seems to me that the KRRS's struggle is exemplary for the difficulties encountered by a wide range of emergent global legal orders to respond fittingly to demands of recognition by many alter- and anti-globalisation movements. Ultimately, these difficulties turn on the institutional possibilities and limitations of representation made available by global governance regimes. Indeed, while I have concentrated on the fundamental structures and dynamic of representation, I have had very little to say about its institutionalisation, other than some words about participation. To borrow a distinction most famously exploited by Claude Lefort, I have approached representation as the core concept of 'the political' (*le politique*), putting aside how 'politics' (*la politique*) stages struggles for representation and recognition.⁵⁵ But it would be a mistake to focus only on the former, a mistake easily made by political philosophers who reserve for themselves the 'fundamental' domain of the political, dismissing politics as the 'derivative' domain they assign to political scientists, lawyers, and the like. Delving into the representational dynamic of inclusion and exclusion at the core of the political demands completion in an analysis of the politics of emergent global legal orders, that is, an enquiry into whether and how such orders might provide an institutional framework that could spark robust struggles for representation and recognition in a global setting. Surely, this also is part of the crisis of representation unleashed by globalisation processes.

I can do no more here than briefly comment on two such institutional initiatives, which, I believe, are presented in their most favourable light if reconstructed as institutional variations on restrained collective self-assertion. The first is global administrative law ('GAL'). It emerges in response to the lacuna created by global regulatory governance, in which decision-making is recalcitrant to ordering by either international treaties or national administrative law. As formulated by Kingsbury, Krisch and Stewart in a seminal article, GAL consists in

the rules and procedures that help ensure the accountability of global administration ... focus[ing] in particular on administrative structures, on transparency, on participatory elements in the administrative procedure, on principles of reasoned decisionmaking, and on mechanisms of review.⁵⁶

I take GAL to be an initiative that seeks to compensate for the initial closure of global governance regimes by reforming their decision-making procedures with a view to more inclusive struggles for representation and recognition. More precisely, GAL aims to put into place administrative procedures and principles that can contribute to strengthening the sense of ownership of joint action by the addressees of those regimes. While some legal scholars have sought to frame GAL as an initiative to secure greater accountability, Stewart perceptively argues that

⁵⁵ Claude Lefort, *Essais sur le politique (XIX^e–XX^e siècles)* (Éditions du Seuil, 1986) 19–20.

⁵⁶ Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68(3&4) *Law and Contemporary Problems* 15, 28.

‘[t]he root problem is not the absence of accountability mechanisms as such, but disregard.’⁵⁷ Stewart explores a range of mechanisms that can be put into place to this effect, in particular rules concerning transparency, non-decisional participation, and reason giving, showing that GAL makes room for interventions by the disregarded — the misrecognised — both anterior and posterior to the enactment of rules by global governance regimes. When depicted in this way, GAL is a significant contribution to what I called the first mode of collective self-restraint. Yet as evidenced above with respect to the WTO, the specialised character of emergent global legal orders strongly limits who counts as disregarded or misrecognised, thereby limiting the scope for transformation of the jointness or commonality of joint action — hence for what might count as the authoritative self-assertion of a collective.

Not surprisingly, therefore, GAL elicits the following critical question: ‘could global administrative law help open spaces for global *politics*?’.⁵⁸ Initiatives regarding transnational and global constitutionalism claim these spaces for themselves. In my view, these initiatives can best be reconstructed as strategies for institutionalising and restraining collective self-assertion by emergent global legal orders. Indeed, one of the implications of the model of law outlined heretofore is that constitutions are not the exclusive prerogative of States, even though State constitutions are charged with a symbolic significance and can marshal allegiance among the citizens of States in ways that are not available to transnational and globalising legal orders. Building on my earlier considerations on representation and recognition, I submit that constitutions have three core functions, each of which is operative in transnational and globalising legal orders. In effect, constitutions lay down: (1) who should get to represent a collective; (2) the conditions, both positive and negative, under which the ongoing process of representing collective unity may be imputed to a collective; and (3) what, at least minimally, is the point represented in the default settings of collective action.⁵⁹ If constitutionalism, to borrow Walker’s apt formulation, is ‘the special type of practical reason . . . concerned with the deepest and most collectively implicated question of “how to decide how to decide” how to act’,⁶⁰ then the institutionalisation and deferral of collective self-assertion by staging struggles for representation and recognition are central to its agenda.

When read in this way, a constitution is the master rule governing processes of inclusion in and exclusion from a legal order. In other words, constitutions are the master rule that govern the process of authoritatively mediated boundary setting whereby the limit between a collective self and its other(s) is posited in response to challenges to collective unity. Returning to Harlow’s question, the main issue confronting transnational and global constitutionalism is whether, in the absence of electoral politics, constitutional venues can be devised that would intensify struggles for representation and recognition beyond the constraints imposed on global politics

⁵⁷ Richard B Stewart, ‘Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness’ (2014) 108(2) *American Journal of International Law* 211, 235.

⁵⁸ Carol Harlow, ‘Global Administrative Law: The Quest for Principles and Values’ (2006) 17(1) *European Journal of International Law* 187, 213 (emphasis added).

⁵⁹ See Lindahl, above n 4, 391–5.

⁶⁰ Neil Walker, ‘Taking Constitutionalism beyond the State’ (2008) 56(3) *Political Studies* 519, 524.

by the administrative procedures of GAL and the current judicial oversight of global governance.

Characterised thus, transnational and global constitutionalism could significantly bolster the authoritativeness of an authoritative politics of boundaries in a global setting, opening up novel institutional venues for the asymmetrical recognition of the other (in ourselves) as one of us and as other than us. Yet, were it to succeed, the constitutionalisation of restrained collective self-assertion by emergent global legal orders would not be able to fully contain global struggles for representation and recognition. For a constitution is itself a representation of collective unity, such that, by representing collective unity as this, rather than as that, a constitution pluralises the collective it seeks to unify, opening up an outside that eludes the normative control of the constitutional order to which it gives rise. Transnational and global constitutionalism, however sensitive to normative pluralism, cannot neutralise the strange outside that accompanies every emergent global legal order like its shadow.

IX Asymmetrical Challenges

This outside bespeaks the powerlessness of emergent global legal orders. ‘We can’, the elemental attestation of power in restrained collective self-assertion, goes hand in hand with a no less primordial ‘we cannot’: we cannot recognise the other (in ourselves) as one of us *and* as other than us. Collective powerlessness manifests itself in demands for recognition that elude restrained collective self-assertion to the extent that they are themselves forms of collective self-assertion that endeavour to actualise what cannot be said or done in the order they challenge. This outside, the domain of a-legality, is the domain of *constituent power* available to alter- and anti-globalisation movements. For if constituent power lies behind a collective, at its inception, so also it lies ahead of it, in the form of a-legal behaviour that, catching an extant collective by surprise, is capable of convoking another way of being and acting together. Constituent power, one could say, is the primordial manifestation of collective self-assertion. Marginalisation is commonly associated with powerlessness, which is certainly the case as concerns the order from which individuals or groups have been marginalised. But they are constitutently powerful by dint of being able to see and to act jointly in ways that are not available to the collective that disempowers them. It is from this domain that contestation of the current configurations of emergent global legal orders cries out, ‘They *can’t* represent us!’⁶¹

Such constituent resistance is not, despite its self-understanding, resistance to representation. It is the endeavour to represent humanity otherwise. ‘Otherwise’ does not mean a ‘clean break’, to use the language of some Brexiters, nor a *creatio ex nihilo*. Instead, it refers to the kind of rupture made possible by the entwinement between collective self and other-than-self proper to global normative (and not merely legal) pluralism. If, as I argued heretofore, no collective is either identical to itself or simply different from its other, then constituent resistance can exploit that

⁶¹ Hans Lindahl, ‘Possibility, Actuality, Rupture: Constituent Power and the Ontology of Change’ in (2015) 22(2) *Constellations* 163.

it is both inside and outside extant global legal orders. It does so by showing how elements of what had been identified as our own, from the first-person plural perspective of an emergent global legal order, can be interpreted and connected differently, allowing ‘us’ to recognise ourselves as capable of speaking and acting jointly in ways that had eluded the practical possibilities available to us.⁶² As Hughes has perceptively pointed out, one of the forms of constituent resistance consists in an exercise of legal powers that gives these a different and unexpected use, effectively turning these powers against the order. This form of collective resistance acts from within the order to evince the order’s outside: a novel representation of commonality in conflict with its putative unity. She shows that peoples’ tribunals, unofficial referenda, citizens’ debt audits and, in the Australian context, the Aboriginal Tent Embassy, are exemplary for a-legality as a ‘political–legal strategy’.⁶³ I see in this form of constituent resistance a subversive variation on the doctrinal figure that French administrative law calls ‘*détournement de pouvoir*’, namely, the use by a public authority of one of its powers for another purpose than that for which it had been conferred. By rendering strange what had been the familiar exercise of powers, the representation of what we are as a unity and the referent of the representation — the ‘us’ to which the act is imputed or attributed — can change, giving rise to a collective that branches off in a new direction. Constituent resistance, which disorganises to reorganise what counts as the common, is precisely what it means that alter- and anti-globalisation movements can pose asymmetrical challenges to legal globalisations.

If it succeeds, constituent power exercised by alter- and anti-globalisation movements deploys temporal ruptures in the form of a retrojective projection. Borrowing a phrase coined by my colleague, van Roermund, constituent power opens up ‘a past that we can look forward to’.⁶⁴ It also dislocates and then relocates a configuration of ought-places, structuring the inside/outside distinction otherwise. For constituent power must begin by (re-)taking place *somewhere*, a place both inside and outside the distribution of ought-places made available by contemporary legal globalisations.

Schmitt famously argued that legal orders get started with a taking, a taking place: a *nomos*, as he called it, playing on the German verb *nehmen*. He later developed this thesis more fully, asserting that the history of international law

⁶² Somewhat analogously, Laclau and Mouffe refer to the construction of new ‘hegemonies’ through the articulation and expansion of ‘chains of equivalence’: Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (Verso, 2nd ed, 1985) 93–145; Mouffe, *On the Political*, above n 20, 53. I withstand the temptation to tease out the similarities and differences between my approach and theirs, other than to say that the locus of both — the similarities and differences — is the concept and dynamic of representation.

⁶³ Carys Hughes, ‘Action between the Legal and the Illegal: A-Legality as a Political–Legal Strategy’ (2018) 27 *Social & Legal Studies* (forthcoming) <<https://doi-org.ezproxy1.library.usyd.edu.au/10.1177/0964663918791009>>. This form of a-legality demands, Hughes argues, expanding the notion of a-legality to include the figure of empowerment as distinctive with respect to commands, permissions, and prohibitions, a figure that obtained ever greater prominence in Kelsen’s conceptualisation of *Sollen* (ought): Hans Kelsen, *Pure Theory of Law* (Max Knight trans, University of California Press, 1967) 56 [trans of: *Reine Rechtslehre* (2nd ed published 1960)].

⁶⁴ Verbal communication between Hans Lindahl and Bert van Roermund.

unfolds as a succession of *nomoi* of the Earth.⁶⁵ I venture to say that constituent resistance, in response to the globalisation of capitalism, is a-nomic, a (re-)taking place that is here and elsewhere. It intimates *a-nomoi* of the Earth, as suggested by the following description of how alter-globalisation movements endeavour to (re-)take place:

As the unemployed in Argentina, the landless in Brazil, and indigenous peoples in Bolivia, Colombia, and Ecuador alike occupied and shut something down, they simultaneously opened something else up, organizing horizontal assemblies and creating prefigurative survival structures for necessities such as food, medicine, child support, and training. These new spaces of autonomous construction are often called *territorios* ('territories') — invoking a new landscape that is conceptual as well as physical.⁶⁶

It remains to be seen whether these and other initiatives can (re-)take place in a way that gives rise to durable communities capable of sustaining themselves in response to the challenges posed by the globalisation of capitalism. Yet, no less than the emergent global legal orders they resist, the politics of boundaries through which alter- and anti-globalisation movements endeavour to assert themselves is authoritative if it exercises self-restraint. By seizing the initiative to represent us otherwise, the dynamic of inclusion and exclusion is already at work in alter- and anti-globalisation movements. They claim that commonality and recognition are on their side, in contrast to the partiality and misrecognition of the global legal orders they resist. Yet they cannot but marginalise in the process of unifying, even if differently. Although they claim to be the spokespersons for humanity, especially when acting in a participatory mode, they too take up a first-person plural perspective *on* humanity, not the perspective *of* humanity. This is no argument against resistance to and the transformation of contemporary patterns of global inclusion and exclusion, patterns that Sassen characterises as driven by a relentless 'logic of expulsion'.⁶⁷ But the dynamic of representation does entail that there are human emancipations in the plural, not the emancipation of humanity in the singular. Emancipatory resistance, like all representational processes, pluralises in the process of unifying. Thesis 4 posited heretofore holds sway in Marx's Thesis 11 on Feuerbach.⁶⁸ If other worlds are possible, as alter-globalisation movements insist, it is because humanity is, and will remain, inside and outside global law.

⁶⁵ Carl Schmitt, 'Appropriation/Distribution/Production: Toward a Proper Formulation of Basic Questions of Any Social and Economic Order (1953)' (1993) 95 *Telos* 52; Carl Schmitt, *The Nomos of the Earth in the International Law of the Jus Publicum Europaeum* (G L Ulmen trans, Telos Press, 2003) [trans of: *Der Nomos der Erde im Völkerrecht des Jus Publicum Europaeum* (first published 1950)].

⁶⁶ Sitrin and Azzellini, above n 25, 11.

⁶⁷ Saskia Sassen, *Expulsions: Brutality and Complexity in the Global Economy* (Belknap Press, 2014).

⁶⁸ 'Philosophers have hitherto only *interpreted* the world in various ways; the point is to *change* it.': Karl Marx, *Theses On Feuerbach* (1845) (Cyril Smith trans, 2002) [trans of: 1) ad Feuerbach (first published 1924)] <<https://www.marxists.org/archive/marx/works/1845/theses/index.htm>> (emphasis in translation).

Litigants and Legal Representatives: A Study of Special Leave Applications in the High Court of Australia

Pam Stewart* and Anita Stuhmcket†

Abstract

This article presents the findings of the first systematic and comprehensive study to probe a substantial tranche of applications for special leave to appeal to the High Court of Australia. Special leave to appeal is discretionary and a case must satisfy the public interest test in s 35A of the *Judiciary Act 1903* (Cth) to be granted leave to appeal. This article presents findings as to the characteristics of the litigants and legal representatives involved in special leave applications. The data reveals high numbers of self-represented applicants and low numbers of legally aided applicants, as well as disproportionate success rates for those litigants who enjoy an advantage because of greater resources and litigation experience. The study also highlights a striking lack of diversity in both applicants and lawyers appearing in special leave applications. These are all matters that are outside the control of the High Court and that have an effect on the nature and flow of the Court's appellate work. The study demonstrates that a High Court appeal is, in many cases, restricted to well-resourced litigants and that there are significant access to justice issues for self-represented litigants due to the limited availability of legal aid.

I Introduction

An application for special leave to appeal is the gateway to final appellate consideration of a case by the High Court of Australia. The resources available to the High Court are finite, limiting the Court's attention to appeals involving questions of particular importance, so that the vast majority of applications for special leave are unsuccessful. Investigation of special leave applications, both successful and unsuccessful, provides insight into the operation and reliability of the

* Senior Lecturer in Law, University of Technology ('UTS') Sydney, New South Wales, Australia.

† Professor of Law, UTS Sydney, New South Wales, Australia.

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special leave to appeal requirement and identifies external factors that may constrain the Court in its work.

In this article, we present the findings from a study of all 783 special-leave-to-appeal applications determined by the High Court between March 2013 and February 2015. It is now more than 30 years since s 35A of the *Judiciary Act 1903* (Cth) (*'Judiciary Act'*) introduced the almost universal special leave requirement.¹ However, this is the first study to examine a substantial tranche of High Court special leave applications in a systematic and comprehensive way. Importantly, this study offers insights into the special leave process that are not available in existing literature. The data pre-dates the 2016 changes to special leave procedures that have resulted in significantly more applications being determined 'on the papers' without oral hearings.² The substantive law as to the requirements for special leave remains constant, so the findings of this study are particularly topical and relevant in light of the recent procedural changes. It is significant because the 2016 procedural changes have resulted in fewer applications being heard orally, with the capacity for detailed research using publicly available data now considerably reduced because of the lack of detail about cases, parties or lawyers in the published dispositions of applications heard on the papers. The volume of data publicly available to the present researchers, particularly that extracted from the transcripts of the many applications heard orally, will not be available in future without access to individual court files for the increased volume of applications heard on the papers. The increased use of 'paper only' determinations has resulted in a loss of transparency about the specifics of the special leave process, making this study well timed and of considerable interest to lawyers,³ researchers and administrators.

The study results show that concerns regarding the administration of justice generally are equally relevant to applicants for special leave to appeal to the High Court. Those concerns include:

¹ Under s35A, inserted into the *Judiciary Act* by *Judiciary Amendment Act (No 2) 1984* (Cth) s 4. Appeals to the Full Court from a single Justice exercising original jurisdiction of the High Court do not require leave, though appeals from interlocutory judgments do: *Judiciary Act* s 34. The removal of the appeal as of right occurred gradually and was complete by 1984: *Judiciary Amendment Act (No 2) 1984* (Cth) s 3. In criminal matters, special leave to appeal has always been required: *Judiciary Act* ss 35–35AA. See David F Jackson, 'The Australian Judicial System: Judicial Power of the Commonwealth' (2001) 24(3) *University of New South Wales Law Journal* 737. For a history of the *Judiciary Act* provisions and requirements for appeal, see *Smith Kline & French Laboratories (Aust) Ltd v Commonwealth* (1991) 173 CLR 194, 205–6 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

² High Court of Australia, *Changes to High Court Procedures for Considering Applications for Special Leave* <http://www.hcourt.gov.au/assets/corporate/policies/Special_Leave_Changes.pdf>. See also Jeremy Gans, 'News: Court Announces Fewer Oral Hearings for Special Leave Applications' on Jeremy Gans, *Opinions on High: High Court Blog* (16 March 2016) <<https://blogs.unimelb.edu.au/opinionsonhigh/2016/03/16/news-court-announces-fewer-oral-hearings-for-special-leave-applications/>>.

³ Gans, above n 2.

- limited access to justice⁴ because of severe restrictions on availability of legal aid;⁵
- the difficulties faced by self-represented litigants;⁶
- limited access to legal advice, representation and remedies for women and children;⁷
- disproportionate success rates for those most ‘capable’ litigants who are seasoned players with significant resources;⁸ and
- lack of diversity in counsel briefed to appear.⁹

Each of these matters is deeply concerning for a final apex court. The availability of legal aid, the diversity of litigants and counsel, and the advantages enjoyed by well-resourced and seasoned litigants are all factors outside the control of the Court, yet they influence the Court’s assessment of special leave applications and selection of cases for appellate hearing.

This study demonstrates the very restricted availability of legal aid to special leave applicants, with only 5.11% of applicants represented by a legal aid body at oral hearings during the study years. Related to the limited availability of legal aid

⁴ Law Council of Australia, *The Justice Project* (2017) <<https://www.lawcouncil.asn.au/justice-project/about-the-project>>; Community Law Australia, *Unaffordable and Out of Reach: The Problem of Access to the Australian Legal System* (July 2012) <http://www.communitylawaustralia.org.au/wp-content/uploads/2012/07/CLA_Report_Final.pdf>.

⁵ Senate Standing Committees on Legal and Constitutional Affairs, Parliament of Australia, *Inquiry into Legal Aid and Access to Justice* (2004) 208 <https://www.aph.gov.au/parliamentary_business/committees/senate/legal_and_constitutional_affairs/completed_inquiries/2002-04/legalaidjustice/report/contents>; Law Council of Australia, *Erosion of Legal Representation in the Australian Justice System* (February 2004) <<http://lca.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/fmsdownload079a.pdf>>.

⁶ Productivity Commission, Australian Government, *Access to Justice Arrangements* (Report No 72, September 2014) vol 1, ch 14 (‘Self-represented litigants’) <<https://www.pc.gov.au/inquiries/completed/access-justice/report/access-justice-volume1.pdf>>; Elizabeth Richardson, Tania Sourdin and Nerida Wallace, *Self-Represented Litigants: Gathering Useful Information* (Final Report, Australian Centre For Justice Innovation, June 2012).

⁷ Pam Stewart and Anita Stuhmcke, ‘Lacunae and Litigants: A Study of Negligence Cases in the High Court of Australia in the First Decade of the 21st Century and Beyond’ (2014) 38(1) *Melbourne University Law Review* 151; Catherine Branson QC, President of the Australian Human Rights Commission, ‘Women as Agents of Change: Balancing the Scales’ (Speech to Commonwealth Law Ministers’ Meeting, NSW Government House, Sydney, 13 July 2011) citing UN Women, *2011–2012 Progress of the World’s Women: In Pursuit of Justice* (2011) 52–5 <<https://www.humanrights.gov.au/news/speeches/president-speech-women-agents-change-balancing-scales>>; Regina Graycar and Jenny Morgan, *The Hidden Gender of Law* (Federation Press, 2nd ed, 2002); Louis Schetzer and Judith Henderson, ‘Access to Justice and Legal Needs, Stage 1: Public Consultations’ (Law & Justice Foundation of New South Wales, August 2003) 67 [2.105] <[http://www.lawfoundation.net.au/ljf/site/articleIDs/EA0F86973A9B9F35CA257060007D4EA2/\\$file/public_consultations_report.pdf](http://www.lawfoundation.net.au/ljf/site/articleIDs/EA0F86973A9B9F35CA257060007D4EA2/$file/public_consultations_report.pdf)>; Ustunia Dolgopool, ‘Justice for Children: The Obligations of Society, Lawyers and Law Schools’ (1997) 1(3) *The Flinders Journal of Law Reform* 297.

⁸ Marc Galanter, ‘Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change’ (1974) 9(1) *Law and Society Review* 95 (Galanter’s theory is known as ‘party capability theory’).

⁹ Daniel Reynolds and George Williams, ‘Gender Equality among Barristers before the High Court’ (2017) 91(6) *Australian Law Journal* 483; Russell Smyth and Vinod Mishra, ‘Barrister Gender and Litigant Success in the High Court of Australia’ (2014) 49(1) *Australian Journal of Political Science* 1.

is the large number of unrepresented applicants, with 46% of all applicants self-representing during the research period. Not one of those applicants was successful. The study reveals limited access to the High Court for women and children, with very few female applicants (18% of individual applicants) or child applicants (1.71% of individual applicants) during the study years. The data demonstrates a conspicuous lack of gender diversity in counsel appearing, with female counsel accounting for just 7.04% of lead advocates briefed for either party in special leave hearings. The disproportionate success rate for the most capable litigants evidenced by previous research is confirmed with the most frequently successful applicants being government and public authorities who succeeded in 53.57% of their applications.¹⁰ By contrast, the overall success rate for all applicants was 10.22%.

Part II of this article provides the context of our study with an outline of the constitutional and statutory framework and procedure for special leave to appeal to the High Court. The study methodology is detailed in Part III. Part IV presents the findings of the study as to overall success rates in special leave applications by reference to case categories and having regard to the public interest function of the High Court and s 35A of the *Judiciary Act*. In Parts V–VIII we provide data detailing the kinds of applicants seeking special leave to appeal and their success rates, and use this to test party capability theory.¹¹ Lastly, in Parts IX–X our findings about seniority and gender of counsel appearing in special leave applications reveal the prevalence of senior counsel,¹² the apparent influence of a small number of very senior members of the Bar and the significant under-representation of female counsel in special leave hearings.

II Special Leave to Appeal: The Constitutional and Statutory Framework and Procedure

The High Court of Australia is the final Australian appellate court. Special leave to appeal to the High Court is required for all appeals from Australian state and territory supreme courts, from state courts exercising federal jurisdiction and from the Federal Court of Australia.¹³ Leave is also required for appeals from interlocutory decisions of High Court justices exercising original jurisdiction.¹⁴

The requirement for special leave to appeal makes the High Court's appellate jurisdiction entirely discretionary.¹⁵ The Court selects the cases that it hears and

¹⁰ Galanter, above n 8; Reginald Sheehan and Kirk Randazzo, 'Explaining Litigant Success in the High Court of Australia' (2012) 47(2) *Australian Journal of Political Science* 239; Burton M Atkins, 'Party Capability Theory as an Explanation for Intervention Behaviour in the English Court of Appeals' (1991) 35(4) *American Journal of Political Science* 881; Herbert Kritzer, 'The Government Gorilla: Why Does Government Come Out Ahead in Appellate Courts?' in Herbert Kritzer and Susan Silbey (eds), *Litigation: Do the "Haves" Still Come Out Ahead?* (Stanford University Press, 2003) 342; Kevin T McGuire, 'Repeat Players in the Supreme Court: The Role of Experienced Lawyers in Litigation Success' (1995) 57(1) *Journal of Politics* 187.

¹¹ Galanter, above n 8.

¹² 'Senior counsel' may include 'Senior Counsel' ('SC') and 'Queen's Counsel' ('QC').

¹³ *Judiciary Act* ss 35, 35AA; *Federal Court of Australia Act 1976* (Cth) s 33.

¹⁴ *Judiciary Act* s 34(2).

¹⁵ *Smith Kline & French Laboratories (Aust) Ltd v Commonwealth* (1991) 173 CLR 194, 218 [36] (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ). In *Coulter v The Queen* it

thereby guides development of the law according to its own program and pace. Section 35A of the *Judiciary Act* prescribes matters that must be considered on an application for special leave to appeal:

In considering whether to grant an application for special leave to appeal to the High Court under this Act or under any other Act, the High Court may have regard to any matters that it considers relevant but shall have regard to:

- (a) whether the proceedings in which the judgment to which the application relates was pronounced involve a question of law:
 - (i) that is of public importance, whether because of its general application or otherwise; or
 - (ii) in respect of which a decision of the High Court, as the final appellate court, is required to resolve differences of opinion between different courts, or within the one court, as to the state of the law; and
- (b) whether the interests of the administration of justice, either generally or in the particular case, require consideration by the High Court of the judgment to which the application relates.

Sir Anthony Mason recognised that these concerns represent a focus on the High Court's public interest function, rather than on the private rights of litigants:

Section 35A reflects a tension between the Court's law-making and adjudicative function. Requirement for special leave, as a condition of an appeal to the High Court, stems from acceptance of the proposition that litigants are entitled to one appeal from a judgment at first instance, but a second appeal to an ultimate court of appeal can only be justified if it serves the public interest. Public interest may be served by clarifying the law, or by insisting on procedural regularity, though, in the particular case, this might be said to relate more closely to the adjudicative function of the courts. The tension to which I refer arises between the public and the private interests served by an appeal to the High Court.¹⁶

Criminal special leave applications may focus on miscarriage of justice arguments related to individual circumstances without substantial reliance on questions of legal principle, though the public interest is served in avoiding any miscarriage of justice.¹⁷ Justice Kirby writing extra-judicially in 2002 traced the

was held to be an 'extremely wide judicial discretion': (1988) 164 CLR 350, 359 (Deane and Gaudron JJ). See also, Sir Anthony Mason, 'The State of the Judicature' (1994) 20(1) *Monash University Law Review* 1, 6.

¹⁶ Sir Anthony Mason, 'The Regulation of Appeals to the High Court of Australia: The Jurisdiction to Grant Special Leave to Appeal' (1996) 15(1) *University of Tasmania Law Review* 1, 4; *Morris v The Queen* (1987) 163 CLR 454, 475 (Dawson J); Sir Anthony Mason, 'The High Court as Gatekeeper' (2000) 24(3) *Melbourne University Law Review* 784. O'Brien refers to 'the antimony' created by the juxtaposition of the High Court's public and private functions: David O'Brien, *Special Leave to Appeal* (Supreme Court of Queensland Library, 2nd ed, 2007) 46.

¹⁷ The issue of whether the interests of the administration of justice in criminal cases require a grant has been referred to as the 'visitation' jurisdiction: Justice Hayne 'Advocacy and Special Leave Applications in the High Court of Australia' (Speech delivered to the Victorian Bar, Continuing Legal Education, Melbourne, 22 November 2004) <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/haynej/haynej_22nov04.html>; Ben Wickham, 'The Procedural and Substantive Aspects of Applications for Special Leave to Appeal in the High Court of Australia' (2007) 28(1) *Adelaide Law Review* 153.

significant increase in appeals in criminal matters heard by the High Court from its inception and opined that the Court's criminal work was 'quite possibly the most vital part of the law of our community' having 'considerable social importance'.¹⁸

The limitations on access to justice, restricted diversity in litigants and legal representatives, and disproportionate advantage for the most capable litigants revealed by the present study may well create some dissonance between the public interest that the Court is compelled to serve under s 35A of the *Judiciary Act* and the interests of individual litigants.

The special leave process is efficient, as is no doubt dictated by the Court's considerable workload, yet that efficiency, coupled with the broad discretion exercised in the selection of cases for appeal, creates some opacity as to the manner in which special leave applications are considered. Procedures are streamlined. Following changes to pt 41 of the *High Court Rules 2004* (Cth) ('*High Court Rules*') in 2016,¹⁹ a large number of applications for special leave are now dealt with 'on the papers'. Rule 41.08.1 permits two Justices to determine *any* application without an oral hearing.²⁰ Previously only those matters where the applicant was unrepresented were heard on the papers.²¹

All applications are now initially examined by a panel of two or three Justices. If the panel, in its broad discretion, decides that an application can be granted or refused without oral argument, then orders are published in open court. The Court's published 'dispositions' of matters heard on the papers offer brief formal reasons with scant information about the substance of the case, the parties or their lawyers.²² If the panel decides that an application warrants oral hearing, then it is listed. There is no guidance as to how the justices decide which applications are to be heard orally. On the question of when an application might be listed for hearing, Kirby J (referring to the pre-2016 rules) has stated that

[i]f there is the slightest possibility that oral argument could change our inclination, or that a point might have been missed in the courts or tribunals below or by the applicant, we will arrange for the application to be removed

¹⁸ Justice Michael Kirby, 'Maximising Special Leave Performance in the High Court of Australia' (2007) 30(3) *University of New South Wales Law Journal* 731, 744–5; Justice Michael Kirby, 'Why Has the High Court Become More Involved in Criminal Appeals?' (2002) 23(1) *Australian Bar Review* 4. See also *Morris v The Queen* (1987) 163 CLR 454, 475 (Dawson J).

¹⁹ Part 41 changes under the *High Court Amendment (2016 Measures No 1) Rules 2016* (Cth) sch 1 item 2 commenced 1 July 2016.

²⁰ Of the applications decided in 2016–17, 75% were finalised without an oral hearing: High Court of Australia, *Annual Report 2016–2017* (30 November 2017) 21 <http://www.hcourt.gov.au/assets/corporate/annual-reports/HCA_Annual_Report_2016-17.pdf> ('2016–17 Annual Report').

²¹ Former *High Court Rules 2004* pt 41 r 41.10.5, now repealed and replaced: *High Court Amendment (2016 Measures No 1) Rules 2016* sch 2 item 2. The new pt 41 does not include separate rules for self-represented applicants except that a respondent need not file a response where an applicant is self-represented unless directed to do so by two Justices (r 41.05.2). In *Cachia v Hanes*, the High Court recognised the right of a litigant to self-represent, but noted the extra burden on the court administration, consequent delays and inefficiencies in the litigation process: (1994) 179 CLR 403, 415–16 (Mason CJ, Brennan, Deane, Dawson and McHugh JJ).

²² For a statistical analysis of reasons given in 40 special leave applications, see Luke Beck, 'The Constitutional Duty to Give Reasons for Judicial Decisions' (2017) 40(3) *University of New South Wales Law Journal* 923.

from the list for disposition on the papers. We will direct that it be listed for oral hearing.²³

If an application is listed for hearing, written submissions and summaries of argument are required.²⁴ Oral hearings are short, with timing strictly prescribed. Each party is allowed 20 minutes for argument with an applicant's reply of five minutes, unless the Court orders otherwise.²⁵ A party may not necessarily be called upon to present oral argument. The Court may decide that one side of the case is strong and may hear from the opposing party only,²⁶ subject to procedural fairness considerations.

III Methodology

This study analyses all 783 special leave decisions of the High Court between March 2013 and February 2015. This period was chosen because the composition of the High Court was static, the personnel being Chief Justice French and Justices Kiefel, Crennan, Bell, Gageler, Keane and Hayne.²⁷ The decisions were accessed electronically.²⁸ The large volume of data had to be extracted from the publicly available records without the aid of technology: a system of electronic data retrieval or machine learning was not possible because of the form in which the records are available on the AustLII database and on the High Court website. The special leave applications coded included those considered on the papers under the then applicable *High Court Rules* rr 41.10.5 and 41.11.1 and also those heard orally under *High Court Rules* r 41.11.3.²⁹ The data set for the study reported here was collated using variables identified and defined by the information available in special leave dispositions and transcripts. The dispositions provide very limited information about parties or their cases though it was possible to extract the data sought in some instances by referring to the lower court judgment from which special leave to appeal was sought. Other information was simply not available from either dispositions or transcripts, for example Legal Aid funding for private lawyers. These gaps in available information made interpretation of some data difficult and there are instances where we acknowledge that specific findings are not possible.

In all, more than 50 variables were coded. The major data-points extracted and analysed in this article are:

²³ Kirby, 'Maximising Special Leave Performance', above n 18, 745.

²⁴ *High Court Rules* r 44.

²⁵ *Ibid* r 41.08.3.

²⁶ Hayne, above n 17.

²⁷ Justice Keane was sworn in as a Justice of the High Court on 5 March 2013. From that date the Bench remained constant until Justice Nettle was sworn in as a Justice of the Court on 3 February 2015, replacing Justice Crennan who retired on 3 February 2015.

²⁸ Four sources were used to collect and cross-check data: High Court of Australia, *Special Leave Applications Results 2014*, <<http://www.hcourt.gov.au/registry/special-leave-applications-results-2014>>; AustLII, *High Court of Australia Special Leave Dispositions* <<http://www8.austlii.edu.au/cgi-bin/viewdb/au/cases/cth/HCASL/>>. Abandoned or discontinued applications were not included in the data set.

²⁹ See above nn 19–21 and accompanying text.

- (1) General case categories of civil, immigration and criminal.³⁰ These categories have been used by the High Court, in its annual reports for the years covered by our research, to differentiate areas of its work.³¹ At a more granular level, 28 categories of legal practice were also coded.
- (2) Hearing type (oral or ‘on the papers’) and length of oral hearings.
- (3) Success rates: grant or refusal of special leave, overall and relative to party type.
- (4) Legal representation of parties: self-representation; legal aid bodies appearing; details of solicitors and counsel.
- (5) Names and status of all parties: individuals; corporations; government and public authorities; other entities.
- (6) Gender and maturity (adult or child) of individual parties.
- (7) Counsel seniority and success rates.
- (8) Gender of counsel appearing in lead (speaking) roles and in secondary roles.

These data-points were selected in order to determine who is using the High Court, whether there are identifiable barriers to access and, if so, for whom, and whether particular parties enjoyed any discernible advantage. We were also keen to examine diversity of gender and seniority among lawyers in special leave applications.

The data regarding success rates relative to party type confirms existing research recognising that more experienced and better resourced parties enjoy greater success.³² The data concerning self-represented and legally aided applicants raises concerns regarding opportunity to appeal to the High Court in particular and access to justice more broadly. Similarly, the data relating to the gender and age of applicants speaks to a lack of opportunity for women and children to access the justice system at the highest level. Of equal concern is the data on gender of counsel appearing in special leave applications revealing significant disparities in briefing patterns for male and female barristers.

IV Overall Success Rates

The obvious starting point for analysis of empirical evidence concerning special leave applications is the overall success rates for those applications. It would come

³⁰ Immigration cases were separately categorised because they accounted for a very significant proportion of the total number of ‘civil’ cases and because their inclusion (without separate identification) in the civil case category would potentially have distorted the figures as to self-representation, paper hearings and success rates in the remaining civil cases being appeals from state and territory supreme courts and from the Federal Court exercising jurisdiction other than in immigration matters.

³¹ See, eg, High Court of Australia, *Annual Report 2013–14* (12 November 2014) 20 (Table D) <<http://www.hcourt.gov.au/assets/corporate/annual-reports/HCA-Annual-Report-2013-14.pdf>> (‘2013–14 Annual Report’). The Court’s most recent Annual Report does not provide any such breakdown: High Court of Australia, *2016–17 Annual Report*, above n 20, 21.

³² Galanter, above n 8.

as no surprise to any Australian lawyer that the success rates are very low, given the numbers of applications filed compared with the finite capacity of the High Court to hear and determine appeals.

From 1 March 2013 until 3 February 2015 there were 783 applications for special leave disposed of by the High Court and, of those, 80 were granted special leave to appeal. That represents a 10.22% overall success rate. This figure is consistent with the High Court's own statistics. The *2013–14 Annual Report* discloses a 10.5% success rate for special leave applications in 2012–2013 (44 granted, 375 refused) and an 11.29% success rate in 2013–14 (54 granted, 418 refused).³³ The temptation in a first response to these low success rates might be to interrogate them in terms of 'access to justice' given that clearly there are very few litigants whose final appeals are heard by the High Court. But here, the essential function of the High Court must be borne in mind. The appellate jurisdiction does not exist to provide yet another appellate opportunity for a disappointed or persistent and often well-resourced litigant who has already failed in an intermediate appellate jurisdiction.³⁴ Rather, s 35A mandates a focus on the Court's public interest responsibility.³⁵

Of considerable interest is the breakdown in Figure 1 (below) of the total number of cases in this study into three main categories; namely civil, criminal and immigration.³⁶ This profile of the Court's work enables closer scrutiny of issues such as the effects of self-representation, mostly in immigration matters, and the availability of legal aid, which is almost entirely confined to criminal matters. The types of applicant also tend to be aligned with particular categories of case. Obviously, there are no corporate applicants in immigration matters. This has some significance when comparing relative success rates between well-resourced applicants and others.

Immigration cases accounted for 27% of all civil applications. This figure is consistent with the High Court's own statistics. In 2013–14 immigration matters comprised 28% of all civil applications and in 2012–13 the proportion was 24%.³⁷

³³ High Court of Australia, *2013–14 Annual Report*, above n 31, 33 (Table I).

³⁴ Kirby, 'Maximising Special Leave Performance', above n 18, 745.

³⁵ David F Jackson, 'The Australian Judicial System: Judicial Power of the Commonwealth' (2001) 24(3) *University of New South Wales Law Journal* 73 and 'The Lawmaking Role of the High Court' (1994) 11 *Australian Bar Review* 197 and 'Practice in the High Court of Australia' (1997) 15 *Australian Bar Review* 187; Kirby, above n 18. Professor Luntz examined the special leave criteria applied by the High Court in 18 tort law cases in 2003 and concluded that few of the criteria for a grant of special leave were apparently satisfied in those cases (though the sample of cases is very small): Harold Luntz 'Round-up of Cases in the High Court of Australia in 2003' (2004) 12 *Torts Law Journal* 1, 10.

³⁶ These categories were used by the High Court in its annual reports for the research years: above n 31. Constitutional cases, that is 'matters arising under the Constitution or involving its interpretation' are within the original jurisdiction of the High Court (*Judiciary Act* s 30) and are not required to seek special leave to appeal. Accordingly, there are no constitutional cases in the data set. For research concerning constitutional cases see, Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2015 Statistics' (2016) 39(3) *University of New South Wales Law Journal* 1161. This article is part of a series, commenced in 2003.

³⁷ High Court of Australia, *2013–14 Annual Report*, above n 31, 17. See also Table D of the High Court of Australia *Annual Report 2012–2013* illustrating the number of immigration matters as a proportion of civil special leave applications filed in the 10 years prior to 2013–14 <<http://www.hcourt.gov.au/>

During the research period criminal cases made up 20.56% of the total number of applications and civil cases, other than immigration cases, made up 57.98% with immigration cases accounting for 21% of the total number of applications.³⁸

Figure 1: Types of applications, success rates and hearings

	Outcome		Success rate (%)	Hearing type		Total cases
	Granted (no.)	Refused (no.)		On paper (no.)	Oral (no.)	
Civil law	53	401	11.67	243	211	454
Criminal law	23	138	14.29	54	107	161
Immigration law	4	164	2.38	150	18	168
Total	80	703	10.22	447	336	783

The vast bulk of immigration matters were heard ‘on the papers’ without oral argument under previous *High Court Rules* r 41.10.5, which applied where the applicant was self-represented. Criminal matters by comparison, were heard orally in 66.46% of cases, no doubt because in most instances the applicant was legally represented with a proportion of applicants legally aided as discussed in Part VI. In civil matters, oral hearings were held in 46.8% of cases. As can be seen from Figure 1 above, the success rate for immigration cases is very low (2.38%), while the success rates for other civil matters and criminal matters are considerably higher at 11.67% and 14.29% respectively. Figure 2 (below) details legal practice areas at a more granular level, allowing immigration cases to be compared to all other categories of case.

The low success rate for immigration cases is arguably reflective of the s 35A ‘public interest test’. Immigration cases would have been the subject of both administrative and judicial review prior to any application for special leave and would generally involve individual rather than public interests. By contrast, the higher success rate in criminal cases appears to recognise that there are cases where the dominant consideration in the grant of special leave is to serve the interests of justice in a singular case ‘to prevent individual injustices’.³⁹ Here the private interests of the individual appellant are served,⁴⁰ though the avoidance of individual injustices in criminal cases where applicants are imprisoned would certainly be in the public interest.

assets/corporate/annual-reports/HCA-Annual-Report-2012-13.pdf> 16 (Table D) (‘2012–13 Annual Report’).

³⁸ The High Court’s 2013–14 Annual Report, above n 31, does not reveal the breakdown between criminal and civil special-leave-to-appeal applications.

³⁹ Kirby, ‘Maximising Special Leave Performance’, above n 18, 744; Kirby, ‘Why Has the High Court Become More Involved in Criminal Appeals?’, above n 18.

⁴⁰ In *Liberato v The Queen*, the High Court majority referred to the public interest function of the Court: (1985) 159 CLR 507, 509 (Mason ACJ, Wilson, Dawson JJ). On the other hand, the dissenting Justices were concerned with the private interests concerning miscarriage of justice: at 509 (Deane J); at 517 (Brennan J).

Figure 2: Legal practice areas⁴¹

Category of case	Total SLAs for category	Outcome (no.)		Success rate (%)	
		Granted	Refused	For category	Of all SLAs
Immigration law	168	4	164	2.38	0.51
Criminal law	161	23	138	14.29	2.94
Tort law	71	5	66	7.04	0.64
Civil procedure	69	3	66	4.35	0.38
Administrative law	36	4	32	11.11	0.51
Family law	34		34	0	0
Contract law	33	3	30	9.09	0.38
Industrial law	25	4	21	16	0.51
Taxation law	24	5	19	20.83	0.64
Property law	22		22	0	0
Statutory interpretation	17	6	11	35.29	0.77
Equity	17	6	11	35.29	0.77
Corporations law	16	8	8	50	1.02
Legal practitioners	12	1	11	8.33	0.13
Estate law	10		10	0	0
Discrimination law	7		7	0	0
Competition law	7	1	6	14.29	0.13
Intellectual property	7	2	5	28.57	0.26
Bankruptcy	7		7	0	0
Constitutional law	6	1	5	16.67	0.13
Insurance law	5	1	4	20	0.13
Evidence	4		4	0	0

⁴¹ 'SLA' = special leave applications. The figures in the '% success of all SLAs' column add up to 10.24% rather than 10.22%, the average success rate. This discrepancy is due to rounding to two decimal places of each item in the chart. The categories of practice area coded for the study were based on the catchwords used by the High Court in *High Court Bulletins* (produced by the Legal Research Officer, High Court of Australia Library) augmented by the catchwords used in other databases such as LexisNexis, AustLII and CCH.

<i>(Figure 2 continued)</i>		Outcome (no.)		Success rate (%)	
Category of case	Total SLAs for category	Granted	Refused	For category	Of all SLAs
Social security	3		3	0	0
Extradition	2		2	0	0
Banking & finance	2		2	0	0
Local government law	2		2	0	0
Workers compensation	2		2	0	0
Native title	2	2		100	0.26
Personal property	2		2	0	0
Admiralty law	1	1		100	0.13
Wills	1		1	0	0
Procedural fairness	1		1	0	0
Succession	1		1	0	0
Land & environment	2		2	0	0
Consumer law	1		1	0	0
Landlord & tenant	1		1	0	0
Judicial process	1		1	0	0
Damages	1		1	0	0
Total	783	80	703		10

V Self-Represented Applicants

There is a very strong correlation between success rates and legal representation. There was a substantial number of self-represented applicants during the research period: in all, 46% of special leave applications (358 out of 783 cases) were filed by self-represented applicants. Not one of the self-represented applicants was granted special leave to appeal.

This concern is not new and has been the subject of comment. The Australian Productivity Commission report on *Access to Justice Arrangements* in 2014 considered that self-represented litigants were particularly disadvantaged in higher courts where ‘complex disputes and questions of law are less suited to self-

representation'.⁴² The data in Figure 3 (below) confirms the concerns of the Productivity Commission in a striking manner.

Figure 3: Self-represented applicants

		Civil law		Criminal law		Immigration law		Total	
		Self-represented		Self-represented		Self-represented			
		Yes	No	Yes	No	Yes	No	Yes	No
Outcome: granted	Number of cases		53		23		4		80
	% allowed in practice area	11.70		14.20		2.38			
	% of total allowed applications	66.25		28.75		5.00			
Outcome: refused	Number of cases	176	225	42	97	140	24	358	345
	Total refused	401		138		164		703	
	% refused in practice area	88.33		85.71		97.62			
	% of total refused applications	57.04		19.63		23.33			
Hearing type (no.)	Oral	211		107		18		336	
	On the papers	243		54		150		447	

Of the total self-represented applicants (358), 39% were in immigration cases (140). Civil cases, other than immigration matters, accounted for 49% (176). By comparison, there were relatively few self-represented applicants in criminal matters, with 12% (42) of the total self-represented applicants. The High Court's *2013–14 Annual Report* records that the proportion of special leave applications filed by self-represented litigants during 2013–14 was 40% compared with 44% during 2012–2013,⁴³ figures broadly consistent with the research data.

To compile the data set for cases where there was no oral hearing, special leave applications filed by self-represented applicants were identified by reference

⁴² Productivity Commission, above n 6, 487. For comment on aspects of the report see Justice Steven Rares, 'Is Access to Justice a Right or a Service?' (Speech delivered at the Access to Justice: Taking the Next Steps Symposium, Monash University, 26 June 2015) [2015] *Federal Judicial Scholarship* 11.

⁴³ High Court of Australia, *Annual Report 2013–14*, above n 31, 31. The proportion of applications filed by self-represented litigants in the previous 10 years is illustrated in the High Court of Australia, *2012–13 Annual Report*: above n 37, 15 (Table C).

to the special leave dispositions.⁴⁴ Special leave dispositions in cases of self-represented applicants each contained a direction to the Registrar to draw up, sign and seal orders dismissing the application under r 41.10.5 of the *High Court Rules*, a rule that specifically dealt with applications by self-represented persons. Incidentally, because the new *High Court Rules* that commenced on 1 July 2016⁴⁵ do not make separate provision for self-represented applicants,⁴⁶ there is no longer any information on the public record indicating whether an applicant was legally represented where a matter is determined on the papers. In matters heard orally, the transcripts reveal whether a party was represented, with the names of counsel and instructing solicitors recorded.

The Productivity Commission's 2014 report recognised that 'while levels of self-representation in [higher] courts are lower, self-representation does, and will continue to, occur'.⁴⁷ The Productivity Commission found that data was limited, being patchy and inconsistent,⁴⁸ but that 'most people self-represent involuntarily because they cannot afford a lawyer or cannot access legal aid'.⁴⁹ The Productivity Commission recognised that there is a group of individuals, whom it called 'the missing middle', that do not qualify for legal aid, but who have no capacity to meet the costs of litigation.⁵⁰

The Productivity Commission's report did not specifically address the issue of self-represented litigants in the High Court. Yet, the proportion of self-represented applicants in special leave applications in the present study is high (46%),⁵¹ with a zero success rate justifying the Commission's disquiet about disadvantage to self-represented litigants.

Applications for special leave by self-represented applicants are almost always dealt with 'on the papers', so that the self-represented party is not required to appear at a hearing. Nevertheless, there is resonance in the Productivity Commission report: 'There are legitimate concerns about self-representation in higher courts. One concern is the possible impact on a just outcome for the self-represented litigant.'⁵²

Justice Kirby, writing extra-judicially in 2007, revealed the concern and approach of High Court Justices to self-represented applicants for special leave. His Honour recognised that the rules enabling matters to be dealt with 'on the papers' alleviated some problems faced by the Court in accommodating self-represented

⁴⁴ On the AustLII website: *High Court of Australia Special Leave Dispositions* <<http://www.austlii.edu.au/cgi-bin/viewdb/au/cases/cth/HCASL/>>.

⁴⁵ *High Court Rules* pt 41, as amended by *High Court Amendment (2016 Measures No 1) Rules 2016* (Cth).

⁴⁶ All applications are now determined according to *High Court Rules* r 41.08.1.

⁴⁷ Productivity Commission, above n 6, 487.

⁴⁸ Ibid 488–9, citing Richardson, Sourdin and Wallace, above n 6.

⁴⁹ Ibid 492.

⁵⁰ Ibid 20.

⁵¹ High Court of Australia, *Annual Report 2015–2016*, 19–20 <http://www.hcourt.gov.au/assets/corporate/annual-reports/HCA_Annual_Report_2015-16.pdf> ('2015–16 Annual Report'). See also applications filed by self-represented litigants in the preceding 10 years: at 21 (Table C).

⁵² Productivity Commission, above n 6, 487.

applicants.⁵³ Where a self-represented applicant's matter is listed for oral hearing, Kirby J said that

[i]f the applicant is not legally represented, the panel might suggest that the Registry explore the availability of pro bono assistance from the relevant Bar Association. This will sometimes also happen in an oral hearing. All Justices regularly do this.⁵⁴

In the present study, all but one of the applications filed by self-represented litigants were dealt with on the papers. The single oral application by a self-represented applicant was refused special leave to appeal.⁵⁵ The applicant was one of several respondents to an application and he apparently filed a 'cross-application'. At the hearing, he made oral submissions with considerable guidance from the Court as to time constraints, and direction to confine his submissions to relevant matters.⁵⁶ The challenges for the Court and the self-represented litigant alike in oral hearings are well illustrated by the comments of Justice Kiefel, as she then was, at that hearing (omitting the responses of the applicant):

Mr Marshall, just to assist you, we are familiar with these principles. Given the time restraints that you have it might be best to focus your attention upon the much more specific matters upon which the applications for special leave depend ... I think you are straying off into general principles now, with which we are familiar.

And

I was not sure when you mentioned that what that had to do with the application for special leave.

And

Mr Marshall, which part of your grounds in your draft notice of appeal are you speaking to at the moment?

And

Perhaps you could return to more relevant matters than these asides.⁵⁷

There was one self-represented respondent in an oral civil application in *Sidhu v Van Dyke*.⁵⁸ The transcript revealed that while the respondent appeared in person, her submissions had been prepared and signed by counsel.⁵⁹ She was, naturally, afforded the opportunity to respond to submissions made by the applicant's senior counsel. She answered questions from the Bench in an articulate

⁵³ Kirby, 'Maximising Special Leave Performance', above n 18, 740.

⁵⁴ Ibid. In *D'Orta-Ekenaike v Victoria Legal Aid*, Callinan J recognised the increasing need for pro bono assistance for litigants and the reliance by the courts on the availability such assistance: (2005) 223 CLR 1, 119 [377].

⁵⁵ Transcript of Proceedings, *Tory v Megna* [2013] HCA Trans 246 (11 October 2013).

⁵⁶ Ibid 365, 505, 515 (Kiefel J).

⁵⁷ Ibid 505, 520, 568, 597 (Kiefel J).

⁵⁸ Transcript of Proceedings, *Sidhu v Van Dyke* [2013] HCA Trans 312 (13 December 2013) 11.

⁵⁹ Ibid 7 (French CJ).

and knowledgeable manner.⁶⁰ Given her responses, there was obviously no need for the Bench to offer explanation or assistance as to procedure or substantive issues.⁶¹

The burden of self-representation on court time, recognised in *Cachia v Hanes*,⁶² is illustrated by the longer hearing time required for the single case with the self-represented applicant. It took 46 minutes compared to the average of 28 minutes for applicants with legal counsel. By contrast, however, the self-represented respondent's hearing took 23 minutes: slightly less time than the average of 28 minutes for legally represented respondents.

This study shows that a self-represented applicant has virtually no prospect of success. The cases in which applicants are typically self-represented are overwhelmingly civil and immigration appeals where legal aid is generally unavailable. Of the total number of immigration applicants in the study, 85% were self-represented.⁶³ The High Court 2013–14 *Annual Report*⁶⁴ reveals that 88% of immigration applications in 2013–14 were filed by self-represented applicants, while in 2012–13, 75% of immigration applicants self-represented.⁶⁵ In earlier years, immigration applications had even higher numbers of self-represented litigants, comprising, for example, 93% of applicants in 2009–10.⁶⁶

Some immigration applicants may have had assistance in the preparation of their applications from an immigration advice service or from a lawyer on a pro bono basis.⁶⁷ It is impossible to know from the High Court dispositions whether that may have been so in individual cases. Certainly, there is virtually no government-funded legal aid available for merits review or judicial review in immigration cases.⁶⁸ So it is unsurprising that the majority of immigration applicants are self-represented. There was one immigration case heard orally during the research period where the respondent asylum seeker was represented by a law firm and senior and junior counsel on a pro bono basis.⁶⁹ This information was not available from any of the

⁶⁰ Ibid 225.

⁶¹ There was a grant of special leave in the case and the appeal was ultimately dismissed: *Sidhu v Van Dyke* (2014) 308 ALR 232 (French CJ, Kiefel, Bell, Gageler, Keane JJ). The respondent was represented by senior counsel at the hearing of the appeal.

⁶² (1994) 179 CLR 403 at 415–16, [22] (Mason CJ, Brennan, Deane, Dawson and McHugh JJ).

⁶³ In the Federal Court of Australia, the majority of self-represented litigants have also been involved in migration appeals: Tania Sourdin, and Nerida Wallace, 'The Dilemmas Posed by Self-Represented Litigants — The Dark Side' (Working Paper No 32, 2014) 3: <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2713561>.

⁶⁴ High Court of Australia, 2013–14 *Annual Report*, above n 31, 17.

⁶⁵ High Court of Australia, 2012–13 *Annual Report*, above n 37, 15. For further statistics concerning numbers of self-represented immigration applicants in previous years in the High Court, see Richardson, Sourdin and Wallace, above n 6; Elizabeth Richardson and Tania Sourdin, 'Mind the Gap: Making Evidence-Based Decisions About Self-Represented Litigants' (2013) 22(4) *Journal of Judicial Administration* 191.

⁶⁶ High Court of Australia, *Annual Report 2009–2010*, 14 <<http://www.hcourt.gov.au/assets/corporate/2010-annual-report/2010annual.pdf>>.

⁶⁷ See, eg, Refugee Advice and Casework Service, <<http://www.racs.org.au>>; Immigration Advice and Rights Centre, <<http://www.iarc.asn.au/index.html>>.

⁶⁸ Andrew and Renata Kaldor Centre for International Refugee Law, *Factsheet: Legal Assistance for People Seeking Asylum* (March 2017), University of New South Wales <<https://perma.cc/VSF3-2CXF>>.

⁶⁹ Transcript of Proceedings, *Minister for Immigration & Citizenship v SZQRB* [2013] HCA Trans 323 (13 December 2013).

High Court records but was gleaned from the website of the solicitors for the respondent to the application brought by the Minister for Immigration.⁷⁰

It is to be anticipated that most immigration applications for special leave are refused, given that cases would have been assessed in the first instance by the Department of Immigration and Border Protection, followed by merits review by the Administrative Appeals Tribunal or the Immigration Assessment Authority followed by judicial review in the Federal Circuit Court and an appeal to the Federal Court. In view of the public interest considerations mandated by s 35A of the *Judiciary Act* and the fact that the High Court does not function merely as a further ‘step’ in the appellate process, it is unlikely that many immigration applications would fall within the parameters warranting a grant of special leave.

There were only four immigration applications for special leave heard orally that were successful. Of those, two were cases in which the Minister for Immigration was the applicant⁷¹ and two were cases where the applicant was the visa seeker.⁷² In all four cases, all parties were legally represented by counsel, though senior counsel did not appear in all cases.

VI Legally Aided Applicants for Special Leave to Appeal

There is a correlation between numbers of self-represented applicants and the availability of legal aid. In 2004, the Law Council of Australia observed that crippling funding constraints on legal aid budgets had severely restricted legal representation in civil matters since the 1990s, though there is a dearth of available data.⁷³ The present study verifies that assertion. There were 40 applications heard orally where a legal aid body was recorded as the applicant’s solicitor. That is a mere 5.11% of all special leave applications during the research years. Of those applications, all but three were in criminal matters. Figure 4 (below) details the numbers and outcomes for applicants represented by legal aid bodies in oral hearings.

⁷⁰ Russell Kennedy Lawyers, *Minister’s High Court Application for Special Leave to Appeal in the Case of Afghan Asylum Seeker was Refused* (18 December 2013) <<http://rk.com.au/news/ministers-high-court-application-for-special-leave-to-appeal-in-the-case-of-afghan-asylum-seeker-was-refused/>>.

⁷¹ Transcript of Proceedings, *Minister for Immigration, Multicultural Affairs and Citizenship v SZRNY* [2014] HCATrans 54 (14 March 2014); Transcript of Proceedings, *Minister for Immigration and Border Protection v SZSCA* [2014] HCATrans 111 (16 May 2014).

⁷² Transcript of Proceedings, *Ueese v Minister for Immigration and Citizenship* [2014] HCATrans 239 (17 October 2014); Transcript of Proceedings, *FTZK v Minister for Immigration and Citizenship* [2013] HCATrans 270 (8 November 2013).

⁷³ Law Council of Australia, above n 4; Mary Anne Noone, ‘Access to Justice Research in Australia’ (2006) 31(1) *Alternative Law Journal* 30.

Figure 4: Legally aided applicants in oral hearings⁷⁴

Practice area	Outcome		Total legal aid applicants	Total SLAs for all applicants	% of legal aid SLAs successful	Legal aid cases as % of total SLAs
	Granted	Refused				
Civil		1	1	454	0	0.22
Criminal	10	27	37	161	27.03	22.98
Immigration	1	1	2	168	50	0.60
Total	11	29	40	783	27.5	5.11

Unavailability of legal aid in the vast bulk of civil cases,⁷⁵ especially at appellate level, would be the chief reason for the large number of self-represented applicants for special leave to appeal. The Law Council of Australia has stated that the ‘erosion in the level of legal representation ... has had a detrimental impact on the legal system and the delivery of justice’.⁷⁶ The Law Council indicated that the demand for legal aid in criminal matters, and in family law matters concerning children, was such that it consumed almost all funding, leaving little or no capacity for civil law legal aid.⁷⁷ This assertion is starkly confirmed by the data for legally aided special leave applications. There was only one civil application and two immigration matters heard orally where the applicant was represented by a legal aid body.⁷⁸

Legally aided matters heard orally were identified for the data set by the names of legal aid bodies recorded as solicitors for applicants on transcripts. There would likely be an additional number of legally aided applicants in criminal matters where private solicitors acted for the applicants. It is not possible to know from those transcripts whether the applicants were legally aided. It was also not possible to know whether any applicants were legally represented on a pro bono basis. The 2017 *10th Annual Performance Report* of the Australian Pro Bono Centre recorded that Australian lawyer signatories to the *National Pro Bono Aspirational Target*

⁷⁴ ‘SLA’ = special leave applications.

⁷⁵ For example, in NSW there are restrictions on the types of civil law matters for which legal aid is available and there are strict means, merits and availability of funds tests: Legal Aid NSW, *Policies, 6. Civil Law Matters* (6 December 2010) <<http://www.legalaid.nsw.gov.au/for-lawyers/policyonline/policies/6.-civil-law-matters-when-legal-aid-is-available/6.3.-list-of-civil-matters-for-which-legal-aid-is-available-to-all-applicants>>.

⁷⁶ Law Council of Australia, above n 4, Executive Summary.

⁷⁷ Law Council of Australia, Submission No 62 to Senate Legal and Constitutional References Committee, Parliament of Australia, *Inquiry into Legal Aid and Access to Justice*, 23 September 2003, 17, [9.1] <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Legal_and_Constitutional_Affairs/Completed_inquiries/2002-04/legalaidjustice/submissions/sublist>.

⁷⁸ The applicant in the civil matter was represented by the Fitzroy Legal Service and the immigration applicants were represented by the Asylum Seeker Resource Centre in one case and the Legal Aid Commission of NSW in the other case.

contribute 35 hours of pro bono legal services, per lawyer, per year.⁷⁹ So it is likely that some individual applicants may have received pro bono representation. Such information is simply not available on the public record.

Of the 5.11% of applications where a legal aid body represented the applicant, most were criminal matters: 37 cases or 22.84% of all criminal law special leave applications. There were only three legally aided non-criminal applications heard orally, confirming that legal aid remains very restricted other than in criminal matters.⁸⁰ Even in cases where legal aid is available, the inadequacy of funding means there is a loss of experienced legal practitioners in legally aided matters because the cost of providing the legal services is not met by legal aid fees.⁸¹ The reality is that in Australia today, there is inequity of access to legal representation and that is reflected in the numbers of self-represented special leave applicants and their correspondingly low success rates.

Overall, 27.5% of legal aid cases were granted special leave compared with the general success rate of 10.22% and the success rate of 14.2% for criminal matters. This increased success rate for legally aided applicants is at least partly explained by the fact that cases are granted legal aid only where there is a very real prospect not only of a grant of special leave, but also of success on the substantive appeal. By way of illustration, Legal Aid Queensland — which will fund applications for special leave to appeal to the High Court for criminal sentences and/or convictions — imposes a merits test requiring that on the legal and factual merits, the application is ‘more likely than not to succeed’ and that ‘a prudent self-funding litigant would risk his or her own financial resources in funding the ... application’.⁸²

VII Who Applies for Special Leave to Appeal and Who is Successful?

The data indicates that High Court appeals are, in the main, confined to a particular class of advantaged litigant. Individuals significantly outnumber corporate and government and public authority applicants for special leave. However, the most capable applicants — namely, government and corporate parties who would have litigation experience and significant resources — are overwhelmingly more successful. Figure 5 (below) shows success rates for different types of applicant.

⁷⁹ Australian Pro Bono Centre, *10th Annual Performance Report of the National Pro Bono Aspirational Target 2007–2017* (October 2017) <<http://www.probonocentre.org.au/wp-content/uploads/2017/09/Aspirational-Target-2017-V11-FINAL.pdf>>. See also, National Pro Bono Resource Centre, *National Survey Report on the Pro Bono Legal Work of Individual Australian Barristers* (November 2008) 6 <<http://www.probonocentre.org.au/wp-content/uploads/2015/09/Barristers-report-FINAL.pdf>>. That survey found that of 355 barristers responding, 311 or 87% had done pro bono legal work in the previous 12-month period.

⁸⁰ Law Council of Australia, above n 4. For discussion of the effect of legal aid availability in criminal matters in the High Court, see Kirby, above n 18.

⁸¹ Law Council of Australia, above n 4, 27, 41.

⁸² Legal Aid Queensland, *The Merits Test* (2019) Grants Policy Manual <<http://www.legalaid.qld.gov.au/About-us/Policies-and-procedures/Grants-Policy-Manual/The-Merits-Test>>.

Figure 5: Applicant types⁸³

Applicant type	Civil law			Criminal law			Immigration law			Total
	Oral		Papers	Oral		Papers	Oral		Papers	
	G	R	R	G	R	R	G	R	R	
Association		1								1
Corporation	21	56	20							97
Crown					3					3
Government & public authorities	15	12	1	1	4		2	3		38
Individual	16	89	221	22	77	54	2	11	150	642
Ship	1									1
Sovereign State			1							1
Total	53	158	243	23	84	54	4	14	150	783

Applicants most likely to obtain special leave are government and public authorities who succeeded in 53.57% of their civil applications and in 47.36% of their applications across all areas of practice.⁸⁴ Corporations succeeded in 21.64% of their applications, all in civil cases. By contrast, individual applicants succeeded in only 4.91% of their civil matters (excluding immigration matters) and in 6.23% of their applications across all practice areas: a sizeable disproportion between individuals and others (that is, government and public authorities, and corporations). Moreover, the success rate for individuals is well below the average of 10.22% for all applications.

Individual applicants are by far the most numerous in special leave applications, partly because of the number of immigration and criminal applications. Even excluding those matters, individuals significantly outnumber corporate and government and public authority applicants in civil matters (326 individuals compared with 125 corporate and government and public authorities combined). This disparity does not offer any immediate explanation for the much lower success rates for individual applicants. Government and public authorities and corporations would be better resourced financially than most individuals and have ease of access to timely expert legal advice and representation throughout the litigation process. They are also more likely to be seasoned to the litigation process; that is, repeat players.

In his 1974 seminal work, Galanter hypothesised that ‘repeat players’ (parties with established litigation experience and significant resources) have more success than ‘one shot’ litigants with fewer resources and less experience. Galanter’s theory and the body of research that followed it are known as ‘party capability theory’. Galanter’s study concluded that there were differential success rates between ‘haves’

⁸³ G = granted; R = refused.

⁸⁴ This figure does not include cases where the Crown was the applicant for special leave. During the period from March 2013 to February 2015, the Crown was the applicant in three criminal matters and was unsuccessful in all.

and ‘have nots’.⁸⁵ Subsequent studies of United States (‘US’) courts showed that government litigants were more often successful than private businesses or organisations or individuals.⁸⁶ Later studies of appellate courts provided less support for Galanter’s hypothesis demonstrating that party strength alone does not determine success rates and concluding that other variables such as area of law and counsel appearing influence outcomes.⁸⁷

The Australian High Court was studied using Galanter’s theory, initially by Smyth⁸⁸ and more recently by Sheehan and Randazzo.⁸⁹ Both studies provided only partial support for the Galanter hypothesis. They concluded that while the Australian Government had an advantage over other litigants, individuals (contrary to Galanter’s hypothesis) possessed higher net advantages over state and local government and private business. However, these studies were concerned exclusively with substantive appeals in the High Court in the periods both before and after the introduction of the special leave requirement in civil matters. They did not consider litigant success in special leave applications.

While individuals may not be disadvantaged in substantive appeals (except by comparison with the Australian Government), Figure 4 (above) shows that individuals are much less likely to be granted special leave to appeal than are government and public authority and corporate applicants. Since the special leave process screens out many more individual appeals than government, public authority and corporate appeals, the Smyth and Sheehan and Randazzo conclusions must be tempered by the gateway effect of the special leave requirement.

The Sheehan and Randazzo study did consider whether there was any shift in success patterns in High Court appeals after the introduction of the universal special leave requirement in 1984. They found that prior to 1984, individual applicants were significantly less likely to win their appeals (than other types of litigant) and that

⁸⁵ Galanter, above n 8.

⁸⁶ Donald Songer and Reginald Sheehan, ‘Who Wins on Appeal: Upperdogs and Underdogs in United States Courts of Appeals’ (1992) 36(1) *American Journal of Political Science* 235. Canadian research has supported Galanter’s theory: Peter McCormick, ‘Party Capability Theory and Appellate Success in the Supreme Court of Canada, 1949–1992’ (1993) 26(3) *Canadian Journal of Political Science* 523. For English research, see Burton M Atkins, ‘Party Capability Theory as an Explanation for Intervention Behaviour in the English Court of Appeal’ (1991) 35(4) *American Journal of Political Science* 881.

⁸⁷ Wheeler Stanton et al, ‘Do the “Haves” Come Out Ahead? Winning and Losing in State Supreme Courts, 1870–1970’ (1987) 21(3) *Law and Society Review* 403; Reginald Sheehan, William Mishler, and Donald Songer, ‘Ideology, Status and the Differential Success of Direct Parties Before the Supreme Court’ (1992) 86(2) *American Political Science Review* 464–71; Donald J Farole Jr, ‘Re-examining Litigant Success in State Supreme Courts’ (1999) 33(4) *Law & Society Review* 1043; Herbert Kritzer, ‘The Government Gorilla: Why Does Government Come Out Ahead in Appellate Courts?’ in Herbert Kritzer and Susan Silbey (eds) *Litigation: Do the “Haves” Still Come Out Ahead?* (Stanford University Press, 2003); Andrea McAtee and Kevin McGuire, ‘Lawyers, Justice and Issue Salience: When and How Do Legal Arguments Affect the US Supreme Court?’ (2007) 41(2) *Law & Society Review* 259; Christopher Hanretty, ‘Have and Have-Nots before the Law Lords’ (2014) 62(3) *Political Studies* 686.

⁸⁸ Russel Smyth, ‘The “Haves” and the “Have-Nots”: An Empirical Study of the Rational Actor and Party Capability Hypotheses in the High Court 1948–99’ (2000) 35(2) *Australian Journal of Political Science* 255.

⁸⁹ Sheehan and Randazzo, above n 10.

after 1984 there was a 'substantial shift' with individuals being 'significantly more likely to win'.⁹⁰ This shift can be explained by the screening out of a high proportion of individual applications at the special leave hurdle, as demonstrated by the present study. Sheehan and Randazzo did not consider the litigants who were excluded by the special leave process.

Smyth referred to 'Australian exceptionalism'⁹¹ to party capability theory, recognising that the leave to appeal requirement 'siphons off routine cases where one party has a clear advantage'.⁹² He posited this as one explanation for the lack of disadvantage for individuals in High Court appeals together with the availability of legal aid and the briefing of senior counsel by individuals in criminal appeals. Ultimately, Smyth concluded that these possible explanations for the difference in the Australian experience did not resolve the issues.

The filtering effect is the very reason for the special leave structure as Kirby J recognised:

The universal special leave system that has operated in the High Court of Australia since 1976 filters out the appeals that are more routine with outcomes more predictable and with legal or factual contests less likely to produce reasonable differences of opinion.⁹³

The present study clearly establishes that individuals' applications for special leave to appeal are refused in considerably greater numbers than those of government, public authorities or corporations. Smyth's suggested explanation for relative individual success in High Court substantive appeals because of 'siphoning off' of cases is therefore strongly supported by our research.

Individual applicants are less likely to enjoy the 'party capability' benefits available to government, public authority and corporate applicants because individuals are more likely to be self-represented, with their applications for leave being heard on the papers in numbers significantly exceeding those of corporate or government and public authorities: in civil matters 221 individuals' applications were heard on the papers, as opposed to 21 applications by corporate and government or public authority bodies. Individuals in civil cases, other than immigration matters, accounted for 49% of all self-represented applicants.

The disproportionate success rates for government, public authority and corporate applicants underscore the inequalities produced by self-representation and the absence of legal aid for individual applicants as well as an inability to access senior legal representation at the appellate level. The data further suggests that the most capable litigants have significant influence on the final appellate work of the High Court.

⁹⁰ Ibid 250.

⁹¹ Smyth, above n 88, 267.

⁹² Ibid 270.

⁹³ Kirby, 'Maximising Special Leave Performance', above n 18, 733.

VIII Female and Child Applicants

The study reveals that women and children make very few applications for special leave to appeal compared with adult males. Previous research confirms the under-representation of women and children in High Court negligence appeals,⁹⁴ but there has been no investigation as to how often such litigants apply for special leave to appeal and whether they are successful or not.

In the present study, the gender and maturity of individual lead applicants was coded.⁹⁵ Women account for only 18% of individual lead applicants with their applications having slightly lower success rates than those of males (see below Figure 6).

Figure 6: Comparison of male and female lead applicants

	Total	%	Granted (no.)	% granted	Refused (no.)	% refused
Individual	642		40	6	602	94
Male	526	82	34	6	492	94
Female	116	18	6	5	110	95

There are recognised obstacles to women’s participation in litigation that do not apply equally to males, including reduced economic capacity.⁹⁶ The fairly diverse legal practice categories in which women lead applicants appeared (see below Figure 7) do not offer any specific explanation for the under-representation of women in the cohort of individual applicants.

Figure 7: Women lead applicants by practice area

Administrative law	7	Family law	9
Bankruptcy	1	Immigration law	21
Civil procedure	15	Industrial law	3
Contract law	4	Land & environment	1
Corporations law	1	Legal practitioners	1
Criminal law	14	Property law	8
Discrimination law	2	Taxation	4
Estate law	2	Torts	21
Equity	2	Total	116

Figure 2 (above Part IV) shows the number and success rates of all applicants by legal practice area across the entire data. A comparison of Figure 2 and Figure 7 (above) underscores the low rates of female applicants in special leave applications.

⁹⁴ Stewart and Stuhmcke, above n 7. See also Pam Stewart and Anita Stuhmcke, ‘High Court Negligence Cases 2000–10’ (2014) 36(4) *Sydney Law Review* 585.

⁹⁵ Where there was more than one applicant in a single suit, the gender and age of the first applicant was coded. There were few such cases and they were largely confined to immigration matters where a male adult was the applicant and another family member was listed as a second applicant.

⁹⁶ Branson, above n 7. For barriers facing culturally and linguistically diverse women, see Wayne Martin, ‘Embracing Diversity in the Law: Solutions and Outcomes’ (2016) 43(8) *Brief* 18–23.

One general explanation for the under-representation of women in the data set may be found in commentary that suggests apparently ‘neutral’ law may, because of gender inequalities in wider society, be unequal in application.⁹⁷ This argument as to the socio-legal construction of gender and the consequent restriction upon public participation similarly applies to other vulnerable populations such as children.⁹⁸ Indeed, in this data set child lead applicants during the research years numbered only 11 (1.71% of individual lead applicants), with 5 of the 11 applications being dealt with on the papers. The specific legal practice areas involving child lead applicants were limited as follows: crime (sentencing): 3; immigration: 4; tort: 3; and family law (capacity and parens patriae): 1.

Three child applicants were granted special leave to appeal (a 27.27% success rate), as detailed in Figure 8 (below).

Figure 8: Child lead applicants by practice area, gender, appearance type and outcome

Hearing type	oral 6; heard on papers 5
Gender	male 7; female 4
Practice area	civil 4; criminal 3; immigration 4
Outcome	granted 3; refused 8

As is the case for women, child litigants face significant impediments to participation in the legal process. The Law Council of Australia states:

Due to limited independence and life experience, children and young people ... often rely on their parents or friends to mediate their access to legal services. Children and young people commonly view the legal system as intimidating, overwhelming, stressful and expensive. This view, combined with limited financial resources, deters many young people from engaging with the legal system. Children and young people often experience communication barriers in court as their social communication skills, vocabulary and language skills are underdeveloped compared to adults, and the justice system does not provide the necessary system supports to help young people understand and navigate the legal system.⁹⁹

Barriers facing child litigants include: the lack of specialist legal services for children; few solicitors skilled in dealing with children, particularly in regional areas; inaccessibility of legal services to children; and the intimidating atmosphere of legal services including minimal public visibility.¹⁰⁰

⁹⁷ Carol Smart, ‘Law’s Truth: Women’s Experience’ in Reg Greyar (ed) *Dissenting Opinions: Feminist Explorations in Law and Society* (Allen & Unwin, 1991), cited in Reg Graycar and Jenny Morgan (eds), *Hidden Gender of Law* (Federation Press, 1990) 176.

⁹⁸ Jonathan Herring, *Vulnerability, Children and the Law* (Springers Briefs in Law, 2018) ch 4 (‘Are Children More Vulnerable than Adults?’).

⁹⁹ Law Council of Australia, *The Justice Project — Children and Young People: Consultation Paper*, (August 2017) 2 <<https://www.lawcouncil.asn.au/files/web-pdf/Justice%20Project/Consultation%20Papers/Children%20and%20Young%20People.pdf>>.

¹⁰⁰ Schetzer and Henderson, above n 7, 69–70.

The small number of female and child applicants for special leave to appeal mirrors the lack of diversity of litigants in the justice system generally and is reflected in a corresponding absence in substantive High Court appeals.

IX The Lawyers in Special Leave Applications:
The Influence of Senior Counsel

Several studies have found that the quality of legal representation influences success in litigation and is a function of party capability.¹⁰¹ Our data confirms this is the case for High Court special leave applications. Senior Counsel or Queen’s Counsel were briefed as lead counsel by the first applicant in 269 of the total of 336 cases heard orally: that is in 80.06% of special leave matters heard orally (see below Figure 9).¹⁰² Senior Counsel or Queen’s Counsel also had higher success rates than junior counsel.

Figure 9: Application outcome by reference to lead counsel¹⁰³

		Successful	Unsuccessful	Total cases (no.)	Success as % of all successful cases	Lead counsel type as % of all cases	Success as % of all cases
Applicant	No barrister	1		1	0	0.30	0
	Non-silk	7	59	66	8.75	19.64	2.08
	QC / SC	73	196	269	91.25	80.06	21.73
	Total	80	256	336			
Respondent	No barrister	1	2	3	0.39	0.89	0.30
	Non-silk	53	5	58	20.70	17.26	15.77
	QC / SC	202	73	275	78.91	81.85	60.12
	Total	256	80	336			

Sheehan and Randazzo examined barrister influence in their study of Australian High Court appeals between 1970 and 2003 and found that while barrister general experience was not influential, prior success in the High Court was significantly related to appellant wins.¹⁰⁴ Hanretty studied appellate outcomes in the House of Lords between 1969 and 2003 and concluded that the experience of

¹⁰¹ Hanretty, above n 87; Stacia Haynie and Kaitlyn Sill, ‘Experienced Advocates and Litigation Outcomes’ (2007) 60(3) *Political Research Quarterly* 443; John Szmer, Susan Johnson and Tammy Sarver, ‘Does the Lawyer Matter? Influencing Outcomes in the Supreme Court of Canada’ (2007) 41(2) *Law & Society Review* 279; McGuire, above n 10; Kevin McGuire, ‘Explaining Executive Success in the U.S. Supreme Court’ (1998) 51(2) *Political Research Quarterly* 505; Paul Wahlbeck, ‘The Life of the Law: Judicial Politics and Legal Change’ (1997) 59(3) *Journal of Politics* 778.

¹⁰² There was a small number of cases where there was more than one applicant each having separate counsel. Data was extracted only for the principal applicant’s counsel. The same approach was taken to data on respondents.

¹⁰³ For applicants, success is an application granted. For respondents, success is an application refused.

¹⁰⁴ Sheehan and Randazzo, above n 10, 247.

counsel had a significant effect on litigant success. Hanretty found that the number of counsel appearing for a party and success of counsel in previous cases did not have a significant effect.¹⁰⁵

Senior Counsel or Queen's Counsel were successful in 27.14% of the applications in which they appeared as leaders for the applicant, whereas junior counsel were successful in only 10.61% of the cases in which they appeared as lead counsel for the applicant. These figures tend to support Hanretty's findings linking counsel experience to success in House of Lords appeals. It is telling too that senior counsel (SC or QC) were briefed in a high percentage (80%) of applicants' cases, signifying that litigants and their advisors recognise the importance of experienced counsel to outcomes.¹⁰⁶

In the present study, we considered the experience of counsel by reference to whether individual counsel had been appointed as Senior Counsel or Queen's Counsel because those appointments require appellate experience in major cases as well as seniority and eminence.¹⁰⁷ It follows that barristers appointed as Senior Counsel or Queen's Counsel have more extensive experience and success than other counsel, especially at appellate level.

Figure 10 (below) displays the 12 most frequently appearing lead counsel in special leave applications (for either applicants or respondents), together with success rates for each. Counsel are referenced by single letters (unrelated to their names) with gender and seniority specified. The success rate figures are 'raw' and are not weighted to adjust for the underlying probability that a barrister is more likely to succeed if appearing for a respondent because the majority of cases are refused leave and, for a respondent, a refusal is counted as a 'success'.

The most frequently appearing 12 counsel appeared in 142 cases out of the total of 336 cases heard orally, that is in 42.26% of hearings. These counsel, all male, must have a very substantial influence on the final appellate work of the High Court simply because they argue such a significant proportion of special leave applications.

¹⁰⁵ Hanretty, above n 87, 695. Conversely, Flemming and Krutz studied leave to appeal applications in the Canadian Supreme Court and found no advantage for more experienced barristers: Roy Flemming, and Glen Krutz, 'Selecting Appeals for Judicial Review in Canada: A Replication and Multivariate Test of American Hypotheses' (2002) 64(1) *Journal of Politics* 232. A South African study found that the number of previous appearances was not significant, but that prior success of lawyers was an indicator of future success: Haynie and Sill, above n 101.

¹⁰⁶ It has been shown in some US research that the impact of counsel is sometimes related to cultural capital recognised by the courts rather than advocacy and legal skill: Rebecca L Sandefur, 'The Impact of Counsel: An Analysis of Empirical Evidence' (2010) 9 *Seattle Journal of Social Justice* 51. Whether this would be so at the highest level in the court hierarchy is not reported and may be unlikely.

¹⁰⁷ See, eg, NSW Bar Association, *Senior Counsel Protocol* (16 May 2013) <<http://archive.nswbar.asn.au/silks/protocol2013.pdf>>.

Figure 10: Top 12 most frequently appearing lead counsel (unweighted)

Lead counsel	Total appearances	Successful (%)	Unsuccessful (%)
Mr A, SC	25	24	76
Mr B QC	17	52.94	47.06
Mr C SC	16	43.75	56.25
Mr D SC	14	64.29	35.71
Mr E SC	12	50	50
Mr F QC	9	55.56	44.44
Mr G SC	9	77.78	22.22
Mr H QC	9	22.22	77.78
Mr I	9	11.11	88.89
Mr J QC	8	75	25
Mr K SC	7	74.43	28.57
Mr L QC	7	100	0

It is telling that the 12 most frequently appearing lead barristers were male. The next group of seven barristers each appeared six times and were the equal 13th most frequently appearing barristers. This group included one female, the most frequently appearing female barrister (who is not Senior Counsel or Queen’s Counsel). There were only 47 female barristers appearing as lead counsel; that is, in speaking roles for applicants or respondents. The most frequently appearing female counsel in leading roles are detailed in Figure 11 (below) together with their percentage success rates. Again the figures are not weighted for the bias in favour of respondents’ counsel.

Figure 11: Top 13 most frequently appearing female lead counsel (unweighted)

Female lead counsel	Total appearances	Successful (%)	Unsuccessful (%)
Ms A	6	100	0
Ms B QC	4	25	75
Ms C SC	2	50	50
Ms D SC	2	100	0
Ms E SC	2	100	0
Ms F SC	2	0	100
Ms G SC	2	100	0
Ms H	2	0	100
Ms I	2	100	0
Ms J SC	2	0	100
Ms K	2	50	50
Ms L SC	2	100	0
Ms M QC	2	50	50

X Counsel Gender

A feature of special leave applications clearly revealed by this study is the low number of briefs for female counsel relative to briefs for male counsel in oral applications. The data confirms the findings of other studies on the gender of counsel appearing in the High Court and accentuates the bias inherent in briefing patterns in Australian High Court practice.¹⁰⁸ This is clearly a matter outside the control of the Court, but the lack of diversity in counsel appearing has implications for the administration of justice generally and for the Australian legal profession. Ideally, the senior ranks of the Bar should mirror the diversity of lawyers and that diversity should subtly inform institutional dynamics, but our study reveals that not to be the case.

Figure 12 (below) details the gender of counsel appearing in leading roles and relative success rates.¹⁰⁹ Sadly, this data reinforces the frequently cited concerns about gender inequality in the Australian legal profession and, in particular, the ‘glass ceiling’ that apparently restricts women lawyers’ attainment of high rank in the profession.¹¹⁰ In 2015, women accounted for 23% of all Australian barristers.¹¹¹ Yet, the number of women appearing in special leave applications during the study years was significantly below that average being 15% of counsel appearing overall.

¹⁰⁸ Reynolds and Williams, above n 9; Smyth and Mishra, above n 9.

¹⁰⁹ In rare instances, where there was more than one applicant or respondent in the same suit with separate counsel, only counsel for the first applicant and the first respondent were coded. Where there were separate cases with separate suit numbers heard together, counsel for the first applicant and respondent in each separate suit number were coded.

¹¹⁰ Jen Travers, ‘The Glass Ceiling’ (2008–2009) 11(1) *Newcastle Law Review* 93; Francesca Bartlett, ‘Model Advocates or a Model for Change? The Model Equal Opportunity Briefing Policy as Affirmative Action’ (2008) 32(2) *Melbourne University Law Review* 351; Angela T Ragusa and Philip Groves, ‘Gendered Meritocracy? Women Senior Counsels in Australia’s Legal Profession’ (2012) 1 *Australian Journal of Gender and Law* 1; New South Wales Bar Association, *Equitable Briefing Working Group Review of the Application in New South Wales of the Equitable Briefing Policy of the Law Council of Australia* (August 2015); Australian Women Lawyers, ‘Only 7.92% of Female Senior Counsel Practising at the Independent Bar are Female, Fifty Years After Australia’s First Female Silk Appointed’ (Media Release, 4 September 2012) cited in Maree Keating and Natalie Zimngast, ‘Fault-Lines in Bar Culture: Women Barristers’ Negotiations with Collegiality, Care and Success’ (2013) 38(4) *Alternative Law Journal* 265, 266 n 24; Australian Women Lawyers, *Gender Appearance Survey* (August 2006) <https://web.archive.org/web/20090914040404/http://womenlawyers.org.au/documents/Final_Gender_Appearance_Survey-August_2006.pdf>; Law Council of Australia, *Beyond the Statistical Gap: 2009 Court Appearance Survey – Strategy for Advancing Appearances by Female Advocates in Australian Courts* (2009) 7 <<https://www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/equal-opportunities-in-the-law/court-appearance-survey>>; Kate Eastman SC, *Visible Targets: The Case for Equitable Briefing* (30 June 2016) <<https://www.kateeastman.com/wp-content/uploads/2016/06/Visible-Targets-June-2016-1.pdf>>; Law Council of Australia, *National Attrition and Re-engagement Study (NARS) Report* (Urbis Pty Ltd, 2014) <<https://www.lawcouncil.asn.au/policy-agenda/advancing-the-profession/equal-opportunities-in-the-law/national-report-on-attrition-and-re-engagement>>.

¹¹¹ Australian Bar Association, *Australian Bar Association Statistics 2015* (30 June 2015) <<http://archive.austbar.asn.au/statistics>>.

Figure 12: Lead counsel by gender: Applicants and respondents (unweighted)¹¹²

Lead counsel gender		Outcome: successful	Outcome: unsuccessful	Total cases	Success (% of successful SLAs)	Success (% of SLAs with same gender lead counsel)	Success (% of SLAs with any gender lead counsel)
Applicant	female	4	20	24	5	17	1
	male	76	235	311	95	24	23
	Total	80	255	335	100	–	24
Respondent	female	21	2	23	8	91	6
	male	234	76	310	92	75	70
	Total	255	78	333	100	–	77

Research has focused on the low number of briefs for female counsel relative to briefs for male counsel in the Australian High Court. A study by Mishra and Smyth revealed that in 2009, 14 women appeared in 19 of the 40 High Court hearings representing a proportion of 48% of all cases.¹¹³ But there were only three women in speaking roles: in 8% of all matters. This Mishra and Smyth study excluded special-leave-to-appeal applications.

Research by Kate Eastman SC disclosed that between 1 July 2014 and 30 October 2015,¹¹⁴ the High Court delivered 62 judgments (excluding special leave applications) in which 402 counsel appeared. Women barristers appeared in 37 of the 62 matters representing appearances in around 60% of cases, but that figure is apt to mislead. The numbers of women appearing overall, were a disappointing proportion of all appearances with a total of 72 women (18%) as against 330 men (82%). Eastman's figures as to senior counsel (SC or QC) appellate appearances are also gloomy, with 15 female senior counsel (3.7% of total appearances) as opposed to 185 male senior counsel (46% of total appearances).

Most recently in 2017, Reynolds and Williams studied all High Court appearances (including special leave applications) by barristers in the 2016 calendar year in matters in which oral argument took place.¹¹⁵ They found that 22% of counsel appearing were women, but that in more than half the cases (51%) no female barristers appeared at all.¹¹⁶ Only 42 female barristers had speaking responsibility in oral argument as opposed to 438 males.¹¹⁷ They concluded that:

¹¹² Rounded to the nearest whole percentage. 'SLA' = special leave applications. For applicants, success is an application granted. For respondents, success is an application refused.

¹¹³ Smyth and Mishra, above n 9, see Table 2.

¹¹⁴ Eastman, above n 110.

¹¹⁵ Reynolds and Williams, above n 9. See also Smyth and Mishra, above n 9.

¹¹⁶ Reynold and Williams, above n 9, 488.

¹¹⁷ Ibid 489.

[W]hen women were briefed, they were given lesser speaking responsibility than men, with 25% of all appearances by women involving a speaking role, compared with 63% of all appearances by men.¹¹⁸

The present study bears out these conclusions with a glaring absence of female counsel appearing as leading advocates for either party, except in a very few cases. Out of the 783 applications in the data set, 336 were heard orally. Of those, there were just 24 matters (7.14% of all oral hearings) in which a female barrister appeared in the leading advocate's role for the applicant and 23 where a female barrister appeared in the leading advocate's role for the respondent (6.85% of all oral hearings). Overall, the number of female barristers appearing in leading roles for either party was 47 representing just 7.04% of the total number of 668 lead advocates.¹¹⁹

Female counsel numbers in the current study are improved when the gender of 'secondary' counsel is considered: that is, counsel in non-speaking roles for applicants or respondents. There were an additional 78 female counsel appearing for applicants in secondary non-speaking roles. There were 12 applications for which a female leader was briefed for the applicant with a female junior. There were an additional 67 female counsel appearing in secondary roles for respondents, with female leaders in 5 of those cases.

There were 167 cases or 49.7% of oral hearings in which female counsel appeared for either party in leading or non-speaking roles. This figure confirms the findings in the Reynolds and Williams study where in just under half the cases (49%), female barristers appeared for either party.¹²⁰ However, the raw numbers of female counsel in the present study are disappointing, with 192 female counsel briefed altogether as opposed to 1095 male counsel (lead and second counsel for applicants or respondents). So female counsel constituted 15% of counsel appearing overall, significantly fewer than the 22% in the Reynolds and Williams 2016 study.¹²¹

The success rates for cases in which female counsel appeared in the lead role for the applicant are almost 8% lower than in cases where the applicant's lead counsel was male. At 16.67% (of the cases in which female leaders appeared), the female leaders' success rates as applicants' counsel is well below the overall success rate of 23.81% for all oral applications. The applicants' male leaders' success rate of 24.44% (of cases in which male leaders appeared) was slightly greater than the 23.81% success rate of all oral applications.

The reasons for this disparity in success rates are not obvious, though the much smaller numbers of female counsel appearing overall would indicate that females are less experienced in High Court special leave applications and thereby may suffer a disadvantage, being less likely to be briefed at all and, if briefed, being less likely to succeed. Such a conclusion is reinforced by the studies that support the

¹¹⁸ Ibid 493.

¹¹⁹ There were four parties that were not represented by counsel at an oral hearing: one self-represented applicant; one self-represented respondent; and two respondents that filed submitting appearances, but did not have counsel appear at the hearing.

¹²⁰ Reynolds and Williams, above n 9, 488.

¹²¹ Ibid.

hypothesis that experience of counsel and previous success are influential elements in litigant success.¹²²

Any interpretation of the data showing the lower success rate for female as compared to male lead counsel is complicated by other disclosures in the study data. The data in Figure 1 (Part IV above) demonstrates that the rate of success in criminal law applications is the highest overall, while Figure 13 (below) shows the large relative over-representation of women lead counsel in criminal applications. The combination of these facts should mitigate against a lower success rate for female as compared to male lead counsel. Yet, Figure 12 (above) indicates the lower success rates for female counsel. There is no evidence that male barristers may reject briefs in cases having weaker prospects of success, though that is a possible reason for the disproportionate success rates. Such an approach would be in breach of the cab rank rule: the ethical obligation of a barrister to accept a brief to appear in a case that is within the barrister's expertise where the barrister would be available to appear and where an acceptable fee is offered.¹²³ There is no Australian research about the effect of the rule, particularly with respect to the specialist bar appearing in the High Court. Some English commentators have observed that there is now ongoing debate as to whether the cab rank rule (which has significant exceptions) is followed in practice,¹²⁴ but there is no empirical data about its operation.¹²⁵

There is a marked disparity in the types of cases in which males and females were briefed as lead advocates. Figure 13 (below) details the practice areas in which male and female counsel were briefed as lead counsel for either applicants or respondents. Of the 28 categories of legal practice that were coded for the study, female lead counsel appear in only 10 practice areas. The most frequent practice area in which both male and female counsel were briefed as leaders is criminal law. They then diverge with male counsels' second and third most common areas for leading appearances being tort law (97%) and contract law (100%), respectively. Female counsels' second and third most common areas for leading appearance are immigration law (19%) and administrative law (15%). There is a disproportionately high appearance rate in immigration and administrative law cases for female lead counsel, given that female lead counsel are briefed in only 7% of all special leave

¹²² Hanretty, above n 87; Haynie and Sill, above n 101; Szmer, above n 101; McGuire, above n 10.

¹²³ *Legal Profession Uniform Conduct (Barristers) Rules 2015* r 17, made under the *Legal Profession Uniform Law* by the Legal Services Council, 26 May 2015. The *Uniform Law* was adopted by New South Wales and Victoria on 1 July 2015. See also *Legal Profession (Barristers) Rules 2014* (ACT) r 85; *Barristers' Conduct Rules* (NT) r 85; *Barristers' Conduct Rules 2011* (Qld) r 21; *Barristers' Conduct Rules* (SA) r 21; *Legal Profession (Barristers) Rules 2016* (Tas) r 5 (adopting the *Legal Profession Uniform Conduct (Barristers) Rules 2015* (NSW) r 17); *Legal Profession Uniform Conduct (Barristers) Rules 2015* (Vic) r 17; *Western Australian Barristers' Rules 2011* (WA) r 21.

¹²⁴ Andrew Higgins, 'Rebooting the Cab Rank Rule as a Limited Universal Service Obligation' (2017) 20(2) *Legal Ethics* 201; John Flood and Morten Hviid, *The Cab Rank Rule: Its Meaning and Purpose in the New Legal Services Market* (A report for the Legal Services Board, 2013) <https://research.legalservicesboard.org.uk/wp-content/media/Cab-Rank-Rule_final-2013.pdf>).

¹²⁵ In *Hall v Simons* [2000] 3 All ER 673, 680 Lord Steyn doubted that the rule often obliged barristers to undertake work they would not otherwise accept. See also *Saif Ali v Sydney Mitchell & Co* [1980] AC 198, 221 (Diplock LJ) and *Giannarelli v Wraith* (1988) 165 CLR 543, [15] (Dawson J). The Australian High Court has favoured the retention of the rule (obiter): *Giannarelli v Wraith* (1988) 165 CLR 543 [4] (Brennan J); *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1 [27] (Gleeson CJ, Gummow, Hayne and Heydon JJ), 119 [377] (Callinan J).

hearings. By contrast, male counsel are briefed in 93% of hearings overall, with a disproportionately high number of appearances in tort law and contract law cases.

Figure 13: Practice areas in which male and female lead counsel were briefed for either party

Practice area	Male lead counsel (no.)	Female lead counsel (no.)
Administrative law	34	6
Admiralty law	1	0
Banking & finance	4	0
Bankruptcy	5	1
Civil procedure	27	0
Competition law	10	0
Constitutional law	10	0
Contract law	38	0
Corporations law	22	0
Criminal law	191	23
Discrimination law	5	1
Land & environment	2	0
Equity	25	0
Estate law	4	0
Evidence	6	0
Extradition	2	2
Family law	4	0
Immigration law	29	7
Industrial law	26	0
Insurance law	6	0
Intellectual property	13	1
Legal practitioners	4	0
Native title	4	0
Property law	10	0
Statutory interpretation	29	1
Taxation law	35	3
Tort law	71	2
Workers compensation	4	0
Total	621	47

The cases in which female counsel were briefed as junior or ‘secondary’ counsel for applicant or respondent, that is with non-speaking roles, are slightly more varied than the types of cases in which female leaders were briefed. Overall, the legal practice areas in which female secondary counsel were briefed are still limited when total numbers of cases in diverse practice areas are considered. Figure 14 (below) lists the practice areas in which female secondary or junior counsel were briefed for either party.¹²⁶

There are some glaring gaps in the practice areas in which female counsel were briefed. No female counsel were briefed in the 11 corporate law cases heard orally. There are other important areas of legal practice where women counsel are seriously under-represented. No female counsel were briefed in the 19 contracts cases heard orally. These included some large commercial law matters. Only two secondary female counsel were briefed in ‘non-speaking’ roles in the contracts cases. There were 13 equity cases heard orally, but only four secondary female briefs in non-speaking roles. Just one woman was briefed in a competition law matter as secondary counsel for a respondent, where there were five cases heard orally. These are the types of matters in which counsels’ fees are likely to be significant. So, there is a noticeable absence of high fee-paying briefs for women barristers in the contract, corporate and equity practice categories.

The over-representation of women counsel in criminal matters may be explained in part by the number of legally aided cases in criminal law applications (see above Figure 4 in Part VI) and the possibility that female counsel are more likely to accept legal aid briefs where low brief fees may discourage male advocates. There were 23 female counsel briefed as lead counsel for either party and 65 women briefed as secondary counsel, out of the total of 107 criminal applications heard orally. The gender pay gap at the Australian bar is well known.¹²⁷ In 2016, Fiona McLeod SC, then President of the Law Council of Australia, noted that the Bar ‘was among the worst professions for unequal pay, due in part to the lack of opportunities for women to work on more expensive cases, despite their experience’.¹²⁸ The brief fees payable by Legal Aid, even for High Court appearances,¹²⁹ are low by comparison with fees payable where the applicant is not legally aided.¹³⁰ While a

¹²⁶ The count comprises individual counsel, rather than cases. There were cases in which more than one female was briefed.

¹²⁷ Samantha Woodhill, ‘Barristers Top the Gender Pay Gap List’, *Australasian Lawyer* (June 2016) reporting a study by Ben Phillips, principal research fellow at the ANU Centre for Social Research and Methods <<https://www.australasianlawyer.com.au/news/barristers-top-the-gender-pay-gap-list-217716.aspx>>.

¹²⁸ Jane Lee, ‘Lawyers Call for Women Barristers to Be Briefed in 30 Per Cent of Cases by 2020’, *The Sydney Morning Herald* (online), 24 June 2016 <<https://www.smh.com.au/politics/federal/lawyers-call-for-women-barristers-to-be-briefed-in-30-per-cent-of-cases-by-2020-20160624-gpqt9.html>>.

¹²⁹ For approvals made on or after 9 December 2013, the Legal Aid Commission of NSW scale fee for High Court special leave application appearances in criminal matters is \$1150 for junior counsel and \$1860 for senior counsel: Legal Aid NSW, *Commonwealth Criminal Matters — Counsel* <<https://www.legalaid.nsw.gov.au/for-lawyers/fee-scales/commonwealth-matters/criminal-matters-counsel>>.

¹³⁰ The Federal Court of Australia provides a national guide to counsels’ fees (issued 28 June 2013): appearance at hearing on applications and appeals (daily rate including conference) of \$900–4200 for junior counsel and \$2060–6400 for senior counsel. While the guide does not apply to High Court matters it provides some indication of the starting point for appearances in High Court special leave

legal aid body was recorded as the briefing solicitor of female barristers on the transcripts in only four applications, there would be a further proportion of legally aided applications in criminal matters where private solicitors acted for applicants. Where counsel appears in a criminal matter briefed by a private solicitor, it is not possible to know from the transcript whether the applicant is legally aided.

Figure 14: Female secondary counsel practice areas

Practice areas in which female 'secondary' counsel were briefed	Number of female secondary counsel (either party)	Total oral cases in category
Administrative law (including discrimination law)	13	23
Banking & finance	2	2
Bankruptcy & insolvency (including corporate insolvency)	2	3
Civil procedure	5	14
Competition law	1	5
Constitutional law	5	5
Contract	2	19
Criminal law	65	107
Equity	4	13
Estate law	1	2
Family law	1	1
Extradition	3	2
Immigration law	7	18
Industrial law	1	13
Intellectual property	3	6
Property law (including native title)	4	5
Statutory interpretation	5	15
Taxation	8	19
Tort	13	36
Total	145	308

Given the gender pay gap at the Bar, female counsel are perhaps prepared to accept a legal aid brief where a male counterpart might not readily do so, notwithstanding the 'cab rank' rule.¹³¹ It has been suggested in the United Kingdom that criminal and family law fees payable on legal aid briefs do not amount to 'proper professional fees' and so barristers are not compelled to accept such work under the

applications: W G Soden, *National Guide to Counsels' Fees* (28 June 2013) Federal Court of Australia <<http://www.fedcourt.gov.au/forms-and-fees/legal-costs/national-guide-counsel-fees>>.

¹³¹ See above n 123.

rule.¹³² The position in Australia is unknown given the absence of any research concerning the operation of the cab rank rule.

Figure 15 (below) demonstrates that female lead counsel for applicants were briefed mostly by private law firms (79% of female counsel briefs for applicants), with 21% briefed by government or a legal aid body. Where female leaders appeared for respondents, they were briefed mostly by government respondents (78%).

Figure 15: Briefing solicitors for female lead counsel

	Appearing as Female Lead Counsel For				Overall	
Briefing solicitor	Applicant		Respondent		All briefings	
Government	4%	1	78%	18	40%	19
Legal Aid	17%	4	–	0	9%	4
Private	79%	19	22%	5	51%	24

Brief fees payable by government would generally be lower¹³³ than fees commanded by senior counsel briefed privately.¹³⁴ This may have an influence on the distribution of government briefs, particularly where counsel is briefed to appear for the respondent to resist an application, rather than for the applicant to prosecute it.

The fact that government respondents briefed more female lead barristers than did private law firms representing respondents may reflect a level of commitment by government to the *Law Council of Australia Model Equitable Briefing Policy*.¹³⁵ Though apparently, in High Court matters, that level of commitment is not particularly strong. This dissonance between government briefing patterns depending on whether it is the applicant or the respondent is puzzling.

Under the *Model Equitable Briefing Policy*, the Law Council of Australia and its members encourage those briefing or selecting barristers to make all reasonable endeavours to brief women barristers with seniority, expertise and experience in the

¹³² Flood and Hviid, above n 124. See also, Bar Standards Board, *The 'Cab Rank Rule': A Fresh View* (2013) <https://www.barstandardsboard.org.uk/media/1460590/bsb_-_cab_rank_rule_paper_28_2_13_v6_final.pdf>.

¹³³ For example, *Legal Services Directions 2017* (Cth) app D, 5 provides for a maximum senior counsel daily rate of \$3,500 (inclusive of GST) without the approval of the Attorney-General and a maximum junior counsel daily rate of \$2,300 (inclusive of GST) without such approval. Under NSW *Attorney General's Rates for Legal Representation* (as at 1 August 2018) the Junior Counsel rate is \$290 per hour with a daily maximum of \$2900 plus GST and the Senior Counsel rate is \$480 per hour with a daily maximum of \$4800 plus GST: <<http://www.justice.nsw.gov.au/legal-services-coordination/Pages/info-for-govt-agencies/attorney-generals-rates-for-legal-representation.aspx>>.

¹³⁴ Soden, above n 130.

¹³⁵ Law Council of Australia, *Equitable Briefing Policy* (2016) <<https://lawcouncil.asn.au/policy-agenda/advancing-the-profession/equal-opportunities-in-the-law/national-model-gender-equitable-briefing-policy>>. See also the observation made that proactive change is required by the legal profession, Justice Melissa Perry, 'There Should be More Women in the Courtroom: Justice Perry' (2015) 37(7) *Bulletin* (Law Society of South Australia) 12–13.

relevant practice area. The policy includes a target that by 1 July 2018, senior women barristers would account for at least 20% of all briefs and/or 20% of the value of all brief fees paid to senior barristers, with briefs to junior women barristers accounting for at least 30% of all briefs and/or 30% of the value of all brief fees paid to junior barristers. The Australian Government Solicitor has adopted the Equitable Briefing Policy as have various governments and statutory agencies around Australia.¹³⁶ Many, but not all, of the targets were met over the first reporting period (2016–17 financial year): women barristers received 20% of total briefs and 15% of the total fees charged by barristers; junior barristers received 28% of briefs; and senior barristers received 12% of briefs.¹³⁷ Yet, the numbers of female advocates briefed in lead roles in special leave applications by government is relatively insignificant, underlining the lack of diversity in lawyers who influence the flow of appellate work.

XI Conclusion

A final appellate court such as the High Court has no control over the types and numbers of applications seeking special leave to appeal. Ultimately, the Court selects the appeals it will hear having regard to s 35A of the *Judiciary Act* and must be guided by public interest considerations in selecting cases for appellate hearing. Yet, this study demonstrates that access to the apex court in the Australian justice system depends on external factors beyond the control of the Court. They are factors that operate well outside the considerations that s 35A mandates as relevant to the grant of special leave to appeal.

This study demonstrates that a High Court appeal is, in many cases, confined to a particular class of litigants and that differentials exist across types, age and resources of applicants for special leave. Litigants' ability to bring special leave applications at all is fettered by severe restrictions on legal aid, which result in significant numbers of self-represented applicants and consequent challenges for the Court in fairly and efficiently dealing with those applications. The data reveals few female or child applicants, underlining a lack of diversity in applicants that must correlate to a similar absence of diverse litigants in final appeals. The study also exposes disproportionate success rates of the most capable litigants, indicating that government and corporate parties must exert influence on the Court's final appellate work and, accordingly, on the ultimate development of Australian law. In terms of

¹³⁶ Australian Government Solicitor, <<http://ags.gov.au/publications/news/equitable-briefing-24August2017.html>>. The NSW Government adopted the previous Equitable Briefing Policy for Female Barristers and Advocates in 2009: Gabrielle Upton, Attorney General, *NSW Government Raising Bar on Equitable Briefing* (Media Release, 8 November 2016): <<http://www.justice.nsw.gov.au/Documents/Media%20Releases/2016/MR16-nsw-raising-bar-on-equitable-briefing.pdf>>; Fair Work Australia and Legal Aid NSW have adopted the policy: Law Council of Australia, above n 135. See also, Law Council of Australia, 'Huge Boost for Equality as Large Firms Adopt Law Council's Equitable Briefing Policy En Masse' (Press Release, 4 November 2016) for a list of law firms adopting the policy <<https://www.lawcouncil.asn.au/media/media-releases/huge-boost-for-equality-as-large-firms-adopt-law-councils-equitable-briefing-policy-en-masse>>. For commentary see Jane Southward and Jason McCormack, 'New Charter for the Advancement of Women' (2016) 28 *Law Society of New South Wales Journal* 34.

¹³⁷ Law Council of Australia, *National Model Gender Equitable Briefing Policy: Annual Report (2016-2017 Financial Year)* (2017) 4 <[https://www.lawcouncil.asn.au/files/web-pdf/EBP%20Annual%20Report%20\(FY%202016-17\).pdf?500422d8-2a91-e811-93fc-005056be13b5](https://www.lawcouncil.asn.au/files/web-pdf/EBP%20Annual%20Report%20(FY%202016-17).pdf?500422d8-2a91-e811-93fc-005056be13b5)>

legal representation, the data concerning counsel appearing in special leave applications confirms the continuing lack of gender diversity, particularly of leading counsel. Importantly, the same data accentuates the influence of a small number of very senior lawyers on the cases selected for appellate consideration.

This study is timely. Its findings are particularly significant in light of the 2016 procedural changes for special leave applications. The 2016 changes increase the proportion of ‘paper only’ determinations and consequently render the special leave process less open to research than ever before. This loss of transparency makes this study of value to justice administrators, lawyers and future researchers as the findings highlight the need for ongoing monitoring of external barriers to the just and effective operation of the special leave to appeal process.

The Principle of Legality: Protecting Statutory Rights from Statutory Infringement?

Bruce Chen*

Abstract

The principle of legality has been described as a presumption that Parliament does not intend to abrogate or curtail fundamental common law rights, freedoms, immunities and principles (collectively ‘fundamental common law protections’), and depart from the general system of law, except by clear and unambiguous language. It is a common law interpretive principle that protects fundamental common law protections from infringing statutes. Nevertheless, a question arises as to whether the principle can and should be extended beyond the realms of the common law, to protect certain statutory rights in Australia. This is yet to be considered at length in academic commentary and is presently unresolved. Such a development would exponentially increase the principle’s potential scope of application. This article seeks to examine comprehensively the issue by reference to the principle of legality’s origins and rationale, the concept of parliamentary sovereignty and doctrine of implied repeal, and analogous instances where statutory rights are protected through interpretation. This article argues that, on balance, the principle of legality should not be utilised to protect statutory rights from statutory infringement.

I Introduction

The principle of legality is a common law interpretive principle, most frequently associated with the presumption that Parliament does not intend to interfere with fundamental common law rights, freedoms and immunities (hereafter referred to collectively as ‘fundamental common law protections’), except by clear and unambiguous language. The principle’s roots ‘lie firmly in the common law’.¹ Several commentators have observed that the principle has sprung from the increasing ubiquity of statutes. The principle was in ‘respon[se] to the avalanche of legislation which regulates our conduct’² and ‘developed ... in an age of expanding

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¹ Mark Elliott, ‘Constitutional Legislation, Fundamental Rights and Article 50’ on Mark Elliott, *Public Law for Everyone* (8 September 2016) <<https://publiclawforeveryone.com/2016/09/08/brexit-constitutional-legislation-fundamental-rights-and-article-50/>>.

² John Doyle and Belinda Wells, ‘How Far Can the Common Law Go towards Protecting Human Rights?’ in Philip Alston (ed), *Promoting Human Rights through Bills of Rights: Comparative Perspectives* (1999, Oxford University Press) 17, 18.

legislative activity, when the proliferating functions of the State might have inadvertently or benignly impinged on rights'.³ In recent times, some have gone so far as to describe the principle of legality as a common law bill of rights. For example, it has been said that the principle's 'significance is that in this age of statutes, our courts have developed a common law bill of rights, freedoms and principles that is strongly resistant to legislative encroachment'.⁴

However, with the proliferation of statutes in the contemporary Australian legal system, the 'rights of citizens are as likely nowadays to be founded in statutory statement as in the common law'.⁵ This gives rise to the question: can and should the principle of legality equally be applied to protect certain statutory rights? The implication being that a statutory provision could be interpreted restrictively, pursuant to the principle of legality, to prevent it from infringing another statutory provision that confers a right.

This notion is of fairly recent history. The leading Australian authority is the 1996 decision of Finn J in the Federal Court of Australia case of *Buck v Comcare*.⁶ Only a few years earlier, prior to his appointment to the Court, Finn had remarked on the 'large encroachment by statute on the traditional domains of the common law'.⁷ Finn described how '[f]rom the 1970's we have witnessed the proliferation of statutes which have entrenched directly upon areas of governmental, commercial and social life which for the most part were regulated, if at all, by common law doctrines'.⁸ He was also cognisant of the 'reaffirmation'⁹ of the common law principle of legality.

Likely inspired by the above trends, in *Buck* Finn J enlarged the principle of legality's protective scope to encompass statutory rights. That case concerned statutory rights to workers' compensation under the *Safety, Rehabilitation and Compensation Act 1988* (Cth) ('SRC Act'). His Honour said (in obiter dicta):

That right does not fall into the category of 'common law' rights which traditionally have been safeguarded from legislative interference etc in the absence of clear and unambiguous statutory language ... Yet it is a right of sufficient significance to the individual in my view, that, where there may be doubt as to Parliament's intention, the courts should favour an interpretation which safeguards the individual. To confine our interpretative safeguards to the protection of 'fundamental common law rights' is to ignore that we live in an age of statutes and that it is statute which, more often than not, provides the rights necessary to secure the basic amenities of life in modern society.¹⁰

³ Philip A Joseph, 'The Principle of Legality: Constitutional Innovation' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 27, 31–2.

⁴ Dan Meagher, 'The Principle of Legality as Clear Statement Rule: Significance and Problems' (2014) 36(3) *Sydney Law Review* 413, 415.

⁵ D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 245.

⁶ (1996) 66 FCR 359 ('*Buck*').

⁷ Paul Finn, 'Statutes and the Common Law' (1992) 22(1) *Western Australian Law Review* 7, 7.

⁸ *Ibid* 11.

⁹ *Ibid* 28.

¹⁰ *Buck* (1996) 66 FCR 359, 364–5.

The references to “‘common law’ rights which traditionally have been safeguarded from legislative interference etc in the absence of clear and unambiguous language’, and ‘interpretative safeguards to the protection of “fundamental common law rights”’, are undoubtedly references to what is commonly known as the principle of legality. Justice Finn extended the principle beyond the common law, to protect statutory rights to workers’ compensation.

The principle of legality is evolving and growing in scope. While there is some support for extending the principle to protect statutory rights, academic commentary has yet to consider it at length and the issue is presently unresolved in the jurisprudence. This is a topic of much significance and controversy. The extension of the principle of legality to protect statutory rights would represent an immense expansion of the principle, particularly with the proliferation of statutes in modern Australian society as described by Finn J. As to the principle’s impact on statutory interpretation, it has greatly risen in prominence in recent times.¹¹ It has become central to the process of statutory interpretation and been applied quite robustly by the courts.¹² Presumably then, a principle of legality that extends to statutory rights would make it more difficult for Parliament to amend or repeal those rights. The test of clear and unambiguous language for rebutting the principle is ‘weighty’;¹³ it is not of ‘a low standard’.¹⁴

Part II of this article outlines the rationale of the principle of legality. Part III examines Australian commentary and jurisprudence, to ascertain the level of agreement on whether the principle of legality applies to statutory rights and, if so, in what circumstances and to which rights. Part IV discusses whether an extended principle of legality is consistent with the rationale of the principle. Part V examines consistency with the concept of parliamentary sovereignty, including what is commonly described as ‘the doctrine of implied repeal’. That doctrine provides that ‘[i]f a later Act makes contrary provision to an earlier, Parliament (though it has not expressly said so) is taken to intend the earlier to be repealed’.¹⁵ Whether this is a key obstacle to an extended principle of legality is considered.

Parts VI to VIII of this article consider existing approaches that are analogous to a principle of legality that protect statutes or statutory rights, and might support the principle’s extension. Part VI analyses a notion being developed by the courts in the United Kingdom (‘UK’) that there are ‘constitutional’ statutes, such that subsequent statutes ought to be interpreted strictly so as not to repeal or amend those earlier constitutional statutes. Part VII discusses statutory bills of rights, such as the Victorian *Charter of Human Rights and Responsibilities Act 2006* (Vic) (‘*Victorian Charter*’), which set out human rights in statute and require legislation to be interpreted compatibly with them where possible. Part VIII considers other

¹¹ See Bruce Chen, ‘The French Court and the Principle of Legality’ (2018) 41(2) *University of New South Wales Law Journal* 401.

¹² *Ibid.*

¹³ George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 43.

¹⁴ *X7 v Australian Crime Commission* (2013) 248 CLR 92, 153 [158] (Kiefel J).

¹⁵ Francis Bennion, *Bennion on Statutory Interpretation: A Code* (LexisNexis, 5th ed, 2008) 304.

interpretive presumptions that fall within the scope of the principle of legality and have been taken to protect certain statutory rights.

Finally, Part IX of this article concludes that the question of whether the principle of legality should extend to statutory rights is a complex issue and the arguments pull in different directions. However, the principle of legality ultimately should not be extended to statutory rights because it would leave it vulnerable to arguments that it is inconsistent with the principle's origins and rationale, and introduces a large and undesirable element of uncertainty. Moreover, there is an actual lack of demonstrable utility in extending the principle in this way.

It is beyond the scope of this article to consider the interaction between federal and state legislation where there is inconsistency.¹⁶ Rather, this article focuses on the principle of legality's possible application where there is potential conflict within a statute or between statutes enacted in the same jurisdiction.

II The Rationale of the Principle of Legality

Recent commentary has heavily critiqued the principle of legality's rationale.¹⁷ The 'original rationale' of the principle has been outlined in several cases. In the seminal High Court of Australia case of *Potter v Minahan*,¹⁸ Justice O'Connor quoted approvingly from *Maxwell on Statutes*,¹⁹ which stated that '[i]t is in the last degree improbable' that Parliament would abrogate or curtail fundamental common law protections 'without expressing its intention with irresistible clearness'.²⁰ This was endorsed by six members of the High Court in *Bropho v Western Australia*.²¹ In *Coco v The Queen*,²² four members of the High Court said that the legislature must have 'not only directed its attention' to the question of abrogation or curtailment of the fundamental common law protection, but 'also determined upon abrogation or curtailment of them'.²³ As if to reinforce the point, Gleeson CJ in *Al-Kateb v Godwin*²⁴ added that Parliament must do so 'consciously' — the legislature must have 'consciously decided upon abrogation or curtailment'.²⁵ The principle of legality is therefore, in the author's view, a presumption concerned with actual legislative intention²⁶ — Parliament's state of mind is such that it is unlikely to enact legislation that abrogates or curtails fundamental common law protections.

¹⁶ See *Australian Constitution* s 109.

¹⁷ See, most recently, Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017).

¹⁸ (1908) 7 CLR 277 ('*Potter*').

¹⁹ J Anwyl Theobald (ed), *Maxwell on the Interpretation of Statutes* (Sweet & Maxwell, 4th ed, 1905).
²⁰ (1908) 7 CLR 277, 304.

²¹ (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ) ('*Bropho*').
²² (1994) 179 CLR 427 ('*Coco*').

²³ *Ibid* 437 (Mason CJ, Brennan, Gaudron and McHugh JJ). See also *Lee v NSW Crime Commission* (2013) 251 CLR 196, 310 [314] (Gageler and Keane JJ), cited in *North Australian Aboriginal Justice Agency v NT* (2015) 256 CLR 569, 606 [81] (Gageler J).
²⁴ (2004) 219 CLR 562.

²⁵ *Ibid* 577 [19] (emphasis added).

²⁶ See also Jeffrey Goldsworthy, 'The Principle of Legality and Legislative Intention' in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 46, 58; Philip Sales, 'Rights and Fundamental Rights in English Law' (2016) 75(1)

Whenever Parliament legislates, it does not do so ‘in a vacuum’²⁷ or ‘on a blank sheet’.²⁸ Rather, Parliament is taken to be aware of standing principles of statutory interpretation, including the principle of legality. Thus, the principle of legality is said to be grounded in an institutional relationship between Parliament and the courts. In an influential passage in *Electrolux Home Products Pty Ltd v Australian Workers’ Union*,²⁹ Gleeson CJ said that the principle of legality is ‘known both to Parliament and the courts, upon which statutory language will be interpreted’.³⁰ The High Court has subsequently cited this obiter dictum in several cases,³¹ to the point that it ‘reflect[s] orthodoxy’.³²

The ‘original rationale’ of the principle has come under scrutiny. One of the reasons for this is the identification of another rationale (at least, arguably) for the principle of legality — the ‘*Simms* rationale’.³³ In *R v Secretary of State for the Home Department; Ex parte Simms*,³⁴ Lord Hoffmann said that

the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.³⁵

Cambridge Law Journal 86, 99, citing *Electrolux Home Products Pty Ltd v Australian Workers’ Union* (2004) 221 CLR 309, 329 (Gleeson CJ).

²⁷ Philip Sales, ‘A Comparison of the Principle of Legality and Section 3 of the *Human Rights Act 1998*’ (2009) 125 (Oct) *Law Quarterly Review* 598, 600, citing Rupert Cross, John Bell and George Engle, *Cross: Statutory Interpretation* (Butterworths, 3rd ed, 1995) 165. See also *Brown v Tasmania* (2017) 261 CLR 328, 494 [535] (Edelman J); Susan Glazebrook, ‘Do They Say What They Mean and Mean What They Say? Some Issues in Statutory Interpretation in the 21st Century’ (2015) 14(1) *Otago Law Review* 61, 69.

²⁸ Lord Johan Steyn, ‘The Intractable Problem of the Interpretation of Legal Texts’ (2003) 25(1) *Sydney Law Review* 5, 18.

²⁹ (2004) 221 CLR 309.

³⁰ *Ibid* 329 [21].

³¹ See *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 520 [47] (French CJ); *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ); *Australian Crime Commission v Stoddart* (2011) 244 CLR 554, 622 [182] (Crennan, Kiefel and Bell JJ); *Australian Education Union v General Manager of Fair Work Australia* (2012) 246 CLR 117, 135 [30] (French CJ, Crennan and Kiefel JJ); *Monis v The Queen* (2013) 249 CLR 92, 209 [331] (Crennan, Kiefel and Bell JJ); *Lee v NSW Crime Commission* (2013) 251 CLR 196, 264 [171] (Kiefel J), 309–10 [312] (Gageler and Keane JJ); *North Australian Aboriginal Justice Agency v NT* (2015) 256 CLR 569, 581 [11] (French CJ, Kiefel and Bell JJ); *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 351 ALR 225, 248 [84] (Edelman J) (*‘Probuild’*).

³² Matthew Groves and Dan Meagher, ‘The Principle of Legality in Australian and New Zealand Law — Final Observations’ in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 258, 261. Cf John Basten, ‘The Principle of Legality — An Unhelpful Label?’ in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 74, 76; Sir Anthony Mason, ‘The Interaction of Statute Law and Common Law’ (2016) 90(5) *Australian Law Journal* 324, 329.

³³ See Brendan Lim, ‘The Normativity of the Principle of Legality’ (2013) 37(2) *Melbourne University Law Review* 372.

³⁴ [2000] 2 AC 115 (*‘Simms’*).

³⁵ *Ibid* 131.

Lim has said this is a ‘normative justification’.³⁶ It ‘places less emphasis’³⁷ on actual legislative intention, and arguably this rationale is ‘not really motivated by genuine uncertainty about Parliament’s intentions’³⁸ (although this can be disputed). Rather, Lim said, the ‘*Simms* rationale’ is ‘concerned with enhancing the parliamentary process’ through ‘political transparency and the amenability of the legislature’s decision to democratic scrutiny and electoral discipline’.³⁹ The above passage from *Simms* has been widely cited, such that it has obtained the status of a ‘definitive modern restatement of the principle’.⁴⁰

The ‘original rationale’ is also under challenge by the High Court of Australia bringing into doubt the notion of actual legislative intention. In *Lacey v Attorney-General (Qld)*,⁴¹ the High Court controversially determined that the concept of legislative intention is a product of the statutory interpretation process itself, rather than something that is pre-existing and subsequently ascertained through the statutory interpretation process.⁴² However, there are some indicators that more recent appointments to the High Court might recognise the existence of actual legislative intention.⁴³ Commentators have also argued, convincingly, that *Lacey* rejects traditional understandings of legislative intention, undermines the rationale of the principle of legality,⁴⁴ and that ‘judges continue to habitually speak *as if* legislative intentions (really) exist’.⁴⁵

Moreover, the High Court has not resiled from the ‘original rationale’, and its close association with actual legislative intention. In *Lee v New South Wales Crime Commission*,⁴⁶ Gageler and Keane JJ said that ‘[m]ore recent statements of the principle in this Court do not detract from the rationale identified in *Potter*, *Bropho* and *Coco* but rather reinforce that rationale’.⁴⁷ In *North Australian Aboriginal Justice Agency v Northern Territory*,⁴⁸ French CJ, Kiefel and Bell JJ

³⁶ Lim, ‘The Normativity of the Principle of Legality’, above n 33, 374.

³⁷ Ibid.

³⁸ Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 308.

³⁹ Brendan Lim, ‘The Rationales for the Principle of Legality’ in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 2, 7.

⁴⁰ Matthew Groves, ‘The Principle of Legality and Administrative Discretion’ in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 168, 168.

⁴¹ (2011) 242 CLR 573 (‘*Lacey*’).

⁴² Ibid 592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also *Momcilovic v The Queen* (2011) 245 CLR 1, 141 [341] (Hayne J) (‘*Momcilovic*’).

⁴³ See Stephen Gageler, ‘Legislative Intention’ (2015) 41(1) *Monash University Law Review* 1; Graham v Minister for Immigration and Border Protection (2017) 347 ALR 350, 369 [76] (Edelman J) in relation to both constitutional and any other (legislative) texts; *Probuild* (2018) 351 ALR 225, 247–8 [84], 249 [87] (Edelman J).

⁴⁴ See Richard Ekins and Jeffrey Goldsworthy, ‘The Reality and Indispensability of Legislative Intentions’ (2014) 36(1) *Sydney Law Review* 39, 42–5; Jeffrey Goldsworthy, ‘Is Legislative Supremacy under Threat? Statutory Interpretation, Legislative Intention and Common-Law Principles’ (2016) 60(11) *Quadrant* 56; Goldsworthy, ‘The Principle of Legality and Legislative Intention’, above n 26, 55–6.

⁴⁵ Goldsworthy, ‘The Principle of Legality and Legislative Intention’, above n 26, 55 (emphasis in original).

⁴⁶ (2013) 251 CLR 196.

⁴⁷ Ibid 309 [312].

⁴⁸ (2015) 256 CLR 569 (‘*North Australian Aboriginal Justice Agency v NT*’).

treated the normative justification as entirely consistent with the ‘original rationale’,⁴⁹ which it acknowledged was ‘longstanding’.⁵⁰ In *Brown v Tasmania*,⁵¹ Edelman J referred to the ‘original rationale’ first set out in *Potter*.⁵² As such, the ‘*Simms* rationale’ is currently better understood as a corollary of the ‘original rationale’. This issue has been dealt with at greater length elsewhere.⁵³

In any event, even if the ‘*Simms* rationale’ were accepted, actual legislative intention is still relevant, as this article argues in Part IV. The principle of legality is motivated by a search for Parliament’s actual legislative intention, which is what *Simms* must still be referring to when it says that ‘Parliament must squarely confront what it is doing’.⁵⁴ The significance of actual legislative intention to whether the principle of legality should apply to statutory rights will soon become apparent.

III Statutory Rights

A Existing Commentary on the Principle of Legality and Statutory Rights

This article now turns to ascertain the level of agreement that the principle of legality can protect certain statutory rights in Australia. Academic commentary has acknowledged that statutes can influence the development of fundamental common law rights and freedoms.⁵⁵ However, this article is concerned with the question of whether the principle of legality should be extended *directly* to statutory rights — such that the principle goes beyond protecting the common law.

Elsewhere in the academic commentary, there is some support for this proposition. Pearce and Geddes acknowledge that ‘[t]he same approach’ to fundamental common law protections ‘could be adopted in relation to statutory rights — clear words would be necessary to limit them’.⁵⁶ Lim goes further, advocating for a shift from ‘fundamental’ common law protections, toward

⁴⁹ Ibid 581–2 [11].

⁵⁰ Ibid 581 [11].

⁵¹ (2017) 261 CLR 328.

⁵² Ibid 498 [544] citing *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 259 [15], which quoted *Potter* (1908) 7 CLR 277, 304.

⁵³ See Bruce Chen, ‘The Principle of Legality: Issues of Rationale and Application’ (2015) 41(2) *Monash University Law Review* 329, 338–9 and the citations therein.

⁵⁴ See Goldsworthy, ‘The Principle of Legality and Legislative Intention’, above n 26, 58; Dan Meagher, ‘The Principle of Legality and Proportionality in Australian Law’ in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 114, 135–6; Williams and Hume, above n 13, 37–8, 46.

⁵⁵ Dan Meagher, ‘The Common Law Principle of Legality in the Age of Rights’ (2011) 35(2) *Melbourne University Law Review* 449, 457; Meagher, ‘The Principle of Legality as a Clear Statement Rule’, above n 4, 430; Kris Gledhill, ‘Rights-Promoting Statutory Interpretive Obligations and the “Principle” of Legality’ in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 93, 93. See further James Spigelman, *The McPherson Lecture Series: Statutory Interpretation and Human Rights* (University of Queensland Press, 2008) vol 3, 29.

⁵⁶ Pearce and Geddes, above n 5, 245. See also George Williams and Daniel Reynolds, ‘The Racial Discrimination Act and Inconsistency under the Australian Constitution’ (2015) 36(1) *Adelaide Law Review* 241, 250–1.

‘vulnerable’ rights,⁵⁷ being a ‘mode of analysis or framework for argument’ with respect to protecting ‘rights which the political process is inherently inapt to protect, because they are claimed by a politically weak minority, or because they go to the substance of the political process and democratic representation itself’.⁵⁸ He considers that there is no reason this ought to be limited to the common law, and can be extended to ‘vulnerable’ statutory rights.⁵⁹

By contrast, Basten JA of the New South Wales Court of Appeal has expressed doubt extra-curially that the principle of legality can be extended to statutory rights.⁶⁰ In his Honour’s view, such a development ‘offers the potential to destroy the principle as a freestanding doctrine’.⁶¹ Justice Basten has pointed to the fact that ‘[w]hen statute affects statute we are within that growing and challenging area of conflict resolution where the conflict is between laws of the same polity’.⁶² Developing Basten JA’s thoughts further — that polity is Parliament. An extended principle of legality would mean that certain statutory rights receive favourable treatment over other statutory provisions, despite all being enacted by Parliament. This links with the concept of parliamentary sovereignty, which is discussed in Part V of this article. Moreover, Basten JA has said that, in practice, ‘the principle of legality cannot necessarily provide useful guidance in determining whether one particular statutory provision derogates from another’.⁶³ That is because where there is conflict between laws, the principle of harmonious construction and the doctrine of implied repeal may already be raised.⁶⁴ Part V of this article also discusses these concepts.

B Statutory Rights within the Context of their Act

The notion that the principle of legality can protect statutory rights has been ‘followed on occasion by courts’.⁶⁵ As noted above, the leading authority is *Buck*⁶⁶ regarding workers’ compensation rights under s 57(2) of the *SRC Act*. In *Australian Postal Corporation v Sinnaiah*, the Full Court of the Federal Court applied *Buck*.⁶⁷ *Sinnaiah* dealt with a different provision of the same Act (s 37(7)), which suspended an employee’s compensation rights for workplace injury, and their ability to institute and continue compensation proceedings, for refusal or failure to undertake a

⁵⁷ Lim, ‘The Normativity of the Principle of Legality’, above n 33, 398–409; Lim, ‘The Rationales for the Principle of Legality’, above n 39, 10.

⁵⁸ Lim, ‘The Normativity of the Principle of Legality’, above n 33, 413. See also Lim, ‘The Rationales for the Principle of Legality’, above n 39, 10–11.

⁵⁹ Lim, ‘The Normativity of the Principle of Legality’, above n 33, 409–12.

⁶⁰ [2018] NSWCA 123 (8 June 2018). Cf his Honour’s judgment in *Elliott v Minister Administering Fisheries Management Act 1994* (2018) 357 ALR 175 (‘*Elliott*’). See also below Part IIIB.

⁶¹ Basten, above n 32, 84.

⁶² *Ibid* 84–5.

⁶³ *Ibid* 85.

⁶⁴ *Ibid*.

⁶⁵ Pearce and Geddes, above n 5, 245.

⁶⁶ (1996) 66 FCR 359.

⁶⁷ (2013) 213 FCR 449 (‘*Sinnaiah*’).

rehabilitation program.⁶⁸ A constructional question arose where a person claimed compensation for multiple injuries but only failed to undertake rehabilitation for one injury: did the suspension take hold in respect of all of the injuries? The Full Court (Cowdroy, Buchanan and Katzmann JJ) in *Sinnaiah* considered that Finn J's obiter dicta remarks 'apply with equal force here'.⁶⁹ The Court observed that a broad interpretation of the provision would result in the suspension of various rights to compensation under the Act.⁷⁰ It rejected the broad interpretation.

In these cases,⁷¹ the possibility of infringement of the statutory right lay in the same legislative scheme that granted the right in the first place. The right to compensation under the same statute could be suspended due to failures to comply with requirements under the *SRC Act* — in *Buck*, to attend a medical examination and, in *Sinnaiah*, to undertake a rehabilitation program. On one view, a parallel may be drawn between the recognition of fundamental common law protections and the recognition of certain statutory provisions within the context of their Acts, for the purposes of the principle of legality. Some common law protections can be taken to be more fundamental than others and deserving of special protection. Not all common law protections fall within the scope of the principle of legality. As Kirby J has said, '[t]he key word is "fundamental"'.⁷² Similarly, a statutory provision might be considered more significant or valuable (see below Part IIID) than another provision and deserving of special protection. That may be so even if the two provisions in question were enacted at the same time in the same statute.

However, in a recent case the New South Wales Court of Appeal (Basten JA, Beazley P and Payne JA agreeing) was much less enthusiastic about the principle of legality's application to statutory rights. In *Elliott*,⁷³ the appellant was a commercial fisherman who had his catch entitlements limited pursuant to a new quota shares scheme. He challenged this, submitting that the statutory provision under the *Fisheries Management Act 1994* (NSW) which gave the power to issue 'further classes of shares'⁷⁴ should be construed narrowly, so as not to allow for impairment of existing property rights without clear and unambiguous language.

The Court considered that the right was more accurately described as a statutory right to participate in fisheries. It referred to the principle of legality's

⁶⁸ *SRC Act* s 37(1) provides that a rehabilitation authority may make a determination that an employee who has suffered an injury resulting in an incapacity for work or an impairment should undertake a rehabilitation program.

⁶⁹ (2013) 213 FCR 449, 458 [34].

⁷⁰ *Ibid* 458–9 [35].

⁷¹ See also *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414, 442–3 [105]–[107], 443 [110], 444 [114] ('valuable' visa rights); *Tassell v Hayes* (1987) 163 CLR 34, 41, 44 (Mason, Wilson and Dawson JJ) (right to be tried by jury); cf *PPHF v Director-General of Security* (2011) 193 FCR 436, 441 [38] (Robertson J, Perram J agreeing) (the right to merits review) where the principle was rebutted as there was no 'doubt as to Parliament's intention'.

⁷² *Malika Holdings Pty Ltd v Stretton* (2001) 204 CLR 290, 328 [121], citing *Potter* (1908) 7 CLR 277, 304 (O'Connor J). See also Chief Justice JJ Spigelman, 'Principle of Legality and the Clear Statement Principle' (2005) 79(12) *Australian Law Journal* 769, 781. Although it has been suggested that this designation should be discarded: see *Momcilovic* (2011) 245 CLR 1, 46 [43] (French CJ); *Tajjour v New South Wales* (2014) 254 CLR 508, 545 [28] (French CJ). Cf Groves, above n 40, 171. (2018) 357 ALR 175.

⁷⁴ Section 71A.

‘original rationale’ and ‘*Simms* rationale’.⁷⁵ Significantly, it considered that under either, ‘there is no necessary constraint depriving the holder of *statutory* rights of the benefit of the principle’.⁷⁶ This can be contrasted with the views expressed in this article. Nevertheless, the Court remained ambivalent, couching the principle of legality’s application in uncertain terms: ‘[t]o the extent that the principle applies’⁷⁷ and ‘[e]ven conceding some limited operation’⁷⁸ to it. Should the principle apply, the Court considered it had ‘muted’⁷⁹ or ‘limited’⁸⁰ application because the right ‘being one conferred by statute, is inherently liable to alteration by statute’.⁸¹ Notably, the Court drew upon analogous authority about a person’s rights under a fishing licence being ‘subject to certain powers conferred on the Director of Fisheries by the Act, and subject to other statutory provisions’.⁸²

Elliott highlights that it is at least questionable whether the principle of legality should be applied in these contexts. Arguably, the principle should have no role to play when statutory rights are bestowed by Parliament subject to qualification. The improbability of Parliament curtailing a statutory right is significantly negated when the right is enacted as curtailed in the first place. Such a right must be read in the context of the Act as a whole, including other statutory provisions. One should query the justification for treating a right as being subject to special protection from its qualifications. The principle of legality is applied to statutes against a background of external standards — historically, it has been fundamental common law protections. In *Sinnaiah*, the principle was applied to statutory rights against a previously non-existent internal standard — that is, provisions within the same Act. This is not akin to the principle of legality’s usual operation. The objection is not necessarily the constructional outcome reached in *Sinnaiah*, but rather that the Court applied the principle of legality in doing so.

C Statutory Rights and Subsequent Legislation

By contrast, there are several authorities where the courts have applied *Buck* to safeguard statutory rights from *subsequent* legislative developments.⁸³ The subsequent statute is interpreted restrictively, so as not to infringe the earlier

⁷⁵ *Elliott* (2018) 357 ALR 175, 184 [36]–[37].

⁷⁶ *Ibid* 184 [38] (emphasis in original).

⁷⁷ *Ibid* 185 [39].

⁷⁸ *Ibid* 189 [60].

⁷⁹ *Ibid* 185 [39].

⁸⁰ *Ibid* 185 [42], 189 [60].

⁸¹ *Ibid* 185 [39].

⁸² *Ibid* 187 [47], quoting *South Australian River Fishery Association Inc v South Australia* (2003) 85 SASR 373, 387 [74] (Doyle CJ, Besanko J agreeing).

⁸³ See *Re Schofield; Ex parte Rangott v P&B Barron Pty Ltd* (1997) 72 FCR 280 (restriction on admissibility of transcript of examination in bankruptcy proceedings); *SB v Parramatta Children’s Court* (2007) 39 Fam LR 132 (right of a parent to appear and examine and cross-examine witnesses in Children’s Court proceedings); *Davies v Barancewicz* (2011) 5 ACTLR 305 (right to sue for workers’ compensation for negligence on the part of someone other than their employer); *Oxenbould v The Solicitors’ Trust* [2011] TASSC 57 (3 November 2011) (overturned on appeal to the Full Court of the Tasmanian Supreme Court, but not on this point) (claims for payment pursuant to the *Legal Profession Act 1993* (Tas) for investment losses suffered from the failure of a law firm’s mortgage loan scheme); *Anglican Care v NSW Nurses and Midwives’ Association* (2015) 231 FCR 316 (‘*Anglican Care*’).

statutory right. The principle of legality is being applied to a subsequent infringing statute against a pre-existing external standard — that is, an earlier statutory right. That right, having been conferred earlier in time and deemed protected, is shielded from subsequent legislative infringement. This is not dissimilar to the principle's application to fundamental common law protections.

The most authoritative decision in this respect was again by the Full Court of the Federal Court in relation to workers' compensation: *Anglican Care*.⁸⁴ Section 130 of the *Fair Work Act 2009* (Cth) removed an employee's entitlement to accrue leave while receiving workers' compensation. Section 130(2) provided an exception where the accrual of such leave is 'permitted by a compensation law'. Justices Bromberg and Katzmann applied *Buck* and *Sinnaiah* to construe the words 'permitted by', such that s 130 did not remove an employee's 'previously enjoyed' statutory right to accrue leave while receiving workers' compensation under the earlier *Workers Compensation Act 1987* (NSW).⁸⁵

There are other cases where the principle of legality's application to statutory rights has been found to be rebutted, due to there being clear and unambiguous language in the subsequent statute and no doubt as to Parliament's intention. This is consistent with the usual operation of the principle of legality. Does this mean, though, that in these cases the courts have actually accepted that the principle can extend to statutory rights? These cases may be divided into three categories. The first category is where the courts have accepted this proposition.⁸⁶ The second category is where the courts have not positively approved or otherwise objected to the notion.⁸⁷ The third category is where the courts have expressly raised uncertainty regarding the proposition, but in any event found that the principle was rebutted.⁸⁸

In summary, the issue of whether the principle of legality extends to protect statutory rights from subsequent legislation remains to be finally determined. The High Court has yet to decide the issue. Acceptance of the proposition by lower courts has been infrequent. Most significantly, the Full Court of the Federal Court endorsed

⁸⁴ (2015) 231 FCR 316.

⁸⁵ *Ibid* 327 [58]–[61], [64]; cf 320 [15] (Jessup J).

⁸⁶ *DPP (WA) v GTR* [2007] WASC 318 (20 December 2007) [28]–[29] (right of certain young offenders not to be regarded as convicted; outcome upheld on appeal to Western Australia Court of Appeal); *Humphreys v Mulco Tool & Engineering Pty Ltd* (2006) 4 DDCR 389, 409 [77]–[78] (rights to claim workers' compensation); *Tabcorp Holdings Ltd v Victoria* [2014] VSC 301 (26 June 2014) [1], [97], [99] (right to terminal payment on grant of new gambling licences; appealed, but this point left unaddressed).

⁸⁷ *Calimoso v Minister for Immigration and Border Protection* (2016) 70 AAR 503, 510 [28]–[30] (right to merits review); *Minister for Immigration and Citizenship v Islam* (2012) 202 FCR 46, 55 [54] (special leave refused by the High Court) (right to merits review); *The Owners – Strata Plan No 72357 v Dasco Constructions Pty Ltd* (2010) 77 NSWLR 607, 611 [24] (right to sue the builder for breach implied warranties); *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* (2005) 222 CLR 439, 472 [81]–[83], 474 [89] (right of Australian citizenship); *Harvey v Minister Administering Water Management Act 2000* (2008) 160 LGERA 50, 71–2 [65] (rights to extract and use groundwater).

⁸⁸ *Brett v Director General, Department of Education* [2015] WASCA 66 (7 April 2015) [18]–[20] (Buss, Le Miere and Murphy JJ) (right to bring a claim for unfair dismissal): 'It is not clear that the court should apply the same approach to limitations on statutory rights as to limitations on common law rights'.

and applied the proposition in *Anglican Care*. However, there remains an air of doubt and uncertainty.

D Which Statutory Rights are Protected?

So far, this article has referred to whether the principle of legality can extend to certain statutory rights. It is clear that there is no support for the application of the principle to *all* statutory rights. In *Buck*, Finn J spoke of statutory rights of ‘sufficient significance to the individual’,⁸⁹ observing that such rights can ‘secure the basic amenities of life in modern society’.⁹⁰ Alternatively, the language of ‘valuable’ statutory rights has been used in this context.⁹¹ This terminology of ‘significant’ or ‘valuable’ statutory rights can be contrasted with ‘fundamental’ common law protections, although it is arguably a distinction without a difference. Pursuant to the principle of legality, the courts presume Parliament to be aware of, and committed to, respecting ‘fundamental’ common law protections because of their significance and value.⁹²

The difficulties in identifying ‘fundamental’ common law protections have previously been articulated.⁹³ There is no authoritative statement of fundamental common law protections, since their recognition is ‘ultimately a matter of judicial choice’.⁹⁴ While attempts have been made to identify the range of fundamental common law protections, no two lists are identical — nor can they be. Recognition of a fundamental common law protection may be contestable or controversial, and thus prone to accusations of judicial activism, given its implications for the statutory interpretation process. It is ‘never really made clear’⁹⁵ how the courts determine whether a common law protection is fundamental or not. To uphold actual parliamentary intention and sovereignty, and the democratic nature of lawmaking, ‘one needs reasonably determinate criteria to identify the fundamental rights which are going to be the basis to create these interpretive effects’.⁹⁶

Similar criticisms apply to ‘significant’ or ‘valuable’ statutory rights. There is no authoritative statement of significant or valuable rights under statute law; such rights also being subject to judicial recognition. It follows that there is uncertainty about which statutory rights are actually significant or valuable and thus protected

⁸⁹ *Buck* (1996) 66 FCR 359, 364. See also *Sinnaiah* (2013) 213 FCR 449, 458 [32]: ‘significant statutory rights’; *DPP (WA) v GTR* [2007] WASC 318 (20 December 2007) [28] (McKechnie J): ‘right of significance to the individual’; *Humphreys v Mulco Tool & Engineering Pty Ltd* (2006) 4 DDCR 389, 409 [77] (McColl JA dissenting): ‘significant statutory entitlements’.

⁹⁰ *Buck* (1996) 66 FCR 359, 365.

⁹¹ See *Minister for Immigration and Citizenship v Haneef* (2007) 163 FCR 414, 443 [110]. See also *Tabcorp Holdings Ltd v Victoria* (2016) 328 ALR 375, 389 [68]; *New South Wales v Macquarie Bank Ltd* (1992) 30 NSWLR 307, 318, 319–20 (Kirby P).

⁹² See further Chen, in response to the supposed distinction between ‘important’ and ‘fundamental’ common law protections: ‘The Principle of Legality: Issues of Rationale and Application’, above n 53, 350.

⁹³ *Ibid* 343–53. As to Lim’s conception of ‘vulnerable’ rights, ‘a criterion of “vulnerability” may give rise to as many questions as one of “fundamental”’: Groves, above n 40, 172 n 25.

⁹⁴ Dan Meagher, ‘The Common Law Principle of Legality’ (2013) 38(4) *Alternative Law Journal* 209, 211; Meagher, ‘The Common Law Principle of Legality in the Age of Rights’, above n 55, 459.

⁹⁵ Meagher, ‘The Common Law Principle of Legality in the Age of Rights’, above n 55, 458.

⁹⁶ Sales, ‘Rights and Fundamental Rights in English Law’, above n 26, 92.

by the principle. Whether a statutory right is significant or valuable (or even a statutory *right* at all), may be contestable and controversial. For example, in *Vikpro Pty Ltd v Wyuna Court Pty Ltd*,⁹⁷ Holmes CJ in the Queensland Court of Appeal simply said in obiter dicta that a lessee's right to resist payment of land tax under the *Land Tax Act 1915* (Qld) was not a 'right of such significance' as to attract the principle of legality.⁹⁸ The reasons for this conclusion were unarticulated. Cases to date have not fleshed out the process and criteria for the identification of significant or valuable statutory rights.⁹⁹

There is potential for a far broader range of significant or valuable statutory rights, as compared with fundamental common law protections. With the proliferation of statutes in modern Australian society, there are hundreds, if not thousands, of rights on the statute books, awaiting potential judicial pronouncement that they attract the protection of the principle of legality. Until these rights receive such pronouncement, and in the absence of a clear process or criteria for identification, their status is unclear. This causes difficulty for the operation of the principle of legality. How are parliamentarians to enact legislation (and parliamentary drafters to draft legislation) with this degree of uncertainty? This is an issue further explored below in Part IV in the context of the principle of legality's rationale.

An additional question is whether the recognition of significant or valuable statutory rights, like fundamental common law protections, may be 'weakened or removed'.¹⁰⁰ In respect of fundamental common law protections, McHugh J in *Malika Holdings Pty Ltd v Stretton*¹⁰¹ stated that '[w]hat is fundamental in one age or place may not be regarded as fundamental in another age or place'.¹⁰² The High Court has recognised that the weakening or removal of fundamental common law protections may occur,¹⁰³ including by subsequent legislative incursions.¹⁰⁴ So, presumably, the same may also occur with significant or valuable statutory rights.¹⁰⁵

⁹⁷ (2016) 103 ATR 787.

⁹⁸ Ibid 796–7 [29].

⁹⁹ It is also not clear how to reconcile protection of a significant or valuable statutory right pursuant to the principle of legality, against competing valuable or significant non-statutory rights. See, eg, *Vikpro Pty Ltd v Wyuna Court Pty Ltd* (2016) 103 ATR 787, 796–7 [29] (Holmes CJ). As to the principle of legality and fundamental common law protections, see Chen, 'The Principle of Legality: Issues of Rationale and Application', above n 53, 362–73; and as to s 32(1) of the *Victorian Charter* and human rights, see Bruce Chen, 'The Principle of Legality and Section 32(1) of the Charter: Same Same or Different?' on Gilbert + Tobin Centre of Public Law, *AUSPUBLAW* (26 October 2016) <<https://auspublaw.org/2016/10/same-same-or-different/>>.

¹⁰⁰ *Bropho* (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

¹⁰¹ (2001) 204 CLR 290.

¹⁰² Ibid 298 [28].

¹⁰³ *Bropho* (1990) 171 CLR 1, 18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ). In that case, the High Court held that the presumption that the Crown is not bound by legislation was weakened. Historical reasons underlying the presumption were considered much less relevant in Australian contemporary conditions, since the activities of the Crown now 'reach into almost all aspects of commercial, industrial and developmental endeavour' and it commonly 'compet[e] and ha[s] commercial dealings on the same basis as private enterprise': at 19.

¹⁰⁴ See Chen, 'The Principle of Legality: Issues of Rationale and Application', above n 53, 356–8, 359–61.

¹⁰⁵ As to 'constitutional' statutes in the UK, discussed in Part VI below, it has been said that their '[c]onstitutional force may be acquired, or may conceivably come to be lost': Sales, 'Rights and Fundamental Rights in English Law', above n 26, 100 n 72.

If that is correct, then only those statutory rights that are not regularly subject to amendment should be able to attract the protection of the principle of legality.

IV Consistency with Rationale of the Principle of Legality

The principle of legality's 'original rationale', as set out earlier, is that '[i]t is in the last degree improbable' that the legislature would abrogate or curtail fundamental common law protections 'without expressing its intention with irresistible clearness'.¹⁰⁶ Parliament must have both 'directed its attention' to, and 'determined' or 'consciously decided' upon, abrogation or curtailment.¹⁰⁷ Arguably, it could also be said it is in the last degree improbable that the legislature would repeal or amend certain statutory rights. There are likely to be statutory rights so 'significant' or 'valuable' that they ought not be taken to be easily abrogated or curtailed.

However, Australian commentator Meagher has explained that the principle of legality 'can only operate as articulated in *Coco* if parliaments in Australia have prior notice as to the content of the common law bill of rights'.¹⁰⁸ Parliament cannot direct its attention to, and determine or consciously decide upon, abrogation or curtailment of something to which it is not alert. This is also consistent with the notion that the principle of legality reflects the institutional relationship between Parliament and the courts. The principle of legality is meant to be known to both Parliament and the courts for the purposes of statutory interpretation.

There are potentially significant difficulties with extending the principle of legality to certain statutory rights. As noted above, this is not within the principle's traditional scope. There is a lack of certainty about whether the principle can extend to significant or valuable statutory rights (and what those rights are). Given this absence of widespread agreement and acceptance, Parliament arguably cannot have determined or consciously decided upon repeal or amendment of certain statutory rights, when it is not even aware that it is required to do so. Arguably, nor does extending the principle of legality beyond its conventional understanding reflect the institutional relationship between Parliament and the courts. The principle must be grounded in an awareness from both institutions as to how it will operate. Thus, an extended principle of legality would likely lead to accusations of judicial activism. As Goldsworthy has said: 'judges do not possess the same relatively unfettered authority to change these interpretive principles'.¹⁰⁹

¹⁰⁶ *Potter* (1908) 7 CLR 277, 304 (citation omitted).

¹⁰⁷ See above nn 23, 25 and accompanying text.

¹⁰⁸ Meagher, 'The Common Law Principle of Legality', above n 94, 213. See also Meagher, 'The Principle of Legality as a Clear Statement Rule', above n 4. By contrast, a bill of human rights provides greater clarity about what rights it protects: see Chen, 'The Principle of Legality and Section 32(1) of the Charter: Same Same or Different?', above n 99. See further Sales, 'A Comparison of the Principle of Legality and Section 3 of the *Human Rights Act 1998*', above n 27, 610 in the UK context.

¹⁰⁹ Goldsworthy, 'Is Legislative Supremacy under Threat?', above n 44, 60, citing *Corporate Affairs Commission (NSW) v Yuill* (1991) 172 CLR 319, 322 (Brennan J). See also Jeffrey Goldsworthy, 'The Constitution and its Common Law Background' (2014) 25(4) *Public Law Review* 265, 270–1. Cf *Probuild* (2018) 351 ALR 225, 239 [58] (Gageler J).

Lim relies on the ‘*Simms* rationale’ — the normative justification that the principle of legality is concerned with enhancing the parliamentary process — to argue that the principle can extend to certain statutory rights.¹¹⁰ He has argued that since the ‘*Simms* rationale’ is animated by this purpose, the principle of legality should be directed away from its application to ‘fundamental’ common law protections, and towards, ‘vulnerable’ rights, which might be sourced in legislation. Lim conceptualised such rights as those ‘vulnerable to casual abrogation’.¹¹¹ They ‘may not be adequately protected by ordinary political processes, in the sense that there is a real risk they might be abrogated by Parliament without effective opportunity for electoral discipline’.¹¹²

However, even if the ‘*Simms* rationale’ were accepted as a new and different rationale, actual legislative intention is still relevant.¹¹³ Lord Hoffmann said that ‘Parliament must squarely confront what it is doing’.¹¹⁴ As Goldsworthy has pointed out, his Lordship ‘wrote as if legislatures can have intentions’.¹¹⁵ Indeed, Lim made a rather significant concession — ‘if Parliament is unaware that a particular right in a particular context will be regarded’ as fundamental, then it ‘it may be accepted’ that Parliament ‘may not be moved “squarely [t]o confront what it is doing”’.¹¹⁶ This is consistent with some UK commentary. The principle of legality ‘has no application “if the necessary contextual backcloth of a relevant basic common law principle is absent”’.¹¹⁷ The fundamental common law protection must be ‘already present’.¹¹⁸ Speaking extra-curially, Justice Philip Sales (as his Lordship then was) adopted the words in *Simms* to say that

if Parliament cannot be taken to *have been squarely on notice* of the existence of [a fundamental common law protection], then the process of ‘reading down’ or modifying the natural meaning of the words used would undermine rather than promote Parliament’s intention as expressed in the legislation.¹¹⁹

Along those lines, Parliament cannot be taken to be ‘squarely on notice’ about the existence of certain statutory rights that are protected by the principle of legality, and to ‘squarely confront’ them in enacting legislation. The ‘necessary contextual backcloth’ is not there; there is no common understanding and acceptance that the principle of legality extends to certain statutory rights.¹²⁰

¹¹⁰ Lim, ‘The Normativity of the Principle of Legality’, above n 33, 398, 409.

¹¹¹ Ibid 403.

¹¹² Ibid.

¹¹³ See Goldsworthy, ‘The Principle of Legality and Legislative Intention’, above n 26.

¹¹⁴ *Simms* [2000] 2 AC 115, 131.

¹¹⁵ Goldsworthy, ‘The Principle of Legality and Legislative Intention’, above n 26, 58.

¹¹⁶ Lim, ‘The Normativity of the Principle of Legality’, above n 33, 409.

¹¹⁷ Sales, ‘A Comparison of the Principle of Legality and Section 3 of the *Human Rights Act 1998*’, above n 27, 605, quoting *R v Secretary of State for the Home Department; Ex parte Stafford* [1999] 2 AC 38, 49 (Lord Steyn).

¹¹⁸ Oliver Jones, *Bennion on Statutory Interpretation: A Code* (LexisNexis, 6th ed, 2013) 754.

¹¹⁹ Sales, ‘A Comparison of the Principle of Legality and Section 3 of the *Human Rights Act 1998*’, above n 27, 605 (emphasis added).

¹²⁰ As to what implications this line of reasoning has for newly recognised fundamental common law protections, see further Chen, ‘The Principle of Legality: Issues of Rationale and Application’, above n 53, 347–53.

V Consistency with Parliamentary Sovereignty and Implied Repeal

Whether an extended principle of legality is consistent with parliamentary sovereignty is a foundational issue. We have already seen the implications for parliamentary sovereignty that arise from the uncertainty about which statutory rights might be protected by the principle of legality. There are further questions, explored below, regarding whether an extended principle of legality might impermissibly limit legislative power.

The writings of Dicey loom large when it comes to the concept of parliamentary sovereignty. In his seminal work, *Introduction to the Study of the Law of the Constitution*,¹²¹ Dicey said that it was a trait of parliamentary sovereignty that the legislature had the power ‘to alter any law, fundamental or otherwise, as freely and in the same manner as other laws’.¹²² No bill is ‘legally speaking, a whit more sacred or immutable than the others, for they each will be neither more nor less than an Act of Parliament’.¹²³ Thus, on the Diceyan view, all statutes are equal and Parliament can legislate to repeal or amend existing statutes.¹²⁴

Further, Dicey said that ‘a sovereign power cannot, while retaining its sovereign character, restrict its own powers by any particular enactment’.¹²⁵ It would contradict the notion of parliamentary sovereignty. Dicey approved the statement that a ‘Parliament cannot so bind its successors by the terms of any statute, as to limit the discretion of a future Parliament’.¹²⁶ Hence, on the Diceyan view, the doctrine of implied repeal is integral to parliamentary sovereignty.¹²⁷ The doctrine stands for the proposition that ‘[i]f a later Act makes contrary provision to an earlier, Parliament (though it has not expressly said so) is taken to intend the earlier to be repealed’.¹²⁸ The High Court of Australia has endorsed this proposition.¹²⁹ Thus, if the principle of legality is applied to protect *earlier* significant or valuable statutory

¹²¹ A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1960).

¹²² Ibid 91. See also 88.

¹²³ Ibid 88–9.

¹²⁴ See further discussion in Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009) 302; Sir John Laws, ‘Constitutional Guarantees’ (2008) 29(1) *Statute Law Review* 1, 3; Mark Elliott, ‘Embracing “Constitutional” Legislation: Towards Fundamental Law?’ (2003) 54(1) *Northern Ireland Legal Quarterly* 25; Alison L Young, *Parliamentary Sovereignty and the Human Rights Act* (Hart Publishing, 2009) 9–10; Geoffrey Lindell, ‘The Statutory Protection of Rights and Parliamentary Sovereignty: Guidance from the United Kingdom?’ (2006) 17(3) *Public Law Review* 188, 193, 198, see also 199–200.

¹²⁵ Dicey, above n 121, 68 n 1.

¹²⁶ Ibid 67, quoting Alpheus Todd, *Parliamentary Government in the British Colonies* (Little, Brown, and Company, 1st ed, 1880) 192. See also 68 n 1.

¹²⁷ Kavanagh, above n 124, 297; Young, above n 124, 32–3; Elliott, above n 124, 25; Lindell, above n 124, 189, 193. Cf Goldsworthy, *Parliamentary Sovereignty*, above n 38, 182, 299; Daniel Kalderimis and Chapman Tripp, ‘*R v Pora*’ [2001] *New Zealand Law Journal* 369.

¹²⁸ Bennion, above n 15, 304. Rather than ‘implied repeal’, Pearce and Geddes prefer to say ‘the later Act displaces or supersedes the earlier’: above n 5, 328.

¹²⁹ See, eg, *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603, 616, 617 (Latham CJ), 623 (Starke J), 625 (Dixon J), 633–4 (Evatt J, in obiter dicta); *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130, 137–8 [18] (Gummow and Hayne JJ) (‘*Ferdinands*’); *Firebird Global Master Fund II Ltd v Nauru* (2015) 258 CLR 31, 60 [82] (French CJ and Kiefel J).

rights from *subsequent* infringing statutes, concerns would undoubtedly be raised that this approach is contrary to the doctrine of implied repeal and challenges parliamentary sovereignty.¹³⁰

It is true that the principle of legality's extension to significant or valuable statutory rights would mean that some statutory provisions are, in Dicey's words, 'more sacred or immutable' than others and Parliament cannot 'as freely and in the same manner' repeal or amend such provisions.¹³¹ This does create a hierarchy of statutory provisions. It is only those that are more significant or valuable that are protected by the principle of legality. But otherwise, the protection of significant or valuable statutory rights pursuant to the principle of legality is consistent with Dicey's conceptualisation of parliamentary sovereignty. Parliament retains the ability to repeal or amend such statutory rights, provided that it has used clear and unambiguous language to do so in the subsequent infringing statute. After all, the principle of legality is considered an orthodox principle of statutory interpretation that 'operat[es] consistently with the principle of parliamentary supremacy'.¹³² It 'can be defeated ... by a sovereign legislature'.¹³³

Moreover, the so-called doctrine of implied repeal does not pose a difficulty for extending the principle of legality to significant or valuable statutory rights. Implied repeal is a 'comparatively rare phenomenon'.¹³⁴ Commentators have recognised as much — it is expressed more accurately as a presumption *against* implied repeal,¹³⁵ it is a 'measure of last resort',¹³⁶ its operation is 'much more limited than is often assumed',¹³⁷ and it 'is not the rule, but the exception'.¹³⁸ In Australian jurisprudence, it is said that the courts firstly presume that 'statutes do not contradict one another',¹³⁹ and seek to apply a 'principle of harmonious construction'¹⁴⁰ so that both statutes can operate harmoniously.¹⁴¹

The respective thresholds for rebutting the principle of legality and the presumption against implied repeal are perhaps not so different. Both would apply at the point of resolving apparent conflict. In Australia, pursuant to the principle of legality 'the implication must be necessary, not just available or somehow thought

¹³⁰ Although noting that, in the Australian context, some prefer to use the term 'parliamentary supremacy' rather than 'parliamentary sovereignty', since parliaments across Australia are subject to the *Australian Constitution*.

¹³¹ See above nn 122–3 and accompanying text.

¹³² Chief Justice Robert French, 'The Courts and the Parliament' (2013) 87(12) *Australian Law Journal* 820, 827.

¹³³ Alexander Williams and George Williams, 'The British Bill of Rights Debate: Lessons from Australia' [2016] *Public Law* 471, 484.

¹³⁴ *Butler v A-G (Vic)* (1961) 106 CLR 268, 275 (Fullagar J), cited in *Dossett v TKJ Nominees Pty Ltd* (2003) 218 CLR 1, 14.

¹³⁵ Bennion, above n 15, 305. See also Young, above n 124, 36–7.

¹³⁶ Kavanagh, above n 124, 298.

¹³⁷ *Ibid.*

¹³⁸ Young, above n 124, 36. See also at 37.

¹³⁹ *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1, 19 [48] (Crennan, Kiefel and Bell JJ) citing *Ferdinands* (2006) 225 CLR 130, 137–8 [18], 146 [49], 148 [54]–[55].

¹⁴⁰ *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1, 33 [98] (Gageler J) citing *Butler v A-G (Vic)* (1961) 106 CLR 268, 276, *Saraswati v The Queen* (1991) 172 CLR 1, 17, *Ferdinands* (2006) 225 CLR 130, 133–4 [4], 137–8 [18].

¹⁴¹ See also Young, above n 124, 43; Kavanagh, above n 124, 297–8 in the UK context.

to be desirable'.¹⁴² The predominant approach¹⁴³ is to ask whether rebuttal of the principle is necessary to 'prevent the statutory provisions from becoming inoperative or meaningless'¹⁴⁴ by reference to their purpose. The approach to the presumption against implied repeal is also stringent in the Australian cases. For instance, in *Saraswati v The Queen*,¹⁴⁵ Gaudron J stated: 'It is a basic rule of construction that, in the absence of express words, an earlier statutory provision is not repealed, altered or derogated from by a later provision unless an intention to that effect is *necessarily to be implied*.'¹⁴⁶ A necessary implication under the presumption against implied repeal will arise where 'the provisions of a later enactment are so inconsistent with or repugnant to the provisions of an earlier one, that the two cannot stand together';¹⁴⁷ they 'cannot be reconciled'.¹⁴⁸

The same terminology of 'necessary implication' is used in both the presumption against implied repeal and the principle of legality. As Basten has said, the 'strength' of the presumption against implied repeal 'reflects the language used to describe' the principle of legality.¹⁴⁹ Both the presumption against implied repeal and an extended principle of legality would afford stringent protection to earlier statutes. That being the case, a principle of legality that protects significant or valuable statutory rights is consistent with the presumption against implied repeal. Thus, implied repeal — since it is the exception to the rule — presents no theoretical obstacle. The principle of legality is in addition to, and reinforces, the existing proposition that an earlier statute is not to be impliedly repealed without clear and unambiguous language.¹⁵⁰ An extended principle of legality would be another interpretive principle relevant to resolving apparent conflict between statutes.¹⁵¹

¹⁴² *X7 v Australian Crime Commission* (2013) 248 CLR 92, 149 [142], cited with approval in *Lee v NSW Crime Commission* (2013) 251 CLR 196, 265 [173] (Kiefel J). See also *Plenty v Dillon* (1991) 171 CLR 635, 654: 'inconvenience in carrying out an object authorised by legislation is not a ground for eroding fundamental common law rights'.

¹⁴³ See further Chen, 'The French Court and the Principle of Legality', above n 11, 428–32.

¹⁴⁴ *Coco* (1994) 179 CLR 427, 436, 438 (Mason CJ, Brennan, Gaudron and McHugh JJ).

¹⁴⁵ (1991) 172 CLR 1.

¹⁴⁶ *Ibid* 17 (emphasis added). See also *Goodwin v Phillips* (1908) 7 CLR 1, 10, quoting Walter S Scott, *Craies on Statute Law* (Sweet and Maxwell, 4th ed, 1936) 303; *Hack v Minister for Lands (NSW)* (1905) 3 CLR 10, 23–4 (O'Connor J); *Ferdinands* (2006) 225 CLR 130, 134 [4] (Gleeson CJ), 163 [109]–[110] (Kirby J); *Shergold v Tanner* (2002) 209 CLR 126, 136–7 [34] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ). See further the general tenor of *Butler v A-G (Vic)* (1961) 106 CLR 268, 275–6 (Fullagar J), 280 (Kitto J), 290 (Windeyer J).

¹⁴⁷ *Hack v Minister for Lands (NSW)* (1905) 3 CLR 10, 23 (O'Connor J), quoting *Kutner v Phillips* [1891] 2 QB 267, 271–2. See further *Butler v A-G (Vic)* (1961) 106 CLR 268, 276 (Fullagar J), 280 (Kitto J). See also Young, above n 124, 36–7 in the UK context.

¹⁴⁸ *Firebird Global Master Fund II Ltd v Nauru* (2015) 258 CLR 31, 61 [87] (French CJ and Kiefel J).

¹⁴⁹ Basten, above n 32, 86.

¹⁵⁰ See also Williams and Hume, above n 13, 19; Lim, 'The Normativity of the Principle of Legality', above n 33, 412. Cf Basten, above n 32, 85; Lim, 'The Normativity of the Principle of Legality', above n 33, 411.

¹⁵¹ There are of course other interpretive principles that do not necessarily point in the same direction, such as *generalia specialibus non derogant* — the presumption that general laws do not derogate from special laws.

VI ‘Constitutional’ Statutes

The remainder of this article focuses on analogous instances where statutory rights are protected through interpretation and whether they provide support for extending the principle of legality to significant or valuable statutory rights. The analysis shows that an extended principle of legality is not as revolutionary for Australia as it might first seem; however, difficulties remain.

First, a parallel may be drawn between the principle of legality protecting statutory rights and the recognition and protection of ‘constitutional’ statutes in UK jurisprudence. Judicial commentators have observed how the strict interpretation of subsequent statutes safeguards these constitutional statutes.¹⁵² In obiter dicta, French CJ of the High Court of Australia said that the classification of constitutional statutes in the UK

has been used, albeit not without controversy (159), to attract to them the protection of a rule constraining their amendment by mere implication in a way which is analogous to the operation of the principle of legality in respect of common law rights and freedoms (160).¹⁵³

Lord Neuberger as President of the UK Supreme Court has remarked (extra-curially) that the protection of constitutional statutes ‘may in fact be no more than an extension of the principle of legality’.¹⁵⁴ Similarly, Lord Justice Sales (extra-curially) has said that the interpretive process requires respect for constitutional statutes ‘in the interpretation of later legislation in much the same way as by reference to fundamental rights under the principle of legality’.¹⁵⁵ Since the UK approach applies the principle of legality or something close to it to statute, this provides a useful comparator for considering whether to extend the principle of legality to statutory rights in Australia.

¹⁵² Lord Neuberger, ‘The Constitutional Role of the Supreme Court in the Context of Devolution in the UK’ (Speech delivered at the Lord Rodger Memorial Lecture 2016, Glasgow, 14 October 2016) <<https://www.supremecourt.uk/docs/speech-161014.pdf>> [18]–[20]; Sales, ‘Rights and Fundamental Rights in English Law’, above n 26, 91; *Cadia Holdings Pty Ltd v New South Wales* (2010) 242 CLR 195, 217–8 [55] (French CJ) (‘*Cadia Holdings*’); Robert French, ‘Foreword’ in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) v, viii; Laws, above n 124, 7–8, in commentary on his own judgment in *Thoburn v Sunderland City Council* [2003] QB 151 (‘*Thoburn*’).

¹⁵³ *Cadia Holdings* (2010) 242 CLR 195, 217–8 [55].

(159) See *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395, 419–20 [62] (Lord Rodger); ‘Editorial: Constitutional Statutes’, (2007) 28(2) *Statute Law Review* iii; Geoffrey Marshall, ‘Metric Measures and Martyrdom by Henry VIII Clause’, (2002) 118 (Oct) *Law Quarterly Review* 493, 495–6, 501.

(160) *Thoburn* [2003] QB 151, 185–7 [60]–[64] (Laws LJ); Daniel Greenberg (ed), *Craies on Legislation* (9th ed, 2008) 581–2.

¹⁵⁴ Neuberger, above n 152, [20].

¹⁵⁵ Sales, ‘Rights and Fundamental Rights in English Law’, above n 26, 91.

A United Kingdom Jurisprudence

*Thoburn*¹⁵⁶ is the ‘novel’¹⁵⁷ and ‘controversial’¹⁵⁸ decision that is ‘usually credited as being the source of the idea’¹⁵⁹ that constitutional statutes are subject to special protection through interpretation. The High Court of England and Wales (Laws LJ, Crane J agreeing) defined a ‘constitutional statute’ as one that ‘(a) conditions the legal relationship between citizen and state in some general, overarching manner, or (b) enlarges or diminishes the scope of what we would now regard as fundamental constitutional rights’.¹⁶⁰ Notably, the first limb of this definition makes the concept of constitutional statutes in the UK broader than the notion of significant or valuable statutory rights espoused in Australia.

The Court in *Thoburn*, referring to the principle of legality, extended it to encompass constitutional statutes. The Court said:

In the present state of its maturity the common law has come to recognise that there exist rights which should properly be classified as constitutional or fundamental ... And from this a further insight follows. We should recognise a hierarchy of Acts of Parliament: as it were ‘ordinary’ statutes and ‘constitutional’ statutes.¹⁶¹

The Court considered that the *European Communities Act 1972* (UK) was a constitutional statute.¹⁶² That Act incorporated European Community law into UK domestic law and was at the heart of the ‘Brexit’ debate about the UK’s decision to leave the European Union. Thus, the Court thought that the repeal or significant amendment of the Act would require ‘express words in the later statute, or ... words so specific that the inference of an actual determination to effect the result contended for was irresistible’.¹⁶³ ‘[G]eneral words could not be supplemented, so as to effect a repeal or significant amendment to a constitutional statute’.¹⁶⁴ Repeal or significant amendment of the *European Communities Act 1972* (UK) could not be by mere implication in a subsequent statute. It needed to be by *necessary* implication.

¹⁵⁶ [2003] QB 151.

¹⁵⁷ Adam Tomkins, *Public Law* (Oxford University Press, 2003) 124; Goldsworthy, *Parliamentary Sovereignty*, above n 38, 312; Elliott, above n 124, 28, 31; Christopher Forsyth and Mark Elliott, ‘The Legitimacy of Judicial Review’ [2003] *Public Law* 286, 298.

¹⁵⁸ Mark Leeming, ‘Equity: Ageless in the “Age of Statutes”’ (2015) 9(2) *Journal of Equity* 108, 109 n 5. See also Nicholas Bamforth, ‘A Constitutional Basis for Anti-discrimination Protection?’ (2003) 119 (Apr) *Law Quarterly Review* 215, 220; Matthew Zagor, ‘Judicial Rhetoric and Constitutional Identity: Comparative Approaches to Aliens’ Rights in the United Kingdom and Australia’ (2008) 19(4) *Public Law Review* 276, 277.

¹⁵⁹ David Feldman, ‘The Nature and Significance of “Constitutional” Legislation’ (2013) 129 (Jul) *Law Quarterly Review* 343, 345.

¹⁶⁰ *Thoburn* [2003] QB 151, 186 [62].

¹⁶¹ *Ibid.*

¹⁶² This was subsequently confirmed by the UK Supreme Court in the ‘Brexit’ litigation: *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61, 145 [67].

¹⁶³ *Thoburn* [2003] QB 151, 187 [63]. Some commentators have taken the view that the dicta in *Thoburn* stands for the proposition that constitutional statutes can only be repealed or significantly amended by express words. However, in light of the second limb of this quotation, such a reading is mistaken.

¹⁶⁴ *Ibid.*

The *Thoburn* approach has gained some support in the ensuing jurisprudence.¹⁶⁵ The UK Supreme Court went further in *H v Lord Advocate*.¹⁶⁶ Lord Hope, who gave the leading judgment, observed the ‘fundamental constitutional nature of the settlement’ achieved by the *Scotland Act 1998* (UK).¹⁶⁷ When it came to overriding this statute, ‘only an express provision to that effect could be held to lead to such a result’.¹⁶⁸ The fact that the *Scotland Act* was a constitutional statute ‘in itself must be held to render it incapable of being altered otherwise than by an express enactment’.¹⁶⁹

While Lord Hope did not refer explicitly to the principle of legality or *Thoburn*, significantly, his Lordship accepted that constitutional statutes were subject to special protection. Moreover, Lord Hope considered that a constitutional statute could only be rebutted by express words, and not by necessary implication. This goes beyond *Thoburn* and the principle of legality — the latter of which can be rebutted by necessary implication. In that respect, *H v Lord Advocate* is ‘quite radical’.¹⁷⁰

There are other statutes considered to be constitutional.¹⁷¹ But there is limited case law on whether subsequent statutes are to be interpreted strictly so as to protect these constitutional statutes. The UK position remains to be finally determined. The discussion in *Thoburn* and *H v Lord Advocate* was only obiter dicta. As Lord Neuberger has said (extra-curially): ‘It remains to be seen whether the notion of entrenched legislation with special constitutional status ... is correct, and, if it is, how far it goes’.¹⁷² This potential development is, in some respects, defensible, but in other respects has its weaknesses.

¹⁶⁵ *H v Lord Advocate* [2013] 1 AC 413; *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) (3 November 2016) (reported at [2018] AC 61, 61–99 with the subsequent UK Supreme Court decision); cf *R (Miller) v Secretary of State for Exiting the European Union* [2018] AC 61, 100–204 (on appeal). See also *R (HS2 Action Alliance) v Secretary of State for Transport* [2014] 1 WLR 324, 382 [207] (Lords Neuberger and Mance), where an issue arose as to how to deal with a potential conflict between a constitutional statute and another, subsequent constitutional statute.

¹⁶⁶ [2013] 1 AC 413.

¹⁶⁷ *Ibid* 435 [30].

¹⁶⁸ *Ibid*.

¹⁶⁹ *Ibid*.

¹⁷⁰ Farrah Ahmed and Adam Perry, ‘The Quasi-Entrenchment of Constitutional Statutes’ (2014) 73(3) *Cambridge Law Journal* 514, 521.

¹⁷¹ Other statutes considered to be ‘constitutional’ include the *Magna Carta 1297*, 25 Edw 1, c 9, *Petition of Right 1628*, 3 Car 1, c 1, *Bill of Rights 1689*, 1 Wm & M Sess 2, c 2, *Claim of Right Act 1689*, c 28, *Act of Settlement 1701*, 12 & 13 Wm 3, c 2, *Act of Union 1707*, c 7, *Union with Scotland Act 1706*, 6 Ann, c 11, *Representation of the People Acts 1832*, 2 & 3 Wm 4, c 45, 1867, 30 & 31 Vict, c 102, and 1884, 48 & 49 Vict, c 3, *Human Rights Act 1998* (UK) c 42, *Government of Wales Act 1998* (UK) c 38, and *Constitutional Reform Act 2005* (UK) c 4: see *Thoburn* [2003] QB 151, 186 [62]; *R (HS2 Action Alliance) v Secretary of State for Transport* [2014] 1 WLR 324, 382 [207]. See further Bennion, above n 15, 189 n 11, 190 n 1 for other potential examples.

¹⁷² Neuberger, above n 152, [19].

B *Consistency with Parliamentary Sovereignty and Implied Repeal*

Concerns about consistency with parliamentary sovereignty for constitutional statutes in the UK bear some resemblance to concerns about a principle of legality that protects significant or valuable statutory rights in Australia. As outlined above, Dicey's view was that no bill is 'more sacred or immutable' than others.¹⁷³ Dicey further stated that '[t]here is under the English constitution no marked or clear distinction between laws which are not fundamental or constitutional and laws which are fundamental or constitutional'.¹⁷⁴ The *Thoburn* decision does run counter to these ideals. The High Court of England and Wales recognised the creation of 'a hierarchy of Acts of Parliament'¹⁷⁵ — ordinary statutes and constitutional statutes. Lord Justice Laws admitted as much in extra-curial commentary on his own judgment, when he said that while '[i]t is inherent in the doctrine [of parliamentary sovereignty] that there is no hierarchy of statutes; all have equal status',¹⁷⁶ 'we need the means to create a hierarchy of laws, so that our constitution may furnish constitutional guarantees'.¹⁷⁷

Nevertheless, the Court in *Thoburn* maintained the view that its approach 'preserves the sovereignty of the legislature'¹⁷⁸ and Laws LJ stated extra-curially that the *Thoburn* approach was not a 'fatal assault on the doctrine of sovereignty'.¹⁷⁹ This is presumably because constitutional statutes can still be repealed by express words or necessary implication.¹⁸⁰ The same could be said of a principle of legality in Australia that protects significant or valuable statutory rights.

Specifically in relation to implied repeal, the Court in *Thoburn* considered that the doctrine of implied repeal had been 'modified',¹⁸¹ by creating an 'exception'¹⁸² to the doctrine with respect to constitutional statutes. However, this description is apt to mislead. As discussed above, implied repeal is itself the exception to the presumption *against* implied repeal. The *Thoburn* approach provides an additional interpretive principle that reinforces the presumption against implied repeal. It does not truly involve a modification as has been suggested. Similarly, an extended principle of legality in the Australian context would not involve a modification of the doctrine of implied repeal.

C *The Position in Australia*

The purpose of this article is not to consider whether the concept of constitutional statutes should be applied in Australia. Nevertheless, for completeness this issue will

¹⁷³ See above n 123 and accompanying text.

¹⁷⁴ Dicey, above n 121, 89.

¹⁷⁵ *Thoburn* [2003] QB 151, 186 [62].

¹⁷⁶ Laws, above n 124, 3.

¹⁷⁷ *Ibid* 5.

¹⁷⁸ *Thoburn* [2003] QB 151, 187 [64].

¹⁷⁹ Laws, above n 124, 6 (emphasis added).

¹⁸⁰ *Ibid* 6–7.

¹⁸¹ *Thoburn* [2003] QB 151, 185 [59]. See further Laws, above n 124, 7–8.

¹⁸² *Thoburn* [2003] QB 151, 185 [60].

be canvassed briefly here. Goldsworthy has suggested that *Thoburn* ‘could be endorsed on relatively orthodox grounds’.¹⁸³ That is because ‘[w]e already accept that there are fundamental common law rights that Parliament is very unlikely to intend to override, and it is just as plausible to think that there are very important statutes that it is equally unlikely to intend to override’.¹⁸⁴

To date in Australia, ‘there is no precedent for a distinction between ... “constitutional statutes” and other statutes’.¹⁸⁵ No Australian court has applied *Thoburn*, which can be traced to a movement to have identified ‘rights’ or ‘guarantees’ which should be accorded some higher status and protection,¹⁸⁶ in the absence of a ‘written constitution’ in the UK.¹⁸⁷ The drivers do not exist to the same extent in Australia. Although it is not to say that Australia has a federal constitutional bill of rights, the *Australian Constitution*, such as s 51, expressly denotes the limits of federal legislative power. Safeguards have also been implied from the *Australian Constitution* based on: the requirement that the Federal Parliament be directly chosen by the people;¹⁸⁸ the separation of powers at the federal level;¹⁸⁹ and in respect of state legislative power, the ‘institutional integrity’ of courts at the state level.¹⁹⁰ It remains true that the ‘rights’ that can be derived from the *Australian Constitution* are scant. But at least on the basis of views expressed by French CJ, it appears very unlikely that Australian courts will adopt the *Thoburn* approach.¹⁹¹ More probable is the approach taken in *Buck* — the principle of legality being extended to protect significant (or valuable) statutory rights.

D Analogous Criticisms

In any event, the UK developments with respect to constitutional statutes illuminate similar concerns that would arise under an extended principle of legality. These have

¹⁸³ Goldsworthy, *Parliamentary Sovereignty*, above n 38, 312.

¹⁸⁴ Ibid 313. See also Rebecca Prebble, ‘Constitutional Statutes and Implied Repeal: The *Thoburn* Decision and the Consequences for New Zealand (2005) 36(2) *Victoria University of Wellington Law Review* 291, 300.

¹⁸⁵ Williams and Reynolds, above n 56, 251. One commentator has provided a list of ‘candidates for treatment as constitutional legislation’ in the Australian context: Simon Evans, ‘Why is the Constitution Binding? Authority, Obligation and the Role of the People’ (2004) 25(1) *Adelaide Law Review* 103, 117, 120.

¹⁸⁶ See *Thoburn* [2003] QB 151, 187 [64]; Laws, above n 124, 4–8; Elliott, above n 124, 40.

¹⁸⁷ Cf Forsyth and Elliott, above n 159, 296–7. As to the position in New Zealand, see Prebble, above n 184.

¹⁸⁸ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

¹⁸⁹ *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254.

¹⁹⁰ *Kable v DPP (NSW)* (1996) 189 CLR 51.

¹⁹¹ In *Cadia Holdings*, French CJ said in obiter dicta, ‘The application of the term “constitutional” to a statute which is not a written constitution must be approached with some care’: (2010) 242 CLR 195, 217 [54]. His Honour went on to say, ‘in a country with a written constitution the utility of such a designation, which is not amenable to precise definition, may be debatable’: at 218 [56]. More recently, his Honour said (extra-curially) that the characterisation of certain statutes as constitutional ‘is no doubt of greater importance in the United Kingdom than in Australia’: French, above n 152, viii. See further Williams and Hume, above n 13, 18–9.

significant force. For instance, Marshall was of the view that *Thoburn* ‘raises some difficult issues’.¹⁹²

The proffered definitions are undeniably vague and it is hard to see any clear dividing line between ordinary statutes and statutes that deal with rights of a kind that we would now regard as fundamental. Are rights to education, medical services or pensions basic or fundamental, or are they mere run-of-the-mill entitlements? ...

What, in any event, is the rationale for supposing that some Acts of Parliament, whatever their subject matter, embody the intentions of the legislature in a more forceful way or in a more protected form than others, in the absence of any explicit Parliamentary expression of intention to create first and second class statutes? ... In the absence of a consistent and workable definition ... [t]his seems to inject an unwelcome element of uncertainty into our public law.¹⁹³

The above criticisms relate to the lack of clarity around the definition of constitutional statutes and the dubious consistency with legislative intention in their recognition and protection. They pertain to the undeveloped criteria and undefined range of statutes that may be regarded as constitutional¹⁹⁴ and, as a result, the lack of certainty in statutory interpretation. If the courts are to apply the presumption ‘in accordance with the wish of the Parliament enacting the constitutional statute’,¹⁹⁵ being a reference to the notion of actual legislative intention, the courts must also be taking their cues from Parliament as to which statutes deserve special protection. Moreover, any attempt to list the constitutional statutes ‘is not and could not be complete’¹⁹⁶ and ‘from a practical perspective this is itself not encouraging’.¹⁹⁷

¹⁹² Marshall, above n 153, 495. See also ‘Editorial: Constitutional Statutes’, above n 153; Feldman, above n 161, 345–8; Matthew S R Palmer, ‘What is New Zealand’s Constitution and Who Interprets It? Constitutional Realism and the Importance of Public Office-Holders’ (2006) 17(2) *Public Law Review* 133, 137 n 24; Prebble, above n 184, 297, 307; *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395, 419 [62] (Lord Rodger); Mark Elliott, ‘Constitutional Legislation, European Union Law and the Nature of the United Kingdom’s Contemporary Constitution’ (2014) 10(3) *European Constitutional Law Review* 379, 386.

¹⁹³ Marshall, above n 153, 495–6.

¹⁹⁴ Cf Lord Justice Sales who posits (extra-curially) that ‘[s]uch constitutional force may be inferred from the circumstances in which a particular piece of legislation was passed, or may be acquired over time from the prominence it is given in constitutional debate’: ‘Rights and Fundamental Rights in English Law’, above n 26, 100 (citations omitted).

¹⁹⁵ Daniel Greenberg (ed), *Craies on Legislation: A Practitioners’ Guide to the Nature, Process, Effect and Interpretation of Legislation* (Sweet & Maxwell, 10th ed, 2012) 665. However, Elliott has observed that Laws LJ in *Thoburn* ‘was at pains to emphasise that whether something is a constitutional statute is not a matter of parliamentary intention. Rather, it is a conclusion reached, and a status ascribed to legislation by, the common law’ (emphasis in original); Mark Elliott, ‘Critical Reflections on the High Court’s Judgment in *R (Miller) v Secretary of State for Exiting the European Union*’ on Mark Elliott, *Public Law for Everyone* (7 November 2016) <<https://publiclawforeveryone.com/2016/11/07/critical-reflections-on-the-high-courts-judgment-in-r-miller-v-secretary-of-state-for-exiting-the-european-union/>>. See further Goldsworthy, *Parliamentary Sovereignty*, above n 38, 313–4; Lindell, above n 124, 198 n 36, 199–200. Cf *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin) (3 November 2016) [88]: ‘Since in enacting the [European Communities Act 1972 (UK)] as a statute of major constitutional importance Parliament has indicated that it should be exempt from casual implied repeal by Parliament itself’ (emphasis added).

¹⁹⁶ Greenberg, above n 195, 665.

¹⁹⁷ ‘Editorial: Constitutional Statutes’, above n 153, iv.

These criticisms mirror and are equally applicable to extending the principle of legality to significant or valuable statutory rights in Australia.

VII Human Rights Statutes

A Overview

A further comparison may be made between an extended principle of legality and the protection of human rights under statutory bills of rights. The *Victorian Charter* is a statutory bill of rights. It is one of only two enacted in Australia, the other being the *Human Rights Act 2004* (ACT) (*ACT HRA*).¹⁹⁸ Taking the *Victorian Charter* as the example, s 32(1) provides that '[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights' under the Charter.¹⁹⁹

The *Victorian Charter* makes clear that s 32(1) applies to both legislation 'passed before or after' commencement of the Charter.²⁰⁰ Thus, statutes passed after commencement of the *Victorian Charter* that engage human rights, set out in the earlier enacted Charter, are to be interpreted pursuant to s 32(1) in a way that avoids incompatibility. Nevertheless, the *Victorian Charter* recognises that it may not always be 'possible' to interpret a statutory provision compatibly with human rights. Unlike a constitutional bill of rights, this does not affect the validity of primary legislation.²⁰¹ Rather, s 36(2) provides that the Victorian Supreme Court and Court of Appeal may make a 'declaration of inconsistent interpretation'.²⁰² This declaration does not affect 'the validity, operation or enforcement of the statutory provision'.²⁰³

In the jurisprudence, s 32(1) has predominantly been equated with the principle of legality. It 'applies ... in the same way as the principle of legality but with a wider field of application';²⁰⁴ although this proposition has been disputed.²⁰⁵

¹⁹⁸ There may soon be a third Australian jurisdiction with a statutory bill of rights: see Human Rights Bill 2018 (Qld).

¹⁹⁹ See also *ACT HRA* s 30.

²⁰⁰ *Victorian Charter* s 49(1) (emphasis added). See also *ACT HRA* s 29.

²⁰¹ *Victorian Charter* s 32(3)(a). See also s 31, which provides that Parliament 'may expressly declare' that an Act or a provision of an Act 'has effect despite being incompatible with one or more of the human rights' (override declaration).

²⁰² See also *ACT HRA*, s 32 on 'declarations of incompatibility'.

²⁰³ *Victorian Charter* ss 36(5)(a). See also *ACT HRA*, s 32(3)(a).

²⁰⁴ *Momcilovic* (2011) 245 CLR 1, 50 [51] (French CJ). See further *Slaveski v Smith* (2012) 34 VR 206, 215 [23], 219 [45] (Warren CJ, Nettle and Redlich JJA); *Noone v Operation Smile (Aust) Inc* (2012) 38 VR 569, 608 [139] (Nettle JA); *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 12–13 [25] (Nettle JA); *Nigro v Secretary to the Department of Justice* (2013) 41 VR 359, 383 [85] (Redlich, Osborn and Priest JJA); *Carolan v The Queen* (2015) 48 VR 87, 103–4 [46] (Ashley, Redlich and Priest JJA). Cf *R v DA* (2016) 263 A Crim R 429, 443 [44] n 46.

²⁰⁵ See *Victoria Police Toll Enforcement v Taha* (2013) 49 VR 1, 61–3 [188]–[191] (Tate JA, in obiter dicta); Julie Debeljak, 'Proportionality, Rights-Consistent Interpretation and Declarations under the Victorian Charter of Human Rights and Responsibilities: The *Momcilovic* Litigation and Beyond' (2014) 40(2) *Monash University Law Review* 340; Justice Pamela Tate, 'Statutory Interpretive Techniques under the Charter: Three Stages of the Charter — Has the Original Conception and Early Technique Survived the Twists of the High Court's Reasoning in *Momcilovic*?' (2014) 2 *Judicial College of Victoria Online*

Therefore parallels might be drawn between the *Victorian Charter* and an extended principle of legality that protects significant or valuable statutory rights. Both would protect rights set out in statute. Both would require a restrictive interpretation of subsequent infringing statutes in the absence of clear and unambiguous language.

B Consistency with Parliamentary Sovereignty and Implied Repeal

The issue of consistency with parliamentary sovereignty and implied repeal also arises under the *Victorian Charter* and other statutory bills of rights. A common theme between the *Victorian Charter*, the *New Zealand Bill of Rights Act 1990* (NZ) ('*NZ BORA*'), and the *UK Human Rights Act 1998* (UK) ('*UK HRA*') is that they are designed to preserve parliamentary sovereignty. The *Victorian Charter* is based on what is commonly known as a 'dialogue' model for human rights.²⁰⁶ It promotes a human rights dialogue between the three branches of the Victorian Government: the Executive, Parliament, and the courts.

Even under this dialogue model, there is a large body of commentary on whether the interpretive mechanisms of the *Victorian Charter*, *NZ BORA* and *UK HRA* are consistent with implied repeal,²⁰⁷ which is considered integral to parliamentary sovereignty.²⁰⁸ With respect to legislation enacted after a bill of rights,²⁰⁹ do interpretive mechanisms undermine the so-called doctrine of implied repeal by requiring that subsequently enacted legislation that is incompatible with human rights must be drafted with clarity as to its intent? In the New Zealand case of *R v Pora*,²¹⁰ three justices of the Court of Appeal gave precedence, where fundamental human rights were concerned, to an earlier statute over a subsequent one, including by reference to s 6 of the *NZ BORA* — the equivalent of s 32(1) of

Journal 43; Sir Anthony Mason, 'Statutory Interpretive Techniques under the *Charter* — Section 32' (2014) 2 *Judicial College of Victoria Online Journal* 69; Gledhill, above n 55.

²⁰⁶ However, usage of the term 'dialogue' was criticised by members of the High Court in *Momcilovic* (2011) 245 CLR 1: see 67–8 [95] (French CJ); 84 [146(iii)] (Gummow J, Hayne J agreeing), 207 [534] (Crennan and Kiefel JJ). Cf Debeljak in response to those remarks: Julie Debeljak, 'Does Australia Need a Bill of Rights?' in Paula Gerber and Melissa Castan (eds), *Contemporary Perspectives on Human Rights Law in Australia* (Lawbook, 2013) 37, 61–2 n 104.

²⁰⁷ For the *Victorian Charter*, see James Allan, 'The *Victorian Charter of Human Rights and Responsibilities*: Exegesis and Criticism' (2006) 30(3) *Melbourne University Law Review* 906, 911–2; Jim South, 'Potential Constitutional and Statutory Limitations on the Scope of the Interpretative Obligation Imposed by s 32(1) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic)' (2009) 28(1) *University of Queensland Law Journal* 143, 155–6; Sir Anthony Mason, 'Human Rights: Issues to be Resolved' (Speech delivered at the Law Institute of Victoria, Melbourne, 24 August 2009) [55]–[60].

²⁰⁸ See above n 127 and accompanying text.

²⁰⁹ The issue of implied repeal also arises with respect to legislation enacted before a bill of rights. For example, does s 32(1) of the *Victorian Charter*, being the subsequently enacted legislation, effect implied repeal of an earlier statute by requiring that the earlier statute must be interpreted where possible so as to be compatible with human rights? This issue was raised in the *Momcilovic v The Queen* proceeding, but not determined: see Transcript of Proceedings, *Momcilovic v The Queen* [2011] HCATrans 15 (8 February 2011) 2260–80, 3435, 4160–245. For present purposes, the application of s 32(1) to post-*Charter* legislation provides the better analogy with the principle of legality's extended application to protect significant or valuable statutory rights from subsequent infringing statutes.

²¹⁰ [2001] 2 NZLR 37.

the *Victorian Charter*. Chief Justice Elias and Tipping J stated that '[i]t is not a correct approach to assume that pro tanto implied repeal ... is to be preferred'²¹¹ and this 'does not affect the orthodoxy that Parliament cannot bind its successors'.²¹² Justice Thomas remarked that implied repeal 'need not be treated as if it were absolute'.²¹³ Thus, s 6 was deployed to operate against the doctrine of implied repeal.²¹⁴ However, three other justices, Gault, Keith and McGrath JJ, disagreed.²¹⁵ Even with the *NZ BORA*, their Honours said, if two enactments cannot be read together 'the provision enacted later in time will prevail'.²¹⁶

There are other examples of rights-protective interpretive provisions that can operate prospectively. For example, s 17(2) of the *Supreme Court Act 1986* (Vic) provides that '[u]nless otherwise expressly provided by this or any other Act, an appeal lies to the Court of Appeal from any determination of the Trial Division constituted by a Judge'. Like Lord Hope's approach in *H v Lord Advocate*,²¹⁷ this goes further than the test under the principle of legality, by excluding the possibility of amendment or repeal by necessary implication. Section 17(2) was the subject of proceedings in *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue* (Vic),²¹⁸ where the High Court of Australia took no issue with the provision's prospective operation,²¹⁹ finding that the subsequently enacted s 148(1) of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) did not 'expressly' provide otherwise.²²⁰

Based on the position taken earlier in this article, the application of s 32(1) of the *Victorian Charter*, and other rights-protective interpretive provisions, to subsequent statutes is broadly consistent with the presumption *against* implied repeal, with implied repeal better viewed as an exception to the rule. What the above further demonstrates is that there are already instances where the courts are empowered to interpret legislation in a way that protects certain statutory rights from subsequent statutes. There already are certain statutes that are 'more sacred or immutable' than others and that Parliament cannot 'as freely and in the same manner' legislate against.²²¹ On the one hand, this bodes well for extending the

²¹¹ Ibid 50 [51]. See also 47–8 [36]–[40].

²¹² Ibid 50 [52]. Rather, said their Honours, the outcome 'implements Parliament's own requirement in s 6 of the [NZ BORA] that Parliament must speak clearly if it wishes to trench upon fundamental rights': at 50 [52]. See also 46–7 [29].

²¹³ Ibid 69 [140]. Not unlike Laws LJ's view in *Thoburn* that constitutional statutes created an 'exception' to the doctrine of implied repeal, Thomas J thought that the doctrine can be subject to 'modification': at 70 [144].

²¹⁴ This approach was controversial: see Andrew Butler, 'Implied Repeal, Parliamentary Sovereignty and Human Rights in New Zealand' [2001] *Public Law* 586; Anita Killeen, Richard Ekins and John Ip, 'Undermining the Grundnorm?' [2001] *New Zealand Law Journal* 299; Kalderimis and Tripp, above n 127; Anthony Bradley, 'Conflicting Statutory Provisions — The Impact of Fundamental Rights' [2001] *New Law Journal* 311.

²¹⁵ The seventh justice, Richardson P, did not consider this issue.

²¹⁶ [2001] 2 NZLR 37, 63 [110].

²¹⁷ See above Part VIA.

²¹⁸ (2001) 207 CLR 72 ('*Roy Morgan*').

²¹⁹ Cf *South-Eastern Drainage Board (SA) v Savings Bank of South Australia* (1939) 62 CLR 603.

²²⁰ *Roy Morgan* (2001) 207 CLR 72, 78–9 [11]–[12] (Gaudron, Gummow, Hayne and Callinan JJ).

²²¹ See above nn 122–3 and accompanying text.

principle of legality to protect significant or valuable statutory rights. An extended principle is not out of step with these rights-based developments.

On the other hand, there is a fundamental difference in that the interpretive function of s 32(1) is conferred by Parliament. It is a democratically sanctioned statutory command. Parliament, when enacting legislation, can be taken to know that the courts will, where possible, interpret legislation compatibly with a clearly identified set of human rights. Given this, s 32(1) bears a greater degree of legitimacy than the courts modifying a common law presumption from how it has long been understood and accepted to operate. There is greater flexibility for Parliament itself to make explicit and subscribe to new ‘standing commitments’.²²² Moreover, if Parliament already has the capacity to lay down interpretive provisions that require that particular statutory rights not be lightly overridden, then there is little to be gained by extending the principle of legality to do the same. Rather, applying the principle to statutory rights in the absence of such interpretive provisions can be seen as contrary to legislative intention.²²³

C *Convergence between the Principle of Legality and the Victorian Charter?*

Furthermore, even if one accepts that the principle of legality extends to significant or valuable statutory rights, this logically leads to a further question — can the principle apply to the human rights in the *Victorian Charter* itself? In *Director of Public Prosecutions v Kaba*,²²⁴ Bell J of the Victorian Supreme Court said in obiter dicta, ‘there is reason to think that the statutory human rights specified in the Charter ... are protected at common law under the principle of legality’.²²⁵ That was because ‘human rights specified in the Charter may be compared with the fundamental rights and liberties traditionally protected by the principle of legality. Following Finn J in *Buck*, it might be concluded that the principle encompasses these human rights’.²²⁶ However, his Honour refrained from expressing a concluded view.

If the principle of legality protects significant or valuable statutory rights, then presumably it would include Charter rights. However, there is questionable utility in applying the principle of legality to Charter rights. The *Victorian Charter* already has its own interpretive mechanism in s 32(1). Furthermore, it is doubtful whether the principle of legality and Charter rights may properly be converged, as there are some aspects that potentially differ in operation. These are explored elsewhere. One example relates to whether justification and proportionality can have

²²² Goldsworthy, *Parliamentary Sovereignty*, above n 38, 305–6.

²²³ This could be broadly analogised with an *expressio unius est exclusio alterius* argument — the express inclusion of rights-protective interpretive provisions in some statutes indicates that such an approach is excluded under other statutes.

²²⁴ (2014) 44 VR 526.

²²⁵ Ibid 580 [188].

²²⁶ Ibid 581 [193].

any role to play in interpretation under the principle of legality²²⁷ and s 32(1).²²⁸ Another example is how the principle of legality and s 32(1) apply to broadly expressed statutory discretions and interpreting the scope of those discretions.²²⁹

VIII Related Presumptions

Finally, it should be noted that the principle of legality already protects certain statutory rights in Australia. The principle encompasses the well-established common law presumptions against interference with vested property rights without adequate compensation²³⁰ and against the retrospective operation of statutes.²³¹ These may be dealt with briefly.

As to the former, the courts have sometimes approached the presumption against interference with ‘vested’²³² property rights as including not only common law property rights, but also property rights sourced in statute.²³³ For example, in *University of Western Australia v Gray (No 20)*,²³⁴ French J (as his Honour then was) held that intellectual property rights derived from patents statutes could ‘fall into the category of property rights which attract the presumption’.²³⁵ An inventor’s intellectual property rights could be vested property rights. Consistently with the above, the High Court of Australia appears to have accepted that the presumption can indeed apply to property rights in statute.²³⁶

²²⁷ See Chen, ‘The Principle of Legality: Issues of Rationale and Application’, above n 53, 362–73; Goldsworthy, ‘The Principle of Legality and Legislative Intention’, above n 26, 69–70; Meagher, ‘The Principle of Legality and Proportionality in Australian Law’, above n 54; Hanna Wilberg, ‘Common Law Rights Have Justified Limits: Refining the “Principle of Legality”’ in Dan Meagher and Matthew Groves (eds), *The Principle of Legality in Australia and New Zealand* (Federation Press, 2017) 139.

²²⁸ See Bruce Chen, ‘Making Sense of *Momcilovic*: The Court of Appeal, Statutory Interpretation and the Charter of Human Rights and Responsibilities Act 2006’ [2013] (74) *Australian Institute of Administrative Law Forum* 67; Victoria, *From Commitment to Culture: The 2015 Review of the Charter of Human Rights and Responsibilities Act 2006*, Parl Paper No 77 (2015) 155.

²²⁹ See Bruce Chen, ‘Section 32(1) of the Charter: Confining Discretions Compatibly with Charter Rights?’ (2016) 42(3) *Monash University Law Review* 608; Bruce Chen, ‘How Does the Charter Affect Discretions? The Limits of Section 38(1) and Beyond’ (2018) 25(1) *Australian Journal of Administrative Law* 28.

²³⁰ *Clissold v Perry* (1904) 1 CLR 363, 373.

²³¹ *Maxwell v Murphy* (1957) 96 CLR 261; *Rodway v The Queen* (1990) 169 CLR 515; *Esber v Commonwealth* (1992) 174 CLR 430.

²³² The word ‘vested’, it is said, ‘is primarily a technical legal term used to differentiate a presently existing interest from a contingent interest’: Australian Law Reform Commission, *Traditional Rights and Freedoms: Encroachments by Commonwealth Laws*, Report No 129 (2015) 466 [18.32]. Something is ‘contingent’ where it is ‘conditioned upon the occurrence of a future event which is itself uncertain or questionable’: *Temwood Holdings Pty Ltd v Western Australian Planning Commission* (2001) 115 LGERA 152, 169 [57].

²³³ See, eg, *Greville v Williams* (1906) 4 CLR 694, 703; *University of Western Australia v Gray (No 20)* (2008) 246 ALR 603, 634 [86], [88]–[89]; *Young v Owners — Strata Plan 3529* (2001) 54 NSWLR 60. Cf discussion in Pearce and Geddes, above n 5, 233–4; *New South Wales v Macquarie Bank Ltd* (1992) 30 NSWLR 307, 319–20 (Kirby P), where his Honour framed it in terms of procedural fairness before depriving a person of a valuable property right.

²³⁴ (2008) 246 ALR 603.

²³⁵ Ibid 634 [89].

²³⁶ *Tabcorp Holdings Ltd v Victoria* (2016) 328 ALR 375, 389 [68].

As to the presumption against retrospective operation of statutes, this common law presumption is widely reflected in interpretation Acts across the federal, state and territory jurisdictions, with respect to statutory rights.²³⁷ The statutory presumption applies to ‘acquired’ or ‘accrued’ statutory rights.²³⁸ It is presumed that, in the absence of express words or a necessary implication to the contrary, legislation will not operate retrospectively to affect existing statutory rights that have been acquired or accrued.

Since the presumption against interference with vested property rights and the presumption against retrospectivity fall within the scope of the principle of legality, the principle in its current state protects certain statutory rights. An extended principle of legality may overlap with these pre-existing presumptions, where relevant.²³⁹ Moreover, as outlined earlier, there will be overlaps between the principle of legality and the presumption against implied repeal.

IX Conclusion

The principle of legality is a common law interpretive principle that protects fundamental common law protections from abrogation or curtailment, except by clear and unambiguous language. While it is uncontroversial that statute law can be a source for the development of fundamental common law protections, it would appear at first glance to be a radical thing for the principle to extend directly to protect statutory rights. However, this article has identified two scenarios in which steps have been taken to develop the principle of legality in this way. The first is where ‘significant’ or ‘valuable’ statutory rights are read generously within the context of the Act in which they are found. However, it is questionable whether this approach is appropriate. The second possibility is that subsequent infringing legislation is interpreted restrictively so as to protect earlier ‘significant’ or ‘valuable’ statutory rights.

There are several arguments in favour of extending the principle of legality to certain statutory rights. It is arguably consistent with the principle’s ‘original rationale’, which already recognises the improbability of certain common law protections being abrogated or curtailed. It is not a great extension of logic to recognise the same with respect to statutory rights. That is all the more pertinent given we live in this modern ‘age of statutes’.²⁴⁰ Alternatively, if the concept of actual legislative intention is abandoned in statutory interpretation, as it was in *Lacey*, this removes the objection (at least, theoretically) that Parliament cannot be taken to know that certain statutory rights are to be protected by the principle of legality and cannot act accordingly. An extended principle is also consistent with the

²³⁷ See, eg, *Acts Interpretation Act 1901* (Cth) s 7(2)(c); *Interpretation Act 1987* (NSW) s 30(1)(c); *Interpretation of Legislation Act 1984* (Vic) s 14(2)(e).

²³⁸ That is, a statutory right that is ‘real’ rather than ‘abstract’: *Abbott v Minister for Lands* [1895] AC 425; it is not ‘a mere hope or expectation that a right will be created’: *Director of Public Works v Ho Po Sang* [1961] AC 901.

²³⁹ See, eg, *Tabcorp Holdings Ltd v Victoria* [2014] VSC 301 (26 June 2014) [93], [97]–[99] (vested property rights); *Oxenbould v The Solicitors’ Trust* [2011] TASSC 57 (3 November 2011) [31], [36]–[37], [39] (presumption against retrospectivity).

²⁴⁰ See above nn 4, 10 and accompanying text.

doctrine of parliamentary sovereignty in some respects. While it would create a hierarchy of statutes, contrary to Dicey's conception of parliamentary sovereignty, Parliament ultimately remains sovereign. Parliament is still free to amend or repeal statutory rights as it wishes, provided it does so with clear and unambiguous language. An extended principle of legality is also consistent with the so-called doctrine of implied repeal as an aspect of parliamentary sovereignty. 'So-called' because, as scholars have rightly identified, it is really a presumption *against* implied repeal. Thus, a principle of legality that protects statutory rights from subsequent infringing statutes adds to and fortifies, rather than deviates from, this presumption.

The protection of particular statutes through the strict interpretation of subsequent statutes is not as revolutionary as it might initially seem. This article provided four examples. First, movement towards the recognition of 'constitutional' statutes in the UK. Second, the enactment of rights-protective interpretive provisions, including under statutory bills of rights in Victoria and the Australian Capital Territory. Third, the common law presumption against interference with vested property rights without adequate compensation and the statutory presumption against retrospective operation, which already apply to protect statutory rights. Fourth, as already noted above, the operation of the presumption against implied repeal.

Nevertheless, there are stronger arguments that pull in the other direction. As to the principle of legality's origins, the principle is not conventionally understood to extend to statutory rights. It protects against legislative incursions into the common law. It would be rather ironic, then, if the principle were applied to the very thing from which it was intended to be shielded. Moreover, the principle of legality is based on actual legislative intention and grounded in the institutional relationship between Parliament and the courts. Arguably, Parliament cannot have 'directed its attention' to, and 'determined' or 'consciously decided' upon, abrogation or curtailment, or 'squarely confront what it is doing', in the absence of widespread agreement. Parliament and the courts are taken to be aware of the principle of legality. However, legitimacy of the principle risks being undermined if the courts strike out on their own to apply the principle to certain statutory rights, contrary to this shared understanding and acceptance.

There are already difficulties in ascertaining the scope of protection of the principle of legality with respect to fundamental common law protections. This has implications for both legislative intention and parliamentary sovereignty, and the democratic nature of lawmaking. Extending the principle of legality to statutes would significantly magnify that problem. There would be a high level of uncertainty and contestability about which statutory rights are 'significant' or 'valuable' and therefore protected. This is borne out in the commentary on the UK experience with respect to 'constitutional' statutes. The extension to certain statutory rights would also lead to a convergence between the principle of legality and s 32(1) of the *Victorian Charter*, which poses some problems given their potential differences in operation. Section 32(1) is also distinguishable from the principle of legality, in that the former is democratically sanctioned, whereas the latter would require modification and would be contrary to actual legislative intention and institutional understanding.

Finally, it appears there is little discernible benefit to be gained in return for such methodological challenges. Parliaments can and already do enact rights-protective interpretive provisions that allow for provisions to be protected against subsequent statutes. The presumption against implied repeal already protects statutes from repeal or amendment by subsequent statutes in the absence of express words or necessary implication. To adopt the words of Gageler J (albeit expressed in different contexts): '[o]utside its application to established categories of protected common law rights and immunities', the principle of legality 'must be approached with caution';²⁴¹ '[u]nfocused invocation' of the principle 'can only weaken its normative force, decrease the predictability of its application, and ultimately call into question its democratic legitimacy'.²⁴²

²⁴¹ *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352, 382 [67].

²⁴² *Independent Commission Against Corruption v Cunneen* (2015) 256 CLR 1, 35–6 [88].

An Empirical Investigation of 20 Years of Trade Mark Infringement Litigation in Australian Courts

Vicki T Huang*

Abstract

In Australia, there has been little empirical research into the enforcement of trade mark rights under s 120 of the *Trade Marks Act 1995* (Cth) ('1995 TM Act'). Nor has there been empirical research into the common practice of litigating concurrent claims under passing off or s 18 of the *Australian Consumer Law 2010* (Cth) ('ACL'). This article reports on the first study to systematically identify and review all 78 trade mark infringement judgments under the 1995 TM Act over the 20-year period since its inception (1 January 1996–1 January 2016). The analysis reveals that, contrary to initial concerns, there has been a significant decline in pleading under the 'new' and expansive ss 120(2) and (3) provisions and an increased reliance on the classic parameters of s 120(1). Significantly, this article finds that passing off in the context of court-resolved s 120 infringement has become redundant. In addition, the analysis reveals that a concurrent claim under ACL s 18 improves the chances of a plaintiff's net win rate by 21.7%. The implications of these results are discussed in relation to litigation practice and doctrine. This article also demonstrates the utility of empirical research in resolving speculative assumptions about the law and in facilitating better informed legal scholarship and practice.

I Introduction

A The Relevance of the Present Study

The introduction of the *Trade Marks Act 1995* (Cth) ('1995 TM Act')¹ led to major changes in Australian trade mark law to comply with Australia's obligations under

* Senior Lecturer, Deakin Law School, Melbourne, Australia. I thank the following people who have commented on excerpts of this work in draft form: Associate Professor Elizabeth Adeney (Deakin University); Associate Professor Jason Bosland (University of Melbourne); Associate Professor Christopher Dent (Murdoch University); Associate Professor Dev Gangjee (Oxford University); Professor Michael Handler (UNSW); Janice Luck (Melbourne University); Dr John Morss (Deakin University); Professor Megan Richardson (Melbourne University); and Associate Professor Amanda Scardamaglia (Swinburne University). I also thank Alexander Kwong and the anonymous referees of this article for their helpful suggestions. Any errors are the author's own.

¹ *Registrar of Trade Marks v Woolworths Ltd* (1999) 93 FCR 365, 371 [19]: 'the 1955 Act was repealed and replaced by the *Trade Marks Act 1995* (Cth) which applies to the present case. It also repealed

the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ('TRIPS Agreement').² In the 20 years since the enactment of the 1995 *TM Act*, there has been no comprehensive study of the effect of those changes. Nor has there been empirical research regarding the practice of litigating concurrent claims in passing off and/or s 18 of the *Australian Consumer Law 2010* (Cth) ('ACL').³ This article is the first to systematically identify and review all 78 trade mark infringement judgments under the 1995 *TM Act* over a 20-year period (1 January 1996–1 January 2016).

In addition to these substantive results, another contribution of this article relates to methodology. This study supports arguments that an empirical approach can provide a 'more accurate description and analyses of how our legal system actually operates'⁴ and facilitates 'a surer epistemological basis to support claims or to question others'.⁵ For example, the method applied in this study provides quantitative evidence that resolves critical competing assumptions about the role of passing off in trade mark litigation.

The method applied is based on Beebe's empirical investigation of United States ('US') trade mark infringement with adjustments made to suit an Australian context.⁶ Although empirical legal studies are labour intensive, they are often well received⁷ as they test the truth of more anecdotal or impressionistic accounts of the law. Therefore, the details of the methodology are set out to encourage the application of empirical methods to other branches of law.

This article is also particularly timely in light of the recent Productivity Commission Inquiry into Intellectual Property Arrangements.⁸ That Inquiry focused on the need to 'get the balance right'⁹ between the benefits of trade marks in terms of reducing consumer search costs and the costs of trade marks in terms of the anti-

the *Trade Marks Act 1994* (Cth) which had been enacted to comply with Australia's international treaty commitments but had not come into force when the 1995 Act was passed'. See also Working Party to Review the Trade Marks Legislation, *Recommended Changes to the Australian Trade Marks Legislation* (Australian Government Public Service, 1992) 74; Mark J Davison and Ian Horak, *Shanahan's Australian Law of Trade Marks and Passing Off* (Lawbook Co, 6th ed, 2016) 648–9 [85.25].

² *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 3 (entered into force 1 January 1995) annex 1C ('*Agreement on Trade-Related Aspects of Intellectual Property Rights*').

³ *Competition and Consumer Act 2010* (Cth) sch 2.

⁴ Michael Heise, 'An Empirical Analysis of Empirical Legal Scholarship Production, 1990–2009' [2011] (5) *University of Illinois Law Review* 1739, 1751, citing Theodore Eisenberg, 'The Origins, Nature, and Promise of Empirical Legal Studies and a Response to Concerns' [2011] (5) *University of Illinois Law Review* 1713.

⁵ Mark A Hall and Ronald F Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96(1) *California Law Review* 63, 75, citing Laura E Little 'Hiding with Words: Obfuscation, Avoidance and Federal Jurisdiction Opinions' (1998) 46(1) *UCLA Law Review* 75.

⁶ Barton Beebe, 'An Empirical Study of the Multifactor Tests for Trademark Infringement' (2006) 94(6) *California Law Review* 1581. See specifically in relation to case selection and the coding of wins and losses.

⁷ Hall and Wright, above n 5, 74, where the US authors reviewed the content analysis projects published during the 1990s and argued that '[c]ontent analysis projects appear somewhat more likely to generate discussion and citation than law review articles more generally'.

⁸ Productivity Commission, *Intellectual Property Arrangements* (Inquiry Report No 78, Productivity Commission, 23 September 2016) 372.

⁹ *Ibid* 376.

competitive effects of monopolies.¹⁰ To that end, the Inquiry set forth numerous recommendations in relation to bettering the quality of marks being registered.¹¹ Unfortunately, the Inquiry provided no detailed analyses as to how trade mark owners actually enforce their registered rights. This is probably because, unlike the case of registration, there is no single database that records detailed infringement information. The Inquiry's recommendations should therefore be considered cautiously. Policy reform to optimise the trade mark system requires a more complete understanding of how 'the system is working in practice'.¹² This means understanding not just how and what is being registered but also how trade mark owners actually enforce their rights in practice. This is particularly interesting in trade mark law, in which (unlike in copyright and patent law) trade mark owners often enforce their rights outside the statutory scheme through concurrent claims. This study is also relevant to various doctrinal debates that exist in trade mark infringement law, which will be discussed in the next section.

B Doctrinal Debates

1 Trade Marks Act 1995 (*Cth*) ss 120(1)–(3)

To make out a claim for trade mark infringement under s 120(1) of the *1995 TM Act*, the plaintiff must prove that the defendant has used or proposes to use¹³ a substantially identical or deceptively similar sign as a trade mark¹⁴ in relation to goods or services¹⁵ in respect of which the plaintiff's trade mark is registered. Section 120(1) reflects the 'classic' conception of trade mark infringement, in which the defendant is using a deceptively similar (or substantially identical) mark on goods and/or services that have been registered by the trade mark owner.

Under s 120(2), as with s 120(1), a person infringes a registered trade mark if the defendant uses or proposes to use as a trade mark a substantially identical or deceptively similar mark. However, unlike s 120(1), the impugned user is now liable for use on goods or services *beyond* those for which the trade mark is registered. Under s 120(2), infringement can be found if the impugned trade mark is used upon: goods of the same description as the registered goods (s 120(2)(a)); 'services that are closely related to registered goods' (s 120(2)(b)); services of the same description as registered services (s 120(2)(c)); or 'goods that are closely related to registered services' (s 120(2)(d)). In other words, s 120(2) broadens the monopoly rights of the

¹⁰ Ibid 396.

¹¹ Ibid 397.

¹² Kimberlee G Weatherall and Paul H Jensen, 'An Empirical Investigation into Patent Enforcement in Australian Courts' (2005) 33(2) *Federal Law Review* 239, 244.

¹³ Section 7(4) of the *1995 TM Act* describes 'use of a trade mark in relation to goods' as meaning 'use of the trade mark upon, or in physical or other relation to, the goods (including second-hand goods)' (emphasis in original). Note that this provision reflects more the physical application of the mark, rather than its meta-physical 'use', which is dealt with in case law.

¹⁴ A trade mark is defined under *1995 TM Act* s 17 as 'a sign used, or intended to be used, to distinguish goods or services dealt with or provided in the course of trade by a person from goods or services so dealt with or provided by any other person'.

¹⁵ Under *1995 TM Act* s 6 'goods of a person means goods dealt with or provided in the course of trade by the person' (emphasis in original).

trade mark owner beyond use on the goods or services for which the owner's trade mark is strictly registered.

Section 120(3) provides even broader protection for some trade mark owners. However, it only applies if the trade mark owner's mark is 'well known in Australia'.¹⁶ If so, the plaintiff can assert an infringement claim where the defendant has used a substantially identical or deceptively similar mark as a trade mark on goods or services *unrelated* to the goods or services for which the plaintiff is registered. This is subject to the additional requirement that the defendant's use of the mark would likely be taken to indicate a connection between the unrelated goods and services and the registered owner of the trade mark and,¹⁷ as a result, the interests of the registered owner would likely be adversely affected.¹⁸

Sections 120(2) and (3) (and related provisions) were introduced to meet the obligations imposed by the *TRIPS Agreement*, particularly art 16.¹⁹ The addition of ss 120(2) and (3) was criticised at the time by some members of the Working Party to Review the Trade Marks Legislation as an unreasonable extension of owners' rights.²⁰ There was also concern that the introduction of the more expansive ss 120(2) and (3) were somewhat redundant or could undermine the role played by passing off and *ACL* s 18 (discussed further below).²¹ Whether and how ss 120(2) and (3) have been litigated will be examined in this article.

2 Concurrent Claims

A related question in trade mark law regards the intersection of concurrent claims with s 120 of the *1995 TM Act*. In a trade mark infringement case, the primary rights relied upon are the plaintiff's statutory rights under s 120 of the *1995 TM Act*. However, a s 120 claim is often pleaded with passing off and/or *ACL* s 18. This gives rise to the question: if a concurrent claim is pleaded, why choose passing off, *ACL* s 18 or both?

¹⁶ *1995 TM Act* (Cth) s 120(4): 'in deciding, for the purposes of paragraph (3)(a), whether a trade mark is *well known in Australia*, one must take account of the extent to which the trade mark is known within the relevant sector of the public, whether as a result of the promotion of the trade mark or for any other reason' (emphasis in original).

¹⁷ *1995 TM Act* (Cth) s 120(3)(c).

¹⁸ *Ibid* s 120(3)(d).

¹⁹ *TRIPS Agreement* art 16(1).

²⁰ Working Party to Review the Trade Marks Legislation, above n 1, 74 states that [d]oubts were expressed by the Working Party about the desirability of adopting the wider infringement provisions, based largely on perceived difficulties in determining the scope of protection as it relates to 'similar' goods and services, and in dealing with an unreasonable extension of rights gained by existing trade mark registrations ...

Further, 'the Institute members of the Working Party remain concerned about the practical and commercial consequences of the recommended broadening of the infringement test': at 74–75.

²¹ See, eg, Davison and Horak, above n 1, describing the *1995 TM Act* as effecting a 'radical change to the concept of infringement'. Under prior Acts, '[r]eputation and goodwill were rarely relevant nor was the likelihood of deception or confusion, except to the limited extent required to consider deceptive similarity of marks': 648–9 [85.25]. Under the new Act, this remains so in the case of s 120(1) but ss 120(2) and (3) 'introduce passing off like concepts into infringement actions although the precise meanings of some of the terms used in the subsection are uncertain and there are significant differences between those subsections and passing off': 648–9 [85.25].

There are key differences between these three causes of action with respect to origins, evidentiary burdens, protected interests, purposes and defences. The *1995 TM Act* provides exclusive rights to distinctive trade marks as a species of statutory property conferred on an owner by way of registration. The interest protected is the property in the trade mark. There is no need to prove distinctiveness of the mark because this is *prima facie* evidenced by the fact of registration (subject to a cross claim for invalidity). Further, the exclusive rights under the *1995 TM Act* are powerful and national in scope. They are the primary rights relied upon in trade mark litigation.

In passing off, liability is incurred where there is a misappropriation of reputation such that the goodwill of the plaintiff is damaged. The interest protected is the plaintiff's reputation, the existence of which must be proved by the plaintiff and is often local, rather than national, in scope.²² In a trade mark infringement context, *ACL s 18* concerns use of the plaintiff's trade indicia such that the public may be misled or deceived as to a commercial association between the parties.²³ The interest protected is the consumer's welfare and prevention of consumer confusion.²⁴

(a) *Challenging the Benefits of Passing Off*

The benefits of arguing concurrently in passing off were more apparent under the earlier *Trade Marks Act 1955 (Cth)* ('*1955 TM Act*') and in the time before federal consumer protection statutes were introduced in the 1970s.²⁵ In Australia, under the

²² For a discussion of the history of passing off and the concept of reputation see *Conagra Inc v McCain Foods (Aust) Pty Ltd* (1992) 23 IPR 193.

²³ *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd* (2007) 159 FCR 397, 418–19 [99], (Black CJ, Emmett and Middleton JJ) ('*Cadbury v Darrell Lea*');

whether or not there is a requirement for some exclusive reputation as an element in the common law tort of passing off, there is no such requirement in relation to Pt V of the *Trade Practices Act*. The question is not whether an applicant has shown a sufficient reputation in a particular get-up or name. The question is whether the use of the particular get-up or name by an alleged wrongdoer in relation to his product is likely to mislead or deceive persons familiar with the claimant's product to believe that the two products are associated, having regard to the state of the knowledge of consumers in Australia of the claimant's product ...

²⁴ *Hansen Beverage Co v Bickfords (Australia) Pty Ltd* (2008) 171 FCR 579, 588–9 [44] (Tamberlin J) (citations omitted) states that

s 52 of the *TPA* imposes no requirement that any particular reputation must be established before a breach of s 52 can be made out. In speaking of the relationship between s 52 and the tort of passing off, Stephen J observed in *Hornsby Building Information Centre Pty Ltd v Sydney Building* (1978) 140 CLR 216 at 226 that the remedy under the *TPA*: ... 'will not, as in passing off, be founded upon any protection of the trader's goodwill but, being directed to preventing that very deception of the public which is injuring his goodwill, it will nevertheless be an effective remedy for that of which he complains' ... 'if what is in question is truly a contravention of s 52(1); that is to say, is conduct which is misleading or deceptive. It is only this with which s 52(1) is at all concerned. It is not concerned, as such, with any unfairness of competition in trade as between two traders.' Accordingly, the sufficiency of the reputation which is required to be shown may be less in proceedings under the *TPA* than in proceedings alleging passing off.

²⁵ See, eg, *Wingate Marketing v Levi Strauss* (1994) 49 FCR 89, 117 (Gummow J) in relation to an infringement action under *1955 TM Act*:

it is generally accepted that the tort of passing-off is concerned with the protection of the business goodwill of the plaintiff against damage by the misrepresentations made by the defendant. Neither protection of goodwill nor deceptive conduct are the primary concern of the action for

1955 TM Act and its predecessors, infringing conduct was narrowly confined to infringing use upon goods or services for which the plaintiff's mark was registered.²⁶ This is what this article refers to as the traditional or 'classic' parameters of trade mark infringement. The primary infringement provision under the *1955 TM Act* was s 62(1), which defined infringement as use of 'a mark which is substantially identical with, or deceptively similar to, the trade mark, in the course of trade, *in relation to goods or services in respect of which the trade mark is registered*'.²⁷ In essence, s 62(1) is the precursor to the modern provision: s 120(1) of the *1995 TM Act*. Passing off was able to fill the gap where the infringing conduct fell outside the scope of the goods and services covered by the registration or where the mark could not be registered.²⁸ As discussed earlier, it has been thought that this gap-filling role is undermined by the current Act because ss 120(2) and (3) of the *1995 TM Act* allow infringement claims for uses beyond the scope of the plaintiff's registration.²⁹

A second role of passing off was to act as a catch-all for infringement of unregistrable marks. This was thought important because the *1955 TM Act* had a narrower definition of a registrable 'sign'. Section 6 of the *1955 TM Act* provided registration for a distinctive 'device, brand, heading, label, ticket, name, signature, word, letter or numeral, or any combination thereof'. It was thought that passing off filled the gap where a mark was unregistrable, such as for a product's 'get-up'³⁰ (known as 'trade dress' in other jurisdictions).³¹ A significant passing off jurisprudence developed around the protection of 'get-up' — that is, the 'shape, size and colouring of [a] container of packaging, the design of [a] label and to some extent, the design of the product itself'.³² It could be argued that this second gap-

trade mark infringement under the present legislation. However, arguments were propounded before us which assumed that the contrary was the case

²⁶ For an overview of the historical progression of the related actions up to the *1995 TM Act*, see *Wingate Marketing v Levi Strauss* (1994) 49 FCR 89, 117–24 (Gummow J).

²⁷ Emphasis added.

²⁸ See, eg, *Campomar Sociedad, Limitada v Nike International Ltd* where Campomar had registered the name NIKE as part of its registrations for perfumery. Nike International (the sportswear company) tried to have the registration revoked even though they were not in the cosmetic business: (2000) 202 CLR 45. As the High Court pointed out, even if their case under the *1955 TM Act* failed, 'there is available to Nike International the law with respect both to the tort of passing-off and to misleading or deceptive conduct within the meaning of s 52 of the TP Act': at 75 [67].

²⁹ See, eg, Davison and Horak, above n 1, 648–9 [85.25].

³⁰ In *Reckitt & Colman Products Ltd v Borden Inc* (1990) 17 IPR 1 at 7 (the 'Jif Lemon' case), in reference to the impugned lemon shaped bottle containing lemon juice, Lord Oliver of Aylmerton described get-up in a passing off context as follows:

first, he must establish a goodwill or reputation attached to the goods or services which he supplies in the mind of the purchasing public by association with the identifying get-up (whether it consists simply of a brand name or a trade description, or the individual features of labelling or packaging) under which his particular goods or services are offered to the public, such that the get-up is recognised by the public as distinctive specifically of the plaintiff's goods or services.

³¹ In the US, it has been said that '[t]rade dress is also useful to convey more than merely the presentation of an article. It covers innovative trading styles, especially for restaurants and retail outlets and might also include a particular format of conducting business. In other words, the term "trade dress" encompasses the whole visual image presented by a trader to customers': Trevor Stevens, 'The Protection of Trade Dress and Colour Marks in Australia' (2003) 93(2) *The Trademark Reporter* 1382, 1383 discussing J Thomas McCarthy, *McCarthy on Trade Marks and Unfair Competition* (West Group USA, 4th ed, 1994) 8.1.

³² Stevens, above n 31, 1383.

filling role has also been undermined by the modern *1995 TM Act*, which added the following as registrable marks: ‘aspect of packaging, shape, colour, sound or scent’.³³ Another point in relation to unregistrable marks is that passing off could protect marks embodying commonly used words that had developed a secondary reputation.³⁴ These marks would be those having little to no inherent adaptation to distinguish. It was previously held that these kind of marks were an exception to the presumption of registrability.³⁵ If the mark had difficulty being registered or could not be registered, then passing off would likely be an attractive option. However, the restructure of s 41 of the *1995 TM Act* by the *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* (Cth) clarified that the presumption of registrability does indeed apply to s 41.³⁶

A third benefit of passing off in trade mark litigation was thought to be access to exemplary damages³⁷ and the option of an account of profits or compensatory damages.³⁸ However, more recent legislation has undermined this advantage by creating a head of ‘additional damages’³⁹ (in addition to an injunction and compensatory damages) for trade mark infringement under *1995 TM Act* s 126(2) to punish and deter.⁴⁰

A final benefit, and perhaps the only benefit, of passing off as a concurrent claim is as a ‘safety net’ or ‘back-up’ claim should the plaintiff’s trade mark rights

³³ *1995 TM Act* s 6.

³⁴ See the discussion of the role of passing off and distinctive marks under the *1955 TM Act* in *Oxford University Press v Registrar of Trade Marks* (1990) 24 FCR 1, 15 (Gummow J).

³⁵ *Blount Inc v Registrar of Trade Marks* (1998) 40 IPR 498, 505 (Branson J):

The above examination of subsections (3) to (6) of s 41 of the Act demonstrates that the section limits the scope of operation of s 33(1) of the Act so far as the question of capacity to distinguish is concerned. ... It is thus not the case, as might otherwise be concluded from the terms of s 33(1), that if the registrar is uncertain whether a trade mark is capable of distinguishing the applicant’s goods or services from the goods or services of other persons then he or she must accept the application.

³⁶ IP Australia, *Trade Marks Office Manual of Practice and Procedure* (1 August 2018) <http://manuals.ipaustralia.gov.au/trademarks/Part_22.pdf> pt 22, 8: ‘[s]ection 41 was repealed and re-enacted by the *Intellectual Property Laws Amendment (Raising the Bar) Act 2012*. The changes to section 41 clarify that the presumption of registrability does apply to section 41.’

³⁷ Exemplary damages could be had for ‘conscious and contumelious disregard for the wronged party’s rights and to deter the wrongdoer from committing like conduct again’: *XL Petroleum (NSW) v Caltex Oil (Australia) Pty Ltd* (1985) 155 CLR 448, 471 (Brennan J). See *Taleb v GM Holden Ltd* (2011) 286 ALR 309, 317 [41] (Finn and Bennett JJ) (citations omitted):

it is accepted in this country that the circumstances of a passing off may be such as to make it appropriate to punish a respondent for conduct showing a conscious and contumelious disregard for the wronged party’s rights and to deter the wrongdoer from committing like conduct again. Such awards have not commonly been made, the apparent reason for this being that the passing off has occurred in conjunction with a copyright infringement for which substantial ‘additional damages’ have been awarded under s 115(4) of the *Copyright Act 1968* (Cth): for example, *Deckers Outdoor* at [115] ...

³⁸ For a discussion of additional and exemplary damages, see *Futuretronics.com.au Pty Ltd v Graphix Labels Pty Ltd* (No 2) (2008) 76 IPR 763.

³⁹ *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* (Cth) s 29.

⁴⁰ For a discussion of the intersection of exemplary damages and the *Copyright Act 1968* (Cth), see *Futuretronics.com.au Pty Ltd v Graphix Labels Pty Ltd* (No 2) (2008) 76 IPR 763. See generally Ricketson and Creswell, *The Law of Intellectual Property: Copyright, Designs & Confidential Information*, (Thomson Reuters, 2nd ed, 1999) [13.900]–[13.940].

be negated.⁴¹ For example, a defendant may counterclaim to have the plaintiff's mark removed from the register for want of validity. A concurrent action in passing off could assist the plaintiff should its trade mark registration be struck down.⁴² Another example relates to mitigating the risk of a court finding that a defendant has not 'used' the impugned sign as a trade mark.⁴³ In such a situation, a plaintiff could succeed by using passing off as a 'back-up claim'.

However, if the remaining useful role for a concurrent claim is acting as a safety net should the plaintiff's rights fail under the *1995 TM Act*, the question remains as to why argue concurrent claims in both passing off and *ACL s 18*? And if so, how do courts resolve those claims?

(b) *ACL s 18*

In a comparison between passing off and *ACL s 18* in the context of s 120 litigation, the disadvantages of passing off are evident. From a practical perspective, the main distinction relates to the evidentiary burden.⁴⁴ With regards to proof, passing off requires the plaintiff to show 'sufficient reputation in a particular get-up or name'.⁴⁵ There 'is no such requirement' in relation to *ACL s 18*.⁴⁶ That is, the latter focuses on whether the defendant's conduct is likely to mislead or deceive as a general proposition. Some commentators would argue that proof of the trader's reputation assists in identifying the nature of the deceptive conduct.⁴⁷ Nevertheless, it is generally the case that proving a misrepresentation damaging a plaintiff's reputation is narrower (and thus more difficult) than proving misleading or deceptive conduct, such that a finding of passing off will likely lead to a breach of *ACL s 18*'s standard.

The only other obvious advantage of passing off is that, unlike *ACL s 18*, it is not bound by conduct that is in 'trade or commerce'. However, this distinction is arguably undermined because conduct in 'trade or commerce' has been interpreted so broadly that cases that are actionable under passing off are almost always covered

⁴¹ Note that this discussion relates to passing off as a collateral claim in the context of s 120 *TM 1995 Act* litigation. It is acknowledged that passing off still retains independent relevance in misleading conduct claims in areas such as advertising.

⁴² For example, in *Toddler Kindy Gymparoo Pty Ltd v Gymboree Pty Ltd* both sides sought removal of their opponent's mark for want of validity and the plaintiff ultimately found success on its passing off claim: (2000) 100 FCR 166 (*'Gymparoo v Gymboree'*).

⁴³ See, eg, *CSR Ltd v Resource Capital Australia Pty Ltd* (2003) 128 FCR 408, where the mark was used for cyber-squatting purposes.

⁴⁴ For a discussion of passing off and *ACL s 18* more generally, see Robert Burrell and Michael Handler, *Australian Trade Mark Law* (Oxford University Press, 2nd ed, 2016) chs 12–13.

⁴⁵ *Cadbury v Darrell Lea* (2007) 159 FCR 397, 419 [99] (Black CJ, Emmett and Middleton JJ), states that, for the statutory claim

[t]he question is whether the use of the particular get-up or name by an alleged wrongdoer in relation to his product is likely to mislead or deceive persons familiar with the claimant's product to believe that the two products are associated, having regard to the state of the knowledge of consumers in Australia of the claimant's product.

⁴⁶ *Ibid* 418–19 [99] (Black CJ, Emmett and Middleton JJ): 'whether or not there is a requirement for some exclusive reputation as an element in the common law tort of passing off, there is no such requirement in relation to Pt V of the *Trade Practices Act*'.

⁴⁷ Burrell and Handler, above n 44, 477 state that 'it will be for the plaintiff to demonstrate sufficient reputation to ground its action for passing off or breach of the statutory prohibition on engaging in misleading or deceptive conduct'.

by *ACL* s 18.⁴⁸ In addition, in the context of s 120 litigation, all trade mark use is, by definition, use related to trade source and is therefore always conduct in ‘trade or commerce’, given the wide interpretation of that expression.

The question remains as to whether and why litigants should argue concurrent claims in both passing off and *ACL* s 18 in trade mark litigation. Burrell and Handler argue that one reason for this quandary is that little thought was given to how the introduction of the federal consumer law in 1974 would affect either trade mark or business reputation infringement claims.⁴⁹ Moreover, ‘this possibility [of overlap and redundancy] was not mentioned at any time during the legislative history’ of the *Trade Practices Act 1974* (Cth) (*TPA 1974*) (the precursor to the *ACL*).⁵⁰

Early concern about potential overlap was expressed in 1984, a decade after the inception of s 52 of the *TPA 1974* (the precursor to *ACL* s 18).⁵¹ Blakeney argued (in what has been described as a ‘seminal’ article)⁵² that passing off was dominating and curbing the broad language of s 52 of the *TPA 1974*.⁵³ His concern was that ‘[t]his may mean that justice is done between the parties but, it is submitted, damage is done to the doctrinal purity of the pro-consumer objectives of the statute.’⁵⁴ Blakeney noted that, despite courts warning against heavy reliance on passing off, inevitably, ‘the final decision has been based on the application of some technical passing off rule’.⁵⁵

In stark contrast to this position, more recently it has been said that ‘passing off is on its last legs’.⁵⁶ For example, Heerey QC and Creighton-Selvay argue that passing off in a trade mark infringement suit can be ‘avoided’ as the increased evidentiary cost (of concurrent claims) does not outweigh the benefits unless exceptional relief is sought.⁵⁷ To resolve these competing positions, whether and

⁴⁸ Ed Heerey QC and Peter Creighton-Selvay, ‘Trade Marks and Passing Off — Has the Old Tort Passed On?’ (2013) 94 *Intellectual Property Forum* 25, 30: ‘it is possible that where misleading or deceptive representations are made, and those representations are not made in trade or commerce, an action for passing off (or trade mark infringement) might succeed, whereas an action for contravention of s 18 of the *ACL* might fail’. The meaning of a misrepresentation outside of trade or commerce was discussed in the case of *Attorney-General; Ex rel Elisha v Holy Apostolic & Catholic Church* (1989) 37 NSWLR 293. The authors discuss the judgment of Young J, which found that the impugned conduct associated with the conduct of a church had not occurred in trade and commerce and was not actionable under s 52 of the *TPA 1974* (now *ACL* s 18).

⁴⁹ Burrell and Handler, above n 44, 463.

⁵⁰ *Ibid.*

⁵¹ Note that the original language under s 52 of the *TPA 1974* read: ‘(1) A corporation shall not, in trade or commerce, engage in conduct that is misleading or deceptive.’ In 2010, ‘corporation’ was replaced by ‘person’ under s 18 of the *ACL*. As a law of the Commonwealth, the *ACL* references to ‘persons’ applies to ‘corporations’: *Competition and Consumer Act 2010* (Cth) s 131(1).

⁵² Burrell and Handler, above n 44, 462.

⁵³ Blakeney argued that s 52 was modelled on s 5 of the US *Federal Trade Commission Act 1914*, inspired ‘by the enviable record in consumer protection’: Michael Blakeney, ‘Old Wine in New Bottles: Influence of the Common Law on the Interpretation of Section 52 of the *Trade Practices Act*’ (1984) 58(6) *Australian Law Journal* 316, 316. Blakeney laments that the intentionally ‘broad language of the section’ has been ‘interpreted more narrowly by Australian judges than by their American counterparts’: at 316.

⁵⁴ *Ibid* 317.

⁵⁵ *Ibid.*

⁵⁶ Heerey and Creighton-Selvay, above n 48, 34.

⁵⁷ *Ibid.*

how passing off and *ACL* s 18 claims are litigated in s 120 litigation is examined in this study.

II Method

Empirical legal studies are uncommon in Australia. This is likely because they are labour intensive and require both quantitative and legal reasoning skills. In Australia, there has been one study specifically examining empirical trends in trade mark litigation.⁵⁸ In this 2006 study, Bosland, Weatherall and Jensen⁵⁹ examined all trade mark enforcement decisions for the five-year period between 1998 and 2002. The authors found ‘two fundamentally different kinds of trade mark litigation’:⁶⁰ counterfeit proceedings, where there was a high rate of success for the applicants;⁶¹ and non-counterfeit cases, where the success rate was ‘lower than the 50% rate predicted by standard economic models of litigation’.⁶²

This study differs from the Bosland et al study with respect to timeframe and research objectives. The Bosland et al study focused on all trade mark enforcement claims under different aspects of the *1995 TM Act* over a five-year timeframe. In contrast, the present study looks only at cases where there was a substantial discussion of rights under s 120 of the *1995 TM Act* over a 20-year timeframe (all cases in the population).⁶³ This methodological difference will be discussed further below in relation to win/loss outcomes. This study looks only at the infringement of registered marks under s 120 of the *1995 TM Act* and only discusses passing off and *ACL* s 18 in that context. This article acknowledges, but excludes, the large body of passing off and *ACL* s 18 jurisprudence that exists outside of s 120 litigation.⁶⁴

⁵⁸ See also Vicki Huang, Kimberlee Weatherall and Elizabeth Webster, ‘The Use of Survey Evidence in Australian Trade Mark and Passing Off Cases’ in Andrew T Kenyon, Ng-Loy Wee Loon and Megan Richardson (eds), *The Law of Reputation and Brands in the Asia Pacific* (Cambridge University Press, 2012) 181 (‘Huang et al study’).

⁵⁹ Jason Bosland, Kimberlee Weatherall and Paul Jensen, ‘Trade Mark and Counterfeit Litigation in Australia’ (2006) 4 *Intellectual Property Quarterly* 347 (‘Bosland et al study’).

⁶⁰ Ibid 377.

⁶¹ Ibid 358: ‘two thirds of the counterfeit cases 66% were resolved within 10 court hours and within less than a year from the date of issue’.

⁶² Ibid 349 citing George L Priest and Benjamin Klein, ‘The Selection of Disputes for Litigation’ (1984) 13(1) *Journal of Legal Studies* 1.

⁶³ For a similar method in a US context, see Beebe, above n 6.

⁶⁴ See, eg, *Google Inc v Australian Competition and Consumer Commission* (2013) 249 CLR 435, where the High Court determined whether Google could be liable for misleading or deceptive conduct under s 52 of the *TPA 1974* (now *ACL* s 18) for its sale of sponsored links that were triggered by keywords where a competitor had purchased the trade marked names of a rival as keywords. For an example related to the application of passing off to protect an advertising campaign, see *Cadbury Schweppes Pty Ltd v Pub Squash Co Pty Ltd* where the Privy Council held that a passing off claim is not limited to a trade mark, but ‘may extend to other descriptive material such as the component parts of an advertising campaign’: [1980] 2 NSWLR 851, 851. For an example of passing off applied to celebrity indicia, see *Hogan v Pacific Dunlop Ltd* (1988) 12 IPR 225, affirmed by *Pacific Dunlop Ltd v Hogan* (1989) 23 FCR 553, where the applicants relied on passing off and breach of the *TPA 1974* ss 52, 53(c) and (d) to claim the respondent’s TV commercial for shoes (a parodic spoof of a scene from *Crocodile Dundee* (directed by Peter Faiman, Rimfire Films, 1986)) represented a false connection between the applicant and the goods of the respondent.

A Case Selection

In relation to Australian case law, the utility of referring to Beebe's method relates to his approach to case selection. Beebe looked at 'all district court opinions that made substantial use of a multi-factor test for the likelihood of consumer confusion' over a five-year period from 1 January 2000 to 31 December 2004 inclusive (1252 opinions excluding appeals).⁶⁵ From this pool, he 'reviewed each of these opinions to determine whether it made *substantial use* of the multi-factor test'.⁶⁶ Beebe 'defined substantial use liberally as any use beyond the mere citation without analysis of the test'.⁶⁷

Beebe further culled cases that would skew the results in terms of representing how tests of infringement are applied. He therefore excluded cases that dealt with counterfeiting, 'breaches of franchising, licensing, or distribution agreements', and 'opinions on motions to dismiss or on motions where the non-moving party failed to appear'.⁶⁸ For example, with respect to counterfeiting opinions, Beebe noted that in counterfeit cases 'the likelihood of confusion is very clear and the factors tend to weigh overwhelmingly in favor of the plaintiff'.⁶⁹ Inclusion would thus skew the results of the study. Of the remaining 337 opinions, Beebe excluded six cases where the outcome of the multi-factor test was reversed.⁷⁰ That is, he retained the district court opinion where there was an appeal, but the trial judge's decision on infringement was affirmed or not agitated.

The cases for this study were located using broad keyword searches in the LexisNexis Australia legal database — 'All Subscribed Australian Case Sources' — for all Australian jurisdictions in order to capture the rare trade mark cases that are brought in state rather than federal courts. Keywords included 'trade mark' and 'infringement' dated between 1 January 1996 and 1 January 2016. This broad search revealed 2355 cases. Duplicates were eliminated. This set was cross-checked against a list derived from another database, Westlaw Australia, which unearthed a small handful of cases not reported in LexisNexis Australia legal database.⁷¹ The final list was cross-checked against a third online database, that of the Australasian Legal Information Institute (austlii.edu.au), but no further additions were required.

Only cases that provided a 'substantial discussion' of s 120 of the 1995 *TM Act* were included. 'Substantial' was defined liberally as 'any use beyond mere citation without analysis of the test'.⁷² Excluded after inspection were cases that focused on ownership disputes (for example, prior use or consent), parallel imports, the 1955 *TM Act*, procedural issues, discovery issues, costs, damages, copyright, patents, design law or contract interpretation. It was found that those cases did not

⁶⁵ Beebe, above n 6, 1649.

⁶⁶ *Ibid* 1650 (emphasis in original).

⁶⁷ *Ibid*.

⁶⁸ *Ibid*.

⁶⁹ *Ibid*.

⁷⁰ *Ibid*.

⁷¹ See, eg, *Société Des Produits Nestlé SA v Christian (No 14)* [2014] FCCA 2968 (19 December 2014), where the absence was reported and rectified.

⁷² Beebe, above n 6, 1650.

include a substantial discussion of the law of trade mark infringement.⁷³ Two further categories of cases were excluded from the analysis: counterfeit cases and first-instance decisions that were reversed on appeal. As per Beebe's and Bosland et al's studies, counterfeit cases are not representative of typical infringement proceedings.⁷⁴ The proceeding is quickly disposed of⁷⁵ and the trade mark owner typically wins.⁷⁶

Appellate judgments were excluded. Appellate courts in trade mark cases are not hearings de novo and the reconsideration of evidence in relation to s 120 is not common.⁷⁷ Of the first-instance decisions, only those that were not reversed on ultimate appeal were included.⁷⁸ Separating out first-instance decisions (where the finding was not reversed) has particular advantages. First, this is a study that examines judicial reasoning regarding s 120. Second, from a statistical point of view, a homogenous group is preferable to make inductive arguments.⁷⁹ Removing appeals and first-instance cases where the s 120 finding was reversed left 78 cases in the sample.⁸⁰

With regards to terminology, Australian courts use the term 'case' loosely, and it is not strictly a term of art. In contrast, 'proceedings' are defined as 'all acts and events between the time of commencement and the judgment'.⁸¹ This can span from multiple judgments on preliminary and interlocutory matters to judgments of higher courts of appeal. A judgment is defined as 'the final order or set of orders made by the Court after a hearing'.⁸² However, a judgment will usually contain a full set of reasons and conclude with a request that parties draft orders to be approved at a later date. Colloquially, the proceedings (and a single judgment within those

⁷³ Ibid. Beebe stated at 1650 (citations omitted) that:

I excluded a small minority of fact patterns that led courts to apply the multifactor test in ways that could skew the results of the study. In most counterfeiting opinions, for example, the likelihood of confusion is very clear and the factors tend to weigh overwhelmingly in favor of the plaintiff. The same is true of opinions involving an alleged breach of a franchising, licensing, or distribution agreement. These opinions were thus excluded from the sample. For similar reasons, I also excluded opinions on motions to dismiss or on motions where the non-moving party failed to appear. I retained and noted opinions involving claims of reverse confusion, and fact patterns in which the defendant repackaged plaintiff's goods.

⁷⁴ See, eg, Bosland et al, above n 59, 366.

⁷⁵ See Huang et al, above n 58, 189. On average, counterfeiting cases took 1.1 hearing days, compared with 2.4 days for passing off and trade mark infringement, which illustrates the less complicated nature of the former.

⁷⁶ Bosland et al, above n 59, 366.

⁷⁷ Ibid 357, where the authors held this to be significant, in contrast to patent cases, which involved difficult questions of claim construction: 'trade mark infringement actions turn largely on issues of fact' and 'are inherently impressionistic' leaving appellate courts reluctant to set aside a trial court's findings.

⁷⁸ Beebe, above n 6, 1650: 'This resulted in a sample of 337 opinions. I excluded the six opinions in which the outcome of the multifactor test was reversed, which yielded a final sample of 331 opinions'.

⁷⁹ As described by Hall and Wright, 'conventional legal scholarship analyzes issues presented in one case or a small group of exceptional or weighty cases, content analysis works by analysing a larger group of similarly weighted cases to find overall patterns': above n 5, 66.

⁸⁰ A full list of the 78 cases and information relating to coding is available from the author.

⁸¹ Federal Court of Australia, *Glossary of Legal Terms* <<http://www.fedcourt.gov.au/digital-law-library/glossary-of-legal-terms>>.

⁸² Ibid.

proceedings) can be known as a ‘case’. In this article, a ‘case’ refers to a single written judgment or decision within a ‘proceeding’. The 78 cases in the sample were coded for ‘posture’ or procedural standing. This showed that there were 58 trial decisions, 16 applications for interlocutory relief, one application for interlocutory orders, two applications for default judgment and one application for summary judgment.

It may be argued that these different types of judgments should not be grouped together because they result from different requirements of proof, argument and reasoning. However, this argument can be refuted because of the consistent approach used to select the cases. As discussed earlier, cases were included if they provided a ‘substantial discussion’ of s 120 of the 1995 *TM Act*. A close reading of the cases found that there were trial decisions that provided limited discussion of s 120 and non-trial proceedings (for example, interlocutory applications) that provided extensive discussion of the issues. In other words, posture did not necessarily determine the quality or quantity of the discussion of issues under investigation. Therefore, although the 78 cases in the dataset reflect different postures, they are consistent in the sense that they all provide a substantial discussion of s 120 of the 1995 *TM Act*.

B Coding

The dataset was coded by the author and data was entered into an author-designed Microsoft Access database. In total, each case was reviewed at least seven times. In addition to coding the factual aspects of each case, each judgment was read to identify specific comments, obiter dicta and rationes decidendi of interest. Regarding hearing length, if the judgment and hearing were heard and delivered on the same day, this was counted as zero days. If the hearing and date of judgment were on separate days, then the hearing length was estimated as one day, unless further dates were listed in the header.⁸³

Coding a win or a loss for each case was complicated by the fact that, for any one case, there could be at least one or more trade marks in suit. Most litigants bring their best case to court and generally put forward all trade marks that may potentially be found to be infringed, even though there is only one mark of critical interest. This makes sense because, once an action has begun, pleadings can only be amended with the consent of the other party or with the leave of the court and can involve time bars and additional costs.⁸⁴ Plaintiffs are strategically better off pleading as many trade marks as they think reasonable in any one case.

To deal with the coding issue of win/loss where more than one trade mark allegedly infringed, Beebe’s method was followed. Beebe coded per case rather than per trade mark;⁸⁵ similarly the Australian studies of Huang et al⁸⁶ and Bosland et al⁸⁷

⁸³ Note that the Bosland et al study, above n 59, had the benefit of more detailed estimates of time from FEDCAMS, a database that is no longer accessible.

⁸⁴ See, eg, *Federal Court Rules 2011* (Cth) rr 16.51–16.60.

⁸⁵ Beebe, above n 6, 1650.

⁸⁶ Huang et al, above n 58, 185.

⁸⁷ Bosland et al, above n 59.

coded by proceedings and not by trade mark. Therefore, if there were multiple marks litigated and there was one 'win', the case was coded as a 'win' overall⁸⁸ A win on a subset of marks will likely give the plaintiff an injunction against the defendant's impugned behaviour. For most plaintiffs, it is likely that such a win would be considered a victory. Coding these types of cases as 'wins' risks over-representing the win rates of the plaintiff. However, a review of the cases found it was uncommon in a single case for there to be multiple marks discussed and a split decision about winning and losing across marks.

The alternative approach would be coding wins/losses per mark, but this method has the problem of over-inflating the sample size. As discussed above, it is assumed that, as rational actors, plaintiffs put forward their best case and that this means including all trade marks for which there is a chance of winning either a s 120 or concurrent claim. However, assuming courts are also rational actors, they will focus on only one or two marks that best represent the legal issues in dispute to dispose efficiently of the case. Therefore, it is argued that coding per case rather than per mark within a case produces a more accurate reflection of the dynamics of judicial reasoning.

III Results and Discussion

A *Winning and Losing*

1 *Stability of the Sample – Appeals*

As described in the method, the dataset included first-instance decisions not reversed on appeal. It is therefore important to examine the rate and nature of appeals as indicators of the stability of the dataset. For example, if a large number of cases were reversed on appeal, then the first-instance dataset will contain a large number of exclusions and thus not be representative of the type of cases that pass through first-instance courts.

Table 1 (below) shows that over the 20-year period there were 22 first-instance decisions that went to an appellate court, ie 26% of cases.⁸⁹ This is low compared with appeals of patent cases.⁹⁰ With regards to the 22 trade mark decisions that went to appeal, 73% (16/22) of appellate judgments affirmed the trial decision on the s 120 issue (affirming seven wins and nine losses). Six appellate judgments reversed the trial decision (reversing five plaintiff s 120 wins and one loss). In short,

⁸⁸ *Louis Vuitton Malletier v Sonya Valentine Pty Ltd*, where there was a win only against one allegedly infringing mark out of two litigated marks: (2013) 222 FCR 45 ('*Louis Vuitton*'); *Hills Industries Ltd v Bitek Pty Ltd*, where there was a win only in relation to a subset of goods within a class: (2011) 214 FCR 396.

⁸⁹ Twenty-six percent is calculated as a percentage of the total number of 84 cases, ie 22/84. The total sample size for this question is 84 because the working sample size of 78 excludes six trial decisions that were reversed on appeal.

⁹⁰ Weatherall and Jensen, above n 12, 266 finding the proportion of patent matters appealed to the Full Federal Court was 59%: ie 17 out of 29 proceedings for the period 1997–2003.

unsuccessful defendants did better on appeal than unsuccessful plaintiffs.⁹¹ Given the low proportion of appeals and the very low number of successful appeals, it can be said that the dataset is representative of first-instance outcomes.

Table 1: Appellate outcomes (n = 22)

Trial outcome	s 120 win	s 120 loss	Total
Reversed	5	1	6
Affirmed	7	9	16
TOTAL	12	10	22

2 *Win/Loss Rates 1 January 1996–1 January 2016*

Over a 20-year period, there were 40/78 (51%) s 120 wins to 38/78 (49%) s 120 losses. It should be emphasised that the win/loss coding relates to success on the s 120 argument, as distinct from the relief sought. This is important because in two interlocutory applications, the plaintiff won the s 120 claim on merits but was not successful in attaining an injunction against the defendant.

The 51% to 49% win:loss ratio is identical to the win:loss ratio reported in Beebe's study of 331 US opinions.⁹² In addition, these findings approximate the influential Priest-Klein 'divergent expectations model', which predicts a 50:50 win:loss ratio where all parties are rational and fully informed.⁹³ However, it is noted that win:loss ratios should be interpreted with caution.⁹⁴ This is because the 'empirical study of judicial outcomes (win rates)' can be 'notoriously problematic'.⁹⁵ It is well-recognised that these observations can be affected by externalities, such as the 'case-selection effect'.⁹⁶ This 'effect' posits that the cases

⁹¹ Note that this does not mean cases that did not seek an appeal were necessarily correct. Parties may choose not to appeal based on factors such as cost or time and not just on the merits of the case. Inferences as to the 'correctness' of the decisions in the 78 cases are not being made here. Rather, these cases are the best population to represent the nature of reasoning at first-instance courts.

⁹² Note that a similar method to Beebe's method of case selection was adopted for this study. See Beebe, above n 6, 1596–7.

⁹³ Priest and Klein, above n 62.

⁹⁴ Clermont and Eisenberg argue that, while it is recognised that win/loss rates can be useful at a descriptive level, the descent 'to the inference level' can 'lead the observer astray': Kevin M Clermont and Theodore Eisenberg, 'Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction' (1998) 83(3) *Cornell Law Review* 581, 588. For critiques of the Priest-Klein model, see, eg, Donald Witman, 'Is the Selection of Cases for Trial Biased?' (1985) 14(1) *Journal of Legal Studies* 185; Steven Shavell, 'Any Frequency of Plaintiff Victory at Trial Is Possible' (1996) 25(2) *Journal of Legal Studies* 493; Daniel Kessler, Thomas Meites, and Geoffrey P Miller, 'Explaining Deviations from the Fifty-Percent Rule: A Multimodal Approach to the Selection of Cases for Litigation' (1996) 25(1) *Journal of Legal Studies* 233.

⁹⁵ Beebe, above n 6, 1592.

⁹⁶ Clermont and Eisenberg, above n 94, 581. Note that there are other selection biases that are possible, such as publication bias. However, trade mark cases are generally pursued in the Federal Court of Australia, which is a superior court of record, *Federal Court of Australia Act 1976* (Cth) s 5.

that come to court represent a ‘biased sample from the mass of underlying disputes’ because most disputes are settled prior to a hearing.⁹⁷ Therefore, the cases and issues that proceed to litigation are not necessarily reflective of the nature of disputes in the marketplace.⁹⁸ An additional issue may be that some ‘irrational’ litigants pursue close or losing cases to defend their mark in the marketplace at all costs.⁹⁹ Therefore, at its highest, this win/loss finding can be said to support the proposition that this method of case selection yields a homogenous sample of ‘close cases’ representing (on average) rational parties with divergent expectations. From a methodological perspective, this is a useful finding in and of itself.

For example, the win:loss ratio for the sample in this study differs from Bosland et al’s findings for non-counterfeit Australian trade mark cases in the five-year period between 1998 and 2002. In that study, the authors found the plaintiff won in 9/30 cases (30%) and lost in 20/39 cases (67%), and there was a partial win in 1/30 cases (3%). The authors considered these results surprising and different to those expected under the divergent expectations model.¹⁰⁰ They suggested that trade mark owners could be overly optimistic or prepared to risk a loss for strategic gains.

It is suggested here that the difference between the two studies relates to the methods of case selection. In this study, cases were included only if there was a substantive discussion of s 120 issues by the court. To that end, cases that dealt with enforcement of rights via ownership issues or contract disputes were excluded. The Bosland et al study explored enforcement of trade mark rights more broadly, which explains why their sample of 30 cases over a five-year period is proportionally larger than the sample of 78 cases over a 20-year period in this study. It is suggested here that the results in this study better reflect win/loss rates with respect to s 120 reasoning, and conclusions are limited and drawn within the confines of this study’s more homogenous dataset.

B *Sections 120(1), (2) and (3)*

This section explores in more detail the rate of pleading and reasoning under the three subsections of ss 120(1), (2) and (3) over two separate decades: Decade One (1 January 1996–31 December 2005), 33 cases; and Decade Two (1 January 2006–1 January 2016), 45 cases. By examining the 20-year period as two halves, a 36% increase in the volume of s 120 litigation from Decade One to Decade Two (from 33 to 45 cases) can be observed (Table 2 below). This increase approximates Australian economic growth between these two periods, which is estimated at 44%.¹⁰¹ In other

⁹⁷ Ibid.

⁹⁸ Ibid 589. The win/loss rates should not be used for inferences as to the ‘underlying mass of disputes and cases’ at large.

⁹⁹ It is beyond the scope of this article to determine more complex motivations (eg, a litigant’s internal risk assessment) beyond the prima facie assumption of protecting their mark.

¹⁰⁰ Bosland et al, above n 59, 373.

¹⁰¹ This was calculated by the author by determining the relative increase between the average real gross national income for January 1996–December 2005 (\$230 156 million) and January 2006–March 2014 (\$331 706 million) (data beyond this timeframe was not available). See Australian Bureau of Statistics, 5206.0—*Australian National Accounts: National Income, Expenditure and Product* (1994) Table 1 <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/5206.0Mar%202014?OpenDocument>>.

words, the increase in the number of litigated cases in Decade Two may be explained by overall growth in the Australian economy, rather than a real increase in the volume of trade mark litigation under s 120.

Table 2 (below) shows that, irrespective of decade, s 120(1) has been the most dominant claim, accounting for 82% and 93% of trade mark infringement suits for Decade One and Decade Two, respectively. Across decades, a relative decline in pleading s 120(2) can be seen, from 33% of cases in Decade One to 29% in Decade Two. A decline can also be observed for s 120(3) claims, from 15% in Decade One to 2% in Decade Two. In sum, claims under s 120(1) (accounting for 93% in Decade Two, up from 82% in Decade One) have become predominant under ss 120, while s 120(2) and (3) are suited to a minority of cases.

Table 2: Section 120 cases over two decades

Decade One: January 1996–December 2005, 33 cases			
Claim	s 120(1)	s 120(2)	s 120(3)
Number of claims	27	11	5
Total cases (1996–2005)	33	33	33
Proportion of claims made per case	82%	33%	15%

Decade Two: January 2006–January 2016, 45 cases			
Claim	s 120(1)	s 120(2)	s 120(3)
Number of claims	42	13	1
Total cases (2006–16)	45	45	45
Proportion of claims made per case	93%	29%	2%

1 *Discussion on the Decline of ss 120(2)–(3) Claims*

These results are interesting given the history of the *1995 TM Act*. As discussed earlier, s 120(2) and s 120(3) were introduced to meet obligations imposed by art 16(1) of the *TRIPS Agreement*.¹⁰² At the time, the Working Party to Review the Trade Marks Legislation expressed concern that these infringement provisions (which permit liability for use on goods and services beyond those for which the plaintiff was registered) could be considered an unreasonable extension of the trade mark owner's rights.¹⁰³ This article shows that excessive reliance on these 'extension' provisions has not occurred in the context of this dataset.

¹⁰² Davison and Horak, above n 1, 648–9 [85.25].

¹⁰³ Working Party to Review the Trade Marks Legislation, above n 1.

2 *The Decline of ss 120(2) and (3) and the Link to ‘Cluttering’*

A potential explanation for why plaintiffs are not relying on ss 120(2) and (3) is because they just do not have to. It may be the case that the bar for registration has been set too low under the *1995 TM Act*, such that trade mark owners have their marks registered across an ‘excessive’ range of goods and/or services. This, plus the presumption of registrability, may have induced over-registration of marks across goods and services where there may only be a spurious intention to use.

The issue of ‘cluttering on the register’ has been recently discussed by academics¹⁰⁴ and in a report by the Productivity Commission.¹⁰⁵ Cluttering can refer to the situation where the specification includes goods and/or services where the owner will not use the mark (over-broad registrations) or where the owner has registered a mark, but fails in its intention to actually use the mark as registered.¹⁰⁶ Cluttering may also refer to disaggregated registrations where a brand owner registers sub-parts of their packaging to create a mosaic of rights over a single package. If cluttering according to these definitions exists, then a potential infringer’s conduct is likely to fall under s 120(1) for allegedly using a substantially identical or deceptively similar mark upon goods and services for which the plaintiff has broadly registered itself. There is no need to assert rights for infringement on similar or related goods and/or services under s 120(2) or (3) because the trade mark owner has registered their marks for all the goods and services that relate to their business (however tenuous). Assessing the veracity of this theory is beyond the scope of this article, but a project is underway to examine the registration data of the marks in this dataset to test this hypothesis.

C *Concurrent Claims in Passing Off and ACL s 18*

As discussed earlier, in Australia it is common for parties to plead a trade mark infringement case under s 120 of the *1995 TM Act* alongside common law passing off and/or breach of *ACL* s 18. For this article, cases pursued under all three causes of actions/claims are termed ‘treble’ pleadings, cases pleaded under two heads are labelled ‘double’ pleadings and those claimed under any or all subsections of s 120 are ‘single’ pleadings.

Table 3 (below) breaks down the various combinations of pleadings that were brought across the 78 cases in this study. Plaintiff success on any claim in a pleading

¹⁰⁴ See, eg, Robert Burrell, ‘Trade Mark Bureaucracies’ in Graeme B Dinwoodie and Mark D Janis (eds) *Trademark Law and Theory A Handbook of Contemporary Research* (Edward Elgar, 2008) 95, 102–7; Burrell and Handler, above n 44; Christine Greenhalgh and Elizabeth Webster, ‘Have Trademarks Become Deceptive?’ (2015) 6(2) *World Intellectual Property Organization Journal* 109.

¹⁰⁵ Productivity Commission, above n 8 [12.2, ‘Improving Effectiveness by Reducing the Scope of Cluttering’].

¹⁰⁶ G von Graevenitz, C Greenhalgh, C Helmers and P Schautschick, *Trade Mark Cluttering: An Exploratory Report* (UK Intellectual Property Office, 2012). This definition was cited by the Productivity Commission: *ibid*. Note that cluttering in a US context was discussed by Beebe and Fromer, who described cluttering as a concept related to, but distinct from, trade mark depletion and trade mark congestion: Barton Beebe and Jeanne C Fromer, ‘Are We Running Out of Trademarks? An Empirical Study of Trademark Depletion and Congestion’ (2018) 131(4) *Harvard Law Review* 945, 950–51.

(for example, s 120 passing off or *ACL* s 18) was coded as win, loss or neutral, respectively. ‘Neutral’ was required because if a court found a win on a s 120 claim they often did not consider collateral claims in a substantive way. In these cases, there was no express win or loss attributed to the collateral claim. In addition to individual claims, the plaintiff’s overall success in its litigation was recorded. If the plaintiff had success on any one of its claims, the case was recorded as a ‘net win’ for the plaintiff. To determine the ‘net win’, each case was examined. If there was a win on any one of s 120, passing off or s 18, the outcome was coded as a ‘net win’.

In terms of popularity of claims, the top line of Table 3 shows that a s 120(1) treble pleading was the predominant action, pursued in 36/78 cases or 46%. The next most popular proceeding was a single pleading under s 120(1) (11/78 cases or 14%) and the third most popular was a treble pleading under ss 120(1)–(2)/passing off/*ACL* s 18 (8/78 cases or 10%).

‘Average Hearing Days’ shows the average number of hearing days for each form of pleading. The average number of hearing days can be considered a reasonable proxy for the cost of the hearing, which in turn is a rough proxy for the cost of the entire proceeding.¹⁰⁷ The length of a hearing was calculated in units of days and estimated from the information given in the header of the judgment.

What can be observed about the top three forms of pleading? The top panel in Table 3 (below) shows treble claims (that is, where a party pleaded three causes of action). The average hearing days for treble claims were high at 4.0 days per case, which is slightly higher than the average of 3.7 days for the total population. The top two lines of that panel show that s 120(1) treble claims and s 120(1) and (2) treble claims took 4.5 and 4.4 hearing days, respectively. In contrast, single claims took 3.0 and 3.4 days to hear, which is under the 3.7 day average. This makes sense: the more claims to be considered, the more time needed to present evidence and arguments and the more time it will take the court to consider them.

Regarding win rates, treble claims of any nature (as shown in the top panel) made up 52/78 cases (or 67%) of the sample, but the win rate on the s 120 component was on average 46%. However, factoring in wins from passing off and s 18, the ‘net win’ rate rose to 56%. In other words, there were five cases that lost on the s 120 claim, but won on passing off or *ACL* s 18.¹⁰⁸ In contrast, for the s 120 single actions (17/78 cases, or 22% of the population), s 120 win rates were very high, accounting for 59%. This differs from the 46% win rate on s 120 issues in treble claims. The hearing days were also much shorter, averaging 3.2 days for s 120 single pleadings (compared with the 3.7 day average of the population as a whole).

¹⁰⁷ The Bosland et al study, calculated length of the proceeding from date of file till the date of judgment, as well as hearing length in hours. ‘These figures are of interest, in part because the amount of time taken to resolve a case is a proxy for the cost of the proceedings ... In terms of the efficient resolution of disputes, these figures compare favourably.’: Bosland et al above n 59, 357.

¹⁰⁸ There were five cases that lost on s 120, but won on passing off/*ACL* s 18: *AMI Australia Holdings Pty Ltd v Bade Medical Institute (Aust) Pty Ltd (No 2)* (2009) 262 ALR 458 (‘*AMI v Bade Medical (No 2)*’); *Outdoor Power Products Pty Ltd v Silvan Australia Pty Ltd* [2005] FCA 1696 (16 November 2001); *CSR Ltd v Resource Capital Australia Pty Ltd* (2003) 128 FCR 408; *Pacific Publications Pty Ltd v IPC Media Pty Ltd* (2003) 57 IPR 28; *Gymbaroo v Gymboree* (2000) 100 FCR 166.

Table 3: Patterns of pleading with hearing days and win rates¹⁰⁹

	Pleaded actions	Cases (n = 78)		Hearing days		Win rate			
		No.	%	Total	Av.	Net	s 120	PO	s 18
TREBLE CLAIMS	s 120(1), PO, s18	36	46.2%	162	4.5	50%	41.7%	27.8%	33.3%
	s 120(1)–(2), PO, s18	8	10.3%	35	4.4	50%	37.5%	25%	75%
	s 120(2), PO, s18	3	3.8%	3	1.0	100%	66.7%	66.7%	66.7%
	s 120(3), PO, s18	2	2.6%	2	1.0	100%	50%	100%	100%
	s 120(2)–(3), PO, s18	2	2.6%	4	2.0	50%	50%	0%	0%
	s 120(1)–(3), PO, s18	1	1.3%	0	0.0	100%	100%	100%	100%
		52	66.7%	206	4.0	55.8%	46.2%	30.8%	34.6%
SINGLE CLAIMS	s 120(1)	11	14.1%	33	3.0	54.5%	54.5%	n/a	n/a
	s 120(1)–(2)	5	6.4%	17	3.4	60%	60%	n/a	n/a
	s 120(2)	1	1.3%	5	5.0	100%	100%	n/a	n/a
		17	21.8%	55	3.2	58.8%	58.8%		
DOUBLE CLAIMS	s 120(1), s18	5	6.4%	18	3.6	60%	60%	n/a	20%
	s 120(1)–(2), s18	2	2.6%	9	4.5	50%	50%	n/a	50%
	s 120(2), s18	1	1.3%	1	1.0	100%	100%	n/a	100%
	s 120(1)–(3), s18	1	1.3%	3	3.0	100%	100%	n/a	n/a
		9	11.5%	31	3.4	55.6%	55.6%		33.3%
	TOTAL	78	100%	292	3.7				

¹⁰⁹ No. = number; av = average; PO = passing off; s 120 = 1995 *TM Act* s 120; s 18 = *ACL* s 18; Net win rate = s 120/PO/s 18; n/a = not applicable.

The bottom third panel of Table 3 (above) refers to cases that presented a double pleading under s 120 and s 18. Note that the sub-sample size only includes nine cases, making inferences difficult. For these nine cases, the s 120 win rate was 56% and the net win rate (which factors in the effect of s 18 wins) was also 56%.

The data in Table 3 prompts the question: why are treble pleadings (at 4.0 days long) so popular when they take longer to hear than single s 120 claims (at 3.2 days) and have relatively poor success in winning on the s 120 portion of the pleading (46% compared with 59% and 56% for single and double pleadings)? The answer to this may lie in the increased chance of getting a ‘net win’ overall. For example, on average, a treble claimant won on the s 120 claim 46% of the time. However, when factoring in wins on either passing off or *ACL* s 18, the win rate for the plaintiff rose to 56%. That is, litigants who lost on the s 120 claim could still win under either passing off or s 18. This 10 percentage point increase represents a 21.7% rise in ‘net wins’ and may justify the additional costs of pursuing a concurrent claim, particularly in ‘close’ cases or where the plaintiff is vulnerable to a cross claim for invalidity.

These results can also be interpreted to mean that more confident plaintiffs may pursue s 120 single claims or s 120/*ACL* s 18 claims to receive the benefit of a shorter hearing and lower costs. Conversely, the inference is that less confident (or perhaps more determined) plaintiffs pursue treble claims for an increased chance of a ‘net win’, which may offset the increased costs of an extended hearing.

1 *Passing Off and ACL s 18 in Treble Claims*

This section refers to the subset of 52 cases in Table 3 (first panel) in which there was a treble pleading. The data reveals that the plaintiff in treble concurrent claims won the s 18 portion of the pleading in 19/52 cases. Among these 19 cases, the plaintiff won the passing off claim in 17/19 cases, while the passing off claim in 2/19 cases was unclear or not considered. The plaintiff lost the s 18 claim in 28 cases. Of these, the plaintiff also lost the passing off case in 27/28 cases, while in one case the passing off claim finding was ‘neutral or unclear’.¹¹⁰ There were five cases in which the s 18 claim was not discussed in the judgment. Of these, in 4/5 cases the passing off claim was also neutral or not discussed, while in one of these cases the passing off claim was lost.¹¹¹ Prima facie, it appears that passing off and *ACL* s 18 outcomes are synchronous. However, a close reading of the cases shows that the outcome of the concurrent portion of the case tends to be driven by *ACL* s 18 reasoning with the passing off action passively following. These cases will be discussed in Part IIIC(3) below.

2 *Patterns in Pleading Over Time*

The decline in the reliance of passing off as a cause of action in concurrent claims can also be seen over time (Table 4, below). The data was split into two groups:

¹¹⁰ *Lift Shop Pty Ltd v Easy Living Home Elevators Pty Ltd* (2013) 103 IPR 511 (*‘Lift Shop’*).

¹¹¹ *Sebel Furniture Ltd v Acoustic and Felts Pty Ltd* (2009) 80 IPR 244.

Decade One (1 January 1996–31 December 2005), 33 cases; and Decade Two (1 January 2006–1 January 2016), 45 cases.

Table 4: Section 120 and passing off and *ACL* s 18 claims over two decades

Decade One: January 1996–December 2005, 33 cases					
Claim	s 120(1)	s 120(2)	s 120(3)	PO	s 18
Number of claims	27	11	5	25	28
Total cases (1996–2005)	33	33	33	33	33
Proportion of claims made per case	82%	33%	15%	76%	85%

Decade Two: January 2006–January 2016, 45 cases					
Claim	s 120(1)	s 120(2)	s 120(3)	PO	s 18
Number of claims	42	13	1	27	33
Total cases (2006–16)	45	45	45	45	45
Proportion of claims made per case	93%	29%	2%	60%	73%

A comparison of Decade One and Decade Two shows that reliance on passing off and *ACL* s 18 as concurrent actions declined in relative terms. That is, in Decade One, passing off presented in 76% (25/33) of trade mark cases, while in Decade Two, it presented in only 60% (27/45) of cases. Cases arguing under *ACL* s 18 presented in 85% of cases in Decade One (28/33), but in only 73% of cases (33/45) in Decade Two. Passing off claims declined more sharply than did concurrent claims under *ACL* s 18. This decline in the popularity of passing off is supported by the finding that there were no double claims in s 120/passing off. Instead, litigants who pursued a double claim did so as a s 120/*ACL* s 18 claim.

It is difficult to identify the reasons for the relative overall decline in concurrent claiming from Decade One to Decade Two. It may be that plaintiffs grew more confident in litigating under their registered rights under s 120 after the 1995 *TM Act* ‘settled in’ after the first 10 years. Alternatively, a speculative inference could be that the 2008 ‘collapse of the US sub-prime housing bubble’¹¹² and decline in economic conditions lowered the tolerance for wider-scale concurrent litigation.

Regardless, this relative increase in reliance on s 120 (that is, statutory trade mark rights) has significant implications. It may indicate that more recent plaintiffs are not as concerned about vulnerability to a cross claim for revocation of their statutory rights; or it may be reflective of ‘cluttering’ of the register. Proving these propositions is beyond the information provided by this data. However, speculative inferences will be discussed further below.

¹¹² Rick Battellino, Deputy Governor Reserve Bank of Australia, ‘Twenty Years of Economic Growth’ (Speech delivered at Moreton Bay Regional Council, Moreton Bay 20 August 2010) <<http://www.rba.gov.au/speeches/2010/sp-dg-200810.html>>.

3 Further Discussion of Results

(a) *ACL s 18 Dominates Passing Off in Substantive Reasoning*

When looking at concurrent claims within treble pleadings (Table 3, above), it was apparent that *ACL s 18* reasoning was more prevalent than passing off reasoning. This supports some speculation in the literature that passing off is becoming less relevant than *ACL s 18* in trade mark litigation.¹¹³ A close reading of the judgments shows that of the 52 cases where both passing off and s 18 were pleaded together, there were only 24 cases where comments were made about concurrent claims in passing off or *ACL s 18*. This level of commentary may seem low, but it must be recalled that in trade mark infringement litigation the primary rights relied upon are rights under the *1995 TM Act*.¹¹⁴ In contrast, rights under passing off and *ACL s 18* require some proof of right. If a court determines the case under a head of s 120, it does not have to explore the concurrent claims.

Examining these 24 cases in depth, in 11 cases¹¹⁵ the outcomes of the concurrent claims were driven by *ACL s 18* reasoning, while the passing off claim was a secondary consideration. For example, in *Lift Shop*, with regards to passing off Buchanan J said '[t]he applicant accepted that this cause of action [passing off] added nothing to the claim under *ACL s 18* and did not press it. In my view, that was an appropriate position to take'.¹¹⁶ Somewhat dismissive comments along these lines were not uncommon. For example, in *Australian Postal Corporation v Digital Post Australia Pty Ltd (No 2)* it was held that '[t]he parties did not contend that, in the event the *ACL* claims were dismissed, there was any likelihood of the claim under the tort of passing off succeeding'.¹¹⁷ Similarly, in *Louis Vuitton*, it was held that:

Although, as I have said, the applicant's case included claims in passing off, counsel accepted that the relief ... under the *ACL* would be no less efficacious for it ... I was not addressed in any detail on the matter of passing off, and I do not propose to make any findings in relation to it.¹¹⁸

In *Virgin Enterprises Ltd v Virgin Home Loans Pty Ltd*, Hely J stated that 'it is not necessary to distinguish between [*ACL s 18*] ... and passing off. If the applicants could not sustain a claim based upon s 52, I cannot conceive any different result applying ... passing off'.¹¹⁹

¹¹³ See, eg, Heerey and Creighton-Selvay, above n 48.

¹¹⁴ This is because the plaintiff's property rights are self-evident by way of their trade mark registration.

¹¹⁵ *Australian Postal Corporation v Digital Post Australia Pty Ltd (No 2)* (2012) 293 ALR 369; *Louis Vuitton* (2013) 222 FCR 45; *Lift Shop* (2013) 103 IPR 511; *REA Group Ltd v Real Estate 1 Ltd* (2013) 217 FCR 327; *Australian Associated Motor Insurers Ltd v Australian Automotive Motor Inspection Centre Pty Ltd* (2003) 60 IPR 92; *Edutainment Pty Ltd v JMC Pty Ltd* (2003) 60 IPR 265; *Anheuser-Busch v Budvar* (2002) 56 IPR 182; *MID Sydney Pty Ltd v Australian Tourism Co Ltd* (1998) 40 IPR 20; *Verrocchi v Direct Chemist Outlet Pty Ltd* (2015) 228 FCR 189; *Cantarella Bros Pty Ltd v Modena Trading Pty Ltd* (2013) 299 ALR 752; *Gymbaroo v Gymboree* (2000) 100 FCR 166.

¹¹⁶ (2013) 103 IPR 511, 516 [27].

¹¹⁷ (2012) 293 ALR 369, 383 [82] (Marshall J).

¹¹⁸ (2013) 222 FCR 45, 57 [40] (Jessup J).

¹¹⁹ [2000] FCA 1175 (10 August 2000) [9].

In contrast, in only three cases did the passing off reasoning lead the reasoning on *ACL* s 18.¹²⁰ For example, in *Pierson's Pro-Health Pty Ltd v Silvex Nominees Pty Ltd (No 2)*, Lucev FM held '[h]aving regard to the court's findings with respect to ... misrepresentation for the purposes of passing off ... similar considerations apply with respect to ... misleading representations ... under ss 52 and 53(c) of the *TP Act*'.¹²¹

In four out of the 24 cases,¹²² courts made an effort in their judgment to distinguish passing off and *ACL* s 18 claims, but the courts' comments did not have a substantive effect. That is, they were more descriptive of the differences between the actions, but did not result in distinctions in outcome. For example, in *AMI v Bade Medical (No 2)*, Flick J said 'there is a further distinction between passing off and s 52. For the purposes of passing off, it may be that deception must continue to the "point of sale"'.¹²³

These findings support recent arguments that courts in trade mark litigation fail to provide a 'strict demarcation of the causes of action'.¹²⁴ Examining the reasoning in these cases reveals that, while some judges do try to acknowledge the differences between passing off and *ACL* s 18,¹²⁵ overall there is a strong tendency to let s 18 determinations lead the reasoning on passing off claims. That is, any stated determinations on passing off are cursory at best. The empirical data indicate no obvious benefit from arguing both passing off and *ACL* s 18 in the context of s 120 litigation.

¹²⁰ *Bob Jane Corporation Pty Ltd v ACN 149 801 141 Pty Ltd* (2013) 97 ACSR 127; *SMA Solar Technology AG v Beyond Building Systems Pty Ltd (No 5)* [2012] FCA 1483 (21 December 2012); *Pierson's Pro-Health Pty Ltd v Silvex Nominees Pty Ltd (No 2)* [2010] FMCA 121 (12 March 2010). [2010] FMCA 121 (12 March 2010), [122] (citations omitted).

¹²¹ *AMI v Bade Medical (No 2)* (2009) 262 ALR 458; *Mars Australia Pty Ltd v Sweet Rewards Pty Ltd* (2009) 81 IPR 354 ('*Mars v Sweet Rewards*'); *Cody Opal (Australia) Pty Ltd v Dimasi* (2004) 64 IPR 378; *Wellness Pty Ltd v Pro Bio Living Waters Pty Ltd* (2004) 61 IPR 242.

¹²² (2009) 262 ALR 458, 505 [194]. See also *Mars v Sweet Rewards*, in which the Court re-iterated that 'passing off protects the goodwill of the applicant. Section 52, by contrast, protects consumers from being misled or deceived': (2009) 81 IPR 354, 361 [27]. As another example, in *Cody Opal (Australia) Pty Ltd v Dimasi* there was some discussion of the 'provisions of ss 52 and 53(c) of the TPA ... along with the sections providing for remedies for breach of these sections' and it was said that these 'overlap the area of operation of the tort of passing off': (2004) 64 IPR 378, 411 [179].

¹²³ Stevens, above n 31, 1402.

¹²⁴ See, eg, *Verrocchi v Direct Chemist Outlet Pty Ltd* (2015) 112 IPR 200, 210 [57]: '[w]hile there is a great deal of practical coincidence between the tort of passing off and contravention of the misleading or deceptive conduct provisions, the two claims have distinct premises'. See also *Mars v Sweet Rewards* (2009) 81 IPR 354, 361 [27]:

Passing off protects the goodwill of the applicant. Section 52, by contrast, protects consumers from being misled or deceived. In a passing off case, the existence of conduct which damages the applicant's goodwill by wrongly suggesting a connexion between the respondent's wares and the applicant's will often also be misleading and deceptive. It is usual therefore in such cases for there to be an overlap between the passing off claim and the claim under s 52.

See also *AMI v Bade Medical (No 2)*: '[i]n this respect, it may be that there is a further distinction between passing off and s 52. For the purposes of passing off, it may be that deception must continue to the "point of sale". Whether or not there is such a requirement in respect to the tort, s 52 does not impose any such constraint': (2009) 262 ALR 458, 505 [194] (citations omitted).

(b) *Is Passing Off Irrelevant to s 120 Litigation?*

Given the above, what is the relevance of passing off as a concurrent claim in a s 120 case? As discussed earlier, passing off's perceived remedial advantages, such as exemplary damages, have now been made irrelevant under the expanded damages head under s 126 of the *1995 TM Act*. Its other advantages — such as coverage of unregistered marks and its role as a safety net — can also be found under the law of *ACL* s 18 and, to some extent, the expanded scope of the *1995 TM Act*. The *ACL* s 18 claim also has the distinct advantage of not requiring 'reputation' as a formal element of determining liability. Recall that to mount a passing off claim, the plaintiff must demonstrate reputation or goodwill as embodied by the plaintiff's trade insignia. In contrast, the statutory claim requires a demonstration of misleading conduct leading to potential or actual consumer deception.

Given the absence of a clear benefit to pursuing passing off, this article argues that it would be a poor use of litigant and court resources to enter a passing off claim as part of a s 120 infringement suit. This is supported by the data that shows litigants — if choosing a double claim — increasingly do so under s 120 and *ACL* s 18 (and not s 120 and passing off). In addition, when analysing a treble claim, courts favour resolving the concurrent portion by focusing their reasoning under *ACL* s 18 and not passing off. It may be that pursuing multiple claims prior to litigation has its advantages in terms of settlement. However, pursuing passing off as a concurrent claim in court provides no apparent benefit.

IV Conclusion

This article reports on a comprehensive study of 20 years of substantive trade mark infringement litigation in Australian courts under s 120 of the *1995 TM Act*. The findings are based on a unique dataset coded to examine not only rates of litigation and success, but also the relationship between concurrent claims under trade mark, passing off and consumer protection laws. The methodology adopted can be used to quantitatively test any area of law where reliance on 'anecdotal' invite deeper inquiry. For example, this article has found empirical support for Heerey QC and Creighton-Selvay's anecdotal assertions regarding passing off.

A critical finding is that the expansive ss 120(2) and (3) provisions have been of declining relevance to s 120 litigation. The data also reveals an overall decline in the pursuit of concurrent claims and a relative increase in the volume of s 120(1) litigation. However, it was found that concurrent claims can still provide net benefits in some cases. Where concurrent claims were pursued in a treble action, a plaintiff secured a higher rate of 'net wins' (46–56%). It is not possible to know the strategic intent of the litigating parties, but an inference made here is that a treble concurrent claim is useful for 'close' cases or where there is likely risk of a cross claim for invalidity. Nevertheless, in cases where there was a concurrent claim, the reasoning of the court was determined by the law of *ACL* s 18 and not passing off. This is contrary to Blakeney's concerns in 1984¹²⁶ and supports the position put forward by

¹²⁶ Blakeney, above n 53.

some practitioners¹²⁷ that the ‘old tort’ has ‘passed on’, at least in the context of s 120 litigation.

One explanation for the change in dynamics could be that trade mark owners have their marks registered across an ‘excessive’ range of goods and/or services. This would allow them to assert their rights under s 120(1), rather than s 120(2), or under concurrent claims. Whether ‘cluttering’ has had an effect on the enforcement of rights is a critical question and addresses key concerns of the Productivity Commission and their recommendations for registration reform. To pursue this question, a cluttering project has begun in relation to the 78 cases in this infringement dataset.

In conclusion, the empirical study reported here has provided a robust and rigorous picture of trade mark enforcement over the last 20 years and tested the validity of numerous assumptions underlying trade mark law and practice. This study has also demonstrated the utility of empirical studies and a method for quantitative analysis of cases in an Australian context. The methodological design of this study can be applied to analyse any branch of law to enhance traditional legal scholarship.

¹²⁷ Heerey and Creighton-Selvay, above n 48.

Before the High Court

Comcare v Banerji: Public Servants and Political Communication

Kieran Pender*

Abstract

In March 2019 the High Court of Australia will, for the first time, consider the constitutionality of limitations on the political expression of public servants. *Comcare v Banerji* will shape the Commonwealth of Australia's regulation of its 240 000 public servants and indirectly impact state and local government employees, cumulatively constituting 16 per cent of the Australian workforce. But the litigation's importance goes beyond its substantive outcome. In *Comcare v Banerji*, the High Court must determine the appropriate methodology to apply when considering the implied freedom of political communication's operation on administrative decisions. The approach it adopts could have a significant impact on the continuing development of implied freedom jurisprudence, as well as the political expression of public servants.

I Introduction

Australian public servants have long endured an 'obligation of silence'.¹ Colonial civil servants were subject to strict limitations on their ability to engage in political life.² Following Federation, employees of the new Commonwealth of Australia were not permitted to 'discuss or in any way promote political movements'.³ While the more draconian of these restrictions have been gradually eased, limitations remain on the political expression of public servants. Until now, these have received surprisingly little judicial scrutiny. Although one of the few judgments in this field invalidated the impugned regulation,⁴ the Australian Public Service ('APS') has continued to limit the speech of its employees.

* Visiting Fellow, Centre for International and Public Law, ANU College of Law, Canberra; Legal Advisor, Legal Policy & Research Unit, International Bar Association, London, England. The author acknowledges the helpful comments of: Professor James Stellios and Associate Professor Heather Roberts, both of ANU College of Law; Emily Hammond, University of Sydney Law School; and an anonymous reviewer.

¹ Edward Hughes, 'Sir James Stephen and the Anonymity of the Civil Servant' (1958) 36 *Public Administration* 29, 29–36.

² R Plehwe, 'Political Rights of Victorian Public Employees' (1983) 42(3) *Australian Journal of Public Administration* 362, 365–6.

³ *Commonwealth Public Service Regulations 1902* (Cth) reg 41.

⁴ *Bennett v President, Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334 ('*Bennett*'). The validity of the replacement restriction was upheld in *R v Goreng Goreng* (2008) 220 FLR 21. See generally Nicola Bevitt, 'The Australian Border Force Act 2015 (Cth) Secrecy Provisions — Borderline Unconstitutional' (2017) 39(2) *Sydney Law Review* 257.

These limitations give rise to tension between competing policy interests. On the one hand, there is significant public interest in an impartial and apolitical bureaucracy.⁵ In Australia's Westminster/Whitehall model, the politicisation of the public service would have considerable adverse consequences. The 'Government of the day' must have confidence in the quality of the public service 'irrespective of which political party is in power',⁶ to prevent 'the insecurity and ineptitude of a reversion to political patronage'.⁷ The Commonwealth, as an employer, is also entitled to expect that its employees obey certain contractual obligations (such as the duty of fidelity), just as a private sector employer would not tolerate overt criticism from an employee.⁸ But, on the other hand, the wholesale exclusion of government employees from political debate has deleterious effects. A complete prohibition would quantitatively degrade political discourse given the size of the restricted class,⁹ and have a qualitative impact given public servants are often 'uniquely qualified to comment' on policy matters.¹⁰ 'Indeed it would be inappropriate', the Commonwealth Public Service Board once admitted, 'to deprive the political process of the talent, expertise and experience of individuals simply because they are employed in the public sector.'¹¹ There are also rights-based concerns: 'because we have not relegated our officials to the status of second class citizens', public servants have a reasonable expectation of political enfranchisement.¹² Appropriately balancing these interests in a constitutional democracy is no easy task.

Comcare v Banerji provides the High Court of Australia with an opportunity to consider this tension and how restrictions on public servants' political expression, first developed in the mid-1800s, interact with two more contemporary developments: the implied freedom of political communication in the *Australian Constitution* and social media. Three primary issues arise from the Commonwealth's termination of a public servant's employment in relation to her use of the social

⁵ *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 75–6 ('*de Freitas*').

⁶ Attorney-General (Cth), 'Submissions of the Attorney-General of the Commonwealth (Intervening)' in *Comcare v Banerji*, Case No C12/2018, 7 November 2018, [26] ('*Attorney-General (Cth) Submissions*'), quoting Australian Public Service Commission, *APS Values and Code of Conduct in Practice* (August 2017) 8.

⁷ R S Parker, 'Official Neutrality and the Right of Public Comment: II. The Vow of Silence' (1964) 23(3) *Australian Journal of Public Administration* 193, 196.

⁸ The contractual element has not received sufficient scholarly attention, partly because the statutory overlay directs primary attention to the constitutional question. All employment contracts contain an implied duty of fidelity that the employee will act in the employer's best interests: *Robb v Green* [1895] 2 QB 315. The extent to which this duty might adapt to the implied freedom was highlighted, but not determined, in *Bennett*: (2003) 134 FCR 334, 362–4.

⁹ In June 2018 there were 1 987 000 public sector employees in Australia, constituting approximately 16 per cent of the Australian workforce: Australian Bureau of Statistics, *Employment and Earnings, Public Sector, Australia, 2017–18* (8 November 2018) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/6248.0.55.002>>; Australian Bureau of Statistics, *Labour Force, Australia, Jan 2019* (21 February 2019) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/6202.0>>.

¹⁰ *San Diego v Roe*, 543 US 77, 80 (2004).

¹¹ Australian Human Rights Commission ('AHRC'), 'Submissions of the AHRC Seeking Leave to Appear as Amicus Curiae', Submission in *Comcare v Banerji*, Case No C12/2018, 12 December 2018, [24] ('*AHRC Submissions*'), quoting Commonwealth Public Service Board, *Guidelines on Official Conduct of Commonwealth Public Servants* (1979) 47.

¹² Paul Finn, *Abuse of Official Trust: Conflict of Interest and Related Matters*, Integrity in Government Second Report (Australian National University, 1993) 61.

media platform Twitter and her subsequent workers' compensation claim. First, how should the relevant limitations on political expression contained within the *Public Service Act 1999* (Cth) ('*Public Service Act*') be interpreted? Second, what is the appropriate methodology for reviewing the constitutionality of the termination? Third, is the termination consistent with the implied freedom of political communication? These questions are not entirely conceptually distinct and there is some overlap between them. However, for the purposes of clarity, this article will consider them each in turn after providing a brief background to *Comcare v Banerji*.

II The Facts and Litigation

In May 2011,¹³ Ms Michaela Banerji joined Twitter. Banerji, a public affairs officer with what was then called the Department of Immigration and Border Protection ('the Department'), elected to tweet under the pseudonym 'LaLegale'. She proceeded to tweet frequently, often criticising the Federal Government, relevant ministers and bureaucrats in relation to border protection policy. The primary sentiment of her tweets was that Australia's treatment of asylum seekers was 'unlawful, immoral and destructive'.¹⁴ Her tweets did not disclose any confidential information. With the exception of one tweet, her comments were made outside of work hours and exclusively using personal communication devices.¹⁵

In March 2012, a fellow employee of the Department complained that Banerji's use of social media was in breach of the APS Code of Conduct, contained within s 13 of the *Public Service Act*. At the time, s 13(11) required APS employees to behave 'at all times' in a manner that 'upholds the APS Values and the integrity and good reputation of the APS'. Among the APS Values articulated at the time in s 10(1) was that the 'APS is apolitical, performing its functions in an impartial and professional manner'.¹⁶ Initially, the Department determined that there was insufficient evidence to proceed with an investigation. However, in May 2012, upon receipt of additional information from the complainant, the Department proceeded to investigate Banerji's suspected contravention of s 13(11). In September 2012, Banerji was advised that the Department proposed to make a finding that she had contravened the APS Code of Conduct. Section 15 provided a discretionary power for the Department to impose various disciplinary measures, including termination of Banerji's employment.

¹³ See generally, *Comcare*, 'Appellant's Chronology', Submission in *Comcare v Banerji*, Case No C12/2018, 7 November 2018 ('*Appellant's Chronology*').

¹⁴ Markus Mannheim, 'Public Servant Loses Fight over Twitter Attack on Government', *Canberra Times* (online), 13 August 2013 <https://www.canberratimes.com.au/national/public-servant-loses-fight-over-twitter-attack-on-government-20130812-2rsgn.html?_ga=2.106608707.1931213015.1541879927-367294655.1447915721>.

¹⁵ The Tribunal found that, of over 9000 tweets, one had been made during work hours. Yet the Tribunal held that Banerji had 'been careful, even assiduous, in avoiding posting tweets during working hours' and that 'nothing turns' on the finding regarding the lone tweet: *Re Banerji and Comcare (Compensation)* [2018] AATA 892 (16 April 2018) [26], [30].

¹⁶ A cognate obligation is now found in *Public Service Act* s 10(5), following minor legislative reform.

A *Banerji v Bowles* (Federal Circuit Court of Australia)

In October 2012, Banerji filed a general protections application with Fair Work Australia. She simultaneously commenced proceedings in the Federal Circuit Court of Australia seeking an interlocutory injunction to prevent the Department from terminating her employment.¹⁷ Banerji grounded her application in a broad conception of the implied freedom of political communication. She placed reliance on comments of Kirby J in *Australian Broadcasting Corporation v Lenah Game Meats*¹⁸ that, she argued, recognised a broad ‘right to express political opinion’.¹⁹

Judge Neville was unwilling to accept this radical departure from implied freedom orthodoxy. In a judgment delivered in August 2013, his Honour refused to issue an injunction: ‘The unbridled right championed by Ms Banerji ... does not exist.’²⁰ Although deferring any substantive hearing on the constitutional claim to a superior court, Judge Neville added some further observations. His Honour said:

I do not see that Ms Banerji’s political comments, ‘tweeted’ while she remains (a) employed by the Department, (b) under a contract of employment, (c) formally constrained by the APS Code of Conduct, and (d) subject to departmental social media guidelines, are constitutionally protected.²¹

In September 2013, the Department advised Banerji that her employment had been terminated pursuant to s 29(1) of the *Public Service Act*.²²

B *Banerji v Comcare* (Administrative Appeals Tribunal)

Following the termination of her employment, Banerji suffered from an adjustment disorder characterised by depression and anxiety. Accordingly, in October 2013 she lodged a claim for workers’ compensation under the *Safety, Rehabilitation and Compensation Act 1988* (Cth). In February 2014, a Comcare delegate refused Banerji’s claim. She subsequently requested a reconsideration, and the refusal was affirmed. In September 2014, Banerji sought merits review of the decision in the Administrative Appeals Tribunal (‘the Tribunal’). The primary matter in dispute was whether the Department’s termination of Banerji’s employment constituted reasonable administrative action taken in a reasonable manner. If so, her claim was destined to fail. However, if — as Banerji contended — the termination was unlawful and therefore could not constitute reasonable administrative action, she would be entitled to workers’ compensation.

At this juncture, it is necessary to highlight the current contours of the implied freedom of political communication. First outlined by the High Court in 1992, the freedom took on a more settled form in 1997 in *Lange v Australian Broadcasting*

¹⁷ *Banerji v Bowles* [2013] FCCA 1052 (9 August 2013) (‘*Banerji*’).

¹⁸ (2001) 208 CLR 199, 280–82.

¹⁹ *Banerji* [2013] FCCA 1052 (9 August 2013) [25].

²⁰ *Ibid* [101].

²¹ *Ibid* [104].

²² *Appellanti’s Chronology*, above n 13, 5.

Corporation.²³ It has subsequently been modified by several cases, including *Coleman v Power*,²⁴ *McCloy v New South Wales*,²⁵ and *Brown v Tasmania*.²⁶ Its most recent authoritative formulation, by Kiefel CJ, Bell and Keane JJ in *Brown*, asks, in relation to an impugned law:

1. Does the law effectively burden the freedom in its terms, operation or effect?
2. If ‘yes’ to 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 and responsible government?
3. If ‘yes’ to 2, is the law reasonably appropriate and adapted to advance that legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government? This question involves ‘proportionality testing’ to determine whether the restriction that the provision imposes on the freedom is justified. The proportionality testing involves three stages, being inquiries as to whether the law is justified as suitable, necessary and adequate in its balance.²⁷

Against this context, the Tribunal’s Deputy President Humphries and Member Hughson found for Banerji.²⁸ After determining that s 13(11) of the APS Code of Conduct burdened the freedom of political communication, the Tribunal applied the *Lange* test. The Tribunal firstly accepted Comcare’s submission that ‘maintaining an apolitical public service, and maintaining public confidence in that service’ was consistent with the constitutionally-prescribed system of government.²⁹ After outlining the approach to proportionality testing articulated in *McCloy*, the Tribunal observed that *if* Banerji’s tweets had been attributable, the imposition of sanctions ‘would have constituted a proportionate and appropriate application of a law competently designed to preserve the [APS’s] apolitical and impartial status’.³⁰

Yet according to the Tribunal, Banerji’s comments made under a pseudonym were not attributable — to her personally or public servants as a class. The Tribunal placed considerable importance on this distinction. ‘The explicit objectives of a law designed to protect the impartial status of the APS,’ the Tribunal continued, ‘fall away in the context of comments not ostensibly made by a public servant.’³¹ Within the *McCloy* proportionality analysis, the Tribunal balanced ‘a serious impingement

²³ (1997) 189 CLR 520 (*‘Lange’*). See generally a helpful discussion of the implied freedom in Shireen Morris and Adrienne Stone, ‘Before the High Court – Abortion Protests and the Limits of Political Communication: *Clubb v Edwards*; *Preston v Avery*’ (2018) 40(3) *Sydney Law Review* 395.

²⁴ (2004) 220 CLR 1 (*‘Coleman’*).

²⁵ (2015) 257 CLR 178 (*‘McCloy’*).

²⁶ (2017) 261 CLR 328 (*‘Brown’*).

²⁷ This formulation merges passages from *McCloy* and *Brown*: *McCloy* (2015) 257 CLR 178, 195–6 (French CJ, Kiefel, Bell and Keane JJ); *Brown* (2017) 261 CLR 328, 364. In January 2019 (after the filing of submissions in the present dispute), the High Court decided *Unions NSW v New South Wales* [2019] HCA 1 (29 January 2019). While the various judgments do not significantly alter the implied freedom orthodoxy, they do collectively stress the importance of the Court being satisfied that the burden on the implied freedom is necessary to achieve the law’s legitimate purpose.

²⁸ *Re Banerji and Comcare (Compensation)* [2018] AATA 892 (16 April 2018).

²⁹ *Ibid* [71], [74].

³⁰ *Ibid* [113].

³¹ *Ibid* [115].

on Ms Banerji's implied freedom' with 'a law only weakly and imperfectly serving a legitimate public interest'.³² The anonymous character of the comments meant that 'the balance tips markedly in Ms Banerji's favour'.³³ Accordingly, the Tribunal held that the termination of Banerji's employment 'unacceptably trespassed on the implied freedom of political communication', such that the termination could not constitute reasonable administrative action.³⁴

In reaching its decision, the Tribunal addressed, but did not resolve, a methodological question that has assumed some importance in the appeal. The Tribunal had proceeded on the basis that Banerji's challenge to the termination required an analysis of the validity of the statute itself. While the Tribunal lacked jurisdiction to invalidate s 13(11), its finding that the termination was *ultra vires* was made on the basis that *the legislation* contravened *Lange/McCloy*. An alternative view is that the statute is to be construed so that it does not authorise an exercise of power that impermissibly infringes on the freedom, with the result that the actual *exercise of the power* — terminating Banerji's employment — is *ultra vires* for exceeding statutory authority. This would be to adopt an administrative, rather than constitutional, review to constrain the exercise of power. Although the Tribunal noted it was 'not the present task' to determine the methodological issue,³⁵ it did reason that s 13(11) 'evidently empowers' the termination of Banerji's employment in such circumstances, and as such 'it is the empowering statute which placed the burden on political communication, and not the act of the delegate'.³⁶ The Tribunal observed:

The words *at all times* must be given their ordinary meaning ... those words have the effect of extending the temporal operation of the Code ... [and importing] the notion that the values must be upheld whatever 'hat' the employee was wearing.³⁷

The Tribunal observed that reading down or severing the offending part of the *Public Service Act* 'would be no easy matter'.³⁸

C *Comcare v Banerji* (High Court of Australia)

Comcare appealed the Tribunal's decision, and in September 2018 the dispute was removed to the High Court. The substantive submissions in support of Comcare's notice of appeal are those of the Attorney-General of the Commonwealth, intervening ('the Commonwealth'). The Commonwealth submits that the termination of Banerji's employment was reasonable administrative action and her Comcare claim must fail.³⁹ The Commonwealth makes two primary, alternative

³² Ibid [117].

³³ Ibid.

³⁴ Ibid [128].

³⁵ Ibid.

³⁶ Ibid [126].

³⁷ Ibid [125] (emphasis in original).

³⁸ Ibid [127].

³⁹ *Attorney-General (Cth) Submissions*, above n 6, [11].

contentions: (A) s 13(11) is valid in all of its possible applications;⁴⁰ or (B) to the extent that the individual exercise of power becomes relevant, in this case it was exercised consistently with the implied freedom.⁴¹

Banerji's position is also multi-layered. If the Court does not accept her primary submission (A) that on its correct interpretation s 13(11) did not extend to her conduct, she submits (B) that the termination itself is invalid. Banerji argues that the decision-maker failed to consider a mandatory relevant consideration (the implied freedom), and the decision itself failed to satisfy the *McCloy* proportionality test.⁴² Alternatively, she contends (C) that the 'intractably broad' s 13(11) 'cannot be justified under the second limb' of *Lange*.⁴³ Banerji argues that the provision fails *McCloy* because it is not suitable ('[s]ingling out APS employees in the conduct of their private lives in this way lacks a rational explanation'),⁴⁴ necessary and/or adequate in balance.⁴⁵ On any of these three bases, Banerji submits that the termination of her employment was invalid and the Tribunal's decision was correct.⁴⁶ Several States have intervened, largely in support of the Commonwealth, while the Australian Human Rights Commission ('AHRC') has sought leave to appear in an amicus curiae capacity.

III Does the Act Apply to Anonymous Communications by APS Employees?

The first issue to arise in *Comcare v Banerji* is whether the *Public Service Act* applies to anonymous communications by APS employees.⁴⁷ Discussion of this interpretive issue can be usefully focused on ss 10 and 13(11). While s 15 authorises the sanction (in the present case, termination) and thereby provides the direct burden on the implied freedom, it is s 13(11) — and s 10 by reference to the APS Values — that provide the nexus with political communication. Indeed, s 13(11) arguably burdens the implied freedom even in the absence of a particular s 15 sanction, in light of its chilling effect.⁴⁸

Banerji argues that s 13(11) simply does not apply to anonymous communication (and thereby her conduct). If this contention were accepted, the

⁴⁰ Ibid [8]. There is a second limb to this argument: to the extent that the validity is dependent on the severity of sanctions imposed, s 13(11) remains valid in all its applications because the statute properly construed requires sanctions be proportionate, which 'is sufficient to ensure that the scheme as a whole remains within constitutional limits': ibid [9]. Due to brevity requirements, this aspect will not be considered further.

⁴¹ Ibid [10]–[11].

⁴² Michaela Banerji, 'Respondent's Submissions', Submission in *Comcare v Banerji*, Case No C12/2018, 5 December 2018, [43]–[50] ('*Banerji Submissions*').

⁴³ Ibid [3].

⁴⁴ Ibid [58].

⁴⁵ Ibid [59]–[60].

⁴⁶ Ibid [17], [61].

⁴⁷ This is raised on a notice of contention filed by Banerji, and the Commonwealth has submitted that the Court should not deal with it on procedural grounds: Attorney-General (Cth), 'Reply Submissions of the Attorney-General of the Commonwealth' in *Comcare v Banerji*, Case No C12/2018, 19 December 2018, [2] ('*Attorney-General (Cth) Reply Submissions*').

⁴⁸ See generally Frederick Schauer, 'Fear, Risk and the First Amendment: Unraveling the "Chilling Effect"' (1978) 58 *Boston University Law Review* 685.

constitutional issues in the case would fall away and the termination of her employment would be ultra vires on statutory grounds. '[T]here must', she submits, 'be a nexus between the conduct and the APS as an institution.'⁴⁹ Banerji cites the principle of legality and presumption of valid meaning in support of this 'narrow construction', decrying that to do otherwise would be to 'effect an extraordinary intrusion into freedom of expression'.⁵⁰ While this may sound superficially compelling, Banerji's approach lacks sufficient textual grounding. In the author's view, Banerji's submissions seek to read in a nexus requirement that has little basis in the terms or context of s 13(11). While the provision may be capable of some reading down, it does not support the categorical bright line immunity that Banerji contends exists for anonymous communications.

The Commonwealth, on the other hand, submits that s 13(11) is wide enough to regulate anonymous communication. However, it is notable that the Commonwealth — like Banerji — otherwise adopts a limited interpretation of the provision's scope to present a smaller 'target' for *Lange/McCloy* scrutiny. The Commonwealth suggests that, while the provision applies to Banerji's anonymous comments, this does not mean that it prohibits APS employees from expressing political opinions at all times.⁵¹ Rather, the Commonwealth submits that the provision provides 'a set of obligations the content of which is context dependent', with the bounds of the obligations depending on 'the seniority of the person within the APS', 'the person to whom the communication is made', 'when and where the communication is made' and 'the manner in which the communication is made'.⁵² As such, the Commonwealth submits that 'the Code is not correctly identified as a prohibition on APS members expressing political opinions' — instead it 'is more nuanced'.⁵³ While the Commonwealth's position is attractive from a policy perspective, as a way of reconciling the competing interests at stake, it arguably replicates the very flaws the Commonwealth points to in Banerji's construction. Both parties seek to insert limitations that are 'uncertain' in 'content' and contain 'no textual foundation'.⁵⁴

Notwithstanding that the Commonwealth and Banerji both advance narrow constructions of s 13(11) (for different purposes), in the author's view the High Court should give the provision its ordinary meaning. This position is supported by the submissions of Western Australia intervening, where the State's Attorney-General argues for a broad construction of s 13(11): 'the words are emphatic in referring to "all times"'.⁵⁵ While the Commonwealth sought to rebut this view in its reply submissions — "[a]t all times" in s 13(11) does not mean "always and under any circumstances"⁵⁶ — such linguistic gymnastics strain the interpretation to breaking point. Section 13(11) was drafted in the manner it was — the explanatory

⁴⁹ *Banerji Submissions*, above n 42, [17].

⁵⁰ *Ibid* [39]–[41].

⁵¹ *Ibid*.

⁵² *Attorney-General (Cth) Submissions*, above n 6, [22].

⁵³ *Ibid*.

⁵⁴ *Attorney-General (Cth) Reply Submissions*, above n 47, [3].

⁵⁵ Attorney-General (WA), 'Annotated Written Submissions on Behalf of the Attorney General for Western Australia (Intervening)' in *Comcare v Banerji*, Case No C12/2018, 14 November 2018, [12] ('*Attorney-General (WA) Submissions*').

⁵⁶ *Attorney-General (Cth) Reply Submissions*, above n 47, [3].

memorandum noted that it was intended to be ‘wider than’ its predecessor,⁵⁷ and the particular subsection’s application ‘at all times’ is distinguishable from other subsections that are limited to conduct ‘in connection with APS employment’.⁵⁸ Together, these indicate a deliberate legislative choice. The Commonwealth should ‘face up to the constitutional consequences’,⁵⁹ rather than be permitted to avoid that reality via a specious interpretation. While reading down to avoid constitutional invalidity may be an orthodox statutory interpretation technique, the Court cannot — as it is being asked to do by the Commonwealth — artificially depart from the provision’s ordinary meaning.⁶⁰ Where legislation ‘is perfectly clear and entire, free from any ambiguity or omission’, seeking to secure constitutional validity by strained interpretation is not a ‘permissible’ solution.⁶¹

If the High Court were to give s 13(11) its ordinary meaning, what bearing might this have on the resolution of the dispute? It would, perhaps, strengthen Banerji’s argument that the provision is incompatible with the implied freedom. If s 13(11) does apply to *all* communications by APS employees, there is more force in Banerji’s attack on the proposition that the Commonwealth can ‘clean[se] APS employees of political opinions’ or limit their ‘ability to express them in ways that do not have a bearing upon the APS as an institution’.⁶² It is understandable, then, that the Commonwealth seeks to avoid the natural reading and reasserts its limited approach: ‘The Commonwealth plainly does not suggest that the Code regulates conduct that is “devoid of any connection whatsoever to employment” ... The Respondent erects and demolishes arguments of straw.’⁶³ On the other hand, if the Commonwealth’s preferred construction were adopted, it would improve the prospects of s 13(11) withstanding *Lange/McCloy* scrutiny. If the APS Code of Conduct already demands a factorial analysis, with consideration given to the identity of the speaker, the content of the communication and the wider context, concerns about silencing the public service are somewhat tempered.

It may be, and indeed it seems plausible, that the High Court finds s 13(11) does apply to Banerji’s anonymous social media posts, but nevertheless rejects the Commonwealth’s interpretation as too narrow and instead adopts a middle ground. This might favour a finding that the provision is neither valid nor invalid on its face, instead bringing to the fore a ‘difficult category’ where statutory power is apt to be exercised in a manner compatible with the implied freedom.⁶⁴ This category raises some complex methodological questions at the intersection of constitutional and administrative law, which remain largely unanswered by existing High Court jurisprudence.

⁵⁷ Explanatory Memorandum, Public Service Bill 1999 (Cth) 25.

⁵⁸ *Public Service Act* ss 13(1)–(4).

⁵⁹ *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 610 (Gageler J) (‘NAAJA’).

⁶⁰ *International Financial Trust Co Ltd v NSW Crime Commissioner* (2009) 240 CLR 319, 349 (French CJ).
⁶¹ *de Freitas* [1999] 1 AC 69, 77.

⁶² *Banerji Submissions*, above n 42, [55].

⁶³ *Attorney-General (Cth) Reply Submissions*, above n 47, [3] n 3.

⁶⁴ James Stellios, ‘*Marbury v Madison*: Constitutional Limitations and Statutory Discretions’ (2016) 42(3) *Australian Bar Review* 324, 331

IV Review Methodology

If s 13(11) does apply to Banerji's anonymous social media posts, the 'central issue' in *Comcare v Banerji* then becomes the review methodology 'to be applied when a discretionary administrative decision is said impermissibly to burden the implied freedom of political communication'.⁶⁵ This, in turn, will be influential in determining the validity of the termination decision. The first methodological issue arising in the submissions is whether the constitutional review task is undertaken entirely at the level of the relevant legislation. The Commonwealth advocates for this approach, with the support of several State Attorneys-General intervening. The AHRC submissions highlight an alternative, that constitutional review could be undertaken directly at the level of the individual decision itself. While the Commonwealth's approach will typically suffice if the authorising statute is valid or invalid on its face, it is not as straightforward in the difficult category — where the authorising statute confers a power that *may* be exercised in a manner compatible with the implied freedom. This gives rise to a second methodological issue. In such cases, the Commonwealth argues that the authorising statute must be construed as constitutionally-compliant, and the validity of an individual decision thereunder is resolved as a question of statutory power via administrative law. While determining the boundaries of statutory power may require reference to constitutional limitations, this *does not* entail undertaking individual-level constitutional review. The third methodological issue raised by the submissions relates to the standard applied when considering the implied freedom in the individual decision context, either when undertaking individual-level constitutional review (per the AHRC on the first issue) or when resolving the statutory boundaries in the difficult category (per the Commonwealth on the second issue).

There is little jurisprudential guidance on evaluating the compatibility of an exercise of executive power with the implied freedom. The difficulty is exacerbated by the implied freedom's oft-repeated nature: that it is *not* an individual right. While these questions were considered in an analogous context between 2015 and 2017 in *Gaynor*, a case involving the political expression of an army reservist, the first instance and intermediate appellate judgments in that case failed to provide a cogent framework.⁶⁶ Instead, the limited guidance that does exist springs from Brennan J in *Miller v TCN Channel Nine Pty Ltd*,⁶⁷ a case concerned with discretionary decision-making affecting the freedom of interstate trade protected by s 92 of the *Constitution*. Justice Brennan stated that '[w]here a discretion, though granted in general terms, can lawfully be exercised only if certain limits are observed, the grant of the discretionary power is construed as confining the exercise of the discretion within those [constitutional] limits.'⁶⁸ This approach was endorsed by French CJ,

⁶⁵ *Attorney-General (Cth) Submissions*, above n 6, [4].

⁶⁶ *Gaynor v Chief of the Defence Force (No 3)* (2015) 237 FCR 188; *Chief of Defence Force v Gaynor* (2017) 246 FCR 298 ('*Gaynor*'). Special leave to appeal was ultimately refused by the High Court: Transcript of Proceedings, *Gaynor v Chief of the Defence Force* [2017] HCATrans 162 (18 August 2017). See generally Joshua Forrester, Lorraine Finlay and Augusto Zimmermann, 'Finding the Streams' True Sources: The Implied Freedom of Political Communication and Executive Power' (2018) 43 *University of Western Australia Law Review* 188.

⁶⁷ (1986) 161 CLR 556 ('*Miller*').

⁶⁸ *Ibid* 614, quoting *Inglis v Moore (No 2)* (1979) 46 FLR 470, 476 (St John and Brennan JJ).

Gummow, Hayne, Crennan and Bell JJ in *Wotton v Queensland*, who noted that as a result ‘any complaint respecting the exercise of power thereunder in a given case ... does not raise a constitutional question, as distinct from a question of the exercise of statutory power’.⁶⁹

These methodological issues will now be considered. To summarise, they are:

- (a) Does constitutional review of compatibility with the implied freedom take place at the level of the authorising statute only?
- (b) If so, how is compatibility assessed in the difficult category of cases where constitutionality is not clear on the statute’s face?
- (c) When the individual decision’s compliance with the implied freedom becomes relevant, either because (a) is answered negatively or because it is necessary in resolving (b), how is this analysis undertaken?

A *Constitutional Review to Focus Only on the Authorising Statute?*

The Commonwealth contends that when an individual administrative decision is challenged on the basis it impermissibly infringes the implied freedom ‘the question is always whether the legislation that purports to confer the power to make the decision (as opposed to the decision itself) is valid’, by reference to the *Lange/McCloy* test.⁷⁰ The intervening State Attorneys-General echo this approach, arguing variously that ‘the constitutional challenge will necessarily be to the validity of the statutory provisions’⁷¹ and that ‘[t]he implied political freedom is concerned with legislative power, not the facts of particular cases.’⁷²

Banerji’s submissions do not dwell on the methodological void and the merits of the respective approaches on this aspect.⁷³ The AHRC, however, provides a persuasive rebuttal in their amicus curiae submissions. It has long been accepted, at least at the Commonwealth level, that the implied freedom acts as a limit on both legislative *and* executive power.⁷⁴ This dual application is demanded by the ‘structural and systemic imperatives which generate the freedom’ — as the AHRC observes, ‘[t]he constitutionally-prescribed systems [of government] are just as apt to be impeded by executive power’.⁷⁵ Accordingly, the AHRC submits that the implied freedom inquiry does not end at the statute because the implied freedom ‘also operates *directly* on the exercise of s 61 executive power’.⁷⁶ On this approach, a constitutional challenge to the exercise of a statutory discretion may be resolved at *either* the statutory level or at the level of the individual exercise.

⁶⁹ (2012) 246 CLR 1, 14 (‘*Wotton*’).

⁷⁰ *Attorney-General (Cth) Submissions*, above n 6, [4] (emphasis in original).

⁷¹ Attorney-General (NSW), ‘Submissions of the Attorney General for New South Wales (Intervening)’, Submission in *Comcare v Banerji*, Case No C12/2018, 14 November 2018, [18].

⁷² *Attorney-General (WA) Submissions*, above n 55, [23].

⁷³ *Banerji Submissions*, above n 42, [42]–[51].

⁷⁴ See, eg, *Lange* (1997) 189 CLR 520, 560.

⁷⁵ *AHRC Submissions*, above n 11, [14].

⁷⁶ *Ibid* [17] (emphasis in original).

B *The Implied Freedom and Statutory Discretion*

Even on the Commonwealth's approach, there will be some cases where the compatibility of a statutory discretion with the implied freedom is unclear on the legislation's face and only becomes apparent following an individual exercise of the discretion — the difficult category.⁷⁷ According to the Commonwealth, the *Miller/Wotton* approach requires that, in such cases, the constitutionality of the authorising statute is accepted and the question becomes whether the discretion's exercise is within statutory bounds — '[t]he discretionary power is construed as extending right up to, but not beyond, the limit of constitutional power'.⁷⁸ This approach may require a constitutional analysis to articulate the exact bounds of statutory power, but it does not 'directly raise any question of constitutional law' — validity is assumed.⁷⁹

A difficulty with the Commonwealth's approach is that it elevates what is, it admits, no more than a 'process of construction' into an absolute rule.⁸⁰ There are long-accepted limits to legislative interpretation. As the High Court said recently, '[t]he constructional task remains throughout to expound the meaning of the statutory text, not to remedy gaps disclosed in it or repair it'.⁸¹ The Commonwealth's reading of the *Miller/Wotton* approach arguably goes beyond this. As the AHRC submits, '[i]t involves reading the text of a statute conferring a broadly-framed discretion as if, by implication, it contained the words "unless the particular exercise of discretion would be contrary to the implied freedom"'.⁸² This is a marked departure from the words of s 13(11) and 'attributes to Parliament an ultimate intention that its laws bear a meaning that is not readily apparent to administrators and citizens'.⁸³ Such an approach exacts a considerable toll on the rule of law: 'the law is less accessible ... Parliament is less accountable ... and there is a real risk that the statute will be administered according to its ordinary meaning'.⁸⁴ That is not to say that a provision would never demonstrate the necessary intent. But unless the High Court's further explication of the *Miller/Wotton* rule involves a significant departure from interpretative orthodoxy, the touchstone will remain legislative intent. That is because, as Gageler J said in *NAAJA*, 'a court has no warrant for preferring one construction of a statutory provision over another merely to avoid constitutional doubt'.⁸⁵

C *Approach to Review of an Individual Administrative Decision*

A third methodological issue arises out of the first and second. To the extent that any analysis focuses on an individual exercise of statutory power (whether for the

⁷⁷ Stellios, above n 64, 331.

⁷⁸ *Attorney-General (Cth) Submissions*, above n 6, [50].

⁷⁹ *Ibid* (emphasis in original).

⁸⁰ *Ibid*.

⁸¹ *HFM043 v Republic of Nauru* (2018) 92 ALJR 817 [24] (Kiefel CJ, Gageler and Nettle JJ).

⁸² *AHRC Submissions*, above n 11, [47].

⁸³ *Ibid* [49].

⁸⁴ *Ibid* [45].

⁸⁵ (2015) 256 CLR 569, 604.

purposes of determining the boundaries of discretionary power via *Miller/Wotton* per the Commonwealth or as part of a freestanding constitutional review per the AHRC), how is that analysis undertaken? Does it ‘draw down’ the full *Lange/McCloy* test for determining compatibility with the implied freedom? The Commonwealth submits that, in asking whether an individual exercise of statutory discretion is compatible, only a limited version of *Lange/McCloy* must be undertaken. According to the Commonwealth, testing for compatibility and suitability is unnecessary because ‘the compatibility of a statute with those requirements cannot vary from decision to decision’.⁸⁶ Instead, the Commonwealth focuses on the adequate-in-balance stage of *McCloy*. ‘[I]f the statute were to authorise burdens on political communication of the nature and extent that arise from a particular administrative decision purportedly made under the statute’, the Commonwealth proposes as the relevant inquiry, ‘would that present as grossly disproportionate to or as otherwise going far beyond what can reasonably be justified in the pursuit of the statutory purpose?’⁸⁷ To the Commonwealth, this approach is attractive because it retains the ‘required systemic focus’.⁸⁸

In contrast, Banerji argues that the *Lange/McCloy* framework applies within the administrative review process, because ‘proportionality as a “class of criteria” has been applied to administrative decision-making, and no more transparent tools of analysis have been fashioned to date’.⁸⁹ This is congruent with the AHRC’s intervention and its emphasis on the implied freedom as limiting executive as well as legislative power. The AHRC, on this point, suggest that the correct approach is to ask ‘whether the particular exercise of power is proportionate or sufficiently tailored to a compatible end’.⁹⁰

Banerji also submits, ‘additionally and not solely’,⁹¹ that orthodox administrative law concepts are relevant: ‘[t]he limit will also be exceeded where the decision-maker fails to consider the implied freedom at all’.⁹² Banerji rejects the Commonwealth’s position, drawn from *A v Independent Commission Against Corruption*,⁹³ that describing a limit on power as a mandatory relevant consideration is conceptually confused. These differing views are not essential to resolving the present dispute, but they are indicative of administrative law’s failure to develop appropriate tools for enforcing constitutional limits. There is force in Banerji’s submission that administrative decision-making which impacts communicative conduct and does not actively consider the implied freedom, instead complying only inadvertently, ‘has little to commend it’.⁹⁴ In the absence of another more appropriate mechanism, utilising relevant considerations to restrain executive power seems attractive — as the aphorism goes, if you only have a hammer, it is tempting to treat everything as a nail. But as a conceptual matter, the implied freedom

⁸⁶ *Attorney-General (Cth) Submissions*, above n 6, [52].

⁸⁷ *Ibid* [56].

⁸⁸ *Ibid*.

⁸⁹ *Banerji Submissions*, above n 42, [43].

⁹⁰ *AHRC Submissions*, above n 11, [58].

⁹¹ *Banerji Submissions*, above n 42, [45] (emphasis altered).

⁹² *Ibid*.

⁹³ (2014) 88 NSWLR 240, 257 (Basten JA).

⁹⁴ *Banerji Submissions*, above n 42, [45].

‘operates as an ultimate limit on power, and an ultimate limit on power cannot sensibly be described as a mandatory consideration’.⁹⁵

D *Consideration*

Predicting the High Court’s jurisprudence is a fraught exercise, and there is little guidance as to which methodological approach the bench will take. At the time of writing, it also remains unclear whether the High Court’s reserved judgment in the ‘safe access zone’ cases could change or clarify the implied freedom.⁹⁶ While undertaking constitutional review at the level of the authorising legislation has the advantage of familiarity, it is difficult to balance the broadly justifiable aims of s 13(11) of the *Public Service Act* and the many categories of its reasonable application with the challenging facts of *Comcare v Banerji* (termination of employment for out-of-hours anonymous political comment). Unless the provision can be read down, constitutional review at the legislative level necessitates an all-or-nothing outcome: s 13(11) is either valid in its entirety (even in extreme cases), or it is invalid despite its many legitimate applications involving no burden on political communication (such as a public servant convicted of child sex offences).⁹⁷

On the other hand, undertaking the constitutional analysis in the context of the individual decision is not free from difficulty either. The wholesale incorporation of *Lange/McCloy* at an applied level could raise objections that doing so crosses the individual right Rubicon,⁹⁸ notwithstanding Banerji’s retort that ‘an individual decision is representative of a larger pattern that would emerge unless the constitutional limitation on the power is enforced’.⁹⁹ Although there are no logical inconsistencies inherent in undertaking individual-level review while maintaining the required right/freedom distinction, the High Court’s caution towards any blurring of the distinction may impede the adoption of this approach. The ambiguity of the Court’s comments in *Wotton*, where they simply recited several of the Commonwealth’s submissions and accepted them, compounds this lack of certainty. In the present case, the Commonwealth criticised the AHRC’s submissions — the AHRC had highlighted the implied freedom’s standalone operation on executive action — as seeking to ‘radically’ limit *Wotton*.¹⁰⁰ But it is unclear whether the Commonwealth’s expansive reading of *Wotton* can be sustained.

Alternatively, the High Court could develop a new methodology — this author has elsewhere commended the merits of an ‘as-applied’ constitutional review approach, with origins in Gageler J’s judgment in *Tajjour v New South Wales*¹⁰¹ and

⁹⁵ Bret Walker and David Hume, ‘Broadly Framed Powers and the Constitution’ in Neil Williams (ed), *Key Issues in Public Law* (Federation Press, 2018) 144, 157.

⁹⁶ See Transcript of Proceedings, *Clubb v Edwards; Preston v Avery* [2018] HCATrans 210 (11 October 2018). See also Morris and Stone, above n 23.

⁹⁷ *Cooper v Australian Taxation Office* [2014] FWC 7551 (6 November 2014); *Cooper v Australian Taxation Office* [2015] FWC 868 (11 March 2015).

⁹⁸ The High Court’s insistence that the implied freedom is not a personal right, with the implications that follow, has been criticised. See, eg, Adrienne Stone, ‘Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication’ (2001) 25(2) *Melbourne University Law Review* 374.

⁹⁹ *Banerji Submissions*, above n 42, [44].

¹⁰⁰ *Attorney-General (Cth) Reply Submissions*, above n 47, [14] n 10.

¹⁰¹ (2014) 254 CLR 508 (*Tajjour*).

American jurisprudence.¹⁰² This would see the constitutional analysis take place at the legislative level, but focused on the statutory burden *as applied* to political communication rather than its general operation. Thus in *Tajjour*, in the context of *Lange*'s second limb, Gageler J noted: 'What is important for that further analysis is that the effective burden ... is confined to the application of the section to an association for a purpose of engaging in [political] communication'.¹⁰³ The consequence in *Tajjour* was that, on Gageler J's approach, the impugned law was invalid but only in its application to political communication-related activities. This would enable the High Court to invalidate s 13(11) to the extent it impermissibly restricts political communication, without preventing, for example, its continued application in cases of public servants convicted of child sex offences. Whatever the Court's preference, their choice will have a significant influence on the development of the implied freedom, and likely continue the convergence of constitutional and administrative law. Finally, it is possible, although in the author's view unlikely, that the Court may sidestep the methodological question, as the Tribunal did. This could be done by resolving the dispute at the interpretative level (as Banerji advocates), or by holding that the termination is valid or invalid on any approach and therefore the correct methodology need not be determined.

V Validity of the Termination Decision

Unless the High Court accepts Banerji's contention that her social media activity does not fall within the scope of s 13(11), the bench will — irrespective of the methodology adopted — be required to determine the validity of the termination of her employment. The chosen methodology may have a significant impact on the outcome of that evaluative exercise, but the Court must ultimately address whether terminating the employment of a public servant for expressing political opinion anonymously on Twitter is compatible with the *Constitution* by reference to *Lange/McCloy*. Reasonable minds can and likely will differ on this issue.

In the author's view, the Court should not uphold broad intrusions into the private lives of public servants, a consequence of which is the distortion of political discourse among a significant portion of the Australian polity. The salient facts of *Banerji* are worth restating. Banerji was a mid-level public servant (APS6), terminated because of the content and tone of her political communications, which were made anonymously, in her own time¹⁰⁴ and using her own electronic devices. That Banerji's identity was subsequently discovered does not change the complexion of her prior tweets, particularly where, as the Tribunal noted, 'it was the Department itself which dissolved her anonymity'.¹⁰⁵

It is possible to imagine alternative versions of this fact pattern where the validity analysis is more likely to be answered in the Commonwealth's favour: if the

¹⁰² Kieran Pender, "'Silent Members of Society'? Public Servants and the Freedom of Political Communication in Australia' (2018) 29(4) *Public Law Review* 327, 345–7. See generally Richard H Fallon Jr, 'As-Applied and Facial Challenges and Third-Party Standing' (2000) 113 *Harvard Law Review* 1321.

¹⁰³ (2014) 254 CLR 508, 583.

¹⁰⁴ See above n 15.

¹⁰⁵ *Ibid* [93].

tweeter was a senior public servant, such that the government might lose trust in the relevant department, or if the tweets were sent during work hours. Likewise, it is possible to envisage scenarios where validity is even more questionable: if the tweets concerned policy relating to a different department, and contained mild analysis rather than inflammatory criticism.¹⁰⁶ Between these poles, *Banerji* sits closer to the latter end of the spectrum. Prohibiting anonymous political expression by non-senior public servants on a topic of immense national interest (as the ongoing debate about border protection ahead of the 2019 Federal Election demonstrates) is not adequate in the balance it strikes between the competing policy objectives. Instead, as the Tribunal commented, ‘restrictions in such circumstances bear a discomfiting resemblance to George Orwell’s *thoughtcrime*’.¹⁰⁷

There is also a concerning trend in the handful of litigated cases arising in the present or analogous contexts over the past decade or two: all involved criticism of Commonwealth policy. But the obligation to act in an apolitical manner cuts both ways. As Western Australia highlights in its intervening submissions, s 13(11) ‘imposed a substantive limit on the ability of the employee to *promote* or criticise’ government policy.¹⁰⁸ It is notable that the Commonwealth has made no publicised attempts to discipline public servants for publicly promoting government policy. Indeed, the Australian Public Service Commission’s latest guidance, *Making Public Comment on Social Media: A Guide for Employees*, advises that while ‘[c]riticising the work, or the administration, of your agency is almost always going to be seen as a breach’ of the APS Code of Conduct, it ‘doesn’t stop you making a positive comment on social media about your agency’.¹⁰⁹ This somewhat undermines the Commonwealth’s submissions emphasising the utmost importance of public sector impartiality, as a legitimate aim for the purposes of *Lange*. It might be suggested that had Banerji instead praised Commonwealth immigration policy (anonymously or otherwise), she would not have found herself in this current predicament.

While the implied freedom might be uniquely Australian, the High Court is not alone in being asked how to appropriately balance the personal expressive rights of public servants (and the public interest in the dissemination of their political views) with the need for an impartial and apolitical public service. It is a vexing dilemma that has confronted superior courts in Europe,¹¹⁰ the United States,¹¹¹ and Canada,¹¹² among other jurisdictions. Although the exhortation that the implied freedom is not a personal right has greatly restricted reliance on comparative

¹⁰⁶ It must be remembered, though, that the implied freedom ‘does not protect only the whispered civilities of intellectual discourse’, but extends to ‘insult and emotion, calumny and invective’ *Coleman* (2004) 220 CLR 1, 91 [239] (Kirby J).

¹⁰⁷ *Re Banerji and Comcare (Compensation)* [2018] AATA 892 (16 April 2018) [116] (emphasis in original).

¹⁰⁸ *Attorney-General (WA) Submissions*, above n 55, [13] (emphasis added).

¹⁰⁹ Australian Public Service Commission, *Making Public Comment on Social Media: A Guide for Employees* (2017) 3.

¹¹⁰ *Wille v Liechtenstein* [1999] ECHR 107 (28 October 1999); *Haseldine v United Kingdom* (1992) D&R 73; *Ahmed v United Kingdom* [1998] ECHR 78 (2 September 1998); *Redfearn v United Kingdom* [2012] ECHR 1878 (6 November 2012).

¹¹¹ *Pickering v Board of Education*, 391 US 563 (1968); *San Diego v Roe*, 543 US 77 (2004); *Lane v Franks* 134 S Ct 2369 (2014).

¹¹² *Fraser v Public Service Staff Relations Board* [1985] 2 SCR 455 (‘*Fraser*’); *Haydon v Canada* [2001] 2 FC 82; *Haydon v Canada* [2004] FC 749; *Osborne v Canada* [1991] 2 SCR 69.

jurisprudence, international case law may provide helpful guidance in *Comcare v Banerji* — or at the very least ‘food for thought’.¹¹³ The High Court might, for example, wish to heed the Canadian Supreme Court’s warning: whatever the exact balance struck, public servants ‘cannot be ... “silent members of society”’.¹¹⁴

VI Conclusion

It has long been said that hard cases make bad law.¹¹⁵ *Comcare v Banerji* is a hard case. Its resolution requires the High Court to determine whether the legislature has struck a constitutionally-compatible balance between conflicting — and compelling — policy considerations. In reaching its conclusion, the Court must explicate the appropriate test for assessing the compliance of administrative decisions with the implied freedom of political communication. On neither front is the Court helped by an abundance of domestic cases, while its insistence on the unique nature of the implied freedom inhibits reliance on comparative law. Whatever the outcome, *Comcare v Banerji* will leave a significant legacy — for tweeting public servants (at both federal and state level) and for the broader development of implied freedom jurisprudence.

¹¹³ Transcript of Proceedings, *Barclay v Penberthy* [2012] HCATrans 98 (1 May 2012) 2123 (Crennan J).

¹¹⁴ *Fraser* [1985] 2 SCR 455, 466.

¹¹⁵ *Northern Securities Company v United States*, 193 US 197, 400 (Holmes J) (1904).

Book Review

The Dual Penal State: The Crisis of Criminal Law in Comparative-Historical Perspective

by Markus D Dubber (2018) Oxford University Press,
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James Monaghan*

I Introduction

Liberal penalty is in crisis. States supposedly committed to a liberal view of criminal law routinely engage in penal violence, seemingly unconstrained by the limits that concepts like ‘law’ and ‘liberalism’ — in certain idealised forms — are meant to provide. In *The Dual Penal State*, Markus D Dubber offers us a diagnosis of this crisis, presents a particular set of critical tools and demonstrates how they might help us to respond to the crisis, and invites us to take up those tools.

This is an ambitious book: Dubber puts a comparative-historical study of German and United States (‘US’) criminal law and criminal law scholarship to a methodological purpose, namely, demonstrating the value of a mode of analysis that Dubber calls ‘*critical analysis of criminal law in a dual penal state*’.¹ Though the argument is dense at times, its methodological focus makes it compelling reading even for those unfamiliar with penalty in Germany and the US. And the fruitfulness of his comparative-historical study commends the critical tools that he employs.

In this review, I outline Dubber’s diagnosis of the crisis of liberal penalty and the tools that he employs in his study. Then, I take up Dubber’s invitation in a preliminary way, suggesting two sites of penal power in the Australian context where his tools might prove illuminating.

II Diagnosing the Crisis of Liberal Penalty

‘The threat and infliction of state penal violence on a massive scale are liberal phenomena, rather than characteristics of “other,” non-liberal societies.’² This is the basic insight on which Dubber builds. The so-called ‘war on crime’, and its

* BA (Hons I and University Medal) LLB (Hons I) (Syd). Researcher to the Court of Appeal, Supreme Court of New South Wales, Australia. Views expressed in this review are those of the author personally, not those of his employer.

¹ Markus D Dubber, *The Dual Penal State: The Crisis of Criminal Law in Comparative-Historical Perspective* (Oxford University Press, 2018), 99 (emphasis in original).

² Ibid 4.

international manifestation, the ‘war on terror’; Guantánamo Bay; detention centres and camps of migrants, sometimes in remote or offshore places; racialised police violence that makes it necessary to protest that ‘Black Lives Matter’; mass incarceration, especially of non-white populations — all these phenomena are found in States that are supposedly committed to ‘the modern liberal legal-political project’.³ Dubber knows that the term ‘liberalism’ names a complex set of traditions, which are expressed differently in different times and places. But working at the ‘general level of the legal-political project of modern liberal states,’ he suggests that a core commitment by which liberalism defines itself is the ‘fundamental and continuous critique of state power’.⁴ States committed to the liberal legal-political project must, on pain of existential hypocrisy, address ‘the *penal paradox*’ — the challenge of legitimating ‘violent interference with the autonomy of persons upon whose autonomy the state’s legitimacy rests’.⁵

Working on the hypothesis that this crisis in liberal penalty is a supranational phenomenon, Dubber studies two comparators, the US and Germany, ‘tolerably representative’ of the common law and the civil law traditions respectively.⁶ Through this comparison, Dubber aims ‘to explore different ways of framing and addressing the penal paradox’.⁷ As he subjects the penal law and scholarship of each system to scrutiny, he finds that, for different reasons, the crisis of liberal penalty is not being attended to in either Germany or the US: both are in ‘states of denial’.⁸

In Part I — comprising the first two chapters — Dubber offers a critical appraisal of the dominant tradition of German criminal legal scholarship,⁹ or as it is known (reflecting its own self-understanding), criminal law ‘science’. In chapter 1, Dubber begins a provocative (re-)reading of the history of criminal law science. His fundamental move is to argue that German criminal law scientists have taken the questions of the legitimacy of penal power to have been resolved by the first generation of German legal scientists — particularly by Feuerbach.¹⁰ For adherents of this founding myth, ‘the question of legitimacy is no longer a proper subject of scientific inquiry’.¹¹ He argues in chapter 2 that criminal law science has developed a set of rhetorical strategies that ‘facilitate the construction and perpetuation of such a calming self-conception’.¹² He cuts some (admittedly) rough distinctions between these strategies: sloganism, labelism, taxonomism, and a somewhat different, overarching category, ontologism. Without going into the details, scholars working in a variety of legal sub-disciplines could fruitfully employ these categories in analysing law’s rhetorical diversions.

³ Ibid 1. Dubber’s claims about whether such a shared project actually exists are modest. Because his focus is how State penal power can be subjected to meaningful scrutiny, it is enough for his purposes ‘if it makes sense to postulate a shared project for purposes of common, and comparative, critical analysis’: at 111.

⁴ Ibid 4.

⁵ Ibid 2 (emphasis in original).

⁶ Ibid 101.

⁷ Ibid 100.

⁸ Ibid 5.

⁹ This appraisal continues throughout the book — notably in *ibid* ch 4.F–G, ch 7.D.3.

¹⁰ Ibid 22.

¹¹ Ibid 23.

¹² Ibid 33.

While German criminal law science recognised the challenge of the penal paradox and (wrongly) considered it resolved once and for all, in the US context, Dubber argues that the paradox is not being addressed because it has never been visible. Dubber advances this claim in Part III of the book, where he offers a critical genealogy of American penalty. In chapter 5, he contends that penal power in the US was not subject to revolutionary reimagining according to republican ideals. Rather, American penalty reproduced

the deeply hierarchical and preconstitutional nature of English penalty ... [remaining] a vestige of a patriarchal penal system in which the sovereign disciplines wayward members of its state household if, and as, it sees fit, without meaningful constraints on its punitive discretion.¹³

Readers familiar with Dubber's earlier work will recognise aspects of this account of American penalty.¹⁴ Of special importance in *The Dual Penal State* is Dubber's understanding of this mode of penal governance (that is, this way of exercising penal power) as modeled on the unrestrained patriarchal authority of a paterfamilias over the household. In his framework, this mode of penal governance is called 'police'.

In chapters 6 and 7, Dubber shows how this view of penalty persisted, in Thomas Jefferson's 'Bill for Proportioning Crimes and Punishments in Cases Heretofore Capital' of 1779, in the framing of the Thirteenth Amendment of the *United States Constitution* in the post-Civil War Reconstruction, in the drafting of the Model Penal and Correctional Code in the mid-20th century, and finally in the 'wars' on crime and terror. From the perspective of police (in Dubber's sense), questions about legitimacy are unintelligible: the authority of the sovereign-patriarch over the State household is literally unquestionable.

These comments on police as a mode of governance move us nicely into Dubber's methodological purposes in the book. Between the (re)appraisal of German criminal law science in Part I and the critical genealogy of American penalty in Part III, we find Dubber's presentation of the mode of analysis that he advocates, '*critical analysis of criminal law in a dual penal state*'.¹⁵

III Critical Analysis of Criminal Law in a Dual Penal State

For some time now, Dubber has been advocating an approach to legal studies called 'critical analysis of law'.¹⁶ That approach seeks to move beyond 'the rhetorical

¹³ Ibid 179.

¹⁴ See, eg, Markus Dirk Dubber, *The Police Power: Patriarchy and the Foundations of American Government* (Columbia University Press, 2005).

¹⁵ Dubber, above n 1, 99 (emphasis in original).

¹⁶ See, eg, the open-access journal *Critical Analysis of Law* <<https://cal.library.utoronto.ca/index.php/cal/index>> and Dubber's 'manifesto' from June 2012 on what critical analysis of law involves: Markus D Dubber, 'Critical Analysis of Law: Interdisciplinarity, Contextuality, and the Future of Legal Studies' <<https://cal.library.utoronto.ca/public/journals/99/CAL.pdf>>. For some recent reflections on critical analysis of law in a historical key, see Markus D Dubber, 'Legal History as Legal Scholarship: Doctrinalism, Interdisciplinarity, and Critical Analysis of Law' in Markus D Dubber and Christopher Tomlins (eds), *The Oxford Handbook of Legal History* (Oxford University Press, 2018) 99.

juxtaposition of doctrinal and interdisciplinary analysis in the service of a comprehensive critique of state power through law in a modern liberal democracy'.¹⁷ As a form of critical analysis, it has both descriptive (analytical) and normative (critical) dimensions.¹⁸ And as a critical analysis of *law*, Dubber locates the relevant normative standards in a particular normative conception of law, understood as a mode of governance.

Dubber distinguishes two modes of state governance — governmentalities, to use Foucault's term — called 'police' and 'law'.¹⁹ I've already sketched what police means. In Dubber's framework,

[c]ritical analysis of law ... regards modern law as having emerged in explicit contradistinction to police as a mode of governance at the long turn of the nineteenth century. In other words, the present book regards modern law as an invention of the enlightenment that gave rise to, and still shapes, the legal-political project of Western liberal democracies: the law state (*Rechtsstaat*), or the state under the 'rule of law,' in contrast to the police state (*Polizeistaat*).²⁰

As Dubber tells it, the 'invention ... of autonomy as a capacity shared by all persons as such' during the enlightenment triggered a 'reconceptualization of state power'.²¹ In that reconceptualization, those who are mere objects of State power under police are redefined as equal, autonomous subjects under law, to whom the State must justify its exercises of power.²² In outline, this is the normative conception of law at work in a critical analysis of law.

Drawing on Weber, Dubber uses law and police as 'ideal types': they are 'contrasting clusters ... of concepts, practices, and ... governmentalities, that add up to a comprehensive framework for critical analysis'.²³ They are tools that are meant to determine 'the appropriate critical vocabulary'²⁴ for scrutinising contemporary exercises of penal power. These tools serve a functional and political purpose in the present: Dubber's aim in applying them in his historical-comparative study is to critique state power, not to produce an 'authoritative' legal history.²⁵

Critically analysing penal power from the perspectives of law and police produces an account of what Dubber calls the dual penal state. This dualistic account of penal power illuminates the operations of, and interactions between, the two modes of penal governance that he identifies. His hope is that others might take up this critical framework for the analysis of penal power, that they might join a 'transnational, and perhaps eventually global, dialogue'²⁶ about criminal law, and

¹⁷ Dubber, 'Legal History as Legal Scholarship', above n 16, 101.

¹⁸ Dubber, above n 1, 174.

¹⁹ Ibid 99.

²⁰ Ibid 99–100 (emphasis in original).

²¹ Ibid 100.

²² Ibid 102–3.

²³ Ibid 104.

²⁴ Ibid.

²⁵ Ibid 103.

²⁶ Ibid 101.

that scholars might work together towards a ‘modest, unpretentious, and inclusive conception of “legal science”’.²⁷

IV Taking Up Dubber’s Tools

Given that *The Dual Penal State* is an argument for a particular set of critical tools, one way to evaluate the success of Dubber’s project is to try them out. If they help us to better understand the contours of State power, then that would go a considerable way to vindicating the project. Assuming that Australian jurisdictions share in the modern liberal legal-political project,²⁸ I conclude by briefly suggesting two sites of penal power in Australia where Dubber’s tools might be illuminating.

First, Dubber’s tools could contribute to the scholarship on the summary criminal jurisdiction. Consider, for example, Mitchell’s findings that, for colonial governments,

the summary criminal jurisdiction presented a means of overcoming many of the impediments to convicting Aboriginal people at trial before a jury, thereby making it a useful means by which to bring Aboriginal people within the pale of the law.²⁹

Without prejudging the analysis, Dubber’s police/law distinction might provide useful tools for mapping the relationships between penal police and penal law in the colonies — and particularly for understanding how ‘policial’ technologies (like the summary jurisdiction) have been, and still are,³⁰ used to circumvent the protections of ‘law’.³¹

Second, Dubber’s tools might illuminate exercises of penal power in the migration space. In addition to possible connections with the crimmigration literature that readily come to mind,³² I suggest that Dubber’s tools might prove useful in critiquing the transformation of the Australian Government Department of

²⁷ Ibid 229. See also Dubber’s ‘The Dual Penal State: Preface’ on the ‘Project-in-Progress-Page’, an innovative online record of the project: <<http://individual.utoronto.ca/dubber/LPpref.html>>.

²⁸ At least for the purposes of embarking on a critical analysis, this seems a safe assumption. But, of course, how law (as a mode of governance) and the liberal legal-political project are understood and performed in Australia — especially given the contexts of empire, settler colonialism, and federalism — are important questions that a critical analysis would have to consider.

²⁹ Tanya Mitchell, ‘Criminalisation of Aboriginal People: Development of the Summary Jurisdiction’ in Thomas Crofts and Arlie Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (Oxford University Press, 2015) 55, 57.

³⁰ On this point, I note how Dubber’s tools — especially those in chapter 2 concerning labelling — could inform consideration of fines in Australian jurisdictions: see Julia Quilter and Russell Hogg, ‘The Hidden Punitiveness of Fines’ (2018) 7(3) *International Journal for Crime, Justice and Social Democracy* 9.

³¹ Mitchell’s recent socio-historical account of the summary jurisdiction in the colonies strongly resonates with Dubber’s account of police power as a power to maintain ‘peace’. Compare: Tanya Mitchell, ‘The Rise to Prominence of the Victim in the Summary Criminal Jurisdiction in the Twentieth Century’ (2018) 5(2) *law&history* 30, 33–5 with Dubber, above n 1, 121–3.

³² See, eg, Louise Boon-Kuo, ‘The Policing of Immigration: Raids, Citizenship and the Criminal Law’ in Thomas Crofts and Arlie Loughnan (eds), *Criminalisation and Criminal Responsibility in Australia* (Oxford University Press, 2015) 276; Michael Grewcock, ‘Punishment, Deportation and Parole: The Detention and Removal of Former Prisoners under Section 501 *Migration Act 1958*’ (2011) 44(1) *Australia & New Zealand Journal of Criminology* 56.

Immigration and Border Protection into a security-focused ‘super-ministry’, the Department of Home Affairs. To sketch just one line of thought, Dubber’s analysis of police offers us tools for understanding the choice of the name ‘Home’ Affairs. This choice paints migrants as threats to the emotionally powerful symbol of the home, and implicitly positions the Government (and particularly, the Minister for Home Affairs) as a kind of paterfamilias. The (intended) effect is to legitimate intrusive or violent State action taken in defence of the home, and to insulate such action from criticism. And Dubber’s comparative-historical approach could help us to contextualise the rhetorical choice here, situating it with respect to the US Department of Homeland Security (formed after the terrorist attacks of 11 September 2001) and, in longer colonial and imperial perspective, with the United Kingdom’s Home Office and earlier Australian Government Departments of Home Affairs and of Home and Territories.³³

³³ Mary Crock and Laurie Berg, *Immigration, Refugees and Forced Migration: Law, Policy and Practice in Australia* (Federation Press, 2011) xxv.