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# *The Noongar Settlement: Australia's First Treaty*

Harry Hobbs\* and George Williams†

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## *Abstract*

There has been a resurgence in debate over the desirability and feasibility of a treaty between Aboriginal and Torres Strait Islanders and the Australian State. The discussion has proceeded on the assumption that no such treaties exist. But is this correct? In this article, we examine the concepts and ideas underlying a treaty, with a view to determining a standard against which agreements and negotiated settlements can be assessed. The standard we apply is informed by the modern treaty-making process in Canada to locate it in contemporary practices and values. We then examine whether any agreement reached in Australia can be regarded as a treaty, including settlements reached under the *Native Title Act 1993* (Cth) and more recent agreements made outside that regime. We conclude that the South West Native Title Settlement, a negotiated agreement between the Noongar people and the Western Australian Government, is Australia's first treaty.

## **I Introduction**

Treaties are accepted around the world as the means of resolving differences between Indigenous peoples and those who have colonised their lands. They have been reached in the United States ('US'),<sup>1</sup> and Aotearoa/New Zealand,<sup>2</sup> and are still being negotiated in Canada today.<sup>3</sup> In contrast, no treaty between Aboriginal and Torres Strait Islander peoples and the Australian State has ever been recognised. This is despite Australia having experienced decades of debate about whether a treaty should be negotiated with Indigenous peoples.<sup>4</sup>

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<sup>1</sup> See, eg, *Two Row Wampum Treaty* (signed and entered into force 21 April 1613), negotiated between representatives of the Haudenosaunee and Dutch Government in modern upstate New York; *Treaty of 1677* (signed and entered into force 29 May 1677), negotiated between Charles II of England and representatives of the Nottoway, Appomattoc, Wayonaoake, Nansemond, Nanzatico, Monacan, Saponi and Meherrin peoples; *Treaty with the Delawares* (signed and entered into force 17 September 1778) negotiated between the Delaware people and the US government.

<sup>2</sup> *Treaty of Waitangi*, signed 6 February 1840, (entered into force 21 May 1840), negotiated between the British Crown and Māori chiefs.

<sup>3</sup> See, eg, *Mi'kmaq Peace and Friendship Treaty*, signed 15 December 1725, (entered into force 4 June 1726). For modern day treaties, see below Part IIB.

<sup>4</sup> See, eg, Yolngu People, Yirrkala Bark Petition (August 1963); Stewart Harris, *It's Coming Yet: An Aboriginal Treaty within Australia between Australians* (Aboriginal Rights Treaty Committee, 1979); National Aboriginal Conference, 'The Makarrata: Some Ways Forward' (Position Paper

The treaty movement in Australia has been reinvigorated, and is being propelled forward by several events. In February 2016, the Victorian Government announced its commitment to negotiate a treaty with Aboriginal Victorians.<sup>5</sup> Consultative forums have since been held in Melbourne and across regional Victoria to develop a culturally appropriate representative body through which those negotiations can take place.<sup>6</sup> An Aboriginal Treaty Working Group and a Victorian Treaty Advancement Commissioner will provide advice to community and government, and guide the establishment of the representative body.<sup>7</sup> In September 2016, incoming Northern Territory Chief Minister Michael Gunner declared that his Government would establish a subcommittee on Aboriginal affairs to ‘drive public discussions on a treaty’ between the Territory and Indigenous nations.<sup>8</sup> Although no firm commitment has yet been made, treaty remains on the Government’s agenda.<sup>9</sup> In South Australia, events are moving forward more quickly. In December 2016, discussion began between the South Australian Government and three Indigenous nations aimed at finalising a treaty.<sup>10</sup> Following the report of the South Australian Treaty Commissioner in July 2017,<sup>11</sup> the State commenced negotiations with three Aboriginal nations: the Ngarrindjeri, Narungga and Adnyamathanha.<sup>12</sup>

The treaty debate has also assumed prominence as people ask whether the proposed recognition of Indigenous peoples in the *Australian Constitution*<sup>13</sup> should be accompanied by a final, negotiated settlement. At the First Nations Constitutional Convention at Uluru in May 2017, around 250 Aboriginal and Torres Strait Islander delegates called on the Commonwealth to establish a Makarrata Commission.

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presented at World Council of Indigenous Peoples, Canberra, April 1981); Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, *Two Hundred Years Later... Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Feasibility of a Compact or ‘Makarrata’ between the Commonwealth and Aboriginal People* (1983) xii recommendation 1; Bob Hawke, ‘Statement of the Prime Minister: Barunga Festival’ (1988) 2(6) *Land Rights News* 22; Council for Aboriginal Reconciliation, ‘Reconciliation: Australia’s Challenge’ (Report, Council for Aboriginal Reconciliation, 4 December 2000) 106 recommendation 6.

<sup>5</sup> Hamish Fitzsimmons, ‘Victorian Government to Begin Talks with First Nations on Australia’s First Indigenous Treaty’, *ABC News* (online), 26 February 2016 <<http://www.abc.net.au/news/2016-02-26/victoria-to-begin-talks-for-first-indigenous-treaty/7202492>>.

<sup>6</sup> See Aboriginal Treaty Interim Working Group, *Aboriginal Community Consultations on the Design of a Representative Body* (December 2016); Aboriginal Treaty Interim Working Group, *Aboriginal Community Consultations on the Design of a Representative Body — Phase 2* (June 2017).

<sup>7</sup> Aboriginal Victoria, *Victorian Treaty Advancement Commission* <<https://www.vic.gov.au/aboriginal-victoria/treaty/victorian-treaty-advancement-commission.html>>.

<sup>8</sup> Helen Davidson, ‘Northern Territory Labor Government Announces Majority Female Cabinet’, *The Guardian* (online), 12 September 2016 <<https://www.theguardian.com/australia-news/2016/sep/12/northern-territory-labor-government-announces-majority-female-cabinet>>.

<sup>9</sup> NT News, ‘Indigenous Treaty Remains on NT Government’s Agenda’, *NT News* (online), 4 May 2017 <<http://www.ntnews.com.au/news/northern-territory/indigenous-treaty-remains-on-nt-governments-agenda/news-story/299369abf4b496a06aa92ee8e5d0300d>>.

<sup>10</sup> Caroline Winter, ‘Treaty: South Australian Government Enters Historic Discussions with Aboriginal Nations’, *ABC News* (online), 15 December 2016 <<http://www.abc.net.au/news/2016-12-14/south-australia-enters-historic-treaty-discussions/8120162>>.

<sup>11</sup> Dr Roger Thomas (Treaty Commissioner), *Talking Treaty: Summary of Engagements and Next Steps* (Office of the Treaty Commissioner, Government of South Australia, July 2017).

<sup>12</sup> Department of State Development (SA), *Treaty Discussions* <<https://statedevelopment.sa.gov.au/aboriginal-affairs/aboriginal-affairs-and-reconciliation/initiatives/treaty-discussions>>.

<sup>13</sup> See generally Megan Davis and George Williams, *Everything You Need to Know about the Referendum to Recognise Indigenous Australians* (NewSouth Publishing, 2015).

Makarrata is a Yolngu word meaning 'a coming together after a struggle', and the delegates explained that it 'captures our aspirations for a fair and truthful relationship with the people of Australia'.<sup>14</sup> The Commission would 'supervise a process of agreement-making between governments and First Nations'.<sup>15</sup>

Despite the emergent treaty negotiations in Victoria, the Northern Territory and South Australia, and the Uluru Convention's call for a Makarrata Commission, treaty-talk at the national level is plagued by two questionable assumptions. These are that no treaties exist between Indigenous peoples and the Australian State, and that a treaty would amount to a radical, perhaps impossible, shift in Australia's public law system. In this article, we address the first of these assumptions, that is, whether it is correct to say that no treaty has been signed between Indigenous peoples and the State. This is a key question in the contemporary debate. If Australia has already entered into one or more treaties, this could provide the basis for further like outcomes, and also end questions about the capacity of Australia's legal system to accommodate such agreements.

In Part II, we examine the concept of treaties between Indigenous peoples and the State to determine what is meant by the term, and the type of agreements it covers. Our approach is substantive, rather than formalistic: we look at the concepts and ideas underlying a treaty, asking what principles and values a comprehensive negotiated settlement should express. This uncovers the fact that there is no one form of 'treaty', but a diverse variety of agreements establishing and governing a myriad of interrelationships.<sup>16</sup> We then examine examples of such agreements so that our standard is further developed by way of case studies. As liberal democracies with a similar colonial history and common law systems, Canada, Aotearoa/New Zealand and the US are all natural comparators to Australia. Of these, we look at Canada in particular because treaties are still being negotiated there between the State and First Nations. Consequently, it offers the best opportunity to locate our understanding of a treaty in current practices and public law values, rather than only in historical examples. While there are many modern treaty processes occurring in Canada, including the Yukon and Inuit Land Claims,<sup>17</sup> our focus is on British Columbia. It is the best comparator from Canada given that it involves agreements over land in which a significant number of peoples live (4.631 million in British Columbia, compared to 35 874 in Yukon and 35 944 in Nunavut).

In Part III, we examine whether any agreement reached in Australia can be regarded as a treaty. We explore the negotiated settlements reached under the *Native*

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<sup>14</sup> Referendum Council, 'Uluru Statement from the Heart' (Statement, Referendum Council, 26 May 2017) <[https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru\\_Statement\\_From\\_The\\_Heart\\_0.PDF](https://www.referendumcouncil.org.au/sites/default/files/2017-05/Uluru_Statement_From_The_Heart_0.PDF)>.

<sup>15</sup> Ibid.

<sup>16</sup> Marcia Langton, Maureen Tehan and Lisa Palmer, 'Introduction' in Marcia Langton et al (eds), *Honour Among Nations?: Treaties and Agreements with Indigenous Peoples* (Melbourne University Press, 2004) 1, 2.

<sup>17</sup> The Yukon Land Claims are conducted under the *Umbrella Final Agreement* (signed and entered into force March 1990); for the Inuit see, eg *Nunavut Land Claims Agreement* (signed 25 May 1993; entered into force 9 July 1993). 'Modern' treaties are those negotiated after the 1973 Canadian Supreme Court decision *Calder v Attorney-General of British Columbia* [1973] SCR 313 ('*Calder*'). See below at Part IIB(1).

*Title Act 1993* (Cth) ('NTA'), and more recent agreements made outside the native title regime. Of these, a primary focus is the South West Native Title Settlement, a negotiated agreement between the Noongar people and the Western Australian Government.<sup>18</sup> Under this settlement, the Noongar people have agreed to exchange native title rights for a comprehensive package of benefits including recognition of traditional ownership, land, a significant financial future fund and other commitments.<sup>19</sup>

## II Treaties with Indigenous Peoples

### A What is a Treaty?

Political communities have long negotiated agreements with neighbours to secure peace and protect and promote their interests. One of the earliest such treaties was settled between the rival Mesopotamian kingdoms of Lagash and Umma between 2550 and 2600 BCE. Expressed in the Sumerian language and inscribed on a stone monument, the Agreement established a territorial boundary between the parties, provided for a system of arbitration if a dispute arose over its interpretation, and designated the ruler of a third State to act as an arbitrator.<sup>20</sup> Evidence also exists that, from the 8<sup>th</sup> century BCE, extensive treaty relations were conducted within ancient China between different nations.<sup>21</sup> Similarly, pre-contact, Indigenous nations developed processes for making and maintaining peaceful diplomatic relations with others.<sup>22</sup> Agreements were also negotiated between warring political communities across Europe.<sup>23</sup> It is no surprise then, that when European colonial powers met Indigenous political communities, negotiated agreements were often struck.

Under the *Vienna Convention on the Law of Treaties*, a treaty is 'an international agreement concluded between States in written form and governed by international law'.<sup>24</sup> This definition might be taken to exclude agreements struck between Indigenous and non-Indigenous peoples,<sup>25</sup> and indeed, many scholarly works on the international law of treaties do not encompass discussion of these

<sup>18</sup> Land, Approvals and Native Title Unit (WA), *South West Native Title Settlement*, Government of Western Australia <<https://www.dpc.wa.gov.au/lantu/south-west-native-title-settlement/Pages/default.aspx>>.

<sup>19</sup> See below Part IIIB(1).

<sup>20</sup> Alexander Orakhelashvili, 'The Relevance of Theory and History — The Essence and Origins of International Law' in Alexander Orakhelashvili (ed), *Research Handbook on the Theory and History of International Law* (Edward Elgar, 2011) 3, 20; Gbenga Oduntan, *International Law and Boundary Disputes in Africa* (Routledge, 2015) 69.

<sup>21</sup> Richard Walker estimates that over 140 treaties were negotiated between 722–476 BCE: Richard Louis Walker, *The Multi-State System of Ancient China* (Shoe String Press, 1953) 82.

<sup>22</sup> Canada, Royal Commission on Aboriginal Peoples, *Report of the Commission on Aboriginal Peoples* (1996) vol 1, 112–14 [3.1]; Leanne Simpson, 'Looking After Gdoo-naaganinaa: Precolonial Nishnaabeg Diplomatic and Treaty Relationships' (2008) 23(2) *Wicazo Sa Review* 29.

<sup>23</sup> See, eg, *Treaty of Durham* (signed and entered into force 9 April 1136); *Treaty of Westphalia* (signed and entered into force 24 October 1648); *Treaty of the Pyrenees* (signed and entered into force 7 November 1659).

<sup>24</sup> *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) art 2(1)(a) ('*Vienna Convention*').

<sup>25</sup> Anthony Aust, *Modern Treaty Law and Practice* (Cambridge University Press, 3<sup>rd</sup> ed, 2013) 16.

agreements.<sup>26</sup> But this approach is unduly limited for two reasons. First, as the Special Rapporteur on the Sub-Commission on Prevention of Discrimination and Protection of Minorities noted in his 1997 report on treaties with Indigenous peoples,

in establishing formal legal relationships with peoples overseas, the European parties were clearly aware that they were negotiating and entering into contractual relations with sovereign nations, with all the international legal implications of that term during the period under consideration.<sup>27</sup>

By entering into formal agreements with the Indigenous peoples they met, the European powers acknowledged the legal capacity of those peoples to make such treaties. Even if Indigenous peoples today do not constitute states, the concept of 'sovereignty' is fluid, and Australian public law principles can comprehend the notion of shared jurisdiction between polities.<sup>28</sup> Second, the definition adopted under the *Vienna Convention* is expressly limited 'for the purposes of the present Convention',<sup>29</sup> and is not determinative of our understanding of political agreements more broadly, nor for defining negotiated settlements between Indigenous peoples and the State.

A holistic approach to understanding treaties avoids marginalising the agreements struck between Indigenous and non-Indigenous political communities. It sees treaties broadly as, for example, 'formalised records of negotiated agreements between parties, usually states, but sometimes people',<sup>30</sup> 'political agreements involving Indigenous peoples and governments that have a binding legal effect'<sup>31</sup> and 'formal and consensual bilateral juridical instruments'.<sup>32</sup> These definitions can encompass a wide variety of forms, processes and outcomes, reflecting the diverse experiences and perspectives of parties to such agreements across time and space.

Our starting point for establishing a standard by which agreements can be assessed as being treaties is a three-year study by Brennan and colleagues of treaties between Indigenous peoples and the State. This study, the only one of its type so far undertaken in Australia, concluded that such treaties contain three criteria.<sup>33</sup> First, they are based on an acknowledgment by the State that Indigenous peoples were prior owners and occupiers of the land now claimed by the State. This entails recognising that, in the absence of a treaty, the legitimacy of state authority over

<sup>26</sup> No discussion of treaties between Indigenous peoples and non-Indigenous peoples appears in: Enzo Cannizzaro and Mahnouch H Arsanjani (eds), *The Law of Treaties Beyond the Vienna Convention* (Oxford University Press, 2011); Malgosia Fitzmaurice and Olufemi Elias, *Contemporary Issues in the Law of Treaties* (Eleven Publishing, 2005); Jan Klabbers, *The Concept of Treaty in International Law* (Kluwer Law, 1998). Cf Ian Brownlie, *Treaties with Indigenous Peoples: The Robb Lectures* (Clarendon Press, 1992).

<sup>27</sup> Miguel Alfonso Martinez, Special Rapporteur, *Studies on Treaties, Agreements and Other Constructive Arrangements between States and Indigenous Populations*, UN Doc E/CN.4/Sub.2/1999/20 (22 June 1999) 18 [110].

<sup>28</sup> Sean Brennan, Brenda Gunn and George Williams, "'Sovereignty" and Its Relevance to Treaty-Making between Indigenous Peoples and Australian Governments' (2004) 26(3) *Sydney Law Review* 307, 347–9.

<sup>29</sup> *Vienna Convention* art 2(1).

<sup>30</sup> J R Miller, *Compact, Contract, Covenant: Aboriginal Treaty-Making in Canada* (University of Toronto Press, 2009) 3.

<sup>31</sup> Sean Brennan et al, *Treaty* (Federation Press, 2005) 3.

<sup>32</sup> Martinez, above n 27, 14 [82]. See further Brennan, Gunn and Williams, above n 28, 309–10.

<sup>33</sup> Brennan et al, above n 31, 3–11.

Indigenous peoples is contested. As part of this first component, the State typically acknowledges the deep injustices done to Indigenous peoples as part of the colonial- and state-building projects, and that this injustice continues to manifest today. Second, the treaties are concluded by way of negotiation, with ‘governments and Indigenous peoples sitting round the table’ and coming to an agreement.<sup>34</sup> Third, while the negotiation process holds many benefits, the treaties must include substantive outcomes. These outcomes should recognise legal rights to protect Indigenous peoples from ‘the wavering sympathies of the [broader political] community’,<sup>35</sup> as well as provide opportunities for sustainable economic development.

These criteria are a useful starting point. However, the study concluded in 2005, and there have been significant events since that time. For example, the United Nations General Assembly’s adoption of the *Declaration on the Rights of Indigenous Peoples* (‘*UNDRIP*’) in 2007,<sup>36</sup> endorsed by Australia in 2009, signals significant developments in Indigenous rights and global democratic governance standards. Although not legally binding, the *UNDRIP* envisages and endorses a pluralised account of the State, where sovereignties are dispersed among multiple polities.<sup>37</sup> For instance, art 3 recognises and affirms that ‘Indigenous peoples have the right to self-determination’, which entails the right to ‘freely determine their political status and freely pursue their economic, social and cultural development’. In exercising this right, art 4 further guarantees that Indigenous peoples have ‘the right to autonomy or self-government in matters relating to their internal and local affairs’.

The Special Rapporteur on the Rights of Indigenous Peoples, has noted that the norms of the Declaration ‘substantially reflect Indigenous peoples own aspirations, which after years of deliberation have come to be accepted by the international community’.<sup>38</sup> For this reason, Indigenous leaders recognised Australia’s endorsement of the Declaration as marking a ‘watershed moment’ in Australia’s relationship with Aboriginal and Torres Strait Islander peoples and as ‘another piece in the jigsaw puzzle of reconciliation’.<sup>39</sup> The terms of, and principles underlying, the Declaration thus serve as an important component of any modern treaty. Indeed, the Declaration creates a framework for Indigenous dialogue and political advocacy with states.<sup>40</sup> It is through treaties that this dialogue may be conducted.

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<sup>34</sup> Sean Brennan, ‘Why a “Treaty” and Why This Project?’ (Discussion Paper No 1, Gilbert and Tobin Centre of Public Law, January 2003) 5.

<sup>35</sup> Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia’s Future* (Federation Press, 2003) 8.

<sup>36</sup> GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, Supp No 49, UN Doc A/RES/61/295 (13 September 2007).

<sup>37</sup> Will Kymlicka, ‘Beyond the Indigenous/Minority Dichotomy?’ in Stephen Allen and Alexandra Xanthaki (eds), *Reflections on the UN Declaration on the Rights of Indigenous Peoples* (Hart, 2011) 183, 190.

<sup>38</sup> James Anaya, Special Rapporteur, *Situation of Human Rights and Fundamental Freedoms of Indigenous People*, UN Doc A/65/264 (9 August 2010) 17 [60].

<sup>39</sup> Tom Calma and Mick Dodson respectively, quoted in Sheila Collingwood-Whittick, ‘Australia’s Northern Territory Intervention and Indigenous Rights on Language, Education and Culture: An Ethnocidal Solution to Aboriginal “Dysfunction”?’ in Elvira Pulitano (ed), *Indigenous Rights in the Age of the UN Declaration* (Cambridge University Press, 2012) 110, 115.

<sup>40</sup> Megan Davis, ‘The United Nations Declaration on the Rights of Indigenous Peoples’ (2007) 6(30) *Indigenous Law Bulletin* 6, 6.



Other significant developments continue to occur in Canada. That nation has, for many years, engaged in crafting treaties between Indigenous peoples and the State, which are recognised as being 'solemn agreements that set out promises, obligations and benefits for both parties'.<sup>41</sup> Canada's experience is of central importance to this article. Our aim in understanding what is meant by a treaty is not to locate the term in historical understandings of the concept that reflect outdated societal and public law values, including as to the limited place of Indigenous peoples within the State. Indeed, what might have been regarded as a treaty in the past may be no more than a tokenistic or sham agreement that falls short of what is now regarded as satisfactory.<sup>42</sup> In contrast, the concept today should be consistent with contemporary legal values such as non-discrimination, self-determination and equality,<sup>43</sup> as reflected in instruments such as the *UNDRIP*.

In the sections below, we refine and develop the criteria of acknowledgement, negotiation, and substantive outcomes, in light of these concerns and more recent developments. We then ground this analysis in the experience of the modern treaty-making process in Canada. The resulting three criteria reveal a substantive rather than formalistic standard that is suitable for use in Australia to determine whether recent agreements amount to a treaty between Indigenous peoples and the State.

## 1 *Recognition as Polities*

The first criteria recognises that a treaty acknowledges that Indigenous peoples were prior owners and occupiers of the land now claimed by the State. Acknowledgement only of this, though, is insufficient. A treaty must also recognise that Indigenous peoples are 'polities'.<sup>44</sup> A polity is a distinct political community composed of individuals collectively united by identity. It can take many forms, including a nation-state, empire, or a sub-state unit. Indigenous communities in Australia have a long history operating as a distinct society, with a unique economic, religious and spiritual relationship to their land.<sup>45</sup> Despite this, governments have preferred to conceive Indigenous peoples as cultural or ethnic minorities within a larger undifferentiated political community. As Barker has explained, the 'making ethnic' or 'ethnification' of Indigenous peoples is a political strategy that relegates Indigenous peoples' aspirations and demands to that of just another minority interest,

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<sup>41</sup> Department of Indigenous and Northern Affairs Canada, *Treaties with Aboriginal People in Canada* (15 September 2010) Government of Canada <<https://www.aadnc-aandc.gc.ca/eng/1100100032291/1100100032292>>.

<sup>42</sup> David A Wishart, 'Contract, Oppression and Agreements with Indigenous Peoples' (2005) 28(3) *University of New South Wales Law Journal* 780, 820.

<sup>43</sup> Though as *Gerhardy v Brown* (1985) 159 CLR 70 illustrates, reconciling Indigenous rights with rights to non-discrimination and equality can be conceptually difficult.

<sup>44</sup> Marcia Langton and Lisa Palmer, 'Treaties, Agreement Making and the Recognition of Indigenous Customary Polities' in Marcia Langton et al (eds), *Honour Among Nations?: Treaties and Agreements with Indigenous Peoples* (Melbourne University Press, 2004) 34, 34–49.

<sup>45</sup> Erica-Irene A Daes, 'An Overview of the History of Indigenous Peoples: Self-determination and the United Nations' (2008) 21(1) *Cambridge Review of International Affairs* 7, 13.

erasing their status as a polity and robbing their calls of political force.<sup>46</sup> An important function of a treaty is to redress this by way of appropriate acknowledgement.

Recognising Indigenous peoples as a polity is, therefore, a first step in any treaty relationship. Failure to do so would ‘undermine the purpose and intent’ of any treaty,<sup>47</sup> as it is through such acknowledgement that the State commits to reconcile ‘the pre-existence of aboriginal societies with the sovereignty of the Crown’.<sup>48</sup> Such acknowledgement differentiates Indigenous peoples from other citizens, and distinguishes the agreement from other legal forms such as contracts. It also reflects international law as affirmed in the *UNDRIP*. The Declaration recognises that Indigenous peoples have multiple nested or overlapping nationalities,<sup>49</sup> guaranteeing that Indigenous peoples have the right ‘to a nationality’,<sup>50</sup> as well as the right to ‘belong to an Indigenous community or nation’ determined in accordance with the ‘traditions and customs of the community or nation concerned’.<sup>51</sup> Indeed, art 33 expressly guarantees that membership in an Indigenous nation ‘does not impair the right of Indigenous individuals to obtain citizenship of the States in which they live’.

## 2 Reached by Negotiation

A treaty is a political agreement to be reached by way of negotiation. Negotiation is the appropriate process for resolving differences between Indigenous peoples and the State as it: reduces the risk that the rights and interests of significant groups will be ignored; brings relevant information and perspectives to the decision-making process; and recognises that winner-take-all processes are unlikely to endure or to produce good policy.<sup>52</sup> Additionally, as negotiation eschews overly legalistic frameworks, it offers parties a ‘more flexible forum for working out acceptable arrangements’,<sup>53</sup> building relationships based on trust and communication. At a minimum, negotiations must be respectful of each participant’s ‘equality of standing’,<sup>54</sup> reflecting the acknowledgment that Indigenous peoples are polities.<sup>55</sup>

<sup>46</sup> Joanne Barker, ‘For Whom Sovereignty Matters’ in Joanne Barker (ed), *Sovereignty Matters: Locations of Contestations and Possibility in Indigenous Struggles for Self-Determination* (University of Nebraska Press, 2005) 1, 16 (emphasis altered).

<sup>47</sup> Michael Mansell, *Treaty and Statehood: Aboriginal Self-determination* (Federation Press, 2016) 113.

<sup>48</sup> *Delgamuukw v British Columbia* [1997] 3 SCR 1010, 1124 [186] (Lamer CJ, Cory and Major JJ) (citations omitted) (‘*Delgamuukw*’). See also *Director, Agriculture Branch, Department of Energy, Mines and Resources v Little Salmon/Carmacks First Nation* [2010] 3 SCR 103, 153 [103] (LeBel and Deschamps JJ).

<sup>49</sup> Keating calls this ‘plurinationalism’: Michael Keating, *Plurinational Democracy: Stateless Nations in a Post-Sovereignty Era* (Oxford University Press, 2001) 27. On the possibility of treaties constituting a new form of substantively inclusive citizenship, see Harry Hobbs, ‘Constitutional Recognition and Reform: Developing an Inclusive Australian Citizenship through Treaty’ (2018) 53 *Australian Journal of Political Science* (forthcoming).

<sup>50</sup> *UNDRIP* art 6.

<sup>51</sup> *Ibid* art 9.

<sup>52</sup> Brennan et al, above n 31, 8.

<sup>53</sup> Christopher McKee, *Treaty Talks in British Columbia: Building a New Relationship* (UBC Press, 3<sup>rd</sup> ed, 2009) 109.

<sup>54</sup> Michael Asch, *On Being Here to Stay: Treaties and Aboriginal Rights in Canada* (University of Toronto Press, 2014) 102.

<sup>55</sup> James Tully, *Strange Multiplicity* (Cambridge University Press, 1995) 29, 211.

Securing a fair negotiation process is difficult, but approaches in Canada and Aotearoa/New Zealand suggest adapting fiduciary principles may be appropriate.<sup>56</sup> In both countries, courts have developed constitutional principles that structure the relationship between Indigenous peoples and the Crown to avoid 'sharp dealing[s]'<sup>57</sup> and prevent the settler-State from acting in their self-interest in negotiations. In dealing with Indigenous peoples, both states have 'trust-like'<sup>58</sup> responsibilities that are 'analogous to fiduciary duties'.<sup>59</sup> In Canada, these principles derive 'from the Crown's assertion of sovereignty over an Aboriginal people and *de facto* control of land and resources that were formerly in the control of that people'.<sup>60</sup> While '[w]hat constitutes honourable conduct will vary with the circumstances',<sup>61</sup> the Aotearoa/New Zealand courts insist negotiation should be conducted under principles of 'good faith, reasonableness, trust, openness and consultation',<sup>62</sup> and 'with the utmost good faith which is the characteristic obligation of partnership'.<sup>63</sup> These principles are affirmed by the Waitangi Tribunal. In its *Te Whānau o Waipareira Report*, the Tribunal explained that negotiation should be 'conducted in a spirit of partnership with the mutual goal of enhancing the status of the other party and the quality of the relationship'.<sup>64</sup> These qualities are necessary for any fair negotiation.

The *UNDRIP* further elucidates the appropriate standard for any negotiation. The Declaration provides that states must undertake 'effective consultation'<sup>65</sup> or '[consult] and cooperat[e]'<sup>66</sup> with Indigenous peoples before adopting and implementing measures that may affect them. Such consultation should be 'undertaken in good faith' with representatives freely chosen by Indigenous peoples through their own representative structures. It implies 'no coercion, intimidation or manipulation', and requires sufficient time and information.<sup>67</sup> This standard recognises Indigenous peoples' 'inherent and prior rights to their lands ... and respects their legitimate authority'.<sup>68</sup>

<sup>56</sup> Kirsty Gover, 'The Honour of the Crowns: State-Indigenous Fiduciary Relationships and Australian Exceptionalism' (2016) 38(3) *Sydney Law Review* 339.

<sup>57</sup> *R v Badger* [1996] 1 SCR 771, 794 [41] (La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ).

<sup>58</sup> *Guerin v The Queen* [1984] 2 SCR 335, 386 (Dickson, Beetz, Chouinard and Lamer JJ).

<sup>59</sup> *New Zealand Maori Council v A-G (NZ)* [1987] 1 NZLR 641, 664 (Cooke P) (Court of Appeal) ('*New Zealand Maori Council* (1987)').

<sup>60</sup> *Manitoba Metis Federation Inc v A-G (Canada)* [2013] 1 SCR 623, 658 [66] (McLachlin CJ and Karakatsanis J) (citations omitted).

<sup>61</sup> *Ibid* 663 [74] (McLachlin CJ and Karakatsanis J).

<sup>62</sup> *New Zealand Maori Council v A-G (NZ)* [2008] 1 NZLR 318, 337 [81] (O'Regan J) (Court of Appeal) ('*New Zealand Maori Council* (2008)').

<sup>63</sup> *New Zealand Maori Council* (1987) [1987] 1 NZLR 641, 664 (Cooke P).

<sup>64</sup> Waitangi Tribunal, *Te Whānau o Waipareira Report* (1998) 234.

<sup>65</sup> *UNDRIP* art 30(2).

<sup>66</sup> *Ibid* arts 15(2), 17(2), 19, 32(2), 36(2), 38.

<sup>67</sup> Permanent Forum on Indigenous Issues, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, 4<sup>th</sup> sess, Agenda Item 4, UN Doc E/C.19/2005/3 (17–19 January 2005) 12 [46]. See also: at 12 [47].

<sup>68</sup> UN Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights Working Group on Indigenous Populations, *Preliminary Working Paper on the Principle of Free, Prior and Informed Consent of Indigenous Peoples in Relation to Development Affecting Their Lands and Natural Resources That Would Serve as a Framework for the Drafting of a Legal Commentary by the Working Group on This Concept submitted by Antoanella-Iulia Motoc and the Tebtebba Foundation*, 22<sup>nd</sup> sess, Agenda Item 5, UN Doc E/CN.4/Sub.2/AC.4/2004/4 (8 July 2004) 5 [13].

While it is desirable that negotiations be structured to minimise the risk that significant disparities in power, resources, and capacity affect the process and terms of the agreement, such imbalances will not necessarily mean that the political agreement is not a treaty. Negotiations will not occur on a level playing field. All agreements, for example, will be reached based on an assumption of overriding sovereignty of the State. Nonetheless, it is critical to our definition that Indigenous peoples are parties to a fair negotiation, not merely an interest group entitled to be consulted or informed of its progress. The process of reaching such an agreement is itself evidence of a commitment to redefining and securing a just, 'positive, mutually respectful and long-term'<sup>69</sup> relationship between Indigenous peoples and the State.

### 3 *Settlement of Claims*

Both sides must accept a series of responsibilities so that the agreement can bind the parties in a relationship of mutual obligation.<sup>70</sup> This goes beyond each party tolerating the other's existence to accepting their enduring presence, accepting that, in the words of Lamer CJ of the Supreme Court of Canada, 'we are all here to stay'.<sup>71</sup> Two issues arise: what sort of outcomes will be agreed, and whether the agreement constitutes a full and final settlement of Indigenous and state claims.

Considering the diversity of Indigenous communities across the globe, it is impossible to be prescriptive in terms of outcomes. While the content of negotiated agreements differs, however, to constitute a treaty, an agreement must contain more than mere symbolic recognition; an inherent right to some level of sovereignty or self-government must be recognised and provided for. This may be seen as a concomitant of the recognition of an Indigenous community as a polity, as required under our first criteria.

In Canada, the Chief Justice of the Supreme Court has identified 'a golden thread' running through the treaty relationship, whereby the common law recognises the 'ancestral laws and customs [of] the aboriginal peoples who occupied the land prior to European settlement'.<sup>72</sup> However, as Macklem notes, despite often referring to Indigenous 'legal systems'<sup>73</sup> or noting that First Nations constituted 'organized, distinctive societies with their own social and political structures',<sup>74</sup> the Court 'has been circumspect about ... recognizing and affirming an Aboriginal right of self-government, that is, an Aboriginal right to make laws' under s 35(1) of the *Canadian Constitution*.<sup>75</sup>

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<sup>69</sup> *First Nation of Nacho Nyak Dun v Yukon* [2017] SCC 58 (1 December 2017) [10].

<sup>70</sup> Brennan et al, above n 31, 9–11.

<sup>71</sup> *Delgamuukw* [1997] 3 SCR 1010, 1124 [186] (Lamer CJ, Cory and Major JJ).

<sup>72</sup> *R v Van der Peet* [1996] 2 SCR 507, 642 [263] (McLachlin J).

<sup>73</sup> Patrick Macklem, 'The Form and Substance of Aboriginal Title: Assimilation, Recognition, Reconciliation' in Peter Oliver, Patrick Macklem and Nathalie Des Rosiers (eds), *The Oxford Handbook of the Canadian Constitution* (Oxford University Press, 2017) 325, 335, quoting *R v Sappier* [2006] 2 SCR 686, 713 [45] (Bastarache J).

<sup>74</sup> Maklem, above n 73, 335, quoting *Mitchell v Minister of National Revenue* [2001] 1 SCR 911, 926 [9] (McLachlin CJ).

<sup>75</sup> Maklem, above n 73, 336.

In *Delgamuukw*, a majority of the Court held that Aboriginal title confers a collective right to exclusive use and occupation of land for a variety of purposes not necessarily related to practices, customs and traditions integral to the distinctive Aboriginal culture.<sup>76</sup> As a collective right, Aboriginal title necessarily has a 'jurisdictional dimension' because as Slattery explains, 'there must be some body or bodies endowed with the authority to determine which individuals have the right to use the land and to regulate the ways the land may be used'.<sup>77</sup> However, the majority cautioned that this right is subject to an 'inherent limit': land cannot be used in a manner that 'is irreconcilable with the nature of the claimants' attachment to those lands'.<sup>78</sup> In *Tsilhqot'in Nation v British Columbia*, the Court affirmed this understanding, holding that the Aboriginal right 'to use and control the land and enjoy its benefits'<sup>79</sup> is a 'right to proactively use and manage the land'.<sup>80</sup> Yet, again, the Court confirmed that this right is subject to inherent limitations: as a collective title held not just for the present generation 'but for all succeeding generations', land cannot be 'developed or misused in a way that would substantially deprive future generations of the benefit of the land'.<sup>81</sup> Whatever the scope of this limitation, it is not one that burdens other forms of collective title, such as Crown land, and therefore substantially detracts from First Nations' right to self-government.

Likewise, in the US, while the Supreme Court recognised the inherent sovereignty of Native American tribes in 1823,<sup>82</sup> this sovereignty is limited<sup>83</sup> and defeasible by congressional action.<sup>84</sup> Further, the scope of self-governance rights over non-Indians is constrained. Tribal nations possess inherent power over their internal affairs, including the authority to regulate the activities of non-Indians who enter 'consensual relationships' with the tribe or its members within tribal lands,<sup>85</sup> but it is not clear whether this extends to the power to try civil cases in Indian tribal courts.<sup>86</sup> Similarly, while tribal nations may exercise criminal jurisdiction over Indians (including non-member Indians)<sup>87</sup> within their territory, they have no criminal jurisdiction over non-Indian persons who commit crimes,<sup>88</sup> but, rather, may only 'exclude persons whom they deem to be undesirable from tribal lands'.<sup>89</sup>

In Aotearoa/New Zealand, debate persists over whether the Treaty of Waitangi protects Māori sovereignty and the extent of those protections. The dispute arises from an inconsistency between the English and Māori texts. Under the English

<sup>76</sup> [1997] 3 SCR 1010, 1082–4 [115]–[117] (Lamer CJ, Cory and Major JJ), 1135 [209] (McLachlin J).

<sup>77</sup> Brian Slattery, 'The Constitutional Dimensions of Aboriginal Title' (2015) 71 *Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 45, 46 (emphasis altered).

<sup>78</sup> *Delgamuukw* [1997] 3 SCR 1010, 1088 [125] (Lamar CJ, Cory and Major JJ), 1135 [209] (McLachlin J).

<sup>79</sup> [2014] 2 SCR 257, 275 [18] (McLachlin CJ).

<sup>80</sup> *Ibid* 300 [94] (McLachlin CJ).

<sup>81</sup> *Ibid* 294 [74] (McLachlin CJ).

<sup>82</sup> *Johnson v M'Intosh*, 21 US (8 Wheat) 543 (1823). See also *Worcester v Georgia*, 31 US (6 Pet) 515 (1832).

<sup>83</sup> *Cherokee Nation v Georgia*, 30 US (5 Peters) 1 (Marshall CJ) (1831).

<sup>84</sup> *United States v Wheeler*, 435 US 313, 323 (Stewart J) (1978).

<sup>85</sup> *Montana v United States* 450 US 544, 565 (1981).

<sup>86</sup> *Dollar General Corporation v Mississippi Band of Choctaw Indians*, 136 S Ct 2159 (2016); *Dolgencorp Inc v Mississippi Band of Choctaw Indians*, 746 F 3d 588 (5<sup>th</sup> Cir, 2014).

<sup>87</sup> 25 USC § 1301 (2018); *United States v Lara*, 541 US 193 (2004).

<sup>88</sup> *Oliphant v Suquamish Indian Tribe*, 435 US 191 (1978).

<sup>89</sup> *Duro v Reina*, 495 US 676, 696 (Kennedy J) (1990).

text, the Māori signatories appear to cede their sovereignty to the British Crown. However, under the Māori text, the signatories agreed to cede *kawanatanga* (governorship), while being promised that their *tino rangatiratanga* (full authority) over their land, people and treasure would remain undisturbed. Like all expressions of sovereignty, defining *tino rangatiratanga* is ‘elusive and very much dependent on its context’.<sup>90</sup> Maaka and Fleras note that, for some, *tino rangatiratanga* means Māori sovereignty ‘prevails over the entirety of Aotearoa; for others, it entails some degree of autonomy from the state; for still others, it consists of shared jurisdictions within a single framework’.<sup>91</sup> The Waitangi Tribunal understands *tino rangatiratanga* as protecting autonomy, meaning ‘the ability of tribal communities to govern themselves as they had for centuries, to determine their own internal political, economic, and social rights and objectives, and to act collectively in accordance with those determinants’.<sup>92</sup>

Common across each of these nations is that a treaty incorporates some form of recognition of Indigenous self-government. The extent of this recognition is variable, and need not extend to granting formal law-making and law-applying powers. Rather, it must recognise or establish structures of culturally appropriate governance and means of decision-making and control that amount to at least a limited form of self-government.<sup>93</sup> As we illustrate in the following section on the Canadian experience, this can include governing systems that reflect the Indigenous nation’s own ‘collective sense of self, values, and priorities’, and that extend beyond merely management or administration of programs and services designed and funded by settler-State governments.<sup>94</sup> These outcomes are consistent with the *UNDRIP*, which provides that Indigenous peoples have the ‘right to autonomy or self-government’ in relation to ‘internal and local affairs’,<sup>95</sup> including the ability to wield greater control over land and resources, as well as authority to ensure cultural preservation and integrity.<sup>96</sup>

Recognising a right to self-government is important as it indicates that the purpose of a treaty is more than an act of symbolic recognition. It is recognition of a relationship between Indigenous peoples and the State designed to improve the lives of Indigenous communities, and to secure the foundations for a just relationship. As such, a treaty is more than a contractual agreement. It is ‘an

<sup>90</sup> Brennan, Gunn and Williams, above n 28, 310.

<sup>91</sup> Roger Maaka and Augie Fleras, ‘Engaging with Indigeneity: Tino Rangatiratanga in Aotearoa’ in Duncan Ivison, Paul Patton and Will Sanders (eds), *Political Theory and the Rights of Indigenous People* (Cambridge University Press, 2000) 89, 100.

<sup>92</sup> Waitangi Tribunal, *Turanga Tangata Turanga Whenua* (2004) vol 1, 113.

<sup>93</sup> Shin Imai distinguishes four types of self-determination: ‘sovereignty and self-government’, ‘self-administration and self-management’, ‘co-management and joint-management’, and ‘participation in public government’: Shin Imai, ‘Indigenous Self-Determination and the State’ (Research Report No 25/2008, Comparative Research in Law & Political Economy, Osgoode Hall Law School, 2008) 11.

<sup>94</sup> Stephen Cornell, ‘Processes of Native Nationhood: The Indigenous Politics of Self-Government’ (2015) 6(4) *International Indigenous Policy Journal* 1, 13.

<sup>95</sup> *UNDRIP* art 4.

<sup>96</sup> *Ibid* arts 11–23, 31–6. See also Jeff J Corn tassel and Tomas Hopkins Primeau, ‘Indigenous “Sovereignty” and International Law: Revised Strategies for Pursuing “Self-Determination”’ (1995) 17(2) *Human Rights Quarterly* 343, 344.

exchange of solemn promises ... [and] an agreement whose nature is sacred'.<sup>97</sup> This aspect of a treaty is significant in light of empirical evidence from the Harvard Project on American Indian Economic Development that demonstrates that Indigenous sovereignty and self-determination is a necessary condition for successful political and economic development.<sup>98</sup> However, while self-government rights are recognised in all treaties, the extent or scope of this right (save some minimum standard) will be subject to negotiation. This permits differing tiers of self-governance according to the size and aspirations of the Indigenous nation, as is appropriate in countries like Australia where Indigenous communities are 'diverse in culture and circumstance' and consequently have very different needs and aspirations.<sup>99</sup>

In agreeing to a series of mutual obligations and responsibilities, Indigenous polities and the State must accept that the agreement constitutes a settlement, or resolution, of their claims. The extent of any such resolution is contested. In exchange for a package of benefits, Indigenous peoples are expected to consent to withdrawing all current and future claims relating to historical and contemporary dispossession; though of course, claims arising from dispute over aspects of the negotiated agreement can be heard. This satisfies the State's desire for certainty, which Woolford suggests is 'an antidote to an assemblage of questions, risks, and fears held by non-Aboriginal government and business interests'.<sup>100</sup> Of most significance are questions relating to foundational myths about ownership and jurisdiction, and economic concerns surrounding current and future investment. In the past, certainty was achieved by unilaterally extinguishing Indigenous rights; now, they must be negotiated away.

Indigenous peoples may understand the process in a different light. Wary of state demands to surrender their rights and interests, many see them as 'living instrument[s]'<sup>101</sup> that do not settle the relationship, but 'redefine the rules for future engagement'.<sup>102</sup> As political agreements, they can always be reinterpreted and renegotiated, but resolving current and future claims is an integral plank in the new political relationship built by any treaty. That said, while a treaty is intended to be a settlement of claims, a new political relationship will not be successful if it is built on ignoring the past. A treaty may mark a liminal moment signifying a commitment on behalf of the settler-State to acknowledge injustice it carried out and legitimate its possession, but it does not close off that history. Reconciliation is not achieved

<sup>97</sup> *R v Badger* [1996] 1 SCR 771, 793 [41] (La Forest, L'Heureux-Dubé, Gonthier, Cory and Iacobucci JJ).

<sup>98</sup> The Harvard Project on American Indian Economic Development, *The State of the Native Nations: Conditions under U.S. Policies of Self-Determination* (Oxford University Press, 2007). For an overview see: The Harvard Project on American Indian Economic Development, *Research Overview* <<http://hpaied.org/publications-and-research>>.

<sup>99</sup> Behrendt, above n 35, 87. Cf Mansell, above n 47, 118, noting that one treaty with all Aboriginal and Torres Strait Islander peoples 'would provide a single standard of justice'.

<sup>100</sup> Andrew Woolford, *Between Justice and Certainty: Treaty Making in British Columbia* (UBC Press, 2005) 146.

<sup>101</sup> *New Zealand Maori Council* (1987) [1987] 1 NZLR 641, 656 (Cooke P).

<sup>102</sup> Maureen Tehan et al, 'Sharing Land and Resources: Modern Agreements and Treaties with Indigenous People in Settler States' in Marcia Langton et al (eds), *Settling with Indigenous Peoples: Modern Treaty and Agreement-Making* (Federation Press, 2006) 1, 15.

by signing a treaty, but is an ‘ongoing process of engagement and discussion’.<sup>103</sup> A treaty is a marriage, not a divorce.<sup>104</sup>

This first-principles approach reveals that in order to constitute a treaty, an agreement must satisfy three criteria. First, it must recognise Indigenous peoples as a polity, distinctive from other citizens of the State on the basis of their status as prior self-governing communities. Second, the agreement must be reached by a fair negotiation process conducted in good faith and in a manner respectful of each participant’s standing as a polity. Third, the agreement must contain more than mere symbolic recognition; it must recognise or establish some form of decision-making and control that amounts to at least a limited form of self-government.

## **B     *Modern Treaty-making in Canada***

Canada’s long history of entering into agreements between Indigenous peoples and the State is instructive for understanding what the term ‘treaty’ should mean in Australia today. In this section, we examine treaties signed between First Nations and the Canadian Crown, especially in British Columbia, in light of our refined standard.

Relationships between the Indigenous peoples of North America and colonists were initially based on lucrative trading arrangements. Eventually, in the 18<sup>th</sup> century, British and French competition for control of land catalysed treaty-making, as both sides formed strategic alliances with First Nations to advance their interests on the continent. After the British had established themselves as the dominant colonial power, King George III issued the *Royal Proclamation Act of 1763*.<sup>105</sup> The Act restricted colonial expansion westwards, guaranteeing Aboriginal ‘Nations or Tribes’ undisturbed possession of their territories, unless purchased by the Crown or ceded via treaty. In recognising Aboriginal claims to ownership and control, the Proclamation serves as an important and early commitment by the Crown to respect the sovereignty of First Nations peoples.<sup>106</sup> Increasing numbers of settlers placed strain on the borders established by the Proclamation, however, and led to the negotiation of land surrender treaties. Described as the ‘era of unsystematic treaty making’,<sup>107</sup> these agreements led Indigenous peoples to surrender large tracts of land to the British in return for defined reserves, annual payments, and rights to hunt, fish and undertake cultural activities over their traditional lands.

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<sup>103</sup> Brian Egan, ‘Resolving “the Indian Land Question”? Racial Rule and Reconciliation in British Columbia’ in Andrew Baldwin, Laura Cameron and Audrey Kobayashi (eds), *Rethinking the Great White North: Race, Nature, and the Historical Geographies of Whiteness in Canada* (UBC Press, 2011) 211, 226.

<sup>104</sup> Carole Blackburn, ‘Producing Legitimacy: Reconciliation and the Negotiation of Aboriginal Rights in Canada’ (2007) 13(3) *Journal of the Royal Anthropological Institute* 621, 627.

<sup>105</sup> 4 Geo 3.

<sup>106</sup> John Borrows, ‘Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government’ in Michael Asch (ed), *Aboriginal Treaty Rights in Canada: Essays on Law, Equality, and Respect for Difference* (UBC Press, 1997) 155, 169; Miller, above n 30, 290.

<sup>107</sup> Christina Godlewska and Jeremy Webber, ‘The *Calder* Decision, Aboriginal Title, and the Nisga’a’ in Hamar Foster, Heather Raven and Jeremy Webber (eds), *Let Right Be Done: Aboriginal Title, the *Calder* Case, and the Future of Indigenous Rights* (UBC Press, 2007) 1, 12.



After the Confederation of Canada in 1867, a new form of treaty-making emerged. Between 1871 and 1921, the Crown entered into treaties with various First Nations to pursue settlement, agriculture, and resource development in the West and North.<sup>108</sup> These eleven 'Numbered Treaties' involved similar exchanges to those treaties prior to 1867. In exchange for extinguishing their land rights, First Nations typically received limited reserve land, monetary compensation, hunting and gathering rights across a wider area, tools for farming and hunting, and schooling.<sup>109</sup> While the Government intended the treaties to enable the assimilation of Aboriginal peoples into European society,<sup>110</sup> the First Nations themselves sought to protect their traditions and culture from increasing intervention.<sup>111</sup> The signing of Treaty 11 between several First Nations in the Northwest Territories and King George V in 1921–22 marked the final numbered treaty. It is important to note, however, that the situation in British Columbia in Western Canada was unique. Fourteen treaties of limited scope had been negotiated on Vancouver Island prior to 1854,<sup>112</sup> and Treaty 8 extended partially into the north-eastern part of the province. The rest of the province, comprising 85 per cent of the land mass, was not — and had never been — subject to treaties, and successive governments refused to enter negotiations with Aboriginal peoples until Indigenous activism eventually forced the British Columbia Government's hand.

## 1 *Resurgence of Treaty-making*

The modern treaty-making process developed out of the Canadian Supreme Court's 1973 decision in *Calder v Attorney-General of British Columbia*.<sup>113</sup> In *Calder*, the Nisga'a Tribal Council sought a declaration that their Aboriginal title in the Nass Valley of north-western British Columbia had never been lawfully extinguished. One justice did not consider the question, instead deciding that the Court did not have jurisdiction to hear the case,<sup>114</sup> leaving six justices to rule on the merits. All six held that Aboriginal title could exist,<sup>115</sup> though splitting evenly on whether the Nisga'a title continued to exist.<sup>116</sup> As such, the appeal was dismissed 4:3.

Although a majority of the Court dismissed the Nisga'a challenge, the decision in *Calder* was momentous, with six justices holding that Aboriginal title is part of Canadian law. This finding prompted the Government of Prime Minister Trudeau to reassess 'the colonialist assumptions underlying [its] aboriginal policy, and to acknowledge the possibility of Aboriginal self-determination, aboriginal and

<sup>108</sup> Arthur J Ray, Jim Miller and Frank J Tough, *Bounty and Benevolence: A History of the Saskatchewan Treaties* (McGill-Queen's University Press, 2000) 59.

<sup>109</sup> It is now accepted that the First Nations did not intend to consent to the blanket extinguishment of their rights and title, but merely to share the land, jurisdiction and management over it: Royal Commission on Aboriginal Peoples, above n 22, vol 2, app A 986 [2.2.4].

<sup>110</sup> Macklem, above n 73, 327.

<sup>111</sup> Derek Whitehouse, 'The Numbered Treaties: Similar Means to Dichotomous Ends' (1994) 3 *Past Imperfect* 25.

<sup>112</sup> See generally Paul Tennant, *Aboriginal People and Politics: The Land Question in British Columbia, 1849–89* (UBC Press, 1990) 18–30, 218–9.

<sup>113</sup> [1973] SCR 313.

<sup>114</sup> Ibid 427 (Pigeon J).

<sup>115</sup> Ibid 328–9 (Martland, Judson and Ritchie JJ), 394 (Hall, Spence and Laskin JJ).

<sup>116</sup> Ibid 344 (Martland, Judson and Ritchie JJ), 413–6 (Hall, Spence and Laskin JJ).

treaty rights, and self-government as key organizing principles'.<sup>117</sup> Less than seven months after the decision was handed down, the Government announced a new comprehensive land claims policy, under which it would 'negotiate with the representatives of Aboriginal peoples on the basis that where their traditional interest in the lands concerned can be established, an agreed form of compensation or benefit would be provided'.<sup>118</sup> This approach was reiterated in a 1981 policy statement explaining that 'Canada would now negotiate settlements with Aboriginal groups where rights of traditional use and occupancy had been neither extinguished by treaty nor "superseded by law"'.<sup>119</sup> These negotiated agreements largely borrowed from the Numbered Treaties, requiring First Nations to extinguish their rights in land in exchange for more limited, defined rights and monetary compensation.<sup>120</sup>

A dispute over the construction of an extensive hydroelectric scheme in Northern Quebec proved the first test of Canada's new approach towards Indigenous peoples. Construction had commenced pre-*Calder*, and the Quebec Government had not consulted with the Cree and Inuit peoples whose territory would be flooded. An injunction was successfully sought in the Quebec Superior Court,<sup>121</sup> blocking construction until an agreement was negotiated. Although the Quebec Court of Appeal later dismissed the injunction, the legal requirement that an agreement be reached remained in force.<sup>122</sup> Economic and political concerns pressured the parties into a quick process, and the *James Bay and Northern Quebec Agreement* ('JBNQA') was signed within two years, on 11 November 1975.<sup>123</sup> The first modern agreement between Indigenous peoples and the Canadian state, the JBNQA settled Aboriginal land claims with the Canadian and Quebec governments. Under the Agreement, the provincial and federal governments transferred 5543km<sup>2</sup> to the Cree and 8151km<sup>2</sup> to the Inuit,<sup>124</sup> as well as exclusive harvesting rights over an additional 15 000km<sup>2</sup>, and agreed to pay CA\$225 million over 20 years to a newly established Cree Regional Authority and Inuit Makivik Corporation.<sup>125</sup> These bodies were officially

<sup>117</sup> Augie Fleras and Jean Leonard Elliot, *The 'Nations Within': Aboriginal-State Relations in Canada, the United States, and New Zealand* (Oxford University Press, 1992) 45 (citations omitted).

<sup>118</sup> Government of Canada, 'Statement of Aboriginal Claims' (Statement, Department of Indian Affairs and Northern Development (Canada), 8 August 1973) quoted in Lisa Palmer and Maureen Tehan, 'Shared Citizenship and Self-Government in Canada: A Case Study of James Bay and Nunavik (Northern Quebec)' in Marcia Langton et al (eds), *Settling with Indigenous Peoples: Modern Treaty and Agreement-Making* (Federation Press, 2006) 19, 23.

<sup>119</sup> Government of Canada, *In All Fairness: A Native Claims Policy* (Department of Indian Affairs and Northern Development (Canada), 16 December 1981), quoted in Godlewska and Webber, above n 107, 6–7.

<sup>120</sup> Paul Rynard, 'The Nisga'a Treaty: Are We on the Right Track?' (2004) 11(3) *International Journal of Minority and Group Rights* 289, 290; Murray Angus, 'Comprehensive Claims: One Step Forward, Two Steps Back' in Diane Engelstad and John Bird (eds), *Nation to Nation: Aboriginal Sovereignty and the Future of Canada* (Anansi Press, 1992) 67, 69.

<sup>121</sup> *Kanatewat v James Bay Development Corporation* [1974] Quebec RP 38.

<sup>122</sup> *James Bay Development Corporation v Kanatewat* [1975] Quebec CA 166.

<sup>123</sup> In 1978, the Agreement's terms were extended to include the Naskapi First Nation: see *Northeastern Quebec Agreement* (signed and entered into force 31 January 1978).

<sup>124</sup> *James Bay and Northern Quebec Agreement* (signed and entered into force 11 November 1975) s 5 ('*James Bay and Northern Quebec Agreement*'); *James Bay and Northern Quebec Native Claims Settlement Act*, SC 1977, c 32, s 3.

<sup>125</sup> *James Bay and Northern Quebec Agreement* s 9.

granted delegated legislative powers under the *Cree-Naskapi (of Quebec) Act*.<sup>126</sup> In return, the Cree and Inuit surrendered Aboriginal title to 981 610 km<sup>2</sup> of the James Bay/Ungava territory.<sup>127</sup> Although heavily criticised for failing to insulate the negotiations from the broader political and economic climate,<sup>128</sup> the *JBNQA* recognises the Cree and Inuit as polities, and guarantees a limited right to self-government with some law-making power.<sup>129</sup>

Notwithstanding the decision in *Calder*, the British Columbia Government refused to recognise Aboriginal title. Once again, it was left to judicial authorities further exploring the scope of Aboriginal interests in land to propel the Government to the negotiating table.<sup>130</sup> In *Guerin v The Queen*, four judges of the Supreme Court declared that Aboriginal title was not created by the *Royal Proclamation Act of 1763*, but rather was derived from the historical occupation and possession by Aboriginal people of their tribal lands.<sup>131</sup> In declaring that Aboriginal title is a pre-existing legal right, the plurality held that Aboriginal title continued to exist on traditional lands not subject to treaties with the Crown and on reserve lands in British Columbia.<sup>132</sup> One year later, in *MacMillan Bloedel Ltd v Mullin*, the Court of Appeal of British Columbia issued a temporary injunction to stop logging on Meares Island in order that the Clayoquot and Ahousaht bands could record and preserve evidence of their title.<sup>133</sup> After the Supreme Court refused to grant leave to appeal, further injunctions were sought and issued, halting resource extraction and construction throughout the province.<sup>134</sup> As McKee notes, natural resource development companies and the Government began to consider whether their own interests would be better served if they entered treaty negotiations.<sup>135</sup> The Supreme Court's 1990 intervention in *R v Sparrow*, where it unanimously held that the 1982 constitutional recognition of Aboriginal and treaty rights 'renounces the old rules of the game' and 'calls for a just settlement for [A]boriginal peoples',<sup>136</sup> added to pressure on the British Columbia Government.

## 2 The British Columbia Treaty Process

The British Columbia Treaty Claims Taskforce was established on 3 December 1990. The Taskforce was set up largely to support First Nations, which did not want 'to be caught without a thoughtful, strategic position or to be put into a position where they could be outflanked by more skilled government negotiators'.<sup>137</sup> Established as a tripartite body, it was composed of seven Commissioners, two

<sup>126</sup> SC 1984, c 18. See also Thomas Isaac, 'Aboriginal Self-Government in Canada: *Cree-Naskapi (of Quebec) Act*' (1991) 7(2) *Native Studies Review* 15.

<sup>127</sup> *James Bay and Northern Quebec Agreement* s 2.1.

<sup>128</sup> Martinez, above n 27, 22 [134]–[137].

<sup>129</sup> Bruce A Clark, *Native Liberty, Crown Sovereignty: The Existing Aboriginal Right of Self-Government in Canada* (McGill-Queen's University Press, 1990) 167–8.

<sup>130</sup> McKee, above n 53, 30.

<sup>131</sup> [1984] 2 SCR 335, 379 (Dickson, Beetz, Chouinard and Lamer JJ).

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

<sup>133</sup> [1985] 3 WWR 577.

<sup>134</sup> McKee, above n 53, 29.

<sup>135</sup> *Ibid.*

<sup>136</sup> *Sparrow v The Queen* [1990] 1 SCR 1075, 1106 (Dickson CJ and La Forest J).

<sup>137</sup> McKee, above n 53, 32.

appointed by each non-Aboriginal government (federal and provincial), and three by First Nations. Consistent with a fair negotiation process, the extra appointee was intended to ‘counteract a potential power imbalance between Aboriginal and non-Aboriginal representatives’, as well as more accurately represent interests of First Nations located across British Columbia.<sup>138</sup> After six months of consultations, the Taskforce made 19 recommendations, all of which were accepted by the three parties. The parties agreed to ‘establish a new relationship based on mutual trust, respect, and understanding — through political negotiations’, and establish the British Columbia Treaty Commission (‘BCTC’) ‘to facilitate the process of negotiations’,<sup>139</sup> symbolising ‘a formal commitment to negotiate modern day treaties’.<sup>140</sup>

Established on 15 April 1993, the BCTC is an independent and impartial body.<sup>141</sup> It is composed of five commissioners, two appointed by First Nations, one each by the Federal Government and the Provincial Government, and one further commissioner agreed to by the three parties. The BCTC facilitates treaty negotiations by ‘monitoring developments and by providing, when necessary, methods of dispute resolution’.<sup>142</sup> As of March 2018, 57 First Nations are participating, and eight have completed treaties under the process.<sup>143</sup>

While each of the eight treaties adopted thus far is specific to the particular First Nation, as well as place, history and circumstance, they share a number of common elements relating to land, resources, governance, finance, and cultural heritage.<sup>144</sup> These common elements assist in elaborating our understanding of what outcomes are likely to be reached under a treaty. The treaties evidence that a land base is a critical precondition for the exercise of self-government. Under the treaties, a portion of the First Nation’s territory is transferred in fee simple for the exclusive use of the First Nation. This includes rights over subsurface resources. Under the *Maa-nulth First Nations Final Agreement*, for example, the Huu-ay-aht First Nation receives 1077 hectares of former Indian Reserves, and 7181 hectares of additional lands.<sup>145</sup> Exclusive resource rights are guaranteed within the First Nation’s territory, with more restrictive resource rights accorded in areas outside their territorial limits. These rights are subject to conservation, as well as public health and safety legislation.<sup>146</sup> In areas outside the First Nation’s territory, certain land use decisions are subject to planning, consultation and joint management.

Most significant, however, are the self-government provisions. Under each treaty, a degree of Aboriginal self-government is recognised. For instance, ch 3 of

<sup>138</sup> Woolford, above n 100, 194 n 2.

<sup>139</sup> British Columbia Claims Taskforce, ‘The Report of the British Columbia Claims Task Force’ (Report, First Nations of British Columbia, Government of British Columbia, Government of Canada, 28 June 1991) 42 app 6 recommendations 1, 3.

<sup>140</sup> McKee, above n 53, 33.

<sup>141</sup> *British Columbia Treaty Commission Act*, SC 1995, c 45, ss 4–5.

<sup>142</sup> McKee, above n 53, 33.

<sup>143</sup> BC Treaty Commission, *Negotiation Update* <<http://www.bctreaty.ca/negotiation-update>>.

<sup>144</sup> Godlewska and Webber, above n 107, 17–18.

<sup>145</sup> *Maa-nulth First Nations Final Agreement*, signed 24 July 2008, (entered into force 1 April 2011) ch 2.1.1(a), 2.3.0.

<sup>146</sup> See, eg, *Tsawwassen First Nation Final Agreement*, signed 6 December 2007, (entered into force 3 April 2009) ch 9 (fisheries), 10 (wildlife), 11 (migratory birds).

the *Yale First Nation Final Agreement* provides that the parties 'acknowledge' the right of self-government and governance of the Yale First Nation, and sets out the principles governing the to-be-drafted Constitution, as well as their governance structure, and jurisdiction.<sup>147</sup> Likewise, ch 15 of the *Tla'amin Final Agreement* provides that the Tla'amin Nation 'has the right to self-government and the authority to make laws, as set out in this Agreement'.<sup>148</sup> Jurisdiction recognised under each treaty typically includes the administration of justice, family and social services, healthcare, and language and cultural education, though federal and provincial law applies where an inconsistency or conflict arises.<sup>149</sup>

These treaties are useful in providing a comparative validation of our standard of what should be regarded as a treaty between Indigenous peoples and the state. First, in all settlements so far adopted, the status of the First Nations as a polity is expressly acknowledged. Interestingly, however, the language is not definitive. The First Nations 'asserts' or 'claims' aboriginal rights based on their 'assertion' of a unique connection with land, the *Constitution* 'recognises and affirms' these rights, and the State 'acknowledge[s] the perspective' of the First Nation 'that harm and losses in relation to its aboriginal rights have occurred in the past', expressing 'regret if any acts or omissions of the Crown have contributed to that perspective'.<sup>150</sup> Nonetheless, despite the tentative language, through this acknowledgement, the distinctive status of First Nations is unambiguously recognised.

Second, the rigid BCTC process involves six stages, which aims at preventing ad hoc negotiations, and enabling each First Nation to negotiate on the basis of clear and established rules and criteria.<sup>151</sup> This ensures that the negotiations are structured in a manner that minimises the risk that power and resource disparities will influence the terms of the agreement, and is a considerable departure from both the historical treaties and the *JBNQA*. Finally, consistent with art 4 of the *UNDRIP*, all treaties recognise a degree of self-government over internal and local affairs, and provide for shared decision-making over additional domains. Despite some criticism that such self-governance rights are subordinate to the Canadian State,<sup>152</sup> it is consistent with modern treaties that are premised on the overriding sovereignty of the State.

### 3 The Nisga'a Final Agreement

Despite the setback in *Calder*, the Nisga'a people continued to advocate for recognition of their lawful title. After a long process, the Nisga'a were finally successful. First signed in 1998 and eventually ratified in April 2000, the *Nisga'a Final Agreement* was the 14<sup>th</sup> modern treaty signed in Canada and the first in British Columbia. Although conducted outside the BCTC, the Treaty contains a similar

<sup>147</sup> *Yale First Nation Final Agreement*, signed 12 March 2011, (entered into force 19 June 2013) ch 3.

<sup>148</sup> *Tla'amin Final Agreement*, signed 10 July 2012, (entered into force 5 April 2016) ch 15.1.

<sup>149</sup> See *Maa-nulth First Nations Final Agreement* ch 1.8.1.

<sup>150</sup> See, eg, *Tsawwassen First Nation Final Agreement* preamble; *Maa-nulth First Nations Final Agreement* preamble (emphasis added).

<sup>151</sup> McKee, above n 53, 112.

<sup>152</sup> Taiaiake Alfred, 'Deconstructing the British Columbia Treaty Process' (2001) 3(3) *Balayi: Culture, Law and Colonialism* 37, 39–43; James Tully, 'Reconsidering the B.C. Treaty Process' in *Speaking Truth to Power: A Treaty Forum* (Government of Canada, 2000) 3, 8.

pattern: in exchange for a 'full and final settlement' in respect of the Nisga'a Aboriginal rights,<sup>153</sup> the federal and provincial governments recognised Nisga'a rights to, inter alia, land, resources, culture, finance and self-governance.

Under the Treaty, the Nisga'a receive ownership in fee simple to 2000km<sup>2</sup> of traditional territory in the Nass Valley. Although comprising only eight per cent of their traditional lands, the Nisga'a retain control and jurisdiction over the use and development of these lands and the forest and mineral resources.<sup>154</sup> Similarly to other treaties, the Nisga'a gain additional resource rights over more extensive territory. This includes the right to hunt (for food, or social and ceremonial purposes) in over 16 000km<sup>2</sup> of land and the right to enact laws to regulate their hunt,<sup>155</sup> as well as the right to fish in over 20 000km<sup>2</sup> of land, and an attendant right to enact laws to regulate their fishery as well as establish and operate commercial fisheries.<sup>156</sup> The Nisga'a exercise their right to self-government via the Nisga'a Lisims Government, 36-member Wilp Si'ayuukhl Nisga'a (legislature) and four village councils. The Nisga'a have legislative authority over matters that directly affect the identity of the Nisga'a nation, including lands, language culture, education, health, child protection, traditional healing practice, fisheries, wildlife, forestry, environmental protection and policing.<sup>157</sup> Notwithstanding the broad ranging jurisdiction, its extent is limited in scope: federal and provincial laws apply where an inconsistency or conflict arises.<sup>158</sup> In addition, the provincial and federal governments committed to CA\$280 million in capital transfers over 14 years to satisfy outstanding claims, and CA\$38 million per year under five-year fiscal financial agreements to fund the operation of the Nisga'a government, so as to enable it to provide public services 'at levels reasonably comparable to those generally prevailing in northwest British Columbia'.<sup>159</sup>

The Nisga'a self-government powers were challenged by the conservative Liberal Party of British Columbia. Premier Gordon Campbell argued that the treaty provisions were inconsistent with the Canadian Constitution, which exhaustively distributes powers between the federal and provincial governments, extinguishing any right to self-government of the Indigenous peoples. In contrast, the Nisga'a argued that land and rights to hunt and fish would be 'empty gestures' if they have no concomitant power to 'establish rules about the use of that land and those rights'.<sup>160</sup> Justice Williamson of the Supreme Court of British Columbia dismissed the challenge, holding that the right to Aboriginal title 'include[s] the right for the

<sup>153</sup> *Nisga'a Final Agreement*, signed 4 May 1999, (entered into force 11 May 2000) ch 2(22) (also known as the '*Nisga'a Treaty*'). Note, however, that the Treaty does not contain a "surrender" clause': Andrew Beynon, 'The Nisga'a Land Question' (2004) 11(3) *International Journal on Minority and Group Rights* 259, 267.

<sup>154</sup> *Nisga'a Final Agreement* ch 3(19).

<sup>155</sup> *Ibid* ch 6(4)–(7).

<sup>156</sup> *Ibid* ch 8.

<sup>157</sup> *Ibid* ch 10–12. See also *UNDRIP* arts 4, 11–15, 20, 25–6, 31–5.

<sup>158</sup> *Nisga'a Final Agreement* ch 11(30)–(129). See further Paul Rynard, "'Welcome In, but Check Your Rights at the Door': The James Bay and Nisga'a Agreements in Canada' (2000) 33(2) *Canadian Journal of Political Science* 211, 217, 230–5.

<sup>159</sup> *Nisga'a Final Agreement* ch 15(3).

<sup>160</sup> *Campbell v A-G (British Columbia)* [2000] 8 WWR 600, [61].

community to make decisions as to the use of the land and therefore the right to have a political structure for making those decisions'.<sup>161</sup>

Similar to treaties signed under the British Columbia process, the *Nisga'a Final Agreement* illustrates how our criteria may be applied in practice. First, the treaty recognises that the Nisga'a were prior owners and occupiers of the land now claimed by Canada, and that they are a distinctive polity. As the *Nisga'a Citizenship Act 2008* (Nisga'a Lisims) signifies, the Nisga'a may continue to live as a distinct society within Canada,<sup>162</sup> enjoying rights under both regimes. Second, the Agreement was negotiated in a manner respectful and reflective of the Nisga'a status as a polity, and structured in such a way to minimise the risk that significant disparities in power would affect the terms of the agreement. Third, the Agreement recognises culturally appropriate forms of decision-making (in this case, amounting to a limited degree of self-government in internal matters) and provides finance to ensure its continuous functioning.

#### 4 *Lessons from the Canadian Process*

The modern treaty-making process in Canada offers insights into how we should understand treaties in Australia today. Reflecting on the *Nisga'a Final Agreement* and the process in British Columbia, Krehbiel argues that 'at its core, treaty making in Canada has historically focused on a relatively straight-forward package of benefits for the First Nation in exchange for extinguishment of its land-based interests within a defined territory'.<sup>163</sup> The package of benefits includes recognising rights to land, resources, governance, and cultural heritage, as well as providing initial and recurring financial compensation in order to enable First Nations to finance their autonomous functions — consistent with art 4 of the *UNDRIP*. It is through these political agreements that the State: acknowledges Indigenous communities as 'polities'; commits to recognising or establishing culturally appropriate structures of decision-making and control that amount to a form of self-government; and legitimises its own sovereignty.

Despite some concerns over process and outcomes, modern treaty-making in Canada reveals that success is important for both Indigenous and non-Indigenous peoples. For non-Indigenous peoples, the treaties legitimate the Canadian State's claim of sovereignty, and provide 'a solid legal basis for future economic development'.<sup>164</sup> More significantly, for First Nations the treaties confirm that, as polities, power and authority resides in the First Nations themselves. As such, they are a medium through which, in the words of Edward Allen, CEO of the Nisga'a Lisims Government, 'we have negotiated our way into Canada, to be full and equal

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<sup>161</sup> Ibid [137].

<sup>162</sup> *Nisga'a Citizenship Act 2008* (Nisga'a Lisims).

<sup>163</sup> Richard B Krehbiel, 'Common Visions: Influences of the Nisga'a Final Agreement on Lheidli T'enneh Negotiations in the BC Treaty Process' (2004) 11(3) *International Journal on Minority and Group Rights* 279, 282.

<sup>164</sup> Standing Senate Committee on Aboriginal Peoples, Parliament of Canada, *A Commitment Worth Preserving: Reviving the British Columbia Treaty Process* (June 2012) 8.

participants of Canadian society'.<sup>165</sup> Indeed, at their highest, the treaty relationship is a symbol of equal partnership, based on 'mutual recognition and sharing'.<sup>166</sup> At the same time, each treaty represents the resilience of the Indigenous nation. As Chief Joseph Gosnell remarked at the signing of the *Nisga'a Final Agreement* at New Aiyansh in August 1998: 'Look around you. Look at our faces. We are the survivors of a long journey. We intend to live here forever. And, under the *Nisga'a Treaty*, we will flourish.'<sup>167</sup>

Consideration of the modern treaty-making process also throws into relief the historic agreements struck between First Nations and the British or Canadian State. Although treaties from the 'unsystematic' era onwards recognised Indigenous peoples as rightful holders of title to their traditional lands, they were assimilative instruments designed to further the economic goals of non-Indigenous peoples. They were not intended to secure a just political relationship, but to 'settle' 'once and for all'<sup>168</sup> First Nations claims to their land so that the Crown could exploit natural resources within First Nations territory. Infected by outdated attitudes, these agreements do not recognise Indigenous governance structures, but subsumed Indigenous peoples within the non-Indigenous governmental system.<sup>169</sup> Although both the Canadian State and First Nations who signed these agreements consider them to be treaties, and their existence legitimates the status and aspirations of those Indigenous nations who signed the agreements, they would not satisfy our criteria.

### III Treaties in Australia

#### A Background

In the process of colonising Australia, Captain James Cook was instructed to take possession of the 'Convenient Situations in the Country' 'with the Consent of the Natives'.<sup>170</sup> Arthur Phillip, the first Governor of New South Wales, instructed his forces to 'endeavour by every possible means to open an Intercourse with the Natives and to conciliate their affections', 'to live in amity and kindness with them'.<sup>171</sup> Despite this, the British and the respective colonial governments never sought to formalise the relationship with Indigenous peoples. Rather, based on the doctrine of *terra nullius*, colonisation preceded on the foundation that the continent

<sup>165</sup> Edward Allen, 'Our Treaty, Our Inherent Right to Self-Government: An Overview of the Nisga'a Final Agreement' (2004) 11(3) *International Journal on Minority and Group Rights* 233, 234.

<sup>166</sup> *Nisga'a Final Agreement* preamble.

<sup>167</sup> Joseph Gosnell, 'No Longer Beggars in Our Own Lands, We Now Go Forward ...', *Vancouver Sun* (Vancouver), 5 August 1998, A11, quoted in Douglas Sanders, "'We Intend to Live Here Forever": A Primer on the Nisga'a Treaty' (2000) 33(1) *University of British Columbia Law Review* 103, 103.

<sup>168</sup> Kenneth S Coates and William R Morrison, 'Treaty Research Report — Treaty No 11 (1921)' (Research Report, Treaties and Historical Research Centre, 1986) 17 (citations omitted).

<sup>169</sup> Gerald Taiaiake Alfred, 'Colonialism and State Dependency' (2009) 5(2) *Journal of Aboriginal Health* 42, 46.

<sup>170</sup> Secret Instructions from Baron Ed Hawke, Sir Piercy Brett and Lord C Spencer to James Cook, 30 July 1768, 1: Museum of Australian Democracy, 'Secret Instructions to Lieutenant Cook 30 July 1768 (UK)', Documenting Democracy <<https://www.foundingdocs.gov.au/item-sdid-67.html>>.

<sup>171</sup> Governor Phillip's Instructions, 25 April 1778, *Historical Records of Australia*, series 1, vol 1 (1914) 13–14.



was 'vacant',<sup>172</sup> 'a tract of territory practically unoccupied, without settled inhabitants or settled law'.<sup>173</sup> This understanding meant ad hoc agreements, like those signed by John Batman with a group of Wurundjeri elders around present-day Melbourne,<sup>174</sup> and George Augustus Robinson's 'friendly mission' in Tasmania,<sup>175</sup> never received official sanction.

It is not clear why the British never signed a treaty with the Indigenous peoples of Australia.<sup>176</sup> The absence, however, clearly affected western political and legal constructions of Aboriginal and Torres Strait Islander peoples; as early as 1836, for example, the Supreme Court of New South Wales declared that Aboriginal people had no law and only 'the wildest most indiscriminatory notions of revenge'.<sup>177</sup> This attitude operated to exclude Indigenous peoples from the protection of the State and justified colonial governments usurping Indigenous lands.<sup>178</sup> Ongoing agitation about the legitimacy of the Australian nation galvanised Indigenous activism and non-Indigenous supporters in the 1970s and 1980s. Unlike Canada, however, legal and political avenues proved less effective.

In 1971, the Supreme Court of the Northern Territory considered a challenge by the Yolngu people who sought a declaration that they enjoyed legal rights to their traditional land. In *Milirrpum v Nabalco Pty Ltd*, Blackburn J rejected the Yolngu people's claim of native title over the Gove peninsula.<sup>179</sup> Despite ruling against the Yolngu, Blackburn J held that they possessed 'a subtle and highly elaborate' system of laws,<sup>180</sup> and, in a confidential memorandum to Government and Opposition, noted that the morality of a system of Aboriginal land rights was 'beyond question'.<sup>181</sup> After nine months of deliberation, however, Prime Minister William McMahon announced that the Government would not legislate to permit Aboriginal title to land. Instead, Aboriginal people would be encouraged to apply for leases, which would be considered, provided that the land was put to 'reasonable' economic or

<sup>172</sup> Sir Richard Bourke, *Proclamation*, 26 August 1835.

<sup>173</sup> *Cooper v Stuart* (1888) 14 App Cas 286, 291 (Lord Watson).

<sup>174</sup> See Bain Attwood and Helen Doyle, *Possession: Batman's Treaty and the Matter of History* (Miegunyah Press, 2009).

<sup>175</sup> See George Augustus Robinson, *Friendly Mission: The Tasmanian Journals and Papers of George Augustus Robinson, 1829–34* (Quintus, 2008).

<sup>176</sup> For suggestions why, see Brennan et al, above n 31, 12–13.

<sup>177</sup> *R v Murrell* (1836) 1 Legge 72. This quote does not appear in the case report, but was uncovered in Justice Burton's 'Notes for Judgment', which appear to be a lost portion of the judgment: *Miscellaneous Correspondence Relating to Aborigines*, State Records of New South Wales 5/116. Cf *R v Ballard* (Unreported, New South Wales Supreme Court, Forbes CJ, 21 April 1929). See further Bruce Kercher, 'Recognition of Indigenous Legal Autonomy in Nineteenth Century New South Wales' (1998) 4(13) *Indigenous Law Bulletin* 7, 7–9.

<sup>178</sup> An 1837 Select Committee report to the House of Commons held that the state of Australian Aborigines was 'so entirely destitute ... of the rudest forms of civil polity, that their claims, whether as sovereigns or proprietors of the soil, have been utterly disregarded': House of Commons Parliamentary Select Committee on Aboriginal Tribes, Parliament of the United Kingdom, *Report* (1837) 125.

<sup>179</sup> (1971) 17 FLR 141.

<sup>180</sup> *Ibid* 267.

<sup>181</sup> Memorandum, from Sir Richard Blackburn, quoted in Frank Brennan and Patricia Turner, *No Small Change: The Road to Recognition for Indigenous Australia* (University of Queensland Press, 2015) 137–8.

social use.<sup>182</sup> In response to McMahon's statement, four young Aboriginal men drove from Redfern to Canberra and established a tent embassy on the lawns in front of Parliament House.<sup>183</sup> The ramshackle collection of tents served as a potent 'symbol of unextinguished Indigenous sovereignty', catalysing calls for a treaty.<sup>184</sup>

Over the course of the 1970s and 1980s, treaty-talk was common. Later in 1971, the Larrakia people organised a petition to Queen Elizabeth II, describing themselves as 'refugees in the country of our ancestors', and calling for land rights and political representation.<sup>185</sup> In 1979, the National Aboriginal Conference, an elected Indigenous body advising government, passed a resolution calling for a 'Makarrata'.<sup>186</sup> In the same year, the Aboriginal Treaty Committee, a voluntary, non-government private body composed of prominent non-Indigenous Australians was established, helping to build political momentum for a treaty among the non-Indigenous community.<sup>187</sup> In 1983, the Senate Standing Committee on Constitutional and Legal Affairs delivered a report on the idea of a treaty, recommending constitutional change in order to implement a 'compact'.<sup>188</sup> Finally, in 1988, Prime Minister Bob Hawke adopted the Barunga Statement, promising to negotiate a treaty to respect and recognise Aboriginal sovereignty within the term of the 35<sup>th</sup> Parliament.<sup>189</sup> Met with hostile opposition from the Coalition, who considered it 'a recipe for separatism' and 'an absurd proposition that a nation should make a treaty with some of its own citizens',<sup>190</sup> the treaty did not eventuate, and was quietly shelved in 1991.

## 1 *Native Title Processes*

Statutory land rights regimes had been enacted in all states except for Western Australia and Tasmania by 1991.<sup>191</sup> While some of these settlements delivered expansive rights — most notably the *Pitjantjatjara Agreement*, which provided direct grants of inalienable freehold land<sup>192</sup> — many were 'much more limited in

<sup>182</sup> William McMahon, 'Australian Aborigines: Commonwealth Policy and Achievements' (Statement, 26 January 1972).

<sup>183</sup> Stewart Harris, 'Anniversary Reflections: "Did the Aboriginal Tent Embassy Achieve Anything? Yes!"', *Canberra Times*, 26 January 1982' in Gary Foley, Andrew Schaap and Edwina Howell (eds), *The Aboriginal Tent Embassy: Sovereignty, Black Power, Land Rights and the State* (Routledge, 2014) 213–14.

<sup>184</sup> Brennan et al, above n 31, 14.

<sup>185</sup> Petition from the Larakia/Larrakia People to Her Majesty, the Queen, 17 October 1972.

<sup>186</sup> See text accompanying above n 14; Julie Fenley, 'The National Aboriginal Conference and the Makarrata: Sovereignty and Treaty Discussions, 1979–81' (2011) 42(3) *Australian Historical Studies* 372, 379.

<sup>187</sup> Harris, above n 4, 15.

<sup>188</sup> Senate Standing Committee on Legal and Constitutional Affairs, above n 4, xii.

<sup>189</sup> Hawke, above n 4.

<sup>190</sup> John Howard, 'Treaty is a Recipe for Separatism' in Ken Baker (ed), *A Treaty with the Aborigines?* (Institute of Public Affairs, 1988) 6, 6.

<sup>191</sup> *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); *Aboriginal Land Rights Act 1983* (NSW); *Aboriginal Land Act 1991* (Qld); *Torres Strait Islander Land Act 1991* (Qld); *Aboriginal Lands Trust Act 1966* (SA); *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA); *Maralinga Tjarutja Land Rights Act 1984* (SA); *Aboriginal Lands Act 1970* (Vic).

<sup>192</sup> *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) ss 15, 17.

scope'.<sup>193</sup> Importantly, however, 'absent any legally enforceable right to land, these settlements remained essentially ad hoc, limited in utility for other Indigenous peoples, and predicated on a supportive political environment'.<sup>194</sup> The High Court of Australia's decision in *Mabo v Queensland (No 2)*,<sup>195</sup> and subsequent enactment of the *NTA*, radically altered this underlying framework, transforming Aboriginal and Torres Strait Islander peoples' moral claims into legal rights.<sup>196</sup> The *NTA* recognises and protects Indigenous Australians' native title and establishes a procedure for dealing with native title claims.

Agreements under the *NTA* bear formal similarities to treaty negotiations. Similar to the process in Canada, the legal architecture of the *NTA* privileges conciliation rather than litigation. While applications for a 'determination of native title' are initially commenced as proceedings in the Federal Court of Australia,<sup>197</sup> the Court practises an intensive case management scheme to identify points of agreement, and to refer particular issues to mediation.<sup>198</sup> As of 5 March 2018, 416 native title determinations have been made.<sup>199</sup> Of these, 328 were by consent, 47 were litigated, and 41 were unopposed.<sup>200</sup>

Even where the parties agree to conciliation, the process can be lengthy. Determination of native title operates as a judgment against the 'world at large',<sup>201</sup> therefore it is critical that all parties 'who hold or wish to assert a claim or interest in respect of the defined area of land' are represented.<sup>202</sup> This may include several Indigenous nations with conflicting claims over land, not to mention pastoralists, mining interests and State and Federal Governments. As such, finalising areas of common ground can be difficult. It is not surprising then that negotiations can take several years, or more. For example, in November 2014, the Kokatha people were finally successful in finalising a consent determination that had taken 18 years.<sup>203</sup> The Kokatha native title claim covers over 33 807km<sup>2</sup> of land, including significant pastoral leases such as Roxby Downs station, BHP Billiton's Olympic Dam mine, and areas used by the Australian Government Department of Defence to conduct training operations. In addition to the significant land base, the Kokatha people are guaranteed non-exclusive rights to hunt, fish, camp, gather and undertake cultural activities including ceremonies and meetings, and to protect places of cultural significance on country.<sup>204</sup>

<sup>193</sup> Maureen Tehan, 'A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the *Native Title Act*' (2003) 27(2) *Melbourne University Law Review* 523, 530.

<sup>194</sup> Harry Hobbs, 'Locating the Logic of Transitional Justice in Liberal Democracies: Native Title in Australia' (2016) 39(2) *University of New South Wales Law Journal* 512, 536.

<sup>195</sup> (1992) 175 CLR 1.

<sup>196</sup> Garth Nettheim, "'The Consent of the Natives': *Mabo* and Indigenous Political Rights' (1993) 15(2) *Sydney Law Review* 223, 224.

<sup>197</sup> *NTA* ss 13, 61.

<sup>198</sup> Australian Law Reform Commission, *Connection to Country: Review of the Native Title Act 1993* (Cth), Report No 126 (2015), 358 [12.7].

<sup>199</sup> National Native Title Tribunal, *Statistics* (5 January 2018) <<http://www.nntt.gov.au/Pages/Statistics.aspx>>.

<sup>200</sup> *Ibid.*

<sup>201</sup> *Dale v Western Australia* (2011) 191 FCR 521, 540 [92] (the Court).

<sup>202</sup> *Western Australia v Ward* (2000) 99 FCR 316, 368 [190] (Beaumont and von Doussa JJ).

<sup>203</sup> *Starkey v South Australia* (2014) 319 ALR 231; the Kokatha Native Title Claim was registered on 17 November 2014 (File No SCD2014/00).

<sup>204</sup> *Ibid* 246–7 [94].

Several developments to simplify the process and expedite completed agreements have been enacted. Indigenous Land Use Agreements ('ILUAs') were introduced as part of the 1998 Amendments to the *NTA*.<sup>205</sup> They are voluntary agreements that may be struck between native title groups and other groups concerning the use of land and waters. This creative process permits flexible and pragmatic settlements, and have proved popular for many native title groups. As of 5 March 2018, there are 1199 ILUAs registered with the National Native Title Tribunal, compared to 406 native title determinations.<sup>206</sup> ILUAs cover a diverse range of agreements, including, for example, providing for Indigenous access to pastoral leasehold, granting access to natural resources on native title land, compensation, or employment and economic opportunities for native title groups.<sup>207</sup> Agreement can be negotiated in the absence of a costly and lengthy application for the determination of the existence of native title,<sup>208</sup> and, depending on the precise agreement struck, can 'offer substantial scope for economic development'.<sup>209</sup> Once registered, the ILUA binds the parties and all persons holding native title to the area, even if not a party to the agreement.<sup>210</sup> However, despite some clear benefits and potential,<sup>211</sup> ILUAs have fallen far below the comprehensive agreements struck in Canada or treaties more broadly. As their name suggests, ILUAs do not grant ownership over land, but concern *use* of land and waters.<sup>212</sup>

Limitations under ILUAs are inherent to the *NTA* process, and while settlements reached under the *NTA* satisfy the first and second of our criteria, they fail the third, and do not constitute treaties. First, native title recognises Indigenous peoples as both traditional owners and occupiers of the land, and so as polities. The source of native title rights and interests is the system of traditional laws and customs of the Indigenous peoples themselves. As such, native title is 'an acknowledgment of the continuation of Indigenous society as a source of authority'.<sup>213</sup> Second, as the statistics indicate, native title is primarily reached by way of negotiation. Although Indigenous Australians seeking to claim native title find that the process is structured against their interests, negotiations are conducted on the basis that Indigenous

<sup>205</sup> *Native Title Amendment Act 1998* (Cth) sch 1 item 9, amending *NTA* pt 2 div 3 sub-div B.

<sup>206</sup> National Native Title Tribunal, above n 199. Though note that many native title consent determinations involve ILUAs.

<sup>207</sup> National Native Title Tribunal, *About Indigenous Land Use Agreements (ILUAs)* <<http://www.nntt.gov.au/ILUAs/Pages/default.aspx>>.

<sup>208</sup> Fred Tanner, 'Land Rights, Native Title and Indigenous Land Use Agreements' in Martin Hinton, Daryle Rigney and Elliott Johnson (eds), *Indigenous Australians and the Law* (Routledge, 2<sup>nd</sup> ed, 2008) 147, 157.

<sup>209</sup> Maureen Tehan and Lee Godden, 'Legal Forms and Their Implications for Long-Term Relationships and Economic, Cultural and Social Empowerment: Structuring Agreements in Australia' in Marcia Langton and Judy Longbottom (eds), *Community Futures, Legal Architecture: Foundations for Indigenous Peoples in the Global Mining Boom* (Routledge, 2012) 111, 122.

<sup>210</sup> *NTA* s 24EA(1). See further Christos Mantziaris and David Martin, *Native Title Corporations: A Legal and Anthropological Analysis* (Federation Press, 2000) 250.

<sup>211</sup> Note that the Noongar Settlement is to be registered as six ILUAs, indicating that ILUAs have unrealised potential as part of a comprehensive negotiated agreement: see below Part IIIB.

<sup>212</sup> Lisa Strelein, 'Symbolism and Function: From Native Title to Indigenous Self-Government' in Lisa Strelein (ed), *Dialogue About Land Justice: Papers from the National Native Title Conferences* (Aboriginal Studies Press, 2010) 127, 131.

<sup>213</sup> *Ibid* 128.

peoples, as prior owners and occupiers of their traditional land, are entitled to be present, rather than merely updated on its progress.

Although agreements under the *NTA* regime recognise Indigenous peoples as polities, the State has not accepted, nor recognised, the concomitant inherent right to self-government. This is a fine distinction, but an important one. While basing the source of native title rights and interests in the normative system of the traditional owners suggests that the courts recognise an inherent right to self-government, legislation and case law has constrained the content of native title rights to 'land and waters'<sup>214</sup> and, at present, does not recognise a right to self-government.<sup>215</sup> Further, *NTA* settlements acknowledge prescribed bodies corporate that act as trustees to hold and manage native title rights and interests,<sup>216</sup> but these bodies are not granted even limited self-governance powers. Rather, they are merely intended to protect and manage native title and to ensure certainty for governments and other parties interested in accessing land and waters.<sup>217</sup>

## 2 Non-Native Title Processes

The limitations inherent in the *NTA* process have constrained Indigenous peoples' ability to transform their moral interests into legally enforceable rights. As a result, calls for a fundamental rethink to the *NTA* have been made,<sup>218</sup> propelling alternative, political agreements made outside the native title system. These arrangements provide greater flexibility and offer some economic benefits but fall short of the political agreements reached in Canada.

The *Traditional Owner Settlement Act 2010* (Vic) ('*TOSA*') is one such alternative. Designed 'to advance reconciliation and promote good relations' between the Victorian State and Indigenous Australians,<sup>219</sup> the *TOSA* enables traditional owners to pursue a negotiated 'recognition and settlement agreement'<sup>220</sup> with the State Government outside the native title regime. The overarching settlement agreement includes four sub-agreements relating to: land, land-use, funding, and natural resources.<sup>221</sup> An ILUA is also registered under the *NTA*,<sup>222</sup> making the Agreement legally binding. As part of any agreement, the traditional owners must withdraw all current and future native title claims.

<sup>214</sup> *Western Australia v Ward* (2000) 99 FCR 316; Australian Law Reform Commission, above n 198, 242 [8.68].

<sup>215</sup> Sean Brennan et al, 'The Idea of Native Title as a Vehicle for Change and Indigenous Empowerment' in Sean Brennan et al (eds), *Native Title from Mabo to Akiba: A Vehicle For Change and Empowerment?* (Federation Press, 2015) 2, 4; Jeremy Webber, 'Native Title as Self-Government' (1999) 22(2) *University of New South Wales Law Journal* 600.

<sup>216</sup> *NTA* pt 2 div 6.

<sup>217</sup> *Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) reg 6.

<sup>218</sup> Australian Law Reform Commission, above n 198. For judicial commentary suggesting the need for a more fundamental reconceptualisation of the State's interaction with Aboriginal and Torres Strait Islander people see: *Western Australia v Ward* (2002) 213 CLR 1, 231 [529] (McHugh J), 398 [970] (Callinan J).

<sup>219</sup> *TOSA* s 1.

<sup>220</sup> *Ibid* pt 2.

<sup>221</sup> *Ibid* pts 3 (land), 4 (land use), 5 (funding), 6 (natural resource management).

<sup>222</sup> *Ibid* ss 10, 30.

For many Indigenous peoples, the breadth of the available outcomes is appealing. So far two agreements with traditional owner groups, arising out of or complementing native title determinations, have been finalised. The *Gunaikurnai Settlement Agreement* was the first to be reached under the *TOSA* in October 2010. Under the Agreement, the State acknowledges the Gunaikurnai people as the traditional owners of an area in Gippsland, and recognises that they hold native title over certain Crown land in that region. In addition, the State: commits to funding the Gunaikurnai people to enable them to manage their affairs and respond to their obligations under the settlement; grants rights of access and use on Crown land for traditional purposes including hunting, fishing, camping and gathering; and invites the Gunaikurnai people to co-manage over ten national parks and reserves.<sup>223</sup> In 2013, the Dja Dja Wurrung people became the second to reach a settlement under the *TOSA*. The *Dja Dja Wurrung Settlement* includes: acknowledgement of past injustices; transfer of two historically and culturally significant freehold properties; six parks and reserves as ‘Aboriginal title’ and joint management of those lands; hunting, fishing and gathering rights; and almost \$10 million in funding by the State for investment in economic development initiatives chosen by the Dja Dja Wurrung.<sup>224</sup> The *TOSA* has only operated since 2010, but it has already been praised by the Aboriginal and Torres Strait Islander Social Justice Commissioner as setting ‘the benchmark for other states to meet when resolving native title claims’.<sup>225</sup>

Both the Gunaikurnai and Dja Dja Wurrung settlements include joint management of land and resources as an integral element of the package. If conducted on a firm basis of formal recognition and active participation in decision-making processes, collaborative land and resource management strategies can empower local communities.<sup>226</sup> These processes also have the potential to break down the disjunction between Indigenous and non-Indigenous cultural norms, providing an opportunity for ‘cross-cultural development of management processes and conflict resolution’,<sup>227</sup> reinforcing both the official acknowledgement of past injustices and grounding a just relationship going forward.<sup>228</sup>

The *TOSA* process offers similar benefits to the negotiated treaties in Canada. Each begins with an acknowledgment of past injustices and recognition that the Indigenous peoples are the traditional owners of the land. A small portion of Crown land is transferred (neither permits private property to be transferred) as freehold

<sup>223</sup> Victorian State Government, ‘Gunaikurnai Native Title Agreement’, Department of Justice and Regulation (Vic) <<http://www.justice.vic.gov.au/home/your+rights/native+title/gunaikurnai+native+title+agreement>>.

<sup>224</sup> Victorian State Government, ‘Dja Dja Wurrung Settlement’, Department of Justice and Regulation (Vic) <<http://www.justice.vic.gov.au/home/your+rights/native+title/dja+dja+wurrung+settlement>>.

<sup>225</sup> Australian Human Rights Commission, *Native Title Report 2011: Aboriginal and Torres Strait Islander Social Justice Commissioner* (2011) 8. For examination of the *TOSA* in relation to water rights, see Katie O’Byrne, ‘More Aqua Nullius? The *Traditional Owner Settlement Act 2010* (Vic) and the Neglect of Indigenous Rights to Manage Inland Water Resources’ (2016) 40(2) *Melbourne University Law Review* 547.

<sup>226</sup> Alfonso Peter Castro and Erik Nielsen, ‘Indigenous People and Co-management: Implications for Conflict Management’ (2001) 4(4) *Environmental Science and Policy* 229, 230.

<sup>227</sup> David Lawrence, ‘Managing Parks/Managing “Country”: Joint Management of Aboriginal Owned Protected Areas in Australia’ (Research Paper No 2, Parliamentary Library, Parliament of Australia, 1996–97) 24 (citations omitted).

<sup>228</sup> Hobbs, above n 194, 547.

title or Aboriginal title; land use and access rights are granted over wider areas; and the First Nation or Traditional Owners are entitled to jointly manage additional parks or reserves. Significantly, the State commits to provide funding to Indigenous-run bodies whose role is to identify, protect and promote the interests of their community. Capital transfer packages are intended both to support Indigenous communities build capacity and as compensation for the 'surrender' of current and future claims.

Notwithstanding the benefits of the *TOSA* regime, it is more limited than the Canadian agreements and does not meet our criteria for a treaty. While Indigenous peoples are recognised as a polity, and negotiation is conducted respectful of each participant's equality of standing, the *TOSA* process does not recognise Indigenous self-government to a sufficient extent. Rather, self-government is limited merely to joint management of national parks and reserves.<sup>229</sup> Joint management arrangements can bring benefits to Indigenous peoples, and — importantly — the traditional owner land management boards will be composed of a majority of members appointed from nominations made by the traditional owner group,<sup>230</sup> so decisions can be made without the consent of non-Indigenous members. Nonetheless, the scope of decision-making power is minimal. Absent broader powers of decision-making, the Gunaikurnai and Dja Dja Wurrung bodies are limited to a communication channel with government as service-delivery organisations. Additionally, and problematically, not all activities that have a significant impact on the rights of traditional owners require their consent,<sup>231</sup> weakening their ability to manage their land and community as required under art 32 of the *UNDRIP*. These agreements are a positive step forward, with the potential to avoid lengthy negotiations under the *NTA*,<sup>232</sup> but they are not treaties.

## B The Noongar Settlement

The Noongar people live in the south-west corner of Western Australia. Traditionally, their country extended from Jurien Bay to the southern coast, and east to Ravensthorpe and Southern Cross, some 200 000km<sup>2</sup>.<sup>233</sup> Over this wide expanse of land, different subgroups of Noongar people — the Ballardong, Yued, Whadjuk, Wardandi, Pinjarup, Bibbulmun, Wilman, and Mineng — live, but they constitute one community, speaking dialects of a common language.<sup>234</sup> From time immemorial,

<sup>229</sup> See, eg, Gunaikurnai Traditional Owner Land Management Board, *Vision and Mission* <<https://www.gunaikurnai.com.au/about>>.

<sup>230</sup> *Conservation, Forests and Lands Act 1987* (Vic) s 82M(3)(a).

<sup>231</sup> *TOSA* pt 4 divs 2–4.

<sup>232</sup> Though note that only two agreements have been finalised since 2010, one of which (Gunaikurnai) was negotiated almost entirely under the *NTA*: see Katie O'Bryan, 'The Gunaikurnai Consent Determination: Is This the High Water Mark for Native Title in Victoria?' (2011) 7(24) *Indigenous Law Bulletin* 7.

<sup>233</sup> Stuart Bradfield, 'Settling Native Title: Pursuing a Comprehensive Regional Agreement in South West Australia' in Marcia Langton et al (eds), *Settling with Indigenous Peoples: Modern Treaty and Agreement-Making* (Federation Press, 2006) 207, 208.

<sup>234</sup> *Bennell v Western Australia* (2006) 153 FCR 120, 192–3 [273]–[276] (Wilcox J).

through the British acquisition of sovereignty in 1829, and still today, the Noongar people have observed their traditional laws and customs.<sup>235</sup>

The Noongar Settlement has its origins in a native title claim. During the 1990s and early 2000s, the South West Aboriginal Land and Sea Council ('SWALSC') oversaw the amalgamation of six native title claims into a single claim encompassing the entirety of Noongar country. This claim area was divided by the Federal Court of Australia into two parts: Part A encompassing Perth and the surrounding non-urban areas; and Part B covering the rest of the claim. In 2006, Wilcox J of the Federal Court examined Part A, and determined that the Noongar people held native title rights to occupy, use and enjoy lands and waters.<sup>236</sup> Hailed as the first decision recognising native title over a capital city,<sup>237</sup> it was subsequently overturned by the Full Federal Court in 2008.<sup>238</sup> Instead of continuing litigation, in December 2009, the SWALSC and the State Government agreed to pursue a negotiated outcome outside of the *NTA*. Four years later, in July 2013, the Government released the terms of its settlement offer and, in October 2014, the SWALSC Noongar Nation Negotiation Team, and the Western Australia Government reached an agreement-in-principle on the text of the settlement. The Settlement takes the form of six ILUAs for the original six specific claim areas. Despite some opposition, these were approved by the Noongar people at a series of authorisation meetings held between January and March 2015.<sup>239</sup> On 2 February 2017, those opposing the deal were successful in preventing four of the ILUAs from being registered, with the Federal Court holding that the *NTA* requires all native title claimants to agree.<sup>240</sup> Illustrating the political nature of agreements with Indigenous peoples, however, the Federal Government swiftly introduced legislation to amend the *NTA* in order to permit the settlement to proceed.<sup>241</sup> Following a Senate Committee Report, the Bill was passed in June 2017.<sup>242</sup> Applications to register the ILUAs have been lodged, and the parties are waiting on a decision by the Native Title Registrar.<sup>243</sup>

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<sup>235</sup> See South West Aboriginal Land and Sea Council, John Host and Chris Owen, *'It's Still in My Heart, This is My Country': The Single Noongar Claim History* (UWA Publishing, 2009).

<sup>236</sup> *Bennell v Western Australia* (2006) 153 FCR 120, 328–9 [832]–[841] (Wilcox J).

<sup>237</sup> Human Rights and Equal Opportunity Commission, *Native Title Report 2007* (2008) 146 (citations omitted).

<sup>238</sup> *Bodney v Bennell* (2008) 167 FCR 84.

<sup>239</sup> Kathryn Diss, 'Claimants Ink \$1.3 billion Western Australia Noongar Native Title Deal', *ABC News* (online), 30 March 2015 <<http://www.abc.net.au/news/2015-03-30/south-west-noongar-native-title-deal-linked/6357746>>.

<sup>240</sup> *McGlade v Native Title Registrar* (2017) 340 ALR 419, 463 [242]–[244] (North and Barker JJ); *NTA* s 24CD(2)(a).

<sup>241</sup> Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 (Cth) sch 1 cl 1, amending *NTA* s 24CD(2)(a).

<sup>242</sup> Senate Legal and Constitutional Affairs Legislation Committee, Parliament of Australia, *Native Title Amendment (Indigenous Land Use Agreements) Bill 2017 [Provisions]* (2017). The Bill was enacted as the *Native Title Amendment (Indigenous Land Use Agreements) Act 2017* (Cth).

<sup>243</sup> Lands, Approvals and Native Title Unit (WA), above n 18.



## 1 *What Does the Settlement Contain?*

The Noongar Settlement is the largest and ‘most comprehensive’<sup>244</sup> agreement to settle Aboriginal interests in land in Australian history, comprising ‘the full and final resolution of all native title claims in the South West of Western Australia, ... in exchange for a comprehensive settlement package’.<sup>245</sup> The Noongar people have agreed to surrender any native title rights and interests that exist in the area under the Agreement, and consent to the validation of all potentially historically invalid acts in relation to those areas.<sup>246</sup> As the preamble to the *Land Administration (South West Native Title Settlement) Act 2016* (WA) makes clear, the package of benefits is intended to compensate the Noongar people ‘for the loss, surrender, diminution, impairment and other effects’ levied on their native title rights and interests.<sup>247</sup> Involving approximately 30 000 Noongar people and covering approximately 200 000km<sup>2</sup>, the total value of the package is \$1.3 billion, and includes agreement on rights, obligations and opportunities relating to land, resources, governance, finance, and cultural heritage.

First, as part of the Agreement, the Western Australian Parliament enacted the *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016* (WA). The first piece of legislation in Western Australia to include the Noongar language,<sup>248</sup> the Act recognises the Noongar people as the traditional owners and occupiers of South West Western Australia, and their continued relationship with country.<sup>249</sup> The Preamble acknowledges in full:

- A. Since time immemorial, the Noongar people have inhabited lands in the south-west of the State; these lands the Noongar people call Noongar boodja (Noongar earth).
- B. Under Noongar law and custom, the Noongar people are the traditional owners of, and have cultural responsibilities and rights in relation to, Noongar boodja.
- C. The Noongar people continue to have a living cultural, spiritual, familial and social relationship with Noongar boodja.
- D. The Noongar people have made, are making, and will continue to make, a significant and unique contribution to the heritage, cultural identity, community and economy of the State.
- E. The Noongar people describe in Schedule 1 their relationship to Noongar boodja and the benefits that all Western Australians derive from that relationship.
- F. So it is appropriate, as part of a package of measures in full and final settlement of all claims by the Noongar people in pending and future applications under the *Native Title Act 1993* (Commonwealth) for the

<sup>244</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 25 November 2015, 8903 (Colin Barnett, Premier).

<sup>245</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 October 2015, 7313 (Colin Barnett, Premier).

<sup>246</sup> *Land Administration (South West Native Title Settlement) Act 2016* (WA) preamble [2].

<sup>247</sup> *Ibid* preamble [3].

<sup>248</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 22 March 2016, 1496 (Peter Collier, Minister for Aboriginal Affairs).

<sup>249</sup> *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016* (WA) s 5.

determination of native title and for compensation payable for acts affecting that native title, to recognise the Noongar people as the traditional owners of the lands described in this Act.<sup>250</sup>

In the second reading speech, the Minister for Aboriginal Affairs, Peter Collier, acknowledged the deep injustices that had been done to the Noongar people since the British arrival in 1826. He recounted the ‘one-sided struggle over land and resources’, the ‘devastating spread of introduced diseases’, the hardening of attitudes towards Aboriginal people at the turn of the 20<sup>th</sup> century and the ‘repressive and coercive system of control’ mandated by the *Aborigines Act 1905* (WA), the impact of which ‘still resonates throughout Western Australian society’.<sup>251</sup> And yet, despite this ‘history of oppression and marginalisation’, the ‘Noongar people have survived’ and continue ‘to assert their rights and identity’.<sup>252</sup> During debate over the Bill, parliamentarians frequently reiterated the significance of this acknowledgement. Antonio Buti, MLA noted that it indicated that the Government ‘has understood that it is important to recognise the legal, historical and moral rights of traditional owners’;<sup>253</sup> while David Kelly MLA lauded the Bill and called for further negotiations across the State.<sup>254</sup>

Establishing and resourcing governance institutions is an integral aspect of the settlement. Six Noongar Regional Corporations and one Central Services Corporation will be created, and will receive \$10 million in funding support each year for 12 years. A capital works program will commit additional funding to build office accommodation and a Noongar Cultural Centre. The Central Services Corporation is responsible for assisting and providing services to the Regional Corporations. It will act as a centralised administrative body with the capacity and professional expertise to maintain, protect and promote the culture, customs, traditions and language of the Noongar people. The Regional Corporations will have a similar role, but will also be responsible for managing the traditional land and waters within their regions, developing regional priorities and engaging with government and third-party stakeholders to further the community interests and priorities of the Noongar people.

The settlement includes a significant transfer of land to the Noongar people. Approximately 320 000 hectares of Crown land will be transferred into the Noongar Boodja Trust (‘NBT’) over five years, establishing a sizeable land estate upon which the Noongar people can exercise self-determination.<sup>255</sup> The NBT will function as a perpetual trust, upon which the Western Australia Government will make funding instalments of \$50 million (indexed) yearly for 12 years. As noted above, capital transfer payments are key elements of any broader settlement, as it demonstrates an understanding that economic development is critical to securing a just and equitable

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<sup>250</sup> Ibid preamble.

<sup>251</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 22 March 2016, 1496–7 (Peter Collier, Minister for Aboriginal Affairs).

<sup>252</sup> Ibid.

<sup>253</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 November 2015, 8652 (Antonio Buti).

<sup>254</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 March 2016, 1409–10 (David Kelly).

<sup>255</sup> See *Land Administration (South West Native Title Settlement) Act 2016* (WA) s 10.

relationship between Indigenous peoples and the State. It also guarantees the continued functioning of Indigenous institutions, as required under art 4 of the *UNDRIP*. Additionally, 121 freehold properties will be refurbished and transferred to the NBT as part of a Housing Program.

The settlement also grants certain rights to the Noongar people over Crown lands not transferred. As part of the Agreement, the Minister for Lands must grant a land and water access licence to each Regional Corporation to allow the group to access and undertake customary activities on certain unallocated Crown land and unmanaged reserves.<sup>256</sup> Subject to the licence, the Noongar people will be able to: visit and care for sites and country; gather, prepare and consume bush tucker and traditional medicine; conduct ceremonies and cultural activities; have meetings, camp and light camp or ceremonial fires on country.<sup>257</sup> Similarly to the Gunaikurnai and Dja Dja Wurrung settlements, the Noongar people will be invited to co-manage land and resources in land outside their territory. Although no joint-management agreement has yet been struck, the overarching negotiated settlement set out prescriptive parameters over future agreements. Joint-management decisions will be made by a body composed of up to 12 persons; six nominated by the Noongar Regional Corporation, and six by the Chief Executive Officer of the Department of Parks and Wildlife; a chairperson will be nominated by the Corporation.<sup>258</sup> This body will make all management decisions relating to the management and development of the Park, including on the value of the land and waters to the culture and heritage of Noongar people, and the methods to determine, conserve, protect and rehabilitate.<sup>259</sup> As has been noted above, joint-management arrangements have the potential to improve employment opportunities for Indigenous peoples.

Enhanced employment and socio-economic opportunities are a key element of the Settlement. To this end, the Agreement proposes to develop a Community Development Framework and a Noongar Economic Participation Framework. These initiatives aim to improve Western Australian human services agencies' communication and collaboration with Noongar people, and to improve economic participation outcomes for Noongar people in the South West. Finally, the settlement contains two complementary heritage protection agreements. The Noongar Heritage Partnership Agreement will set out a framework through which the Department of Aboriginal Affairs and the relevant Regional Corporation can work in partnership to identify, record, protect and manage Noongar Heritage values and sites within the agreement area. The Noongar Standard Heritage Agreement will improve processes for the preservation of heritage. The Noongar Settlement is far-reaching, but is it Australia's first treaty?

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<sup>256</sup> Ibid s 13.

<sup>257</sup> *Wagyl Kaip & Southern Noongar Indigenous Land Use Agreement*, signed 8 June 2015, (not yet in force) annex O preamble [F] ('*Wagyl Kaip & Southern Noongar Indigenous Land Use Agreement*').

<sup>258</sup> Ibid annex N ss 3, 4.1. This compares unfavourably to the Victorian arrangements where traditional owners may nominate a majority of members to the board: see above Part IIIA(2).

<sup>259</sup> *Wagyl Kaip & Southern Noongar Indigenous Land Use Agreement* annex N s 3.1(a)(i).

## 2 *Is the Noongar Settlement a Treaty?*

There is common agreement that the Noongar Settlement is a milestone in the history of Western Australia. In the second reading speech on the Noongar Recognition Bill, Premier Colin Barnett explained that the settlement is the ‘most comprehensive native title agreement proposed’ in Australia.<sup>260</sup> Other members of the Western Australia Parliament reiterated this. The Minister for Aboriginal Affairs, Peter Collier, remarked that the Bill ‘has greater significance than simply one element of a native title agreement and will ultimately stand alone as a historic, overdue recognition of the Noongar people’.<sup>261</sup> The Deputy Opposition Leader, Roger Cook noted that the Agreement ‘is the single most important thing this government can do’.<sup>262</sup> Certainly, as McCagh writes, the ‘scale and scope of the package offered by the [Noongar Recognition] Bill are seemingly unprecedented’.<sup>263</sup>

Scholars witnessing the negotiations and final agreement have contended that the Settlement reflects developments within native title dispute resolution. Young, for example, considers that the package ‘breaks new ground’ and reflects ‘an important maturing of native title dispute resolution’.<sup>264</sup> Likewise Morris considers that the Agreement demonstrates that native title settlements can be expanded to ‘include cultural redress, an accounting of history and formal apologies, in addition to land and financial compensation’.<sup>265</sup> Morris argues that if this process was ‘pursued wholeheartedly’ it could ‘help propel practical recognition of Indigenous languages and heritage, as has occurred in New Zealand’.<sup>266</sup> Indeed, the Noongar nation’s ‘innovative’ comprehensive settlement ‘shows some of the potential that already exist’ for structuring an appropriate relationship between the State and Indigenous peoples.<sup>267</sup>

Notwithstanding the significance of the Agreement, there has been little recognition that the Noongar Settlement may constitute the first treaty signed between Indigenous Australians and the State.<sup>268</sup> Writing generally about the process

<sup>260</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 October 2015, 7313 (Colin Barnett, Premier). See also Western Australia, *Parliamentary Debates*, Legislative Assembly, 25 November 2015, 8903 (Colin Barnett, Premier).

<sup>261</sup> Western Australia, *Parliamentary Debates*, Legislative Council, 22 March 2016, 1497 (Peter Collier).

<sup>262</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 November 2015, 8688 (Roger Cook, Deputy Opposition Leader).

<sup>263</sup> Michael McCagh, ‘Native Title in the Southwest: The Noongar Recognition Bill’ (2015) 8(18) *Indigenous Law Bulletin* 26, 26.

<sup>264</sup> Simon Young, ‘From the Bike to the Bus: the Noongar Native Title Settlement’, *The Conversation* (online), 15 July 2013 <<https://theconversation.com/from-the-bike-to-the-bus-the-noongar-native-title-settlement-15955>>.

<sup>265</sup> Shireen Morris, ‘Lessons from New Zealand: Towards a Better Working Relationship between Indigenous Peoples and the State’ (2015) 18(2) *Australian Indigenous Law Review* 67, 79–80.

<sup>266</sup> *Ibid.*

<sup>267</sup> Brennan et al, above n 215, 4–5.

<sup>268</sup> Michael Mansell suggests that it ‘has some elements of treaty making’, but does not constitute a treaty because it ‘does not include empowerment or independent long-term funding or deal with Aboriginal sovereignty’: Mansell, above n 47, 121–3. Former Minister for Aboriginal Affairs Fred Chaney considers it to be a treaty: Fred Chaney, ‘Uluru Proposals Deserve Better than a Knee-Jerk Reaction’, *The Sydney Morning Herald* (online), 7 June 2017 <<http://www.smh.com.au/comment/uluru-proposals-deserve-better-than-a-kneejerk-reaction-20170606-gw17pz.html>>.

of regional agreements, Anker suggests that this reflects the Australian Government's prioritisation of practical reconciliation, and aversion to the concept of Indigenous self-determination, and its potentially radical consequences.<sup>269</sup> Anker appears correct; Western Australian legislators have generally chosen their words carefully, and in praising the process and outcomes of the Agreement have shied away from calling it a treaty, with some expressly rejecting the comparison.<sup>270</sup> Nonetheless, some parliamentarians have been less reticent. In the same debate, Peter Tinley, a member of the shadow ministry, lauded the settlement calling it 'in effect' a treaty and arguing that 'it would be a fantastic outcome' if it could be extended to 'all Indigenous people in Western Australia'.<sup>271</sup> Deputy Opposition Leader Cook also remarked on this fact. In debate on the Noongar Recognition Bill, Cook noted:

By its very nature, the Noongar agreement is in fact a classic treaty; it is a coming together between two nations to agree upon certain things, and in doing so, finding a way forward together and recognising each other's sovereignty. By recognising each other's sovereignty, they decided how they would continue to coexist in a manner that they agreed to through negotiation. Yothu Yindi sung 'treaty now', and that is what we are doing here; this is a treaty between the government of Western Australia representing the newcomers, and the nation of the Noongar people.<sup>272</sup>

Tinley and Cook are correct. The South West Native Title Settlement does more than augur a new development of native title negotiations: the Settlement is Australia's first treaty between Indigenous peoples and the State.

First, the treaty recognises the Noongar as both traditional owners of the land and as a distinct polity, differentiated from other Western Australians. Participants involved in the negotiation explicitly connected their aims to recognition of Noongar nationhood: at the initial negotiation meeting in 2010, the Noongar lead negotiator Glen Kelly, insisted on a 'nation to nation' dialogue;<sup>273</sup> throughout the process the Noongar people identified as a nation, organised as a nation, and acted as a nation. This status was explicitly recognised by the conservative Western Australian Government. Upon notification that the Noongar people had voted to accept the Settlement, Premier Barnett issued a press release, noting that 'break-through agreement' was 'a historic achievement in reconciliation' and an 'extraordinary act of self-determination by Aboriginal people...provid[ing] them with a real opportunity for independence'.<sup>274</sup> In debates over the Recognition Bill, Deputy Opposition Leader Cook agreed, averring that the Settlement 'is the single greatest

<sup>269</sup> Kirsten Anker, *Declarations of Interdependence: A Legal Pluralistic Approach to Indigenous Rights* (Ashgate, 2014) 178.

<sup>270</sup> See, eg, Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 March 2016, 1416 (Antonio Buti).

<sup>271</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 March 2016, 1418 (Peter Tinley).

<sup>272</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 November 2015, 8688 (Roger Cook, Deputy Opposition Leader).

<sup>273</sup> Glen Kelly and Stuart Bradfield, 'Winning Native Title, or Winning Out of Native Title?' (2012) 8(2) *Indigenous Law Bulletin* 14, 15; Brennan et al, above n 215, 12–13.

<sup>274</sup> Department of Premier and Cabinet (WA), 'Noongars Vote to Accept Historic Offer' (Media Statement, 30 March 2015) <<https://www.mediastatements.wa.gov.au/Pages/Barnett/2015/03/Noongars-vote-to-accept-historic-offer.aspx>>.

act of sovereignty by the Noongar nation since settlement',<sup>275</sup> and William Johnston, MLA lauded the Bill as providing 'proper recognition of the Noongar people being not just the occupiers of the land, but the governing force of the land'.<sup>276</sup>

Second, the Settlement was agreed to via a political negotiation respectful of each party's equality of standing, evincing a commitment to secure a just relationship between Indigenous peoples and the State. In recognising the Noongar nation, the Settlement emphasises the interconnectedness and interrelationship of Indigenous and non-Indigenous Australians in South West Western Australia. Repeatedly highlighted is the idea that the Agreement is 'ultimately an investment in both the Noongar community and the shared future of the Western Australian community as a whole',<sup>277</sup> because both communities 'walk together in this journey'.<sup>278</sup> Although Noongar nationhood is achieved subject to the overriding sovereignty of the Australian State, the treaty redefines the political relationship between Noongar and the Western Australian State, and achieves a just, equitable and sustainable settlement.

The successful Agreement further emphasises the significance of negotiation outside rigid legal frameworks, as the appropriate process to resolve the political relationship between Indigenous peoples and the State. Glen Kelly and Stuart Bradfield, CEO and Manager of Negotiations of the SWALSC respectively, have explained that the Noongar believed that the *NTA* process would prove inadequate for their aspirations. They recognised that in many areas of their country, native title rights had been extinguished, and where rights may be found to exist, Australian law would recognise rights only to non-exclusive use and possession. Further, much of the extinguishment occurred prior to the enactment of the *Racial Discrimination Act 1975* (Cth), meaning that while 'a win in the courts would provide formal recognition as traditional owners ... it would provide little else'.<sup>279</sup>

Third, the settlement contains more than mere symbolic recognition. In consideration of surrendering their native title rights and interests and validating all potentially invalid acts committed on their territory, the Noongar people receive a package of benefits similar to those negotiated under Canada's modern treaty-making process. The Noongar are guaranteed a sizeable land base, non-exclusive rights to resources over an extended area, a large and sustained financial contribution from the State Government, and enhanced cultural heritage protection. Together, these elements serve two goals key to any treaty: they acknowledge the injustices of the past, and serve the Noongar people's future by strengthening culture and enhancing economic opportunities. It is true that the self-governance rights are not as extensive under the Noongar Settlement. There is no scope (at present) for a Noongar government, and the Noongar people are not entitled to pass legislation.

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<sup>275</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 November 2015, 8688 (Roger Cook, Deputy Opposition Leader).

<sup>276</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 March 2016, 1407 (William Johnston).

<sup>277</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 14 October 2015, 7313 (Colin Barnett, Premier).

<sup>278</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 18 November 2015, 8567 (David Templeman).

<sup>279</sup> Kelly and Bradfield, above n 273, 15.

However, as we noted above, these elements are not necessary to constitute a treaty; what is required is the recognition or establishment, and resourcing, of institutions and structures of culturally appropriate governance and means of decision-making and control that amount to at least a limited form of self-government. Such a relationship is consistent with art 4 of the *UNDRIP* and the arrangements found in the modern treaty-making process in Canada. In this regard, the Central Services Corporation and the six Noongar Regional Corporations will develop and implement culturally appropriate policies based on local and regional priorities. Although similar in form to Registered Native Title Bodies Corporate, their substantial funding and key position within the broader settlement highlight the more significant role they will play. These bodies formalise self-governance arrangements, and may 'pave the way' for 'robust forms of Indigenous jurisdiction'.<sup>280</sup> The bodies also serve as conduit for engagement with the State Government and third parties, granting the Noongar people a 'seat at the table' of decision-making.

The Noongar Settlement provides more than merely a seat at the table, however. As Kelly and Bradfield have explained, their goal was:

to secure recognition and cultural and customary rights over our traditional lands, and consequently, to lay a platform of self-determination. We do not seek to be restricted to a marginal set of rights on a very limited amount of land. This means political empowerment and political status that enables a much higher level of control and influence over our affairs.<sup>281</sup>

It is through the Central Services Corporation and six Regional Corporations, that the Noongar will exercise stronger, and more capable, institutions of Aboriginal governance, and, significantly, substantive decision-making and control. This control is sufficient to satisfy our third criteria. As the Agreement satisfies all three of our criteria, the South West Native Title Settlement is Australia's first treaty.

## IV Conclusion

In this article, we have explored the concepts and principles underlying negotiated agreements between Indigenous peoples and the State to understand what constitutes a treaty. A first principles assessment, and close examination of the modern treaty-making process in Canada, reveals that a treaty contains three elements. First, recognition that Indigenous peoples are polities, and so are distinctive and differentiated from other citizens within the State. Second, that settlement is achieved via a broad-ranging political agreement negotiated in good faith and in a manner respectful of each party's standing as a polity. Third, that the State recognises or establishes, and resources, structures of culturally appropriate governance with powers of decision-making and control that amount to (at least) a limited form of self-government. Treaties are not merely symbolic instruments; they entail transferring some decision-making power from the State to Indigenous polities. The extent and scope of that self-governing power will differ according to

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<sup>280</sup> Dylan Lino, 'Towards Indigenous-Settler Federalism' (2017) 28(2) *Public Law Review* 118, 131.

<sup>281</sup> Glen Kelly and Stuart Bradfield, 'Negotiating a Noongar Native Title Settlement' in Sean Brennan et al (eds), *Native Title From Mabo to Akiba: A Vehicle for Change and Empowerment?* (Federation Press, 2015) 249, 250.

context, but *some* decision-making power must be transferred. In consideration, Indigenous peoples must accept that the settlement constitutes a resolution of their claims against the State.

Assessing agreements made under and outside the *NTA* regime against these criteria indicates that the Noongar Settlement comprises the first treaty between Indigenous peoples and the State in Australia. This is a noteworthy achievement. It rectifies an absence long regarded as problematic. In 1832, for example, in the aftermath of the 'Black War', George Arthur, Governor of Van Diemen's Land, remarked that it was 'a fatal error ... that a treaty was not entered into with the natives' there. He recommended to the Colonial Office that an understanding be reached with the Indigenous peoples before a new colony was established in South Australia 'to prevent a long-continued warfare'.<sup>282</sup> With the signing of the Noongar Treaty, Australia has — at long last — finalised a treaty.

The Noongar Treaty has two important consequences for future debate. First, the Noongar Treaty demonstrates how much of the current debate is misdirected in focusing upon the idea of a national treaty. Treaty processes are underway at the state and territory level in Victoria, the Northern Territory and South Australia, and have led to the first such outcome in Western Australia. As in Canada, we can expect negotiations to occur predominately at this level. Significantly, these are moving forward despite the rhetoric emerging nationally as part of the constitutional recognition process. Second, in registering the comprehensive political agreement as six ILUAs, the Agreement evinces that treaties can be achieved in a manner consistent with Australia's existing public law system. Indeed, this can be done in a relatively straightforward way, with the key impediments being political will and successful compromise between Indigenous peoples and the State.

If the Noongar Treaty emerges as a popular and fruitful settlement, it can provide the basis for further treaties with Aboriginal and Torres Strait Islander peoples. Such negotiated treaties will mark an important break from a system that for many decades has disregarded the views of Indigenous Australians, and reinforced their feelings of powerlessness. As Glen Kelly, CEO of the SWLSC and Noongar lead negotiator, has explained, the Noongar Treaty 'will have a massive and revitalising effect on Noongar people and culture'.<sup>283</sup>

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<sup>282</sup> Letter from George Arthur to R Hay, September 1832. Stored at the Tasmanian Archive and Heritage Office, file no CO280/35.

<sup>283</sup> Diss, above n 239.



# *Taking the Human Out of the Regulation of Road Behaviour*

Chris Dent\*

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## *Abstract*

Autonomous vehicles ('AVs') are likely to pose a significant challenge to the regulation of road behaviour in the medium to long term. The extent of that challenge depends, in part, on the categorisation of the change that they represent. This article, through taking an expansive regulatory approach, argues that the replacement of the human driver, by a machine, is not as radical as it may appear. Using Black's notion of decentred regulation, the article concludes that the role of the human decision-maker is only a relatively small part of the overall system that guides behaviour on the roads. The infrastructure, the design of the cars, the associated systems around insurance and enforcement intersect to the extent that the 'human' aspect of current drivers is of lesser relevance to the regulatory efforts. This is not to say that the transition to an all-autonomous fleet will be simple; instead, the claim is that the reoriented perspective offered here provides a better context for the key difference between AVs and humans, being the processes by which decisions are made by each category of entity.

## **I Introduction**

The regulation of road behaviour is a key aspect of governance today — most citizens drive, ride, walk or are driven on the roads on a daily basis. The regulatory system's current settings are facing the significant challenge of incorporating the actions of autonomous vehicles ('AVs') — those vehicles that will not require a driver to control them.<sup>1</sup> Recent legislative developments in the area include an amending Act in South Australia covering trials of driverless vehicles,<sup>2</sup> a Texas statute that regulates the use of such vehicles<sup>3</sup> and a Californian statute that has authorised the use of vehicles without drivers, steering wheels or brake pedals on

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<sup>1</sup> How the use of AVs will be dealt with by the law is a burgeoning area of research — much of it coming out of the United States ('US'). See, eg, Dorothy F Glancy, 'Autonomous and Automated and Connected Cars — Oh My! First Generation Autonomous Cars in the Legal Ecosystem' (2015) 16(2) *Minnesota Journal of Law, Science & Technology* 619; Jeffrey R Zohn, 'When Robots Attack: How Should the Law Handle Self-Driving Cars that Cause Damages' [2015] (2) *Journal of Law, Technology and Policy* 461. Other research in the area will be referred to in the discussion below.

<sup>2</sup> *Motor Vehicles (Trials of Automotive Technologies) Amendment Act 2016* (SA), inserting *Motor Vehicles Act 1959* (SA) pt 4A.

<sup>3</sup> *An Act Related to Automated Motor Vehicles*, Tex Transportation Code Ann §§ 545.451–545.456 (2017). Prior to this legislation, Texas law was silent as to the regulation of AVs.

public roads in limited circumstances.<sup>4</sup> In terms of the development of regulations, the Australian National Transport Commission ('NTC') has recently released a set of guidelines for AV trials<sup>5</sup> and the Californian Department of Motor Vehicles is also reviewing regulations covering the deployment of such vehicles.<sup>6</sup> Finally, a Bill had been presented to the United Kingdom ('UK') Parliament covering, inter alia, the question of insurance and liability for crashes involving AVs.<sup>7</sup>

This article argues that the 'human' was on the way out of the regulatory processes well before the first AVs were used on the streets.<sup>8</sup> Through an examination of the systems that constrain the actions of drivers, it will be asserted that the system has been moving away from the assessment of individual road-users.<sup>9</sup> The theoretical framework for this analysis is Black's 'decentred regulation'<sup>10</sup> — an idea of particular value as there is no centralised regulator with responsibility for all aspects of road behaviour.

The focus of this research is on the on-road behaviour of drivers, rather than of other road users, such as cyclists and pedestrians. This is both because the future role of AVs is being discussed and because of the perception that there are more regulatory tools and processes aimed at drivers as opposed to those aimed at other road users.<sup>11</sup> The goal of this analysis is to revisit some of the obvious, and less

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<sup>4</sup> *An Act to Add and Repeal Section 38755 of the Vehicle Code, Relating to Autonomous Vehicles*, Cal Vehicle Code § 38755 (2016). For a more complete listing of the legislative efforts around AVs in US jurisdictions, see Center for Internet and Society, *Automated Driving: Legislative and Regulatory Action* (2017) <[http://cyberlaw.stanford.edu/wiki/index.php/Automated\\_Driving:\\_Legislative\\_and\\_Regulatory\\_Action](http://cyberlaw.stanford.edu/wiki/index.php/Automated_Driving:_Legislative_and_Regulatory_Action)>.

<sup>5</sup> NTC, *Guidelines for Trials of Autonomous Vehicles in Australia* (2017) <[https://www.ntc.gov.au/Media/Reports/\(00F4B0A0-55E9-17E7-BF15-D70F4725A938\).pdf](https://www.ntc.gov.au/Media/Reports/(00F4B0A0-55E9-17E7-BF15-D70F4725A938).pdf)>.

<sup>6</sup> Department of Motor Vehicles, California, *Deployment of Autonomous Vehicles for Public Operation* <<https://www.dmv.ca.gov/portal/dmv/detail/vr/autonomous/auto>>.

<sup>7</sup> Vehicle Technology and Aviation Bill 2017 (UK). The issues of liability and insurance for crashes involving AVs will be discussed below. This Bill, however, lapsed with the proroguing of Parliament before the 2017 General Election. It has yet to be reintroduced.

<sup>8</sup> Another 'human' aspect of the introduction of AVs, not considered in this article, is their social impact. This is the subject of a Parliamentary Inquiry: Standing Committee on Industry, Innovation, Science and Resources, House of Representatives, *Inquiry into the Social Issues Relating to Land-Based Driverless Vehicles in Australia* <[http://www.aph.gov.au/Parliamentary\\_Business/Committees/House/Industry\\_Innovation\\_Science\\_and\\_Resources/Driverless\\_vehicles](http://www.aph.gov.au/Parliamentary_Business/Committees/House/Industry_Innovation_Science_and_Resources/Driverless_vehicles)>.

<sup>9</sup> There is little legal academic research into road behaviour, despite its important role in society. For recent examples, see Gabrielle Appleby and Adam Webster, 'Cycling and the Law' (2016) 39(1) *University of New South Wales Law Journal* 129; Chris Dent, 'Relationships between Laws, Norms and Practices: The Case of Road Behaviour' (2012) 21(3) *Griffith Law Review* 708. There is also little by way of commentary on road law. The few in Australia include state-based texts for NSW, eg, Nic Angelov, *Traffic Law NSW* (Thomson Reuters, 17<sup>th</sup> ed, 2017); for Western Australia ('WA'): Patrick Mugliston, Stuart Ainsworth and Hal Gibson Pateshall Colebatch, *Traffic Law in Western Australia* (LexisNexis Butterworths, 2007); and for Victoria: Michael J Lombard, John Marquis and Warwick Walsh-Buckley, *Motor and Traffic Law Victoria 2012* (LexisNexis Butterworths, 2012). It is not clear that all states and territories have an equivalent text.

<sup>10</sup> See, eg, Julia Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54(1) *Current Legal Problems* 103.

<sup>11</sup> It should also be noted that, with the high-level theoretical approach to the issue, the analysis will be founded on the regulation of AVs in the abstract, and not on the more practical issue of how the regime could engage with both AVs and human drivers sharing the roads. For more practical engagements, see, eg, Kieran Tranter, 'The Challenges of Autonomous Motor Vehicles for

obvious, aspects of the regulation of road behaviour in order to gain a broader perspective on that regulation. More specifically, the focus of the analysis is the manner in which the regulation impacts on the decision-making processes of drivers.<sup>12</sup> Given the shift away from the importance of human decisions in this area, the greater use of AVs may not be as revolutionary as currently feared.<sup>13</sup>

## II Regulation of Road Behaviour and Decentred Regulation

In terms of a definition, the regulation of road behaviour covers any process that impacts on the actions of a driver when driving a car. Those processes may be a part of the law, they may be a function of the vehicle itself (some aspects of which are also governed by law) or they may be part of the road infrastructure. This Part of the article discusses the wide conception of regulation within the theory of decentred regulation.

### A Decentred Regulation

In general terms, a regulatory regime may be understood to comprise ‘standard-setting, monitoring compliance with the standards, and enforcement of the standards.’<sup>14</sup> More traditional definitions include the ‘promulgation of an authoritative set of rules, accompanied by some mechanism, typically a public agency, for monitoring and promoting compliance with these rules’ and regulation ‘takes in all the efforts of state agencies to steer the economy’.<sup>15</sup> This assumption of a ‘public agency’ is why many of the regulatory frameworks developed in the past have been aimed at firms or industry sectors with defined roles and responsibilities. That is, regulatory efforts have involved regulatory organisations active in the monitoring of compliance with standards set either by the State or by the State in consultation with the targeted industry sector.<sup>16</sup> There is no single, centralised, organisation active in the regulation of road behaviour. Despite this, there are aspects of this (limited) understanding of the regulation of road behaviour that render it amenable to analysis through the use of the theory, those aspects being the setting of standards, the enforcement of the standards (through civil compensation and

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Queensland Road and Criminal Laws’ (2016) 16(2) *Queensland University of Technology Law Review* 59.

<sup>12</sup> As the focus is on the decision-making that occurs on the road, there will be no engagement with manner in which information about road use may be used by those away from the road, ie privacy concerns around AVs. For a discussion of the intersection of privacy and tort liability in this area, see Jack Boeglin, ‘The Costs of Self-Driving Cars: Reconciling Freedom and Privacy with Tort Liability in Autonomous Vehicle Regulation’ (2015) 17(1) *Yale Journal of Law and Technology* 171.

<sup>13</sup> Levy also considers that AVs do not pose a significant regulatory problem. His reasoning, however, is different to that presented here (and is US-based): Jeremy Levy, ‘No Need to Reinvent the Wheel: Why Existing Liability Law Does Not Need to be Pre-emptively Altered to Cope with the Debut of the Driverless Car’ (2016) 9(2) *Journal of Business, Entrepreneurship and the Law* 355.

<sup>14</sup> Hilary Charlesworth and Christine Chinkin, ‘Regulatory Frameworks in International Law’ in Christine Parker et al (eds), *Regulating Law* (Oxford University Press, 2004) 246, 246.

<sup>15</sup> Robert Baldwin, Colin Scott and Christopher Hood, ‘Introduction’ in Robert Baldwin, Colin Scott and Christopher Hood (eds), *A Reader on Regulation* (Oxford University Press, 1998) 1, 3.

<sup>16</sup> An obvious example is the WorkCover Authority, which has regulatory responsibilities in the area of occupational health and safety.

criminal penalties) and its role in maintaining the efficacy of the road transport network — a key sector of the economy.

Black's decentred understanding of regulation is broad and rests on an understanding of regulation as being wider than government regulation.<sup>17</sup> Regulation is seen as the 'intentional activity of attempting to control, order or influence the behaviour of others'.<sup>18</sup> This understanding can, therefore, focus on the importance of social and cultural factors.<sup>19</sup> The emphasis in this analysis, however, is on the legal framework, broadly understood, that encapsulates the control of driver behaviour, along with the norms that have developed around the framework.

One particular value of the notion of decentred regulation is the recognition that regulation does not always operate from the top down, or from key industry bodies across; that is, regulation may be better understood to be much more widely spread through the community.<sup>20</sup> According to Black, there are five aspects of the 'decentred understanding' of regulation; these are: 'complexity, fragmentation, interdependencies, ungovernability, and the rejection of a clear distinction between public and private'.<sup>21</sup> The focus, then, is on the non-rigid relationships between the parties involved in the operation of the regulatory system. As such, decentred regulation may be evidenced by a 'greater reliance on markets and less faith in both judicial elaboration of private law and control mechanisms involving regulators'.<sup>22</sup> This, again, reflects a shift away from 'command and control' modes of governance and acknowledges the role that individual parties may have in the protection of their own interests. Each of the five aspects of Black's theory will be considered in light of the regulation of road behaviour.

## B Fragmentation

It makes sense, given that it is what road users are used to, that the regulation of road behaviour is fragmented. At the highest level of analysis, there are: the vehicle standards that govern the construction of cars; the road rules themselves that relate to on-road decisions by drivers and the processes to enforce them; the informal set of norms that also impact on decisions; the systems in place to compensate for any

<sup>17</sup> Haines, for example, argued that regulatory theory 'had a rather restricted focus' and was limited to the analysis of the 'relations between individual regulators and organisations': Fiona Haines, *Corporate Regulation: Beyond 'Punish or Persuade'* (Clarendon Press, 1997) 15.

<sup>18</sup> Christine Parker et al, 'Introduction' in Christine Parker et al (eds), *Regulating Law* (Oxford University Press, 2004) 1, 1, quoting Julia Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1, 25.

<sup>19</sup> In this area, see, eg, John Urry's notion of 'automobility': John Urry, 'The "System" of Automobility' (2004) 21(4–5) *Theory, Culture & Society* 25.

<sup>20</sup> Put another way, regulatory theory has, in the past, focused on decisions made by one party over actions of another — where the first party is not the locus of harm.

<sup>21</sup> Black, above n 18, 4. For applications of this idea to the law, see Chris Dent, 'Compensation and/or Correcting the Record: A Framework for the Regulation of (Defamatory) Speech' (2011) 16 *Media and Arts Law Review* 123; Chris Dent, 'Copyright as (Decentred) Regulation: Digital Piracy as a Case Study' (2009) 35(2) *Monash University Law Review* 348.

<sup>22</sup> Hugh Collins, 'Regulating Contract Law' in Christine Parker et al (eds), *Regulating Law* (Oxford University Press, 2004) 13, 29.

damage resulting from on-road decisions; and the sets of knowledge that delimit the road infrastructure. Each of these will be highlighted briefly.

## 1 *Vehicle Standards*

It seems trite to say that cars, these days, are more technologically developed than those of even 20 years ago. Design standards, or more properly the *Australian Design Rules* ('*ADRs*'),<sup>23</sup> do not directly impact on the decisions drivers make on the roads.<sup>24</sup> As noted by the NTC, the *ADRs* are 'generally performance based and cover issues such as vehicle structure, lighting, noise, engine exhaust emissions, anti-theft controls and braking. One of the purposes of the *ADRs* is to make road vehicles safe to use.'<sup>25</sup> It is this focus on safety that ties the *ADRs* to driver behaviour.

There is little value in describing, in detail, all the *ADRs* that are relevant to vehicles — though they cover most aspects of a vehicle's construction.<sup>26</sup> The point here is to highlight their role in mandating performance criteria for vehicles in order for them to be sold in Australia. Under the *Australian Consumer Law*, a 'person must not, in trade or commerce, supply consumer goods of a particular kind if: (a) a safety standard for consumer goods of that kind is in force; and (b) those goods do not comply with the standard'.<sup>27</sup> Section 41 of *Motor Vehicle Standards Act 1989* (Cth) defines the national standard under the *ADRs* to be the safety standard for the purposes of the *Australian Consumer Law*. As such, the *ADRs* impact on the liability of sellers of vehicles and, potentially, on that of drivers who knowingly use a vehicle that does not meet the *ADRs*.<sup>28</sup> Though the *ADRs* may not have a direct impact on road behaviour, the constraints that they place on the vehicles mean that bad human decisions made while driving a vehicle do not have the same consequences as they may have had with earlier designs. Further, the standardisation of vehicles through the *ADRs* means that the decisions available to drivers also become standardised, and therefore more predictable, when dealing with the vehicle's features.

<sup>23</sup> These design standards are in addition to any state-based regulations that relate to the roadworthiness of vehicle — see, eg, the regulations discussed in Mugliston, Ainsworth and Colebatch, above n 9, 155–78.

<sup>24</sup> The *ADRs* are administered under the *Motor Vehicle Standards Act 1989* (Cth).

<sup>25</sup> NTC, 'Regulatory Options for Automated Vehicles' (Discussion Paper, NTC, May 2016) 81.

<sup>26</sup> The *ADRs* themselves are very detailed. The first vehicle *ADR* covers reversing lamps. The Rule stipulates, inter alia, the minimum intensity of light along the axis of reference (80 candelas), the maximum intensity of light in directions in or above the horizontal plane (300 candelas) and below the horizontal plane (600 candelas), and the 'trichromatic coordinates' of the white light to be emitted: Minister for Local Government, Territories and Roads (Cth), *Vehicle Standard (Australian Design Rule 1/00 — Reversing Lamps)*, 21 November 2005.

<sup>27</sup> *Competition and Consumer Act 2010* (Cth) sch 2 s 106(1).

<sup>28</sup> On a related note, the technology in cars, particularly the use of on-board computers, means that the maintenance of vehicles is now increasingly out of the reach of most vehicle owners. The skills needed are such that a thorough knowledge of an internal combustion engine is no longer sufficient to fully service a vehicle. The technology, and the *ADRs*, also may impact on the capacity of individuals to modify vehicles legally. Also, the use of software means that intellectual property law may be an issue. In the US, at least, there is an exemption to the *Digital Millennium Copyright Act*, 17 USC §1201(a) (1998) that allows consumers to bypass the technological protection mechanisms on their vehicles' electronic control units for the purposes of 'diagnosis, repair, or modification': *Exemptions to Prohibition Against Circumvention*, 37 CFR §201.40(b)(6) (2015).

## 2 Road Rules and their Enforcement

The rules that govern driving are themselves clear examples of fragmentation in that the legislation over driver behaviour is a matter of state, rather than Commonwealth, law. This is a function of Australia's constitutional arrangements, rather than an artefact of the regulatory processes. A significant amount of standardisation has taken place over the past couple of decades, notably with the drafting of the *Australian Road Rules*.<sup>29</sup> There remain notable exceptions, such as the 'hook-turns' allowable under the Victorian Rules.<sup>30</sup>

In terms of enforcement of the road rules, one of the most visible aspects is the role of the police. Traffic officers can be seen to perform a 'symbolic justice' role in that they show the 'public that a regime of law exists'.<sup>31</sup> Their visibility may not be that high. To take Victoria as an example, there were 13 529 police officers in that state as of 30 June 2017.<sup>32</sup> That said, there were 53 500 lane kilometres of road pavement at the same time,<sup>33</sup> and Victoria had a population of 6.3 million in June 2017.<sup>34</sup> Of course, not all Victorians were drivers at that time; however, not all police officers are active in enforcing the road rules. As such, while the police are a visible form of regulation; they may not be *that* visible; and, therefore, their impact on the regulation of drivers may be reduced.

Of increasing importance is the use of automated systems for detecting infringements of the road rules.<sup>35</sup> Examples of these include speed cameras (including point-to-point cameras)<sup>36</sup> and red-light cameras.<sup>37</sup> These rely on technology – including lasers, induction loops and visual recognition software – in order to catch drivers who transgress the rules. Currently, there are almost 300 fixed cameras in Victoria and a small number of point-to-point cameras.<sup>38</sup> The number of mobile cameras is not, however, publicly available. The point here is that the

<sup>29</sup> The *Australian Road Rules* were first approved in 1999 by the former Australian Transport Council (now the Transport and Infrastructure Council). The specific road rules of each state and territory are now based on the *Australian Road Rules*: see, eg, *Road Safety Road Rules 2017* (Vic) and *Road Traffic Code 2000* (WA). The *Australian Road Rules* are reviewed regularly by the NTC: see, eg, NTC, *Review of the Australian Road Rules and Vehicle Standards Rules* (Report, NTC, May 2013). Consultation on the 12<sup>th</sup> amendment to the Rules took place in 2017: NTC, *The Australia Road Rules* <<https://www.ntc.gov.au/roads/rules-compliance/the-australian-road-rules/>>

<sup>30</sup> *Road Safety Road Rules 2017* (Vic) reg 34.

<sup>31</sup> David H Bayley, *Police for the Future* (Oxford University Press, 1996) 34.

<sup>32</sup> Victoria Police, 'Annual Report 2016–17' (Annual Report, Victoria Police, 2017) 7.

<sup>33</sup> VicRoads, 'Annual Report 2016–17' (Annual Report, Vic Roads, August 2017) 33.

<sup>34</sup> Australian Bureau of Statistics, *3101.0 — Australian Demographic Statistics, Mar 2016* (14 December 2016) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/3101.0>>.

<sup>35</sup> O'Malley expands on role of technology in the enforcement of road behaviour: Pat O'Malley, 'Simulated Justice: Risk, Money and Telemetric Policing' (2010) 50(5) *British Journal of Criminology* 795.

<sup>36</sup> Point-to-point cameras measure the average speed of a vehicle over a set distance, rather than measuring the speed of a vehicle at a specific point in time.

<sup>37</sup> For a thorough risk-based analysis of the use of, and attitudes towards, these devices, see Helen Wells, *The Fast and the Furious: Drivers, Speed Cameras and Control in Risk Society* (Ashgate, 2012).

<sup>38</sup> Victorian State Government, *Camera Locations* (20 December 2017) *Cameras Save Lives* <<https://www.camerassavelives.vic.gov.au/camera-locations>>.

technology captures a higher number of offences than a purely human police force could, the accuracy of the records is likely to be better and there is no discretion, at the point of recording, with respect to the issuing of an infringement. This has the dual effect of taking the human out of enforcement and of reinforcing the reach of enforcement efforts in the minds of the drivers.<sup>39</sup>

In terms of the processes of prosecution, the vast majority of infringements are settled without the offender appearing in court. Again, using Victorian statistics as an example, there an election to go to court for only 2.07% of the infringements issued for the three years 2012–3 to 2014–5.<sup>40</sup> A further 4.3% of infringements are withdrawn<sup>41</sup> — presumably many or most after a challenge from the alleged offender — meaning that almost 94% of infringements are paid without question and without engaging with the judicial system. The ease of payment, similar to the online payment of utility bills, may mean that infringements are seen as an acceptable cost of living, rather than a (shaming) punishment for a wrong.<sup>42</sup>

### 3 Norms

The third aspect of driver regulation relates to the norms that are internalised by drivers. In terms of what is meant by ‘norms’, the definition to be used here is that a norm is the ‘common measure’ of behaviour within a group.<sup>43</sup> This means both that norms are tacitly accepted by the members of that group and that they are a standard — a ‘measure’ — against which the actual behaviour of individuals may be judged.<sup>44</sup> A key technical aspect of the term ‘norm’ is the implicit reference to the ‘bell curve’ — in this case, a distribution of actions or practices around a median standard.<sup>45</sup> Some individuals, therefore, will exceed the standard, whereas others will not quite meet it. Importantly, norms focus on actual behaviours and not on any prescribed rules.<sup>46</sup>

<sup>39</sup> There is also evidence to suggest that red-light cameras impact on driver behaviour: J R R Mackenzie, C N Kloeden and T P Hutchinson, ‘Analysis of Infringement Data from Fixed Red Light and Speed Cameras at Signalised Intersections in South Australia’ (Report, No CASR071, Centre for Automotive Safety Research, June 2012).

<sup>40</sup> These figures combine traffic infringements and infringements for excessive speed, drink and drug driving: Infringement Management and Enforcement Services, ‘Annual Report on the Infringements System’ (Report, No CD/15/525277, Department of Justice and Regulation (Vic), January 2016) 9.

<sup>41</sup> Ibid.

<sup>42</sup> The fact that there was an annual average of over 3.1 million infringements over the three years, coupled with the fact that only a limited number of infringements can be compiled before a licence is lost, suggests that a significant proportion of the population of road-users infringe each year.

<sup>43</sup> François Ewald, ‘Justice, Equality, Judgment: On “Social Justice”’ in Gunther Teubner (ed), *Juridification of Social Spheres* (Walter de Gruyter, 1987) 91, 108 (emphasis altered).

<sup>44</sup> For a very useful discussion of the distinction between a norm that is ‘immanent to’ a social group and a rule or principle imposed from outside the group, see Ben Golder and Peter Fitzpatrick, *Foucault’s Law* (Routledge, 2009) 43 n 43.

<sup>45</sup> For a discussion of this, see Mary Beth Mader, ‘Foucault and Social Measure’ (2007) 17(1) *Journal of French Philosophy* 1.

<sup>46</sup> It may be noted that public service announcements in the media — such as the slogan ‘if you drink and drive, you’re a bloody idiot’ — focus on messages aimed at reminding (or teaching) road users of the *standard* of behaviour expected when they use the road and all are based on the rules as promulgated by the Parliament.

Many norms are not adopted by an individual as the result of specific instruction. They are, nonetheless, standards of behaviour that road users are expected to abide by (though it is other road users and not the police that have such expectations). Some of these relate to behaviour that may be seen as ‘common courtesy’, such as letting a driver on a side street into traffic when stopped at a set of traffic lights. Instead of formal instruction, these norms are adopted as a result of two processes — observing the behaviour of others and listening to the standards expressed by friends and family who accompany the user in her, or his, travels. A number of groups of people may be seen to be the source of normative practices. Practices may, in particular, be learnt from ‘peers’ — whether they be the group of friends who accompany an inexperienced driver as she or he gets used to the idea of having a licence, or the other road users who use the road at the same time the individual does. Both sets of peers exhibit practices that an individual will take on board as the ‘right’ way to put abstract norms into practice.<sup>47</sup>

#### 4 Compensation

The regulation of road behaviour can be extended to include those processes that are available to seek redress for any harm suffered as a result of a breach of the rules. In Australia, there are two key processes here: insurance and litigation. There are also two types of insurance: compulsory, for personal injury; and voluntary, for property damage. For the purposes of this analysis, these compensation schemes are considered part of the regulation of road behaviour because the potential for significant financial consequences for breaching the road rules could be a key way of limiting breaches of the road rules.

In terms of litigation, an injured person could sue a driver where the harm suffered was allegedly the result of negligence. The standard tests for that cause of action apply — there needs to be a duty of care, a breach of the relevant standard of care attached to that duty and not-too-remote harm that was caused by the breach.<sup>48</sup> In most cases, the existence of a duty between one road user and another will not be an issue; neither will the issue of causation of any physical damage. Unsurprisingly, key High Court of Australia judgments in the area relate to the standard of care owed — for example, *Imbree v McNeilly*<sup>49</sup> and the earlier judgment that it overruled, *Cook v Cook*.<sup>50</sup> If the plaintiff can show that the defendant breached the requisite standard of care, then the plaintiff may receive compensation for their injuries.

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<sup>47</sup> Such informal norms are subject to sanction, as are the formal road rules. The negative consequences for breaching a norm are usually limited to expressions of disapproval — perhaps ridicule if voiced by a peer inside a vehicle or a honk of a horn from other road users. In some cases, however, physical assault, commonly referred to as ‘road rage’, may be the result of a failure to meet the norms of road behaviour. While these sanctions are not as systematic as the state-instituted penalties, they are, nonetheless, perceived to be unpleasant and to be avoided by road users.

<sup>48</sup> The standard tests for negligence apply. These tests are, to a significant extent, delimited by the uniform State Civil Liability Acts (for example, *Civil Liability Act 2002* (NSW)). Aspects of these tests will be discussed further below.

<sup>49</sup> (2008) 236 CLR 510.

<sup>50</sup> (1986) 162 CLR 376.



Pursuing litigation, however, is an expensive and risky option. Insurance may reduce the need for an injured party to seek legal redress by themselves. With respect to insurance, many drivers take out (voluntary) insurance to cover any property damage that results from their driving.<sup>51</sup> There are different levels of insurance aimed at managing the financial risks that attach to driving.<sup>52</sup> These range from a simple ‘third party damage’ policy through to a ‘comprehensive’ policy. If a policy is taken out, then drivers may not have to find a substantial amount of money to compensate anyone who suffered property damage as a result of their driving; instead, the driver pays a regular premium as well as an excess at the time of a claim. This may be seen to reduce the negative financial consequences associated with bad driving. Many insurance companies, however, charge higher premiums to drivers who make more claims.<sup>53</sup> This retains some degree of fiscal pain for driving that may result in a claim.

Further, all the Australian states and territories have compulsory third party (‘CTP’) schemes that provide compensation for personal injuries that result from car crashes.<sup>54</sup> The purpose of the schemes is to indemnify drivers (and vehicle owners) for any personal injury for which they may be liable. Some schemes operate on a ‘no-fault’ basis;<sup>55</sup> whereas others require the claimant to establish that a driver or owner of a vehicle was at least partially at fault.<sup>56</sup> Where compensation is available through a scheme, the defendant may not be liable for the potentially very high damages awards that arise in motor vehicle claims (in terms of loss of earnings, rehabilitation expenses and modifications to homes to accommodate a disability that arose from the crash).<sup>57</sup> Premiums are included in the vehicle registration fees levied by each state and territory jurisdiction and, therefore, the expense of the insurance to the driver does not act as a constraint on road behaviour.

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<sup>51</sup> It is not clear how many drivers choose not to take out insurance. The national industry body, Insurance Statistics Australia Ltd, does not list it as a statistic that it collects: Insurance Statistics Australia Ltd, *Frequently Asked Questions* (2016) <<http://www.insurancestats.com.au/frequently-asked-questions>>. In WA (as an example), the Department of Transport has been quoted as saying that it ‘did not collect data relating to uninsured vehicles being driven on public roads’: Angela Pownall, ‘Call to Protect Drivers in “Uninsured” Mishaps’, *The West Australian* (online), 9 July 2016 <<https://thewest.com.au/news/australia/call-to-protect-drivers-in-uninsured-mishaps-ng-ya-112030?r=1>>.

<sup>52</sup> Some losses that are covered do not relate, directly, to driver behaviour, such as those policies that cover the theft of a vehicle.

<sup>53</sup> They also charge higher premiums for groups of drivers who they see to pose a higher risk on the road, such as inexperienced drivers.

<sup>54</sup> See, eg, *Motor Accidents Compensation Act 1999* (NSW); *Motor Accident Insurance Act 1994* (Qld); *Motor Vehicles Act 1959* (SA).

<sup>55</sup> For example, the Victorian system as operated by the Transport Accident Commission under the *Transport Accident Act 1986* (Vic).

<sup>56</sup> For example, the system in WA, as operated by the Insurance Commission of Western Australia (‘WA Insurance Commission’) under the *Motor Vehicle (Third Party Insurance) Act 1943* (WA). As of July 2016, where the claimant has suffered a ‘catastrophic injury’, there is no need for that claimant to establish that any driver or owner was at fault. More specifically, there is no need to show fault in order for an injured person to be eligible to participate in the scheme: *Motor Vehicle (Catastrophic Injuries) Act 2016* (WA) s 8.

<sup>57</sup> It may be noted that, under some schemes, the scheme prevents the claimant also bringing an action for negligence against the driver: see, eg, *Motor Accidents (Compensation) Act 1979* (NT) s 5.

Key points to be made about insurance are that, first, for the no-fault CTP schemes, the mental processes of the driver involved does not have to be in issue. Second, the dispute is (usually) settled without the input of the driver who caused the damage. For personal injury, the injured party makes a claim against the insurer. For property damage, it is often the insurance company of the property owner that negotiates with the driver's insurance company. In other words, the driver caused the harm, but may have a limited role in the compensation process – though, perhaps, the more serious the damage caused, the more likely the driver will be charged with a driving offence that will require a court appearance.

## 5 Road Infrastructure

Road design is also a key process by which crashes are minimised — one of the goals of the regulatory system. Two obvious examples of safety-oriented design include the use of bitumen as a road surface<sup>58</sup> (as opposed to, for example, gravel) and the adoption of barriers between opposing lanes of freeway traffic. These features, admittedly, may make drivers feel more comfortable when speeding by removing risks from the environment (on the basis that bitumen is a more consistent surface and barriers minimise inadvertent head-on collisions). The number of lanes of a road may also impact on congestion levels and the potential speed of drivers on it. Lanes both increase choice (which lane should a driver be in for a future road change), thereby taking up mental 'space',<sup>59</sup> and decrease choice (channelling vehicles in established lanes is clearer than having a road of the same width without marked lanes). However, adequate signage reduces stress, as does the greater traffic flow (in many cases) of multi-lane roads.

Other aspects of road design also impact on the decision-making of drivers. Traffic lights, for example, reduce the need for drivers to assess the behaviour of other vehicles when negotiating an intersection and roundabouts mean that drivers have to consider other road users coming from only one direction. Both types of design contribute to the road environment playing a significant role in guiding the actions of drivers. In other words, while infrastructure design is often considered in terms of safety and the minimisations of collisions,<sup>60</sup> it may also be usefully seen in terms of its impact on driver decision-making.

An associated aspect of design is the designation of speed limits — both the legal maximum speed limit on most roads and the recommended speed limits that

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<sup>58</sup> For a discussion of the impact of the road surface on crashes, see Peter Cairney and Paul Bennett, 'An Exploratory Study of Surface Characteristics and Crash Occurrence on Selected Roads in Australia' (Report, No ARR 382, ARRB Group Ltd, May 2013).

<sup>59</sup> This is sometimes referred to as 'mental workload': see, eg, Nina Schaap et al, 'The Relationship between Driver Distraction and Mental Workload' in Michael A Regan, John D Lee and Trent W Victor (eds), *Driver Distraction and Inattention: Advances in Research and Countermeasures* (Ashgate, 2013) 63.

<sup>60</sup> As almost random examples, see Benoît Flahaut, 'Impact of Infrastructure and Local Environment on Road Unsafty: Logistic Modeling with Spatial Autocorrelation' (2004) 36(6) *Accident Analysis and Prevention* 1055; Robert B Noland, 'Traffic Fatalities and Injuries: The Effect of Changes in Infrastructure and Other Trends' (2003) 35(4) *Accident Analysis and Prevention* 599.

may feature on some bends in the road.<sup>61</sup> Speed limits are, of course, a key site of prosecution of drivers and a key point of disagreement between drivers and ‘the law’.<sup>62</sup> This disagreement is discussed in terms of the ‘credibility’ of speed limits — where ‘credibility means that drivers consider a speed limit as logical or appropriate in the light of the characteristics of the road and its immediate surroundings’.<sup>63</sup> This means that where a driver does not find a posted speed limit to be credible, they may choose to ignore it.

## C Complexity

At one level, the fragmentation of the regulation of road behaviour, described above, is a clear example of the complexity of the regulation. Within each fragment there is additional complexity. There are, for example, over 400 regulations in the *Road Safety Road Rules 2017* (Vic); these are in addition to the more than 480 sections in the *Road Safety Act 1986* (Vic). Not all of these provisions cover the use of a car on the road; however, a sufficient number of them do such that navigating the law can be a complex process. The complexity of insurance policies of all types needs no emphasis for any of those who have taken the time to read one.

If the automated enforcement processes are considered, there is complexity in their maintenance and continued use as evidence-providing instruments. In order for the evidence of speed cameras to be used for prosecutions, the devices have to be checked. There is a specific set of rules around the frequency, and requirements, of these calibration checks. More specifically, in order for the data from a speed camera to be used in a prosecution in NSW, certification may be produced to prove that the device had been checked.<sup>64</sup> The Regulation tied to that provision sets out the Australian Standard with which the device should comply<sup>65</sup> and the prescribed period for the testing of the speed measurement device (every 12 months).<sup>66</sup> That regulation also sets out specific security indicators that are required to have photographs, taken by the cameras, used as evidence (for example, a series of 48 characters of which 32 characters have been produced by an MD5 algorithm or a series of 128 characters produced by a SHA-512 algorithm).<sup>67</sup> A failure to comply

<sup>61</sup> The setting of speed limits will be highlighted below.

<sup>62</sup> The Northern Territory trial of an ‘open’ speed limit provided the opportunity for community discussion on the issue. Many commentators were of the opinion that, as long as the individual driver thought it safe, then a speed limit higher than 110km/h would be safe. See, eg, the comments attached to Ian J Faulks, ‘Goodbye Speed Limits: The NT’s Risky Road Safety Strategy’, *The Conversation* (online), 17 October 2013 <<https://theconversation.com/goodbye-speed-limits-the-nts-risky-road-safety-strategy-19241>>.

<sup>63</sup> Charles Goldenbeld and Ingrid van Schagen, ‘The Credibility of Speed Limits on 80 Km/h Rural Roads: The Effects of Road and Person(ality) Characteristics’ (2007) 39(6) *Accident Analysis and Prevention* 1121, 1121.

<sup>64</sup> *Road Transport Act 2013* (NSW) s 137.

<sup>65</sup> *Road Transport (General) Regulation 2013* (NSW) reg 35(1)(a) ties the standard to Standards Australia, *Radar Speed Detection: Part 1: Functional Requirements and Definitions*, AS 2898.1—2003, 11 August 2003.

<sup>66</sup> *Road Transport (General) Regulation 2013* (NSW) reg 35(1)(b)–(c).

<sup>67</sup> *Ibid* reg 35(2). It may be noted that the cameras have to be tested every 30 days. The certification of these cameras is regulated under *Road Transport Act 2013* (NSW) s 138.

with these requirements would render a prosecution unsuccessful, if based on that data alone.

There is also complexity associated with *ADRs*. As noted above, the *Motor Vehicle Standards Act 1989* (Cth) has a role in the setting, and maintenance, of the standards for road vehicles and vehicle components in Australia. The Act establishes the process by which standards are determined (by the Minister,<sup>68</sup> who may consult with specified organisations prior to the determination<sup>69</sup>). The Act also allows for the testing and inspection of vehicles and components, the inspection of facilities for such testing, the inspection of the manufacturing process and the examination of documents relating to testing or manufacture of vehicles and components.<sup>70</sup> Certain powers are given to inspectors,<sup>71</sup> including entering premises without consent,<sup>72</sup> in order to ensure compliance with the Act.<sup>73</sup> There are also specified penalties for rendering a vehicle non-standard<sup>74</sup> and for supplying a nonstandard new vehicle to the market.<sup>75</sup>

As a final example, the allocation of speed limits is a complex process. The Organisation for Economic Co-operation and Development ('OECD') has noted that speed management policy must be based on an evaluation of what are the appropriate speeds on these different parts of the road network. The appropriate speed for a section of road is set taking into account safety, mobility and environmental considerations and the impact of the chosen speed on the quality of life for the people living alongside the road. Appropriate speed differs from one type of road to another and recognises the different weight to be given to the various elements on the different parts of the road network.<sup>76</sup>

The setting of a speed limit for a given stretch of road, therefore, requires the input of significant data and specialised knowledge. The multiple data sets, and the multiple bodies of specialised knowledge, that inform the regulation of road behaviour reinforce the complexity of the processes.

## D *Interdependency*

Turning to the third aspect of decentred regulation, the various fragments of the regulation of road behaviour do not operate in isolation. It is the multifaceted nature of the regulation that shows, in part, its interdependency. The assessment of the OECD around speed limits, for example, highlights the, at times competing, goals

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<sup>68</sup> *Motor Vehicle Standards Act 1989* (Cth) s 7.

<sup>69</sup> *Ibid* s 8.

<sup>70</sup> *Ibid* s 9.

<sup>71</sup> *Ibid* s 27.

<sup>72</sup> *Ibid* s 28. Such entry is only possible if a Magistrate is satisfied that the entry is 'reasonably necessary' for the inspector to assess compliance with the statutory requirements and issues a warrant.

<sup>73</sup> There is also a penalty for failing to answer the questions of, or produce documents for, an inspector without a 'reasonable excuse': *ibid* s 32.

<sup>74</sup> *Ibid* s 13A.

<sup>75</sup> *Ibid* s 14.

<sup>76</sup> Transport Research Centre, 'Speed Management' (Report, Organisation for Economic Cooperation and Development and European Conference of Ministers of Transport, 2006) 86.

for the regulation of road behaviour. The reference to ‘appropriate speed’ takes account of ‘safety’ and ‘mobility’. These accord with two of the goals discussed elsewhere: ‘efficient transit ... the avoidance of harm’ and the self-regulation of road users.<sup>77</sup> Further, the competing regulatory goals mean that different regulatory processes contribute to each of the goals in different ways. For example, improving the safety of cars through changing the *ADRs* may mean that drivers feel safer and, as a result, may drive more recklessly. More ambiguously, cruise control, while reducing the chance that drivers will speed, may mean that the driver concentrates less on the driving process.<sup>78</sup> This impacts on the goal of the self-regulation of drivers, which is not necessarily a bad thing.<sup>79</sup> However, there is value in pointing out this effect. More generally, maximising the safety of the system, for example, through a very low maximum speed limit would be directly counter to the goal of efficient transit. In addition, maximising self-regulation through the reduction of penalties may decrease both safety and efficiency — though removing self-regulation through only allowing professional drivers on the road would also negatively impact efficiency.

In terms of a more specific example of interdependency, the norms associated with road behaviour may often depend on the road rules. Although anecdotal, it seems that, in many jurisdictions, the norm is for drivers to drive at up to 5 km/h above the posted speed limit rather than sticking to the limit, or for drivers not to stop at yellow traffic lights even when it is safe to do so (but, much less often, going through a red). These behaviours become, through widespread acceptance, the standard against which all drivers are judged. They are related to the road rules, but are not identical to the relevant provisions in the rules.

One legal feature that ties together many of the interdependent aspects of regulation is the contract in that these legally enforceable agreements define the interdependencies. Collins has noted that a decentred approach to regulation places a ‘new burden on the law of contracts’.<sup>80</sup> To take some examples of key contracts in the area, voluntary insurance cover is bought via contracts, with indemnities being included to cover certain actions of the driver.<sup>81</sup> Contracts, in the area of the

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<sup>77</sup> Dent, above n 9, 712.

<sup>78</sup> As another example, parking assist technology for parallel parking may have reduced the risks of minor crashes while also reducing the skill-set of drivers. Earlier technologies, such as automatic gearboxes, also reduced the need for drivers to think about the appropriate gear for the desired driving performance.

<sup>79</sup> It can be justified on the basis that either human decision-making is constrained by time limits and so removing small decisions frees up time for other decisions; or that human decision-making is based on heuristics and, as the heuristics may be wrong, taking decisions away from the human reduces the risk of bad decisions. See generally Gerd Gigerenzer and Daniel G Goldstein, ‘Reasoning the Fast and Frugal Way: Models of Bounded Rationality’ in Terry Connolly, Hal R Arkes and Kenneth R Hammond (eds), *Judgment and Decision Making: An Interdisciplinary Reader* (Cambridge University Press, 2<sup>nd</sup> ed, 2000) 621; Gerd Gigerenzer, ‘Fast and Frugal Heuristics: The Tools of Bounded Rationality’ in Derek J Koehler and Nigel Harvey (eds), *Blackwell Handbook of Judgment and Decision Making* (Blackwell Publishing, 2004) 62.

<sup>80</sup> Collins, above n 22, 29.

<sup>81</sup> With respect to CTP insurance, some jurisdictions allow consumers to enter into a contract for that insurance from their choice of provider. In the Australian Capital Territory (‘ACT’), for example, CTP insurance may be purchased from ‘licensed insurers’. More specifically, it is an offence to issue a CTP

enforcement of the road rules, also allow the payment of fines without attending court or involving the police officer/radar camera.<sup>82</sup> In addition, there are, of course, the contracts that arrange for the payment of the personnel — these tie together the individuals and the regulating entities.<sup>83</sup> Further, the provision of any expert advice, with respect to road and vehicle design, would also be governed by contracts; as would the supply of car parts to manufacturers — likely with specific requirements relating to any standards to which the parts are subject. In short, regulation in this area is delimited by contracts. As a result, while the system appears chaotic, each individual actor within it is bound to other actors. The contracts, then, may be seen to affirm the interdependency as most contracting parties are likely to have multiple roles in the system (for example, all regulators are also likely to be drivers and parties to insurance contracts). The actions of all, whether regulatory or as a road user, are not made in isolation — contractual obligations would have played at least some role in their making.

### **E     *Lack of Clear Distinction between the Public and Private Sectors***

This fourth aspect of decentred regulation is founded on the assessment that the public sector is no longer solely, or predominantly, responsible for regulating the behaviour of citizens. While many of the fragmented aspects of regulation described above (the enforcement of the road rules and the inspection of manufacturers) do rely on the State, other aspects rely, to a greater extent, on the private sector. If the ‘private’ is understood more broadly, it could incorporate the role of the (private) individual; for the purposes of this analysis, the individual is covered in more depth below in Part III.

The insurance schemes are a key example of the lack of distinction between the two sectors. Compensation for harm is an integral part of the system — perhaps much more important to the injured party than the prosecution of the traffic infringement that caused the harm. However, it is not the State that provides the insurance. If the role of the State is to protect the citizens,<sup>84</sup> and if insurance is seen as the protection of citizens from the results of wrongful actions, then insurance could properly be seen as the role of the State. Even without using such a lens, when it comes to CTP policies, in most cases, it is private sector organisations that are entering into contracts that are required by law. The insurer could be a State organisation, relying on the economic value of the State to underwrite the policies;

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policy without a licence: for example, *Road Transport (Third-Party Insurance) Act 2008* (ACT) s 180. It may be noted that such an insurer ‘cannot repudiate, or decline to issue or renew, a CTP policy’: *Road Transport (Third-Party Insurance) Act 2008* (ACT) s 24. In other jurisdictions, however, there is a single entity that provides this insurance — for example, the WA Insurance Commission.

<sup>82</sup> There are also the contracts that allow for the provision, service and calibration of the automated enforcement devices.

<sup>83</sup> These are not necessarily contracts of employment. Police officers in WA, for example, have been characterised as ‘officer[s] responsible to the Crown’ and not employees: *Minister of Police (WA) v Western Australian Police Union* [2000] WAIRComm 226 (14 November 2000) 33 [86]. The history of characterisation of the role of police in Australia dates to *Enever v The King* (1906) 3 CLR 969, 975–8.

<sup>84</sup> Such as the ‘nightwatchman’ role of classical liberal theory: Robert Nozick, *Anarchy, State, and Utopia* (Basic Books, 1974) 26.

instead, the line is blurred by having private companies providing the policies.<sup>85</sup> On a related point, the WA Insurance Commission, the body that provides CTP insurance in that state, is a statutory corporation. It is corporation that is ‘an agent of the Crown in right of the State and has the status, immunities and privileges of the Crown except as otherwise prescribed.’<sup>86</sup> This combination reflects an attempt to garner the benefits of both public and private forms of institutional organisation.

As another example, the operation of enforcement systems is outsourced in some jurisdictions. In New South Wales (‘NSW’), a private contractor is used to operate the speed cameras.<sup>87</sup> While the ‘program is managed by Transport for NSW in consultation with NSW Police’,<sup>88</sup> the practice still represents a private sector organisation operating in a space that used to be exclusively the province of the public sector. This observation is neither new, nor is it meant as a criticism. Its purpose is to reinforce, along with the analysis above, the fact that the regulation of road behaviour is usefully understood in terms of Black’s theory.

### III The Ungovernable Driver and the Regulation of their Decision-Making

There is one of Black’s five aspects of decentred regulation that has not been considered yet: ‘ungovernability’. This is the only aspect that specifically focuses on the human as the target of regulation. This Part of the article considers the ‘ungovernable’ driver and the web of regulation described in Part II above. For Black, ungovernability relates to the behaviour, attitudes, and autonomy of the regulated parties.<sup>89</sup> Taken together, these components suggest not that they cannot be governed at all, but that there are significant challenges associated with getting them to comply with the laws as promulgated by Parliament. Expressed differently, in the context of this article, all of the complex, interdependent and fragmented processes are aimed at guiding the behaviour of drivers — with each of the processes having a role in the guidance (though it can never be clear which process is the most important for modifying the relevant behaviour).

The suggestion here, however, is that, perhaps due to their ungovernability, the role of the driver is diminishing in this area of regulation.<sup>90</sup> More specifically,

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<sup>85</sup> There are multiple ways in which the rise in risk assessment and management has been explored theoretically. There is, of course, Beck’s work: see, eg, Ulrich Beck, *Risk Society: Towards a New Modernity* (Mark Ritter, Sage, 1992) [trans of *Risikogesellschaft: Auf dem Weg in eine andere Moderne* (first published 1986)]. There is also the more ‘governmentalist’ model: see, eg, Robert Castel, ‘From Dangerousness to Risk’, in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect — Studies in Governmentality* (University of Chicago Press, 1991) 281.

<sup>86</sup> *Insurance Commission of Western Australia Act 1986* (WA) s 4A.

<sup>87</sup> Transport for NSW, ‘NSW Speed Camera Strategy’ (Strategy Document, Transport for NSW, June 2012) 11.

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

<sup>89</sup> Black, above n 18, 6–7.

<sup>90</sup> Even in the area of contracts, the individual is being removed. For example, in many cases involving the drivers themselves, the contracts are not subject to significant negotiation. Contracts for the sale of cars and for the provision of insurance, to take two examples, tend to be standard form contracts that are offered, as is, by the supplier and accepted by the purchaser. Relatively minor clauses may

the role of the decision-making of drivers has been reduced over time.<sup>91</sup> For example, and particularly when breaches of the minor offences are considered, the systems do not care about why a person drives at 15 km/h over the limit or why the person ran a red light. For these (minor) offences, it is sufficient that the driver was caught doing the act. A decision may be imputed to the actions of the driver, however it does not matter whether the decision was conscious, in terms of the driver weighing up the risks associated with the breach,<sup>92</sup> or whether there was a lack of attention or other carelessness.<sup>93</sup> To be clear, it seems natural for the decision-making of individuals to be considered when the law is breached as we ourselves acknowledge the decisions (or lack thereof) behind our own actions. This ‘common sense’ is not, however, the only lens through which the regulation of behaviour may be viewed.

When the issue of compensation for damage is considered, some of the compulsory insurance schemes do not even require that someone be found to be at fault. As noted above, where there is no need to establish fault, then there is no need, or opportunity, to question the decisions of any of those in the crash. Even, however, where fault does have to be established in order for the insurance to be paid, this may not entail an interrogation of the decisions of the at-fault driver. There is neither a need for a conviction to be recorded, nor a successful claim in negligence, against a driver in order for the hurt individual to make a successful claim.<sup>94</sup> The issue for the insurance companies relates to whether the driver caused the crash<sup>95</sup> — an examination of the circumstances of the incident, rather than the mental processes of the driver.

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be amended before the agreement is signed; however, the terms are predominantly set by the supplier. In the vast majority of cases, the supplier will have more resources than the purchaser and the contract is likely to have been the product of significant legal advice — with most suppliers being ‘repeat players’. Galanter has discussed the impact of, and advantages to, ‘repeat players’ in the legal system: Marc Galanter, ‘Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change’ (1974) 9(1) *Law and Society Review* 95. This limits the options faced by drivers when entering into contracts and limits the extent to which the terms of the contracts reveals the preferences of the customer when entering into them.

<sup>91</sup> This reduced focus on decision-making does not mean that humans are, necessarily, being completely removed from the road safety system. As it stands, the use of automated forms of identification still centres on the human driver — if only to know where to send the infringement notice (such as facial-recognition technology — though this is not yet widely used on the roads).

<sup>92</sup> Such a calculation may be inaccurate on the basis that up to ‘90 per cent of drivers believe that their driving skills are better than average’: Helen Wells, ‘Risk and Expertise in the Speed Limit Enforcement Debate: Challenges, Adaptations and Responses’ (2011) 11(3) *Criminology and Criminal Justice* 225, 236, citing Patricia Delhomme, ‘Comparing One’s Driving with Others’: Assessment of the Ability and Frequency of Offences. Evidence for a Superior Conformity of Self-Bias?’ (1991) 23(6) *Accident Analysis and Prevention* 493.

<sup>93</sup> Alternatively, the driver may make a conscious decision that justifies their behaviour and undertakes a process of ‘deresponsibilisation’: Wells, above n 37, 118–24. This process seeks to render the driver blameless on the basis that it is not a serious breach of the law. The enforcement agent of the law — whether a camera or an officer — still does not pay heed to this form of argument.

<sup>94</sup> Greg Pynt, *Australian Insurance Law: A First Reference* (LexisNexis Butterworths, 3<sup>rd</sup> ed, 2015) 306, citing *Government Insurance Office of NSW v R J Green & Lloyd* (1966) 114 CLR 437, 444 (Barwick CJ). The WA Insurance Commission website, for example, makes no mention of any legal action as being a necessary condition for making a claim: WA Insurance Commission, *Make a Claim* <<https://www.icwa.wa.gov.au/motor-injury-insurance/involved-in-a-crash/make-a-claim>>.

<sup>95</sup> For a discussion of, and links to, the relevant case law around the terms used in policies relating to causation, see Pynt, above n 94, 330–1.



Legal actions in negligence for property damage arguably explore the decision-making of the driver, should they get to court (as opposed to being settled between insurance companies). The Civil Liability Acts<sup>96</sup> set out the requisite test:

- (1) A person is not negligent in failing to take precautions against a risk of harm unless:
  - (a) the risk was foreseeable (that is, it is a risk of which the person knew or ought to have known), and
  - (b) the risk was not insignificant, and
  - (c) in the circumstances, a reasonable person in the person's position would have taken those precautions.
- (2) In determining whether a reasonable person would have taken precautions against a risk of harm, the court is to consider the following (amongst other relevant things):
  - (a) the probability that the harm would occur if care were not taken,
  - (b) the likely seriousness of the harm,
  - (c) the burden of taking precautions to avoid the risk of harm,
  - (d) the social utility of the activity that creates the risk of harm.<sup>97</sup>

The test, therefore, considers what the driver 'knew or ought to have known' and considers what precautions the reasonable person would have taken (or would have decided to take).<sup>98</sup> The test also is couched in terms of the assessment of risk.<sup>99</sup> A precise calculation of risk is not, however, part of the adjudicative process.<sup>100</sup> Not every time a person runs a red light, for example, will a crash occur (either because of the level of traffic or because of the actions of other drivers).<sup>101</sup> It is sufficient that the court considers that the (uncalculated) level of risk is too great for a reasonable person to take (assuming all the other requirements for the action have been met).

<sup>96</sup> Very similar pieces of legislation were passed across Australia in 2002 after the Ipp Report — an inquiry launched in response to a perceived crisis in personal injury awards: David Ipp et al, 'Review of the Law of Negligence: Final Report' (Report, Commonwealth of Australia, 30 September 2002).

<sup>97</sup> *Civil Liability Act 2002* (NSW) s 5B.

<sup>98</sup> The courts may also take account of the relative skills and attributes of the parties: see, eg, *Imbree v McNeilly* (2008) 236 CLR 510, 514 [3] (Gleeson CJ). However, this does not mean that the courts explicitly consider the decisions made by the parties. As an aside, in *Imbree* Kirby J discussed extensively the relevance of the compulsory third party insurance to the case: at 542–4 [107]–[112]; no other judgments considered insurance at the same level of detail (Kirby J, however, did not disagree with the orders of the others).

<sup>99</sup> Another example of risk assessment in the context of driving is the decision whether or not to buy any non-compulsory insurance policy. That decision may be seen as a function of the forms of governance in society: see, eg, François Ewald, 'Insurance and Risk', in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect — Studies in Governmentality* (University of Chicago Press, 1991) 197.

<sup>100</sup> There was a relatively nuanced understanding of the factors that contributed to the decision of the relevant party in *Allen v Chadwick* (2015) 256 CLR 148. The relevant party, however, was not a driver — she was a passenger who knowingly got into a car driven by a person under the influence of alcohol.

<sup>101</sup> Further, not every time a crash occurs will it result in death or serious injury — though that is less relevant for a discussion of liability under the Civil Liability Acts as compensation under the compulsory schemes is expressly excluded (see, eg, *Civil Liability Act 2002* (NSW) s 3B(1)).

Any consideration of the mental processes of the driver, however, is a shift away from the historical tendency, evident within the law, with respect to decision-making. There is not the space to fully articulate this argument here,<sup>102</sup> however it is clear that in the 18<sup>th</sup> century the law tended to only care about the outcome of an action, rather than the reasons behind it. In the 18<sup>th</sup> century cases that operate as precursors to negligence law, for example, there was a greater recourse to absolute liability, such as with respect to the claims against common carriers.<sup>103</sup> It was only in the 19<sup>th</sup> century that the law became more interested in the “internal life” of defendants.<sup>104</sup> It was in that century that the ‘reasonable man’ and the ‘prudent man’ (as they then were) were born.<sup>105</sup> These standards have developed since that time to the point that it is uncontroversial for a legal test to purport to examine the mind of a party.

A final point may be made in this exploration of the assessment of driver decisions. It was highlighted above that most driving offences are prosecuted without the driver entering a court. The more serious offences require attendance — a key reason for which is that a trial allows a more thorough investigation of the crash and those factors that led up to it. In Western Australia (‘WA’), for example, there are few indictable offences, all of which are in the *Road Traffic Act 1974* (WA) rather than in the *Road Traffic Code 2000* (WA).<sup>106</sup> It is these investigations, therefore, that are most likely to consider the decision-making (or lack of it) of drivers.

Importantly, for this analysis, the mental aspect of driving offences is not always in issue.<sup>107</sup> For the states and territories with a Criminal Code, for example, there may not be a need to look into the mind of the driver. Under WA law, intention (unless expressly referred to in the relevant provision) and motive are not relevant to the issue of criminal responsibility.<sup>108</sup> Non-code states still may engage with the

<sup>102</sup> For an exploration of how the law began to look at the role of knowledge in the decision-making of parties, see Chris Dent, ‘The Rise in References to “Knowledge” in 19<sup>th</sup> Century English Law’ (2016) 16(1) *Legal History* 27.

<sup>103</sup> For example, a common carrier was liable for ‘for every accident, except by the act of God, or the King’s enemies’: *Forward v Pittard* (1785) 1 TR 27, 33; 99 ER 953, 956 (Lord Mansfield).

<sup>104</sup> For an exploration of this in the US context, see Susanna L Blumenthal, *Law and the Modern Mind: Consciousness and Responsibility in American Legal Culture* (Harvard University Press, 2016).

<sup>105</sup> The first reference to the ‘reasonable man’ was in *Blyth v Birmingham Waterworks Co* (1856) 11 EX 781, 784; 156 ER 1047, 1049 (Alderson B) and the ‘prudent man’ appeared in *Vaughan v Menlove* (1837) 3 Bing (NC) 468, 475; 132 ER 490, 493 (Tindal CJ). See also Chris Dent, ‘The “Reasonable Man”, His Nineteenth-Century Siblings and Their Legacy’ (2017) 44(3) *Journal of Law and Society* 406.

<sup>106</sup> The indictable offences include: a failure to render assistance after a crash that caused bodily harm: s 54; a failure to report such a crash to the police: s 56; dangerous driving causing death or grievous bodily harm: s 59; dangerous driving causing bodily harm: s 59A; and reckless driving: s 60.

<sup>107</sup> Gurney notes that in the US, ‘many traffic laws only require an *actus reus*’ and not a *mens rea*: Jeffrey K Gurney, ‘Driving into the Unknown: Examining the Crossroads of Criminal Law and Autonomous Vehicles’ (2015) 5(2) *Wake Forest Journal of Law and Policy* 393, 408. He supports this with the assertion that ‘traffic regulations are generally considered public welfare offences’ and, therefore, are seen in strict liability terms: at 408 n 94.

<sup>108</sup> Sections 23, 23A, 23B and 24 ‘supplant’ the common law principles of *mens rea*: Thomas Crofts and Kelley Burton, *The Criminal Codes: Commentary and Materials* (Lawbook, 6<sup>th</sup> ed, 2009) 9.

concept of mens rea<sup>109</sup> when it comes to driving offences.<sup>110</sup> In such jurisdictions, the case law refers to what an ‘ordinary prudent individual’ would consider appropriate action when considering the intention of the accused driver.<sup>111</sup> This approach, therefore, mirrors the approach used in negligence law — assessing what the decision should have been, rather than assessing what the specific intentions or motivations of the offending driver were. Even these instances of this level of forensic examination, however, are a very small percentage of the number of infringements of the road safety laws.

## IV Ungovernable Autonomous Vehicles?

Part IV of this article is founded on the twin observations that the regulation in this area is usefully seen in terms of decentred regulation and that the ‘human’ role in that regulation has decreased over time. If it is accepted that the law is moving away, or at least paying less attention to, the decision-making of drivers, then this may have ramifications for the regulation of AVs.<sup>112</sup> This analysis is, therefore, based on an assumption, but not necessarily the hope, that the use of the technology will grow.<sup>113</sup>

First, it is acknowledged that, while decisions of humans are regularly considered, it is less common to view ‘machines’ as making decisions. The argument here is based on the fact that the on-board systems of AVs can be seen to make decisions<sup>114</sup> – and it does not take a radical view of the process to reach that position.<sup>115</sup> To consider further, there needs to be a more detailed consideration of

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<sup>109</sup> The concept of mens rea may be seen to counter the assertion above that the law only began to consider the decision-making of parties in the 19<sup>th</sup> century on the basis that mens rea has a longer history than that. Two points may be made here. First, the modern understanding of mens rea entered the law in the 19<sup>th</sup> century (see, Adekemi Odujirin, *The Normative Basis of Fault in Criminal Law: History and Theory* (University of Toronto Press, 1998)). Second, earlier references to the mental element of crimes such as ‘malice aforethought’, by commentators such as Coke, did not demonstrate an interest in ‘defences based on the accused’s mental state’: Louis Blom-Cooper and Terence Morris, *With Malice Aforethought: A Study of the Crime and Punishment for Homicide* (Hart, 2004) 25–6.

<sup>110</sup> See, eg, *DPP (NSW) v Bone* (2005) 64 NSWLR 735 (in relation to an offence under the *Road Transport (Safety and Traffic Management Act 1999* (NSW)); *DPP (NSW) v Kailahi* (2008) 191 A Crim R 145 (in relation to an offence under the *Road Transport (Driver Licensing) Act 1998* (NSW)).

<sup>111</sup> *R v Lawrence* [1982] AC 510, 526 (Lord Diplock), quoted with approval in *Maritime Authority of NSW v Rofe* (2012) 84 NSWLR 51, 60 [20] (Brereton J).

<sup>112</sup> An international standard that has been put in place for AVs: SAE International, *Taxonomy and Definitions for Terms Related to Driving Automation Systems for On-Road Motor Vehicles*, J3016\_201609, 30 September 2009 <[http://standards.sae.org/j3016\\_201609/](http://standards.sae.org/j3016_201609/)>. The associated document is a taxonomy and a set of definitions relating to AVs and other automated systems for vehicles.

<sup>113</sup> For a discussion of resistance to the current trend in the technologisation of personal transport and its regulation, see Gavin J Smith and Pat O’Malley, ‘Driving Politics: Data-driven Governance and Resistance’ (2017) 57 *British Journal of Criminology* 275.

<sup>114</sup> For a description of how AVs work, see Harry Surden and Mary-Anne Williams, ‘Technological Opacity, Predictability, and Self-Driving Cars’ (2016) 38(1) *Cardozo Law Review* 121. It may be noted that the second author is a Professor of Engineering and Robotics.

<sup>115</sup> It has already been noted that systems with artificial intelligence (‘AI’) are understood to make decisions. It has been said that a ‘fundamental difference between the decision-making processes of humans and those of modern AI [is that] AI systems [may] generate solutions that a human would not expect’: Matthew U Scherer, ‘Regulating Artificial Intelligence Systems: Risks, Challenges,

what decision-making is and what constitutes a decision in the context of road behaviour.<sup>116</sup> The issue will be explored in the context of AVs operating under a ‘Full Self-Driving Automation’ mode.<sup>117</sup> This means that the ‘vehicle is designed to perform all safety-critical driving functions and monitor roadway conditions for an entire trip.’<sup>118</sup> In other words, an AV driving in this mode is operating in the same way that a human driver does when they are in control of a car.

With respect to the decisions involved, driving on the road is a complex process. It comprises of multiple, interacting actions and inactions that are engaged with iteratively. The steering of the car is separate, but related, to the vehicle’s speed (which itself requires decisions over the use of power versus brakes). An awareness of, and responses to, any surrounding traffic is separate, but related, to any obligations imposed by traffic lights or signs. Gear selection, navigation and the use of windscreen wipers or indicators are other key decisions that need to be made throughout many journeys. In other words, at every point in which a setting of the vehicle is changed, a decision is made; not only that, but every time the possibility of a change to a setting is considered and rejected, a decision is made. A single journey through an urban centre, therefore, may require thousands of decisions.

A list of factors that can be seen to describe decision-making on the road has been noted as being of potential relevance to a prosecution for dangerous driving causing death or grievous bodily harm under s 59 of the *Road Traffic Act 1974* (WA):<sup>119</sup>

[T]he nature and quality of the driving itself; the amount of traffic on the road at the time ... the amount of traffic which might reasonably be expected to enter the road ... the number of pedestrians on or near the road ... the nature of the road itself; the weather conditions including visibility; ... the condition and state of repair of the motor vehicle; the [relevant] experience of the driver [including] the driver’s familiarity or lack of familiarity with the road.<sup>120</sup>

There is, obviously, nothing in this list that requires the driver to be human. Many of the factors can be understood to be inputs into the decision-making process (the

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Competencies, and Strategies’ (2016) 29(2) *Harvard Journal of Law and Technology* 353, 364. Given the highly constrained nature of decisions on the road (limited by the road infrastructure, the vehicle itself and the road rules), this may not be a significant problem for AVs.

<sup>116</sup> It should be noted that this remains a high-level discussion, instead of a more technical discussion of how the detail of the current law would apply — in part given the fact that ‘no jurisdiction has yet regulated’ full self-driving AVs: Tranter, above n 11, 80;. The NTC, for example, engages with the issue of the ‘control’ of AVs and how that relates to the current law: NTC, ‘Regulatory Reforms for Automated Vehicles (Policy Paper, NTC, November 2016) 32–6. Such a level of detail will not be gone into here.

<sup>117</sup> Tranter, above n 11, 64. This is a category used by the US National Highway Traffic Safety Administration (NHTSA) and adopted in Australian analyses of AVs. Full Self-Driving Automation covers the highest level (level 4) of automation in vehicles.

<sup>118</sup> Adam Thierer and Ryan Hagemann, ‘Removing Roadblocks to Intelligent Vehicles and Driverless Cars’ (2015) 5(2) *Wake Forest Journal of Law and Policy* 339, 344. Many discussions of AVs feature the NHTSA levels. The titles of the other levels of automation are: 0 — No Automation; 1 — Function-Specific Automation; 2 — Combined Function Automation; and 3 — Limited Self-Driving Automation.

<sup>119</sup> Other jurisdictions have the equivalent offence in the ‘general criminal statute’: Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Final Report (2007) 120.

<sup>120</sup> Mugliston, Ainsworth and Colebatch, above n 9, 101.

amount of traffic, the number of pedestrians, the nature of the road, the weather conditions and the state of the vehicle) and others may be seen in terms of the risk management strategy of the driver (the nature of the driving and the driver's familiarity with the road). The inputs, for an AV, are a function of the sensors connected to the system and the risk management strategy is a function of the software of the system.

Given that assessment, there needs to be a closer look at the 'decision-making' of AVs.<sup>121</sup> Four categories of information may be seen to be relevant for a decision: what are the alternatives; what are the possible outcomes; what is the likelihood of each outcome; and what is the value of each outcome to the decision-maker?<sup>122</sup> Each of these categories, in the context of decisions made on the road, contain a knowable number of entries. In the first category of information, there is only a limited number of speeds (and rates of acceleration or deceleration) that are possible, a finite number of gears and relatively few options with respect to directions (assuming that the vehicle is to stay on the road).

An artificial intelligence system in an AV would be able to assess (most of) the possible outcomes of any change in the settings of the vehicle. Two sets of interactions are important here. The first set is that of the effect on the vehicle of the interaction of multiple changes in the AV's settings (for example, increasing power while changing gears and rounding a bend). The second set relates to the interaction of the AV, the surrounding road users and the road environment more generally.<sup>123</sup> The first set of interactions is relatively straightforward as they are a matter of basic physics. The second set is more problematic as it requires an understanding of the behaviour of other users, and possible changes of behaviour by those other users resulting from the AV's changes. It is likely that an AV with sufficient sensors and computing power would be able to track and predict the movement of other road users more effectively than a human driver could. Further, in the same way that human drivers become more predictable with standardised vehicles, AVs will also be (relatively) predictable to other AVs.

In terms of inputs, AVs will also be able to learn the norms that are part of the regulation of road behaviour. This may, on the surface, seem to be an area that would be the most resistant to a transfer to the regulation of AVs, on the basis that norms are an artefact of the social and AVs are not social beings. Norms, however, can be understood as a process of learning road behaviour. Given that the software

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<sup>121</sup> This is a different question to one that could focus on the entity that could be deemed responsible for any bad decision of the AV. For example, the failure of a piece of hardware (such as a sensor), or the software that made the decision, could be found to be behind a crash that caused death. That raises the question of who should take responsibility for the crash. The issue of responsibility has been discussed in general terms by others: see, eg, NTC, above n 25, 74–80. This topic was not given a standalone chapter in the subsequent NTC policy paper. For a US discussion of the issue of product liability for AVs, see Jeffrey K Gurney, 'Sue My Car, Not Me: Products Liability and Accidents Involving Autonomous Vehicles' [2013] (2) *University of Illinois Journal of Law, Technology and Policy* 247.

<sup>122</sup> 'General Introduction' in Terry Connolly, Hal R Arkes and Kenneth R Hammond (eds), *Judgment and Decision Making: An Interdisciplinary Reader* (Cambridge University Press, 2<sup>nd</sup> ed, 2000) 1, 4.

<sup>123</sup> As noted above, the infrastructure is already a form of behaviour regulation. This would not change when AVs are more common.

that will guide AVs will have the ability to learn from experience,<sup>124</sup> such vehicles will be able to act in a way that is in accordance with the behaviour of the surrounding vehicles.<sup>125</sup> Of course, unlike with human drivers, the AVs may have strict limits on their actions as a result of their programming, which means that machine-learned norms will not be contrary to the road rules. It is likely that, if AVs ever dominate the road, then the norms will match the rules (allowing for changing traffic, road and weather conditions). Until that point, the learning nature of the AVs may mean that the vehicles ‘blend in’ with the behaviour of the human-piloted vehicles.

Returning to the four categories of information relevant to decision-making, the issue of the value of particular outcomes is, perhaps, the most contentious in the context of AVs. ‘Value’, of course, is a term with multiple meanings. Some of them are straightforward: an increase in speed of an AV (all other things being equal) would get the vehicle more quickly to its intended destination, which may be programmed to be of value to the AV. The ‘negative’ value of being prosecuted for speeding may impact on the AV’s decision to minimise, absolutely, its travel time. The more problematic instance would be where value is seen to have a ‘moral’ component. One study has highlighted how AVs may have to choose between harming several humans and harming one person (which could be the owner and sole passenger of the vehicle), with the study concluding that ‘figuring out how to build ethical autonomous machines is one of the thorniest challenges in artificial intelligence today.’<sup>126</sup> The question of the appropriate value setting regarding causing unavoidable harm is a software issue that will be dealt with by, and may be subject to, a set of safety standards.<sup>127</sup>

There is little reason to consider that the AVs will not be able to be seen as decision-makers. Further, assuming that a set of ADRs are created for the software, there would be a standardisation of responses (or decisions) of AVs.<sup>128</sup> This would

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<sup>124</sup> The US Department of Transport has issued a proposed rule that will require new vehicles to have the capacity to ‘talk’ to each other, including the sharing of information about the location, direction and speed of each vehicle: US Department of Transportation, *US DOT Advances Deployment of Vehicle Technology to Prevent Hundreds of Thousands of Crashes* (13 December 2016) <<https://www.transportation.gov/briefing-room/us-dot-advances-deployment-connected-vehicle-technology-prevent-hundreds-thousands>>. Compiling, and comparing, such data over time will give an AV an understanding of how other vehicles move in different circumstances.

<sup>125</sup> Surden and Williams describe how AVs will be ‘designed to “learn” over time and change how they act as they encounter new data’: Surden and Williams, above n 114, 163.

<sup>126</sup> Jean-François Bonnefon, Azim Shariff and Iyad Rahwan, ‘The Social Dilemma of Autonomous Vehicles’ (2016) 352(6293) *Science* 1573, 1576 (citations omitted). See also Ethics Commission on Automated Driving, *Automated and Connected Driving* (German Federal Ministry of Transport and Digital Infrastructure, 2017). Others have considered the ethics of *not* using AVs: Robert Sparrow and Mark Howard, ‘When Human Beings are Like Drunk Robots: Driverless Vehicles, Ethics and the Future of Transport’ (2017) 80 *Transport Research Part C* 206.

<sup>127</sup> For a discussion of potential processes to ensure that the regulation of AVs is ‘ethically sound’, see Nick Belay, ‘Robot Ethics and Self-Driving Cars: How Ethical Determination in Software Will Require a New Legal Framework’ (2015) 40(1) *Journal of the Legal Profession* 119.

<sup>128</sup> In some ways, it is clear that AVs would be better decision-makers than humans. They would not be subject to the Dunning-Kruger effect or to other forms of illusory superiority. For an overview of cognitive illusions, see Ward Edwards and Detlof von Winterfeldt, ‘On Cognitive Illusions and Their Implications’ in Terry Connolly, Hal R Arkes and Kenneth R Hammond (eds), *Judgment and*

reduce the variability of decision-making on the road,<sup>129</sup> and, as a result, simplify the risk assessment processes of the AVs. As noted, however, the decentred nature of the driver regulation has meant that human decisions in the area are becoming less targeted by the forms of regulation. The shift away from the regulation of human decision-making may also indicate that the system is caring less about the ‘self’ at the heart of road behaviour.<sup>130</sup> As such, AVs may be seen as ungovernable just as human drivers are. AVs may not have all the mental distractions of a human – including worrying about a missed work opportunity or stressing about a more personal crisis — however, these distractions are part of the human road users’ existence as humans and not as road users. To suggest that, given their less distracted nature, AVs should be seen as less capable of being subject to the complex web of road regulation seems perverse. In short, the regulatory goal of reducing trauma on the road and any additional goal of streamlining the post-crash processes may be accommodated by AVs as well by human drivers.<sup>131</sup>

## V Conclusion

The regulation of road behaviour in Australia appears to be effective. While the headline figure of 1295 road deaths in 2016 in Australia may seem high,<sup>132</sup> the statistic of 0.5 road deaths per 100 million vehicle kilometres travelled<sup>133</sup> indicates that the chance of getting killed in a car crash is actually very small. The reduction or removal of human error, and human decision-making, is likely to reduce that risk even further.<sup>134</sup> As a result, concerns over the fact that AVs may cause accidents may be misplaced, as we already accept a significant number of road deaths every year.<sup>135</sup>

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*Decision Making: An Interdisciplinary Reader* (Cambridge University Press, 2<sup>nd</sup> ed, 2000) 592. Not only that, the reaction time and decision-making speed of AVs are likely to be much better than those of humans.

<sup>129</sup> That is, given the range of personal experiences, knowledge and skills of the human drivers on the road now, there may be a significant range of decisions that are made in response to a single set of circumstances.

<sup>130</sup> Expressed differently, the reduced interest in the human ‘self’ may make it easier for the regulatory systems to embrace a non-human ‘self’.

<sup>131</sup> In terms of any compensation payable after a crash, again, the current systems should be able to accommodate the new technology. Where an AV hurts an individual, and the crash happened in a jurisdiction with a ‘no-fault’ CTP scheme, the insurer will compensate the injured party in the same way they do now because the decisions of the AV would be as irrelevant as the decision-making of drivers under the current system. Where the CTP scheme is not ‘no fault’, and for crashes where property damage is suffered, then there would be the need to apportion responsibility among those involved in the crash. For a US-based discussion of the potential role of insurance in crashes featuring AVs, see Carrie Schroll, ‘Splitting the Bill: Creating a National Car Insurance Fund to Pay for Accidents in Autonomous Vehicles’ (2015) 109(3) *Northwestern University Law Review* 803.

<sup>132</sup> Bureau of Infrastructure, Transport and Regional Economics, ‘Road Trauma Australia 2016 Statistical Summary’ (Report, Department of Infrastructure and Regional Development, 2016) 1.

<sup>133</sup> *Ibid* 39.

<sup>134</sup> ‘Most experts predict that autonomous cars will be much safer than human drivers’: Surden and Williams, above n 114, 128.

<sup>135</sup> It may be there has been a long-term fear of technology at the heart of the road rule enforcement system. This fear had its first expression in the requirement that the first automobiles had a speed limit of four miles per hour and that all vehicles were to be preceded by a person carrying a single red flag:

This article has shown that the current, albeit complex, system of regulation has reduced the role of the agency of human drivers — presumably to make the processes cheaper and/or more efficient. This reduction in agency shows the reduction in the relative importance of the decision-making of individuals, a benchmark against which the decision-making of AVs may be considered. The systems already in place operate to minimise the impact any individual driver may have on the perpetuation of the regulatory endeavours. That reduction in agency may facilitate the introduction of fully independent AVs. Further, the introduction of AVs may reduce the impact of ad hoc, unstructured, or ill-informed processes of human risk assessment and decision-making. Not that the technology is quite ready to provide fully self-driving vehicles — this may be the rare case of the law being *ahead* of, instead of behind, the times.

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*Locomotives Act 1865*, 28 & 29 Vict 1, c 83, s 3 (commonly known as the ‘*Red Flag Act*’). For example, the media of the early 20<sup>th</sup> century, with a touch of hyperbole, claimed a ‘machine of steel and brass will delight in killing people’: ‘Horse v Motor’, *The Argus* (Melbourne), 12 December 1900, 4, quoted in Kieran Tranter, ‘“The History of the Haste-Wagons”: The *Motor Car Act 1909* (Vic), Emergent Technology and the Call for Law’ (2005) 29(3) *Melbourne University Law Review* 843, 846.



# Financial Robots as Instruments of Fiduciary Loyalty

Simone Degeling\* and Jessica Hudson†

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## Abstract

Retail financial consumers increasingly interact with financial services providers via a financial robot that is driven by an algorithm or other mathematical model ('robo financial advice'). In this sector, the focus of industry and legal participants is on statutory regulation under the *Corporations Act 2001* (Cth) and associated class orders and guidance issued by the Australian Securities and Investment Commission. We argue that despite compliance with this regime, significant legal risk remains. Equity continues to operate in a domain where fiduciary obligations, and attendant poorly managed fiduciary conflicts, arise systemically. This article considers the application of the fiduciary norm to robo financial advice. In doing so, it explores the interaction of equitable principle and statute, and pursues a deeper understanding of the application of equitable fiduciary principle to robo financial advice.

## I Introduction

Robo financial advice is that given by an advice provider where the method of transmission of the advice is via a digital platform.<sup>1</sup> The regulatory posture in Australia is one of facilitating technological advances in the provision of financial services.<sup>2</sup> In view are various competing policy imperatives including the need for automated processing of transactions, streamlined communication and the possibility of increased consumer access to financial services. While the Australian Securities and Investments Commission ('ASIC') has issued regulatory guidance on robo financial advice,<sup>3</sup> this guidance does not address the application of equitable

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<sup>1</sup> For example, an online website, smartphone app or software program.

<sup>2</sup> Australian Securities and Investments Commission ('ASIC'), *Regulatory Guide 255: Providing Digital Financial Product Advice to Retail Clients*, August 2016, [255.1]–[255.17] ('ASIC RG 255'). Contrast the apparently cautious approach taken by regulators in the United States: Megan Ji, 'Are Robots Good Fiduciaries? Regulating Robo-Advisors under the *Investment Advisers Act of 1940*' (2017) 117(6) *Columbia Law Review* 1543.

<sup>3</sup> ASIC RG 255, above n 2. Note, however, that ASIC *Regulatory Guide 175*, which applies to providers of financial product advice, expressly identifies fiduciary duties that may apply to the provision of advice: ASIC, *Regulatory Guide 175 Licensing: Financial Product Advisers — Conduct and Disclosure*, November 2017, [175.90]–[175.91] ('ASIC RG 175').

fiduciary principles. There is thus a risk that non-statutory regulation of robo financial advisers, including equitable fiduciary obligations, are not systemically prominent. A concomitant compliance risk arises for advice providers in adopting a mindset focused solely on statute. This article demonstrates that robo financial advice creates the risk of breach of equitable fiduciary obligations despite an adviser's compliance with statutory obligations relating to conflicts of interest, including duties to disclose such conflict(s).<sup>4</sup> The robo financial adviser is, thus, exposed to the possibility of equitable remedies. Further, a breach of fiduciary obligations may adversely impact the adviser's or licence holder's Australian Financial Services License ('AFSL').<sup>5</sup>

Some ground clearing is necessary in order to proceed. First, the 'robot' is not the financial adviser. Rather, the financial robot is the digital means by which the advice is manifested and/or communicated. As explored below, somewhere in the matrix of facts exists a legal entity which is the adviser. ASIC describes robo advice as being 'without the direct involvement of a human adviser',<sup>6</sup> and it might therefore erroneously be argued that a financial robot cannot be an adviser for the purposes of legal regulation. However, this article takes the contrary position that robo advice is the product of the acts of a legal entity, capable of bearing equitable responsibility. As discussed below, we argue that while robo financial advice is communicated through a digital medium, the advice is itself embodied by, and contained within, a decision tree. The decision tree contains predetermined pathways navigated by the client. The list of possible destinations is also predetermined, such that the available advice outcomes are members of a closed set. The adviser determines the pathways, and the outcomes, and thus provides advice. A client receives advice provided by a financial adviser whether the client receives verbal advice from an adviser in a face-to-face meeting in which the adviser uses expertise, experience and an algorithm, or robo financial advice, which is a product of the same or similar expertise, experience and an algorithm.<sup>7</sup>

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<sup>4</sup> *Corporations Act 2001* (Cth) ch 7 ('*Corporations Act*'). See generally Tables 2 and 3 in this article.

<sup>5</sup> The obligation in *Corporations Act* s 912A(1)(a) to 'do all things necessary to ensure that the financial services ... are provided efficiently, honestly and fairly' is interpreted in *ASIC RG 175* to include compliance with common law obligations: *ASIC RG 175*, above n 3, [175.90]–[175.91]. We take common law here to include equity, which as ASIC recognises, includes fiduciary duties. See also *Corporations Act* s 960B. The loss of an AFSL or more restrictive conditions may arise from s 914A(1) (conditions on the licence) taken together with s 915C(1) (ASIC may suspend or cancel licence for failure to comply with obligations under s 912A). See also *ASIC v Camelot Derivatives Pty Limited (in liq)* (2012) 88 ACSR 206, 225 [69] (Foster J), quoted in *ASIC v Cassimatis (No 8)* (2016) 336 ALR 209, 337–8 [674] (Edelman J).

<sup>6</sup> *ASIC RG 255*, above n 2, [255.1].

<sup>7</sup> Section 961(6) of the *Corporations Act* states that '[a] person who offers personal advice through a computer program is taken to be the person who is to provide the advice and is the provider for the purposes of this division.' Section 52 of the Act states that '[a] reference to doing an act or thing includes a reference to causing or authorising the act or thing to be done.' That robo advice is advice is also the foundation of *ASIC RG 255*, above n 2, [255.1]. See also *ASIC v Cassimatis (No 8)* (2016) 336 ALR 209, 221 [21], 232–3 [81]–[85] (Edelman J). The predicate of Edelman J's decision is that the interaction between human adviser and client, and subsequent advice that follows predetermined standardised pathways, may constitute financial advice. In that case, the defendants 'create[ed] and advance[ed] a model, and a system for application of the model, to be applied in almost every circumstance': at 368–9 [824] (Edelman J).

Second, our analysis observes particular courses of dealing in the pattern of interaction between a robo financial adviser and client, which we label ‘substantive advice’ and ‘advice about advice’.<sup>8</sup> Substantive advice is advice capable of implementation by the client concerning actual investments or investment strategies. Thus, for example, substantive advice includes financial product advice.<sup>9</sup> Advice about advice is a conceptually preliminary recommendation by the adviser. Advice about advice may encompass, for example, the threshold question of whether or not the client should receive substantive financial advice. Alternatively, advice about advice may relate to the selection of the topic areas of advice on which the client will receive substantive advice. Advice about advice is conceptually preliminary, but depending on the course of dealing, may or may not occur prior in time to the substantive advice. Robo financial advice collapses these categories and may encompass both advice about advice and also substantive advice. We return to these particular courses of dealing in Part II below.

It is important to delineate between these courses of dealing, and thus scopes of advice, because pts 7.7–7.7A and 7.9 of the *Corporations Act 2001* (Cth) (*‘Corporations Act’*) only apply to financial product advice.<sup>10</sup> Depending on the facts, the statutory definition of financial product advice may not capture *all* courses of dealing in which robo financial advice is given. Specifically, although substantive advice will, as a factual matter, usually fall within the statutory definition of financial product advice,<sup>11</sup> advice about advice may not. However, equity scrutinises all courses of dealing, including advice about advice, substantive advice and financial product advice.<sup>12</sup> This article demonstrates that the robo financial adviser who complies with pts 7.7–7.7A and 7.9 of the *Corporations Act* nonetheless may be exposed to the risk of fiduciary breach. Moreover, equity’s gold standard of conduct, which is full fiduciary disclosure and client consent, may be difficult to implement. Regulators and financial advisers, therefore, need to consider the role of the fiduciary norm in supervising and modelling the conduct of market participants.

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<sup>8</sup> This article applies and develops the framework identified and developed by the present authors: Simone Degeling and Jessica Hudson, ‘Equitable Money Remedies against Financial Advisers Who Give “Advice about Advice”’ (2015) 33(3) *Company and Securities Law Journal* 166; Simone Degeling and Jessica Hudson, ‘Fiduciary Obligations, Financial Advisers and FOFA’ (2014) 32(8) *Company and Securities Law Journal* 527. These articles demonstrate that the courses of dealing labelled ‘advice about advice’ and ‘substantive advice’ are not particular to robo financial advice.

<sup>9</sup> *Corporations Act* s 766B(1).

<sup>10</sup> *Ibid.*

<sup>11</sup> Such as where the topic of substantive advice relates to a financial product as defined in pt 7.1 div 3 of the *Corporations Act* and includes, for example, a derivative, a security (which includes a share or debenture: s 761A), a policy of life insurance, and a carbon credit unit: s 764A(1).

<sup>12</sup> Note that the operation of equity is not ousted by ch 7 of the *Corporations Act* and is, thus, capable of application to the conduct falling within the statutory definition of financial product advice. See generally Part IID below.

## II Robo Advice and Courses of Dealing

### A *What is Robo Advice?*

As has been said, robo advice is advice concerning a client's financial decisions provided through a digital platform. Robo advice encompasses completion of standardised questions by the client via the adviser's platform, which reveal information about the client and their objectives, and the automatic generation of recommendations for that client using algorithms and technology. The client navigates a decision tree of questions designed to elicit information according to which the adviser allocates possible recommendations for that client from a menu of predetermined possible outcomes. The provision of robo advice to suitable clients is one of these outcomes. There may also be other services provided by the platform consequent on the implementation of this advice, such as custodial, execution and portfolio management services.

A paradigm example of robo advice is the ASIC Digital X example:<sup>13</sup>

#### **Scenario**

Digital X is a start-up fintech company that provides digital advice. The advice is limited to portfolio construction investment advice on exchange-traded funds (ETFs).

Digital X determines the client's investment profile by asking the client a number of questions about their financial situation and goals. Clients who are not filtered out of the model are aligned with one of a limited number of ETF portfolios based on their investment profile.

Digital X's algorithm then automatically recommends to the client an investment strategy based on their personal profile, and a Statement of Advice (SOA) is generated and provided.

#### **Commentary**

Digital X is providing personal advice. Through its algorithm, Digital X has considered one or more of the client's relevant circumstances (e.g. their objectives, financial situation and needs) when recommending a financial product.

In the above example, the adviser gathers information about the client and, in parallel, assesses the suitability of the client as a candidate for robo financial advice. This triaging process may result in the client being assessed as suitable for the services offered and allowed to proceed to the next stage or 'filtered out'. Table 1 below sets out some examples of filtering as part of the robo advice triage process. Assuming the client is not filtered out of the platform, and depending on the range of services and topics of advice offered by the platform, there may be some further triaging process by which the client is aligned with one or more suitable services. This triaging process is contemplated in the above example: 'Digital X determines the client's investment profile by asking the client a number of questions about their financial situation and goals. *Clients who are not filtered out of the model are aligned with one of a limited number of ETF portfolios based on their investment profile.*'<sup>14</sup> Digital X

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<sup>13</sup> ASIC RG 255, above n 2, [255.28].

<sup>14</sup> Ibid (emphasis added).

thus gives financial advice on ETFs to meet the client's self-selected financial situation and goals. The client will have chosen the information about their financial situation and goals from a menu of options presented on the platform.

A second version of this example arises by extrapolating from Digital X, and concerns platforms that may commence the information-gathering and triaging phase with a different set of questions designed to reveal information about the client's life aspirations.<sup>15</sup> For example, as described in the Explanatory Memorandum to the Corporations Amendment (Streamlining of Future of Financial Advice) Bill 2014 (Cth),<sup>16</sup> the filtering questions presented by the adviser may ask about the client's financial objectives, circumstances and needs. Thus, 'superannuation, debt consolidation and life insurance' may be identified as relevant financial objectives ('Financial Objectives Filter').<sup>17</sup> The client will follow a path through the decision tree depending on their answers to the questions posed by the financial adviser. At an even higher level of generality, according to life objectives, a third hypothetical version of this platform might similarly triage clients according to aspirations such as 'security in retirement', 'pay for children's education', 'own my own home' or 'nest egg' ('Life Objectives Filter'). Such platforms will similarly make recommendations to the client about the suitability of the adviser's services.

As foreshadowed above, it should be observed that despite commentary describing robo financial advice as being 'without the direct involvement of a human adviser',<sup>18</sup> the significance of the digital delivery of this advice should not be overstated. In building the decision tree and questionnaire with which the client interacts, and the algorithm underpinning the operation of the digital platform, a legal entity has made decisions and predetermined the pathways of decision and potential liability that will apply to this interaction. The fiduciary norm applies to the robo financial adviser indistinguishably to any other adviser within its purview. ASIC states in Regulatory Guide 255 that 'the law is technology neutral'.<sup>19</sup> We contend that equity adopts a similar posture in being indifferent to the medium through which advice is given. However, despite ASIC's assertion that there is no human involvement, equity's focus on the entire course of dealing between the

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<sup>15</sup> Similar examples of online advice platforms that filter according to financial objectives or the client's life goals are given in ASIC, *Regulatory Guide 244: Giving Information, General Advice and Scaled Advice*, 13 December 2012, [244.79] examples D7–D8 and related commentary.

<sup>16</sup> Explanatory Memorandum [1.29]–[1.30]. The Bill has not been enacted, and the regulations implemented to insert a specific example of scaled advice, reg 7.7A.2(4) of the *Corporations Amendment (Streamlining Future of Financial Advice) Regulation 2014* (Cth), were disallowed on 19 November 2014.

<sup>17</sup> Another example of similar filtering (albeit face-to-face advice) is given in *ASIC RG 175*, above n 3, [175.298] example 14 (emphasis added):

A client in their early 40s asks an advice provider to review every aspect of their financial situation to determine how the advice provider can maximise the client's savings over the medium and long term. The advice provider gives the client an estimate of the cost to prepare the requested advice. This amount is more than the client is willing to pay for the advice.

The advice provider then identifies the key areas *that they think the client should receive advice on*, based on the objectives, financial situation and needs that the client disclosed to the advice provider in their instructions.

<sup>18</sup> *ASIC RG 255*, above n 2, [255.1].

<sup>19</sup> *Ibid* [255.6].

parties allows a conclusion not only that there are other human and legal entities involved, but that such entities potentially owe fiduciary obligations to the client.

Table 1: Filter examples

Filter example	Triage process	Robo example – Advice about advice	Robo example – substantive advice
Digital X filter	Adviser assesses client’s suitability to receive advice on topic area offered according to personal information provided by client.	Adviser filters client out of platform because client’s personal debt is too high relative to assets, and/or income levels are below threshold minimum.  Advice about advice: that client should not receive substantive advice.	Adviser filters client out of platform because client’s personal debt is too high relative to assets, and/or income levels are below threshold minimum.  Substantive advice: that client should not invest in investments advised on (here, ETF).
Financial objectives filter	As above. Adviser prioritises one or a limited set of topic areas for advice according to client’s self-identified financial objectives.	Adviser identifies topic area of ‘superannuation and life insurance’ as the topic area of advice having regard to the client’s self-selected financial objectives and personal circumstances.  Advice about advice: that client should get substantive advice on prioritised topic area over other areas of advice in order to achieve financial objective.	Depends on topic areas and whether adviser offers advice on more than one financial product or class of financial product.  Example of substantive advice: that client should make higher superannuation contributions.
Life objectives filter	As above. However, the adviser identifies the client’s financial objectives by translating life objectives into financial objectives.	Adviser identifies topic area of ‘superannuation and life insurance’ having regard to client’s general life aspirations.  Advice about advice: (i) the particular identified financial objective will achieve client’s life objective; and (ii) that client should get substantive advice on prioritised topic area over other areas of advice in order to achieve particular financial objective.	Depends on topic areas and whether adviser offers advice on more than one financial product or class of financial product.  Example of substantive advice: that client should make higher superannuation contributions.

## B *Applicable Statutory Regime*

The *Corporations Act* applies to the provision of ‘financial product advice’, which is a recommendation or a statement of opinion, or a report of either of those things, that is intended to influence a person in making a decision in relation to a particular financial product ... or could reasonably be regarded as being intended to have such an influence.<sup>20</sup>

The nature and content of the statutory obligations attendant upon the provision of financial product advice depend upon the type of advice given,<sup>21</sup> and whether the client is a ‘retail client’ or ‘wholesale client’.<sup>22</sup> A provider of robo financial advice will need to hold the relevant licence or be an authorised representative of a licensee<sup>23</sup> to provide financial product advice. There are certain obligations that will apply irrespective of the client or the nature of the investment.<sup>24</sup> The legislative focus is upon the provision of financial product advice to retail clients, in which case certain disclosures and notices must be given to the client.<sup>25</sup> Further obligations regulate the standards of conduct of the financial adviser and quality of advice provided, the contents of which turn on whether the financial product advice is ‘personal advice’<sup>26</sup> or ‘general advice’.<sup>27</sup> These statutory requirements apply to the provision of robo financial advice.<sup>28</sup>

The discussion below demonstrates that the robo financial adviser who complies with the disclosures and obligations mandated by pts 7.7, 7.7A and 7.9 of the *Corporations Act*, will not also systematically evidence conduct capable of discharging applicable equitable fiduciary obligations. Further, we take the view that

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<sup>20</sup> *Corporations Act* s 766B(1).

<sup>21</sup> There are two types of financial product advice: ‘general advice’ (s 766B(4)) and ‘personal advice’ (s 766B(3)).

<sup>22</sup> All clients will be a ‘retail client’ unless an exception applies — in which case they will be a ‘wholesale client’, which includes where a client is: a professional investor; receiving the advice in the context of a large business; paying a price where either the value of the financial product or financial service exceeds \$500,000; a sophisticated investor; or a high net worth individual (eg, with assets over \$2.5 million); *Corporations Act* ss 761G, 761GA. See also *Corporations Regulations 2001* (Cth) regs 7.1.11–7.1.28.

<sup>23</sup> ‘Financial product advice’ is a ‘financial service’ (s 766A(1)(a)), and providers of ‘financial services’ are required to hold an Australian financial services licence (‘AFSL’) (s 911A(1)) or be an authorised representative of an AFSL holder (s 911A(2)).

<sup>24</sup> See, eg, *Corporations Act* pt 7.10.

<sup>25</sup> See Table 2 below.

<sup>26</sup> ‘Personal advice’ (s 766B(3)) is financial product advice that is given or directed to a person (including by electronic meaning) in circumstances where:

- (a) the provider of the advice has considered one or more of the person’s objectives, financial situation and needs ...; or
- (b) a reasonable person might expect the provider to have considered one or more of those matters ... .

<sup>27</sup> ‘General advice’ is financial product advice that is not personal advice (s 766B(4)).

<sup>28</sup> *ASIC v Online Investors Advantage Inc* (2005) 194 FLR 449 (Moynihan J), where financial product advice was provided through a website with automated advice functions; *ASIC v Oxford Investments (Tasmania) Pty Ltd* (2008) 169 FCR 522 (Heerey J), where financial product advice was provided through software, including an excel spreadsheet with automated advice functions; *ASIC v Stone Assets Management Pty Ltd* (2012) 205 FCR 120 (Besanko J), where financial product advice was provided through a link on the ‘company’s website’ to an online trading platform with automated advice functions. See also *Re Market Wizard Systems (UK) Ltd* [1998] 2 BCLC 282 (Carnwarth J).

meeting the statutory requirements may itself create a course of dealing attracting equity's scrutiny. Thus, robo financial advisers with compliance systems directed only to statute may remain exposed to unmet fiduciary risk. Tables 2 and 3 below outline these statutory requirements as a basis for our analysis of the course of dealing thereby created.

**Table 2:** Required statutory disclosures

Disclosure Type	Financial services guide ('FSG')	Statement of advice ('SOA')	Product disclosure statement ('PDS')
<b>When</b>	'[A]s soon as practicable after it becomes apparent to the providing entity [financial adviser] that the financial service will be, or is likely to be, provided to the client, and must in any event be given to the client before the financial service is provided': s 941D(1), where the client is a retail client: s 941A.	Provision of personal advice to retail client: s 946A(1). Personal advice is financial product advice given in circumstances where the adviser has taken account the client's objectives, financial situation and needs, or a reasonable person might expect the adviser to have taken regard of the client's objectives: s 766B(3).	PDS is disclosed by the issuer, but the adviser must provide a copy of the PDS to the retail client when the adviser makes a recommendation to the client to acquire a financial product: s 1012A.
<b>Content requirements</b>	Remuneration, including commissions or other benefits to be received by a financial adviser in relation to the services offered: ss 942B–942C.	Matters such as any associations, relationships or remuneration and commissions that may influence the adviser in providing the advice: ss 947B–947C.	Cost of the product and information about commissions or other payments that may impact on returns to the retail client: ss 1012A–1012C.
<b>Purpose</b>	Information required by a retail client to decide whether to engage or acquire the financial service offered: ss 942B(3), 942C(3).	Information required by a retail client to decide whether to act on the advice provided: ss 947B(3), 947C(3).	Information required by a retail investor to decide whether or not to acquire the financial product offered: ss 1013D(1), 1013E.

In addition to statutory disclosures, there are statutory obligations applying to robo financial advice. These obligations apply to the provision of financial product advice to retail clients,<sup>29</sup> and are contained in pt 7.7A of the *Corporations Act*. We summarise these in Table 3 below ('FOFA Obligations').

<sup>29</sup> There are, of course, other statutory and general law regimes that apply to the making of statements including those under pt 7.9 div 7 and pt 7.10 of the *Corporations Act*, the *Australian Consumer Law*



**Table 3: FOFA Obligations**

<b>Best interests duty</b>	<p>The adviser must act in the best interests of their clients in relation to the advice ('best interests duty').<sup>30</sup></p> <p>The best interests duty can be satisfied if the adviser has taken all of the following steps in connection with the provision of the advice:<sup>31</sup></p> <ul style="list-style-type: none"> <li>a) identify the objectives, financial situation and needs of the client as disclosed by the client;</li> <li>b) identify the subject matter of the advice sought and the objectives, financial situation and needs of the client that would reasonably be considered as relevant to advice sought on that subject matter ('client's relevant circumstances');</li> <li>c) make reasonable inquiries to obtain complete and accurate information;</li> <li>d) ensure the adviser has the necessary expertise on the subject matter;</li> <li>e) conduct reasonable investigations into the financial products that meet the client's circumstances;</li> <li>f) base all judgements in advising the client on their circumstances; and</li> <li>g) take any other step that would be reasonably regarded as being in the best interests of the client given the client's relevant circumstances.</li> </ul>
<b>Prioritise client's interests</b>	The adviser must place the interests of their clients ahead of their own. <sup>32</sup>
<b>Provide appropriate advice</b>	The adviser must provide advice that is appropriate. <sup>33</sup>
<b>Give warnings</b>	The adviser must warn the client if the financial product advice is based on incomplete or inaccurate information. <sup>34</sup>
<b>Not accept conflicted remuneration</b>	The adviser must not accept conflicted remuneration. <sup>35</sup>
<b>Not charge certain fees</b>	The adviser must not charge asset-based fees on borrowed amounts, where the fee charged by the adviser is calculated by reference to the amount borrowed or used to acquire a financial product. <sup>36</sup>

(*Competition and Consumer Act 2010* (Cth) sch 2) and *Australian Securities and Investments Commission Act 2001* (Cth), together with general law actions such as the tort of deceit. These further regimes are not covered in this article.

<sup>30</sup> *Corporations Act* pt 7.7A div 2 subdiv B (only applies to personal advice: s 961(1)).

<sup>31</sup> *Ibid* pt 7.7A div 2 subdiv B (only applies to personal advice: s 961B(2)).

<sup>32</sup> *Ibid* pt 7.7A div 2 subdiv E (only applies to personal advice: s 961(1)).

<sup>33</sup> *Ibid* pt 7.7A div 2 subdiv C (only applies to personal advice: s 961(1)).

<sup>34</sup> *Ibid* pt 7.7A div 2 subdiv D (only applies to personal advice: s 961(1)).

<sup>35</sup> *Ibid* pt 7.7A div 4 applies in relation to the provision of financial product advice (general advice and personal advice) to retail clients to prohibit a financial services licensee, an authorised representative, or other representative from receiving conflicted remuneration, as defined in s 963A, and prohibits an employer, product issuer or seller from giving conflicted remuneration.

<sup>36</sup> *Ibid* pt 7.7A div 5, subdiv B applies where a financial services licensee, or a representative of a financial services licensee, provides financial product advice to a retail client.

<b>Give fee disclosure statements and enhanced fee disclosure</b>	<p>The adviser must give the client a fee disclosure statement and renewal notice at the specified times during the life of an ongoing fee arrangement.<sup>37</sup> If, after receiving the renewal notice, the client decides not to renew or fails to respond to the fee recipient's renewal notice, the ongoing fee arrangement terminates.<sup>38</sup> This means that the fee recipient is not obligated to provide ongoing financial advice to the client, and the client is not obligated to continue paying the ongoing fee.<sup>39</sup></p> <p>The adviser must provide enhanced disclosure of the fees charged and services provided in the disclosure statement.<sup>40</sup></p>
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### C *Assumed Statutory Course of Dealing and Different Types of Advice*

The *Corporations Act* assumes a pattern of interaction between the adviser and retail client. The statute assumes a state of affairs such that via statutory disclosures (such as, SOA and FSG), the client is informed of the terms on which the advice is given, and the content of that advice. In the above examples, the client would likely acknowledge by clicking 'I agree' (or, for example, 'try it now', 'get started', or 'commence') indicating that they have read and understood the robo website terms and conditions and FSG on first accessing the website. After giving this apparent consent, the client commences navigating the inbuilt decision tree.

Thus, from the first interaction with the robo financial adviser, we assume that the client has been given a FSG. The client then works through the various questions designed to allocate the client to one of the menu of predetermined possible advice outcomes. In the Digital X example, the client is directed to a financial product (ETF) that meets the client's self-selected financial goal. The end point of the robo financial advice is a SOA. The client may then be given an opportunity to purchase securities or otherwise implement the advice contained in the SOA. In the alternative courses of dealing above, in which the Financial Objectives Filter and the Life Objectives Filter are applied, a FSG similarly is acknowledged to have been received by the client on first accessing the robo advice platform. Assuming that financial product advice is similarly given by the robo financial adviser, the platform will also provide a SOA.

As is assumed by the *Corporations Act*, robo financial advice is financial advice since it is a statement of opinion or recommendation that influences or is intended to influence the client's decision in relation to a financial product.<sup>41</sup> In a face-to-face human interaction between adviser and client, the parties may have

<sup>37</sup> Ibid pt 7.7A div 3 applies to fee recipients, being either the financial services licensee or representative (s 962C) in relation to an arrangement to provide personal advice to a retail client (ss 962–962A).

<sup>38</sup> Ibid ss 962M–962N, 962Q.

<sup>39</sup> Ibid s 962Q.

<sup>40</sup> Ibid pt 7.7A div 3, applies to fee recipients, being either the financial services licensee or representative (s 962C) in relation to an arrangement to provide personal advice to a retail client (ss 962–962A).

<sup>41</sup> Ibid s 766B.

commenced their course of dealing prior to the stage when substantive advice is provided. For example, the financial adviser may give ‘advice about advice’ as to the topic area on which the client will receive substantive advice. As explained below, in robo financial advice, we observe the same pattern, albeit that the advice about advice occurs in parallel with substantive advice. The decision tree embedded within the robo financial adviser asks questions and allocates the client towards one of the menu of advice outcomes. Thus, advice about advice is provided.

The following section identifies advice about advice and substantive advice in relation to: (1) the Digital X Filter; (2) the Financial Objectives Filter; and (3) the Life Objectives Filter. The purpose of doing so is carefully to articulate the course of dealing between the parties and to identify the relevant financial advice in respect of which any equitable fiduciary obligation may arise.

## 1 *The Digital X Filter*

In the Digital X example, after the client clicks ‘I agree’ and commences interacting with the robo financial adviser, the gateway questions allocate the client to a decision tree according to the client’s self-selected financial goal. Irrespective of the gateway questions, which will likely elicit information about the client’s personal and financial circumstances, the outcome will be either that the client does or does not receive substantive robo advice. Implicit in either possible outcome is a prior unarticulated decision of the robo financial adviser, which is whether or not to provide robo advice to that client at all. The mechanics of the prior decision are not transparent to the client. However, the decision will be revealed if — following answers to gateway questions such as ‘What is your weekly income?’ and ‘What are your weekly expenses?’ — the robo financial adviser responds with a decision outcome that the client is filtered out of the platform with a message such as: ‘We advise clients to reduce debts before pursuing financial investments. Please come back when you are debt free.’ Alternatively, the client will be offered substantive advice. After the gateway questions, the client will follow the decision tree and be allocated to a decision outcome, triggering provision of a SOA. The SOA may or may not be capable of implementation on the same platform. Digital X clients ‘are aligned with one of a limited number of ETF portfolios based on their investment profile[s]’.<sup>42</sup>

The crucial observation is that the robo financial adviser is, thereby, making a conceptually distinct decision about whether or not to offer substantive advice to the client. In the case where substantive advice is offered, there is an additional decision, which is that substantive advice is only offered on the topic area of the robo advice platform, and not on other topic areas. These preliminary decisions constitute advice about advice. Of course, as described above in the Financial Objectives Filter and the Life Objectives Filter, it is possible that a robo financial adviser may ask other gateway questions. In such cases, the possibility of the robo financial adviser offering advice about advice is more clearly in view.

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<sup>42</sup> ASIC RG 255, above n 2, [255.28] example 3. See also above n 15 and accompanying text.

The robo financial adviser in Digital X therefore gives advice about advice. It is important to observe that advice about advice is a separate concept to financial product advice.<sup>43</sup> Advice about advice may concern the options available to the client in relation to any number of alternative topic areas of financial inquiry. However, advice about advice and financial product advice may overlap where the adviser provides advice on topic areas such that the topic area(s) are themselves confined to a 'particular financial product or class of products'. For example, in Digital X, the financial product advice is that the client should invest in 'one of a limited number ETF portfolios.' On these particular facts, this is financial product advice because the robo financial adviser is providing 'a recommendation or statement of opinion intended to influence the client' in making a decision in relation to ETF portfolios, which are a particular financial product or class of financial products.<sup>44</sup> Thus, Digital X provides advice about advice and also financial product advice.

Digital X's algorithm also automatically filters the client in or out of the platform. In doing so, Digital X provides advice on a different matter: whether or not the client should receive investment advice at all. This also constitutes advice about advice. In providing this advice about advice, Digital X allocates the client to an appropriate decision tree or filters them out of the platform. This advice about advice may or may not be financial product advice. Since Digital X provides advice on only one topic area of advice, which is itself confined to a single financial product, the robo financial adviser thereby also may be providing financial product advice.<sup>45</sup> However, the point to note is that in deciding whether to permit the client to proceed through the decision tree or in filtering the client out of the platform, the robo financial adviser is advising the client on their suitability to receive financial advice at all.

There is also substantive advice. In filtering out the client or allocating the client to an appropriate decision tree, Digital X implicitly makes a recommendation as to whether or not the client should invest in ETF portfolios. This is structurally inevitable since ETF portfolios are the only class of financial product on which Digital X provides advice. It is for this reason that the substantive advice will similarly constitute financial product advice. The advice about advice and substantive advice are, thus, provided in parallel. As a result, the robo financial adviser's allocation of the client to receive a SOA, or not, means it is difficult to distinguish between these forms of advice.

## 2      *The Financial Objectives Filter*

In relation to the Financial Objectives Filter, the client selects between receiving advice on 'superannuation', 'debt consolidation' and 'life insurance'. Depending on the client's answers to the subsequent gateway questions, the robo financial adviser allocates the client to an appropriate decision tree or filters them off the platform. Thus, the robo financial adviser provides advice about advice as to the client's suitability to receive substantive advice on the selected topic area. In addition, as

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<sup>43</sup> To constitute financial product advice, the advice must relate to a particular financial product or class of products: *Corporations Act* s 766B(1).

<sup>44</sup> *ASIC v Online Investors Advantage Inc* (2005) 194 FLR 449, 465 [123]–[125] (Moynihan J).

<sup>45</sup> See above n 43.

with Digital X, it may be argued there is substantive advice and financial product advice being given about certain investments. This will, in part, depend on the topic areas and whether the robo financial adviser offers financial advice on more than one financial product or class of financial products.

### 3 *The Life Objectives Filter*

The Life Objectives Filter more explicitly differentiates between advice about advice and substantive advice. In this example, the client selects between ‘security in retirement’, ‘paying for children’s education’, ‘owning own home’ or ‘having a nest egg’. The robo financial adviser translates the client’s life objective(s) into a pre-programmed financial objective(s) on which to receive substantive robo financial advice. For example, ‘security in retirement’ as a life objective might translate to ‘superannuation strategy’ as a financial objective. Having a ‘nest egg’ might similarly translate to ‘portfolio strategy’. This translation and alignment constitutes advice about advice. The robo financial adviser is counselling the client on a suitable topic area of financial advice.

Throughout this process, the client will also answer the gateway questions, such as their age, income, liabilities and assets, risk tolerance and desired rate of return. Based on the client’s responses the robo financial adviser allocates the client to the appropriate decision tree, or filters them out of the platform. This allocation implicitly confirms the client’s suitability to receive substantive advice on a particular topic(s), now expressed as financial objectives. At this point in the analysis, the Life Objectives Filter follows a similar pattern to the Digital X Filter and Financial Objectives Filter examples discussed above. However, the Life Objectives Filter uniquely provides a distinct phase of advice about advice in translating life objectives into financial objectives. In translating life objectives, the robo financial adviser is not providing financial product advice. In consequence, the investor protections contingent upon the provision of financial product advice, such as FOFA Obligations<sup>46</sup> and the requirement to make statutory disclosures<sup>47</sup> are not engaged.

Careful construction of the course of dealing between the robo financial adviser and the client demonstrates that since financial product advice is not being given, statutory protection of retail clients under the *Corporations Act* is not consistently available. However, the robo financial adviser may owe equitable fiduciary obligations. As is demonstrated below, equity independently scrutinises the conduct of the robo financial adviser who may constitute itself a fiduciary and, thus, owe an obligation of loyalty to the client. Further, the robo financial adviser’s conduct in compliance with the *Corporations Act* will not necessarily be that which also meets equity’s stringent standards. It is to these equitable obligations that we now turn.

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<sup>46</sup> See Table 3 above.

<sup>47</sup> See Table 2 above.

## D *Equitable Fiduciary Obligations based on a Statutory Course of Dealing*

There is a debate as to the normative foundations and justifications for fiduciary obligations.<sup>48</sup> This discussion seeks to shed some light on why fiduciary law should be concerned with the conduct of robo financial advisers. It is impossible to canvas every theory of fiduciary obligations, and implicit in the calculation is some judgement about the role of fiduciary law in regulating *all* financial advisers. Part of the difficulty is that unlike other fiduciaries, such as agents and trustees, who may also have custody of assets or otherwise have the power to transform the legal status of the principal, the financial adviser does only and exactly just that: *advise*. Nonetheless, as pointed out by Smith, despite an absence of formal power to bind the principal, on particular facts, the robo financial adviser's influence over the client may be so powerful that it is *as if* the robo adviser had the power to affect the legal position of the client.<sup>49</sup>

Additionally, where the adviser is a stockbroker, it is also necessary to separate the financial adviser's function as an agent who buys and sells securities, and their advisory function. This distinction is forcefully illustrated by the facts of *Daly v Sydney Stock Exchange Ltd*.<sup>50</sup> As is discussed further below in Part IID, Dr Daly sought *advice* from Patrick Partners, a firm of stockbrokers. He had inherited a sum of money and, after reading a book entitled 'Investment for Everyone', decided to invest the money on the stock exchange.<sup>51</sup> Apart from a small

<sup>48</sup> A non-exhaustive list of recent literatures includes: Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing, 2010); Matthew Conaglen, 'Fiduciary Duties and Voluntary Undertakings' (2013) 7(2) *Journal of Equity* 105; James Edelman, 'When Do Fiduciary Duties Arise?' (2010) 126 (Apr) *Law Quarterly Review* 302; James Edelman, 'The Importance of the Fiduciary Undertaking' (2013) 7(2) *Journal of Equity* 128; James Edelman, 'The Role of Status in the Law of Obligations: Common Callings, Implied Terms, and Lessons for Fiduciary Duties' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 21; P D Finn, *Fiduciary Obligations* (Lawbook, 1977); P D Finn, 'The Fiduciary Principle' in T G Youdan (ed) *Equity, Fiduciaries and Trusts* (Carswell, 1989) 1; Paul Finn, 'Fiduciary Reflections' (2014) 88(2) *Australian Law Journal* 127; Joshua Getzler, 'Rumford Market and the Genesis of Fiduciary Obligations' in Andrew Burrows and Lord Rodger of Earlsferry (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford University Press, 2006) 577; Joshua Getzler, '"As If" Accountability and the Counterfactual Trust' (2011) 91(3) *Boston University Law Review* 973; Joshua Getzler, 'Ascribing and Limiting Fiduciary Obligations: Understanding the Operation of Consent' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 39; Matthew Harding, 'Trust and Fiduciary Law' (2013) 33(1) *Oxford Journal of Legal Studies* 81; Paul B Miller, 'Justifying Fiduciary Duties' (2013) 58(4) *McGill LJ* 969; Paul B Miller, 'The Fiduciary Relationship' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 63; Leonard I Rotman, 'Fiduciary Law's "Holy Grail": Reconciling Theory and Practice in Fiduciary Jurisprudence' (2011) 91(3) *Boston University Law Review* 921; Lionel Smith, 'Deterrence, Prophylaxis and Punishment in Fiduciary Obligations' (2013) 7(2) *Journal of Equity* 87; Lionel Smith, 'The Motive, Not the Deed' in Joshua Getzler (ed), *Rationalising Property, Equity and Trusts: Essays in Honour of Edward Burn* (LexisNexis, 2003) 53; Lionel Smith, 'Fiduciary Relationships: Ensuring the Loyal Exercise of Judgment on behalf of Another' (2014) 130 (Oct) *Law Quarterly Review* 608; Lionel Smith, 'Can We Be Obligated to Be Selfless?' in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 141.

<sup>49</sup> Lionel Smith, 'Parenthood Is a Fiduciary Relationship', 24 July 2017 <<https://ssrn.com/abstract=3007812>> 13.

<sup>50</sup> (1986) 160 CLR 371 ('Daly').

<sup>51</sup> *Daly v Sydney Stock Exchange Ltd* [1981] 2 NSWLR 179, 183C (Powell J).

parcel of shares, Dr Daly had not previously invested in the share market. He approached Patrick Partners and met an employee, who was employed as a ‘client adviser’ or ‘sales adviser’, to inquire about shares in which he might invest his money.<sup>52</sup> The employee advised Dr Daly that the time was not propitious to purchase shares, but that Dr Daly should lend the money to Patrick Partners. Thus, the firm was not engaged to implement any transactions on his behalf. Despite being a ‘stockbroker’, on the facts, Patrick Partners provided advice alone.

Accounts of fiduciary law that rest on respect for the principal’s autonomy, or are derived from the principal’s authority, thus face a particular challenge in accommodating advisers, which is that a principal may engage an adviser and yet retain a degree of autonomy.<sup>53</sup> Similarly, a principal may engage an adviser who does not, in any meaningful sense, ‘stand in substitution’ for the principal.<sup>54</sup> However, as is discussed below, we speculate that the particular context of robo financial advisers tips the normative balance in both of these models in favour of the adviser owing an obligation of fiduciary loyalty.

Smith advances an ‘interpretative theory of fiduciary relationships’.<sup>55</sup> According to Smith, an obligation of fiduciary loyalty arises when decision-making powers are held for and on behalf of another person, where those powers are held in a ‘managerial capacity’.<sup>56</sup> Therefore, the powers must be exercised according to what the fiduciary believes is in the best interests of the principal and may not be exercised when the ‘fiduciary is in a conflict’.<sup>57</sup> When a financial adviser is appointed, is the principal’s autonomy sufficiently entrusted or transferred to the (fiduciary) adviser? Arguably this is the purpose of the doctrinal tests outlined below. Equity seeks to determine whether the substance of the relationship is such that an obligation of loyalty applies. Notwithstanding that formal authority to make and implement decisions rests with the principal, as a ‘factual’ matter ‘factual power is held for and on behalf of the advisee’.<sup>58</sup> Application of this theory therefore depends on our ability to be satisfied that ‘there has been a partial transfer of autonomy’ to the adviser.<sup>59</sup> In relation to a robo financial adviser, we may question the extent to which the client perceives the digital platform to be neutral or impartial. On some facts, it may be demonstrated that the client’s belief in the unbiased

<sup>52</sup> Ibid 183D (Powell J).

<sup>53</sup> Smith, ‘Ensuring the Loyal Exercise of Judgment’, above n 48, 618–19.

<sup>54</sup> Paul B Miller, ‘The Fiduciary Relationship’ in A Gold and P Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014) 63, 71.

<sup>55</sup> Lionel D Smith, ‘Contract, Consent, and Fiduciary Relationships’ in Paul B Miller and Andrew S Gold (eds), *Contract, Status, and Fiduciary Law* (Oxford University Press, 2016) 117, 134.

<sup>56</sup> Ibid 134–5. See also Smith, ‘Ensuring the Loyal Exercise of Judgment’, above n 48, 614–16.

<sup>57</sup> Smith, above n 55, 135. According to Smith’s theory, the no-conflict rules ‘tell a fiduciary when judgement cannot be safely exercised in relation to a fiduciary power’ and breach renders the transaction, *inter alia*, voidable by the principal. The no-conflict rule is, thus, about the vitiation of the principal’s consent. Smith views the no-profit rule as a rule of primary attribution by which profit obtained in breach of duty is attributed to the principal from the moment of acquisition. It is a rule about the principal’s primary entitlement to the profit. See Smith, ‘Ensuring the Loyal Exercise of Judgment’, above n 48, 625, 628. See also J E Penner, ‘Is Loyalty a Virtue, and Even If It Is, Does It Really Help Explain Fiduciary Liability?’ in Andrew S Gold and Paul B Miller (eds), *Philosophical Foundations of Fiduciary Law* (Oxford University Press, 2014), 159, 171.

<sup>58</sup> Smith, ‘Ensuring the Loyal Exercise of Judgment’, above n 48, 619.

<sup>59</sup> Ibid.

competence of the robot allows the client to cede more decision-making power to the digital platform. In this sense, the ‘factual power’ held by the robo financial adviser may, on the facts, be greater as compared to a human adviser.

The same point is possible in relation to Miller’s work. Miller argues that fiduciary power is ‘a form of *authority* ordinarily derived from the *legal personality* of another (natural or artificial) person’.<sup>60</sup> The fiduciary is invested with the fiduciary power/authority of the principal and, therefore, stands in substitution for the principal ‘in exercising a legal capacity that is ordinarily derived from ... [the principal’s] legal capacity’.<sup>61</sup> In relation to advisers, Miller also points out the important distinction we draw above, which is that it is relatively straightforward to characterise a stockbroker as fiduciary, where that person has some discretionary decision-making power in relation to investments, and where that power also includes the authority to implement transactions.<sup>62</sup> However, of interest is a different scenario, in which it is the client who implements any advice.<sup>63</sup> To the extent that Miller’s model contemplates a principal who is ‘incapable of exercising independent judgment’<sup>64</sup> — such that the financial adviser enjoys ‘effective discretionary power’ despite no formal relinquishment by the client — the robo financial adviser may similarly give financial advice.<sup>65</sup> As identified above, the systemic pattern may show that consumers are *more* willing to trust the digital platform than a face-to-face adviser.<sup>66</sup>

Our concern with the willingness of the client to trust the robo adviser comes close to Finn’s ‘fiduciary expectation’ thesis.<sup>67</sup> Informed by considerations of public policy ‘aimed at preserving the integrity and utility of such relationships given the expectation that the community is considered to have of behaviour in them, and given the purposes they serve in society’,<sup>68</sup> fiduciary obligations are recognised where the actual circumstances of a relationship demonstrate that ‘one party is entitled to expect that the other will act in his or her interests in and for the purposes

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<sup>60</sup> Miller, ‘The Fiduciary Relationship’, above n 54, 70 (emphasis in original).

<sup>61</sup> Ibid 71.

<sup>62</sup> Ibid 84. Albeit, as discussed in this article, some robo platforms also direct clients to portfolio and execution services.

<sup>63</sup> Some robo platforms may, of course, be more comprehensive and offer advice as well as execution and portfolio management services, the latter being provided either by the robo entity or a separate but related entity. These services may obviously be conflicted.

<sup>64</sup> Miller, ‘The Fiduciary Relationship’, above n 54, 84 n 76.

<sup>65</sup> A question behind both Smith’s and Miller’s accounts, resolution of which lies beyond the scope of this article, is the question of *why* the principal has transferred autonomy or authority. Specifically, whether undue influence has been in view, given the shared historical roots of both doctrines. See generally Rick Bigwood, ‘From *Morgan* to *Etridge*: Tracing the (Dis)Integration of Undue Influence in the United Kingdom’ in Jason W Neyers, Richard Bronaugh and Stephen G A Pitel (eds), *Exploring Contract Law* (Hart Publishing, 2009), 369; Robyn Honey, ‘Divergence in the Australian and English Law of Undue Influence: Vacillation or Variance?’ in Andrew Robertson and Michael Tilbury (eds), *Divergences in Private Law* (Hart Publishing, 2016), 271.

<sup>66</sup> We acknowledge this is an empirical question beyond the scope of this article. In addition, the mode of interaction and advice delivery may be a hybrid, utilising digital means to varying degrees — for example, via email or online chat platform. These hybrid modes are not specifically considered in this article.

<sup>67</sup> Finn, ‘Fiduciary Reflections’, above n 48, 139. See also Finn, ‘The Fiduciary Principle’, above n 48, 46–7.

<sup>68</sup> Finn, ‘Fiduciary Reflections’, above n 48, 139.



of the relationship'.<sup>69</sup> Finn particularly identifies 'lawyers and investment advisers' as being commonly subject to fiduciary loyalty on this basis.<sup>70</sup> As a matter of doctrine, the discussion below turns to the specific questions of whether the elements identified by Finn, such as ascendancy and vulnerability, are made out, which we argue do as a normative matter justify a relationship capable of the fiduciary protection suggested by Finn. However, we would go further and speculate that it is in the intrinsic nature of the digital platform through which robo financial advice is delivered that an expectation of loyalty may be generated. ASIC guidance itself contemplates that a client should expect to be in a better position if they follow the advice provided by the robo adviser,<sup>71</sup> and predicts that 'digital advice has the potential to be a convenient and low-cost option for retail clients who may not otherwise seek advice'.<sup>72</sup> We suggest that while a lower cost may indeed be one reason for increased uptake of robo financial advice, the question must also be asked: do consumers trust financial robots more than human advisers? To the extent that trust is relevant, so is the fiduciary norm.

Unlike the above explanations for fiduciary duties, which are identified in service of the law's ends or policies,<sup>73</sup> Edelman's undertakings thesis posits that the necessary, but not sufficient, condition is that the conduct of the fiduciary 'has manifested an undertaking such that the principal is entitled, "in an objective sense, to expect that the other will act in his or their interests in and for the purposes of the relationship"'.<sup>74</sup> Edelman argues that the status or office held by a person is also an important circumstance in determining the scope of duties that the officeholder may reasonably be held to have undertaken.<sup>75</sup> Thus, Edelman's account is based on the undertaking or consent of the putative fiduciary, as constructed by the reasonable person in the position of the putative principal. As the discussion below demonstrates, it might be argued that the robo financial adviser necessarily 'undertakes a particular financial advisory role for the client',<sup>76</sup> carrying with it the necessary fiduciary undertaking.

In addition, there are further justifications for the application of the fiduciary norm in relation to robo financial advice. As Rotman identifies,<sup>77</sup> the circumstances

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<sup>69</sup> Ibid.

<sup>70</sup> Ibid.

<sup>71</sup> See, eg. *ASIC RG 255*, above n 2, [255.95].

<sup>72</sup> Ibid [255.3].

<sup>73</sup> See generally Miller, 'Justifying Fiduciary Duties', above n 48, 994–1004. Conaglen also outlines the nature and function of fiduciary duties by reference to ends, arguing that fiduciary obligations serve a prophylactic and protective function in the service of the fiduciary's non-fiduciary duties. On this model, fiduciary duties increase the likelihood of the fiduciary's faithful adherence to (non-fiduciary) duty. See Conaglen, *Fiduciary Loyalty*, above n 48, 61.

<sup>74</sup> Edelman, 'The Importance of the Fiduciary Undertaking', above n 48, 133, quoting *Red Hill Iron Pty Ltd v API Management Pty Ltd* [2012] WASC 323 (5 November 2012), [362] itself quoting *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410, 541.

<sup>75</sup> Edelman, 'The Role of Status in the Law of Obligations', above n 48.

<sup>76</sup> *Aequitas v Sparad No 100 Ltd (formerly Australian European Finance Corp Ltd)* [2001] NSWSC 14 (9 April 2001), [307] (Austin J) ('*Aequitas*') applying *Daly* (1986) 160 CLR 371, 377 (Gibbs CJ), 384–5 (Brennan J). See also *Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390, 391 (The Court) ('*CBA v Smith*') in which the bank 'assumed a fiduciary responsibility towards the customer' in giving that customer 'advice upon financial affairs'.

<sup>77</sup> Rotman, above n 48, 970–1.

must justify fiduciary protection. Where contract, tort or unjust enrichment can rectify injustice, then fiduciary law should have no role to play. The decision tree in which financial advice is embedded and through which it is delivered is opaque to the client. Further, the client cannot ask questions of the financial robot, or ask for clarification. Crucially, the client cannot ask for reasons beyond those automatically given by the platform and, therefore, cannot assess the basis for the financial advice and whether or not to act upon it. The information asymmetries in the relationship between the adviser and client are heavily weighted in favour of the robo financial adviser. As a formal matter, private ordering with the robo financial adviser is not possible. Additionally, the client entrusts the robo financial adviser with information that may be confidential in character, such as particular financial information and personal attributes and goals. Taken together, we argue that these features suggest the recognition of fiduciary loyalty in the giving of robo financial advice. There is a systemic risk of abuse of power by the robo financial adviser and holding the adviser to a particular standard of performance or degree of care will not meet this risk. The client is unable to monitor or evaluate the robo adviser's performance and, in any case, as Getzler explains: '[w]hat is being sought from the fiduciary is a decent process of decision making rather than a defined or prescribed result.'<sup>78</sup>

Assuming that we can be reassured as to *why* the fiduciary norm should apply to the robo financial adviser–client relationship, we now turn to establishing the presence of a fiduciary relationship in the statutory courses of dealing identified above in Part IIC.

Reference has already been made to *Daly*, in which the High Court held Patrick Partners owed fiduciary obligations to Dr Daly. Recall that an employee of Patrick Partners suggested to Dr Daly that instead of purchasing shares, he should lend the money to the firm for interest 'until the time was right to buy [shares]' adding that the 'firm was safe as a bank'.<sup>79</sup> Dr Daly pursued this course and lent the firm money on an unsecured basis. Patrick Partners was, in fact, in a parlous financial situation, which was not disclosed to Dr Daly. On the insolvency of the firm, the debt to him could not be repaid. Dr Daly commenced an action to recover from a statutory fidelity fund and his entitlement depended on whether the firm had received the funds as (constructive) trustee. Argument was directed to the question whether the firm stood in a fiduciary relationship to Dr Daly.

In determining that a fiduciary relationship had arisen, Gibbs CJ pointed to the need for an undertaking by the firm and reliance by the client:

The firm, which held itself out as an adviser on matters of investment, undertook to advise Dr Daly, and Dr Daly relied on the advice which the firm gave him. In those circumstances the firm had a duty to disclose to Dr Daly the information in its possession which would have revealed that the transaction was likely to be a most disadvantageous one from his point of view. Normally, the relation between a stockbroker and his client will be one of a fiduciary nature and such as to place on the broker an obligation to make

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<sup>78</sup> Joshua Getzler, 'Financial Crisis and the Decline of Fiduciary Law' in Nicholas Morris and David Vines (eds) *Capital Failure: Rebuilding Trust in Financial Services* (Oxford University Press, 2014) 193, 199–200.

<sup>79</sup> *Daly* (1986) 160 CLR 371, 375 (Gibbs CJ).

to the client a full and accurate disclosure of the broker's own interest in the transaction.<sup>80</sup>

Justice Brennan identified:

Whenever a stockbroker or other person who holds himself out as having expertise in advising on investments is approached for advice on investments and undertakes to give it, in giving that advice the adviser stands in a fiduciary relationship to the person whom he advises.<sup>81</sup>

As has been said, it is also important to distinguish the activity of the firm in *Daly*. Prominent in the facts was *advice* and *advising*. Despite the firm being described as a 'stockbroker', the activity was not buying and selling securities. Had the employee been engaged to do so, a fiduciary relationship of agency would have arisen. It is for this reason that stockbrokers are often more easily cast as fiduciary in virtue of status. However, where the activity is advising, more careful construction is required. Following *Daly*, the relationship between a financial adviser and client is a distinct category of fiduciary relationship that arises whenever the criteria in *Daly* are met.<sup>82</sup> The existence of this obligation may prevent the fiduciary from subsequently attempting to contract out of any fiduciary obligations. We explore this issue below.

A fact-based fiduciary relationship may also arise from the course of dealing between the parties and the facts and circumstances of the case. Courts in Australia have articulated differing approaches to the identification of an ad hoc fiduciary relationship. Most prominent is the 'essence' account of Mason J in *Hospital Products Limited v United States Surgical Corporation*,<sup>83</sup> and the multi-factorial approach articulated by Gaudron and McHugh JJ in *Breen v Williams*.<sup>84</sup> Irrespective

<sup>80</sup> Ibid 377 (Gibbs CJ) (references omitted).

<sup>81</sup> Ibid 385 (Brennan J).

<sup>82</sup> In the sense that a financial adviser–advisee relationship falling strictly within the criteria identified will be fiduciary: see *Daly* (1986) 160 CLR 371, 377 (Gibbs CJ), 385 (Brennan J). *Daly* was approved in *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165, 197–8 [72]–[74] (McHugh, Gummow, Hayne and Callinan JJ) ('*Pilmer*'). See also *Aequitas* [2001] NSWSC 14 (9 November 2011), [307] (Austin J) and *ASIC v Citigroup (No 4)* (2007) 160 FCR 35, 77–8 [283]–[284] (Jacobson J), which hold fast to criteria identified in *Daly* — namely, the need to identify an undertaking to act in the client's interests in a particular financial advisory role and a holding out by the putative adviser of some expertise in financial matters. To the extent that the facts systematically disclose these elements in financial adviser relationships, *Daly* applies, unless displaced (as, for example, in *Pilmer*), where the necessary element of 'advising' was not present. Rather, the report of the auditor was a statement of opinion provided to satisfy the ASX listing rules.

<sup>83</sup> (1984) 156 CLR 41 ('*Hospital Products*'). Justice Mason stated that the features of fiduciary relationships 'from the illustrations which the judicial decisions provide' suggest that '[t]he critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense': at 96–7.

<sup>84</sup> (1996) 186 CLR 71, 106–7 (citations omitted) ('*Breen*').

Australian courts have consciously refrained from attempting to provide a general test ... the term "fiduciary relationship" defies definition. ... the courts have identified various circumstances that, if present, point towards, but do not determine, the existence of a fiduciary relationship. These ... have included: the existence of a relation of confidence; inequality of bargaining power; an undertaking by one party to perform a task or fulfil a duty in the interests of another party; the scope for one party to unilaterally exercise a discretion or power which may affect the rights or interests of another; and a dependency or vulnerability on the part of one party that causes that party to rely on another.

of the description adopted, the discussion below demonstrates that the robo financial adviser likely constitutes itself fiduciary in providing advice, both advice about advice and substantive advice. All potential courses of dealing, therefore, pose risk for the robo financial adviser.

Justice Mason's obiter dicta in *Hospital Products* was applied in relation to a financial adviser in *Wingecarribee Shire Council v Lehman Brothers Australia Ltd (in liq)*.<sup>85</sup> In that case, a financial adviser recommended the purchase of financial products (notes) to various local councils. The face of the notes contained a purported disclosure such that the financial adviser (Grange) 'may also receive placement fees'.<sup>86</sup> Acting on the advice, the local councils purchased the notes from an entity related to the adviser and suffered financial losses. The local councils successfully obtained equitable compensation for these losses as a remedy for the adviser's breach of fiduciary duty. The Court, therefore, had to determine whether the financial adviser owed fiduciary obligations to the client.

In confirming the existence of a fiduciary duty, Rares J stated:

Grange held itself out to Swan at all times from about mid-2003 (when Mr O'Dea began offering advice about rewriting Swan's investment policy and investing in the Forum AAA SCDO) as an adviser on matters of investment and undertook to advise Swan on those matters. Swan reposed trust and confidence in Grange acting as its adviser on investing the council's money in financial products. Grange undertook, from when it negotiated the Forum AAA transaction, to act in the interests of Swan in the exercise of the council's investment powers and discretions that affected Swan's interests in a legal or practical sense.<sup>87</sup>

As described above, the course of dealing between a robo adviser and client may be understood both as advice about advice and substantive advice. A fiduciary relationship arises on both types of advice. In addition, it should be noted that although the scope of the fiduciary relationships may be different, the existence of a fiduciary relationship may be demonstrated on all three courses of dealing described above: Digital X, Financial Objectives Filter and Life Objectives Filter.

Dealing first with advice about advice, in all three courses of dealing, the robo financial adviser determines the client's suitability to receive the substantive advice offered. Depending on the client's answers to the gateway questions, the robo financial adviser allocates the client to a decision tree, or filters them out of the advice platform. Ultimately, ascription of the fiduciary character will depend on the evidence in a given scenario.

Turning to the criteria identified in *Daly*, the most crucial observation is that the robo financial adviser holds itself out as an adviser on matters of investment.<sup>88</sup>

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<sup>85</sup> (2012) 301 ALR 1, 200 [743] (Rares J) ('*Wingecarribee*').

<sup>86</sup> Ibid 76 [254] (Rares J).

<sup>87</sup> Ibid 200 [743] (Rares J). See also *ABN AMRO Bank NV v Bathurst Regional Council* (2014) 224 FCR 1, 210–11 [1066]; *ASIC v Citigroup (No 4)* (2007) 160 FCR 35, 77–8 [282]–[286] (Jacobson J) — although on the facts the Court found a fiduciary duty had been contractually validly excluded.

<sup>88</sup> *Aequitas* [2001] NSWSC 14 (9 April 2001), [307] (Austin J) applying *Daly* (1986) 160 CLR, 377 (Gibbs CJ), 384–5 (Brennan J). The important matter here is substance not form. We do not suggest

Importantly, the advice given implicitly covers the robot's decision as to the suitability of the client to receive substantive advice. The robot 'undertakes a particular financial advisory role for the client'.<sup>89</sup> Thus, the matters on which the adviser holds out expertise may be wider than is first apparent. The existence of an undertaking is further supported by the individuated nature of the interaction between robo financial adviser and client. The client relies on the expertise of the robo financial adviser first in confirming their suitability to receive substantive advice and then, where relevant, in the identification of the topic areas of advice. In answering the gateway questions, the client will have entrusted confidential personal information to the robo financial adviser. It is very difficult for the client to verify the advice given by the robo financial adviser in either filtering the client out or confirming their eligibility to proceed. The inner calculations of the robo financial adviser are fixed and predetermined and do not permit any questions and answers to be given. The client has no opportunity to challenge or question the robo financial adviser or the advice about advice during the process. Hence, the client is vulnerable in receiving advice about advice.

Similarly, the characteristics of an ad hoc fiduciary relationship are present. In addition to the elements of undertaking, vulnerability and reliance identified above, it might be argued that the robo adviser holds itself out via statements on the platform as acting in the interests of the client such that a legitimate expectation of loyalty is created.<sup>90</sup> Similarly, the paradigm elements of trust and confidence are present. Balanced against these factors, however, is the obvious point that the client may exit with a click of the mouse. But this possibility does not and should not derogate from the potential fiduciary analysis. In the more familiar example, in which the adviser and client interact face-to-face, the parallel argument may be made that the client can exit the meeting. Equity is suspicious of such arguments.

Turning to the provision of substantive advice, in all three examples, the robo adviser provides a recommendation to the client regarding financial investments. A fiduciary relationship may likewise arise. The structural characteristics of the *Daly* financial adviser–client relationship are present systemically when substantive advice is given. Similarly, there is an expectation of loyalty and an undertaking to act in the interests of the client coupled with vulnerability and power to affect the interests of the client.

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that merely by renaming the activity as 'provision of general information' fiduciary law would turn a blind eye.

<sup>89</sup> *Aequitas* [2001] NSWSC 14 (9 April 2001), [307] (Austin J) applying *Daly* (1986) 160 CLR, 377 (Gibbs CJ), 384–5 (Brennan J). See also *CBA v Smith* (1991) 42 FCR 390, 391 (The Court) in which the bank 'assumed a fiduciary responsibility towards the customer' in giving that customer 'advice upon financial affairs'.

<sup>90</sup> Cf Finn, 'The Fiduciary Principle', above n 48, 46: '[what must be shown] is that the actual circumstances are such that one party is entitled to expect that the other will act in [their] interests in and for the purposes of the relationship'.

## E *The Scope of the Fiduciary Duty*

Not all aspects of the relationship between robo financial adviser and client will be fiduciary in nature.<sup>91</sup> It is, therefore, necessary to construe the scope of the fiduciary relationship. In the robo financial adviser examples, this is bounded by the robo financial adviser's particular role in each course of dealing. For example, in the Life Objectives Filter, the robo financial adviser provides advice about advice in presenting topic areas for advice or filtering the client out of the platform. Recall, the life objectives are: 'security in retirement', 'pay for children's education', 'own my own home', or 'nest egg'. In translating a life objective into a financial objective, and then particularising a financial objective, the robo financial adviser assists the client in prioritising and selecting an appropriate topic area. Ultimately, this also potentially translates to substantive advice on that topic area. The scope of the robo financial adviser's fiduciary duty therefore initially embraces the process of filtering and selecting the client's topic preferences. There is potentially a second fiduciary duty that maps the robo financial adviser's role in providing substantive advice. Similarly, in the Financial Objectives Filter and the Digital X scenario, the scope of the robo financial adviser's fiduciary obligations are defined by reference to the roles in initially, identifying and prioritising the client's objectives, and also in providing substantive advice.

Three crucial points must be made. First, consistent with the observation that advice about advice and substantive advice are provided in parallel, the robo financial adviser may owe more than one fiduciary obligation to the client, arising from the same course of dealing. Second, a fiduciary relationship may arise very early, if not at the commencement, in the interaction between the robo financial adviser and client. This is significant because, as discussed below, the robo financial adviser's compliance with statutory obligations under the *Corporations Act*, will not systemically elicit conduct that also discharges or eliminates any fiduciary obligations. Third, depending on the course of dealing in question, the scope of any fiduciary obligation is potentially wider: for example, the Life Objectives Filter in relation to advice about advice may create a fiduciary obligation encompassing a broader range of conduct.

## F *Fiduciary Duty Content and Breach*

The fiduciary obligation is loyalty.<sup>92</sup> Therefore, the robo financial adviser must not put itself in a position of conflict.<sup>93</sup> Breach occurs where the adviser puts itself in a

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<sup>91</sup> *Howard v Federal Commissioner of Taxation* (2014) 253 CLR 83, 100 [34] (French CJ and Keane J).

<sup>92</sup> *Bristol and West Building Society v Mothew* [1998] Ch 1, 18 (Millet LJ); *P&V Industries Pty Ltd v Porto* (2006) 14 VR 1, 6 [23] (Hollingworth J), after referring to *Breen* (1996) 186 CLR 71 and *Pilmer* (2001) 207 CLR 165: 'the no conflict and no profit rules encompass the whole content of fiduciary obligations and the duty of loyalty imposed on a fiduciary is promoted by prohibiting disloyalty rather than by prescribing some positive duty' (citing Richard Nolan, 'A Fiduciary Duty to Disclose?' (1997) 113 (Apr) *Law Quarterly Review* 220, 222).

<sup>93</sup> *CBA v Smith* (1991) 42 FCR 390, 392 (The Court); an obligation 'not to enter upon conflicting engagements to several parties': *Breen* (1996) 186 CLR 71, 135 (Gummow J); *Pilmer* (2001) 207 CLR 165, 199 [78] (McHugh, Gummow, Hayne and Callinan JJ). See also *Beach Petroleum NL v*

position of a conflict, or real or substantial possibility of conflict, between duties or between the adviser's self-interest and duty to the client.<sup>94</sup> Crucially, breach occurs not simply on an actual conflict, but potential conflict. As discussed in Part IIG below, a robo financial adviser may avoid the consequences of breach by seeking the fully informed consent of their principal.

To the extent that the advice constitutes financial product advice,<sup>95</sup> the robo financial adviser must conform to various statutory obligations including the adviser's FOFA Obligations.<sup>96</sup> However, the robo financial adviser cannot rely on meeting its FOFA Obligations in seeking to perform any fiduciary obligations. Rather, the FOFA Obligations are predicated on the existence of conflict between the adviser and client, and propose a method by which this conflict should be managed. For example, although pt 7.7A div 4 prohibits conflicted adviser remuneration, there are exceptions.<sup>97</sup> Further, an advice provider is permitted to be in a position of conflict, provided the advice provider prioritises the client's interests.<sup>98</sup> Recall that advice about advice is not financial product advice since the advice does not relate to a particular financial product or class of products.<sup>99</sup> Therefore, the robo financial adviser is not required to comply with FOFA Obligations in the case of advice about advice. However, FOFA Obligations do apply to substantive advice. Thus, we argue that robo financial adviser conduct that meets FOFA Obligations may not evidence conduct capable of discharging that adviser's fiduciary obligations.

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*Abbott Tout Russell Kennedy* (1999) 48 NSWLR 1, 47 (The Court); *Howard v Commissioner of Taxation* (2014) 253 CLR 83, 107 [59] (Hayne and Crennan JJ).

<sup>94</sup> *CBA v Smith* (1991) 42 FCR 390, 392 (The Court); *Breen* (1996) 186 CLR 71, 135 (Gummow J); *Birchnell v Equity Trustees, Executors and Agency Co Ltd* (1929) 42 CLR 384, 408 (Dixon J); *Boardman v Phipps* [1967] 2 AC 46, 124 (Lord Upjohn); *Hospital Products* (1984) 156 CLR 41, 103 (Mason J); *Pilmer* (2001) 207 CLR 165, 199 [79] (McHugh, Gummow, Hayne and Callinan JJ); *Australian Careers Institute Pty Ltd v Australian Institute of Fitness Pty Ltd* (2016) 340 ALR 580, 581–2 [3]–[5] (Bathurst CJ); 605 [132] (Sackville AJA with whom Meagher JA agreed).

<sup>95</sup> *Corporations Act* s 766B(1). See above nn 23–5, 28–9 and accompanying text.

<sup>96</sup> See Table 3 above.

<sup>97</sup> *Corporations Act* pt 7.7A div 4 prohibits a financial services licensee, authorised representative or other representative from receiving conflicted remuneration, as defined in s 963A and prohibits a product issuer or seller from giving conflicted remuneration. Note that exceptions to the prohibition on receiving conflicted remuneration are set out in pt 7.7A div 4 subdiv B. These include, a benefit given to the licensee or representative solely in relation to a life risk insurance product: s 963B, or non-monetary benefits less than the prescribed amount of \$300 where the benefit is given in relation to some insurance products and has a genuine education or training purpose: *Corporations Act* s 963C; *Corporations Regulations 2001* (Cth) reg 7.7A.13.

<sup>98</sup> *Corporations Act* s 961J(1):

If the provider knows, or reasonably ought to know, that there is a conflict between the interests of the client and the interests of:

- (a) the provider, or
- (b) an associate of the provider; or

...

the provider must give priority to the client's interests when giving the advice.

<sup>99</sup> *Ibid* s 766B(1). However, as acknowledged above, in Digital X the advice may constitute advice about advice, substantive advice and also financial product advice since the platform only advises on one financial product or class of financial product.

Specifically, as outlined in Table 3 above, the FOFA Obligations require the adviser to 'act in the best interests of the client in relation to the advice'.<sup>100</sup> In order to satisfy this obligation, the statute prescribes various steps that we suggest demonstrate that the adviser has exercised a degree of care and skill in advising the client. In addition, the adviser must take steps directed to the 'appropriateness' of the advice and must only provide the advice if it is appropriate.<sup>101</sup> Neither of these standards directs the adviser to meet the fiduciary obligation of loyalty.<sup>102</sup>

## 1 *Conflict of Duty and Self-interest*

The robo financial adviser must avoid a conflict between its duty to the client and its self-interest. In the Life Objectives Filter, the robo financial adviser translates life objectives to financial objectives. In the Financial Objectives Filter, the client is similarly guided to choose between a closed set of alternate financial objectives. In both scenarios, the robo financial adviser must only present topic areas within the scope of its licence<sup>103</sup> and on which it is qualified to advise.<sup>104</sup> Similarly, the robo financial adviser will likely present within the closed set of topic areas, those which for self-interested reasons, are beneficial to the adviser or a related entity. For example, the offered topic areas or financial products may correlate to providers offering execution, custodial and management services related to the robo financial adviser. To put the matter starkly, contrast the pattern of robo financial advice with a hypothetical situation in which a client approaches an adviser and *all* potential topic areas of advice are open for discussion, and in which the adviser has no interest in providing advice on one topic area over the other.

The analysis in relation to the Digital X scenario, is more nuanced. The client accesses the digital platform that only offers advice on one topic area: portfolio construction investment advice on ETF. However, as discussed above, all three scenarios contain an additional advice outcome. Specifically, the gateway questions and other filtering mechanisms determine whether or not the client should receive robo financial advice or be filtered out of the platform. Thus, even in Digital X, in which it appears that there has been no allocation of topic areas, nonetheless the robo financial adviser has determined whether or not the client should receive financial advice. This latter decision may be conflicted. Thus, it is not difficult to construct facts on which the robo adviser is in breach of its fiduciary obligation to avoid a conflict of duty and interest.

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<sup>100</sup> Ibid s 961B(1).

<sup>101</sup> Ibid s 961G.

<sup>102</sup> There is a debate beyond the scope of this article as to whether an obligation to act in the best interests of another is fiduciary or not. We observe that irrespective of the juridical basis of any best interest obligation binding the adviser, discharging this obligation will not, of itself, satisfy equity's obligations to avoid conflicts.

<sup>103</sup> *Corporations Act* s 911A(1).

<sup>104</sup> Section 912A of the *Corporations Act* requires a licensee to ensure their representatives comply with minimum standards for training of financial advisers and maintain organisational competence to provide the financial services authorised by the licence. See further ASIC, *Regulatory Guide 146 Licensing: Training of Financial Product Advisers*, July 2012; ASIC, *Regulatory Guide 105 Licensing: Organisational Competence*, 15 December 2016.



## 2 *Conflict of Duty and Duty*

The robo adviser must also avoid conflicts between duties. It is in the nature of robo financial advice that it is intended for mass consumption. Indeed, commentary has referred to robo financial advice having a ‘democratising’ effect.<sup>105</sup> In this environment, the risk of breach arises as individual clients are unlikely to have an identity of interest. As stated by the Court in *CBA v Smith*,

The reason is that by reason of the multiple engagements, the fiduciary may be unable to discharge adequately the one without conflicting his obligation in the other. Thus, it has been said, after ample citation of authority that where an adviser in a sale is also the undisclosed adviser of the purchaser, an actual conflict of duties arises ...<sup>106</sup>

Importantly, breach arises from the possibility of conflict, not merely on actual conflict. Two characteristics of robo financial advice immediately raise concerns. First, robo financial advice appears to proceed as a one-dimensional assessment of each client’s interest. It is not clear the extent to which a landscape of differing clients and their interest is being taken account of in the provision of robo financial advice. In any event, the gateway questions are not likely to elicit information for the robo financial adviser sufficiently to appreciate the conflicts of interests that may arise between clients. The closed and predetermined nature of the decision tree prevents a sophisticated appreciation of the nature of the clients’ interests. Second, as shown by Digital X, a robo platform may advise on acquisition of particular securities that may have limited market supply. In such circumstances, we may speculate as to the market impacts of this advice. This clearly engages the fiduciary obligation to avoid conflicts of duty.

## G *Disclosure and Consent*

The robo financial adviser may obtain the informed consent of the client in order to avoid fiduciary liability.<sup>107</sup> *Maguire v Makaronis* states that ‘[w]hat is required for a fully informed consent is a question of fact in all the circumstances of each case and there is no precise formula which will determine in all cases if fully informed consent has been given’.<sup>108</sup> Relevant considerations include whether the fiduciary has disclosed all information relevant to the transaction or decision. The fiduciary will not meet the standard by giving information sufficient only to place the principal on inquiry.<sup>109</sup> Thus, the robo financial adviser must disclose the nature and extent of the conflict of duty and duty, or duty and interest.<sup>110</sup> In addition, in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*, the Court noted that ‘the sufficiency of disclosure can

<sup>105</sup> Wealthfront Investment, ‘Methodology White Paper’, <<https://research.wealthfront.com/whitepapers/investment-methodology>>.

<sup>106</sup> (1991) 42 FCR 390, 392 (The Court) (citation omitted).

<sup>107</sup> There is a question beyond the scope of this article of the extent to which the course of dealing between the client and robo adviser supports other equitable defences such as equitable estoppels.

<sup>108</sup> (1997) 188 CLR 449, 466 (Brennan CJ, Gaudron, McHugh and Gummow JJ).

<sup>109</sup> *New Zealand Netherlands Society ‘Oranje’ Inc v Kuys* [1973] 1 WLR 1126, 1127 (Lord Wilberforce) (PC).

<sup>110</sup> *Blackmagic Design Pty Ltd v Overliese* (2011) 191 FCR 1, 23 [110] (Besanko J, with whom Finkelstein and Jacobson JJ agreed).

depend on the sophistication and intelligence of the persons to whom disclosure must be made'.<sup>111</sup> Equitable consent is a function of the principal's ability to make a conscious and informed choice. At minimum, the principal must have turned their mind, or had the ability to turn their mind, to the question whether or not to consent to the breach of fiduciary duty.

Clients commence their interaction with the robo financial adviser by acknowledging their agreement to the platform terms and conditions and receipt of a FSG. Therefore, as a matter of chronology, the client's click or tap has the potential to found a good defence for the adviser. However, the difficulty is that the quality of the fiduciary disclosure at this point will not likely constitute sufficient disclosure for effective equitable consent. A FSG is not sufficient disclosure, since it fails to address the particular circumstances of each client and is not directed to any particular breach of duty. Rather, a FSG is uniform and contains a baseline level of information about remuneration, including commissions or other benefits to be received by the adviser in relation to the services offered.<sup>112</sup> Disclosure in the FSG need only be generic and need not be directed to the specific nature and extent of the conflicts of interest, or duty and duty, that may arise. Therefore, information provided to the client on clicking, including acknowledging not only a FSG, but also any terms and conditions, may be in the nature of blanket statements that fall short of equity's standard. For example, in *Wingecarribee*, a contractual term on the face of debt instruments that the adviser [Grange] 'may also receive placement fees from Issuers'<sup>113</sup> was insufficient disclosure to meet equity's standard.<sup>114</sup> Therefore, in relation to the advice about advice provided in all of three of the filter examples, the client may have insufficient information on which to found any consent, albeit that the timing of the disclosures coincides with the commencement of any course of dealing relevant for equitable fiduciary obligations.

In requiring the adviser to meet 'the sophistication and intelligence of the persons to whom disclosure must be made',<sup>115</sup> the robo financial adviser faces a particular risk. Face-to-face financial advisers may observe and communicate with the client through an iterative process in order to meet equity's standard of the fullest of disclosure.<sup>116</sup> There is, thus, the possibility of a 'feedback loop'. However, all interactions with the robo financial adviser occur according to predetermined pathways. It is systemically impossible, therefore, for the robo financial adviser's disclosure to be tailored to the particular circumstances of all individual clients, whether they be 'shrewd and astute' or "'babes in the woods'".<sup>117</sup>

Client consent is signified by clicking or its equivalent. This discussion does not further interrogate the phenomenon of consent. We take the view that agreeing to the terms and conditions on a website or digital platform may be sufficient to signify good consent in equity. Nonetheless, we note that other substantive equitable

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<sup>111</sup> (2007) 230 CLR 89, 139 [107] (The Court) ('*Farah*').

<sup>112</sup> *Corporations Act* ss 942B–942C.

<sup>113</sup> *Wingecarribee* (2012) 301 ALR 1, 76 [254] (Rares J).

<sup>114</sup> *Ibid* 201 [747]–[748].

<sup>115</sup> *Farah* (2007) 230 CLR 89, 139 [107] (The Court).

<sup>116</sup> *Boardman v Phipps* [1967] 2 AC 46, 93 (Viscount Dilhorne); *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 1 WLR 1126, 1131–2 (Lord Wilberforce) (PC).

<sup>117</sup> *Farah* (2007) 230 CLR 89, 139 [108] (The Court).

doctrine may scrutinise provision of consent in these transactions. Specifically, undue influence or unconscionability may be relevant. The fact that advice is provided via a digital platform may suggest to the client a quality of independence and authority in the robot that may be absent from a face-to-face interaction. These issues are not further explored here.

After the client progresses through the decision tree, in all filter examples the client either receives a SOA or exits the platform. Recall that in the Digital X example, the Financial Objectives Filter, and the Life Objectives Filter, the client receives advice about advice as to the topic area on which to receive substantive advice. As the discussion above demonstrates, the filters differ as to the specificity of the advice about advice. Any fiduciary relationship that exists is wrapped around the giving of the advice about advice, and is constituted by the prior course of dealing. The scope of the relevant fiduciary relationship similarly maps the specificity of the advice about advice. The SOA, likewise, need not contain the information required to meet equity's standard and comes too late in the course of dealing to provide fiduciary disclosure.

As outlined in Table 2 above, the SOA must reveal any associations, relationships or remuneration and commissions that may influence the adviser in providing the substantive advice.<sup>118</sup> While these matters may clearly be relevant to a client's decision whether or not to consent to a breach of fiduciary duty, as a substantive matter, they do not speak to any breach of the adviser's fiduciary duty in giving advice about advice. For example, disclosure in the SOA that the adviser will receive fees if the client purchases securities in Company Y may, on some facts, meet equity's standard in relation to a fiduciary relationship of an adviser in giving investment advice about whether or not to purchase securities (substantive advice). However, that same disclosure will not suffice for the adviser who is asked 'On what topic area should I receive advice?'. Disclosure about an entitlement to fees will only be meaningful if the client has the further realisation that the adviser may be influenced in steering the client to 'purchase of securities in Company Y' as the topic area of advice. In this latter example, equity may well require the adviser further to reveal the nature and extent of their conflict in counselling on the topic area of advice.

Thus, the SOA will not systematically meet the fiduciary disclosure for any fiduciary relationship in relation to the giving of advice about advice. In addition, the timing of the SOA is too late in the parties' course of dealing. By the time the SOA is provided, a fiduciary relationship may already exist and the adviser may already be in breach. On this view, the SOA might well provide the foundation for any subsequent ratification by the client. However, this will still be limited by the sufficiency of fiduciary disclosure contained in the SOA.

The client may also receive substantive advice, which is the subject of a fiduciary relationship distinct from that surrounding advice about advice. The SOA may similarly be harnessed to provide fiduciary disclosure of the nature and extent of conflict in relation to substantive advice. However, the difference is that in the case of substantive advice, the breach of duty revealed in any conflicted advice and

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<sup>118</sup> *Corporations Act* ss 947B–947C. See also ASIC, *Regulatory Guide 246: Conflicted and Other Banned Remuneration*, December 2017.

the information contained in the SOA are communicated contemporaneously to the client. The potential therefore arises for a SOA to constitute fiduciary disclosure. A caveat to this is the particular facts of Digital X, since in that example, the distinction between advice about advice and substantive advice is difficult to draw. Digital X provides advice only on ETFs and, thus, there are no other potential topic areas on which to receive substantive advice. Therefore, implicit in advice about advice is substantive advice.

An additional difficulty, referred to above, is that like the FSG, and any other disclosure made by the robo financial adviser, it is not systematically possible to ensure disclosure meets the sophistication and intelligence of each individual client.<sup>119</sup>

The decision tree contemplates that some clients will exit the platform without receiving a SOA. In particular, a client may be filtered out according to their suitability to receive substantive advice. We have already made the point that this outcome in fact constitutes advice about advice and substantive advice, at least when provided in Digital X.<sup>120</sup> However, as these clients have not received a SOA, a SOA cannot provide the factual foundation for any defence in equity. For example, in relation to advice about advice, a highly geared client who identifies the topic areas 'superannuation and life insurance' or 'debt consolidation' may be filtered out of the platform. Bearing in mind that breach of fiduciary duty exists on the possibility of conflict between duty and self-interest or duties, it is not difficult to construct facts such that the robo adviser's advice implicit in filtering out the client is conflicted.

Finally, in relation to a conflict between duties, in addition to the matters discussed above, we observe that the robo financial adviser may have various clients with potentially diverse and conflicting interests. The decision tree is likely not structured to reveal any conflict or potential conflict between these interests. The difficulties of timing and content identified above apply equally to fiduciary disclosure designed to meet conflicts between fiduciary duties. Further, the robo financial adviser is inherently unable to appreciate the nature and extent of its conflicting obligations to multiple clients, which obviously goes to breach, but also informs the adequacy of disclosure.

As a matter of completeness, we return here to the adviser's FOFA Obligations. Despite the *Corporations Act* mandating provision of fee disclosure statements to clients,<sup>121</sup> this information is similarly given after any advice about advice or substantive advice. Further, it is limited in subject matter. Therefore, compliance with this FOFA Obligation similarly does not assist the fiduciary in obtaining informed client consent.

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<sup>119</sup> *Farah* (2007) 230 CLR 89, 139 [107] (The Court).

<sup>120</sup> Since implicitly the client is thereby receiving 'a recommendation or statement of opinion ... that is intended to influence [the client] in making a decision in relation to a particular financial product or class of financial products ... or could reasonably be regarded as intended to have such an influence.': *Corporations Act* s 766B(1).

<sup>121</sup> *Ibid* pt 7.7A div 3.

### III Contracting Out of Any Fiduciary Obligation

Potential fiduciaries may seek to arrange their affairs to avoid assuming fiduciary obligations by entering a contract with their principal, which contains a term to the effect that the parties agree that no fiduciary obligations arise between them. In *ASIC v Citigroup (No 4)*,<sup>122</sup> the mandate letter between Citigroup (adviser) and Toll (the company) acknowledged that ‘Citigroup [was] ... an independent contractor and not ... a fiduciary’,<sup>123</sup> and ASIC ‘specifically eschewed any suggestion that the fiduciary relationship arose prior to the execution of the mandate letter.’<sup>124</sup> But for this fact, the prior course of dealing between them may have satisfied the requirements establishing ‘fiduciary obligations before the execution of the contract, as in *United Dominions v Brian*’.<sup>125</sup>

Robo financial advisers may similarly seek to employ this strategy of contracting out. Their ability to do so is inherently a function of contract law’s ability to recognise the existence and enforceability of contracts formed through a digital medium, which is a matter beyond the scope of this discussion. Assuming, as a matter of formal validity, that a digital contract is possible, equitable fiduciary obligations may validly be excluded to the extent that to do so would not itself be a breach of any prior existing fiduciary obligations. Thus, for example, a fiduciary relationship recognised in virtue of status cannot easily be excluded by contract. Similarly, if on the facts, a fiduciary relationship is identified through a course of dealing, a subsequent attempt to contract out of the fiduciary obligations will be a breach of fiduciary duty. As has been noted, the category financial adviser and client is a contested status-based fiduciary relationship. In consequence, any attempt to contract out at the ‘click’ stage of client interaction may be unsuccessful to the extent that a relationship of adviser and client has already been constituted, and depending on whether the principal is able to give good consent to the breach. However, we also contend that an ad hoc fiduciary relationship may arise, depending on the decision tree, for any particular robo adviser. For this latter category, contracting out *may* be possible depending on the facts and course of dealing. Thus, we conclude that contracting out is not a reliable strategy for robo advisers who seek to avoid the creation of fiduciary obligations.

### IV Conclusion

It is trite to observe that equity is concerned with the whole of the course of dealing between the parties. The decision tree embedded within the financial robot and robo financial advice creates the possibility of equitable fiduciary obligations arising. Industry participants concerned principally with regulatory and statutory compliance may not be aware of these equitable obligations and, thus, be exposed to the risk of breach of fiduciary duty. Equitable remedies such as rescission and account of

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<sup>122</sup> (2007) 160 FCR 35.

<sup>123</sup> Ibid 59 [145] (Jacobson J).

<sup>124</sup> Ibid 80 [306] (Jacobson J).

<sup>125</sup> Ibid 80 [305] (Jacobson J) referring to *United Dominions Corporation Ltd v Brian Pty Ltd* (1985) 157 CLR 1.

profits in relation to commissions and fees, and equitable compensation in relation to lost opportunity, may apply. Additionally, AFSL licence holders may be in breach of their licence conditions by virtue of any breach of fiduciary duty.<sup>126</sup>

A further risk is that a director of the company that is the advice provider or holder of the AFSL under which the advice is provided may face personal liability for breach of directors' duties. Justice Edelman in *ASIC v Cassimatis (No 8)*<sup>127</sup> found that directors had contravened s 180(1) of the *Corporations Act* by exercising their powers in a way that caused or permitted (by omission to prevent) inappropriate advice to be given to investors, which would have been 'catastrophic' for the entity to whom the directors owed their duties. In *ASIC v Cassimatis (No 8)*, the directors' breach turned upon the provision of advice that contravened s 945A of the *Corporations Act* (the predecessor of s 961B). Given the potential ramifications for the advice provider who fails to comply with their equitable fiduciary duties, a director who allows the corporate adviser to breach its equitable fiduciary duties might also be in breach of s 180(1) of the *Corporations Act*.

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<sup>126</sup> Above n 5.

<sup>127</sup> (2016) 336 ALR 209, 370 [833].

# “Restoring the Rule of Law” through Commercial (Dis)incentives: The Code for the Tendering and Performance of Building Work 2016

Anthony Forsyth\*

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## *Abstract*

This article examines the Australian Coalition Government’s attempt to restore the rule of law in the building and construction industry, through the procurement requirements in the *Code for the Tendering and Performance of Building Work 2016* (Cth) (*‘2016 Code’*). It traces the evolution of the separate scheme of construction regulation adopted in 2005 following the Cole Royal Commission, the subsequent Labor Government changes to this scheme, and the initiatives of the Coalition Government since 2013. The article then considers the use of procurement guidelines to implement workplace reform in the construction industry since 1997, followed by a detailed explanation of the new procurement rules in the *2016 Code*. The concept of the rule of law is examined as a basis for analysis of arguments in support of its reinstatement in the Australian construction industry. The article concludes that the Government’s use of the procurement rules in the *2016 Code* is partly aimed at restoring the rule of law — narrowly conceived as ensuring compliance with the law — but is also a mechanism to reduce union power and enhance productivity in the Australian construction industry.

## **I Introduction**

This article examines the Australian Coalition Government’s attempt to bring back the rule of law in the building and construction industry, through the procurement requirements in the *Code for the Tendering and Performance of Building Work 2016* (Cth) (*‘2016 Code’*). Since coming to office in September 2013, the Coalition has

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repeatedly expressed its intention to ‘restore the rule of law’<sup>1</sup> in a sector where unlawful conduct is a significant problem (eg illegal industrial action, coercion and unlawful union entry onto sites).<sup>2</sup> The primary vehicle for achieving this objective is the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) (‘*BCIIP Act*’), which was passed by Federal Parliament in late 2016. The *BCIIP Act* re-established the Howard-era regulator, the Australian Building and Construction Commission (‘ABCC’), and introduced stronger prohibitions on unlawful strikes, picketing and coercion in the construction sector along with higher penalties.

The *BCIIP Act* also includes a provision that facilitated the issuing of the *2016 Code*, which is another important instrument through which the Government is pursuing its ‘rule of law’ objective in the building industry. Construction companies and contractors must comply with the *2016 Code* in order to remain eligible to tender for, and be awarded, Commonwealth-funded building work. This includes ensuring that there are no provisions in a bidding company’s enterprise agreements that infringe a wide range of new prohibitions on agreement content under the *2016 Code*. The Code therefore holds considerable potential to influence the practices of construction companies and their relationships with unions (particularly the Construction, Forestry, Mining and Energy Union (‘CFMEU’)), and to achieve the kind of cultural change in the building industry sought by the Government. In 2003, the Cole Royal Commission into the Building and Construction Industry saw the opportunity for procurement guidelines to drive workplace reform, stating in its Final Report that:

Because governments provide significant funds for building and construction activity, including on the occasions when they are the clients directly commissioning the work, they have the capacity through their purchasing power to influence the behaviour of participants in this industry.<sup>3</sup>

The Productivity Commission put this a little more bluntly, describing the role of the 2013 iteration of the Code as being ‘purely to use government procurement as a carrot and stick for improved workplace relations and [health and safety]’.<sup>4</sup> According to Howe, this approach is one of several forms of the dispensation of ‘money and favours’ by governments ‘to promote desired labour relations practices’, a regulatory technique that contrasts with traditional forms of direct regulation of the labour market.<sup>5</sup> Creighton has observed that procurement instruments dating as far back as the *Fair Wages Resolution 1891* (UK) had traditionally been utilised to protect workers from exploitation and to promote collective bargaining. In contrast,

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<sup>1</sup> See, eg, Commonwealth, *Parliamentary Debates*, House of Representatives, 31 August 2016, 84 (Malcolm Turnbull, Prime Minister), introducing the Building and Construction Industry (Improving Productivity) Bill 2013 (Cth) into Parliament.

<sup>2</sup> Productivity Commission (Cth), *Public Infrastructure: Inquiry Report* (Report No 71, Productivity Commission (Cth), 27 May 2014) vol 2, 530–1.

<sup>3</sup> Commonwealth, Royal Commission into the Building and Construction Industry, *Final Report* (2003) vol 7, 49 [3.2] (‘Cole Royal Commission’).

<sup>4</sup> Productivity Commission (Cth), above n 2, vol 2, 503.

<sup>5</sup> John Howe, “‘Money and Favours’: Government Deployment of Public Wealth as an Instrument of Labour Regulation” in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (Federation Press, 2006) 167, 167; other government initiatives discussed by Howe include financial incentives, subsidies, administrative guidelines, and ‘quasi-contracts’/other devices to achieve contracting out of government functions: at 169–70.



the forerunner to the *2016 Code* adopted by the Howard Government was used mainly 'to constrain the industrial behaviour of workers and unions in the construction industry', and thus amounted to 'a perversion of the logic of using public procurement as a vehicle for workplace relations reform'.<sup>6</sup>

This article seeks to assess the deployment of the *2016 Code* to achieve the Turnbull Government's aim of returning to the rule of law in the Australian building industry. Respect for the rule of law became a subject of heated debate in March 2017, when the new Secretary of the Australian Council of Trade Unions ('ACTU'), Sally McManus, stated (in response to a question about the CFMEU's alleged flouting of legal restrictions on industrial action) that: 'I believe in the rule of law where the law is fair, where the law is right. But when it's unjust, I don't think there's a problem with breaking it.'<sup>7</sup> Her comments were strongly criticised by Coalition politicians,<sup>8</sup> and were even repudiated by Federal Labor leader Bill Shorten.<sup>9</sup> McManus's position also gave the Coalition Government another opportunity to mount its arguments as to the 'lawlessness' of the construction sector and the need for its reforms.<sup>10</sup>

Part II of the article outlines key elements of the concept of the rule of law, focusing, in particular, on the notions of compliance with legal rules and equal treatment before the law. Part III traces the evolution of the separate scheme of construction regulation adopted in 2005 following the recommendations of the Cole Royal Commission, the subsequent Labor Government changes to this scheme, and the initiatives of the Coalition Government since 2013. Part IV discusses the use of procurement guidelines to implement workplace reform in the construction industry since 1997, and is followed by a detailed explanation in Part V of the new procurement rules set out in the *2016 Code*. Part VI analyses the arguments in support of the need to reinstate the rule of law in the Australian construction industry. The analysis also considers whether the *2016 Code* is really intended to achieve

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<sup>6</sup> Breen Creighton, 'Government Procurement as a Vehicle for Workplace Relations Reform: The Case of the National Code of Practice for the Construction Industry' (2012) 40(3) *Federal Law Review* 349, 383–4. See also John Howe and Ingrid Landau, 'Using Public Procurement to Promote Better Labour Standards in Australia: A Case Study of Responsive Regulatory Design' (2009) 51(4) *Journal of Industrial Relations* 575; Catherine Barnard, 'To Boldly Go: Social Clauses in Public Procurement' (2017) 46(2) *Industrial Law Journal* 208 (exploring recent European Union public procurement directives and their implementation in the United Kingdom).

<sup>7</sup> ABC, 'New ACTU Boss Says It's Ok for Workers to Break "Unjust Laws"', 7.30, 15 March 2017 (Sally McManus).

<sup>8</sup> David Marin-Guzman, 'Malcolm Turnbull Says He Can't Work With New ACTU Boss Sally McManus', *Australian Financial Review* (online), 17 March 2017 <<http://www.afr.com/news/policy/industrial-relations/malcolm-turnbull-says-he-cant-work-with-new-actu-boss-sally-mcmanus-20170316-gv06gu>>.

<sup>9</sup> Latika Bourke, 'Bill Shorten Rejects ACTU Leader Sally McManus' View on Breaking "Unjust" Laws', *The Sydney Morning Herald* (online), 16 March 2017 <<http://www.smh.com.au/federal-politics/political-news/bill-shorten-rejects-actu-leader-sally-mcmanus-view-on-breaking-unjust-laws-20170315-guz1vp.html>>.

<sup>10</sup> See, eg, Tom McLroy and Amy Remeikis, 'Breaking the Law an Australian Worker Tradition: ACTU Boss Sally McManus', *The Sydney Morning Herald* (online), 16 March 2017 <<http://www.smh.com.au/federal-politics/political-news/anarchomaxist-claptrap-liberals-slam-actu-boss-sally-mcmanus-over-law-breaking-comments-20170315-guz3sh.html>>; Australian Associated Press, 'Turnbull Stands Up to Union Secretary', *SBS News* (online), 17 March 2017 <<https://www.sbs.com.au/news/turnbull-stands-up-to-actu-secretary>>.

broader workplace reform objectives of the Coalition Government, and how it has been argued that the separate scheme of building industry regulation offends the rule of law. Some concluding observations are made in Part VII.

## II The Concept of the Rule of Law

Bingham observed that the modern concept of ‘the rule of law’ is generally credited to the English constitutional law professor, A V Dicey,<sup>11</sup> who devoted a large part of his seminal 1885 work to defining and examining the application of the rule of law.<sup>12</sup> Dicey referred to ‘the supremacy or the rule of law’ as ‘a characteristic of the English constitution’, with three defining features: first, that no person should be punished ‘except for a distinct breach of law established in the ordinary legal manner before the ordinary Courts of the land’;<sup>13</sup> second, not only that ‘no man is above the law’, but also that ‘every man, whatever be his rank or condition, is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary tribunals’ — ‘the idea of legal equality’;<sup>14</sup> and third, that general constitutional principles such as the right to personal liberty are ‘the result of judicial decisions determining the rights of private persons in particular cases brought before the Courts’.<sup>15</sup>

Bingham sought to encapsulate Dicey’s conception of the rule of law as follows:

The core of the existing principle is ... that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.<sup>16</sup>

Bingham then set out eight principles that are ‘ingredients of the rule of law’.<sup>17</sup> These ingredients include: that the law must be accessible, clear and predictable; that laws should apply equally to all (except where objective differences justify differentiation); that government officials must exercise their powers in good faith, for proper purposes, within power and not unreasonably; and that adjudicative procedures provided by the State must be fair.<sup>18</sup> The notion of equality before the law has been further expounded, for example by Gowder, as requiring *regularity* in the application of the law; *publicity* as to what the law is and what it requires of subjects; and *generality* (‘[n]either the rules under which officials exercise coercion nor officials’ use of discretion under those rules make irrelevant distinctions between subjects of

<sup>11</sup> Baron Tom Bingham, *The Rule of Law* (Allen Lane, 2010) 3.

<sup>12</sup> A V Dicey, *Introduction to the Study of the Law of the Constitution* (LibertyClassics, 8<sup>th</sup> ed, 1982) 104–273. See further Mark D Walters, ‘Dicey on Writing the Law of the Constitution’ (2012) 32(1) *Oxford Journal of Legal Studies* 21. On the much earlier antecedents of the rule of law, see James Spigelman, ‘Magna Carta: The Rule of Law and Liberty’ (2015) 31(2) *Policy: A Journal of Public Policy and Ideas* 24; on the various philosophical foundations of the concept over time, see Judith Shklar, ‘Political Theory and the Rule of Law’ in Allan C Hutchinson and Patrick J Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell, 1987) 1, ch 1.

<sup>13</sup> Dicey, above n 12, 110.

<sup>14</sup> Ibid 114. See also 120.

<sup>15</sup> Ibid 115.

<sup>16</sup> Bingham, above n 11, 8.

<sup>17</sup> Ibid 37. See chs 3–10.

<sup>18</sup> Ibid 37, 55, 60, 90.

law’).<sup>19</sup> Importantly for purposes of this article, Gowder goes on to mount the proposition that: ‘when a law or exercise of official discretion treats people differently from one another, there must be public reasons to justify the different treatment’.<sup>20</sup>

Bottomley and Bronitt contend that: ‘For the liberal theorist, the rule of law is more to do with the duties on *governments* than on citizens. It obliges governments to rule only by way of laws.’<sup>21</sup> On this view, the rule of law is valuable because it constrains the absolute power of government and protects the liberties of citizens. Allan has argued, though, that while the rule of law stands against the arbitrary or discriminatory exercise of power, it ‘does not itself afford a complete protection of liberty: it does not identify spheres of personal conduct which should be immune from legislative or governmental interference, or specify all the liberties essential to an effective democracy’.<sup>22</sup> This is consistent with Hayek’s conception of the rule of law as a safeguard of individual freedom, but ‘[restricting] government only in its coercive activities’.<sup>23</sup> Hayek also addressed the issue recently raised by Sally McManus’s view that unjust laws can be broken,<sup>24</sup> as follows:

It is sometimes said that, in addition to being general and equal, the law of the rule of law must also be just. But though there can be no doubt that, in order to be effective, it must be accepted as just by most people, it is doubtful whether we possess any other formal criteria of justice than generality and equality — unless, that is, we can test the law for conformity with more general rules which, though perhaps unwritten, are generally accepted, once they have been formulated.<sup>25</sup>

The centrality, to the rule of law’s purpose, of an expectation of compliance with the law is contested. Bottomley and Bronitt maintain that: ‘in everyday use “the rule of law” is often taken to mean simply “law and order”, that is, people should obey the law. While law and order might be an aspect of some versions of the rule of law, it is not really at the heart of it’.<sup>26</sup> For theorists like Fuller, however, the rule of law notion is more nuanced and reflects a kind of balance between government and

<sup>19</sup> Paul Gowder, ‘The Rule of Law and Equality’ (2013) 32(5) *Law and Philosophy* 565, 566. See also Christopher Nathan, ‘What is Basic Equality?’ in Uwe Steinhoff (ed), *Do All Persons Have Equal Moral Worth?: On ‘Basic Equality’ and Equal Respect and Concern* (Oxford University Press, 2014) 1.

<sup>20</sup> Gowder, above n 19, 602 (citations omitted). See also 603–11; and below Part VID the discussion of how the specialist scheme of construction industry regulation may offend the equality objective of the rule of law.

<sup>21</sup> Stephen Bottomley and Simon Bronitt, *Law in Context* (Federation Press, 4<sup>th</sup> ed, 2012) 42 (emphasis in original). See also, eg, Mortimer N S Sellers, ‘What is the Rule of Law and Why is it so Important?’ in James R Silkenat, James E Hickey Jr and Peter D Barenboim (eds), *The Legal Doctrines of the Rule of Law and the Legal State (Rechtsstaat)* (Springer, 2014) 3; Allan C Hutchinson and Patrick J Monahan, ‘Democracy and the Rule of Law’ in Allan C Hutchinson and Patrick J Monahan (eds), *The Rule of Law: Ideal or Ideology* (Carswell, 1987) 97, 100–1.

<sup>22</sup> T R S Allan, ‘The Rule of Law as the Rule of Reason: Consent and Constitutionalism’ (1999) 115 (April) *Law Quarterly Review* 221, 225.

<sup>23</sup> Friedrich A Hayek, *The Constitution of Liberty* (Routledge & Kegan Paul, 1960) 206 (citations omitted). See also *ibid* 225.

<sup>24</sup> See nn 7–10 above and accompanying text.

<sup>25</sup> Hayek, above n 23, 210.

<sup>26</sup> Bottomley and Bronitt, above n 21, 42. See further Alois Troller, *The Law and Order: An Introduction to Thinking about the Nature of Law* (A J Sijthoff, 1969) [trans of: *Rechtserlebnis und Rechtspflege; ein Fussweg zur Jurisprudenz für Ungeübte begehbar* (first published 1962)].

citizen, or as he put it: ‘a relatively stable reciprocity of expectations between law-giver and subject’.<sup>27</sup> Allan articulates this sort of approach in the following terms:

The idea that adherence to the rule of law is intended to enable the law’s subjects to obey it ... is too closely related to an underlying assumption that the law is primarily a means for achieving governmental objectives and overlooks the role of law as a set of constraints and limitations on the pursuit of such objectives. Properly understood, the rule of law is quite as much concerned with ensuring that state officials — both executive and judiciary — are able to obey the law, and required to do so, as with affording guidance to the private citizen.<sup>28</sup>

However, it is the arguably narrower understanding of the rule of law as requiring that the law must be *observed*, which has generally informed the debate about building industry regulation in Australia over the last 30 years. In 1988, Walker wrote of ‘the construction industry as a no-law state’, where the report of the 1981–82 Royal Commission into Activities of the Australian Building Construction Employees’ and Builders’ Labourers’ Federation had exposed ‘an organized group that succeeded in placing itself above the law and indeed suppressing the rule of law throughout the construction industry’.<sup>29</sup> For Walker, these activities offended his conception of the rule of law, which included the need for ‘institutions and procedures that are capable of speedily enforcing’ substantive laws ‘which prohibit violence, coercion, general lawlessness and anarchy’.<sup>30</sup> The notion that the law must be complied with lies behind the development of the specialist scheme of building industry regulation in Australia since the early 2000s, and continues to be foundational to the case in support of that scheme due to the ‘lawlessness’ of the principal construction union, the CFMEU.<sup>31</sup>

### III The Evolution of Construction Industry Regulation in Australia

#### A *The Cole Royal Commission and Howard Government Legislation*

Generally, workplace and employment relations in Australia are regulated by the *Fair Work Act 2009* (Cth) (*FW Act*). This legislation applies to most Australian private sector employers and employees,<sup>32</sup> setting minimum employment standards

<sup>27</sup> Lon L Fuller, *The Morality of Law* (Yale University Press, revised ed, 1969) 209.

<sup>28</sup> Allan, above n 22, 229. See also Krygier’s contrasting notions of the rule of law as ‘thin’ (‘formal, institution-focused’) and ‘thick’ (‘substantive, or material’): Martin Krygier, ‘The Rule of Law: Pasts, Presents, and Two Possible Futures’ (2016) 12(1) *Annual Review of Law and Social Science* 199, 213–14.

<sup>29</sup> Geoffrey de Q Walker, *The Rule of Law: Foundation of Constitutional Democracy* (Melbourne University Press, 1988) 222. See further 222–8.

<sup>30</sup> Ibid 28 (although note that Walker did not wish this view to be equated with ‘mere “law and order”’: at 29). See also ch 7.

<sup>31</sup> See, eg, Alan Colman, ‘The ABCC Bill is About Fairness and the Rule of Law’, *Australian Financial Review* (online), 18 April 2016 <<http://www.afr.com/opinion/the-abcc-bill-is-about-fairness-and-the-rule-of-law-20160418-go8orl>>.

<sup>32</sup> On the coverage of the national workplace relations system, see further Andrew Stewart et al, *Creighton and Stewart’s Labour Law* (Federation Press, 6<sup>th</sup> ed, 2016) ch 6.

and providing for the making of industry-level awards and enterprise agreements (including rules relating to enterprise bargaining and ‘protected’ industrial action in support of bargaining claims).<sup>33</sup> The *FW Act* also provides employees with protection from unfair dismissal and various forms of ‘adverse action’ by employers (related to an employee’s exercise of defined ‘workplace rights’ or engagement in ‘industrial activity’).<sup>34</sup> The national workplace relations system is overseen by the Fair Work Commission (‘FWC’), which makes awards, approves agreements and resolves a wide range of claims and disputes arising under the *FW Act*;<sup>35</sup> and the Fair Work Ombudsman, which has responsibility for enforcement and ensuring compliance with the legislation and instruments made under it.<sup>36</sup>

However, since 2005 an additional regulatory framework has applied to industrial relations in the building and construction industry, along with various iterations of a specialist regulator for that sector. The origins of this separate system of regulation can be traced to the Howard Government’s establishment of a Royal Commission into the Building and Construction Industry in 2001, headed up by former New South Wales judge Terence Cole QC. In its 2003 Final Report, the Cole Royal Commission made extensive findings as to the ‘lawlessness’ of the construction sector, including breaches of relevant criminal laws, the *Workplace Relations Act 1996* (Cth) (the predecessor to the *FW Act*), state occupational health and safety (‘OHS’) laws and court/tribunal orders.<sup>37</sup> Commissioner Cole made observations that the rule of law had ceased to apply in the construction industry, particularly in Western Australia and Victoria, and had been supplanted by ‘commercial expediency’ in New South Wales.<sup>38</sup> In his view, the widespread lawless conduct in the industry arose from:

a clash between the short term project profitability focus of the providers of capital, clients, head contractors and subcontractors on the one hand, and the long term aspirations of the union movement, especially the CFMEU, to dominate, control and regulate the industry for its benefit, and what it perceives to be the benefit of its members, on the other hand.<sup>39</sup>

The key recommendation of the Cole Royal Commission was for the establishment of a specialist agency to enforce applicable laws in the construction industry, and to effect a cultural shift towards respect for the rule of law.<sup>40</sup> In response, the Howard Government established the ABCC under the *Building and Construction Industry Improvement Act 2005* (Cth), which also gave this body

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<sup>33</sup> *FW Act* pts 2-2, 2-3, 2-4, 3-3.

<sup>34</sup> *Ibid* pts 3-2, 3-1.

<sup>35</sup> *Ibid* pt 5-1.

<sup>36</sup> *Ibid* pt 5-2.

<sup>37</sup> Cole Royal Commission, above n 3, vol 1, 5–6 [1.15]–[1.17].

<sup>38</sup> *Ibid* vol 12, 37 [94], 89–94 [5–28], 279–82 [5–28]. See also ‘Cole’s State Findings Prepare Ground for Reform Push’, *Workplace Express* (online), 26 March 2003 <<https://www.workplaceexpress.com.au>>.

<sup>39</sup> Cole Royal Commission, above n 3, vol 1, 11 [1.20]. See also ‘Unions to Seek Senate Veto on Cole Changes’, *Workplace Express* (online), 27 March 2003 <<https://www.workplaceexpress.com.au>>.

<sup>40</sup> Cole Royal Commission, above n 3, vol 1, 4 [1.10], 13–14 [1.33]–[1.34]. See also vol 11, titled ‘Reform — Achieving Cultural Change’. Note also the critical accounts of the Cole Royal Commission (from the unions’ perspective) in Jim Marr, *First the Verdict: The Real Story of the Building Industry Royal Commission* (Pluto Press, 2003); Liz Ross, ‘Building Unions and Government “Reform”: The Challenge for Unions’ (2005) 56 *Journal of Australian Political Economy* 172.

compulsory evidence-gathering powers<sup>41</sup> and imposed new restrictions on unlawful industrial action with significant penalties (among other reforms).<sup>42</sup> The ABCC's role was to increase the level of compliance with laws applicable to workplace relations in the construction industry, predominantly through investigation of suspected breaches and bringing enforcement proceedings.<sup>43</sup>

## **B     *The Rudd/Gillard Governments' Changes to Construction Regulation***

The Labor Opposition went to the 2007 Federal Election promising to retain the ABCC (despite the union movement's concerns about the separate regulatory regime for the building industry), but to transfer its functions to a specialist division of the national industrial tribunal after a two-year transition period.<sup>44</sup> Ultimately, the Rudd Labor Government did not implement that proposal. It commissioned former Federal Court Justice the Honourable Murray Wilcox QC to engage in public consultation on options for construction industry regulation, but then ignored his recommendation to house the construction regulator within the FWO.<sup>45</sup> Instead, under the *Building and Construction Industry Improvement Amendment (Transition to Fair Work) Act 2012* (Cth), the ABCC was replaced by the Fair Work Building Industry Inspectorate, which operated under the name 'Fair Work Building and Construction' ('FWBC'). The 2012 building industry legislation replaced the *Building and Construction Industry Improvement Act 2005* (Cth) with the *Fair Work (Building Industry) Act 2012* (Cth),<sup>46</sup> under which some safeguards were imposed on the FWBC's exercise of its compulsory examination powers<sup>47</sup> and the strictures on unlawful industrial action in the construction sector were removed.

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<sup>41</sup> Since their introduction, these powers have been a particularly controversial aspect of construction industry regulation: see George Williams and Nicola McGarrrity, 'The Investigatory Powers of the Australian Building and Construction Commission' (2008) 21(3) *Australian Journal of Labour Law* 244; Stewart et al, above n 32, 1010–15.

<sup>42</sup> See further Anthony Forsyth et al, *Workplace Relations in the Building and Construction Industry* (LexisNexis Butterworths, 2007), chs 1–2, 7, 9; John Howe, "'Deregulation" of Labour Relations in Australia: Towards a More "Centred" Command and Control Model', in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation* (Federation Press, 2006) 147, 159–65.

<sup>43</sup> Howe, above n 42, 159–60.

<sup>44</sup> Kevin Rudd and Julia Gillard, 'Forward with Fairness — Policy Implementation Plan' (Statement, 28 August 2007) 4.

<sup>45</sup> Murray Wilcox, 'Transition to Fair Work Australia for the Building and Construction Industry' (Report, Australian Government, March 2009) ('Wilcox Review'). Wilcox noted that: 'The *BCII Act* provisions have always been, and remain, highly controversial': at 1 [1.5]. However, he concluded that: 'the ABCC's work is not yet done. Although I accept there has been a big improvement in building industry behaviour during recent years, some problems remain': at 14 [3.23]. See also 55–6 [5.77]–[5.83]. More generally, see Emma Goodwin, 'Constructing Fair Work for the Australian Building and Construction Industry: The Honourable Murray Wilcox QC's Report *Transition to Fair Work Australia for the Building and Construction Industry*' (2009) 22(2) *Australian Journal of Labour Law* 173.

<sup>46</sup> See further Emma Goodwin, 'Building on Shifting Sands: From the *Fair Work (Building Industry) Act 2012* (Cth) to the Building and Construction Industry (Improving Productivity) Bill 2013 (Cth)' (2014) 27(1) *Australian Journal of Labour Law* 97, 100–105.

<sup>47</sup> Wilcox Review, above n 45, chs 5–6. See also Breen Creighton and Andrew Stewart, *Labour Law* (Federation Press, 5<sup>th</sup> ed, 2010) 868–9.

## C *Winding Back Labor's Changes: The Coalition Government's Construction Reforms*

Continuing the pattern of incoming governments changing construction industry regulation, after the 2013 Election, the Abbott Coalition Government quickly sought to implement its policy commitment to bring back the ABCC and maintain the rule of law in the construction industry.<sup>48</sup> However, it took the Government (by then, led by Prime Minister Turnbull) three years to gain Parliament's support for the *BCIIP Act*.<sup>49</sup> In the meantime, the Government-initiated Royal Commission on Trade Union Governance and Corruption had made extensive findings (similar to those of the Cole Royal Commission) as to the extent of lawless conduct in the industry and the CFMEU's '[habitual] contempt for the rule of law'.<sup>50</sup> Commissioner the Honourable Dyson Heydon QC AC recommended 'that there continue to be a separate industry-specific regulator for the building and construction industry'.<sup>51</sup>

As indicated earlier, the *BCIIP Act* re-established the ABCC (with effect from 2 December 2016), although with a number of new constraints on its powers, which formed part of a series of amendments agreed to by the Government in order to secure passage of the legislation by crossbench senators.<sup>52</sup> In addition, the *BCIIP Act* re-introduced prohibitions on unlawful industrial action and coercion (similar to those that operated under the *Building and Construction Industry Improvement Act 2005* (Cth), and created a new prohibition on unlawful picketing.<sup>53</sup> The Turnbull Government had staked a great deal on getting this legislation enacted, first calling a special sitting of Federal Parliament in April 2016 to consider it (following repeated rejection of the Bill for the *BCIIP Act* by the Senate);<sup>54</sup> then (once it was rejected again at the special sitting) calling a double dissolution Election for 2 July 2016.<sup>55</sup> Prime Minister Turnbull invoked the need to 'restore the rule of law' in the construction industry through the ABCC as a vital economic reform, both when calling the Election<sup>56</sup> and when claiming victory on Election night<sup>57</sup> (albeit with a substantially reduced majority in the House of Representatives). The Election result

<sup>48</sup> Liberal Party of Australia and The Nationals, 'The Coalition's Policy to Improve the Fair Work Laws' (Policy Statement, May 2013).

<sup>49</sup> On the earliest of the several Bills ultimately enacted as the *BCIIP Act*, see Goodwin, above n 46, 105–10.

<sup>50</sup> Commonwealth, Royal Commission into Trade Union Governance and Corruption, *Final Report* (2015) vol 5, 401 [8.23].

<sup>51</sup> *Ibid* vol 5, 435 [8.109].

<sup>52</sup> For example, the Government abandoned plans to remove the framework of administrative law oversight applying to the ABCC's exercise of its powers to obtain evidence compulsorily (see *BCIIP Act* ss 61A–5). See further David Marin-Guzman, 'Michaelia Cash's Concessions on Australian Building and Construction Commission', *Australian Financial Review* (online), 30 November 2016 <<http://www.afr.com/news/explainer-what-is-left-of-the-australian-building-and-construction-commission-20161129-gt0ihe>>.

<sup>53</sup> See *BCIIP Act* chs 5–6 (ss 44–58).

<sup>54</sup> 'Turnbull Bringing on IR Bill Votes Next Month', *Workplace Express* (online), 21 March 2016 <<https://www.workplaceexpress.com.au>>.

<sup>55</sup> 'Turnbull Confirms ABCC Bills' Rejection to Trigger Election', *Workplace Express* (online), 19 April 2016 <<https://www.workplaceexpress.com.au>>.

<sup>56</sup> 'Turnbull Calls Double Dissolution Election', *Workplace Express* (online), 8 May 2016 <<https://www.workplaceexpress.com.au>>.

<sup>57</sup> 'PM Defends Double Dissolution as Doubts Raised about Joint Sitting', *Workplace Express* (online), 3 July 2016 <<https://www.workplaceexpress.com.au>>.

also produced a more workable Senate,<sup>58</sup> which led to the passage not only of the *BCIIP Act*, but also the other election trigger, legislation implementing the Government's enhanced framework for trade union regulation (in response to corruption and financial mismanagement within several unions).<sup>59</sup>

## IV Reform through Procurement Requirements: From the 1997 Code to the 2016 Code

### A Increasing Use of Procurement as a Policy Lever 1997–2009

The use of procurement requirements to achieve workplace reform objectives commenced under the Howard Government, through its *National Code of Practice for the Construction Industry*, which was agreed to by the Federal, state and territory governments in 1997 ('1997 Code').<sup>60</sup> This instrument established a series of general principles to which companies seeking to work on government construction projects were required to adhere, including industrial relations principles dealing with freedom of association and the right not to associate (among other matters). Accompanying the 1997 Code were various versions of the *Australian Government Implementation Guidelines for the National Code of Practice for the Construction Industry* ('Code Guidelines'), which specified more detailed industrial relations requirements and made compliance with those requirements a condition of eligibility to bid for and be awarded federally-funded building work.<sup>61</sup> In addition to bolstering freedom of association and limiting union right of entry,<sup>62</sup> the *Code Guidelines* sought to preclude 'pattern bargaining' (a practice whereby unions obtain common outcomes across more than one enterprise agreement) and the imposition of construction industry awards on subcontractors.<sup>63</sup>

The Cole Royal Commission recommended that the Federal Government make greater use of the 1997 Code and *Code Guidelines* 'as a vehicle for reform' in the building and construction industry.<sup>64</sup> Commissioner Cole found that the 1997 Code was not being applied consistently across all Commonwealth-funded projects, and there was neither adequate monitoring of compliance, nor imposition of

<sup>58</sup> See, eg, Phillip Coorey, 'One Nation Boosts Govt's Chances on IR Bills', *Australian Financial Review* (online), 10 October 2016 <<http://www.afr.com/news/politics/one-nation-boosts-govts-chances-on-ir-bills-20161009-gryhh5>>.

<sup>59</sup> *Fair Work (Registered Organisations) Amendment Act 2016* (Cth). See also Royal Commission into Trade Union Governance and Corruption, above n 50.

<sup>60</sup> Australian Procurement and Construction Council ('APCC'), 'National Code of Practice for the Construction Industry' (1997). See Forsyth et al, above n 42, 20–1. Note that at various times, some state governments have also adopted construction industry codes to further workplace reform objectives. These state codes are not examined in this article, for discussion see Creighton, above n 6, 361; Productivity Commission (Cth), above n 2, vol 2, 547, 550; Stewart et al, above n 32, 1026. See also *Victoria v CFMEU* (2013) 218 FCR 172.

<sup>61</sup> Compliance with the 1997 Code and *Code Guidelines* was also made a condition of state governments obtaining federal funding for state infrastructure projects, such as the redevelopment of the Melbourne Cricket Ground in preparation for the 2006 Commonwealth Games: see Howe, above n 5, 176–7.

<sup>62</sup> Forsyth et al, above n 42, 31, 33–4.

<sup>63</sup> Howe, above n 5, 177.

<sup>64</sup> Cole Royal Commission, above n 3, vol 11, 12–14 [48].



sanctions for breaches of the Code and *Code Guidelines*.<sup>65</sup> Highlighting the benefits of application of the *1997 Code* on the Alice Springs to Darwin Railway Project,<sup>66</sup> Commissioner Cole recommended that the Code and Guidelines apply to all projects where the Commonwealth directly or indirectly provides funds for construction; and that parties contracting with the Commonwealth for government-funded work also be required to comply with the Code and Guidelines on their privately-funded projects.<sup>67</sup> In 2005, the *Code Guidelines* were changed to require tenderers for Commonwealth-funded building work to be Code-compliant on all their privately-funded work as well, and for all their related entities to be Code-compliant.<sup>68</sup>

## **B     *The Labor Government and the Code 2009–13***

The 2009 Wilcox Review essentially endorsed continued application of the *1997 Code* and *Code Guidelines*, stating that:

There is widespread support for the idea behind the Guidelines. They are seen as ‘raising the stakes’ on employer misbehaviour; it is one thing to expose oneself to a relatively small monetary penalty, another thing to render oneself ineligible to tender for a project that is funded, even indirectly, by the Commonwealth.<sup>69</sup>

The Wilcox Review recommended that the *Code Guidelines* be retained (with some changes), and that they be transformed from an administrative policy to a legislative instrument subject to scrutiny by Parliament (with the capacity for judicial and administrative review of any adverse decision made under that instrument).<sup>70</sup> The Labor Government made several changes to the *Code Guidelines*, in 2009 and again in 2012,<sup>71</sup> before taking the more significant step of replacing the *1997 Code* with the *Building Code 2013* (Cth) (*‘2013 Code’*). This placed into effect the Wilcox Review recommendation noted above: whereas previously the federal construction procurement rules operated as policy instruments, the *2013 Code* was made as a legislative instrument under s 27 of the *Fair Work Building Industry Act 2012* (Cth). The Code thereby obtained greater legal force and certainty, making it less amenable to change at the discretion of government and subjecting it to possible disallowance in either House of Parliament.<sup>72</sup> Further, decisions taken under the Code became subject to a range of potential review processes.<sup>73</sup> Accompanying the *2013 Code* were the *Supporting Guidelines for Commonwealth-Funded Entities*.

<sup>65</sup> Ibid vol 7, 49 [3.4]. See further 65–71 [3.65]–[3.84].

<sup>66</sup> Ibid 69–71 [3.71]–[3.84], 73 [3.85], 81 [3.117].

<sup>67</sup> Ibid 79–81 [3.106]–[3.117]. See also ‘Cole Code Push to Drive Change in Private Sector’, *Workplace Express* (online), 15 April 2003 <<https://www.workplaceexpress.com.au>>.

<sup>68</sup> Forsyth et al, above n 42, 21–2.

<sup>69</sup> Wilcox Review, above n 45, 4 [1.29].

<sup>70</sup> Ibid 4–5 [1.27]–[1.33], 87–9 [7.32].

<sup>71</sup> The *1997 Code*, and *Code Guidelines* as in place following the 2012 changes, are examined in Creighton, above n 6, 364–77.

<sup>72</sup> Stewart et al, above n 32, 1021. However, it should be noted that in terms of content, the *2013 Code* was essentially the same as the *2012 Code Guidelines*.

<sup>73</sup> See further below Part VC.

## C *The Slow Road to Reform: From the 2014 Proposed Code to the 2016 Code*

Consistent with its commitment to restore the rule of the law in the construction industry through the legislation re-establishing the ABCC, in April 2014 the Coalition Government released a proposed new instrument to replace the *2013 Code*. The advance release of the Building and Construction Industry (Fair and Lawful Building Sites) Code ('2014 Proposed Code') sought to impose similar procurement requirements to those that had applied under the Howard Government, including support for freedom of association and restrictions on union entry rights.<sup>74</sup> When releasing the 2014 Proposed Code, then Minister for Employment Senator Eric Abetz indicated that it was 'designed to restore the rule of law and fairness to Australia's construction sector'.<sup>75</sup> The Minister further stated that:

Fair, productive and lawful building sites are critical to Australia's competitiveness, and job creation potential. ... For too long, the building and construction sector has provided the worst examples of industrial relations lawlessness. The new code emphasises the importance of compliance with the law and freedom of association on building sites. ... Our new code, together with a stronger ABCC, will help get the building and construction industry back on track.<sup>76</sup>

Importantly, the 2014 Proposed Code also sought to re-introduce a wide range of restrictions on the content of enterprise agreements, primarily aimed at precluding agreement clauses that provide support for the role of unions or impinge on workplace flexibility or efficiency. While the 2014 Proposed Code could not take effect until the Bill for the *BCIIP Act* was passed by Parliament, the new Code's agreement prohibitions were stated to apply to enterprise agreements made after 24 April 2014.<sup>77</sup> According to the Minister, this meant

that from commencement of the [2014 Proposed Code], contractors covered by agreements that were made after 24 April 2014 that do not comply with the code's content requirements for enterprise agreements, will not be eligible to tender for and be awarded Commonwealth-funded building work.<sup>78</sup>

This led to a lengthy period of confusion and uncertainty for all parties involved in the construction industry,<sup>79</sup> which continued through to the passage of the *BCIIP Act* in late 2016 and the issuing of the *2016 Code*. To secure support for the legislation

<sup>74</sup> Much of the content of the 2014 Proposed Code is reflected in the *2016 Code*, which is examined in detail below in Part V. For a critique, see The McKell Institute, 'Unfounded and Unfair: An Analysis of the Building and Construction Code (2014)' (Report, October 2016).

<sup>75</sup> Eric Abetz, 'Building and Construction Industry Code 2014 Released' (Media Release, 17 April 2014).  
<sup>76</sup> Ibid.

<sup>77</sup> 2014 Proposed Code s 11(2).

<sup>78</sup> Abetz, above n 75.

<sup>79</sup> See, eg, "'Uncertain' Draft Building Code Fails BOOT: Bench', *Workplace Express* (online), 26 June 2015 <<https://www.workplaceexpress.com.au>>; relating to a decision by the FWC to refuse approval of an enterprise agreement that incorporated the terms of the 2014 Proposed Code (*CFMEU v CSR Ltd* (2015) 250 IR 16); 'Code Sparked Major Construction Dispute, Says ETU', *Workplace Express* (online), 11 May 2016 <<https://www.workplaceexpress.com.au>>; *Australian Building and Construction Commissioner v CFMEU* (2017) 267 IR 130 (where it was found that the union had breached ss 343 and 348 of the *FW Act* by organising a series of meetings with employees of contractors in a dispute over agreement negotiations, which involved the principal contractor's refusal to enter into an agreement that would not comply with the *2013 Code* or the 2014 Proposed Code).

from crossbench senators, the Government compromised on the retrospective application of the new Code prohibitions on agreement content, instead striking a deal for a two-year transition period (which was altered in early 2017 following a change of position by Senator Derryn Hinch).<sup>80</sup>

## V The Code for the Tendering and Performance of Building Work 2016

### A Purposes and Scope of the 2016 Code

The *2016 Code* was issued by the Employment Minister, Senator Michaelia Cash, on 2 December 2016, under s 34(1) of the *BCIIP Act* (which provides for the Code to be issued as a legislative instrument).<sup>81</sup> On that date, referring to the commencement of both the new legislation and the *2016 Code*, the Minister stated that: ‘A new era for Australia’s building and construction industry has started from today. An era in which law and order is restored and respected.’<sup>82</sup> Among other aims, the new Code seeks to:<sup>83</sup>

- ‘promote an improved workplace relations framework for building work and promote compliance’ with applicable laws;<sup>84</sup>
- ‘encourage the development of safe, healthy, fair, lawful and productive building sites for the benefit of all building industry participants’;<sup>85</sup>
- ‘increase the likelihood of timely, predictable, and cost-efficient delivery of Commonwealth funded building work’;<sup>86</sup> and
- ‘establish an enforcement framework under which building contractors and building industry participants may be excluded from tendering for, or being awarded, Commonwealth funded building work if they do not comply’ with the *2016 Code*.<sup>87</sup>

These objectives clearly signal a desire to ensure that all relevant laws are complied with in the construction sector, and must be read in conjunction with the objects of the *BCIIP Act*, which now explicitly include ‘promoting respect for the rule of law’ (s 3(2)(b)) and ‘ensuring that building industry participants are accountable for their unlawful conduct’ (s 3(2)(e)).

<sup>80</sup> On the complex transitional arrangements for the *2016 Code*, see below Part VB.

<sup>81</sup> Note that a motion for disallowance of certain provisions of the *2016 Code* was moved in the House of Representatives on 29 March 2017 by the Shadow Minister for Employment and Workplace Relations, Brendan O’Connor, but did not succeed. Another motion, for disallowance of the entire *2016 Code*, was moved in the Senate by Senator Doug Cameron on 9 August 2017, and was also voted down: see David Marin-Guzman, ‘Nick Xenophon Defies CFMEU Threats of “Armageddon” Over Building Code’, *Australian Financial Review* (online), 9 August 2017 <<http://www.afr.com/news/policy/industrial-relations/nick-xenophon-defies-cfmeu-threats-of-armageddon-over-building-code-20170809-gxss5h>>.

<sup>82</sup> Michaelia Cash, Minister for Employment, ‘New Building Code to Improve Conduct and Boost Productivity on Building Sites’ (Media Release, 2 December 2016).

<sup>83</sup> *2016 Code* s 5.

<sup>84</sup> *Ibid* s 5(a).

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

<sup>86</sup> *Ibid* s 5(d).

<sup>87</sup> *Ibid* s 5(g).

The potential application of the *2016 Code* is established by the *BCIIP Act*, which provides in s 34(3) that compliance with the Code can only be required of ‘building contractors’ that are constitutional corporations, ‘building industry participants’ carrying out work in a Territory or Commonwealth place, and Commonwealth bodies or authorities.<sup>88</sup> The *2016 Code* mostly adopts<sup>89</sup> the broad definition of ‘building work’ in s 6 of the *BCIIP Act*, which includes ‘the construction, alteration, extension, restoration, repair, demolition or dismantling of buildings, structures or works that form, or are to form, part of land’,<sup>90</sup> as well as ‘transporting or supplying goods to be used’ in that work ‘directly to building sites (including any resources platform)’.<sup>91</sup>

Generally, the *2016 Code* applies to a building contractor or building industry participant ‘from the first time they submit an expression of interest or tender (howsoever described) for Commonwealth funded building work’ on or after 2 December 2016.<sup>92</sup> From that point on, the contractor or participant becomes a ‘code covered entity’, which also means that each of its related entities then become subject to the *2016 Code*;<sup>93</sup> and that the code covered entity must be compliant with the Code on all of its privately funded projects.<sup>94</sup> The ‘Commonwealth funded building work’ to which the Code applies is defined to include a range of projects with varying levels of direct or indirect Federal Government financial contribution or involvement.<sup>95</sup>

## B Principal Obligations Imposed by the *2016 Code*

The *2016 Code* imposes a wide range of restrictions and conditions on building contractors and building industry participants, which apply once they become code covered entities. The following discussion highlights the key obligations imposed by the Code, with particular attention given to new or different rules introduced by the Coalition Government in its replacement of the *2013 Code*,<sup>96</sup> and those aspects of the *2016 Code* that arose from crossbench amendments to the Bill for the *BCIIP Act*.

<sup>88</sup> In turn, *BCIIP Act* s 5 defines the terms ‘building contractor’ (a person who has entered into/offered to enter into a contract for services for carrying out building work or arranging for such work to be carried out); and ‘building industry participant’ (a building employer, building employee, building contractor, person who enters into a contract with a building contractor (for carrying out of building work), building association, and officers, delegates and other representatives of building associations). ‘Building associations’ are industrial associations of building employers, employees or contractors: *BCIIP Act* s 5.

<sup>89</sup> See *2016 Code* Notes to s 3(1) ‘code covered entity’; *2016 Code* s 3(4).

<sup>90</sup> *BCIIP Act* s 6(1)(a).

<sup>91</sup> *Ibid* s 6(1)(e). On the addition of transport and supply to building sites to the definition of building work through the 2016 legislation, see Goodwin, above n 46, 105–6, 110.

<sup>92</sup> *2016 Code* s 6(1). Note that the *2013 Code* and *Supporting Guidelines for Commonwealth-Funded Entities* continue to apply to Commonwealth funded projects that were the subject of expressions of interest or tenders prior to 2 December 2016.

<sup>93</sup> *2016 Code* ss 6(2), 8(8).

<sup>94</sup> *Ibid* sch 1 item 9. Note also the obligations of code covered entities in relation to compliance with the *2016 Code* by their subcontractors: ss 8(3)–(7).

<sup>95</sup> *Ibid* s 3 (definition of ‘publicly funded building work’), sch 1 items 1–8.

<sup>96</sup> This article does not examine the OHS or drug and alcohol management/testing provisions of the *2016 Code* (see, eg, s 16A, sch 4), other than to note that the *2013 Code* requirements relating to ‘work health safety and rehabilitation’ management systems/plans have been removed: *2013 Code* s 20.

First and foremost, code covered entities are required to comply with the Code,<sup>97</sup> and with the *BCIIP Act*, designated building laws (eg the *FW Act*, modern awards and enterprise agreements), the *Competition and Consumer Act 2010* (Cth) ('*Competition Act*'), OHS laws, the *Migration Act 1958* (Cth), and applicable court and tribunal decisions, orders, etc.<sup>98</sup> In addition, code covered entities are subject to more extensive reporting requirements than applied under the *2013 Code*. For example, they must report actual or threatened industrial action to the ABCC within 24 hours of becoming aware of the action (or threat); take reasonable steps to prevent or end any unprotected industrial action (such as seeking an order from the FWC or a court); and report any unlawful secondary boycott activity to the ABCC within 24 hours.<sup>99</sup>

Second, a major concern of the Coalition Government in introducing the *2016 Code* has been to subject building contractors/participants to comprehensive limits on enterprise agreement clauses that impede managerial prerogative or improvements to productivity, are discriminatory, or are inconsistent with a broader set of freedom of association principles than applied under the *2013 Code*.<sup>100</sup> To that end, s 11(3) provides an extensive list of provisions that 'are not permitted to be included in enterprise agreements', such as: any restriction on the types of workers that may be engaged (eg casuals); a requirement to consult with a union over the number or types of workers or subcontractors to be engaged; any prescription of the terms and conditions of engagement of subcontractors or their employees (eg 'jump up' clauses); a requirement to apply union logos or mottos to company property/equipment (eg union flags on cranes); or any form of encouragement (or discouragement) of union membership.<sup>101</sup> The prohibitions on agreement content are bolstered by a number of anti-avoidance provisions: s 11(4) precludes engagement in conduct or practices (outside the terms of an enterprise agreement) that would have the same effect as that prohibited by ss 11(1) and (3);<sup>102</sup> s 11A prohibits agreement clauses which purport to remedy clauses otherwise in breach of s 11; while s 10 prohibits unregistered written agreements (eg 'side deals' that seek to circumvent the s 11 limits on agreement content).<sup>103</sup>

It was noted earlier in the article that these agreement prohibitions were to apply, under the 2014 Proposed Code, to agreements made after 24 April 2014, but that the Government compromised on this proposal to ensure passage of the *BCIIP Act* through Parliament.<sup>104</sup> Under the arrangements for this compromise as originally

<sup>97</sup> Ibid s 7(a).

<sup>98</sup> Ibid s 9. This is a broader range of laws than was specified in the equivalent provision of the *2013 Code*: s 9.

<sup>99</sup> *2016 Code* s 16. On protected and unprotected industrial action under the *FW Act*, remedies for unprotected action, and secondary boycotts under the *Competition Act*, see Stewart et al, above n 32, chs 26, 27; Shae McCrystal, *The Right to Strike in Australia* (Federation Press, 2010) chs 5–7.

<sup>100</sup> *2016 Code* s 11(1); the freedom of association provisions in s 13 are discussed below.

<sup>101</sup> For a full explanation of the types of agreement clauses prohibited by s 11(3), see Explanatory Statement, Code for the Tendering and Performance of Building Work 2016 (Cth) 9–13 [51]–[71] ('*2016 Code Explanatory Statement*').

<sup>102</sup> See also *2016 Code* s 11(5).

<sup>103</sup> *2016 Code Explanatory Statement* 7 [41]. On s 10 of the *2016 Code*, see below nn 136–8 and accompanying text.

<sup>104</sup> See above Part IVC.

enacted in late 2016, companies that had entered into enterprise agreements with unions (before 2 December 2016) that would not comply with the new prohibitions on agreement content were to remain eligible to bid for and be awarded Commonwealth funded work until 29 November 2018.<sup>105</sup> In effect, this gave companies that had entered into non-compliant agreements two years to ‘get their house in order’ (this outcome benefited, for example, a group of companies that had made agreements earlier in 2016 against the advice of the Master Builders Association).<sup>106</sup>

However Senator Hinch, who had been instrumental in securing this compromise,<sup>107</sup> reversed his position in early 2017<sup>108</sup> — paving the way for the Government to introduce an amendment implementing new transitional arrangements. The amendment was passed by Parliament on 16 February 2017,<sup>109</sup> essentially reducing the two-year ‘grace period’ for application of the 2016 Code agreement restrictions to nine months, and prohibiting tenderers for Commonwealth funded work from being awarded a contract during that nine-month period, unless they had a Code-compliant agreement.<sup>110</sup> Minister Cash then issued a new legislative instrument amending the 2016 Code,<sup>111</sup> setting out further (complex) transitional rules dealing with the application of the Code agreement prohibitions and the eligibility of companies to bid for, and be awarded, Commonwealth funded work.<sup>112</sup>

<sup>105</sup> *BCIIP Act s 34(2E)*, later amended by *Building and Construction Industry (Improving Productivity) Amendment Act 2017* (Cth) sch 1 ss 1–2. See also *2016 Code s 11(2)*, later amended by *Code for the Tendering and Performance of Building Work Amendment Instrument 2017* (Cth).

<sup>106</sup> Ewin Hannan, ‘Election 2016: Master Builders Slams Contractors over CFMEU Pay Deal’, *Australian Financial Review* (online), 18 May 2016 <<http://www.afr.com/news/politics/election/election-2016-master-builders-slams-contractors-over-cfmeu-pay-deal-20160518-goy8cc>>; ‘CFMEU Branch Secures “Unsustainable” Pay Rises’, *Workplace Express* (online), 13 July 2016 <<https://www.workplaceexpress.com.au>>. See also Paul Karp, ‘Turnbull Vows to Stop “Excessive” Pay Rises for Construction Workers’, *The Guardian* (online), 1 June 2016 <<https://www.theguardian.com/australia-news/2016/jun/01/election-2016-malcolm-turnbull-above-inflation-pay-rise-construction-workers-union>>; ‘Threat to Construction Deals if ABCC Legislation Passes’, *Workplace Express* (online), 26 April 2016 <<https://www.workplaceexpress.com.au>> (including discussion of Master Builders Association allegations that building unions were pressuring subcontractors to sign agreements that would not comply with the 2014 Proposed Code); David Marin-Guzman, ‘Major Contractors Revolt Against Master Builders Association’, *Australian Financial Review* (online), 26 January 2017 <<http://www.afr.com/news/policy/industrial-relations/major-contractors-revolt-against-master-builders-association-20170126-gtz1e3>>.

<sup>107</sup> Ewin Hannan, ‘Derryn Hinch Proposes ABCC Changes’, *The Australian* (online), 30 November 2016 <<http://www.theaustralian.com.au/national-affairs/industrial-relations/derryn-hinch-proposes-abcc-changes/news-story/6fc26ebf9efeed23bfecf9d4eba39486>>.

<sup>108</sup> ‘Construction Code Holiday to Be Cut, After Hinch Volte-Face’, *Workplace Express* (online), 8 February 2017 <<https://www.workplaceexpress.com.au>>.

<sup>109</sup> *Building and Construction Industry (Improving Productivity) Amendment Act 2017* (Cth).

<sup>110</sup> See now *BCIIP Act s 34(2E)*, as amended by *2017 Act*. The effect of the amendment was that companies with an agreement that did not comply with the 2016 Code could tender for Commonwealth work until 31 August 2017, but could not be awarded the work until they complied (see Explanatory Memorandum, *Building and Construction Industry (Improving Productivity) Amendment Bill 2017*). Since 1 September 2017, companies have been required to be fully compliant with the 2016 Code in order to tender for, and be awarded, Commonwealth funded work.

<sup>111</sup> *Code for the Tendering and Performance of Building Work Amendment Instrument 2017* (Cth).

<sup>112</sup> These rules vary depending on when the relevant enterprise agreement was made and when the company submitted its tender: see now *2016 Code s 11(2)*, sch 5; as amended by the *Code for the Tendering and Performance of Building Work Amendment Instrument 2017* (Cth). See also ABCC, *Transitional Arrangements — Interaction between Building Code 2013 and Building Code 2016*

These new arrangements were justified by the Employment Minister on the basis that small and medium construction businesses could not wait two years (the original transitional period for Code 2016 compliance) while having to compete with those companies that had struck non-compliant enterprise agreements:

They cannot stand up to the CFMEU, they cannot stand up to Lendlease; they cannot stand up to Probuild. That is why we are moving this amendment with the crossbench, because we are here today to say to the big end of town and to say to the CFMEU ... 'The reason we are doing this is to stop your cartel-like behaviour'.<sup>113</sup>

However, it must be noted that the *2016 Code* transitional rules for enterprise agreement content, particularly the 1 September 2017 deadline for having fully Code-compliant agreements, led to ongoing confusion and uncertainty in the industry. The CFMEU adopted a general position that it would not renegotiate existing agreements to make them Code-compliant.<sup>114</sup> Other unions, such as the Australian Manufacturing Workers' Union, took a more cooperative approach to renegotiation. At least one employer, Boral subsidiary De Martin & Gasperini, raised the prospect of redundancies after employees voted down changes to their enterprise agreement to ensure Code compliance.<sup>115</sup> Another employer, Lendlease Engineering Pty Ltd, obtained FWC approval of a Code-compliant agreement despite opposition from the CFMEU and the Australian Workers' Union.<sup>116</sup>

Third, the *2016 Code* carries over similar obligations regarding freedom of association to those found in the *2013 Code*, while adding a number of further requirements. As before, code covered entities 'must protect freedom of association in respect of building work' through policies and practices that ensure people are free: to become, or not become, members of building unions; to be represented (or not) by unions; to participate (or not) in lawful industrial activities; and to not be discriminated against in terms of workplace benefits because they are, or are not,

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<<https://www.abcc.gov.au/building-code/transitional-arrangements-%E2%80%93-93-interaction-between-building-code-2013-and-building-code-2016>>. Reportedly, the new transitional rules arose following lobbying by the Australian Industry Group: 'CFMEU Finalises Day for National Protest against ABCC', *Workplace Express* (online), 28 February 2017 <<https://www.workplaceexpress.com.au>>.

<sup>113</sup> Commonwealth, *Parliamentary Debates*, Senate, 15 February 2017, 1051 (Michaelia Cash, Minister for Employment). Note that the new arrangements presented many construction companies with the dilemma of having to renegotiate existing agreements, or make new ones, to ensure *2016 Code* compliance in the face of the CFMEU refusing to relinquish conditions in existing agreements: see Paul Karp, "'We're Not Bluffing": Construction Union on Collision Course Over Building Code', *The Guardian* (online), 3 April 2017 <<https://www.theguardian.com/australia-news/2017/apr/03/were-not-bluffing-construction-union-on-collision-course-over-building-code>>. For a further illustration of the threat to widespread industry practices, see 'Code Outlaws RDO Calendar: ABCC', *Workplace Express* (online), 10 March 2017 <<https://www.workplaceexpress.com.au>>.

<sup>114</sup> Nick Toscano, 'Tensions Rise in Building Industry as Blacklist Looms', *The Sydney Morning Herald* (online), 5 June 2017 <<http://www.smh.com.au/business/workplace-relations/tensions-rise-in-building-industry-as-blacklist-looms-20170602-gwjfi5.html>>.

<sup>115</sup> Jenny Wiggins, 'Construction Firms Do Deals with Unions over Building Code', *Australian Financial Review* (online), 5 July 2017 <<http://www.afr.com/business/construction-firms-do-deals-with-unions-over-building-code-20170705-gx4wua>>.

<sup>116</sup> *Re Lendlease Engineering Pty Ltd* [2017] FWC 3080 (6 June 2017), and *CFMEU v Lendlease Engineering Pty Ltd* [2017] FWCFB 4001 (15 August 2017). In another case, the FWC granted an employer's application to terminate an existing enterprise agreement (under *FW Act* ss 222–3) for reasons including the employer's view that the agreement did not comply with the *2016 Code*: see *Re Grandstand Scaffold Services Pty Ltd* [2017] FWCA 3980 (28 July 2017).

union members.<sup>117</sup> Section 13(2) of the *2016 Code* sets out an expanded list of practices that must, or must not, be engaged in to ensure the observance of freedom of association on building sites. For example, personal information must be handled in accordance with the *Privacy Act 1988* (Cth);<sup>118</sup> ‘no ticket, no start’ signs cannot be displayed, nor signs which seek to vilify employees who participate in industrial activities (or do not);<sup>119</sup> ‘show card’ days must not occur;<sup>120</sup> forms that require employees or subcontractors to identify union membership cannot be used;<sup>121</sup> employment cannot be refused or terminated based on union status;<sup>122</sup> union logos or mottos must not be applied to company property etc;<sup>123</sup> non-working shop stewards must not be engaged, nor other individuals nominated by a union;<sup>124</sup> employees must be provided free choice about whether to be represented in dispute processes and by whom;<sup>125</sup> and union officials or delegates must not be involved in induction processes.<sup>126</sup>

Many of these practices would be unlawful under pt 3-1 of the *FW Act*, which preserves the right of employees to join and be involved in unions or not to do so.<sup>127</sup> However, practices through which *encouragement* is provided to union membership or presence in the workplace (as opposed to pressure to join the union) would not necessarily offend pt 3-1.<sup>128</sup> In contrast, s 13(2) of the *2016 Code* exhibits a stronger determination to ensure that union membership (or non-membership) is a matter for individual choice. For example, the prohibition on display of union signs and mottos on building sites is considered necessary by the Government

because such practices can result in an implication that membership of a building association is a mandatory requirement of employment with the particular employer or at a particular site. These practices are inconsistent with the proposition that membership of a building association is a matter for individual choice.<sup>129</sup>

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<sup>117</sup> *2016 Code* s 13(1).

<sup>118</sup> *Ibid* s 13(2)(a).

<sup>119</sup> *Ibid* s 13(2)(b)–(c).

<sup>120</sup> *Ibid* s 13(2)(d).

<sup>121</sup> *Ibid* s 13(2)(f).

<sup>122</sup> *Ibid* s 13(2)(h)–(i).

<sup>123</sup> *Ibid* s 13(2)(j).

<sup>124</sup> *Ibid* s 13(2)(l).

<sup>125</sup> *Ibid* s 13(2)(o).

<sup>126</sup> *Ibid* s 13(2)(p).

<sup>127</sup> See especially *FW Act* ss 50, 346–7. These general protections are reinforced by ss 12 (definition of ‘objectionable term’) and 194(b), which make enterprise agreement provisions that would breach pt 3-1 ‘unlawful terms’ that cannot be included in an agreement. On pt 3-1 generally, see Breen Creighton, ‘Individualization and the Protection of Worker Voice in Australia’, in Alan Bogg and Tonia Novitz (eds), *Voices at Work: Continuity and Change in the Common Law World* (Oxford University Press, 2014) 232.

<sup>128</sup> See, eg, *Australian Industry Group v Fair Work Australia* (2012) 205 FCR 339, 369–70 [85]–[89] (the Court); *United Firefighters’ Union of Australia v Country Fire Authority* (2015) 228 FCR 497.

<sup>129</sup> *2016 Code Explanatory Statement* 18 [98]. See also 19 [99]. FWBC had taken the view that the application of union stickers on employees’ clothing breached the freedom of association provisions of the *2013 Code*, leading in one instance to the dismissal of three construction workers (and warnings being issued to 130 more) who refused a management directive to remove their stickers, see: ‘Workers Let Go After FWBC Declares Union Stickers Breach Building Code’, *Workforce* (Sydney), 8 June 2016; *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia — Electrical, Energy and Services Division —*



In February 2018, the ABCC took this view even further, issuing a ‘fact sheet’, which states that the prohibited union logos, mottos and indicia under s 13(2)(j) of the *2016 Code* include: ‘images generally attributed to, or associated with a [building union], such as the iconic symbol of the five white stars and white cross on the Eureka Stockade flag’.<sup>130</sup>

Fourth, related to the freedom of association provisions, s 14 of the *2016 Code* tightens the requirements relating to union right of entry. The intent of s 14 is to ‘[recognise] that legislative right of entry is a privilege that only a select class of persons can apply to access’;<sup>131</sup> namely, building union officials with the appropriate permit who meet the applicable statutory requirements for entry. As before, code covered entities are required to comply with federal, state and territory laws (as applicable) that provide permit-holders with a right to enter premises where building work is performed, such as OHS statutes and pt 3-4 of the *FW Act*.<sup>132</sup> In addition, however, a code covered entity must (as far as reasonably practicable) ensure that entry by a union official is for a purpose permitted by pt 3-4 or the applicable OHS legislation; and that the union official complies with all requirements of the relevant legislation (including permit and notice requirements).<sup>133</sup> This would preclude, for example, a union official from being invited onto a building site for purposes of involvement in a dispute resolution process under an award or enterprise agreement, because this is not a purpose contemplated by any right of entry legislation — although workplace delegates may represent employees in those processes under s 13(k) of the *2016 Code*.

Fifth, as was the case under the *2013 Code*, code covered entities must not enter into unregistered written agreements in relation to building work, such as an unregistered site agreement between a head contractor and the relevant union.<sup>134</sup> This prohibition covers any agreement that will not be registered or approved under the *FW Act* (or where the code covered entity reasonably believes this to be the case) and: deals with matters that would be prohibited by s 11 of the *2016 Code*<sup>135</sup>; or provides for terms and conditions of employees or subcontractors; or restricts the type or form of engagement used to engage subcontractors.<sup>136</sup> However, the prohibition does not extend to ‘a common law agreement made between an employer

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*Queensland Divisional Branch v Laing O’Rourke Australia Construction Pty Ltd* [2016] FWC 3699 (8 June 2016) (a failed attempt by the unions to address the issue through the dispute resolution clause of the applicable enterprise agreement). See also *Harrison v P & T Tube Mills Pty Ltd* (2009) 181 IR 162 (relating to dismissal of an employee following a ‘union sticker dispute’, although not in the construction industry).

<sup>130</sup> ABCC, *Freedom of Association – Logos, Mottos and Indicia: Differences between the 2013 and 2016 Codes* (30 January 2018) <<https://www.abcc.gov.au/resources/fact-sheets/building-code-2016/freedom-association-%E2%80%93-logos-mottos-and-indicia>>.

<sup>131</sup> *2016 Code Explanatory Statement* 19 [101].

<sup>132</sup> *2016 Code* s 14(1).

<sup>133</sup> *Ibid* s 14(2). On the need to meet the requirements of both pt 3-4 and the applicable OHS legislation (where entry is sought for OHS purposes), see *Australian Building and Construction Commissioner v Powell* (2017) 268 IR 113.

<sup>134</sup> *2016 Code* s 10.

<sup>135</sup> See above nn 100–103 and accompanying text.

<sup>136</sup> *2016 Code* s 10(1).

and an individual employee'.<sup>137</sup> In addition to circumvention of the s 11 prohibitions, a concern underlying the prohibition of unregistered agreements seems to be that, frequently, such agreements provide superior terms and conditions to those in the applicable award or enterprise agreement.<sup>138</sup> Linked to the unregistered agreements prohibition is the *BCIIP Act*'s revival of an earlier prohibition (recommended by the Cole Royal Commission and introduced by the *Building and Construction Industry Improvement Act 2005* (Cth)) upon project agreements. Typically, these are agreements negotiated with relevant unions by a head contractor for a specific site or project, which is then applied to all contractors/subcontractors engaged on the site (although they may not be in a position to apply the generous terms and conditions of the agreement).<sup>139</sup> Subsections 59(1)(a)–(b) of the *BCIIP Act* therefore makes unenforceable an agreement 'entered into with the intention of securing standard employment conditions for building employees in respect of building work that they carry out at a particular building site or sites', where 'not all the employees are employed in a single enterprise'.<sup>140</sup>

Sixth, a number of new requirements were introduced under the *2016 Code* as part of the Government's agreement with crossbench senators to secure passage of the *BCIIP Act*. These include:

- provisions requiring code covered entities to comply with applicable laws relating to security of payments due to persons engaged to perform building work for the entity, and to ensure that disputed payments are resolved through reasonable, timely and cooperative processes;<sup>141</sup>
- a requirement that the preferred tenderer for Commonwealth funded building work provide a range of information about the proposed work, such as 'the extent to which domestically sourced and manufactured building materials will be used',<sup>142</sup> compliance of building materials with Australian standards, and the project's impact on jobs and contribution to skills growth;<sup>143</sup>

<sup>137</sup> Ibid s 10(2). The Government contends that for the exclusion of individual common law agreements from the s 10 prohibition to apply, the relevant common law agreement must be 'genuine'. According to the *2016 Code Explanatory Statement* 8 [45], this is intended to address the following kind of situation:

An agreement negotiated collectively between an employer and the employer's employees to, for example, give a general pay rise to employees through individual common law employment agreements while the employees are covered by an enterprise agreement would not be a genuine common law agreement.

However, this appears to be an attempt to read into the terms of the *2016 Code* language that is not there. This is unlikely to be effective in practice, as extrinsic materials cannot be used 'to place upon words [in a statute or delegated legislation] a meaning they cannot reasonably bear': Perry Herzfeld and Thomas Prince, *Statutory Interpretation Principles* (Lawbook, 2014) 207.

<sup>138</sup> See Stewart et al, above n 32, 1024. Note also the prohibition of coercion, undue influence etc to make 'an above-entitlements payment' in s 12 of the *2016 Code*; and the imposition of several prohibitions of various types of coercive activity under the *BCIIP Act* ss 51–5.

<sup>139</sup> Stewart et al, above n 32, 1019–20.

<sup>140</sup> Unless the agreement takes the form of a Commonwealth industrial instrument, such as an enterprise agreement made under the *FW Act*: *BCIIP Act* s 59(1)(d). Note also that *BCIIP Act* s 59(2) defines the term 'single enterprise'.

<sup>141</sup> *2016 Code* ss 11D–11E. See also *BCIIP Act* ch 2 pt 4 (establishing a federal 'Security of Payments Working Group').

<sup>142</sup> *2016 Code* s 25A(1)(a).

<sup>143</sup> Ibid; *BCIIP Act* s 34(2A)(a). See also *BCIIP Act* s 34(2A)–(2C).

- a prohibition on the engagement of non-Australian citizens/permanent residents to undertake building work, unless the position is first advertised in Australia (with specified requirements as to the terms of the advertisement) and ‘the employer demonstrates that no Australian citizen or Australian permanent resident is suitable for the job’;<sup>144</sup> and
- prohibitions on various collusive practices between tenderers for Commonwealth funded work.<sup>145</sup>

## C *Enforcement of the 2016 Code*

The ABCC has primary responsibility for monitoring compliance with, and enforcing, the *2016 Code*.<sup>146</sup> The ABCC has power under s 35 of the *BCIIP Act* to issue a written notice to a person required to comply with the Code, directing that person to provide information, within 14 days, about the extent of their compliance in respect of particular building work. ABCC Inspectors may use their compliance powers (such as powers of entry and investigation) for the purposes of ensuring compliance with the *2016 Code*,<sup>147</sup> and may also issue compliance notices under s 99 of the *BCIIP Act*. Further, code covered entities must notify the ABCC of a breach or suspected breach of the *2016 Code* within two working days (previously 21 days), and advise the ABCC of the steps that have been or will be taken to rectify the breach.<sup>148</sup>

The process for dealing with non-compliance with the *2016 Code*, and possible sanctions, are as follows. The Australian Building and Construction Commissioner may refer to the Employment Minister any matter involving an entity’s failure to comply with the Code (or a s 99 compliance notice relating to the Code), with recommendations as to the proposed sanction.<sup>149</sup> The Minister may then issue a formal warning to the code covered entity,<sup>150</sup> or impose an ‘exclusion sanction’<sup>151</sup> — namely, a period (no longer than one year) during which the entity cannot tender for or be awarded Commonwealth funded building work.<sup>152</sup> An exclusion sanction must be imposed ‘unless the Minister is satisfied that it would not be appropriate in the circumstances because of the nature of, or factors contributing to, the failure to comply’.<sup>153</sup> An entity that may be subject to an exclusion sanction is entitled: to be provided with written notice, by the Minister, of the alleged Code breach; and to make a submission in relation to the proposed sanction by a specified date.<sup>154</sup> The entity must subsequently be provided with

<sup>144</sup> *2016 Code* s 11F(1)(a). See also *2016 Code* s 11C(1); *BCIIP Act* s 34(2D)(d).

<sup>145</sup> *2016 Code* s 11C.

<sup>146</sup> See further Stewart et al, above n 32, 1029–30. Until April 2016, these functions under the *2013 Code* were performed by the Code Monitoring Group, the Department of Employment and the FWBC.

<sup>147</sup> *BCIIP Act* s 70(1)(a)–(b). On the extent of ABCC Inspectors’ powers, see ss 71–9.

<sup>148</sup> *2016 Code* s 17.

<sup>149</sup> *Ibid* s 18(1).

<sup>150</sup> *Ibid* s 18(1A)(b).

<sup>151</sup> *Ibid* s 18(1A)(a).

<sup>152</sup> *Ibid* s 3(3) (definition of ‘exclusion sanction’).

<sup>153</sup> *Ibid* s 18(1B).

<sup>154</sup> *Ibid* s 19(1).

written notice of any decision to impose an exclusion sanction, and the reasons for it, within 14 days of the decision being made.<sup>155</sup>

In March 2017, the Employment Minister imposed the first ever sanction for Code breaches upon J Hutchinson Pty Ltd, precluding the company from bidding for federally-funded building work from 1 April to 30 June 2017.<sup>156</sup> Across several projects, Hutchinson had breached the *2013 Code* requirements (reflected in the *2016 Code*) to ensure Code compliance by its subcontractors, by influencing subcontractors to have a particular workplace arrangement, and by failing to ensure its workers were free to join or not join a union (including through display of a ‘no ticket, no start’ sign at one site).<sup>157</sup> The ABCC indicated in late May 2017 that a further three building companies had been sent ‘show cause’ letters, seeking responses as to why sanctions should not be imposed for Code breaches.<sup>158</sup>

While the *2016 Code* itself is silent on whether there is any right of review or appeal against the imposition of an exclusion sanction, it is likely that a complaint could be made to the Commonwealth Ombudsman, review could be sought under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), and/or an application for judicial review could be made under s 39B of the *Judiciary Act 1903* (Cth).<sup>159</sup> The second and third of those avenues — *Administrative Decisions (Judicial Review) Act 1977* (Cth) review and judicial review — formed the basis for a legal challenge brought by the Communications, Electrical and Plumbing Union, against the ABCC’s decision under another part of the *2016 Code* (not to exempt South Australian Power Networks from the operation of the Code as an ‘essential service’ under s 6A).<sup>160</sup>

The ABCC also plays an important role in assessing enterprise agreements for compliance with the *2016 Code*. Under s 22 of the *2016 Code*, the ABCC may issue a determination that an agreement meets the requirements of s 11 (as discussed above in Part VB), and may provide preliminary advice on agreement compliance with the Code. The ABCC requires tenderers for Commonwealth funded building work to conduct a preliminary self-review of their agreement, using extensive guidance material provided by the ABCC (including sample agreement clauses); then to submit the agreement for an assessment of Code compliance.<sup>161</sup> An

<sup>155</sup> Ibid s 19(3)(c).

<sup>156</sup> Australian Building and Construction Commission, *Notification of Sanction under Building Code* (31 March 2017) <<https://www.abcc.gov.au/notification-sanction-under-building-code>>.

<sup>157</sup> ‘Cash Imposes Sanction on Hutchinson, as CFMEU Refuses to Change Deals’, *Workplace Express* (online), 3 April 2017 <<https://www.workplaceexpress.com.au>>.

<sup>158</sup> ‘Code Bites as More Builders Face Commonwealth Project Bans’, *Workplace Express* (online), 31 May 2017 <<https://www.workplaceexpress.com.au>>.

<sup>159</sup> See further Stewart et al, above n 32, 1030–1.

<sup>160</sup> See ‘Power Supply Potential Pawn as Building Code Faces First Legal Challenge’, *Workplace Express* (online), 19 June 2017 <<https://www.workplaceexpress.com.au>>; ‘Roe Leaving FWC; Individual Workers Facing Strike Fines; and More’, *Workplace Express* (online), 30 June 2017 <<https://www.workplaceexpress.com.au>>. The union’s application was ultimately discontinued, following an amendment in August 2017 to relevant provisions of the *2016 Code*: see *Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing and Allied Services Union of Australia v Australian Building and Construction Commissioner* [2017] FCA 1062 (5 September 2017).

<sup>161</sup> ABCC, *Preliminary Review* <<https://www.abcc.gov.au/building-code/eligibility-tender/preliminary-review>>. For further detail on the agreement assessment process within the overall framework of tendering for Commonwealth work, see Stewart et al, above n 32, 1029–30; ‘FWBC Expands its Role’ *Workplace Express* (online), 16 May 2016 <<https://www.workplaceexpress.com.au>>.

assessment of compliance with s 11 of the *2016 Code* is one of the key criteria for eligibility to be awarded Commonwealth funded work.<sup>162</sup>

## **VI Analysis: The 2016 Code as an Instrument for Restoring the Rule of Law**

### **A Introduction**

This Part of the article examines the arguments mounted by proponents of restoring the rule of law in the Australian construction industry, and the ways in which it is said that the CFMEU's conduct has led to a breakdown of law and order. This is followed by an analysis of the extent to which the *2016 Code* is really a mechanism for addressing those issues, or whether it seeks to achieve other workplace reform objectives of the Coalition Government. Attention then turns to contentions that the specialist scheme of construction industry regulation offends rule of law principles, primarily the concern to ensure equal treatment before the law.

### **B The Case for Restoring the Rule of Law in the Construction Industry**

When reintroducing the Bill for the *BCIIP Act* following the 2016 Election, Prime Minister Turnbull stated the Government's argument as to the need to restore the rule of law in the construction industry as follows:<sup>163</sup>

The Coalition Government will always stand up for the rule of law. ...

[The Bill to re-establish the ABCC] will ensure the rule of law prevails on building sites across the country. ...

Two royal commissions have now identified systemic unlawful behaviour in the construction industry. ...

The industry is still marred by illegal strikes, constant bullying, intimidation and thuggery. ...

The Bill upholds and promotes respect for the rule of law and ensures respect for the rights of all building industry participants. ...

A re-established ABCC will also administer a building code that will govern industrial relations arrangements for government-funded projects. ...

No person in Australia ... should have to work in an industry where the rule of law is routinely defied. ...

This Bill will ensure our construction industry is safe, productive and free of intimidation and harassment. This will create the conditions for Australians to get the infrastructure they need at a price we can afford.

The Royal Commissions referred to by the Prime Minister were the Cole Royal Commission<sup>164</sup> and the more recent Heydon Royal Commission on Trade Union Governance and Corruption, which made similar findings about the continued

<sup>162</sup> *2016 Code* s 23(1)(a).

<sup>163</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 31 August 2016, 81–5 (Malcolm Turnbull, Prime Minister).

<sup>164</sup> Cole Royal Commission, above n 3. See also above nn 37–40, 64–7 and accompanying text for a discussion of the main findings.

lawlessness of the building industry.<sup>165</sup> Commissioner Heydon dealt extensively with the conduct of the CFMEU in his Final Report, pointing to its 'repeated unlawful conduct' including breaches of the law and court orders,<sup>166</sup> and to judicial criticism of the union and its officials due to their 'disregard for the law'.<sup>167</sup> For example, the Commissioner stated that: 'The concept of the rule of law has been described as an anathema to the CFMEU.'<sup>168</sup> He went so far as to suggest that

[t]here is a longstanding malignancy or disease within the CFMEU. One symptom is regular disregard for industrial laws by CFMEU officials. ... Another symptom of the disease is that CFMEU officials habitually show contempt for the rule of law.

What can be done to cut out the malignancy and cure the disease?<sup>169</sup>

Commissioner Heydon's solutions included the possibility of special legislation disqualifying CFMEU officials considered not to be fit and proper persons to hold union office.<sup>170</sup> He also recommended that the specialist building industry regulator continue to operate, with investigatory and enforcement functions relating to then-existing laws<sup>171</sup> along with enhanced penalties for unlawful industrial action, coercion and a new prohibition of industrially motivated picketing<sup>172</sup> (along the lines of the provisions eventually enacted in the *BCIIP Act*).

The principal concerns of Commissioner Heydon, the Coalition Government, the courts and the construction industry regulator have been about the CFMEU's propensity for taking unlawful industrial action, then ignoring court orders and injunctions intended to address that action, as well as various types of coercive conduct. Perhaps the starkest illustration of the combination of these illegal activities is provided by the Grocon Emporium project dispute in 2012, in which the CFMEU maintained an unlawful blockade of the site in central Melbourne for more than two weeks. The dispute originated over union demands relating to the role of safety representatives on the site<sup>173</sup> and gave rise to various legal proceedings, including a criminal contempt action following the union's refusal to comply with an injunction

<sup>165</sup> Royal Commission into Trade Union Governance and Corruption, above n 50. See also above nn 50–51 and accompanying text.

<sup>166</sup> Ibid vol 5, 397 [8.12]. See also 396–7 [8.7]–[8.12], appendix A 487–574 (a summary table of 147 construction industry cases involving successful proceedings against building industry participants for industrial law breaches and contempt over the period 2000–15).

<sup>167</sup> Ibid vol 5, 397 [8.13]. See also vol 5, 398–401 [8.14]–[8.22].

<sup>168</sup> Ibid vol 5, 398 [8.14], citing *Director, Fair Work Building Industry Inspectorate v CFMEU (No 2)* [2015] FCA 407 (1 May 2015), [103] (Tracey J). For another example, see the reference by Mortimer J to the 'contumelious disregard for the restrictions the law imposes on industrial activities shown by those who control the CFMEU': *Director, Fair Work Building Industry Inspectorate v CFMEU (No 2)* [2016] FCA 436 (13 May 2016) 49 [196].

<sup>169</sup> Royal Commission into Trade Union Governance and Corruption, above n 50, vol 5, 401 [8.23]–[8.24].

<sup>170</sup> Ibid vol 5, 408 [8.44]. The Government has indicated that it will not implement this recommendation because it is not the role of Parliament to ban union officials: 'Coalition Confirms Adoption of 48 TURC Recommendations', *Workforce* (Sydney), 24 June 2016. Instead, however, see the Fair Work (Registered Organisations) Amendment (Ensuring Integrity) Bill 2017 (Cth); David Marin-Guzman, 'New Laws Threaten CFMEU with Deregistration', *Australian Financial Review* (online), 16 August 2017 <<http://www.afr.com/news/policy/industrial-relations/new-laws-threaten-cfmeu-with-deregistration-20170816-gxx6wp>>.

<sup>171</sup> Royal Commission into Trade Union Governance and Corruption, above n 50, vol 5, 436 [8.112].

<sup>172</sup> Ibid vol 5, 478 [8.192].

<sup>173</sup> ABC, 'CFMEU Clashes with Grocon Over Safety Officials', *Lateline*, 28 August 2012.

to lift the picket, and civil penalty proceedings for unlawful coercion in respect of the ‘safety rep’ demands. The CFMEU was fined \$1.25 million in the criminal contempt case,<sup>174</sup> while penalties of over \$150 000 were imposed on the union and eight of its officials in the coercion proceedings brought by FWBC.<sup>175</sup> The union also settled a common law claim for damages brought by Grocon in respect of the Emporium site blockade,<sup>176</sup> and had to defend a number of civil and criminal proceedings arising from an alleged secondary boycott of concrete supplier Boral on Melbourne building sites in the wake of the Grocon dispute.<sup>177</sup>

There are many other reported cases in which the CFMEU, its officials and/or members have been found to have engaged in unlawful industrial action.<sup>178</sup> For its part, the CFMEU argues that it is sometimes necessary to engage in such action — for example, to protest against what it sees as unjust laws (like the *BCIIP Act* and the *2016 Code*) and problems with safety issues on building sites which have led to the deaths of construction workers.<sup>179</sup> This was also the basis for the incoming ACTU Secretary’s comments defending the right of unions to ignore the rule of law in March 2017,<sup>180</sup> although it has been pointed out that many instances of unlawful CFMEU industrial action do not involve safety concerns.<sup>181</sup> Sally McManus also highlighted the unfairness of restrictions on union entry rights: ‘When union officials

<sup>174</sup> *Grocon v CFMEU (No 2)* (2014) 241 IR 288, and *CFMEU v Grocon Constructors (Victoria) Pty Ltd* (2014) 47 VR 527.

<sup>175</sup> *Director, Fair Work Building Industry Inspectorate v CFMEU* [2015] FCA 225 (17 March 2015); *Director, Fair Work Building Industry Inspectorate v CFMEU* [2015] FCA 1213 (11 November 2015).

<sup>176</sup> ‘CFMEU to Pay \$3.6 Million to Settle Grocon Case’, *Workplace Express* (online), 22 June 2015 <<https://www.workplaceexpress.com.au>>.

<sup>177</sup> ‘CFMEU to Pay Up to \$9 Million to Settle Boral Action’, *Workplace Express* (online), 18 September 2016 <<https://www.workplaceexpress.com.au>>; ‘CFMEU Loses Appeal Over “Boral Bans”’, *Workplace Express* (online), 19 July 2016 <<https://www.workplaceexpress.com.au>>; ‘Boral Lost Customers From CFMEU Boycott, Court Hears’, *Workplace Express* (online), 3 October 2016 <<https://www.workplaceexpress.com.au>>; ‘CFMEU’s Setka Asks Supreme Court to Axe Blackmail Case’, *Workplace Express* (online), 2 December 2016 <<https://www.workplaceexpress.com.au>>; *Setka v Magistrates Court of Victoria* (2017) 323 FLR 108.

<sup>178</sup> See, eg, *Director, Fair Work Building Industry Inspectorate v Abbott (No 6)* [2013] FCA 942 (18 September 2013); *Director, Fair Work Building Industry Inspectorate v CFMEU* [2015] FCA 226 (17 March 2015); *Director, Fair Work Building Industry Inspectorate v Vink* [2016] FCCA 488 (9 March 2016); *Australian Building and Construction Commissioner v McCullough (No 2)* [2017] FCA 295 (22 March 2017); *Australian Building and Construction Commission v CFMEU* (2017) 268 IR 178 (‘Kane Constructions Case’).

<sup>179</sup> See, eg, ‘Building Industry Will Stop, Enough is Enough, CFMEU Warns’, *Workplace Express* (online), 15 February 2017 <<https://www.workplaceexpress.com.au>>; ‘Victorian CFMEU Leader Vows to Defy IR Construction Laws’, *Workplace Express* (online), 9 March 2017 <<https://www.workplaceexpress.com.au>>.

<sup>180</sup> See nn 7–10 above and accompanying text. Support can be found for McManus’s position on defying unjust laws: see, eg, Bottomley and Bronitt’s reference to Fuller, above n 27, ‘ch 2, suggesting that there is no obligation to obey legal rules that violate the rule of law as they are not laws at all: Bottomley and Bronitt, above n 21, 42; cf Hayek, above n 23, 210.

<sup>181</sup> Matthew Dunkley, ‘New Union Chief Sally McManus has a Problem with Facts’, *The Sydney Morning Herald* (online), 23 March 2017 <<http://www.smh.com.au/business/workplace-relations/new-union-chief-sally-mcmanus-has-a-problem-with-facts-20170319-gv1rn6.html>>. See further cases such as *Director, Fair Work Building Industry Inspectorate v Merckx* [2015] FCA 316 (2 April 2015); *Kane Constructions Case* (2017) 268 IR 178.

are prevented from going onto a worksite because they need to give 24 hours' notice and they know that someone's life is at risk, I think that is an unjust law.'<sup>182</sup>

As well as the inaccuracy of that description of the legal position,<sup>183</sup> there have been many judicial findings of entry onto building sites by CFMEU officials in breach of applicable restrictions under the *FW Act* and/or OHS legislation.<sup>184</sup> Further, the Heydon Royal Commission considered evidence of the misuse of entry rights for OHS purposes to address industrial issues,<sup>185</sup> while alleged breaches of right of entry laws have become an increasing focus of compliance activity on the part of the construction industry regulator.<sup>186</sup> The CFMEU has also, on occasions, demonstrated a belligerent approach to interactions with ABCC inspectors. This was most clearly exemplified by Victorian CFMEU Secretary John Setka's warning (at a public rally held in Melbourne on 19 June 2017) that the union would expose ABCC inspectors in their communities so that they would 'not be able to show their faces anywhere'.<sup>187</sup> These comments were condemned by both the Government and Opposition.<sup>188</sup> Although Setka later apologised for his remarks,<sup>189</sup> they served to entrench a perception that the union regards itself as 'above the law'.

### C *Is the 2016 Code about Restoring the Rule of Law or Something Else?*

The discussion in the preceding section illustrates that there is a persuasive basis for the notion of restoring the rule of law in the building industry, if one accepts the

<sup>182</sup> 'I Will Not Keep My Head Down: ACTU's McManus', *Workplace Express* (online), 29 March 2017 <<https://www.workplaceexpress.com.au>>.

<sup>183</sup> The requirement to give 24 hours' notice of entry for OHS purposes only applies to entry for purposes of accessing employment records (*FW Act* s 495; *Work Health and Safety Act 2011* (Cth) s 120) and for consulting with employees on safety matters (*Work Health and Safety Act 2011* (Cth) ss 121–2); it does not apply for purposes of entry to investigate a suspected OHS contravention under *Work Health and Safety Act 2011* (Cth) ss 117–19. This is also the position in those states and territories that have adopted the model *Work Health and Safety Act* (ie all but Victoria and Western Australia).

<sup>184</sup> See, eg, *Director, Fair Work Building Industry Inspectorate v CFMEU* [2016] FCA 413 (22 April 2016); *Director, Fair Work Building Industry Inspectorate v CFMEU* [2016] FCA 414 (22 April 2016); *Director, Fair Work Building Industry Inspectorate v O'Connor* [2016] FCA 415 (22 April 2016); *Director, Fair Work Building Industry Inspectorate v Bolton (No 1)* [2016] FCA 816 (19 July 2016); *Director, Fair Work Building Industry Inspectorate v Bolton (No 2)* (2016) 261 IR 452. See also *Fair Work Commission v Roberts* [2016] FWC 4052 (29 June 2016), relating to the suspension of a CFMEU official's right of entry permit; *Australian Building and Construction Commissioner v Powell* (2017) 268 IR 113, dealing with the inability of an official (without a federal entry permit) to obtain entry onto a site to assist a safety representative under Victorian OHS legislation.

<sup>185</sup> Royal Commission into Trade Union Governance and Corruption, above n 50, vol 2, ch 3.2; vol 3, ch 6.3; vol 5, 578 [9.5].

<sup>186</sup> 'Entry Permit Breaches Dominating FWBC Actions', *Workplace Express* (online), 18 August 2015 <<https://www.workplaceexpress.com.au>>. See also Nigel Hadgkiss, 'The Rule of Law — One Year On' (Speech delivered at the IRSWA State Conference, Rottneest Island, Western Australia, 22 November 2014).

<sup>187</sup> 'CFMEU Official Threatens to Expose Inspectors' "Secret Lives", *Workplace Express* (online), 20 June 2017 <<https://www.workplaceexpress.com.au>>.

<sup>188</sup> David Marin-Guzman, 'Bill Shorten "Repudiates" CFMEU Boss John Setka's Threats to ABCC Officials', *Australian Financial Review* (online), 21 June 2017 <<http://www.afr.com/news/policy/industrial-relations/bill-shorten-repudiates-cfmeu-boss-john-setkas-threats-to-abcc-officials-20170621-gwvc4d>> (noting also that the Federal Employment Minister would be referring the matter to police).

<sup>189</sup> 'CFMEU Leader Apologises for "Heat of the Moment" Comments', *Workplace Express* (online), 23 June 2017 <<https://www.workplaceexpress.com.au>>.



narrow view of the rule of law as necessitating compliance with legal rules.<sup>190</sup> To what extent, then, is the *2016 Code* oriented towards achieving that objective? Clearly there are elements of the Code that aim to promote respect for the law by construction industry participants, such as the requirements to comply with the Code itself and other applicable laws, as well as the rulings of courts and tribunals. The goal of compliance can also be seen in the reporting requirements about industrial action — although notably, *any* industrial action must be reported to the ABCC, not just unlawful industrial action. Similarly, the *2016 Code* seeks to ensure observance of the *FW Act* provisions relating to freedom of association and union right of entry, and compliance with various laws dealing with security of payments.

However in many more respects, the *2016 Code* has nothing at all to do with the rule of law. Rather, it seeks to promote other aspects of the Government's workplace relations agenda, particularly its desire to dilute the power and influence of trade unions. This is no longer the explicitly articulated feature of Coalition policy that it was in the Howard era (particularly through the 2005 'Work Choices' legislation).<sup>191</sup> However, it is evident, for example, in the Government's attempts to limit union entry rights under pt 3-4 of the *FW Act*,<sup>192</sup> and in its robust posturing in agreement negotiations in the federal public sector.<sup>193</sup> Unions are also being subjected to higher standards of governance and accountability, particularly in relation to financial management, although this is largely a necessary response to the corruption issues identified by the Heydon Royal Commission.<sup>194</sup>

Arguably, the *2016 Code* is the Coalition Government's most potent statement of anti-union intent — especially the extensive attempts to preclude union involvement in the workplace through the agreement content restrictions and freedom of association requirements. These provisions of the *2016 Code* go well beyond ensuring *neutrality* in the choice presented to employees as to whether they should join a union or become involved in union activities (or not).<sup>195</sup> Rather, the *2016 Code* restrictions seek to prevent employers from offering any support for, or tolerance of, union involvement in the workplace — right down to prohibiting the display of union flags or symbols and union involvement in employee inductions — under the pain of possible ineligibility for Commonwealth-funded building work.

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<sup>190</sup> See above Part II.

<sup>191</sup> Anthony Forsyth and Carolyn Sutherland, 'From "Uncharted Seas" to "Stormy Waters": How Will Trade Unions Fare under the Work Choices Legislation?' (2006) 16(2) *Economic and Labour Relations Review* 215.

<sup>192</sup> See Fair Work Amendment (Remaining 2014 Measures) Bill 2015 (Cth), discussed in Stewart et al, above n 32, 870.

<sup>193</sup> 'Abbott Government Tightens Screws with New APS Bargaining Policy', *Workplace Express* (online), 2 April 2014 <<https://www.workplaceexpress.com.au>>; Sue Williamson, Michael O'Donnell and Cameron Roles, 'Bargaining over Australian Public Service Cuts: Do Forcing Strategies Work?' (2016) 27(1) *Economic and Labour Relations Review* 46.

<sup>194</sup> See n 59 above and accompanying text; *Fair Work Amendment (Corrupting Benefits) Act 2017* (Cth); Anthony Forsyth, 'Law, Politics and Ideology: The Regulatory Response to Trade Union Corruption in Australia' (2017) 40(4) *University of New South Wales Law Journal* 1336.

<sup>195</sup> The notion of state neutrality in the legal rules for union activity such as collective bargaining is explored in the United States and United Kingdom contexts in (respectively): Benjamin I Sachs, 'Enabling Employee Choice: A Structural Approach to the Rules of Union Organizing' (2010) 123(3) *Harvard Law Review* 655; Ruth Dukes, 'The Statutory Recognition Procedure 1999: No Bias in Favour of Recognition?' (2008) 37(3) *Industrial Law Journal* 236.

As indicated earlier in the article, the reach of the Code's prohibitions extend to preclude certain forms of employer activity (that is, encouragement or facilitation of union involvement) that are more than likely permissible under the *FW Act*.<sup>196</sup> The *2016 Code* is therefore as much an instrument to drive an ideological view antipathetic to trade unions, as it is a vehicle to restore the rule of law.

The enterprise agreement restrictions in the *2016 Code* also point to another of the Coalition's policy objectives: enhancing productivity and competitiveness.<sup>197</sup> In its first term in office, the Government largely left it to the Productivity Commission to examine how the workplace relations system could be improved, and ensure that businesses can 'grow, prosper and employ'.<sup>198</sup> The Commission's reform recommendations were more moderate than many observers expected,<sup>199</sup> but have still not been acted upon by the Government.<sup>200</sup> As indicated earlier, the *2016 Code* precludes agreement clauses that limit management decision-making or productivity gains. Of particular note in that context are the prohibitions on clauses restricting the utilisation of flexible forms of labour (for example, contractors or labour hire), and on 'jump up'-type provisions. Through the *2016 Code*, therefore, the Government has implemented (in the construction industry) a recommendation of the Productivity Commission to restrict the permissible content of agreements,<sup>201</sup> which it has not yet been prepared to pursue more broadly.

## D Rule of Law Concerns about Construction Industry Regulation

While it has been shown that the *2016 Code* is only partly aimed at rule of law concerns, the *BCIIP Act* is certainly more squarely focused on ensuring compliance with prohibitions on unlawful industrial action, picketing and coercion through stiff penalties and a vigilant regulator (the ABCC). Yet this only addresses one element — enforcement of existing laws — of some (but not all) perspectives of what the rule of law means. At the same time, the specialist scheme of construction industry regulation that has operated in Australia since 2005 has raised a number of concerns, particularly regarding its incursion on a principle that (as discussed earlier in this article)<sup>202</sup> is another foundational component of the rule of law in Dicey's terms: equality before the law.<sup>203</sup>

<sup>196</sup> See above nn 117–129 and accompanying text.

<sup>197</sup> Liberal Party of Australia and The Nationals, *The Coalition's Policy to Create Jobs by Improving Productivity* (Policy Statement, 4 September 2013). See also Liberal Party of Australia and The Nationals, above n 48.

<sup>198</sup> Productivity Commission (Cth), 'Workplace Relations Framework' (Inquiry Report, Australian Government, 30 November 2015) vol 1, vi. See also v–vii.

<sup>199</sup> Ibid. See also Stewart et al, above n 32, 75–6. More generally, see David Peetz, 'The Productivity Commission and Industrial Relations Reform' (2016) 27(2) *Economic and Labour Relations Review* 164.

<sup>200</sup> Ewin Hannan, 'Election 2016: Coalition Silent on Promised Productivity Commission Response', *Australian Financial Review* (online), 29 June 2016 <<http://www.afr.com/news/policy/industrial-relations/election-2016-coalition-silent-on-promised-productivity-commission-response-20160629-gpulge>>.

<sup>201</sup> Productivity Commission (Cth), above n 198, vol 2, 815–20.

<sup>202</sup> See above Part II.

<sup>203</sup> Another significant rule of law issue raised about the system of construction industry regulation has been its abrogation of individual liberties through the coercive investigatory powers of the ABCC (see above nn 41, 47, 52 and accompanying text). Space does not permit further examination of those issues here; see further Williams and McGarrity, above n 41, 247, 276–7.

The ACTU has maintained that the imposition of special laws for workers in the construction industry is unnecessary and discriminatory, and that the ABCC (as it operated under the *Building and Construction Industry Improvement Act 2005* (Cth)) was ‘aggressive, coercive and biased’ in its overwhelming focus on the activities of workers and unions.<sup>204</sup> For the CFMEU: ‘principles of equal treatment before the law demand that there be no separate regulator for the building industry and no accompanying laws directed at the participants of that industry’.<sup>205</sup> It was noted earlier that according to Bingham and Gowder, laws should generally apply equally to everyone unless there are objective or public differences justifying different treatment.<sup>206</sup> According to Gowder, reasons for such differential application of the law that ‘appeal to plausible conceptions of the public good will always count’, while reasons ‘based on patronizing or disdainful attitudes toward classes of individuals will never count’.<sup>207</sup> Clearly, perceptions of ‘the public good’ will always be in the eye of the beholder. Nevertheless, it is strongly arguable that the ‘justification’ test for differential treatment is satisfied in respect of the Australian building industry, based on the lawlessness discussed in Part VIB above. Even the Labor Party, when last in government<sup>208</sup> and leading up to the 2016 Election,<sup>209</sup> has supported a (less restrictive) separate system of regulation for this industry.

However, in at least one case a court has criticised the construction regulator for bringing an unsuccessful enforcement proceeding against the CFMEU.<sup>210</sup> Commissioner Heydon found no evidence of anti-union bias on the part of the ABCC.<sup>211</sup> Nevertheless, the concerns of the ACTU and CFMEU have, to some extent, been validated by the inclusion in the *BCIIP Act* of a provision requiring the ABCC to carry out its functions in a way that ensures

the policies and procedures adopted and resources allocated for protecting and enforcing rights and obligations arising under [applicable building industry laws] are, to the greatest extent practicable having regard to industry conditions based on complaints received by the [ABCC], applied in a reasonable and proportionate manner to each of the categories of building industry participants.<sup>212</sup>

Union concerns about the ABCC’s lack of impartiality were further reinforced in September 2017, when Australian Building and Construction Commissioner Nigel Hadgkiss resigned following revelations that he had breached the *FW Act* by

<sup>204</sup> See Royal Commission into Trade Union Governance and Corruption, above n 50, vol 5, 420 [8.75]. See also vol 5, 419–21 [8.72]–[8.77].

<sup>205</sup> Ibid vol 5, 422 [8.78]. See also the Wilcox Review’s consideration of the justification for a special scheme of regulation in Wilcox Review, above n 45, ch 4.

<sup>206</sup> See above nn 18, 20 and accompanying text.

<sup>207</sup> Gowder, above n 19, 607–8 (citations omitted).

<sup>208</sup> See nn 44–7 above and accompanying text.

<sup>209</sup> Ewin Hannan, ‘Why Voters are Not Getting the Full Picture on the ABCC’, *Australian Financial Review* (online), 23 March 2016 <<http://www.afr.com/news/politics/why-voters-are-not-getting-the-full-picture-on-the-abcc-20160322-gnot1r>>.

<sup>210</sup> See, eg, *Director, Fair Work Building Industry Inspectorate v Ingham* [2016] FCA 328 (7 April 2016).

<sup>211</sup> Royal Commission into Trade Union Governance and Corruption, above n 50, vol 5, 433–4 [8.103]–[8.107].

<sup>212</sup> *BCIIP Act* s 16(2), which was inserted as part of the crossbench amendments to the legislation in the Senate.

publishing incorrect information about union entry rights.<sup>213</sup> Based on his admissions of wrongdoing, a civil penalty of \$8500 was subsequently imposed upon Hadgkiss by the Federal Court, for breaching the legislation he was required to police.<sup>214</sup>

## VII Conclusion

This article has concluded that the Coalition Government's use of the procurement rules in the *2016 Code* is partly aimed at restoring the rule of law in the Australian construction industry, with the rule of law narrowly conceived as ensuring compliance with the law. In addition, though, it has been shown that the *2016 Code* is intended to achieve certain other workplace reform objectives, including reducing union power and enhancing productivity and competitiveness. These conclusions were reached following a detailed examination of: the evolution of the specialist framework of building industry regulation since the Cole Royal Commission in 2003; the use of commercial (dis)incentives through procurement policy to drive workplace reform in this sector since 1997; and the obligations imposed under the *2016 Code*.

In the course of the above analysis, it was observed that the CFMEU's wilful defiance of legal restrictions on industrial action, coercion and right of entry — and court orders and injunctions enforcing those limitations — means that there is a need to reimpose 'law and order' in the building industry. However, this is only one aspect of the rule of law, and the separate scheme of construction regulation has raised significant concerns over the years in relation to compliance with another central feature of the liberal conception of the rule of law: equal treatment before the law.

In the end, there must be some doubt as to the likely effect of the *2016 Code* (and the *BCIIP Act*) to effect the cultural change the Australian Government is seeking to bring about. Imposing commercial 'carrots and sticks' on construction companies has some capacity to influence behaviour, because most larger players will want to tender for Commonwealth funded projects — and many smaller companies will seek to be engaged on those projects.<sup>215</sup> On the other hand, similar obligations have applied previously (under the Howard Government) and the special scheme of construction regulation has been in place for almost 15 years without any real change in the nature of industrial relations practices on building sites.<sup>216</sup> It is, therefore, far from certain that the Government can turn the mantra of 'restoring the rule of law' in the Australian construction industry into reality.

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<sup>213</sup> 'ABCC's Hadgkiss Admits Contravening Act', *Workplace Express* (online), 12 September 2017 <<https://www.workplaceexpress.com.au>>.

<sup>214</sup> *CFMEU v Director of the Fair Work Building Industry Inspectorate* [2017] FCA 1166 (29 September 2017).

<sup>215</sup> Stewart et al, above n 32, 1023.

<sup>216</sup> See, eg, Nigel Hadgkiss, 'Plans and Priorities of the Construction Industry Regulator' (Speech delivered at the Australian Industry Group National PIR Group Conference, Canberra, 2 May 2016); 'FWBC Needs Bigger Stick to Force Compliance: Hadgkiss', *Workplace Express* (online), 14 October 2016 <<https://www.workplaceexpress.com.au>>.

# *In Whose Interests? Fiduciary Obligations of Union Officials in Bargaining*

Jill Murray\*

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## *Abstract*

This article examines the proposition that trade union officials owe fiduciary obligations to those they represent in enterprise bargaining under the *Fair Work Act 2009* (Cth), as held by the Royal Commission into Trade Union Governance and Corruption. It is argued that there are several formidable hurdles to such a conclusion, including the character of the bargaining regime under the Act, and the potential clash between the contention of the Royal Commission and the existing view of union officials as owing fiduciary obligations to the union as a continuing organisational entity. The importation of individualistic private law norms, if the fiduciary view of union bargaining were to be adopted by the courts, would challenge some fundamental conceptions of collective bargaining and the role of unions. While ‘sweetheart deals’ of the kind exposed by the Royal Commission may call for new legal responses, this article concludes that fiduciary law is not an appropriate legal tool for regulating union behaviour during bargaining.

## **I Introduction**

Does a union official owe fiduciary obligations and, if so, to whom and under what circumstances? These questions have taken on contemporary significance because of the findings of the Royal Commission into Trade Union Governance and Corruption (‘the Royal Commission’). As well as recommending statutory changes in relation to ‘corrupting payments’,<sup>1</sup> the Royal Commission found that a number of union officials may have breached a fiduciary obligation to members at an individual workplace by overseeing sub-standard industrial agreements while the union received secret payments from the employer.<sup>2</sup>

The finding that union officials owe a fiduciary obligation to members during enterprise bargaining is novel: the existing case law on the fiduciary obligations of union officials in Australia largely focuses on officials’ management roles and, in summary, holds that union officials owe a fiduciary obligation to the union as a

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<sup>1</sup> Commonwealth, Royal Commission into Trade Union Governance and Corruption, *Final Report* (2015) vol 5, 266 (Recommendation 40).

<sup>2</sup> *Ibid* vol 4, 765–6 (where the Royal Commission held that the union and its officials owed a fiduciary obligation to members at an individual workplace, and that this obligation may have been breached where the union received payment while negotiating an agreement which disadvantaged members).

continuing organisational entity.<sup>3</sup> The extant cases liken union officials to company directors, whereas the Royal Commission argued that union officials bargain in the statutory context as agents for their members, or in a role sufficiently agent-like to give rise to fiduciary obligations to members.<sup>4</sup>

Of course, it is technically possible that an official may owe fiduciary obligations to different entities or people in relation to different aspects of their role. However, this article argues that the Royal Commission's contention is problematic in two respects: the statutory context within which union officials participate in enterprise bargaining is largely incompatible with the view that union officials bargain as agents, and there are inherent conflicts between the traditional conception of the union official's fiduciary duty and the Royal Commission's view.

Before turning to these arguments, an example of the impugned bargaining behaviour and the rationale for the Royal Commission's ascription of fiduciary obligations is discussed in Part II. In Part III, the existing law on the fiduciary obligations of union officials is examined. Part IV sets out the argument that it is difficult to view union bargaining representatives under the *Fair Work Act 2009* (Cth) ('*Fair Work Act*') as fiduciaries for the purpose of that role. Part V highlights the potential conflicts between the Royal Commission's view and the traditional notion of union officials' fiduciary obligations as discussed in Part III. Finally, in Part VI, the conceptual, practical and political ramifications of the Royal Commission's fiduciary contention, should it be successfully argued in court or replicated in statutory terms, are analysed.

## II Anatomy of a Sweetheart Deal

### A *The AWU-Chiquita Mushrooms Enterprise Agreement 2004*

The Royal Commission's findings that union officials may have breached a fiduciary obligation to individual members were made following a number of case studies into instances of enterprise bargaining. One of these involved negotiations between the Australian Workers' Union Victorian Branch ('AWU') and Chiquita Mushrooms ('CM'), leading to an enterprise agreement in 2004.<sup>5</sup> The Royal Commission held that the AWU Assistant Secretary and the union itself should be regarded as agents for their members at CM, and that by reaching a 'bad' agreement with management at the same time as the union received payments from CM, they had breached their fiduciary obligation to those workers.<sup>6</sup>

CM was a commercial mushroom cultivation business, with two sites in Victoria employing over 500 workers to harvest the crops. The company had an extraordinarily poor health and safety record, caused in part by the system of bonus payments that encouraged workers to work excessively hard. According to the

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<sup>3</sup> *Allen v Townsend* (1977) 31 FLR 431 ('*Allen*').

<sup>4</sup> Michael Christie, 'Legal Duties and Liabilities of Federal Union Officials' (1986) 15(4) *Melbourne University Law Review* 591.

<sup>5</sup> Royal Commission into Trade Union Governance and Corruption, above n 1, vol 4, ch 10.6.

<sup>6</sup> *Ibid* vol 4, 766.

company, by 2004 CM's WorkCover insurance premiums spiked at \$6.2 million per annum, an unsustainable 47% of the total labour costs of the company, threatening the viability of the business.<sup>7</sup> Instead of addressing the safety issue directly by improving work practices, CM decided on a strategy to terminate the employment of a significant proportion of its 'permanent' workforce and to engage workers through a labour hire firm.<sup>8</sup> This tactic would remove CM's WorkCover liabilities with the stroke of a pen: as the Royal Commission put it, '[i]ncreased labour hire would assist in solving this problem because injuries to labour hire workers would affect the premiums of the labour hire company in question, and not Chiquita.'<sup>9</sup> The shift to labour hire employment also created an opportunity to reduce labour costs because the terms and conditions of the labour hire firm were lower than those of the CM workers.

Standing in the way of this strategy was the existing enterprise agreement between the AWU and CM, which mandated a minimum number of permanent workers, thus limiting the number of jobs that could be outsourced from direct employment by CM. This agreement also required that any labour hire staff engaged to work at CM would be paid the same amount as the permanent CM workers, and created the system of bonus pay based on the number of boxes of mushrooms picked per day.

Negotiations between the AWU and CM in 2004 led to a new enterprise agreement that: lowered the minimum number of permanent workers from 270 to 120; permitted labour hire workers to earn less than permanent staff; capped the bonus system that encouraged dangerous overwork; and limited the number of consecutive days staff could work to six. CM management also agreed to an AWU claim, made through the enterprise bargaining process, for 'paid education leave': the business agreed to pay the AWU \$4000 per month for six months.<sup>10</sup> The paid education agreement was a so-called 'side deal' settled in correspondence with the union, rather than appearing in the terms of the enterprise agreement itself.

As a result of the 2004 enterprise agreement, a significant number of the permanent mushroom pickers lost their jobs at CM, most through a voluntary redundancy scheme. Some were subsequently engaged to work at CM via a labour hire firm on the lower terms and conditions lawfully set for employees of the labour hire firm.

Evidence to the Royal Commission about the six \$4000 payments to the union by CM was contested.<sup>11</sup> The AWU had made the claim for such payments in the previous enterprise bargaining round and was pursuing the same claim throughout all its enterprise bargaining negotiations in Victoria.<sup>12</sup> However, one CM manager gave evidence that suggested the money was 'a small price to pay' to keep the union 'at bay' over the proposal for mass sackings and outsourcing of the

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<sup>7</sup> Ibid vol 4, 725.

<sup>8</sup> The term 'permanent' is used to indicate the CM workers employed on ongoing contracts.

<sup>9</sup> Royal Commission into Trade Union Governance and Corruption, above n 1, vol 4, 725.

<sup>10</sup> Ibid vol 4, 729.

<sup>11</sup> Ibid vol 4, 730ff.

<sup>12</sup> Ibid vol 4, 734.

mushroom pickers' jobs.<sup>13</sup> It was suggested that the amount of \$4000 was suspiciously similar to the membership dues lost to the AWU through the outsourcing of the permanent workers' jobs, suggesting that the payments were 'designed to compensate the AWU for a loss of membership revenue'.<sup>14</sup>

The Royal Commission found that there was no evidence of any services provided by the AWU to CM in exchange for the \$24 000 for paid education leave. It reasoned that a firm in such financial trouble as CM would not have given \$24 000 to the union for any 'altruistic concern about improving training'.<sup>15</sup> The payments must have been for the benefit of CM, and the Royal Commission did not accept that the benefit would have been reductions in worker injury as 'this would be a long game'.<sup>16</sup> Instead, the Royal Commission characterised the payments as having a tendency to corrupt the AWU and hinder it from acting solely in the interests of its members during the bargaining process, possibly breaching a fiduciary obligation to those members.<sup>17</sup>

As required by the federal statute at the time,<sup>18</sup> the 2004 enterprise agreement was put to a vote of the workers affected and a majority approved it, and the Australian Industrial Relations Commission certified that the agreement passed the relevant statutory hurdles.

## **B     *The Royal Commission's Rationale for Breach of Fiduciary Obligation***

The Royal Commission arrived at its conclusion of possible breach of fiduciary obligation through a number of steps. The first step was a finding that the union official in question, the Assistant Secretary of the AWU, owed a fiduciary obligation to the members at CM in respect of his role as a senior negotiator for the 2004 enterprise agreement.

The initial characterisation of the union official as fiduciary during bargaining is critical to all the contentions that follow because, as Finn points out:

The payment of money ... to a person to secure influence or the showing of favour is not necessarily improper per se. Where, however, the recipient of the payment has undertaken to act for another and the payment is made to him in that capacity, it can create an interest antagonistic to the proper performance of the undertaking.<sup>19</sup>

In other words, in the Royal Commission's rationale, it is *because* the union official stood in a fiduciary relation to their principals that the payments to the union

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<sup>13</sup> Ibid vol 4, 735.

<sup>14</sup> Ibid vol 4, 737.

<sup>15</sup> Ibid vol 4, 736–7, 746–7.

<sup>16</sup> Ibid vol 4, 737.

<sup>17</sup> The Royal Commission recommended that its Report and all relevant materials be provided to the Victorian Commissioner of Police so that consideration could be given to prosecution of the official and CM for breach of *Crimes Act 1958* (Vic) s 176 in relation to possible corrupt commission offences: *ibid* vol 4, 771.

<sup>18</sup> *Workplace Relations Act 1996* (Cth).

<sup>19</sup> P D Finn, *Fiduciary Obligations* (Law Book Co, 1977) 218.



necessarily gave rise to a relevant conflict of interest, which amounted to a breach of the fiduciary obligation.

The Royal Commission based its findings of a fiduciary obligation in bargaining on the definition of the fiduciary given by Mason J in the *Hospital Products Ltd v United State Surgical Corporation*.<sup>20</sup> Particular emphasis was put on the fiduciary acting on behalf of another in ways that would affect that other person 'in a legal or practical sense'.<sup>21</sup> The Royal Commission's application of these principles to enterprise bargaining is as follows:

workers asked to vote on an agreement will not know any or all of the complexities of the bargaining process that preceded it. They will not ordinarily be in a position to judge to what extent that process has been undertaken in their interests. They are in a position where they are asked to trust that it has been. ... they must assume that the agreement they are asked to approve is the best that the union has been able to achieve on their behalf. All of these matters point strongly to the conclusion that the bargaining representative is a fiduciary.<sup>22</sup>

In its second step, the Royal Commission formed a normative judgement about the substance of the 2004 enterprise agreement. It stated that the agreement was 'not a good result for workers in any sense'.<sup>23</sup> The Royal Commission held that the 2004 agreement 'left most Chiquita employees worse off' because 'it permitted Chiquita to decrease the number of workers employed by it and increase the number of workers employed by labour hire companies', and it permitted CM to pay less to the labour hire workers than those employed directly by CM.<sup>24</sup>

The third step was to draw a connection between the 'sub-standard' nature of the agreement and the payments made by CM to the AWU ostensibly for 'paid education'. The agreement was 'a bad result that was arrived at in circumstances where Chiquita and the AWU had entered into a secret side agreement for the payments of \$24,000'.<sup>25</sup> The six monthly payments of \$4000 were found to confer 'a direct benefit on the AWU. They were contrary to the interests of Chiquita employees because they weakened the AWU's bargaining position in [the enterprise bargaining] negotiations.'<sup>26</sup> By entering into the agreement in relation to paid education leave, the AWU official and the union itself 'may have been acting in a position of actual conflict or a position where there was a substantial possibility of such conflict'.<sup>27</sup>

Finally, the Royal Commission found that the officials had not cured their breach of fiduciary obligations by obtaining the fully informed consent of their principals: '[t]he payments were not disclosed to Chiquita employees.'<sup>28</sup>

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<sup>20</sup> (1984) 156 CLR 41, 96-7 ('*Hospital Products*').

<sup>21</sup> Ibid 97.

<sup>22</sup> Royal Commission into Trade Union Governance and Corruption, above n 1, vol 4, 478.

<sup>23</sup> Ibid vol 4, 764.

<sup>24</sup> Ibid vol 4, 747-8.

<sup>25</sup> Ibid vol 4, 764.

<sup>26</sup> Ibid vol 4, 765.

<sup>27</sup> Ibid.

<sup>28</sup> Ibid. This was disputed by the AWU, but it provided no evidence to the contrary.

A strong narrative emerges from the Royal Commission's findings: union officials bargain as agents, or in a role sufficiently akin to that of agent, and therefore owe fiduciary obligations to members in respect of the negotiation process. It should be noted that under fiduciary law, there is no need to show that the fiduciary did a bad deal in exchange for an illicit payment: any benefit to the fiduciary arising from their fiduciary role amounts to a breach of duty unless it has the fully informed consent of the principal.<sup>29</sup> However, there is no doubting the political power of the story, as is discussed in Part VI.

### III Trade Union Officials and Fiduciary Law in Australia

The notion of a fiduciary obligation originally evolved to control the potential for self-interested misbehaviour by people who were entrusted with the management of property for the benefit of another person.<sup>30</sup> It exceeds a duty to act in good faith, because a duty of good faith can be exercised while having some regard to one's own interests. Fiduciaries must place the interests of their beneficiaries ahead of their own, or any other party, within the scope of their obligation.<sup>31</sup> The courts have avoided reducing the fiduciary concept to a simple formula of words, but the following famous statement, relied upon by the Royal Commission in finding that the union officials were fiduciaries, is widely regarded as presenting the key elements:

The critical feature of [fiduciary] relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that other person in a legal or a practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position.<sup>32</sup>

Prosecution of union officials for breach of a fiduciary obligation has been relatively rare in Australia, and the settled cases deal with misuse of union resources, and intra-union disputes about behaviour during union elections.<sup>33</sup> In one of the most recent decisions, a former Member of Parliament, Craig Thomson, was held to account for breaching his fiduciary and statutory duties when he was a union official, by directing an employee of the union to work on his election campaign.<sup>34</sup> Generally, the courts have held that trade union officials owe fiduciary obligations *to the union itself*.<sup>35</sup> Christie states that the idea that a fiduciary obligation may be

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<sup>29</sup> Ibid vol 4, 490.

<sup>30</sup> Matthew Conaglen, *Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties* (Hart Publishing, 2010); Sarah Worthington, *Equity* (Oxford University Press, 2<sup>nd</sup> ed, 2006) 63.

<sup>31</sup> *Breen v Williams* (1996) 186 CLR 71.

<sup>32</sup> *Hospital Products* (1984) 156 CLR 41, 96–7; Royal Commission into Trade Union Governance and Corruption, above n 1, vol 4, 475–6.

<sup>33</sup> *Carling v Platt* (1955) 80 CAR 283, 292–3; *Re Australian Postal and Telecommunications Union (NSW)*, ex parte Wilson (1979) 28 ALR 330; Christie, above n 4, 593–4.

<sup>34</sup> *General Manager of the Fair Work Commission v Thomson (No 3)* [2015] FCA 1001 (11 September 2015) [76].

<sup>35</sup> *Scott v Jess* (1984) 3 FCR 263, 287.

owed to a union's members is 'misconceived' and 'no authority has ever been cited to support it.'<sup>36</sup>

This view of the union official as fiduciary is based on an analogy between their role and that of the company director, one of the established categories of fiduciary. The company director must not exercise their powers otherwise than in good faith and for the purpose for which the power was granted.<sup>37</sup> The most detailed discussion of the analogy between union official and company director is found in *Allen*:

There are many similarities between [trade unions registered under the *Conciliation and Arbitration Act*] and legal persons incorporated under the *Companies Act*. Each is a creature of statute. Their essential similarity is that each has a legal personality separate and distinct from its members. Each has an independent existence as a legal person. ... Each has perpetual succession. ... The property of each does not belong to its members from time to time.<sup>38</sup>

The fact that the union official's fiduciary obligation is owed to the organisation itself, rather than individual members or groups of members, is of critical importance. For example, it means that a union official may be duty bound *not* to act in the best interests of a particular group of members if this would be detrimental to the interests of the union as a whole, including the union's future interests.

This point is made explicitly in *Allen*, which envisages the union official overriding the wishes of a group of members when necessary:

In the conditions of the [vehicle building] industry in which the members of this union work it is necessary that the federal secretary be a capable negotiator and have sufficient personality to press for advantage for his members when appropriate and to *quench the tide of militancy when appropriate*.<sup>39</sup>

There is no duty to treat the members equally, nor to distribute resources equally for the benefit of all members at all times, mirroring the principle that company directors might 'necessarily affect adversely the interests of one class of shareholders and benefit the interests of another class' when circumstances demand.<sup>40</sup>

There are many situations in which the governing body of [a trade union] will quite properly expend the funds of an organisation in a way which will benefit only some members, or will benefit some members more than others. Some organisations find it necessary to subsidise the expense of running small branches by payment out of funds collected from members of larger branches. In some cases, the pursuit of a claim for industrial conditions on behalf of one member or a group of members may involve a disproportionate expenditure of the organisation's funds, without any real possibility of a flow on of any conditions won to other members. Depending upon the circumstances of each case, these unequal applications of funds may be perfectly proper.<sup>41</sup>

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<sup>36</sup> Christie, above n 4, 601, 611.

<sup>37</sup> (1977) 31 FLR 431, 483.

<sup>38</sup> Ibid 484.

<sup>39</sup> Ibid 457 (emphasis added).

<sup>40</sup> *Mills v Mills* (1938) 60 CLR 150, 164.

<sup>41</sup> *Scott v Jess* (1984) 3 FCR 263, 288.

The settled cases deal with unions in their statutory context. In order to examine whether or not the union official bargains as agent or in an agent-like role (and therefore owes a fiduciary obligation to their members during enterprise bargaining), it is necessary now to turn to an examination of the statutory rules shaping unions' role in bargaining under the statutory scheme. The behaviour of the AWU impugned by the Royal Commission arose in the context of bargaining under the *Workplace Relations Act 1996* (Cth). As the Royal Commission explicitly extends its analysis of union actions to include actions taken under the *Fair Work Act*, the following discussion will focus on bargaining under the current statutory provisions.

#### IV The Fiduciary Contention and Statutory Enterprise Bargaining

As we have seen, the Royal Commission found that union officials may owe fiduciary obligations to those on whose behalf they engage in enterprise bargaining. At places in its findings, the Royal Commission associates the role of the union in bargaining with the role of agent, and its general description of the union's activities in enterprise bargaining is strongly suggestive that the union official plays at least an agent-like role. This section critically analyses the contention that a useful analogy can be drawn between agency and collective bargaining by union officials in the context of the *Fair Work Act*.

The legal concept of the agent is well-known: '[a]gency is a word used in the law to connote an authority or capacity in one person to create legal relations between a person occupying the position of principal and third parties.'<sup>42</sup> There is no definitive ruling about whether or not union officials in Australia are, in fact, legal agents when bargaining. The question has arisen here and in the United Kingdom in relation to the legal status of unregistered agreements made between unions and employers.<sup>43</sup>

In *Ryan v Textile Clothing and Footwear Union*, Brooking JA in the Victorian Court of Appeal stated that '[t]here is no reason in theory why a union could not, in making an agreement with an employer ... do so as agent for some or all of its members.'<sup>44</sup> However, the Court unanimously concluded that, as Brooking JA stated '[i]t will usually be found, however, that there are great if not insuperable difficulties, in a given case, in treating a trade union as acting as agent in entering into a collective agreement.'<sup>45</sup> That case concerned an unregistered agreement made outside the statutory system and the union invoked its status as agent in an unsuccessful attempt to argue that the agreement had contractual effect. Reviewing British cases on this topic, Mitchell and Naughton state that: 'courts have

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<sup>42</sup> *International Harvester Co of Australia Pty Ltd v Carrigan's Hazeldene Pastoral Co* (1958) 100 CLR 644, 652.

<sup>43</sup> W B Creighton, W J Ford and R J Mitchell, *Labour Law: Materials and Commentary* (Law Book Co, 1983) 58; R J Mitchell and R B Naughton, 'Collective Agreements, Industrial Awards and the Contract of Employment' (1989) 2(3) *Australian Journal of Labour Law* 252.

<sup>44</sup> [1996] 2 VR 235, 238.

<sup>45</sup> *Ibid* 238.

shied away from an acceptance of the general proposition that a union acts as agent for the individual worker by virtue of the fact of union membership'.<sup>46</sup>

Unions registered in the federal system are also bound by the terms of the *Fair Work (Registered Organisations) Act 2009* (Cth). With some exceptions, the duties placed on union officials largely mirror the obligations of company directors imposed by the *Corporations Act 2001* (Cth), including a duty to act in good faith in the best interests of the organisation and for a proper purpose,<sup>47</sup> in addition to equitable and common law duties. The Royal Commission found that the AWU had made inappropriate use of its powers during the CM enterprise bargaining negotiations. Whether or not this was the case will be discussed in the context of the analysis below of the *Fair Work Act* bargaining provisions and the actual conduct of the parties.

### A *Mapping the Agency Contention onto the Statutory Enterprise Bargaining Regime*

The *Fair Work Act* creates a system for making enterprise agreements through an interconnected web of provisions.<sup>48</sup> Before turning to some of the important individual elements, several general features of this system should be noted. The Act privileges the making of agreements at the level of the single enterprise over those made with multi-employer bargaining units. Although it is common to refer to the *Fair Work Act* as creating a scheme of enterprise bargaining, the Act permits the creation of an agreement without any actual bargaining at all. Because the employer is permitted to put their preferred agreement to a vote of the relevant employees at any time, whether or not the workers' representatives agree, it is axiomatic that the 'agreement' need not represent any final outcome negotiated to the satisfaction of the bargaining representatives.<sup>49</sup> Nor is it necessary for all the affected workers to agree to the final terms: all that is required for a proposed enterprise agreement to proceed to the Fair Work Commission for approval is that a simple majority of the affected employees vote in favour of the agreement.<sup>50</sup> Once approved, an enterprise agreement made under the Act sets legally binding minimum conditions of employment for all the workers covered by it, whether they voted for it or not, and for any future employees engaged during the life of the agreement.<sup>51</sup>

At the heart of the system for making Fair Work agreements is the right of each individual employee subject to any proposed agreement to appoint a bargaining representative. The process for making agreements begins when an employer wishing to commence bargaining with a group of employees issues a notice informing every worker to be covered by the agreement that they have the right to

<sup>46</sup> Mitchell and Naughton, above n 43, 255.

<sup>47</sup> *Fair Work (Registered Organisations) Act 2009* (Cth) s 286.

<sup>48</sup> *Fair Work Act* pt 2-4 (enterprise agreements); Andreas Pekarek et al, 'Old Game, New Rules? The Dynamics of Enterprise Bargaining under the *Fair Work Act*' (2017) 59(1) *Journal of Industrial Relations* 44.

<sup>49</sup> *Fair Work Act* s 181.

<sup>50</sup> *Ibid* s 182.

<sup>51</sup> *Ibid* ss 50-53. Breach of a provision of an enterprise agreement gives right to apply for an order under the Act's civil remedy provision regime: s 539.

nominate a bargaining representative.<sup>52</sup> If union members do not nominate a bargaining representative, the union is the default bargaining representative.<sup>53</sup>

The default assignment of a union official as the bargaining representative suggests that the formal conditions of an express agency agreement between the official and each of the members covered during bargaining have not been met, as the Act allows unions to become the bargaining representative for employees without the workers' explicit agreement and without workers issuing any instructions whatsoever about the task at hand. Further, the *Fair Work Act* process is such that the exact identity of the agent may not be clear, even to the purported principals, as it is left up to the union to determine which individual or individuals will actually be involved in the negotiation process.

At the level of broad concept, the agent–principal relationship is essentially binary and personal in nature: generally, an agent represents a principal. By contrast, in industrial relations the task of negotiating an enterprise agreement on behalf of union members is not infrequently undertaken by more than one person. This may be because a number of workers nominate bargaining representatives other than the union,<sup>54</sup> or because the sole union involved decides to select a team of people to participate in the bargaining process. It is common for these teams to include: officers of the union (as was the case with the participation of the AWU Assistant Secretary in the CM–AWU negotiations in 2004); union employees such as organisers or industrial officers from the head office or the local branch or both; union delegates from the workplace itself; ordinary rank and file members from the shop floor; or some combination of these actors.<sup>55</sup> This feature of collective bargaining, as Hepple notes, 'introduces extremely difficult problems of agency to which the common law provides no clear answers'.<sup>56</sup> If it is accepted that each member of the union negotiating team owes a fiduciary obligation to the workers (even if it is accepted that they are not common law agents), this would represent a significant extension of fiduciary law to persons to whom it does not currently apply. As Christie argued, '[i]f an official is merely an employee, it will be more difficult to argue that he owes fiduciary duties in many situations'.<sup>57</sup> That is, it is very unlikely that a court would find that one of the CM mushroom pickers who participated in the 2004 enterprise bargaining process owed a fiduciary duty to their fellow workers.<sup>58</sup>

Generally, union officials bargain for more than one principal: where the union is the default bargaining representative, it commonly negotiates on behalf of all its members at that enterprise. Fiduciary law has adapted to ensure that a fiduciary may owe duties to more than one principal, and to different classes of principal,

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<sup>52</sup> Ibid s 173.

<sup>53</sup> Ibid s 176(1)(b).

<sup>54</sup> Joellen Riley, 'Bargaining Fair Work Style: Fault-lines in the Australian Model' (2012) 37(1) *New Zealand Journal of Employment Relations* 22.

<sup>55</sup> For example, the union team negotiating the 2017 enterprise agreement with La Trobe University includes an official from the union's central office, staff from the union's local office, local shop stewards and other rank and file members employed in various roles across the University.

<sup>56</sup> B A Hepple, 'Intention to Create Legal Relations' (1970) 28(1) *Cambridge Law Journal* 122, 136.

<sup>57</sup> Christie, above n 4, 597.

<sup>58</sup> In *Micallef v Donnelly*, the Court held that a union organiser did not owe a fiduciary obligation to the union: [2002] FCA 221 (12 March 2002).

notably in the case of the trustee's obligation to deal fairly as between the beneficiaries of income and capital.<sup>59</sup> However, it is arguable that the labour relations context presents a qualitatively different set of problems. Union officials may find that there is an extremely complex set of interests at play in enterprise bargaining.

Acting in the best interests of the members during enterprise bargaining may not be as simple as trying to achieve the biggest possible pay increase for each member. Workers may expect the union to further a range of potentially conflicting goals, such as seeking provisions designed to improve the gender balance of staff at the enterprise, or to assist casual workers to gain permanency. Some workers may reject such goals in favour of higher pay outcomes, or want the union to put all its advocacy towards improving the job security of existing non-casual members. Even among workers focused solely on their own interests, there is likely to be a myriad of private agendas as to what the preferable outcome would be: one worker may hope for the biggest pay increase possible, while another wants the union to bargain for lower parking fees, or better work/family provisions or more leave and so on. Workers may have multiple identities for the purposes of the setting of a bargaining agenda: a woman whose main goal is lower parking fees might equally care about improving the position of casual workers or improving gender equality or both.

These examples could be multiplied hundreds of times in large workplaces, and these are matters that a court would find it difficult to adjudicate in the context of an alleged breach of fiduciary obligation. It is not clear what equity's standard of fairness and impartiality in the treatment of multiple beneficiaries means in this complicated context of myriad interests and agendas.

A further difficulty for the Royal Commission's agency focus is that *Fair Work Act* bargaining representatives are participating in a process that creates legal rights for future employees. Thus, even if a particular classification covered by a proposed agreement has no current employees, the union must consider the interests of those workers — future members — when making the deal. This undercuts the legal view of the union official as agent: it is not legally possible for an agency relationship to exist between an unidentified principal who may materialise in the future:<sup>60</sup> 'a person cannot make an agreement as an agent for a principal who does not exist at the time the agreement is made'.<sup>61</sup>

Of course, ideas of authority and instruction are complex, and agency arrangements may emerge in the absence of any express agreement. Fridman says it is 'necessary to analyse the agent's power to affect his principal's legal position vis-à-vis third parties when determining the nature of the relationship in the absence of an express authority'.<sup>62</sup> But here, too, the *Fair Work Act* diverges from a pure agency model. Under the Act, a bargaining representative does not have the power to conclude an agreement with the employer:

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<sup>59</sup> *Nestle v National Westminster Bank Plc* [1994] 1 All ER 118.

<sup>60</sup> Patrick Elias, Brian Napier and Peter Wallington, *Labour Law Cases and Materials* (Butterworths, 1980) 406.

<sup>61</sup> Andrew Stewart and Joellen Riley, 'Working around Work Choices: Collective Bargaining and the Common Law' (2007) 31(3) *Melbourne University Law Review* 903, 924.

<sup>62</sup> G H L Fridman, *Fridman's Law of Agency* (Butterworths 1983) 15.

it is not bargaining representatives who ‘made the agreement’ ... The proposed enterprise agreement is ‘made’ when a majority of employees cast a valid vote to approve the agreement pursuant to s 182 of the [*Fair Work*] Act.<sup>63</sup>

The Royal Commission addressed this contention by arguing that while union officials may not technically change the legal interests of the workers, they affect the interests of a principal in a ‘practical sense’.<sup>64</sup> This conception still retains, at its heart, the idea that it is the union official or the union itself that makes the deal, largely in isolation from the members affected. The majoritarian process of approval, however, undermines the Royal Commission’s view. The Act permits the creation of an agreement *despite* the wishes of a substantial number of workers covered by it. Those disgruntled workers may want their bargaining representative to continue negotiations in order to achieve a better deal. But even if this wish becomes a direct instruction, the bargaining representative does not have sufficient control over the process to even ensure that the negotiations continue, much less that they will conclude on better terms. A valid vote of 50% plus one ends the process whether the bargaining representatives agree or not. Even after this stage, the agreement does not take effect until it is approved by the Fair Work Commission according to its statutory criteria.

A final feature of the *Fair Work Act* that does not sit comfortably with the agency approach is the fact that the Act permits and encourages concessional bargaining. Flexibility is one of the objects of the Act, which permits otherwise legally binding minimum employment standards to be reduced or abolished in certain circumstances through the creation of an enterprise agreement. The Act establishes a normative floor below which these trade-offs must not fall: enterprise agreements will only be approved if they pass the ‘better-off-overall test’, which occurs when the Fair Work Commission is satisfied that each current employee and each prospective employee are better off overall when the agreement is compared with the underpinning award.<sup>65</sup>

What the Act does not require is that all employees are better off to the same extent: lawful agreements may legitimately create winners and losers. For example, an employer may wish to abolish penalty rates for working at night, and offer an increase in the basic rate of pay just enough to provide a narrow benefit to the night workers covered by the deal. Of course, those employees who do not work on night duty lose none of their pre-existing entitlements, and so get the full benefit of the pay increase. The night staff, by contrast, would suffer a major loss only just compensated for in the pay increase. Each worker may be ‘better off overall’, as required by the Act, but the day workers are comparative winners and the night workers comparative losers.

Because differential outcomes such as this are permitted under the Act, there are conflicting interests among the employees depending on their current entitlements and management’s negotiating goals. A fiduciary bargaining for workers with conflicting interests is in a position of a duty–duty conflict in breach

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<sup>63</sup> Application by MMA Offshore Logistics Pty Ltd [2016] FWC 3789 (8 July 2016), [61].

<sup>64</sup> Royal Commission into Trade Union Governance and Corruption, above n 1, vol 4, 478, citing Mason J in *Hospital Products* (1984) 156 CLR 41, 96–7.

<sup>65</sup> *Fair Work Act* ss 186(2)(d), 193.



of their obligation to each worker, another sign that the statutory context is largely inimical to the conceptualisation of union officials as fiduciaries to their members in bargaining. The essence of bargaining under such statutory rules necessarily involves compromise, trade-off and concession in relation to the overall bargaining agenda and the workers among themselves, to an extent and in ways that are foreign to fiduciaries such as trustees.

The Royal Commission's response to this argument does not seem compelling:

The particular duty in question is a duty during the bargaining process. It is not a duty to obtain any particular outcome for members at the end of that process. And, in any event, if there is a significant risk of conflict [of interest between groups of members impacted differently by the bargained outcomes] during that process, the union and its officials can declare it and seek consent to proceed, or withdraw.<sup>66</sup>

If a union official had to withdraw from bargaining whenever members are impacted differentially during enterprise bargaining, they would be effectively excluded from any bargaining role under the Act.

For all the above reasons, it is difficult to conclude that the *Fair Work Act* provides a legal context within which union officials as a general rule owe fiduciary obligations when operating as bargaining representatives.<sup>67</sup>

## **B     *Fiduciary Obligations and the Statutory Requirements for the Independence of the Bargaining Parties***

The other legal context relevant to this discussion is the statutory system governing the independence of union bargaining representatives from the employer. If a fiduciary obligation is to be found as a matter of course in relation to statutory bargaining by union officials, then we would expect the statute to express a need for absolute independence of the union bargaining representative from the employer: anything less would amount to a breach of the fiduciary obligation unless the principal had given their fully informed consent to the potential conflict of interest. However, the *Fair Work Act* does not require such absolute independence, in line with international jurisprudence on freedom of association.<sup>68</sup>

The *Fair Work Regulations 2009* (Cth) state that an employee bargaining representative must be 'free from control by' and 'free from improper influence from' the employer or another bargaining representative.<sup>69</sup> These are less demanding obligations than would be expected of a fiduciary: the regulation permits a relationship between a representative and their principal's employer provided it falls short of control, and allows some influence by the employer provided it is not 'improper'. Implicit in the wording of reg 2.06 is that representatives may look to their own interests in respect of their dealings with the employer, provided that after a certain (ill-defined) point, their behaviour may breach the required standard of

<sup>66</sup> Royal Commission into Trade Union Governance and Corruption, above n 1, vol 4, 485.

<sup>67</sup> *Boulting v Association of Cinematograph, Television and Allied Technicians* [1963] 2 QB 606.

<sup>68</sup> See, eg, *Mounted Police Association of Ontario v Canada (Attorney General)* [2015] 1 SCR 3.

<sup>69</sup> *Fair Work Regulations 2009* (Cth) reg 2.06.

independence. For example, a union bargaining representative may have an ongoing relationship with the employer that involves a degree of cooperation on certain matters. The fiduciary standard would prohibit *any* mutually beneficial relationship or any influence that could be seen as fettering the representative's independence in their role in the absence of fully informed consent of the principal, even where the principal benefits from the relationship or arrangement between the employer and the bargaining representative.<sup>70</sup>

Not only does the Regulation not create a requirement of total separation and complete independence from the employer, Parliament chose not to require the Fair Work Commission to ensure the independence of the bargaining representatives in the process for making agreements: 'there are no provisions [in the *Fair Work Act*] that empower the Commission to determine whether a bargaining representative is independent'.<sup>71</sup> This stands in stark contrast to the positive obligation placed on the Fair Work Commission to investigate whether nor not a union official is a fit and proper person for the purposes of right of entry certificates.<sup>72</sup>

Despite the lack of a power in relation to the independence of bargaining representatives, the Fair Work Commission has utilised the standard in reg 2.06 as an aid to assessing whether or not 'genuine agreement' over a proposed enterprise agreement has, in fact, been reached. This small body of case law shows that the Fair Work Commission interprets reg 2.06 in a way that is not consistent with the view of union officials as fiduciaries in relation to their members during enterprise bargaining.

For example, a Full Bench of the Commission accepted that an agreement was 'genuinely agreed' despite the fact that one of the worker bargaining representatives was employed by the employer as a senior manager, owned shares in the employing company and at times during the negotiations acted in his role as manager (including when explaining the terms of the agreement on behalf of management to the staff).<sup>73</sup>

The Commission reasoned that, despite the manifest lack of independence of that bargaining representative from the employer, because union bargaining representatives were also involved in the negotiation, the interests of the workers had been sufficiently represented and no different outcomes were likely if the manager had not acted as a representative during negotiations.<sup>74</sup>

A strict fiduciary approach to bargaining representatives, however, would disqualify the manager from undertaking the bargaining representative role, and it is unlikely that even the informed consent of the principals would be sufficient to

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<sup>70</sup> *Boardman v Phipps* [1967] 2 AC 46, 88.

<sup>71</sup> *Construction, Forestry, Mining and Energy Union v AGL Loy Yang Pty Ltd* [2016] FWC 7839 (28 October 2016) [164] quoting *Construction, Forestry, Mining and Energy Union v AGL Loy Yang Pty Ltd* [2016] FWC 4364 (1 July 2016) [78] (Clancy DP).

<sup>72</sup> The Fair Work Commission may only authorise an official for the purposes of right of entry if they meet the standards set out in s 513 of the *Fair Work Act*.

<sup>73</sup> *Maritime Union of Australia v Sea Swift Pty Ltd* [2016] FWC 651 (8 February 2016).

<sup>74</sup> *Ibid.*

overcome the conflict of interest inherent in the dual roles of manager and worker representative.

The proposed imposition of the fiduciary standard upon the current statutory regulation of the independence of the bargaining parties represents a very significant extension of both the substantive rules relating to independence and the procedural options in relation to contesting the issue under the *Fair Work Act*.

## V Reassessing the AWU-CM Agreement

As we have seen, Australian courts have decided union officials owe a fiduciary obligation to the union as an incorporated continuing entity: this will be referred to as ‘the *Allen* approach’. The Royal Commission argued that it was not ‘possible to see, at least in the particular situation of the enterprise bargaining process, how there could be any conflict between duties owed by officials to their union and duties owed to the members on behalf of whom they are bargaining.’<sup>75</sup> This Part re-examines the factual matrix of the AWU-CM case study and argues that there are fundamental tensions between the *Allen* approach and the contentions of the Royal Commission.

What does it mean for a senior union official when management in a large, unionised workplace decides to terminate the employment of many of its employees and replace them with labour hire workers on different, less advantageous conditions? In addition to the concerns about the fate of the current members, the union official is faced with an organisational crisis: the potential loss of members and influence at a previously unionised site is a serious problem for the financial and strategic interests of any union. The two sets of interests largely coincide, because a strong continuing union presence at CM is in the interests of the union members (the remaining permanent mushroom pickers and arguably also the labour hire workers sent to CM). However, it is clear from the *Allen* approach that the interests of the members at CM must not completely trump the broader strategic interests of the union *qua* union. It must therefore be lawful for the union to have at least some regard to its own ongoing organisational goals while trying to do the best it can for the workers, a position that is not permitted if the union officials owe a fiduciary obligation to the members at that workplace during bargaining.

Once they had heard CM management’s plans for change, the AWU officials had to make a set of strategic decisions based on their assessment of all the circumstances, including the attitude of members to the proposed changes. They had to assess: the seriousness of management’s intention to implement its plan; the legality of what was proposed and therefore the possible options for a legal defence strategy; the costs and risks of opposing the plan; the likelihood that the union’s determined opposition would have any effect on the plan; the prospects for signing up the labour hire workers as AWU members in the future; and many other strategic, practical questions. In sum, given all the circumstances and variables, known and unknown, what was the best outcome the union as a whole could achieve in these particular circumstances?

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<sup>75</sup> Royal Commission into Trade Union Governance and Corruption, above n 1, vol 4, 484.

It is not suggested that the union officials are at large to favour the union's organisational interests over an individual group of members' interests. The AWU rules, for example, required the union to act in the interests of members and failure to do so would have been a breach of contract between the members and the union. Union officials are required to exercise their powers in good faith and with due skill and care, matters which the common law would determine in cases of alleged breach.<sup>76</sup> The statutory scheme provides union members with the opportunity to vote out a leadership if it is seen as too close to management.<sup>77</sup> And, as we have seen, under the *Fair Work Act* only an agreement that has been voted for by the majority of workers covered by it, and which also passes the better-off-overall test, will be approved.

Central to the Royal Commission's view of enterprise bargaining is that it is a task performed by union officials independently of the members, thus creating the necessary vulnerability–power relationship supporting the ascription of fiduciary obligations. This does not capture the character of bargaining between the AWU and CM: the team of AWU negotiators included not just the AWU Assistant Secretary, but also ordinary members from among the CM staff.<sup>78</sup> The Royal Commission's central contention that CM members simply had to trust the union in relation to the outcome of the enterprise bargaining because they would be unaware of the negotiations is further undermined by the fact that at least one CM AWU member was on the Branch Committee of Management of the AWU, organisationally the body to which the Assistant Secretary reported.<sup>79</sup> The AWU State Secretary, Bill Shorten, held separate discussions with senior management of CM, but the purport of these discussions were relayed to the CM members on the enterprise bargaining negotiating committee by the Assistant Secretary.

In other words, the CM–AWU bargaining process presents a richer set of more complex relationships and interactions between the union and the people it was representing during the bargaining than that suggested by the Royal Commission. In the grave circumstances that confronted the union after CM's drastic plans were revealed, it is only to be expected that senior officials from the union office would take an active role in seeking to protect the members and the interests of the union as a whole. If this picture of union leadership and participation in the CM matter is accurate, it shows a union operating as the law would expect in accordance with the *Allen* approach — indeed, anything less than this level of engagement by the union would arguably demonstrate a failure to engage with a serious threat to the union's future.

The legal context also plays an important role in shaping the options open to the union during negotiations such as these. As we have seen, the statutory context

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<sup>76</sup> *Buckley v National Union of General & Municipal Workers* [1967] 3 ALL ER 767. In this case, a union member was given incorrect advice and successfully sued the union for negligence.

<sup>77</sup> RRS Tracey, 'The Legal Approach to Democratic Control of Trade Unions' (1985) 15(2) *Melbourne University Law Review* 177.

<sup>78</sup> Minutes of the AWU–CM enterprise bargaining negotiation tendered to the Royal Commission: AWU, *Chiquita Mushrooms: Log of Claims for Renewal of EBA from 2003* (9 July 2015) Royal Commission into Trade Union Governance and Corruption <<https://www.tradeunionroyalcommission.gov.au/Hearings/Documents/2015/Evidence9July2015/MFI-13-Tab-01.pdf>>.

<sup>79</sup> Royal Commission into Trade Union Governance and Corruption, *Transcript of Public Hearing*, 9 July 2015, 176.

of bargaining does not provide much assistance to unions seeking to influence management, and such was the case when the AWU–CM enterprise agreement discussed in this article was negotiated. For example, the union was not permitted to marshal all its available industrial muscle by calling on its membership at all Victorian worksites to support the CM workers, as this would expose the union officials, employees and members to significant fines and expenses in terms of a legal defence. Under single enterprise bargaining, the union's only lawful source of workplace industrial power was what it could muster from among its CM membership.<sup>80</sup>

Would the CM workers take strike action in the face of the employer's plans and, if they did, would this alter the company's position? It cannot be assumed that union officials can conjure up a strike of their own volition: members will not automatically agree to walk off the job. Low paid workers whose jobs security is vulnerable may be particularly reluctant to lose an indefinite amount of pay on the gamble that this will secure their ongoing employment. It will be recalled that even after the impugned agreement was made in 2004, there were still 150 permanent jobs protected into the future by its terms. It is possible that the chance of retaining some secure employment for a significant minority of workers would have muted any industrial response from the CM members. No doubt a hard-headed assessment of just how successful any industrial action might be in the face of management determination to cut its WorkCover costs would have been made, not just by the union officials, but by the rank and file members themselves.

If financial support was the key issue inhibiting members from taking industrial action, the union was then faced with the question of whether or not to expend union funds on strike pay from the union's general revenue. This would involve a transfer of general funds to a single branch, effectively depleting resources available to all the other AWU workplaces and the union centrally. It is by no means clear that paying strike pay to the CM workers would have been in the best interests of the AWU as a whole. As the Court noted in *Allen*, the duty of a union official in such circumstances is to act fairly as between the different groups of members and, if necessary, to refuse to carry out the wishes of a group of members where the broader interests of the organisation demand it.<sup>81</sup> And even if extensive strike action had been taken, there was no guarantee that CM would have altered its plans in response.

As noted above, Finn described payments in breach of fiduciary obligation arising where 'the recipient of the payment has undertaken to act for another *and the payment is made to him in that capacity*'.<sup>82</sup> The decisions taken by the union, its members and the CM management did not arise *solely* in relation to this particular instance of bargaining leading to the 2004 agreement. This round of bargaining was part of a historical relationship between the union and the company stretching back

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<sup>80</sup> The *Fair Work Act*'s protected industrial regime provides some legal protections for industrial action taken in support of the making of enterprise agreements, and explicitly excludes industrial action taken by employees in relation to a multi-employer agreement: s 413. AWU members who were not employed at CM would receive no protection under the Act for industrial action in support of the making of an enterprise agreement at that workplace. See generally Shae McCrystal, 'The *Fair Work Act* 2009 (Cth) and the Right to Strike' (2010) 23(1) *Australian Journal of Labour Law* 3.

<sup>81</sup> *Allen* (1977) 31 FLR 431, 483.

<sup>82</sup> Finn, above n 19, 218 (emphasis added).

years. Unions and employers are 'repeat players' in the process of enterprise bargaining, a process that has much in common with parties engaged in relational contracting.<sup>83</sup> An agreement by management to provide material assistance to a union is not unusual in industrial relations and, viewed through a labour relations lens, is rarely seen as giving rise to the complete subjugation of the union to the employer's wishes. Stepping away from the Royal Commission's fiduciary approach to bargaining, the fact that CM agreed to the paid education leave payments is a common example of how industrial relations bargaining works: the union makes a claim for a provision that will be good for the members and also entrench the union's role in training provision into the future, and management agrees to it because, on balance, its own strategic interests are served by making this concession.

It seems clear that in the process of making the 2004 enterprise agreement, the AWU was able to parlay its longstanding relationship with CM into a complex set of deals to meet its strategic and organisational priorities at the time. In addition to the paid education leave side deal, the union secured an informal agreement that CM would pay higher redundancy payouts to the departing staff than were required by law.<sup>84</sup> CM had no legal obligation to adhere to this side deal: the fact that the payouts were made at this higher level is a testament to the culture of bargaining and the historical 'continuing relationship'<sup>85</sup> between the parties.<sup>86</sup> The union and its members agreed to cooperate in the outsourcing and in relation to changes to the existing binding rules in order to make the workplace safer for the remaining CM employees (capped bonuses and limits on consecutive days).<sup>87</sup> And the union extracted a payment from CM to help the union conduct health and safety training, and/or to cover the cost of the lost membership fees.<sup>88</sup> Finally, the union negotiated itself a platform of continuing relevance and control within the workplace, as management was required by the new enterprise agreement to consult with the AWU on any further outsourcing.<sup>89</sup>

Using the *Allen* approach, the AWU's behaviour during bargaining can be seen as reasonable. The Royal Commission's view that the \$24 000 payment should be seen as a quid pro quo for the 2004 enterprise agreement was not the only possible interpretation of the exchanges made by the parties at that time.<sup>90</sup> As we have seen, this view ignores the fact that the payment was made in the course of a longstanding and continuing relationship between the management of CM and the AWU. The Royal Commission rejects the thesis that CM was playing 'a long game' in agreeing

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<sup>83</sup> Marc Galanter, 'Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change' (1974) 9(1) *Law and Society Review* 95.

<sup>84</sup> This is confirmed by the Australian Industrial Relations Commission in a decision on unfair dismissal claims brought by four former CM workers under the *Workplace Relations Act 1996* (Cth) s 170CE: *Hodgson v Chiquita Mushrooms* [2005] Australian Industrial Relations Commission 515 (9 June 2005).

<sup>85</sup> Allan Flanders with Alan Fox, 'Collective Bargaining: From Donovan to Durkheim' in Allan Flanders, *Management and Unions: The Theory and Reform of Industrial Relations* (Faber, 1970) 248, 252.

<sup>86</sup> Ian Turner, *In Union is Strength: A History of Trade Unions in Australia 1788–1974* (Nelson Books, 1976) 133.

<sup>87</sup> Royal Commission into Trade Union Governance and Corruption, above n 1, vol 4, 761, 763.

<sup>88</sup> That is, in the form of the paid education leave payments.

<sup>89</sup> Royal Commission into Trade Union Governance and Corruption, above n 1, vol 4, 750.

<sup>90</sup> *Ibid* vol 4, 765.

to the paid education leave claim, but it is arguable that aspects of the final agreement and side deals were directed at this longer bargaining horizon.

The normative view that the agreement was ‘bad’ misses the point of both the regulatory structures of the federal statute and the strategic, practical difficulties faced by the AWU. There is no platonic ‘good’ agreement by which the 2004 enterprise agreement at CM can be judged. And this section has shown that the union arguably acted in the best interests of the members at CM, while having regard to its overarching fiduciary obligation to the union itself. All the statute requires is that every worker covered by the agreement is better off when compared with the underpinning award.

The Royal Commission’s focus on the ‘bad’ outcome for workers highlights the question of what remedy would be available to any individual member represented by the AWU during enterprise bargaining. The AWU Assistant Secretary received no money personally, and there is no objective means by which it can be proved that the content of the agreement fell short of what a faithful fiduciary would have achieved in the circumstances. It is also unclear how the court would deal with a complainant who argued breach of fiduciary obligation, yet voted in support of the enterprise agreement.

These difficulties suggest that the fiduciary standard is simply inappropriate in the context of bargaining. It makes more sense to consider something akin to the public law standard in American law, which places a duty of ‘fair representation’ on union officials in bargaining.<sup>91</sup> The United States Supreme Court has held that this means that the union bargaining representative must ‘serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct’.<sup>92</sup> The Court permits a range of responses in any given circumstance: ‘a union’s actions are arbitrary only if, in light of the factual and legal landscape at the time of the union’s actions, the union’s behavior is so far outside a “wide range of reasonableness” as to be irrational’.<sup>93</sup>

## VI Ramifications of the Fiduciary Contention

The Royal Commission’s fiduciary contention, if upheld in equity or enacted through legislation, is likely to have far-reaching ramifications. This part of the article discusses the conceptual, practical and political import of the Royal Commission’s findings.

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<sup>91</sup> Graeme Orr, ‘Agency Shops in Australia? Compulsory Bargaining Fees, Union (In)security and the Rights of Free-Riders’ (2001) 14(1) *Australian Journal of Labour Law* 1, 18.

<sup>92</sup> *Vaca v Sipes*, 386 US 171, 177 (1967); Louise Floyd and Michael Evan Gold, ‘Jimmy Hoffa: Alive, Well and Living in Australia: The Kennedy Legacy and Australian Labor Law Reform’ (2015) 49(1) *The International Lawyer* 21.

<sup>93</sup> *Air Line Pilots Association, International v O’Neill*, 499 US 65, 67 (1991) citing *Ford Motor Co v Huffman*, 345 US 330, 338 (1953).

Waves of legislative change since the 1980s have constrained and undercut the traditional conception of unions as it was under conciliation and arbitration.<sup>94</sup> The Royal Commission's findings take a further decisive step towards final unmooring of unions from many of the assumptions, norms and expectations of Australian labour law traditions. For much of the 20<sup>th</sup> century, trade unions were regarded as integral actors in the statutory conciliation and arbitration system. They were parties principal as of right, and were seen as having a legitimate role in representing the interests of their current and future members in an industry or profession.<sup>95</sup> As the Full Court of the Victorian Supreme Court has expressed it: 'In arbitration ...the [union] organization is not a mere agent of its members but stands in their place and acts on their account'.<sup>96</sup>

In society more broadly, unions were 'major instruments of social reform'.<sup>97</sup> The Royal Commission's fiduciary contention, if adopted, suggests that collective bargaining as a process and institution would be stripped back to a focus on an atomistic one-off transaction in which the union is merely a bargaining agent for those workers on whose behalf it is bargaining in that instance.

The Royal Commission presents an individualistic vision of bargaining, and encourages assumptions that each principal should ensure that their own personal outcomes are placed ahead of the rest. This is a subtle but powerful assault on the very idea of collectivity, and the common theoretical assumptions underlying its utility. For example, much scholarly writing on labour law starts from the premise that collective bargaining corrects a power imbalance between workers and employers for the benefit of those workers.<sup>98</sup> Under the fiduciary contention, much of this supposed countervailing power of the continuing organisation of the union is effectively neutralised.

The Royal Commission construes the union official as autonomous in bargaining, and the individual union member as someone in a state of disengaged passivity. The fiduciary relationship proposed by the Royal Commission is built on the idea of the union official acting independently from the members, effectively making the deal which the vulnerable, ill-informed member must accept from a position of ignorance. This narrative captures the individualistic dynamics of the agency-like relationship, as in the case of a person who engages an agent to buy them a car. The person purchasing the car is out of the loop, vulnerable to their agent's autonomy in respect of the purchase. It is this autonomy to act in a matter affecting the principal that Finn holds up as the defining feature of the fiduciary.<sup>99</sup>

By focusing the fiduciary obligation on a single instance of bargaining, the Royal Commission tears at the fabric of the potential ongoing relationship between

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<sup>94</sup> Jill Murray, 'Work Choices and the Radical Revision of the Public Realm of Australian Statutory Labour Law' (2006) 35(4) *Industrial Law Journal* 343.

<sup>95</sup> *Federated Ironworkers' Association of Australia v Commonwealth* (1951) 84 CLR 265, 280.

<sup>96</sup> *R v Gallagher* [1986] VR 219, 225 (citation omitted).

<sup>97</sup> D W Rawson, *Unions and Unionists in Australia* (George Allen & Unwin, 1978) 9.

<sup>98</sup> Shae McCrystal, 'Regulating Collective Rights in Bargaining: Employees, Self-Employed Persons and Small Businesses' in Christopher Arup, et al (eds) *Labour Law and Labour Market Regulation* (Federation Press, 2006) 597, 601.

<sup>99</sup> Finn, above n 19, 13.



the parties, which has been central to unionised collective bargaining since first analysed by the Webbs over 100 years ago.<sup>100</sup> The duality of the union role envisioned by Flanders, ‘a pressure group representing members and a co-legislator with the employer’,<sup>101</sup> becomes a singularity based on wringing the best for members out of an isolated deal. Could it be any longer said, as Flanders and Fox have, that

[c]ollective bargaining is not an unrestrained power struggle in which union leaders act like army commanders, urging the troops into total war, intent only on maximising gains and imposing the greatest possible defeat upon the employers. They are in the main cautious men keenly aware that collective bargaining is a continuing relationship within which the parties have to live together.<sup>102</sup>

The fiduciary model is likely to constrain cooperative partnership arrangements between employers and unions. Pluralistic approaches to labour relations may bring with them the provision of benefits by employers to unions (for example, provision of office space, collection of union dues, direct support for organising and union bargaining representatives) as a gesture toward sustaining the relationship.<sup>103</sup> The Royal Commission’s fiduciary finding would interpret any such gesture as a breach of fiduciary obligation unless fully informed consent could be obtained. The issue of ‘fully informed consent’ as it exists in fiduciary law sits uneasily in the practical context of labour relations. Employers may be reluctant to publicly reveal information about their dealings with the union. And in a workplace where union officials may bargain for hundreds, perhaps thousands of workers, the withholding of consent by a single member to a benefit awarded to the union would have the effect of derailing the entire union strategy. It is not just possible, but likely, that different members could object to different parts of any proposed agreement given the context of concessional bargaining imposed by the statute.

The Royal Commission’s fiduciary conception, if adopted, may also limit the capacity of unions to adapt to the rapidly changing world of work. Unions held to a fiduciary standard when bargaining in relation to members at an individual workplace may find themselves tied to archaic and dying work forms and industries. Imagine, for example, if the Teamsters Union had been limited to acting selflessly only in the interests of people whose job it was to drive teams of horses.<sup>104</sup> The logic of the Royal Commission clashes with the obligation to protect the interests of the union organisation, because it privileges the interests of the current individual members during bargaining. It is unlikely that people working as teamsters would give their fully informed consent to any action by the union designed to preserve its influence in times of motorised transport if this also led to the alteration of their existing conditions or loss of their jobs driving horses.

<sup>100</sup> Sidney Webb and Beatrice Webb, *Industrial Democracy* (Longmans, Green and Co, 1902).

<sup>101</sup> Allan D Flanders, *Trade Unions* (Hutchinson University Library, 7<sup>th</sup> revised ed, 1968) 14.

<sup>102</sup> Flanders and Fox, above n 85, 246.

<sup>103</sup> H A Clegg, *The Changing System of Industrial Relations in Great Britain* (Basil Blackwell, 1979) 240.

<sup>104</sup> The International Brotherhood of Teamsters originally covered drivers of horse drawn carriages, but as technology changed it expanded its membership to truck drivers, then to a broad range of workers in a variety of industries: <<https://teamster.org/>>.

Finally, the Royal Commission has already had a tangible impact on political discourse in Australia.<sup>105</sup> The narrative about selling out workers in return for corrupt payments has provided political opponents with a clear and powerful critique of the broader labour movement, including the Australian Labor Party and its leader Bill Shorten, who was the national and State Secretary of the AWU at the time the CM enterprise agreement of 2004 was made.

The fact that Australian labour law has reached this point is, in part, indicative of the paradoxical state of political attitudes to statutory labour regulation. Both major parties at the federal level have endorsed the embedding of concessional bargaining within the statutory enterprise bargaining system subject only to minimalist standards such as the better-off-overall test. Both parties have championed limiting union power and influence by focusing statutory bargaining on a single enterprise and effectively limiting the matters over which formal agreements are made to narrow 'bread and butter' issues. A Labor Government drafted the *Fair Work Act* in such a way as to invite the agency conception adopted by the Royal Commission, for example by placing the bargaining representative concept at the heart of the enterprise bargaining regime as discussed above. The Australian Labor Party has thus played a role in bringing about the diabolical rhetoric to which it is now subject.<sup>106</sup>

At the same time, the Liberal and National Parties have championed greater employer power over workplace matters. In 2002, the Workplace Relations Minister Tony Abbott addressed the Institute of Public Affairs and urged employers to take robust action against restrictive work rules, and nominated the CM–AWU enterprise agreement as one of the worst.<sup>107</sup> Now, the fact that the AWU participated in the removal of these restrictions is held up as a matter of public shame for 'selling out' the workers.<sup>108</sup>

## VII Conclusion

The first step in the Royal Commission's ascription of fiduciary obligation to union officials in bargaining is that they are, in fact, fiduciaries, loosely based on an analogy with agents or agent-like roles. It has been argued here that there are significant barriers to sustaining this view of the union official: both the enterprise bargaining scheme itself, and the existence of the *Allen* view of fiduciary obligation of union officials tend not support this characterisation. From a labour relations perspective, the collaboration of union and employer, even to the point at which an employer gives the union money to assist it during a period of radical restructuring, is not necessarily the kind of absolute breach of trust regulated by the fiduciary standard.

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<sup>105</sup> Matthew Benns, 'Long Story Shorten', *The Courier Mail* (Brisbane), 11 July 2015, 38; Dennis Shanahan, 'On the Witness Stand, Shorten Comes up Short', *The Australian* (Sydney), 11 July 2015, 16.

<sup>106</sup> For example, Editorial, 'With Friends like Shorten, Workers Don't Need Enemies', *The Canberra Times* (Canberra), 20 June 2015, 6.

<sup>107</sup> 'Markets Must Get Up to Speed on IR: IPA', *Workplace Express*, 16 December 2002.

<sup>108</sup> Editorial, 'Labor's Bad Union Bosses Sell Out the Membership', *The Australian* (Sydney), 6 January 2016, 11.

The application of fiduciary law, imposing the highest individual private law standard on a union official engaged in a single instance of bargaining, is not appropriate in the context of industrial bargaining. It has the potential to disrupt the current statutory regime by imposing individualistic obligations at odds with the majoritarian, concessional bargaining scheme envisaged by the statute and, if adopted, is likely to promote an even narrower construction of the role of unions in collective bargaining in Australia than is permitted under the present law.



# Review Essay

*Critical Perspectives on the Uniform Evidence Law*  
by Andrew Roberts and Jeremy Gans (eds) (2017)  
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## Abstract

This review essay discusses various aspects of the edited collection of essays on the *Uniform Evidence Law* ('UEL'). First, some general observations on the UEL are offered. Second, the chapters on the origins, development and future of the UEL are used to discuss the UEL's place in Australia and the world. Third, the role of probative value is considered with respect to Andrew Roberts' chapter. Fourth, David Hamer's views on tendency and coincidence evidence are critically discussed. Finally, some concluding remarks are offered.

## I Introduction

In July 1979, the Federal Attorney-General Peter Durack issued terms of reference to the Australian Law Reform Commission ('ALRC') seeking a report on the possibility of creating a uniform law of evidence for the Commonwealth of Australia.<sup>1</sup> The report was to be written 'with a view to producing a wholly comprehensive law of evidence based on concepts appropriate to current conditions and anticipated requirements'.<sup>2</sup> The resulting report, issued in 1985, recommended that

[t]he enactment of a comprehensive uniform law of evidence for Federal and Territory courts is highly desirable. It is unacceptable as a matter of principle to have in the one polity, the Commonwealth, differing rules that may lead to different results in the application of national legislation where this is the result of the irrelevant factor of where a case is commenced.<sup>3</sup>

During the 10 years that passed between the issuing of this interim report and the enactment of the first of the 'uniform' evidence laws, the Standing Committee of Attorneys-General would, in 1991, agree in principle to the adoption of a uniform evidence law for all courts, state and federal, across Australia.<sup>4</sup>

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<sup>1</sup> Australian Law Reform Commission, *Evidence (Interim)*, Report No 26 (1985) xxviii.

<sup>2</sup> Ibid.

<sup>3</sup> Ibid 118.

<sup>4</sup> See Andrew Roberts and Jeremy Gans, 'Introduction' in Andrew Roberts and Jeremy Gans (eds), *Critical Perspectives on the Uniform Evidence Law* (Federation Press, 2017) 1.

In the volume of essays *Critical Perspectives on the Uniform Evidence Law*, editors Andrew Roberts and Jeremy Gans have assembled eminent scholars to reflect upon the successes and failures of this ongoing project.<sup>5</sup> The first of the Uniform Evidence Laws ('UEL') were enacted by the Commonwealth<sup>6</sup> and New South Wales<sup>7</sup> in 1995. Seven years later, Tasmania followed suit<sup>8</sup> and another seven years after that, Victoria passed its version of the UEL.<sup>9</sup> Both the Australian Capital Territory ('ACT')<sup>10</sup> and the Northern Territory<sup>11</sup> have enacted versions of the uniform legislation, as has Norfolk Island.<sup>12</sup> As would be obvious from this list, the project is still ongoing because Queensland, South Australia and Western Australia have yet to enact UEL legislation. What may be less obvious is that uniformity itself remains elusive among the states and territories that have adopted the UEL. As described by the book's editors, '[t]he Australian statutes have never been entirely uniform and recent years have seen local amendments that have increased the divergence of the main Australian jurisdictions.'<sup>13</sup>

This book of critical evaluations of the UEL is, therefore, timely and important — one might even say critical — at a time where specific consideration of the laws of evidence is increasingly needed given that judicially created complexity is adding to many complexities inherent in the laws. The book has been published in the midst of the handing down and continued consideration of several major, and occasionally high-profile, High Court of Australia decisions on the UEL and the principles for interpreting and applying its provisions. These decisions have involved unsettled and developing areas of the law such as expert opinion evidence<sup>14</sup> and the standards surrounding inferences that can be drawn from the absence of evidence.<sup>15</sup> Other decisions have resolved disparities between at least two of the main Australian UEL jurisdictions, New South Wales and Victoria, on the issues of the correct standard for the assessment of probative value<sup>16</sup> and the significant probative value test for tendency and coincidence evidence.<sup>17</sup> In addition to resolving the disparities, these decisions also attempted to clarify standards for the application of the principles underlying the law itself. How successful these attempts have been remains an open question, further pointing to the need for a book such as this one to provoke conversation, evaluation and, perhaps, reform.

The book has also been published shortly after the report issued by the Royal Commission into Institutional Responses to Child Sexual Abuse, released in August

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<sup>5</sup> Andrew Roberts and Jeremy Gans (eds), *Critical Perspectives on the Uniform Evidence Law* (Federation Press, 2017).

<sup>6</sup> *Evidence Act 1995* (Cth).

<sup>7</sup> *Evidence Act 1995* (NSW).

<sup>8</sup> *Evidence Act 2001* (Tas).

<sup>9</sup> *Evidence Act 2008* (Vic).

<sup>10</sup> *Evidence Act 2011* (ACT).

<sup>11</sup> *Evidence (National Uniform Legislation) Act 2011* (NT).

<sup>12</sup> *Evidence Act 2004* (NI).

<sup>13</sup> Roberts and Gans, above n 4, 2.

<sup>14</sup> *Honeysett v The Queen* (2014) 253 CLR 122.

<sup>15</sup> *R v Baden-Clay* (2016) 258 CLR 308.

<sup>16</sup> *IMM v The Queen* (2016) 257 CLR 300 ('IMM').

<sup>17</sup> *Hughes v The Queen* (2017) 344 ALR 187 ('Hughes').

2017.<sup>18</sup> Among other things, the Royal Commission Report evaluated and made recommendations for reform to the tendency and coincidence rules in prosecutions for sexual offences against children.<sup>19</sup> These recommendations for reform were, of course, made shortly — and in the case of *Hughes* just weeks — after the decisions by the High Court that affect these very areas of the law. Thus, it seems an ideal time to consider seriously the strengths, weaknesses and future of the *UEL* from both a scholarly and practical perspective.

This essay will look briefly at how that evaluation has been done in *Critical Perspectives on the Uniform Evidence Laws* by looking at a few themes that emerge from the various chapters. Part II of this essay will discuss the opening book chapters on the origins and initial growth of the *UEL* and the prospects for future adoption. Part III will then consider Roberts' chapter, mainly focusing on the High Court decision in *IMM* and its effect on probative value considerations. Given the scope of the decision in *IMM*, and its connection with many areas of evidence law raised throughout the book, it is worthwhile to take a closer look at this particular chapter. Part IV will be devoted to a discussion of David Hamer's chapter on his theories about and suggestions for reform to the tendency and coincidence rules. This is an especially timely subject given the High Court's recent decision in *Hughes* and the Royal Commission Report, which cites with approval submissions and testimony made by Hamer along the same line as the argument set forth in his chapter here.<sup>20</sup> Part V will offer some concluding thoughts.

## II The Origins, Growth and Future of the *UEL*

Gans' early chapter relates one of the more fascinating, certainly oddest and presumably least known aspects of the *UEL* — that although three of the largest Australian states have yet to adopt the *UEL*, localised versions of it have been adopted in several nations (and one self-governing territory) on the other side of the globe.<sup>21</sup> Specifically, evidence statutes based largely on the initial draft of the *UEL* attached to the ALRC's 1985 report have been enacted in Barbados, Saint Lucia, the British Virgin Islands and Saint Kitts and Nevis.<sup>22</sup> In a breezy, opinionated chapter filled with authorial asides, Gans recounts some of the development of the *UEL*, chastises the High Court for its treatment of the *UEL* in *IMM* and describes how the *UEL* likely made its journey around the world, whilst still bypassing Queensland, South Australia and Western Australia.

Gans criticises the *IMM* majority for not treating all *UEL* jurisdictions as equal by citing only decisions from courts in New South Wales and Victoria and

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<sup>18</sup> Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Final Report* (2017) ('Royal Commission Report').

<sup>19</sup> Commonwealth, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report* (2017) pt VI 409 ('Royal Commission Criminal Justice Report').

<sup>20</sup> See, eg, *ibid* pt VI 579–90.

<sup>21</sup> Jeremy Gans, 'The Uniform Evidence Law in the Islands' in Andrew Roberts and Jeremy Gans (eds), *Critical Perspectives on the Uniform Evidence Law* (Federation Press, 2017) 13.

<sup>22</sup> *Ibid* 15.

ignoring decisions from courts in the ACT and Tasmania.<sup>23</sup> In Gans' estimation, this omission could be due to several possible influences, namely

the parochial foibles of the majority judgment's unidentified author, the traditional dominance of New South Wales and Victorian judges on the national court and the High Court's recent tilt towards brevity to a fault in its reasons for judgment.<sup>24</sup>

However, the main focus of the chapter is less on these identified possibilities as much as it is to point out that the High Court has ignored the 'true extent of the *UEL*'s spread' within and beyond Australia.<sup>25</sup>

Gans takes a keen eye to point out both similarities and differences in the various, globe-hopping versions of the *UEL* and uses these connections as a springboard to argue that looking to the offshore similarities in evidence laws in the immediate region (such as New Zealand), around the world (such as the Caribbean, Canada and the Solomon Islands), and within Australia (specifically to Tasmania) could enhance the acceptance, further propagation and principled development of the *UEL*.<sup>26</sup> Whether this will eventuate, and Gans seems somewhat sceptical that it will, especially given the High Court's recent reluctance to even look as far afield as Tasmania,<sup>27</sup> it is noteworthy that the *UEL* can be found in nearly as many jurisdictions outside Australia as it can within national borders.

Whether the *UEL* will make its way to those holdout states is the subject of Andrew Hemming's subsequent chapter — and his assessment is that the prognosis for intranational *UEL* propagation is not good.<sup>28</sup> This conclusion is based on letters Hemming received from the Attorneys-General of Queensland, South Australia and Western Australia, each providing explanations for why those states were satisfied with their own evidence laws and, therefore, were not considering adoption of the *UEL* at this time.<sup>29</sup> Hemming identifies at least two common themes in the responses: 'the view that the common law is superior to the uniform evidence legislation and the perceived lack of any clear benefit to joining the uniform evidence regime'.<sup>30</sup> He also critically analyses each of the individual responses in order to discern whether the rationales for the rejection of the *UEL* are reasonable and well-considered.<sup>31</sup> Perhaps the best that can be said at this stage is that the *UEL* project will remain an ongoing one for some time to come.

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<sup>23</sup> Ibid 13–14.

<sup>24</sup> Ibid 14.

<sup>25</sup> Ibid.

<sup>26</sup> Ibid 31–3.

<sup>27</sup> Ibid 32.

<sup>28</sup> Andrew Hemming, 'Adoption of the Uniform Evidence Legislation: So Far and No Further?' in Andrew Roberts and Jeremy Gans (eds), *Critical Perspectives on the Uniform Evidence Law* (Federation Press, 2017) 34.

<sup>29</sup> Ibid.

<sup>30</sup> Ibid 35.

<sup>31</sup> Hemming, above n 28.



### III The High Court of Australia's Approach to the *UEL* and Probative Value

In the first chapter to grapple with both the substance and interpretation of a specific provision of the *UEL*,<sup>32</sup> Roberts examines the *UEL* approach to probative value through a critical analysis of the High Court's recent decision in *IMM*.<sup>33</sup> In short, and to vastly compress and oversimplify the majority judgment, the High Court endorsed New South Wales' approach to the assessment of probative value over that of Victoria. The High Court held that probative value — defined in the *UEL* Dictionary as 'the extent to which the evidence could rationally affect the assessment of the probability of the existence of a fact in issue' — is to be evaluated without considering the reliability of the evidence at issue, as reliability is to be reserved exclusively for the jury.<sup>34</sup> In Roberts' opinion, this approach is 'incoherent' and the result of a process of reasoning that stemmed from a 'conceptually impoverished and intellectually "thin" analysis in the appellate courts'.<sup>35</sup>

The main thrust of Roberts' argument criticising the High Court decision is that the justices in the majority paid insufficient regard to the concept of rationality that is included in the definition of probative value referred to above. This failing is presented as a simple case of misapplied statutory interpretation. Roberts builds his argument upon the premise — a premise never fully explicated, explained or justified — that when interpreting statutory language 'it is clear that some words are more important than others'.<sup>36</sup> Roberts then proceeds to argue that the word 'rational' in the definition of probative value is the most important word and the one that requires more full and careful consideration by interpreting courts, especially the High Court.<sup>37</sup>

Roberts attempts to further flesh out the problems with the High Court's decision through the example used by Heydon in an article cited in the High Court's majority judgment.<sup>38</sup> In the example, Heydon posits an identification with inherently low probative value because it was made 'very briefly in foggy conditions and in bad light by a witness who did not know the person identified'.<sup>39</sup> The High Court rejected an approach to this identification that would assess it as 'as high as any other identification [when taken at its highest]' with the judge then able to 'look for particular weaknesses in the evidence (which would include reliability)'.<sup>40</sup> Instead, it found that the correct approach was to consider the evidence 'an identification, but a weak one because it is simply unconvincing'.<sup>41</sup> The rejected approach disallows

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<sup>32</sup> Andrew Roberts, 'Probative Value, Reliability, and Rationality' in Andrew Roberts and Jeremy Gans (eds), *Critical Perspectives on the Uniform Evidence Law* (Federation Press, 2017) 63.

<sup>33</sup> (2016) 257 CLR 300.

<sup>34</sup> Ibid 315 [50].

<sup>35</sup> Roberts, above n 32, 64.

<sup>36</sup> Ibid.

<sup>37</sup> Ibid 65.

<sup>38</sup> *IMM* (2016) 257 CLR 300, 315 [50] citing J D Heydon, 'Is the Weight of the Evidence Material to its Admissibility' (2014) 26(2) *Current Issues in Criminal Justice* 219, 234.

<sup>39</sup> Heydon, above n 38, 234.

<sup>40</sup> *IMM* (2016) 257 CLR 300, 315 [50].

<sup>41</sup> Ibid.

judicial consideration of extrinsic determinations, such as reliability, that should be left to the jury. The endorsed approach restricts the considerations to the internal strengths and weaknesses inherent in a piece of evidence, such that a court is not obligated to establish a high probative value for every piece of relevant evidence, even where that evidence is ‘taken at its highest’, since the highest a particular piece of evidence could be taken may not be very high at all.<sup>42</sup>

For Roberts, this reasoning demonstrates that ‘the incoherence of the approach is obvious’.<sup>43</sup> In his estimation, the High Court majority’s analysis seems to be drawing a distinction where none exists, essentially creating a reliability test, but explaining that test without reference to reliability and, thus, obfuscating the test’s true effect. The biggest issue with this argument is that it is continually asserted without being effectively demonstrated. What the High Court seems to be getting at, albeit in a manner that is less than crystal clear, is that there is a genuine distinction between a probative value analysis that (impermissibly) includes reliability as a consideration and one that correctly does not. That distinction is based on a court looking at the evidence at issue and considering its probative value by asking ‘of what is the evidence meant to be probative?’. In the example used by the High Court,<sup>44</sup> the answer would be ‘probative of the identification of the person purportedly identified’. That being the nature of the inquiry, the court can now ask ‘*how much* is the evidence probative of that fact?’. For the identification example, the answer would be ‘not very, due to the inherent weaknesses of the identification itself’. No consideration of the reliability of the evidence is needed here because the probative value discounting weaknesses are part and parcel of the identification itself. The court need not make any assumptions about the weight that a jury might assign to the piece of evidence when the court concludes that even if the jury takes this identification for everything it is worth, it still will not be worth that much.

In a further justification of his reasoning, Roberts asserts his contention that the focus of the probative value inquiry should be on the word ‘rational’ in the definition of the term.<sup>45</sup> As Roberts explains it, ‘in admonishing trial judges to refrain from considering issues of credibility and reliability, the appellate courts prevent trial judges from engaging in the evaluative inquiry that the dictionary definition of probative value requires’.<sup>46</sup> Yet, Roberts never explains why the word ‘rational’ in the definition is more important than the word ‘could’, which is also in the definition. If emphasis is placed on the fact that the definition states that probative value is ‘the extent to which evidence *could* rationally affect the probability of the existence of a fact in issue’, then the focus of the inquiry appears to shift from the court’s allowable assessment of the evidence to a view of what the jury *could* make of the evidence. The basic principles behind the evaluative task may remain the same, but the limits on the court’s ability to insert itself into the jury’s fact-finding role takes on greater importance than Roberts wants to allow.

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<sup>42</sup> Ibid.

<sup>43</sup> Roberts, above n 32, 69.

<sup>44</sup> *IMM* (2016) 257 CLR 300, 315 [50].

<sup>45</sup> Roberts, above n 32, 74.

<sup>46</sup> Ibid 75.

Roberts suggests that the question may be one of perspective. He asks, ‘if the trial judge is not to assign weight to the evidence himself or herself, or consider what weight the jury might place on it, from whose perspective is the evaluative task to be undertaken?’<sup>47</sup> The answer to that question seems to be that the evaluative task is to be undertaken from the perspective of a hypothetical jury, but not necessarily the one that has been seated in the actual trial. In other words, the judge must be careful not to make fact-finding determinations on the jury’s behalf or to substitute a judicial evaluation of the facts for that of the hypothetical jury. To put that another way, the judge is only to assess the extent to which a piece of evidence *could* rationally affect the jury’s assessment of the probability of the existence of a fact in issue. The judge cannot, and should not be able to, assess whether the jury *will* view the evidence rationally or assign the evidence its full hypothetical weight or reject it altogether.

Roberts’ argument that the *IMM* majority’s probative value approach is incoherent presents as a kind of tautology — the approach is incoherent because insufficient attention is given to rationality, the concept of which is inextricably linked to reliability, so reliability must be a component of the probative value assessment, making the High Court’s approach incoherent. That circularity of reasoning is, ultimately, the argument’s downfall. However, the chapter is important in that it invites a critical reading of *IMM*, which in many respects does not do the heavy lifting required to provide the guidance that lower courts may need when considering the task of probative value assessment — especially those outside of New South Wales that may have less experience with the endorsed approach. *IMM* will almost certainly require further evaluation in the area to which the assessment of probative value was ultimately directed in the case — tendency and coincidence evidence, the subject of the next part of this essay.

#### IV Tendency, Coincidence and the *UEL*

One of the most interesting, and potentially influential, chapters in the book comes courtesy of Hamer and his explication of a theory about tendency and coincidence evidence in criminal trials.<sup>48</sup> The broad outline of the theory is that tendency evidence is merely a subcategory of coincidence evidence, which makes treating those types of evidence as separate entities irrational and unnecessary.<sup>49</sup> Hamer’s theories have already gone beyond the pages of the book and informed recommendations made by the Royal Commission into Institutional Responses to Child Sexual Abuse.<sup>50</sup> This makes it all the more important to examine the changes that reliance on the theories could bring to tendency and coincidence assessment.

Before discussing Hamer’s theory and the use of it by the Royal Commission, it will be useful to include a brief description of tendency and coincidence evidence in the *UEL*. Section 97 of the *UEL* establishes the rule for admissibility of tendency

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<sup>47</sup> Ibid 76.

<sup>48</sup> David Hamer, ““Tendency Evidence” and “Coincidence Evidence” in the Criminal Trial: What’s the Difference?” in Andrew Roberts and Jeremy Gans (eds), *Critical Perspectives on the Uniform Evidence Law* (Federation Press, 2017) 158.

<sup>49</sup> Ibid 174–5.

<sup>50</sup> Royal Commission Criminal Justice Report, above n 19, pt VI 579–90.

evidence and s 98 does the same for coincidence evidence. Tendency evidence is defined in s 97 as

[e]vidence of the character, reputation or conduct of a person, or a tendency that a person has or had [that is used] to prove that a person has or had a tendency (whether because of that person's character or otherwise) to act in a particular way, or to have a particular state of mind.

Coincidence evidence is defined in s 98 as

[e]vidence that 2 or more events occurred [that is used] to prove that a person did a particular act or had a particular state of mind on the basis that, having regard to any similarities in the events or the circumstances in which they occurred, or any similarities in both the events and the circumstances in which they occurred, it is improbable that the events occurred coincidentally.

Sections 97 and 98 are exclusionary rules in that each section excludes tendency or coincidence evidence unless two prerequisite criteria are satisfied, one procedural and one substantive. The procedural requirement is that reasonable notice be given in writing to each other party of the intention to adduce the evidence.<sup>51</sup> The substantive requirement is that 'the court thinks that the evidence will, either by itself or having regard to other evidence adduced or to be adduced by the party seeking to adduce the evidence, have significant probative value'.<sup>52</sup>

What may not be obvious from these definitions of tendency and coincidence evidence is that each involves its own process of reasoning to demonstrate its utility and, therefore, its probative value. For tendency evidence, the reasoning process is that the tendency itself is relevant to a fact in issue in the proceeding and that the incidents that are alleged to establish the tendency actually serve, in some meaningful way, to establish that tendency. There is no requirement that the incidents (which may reflect on the character, reputation or conduct of a person) be similar to one another in any specific way, a point made explicit by the High Court's majority judgment in *Hughes*.<sup>53</sup> This is in direct contrast to s 98, which is premised on the existence of similarities in either the events or the circumstances, or both, such that those similarities can be used to argue that the person's involvement in the commission of a particular act or the person's having a particular state of mind is unlikely to be coincidental. Tendency evidence can, thus, generally be used in a more positive manner — to prove that a person has a tendency to act in a particular way or to have a particular state of mind. Coincidence evidence, on the other hand, can generally be used to cut off a line of argument or a defence, by diffusing the possibility that apparently repeat behaviour is the product of mere coincidence.

For Hamer, these are distinctions without difference given the theoretical underpinnings of tendency and coincidence-type evidence and, in his terminology, the natural forms of the evidence. As Hamer describes it, tendency evidence against an accused operates sequentially; that is, the reasoning process progresses from adducing the incidents said to establish the tendency, to establishment of the tendency, to acceptance of the tendency by the jury, to the jury reasoning that the

<sup>51</sup> Unless notice is dispensed with, as allowed by s 100 of the *UEL*.

<sup>52</sup> *UEL* ss 97(1)(b), 98(1)(b).

<sup>53</sup> (2017) 344 ALR 187. The *Hughes* majority did, however, note that similarities would likely enhance the probative value of the tendency evidence: at 199 [39]–[40].

accused acted consistently with the tendency at the time of the offence charged, to the increased likelihood of the accused's guilt.<sup>54</sup> Coincidence evidence is described as operating more holistically, as the similarities proffered are pooled together along with the offence charged in order to diminish or eliminate the likelihood of the similarities being produced by coincidence.<sup>55</sup>

Just what turns on these different conceptions of the evidence is not made fully clear. Hamer seems to find problems with the idea that coincidence evidence can be disputed on the basis that the uncharged acts that are alleged to establish the similarities are unproven.<sup>56</sup> This problem is exacerbated by the requirement from *IMM* that the court is required to assume, for purposes of assessing probative value, that the evidence will be accepted by the jury.<sup>57</sup> Thus, it is difficult, if not impossible, for a court to take into account the overall strength of the evidence of similarity when assessing the admissibility of coincidence evidence.<sup>58</sup>

In the first instance, it is not entirely clear that this is a correct reading of *IMM*. As discussed in Part III of this essay, the majority judgment in *IMM* allows for a probative value analysis that evaluates the inherent probative value of the evidence, such that not every piece of evidence must be considered equally probative. It is true that *IMM* requires that evidence be taken at its highest so that the court does not usurp the jury's fact-finding role.<sup>59</sup> But if there are inherent weaknesses in the evidence, then the court still has the capacity to find that the probative value of the evidence is low.<sup>60</sup> There is little doubt that this is a complicated test to apply and it is especially complicated in the area of tendency and coincidence where a court may be asked to evaluate the cumulative impact of both charged and uncharged acts or incidents said to establish the tendency or disprove the coincidence. But even *IMM* seems to indicate — though in a portion of the majority judgment that is itself potentially problematic (and outside of the scope of this essay) — that the court can assess the probative value of the components of the tendency or coincidence evidence in its assessment of whether the evidence has significant probative value.<sup>61</sup>

In fact, Hamer seems to have tendency and coincidence evidence exactly backward when he states his view of the natural forms of the kinds of evidence, arguing that each type of evidence has a natural fit in particular circumstances:

The more sequential propensity inference appears better suited to cases where a prior conviction or uncontested admission clearly established the defendant's commission of the other misconduct from the outset. From that firm base, the fact-finder may be asked to infer that the defendant has a tendency to commit that kind of misconduct, and that the tendency led the defendant to commit the

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<sup>54</sup> Hamer, above n 48, 159.

<sup>55</sup> Ibid 160.

<sup>56</sup> Ibid.

<sup>57</sup> *IMM* (2016) 257 CLR 300, 314 [49], 315 [52].

<sup>58</sup> Hamer, above n 48, 160.

<sup>59</sup> *IMM* (2016) 257 CLR 300, 315 [50].

<sup>60</sup> Ibid.

<sup>61</sup> Ibid 317–18 [60]–[64]. The reasoning in *IMM* should also allow the court to take the inherent weaknesses of the evidence into account for purposes of the balancing test in s 101 of the *UEL* (or s 137, if necessary).

charged offence. The more holistic coincidence inference may appear better suited to cases where the defendant is merely implicated in an array of harms (including the charged offence) by opportunity evidence or disputed accusations of other alleged victims. There is no firm base from which to move to the defendant's tendency and then to the defendant's guilt. However, when the evidence is pooled together it may appear wholly implausible that so many harms could be connected with the defendant if he were innocent.<sup>62</sup>

This description does not seem to fit where uncharged acts form the basis for the tendency evidence, as in *Hughes*.<sup>63</sup> The non-complainant witnesses in *Hughes* were able to give evidence notwithstanding the fact that the incidents of molestation testified about were not the subject of charged offences that themselves would have to be proved. No prior admission or conviction was adduced in that case. Thus, the tendency connection was premised on the accused having actually been involved in the incidents even though proof of the defendant's involvement did not have to be established. The sole ability for the defence to challenge the witnesses' evidence would be to challenge the substance of the evidence or discredit the witnesses on cross-examination, the effect of which would only make it less likely that the jury would accept the existence of the tendency. This is, of course, how tendency reasoning works. The point here is that conclusively linking the defendant to the incidents said to establish the tendency is not strictly necessary.

Coincidence, on the other hand, does seem to require some specific connection to the accused. Since coincidence evidence is premised on similarities in the events or circumstances, it is difficult to see how the events or circumstances offered as coincidence evidence could be relevant, much less have significant probative value, if no connection to the accused could also be offered so that the similarities prove anything about the facts in issue. The classic case of *Makin v Attorney-General (NSW)*<sup>64</sup> provides a good example. The Makins, husband and wife, were both convicted of the murder of an infant, whom they had taken into their home following a payment made to them by the child's mother. At their trial, evidence was adduced that the Makins had taken in and murdered several other children following similar arrangements.<sup>65</sup> The evidence of the other children's murders was based on exhumations of bodies found buried at residences where the Makins had previously lived.<sup>66</sup>

It is difficult to see how this evidence could be adduced on anything other than a coincidence basis. There does not seem to be an argument available for the Makins to have a tendency to commit infanticide, even where the connection between the Makins, their residences and the other bodies was established. Rather, the connection between the Makins and their residences where the bodies were found lends itself to an argument that it could not possibly be a coincidence that infant bodies happened to be buried in each of the yards of houses in which the Makins lived. It is this orientation of coincidence evidence, which may be used to disprove, discount or eliminate an argument or defence of coincidence that separates

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<sup>62</sup> Hamer, above n 48, 161–2.

<sup>63</sup> *Hughes* (2017) 344 ALR 187, 191 [5].

<sup>64</sup> [1894] AC 57.

<sup>65</sup> *Ibid* 67–8.

<sup>66</sup> *Ibid* 58–9, 68.

coincidence from tendency. In contrast, tendency is oriented around establishing something positive — that is, the existence of the tendency.

Hamer goes on to argue that tendency evidence is a specific subcategory of coincidence evidence that relies on similarities among the various incidents alleged to establish the tendency.<sup>67</sup> This means that the existence of the tendency and the inputs that allow the tendency to be demonstrated are not the product of coincidence.<sup>68</sup> These arguments have a pleasing circularity to them, but it does not appear that they accurately capture the distinctions between the processes specific to tendency and coincidence reasoning. It will also be interesting to see how Hamer reconciles these views with the *Hughes* majority's rejection of the necessity of similarities for tendency evidence.

As mentioned above, Hamer's views have taken on additional significance with the Royal Commission into Institutional Responses to Child Sexual Abuse's recommendations for reform of the tendency and coincidence rules for child sexual offence proceedings.<sup>69</sup> Though the Royal Commission did not ultimately recommend removing the distinction between tendency and coincidence in the legislation, it did state that it '[did] not find the distinction between tendency and coincidence evidence convincing' and stated that it saw 'considerable merit' in Hamer's analysis on the issue.<sup>70</sup> The Royal Commission did, however, recommend that the significant probative value analysis for tendency and coincidence evidence be replaced by one that would allow for admissibility of the evidence where "relevant to an important evidentiary issue" in the [child sexual offence] proceeding'.<sup>71</sup> The new test would also eliminate the protections provided by s 101 of the *UEL* for tendency or coincidence evidence about an accused. This recommendation was also influenced by submissions made to the Royal Commission by Hamer.<sup>72</sup>

It is difficult to imagine any Parliament in a *UEL* jurisdiction amending the evidence laws for tendency and coincidence only with respect to child sexual offences, rather than amending the tendency and coincidence rules generally. At first glance, it seems as if the Royal Commission recommendations are designed to allow a great deal of tendency and coincidence evidence to be admitted in proceedings, without much oversight or gatekeeping by the courts. This may be emotionally satisfying in prosecutions for child sexual offence proceedings, but the emotional nature of this kind of evidence suggests that it may be more prudent to maintain an active role for the courts in interrogating the propriety of tendency and coincidence evidence with respect to each case.

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<sup>67</sup> Hamer, above n 48, 171.

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

<sup>69</sup> Royal Commission Criminal Justice Report, above n 19, pt VI 409, 638, 640.

<sup>70</sup> *Ibid* 643.

<sup>71</sup> *Ibid* 642.

<sup>72</sup> *Ibid* 640–41.

## V Conclusion

This brief overview hopefully demonstrates in some way the importance of continuing the discussions suggested by this timely, and occasionally provocative, book. In addition to the sections covered here, there are other important chapters such as those by: Gary Edmond and Kristy A Martire on expert evidence; Mark Weinberg on admissions; Annie Cossins and Jane Goodman-Delahunty, and a chapter by Miiko Kumar, each on aspects of delayed complaint evidence; and Mehera San Roque on identification evidence. Going forward, the High Court will no doubt have to revisit its decisions in *IMM* and *Hughes* on many occasions to clarify and standardise what are likely to be difficult judgments for lower courts to apply with consistency. Parliaments in *UEL* jurisdictions will also have to grapple with the issues raised by the Royal Commission, further contributing to the development, and possible greater lack of uniformity, of the *UEL*. This is an interesting time for Australian evidence law and Roberts and Gans have done a service by assembling these authors to advance the conversation.