2025 volume 47

the sydney law review

articles

lectures and addresses

before the high court

case notes and comments

books reviews and review essays

Address correspondence to:
Sydney Law Review
Sydney Law School
Building F10, Eastern Avenue
UNIVERSITY OF SYDNEY NSW 2006
AUSTRALIA

Email: sydneylawreview@sydney.edu.au
Website and submissions: https://openjournals.library.sydney.edu.au/slr

The *Sydney Law Review* is a refereed journal.

ISSN 1444–9528 (ONLINE)

Beyond Restorative Justice: Prioritising Deliberative Self-Determination in Indigenous Sentencing Court Systems

Coel Healy[*]

Abstract

Indigenous Sentencing Courts ('ISCs') are inadequately understood solely as restorative justice institutions. Instead, an alternative theory — 'deliberative democracy' — may help us analyse and understand the value of these courts. By examining a cross-section of ISC systems throughout Australian jurisdictions, I argue that the cultural and political aims associated with the introduction of ISCs calls for an alternative theory that takes greater account of the participatory role of Elders and Respected Persons and the broader social impact these courts seek to make. A broadened understanding of ISCs' value to both state justice systems and Indigenous goals of self-determination emerges by considering the extent to which ISCs offer inclusive, authentic, and consequential deliberation to Elders and Respected Persons who assist the court in reaching a sentencing decision.

I Introduction

In this article, I use the term 'Indigenous Sentencing Courts' ('ISCs') to refer generally to Indigenous sentencing 'court' systems (also known as 'circle sentencing courts') as introduced in state and territory jurisdictions across Australia.[1] As specialist sentencing institutions, ISCs are inadequately understood through theories of restorative justice and therapeutic jurisprudence. In this article, I put forward deliberative democracy as an alternative framework for understanding the value of these courts. Cultural and political objectives associated with the introduction of ISCs are at odds with traditional sentencing principles and narrow measures of

Please cite this article as:

Coel Healy, 'Beyond Restorative Justice: Prioritising Deliberative Self-Determination in Indigenous Sentencing Court Systems' (2025) 47 *Sydney Law Review* 21332: 1–34 <https://doi.org/10.30722/slr.21332>.

* JD (*ANU*). I am a non-Indigenous lawyer. This research is not intended to replace the important perspectives of Aboriginal and Torres Strait Islander scholars.
Email: coel.healy@alumni.anu.edu.au; ORCID iD: https://orcid.org/0000-0002-6311-8933.

1 Cf Rudin's discussion of circle sentencing in Canada's criminal justice system: Jonathan Rudin, *Indigenous People and the Criminal Justice System: A Practitioner's Handbook* (Emond, 2nd ed, 2022) ch 8.

efficacy. Instead, ISCs, as internally deliberative institutions, are best understood through the lens of ideals associated with deliberative democracy, which prioritises and provides an evaluative framework for assessing the quality of the deliberation that occurs within these court sites, and the positive effect this deliberation might have on the broader intercultural dialogue between Aboriginal and non-Aboriginal cultures and their respective justice systems. When evaluated based upon ideals such as whether legitimate deliberation takes place in an *inclusive*, *authentic* and *consequential* manner, the value of ISCs as systems for enabling Indigenous communities' meaningful participation and self-determination in justice processes is brought into the foreground. Deliberative democracy provides a lens to assess the positive outcomes of ISCs that differs greatly from commonly used and simplistic measures of efficacy relied upon by governments, such as rehabilitation of the offender and recidivism rates.

In Part II of this article, I discuss the history of ISCs. I focus on the distinct aims and objectives under which ICSs are promoted, and how their operational structures differ to that of mainstream court systems. Taking these distinct aims, objectives and structures into account highlights that traditional theories of restorative justice and therapeutic jurisprudence are inadequate for assessing the value of these courts. Furthermore, theories of restorative justice prioritise normative sentencing principles such as 'the 'public interest [in the] rehabilitation of the offender and avoidance of recidivism' over the broader aims and goals of Indigenous people.[2]

In Part III of this article, I examine deliberative democracy as an applied theory, considering its efficacy and appropriateness as an alternative evaluative framework. I discuss how deliberative democracy is defined, and whether the theory, as articulated as part of a western philosophical tradition, should be used as a framework of analysis. I then argue that Dryzek's deliberative capacity hallmarks of inclusivity, authenticity and consequentiality offer an evaluative framework in which the procedure and internally deliberative aspects of ISCs may be examined, specifically the deliberation between Indigenous Elders and presiding judicial officers. Furthermore, I examine deliberative democracy's record in applied contexts.

Finally, in Part IV I bring ISCs and deliberative democracy together. I examine how the laws governing ISCs enable legitimate deliberation by Indigenous Elders and Respected Persons, and identify factors that may undermine this legitimacy. I conclude that evaluating ISCs based upon the presence or absence of deliberative capacity hallmarks promotes a shared language or hybridity between legal systems where both legal systems may be more amenable to mutually inform and understand the values of the other.

[2] *R v Fernando* (1992) 76 A Crim R 58, 63 (Wood J) ('*Fernando*').

II Indigenous Sentencing Courts and Restorative Justice

ISCs are specialist courts[3] established in most Australian states and territories by governments, and designed to reform sentencing for Aboriginal and Torres Strait Islander individuals through culturally appropriate and inclusive practices. ISCs operate at multiple levels of the judicial system. For example, in Victoria, the Koori Court operates at the Children's Court, Magistrates' Court and County Court levels with respect to both summary and indictable offences.[4] The Australian Law Reform Commission ('ALRC') reported that ISCs attempt to engage the accused through 'individualised case management' and aim to address 'underlying issues in culturally appropriate ways, including by having Elders participate in sentencing discussion'.[5] It is through this participation that ISCs seek to enable a process of accountability to the accused's community.[6] The involvement of Elders in the sentencing process is the central focus of this article.

ISCs focus solely on the sentencing phase of the criminal justice process and require the accused to have entered a guilty plea prior to the matter being heard. Broadly speaking, ISC systems operate alongside, and at the discretion, of mainstream courts, who refer matters for sentencing to the ISC where certain conditions are met. ISCs are created and governed by specific state/territory-based statutes or court practice directions.[7] These rules also prescribe the circumstances when matters can be transferred to an ISC. Different Australian state and territory jurisdictions have varying eligibility requirements. For example, the accused is generally required to satisfy a range of specific identification, plea and consent requirements for the ISC to have jurisdiction.[8] ISCs emphasise a culturally sensitive and inclusive format. In contrast to standard courts, judicial officers sit at eye level with offenders and lawyers are positioned similarly. Indigenous Elders or Respected Persons assisting with proceedings do so to represent the accused's community and contribute to the decision-making process. While the role and participation of Elders and Respected Persons varies between jurisdictions, as will be seen, this participation has historically been characterised in restorative or therapeutic justice terms.[9]

---

3 See further Part IV(A)(1) below. See Elena Marchetti and Kathleen Daly, 'Indigenous Sentencing Courts: Towards a Theoretical and Jurisprudential Model' (2007) 29(3) *Sydney Law Review* 415, 428, quoting Arie Freiberg, 'Innovations in the Court System' (Conference Paper, Australian Institute of Criminology International Conference on Crime in Australia: International Connections, Melbourne, 30 November 2004) 8.

4 See, eg, *County Court Act 1958* (Vic) s 4B. See also County Court of Victoria, *Practice Note PNCR 1-2021: County Koori Court*, 13 May 2021, 3 ('*Practice Note PNCR 1-2021*').

5 Australian Law Reform Commission ('ALRC'), *Pathways to Justice: An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017) 330 [10.38] ('*Pathways to Justice Report*').

6 Marchetti and Daly (n 3) 421.

7 See, eg, *County Court Act 1958* (Vic) (n 4). See also ACT Magistrates' Court, *Practice Direction No 2 of 2024: Practice Direction – Galambany Court*, 5 February 2024 ('*ACT Practice Direction No 2 of 2024*').

8 Marchetti and Daly (n 3) 423–4. See also Samantha Jeffries and Philip C Stenning, 'Sentencing Aboriginal Offenders: Law, Policy, and Practice in Three Countries' (2014) 56(4) *Canadian Journal of Criminology and Criminal Justice* 447.

9 Marchetti and Daly (n 3) 419, 427.

A *Background to Indigenous Sentencing Courts*

1 *The Australian Criminal Sentencing System*

The Australian criminal sentencing system, informed by the common law, operates largely pursuant to state and territory legislation.[10] Sentencing systems, in both their design and operation, seek to promote principled and purposeful sentencing decisions.[11] The normative sentencing principles of the Australian criminal justice system include 'punishment, deterrence, rehabilitation of the offender, offender accountability, denunciation of the offender's conduct, community protection, and recognition of the seriousness of the offence and harm to the victim'.[12] This is reflected in legislation. For example, under s 3A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) the purposes of sentencing are defined as:

> (a) to ensure that the offender is adequately punished for the offence,
>
> (b) to prevent crime by deterring the offender and other persons from committing similar offences,
>
> (c) to protect the community from the offender,
>
> (d) to promote the rehabilitation of the offender,
>
> (e) to make the offender accountable for his or her actions,
>
> (f) to denounce the conduct of the offender,
>
> (g) to recognise the harm done to the victim of the crime and the community.

Additional sentencing principles have emerged in some jurisdictions that recognise and take account of the disadvantage and collective challenges faced by Indigenous peoples.[13]

In evaluating the efficacy of sentencing programs (including specialist courts), policymakers have given great attention to their effect on rates of recidivism in determining the deterrent effect of any particular policy platform. In 2018 the ALRC reported that

> [n]ationally, the proportion of prisoners with a prior record of imprisonment was very high: three quarters (76%) of Aboriginal and Torres Strait Islander prisoners and half (49%) of non-Indigenous prisoners in 2016 had been in custody on at least one previous occasion.[14]

The ALRC noted however, among other things, that 'prior record is not a measure of recidivism' and that it is 'incorrect to conclude that, because 76% of Aboriginal and Torres Strait Islander prisoners may be repeat offenders, the recidivism rate is 76%'.[15] Rates of recidivism are a problematic metric for judging sentencing efficacy

---

10 See generally *Crimes (Sentencing) Act 2005* (ACT); *Crimes (Sentencing Procedure) Act 1999* (NSW); *Sentencing Act 1995* (NT); *Penalties and Sentences Act 1992* (Qld); *Sentencing Act 1991* (Vic).

11 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A.

12 Thalia Anthony, *Indigenous People, Crime and Punishment* (Routledge, 2013) 10. See especially *Crimes Act 1914* (Cth) s 16A; *Crimes (Sentencing) Act 2005* (ACT) s 7; *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act 1995* (NT) s 5(1); *Penalties and Sentences Act 1992* (Qld) s 9(1); *Sentencing Act 2017* (SA) ss 3–4; *Sentencing Act 1997* (Tas) s 3; *Sentencing Act 1991* (Vic) s 5(1); *Sentencing Act 1995* (WA) s 6.

13 *Fernando* (n 2) 62–3 (per Wood J); see generally *Bugmy v The Queen* (2013) 249 CLR 571.

14 *Pathways to Justice Report* (n 5) 120 [3.70].

15 Ibid 119 [3.69].

due to the inaccuracy of 'prior record' as a statistic generally.[16] Further, as will be discussed Part II(E) below, reliance on recidivism rates may lead to Indigeneity being viewed through a lens of risk.[17]

2 *Indigenous Sentencing Courts in Australia*

In 1999, the first formalised Australian ISC was established in South Australia.[18] The only remaining Australian jurisdiction yet to adopt an ISC system is Tasmania.[19] The legislative design and operation of ISCs varies between Australian states and territories. Some courts, such as the Victorian Koori Courts emphasise participation of the Aboriginal community, while others, such as the Galambany Court in the Australian Capital Territory (ACT), prioritise restorative justice goals.[20] In most jurisdictions across Australia, these courts complement mainstream judicial and criminal justice systems. ISCs, as Stobbs and McKenzie have noted, are diverse among jurisdictions, with nuanced procedural differences at each site.[21] Importantly, ISCs do not practice or adopt Indigenous customary law.[22] Rather, they operate pursuant to and enforce Australian laws when sentencing.[23] In ISCs, the Magistrate or Judge 'retains the ultimate power in sentencing the offender'.[24] ISCs' point of difference is that they provide an opportunity for participation in the process by Indigenous Elders or Respected Persons.[25]

Threshold requirements must be met for a matter to be heard by an ISC. These include Aboriginal identification,[26] whereby the accused

> (a) is descended from an Aborigine, Aboriginal person or Torres Strait Islander; or
>
> (b) identifies as an Aborigine, Aboriginal person or Torres Strait Islander; or
>
> (c) is accepted as an Aborigine person or Torres Strait Islander by an Aboriginal or Torres Strait Island community.[27]

---

16 Ibid.

17 Anthony (n 12) draws attention to the justice system's characterisation of dysfunction within Indigenous communities, which become 'viewed as perpetuating criminality': at 77. Similarly, 'deterrence, victimization (sic) and community protection are construed to engender Indigeneity as a risk factor': at 77.

18 Marchetti and Daly (n 3) 416.

19 Ibid. See also Tasmania Law Reform Institute, *Circle Sentencing* (Research Brief, December 2024) 1 [1.1].

20 See, eg, *County Court Act 1958* (Vic) (n 4) s 4G. Cf *ACT Practice Direction No 2 of 2024* (n 7) paras 6(e), (g).

21 Nigel Stobbs and Geraldine Mackenzie, 'Evaluating the Performance of Indigenous Sentencing Courts' (2009) 13(2) *Australian Indigenous Law Review* 90, 100.

22 Contrast can be made to instances where courts have recognised application of customary punishment practices such as 'spearing, shaming and banishment': see Marchetti and Daly (n 3) 420. See also *Sentencing Act 1995* (NT) s 104A ('Special provisions regarding cultural information'); Jeffries and Stenning (n 8).

23 Marchetti and Daly (n 3) 420.

24 Ibid 421. See, eg, Queensland Magistrates' Court, *Practice Direction No 2 of 2016 (Amended): Queensland Murri Court*, 16 May 2017, para 1(b) ('*Qld Practice Direction No 2 of 2016 (Amended)*').

25 Marchetti and Daly (n 3) 420.

26 See, eg, *ACT Practice Direction No 2 of 2024* (n 7) para 27(a); *County Court Act 1958* (Vic) (n 4) s 4E(a); *Qld Practice Direction No 2 of 2016 (Amended)* (n 24) para 14(a).

27 See, eg, *County Court Act* 1958 (Vic) (n 4) s 3(1) (definition of 'Aborigine'); *Qld Practice Direction No 2 of 2016 (Amended)* (n 24) para 14(a).

The victim of the offence is not required to meet this identification requirement. An accused must have entered a guilty plea 'or have been found guilty in a summary hearing'.[28] Consent by the accused is required for the matter to be heard by an ISC.[29] Furthermore, any criminal proceeding 'must be one that is normally heard in a Magistrates' or Local Court',[30] noting that in Victoria, the Koori Court system has in recent years expanded to include the County Court level.[31] In most jurisdictions, there is also a geographical requirement that 'the offence … occurred in the geographical area covered by the court'.[32]

Marchetti and Daly have identified three key reasons why governments have sought to establish ISCs.[33] First, they aim to 'reduce the over-representation of Indigenous people in custody'.[34] Second, they may provide an 'opportunity for governments to address key recommendations made by the Royal Commission into Aboriginal Deaths in Custody'.[35] These recommendations included 'reducing Indigenous incarceration, increasing the participation of Indigenous people in the justice system as court staff or advisors, and identifying mechanisms for Indigenous communities to resolve disputes and deal with offenders in culturally appropriate ways'.[36] Third, ISCs have been established to complement Aboriginal Justice Agreements responding to the issue of over incarceration.[37]

3 *Types of Offences Heard by Indigenous Sentencing Courts*

Each jurisdiction differs in the types of offences that can be heard in their ISC system. Victoria takes a broad approach, for example the Koori Court, at the Magistrates' Court level, can hear all offences able to be finalised in the Magistrates' Court,[38] with the exception of sexual offences.[39] Other jurisdictions, like the ACT's Galambany Court, exclude certain offence types including sexual offences and indictable offences where the matter cannot be heard summarily.[40] By contrast, South Australia's Nunga Court division does not specifically exclude any particular offence type. Rather, the defendant must seek consent from the Director of Public Prosecutions for sentencing proceedings relating to a major indictable offence be transferred into the Nunga Court.[41]

---

28 Marchetti and Daly (n 3) 421. See also Harry Blagg and Thalia Anthony, *Decolonising Criminology: Imagining Justice in a Postcolonial World* (Palgrave Macmillan, 2019) 258.
29 Marchetti and Daly (n 3) 421.
30 Ibid.
31 See *County Court Act 1958* (Vic) (n 4) s 4A.
32 Marchetti and Daly (n 3) 421.
33 Ibid 422–3. See also Jeffries and Stenning (n 8) 468.
34 Marchetti and Daly (n 3) 422.
35 Ibid.
36 Ibid.
37 Ibid. See, eg, *The Victorian Aboriginal Justice Agreement*: State Government of Victoria, *Burra Lotjpa Dunguludja: The Agreement* (Web Page, 5 August 2024) <https://www.aboriginaljustice.vic.gov.au/the-agreement/the-victorian-aboriginal-justice-agreement>. See also *Pathways to Justice Report* (n 5) 499–500 [16.28].
38 *Magistrates' Court Act 1989* (Vic) s 25.
39 Ibid s 4F(1)(b)(i).
40 *ACT Practice Direction No 2 of 2024* (n 7) paras 8(b)–(c).
41 Courts Administration Authority of South Australia, *Nunga Court Bench Book: A Bench Book for the Nunga Court at Port Adelaide and Murray Bridge*, 1 February 2024, 16.

4 *Key Features and Values of Indigenous Sentencing Courts*

Central to ISCs is the inclusion and involvement of community. In the ACT, the Galambany Court aims to provide 'effective and restorative processes to Aboriginal and Torres Strait Islander defendants through community involvement in sentencing'.[42] The Ngunnawal word 'galambany' is understood to mean 'we all, including you', indicative of the aim of community participation.[43] During the establishment of the Victorian Koori Court, the Honourable Justin Madden stated during the second reading speech that the Koori Court aimed to create

> an informal and accessible atmosphere … allowing greater participation by the Aboriginal community through the Koori [E]lder or [R]espected [P]erson, Aboriginal justice worker, [I]ndigenous offenders and their extended families or wide group of connected kin, and if desired, victims in the [C]ourt and sentencing process.[44]

Elders and Respected Persons appear in advisory capacities to the Magistrate, and are tasked with speaking with the offender, and providing views to the Magistrate about the nature of the defendant's conduct in relation to the respective community.[45] In some ISC systems, Elders and Respected Persons may be involved in interviewing the defendant, preparing written pre-sentence reports to the Magistrate, and may assist with post-sentence monitoring and support.[46]

B *How Indigenous Sentencing Courts Fit within the Restorative Justice Framework*

The term 'restorative justice' is largely attributed to Albert Eglash,[47] for whom restorative justice was one of three 'forms' of criminal justice: retributive, distributive and restorative.[48] The term 'restorative justice' was defined by Tony Marshall in his 1999 UK Home Office study as 'a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future'.[49]

Latimer, Dowden and Muise argued that the term restorative justice is used interchangeably with concepts such as 'community justice, transformative justice, peacemaking criminology, and relational justice'.[50] The term 'therapeutic jurisprudence' is also often used, and confused, in discourse concerning restorative

---

42 ACT Magistrates Court, *Galambany Court* (Web Page) <www.courts.act.gov.au/magistrates/about-the-courts/areas-in-the-act-magistrates-court/galambany-court>.

43 Ibid.

44 Victoria, *Parliamentary Debates*, Legislative Council, 29 May 2002, 1283 (Justin Madden) ('Magistrates' Court (Koori Court) Bill Second Reading').

45 Marchetti and Daly (n 3) 421 n 16.

46 Ibid.

47 Shadd Maruna, 'The Role of Wounded Healing in Restorative Justice. An Appreciation of Albert Eglash' (2014) 2(1) *Restorative Justice: An International Journal* 9, 9–11.

48 Theo Gavrielides, 'Restorative Justice — The Perplexing Concept: Conceptual Fault-Lines and Power Battles within the Restorative Justice Movement' (2008) 8(2) *Criminology and Criminal Justice* 165, 167.

49 Tony E Marshall, *Restorative Justice: An Overview* (Home Office (UK) Research Development and Statistics Directorate, 1999) 5.

50 Jeff Latimer, Craig Dowden and Danielle Muise, 'The Effectiveness of Restorative Justice Practices: A Meta-Analysis' (2005) 85(2) *The Prison Journal* 127, 128.

justice.[51] It is important to distinguish therapeutic jurisprudence, which is defined as 'the study of how the law, its officials, processes and institutions affect the people who come under its influence'.[52] Therapeutic jurisprudence applies many restorative justice principles, however this term inherently pathologises the defendant. Therapeutic jurisprudence is associated with so-called 'solution-focused judging', whereby the court becomes a 'facilitator of change' as opposed to 'solv[ing] a participant's "problems"'.[53]

Restorative justice includes three key 'elements': voluntariness, truth-telling and a face-to-face encounter.[54] In summary, the aims of restorative justice are: voluntariness for all participants; an acceptance of responsibility by the offender; 'open and honest' discussion by the offender about the criminal conduct; and the meeting of participants in 'safe and organized' settings whereby 'an appropriate method of repairing the harm' can be agreed.[55] Restorative justice facilitates restoring relationships and provides the community with opportunities for healing by reintegrating victims and offenders.[56]

Common restorative justice practices include victim-offender mediation, conferencing, and circle and forum sentencing.[57] These processes have been implemented in Australia through various pieces of state and territory legislation, such as the *Crimes (Restorative Justice) Act 2004* (ACT),[58] which outlines key restorative justice principles such as: empowering victims; bringing together victims, offenders and supporters in a safe environment; and prioritising victims' interests.[59]

C *Limitations in Viewing Indigenous Sentencing Courts through the Lens of Restorative Justice*

When distinguished from other specialist courts that apply restorative justice principles, ISCs may not necessarily involve victims and, instead, take an 'offender-centred approach'.[60] For example, the County Koori Court purports to seek inclusive changes to shift the 'court-community relationships' by promoting 'effective communication between the offender and the judicial officer [and] reliance on Indigenous knowledge in the sentencing process … and the use of penalties better suited to the circumstances of the offender'.[61] There is also a focus on accountability

---

51 See, eg, John Braithwaite, 'Restorative Justice and Therapeutic Jurisprudence' (2002) 38(2) *Criminal Law Bulletin* 244.

52 See generally Magistrate Pauline Spencer, 'To Dream the Impossible Dream? Therapeutic Jurisprudence in Mainstream Courts' (Speech, International Conference on Law and Society, June 2012) 3<http://dx.doi.org/10.2139/ssrn.2083370>.

53 Ibid.

54 Latimer, Dowden and Muise (n 50) 128.

55 Ibid 128.

56 Ibid 128–9.

57 See generally Australian Law Reform Commission, *Family Violence: Improving Legal Frameworks* (Consultation Paper Summary, April 2010) 150.

58 *Crimes (Restorative Justice) Act 2004* (ACT) s 44.

59 Ibid ss 6(a)–(c).

60 See Gwen Robinson and Joanna Shapland, 'Reducing Recidivism: A Task for Restorative Justice?' (2008) 48(3) *The British Journal of Criminology*, 337, 337.

61 Samantha Brown, 'Koori Courts and Fairness' (Master of Science in Applied Criminology Thesis, Northern Arizona University, 2012) 10.

to community and priority given to considering the circumstances of the defendant.[62] Additionally, ISCs have distinct policy aims that reside outside a restorative justice framing: namely, reducing Indigenous incarceration and responding to justice issues specific to Indigenous communities.[63] Many ISCs were established in view of the goals and ambitions set out in now-expired Aboriginal Justice Agreements between state governments and Aboriginal and Torres Strait Islander communities.[64] More recent agreements in Victoria demonstrate continued advocacy by Indigenous stakeholders to expand and shape the development of the Koori Court system while aspiring to 'establish justice institutions to exercise self-determination' and 'greater Aboriginal authority'.[65]

Tauri has argued that restorative justice is enmeshed within a 'colonial project of crime control' and is 'complicit in the settler-colonial state's continuing subjugation of Indigenous peoples'.[66] Woolford argued that restorative justice needs to grapple with the political context in which the theory is situated and the means by which it operates.[67] We should query whether the aims of restorative justice, and its practices, align with the aims of Indigenous peoples, ISCs and broader justice policy initiatives aimed at redressing legacies of settler-colonial harm. In this respect, alternative theoretical framing is necessary to understand and evaluate these courts.

Restorative justice, as an organising framework, inadequately reflects the broader aims and objectives of Indigenous peoples with respect to the justice system.[68] The term's scope has been redefined and repackaged by governments, whereby its practices and ideas are uncertain.[69] For this reason, Daly has argued that restorative justice lacks clear definition.[70] This has prompted restorative justice advocates to 'distinguish practices that are near and far from the restorative ideal'.[71] ISCs are 'more than just an example of restorative justice or therapeutic jurisprudence'; they are, in fact, 'unique unto themselves'.[72] Marchetti and Daly, among others, have argued that because of this uniqueness, a similarly 'unique theoretical and jurisprudential model' is required.[73] Payne has suggested that ISCs, in the context of their broader influence on the justice system, 'are politically concerned with social change in race relations', a concern that goes beyond the scope

62 Ibid.
63 Marchetti and Daly (n 3) 422–4.
64 Ibid. See further *Pathways to Justice Report* (n 5) 499–500 [16.28]. See especially Department of Justice (Vic), *Victorian Aboriginal Justice Agreement (AJA1 2000–2006)* (2000).
65 Department of Justice (Vic), *Burra Lotjpa Dunguludja: Victorian Aboriginal Justice Agreement Phase 4* (2018) 7, 13, 39, 47. See especially at 13 n 9.
66 Juan Marcellus Tauri, 'What Exactly Are You Restoring Us To? A Critical Examination of Indigenous Experiences of State-Centred Restorative Justice' (2022) 61(1) *The Howard Journal of Crime and Justice* 53, 56.
67 Andrew Woolford and Amanda Nelund, *The Politics of Restorative Justice: A Critical Introduction* (Fernwood, 2nd ed, 2019) 15.
68 Marchetti and Daly (n 3) 415.
69 Ibid.
70 Ibid.
71 Ibid.
72 Brown (n 61) 10, quoting Mark Harris, *'A Sentencing Conversation': Evaluation of the Koori Courts Pilot Program October 2002–October 2004* (Evaluation Report, Department of Justice (Vic), 2006).
73 Marchetti and Daly (n 3) 419.

of a restorative justice paradigm.[74] Additionally, Cunneen has argued the very efficacy of ISCs' programs relies upon separation from 'state-sponsored' restorative justice labels.[75] The separation from restorative justice lies in ISCs' ability to empower Indigenous peoples and incorporate their 'perspectives and values' into the judicial and sentencing process.[76] In this way, ISCs have the potential to be socially and politically 'transformative', at a variety of levels, rather than merely 'restorative'.[77] ISCs, while not perfect institutions, may be seen to go some way towards answering Anthony's call for a 'postcolonial sentencing paradigm' that 'deconstructs the asymmetrical relationship between the colonizer's [sic] law and Indigenous laws', providing agency to Indigenous participants.[78]

D *Self-Determination and Post-Colonial Objectives*

The aims of Aboriginal and Torres Strait Islander peoples, as a 'political community' and 'constitutional constituency',[79] are diverse and multifaceted in the 'post-colonial' context. Aboriginal peoples in Australia have campaigned for societal and structural transformation of the justice system.[80] Fulfilling these aims requires a 'transformative' approach to justice, as argued for by Anthony.[81] This involves: fostering a 'parity of participation' between Indigenous peoples and the broader legal system in respect of 'legal norm creation and dispensation';[82] creating systems where Indigenous societies autonomously control and apply their 'laws and governance structures to their members';[83] and government engagement with Indigenous peoples which 'decentres postcolonial power'.[84]

These aims mirror some of the broader principles of self-determination outlined in the *UN Declaration on the Rights of Indigenous Peoples*, namely:[85]

- 'the right to self-determination' (art 3)
- 'the right to autonomy or self-government in matters relating to their internal and local affairs' (art 4)
- 'the right to participate in decision-making in matters [affecting] their rights, through representatives chosen by themselves in accordance with

---

74 Jason Payne, 'Aboriginal Sentencing Courts' (Speech, Uluru Criminal Law Conference, 31 August 2012) quoted in Anthony (n 12) 207.

75 Anthony (n 12) 206, quoting Chris Cunneen, 'Understanding Restorative Justice through the Lens of Critical Criminology' in Thalia Anthony and Chris Cunneen (eds), *The Critical Criminology Companion* (Hawkins Press, 2008) 290, 292.

76 Anthony (n 12) 206–7.

77 Ibid.

78 Ibid 69.

79 See Shireen Morris, '"The Torment of Our Powerlessness": Addressing Indigenous Constitutional Vulnerability through the Uluru Statement's Call for a First Nations Voice in Their Affairs' (2020) *43*(3) *UNSW Law Journal* 629, 629.

80 'Barunga Statement' (Presented to the Prime Minister of Australia on behalf of the Central and Northern Land Councils, 12 June 1988).

81 Anthony (n 12) 203.

82 Ibid 201.

83 Ibid 203.

84 Ibid.

85 *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007).

their own procedures, as well as to maintain and develop their own indigenous [sic] decision-making institutions' (art 18); and

- a requirement that the State will 'consult and cooperate in good faith' with Indigenous peoples with respect to laws or administrative measures that may affect them (art 19).

Achieving self-determination has been deemed necessary by Indigenous leaders to: further Indigenous participation and autonomy in Australian parliaments, public life and institutions;[86] address a lack of institutional accountability to Indigenous peoples;[87] create 'representative' self-governance structures that 'mediate the interface with Australian governments';[88] address disadvantage and the 'effects of past discrimination' by 'enabling equal rights';[89] and ensure the 'views of Indigenous people' are taken into account in relation to laws that affect them.[90] Indigenous Elders themselves have argued for a coalescence of 'Indigenous and non-Indigenous law' so that they may 'recognise each other', in order to achieve a 'two-way understanding between Indigenous and non-Indigenous laws so one does not prevail over the other'.[91]

E *The Public Interest in Offender Rehabilitation and Deterrence versus the Post-Colonial Aims of Indigenous Peoples*

Robinson and Shapland have argued that, among policymakers, interest is growing 'in the capacity of restorative justice interventions to impact positively on rates of recidivism'.[92] This sees goals such as achieving deterrence, rehabilitation of the offender and reduced recidivism prioritised over accounting for and redressing the post-colonial experience of Indigenous peoples within the justice system.[93] Many governments view reduced offender recidivism as the primary rationale for the establishment of ISCs.[94] Stobbs and McKenzie highlight that the Law Reform Commission of WA openly stated that the wellbeing of participants is not a measure of efficacy, and instead, community-wide benefit must be shown.[95]

Marchetti has argued that the recidivism metric is relied upon where policymakers seek to make funding decisions.[96] This leaves programs at risk of

86 *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (January 2012) ('*Report of the Expert Panel*') xv.
87 Ibid.
88 Ibid 180.
89 Ibid 185.
90 Ibid.
91 Anthony (n 12) 201. See also James Gaykamangu, 'Ngarra Law: Aboriginal Customary Law from Arnhem Land' (2012) 2(4) *Northern Territory Law Journal* 236, 236.
92 Gwen Robinson and Joanna Shapland, 'Reducing Recidivism: *A Task for Restorative Justice?*' (2008) 48(3) *The British Journal of Criminology* 337, 337.
93 Anthony (n 12) 147. See also *Fernando* (n 2).
94 *Pathways to Justice Report* (n 5) 329 [10.36]. See also Chris Cunneen, 'Sentencing, Punishment and Indigenous People in Australia' (2018) 3(1) *Journal of Global Indigeneity* article 4, 10.
95 See Stobbs and Mackenzie (n 21) 101, quoting Law Reform Commission of Western Australia, *Court Intervention Programs: Consultation Paper* (Project No 96, 2008) 8.
96 Elena Marchetti, 'Nothing Works? A Meta-Review of Indigenous Sentencing Court Evaluations' (2017) 28(3) *Current Issues in Criminal Justice* 257, 261.

closure where the results are less than satisfactory.[97] For example, in 2015 Western Australia abolished two sentencing court systems, the Geraldton Bandimalgu Court, which specialised in family violence offences, and the Kalgoorlie Community Court.[98] The former was abolished following 'a 2014 evaluation that found that while rates of reoffending were lower, the difference was not statistically significant'.[99] However, 'the Kalgoorlie Community Court was abolished following an evaluation that found that recidivism rates were higher than in mainstream courts'.[100] The ALRC noted that in 2012 the Queensland Murri Court system was temporarily abolished due to its failure to reduce recidivism rates.[101]

Criticisms of ISCs with respect to offender recidivism rely foremost on empirical data and positivist metrics.[102] A study of the Nowra Circle Court

> cautioned against the accuracy of an exclusive statistical or qualitative analysis of rates of recidivism. It advocated for a mix of qualitative and statistical data, to get a better understanding of recidivism on the basis that 'desistance from offending' is an uneven process.[103]

Marchetti has proposed evaluating ISCs through a range of metrics, whereby recidivism is viewed 'as just one measure of success' among others.[104] Anthony has argued that the focus on metrics like reduced recidivism, deterrence and community protection construe Indigeneity 'as a risk factor'.[105] Thus, seemingly neutral research metrics might also be seen as tools of the dominant institution to entrench its dominance.[106] For ISCs to be properly evaluated in a way that truly reflects their purposes, attention should instead be paid to how measures and their respective methods could 'reflect Indigenous-centric values and knowledges'.[107] As Marchetti has written, ISCs may be 'achieving outcomes' that are not measured by 'policy-driven evaluations'.[108] These might include other aims outlined in the ALRC report, such as 'increased attendance rates, and "… better and more culturally relevant sentencing process"'.[109]

F *Restorative Justice Deprioritises the Post-Colonial Objectives of Aboriginal People*

ISCs espouse qualities associated with remediating the longstanding legacies of colonialism, including: reducing Indigenous incarceration; providing opportunities for governments to respond to the Royal Commission into Aboriginal Deaths in Custody; and complementing formal arrangements, such as former Aboriginal

97 Ibid.
98 *Pathways to Justice Report* (n 5) 330 [10.36].
99 Ibid. See also Marchetti (n 96) 261.
100 *Pathways to Justice Report* (n 5) 330 [10.36].
101 Ibid. Note that the Queensland Murri Court was reinstated in 2016.
102 *Pathways to Justice Report* (n 5) 120 [3.72].
103 Ibid 330 [10.36] n 71.
104 Marchetti (n 96) 261.
105 Anthony (n 12) 76–7.
106 See generally Linda Tuhiwai Smith, *Decolonizing Methodologies: Research and Indigenous Peoples* (Zed Books, 3rd ed, 2021) 67–90.
107 Marchetti (n 96) 258.
108 Ibid.
109 *Pathways to Justice Report* (n 5) 330 [10.37].

Justice Agreements between Indigenous stakeholders and governments. Additionally, ISCs claim to offer opportunities to provide inclusive and reflective sentencing that is culturally appropriate.

Restorative justice framing places emphasis on procedural qualities such as: the *voluntary* process for the defendant; encouragement to accept responsibility for offences prior to being sentenced; prioritising open and honest discussion through the inclusion of Elders and Respected Persons; and safe and organised engagement of participants through culturally appropriate formats. However, restorative justice at a procedural level is predominantly centred on addressing the needs of victims, as demonstrated by the *Crimes (Restorative Justice) Act 2004* (ACT).[110] The aims of ISCs are, however, arguably different to those of restorative justice, in that they are concerned with societal considerations beyond the victim, take an offender-centred approach focused on accountability to community, and give consideration to the defendant's circumstances.

The restorative justice paradigm limits the extent to which the necessary 'structural shifts'[111] can take place to bring about 'a cultural and political transformation of the law' to empower Indigenous communities in the justice process.[112] The 'transformative approach' to justice,[113] first articulated by Fraser and described by Anthony, is intrinsically part of a broader discussion concerning the 'post-colonial' goals of Indigenous peoples.[114] Restorative justice framing positions these goals outside of orthodox sentencing and justice considerations, and reinforces settler-colonial objectives through the use of narrow evaluative metrics and targets. In this mode, reducing offender recidivism becomes the dominant '"rationale for the use of specialist Aboriginal courts"'.[115] As a result, ISC outcomes are unfairly evaluated against the backdrop of mainstream sentencing processes. Empirical and positivist metrics of recidivism rates constitute a narrow evaluative measure of ISC efficacy and position Indigeneity to be viewed through a lens of risk.[116] This ignores broader 'post-colonial' aims associated with the formation of ISCs, including empowering Indigenous communities within the justice process.[117]

III Deliberative Democratic Theory

Deliberative democracy, a multi-modal theory, with a so-called 'normative core',[118] has been applied in a range of other research contexts to analyse both micro and macro deliberation. Central to its inquiry, the theory asks *why* and *how* a site or forum should be accepted as legitimate by its participants. The theory provides

---

110 See, eg, *Crimes (Restorative Justice) Act 2004* (ACT) (n 58) ss 6(a), (c).
111 Anthony (n 12) 201.
112 Marchetti and Daly (n 3) 415.
113 Anthony (n 12) 201. See also Nancy Fraser, 'From Redistribution to Recognition? Dilemmas of Justice in a "Post-Socialist" Age' (1995) 212 (Jul/Aug) *New Left Review* 68, 82.
114 Anthony (n 12) 203.
115 *Pathways to Justice Report* (n 5) 329 [10.35] quoting Paul Bennett, *Specialist Courts for Sentencing Aboriginal Offenders* (Federation Press, 2016).
116 Anthony (n 12) 21, 195.
117 Ibid 76–7, 202.
118 James Bohman, 'Realizing Deliberative Democracy as a Mode of Inquiry: Pragmatism, Social Facts, and Normative Theory' (2004) 18(1) *The Journal of Speculative Philosophy* 23, 25.

criteria capable of evaluating the processes, outcomes and substance of institutions like ISCs both as discrete decision-making sites and as institutions concerned with broader societal change. To examine whether deliberative democracy can be applied as an evaluative framework in relation to the efficacy and value of ISCs, we must first define the broader concept of deliberative democracy, consider why the theory is an appropriate organising framework, and finally examine whether it is capable of application in a justice system context.

A *Defining 'Deliberative Democracy'*

Deliberative democracy, as defined by Gutmann and Thompson, is a framework through which decisions and policies made within a democracy are justified because they are agreed through a process of 'discussion among free and equal citizens or their accountable representatives'.[119] *Deliberation* in the context of a 'deliberative democracy' refers to a 'distinctive communicative practice' involving 'reason-giving and mutual justification' or reciprocity.[120] This reason-giving process requires a 'transmission of ideas, proposals, and discourses'[121] and 'no force except that of the better argument is [to be] exercised'.[122] Beyond this core meaning, deliberative democracy can be seen as 'a larger, normative project' that 'encompasses multiple other institutions and practices' including judicial systems.[123] The relationship between theories of deliberative democracy and legal systems is, as Levy and Orr argue, 'reflexive' in nature.[124] Two interconnected questions surround this relationship: first, 'how [the] law [in question] shapes, enables, or constrains deliberation'; and second, 'how deliberation shapes law, whether by generating new regulatory models or understandings, or reinforcing existing rules and their interpretation'.[125]

B *Should Deliberative Democracy Theory Be Applied to Indigenous Sentencing Courts?*

1 *Why Deliberative Democracy?*

ISCs are deliberative sites because of the nexus existing between the collective deliberation of Elders and the Magistrate and the resultant sentencing decision. ISCs should be analysed in respect of their deliberative qualities as there is a notable lack of scholarship in this area. McCaul, among others, has argued that historically Indigenous participation 'in decision-making in Australia is … denied, ignored, or

---

119 Amy Gutmann and Dennis Thompson, 'Why Deliberative Democracy is Different' (2000) 17(1) *Social Philosophy and Policy* 161, 161.

120 André Bächtiger and John Parkinson, *Mapping and Measuring Deliberation: Towards a New Deliberative Quality* (Oxford University Press, 2019) 21.

121 Mary F Scudder, Selen A Ercan and Kerry McCallum, 'Institutional Listening in Deliberative Democracy: Towards a Deliberative Logic of Transmission' (2021) 43(1) *Politics* 38, 39.

122 Ron Levy and Graeme Orr, *The Law of Deliberative Democracy* (Routledge, 1st ed, 2016) 21, quoting Jürgen Habermas, 'Reconciliation through the Public Use of Reason: Remarks on John Rawls's Political Liberalism' (1995) 92(3) *Journal of Philosophy* 109, 124.

123 Scudder, Ercan and McCallum (n 121) 39.

124 Levy and Orr (n 122) 195.

125 Ibid.

partial at best'.[126] According to McCaul, deliberative engagement between Indigenous peoples and the State is 'under-theorised' and 'therefore largely absent in the literature of deliberative democracy'.[127]

Deliberative democracy is positioned to resolve asymmetries or incommensurability between dominant non-Indigenous law and Indigenous laws because the theory recognises different models and practices of democracy.[128] In order to do so, we should consider deliberative democracy's relevance to institutional design, and how it can be used to level the playing field.[129] When informed by deliberative democratic values, appropriately designed ISC institutions might serve to empower Indigenous communities in the justice system, by including Elders in the decision-making process where they have, in the past, been excluded. From a design perspective, 'community based deliberative spaces', a description that ISCs in some ways might be able to meet, 'may offer … insights into democratisation processes "from below" that are more participatory than representative forms of democracy' because social relations are based on 'Indigenous notions of reciprocity and exchange, rather than competition'.[130]

2 *Should Deliberative Democracy Be Understood as a Philosophy Rooted in Western Philosophical Tradition?*

Banerjee has argued that 'Enlightenment reasoning and philosophies of history provided an intellectual justification of more than two hundred years of colonialism'.[131] He points to deliberative democracy's 'quest for consensus' which, he claims, ignores 'legacies of colonialism and structural inequalities that persist in contemporary societies'.[132] Recent scholarship shows that deliberative democracy scholars are alive to critical discussions concerning colonialism.[133] Ibhawoh highlights that examples of deliberative and consensus-based decision-making are evident across cultures and societies.[134] In this regard, the normative principles of deliberative democracy are not, and should not, be understood as part of a dominant

---

126 Justin McCaul, 'Deliberative Democracy Must First Engage with Settler Colonialism' in Hans Asenbaum and Friedel Marquardt (eds), 'Can Deliberative Democracy Be Decolonized? A Debate' (Working Paper Series No 2024/01, Centre for Deliberative Democracy and Global Governance, University of Canberra, 2024) 8, 8.

127 Ibid 10.

128 See, eg, Martin Hébert, 'Indigenous Spheres of Deliberation' in Andre Bächtiger, John S Dryzek, Jane Mansbridge and Mark Warren (eds) *The Oxford Handbook of Deliberative Democracy* (Oxford University Press, 2018) 100. Cf Subhabrata Bobby Banerjee, 'Decolonizing Deliberative Democracy: Perspectives from Below' (2022) 181(2) *Journal of Business Ethics* 283, 296. See also Anthony (n 12) 69.

129 Archon Fung, 'Survey Article: Recipes for Public Spheres: Eight Institutional Design Choices and Their Consequences' (2003) 11(3) *Journal of Political Philosophy* 338, 344.

130 McCaul, 'Deliberative Democracy Must First Engage with Settler Colonialism' (n 126) 10.

131 Banerjee (n 128) 286.

132 Ibid 284.

133 See generally Hans Asenbaum and Friedel Marquardt (eds), 'Can Deliberative Democracy Be Decolonized? A Debate' (Working Paper Series No 2024/01, Centre for Deliberative Democracy and Global Governance, University of Canberra, 2024).

134 Bonny Ibhawoh, 'Decolonizing Deliberative Democracy: Four Possible Approaches' in Hans Asenbaum and Friedel Marquardt (eds), 'Can Deliberative Democracy Be Decolonized? A Debate' (Working Paper Series No 2024/01, Centre for Deliberative Democracy and Global Governance, University of Canberra, 2024) 14, 14.

western paradigm.[135] Instead, it has been said that the scholarship surrounding deliberative democracy, as a theory, is intellectually hegemonic in that it is 'dominated by West-centric frameworks, paradigms, and cases'.[136] Ibhawoh has argued that, in view of this, scholars should pay close attention to 'the silences, omissions, and erasures of liberal democratic discourses' and that democratic deliberation can take diverse forms.[137] For example, as Hébert has argued, 'Indigenous deliberation and agency go hand in hand'.[138] McCaul has acknowledged deliberative democracy's openness to de-colonial perspectives, calling for Indigenous peoples to 'lead and formulate new theoretical and empirical work' from the perspective and lived experience of colonized, Indigenous people living 'under conditions of settler colonialism'.[139]

Another critique in respect of deliberative democracy's application is that the Australian justice system, in its present form, undermines and nullifies the cultural and spiritual values of Indigenous peoples through 'state power and regulation',[140] requiring a re-imagined justice system 'not defined by Eurocentric modernity'.[141] This 'hegemonic domination', Banerjee has argued, limits 'open access, participation and social equality'.[142] Banerjee claims that deliberative democracy theory lacks a 'sophisticated analysis of power'; or alternatively, that its analysis of power is nuanced, because it acknowledges and accepts a level of 'coercive power' within deliberative practice.[143] Other scholars have made convincing arguments for deliberative democracy's applicability in the face of coercive power. For example, Valadez has argued that deliberative democracy functions as an appropriate analytical theory in 'societies burdened with asymmetries in power between ethnocultural groups',[144] such as in the Australian context. Valadez highlights deliberative democracy's focus on mutual understanding, inclusive public discourse, and achieving outcomes through rational persuasion, not force.[145] In this article, I argue that deliberative democracy presents a mode capable of reimagining the justice system's priorities, and may, in the same way contemplated by McCaul, lead to an opening up of 'deliberative space for greater engagement with the state and Indigenous governance' and potentially overcome the limitations of 'existing structures of representative democracy'.[146] Levy, O'Flynn and Kong have suggested that it is a primary goal of deliberative democracy to find 'consensus between majority and minority groups'[147] and, as such, the inclusion of 'minority group

135 Ibid.
136 Ibid.
137 Ibid 15.
138 Hébert (n 128) 100, 108.
139 McCaul, 'Deliberative Democracy Must First Engage with Settler Colonialism' (n 126) 9.
140 Banerjee (n 128) 292.
141 Ibid 289. See also 290–92.
142 Ibid 285.
143 Ibid.
144 Jorge M Valadez, 'Deliberation, Cultural Difference, and Indigenous Self-Governance' (2010) 19(2) *The Good Society* 60,62.
145 Ibid.
146 Justin McCaul, 'Caring for Country as Deliberative Policymaking' in Nikki Moodie and Sarah Maddison (eds), *Public Policy and Indigenous Futures* (Springer, 2023) 51, 67.
147 Ron Levy, Ian O'Flynn and Hoi L Kong, *Deliberative Peace Referendums* (Oxford University Press, 2021) 117.

voices' within a deliberative site takes on 'special salience' in demonstrating the site's legitimacy as a true deliberative institution.[148]

C *Analysing Indigenous Sentencing Courts as Decision-Making Sites*

Deliberative democracy provides a set of criteria to examine specialist court institutions like ISCs from both micro and macro perspectives.[149] ISCs, when understood as micro-scale, discrete decision-making institutions, are in the Foucauldian sense 'governmentalities'[150] in that 'decisions are devolved' to be made by themselves.[151] It is the observable nexus between the 'collective deliberation' (in this case, the deliberation between Elders and the Judge at each hearing, albeit limited by legislative constraints) and the decision-making process (the sentencing decision) that make ISCs appropriate for deliberative evaluation.[152]

Deliberative democracy is distinct from restorative justice in that it asks why and how an institutional site or forum, such as a court, should be accepted as legitimate, through normative and descriptive inquiry. Criticism made of the theory's utopian ideals,[153] in fact, draws into focus its greatest strength: its position to critique socially complex institutional spaces.[154] The theory asks whether a particular democratic site or forum demonstrates particular 'normative presuppositions of communication' or 'immanent norms', such as the site's capacity to enable free and equal communication between participants.[155] These norms, and other related hallmarks, become usable criteria on the basis of which a normative analysis of ISCs can take place. This approach is consistent with scholars such as Scudder, White, Owen and Smith who, among others, call for a focus less on locating a 'practice' of deliberative democracy and more on its 'normative contribution'.[156]

Deliberative democracy's so-called 'procedural approach' asks us to query whether ISCs are, at an operational and procedural level, capable of enabling free deliberation between Elders and the Magistrate.[157] As Neblo has written, the approach 'attempt[s] to map the theory's key concepts into an operational form'.[158] However, there are also limitations with taking the procedural approach in isolation, given its lack of consideration towards 'substantive' elements, such as 'equal

---

148 Ibid.

149 Jacki Schirmer, Melanie Dare and Selen A Ercan, 'Deliberative Democracy and the Tasmanian Forest Peace Process' (2016) 51(2) *Australian Journal of Political Science* 288, 289.

150 Ibid 855.

151 Stephen Elstub, 'Overcoming Complexity: Institutionalising Deliberative Democracy through Secondary Associations' (2007) 16(1) *The Good Society* 14.

152 Ibid 19.

153 Ibid 14.

154 Ibid.

155 Robert Shelly, 'Institutionalising Deliberative Democracy' (2001) 26(1) *Alternative Law Journal* 36, 37.

156 Mary F Scudder and Stephen K White, *The Two Faces of Democracy: Decentering Agonism and Deliberation* (Oxford University Press, 2023) 52–3. See also David Owen and Graham Smith, 'Survey Article: Deliberation, Democracy, and the Systemic Turn' (2015) 23(2) *Journal of Political Philosophy* 213.

157 See, eg, Habermas (n 122).

158 Michael A Neblo, *Deliberative Democracy between Theory and Practice* (Cambridge University Press, 2015) 35.

outcomes'.[159] For this reason, in this article I modify this approach and place equality and social inclusion as core normative ideals, central to the definition of 'deliberative democracy' that should be thought about in view of Dryzek's hallmarks, as discussed further in Part III(D) below.[160]

Deliberative democratic sites must be seen to be legitimate in the eyes of the public,[161] whereby 'those subject to a collective decision' have the 'right, ability, and opportunity… to participate in deliberation about the content of that decision'.[162] Deliberative legitimacy can be conceptualised in two ways: legitimacy as created '*through* deliberation' which, Böker has argued, constitutes the 'norm of legitimacy', or 'the legitimacy (or justification) *of* deliberation' itself.[163] Böker's approach queries 'what normative demands of legitimacy are implicit in the theory of deliberative democracy'.[164] Deliberative legitimacy is predicated on participants within a system 'claim[ing] their right to justification'.[165] Dryzek has written that institutions that have capacity for deliberation are 'more legitimate'.[166] The legitimacy of any deliberative site can therefore be understood in reference to its capacity for deliberation: deliberative capacity.

D *The Hallmarks of Deliberative Capacity*

According to Dryzek, deliberative capacity requires the satisfaction of key criteria, namely that the deliberation is 'authentic, inclusive, and consequential'.[167] Dryzek has proposed that '[a] polity with a high degree of authentic, inclusive, and consequential deliberation will have an effective deliberative system'.[168] These criteria indicate effective deliberative democratic sites and the 'standards of legitimacy' by which they may be evaluated.[169]

Authentic deliberation can broadly be understood to mean deliberation that induces reflection without coercion and seeks to 'connect claims to more general principles, and exhibit reciprocity'.[170] Coercion, as an 'anti-deliberative' force includes the use of 'brute strength', 'the identity and status of speakers', or 'majority

---

159 Ibid 36. See also Amy Gutmann and Dennis Thompson, *Why Deliberative Democracy?* (Princeton University Press, 2004).

160 See, eg, the approach taken in Ben Cross, 'Deliberative Systems Theory and Activism' (2021) 24(6) *Critical Review of International Social and Political Philosophy* 866, 868.

161 John S Dryzek, 'Democratization as Deliberative Capacity Building' (2009) 42(11) *Comparative Political Studies* 1379, 1390 ('Democratization').

162 Ibid 1381.

163 Marit Böker, 'Justification, Critique and Deliberative Legitimacy: The Limits of Mini-Publics' (2017) 16(1) *Contemporary Political Theory* 19, 24 (emphasis in original).

164 Ibid.

165 Ibid 19.

166 Dryzek, 'Democratization' (n 161) 1390.

167 Ibid 1382. See also Böker (n 163) 22.

168 Dryzek, 'Democratization' (n 161) 1382. Note that Dryzek's use of the word 'system' predates later scholarly usage associated with 'deliberative systems theory'.

169 See Chiara Valentini, 'Deliberative Constitutionalism and Judicial Review. A Systemic Approach' (2022) (47) *Revus: Journal for Constitutional Theory and Philosophy of Law* 103, 110. Cf Levy and Orr (n 122) 22. See further discussion on this point in Part IV(A) below.

170 Dryzek, 'Democratization' (n 161) 1382. See also Böker (n 163) 22. See further Part IV(A)(2) below.

feeling' to undermine deliberation.[171] As Neblo has argued, achieving authentic deliberation can be seen as the means to securing 'authentic deliberative buy-in' for good decisions.[172] When buy-in is achieved, individuals 'recognize [decisions] as reasonable and … embrace them as their own'.[173] This is essential for participants to feel meaningfully engaged.[174]

Inclusive deliberation, as argued by Dryzek, is less a requirement of deliberation itself, and instead a criterion to establish deliberative *democracy*.[175] Being 'inclusive' requires that 'a broad range of interests, ideas, and positions are permitted so that people encounter a plurality of views'.[176] Levy and Orr argue that

> [i]nclusive decision-making can be more epistemically rigorous and can yield decisions more responsive and acceptable to a broad cross-section of citizens. Conversely, when 'entire social perspectives – such as those of minorities or women – are excluded from the political arena' the problematic result is 'an impoverishment of political life'.[177]

In the adjudicative context, courts have sought to 'expand their democratic representativeness' in a number of ways, such as through the inclusion of 'amici curiae' ('friends of the court') and 'interveners' in litigation processes.[178]

Consequential deliberation requires 'an impact on [the content of] collective decisions or social outcomes';[179] in other words, consequential deliberation requires participation to lead to actual results.[180] The overall *consequentiality* of deliberation is concerned with both achieving quality outcomes and, from a procedural perspective, empowerment of participants in the process.[181] A study of an Australian Citizens' Parliament held in Canberra found that the 'resonance of consequentiality' among participants gave participants a feeling of an 'empowered space'.[182] That feeling is present in ISCs — through their involvement in deliberation within the space, Elders and Respected Persons have an opportunity to 're-establish [their] authority, reinvigorate cultural protocols and [promote] self-government'.[183]

Sass and Dryzek have described the consequentiality hallmark as capable of being 'assessed in terms of the impact of deliberative participation on collective

---

171 Ron Levy, 'Deliberative Democracy and Political Law: The Coercion Problem' (2014) *SSRN* 6–7 <http://dx.doi.org/10.2139/ssrn.2490239> ('The Coercion Problem').

172 Neblo (n 158) 8.

173 Ibid.

174 Ibid 89–91.

175 Dryzek, 'Democratization' (n 161) 1382.

176 Valentini (n 169) 110.

177 Levy and Orr (n 122) 124 (citations omitted).

178 Ron Levy, 'Rights and Deliberative Systems' (2022) 18(1) *Journal of Deliberative Democracy* 27, 30. See further nn 257–62 and accompanying text below.

179 Valentini (n 169) 110, quoting Dryzek, 'Democratization' (n 161) 1382. See also John S Dryzek, 'The Deliberative Democrat's Idea of Justice' (2013) 12(4) *European Journal of Political Theory* 329, 334 ('Idea of Justice'). See also further discussion in Part IV(A)(3) below.

180 Nicole Curato and Simon Niemeyer, 'Reaching Out to Overcome Political Apathy: Building Participatory Capacity through Deliberative Engagement' (2013) 41(3) *Politics & Policy* 355, 368.

181 Neblo (n 158) 37.

182 Curato and Niemeyer (n 180) 369.

183 Kathleen Daly and Elena Marchetti, 'Innovative Justice Processes: Restorative Justice, Indigenous Justice, and Therapeutic Jurisprudence' in Marinella Marmo, Willem de Lint and Darren Palmer (eds), *Crime and Justice: A Guide to Criminology* (Lawbook, 4th ed, 2012) 453.

outcomes such as public policies, but also on social norms, and on the nature of the relationships between different social groups'.[184] Consequential and impactful deliberation by Elders and Respected Persons in ISCs might broadly involve:

- deliberating in relation to the nature and particulars of the sentencing decision, including its duration;
- feeling they, or their community, have had a voice in the dominant state-administered justice process;
- their voice was accepted as legitimate within the process; and
- preservation of the distinctiveness and authority of Indigenous laws and customs in the face of the state justice process.[185]

Beyond the mere procedural considerations of Dryzek's hallmarks, substantive principles such as 'basic liberty and fair opportunity' should be considered.[186] In the decision-making process, 'mutually justifiable reasons' form the basis of a 'mutually binding' decision or outcome.[187] For a Judge or Magistrate to hand down a sentencing decision that represents a mutual position of both the Elders and the Judge, it would be necessary to consider whether Elders have equal opportunity and individual liberty within the site. The inclusion of substantive principles within deliberative analysis is subject to considerable debate.[188] For example, to what extent should concepts of equality operate as a deliberative ideal? One may argue that equality, as a distinct hallmark of deliberation, is present where all parties have equally engaged (equality of outcome) or are capable of doing so (equality of opportunity).[189] However, as will be discussed, issues exist with respect to the use of equality as a measure or hallmark of deliberative legitimacy.

There are two key modes of analysis with respect to deliberative equality: 'procedural' and 'substantive' equality.[190] These are entangled because 'formal equality remains a controversial procedural norm in modern democracies' as it does not, in and of itself, grant 'substantive equal opportunity in terms of political influence'.[191] Trantidis has argued that this entanglement arises out of a circularity in which 'unfair social conditions create unfair terms of political participation which, in turn, reproduce these social conditions'.[192] It is argued that procedural equality requires the satisfaction of three normative conditions: unrestricted domain, anonymity, and neutrality.[193] According to Trantidis, 'formal procedural equality is

---

184 Jensen Sass and John S Dryzek. 'Symbols and Reasons in Democratization: Cultural Sociology Meets Deliberative Democracy' (2024) 53(4) *Theory and Society* 883, 884.

185 McCaul, 'Deliberative Democracy Must First Engage with Settler Colonialism' (n 126) 8.

186 Amy Gutmann and Dennis Thompson, 'Deliberative Democracy Beyond Process' (2002) 10(2) *The Journal of Political Philosophy* 153, 153.

187 Amy Gutmann and Dennis Thompson, 'Why Deliberative Democracy is Different' (n 119) 168.

188 See Jack Knight and James Johnson, 'What Sort of Political Equality Does Deliberative Democracy Require?' in James Bohman and William Rehg (eds), *Deliberative Democracy: Essays on Reason and Politics* (MIT Press, 1997) 279.

189 Ibid 280.

190 Ibid 281–2.

191 Aris Trantidis, 'Progressive Constitutional Deliberation: Political Equality, Social Inequalities and Democracy's Legitimacy Challenge' (2022) 44(3) *Politics* 453, 456.

192 Trantidis (n 191) 454.

193 Knight and Johnson (n 188) 283.

criticised for systematically disadvantaging certain groups such as women and minorities'.[194] Levy and Orr, however, propose that equality 'has a more distinctive rationale in deliberative democracy theory'.[195] For it to be seen as a 'tool of deliberation', we should attempt to understand it as 'broad inclusivity',[196] which is already included within Dryzek's three hallmarks. In this respect, for now we can dispense with an analysis of equality as its own distinct criterion, and instead revert wholly to the three hallmarks.

E *The Application of the Deliberative Democracy Framework*

1 Can Indigenous Sentencing Courts Be Understood as Deliberative Democratic Sites?

Legislators, courts and policymakers involved in the design and promotion of ISCs make claims that these court models are participatory by reason of their inclusion of Aboriginal Elders and Respected Persons. For example, The *County Koori Court Practice Note* (Vic) states that

> [t]he objective of the County Koori Court is to ensure greater participation of the Aboriginal community in the sentencing process… through the role played in that process by the Aboriginal Elders or Respected Persons and others such as the County Koori Court Coordinator.[197]

The Practice Note outlines the scope of the role of Elders and Respected Persons,[198] stating that during the hearing, Elders provide background on the defendant, discuss reasons for the offending behaviour,[199] and address the defendant regarding their behaviour's impact on the community.[200] While circular, there is a teleological argument that ISCs, which make participatory claims, should be assessed with an aligned theoretical framework: deliberative democracy.

Some scholars have examined similar court specialist systems that they refer to as 'problem-solving' courts.[201] This description, which emphasises deficit, is inappropriate in respect of ISCs in view of the 'paternalism, assimilation and (more often) indifference' that characterise Australian Indigenous policy.[202] When instead understood as specialist courts, ISCs demonstrate procedural similarities to drug courts and specialist family violence courts.[203] Mirchandani implores us to consider the way in which specialist court models 'transcend' therapy's focus on 'individual

194 Trantidis (n 191) 454.
195 Levy and Orr (n 122) 124.
196 Ibid.
197 *Practice Note PNCR 1-2021* (n 4) 3 [1.3].
198 See, eg, ibid 7 [6.8], 7 [6.13].
199 Ibid 7 [6.8].
200 Ibid.
201 See, eg, Rekha Mirchandani, 'Beyond Therapy: Problem-Solving Courts and the Deliberative Democratic State' (2008) 33(4) *Law & Social Inquiry* 853, 853
202 Justin McCaul, 'Indigenous Land and Water Policy' in Sheryl Lightfoot and Sarah Maddison (eds), *Handbook of Indigenous Public Policy* (Edward Elgar, 2024) 177, 182.
203 See Catherine Spooner, Wayne Hall and Richard P Mattick, 'An Overview of Diversion Strategies for Australian Drug-Related Offenders' (2001) 20(3) *Drug and Alcohol Review* 281, 286–7.

change' to 'involve an agenda of social change and processes of open, rational, and ongoing deliberation'.[204] There are similarities to what McCaul has discussed in relation to the 'Caring for Country' initiative,[205] involving 'exchanges between Aboriginal groups and the state', which was recognisably deliberative in its 'principles, values, and processes' and was 'approached not as a contest between adversaries, but a process for parties to develop mutually acceptable negotiation protocols and processes'.[206] ISCs can also be seen as 'new state mechanisms' in which democratic deliberation emerges in a 'fuller, thicker, more varied' form.[207]

In deliberative democracy scholarship, uncertainty surrounds whether courts function as true deliberative sites within broader democratic systems.[208] Hutt, for example, has argued that courts do not facilitate democratic deliberation as required by the theory.[209] In Hutt's view, deliberative democracy is not adequately placed to examine the deliberative traits of judicial systems, because 'structural features of judicial procedures',[210] such as their enacting legislation, restrict free deliberation by the participants.[211] By contrast, Warren argued that where a system '*empowers inclusion, forms collective agendas and wills*, and *organizes collective decision capacity* it will count as "democratic"'.[212]

Hutt has argued that court institutional structures prevent judges and the parties from deliberating during a trial.[213] This, however, ignores ISCs' unique format and their position as nested institutions within the broader judicial system, concerned primarily with sentencing and designed with dialogue between the community and the offender in mind. As previously discussed, ISCs have unique features that place them outside the mainstream judicial sentencing, including the involvement of Elders and Respected Persons in advisory capacities to the Magistrate.[214] ISCs' unique characteristics may serve to distinguish them from the 'institutional environment and conditions' that hinder the deliberative capacity of mainstream judicial procedures.[215] However, Hutt's argument underlines some of the key limitations deliberative theory faces with respect to legal institutions.

2 *Deliberative Democratic Theory as an Applied Framework*

Deliberative democratic theory faces challenges as an applied form of analysis — in particular, whether we can translate its normative ideals into 'empirical evaluative

---

204 Mirchandani (n 201) 856.
205 McCaul, 'Caring for Country as Deliberative Policymaking' (n 146) 66.
206 Ibid.
207 Mirchandani (n 201) 885.
208 Donald Bello Hutt, 'Measuring Popular and Judicial Deliberation: A Critical Comparison' (2018) 16(4) *International Journal of Constitutional Law* 1121, 1137. See also John Ferejohn and Pasquale Pasquino, 'Constitutional Courts as Deliberative Institutions: Towards an Institutional Theory of Constitutional Justice' in Wojciech Sadurski (ed), *Constitutional Justice, East and West* (Kluwer Law International, 2002) 21.
209 Hutt (n 208) 1136.
210 Ibid 1123.
211 Ibid 1136.
212 Scudder and White (n 156) 54, quoting Mark E Warren, 'A Problem-Based Approach to Democratic Theory' (2017) 111(1) *American Political Science Review* 39, 39 (emphasis in original).
213 Hutt (n 208) 1122.
214 Marchetti and Daly (n 3) 421.
215 Hutt (n 208) 1122.

schemes'.[216] Hutt, for example, has argued that there are limitations in the theory's ability to examine the deliberative traits of judicial systems.[217] Hutt considers many applied theorists,[218] and suggests that deliberative democracy is not positioned to 'fully test the adequacy of its practice to its principles'.[219] Notably, he has argued that the theory cannot be empirically applied to analyse the deliberative qualities of the judiciary.[220] This is due to a tendency by scholars to mistake 'dialogue and argument exchange taking place inside the courtroom' as demonstrative of deliberative democracy principles.[221] According to Hutt, courtroom dialogue and argument is a restricted form of deliberation, and raises questions as to whether courts are 'ideal deliberative institutions'.[222]

3 Examples of the Application of the Deliberative Democracy Framework in Related Areas

Deliberative democracy theory has been effectively applied as an analytical tool to a wide variety of institutions, processes and forums. It asks questions like 'what are the barriers to deliberation?' and can the deliberative site (subject to analysis) resolve 'intractable social or political issues'?[223] Similar questions can be posed in respect of specialist sentencing courts like ISCs regarding both their role as institutions of social change, capable of a form of systemic deliberation within the broader justice system, and the barriers to deliberation that exist at a discrete, procedural or forum level. These questions thereby set the focus on ISCs' capacity (as discrete sites) for deliberation.

One example of deliberative democracy's analytical application includes Schouten, Leroy and Glasbergen's use of Dryzek's deliberative capacity analysis as a research strategy to examine 'private multi-stakeholder governance' regimes.[224] Their case studies assessed the deliberative capacity of governance roundtables where stakeholders within a supply chain come together to address industry-wide concerns.[225] They found that the roundtables fell short on 'two out of three criteria of deliberative capacity: inclusion and consequentiality' and that there was a 'lack of transmission from deliberative processes outside the [r]oundtable setting to deliberative processes within'.[226]

---

216 Ibid 1121.
217 Ibid 1122.
218 See, eg, Laura W Black, Stephanie Burkhalter, John Gastil and Jennifer Stromer-Galley, 'Methods for Analyzing and Measuring Group Deliberation' in Erik P Bucy and R Lance Holbert (eds), *Sourcebook for Political Communication Research: Methods, Measures, and Analytical Techniques* (Routledge, 2013) 323.
219 Hutt (n 208) 1122.
220 Ibid 1121.
221 Ibid 1122.
222 Ibid 1123.
223 Scudder and White (n 156) 20.
224 See generally Greetje Schouten, Pieter Leroy and Pieter Glasbergen, 'On the Deliberative Capacity of Private Multi-Stakeholder Governance: The Roundtables on Responsible Soy and Sustainable Palm Oil' (2012) 83 *Ecological Economics* 42. 218
225 Ibid 49.
226 Ibid.

Schirmer, Dare and Ercan adopted aspects of Dryzek's model in an examination of 'deliberative democracy and the Tasmanian forest peace process', an engagement process initiated in 2009 that led to the formation of the Tasmanian Forest Agreement.[227] Five criteria were used to assess the deliberative quality of the process: access to deliberation, inclusiveness, deliberativeness, openness and transparency, and consequentiality.[228] They noted that it was difficult for participatory processes to satisfy 'all five criteria of deliberative democracy equally and simultaneously'.[229] The study gained insights about the process and whether it was an ideal deliberative site.[230] Schirmer, Dare and Ercan called for deliberative theorists to consider 'how best to build incremental deliberative processes in which succeeding stages gradually build deliberative quality, rather than attempting to achieve all normative criteria simultaneously'.[231]

Hébert has examined forms of deliberation by the Indigenous Me'phaa people of Mexico with respect to 'community life', 'regional organisations' and 'national and international political movements'.[232] He analysed how Me'phaa deliberation was 'multi-scalar' within these contexts and took account of community fracturing and 'scission' resulting from State administrative policies.[233] The Me'phaa demonstrated 'consensus-making practices' that extended their political agency beyond the community-level and into systemic and global contexts.[234] Hébert found there was Indigenous political agency and that Indigenous organisations played a role 'in engaging the state and affirming self-determination'.[235]

In 2004, Parkinson and Roche examined restorative justice through a deliberative democracy lens.[236] They concluded that there were a 'number of points of contact between deliberative democracy and restorative justice' and that the latter can be seen as an 'institutional approximation' for deliberative democratic principles.[237] However, their research was limited in that it did not consider specialist court institutions like ISCs.

4 *Differentiating between Deliberative Democracy's Procedural, Output and Substantive Values*

There are a number of observable alignments and differences between the procedure, substance and output of deliberative democracy theory and restorative justice theory. Restorative justice is concerned with the substantive output of decisions: namely, repairing harms caused by crimes.[238] This involves an attempt to 'restore victims,

227 See generally Schirmer, Dare and Ercan (n 149).
228 Ibid 290.
229 Ibid 302.
230 Ibid.
231 Ibid.
232 See generally Hébert (n 128) 100, 105.
233 Ibid 102, 105.
234 Ibid 105.
235 Ibid 105–6.
236 John Parkinson and Declan Roche 'Restorative Justice: Deliberative Democracy in Action?' (2004) 39(3) *Australian Journal of Political Science* 505.
237 Ibid 506, 516.
238 Daly and Marchetti (n 183) 455, 457–9.

offenders and communities' by holding 'offenders accountable for crime in ways that are constructive, but not punitive or harsh' and reducing 'victim fear towards the offender'.[239] By contrast, under deliberative democracy, the output focus is placed on achieving a sense of legitimacy of process, by asking both '*how* to achieve democratic legitimacy' and 'how we ought to think about legitimacy'.[240] In this sense, deliberative democracy is less concerned with the content of decisions, rather, the quality of deliberation tells us something about the quality of the outcome and the process that gave rise to the outcome.[241]

Chambers has argued that at the procedural level deliberative democracy prioritises inclusive communication practices, reason-giving and equality of participation.[242] These procedural qualities are said to give rise to 'legitimate outcomes' for deliberative sites.[243] This is in contrast to restorative justice, which favours 'the facilitation of participation and communication between the parties involved' in order to give a voice to victims, and with a view towards an agreed set of consequences that satisfy all parties.[244] Restorative justice, while emphasising dialogue and participation in the process by offenders, victims and their supporters,[245] gives less attention 'to the formalities of the criminal legal process or the voices of legal actors alone'.[246] In the case of ISCs, Elder and Respected Person participation concerns communicating to the defendant the 'impact of the offence', inducing reflection or remorse, and promoting acceptance of responsibility.[247]

At a substantive level, deliberative democracy is primarily centred on the decision-making process itself and, as argued by Kanra, achieving a form of social learning by the participants.[248] The deliberative process involves 'interaction between participants … to develop an understanding of each other's claims'.[249] The views of Elders and those of the Judge or Magistrate would, in an ideal ISC setting, be assessed and evaluated by each other, rather than a one-way information giving exercise.[250] As O'Doherty has noted, achieving 'complementary goals', such as social learning, in order to produce better citizens as well as better (social) decisions has been contemplated by a number of scholars.[251]

---

239 Ibid.
240 Scudder and White (n 156) 24 (emphasis in original).
241 See generally ibid 22, 25.
242 Simone Chambers, 'Deliberative Democracy and the Digital Public Sphere: Asymmetrical Fragmentation as a Political Not a Technological Problem' (2023) 30(1) *Constellations: An International Journal of Critical and Democratic Theory* 61, 62.
243 Scudder and White (n 156) 22.
244 Tinneke Van Camp and Jo-Anne Wemmers, 'Victim Satisfaction with Restorative Justice: More Than Simply Procedural Justice' (2013) 19(2) *International Review of Victimology* 117, 118.
245 Daly and Marchetti (n 183) 455, 456–7.
246 Ibid.
247 Ibid 461.
248 Bora Kanra, 'Binary Deliberation: The Role of Social Learning in Divided Societies' (2012) 8(1) *Journal of Deliberative Democracy* article 1, 2.
249 Ibid.
250 Ibid.
251 Kieran C O'Doherty, 'Synthesising the Outputs of Deliberation: Extracting Meaningful Results from a Public Forum' (2013) 9(1) *Journal of Deliberative Democracy* article 8, 2.

IV Indigenous Sentencing Courts as Deliberative Institutions

For the deliberation between Elders and sentencing judges to be legitimate, participation must be inclusive, authentic and consequential. These hallmarks can be understood as measures of 'relational processes'.[252] Fundamental to self-determination, Hébert has argued that 'Indigenous deliberation and agency go hand in hand'.[253] Hébert argued that the repression and short-circuiting of relational processes and 'undermining the particular forms of authority that operate within them' are indicative of coloniality.[254] By bringing ISCs within a deliberative democracy framework, these relational processes can be prioritised. While I have not sought, in this article, to quantify these participatory metrics, ISCs are deliberative sites that are capable of offering a level of inclusive, authentic and consequential deliberation. As such, an affinity exists with deliberative democracy in a way that is absent within a paradigm strictly focused on restorative justice. In this respect, deliberative democracy can, and should, be applied to ISCs as an evaluative framework to determine whether they are legitimate deliberative forums.

A *The Deliberative Relationship Between Participants in the ISC Process: Elders, Respected Person and Magistrates*

Dryzek and Niemeyer have both argued that we can think about a deliberative site's impact in terms of the extent to which the forum enables deliberation, rather than its capacity to reach a decision.[255] To do this, we return to the three deliberative hallmarks proposed by Dryzek and consider to what degree the law surrounding ISCs shapes, enables, or constrains these qualities.[256]

1 *Inclusive Deliberation*

From a conventional court perspective, the nature and formality of stakeholder expression is constrained by the legal rules governing court processes, requiring views to be presented by way of oral or written submissions. Courts have mechanisms that allow for inclusive participation: amici curiae[257] and interveners.[258] After seeking leave, these third parties may be permitted to file submissions to assist the court in resolving a point of fact or law where it is 'in the interests of the administration of justice that the Court have the benefit of a larger view of the matter before it than the parties are able or willing to offer'.[259] Williams highlights 'the long history of [amici curiae] being used by the judiciary to overcome the shortcomings

---

252 Hébert (n 128) 108.
253 Ibid.
254 Ibid.
255 Dryzek, 'Idea of Justice' (n 179) 333. Note also the distinction between 'decision-making' and 'deliberation-making' in Simon Niemeyer, 'Scaling Up Deliberation to Mass Publics: Harnessing Minipublics in a Deliberative System' in Kimmo Grönlund, André Bächtiger and Maija Setälä (eds), *Deliberative Mini-Publics: Involving Citizens in the Democratic Process* (Rowman & Littlefield Publishers, 2014) 177, 179.
256 Levy and Orr (n 122) 195; Dryzek, 'Democratization' (n 161) 1382.
257 Levy, 'Rights and Deliberative Systems' (n 178) 30.
258 Ibid.
259 *Wurridjal v The Commonwealth* (2009) 237 CLR 309, 312 (French CJ).

of the adversarial model of litigation'.[260] This intervention 'can enhance "the legitimacy of the court's decision particularly in those cases raising fundamental social and moral questions"'.[261] In this respect, conventional court processes exhibit inclusive elements that are capable of promoting 'underserved interests to find entry into public decision-making'.[262]

The role of Elders and Respected Persons in sentencing might, in many ways, be seen as an expansion of the curial process, without the structural constraints associated with amici curiae participation, in that they are able to openly share their views with the court and participate in the process. ISC laws adopt a language of inclusivity within their mission objectives and statutory provisions, however, these same laws limit the extent to which Elders and Respected Persons may be included and their views considered by the presiding Magistrate or Judge in reaching a sentencing decision.[263] Drawing upon the amici curiae example, policymakers could expand the range of issues on which Elders and Respected Persons may deliberate, and find ways to give greater weight to their contribution in order to address counter-majoritarian concerns about judicial power.[264]

Listening to stakeholders is essential for inclusive deliberation.[265] Burgess, Grice and Wood have argued that Aboriginal leading practices are 'founded on deep listening, reciprocity, and respect'.[266] Bobongie-Harris, Hromek and O'Brien have written that within Aboriginal cultures, 'listeners of the story [have] as much responsibility to and for the story as the story-teller'.[267] The extent to which a participant, Elder or Respected Person is truly listened to is related to the extent to which they are included in the deliberative process. Aboriginal Elders and Respected Persons are leaders in their communities and therefore the extent to which this is recognised within an ISC may reflect its overall deliberative character.

Defendants involved in the Victorian Koori Court have spoken of its *inclusive* qualities for them as parties to the proceeding.[268] They have noted that Elders 'contribute to the sentencing discussion, bringing their knowledge of community culture, values and kinship'.[269] Furthermore, Elders 'directly engage the [a]ccused' and foster 'community participation in the delivery of justice' and 'may also speak

---

260 George Williams, 'The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis' (2000) 28(3) *Federal Law Review* 365, 367.

261 Ibid.

262 Levy, 'Rights and Deliberative Systems' (n 178) 30.

263 See, eg, Magistrates' Court (Koori Court) Bill Second Reading (n 44) 1283.

264 Williams (n 260) 367.

265 Francis Bobongie-Harris, Danièle Hromek and Grace O'Brien, 'Country, Community and Indigenous Research: A Research Framework That Uses Indigenous Research Methodologies (Storytelling, Deep Listening and Yarning)' (2021) (2) *Australian Aboriginal Studies* 14, 18.

266 Catherine Burgess, Christine Grice, and Julian Wood, 'Leading by Listening: Why Aboriginal Voices Matter in Creating a World Worth Living In' in Kristin Elaine Reimer. Mervi Kaukko, Sally Windsor, Kathleen Mahon, Stephen Kemmis (eds*) Living Well in a World Worth Living in for All, Volume 1: Current Practices of Social Justice, Sustainability and Wellbeing* (Springer, 2023) 115, 115.

267 Bobongie-Harris, Hromek and O'Brien (n 265) 18.

268 Zoë Dawkins, Martyn Brookes, Katrina Middlin and Paul Crossley, *County Koori Court of Victoria: Final Evaluation Report* (County Court of Victoria and the Department of Justice (Vic), September 2011) 25 ('*County Koori Court Final Evaluation Report*').

269 Ibid 9.

directly to the [a]ccused about their behaviour and its effect upon the community'.[270] Through this role, Elders have been able to 'provide information on the background of the [a]ccused and possible reasons for the offending behaviour'.[271] Elders explain to the Magistrate or Judge the kinship and family connections, advise on cultural practices and protocols, and provide their 'perspectives relevant to sentencing'.[272]

Communication, for it to be inclusive, must be understood by both the giver and receiver of information. Unsurprisingly, there are notable language barriers for Aboriginal speakers engaged in court processes.[273] It has been noted in the Northern Territory context that 'Elders communicated in their Indigenous language to the offender'.[274] The Koori Court has sought to minimise miscommunication through 'the use of plain English'.[275] To date, scholarship has largely been confined to the effects of miscommunication 'between Indigenous offenders and legal professionals', however further research is needed in relation to the linguistic impact on Elders and Respected Persons deliberating with judges.[276]

2 *Authentic Deliberation and Deliberative Buy-In*

Authentic deliberation 'induces reflection' without coercion.[277] Reflection is defined broadly as 'a fixing of the thoughts on something; careful consideration', 'a thought occurring in consideration or meditation', and 'the casting of some imputation or reproach'.[278] Coercion refers to structures or practices antithetical to rational forms of deliberation.[279] Elders and Respected Persons who take part in ISCs are subject to coercion through the legal rules that structure their deliberations;[280] that is, they are subject to the statutory authority exercised by the Magistrate or Judge presiding over the hearing.[281] In most ISC jurisdictions, Elders and Respected Persons are, in effect assuming, 'advisory' positions to the Magistrate or Judge who retains all sentencing discretion.[282] Whether, and to what extent, the views of Elders or Respected Persons are taken into account is ultimately at the discretion of the presiding magistrate and therefore, the authenticity of deliberation between the Elders or Respected Persons and the Magistrate may be seen to be diminished. The limited scope of participation raises questions as to whether the laws governing ISCs enable what Neblo describes as deliberative 'buy-in'.[283] This goes to the heart of

---

270 Ibid.
271 Ibid.
272 Ibid.
273 Natalie Stroud, 'The Koori Court Revisited: A Review of Cultural and Language Awareness in the Administration of Justice' (2010) 18(3) *Australian Law Librarian* 184, 185.
274 Blagg and Anthony (n 28) 260.
275 Stroud (n 273) 189.
276 Ibid 184. See also Blagg and Anthony (n 28) 260.
277 Valentini (n 169) 110, quoting Dryzek, 'Democratization' (n 161) 1382.
278 *Macquarie Dictionary* (online at 17 February 2025) 'reflection' (defs 5, 6, 8).
279 See generally Levy, 'The Coercion Problem' (n 171).
280 Ibid 8.
281 See, eg, *Qld Practice Direction No 2 of 2016 (Amended)* (n 24) para 1(b).
282 Elders in the Victorian Koori Court discuss the impact of the defendant's offending behaviour on their community and play a support role in respect of the defendant and victim: see *County Koori Court Final Evaluation Report* (n 268) 9.
283 Neblo (n 158) 89–91.

whether the common voice[284] of Elders and Respected Persons is in fact meaningfully represented as part of the ISC process. Acknowledging the 'coercive power' of the laws governing ISCs, policymakers should consider the overall procedural design of ISCs and whether their design marginalises, includes or constrains deliberation by certain stakeholders.[285]

3 *Consequential Deliberation*

For deliberation to be 'consequential' there must be an 'impact' upon 'collective decisions or social outcomes'.[286] As such, the participation of Elders must in turn 'lead to actual results'.[287] Some scholars, such as Blagg and Anthony, have argued for a greater jurisdictional remit for ISCs as opposed to them being used in an 'ad-hoc manner' at the 'discretion of the Magistrate'.[288] Across Australia, ISCs do not presently

> provide authority to the Elders to determine the sentence. Rather, they provide advice to the sentencing Judge or Magistrate, drawing on the Indigenous community's expectations and awareness of appropriate avenues, programs and supports for the individuals involved and their families. Ultimately, the magistrate or judge determines the sentence and the extent to which the views of Elders are taken into account, if at all. This is regarded by certain Elders, [within] the Yolŋu and Warlpiri communities as an inadequate model given the 'continuing relevance of Indigenous Laws to their lives and the role of Elders in relation to the mostly younger offenders.[289]

Cunneen has argued that ISC deliberations have 'been typified as power-sharing arrangements'[290] and noted that cooperation from Indigenous participants relies upon the community having 'confidence that the power-sharing arrangements will be honoured'.[291] Under the *Magistrates' Court Act 1989* (Vic) s 4G(2), the Koori Court '*may* consider any oral statement made to it by an Aboriginal elder or respected person' (emphasis added). Similar discretion afforded to the Magistrate or Judge is also reflected in ISC legislation in both Queensland and the ACT.[292] Appleby and colleagues have highlighted how the principles elucidated in *Kable v Director of Public Prosecutions* ('*Kable*') create constitutional implications for ISCs that limit the extent judicial power can be delegated to Elders or Respected

---

284 See generally ibid 2–4.
285 Ibid 14.
286 Valentini (n 169) 110, quoting Dryzek, 'Democratization' (n 161) 1382.
287 Curato and Niemeyer (n 180) 368.
288 Blagg and Anthony (n 28) 260. See also George Pascoe Gaymarani, 'An Introduction to the Ngarra Law of Arnhem Land' (2011) 1(6) *Northern Territory Law Journal* 283, 299.
289 Blagg and Anthony (n 28) 260.
290 Cunneen, 'Sentencing, Punishment and Indigenous People in Australia' (n 94) 11, citing Ivan Potas, Jane Smart, Georgia Bignell, Brendan Thomas and Rowena Lawrie, *Circle Sentencing in New South Wales: A Review and Evaluation* (Judicial Commission of New South Wales and Aboriginal Justice Advisory Committee, October 2003).
291 Cunneen, 'Sentencing, Punishment and Indigenous People in Australia' (n 94) 11, citing Potas et al (n 290) 4.
292 See, eg, *ACT Practice Direction No 2 of 2024* (n 7) paras 34(c), 37(c); *Qld Practice Direction No 2 of 2016 (Amended)* (n 24) paras 1(b), (3).

Persons.[293] Should influence over judicial decisions be given to Elders and Respected Persons — for example, through legislative amendments to diminish the discretionary power of judicial officers or alternatively through the direct empowerment of Elders and Respected Persons — ISCs run the risk of being inconsistent with *Kable* principles and Chapter III of the *Australian Constitution*.[294] *Kable* held that the institutional integrity and independence of courts cannot be impaired by state legislation.[295] These constitutional limitations determine the extent to which judicial power can be reshaped within ISCs.[296] In this respect, the laws governing ISCs currently constrain the extent of participation by Elders, irrespective of any perception of consequential deliberation.

The *County Koori Court Final Evaluation Report* noted reflections of participants in the Court on the input from Elders and Respected Persons.[297] One defendant 'discussed the feeling of being reprimanded by the Elders', noted that the Elders contributed to 'a better understanding of [their] past and reasons for current offending', and 'commented on the respectful atmosphere of the sentencing discussion, and how this facilitated a problem-solving approach to their offending and resulted in punishment that they are more likely to engage in and respond to'.[298] The Report identified soft examples of consequentiality, whereby the presence of Elders and Respected Persons had an 'impact' on the accused's understanding, and perhaps greater amenability towards the legitimacy of the sentencing and ISC process.[299] While these non-curial forms of consequential engagement are present, truly consequential deliberation, in respect of sentencing outcome, is ultimately constrained by legislative and constitutional imperatives. In this way, ISC models appear presently to lack true deliberative legitimacy for Elder and Respected Person participants.

B *Fostering Communication between Legal Systems*

Deliberative democracy is said to promote a 'sensitivity to difference and disagreement' in democracy.[300] By creating an environment in which persuasion can be used to 'reach common ground',[301] ISCs may provide an empowered space where Indigenous people may develop or repurpose new 'deliberative practices' within the colonial context,[302] similar to how Indigenous groups have demonstrated resilience to settler-colonial States in other jurisdictions.[303]

---

293 Gabrielle Appleby, Anna Olijnyk, John Williams and James Stellios, *Judicial Federalism in Australia: History, Theory, Doctrine and Practice* (Federation Press, 2021) 141, citing *Kable v DPP (NSW)* (1996) 189 CLR 51 ('*Kable*').

294 Appleby et al (n 293) 141.

295 *Kable* (n 293) 107 (Gaudron J), 118 (McHugh J), 132 (Gummow J).

296 Ibid. See also Appleby et al (n 293) 141, where it is argued that 'there has not been any constitutional challenge to [these] specialist courts in Australia ... [as these] courts operate by consent'.

297 *County Koori Court Final Evaluation Report* (n 268).

298 Ibid 44.

299 See, eg, ibid 33.

300 Scudder and White (n 156) 20.

301 Levy, 'The Coercion Problem' (n 171) 8.

302 Hébert (n 128) 101.

303 Ibid.

Gutmann and Thompson have claimed that deliberative democracy framing cannot '"make incompatible values compatible, but it can help participants recognize moral merit in their opponents' claim", and achieve a shared sense of legitimacy'.[304] In this sense, a deliberative democratic framing may serve to promote commensurability between non-Indigenous and Indigenous justice practices by fostering intercultural dialogue.[305] This may lead to the generation of 'new regulatory models or understandings'.[306] The understandings or legal interpretations arrived at through deliberation may promote recognition of Indigenous legal systems and thus serve to generate commensurability or 'interlegality' between systems.[307] Where ISCs are able to offer legitimate deliberation to stakeholders that is seen to be authentic, inclusive and consequential, broader power imbalances and the incommensurability between Indigenous law and dominant non-Indigenous law may, to an extent, resolve. From this inter-system level, the deliberative hallmarks function to prioritise 'meaningful communication' and 'mutual recognition' between cultures.[308]

In turn, this may work towards decolonising 'institutional patterns of Indigenous subordination'[309] by creating forms of 'hybrid justice' that include 'inter-cultural' dialogue.[310] These 'hybrid' forms of justice contrast the binary models of retributive and restorative justice.[311] The promotion of 'inter-cultural' dialogue allows for Indigenous aims and objectives to be furthered against the backdrop of 'criminal justice apparatus of the Global North'.[312] Hybrid justice, achieved through prioritising legitimate deliberation, decentres colonial legal authority to invoke 'Indigenous place-based and place-centred justice, including' in the 'process of generating these spaces'.[313]

Interlegality describes the 'porosity' in legal systems that makes them amenable to difference and 'cross-cultural penetration'.[314] In 1997, Drummond examined the legal pluralism between Canadian State justice processes and the laws of Inuit people.[315] Proulx has argued that Drummond's work identifies the means by which interlegality occurs. This sees communication and dialogue between 'Aboriginal and non-Aboriginal legal systems' as essential to the incorporation of 'distinctive and unfamiliar [laws and practices] into the familiar'.[316] Interlegality

---

304 Schirmer, Dare and Ercan (n 149) 289–90, quoting Gutmann and Thompson, *Why Deliberative Democracy?* (n 159) 11.

305 See generally Paul Healy, 'Overcoming Incommensurability through Intercultural Dialogue' (2013) 9(1) *Cosmos and History: The Journal of Natural and Social Philosophy* 265, 265–6, 274.

306 Ibid.

307 Craig Proulx, 'Blending Justice: Interlegality and the Incorporation of Aboriginal Justice into the Formal Canadian Justice System' (2005) 37(51) *The Journal of Legal Pluralism and Unofficial Law* 79, 81, 83.

308 Healy (n 305) 266.

309 Anthony (n 12) 203.

310 Blagg and Anthony (n 28) 246.

311 Proulx (n 307) 83. See also Kathleen Daly, 'Restorative Justice: The Real Story' (2002) 4(1) *Punishment & Society* 55, 66.

312 Blagg and Anthony (n 28) 246.

313 Ibid 247. See also Hajiali Sepahvand, 'Hybridity as Instrument of Decolonization in Herman Melville's *Moby Dick*' (2012) 2(5) *Theory & Practice in Language Studies* 895, 898.

314 Proulx (n 307) 81.

315 See generally Susan G Drummond, *Incorporating the Familiar: An Investigation into Legal Sensibilities in Nunavik* (McGill-Queen's University Press, 1997).

316 Proulx (n 307) 81, citing Drummond, ibid 22–3.

therefore can be seen as the end result of effective dialogue, and as such, a product of deliberation. Cunneen has suggested that where Indigenous law and dominant non-Indigenous law coalesce 'a type of postcolonial hybridity' may emerge 'where institutional processes are changed and the outcome is *neither* an Indigenous process nor the dominant non-Indigenous legal process'.[317] Similarly, Blagg and Anthony argue that ISCs 'carved out' these 'hybrid spaces' within the mainstream sentencing system.[318] ISCs therefore have capacity to 'unsettle non-Indigenous authority in sentencing through enlivening Indigenous standpoints'.[319]

By achieving hybrid justice, 'sentencing — as a site of punishment, rehabilitation and integration' may be able to 'do more than further objectives of state law and order, and instead augment Indigenous social orders'.[320] Hybridity between systems may 'shift the gaze' from sentencing alone towards challenging the 'legal traditions, discourses and [criminal justice] processes' of the Global North.[321] Hybridity may also lead to an emergence of interlegality, whereby the ideas, philosophies and practices of Aboriginal peoples may be able to penetrate, and lead to a change of mainstream justice systems.[322] Likewise, opposing systems of law could incorporate 'each other's "socially legitimate sense of limits" and each other's sense of injustice into their justice/legal spheres'.[323] In this way, where a legitimate deliberation within a forum results in a hybrid justice outcome, new 'spaces for a negotiation between the laws of the settler state and Indigenous nations' may emerge.[324] This may serve to 'reinvigorate Indigenous legal and cultural values relating to the authority of Elders, respect for Indigenous Knowledges and holistic and collective responses to individual needs'.[325]

V Conclusion

ISCs were introduced to reduce Indigenous incarceration, provide opportunities for governments to respond to the Royal Commission into Aboriginal Deaths in Custody, and complement various justice agreements between Indigenous stakeholders and governments. They offer opportunities to provide inclusive and reflective sentencing that is culturally appropriate. They have been characterised as restorative justice processes — by virtue of their voluntary nature, focus on accepting responsibility prior to sentencing, and encouragement of open and honest communication — but the restorative justice framework does not capture the broader goals of Indigenous peoples with respect to the justice system. While restorative justice may be able to address the needs of victims, it is not equipped as a theory to acknowledge or promote the broader aims of ISCs and 'cultural and political transformation of the law' as sought by Indigenous peoples.[326] Restorative justice

317 Cunneen, 'Sentencing, Punishment and Indigenous People in Australia' (n 94) 13 (emphasis in original).
318 Blagg and Anthony (n 28) 257–8.
319 Ibid 258.
320 Ibid 245.
321 Ibid 246, 258.
322 Proulx (n 307) 81.
323 Ibid 104, quoting Drummond (n 315) 136.
324 Blagg and Anthony (n 28) 246.
325 Ibid.
326 Marchetti and Daly (n 3) 415.

framing deprioritises these aims, and favours settler-colonial evaluative measures such as rates of recidivism and deterrence. As a result, ISC outcomes are unfairly evaluated against narrow measures leading to the closure of ISC programs in some jurisdictions, and Indigeneity being viewed through a lens of risk.

While ISCs are by no means ideal examples of deliberative democracy, the theory provides an alternative evaluative framework by which we can examine the laws governing ISCs: namely, Dryzek's hallmarks of deliberative capacity (inclusivity, authenticity and consequentiality).[327] These can be used to assess the legitimacy of the deliberation afforded to Elders and Respected Persons who play an integral role within ISCs.

When inclusivity is used as a criterion for evaluating ISCs, it becomes clear that there are some shortcomings with regards to both inclusive language and cultural practices. There is a clear and important need to facilitate Aboriginal and Torres Strait Islander languages in the court process in order to achieve inclusive deliberation. By working towards greater incorporation of Indigenous languages and laws within ISCs, both the deliberative hallmarks of inclusivity and consequentiality could be strengthened leading to a more legitimate deliberative forum. The laws governing ISCs constrain authentic deliberation by coercing Elders and Respected Persons through prescribing the content and application of such deliberation.[328] These laws limit what can be deliberated and how those deliberations are given effect. They govern the role of judicial officers overseeing the ISCs.

Furthermore, by examining the extent to which ISCs enable consequential deliberation by Indigenous participants, it is possible to evaluate whether such Indigenous communities are empowered within this process. Constitutional issues limit the extent to which judicial power can be delegated to Elders or Respected Persons.[329] Where Elders and Respected Persons are not provided with the power to shape outcomes, community confidence in the system may wane. It has been noted that the presence of Elders and Respected Persons has led to the defendant having a greater understanding of, and greater amenability towards, the overall sentencing process.[330]

Deliberative democracy may provide a pathway towards addressing power imbalances between Indigenous law and dominant non-Indigenous law, leading to a more nuanced discussion about how such imbalances may be addressed at a structural level. Strengthening deliberation using Dryzek's three hallmarks may shape law through the development of forms of hybrid justice and interlegality between Indigenous legal systems and dominant non-Indigenous systems.[331] By achieving hybridity through deliberative democracy the legal hegemony of the Global North may be challenged.[332] The ideas, philosophies and practices of Aboriginal peoples may be able to penetrate the dominant non-Indigenous legal system resulting in change to mainstream justice systems and a degree of

327 Dryzek, 'Democratization' (n 161) 1399.
328 Levy, 'The Coercion Problem' (n 171) 8.
329 Appleby et al (n 293) 141.
330 *County Koori Court Final Evaluation Report* (n 268) 30–32.
331 Levy and Orr (n 122) 195.
332 Blagg and Anthony (n 28) 246.

commensurability.[333] The legitimisation of deliberation in ISCs may facilitate negotiation between legal systems in which hybrid forms of justice may emerge and where Indigenous disadvantage within the justice system may be addressed.[334] If pursued, these ideals may see a coalescence of Indigenous and dominant non-Indigenous laws, where both legal systems are able to mutually inform and understand the values of the other.

[333] Proulx (n 307) 81.
[334] Blagg and Anthony (n 28) 246.

The Interpretation of UNCITRAL Law in Australian Courts: A Roadmap for Elevating the UN Sales Convention's Status to That of Arbitration Law

Benjamin Hayward*

Abstract

Despite being part of Australian law for more than 30 years, the *United Nations Convention on Contracts for the International Sale of Goods* ('*CISG*') has not secured the internationally minded interpretation that *CISG* art 7(1) requires. Australia's international commercial arbitration ('ICA') laws, however, are routinely approached by Australian courts with an internationalist perspective, as their own interpretative rules require. It is tempting to conclude that Australia's approach to interpreting its ICA laws is transferable to the *CISG* context. In this article I address a previously unexplored nuance affecting that conclusion. Australian courts routinely accept Singaporean, Hong Kong and New Zealand interpretative influence concerning ICA laws. In the *CISG* context, however, significantly less influence from those jurisdictions exists. That being so, I explore how Australia's courts might better apply the *CISG* in an internationalist manner. First, I recommend that Australia's courts emphasise to practitioners the need to consider the *CISG's* application and its internationalist interpretation requirements. Second, I recommend that Australian courts use the amicus curiae procedure to solicit third party submissions addressing the *CISG's* interpretation.

Please cite this article as:

Benjamin Hayward, 'The Interpretation of UNCITRAL Law in Australian Courts: A Roadmap for Elevating the UN Sales Convention's Status to That of Arbitration Law' (2025) 47 *Sydney Law Review* 21292: 1–28 <https://doi.org/10.30722/slr.21292>.

* Associate Professor, Department of Business Law and Taxation, Monash Business School, Monash University, Caulfield East, Victoria, Australia.
Email: benjamin.hayward@monash.edu. ORCID iD: https://orcid.org/0000-0001-7409-7966.

Materials in Part II of this article are adapted from Andrea Anastasi, Benjamin Hayward and Stephanie Peta Brown, 'An Internationalist Approach to Interpreting Private International Law? Arbitration and Sales Law in Australia' (2020) 44(1) *Melbourne University Law Review* 1. The author would like to thank the organisers of (and attendees at) the annual May seminar of the UNCITRAL National Coordinating Committee for Australia held at the University of Canberra on 26 May 2023, where a work-in-progress version of this article was presented. Case law statistics, international instrument adoption information, and court library holdings referred to in this article are current as at 2 December 2024. Any errors remain the author's own.

Both techniques are applied by foreign courts in the ICA context and would assist Australian courts in discharging their *CISG* art 7(1) obligations.

I Introduction

Australia has a long association with the United Nations Commission on International Trade Law ('UNCITRAL'). It was an original UNCITRAL member and is a current member through to 2028.[1] The UNCITRAL National Coordinating Committee for Australia 'provide[s] the primary platform for Australia's engagement' with UNCITRAL.[2] Australia has also adopted several UNCITRAL instruments aimed at addressing the 'conviction that divergences arising from the laws of different States in matters relating to international trade constitute one of the obstacles to the development of world trade'.[3] These include the *United Nations Convention on Contracts for the International Sale of Goods* ('*CISG*'),[4] the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards* ('*New York Convention*'),[5] and the *UNCITRAL Model Law on International Commercial Arbitration* ('*Model Law*').[6]

The *CISG* is a treaty intended to facilitate cross-border goods trade by establishing uniform contract law rules governing international sales of goods.[7] By establishing uniform substantive law rules addressing contract formation and party

---

1 United Nations ('UN'), 'Member States History', *United Nations Commission on International Trade Law* (Web Page) <https://uncitral.un.org/en/about/faq/mandate_composition/memberhistory>.

2 UNCITRAL National Coordinating Committee for Australia, 'Chair's Welcome', *About Us* (Web Page) <https://www.uncca.org/about-us>.

3 *Establishment of the United Nations Commission on International Trade Law*, GA Res 2205/XXI, UN GAOR, 21st sess, 1497th plen mtg (17 December 1966) 99.

4 *United Nations Convention on Contracts for the International Sale of Goods*, opened for signature 11 April 1980, 1489 UNTS 3 (entered into force 1 January 1988) ('*CISG*'). See United Nations, 'Chapter X: International Trade and Development – 10 United Nations Convention on Contracts for the International Sale of Goods', *United Nations Treaty Collection* (Web Page, 26 March 2025) <https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20X/X-10.en.pdf> ('Chapter X'); *Sale of Goods (Vienna Convention) Act 1987* (ACT); *Sale of Goods (Vienna Convention) Act 1987* (Norfolk Island); *Sale of Goods (Vienna Convention) Act 1986* (NSW); *Sale of Goods (Vienna Convention) Act 1987* (NT); *Sale of Goods (Vienna Convention) Act 1986* (Qld); *Sale of Goods (Vienna Convention) Act 1986* (SA); *Sale of Goods (Vienna Convention) Act 1987* (Tas); *Goods Act 1958* (Vic) pt IV; *Sale of Goods (Vienna Convention) Act 1986* (WA); *Competition and Consumer Act 2010* (Cth) sch 2 s 68.

5 *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, opened for signature 10 June 1958, 330 UNTS 3 (entered into force 7 June 1959) ('*New York Convention*'). See United Nations, 'Chapter XXII: Commercial Arbitration and Mediation – 1 Convention on the Recognition and Enforcement of Foreign Arbitral Awards', *United Nations Treaty Collection* (Web Page, 26 March 2025) <https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXII-1&chapter=22&clang=_en> ('Chapter XXII'); *International Arbitration Act 1974* (Cth) ss 2D(d), 3–14.

6 *UNCITRAL Model Law on International Commercial Arbitration*, GA Res 61/33, UN Doc A/RES/61/33 (18 December 2006, adopted 4 December 2006) ('*Model Law*'). See United Nations, 'Status: *UNCITRAL Model Law on International Commercial Arbitration* (1985), with amendments as adopted in 2006', UNCITRAL (Web Page) <https://uncitral.un.org/en/texts/arbitration/modellaw/commercial_arbitration/status> ('*Model Law* Status'); *International Arbitration Act 1974* (Cth) ss 2D(e), 16(1), sch 2.

7 *CISG* (n 4) Preamble para 3.

rights and obligations,[8] transaction costs are reduced and trade is thereby promoted.[9] The *New York Convention* and the *Model Law*, on the other hand, are procedural laws addressing different legal aspects of international commercial arbitration ('ICA'). ICA is 'a means by which international business disputes can be definitively resolved, pursuant to the parties' agreement, by independent, non-governmental decision-makers, selected by or for the parties, applying neutral adjudicative procedures that provide the parties an opportunity to be heard'.[10] Essentially, ICA is a form of 'private justice'[11] grounded in party agreement that occurs outside of court but remains governed by law and relies on court support for its effectiveness.[12] This being so, the *New York Convention* is a treaty harmonising standards for enforcing arbitration agreements and ICA awards,[13] allowing courts to enforce both party agreements to arbitrate and the outcomes of ICA. The *Model Law* fulfils a different purpose.[14] It is a 'prototype' law[15] that States can adopt (verbatim or modified) to regulate the conduct of ICAs occurring within their jurisdictions and harmonise their ICA processes with those established in other jurisdictions.[16] Together, the *New York Convention* and *Model Law* constitute a necessary legal backbone for the global ICA system.

Australia's *CISG* and ICA laws, based on these instruments, have historically had a difficult time so far as their internationally minded interpretations go.[17] 2010, the year that Justice Croft of the Supreme Court of Victoria queried whether Australian courts could get their act together on ICA,[18] is a pivotal time in this

---

8 Ibid art 4.

9 MJ Bonell, 'Introduction to the Convention' in CM Bianca and MJ Bonell (eds), *Commentary on the International Sales Law: The 1980 Vienna Sales Convention* (Giuffrè, 1987) 1, 14–16 [2.3].

10 Gary B Born, *International Commercial Arbitration* (Kluwer Law International, 3rd ed, 2021) 67.

11 Claudia Salomon, 'Guardian, Gatekeeper or Guide: The Role of Arbitral Institutions in Protecting the Integrity of the Arbitral Process, Promoting the Rule of Law, and Providing Access to Justice' [2024] (3) *ICC Dispute Resolution Bulletin* 5, 6.

12 ICA is considered a preferred dispute resolution process among legal practitioners and other stakeholders operating in the international trade space: School of International Arbitration, Queen Mary University of London, '2021 International Arbitration Survey: Adapting Arbitration to a Changing World', *Research* (Survey Report, 2021) 5–6 <https://www.qmul.ac.uk/arbitration/media/arbitration/docs/LON0320037-QMUL-International-Arbitration-Survey-2021_19_WEB.pdf>. For a description of the range of respondents to this survey: see 35–6.

13 Born (n 10) 104–5.

14 Ibid 104.

15 Peter Binder, *International Commercial Arbitration and Mediation in UNCITRAL Model Law Jurisdictions* (Kluwer Law International, 4th ed, 2019) 18.

16 Born (n 10) 140–1.

17 Regarding the *CISG*: see, eg, Lisa Spagnolo, 'The Last Outpost: Automatic *CISG* Opt Outs, Misapplications and the Costs of Ignoring the *Vienna Sales Convention* for Australian Lawyers' (2009) 10(1) *Melbourne Journal of International Law* 141, 169. Regarding the *International Arbitration Act 1974* (Cth): see, eg, Justice Clyde Croft, 'The Development of Australia as an Arbitral Seat: A Victorian Supreme Court Perspective' in Albert Jan van den Berg (ed), *Arbitration: The Next Fifty Years: 50th Anniversary Conference, Geneva 2011* (International Council for Commercial Arbitration (ICCA) Congress Series No 16, Kluwer Law International, 2012) 227, 233.

18 See generally Justice Clyde Croft, 'Can Australian Courts Get Their Act Together on International Commercial Arbitration?' (Conference Paper, Financial Review International Dispute Resolution Conference, 15 October 2010) <https://www.supremecourt.vic.gov.au/about-the-court/speeches/can-australian-courts-get-their-act-together-on-international-commercial> ('Can Australian Courts Get Their Act Together?').

regard. Australia's 'most interesting'[19] ICA cases were decided following the enactment of the *International Arbitration Amendment Act 2010* (Cth) and the *Commercial Arbitration Act 2010* (NSW) – the first of Australia's domestic commercial arbitration Acts based on the *Model Law*[20] that are treated as ICA laws for the purposes of this article.[21] The *New York Convention* and *Model Law* are now routinely interpreted in an internationalist manner in Australian courts.[22] On the other hand, Australia's *CISG* laws still do not receive that same treatment.[23] In this article, I investigate this otherwise trite observation from a new perspective. Noting the intuitive appeal of extending Australia's ICA interpretative approach to the *CISG*,[24] I argue that different practical strategies are necessary to give effect to these laws' respective internationalist interpretation requirements.

My focus being on these practical strategies, it is important to note that I am not addressing *why* Australia's *CISG* and ICA laws are interpreted inconsistently. Scholarship analyses this matter elsewhere: identifying as possible explanations (among other things) their respective substantive and procedural natures, and the wording of Australia's *CISG* implementing legislation.[25]

In Part II of this article, I set the scene by identifying the internationalist interpretation rules governing all three instruments under examination. In Part III, I demonstrate that in Australia the *New York Convention* and *Model Law* are routinely interpreted in a manner particularly receptive of Singaporean, Hong Kong and New Zealand interpretative influence. In Part IV, I explain that significantly less influence from those jurisdictions exists regarding the *CISG*. That being so, in Part V I make two recommendations aimed at better equipping Australian courts to discharge their

---

19 Dean Lewis, *The Interpretation and Uniformity of the UNCITRAL Model Law on International Commercial Arbitration: Australia, Hong Kong and Singapore* (Kluwer Law International, 2016) 88.

20 See *Commercial Arbitration Act 2017* (ACT) pt 1A note; *Commercial Arbitration Act 2010* (NSW) pt 1A note; *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT) s 1E; *Commercial Arbitration Act 2013* (Qld) pt 1A note; *Commercial Arbitration Act 2011* (SA) pt 1A note; *Commercial Arbitration Act 2011* (Tas) pt 1A note; *Commercial Arbitration Act 2011* (Vic) pt 1A note; *Commercial Arbitration Act 2012* (WA) s 1D.

21 Australia's domestic commercial arbitration Acts must be interpreted consistently with their international counterpart: *Commercial Arbitration Act 2017* (ACT) s 2A(1); *Commercial Arbitration Act 2010* (NSW) s 2A(1); *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT) s 2A(1); *Commercial Arbitration Act 2013* (Qld) s 2A(1); *Commercial Arbitration Act 2011* (SA) s 2A(1); *Commercial Arbitration Act 2011* (Tas) s 2A(1); *Commercial Arbitration Act 2011* (Vic) s 2A(1); *Commercial Arbitration Act 2012* (WA) s 2A(1). See *CBI Constructors Pty Ltd v Chevron Australia Pty Ltd* (2024) 98 ALJR 1096, 1107–8 [45] (Gageler CJ, Gordon, Edelman, Steward and Gleeson JJ), 1111 [61] (Jagot and Beech-Jones JJ) ('*CBI*'); *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (2024) 98 ALJR 880, 885 [3] (Gageler CJ), 898 [91] (Gordon and Gleeson JJ), 926–7 [235] (Steward J), 940 [298] (Jagot and Beech-Jones JJ) ('*Tesseract*').

22 Andrea Anastasi, Benjamin Hayward and Stephanie Peta Brown, 'An Internationalist Approach to Interpreting Private International Law? Arbitration and Sales Law in Australia' (2020) 44(1) *Melbourne University Law Review* 1, 20–35; Luke Nottage, 'Cross-Fertilisation in International Commercial Arbitration, Investor-State Arbitration and Mediation: The Good, the Bad and the Ugly?' (Speech, Supreme Court of New South Wales ADR Address, 2 November 2023) 4 <https://disputescentre.com.au/supreme-court-of-new-south-wales-adr-address-2023/>.

23 Anastasi, Hayward and Brown (n 22) 37–44.

24 See, eg, ibid 50–3; Benjamin Hayward, '*CISG* as the Applicable Law: The Curious Case of Australia' in Poomintr Sooksripaisarnkit and Sai Ramani Garimella (eds), *Contracts for the International Sale of Goods: A Multidisciplinary Perspective* (Sweet & Maxwell, 2019) 167, 185–7 [10.45]–[10.48] ('*CISG* as the Applicable Law').

25 Anastasi, Hayward and Brown (n 22) 44–54.

CISG art 7(1) interpretative obligations, which are binding under public international law.[26] In Part VI, I conclude that effecting those recommendations stands to assist the *CISG* in fulfilling its trade facilitation purposes.

II Internationalist Interpretation: The *CISG*, *New York Convention* and *Model Law*

An appropriate starting point for my analysis, given the interpretative stratification identified in Part I, is the internationalist interpretation requirement relating to the application of the *CISG*, *New York Convention* and *Model Law*.

The *CISG* embeds internationally minded interpretative rules in *CISG* art 7(1): '[i]n the interpretation of this *Convention*, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade'. This provision requires the *CISG's* autonomous interpretation, 'free from domestic preconceptions'.[27] It also requires judicial and arbitral decision-makers to consider internationally minded interpretative resources including the treaty's *travaux préparatoires*, scholarship, and international case law.[28]

The *New York Convention*, pre-dating the *CISG* art 7(1) 'standard uniform interpretation clause',[29] does not contain interpretative instructions. Equivalent internationalist interpretation rules apply, however, via public international law principles reflected in the *Vienna Convention on the Law of Treaties*.[30] Conceptually, those rules apply to the *New York Convention* via 'reading in'.[31]

Finally, although the 1985 version of the *Model Law* was also silent as to its interpretation, this changed with its 2006 revisions. *CISG* art 7(1) became the template on which a new *Model Law* art 2A(1) was based.[32] Model laws are generally domestic legislation when implemented and are not necessarily required to be interpreted with an internationalist mindset.[33] *Model Law* art 2A(1) displaces that general position, providing that '[i]n the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith'. Though the drafting history of *Model*

---

26 Renaud Sorieul, Emma Hatcher and Cyril Emery, 'Possible Future Work by UNCITRAL in the Field of Contract Law: Preliminary Thoughts from the Secretariat' (2013) 58(4) *Villanova Law Review* 491, 500.

27 Pascal Hachem, 'Article 7 CISG: Interpretation of Convention and Gap-Filling' in Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 5th ed, 2022) 135, 137 [5] ('Article 7').

28 João Ribeiro-Bidaoui, 'The International Obligation of the Uniform and Autonomous Interpretation of Private Law Conventions: Consequences for Domestic Courts and International Organisations' (2020) 67(1) *Netherlands International Law Review* 139, 148–50.

29 Ibid 141.

30 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980) ('*VCLT*').

31 Drossos Stamboulakis, *Comparative Recognition and Enforcement: Foreign Judgments and Awards* (Cambridge University Press, 2023) 214–15.

32 Binder (n 15) 59–60.

33 Ingeborg Schwenzer, 'Who Needs a Uniform Contract Law, and Why?' (2013) 58(4) *Villanova Law Review* 723, 728.

Law art 2A(1) gives little guidance as to its intended meaning,[34] its relationship with *CISG* art 7(1) confirms that it requires an internationalist interpretation when applying the *Model Law*.

III Internationalist Interpretation Examined: The *New York Convention* and *Model Law* in Australia

As I identified in Part I, Australia's ICA laws have enjoyed more than a decade of jurisprudential progress, with ICA being described in 2011 as 'the new black' in Australian law.[35] While it is well established that Australia's ICA laws are now routinely interpreted in an internationalist spirit, in this Part I examine a different matter: the practical means by which that interpretation is secured.

A *Realising Internationalist Interpretation in Practice: Singaporean, Hong Kong, and New Zealand Case Law*

While the *New York Convention* and *Model Law* are both subject to internationalist interpretation requirements, Australian courts often refer to Singaporean, Hong Kong, and New Zealand case law in particular to satisfy those requirements. At the heart of this proposition lies a 'critical passage'[36] in *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* ('*TCL v Castel*'):

> This approach to confining the scope of public policy has widespread international judicial support. Contrary to the submission of the appellant, it is not only appropriate, but essential, to pay due regard to the reasoned decisions of other countries where their laws are either based on, or take their content from, international conventions or instruments such as the *New York Convention* and the *Model Law*. It is of the first importance to attempt to create or maintain, as far as the language employed by Parliament in the *IAA* permits, a degree of international harmony and concordance of approach to international commercial arbitration. This is especially so by reference to the reasoned judgments of common law countries in the region, such as Singapore, Hong Kong and New Zealand. Such is a reflection of the growing recognition of the harmony of what can be seen as the 'law of international commerce' … It is also an approach required by Art 2A of the *Model Law*, and by the highest authority when dealing with treaties … This approach should not be confined to treaties proper to which there are contracting state parties. Where, as with the *Model Law*, there has been extensive discussion and negotiation of a model law under the auspices of a United Nations body, such as UNCITRAL, and where the *Model Law* has been adopted by the General Assembly of the United Nations with recommendation of 'due consideration' by member states to advance uniformity of approach, the same appropriate respect for, and, where necessary, sensitivity or deference to,

[34] Howard M Holtzmann, Joseph E Neuhaus, Edda Kristjánsdóttir and Thomas W Walsh, *A Guide to the 2006 Amendments to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (Kluwer Law International, 2015) 24–5.

[35] Richard Garnett and Luke Nottage, 'The 2010 Amendments to the *International Arbitration Act*: A New Dawn for Australia?' (2011) 7(1) *Asian International Arbitration Journal* 29, 31.

[36] Anastasi, Hayward and Brown (n 22) 29.

> reasoned decisions of other countries, should be shown. This is especially so in the field of international commerce.[37]

To be clear, I do not claim that Australia's courts exclusively or principally rely on Singaporean, Hong Kong, and New Zealand ICA case law. That would be inconsistent with the very notion of internationalist interpretation, and the High Court of Australia's views expressed in related proceedings one year earlier:

> Those considerations of international origin and international application make imperative that the *Model Law* be construed without any assumptions that it embodies common law concepts or that it will apply only to arbitral awards or arbitration agreements that are governed by common law principles.[38]

Still, *TCL v Castel* establishes what might be called a heightened interpretative value of 'the reasoned judgments of common law countries in the region, such as Singapore, Hong Kong and New Zealand'.[39] The Full Federal Court of Australia apparently envisages reliance on cases from those jurisdictions as going some significant (practical) way towards securing the *New York Convention* and *Model Law's* internationalist interpretation. This view has been influential. The Lexis Advance database discloses 18 Australian cases citing *TCL v Castel* as at 2 December 2024,[40] and the decision features in Australian judges' extra-curial writings.[41]

---

37 *TCL Air Conditioner (Zhongshan) Co Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361, 383–4 [75] (Allsop CJ, Middleton and Foster JJ) ('*TCL v Castel*').

38 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia* (2013) 251 CLR 533, 545 [8] (French CJ and Gageler J). See also *Tesseract* (n 21) 887 [19] (Gageler CJ).

39 *TCL v Castel* (n 37) 384 [75] (Allsop CJ, Middleton and Foster JJ).

40 *International Relief and Development Inc v Ladu* [2014] FCA 887, [169] (Kenny J); *William Hare UAE LLC v Aircraft Support Industries Pty Ltd* (2014) 290 FLR 233, 244–5 [41], 265 [128] (Darke J) ('*William Hare NSWSC*'); *Chief Executive Officer of Australian Sports Anti-Doping Authority Australian Football League (ASADA) v 34 Players* [2014] VSC 635, [7] n 7 (Croft J) (citing *TCL v Castel* in context, though without pinpoint); *Cameron Australasia Pty Ltd v AED Oil Ltd* [2015] VSC 163, [19] (Croft J) ('*Cameron*'); *Robotunits Pty Ltd v Mennel* (2015) 49 VR 323, 328–9 [13] (Croft J) ('*Robotunits*'); *Aircraft Support Industries Pty Ltd v William Hare UAE LLC* (2015) 324 ALR 372, 390 [59] (Bathurst CJ, Beazley P agreeing at 391 [64], Sackville AJA agreeing at 391 [65]); *Indian Farmers Fertiliser Cooperative Ltd v Gutnick* (2015) 304 FLR 199, 207 [18] n 28, 207–8 [20], 212 [32], 222 [73] n 117 (Croft J) ('*Indian Farmers No 1*'); *Indian Farmers Fertiliser Cooperative Ltd v Gutnick (No 2)* [2015] VSC 770, [13] n 20 (Croft J) ('*Indian Farmers No 2*'); *Amasya Enterprises Pty Ltd v Asta Developments (Aust) Pty Ltd* [2016] VSC 326, [23], [31] n 57 (Croft J) ('*Amasya*'); *WDR Delaware Corporation v Hydrox Holdings Pty Ltd* (2016) 245 FCR 452, 470 [101] (Foster J); *Lysaght Building Solutions Pty Ltd v Blanalko Pty Ltd* (2017) 52 VR 198, 201 [10] n 3 (Croft J) ('*Lysaght*'); *Mango Boulevard Pty Ltd v Mio Art Pty Ltd* [2018] 1 Qd R 245, 255 [20] (Jackson J) ('*Mango Boulevard*'); *Liaoning Zhongwang Group Co Ltd v Alfield Group Pty Ltd* [2017] FCA 1223, [96] (Gleeson J) ('*Liaoning*'); *Energy City Qatar Holding Co v Hub Street Equipment Pty Ltd (No 2)* [2020] FCA 1116, [52] (Jagot J); *Beijing Jishi Venture Capital Fund (Ltd Partnership) v Liu* [2021] FCA 477, [40] (Middleton J); *Hub Street Equipment Pty Ltd v Energy City Qatar Holding Company* (2021) 290 FCR 298, 305 [18] (Stewart J, Allsop CJ agreeing at 301 [1], Middleton J agreeing at 302 [12]) ('*Hub Street Appeal*'); *Gemcan Constructions Pty Ltd v Westbourne Grammar School* [2022] VSC 6, [77] n 78 (Riordan J) ('*Gemcan*'); *Guoao Holding Group Co Ltd v Xue (No 2)* [2022] FCA 1584, [32] (Stewart J) ('*Guoao*'); *Secretary, Department of Social Services v Vader* (2024) 302 FCR 352, 368 [55] (Perry J, Charlesworth J agreeing at 374 [81], Jackson J agreeing at 374 [82]–[83]).

41 See, eg, Justice Clyde Croft, 'The Temptation of Domesticity: An Evolving Challenge in Arbitration' in Neil Kaplan and Michael Moser (eds), *Jurisdiction, Admissibility and Choice of Law in*

B *Rationales: Understanding Why Singaporean, Hong Kong, and New Zealand Case Law is Considered Important by Australian Courts*

Why has the Full Federal Court suggested that Australian courts should 'especially'[42] refer to Singaporean, Hong Kong, and New Zealand ICA judgments? There are several potential explanations and, starting with the practical, ample ICA jurisprudence exists in each of these jurisdictions. While it is difficult to say with absolute precision, there are in the order of 1,476 Singaporean ICA cases,[43] 388 Hong Kong cases,[44] and 716 New Zealand cases[45] handed down in those jurisdictions' overlapping *New York Convention* and *Model Law* eras. As each jurisdiction adopted the *New York Convention* before the *Model Law*,[46] still further *New York Convention* cases are likely to exist. With this many ICA cases, relevant and useful decisions are identifiable by Australian courts. In addition, as *TCL v Castel* noted, Singapore, Hong Kong, and New Zealand are common law jurisdictions in Australia's region.[47] From the perspective of Australian courts and practitioners, decisions from those jurisdictions thus have a certain accessibility (especially given their shared use of legal English).[48]

Still, the significance of the accessibility of Singapore, Hong Kong and New Zealand case law should not be overstated. Several international efforts ensure that the world's ICA case law is shared widely across national borders, legal traditions, and languages. For example, as at 2 December 2024, the Case Law on UNCITRAL

International Arbitration: Liber Amicorum Michael Pryles (Kluwer Law International, 2018) 57, 59–60 ('The Temptation of Domesticity').

42 *TCL v Castel* (n 37) 384 [75] (Allsop CJ, Middleton and Foster JJ).

43 Determined via searching (as at 2 December 2024) the vLexJustis database, a subscription database cataloguing reported and unreported Singaporean case law: see vLex, 'Sign In' (Web Page) <https://justis.vlex.com/>. This search used the exact term 'Arbitration Act' and a date range on or after 27 January 1995: the date that the *International Arbitration Act 1994* (Singapore) (implementing the *Model Law* (n 6)) came into force. Using the search term 'Arbitration Act' thereby captured all references to the *International Arbitration Act* (Singapore, cap 143A, 2020 rev ed) and its predecessors, as well as all references to the domestically focused *Arbitration Act* (Singapore, cap 10, 2002 rev ed) and its predecessors. That latter Act's case law is of ICA significance as 'much of the [*Arbitration Act*] is based on the *Model Law*': Robert Merkin and Johanna Hjalmarsson, *Singapore Arbitration Legislation: Annotated* (Informa Law, 2nd ed, 2016) 3. See also *Drydocks World-Singapore Pte Ltd v Jurong Port Pte Ltd* [2010] SGHC 185, [14]–[20] (Nathaniel Khng AR).

44 Determined via searching (as at 2 December 2024) the Westlaw US & International database, a subscription database housing a significant collection of Hong Kong case law. This search used the exact term 'Arbitration Ordinance' and a date range after 31 May 2011: as the *Arbitration Ordinance* (Hong Kong) cap 609 (implementing the *Model Law* (n 6)) came into force on 1 June 2011. While this figure is likely over-inclusive, as some cases decided on or after 1 June 2011 would inevitably still have applied the (now repealed) *Arbitration Ordinance* (Hong Kong) cap 341, it remains sufficiently high to confirm my proposition.

45 Determined via searching (as at 2 December 2024) the New Zealand Legal Information Institute ('NZLII') database: see NZLII, 'Search NZLII' (Web Page) <https://www.nzlii.org/forms/search1.html>. This search used the exact term 'Arbitration Act 1996', as the *Arbitration Act 1996* (NZ) is the Act implementing the *Model Law* (n 6) in New Zealand.

46 See UN, 'Chapter XXII' (n 5); UN, '*Model Law* Status' (n 6).

47 *TCL v Castel* (n 37) 384 [75] (Allsop CJ, Middleton and Foster JJ).

48 With limited exception in Hong Kong, where Chinese is also an officially recognised language for court proceedings: *Official Languages Ordinance* (Hong Kong) cap 5, s 3(1).

Texts ('CLOUT') database[49] hosts 325 *New York Convention* case abstracts from 52 different jurisdictions, and 562 *Model Law* abstracts from 43 different jurisdictions, all presented in the six official United Nations languages, including English. Binder's article-by-article commentary on the *Model Law*[50] summarises CLOUT cases relevant (as at 2019) to each *Model Law* provision. The *ICCA Yearbook Commercial Arbitration*, hosted on the Kluwer Arbitration database and in its 49th volume in 2024, summarises (in English) and translates (into English) *New York Convention* case law. These and additional cases are also available on Professor Albert Jan van den Berg's newyorkconvention.org website,[51] covering 97 jurisdictions as at 2 December 2024.[52] *New York Convention* and *Model Law* case law from around the world is thus readily accessible to those with the will to look. Given the ready availability of worldwide ICA case law, a more robust explanation than simple convenience is required to explain the Full Court's reference to Singaporean, Hong Kong, and New Zealand case law in *TCL v Castel*. This is particularly so given that Australia's preparedness to accept interpretative influence from those jurisdictions has correlated with an improved quality of Australia's ICA case law.[53]

A partial explanation lies in the reality that Australian courts will be most assisted by ICA case law from jurisdictions also adopting the *Model Law* and *New York Convention*,[54] thereby having textual 'similarity' in their ICA legislations.[55] While the *New York Convention* boasts 172 Contracting States,[56] making its reach 'almost universal',[57] many leading arbitral centres (including England and Wales, France, and Switzerland) have not adopted the *Model Law*,[58] while Singapore, Hong Kong, and New Zealand have.[59] Save as to local variations in the *Model Law's* implementation,[60] Singaporean, Hong Kong, and New Zealand case law will be instructive in both *New York Convention* and *Model Law* contexts. Of course, there

---

49 United Nations, 'Case Law on UNCITRAL Texts (CLOUT)', *United Nations Commission on International Trade Law* (Web Page) <https://uncitral.un.org/en/case_law> ('CLOUT').

50 Binder (n 15).

51 'The *New York Convention*', *New York Convention* (Web Page) <https://www.newyorkconvention.org/>.

52 'Court Decisions: Per Country', *New York Convention* (Web Page) <https://www.newyorkconvention.org/court-decisions/court-decisions-per-country>.

53 Lewis (n 19) 107–29; Sydney Law School, 'Comparative History of International Arbitration: Australia, Japan and Beyond (21 September 2023)', *YouTube* (Seminar Recording, 23 November 2023) 00:58:54–00:59:24 (Professor Luke Nottage) <https://www.youtube.com/watch?v=0X6XVOR0Y6U>.

54 Croft, 'The Temptation of Domesticity' (n 41) 60.

55 *IMC Aviation Solutions Pty Ltd v Altain Khuder LLC* (2011) 38 VR 303, 314 [37] (Warren CJ). See also 342 [130] (Hansen JA and Kyrou AJA).

56 UN, 'Chapter XXII' (n 5).

57 Alex Baykitch and Lorraine Hui, 'Celebrating 50 Years of the *New York Convention*' (2008) 31(1) *University of New South Wales Law Journal* 364, 364.

58 UN, '*Model Law* Status' (n 6). See *Arbitration Act 1996* (UK); *Décret n° 2011-48 du 13 janvier 2011 portant réforme de l'arbitrage* [Decree No 2011-48 of 13 January 2011 on the new French Law on International Arbitration] (France) JO, 14 January 2011; *Bundesgesetz vom 18 Dezember 1987 über das Internationale Privatrecht* [Federal Act on Private International Law] (Switzerland) AS 1988 1776, 1 January 1989, ch 12.

59 UN, '*Model Law* Status' (n 6). See *International Arbitration Act* (Singapore, cap 143A, 2020 rev ed) s 3(1), sch 1; *Arbitration Ordinance* (Hong Kong) cap 609, s 4, sch 1; *Arbitration Act 1996* (NZ) s 6(1)(a), sch 1.

60 See, eg, *CBI* (n 21) 1117 [89] (Jagot and Beech-Jones JJ); *Mango Boulevard* (n 40) 260 [45] (Jackson J).

are many other *Model Law* States across the Asia-Pacific and beyond,[61] and much international English language ICA case law (as noted above). Still, the common ICA framework shared by Australia, Singapore, Hong Kong, and New Zealand provides a legal foundation for *TCL v Castel's* interpretative directive.

In addition to that legal foundation, Singapore and Hong Kong are leading global (and no longer just regional)[62] arbitration centres.[63] Those jurisdictions' cases interpreting the *New York Convention* and *Model Law* can thus fairly be described as having global significance. When Australian courts refer to them, in turn, those courts can be seen as adopting a de facto internationalist approach to those instruments' interpretation.

C *Results: Evidencing Australia's Receptiveness to Singaporean, Hong Kong, and New Zealand ICA Case Law*

What evidence is there, then, of Australian courts actually treating Singaporean, Hong Kong, and New Zealand ICA case law as 'especially' important?[64] In this Part I identify several examples. According to the Lexis Advance database as at 2 December 2024, 242 cases have addressed the *International Arbitration Act 1974* (Cth) since the *International Arbitration Amendment Act 2010* (Cth) came into force on 6 July 2010,[65] and there are 339 instances of courts addressing Australia's domestic commercial arbitration Acts[66] (treated as ICA cases for present purposes given the *Model Law* foundations of those Acts). Given these case numbers, my examples are necessarily select. In this context, then, I evidence Australia's receptiveness to Singaporean, Hong Kong, and New Zealand ICA case law by reference to *qualitatively impactful* examples.

1 *TCL v Castel: A Starting Point*

Unsurprisingly, *TCL v Castel* is an excellent starting point. Of its international case citations, 18 are from Singapore, Hong Kong, and New Zealand, while 28 come from the rest of the world.[67] On a strictly numerical basis, citations to Singaporean, Hong Kong, and New Zealand cases are overrepresented. Although this evidence is not

---

61 Justice Clyde Croft, 'The Judicial Approach to Arbitration: An Asia Pacific Perspective' (Conference Paper, Arbitrators' and Mediators' Institute of New Zealand Conference, August 2014) 1 <https://www.supremecourt.vic.gov.au/about-the-court/speeches/the-judicial-approach-to-arbitration-an-asia-pacific-perspective> ('The Judicial Approach'); UN, '*Model Law* Status' (n 6).

62 Cf Loukas A Mistelis, 'Arbitral Seats: Choices and Competition' in Stefan Kröll, Loukas A Mistelis, María Pilar Perales Viscasillas and Vikki M Rogers (eds), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution* (Kluwer Law International, 2011) 363, 377.

63 School of International Arbitration, Queen Mary University of London (n 12) 6–7.

64 *TCL v Castel* (n 37) 384 [75] (Allsop CJ, Middleton and Foster JJ).

65 *International Arbitration Amendment Act 2010* (Cth) s 2(1).

66 There are 6 cases referencing the *Commercial Arbitration Act 2017* (ACT), 114 referencing the *Commercial Arbitration Act 2010* (NSW), 8 referencing the *Commercial Arbitration (National Uniform Legislation) Act 2011* (NT), 23 referencing the *Commercial Arbitration Act 2013* (Qld), 24 referencing the *Commercial Arbitration Act 2011* (SA), 11 referencing the *Commercial Arbitration Act 2011* (Tas), 60 referencing the *Commercial Arbitration Act 2011* (Vic), and 93 referencing the *Commercial Arbitration Act 2012* (WA). The word 'instances' rather than 'cases' is used in this note's accompanying text as these jurisdictional numbers are not mutually exclusive; some cases refer to more than one (sometimes even all) of the domestic commercial arbitration Acts.

67 *TCL v Castel* (n 37) 363–6.

itself qualitative, it provides context for *TCL v Castel's* substantive resolution, where the Full Federal Court rejected the legitimacy of dressing up merits challenges to awards as being based on natural justice concerns.[68] In analysing natural justice, *TCL v Castel* referred to Singaporean, Hong Kong, and New Zealand cases.[69] That this analysis is qualitatively impactful is confirmed by its subsequent scholarly[70] and judicial[71] attention. It is interesting also to observe that *TCL v Castel* itself described the issue as being a matter 'of some importance'.[72]

2 *TCL v Castel: A Springboard*

Cases citing *TCL v Castel* also tend to cite case law from Singapore, Hong Kong, and New Zealand. For example, in *Guoao Holding Group Co Ltd v Xue (No 2)*, the Federal Court noted that *TCL v Castel* had 'adopted comments of Bokhary PJ and Sir Anthony Mason in *Hebei Import & Export Corp v Polytek Engineering Co Ltd*' from Hong Kong.[73] Equivalent analyses are seen elsewhere.[74] By way of further example, the Victorian Supreme Court in *Full Joy Foods Pty Ltd v Australian Dairy Park Pty Ltd* identified that '[i]n *TCL*, the Full Court accepted as "helpful … but not determinative" the following list of general principles distilled by Fisher J in *Trustees of Rotoaira Forest Trust v Attorney-General*' regarding public policy and natural justice.[75] Other cases are to similar effect,[76] and there are more examples.[77]

---

68 Ibid 376 [54] (Allsop CJ, Middleton and Foster JJ).

69 Ibid 380–1 [64], 384–5 [76], 385–6 [79] (Allsop CJ, Middleton and Foster JJ).

70 See, eg, Chester Brown and Malcolm Holmes, *The International Arbitration Act 1974: A Commentary* (LexisNexis, 3rd ed, 2018) 91, 105–6; Shaheer Tarin and Ozlem Susler, 'Judicial Approaches to Enforcing Foreign Arbitral Awards in Australia and Singapore' (2020) 21(2) *Flinders Law Journal* 201, 218–19; Jonathan Hill, 'Claims That an Arbitral Tribunal Failed to Deal With an Issue: The Setting Aside of Awards under the *Arbitration Act 1996* and the *UNCITRAL Model Law on International Commercial Arbitration*' (2018) 34(3) *Arbitration International* 385, 412–13; Stephen R Tully, 'Challenging Awards Before the National Courts for a Denial of Natural Justice: Lessons from Australia' (2016) 32(4) *Arbitration International* 659, 665–6, 675.

71 *Indian Farmers No 1* (n 40) 207 [18] (Croft J); *Sauber Motorsport AG v Giedo van der Garde BV* (2015) 317 ALR 786, 789 [8], 790 [17] (Whelan, Beach and Ferguson JJA); *Colin Joss & Co Pty Ltd v Cube Furniture Pty Ltd* [2015] NSWSC 735, [45], [56], [79] (Hammerschlag J); *ALYK (HK) Ltd v Caprock Commodities Trading Pty Ltd* [2015] NSWSC 1006, [16] (Black J); *Cameron* (n 40) [22], [35], [59] (Croft J); *Amasya* (n 40) [18] (Croft J); *Lysaght* (n 40) 209 [29] (Croft J); *Mango Boulevard* (n 40) 255 [20] (Jackson J).

72 *TCL v Castel* (n 37) 367 [11] (Allsop CJ, Middleton and Foster JJ).

73 *Guoao* (n 40) [33] (Stewart J). See *Hebei Import & Export Corp v Polytek Engineering Co Ltd* [1999] 2 HKCFAR 111.

74 *Gemcan* (n 40) [78] (Riordan J); *Mango Boulevard Pty Ltd v Mio Art Pty Ltd* [2018] QCA 39, [103] (McMurdo JA, Fraser JA agreeing at [1]) ('*Mango Appeal*'); *Gutnick v Indian Farmers Fertiliser Cooperative Ltd* (2016) 49 VR 732, 740 [19] n 31 (Warren CJ, Santamaria and Beach JJA); *Indian Farmers No 1* (n 40) 212–13 [33]–[35] (Croft J); *Liaoning* (n 40) [102] (Gleeson J).

75 *Full Joy Foods Pty Ltd v Australian Dairy Park Pty Ltd* [2020] VSC 672, [75] (Niall JA). See *Trustees of Rotoaira Forest Trust v Attorney-General* [1999] 2 NZLR 452.

76 *Amasya* (n 40) [45]–[47], [49] (Croft J); *Hui v Esposito Holdings Pty Ltd* (2017) 345 ALR 287, 342 [226] (Beach J); *Mango Appeal* (n 74) [17] n 14 (Morrison JA); *Mango Boulevard* (n 40) 275 [102]–[103] (Jackson J); *The Nuance Group (Australia) Pty Ltd v Shape Australia Pty Ltd* (2021) 395 ALR 720, 750–1 [138]–[139] (Rees J) ('*Nuance*').

77 *Lieschke v Lieschke* [2022] NSWSC 1705, [7], [10], [16], [151] (Rees J) ('*Lieschke*'); *Nuance* (n 76) 749 [132], 752 [143], 753 [147] (Rees J); *Sharma v Military Ceramics Corp* [2020] FCA 216, [48]–[49] (Stewart J); *Tayar v Feldman* [2020] VSC 66, [150] nn 46–7 (Lyons J) ('*Tayar*'); *Mango Boulevard* (n 40) 258 [31]–[34], 260 [47] n 21, 269 [86] (Jackson J); *Lysaght* (n 40) 211–12 [34]

Regarding qualitative impact, here we see courts drawing on *TCL v Castel's* own reasoning in conjunction with its interpretative directive.

3 *TCL v Castel: Reflected in Party Submissions*

Further evidence of *TCL v Castel's* interpretative directive having qualitative impact can be seen in courts recounting party submissions drawing heavily on Singaporean and Hong Kong ICA case law.[78] Such submissions demonstrate practitioner awareness of the value placed by Australian courts on those jurisdictions' cases.

4 *Minimum Curial Intervention*

Perhaps one of the most qualitatively impactful examples of Singaporean and Hong Kong ICA case law's interpretative influence in Australia relates to the principle of minimum (or minimal) curial intervention. Post-2010 Australian ICA cases have endorsed this principle, typically citing both *TCL v Castel* and relevant Singaporean and Hong Kong cases.[79] That this approach is particularly impactful emerges from three considerations. First, the High Court of Australia has identified this principle twice, very recently, with reference to Singaporean cases.[80] Second, the *International Arbitration Amendment Act 2010* (Cth) was passed amid some Australian courts intervening in the ICA process more than the *New York Convention* and *Model Law* envisage,[81] and those cases were considered damaging to Australia's ICA reputation.[82] Third, Australia's contemporary adherence to this principle features in its ICA branding, communicated (for example) through judges' extra-curial writings.[83]

---

n 24, 212 [35] (Croft J); *Liaoning* (n 40) [117]–[118] (Gleeson J); *Amasya* (n 40) [28]–[30], [82] n 158, [92] n 171 (Croft J); *Indian Farmers No 1* (n 40) 210 [28] n 41 (Croft J); *Cameron* (n 40) [17] n 17, [53] n 140 (Croft J); *Indian Farmers No 2* (n 40) [6] n 10, [13]–[17] (Croft J); *William Hare NSWSC* (n 40) 264–5 [124] (Darke J).

78 See, eg, *Cameron* (n 40) [23] nn 31–45, 48–9, 51–5, 60, 62–5, [45] n 126, [51] n 137 (Croft J); *Lysaght* (n 40) 218–19 [52]–[54] (Croft J); *Amasya* (n 40) [44], [90] (Croft J).

79 *Lieschke* (n 77) [14]–[15] (Rees J); *Gemcan* (n 40) [74] (Riordan J); *Tayar* (n 77) [59] n 17, [135] (Lyons J); *Spaseski v Mladenovski* [2019] WASC 65, [55]–[57], [60] (Kenneth Martin J) ('*Spaseski*'); *Mango Appeal* (n 74) [85] n 82 (Morrison JA); *Mango Boulevard* (n 40) 255–7 [20] (Jackson J); *Amasya* (n 40) [23], [74] (Croft J); *Indian Farmers No 1* (n 40) 208 [21]–[22] (Croft J); *Robotunits* (n 40) 329 [14] (Croft J); *Cameron* (n 40) [20]–[21], [34] n 95 (Croft J).

80 *CBI* (n 21) 1107 [41] (Gageler CJ, Gordon, Edelman, Steward and Gleeson JJ); *Tesseract* (n 21) 924 [219], 925 [226] (Edelman J).

81 See, eg, *Re Resort Condominiums International Inc* [1995] 1 Qd R 406, 427 (Lee J): 'a general discretion exists whether to enforce a foreign award' even if no ground for refusal is established; *Corvetina Technology Ltd v Clough Engineering Ltd* (2004) 183 FLR 317, 320 [10] (McDougall J): the public policy defence is 'wide'.

82 Robert McClelland, 'International Commercial Arbitration in Australia: More Effective and Certain' (Speech, International Commercial Arbitration: Efficient, Effective, Economical? Conference, 4 December 2009): 'I am sure no one here needs reminding of the impact that the *Eisenwerk* decision has had on Australia's reputation internationally'. See ***Australian Granites Ltd v Eisenwerk Hensel Bayreuth Dipl-Ing Burkhardt GmbH*** [2001] 1 Qd R 461.

83 See, eg, Croft, 'The Temptation of Domesticity' (n 41) 60–1; Chief Justice James Allsop and Justice Clyde Croft, 'The Role of the Courts in Australia's Arbitration Regime' (Seminar Paper, Commercial CPD Seminar Series, 11 November 2015) 4–5 <https://www.supremecourt.vic.gov.au/about-the-court/speeches/the-role-of-the-courts-in-australias-arbitration-regime>; Croft, 'The Judicial Approach' (n 61) 1, 3; Justice James Allsop, 'International Arbitration and the Courts: The Australian

5 *The Discretion to Enforce*

Another example of Singaporean and Hong Kong case law having a particular qualitative impact on Australian ICA law is seen in Australia's recognition of an enforcement (or annulment) court's discretion to enforce an award (or decline annulment) notwithstanding the existence of a challenge ground. Australian courts now recognise this discretion, with reference to Singaporean and Hong Kong case law.[84] This interpretative influence ensures that Australian courts respect the text of the *New York Convention* art V and *Model Law* art 34(2), all using the permissive 'may' regarding award challenges,[85] notwithstanding the potentially narrow scope for exercising this discretion.[86]

6 *The Model Law in the High Court of Australia*

Finally, returning to the two High Court cases referenced in Part III(C)(4), both cite Singaporean and Hong Kong cases throughout, the most recent quite liberally.[87] Here, the influence of Singaporean and Hong Kong ICA case law is felt not only in these two decisions, but also in the signalling effect that their citation practices have for future disputes.

What emerges from this analysis is both a stated and evidenced preference of Australian courts for Singaporean, Hong Kong, and New Zealand ICA case law. What, then, of the *CISG*? Can Australia's courts take a similar practical approach to effect its internationalist interpretation? This is the question to which I turn in Part IV.

IV Internationalist Interpretation Examined: The *CISG* in Australia

It is well known that Australia's courts have not taken a consistently internationalist approach to the *CISG's* interpretation, despite the *CISG* art 7(1) requirement to do so.[88] In this Part, I show that Australia's courts cannot correct this state of affairs via ICA's practical strategy of referring 'especially'[89] to Singaporean, Hong Kong, and

---

Approach' (Conference Paper, CIArb Asia Pacific Conference, 2011) 6–7 <https://supremecourt.nsw.gov.au/documents/Publications/Speeches/Pre-2015-Speeches/Assorted---A-to-K/allsop_index.pdf>; Croft, 'Can Australian Courts Get Their Act Together?' (n 18) 18; Chief Justice Marilyn Warren, 'The Victorian Supreme Court's Perspective on Arbitration' (Speech, International Commercial Arbitration: Efficient, Effective, Economical? Conference, 4 December 2009) 4.

84 *Hub Street Appeal* (n 40), 320 [92], 321 [95]–[97] (Stewart J, Allsop CJ agreeing at 301 [1], Middleton J agreeing at 302 [12]); *Spaseski* (n 79) [64], [112] (Kenneth Martin J); *Indian Farmers No 1* (n 40) 234 [113]–[114] (Croft J); *Cameron* (n 40) [23] (Croft J); *TCL v Castel* (n 37) 375 [48] (Allsop CJ, Middleton and Foster JJ).

85 Born (n 10) 3435, 3741–2.

86 Ibid 3436, 3745–6.

87 *CBI* (n 21) 1101 [15] n 6, 1102 [18], 1104 [25] n 24, 1105 [28]–[29] nn 34–7, 1105 [30] nn 39–40, 1106 [35] n 45, 1106 [37] n 47, 1107 [41] n 49, 1108 [45] nn 57–60, 1108 [47] (Gageler CJ, Gordon, Edelman, Steward and Gleeson JJ), 1112 [66] n 101–2, [69], 1114–15 [75]–[77], 1116–17 [84]–[87], 1117 [89] (Jagot and Beech-Jones JJ); *Tesseract* (n 21) 889 [32]–[33], 891 [46] (Gageler CJ), 901 [103] (Gordon and Gleeson JJ), 923 [214] n 219, 923 [216] n 221, 925 [226] n 228 (Edelman J), 947 [342] n 346 (Jagot and Beech-Jones JJ).

88 Anastasi, Hayward and Brown (n 22) 37–44.

89 *TCL v Castel* (n 37) 384 [75] (Allsop CJ, Middleton and Foster JJ).

New Zealand cases. The reason is that only limited helpful *CISG* case law exists in those jurisdictions.

For the purposes of clarity, I do not claim that this lack of Singaporean, Hong Kong, and New Zealand *CISG* case law has *caused* Australia's *CISG* status quo. Instead, identifying this relative lack of helpful case law is essential context for charting the course ahead, a matter I address in Part V.

A *Singapore's CISG Case Law*

Singapore acceded to the *CISG* on 16 February 1995,[90] giving it force of law via the *Sale of Goods (United Nations Convention) Act 1995* (Singapore, 2020 rev ed). Although the *CISG* has been part of Singaporean law for approximately 30 years, no Singaporean cases apply the instrument.

In order to identify all Singaporean *CISG* cases — by which I mean Singaporean cases relating to the *CISG* in any way — I conducted searches across the vLexJustis database, the eLitigation Supreme Court Judgments database,[91] the Albert H Kritzer *CISG* Database,[92] *CISG*-online,[93] UNCITRAL's CLOUT database,[94] and UNILEX.[95] The vLexJustis and eLitigation Supreme Court Judgments databases were my primary search vehicles.[96] Though they are not commonly used by *CISG* scholars, they (collectively) contain all reported and unreported Singaporean judgments, and are thus complete repositories of all types of Singaporean cases. That being so, supplementary reference was made to the other databases listed above to ensure that my search was as thorough as possible. While 20 cases were identified,[97] none apply the *CISG*.

---

90 UN, 'Chapter X' (n 4) 2.

91 eLitigation, 'Supreme Court Judgments' (Web Page, 1 August 2024) <https://www.elitigation.sg/gd/>.

92 Pace University Elisabeth Haub School of Law, 'Search Cases in the *CISG* Database', *Pace Law Albert H Kritzer CISG Database* (Web Page) <https://iicl.law.pace.edu/cisg/search/cases>. Though there is a perception that the Albert H Kritzer *CISG* Database is no longer regularly updated, this is not so, particularly for the jurisdictions I examined for this article. Free registration is required to access the Database's case law search functionality.

93 Faculty of Law University of Basel, 'Search for Cases', *CISG-online* (Web Page, 2024) <https://cisg-online.org/search-for-cases>.

94 UN, 'CLOUT' (n 49).

95 'Selected Cases by Country', *UNILEX* (Web Page) <unilex.info/cisg/cases/country/all>.

96 The following (exact phrase) search terms were used across each: 'CISG', 'Vienna Sales', 'Convention on Contracts', 'Convention on International Sale', 'Convention on the International Sale', and 'Sale of Goods (United Nations Convention) Act'. The search term 'Vienna Convention' was omitted, so as to eliminate false positive results referencing the *VCLT* (n 30).

97 As at 2 December 2024, and excluding irrelevant cases where the party name 'CIFG' was misspelled on one occasion as 'CISG' (*CIFG Special Assets Capital I Ltd v Ong Puay Koon* [2018] 1 SLR 170, 175 [15] (Sundaresh Menon CJ)) and where the carriage of goods (rather than the sale of goods) was involved (*Wilmar Trading Pte Ltd v Heroic Warrior Inc* [2020] 1 Lloyd's Rep 130).

Of the 20 cases, 13 reference the *CISG* in ICA contexts.[98] As courts do not review the merits of disputes in ICA-related litigation,[99] Singapore's courts had no capacity to apply the *CISG* in these cases, even where it was the arbitrated contract's governing law. Singapore's status as a global arbitration centre might explain its lack of case law applying the *CISG*, with several pieces of evidence supporting that conclusion:

- approximately two-thirds of Singapore's *CISG* cases exist in this ICA context;
- the two most recent cases involved Singapore-seated arbitrations;[100] and
- the *CISG* has an empirically confirmed relationship with ICA.[101]

Although Singapore has made a *CISG* art 95 declaration,[102] it is probably not true that this 'seriously' curtails the *CISG's* Singaporean application, as suggested elsewhere.[103] With the *CISG* now having 97 Contracting States,[104] *CISG* art 1(1)(a) (causing the *CISG* to apply where both parties are from Contracting States) is 'the standard avenue for the *CISG's* applicability'.[105] Indeed, two out of Singapore's top

---

98 Award enforcement and set aside cases: *Quarella SpA v Scelta Marble Australia Pty Ltd* [2012] 4 SLR 1057, 1060–3 [8], [13]–[21], [23]–[26], [29], 1064 [32], 1066–9 [37]–[39] (Judith Prakash J); *Triulzi Cesare SRL v Xinyi Group (Glass) Co Ltd* [2015] 1 SLR 114, 121 [17], 159–62 [160]–[165] (Belinda Ang Saw Ean J); *Quanzhou Sanhong Trading Limited Liability Co Ltd v ADM Asia-Pacific Trading Pte Ltd* [2017] SGHC 199, [15], [17]–[18] (Chua Lee Ming J); *Man Diesel Turbo SE v IM Skaugen Marine Services Pte Ltd* [2019] 4 SLR 537, 569–70 [92]–[93] (Belinda Ang Saw Ean J); *BVU v BVX* [2019] SGHC 69, [4(e)], [23]–[24], [28], [89]–[91], [94], [101] (Ang Cheng Hock JC); *BXH v BXI* [2020] 1 SLR 1043, 1057–8 [51] (Steven Chong JA for the Court); *Lao Holdings NV v Government of the Lao People's Democratic Republic* [2021] 5 SLR 228, 270 [134]–[135] (Quentin Loh JAD, Vivian Ramsey and Douglas Jones IJJ); *Lao Holdings NV v Government of the Lao People's Democratic Republic* [2023] 1 SLR 55, 86 [119] (Robert French IJ for the Court); *Siddiqsons Tin Plate Ltd v New Metallurgy Hi-Tech Group Co Ltd* [2024] SGHC 272, [10], [46]–[53] (Hri Kumar Nair J) ('*Siddiqsons*'). Otherwise regarding arbitration: *Mitsui Engineering & Shipbuilding Co Pty Ltd v PSA Corp Ltd* [2003] 1 SLR 446, 453–4 [35] (Woo Bih Li JC); *Silverlink Resorts Ltd v MS First Capital Insurance Ltd* [2021] 3 SLR 1422, 1431 [26] (Chua Lee Ming J); *Hunan Xiangzhong Mining Group Ltd v Oilive Pte Ltd* [2022] 5 SLR 239, 244–5 [7] (S Mohan J); *DGE v DGF* [2024] SGHC 107, [4]–[5], [16]–[17], [25], [27], [42], [54], [61], [80], [89], [94], [128]–[138], [141], [151], [173]–[189] (Kristy Tan JC) ('*DGE*').

99 *AKN v ALC* [2015] 3 SLR 488, 503–4 [37] (Sundaresh Menon CJ for the Court); *AJU v AJT* [2011] 4 SLR 739, 772 [65]–[66] (Chan Sek Keong CJ for the Court); Born (n 10) 3437–8, 3760.

100 *DGE* (n 98) [1] (Kristy Tan JC); *Siddiqsons* (n 98) [72] (Hri Kumar Nair J).

101 Ingeborg Schwenzer and Edgardo Muñoz, *Global Sales and Contract Law* (Oxford University Press, 2nd ed, 2022) 76–7 [5.10]–[5.11].

102 Pursuant to this declaration, Singapore will not apply *CISG* (n 4) art 1(1)(b), which causes the treaty to apply 'when the rules of private international law lead to the application of the law of a Contracting State': see UN, 'Chapter X' (n 4) 4; *Sale of Goods (United Nations Convention) Act 1995* (Singapore, 2020 rev ed) s 3(2).

103 Gary F Bell, 'Why Singapore Should Withdraw its Article 95 Reservation to the *United Nations Convention on Contracts for the International Sale of Goods* (*CISG*)' (2005) 9 *Singapore Year Book of International Law* 55, 56.

104 UN, 'Chapter X' (n 4) 1.

105 Pascal Hachem, 'Article 1 CISG: Sphere of Application' in Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 5th ed, 2022) 26, 29 [6].

three trading partners (Mainland China and the United States of America ('US'), but not Malaysia)[106] are *CISG* jurisdictions.[107]

Singapore's seven remaining *CISG* cases also do not apply the treaty. One concerns a distributorship agreement,[108] two quote *CISG* exclusions where the parties' dispute actually involved jurisdictional questions,[109] and the remaining four apply non-harmonised Singaporean contract law and reference the *CISG* for comparative purposes.[110]

At most, Australia's courts might gain limited interpretative assistance from Singapore's cases comparing the *CISG* with non-harmonised Singaporean contract law. Otherwise, no Singaporean *CISG* interpretative assistance exists.

B *Hong Kong's CISG Case Law*

Compared with Singapore, Hong Kong's *CISG* history is recent. The People's Republic of China ('PRC') was an original *CISG* Contracting State.[111] However, the United Kingdom's abstention from *CISG* membership and Hong Kong's handover to the PRC on 1 July 1997 left it 'at best unclear'[112] whether the *CISG* applied in that Special Administrative Region ('SAR'). In addition, there is 'diverse case law on this question'.[113] From the PRC's perspective, the *CISG* extends to the Hong Kong SAR only from 1 December 2022, via the *Sale of Goods (United Nations Convention) Ordinance* (Hong Kong) cap 641.[114] Since I examine in this Part the *CISG's* application in Hong Kong, it is this PRC perspective that is relevant. Still, it is possible for Hong Kong *CISG* case law to pre-date 1 December 2022 if the *CISG* was applied as part of a foreign governing law, or if it were applied to contracts between Mainland China and Hong Kong entities via choice of law clauses having

---

106 Department of Statistics Singapore, 'Singapore's International Trade', *SingStat* (Web Page, 8 April 2025) <https://www.singstat.gov.sg/modules/infographics/singapore-international-trade>.

107 UN, 'Chapter X' (n 4) 1–2.

108 *William Jacks & Co (Singapore) Pte Ltd v Nelson Honey & Marketing (NZ) Ltd* [2015] SGHCR 21, [67] (Zhuang WenXiong AR). Distributorship agreements are not sale of goods contracts for the purposes of *CISG* (n 4) art 1(1).

109 *Allianz Capital Partners GmbH v Andress Goh* [2022] SGHC 266, [62] (See Kee Oon J); *Allianz Capital Partners GmbH v Andress Goh* [2023] 1 SLR 1618, 1625 [14] (Kannan Ramesh JAD for the Court).

110 *Charles Lim Teng Siang v Hong Choon Hau* [2021] 2 SLR 153, 165 [39] (Steven Chong JCA for the Court); *Sembcorp Marine Ltd v PPL Holdings Pte Ltd* [2013] 4 SLR 193, 211–12 [37] (Sundaresh Menon CJ for the Court); *Zurich Insurance (Singapore) Pte Ltd v B-Gold Interior Design & Construction Pte Ltd* [2008] 3 SLR(R) 1029, 1060–1 [62] (VK Rajah JA for the Court); *Chwee Kin Keong v Digilandmall.com Pte Ltd* [2004] 2 SLR(R) 594, 621 [100] (VK Rajah JC).

111 Ulrich Schroeter, 'Article 99 CISG: Entry into Force' in Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 5th ed, 2022) 1647, 1650 [9].

112 Ulrich G Schroeter, 'The Status of Hong Kong and Macao under the *United Nations Convention on Contracts for the International Sale of Goods*' (2004) 16(2) *Pace International Law Review* 307, 309.

113 UNCITRAL: United Nations Commission on International Trade Law, 'Topic 3: The *CISG* as a Backbone of Transnational Commercial Law', *YouTube* (Seminar Recording, 30 October 2020) 00:13:45–00:14:12 (Professor Ingeborg Schwenzer) <https://www.youtube.com/watch?v=GidMVLIO6Ig> ('Topic 3').

114 Unlike Mainland China (and Singapore), Hong Kong does not disapply *CISG* (n 4) art 1(1)(b): UN, 'Chapter X' (n 4) 3.

that effect (as in Mainland Chinese court practice).[115] For this reason, I did not confine my case law search to 1 December 2022 and beyond.

In order to identify all of Hong Kong's *CISG* cases, my primary search was conducted across the Westlaw US & International database.[116] Supplementary reference was again made to the Albert H Kritzer *CISG* Database, *CISG*-online, UNCITRAL's CLOUT database, and UNILEX. No cases dated on or after 1 December 2022 were returned. Six prior cases were identified,[117] all referencing *CISG* exclusions.[118]

While Hong Kong (like Singapore) is a global arbitration centre, the *CISG's* recent extension to that SAR is the most likely reason for its current lack of *CISG* case law; though Hong Kong's arbitration hub credentials may limit its generation of *CISG* case law into the future. In any event, since no existing Hong Kong cases interpret the *CISG*, no interpretative assistance is provided to Australia's courts.

C *New Zealand's CISG Case Law*

The position differs in New Zealand, which adopted the *CISG* at a similar time to Singapore (22 September 1994),[119] gave the treaty initial effect via the *Sale of Goods (United Nations Convention) Act 1994* (NZ),[120] and currently enacts it via the *Contract and Commercial Law Act 2017* (NZ) ss 202–6.[121]

In order to identify all New Zealand *CISG* cases, I employed a different search strategy as compared to that for Singapore and Hong Kong's cases. This is because existing scholarship identifies some *CISG* cases heard by New Zealand

---

115 See, eg, Geng Wang, Shu Zhang and Peng Guo, 'Chapter 1: *Novelact (Resources) Limited v Xiamen Special Economic Zone International Trade Trust Company*' in Peng Guo, Haicong Zuo and Shu Zhang (eds), *Selected Chinese Cases on the UN Sales Convention (CISG) Vol 1* (Springer, 2022) 1, 5. The *CISG* (n 4) would not be applicable on its own terms here because the parties would not be 'in different States': see *CISG* (n 4) art 1(1).

116 The same exact phrase search terms were used as for Singapore (see n 96), though substituting 'Sale of Goods (United Nations Convention) Ordinance' for 'Sale of Goods (United Nations Convention) Act'.

117 Putting aside two Philippines decisions returned by the Westlaw US & International database in error: *Benjamin Bautista v Shirley G Unangst* [2008] PHSC 664 (actually referring to the Criminal Investigation Service Group, rather than the *CISG* (n 4) treaty); *MCC Industrial Sales Corp v Ssangyong Corp* [2007] PHSC 1235, n 82 (Nachura J).

118 *Beyond the Network Ltd v Vectone Ltd* [2005] HKEC 2075, [6] (Reyes J); *PCCW Global Ltd v Interactive Communications Services Ltd* [2007] 1 HKLRD 309, 312 [8] (Tang V-P); *Klöckner Pentaplast GmbH & Co KG v Advance Technology (HK) Co Ltd* [2011] 4 HKLRD 262, 266 [5] (Saunders J); *Klöckner Pentaplast GmbH & Co KG v Advance Technology (HK) Co Ltd* [2011] HKEC 1401, [4] (Tang V-P); *Defond Electrical Industries Ltd v Partminer Worldwide Inc* [2011] HKEC 335, [3] (Chan DJ); *CEP Ltd v* 无锡市佳诚太阳能科技有限公司 [2014] HKEC 581, [3] n 1 (Recorder Jat Sew Tong SC).

119 UN, 'Chapter X' (n 4) 2.

120 Pursuant to the *Sale of Goods (United Nations Convention) Act Commencement Order 1995* (NZ) ord 2, the *Sale of Goods (United Nations Convention) Act 1994* (NZ) came into force on 1 October 1995.

121 The *Contract and Commercial Law Act 2017* (NZ) s 345(1)(j) repealed the *Sale of Goods (United Nations Convention) Act 1994* (NZ).

courts.[122] As a starting point, I independently sourced and read these pre-identified judgments. Acknowledging that some *CISG* cases may have been missed in this scholarship – a possibility that eventuated – I then conducted my own search across all dates via the New Zealand Legal Information Institute case law database.[123] Lexis Advance was used to determine whether cases thereby identified had been reported in the *New Zealand Law Reports*. Supplementary reference was again made to the Albert H Kritzer *CISG* Database, *CISG*-online, UNCITRAL's CLOUT database, and UNILEX. A total of 29 New Zealand *CISG* cases were returned.

Butler's scholarship suggests that New Zealand's pre-2010 *CISG* cases mostly refer to the treaty for comparative purposes, when applying non-harmonised New Zealand contract law.[124] My searches (identifying 17 relevant cases) confirm this, and also identify early references to the *CISG* for other contextual purposes.[125] New Zealand's case law comparing the *CISG* to its non-harmonised contract law may offer Australian courts limited interpretative insights. In New Zealand, more cases of this nature exist than in Singapore.

The first New Zealand case applying the *CISG* was the 2010 High Court decision in *Smallmon v Transport Sales Ltd*.[126] The *CISG* was also applied in the appeal from that decision.[127] Referring to New Zealand's *CISG* implementing legislation, the High Court recognised that the *CISG* displaced the *Sale of Goods Act*

---

122 Petra Butler, 'New Zealand' in Larry A DiMatteo (ed), *International Sales Law: A Global Challenge* (Cambridge University Press, 2014) 539, 540–4 ('New Zealand 2014'); Petra Butler, 'New Zealand' in Franco Ferrari (ed), *The CISG and Its Impact on National Legal Systems* (Sellier European Law Publishers, 2008) 251, 254–8 ('New Zealand 2008'); Petra Butler, 'The Use of the *CISG* in Domestic Law' (2011) 15(1) *Vindobona Journal of International Commercial Law and Arbitration* 15, 17, 19–20, 24–6.

123 The same exact phase search terms were used as for Singapore (see n 96), retaining 'Sale of Goods (United Nations Convention) Act', and adding the exact phrase search term 'Contract and Commercial Law Act'. Noting that the *Contract and Commercial Law Act 2017* (NZ) addresses contract and commercial law in general (inclusive of the *CISG* (n 4)), my search using that term on 2 December 2024 returned 1236 cases, none of which were *CISG* (n 4) cases not already identified by other means.

124 Butler, 'New Zealand 2014' (n 122) 546.

125 *Crump v Wala* [1994] 2 NZLR 331, 338 (Hammond J); *Attorney-General v Dreux Holdings Ltd* (1997) 7 TCLR 617, 627–8 (Blanchard J), 642 (Thomas J) ('*Dreux Holdings*'); *BP Oil NZ Ltd v Rhumvale Resources Ltd* (1997) 8 TCLR 116, 123–4 (Keith J); *Tri-Star Customs and Forwarding Ltd v Denning* [1999] 1 NZLR 33, 37 (Henry J); *Integrity Cars (Wholesale) Ltd v Chief Executive of New Zealand Customs Service* [2001] NZCA 86, [19] (Keith J); *Yoshimoto v Canterbury Golf International Ltd* [2001] 1 NZLR 523, 547–8 [88]–[90] (Thomas J) ('*Yoshimoto*'); *Bobux Marketing Ltd v Raynor Marketing Ltd* [2002] 1 NZLR 506, 515 [39] (Thomas J); *KA (Newmarket) Ltd v Hart* (High Court of New Zealand, Heath J, 10 May 2002) [68]; *Thompson v Cameron* (High Court of New Zealand, Chambers J, 27 March 2002) [20]; *International Housewares (NZ) Ltd v SEB SA* (High Court of New Zealand, Master Lang, 31 March 2003) [44]–[45], [59]; *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2008] 1 NZLR 277, 295 [55] (Tipping J) (not referencing the *CISG* (n 4) by name, but citing *Dreux Holdings* (n 125) and referring to 'general international trade practice'); *MH Publications Ltd v Komori (UK) Ltd* [2008] NZHC 2570, [36], [200] (DI Gendall AsJ); *Dysart Timbers Ltd v Nielsen* [2009] 3 NZLR 160, 174 [55] n 32 (McGrath J); *Fairfax v Ireton* [2009] 3 NZLR 289, 331 [180] (Baragwanath J); *Alcatel-Lucent NZ Ltd v Juniper Networks Australia Pty Ltd* [2009] NZHC 2258, [47] (Clifford J); *Nils Sperre AS v Vela Fishing Ltd* [2009] NZHC 1651, [2], [7], [9] (Duffy J); *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] 2 NZLR 444, 449, 452 (McIntosh) (during argument) ('*Vector Gas*').

126 *Smallmon v Transport Sales Ltd* [2010] NZHC 1367 ('*Smallmon Trial*'). See also Butler, 'New Zealand 2014' (n 122) 544.

127 *Smallmon v Transport Sales Ltd* [2012] 2 NZLR 109 ('*Smallmon Appeal*').

1908 (NZ).[128] With reference to *CISG* art 7, the High Court rejected both parties' attempts to rely on 'domestic sale of goods law'.[129] The High Court recognised art 7(1)'s autonomous interpretation rule;[130] and evidenced that rule's application by referencing international case law and scholarship regarding *CISG* art 35(2).[131] On appeal, the *CISG's* autonomous and internationalist interpretation requirements were again identified[132] and given effect via reference to international scholarship[133] and case law.[134] Furthermore, both courts identified the Pace Law School's *CISG* database (now the Pace Law Albert H Kritzer *CISG* Database) as a source of international *CISG* case law.[135]

There are several reasons why these decisions are instructive from an Australian perspective. First, Australian courts have generally failed to interpret the *CISG* in accordance with the internationalist requirements of *CISG* art 7(1).[136] Second, Australian courts have sometimes failed to appreciate that the *CISG's* application displaces non-harmonised sales law to the subject-matter extent of *CISG* art 4.[137] And third, *CISG* art 35(2) has often been at issue in Australian *CISG* litigation.[138] Referencing both *Smallmon* judgments would assist Australian courts in all three respects.

Post-*Smallmon*, 10 additional New Zealand judgments reference the *CISG*. Some reference *CISG* exclusions,[139] some continue to compare the *CISG* with non-harmonised New Zealand contract law,[140] and one identifies that the *CISG* was not argued and not considered regarding a property law question.[141] One applies the

---

128 *Smallmon Trial* (n 126) [62] (French J). The *Sale of Goods Act 1908* (NZ) was repealed by the *Contract and Commercial Law Act 2017* (NZ) s 345(1)(i).

129 *Smallmon Trial* (n 126) [85]–[86] (French J).

130 Ibid [88] (French J).

131 Ibid [82]–[84] (French J).

132 *Smallmon Appeal* (n 127) 119–20 [34], 121 [39], [41] (Stevens J for the Court).

133 Ibid 121 [38] n 26, [40], 122–3 [45] n 38, 125 [58] (Stevens J for the Court).

134 Ibid 121–23 [42]–[48] (Stevens J for the Court).

135 *Smallmon Trial* (n 126) [82] n 1 (French J); ibid 117–18 [26] nn 17–19, 121–3 [42]–[48] nn 29–39 (Stevens J for the Court).

136 See, eg, *Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd* [2010] FCA 1028, [123] (Ryan J); *Castel Electronics Pty Ltd v Toshiba Singapore Pte Ltd* (2011) 192 FCR 445, 460 [89] (Keane CJ, Lander and Besanko JJ); *Fryer Holdings (in liq) v Liaoning MEC Group Co Ltd* [2012] NSWSC 18, [16], [19] (McDougall J) ('*Fryer Holdings*').

137 *Playcorp Pty Ltd v Taiyo Kogyo Ltd* [2003] VSC 108, [235], [245] (Hansen J) ('*Playcorp*'); *A-G (Botswana) v Aussie Diamond Products Pty Ltd (No 3)* [2010] WASC 141, [210] (Murphy J) ('*Aussie Diamond*').

138 Bruno Zeller, 'The *CISG* and the Common Law: The Australian Experience' in Ulrich Magnus (ed), *CISG vs Regional Sales Law Unification: With a Focus on the New Common European Sales Law* (Sellier European Law Publishers, 2012) 57, 76. See, eg, *Fryer Holdings* (n 136) [16] (McDougall J).

139 *Commerce Commission v Viagogo AG* (2024) 16 TCLR 774, 812 [206] (Peters J); *A-Ward Ltd v Raw Metal Corp Pty Ltd* [2024] 2 NZLR 475, 477 [2], 478–9 [8] (O'Gorman J); *Arachchige v Rasier New Zealand Ltd* [2020] NZEmpC 230, app 1 [35] (JC Holden J); *Transdiesel Ltd v MTU America Ltd* [2016] NZHC 280, [19] (Osborne AsJ).

140 *Edwards v Laybuy Holdings Ltd* [2023] NZEmpC 188, [46] n 16 (JC Holden J); *North Shore City Council v Body Corporate 188529 [Sunset Terraces]* [2010] 3 NZLR 486, 506 [44] (Baragwanath J).

141 *Hayat Group Ltd (in liq) v New Zealand Customs* [2011] NZHC 922, [18] (Heath J). But see *CISG* (n 4) art 4(b).

CISG,[142] one applies it indirectly in conjunction with jurisdictional rules,[143] and another jurisdictional judgment mentions the *CISG* as a pleaded cause of action.[144]

The *CISG's* New Zealand operation has been likened to a 'sleeping beauty slumber'.[145] However, although New Zealand has fewer *CISG* cases (29) than Australia (61),[146] its *CISG* case law still stands to benefit Australian courts. One might wonder why this is so. Although New Zealand similarly does not benefit from Singaporean and Hong Kong *CISG* interpretative influence, it must be remembered (as explained at Part IV's outset) that no causative argument is made in this respect. The wording of New Zealand's *CISG* legislation, confirming that the treaty operates as a 'code',[147] is a plausible explanation. That wording clearly identifies that New Zealand's non-harmonised law is displaced where the *CISG* applies,[148] and is a recommended model for Australian legislative reform.[149] Australia's *CISG* Acts, on the other hand, reference the concept of inconsistency,[150] which has led some courts to decline the *CISG's* application on the basis that the *CISG* is (supposedly) consistent with ordinary Australian law.[151] Yet another possible explanation may be the New Zealand courts' greater general receptiveness to international case law and scholarship:[152] should this be the case, it would evidence a mode of reasoning well

---

142 *National Plant and Equipment Pty Ltd v P Mundy Heavy Equipment Ltd* [2020] NZHC 1201, [29], [33]–[42] (RM Bell AsJ).

143 *Nelson Honey & Marketing (NZ) Ltd v William Jacks & Co (Singapore) Pvt Ltd* [2015] NZHC 1215, [51]–[64] (Matthews AsJ).

144 *Hill Forest Services Ltd v Cirrus Design Corp* [2020] NZHC 2551, [16] (Downs J).

145 Butler, 'New Zealand 2008' (n 122) 258.

146 The most recent published census puts Australia's *CISG* case load at 57 decisions: Benjamin Hayward, '"Text, Context, and Purpose": Australian Lawmakers' Adoption of the *CISG*, and the Use of Legislative Histories as Aids in Statutory Interpretation' (2024) 47(2) *Melbourne University Law Review* 303, 385 ('Text, Context, and Purpose'). As at 2 December 2024, three further *CISG*-related decisions have been identified: *Aqua Star Pty Ltd v CP Aquaculture (India) Pvt Ltd* [2024] VSCA 67 (Kennedy and Walker JJA); *Re Aqua Star Pty Ltd* [2024] VSC 377 (Gardiner AsJ); *Walsh v Trustees of the Roman Catholic Church for the Archdiocese of Canberra and Goldburn* (2024) 386 FLR 264, 287 [160] (Curtin AJ). The first two of these do not address the *CISG* (n 4) but are related to *CP Aquaculture (India) Pvt Ltd v Aqua Star Pty Ltd* [2023] VCC 2134 (Macnamara J) ('*CP Aquaculture*'). I have also identified one judgment missed in that published census: *Limit (No 3) Ltd v ACE Insurance Ltd* [2009] NSWSC 514, [147] (Rein J).

147 *Smallmon Trial* (n 126) [62] (French J).

148 *Contract and Commercial Law Act 2017* (NZ) s 205; *Sale of Goods (United Nations Convention) Act 1994* (NZ) s 5, as repealed by *Contract and Commercial Law Act 2017* (NZ) s 345(1)(j).

149 Anastasi, Hayward and Brown (n 22) 51–2.

150 *Sale of Goods (Vienna Convention) Act 1987* (ACT) s 6; *Sale of Goods (Vienna Convention) Act 1987* (Norfolk Island) s 6; *Sale of Goods (Vienna Convention) Act 1986* (NSW) s 6; *Sale of Goods (Vienna Convention) Act 1987* (NT) s 6; *Sale of Goods (Vienna Convention) Act 1986* (Qld) s 6; *Sale of Goods (Vienna Convention) Act 1986* (SA) s 5; *Sale of Goods (Vienna Convention) Act 1987* (Tas) s 6; *Goods Act 1958* (Vic) s 87; *Sale of Goods (Vienna Convention) Act 1986* (WA) s 6; *Competition and Consumer Act 2010* (Cth) sch 2 s 68.

151 *Playcorp* (n 137) [235], [245] (Hansen J); *Aussie Diamond* (n 137) [210] (Murphy J). See also Hayward, 'Text, Context, and Purpose' (n 146) 324–7.

152 I am unable to statistically confirm this observation, though it appears from my review of cases applying New Zealand's non-harmonised contract law and referring to the *CISG* (n 4) for comparative purposes: see, eg, *Yoshimoto* (n 125) 538–9 [59]–[62], 539–40 [64]–[65], 540–41 [67]–[68], 542–3 [71]–[74], 545 [80], 547 [88], 548 [90] (Thomas J); *Vector Gas* (n 125) 453 [5], 455–6 [9], [11], [13]–[14] (Blanchard J), 457 [19] nn 15 – 16, 458 [22] n 20–2, 459 [23] n 24, 460 [29] nn 29–30, 461 [33] n 35, 462 [34]–[37] (Tipping J), 468–71 [57]–[69], 472–4 [72]–[78] (McGrath J), 478 [103], 481–5 [120]–[130], 485 [132], [134], 487 [142] (Wilson J).

suited to discharging the requirements of *CISG* art 7(1).[153] Whatever the reason, New Zealand *CISG* interpretative influence does exist from which Australian courts might benefit.

V Two Recommendations: Supporting the *CISG's* Internationalist Interpretation in Australia

In Parts III–IV I identified an interpretative stratification. While the *New York Convention*, *Model Law*, and *CISG* are all subject to internationalist interpretation rules, the practice of Australian courts in 'especially'[154] referring to Singaporean, Hong Kong, and New Zealand ICA case law cannot translate to the *CISG*. Only New Zealand's *CISG* case law provides meaningful interpretative guidance; Singapore's assistance is limited; and Hong Kong interpretative assistance does not exist.

CISG art 7(1) imposes a public international law obligation on Australia's courts to interpret the *CISG* in an autonomous and internationalist manner.[155] This obligation has seldom been discharged.[156] Noting that Australia's courts cannot replicate their ICA interpretative strategy in the *CISG* context, in this Part I make two recommendations for judges hearing *CISG*-related cases that are intended to help Australia's courts better comply with *CISG* art 7(1). Both are based on strategies used by foreign courts in ICA matters and are capable of application in the Australian *CISG* context.

A *Setting Expectations: Judicial Guidance*

My first recommendation is that Australian judges consider giving parties' legal representatives guidance around the *CISG's* application, and their expectations around internationalist *CISG* argument. On the former, judges could: insist on parties carefully considering whether the *CISG* applies; explain to parties the principles used to determine that application; and identify the interpretative implications of the *CISG's* application. This would, for example, avoid the problem recently seen in *CP Aquaculture (India) Pvt Ltd v Aqua Star Pty Ltd*.[157] There, in the context of an Australian–Indian contract, the parties agreed that Victorian law applied; yet the *CISG* (part of Victorian law) was not engaged. On the plaintiff's view, this was because India was not a *CISG* jurisdiction, and on the defendant's view, neither party had alleged or proved the *CISG's* application.[158] Had the parties been encouraged to consider the matter more carefully, it may have emerged that the *CISG* still applied via art 1(1)(b) and did not require proof as foreign law.[159]

---

153 Hachem, 'Article 7' (n 27) 139–41 [10], [12]–[13].
154 *TCL v Castel* (n 37) 384 [75] (Allsop CJ, Middleton and Foster JJ).
155 Sorieul, Hatcher and Emery (n 26) 500.
156 Anastasi, Hayward and Brown (n 22) 37–44.
157 *CP Aquaculture* (n 146).
158 Ibid [182]–[183] (Macnamara J).
159 *Roder Zelt-und Hallenkonstruktionen GmbH v Rosedown Park Pty Ltd* (1995) 57 FCR 216, 222 (von Doussa J) ('*Roder*').

On the latter point as to internationalist *CISG* argument, judges might usefully alert practitioners to the 'several efforts [that] have been made to make interpretative matters easier for courts'.[160] These include:

- online case law databases referenced in Part IV (the Albert H Kritzer *CISG* Database, *CISG*-online, UNCITRAL's CLOUT database, and UNILEX);
- the world's two pre-eminent article-by-article *CISG* commentaries,[161] both cross-referencing cases to the Albert H Kritzer *CISG* Database and *CISG*-online;
- UNCITRAL's *CISG* case law digest;[162]
- the *CISG* Advisory Council's opinions,[163] cited by foreign courts as authoritative interpretative tools;[164] and
- commercial texts collating international *CISG* judgments and arbitral awards.

Consulting these materials would disclose, for example, the existence of voluminous Chinese *CISG* case law rendered through the China International and Economic Trade Arbitration Commission[165] and China's State courts;[166] several Japanese *CISG* cases,[167] noting that '[p]arties do not seem to commonly exclude the

---

160 Hachem, 'Article 7' (n 27) 140 [11].

161 Ingeborg Schwenzer and Ulrich G Schroeter (eds), *Schlechtriem & Schwenzer: Commentary on the UN Convention on the International Sale of Goods (CISG)* (Oxford University Press, 5th ed, 2022); Stefan Kröll, Loukas Mistelis and Pilar Perales Viscasillas (eds), *UN Convention on Contracts for the International Sale of Goods: A Commentary* (CH Beck, Hart & Nomos, 2nd ed, 2018). As at 2 December 2024, at least one edition of at least one of these texts is held in the Federal Court of Australia Library's branches in the Australian Capital Territory, New South Wales, Queensland, South Australia, Victoria, and Western Australia. See 'Federal Court Library Catalogue', *Federal Court of Australia* (Web Page) <https://www.fedcourt.gov.au/digital-law-library/library/library-catalogue>.

162 United Nations Commission on International Trade Law, *UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (United Nations, 3rd ed, 2016). It has been suggested that the equivalent *Model Law* (n 6) digest should be legislatively identified as a useful *Model Law* (n 6) interpretative resource via amendments to the *International Arbitration Act 1974* (Cth) s 17(1): Luke Nottage, 'International Commercial Arbitration in Australia: What's New and What's Next?' (2013) 30(5) *Journal of International Arbitration* 465, 492. For that equivalent *Model Law* (n 6) digest, see United Nations Commission on International Trade Law, *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (United Nations, 2012).

163 'Opinions', *CISG Advisory Council* (Web Page, 2024) <https://cisgac.com/opinions/>.

164 'Case Law New', *CISG Advisory Council* (Web Page, 2024) <https://cisgac.com/case-law/>.

165 As at 2 December 2024, 403 *CISG* (n 4) awards rendered by China International and Economic Trade Arbitration Commission tribunals are recorded on the Albert H Kritzer *CISG* Database, with 293 recorded on *CISG*-online.

166 Peng Guo, Haicong Zuo and Shu Zhang (eds), *Selected Chinese Cases on the UN Sales Convention (CISG) Vol 1* (Springer, 2022) (48 cases); Peng Guo, Haicong Zuo and Shu Zhang (eds), *Selected Chinese Cases on the UN Sales Convention (CISG) Vol 2* (Springer, 2023) (40 cases); Peng Guo, Haicong Zuo and Shu Zhang (eds), *Selected Chinese Cases on the UN Sales Convention (CISG) Vol 3* (Springer, 2024) (44 cases); Peng Guo, Haicong Zuo and Shu Zhang (eds), *Selected Chinese Cases on the UN Sales Convention (CISG) Vol 4* (Springer, 2025) (38 cases).

167 As at 2 December 2024, seven Japanese *CISG* (n 4) decisions are recorded on each of the Albert H Kritzer *CISG* Database and *CISG*-online.

application of *CISG* in Japan';[168] and numerous Canadian[169] and US cases.[170] Despite some criticism of its early *CISG* decisions,[171] US case law (even in 2004) was described as 'now by far the most developed and thoroughly examined amongst the common law member states'.[172]

An Australian judge might model such guidance on the approach taken by Kaplan J in Hong Kong, concerning ICA law. In *Fung Sang Trading Ltd v Kai Sun Sea Products & Food Co Ltd*, Kaplan J's judgment included the following note addressing the *Model Law*:

> [It may be helpful for practitioners to be aware of two books on the *Model Law*. The fullest guide to the *Model Law* is 'A Guide to the UNCITRAL *Model Law on International Commercial Arbitration*' written by Howard Holtzmann and Joseph Neuhaus published by Kluwer in 1989. This is a substantial treatise which takes each article of the *Model Law*, comments on it and sets out the various *travaux preparatoires* [sic]. For a shorter and more succinct commentary there is Aron Broches' 'Commentary on the *UNCITRAL Model Law*' also published by Kluwer in 1990.][173]

Shortly after, Kaplan J addressed the *New York Convention* in a similar fashion. In *Shenzhen Nan Da Industrial and Trade United Co Ltd v FM International Ltd*, his Honour stated:

> Before parting with this case, I would like to make the following observations which are not intended as criticism of counsel or their solicitors. There are almost 90 countries who have acceded to the *New York Convention*. Courts in *Convention* countries are being asked to consider the *Convention* on a regular basis and there are many decisions on the *Convention*. It is clearly desirable, so far as is practicable, for the interpretation of the *Convention* to be uniform. Cases under the *Convention* are increasing dramatically in Hong Kong. … There is only one text book devoted solely to the *New York Convention* and that is by Professor Albert Jan van den Berg published in 1981 by Kluwer. That must be the starting point for the consideration of any problem arising under the *Convention*. But this excellent book is now a little out of date and thus it is essential to keep abreast of new developments by reference to *The Yearbook on Commercial Arbitration* published by the International Council for Commercial Arbitration (ICCA). This too is published by Kluwer and is now edited by Professor Albert Jan van den Berg. This work is in the Supreme Court Library and is at the Hong Kong International Arbitration Centre and contains references to all known decisions on the *Convention*. I was not

---

168 Asian Business Law Institute, 'Exclusive Jurisdiction and *CISG* for Contracts under Japanese Law' (Report, March 2024) 2 <https://www.linkedin.com/posts/asian-business-law-institute_internationality-of-contracts-japan-2-activity-7174230697841229825-OSnx>. As at 2 December 2024, I have confirmed with the Asian Business Law Institute that this report has only been published on LinkedIn.

169 As at 2 December 2024, 49 Canadian *CISG* (n 4) cases are recorded on the Albert H Kritzer *CISG* Database, with 39 recorded on *CISG*-online.

170 As at 2 December 2024, 482 United States *CISG* (n 4) cases are recorded on the Albert H Kritzer *CISG* Database, with 412 recorded on *CISG*-online.

171 See, eg, V Susanne Cook, 'The *UN Convention on Contracts for the International Sale of Goods*: A Mandate to Abandon Legal Ethnocentricity' (1997) 16(2) *Journal of Law and Commerce* 257, 259–60, regarding *Delchi Carrier SpA v Rotorex Corporation*, 71 F 3d 1024 (2nd Cir, 1995).

172 Henning Lutz, 'The *CISG* and Common Law Courts: Is There Really a Problem?' (2004) 35(3) *Victoria University of Wellington Law Review* 711, 712.

173 *Fung Sang Trading Ltd v Kai Sun Sea Products & Food Co Ltd* [1992] 1 HKLR 40, 49.

> referred to either of these works and I would suggest that anyone researching or arguing a *New York Convention* point must start with these two works.[174]

Of course, it is conventional wisdom for Australian courts to say 'no more than is necessary to decide' the disputes before them.[175] One might wonder, then, whether giving this kind of guidance is an appropriate part of the Australian judicial function, even if a suitable case arises. Noting that Australia's *CISG* case load grows incrementally but consistently,[176] it is inevitable that a suitable case will eventually arise, particularly if this recommendation's first element is given effect. When that happens, it would indeed be appropriate for an Australian court to act as recommended. Australia's first ever case applying the *CISG* included critique around the parties' *CISG* argument that approaches this type of guidance.[177] Australian courts otherwise routinely identify deficiencies in the arguments put before them, in all kinds of cases.[178] That being the case, it is only an incremental step to implement my recommendation. The propriety of doing so is further confirmed by understanding the guidance recommended here as simple obiter dicta: an unquestionably accepted feature of Australian law.[179]

B *Seeking Input: Amicus Curiae*

My second recommendation for judges hearing *CISG*-related cases in Australia is to consider using the amicus curiae procedure to solicit international (or internationally minded) third party submissions directed at the *CISG's* interpretation.[180] Such submissions might be sought from a foreign law firm, the UNCITRAL National Coordinating Committee for Australia, or perhaps even an international or Australian academic expert, to identify just a few possibilities.

This recommendation's inspiration comes from the Canadian ICA decision of *Hypertec Real Estate Inc v Equinix Canada Ltd*[181] ('*Hypertec*'). There, a foreign

---

174 *Shenzhen Nan Da Industrial and Trade United Co Ltd v FM International Ltd* [1992] 1 HKC 328, 336–7.

175 *Primavera v Bakos* [2018] NSWSC 142, [1] (Black J); *Chapman v Quinlan* (Supreme Court of South Australia, Cox J, 17 June 1980) 1.

176 Hayward, 'Text, Context, and Purpose' (n 146) 377–85.

177 *Roder* (n 159) 220, 233 (von Doussa J).

178 See, eg, *Ninety Five Pty Ltd (in liq) v Banque Nationale de Paris* (Supreme Court of Western Australia, Smith J, 12 June 1987) 101 (claim against constructive trustee); *R v Nikodjevic* [2004] VSCA 222, [21] (Ormiston JA, Callaway JA agreeing at [53], Vincent JA agreeing at [54]–[55]) (criminal sentencing); *Conway v Jerram* (2010) 78 NSWLR 689, 703 [68] (Barr AJ) (coronial inquest); *R v Manolas* [2019] NTSC 60, [10], [13] (Riley AJ) (criminal stay); *BET20 v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2020] FCA 1539, [15] (Abraham J) (visa cancellation).

179 Evidenced by, for example, obiter dicta's reference in Australian textbooks designed for use in first year introductory Bachelor of Laws units of study: see, eg, Robin Creyke, David Harmer, Patrick O'Mara, Belinda Smith and Tristan S Taylor, *Laying Down the Law* (LexisNexis, 11th ed, 2021) 194 [7.16].

180 For the purposes of clarity, this recommendation addresses the appointment of amicus curiae and not intervention, the latter being a different procedure whereby interveners become party to the proceedings: George Williams, 'The Amicus Curiae and Intervener in the High Court of Australia: A Comparative Analysis' (2000) 28(3) *Federal Law Review* 365, 368–9.

181 *Hypertec Real Estate Inc v Equinix Canada Ltd* [2023] QCCS 3061. This was an ICA decision in the sense that Canadian inter-provincial arbitrations 'are [legally] assimilated to international arbitrations': at [25] (Babak Barin JCS).

law firm was appointed (pro bono) as an amicus curiae, on the court's own motion and over one party's objection, to provide ten pages of written submissions addressing ICA law.[182] This appointment was described as 'beneficial not only for the parties, but also the development and growth of the law of arbitration in this province'.[183] Describing an amicus curiae as not just a friend of the court but a friend of the court 'in need',[184] Babak Barin JCS made the following comments:

> Turning back to the issue of expounding law impartially, it is useful not to underestimate the importance, in certain occasions, of obtaining neutral and comprehensive assistance, particularly where the legal issues are delicate, complex and of general application and where more significantly, the superior court does *not* have the much-needed basic resources — for example, comprehensive national and international research capabilities — to carry out its duties.[185]

Appointing an amicus curiae in Australian *CISG* proceedings could bring several benefits. Notwithstanding the ready availability of English language *CISG* case law, an amicus may help overcome language barriers still affecting the accessibility of some interpretative materials.[186] The internationalist expertise of an amicus may help narrow a dispute's scope.[187] And, most importantly, an amicus may provide a much-needed internationalist perspective on the *CISG's* interpretation where party submissions are not so cast.[188] The appointment of an amicus in accordance with my recommendation would therefore not be improperly focused on the law's abstract development,[189] but would instead be consistent with its 'major purpose' of ensuring 'that a precedent is sound'.[190]

Given *Hypertec's* Canadian origins, it is again necessary to show that my recommendation can be implemented in Australia. From the outset, it must be admitted that amicus appointments are 'a relatively rare event in Australian courts'.[191] The High Court of Australia in particular has been 'less than enthusiastic about allowing amicus interventions'.[192] However, even it recently allowed amicus submissions by the Australian Centre for International Commercial Arbitration in a case relating to Australia's domestic commercial arbitration laws,[193] and not for the

---

182 Ibid [18]–[19], [33].
183 Ibid [19].
184 Ibid [5].
185 Ibid [27] (emphasis in original).
186 For example, not all of the foreign language cases recorded on the Albert H Kritzer *CISG* Database and on *CISG*-online are accompanied by English translations, and CLOUT abstracts (themselves only summaries) may be accompanied by original foreign language judgments but not English translations of those judgments.
187 Cf Justice Susan Kenny, 'Interveners and Amici Curiae in the High Court' (1998) 20(1) *Adelaide Law Review* 159, 167.
188 See, eg, *Roder* (n 159) 220, 233 (von Doussa J); *Playcorp* (n 137) [235], [245] (Hansen J); *Aussie Diamond* (n 137) [210] (Murphy J).
189 Transcript of Proceedings, *Garcia v National Australia Bank Ltd* [1998] HCATrans 50 (McHugh J), cited in Ernst Willheim, 'Amici Curiae and Access to Constitutional Justice in the High Court of Australia' (2010) 22(3) *Bond Law Review* 126, 128.
190 Loretta Re, 'The Amicus Curiae Brief: Access to the Courts for Public Interest Associations' (1984) 14(3) *Melbourne University Law Review* 522, 533.
191 Kenny (n 187) 160.
192 Ernst Willheim, 'An Amicus Experience in the High Court: *Wurridjal v Commonwealth*' (2009) 20(2) *Public Law Review* 104, 105.
193 *Tesseract* (n 21) 885 [7] (Gageler CJ).

first time.[194] Other Australian private law cases involving amicus appointments are readily identified.[195] Thus while amicus curiae may sometimes be appointed where submissions are offered 'in the public interest',[196] as in *Commonwealth v Tasmania* (involving the Tasmanian Wilderness Society Inc),[197] the public interest is not a limiting factor. Instead, 'there is no prescription of the circumstances in which it may or may not be proper for a court to hear an amicus'.[198]

Australian courts have provided some guidance as to when amicus appointments will be appropriate. According to the Federal Court, an amicus can be appointed where it would be 'assisting the court in its task of resolving the issues tendered by the parties by drawing attention to some aspect of the case which might otherwise be overlooked'.[199] The High Court has similarly explained that '[t]he footing on which an amicus curiae is heard is that that person is willing to offer the Court a submission on law or relevant fact which will assist the Court in a way in which the Court would not otherwise have been assisted'.[200] Noting that Australian courts have historically deferred to party submissions concerning the *CISG*,[201] this test would be satisfied where such submissions fail to reflect the internationalist interpretation requirements of *CISG* art 7(1).

One final aspect of *Hypertec* that might (at first glance) appear problematic in Australia is that court's appointment of an amicus curiae on its own motion. It has been suggested, for example, that in Australia an amicus 'must apply to the court for leave to be … heard'.[202] Nevertheless, this is not a strict requirement. It has been reported, admittedly without case citation, that some Australian courts have themselves 'instigated the involvement as amicus of counsel who are not otherwise involved in the case'.[203] It is therefore open to an Australian court to itself seek out amicus submissions to assist in discharging its *CISG* art 7(1) obligations.

---

194 *Westport Insurance Corporation v Gordian Runoff Ltd* (2011) 244 CLR 239, 243, 254–6 (Jackson QC) (during argument).

195 See, eg, *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458, 482 [60] (Gummow, Hayne and Heydon JJ) (copyright); *Stevens v Kabushiki Sony Computer Entertainment* (2005) 224 CLR 193, 205 [26] (Gleeson CJ, Gummow, Hayne and Heydon JJ) (copyright); *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 222 FCR 465, 471 [19]–[21] (Wilcox J) (copyright); *Ninety Five Pty Ltd (in liq) v Banque Nationale de Paris* [1988] WAR 132, 183 (Smith J) (trusts). See also Kenny (n 187) 162–5 (referencing a medical negligence claim not proceeding to judgment).

196 *United States Tobacco Co v Minister for Consumer Affairs* (1988) 20 FCR 520, 535 (Davies, Wilcox and Gummow JJ) ('*United States Tobacco*').

197 *Commonwealth v Tasmania* (1983) 158 CLR 1, 50–1 (Gibbs CJ) (during argument).

198 *United States Tobacco* (n 196) 535 (Davies, Wilcox and Gummow JJ).

199 *Bropho v Tickner* (1993) 40 FCR 165, 172 (Wilcox J).

200 *Levy v Victoria* (1997) 189 CLR 579, 604 (Brennan CJ). See also *Wurridjal v Commonwealth* [2008] HCATrans 348 (French CJ); *Kruger v Commonwealth* [1996] HCATrans 68, quoted in Kenny (n 187) 162.

201 See, eg, *Playcorp* (n 137) [235] (Hansen J); *Aussie Diamond* (n 137) [210] (Murphy J).

202 Kenny (n 187) 159.

203 Mary Wyburn, 'Choosing Your Friends Wisely: The Amicus Curiae in Key Copyright Cases and its Potential to Affect Copyright Policy' (2006) 24(1–2) *Copyright Reporter* 124, 126. See also Re (n 190) 524.

C *Securing Action: Motivating Adoption of My Recommendations*

While my two recommendations are legally robust, their adoption might require an Australian judge sufficiently motivated to act on them. It may be observed, in this regard, that Kaplan J was a well-known ICA expert prior to his Honour's judicial appointment; and that Babak Barin JCS (deciding *Hypertec*) had a pre-appointment professional background in arbitration.

This being so, the implementation of my recommendations would be supported by judicial education initiatives targeting the *CISG*. Organisations such as the Australian Judicial Officers Association[204] and the National Judicial College of Australia[205] offer potential educative fora. If Australian judges are better equipped at understanding the requirements of *CISG* art 7(1), they should be in a better position to identify when *CISG* proceedings are floating adrift, and (in turn) understand how my recommendations can restore their mooring. Education initiatives targeting the profession would similarly assist in the longer run, given that (with limited exceptions) senior practitioners form the population from which judges are appointed.

VI Conclusion

Improving Australia's *CISG* interpretative track record stands to benefit international trade. As I noted in Part I, UNCITRAL's work is premised on the 'conviction that divergences arising from the laws of different States in matters relating to international trade constitute one of the obstacles to the development of world trade'.[206] Despite being one nation among the *CISG's* 97 Contracting States,[207] 'Australia (and thus the world) stands to benefit from a more proactive engagement with the *CISG*'.[208] It is important to note, in addition, that practitioners risk professional liability[209] and disciplinary proceedings[210] if they fail to competently engage with the *CISG*.

My Part V recommendations are directed at helping Australian judges to discharge their art 7(1) obligation to interpret the *CISG* in an internationalist spirit. Since internationalist argument is more likely to occur where it is judicially insisted on,[211] those recommendations also mitigate the practitioner risks identified above. The need for these recommendations reflects the interpretative stratification identified across Parts III–IV. That stratification's identification must now guide initiatives to improve the *CISG's* future Australian interpretation.

---

204 'Welcome to the Australian Judicial Officers Association', *Australian Judicial Officers Association* (Web Page, 2024) <https://www.ajoa.asn.au/>.

205 For an overview of the College's programs: see 'Program Planning Committees', *National Judicial College of Australia* (Web Page, 2023) <https://www.njca.com.au/about-us/committees/>.

206 *Establishment of the United Nations Commission on International Trade Law* (n 3) 99. See also *CISG* (n 4) Preamble para 3.

207 UN, 'Chapter X' (n 4) 1.

208 Hayward, '*CISG* as the Applicable Law' (n 24) 187 [10.49].

209 Spagnolo (n 17) 163–4; UNCITRAL, 'Topic 3' (n 113) 00:32:59–00:33:53 (Professor Ingeborg Schwenzer).

210 *Australian Solicitors' Conduct Rules 2021 (as published November 2023)* r 4.1.3; *Legal Profession Uniform Conduct (Barristers) Rules 2015* r 4(c).

211 Anastasi, Hayward and Brown (n 22) 52.

Despite Australia's 'wanting' state of existing *CISG* case law,[212] the interpretative challenge faced by future Australian courts should not be overstated. Even German courts — having excellent reputations concerning the *CISG*[213] — tend to refer mainly to German (and German language) *CISG* interpretative sources.[214] If Australian courts applying the *CISG* can begin by referring even to Australian sources of *CISG* interpretative guidance (such as Australian *CISG* scholarship), this would be a welcome first step. From there, adopting my recommendations in this article will help Australian courts elevate the quality of their *CISG* interpretations to ICA law's existing excellent status. This is ultimately in the service of the *CISG's* trade facilitation objectives and its merchant end-users.

[212] Hayward, '*CISG* as the Applicable Law' (n 24) 180 [10.34].

[213] FGV, 'The *United Nations Convention on Contracts for the International Sale of Goods* (Parte 3)', *YouTube* (Conference Recording, 21 December 2012) 00:11:52–00:12:13 (Professor Franco Ferrari) <https://www.youtube.com/watch?v=Tt8ZY2zFhbM>.

[214] UNCITRAL, 'Topic 3' (n 113) 00:34:40–00:00:35:30 (Professor Ingeborg Schwenzer). For two prominent examples: *New Zealand Mussels Case*, Bundesgerichtshof [German Supreme Court], VIII ZR 159/94, 8 March 1995 [tr Birgit Kurtz, *CISG*-online No 144 <https://cisg-online.org/search-for-cases?caseId=6122>]; *Machinery Case*, Bundesgerichtshof [German Supreme Court], VIII ZR 60/01, 31 October 2001 [tr Birgit Kurtz, *CISG*-online No 617 <https://cisg-online.org/search-for-cases?caseId=6575>].

Data Sharing in the Australian Public Sector after the Optus and Medibank Incidents: Taking Reasonable Steps to Prevent Data Breaches

Serena Syme Hildenbrand*

Abstract

In this article I identify weaknesses in the framework for public sector data sharing in Australia. Many Australian public sector agencies must share personal information they hold, potentially increasing the risk of a data breach. I consider the legal standard expected of data holders under the *Privacy Act 1988* (Cth) to take 'reasonable steps' to protect the data, including in light of the 2022 Optus and Medibank breaches. For public sector data, legislated data sharing frameworks also apply, overriding some statutory protections and introducing potential areas of weakness and confusion. One concern is public sector reliance on the unsuitable 'Five Safes' data sharing principles, adopted into statutes with an apparent absence of critical examination. Data sharing agreements ('DSAs') may assist, but often fail to do so due to vague standards and contractual omissions. To meet the reasonable steps standard, I argue that public sector data holders should ensure that their DSAs require data recipients to have appropriate security governance and risk management in place (ideally including compliance with an independent security standard) and impose obligations regarding data retention, staff training, and auditing. To assist in meeting the reasonable steps standard, security risk assessments should also be undertaken as standard data sharing practice.

Please cite this article as:
Serena Syme Hildenbrand, 'Data Sharing in the Australian Public Sector after the Optus and Medibank Incidents: Taking Reasonable Steps to Prevent Data Breaches' (2025) 47 *Sydney Law Review* 21383: 1–34 <https://doi.org/10.30722/slr.21383>.

* PhD candidate, Deakin University, Faculty of Business and Law, Deakin Law School, Burwood, Victoria, Australia; Associate Director of Data Sharing (driver and vehicle data), Department of Transport & Planning, Victoria, Australia. Email: shildenbrand@deakin.edu.au.
ORCID iD: https://orcid.org/0009-0004-2664-5381. The views expressed in this article are my own and not necessarily those of the Department. I thank my supervisory team of Shiri Krebs, Matthew Groves and Bruce Chen for their ongoing support and valuable input.

I Introduction

In September 2022, the Optus data breach exposed the personal data of 9.8 million customers.[1] The identity credentials of many of those customers were compromised, requiring them to obtain new credentials to prevent identity fraud.[2] The breach was triggered by an unidentified hacker accessing personal information through a system vulnerability. Clare O'Neil, the Australian Government Minister for Home Affairs, characterised it as a 'basic' attack where Optus 'effectively left the window open'.[3] A few weeks after the Optus data breach, health insurer Medibank experienced a similarly serious breach, resulting in the exposure of 9.7 million personal records including health information, some of which was published.[4] This was an intentional attack by a Russian cyber-crime gang, using stolen login information.[5] Due to the sensitivity of this data, Minister O'Neil described the Medibank breach as 'the single most devastating cyber-attack we have experienced as a nation'.[6] Victoria Police reported that at least 11,000 cybercrime incidents were linked to the Medibank breach.[7] A number of regulatory and civil actions have been brought against both Optus and Medibank, detailed further below in Part II.

These exposures of private sector data were truly damaging,[8] and it is not difficult to imagine a similar scenario playing out with sensitive public sector data maintained by Australian governments. As an example, the National Exchange of Vehicle and Driver Information System ('NEVDIS') has been used since 1998 to collect driver and vehicle information from every Australian state and territory with

---

1 Commonwealth, *Parliamentary Debates*, House of Representatives, 26 September 2022, 1500 (Clare O'Neil, Minister for Home Affairs and Minister for Cybersecurity). See also Ben Knight and staff, 'Optus Data Breach Class Action Launched for Millions of Australians Caught Up in Cyber Attack', *ABC News* (online, 21 April 2023) <https://www.abc.net.au/news/2023-04-21/optus-hack-class-action-customer-privacy-breach-data-leaked/102247638>.

2 Lucy Cormack, '"It's Almost a Fluke": Why NSW Drivers' Licences Have Largely Been Spared in Optus Hack', *The Sydney Morning Herald* (online, 1 October 2022) <https://www.smh.com.au/politics/nsw/it-s-almost-a-fluke-why-nsw-drivers-licences-have-largely-been-spared-in-optus-hack-20220929-p5bm1v.html>.

3 Clare O'Neil, Minister for Home Affairs (Cth), 'Interview with ABC 7:30' (transcript, 26 September 2022) <https://minister.homeaffairs.gov.au/ClareONeil/Pages/interview-abc-730-26092022.aspx>; Jake Evans, 'Home Affairs Minister Clare O'Neil says Optus "Left the Window Open" for Cyber Criminals to Conduct Simple Hack', *ABC News* (online, 28 September 2022) <https://www.abc.net.au/news/2022-09-26/home-affairs-minister-blames-optus-for-cyber-attack-hack/101474636>.

4 Clare O'Neil, Minister for Home Affairs (Cth), 'Cyber Sanctions in Response to Medibank Private Cyber Attack' (Joint Media Release with Richard Marles and Penny Wong, 23 January 2024) <https://minister.homeaffairs.gov.au/ClareONeil/Pages/cyber-sanctions-in-response-to-medibank-private-cyber-attack.aspx>. See also Tiffanie Turnbull, 'Medibank Hack: Russian Sanctioned over Australia's Worst Data Breach', *BBC News* (online, 23 January 2024) <https://www.bbc.com/news/world-australia-68064850>.

5 O'Neil, 'Cyber Sanctions in Response to Medibank Private Cyber Attack' (n 4); Turnbull (n 4).

6 O'Neil, 'Cyber Sanctions in Response to Medibank Private Cyber Attack' (n 4); Turnbull (n 4).

7 Victoria Police, Submission No 34 to Joint Committee on Law Enforcement, Parliament of Australia, *Inquiry into the Capability of Law Enforcement to Respond to Cybercrime* (December 2023) 19.

8 Note also the July 2025 Qantas data breach, which exposed the personal information of 5.7 million individuals: see, eg, Qantas, 'Update On Qantas Cyber Incident: Wednesday 9 July 2025' (Media Release, 9 July 2025) <https://www.qantasnewsroom.com.au/media-releases/update-on-qantas-cyber-incident-wednesday-9-july-2025/>; Maurice Blackburn Lawyers, 'Compensation Sought on behalf of Nearly Six Million Aussies Caught Up in Massive Qantas Data Breach' (Media Release, 18 July 2025) <https://www.mauriceblackburn.com.au/media-centre/media-statements/2025/compensation-sought-on-behalf-of-aussies-caught-up-in-qantas-data-breach/>.

the combined database managed by Austroads, the association of Australian and New Zealand transport agencies.[9] Jurisdictions share data with NEVDIS daily; it holds millions of sensitive records of driver licence details, representing every current Australian driver. Should NEVDIS data sharing pathways or databases be compromised, the damage — including the need to replace driver licences — would far exceed the Optus and Medibank breaches. While NEVDIS contains personal information, risks also exist with public sector data sharing initiatives involving de-identified data. An example is the National Disability Data Asset ('NDDA'), which will bring together de-identified data on people with disability from all states and territories to boost research, policy development and service delivery around disability issues.[10] Its privacy impact assessment highlighted re-identification of the data as an ongoing risk requiring monitoring[11] given that the NDDA will contain sensitive information about vulnerable people, such as disability level/type, medical and treatment data, offender and victim records, housing status and welfare payments.[12]

Much has been written on the Optus and Medibank breaches and the threat they pose to customers' security and company reputations. Malicious attacks such as these are data breaches of great concern, but the term 'data breach' encompasses broader actions and consequences. The Office of the Australian Information Commissioner ('OAIC') defines a data breach as 'an unauthorised access or disclosure of personal information, or loss of personal information'.[13] A data breach can occur without malicious intent, simply through human error or failures of process or technology.[14] It can arise in relation to any activity involving personal information: collecting and holding customer information, as Optus and Medibank did; data use; data destruction; and most relevantly to this article, data sharing (where data is transferred from one data holder to another for a specific purpose).

In this article I focus on the legal obligations of organisations handling personal information to protect against data breaches, with a particular focus on public sector data holders and sharers. Government data holders are often required to manage large volumes of personal customer data, and public sector data sharing

---

9 'NEVDIS', *Austroads* (Web Page) <https://austroads.com.au/drivers-and-vehicles/nevdis>.

10 Amanda Rishworth MP, 'Governments Come Together to Deliver National Disability Data Asset' (Media Release, 9 June 2023) <https://ministers.dss.gov.au/media-releases/11431>. See also 'National Disability Data Asset Factsheet', *National Disability Data Asset* (Web Page) <https://www.ndda.gov.au/ndda-factsheet>.

11 National Disability Data Asset ('NDDA'), *Summary of the 2023 Privacy Impact Assessment* (Report) <https://www.ndda.gov.au/summary-pia-report>.

12 NDDA, *Interim Learnings from Test Case Analyses* (Report, September 2021) <https://www.ndda.gov.au/research-projects/pilot-phase-and-findings>.

13 Office of the Australian Information Commissioner (Cth) ('OAIC'), *Data Breach Preparation and Response: A Guide to Managing Data Breaches in accordance with the Privacy Act 1988 (Cth)*, (Guidance Material, June 2024) 8 <https://www.oaic.gov.au/privacy/privacy-guidance-for-organisations-and-government-agencies/preventing-preparing-for-and-responding-to-data-breaches/data-breach-preparation-and-response>. See also the narrower definition of 'eligible data breach' in *Privacy Act 1988* (Cth) s 26WE ('*Privacy Act*'), which triggers mandatory notification to the OAIC under s 26WL of the *Privacy Act*.

14 See, eg, the OAIC data breach notification form, which requires the organisation to advise whether the incident was caused by malicious or criminal attack; system fault; or human error: OAIC, 'Notifiable Data Breach Form' <https://www.oaic.gov.au/__data/assets/pdf_file/0008/2240/oaic-ndb-form-for-training-purposes-only.pdf>.

(such as for NEVDIS, the NDDA and other purposes including law enforcement) is indispensable to meet legislative obligations and public expectations. However, the act of sharing information may increase the risk of a data breach. Personal information may be more vulnerable during the transfer itself,[15] and its security after transfer depends on the data recipient's conduct and security environment. Data recipients may also on-share the data with third parties, adding additional risk.

In Part II of this article I analyse the relevant legal obligations, starting with the OAIC's documented approach to assessing whether an Australian government or private sector organisation impacted by a data breach discharged its obligations under the *Privacy Act 1988* (Cth) ('*Privacy Act*'), specifically by reference to data security obligations imposed under that Act by Australian Privacy Principle ('APP') 11.[16] I also consider the various legal actions and grounds asserted against Optus and Medibank to illustrate the standard a data holder is expected to apply to prevent data breaches.

In the public sector context, an additional source of legal obligations is data sharing legislation such as the *Data Availability and Transparency Act 2022* (Cth) ('*DAT Act*').[17] The *DAT Act* encourages public sector data sharing — there is no equivalent legislation applicable to the private sector. Although it is intended to operate consistently with the *Privacy Act* and APP 11, I explore how the *DAT Act* overlay adds complexity and operational weaknesses to the task of protecting public sector data, potentially undermining *Privacy Act* protections and confusing public servants involved in data sharing management. I highlight why this is cause for concern, given the significance and sensitivity of such data.

To explore these issues, in Part III I focus on data sharing, describing the legislative framework applicable to public sector data sharing in Australia, and identifying gaps arising from the more recent overlay of the *DAT Act* provisions on the existing *Privacy Act* protective framework. In particular, I highlight the role of state and federal data sharing legislation such as the *DAT Act* in the widespread adoption and application of the Five Safes framework ('Five Safes') as the de facto standard for sharing public sector data in Australia. Unfortunately, the Five Safes is deeply flawed and regrettable in its application to personal information, introducing areas of weakness in protecting such data.

In Part IV I look at the additional protection offered by Data Sharing Agreements ('DSA's) required by data sharing legislation. I analyse four public sector DSA templates, together with relevant guidance, to assess whether the DSAs commonly used by the Australian public sector assist in redressing the weaknesses introduced by application of the Five Safes. Overall, I conclude that the DSAs add value, but tend to be overly vague in their application, perpetuating areas of weakness.

---

15 Ahmed Albugmi, Madini O Alassafi, Robert Walters and Gary Wills, 'Data Security in Cloud Computing' (2016) *2016 Fifth International Conference on Future Generation Communication Technologies (FGCT)* 55, 56.

16 *Privacy Act* (n 13) sch 1 ('*Australian Privacy Principles*') APP 11.

17 *Data Availability and Transparency Act 2022* (Cth) ('*DAT Act*').

What can be done about these gaps in protection introduced by data sharing legislation? Absent amendments to that legislation, in Part V of this article I propose additional protections that government data holders should include in their DSAs to assist in both protecting data subjects and mitigating these risks. In Part VI I conclude that following major data breaches such as Optus and Medibank, public sector agencies would be well advised to apply a higher level of data protection. At its most simple, this can be achieved by putting stronger DSAs in place and monitoring compliance with them, and performing a security risk assessment for each data share.

II The Reasonable Steps Standard under Information Privacy Legislation

A *Australian Information Privacy Frameworks: The Privacy Act 1988 (Cth) and State Counterparts*

The *Privacy Act* establishes the legislative framework for information privacy at the federal level, covering the data activities of 'APP entities' — federal public sector agencies as well as organisations with annual turnover exceeding $3 million (including Optus and Medibank).[18] Section 13 of the *Privacy Act* provides that an APP entity interferes with the privacy of an individual if it fails to comply with an APP in relation to that individual's personal information, and s 15 requires APP entities to comply with the *Australian Privacy Principles*. Similar provisions can be found in state and territory information privacy laws covering public sector agencies,[19] with most containing at least one privacy principle focused on information security, paralleling APP 11:

> 11.1 If an APP entity holds personal information, the entity must take such steps as are reasonable in the circumstances to protect the information:
>
> (a) from misuse, interference and loss; and
>
> (b) from unauthorised access, modification or disclosure.
>
> 11.2 If:
>
> (a) an APP entity holds personal information about an individual; and
>
> [(b)–(d) [that information is no longer needed or required to be retained and is not contained in a Commonwealth record];]
>
> the entity must take such steps as are reasonable in the circumstances to destroy the information or to ensure that the information is de-identified.[20]

---

18 *Privacy Act* (n 13) ss 6(1) (definitions of 'APP entity', 'agency' and 'organisation'), 6C.

19 *Information Privacy Act 2014* (ACT) ('*ACT IPA*'); *Privacy and Personal Information Protection Act 1998* (NSW) ('*NSW PPIPA*'); *Information Act 2002* (NT) ('*NT IA*'); *Information Privacy Act 2009* (Qld) ('*Qld IPA*'); *Privacy and Data Protection Act 2014* (Vic) ('*Vic PDPA*');); *Personal Information Protection Act 2004* (Tas) ('*Tas PIPA*'); *Privacy and Responsible Information Sharing Act 2024* (WA) ('*WA PRISA*'). South Australia has a relevant Cabinet Administrative Instruction, which does not offer equivalent protection: see *Information Privacy Principles (IPPS) Instruction* (Premier and Cabinet Circular PC012). Note that the *Information Privacy and Other Legislation Amendment Act 2023* (Qld) amends the *Qld IPA* from 1 July 2025, and the *WA PRISA* is yet to fully commence.

20 *Australian Privacy* Principles (n 16) APP 11. See also the equivalent information/territory protection provisions ('IPP/TPP') under state and territory legislation, which have some drafting differences but

This clause is considered the 'most operative and directly relevant protection of personal data obligation in Australian law',[21] and is identified by the OAIC as 'key to minimising the risk of a data breach'.[22] While the new *Cyber Security Act 2024* (Cth) requires APP entities to report to the Australian Signals Directorate any ransomware payments to hackers and facilitates voluntary data breach notifications by any Australian organisation (including with limited use protections around information shared), it does not change the central role of APP 11 in setting the standard for preparedness.[23]

APP 11 raises some important concepts. First, it references a central concept in privacy regulation: 'personal information', defined as 'information or an opinion about an identified individual, or an individual who is reasonably identifiable'.[24] My references in this article to personal information point back to that key underlying definition. Second, APP 11 indicates that obligations are triggered if the entity 'holds' that information, defined to mean that the entity 'has possession or control of a record that contains the personal information'.[25] The personal information does not need to be in the entity's possession for APP 11 to apply, provided the entity 'has the right or power to deal with the personal information'.[26] This is often interpreted to mean that a public sector data holder continues to 'hold' personal information it collects and maintains even after it has shared it, because it retains control through legal means (such as under a DSA).[27]

Third, APP 11 imposes a reasonableness standard on organisations in managing the security of personal information they hold ('the reasonable steps standard').[28] The OAIC guidance on APP 11 indicates that reasonable steps will depend on a variety of factors, all as assessed by the OAIC, including: the organisation's size and resources; the amount and sensitivity of personal information held; the potential harms; and the feasibility of security measures.[29] The reasonable

---

a similar effect: *NSW PPIPA* (n 19) cl 12 (IPP 12); *Vic PDPA* (n 19) sch 1 IPP 4; *Qld IPA* (n 19) sch 3 IPP 4; *ACT IPA* (n 19) sch 1 pt 1.4 TPP 11; *Tas PIPA* (n 19) cl 4 (IPP 4); *NT IA* (n 19) sch 2 IPP 4; *WA PRISA* (n 19) sch 1 (IPP 4) (not yet in effect).

21 Joel Lisk, 'Data Security in Australia: The Obligation to Protect' (2023) 97(10) *Australian Law Journal* 749, 757.

22 OAIC, *Data Breach Preparation and Response* (n 13) 9.

23 *Cyber Security Act 2024* (Cth) pts 3–4. See also Australian Signals Directorate (Cth), 'Ransomware Payment and Cyber Extortion Payment Reporting', *Australian Cyber Security Centre* (Web Page) <https://www.cyber.gov.au/report-and-recover/report/ransomware-payment-and-cyber-extortion-payment-reporting>.

24 *Privacy Act* (n 13) s 6(1) (definition of 'personal information').

25 Ibid s 6(1) (definition of 'holds').

26 See, eg, OAIC, *Australian Privacy Principles Guidelines* (December 2022) 19 [B.84] <https://www.oaic.gov.au/privacy/australian-privacy-principles-guidelines>.

27 See, eg, Office of the Victorian Information Commissioner ('OVIC'), *Guidelines to the Information Privacy Principles* (online, 4th ed, 2019) [4.59]–[4.62] <https://ovic.vic.gov.au/privacy/guidelines-to-the-information-privacy-principles/>.

28 This is not a narrow *Wednesbury* standard of reasonableness as applied under judicial review: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223. The OAIC guidance indicates that the APP entity must take positive steps to protect the data: OAIC, *Australian Privacy Principles Guidelines* (n 26) 4 [11.7]–[11.8].

29 OAIC, *Australian Privacy Principles Guidelines* (n 26) 4 [11.7]–[11.8]; OAIC, *Guide to Securing Personal Information: 'Reasonable Steps' to Protect Personal Information* (2018) <https://www.oaic.gov.au/privacy/privacy-guidance-for-organisations-and-government-agencies/handling-personal-information?external-uuid=2bc65cdd-f52f-4981-9f16-f4ec8716b507>.

steps standard is applied by the OAIC in its own discretion and has not yet received 'substantial judicial consideration'.[30] But the OAIC's approach is evident in a number of documented investigations of data breaches, particularly breaches affecting Sony Playstation Network ('Sony') in 2011,[31] Epsilon in 2011,[32] Adobe in 2013,[33] Avid Life Media ('Ashley Madison') in 2015,[34] Australian Recoveries & Collections ('ARC') in 2015,[35] and Marriott International ('Marriott') in 2015–18.[36]

The OAIC's investigations show that while the reasonable steps standard is demanding, it does not require a data holder to 'design impenetrable systems'.[37] But it is helpful if the data holder can demonstrate compliance with independent information security standards. Technology companies Epsilon and Sony were found by the Commissioner (in separate matters) to have met the reasonable steps standard, at least partially because they were operating in compliance with an independent security standard, ISO 27001[38].[39]

The investigations also demonstrate that security measures are inadequate if they are not effectively implemented. In a joint report with the Canadian Privacy Commissioner into the Ashley Madison breach, the OAIC found that even though security safeguards existed, the reasonable steps standard was not met because the safeguards were not coherently implemented with an appropriate governance framework including a security policy, a risk management process and adequate staff training in privacy and security.[40] Such a security framework needs to include adequate monitoring, as noted by the OAIC in relation to Marriott, which was found to have fallen short of reasonable steps largely due to deficiencies in security monitoring.[41]

Appropriate contractual protections are key if the data is in the hands of a third party. The Blood Service breach involved the inadvertent internet publication

---

30 Lisk (n 21) 757. This may change with the Optus and Medibank cases.

31 *Sony PlayStation Network/Qriocity: Own Motion Investigation Report* [2011] AICmrCN 16 (29 September 2011) ('*Sony Report*').

32 *Dell Australia and Epsilon: Own Motion Investigation Report* [2012] AICmrCN 2 (1 June 2012) ('*Epsilon Report*').

33 *Adobe Systems Software Ireland Ltd: Own Motion Investigation Report* [2015] AICmrCN 1 (1 June 2015).

34 OAIC, *Joint investigation of Ashley Madison by the Privacy Commissioner of Canada and the Australian Privacy Commissioner and Acting Australian Information Commissioner* (Investigation Report, 24 August 2016) ('*Ashley Madison Investigation Report*') <https://www.oaic.gov.au/privacy/privacy-assessments-and-decisions/privacy-decisions/investigation-reports/ashley-madison-joint-investigation>.

35 OAIC, *Australian Recoveries & Collections: Enforceable Undertaking* (Decision, 31 August 2016) ('*ARC Enforceable Undertaking*') <https://www.oaic.gov.au/privacy/privacy-assessments-and-decisions/privacy-decisions/enforceable-undertakings/australian-recoveries-and-collections-enforceable-undertaking>.

36 OAIC, *Marriott International: Enforceable Undertaking* (Decision, 7 February 2023) <https://www.oaic.gov.au/privacy/privacy-assessments-and-decisions/privacy-decisions/enforceable-undertakings/marriott-international-enforceable-undertaking>.

37 *Adobe Systems Software Ireland: Own Motion Investigation Report* (n 33).

38 International Organization for Standardization, *ISO/IEC 27001: Information Security, Cybersecurity And Privacy Protection — Information Security Management Systems — Requirements* (3rd ed, 2022).

39 Sony had implemented 'internal information technology security standards that are based on the international information security standard ISO/IEC 27001': *Sony Report* (n 31). See also *Epsilon Report* (n 32).

40 *Ashley Madison Investigation Report* (n 34) 4 [8]–[10].

41 *Marriott International: Enforceable Undertaking* (n 36) [18].

of personal information by a contractor. The OAIC identified a failure to satisfy the reasonable steps standard — despite the Blood Service's security framework with adequate safeguards — because the security requirements in the outsourcing contract 'were not clearly articulated or proportional to the scale and sensitivity of the information held'.[42]

Other missing protections identified by the OAIC were appropriate data retention practices, staff training in privacy and security, and auditing. The Blood Service and Ashley Madison were both criticised for retaining personal information longer than needed.[43] A lack of staff training contributed to both the ARC breach and Ashley Madison breach.[44] Auditing was raised as an issue in relation to the Blood Service, which had no reporting or assurance mechanisms in its outsourcing contract.[45]

These investigations highlight that the reasonable steps standard of data protection as applied by the OAIC is relatively demanding. The OAIC's investigations and guidance indicate that for an organisation to achieve and maintain the standard, considerable focused action is required, including:

- implemented security and risk management policies (covering system monitoring);
- appropriate contractual obligations on third parties and contractors;
- relevant data retention practices;
- staff training in privacy and security; and
- auditing or reporting on contract compliance.

Demonstrated compliance with independent security standards, such as the Australian Government's Protective Security Policy Framework,[46] ISO 27001 or the Australian Cyber Security Centre's Essential Eight security framework ('Essential Eight'),[47] will assist.

The 2022 *Privacy Act Review Report* recommended changes to strengthen APP 11, of which the following were accepted by the Government:

(a) Amending APP 11.1 to indicate that 'reasonable steps' includes both technical and organisational measures. This amendment is included in s 34 of the *Privacy and Other Legislation Amendment Act 2024* (Cth)

---

42 OAIC, *DonateBlood.com.au Data Breach (Australian Red Cross Blood Service)* (Decision, 7 August 2017) <https://www.oaic.gov.au/privacy/privacy-assessments-and-decisions/privacy-decisions/investigation-reports/donateblood.com.au-data-breach-australian-red-cross-blood-service>.

43 Ibid; *Ashley Madison Investigation Report* (n 34) 24 [114]–[116].

44 *Ashley Madison Investigation Report* (n 34) 18 [78]; *ARC Enforceable Undertaking* (n 35) [5.6].

45 OAIC, *DonateBlood.com.au Data Breach* (n 42).

46 'Applying the Protective Security Policy Framework', *Department of Home Affairs (Cth)* (Web Page) <https://www.protectivesecurity.gov.au/about/applying-protective-security-policy-framework>.

47 Australian Signals Directorate (Cth), 'Essential Eight', *Australian Cyber Security Centre* (Web Page) <https://www.cyber.gov.au/resources-business-and-government/essential-cyber-security/essential-eight>. Essential Eight assesses an organisation's cybersecurity maturity (ie, the extent to which security controls are developed and ingrained in that organisation) at levels 0–3, with a target maturity level of at least 2 appropriate for handling personal information.

('*2024 Amendment Act*'), requiring organisations to incorporate both types of measure in security protections.[48]

(b) Enhancing the OAIC's guidance on what constitutes 'reasonable steps'.[49]

These changes are likely to assist in clarifying and applying the reasonable steps standard in practice, without substantially amending APP 11's operational effect.

If an APP entity fails to meet this standard and a data breach ensues, it may be subject to enforcement mechanisms under the *Privacy Act*. This includes injunctive relief,[50] a complaints process,[51] and substantial fines for serious or repeated interferences.[52] The *2024 Amendment Act* added a suite of new enforcement mechanisms (most commencing in December 2024) such as:

- more flexible civil penalties for privacy infringement;[53]
- expansion of the orders available to the Federal Court of Australia to address privacy offences;[54]
- conferral on the Information Commissioner of increased powers around public inquiries, determinations and monitoring;[55]
- inclusion of a statutory cause of action for serious privacy invasions;[56] and
- the criminalisation of doxxing behaviours.[57]

The practical impact of these new enforcement mechanisms will soon emerge. But in the meantime, it is instructive to look at the legal avenues pursued, and claims made in the Optus and Medibank cases, outlined in the next section.

B *The Application of the Reasonable Steps Standard to the Optus and Medicare Claims*

The Optus breach arose from a vulnerability with an Application Programming Interface ('API'), effectively a gateway for data access. A coding error in 2018

---

48 Explanatory Memorandum, Privacy and Other Legislation Amendment Bill 2024 (Cth) 4 [12], 43 [99]–[102].

49 Attorney-General's Department (Cth), *Privacy Act Review Report* (2022) 224–6 <https://www.ag.gov.au/rights-and-protections/publications/privacy-act-review-report>; Attorney-General's Department (Cth), *Government Response: Privacy Act Review Report* (2023) 33–4 <https://www.ag.gov.au/rights-and-protections/publications/government-response-privacy-act-review-report> ('*Government Response*').

50 *Privacy Act* (n 13) s 80W.

51 Ibid ss 36, 52.

52 Ibid s 13G.

53 *Privacy and Other Legislation Amendment Act 2024* (Cth) sch 1 pt 8 ('*2024 Amendment Act*') amending *Privacy Act* (n 13) s 13G, inserting *Privacy Act* (n 13) ss 13H, 13J–13K. 'Doxxing' is the malicious publication of personal data for harassment: see *2024 Amendment Act* sch 3 inserting *Criminal Code Act 1995* (Cth) sch 1 (*Criminal Code*) ss 474.17C–474.17D.

54 *2024 Amendment Act* (n 53) sch 1 pt 9 inserting *Privacy Act* (n 13) s 80UA.

55 See, eg, *2024 Amendment Act* (n 53) sch 1 pt 10 inserting *Privacy Act* (n 13) pt IV div 3B; sch 1 pt 14 amending *Privacy Act* (n 13) pt VIB.

56 *2024 Amendment Act* (n 53) sch 2 adding *Privacy Act* (n 13) sch 2 (in force from 10 June 2025).

57 *2024 Amendment Act* (n 53) sch 3 inserting *Criminal Code* (n 53) ss 474.17C–474.17D. 'Doxxing' is the malicious publication of personal data for harassment.

weakened the protection of two Optus domains containing APIs. This coding error was detected by Optus and fixed in 2021 for one domain but not for the second, which was exploited by the hacker.[58] The weakness existed for four years prior to the breach and Optus had many opportunities to detect and correct it.[59] Submissions by the OAIC suggest that '[t]he cyberattack was not highly sophisticated … [i]t was carried out through a simple process of trial and error'.[60] The Medibank breach was caused by compromised login credentials. A contractor had saved Medibank passwords to his personal browser, allowing the hacker to steal the passwords and undertake multiple accesses to Medibank systems that were unprotected by multi-factor authentication and so poorly monitored that Medibank did not uncover the ongoing breach for almost two months.[61]

What options were open to the many Optus and Medibank victims? At the time, it was commonly accepted that enforcement avenues for individuals under the *Privacy Act* were inadequate.[62] The *2024 Amendment Act* includes mechanisms that may have benefited those victims. One is a tort for serious invasions of privacy, allowing natural persons to sue if they experience an intentional or reckless intrusion of a serious nature.[63] While this cause of action is not broadly relevant to data breaches, it may have utility in the most egregious cases of reckless behaviour.[64] As already noted, the *2024 Amendment Act* also increases civil penalties and extends the range of orders available to courts.[65] A more targeted solution recommended by the 2022 *Privacy Act Review Report* (which the Government accepted in principle but has not yet legislated) was the inclusion in the *Privacy Act* of a direct right of action to allow data breach victims to bring action against APP entities in respect of a breach of the Act and *Australian Privacy Principles*, seeking compensation for economic and non-economic loss and aggravated damages.[66] In agreeing 'in-principle' to this new enforcement mechanism, the Government noted that damages should be unlimited, but required a complainant to first undertake a complaints process to prevent court overload.[67] Such a right of action will assist in data breach cases should it be legislated.

Given there was no direct right of action under the *Privacy Act*, Optus and Medibank victims pursued other avenues: namely, representative complaints to the

---

58 Australian Communications and Media Authority ('ACMA'), 'Concise Statement', Submission in *Australian Communications and Media Authority v Optus Mobile Pty Ltd*, Federal Court of Australia, VID429/2024, 19 June 2024, 2–3 [8]–[14].

59 Ibid 2 [12]–[13].

60 Ibid 3 [15].

61 Australian Information Commissioner, 'Concise Statement', Submission in *Australian Information Commissioner v Medibank Private Ltd*, Federal Court of Australia, VID497/2024, 19 June 2024, [8]–[18] ('OAIC Concise Statement').

62 See, eg, Australian Competition and Consumer Commission, *Digital Platforms Inquiry: Final Report* (June 2019) 23–4 <https://www.accc.gov.au/publications/digital-platforms-inquiry-final-report>.

63 *Privacy Act* (n 13) sch 2. The tort came into effect on 10 June 2025.

64 The tort is informed by the Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (Report No 123, June 2014) ('*2014 ALRC Report*'): Explanatory Memorandum, Privacy and Other Legislation Amendment Bill (n 48) 8 [3]. The *2014 ALRC Report* specifically recommended that the tort not apply to data breaches because other available remedies were more appropriate: *2014 ALRC Report* (n 64) 122 [7.61]–[7.62].

65 See above nn 53–4.

66 Attorney-General's Department (Cth), *Government Response* (n 49) 19.

67 Ibid.

OAIC under s 36 of the *Privacy Act*, and class actions in the Federal Court of Australia.[68] The OAIC also brought a civil penalty action against Medibank under s 13G of the *Privacy Act*.[69] To what extent do these avenues of redress involve consideration of the reasonable steps standard?

Representative complaints under the *Privacy Act* concern an interference with privacy, so an investigation of data breach complaints can be expected to focus on the reasonable steps standard under APP 11. Such a process is low-cost to initiate and allows each class member's circumstances to be considered individually, with compensation available for loss and damage including non-economic loss.[70] The process is essentially inquisitorial, with the OAIC empowered to secure evidence and investigate the claim without application of the rules of evidence.[71] These complaints can be time consuming to resolve,[72] and the determination is non-binding, potentially requiring court action for enforcement, which will increase the time and cost before a complainant receives recompense.[73] The OAIC's approach to 'reasonable steps' is likely to be consistent with that detailed above in Part II(A).

The second avenue pursued is class actions in the Federal Court of Australia. The legal claims in such actions vary, but may include a negligence ground, as in the Optus class action.[74] Class actions are expensive and can take considerable time to reach a conclusion, often with litigation funders taking a significant portion of any damages awarded.[75] Despite strong interest from lawyers and litigation funders there

---

68 'Representative Complaints Update', *Office of the Australian Information Commissioner* (Web Page, 13 December 2023) <https://www.oaic.gov.au/newsroom/representative-complaints>; Knight and staff (n 1); Colin Kruger, 'Compensation for Medibank Hack Victims Could Be Fast-Tracked', *The Age* (online, 8 April 2024) <https://www.theage.com.au/business/companies/compensation-for-medibank-hack-victims-could-be-fast-tracked-20240405-p5fhrl.html?btis=>; Melissa Brown, 'Law Firm Launches Class Action on behalf of Millions of Customers Caught Up in Medibank Data Hack', *ABC News* (online, 5 May 2023) <https://www.abc.net.au/news/2023-05-05/medibank-data-breach-class-action-slater-gordon/102307106>.

69 *Australian Information Commissioner v Medibank Private Ltd* (Federal Court of Australia, VID497/2024, commenced 5 June 2024); 'OAIC Takes Civil Penalty Action against Medibank', *Office of the Australian Information Commissioner* (Web Page, 5 June 2024) <https://www.oaic.gov.au/newsroom/oaic-takes-civil-penalty-action-against-medibank>. The telecommunications regulator (ACMA) also brought action against Optus under the *Telecommunications (Interception and Access) Act 1979* (Cth), but the legal basis is beyond scope here due to its lack of general application to data breach defendants: *Australian Communications and Media Authority v Optus Mobile Pty Ltd* (Federal Court of Australia, VID429/2024, commenced 20 May 2024); see also Ry Crozier, 'Optus to Face ACMA-Filed Court Case over Data Breach', *IT News* (online, 23 May 2024) <https://www.itnews.com.au/news/optus-to-face-acma-filed-court-case-over-data-breach-608235>. Further, the Federal Government has applied cyber sanctions to the Russian hackers in the Medibank case: Penny Wong, 'Further Cyber Sanctions in Response to Medibank Private Cyberattack', (Joint media release with Richard Marles and Tony Burke, 12 February 2025) <https://www.foreignminister.gov.au/minister/penny-wong/media-release/further-cyber-sanctions-response-medibank-private-cyberattack>.

70 'Representative Complaints Update' (n 68).

71 See, eg, *Medibank Private Ltd v Australian Information Commissioner* (2024) 301 FCR 517, 540 [108]–[109].

72 Rose Dlougatch, 'Cyber-Insecurity: Data Breaches, Remedies and the Enforcement of the Right to Privacy' (2018) 25(4) *Australian Journal of Administrative Law* 219, 224.

73 *Privacy Act* (n 13) s 52(1B); Aiden Lerch and Sophie Whittaker, 'More Valuable Than Oil: The Application of Tort Law and Equity to Data Breach Cases' (2019) 27(2) *Tort Law Review* 100, 105.

74 *Robertson v Singtel Optus Pty Ltd* (Federal Court of Australia, VID256/2023, commenced 20 April 2023); Knight and staff (n 1).

75 Kruger (n 68).

has not yet been a successful data breach class action in Australia.[76] This contrasts with the United States, where negligence actions based on a failure to discharge a duty of care have been successful in class actions around data breaches.[77] A successful negligence action in Australia would require the court to identify a common law duty of care towards data subjects, which has not yet been established here as a legal basis for data breach compensation.[78] A class action might reference the reasonable steps standard[79] as part of the standard of care expected of a data holder in a negligence claim. Given that Australian courts have not yet recognised the duty of care, the relevant standard of care has not yet been considered or established by an Australian court.[80] Lerch and Whittaker refer to the approach taken by US courts, where the standard of care was assessed by considering the duties imposed on defendants by privacy legislation,[81] and conclude that '[i]t would therefore be reasonable for the [*Australian Privacy Principles*] to be the standard of care applicable in [Australian] data breach cases'.[82] But it is yet to be seen in practice, including whether a court's approach to applying the reasonable steps standard would align with the OAIC approach. Future decisions in data breach class actions (like Optus) may further develop our understanding of the standard.

Finally, as noted earlier, the OAIC is pursuing a civil penalty action against Medibank under s 13G of the *Privacy Act* for serious or repeated privacy interferences, focusing on whether Medibank met the reasonable steps standard under APP 11.[83] Medibank is only the third defendant faced with such an action.[84] An OAIC submission in this matter helpfully includes an Annexure listing expected security protections aligned with independent standards like the Essential Eight, consistent with the reasonable steps considerations detailed above.[85] Significant penalties apply for contraventions of s 13G — even though new higher s 13G penalties were introduced after the Medibank breach, applicable penalties in the Medibank case are up to $2.22 million for each contravention.[86] This civil penalty

---

76 Gavin Smith and Valeska Bloch, 'Where Are All the Data Breach Class Actions in Australia?', *Allens* (Blog Post, 17 October 2018) <https://www.allens.com.au/insights-news/insights/2018/10/pulse-where-are-all-the-data-breach-class-actions-in>.

77 Lerch and Whittaker (n 73) 109; Smith and Bloch (n 76). In 2017, 95% of US federal data breach class actions included negligence, with 65% listing it as the primary cause of action: Daniel M Filler, David M Haendler and Jordan L Fischer, 'Negligence at the Breach: Information Fiduciaries and the Duty to Care for Data' (2022) 54(1) *Connecticut Law Review* 105, 117.

78 Amanda Beattie, Kieran Doyle and Nicole Gabryk, 'The Rise of Data Breach Class Actions: Legal Trends and Implications', *Wotton Kearney* (Blog Post, 26 October 2023) <https://www.wotton kearney.com.au/the-rise-of-data-breach-class-actions-legal-trends-and-implications/>.

79 See, eg, the Medibank claims: Brown (n 68).

80 Lerch and Whittaker (n 73) 113.

81 Ibid 110–1.

82 Ibid 114.

83 *Australian Information Commissioner v Medibank Private Ltd* (n 69).

84 Elizabeth Knight, 'Medibank on the Hook for Trillions But There's More at Stake than Money', *The Sydney Morning Herald* (online, 5 June 2024) <https://www.smh.com.au/business/companies/ medibank-on-the-hook-for-trillions-but-there-s-more-at-stake-than-money-20240604-p5jj62.html>.

85 'OAIC Concise Statement' (n 61) Annexure B.

86 The *Privacy Legislation Amendment (Enforcement and Other Measures) Act 2022* (Cth) commenced in December 2022 and increased s 13G penalties for a body corporate from $2.22 million to the higher of $50 million, three times the value of benefit or 30% of adjusted turnover. The *2024 Amendment Act* retained these penalty amounts while clarifying what conduct meets the threshold

action is an important mechanism to encourage better corporate behaviour, but does not compensate victims.

A public sector data holder impacted by a significant data breach is less likely to face a class action or civil penalty action. Even if a duty of care to prevent data breaches were established in Australia, courts may be reluctant to extend it to public sector data holders, given well-established judicial concerns around imposing new liabilities relating to government's failure to act (typically in a resource-constrained environment), and where the duties and obligations of government may differ from those of other entities.[87] The existence in Australia of a statutory duty on public sector agencies (such as an obligation under APP 11) is not usually enough to found a new duty of care.[88] For a representative complaint, a public sector APP entity will be in the same position as a public company like Optus or Medibank, and the OAIC will apply the APP 11 reasonable steps standard. In Part III below, I focus solely on the public sector, assessing whether public sector data sharing frameworks assist government data holders to meet the reasonable steps standard.

III Public Sector Data Sharing Frameworks

I have noted that public sector data holders are often required to share personal information for policy development, law enforcement and other purposes — and that data sharing potentially increases the risks of a data breach. In this Part I outline the importance of such data sharing and assess the impact of legislated public sector data sharing frameworks.

The Australian public sector holds vast quantities of data. In 2017, the Productivity Commission's report from its inquiry into the use of public and private sector data ('*Productivity Commission Report*') estimated a potential boost to economic output of up to $64 billion per year if public sector data were made more widely available.[89] The Report found that this value is not currently being realised, observing that 'numerous hurdles to sharing and releasing data are choking the use and value of Australia's data'.[90] One such hurdle is that data is 'systematically siloed in the public sector with little sharing between agencies or beyond'.[91] While the notorious 'Robodebt' program highlighted Federal Government cross-agency data sharing and data matching for welfare debt recovery, such data sharing activities are not widespread.[92] The *Productivity Commission Report* considered that the lack of

for s 13G: Explanatory Memorandum, Privacy and Other Legislation Amendment Bill (n 48) 20 [81]–[82].

87 Janina Boughey, Ellen Rock and Greg Weeks, *Government Liability: Principles & Remedies* (Lexis Nexis Butterworths, 2019) 412–18. There is also the concern that liabilities would be funded from the public purse: at 412.

88 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook Co, 7th ed, 2022) 1237 [21.440].

89 Productivity Commission, *Data Availability and Use* (Inquiry Report No 82, 31 March 2017) 117–8 <https://www.pc.gov.au/inquiries/completed/data-access/report> ('*Productivity Commission Report*').

90 Ibid 2.

91 Ibid 145.

92 The Robodebt Scheme's cross-agency data activity relied on specific legislation — the *Data-matching Program (Assistance and Tax) Act 1990 (Cth)*, which regulates the use of tax file numbers across multiple agencies to detect incorrect payments: *Royal Commission into the Robodebt Scheme*

coordinated data sharing among public sector entities was contributing to 'fragmentation and duplication of data collection activities' and waste.[93] In this context, the types of data sharing exemplified by the NDDA and NEVDIS are encouraging. The Victorian test case undertaken as part of the NDDA pilot involved linking disability service data and mental health service data to study the population impacted by *both* disability and mental health and to assess which supports are most effective in improving outcomes.[94] This is the type of valuable data activity that is likely to attract community approval. Data sharing is also highly beneficial for law enforcement, including in fields such as child protection or domestic violence prevention where it may allow patterns of bad behaviour to be detected and addressed, ideally preventing harm.[95] NEVDIS falls in the law enforcement category, allowing the tracking of stolen vehicles across state borders and helping prevent vehicle cloning.[96] Safe, trusted and effective public sector data sharing is needed to allow such important initiatives to continue and increase. While the *Productivity Commission Report* displayed frustration with current data sharing practices and a strong desire to drive change, it recognised the importance of building social licence around data sharing, because otherwise such initiatives will be widely rejected and fail.[97] Importantly, one of the most critical components of social licence identified in the Report was trust, as achieved through '[e]mbedding genuine safeguards into Australia's data framework to assure people their data is being used safely'.[98] A key conclusion of the *Productivity Commission Report* was the need to free up government data using a legislated data sharing framework.[99] In evaluating this approach below, it is pertinent to keep the concepts of social licence and genuine safeguards in mind.

A *Data Sharing Frameworks: The* DAT Act *and State Counterparts*

The *Productivity Commission Report* recommendation led to the passage and 1 April 2022 commencement of the *DAT Act*, establishing a scheme under which Federal Government agencies may share public sector data with accredited users from the federal or state public sectors or Australian universities in specified circumstances,[100] with such sharing to be regulated by a new Office of the National Data Commissioner ('ONDC').[101] The *DAT Act* was pre-dated by some public sector data sharing Acts in the States all designed to facilitate public sector data sharing, such as the *Data Sharing (Government Sector) Act 2015* (NSW), the *Victorian Data*

(Final Report, July 2023) 11–13. This is the only data matching legislation at the federal level: 'Government Data Matching', *Office of the Australian Information Commissioner* (Web Page) <https://www.oaic.gov.au/privacy/privacy-legislation/related-legislation/government-data-matching>.

93 *Productivity Commission Report* (n 89) 153.

94 NDDA, *Interim Learnings from Test Case Analyses* (n 12) 18–25.

95 *Productivity Commission Report* (n 89) 147 (Box 3.4).

96 'NEVDIS' (n 9). Vehicle cloning is where a registered vehicle is used to hide the identity of a stolen vehicle.

97 *Productivity Commission Report* (n 89) 177.

98 Ibid 178.

99 Ibid 14.

100 *DAT Act* (n 17) s 13.

101 Ibid s 45.

Sharing Act 2017 (Vic) and the *Public Sector (Data Sharing) Act 2016* (SA).[102] Of these, the *Public Sector (Data Sharing) Act* 2016 (SA) is considered the broadest, because it covers law enforcement data and overrides all other state legislation.[103] The *DAT Act*, applying as it does to all public sector data in the hands of the Commonwealth, may have an even greater impact.[104] It is not mandatory for Federal Government agencies to conduct their data sharing under the auspices of the *DAT Act*; they may choose instead to conduct their sharing under a DSA or memorandum of understanding ('MOU')[105] provided they have identified an adequate legal basis for that sharing.[106] But because the *DAT Act* simplifies some sharing considerations, including by providing a clear legal basis for sharing for certain allowed purposes, it is likely that many organisations will employ it. For example, while NEVDIS does not rely on the *DAT Act*, it is possible that the NDDA will.

Chapter 2 of the *DAT Act* sets out specific 'authorisations', allowing sharing and handling of public sector data if specified conditions are met. Importantly, if the sharing is so authorised, s 23 provides that it may override all other laws (federal, state or territory).[107] This allows authorised data sharing to take precedence over secrecy provisions, which creates new risks for data protection. For example, both the *Child Care Act 1972* (Cth) s 12J and the *Age Discrimination Act 2004* (Cth) s 60 strictly restrict the use of personal or protected information held under those Acts, but such information could potentially be shared under the *DAT Act*. The *DAT Act* requires the sharing to be for one of three allowed purposes in s 15: the delivery of government services; informing government policy and programs; or research and development — not data sharing for law enforcement.[108] There are numerous other conditions in s 13, including that the sharing must be:

- consistent with constitutional requirements, including to an appropriate recipient (s 13(4));
- consistent with specified 'data sharing principles' set out in s 16 (s 13(1)(e));
- covered by and consistent with a valid DSA as defined in ss 18–19 (s 13(1)(c)–(d));

---

[102] The legislation is summarised in a NSW review of its Act: Department of Customer Service (NSW), *Review of the Data Sharing (Government Sector) Act 2015* (August 2021) 10–13 <https://www.parliament.nsw.gov.au/tp/files/80507/Statutory%20Review%20of%20the%20Data%20Sharing%20Government%20Sector%20Act%202015.pdf> ('*NSW Review*'). Western Australia now has new data sharing legislation, not yet in effect: *WA PRISA* (n 19).

[103] *NSW Review* (n 102) 12.

[104] *DAT Act* (n 17) s 9 (definition of 'public sector data'). This could include data collected by the Commonwealth from states and the private sector.

[105] A data sharing MOU is a non-binding DSA, often used between government parties because emanations of the same Crown cannot enter binding arrangements. In this article I treat a data sharing MOU as a DSA and refer to it as such.

[106] Revised Explanatory Memorandum, Data Availability and Transparency Bill 2022 (Cth) 5 [30]–[31]. Legal basis generally consists of an allowed head of sharing under privacy legislation, such as under *Australian Privacy Principles* (n 16) APP 6, together with a legislative power allowing the data holder to share data for that purpose.

[107] This implements the *Productivity Commission Report* recommendation regarding legal override: *Productivity Commission Report* (n 89) 333.

[108] *DAT Act* (n 17) s 15(1). Data sharing for law enforcement relies on *Australian Privacy Principles* (n 16) APP 6.2(e).

- subject to appropriate privacy protection in accordance with s 16E (ss 13(1)(g), (i)); and
- not otherwise prohibited under s 17 (s 13(2)(c)).

Civil penalties apply if data is nominally shared under a *DAT Act* authorisation but fails to comply with s 13.[109]

How might the *DAT Act's* legislative override impact the *Privacy Act*? While the override applies to any Australian legislation prohibiting sharing (including laws enacted after it), the *Privacy Act* is an exception.[110] The *DAT Act*'s legislative history indicates a strong intent for it to operate consistently with the *Privacy Act*.[111] The Revised Explanatory Memorandum for the DAT Bill specified that it was 'not intended to override the *Privacy Act*' and demonstrated an expectation that s 17(5) of the *DAT Act* would prohibit any data handling inconsistent with the *Privacy Act*.[112] Further, DSAs under the *DAT Act* must include terms binding the parties to comply with all *Australian Privacy Principles*.[113] Accordingly, the legislative override will not limit the *Australian Privacy Principles*, and the APP 11 reasonable steps standard will apply to all *DAT Act* sharing. But, in practice, the *DAT Act* contains weaknesses in protection, and its complexity raises the practical risk that public servants will view it as exhaustive and fail to meaningfully apply APP 11. The main weakness comes from its reliance on data sharing principles. The *Productivity Commission Report* evidenced suspicion towards the use of DSAs and MOUs in public sector data sharing, describing the MOUs as 'unnecessarily complicated and time consuming',[114] and recommending reliance instead on data sharing principles based on the Five Safes.[115] Ultimately, the *DAT Act* retained DSAs but required them to implement data sharing principles.[116] In Parts III(B)–(C) I assess these data sharing principles, a critical component of the *DAT Act* framework.

B *Data Sharing Principles Based on the Five Safes*

A feature of the *DAT Act* and other Australian legislative data sharing frameworks is the application of data sharing principles based on the Five Safes. The Five Safes is a framework for planning, designing and evaluating data access solutions.[117] It was devised at the United Kingdom ('UK') Office for National Statistics in the early 2000s to enable the sharing of confidential business survey data for research

---

109 *DAT Act* (n 17) s 14(1).

110 Revised Explanatory Memorandum (n 106) 39 [233]–[236].

111 See, eg, *DAT Act* (n 17) ss 3(b), 16E, 16F; Supplementary Explanatory Memorandum, Data Availability and Transparency Bill 2020 (Cth) 1 [3], 5 [11], 6 [20].

112 Revised Explanatory Memorandum (n 106) 39 [236]; see also at 29 [168]. The *DAT Act* (n 17) s 17(5)(a) bars sharing that would contravene a Commonwealth Act giving effect to international law, which the *Privacy Act* (n 13) does.

113 *DAT Act* (n 17) ss 16E(2), 16F. See also Supplementary Explanatory Memorandum (n 111) 101 [8].

114 *Productivity Commission Report* (n 89) 449.

115 Ibid 318.

116 *DAT Act* (n 17) ss 13(d), 16, 19(7).

117 Felix Ritchie, 'The "Five Safes": A Framework for Planning, Designing and Evaluating Data Access Solutions' (Conference Paper, Data for Policy 2017: Government by Algorithm?, September 2017) <https://uwe-repository.worktribe.com/output/880713> ('The "Five Safes"').

purposes.[118] This confidential data was not personal information— it related to businesses and not individuals. Subsequently, the Five Safes was used to disseminate detailed but anonymised census data.[119] In short, the Five Safes was designed to allow confidential (but not personal) data to be made available to academic researchers in a controlled way.[120] In recent years, the Five Safes' designer Felix Ritchie has increasingly publicised the Five Safes as an appropriate model for public sector data sharing,[121] representing a significant departure from the original use case.

Under the Five Safes, the prospective discloser must assess five dimensions of a data request, namely: the project, people, settings, data and outputs (see Table 1 summary below).[122] Each dimension requires certain controls to be imposed to ensure a 'safe' outcome: safe projects, safe people, and so on. The controls can be shifted and combined to produce appropriate sharing controls overall, and all five dimensions need to be assessed together to determine whether an adequate solution has been reached.[123]

Table 1: Elements of the Five Safes framework[124]

Dimension	Assessment scope
Safe projects	Legal, moral and ethical considerations, public benefit, valid statistical purpose
Safe people	Data user knowledge, skills and incentives
Safe settings	Practical controls on data access, including physical environment and compliance processes.
Safe data	Potential for re-identification of individuals in the data.
Safe outputs	Analysis of outputs to remove identifiable information.

The Five Safes is not prescriptive; 'it is a framework for thinking, but does not explicitly state a solution'.[125] It is not designed to identify the best solution, but rather a range of possible solutions in which the term 'safe' is regarded as a continuous measure, rather than as a binary 'safe' or 'unsafe'.[126]

[118] Felix Ritchie, 'Secure Access to Confidential Microdata: Four Years of the Virtual Microdata Laboratory' (2008) 2(5) *Economic & Labour Market Review* 29, 30.
[119] Ibid 31.
[120] Ibid 30.
[121] Ritchie, 'The "Five Safes"' (n 117) 3–4.
[122] Tanvi Desai, Felix Ritchie and Richard Welpton, 'Five Safes: Designing Data Access for Research' (Working Paper No 1601, Economics Working Paper Series, UWE Bristol Faculty of Business and Law, January 2016) 5 <https://uwe-repository.worktribe.com/output/914745>.
[123] Ibid 5–6.
[124] Ibid 8–16.
[125] Felix Ritchie and Elizabeth Green, 'Frameworks, Principles and Accreditation in Modern Data Management' (Working Paper, UWE Bristol Business School Working Papers in Economics, 2020) 2 <https://uwe-repository.worktribe.com/output/6790882>.
[126] Desai, Ritchie and Welpton (n 122) 15–16.

In 2015, the Australian Bureau of Statistics started using the Five Safes to share a wide variety of data.[127] The Five Safes was then adopted in Australian legislation, starting with the *Public Sector (Data Sharing) Act 2016* (SA).[128] The original 2020 Explanatory Memorandum for the *DAT Act* refers to the data sharing principles as 'a key safeguard to manage risks of sharing public sector data based on the internationally recognised five safes framework'.[129] A major Commonwealth data sharing agreement preceding the *DAT Act*, the 2021 *Intergovernmental Agreement on Data Sharing between Commonwealth and State and Territory Governments*, reflected this approach, including data sharing principles based on the Five Safes.[130] The Five Safes is now represented in a wide variety of Australian legislation and policy materials.[131] Unfortunately, this uncritical reliance on the Five Safes has introduced a significant area of weakness into Australian public sector data sharing.[132] The Five Safes is used in the UK, Canada and other countries, but it has achieved significantly greater purchase in Australia, with Ritchie and Green identifying Australia's public sector adoption of the framework both as 'a substantial leap beyond current practices in other countries' and also 'more of a risk than a piecemeal approach'.[133]

While the data sharing principles in s 16 of the *DAT Act* and further detailed in Part 2 of the *Data Availability and Transparency Code 2022* (Cth) ('*DAT Code*')[134] are openly based on the Five Safes, they are slightly modified, as outlined in Table 2 below.

Notice the differences between Tables 1 and 2: while the *DAT Act* purports to lean on an 'internationally recognised' framework,[135] the Five Safes is an academic framework rather than a legislative code, so its implementation unavoidably leads to potentially significant changes.[136]

---

127 Ibid 17; 'Five Safes Framework', *Australian Bureau of Statistics* (Web Page) <https://www.abs.gov.au/about/data-services/data-confidentiality-guide/five-safes-framework>.

128 'Sharing Public Sector Data', *Department of Treasury and Finance (SA)* (Web Page) <https://www.treasury.sa.gov.au/Our-services/information-sharing-data-analytics/information-sharing-in-south-australia/sharing-public-sector-data>.

129 Explanatory Memorandum, Data Availability and Transparency Bill 2020 (Cth) 23 [114].

130 *Intergovernmental Agreement on Data Sharing between Commonwealth and State and Territory Governments* (signed and entered into force July 2021) cls 5(b), 12.

131 See, eg, *NSW Review* (n 102) 28.

132 See, eg, Shiri Krebs and Lyria Bennett Moses, 'Data Sharing Agreements: Contracting Personal Information in the Digital Age' (2024) 48(1) *Melbourne University Law Review* 95, 107.

133 Ritchie and Green (n 125) 13.

134 The *Data Availability and Transparency Code 2022* (Cth) ('*DAT Code*') is made under the *DAT Act* s 126. The *DAT Code* s 5 requires a data sharing arrangement to be consistent with the data sharing principles.

135 See above n 129 and accompanying quote.

136 Further, several amendments were made to the data sharing principles through the legislative process: 'Data Availability and Transparency Bill 2022', *Parliament of Australia* <https://www.aph.gov.au/Parliamentary_Business/Bills_LEGislation/Bills_Search_Results/Result?bId=r6649>.

Table 2: Five Safes framework, as reflected in the *DAT Act* and *DAT Code*

	DAT Act **Principle (s 16)**	***DAT Code*** **Data sharer must satisfy itself that project is consistent with this principle by:**
Safe Projects	Project is appropriate	Applying a public interest assessment (s 6) and ethics assessment (s 7).
Safe People	Data is only provided to appropriate persons	Addressing any conflict of interest (ss 8–10). Considering the attributes, qualifications, affiliations, expertise and experience of data recipients (ss 11–2).
Safe Settings	Data is handled in an appropriate environment	Considering whether reasonable and proportionate security standards are in place (s 13).
Safe Data	Only data reasonably necessary for purpose is handled, with appropriate protections	Considering whether data is reasonably necessary and whether it should be treated prior to sharing (s 14).
Safe Outputs	The only output is final and necessary	Considering the nature and use of the output (s 15).

C *Why Use of the Five Safes Framework Falls Short of the Reasonable Steps Standard*

Given its wide use throughout the Australian public sector, the Five Safes framework has received remarkably little formal scrutiny.[137] It was critiqued by 14 Australian privacy experts in their submission to a Senate Committee on the *DAT Act* who noted:

> Even in the field of de-identification, the Five Safes has been criticised as not fit for purpose. It is even less fit as a replacement for current legal and ethical criteria for sharing, because it was not designed to create an authority to share personal information in the first place.[138]

A community submission to a Western Australian privacy consultation ('Brennan et al WA Submission') expressed doubt whether the Five Safes was an effective methodology, noting incisively that the submission authors had 'been unable to locate any material produced by any privacy regulator in the world that endorses

[137] Chris Culnane, Benjamin IP Rubinstein and David Watts, 'Not Fit for Purpose: A Critical Analysis of the "Five Safes"' (Working Paper, 4 November 2020) 2 <https://doi.org/10.48550/arXiv.2011.02142>.

[138] Melanie Marks, Anna Johnston et al, Submission No 2 to the Senate Committee on the Data Availability & Transparency Bill, *Inquiry into the Data Availability and Transparency Bill 2020 and the Data Availability and Transparency (Consequential Amendments) Bill 2020* (17 February 2021) 8, citing Culnane, Rubinstein and Watts (n 137) <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/DataTransparency/Submissions>.

it',[139] and strongly recommending that it not be adopted in that State.[140] The most scathing assessment to date was a 2020 working paper by Culnane, Rubinstein and Watts, which asserted that the Five Safes framework is 'fundamentally flawed' and 'appropriates notions of safety without being anchored in any objective standard by which to assess or measure what is and is not safe'.[141] When these critiques are considered in the context of public sector data, it becomes clear that there are significant risks in relying on the Five Safes, as discussed below in Parts III(C)(1)–(4).

1 *The Five Safes Framework Has Critical Design Weaknesses*

Five critical design weaknesses identified in the Culnane, Rubinstein and Watts working paper and Brennan et al WA Submission are as follows.

(a) *The Five Safes Disregards Legal Considerations*

Because of its statistical origins, the framework appears oriented towards quantitative data,[142] which may explain why it appears to bypass legal protections and privacy rights.[143] Applicable laws, legal basis and privacy and security requirements are inadequately expressed — other than a passing mention of legal compliance under 'Safe projects'.[144] The Brennan et al WA Submission states that the Five Safes must only be used once the legal authority to share personal information has been identified.[145] Otherwise, non-compliance with law is likely; the UK Department of Education considered that it was fully complying with the Five Safes while sharing children's personal information with the private sector in contravention of applicable privacy laws.[146]

(b) *The Five Safes Uses an Unrealistic Concept of Safety*

The Framework relies on a theoretical concept of safety, unattached to real risks.[147] Further, the framework evaluates 'safety' rather than risk, a more familiar concept in most workplaces.[148] The Culnane, Rubinstein and Watts working paper describes

---

139 Pip Brennan, Mark Fitzpatrick, Juan Larranaga, Vicki O'Donnell, Maria Osman, Carol Petterson, Julia Powles, Chris Twomey and Ross Wortham, Independent Submission to the *Privacy and Responsible Information Sharing for the Western Australia Public Sector* Discussion Paper (2019), 13 <https://www.wa.gov.au/government/document-collections/what-we-heard-privacy-and-responsible-information-sharing>.

140 Ibid 14. In fact, the new WA legislation includes 'responsible sharing principles' modelled on the Five Safes, with which DSAs must comply: *WA PRISA* (n 19) s 175, sch 2.

141 Culnane, Rubinstein and Watts (n 137) 1–2.

142 Desai, Ritchie and Welpton (n 122) 4.

143 Culnane, Rubinstein and Watts (n 137) 2–3.

144 Desai, Ritchie and Welpton (n 122) 8.

145 Brennan et al (n 139) 13.

146 Emma Day, Kruakae Pothong, Ayça Atabey and Sonia Livingstone, 'Who Controls Children's Education Data? A Socio-Legal Analysis of the UK Governance Regimes for Schools and EdTech' (2024) 49(3) *Learning, Media and Technology* 356, 362: 'Only (deidentified) 'safe data' is meant to be shared by [government], but of the 84 … shares with commercial entities, 18 (23%) shares included either Level 1 "instant identifier" (e.g., full names, addresses, email addresses) or Level 2 "meaningful identifiers"'.

147 Culnane, Rubinstein and Watts (n 137) 4–6.

148 Ibid 6.

the use of 'safe' as 'emotive' and 'overly optimistic'.[149] In fact, the 'use of "safe" was a deliberate attempt to dismantle the binary meaning of safe/unsafe, and make it explicitly a relative concept'[150] — which may be poorly understood by the public servants applying it. The Brennan et al WA Submission denies that the Five Safes is a risk management framework at all.[151]

(c) *The Five Safes Relies on the Five Dimensions Being Independent When They Are Not*

The framework assumes that the safes are independent of one another.[152] But in practice they appear to depend on one another: 'if one safe fails it can bring down all or some of the rest', leading to comparisons with a 'house of cards'.[153]

(d) *The Five Safes Focuses on a Point in Time When Risks Extend across a Lifecycle*

The framework requires a point-in-time analysis, when the risks associated with personal information apply to its whole lifecycle.[154] The Brennan et al WA Submission notes that this base assumption of the Five Safes that risks are static is wrong; the risks of disclosure are dynamic and vary across the lifecycle.[155]

(e) *The Five Safes Does Not Apply Any Independent Standard of Data Security*

The Five Safes does not require compliance with any independent security standard, such as the Protective Security Policy Framework, ISO 27001 or Essential Eight: '[i]t appropriates notions of safety without being anchored in any objective standard'.[156]

2 *The Framework Does Not Adequately Address Personal Information*

Descriptions of the framework imply that it applies to de-identified data (many of the controls are intended to prevent identification of the data), but the framework does not make this explicit.[157] However, the Five Safes is now applied to the sharing of personal information under the *DAT Act* by Australian public sector agencies, without clear awareness that this contradicts its intent.[158]

---

149 Ibid 7.
150 Desai, Ritchie and Welpton (n 122) 15.
151 Brennan et al (n 139) 13.
152 Desai, Ritchie and Welpton (n 122) 6.
153 Culnane, Rubinstein and Watts (n 137) 8.
154 Ibid 2.
155 Brennan et al (n 139) 13.
156 Culnane, Rubinstein and Watts (n 137) 2.
157 See, eg, Desai, Ritchie and Welpton (n 122) 11. In their 2020 co-authored working paper, Ritchie and Green state that '[i]t could be argued that the common measure across all dimensions is "what is the risk of re-identification?"': Ritchie and Green (n 125) 9. But the framework is now being widely used in Australia for the sharing of personal information, where the likelihood of identification is 100%.
158 The Senate Standing Committee sought unsuccessfully to limit the *DAT Act* to de-identified information, which would have been appropriate: Senate Standing Committee for the Scrutiny of

3 *The Framework Demands a High Degree of User Sophistication*

The framework is described by Ritchie and others as 'explicitly relativistic, subjective and empirical',[159] where 'the use of the framework itself is no guarantee of good practice'.[160] In considering the framework as part of a Technical White Paper, the Australian Computer Society ('ACS') notes that 'several of the dimensions are highly dependent on judgement'.[161] These are concerning descriptors of a framework intended to be used by mid-level public servants to protect sensitive data. Such decision-making does not fall within an established professional skillset, and the subjectivity makes consistency of outcomes unlikely.

The ACS recommended the inclusion of additional dimensions, and also proposed quantified risk thresholds for each dimension.[162] Under the ACS' quantified approach, any data sharing project 'using personal information' would be assessed at 'Safe Level 1 – Not safe project', and would not proceed.[163] This means that the ACS has concluded that the Five Safes is not suitable for sharing personal information in *any* circumstances — and yet it remains the Australian public sector standard for the sharing of personal information.

4 *The Framework Is Poorly Suited for Adoption into Legislation*

How did Australian legislatures adopt the Five Safes as legislative principles that may be inconsistent with, and undermine, their existing laws? Especially when faced with fast-moving technologies, it is not unusual for legislatures to provide regulatory flexibility by recognising rules and guidelines developed by non-legislative bodies. Examples include industry codes and standards under both the *Telecommunications Act 1997* (Cth)[164] and the *Online Safety Act 2021* (Cth).[165] But in those contexts, the external document is reviewed and confirmed by the relevant regulator before being implemented. What is unusual here is for external principles to be included in a Bill, modified through the legislative process and adopted into legislation with minimal formal review and no rigorous assessment of the modifications. The roots of this development are the *Productivity Commission*

Bills, Parliament of Australia, *Scrutiny Digest* (Digest 1 of 2021, 29 January 2021) 5 [1.10] <https://www.aph.gov.au/-/media/Committees/Senate/committee/scrutiny/scrutiny_digest/2021/PDF/d01_21.pdf>.

159 Desai, Ritchie and Welpton (n 122) 21.

160 Ritchie and Green (n 125) 5.

161 Australian Computer Society ('ACS'), *Data Sharing Frameworks: Technical White Paper* (September 2017) 69 <https://www.acs.org.au/content/dam/acs/acs-publications/ACS_Data-Sharing-Frameworks_FINAL_FA_SINGLE_LR.pdf>.

162 ACS, *Privacy in Data Sharing: A Guide for Business and Government* (November 2018) 18–19, 55–65 <https://www.acs.org.au/content/dam/acs/acs-publications/Privacy%20in%20Data%20Sharing%20-%20final%20version.pdf>. Notably, such thresholds are explicitly rejected by Ritchie and Green, who describe the lack of quantitative measures as a strength of the framework: Ritchie and Green (n 125) 11.

163 Ibid 57.

164 'About Industry Codes and Standards', *Australian Communications and Media Authority* (Web Page, 10 October 2023) <https://www.acma.gov.au/about-industry-codes-and-standards>. The page indicates that industry codes and standards are approved by the ACMA as the regulator.

165 'Industry Codes and Standards', *eSafety Commissioner* (Web Page, 23 May 2025) <https://www.esafety.gov.au/industry/codes>. The page indicates that codes are developed by industry and submitted as drafts to the eSafety Commissioner for review and publication.

Report's evident frustration with status quo data sharing and its recommendation to adopt a principles-based legislative framework weighted towards data openness.[166] A principles-based approach requires principles, so the *Productivity Commission Report* identified the Five Safes as the preferred approach — seemingly in reliance on the Australian Bureau of Statistics' prior adoption and an article co-authored by Ritchie, and in the absence of any independent evaluation of effectiveness.[167] Parliamentary scrutiny identified valid issues about the use of the data sharing principles — their potential to undermine consent; the failure to restrict sharing to de-identified data; the vagueness of the 'public interest' test; and the use of the *DAT Code* (a legislative instrument not subject to Parliamentary scrutiny) to flesh out the principles — but did not secure major changes to address these issues.[168] The impact is heightened by the *DAT Act*'s legislative override, which allows authorised data sharing in compliance with the data sharing principles to proceed despite other laws.[169] As Witzleb noted in 2023, it remains to be seen whether the *DAT Act* achieves the appropriate balance between protection and enabling appropriate use of government data.[170]

In a recent article, Green and Ritchie assessed critiques of the Five Safes including the Culnane, Rubinstein and Watts working paper and the Brennan et al WA Submission. Green and Ritchie dismissed them as 'misinterpretations' of the model, asserting without analysis that 'the problem is not the framework, but the implementation'.[171] The Green and Ritchie article did not tackle the critiques in any detail, focusing instead on promoting the Five Safes.[172] In relation to concerns that the Five Safes does not adequately recognise legal requirements, Green and Ritchie stated that 'modern data protection laws are explicitly multi-dimensional and recognise the impossibility of prescribing absolute standards',[173] seemingly misrepresenting the requirements of such laws.[174] The approach to defending the Five Safes in the Green and Ritchie article lacks academic rigour and should give pause to governments relying on it. In this light, recent comments by Ritchie and Whittard that 'in general [the Five Safes'] use as a framework is uncontroversial' seem deliberately misleading.[175]

---

166 *Productivity Commission Report* (n 89) 96–7.

167 Ibid 185, 418–19 (citing Desai, Ritchie and Welpton (n 122)).

168 Senate Standing Committee for the Scrutiny of Bills (n 158) 4–7 [1.9]–[1.17]. The scrutiny resulted in changes to the Explanatory Memorandum, but did not substantially resolve the identified issues: Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Scrutiny Digest* (Digest 5 of 2021, 17 March 2021) 37–8, [2.4]–[2.10].

169 *DAT Act* (n 17) s 23.

170 Normann Witzleb, 'Responding to Global Trends? Privacy Law Reform in Australia' in Moritz Hennemann, Kai von Lewinski, Daniela Wawra and Thomas Widjaja (eds), *Data Disclosure: Global Developments and Perspectives* (De Gruyter, 2023) 147, 166.

171 Elizabeth Green and Felix Ritchie, 'The Present and Future of the Five Safes Framework' (2023) 13(2) *Journal of Privacy and Confidentiality* jpc.831, 6–7.

172 Ibid 14–16.

173 Ibid 10.

174 While information privacy laws may avoid absolutes in relation to the *means* of data protection, they tend to be very clear around permitted *purposes* for the use of personal information: see, eg, *Australian Privacy Principles* (n 16) APP 6.

175 Felix Ritchie and Damian Whittard, 'Using the Five Safes to Structure Economic Evaluations of Data Governance' (2024) 6 *Data & Policy* e16, e16-4.

In Part II above, I detailed that the applicable legal standard for data holders in defending against a data breach is the taking of reasonable steps to protect the data, in compliance with APP 11. Given the significant weaknesses in its data sharing principles based on the Five Safes, application of the *DAT Act* may result in data sharing conduct that does not meet this standard. The Five Safes' lack of focus on legal compliance, its omission of defined risk or information security standards, its inherently subjective approach and its lack of alerts around dangerous practice may result in public sector data holders unwittingly engaging in poor and risky data sharing practice that falls short of the reasonable steps standard. As an example, if the NDDA were to rely on the *DAT Act* for data sharing, the weaknesses in the model might result in the sharing of inadequately de-identified personal information without reasonable security protection. While the *DAT Act* prohibits a recipient from *intentionally* re-identifying de-identified data,[176] this would not protect data from re-identification if inadvertently disclosed — triggering a data breach of considerable concern given the vulnerability of the data subjects and sensitivity of the data.

It is important to note that the *DAT Act* requires the use of DSAs, which may apply an additional layer of protection. In Part IV below, I assess the ability of DSAs to remedy weaknesses introduced by the Five Safes. But at a minimum, the widespread use of the Five Safes in the Australian public sector requires critical evaluation.

IV Comparing Public Sector Data Sharing Agreement Templates

DSAs are an important tool in managing the ongoing conduct of data sharing involving personal information. A DSA allows the data holder to communicate expectations and legal requirements, undertake compliance monitoring and impose sanctions where necessary. Even where the recipient is bound by the same privacy laws as the data holder and is subject to legislative compliance mechanisms, a DSA provides a practical way for the data holder to enforce those obligations, such as by withholding data or terminating the DSA in the event of non-compliance. Unlike a 'point-in-time' data sharing decision, a DSA also imposes ongoing obligations and helps manage the data lifecycle, from the method of sharing through to data destruction.

While Australian data sharing legislation did not eliminate DSAs, in most cases it was closely followed by form-like DSA templates intended to streamline the DSA process, for completion by non-legal staff without significant legal oversight. Perhaps inadvertently, the templates risk focusing public servants on *DAT Act* obligations to the exclusion of reasonable steps requirements. In this section I review four standard public sector DSA templates from federal, state and territory jurisdictions, to identify the additional protection they offer.[177] Analysis by Krebs and

[176] *DAT Act* (n 17) s 16A(3).

[177] I have not included the *Intergovernmental Agreement on Data Sharing between Commonwealth and State and Territory Governments* because it does not contain its own DSA template, stating: 'A [separate] data sharing agreement can be used to ensure the arrangement is appropriately authorised and governed': *Intergovernmental Agreement on Data Sharing between Commonwealth and State and Territory Governments* (n 130) sch E.

Bennett Moses concluded that '[m]ost of the Australian data sharing agreements that we reviewed lacked both specificity and comprehensiveness, resorting to general principles and failing to include important obligations'.[178] My focus is to assess whether these templates contain adequate protections to overcome weaknesses in the Five Safes and to help ensure that the reasonable steps standard is met.

A *The Office of the National Data Commissioner DSA Template*

The recently superseded 2022 ONDC DSA template ('ONDC DSA') resembles a form and includes encouragement on the first page for parties to seek legal advice on whether it will be binding.[179] As a relatively generic template, it focuses on recording the parties' mutual intentions, rather than applying standards set by the data provider. The bulk of the template is devoted to the application of the data sharing principles (that is, the Five Safes). To the extent that there are obligations under the ONDC DSA, they generally flow from the data sharing principles and perpetuate any gaps or weaknesses in the application of those principles. For instance, under the principle 'Setting', cl 4.14 requires the parties to '[d]escribe in detail the physical and Information Technology (IT) environment that will be used to transmit, store and access the data'.[180] The parties could describe a completely unsuitable environment for personal information and there is no guidance that this must be rejected. Due to its reliance on the data sharing principles, the ONDC DSA template is lacking safeguards to ensure that an appropriate level of protection is applied. While this template has been superseded, it remains relevant due to its influence on other jurisdictions.

B *The Australian Capital Territory Public Sector DSA Template*

The Australian Capital Territory ('ACT') public sector DSA template ('ACT DSA') is a version of the ONDC DSA, tailored for use by the ACT Government.[181] It has a similar format and focus on the data sharing principles (that is, the Five Safes), and accordingly carries the same weaknesses as the ONDC DSA.

C *The South Australian Intra-Government DSA Template*

The South Australian intra-government DSA template ('SA DSA'), used for South Australian agencies sharing data with one another, is expressly described as a 'form' in its preamble.[182] Like the ONDC DSA, it focuses on recording the parties' mutual

---

178 Krebs and Bennett Moses (n 132) 136.

179 'Data Sharing Agreement Template', *Office of the National Data Commissioner* (Template, 2022) 1 <https://www.datacommissioner.gov.au/sites/default/files/2022-07/ONDC_Legislation_Agnostic_DSA_Template.doc> ('ONDC DSA'). This template was current until February 2025, when a new dynamically generated template was introduced in the Dataplace platform: 'Data Sharing Agreements', *Office of the National Data Commissioner* (Guidance Note, 2025:2) <https://www.datacommissioner.gov.au/data-sharing-agreements>.

180 Ibid 9.

181 ACT Government, 'External Data Sharing Agreement Template', *ACT Data Sharing Policy* (2 January 2025) <https://www.act.gov.au/open/act-data-sharing-policy> ('ACT DSA').

182 Department of the Premier and Cabinet (SA), 'South Australian Intra-Government Data Sharing Agreement', *Data Sharing Agreement Forms* <https://www.treasury.sa.gov.au/Our-services/data-sharing/data-sharing-forms-and-templates> ('SA DSA').

intentions, with a substantial section (part 6) to step through application of the data sharing principles (ie the Five Safes). Again, this approach leaves significant discretion to each individual assessment, failing to set an objective standard or indicating when sharing might be inappropriate. For instance, one of the Safe Settings questions is 'Based on these safeguards, is the likelihood of accidental disclosure or access low?' with a yes/no checkbox.[183] If the answer is 'no', there is no guidance that additional controls must be applied. It presumably assumes that the signatory will review these criteria carefully before signing, but in a busy public service agency that may leave too much room for error.

D *The DSA under the Victorian Government Data Sharing Heads of Agreement*

The Victorian Government's *Data Sharing Heads of Agreement* ('Heads of Agreement')[184] was intended to operationalise the *Victorian Public Sector Data Sharing Policy*.[185] The DSA ('Vic DSA'), contained in Annexure 1 under the Heads of Agreement, is non-binding and for use within Victorian Government departments who are signatories to the Heads of Agreement.[186] The annexure also has the appearance of a form, but does import certain obligations from the Heads of Agreement, such as the obligation to only use the data for a specified purpose (cl 8), and requirements for data handling, retention and security, including compliance with the Victorian Protective Data Security Standards[187] and completion of a security assessment (cl 12). Further, cl 4 of the Heads of Agreement requires the parties to comply with applicable privacy law and the Victorian Protective Data Security Standards, thereby upholding compliance with independent security standards. These elements make this DSA considerably stronger than the others reviewed. While the explanatory material indicates that the '[p]arties are free to replace all or any part of the annexures with the format/content that best suits their circumstances',[188] which may undermine such requirements, the best view is that

---

183 Ibid 7. Below the check boxes, the form states 'Provide specific details below', but there is no suggestion that such details are required.

184 Victorian Government, 'Victorian Public Sector (VPS) Data Sharing Heads of Agreement – as at 19 August 2022', *Victorian Public Sector Data Sharing Heads of Agreement* (19 December 2022) <https://www.vic.gov.au/victorian-public-sector-data-sharing-heads-agreement> ('Heads of Agreement'). Note that the application of data sharing principles to these Heads of Agreement is a little unclear due to an outdated definition of 'National Data Sharing Principles' as 'the principles set out in the Office of the National Data Commissioner's *Best Practice Guide to Applying Data Sharing Principles*': at 4. The Guide referred to principles based on the Five Safes but has since been archived and is no longer available on the ONDC website: Department of Prime Minister and Cabinet (Cth), *Best Practice Guide to Applying Data Sharing Principles* (15 March 2019) <https://nla.gov.au/nla.obj-1856777422/view>.

185 'Victorian Public Sector Data Sharing Policy', *Victorian Government* (Web Page, 1 May 2024) <https://www.vic.gov.au/victorian-public-sector-data-sharing-policy>.

186 Victorian Government ,'VPS Data Sharing Heads of Agreement - Template Annexures - Version 3.1' (December 2022) <https://www.vic.gov.au/victorian-public-sector-data-sharing-heads-agreement> ('Vic DSA').

187 OVIC, *Victorian Protective Data Security Standards Version 2.0 Implementation Guidance v 2.1* (January 2021) <https://ovic.vic.gov.au/wp-content/uploads/2021/02/20210216-VPDSS-V2.0-Implementation-Guidance-V2.1.pdf>. The Victorian Protective Data Security Standards are the Victorian equivalent of the Protective Security Policy Framework.

188 Vic DSA (n 186) 1.

this flexibility was not intended to, and should, not override the requirements in the Heads of Agreement.

E *Key Elements of Public Sector DSAs*

Table 3 below provides a summary of the contents for the four DSAs (ONDC, SA, ACT, Vic), compared against one another and two additional frameworks:

(a) the requirements for a compliant DSA under the *DAT Act* s 19; and

(b) the Office of the Victorian Information Commissioner ('OVIC') publication *Information Sharing and Privacy: Guidance for Sharing Personal Information* ('*OVIC Guidance*'), which includes a section on the recommended contents of a DSA.[189]

The shading in Table 3 shows the provisions that are present in each document, with unshaded areas highlighting omissions.

Table 3 indicates that the following eight DSA elements are specified in all four DSAs, required by the *DAT Act* s 19 and recommended for inclusion by the *OVIC Guidance*.

1 *Parties*

The parties to the DSA should be clearly specified, generally including name, ABN, address, role under the agreement (discloser or recipient) and contact details.[190] Similarly, all four DSAs require that the agreement be appropriately executed (while execution is not mentioned in the *DAT Act* s 19 and the *OVIC Guidance*, it can be assumed as being necessary to finalise an agreement).

2 *Defined Purpose or Project*

A standard and characteristic element of DSAs is a statement of the intended purpose of data use.[191] If a DSA is entered for a specific project, it will generally include a description of the project and how the data will be used as part of that project, and sometimes the public benefits of the project.

3 *Defined Data*

It is usual to clearly specify what type of data is covered by the DSA, potentially at the level of databases or data fields.[192] This is often covered by a defined term, such as the 'Data' or 'Information', and referenced throughout the DSA.

---

189 OVIC, *Information Sharing and Privacy: Guidance for Sharing Personal Information* (D20/8573, April 2021) 14–17 ('*OVIC Guidance*') <https://ovic.vic.gov.au/wp-content/uploads/2021/04/Information-Sharing-and-Privacy-Gudiance-on-Sharing-Personal-Information.docx>.

190 *DAT Act* (n 17) s 19(1); ONDC DSA (n 179) 2–4; SA DSA (n 182) 1–2; ACT DSA (n 181) 4; Vic DSA (n 186) 1; *OVIC Guidance* (n 189) 15.

191 See, eg, *DAT Act* (n 17) s 19(2); ONDC DSA (n 179) 5; SA DSA (n 182) 2; ACT DSA (n 181) 5; Vic DSA (n 186) 2; *OVIC Guidance* (n 189) 15.

192 See, eg, *DAT Act* (n 17) s 19(3); ONDC DSA (n 179) 10; SA DSA (n 182) 4; ACT DSA (n 181) 9; Vic DSA (n 186) 1–2; *OVIC Guidance* (n 189) 15.

Table 3: Comparison of DSAs, the *OVIC Guidance* and the *DAT Act* s 19[†]

	ONDC DSA	**SA DSA**	**ACT DSA**	**Vic DSA**	***OVIC Guidance***	***DAT Act* s 19**
Parties	■	■	■	■	■	■
Defined purpose/project	■	■	■	■	■	■
Purpose limitation	■	■	■	■	■	■
Defined data	■	■	■	■	■	■
Data lifecycle, retention	■	■	■	■	■	■
Data quality		■	■	■		
Legislative basis	■				■	■
Matching, re-identification restrictions	■	■	■			■
Third party recipients, on-sharing	■		■	■		■
Users	■	■	■	■	■	*Addressed by data sharing principles*
Incident management	■		■		■	■
Security	■	■	■	■	■	*Addressed by data sharing principles*
Risk assessments	■	■	■	■	■	*Addressed by data sharing principles*
Non-compliance & enforcement		■			■	■
Assurance				■	■	
Duration	■		■	■	■	■
Variation	■		■			■
Termination			■	■	■	■
Execution	■	■	■	■		

[†] ■ denotes coverage
denotes no coverage

4 *Users*

All of the templates require some specification or definition of the relevant users (noting that for the *DAT Act* s 19, this is encompassed by the data sharing principles).[193]

These elements are arguably all necessary to establish an effective and meaningful DSA, but offer only a minimal contribution to satisfying the reasonable steps standard. The following elements, also present in all four agreements, begin to contribute to meeting that standard.

5 *Purpose Limitation*

Each DSA includes a requirement that data use be restricted to the specified purpose.[194] Some DSAs may allow uses incidental to the specified purpose (provided the incidental purpose(s) are specified),[195] and some may restrict the use to the specified purpose only, but there will generally be a purpose limitation in any public sector DSA.[196] This purpose limitation is important to the security of the data.

6 *Risk Assessments*

All templates consider whether other assessments are needed (for the *DAT Act* s 19 this is encompassed by the data sharing principles, which mention an ethics assessment), and most require that a separate Privacy Impact Assessment ('PIA') be performed.[197] A PIA will assess compliance with applicable privacy laws and identify any privacy risks that need to be controlled as part of the project. A PIA will ideally encourage *Privacy Act* compliance, but as it is commonly prepared by non-technical staff there is a high risk that the APP 11 'reasonable steps' analysis will be inadequate. A security risk assessment is prepared by technical staff and is generally more effective in this regard. The Vic DSA also requires performance of a security risk assessment (recommended in the *OVIC Guidance* also),[198] and the ONDC DSA, SA DSA and ACT DSA inquire whether ethics, finance or IT approval is relevant.[199]

7 *Security*

All templates require security controls to be considered and specified (again, in the case of the *DAT Act* s 19, this is encompassed by the data sharing principles).[200] In

193 ONDC DSA (n 179) 8–9; SA DSA (n 182) 5; ACT DSA (n 181) 7; Vic DSA (n 186) 1; *OVIC Guidance* (n 189) 16.

194 See, eg, *DAT Act* (n 17) s 19(6); ONDC DSA (n 179) 5*;* SA DSA (n 182) 4; ACT DSA (n 181) 6; Vic DSA (n 186) 2 (item 1); *OVIC Guidance* (n 189) 16.

195 *DAT Act* (n 17) s 19(6)(a)(ii).

196 The purpose restriction might also be imposed by legislation — see, eg, *Road Safety Act 1986* (Vic) s 90N(2), which requires the relevant agreement to include a binding undertaking that the recipient will only use the shared personal information for the specified purpose.

197 See, eg, ONDC DSA (n 179) 7; SA DSA (n 182) 3; ACT DSA (n 181) 6; Vic DSA (n 186) 3 (item 4), Annexures 2–3 (combined with Heads of Agreement (n 184) cl 12); *OVIC Guidance* (n 189) 16.

198 Vic DSA (n 186) 3 (item 3), Annexure 3 (combined with Heads of Agreement (n 184) cl 12); *OVIC Guidance* (n 189) 16.

199 ONDC DSA (n 179) 7; SA DSA (n 182) 3; ACT DSA (n 181) 6.

200 ONDC DSA (n 179) 9–10; SA DSA (n 182) 4, 6–7; ACT DSA (n 181) 8; Vic DSA (n 186) 3 (item 3); *OVIC Guidance* (n 189)16.

most cases, this is included as a response to the 'Safe Settings' element of the Five Safes, asking that the chosen security settings be documented but not setting any minimum standards or guardrails.[201] Some DSAs require more detail than others, with the ACT DSA asking whether the data recipient complies with ISO 27001,[202] without indicating how this information should be evaluated.[203] Only the Vic DSA requires a security risk assessment, which provides detail on applicable security settings and potential areas of weakness, and would usually require technical staff to assess the security settings and evaluate their effectiveness against an independent security standard, and presumably action any recommendations. A security risk assessment is a valuable component of any data sharing activity — this is a strength of the Vic DSA, which is also strong in requiring compliance with an independent information security standard, the Victorian Protective Data Security Standards. The other three DSAs do not require compliance with any independent standard.

8 *Data Lifecycle and Retention*

While all DSAs refer to data retention, only the Vic DSA applies appropriate data retention requirements, with the data recipient being required to agree to securely destroy the data once it is no longer needed.[204] All other DSAs just ask the parties to specify how they will treat the data at the end of the project or purpose, with no standard specified.[205]

Table 3 (above) also points to some components that are less universal but are specified in several of the DSAs. In Part V below, I discuss the elements that are lacking or should be more consistently applied to assist with meeting the reasonable steps standard.

V Improving Data Sharing Agreements to Meet the Reasonable Steps Standard

There are additional DSA elements that would go a long way towards addressing the deficiencies of the Five Safes and enabling a public sector data holder to ensure that it has taken reasonable steps to protect the shared data — as well as building the social licence around data sharing emphasised in the *Productivity Commission Report* by implementing genuine safeguards. The OAIC findings discussed in Part II above suggest that an adequate DSA should require the data recipient to implement: security and risk management policies (covering system monitoring); appropriate data retention policies; staff training in privacy and security; and effective contractual arrangements for any on-sharing to data recipient contractors. In addition, the DSA should include an assurance and audit framework for contract compliance and would ideally require the data recipient to operate in accordance with an independent security standard. Considering these OAIC expectations for the reasonable steps standard, it is notable that the DSAs analysed in Table 3 (above) largely lack those elements.

---

201 See, eg, SA DSA (n 182) 6–7; ACT DSA (n 181) 8–9.
202 International Organization for Standardization (n 38).
203 ACT DSA (n 181) 8.
204 Heads of Agreement (n 184) cl 13; Vic DSA (n 186) 4 (item 8).
205 See, eg, ONDC DSA (n 179) 8; SA DSA (n 182) 7; ACT DSA (n 181) 7.

A *Appropriate Security Governance and Risk Management Policies*

None of the DSAs require the recipient organisation to have commonly implemented security governance in place (such as security policies and risk management policies). An enterprise security management policy would usually detail requirements for security threat monitoring and alerting, and such policies should also cover management of data incidents. The OAIC described such governance in the Ashley Madison joint investigation as 'a basic organizational security safeguard, particularly for an organization holding significant amounts of personal information'.[206] In that investigation, the OAIC identified 'critical gaps in security' that it attributed to the lack of an implemented security governance and monitoring framework.[207] Further, the lack of a documented risk management framework in the Ashley Madison case seemed to underpin a failure of appropriate risk assessment, potentially contributing to the loss of data.[208] There is a clear risk of non-compliance with the reasonable steps standard if appropriate security governance and risk management policies are not required by the relevant DSA.

B *Data Retention Requirements*

The DSAs should specify how long data may be kept, and how it should be disposed of, consistent with APP 11.2. Only the Vic DSA is adequate in this regard, with an overarching obligation to dispose of data in the Heads of Agreement,[209] and more detail on data retention, destruction and assurance in the Vic DSA itself.[210] The other DSAs merely allow the users to record data retention arrangements — but data holders using those DSAs should take that opportunity to be prescriptive, following the example of the Vic DSA. Applying the Blood Service findings around reasonable steps under APP 11.2, both the data holder and the data recipient should have systems and procedures in place 'to identify information the organisation no longer needs and destroy or de-identify this information'.[211]

C *Staff Training Requirements*

None of the DSAs is prescriptive in relation to staff training in privacy and security; only the *OVIC Guidance* makes any significant mention of this.[212] Some of the DSAs request details of the users' qualifications, but without setting a minimum standard or requiring any refresher training. By means of an enforceable undertaking, the OAIC required ARC to develop, finalise and conduct privacy training with its staff on a regular basis, including during onboarding and at regular intervals, and to maintain records of training compliance.[213] While this was considered necessary to implement the reasonable steps standard in the face of the employee conduct that

206 *Ashley Madison Investigation Report* (n 40) 15 [65].
207 Ibid 15 [67].
208 Ibid 16 [69]–[70].
209 Heads of Agreement (n 184) cl 13.
210 Vic DSA (n 186) 4 (items 8, 10).
211 OAIC, *DonateBlood.com.au Data Breach* (n 42).
212 *OVIC Guidance* (n 189) 16.
213 *ARC Enforceable Undertaking* (n 35) [5.6].

triggered the ARC breach, it would be good practice in any case. At a minimum, the DSA should require some type of staff compliance training in privacy and security, to ensure that employees understand their obligations under the DSA.[214]

D *Contracting Obligations*

None of the DSAs address the issue of whether subcontractors can be used to manage the data and the obligations that should apply to them. Given the OAIC's findings regarding contractual arrangements in the Blood Service breach, this is likely to be a weakness. Data recipients may engage subcontractors to undertake data hosting and data analytics, or to manage infringements or customer queries, among other things. A DSA should specifically require the data recipient to take responsibility for its subcontractors' compliance with the DSA, otherwise the protections of the DSA are likely to be significantly undermined by subcontractor use. A related issue is the offshoring of data by contractors to jurisdictions with a lower level of legislative privacy and security protection. This can expose the data to considerable risk, but was not addressed in any of the DSA templates.[215] The DSAs should specifically limit offshoring of the data.

E *Auditing for Compliance*

Another common deficit in the templates is a lack of ongoing compliance and assurance activity. Among the four DSAs, only the Vic DSA references this, suggesting that the parties document any assurance required for data destruction, and also any other assurance or audit processes — but without requiring such assurance.[216] A data holder cannot be confident of compliance in the absence of ongoing reporting or auditing.[217] In the case of shared personal information, it is appropriate to apply regular auditing to the data recipient (either self-assessment or some level of independent auditing) to ensure that agreed standards continue to be met. Resources permitting, it may be appropriate to specifically allow investigative access by the data holder or its agent (such as a security testing company) to the data recipient's environment and data use in order to confirm that appropriate standards are being upheld. None of the DSAs require the data recipient to allow investigative access by the data holder. Ideally, all of the DSAs should be reviewed and updated to add assurance requirements and (where feasible) allow for investigative access. Auditing and inspection activity often requires follow up and ongoing supervision to ensure that any identified issues are appropriately rectified and closed out — such activities will need to be adequately resourced by the data holder.

---

[214] The data holder may wish to prepare and supply relevant user training to data recipients, especially if there are complexities around appropriate use of the data.

[215] It may also point to non-compliance with APP 8, which covers the cross-border disclosure of personal information and requires an APP entity to 'take such steps as are reasonable in the circumstances to ensure that the overseas recipient does not breach the *Australian Privacy Principles* (other than Australian Privacy Principle 1)': *Australian Privacy Principles* (n 16) APP 8.

[216] Vic DSA (n 186) 4 (items 8, 10).

[217] See, eg, the OAIC Guide reference to auditing: OAIC, *Guide to Securing Personal Information* (n 29) 42.

F *Independent Standards*

With the exception of the Vic DSA, the DSAs do not require compliance with any independent security standards. This omission from the templates implies that *any* level of protection may be adequate provided it is documented and agreed. While the reasonable steps standard does not require compliance with an independent security standard, the OAIC's investigations into Sony and Epsilon indicate it can be beneficial in establishing that reasonable steps were taken.[218] Also, the OAIC referenced independent standards to establish the measures that Medibank should have implemented.[219] By requiring compliance with the Victorian Protective Data Security Standards and also a security risk assessment, the Vic DSA could assist data holders in demonstrating that reasonable steps were applied. The other three DSAs do not require this. Guidance should be developed for data holders using those DSAs, encouraging them to require that data recipients comply with an independent standard such as Protective Security Policy Framework, ISO 27001 or the Essential Eight, including a security risk assessment in each instance.

The existing public sector DSA templates would be improved by paying attention to the six elements discussed above in Part V(A)–(F), to help address the weakness of the Five Safes and ensure that reasonable steps have been taken. This is not a 'set and forget' exercise. To appropriately monitor and oversee each DSA, ongoing contract management will be required, including supervising annual assurance activities and determining on a risk basis whether additional controls (such as investigative access) should be actioned. Public sector data holders should ensure that they are adequately resourced to actively manage their data sharing arrangements throughout the data sharing lifespan.

VI Conclusions

As illustrated by the NDDA and NEVDIS examples, public sector data sharing is highly valuable — it underpins law enforcement, policy development and service delivery, and may unlock considerable economic value. But for such data sharing to grow and flourish, the *Productivity Commission Report* asserts that it needs strong trust and social licence, based on the public's confidence that their data will not be negatively impacted by a data breach or otherwise. In this article I considered the OAIC's application of the APP 11 reasonable steps standard to understand the standard of conduct applicable to public sector data holders to prevent a data breach. I also outlined the weakness introduced into public sector data management by the *DAT Act*, which overrides some legislative protection and may apply inadequate data protection due to reliance on unsuitable data sharing principles. Although the *DAT Act* is intended to operate alongside and in addition to the *Privacy Act* and APP 11, its complexity is such that public servants may apply it and corresponding DSA templates in a standalone manner, resulting in weak or inadequate efforts to comply with the reasonable steps standard.

I stepped through the unfortunate process by which the Five Safes were adopted as data sharing principles, and critiqued that framework, outlining its

[218] *Sony Report* (n 31); *Epsilon Report* (n 32).
[219] 'OAIC Concise Statement' (n 61) Annexure B.

weaknesses in respect of the sharing of personal information. A high-level principles-based approach like the Five Safes framework, while potentially suitable for research and statistics, raises too many risks and offers too little guidance in a public sector context. It is ill-equipped to satisfy the reasonable steps standard. I also assessed the role of DSAs in helping to fill that gap, highlighting six areas that could immediately be improved to assist in satisfying the reasonable steps standard. This would involve updating or using the DSAs to:

- require that the data recipient has appropriate security governance policies and a risk management framework in place;
- apply appropriate data retention policies; impose obligations in relation to staff training in privacy and security; include restrictions and obligations in relation to subcontracting;
- impose assurance and compliance activities on the data recipient; and
- require that a data recipient's environment comply with an independent standard where feasible.

Ideally, DSA templates would be amended accordingly, but they are sufficiently flexible to allow data holders to include these requirements in practice, starting immediately. In this regard, the stronger Vic DSA provides a helpful model. This is not just contractual amendment — appropriate ongoing management is needed throughout the data lifecycle.

Strengthened DSAs would ideally be combined with targeted guidance to public servants on the ongoing relevance of APP 11 to data handling under the *DAT Act*. This guidance should strongly encourage the undertaking of a security risk assessment as part of each *DAT Act* authorisation, together with the implementation of any ensuing recommendations. Should such improvements be made, it would allow Australian public sector agencies to ensure that they take reasonable steps in their data sharing activities to protect their customers' personal information, consistent with APP 11. Not incidentally, such action is likely to build social licence around data sharing by implementing genuine safeguards that reduce the likelihood of a data breach and protect important customer data.

Rethinking Corporate Groups: Insights from Systems Intentionality

Elise Bant*

Abstract

Corporate groups continue to present significant challenges for corporate law and regulation. In this article, I consider the insights for group responsibility offered by a novel, holistic model of corporate responsibility entitled 'Systems Intentionality'. Recently endorsed and applied in the High Court of Australia, this model posits that corporations manifest their states of mind through their systems of conduct, policies, and practices. Viewed at a certain level of generality, corporate groups can, and often do, operate as coordinated systems of conduct. Systems Intentionality suggests that such group systems will manifest certain states of mind, typically (but not necessarily only) that of the parent. These mindsets may be relevant to establishing the parent's direct liability for harms resulting from its systems of conduct through orthodox, doctrinal routes. The model may, therefore, provide invaluable assistance towards placing group and network responsibility on more transparent and principled footing, consistent with recent, broader trends supporting direct parent liability.

I Introduction

Australian corporate law is undergoing a quiet revolution. In the recent High Court of Australia decision in *Productivity Partners Pty Ltd v Australian Competition and*

Please cite this article as:

Elise Bant, 'Rethinking Corporate Groups: Insights from Systems Intentionality' (2025) 47 *Sydney Law Review* 20353: 1–29 <https://doi.org/10.30722/slr.20353>.

* Professor of Private Law and Commercial Regulation, University of Western Australia (UWA) Law School, Perth, Western Australia, Australia; Professorial Fellow, University of Melbourne, Victoria, Australia. Email: elise.bant@uwa.edu.au. ORCID iD: https://orcid.org/0000-0003-2188-0521.
This article forms part of Australian Research Council Future Fellowship project FT190100475 entitled 'Unravelling Corporate Fraud: Re-Purposing Ancient Doctrines for Modern Times'. I am indebted to the independent reviewers, the participants at the Singapore Management University Corporate Law Workshop held in July 2024, the Melbourne Law School Laureate Program in Global Corporations and International Law workshop held in August 2024, Ms Rebecca Faugno (UWA), Professor Jason Harris (Sydney Law School) and Professor Christian Witting (National University of Singapore) for their very helpful comments on earlier drafts of this article. Responsibility for all remaining infelicities and errors rests with me.

Consumer Commission ('*Productivity Partners*'),[1] Gordon J and Edelman J separately endorsed and applied reasoning consistent with a novel, holistic model of corporate responsibility entitled 'Systems Intentionality'.[2] This posits that corporations manifest, in the dual sense of reveal and instantiate, their states of mind through their everyday, or de facto, systems of conduct, policies, and practices. As Gordon J put it: '[c]orporations "think" and act through systems'.[3] And as Edelman J observed, this 'systems liability'[4] approach (his Honour's preferred terminology) enables proof of state-of-mind elements relevant to corporate liability rules without requiring evidence to be brought of responsible individuals within the corporation, whose mental states can be attributed to the corporation.[5] Their Honours separately used this approach to find that the corporate wrongdoer in that case had engaged knowingly and intentionally in conduct that should be characterised as 'unconscionable' and, so, contrary to the applicable statutory prohibition.[6]

This statutory context might seem an unlikely locus for a broad-based revolution. As always, much will rest on subsequent judicial interpretation. However, it is striking that neither judge confined their reasoning to the statutory context. To the contrary, both expressed their analytical approach in general terms. Edelman J explicitly characterised the statutory prohibition as, itself, reflecting a more generally-applicable principle of direct systems liability.[7] Further, it is arguable that Gordon J's analysis was relevantly endorsed by Steward J and, separately, Beech-Jones J.[8] There is enough in the case, therefore, to warrant careful consideration of the potential implications of such systems-based reasoning for corporate responsibility.

---

1 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2024) 98 ALJR 1021 ('*Productivity Partners*'), especially 1047–8 [108]–[111], 1051–2 [134], 1053 [143] (Gordon J) 1061–2 [199]–[200], 1067–9 [236]–[241] (Edelman J).

2 The core of the model is set out in Elise Bant, 'Systems Intentionality: Theory and Practice' in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023) 183 ('Systems Intentionality'), cited by Gordon J in *Productivity Partners* (n 1) 1047–8 [108]–[109]; Elise Bant, 'Modelling Corporate States of Mind through Systems Intentionality' in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023) 231 ('Modelling'). See also Elise Bant, 'Culpable Corporate Minds' (2021) 48(2) *University of Western Australia Law Review* 352; Elise Bant and Jeannie Marie Paterson, 'Systems of Misconduct: Corporate Culpability and Statutory Unconscionability' (2021) 15(1) *Journal of Equity* 63 ('Systems of Misconduct'), both cited by Edelman J in *Productivity Partners* (n 1) 1068 [238], 1068 [240] . The full project publications and findings are available at *Unravelling Corporate Fraud: Repurposing Ancient Doctrines for Modern Times* (Website) <https://unravellingcorporatefraud.com/>.

3 *Productivity Partners* (n 1) 1047 [108].

4 See, eg, ibid 1061–2 [199]–[200].

5 Ibid 1061–2 [198]–[200], 1069 [247]. For the common law's gradual recognition of corporate capacity to hold mental states, see Samuel Walpole, 'Criminal Responsibility as a Distinctive Form of Corporate Regulation' (2020) 35(2) *Australian Journal of Corporate Law* 235; Elise Bant, 'Corporate Mistake' in Jodi Gardner, Amy Goymour, Janet O'Sullivan and Sarah Worthington (eds), *Politics, Policy and Private Law Vol II: Contract, Commercial and Company Law* (Hart Publishing, 2025) 123 ('Corporate Mistake').

6 *Productivity Partners* (n 1) 1053 [143] (Gordon J); 1069 [242], [246] (Edelman J), applying *Australian Consumer Law* ('*ACL*') ss 21–2, in *Competition and Consumer Act 2010* (Cth) sch 2. The equivalent prohibition for financial services is *Australian Securities and Investments Commission Act 2001* (Cth) ss 12CB, 12CC ('*ASIC Act*').

7 *Productivity Partners* (n 1) 1068 [238].

8 Ibid 1077 [282], 1082 [307] (Steward J); 1088 [340] (Beech-Jones J).

In this article, I confine my discussion to the potential insights offered by Systems Intentionality for the challenging field of corporate group responsibility.[9] The basic point is simple: viewed at a certain level of generality, corporate groups and networks[10] can, and often do, operate as coordinated systems of conduct. Such group systems will manifest certain states of mind, typically (but not necessarily only) that of the 'parent'.[11] These mindsets may be relevant to establishing the parent's direct liability for harms resulting from its systems of conduct. The model may, therefore, provide invaluable assistance towards placing group and network responsibility on a more transparent and principled footing.

As my analysis will demonstrate, this approach in no way requires 'piercing the corporate veil' or any of its metaphorical counterparts.[12] Rather, assessment of corporate mental states manifested through systems of conduct comprising corporate actors, or elements, proceeds as an objective exercise of interpretation or construction.[13] The mode of analysis in no way serves to deny the separate legal identity of members of corporate groups or networks associating to pursue a common business model.[14] Rather, it embraces that reality and, in so doing, ascribes to group members the responsibilities that come with legal personhood.

The argument proceeds in four stages. In Part II, I provide an overview of the recent and renewed focus on direct parent liability, including liability through agency principles. In Part III, I outline the model of Systems Intentionality, including a brief discussion of its relationship to concepts of agency and (more broadly-speaking) 'proxy' conduct. In Part IV, I consider how the model may shed light on parent knowledge and intentions manifested through coordinated systems of conduct

---

9 This approach accepts that the endorsement in the High Court was necessarily partial and constrained, not least because limited to the issues arising in the case, as explored in Elise Bant and Rebecca Faugno, 'Revolution and Evolution in Corporate Law: *Productivity Partners* and Systems Intentionality in the High Court of Australia' (2025) *Australian Journal of Corporate Law* (forthcoming).

10 Corporate groups typically comprise corporations 'associated by common or interlocking shareholdings, allied to unified control or capacity to control': *Walker v Wimborne* (1976) 137 CLR 1, 6 (Mason J). As that case illustrates, however, corporate groups may be 'looser', coming in the form of coordinated business structures between independent corporations or 'networks': Christian Witting, *Liability of Corporate Groups and Networks* (Cambridge University Press, 2018) 5. Parts IV and V below address both possibilities.

11 In this article, I use the language of 'parent' and 'holding' companies interchangeably: as explained in Part V, the nature of the shareholding interest may be an informing, but not determinative consideration.

12 Cf lifting (generally, to assess shareholdings for some purpose of the law). Inconsistent usage is common: see Ian M Ramsay and David B Noakes, 'Piercing the Corporate Veil in Australia (2001) 19(4) *Company and Securities Law Journal* 250. For one attempt at clear delineation between piercing and lifting, see *Atlas Maritime Co SA v Avalon Maritime Ltd (No 1)* [1991] 4 All ER 769, 779 (Staughton LJ); cf *Prest v Petrodel Resources Ltd* [2013] 2 AC 415, 484 [28] (Lord Sumption JSC), distinguishing 'concealment' (generally not involving piercing) and 'evasion', see also at 498 [60] (Lord Neuberger PSC).

13 Corporate mindsets are commonly treated as 'facts' in line with natural persons' mental states: *Edgington v Fitzmaurice* (1885) 29 Ch D 459 (CA), 483 (Bowen LJ); *Generics (UK) v Warner-Lambert Co LLC* [2019] Bus LR 360, 421 [171] (Lord Briggs JSC). On corporate minds as 'social facts', see Eva Micheler, *Company Law: A Real Entity Theory* (Oxford University Press, 2021) 20, discussing Émile Durkheim, *Durkheim: Rules of Sociological Method and Selected Texts on Sociology and Its Method*, ed Steven Lukes (Macmillan Education, 2nd ed, 2013) 49–71. Cf *Productivity Partners* (n 1) 1067–8 [236], 1068 [240] (Edelman J).

14 Witting (n 10) 5.

utilising corporate networks. I draw on extensive jurisprudence arising from Australia's statutory unconscionable conduct prohibitions, to which *Productivity Partners* now contributes. In Part V, I return to consider the leading Australian authorities on parent liability. In Part VI, I conclude with some brief reflections on the ramifications of my analysis for parent and corporate group members' liability.

II A Refocusing on Direct Parent Liability

The bases on which a member of a corporate group (typically, a parent) may be held responsible for acts of another (typically, a subsidiary) continue to attract significant attention and debate.[15] The reasons lie in the foundational case of *Salomon v A Salomon & Co Ltd* ('*Salomon v Salomon*').[16] This famously emancipated corporate legal identity from the identity of its shareholders.[17] Applied to corporate group structures, the separate legal identity doctrine has had profound consequences for corporate parents' liability for harms arising from subsidiaries' activities.

Parent companies will not generally be responsible for subsidiaries' misconduct. A limited and controversial exception exists where courts are prepared to 'pierce the corporate veil'. That metaphor is usually employed to refer to the circumstances in which the legal identity of a company, separate from its 'owner' and/or 'controller',[18] may be disregarded, so as to permit the corporation's liabilities to be treated as personal to the controller. One must only state it in this way to see that the circumstances in which this may occur will be limited, most obviously to circumstances where incorporation is but a dishonest sham or façade, adopted to mask the true nature of the controller's activities.[19]

---

15 See, eg, Witting (n 10); Australian Law Reform Commission ('ALRC'), *Corporate Criminal Responsibility: Final Report* (Report No 136, April 2020) ('*ALRC Final Report*') 476 [10.138]; ALRC, *Corporate Criminal Responsibility* (Discussion Paper No 87, November 2019) ch 12; Radha Ivory and Anna John, 'Holding Companies Responsible? The Criminal Liability of Australian Corporations for Extraterritorial Human Rights Violations' (2017) 40(2) *UNSW Law Journal* 1175.

16 *Salomon v A Salomon & Co Ltd* [1897] AC 22 ('*Salomon v Salomon*'), discussed further below in Part V(A). While renowned on this count, common law corporations arguably pre-date the case by some centuries, and certainly the advent of chartered or registered corporations: Samuel Stoljar, *Groups and Entities: An Inquiry into Corporate Theory* (Australian National University Press, 1973).

17 See, eg, Ross Grantham and Charles Rickett, 'The Bootmaker's Legacy to Company Law Doctrine' in Ross Grantham and Charles Rickett (eds) *Corporate Personality in the 20th Century* (Hart Publishing, 1996) 1, 8. As Justice James Allsop noted extra-curially, the Australian cases of *CSR Ltd v Wren* (1997) 44 NSWLR 463 and *CSR Ltd v Young* (1998) Aust Torts Reports 81-468 are consistent with this analysis: Justice James Allsop, 'Piercing the Corporate Veil: Recent International Developments' (FCA) [2022] *Federal Judicial Scholarship* 16, [56]–[59]. See further *Barrow v CSR* (Supreme Court of Western Australia, Rowland J, 4 August 1988) 218, discussed in Warren (n 22) 677–80. See also in New Zealand, *James Hardie Industries plc v White* [2019] 2 NZLR 49, 68 [64]. Contra is *James Hardie & Co Pty Ltd v Hall* (1998) 43 NSWLR 554, 584 (Sheller JA) ('*James Hardie v Hall*'). See further Part V below. For reflections on shareholders as 'owners', see Duncan I Wallace, 'The Reality of Shareholder Ownership: For-Profit Corporations as Slaves' (2024) 47(4) *UNSW Law Journal* 1255.

18 Whether shareholdings are or should be relevant to the inquiry, beyond evidencing the shareholder's capacity to influence or control the corporation, is addressed in Parts IV and V. Similar questions arise when seeking to sheet home liability against directors.

19 See, eg, *James Hardie v Hall* (n 17) 583–4 (Sheller JA); *Prest v Petrodel Resources Ltd* (n 12) 488 [35] (Lord Sumption JSC), 503 [81] (Lord Neuberger PSC).

Three recent developments, however, point towards a more transparent, principled and effective way of addressing the challenges of group liability. First, as Chief Justice James Allsop has helpfully observed, there is increasing realisation that addressing issues of parental corporate responsibility through a doctrine of veil-piercing is unhelpful.[20]

The scope and operation of the exception are persistently obscure and shifting, consistent with the metaphor itself. More importantly for current purposes, however, any limited categories of case to which it applies need to be kept sharply distinct from the circumstances in which a controller of a company should be held responsible for the company's acts, on the controller's own account.[21] That is, it is a separate question whether and why a controller may have direct responsibility for the acts of the company. On this approach, the separate legal identity of the company (and with it, the related concept of limited liability) is by no means overlooked.[22] Rather, it is fully accepted and becomes part of the matrix of circumstances that must be considered in determining whether the controller is independently and personally liable through the application of some legal, equitable or statutory principle.

One circumstance in which direct liability may arise is where a company acts as agent of its controller:[23] here, the act of the company is treated in law as the act of the controller.[24] Consistently, the controller is directly liable for the legal consequences of that act, just as it would be if it had engaged personally in the behaviour.[25] Parent liability may also arise directly under statute,[26] or through other general law doctrines, including in conjunction with agency principles.[27]

---

20 Allsop (n 17).

21 Ibid [33]. See, eg, *Prest v Petrodel Resources Ltd* (n 12) 478 [16] (Lord Sumption JSC).

22 Contrary to, eg, *Briggs v James Hardie & Co Pty Ltd* (1989) 16 NSWLR 549, 567 (Rogers AJA) ('*Briggs v James Hardie*'), discussed in Part V(B) below; see also Chief Justice Marilyn Warren, 'Corporate Structures, the Veil and the Role of the Courts' (2016) 40(2) *Melbourne University Law Review* 657; Jason Harris, 'Lifting the Corporate Veil on the Basis of an Implied Agency: A Re-Evaluation of Smith, Stone and Knight' (2005) 23(1) *Company and Securities Law Journal* 7, 9.

23 *ACN 007 528 207 Pty Ltd (in liq) v Bird Cameron* (2005) 91 SASR 570, 592 [96] (Besanko J) ('*Bird Cameron*'). The nature and boundaries of agency, including by reference to a (potentially) more expansive conception of 'proxy conduct', is a key issue for group liability and is addressed below in Parts III–V.

24 The many and various versions of the Australian statutory 'TPA model', which originated in the *Trade Practices Act 1974* (Cth) s 84 and includes *Corporations Act 2001* (Cth) s 769B ('*Corporations Act*'), impose direct liability on a corporation by deeming the conduct and states of mind of officers, employees and agents of the corporation to be those of the company: see *ALRC Final Report* (n 15) 225 [6.28], 251–8 [6.127]–[6.158]; *Trade Practices Commission v Tubemakers of Australia Ltd* (1983) 47 ALR 791, 737–8 (Toohey J). As the ALRC noted, notwithstanding that these permit some aggregation between conduct and fault, they require that a single officer, employee or agent had the requisite state of mind, as opposed to organisational or holistic, attribution approaches: *ALRC Final Report* (n 15) 251 [6.126].

25 Allsop (n 17) [33]; *Idoport Pty Ltd v National Australia Bank Ltd; National Australia Bank Ltd v OAMPS Ltd* [2004] NSWSC 695 [144] (Einstein J).

26 For United States and European Union examples, see Witting (n 10) ch 8.

27 Such as through accessorial liability doctrines (see Part IV(B)(3) and Part VI below) and negligence, the subject of *Chandler v Cape* [2012] 1 WLR 3111; *Lungowe v Vedanta Resources plc* [2020] AC 1045; *Okpabi v Royal Dutch Shell plc* [2021] 1 WLR 1294 — discussed in William Day, 'Negligence and the Corporate Veil: Parent Companies' Duty of Care to their Subsidiaries' Employees' (2014) *Lloyds Maritime and Commercial Law Quarterly* 454, 457; Nic Wilson, 'When is a Subsidiary's Negligence the Parent Company's Problem?' (2020) 26 *Canterbury Law Review* 161, 165; Martin

This renewed focus on more traditional routes to direct parent liability connects helpfully with the second, potentially important milestone in the journey towards more certain and principled treatment of corporate groups. In *CCIG Investments Pty Ltd v Schokman* ('*CCIG Investments*'), Edelman and Steward JJ engaged in careful analysis of the tortuous history of the umbrella conception of 'vicarious liability'.[28] On their Honours' analysis, this label frequently harbours three distinctive concepts. The first concept encompasses cases where a defendant's liability is primary, but founded on another party's acts or conduct, which are attributed to the defendant. Their Honours described this concept as referring, 'loosely', to agency or 'vicarious conduct',[29] and including acts forming part of a joint enterprise (and so, agreed), or procured, authorised or ratified by the defendant.[30] For clarity, in this article I use 'proxy conduct' to signify this potentially broader conduct-attribution concept.

As their Honours explained in *CCIG Investments*, this category must be sharply distinguished from a second concept: vicarious *liability* for the wrongdoing of another, a form of secondary or indirect liability.[31] Here, the claim is not that the defendant has itself engaged in the impugned conduct, or has committed a wrong: rather, the defendant is responsible for the wrongdoing of a third party. A third concept, 'non-delegable duty', again, demands separate treatment.[32]

While their Honours were concerned to 'disentangle'[33] these three conceptions for the purposes of an employer liability case, separate identification of proxy conduct has great value for current purposes. This operates as an 'attribution of conduct' (as opposed to liability) rule.[34] The rule is most clearly met where the act of one person (which could be a natural or artificial person, such as a corporation)[35] is treated in law as the act of another. In such cases, the attributed conduct becomes the foundation for assessment of the defendant's direct responsibility for the legal consequences of their own act. This is not, then, 'vicarious liability' for the wrongdoing of another, a form of secondary or indirect liability.[36] Rather, it is primary or direct liability arising from the defendant's own acts, albeit carried out by or through another.

Petrin and Barnali Choudhury, 'Group Company Liability' (2018) 19(4) *European Business Organization Law Review* 771, 775–9, 782–94.

28 *CCIG Investments Pty Ltd v Schokman* (2023) 278 CLR 165, 185–200 [48]–[81] ('*CCIG Investments*').

29 Ibid 185–6 [50], 187–8 [55]. The TPA model (n 24) of conduct attribution recognises a broad form of proxy conduct: see, eg *Walplan Pty Ltd v Wallace* (1985) 8 FCR 27, 36–8 (Lockhart J, Sweeney and Neave JJ agreeing). 'Agent' for these purposes includes corporations: *Australian Competition and Consumer Commission v Yazaki Corporation (No 2)* (2015) 332 ALR 396, 443 [217] (Besanko J). Cf Besanko J on common law agency at 457–8 [311]–[312]; 466–9 [349]–[362] and Part IV below.

30 *CCIG Investments* (n 28) 185–6 [50]: see also at 187–8 [55], 190–1 [62], 192–3 [66].

31 Ibid 192 [65].

32 Ibid 187 [53].

33 Ibid 187 [54].

34 Ibid 187–8 [55].

35 Or another juristic person, such as the body politic of the Commonwealth of Australia: *Chief Executive Officer, Aboriginal Areas Protection Authority v Director of National Parks* (2024) 98 ALJR 655, 684–5 [142] (Edelman J).

36 *CCIG Investments* (n 28) 192 [65] (Edelman and Steward JJ).

The third, conceptually related development, and the focus of this article, is to explore the potential ramification for group liability of adopting reasoning consistent with the model of 'Systems Intentionality' cited in *Productivity Partners*.[37] This model proposes that corporations manifest their states of mind through what I call their 'adopted or deployed' systems of conduct, policies and practices.[38] As Part III explains, systems of conduct typically comprise multiple elements, operating in coordinated ways. These steps are commonly performed by natural persons, corporate persons and, indeed, through non-agentic automated and algorithmic tools.[39] Where a system of conduct, however comprised, is adopted or deployed by a corporation (including, to adapt Edelman and Steward JJ's phrase, where it is procured, authorised or ratified, or adopted as part of a joint enterprise),[40] the corporation as a construct engages directly and purposively in and with the world, in a 'real' way. It is to this possibility that I now turn.

III Systems Intentionality

A *The Model Outlined*

Systems Intentionality posits that corporations, lacking natural minds, necessarily adopt and deploy systems of conduct, policies and practices to engage purposively in and with the world. The board of directors is the most fundamental of these decision-making systems.[41] Traditional attribution rules therefore focus on the board as the corporation's indubitable directing mind and will. But beyond very small and hierarchical entities, of the 'mum and dad' or 'one-person' variety, these systems are hardly sufficient to enable most modern corporations to operate successfully. So, more diffused systems of conduct are deployed, such as through devolved lines of authority,[42] or even more diffused 'standard operating procedures' and more granular and organic practices. All these processes and practices nudge, direct and coordinate behaviours on the ground, to achieve corporate purposes.[43]

---

37 See above nn 1–2.

38 Formal representations of policies and practices may diverge sharply from the daily reality, with implications, for eg, for misleading or deceptive conduct liability: explained in Elise Bant, 'Where's WALL-E: Corporate Fraud in the Digital Age' in Paul S Davies and Hans Tjio (eds), *Fraud and Risk in Commercial Law* (Hart Publishing, 2024) 55, 62–7 ('Where's WALL-E').

39 Cf Justice James Edelman, 'Direct and Vicarious Liability of Corporations' in Edwin Peel and Rebecca Probert (eds), *Shaping the Law of Obligations: Essays in Honour of Professor Ewan McKendrick KC* (Oxford University Press, 2023) 211.

40 *CCIG Investments* (n 28) 185–6 [50]; see also at 187–8 [55], 190–1 [62], 192–3 [66]. Cf the more limited formulation expressed in *Productivity Partners* (n 1) 1068 [237] (Edelman J), discussed in Part III(B) below.

41 See further Bant, 'Corporate Mistake' (n 5); cf *Productivity Partners* (n 1) 1061–2 [199] 'also', 1068 [237] 'alternative' (Edelman J), which may suggest that systems liability is inherently different from and independent of traditional attribution rules. See also *Automotive Invest Pty Ltd v Federal Commissioner of Taxation* (2024) 98 ALJR 1245 1266–7 [114]–[115], 1270 [135] (Edelman, Steward and Gleeson JJ) ('*Automotive Invest*').

42 Rachel Leow, *Corporate Attribution in Private Law* (Hart Publishing, 2022) 36–7; Rachel Leow, '*Meridian*, Allocated Powers, and Systems Intentionality Compared', in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023) 119, 123–6 ('*Meridian*'). See also Christian Witting, 'The Place of Managers in the Corporate Governance Architecture' (2024) 24(1) *Journal of Corporate Law Studies* 267.

43 *Productivity Partners* (n 1) 1047 [108] (Gordon J). See also text accompanying n 45 below.

Systems of conduct are, on this model, always 'generally' intended, in the sense of being deliberate conduct, although whether the ends or results of that conduct are 'specifically' intended is a separate question, to be assessed objectively in light of the characteristics of the particular system.[44] The general intentionality of systems of conduct arise from the very fact of them being systems: systems, schemes, plans, strategies, processes and equivalents all exist for a purpose — at the least to produce the coordinated conduct the subject of the scheme. In the words of Gordon J, '[s]ystems are inherently purposive'.[45] Further, Systems Intentionality posits that corporations may be taken to know the critical features of their systems, required for them to deploy successfully (that is, according to their terms).[46] Otherwise, the successful deployment of a system depends upon accidental or coincidental application of its steps or elements, in the correct, synchronised way. While not impossible, this is sufficiently unlikely to warrant placing the onus of demonstrating accident or mistake onto the corporation that has deployed the system, according to its terms.

A final, and important, aspect of this process of interpretation or construction is to recognise that systems of conduct must be identified and assessed at a certain level of generality, relevant to the legal issue at play.[47] Here, the model of Systems Intentionality posits an expansive approach to identifying, then characterising, the pertinent system. As I will demonstrate in Part IV, systems of conduct commonly comprise both positive and negative (omitted) steps, as well as proactive and reactive elements (such as audit and remedial mechanisms).[48] An expansive lens is appropriate, as systems of conduct generally deploy repeatedly over time.[49] Thus, how a corporation responds to the impacts of its behaviour in the world itself reflects and sheds light on its capacities and choices as a normatively responsible juristic person.[50] In the same way, omitted steps, including here the 'default settings' that determine the way in which a system deploys at critical junctures or pressure points, are often very expressive of corporate choices, preferences and overall intentions.[51] It is the integrated system, viewed holistically and over time, that most clearly manifests the corporate intention(s).

B *Systems Intentionality and Proxy Conduct*

In the spectrum of liability mechanisms, Systems Intentionality provides a novel way of ascertaining corporate mental states manifested through their adopted or deployed

44 See Bant, 'Modelling' (n 2).
45 *Productivity Partners* (n 1) 1047 [108].
46 Ibid.
47 Bant, 'Systems Intentionality' (n 2) 197.
48 Brent Fisse, 'Reactive Corporate Fault' in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023) 139; Peter A French, 'The Principle of Responsive Adjustment in Corporate Moral Responsibility: The Crash on Mount Erebus' (1984) 3(2) *Journal of Business Ethics* 101.
49 See further Elise Bant, 'Corporate Evil: A Story of Systems and Silences' in Penny Crofts (ed), *Evil Corporations: Law, Culpability and Regulation* (Routledge, 2024) 223 ('Corporate Evil').
50 Adopting and adapting Fisse (n 48) and French (n 48).
51 Strikingly apparent in automated systems: see Bant, 'Where's WALL-E' (n 38) 69–73; Jeannie Marie Paterson, Elise Bant and Henry Cooney, '*Australian Competition and Consumer Commission v Google*: Deterring Misleading Conduct in Digital Privacy Policies' (2021) 26(3) *Communications Law* 136, 139, 142–4.

systems of conduct. Because of this dependence on identifying 'their' corporate systems of conduct, Systems Intentionality has an analytical and conceptual connection with agency principles and (more broadly) proxy conduct.[52] This is acknowledged in the idea that corporations manifest their states of mind through their *adopted or deployed* systems of conduct, policies and practices. However, to date, this element of the model remains underdeveloped. In that context, some further, although necessarily brief observations on how systems of conduct may be construed as adopted or deployed by corporations, so that these systems can, in turn, be construed to manifest corporate mental states, is therefore warranted.[53]

First, in *Productivity Partners* Edelman J commented that corporations may be recognised as acting or having an intention

> where a system has been built with the authority of senior persons controlling the company such that the actions of automated processes, or of one or more natural persons, can be properly attributed to the corporation to the extent that they arise out of that system.[54]

While no doubt correct, this appears to suggest that only formally approved systems of conduct enable corporations to engage purposively and directly in the world.[55] However, as Gordon J put it, 'a system may develop organically as a practice, operate at a level of policy or be a combination of practice and policy'.[56] Further, a restrictive approach to the question of adoption or approval may collapse systems liability back into traditional attribution approaches, themselves dependent on responsible natural agents. It would also permit corporations to engage in strategic narratives of denial,[57] by enabling them to claim, for example, ignorance of longstanding malpractices tacitly adopted and endorsed through corporate processes (such as corporate training of employees in the practice, related bonus and promotion systems, and remedial processes)[58], on the basis that senior officers were subjectively oblivious to the problem.[59] Finally, as Leow has argued, corporate powers may be allocated or delegated in practice in ways that differ substantially from the formal corporate hierarchy.[60] This may also be true for authorisation and allocation processes themselves,[61] so that corporate 'adoption' (or authorisation or ratification) of systems of conduct may be evidenced through (for example)

---

52 Cf Leow, *Corporate Attribution in Private Law* (n 42) 37, preferring an analysis based on the 'allocation and delegation' of corporate powers over agency principles.

53 See also Bant, 'Systems Intentionality' (n 2) 202–3.

54 *Productivity Partners* (n 1) 1068 [237].

55 Cf Edelman J: ibid 1061–2 [199]–[200], 1067–9 [236]–[241].

56 Ibid 1047 [108] (Gordon J).

57 Bant, 'Corporate Evil' (n 49) 225–32.

58 On 'reactive corporate fault', see above n 48 and below n 119 and accompanying text.

59 See, eg, the failures of casino executives to be alive to longstanding practices that facilitated money laundering, supported by information barriers: cf the characterisations of systemic corporate misconduct in *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019); *Royal Commission into the Casino Operator and Licence* (Report, October 2021), as discussed in Elise Bant, 'Reforming the Laws of Corporate Attribution: "Systems Intentionality" Draft Statutory Provision' (2022) 39(5) *Company and Securities Law Journal* 259, 274–5.

60 Leow, *Corporate Attribution in Private Law* (n 42) 41; Leow, '*Meridian*' (n 42) 125.

61 Cf statutory authorisation requirements, such as the Australian 'Banking Executive Accountability Regime' and 'Financial Accountability Regime' reforms examined in Pamela Hanrahan, 'Culpable Executives' in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023) 373.

longstanding practices, objectively construed. Systems Intentionality therefore necessarily adopts a broad interpretive approach to the issue of adoption or deployment, including in the senses of express, implicit or apparent authorisation or ratification of the system of conduct.[62]

Second, and relatedly, Systems Intentionality recognises proxy conduct as integral to corporate existence. Lacking hands and feet, corporations must always 'conduct' their business in the world through some independent means.[63] This may certainly be through natural or corporate agents, who are separate legal entities, having independent agency. But Systems Intentionality further highlights that corporations frequently also act purposively through teams of natural and corporate agents, across jurisdictions and space, and over time.[64] Further, systems of conduct may comprise automated and algorithmic tools that cannot strictly or sensibly be described as 'agents' (at least, not in the sense of having independent agency and capacity for responsibility).[65] The term 'proxy conduct' attempts to recognise, and signal, that more expansive reality. In many cases of corporate harms generated through automated or algorithmic processes, for example, it makes little sense to search for a natural person, or team of persons responsible for deploying the system as the repository of conduct, fault and hence liability. Rather, responsibility rests with the entity that adopts and deploys the system assessed as a whole. And by assessing the default settings, guiding parameters and overall choice architecture of the automated and algorithmic system, it becomes entirely possible to identify the corporate choices, values, intentions and preferences sought to be achieved through this complex amalgam of agentic and non-agentic tools.[66]

Third, it might be possible to utilise an expansive idea of agency as proxy conduct to encompass such coordinated and complex systems of conduct. In *Productivity Partners*, Edelman J preferred to use the concept of 'group agency'.[67] On this approach, the law 'treats'[68] a corporation as having acted and having an intention 'as though the system, as a construct, were a natural person'.[69] This might also be described as 'constructive' (or, possibly, constructed) agency. However framed, we must be clear that the system is not, itself, an autonomous agent: code has no autonomy in decision-making. Rather, the point is that, *as a matter of construction*, the coordinated agentic and non-agentic elements that together comprise the system of conduct are how the corporation (itself an autonomous agent) engages purposively in and with the world.

---

62 See further Part IV below. Cf *Criminal Code Act 1995* (Cth) s 12.3(2)(c): a body corporate may authorise or permit an offence where a 'corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance'.

63 Cf *Productivity Partners* (n 1) 1067 [236] (Edelman J) on the corporation as 'heuristic'.

64 Powerfully illustrated by the generational and iterative processes of developing even basic automated and algorithmic tools: see AS McConnell, *Code Complete* (Microsoft Press, 2nd ed, 2004) 502.

65 See above Part II(C); Jeannie Marie Paterson and Elise Bant, 'Automated Mistakes: Vitiated Consent and State of Mind Culpability in Algorithmic Contracting' in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023) 255, 265 ('Automated Mistakes'); Bant, 'Where's WALL-E' (n 38) 57–8.

66 Paterson and Bant, 'Automated Mistakes' (n 65) 269–71; Bant, 'Where's WALL-E' (n 38) 69–73.

67 *Productivity Partners* (n 1) 1068 [239].

68 Ibid 1068 [240].

69 Ibid 1068 [241].

Fourth, while such an approach may seem novel, on closer reflection it seems clear that there is no sharp boundary between agentic and non-agentic systems of conduct, or mixed systems. Many systems of conduct seek actively to constrain the discretion or independent judgement of natural agents within the system: standard operating procedures are a well-known example. In many cases, individual employees within a corporate system of conduct will act in a purely executive capacity, applying no independent judgement at all to the task at hand. In such cases, the employee's state of mind will often be irrelevant to ascertaining the corporate intention with which some conduct occurred: whether the employee was daydreaming, motivated by malicious or mischievous inclinations, trying to do their best or worst, the primary issue will generally be whether they performed their role correctly that is, according to the terms of the system of conduct in which they were embedded. Where they have, the corporate intention is manifested.[70] Conversely, where the system has not deployed according to its terms (for example, through some step failing or being omitted), corporate mistake may be present. Depending on the nature of the system, the private and subjective mindset of the employee may be irrelevant to that assessment, as the following section shows.[71]

C *The Model Illustrated*

I have typically illustrated the operation of this model through variations on an everyday example. While the purpose of the exercise is to provide a simple entry-point to understanding Systems Intentionality, it also underscores three important aspects of the approach relevant to the current inquiry. First, the Systems Intentionality model operates consistently with common approaches to determining natural parties' mindsets relevant to individual responsibility. Second, and relatedly, it provides a principled foundation for the law's equivalent treatment of corporate and natural actors, a recurrent concern in the context of corporate law and law reform.[72] Third, it offers a powerful means of characterising systemic conduct incorporating persons, both corporate and natural, in conjunction with non-agentic elements, such as automated systems. This last aspect has particular salience for corporate groups and networks, where ideas of agency and responsibility lie at the heart of the liability challenge. As I demonstrate in Part IV, the analysis suggested in the worked, hypothetical examples both aligns with and sheds light on the developing jurisprudence of courts addressing unconscionable business systems of conduct. In this way, my analysis provides a firm theoretical and doctrinal foundation for tackling responsibility within corporate groups, the subject of Part V.

Turning to this initial, illustrative task, and as Diamantis has explained, natural persons commonly adopt external mind supports to assist them to achieve their ends: recipes, maps and notes are common examples.[73] From the perspective of Systems Intentionality, these are all systems of conduct that help nudge, direct or coordinate the person's activities towards a certain end (or ends). Thus, a cook who deploys a novel cake recipe thereby manifests (in the dual sense of reveals and

---

70 See further ibid 1068 [240].
71 Bant, 'Corporate Mistake' (n 5) 134–41.
72 See, eg, *ALRC Final Report* (n 15) 32 [1.17]–[1.18], 34 [1.22].
73 Mihailis E Diamantis, 'The Extended Corporate Mind: When Corporations Use AI to Break the Law' (2020) 98(4) *North Carolina Law Review* 893, 900, 912.

instantiates) their intentions.[74] No mind-reading or brain surgery is involved: their performed system of conduct manifests their general intention (to engage in baking) and their specific intention (to bake a cake of a certain kind).[75]

Importantly, for current purposes, this analysis is not affected by interposition of agents or automated elements into the picture. It does not matter if (for example) the step of beating an egg and folding in flour is done by hand or food processor. Nor if a young family member or carer assists. Nor if the carer is actually employed by a third-party service provider, paid by the cook pursuant to separate contractual arrangements, subsidised by the government. Nor if the carer performs the required task correctly by accident, or by mistake, or in order to annoy another, or because the carer believes (maliciously and incorrectly) that the prescribed steps will guarantee the failure of the baking process. None of these details detract from our ability to identify that the cook means to bake, and to bake a cake. Where the system deploys correctly (that is, according to its terms), those intentions are both revealed and realised.

Further, certain knowledge is patent from the cook's successful deployment of the recipe. Where performed personally, it is reasonable to conclude, in the absence of evidence to the contrary, that the cook must know what the elements and steps are, required to produce the cake. Otherwise, its success (that is, deployment in accordance with its terms) depends on happy accident, or perhaps the cook's intuition or memory (notably, back-ups that are not available to the artificial corporate person). Where automated or agentic steps are interposed, those steps reflect the cook's choice, of which they are necessarily aware. And given that the cook's overall intention remains the same, it is fair to assume that the necessary knowledge is also embedded or transferred as required throughout the system (for example, through appropriate programming of the machine, or supervision/direction of the employee). Otherwise, achievement of the cook's general and specific intentions is largely dependent on good fortune — again not impossible, but unlikely.

Finally, to reiterate, it is the system of conduct *as deployed* that manifests the cook's intention, and the system of conduct should be viewed and assessed in holistic terms. Primary (and seemingly positive) systems themselves necessarily entail the adoption of certain steps and omissions of others: two eggs, not one; baking, not frying; testing before resting. Suppose, for example, the cook purports to be following a classic cake recipe, however they produce pancakes. The cook may claim a 'mistake' or 'systems error' in the sense outlined earlier: some step (or, perhaps, steps) somewhere in the system has been omitted or otherwise failed to deploy according to the terms of the formal recipe. However, the analytical starting point through the lens of Systems Intentionality is that the system of conduct *as deployed* appears objectively to be a pancake recipe. On this analysis, omitting steps of (for example) creaming butter and sugar, required to produce the classic cake, need not be seen as a simple matter of omission reflective of carelessness, error or

---

74 This pronoun is deliberate, to encompass non-binary genders.

75 Courts accordingly 'infer' the natural person's subjective mindset from these acts. By contrast, as corporations enjoy no natural mind, the process is always an objective one of construction: on the distinction, see Elise Bant, 'The Culpable Corporate Mind: Taxonomy and Synthesis' in Elise Bant (ed), *The Culpable Corporate Mind* (Hart Publishing, 2023) 3, 23–4. Cf *Automotive Invest* (n 41) 1266–7 [114]–[115], 1270 [135] (Edelman, Steward and Gleeson JJ).

accident, but an active design choice and highly reflective of the cook's true state of mind. Consistently, on the model of Systems Intentionality, the cook bears the onus of proving mistake. Moreover, the initial characterisation of the recipe as manifesting an intention to make pancakes is fortified and becomes irresistible where the system repeats over time, and no change is made to 'correct' the error. Just like the 'omission' to include a key step in the cake recipe, the cook's failure to react to correct the claimed error is likewise eloquent of and consistent with the initial characterisation.

This does not mean there is no room for a genuine 'systems error', although demonstrating it in the case of a single instance of deployment will be challenging.[76] The cook may be able demonstrate, for example, that their normally reliable food processor broke down, or a family member may confess to deliberately sabotaging the mixture. Here, it will make sense to talk of there being a 'systems error' or mistake. And notably, this will be the case even if no subjective mistake is present on the part of any natural agent engaged in the cooking process, and it is nonsensical to talk of mistake on the part of the kitchen appliance. It is the deployed system of conduct that manifests the cook's state of mind, including mistake.

Subject to two caveats, effectively the same analysis holds true for corporations that deploy systems of conduct to achieve their ends. The first is that, lacking natural minds, the fact-finding process is always, strictly speaking, one of construction, not inference.[77] Second, the corporation cannot supplement or substitute its decision-making with memory or intuition, in the same way as can a cook. It can only 'think' and act through its systems.[78] And it is highly unlikely that corporate systems of conduct, which tend to deploy repeatedly over time, will successfully deploy ('successful' in the sense of according to their terms) by accident or mistake. At the least, the onus lies on the corporation to explain how it was ignorant of what was, after all, its own system, and how any pleaded 'mistakes' arose. In this context, corporate systems of conduct serve as a highly reliable window into the corporate mind.[79]

IV Corporate Systems of Conduct: Business Models and Networks

A *Introduction and Overview*

How can this theoretical model shed light on liability in corporate groups? Here, the model of Systems Intentionality is informed by a rich vein of case law applying (largely) statutory prohibitions on 'unconscionable systems of conduct' found across

[76] Where the recipe/process is deployed repeatedly, by contrast, a prompt change to correct the step evidences a 'responsive adjustment' reflective of the mistake, and the cook's true intention: see above n 48.

[77] See above n 75.

[78] *Productivity Partners* (n 1) 1047 [108] (Gordon J).

[79] Witting (n 42) 11 n 65 argues that it is the only window.

a range of trading contexts.[80] These cases typically address problematic business models (or schemes, strategies or systems of conduct) that are contrary to fair trading practices. Courts have invariably been concerned to identify the corporate states of mind and related normative standards such as dishonesty, recklessness and, of course, unconscionability, revealed through those malpractices. And, relevantly for current purposes, systems of conduct not infrequently involve coordinated behaviours between natural and corporate agents (corporate 'networks'), as well as automated and algorithmic elements. *Productivity Partners* is the latest and most significant contribution to that body of jurisprudence.

The case law authorities suggest that courts already engage in a rigorous process of assessing corporate intentions and knowledge manifested through systems of conduct comprising (amongst other elements) corporate networks. What is more, courts' approaches to these questions have been largely consistent with that supported by Systems Intentionality. For the purposes of this article, the implication from this conclusion is both simple and striking: what works for systems of conduct involving corporate *networks* should also work, as a matter of theory, for corporate *groups*. This possibility is the focus of Part V.

Some key lessons emerge from the unconscionability authorities, which are illustrated through particular case examples in the following section. First, taken as a whole, the cases underscore the point made above in Part III(B), that corporations necessarily engage in proxy conduct. Second, courts' approaches to existing principles of 'agency'[81] in the unconscionable system of conduct cases have, typically, been broad.[82] In general, the critical characteristic is that one (natural or corporate) person acts on behalf of the corporation, as part of its impugned system of conduct, in relation to some matter or dealing.[83] Third, and relatedly, this agency can be limited to some facet of the business: for example, to natural or corporate agents who 'canvass' or 'introduce' consumers for the defendant business and then step away from the process.[84] Fourth, however, the principal must have some degree

---

80 See, eg, *ACL* (n 6) ss 21–2; *ASIC Act* (n 6) ss 12CB, 12CC. For analysis of a wide range of these cases, see Bant and Paterson, 'Systems of Misconduct' (n 2); Bant, 'Systems Intentionality' (n 2). Cf *Stubbings v Jams 2 Pty Ltd* (2022) 276 CLR 1, 32 [81] (Gordon J), see also (on the equitable doctrine) 20–1 [39] (Kiefel CJ, Keane and Gleeson JJ); Michael Bryan, 'Asset-Based Lending: A Case Study in Unconscionable Systems of Conduct' in Elise Bant (ed) *The Culpable Corporate Mind* (Hart Publishing, 2023) 295.

81 See, eg, *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 4)* (2018) ATPR ¶42-615, 46,070–1 [282]–[287] (Gleeson J) ('*Cornerstone Investment*'), cited with approval in *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 3*) (2019) ATPR ¶42-655,47,761–2 [29] (Bromwich J) ('*ACCC v AIPE*').

82 *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (No 3)* (2021) 154 ACSR 472, 500–1 [113] (Stewart J), approved on appeal *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission* (2023) 297 FCR 180, 290 [357] (Wigney and O'Bryan JJ).

83 *Cornerstone Investment* (n 81) 47,071 [284], 47,072–3 [300]–[301] (Gleeson J). See also *Australasian Brokerage Ltd v Australian and New Zealand Banking Corporation Ltd* (1934) 52 CLR 430, 451–2 (Dixon, Evatt and McTiernan JJ).

84 *Tonto Home Loans Australia Pty Ltd v Tavares* (2011) 15 BPR 29,699, 29,742–3 [178] (Allsop P, Bathurst CJ and Campbell JA agreeing) ('*Tonto Home Loans*'), cited with approval in *Cornerstone Investment* (n 81) 46,071 [287] (Gleeson J).

of control, 'requisite for the purpose of the role',[85] in order for the agent relevantly to act 'on behalf of' the principal and, accordingly, to form part of the principal's system of conduct. Clearly, given these are network cases, proof of control does not depend on evidence of some interlocking shareholdings, or common directorships, between corporate principal and its agent(s).[86] As will be discussed in Part V, this striking feature suggests a pathway through the thicket, towards a more principled approach to direct corporate parent liability. Fifth, the unconscionability cases evidence that while senior officers of a corporation may have known of, or expressly authorised, the impugned system of conduct,[87] the terms of the overall arrangement (the 'actual' authority) may be express, or implied from the conduct of the principal and agent and the circumstances of the case, including the course of business between agent and principal.[88] The fact, for example, that the written contract of appointment expressly excludes agency is not determinative of the question.[89] The principal may further be responsible for acts that are within the 'apparent' or ostensible authority of the agent. Indeed, as I will argue, the fact that agents behave badly, even in breach of express (formal) agency terms, does not mean they do not form part of the principal's business model, for which harmful, external consequences, the principal is responsible.[90]

Rather than focusing on the formal terms of individual agency arrangements, therefore, courts have been willing and able to construe the impugned system of conduct, and the corporate state of mind it manifests, as a whole. In this task, 'identification, assessment and characterisation of the system of conduct is, by reference to the totality of the circumstances, both internal and external to the corporation'.[91]

The final, key lesson to be derived from these authorities for the related sphere of corporate groups concerns the broad range of evidence going to the real-life systems, policies and practices may be available to aid the process of interpretation of construction.[92] Typically, employee testimony, internal scripts, remuneration and promotion criteria, complaints processes, audit outcomes and the corporate responses to those outcomes, and default settings on automated programs will furnish salient evidence of the system of conduct adopted and deployed by the corporation. External evidence may include patterns of outcomes, communications (including incentives and disincentives) between the corporation and external

85 *Tonto Home Loans* (n 84) 29,742 [177].

86 See above n 10 quoting Mason J in *Walker v Wimborne*.

87 *Australian Competition and Consumer Commission v Get Qualified Australia Pty Ltd (in liq) (No 2)* [2017] FCA 709, [179], [190] (Beach J) ('*Get Qualified*').

88 See, eg, *Cornerstone Investment* (n 81) 46,063 [221]–[222], 46,063 [225]–[227] (Gleeson J); *Cargill Australia Ltd v Viterra Malt Pty Ltd (No 28)* [2022] VSC 13, [3088] (Elliott J), cf [3091]–[3092]; *Australian Securities and Investments Commission v Union Standard International Group Pty Ltd (No 4)* [2024] FCA 1481, [1719]–[1725] (Wigney J).

89 *Cornerstone Investment* (n 81) 46,071 [286]. See also *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* (2020) 275 FCR 57, 142–4 [463]–[469] (Beach J).

90 *ACCC v AIPE* (n 81) 47,763 [33] (Bromwich J). See further, Sarah Worthington, 'Corporate Attribution and Agency: Back to Basics' (2017) 133(January) *Law Quarterly Review* 118.

91 *Productivity Partners* (n 1) 1048 [110] (Gordon J).

92 Ibid. See further Bant, 'Systems Intentionality' (n 2) 203–7; *Productivity Partners* (n 1) 1048 [110] (Gordon J).

parties, including consumers, and the testimony of external parties subjected to the system of conduct.

Overall, the picture that emerges is one where the defendant's responsibility arises directly through systems of misconduct performed by agents, teams of agents, together with other tools or means, which are identified, through a process of interpretation or construction, as forming part of the defendant's own business model and, hence, manifesting its states of mind.

B *Case Examples*

Three leading cases arising from the Commonwealth Government's troubled VET FEE-HELP funding scheme illustrate the analysis.[93]

1 *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 4)*

In *Australian Competition and Consumer Commission v Cornerstone Investment Aust Pty Ltd (in liq) (No 4)* ('*Cornerstone Investment*'),[94] Gleeson J addressed a Vocation Education Training ('VET') provider's business model to sign up students to various educational programs. Consistently with the then-applicable Commonwealth scheme, and Empower's own published target demographic, Gleeson J found that Empower targeted areas with significant populations of persons of low socio-economic status to recruit its students.[95] The defendant's recruitment was carried out through third-party marketing and recruitment agents, variously corporate and individual in nature, which themselves subcontracted dozens of additional 'entities'.[96] Some marketers also engaged 'brokers' to assist them in their work.[97] Unlike some authorities involving unconscionable systems of conduct,[98] there were no scripts, training programs or equivalents in evidence, issued by Empower, to prove Empower's corporate knowledge and approval of agents' specific forms of misconduct.[99] Nor did the consumer regulator, the Australian Competition and Consumer Commission ('ACCC') allege that any particular officer of Empower was aware of any specific instance of misconduct on the part of any particular recruiter.[100]

Nonetheless, Gleeson J held that Empower engaged in an unconscionable system of conduct in enrolling students through the recruitment agents. Empower's enrolment system had a number of positive and negative (or omitted) elements. First, the published 'target' demographic (that is, the group from which Empower intended

---

93 See also *Unique International College Pty Ltd v Australian Competition and Consumer Commission* (2018) 266 FCR 631; *Australian Competition and Consumer Commission v Phoenix Institute of Australia Pty Ltd* [2021] FCA 956.

94 *Cornerstone Investment* (n 81).

95 Ibid 46,039 [13], 46,069 [272], 46,119 [750].

96 Ibid 46,047–8 [79]–[92].

97 Ibid 46,042 [36], 46,049 [102], 46,054–5 [148], 46,069 [269].

98 See, eg, the 'conversation guide' and 'objection handling guide' given to employees and independent contractors in *Get Qualified* (n 87) [95], [102], [105]–[113], [133], [135], [139]–[140], [160], [355]–[357], [405].

99 *Cornerstone Investment* (n 81) 46,119 [750].

100 Ibid 46,063 [220]–[222].

to recruit customers) of its recruitment business model included disadvantaged communities.[101] Further:

> There is no evidence of instructions or recommendations made to Empower's recruiters about areas that they should target for enrolments. However, the fact that Empower's enrolments tended to come from disadvantaged communities is consistent with Empower's target demographic. In those circumstances, it is more likely than not that Empower's recruiters generally attempted to recruit students from Empower's target demographic as a result of Empower's encouragement to do so.[102]

Third, a key feature of the overall recruitment model was for marketers and recruiters to promise and provide consumers with 'free' laptops and financial incentives.[103] Empower admitted to providing the financial outlay for certain laptop and gift vouchers,[104] which meant there was 'no reason to doubt' that Empower was aware of these stratagems, employed by marketers, to attract enrolments.[105] Mentions of cash incentives for 'referring a friend' and for computers were also included in Empower's marketing materials.[106]

Fourth, this direct assistance and corresponding corporate knowledge were coupled with Empower's appointment of recruiters 'who were practically untrained, who received no [*Australian Consumer Law* (*'ACL'*)[107]] training and were remunerated on a commission basis for securing enrolments'[108] and involved 'unsolicited consumer agreements,' again without any process for ensuring compliance with *ACL* requirements.[109] In Systems Intentionality terms, these 'omissions' were critical aspects of the design of Empower's enrolment business model, system or strategy, assessed holistically.

Gleeson J concluded that Empower's system, comprising these components, 'reflected a callous indifference to the considerations of consumer protection',[110] including the risk of recruiter misconduct in the pursuit of substantial benefits to Empower.[111]

2 *Australian Competition and Consumer Commission v Australian Institute of Professional Education Pty Ltd (in liq) (No 3)*

A similarly complex and devolved system of conduct arose in *Australian Competition and Consumer Commission v Australian Institute of Professional*

---

101 Ibid 46,063 [226], approved by its sole director and shareholder, Mr Yang.
102 Ibid 46,069 [273].
103 Ibid 46,039 [12], 46,045 [67]–[69].
104 Ibid 46,044 [57]–[58].
105 Ibid 46,063 [225]–[226].
106 Ibid 46,063 [227].
107 *ACL* (n 6).
108 *Cornerstone Investment* (n 81) 46,119–20 [751].
109 Ibid. See also *Australian Competition and Consumer Commission v Titan Marketing Pty Ltd* [2014] ATPR ¶42-480 (*'Titan Marketing'*).
110 *Cornerstone Investment* (n 81) 46,119 [750], see also 46,119–20 [751]. Likely, a form of recklessness: Bant and Paterson, 'Systems of Misconduct' (n 2) 88; Bant, 'Modelling' (n 2) 235–9, 250.
111 See also *Titan Marketing* (n 109), discussed in *Cornerstone Investments* (n 81) 46,117–18 [739] (Gleeson J).

Education Pty Ltd (in liq) (No 3).[112] Here, Bromwich J considered that the obvious risks of exploitation inherent in the VET FEE-HELP scheme meant that

> [a]n enrolment process that predictably produced, or even encouraged a situation in which such unsuitable consumers became enrolled would invite close scrutiny to see whether that was, in all the circumstances, unconscionable. The conclusion that the conduct overall was unconscionable would be more readily reached *if such an outcome was either intentional or sufficiently predictable or recurrent to require overt steps to be taken to minimise the chance of it occurring*.[113]

Here, in response to the introduction of the VET scheme, the Australian Institute of Professional Education ('AIPE') entered into contracts with 35 independent 'service providers' who engaged an unknown number of sub-contractors and other entities to perform the work. Only some of these were known to and authorised by AIPE.[114] The 'service providers' were engaged to market AIPE courses to potential students and attract enrolments. They earned commissions for 'referrals' (tellingly, defined as enrolments that lasted until the census date, at which point AIPE earned the Commonwealth fee).[115] AIPE monitored referrals and would terminate service providers who did not meet minimum monthly referral requirements.[116] Similar due diligence did not attend their training or oversight of their recruitment activities. As in *Cornerstone Investment*, the providers were untrained in terms of Australia's consumer law requirements. Highly incentivised to sign up students, many engaged in patterns of misconduct. These involved visiting low socio-economic communities to recruit disadvantaged or vulnerable students, engaging in misleading conduct and offering incentives (such as cash and credits) to sign up, or for getting others to sign up, as well as promising the ubiquitous 'free' laptops.[117]

Following the introduction of its recruitment strategy, enrolment numbers with AIPE exploded. By contrast, AIPE's staffing levels to service those students did not change.[118] A large number of complaints, including as to agent misconduct, did not lead to any significant changes, notwithstanding that they were reported to the Chief Executive Officer ('CEO') of AIPE (on traditional attribution approaches, part of its directing mind and will).[119]

As with the other cases, AIPE's 'system of conduct' comprised a combination of integrated acts and omissions, employees, agents and sub-agents. After observing that the recruiters played a central role in AIPE's business, and acted within the scope of their actual or apparent authority for its benefit, Bromwich J observed:

> In any event, the applicants submit, and I accept, that even if the conduct of some of the recruiters was not the conduct of AIPE under s 139B(1)(a), it does not follow that such conduct is outside or irrelevant to the system of conduct or pattern of behaviour alleged. *AIPE's enrolment system involved the*

112 *ACCC v AIPE* (n 81).
113 Ibid 47,775 [80] (emphasis added); see also 47,776 [84].
114 Ibid 47,755 [10], 47,759 [24].
115 Ibid 47,759 [24].
116 Ibid.
117 Ibid 47,763–4 [34].
118 Ibid 47,897–8 [690].
119 Ibid 47,913 [760]. Systemically, this reflects 'reactive corporate fault': see above n 48.

> *implementation of its decisions and actions, which facilitated and encouraged conduct in the field by reference to the structure of the written contracts with the agents, the payment of large commissions and the lack of processes … to ensure that only consumers who were suitable were enrolled as students.*[120]

Through the lens of Systems Intentionality, this is exactly and precisely the point. Key to AIPE's enrolment system, as deployed, was the conduct of unsupervised, untrained and highly incentivised recruiters to recruit students from inherently vulnerable consumer groups, coupled with a lack of functional internal audit and complaint processes and practices.[121]

Bromwich J further found that AIPE's CEO and senior staff well knew of the recruiter problems and that many of the students engaged through their conduct were simply incapable of undertaking AIPE's courses.[122] This reinforced his Honour's findings concerning AIPE's manifested knowledge and intentions. However, such findings may also support separate accessorial liability on the part of the responsible officer, and associated companies, as occurred in *Productivity Partners*,[123] to which I now turn.

3 *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission*

Productivity Partners involved a VET provider, Captain Cook College, that chose to remove certain safeguards from its student enrolment systems.[124] These protective processes were designed (in the sense of apt, or 'geared') to protect 'unwitting and unsuitable' students from being enrolled in its courses through third-party recruiters' misconduct.[125] The safeguards had been effective, resulting in around half the students withdrawing before census date — and therefore before the College became entitled to matched Commonwealth funding, and recruiters earned their commissions. With their removal, College (and recruiter) earnings skyrocketed.[126]

On Gordon J's systemic analysis, the College's revised system of enrolment was 'geared towards "profit maximisation" that was necessarily, and inevitably, adverse to, and at the expense of, student interests'.[127] The College knew the risks (indeed, reality) of agent misconduct — that is why it had the safeguards in place. The dismantling of those controls manifested its intention to reap profits at the expense of students, in full knowledge of the foreseeable, likely and indeed inevitable consequences for the students involved.[128] This was conduct that was, in all the circumstances, unconscionable.

Edelman J, in separate reasons, adopted a similar analysis and also found the College's conduct was unconscionable. On the question of intention, his Honour

---

120 Ibid 47,763 [33] (emphasis added).
121 Ibid 47,798–9 [171].
122 Ibid 47,912–13 [757]–[760].
123 *Productivity Partners* (n 1). See also *Get Qualified* (n 87) [7] (Beach J).
124 *Productivity Partners* (n 1) 1031–2 [35]–[37] (Gageler CJ and Jagot J).
125 Ibid 1034 [49] (Gageler CJ and Jagot J), 1056 [156] (Gordon J).
126 Ibid 1032–3 [38]–[41] (Gageler CJ and Jagot J).
127 Ibid 1052 [134].
128 Ibid 1053 [143], see also 1048 [111].

noted that while it might be accepted that the College did not 'desire' its agents' misconduct,[129] or the enrolment of unsuitable students, as ends 'good' in themselves, the College's (revised) system of enrolments manifested its choice to adopt agent misconduct or unsuitable student enrolments as the means to the ultimate end of maximising profits.[130]

Finally, and although this can only be sketched here in barest outline, it is noteworthy that both Gordon J and Edelman J found that the CEO of the College, a Mr Wills, was knowingly concerned in or party to the College's misconduct. It followed that its parent company, Site, of which Mr Wills was also the Chief Operating Officer, was similarly liable as a corporate accessory.[131] As this makes apparent, systems-based reasoning in no way precludes individual, positional responsibility on the part of responsible officers for misconduct that occurs on their watch. It may also support accessorial corporate liability. Both are matters of considerable interest for corporate group responsibility.

C *Conclusion: Corporate Business Models and Networks*

Through the lens of Systems Intentionality, these cases illustrate how corporations may adopt and deploy systems of conduct that involve teams of agents, individuals, employees, volunteers, corporations, automated and algorithmic elements. These systems of conduct manifest (in the dual sense of reveal and instantiate) the corporate states of mind. In identifying and characterising such corporate systems, Systems Intentionality proposes, consistently with the authorities, that the discrete contractual terms and relationships between corporation and actors within its system must not distract from assessing the overall nature of the corporation's system, viewed holistically and the level of generality relevant to the law's inquiry. Agent misconduct may give rise to claims by their corporate principal for breach of contract (a possibility raising, among other issues, interesting questions of, for example, waiver or consent to breach). But that is a quite separate question from whether the agent's conduct can be attributed to the corporate principal, so as to provide the factual foundations for direct parent liability vis-à-vis third parties.[132] Indeed, contrary to formal, contractual appearances, agent misconduct may be central to a corporate system of conduct. Consistently, automated and algorithmic elements are not even actors and have no legal relationship at all with the corporations that deploy them. They are simply tools. Yet they too may shed powerful light on corporate choices and preferences.[133] Further, individuals who know of and facilitate corporate systems of misconduct may be independently responsible as accessories, as may be associated corporations. Additional examples can be given of courts applying

---

129 On the approach taken to agency, see above n 67.

130 *Productivity Partners* (n 1) 1069 [242], [246]; see also 1053 [143] (Gordon J).

131 Ibid 1061 [193]–[194] (Gordon J), 1074–6 [275], 1077 [279]–[280] (Edelman J). The final penalty decision contains reflections on the role of the parent in inducing the misconduct, relevant to the kind of analysis offered here: *Australian Competition and Consumer Commission v Productivity Partners Pty Ltd (in admin) (No 6)* [2025] FCA 542, [85]–[87] (Stewart J).

132 Worthington (n 90) 132–9.

133 See, eg, the 'fees for no services' scandals, which were the subject of the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (n 59) vol 1, 133–40, 154–7, discussed in Bant, 'Where's WALL-E' (n 38) 70–3, illustrated in *Australian Securities and Investments Commission v Westpac Banking Corporation (Omnibus)* (2022) 407 ALR 1.

reasoning largely consistent with this analysis, involving complex, multi-agent and non-agentic contributions.[134] Systems Intentionality provides a new theoretical and doctrinal framework for explaining and supporting those intuitions. It also provides a means of exploring new routes to corporate responsibility. Thus, McGaughey has powerfully argued that, by extension of this form of reasoning, multinational corporations that incorporate modern slavery within their operations and supply chains may be found knowingly, recklessly and even deliberately to have done so.[135] Suppose a retailer sells clothing brands within Australia for consistently bargain-basement prices, where the key manufacturing process occurs in a jurisdiction well-known within the industry to engage in modern slavery practices. The retailer must (structurally, as a matter of its inherent business model) know that there is a strong risk, or even likelihood, or even certainty (depending on, for example, the sale price and the source jurisdiction concerned) that modern slavery infects its supply chain. Where a corporation in that kind of case fails to engage in due diligence, this need not be characterised solely in terms of negligence. The decision not to investigate is more than accident or omission: it is a conscious corporate choice not to inquire, smacking of the sort of 'callous indifference' to which Gleeson J referred.[136] This mindset stands in stark contrast to the prudent and active inquiring mindset demanded by modern slavery regimes, which require corporations to develop, adopt and deploy systems of conduct directed to identifying and mitigating modern slavery. This assessment of organisational culpability may have great significance, where modern slavery regulations are supported by penalties,[137] for procurement and debarment regimes,[138] as well as broader reputational and regulatory respects.[139]

V Returning to Corporate Groups

A *Introduction and Overview*

In the previous Part, I explained how courts' developing understandings of corporate responsibility manifested through complex corporate systems of misconduct are consistent with, and illustrate, the analysis supported by Systems Intentionality. In this Part, I explore the striking implication of the discussion, namely that if the analysis works in the context of multi-agent business models, corporate networks,

---

134 See, eg, the Rolls-Royce bribery and 'failure to prevent' litigation, the subject of extended analysis in Elise Bant and Rebecca Faugno, 'Corporate Culture and Systems Intentionality: Part of the Regulator's Essential Toolkit' (2024) 23(2) *Journal of Corporate Law Studies* 345.

135 Fiona McGaughey, 'Regulatory Pluralism to Tackle Modern Slavery' in Elise Bant, *The Culpable Corporate Mind* (Hart Publishing, 2023) 441, 453–4.

136 See above n 110 and accompanying text.

137 Recommended in the *Report of the Statutory Review of the Modern Slavery Act 2018 (Cth): The First Three Years* (Final Report, 2023) and Australian Institute of Company Directors ('AICD'), Submission to the Attorney-General's (Cth), *Consultation on Strengthening the Modern Slavery Act 2018 (Cth)* <https://www.aicd.com.au/news-media/policy-submissions/2025/aicd-submission-on-strengthening-modern-slavery-act.html>.

138 Fiona McGaughey, Rebecca Faugno, Elise Bant and Holly Cullen, 'Public Procurement for Protecting Human Rights' (2022) 47(2) *Alternative Law Journal* 143.

139 Note also the Organisation for Economic Co-operation and Development ('OECD') emphasis on the importance of embedded systems of conduct, policies and practices for responsible entities: see, eg, *OECD Guidelines for Multinational Enterprises on Responsible Business Conduct* (OECD Publishing, 2023) 17 [15] on due diligence systems <https://doi.org/10.1787/81f92357-en>.

and supply chains, it is difficult to see why it cannot work with corporate groups. Indeed, through this systemic lens, it becomes possible to probe from a new, principled basis, cornerstone authorities under Australian law concerning the responsibility of parent companies for harms inflicted through their subsidiaries.

In the following section I undertake this task, revealing some judicial analysis consistent with a Systems Intentionality approach. But systemic reasoning has been irregular and, arguably, undermined by repeated and sustained confusion over the relevance of 'interlocking shareholdings' and 'shared directors' as criteria for parent responsibility. As the unconscionability case law authorities demonstrate, the fact a subsidiary is largely or wholly owned by its parent cannot be a precondition for direct principal/parent responsibility. Rather, the central question is whether the harm resulted from the parent's system of conduct (of which the subsidiary formed part). Interlocking shareholdings are only relevant to the extent that they usefully bear on that more precise issue. Shared directorships between parent and subsidiaries may likewise also be relevant, where these served to promote or embed a parent's harmful system of conduct, policy and practice through a subsidiary. Further, as I demonstrated in the previous Part, the range of evidence germane to the existence, nature and operation of a parent's alleged system of conduct goes far beyond shareholdings and directorships. This full range of evidence can and should usefully be drawn upon to find a principled basis for direct parent liability.

A more focused inquiry into the parent's adopted or deployed system of conduct, and the subsidiaries' role within it, yields important insights. The first is implicit in the preceding discussion: the simple facts of dominant shareholdings or shared directorships cannot *of themselves* make the subsidiary an agent of the parent *for the purposes of the particular impugned transaction or event*. The question, rather, is whether the harm resulted from the parent's adopted or deployed system of conduct, of which the subsidiary was part. If the parent did adopt or deploy a system of conduct through its subsidiary, then this system of conduct constitutes the parent's purposive conduct, and will manifest its states of mind, in the ways described and illustrated earlier. But the nature and operation of the parent's system of conduct must first be positively ascertained.

This was, after all, a key insight from *Salomon v Salomon*.[140] The mere fact that Mr Salomon owned almost all of the shares in the boot-making company, and was its sole director, did not mean that the company thereby operated as his agent.[141] The company was set up by Mr Salomon lawfully and without fraud. From the date of incorporation, it was its own juristic person. It purchased Mr Salomon's hitherto profitable boot-making business, which it conducted on its own account. Intervening strikes and a 'great depression' in the trade caused the business to fail, notwithstanding the efforts of Mr Salomon.[142] None of these facts could support a finding that it served as his agent, let alone was a mere 'alias', or instrument of some personal fraud on his part.[143]

---

140 *Salomon v Salomon* (n 16).

141 Ibid 31, 33–4 (Lord Halsbury LC), 35 (Lord Watson), 43 (Lord Herschell), 51–3 (Lord Macnaghten) 56–7 (Lord Davey).

142 Ibid 49 (Lord Macnaghten).

143 Ibid 42 (Lord Herschell), 50 (Lord Mcnaghten), 56 (Lord Davey).

That a subsidiary cannot be assumed to have acted as agent of the parent is therefore clear. Conversely, as the unconscionability authorities also make clear, a more focused attention on the subsidiary's role within a parent's system of conduct highlights that it is unnecessary (as some corporate group case law authorities have suggested) for subsidiaries to be shown to be agents *for all times and all purposes*, in order for their conduct to be attributed to the corporate parent. Corporate actors who serve as sometimes-agentic elements of a principal's system of conduct may well have other independent business activities. That fact should be no bar to the principal's responsibility, where the agent can be shown to have acted, relevantly for the purposes of the claim in issue, as part of the parent's own system of conduct.

With a renewed focus on the existence, nature and operation of the parent's system of conduct, it becomes possible to lay the foundations for direct parental liability on traditional, doctrinal bases, as the following discussion shows.

B *The Key Case Law Authorities*

A leading case in the story of corporate parent responsibility is *James Hardie & Co Pty Ltd v Hall*.[144] The question for current purposes was whether the defendants, James Hardie & Co Pty Ltd and its holding company, James Hardie Industries Ltd, owed a duty of care to the plaintiff employee of a New Zealand subsidiary, James Hardie & Co (NZ) (the subsidiary). At first instance, Judge O'Meally had concluded that each defendant exercised influence over the subsidiary's operations of the New Zealand factory where the plaintiff worked, and through which he contracted asbestosis.[145] This influence was exercised through directions and recommendations to the Board of the subsidiary, which would 'not infrequent[ly]' be adopted and followed by the subsidiary.[146] The totality of the evidence, including of the published histories of the companies, showed that they operated as part of an integrated 'single administrative, manufacturing and technical entity'.[147] Judge O'Meally considered that although the plaintiff was not an employee of the defendants, the 'administrative structures' of the defendants placed them in a relationship of proximity to the plaintiff.[148] Strikingly, this was not founded on the mere fact that the holding company held some 95% of shares in the subsidiary. Rather, the defendants were liable on their own accounts, for the relationship of proximity created through their acts of influence. The fact that the New Zealand subsidiary may also separately owe a duty of care to its employee did not affect that influence and its consequences.

This sort of reasoning is consistent with the analysis I advocate in this article. However, on appeal, Sheller JA (with whom Beazley and Stein JJA concurred) found it 'difficult to distinguish this approach from a reliance upon the undoubted control that the Holding Company, with 95 per cent of the shares, had over [the subsidiary]'.[149] The lines between 'lifting the corporate veil', agency and imposition

---

144 *James Hardie v Hall* (n 17), discussed perceptively by Allsop (n 17) [60]–[61].

145 *Putt v James Hardie & Co Pty Ltd* [1998] NSWDDT 1, [89], [134] ('*Putt v James Hardie*'); *James Hardie v Hall* (n 17) 561, 564.

146 *Putt v James Hardie* (n 145) [89]; *James Hardie v Hall* (n 17) 561.

147 *Putt v James Hardie* (n 145) [89]; *James Hardie v Hall* (n 17) 562. See also *Putt v James Hardie* (n 145) [147]; *James Hardie v Hall* (n 17) 563–4.

148 *Putt v James Hardie* (n 145) [147]; *James Hardie v Hall* (n 17) 564.

149 *James Hardie v Hall* (n 17) 579.

of duties on members of a corporate group arising out of the degree of control or influence exercised over another actor were 'easily blurred'.[150]

Here, his Honour referred with approval to the decision *Briggs v James Hardie & Co Pty Ltd* ('*Briggs v James Hardie*'), where Rogers AJA admitted to similar difficulty in reconciling the so-called agency exception[151] with the principle of limited liability. In that case, two companies (Hardies and Wunderlich) held equal shares in the corporate owner and operator ('Asbestos Mines') of an asbestos mine in Baryulgil, New South Wales. Mr Briggs contracted asbestosis after working in the mine for about six years. He argued that Hardies and Wunderlich were his employers during the relevant period, as they exercised complete control over Asbestos Mines as the corporate vehicle for their joint venture.[152] Rogers AJA reluctantly[153] concluded that the idea 'that the corporate veil may be pierced where one company exercises complete dominion and control over another is entirely too simplistic'.[154] If accepted, 'the principle of limited liability in relation to the activities of subsidiaries would be left in tatters'.[155] Further, on that basis, the decisions in leading authorities in *Industrial Equity Ltd v Blackburn* ('*Industrial Equity*')[156] and *Walker v Wimborne*[157] should have been different.[158]

Addressing these points in turn: first, where one person *exercises* (as opposed to having some general capacity to exercise) 'complete dominion and control' over another *in relation to some transaction or dealing*, that other party it is highly like to constitute the agent, or even the alter ego,[159] of the controller. In such circumstances, the controller acts directly, albeit through another. In such circumstances, the other actor is little different to an automated program coded to carry out the controller's wishes, entirely without any discretion: a mere tool of the controller.[160]

Second, the direct liability analysis I advocate here, and seemingly adopted by Judge O'Meally, by no means requires piercing or lifting the corporate veil.[161]

---

150 Ibid 579–80.

151 As explained above in Part II, this is not, properly speaking, an exception to the related principles of separate legal identity and limited liability.

152 *Briggs v James Hardie* (n 22) 567.

153 Ibid eg, 558–9, 577–81, leaving open a 'more principled approach' (at 577) that allowed a claim in negligence against Hardies and Wunderlich: at 577–8, 580–1.

154 Ibid 577. This observation has been accepted repeatedly: see, eg, *Varangian Pty Ltd v OFM Capital Ltd* [2003] VSC 444, [142] (Dodds-Streeton J). See also *Bird Cameron* (n 23) 596 [110]–[111] (Besanko J), the subject of analysis on this point in Anil Hargovan and Jason Harris, 'The Relevance of Control in Establishing an Implied Agency Relationship Between a Company and its Owners' (2005) 23(7) *Company and Securities Law Journal* 459.

155 *Briggs v James Hardie* (n 22) 567.

156 *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567('*Industrial Equity*').

157 *Walker v Wimborne* (n 10).

158 *Briggs v James Hardie* (n 22) 577.

159 For important analysis of an independent equitable conception of corporate alter ego liability, see Jamie Glister and Calida Tang, 'Corporate Alter Ego Liability in Equity' (2024) 47(4) *UNSW Law Journal* 1071, examining the developing jurisprudence arising from *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296. The seemingly close relationship between this developing jurisprudence and the analysis here offered demands further attention, but must await another occasion.

160 Paterson and Bant, 'Automated Mistakes' (n 65) 265.

161 See above Part II.

The subsidiary's independent legal personhood is no more denied, or pierced, than that of the third-party recruiters in the unconscionability cases. Rather, the parent is being held responsible for its own system of conduct carried out through, inter alia, its subsidiary.

Third, the issues in play in both *Industrial Equity* and *Walker v Wimborne* were quite different to those in issue in *Briggs v James Hardie* and, in turn, in *James Hardie v Hall*. In *Industrial Equity*, the Court held that, absent legislation, a holding company was only entitled to declare dividends over profits held by the holding company, and could not notionally accrue or claim the profits held by members of the wider group.[162] The legislative allowance of consolidated or group accounts in the interests of financial transparency did not mean that the profits of the subsidiary were those of the holding company.[163] This must be right. To find otherwise would entail simply ignoring the separate legal identity of the group members, or recognising some single, overarching corporate group entity.[164]

Likewise, *Walker v Wimborne* rightly emphasised that the question whether director of company A had acted in the best interests of that company could not be answered by reference to the interests of company B or the broader corporate group. It had to be answered by reference to the interests of company A.[165] This is not to say that the interests of company A cannot be informed by wider group interests, but that the proper lens for the purposes of the director's inquiry must faithfully be focused upon the interests of the company for which the director acted on the occasion in question.

In *Briggs v James Hardie* and *James Hardie v Hall*, by contrast, deployed dominance and control went to the heart of the very question in issue, namely whether there were circumstances that gave rise to a duty of care directly between the defendants and the plaintiff. On this question, in *James Hardie v Hall*, Sheller JA recognised that, as in an earlier authority of *CSR Ltd v Wren*,[166] 'the system of work and the working conditions on the factory floor' were key to the finding of a duty of care between parent and subsidiary.[167] In the language of Systems Intentionality, control and dominance are matters that inform whether and how the subsidiary's working conditions were the result of — indeed part of — the parent's system of conduct.[168] In *CSR Ltd v Wren*, the working conditions on the factory floor were found to be CSR's systems of conduct and practices, which reflected CSR's

---

162 *Industrial Equity* (n 156) 576–7 (Mason J, with whom Stephen, Murphy and Aickin JJ separately concurred).

163 Ibid.

164 *Briggs v James Hardie* (n 22) 577. See also *Federal Commissioner of Taxation v BHP Billiton Ltd* (2011) 244 CLR 325, 343–4 [62] (French CJ, Heydon, Crennan and Bell JJ); Jason Harris and Anil Hargovan, 'Corporate Groups: The Intersection Between Corporate and Tax Law — *Commissioner of Taxation v BHP Billiton Finance Ltd*' (2010) 32(4) *Sydney Law Review* 723.

165 *Walker v Wimborne* (n 10) 6–7 (Mason J).

166 *CSR Ltd v Wren* (n 17) 464 (Powell JA) 483–4 (Beazley and Stein JJA).

167 *James Hardie v Hall* (n 17) 583.

168 If the subsidiary's, the parent may still attract direct liability, for example as an accessory: cf *Lifestyle Equities CV v Ahmed* [2025] AC 1, 19–24 [24]–[40] (Lord Leggatt JSC, with whom Lords Lloyd-Jones, Stephens and Richards JJSC and Lord Kitchin agreed) on the analogous accessory liability of directors for wrongs committed by their company.

knowledge and intentions with respect to the workings of the factory.[169] Those conditions therefore provided important factual findings relevant to proximity, duty and breach.

Sheller JA however emphasised that critical to the reasoning in *CSR Ltd v Wren*, was the fact that the foreman and manager of the factory was a CSR employee. This 'direct control' over the operational aspects of its subsidiary's factory meant that there was no question of lifting the corporate veil. By contrast, in *James Hardie v Hall* his Honour considered that the plaintiff was employed by the subsidiary, and the relationship between the defendants and the subsidiary was not a mere façade. At most, the defendants 'were in a position to insist that proper workplace standards were maintained'.[170] These facts were sufficient to distinguish the cases.

By contrast, Systems Intentionality suggests that the fact that another company employed the plaintiff could not thereby stop the 'system of work' in *James Hardie v Hall* from being the defendants' own system, if that was indeed the case. Thus, it made no substantive difference to the worked example in Part III(C) that the cook's carer was employed through a government scheme, or that third-party recruiters were appointed through a jumble of opaque and uncertain arrangements as described in Part IV. Any formal contractual arrangements between the deployer of the system and the agentic elements of the system should not be permitted distract from characterisation of the system of conduct, as deployed, as a whole. Further, the findings of Judge O'Meally seemed apt to shed light on the presence of such a system, although further evidence, such as the substance of parental policies around work practices (that is, the real-life systems or practices) would have shed additional light. Any system would necessarily manifest the defendants' knowledge of the circumstances and risks to which employees, such as the plaintiff, were exposed. And failure to act (far from being a less culpable aspect of parent involvement) could legitimately be considered to be part of that system, assessed at a certain level of generality. Contrary to the findings of Sheller JA, therefore, the analysis of Judge O'Meally in *James Hardie v Hall* did not give mere 'lip service'[171] to the integrity of the corporate veil, but rather adopted the separate legal identity of parent and subsidiary as part of the matrix of circumstances that informed his inquiry into proximity. On the other hand, the fact (as fact it is) that the subsidiary was a separate legal identity did not thereby require dis-attribution of the parent.[172] Yet this was arguably the consequence of Sheller JA's analysis.

Two final matters warrant emphasis, by way of conclusion. In *Briggs v James Hardie*, Rogers AJA asked rhetorically 'If exercise of dominance be at least part of the test, what degree of dominance is required? If so, what is the extent of reliance on the parent that is required to be shown?'[173] First, a relationship of 'dominance', or conversely reliance, may be relevant to issues of causation raised by the specific doctrine in issue. For example, it may suggest that that the parent made a significant contribution to the subsidiary's corporate decision to engage in conduct that harmed

169 *CSR Ltd v Wren* (n 17) 464 (Powell JA) 483–4 (Beazley and Stein JJA).
170 *James Hardie v Hall* (n 17) 581, see also at 583.
171 Ibid 581.
172 See *Lifestyle Equities CV v Ahmed* (n 168) 22 [35] (Lord Leggatt JSC).
173 *Briggs v James Hardie* (n 22) 576 (citations omitted).

the plaintiff.[174] But, as explained earlier, through the lens of Systems Intentionality, 'dominance' also directly informs the question of whether the parent had adopted and/or deployed the system of conduct carried out (in part) by the subsidiary. This has some significant, practical ramifications. On this approach, the precise shareholding of a parent in its subsidiary is of marginal, evidential significance. While it might suggest the *potential* for dominance or control, what is of greater, indeed critical, significance is whether and how the subsidiary's conduct *through which the harm occurred* formed part of the parent's own system of conduct. Here, by analogy with the 'unconscionable system of conduct' cases, the fact that a parent has issued or overseen, or adopted training practices for the subsidiary in the system or business model in issue, or imposed and embedded relevant policies that nudge, direct or coordinate its behaviours and the like, all bear on this issue.[175] Shared directorships, or controlled directorships, whereby the parent takes control of the decision-making of a subsidiary by issuing instructions to the subsidiary on matters relevant to the particular harm the subject of the claim will also be relevant to this question. If the analysis discloses that the harm resulted from the parent's system of conduct, then the parent's system of conduct will manifest certain intention and knowledge, which can readily be characterised.

Second, and relatedly, Systems Intentionality makes clear (and the unconscionable systems of conduct authorities illustrate)[176] that it should not it have been considered fatal to the claim in *James Hardie v Hall* that a subsidiary may act independently from time to time, or even repeatedly.[177] Rather, the question is whether the subsidiary formed part of the parent's system of conduct *on the occasion in issue*. Where it did, analysis of its role is important to identify and then characterise the parent's system of conduct and, with it, the parent's corporate mindset. This may then inform the parent's liability, on its own account.

VI Conclusion

In this article, I have sought to contribute to the search to find a more principled and practical means of determining responsibility within corporate groups, considered as complex 'systems of conduct'. Systems Intentionality suggests that, in some cases, and for some circumstances, parent corporations may adopt and deploy systems of conduct to which their subsidiaries contribute, and through which harms occur. Such systems will manifest the parent's states of mind, which may bear on the parent's direct responsibility pursuant to some common law, equitable and statutory doctrine. In this way, Systems Intentionality does not provide an exhaustive solution or 'silver bullet' to the problems posed by corporate groups, but rather may serve to support

---

174 Elise Bant and Jeannie Marie Paterson, 'Statutory Causation in Cases of Misleading Conduct: Lessons from and for the Common Law' (2017) 24(1) *Torts Law Journal* 1, 10–11, 15–22.

175 Cf Chris McGrath, 'Implications of the United Kingdom's Approach for Parent Company Liability in Australia' (2021) 38(8) *Company and Securities Law Journal* 577, 577–8; Petrin and Choudhury (n 27) 777–8.

176 Bant, 'Systems Intentionality' (n 2) 202–3, discussing *Australian Competition and Consumer Commission v ACN 117 372 915 Pty Ltd (in liq)* [2015] FCA 368, [939]–[942], cited in *Unique International College Pty Ltd v ACCC* (n 93) 661–2 [131] (Allsop CJ, Middleton and Mortimer JJ).

177 *James Hardie v Hall* (n 17) 583. See also Cf *Bird Cameron* (n 23) 594–7 [108]–[115] (Besanko J).

existing laws, as well as design of proposed reforms[178] in a principled way that does not do violence to core principles of corporate law.

While these cannot be explored here except in barest outline, the ramifications of my analysis may require some rethinking of common assumptions of corporate practice. On this approach, for example, shifting funds within a corporate group in order to defeat claims against the subsidiary may not operate as some sort of 'get out of jail free' card for the parent.[179] Direct parent liability relating to the harm caused by the subsidiary[180] may remain, although the precise nature of that liability will need to be carefully and separately established.[181] A key question here will be whether and how the subsidiary's harmful behaviour on the instance(s) in question formed part of the parent's own system of conduct. It is here that evidence of overarching and more granular parental policies that influenced, nudged or contributed towards the conduct resulting in the harm will be critical. However, these will not be the only source of relevant evidence. As I have shown, a wealth of caselaw exists on how to prove systems of conduct and the bearings these have on a range of corporate mental states commonly relevant to liability.[182] Commonly dealing with business models that incorporate multiple corporate agents and networks, these learnings should be readily transferable to the group context.

Consistently, the Systems Intentionality analysis suggests how and why accessorial or joint group liability may be possible and appropriate in some circumstances, just as it may be for natural persons who are engaged in connected activities.[183] Again, corporate knowledge and intention manifested through combining or coordinating (mis)conduct in some way will often be important in determining the nature of that liability.[184] This can be addressed through assessing the system of conduct to which the corporate accessory contributed.

Further, the analysis provides another means of thinking through when and whether it may be necessary or appropriate to regard a corporate group as a separate

---

178 See, eg, Witting (n 10) chs 9, 11; Petrin and Choudhury (n 27) 782–9; Helen Anderson, 'Piercing the Veil on Corporate Groups in Australia: The Case for Reform' (2009) 33(2) *Melbourne University Law Review* 333, 359–66.

179 See, eg, Edwina Dunn, 'James Hardie: No Soul to be Damned and No Body to be Kicked' (2005) 27(2) *Sydney Law Review* 339; Witting (n 10) ch 4 ('Insolvent Entity Case Studies').

180 There may also, of course, be claims arising from the act of procuring a transfer of funds to defeat the subsidiary's creditors or other direct liabilities.

181 Similarly, the fact that the parent may be liable does not mean that the subsidiary is thereby excused: for similar discussion in the context of 'dis-attribution fallacy' of directors who have procured or assisted their company to breach some duty, see *Lifestyle Equities CV v Ahmed* (n 168) 22 [35], 22–4 [37]–[40], 27 [52], 35–6 [81]–[85] (Lord Leggatt JSC). Cf *Keller v LED Technologies Pty Ltd* (2010) 268 ALR 613, criticised in Stefan Lo, "Dis-Attribution Fallacy and Directors' Tort Liabilities" (2016) 30(3) *Australian Journal of Corporate Law* 215.

182 Discussed above in Part III.

183 Peter Edmundson, 'Sidestepping Limited Liability in Corporate Groups Using the Tort of Interference with Contract' (2006) 30(1) *Melbourne University Law Review* 62; Peter Edmundson and James Mitchell, 'Knowing Receipt in Corporate Group Structures' (2005) 23(8) *Company and Securities Law Journal* 515. See also Witting (n 10) 406–12. Cf equitable alter ego liability of the kind analysed by Glister and Tang (n 159).

184 This need not be the same mental state as required for the primary tortfeasor: see *Lifestyle Equities CV v Ahmed* (n 168) 37–40 [86]–[98] (Lord Leggatt JSC).

legal entity in and of itself.[185] To the extent that coordinated systems of conduct are deployed by a parent company, or accessory liability follows from group companies' individual contributions to systems of misconduct, then liability may be sensibly sheeted home to extant corporate individuals, without the necessity for recognising some greater, collective group agent in which responsibility resides. The model may, however, helpfully inform developing theories of 'group enterprise' liability,[186] which also emphasise coordinated conduct between group members as a basis for an extended form of joint liability.

Finally, as Justice Allsop observed, and as is amply supported by the 'unconscionable systems of conduct' jurisprudence, a more nuanced approach to corporate group responsibility has the potential to make more transparent the range of risks that must be assessed by boards of group companies:

> If the best way of running and managing a business or businesses organised by subsidiary companies in a group involves group-wide policies promulgated, supervised, directed and enforced by officers of the parent, not to be actively involved in such policy promulgation, supervision, direction and enforcement will or may involve business risk; to be so actively involved may involve or heighten liability risk.[187]

[185] See, eg, *Qintex Australia Finance Ltd v Schröders Ltd* (1990) 3 ACSR 267, 269 (Rogers J) discussed in Robert Baxt and Timothy Lane, 'Developments in relation to Corporate Groups and the Responsibilities of Directors: Some Insights and New Directions' (1998) 16(8) *Company and Securities Law Journal* 628, 629. Cf statutory provisions permitting consolidated or group financial statements, group reporting and disclosure (*Corporations Act* (n 24) ch 2M) and 'pooling' orders for insolvency purposes (*Corporations Act* (n 24) s 579E(1)). See also, eg, *Corporations Act* (n 24) s 187, which allows a director of a wholly owned subsidiary to act in the interests of the parent company in some circumstances.

[186] Cf, eg, *Bluecorp Pty Ltd (in liq) v ANZ Executors and Trustee Co Ltd* (1995) 18 ACSR 566, 568–569 (Macrossan CJ, Fitzgerald P and Davies JA); *James Hardie v Hall* (n 17) 579–80 (Sheller JA, Beazley and Stein JJA concurring); Witting (n 10) 174–85; Martin and Choudhury (n 27) 789–91. Leading proponents include Adolf Berle, 'The Theory of Enterprise Liability' (1947) 47(3) *Columbia Law Review* 343; Phillip Blumberg, *The Multinational Challenge to Corporation Law* (Oxford University Press, 2nd ed, 2012); Phillip Blumberg, 'The Transformation of Modern Corporation Law: The Law of Corporate Groups' (2005) 37(3) *Connecticut Law Review* 605. There is an interesting comparison also to be made between 'group enterprise' theory and theories of 'aggregation' in the corporate attribution context.

[187] Allsop (n 17) [70], see also at [64].

Outcome Responsibility and Autonomy: Rationalising the Change of Position Defence in Mistaken Payment Claims

Charlie Ward*

Abstract

Three decades on from its decisive advent in England and Australia, the change of position defence has become part of the fabric of the law of restitution. Yet its rationale — long neglected but increasingly scrutinised — remains a matter of debate. This article seeks to advance the debate by analysing possible rationales for the defence as it applies to the paradigm case of restitution, mistaken payments. After exposing difficulties with many of the candidates that have hitherto attracted support, this article advances two rationales better suited to facilitate principled development of the defence: outcome responsibility, and reciprocal recognition of decisional autonomy. Both rationales put the defence on firm normative foundations, align with its present contours and suggest areas for further development.

I Introduction

Suppose that a claimant mistakenly pays a defendant $1,000. She (the claimant)[1] is prima facie entitled to restitution of $1,000 from the defendant.[2] Suppose now that the defendant, believing himself entitled to the mistaken payment, spends $500 on a lavish meal he would not otherwise have purchased. In Australia, as in most common

Please cite this article as:

Charlie Ward, 'Outcome Responsibility and Autonomy: Rationalising the Change of Position Defence in Mistaken Payment Claims' (2025) 47 *Sydney Law Review* 20123: 1–31 <https://doi.org/10.30722/slr.20123>.

* BCL Candidate (*Oxon*); BEc, LLB (*Syd*). Email: charlie.ward@sydney.edu.au.
This article began life as an Honours thesis under the supervision of Associate Professor David Winterton, to whom I am grateful. I thank Emerson Hynard, the anonymous referees and the *Sydney Law Review* Editors for their helpful comments. All remaining errors are mine.

1 For convenience, this article refers to the claimant by feminine pronouns and to the defendant by masculine pronouns.

2 *Kelly v Solari* (1841) 152 ER 24.

law jurisdictions,[3] the defendant may invoke the change of position defence to reduce his liability to the claimant by $500.[4] This article investigates why: that is, the rationale for the change of position defence as it applies to mistaken payment claims.

While its historical roots trace back at least as far as *Moses v Macferlan*,[5] formal recognition of the defence came only three decades ago with the decisions, in quick succession, of *Lipkin Gorman v Karpnale* ('*Lipkin Gorman*')[6] in England and *David Securities v Commonwealth Bank of Australia* ('*David Securities*') in Australia.[7] Judicial explication since has been relatively sparse. The High Court of Australia last addressed the defence in detail a decade ago, in *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* ('*Hills*').[8] Important questions about its operation remain.[9] There is, accordingly, much work for a rationale to do in facilitating the principled development of the defence,[10] which this article understands as the end to which rationales are most valuably put.

In achieving that end, a rationale may have broader implications for the law of restitution, particularly given the strategy Lord Goff articulated in *Lipkin Gorman* of a liberalised right to restitution tempered by defences.[11] Already the defence has contributed to the demise of the mistake of law bar,[12] and the overruling of *Sinclair*

3 In England, see *Barclays Bank Ltd v WJ Simms Son & Cooke (Southern) Ltd* [1980] QB 677, 695–6 (Goff J); *Lipkin Gorman (A Firm) v Karpnale Ltd* [1991] 2 AC 548 ('*Lipkin Gorman*'). In the United States, see American Law Institute, *Restatement (Third) of Restitution and Unjust Enrichment* (2011) § 65 ('*Third Restatement*'). In Canada, see *Storthoaks (Rural Municipality) v Mobil Oil Canada Ltd* [1976] 2 SCR 147. In Singapore, see *Seagate Technology Pte Ltd v Goh Han Kim* [1994] 3 SLR(R) 836; *Cavenagh Investment Pte Ltd v Kaushik Rajiv* [2013] 2 SLR 543, 568 [59] (Chan Seng Onn J).

4 *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 175 CLR 353 ('*David Securities*'); *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560 ('*Hills*'); Elise Bant, *The Change of Position Defence* (Hart Publishing, 2009) 2–3.

5 *Moses v Macferlan* (1760) 2 Burr 1005; 97 ER 676, 679 (Lord Mansfield). See Eleanor Makeig, 'Money Had and Received – and Retained? The Role of Retention at Notice for Personal Common Law Liability' (2020) 94(11) *Australian Law Journal* 855, 865–6.

6 *Lipkin Gorman* (n 3).

7 *David Securities* (n 4) 379 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ). Limited statutory forms of the defence already existed, for example the *Property Law Act 1969* (WA) s 125 and the *Trustees Act 1962* (WA) s 65(8). Embryonic murmurs of the defence had also emerged in earlier Australian decisions, especially *Australia New Zealand Banking Group Ltd v Westpac Banking Corporation* (1988) 164 CLR 662, 673 (Mason CJ, Wilson, Deane, Toohey and Gaudron JJ) and *Commercial Bank of Australia v Ltd v Younis* [1979] 1 NSWLR 444, 450 (Hope JA, Reynolds and Hutley JJA agreeing). Cf *David Securities* (n 4) 384–5 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ); K Mason, JW Carter and GJ Tolhurst, *Mason & Carter's Restitution Law in Australia* (LexisNexis, 4th ed, 2021) 962 [2404].

8 *Hills* (n 4).

9 See Justice James Edelman, 'Change of Position: A Defence of Unjust Disenrichment' (2012) 92(3) *Boston University Law Review* 1009, 1015–17; Elise Bant, 'Change of Position: Outstanding Issues' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Unjust Enrichment* (Hart Publishing, 2016) 133 ('Outstanding Issues').

10 Edelman (n 9) 1017.

11 *Lipkin Gorman* (n 3) 581 (Lord Goff).

12 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, 373 ('*Kleinwort Benson*').

v Brougham;[13] it may yet inform questions about other restitutionary defences such as estoppel,[14] and the very foundations of restitutionary liability.[15]

Some judicial attention has been given to the rationale for the defence. The leading contender that emerges from the cases is 'inequitability', which formed the crux of one of Lord Goff's seminal formulations of the defence in *Lipkin Gorman*[16] and found repeated support in *Hills*.[17] This rationale suffers the critical impediment, however, of being too abstract to guide meaningfully the contest between the innocent and often evenly-matched parties in a change of position case. Moreover, other rationales that have attracted judicial and academic favour — disenrichment, security of receipts, loss allocation, and that the defendant should not be left unjustifiably worse off by restitution (the 'no worse off' rationale) — either work from a faulty premise or do not alone represent a complete rationale for the defence.

This article identifies two better rationales. The first hinges on Honoré's theory of 'outcome responsibility'.[18] It justifies the defence on the basis that the claimant causes any detriment the defendant would suffer if, following a change of position, he were required to make restitution. The second rationale is autonomy. It combines aspects of existing autonomy-based theories to justify the defence on the basis that in bringing her claim, which is arguably designed to protect her autonomy in decision-making ('decisional' autonomy), the claimant must reciprocally recognise the defendant's decisional autonomy.

Both rationales are, it will be argued, normatively persuasive, and neither is inconsistent with the existing case law. Both are therefore good rationales on the criteria this article adopts. Their symmetry with the cases implies that the two rationales coexist in harmony, and it will be seen that in some respects they supplement one another. However, their precise interaction and implications for the defence are matters beyond the scope of this article.

This article proceeds in three parts. Part II lays the groundwork for the substantive arguments, articulating the understanding of 'rationales' and concomitant methodology adopted and explaining its concern here only with the application of the defence to mistaken payments. Part III surveys and debunks inequitability, disenrichment, security of receipts, loss allocation, and the no worse off rationale. Part IV canvasses outcome responsibility and decisional autonomy, concluding that both are better suited to facilitate principled development of the defence in its application to mistaken payment claims.

---

13 *Sinclair v Brougham* [1914] AC 398.

14 See, eg, *Hills* (n 4) 625 [156] (Gageler J); Bant, 'Outstanding Issues' (n 9) 161; Ross Grantham, 'Change of Position-Based Defences' in Elise Bant, Kit Barker and Simone Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (Edward Elgar Publishing, 2020) 418, 434.

15 Graham Virgo, 'Change of Position: The Importance of Being Principled' (2005) 13 *Restitution Law Review* 34, 35.

16 *Lipkin Gorman* (n 3) 580 (Lord Goff).

17 *Hills* (n 4) 568 [1], 577 [17], 580 [23], 583 [27] (French CJ), 591 [57], 594 [69], 602 [96] (Hayne, Crennan, Kiefel, Bell and Keane JJ), 620 [146] (Gageler J).

18 See, eg, Tony Honoré, *Responsibility and Fault* (Hart Publishing, 1999); Tony Honoré, 'Appreciations and Responses' in Peter Cane and John Gardner (eds), *Relating to Responsibility: Essays for Tony Honoré on his Eightieth Birthday* (Hart Publishing, 2001) 219.

II Framing the Inquiry

A *On Rationales*

This article proceeds on an understanding that a rationale for change of position is best directed to facilitating the principled development of the defence.[19] The viability of a rationale to this end raises two well-worn sites of tension that guide the criteria to be applied in identifying an appropriate rationale: the first, between a rationale's consistency with existing law and its normative persuasiveness; the second, between abstractness and specificity.

1 *Consistency and Persuasiveness*

In the first place, a rationale cannot influence the law unless judges recognise and apply it. This is unlikely, given the preference of the common law for incremental development, if a rationale produces a model of the defence starkly inconsistent with the corpus of cases.[20] However, to treat consistency as the pivotal feature of a rationale risks a purely descriptive account. That would not facilitate development, because little if anything could be drawn from the rationale to resolve issues and inconsistencies left extant in the jurisprudence.[21]

To resolve those points, a rationale must identify reasons that underlie, and can be extrapolated beyond the confines of, the cases. That is 'explanation': identifying the actual reasons that the defence exists as it does, without inquiring (unlike the task of 'justification') into whether those reasons are normatively good.[22] But in Gardner's words, attempts to explain legal norms rationally (that is, by reference to reasons) 'cannot but be concerned with the justifiability or defensibility of those norms'.[23] A number of explanations might feasibly underlie a doctrine, particularly where, as in the law of restitution, inconsistent authorities exist. The choice of one explanation without an inquiry into its normative soundness is arbitrary and risks undermining the entire endeavour. By contrast, justifications support 'coherence'[24] and 'theoretical stability';[25] they allow bad cases to be jettisoned on a firm, defensible basis.

---

19 Graham Virgo, 'A Taxonomy of Defences in Restitution' in Elise Bant, Kit Barker and Simone Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (Edward Elgar, 2020) 398, 398; Edelman (n 9) 1010; Grantham, 'Change of Position-Based Defences' (n 14) 418–19; Graham Virgo, *The Principles of the Law of Restitution* (Oxford University Press, 4th ed, 2024) 753.

20 Robert Reed, 'Theory and Practice' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Unjust Enrichment* (Hart Publishing, 2016) 309, 311.

21 See generally Ronald Dworkin, *Law's Empire* (Hart Publishing, 1998) chs 2–3. See also Charlie Webb, *Reason and Restitution: A Theory of Unjust Enrichment* (Oxford University Press, 2016) 7.

22 See Joseph Raz, *From Normativity to Responsibility* (Oxford University Press, 2011) 16.

23 John Gardner, 'Backwards and Forwards with Tort Law' in *Torts and Other Wrongs* (Oxford University Press, 2019) 103, 110. See also David Winterton, *Money Awards in Contract* (Hart Publishing, 2015) 17–18. Cf Andy Summers, *Mitigation in the Law of Damages* (Oxford University Press, 2024) xli–xlii.

24 Webb (n 21) 7.

25 Ross Grantham and Charles Rickett, 'Unjust Enrichment — Reason, Place and Content' in CEF Rickett and Ross Grantham, *Structure and Justification in Private Law: Essays for Peter Birks* (Hart Publishing, 2008) 5, 8.

It remains true, however, that a rationale is unlikely to influence the law if it requires a great departure from the law's current state. A normatively persuasive rationale that is also consistent with the cases is, accordingly, a better rationale.

This stance might be criticised as a 'cocktail' of philosophy and law that risks speaking to neither philosophers nor judges.[26] But that criticism could be levelled against any of what have been termed 'interpretive' theories, which mix explanation and justification in seeking to reveal an 'intelligible order' within a body of case law by reference to broader normative considerations.[27] While questions regarding the appropriate balance between theory and doctrine within interpretive scholarship remain,[28] they may be insoluble. As such, this article requires a rationale at a minimum to provide a normatively persuasive justification for the defence and, as between possible justifications, prefers those consistent with the cases.

2 *Abstractness and Specificity*

To facilitate principled development, a rationale cannot leave unbridled discretion. This raises the second tension, manifest in *Hills*, between 'the dangers of a diffuse discretion and the restrictions of rigid rules'.[29] Whereas the *Hills* plurality excoriated attempts to 'chart [the] metes and bounds' of change of position (and legal doctrines generally),[30] French CJ stressed the importance of particularised 'criteria'[31] to avoid 'a distinct tribunal in [each judge's] breast'.[32]

The question what balance ought generally to be struck dwarfs this article. In the specific context of change of position, however, there is particular cause to be wary of wide discretion, and thus of wide rationales. The parties are both innocent and, ordinarily, their merits relatively equal.[33] The defence is thereby vulnerable to 'idiosyncratic notions of palm-tree justice':[34] unconstrained by principle, judges could choose any marginal circumstance they thought ought to make the difference.

Hamilton LJ raised this concern in rejecting the defence almost 80 years before *Lipkin Gorman*, exhorting that 'we are not now free in the twentieth century to administer that vague jurisprudence which is sometimes attractively styled "justice between man and man"'.[35] Lord Goff echoed this sentiment in *Lipkin Gorman* and stressed the imperative that 'where recovery is denied, it is denied on

---

26 Frederick Wilmot-Smith, 'Reasons? For *Restitution*?' (2016) 79(6) *Modern Law Review* 1116, 1127.

27 Stephen A Smith, *Contract Theory* (Clarendon, 2004) 5. Examples of interpretive theories are collected in Steve Hedley, 'The Shock of the Old: Interpretivism in Obligations' in CEF Rickett and Ross Grantham (eds), *Structure and Justification in Private Law: Essays for Peter Birks* (Hart Publishing, 2008) 205, 205 n 1.

28 See generally Wilmot-Smith, 'Reasons? For *Restitution*?' (n 26); Beever and Rickett (n 26) 321.

29 *Commerzbank AG v Price-Jones* [2003] EWCA Civ 1663, [32] (Mummery LJ) ('*Commerzbank*').

30 *Hills* (n 4) 603 [98] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

31 Ibid 582 [25] (French CJ).

32 Ibid, quoting *Perre v Apand Pty Ltd* (1998) 198 CLR 180, 211 (McHugh J).

33 Grantham, 'Change of Position-Based Defences' (n 14) 418–19, 424; Ross Grantham, 'Allocating the Costs of Making Restitution: Change of Position' in Kit Barker and Ross Grantham (eds), *Apportionment in Private Law* (Hart Publishing, 2018) 197, 197 ('Allocating the Costs of Making Restitution').

34 Edelman (n 9) 1011.

35 *Baylis v Bishop of London* [1913] 1 Ch 127, 140 (Hamilton LJ).

the basis of legal principle'.[36] This concern has, however, receded from judicial view. The defence has been interpreted as 'a broadly stated concept of practical justice',[37] and a trend in the case law has emerged toward unprincipled 'individualised justice'.[38]

And yet, Hamilton LJ's concern remains apposite. Consider *Hills*, for example.[39] Both the claimant (AFSL) and the defendants (Hills and Bosch) were innocent victims of a fraudulent scheme orchestrated by a third party (Skarzynski). AFSL paid more than $500,000 to Hills and Bosch in the mistaken belief, created by invoices Skarzynski had forged, that it was thereby acquiring equipment. The equipment did not actually exist. At Skaryznski's urging, Hills and Bosch treated the payments by AFSL as extinguishing longstanding debts they were owed by Skarzynski's companies. Both defendants thereafter resumed their previously restricted trading relationships with Skarzynski's companies. Hills also abstained from seeking security and commencing recovery proceedings for the debts; Bosch caused to be set aside default judgments and garnishee orders it had already obtained in respect of the debts it was owed. Neither defendant incurred any specific items of expenditure in reliance on the mistaken payments.

One judge might consider determinative, as the trial judge did, that the opportunities Hills forwent to seek security and take recovery action were speculative.[40] Another might consider, like each member of the High Court, that those lost opportunities were still valuable.[41] Yet another might consider the parties' relative fault to tip the balance;[42] another again the parties' relative financial positions and the consequent hardship they would suffer by having to make restitution.[43] Each of these considerations might properly have a place, either in the change of position defence or another. The problem, however, is the inconsistent selection of which considerations trump which. As *Hills*' factual matrix illustrates, that is liable to occur if discretion is too widely given, which raises a risk too of a weighing of the parties' equities at large — an exercise the plurality expressly disavowed.[44]

A rationale therefore needs sufficient content to avoid untethered judicial discretion. It need not and should not be algorithmic, supplying a precise calculus

---

36 *Lipkin Gorman* (n 3) 578. See also *Philip Collins Ltd v Davis* [2000] 3 All ER 808, 827 (Jonathan Parker J) ('*Philip Collins v Davis*').

37 *Commerzbank* (n 29) [48] (Munby J).

38 Ross Grantham and Charles Rickett, 'A Normative Account of Defences to Restitutionary Liability' (2008) 67(1) *Cambridge Law Journal* 92, 125.

39 *Hills* (n 4).

40 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2011) 5 BFRA 555, 565–6 [74]–[77] (Einstein J).

41 *Hills* (n 4) 583 [28] (French CJ), 626 [157] (Gageler J).

42 As is the case in New Zealand and arguably Canada: see respectively Paul F Dalkie, 'The Difficulty with a Concept of Relative Fault in Restitution' (2021) 17(1) *Otago Law Review* 143; Maziar Peihani, 'The Recovery of Mistaken Payments: Revisiting the Doctrine of Relative Fault' (2023) 101(2) *The Canadian Bar Review* 419, 436–8. Cf the position in England: *Dextra Bank & Trust Co Ltd v Bank of Jamaica* [2002] 1 All ER (Comm) 193, 207 [45] (Lords Bingham and Goff) ('*Dextra Bank*').

43 See, eg, *Menzies v Bennett* (NZ Supreme Court, Beattie J, 14 August 1969); Paul A Walker, 'Change of Position and Restitution for Wrongs: "Ne'er the Twain Shall Meet"?' (2009) 33(1) *Melbourne University Law Review* 235, 268.

44 *Hills* (n 4) 594 [69] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

for every case. But it should provide a framework that facilitates consistent adjudication of the defence.

As such, this article adopts three criteria for assessing the viability of a rationale. First, a rationale cannot be so abstract that it does not meaningfully constrain judicial discretion. Second, a rationale must provide a normative justification for the defence. Third, consistency or 'fit' with the existing case law is a desirable characteristic.

Four features of the defence are relevant for assessing consistency:

(i) the defendant must change his position in good faith,[45] in that he must not subjectively know of the mistake[46] and must objectively have 'a foundation of information'[47] (something 'more than the fact of receipt standing alone'),[48] which is 'obtained in connection with the receipt' and sufficient to justify acting on the basis of it;[49]

(ii) the defendant's change of position must, at least under Australian law, be irreversible[50] (that is, 'legally or practically irreversible' or 'significant[ly]' difficult to reverse);[51]

(iii) the change of position need not result in quantifiable detriment, but if it does, the defence only operates *pro tanto* to the extent of that detriment;[52] and

(iv) the change of position may occur in anticipation of the mistaken transfer.[53]

---

45 *David Securities* (n 4) 385–6 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ), 406 (Dawson J); *Lipkin Gorman* (n 3) 579–80 (Lord Goff).

46 *Automotive Holdings Group Ltd v Prime Constructions Australia Pty Ltd* [2018] NSWSC 1960, [259] (Slattery J) ('*Automotive Holdings*').

47 *Perpetual Trustees Australia Ltd v Heperu Pty Ltd* (2009) 76 NSWLR 195, 224 [139] (Allsop P, Campbell JA and Handley AJA agreeing) ('*Perpetual Trustees v Heperu*').

48 *State Bank of New South Wales Ltd v Swiss Bank Corporation* (1995) 39 NSWLR 350, 356 (Priestley, Handley and Sheller JJA).

49 *Perpetual Trustees Heperu* (n 47) 224 [139] (Allsop P; Campbell JA and Handley AJA agreeing), cited in *Automotive Holdings* (n 46) [257] (Slattery J).

50 *Hills* (n 4) 580–2 [23]–[25] (French CJ), 602 [95], 604 [102] (Hayne, Crennan, Kiefel, Bell and Keane JJ); *Alpha Wealth Financial Services Pty Ltd v Frankland River Olive Co Ltd* (2008) 66 ACSR 594 ('*Alpha Wealth*'); *Redland City Council v Kozik* (2024) 98 ALJR 544, 592 [241] (Gordon, Edelman and Steward JJ). Cf Edelman (n 9) 1019.

51 *Alpha Wealth* (n 50) 638 [202] (Buss JA, Steytler JA agreeing); *Point Bay Developments Pty Ltd v Perkins (WA) Pty Ltd* (2021) 9 QR 330, 351 [75] (Flanagan J).

52 *Hills* (n 4) 569 [4], 577–80 [17]–[21] (French CJ), 598–9 [84], 600 [88] (Hayne, Crennan, Kiefel, Bell, and Keane JJ), 622 [150], 625–6 [157]–[158] (Gageler J); *Comgroup Supplies Pty Ltd v Products for Industry Pty Ltd* [2016] QCA 88, [61] (Atkinson J, McMurdo P and Mullins J agreeing).

53 Albeit this feature is still only supported by *obiter dicta* of various English and Australian courts beginning with *Dextra Bank* (n 42) 204 [38] (Lords Bingham and Goff), cited in *Alpha Wealth* (n 50) 601 [23] (Pullin JA), 640 [204] (Buss JA, Steytler JA agreeing); *Fitzsimons v Minister for Liquor Gaming and Racing (NSW)* [2008] NSWSC 782, [125] (McDougall J); *Robinson v Robinson* (2020) 102 NSWLR 1, 41 [200], 42 [204] (Ward JA). See also *Commonwealth Bank of Australia v Stephens* [2017] VSC 385, [521] (Sloss J).

B *Narrowing Focus to Mistaken Payments*

The spectrum of claims to which change of position may be a defence is unclear. Commentators disagree about whether that spectrum spans all kinds of restitutionary claims,[54] or only those based on unjust enrichment.[55] Even within unjust enrichment claims, difficulties arise in relation to certain unjust factors including the *Woolwich* principle,[56] duress,[57] undue influence[58] and failure of condition.[59] And even if its full applications were clear, Duncan Sheehan has recently claimed that the defence has a different rationale in its application to restitution for wrongs than to other cases.[60]

Pursuing a unitary rationale for the defence in its entirety is therefore a fraught enterprise. An appropriate salve, as a matter of both empirics and theory, is to narrow focus to mistaken payment claims.[61] Empirically, the defence has been applied 'almost exclusively' to such claims,[62] including in *David Securities* and *Hills*. And theoretically, those claims are the 'core' case to which the defence applies,[63] in keeping with their role as the paradigmatic case of restitution.[64]

This narrowing does not exclude the possibility that a rationale cultivated in the environment of the mistaken payment claim could apply equally to cases involving other unjust factors. Before that hypothesis can meaningfully be tested, however, a rationale must first be cultivated. It is thus prudent to begin from a paradigmatic case and, from there, to identify analogies or extrapolate to other categories of cases. As such, this article investigates the rationale for the defence only in its application to mistaken payments.

---

54 See, eg, Mason, Carter and Tolhurst (n 7) 969–70 [2410].

55 See, eg, Peter Birks, *Unjust Enrichment* (Oxford University Press, 2nd ed, 2005) 64–5.

56 Bant, 'Outstanding Issues' (n 9) 134 n 14.

57 See Bant, *The Change of Position Defence* (n 4) 195–204.

58 Ibid.

59 *Goss v Chilcott* [1996] AC 788, 799 (Lord Goff); *Haugesund Kommune v Depfa ACS Bank* [2012] QB 549, affirming *Haugesund Kommune v Depfa ACS Bank* [2009] EWHC 2227 (Comm), [163]–[164] (Tomlinson J); Edelman (n 9) 1025; Robert Stevens, 'Is There a Law of Unjust Enrichment?' in Simone Degeling and James Edelman (eds), *Unjust Enrichment in Commercial Law* (Lawbook, 2008) 11, 32.

60 Duncan Sheehan, 'The Scope and Rationale(s) of the Change of Position Defence' (2023) 74(2) *Northern Ireland Legal Quarterly* 269. Cf Walker (n 43) 253, 268.

61 Encompassing both physical and non-physical transfers of money. While those two cases might be liable to produce different issues (for example, whether the defendant physically received money might bear on whether any subsequent change of position occurred in good faith), those differences manifest at a factual level. This article therefore does not bifurcate these categories for the purposes of identifying the rationales for the defence.

62 Grantham, 'Change of Position-Based Defences' (n 14) 430.

63 Bant, *The Change of Position Defence* (n 4) 2–3. See also *Lipkin Gorman* (n 3) 580 (Lord Goff).

64 Dennis Klimchuk, 'Unjust Enrichment and the Forms of Justice' in Elise Bant, Kit Barker and Simone Degeling (eds), *Research Handbook on Unjust Enrichment and Restitution* (Edward Elgar Publishing, 2020) 186, 187. Cf JE Penner, 'We All Make Mistakes: A "Duty of Virtue" Theory of Restitutionary Liability for Mistaken Payments' (2018) 81(2) *Modern Law Review* 222, 223.

C *Symmetry with Rationale for Mistaken Payments Liability*

If, as Lord Goff proclaimed, defences temper restitutionary liability,[65] one might expect a degree of symmetry between the reasons for imposing that liability and the reasons for relieving a defendant from it. Indeed, on one view (canvassed in Part III(E) below) that is true of the change of position defence. Both liability and defence are justified, so the argument runs, by the imperative that a defendant be left no worse off by making restitution. But as will be seen, that symmetry introduces a circuity and, in turn, begs the foundational question: why ought a defendant not be left worse off?

Conversely, one need look no further than limitation periods (for example) to recognise that defences often reflect extrinsic concerns to the liability which they relieve. Accordingly, this article does not require that a rationale for change of position be determined by, or necessarily consistent with, the rationale(s) that underpin mistaken payments liability.

III Previously-Proposed Rationales

A *Inequitability*

By a significant margin, the most judicially popular rationale for the defence is inequitability and its cognates, 'unconscionability' and 'injustice'.[66] In formulating the defence, Lord Goff said:

> At present I do not wish to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it would be inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full.[67]

Each judgment in *Hills* adopted a version of this standard.[68] Inequitability is also central to statements of the defence in New Zealand,[69] the United States[70] and Canada.[71]

The critical difficulty inequitability faces as a rationale is that it is 'extremely abstract'.[72] What is 'inequitable' depends, as Lord Goff made clear, on all the

---

65 See above n 11.

66 Edelman and Bant suggest these terms are used interchangeably in the authorities: see Justice James Edelman and Elise Bant, *Unjust Enrichment* (Hart Publishing, 2nd ed, 2016) 332–3. See also *Niru Battery Manufacturing Co v Milestone Trading Ltd (No 1)* [2004] QB 985, 1000 [149] (Clarke LJ); *National Westminster Bank plc v Somer International* [2002] 1 All ER 198, 210 [30] (Potter LJ).

67 *Lipkin Gorman* (n 3) 580 (Lord Goff).

68 *Hills* (n 4) 568 [1], 577 [17], 580 [23], 583 [27] (French CJ), 591 [57], 594 [69], 602 [96] (Hayne, Crennan, Kiefel, Bell and Keane JJ), 620 [146] (Gageler J). See also *Alpha Wealth* (n 50) 638 [201] (Buss JA, Steytler JA agreeing).

69 *Property Law Act 2007* (NZ) s 74B; *National Bank of New Zealand Ltd v Waitaki International Processing (NI) Ltd* [1999] 2 NZLR 211, 220–1 (Henry J), 229–30 (Thomas J), 232–3 (Tipping J) ('*Waitaki*').

70 *Third Restatement* (n 3) § 65.

71 *Garland v Consumers' Gas Co Ltd* [2004] 1 SCR 629, 658–9 (Iacobucci J).

72 Edelman (n 8) 1010. See to more dramatic effect Gareth Jones, 'Some Thoughts on Change of Position' in Andrew Burrows and Alan Rodger (eds), *Mapping the Law: Essays in Memory of Peter Birks* (Oxford University Press, 2006) 65, 79.

circumstances. Left untouched, it is vulnerable to inconsistent application — a grave ailment given the finely-balanced dynamics that change of position entails.

Of course, inequitability has not been left untouched. Principles (including those outlined in Part II(A)) have developed to ensure that the discretion is not 'at large'.[73] However, two points weaken the force of this observation. First, courts have still interpreted Lord Goff's formulation 'as if it were indeed set in stone'.[74] Applying inequitability directly in this way, without stating any principles to elucidate when restitution is inequitable, produces decisions that can be confined to their own facts. That frustrates Lord Goff's stated intention that the defence develop on a case-by-case basis.[75]

Second, the abstractness of inequitability means inconsistent principles might conceivably be — and have been — accommodated beneath it. One manifestation is the confusion under Australian law as to whether the defence is 'narrow' or 'wide'.[76] The 'narrow' version requires that the defendant rely on the enrichment in changing his position, and so limits the defence to 'reliance-based' or 'defendant-instigated' changes of position.[77] By contrast, the 'wide' version requires only some causal link, not necessarily reliance, between the enrichment and the change of position. It encompasses 'independent'[78] or 'non-participatory'[79] changes of position, the paradigmatic cases of which involve the spontaneous theft, destruction or devaluation of an enrichment without any action on the defendant's part (as, for example, where mistakenly gifted shares become worthless upon a company's demise).[80]

The wide view has been 'strongly' affirmed in England,[81] where inequitability is also the touchstone of the defence. Clearly, then, inequitability is capable of accommodating independent changes of position.[82] In *David Securities*, however, the 'central element' of the defence was said to be 'detriment on the *faith*

---

73 *Hills* (n 4) 594 [69] (Hayne, Crennan, Kiefel, Bell and Keane JJ); Edelman (n 9) 1010. See also Justice WMC Gummow, '*Moses v Macferlan*: 250 Years On' (2010) 84(11) *Australian Law Journal* 756, 760.

74 Jones (n 72) 79.

75 *Lipkin Gorman* (n 3) 580 (Lord Goff).

76 *Alpha Wealth* (n 50) 639–40 [203] (Buss JA, Steytler JA agreeing); Andrew Burrows, *The Law of Restitution* (Oxford University Press, 3rd ed, 2011) 528–30.

77 Bant, 'Outstanding Issues' (n 9) 153.

78 Ibid 151.

79 Mason, Carter and Tolhurst (n 7) 982 [2422].

80 Bant labels the narrow/wide distinction a 'false dichotomy'. In her view, reliance is a convenient, not exclusive, label for causation in circumstances where, as in reliance-based change of position cases, a party has taken positive action: Elise Bant, 'Causation and Scope of Liability in Unjust Enrichment' (2009) 17 *Restitution Law Review* 60, 75; Bant, 'Outstanding Issues' (n 9) 152–5. But this assumes that there is no other reason for limiting the relevant causal concept to reliance. As will be seen, both outcome responsibility and decisional autonomy supply such a reason.

81 Bant, 'Outstanding Issues' (n 9) 151. There is also some support for this position in New Zealand (see *Waitaki* (n 69)) in circumstances where statutory forms of the defence expressly require reliance: *Property Law Act 2007* (NZ) (n 69) s 74B; *Companies Act 1993* (NZ) s 296(3); *McIntosh v Fisk* [2017] 1 NZLR 863, 904 [139] (Arnold, O'Regan and Ellen France JJ).

82 See also *Gertsch v Atsas* [1999] NSWSC 898; *Corporate Management Services (Australia) Pty Ltd v Abi-Arraj* [2000] NSWSC 361.

of the receipt',[83] which the *Hills* plurality interpreted to require reliance.[84] *David Securities* was arguably not intended to decide the point,[85] and the *Hills* plurality confined its pronouncement to 'cases such as the present'.[86] Nonetheless, intermediate appellate authorities have since held, as Gageler J did in *Hills*,[87] that reliance is a categorical requirement of the defence.[88]

What emerges from this example is that reifying inequitability into the concrete principles necessary for the consistent adjudication of the defence is counterproductively liable to engender confusion and inconsistency. If the goal of consistent adjudication is taken seriously, a rationale must better guide, if not decisively answer, questions like whether reliance is necessary – which, as will be seen, both the outcome responsibility and autonomy rationales do. Accordingly, inequitability is not the best rationale for the defence.

B *Disenrichment*

Birks, eager to understand the defence in terms more precise than the 'broad language' of inequitability, claimed that 'all [its] known examples' are covered by a narrower core: disenrichment.[89] On this account, the defendant's liability is 'extinguished to the extent that, by reason of an event which would not have happened but for the enrichment, his wealth is reduced'.[90]

While disenrichment has 'powerful'[91] support,[92] courts and commentators alike have levelled a barrage of criticisms against it.[93] It suffices to note one: the falsity of Birks' premise that disenrichment negates the 'enrichment' element of the primary claim.[94] For that premise to be true, disenrichment must be the obverse of

---

83 *David Securities* (n 4) 385 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ) (emphasis in original).

84 *Hills* (n 4) 597 [81] (Hayne, Crennan, Kiefel, Bell and Keane JJ). 'On the faith of' and 'reliance' are interchangeable: see *Alpha Wealth* (n 50) 639 [203] (Buss JA, Steyler JA agreeing); *Dextra Bank* (n 42) 204 [38] (Lords Bingham and Goff); *Citigroup Pty Ltd v National Australia Bank Ltd* (2012) 82 NSWLR 391, 405 [67] (Barrett JA) ('*Citigroup v NAB*'); *Port of Brisbane Corporation v ANZ Securities Ltd (No 2)* [2003] 2 Qd R 661, 671 [13] (McPherson JA) ('*Port of Brisbane*').

85 Edelman and Bant (n 66) 340–1; Kit Barker and Ross Grantham, *Unjust Enrichment* (LexisNexis Butterworths, 2nd ed, 2018) 472 [12.16C].

86 *Hills* (n 4) 597 [81] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

87 Ibid 625 [157] (Gageler J).

88 *Port of Brisbane* (n 84) 671 [13] (McPherson JA); *Hills Industries Ltd v Australian Financial Services and Leasing Pty Ltd* (2012) 295 ALR 147, 192 [203] (Meagher JA) ('*Hills (NSWCA)*'); *Citigroup v NAB* (n 84) 405 [64] (Barrett JA), cf 394 [6] (Bathurst CJ, Allsop P and Meagher JA); *Southage Pty Ltd v Vescovi* (2015) 321 ALR 383, 399 [65] (Warren CJ, Santamaria JA and Ginnane AJA).

89 Birks, *Unjust Enrichment* (n 55) 208.

90 Ibid.

91 *Hills* (n 4) 621 [148] (Gageler J). See also Bant, 'Outstanding Issues' (n 9) 140.

92 See, eg, Burrows, *The Law of Restitution* (n 76) 526–7; Robert Chambers, 'Two Kinds of Enrichment' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press, 2009) 242, 247–9.

93 See, eg, *Hills* (n 4) 577 [17], 580–2 [23]–[24] (French CJ), 596–7 [78] (Hayne, Crennan, Kiefel, Bell and Keane JJ), 621–2 [148] (Gageler J); *Hills (NSWCA)* (n 88) 180–1 [153] (Allsop P); Mason, Carter and Tolhurst (n 7) 974–5 [2415]; Bant, 'Outstanding Issues' (n 9) 141–2.

94 Birks, *Unjust Enrichment* (n 55) 207–9; Peter Birks, *Restitution: The Future* (Federation Press, 1992) 125; Peter Birks, 'Change of Position and Surviving Enrichment' in William Swadling (ed), *The*

enrichment. But Birks himself shows this is not the case, in both directions; some enrichments do not count as disenrichments, and vice versa.

Consider an ephemeral benefit that does not enlarge the defendant's wealth, such as a haircut.[95] A haircut constitutes an enrichment for the purposes of establishing the defendant's liability so long as he chose it.[96] It would follow, if enrichment quadrates with disenrichment, that a defendant who chooses to spend a mistaken payment on a haircut (for example) is enriched by the haircut and therefore cannot avail himself of the defence. But this is contrary to Birks' view,[97] and to authority.[98]

As to disenrichments that do not count as enrichments, a pivotal holding in *Hills*,[99] consistent with prior jurisprudence abroad,[100] was that non-pecuniary or unquantifiable changes of position can attract the defence.[101] Birks came to recognise that these changes (for example, the decision to have a child) have 'foundation[s] in disenrichment'.[102] If disenrichment quadrates with enrichment, that would mean children (for example) are enrichments. But as Birks himself noted, children do not constitute material gains to the defendant for the purposes of the enrichment inquiry.[103]

Without quadration, the premise of negation that justifies a disenrichment model of change of position fails. Disenrichment therefore fails as a rationale for the defence.

C *Security of Receipts*

One rationale that Birks stated for his disenrichment defence was 'security of receipts'.[104] Like disenrichment, this rationale attracted early support.[105] Also like disenrichment, however, it was rejected as a rationale in *Hills*, where the plurality stated that it does not motivate the defence but is instead a result the defence incidentally achieves.[106]

Limits of Restitutionary Claims: A Comparative Analysis (United Kingdom National Committee of Comparative Law, 1997).

95 Bant, 'Outstanding Issues' (n 9) 143.

96 See *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635, 663 [79] (Gummow, Hayne, Crennan and Kiefel JJ); *Benedetti v Sawiris* [2014] AC 938, 986–7 [112]–[117] (Lord Reed JSC).

97 Birks, *Restitution: The Future* (n 94) 125, 138.

98 See, eg, *Philip Collins v Davis* (n 36) 830 (Jonathan Parker J).

99 *Hills* (n 4) 600 [88] (Hayne, Crennan, Kiefel, Bell and Keane JJ), 626 [157] (Gageler J).

100 See, eg, *Commerzbank* (n 29) [66] (Munby J); *Philip Collins v Davis* (n 36); *RBC Dominion Securities v Dawson* (1994) 111 DLR (4th) 230; *Kinlan v Crimmin* [2007] BCC 106, 121–2 (Sales DJHC).

101 See also *TRA Global Pty Ltd v Kebakoska* (2011) 209 IR 453 ('*TRA Global*'); *Palmer v Blue Circle Southern Cement* (1999) 48 NSWLR 318, 323–5 [23]–[37] (Bell J).

102 Peter Birks, 'Change of Position: The Two Central Questions' (2004) 120 (July) *Law Quarterly Review* 373, 375.

103 Birks, *Unjust Enrichment* (n 55) 51.

104 Ibid 209.

105 See, eg, *Kleinwort Benson* (n 12) 382, 384 (Lord Goff); Andrew Burrows, *The Law of Restitution* (Butterworths, 2nd ed, 2002); James Edelman and Elise Bant, *Unjust Enrichment in Australia* (Oxford University Press, 1st ed, 2006) 322; Hanoch Dagan, *The Law and Ethics of Restitution* (Cambridge University Press, 2004) 55.

106 *Hills* (n 4) 601 [92] (Hayne, Crennan, Kiefel, Bell and Keane JJ). See also Edelman (n 9) 1018; *Dextra Bank* (n 42) 205 [38] (Lords Bingham and Goff).

In evaluating the plurality's proposition, care should be taken to disentangle two dimensions of the 'slippery' concept of security of receipts.[107] The first, predominant in academic commentary,[108] is the individual-oriented conception Birks envisioned: a 'general interest in our being free to dispose of wealth which appears to be at our disposition' (the 'personal' dimension).[109] The second dimension, increasingly present in the case law,[110] relates to the stability of markets and reflects a desire not to 'unsettle business'[111] (the 'commercial' dimension).

The *Hills* plurality's proposition has force with respect to the commercial dimension, but not the personal dimension. If the concern of the commercial dimension not to disrupt the economy were taken to its logical conclusion, the defence should arguably be available in every case. Otherwise, not only the actuality but also the mere threat of mistaken transfers being reversed could affect the way parties transact, and thus the economy at large. That would be too blunt a model of the defence. The better view is that, while the commercial dimension is not irrelevant, some other rationale guides the change of position defence, the operation of which has the 'additional, desirable effect of reassuring and stabilising markets'.[112]

By contrast, the personal dimension of security of receipts can be understood as a facet of the broader autonomy-based rationale discussed in Part IV(B) below. It will be seen there that the relevant aspect of the defendant's autonomy is his interest in not being held to non-autonomous decisions. If the defendant mistakenly believes his receipt secure, any decision he makes on the basis of that belief is non-autonomous, and holding him to such a decision would infringe his decisional autonomy. That does not automatically entitle the defendant to the defence; as will be seen, the parties' decisional autonomy interests must be sensitively balanced. It does mean, however, that the personal dimension of security of receipts plays an important (albeit not exhaustive) part in the rationale for the defence.

One point ostensibly challenges this conclusion: Justice Gummow's extra-curial observation that restitution for mistaken payments itself qualifies security of receipts.[113] The *Hills* plurality relied on this observation to reinforce its conclusion that security of receipts does not guide the defence.[114] The logic would appear to be that because mistaken payment claims undercut the security of the defendant's receipt, it would be contradictory to allow him a defence on the basis that he is entitled to the security of that receipt. This logic assumes that because security of receipts is qualified by restitution, it falls away as a concern. But arguably the threat

---

107 Bant, *The Change of Position Defence* (n 4) 214.

108 See, eg, ibid; Dagan (n 105) 45–6; Edelman and Bant, *Unjust Enrichment* (n 66) 348.

109 Birks, *Unjust Enrichment* (n 55) 209. See to similar effect Bant, *The Change of Position Defence* (n 4) 214.

110 See, eg, *Hills (NSWCA)* (n 88) 194 [211] (Meagher JA); *London & River Plate Bank Ltd v Bank of Liverpool Ltd* [1896] 1 QB 7, 11–12, quoted in *Hills* (n 4) 600–1 [90] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

111 *Hills (NSWCA)* (n 88) 194 [211] (Meagher JA), quoting *Taylor v Blakelock* (1886) 32 Ch D 560, 570 (Bowen LJ). See also Virgo, 'A Taxonomy of Defences in Restitution' (n 19) 407; *Banque Worms v BankAmerica International*, 77 NY 2d 362, 372–3 (NY Ct App, 1991).

112 Barker and Grantham, *Unjust Enrichment* (n 85) 458 [12.2]. See also Edelman (n 9) 1018.

113 Gummow (n 73) 757. See also *Hills* (n 4) 583 [28] (French CJ).

114 *Hills* (n 4) 601 [92] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

restitutionary liability poses to security of receipts militates against recognising such liability in the first place, and it is only because this threat is reduced to an acceptable level by the safeguard of defences such as change of position that the liability is recognised.[115] While this does not save the commercial dimension from the criticisms above, it does support the conclusion that the personal dimension is part of the autonomy-based rationale for the defence put forward in Part IV(B).

D *Loss Allocation*

A detrimental change of position introduces into the overall transaction between the claimant and the defendant a loss 'that one of the parties must bear'.[116] The defence is often framed in terms of allocating that loss.[117] For example, the *Hills* plurality stated the relevant inquiry in change of position is '*who* should properly bear the loss and *why*'.[118] It is evident from this formulation, however, that loss allocation does not itself justify the defence; it merely frames the questions that some other reason answers.[119] It is that reason, rather than loss allocation, which is the rationale for the defence.

E *The 'No Worse Off' Rationale*

Consistently with *David Securities*,[120] each judgment in *Hills* considered detriment a necessary element of change of position.[121] From this, Bant deduces a rationale that the defence is designed to ensure the defendant is not left unjustifiably worse off by making restitution than if he had not received the enrichment.[122] It has elsewhere been argued that this is the 'purpose' of the defence.[123] Like loss allocation, however, this 'no worse off' rationale provides no normative basis for the defence: it does not say why the defendant should not be left worse off.[124]

This normative gap can ostensibly be filled by an 'attractive'[125] line of thinking that Wilmot-Smith terms the 'No Harm thesis'.[126] Liability for mistaken payments is justified, the No Harm thesis posits, because the act of restitution leaves the defendant no worse off than he was prior to receiving the enrichment (the *status*

---

115 Thomas Krebs, *Restitution at the Crossroads: A Comparative Study* (Routledge-Cavendish, 2001) 41–2; Mason, Carter and Tolhurst (n 7) 982 [2422].

116 *Third Restatement* (n 3) § 65 cmt a.

117 See, eg, *Waitaki* (n 69) 229 (Thomas J); ibid § 65 cmt h.

118 *Hills* (n 4) 597 [78] (Hayne, Crennan, Kiefel, Bell and Keane JJ) (emphasis in original).

119 Edelman (n 9) 1019; Grantham, 'Allocating the Costs of Making Restitution' (n 33) 198.

120 *David Securities* (n 4) 385 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ), 405–6 (Dawson J).

121 *Hills* (n 4) 582 [25] (French CJ), 585 [36] (Hayne, Crennan, Kiefel, Bell and Keane JJ), 626 [157] (Gageler J).

122 Bant, 'Outstanding Issues' (n 9) 148, 161.

123 Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith, 'Defences in Unjust Enrichment: Questions and Themes' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Unjust Enrichment* (Hart Publishing, 2016) 1, 12.

124 Grantham, 'Change of Position-Based Defences' (n 14) 423.

125 Ajay Ratan, 'The Unity of Pre-Receipt and Post-Receipt Detriment' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Unjust Enrichment* (Hart Publishing, 2016) 87, 109.

126 Frederick Wilmot-Smith, 'Should the Payee Pay?' (2017) 37(4) *Oxford Journal of Legal Studies* 844, 846, 849.

quo ante).[127] There is a close complementarity with the no worse off rationale: if the No Harm thesis is correct, some mechanism must ensure the defendant is left no worse off — a task the defence, understood according to the no worse off rationale, fulfils.

The No Harm thesis is widely argued or assumed to be correct.[128] It only holds, however, if the *status quo ante* is the appropriate baseline. But the No Harm thesis seeks to justify the specific act of making restitution. Arguably, then, the moment immediately prior to that act, the *status quo*, is the more appropriate baseline, at which point the defendant already has the enrichment.[129] As against the *status quo*, restitution leaves the defendant decidedly worse off: he had the enrichment, and restitution takes it away. Absent some reason for the *status quo ante* as the relevant baseline, the No Harm thesis does not hold.

A tempting retort is that, because the enrichment is the product of a mistaken transfer, the defendant is not 'entitled' to it. But this is circuitous; the very question the No Harm thesis seeks to answer is whether restitutionary liability is justified, which is essentially a question of whether the defendant is entitled to the enrichment.[130]

As Wilmot-Smith notes, no other persuasive reason has yet been identified.[131] Accordingly, the No Harm thesis fails, and with it the no worse off rationale.

IV The Better Contenders

This Part proffers two better rationales: the theory of outcome responsibility developed by Honoré, and reciprocal recognition of the parties' decisional autonomy interests.

A *Outcome Responsibility*

Outcome responsibility says 'we are, if of full capacity and hence in a position to control our behaviour, responsible for the outcomes of our conduct'.[132] Situated within the change of position defence, it fastens on the claimant's role as instigator: her mistaken payment initiates the sequence of events that leads to the defendant's change of position, and thus to the defendant's putative detriment were he to make restitution in full.

Sheehan, building upon work by Ajay Ratan,[133] has dismissed outcome responsibility as a rationale for the change of position defence. His conclusion is founded on the failure of outcome responsibility to explain the availability of the

127 Ibid 848–9

128 See, eg, Robert Stevens, *The Laws of Restitution* (Oxford University Press, 2023) 15, 356; Birks, *Unjust Enrichment* (n 55) 7, 209; J Beatson and W Bishop, 'Mistaken Payments in the Law of Restitution' (1986) 36(2) *University of Toronto Law Journal* 149, 150; Krebs (n 115) 41; Webb (n 21) 195; Klimchuk, 'Unjust Enrichment and the Forms of Justice' (n 64)195; Ratan (n 125) 88.

129 Wilmot-Smith, 'Should the Payee Pay?' (n 126) 848–9.

130 Ibid 849.

131 Ibid 848.

132 Honoré, *Responsibility and Fault* (n 18) 76.

133 Ratan (n 125).

defence for independent changes of position and cases of innocent wrongdoing.[134] But neither of these supposed lacunae afflicts the arguments of this article. The first is no lacuna under Australian law given the apparent requirement of reliance that emerges from the authorities, as canvassed in Part III(A) above.[135] The second is presently irrelevant given the concern of this article only with mistaken payments.

Proceeding then from an unimpeded starting point, Part IV(A)(1) briefly outlines the salient features of outcome responsibility. Parts IV(A)(2)–(4) address three assumptions on which the viability of outcome responsibility as a rationale rests, namely that:

(1) outcome responsibility can sensibly be applied in the context of change of position (which Part IV(A)(2) vindicates);

(2) the claimant is outcome responsible for the defendant's putative detriment (which Part IV(A)(3) shows is true in reliance-based changes of position, but not independent changes of position); and

(3) the claimant's outcome responsibility can ground the attribution of the defendant's detriment to her in a legal, rather than merely moral, sense (which Part IV(A)(4) vindicates).

That much suggests outcome responsibility justifies the defence in cases of reliance-based changes of position. Part IV(A)(5) concludes by analysing the consistency of this rationale with the current features of the defence.

1 *Defining Outcome Responsibility*

Outcome responsibility attributes to us a basic responsibility, more fundamental than moral or legal responsibility,[136] for the outcomes of our conduct. Those outcomes, both good and bad, often depend on matters out of our control: that one negligent driver strikes and kills a pedestrian, and another equally negligent driver does not, is partly a matter of luck.[137] Yet it is a 'familiar and pervasive feature of human life'[138] that we attribute responsibility to the first driver for this negative outcome.[139]

Honoré posits that one reason for this attribution is personhood.[140] Responsibility for our successes and failures alike accords us a sense of history in the world, of having made a difference; as such, he says, it is 'an essential constituent of our character and identity'.[141] As Part IV(A)(3) develops, this premise is important in selecting some means — ultimately, this article suggests, common-

134 Sheehan (n 60).
135 See above nn 83–8.
136 Honoré, *Responsibility and Fault* (n 18) 27; Honoré, 'Appreciations and Responses' (n 18) 223, 228. Cf Peter Cane, 'Responsibility and Fault: A Relational and Functional Approach to Responsibility' in Peter Cane and John Gardner (eds), *Relating to Responsibility* (Hart Publishing, 2001) 81, 81.
137 Arthur Ripstein, 'Private Law and Private Narratives' (2000) 20(4) *Oxford Journal of Legal Studies* 683, 684.
138 Ibid 683.
139 Honoré, *Responsibility and Fault* (n 18) 25.
140 Honoré, 'Appreciations and Responses' (n 18) 226.
141 Honoré, *Responsibility and Fault* (n 18) 76.

sense causation as framed by Hart and Honoré[142] — of delimiting precisely when one person is outcome responsible for another's loss.

Outcome responsibility is but a 'stepping stone' to legal liability.[143] Before it justifies legal liability, outcome responsibility requires an 'extra element': either fault by the responsible party or a special risk of harm inherent in their impugned action.[144] This requirement, the 'addition thesis',[145] is revisited in Part IV(A)(4) below.

2 *Threshold Matters*

Honoré's primary analytical context for outcome responsibility is (a) liability (b) in tort. Change of position is (a) a defence (b) to (for present purposes) mistaken payment claims. Neither difference renders outcome responsibility inapt here, however. As to (a), Honoré himself deploys outcome responsibility to justify a defence, contributory negligence.[146] As to (b), Honoré purports to lay out a general theory of responsibility; its instantiation in tort is a useful rather than exhaustive example. The argument may be made that outcome responsibility only makes sense when it relates, as it does in tort, to responsibility for a loss. But that argument does not touch the change of position defence, which, unlike restitutionary liability, is indeed concerned with loss.[147]

Another conceptual objection might arise from Honoré's description of outcome responsibility as the result of an 'implicit bet' on outcomes.[148] The analogy seems problematic: a claimant arguably does not 'choose' to make a mistaken payment in the same way a gambler 'chooses' to bet. But Honoré later recanted the analogy,[149] stating that an individual need only be of 'full capacity' to be held outcome responsible.[150] It is the existence of capacity, rather than its exercise in a particular case, that is necessary.[151] And while a mistake might represent a momentary deviation from capacity for an otherwise-capable person, it does not impeach the existence of that capacity or, consequently, the mistaken claimant's outcome responsibility. The objection is therefore toothless.

---

142 To be distinguished from the common-sense approach to causation endorsed by the High Court of Australia in, for example, *Fitzgerald v Penn* (1954) 91 CLR 268, 278 (Dixon CJ, Fullagar and Kitto JJ) and *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506 and criticised in the authorities collected in *Agricultural Land Management Ltd v Jackson (No 2)* (2014) 48 WAR 1, 74–5 [392]–[393] (Edelman J).

143 Ratan (n 125) 104, also at 87; Honoré, 'Appreciations and Responses' (n 18) 228–9. Indeed, Lucy claims that liability in private law is 'best understood as a specific form' of outcome responsibility: William Lucy, *Philosophy of Private Law* (Oxford University Press, 2006) 59.

144 Honoré, *Responsibility and Fault* (n 18) 27.

145 Dennis Klimchuk, 'Book Review: *Responsibility and Fault* by Tony Honoré' (2000) 109(436) *Mind* 937, 938.

146 Honoré, *Responsibility and Fault* (n 18) 89–90.

147 See *Hills* (n 4) 597 [78] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

148 Honoré, *Responsibility and Fault* (n 18) 25.

149 Honoré, 'Appreciations and Responses' (n 18) 225–6.

150 Honoré, *Responsibility and Fault* (n 18) 76.

151 Ripstein, 'Private Law and Private Narratives' (n 137) 685.

3 *Common-Sense Causation and the Claimant's Outcome Responsibility*

The question then arises: how does one determine when, and for what, a claimant in a mistaken payment case is outcome responsible? While recognising that the bounds of outcome responsibility are delimited by 'causal criteria', Honoré refrains from enumerating them.[152] What follows is the argument that such criteria can be found in the framework of common-sense causation that he and Hart construct in *Causation in the Law*.[153]

(a) *Common-Sense Causation in Outline*

Common-sense causation operates negatively. It takes as its subject some prima facie connection between an event and an outcome and says two things can interrupt it: an abnormal condition, being something that is not 'present as part of the usual state or mode of operation of the thing under inquiry';[154] or a choice, being a 'free, deliberate and informed act or omission of a human being, intended to exploit the situation created by an [earlier event]'.[155]

The object of both the 'abnormality' and 'choice' principles is to identify what makes the difference in producing an outcome.[156] So emerges a shared basis between common-sense causation and outcome responsibility: a sense of meaningful intervention in the world. While sustained criticism has sunk common-sense causation into desuetude in its titular aim as a general theory of causation,[157] this shared basis means, as Perry has recognised, that common-sense causation can be understood as an analysis of outcome responsibility.[158]

(b) *Preferring Common-Sense Causation*

At this point another potential objection rears its head. Hart and Honoré refer to common-sense causation not as all-encompassing, but rather as one of a tripartite 'family' of causal concepts.[159] Whereas common-sense causation chiefly concerns the bringing about of physical events, its two siblings, 'interpersonal transactions'[160] and 'opportunities'[161], concern the causing of human conduct. An interpersonal transaction occurs where one person's conduct provides a reason for another's conduct;[162] opportunities involve one person's conduct providing an opportunity for another's.[163] Ostensibly, either theory fits change of position.

---

152 Honoré, 'Appreciations and Responses' (n 18) 223; see also 229. Cf Stephen R Perry, 'The Moral Foundations of Tort Law' (1992) 77(2) *Iowa Law Review* 449, 494.
153 HLA Hart and Tony Honoré, *Causation in the Law* (Oxford University Press, 2nd ed, 1985).
154 Ibid 35.
155 Ibid 136. This has been judicially described as an 'undoubted rule': *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360, 367 (Lord Hoffmann). See further Summers (n 23) 91–2.
156 Hart and Honoré (n 153) 29, 34, 35.
157 Andrew Summers, 'Common-Sense Causation in the Law' (2018) 38(4) *Oxford Journal of Legal Studies* 793, 800.
158 Perry (n 152) 503.
159 Hart and Honoré (n 153) 28.
160 Ibid 51.
161 Ibid 59.
162 Ibid 51.
163 Ibid 59.

That fit is, however, superficial. Unlike interpersonal transactions, change of position cases are not typified by a defendant's 'persuasion' or 'inducement' to act.[164] Nor is a claimant under any duty to take precautions in respect of her mistaken transfer, which duties are a premise of the theory of opportunities.[165] And in any event, the key difference Hart and Honoré give between causation of physical events and causation of human conduct — that generalisations play a more central role in the former[166] — is open to criticism. As Mackie argues, our general knowledge of human purposes informs our causal interpretations of human conduct in much the same way as our general knowledge of physical events informs our sense of physical causation.[167] Common-sense causation has also been deployed as an explanation for another doctrine concerned with human conduct: mitigation.[168]

It remains then to consider in what circumstances common-sense causation says a claimant is outcome responsible for the defendant's change of position.

(c) *Applying Common-Sense Causation*

The first task is to establish some prima facie connection between the claimant's mistaken transfer and the defendant's putative detriment. This task might be analogised with the 'factual' (as opposed to 'legal') stage of the bifurcated approach to causation orthodox in the judiciary and the academy.[169] At this stage Bant suggests the appropriate metric varies as between independent and reliance-based changes of position. For the former, the 'but-for' standard is appropriate. By contrast, because the latter involves human decision-making, Bant says the question ought to be whether the claimant's mistaken transfer was 'a factor' in the defendant's change of position.[170] But whichever standard is adopted, it is clearly satisfied in a typical case. But for the claimant's mistaken transfer, the defendant could not have acted on the enrichment (in a reliance-based change of position), nor could the enrichment be thieved, destroyed or devalued by someone or something else (in an independent change of position). Moreoever, in a reliance-based case, the transfer was at least 'a factor' in the defendant's change of position.

---

164 Ibid 52. Hart and Honoré also suggest that an interpersonal transaction requires that the inducing party intend the induced party to act as they do: ibid 53. That is incompatible with change of position; the claimant need not intend the defendant to rely on the mistaken transfer. Bagshaw doubts whether intention is necessary to Hart and Honoré's account: Roderick Bagshaw, 'Causing the Behaviour of Others and Other Causal Mixtures' in Richard Goldberg (ed), *Perspectives on Causation* (Hart Publishing, 2011) 361, 367. Even if it is not, however, an ill fit remains between change of position and persuasion or inducement.

165 Hart and Honoré (n 153) 195.

166 Ibid 52.

167 JL Mackie, *The Cement of the Universe: A Study of Causation* (Oxford University Press, 1980) 120–5.

168 Summers (n 23) ch 6.

169 Summers (n 157) 798; *Wallace v Kam* (2013) 250 CLR 375, 381 [11] (French CJ, Crennan, Kiefel, Gageler and Keane JJ); *Caason Investments Pty Ltd v Cao* (2015) 236 FCR 322, 353–4 [163] (Edelman J). 'Factual causation' and 'scope of liability' are similarly bifurcated under State civil liability legislation: *Civil Liability Act 2002* (NSW) s 5D; *Civil Liability Act 2003* (Qld) s 11; *Civil Liability Act 1936* (SA) s 34; *Civil Liability Act 2002* (Tas) s 13; *Wrongs Act 1958* (Vic) s 51; *Civil Liability Act 2002* (WA) s 5C.

170 Bant, 'Causation and Scope of Liability in Unjust Enrichment' (n 80) 76; Bant, 'Outstanding Issues' (n 9) 153.

The contribution of common-sense causation is to displace this prima facie connection if either of the choice or abnormality principles applies.[171] These principles suggest that independent changes of position ought to be excluded from the defence, consistently with the narrow view that Australian authority favours. In particular, theft involves free, deliberate and informed human action, as does intentional destruction; these cases of independent change of position are therefore excluded by the choice principle. And cases of spontaneous destruction or devaluation (where, for example, the defendant's enrichment consists in shares and market forces render them worthless) can readily be perceived as abnormal. The claimant is not in these circumstances outcome responsible for the defendant's detriment. Independent changes of position therefore do not count.

By contrast, though a reliance-based change of position involves human conduct, it is premised on the defendant's mistaken belief that he is entitled to the enrichment. This means, on Hart and Honoré's analysis, that it is not intended to exploit the mistaken transfer.[172] Accordingly, it does not engage the choice principle and interrupt the claimant's outcome responsibility. The obvious exception is where the defendant changes his position in bad faith; this is addressed in Part IV(A)(5)(a) below.

4 *Justification*

Accepting that much, recall the addition thesis: that outcome responsibility only justifies legal liability when combined with fault or a special risk of harm.[173] There is an argument that because change of position reduces rather than imposes liability, the addition thesis need not hold to justify it.[174] But reducing the claimant's entitlement can be viewed as imposing on her part of her loss, as Honoré suggests in the context of contributory negligence.[175]

To satisfy the addition thesis, either the claimant must be at fault in making the mistaken transfer, or the transfer must carry a special risk of harm. The former is difficult: a claimant is not always at 'fault' (however that term is understood) in making the mistaken transfer, nor is the claimant's fault currently an element of the defence. Special risk is more promising. The relevant harm is the detriment the defendant would suffer by making restitution, having already changed his position. To pay a person carries a strong likelihood that the person will spend or otherwise rely upon the payment. Since a mistaken payment necessarily carries the potential for an order for restitution, that strong likelihood translates into a special risk that

---

171 Cf those cases and commentary which assume a 'but-for' connection is sufficient: *Test Claimants in the FII Group Litigation v Commissioners for Her Majesty's Revenue & Customs (No 5)* [2015] STC 1471, [343] (Henderson J) ('*FII (No 5)*'); *Scottish Equitable plc v Derby* [2001] 3 All ER 818, 827 [31] (Robert Walker LJ); Ratan (n 125) 110. See further Bant, 'Outstanding Issues' (n 9) 153.

172 Hart and Honoré (n 153) 149–50.

173 See above nn 144–5 and accompanying text.

174 More generally, Stevens argues that the range of reasons that might justify reducing or defeating liability is broader than the reasons that justify imposing liability: Robert Stevens, 'Private Law and the Form of Reasons' in Andrew Robertson and James Goudkamp (eds), *Form and Substance in the Law of Obligations* (Hart Publishing, 2019) 119.

175 Honoré, *Responsibility and Fault* (n 18) 89.

the defendant will suffer harm. On that basis, mistaken payments do arguably satisfy the addition thesis.

5 *Consistency*

If the claims made so far are accepted, outcome responsibility justifies the defence in relation to reliance-based changes of position. In terms of the key features of the defence, outcome responsibility does not exclude the possibility of non-pecuniary and unquantifiable detriment. Indeed, unlike the decisional autonomy rationale in Part IV(B) below, it does not prescribe any qualities that the defendant's detriment must have; it only sets out who is responsible for it. It is consistent with (or at least does not stand in the way of) the accepted *pro tanto* operation of the defence. It is also, as Ratan persuasively argues, consistent with the availability of anticipatory changes of position.[176]

Two features warrant more detailed consideration: good faith and irreversibility.

(a) *Good Faith*

As noted above, a defendant who labours under a mistake does not, by changing his position, engage the choice principle; the claimant remains outcome responsible for the defendant's putative detriment. But if the defendant changes his position in subjective bad faith (that is, with knowledge of the mistake),[177] his action is intended to exploit the mistaken transfer and the choice principle renders him outcome responsible for any resultant detriment he suffers. In this way, outcome responsibility is consistent with the subjective aspect of the good faith requirement.

In addition, the abnormality principle can be seen to cohere with the objective aspect of good faith sketched by the cases.[178] Those cases converge on a standard that Bant and Bryan argue 'strongly resembles a reasonableness requirement'.[179] That aligns with the abnormality principle if the concept of reasonableness is linked, as it has been in mitigation jurisprudence, to the 'ordinary course of things'.[180] Conduct that is unreasonable (or, on the current authorities, not supported by a requisite foundation of information) can be seen as abnormal, thereby interrupting the claimant's outcome responsibility.

---

176 Ratan (n 125).

177 *Automotive Holdings* (n 46) [259] (Slattery J); *Lipkin Gorman* (n 3) 580 (Lord Goff).

178 See above nn 47–9 and accompanying text.

179 Elise Bant and Michael Bryan, 'Fact, Future and Fiction: Risk and Reasonable Reliance in Estoppel' (2015) 35(3) *Oxford Journal of Legal Studies* 427, 449. The authors of *Mason & Carter's Restitution Law in Australia* argue that, in holding mere negligence insufficient to establish a lack of good faith, several cases 'effectively deny' a reasonableness requirement: Mason, Carter and Tolhurst (n 7) 982 [2422]. However, one of the Australian authorities cited appears to leave the question of reasonableness open: see *Sino Iron Pty Ltd v Worldwide Wagering Pty Ltd* (2017) 52 VR 664, 746 [280] (Hargrave J). Gageler J later did so, unequivocally, in *Hills* (on the basis that the question did not arise): *Hills* (n 4) 625 [157] (Gageler J). See also *Automotive Holdings* (n 46) [263] (Slattery J). Cf *FII (No 5)* (n 171) [353]–[355] (Henderson J).

180 *Kelvin Shipping v Canadian Pacific Railway Co* ('*The Metagama*') (1928) SC (HL) 21, 25 (Viscount Haldane). See also *McKew v Holland & Hannen & Cubitts (Scotland) Ltd* [1969] 3 All ER 1621, 1625 (Lord Guest). See further Summers (n 23) 110.

(b) *Irreversibility*

The final element to survey for consistency is irreversibility. Outcome responsibility accommodates this requirement within the choice principle because of the temporal posture of the defence. At the time of adjudicating the defence, the question is not whether the defendant has reversed his change of position but whether he could in future. It follows that, whether or not he knew before, the defendant must know now (given the claimant has brought proceedings) that the payment was mistaken and, if it is raised by the claimant, that a particular course is available to him to reverse all or part of his putative detriment. Thus, a prospective failure to reverse would have the requisite qualities (of being informed, free and deliberate) to engage the choice principle.

Australian courts have set the threshold of difficulty that must be met before a change of position is considered irreversible.[181] They have yet to grapple in detail, however, with how 'complete' irreversibility must be. In particular, it is unclear whether the defendant must be able to recoup the entirety of his putative detriment, or, if not, what approximation will suffice. Outcome responsibility supplies an answer, which is that reversibility should be understood as a spectrum, not as a categorical disqualifier. The claimant is outcome responsible for the act comprising the defendant's change of position; the claimant is *not* outcome responsible for any subsequent failure by the defendant to reverse it, in circumstances where he could. Reversibility should therefore disentitle the defendant from the defence not categorically, but only to the extent that his detriment is reversible.

Thus, outcome responsibility is not only consistent with the cases; it also suggests the refinement of existing principle. In combination with the matters canvassed above (namely its comprehensibility as a conceptual framework for change of position and its justificatory force), it is therefore a good rationale for the defence.

B *Autonomy*

The second rationale that this article contends is persuasive is reciprocal recognition of the parties' decisional autonomy. Autonomy-based rationales have found significant academic favour,[182] and, significantly for this article's aim of identifying a rationale that 'speaks' to judges, hints of judicial support have also emerged.[183]

The autonomy-based rationales commentators proffer generally follow the same two-step logic. First, they argue that the claimant's claim protects a particular autonomy interest that she has. Second, they argue (or assume) that the claimant must, in invoking her autonomy-protecting claim, reciprocally recognise the same autonomy interest in D. Thus, the argument runs, the change of position defence is

---

[181] See above nn 50–1 and accompanying text.

[182] See, eg, Edelman (n 8); Weeliem Seah, 'Mistake as an Unjust Factor: Autonomy and Unjust Enrichment' (DPhil thesis, University of Oxford, 2015) 41–3; Dagan (n 105) 46; Virgo, *The Principles of the Law of Restitution* (n 19) 755.

[183] *Benedetti v Sawiris* (n 96) 987–8 [118] (Lord Reed); *Sempra Metals v Inland Revenue Commissioners* [2008] 1 AC 561, 606 [119] (Lord Nicholls), 650 [232] (Lord Mance). See further AVM Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (Hart Publishing, 2012) 224.

justified on the basis that it performs the necessary task of taking into account the effect of the claimant's claim on the defendant's relevant autonomy interest.

However, these rationales run into three difficulties. First, autonomy is a 'protean' concept,[184] and commentators define the claimant's autonomy interest, and thus the defendant's reciprocal interest, in different ways. Part IV(B)(1) focuses on two, which can be termed 'autonomy of disposition' and 'decisional autonomy'. It ultimately prefers the latter on the basis that, reciprocated to the defendant, the former bears significant inconsistencies with the case law. Second, few commentators provide a reason at the second step why the claimant must reciprocally recognise the defendant's autonomy interest. Part IV(B)(2) locates such a reason in Kantian theory. Third, the question arises of how to reconcile the parties' competing autonomy interests, which is addressed in Part IV(B)(3).

In addressing these difficulties, several points of consistency are noted between an autonomy-based rationale and the cases. Part IV(B)(4) concludes by refuting other points of purported inconsistency.

1 *Defining the Parties' Autonomy Interests*

(a) *The Claimant's Autonomy Interest*

It is beyond the scope of this article to identify definitively the best rationale(s) for the claimant's entitlement to recover a mistaken payment.[185] What is presently material is that persuasive arguments have been advanced that one rationale is the protection of the claimant's autonomy. The starting point of these arguments is the orthodox view that the claimant's mistake vitiates her 'intention',[186] 'free will',[187] or 'consent'[188] in relation to the mistaken transfer. In other words, the mistake renders the claimant's decision to transfer 'non-autonomous' by creating a misalignment between the circumstances in which the claimant was content to make the transfer and the circumstances as they exist in fact.[189] Holding the claimant to this non-autonomous decision would infringe some autonomy interest she has, such that her mistake provides a reason to allow her to recover the enrichment.

Commentators split roughly in two, however, as to what that autonomy interest is. The first group prefers 'decisional' autonomy: an individual's interest in being held only to autonomous decisions, which is a 'recurring theme throughout

---

184 Richard H Fallon Jr, 'Two Senses of Autonomy' (1994) 46(4) *Stanford Law Review* 875, 876.

185 For recent, detailed consideration of this point, see, eg, Wilmot-Smith, 'Should the Payee Pay?' (n 126); Penner (n 64).

186 See, eg, *David Securities* (n 4) 378 (Mason CJ, Deane, Toohey, Gaudron and McHugh JJ); Birks, *Unjust Enrichment* (n 55) 105; Mason, Carter and Tolhurst (n 7) 160 [403]; Edelman (n 9) 1022.

187 Mitchell McInnes, 'Enrichments and Reasons for Restitution: Protecting Freedom of Choice' (2003) 48(3) *McGill Law Journal* 419, 424; Grantham, 'Change of Position-Based Defences' (n 14) 418.

188 Dennis Klimchuk, 'The Normative Foundations of Unjust Enrichment' in Robert Chambers, Charles Mitchell and James Penner (eds), *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford University Press, 2009) 81, 93; Wilmot-Smith, 'Reasons? For *Restitution*?' (n 26) 1128.

189 Seah (n 182) 18–20.

unjust enrichment'.[190] On this account, the mere fact that the claimant's decision to transfer was non-autonomous means she should not be held to the transfer.[191]

The second group of commentators is less unified (a matter discussed in Part IV(B)(1)(b)(i) below), but can be tied together by the idea of 'autonomy of disposition'. Autonomy of disposition, which traces back to the maxim *cujus est dare, ejus est disponere* ('whose is to give, his is to dispose'),[192] is an individual's interest (applicable beyond the context of restitution)[193] in only being deprived of property by an autonomous decision.[194] This is subtly different to decisional autonomy: what establishes the claimant's prima facie entitlement to restitution is not the presence of a non-autonomous decision, but the absence of an autonomous decision to transfer the enrichment.

That subtle difference does not affect the analysis in relation to the claimant. Suppose, for example, that the claimant mistakenly pays the defendant $100,000. Holding the claimant to the transfer infringes her decisional autonomy, because the decision to transfer was non-autonomous; it also infringes her autonomy of disposition, because there was no autonomous decision to part with the $100,000.

(b) *The Defendant's Reciprocal Interest*

By contrast, this subtle difference becomes material in the reciprocal recognition of these interests in the defendant, and thus bears crucially on which interest should be adopted for the purposes of an autonomy-based rationale. Because different rationales are produced depending on which interest is adopted, consistency with the case law is used, in line with the general approach of this article, as a means of determining which interest to prefer.

The difference between these interests can be illustrated by continuing with the example above. Suppose that the defendant, upon receiving the $100,000 from the claimant, changes his position in two ways. First, he gifts $50,000 to a friend. Then, he decides to divorce his spouse on the basis of his newfound (apparent) financial security.

(i) Autonomy of Disposition

What is material in relation to the defendant's autonomy of disposition is whether the defendant has been deprived of his property without an autonomous decision. Whether the $100,000 constitutes 'his' property is the source of the disunity foreshadowed earlier, and leads to two markedly different conceptions of when the defendant's autonomy of disposition is infringed by an order for restitution. In

---

190 McInnes (n 187) 446.

191 Ibid; Klimchuk, 'The Normative Foundations of Unjust Enrichment' (n 188) 93. See also Bant, *The Change of Position Defence* (n 4) 213.

192 Sir Edward Coke, *The Selected Writings and Speeches of Sir Edward Coke*, ed Steve Sheppard (Liberty Fund, 2003) vol 1, 178.

193 *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2012] 1 AC 383, 426 [129] (Lord Walker).

194 Grantham, 'Allocating the Costs of Making Restitution' (n 33) 197; Dagan (n 105) 42; Ernest J Weinrib, *Corrective Justice* (Oxford University Press, 2012) 203; Seah (n 182) 18–20.

particular, autonomy of disposition underlies two different, general theories for restitutionary liability that diverge on this point.

The first is the 'property' theory, according to which the claimant's mistake and the consequent discordance of the transfer with her autonomy of disposition means that she retains, despite the passage of legal title to the defendant, a 'normative' interest in the enrichment that the law vindicates. On this theory, which has been the subject of various criticisms and defences,[195] but arguably represents the theoretical orthodoxy,[196] the claimant's continuing interest in the enrichment prevents the enrichment from being 'the defendant's'.[197] This would suggest, in the example above, that since the enrichment is not the defendant's, to the extent he has not spent it his autonomy of disposition is not infringed by having to return it. Thus, it suggests that the defendant can only avail himself of the defence to the extent of his $50,000 expenditure. Unless he can point to any financial detriment based on the decision to divorce, that decision does not bear on his liability.

The second theory that autonomy of disposition underlies is put forward by Grantham. The enrichment becomes the defendant's, Grantham argues, as soon as he integrates it into his 'plans and projects'.[198] The only circumstances in which this is not so are where the claimant immediately asks for the enrichment back,[199] where the defendant does not know of the mistaken payment (for example, because it was paid into a dormant bank account),[200] or where the defendant knows of the claimant's mistake and, as a result, abstains from incorporating it into his plans and projects. In all other circumstances, the enrichment is the defendant's, such that an order for restitution necessarily infringes the defendant's autonomy of disposition by exacting the enrichment, even where he has incurred no financial detriment or made no actual decision on the basis of the enrichment. This produces an extraordinarily broad conception of the defence, as Grantham himself concedes.[201] Thus, in the example above, it is the mere fact that the defendant has incorporated the enrichment into his plans – something less, even, than his having made either the gift or the decision to divorce – that means his autonomy of disposition is infringed by restitution, and that he should have the benefit of the defence.

Both variations of autonomy of disposition suggest models of the defence that are manifestly inconsistent with the authorities. The 'property' theory is both underinclusive and overinclusive. It does not include, in the example above, the decision to divorce, which English authority suggests should count[202] and which more generally falls into the category of non-pecuniary changes of position, a category accepted in *Hills* to be capable of attracting the defence.[203] It similarly

---

195 See generally Klimchuk, 'Unjust Enrichment and the Forms of Justice' (n 64) 190–2; Wilmot-Smith, 'Reasons? For *Restitution*?' (n 26), 1129–34.

196 Wilmot-Smith, 'Should the Payee Pay?' (n 126) 849 n 26.

197 See, eg, Webb (n 21) 97; Dan Priel, 'The Justice in Unjust Enrichment' (2014) 51(3) *Osgoode Hall Law Journal* 813, 838.

198 Grantham, 'Allocating the Costs of Making Restitution (n 33) 209–11.

199 Ibid 210.

200 Ibid.

201 Ibid 212.

202 *Commerzbank* (n 29) [66] (Munby J).

203 *Hills* (n 4) 600 [88] (Hayne, Crennan, Kiefel, Bell and Keane JJ).

excludes forgone opportunities, again inconsistently with *Hills*,[204] because they do not actively cause financial detriment. It is overinclusive because even if the $50,000 gift is reversible, unless and until that gift is reversed an order for restitution would still require the defendant to dip into his own wealth and thereby infringe his autonomy of disposition.[205] Irreversibility therefore does not seem to be a prerequisite to the defence on this account, contrary to the authorities noted above.[206]

Grantham's conception of autonomy of disposition also appears to include reversible change of position. It is the mere fact that the enrichment has been incorporated into the defendant's plans and projects, rather than whether those plans and projects are irreversible (or have even come to fruition), that renders restitution an infringement of the defendant's autonomy of disposition. Another significant overinclusion is that Grantham's rationale has no inherent mechanism to exclude bad faith changes of position. The enrichment is apparently, on Grantham's model, still considered to be the defendant's even if he incorporates it into his plans and projects with knowledge that the claimant's transfer was mistaken.

Grantham suggests a novel cure for the latter inconsistency: that once the defendant becomes aware of the claimant's mistake he comes under a duty, like a voluntary bailee of goods, not to dissipate the enrichment.[207] However, Grantham does not argue that this duty is related to the defendant's autonomy of disposition; rather, he introduces it into his account only on the basis that it 'largely coincide[s]' with the cases.[208] Even assuming that consistency with the cases can be a good reason to superimpose an otherwise alien element into his account, it is a weak reason here because a bailee's duty includes a requirement to act reasonably. As noted above, such a requirement has not been definitively recognised in change of position.

As such, a rationale based on either conception of autonomy of disposition involves significant inconsistency with the case law, in particular the requirements of irreversibility and good faith.

(ii) Decisional Autonomy

By contrast, decisional autonomy carries neither inconsistency and, as will be seen below, is otherwise consistent with the accepted features of the defence. It does, however, present a different problem. To avoid infringing the defendant's decisional autonomy requires that he not be held to non-autonomous decisions in relation to the enrichment — in the example above, his decisions to gift $50,000 and to divorce his spouse, both of which were made on the mistaken basis that he was entitled to the enrichment. That end cannot be achieved by affording the defendant a defence, because that would not reverse the gift or the divorce. But although the defence cannot *prevent* an infringement to the defendant's autonomy, it does provide the next best thing: it retrospectively cures the defect in the defendant's decision-making. The defendant was content to gift $50,000 and divorce his spouse on the

[204] Ibid 583–4 [29]–[30] (French CJ), 626 [157] (Gageler J). See also *TRA Global* (n 101).
[205] Cf Seah (n 182) 46–7.
[206] See above nn 50–1 and accompanying text.
[207] Grantham, 'Allocating the Costs of Making Restitution (n 33) 218.
[208] Ibid.

understanding that he was entitled to the $100,000; if he is afforded a full defence, that understanding is effectively validated.

It follows from framing the defence as the next best thing to reversing the defendant's non-autonomous decisions that if those decisions *are* easily reversible, the defence should not be available. This neatly accords, unlike autonomy of disposition, with the irreversibility requirement under current law. So, for example, if the $50,000 gift is reversible, and the defendant's decisional autonomy is thereby able to be directly vindicated, the defendant should not be able to avail himself of the defence in respect of that change of position.[209]

As foreshadowed, a rationale based on decisional autonomy is also consistent with the good faith requirement, insofar as that requirement is subjective.[210] As Bant notes, if the defendant 'knows that the claimant's decision to transfer was vitiated, there is no need to protect his autonomy, because his change of position reflected an unimpaired exercise of his decision-making capacity'.[211]

Thus, decisional autonomy can be preferred over autonomy of disposition on the basis that it does not suffer from the same inconsistencies with the case law. It also clearly excludes independent changes of position, because in such cases the defendant has made no decision in relation to the enrichment, let alone a non-autonomous decision. In this respect, it is both consistent with the reliance-favouring authority canvassed above and a more useful rationale than inequitability (which failed to provide guidance on whether reliance should be necessary).

2 *Reciprocity*

For an autonomy-based rationale to be normatively persuasive, some justification must be given for why the claimant must reciprocally recognise the defendant's autonomy. Many commentators avoid this task.[212] Grantham and Rickett are an exception, and suggest two possible justifications.[213] The first is corrective justice. Given the longstanding debate that rages about which form of justice, corrective or distributive, underpins mistaken payment liability,[214] this article is agnostic on the topic; as such, the potential role of corrective justice as a justification for reciprocity is not pursued here. The second justification, to which Seah also adverts, is 'contradiction'.[215]

If understood as *moral* contradiction, this justification has force. Its basis can be found in the Categorical Imperative, the centrepiece of Kant's moral philosophy. Its first formulation, the Formula of Universal Law, enjoins us to 'act only in accordance with that maxim through which you can at the same time will that it

---

209 Dagan (n 105) 48. Cf Bant, *The Change of Position Defence* (n 4) 213.

210 As to the consistency of decisional autonomy with the objective aspect of good faith, see Part IV(B)(4) below.

211 Bant, *The Change of Position Defence* (n 4) 213.

212 See, eg, Edelman (n 9) 1021; McInnes (n 187) 455.

213 Grantham and Rickett, 'A Normative Account of Defences to Restitutionary Liability' (n 38) 101, 104.

214 See generally Klimchuk, 'Unjust Enrichment and the Forms of Justice' (n 64) 186.

215 Seah (n 182) 44.

become a universal law'.[216] In other words, the subjective maxims or bases on which we act must be capable of being universalised to every other person without contradiction; if we assert something to be true of ourselves, we must accept it to be equally true of others.

The Formula of Universal Law and Kantian moral philosophy generally are 'pre-legal'.[217] But Kantian philosophy predominates, both explicitly and implicitly,[218] in theoretical accounts of restitution and of private law more broadly.[219] Whether this is desirable is beyond the scope of this article.[220] But the preponderance of Kantian thinking in private law theory offers at least a promising basis to say that the Formula of Universal Law can properly inform the change of position defence.

Applied to change of position, the Formula means the claimant cannot invoke her decisional autonomy in respect of the enrichment without accepting that the defendant is also entitled to the same decisional autonomy. In asking that she not be held to her non-autonomous decision in relation to the enrichment (the mistaken transfer), the claimant must accept that the defendant is also entitled to ask not to be held to any non-autonomous decisions he makes in relation to the enrichment. Kantian moral philosophy thus substantiates the intuition that the claimant must reciprocally recognise the defendant's autonomy.

3 *Reconciling the Parties' Autonomy Interests*

How, then, should the parties' competing decisional autonomy interests be reconciled? It may be accepted that they deserve 'equal' respect.[221] 'Equality' should not be a rigid implement, however, because the manner in which the parties' autonomy interests are implicated differs in two material respects.

First, the claimant's non-autonomous decision is a mistaken payment of money, whereas the defendant's non-autonomous decision need not involve financial expenditure. Thus, the 'unjust disenrichment' model that Edelman J posits extra-judicially — which suggests that equal respect requires the defendant's change of position, like the claimant's mistaken transfer, to be 'disenriching'[222] — proceeds from the false premise that the parties' decisions mirror one another.

Second, as noted above, the defendant's non-autonomous decision is not reversed by affording him a defence. So, unlike the claimant — reversal of whose

---

216 Immanuel Kant, *Groundwork of the Metaphysics of Morals* in *Practical Philosophy*, tr/ed Mary J Gregor (Cambridge University Press, 1996) 4:421.

217 Grantham and Rickett 'A Normative Account of Defences to Restitutionary Liability' (n 38) 100. See also Wilmot-Smith, 'Should the Payee Pay?' (n 126) 852 n 36.

218 Jennifer M Nadler, 'What Right Does Unjust Enrichment Law Protect?' (2008) 28(2) *Oxford Journal of Legal Studies* 245, 248.

219 See Alan Brudner, *The Unity of the Common Law* (Oxford University Press, 2nd ed, 2013) 65; Ernest J Weinrib, *The Idea of Private Law* (Oxford University Press, 2012) ch 4; Arthur Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Harvard University Press, 2009) 19–24.

220 See generally Chris Maxwell, 'Thinking Philosophically About Law: The Role of Moral and Political Reasoning in Shaping the Law' (2023) 47(1) *Melbourne University Law Review* 229, 231–7.

221 Grantham and Rickett, 'A Normative Account of Defences to Restitutionary Liability' (n 38) 101; Edelman (n 9) 1021.

222 Edelman (n 9) 1021–3.

non-autonomous decision is the very outcome of restitution — the defendant's decisional autonomy cannot be directly vindicated within the confines of the restitutionary claim.

This asymmetry warrants a flexible approach. Flexibility is achieved by a conception of the defence as a balancing act, rather than a rigid preference for one party's decisional autonomy interest.[223] This approach evokes Lord Goff's weighing of injustices,[224] albeit its parameters are narrower. What falls to be compared between the parties is not 'free-floating justice', but their 'more definite' decisional autonomy interests.[225] It is not the general 'balancing of competing equities' disavowed in *Hills*;[226] at the same time, its flexibility addresses the concern that the defence not be unduly restricted by technicality.[227]

4 *Consistency*

Several points of consistency between a decisional autonomy-based rationale and the cases have already been noted, namely the good faith requirement (insofar as it is subjective) and the availability of the defence in cases of non-pecuniary and unquantifiable changes of position. In addition, anticipatory changes of position are readily accommodated into this framework; whether it occurs before or after receipt, the defendant's change of position is premised on a mistake and so his decisional autonomy is infringed by holding him to it. And as noted in Part IV(B)(3) above, a premise of the defence is that it cannot reverse the defendant's change of position and so opts for the next best thing. A corollary is that, consistently with the irreversibility requirement, if it is possible for the defendant to reverse the change of position himself the defence should not be available.

However, Bant suggests two other features of the defence are incongruous with a purely autonomy-based rationale.

(a) *Fault*

The first is the role of fault. Bant seizes, in particular, upon the requirement that the defendant's reliance be reasonable. As noted above, this is not yet an accepted part of the defence. However, the concern applies equally to the good faith requirement insofar as it is objective. Bant's concern is that limiting the availability of the defence by reference to the defendant's fault 'cannot reflect a concern to *protect* [his] autonomy'.[228]

This relies on the faulty premise, however, that the defence is single-mindedly concerned with protecting the defendant's autonomy, without regard to other considerations. As framed above, and as Bant herself recognises, the defence does not protect the defendant's decisional autonomy to an unlimited extent

---

223 Grantham, 'Change of Position-Based Defences' (n 14) 426; Bant, *The Change of Position Defence* (n 4) 214; Seah (n 182) 41.
224 *Lipkin Gorman* (n 3) 579 (Lord Goff).
225 Grantham and Rickett, 'A Normative Account of Defences to Restitutionary Liability' (n 38) 123.
226 *Hills* (n 4) 594 [69] (Hayne, Crennan, Kiefel, Bell and Keane JJ).
227 Ibid 582 [24] (French CJ), 600 [88] (Hayne, Crennan, Kiefel, Bell and Keane JJ).
228 Bant, *The Change of Position Defence* (n 4) 213 (emphasis in original).

wherever it is infringed;[229] it reconciles both parties' decisional autonomy interests.[230] If the defendant changes his position unreasonably or otherwise than in objective good faith, that may provide a reason to defer his autonomy interest to the claimant's.[231] So understood, an autonomy-based rationale is consistent with these fault-based features of the defence.

(b) *Pro Tanto Operation*

Second, Bant argues that an exclusive autonomy rationale would produce a defence that operates in full, rather than *pro tanto* (as it currently does).[232] This argument is grounded in Dagan's view of autonomy, which attaches significance not merely to the decisions the defendant actually makes on the basis of a mistaken payment but also to the expectations the payment engenders about his wealth. Those expectations in turn feed in manifold (and difficult-to-isolate) ways into his 'life-plans'.[233] As Bant suggests, for the defence to protect this autonomy interest fully it would arguably have to apply in full wherever the defendant generates an expectation that the enrichment is part of his wealth, because it is difficult to extricate precisely what effect that expectation has on the defendant's life plans.[234]

However, Dagan's view of autonomy is wider than the decisional autonomy interest that this article adopts. It is not the mere fact that the defendant has generated expectations on the basis of an enrichment that implicates the defendant's decisional autonomy, but the crystallisation of those expectations into actual decisions. Thus, the defendant must point to specific decisions made on the basis of the enrichment to invoke the defence. Where those decisions involve expenditure less than the full amount of the enrichment, the defendant's decisional autonomy is given effect by affording him the defence to the extent of that expenditure. Accordingly, the *pro tanto* operation of the defence is consistent with the decisional autonomy rationale posited above.

Reciprocal recognition of decisional autonomy therefore provides a persuasive normative justification that is consistent with the accepted features of the defence.

V Conclusion

Of all defences to restitutionary claims, change of position has received the lion's share of theoretical attention.[235] As was seen in Part III, however, the corpus of thinking that has developed about its foundations is unsatisfying. Rationales hitherto in vogue have material shortcomings in their capacity to facilitate principled development of the defence: inequitability its abstractness; disenrichment its false premise; security of receipts its subsidiarity to a broader autonomy-based rationale;

---

229 Ibid 217. See also Seah (n 182) 16–17.
230 Bant, *The Change of Position Defence* (n 4) 214.
231 Ross Grantham, 'Change of Position-Based Defences' (n 14) 429.
232 Bant, *The Change of Position Defence* (n 4) 213.
233 Dagan (n 105) 48.
234 Bant, *The Change of Position Defence* (n 4) 213.
235 Graham Virgo, 'Review: *Tort Law Defences* by James Goudkamp' (2015) 74(1) *Cambridge Law Journal* 160, 160.

and loss allocation and the 'no worse off' rationale their inability to provide a normative justification for the defence.

Part IV advanced two better rationales: outcome responsibility and reciprocal recognition of decisional autonomy. Both justify the defence in its application to mistaken payment claims and broadly align with the state of the authorities.

That alignment suggests these rationales can stand comfortably together and, at times, complementarily: as, for example, in the more precise position that can be drawn from outcome responsibility than decisional autonomy about the irreversibility requirement, and the content that decisional autonomy gives to the requisite qualities of the defendant's putative detriment, which outcome responsibility does not. The precise interaction between the rationales is, however, a matter for further analysis. So are the exact contours along which they suggest the defence should develop. What this article has sought to demonstrate is that, as and when further questions inevitably arise about the change of position defence, they are best confronted using these rationales.

Whistleblower Protections in Sport: The Missing Element in Australia's Sports Integrity Framework?

Kieran Pender*

Abstract

Whistleblowers play a central role in exposing organisational wrongdoing. However, many potential whistleblowers stay silent for fear of the risks involved in speaking up. To encourage whistleblowing, governments and authorities have enacted whistleblower protection laws and created whistleblower support and incentive schemes. The potential utility of these mechanisms in sporting contexts has been insufficiently considered by researchers and policymakers. Given increased national and international attention on integrity in sport, including in Australia following the establishment of Sport Integrity Australia in 2020, consideration of the application and limitations of whistleblower protections in sport is timely. In this article, I identify critical gaps in Australia's whistleblowing framework as it applies to sport and offer recommendations for reform to ensure sport-related whistleblowers can speak up safely and lawfully. The sporting context also offers a valuable case study to consider wider limitations of Australian whistleblowing law amid an active federal law reform agenda. Whistleblowers make a meaningful contribution to integrity in sport and elsewhere, and it is vital they are empowered to expose wrongdoing and protected when they do.

Please cite this article as:

Kieran Pender, 'Whistleblower Protections in Sport: The Missing Element in Australia's Sports Integrity Framework?' (2025) 47 *Sydney Law Review* 20339: 1–36 <https://doi.org/10.30722/slr.20339>.

* Honorary Senior Lecturer, ANU College of Law, Governance and Policy, The Australian National University, Australian Capital Territory, Australia. Email: kieran.pender@anu.edu.au.
ORCID iD: https://orcid.org/0000-0002-5100-5827.
All views expressed are the author's own. With thanks to Associate Professor Catherine Ordway and Hayden Opie AM, and the *Sydney Law Review* editors and reviewers, for their helpful comments. Thanks to Hannah Price for her research assistance.

I Introduction

> Sport won't be clean. Never.
>
> — Anti-doping whistleblower Grigory Rodchenkov[1]

> It is notable that none of the historic cases of doping have been identified through testing programs — instead whistle-blowers have brought major cases of systemic and deliberate doping to the attention of anti-doping authorities who would otherwise have remained unaware. This situation highlights the complexity of the doping environment, and the need for fresh and innovative approaches.
>
> — Australian Sports Anti-Doping Authority[2]

Whatever the organisational context, whistleblowers play a critical role in exposing wrongdoing.[3] However, the decision to speak up often comes with significant risk, including potential criminal liability,[4] civil litigation,[5] or retaliation at work.[6] Prior Australian research has shown that as many as 8 in 10 whistleblowers face some form of detriment for blowing the whistle.[7] In response, recognising the vital public interest in whistleblowing, legislatures in Australia and around the world have responded with laws to protect and empower whistleblowers. Queensland enacted Australia's first dedicated whistleblower protection provisions in 1990[8] and such provisions have

---

1 Grigory Rodchenkov quoted in Murad Ahmed, 'Whistleblower Grigory Rodchenkov: "Sport Won't Be Clean. Never"', *Financial Times* (online, 31 July 2020) <https://www.ft.com/content/0630521e-37d3-4a44-a7ea-b2dc82f8bad9>.

2 The Australian Sports Anti-Doping Authority ('ASADA', as it then was) quoted in *Report of the Review of Australia's Sports Integrity Arrangements* (2018) 52 ('*Wood Review Report*').

3 See generally David Lewis, AJ Brown and Richard Moberly, 'Whistleblowing, its Importance and the state of the research' in AJ Brown, David Lewis, Richard Moberly and Wim Vandekerckhove (eds), *International Handbook on Whistleblowing Research* (Edward Elgar, 2014) 1, 1–34.

4 Sarah Basford Canales, 'David McBride: Former Army Lawyer Sentenced to Five Years for Stealing and Leaking Afghanistan War Documents', *The Guardian* (online, 14 May 2024) <https://www.theguardian.com/australia-news/article/2024/may/14/david-mcbride-former-army-lawyer-sentenced-to-five-years-for-stealing-and-leaking-afghanistan-war-documents> ('David McBride, 14 May 2024'); Sarah Basford Canales, 'ATO Whistleblower Richard Boyle to Face Trial after High Court Refuses Attempt to Appeal', *The Guardian* (online, 7 November 2024) <https://www.theguardian.com/australia-news/2024/nov/07/ato-whistleblower-richard-boyle-to-face-trial-after-high-court-refuses-appeal-ntwnfb>.

5 See, eg, Harriet Alexander, '"I've Nothing to Lose": Dying Whistleblower Sued by ClubsNSW', *The Sydney Morning Herald* (online, 22 September 2022) <https://www.smh.com.au/national/nsw/i-ve-nothing-to-lose-dying-whistleblower-sued-by-clubsnsw-20220921-p5bjsr.html>.

6 Note that throughout the article, 'reprisal', 'detriment' and 'retaliation' are used interchangeably to describe the mistreatment of a whistleblower as a consequence of their whistleblowing.

7 See, eg, an empirical study that found '[a]round four in every five whistleblowers (81.6%) experienced at least one type of these informal repercussions, compared with one in two (48.8%) who experienced at least one type of formal repercussion': AJ Brown, Sandra Lawrence, Jane Olsen, Louise Rosemann, Kath Hall, Eva Tsahuridu, Chris Wheeler, Michael Macaulay, Rodney Smith and Paula Brough, Clean as a Whistle: A Five Step Guide to Better Whistleblowing Policy and Practice in Business and Government (Whistling While They Work 2 Key Findings and Actions, Griffith University, August 2019) 24.

8 Whistleblowers (Interim Protection) and Miscellaneous Amendments Bill 1990 (Qld). See generally Zac Dadic, 'Whistleblower Protection and Disclosures to Members of the Queensland Legislative Assembly' (2009) 24(2) *Australasian Parliamentary Review* 97.

since proliferated across the Australian legislative landscape. The question of whether these laws are working has been subject to considerable public, policy and political scrutiny.[9] In recent years, whistleblowing reforms have been enacted in New South Wales ('NSW') and federally,[10] while reform is ongoing in Queensland and to the primary federal public and private sector whistleblowing laws.

Sport offers a useful case study for analysing the shortcomings of Australian whistleblowing law, in order to inform those ongoing law reform processes. Organised sports worldwide face manifold integrity challenges. These challenges are acute and receive considerable attention at the highest levels: from doping in professional cycling to match-fixing in international cricket to safeguarding shortcomings in elite gymnastics. However, the integrity risks faced by sport are not isolated to the world stage. At all levels, from fifth-tier regional football competitions to the Olympics, integrity risks exist. In response, and prompted by numerous high-profile scandals, regulatory authorities in Australia and internationally have pursued an active sporting integrity agenda in recent years. Given the cultural, economic and political salience of sport in Australia, integrity in sport — and the ability of whistleblowers to speak up — is an important issue in its own right. Without robust integrity measures, public confidence in the legitimacy of sport and sporting outcomes is undermined. But given some of the distinct structural and legal aspects of sport in Australia, and its breadth (from volunteer-run amateur competition to multi-billion-dollar commercial leagues), whistleblowing in sport is also an insightful field against which to assess whistleblower protections in Australia more generally.

In 2020, the Australian Government established Sport Integrity Australia ('SIA'), following the Review into Australia's Sports Integrity Arrangements ('Wood Review').[11] The *Wood Review Report* had outlined considerable integrity challenges faced by Australian sport, including in relation to match-fixing and anti-doping, and highlighted the risks of inaction. The Report noted that '[f]or many years the integrity of sport has been under threat internationally, in particular through doping scandals and competition manipulation' and 'Australia has not been immune from such events'.[12] The Government agreed with most of the Wood Review's recommendations,[13] and SIA was established to ensure a robust integrity framework for Australian sports.

Wrongdoing in sport, as in any field, can be detected in various ways. The anti-doping regime overseen locally by SIA and globally by the World Anti-Doping

---

9 See generally Alan Wilson, *Review of the Public Interest Disclosure Act 2010* (Report, Queensland Department of Justice and Attorney-General (Qld), June 2023); Attorney-General's Department (Cth), *Public Sector Whistleblowing Reforms: Stage 2 – Reducing Complexity and Improving the Effectiveness and Accessibility of Protections for Whistleblowers* (Consultation Paper, November 2023) ('*Reforms Consultation Paper*'); The Australia Institute, 'Voters Overwhelmingly Support Stronger Whistleblower Protections – New Poll' (Media Release, 24 April 2025) <https://australiainstitute.org.au/post/voters-overwhelmingly-support-stronger-whistleblower-protections-new-poll>.

10 *Public Interest Disclosures Act 2022* (NSW); Public Interest Disclosure Amendment (Review) Bill 2022 (Cth).

11 *Sport Integrity Australia Act 2020* (Cth).

12 *Wood Review Report* (n 2) 26.

13 Department of Health (Cth), *Safeguarding the Integrity of Sport – The Government Response to the Wood Review* (February 2019).

Agency ('WADA') has a comprehensive testing regime, both in and out of competition. Match-fixing can often be detected through analysis of money flows and betting patterns. However, in many cases, detection of wrongdoing requires an insider to speak out. Wrongdoing typically takes place covertly; often, illicit behaviour can only be identified and held to account if someone privy to the wrongdoing blows the whistle. It is for this reason that, across the public and private sectors, whistleblowers are widely recognised as the primary mechanism for organisational or regulatory identification of wrongdoing.[14]

However, in sporting contexts and elsewhere, organisational cultures are often hostile to those who speak up. For example, a study of professional football players in the United Kingdom indicated an intra-club culture that forbids reporting wrongdoing (especially bullying).[15] The study indicated that 'snitching' to internal reporting mechanisms was likely to result in ostracism and exclusion by fellow team members.[16] Since 2018, the *Code of Ethics* of the International Federation of Association Football ('FIFA') has prohibited public statements of a 'defamatory nature'[17] — a development that may further silence potential whistleblowers, who fear retaliation should their allegations reach the public domain.[18] Indeed whistleblowers often face retaliation for speaking up, which can have a silencing effect.[19] As a result, wrongdoing stays hidden because prospective whistleblowers are worried about the risks of speaking up.

Australia has not been alone in pursuing dedicated laws to address these risks and encourage whistleblowing.[20] Almost a third of countries globally now have standalone whistleblower protection laws;[21] some countries also have independent whistleblower protection authorities, or other support schemes, to assist whistleblowers.[22] In sport specifically, international organisations such as WADA have also introduced provisions holding those who discourage or retaliate against whistleblowers to the same standard of accountability as wrongdoers themselves,

---

14 See generally National Whistleblower Center, *Proven Effectiveness of Whistleblowers* (Factsheet, 2010) <https://www.ohchr.org/sites/default/files/lib-docs/HRBodies/UPR/Documents/session9/US/NWC_NationalWhistleblowersCenter_Annex2.pdf> and sourced cited therein. See also 'Why Whistleblowing Works', *National Whistleblower Center* (Web Page) <https://www.whistleblowers.org/why-whistleblowing-works/>.

15 James A Newman, Victoria E Warburton and Kate Russell, 'Whistleblowing of Bullying in Professional Football: To Report or Not to Report?' (2022) 61 *Psychology of Sport and Exercise* 102177:1–10, 6.

16 Ibid.

17 Fédération Internationale de Football Association ('FIFA'), *Code of Ethics* (2023) cl 23.2.

18 Associated Press, 'FIFA Defends Overhaul of Ethics Code That Protects "Reputations of Others"', *ESPN* (online, 15 August 2018) <https://www.espn.com.au/football/story/_/id/37559968/fifa-defends-overhaul-ethics-code-protects-reputations-others>.

19 See generally Kieran Pender, *The Cost of Courage: Fixing Australia's Whistleblower Protections* (Human Rights Law Centre, August 2023) ('*Cost of Courage*').

20 See generally International Bar Association and Government Accountability Project, *Are Whistleblowing Laws Working? A Global Study of Whistleblower Protection Litigation* (2021).

21 'Whistleblower Laws Around the World', *National Whistleblower Center* (Web Page), <https://www.whistleblowers.org/whistleblower-laws-around-the-world/>.

22 See generally CEELI Institute, *Beyond Paper Rights: Implementing Whistleblower Protections in Central and Eastern Europe* (November 2023).

while offering amnesties to wrongdoers who disclose code violations.[23] Such changes are signs of a growing global consciousness of whistleblowing's important role in safeguarding sport integrity, and the protections and incentives needed to facilitate it.

The field of sport integrity, in Australia and abroad, has received considerable academic attention, including through a legal lens.[24] Similarly, there has been substantial academic and policy literature on whistleblower protections and how to better protect and encourage individuals to expose wrongdoing.[25] However, perplexingly, one area where the utility of whistleblowing as an integrity tool has been less considered is sport. While sport-related whistleblowers have often proven central in exposing doping violations, match-fixing and other integrity concerns, there has been little sustained focus in Australia, or elsewhere, about the unique challenges and opportunities faced in seeking to protect and encourage these whistleblowers. The relatively recent literature that does exist has focused on whistleblowers' intentions or experiences in speaking up,[26] rather than analysing the legal framework that does or does not protect them in doing so. In this article, I seek to address that lacuna, asking whether Australia's whistleblower protection framework adequately protects sport-related whistleblowers. The answer, in short, is no — there is much work to be done, with considerable opportunity for such whistleblowers to be better protected.

Whistleblowing in sport in Australia has received renewed attention in recent years. In January 2025, concerns were raised about a sporting body trying to silence a whistleblower who had spoken up about sexual abuse.[27] In April 2025, a manager at AFL club Carlton resigned after a whistleblower sparked an integrity investigation.[28] In 2024, a federal MP used parliamentary privilege to bring forward

---

23 World Anti-Doping Agency ('WADA'), *World Anti-Doping Code* (1 January 2021) cls 2.11.1, 10.7.1 ('*WADA Code*').

24 See by way of context Andy Harvey and Mike McNamee, 'Sport Integrity: Ethics, Policy and Practice: An Introduction' (20198) 4(1) *Journal of Global Sport Management* 1, 1–7 and subsequent articles in the (2019) 4(1) special edition on 'Sport Integrity: Ethics, Policy and Practice'. For a discussion of sports integrity and decision-making as a 'de facto legal system', see Ryan M Rodenberg, 'Review Essay: Entering the "Grey Zone" of Sports Jurisprudence' (2022) 44(2) *Sydney Law Review* 329, 330 <https://openjournals.library.sydney.edu.au/SLR/article/view/19529>.

25 See the literature outlined below in Part II(B).

26 See, eg, Kelsey Erickson, Laurie B Patterson and Susan H Backhouse, '"The Process Isn't a Case of Report It and Stop": Athletes' Lived Experience of Whistleblowing on Doping in Sport' (2019) 22(5) *Sport Management Review* 724; Vassilis Barkoukis, Dmitriy Bondarev, Lambros Lazuras, Sabina Shakverdieva, Despoina Ourda, Konstantin Bochaver and Anna Robson, 'Whistleblowing against Doping in Sport: A Cross-National Study on the Effects of Motivation and Sportspersonship Orientations on Whistleblowing Intentions' (2021) 39(10) *Journal of Sports Sciences* 1164.

27 Jessica Halloran and Stephen Rice, '"They're Trying to Silence Me": Pole Vault Sex Abuse Whistleblower Paul Burgess Hits Back', *The Australian* (online, 7 January 2025) <https://www.theaustralian.com.au/sport/theyre-trying-to-silence-me-pole-vault-sex-abuse-whistleblower-paul-burgess-hits-back/news-story/e75c3837f3c14b0a1bb8292b6971b224>; Jessica Halloran and Stephen Rice, 'Athletics Embroiled in Civil War over Whistleblower', *The Australian* (online, 28 January 2025) <https://www.theaustralian.com.au/sport/athletics-embroiled-in-civil-war-over-whistleblower/news-story/dbf756cbf7a12fd819f30e9184ae091a>.

28 Sam McClure, 'Carlton Manager under Investigation after Staff Complaints', *The Age* (online, 16 April 2025) <https://www.theage.com.au/sport/afl/carlton-manager-under-investigation-after-staff-complaints-20250416-p5lscx.html>; Peter Ryan and Scott Spits, 'Carlton Manager Resigns

the concerns of a whistleblower about illicit drug use in AFL being covered up.[29] A year earlier, the AFL Players' Association established a whistleblowing program after research showed athletes did not feel comfortable speaking up, for fear of reprisal.[30] In 2021, a whistleblower's allegations of sexism and misogyny shocked professional swimming.[31] Among the recommendations of the independent review commissioned in response to that controversy was the establishment of a dedicated whistleblowing policy and procedure.[32] Accordingly, a sustained examination of the application of whistleblower protections to sport in Australia is overdue.

And while sport is an atypical context, the challenges faced by sport-related whistleblowers are by no means unique. Sport provides an illuminating case study in which to consider limitations arising under Australian whistleblowing law more broadly. Many of the issues arising in the sporting context are acute examples of more widespread challenges. For example, the limited jurisdictional scope of private sector whistleblowing laws in relation to non-corporate entities, explored in Part III(C)(3), is particularly vexing in the sport context because of the variety of legal forms sporting bodies take, particularly at a grassroots level. But it is a wider problem: the shortcoming has recently caught the Australian Government Treasury's attention following the PwC leaks scandal, in relation to application to partnership legal forms.[33] Questions of who the whistle can be blown to, a vexing issue in sport explored at Part III(C)(2), has also been subject to recent judicial and media attention.[34] Analysing whistleblower protections as they apply to sport can therefore tell us a great deal about the flaws in the framework generally, which affect all Australian whistleblowers. Sport is a helpful analytical prism through which to assess the wider landscape.

I drafted this article before, during and after the Paris Olympics, which I attended in a professional capacity. The proximity of the Olympics felt apt — integrity in sport was a central theme of the Olympics, including in relation to anti-doping in swimming and governance in boxing. The anti-doping scandals currently troubling international swimming, and other sports, demonstrate how fraught these

---

after Whistleblower Sparked Investigation', *The Age* (online, 24 April 2025) <https://www.theage.com.au/sport/afl/carlton-manager-resigns-after-whistleblower-sparked-investigation-20250424-p5lu3n.html>.

29 Tiffanie Turnbull, 'Australia Football League Denies It Has a Cocaine Problem after Whistleblower Claims', *BBC* (online, 27 March 2024) <https://www.bbc.com/news/world-australia-68622832>.

30 Sarah Burt, 'AFLPA Set to Launch Whistleblower Service after Staggering Survey Results', *7News* (online, 27 June 2023) <https://7news.com.au/sport/afl/aflpa-set-to-launch-whistleblower-service-after-staggering-survey-results--c-11101999>.

31 SBS and AAP, 'Australian Swimmers Urged to Detail Sexism after Maddie Groves Withdraws from Olympics', *SBS News* (online, 12 June 2021) <https://www.sbs.com.au/news/article/australian-swimmers-urged-to-detail-sexism-after-maddie-groves-withdraws-from-olympics/7z0dz8knq>.

32 Julian Linden, 'Swimming Australia Rethinking Promise on How to Implement Reforms Tackling Abuse', *The Daily Telegraph* (online, 11 December 2022) <https://www.dailytelegraph.com.au/sport/swimming-australia-rethinking-promise-on-how-to-implement-reforms-tackling-abuse/news-story/5b858190458ef905638e3ff1353658d5>.

33 Treasury (Cth), *Regulation of Accounting, Auditing and Consulting Firms in Australia: Consultation Paper* (May 2024) 39–40.

34 See, eg, *Mount v Dover Castle Metals Pty Ltd* (2025) 339 IR 1; Christopher Knaus, 'Whistleblower Claims He Was Told to Fabricate Data for AEC during Indigenous Voice Campaign', *The Guardian* (online, 20 August 2024) <https://www.theguardian.com/australia-news/article/2024/aug/20/firm-hired-by-aec-accused-of-fabricating-data-during-indigenous-voice-campaign>.

issues are. Allegations and counter-allegations have been rife, including between WADA and Western anti-doping authorities.[35] In that challenging context, the importance of insiders speaking up — as has been a feature of the investigative reporting on Chinese anti-doping issues[36] — is ever more crucial.

In Part II I situate this discussion in the wider sport integrity landscape, outlining the existing domestic and international context, including a review of the limited scholarship on whistleblowing in sport. In Part III, I consider how sports integrity issues map against Australia's existing whistleblower protection framework, including the federal public sector protections in the *Public Interest Disclosure Act 2013* (Cth) ('*PID Act*') and protections in the *Corporations Act 2001* (Cth) ('*Corporations Act*'). This discussion will have three parts: an introduction to the Australian whistleblower protection landscape, a consideration of the existing (limited) integration of those protections to sport, and a deeper analysis of how current protections could apply to sporting contexts, informed by four hypothetical scenarios. In undertaking this analysis, I will identify shortcomings in the application of existing whistleblower protections to sport in Australia, with many potential sport-related whistleblowers not adequately covered by legal protections. This includes, but is not limited to, challenges in applying orthodox whistleblower protections, which are largely framed around workplace participants and workplace retaliation, in the sporting context. While the hypothetical examples are framed around common sporting integrity issues, and informed by prior cases, they provide a more suitable analytical tool than retrospective analysis of known cases.

In Part IV I consider opportunities for reform, including how Australia's sports integrity framework could be adapted to better support people coming forward to expose wrongdoing in sport, and the potential for sport to pioneer innovative solutions that could ultimately benefit all whistleblowers. In Part V, I conclude with some reflections on areas for future research.

The importance of whistleblowing in sport was not lost on the landmark Wood Review. The *Wood Review Report* quoted the predecessor to SIA, the Australian Sports Anti-Doping Authority ('ASADA'), which said in its submission to the Review:

> Those most likely to know who is doping in any sport are fellow athletes. However, most athletes remain unwilling to 'blow the whistle' on drug cheats. The consequences for athletes of breaking the silence on doping can be acute. Whistleblowers can be ostracised by fellow athletes and by the governing body of their sport, can have their sporting careers ended, and can ruin their chances of a career in the sporting industry. Consequently, a fundamental contemporary challenge for anti-doping organisations is the development of a framework for obtaining information from athletes and athlete support

[35] See, eg, Kieran Pender, 'Adam Peaty Calls for "Fair Game" amid Doping Concerns at Olympic Swimming', *The Guardian* (online, 27 July 2024) <https://www.theguardian.com/sport/article/2024/jul/27/adam-peaty-calls-for-fair-game-amid-anti-doping-concern-at-olympic-swimming-heats>.

[36] Michael S Schmidt and Tariq Panja, 'Top Chinese Swimmers Tested Positive for Banned Drug, Then Won Olympic Gold', *The New York Times* (online, 20 April 2024) <https://www.nytimes.com/2024/04/20/world/asia/chinese-swimmers-doping-olympics.html>. See also Sean Ingle, 'Chinese Swimmers Won Olympic Golds after Testing Positive for Banned Drug', *The Guardian* (online, 20 April 2024) <https://www.theguardian.com/sport/2024/apr/20/chinese-swimmers-won-olympic-golds-after-testing-positive-for-banned-drug>.

> persons on doping within sport that affords whistleblowers the protections that they require.[37]

Consequently, the *Wood Review Report* recommended the establishment of a robust whistleblower protection scheme alongside whistleblowing reporting systems.[38] In its response, the Australian Government agreed to this and a related recommendation.[39] While SIA has established a whistleblowing intake process, there has not yet been movement towards legislative reform to establish sport integrity-specific whistleblower protections. In its *2022–26 Corporate Plan*, SIA indicated its intent to '[e]stablish a Whistleblower Scheme to enable confidential reporting of integrity threats', which would include 'the establishment of the legislative framework required to support protected disclosures as a Commonwealth authority under the whistleblower laws'.[40] In the latest *2025–29 Corporate Plan*, this specific initiative has been consolidated into generalised integrity objectives.[41] It is unclear whether the Government and SIA remain committed to sport-specific whistleblower protections.

These circumstances make this article timely. Recent events in global and local sport have underscored the fact that integrity issues remain a critical risk for Australian sports. Protecting and empowering whistleblowers to raise concerns can be a vital mechanism for sports and oversight bodies to protect the integrity of sport and take action against wrongdoers. Over the past six years, there has been increased international attention on sport-related whistleblowers. For example, Transparency International published a best practice guide for whistleblowing in sport in 2018,[42] while in 2022 a monitoring group of the Council of Europe issued a recommendation on whistleblower protection in the context of anti-doping.[43] As I demonstrate in this article, legislative and non-legislative initiatives are needed to ensure that Australian whistleblowers are protected when they raise concerns about wrongdoing in sport. While recent international contributions should be heeded, the *Wood Review Report*'s recommendation and SIA's prior plans in this respect also remain salient. Protections for whistleblowers are good for integrity in sport. I hope that this article makes a modest contribution to policy consideration of the next phase of reform to the Australian sports integrity landscape, and to whistleblower protection reform in Australia more generally.

---

37 *Wood Review Report* (n 2) 15 (recommendation 23), 18 (recommendation 47).
38 ASADA quoted in *Wood Review Report* (n 2) 130.
39 Department of Health (Cth) (n 13) 25.
40 Sport Integrity Australia ('SIA'), *Corporate Plan: 2022–2026* (2022) 20 ('*2022–26 Corporate Plan*').
41 SIA, *Corporate Plan: 2025–2029* (2025) 6–8 ('*2025–29 Corporate Plan*').
42 Iñaki Albisu Ardigó, Transparency International, *Best Practices for Whistleblowing in Sport* (7 September 2018).
43 Council of Europe Monitoring Group, *Recommendation on the Protection of Whistleblowers in the Context of the Fight Against Doping in Sport* (T-DO (2021) 28 Final, 11 January 2022).

II Context

A *Integrity in Sport*

Cheating has been prevalent for as long as humans have gathered to participate in organised sport.[44] Famously, at the Olympics in Ancient Greece, pedestals were held up by statues inscribed with the names of those who had transgressed: 'to punish, in perpetuity, athletes who violated Olympic rules'.[45] The use of performance-enhancing drugs can also be traced back to Ancient Greece, and perhaps even earlier,[46] although anti-doping regulation is relatively recent. Athletics became the first sport to ban doping in 1928, while doping controls at the Olympics were not introduced until the mid-1960s. It was only in 1999 that WADA was established.[47] Nevertheless, in the past quarter-century, there has been considerable international attention on integrity in sport, prompted by high-profile cases of doping, match-fixing and other forms of competitive manipulation.[48] This has led to a burgeoning academic subfield, with considerable research undertaken on the prevalence of sports-related wrongdoing and the efficacy of efforts to address it. Today, integrity is a priority for most major international sports.[49]

B *Whistleblowing in Sport*

Over the past decade, there has been increased academic research attention directed towards whistleblowing in sport, driven by high-profile contemporary examples and greater policy focus on whistleblower protections. Much of this literature has focused on the experiences of athletes in speaking up. For example, one research team considered the lived experience of anti-doping whistleblowers.[50] Another major cross-national study in 2021, recognising that 'research on whistleblowing against doping is scarce', undertook the first quantitative study on whistleblower motivations in sport.[51] Other researchers have considered what contributes to the effectiveness of reporting channels for sport-related whistleblowers,[52] and the

---

44 But see Richard H McLaren, 'Is Sport Losing Its Integrity?' (2011) 21(2) *Marquette Sports Law Review* 551, 553.

45 Charles E Yesalis and Michael S Bahrke, 'History of Doping in Sport' (2002) 24(1) *International Sports Studies* 42, 42.

46 Ibid 44.

47 See generally Ivan Waddington and Verner Møller, 'WADA at Twenty: Old Problems and Old Thinking?' (2019) 11(2) *International Journal of Sport Policy and Politics* 219.

48 For a summary of recent cheating scandals in sport, see Danielle Kamis, Thomas Newmark, Daniel Begel and Ira D Glick, 'Cheating and Sports: History, Diagnosis and Treatment' (2016) 28(6) *International Review of Psychiatry* 551, 551–2.

49 See, eg, International Olympic Committee ('IOC'), 'IOC Teams Up with Paris 2024 and French Authorities to Protect Games Integrity' (Media Release, 27 July 2024) <https://olympics.com/ioc/news/ioc-teams-up-with-paris-2024-and-french-authorities-to-protect-games-integrity>.

50 Erickson, Patterson and Backhouse (n 26).

51 Barkoukis et al (n 26) 1164. See also Lambros Lazuras, Vassilis Barkoukis, Dmitriy Bondarev, Yannis Ntovolis, Konstantin Bochaver, Nikolaos Theodorou and Kevin Bingham, 'Whistleblowing Against Doping Misconduct in Sport: A Reasoned Action Perspective with a Focus on Affective and Normative Processes' (2021) 43(4) *Journal of Sport and Exercise Psychology* 285.

52 Pim Verschuuren, 'Whistleblowing Determinants and the Effectiveness of Reporting Channels in the International Sports Sector' (2020) 23(1) *Sport Management Review* 142; Apolena Ondráčková and

failures of generalised whistleblower protection policies within sport.[53] Albeit starting from a limited base, this research has begun to elucidate a more sophisticated understanding of how whistleblowing operates in sport.[54]

There is some debate about what does, or should, motivate individuals to blow the whistle. Traditionally, it was assumed that whistleblowers primarily disclosed 'out of a sense of fairness and justice' rather than for personal gain.[55] In certain jurisdictions, a perception persists that whistleblowing should remain an act of civic duty, unpolluted by concerns about monetary rewards or career ambition (some whistleblowing laws require that the whistleblower disclose in good faith).[56] This contrasts to the historical position of the United States ('US'), which, from the days of the American Civil War, has used financial incentives to encourage culpable 'rogues' to blow the whistle on their co-conspirators, capitalising on self-interest and vengeance to improve law enforcement outcomes.[57] In practice, whistleblowing — both in whether it occurs and how it takes place — is impacted by individual moral identity, organisational commitment, the perceived ethical values of the organisation being reported on, and the personal costs associated with disclosure.[58] Furthermore, those with greater status and power within an organisation appear more likely to make disclosures — especially in a sporting context.[59] Blowing the whistle can be a difficult decision where sports participants exist in a highly institutionalised environment, with limited power, an intense culture of loyalty and high personal vulnerability associated with disclosing.[60]

While there has been limited Australia-specific research on whistleblowing in sport, the existing application of whistleblowing laws to Australian sports, the potential benefit of these protections and areas of ongoing uncertainty were all considered by the *Wood Review Report*. It noted that '[p]rotection for whistleblowers will be critical in developing a more robust system of sports integrity governance, both in relation to doping and other integrity issues'.[61] Further consideration of sports integrity whistleblowing came in an academic report commissioned by the Australian Government Department of Health as part of its response to the *Wood*

Pim Verschuuren, 'Whistleblowing Platforms as a Solution to Fight Corruption: A Model from the Czech Republic' in Catherine Ordway (ed), *Restoring Trust in Sport: Corruption Cases and Solutions* (Routledge, 2021) 132; Newman, Warburton and Russell (n 15).

53 Hannah M Davis, 'The Cost of Gold: How Generalized Whistleblowing Policies Are Failing Athletes' (2021) 32(1) *Marquette Sports Law Review* 305.

54 There has also been an increase in jurisdiction-specific research: see, eg, Vassilis Barkoukis, Monica Stănescu, Marius Stoicescu and Haralambos Tsorbatzoudis, 'Tackling Irregularities in Sport through Education on Whistleblowing' (2019) 11(1) *Romanian Journal for Multidimensional Education* 1.

55 Klaus Ulrich Schmolke, 'Compensation, but No Rewards for Whistleblowers? – Some Thoughts on the Introduction of Financial Incentive Programmes in the Wake of the EU Whistleblower Directive's Transposition' [2022] (1) *Zeitschrift für Europäisches Privatrecht* 82, 93.

56 Parliamentary Joint Committee on Corporations and Financial Services ('PJCCFS'), Parliament of Australia, *Whistleblower Protections* (Report, September 2017) 133 ('*PJCCFS Report*').

57 Congressional Globe, 37th Cong, 3rd sess, 955–6 (statement of Senator Jacob M Howard).

58 Philmore Alleyne, 'The Influence of Organisational Commitment and Corporate Ethical Values on Non-Public Accountants' Whistle-Blowing Intentions in Barbados' (2016) 17(2) *Journal of Applied Accounting Research* 190; Lazuras et al (n 51).

59 Verschuuren (n 52); Newman, Warburton and Russell (n 15).

60 Newman, Warburton and Russell (n 15).

61 *Wood Review Report* (n 2) 130.

Review Report.[62] The report identified the need to develop 'strong whistleblower/reporting processes that protect individuals and place responsibility on organisations to properly manage and respond to reports' as a key area of best-practice.[63] In light of this context, it is now helpful to trace the emergence of whistleblower protections, before returning to the intersection between whistleblowing and sport.

III Whistleblower Protections and Sport

A *Australian Whistleblower Protections*

The concept of whistleblowing has ancient origins. The Greeks celebrated the notion of *parrhesia*, or fearless speech.[64] As early as the 300s BCE, an Athenian orator noted that 'neither the laws nor judges can bring any results unless someone denounces the wrong doers'.[65] Britain pioneered the first whistleblower incentive laws in the 7th century, providing a share of the punitive proceeds to anyone who informed upon someone working on the Sabbath.[66] A similar mechanism was enacted in the US during the Civil War — a law that is still utilised by American whistleblowers today.[67] The modern concept of whistleblowing, however, emerged in the US in the 1970s, led by consumer advocate Ralph Nader who described it as 'an act of a man or a woman who, believing that the public interest overrides the interest of the organisation he serves, publicly "blows the whistle" if the organisation is involved in corrupt, illegal, fraudulent or harmful activity'.[68] The activism of Nader and others soon sparked the first modern whistleblowing laws in the US and beyond.

Australia was an early adopter of the principles pioneered in the US. Queensland became only the second jurisdiction globally to adopt dedicated whistleblower protections, following the landmark Fitzgerald Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct.[69] Other Australian states and territories followed; today, the vast majority of the Australian workforce is covered by dedicated whistleblower protections. Every state and

---

62 Kath Hall, Adam Masters and Catherine Ordway, *Sport Integrity and Corruption: Best Practice Australian and International Policy & Program Delivery Approaches* (Working Paper No 1, Transnational Research Institute on Corruption, September 2021) 33.

63 Ibid 33

64 See Alan Chu, 'In Tradition of Speaking Fearlessly: Locating a Rhetoric of Whistleblowing in the Parrhēsiastic Dialectic' (2016) 19(3) *Advances in the History of Rhetoric* 231, 239–48.

65 Lykourgos (Athenian orator) quoted in Kieran Pender, Sofya Cherkasova and Anna Yamaoka-Enkerlin, 'Compliance and Whistleblowing: How Technology Will Replace, Empower and Change Whistleblowers' in Jelena Madir (ed), *FinTech: Law and Regulation* (Edward Elgar, 3rd ed, 2024) 485, 486.

66 International Bar Association, *Whistleblower Protections: A Guide* (April 2018) 5.

67 See generally Patricia Meador and Elizabeth S Warren, 'The *False Claims Act*: A Civil War Relic Evolves into a Modern Weapon' (1998) 65(2) *Tennessee Law Review* 455.

68 Ralph Nader, 'An Anatomy of Whistle Blowing' in Ralph Nader, Peter J Petkas and Kate Blackwell (eds) *Whistle Blowing: The Report of the Conference on Professional Responsibility* (Bantam Books, 1972) vii.

69 GE Fitzgerald, *Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (Report, 3 July 1989).

territory has whistleblower protections for their public sector workers.[70] At a federal level, there are primary regimes for the public sector (in the *PID Act*) and the private sector (in the *Corporations Act* ch 9 pt 9.4AAA). There are also sector-specific regimes: for unions,[71] tax,[72] aged care,[73] the National Disability Insurance Scheme ('NDIS'),[74] Aboriginal and Torres Strait Islander corporations,[75] and for those blowing the whistle to the National Anti-Corruption Commission.[76]

While all these schemes have minor variations, broadly they seek to do at least three things:

(1) to provide avenues and protocols for whistleblowers to speak up about wrongdoing;

(2) to establish requirements and procedures for the investigation of those allegations of wrongdoing; and

(3) to provide protections for the whistleblower.

Those protections take two forms: a shield, with immunity from civil, criminal and administrative liability,[77] and a sword, with a whistleblower able to take legal action for compensation, reinstatement and so on in the event they suffer detriment for blowing the whistle.[78]

B *Whistleblower Protections and Sport*

It is against this backdrop that I consider protections for sports integrity whistleblowers in Australia. It is helpful to consider these frameworks as having three distinct eligibility requirements for the scheme to be engaged.

First, in terms of the personal scope (persons, or prospective whistleblowers covered by the regime), all Australian whistleblower protection regimes are employment or workplace focused. The *PID Act* covers federal public servants and contractors;[79] state and territory equivalents encompass state and, in some cases, local public servants. The *Corporations Act* extends beyond a narrow employment focus, extending to contractors, subcontractors, unpaid workplace participants (volunteers) and family members.[80] However, its protection regime still hinges on a workplace or quasi-workplace relationship: the whistleblower must have some workplace nexus with a 'regulated entity', being a corporation or particular financial

---

70 *Public Interest Disclosure Act 2012* (ACT); *Public Interest Disclosures Act 2022* (NSW) (n 10); *Independent Commissioner Against Corruption Act 2017* (NT); *Public Interest Disclosure Act 2010* (Qld); *Public Interest Disclosure Act 2018* (SA); *Public Interest Disclosures Act 2002* (Tas); *Public Interest Disclosures Act 2012* (Vic); *Public Interest Disclosure Act 2003* (WA).

71 *Fair Work (Registered Organisations) Act 2009* (Cth).

72 *Taxation Administration Act 1953* (Cth).

73 The *Aged Care Act 1997* (Cth) will be replaced by the *Aged Care Act 2024* (Cth) from 1 November 2025.

74 *National Disability Insurance Scheme Act 2013* (Cth).

75 *Corporations (Aboriginal and Torres Strait Islander) Act 2006* (Cth).

76 *National Anti-Corruption Commission Act 2022* (Cth).

77 See, eg, *Public Interest Disclosure Act 2013* (Cth) s 10 ('*PID Act*'); *Corporations Act 2001* (Cth) s 1317AB ('*Corporations Act*').

78 See, eg, *PID Act* (n 77) ss 13–17; *Corporations Act* (n 77) s 1317AD.

79 *PID Act* (n 77) s 69.

80 *Corporations Act* (n 77) s 1317AAA.

services legal entity.[81] If a whistleblower falls within one of these categories, they satisfy the first eligibility requirement: the scope of persons covered by the law.

The second requirement relates to the subject matter of the disclosure. Here, the Australian regimes diverge. The *PID Act* is very prescriptive, setting out different categories of wrongdoing on which the whistle can be blown, including unlawful conduct, conduct that is an abuse of public trust and conduct that causes danger to health, safety or the environment.[82] Other regimes are broader: the *Corporations Act* covers information that 'concerns misconduct, or an improper state of affairs or circumstances, in relation to' the regulated entity.[83] In both cases, the regimes are engaged whether or not the alleged wrongdoing is in fact true — provided the whistleblower has 'reasonable grounds to suspect' their allegations, the whistleblower will be protected.[84]

The third and final requirement relates to the recipient scope: the disclosure must be made to an eligible recipient. Each whistleblowing regime sets out who can receive a disclosure, which then engages the law (although there are also protections for attempted whistleblowing, or detriment taken against someone presumed to be a whistleblower). Most laws provide for three categories of recipients:

- internal whistleblowing to supervisors or senior executives;
- external whistleblowing to regulators and oversight bodies; and
- public whistleblowing to the media or members of parliament, in emergency or last-resort cases.[85]

On its face, then, there is much potential for Australia's protections to apply to sports integrity whistleblowers. Certainly, anyone within government, at any level, is likely to be protected if they raise concerns about integrity issues in relation to regulation and oversight. The breadth of private sector protections, applying to almost all corporate entities in Australia, mean that many sporting organisations — which are often proprietary limited companies or companies limited by guarantee — are within the scope of these laws. The breadth of the disclosure scope under the *Corporations Act* means that most sports integrity issues would be captured by the regime. Finally, some of the sector-specific laws might have sporting application. If, for example, a sporting team is evading its tax liability, a whistleblower could raise concerns consistently with the tax whistleblower protections.[86] Similarly, a whistleblower could raise concerns with the National Anti-Corruption Commission about corruption in sport involving some Australian Government nexus.[87]

As a concrete example, in 2016 the chief executive of the Brumbies rugby union team succeeded (on an interlocutory basis) in proving he was entitled to whistleblower protections under the *Public Interest Disclosure Act 2012* (ACT) after

81 Ibid s 1317AAB.
82 *PID Act* (n 77) s 29.
83 *Corporations Act* (n 77) s 1317AA(4).
84 Ibid.
85 See, eg, *PID Act* (n 77) s 26.
86 *Taxation Administration Act 1953* (Cth) (n 72) pt IVD.
87 Albeit protections for non-government whistleblowers are limited to offences against reprisals: see *National Anti-Corruption Commission Act 2022* (Cth) (n 76) s 30.

making multiple disclosures to the Australian Capital Territory ('ACT') Government and the University of Canberra (a team sponsor).[88] The whistleblower had raised concerns about the lawfulness of the club's commercial arrangements and was stood down as a result, precipitating the legal action. While this comprises one of few successful actions under Australian whistleblowing laws (and perhaps the sole sporting one), it demonstrates the potential for protections and accountability within Australia's existing scheme.

C *Coverage and Gaps*

To illustrate areas of potential coverage and shortcomings with the status quo, it is helpful to examine how current whistleblower protections would or would not apply to different sporting contexts in Australia. These examples are not intended to be exhaustive but they do seek to be indicative — hypotheticals that are foreseeable, and demonstrate both the potentially beneficial application of whistleblowing laws and the gaps that undermine such protections' utility in sport.[89] SIA's guidance paper for sports on the application of the *Corporations Act* also offers various instructive hypotheticals, although, understandably, its analysis is more focused on the law's practical operation than on its shortcomings.[90]

The below case studies may be hypothetical, but that should not distract from the real practical significance of whistleblowing in sport and what these scenarios tell us about the strengths and shortcomings in Australian whistleblower protections more generally. The establishment of SIA and the heightened focus on integrity within sports, including the roll-out of national integrity frameworks, coincide with greater public and policy focus on whistleblower protections in Australia. Whistleblowers have always had a role to play in sports integrity — as the starting epigraph from SIA's predecessor made clear in its submission to the Wood Review.[91] But with an active regulator, improving speak-up infrastructure in sport and elsewhere, and an active reform horizon ahead (discussed further in Part IV), we are likely to see more whistleblowing in sport, and greater sport-applicable whistleblower protections, in the years ahead. That makes it all the more critical to consider scenarios in which different types of sport whistleblowing might arise, and the challenges that might be faced by whistleblowers.

1 *Integrity within Integrity Bodies*

To begin with a straightforward hypothetical scenario, say Dylan works at SIA as part of its anti-doping program. As an employee of an Australian Government agency, Dylan is within the personal scope of the *PID Act*.[92] If Dylan became concerned about wrongdoing (say, a colleague was erroneously applying anti-doping protocols in a way that might advantage or disadvantage a particular athlete), he

88 *Jones v University of Canberra* (2016) 311 FLR 1.

89 The sports and names have been chosen randomly. The hypothetical scenarios are not intended to have any resemblance to real-life equivalents.

90 SIA, *Whistleblower Laws: Summary Paper* (July 2020) ('*SIA Summary*').

91 See above n 2 and accompanying text.

92 Public interest disclosures can be made by current or former public officials: *PID Act* (n 77) s 26. An Australian Public Service employee is a public official: s 69.

could raise concerns with his supervisor, the head of the agency or an authorised internal recipient, satisfying the recipient scope.[93] Provided Dylan had reasonable grounds to believe that his disclosure tended to show one or more instances of 'disclosable conduct' (eg, conduct that was unlawful, involved corruption, or was maladministration for being done with improper motives), his whistleblowing would constitute a protected disclosure, meeting the disclosure scope.[94]

Once Dylan had spoken up, SIA would be required to investigate his concerns.[95] He would consequently gain immunity for blowing the whistle[96] and if he faced employment-related detriment such as being dismissed or demoted, he could bring proceedings for reprisal.[97] He would also be entitled to confidentiality protections and any person who took detrimental action against him would be criminally liable.[98] The personal scope of this regime is also broad. If Dylan was instead a laboratory technician employed by a third-party laboratory engaged by SIA to undertake secondary testing and he had concerns about improper directives from an SIA official, he could still make a protected disclosure in relation to the SIA (in addition to any whistleblower protections under the *Corporations Act* he might have as an employee of a company).[99]

Of course, none of the above guarantees a positive outcome for Dylan, but the *PID Act* creates a comprehensive scheme for him to safely and lawfully expose wrongdoing within SIA and for those concerns to then be investigated. If his concerns related to the conduct of senior officials, such as the head of SIA, Dylan could instead report them to the Commonwealth Ombudsman.[100] If his concerns went unheeded, he could even escalate them by disclosing to journalists or politicians.[101] Finally, if Dylan suffered retaliation for speaking up, he would have a suite of legal protections available to him.[102] These measures do not guarantee integrity or an absence of wrongdoing within SIA or other government bodies with a role to play in ensuring sporting integrity (such as the National Sports Tribunal and the Australian Government Department of Health, Disability and Ageing). However, they encourage those who witness wrongdoing to speak up, and by so doing (a) ensure more whistleblowing; and (b) disincentivise wrongdoing by increasing the risks associated with it.

2 *Exposing a Doping Culture within Rugby League*

Regrettably, the situation is less straightforward across other parts of the Australian sporting landscape. Say Zack is a rugby league player with a professional team in the

93 Ibid s 26(1) item 1 column 2.
94 Ibid s 29.
95 Subject to various requirements and exceptions, including reallocation to other investigative agencies: ibid pt 3.
96 Ibid s 10.
97 Ibid ss 13–19A.
98 Ibid pt 2.
99 Ibid s 69(1) item 16.
100 Ibid s 34. See also 'Information for Disclosers', *Commonwealth Ombudsman* (Web Page) <https://www.ombudsman.gov.au/industry-and-agency-oversight/public-interest-disclosure-whistleblowing/information-for-disclosers>.
101 *PID Act* (n 77) s 26(1) item 2.
102 Ibid ss 13–19A.

National Rugby League ('NRL'). Zack is worried about a doping culture within the team after a club doctor pressures him to take a substance that Zack believes is prohibited under the *WADA Code*.[103] Professional sporting teams typically operate with a corporate structure involving a company regulated by the *Corporations Act* Therefore, it is likely that Zack falls within the personal scope of those whistleblower protections, as an employee of the club.[104] Under those provisions,[105] Zack could blow the whistle to an eligible recipient to satisfy the recipient scope — being either an officer or senior manager (such as the chief executive or general counsel of the club), an auditor or actuary of the club, or a person authorised by the club to receive disclosures (such as under a specific whistleblowing policy).[106] In relation to the disclosure scope, SIA has previously taken the position that '[a]llegations of breaches of match-fixing, anti-doping or breaches of integrity rules' likely meet the 'misconduct, or an improper state of affairs or circumstances' threshold.[107]

If Zack blew the whistle about his doping concerns to the club chief executive, he would be entitled to protections under the *Corporations Act* that largely mirror those under the *PID Act* outlined above in Part III(B) . However, unlike the *PID Act*, the *Corporations Act* protections are more restrictive when it comes to recipient scope: if Zack raised concerns with his coach, or the head doctor, these individuals would likely not constitute senior managers.[108] Zack would lack recourse to whistleblower protections in such circumstances. For example, if he raised concerns with his coach and was then dismissed, he would not be protected (at least under the *Corporations Act*).

What if Zack did not feel comfortable speaking up internally, due to fears that the wrongdoing was systemic and that all senior managers were implicated? He might fear that if he disclosed internally, nothing would be done in response to his concerns. Under the NRL's Anti-Doping Policy, '[i]t is the responsibility of all participants in Rugby League to promote anti-doping in Rugby League [and] [i]f you are aware that a participant is doping, you can report this confidentially'.[109] The Policy then provides contact details for the NRL's Integrity Unit, a specialised NRL Integrity Hotline, and SIA. SIA has a portal on its website for making integrity complaints, including in relation to anti-doping. However, if Zack were to raise his concerns pursuant to those avenues, he would not enjoy any whistleblower protections under the *Corporations Act* because the recipient scope under private sector whistleblowing law is limited to: (i) internal recipients;[110] (ii) the corporate regulator, the Australian Securities and Investments Commission ('ASIC'), or the banking regulator, the Australian Prudential Regulation Authority ('APRA');[111] (iii) a lawyer for the purpose of seeking legal advice in relation to the

103 *WADA Code* (n 23).
104 *Corporations Act* (n 77) s 1317AAA.
105 Ibid pt 9.4AAA.
106 Ibid s 1317AAC(1).
107 SIA, *SIA Summary* (n 90) 13.
108 Ibid 14.
109 'Anti-Doping', *NRL (National Rugby League)* (Web Page) <https://www.nrl.com/operations/integrity/anti-doping>.
110 *Corporations Act* (n 77) s 1317AA(2).
111 Ibid s 1317AA(1)(b)(i)–(ii).

whistleblowing;[112] or (iv) a journalist or member of parliament in certain narrow circumstances.[113]

This demonstrates a significant gap in current whistleblower protections in the sport integrity context. It means that whistleblower protections are only engaged when an athlete at a professional club reports internally (and even then, only to the right internal recipients) or through limited external pathways. There is presently no scope for protected reporting to leagues/competitions or SIA. Thus, if Zack reported his anti-doping concerns directly to SIA, and subsequently faced retaliation at his club, he would not have access to whistleblower-specific legal remedies.

Another potential gap relates to the on-field nature of retaliation that a whistleblowing athlete might face. Section 1317ADA of the *Corporations Act* gives a broad, inclusive definition to 'detriment', including ('without limitation'), dismissal, injury or alteration of an employee's position or duties, discrimination, harassment, injury (including psychological harm), reputational harm or damage to a person's financial position. The compensation provisions also provide for a reverse onus: provided the whistleblower can adduce or point to evidence 'that suggests a reasonable possibility of the [relevant] matters',[114] the burden is on the respondent (the employer, and/or individual who perpetrated the alleged reprisal) to disprove the claim.[115] Broadly, these provisions should make it easy for whistleblowers to make out detriment claims. However, in practice there has been very little litigation and not a single successful compensation claim under either the *PID Act* or *Corporations Act*.[116]

Despite these advantages for applicants, the orthodox workplace focus of Australian whistleblowing laws, including in relation to conceptions of detriment, may add additional challenges in the sports integrity context. Say Zack's head coach came to know that he had blown the whistle, either formally because the head coach was a designated recipient under the club's whistleblowing policy or through some informal means. Perhaps Zack had blown the whistle to the club's chief executive (a senior manager, and hence an eligible recipient), who had then unlawfully disclosed that fact to the head coach.[117] Perhaps, if an investigation eventually commenced, the team doctor — suspicious that Zack may have been the one to raise concerns — told the head coach, even if the whistleblowing itself remained confidential. What would Zack's options then be if the head coach elected not to start Zack in the next game or played him out of position? There are a variety of imaginable ways in which the head coach could seek to exact retribution on Zack for his whistleblowing, while remaining defensible in the sporting context: the coach could argue that the club is

112 Ibid s 1317AA(3).
113 Ibid s 1317AAD.
114 Ibid s 1317AD(2B)(a).
115 Ibid s 1317AD(2B).
116 Pender, *Cost of Courage* (n 19) 9.
117 While breaching the *Corporations Act* (n 77) confidentiality protections is an offence giving rise to civil penalties, there is some uncertainty around enforcement of the obligations. On one view (probably the better one), only the corporate regulator (not individual whistleblowers) has standing to bring an application for failure to comply with the confidentiality obligations. That said, it may be that disclosure of a whistleblower's identity could constitute detriment, the penalties for which are enforceable in the ordinary way. See *Mount v Dover Castle Metals Pty Ltd* (2025) 339 IR 1, 38–41 [154]–[168].

saving Zack for a big game coming up, or experimenting with a new formation, or wants to avoid a match-up between Zack and a superior opponent. Granted, this can also occur in other workplace contexts: it is commonplace that, in response to a whistleblowing claim, employers seek to justify employment action on the basis of some other, justifiable ground: for example, by claiming that there were separate, unrelated misconduct or performance issues. However, the atypical nature of the sporting context adds further complexity. While courts and workplace tribunals are familiar with interrogating organisational decision-making, they may find it more troubling to attempt to review sporting decisions made by coaching staff. One person's retaliation could be another's reasonable coaching decision.

The subtlety of retaliation caused through coaching decisions may therefore prove difficult to effectively address through litigation. While any of the above likely falls within the definition of 'alteration of an employee's position or duties to his or her disadvantage'[118] (a specified form of detriment), proving it may be more difficult — even with the help of the shifting burden. Additionally, the *Corporations Act* allows for courts to grant a range of remedies, including reinstatement,[119] or 'an injunction, on such terms as the court thinks appropriate, to prevent, stop or remedy the effects of the detrimental conduct'.[120] Once more, while, on their terms, these provisions are broad enough to allow appropriate application in the sporting context, until they are deployed effectively, question marks linger about their application to an employment context with the distinct overlay of high performance sport.

3 *Match-Fixing in Table Tennis*

Zack's case demonstrates some of the difficulties aligning the sporting reality with the *Corporations Act* framework. However, at least that regime applies to him, notwithstanding some idiosyncrasies. The situation may be worse where a sporting organisation falls entirely outside the remit of the private sector whistleblowing laws. Consider a hypothetical scenario involving match-fixing in table tennis. In Australia, table tennis is governed through a federated structure: Table Tennis Australia ('TTA'), constituted as a public company limited by guarantee, is the recognised national sporting organisation.[121] TTA is constituted by 'member state' entities, being recognised table tennis governing bodies in each state and territory otherwise known as state sporting organisations. These entities have voting rights, while there are also other membership categories that do not have voting rights. For the ACT, the member state entity is Table Tennis ACT ('TTACT'), an association incorporated under the *Associations Incorporation Act 1991* (ACT).[122]

Say Camille is a competition administrator at TTACT, charged with administering the ACT rounds of a national qualifying process that ultimately determines which Canberra-based players progress to national playoffs for potential Olympic selection. Say Camille's manager at TTACT, Ahmed, instructs her to

---

118 *Corporations Act* (n 77) s 1317ADA(c).
119 Ibid s 1317AE(1)(e).
120 Ibid s 1317AE(1)(c).
121 Table Tennis Australia ('TTA'), *Constitution: Table Tennis Australia Limited* (at 24 April 2021) <https://cdn.revolutionise.com.au/cups/tta/files/feogabkuhlsa1ml5.pdf>.
122 Table Tennis ACT Incorporated, *Objects and Rules* (at 15 December 2008) <https://cdn.revolutionise.com.au/cups/tabletennisact/files/cevxdz6o4yxxhwce.pdf>.

structure the draw for a forthcoming competition, not at random, but in a certain way that would advantage some players over others. Camille is concerned that Ahmed's direction is improper, in that it is contrary to TTACT competition policies, and might have been influenced by other factors (say Camille had heard rumours that Ahmed was in financial difficulties, and wonders whether he might have been paid by players to secure a favourable draw).

There are at least five problems occasioned by the above governance structures from a whistleblowing perspective. First, while TTA is the peak body and, as a company limited by guarantee, subject to the whistleblowing regime in the *Corporations Act*, that framework is only applicable to wrongdoing *in relation to the regulated entity*, being TTA. Therefore, wrongdoing in relation to TTACT or other state bodies, even if reported to TTA will not engage whistleblower protections because the disclosure scope is not satisfied. If Camille went to the TTA website, she would see an extensive suite of information about TTA's National Integrity Framework, including avenues for raising concerns.[123] However, if Camille raised concerns about Ahmed's conduct to TTA, she would not be classified as a protected whistleblower because the wrongdoing relates to TTACT, rather than TTA. This may be the case even if the apparent wrongdoing contravenes TTA policies as SIA has conceded in its summary of the *Corporations Act* protections and their application to sports:

> information concerning a team's alleged match-fixing is unlikely to be a disclosable matter, to the sport's [national sporting organisation], where the conduct arises in a competition administered by an SSO, and involves state or club-level athletes, even where the applicable anti-match fixing policy was imposed by the [national sporting organisation].[124]

This is a significant accountability gap in any federated structure within Australia sport.

There are also imaginable variations of this hypothetical scenario that give rise to further uncertainty (which is only likely to deter whistleblowing). Say Ahmed was an employee of TTA rather than TTACT; in that situation, his apparent match-fixing would comprise wrongdoing related to the regulated entity, satisfying the disclosure scope. However, it is less clear whether Camille would satisfy the personal scope, given she is an employee of TTACT. It is commonplace for national sporting organisation and state sporting organisation employees to work closely together to organise and administer competitions. Whether Camille would fall within TTA's whistleblower protection framework would depend on whether her engagement with TTA constituted the supply of services to that organisation (directly or indirectly through TTACT).[125] While the *Corporations Act* provides that such supply can be paid or unpaid, which may mean informal collaboration between the two organisations is sufficient, coverage may depend on the nature and extent of their relationship and Camille's role in relation to any particular competition. That is hardly a level of certainty that would incline someone to blow the whistle.

---

123 Table Tennis Australia, 'Integrity – Protecting Table Tennis Together', *TTA National Integrity Framework* (Web Page, 1 March 2024) <https://www.tabletennis.org.au/about-governance/national-integrity-framework>.

124 SIA, *SIA Summary* (n 90) 13.

125 *Corporations Act* (n 77) ss 1317AAA(c)–(d).

The second issue resulting from the governance structure of table tennis in Australia arises as a consequence of TTACT's legal status. The above analysis related to Camille's attempt to blow the whistle to TTA, but what if she blew the whistle to her immediate employer, TTACT? The *Corporations Act* framework applies to regulated entities, being (a) companies; (b) certain financial entities; and (c) 'corporation[s] to which paragraph 51(xx) of the *Constitution* applies'.[126] TTACT is an incorporated association; it does not satisfy the first or second category. Is it a corporation to which s 51(xx) applies? This is a complex constitutional question, arising because the *Corporations Act* was legislated on the basis of the trading, financial and foreign corporations head of power in the *Australian Constitution*. In some cases, particularly if an incorporated association undertook significant revenue-generating activity (such as offering paid membership, charging fees for competition entry and selling merchandise), this might satisfy the constitutional definition. However, it is by no means certain that this will always or even typically be the case. Thus, SIA says in its guide:

> there are a variety of cases that have held that sport organisations registered as an incorporated association are not constitutional corporations for the purposes of the *Fair Work Act 2009*, which uses the same definition … Importantly however, the fact that sport organisations are usually not-for-profit is not, alone, sufficient to be considered 'not trading'.[127]

Consequently, Camille would be left in the invidious position of requiring a working knowledge of constitutional law, or an astute lawyer, to know whether she would be protected by the *Corporations Act* in blowing the whistle to a senior manager at TTACT. Furthermore, that uncertainty will never be resolved with any comprehensiveness, say through a judgment or a counsel opinion procured by SIA, because it will always depend on a case-by-case assessment of the constitutional test.[128] As such, even if TTACT's activities were sufficient to satisfy the constitutional threshold, that is no guarantee that, say, Table Tennis Victoria would also be covered by the whistleblowing regime.

The third potential issue relates to the status of participants. Say Camille was not an employee of TTACT, but instead a player in the competition. While in professional clubs athletes like Zack are employees and therefore satisfy the personal scope, in many other sports, most participants are not employees of governing bodies, but instead participate on a voluntary basis — even at a relatively high-level, some may be required to pay registration fees to compete, while others may compete for prize money. If Camille inspected the draw for the qualifying competition and grew concerned that one of her rivals had a suspiciously easy route to the finals (a route that would be highly unlikely in a randomised draw), she may wish to register her concerns. However, it is uncertain whether the *Corporations Act*, even if it did apply to TTACT, would extend to Camille. The personal scope is predicated on some form of workplace relationship with the regulated entity,[129] with the prototypical category being employees. Although it extends to service providers, whether paid or

---

126 Ibid s 1317AAB.

127 SIA, *SIA Summary* (n 90) 11 (emphasis omitted).

128 See, eg, *R v Federal Court of Australia; Ex parte WA National Football League (Inc)* (1979) 143 CLR 190, 233 (Mason J).

129 *Corporations Act* (n 77) s 1317AAA.

unpaid, it seems unlikely that a participant in a TTACT-organised competition could be described as a service provider. While the retaliation risks might be more direct for employees, there remains ample scope for detriment against participants: blacklisting from competition, impact on membership, access to coaching and development opportunities and so on. The lack of protections would therefore likely inhibit whistleblowing for participants who are not employees of a sporting body.

Fourth, in none of these circumstances could someone at TTACT or TTA blow the whistle to SIA and be entitled to protections. Despite being the national integrity body for sport, individual reports of match-fixing or other forms of competition manipulation are not within SIA's jurisdiction. If a whistleblower otherwise met the personal and disclosure scope of the *Corporations Act* regime, the only regulatory disclosure pathway would be to ASIC or APRA. Neither is likely to be particularly interested in match-fixing in sport. While a report to law enforcement may engage standalone witness protections, they are largely enforced through criminal offence provisions, rather than the suite of civil remedies available to whistleblowers.

A fifth and final hurdle that Camille might face is that, depending on the policies enforced by TTA and TTACT, she may also be under a positive obligation to disclose wrongful conduct to a superior or other organisation, despite potentially having only limited access to legal protections if she does so. Many sporting organisations now impose disciplinary penalties on participants, employees and volunteers who fail to blow the whistle after becoming aware of misconduct, pursuant to SIA model frameworks.[130] This places whistleblowers in a difficult position, where they face consequences whether they report or fail to do so. Obligations to disclose may also raise complexities as further reform is pursued. Since some whistleblowing frameworks do not apply where disclosures are made in the ordinary course of a person's duties, whistleblower protections might not be available where someone faces a positive obligation to report.[131] This highlights the need for better integration across whistleblowing and accountability frameworks moving forward.[132]

4 *Cultural Issues in Cycling*

Further complications arise from the disclosure scope, and the exclusion of personal grievances from whistleblower protections. Say Amira is an elite cyclist within the track cycling program at AusCycling. Say too that Amira is of Iranian heritage. Over the past decade, there has been a growing focus on organisational culture giving rise to integrity concerns.[133] This has arisen both in acute cases of wrongdoing (such as

[130] See, eg, Sport Integrity Australia and Swimming Australia, *National Integrity Framework: Competition Manipulation and Sport Gambling Policy* (2024) cl 4.1(g) <https://www.swimming.org.au/resources/swimming-national-integrity-framework>.

[131] See, eg, *PID Act* (n 77) s 26(1) item 1 column 3(b).

[132] See discussion below at Part IV(B).

[133] See, eg, Nino Bucci, 'Gymnastics Australia Asked Child Athletes Who Reported Abuse to Sign Gag Orders before Meetings', *The Guardian* (online, 10 August 2022) <https://www.theguardian.com/australia-news/2022/aug/10/gymnastics-australia-asked-child-athletes-who-reported-abuse-to-sign-gag-orders-before-meetings>; Tom Maddocks and Russell Jackson, 'AFL Terminates Investigation

sexual abuse and harassment and racial vilification) and more generalised concerns about toxic organisational cultures that cause harm to participants. In response to such allegations, there have been a number of reports and inquiries. Ensuring healthy and respectful organisational cultures within Australian sport has become a priority for SIA — both in relation to child participants (under the safeguarding framework)[134] and for athletes generally. For sports that have adopted the National Integrity Framework, SIA can receive complaints of unlawful discrimination.[135] 'Discrimination in sport is any type of unfair treatment based on a Protected Characteristic', SIA has previously explained, 'which results in a negative outcome and can include both direct and indirect discrimination'.[136]

Say Amira has been experiencing a toxic training environment due to repeated comments involving racial stereotypes by the squad's sports scientist, Stephan. At first Amira might have stayed quiet, but after seeing other high-profile cases of athletes calling out racial discrimination in sport, she decides to speak up. In doing so, she would face many of the same challenges outlined in Part III(C)(2) above. As an employee of AusCycling, a company limited by guarantee, Amira would be within the personal scope of the *Corporations Act* framework, albeit with limits on protected disclosure pathways and complaints to SIA due to issues with the recipient scope.

However, two more acute issues arise in relation to the disclosure scope. First, would the conduct constitute 'misconduct, or an improper state of affairs or circumstances' in relation to AusCycling?[137] Racial discrimination is unlawful under the *Racial Discrimination Act 1975* (Cth) ('*Racial Discrimination Act*') and state and territory equivalents.[138] The plain wording of the disclosure scope indicates a breadth of conduct is captured, but the indicative examples provided suggest a somewhat higher bar. For example, the *Corporations Act* suggests that the disclosure scope requirement will be satisfied where the regulated entity has engaged in conduct in contravention of certain financial laws, or where the conduct 'constitutes

into Alleged Racism at Hawthorn, Making No Findings Against Alastair Clarkson and Chris Fagan', *ABC News* (online, 30 May 2023) <https://www.abc.net.au/news/2023-05-30/afl-hawthorn-racism-review-makes-no-findings/102413056>; Mostafa Rachwani, 'Swimming Australia Report Calls for Skinfold Test Ban and Female Coach Quota', *The Guardian* (online, 21 January 2022) <https://www.theguardian.com/sport/2022/jan/21/swimming-australia-report-recommends-banning-skinfold-tests-and-introducing-female-coach-quota>; Kieran Pender, 'The Week that Rocked Australian Swimming: Maddie Groves Blows Lid on Ugly Culture', *The Guardian* (online, 20 June 2021) <https://www.theguardian.com/sport/2021/jun/20/the-week-that-rocked-australian-swimming-maddie-groves-blows-lid-on-ugly-culture>. Note, this trend does have longstanding origins: see, eg, Hayden Opie, *Report of the Independent Inquiry into Women's Artistic Gymnastics at the Australian Institute of Sport* (1995).

134 'Safeguarding for Children and Young People', *Sport Integrity Australia* (Web Page) <https://www.sportintegrity.gov.au/what-we-do/safeguarding/safeguarding-children-and-young-people>.

135 'What You Can Report', *Sport Integrity Australia* (Web Page) <https://www.sportintegrity.gov.au/make-a-report/what-you-can-report>.

136 'Tell Us About a Concern or Issue', *Sport Integrity Australia* (Web Page) <https://www.sportintegrity.gov.au/contact-us/reporting> archived at <https://web.archive.org/web/20250315022029/https://www.sportintegrity.gov.au/contact-us/reporting>.

137 *Corporations Act* (n 77) s 1317AA(4).

138 *Discrimination Act 1991* (ACT); *Anti-Discrimination Act 1977* (NSW); *Anti-Discrimination Act 1992* (NT); *Anti-Discrimination Act 1991* (Qld); *Equal Opportunity Act 1984* (SA); *Anti-Discrimination Act 1998* (Tas); *Equal Opportunity Act 2010* (Vic); *Equal Opportunity Act 1984* (WA).

an offence against any other law of the Commonwealth that is punishable by imprisonment for a period of 12 months or more'.[139] However, the regime established by the *Racial Discrimination Act* is largely based on civil rather than criminal liability.[140]

Second, and relatedly, the *Corporations Act* excludes from the disclosure scope 'personal work-related grievance[s]' (with equivalent limitations in other regimes).[141] That phrase is defined as including

> information [that] concerns a grievance about any matter in relation to the discloser's employment, or former employment, having (or tending to have) implications for the discloser personally[142]

unless the disclosure has

> significant implications for the regulated entity to which it relates, or another regulated entity, that do not relate to the discloser'.[143]

A listed indicative example includes 'an interpersonal conflict between the discloser and another employee'.[144]

Greater clarity about the policy intent of this exclusion can be found in the equivalent provision in the *PID Act*, which was amended in mid-2023. The revised *PID Act* provision provides that 'personal work-related conduct is not disclosable conduct unless', for example,

> (b) the conduct:
>
> (i) is of such a significant nature that it would undermine public confidence in an agency (or agencies); or
>
> (ii) has other significant implications for an agency (or agencies).[145]

Both the disclosure scope and personal work-related grievance exclusion would cause uncertainty for someone in Amira's position. Clearly there are versions of this scenario where the disclosure scope is satisfied, with no concerns about the exclusion. The disclosure scope is evidently met if there is systemic, organisation-wide racial discrimination, including obvious contraventions of the *Racial Discrimination Act*, impacting Amira alongside other members of the squad and AusCycling employees. But what if Stephan's comments were made only once, only to Amira? Notwithstanding that they may constitute unlawful conduct contrary to the *Racial Discrimination Act* and have a harmful impact on Amira, the disclosure scope threshold in the *Corporations Act* in relation to such conduct is not clear and the exclusion may be applicable. Does a single incident of racial discrimination have 'significant implications' for an organisation? The answer to that question is vexed, and may depend on the nature of the discrimination, its impact, the power imbalance between those involved, and possibly even the size of the sporting organisation (an

139 Ibid s 1317AA(5)(d).
140 *Racial Discrimination Act 1975* (Cth) pt II, but see pt IV.
141 *Corporations Act* (n 77) s 1317AADA(1)(a). See, eg, *PID Act* (n 77) s 29A.
142 *Corporations Act* (n 77) s 1317AADA(2)(a).
143 Ibid s 1317AADA(2)(b)(i).
144 Ibid s 1317AADA(2) example (a).
145 *PID Act* (n 77) s 29(2A) (emphasis omitted).

incident in a small organisation may be more significant than one in an organisation with hundreds of staff).

These nuanced distinctions are evidenced in a 'help sheet' prepared by SIA, where '[m]y work mate propositioned me at the office after a drinks function' is classified as a workplace grievance, while the following is provided as an example of a qualifying whistleblower disclosure: 'My work mate propositioned me. I'm the fifth woman in our office he has sexually harassed. We have all complained to HR and nothing has happened.'[146] These are polar examples, but there is likely to be a range of conduct between these poles where the answer is less straightforward. That would leave Amira in a position of uncertainty should she wish to raise concerns about Stephan's conduct.

It is worth noting that certain additional whistleblower-style protections exist in relation to conduct that might otherwise be considered a 'workplace grievance'. For example, the *Sex Discrimination Act 1984* (Cth) s 47A makes it unlawful to victimise a person for making allegations of its contravention or for making or proposing to make a complaint under the *Australian Human Rights Commission Act 1986* (Cth). There is theoretically a broad array of remedies available in the event of victimisation, including monetary damages and orders to reinstate a person's employment where they have been unjustly dismissed.[147]

D *Discussion*

From the foregoing analysis, a few themes emerge that helpfully articulate some of the dilemmas facing sport-related whistleblowers and sports integrity policymakers wishing to improve the framework.

1 *Availability of Protections*

Evidently, there are substantial gaps in the availability of protections for prospective sports integrity whistleblowers. These gaps arise for a few reasons, including because of the corporation-focus of the *Corporations Act* (reflecting its constitutional underpinnings), and the employment-centric nature of the existing regime (which may exclude the breadth of potential sports integrity whistleblowers, encompassing non-contracted players, volunteers, parents and so on). Thus, while the private sector framework potentially offers partial coverage for sports integrity whistleblowers, the existing scope of potential coverage is deeply unsatisfactory.

This is particularly so in relation to entities covered by the *Corporations Act* regime. Australia's sporting organisation landscape is characterised by a breadth of legal types of governing bodies. Most national sporting organisations are companies limited by guarantee, but due to Australia's federal structure, these national sporting organisations are often the tip of the organisational pyramid. Beneath them are state sporting organisations, which may or may not take corporate form (and, even if they do, may or may not be trading corporations for constitutional purposes). Beneath them are clubs and other sporting bodies, some formal and some informal. Any of

146 SIA, *SIA Summary* (n 90) 20.
147 *Australian Human Rights Commission Act 1986* (Cth) pt IIB.

these entities could face integrity risks. However, only those that fall within the scope of the *Corporations Act* benefit from a regime that will help whistleblowers speak up.

Advocacy groups are increasingly arguing for a broad-based approach to whistleblower protections, suggesting that there are a range of heads of power in the *Australian Constitution* that could underpin a more holistic whistleblower protection regime.[148] Even if a conservative constitutional approach was taken, Australia became a signatory to the *Council of Europe Convention on the Manipulation of Sports Competitions* ('*Macolin Convention*') in 2019[149] and is a longstanding participant in various international anti-doping instruments, meaning the external affairs power in the *Australian Constitution* would likely support sports-specific whistleblower protections.[150] This could apply to all sporting organisations or be framed so as to apply only to national sporting organisations, but permit whistleblowers to raise concerns to national sporting organisations as they arise throughout the sport organisational pyramid.

Nor is the need to extend application beyond the employment context an insurmountable obstacle. The whistleblower protections in the *Aged Care Act 1997* (Cth), for example, extend to 'a family member, carer, representative, advocate (including an independent advocate) of the recipient, or another person who is significant to the recipient'.[151] There is no conceptual reason why an appropriately-drafted whistleblowing framework for sports integrity whistleblowers cannot encompass the broad spectrum of people who may have information about wrongdoing in sport.

2 *SIA's Role in the Framework*

It is a major flaw of the existing regime that SIA can offer no legal protection to whistleblowers who provide it with information. While SIA's role in Australia's sports integrity regime may offer a degree of practical protection — national sporting organisation, for example, may be hesitant to retaliate against a whistleblower who gives information to SIA — this is hardly sufficient to assure prospective whistleblowers. This shortcoming is not unique to sports integrity: because ASIC and APRA are the only regulators eligible to receive *Corporations Act* disclosures, whistleblowers wanting to disclose to any other regulatory body are left with no protected pathway.[152] Accordingly, a significant improvement to the private sector whistleblowing regime generally, which would specifically benefit sports integrity, would be the inclusion of a range of regulatory bodies, including SIA, within the *Corporations Act* framework. This adjustment need not be difficult; the regime

---

148 See, eg, Human Rights Law Centre, Transparency International Australia and Griffith University Centre for Governance and Public Policy, Submission to Treasury, *Response to PwC – Regulation of Accounting, Auditing and Consulting Firms in Australia* (29 June 2024) 7 ('*Treasury Submission*').

149 *Council of Europe Convention on the Manipulation of Sports Competitions*, opened for signature 18 September 2014, CETS No 215 (entered into force 1 September 2019) ('*Macolin Convention*').

150 *Australian Constitution* s 51(xxix).

151 *Aged Care Act 1997* (Cth) (n 73) s 54-4(1)(d). The *Aged Care Act 2024* (Cth) (n 73), which will take effect from November 2025, adopts the same approach.

152 For one recent controversy and associated commentary about inadequate reporting channels, see Knaus (n 34).

already provides for disclosures to 'a Commonwealth authority prescribed for the purposes of [s 1317AA(1)(b)] in relation to the regulated entity'.[153] However, as yet, no Commonwealth authorities have been so prescribed. SIA should be incorporated within the *Corporations Act* framework in relation to sports integrity whistleblowing. It seems absurd that, at present, a whistleblower can gain far more protection by disclosing to a national newspaper than by speaking to SIA.[154]

3 *Evolving Notions of Sports Integrity*

Amira's circumstances demonstrate the ongoing evolution of what constitutes sports integrity issues. In the past, instances of workplace bullying, sexual harassment, discrimination and other forms of toxic behaviour might have been considered matters for employment law generally, or anti-discrimination law. Increasingly, a sports integrity lens is being applied to these issues — as demonstrated by their inclusion within SIA's scope, and the numerous, recent high-profile reviews and inquiries into cultural issues within sports, including swimming, gymnastics and AFL clubs.[155] Amira's examples demonstrate some of the uncertainties that arise as a result, which may reflect a lag between the law and societal expectations around wrongdoing. It also demonstrates the need for flexibility in the law to permit continuing evolution. Particularly in the sporting context, where competitive imperatives often drive rapid change, whistleblower protections regimes need to be wide enough, or updated frequently enough, to capture new and emerging forms of sports integrity risks.

4 *Need for Whistleblower Protections*

Finally, it is worth underscoring why the shortcomings and loopholes in protection are so problematic. As things stand, sports integrity whistleblowers who are not employed by a sporting organisation are entitled to no form of protection (although, conversely, they face fewer legal risks in speaking up). For those who are employed, workplace law may provide some legal protections even in the absence of the application of whistleblower protection law. For example, general protections in the *Fair Work Act 2009* (Cth) protect against adverse action for raising a complaint or inquiry,[156] including to an external body such as SIA. This is better than nothing, but whistleblower protections exist for a reason — they are additional, enhanced legal protections, in recognition of whistleblowers' important societal role. Whistleblower protections are meaningfully different and, in critical respects, more protective than employment law. Accordingly, it is not an answer to the above to say that

---

153 *Corporations Act* (n 77) s 1317AA(1)(b)(iii).

154 Provided they follow the steps set out in the *Corporations Act* (n 77) s 1317AAD (see above Part III(C)(2)).

155 See, eg, 'Policies: 2021 Independent Panel Report Response', *SwimAus* (Web Page) <https://www.swimming.org.au/resources/2021-independent-panel-report-response>; Australian Human Rights Commission, *Change the Routine: Independent Review into Gymnastics in Australia* (Report, 2021) <https://humanrights.gov.au/our-work/sex-discrimination/publications/change-routine-independent-review-gymnastics-australia>; University of Technology Sydney ('UTS'), *Do Better — Independent Review into Collingwood Football Club's responses to Incidents of Racism and Cultural Safety in the Workplace* (Final Report, 2021) <https://resources.afl.com.au/afl/document/2021/02/01/0bd7a62e-7508-4a7e-9cb0-37c375507415/Do_Better.pdf>.

156 *Fair Work Act 2009* (Cth) s 340.

employment law is enough. The compelling policy rationale for whistleblower protections in corporate Australia and in public sector Australia is equally strong in the sports integrity context.

Consider Zack's example from Part III(C)(2) above. Say Zack threatened to blow the whistle to SIA after initial attempts to raise concerns with his coach (which would not satisfy the recipient scope). Because SIA is not an authorised recipient, the club could dismiss Zack's employment for breach of contract. It could even seek an injunction to prevent Zack from exposing confidential information. Furthermore, if Zack went ahead and blew the whistle to SIA, the club could seek damages in contract, equity and under statute. That may sound far-fetched — and there is some authority in equity that no confidence lies in iniquity[157] — but it is hardly novel. In recent years, ClubsNSW sued former employee and whistleblower Troy Stolz after he gave board documents to Andrew Wilkie MP and journalists, disclosing widespread non-compliance with anti-money laundering law by ClubsNSW's member clubs.[158] The case eventually settled, but not before Stolz faced substantial legal costs.[159] It is for this reason that whistleblowing law provides both a sword (the ability to seek compensation for retaliation) and a shield — an immunity from criminal, civil and administrative liability. Only if Zack is covered by the *Corporations Act* and SIA is an eligible recipient can he safely and lawfully raise concerns about doping to the regulator. At present, someone in Zack's shoes would face an unenviable choice.

IV Reform

A *State of Play*

The identification of these issues is timely, given the considerable current momentum around stronger whistleblower protection laws in Australia. There has been widespread recognition of the fact that Australia's protection framework, particularly at a federal level, is inadequate.[160] This policy discourse has been made more salient by the high-profile prosecutions of several whistleblowers.[161] In mid-2023, the

[157] See, eg, *Gartside v Outram*, where it was said that 'there is no confidence as to the disclosure of iniquity': (1856) 26 LJ Ch 113, 114. However, note the caution expressed in the authoritative Australian text: Mark Irving, *The Contract of Employment* (LexisNexis, 2nd ed, 2019) 620–1.

[158] Christopher Knaus, 'NSW Clubs' Lobby Alleges Whistleblower Troy Stolz Waged Media Campaign to "Tarnish" Its Reputation', *The Guardian* (online, 15 August 2022) <https://www.theguardian.com/australia-news/2022/aug/15/nsw-clubs-lobby-alleges-whistleblower-troy-stolz-waged-media-campaign-to-tarnish-its-reputation>.

[159] Michael McGowan, 'ClubsNSW Settles Case with Terminally Ill Whistleblower Troy Stolz', *The Guardian* (online, 7 February 2023) <https://www.theguardian.com/australia-news/2023/feb/07/clubsnsw-settles-case-with-terminally-ill-whistleblower-troy-stolz>.

[160] Pender, *Cost of Courage* (n 19) 13; Griffith University Centre for Governance and Public Policy, Human Rights Law Centre and Transparency International Australia, *Protecting Australia's Whistleblowers: The Federal Roadmap* (2022) 2 ('*Federal Roadmap*').

[161] See, eg, Basford Canales, 'David McBride, 14 May 2024' (n 4); Paul Karp, 'Prosecution of Whistleblower Lawyer Bernard Collaery Dropped after Decision by Attorney General', *The Guardian* (online, 7 July 2022) <https://www.theguardian.com/australia-news/2022/jul/07/prosecution-of-whistleblower-lawyer-bernard-collaery-dropped-after-decision-by-attorney-general>; Olivia Mason, 'ATO Whistleblower Richard Boyle has Protection Appeal Dismissed — but Reasons

Australian Parliament enacted a first phase of reform to the *PID Act*, largely comprising technical changes to improve its functioning.[162] In late 2023, the Australian Government's Attorney-General's Department published a consultation paper on more comprehensive reform to the *PID Act*.[163] Among the issues listed for consideration in the discussion paper was whether the Government should establish a whistleblower protection authority.[164] In September 2025, the Attorney-General's Department released an exposure draft of the Public Interest Disclosure and Other Legislation Amendment (Whistleblower Protections) Bill 2025 to reform the *PID Act* and create a Whistleblower Ombudsman within the Commonwealth Ombudsman, with some though not all of the functions envisaged by advocates of an authority.[165]

Whistleblower protection reform has also been part of several responses to recent major scandals and shortcomings. The *Aged Care Act 2024* (Cth) was a reform that arose from the Royal Commission into Aged Care Quality and Safety and includes stronger whistleblower protections.[166] In response to the PwC leaks scandal, whistleblower protections in the tax sector have been strengthened,[167] while consideration is ongoing regarding improving arrangements for the consulting, accounting and audit sector.[168] Better protections for whistleblowers in the NDIS sector have been mooted,[169] while new whistleblower protections were introduced in late 2024 for parliamentary staff as part of the Independent Parliamentary Standards Commission.[170]

However, together with the second phase of *PID Act* reform, perhaps the most substantial development in this context has just commenced with the statutory review of the *Corporations Act* whistleblower protections, which is being led by Treasury. The review, required under the last round of amendments to the framework

---

Suppressed for Now', *ABC News* (online, 19 June 2024) <https://www.abc.net.au/news/2024-06-19/richard-boyle-has-bid-for-whistleblower-protections-dismissed/103996456>.

162 Public Interest Disclosure Amendment (Review) Bill 2022 (Cth).

163 Attorney-General's Department (Cth), *Reforms Consultation Paper* (n 9).

164 Ibid 20–3.

165 See Attorney-General's Department (Cth), 'Public Sector Whistleblower Reforms', *Consultation Hub* (Web Page)<https://consultations.ag.gov.au/integrity/public_sector_whistleblower_reforms/>.

166 See *Aged Care Act 2024* (Cth) (n 73) ch 7 pt 5, which will be in force from 1 November 2025. See further 'About the New Rights-Based Aged Care Act', *Department of Health, Disability and Ageing (Cth)* (Web Page, 18 September 2025) <https://www.health.gov.au/our-work/aged-care-act/about>.

167 *Treasury Laws Amendment (Tax Accountability and Fairness) Act 2024* (Cth) sch 2. See, eg, *Taxation Administration Act 1953* (Cth) (n 72) ss 14ZZT, 14ZZXA.

168 Treasury (Cth) (n 33) 39–40.

169 See, eg, Human Rights Law Centre, Submission to Senate Standing Committees on Community Affairs Legislation Committee, Parliament of Australia, *Inquiry into the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No 1) Bill 2024* (31 May 2024). See also Senator Jordon Steele-John's proposed amendments to the National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No 1) Bill 2024 (Cth) that would have strengthened whistleblower protections in the *National Disability Insurance Scheme Act 2013* (n 74) but were rejected by the Senate: National Disability Insurance Scheme Amendment (Getting the NDIS Back on Track No. 1) Bill 2024, Committee of the Whole debate, 12 Aug 2024, [sheet 2738] (Senator Steele-John) <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fr7181%22>.

170 *Parliamentary Workplace Support Service Amendment (Independent Parliamentary Standards Commission) Act 2024* (Cth) amending *Parliamentary Workplace Support Service Act 2023* (Cth) pt 2A div 8.

in 2019,[171] provides an opportunity for substantial consideration of the efficacy of Australia's private sector whistleblower protections. Given that many of the issues I identify in this article arise from the partial or flawed application of the *Corporations Act* in the sports integrity context, this could represent a prime opportunity for change.

This momentum juxtaposes somewhat awkwardly with SIA's evolving position. As highlighted earlier, SIA's *2022–26 Corporate Plan* indicated an intention to 'initially focus on the establishment of the legislative framework required to support protected disclosures as a Commonwealth authority under the whistleblower laws', as a precondition to 'deliver' a 'Whistleblower Scheme for the sporting community'.[172] The *2025–29 Corporate Plan*, however, only indicates that SIA provides 'avenues for listening to and managing confidential disclosures, providing advice, supporting and protecting people who choose to report' — there is no longer any explicit mention of whistleblowing or whistleblower protections.[173] This dearth of stronger reform objectives may be understandable given SIA is a small agency with limited resources. However, given the importance of whistleblowers to exposing sports integrity shortcomings, the issues I identify in this article and the current momentum for change, SIA may wish to reconsider the prioritisation of a stronger whistleblower protection framework.

B *Legislative Reform*

What, then, would optimal reform look like? A range of civil society groups, including the Human Rights Law Centre at which I work, have consistently called for a singular whistleblowing regime for all non-government whistleblowing, aligned to the maximum extent possible with the *PID Act* regime.[174] Such a proposal is not novel — it was recommended by a 2017 bipartisan joint parliamentary inquiry.[175] Consistency is desirable due to existing overlap and unnecessary confusion: the existence of multiple, inconsistent regimes imposes a sizeable burden on both organisations and prospective whistleblowers. Furthermore, consolidating whistleblower protections into a single regime will ensure harmonised progress moving forward so that future reform can be done cleanly in one place, rather than inconsistently across the existing and increasingly complex patchwork quilt of regulation. As mentioned previously, a singular non-government whistleblowing law might be adequately supported by federal legislative authority under the *Australian Constitution*.[176] The optimal reform, then, is that sports integrity whistleblowers are considered and addressed as part of holistic reform that delivers an overarching, accessible whistleblower protection regime for non-public sector whistleblowers, maximally-aligned with the *PID Act* for consistency and harmonisation.

---

171 *Corporations Act* (n 77) s 1317AK.

172 SIA, *2022–26 Corporate Plan* (n 40) 20.

173 SIA, *2025–29 Corporate Plan* (n 41) 9.

174 See, eg, Griffith University Centre for Governance and Public Policy, Human Rights Law Centre and Transparency International Australia, *Federal Roadmap* (n 160); Human Rights Law Centre, Submission No 494035328 to Attorney-General's Department (Cth), *Public Sector Whistleblowing Stage 2 Reforms* (9 January 2024) 37.

175 PJCCFS, *PJCCFS Report* (n 56) xiii.

176 See Human Rights Law Centre, *Treasury Submission* (n 148) 7. See also above nn 148–9 and accompanying text.

Harmonised reform need not overlook the particularities of sports integrity whistleblowers. It has been suggested in other contexts, including aged care,[177] that a single whistleblowing framework can still account for sector-specific distinctions, building from a common base. In other words, from a core framework of best-practice protections, provision could still be made for the distinctive nature of sport — non-employed players might be brought within the personal scope, for example, just as family members might be included in an aged care specific allowance. There is a middle-ground that can be reached through appropriate legislative drafting to ensure the benefits of consistency while remaining sufficiently flexible to accommodate sector-specific needs.

Comprehensive, harmonised reform will take time. As an interim solution, temporary amendments could be made to the *Corporations Act* to better integrate sports integrity whistleblowing. These changes could include the insertion of SIA as a regulatory reporting channel, expansion of the disclosure scope to better permit reporting of wrongdoing within a pyramidal sport organisational structure, and changes to the personal scope to encompass non-employed participants. Such changes would address some, albeit not all, of the shortcomings and uncertainties identified in Part III. As interim solutions, they could all be done within the existing scope of the *Corporations Act*, including its current constitutional basis (by providing coverage for non-constitutional corporations as a consequence of reporting to the parent national sporting organisation, rather than in their own right). Such changes should be considered as a matter of urgency, to ensure sports integrity whistleblowers have the confidence to speak up now.

If comprehensive and harmonised reform is not forthcoming, further consideration of a sports integrity-specific whistleblowing framework may be required. For the reasons outlined above, such a step is the less desirable option — it would further fragment protections, meaning that some sports integrity whistleblowers could find themselves covered by multiple overlapping and potentially inconsistent regimes (that is, even in a simple example, both the *Corporations Act* and the sports integrity-specific framework). However, this may become necessary in the absence of a holistic approach. As mentioned in Part III(D)(1) above, there is likely to be adequate constitutional basis for such legislation under the external affairs power since the *Macolin Convention*, for example, provides that:

> [e]ach Party shall encourage sports organisations to adopt and implement the appropriate measures in order to ensure … (c) effective mechanisms to facilitate the disclosure of any information concerning potential or actual cases of manipulation of sports competitions, *including adequate protection for whistle blowers* …[178]

Such protections could be included in an amended *Sport Integrity Australia Act 2020* (Cth), or a standalone statute. Standalone legislation would have the benefit of being

[177] See, eg, Human Rights Law Centre, Griffith University Centre for Governance and Public Policy and Transparency International Australia, Submission to Department of Health and Aged Care (Cth), *Consultation: Foundations of a New Aged Care Act* (21 September 2023) 10–14.

[178] *Macolin Convention* (n 149) art 7(2) (emphasis added).

fully tailored to the atypical sporting context, albeit may contribute to the further fragmentation of the whistleblower protection landscape in Australia.

C *Beyond Law Reform*

Law reform is a necessary but not sufficient response to the need to protect and empower sport-related whistleblowers in Australia. The history of whistleblowing laws in Australia shows that legal protections are not self-executing; alone, they do not achieve robust, accessible protections for whistleblowers. Accordingly, sports policymakers in Australia should consider a range of non-legislative initiatives to support law reform and best ensure sport integrity whistleblowers can speak up.

1 *Whistleblower Support Function*

First, there has been considerable discussion in recent policy dialogue about the utility of dedicated institutional support for whistleblowers. This has been most visible at a federal level, with growing calls for a whistleblower protection authority or commission, culminating in the introduction of a Bill to establish one in early 2025.[179] Equivalent bodies exist in several other jurisdictions, including the US,[180] the Netherlands[181] and Slovakia.[182] Such a body, if established in Australia, would benefit the sports integrity landscape. However, in the absence of such significant institutional reform, there nevertheless remains scope for positive movement within the sports integrity ecosystem. In 2024 the NSW Ombudsman established a dedicated internal whistleblower support team.[183] An independent review of Queensland's whistleblowing regime in 2023 recommended greater support functions within the state integrity landscape.[184] Many of the major banks, which pursued comprehensive internal whistleblowing initiatives following the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, have dedicated whistleblower support officers.[185] SIA could consider following these initiatives and

---

[179] For the Bill's current status, see 'Whistleblower Protection Authority Bill 2025', *Parliament of Australia* (Web Page) <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillhome%2Fs1436%22>. See also Transparency International Australia, Human Rights Law Centre and Griffith University Centre for Governance and Public Policy, *Making Australian Whistleblowing Laws Work: Draft Design Principles for a Whistleblower Protection Authority* (February 2024) ('*Design Principles*'); Whistleblower Protection Authority Bill 2025 (Cth).

[180] 'Disclosure of Wrongdoing: Overview', *US Office of Special Counsel* (Web Page) <https://osc.gov/Services/Pages/DU.aspx>.

[181] 'English', *Huis voor Klokkenluiders* [*Dutch Whistleblowers Authority* (Netherlands)] (Web Page) <https://www.huisvoorklokkenluiders.nl/english>.

[182] 'About Us', *Úrad na Ochranu Oznamovateľov* [*Office for the Protection of Whistleblowers* (Slovakia)] (Web Page) <https://www.oznamovatelia.sk/en/o-nas/>.

[183] NSW Ombudsman's Office, 'Empowering Public Officials to Speak Up: NSW Ombudsman Sets Up New Whistleblower Support Function' (June 2024, Issue 63) *Corruption Matters* <https://www.icac.nsw.gov.au/newsletter/issue63/ombudsman.html>.

[184] Wilson (n 9) 8–9.

[185] See, eg, 'Whistleblower Support Officer': CommBank, 'Group Whistleblower Policy' (April 2025) <https://www.commbank.com.au/content/dam/commbank/assets/about/opportunity-initiatives/commbank-whistleblower-policy.pdf>; 'Whistleblower Protection Officer': Australia and New Zealand Banking Group ('ANZ'), 'Whistleblower Policy' (April 2025) <https://www.anz.com.au/about-us/esg/fair-responsible-banking/culture-conduct/>; National Australia Bank ('NAB'), 'Group Whistleblower Protection Policy' (April 2025) <https://www.nab.com.au/content/dam/nabrwd/

appropriately resourcing a dedicated whistleblower support function to assist those who reach out to provide SIA with information.

2 *External Support and Legal Advice*

Recognition of the need for greater institutional support for whistleblowers has been accompanied by an awareness that some of that support must necessarily be delivered independently. There has, accordingly, been growing consideration of the provision of such support — largely focused on legal advice and mental health and psychological support. The need for legal assistance is an obvious consequence of the complexity of whistleblowing schemes and the associated legal risk. Victoria considered a legal funding arrangement for state government whistleblowers in 2019,[186] while the 2023 Queensland review recommended a pilot scheme for legal support.[187] Neither has come to fruition yet and the idea was again raised in the *PID Act* reform consultation paper.[188] SIA might wish to consider whether to pilot a scheme whereby sports integrity whistleblowers can access free or subsidised legal assistance alongside their disclosures.[189]

There is also growing understanding of the mental health and wellbeing impact of whistleblowing.[190] The Victorian scheme envisaged funding for non-legal support, including psychological services and career-counselling.[191] Presently, SIA's website includes links to various free wellbeing services, such as Lifeline, and advises: 'You may be eligible to receive support from the Australian Institute of Sport (AIS) Mental Health Referral Network'.[192] It might also consider providing dedicated psychological support for whistleblowers, as part of an evolved SIA approach to whistleblowing. It is notable that the Council of Europe Monitoring Group's recommendation on whistleblower protection in the anti-doping context included a '[r]ight to assistance', providing that '[w]hen conditions permit, whistleblowers may be provided with assistance, which can notably include legal, psychological, or physical support'.[193]

documents/policy/corporate/whistleblower-policy.pdf>; Westpac, 'Westpac Group Speaking Up Policy' (June 2025) <https://www.westpac.com.au/content/dam/public/wbc/documents/pdf/aw/WBC-speaking-up-policy.pdf>.

186 Discussed in Pender, *Cost of Courage* (n 19) 16.

187 Wilson (n 9) 213 (recommendation 89).

188 Attorney-General's Department (Cth), *Reforms Consultation Paper* (n 9) 22–3.

189 In August 2023, the Human Rights Law Centre launched the Whistleblower Project, Australia's first pro bono legal service for whistleblowers. The author has led the establishment of the service. See Nick Feik, 'Whistle While We Work' (July 2023) *The Monthly* <https://www.themonthly.com.au/issue/2023/july/nick-feik/whistle-while-we-work>.

190 Pender, *Cost of Courage* (n 19) 16.

191 Ibid.

192 'Make an Integrity Complaint or Report', *Sport Integrity Australia* (Web Page) <https://www.sportintegrity.gov.au/contact-us/make-an-integrity-complaint-or-report>. See also 'Mental Health and Wellbeing', *Sport Integrity Australia* (Web Page) <https://www.sportintegrity.gov.au/mental-health-and-wellbeing>.

193 Council of Europe Monitoring Group (n 43) pt III art 7.

3 *Incentive Schemes*

One way to encourage whistleblowing, and address some of the considerable financial risk associated with speaking up, is through whistleblower incentive programs.[194] These have been pioneered in the US, taking two primary forms. Under the *False Claims Act of 1863*,[195] and state-level equivalents, an employee of a private sector entity that is defrauding the Government can bring a lawsuit on the government's behalf. This is known as a *qui tam* suit. The Government can then choose whether to take over the suit or allow the whistleblower to continue it — in either event, if the suit leads to a judgment sum, penalty or settlement, the whistleblower is entitled to a proportion, typically in the order of 15–30%.[196] Over the past four decades, the primary American scheme has helped the taxpayer recover more than A$80 billion, with whistleblowers receiving more than A$15 billion.[197] The second approach is a whistleblower rewards scheme administered by a regulator. In the US, the most prominent, although by no means the only, scheme is overseen by the Securities and Exchange Commission ('SEC'). If a whistleblower brings information to the SEC, which leads to successful enforcement proceedings, the whistleblower can receive a share of the penalty. Since being established in the wake of the 2007–09 Global Financial Crisis, the SEC program has helped recover over A$10 billion, with several billion paid to whistleblowers.[198] Although the US pioneered these schemes, they have caught on elsewhere:[199] several Canadian regulators have recently introduced whistleblower incentive programs, while the British competition and tax regulators both administer reward schemes. A common concern regarding such schemes is that the availability of rewards can lead to an increase in baseless or vexatious disclosures, creating an additional administrative burden for regulators responsible for checking them.[200] However, such issues can be minimised with scheme design. For example, regulators might reject information that, on its face, lacks sufficient evidence , or be empowered to penalise those who submit misleading information.[201] They might also bar further rewards claims for known whistleblowers who have exceeded a certain number of meritless disclosures.

---

194 See generally Allan Fels, 'How to Keep Corporations Honest', *The Saturday Paper* (online, 23 March 2024) <https://www.thesaturdaypaper.com.au/comment/topic/2024/03/23/how-keep-corporations-honest>.

195 *False Claims Act of 1863*, 31 USC §§ 3729–33 (1863).

196 US Department of Justice, 'False Claims Act Settlements and Judgments Exceed $2.9B in Fiscal Year 2024' (Press Release 25-58, 15 January 2025) <https://www.justice.gov/archives/opa/pr/false-claims-act-settlements-and-judgments-exceed-29b-fiscal-year-2024>.

197 US Department of Justice, 'Fraud Statistics – Overview' (2024) <https://www.justice.gov/archives/opa/media/1384546/dl>.

198 See United States Securities and Exchange Commission ('SEC'), 'SEC Announces Enforcement Results for Fiscal Year 2024' (Press Release 2024-186, 22 November 2024) <https://www.sec.gov/newsroom/press-releases/2024-186>; SEC, 'Whistleblower Program' (Web Page), <https://www.sec.gov/enforcement-litigation/whistleblower-program>.

199 See generally Eliza Lockhart, *The Inside Track: The Role of Financial Rewards for Whistleblowers in the Fight Against Economic Crime* (Serious Organised Crime and Anti-Corruption Evidence Research Programme Research Paper No 31, December 2024).

200 PJCCFS, *PJCCFS Report* (n 56) 134.

201 See, eg, *Commodity Futures Trading Commission Whistleblower Rules*, 17 CFR § 165.3(b) (2017); *Ontario Securities Commission Policy 15-601 Whistleblower Program*, § 2 (2022); *SEC Securities Whistleblower Incentives and Protections*, 17 CFR § 240.21F-9 (2025).

In Australia, a whistleblower incentive program was recommended by the 2017 parliamentary inquiry,[202] and formed part of the Australian Labor Party's (unsuccessful) 2019 Election platform.[203] The concept was raised in the recent *PID Act* discussion paper, and is likely to also be considered as part of the *Corporations Act* review.[204] However, these ongoing reform processes would not prevent SIA considering its own standalone sports integrity whistleblower incentive program. This could take various forms: a simple model might enable SIA to actively solicit whistleblower disclosures on the basis that those leading to successful enforcement proceedings will be entitled to a reward (no different, conceptually, to state police paying for information in missing persons' cases, as is commonplace).[205] While, unlike the American schemes, it may be difficult to base the amount paid on some percentage of the fine, SIA could promulgate a table of rewards that identifies in advance the amounts paid on an escalating scale depending on the regulatory importance and severity of the wrongdoing. This would certainly be a significant step forward.

Furthermore, sport offers a relatively self-contained ecosystem that may prove ideal for piloting a whistleblower incentive program that might have future applications in other sectors.[206] Caution should be taken, however, to ensure that encouraging and rewarding whistleblowing uniquely within SIA does not deter individuals from reporting wrongful and potentially criminal conduct to other forms of law enforcement where appropriate. By way of example, the Korea's Sport and Olympic Committee's Clean Sports Reporting Centre (later subsumed within the Korean Sports Ethics Centre), which allowed for the disclosure of match-fixing and integrity concerns without requiring subsequent police investigation, drew criticism for reducing transparency and accountability regarding the prosecution of sport-related offences that were ordinarily within the remit of Korean public prosecutors.[207] Any measures taken by the SIA to incentivise disclosure should therefore also include safeguards to prevent vital information being cloistered there.

4 *Innovation*

The above suggestions need not be exhaustive. The global whistleblowing landscape is going through a revolution. There has been significant progress towards stronger laws around the world, particularly in the wake of the European Union's landmark

---

202 PJCCFS, *PJCCFS Report* (n 56) 138–9 (recommendations 11.1–11.2).

203 Mark Dreyfus MP, 'Labor Will Protect and Reward Banking Whistleblowers' (Media Release, 3 February 2019) <https://www.markdreyfus.com/media/media-releases/labor-will-protect-and-reward-banking-whistleblowers-mark-dreyfus-qc-mp>.

204 Attorney-General's Department (Cth), *Reforms Consultation* (n 9).

205 See 'Rewards Offered', *NSW Police Force* (Web Page) <https://www.police.nsw.gov.au/can_you_help_us/rewards>.

206 See also Hall, Masters and Ordway's suggestion that consideration be given to 'creating a leniency policy for persons who report wrongdoing in relation to any disciplinary outcomes. This might be a discounted penalty in relation to their own wrongdoing or a financial reward for information leading to prosecution', or, alternatively, 'an award or other means of recognition for role models who contribute to the high ethical standing and integrity of sport, or who speak up about wrongdoing': Hall, Masters and Ordway (n 62) 37.

207 Stacey Steele, Jess (Hee Sung) Shin and Sarah (Jin Hyung) Yang, 'Match-Fixing and the Roles of Public Prosecutors in Korea' in Stacey Steele and Hayden Opie (eds), *Match-Fixing in Sport: Comparative Studies from Australia, Japan, Korea and Beyond* (Routledge, 2017) 204.

2019 *Whistleblower Protection Directive*.[208] The US, meanwhile, has led the way on whistleblower incentive programs and other regimes that encourage people to speak up by giving them the tools to make an impact. In June 2024, the US Attorney's Office for the Southern District of New York launched a pilot whistleblower amnesty program to encourage 'early and voluntary self-disclosure of criminal conduct by individual participants in certain non-violent offenses'.[209] Evidently, whistleblower protection best practice is fast evolving, and sport, as a distinct regulatory ecosystem with a high premium on integrity, could well be a trailblazer in promoting innovative laws and initiatives to empower whistleblowers. Sport in Australia need not lag behind; there is every reason to think that Australian sport could lead the way in protecting whistleblowers, enhancing integrity in sport in the process.

V Conclusion

In this article, I have considered the application of Australian whistleblower protections to issues of sporting integrity. Sport is an important context in its own right, given the cultural, economic and political salience of sport in Australia, but it is also an instructive site for analysing shortcomings in whistleblowing frameworks under Australian law more generally. While existing protections cover some categories of potential sports integrity whistleblowers, there are a number of shortcomings, including in relation to individuals covered under the laws, the protected avenues for speaking up and the atypical sporting context. I have concluded that there is work to be done to ensure sport-related whistleblowers can speak up safely and lawfully about integrity issues in Australia. That finding should come as no surprise, given the express recommendation of the *Wood Review Report* in relation to whistleblower protections in sport, but this article is the first rigorous analysis of the integration between Australia's whistleblowing and sports integrity frameworks. These implications are not limited to sport, with many of the concerns that I have identified applying to a range of whistleblowing contexts. I therefore hope that the article usefully contributes to ongoing policy consideration of potential reform. The need for reform is urgent — without stronger protections, prospective whistleblowers in Australia will remain silent and wrongdoing in sport will go unaddressed. It is alarming, for example, that there is presently no protected avenue for a whistleblower to provide information to SIA.

More research needs to be done at the intersection of whistleblowing and sports integrity in Australia. International literature has provided helpful insight into athlete perceptions on whistleblowing.[210] Equivalent research undertaken with Australian athletes could yield important perspectives to inform the work of SIA and other stakeholders. Much Australian whistleblowing policy development has been informed by landmark research on organisational perceptions of, and approaches to,

---

[208] *Directive (EU) 2019/1937 of the European Parliament and of the Council of 23 October 2019 on the Protection of Persons who Report Breaches of Union Law* [2019] OJ L 305/17 ('*EU Whistleblower Protection Directive*'). See, eg, CEELI Institute (n 22). But see Transparency International, *How Well Do EU Countries Protect Whistleblowers? Assessing the Transposition of the EU Whistleblower Protection Directive* (2023).

[209] US Department of Justice, 'SDNY Whistleblower Pilot Program', *United States Attorney's Office* (Web Page, 14 January 2025) <https://www.justice.gov/usao-sdny/sdny-whistleblower-pilot-program>.

[210] See the literature outlined above at Part II(B).

whistleblowing, through the Whistling While They Work project and subsequent initiatives.[211] Similar work could be undertaken within sports in Australia as part of efforts to ensure sports teams and governance organisations are taking whistleblowing seriously.

While law reform is a necessary first step, other sectors are increasingly focused on adapting whistleblowing support mechanisms and oversight bodies to ensure the protections work in practice. At a federal level, there have been calls for the establishment of a whistleblower protection authority.[212] At state level, the NSW Ombudsman recently established a dedicated whistleblower protection unit. There is growing awareness of the need to provide legal services and other forms of support to whistleblowers.[213] It might therefore be helpful for researchers to consider other steps, beyond law reform, that SIA and cognate bodies could take to encourage, protect and support whistleblowers.

I began this article with two epigraphs. The first was from anti-doping whistleblower Grigory Rodchenkov,[214] who helped expose systemic doping violations overseen by the Russian state. His whistleblowing led to Russian athletes being restricted from participating in national colours at several Olympics and was subsequently depicted in the film *Icarus*. Rodchenkov's words sound a note of resignation, that the fight against cheating in sport is never over. They were followed by an extract from the submission of SIA's predecessor, ASADA, to the Wood Review. ASADA noted that many of the high-profile cases of systemic doping have been brought to light through whistleblowing, not testing. This, ASADA argued, underscored 'the need for fresh and innovative approaches'.[215] Despite the contrasting tenor of these epigraphs, they are underpinned by a consistent notion: the fight for integrity in sport is never over. The establishment of SIA is an important step, but policymakers cannot 'set and forget'. To maintain public confidence in sport, regulators must use all tools at their disposal. Better utilisation and protection of whistleblowers is a critical next step in protecting the integrity of sport in Australia.

---

211 See Brown et al (n 7).

212 Transparency International Australia, Human Rights Law Centre and Griffith University Centre for Governance and Public Policy, *Design Principles* (n 179).

213 See discussion above at Part IV(C)(4).

214 Ahmed (n 1).

215 ASADA (as it then was) quoted in *Wood Review Report* (n 2) 52.

Efficiency and Certainty in Decision-Making: An Evaluation of the Insolvency Practitioner Disciplinary Committees

Catherine Robinson*

Abstract

The increase in rates of company failures and personal bankruptcy within the current economic climate warrants an assessment of the framework governing the conduct of the insolvency practitioners who administer them. Historically, trust and confidence in registered liquidators and trustees in bankruptcy has been impacted by concerns of widespread misconduct in the profession as discussed by the media and in the Australian Parliament. Providing evidence about this issue, which has been exceedingly scarce in academic literature, is in the public interest where financially distressed consumers are vulnerable to seeking the alternate services of untrustworthy insolvency advisers (otherwise known as 'debt vultures'). The *Insolvency Law Reform Act 2016* (Cth) introduced a new regulatory regime for insolvency practitioners; specifically, the introduction of pt 2 disciplinary committees in corporate insolvency and bankruptcy ('disciplinary committees'). Matters referred to the disciplinary committees are deemed to be the most serious by the insolvency regulators. In this article, I examine the totality of cases that have been published by the committees from the commencement of the regime on 1 March 2017 to 1 March 2025, including critically evaluating how they identify and weigh factors to determine appropriate orders. I seek to provide answers to the questions of whether the committees are achieving their intended legislative objectives to be efficient and resolve misconduct matters in a timely manner, and whether there is certainty in their decision-making. Overall, my research found that there continues to be a small number of matters appearing before disciplinary committees.

Please cite this article as:

Catherine Robinson, 'Efficiency and Certainty in Decision-Making: An Evaluation of the Insolvency Practitioner Disciplinary Committees' (2025) 47 *Sydney Law Review* 19975: 1–38 <https://doi.org/10.30722/slr.19975>.

* Senior Lecturer, Faculty of Law, University of Technology Sydney, New South Wales, Australia. Email: catherine.robinson@uts.edu.au. ORCID iD: https://orcid.org/0000-0001-9335-4817.

The author thanks Professor Christopher Symes, Associate Professor David Brown, the peer reviewers, and the *Sydney Law Review* editorial team for their comments on an earlier version of this article.

I Introduction

Insolvency is a term used to describe a person's or company's ability to pay their debts when they fall due.[1] In Australia, a natural person who is insolvent may enter the 'bankruptcy' process (which is administered by the Commonwealth Official Trustee or privately by registered trustees) and a company may go into 'liquidation' (which is administered privately by registered liquidators).[2]

Australia has traditionally maintained a bifurcated system of personal and corporate insolvency laws and regulation.[3] The regulator for the *Corporations Act 2001* (Cth) ('*Corporations Act*') with oversight of liquidators is the Australian Securities and Investments Commission ('ASIC').[4] The regulator for the *Bankruptcy Act 1966* (Cth) ('*Bankruptcy Act*') with oversight of bankruptcy trustees (hereafter 'trustees') is the Australian Financial Security Authority ('AFSA').[5] The 2023 Parliamentary Joint Committee on Corporations and Financial Services ('PJC') Inquiry into Corporate Insolvency in Australia recommended as a priority issue for review the costs and complexity of this regulatory division for debtors in distress where personal and business finances are often intertwined.[6] In a significant move towards effecting this recommendation and aligning insolvency under a single regulatory umbrella, on 13 May 2025 the Commonwealth Governor-General signed an Administrative Arrangements Order transferring, inter alia, responsibility for bankruptcy, including associated legislation, from the Commonwealth Attorney-General's Department to the Treasury.[7] While the change became effective immediately, the operational implications of having separate regulators is yet to be determined.

In the current economic climate, including the Australian Taxation Office's accelerated collection activities which had been put on hold during the COVID-19 pandemic, increasing numbers of individuals and companies may face insolvency.[8] Accordingly, there is a greater need for trust and confidence in registered liquidators

---

1 *Corporations Act 2001* (Cth) ('*Corporations Act*') s 95A; *Bankruptcy Act 1966* (Cth) ('*Bankruptcy Act*') s 5. For a discussion of 'bankruptcy' as distinct from 'insolvency', see Elizabeth Streten, *Legal and Ethical Standards in Corporate Insolvency* (Routledge, 2024) 7–8.

2 See Michael Gronow and Stewart Maiden, Thomson Reuters, *McPherson's Law of Company Liquidation* (online at 28 October 2025) [1.210]; Paul McQuade and Michael Gronow, Thomson Reuters, *McDonald, Henry & Meek Australian Bankruptcy Law and Practice* (online at 28 October 2025) [15.0.10].

3 Explanatory Memorandum, Insolvency Law Reform Bill 2015 (Cth) ('ILR Bill Explanatory Memorandum') 236 [9.7]. For a history of the development of insolvency laws in Australia, see Streten (n 1) 8–19.

4 *Australian Securities and Investments Commission Act 2001* (Cth) s 11 ('*ASIC Act*').

5 The Chief Executive of the Australian Financial Security Authority ('AFSA') is appointed as the Inspector-General in Bankruptcy who administers the *Bankruptcy Act* (n 1) ss 11–13.

6 Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Corporate Insolvency in Australia* (Report, July 2023) 53 [3.104] ('*PJC Report*').

7 Department of the Prime Minister and Cabinet (Cth), *Administrative Arrangements Order* (13 May 2025) pt 15.

8 See AFSA, 'Provisional Personal Insolvencies Increased in January 2025' (Media Release, 3 March 2025) <https://www.afsa.gov.au/newsroom/provisional-personal-insolvencies-increased-january-2025>; Australian Securities and Investments Commission ('ASIC'), 'Insolvency Statistics: Series 2, Table 2: All Appointments Over a Company including the First, Subsequent and Transitional Appointments, 2020–25' (7 October 2025) Table 2 <https://www.asic.gov.au/about-asic/corporate-publications/statistics/insolvency-statistics/>.

and registered trustees (together 'insolvency practitioners') who are specially accredited to support financially distressed debtors through the insolvency process.[9] If debtors do not have confidence in the quality and integrity of practitioners, they may turn to other sources of assistance, including untrustworthy advisers. These predatory advisers or 'debt vultures' widely advertise through social media and while they appear to be credible, can provide unethical advice (such as suggesting ways to hide assets), which can result in people unwittingly engaging in criminal behaviour.[10]

While there is a clear need for integrity and high standards of professionalism, the insolvency profession has historically been viewed in a poor light due to highly publicised incidences of misconduct. This is despite any evidence to support a prevalence of wrongdoing.[11] In 2025, there continues to be public attention to these issues with adverse media reporting of a former registered trustee and former registered liquidator's conduct.[12] The spotlight is likely in part because of their great responsibility where upon appointment they become custodians of the livelihood of directors of the companies or the individual bankrupt's estate. This necessarily impacts other stakeholders such as family members and employees of the business who rely on the practitioner to undertake their legal and fiduciary duties such as paying out entitlements to workers or attempting to turn around struggling business. Therefore, when practitioners engage in misconduct such as gaining personal benefit by misappropriating funds from the debtor's estates that they have assumed control of, there is significant prejudice and detriment to all stakeholders. It disrupts and prolongs the insolvency process, impeding the prospects of the business and the business owner/s getting back on their feet. Further, it diminishes the already low likelihood of monetary return for unsecured creditors, shareholders, and the Australian Government.[13]

Accordingly, a robust efficient regulatory framework founded on principles of integrity, accountability and high standards of professionalism is important for public confidence.[14] It supports the legitimacy of the insolvency regime as a mechanism for 'a fair and orderly process for dealing with the financial affairs of insolvent individuals and companies'.[15] Confidence in the insolvency system and

---

9 See Ian Fletcher, 'Spreading the Gospel: The Mission of Insolvency Law, and Insolvency Practitioners, in the Early 21st Century' [2014] (7) *Journal of Business Law* 523, 526; Streten (n 1) 1–7; *PJC Report* (n 6) 175 [8.98].

10 See AFSA, *Untrustworthy Advisors: A Hidden Scourge in Australia's Personal Insolvency System* <https://www.afsa.gov.au/about-us/regulation-and-compliance/untrustworthy-advisors-hidden-scourge> ('*Untrustworthy Advisors*'); Vivien Chen and Michelle Welsh, 'Safeguarding Australian Consumers from "Debt Vultures"' (2023) 45(1) *Sydney Law Review* 45.

11 *PJC Report* (n 6) 99.

12 Michael Murray, 'Leroy and the [Still] Missing Bankruptcy Funds', *Murrays Legal* (Blog Post, 20 February 2025) <https://murrayslegal.com.au/blog/2025/02/20/leroy-and-the-missing-bankruptcy-funds> ('Murray on Leroy'); Brad Norington, 'Five-Star Luxury for Kathy Jackson Trustee Paul Leroy Missing with $2m', *The Australian* (online, 6 February 2024) <https://www.theaustralian.com.au%2Fnation%2Ffivestar-luxury-for-kathy-jackson-trustee-paul-leroy-missing-with-2m>. See also generally Elizabeth Streten, 'Insolvency Practitioners: A Phenomenological Study' (2021) 29(2) *Insolvency Law Journal* 83, 86–7.

13 Michael Murray and Jason Harris, *Keay's Insolvency: Personal and Corporate Law Practice* (Thomson Reuters, 11th ed, 2022) 4.

14 Streten (n 12) 85.

15 Australian Law Reform Commission, *General Insolvency Inquiry* (Report No 45, December 1988) 15.

those operating within it, such as the professional and regulatory bodies, increases the willingness of financiers to provide credit, minimise costs to vulnerable stakeholders, and reduce business closures.[16]

Against the backdrop of this need for trust and confidence in the profession, the *Insolvency Law Reform Act 2016* (Cth) ('*ILR Act*') was enacted to introduce a suite of regulatory changes including pt 2 disciplinary committees. The disciplinary committees are the primary forum for resolution of the most serious and often highly publicised misconduct by insolvency practitioners.[17] In light of government and industry efforts to encourage early financial intervention and the uptake of their professional services, in this article I make a timely evaluation of the adequacy of practitioner misconduct enforcement by the disciplinary committees and identify opportunities for improvement.[18] It is important to assess the reform to a newly formed body empowered to discipline practitioners, given that the 2024 Senate Economics References Committee report found that ASIC (the disciplinary and registering body of company liquidators) had 'comprehensively failed to fulfil its regulatory remit'.[19]

A key objective of the disciplinary committees, which the *ILR Act* adopted from the former committees in bankruptcy along with their structure, was to align the corporate and personal insolvency systems and promote greater consistency of outcomes for practitioners.[20] Matters are referred to disciplinary committees by ASIC or AFSA (together 'the Regulators'). This consistency objective is also reflected in the legislative aim of ASIC to 'maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty'.[21] Stern and Holder refer to the principles of regulatory governance as 'certainty', 'equality' or 'predictability'.[22] In this article, I use the term 'consistency' throughout as an indicator of certainty. Consistency is central to achieving equality in the administration of justice and can have a profound impact on stakeholders, particularly practitioners who are subject to disciplinary proceedings. The predictability of the disciplinary committees' decision-making

---

16 Senate Economics References Committee, Parliament of Australia, *The Regulation, Registration and Remuneration of Insolvency Practitioners in Australia: The Case for a New Framework* (Report, September 2010) 1 ('*2010 Senate Economics References Committee Report*').

17 Catherine Robinson, 'CALDB to Part 2 Committee — A Review of Disciplinary Matters from 2017 to 2021' (2022) 37(2) *Australian Journal of Corporate Law* 163 ('CALDB to Pt 2 Committee').

18 See AFSA, *Untrustworthy Advisors* (n 10); 'Beware of Dodgy Insolvency Advisers!', *ARITA* (Australian Restructuring Insolvency and Turnaround Association) (Web Page) <https://arita.com.au/ARITA/ARITA/Insolvency_help/Beware_of_dodgy_insolvency_advisers.aspx>.

19 Senate Economics References Committee, Parliament of Australia, *Australian Securities and Investments Commission Investigation and Enforcement* (Report, July 2024) xxiii [8.7], 157 [8.7].

20 Australian Government, *Options Paper: A Modernisation and Harmonisation of the Regulatory Framework Applying to Insolvency Practitioners in Australia* (June 2011) 4–5 [24]–[27] ('*Australian Government Options Paper*'). For a study on insolvency practitioner preliminary views on the changes to the disciplinary regime, see Catherine Robinson, 'An Early Response to Regulatory Changes under the *Insolvency Law Reform Act 2016* (Cth): A Survey of Registered Liquidators and Registered Trustees' (2019) 27(4) *Insolvency Law Journal* 211 ('An Early Response to Regulatory Changes').

21 *ASIC Act* (n 4) s 1(2)(a).

22 Jon Stern and Stuart Holder, 'Regulatory Governance Criteria for Assessing the Performance of Regulatory Systems: An Application to Infrastructure in the Developing Countries of Asia' (1999) 8(1) *Utilities Policy* 33.

improves the practitioners' ability to make effective judgments about the process and their livelihood.

The methodology to assess each indicator is adapted from the framework used by Armson to evaluate the certainty and speed of the Australian Takeovers Panel.[23] This study is the first evaluation of decisions of a body set up under the *Corporations Act* with broad discretions to hear matters quickly, since the Takeovers Panel.

Another key objective of the disciplinary committees was to be a forum to 'better enable timely and appropriate action to be taken when misconduct occurs'.[24] Like certainty, efficient resolution of disciplinary matters is important for practitioners to finalise external administrations for stakeholders participating in the insolvency scheme who are awaiting a monetary distribution (if any).

In this article I address the questions of whether the disciplinary committees have met the legislative and policy objectives of being consistent and timely. My research investigates these questions by drawing on all published Committee decisions since commencement of the *ILR Act*. As will be seen, a main conclusion of the study is that overall, the committees have demonstrated strong procedural and substantive consistency and that like matters receive like treatment and outcomes. Efficiency for the disciplinary committees in corporate insolvency could not be measured due to the number of unpublished decisions, whereas matters before the committees in bankruptcy were resolved within three to six months. While this was outside the statutory timeframe, there were reasonable explanations for the delays. Similarly, while the number of unreported decisions of disciplinary committees in corporate insolvency was a limitation of this study, there are a number of public interest reasons for non-publication. Further, analysis of all publicly available cases offers original and valuable insights.

In this article, I build on my previous work that mapped the demographics and typology of conduct matters appearing before the disciplinary committees.[25] I also respond to the call of the *PJC Report* that identified misconduct and enforcement data as a specific area where data may be useful, including to 'assess the efficiency of insolvency regulators'.[26]

In the next Part, I outline the limitations of this study. In Part III, I then briefly outline the development of the disciplinary committees and their role and statutory functions within the regulatory framework. In Part IV, I explain the methodology used to measure certainty and efficiency. This is followed by Part V, in which I provide an overview of the case set to contextualise the disciplinary matters examined. In Part VI, I focus on the procedural and substantive consistency of the disciplinary committees and consider the application of the public interest policy and

---

23 See Emma Jane Armson, 'The Australian Takeovers Panel: An Effective Forum for Dispute Resolution?' (PhD Thesis, University of Melbourne, 2017) ('Armson PhD'); Emma Armson, 'Certainty in Decision-Making: An Assessment of the Australian Takeovers Panel' (2016) 38(3) *Sydney Law Review* 369.

24 Australian Government, *Proposals Paper: A Modernisation and Harmonisation of the Regulatory Framework Applying to Insolvency Practitioners in Australia* (December 2011) ('*Australian Government Proposals Paper*') 27 [140].

25 Robinson, 'CALDB to Pt 2 Committee' (n 17).

26 *PJC Report* (n 6) 99 [6.30].

other factors to the determination of outcomes in committee decisions. In Part VII, I assess the speed of the disciplinary committees' decision-making. In particular, I detail the impact of appeals on the resolution of the overall matter. In Part VIII, I conclude by suggesting further law reform towards a unified insolvency regime in Australia with a single insolvency practitioner regulator.

II A Limitation of the Study

A limitation of this study is the small sample size. As I explain in Part III of this article, the disciplinary committees have powers to determine their own processes including to publish, as they see fit, the decision and reasons for the exercise of their powers.[27] During the study period (1 March 2017 to 1 March 2025), there were 18 referrals from the Regulators to the disciplinary committees, of which seven decisions were not published. Notably, this limitation is unlikely to be overcome with a longer study time for two reasons. First, the ongoing trend of a small number of serious misconduct matters appearing before the disciplinary committees is unlikely to produce a larger sample size.[28] Second, even if there was an increase in misconduct matters, the legislative discretion to not publish committee decisions could remain a barrier to an increased sample size.

Consistent with the academic literature, the small sample size of the case study supports case-oriented analysis.[29]As I will show in this article, the quantity of the sample size is balanced against quality and is sufficient to allow a new and richly textured understanding of the study questions.[30] The adequacy of the sample size was determined on the basis of informational needs and enables the study questions to be answered with sufficient confidence.[31] Based on the practical justification, the size of this case study is an appropriate sample of any larger population of actual decisions and the findings can likely be generalised to disciplinary decisions that are not published. This is because if there is consistency between the disciplinary committees then knowing how they have decided such cases enables predictions to be made about later cases.

Overall, my findings contribute to further understanding whether there are procedural or substantive differences that operate as barriers to certainty and efficiency in the resolution of misconduct matters.

---

27 *Insolvency Practice Rules (Corporations) 2016* (Cth) ('*Insolvency Practice Rules (Corporations)*') r 50-5; *Insolvency Practice Rules (Bankruptcy) 2016* (Cth) r 50-5 ('*Insolvency Practice Rules (Bankruptcy)*').

28 Robinson, 'CALDB to Pt 2 Committee' (n 17) 184.

29 Konstantina Vasileiou, Julie Barnett, Susan Thorpe and Terry Young, 'Characterising and Justifying Sample Size Sufficiency in Interview-Based Studies: Systematic Analysis of Qualitative Health Research Over a 15-year Period' (2018) 18(1):148 *BMC Medical Research Methodology* 148. In qualitative studies, it is common for data to be based on one to 30 informants: see Mariette Bengtsson, 'How to Plan and Perform a Qualitative Study Using Content Analysis' (2016) 2 *Nursing Plus Open* 8, 10.

30 Margarete Sandelowski, 'One is the Liveliest Number: The Case Orientation of Qualitative Research' (1996) 19(6) *Research in Nursing and Health* 525.

31 Vasileiou et al (n 29) 16.

III The Genesis of the Corporate and Personal Insolvency Disciplinary Committees in Australia

While it is beyond the scope of this article to detail the history of the regulation of insolvency practitioners, relevantly, the first disciplinary committee — the Companies Auditors and Liquidators Disciplinary Board ('CALDB') — was established in 1990.[32] The CALDB was formed to act as an independent expert disciplinary tribunal regarding company auditors and liquidators who failed to carry out their obligations.[33]

The objectives under the *Corporations Act 1989* (Cth) were designed for the discipline of registered liquidators by CALDB to be a 'fast and efficient process'.[34] There was however, criticism of the time and costs to hear prosecuted matters and reach findings, along with a lack of transparency in the proceedings.[35] The tribunal nature of the CALDB meant that it was not a quick, cost-effective approach to dealing with disciplinary matters.[36]

By contrast, in personal insolvency, problems of inefficiency and delay were avoided by a statutory timeframe imposed on disciplinary committees in bankruptcy to decide a matter within 60 days of being convened.[37] In the High Court of Australia, Kirby J noted the advantages of a professional insolvency disciplinary board 'over the courts of cost saving, speed, flexibility and specialist knowledge'.[38] Recommendations from the 2010 Senate Economics References Committee Inquiry included transferring responsibility for regulating liquidators from the CALDB to a new system of separate committees for corporate insolvency and personal insolvency, based on the disciplinary committees in bankruptcy.[39]

In 2016, the Australian Government went on to adopt this recommendation under the *ILR Act.* The *ILR Act* led to legislative changes in key areas of the discipline and regulation of insolvency practitioners. The reforms were intended to improve the investigative, referral and disciplinary powers of the courts, 'industry bodies', and the Regulators.[40] The *ILR Act* laid the legislative foundation for the *Insolvency Practice Schedule* inserted as the *Corporations Act* sch 2 ('*Insolvency Practice Schedule (Corporations)*') and the *Bankruptcy Act* sch 2 ('*Insolvency*

---

32 *Australian Securities Commission Act 1989* (Cth) s 202. See also Christopher Symes and Michael Murray, 'Australian Insolvency Practitioners as Unique Professionals: An Examination of the History of Liquidators and Trustees' (2023) 31(2) *Insolvency Law Journal* 97, 110.

33 Symes and Murray (n 32) 110.

34 ILR Bill Explanatory Memorandum (n 3) 244 [9.33].

35 Evidence to Senate Economic References Committee, *Parliamentary Debates*, Parliament of Australia, Canberra, 13 April 2010, E46–7, E54 (Mr Geoff Slater).

36 *2010 Senate Economics References Committee Report* (n 16) 75 [6.37], 76 [6.41].

37 *Bankruptcy Regulations 1996* (Cth) reg 8.34 (replaced by *Insolvency Practice Rules (Bankruptcy)* (n 27) r 50-90).

38 *Albarran v Members of the Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350, 378 [95].

39 *2010 Senate Economics References Committee Report* (n 16) 150–1 [11.18]–[11.26] (Recommendation 3); *Australian Government Proposals Paper* (n 24) 2 [13].

40 *Insolvency Practice Rules (Corporations)* (n 27) r 40-1; *Insolvency Practice Rules (Bankruptcy)* (n 27) r 40-1. This provision sets out the prescribed 'industry bodies'.

Practice Schedule (Bankruptcy)'). CALDB's jurisdiction over liquidators was transferred into the new disciplinary committees in corporate insolvency.[41]

While the industry bodies can only regulate practitioners who are members, the majority of practitioners in Australia are bound by the leading codes issued by the Accounting Professional and Ethical Standards Board ('APES'), the APES 330 Insolvency Services, and the Australian Restructuring Insolvency and Turnaround Association ('ARITA') *Code of Professional Practice*.[42] The courts acknowledge these as 'a useful guide to the common practice in such matters, and to the profession's own view of proper professional standard'.[43] Under the legislative reforms the disciplinary committees in corporations and bankruptcy were the primary forum for rapid handling of matters that may relate to conduct in more than one insolvency administration.[44] Under the *Insolvency Practice Schedules*, the court,[45] on its own initiative during proceedings before it, or on application by the Regulators, could commence proceedings against a practitioner.[46] It was contemplated this approach would be reserved for more legally complex matters relating to conduct in particular administrations and where extensive use of coercive examination powers was required.[47] Matters where disciplinary remedies alone were insufficient would proceed directly to court, thereby reducing potential issues of procedural overlap between the disciplinary committee and the courts.[48]

The court is given broad powers including to make orders as it thinks fit in relation to a registered liquidator or trustee.[49] These are subject to non-exhaustive matters the court can take into account, including the effect of the registered liquidator's or trustee's actions (or inaction) on 'public confidence in registered liquidators and trustees as a group'.[50]

A practitioner may seek a review by the Administrative Review Tribunal ('ART') (formerly the Administrative Appeals Tribunal of Australia ('AAT')) of certain decisions, including a decision of a disciplinary committee.[51] As the cases analysed in this study were commenced and/or concluded prior to the establishment of the ART on 14 October 2024, discussion throughout this article refers to the AAT.

---

41 On 1 March 2017, the CALDB became the Companies Auditors Disciplinary Board: *Insolvency Practice Schedule (Corporations*) div 40; *Insolvency Practice Schedule (Bankruptcy*) div 40; 'About CADB', *Companies Auditors Disciplinary Board (Cth)* (Web Page) <https://www.cadb.gov.au/about-cadb/>.

42 See, eg, Australian Restructuring Insolvency and Turnaround Association ('ARITA'), *Annual Report 2024* (2024) 4.

43 *Bovis Lend Lease Pty Ltd v Wily* (2003) 45 ACSR 612, 653 [163].

44 *Australian Government Proposals Paper* (n 24) 29 [148].

45 *Corporations Act* (n 1) s 58AA.

46 *Insolvency Practice Schedule (Corporations)* ss 45-1(2), 90-20; *Insolvency Practice Schedule (Bankruptcy)* ss 45-1(2), 90-20.

47 ILR Bill Explanatory Memorandum (n 3) 267 [9.145].

48 Ibid.

49 *Insolvency Practice Schedule (Corporations)* (n 46) s 40-15; *Insolvency Practice Schedule (Bankruptcy)* (n 46) s 40-15.

50 *Insolvency Practice Schedule (Corporations)* (n 46) s 45-1(4)(e). See also *Insolvency Practice Schedule (Bankruptcy)* (n 46) s 45-1(4)(e).

51 *Insolvency Practice Schedule (Corporations)* (n 46) s 40-55; *Insolvency Practice Schedule (Bankruptcy)* (n 46) s 40-55. See *Administrative Review Tribunal Act 2024* (Cth), which superseded the *Administrative Appeals Tribunal Act 1975* (Cth), the applicable legislation for the disciplinary cases examined in this study.

A *The Power of ASIC and AFSA to Convene a Disciplinary Committee*

The Regulators are empowered to convene a disciplinary committee where they have first issued a 'show-cause' notice to a practitioner.[52] The power to convene a disciplinary committee can only be enlivened where the Regulators have issued a show-cause notice and have not received an explanation within 20 business days, or are not satisfied by the explanation.[53] There is no requirement in the *Insolvency Practice Schedule (Corporations)* or the *Insolvency Practice Schedule (Bankruptcy)* for the Regulators to give the reasons to the practitioner or the Committee for determining that the practitioners' explanation was unsatisfactory. The matter then proceeds directly to a disciplinary committee and the practitioner cannot challenge the grounds of referral. When making referrals, however, the Regulators are subject to statutory model litigant obligations.[54]

B *An Overview of a Disciplinary Committee's Statutory Functions*

The purpose of a disciplinary committee is to administer the objectives of the legislation in ensuring any person registered as a trustee or liquidator has an appropriate level of expertise and behaves ethically.[55] A committee's broad functions include investigating, preparing a report and deciding disciplinary action, including whether a practitioner's registration is to continue.[56]

The objective for the committee is to ensure a 'fair, timely, effective, and transparent process' for resolving disciplinary matters underpins all proceedings.[57] To effect this, a disciplinary committee is separately constituted for each 'matter' and convened from the time of referral to the committee by ASIC or AFSA.[58]

1 *Committee Processes*

Each disciplinary committee is empowered to make rules to determine the procedures to be followed in proceedings.[59] There is no requirement that these rules are made available publicly and/or to the parties involved, including the practitioner and their representatives. Given the ad hoc composition of a disciplinary committee for each matter, it is likely that each committee establishes unique rules to govern

---

52 *Insolvency Practice Schedule (Corporations)* (n 46) s 40-40; *Insolvency Practice Schedule (Bankruptcy)* (n 46) s 40-40.

53 *Insolvency Practice Schedule (Corporations)* (n 46) s 40-50(b); *Insolvency Practice Schedule (Bankruptcy)* (n 46) s 40-50(b).

54 *Legal Services Directions 2017* (Cth) app B.

55 ILR Bill Explanatory Memorandum (n 3) 7.

56 Ibid 167.

57 Institute of Chartered Accountants in Australia, Submission to Australian Government, *Proposals Paper: A Modernisation and Harmonisation of the Regulatory Framework Applying to Insolvency Practitioners in Australia* (8 March 2013) 6.

58 *Insolvency Practice Schedule (Corporations)* (n 46) s 40-50; *Insolvency Practice Schedule (Bankruptcy)* (n 46) s 40-50.

59 *Insolvency Practice Rules (Corporations)* (n 27) r 50-5; *Insolvency Practice Rules (Bankruptcy)* (n 27) r 50-5. See also *Insolvency Practice Schedule (Corporations)* (n 46) s 50-1; *Insolvency Practice Schedule (Bankruptcy)* (n 46) s 50-1.

their processes. When the committees were introduced, this raised concerns that, absent a 'Manual for Committees', the consistency of decision-making and transparency of process across committees would be unknown to affected practitioners and stakeholders.[60] Moreover, due to the private nature of disciplinary committee proceedings, practitioners cannot elect to hold a public hearing, which had been an option under the CALDB.

The principle that quasi-judicial proceedings should be open must be balanced against the principles of natural justice where cases might include allegations such as criminal behaviour, which could inform proceedings against the practitioner.[61] As the cases illustrate, there is potential harm and injustice to the practitioner and their livelihood as well as innocent third parties to have these matters aired in public.[62] There is a real concern with holding open hearings where information can make its way into the public sphere without a right of reply by the practitioner.[63] As will be discussed in Part VI, in cases where the committees have found no wrongdoing, their decisions have not been made available and the limited details on the ASIC website do not exonerate the practitioner.[64] Conducting disciplinary hearings in private preserves the integrity of proceedings as an integral component of the broader justice system.

After a referral is received, the committee is required to make a decision on at least a majority basis[65] and provide a report setting out its decision and reasons to the referring Regulator and the affected practitioner.[66] The committee can make reasonable inquiries of any person for the purposes of making an informed decision, or where the Chair believes it appropriate, in order to have sufficient information to make a decision.[67] The disciplinary committee has wide inquisitorial investigative powers and can inform themselves on any matter as they see fit.[68] Although a disciplinary committee is not bound by the rules of evidence, it is required to observe the principles of natural justice,[69] including '[a]dequate disclosure to the practitioner

---

60 David Castle, 'Insolvency Law Reform: Corporate Disciplinary Committees and Natural Justice' (2017) 18 (3–4) *Insolvency Law Bulletin* 73.

61 Robert Lindsay, 'Disciplinary Hearings: What is to be Done?' (2015) 80 *Australian Institute of Administrative Law Forum* 82.

62 *Kukulovski and A Committee Convened under Section 40-45 of the Insolvency Practice Schedule (Corporations)* [2020] AATA 40 ('*Kukulovski* (2020)').

63 Lindsay (n 61) 82.

64 See below n 120 and accompanying text.

65 *Insolvency Practice Schedule (Corporations)* (n 46) s 40-55 read together with *Insolvency Practice Rules (Corporations)* (n 27) rr 50-60(3), 50-65(2); *Insolvency Practice Schedule (Bankruptcy)* (n 46) s 40-55 read together with *Insolvency Practice Rules (Bankruptcy)* (n 27) rr 50-60(3), 50-65(2).

66 *Insolvency Practice Schedule (Corporations)* (n 46) s 40-60(a)–(b); *Insolvency Practice Schedule (Bankruptcy)* (n 46) s 40-60(a)–(b); *Insolvency Practice Rules (Corporations)* (n 27) r 50-95; *Insolvency Practice Rules (Bankruptcy)* (n 27) r 50-95.

67 *Insolvency Practice Rules (Corporations)* (n 27) r 50-75; *Insolvency Practice Rules (Bankruptcy)* (n 27) r 50-75.

68 *Insolvency Practice Rules (Corporations)* (n 27) r 50-55(2); *Insolvency Practice Rules (Bankruptcy)* (n 27) r 50-55(2).

69 *Insolvency Practice Rules (Corporations)* (n 27) r 50-55(1); *Insolvency Practice Rules (Bankruptcy)* (n 27) r 50-55(1); Treasury (Cth), *Explanatory Material: Draft Insolvency Practice Rules (Corporations) 2016; Draft Insolvency Practice Rules (Bankruptcy) 2016* (2016) 6 [32]–[36] <https://treasury.gov.au/sites/default/files/2019-03/C2016-034_Explanatory-Materials-Insolvency-Practice-Rules-2016.pdf>.

so that effective representations may be made'[70] and to observe the statutory model litigant obligations.[71]

If the committee decides to cancel a practitioner's registration, the practitioner would receive notification[72] that an interview will be held as soon as practicable.[73] At the interview, the committee has regard to information and 'any other matter that the committee considers relevant'.[74] Committee members can ask any question they reasonably believed to be related to any matter relevant to their decision to cancel a registration.[75] The evidence before the committee generally comprises the response to a show-cause notice.[76] During and after the interview, the practitioner can make further submissions.[77]

2 *Committee Powers and Enforcement of Committee Decisions*

The *ILR Act* clearly expanded the range of matters on which a committee can make a decision, compared to the former committees in bankruptcy. These matters include: continuing, cancelling or suspending a registered liquidator or registered trustee's registration for a period or indefinitely; and imposing conditions on the liquidator or trustee[78] and other insolvency practitioners preventing them from carrying out functions or duties for a period of up to 10 years.[79]

A disciplinary committee is empowered to disclose information or a document to prescribed bodies, including industry bodies, to administer and enforce the law.[80] Like the CALDB and former committees in bankruptcy, a disciplinary committee cannot enforce its own decision/s. It is the referring Regulators' responsibility to give effect to the committees' decision or apply to a court to secure compliance.[81]

---

70 Treasury (Cth) (n 69) 6 [32].

71 *Legal Services Directions 2017* (Cth) (n 54) para 4.2.

72 *Insolvency Practice Rules (Corporations)* (n 27) r 50-85(2)(c); *Insolvency Practice Rules (Bankruptcy)* (n 27) r 50-85(2)(c).

73 *Insolvency Practice Rules (Corporations)* (n 27) r 50-85(2)–(3); *Insolvency Practice Rules (Bankruptcy)* (n 27) r 50-85(2)–(3). Interviews were also required for applications to vary conditions imposed on a registration or lift or shorten a condition on the registration: *Insolvency Practice Rules (Corporations)* (n 27) r 50-80(1)(b)–(c); *Insolvency Practice Rules (Bankruptcy)* (n 27) r 50-80(1)(b)–(c).

74 *Insolvency Practice Schedule (Corporations)* (n 46) s 40-55(3)(e); *Insolvency Practice Schedule (Bankruptcy)* (n 46) s 40-55(3)(e).

75 *Insolvency Practice Rules (Corporations)* (n 27) r 50-85(4); *Insolvency Practice Rules (Bankruptcy)* (n 27) r 50-85(4).

76 *Report of the Committee Convened pursuant to s 40-50 of the Insolvency Practice Schedule (Bankruptcy) to Make a Decision about Ms Louise Thomson, a Registered Trustee* (30 July 2020) ('*Thomson* (2020)') 1 [4], 4 [18].

77 Ibid 6 [29].

78 *Insolvency Practice Schedule (Corporations)* (n 46) s 40-55(1)–(2); *Insolvency Practice Schedule (Bankruptcy)* (n 46) s 40-55(1)–(2).

79 *Insolvency Practice Schedule (Corporations)* (n 46) s 40-55(1)(g); *Insolvency Practice Schedule (Bankruptcy)* (n 46) s 40-55(1)(g).

80 *Insolvency Practice Schedule (Corporations)* (n 46)s 50-35(2)(b)(iv); *Insolvency Practice Schedule (Bankruptcy)* (n 46) s 50-35(2)(b)(iv), *Insolvency Practice Rules (Corporations)* (n 27) r 50-100; *Insolvency Practice Rules (Bankruptcy)* (n 27) r 50-100.

81 *Insolvency Practice Schedule (Corporations)* (n 46) s 40-65; *Insolvency Practice Schedule (Bankruptcy)* (n 46) s 40-65.

Given the intention for disciplinary committees to be the primary forum for efficient handling of matters, it was implicit in the *ILR Act* that a committee conduct proceedings in a timely manner.[82] A committee is required to use its best endeavours to make a decision within 60 days of the matter being referred to it.[83]

This section has detailed the expansion of powers and regulatory tools of the Regulators, the disciplinary committees and industry bodies (collectively, 'the regulatory bodies') to administer the policy objectives of the insolvency law reforms.

IV Methodology to Assess Certainty and Efficiency

The aim of this study was to use classical content analysis to assess the extent to which the committees demonstrate certainty and efficiency in procedural and substantive decision-making.[84] I carried out qualitative analysis of all published disciplinary committee cases from 1 March 2017 to 1 March 2025. The analysis also included the two review decisions of the AAT.[85] Content analysis examines themes in texts, which is suitable for assessing judicial decisions where there are multiple decisions of similar weight.[86] I extend the applicability of this method to the quasi-judicial decisions of the disciplinary committees.[87] This method is applicable to misconduct matters involving insolvency practitioners given my earlier research has shown that only serious breaches of conduct are referred to disciplinary committees.[88] Content analysis also focuses on the patterns across cases and the collective insights from them.[89] This is relevant to misconduct matters where it is in the professional and public interest to identify trends in how cases are decided — particularly those with similar issues and circumstances.

In this article, I build on my analysis of the dataset of disciplinary committee decisions from 1 March 2017 to 1 March 2021 ('2021 study').[90] My 2021 study used qualitative analysis to analyse the demographics and typology of misconduct matters. The research mapped the relationship between types of misconduct and outcomes. I found that the majority (71%) of practitioners before disciplinary committee proceedings were men, and most of them were based in NSW (72%).[91]

---

82 *Insolvency Practice Rules (Corporations)* (n 27) r 50-90; *Insolvency Practice Rules (Bankruptcy)* (n 27) r 50-90. See *Australian Government Proposals Paper* (n 24) 31 [164].

83 *Insolvency Practice Rules (Corporations)* (n 27) r 50-90; *Insolvency Practice Rules (Bankruptcy)* (n 27) r 50-90.

84 Classical content analysis is used to examine text or images from documents such as case reports. See Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press, 2010) 926, 941.

85 *Kukulovski and A Committee Convened under Section 40-45 of the Insolvency Practice Schedule (Corporations)* (AAT No 2019/8307, Deputy President SA Forgie, 7 January 2021) ('*Kukulovski* (2021)'); *Kukulovski* (2020) (n 62); *Duncan and A Committee Convened under Section 40-45 of the Insolvency Practice Schedule (Corporations)* [2024] AATA 609 ('*Duncan*').

86 Mark A Hall and Ronald F Wright, 'Systematic Content Analysis of Judicial Opinions' (2008) 96(1) *California Law Review* 63, 66.

87 Robinson, 'CALDB to Pt 2 Committee' (n 17) 169.

88 Ibid 165.

89 Hall and Wright (n 86) 66. See also Michael Quinn Patton, *Qualitative Research and Evaluation Methods* (SAGE Publications, 4th ed, 2015).

90 Robinson, 'CALDB to Pt 2 Committee' (n 17) 163.

91 Ibid 170.

The outcomes imposed by the committees were proportionate to the misconduct and varied, with the most commonly used orders being cancellation of registration followed by suspension, conditional registration, and unconditional registration.[92] I concluded that misconduct matters before the disciplinary committees most commonly related to dealings with funds of an administration, or other types of 'low risk' breaches that together amounted to a serious breach.[93]

In the present article, I focus on two key aspects of committee decision-making and evaluate the extent to which it aligns with the policy and legislative objectives of the *ILR Act* reform. A framework to evaluate the operation of regulatory bodies (including disciplinary committees), or the disciplinary regime of insolvency practitioners, does not exist globally. My approach is a novel application to an insolvency regulatory body. As noted in the Introduction to this article, my study has adapted a version of the framework applied by Armson in the assessment of the Australian Takeovers Panel.[94] In Armson's study, similar indicators of certainty and speed in decision-making were measured along a spectrum of strong, medium, or weak. This method is appropriate here given the commercial nature of the disciplinary committees. In the following section, I outline the methodology that has been adopted to assess certainty and efficiency.

A *How to Measure Certainty*

Certainty in decision-making and the application of law and policy are important features of regulatory bodies. In disciplinary proceedings where determinations can restrict a person practising their profession, there is an imperative for like cases and facts to receive similar procedural treatment and produce like results.[95] More broadly, certainty gives stakeholders confidence in the regime where there is discretion for the Regulators to take enforcement action by reference to broad statutory criteria and where there remains ongoing concern with inconsistencies between AFSA's and ASIC's regulatory approaches.[96] This is reflected in the *ILR Act* objective that the regulatory frameworks for insolvency practitioners should promote 'consistency for practitioners and other stakeholders operating in both the personal and corporate insolvency industries'.[97] Predictability is included as a governance principle in the assessment of the disciplinary regime.[98] As outlined in the Introduction to this article, the term 'consistency' is used throughout this article as an indicator of certainty and predictability.

In my study, certainty has been measured in terms of procedural consistency and substantive consistency:

---

92 Ibid 172–3.
93 Ibid 172.
94 'Armson PhD' (n 23).
95 One essential element of the concept of justice is the principle of treating like cases alike: see HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) *Harvard Law Review* 593, 624.
96 See *PJC Report* (n 6) 84. For an analysis of the divergence in AFSA and ASIC regulatory approaches see, Catherine Robinson, 'Regulation of Insolvency Practitioners in a Pandemic' (2020) 28(4) *Insolvency Law Journal* 181.
97 *Australian Government Options Paper* (n 20) 4 [24].
98 Stern and Holder (n 22) 33.

(i) whether comparable misconduct cases are subject to a similar range of procedural treatment (procedural consistency);[99] and

(ii) whether similar facts produce similar outcomes (substantive consistency).

My analysis considers whether committee decisions are made within the same range of law and policy (specifically, public interest policy).[100] In respect of predictability, this includes analysis of:

- how disciplinary committees articulate and weigh factors used to determine appropriate orders;
- categorisation of seriousness;
- whether like cases received similar outcomes; and
- differences in outcomes and reasons for any divergence.

As I outlined in Part III above, the legislative framework empowers a disciplinary committee with significant procedural flexibility and broad discretionary powers. This reflects the intention, as previously noted, to create a forum to 'better enable timely and *appropriate* disciplinary action to be taken when misconduct occurs'[101] and be 'empowered to grant a wide range of remedies'.[102] At the same time, there exists a tension between the wide discretionary powers of a committee and the uncertainty in processes or outcomes that such discretion can lead to. As outlined in Part II above, transparency of decisions is a barrier to the assessment of certainty and efficiency where there is discretion for a committee to publish the decision and/or reasons for that decision.[103]

As explained above, my analysis adopts the criteria of strong, medium, and weak from Armson's approach to measuring the certainty of decisions by the Takeovers Panels. A strong form of certainty in decision-making involves a high level of consistency in the treatment and outcomes for practitioners in similar situations. This indicator is derived from decisions of Australian courts and tribunals that recognise that consistency is desirable.[104] The medium form involves similar treatment and outcomes as the general rule, with deviation in a limited number of matters. This measure recognises the wide discretion and flexibility of individually empanelled committees to decide and not be bound by decisions of other committees. A weak form of certainty results in decision-making with variation between the committees' treatment and/or outcomes in relation to similar circumstances.[105] For example, where like cases are being treated and decided unlike

---

99 Bryan Finlay and Richard Ogden, 'Consistency in Tribunal Decision-Making' (2012) 25(3) *Canadian Journal of Administrative Law & Practice* 277, 278.

100 Ibid.

101 *Australian Government Proposals Paper* (n 24) 27 [140] (emphasis added).

102 *Australia Government Options Paper* (n 20) 29 [155].

103 *Insolvency Practice Schedule (Corporations)* (n 46) s 40-55(1)(h); *Insolvency Practice Schedule (Bankruptcy)* (n 46) s 40-55(1)(h).

104 Emily Johnson 'Should "Inconsistency" of Administrative Decisions Give Rise to Judicial Review?' (2013) 72 *Australian Institute of Administrative Law Forum* 50.

105 'Armson PhD' (n 23) 226.

each other this could involve review applications and/or committee decisions being overturned by the ART or the courts.

The overarching question with respect to certainty is: does the alignment of the personal and corporate insolvency disciplinary frameworks achieve consistent outcomes for the regulated population?

B *How to Measure Efficiency*

Efficiency in the regulation of insolvency practitioners and, particularly, minimising the time to conclude disciplinary matters was a key aim of the *ILR Act*. This is due to the detrimental impact of delay on practitioners and on third parties who may rely on them (including their employees), as well as stakeholders waiting on the (monetary) resolution of the insolvency proceeding.[106] Serious concerns include uncertainty about whether practitioners can continue with existing matters or take on new matters and then have to transfer these files. The cases of *Kukulovski* (2020)[107] and *Thomson* (2020) illustrate these complexities for practitioners operating in a multinational firm as well as sole practitioners. For firms trading under a national practice brand there are also concerns with disenfranchisement.[108]

Speed of decisions also impacts certainty of the insolvency regime by contributing to a body of precedent. My analysis does not compare the efficiency of disciplinary committees against the former CALDB. Rather, the focus is on the extent to which the committees are meeting the legislative timeframes and policy objectives to be a more efficient method of resolution for disciplinary matters than the CALDB and the courts.

It is also difficult to compare the speed of the decision-making of different bodies due to a lack of consistency in periods used to measure speed and limited reporting by the bodies about resolved matters.[109] In misconducts matters, there are further challenges with comparing speed of regulatory bodies as, generally, misconduct *between* professions (for example, doctors or lawyers) and the complexities of individual cases may affect the timing.[110]

As outlined in Part II above, disciplinary committees are convened upon the referral of matters from ASIC or AFSA. I measure time taken to resolve a matter from the date of referral to the date when the committee makes it decision and assess their speed by analysing 17 cases that have been finalised between 1 March 2017

---

106 See, eg, *Kukulovski* (2020) (n 62) 6 [15], where the Administrative Appeals Tribunal of Australia ('AAT') noted that the applicant liquidator 'has a de facto partner who is pregnant, and who experiences health problems. … Mr Kukulovski is also currently providing some financial support to his former partner. He says his capacity for providing all of that assistance and support will be diminished if he is unable to work'.

107 *Kukulovski* (2020) (n 62).

108 Ibid 6 [16].

109 'Armson PhD' (n 23) 147.

110 See Jenni Millbank, 'Serious Misconduct of Health Professionals in Disciplinary Tribunals under the National Law 2010–17' (2010) 44(2) *Australian Health Review* 190. There are, however, a limited number of cases involving legal practitioners that have been applied in disciplinary proceedings concerning health practitioners. See Gabrielle Wolf and Mirko Bagaric, 'Nice or Nasty?: Reasons to Abolish Character as a Consideration in Australian Sentencing Hearings and Professionals' Disciplinary Proceedings' (2018) 44(3) *Monash University Law Review* 567, 575.

and 1 March 2025. As at 1 March 2025, there was one matter before a disciplinary committee in corporate insolvency that had been stayed.[111] Like the discussion on certainty in Part IV(A) above, a limitation of this assessment is that in seven corporate insolvency matters the decisions have not been published, which is explored further in Part VII(C) below.

Like my methodology for assessing certainty, which is adopted from Armson's assessment of the Takeovers Panels, the speed of disciplinary committee decision-making can be assessed as strong, medium, or weak:

- A strong form of efficiency would be making a decision with the 60-day statutory timeframe from referral of a matter by ASIC or AFSA.
- A medium form of efficiency would be the making of a committee decision within three to six months of referral.
- A weak form of efficiency would be decisions being made more than six months after the date of referral to the committee.[112]

The medium and weak parameters reflect the timing goals applied to courts, tribunals, and panels in relation to corporate dispute matters.[113] I consider these to be an appropriate benchmark for the disciplinary committees considering the objects of the *ILR Act*, the purpose of the committees, and the complexity of commercial and professional conduct aspects of matters.[114]

As mentioned earlier in Part IV, there have been two appeals decided by the AAT between 1 March 2017 and 1 March 2025.[115] It is important to assess the efficiency of that decision-making body in light of the 2022 decision to abolish the AAT in its form at that time due to issues of delay.[116] In the 2020–21 and 2022–23 periods, the median time taken by the AAT to finalise taxation and commercial matters was 45 and 51 weeks respectively.[117] As such, I compare the two appeal cases to these benchmarks.

The overarching question with respect to efficiency is: does the disciplinary regime achieve its reform outcomes in an efficient manner, with respect to the speed of disciplinary processes?

---

111 See Giles Geoffrey Woodgate entry listed in 'Registered Liquidator Disciplinary Decisions', *ASIC* (Web Page) <https://asic.gov.au/for-finance-professionals/registered-liquidators/your-ongoing-obligations-as-a-registered-liquidator/liquidator-compliance/registered-liquidator-disciplinary-decisions/> ('ASIC Registered Liquidator Disciplinary Decisions'). See also n 124 below and accompanying text.

112 'Armson PhD' (n 23) 155.

113 See Armson PhD (n 23); Emma Armson, 'Certainty in Decision-Making: An Assessment of the Australian Takeovers Panel' (2016) 38(3) *Sydney Law Review* 369.

114 Ibid 151.

115 *Kukulovski* (2021) (n 85); *Duncan* (n 85).

116 Administrative Review Tribunal, 'New Federal Administrative Review Body Commences' (News and Updates, 14 October 2024) <https://www.art.gov.au/about/news-and-updates/new-federal-administrative-review-body-commences>.

117 See 'AAT Statistics', *Administrative Review Tribunal* (Web Page) <https://www.art.gov.au/about-us/accountability-and-reporting/former-administrative-appeals-tribunal/aat-statistics> for: AAT, *AAT Caseload Report 2020–21*; AAT, *AAT Caseload Report 2022–23*.

V An Overview of the Dataset

There is no requirement for the Regulators to publish referrals to the committees. Table 1 below represents ASIC and AFSA referrals to disciplinary committees.

Table 1: ASIC and AFSA referrals to disciplinary committees, 1 March 2017–1 March 2025

	ASIC	AFSA
Referrals to disciplinary committees	13	5
Published decisions of disciplinary committees	7	4
AAT decisions	2	0

The referrals and decisions in corporate insolvency were obtained from ASIC's 'Registered Liquidator Disciplinary Decisions' web page.[118] The two AAT decisions are accessible in the Australasian Legal Information Institute ('AustLII') database.[119]

In respect of the seven corporate insolvency decisions that were not published:

- in two matters, the committees were not satisfied that the practitioners' conduct warranted disciplinary action and the practitioners continue to be registered;[120]
- in one matter, the reprimand and the decision were published as a summary only, and the practitioner continues to be registered with conditions;[121]
- in one matter, the Committee did not consider the case as the practitioner's registration had been cancelled by ASIC following orders of the Federal Court of Australia;[122]
- two matters were reviewed by the AAT (one matter was subject to a non-publication order by the AAT and the practitioner's registration was cancelled by consent of the parties);[123] and
- one decision has been stayed.[124]

[118] 'ASIC Registered Liquidator Disciplinary Decisions' (n 111).

[119] 'Administrative Appeals Tribunal of Australia', *AustLII* (Web Page) <https://austlii.edu.au/cgi-bin/viewdb/au/cases/cth/AATA/>.

[120] In the matters of Katherine Elizabeth Barnet and William John Fletcher there is no further information about why the committees ordered their continued registration: see 'ASIC Registered Liquidator Disciplinary Decisions' (n 111).

[121] ASIC, 'Disciplinary Committee Decision – Nicholas Crouch' (Media Release 22-171MR, 1 July 2022) <https://www.asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-171mr-disciplinary-committee-decision-nicholas-crouch/> ('Crouch MR').

[122] 'ASIC Registered Liquidator Disciplinary Decisions' (n 111); *Federal Commissioner of Taxation v Iannuzzi (No 2)* (2019) 140 ACSR 497.

[123] *Duncan* (n 85); *Kukulovski* (2021) (n 85). In *Kukulovski* (2021), the AAT set aside the decision of the Disciplinary Committee to direct ASIC to publish the report.

[124] ASIC, *Referral of Matter to Schedule 2 Committee: Giles Geoffrey Woodgate* (23 June 2023) <https://download.asic.gov.au/media/xdjobmck/20230623-form-986-referral-to-committee-woodgate-030874364.pdf> ('*Woodgate Referral*').

Unlike ASIC, AFSA does not have a central register of referrals to committees and their decisions. The information was obtained by contacting AFSA's statistics department.[125] A search of the AustLII databases did not return any results. In one matter, AFSA cancelled the trustee's registration and the Committee did not consider the case.[126]

This research extends the results of my 2021 study from 1 March 2021 to 1 March 2025.[127] Since 2021, there have been five corporate insolvency cases all involving men, with three practitioners from New South Wales (NSW),[128] one from South Australia,[129] and one based in Singapore (originally from NSW).[130]

The predominant matters in corporate insolvency continue to be explained by the larger number of registered liquidators (642) compared to registered trustees (213).[131] As will be discussed in Part VII below, the absence of referrals by AFSA to disciplinary committees during this period remains consistent with AFSA's low levels of referrals generally since commencement of the reforms in 2017. The proportion of practitioners subject to Disciplinary Committee proceedings who are male has increased from 71% to 100%.[132] This differs dramatically from the results of my 2021 study, although gender disproportion remains high in the insolvency profession, with males still comprising about 90% of registered liquidators and 87% of registered trustees.[133] The jurisdictional difference reflects that a majority of insolvency practitioners operate within NSW.[134]

Another important distinction from the 2021 results is that where specified or possible to discern, recent cases have not involved the deliberate misappropriation

---

125 AFSA, *Email from AFSA Statistics to Catherine Robinson* (Email, 28 April 2025) ('AFSA Correspondence') (correspondence on file with the author).

126 AFSA, 'Trustee Deregistered for Failure to Meet *Bankruptcy Act* Standards' (Media Release, 5 February 2024) <https://www.afsa.gov.au/newsroom/trustee-deregistered-failure-meet-bankruptcy-act-standards>. See also above n 12.

127 Robinson, 'CALDB to Pt 2 Committee' (n 17) 184.

128 See ASIC, 'Crouch MR' (n 121); ASIC, *Woodgate Referral* (n 124); *Report of the Committee Convened to Make a Disciplinary Decision about Steven Naidenov, A Registered Liquidator* (21 December 2023) ('*Naidenov*').

129 *Report of the Committee Convened to Make a Disciplinary Decision about Richard Ernest Auricht, A Registered Liquidator* (28 June 2023) ('*Auricht*').

130 *Duncan* (n 85) 2 [1].

131 ASIC, 'Annual ASIC Insolvency Data Reveals Increase in Companies Failing' (News, 25 July 2024) <https://asic.gov.au/about-asic/news-centre/news-items/annual-asic-insolvency-data-reveals-increase-in-companies-failing/>; AFSA, *Register of Trustees* (Web Page) <https://services.afsa.gov.au/insolvency-dashboard/practitioner/public/registered-trustee/search>.

132 AFSA correspondence (n 125); 'ASIC Registered Liquidator Disciplinary Decisions' (n 111). ASIC, 'Insolvency Statistics Series 4: Registered Liquidator Statistics, September 1999–March 2025', (April 2025) <https://www.asic.gov.au/about-asic/corporate-publications/statistics/insolvency-statistics> Table 4.4.

133 Ibid cf Robinson, 'CALDB to Pt 2 Committee' (n 17) 170. ASIC, 'Insolvency Statistics Series 4' (n 134) Table 4.4.

134 ASIC, 'Insolvency Statistics Series 4' (n 132) Table 4.1; AFSA, 'Register of Trustees' (n 131). See also Christine Chen, 'AFSA's Positive Discrimination Makes Inroads for Female Trustees', *Accountants Daily* (online, 13 March 2024) <https://www.accountantsdaily.com.au/business/19726-afsa-s-positive-discrimination-makes-inroads-for-female-trustees>.

of funds of an administration and concurrent criminal proceedings.[135] This seems to be a retreat from the proportion of these types of matters in my 2021 study. A possible explanation for this might be the general deterrent effect from two highly publicised matters where the practitioners received the maximum disciplinary outcomes by the disciplinary committees and the courts for their fraudulent conduct: cancellation of registration and imprisonment, respectively.[136]

Since my 2021 study, there has also been an absence of mental health and personal issues that are usually raised by practitioners facing disciplinary hearings.[137] In previous matters, insolvency practitioners have led evidence about their vulnerable state as a result of their circumstances including domestic problems[138] and financial pressures.[139] Textual analysis of the cases indicates that a common theme throughout recent matters relates to issues around:

- diligence and competency of the practitioner resulting in unapproved fees due to a lack of proper business practices;[140]
- lodging an end of administration return and failing to handover possession or control of all books relating to an external administration within a specified period;[141] and
- failing to hold the qualifications, experience and knowledge prescribed by the legislation.[142]

Similar to the results of my 2021 study, in recent cases the committees made various orders including: one cancellation;[143] directions not to accept further

---

135 See 'Murray on Leroy' (n 12); Norington (n 12). The 2024 media reporting about Leroy relates to the trustee's historical conduct in the administration of bankrupt estates in 2002 and 2015, which pre-dated the *ILR* Act (n 41).

136 ASIC, 'Former Liquidator David Leigh Sentenced to Seven Years Imprisonment for Fraud' (Media Release 19-104MR, 3 May 2019) <https://www.asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-104mr-former-liquidator-david-leigh-sentenced-to-seven-years-imprisonment-for-fraud/> ('Leigh MR'); ASIC, 'Former Sydney Liquidator Sentenced to Three Years' Imprisonment for Dishonesty and Fraud Offences' (Media Release 22-019MR, 14 February 2022) <https://www.asic.gov.au/about-asic/news-centre/find-a-media-release/2022-releases/22-019mr-former-sydney-liquidator-sentenced-to-three-years-imprisonment-for-dishonesty-and-fraud-offences/> ('Young MR'). See also Sonia Kohlbacher, 'Queensland Liquidator Imprisoned for Embezzlement', *Brisbane Times* (online, 3 May 2019) <https://www.brisbanetimes.com.au/national/queensland/queensland-liquidator-imprisoned-for-embezzlement-20190503-p51jzb.html>; Peter Gosnell, 'Sentencing Delay Helps Ex-Liquidator Avoid Gaol' on Peter Gosnell, *Insolvency News Online* (11 February 2022) <https://insolvencynewsonline.com.au/sentencing-delay-helps-ex-liquidator-avoid-gaol/>.

137 Moore, Buckingham and Diesfeld have noted the findings of academic research in Australia, Canada and the United States that disciplinary cases often involve lawyers who are impaired by physical or mental health conditions, or substance abuse: Jennifer Moore, Donna Buckingham and Kate Diesfeld, 'Disciplinary Tribunal Cases involving New Zealand Lawyers with Physical or Mental Impairment, 2009–2013' (2015) 22(5) *Psychiatry, Psychology and Law* 649, 650.

138 *Report of the Committee Convened to Make a Disciplinary Decision about Amanda Young, A Registered Liquidator* (3 June 2020) ('*Young*') 10 [74].

139 *Report of the Committee Convened to Make a Disciplinary Decision about David John Leigh, A Registered Liquidator* (February 2019) ('*Leigh (corporate)*') 4 [23].

140 *Auricht* (n 129).

141 ASIC, 'Crouch MR' (n 121).

142 *Duncan* (n 85).

143 *Auricht* (n 129).

appointments for a period followed by unconditional registration[144] or conditional registration;[145] one reprimand;[146] and one conditional registration (by consent and on appeal from the AAT).[147] This is important as it reflects the policy and legislative intention to empower the disciplinary committees with a wide range of regulatory tools, and there is no clear preference towards a certain outcome (such as deregistration).[148]

VI Certainty

A *Procedural Consistency*

1 *'Principles of Natural Justice'*

Many disciplinary committee decisions have made specific statements endorsing the requirement to observe natural justice, which includes procedural fairness.[149] This requirement has been interpreted by disciplinary committees to include:

- providing all relevant information about ASIC or AFSA's concerns to the practitioner;[150]
- giving the practitioner the opportunity to be heard and respond to these concerns;[151] and
- affording reasonable flexibility and consenting to extensions of time for practitioners to put forward additional material in written submissions or oral interviews.[152]

The legislation does not require disciplinary committees to interview practitioners as a prerequisite to making their decision.[153] Notwithstanding this, in all published cases practitioners were afforded the opportunity to attend an interview and provide further information to the committee. In *Young*, the Committee invited the practitioner to attend two interviews.[154]

Consistent with the literature on professional misconduct, the majority of cases decided by a Disciplinary Committee have involved multiple grounds and allegations.[155] However, unlike disciplinary matters about lawyers in Australia and

144 *Naidenov* (n 128).
145 ASIC, 'Crouch MR' (n 121).
146 Ibid.
147 *Duncan* (n 85).
148 *Insolvency Practice Schedule (Corporations)* (n 46) s 40-55; *Insolvency Practice Schedule (Bankruptcy)* (n 46) s 40-55.
149 See *Young* (n 138) 4 [20]–[22]; *Auricht* (n 129) [14], [16]–[17]; *Leigh (corporate)* (n 139) 8 [50], 9 [53].
150 *Auricht* (n 129) [16].
151 *Thomson* (2020) (n 76).
152 *Young* (n 138) 3–4 [15], 4 [21].
153 *Insolvency Practice Schedule (Corporations)* (n 46) s 40-55; *Insolvency Practice Schedule (Bankruptcy)* (n 46) s 40-55; *Insolvency Practice Rules (Corporations)* (n 27) r 50-85; *Insolvency Practice Rules (Bankruptcy)* (n 27) r 50-85.
154 *Young* (n 138) 2 [6], 4 [21].
155 See, eg, Moore, Buckingham and Diesfeld (n 137) 650; Katherine J Elkin, Matthew J Spittal, David J Elkin and David M Studdert, 'Doctors Disciplined for Professional Misconduct in Australia and New Zealand, 2000–2009' (2011) 194(9) *Medical Journal of Australia* 452, 455.

other jurisdictions,[156] there have been only two cases involving practitioners with mental health conditions.[157] In those cases involving highly complex issues of fact or law, committees have consistently allowed practitioners more time to adduce further evidence.[158] For example, in *Auricht*, the Committee considered information provided during the interview, and information supplied by the practitioner on six separate occasions over a period of nine months, to determine the issue of drawing remuneration without creditor or court approval.[159] The protracted time to produce evidence was due to the practitioner having to recall events that occurred nine years prior to the disciplinary proceedings, and reconcile all drawings and approvals in the sum of $887,302.75 between 2013 to 2017 (when there had been no system in place at the time). The disciplinary proceedings in *Naidenov* concerned the practitioner's conduct in relation to the intermingled affairs of a group of companies.[160] In addition to being interviewed by the Committee, the practitioner provided written information on at least eight separate occasions.[161]

In *Young* however, the Committee included a clear qualification to their support for natural justice: that affording natural justice is not an absolute requirement particularly where it needs to be balanced with protection of the public.[162] In this matter, the Committee declined to delay their decision pending further information about criminal prosecution the practitioner might face because they viewed it as inappropriate and contrary to the public given the gravity of the conduct.[163] Although the practitioner was subject to dual disciplinary and criminal investigations, the disciplinary process was not paused until the criminal process was concluded. Moreover, the Committee did not require further material from the criminal proceedings to make the determination that the practitioner was not fit and proper to be a registered liquidator.

2 *Case Management*

In all published decisions, the disciplinary committees outlined their case management processes. Figure 1 below illustrates the pathways to resolution before the committees. This demonstrates the highly flexible nature of the committees to adapt their processes to enhance efficiency in the resolution of disciplinary matters, as intended by the *ILR Act* reforms. Following on from the above discussion, cases involving more complex matters are generally afforded more time.

---

156 Moore, Buckingham and Diesfeld (n 137).

157 *Auricht* (n 129) [71]–[72]; *Young* (n 138) 10 [74], 11 [88].

158 *Auricht* (n 129) [9], [11], [15]; *Young* (n 138) 3–4 [15]; *Naidenov* (n 128) [9], [29].

159 *Auricht* (n 129) [48].

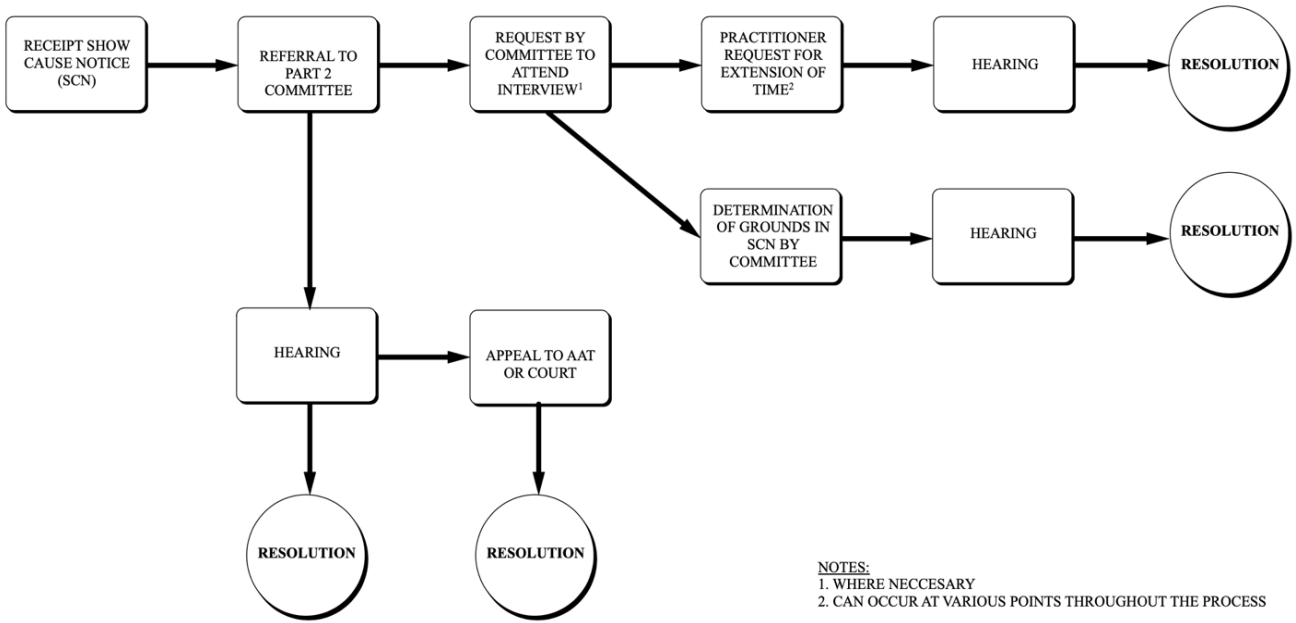
160 The *Corporations Act* (n 1) pt 5.6 div 8 contains the pooling provisions. Since their introduction in 2007, there have only been a few reported cases considering these provisions. See Jason Harris, 'Corporate Group Insolvencies: Charting the Past, Present and Future of "Pooling" Arrangements' (2007) 15(2) *Insolvency Law Journal* 78; Mark Wenn, Alex Myers and Amy Green, 'Pooling: The Broader Application of Pooling Orders' (2022) 34(1) *Australian Restructuring Insolvency & Turnaround Association Journal* 34.

161 The practitioner submitted written evidence on 12 December 2022, 1 February 2022, 9 March 2023, 29 March 2023, 16 July 2023, 18 July 2023, 24 July 2023, and 25 July 2023: *Naidenov* (n 128) [9], [11].

162 *Young* (n 138) 11 [83], 12 [89]–[90].

163 Ibid 12 [89]–[90].

Figure 1: Disciplinary Committee Case Management Pathways



3 *Decision Formats*

Regarding consistency in the presentation of decisions, the average length of Disciplinary Committee decisions is 10 pages — ranging from three pages to 37 pages. The inaugural decision of *Turner* was only three pages long and can be treated as an outlier.[164] Subsequent disciplinary committees have had cases to follow when documenting their decisions, as well as conducting their processes and evaluating outcomes.

Disciplinary committee decisions have generally adhered to the following written structure:

- Decision Name/Citation
- Membership of committee
- Decision
- Reasons for decision
- Introduction
- Factual circumstances around conduct
- Process, procedural matters for consideration including natural justice
- Issues of fact and law
- Decision-making process
- Summary of reasons for decision
- Decision including any direction to ASIC or AFSA to publish
- Signatures and date
- Appendices/ Annexures and Schedules

In mapping the written approaches of the disciplinary committees, it is clear that decisions are structured in a comprehensive and logical manner. Maintaining this system in decision writing is important to promote reasonable uniformity among the committees and contributes to the development of qualitative guidance for future committees and/or practitioners.

B ***Substantive Consistency***

1 *Application of the Public Interest Policy*

Central to the policy objectives of the *ILR Act* is protection of the public interest. In all published decisions, the disciplinary committees have consistently referred to the importance of the public interest policy to their function or decision-making. This

[164] *Summary Decision on Referral of Matter to Schedule 2 Committee: Dennis Anthony Turner, A Liquidator* (8 March 2018).

was emphasised in two separate decisions of committees in bankruptcy relating to the same trustee.

In *Thomson* (2018), a loss of confidence by the Federal Court was sufficient grounds for AFSA to refer the practitioner to a disciplinary committee.[165] The Committee cited the finding of the Court that the practitioner's 'conduct fell short of the high standard expected of a trustee'.[166] Notwithstanding the several swingeing criticisms of the Court,[167] the Committee concluded that the trustee should continue to be registered without conditions. The trustee's registration was, however, ultimately cancelled in a second decision relating to separate issues in *Thomson* (2020), whereby the Committee made it clear that the key objective of the disciplinary process and the Committee's 'primary concern' is 'the protection of the public'.[168]

Support for the public interest policy was made more explicit by the Committee in *Moore*.[169] The Committee emphasised the difference in the private nature of a practitioner's livelihood in the context of the importance of the public interest: 'the impact of the Committee's decision on the practitioner is to be given limited consideration, as the prime concern of the Committee is the protection of the public'.[170] The practitioner had also submitted that publication of the formal conditions to their registration would have adverse economic and reputational effects.[171] In deciding to publish its report, the Committee again placed more weight on the promotion of public confidence in the insolvency system over the practitioner's private concerns.[172]

In *Moore*, the practitioner relied upon several authorities, from which the Committee articulated the following relevant principles:

> The powers to cancel or suspend registration of a trustee are not punitive, the function of the Committee is not to punish or exact retribution. It is entirely protective in the public interest.[173]
>
> and
>
> [The protection of the public] also includes the maintenance of a system under which the public can be confident that trustees will know that breaches of duty will be appropriately dealt with ...[174]

---

165 *Report of the Committee Convened Pursuant to Schedule 2, Section 40-45 of the Bankruptcy Act 1966 to Make a Decision about Ms Louise Thomson, a Registered Trustee* (5 April 2018) ('*Thomson* (2018)'); *Re Young (Bankrupt); Young v Thomson (Trustee) (No 4)* [2017] FCA 175.

166 *Thomson* (2018) 3.

167 *Young v Thomson (Trustee) (No 4)* (n 165) [21]–[25].

168 *Thomson* (2020) (n 76) 36 [170].

169 *Report of the Committee Convened under s 40-50 of the Insolvency Practice Schedule (Bankruptcy) to Make a Decision about Mr Daniel Moore, A Registered Trustee* (15 July 2021) ('*Moore*').

170 Ibid 15 [100.4].

171 Ibid 19 [118].

172 Ibid 19 [124].

173 Ibid 14 [100.1], citing *Re Inspector-General in Bankruptcy v Matthews* [1990] FCA 519, [18].

174 Ibid 14 [100.3], citing *NHPT v Members of the Companies Auditors & Liquidators Disciplinary Board* [2015] AATA 245, [18].

These views align with the policy-driven genesis of the disciplinary committees as an alternative dispute forum to the courts. In *Leigh* (*bankruptcy*), the Committee made a strong statement in support of the public policy interest emphasising that:

> Mr Leigh's actions have *severed* the confidence that the court and all stakeholders in insolvency proceedings are entitled to expect and command.[175]

As identified in Part V(A)(1) above, this approach was applied by the Disciplinary Committee in *Young* in refusing the practitioner's request to adjourn the matter because it was 'in the public interest [to] deal with this matter as expeditiously as possible'.[176] In support of this conclusion, the Committee stated that 'suspension [of registration] would be inappropriate and contrary to the public interest [in part] because of the importance of protecting the public, and specifically and generally deterring others, from similar conduct'.[177]

2 *Consistency in Outcomes*

Unlike the courts, the disciplinary committees are not bound by the doctrine of *stare decisis*. This means they are not held to the reasons that led to a previous committee's decision in a like case, nor are they bound by the doctrine of *res judicata*: previous decisions are not binding on disciplinary committees.

Since 1 March 2017, the most serious order, cancellation of registration, has been imposed by disciplinary committees in five matters relating to four practitioners. In the *Leigh* cases, the practitioner was a dual registered liquidator and registered trustee and had been referred to separate disciplinary committees by ASIC and AFSA. While the conduct related to the practitioner's capacity as a liquidator, AFSA was satisfied this could adversely impact their registration as a trustee. The cases of *Leigh* and *Young* involved fraudulent conduct and misappropriation of funds totalling $800,000 and $238,502.23 respectively, and there were crossovers with criminal proceedings whereby the practitioners received custodial sentences.[178] The committees in these matters imposed cancellation orders, with the Committee in *Leigh (corporate)* emphasising 'the conduct showed a lack of honesty, integrity and good character'.[179]

In both *Leigh* cases, the disciplinary committees went further and ordered an 8-year, and 10-year condition be imposed on all other registered trustees and registered liquidators respectively. The Committee in *Leigh (corporate)* reasoned 'it is not appropriate for Mr Leigh to participate in any capacity in the insolvency industry ... [this] would create a danger to others'[180] and 'the regulatory purpose of cancellation would not be achieved if Mr Leigh could still work in the insolvency

---

175 *Report of the Committee Convened pursuant to Schedule 2, Section 40-45 of the Bankruptcy Act 1966 to Make a Decision about Mr David Leigh, A Registered Trustee* (31 January 2019) 5 ('*Leigh (bankruptcy)*') (emphasis added).

176 *Young* (n 138) 11 [87].

177 Ibid 12 [90].

178 The Brisbane District Court decision in David John Leigh, and the New South Wales District Court decision in Amanda Young were unreported, but see ASIC, 'Leigh MR' (n 136); Kohlbacher (n 136); ASIC, 'Young MR' (n 136); Gosnell (n 136).

179 *Leigh (bankruptcy)* (n 175) 6.

180 *Leigh (corporate)* 9 [57].

industry under a registered liquidator'.[181] The Committee in *Leigh (bankruptcy)* stressed 'this action is necessary to enforce Mr Leigh's disqualification term and to protect the integrity and reputation of the insolvency profession'.[182] The outcomes in the *Leigh* decisions further demonstrate consistency between two separately convened disciplinary committees whereby different committees with their own members, processes and procedures have arrived at the same decision.

In *Auricht*, the Disciplinary Committee considered a cancellation order was appropriate given the seriousness of the findings.[183] In this case, drawing fees from an administration without any approval system in place was found to be a 'failure of a basic fundamental requirement of a liquidator'.[184] As such, the Committee concluded that the practitioner did not have the 'capacity to adequately and properly perform the duties of a liquidator'.[185] In *Thomson* (2020), a cancellation order was imposed where there had been multiple breaches of the trustee's statutory duties in the investigations of a bankrupt without appropriate recognition of wrongdoing.[186] The failure to undertake these investigations had the detrimental effect of depriving the estate and its creditors. Although the Committee found each breach was, of itself, 'towards the lower end of the scale of seriousness … taken together, and combined with the lack of proper record keeping in Mr M's bankrupt estate', they constituted serious breaches.[187]

The disciplinary committees have consistently made orders for practitioners to continue to be registered in circumstances where, compared to disciplinary matters of former practitioners, 'the nature and extent of the misconduct and seriousness of errors [are] absent'.[188]

3 *Considerations to Applying Outcomes*

The disciplinary committees have regularly taken into account evidence of rehabilitation, such as genuine acceptance of failure, remorse and contrition,[189] as well as remediation efforts as tending towards conclusions of less serious misconduct.[190] Despite there being some 20 areas of concern involving serious and ongoing failure to adequately and properly perform the duties of a liquidator, the Committee in *Ball* found that '[i]ndeed, but for Mr Ball's particular circumstances, the contrition he demonstrated ... such action would have included cancellation of

---

181 Ibid.
182 *Leigh (bankruptcy)* (n 175) 6.
183 *Auricht* (n 129) [174]–[178].
184 Ibid [61].
185 *Auricht* (n 129) [175], [177]. For a discussion of the meaning of 'adequately' see *Dean-Willcocks v Companies Auditors and Liquidators Disciplinary Board* (2006) ASCR 698, 709 [24]–[25] (Tamberlin J); *Davies v Australian Securities Commission* (1995) 59 FCR 221, 240–42 (Hill J).
186 *Thomson* (2020) (n 76) 1 [1], 34 [159],[161]–[162]. See also Robinson, 'CALDB to Pt 2 Committee' (n 17) 177.
187 *Thomson* (2020) (n 76) 23 [109].
188 *Moore* (n 169) 16 [107], where the Committee referred to the decisions of *Thomson* (2020) (n 76) and *Re Wong; Inspector-General in Bankruptcy v Pattison* [2008] AATA 487.
189 *Report of a Committee Convened to Make a Disciplinary Decision about Mitchell Warren Ball, A Registered Liquidator* (25 November 2019) 4 ('*Ball*').
190 *Naidenov* (n 128) [6], [36].

his registration'.[191] The Committee in *Ball* was also satisfied with the extent of operational improvements to prevent reoccurrence of past failings such as: implementing an electronic system in place of paper based check-list procedures and using third party consultants to conduct compliance reviews.[192]

Similarly, in *Naidenov* the Committee placed weight on the practitioner's admissions that while their conduct did not meet the requisite standard, the practitioner had rectified improper payments that had been made in breach of their duties. The Committee emphasised 'had Mr Naidenov failed to appreciate the serious and significant dereliction of his obligations that his actions represent, and failed to make any repayments to the company, the Committee may have considered this matter differently'.[193]

These outcomes may be contrasted with the case of *Thomson* (2020), where the Committee found the practitioner had failed 'to recognise the existence of a potential conflict of interest… coupled with [a] failure to appreciate that her continued occupation of this role constituted an ongoing and actual conflict of interest'.[194] The Committee emphasised that this represented a serious misunderstanding of 'one of the most fundamental duties of a trustee under the general law'.[195] Further, the Committee was not satisfied the practitioner had demonstrated any further education or training to address such gap in knowledge.[196] The Committee concluded that it was not appropriate for the practitioner to continue to be registered in circumstances where she had 'failed to carry out adequately and properly her general law duty of independence and various statutory duties … where these failures could have adversely affected the interests of creditors'.[197]

Relatedly, in *Auricht* the Committee concluded that a cancellation order was warranted where the practitioner failed to understand the 'gravitas [sic] of the conduct' in making 14 drawings for fees over an extended period totalling $297,995.67 without approval.[198] Those drawings had occurred because the practitioner did not have sufficient business practices in place to ensure that unapproved fees were not drawn.[199] The Committee rejected that the strategies and business systems the practitioner had subsequently implemented would be sufficient to ensure the same errors would not be made again.[200]

---

191 *Ball* (n 189) 4 [15]. The Committee noted 'it is not necessary, given Mr Ball's acknowledgements, to set out his conduct in detail': at 3 [9].

192 Ibid 4 [12].

193 *Naidenov* (n 128) [36].

194 *Thomson* (2020) (n 76) 36 [172]. The leading authority on the requirement for independence arising from a referral relationship is *Australian Securities and Investments Commission v Franklin* (2014) 223 FCR 204, 232 [125] (White J). For a practical guide to referral relationships and the requirement for independence, see *ARITA Code of Professional Practice* (4th ed, 1 January 2020)) ('*ARITA Code*') Insolvency Services s 3. For the rationale of the independence requirement for insolvency practitioners, see *ARITA, Practice Statement 1: Insolvency — Independence* (16 September 2019) 1.

195 *Thomson* (2020) (n 76) 36 [172].

196 Ibid 35–6 [168].

197 Ibid 36 [173].

198 *Auricht* (n 129) [123].

199 Ibid.

200 Ibid [69], [168].

C *Review of Committee Decisions*

As outlined in Part III above, decisions of disciplinary committees about suspension or cancellation of registration can be reviewed by the ART.[201] Review mechanisms are an important avenue to provide an incentive against inappropriate decision-making that can impact efficiency and certainty.[202] Given the recency of the establishment of the ART in 2024 and lack of commentary, the following discussion regarding the AAT will likely be applicable to the ART.

While the AAT 'steps into the Committee's shoes when making a decision under s 40-55 [of the *Insolvency Practice Schedule*]',[203] and therefore the discretionary powers under s 40-55 are available to them, the Tribunal is not obliged to suspend or cancel a practitioner's registration.[204] Rather its role is to make the 'correct or preferable decision in all the relevant circumstances'.[205] The focus of the AAT review is not to determine whether the original decision-maker was wrong or at fault.[206] As discussed above, a key determinant of consistency is ensuring that practitioners in like situations receive similar treatment and outcomes.

To date, there have been two appeals of disciplinary committees convened in corporate insolvency to the AAT and in both cases the committees' decisions have not been published.[207] In *Kukulovski*, the matter before the Committee involved a failure to adequately supervise staff. This failure resulted in monies being paid in the sum of $190,000 and $10,000 from two administrations toward legal fees for an unrelated external administration. The error arose as the funds were deposited into the firm account instead of the liquidation bank account. The effect was the practitioner failed to report receipt of monies to creditors and subsequently lodged false or misleading forms with ASIC.

There were two reviewable decisions before the AAT:[208]

(1) the cancellation of Kukulovski's registration; and

(2) the decision to direct ASIC to the publish the report of the Committee decision.

Similar to the approach taken by the disciplinary committees, the AAT applied the public interest policy in its decision. In respect of the first decision, the AAT affirmed the committee's decision as it was satisfied 'the public interest in particular

---

201 *Insolvency Practice Schedule (Corporations)* (n 46) s 40-1; *Insolvency Practice Schedule (Bankruptcy)* (n 46) s 40-1.

202 Paul Hughes, Justin Oliver and Rachel Trindade, 'The Role of Courts and Tribunals in Providing Guidance to Regulators' (Conference Paper, ACCC Regulatory Conference, 24 July 2008) 4 [3.1] <https://www.accc.gov.au/system/files/The%20role%20of%20courts%20and%20tribunals.pdf>.

203 *Duncan* (n 85) 3 [5].

204 Ibid (n 85) 3 [6].

205 Ibid. See also Kerrie O'Callaghan and Michelle Howard, 'Promoting Administrative Justice: The Correct and Preferable Decision and the Role of Government Policy in the Determination' (2013) 32(1) *University of Queensland Law Journal* 169.

206 Justice David Thomas 'Contemporary Challenges in Merits Review: The AAT in a Changing Australia' (2019) 96 *Australian Institute of Administrative Law Forum* 1, 5.

207 *Kukulovski* (2021) (n 85); *Duncan* (n 85).

208 *Kukulovski* (2020) (n 62).

weighs against staying the cancellation decision'.[209] Ultimately, the parties agreed to suspension of registration for a period of three years.[210] However, there was a significant difference between the Committee and the AAT in relation to the second decision, which is discussed below.

The AAT set aside the Committee's decision to direct ASIC to publish as it was noted, among other things, that the report of the decision contained 'speculation' that had not been subject to a proper review and had not yet been redacted from the text of the decision.[211] There was also the commercial interests of parties to balance with public interest, with the AAT placing emphasis on the commercial risk of disenfranchisement and reputational damage to the national firm and innocent third parties including employees.[212] The issue of natural justice was a significant factor in the AAT's application of the public interest policy, with the Tribunal outlining a number of circumstances where it would not be in the public interest to publish the decision.[213]

In *Duncan*,[214] the appeal related to the 2023 cancellation by the Committee of the practitioner's registration on the grounds they no longer had the qualifications, experience, knowledge and abilities prescribed under the *Corporations Act*.[215] It was submitted by counsel for the applicant that the Disciplinary Committee's adverse decision had been predicated on the applicant's 'sub-optimal' performance when interviewed by the Committee.[216] The applicant's subsequent performance in the witness box before the AAT led ASIC to 'abandon [its] contention that [the applicant] did not have the experience and knowledge required'.[217] As a result, the AAT set aside the decision cancelling the applicant's registration.

The *Duncan* matter typifies the function of the AAT in considering a different case from that addressed by the original decision-maker. It was conceded that the practitioner had not been able to demonstrate their expertise and knowledge before the Disciplinary Committee, and thereafter *could* exhibit this before the AAT, which resulted in a different outcome.[218]

On the issue of procedural consistency, the applicant submitted that questioning during the Committee meeting did not proceed in a way that was 'fair' to the applicant.[219] Whether this occurred and might have adversely impacted the Committee's performance remains unknown given the Committee did not publish the decision, and the AAT was not asked to consider this issue or the issue of non-

---

209 Ibid 10 [28].
210 *Kukulovski* (2021) (n 85) 1.
211 *Kukulovski* (2020) (n 62) 10 [31]. The AAT stated, at 11 [33], that 'ASIC is free to conduct its own review of the text of the reasons for decision and suggest any redactions if it wishes the Tribunal to reconsider the stay decision [against publication] at a future point'.
212 Ibid 6–7 [16]–[18].
213 Ibid 5 [9].
214 *Duncan* (n 85).
215 ASIC, 'Liquidator Disciplinary Committee Cancels Registration of Cameron Duncan' (Media Release 23-065MR, 15 March 2023) ('Duncan MR').
216 *Duncan* (n 85) 6 [18].
217 Ibid 7–8 [24].
218 Ibid.
219 Ibid 6 [18].

publication.[220] Given the allegation of unfair treatment and potentially a denial of procedural justice, which was also adversely reported by the media,[221] this serves as a warning to future committees to minimise this uncertainty by providing guidance on their processes and exercising their powers.

The outcomes in *Kukulovski* (2020), *Kukulovski* (2021) and *Duncan* were consistent with the non-adversarial model of the AAT and demonstrate the importance of the Tribunal in ensuring the disciplinary committees act according to law. In the two appeal cases, the parties (ASIC as the instigator of the disciplinary cases and the applicants) were not so widely divergent in their positions that the AAT had to decide the outcome. Ultimately, in both cases the parties consented to the individual outcomes with the AAT giving effect to the orders consistent with its administrative, not judicial, function. The availability of review, however, necessarily impacts the time for disciplinary committees to make a decision, which is discussed in Part VII below.

D *Assessment of Certainty*

Part III above outlined the method to assess certainty in disciplinary committee decisions, which comprises procedural consistency and substantive consistency. A strong form of consistency involves a high level of consistency in the process and procedure to be applied for like cases and would also involve similar decision outcomes in relation to similar circumstances. A medium form would be where consistency was achieved as a general rule with deviation in a limited number of matters. A weak form would involve inconsistency between the processes and decision outcomes for like cases.

The disciplinary committee processes and outcomes to date have not validated initial concerns regarding the lack of a manual for disciplinary committee process. My analysis demonstrates that, on the whole, the disciplinary committees have achieved high levels of procedural certainty in their decision-making. Cases involving more complex matters of fact or legal issues are afforded more time and opportunities to adduce evidence including by attending a number of pre-hearing interviews. In terms of substantive certainty in decision-making, I conclude that the committees have consistently applied the public interest policy in making orders. Decisions appear to focus on signalling to practitioners the issue of setting high standards of professional conduct. There is consistency in disciplinary committee outcomes where egregious misconduct involving dual criminal proceedings, has resulted in cancellation of registration. For other matters, the disciplinary committees have placed a consistent focus on whether the practitioner demonstrated contrition and remediating conduct in applying greater or less serious orders.

In relation to the seven decisions in corporate insolvency that have not been published, there appear to have been reasonable explanations for non-publication

---

220 Ibid 13 [44].

221 See Michael Murray, 'Liquidator Discipline Outcome – Reasons Unknown', *Murrays Legal* (Blog Post, 17 March 2023) <https://murrayslegal.com.au/blog/2023/03/17/liquidator-discipline-outcome-reasons-unknown/>; Peter Gosnell, 'KordaMentha Partner Stripped of Registration', *Insolvency News Online* (17 March 2023) <https://insolvencynewsonline.com.au/kordamentha-partner-stripped-of-registration/>.

including that four practitioners continue to be registered. In light of the sample size justification detailed in Part II above, the insights from my study ground an argument that, on the whole, the disciplinary committees have generally achieved a strong form of certainty in decision-making since commencement of the *ILR Act*.

VII Efficiency

A *Speed of Committee Decision-Making*

The key indicator of efficiency in disciplinary committee decision-making is the time taken from referral of the case by ASIC or AFSA to the committee's decision. Given the difference in the volume of referrals, the decisions of disciplinary committees convened are separately depicted for corporate insolvency (Table 2) and for personal insolvency (Table 3). Tables 2 and 3 each detail the key stages in the disciplinary process:

- time from the issue of ASIC or AFSA's show-cause notice to referral to a disciplinary committee;
- time from the Regulators' referral to committee decision; and
- time to conclusion of the matter calculated from the date of issue of show-cause notice to committee and/or AAT decision.

Tables 2 and 3 also contain the number of cases per year from 1 March 2017 to 1 March 2025.

As Table 2 illustrates, in more than half of the corporate insolvency cases the timing between key events is unknown. Given the sample size, the percentage of missing values being greater than 10% impacts on reliability of the data.[222] The impact of the missing data is significant considering the small sample size. As a result, average calculation of the times for disciplinary committees convened in corporate insolvency are unable to be determined. Notably, from the known cases only one matter was decided within the recommended 60-day statutory timeframe. In terms of overall resolution of the disciplinary matter, there is a great variability between the shortest matter, which was concluded in 79 days, compared to the longest case, which was resolved in 645 days as a result of an appeal to the AAT. This is discussed further below.

On the other hand, the average times can be calculated for disciplinary committees in bankruptcy. As set out at the bottom of Table 3, the average time to committee decision was 112.25 days from referral by AFSA. The average time taken to conclude a disciplinary matter was 205.5 days and ranged from 99 days to 353 days in 2019.

[222] Derrick A Bennett 'How Can I Deal with Missing Data in my Study?' (2001) 25(5) *Australian and New Zealand Journal of Public Health* 464, 464.

Table 2: Time taken from ASIC referral to Disciplinary Committee ('DC') decision, 2017–2025

Year of referral	Matters before DC (number)	Name of case	Time from issuing show-cause notice to referral to DC (days)	Time from referral to DC to decision (days)	Time from issuing show-cause notice to DC or AAT decision date (days)
2017	1	*Turner*[223]	Unknown	Unknown	79
2018	1	*Leigh*[224]	50	50	100
2019	4	*Young*[225] *Ball*[226] *Iannuzzi*[227] (no DC decision) *Kukulovski*[228]	60 Unknown Unknown 131	215 (> 6 months) Unknown Unknown 200 (> 6 months)	275 (> 6 months) 252 (> 6 months) 178 591 (> 1 year and 6 months)
2020	2	*Barnet*[229] *Fletcher*[230]	Unknown Unknown	126 126	Unknown Unknown
2021	1	*Crouch*[231]	296 (> 6 months)	225 (> 6 months)	521 (> 1 year)
2022	2	*Duncan*[232] *Auricht*[233]	Unknown 110	102 202 (> 6 months)	645 (>1 year) 312 (> 6 months)
2023	2	*Naidenov*[234] *Woodgate*[235]	223 Unknown	206 118	429 (> 1 year) Committee decision stayed
2024	0				
2025	0				
Average	**Unable to be determined**				

[223] *Turner* (n 164).
[224] *Leigh (corporate)* (n 139).
[225] *Young* (n 138).
[226] *Ball* (n 189).
[227] 'ASIC Registered Liquidator Disciplinary Decisions' (n 111).
[228] *Kukulovski* (2020) (n 62).
[229] 'ASIC Registered Liquidator Disciplinary Decisions' (n 111).
[230] Ibid.
[231] *Report of the Committee Convened to Make a Disciplinary Decision about Nicholas James David Crouch, A Registered Liquidator* (24 June 2022) ('*Crouch*').
[232] 'ASIC Registered Liquidator Disciplinary Decisions' (n 111). See also *Duncan* (n 85).
[233] *Auricht* (n 129).
[234] *Naidenov* (n 128).
[235] ASIC, *Woodgate Referral* (n 124). Note: decision stayed.

Table 3: Time taken from AFSA referral to Disciplinary Committee ('DC') decision, 2017–2025

Year	Matters before DC (number)	Name of case	Time from issuing show-cause notice to referral to DC (days)	Time from referral to DC to decision (days)	Timing to conclusion of matter (from date of issue of show-cause notice to date of Disciplinary Committee decision)
2017	0				
2018	1	*Thomson*[236]	89	57	146
2019	2	*Leigh*[237] *Thomson*[238]	77 108	20 245 (> 6 months)	99 353 (> 6 months)
2020	0				
2021	1	*Moore*[239]	97	127	224 (> 6 months)
2022	0				
2023	0				
2024	0				
2025	0				
Average			**92.75**	**112.25**	**205.5**

[236] *Thomson* (2018) (n 165).
[237] *Leigh (bankruptcy)* (n 175).
[238] *Thomson* (2020) (n 76).
[239] *Moore* (n 169).

B *The Kukulovski Matter and the Administrative Appeals Tribunal*

The speed of disciplinary committee decision-making was significantly impacted in the *Kukulovski* matter. As discussed above, the matter involved two AAT decisions in 2020 and 2021. Table 4 below details the timeline of events. It shows that the time taken from the ASIC referral to conclusion (the second AAT decision) was 591 days. This far exceeds the timing of the majority of other disciplinary committee matters in corporate and personal insolvency. The *Kukulovski* matter took six times longer to conclude than *Turner*, which was resolved in 79 days and was not subject to appeal.

Table 4: *Kukulovski* timeline of events

Date	**Event**
16 January 2019	ASIC issue show-cause notice
27 May 2019	ASIC referral to Disciplinary Committee
13 December 2019	Decision of Disciplinary Committee to cancel registration
16 December 2019	Applicant lodged review of Disciplinary Committee decision
23 December 2019	Interlocutory hearing
6 January 2020	First AAT decision
15 January 2020	Publication of decision delayed by order of AAT
22 December 2020	Parties reach agreement
7 January 2021	Second AAT decision

Importantly, the timeline highlights that the initial AAT review was concluded in an efficient manner, less than one month from the time of lodgement by the applicant. This was significantly less time than the average time of 45 weeks for commercial and taxation matters in the AAT.[240] There was a short delay due to ASIC's consent to stay proceedings over the Christmas break and delay in publication of decision from the date of decision on 6 January 2020 until 15 January 2020. The significant delay of 365 days was the time between AAT hearings and the time taken for the Disciplinary Committee and the applicant to reach agreement. The 2020 AAT hearing and subsequent decision was straightforward in giving effect to that agreement.

In *Duncan*, there were no details about what occurred between the time from the Committee's decision to cancel the liquidator's registration on 28 February 2023, and the subsequent decision of the AAT on 4 April 2024.[241] Given the timing of the applicant's witness statement and supplementary witness statements in June and August 2023, it can be reasonably inferred the delay between decisions related to the Tribunal proceedings. A key distinction between the *Kukulovski* matter and *Duncan* is that the applicant's livelihood in the former was directly impacted by the

[240] AAT, *AAT Caseload Report 2020–21* (n 117).
[241] *Duncan* (n 85) ASIC, 'Duncan MR' (n 215).

cancellation of his registration,[242] whereas in the latter case the applicant maintained a practice overseas focusing on Singaporean and Indonesian clients and had not lived and worked as a registered liquidator in Australia since 2012.[243]

C *Assessment of Efficiency*

As for certainty, in this study I assessed efficiency of the disciplinary committees' processes and decision-making against benchmarks involving strong, medium, and weak forms. Efficiency is indicated by the speed of decision-making. A strong form of speed in decision-making involves consistently making decisions within the 60-day statutory timeframe from referral by ASIC or AFSA to a Disciplinary Committee. A medium form of speed includes making decisions within three to six months, and a weak form would involve decision-making more than six months from referral.

Disciplinary proceedings can take time to resolve because they may involve highly complex matters and impact a practitioner's livelihood as well as third parties who rely on them. While speed is important, affording natural justice and ensuring that the correct decision is made are paramount. The discussion on certainty in Part VI(A) also identified three factors that may impact the speed of the disciplinary committees: natural justice, non-publication of decisions and/or reasons, and right of review. First, the cases of *Auricht*, *Young*, *Leigh (corporate)*, and *Naidenov* are examples of where the committees have applied the principles of natural justice to give the practitioner more time to respond to allegations. Second, a valid assessment of efficiency is only possible through transparency of the committees' decisions. The seven unpublished decisions impacted the calculation of average times for corporate insolvency matters. Although, as discussed above, in cases where decisions were not published and no further information was released by ASIC, there appear to be cogent reasons for non-publication including that the practitioners continue to remain registered, or the practitioner's registration was cancelled at the time, but they continue to be a partner of a large international firm. Similar to the reasons for conducting hearings in private, it can be argued there is a protective interest in keeping disciplinary matters confidential to minimise the impact upon the practitioners' livelihood and commercial interests. Finally, the *Kukulovski* matter demonstrates the significant impact of an AAT review on the speed of disciplinary committees taking 591 days to conclude the matter from referral by ASIC to the Committee.

For the period between 1 March 2017 and 1 March 2025, the average time from referral to decision for the disciplinary committees convened by ASIC was unable to be determined. By contrast, the average time for committees convened in bankruptcy was able to be determined. The committees took an average of 112.25 days to make a decision, with half of the matters being decided within the 60-day statutory timeframe. The long time to decision in the *Thomson* (2020) case was due to the practitioner's request that the Disciplinary Committee first decide whether ASIC's grounds had been made out.[244] Support for this approach was said

[242] *Kukulovski* (2020) (n 62) 6 [15].
[243] *Duncan* (n 85) 2 [1].
[244] *Thomson* (2020) (n 76) 4 [25].

to be found in a decision of the AAT.[245] The *Moore* case was impacted by the lockdowns imposed during the COVID-19 pandemic that delayed the interviews by two months.[246] Notwithstanding this, all disciplinary matters in bankruptcy were concluded within one year, with the majority being concluded within six months.

A possible explanation for the efficiency of the bankruptcy cases may be due to corporate insolvency matters typically involving more highly complex or contentious issues as evidenced by the *Kukulovski* and *Duncan* appeal matters.[247] In another example, the corporate insolvency Disciplinary Committee in *Leigh* took twice as long to make a decision as the counterpart committee in bankruptcy.[248] This was because the original matter concerned the practitioner's conduct as a liquidator. On the other hand, the Committee in bankruptcy had a more straightforward case to consider, whether the practitioner's conduct as a liquidator meant they were no longer a fit and proper person to carry out adequately and properly the duties of a trustee.[249]

Speed of bankruptcy disciplinary matters can also be attributed to the lower volume, with the committees in corporate insolvency hearing three times as many cases. As highlighted in Table 3, the disciplinary committees in bankruptcy did not hear any matters in 2017, 2020, 2022–24 and, as at 28 April 2025, none in 2025.[250] The lack of serious misconduct matters warranting disciplinary action accords with the generally low levels of misconduct reported by AFSA.[251]

As identified in Table 4, the *Kukulovski* appeal to the AAT had a significant impact on the speed of the disciplinary committees. It took 591 days to conclude, which could be explained by the need for the parties to reach mutual agreement. Notwithstanding the delay in the overall outcome, the AAT demonstrated a strong form of efficiency in hearing the matter within seven days of the application and making a decision within 21 days over the public holiday period. Similarly, the *Crouch* case had a long timeframe: the Committee took more than six months to make its decision and the matter was concluded in 521 days.[252] There was nothing to explain the reasons for delay as the decision was issued as a summary only, although the practitioner continues to be registered and practices in a small firm.[253]

Despite the small number of decisions, the dataset provides a sufficient basis upon which to make an assessment for the disciplinary committees in bankruptcy. The committees in bankruptcy have achieved a medium speed, taking between three to six months to make a decision. However, for the disciplinary committees in corporate insolvency an assessment of efficiency is unable to be determined.

---

245 Ibid, citing *Joubert v Members of the Companies Auditors and Liquidators Disciplinary Board* [2018] AATA 944.

246 *Moore* (n 169) 3 [13].

247 See *Kukulovski* (2021) (n 85); *Duncan* (n 85).

248 *Leigh (corporate)* (n 139).

249 *Insolvency Practice Schedule (Bankruptcy)* (n 46) s 40-40(1)(n): *Leigh (bankruptcy)* (n 175) 2.

250 AFSA correspondence (n 125).

251 See AFSA, 'Practitioner Surveillance, Enforcement and Compliance Statistics', *Inspector-General Statistics* (Web Page, July 2024–March 2025) <https://www.afsa.gov.au/about-us/statistics/practitioner-surveillance-enforcement-and-compliance-statistics>.

252 'ASIC Registered Liquidator Disciplinary Decisions' (n 111).

253 Ibid.

VIII Conclusion

Efficiency and certainty in disciplinary proceedings is important for insolvency professionals given their central role in administering and resolving external administrations for companies, consumers, and stakeholders. It is relevant to examine these proceedings as the disciplinary committees are responsible for determining whether practitioners continue to be registered, which can have a significant impact upon their livelihoods and of those who depend on them. Further, data about the incidence of serious misconduct before the committees is important for trust and confidence in both the profession and those who regulate it. More broadly, from a policymaking and lawmaking perspective a high level of efficiency and certainty in disciplinary committees is central to demonstrating good governance and maintaining confidence in the integrity of the insolvency framework — key objectives of the 2016 insolvency law reforms.

Through a content analysis approach of the first eight years of available cases (March 2017–March 2025), I have evaluated whether there has been efficiency and certainty in the disciplinary committees' decision-making. First, I defined certainty as consistency, which comprised procedural (process-related) and substantive (outcomes-related) consistency. The disciplinary committee decisions demonstrate a highly consistent approach to adhering to the principles of natural justice, including affording practitioners with complex matters more opportunities to be heard. The committees regularly applied the public interest policy to their determinations, which required consideration of whether the practitioner posed future risk to the public and profession and if there was possibility of reform. Cancellation, the most restrictive order, was used where the gravity of the practitioner's conduct was such that removing them from practice was the only option available to protect the public. This was reserved for cases that involved criminality, or where the practitioner did not appreciate the inappropriateness of their conduct or had failed to satisfy a committee of the efficacy of changes made to their practice to avoid repeating past behaviour. The small sample of the case study is representative of the low levels of serious misconduct appearing before the pt 2 disciplinary committees. Along with the justification explained in my discussion on the limitations of my study (Part II), these provide a sufficient basis upon which to conclude that overall, the disciplinary committees' decisions demonstrate a strong form of certainty. This is important in terms of the consistent emphasis on deterrence and maintenance of high standards of professional conduct. It also provides clear educative signals to the profession and public in the determination of committee outcomes.

I interpreted the second element, efficiency, to mean speed of committee decision-making as evaluated against the statutory timeframes and policy objectives of the disciplinary committees to be an expeditious alternative to the courts. Efficiency of the disciplinary committees in corporate insolvency generally, was unable to be determined due to the significant number of unpublished decisions. As explained in the methodology this was an overall limiting factor for the assessment of both certainty and efficiency. However, some thematic observations emerge, related to the reasons for non-publication and public interest factors including harm or prejudice to third parties. Given the strong public and professional interest in disciplinary matters where committees decide their reports should not be made

available, it is suggested they direct the Regulators to communicate those factors leading to non-publication.[254]

For the disciplinary committees in bankruptcy, I found that, overall, they exhibited a medium form of efficiency, with half of the cases decided within the statutory timeframe. For matters in both corporate insolvency and bankruptcy that were not decided within the statutory timeframes, there appeared to be objectively justifiable reasons for the delay, such as COVID-19 pandemic impacts or allowing more time for the practitioner to provide additional information or for the parties to agree on an outcome. Further, as I noted earlier in this article, ensuring the correct decision is made is a greater consideration than speed of decision-making. As my study highlights, AAT reviews of committee decisions materially increased the time to overall resolution of the matter.

These findings build on my previous work by extending the disciplinary proceedings dataset to the present time. My research confirms that only cases involving allegations of serious breaches of duties continue to appear before the disciplinary committees. More broadly, it provides renewed support for the argument that there are a few 'bad apples' rather than a systemic failure in the insolvency profession, with only 18 referrals to the disciplinary committees over an eight-year period.[255] Tempering public discourse surrounding insolvency practitioners to reflect this, along with continued government and industry education across communication platforms, could better inform consumers about the harmful implications of engaging untrustworthy insolvency advisers.

My findings also support further consideration of the ongoing criticism of ASIC's enforcement activities. As seen in the *Leigh* matter, there also appears to be an unnecessary duplication of resources given that at the time the *ILR Act* was implemented the majority of registered trustees were dual registered liquidators.[256] In light of the recent *Administrative Arrangements Order*, which unifies corporate and personal insolvency laws under the Treasury,[257] it is suggested the next step for the Australian Government is optimising supervisory functions and reducing complexity for vulnerable debtors in the system who are dealing with separate regulators. This could be achieved by a single insolvency practitioner regulator whose approach should be modelled on AFSA's best practice and good relationship with the regulated population.[258]

---

254 ASIC, 'Duncan MR' (n 215). In this media release ASIC noted, '[t]he Committee determined that its report on Mr Duncan's matter should not be published by ASIC. ASIC will not comment further on the reasons for the Committee's decision'.

255 See Elizabeth Jean Streten, 'Practitioners' Perspectives: Experiences Adhering to Legal and Ethical Regulatory Standards' (PhD Thesis, Queensland University of Technology, 2019) 166; Robinson, 'An Early Response to Regulatory Changes' (n 20) 212.

256 Robinson, 'An Early Response to Regulatory Changes' (n 20) 214.

257 Department of the Prime Minister and Cabinet (Cth) (n 7) pt 15.

258 In support of the proposition for AFSA as a single regulator see ARITA, Submission No 36 to the Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Inquiry into Corporate Insolvency in Australia* (30 November 2022) 38; Robinson, 'Regulation of Insolvency Practitioners in a Pandemic' (n 96); Robinson, 'An Early Response to Regulatory Changes' (n 20) 212.

Engaging Industry in Co-Regulatory Rule-Making

Karen Lee*

Abstract

Co-regulation — when an industry association develops a code of practice and this has legislative backing — has become an important regulatory tool. Yet, we lack an understanding of how industry associations engage their members and non-members when developing codes of practice. This oversight is surprising given growing recognition of the importance of regulatory intermediaries like industry associations for achieving regulatory objectives. It is all the more surprising when the purposes of industry engagement during rule-making are understood. In this article, I use the development of the Australian *Telecommunications Consumer Protections Code 2019* by the Communications Alliance ('Comms Alliance') as a case study to identify the different ways in which the Comms Alliance engaged with industry participants during rule-making and to assess if the functions of industry engagement were discharged. Drawing on interviews with telecommunications companies subject to the Code, I argue that the process of industry engagement had some value in the development of the Code. However, the engagement barriers faced by a sizeable number of industry participants prevented the full realisation of co-regulatory rule-making's purported benefits. I conclude the article by discussing the potential implications of these findings for legislators, governments, and policymakers, highlighting the need for further empirical study of industry associations and their practices in industry sectors within Australia and farther afield.

I Introduction

In the modern regulatory state, co-regulation — 'where [an] industry [association] develops its own code or accreditation scheme, and this has legislative backing'[1] — has become an important tool in the effort to accomplish public policy goals in

Please cite this article as:

Karen Lee, 'Engaging Industry in Co-Regulatory Rule-Making' (2025) 47 *Sydney Law Review* 20700: 1–33 <https://doi.org/10.30722/slr.20700>.

* Senior Lecturer, Faculty of Law, University of Technology Sydney (UTS), Sydney, New South Wales, Australia. Email: Karen.Lee@uts.edu.au. ORCID iD: https://orcid.org/0000-0002-9640-221X. I wish to thank the UTS Law Faculty for the research grant that made aspects of this research possible and the two anonymous referees for helpful comments on an earlier draft. The research was approved by the UTS Human Research Ethics Committee (ETH 21-6356 and 21-6752).

1 Department of Communications (Cth), *Regulating Harms in the Australian Communications Sector: Observations on Current Arrangements* (Policy Background Paper No 2, May 2014) 10.

Australia and worldwide. The reasons for turning to industry associations and their norms vary,[2] but when legislators, governments and regulators do so, they often stipulate that these associations must have consulted with industry participants before they will recognise and/or enforce those norms. For example, pt 6 of the *Telecommunications Act 1997* (Cth) ('*Telecommunications Act*') enables 'bodies or associations' representing 'sections of the telecommunications industry' to formulate and seek the registration of codes of practice dealing with (among other matters) consumer protection with the Australian Communications and Media Authority ('ACMA').[3] Upon registration, codes become enforceable by the ACMA.[4] However, before registering codes, the ACMA must be satisfied that the relevant body or association has 'published a draft of the code on its website, and invited participants in that section of the industry to make submissions to the body or association about the draft'.[5] Comparable obligations can be found in the *Broadcasting Services Act 1992* (Cth) and *Online Safety Act 2021* (Cth),[6] which permit, respectively, bodies and associations representing traditional broadcasters and sections of the online industry to formulate and seek the registration of codes of practice with the ACMA or the eSafety Commissioner.

There is, however, a limited understanding of: how industry associations engage their members and non-members when undertaking rule-making; which industry members engage with those industry associations; and why they choose to engage or disengage with their rule-making processes. With few exceptions, the law and policy literature on engagement during rule-making focuses on consultation undertaken by state actors — government departments and independent regulators — either when developing legislative proposals for consideration by Parliament or before adopting rules in legislative instruments and other forms of delegated legislation.[7] There is some literature on how industry and industry associations consult with consumers during industry rule-making,[8] but even less on how industry actors (individually or collectively) engage with each other. This oversight is surprising given the growing recognition of the importance of regulatory intermediaries like industry associations to the achievement of regulatory

---

2 See, eg, Karen Lee, 'Counting the Casualties of Telecom: The Adoption of Part 6 of the *Telecommunications Act 1997* (Cth)' (2009) 37(1) *Federal Law Review* 41.

3 *Telecommunications Act 1997* (Cth) ss 106, 117 ('*Telecommunications Act*').

4 Ibid ss 121–2.

5 Ibid s 117(1)(e)(i).

6 *Broadcasting Services Act 1992* (Cth) ss 123(4)(b)(ii), 130M(1)(f); *Online Safety Act 2021* (Cth) s 140(1)(f)(i) ('*Online Safety Act*'). The Australian Government's November 2024 announcement that it will adopt a duty of care and due diligence approach to regulate digital platforms and other online providers means co-regulation may have a less prominent role in that industry sector in the future: Michelle Rowland, 'New Duty of Care Obligations on Platforms Will Keep Australians Safer Online' (Media Release, 14 November 2024). However, it does not affect the significance of this article, which is focused on the engagement practices of industry associations when co-regulation is used.

7 The literature is voluminous: see, eg, John Morison, 'Citizen Participation: A Critical Look at the Democratic Adequacy of Government Consultations' (2017) 37(3) *Oxford Journal of Legal Studies* 636.

8 See, eg, Karen Lee and Derek Wilding, 'Towards Responsiveness: Consumer and Citizen Engagement in Co-regulatory Rule-Making in the Australian Communications Sector' (2021) 49(2) *Federal Law Review* 272.

objectives.[9] It is all the more surprising when the rule-making, compliance, and enforcement purposes of industry engagement, underpinning legislative consultation requirements, are understood.

In this article, I use as a case study the development of the fourth edition of the *Telecommunications Consumer Protections Code* ('*TCP Code 2019*').[10] At the time of writing, the Code is an important component of the Australian telecommunications consumer protection framework, drafted by a working committee of the Communications Alliance ('Comms Alliance')[11] — the communications industry's primary co-regulatory body.[12] I seek to build a better understanding of the ways in which industry associations engage with industry participants during co-regulatory rule-making and how industry participants respond to those initiatives. Drawing on interviews with micro, small, medium and large telecommunications companies subject to that Code, I highlight that the desire for voice and avoidance of costly, ineffective regulation may motivate large and medium businesses to become members of industry associations and participate in industry rule-making. However, small and micro-sized businesses apparently confront a number of engagement barriers — barriers that suggest that if industry rule-making is to truly fulfil its objectives of knowledge-gathering, education, and self-reflection, and its ultimate goal of effective regulation, the conferral of rule-making powers by the state may be more appropriate when the regulated sector contains a relatively small number of medium to large participants.

I begin by setting out the rule-making, compliance and enforcement functions of industry engagement. I then provide an overview of the *TCP Code 2019* and how it was developed, including an explanation of the process used to collect the qualitative data that informs this article. Following discussion of the mechanisms

---

9 See, eg, the journal issue on this topic edited by Kenneth W Abbott, David Levi-Faur and Duncan Snidal: Regulatory Intermediaries in the Age of Governance (2017) 670 *The Annals of the American Academy of Political and Social Science*.

10 Communications Alliance, *Telecommunications Consumer Protections Code* (4th ed Industry Code C628:2019) ('*TCP Code 2019*'). It was varied in minor respects in 2022: see Communications Alliance, *Telecommunications Consumer Protections Code Incorporating Variation No 1/2022* (4th ed Industry Code C628:2019, registered 16 June 2022) ('*TCP Code 2019 Incorporating Variation No 1/2022*'). Minor variations do not necessitate industry consultation: *Telecommunications Act* (n 3) s 119A(1)(e). At the time of writing, the *TCP Code 2019 Incorporating Variation No 1/2022* is registered with the Australian Communications and Media Authority ('ACMA'): 'Register of Telco Industry Codes and Standards', *ACMA* (Web Page, 22 October 2025) <https://www.acma.gov.au/register-telco-industry-codes-and-standards>.

11 As of July 2025, the Communications Alliance ('Comms Alliance') has rebranded as the Australian Telecommunications Alliance ('ATA'): 'About Us', *ATA* (Web Page) <https://www.austelco.org.au/about-us/>. However, this article will refer to the Comms Alliance given it was known as such during my research.

12 Whether the Code will remain so in the future is less clear. On 24 October 2025, the ACMA declined to register a fifth edition of the TCP Code proposed by the ATA, stating that 'it would not provide appropriate community safeguards for telco consumers' and giving the ATA 30 days to revise the Code: ACMA, 'ACMA Rejects Proposed Telco Industry Code' (Media Release MR33/2025, 24 October 2025) <https://www.acma.gov.au/articles/2025-10/acma-rejects-proposed-telco-industry-code>. The ATA submitted a revised Code to the ACMA for registration on 24 November 2025. However, if the ACMA concludes the revised Code has failed to address the deficiencies it identified, the ACMA may adopt an industry standard: see 'Stage 4: Submission to the ACMA', *ATA* (Web Page) <https://www.austelco.org.au/news-and-resources/reviews-and-consultations/tcp-code-review-2024/stage-4-submission-to-the-acma/>; *Telecommunications Act* (n 3) s 125.

used by the Comms Alliance to engage industry participants and whether they chose to engage or disengage with Code development, I assess whether the rule-making functions of industry engagement were discharged, notwithstanding that most industry participants subject to the Code did not participate in the process. I argue that for participating Comms Alliance members, which included the largest industry players along with a representative mix of other large and medium participants subject to the Code, the engagement process had some value. It led to the pooling of a significant amount of industry knowledge. Participating members also benefited from educational opportunities presented during the process, arguably provoking some critical self-reflection. However, the engagement barriers apparently faced by a sizeable number of small and micro-sized participants prevented the full realisation of co-regulation's potential benefits. I conclude the article by discussing the potential implications of these findings for legislators, governments, and policymakers, highlighting the need for further empirical study of industry associations and their practices in industry sectors within Australia and farther afield.

II The Importance of Industry Engagement

Industry engagement in the rule-making processes of industry associations is essential for the success of co-regulatory regimes. Without it, rules would not be produced. Behaviour would not be altered. Regulatory problems would remain unaddressed, forcing government to intervene directly in the market. More worryingly, consumers may suffer harm.[13] Yet, even though the success of co-regulation turns on industry engagement, the specific purpose(s) of participation by firms and engagement by industry associations with industry participants during their rule-making processes have not been clearly identified. A close reading of the regulatory literature, however, indicates that industry engagement in a co-regulatory rule-making context serves (or has the potential to serve) three rule-making functions as well as important compliance and enforcement-related functions.

In Parts II(A)–(C) below, I identify and explain each function of industry engagement, grounding them in regulatory theory and the small, but growing, body of literature on industry rule-making. This literature considers multiple types of industry rule-making, including those which permit individual firms to draft their own rules for regulatory approval. Although different from the definition of co-regulation offered above and from the forms of co-regulation that have traditionally been used in the communications sector, these 'one-on-one' forms of industry rule-making shed light on the functions of industry engagement in co-regulatory rule-making.

A *The Rule-Making Functions of Industry Engagement*

1 *Knowledge-Gathering*

The first function industry engagement serves is *knowledge-gathering*: the individual companies and industry associations involved are expected to gather information relevant to the particular regulatory issue. Relevant information, which

[13] See, eg, Rodrigo Vallejo, 'The Private Administrative Law of Technical Standardization' (2021) 40(1) *Yearbook of European Law* 172, 225–6.

may take the form of data and/or know-how, may be sourced, for example, from industry participants subject to any proposed rules and other industry participants not subject to those proposed rules. These other market participants might have a direct or indirect role in the creation and/or resolution of the particular regulatory problem and have important knowledge to share in relation to those roles. Industry participants may already have the information to hand or need their employees and/or contractors to find and collate data located within or outside their business premises. In the case of industry associations, the information is most likely to come from its members, although longstanding and well-established associations may also have acquired pertinent information they can share.

Knowledge-gathering is central to the leading regulatory approaches that encourage the state to experiment with industry rule-making. Indeed, one of the most common purposes cited in support of involving industry in rule-making is to overcome the information asymmetries regulators confront when formulating rules. Industry participants are said to have a deeper knowledge about themselves, the industry in which they operate, and the cost and impact of rules than regulators have or than regulators can obtain at a reasonable cost. As Coglianese and Mendelson, writing about meta-regulation and self-regulation, have stated, regulatory targets likely have 'far greater knowledge of and information about their own operations — and are therefore more likely to find the most cost-effective solution to the problem at issue'.[14] The importance of knowledge-gathering is also seen in the literature on democratic experimentalism and its precursor, directly deliberative polyarchy.[15] In their classic text *Responsive Regulation: Transcending the Deregulation Debate*,[16] Ayres and Braithwaite do not explicitly refer to 'industry knowledge' or 'industry expertise' in support of their conception of 'enforced self-regulation',[17] but the model is clearly predicated on the assumption that industry participants have important knowledge of themselves with a direct bearing on the matter in question — an assumption Gunningham and Grabosky also make in *Smart Regulation: Designing Environmental Policy*.[18]

2 *Education*

The second function of industry engagement is *education*: engagement is expected to inform industry members and/or their associations. The precise lessons industry engagement will or ought to impart to industry members and associations will vary on a case-by-case basis. Ideally, however, industry engagement has the potential to educate industry participants about the adverse risks and consequences of their own business practices — especially when used in conjunction with engagement with uncaptured regulators, consumers, and citizens. The exercise allows industry

---

14 Cary Coglianese and Evan Mendelson, 'Meta-Regulation and Self-Regulation' in Robert Baldwin, Martin Cave and Martin Lodge (eds), *The Oxford Handbook of Regulation* (Oxford University Press, 2010) 146, 152.

15 Joshua Cohen and Charles Sabel, 'Directly-Deliberative Polyarchy' (1997) 3(4) *European Law Journal* 313, 326.

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

17 Ibid ch 4.

18 Neil Gunningham and Peter Grabosky (eds), *Smart Regulation: Designing Environmental Policy* (Oxford University Press, 1998).

associations, for example, to convey salient information, gathered during discussions with regulators, consumers and/or citizens, to their members, perhaps in language that translates reported difficulties, so they better understand the matters at hand. But industry consultation is not limited to this objective. It serves additional purposes too. It provides an important opportunity for underperforming market participants to learn about industry best practice, the norms they are expected to meet and how they might meet them. It can also teach industry about the advantages and disadvantages of different ways to mitigate and/or eliminate unwanted risks and consequences.

Although not as pronounced in the leading regulatory approaches that encourage the state to experiment with industry rule-making, the education function, which can also be seen as a corollary of the knowledge-gathering function, is nevertheless present. For example, in their discussion equating informational regulation with 'elementary forms of management-based regulation',[19] Coglianese and Lazer state the purpose of informational regulation is 'to change the behavior of the firm by making managers *more aware of* and concerned about their organization's social outputs'.[20] If informational regulation and management-based regulation share this same objective, then at least one of the purposes of engaging directly with industry during 'internal rule-making efforts' must be to educate industry participants about their practices with the purpose of moving it toward 'the achievement of specific public goals'.[21] Scholars of enforceable undertakings also indicate this form of rule-making may 'be viewed as educational, sending a message to regulated entities regarding the types of conduct deemed inappropriate by regulators'.[22] Similarly, Gunningham and Sinclair have noted evidence that 'the very act of negotiating co-regulatory agreements provides industry with a greater *insight* into better environmental management'.[23]

3 *Self-Reflection*

The third and final function of industry engagement is to trigger self-reflection: the internal review and assessment by individual companies of their conduct against legal, social, regulatory norms, their causes, and the tools at their disposal to resolve them. In an ideal world, corporate self-reflection should occur in the absence of external regulatory triggers.[24] However, where internal self-reflection has not already taken place, industry engagement should mark the commencement of self-assessment in light of any knowledge gathered and shared as a result of participation or the industry association consultation exercise. Where some internal self-reflection has already occurred, industry engagement has the potential to spark further and deeper self-reflection, forcing reconsideration of concerns initially or summarily

---

19 Cary Coglianese and David Lazer, 'Management-Based Regulation: Prescribing Private Management to Achieve Public Goals' (2003) 37(4) *Law & Society Review* 691, 695.

20 Ibid (emphasis added).

21 Ibid 692.

22 Marina Nehme, 'Enforceable Undertakings' Practices Across Australian Regulators: Lessons Learned' (2021) 21(1) *Journal of Corporate Law Studies* 283, 301.

23 Neil Gunningham and Darren Sinclair, 'Instruments for Environmental Protection' in Neil Gunningham and Peter Grabosky (eds), *Smart Regulation: Designing Environmental Policy* (Oxford University Press, 1998) 37, 55 (emphasis added, citations omitted).

24 See, eg, Christine Parker, *The Open Corporation: Effective Self-Regulation and Democracy* (Cambridge University Press, 2002) ch 2.

dismissed. Industry engagement, of course, does not guarantee self-reflection will occur, but it has the potential to set it in motion and is undertaken in the hope that it will trigger critical self-evaluation.

Like the education function of industry engagement, activating self-reflection is not as prominent as knowledge-gathering in the regulatory literature considered thus far. However, activating self-reflection is or should be one of industry consultation's objectives (if not its fundamental objective) for the regulatory scholars discussed here. For them, industry consultation is in no way the sole trigger for self-reflection, but along with public consultation it can be an impetus for self-reflection. Coglianese and Lazer state explicitly that management-based regulation involves 'forcing firms to *confront and assess* risks that they might otherwise find insufficiently beneficial to study'.[25] In their discussion of the strengths and weaknesses of self-regulation, which they define as 'a process whereby an organized group regulates the behaviour of its members',[26] Gunningham and Sinclair also highlight that self-regulation, in theory, offers 'the potential for utilizing peer pressure' to raise the standard of industry behaviour.[27] In other words, it provides opportunities for industry 'laggards' to reflect on their own conduct and learn from industry 'leaders' — an idea echoed by Braithwaite in subsequent work explaining and developing the ideal of responsive regulation[28] and Parker in her work on meta-regulation and other strategies to render the corporation more 'permeable' to wider social concerns.[29]

The actual depth of self-reflection that industry engagement sparks may, of course, depend on the way in which the industry association undertakes it or the way in which a firm chooses to engage with that process. Techniques of enforced self-regulation, management-based-regulation, and enforceable undertakings all envisage mandatory one-on-one consultation (orally and in writing) with firms, tailored to their needs. Led by regulators, this form of consultation is seen as preferable to one of the standard ways of engaging with industry in traditional rule-making — a call for voluntary written submissions — because it involves direct participation and is likely to provoke more fulsome and deeper industry engagement. However, if undertaken by an industry association, engagement may not need to be one-on-one. A call for voluntary written submissions to its members and non-members may be sufficient, because the consultation process is led by industry — an issue that is addressed below in Part IV.

B *The Compliance Function of Industry Engagement*

Industry engagement during rule-making also potentially serves an important compliance function — it can help to motivate companies (or at least some of the various individuals who work for them and make decisions collectively on their behalf) to voluntarily conform to rules. By engaging their members and non-

[25] Coglianese and Lazer (n 19) 703 (emphasis added).
[26] Gunningham and Sinclair (n 23) 50.
[27] Ibid 52.
[28] John Braithwaite, 'The Essence of Responsive Regulation' (2011) 44(3) *University of British Columbia Law Review* 475, 481, 503.
[29] Parker (n 24) chs 8–9.

members in discussions individually or collectively as rules are drafted, industry associations can enhance the likelihood firms will accept those rules and therefore take the necessary steps to comply with them.

Ayres and Braithwaite make the connection between consultation, regulatory rule-making, and compliance in their chapter on enforced self-regulation, stating that having a say in rule-making is likely to make regulation 'more palatable', thereby enhancing 'acceptance' of rules and their 'execution'.[30] However, the basis for the connection is best explained in their chapter on the 'benign big gun',[31] where they highlight that economic rationalism — the premise that underpins traditional deterrence theories of compliance — is not the only factor that motivates compliance.[32] Corporate actors will often be motivated by economic rationalism and some corporate actors will only be motivated by profit-seeking motives, but many (if not most) will also be motivated 'to do what is right, to be faithful to their identity as a law abiding citizen, and to sustain a self-concept of social responsibility'.[33] It is for that reason they suggest that regulators need to engage in dialogue with regulatees — dialogue that a 'tit-for-tat' enforcement strategy and dialogue that consultation during co-regulation, enforced self-regulation and other forms of industry rule-making facilitate.[34]

C *The Enforcement Function of Industry Engagement*

In addition to its compliance functions, industry engagement during rule-making may facilitate regulatory enforcement of rules adopted by industry associations and registered with regulators. Enforcement may be facilitated because industry engagement can lead to rules with more precision and greater clarity, thereby helping to eliminate the risks of over- and under-inclusiveness, 'indeterminacy' and interpretation said to hinder rule enforcement and regulatory effectiveness in traditional regulatory contexts.[35] Compliance with industry codes is often voluntary, but compliance with codes may be mandatory. This may occur, for example, if legislation supporting a co-regulatory regime makes code compliance mandatory upon the registration of a code[36] or if a regulator has power to direct a firm, found to be in breach of a code, to comply with the code.[37] However, where code enforcement (in any form) is envisaged, contributions made by individual corporate actors to

30 Ayres and Braithwaite (n 16) 113.
31 Ibid ch 2.
32 Ibid 21–7.
33 Ibid 22.
34 Procedural justice theorists like Tom Tyler share similar views but emphasise that compliance is motivated by legitimacy — people's belief that lawmakers have the right to govern them: see, eg, Tom R Tyler and John M Darley, 'Building a Law-Abiding Society: Taking Public Views about Morality and the Legitimacy of Legal Authorities into Account When Formulating Substantive Law' (2000) 28(3) *Hofstra Law Review* 707.
35 Julia Black, *Rules and Regulators* (Clarendon Press, 1997) ch 2.
36 See, eg, Michelle Rowland, 'Albanese Government Takes Strong Action to Protect Telco Consumers' (Media Release, 21 January 2025). The Telecommunications Amendment (Enhancing Consumer Safeguards) Bill 2025 (Cth), reintroduced into Parliament on 28 August 2025, stipulates that compliance with registered industry codes is mandatory: Department of Parliamentary Services (Cth), *Bills Digest* (Digest No 12 of 2025–26, 1 September 2025). See also Telecommunications Amendment (Enhancing Consumer Safeguards) Bill 2025 (Cth) sch 2.
37 See, eg, *Online Safety Act* (n 6) s 143; *Telecommunications Act* (n 3) s 121.

industry associations during rule-making can contribute to the particularity that regulators need to withstand legal challenge.[38]

Of all the functions of industry engagement considered here, the possible enforcement benefit of industry engagement in rule-making has received the least attention in the regulatory literature. Moreover, when industry consultation and enforcement are discussed, they are talked about only in contexts where individual firms engage in rule-setting on a one-on-one basis with regulators such as enforced self-regulation, enforceable undertakings, or management-based regulation. For example, when setting out the potential benefits of enforced self-regulation, Ayres and Braithwaite state that involvement of regulatees in rule-making has the potential to replace 'bland and meaningless rules (eg, that accounts be "true and fair")' associated with direct regulation with 'precise and particularistic rules', rendering 'acquittals … more difficult to secure by appeal to the vagaries of the wording'.[39] The contribution of discussions that industry associations might have with their members and non-members about Code rules are not explicitly acknowledged or considered. Collective industry rule-making by industry associations may not lead to rules that are as particularistic as rules produced by one-on-one firm negotiation. Nevertheless, any industry input that industry associations receive must have the potential to lead to greater particularity with possible resultant enforcement benefits in the form of more accurate inclusiveness, greater determinacy and further clarity.

III The *Telecommunications Consumer Protections Code*

A *Overview of the* TCP Code 2019 *and Its Development*

The *Telecommunications Consumer Protections (Code* ('*TCP Code*') has been a cornerstone of the consumer protection framework for the Australian telecommunications industry since 2007[40] when the first version of the Code was adopted by the Comms Alliance and registered with the ACMA.[41] The *TCP Code* applies to a sub-class of carriage service providers, namely those which supply telecommunication services, including related goods such as handsets and some content services, to residential customers and small-business/non-profit organisations.[42] To qualify as a carriage service provider, including those subject to the Code, entities and individuals do not need to own and/or operate communications infrastructure. Instead, they must supply 'listed carriage services'[43] — carriage services provided within and/or to and from Australia to the public using 'network units'[44] owned and/or operated by third parties known as 'carriers'. Examples of carriage services well-known to consumers and on which they depend include telephony, mobile, Internet access and data services.

---

38 See, eg, ACMA, *Guide to Developing and Varying Telecommunications Codes for Registration* (2015) 5–6.

39 Ayres and Braithwaite (n 16) 115.

40 Whether it will be in the future is in doubt at the time of writing: see above n 12.

41 It resulted from the amalgamation of six earlier industry codes.

42 See, eg, *TCP Code 2019 Incorporating Variation No 1/2022* (n 10) cl 1.4.

43 *Telecommunications Act* (n 3) s 16.

44 Put simply, network units include any communications infrastructure, including wires, cables, fibres, base-stations and satellite-based facilities. See further *Telecommunications Act* (n 3) pt 2 div 2.

The precise obligations imposed on telecommunications providers differ in each of the four editions[45] (and their variations[46]) of the *TCP Code*; however, each iteration has adopted rules corresponding to each stage of the customer lifecycle (for example, advertising, sales, contracts and billing). The '*TCP Code 2019*', development of which is the focus of my case study, is 83 pages long with eight substantive chapters setting out general rules and additional requirements relating to: advertising, sales, contracts, and customer service; billing; credit and debit management; financial hardship;[47] changing suppliers; and Code compliance and monitoring.[48] Among other obligations, the *TCP Code 2019* required telecommunications providers to make available 'critical information summaries' about their product and service offerings, detailing, for example, minimum and maximum charges, early termination fees, and how to make a complaint,[49] so consumers could compare offers. The Code also mandated that providers assess the ability of their customers to pay their bills before providing post-paid services.[50] Further, it stipulated that providers had to: provide tools like call barring and expenditure caps to help customers limit the money they spent on post-paid services; and notify customers when they exceeded specified percentages of their data allowances.

Development of the *TCP Code 2019* began in 2017 (as was required) with a review of the previous edition of the Code.[51] In accordance with the Comms Alliance's internal processes,[52] the review was initiated by its Industry Consumer Advisory Group ('ICAG'). ICAG is a standing body comprised of Comms Alliance members (including carriers, carriage service providers, and content service providers[53]) responsible for matters related to 'the delivery of services to end users'.[54] Following consideration of a background report prepared by the Comms Alliance's project manager, and meetings with regulatory bodies[55] and the Australian Communications Consumer Action Network ('ACCAN'), the 'peak'

---

45 See Communications Alliance, *Telecommunications Consumer Protections Code* (1st ed Industry Code C628:2007); Communications Alliance, *Telecommunications Consumer Protections Code* (2nd ed Industry Code C628:2012) ('*TCP Code 2012*'); *Telecommunications Consumer Protections Code* (3rd ed Industry Code C628:2015) ('*TCP Code 2015*'); *TCP Code 2019* (n 10).

46 The third edition was varied three times. The fourth edition was varied once.

47 The financial hardship obligations were replaced by the requirements of the *Telecommunications (Financial Hardship) Industry Standard 2024* (Cth).

48 The complaint handling chapter included in the *TCP Code* 2015 (n 45) was omitted from *TCP Code 2019* (n 10) because, when the latter was being drafted, the ACMA adopted an industry standard for complaint handling: see *Telecommunications (Consumer Complaints Handling) Industry Standard 2018* (Cth).

49 *TCP Code 2019* (n 10) cl 4.2.

50 Ibid cl 6.1.

51 See Communications Alliance, *Telecommunications Consumer Protections Code Incorporating Variation No 1/2018* (3rd ed Industry Code C628:2015, July 2018) cl 1.6.

52 Communications Alliance, *Document Maintenance Policy and Process* (May 2008) cl 3.

53 Content service providers use listed carriage services to provide content services to the public, including, for example, broadcasting, video-on-demand and interactive computer game services: see *Telecommunications Act* (n 3) s 97.

54 Communications Alliance, *Industry Consumer Advisory Group* (Web Page, 10 April 2013), archived at <https://webarchive.nla.gov.au/awa/20130409203438/http://commsalliance.com.au/Activities/committees-and-groups/ICAG>.

55 They included ACMA, the Australian Competition and Consumer Commission ('ACCC'), the Telecommunications Industry Ombudsman and Communications Compliance ('CommCom').

Australian consumer group for communications consumers, ICAG decided the Code should be revised.[56] The Comms Alliance Project Manager then sought expressions of interest to participate in a 'representative'[57] working committee responsible for drafting the new Code from consumers, regulators, and Comms Alliance industry members.[58]

By October 2017, the working committee had been established and its members appointed. It was independently chaired by Fay Holthuyzen, former Deputy Secretary of the Commonwealth Department of Communications (also appointed by the Comms Alliance),[59] and initially consisted of six voting members and four non-voting members. The six voting members comprised four industry representatives (inabox, Optus, Telstra, and Vodafone Hutchison Australia ('VHA')[60]) and two consumer group representatives (ACCAN and Legal Aid NSW). The four non-voting members included the ACMA, the Australian Competition and Consumer Commission ('ACCC'), the Commonwealth Department of Communications and the Arts, and the Comms Alliance).[61] Working committee members met periodically over a period of approximately 16 months to revise the Code. A draft of the revised Code was published on the Comms Alliance's website for industry and public comment on 9 July 2018 with both groups given 30 days to provide written feedback.[62] Following consideration of submissions, the members of the working committee, which by then no longer included inabox[63] and Legal Aid NSW,[64] formally voted to approve the *TCP Code 2019*. It was later submitted to the Comms Alliance's Board for approval. The Board decided to adopt and submit the Code to the ACMA for registration. The ACMA registered the *TCP Code 2019* on 1 July 2019.[65]

B *Data Collection*

When data collection for my research began in 2021, the *TCP Code 2019* had been registered for approximately 18 months with the ACMA and its development was therefore relatively 'fresh' in the memories of potential interviewees. However, identifying and locating potential interviewees still proved to be difficult. This was

56 Interview with Comms Alliance representative (Karen Lee, online, 17 September 2021).

57 Communications Alliance, *Operating Manual for the Development of Industry Codes, Standards and Supplementary Documents and the Establishment and Operation of Advisory Groups* (June 2007) cl 2.1 archived at <https://web.archive.org.au/awa/20170215092811mp_/http://commsalliance.com.au/__data/assets/pdf_file/0010/1252/Operating_Manual_June_2007.pdf> ('*Operating Manual* (2007)').

58 Interview with Comms Alliance representative (n 56).

59 Communications Alliance, 'Independent Chair Appointed to Telecommunications Consumer Protection Code Review' (Media Release, 21 August 2017).

60 VHA merged with TPG Telecom in 2020: 'About Us', *TPG Telecom* (Web Page) <https://www.tpgtelecom.com.au/about-us>.

61 *TCP Code 2019* (n 10) 76.

62 Communications Alliance, 'Stronger Telco Consumer Protection Code – Feedback Wanted' (Media Release, 9 July 2018) ('Stronger Telco Consumer Protection Code').

63 inabox was purchased by MNF in October 2018: Brendon Foye, 'Inabox Sold to MNF Group for up to $33.5 million', *IT News* (online, 8 October 2018) <https://www.itnews.com.au/news/inabox-sold-to-mnf-group-for-up-to-335-million-513628>.

64 *TCP Code 2019* (n 10) 76.

65 Communications Alliance, 'Stronger Protections for Telecommunications Customers Take Effect Today' (Media Release, 1 August 2019).

because since 1997 when the Australian market was fully liberalised, there was no requirement to notify a regulator of service provision and no corresponding obligation on a regulator to publish a register of service providers.[66] In the absence of an official list, I decided the closest substitute was the list published by Communications Compliance ('CommCom') of 379 service providers that lodged the *TCP Code 2019* compliance documentation in 2020. The CommCom list was a relatively accurate snapshot of market participants for three reasons. First, CommCom, a company limited by guarantee, is the independent body responsible for overseeing the *TCP Code* compliance and monitoring. Second, since September 2012,[67] service providers have been required to submit, on an annual basis, a compliance attestation and/or independent assessment of compliance,[68] and when non-compliant, a 'compliance achievement plan' to CommCom.[69] Third, since 2016,[70] service providers must register with the Comms Alliance for the purposes of Code compliance. The information collected by the Comms Alliance is not published but is forwarded to CommCom so it can perform its compliance functions. CommCom, however, published only the names of the 379 service providers. It did not publish their Australian Business Numbers, Australian Company Numbers, all relevant business names, or the contact details of the nominated staff members service providers were required to submit when registering with the Comms Alliance. It also did not publish the number of telecommunications 'services in operation' that each service provider supplied to its customers. This is a measure commonly used by the ACCC and the industry to determine market share.[71]

'Services in operation' data (other than for the very largest providers) was not published by another source. Therefore, in an effort to ensure interviews were conducted with differently situated members of the telecommunications industry, I decided that, before contact details were located, the 379 service providers should, where possible, be classified into four categories using criteria commonly adopted

---

66 A registration requirement is common in other countries: see, eg, *Communications Act 2003* (UK) ss 33, 44. The absence of a register has also frustrated the ACCC, ACMA and Telecommunications Industry Ombudsman, who have repeatedly called for one to facilitate the enforcement of applicable regulatory requirements: see, eg, submissions in response to Department of Infrastructure, Transport, Regional Development, Communications and the Arts (Cth), *Registration or Licensing Scheme for Carriage Service Providers: Discussion Paper* (September 2023) <https://www.infrastructure.gov.au/have-your-say/discussion-paper-carriage-service-provider-csp-registration-or-licensing-scheme-telecommunications>. These calls have finally been answered with the Commonwealth Minister for Communications announcing in January 2025 that the Government would establish a carriage service provider registration scheme: see Rowland (n 36). The Telecommunications Amendment (Enhancing Consumer Safeguards) Bill 2025 (Cth), which prohibits 'registrable carriage service providers' from supplying listed carriage services to the public unless registered, was reintroduced into Parliament on 28 August 2025: Department of Parliamentary Services (Cth) (n 36). See also Telecommunications Amendment (Enhancing Consumer Safeguards) Bill 2025 (Cth) sch 1.

67 See, eg, *TCP Code 2012* (n 45) cls 9.3–9.5.

68 The precise attestation varies depending on the size of the service provider and whether they are fully, partially or non-compliant with the *TCP Code*. For the current requirements, see *TCP Code 2019 Incorporating Variation No 1/2022* (n 10) cl 10.4.

69 *TCP Code 2019 Incorporating Variation No 1/2022* (n 10) cl 10.5.

70 See, eg, Communications Alliance, *Telecommunications Consumer Protections Code Incorporating Variation No 1/2016* (3rd ed Industry Code C628:2015, February 2016) cl 9.1.1(b).

71 See, eg, ACCC, *ACCC Communications Market Report 2023–24* (December 2024) 19–21.

by the Australian Bureau of Statistics:[72] large (200+ employees), medium (20–199 employees), small (5–19 employees), and micro-businesses (0–4 employees). Relying on data found in various business directories,[73] and after grouping subsidiary companies with their better-known parents, classification yielded a list of potential interviewees with 16 large providers, 50 medium providers, 85 small providers, and 78 micro providers.[74] The internet and other publicly-available sources of information were then searched for the direct email addresses of these providers' key principals and/or regulatory affairs managers,[75] who were then invited via email to participate in the research, with reminders sent where required. When direct email addresses could not be located, invitations were sent to generic company email addresses.[76] The Comms Alliance also emailed some invitations to its service provider members.[77] Other industry associations were also approached and asked to suggest interview candidates. Some interviewees provided the contact details of additional people they suggested should be interviewed; others wrote to colleagues on my behalf. In the end, in addition to a Comms Alliance representative, interviews were conducted with current or former employees from four large, four medium, two small, and two micro service providers.[78] Of the 12 service providers represented, four[79] were Comms Alliance members when the *TCP Code 2019* was drafted and eight were non-members. One of the non-members had previously been a Comms Alliance member. Six had never been members.[80] One joined after the *TCP Code 2019* was drafted. The four large service providers all participated in the Code's development in some way. Some sat on the working committee. The eight medium, small and micro service providers did not participate in any way. All interviewees spoke on the condition of anonymity.

The final number of companies interviewed was small. Only 12 companies were interviewed and only four of the 12 had engaged in the rule-making process. Nevertheless, when coupled with insights from a Comms Alliance representative, heavily involved with the *TCP Code 2019* and experienced in Code consultation practices, the qualitative data collected sheds light into rule-making consultation

---

72 See, eg, Australian Bureau of Statistics, *Counts of Australian Businesses, including Entries and Exits July 2021–June 2025* (Web Page, 26 August 2025) <https://www.abs.gov.au/statistics/economy/business-indicators/counts-australian-businesses-including-entries-and-exits/latest-release>.

73 They included Dun & Bradstreet (<https://www.dnb.com>), Zoom Info (<https://www.zoominfo.com/>), and Mint Global (now known as Moody's Orbis).

74 Forty-one providers could not be categorised.

75 I thought potential interviewees would be more responsive to emails than hardcopy invitations sent to their registered corporate addresses.

76 CoreData Research Australia, a business consultancy firm experienced in gathering business intelligence, was hired to help find the contact details of staff at medium, small and micro telecommunications service providers and to recruit participants.

77 As of 31 October 2020, the Comms Alliance had 105 members, only 18 of whom were service providers and appeared on CommCom's 2020 Code compliance documentation list: see 'Membership', *Communications Alliance Ltd* (Web Page, 31 October 2020), archived at <https://webarchive.nla.gov.au/awa/20201030135017/http://pandora.nla.gov.au/pan/25087/20201031-0000/www.commsalliance.com.au/about-us/membership.html>.

78 All interviewees confirmed their employer's classification was correct.

79 This number includes three large service providers and one small provider owned by a non-service provider member of Comms Alliance.

80 As a few interviewees appeared to confuse the Comms Alliance with CommCom, membership was verified by referring to Comms Alliance membership lists available on the Comms Alliance website archived on Trove: see, eg, 'Membership' (n 77).

processes led by industry associations and their ability to serve as effective intermediaries between regulatory targets (market participants) and regulators — the central objective of the article. Further empirical research needs to be conducted, but the findings discussed in this article serve as an important starting point. They better inform the ongoing academic debate about the capacity of rule-making intermediaries to contribute to the achievement of public policy objectives — a debate that will benefit from additional evidence of empirical experience.

C *Industry Engagement*

1 *Mechanisms of Engagement*

The Comms Alliance provided its members with four principal ways to have a say in the *TCP Code 2019* development process:

(a) working committee membership;

(b) ICAG membership;

(c) Operations Council membership and/or attendance at its meetings; and

(d) a 30-day opportunity to submit written comments[81] on the draft Code.

The Comms Alliance does not prohibit non-member companies from joining its working committees,[82] but an opportunity to submit written comments on the draft Code is the principal way that non-members can provide input into the Code development process. A Comms Alliance representative said it will take into account the views of industry non-members and provide working committees with the comments of non-members made in response to Comms Alliance media releases about the *TCP Code 2019* development. However, for the draft Code consultation, the Comms Alliance advertised the opportunity to submit written comments only on its website and in media releases[83] and its free bi-monthly newsletter *We Communicate*.[84] It did not offer additional opportunities for non-member input.[85]

I discuss below each of the four engagement mechanisms and the extent to which service providers utilised them.

(a) *Working Committee*

Four companies were represented on the working committee: inabox, Optus, Telstra, and VHA,[86] all of whom were Comms Alliance members when the *TCP Code 2019*

---

81 The *Telecommunications Act* (n 3) ss 117(1)(e), (3) mandate that industry participants have at least 30 days to comment. It does not require written submissions, but as a matter of practice the ACMA has been satisfied that an adequate opportunity to make submissions has been provided if Comms Alliance allows industry to make written submissions on its draft rules: see ACMA (n 38) 21.

82 See generally *Operating Manual* (2007) (n 57).

83 See 'Stronger Telco Consumer Protection Code' (n 62).

84 See the 9 July 2018, 17 July 2018, 6 August 2018 editions of *We Communicate*, archived at <https://webarchive.nla.gov.au/awa/20190303023657/http://commsalliance.com.au/Documents/newsletter>.

85 Interview with Comms Alliance representative (n 56).

86 *TCP Code 2019* (n 10) 76.

was drafted.[87] Telstra and Optus had, respectively, the first and third largest share of the retail markets for fixed voice services and broadband services; and the first and second largest share of the retail markets for mobile phone and mobile broadband services.[88] VHA had the third largest share of the relative mobile phone and mobile broadband services market. inabox[89] was a 'white label end-to end' provider, meaning it offered telecommunications products and services that other third-party companies could 'brand' and use to offer their own retail services. It was not a retail service provider. Its customers were retail service providers, subject to the Code, and included some small and micro providers.

inabox was directly approached by the Comms Alliance because of its familiarity with smaller service providers. Telstra, Optus, and VHA nominated themselves, and were appointed by the Comms Alliance, to participate in the working committee. The Comms Alliance extended invitations to participate on the working committee to all ICAG members and others; however, no one else volunteered.[90] Interviewees from large working committee members suggested ICAG members expected Telstra, Optus and VHA would volunteer for, and be appointed to, the working committee.[91] This expectation arose for three main reasons. First, the Comms Alliance limited the number of industry members in an effort to minimise consumer representative concerns about the disparity between the number of consumer and industry members on the working committee.[92] Second, Telstra, Optus and VHA were better resourced to support working committee's development of the Code — an activity described as long and time-consuming.[93] Third, ICAG members were

> comfortable with Telstra Optus and [VHA] arguing the case … In simple terms, I think they had a view that if Telstra, Optus and [VHA] agreed, then basically, they wouldn't agree to things that … other members couldn't agree with.[94]

---

87 'Membership', *Communications Alliance Ltd* (Web Pages, 15 February 2017, 11 March 2018, 3 March 2019), archived at <https://webarchive.nla.gov.au/awa/20190303023350/http://commsalliance.com.au/about-us/membership>.

88 ACCC, *ACCC Communications Market Report 2017–18* (February 2019) 17–18, 26–7, 34, 37. The ACCC did not give a definitive breakdown of the providers' market shares of fixed voice services because it does not collect data about all service providers. The ACCC's data on Telstra's fixed services also includes Telstra's Belong-branded services: at 36–7. See also ACCC, *ACCC Communications Market Report 2018–19* (December 2019) 22, 31, 38, 42.

89 In 2017, inabox entered into a three-year agreement with Telstra to provide 'enablement services' so Telstra could provide inabox's white label services (with its own telecommunications services) to some of its wholesale customers: see Brendon Foye, 'Telstra and Inabox Join Forces to Help Resellers Quickly Launch into Telecommunications Services', *techpartmer.news* (online, 7 December 2017) <https://www.techpartner.news/news/telstra-and-inabox-join-forces-to-help-resellers-quickly-launch-into-telecommunications-services-479320>.

90 Interview with Comms Alliance representative (n 56).

91 Ibid; Interview with Large Telco A Participant 2 (Karen Lee, online, 1 September 2021) ('Large Telco A Participant 2'); Interview with Large Telco B Participant 1 (Karen Lee, online, 22 September 2021) ('Large Telco B Participant 1'); Interview with Large Telco C (Karen Lee, online, 22 December 2021) ('Large Telco C').

92 Interview with Large Telco A Participant 1 (Karen Lee, online, 7 December 2021) ('Large Telco A Participant 1').

93 Large Telco B Participant 1 (n 91); Large Telco C (n 91).

94 Large Telco A Participant 1 (n 92).

This point was emphasised by a representative of a large service provider ICAG member, not represented on the working committee.[95]

Telstra and Optus each had two representatives on the working committee; VHA and inabox each had one representative until inabox ceased to participate in the working committee in late 2018,[96] when it merged with another company, citing staff changes and resource constraints.[97] All industry representatives represented the interests of their employers.[98] One working committee representative from a large service provider reported their focus was on obtaining input from the retail divisions of their employers about the Code. Their wholesale divisions were not involved. This was the case even though their employers were also carriers (owners and operators of telecommunications networks) that provided telecommunications services on a wholesale basis to some service providers subject to the Code.[99] However, another representative from a different large service provider said, as a general rule, its wholesale division will contact its wholesale customers subject to the Code when proposed rule changes are likely to have a major impact on them and will suggest these customers contact the Comms Alliance for further information.[100] This representative added their employer was 'cognizant' of how rules might affect their wholesale customers subject to the Code and as a vertically-integrated business 'it has to make sure the rules work for different segments of the market'.[101]

One representative said they did approach at least one Comms Alliance member (a small service provider) about proposed modifications to credit assessment rules — contentious modifications proposed by consumer representatives on the working committee — to ensure they were 'pragmatic and doable'.[102] Nevertheless, the working committee generally relied on the Comms Alliance and the Project Manager for 'insights into other providers that we might not have a close relationship with', and if it did seek the views of other Comms Alliance members it 'would go to the larger ones' for reasons of 'convenience and time pressure' rather than 'malice'.[103] This representative added,

> I wish I could say [the Code] was the only thing I was doing at that particular time. But it was a fairly big commitment in terms of time. So you really were running pretty hard in terms of doing the things you had to do before the next meeting.[104]

Working committee representatives interviewed reported they did not directly approach non-members of the Comms Alliance during Code development.[105]

---

95 Large Telco C (n 91).
96 *TCP Code 2019* (n 10) 76.
97 Interview with Comms Alliance representative (n 56). Legal Aid NSW had one representative on the working committee; ACCAN had up to three representatives.
98 Large Telco A Participant 2 (n 91); Large Telco B Participant 1 (n 91).
99 Large Telco A Participant 1 (n 92). This interviewee said contacting wholesale customers subject to the Code would '[open] another can of worms'.
100 Large Telco B Participant 1 (n 91).
101 Ibid.
102 Large Telco A Participant 1 (n 92).
103 Large Telco A Participant 2 (n 91).
104 Large Telco A Participant 1 (n 92).
105 Ibid; Large Telco A Participant 2 (n 91); Large Telco B Participant 1 (n 91).

(b) *ICAG*

ICAG is a members' only forum, and its meetings held monthly, outside of and between working committee meetings, were described as the 'main [engagement] vehicle' for the Comms Alliance members, giving them a 'voice' on the working committee.[106] The Comms Alliance's Policy and Regulation Manager, who also provided project management support to the Code's working committee, drew ICAG members' attention via email and/or in meetings to more controversial issues that arose in working committee meetings or to matters that 'may impact smaller or midsize providers differently than the larger providers' and solicited feedback.[107] ICAG meetings were also regularly attended by Telstra, Optus and VHA working committee representatives.[108]

Throughout the development of the *TCP Code 2019*, ICAG had between 10 and 12 members, not all of whom were subject to the Code's provisions.[109] The following 15 service providers were ICAG members for at least some of the time: AAPT, amaysim, Community Telco (also known as Bendigo Telco), Engin (once owned by M2/Primus, now owned by Vocus), Foxtel,[110] Fuzenet, iiNet (owned by AAPT until August 2015 when it was sold to TPG), Jeenee Mobile (now owned by amaysim), M2/Primus (now owned by Vocus), MyRepublic, Optus, Pivotel, Telstra, Vocus, and VHA.[111] Based on my classification scheme and the number of employees found in business directories,[112] these 15 ICAG members included eight large, four medium, zero small and zero micro service providers. Two providers (Jeenee Mobile and M2/Primus) could not be classified because their employee numbers could not be found. Although no small or micro service providers appear to have participated, member participation in ICAG appears to have been relatively high, given the total number of Comms Alliance service provider members who were

106 Interview with Comms Alliance representative (n 56).

107 Ibid. Feedback was provided via email, orally during meetings or over the phone.

108 Ibid.

109 See 'Industry Consumer Advisory Group (ICAG)', *Communications Alliance Ltd* (Web Pages, 15 February 2017, 11 March 2018, 3 March 2019), archived at <https://webarchive.nla.gov.au/awa/20130409203438/http://commsalliance.com.au/Activities/committees-and-groups/ICAG>. NBN Co and Holding Redlich were ICAG members. However, NBN Co is a wholesale provider. Holding Redlich is a law firm.

110 Telstra owned 50 per cent of Foxtel until June 2018: David Chau, 'Telstra and News Corp to Merge Foxtel and Fox Sports by June', *ABC News* (online, 6 March 2018) <https://www.abc.net.au/news/2018-03-06/foxtel-fox-sports-merger/9517102>. Telsta owned 35 per cent of Foxtel until DAZN's acquisition of Foxtel was completed in April 2025: see Foxtel Group, DAZN Group Completes Acquisition of Foxtel, Strengthening Global Sports Streaming Leadership; (Company Announcement, 2 April 2025) <https://foxtelgroup.com.au/newsroom/dazn-group-completes-acquisition-of-foxtel-strengthening-global-sports-streaming-leadership>; 'Foxtel Group Welcomes News Corp and Telstra Agreement for DAZN to Acquire Australian Sports and Entertainment Leader' (Company Announcement, 23 December 2024) <https://foxtelgroup.com.au/newsroom/foxtel-group-welcomes-news-corp-and-telstra-agreement-for-dazn-to-acquire-australian-sports-and-entertainment-leader>.

111 The large service providers were AAPT, amaysim, Foxtel, iiNet, Optus, Telstra, Vocus and VHA. The medium service providers were Community Telco (also known as Bendigo Tel Co), Engin, Fuzenet, MyRepublic, and Pivotel. Foxtel was classified as a large service provider even though telecommunications is a small percentage of Foxtel's business because of its employee numbers.

112 See above n 73.

subject to the Code between February 2017 and March 2019. Approximately 50 per cent of its service provider members participated in ICAG.[113]

However, one of ICAG's key challenges, identified by a large service provider member, was '[making] sure that we're getting the message out to *all* the relevant members'.[114] The Comms Alliance representative suggested it kept non-ICAG members informed of Code developments via email or (if required) solicited their views by phone.[115]

(c) *The Comms Alliance Operations Council*

The Operations Council is an internal body within the Comms Alliance 'comprised of senior representatives from member companies to guide and help manage the core operational activities of the Alliance'.[116] Its members included the chairs of the Comms Alliance's Reference Panels (standing bodies comprised of Comms Alliance members, responsible for a specific area of industry activity) and former members of the National Broadband Network Project Steering Committee.[117]

When the Code was developed, 15 companies were represented on the Council.[118] Seven of the 15 companies (Foxtel, iiNet, AAPT, M2, Optus, Pivotel Satellite[119] Telstra and VHA) were service providers. As noted above, Optus, Telstra, and VHA were also working committee members, and three of their working committee representatives[120] were Council representatives.[121] Along with Comms Alliance staff, working committee representatives provided updates on *TCP Code 2019* progress as well as solicited feedback and participation from Council members.[122]

---

113 This figure was arrived at by comparing and contrasting the company names on the CommCom Code compliance documentation list and the Comms Alliance membership lists available on its website between 19 February 2017 and 3 March 2019, archived at <https://webarchive.nla.gov.au>. For various reasons too detailed to summarise here, it is not possible to give a precise figure.

114 Large Telco A Participant 1 (n 92) (emphasis added).

115 Interview with Comms Alliance representative (n 56).

116 See 'Operations Council', *Communications Alliance Ltd* (Web Page, 3 March 2019), archived at <https://webarchive.nla.gov.au/awa/20190303044546/http://commsalliance.com.au/Activities/committees-and-groups/operations-council>.

117 This committee was responsible for addressing industry needs following the Australian Government's 2009 decision to build and operate the NBN: see 'NBN Project History', *Communications Alliance Ltd* (Web Page, 22 March 2012), archived at <https://webarchive.nla.gov.au/awa/20120322093235/http://www.commsalliance.com.au/Activities/nbn/history>.

118 Communications Alliance, *Operations Council* (Web Pages, 15 February 2017, 11 March 2018, 3 March 2019), archived at <https://webarchive.nla.gov.au/awa/20190303044546/http://commsalliance.com.au/Activities/committees-and-groups/operations-council>.

119 Pivotel Satellite is the same entity as Pivotel. The name Pivotel Satellite is used here because Comms Alliance listed it on its Operations Council web page: Communications Alliance, *Operations Council* (Web Page), archived at <https://webarchive.nla.gov.au/awa/20190303044546/http://commsalliance.com.au/Activities/committees-and-groups/operations-council>.

120 *Constitution*, Communications Alliance Operations Council (at 15 September 2023), archived at <https://webarchive.nla.gov.au/awa/20180310130644/http://commsalliance.com.au/Activities/committees-and-groups/operations-council>.

121 Large Telco A Participant 1 (n 92); Large Telco A Participant 2 (n 91); Large Telco B Participant 1 (n 91).

122 Large Telco A Participant 1 (n 92).

(d) *Written Submissions*

The opportunity to make written submissions was published on the Comms Alliance's website — an opportunity also advertised on its LinkedIn account, and in the free bi-monthly newsletter (*We Communicate*) Comms Alliance circulated via email to its subscribers.[123] In addition, the Comms Alliance issued a media release inviting industry participants to make written submissions. However, only three industry participants made written submissions: Optus; Telstra; and Aussie Broadband, a large service provider who became a Comms Alliance member as or shortly after the Code was finalised.[124]

In summary, four things stand out about industry engagement in this Code development process. First, the process had strong involvement from Comms Alliance service provider members. At least 50 per cent engaged in the process in some way.[125] Second, with one exception, the biggest service providers actively and significantly contributed to the process using three of the four available engagement mechanisms.[126] The largest providers of all services used all four mechanisms.[127] Third, the number of service providers who are Comms Alliance members was low relative to the estimated total number of industry participants. Fourth, few (if any) non-Comms Alliance members engaged with the process.[128]

In Parts III(C)(2)–(3) below, I consider why service providers chose to engage or disengage with the process, and the barriers that impeded those that did not participate. Given the strong correlation between Comms Alliance membership and engagement, I also consider why service providers were (or were not) Comms Alliance members.

2 *Why Participate?*

All interviewed representatives from the four large service providers said participation[129] allowed their employers to 'inform the development of rules'[130] — an important opportunity because they know their customers and can develop more practical solutions than regulators and consumer organisations can.[131] As one stated, the *TCP Code 2019* rules

> impact the sorts of costs that we might have to bear, the systems, the process that we might have to invest in. Sometimes, it can also … influence or conflict

---

123 Interview with Comms Alliance representative (n 56). Subscribers may include Comms Alliance members and non-members.

124 See also 'Drafts for Public Comment', *Communications Alliance Ltd* (Web Page, 31 October 2018), archived at <https://webarchive.nla.gov.au/awa/20181030223731/http://pandora.nla.gov.au/pan/25087/20181031-0143/www.commsalliance.com.au/Documents/public-comment.html>.

125 The number of members who exchanged emails or had conversations with Comms Alliance staff about the Code could not be determined.

126 Interview with Comms Alliance representative (n 56); Large Telco A Participant 1 (n 92); Large Telco A Participant 2 (n 91); Large Telco B Participant 1 (n 91).

127 Interview with Comms Alliance representative (n 56); Large Telco A Participant 1 (n 92); Large Telco A Participant 2 (n 91); Large Telco B Participant 1 (n 91).

128 Interview with Comms Alliance representative (n 56); Large Telco A Participant 1 (n 92); Large Telco A Participant 2 (n 91); Large Telco B Participant 1 (n 91).

129 This included Large Telco D: Interview with Large Telco D (Karen Lee, online, 21 February 2022).

130 Large Telco A Participant 1 (n 92).

131 Large Telco B Participant 1 (n 91).

> with some of the things that we are wanting to do for customers. … It's important … to ensure that the rule-making processes have sufficient flexibility to provide … opportunities for different options, different technologies, different flexibility.[132]

Industry also 'need[ed] the rules written in a way, which makes sense for industry… if it's not worded in a way that industry can understand or apply, then … the value or the benefit [of the rules] is reduced'.[133] Similarly, 'there's a key interest in making sure that whatever the rules are' industry can comply with them.[134]

The motivations of 'voice' and avoidance of costly, ineffective state regulation also drove membership of the Comms Alliance. Three of the four interviewees from large providers suggested they are Comms Alliance members because co-regulation delivers the best outcome for industry, consumers and regulators, a belief 'that came from a strong commercial view that the industry … really knew best how to resolve some of the issues and manage some of the issues'.[135] Four interviewees said it was important for industry to have a 'collective' voice or influence,[136] and have their 'views heard',[137] while another said their employer wanted to play a 'constructive role' in the regulatory process.[138] However, regulatory and legal resource constraints were additional drivers of Comms Alliance membership. One interviewee from a large service provider much smaller than the others stated, 'it's impossible for any individual at the moment to stay across what's happening' in this 'regulated area';[139] membership made that task much easier.

3 *Why Disengage?*

The interviewed representatives from the eight medium, small and micro service providers which did not participate in Code development cited a variety of reasons for not engaging with the process.[140] With the exception of limited business impact, referred to by some interviewees,[141] all reasons indicate the existence of participation

---

132 Ibid.
133 Ibid.
134 Ibid.
135 Large Telco A Participant 1 (n 92).
136 Large Telco A Participant 2 (n 91).
137 Large Telco C (n 91).
138 Large Telco A Participant 2 (n 91).
139 Large Telco C (n 91).
140 Large service providers and Comms Alliance staff interviewed said cost, time commitment, Code complexity, and lack of specialist skills contributed to non-engagement by smaller providers. However, large service providers referred to three additional factors: 'they know they can rely on those who are participating to 'serve their interests and ensure that things are kept sort of honest and practical and commercial'; 'trust' in Comms Alliance to 'put [their] views forward'; and membership of another industry organisation that provides updates on Codes: see Interview with Large Telco B Participant 2 (Karen Lee, online, 22 September 2021); Large Telco A Participant 1 (n 92); Large Telco B Participant 1 (n 91), Large Telco C (n 91). While those reasons may may explain why some smaller service providers did not engage, I have not discussed them in the above analysis because the medium, small and micro service providers interviewed made no reference to them.
141 Interview with Small Telco A (Karen Lee, online, 30 September 2021) ('Small Telco A'); Interview with Micro Telco A (Karen Lee, online, 21 September 2021) ('Micro Telco A').

barriers for smaller companies in industry rule-making — barriers similar to those they encounter in traditional rule-making.[142]

The lack of resource was the most significant (and commonly cited) reason for non-engagement by medium, small and micro service providers. Participation inevitably meant that staff members were 'not doing something else'.[143] The representative of two medium service providers explained: 'As a small business … a lot of your focus is around growth … you're having to pull people off one project to work on things like that. And sometimes that can hamper your growth'.[144]

An inability to influence the process or derive benefit from their participation was also mentioned. '[T]he rules are written for the bigger guys', said one micro service provider.[145] 'If it's just gonna be I'm gonna get stuck with whatever the outcome is, it's just a case of what's the point?', said a small service provider representative.[146] A similar view was expressed by a representative from a medium service provider (and former Comms Alliance member):

> [T]here was minimal opportunity to be involved unless you're actually on the working committee for it and getting on the working committee for it was virtually impossible …
>
> Comms Alliance is very, very heavily geared towards its largest members, which are the big telcos. And I genuinely feel that as a smaller telco, they're not interested in our voice …
>
> Participation in these processes, and the desire to participate is directly proportionate to the extent that we feel our voice will be heard or our opinion will be considered and taken into effect …[147]

Another medium service provider who was critical of the *TCP Code 2019* and the way the Telecommunications Industry Ombudsman adjudicates consumer disputes arising under the Code said: 'If things don't change when those [large companies] are engaging, then our legal say is not going to make a difference'.[148]

A belief they could not add value to the process or lacked the skills or expertise needed to participate also led to non-participation. As a representative from a micro service provider observed, staff are 'often technical-focused people [with] limited sophistication in relation to business [and] legal matters [and] certainly don't have the funds to go off and get a top tier law firm to make submissions on their behalf'.[149] The representative from a medium-sized service provider said that without a law degree he could not engage in the 'quite detailed and nuanced legal wording of the ins and outs of things like [the Code]'.[150] The representative of two

---

142 On participation barriers faced by 'missing stakeholders', including small businesses, in traditional United States ('US') administrative rule-making, see, eg, Cynthia R Farina, Mary J Newhart, Claire Cardie and Dan Cosley, 'Rulemaking 2.0' (2011) 65(2) *University of Miami Law Review* 395.

143 Interview with Small Telco B (Karen Lee, online, 10 February 2022) ('Small Telco B').

144 Interview with Medium Telcos C and D (Karen Lee, online, 24 September 2022) ('Medium Telcos C and D').

145 Micro Telco A (n 141).

146 Small Telco B (n 143).

147 Interview with Medium Telco A (Karen Lee, online, 30 September 2021) ('Medium Telco A').

148 Interview with Medium Telco B (Karen Lee, online, 8 February 2022) '('Medium Telco B').

149 Interview with Micro Telco B (Karen Lee, online, 20 September 2021) ('Micro Telco B').

150 Medium Telco A (n 147).

medium service providers mentioned the 'many other bigger players in the space … that were probably better positioned to give feedback'.[151]

Criticisms of the Comms Alliance Code development process were cited as reasons for non-participation too. Several interviewees from both member and non-member service providers reported they were not provided with an opportunity to engage in the Code review or development process, and if engagement was solicited, it occurred too late in the process.[152] Notwithstanding any efforts that the Comms Alliance may have made to solicit their views, few could recall being invited to participate while the process was ongoing.[153] The Comms Alliance did send out an email to service providers registered with the Comms Alliance once the *TCP Code 2019* was finalised, inviting them to participate in a webinar about changes to the Code.[154] However, this was seen as 'late in the piece' by one member representative. This representative said that the Comms Alliance did very little to engage with smaller members (eg, holding a discussion panel for smaller service providers independent of the bigger players) and was unaware ICAG existed. They also indicated that their desire to participate was reduced because working committee representatives represented their own interests.[155]

Negative views about the Comms Alliance as an organisation, the *TCP Code* generally, and weaknesses in the co-regulatory regime and the wider regulatory framework created powerful disincentives to participate as well. One micro service provider representative stated that the Comms Alliance does not do a 'good job'; it 'acts predominantly in the best interests of Comms Alliance' (ie, 'it adopts some of the consumer advocate positions, which … don't benefit consumers and don't benefit [carriage service providers], but fall within the ambit of today's fashionable thing to do for consumer protection'); and the Code was not 'fit for purpose' (eg, its provisions do not assist consumers).[156] They added the [wider telecommunications] regulatory framework was 'piecemeal' — a sentiment echoed by a medium service provider representative: 'to be frank … I feel a lot of [consumer protection]'s about appeasing the ACCC, and appeasing the [Telecommunications Industry Ombudsman], by making policies that appear good on the surface, but actually just suck for everybody, including consumers'.[157] The fact that compliance with the *TCP Code* was 'voluntary' unless and until the ACMA directed a service provider to comply with it was also cited as a reason for service providers not to become involved in Code development.[158]

---

151 Medium Telcos C and D (n 144).

152 Medium Telco A (n 147); Medium Telco B (n 148); Small Telco B (n 143).

153 Medium Telco A (147); Medium Telco B (n 148); Medium Telcos C and D (n 144): Small Telco B (n 143); Small Telco A (n 141); Micro Telco A (n 141); Micro Telco B (n 149).

154 Interview with Comms Alliance representative (n 56). The Comms Alliance representative pointed out that the register could be used only for limited purposes, ie, *TCP Code* compliance and monitoring, not rule-making: see *TCP Code 2019 Incorporating Variation No 1/2022* (n 10) cl 10.1.1. The ACMA, which has access to the register, did not ask Comms Alliance to contact organisations on the register or do further consultation with registrants beyond what it had already done.

155 Small Telco B (n 143).

156 Micro Telco B (n 149). Medium Telco B said the Code failed to place enough responsibility on consumers (n 148).

157 Medium Telco A (n 147).

158 Micro Telco B (n 149).

The relatively small impact of the Code on their businesses was another factor cited by two interviewees. One micro service provider representative said many Code rules sought to regulate activities they did not engage in (eg, offering credit).[159] The representative for two medium service providers stated the *TCP Code* is not a 'really big problem for us … if it was a bigger problem for us, maybe we might think of it differently'.[160] A third interviewee suggested they are 'just better off giving [a] customer 30 days' notice and [allowing the customer to go] to another provider' if they complained to the Telecommunications Industry Ombudsman, especially when the source of the problem resides with the wholesaler, rather than engage in the process of revising Code rules that they thought were unfair to providers. They suggested that because they receive only one or two Telecommunications Industry Ombudsman complaints a month, the fees that the Ombudsman levies to resolve *TCP Code* disputes did not create a financial incentive to change or participate in the Code development system: 'unless it's a big enough problem for you, you're not gonna do anything about it'.[161]

Another factor that contributed to non-participation was the lack of knowledge about the regulatory environment — a factor identified by the Comms Alliance representative and which became apparent in interviews with medium, small and micro service providers. The Comms Alliance representative stated that 'industry sees and understands the impact of operational codes much more clearly than they see and understand the impact of changes to something like the *TCP Code*'[162] — an observation consistent with one medium service provider representative interviewed who said they failed to understand the importance of the *TCP Code* when it was developed.[163] At least two service providers interviewed confused being a member of Comms Alliance with CommCom itself or with registering with the Comms Alliance for the purposes of Code compliance and CommCom-related obligations. They said they were members of the Comms Alliance when they meant that they had registered with Comms Alliance or had submitted compliance documentation to CommCom.[164] A third service provider demonstrated some misunderstandings of the *TCP Code* rules as well.[165]

Finally, 'participation fatigue' and Comms Alliance membership fees were said, especially among micro service providers, to create disincentives to engage with Comms Alliance processes. One micro service provider reported participation fatigue arose among micro service providers because they had engaged in other regulatory fora over the years without success.[166] Moreover, even though they were

---

159 Micro Telco A (n 141).

160 Medium Telcos C and D (n 144).

161 Medium Telco B (n 148).

162 Interview with Comms Alliance representative (n 56).

163 Medium Telco A (n 147).

164 Medium Telco B (n 148); Small Telco A (n 141). Arguably, this confusion is not unreasonable given CommCom charges a fee to review Compliance Attestation Documents and interacts with them at least once a year.

165 Micro Telco B (n 149).

166 Ibid. The Interview with Comms Alliance representative (n 56) also referred to participation fatigue:

> But that is more for the RSPs [retail service providers] who are engaged but have limited resources, or honestly, even really the large ones, we are all struggling under the weight of the consultations, the revisions, the rules. … that has been and will continue to limit how much and what level of quality we can engage at.

tiered, based on company size and turnover, Comms Alliance membership fees were seen as a barrier because the profit margins of micro providers are so low. Tiered fees were also said to be the reason why the largest providers had 'more influence' over the Comms Alliance, resulting in the silencing of other voices mentioned earlier.[167] A medium service provider, and former Comms Alliance member, said the Comms Alliance is the 'baby of the large telcos' and 'their job is to represent the organisations that are their members', which it does 'right … if they're representing the interests of the members who are largest, and paying them the most to be part of it'.[168]

The most common reasons given for non-membership also overlapped with some of the reasons given for non-participation. They included: a lack of awareness of the Comms Alliance or how membership would be useful;[169] an inability to attribute the expense of membership to sales;[170] and an inability to influence the Comms Alliance and/or its rule-making processes.[171]

IV Evaluation

A *Were the Engagement Functions Performed?*

The limited interview data collected does not enable in-depth evaluation of whether Comms Alliance members' involvement in the working committee, ICAG, the Operations Council or otherwise increased their motivation or the motivation of non-members to comply with the *TCP Code 2019*. While academic literature suggests that participating Comms Alliance service provider members should be more likely to comply with the Code than non-members who did not engage in the process, testing that hypothesis (or even establishing a correlation between engagement in Code development and compliance) is difficult. Because of the risk of self-serving answers, service provider representatives were not asked if their engagement motivated their organisations to comply with the *TCP Code*. Further, there is a lack of publicly available information on the performance of individual service providers. The Telecommunications Industry Ombudsman publishes aggregated data about who makes complaints, complaints by service type (eg, Internet, landline, mobile and multiple services) and the top 10 providers and/or brands by complaint numbers.[172] However, the Ombudsman has assumed complaints-handling responsibility under multiple Comms Alliance codes, and it does not publish disaggregated *TCP Code* data. Nor does it identify or determine if service providers committed actual or potential breaches of the *TCP Code 2019*. Data published by the Comms Alliance in its quarterly *Complaints in Context* reports was also of limited assistance. They show the number of Telecommunications Industry Ombudsman complaints against service providers as a ratio of the services they provide. But only the 10 service providers with the largest number of complaints in

167 Micro Telco B (n 149).
168 Medium Telco A (n 147).
169 Micro Telco A (n 141).
170 Ibid.
171 Medium Telco A (n 147).
172 See, eg, Telecommunications Industry Ombudsman, *Quarterly Report: Quarter 2 Financial Year 2020–21* (undated).

each prior financial year are required to participate in the reports,[173] and although other service providers may voluntarily participate, few do in practice. Since October 2019, the ACMA has published, on a quarterly basis, information about the complaints-handling performance of providers with 30,000 or more services in operation,[174] but until the September 2024 quarter, this data was aggregated.[175] This data also does not specify if service providers committed actual or potential breaches of the *TCP Code 2019*. A study of the ACMA's enforcement of the *TCP Code*, including the *TCP Code 2019*, since its adoption in 2007 might shed some light on the correlation between Code engagement and compliance, but requires further research outside the scope of this article. All that can be said here is that if industry engagement in rule-making does motivate compliance, the low participation rates in Code development suggest opportunities to initiate and sustain concern about compliance at the outset may be being lost. It may also help explain the need for the annual compliance attestation process overseen by CommCom.[176]

To what extent industry engagement in Code development has led to greater particularity in rules (and hence increased ability to enforce *TCP Code* rules) is equally difficult to assess from the data collected. On the one hand, the *TCP Code 2019* is a lengthy document, and there is a view among many in the industry that it (and its predecessors) is overly prescriptive, triggering a call for a more 'principles-based' or 'outcomes-based' approach to codes.[177] On the other hand, the ACMA and consumer groups like ACCAN have argued that the existing Code development process can result in unclear and ambiguous rules, making enforcement of Code rules difficult.[178] However, the cause of both complaints is often attributed to the hard-fought negotiations between industry and consumer representatives and the requirement to reach consensus within the working committee. Industry participation per se is not mentioned as a contributing factor.[179] That said, it is almost inconceivable to think that industry involvement would not have led to greater

---

[173] See *TCP Code 2019* (n 10) cl 4.7.3. See also Communications Alliance, *Telecommunications Complaints in Context* from July–September 2019 – July–September 2024.

[174] See, eg, ACMA, *Telecommunications Complaints-Handling 2018–19* (Report, October 2019).

[175] See, eg, 'Action on Telco Consumer Protections: October to December 2024', *ACMA* (Web Page, 24 July 2025) <https://www.acma.gov.au/publications/2025-02/report/action-telco-consumer-protections-october-december-2024>.

[176] For background information on the creation of CommCom, see, eg, ACMA, *Reconnecting the Customer: Final Public Inquiry Report* (September 2011).

[177] See, eg, Telstra Corporation, Submission to Department of Infrastructure, Transport, Regional Development and Communications (Cth), *Consumer Safeguards Review — Part C: Choice and Fairness* (September 2020).

[178] See, eg, Australian Communications Consumer Action Network ('ACCAN'), Submission to Department of Infrastructure, Transport, Regional Development and Communications (Cth), *Consumer Safeguards Review — Part C: Choice and Fairness* (25 September 2020); ACMA, Submission to Department of Infrastructure, Transport, Regional Development and Communications (Cth), *Consumer Safeguards Review — Part C: Choice and Fairness* (25 September 2020) ('Submission to Consumer Safeguards Review'). See also ACMA, *What Consumers Want – Consumer Expectations for Telecommunications Safeguards: A Position Paper for the Telecommunications Sector* (July 2023).

[179] The Comms Alliance adopted a different process for the iteration of the *TCP Code* presented to, but rejected by, the ACMA on 24 October 2025: see Communications Alliance, *Discussion Paper: Telecommunications Consumer Protection[s] (TCP) Code* (May 2023) 6–7; Communications Alliance, *TCP Code Drafting Committee – Terms of Reference* (May 2023); ACMA, 'ACMA Rejects Proposed Telco Industry Code' (n 12).

particularity in the Code rules; industry working committee members often had to reach a collective industry view before taking positions to all working committee members.[180]

The limited interview data collected does, however, permit some evaluation of whether the three rule-making functions of industry engagement — knowledge-gathering, education, and self-reflection — were discharged in the case study. As highlighted below, the engagement mechanisms adopted by the Comms Alliance enabled knowledge-transfer and provided educational opportunities for its members as well as occasions capable of provoking their critical self-reflection — opportunities that most Comms Alliance members embraced, resulting in better informed rule-making and some degree of self-evaluation. However, the apparently limited engagement of non-members during industry consultation raises questions about the ability of the process to elicit information, educate or provoke critical self-reflection among this group of service providers that are subject to the *TCP Code 2019*.

Even if it is not possible to determine the precise nature or quantity of information they provided, carriage service providers subject to the Code clearly provided the Comms Alliance and/or working committee representatives with pertinent information that was considered and/or used to inform Code development. Apart from Aussie Broadband,[181] all information was provided by Comms Alliance's carriage service provider members that are subject to the Code. Representatives of the largest carriage service providers (Telstra, Optus, and VHA) fed information directly into the working committee. This information was then discussed by representatives from consumer organisations and regulators. The 12 large and medium-sized ICAG members subject to the Code but not represented on the working committee[182] were able to provide relevant information to Telstra, Optus, and VHA working committee representatives during ICAG meetings — information that was then passed on, where appropriate, to all working committee representatives. Operations Council meetings provided additional opportunities to supply and discuss information with working committee representatives. The 15 large and medium-sized members appear to have been the largest contributors of information, but Comms Alliance staff made efforts to solicit the views of the small number of remaining Comms Alliance members subject to the Code who did not participate in the working committee, ICAG or the Operations Council.[183] They also sought to ensure that organisations with knowledge about small service providers were represented on the working committee. Although not a carriage service provider, inabox could share insights about the business models and needs of small and micro service providers with all working committee members. Telstra, Optus, and VHA, as wholesalers to many small and micro service providers and owners of

---

180 See Karen Lee, *The Legitimacy and Responsiveness of Industry Rule-Making* (Hart, 2018) chs 5–7.

181 Aussie Broadband made a written submission about the draft Code during public consultation: see 'Drafts for Public Comment' (n 124).

182 See above Part III(C)(1)(b).

183 Based on the data found in sources referred to above in n 113, approximately seven service provider members did not participate in the working committee, ICAG or the Operations Council in 2017 and 2018. In 2019, approximately one service provider member did not participate in these engagement mechanisms.

diverse-sized brands,[184] were also broadly aware of their requirements and mindful of 'how changes would impact them'.[185]

Whether there was sufficient knowledge transfer from small and micro carriage service providers in the development of the *TCP Code 2019* is, however, open to debate. On the one hand, some informed feedback about small and micro service providers was fed into the process. Further, given the lack of resources faced by many small and micro service providers, it is unrealistic to expect all small and micro service providers to have participated in the process. On the other hand, subject to one exception (the small service provider that a working committee member approached directly), small and micro providers had no direct input into the Code development process, even though they were overwhelmingly the majority of service providers subject to the Code. The medium, small and micro service provider representatives interviewed suggested that their absence was problematic. They indicated that they 'get stuck with whatever's left'[186] — a result that led to 'not well thought through' rules:[187] rules that were too heavily mobile-oriented; rules that were difficult to comply with; or a set of rules designed for large market participants who offer 'standardised products' that, notwithstanding existing concessions within the *TCP Code* for smaller providers, creates 'a whole lot of red tape' for small providers who supply them; or rules that address 'real problems' that smaller providers never come across.[188] Another provider representative felt that some rules lacked important detail (eg, provision of modem information to customers) where others were too prescriptive.[189]

Education arguably began when ICAG members read the background report prepared by Comms Alliance staff and held meetings with regulators, ACCAN, and CommCom to discuss the efficacy of the third edition of the *TCP Code* (*TCP Code 2015*). It continued after ICAG recommended, and the Comms Alliance agreed to establish, a working committee to revise the Code and for the duration of its development. Self-evaluation, however, was triggered when consumer and regulator representatives brought actual and/or perceived weaknesses in the Code to the attention of the four industry working committee representatives, who in turn took this feedback to their relevant internal divisions for discussion. As one industry working committee member highlighted:

> industry went in there with no real predetermined objectives to achieve in terms of, we wanted sort of this to be changed to that. We really just wanted duplication to be removed, a bit more simplification in the Code … The consumer movement, to their credit, had done a lot of work prior to going to

[184] For example, Telstra owns the Belong brand.
[185] Interview with Comms Alliance representative (n 56).
[186] Small Telco B (n 143).
[187] Ibid. The credit-checking rules of *TCP Code 2019* (n 10) cl 6.1.1(b), requiring suppliers to perform an external credit check for new residential customers wanting to purchase post-paid services if the contract value was over $1,000, were cited by this small provider as an example. They were said to make sense from a business perspective for mobile service providers because ongoing mobile plans were 'open ended' (ie, the costs associated with performing credit checks could be easily absorbed for mobile service providers), however they were problematic for providers of fixed line products because they are offered on a fixed term basis and the maximum early termination fee is capped, so suppliers struggle to recoup the cost of the credit check from their customers.
[188] Medium Telco A (n 147).
[189] Medium Telco B (n 148).

> the start of the working committee process, and had a long list of requirements. And they basically went to just about every element of the Code.[190]

ICAG and Operations Council members not represented on the working committee would not have heard consumer and regulator concerns first-hand. Nevertheless, they were at least educated about consumer and regulator expectations. Industry working committee members explained consumer and regulator feedback to ICAG and Operations Council members. This feedback was discussed by those members and, according to an ICAG member not represented on the working committee, was passed on to internal team members for evaluation and comment.[191]

It is less clear whether and to what extent the Comms Alliance and its industry working committee, ICAG and Operations Council members taught underperforming members (if any) about industry best practice — another educational aim of industry engagement — and sparked self-reflection by those members in this case study. The Comms Alliance, as an organisation, provides a forum where its members can discuss matters, with education and self-reflection potentially important by-products of those discussions. However, the Comms Alliance is often the facilitator and not the driver of those discussions. Nevertheless, Comms Alliance staff on this occasion appear to have worked toward the goal of educating Comms Alliance members. Along with industry working committee members, they provided updates to ICAG and Operations Council members and solicited the feedback of smaller members by phone or with emails highlighting areas of concern. Responding to such requests would have necessitated consideration of the relevant issues and the ability or otherwise of the businesses to adapt accordingly. Without access to the working committee, ICAG and Operations Council minutes for this Code, it is difficult to determine if members educated other members about their own practices and if those discussions precipitated internal evaluation of their behaviour. Studies of the development of other Comms Alliance codes suggest industry working committee members do share information about their practices among themselves and with non-industry working committee members. However, information sharing does not always result in the adoption of tougher rules or lead to alterations in service provider practices because of the need to reach industry consensus and industry's reluctance to sign up to rules it cannot comply with from the outset.[192]

The Comms Alliance clearly made some effort to educate non-members about the *TCP Code 2019* while it was developed. In addition to publishing the draft Code for comment on its website, the Comms Alliance published a 12-page explanatory statement.[193] This statement included an overview of the background to the Code, its role in the wider telecommunications consumer protection framework, the revision process, and proposed changes, and sought feedback on two specific

---

190 Large Telco A Participant 1 (n 92).

191 Large Telco C (n 91).

192 Lee (n 180) chs 5–8.

193 Communications Alliance, *Telecommunications Consumer Protections (TCP) Code DR C628:2018: Public Comment Explanatory Statement* (July 2018) <https://web.archive.org.au/awa/20181030223728mp_/http://pandora.nla.gov.au/pan/25087/20181031-0143/www.commsalliance.com.au/__data/assets/pdf_file/0006/60666/EXPLANATORY-STATEMENT-TCP-Code-Public-Comment-2018.pdf>.

questions: the definition of 'consumer' and the proposed removal of 'value plan' rules. It also included two appendices: one with a detailed summary of substantive changes; the other setting out the working committee's terms of reference. However, because of the small number of industry written submissions and interviews conducted, it is difficult to determine if these documents were noticed and/or read by non-members and therefore if they had any educational impact. One suspects though its impact was limited. Following the Comms Alliance 'Public Comment' page on its website, where the Comms Alliance solicits comments on draft codes, and receiving *We Communicate* are free. *We Communicate* subscribers also do not need to be Comms Alliance members to receive it. Yet service providers need to know who the Comms Alliance is, and they must make the effort to follow the Comms Alliance to see Code development information and/or register with Comms Alliance to receive the free newsletter. As stated earlier, not all interviewees knew who the Comms Alliance was.

The limited engagement of non-members during industry consultation suggests Code development did not trigger the desired levels of self-reflection among this cohort of service providers subject to the Code.

B *Are There Ways to Improve Industry Engagement?*

Given the importance of industry education and self-reflection to consumer Code development, the question arises whether anything can and should be done to increase the participation rates of non-Comms Alliance members subject to the Code. Some potential solutions suggested by or discussed with some interviewees included:

- requiring the Comms Alliance, CommCom, and/or the ACMA to notify Comms Alliance registered service providers of Code development activities; or granting the Comms Alliance and regulators the power to access the Telecommunications Industry Ombudsman's list of service providers[194] participating in its dispute resolution scheme;[195]
- requiring or otherwise better incentivising the Comms Alliance to go beyond its membership when developing consumer codes such as the *TCP Code*, for example by organising workshops for small and micro service providers to better understand their needs and solicit their feedback or offering training sessions (perhaps in conjunction with the ACMA or CommCom) about the Code development process;
- promoting the creation of a dedicated small and micro provider industry association which could either develop its own codes or be responsible for providing input into Comms Alliance consumer Code processes;

[194] The *Telecommunications (Consumer Protection and Service Standards) Act 1999* (Cth) s 128 requires service providers to join and participate in the Telecommunications Industry Ombudsman scheme.

[195] Imposing such requirements was discussed because the register of providers that Comms Alliance maintains for *TCP Code* purposes can only be used only for compliance and monitoring: see above n 154.

- adopting a principles-based or outcomes-based approach to *TCP Code* development or requiring industry participants to formulate rules on a one-on-one basis for approval with the regulator;[196]
- addressing the weaknesses in the co-regulatory regime and the telecommunications regulatory framework that create disincentives to participate (eg, the ACMA's weak powers to enforce the *TCP Code*);[197] and
- making membership of the Comms Alliance mandatory for carriage service providers subject to the *TCP Code*.

However, many interviewees felt that these measures were undesirable, not feasible and/or would not result in a significant increase in participation. One interviewee stated they would never participate in Code development unless it was required.[198] However, mandating participation was not seen as desirable. A Comms Alliance member representative said that '[w]e want to see the people who do want to participate'.[199] An industry association for small and micro service providers was thought likely to fail because providers would be unwilling to pay membership fees given their small profit margins, and because of the impracticality of corralling the large numbers of such service providers. One-on-one negotiation with industry participants was universally seen as unworkable and too resource-intensive for small and micro service providers, as well as the ACMA, because of the large number of providers in the market.[200] While desired by many interviewees,[201] shifting to principles-based codes would create enforcement difficulties. Allowing the Comms Alliance, CommCom and/or the ACMA to use the *TCP Code* register for Code development purposes would at least ensure industry participants receive notification of Code development activities and opportunities to provide feedback, and, where necessary, enable them to actively solicit their engagement. The ACMA's usual practice is to only issue a press release or make an announcement via its social media channels highlighting the Comms Alliance's calls for comments on draft codes. Yet, while potentially beneficial, there was doubt that direct contact by any of these parties would motivate non-members to participate because of the engagement barriers they face. As the Comms Alliance Project Manager stated, 'In terms of non-members, we rarely hear anything back … you know, we do try'.[202]

Some Comms Alliance members interviewed suggested that non-participation by non-members subject to the *TCP Code* was 'not necessarily indicative of problems or faults with the process'.[203] On balance, that statement is

196 Enforced self-regulation was raised with interviewees for the reasons suggested by Ayres and Braithwaite (n 16) 110–20.

197 The Australian Government announced that it would buttress the ACMA's *TCP Code* enforcement powers after data collection finished: see above n 36.

198 Medium Telco B (n 148).

199 Interview with Comms Alliance representative (n 56).

200 Possible workarounds for small and micro service providers exist, as Ayres and Braithwaite have pointed out. These include the development of a suite of different rules for providers to choose from or allowing providers to copy rules adopted by others: Ayres and Braithwaite (n 16) 129.

201 See, eg, Large Telco A Participant 2 (n 91); Medium Telcos C and D (n 144); Micro Telco B (149).

202 Interview with Comms Alliance representative (n 56).

203 Large Telco A Participant 2 (n 91).

accurate. Apart from organising at least one workshop with smaller providers before and during Code development and possibly experimenting with e-consultation tools to help reduce resource and skill participation barriers,[204] it is hard to identify what more it should have done given the Comms Alliance was unable to use the register of service providers that CommCom maintains for Code compliance purposes. However, my case study does point to potential structural (and arguably fundamental) limitations of co-regulation (at least in the telecommunications sector) as well as the bounded capacity of industry associations like the Comms Alliance to serve as effective intermediaries between industry players and regulators during rule-making. Legislators, governments, regulators and regulatory theorists should be mindful of these potential limitations when contemplating co-regulation or designing the regulatory frameworks supporting it.

C *Implications for Co-Regulatory Rule-Making*

Two potential implications for co-regulatory rule-making can be drawn from the data collected from my research.

First, the case study suggests that co-regulatory rule-making (at least when consumer-protection measures are involved) may be more suitable for industries with a small amount of relatively large-sized players. As has been highlighted, only the large and medium-sized service providers had the resources and motivation to engage in Code development whether in working committees, ICAG, the Operations Council or by submitting written comments. While they may have been affected by the Code and had insights into the contours of regulatory problems and the limitations of Code rules, small and micro-sized service providers confronted some significant engagement barriers that hindered their ability to participate. And by not participating, the Code development process did not provoke them to critically reflect on their own conduct or serve to educate them about practices potentially detrimental to consumers. The process did lead to some transfer of knowledge about small and micro players, but the transfer occurred because of knowledge held by large service providers, owned by vertically-integrated businesses supplying services on a wholesale basis to other market participants, rather than small and micro service providers themselves. And it would appear that the input of large and medium-sized service providers should not be mistaken for being representative of possible input from small and micro providers, a counterargument often used to justify the status quo.[205] Co-regulation was first introduced in the Australian telecommunications market when there were relatively few market providers. The growth in the number of providers (and their limited engagement) have contributed, at least in part, to a call for the ACMA to have greater power to directly regulate the

[204] Similar experiments have been tried, for example, in administrative rule-making in the US with mixed success in overcoming engagement barriers for small businesses: see, eg, Farina et al (n 142). Note no interviewee mentioned using technology as a possible solution to address the barriers this article identifies.

[205] See the text accompanying n 187.

industry[206] — a call that the Australian Government announced in early 2025 and again in August 2025 that it will answer.[207]

Second, while my case study highlights that industry associations can engage successfully with their industry members, it also highlights factors that constrain the ability of industry associations to assist regulators and hence the achievement of regulatory objectives. Unless required by law, voluntary membership organisations inherently have few incentives to go beyond their membership while engaged in rule-making. As one interviewee stated:

> [The Chief Executive Officer ('CEO')] is going to invest his time in making sure his membership's happy and comfortable with what he's doing … [G]oing to Comms Alliance non-members and saying, 'What do you think?' is sort of ... well, it's a case of 'join Comms Alliance' would be [their] conversation with those non-members, as opposed to 'do you want to talk about the *TCP Code*?'.[208]

Industry associations also need funding to operate and will likely attract, as well as court, the larger providers who have more money and other resources than smaller providers. Charging smaller providers lower fees may be driven by a genuine desire to ensure equality of access to the association. However, payment of higher fees by larger providers is often rewarded with a right to appoint directors to the association's board[209] and may create incentives for industry association CEOs to appoint representatives from larger service providers to internal bodies such as working committees, with the result they have greater say in rule-making. Even if higher fee payments do not generate those incentives, smaller service providers do not have the time needed to participate in those internal bodies, and their non-involvement can create feelings of exclusion that exacerbate engagement barriers as well as the belief, expressed by one interviewee from a medium-sized service provider, that they were better off working with relevant regulators and government departments to formulate rules than with the Comms Alliance.[210] In theory, another industry association could enter the market and service the needs of smaller players, but as some interviewees suggested, it will struggle to attract members because they cannot afford the membership fees.

V Conclusion

To date, the study of intermediaries has focused on their role in 'downstream' regulatory activities: the activities of rule implementation, monitoring and enforcement.[211] In this article, I have sought to highlight that intermediaries such as the Comms Alliance are also operating in the 'upstream' regulatory activity of rule-making. I have argued that the ability of industry associations to engage industry

---

206 See, eg, ACMA, Submission to Consumer Safeguards Review (n 178) 9.

207 See above n 36; Anika Wells, 'Albanese Government Delivering Better Protection for Telco Consumers' (Media Release, 26 August 2025).

208 Large Telco A Participant 1 (n 92).

209 See, eg, *Constitution*, Communications Alliance (at November 2007) cl 5.3(b).

210 Medium Telco A (n 147).

211 See, eg, Kenneth W Abbott, David Levi-Faur and Duncan Snidal, 'Theorizing Regulatory Intermediaries: The RIT Model' (2017) 670 *Annals of the American Academy of Political and Social Science* 14.

participants in Code development is critical to the success of co-regulatory regimes, because industry engagement serves multiple rule-making, compliance and enforcement functions. My research demonstrates that industry associations can play an important role in facilitating knowledge-transfer and education as well as some degree of critical self-reflection among its members. However, it has also shown that medium, small and micro-sized non-members of industry associations can face a range of engagement barriers in industry association-led rule-making — barriers that can make it as difficult for industry associations as it is for traditional rule-makers to elicit participation in consultation exercises. In addition, my research has highlighted that industry association dynamics may unwittingly undermine smaller industry voices, thereby reinforcing, rather than reducing, other participation barriers. Further empirical research is necessary to confirm these findings, drawn from a small number of industry participants, but legislators, governments, and policymakers should nevertheless be sensitive to the possible presence of engagement barriers and exclusionary effects of industry association dynamics before delegating rule-making responsibilities to industry associations.

Equitable High-Density Housing: Fiduciary Duties in Developer-Negotiated Body Corporate Contracts

Matthew Conaglen[*] and Cathy Sherry[†]

Abstract

Strata title apartments constitute a significant and growing segment of the Australian housing market and have increasingly been the subject of consumer complaint. A particular source of concern are contracts between bodies corporate and service providers when housing developers have played a role in the contract's negotiation and formation. By analogy with company promoters, case law has held that developers owe bodies corporate a fiduciary duty. This article explores the consequence of that fiduciary duty for contracts between a body corporate and third-party service providers when the developer assisted in the formation of that contract. It situates discussion in the context of New South Wales strata title legislation, and draws on current developer practices, such as the creation of embedded networks for energy and water in apartment buildings.

I Introduction

Strata title is the fastest growing form of residential title in Australia. Urban consolidation policies have incentivised apartment and master-planned development in capital cities for decades, with over 4 million Australians now calling strata title

Please cite this article as:

Matthew Conaglen and Cathy Sherry, 'Equitable High-Density Housing: Fiduciary Duties in Developer-Negotiated Body Corporate Contracts' (2025) 47 *Sydney Law Review* 20950:1–27 <https://doi.org/10.30722/slr.20950>.

[*] Professor of Equity and Trusts, University of Sydney Law School, Sydney, New South Wales, Australia.
Email: matthew.conaglen@sydney.edu.au; ORCID iD: https://orcid.org/0000-0002-2646-3463.

[†] Professor, Macquarie Law School and Smart Green Cities Research Centre, Macquarie University, Sydney, New South Wales, Australia.
Email: cathy.sherry@mq.edu.au; ORCID iD: https://orcid.org/0000-0001-9676-0693.

We are grateful, with the normal caveats, to Jamie Glister and two anonymous referees for helpful comments.

home.[1] State governments have recently implemented planning reforms to further facilitate apartment construction on the assumption that this will increase housing supply, thus easing the housing affordability crisis.[2]

In tandem with increased construction, strata title has increasingly become the subject of consumer complaint,[3] and litigation, with allegations of exploitative practices on the part of developers and strata managers. Complaints from strata owners are typically consistent: opaque, inflated or unnecessary charges, that owners seem unable to escape. Although not obvious to many people, the source of these problems is the strata title legal form (or more accurately, a misuse of that form): strata title compels owners to make annual monetary payments called 'levies', and mandates membership of a body corporate, called an owners corporation ('OC') in New South Wales ('NSW'). The OC is a separate legal entity that can be bound by contracts that owners must pay for through their levies. When owners buy a new apartment, they frequently discover a range of OC contracts that they did not negotiate and have not read, but for which they have no choice but to pay.

Unhappy with the contractual and financial obligations they find themselves subject to because of OC contracts, owners have sued. In several cases, courts have held that strata developers owe fiduciary duties to the OC.[4] That conclusion stems from analogies made by courts between strata developers and company promoters, who have long been held to owe fiduciary duties to a company they promote.[5] In this article, we investigate the consequences of that view, with a particular focus on the relevance of the developer's fiduciary status to a longstanding and increasingly problematic strata title development practice: developers playing a role in the negotiation of contracts with third-party service providers that are ultimately entered between the OC and the third-party service provider. We explore the possibility that these practices can involve breach of the developer's fiduciary duties and concludes with consideration of remedies that might be available to OCs as a result.

---

1 City Futures Research Centre, UNSW Sydney, *Australasian Strata Insights 2024* (Report, October 2025) 5 <https://www.unsw.edu.au/research/city-futures/our-research/projects/2024-australasian-strata-insights>.

2 See, eg, New South Wales ('NSW') Government, *Transport Oriented Development Program* (December 2023) <https://www.planning.nsw.gov.au/sites/default/files/2023-12/transport-oriented-development-program.pdf>.

3 See 'The Strata Trap', *Four Corners* (Australian Broadcasting Corporation, 9 September 2024) <https://www.abc.net.au/news/2024-09-09/the-strata-trap/104330248>.

4 See, eg, *Re Steel* (1968) 88 WN (Pt 1) (NSW) 467, 469, 470 (Else-Mitchell J) ('*Re Steel*'); *Community Association DP No 270180 v Arrow Asset Management Pty Ltd* [2007] NSWSC 527 [218], [225], [231]–[234] (McDougall J) ('*Arrow Asset Management*'); *Radford v Owners of Miami Apartments, Kings Park Strata Plan 45236* [2007] WASC 250, [157] (Simmonds J) ('*Radford*'); *Meriton Apartments Pty Ltd v Owners Strata Plan No 72381* (2015) 105 ACSR 1, 71 [378], 72–3 [381]–[384] (Slattery J) ('*Meriton Apartments*'); *Owners of Strata Plan 74602 v Eastmark Holdings Pty Ltd* [2015] NSWSC 1981, [64] (Stevenson J) ('*Eastmark*').

5 See, eg, *Bagnall v Carlton* (1877) 6 Ch D 371, 386 (Bacon V-C), 404 (Baggallay LJ) (CA) ('*Bagnall*'); *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218, 1236 (Lord Cairns LC), 1268–9 (Lord Blackburn) ('*Erlanger*'); *Emma Silver Mining Co v Grant* (1879) 11 Ch D 918, 934–6 (Jessel MR) ('*Emma v Grant*'); *Emma Silver Mining Co Ltd v Lewis & Son* (1879) 4 CPD 396, 408 (Lindley J for the Court) ('*Emma v Lewis*').

While most strata properties will be apartments,[6] the strata legal form is also used for low-rise developments ranging from peri-urban master-planned estates to eco-villages. These latter low-rise developments are often preferred by local councils as they privatise infrastructure and services, relieving councils of the need to provide those not just initially, but in perpetuity.[7] Strata title legislation varies among the states and territories, but its core concepts are consistent, and in this article we use the NSW legislation as the basis for discussion.

II Strata Development Practice

When someone buys an apartment from a strata developer, it is well-understood that the developer is making a profit on the sale of that apartment. That is an arms-length commercial transaction in which 'each [party] is engaged in conducting his own affairs',[8] which means that the transaction is generally not subject to fiduciary regulation:[9] no purchaser expects the strata developer to be acting altruistically when it sells an apartment. That is not so, however, where the apartment owners decide to enter a contract with a third party to provide services to the OC: it is far from clear that the developer has any interest in such third-party contracts. If the developer does have such an interest, the mere fact that there is no fiduciary duty owed to the apartment owners regarding the sale of apartments does not mean that the developer owes no fiduciary duty regarding the separate third-party service contracts.

Third-party service contracts are increasingly ubiquitous in modern strata developments. While owners can (and do) manage their own smaller schemes, the larger the scheme, the more likely it is that owners will need professional assistance. Legislation imposes a range of obligations on the OC, including obligations to manage the finances of the scheme, take out insurance, keep records and accounts, and crucially, to manage, repair and maintain the common property which the OC holds as 'agent' for all of the apartment owners as tenants in common.[10] If there are hundreds or even thousands of residents in a development, their common property will include complex plant and equipment, possibly recreational facilities, and even publicly-accessible open space. The OC will need to enter contracts with professional service providers to assist in managing these facilities.

OC contracts are binding on the apartment owners, not in the sense that those owners become parties to the third-party contracts, but in the sense that the OC 'must levy owners each year in accordance with their unit entitlements, to extract the necessary money for administrative and sinking funds to maintain and run the

---

6 For simplicity, we refer to the person who buys a strata title from a developer as an 'apartment' owner, while recognising that developers build and sell many different sorts of properties.

7 Cathy Sherry, 'Land of the Free and Home of the Brave? The Implications of United States Homeowner Association Law for Australian Strata and Community Title' (2014) 23(2) *Australian Property Law Journal* 94.

8 BH McPherson, 'Fiduciaries: Who Are They?' (1998) 72(4) *Australian Law Journal* 288, 290.

9 See, eg, *Keith Henry & Co Pty Ltd v Stuart Walker & Co Pty Ltd* (1958) 100 CLR 342, 351 (Dixon CJ, McTiernan and Fullagar J); *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 70, 72 (Gibbs CJ), 100 (Mason J), 118–119 (Wilson J), 146, 149 (Dawson J) ('*Hospital Products*').

10 *Strata Schemes Development Act 2015* (NSW) s 28(1) ('*SSD Act*'). The OC has been described as a kind of trustee for the owners: *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* (2014) 254 CLR 185, 195 [9]–[11] (French CJ) ('*Brookfield*').

scheme'.[11] Levying provisions are the key reason strata title legislation exists,[12] overcoming the longstanding property law rule that prevents positive obligations from binding freehold land and thus affecting successors in title.[13] This rule prevents current landowners from loading land up with obligations to pay money that all future owners of that land will need to discharge. However, the rule presents a problem if owners of fee simple apartment titles are going to be made to pay for the necessary upkeep of a collectively-owned building. To the extent that the levying provisions achieve this end, they are entirely legitimate. However, developers and the strata industry have recognised that the levying provisions are also an income stream that can be tapped by the developer or third-party companies via OC contracts.

While some contracts will provide owners with value for money, others appear not to be commercially competitive, at least from the owners' perspective. Contracts for 'embedded networks', which are invariably included in contemporary large-scale developments,[14] are a good example. Embedded networks allow for the bulk purchase of electricity or gas at a parent meter at a discount, or alternatively, the generation of energy onsite, and then the distribution of that energy to residents inside the strata scheme.[15] While owners could run their own embedded network, networks are typically run by third-party companies called 'embedded network operators' ('ENOs'). In theory, embedded networks provide residents with discounted energy, either because it is generated onsite (for example, solar panels) or because when it is purchased from retailers 'the network cost for large customers can be significantly lower than the combined costs of all the individual small customers'.[16] However, in practice, embedded networks have been the subject of multiple parliamentary and regulatory inquiries because residents are being charged above market rates for utilities, which they have no choice but to use.[17]

For example, some strata developments have solar panels on the roof, as part of an embedded network, installed and operated by a third-party provider. The contracts regarding those panels sometimes provide that the third-party retains

---

11 Cathy Sherry, *Strata Title Property Rights: Private Governance of Multi-Owned Properties* (Routledge, 2017) 30 ('*Strata Title Property Rights*').

12 Ibid 14.

13 *Austerberry v Corporation of Oldham* (1885) 29 Ch D 750 (CA); *Pirie v Registrar-General* (1962) 109 CLR 619.

14 Cathy Sherry, 'Collectively Owned Distributed Energy Resources and Private Property Law: Embedded Networks in High-Density and Master-Planned Housing' (2025) 43(3) *Journal of Energy and Natural Resources Law* 383.

15 Mike B Roberts, Arijit Sharma and Iain MacGill, 'Efficient, Effective and Fair Allocation of Costs and Benefits in Residential Energy Communities Deploying Shared Photovoltaics' (2022) 305 *Applied Energy* 117935:1–15.

16 Independent Pricing and Regulatory Tribunal (NSW), *Embedded Networks: Final Report* (April 2024) 29 ('*IPART Report*').

17 Legislative Assembly Committee on Law and Safety, Parliament of New South Wales, *Embedded Networks in New South Wales* (Report 3/57, November 2022); Department of Environment, Land, Water and Planning (Vic), *Embedded Networks Review: Final Recommendations Report* (January 2022); Australian Energy Market Commission, *Updating the Regulatory Frameworks for Embedded Networks* (Final Report, 20 June 2019) <https://www.aemc.gov.au/market-reviews-advice/updating-regulatory-frameworks-embedded-networks>; 'NSW Embedded Network Action Plan', *NSW Climate and Energy Action* (Web Page, 16 October 2025) <https://www.energy.nsw.gov.au/nsw-plans-and-progress/regulation-and-policy/nsw-embedded-network-action-plan>; *IPART Report* (n 16).

ownership of the panels, as well as all the electricity generated. The provider can sell the solar energy back to the grid for its own profit or sell it to the OC at its peak rate. The apartment owners will receive little or no benefit from the solar panels, not even rent for the use of the OC's common property on which the panels are sited.

Similarly, we have seen contracts under which a third-party provider agrees to provide electricity metering equipment to an OC, and to sell electricity to apartment owners at rates which are at least as favourable as the provider's best *generally available* peak rate. This means that the apartment owners do not receive any of the savings that flow from the bulk purchasing efficiencies of an embedded network; these are taken as ENO profit. Further, although apartment owners will pay no more than *peak* rates for electricity, no *off-peak* rates are available. Because the apartments will have been constructed by the developer and ENO with 'child' meters that do not have a National Metering Identifier, other retailers cannot supply individual apartments, effectively preventing owners and tenants from changing retailers and benefiting from market competition.[18]

These third-party contracts often run for many years, with a further renewal period. The OC is given relatively few rights to terminate, whereas the other party is often able to terminate readily. If the contract is terminated, the service provider may be given the ability to elect between:

(i) forcing the OC to purchase the plant from the provider at a set price;

(ii) removing the plant; or

(iii) leaving the plant in situ in exchange for a nominal payment (for example, $1 *if* the provider asks for that payment).

The provider's choice between these options will obviously be based on the current value of the plant and in its own interests, rather than in the interests of the apartment owners. The commercially one-sided nature of these options is further emphasised when it is recognised that the plant is almost certainly a fixture,[19] and thus part of the common property that already belongs to the OC and that owners paid for when they purchased their apartments. Although recent amendments to the *Strata Schemes Management Act 2015* (NSW) ('*SSM Act*') have now limited embedded network contracts to three years in line with other utility contracts,[20] there is a risk that developers will continue to include clauses requiring the OC to pay the capital costs of the network if the embedded network contract ends for *any* reason, effectively compelling OCs to renew contracts after an initial three-year term.

These contracts could simply be seen as poor commercial decision-making on the part of the OC, but that is because the discussion to this point has omitted the developer's role in the creation of these contracts and in the OC's decision to enter them. In the real world of strata practice, developers are routinely paid for these

---

18 *IPART Report* (n 16) 96.

19 *Holland v Hodgson* (1872) LR 7 CP 328, 335 (Blackburn J for the Court); *TEC Desert Pty Ltd v Commissioner of State Revenue (Western Australia)* (2010) 241 CLR 576, 585–90 (French CJ, Gummow, Heydon, Crennan and Kiefel JJ) ('*TEC Desert*'). See also below n 67.

20 *Strata Schemes Management Act 2015* (NSW) s132A(4) ('*SSM Act*') used to exempt embedded networks from the three-year limit on utility contracts, but that exemption was removed in early 2025: see *Strata Schemes Legislation Amendment Act 2025* (NSW) sch 1 [44].

contracts, either in cash or kind, by the third-party companies, creating additional profit for developers.[21] For example, ENOs typically pay developers for embedded network contracts by installing the embedded network infrastructure for the developer for free.[22] Other examples of OC contracts that are the result of in-kind payments to developers are:

- the 'almost universal practice' of strata managers providing free or discounted consultancy to developers on OC budgets in return for a strata management contract;[23]
- the provision of free landscaping in return for a landscaping contract; and
- increasingly, the provision of sustainability infrastructure like electric vehicle (EV) chargers, car share services, and grey and/or black water treatment plants in return for contracts with the OC for their maintenance and management.

Rather than paying in-kind, some third-party companies make cash payments to developers for contracts, such as the $190,000 payment made to the developer for a facilities management contract in *Community Association DP No 270180 v Arrow Asset Management Pty Ltd* ('*Arrow Asset Management*').[24]

These OC contracts are negotiated by the developer and third-party service providers during the construction phase and prior to the registration of the strata plan and creation of the OC. Also during this phase, or even earlier, purchasers are signing off-the-plan contracts for unconstructed apartments. Off-the-plan contracts can only disclose the possibility of third-party–OC contracts, because the latter contracts have not yet been finalised. The third-party–OC contracts will not be seen by apartment owners until the first annual general meeting ('AGM'), well after settlement of sales, when the developer ensures that the contracts are presented to the OC with instructions from the strata manager (who has also likely provided benefits to the developer) for the OC to sign the contracts as a necessary part of the building's functioning. New apartment owners, acting as the OC, with no knowledge of building infrastructure or strata scheme management, invariably do so,[25] trusting that the developer and strata manager have acted, and are continuing to act, in their best interests.

The profits that developers are making from these OC contracts are rarely transparent. '[T]he entity that has the most legitimate right to exploit the business associated with maintaining the collectively owned property of the [apartment

---

21 Nicole Johnston, 'An Examination of How Conflicts of Interest Detract from Developers Upholding Governance Responsibilities in the Transition Phase of Multi-Owned Developments: A Grounded Theory Approach' (PhD Thesis, Deakin University, 2017).

22 Evidence to New South Wales Legislative Assembly Committee on Law and Safety, *Embedded Networks in New South Wales*, Parliament of New South Wales, Sydney, 12 August 2022, 12 (Stephen Brell, Strata Community Australia).

23 See, eg, Michael Kleinschmidt, 'Falling Short of the Target: Some Implications for Fiduciary Duties for Developer Practice in Queensland and New South Wales' (2011) 19(3) *Australian Property Law Journal* 262, 264.

24 *Arrow Asset Management* (n 4).

25 Evidence to New South Wales Legislative Assembly Committee on Law and Safety, *Embedded Networks in New South Wales*, Parliament of New South Wales, Sydney, 12 August 2022, 12 (Stephen Brell, Strata Community Australia), 46 (Glen Streatfield, Energy Metrics Consulting).

owners'] community is the community itself',[26] but some developers appear to have been unable to resist the temptation to use their position as another, unrecognised, vehicle for profit.[27] That may involve breaches of the developer's fiduciary duties. Those breaches of fiduciary duty can, in turn, have consequences for the third-party contracts themselves, and may generate pecuniary liabilities for developers.

III The Developer's Fiduciary Status

In order to analyse this issue, it is useful to consider the reasons why developers have been held to owe fiduciary duties. Those reasons help to identify the ways in which there may be fiduciary problems in the developer's involvement in the creation of third-party service contracts with the OC.

A *The Reasons for Fiduciary Status*

The early treatment of strata developers as fiduciaries arose by analogy with promoters of companies:[28] just as a promoter of a company occupies a fiduciary position when it creates the company,[29] the developer occupies a fiduciary position when it brings the OC into existence by registering the strata plan. The early decision of Else-Mitchell J in *Re Steel* mentioned the possibility of developers being promoters, but his Honour's decision was more concerned with the fiduciary role of the members of the committee of the OC, who occupied positions akin to that of directors of a company.[30] However, in *Arrow Asset Management*, McDougall J accepted the analogy between the position of strata developers and that of company promoters,[31] and that approach has been followed in the subsequent case law.[32]

The analogy between developers and company promoters is obvious — indeed, it may simply be a direct application of principle, rather than an analogy — in situations where the development was a 'company title' scheme, the preferred form prior to strata titles legislation. In company title schemes, a company would purchase the land (and building), and then sell shares in the company to apartment owners, whose shareholding would entitle them to occupy an apartment in the building.[33] When someone bought land with a view to floating a company to buy the land and build apartments on it so that shares in the company could be sold to apartment owners, the developer was a promoter of a company in the conventional sense and so owed fiduciary duties. Indeed, one of the leading Australian cases about

---

26 Cathy Sherry, 'Long-Term Management Contracts and Developer Abuse in New South Wales' in Sarah Blandy and Ann Dupuis (eds), *Multi-Owner Housing: Law, Power and Practice* (Routledge, 2010) 159, 172.

27 Ibid 174.

28 See, eg, *Re Steel* (n 4) 470 (Else-Mitchell J).

29 See, eg, *Bagnall* (n 5) 386 (Bacon V-C), 404 (Baggallay LJ) (CA); *Erlanger* (n 5) 1236 (Lord Cairns LC), 1268–9 (Lord Blackburn); *Emma v Grant* (n 5) 934–6 (Jessel MR); *Emma v Lewis* (n 5) 408 (Lindley J for the Court).

30 *Re Steel* (n 4) 469–71 (Else-Mitchell J).

31 Ibid, discussed in *Arrow Asset Management* (n 4) [211], [225] (McDougall J).

32 *Radford* (n 4) [157] (Simmonds J); *Meriton Apartments* (n 4) 72 [381] (Slattery J); *Eastmark* (n 4) [64] (Stevenson J).

33 Brendan Edgeworth, *Butt's Land Law* (Thomson Reuters, 7th ed, 2017) 954–5 [13.40].

company promoters was concerned with the activity of a property developer who undertook this sort of work.[34]

Given that history, one can understand why lawyers and judges would treat strata developers like company promoters, even after the introduction of strata title legislation. However, the analogy between the activities of strata developers and promoters is not quite so obvious, because a developer sells apartments directly to the apartment owners, rather than to the company (the OC) as a promoter normally would. Having said that, the common property will vest in the OC when the developer registers the strata plan. A further difference is that apartment owners do not get their property interests from the company (the OC) as shareholders in a newly-formed company would, but rather from the developer.

Notwithstanding those differences, there is still an analogy between the position and activity of strata developers and that of company promoters. The concept of a company 'promoter' 'has no very definite meaning',[35] but it is 'a short and convenient way of designating those who set in motion the machinery by which the Act enables them to create an incorporated company'.[36] The basic idea is 'one who undertakes to form a company with reference to a given project and to set it going, and who takes the necessary steps to accomplish that purpose'[37] is a fiduciary towards that company,[38] and that 'persons who get up and form a company have duties towards it before it comes into existence'.[39] In *Fawcett v Whitehouse*, a person who negotiated a deal as agent for an intended partnership (and who was therefore a promoter of that partnership) was held to owe fiduciary duties to the intended co-partners.[40] As use of the corporate form became more popular with the enactment of general incorporation statutes, that idea was extended to the promoters of companies. The promoter was therefore analogous to an agent for the company, although it could not strictly be an agent for the company given the company did not yet exist. While the concept of being 'an agent for a non-existent company'[41] was somewhat strained, the courts also conceived of the promoter as acting like a trustee for the intended company (just as '[t]here can be a trustee for unborn children'[42]).[43] Those analogies — with agency and trusteeship — convinced courts to treat promoters as fiduciaries

---

34 *Tracy v Mandalay Pty Ltd* (1953) 88 CLR 215 ('*Tracy*').

35 *Emma v Lewis* (n 5) 407 (Lindley J for the Court). 'It is not a word of art': *Twycross v Grant* (1877) 2 CPD 469, 503 (CA). See also *Whaley Bridge Calico Printing Co v Green* (1879) 5 QBD 109, 111 (Bowen J); *Aequitas v AEFC* (2001) 19 ACLC 1006, 1071 [346] (Austin J) ('*Aequitas*'); Paul L Davies, Sarah Worthington and Christopher Hare, *Gower's Principles of Modern Company Law* (Thomson Reuters, 11th ed, 2021) 378 [10-136]; Joseph Gross, 'Who is a Company Promoter?' (1970) 86(4) *Law Quarterly Review* 493. Cotton LJ expressed dislike for the term in *Ladywell Mining Co v Brookes* (1887) 35 Ch D 400, 411 (Cotton LJ) (CA) ('*Ladywell Mining*').

36 *Erlanger* (n 5) 1268 (Lord Blackburn). Lord Blackburn's reference to 'the Act' was to the *Companies Act 1862*, 25 & 26 Vict, c 89, which 'provided the statutory framework for modern English company law': Susan Watson, *The Making of the Modern Company* (Bloomsbury, 2022) 130.

37 *Twycross v Grant* (n 35) 541 (Cockburn CJ).

38 Ibid 538; *Erlanger* (n 5) 1268 (Lord Blackburn).

39 *Emma v Lewis* (n 5) 407 (Lindley J for the Court).

40 *Fawcett v Whitehouse* (1829) 1 Russ & My 132; 39 ER 51, 56–7 (Lyndhurst LC) .

41 *Re Leeds and Hanley Theatres of Varieties Ltd* [1902] 2 Ch 809, 819 (Romer LJ) ('*Re Leeds*').

42 Ibid.

43 *Bagnall* (n 5) 407 (Cotton LJ); *Re Leeds* (n 41) 822 (Vaughan Williams LJ); Joseph Gold, 'The Liability of Promoters for Secret Profits in English Law' (1943) 5(1) *University of Toronto Law Journal* 21, 26.

for the company, and they can also be applied to the role that developers occupy when they negotiate contracts which the OC will later be asked to enter, after the developer creates the OC by registering the strata plan.

In effect, developers take control of decision-making about these service contracts, with owners having little real choice but to repose trust and confidence in the developer to have negotiated the contracts in the best interests of the future owners. That leaves owners, who have little capacity to exercise independent judgment about the choices they are offered, vulnerable to the possibility of developers taking advantage of the role they have undertaken,[44] which justifies the owners' expectation that the developer will act (or will have acted) in their interests.[45] An agent's undertaking to act on behalf of its principal, even if it is only inferred from the circumstance of agency, qualifies the agent as a fiduciary for their principal,[46] and developers (like company promoters) voluntarily take on a comparable role when they set about creating a strata development.

B *The Fiduciary Duties of Developers*

As Frankfurter J famously observed in *Securities and Exchange Commission v Chenery Corp*:

> [T]o say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?[47]

Generally, promoters were considered to owe their fiduciary duties to the company.[48] In some cases, promoters were said to owe a duty to intending shareholders of the company,[49] but those observations are generally explicable on the basis that a promoter who wished to keep a profit made via promotion of the company would need to have that profit approved by an independent board of directors for the company,[50] and if there was none then the shareholders would need to be informed.[51] Another reason is that in some cases the promoter created a non-corporate investment syndicate, and so owed duties directly to the members of that

---

44 *Hospital Products* (n 9) 96–7 (Mason J).

45 *Australian Securities and Investment Commission v Citigroup Global Markets Australia Pty Ltd (No 4)* (2007) 160 FCR 35, 76 [272]–[275] (Jacobson J) ('*ASIC v Citigroup*').

46 *Hospital Products* (n 9) 96–7 (Mason J); *Grimaldi v Chameleon Mining NL (No 2)* (2012) 200 FCR 296, 345 [177] (Finn, Stone and Perram JJ) ('*Grimaldi*').

47 *Securities and Exchange Commission v Chenery Corp*, 318 US 80, 85–6 (1943), quoted with approval in *Pilmer v Duke Group Ltd* (2001) 207 CLR 165, 198–9 [77] (McHugh, Gummow, Hayne and Callinan JJ) ('*Pilmer*'). See similarly, *Boardman v Phipps* [1967] 2 AC 46, 127 (Lord Upjohn).

48 *Bagnall* (n 5) 404 (Baggallay LJ); *Emma v Grant* (n 5) 936 (Jessel MR); *Gluckstein v Barnes* [1900] AC 240, 246 (Earl of Halsbury LC); *Jubilee Cotton Mills Ltd (in liq) v Lewis* [1924] AC 958, 968 (Lord Dunedin) ('*Jubilee Cotton*'); *Tracy* (n 34) 240 (Dixon CJ, Williams and Taylor JJ); *Australian Breeders Co-Operative Society Ltd v Jones* (1997) 150 ALR 488, 508 (Wilcox and Lindgren JJ) (FCAFC) ('*ABCOS*'). See also *Hichens v Congreve* (1831) 4 Sim 420; 58 ER 157, 160 (Shadwell V-C).

49 *Gluckstein v Barnes* (n 48) 249 (Lord Macnaghten); *Re Leeds* (n 41) 823 (Vaughan Williams LJ); *Jubilee Cotton* (n 48) 971 (Lord Sumner). See also *Directors of the Central Railway Co of Venezuela v Kisch* (1867) LR 2 HL 99, 113 (Lord Chelmsford LC) ('*Kisch*') (referring to 'the public'); *Twycross v Grant* (n 35) 527 (Cockburn CJ).

50 *Erlanger* (n 5) 1229 (Lord Penzance), 1236 (Lord Cairns LC), 1255 (Lord O'Hagan).

51 *Aequitas* (n 35) 1060 [292], 1060–1 [297] (Austin J).

syndicate.[52] Given the OC is a corporate body,[53] and acts in some sense as 'agent' for the apartment owners,[54] the developer's fiduciary duties can sensibly be taken as being owed to the OC, analogously with a promoter's fiduciary duties to the company that it creates.

Some of the older cases talk of the promoter's fiduciary duty as a duty to disclose his or her interest in the transaction that the company is being asked to enter.[55] That view does not sit well with the modern Australian view of fiduciary duties as 'proscriptive rather than prescriptive in nature',[56] given it seems to envisage a fiduciary duty that requires positive action (in the form of disclosure). More recent case law has therefore queried whether it is correct to talk of fiduciary duties of disclosure.[57] There can be no doubt, however, that a promoter or developer who occupies a fiduciary position will owe the twin 'fiduciary proscriptive obligations — not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict'.[58] It is these fiduciary duties which are most likely to cause problems for developers if they have been involved in creating the third-party service contracts which the OC later enters: 'as a promoter, as the man who has formed the company, he cannot take a secret profit',[59] and must 'avoid placing themselves in a position where there is a real sensible possibility of conflict between their duty and their personal interest'.[60]

However, the concept of disclosure remains relevant, in the sense that a failure to make sufficient disclosure will render ineffective any consent that the fiduciary's principal might otherwise be argued to have given to the conduct which amounted to a breach of fiduciary duty. As the High Court of Australia put it in *Maguire v Makaronis*, 'there was no duty as such on the appellants to obtain an informed consent from the respondents. Rather, the existence of an informed consent

52 *ABCOS* (n 48) 518 (Wilcox and Lindgren JJ). See also *Fawcett v Whitehouse* (n 40).
53 *SSM Act* (n 20) s 8(1).
54 *SSD Act* (n 10) s 28(1).
55 See, eg, *New Brunswick & Canada Railway & Land Co v Muggeridge* (1860) 1 Dr & Sm 363; 62 ER 418, 425 (Kindersley V-C) (VC); *Kisch* (n 49), 113 (Lord Chelmsford LC); *Dunne v English* (1874) LR 18 Eq 524, 533, 534 (Jessel MR); *Bagnall* (n 5) 386 (Bacon V-C); *Erlanger* (n 5) 1236 (Lord Cairns LC); *Cavendish Bentinck v Fenn* (1887) 12 App Cas 652, 658 (Lord Herschell), 667 (Lord FitzGerald) ('*Cavendish Bentinck*'); *Gluckstein v Barnes* (n 48) 246 (Earl of Halsbury LC); *Re Leeds* (n 41) 823 (Vaughan Williams LJ), 831 (Stirling LJ); *Tracy* (n 34) 240 (Dixon CJ, Williams and Taylor JJ).
56 *Pilmer* (n 47) 198 [74] (McHugh, Gummow, Hayne and Callinan JJ), citing *Breen v Williams* (1996) 186 CLR 71, 113 (Gaudron and McHugh JJ), 137–8 (Gummow J); *Youyang Pty Ltd v Minter Ellison Morris Fletcher* (2003) 212 CLR 484, 501 [41] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ); *Grimaldi* (n 46) 345 [178] (Finn, Stone and Perram JJ); *Howard v Federal Commissioner of Taxation* (2014) 253 CLR 83, 99 [31] (French CJ and Keane J), 106 [56] (Hayne and Crennan JJ); *Ancient Order of Foresters in Victoria Friendly Society Ltd v Lifeplan Australia Friendly Society Ltd* (2018) 265 CLR 1, 30 [67] (Gageler J) ('*Ancient Order*').
57 *Arrow Asset Management* (n 4) [212] (McDougall J); *Meriton Apartments* (n 4) 72 [381] (Slattery J).
58 *Breen v Williams* (n 56) 113 (Gaudron and McHugh JJ). See also *Chan v Zacharia* (1984) 154 CLR 178, 199 (Deane J).
59 *Emma v Grant* (n 5) 936 (Jessel MR).
60 *Aequitas* (n 35) 1070–1 [343] (Austin J).

would have gone to negate what otherwise was a breach of duty'.[61] A developer will likely have committed a breach of fiduciary duty if:

- they had a personal interest in the contract which the OC later entered and there was a 'real sensible possibility of conflict'[62] between that interest and the developer's duty to act in the interests of the OC in its dealings regarding the creation of contracts for the OC; or
- the developer otherwise profited or benefited by reason of the OC's entry into that contract.

The developer can then only defend itself if it obtained the fully informed consent of the OC,[63] which will only be the case if the developer has made 'full and frank disclosure of all material facts'[64] before obtaining that consent.[65]

IV Fiduciary Problems in Owners Corporation Contracts

It is now possible to consider the impact that the developer's fiduciary duties might have on contracts that the OC enters.

A *Contracts between an Owners Corporation and a Developer*

We start with the easier, although less common, case of a contract which the developer enters directly with the OC, as it provides a straightforward example of the application of fiduciary principles.

1 *The Developer Itself*

To take one example, the developer may have installed infrastructure, such as a pool heater,[66] to which the developer retains title after the common property vests in the OC. The developer may then contract with the OC to provide services to the OC, and the apartment owners, by using (and maintaining) that infrastructure, and it may stipulate for a right to remove the infrastructure if the OC wishes to have the service provided by someone else.

---

61 *Maguire v Makaronis* (1997) 188 CLR 449, 467 (Brennan CJ, Gaudron, McHugh and Gummow JJ) ('*Maguire v Makaronis*'). See also *Blackmagic Design Pty Ltd v Overliese* (2011) 191 FCR 1, 22–3 [105]–[108] (Besanko J) (FCAFC); *Mualim v Dzelme* (2021) 157 ACSR 367, 388 [111] (Gleeson JA); *Wright v Lemon* [2024] WASCA 19, 161 [437] (Buss P). Cf *ABCOS* (n 48) 516 (Wilcox and Lindgren JJ), in which the Full Court of the Federal Court of Australia talked of a duty to disclose, notwithstanding that the case was argued and decided after the High Court of Australia had delivered judgment in both *Breen v Williams* (n 56) and *Maguire v Makaronis* (n 61).

62 *Boardman v Phipps* (n 47) 124 (Lord Upjohn); *Hospital Products* (n 9) 103 (Mason J); *Pilmer* (n 47) 199 [78] (McHugh, Gummow, Hayne and Callinan JJ).

63 *Boardman v Phipps* (n 47) 109 (Lord Hodson); *ASIC v Citigroup* (n 45) 79 [293] (Jacobson J).

64 *New Zealand Netherlands Society 'Oranje' Inc v Kuys* [1973] 1 WLR 1126, 1132 (Lord Wilberforce for the Court) (PC).

65 For further discussion of what full disclosure requires, see below Part V(B).

66 See, eg, Kleinschmidt (n 23) 264.

It is not clear that infrastructure will necessarily continue to belong to the developer, as it may well become a fixture.[67] This is an objective conclusion of property law that cannot be avoided by contract.[68] However, while that is significant when land is transferred between natural persons (a contract between A and B that an item will remain a chattel is not enforceable against a new owner of the land, C), common property never changes hands, always being owned by the OC as agent for the owners.[69] Thus, the OC will always be bound by a contract that it entered into with the developer, even if the infrastructure is objectively a fixture.

However, the developer's fiduciary position when this contract is entered generates the possibility that the contract involves a breach of the developer's fiduciary duties. The analogy with company promoters selling assets to the company once it has been formed is clearest in this context. Even if the promoter bought those assets at a time when it was not in a fiduciary position vis-à-vis the company,[70] a sale of the assets to the company can be rescinded if the company was not provided with an independent board of directors to approve the contract, and if the promoter did not fully disclose all material facts to that board so it could make an informed decision whether the contract was in the best interests of the company.[71] As Lord Wynford put it in *Rothschild v Brookman*:

> no man ought to be trusted in a situation that gives him the opportunity of taking advantage of the person who has reposed confidence in him … [a fiduciary] is bound to show, by clear evidence, that [his principal] knew at the time the real nature of these transactions, and with full knowledge of their nature assented to them.[72]

Or, as Cockburn CJ put it in *Twycross v Grant*:

> Fully admitting that a person who sells to a company is no more bound to disclose how, or upon what terms, he acquired the subject-matter of the sale, than an ordinary vendor to an ordinary purchaser, it seems to me that when the vendor adopts the character of a promoter, the matter assumes a very different aspect. A fiduciary or, at all events, a quasi-fiduciary, relation arises between him and the company. He is bound to protect its interests, and those of the shareholders. All his dealings with them, and for them, should be *uberrimae fidei*. He should conceal nothing from them which it is essential to them to know. If he proposes to appropriate to himself any part of their funds as a reward for his services, or to derive advantage by selling to them at a

---

67 Whether something has become a fixture will depend on the familiar inquiry into the degree and objective purpose of annexation of the thing to the land: *Holland v Hodgson* (n 19) 335 (Blackburn J for the Court); *TEC Desert* (n 19) 586 [24] (French CJ, Gummow, Heydon, Crennan and Kiefel JJ), quoting *National Australia Bank Ltd v Blacker* (2000) 104 FCR 288, 293 [10] (Conti J).

68 *SPIC Pacific Hydro Pty Ltd v Chief Commissioner of State Revenue (NSW)* (2021) 113 ATR 24; *Hobson v Gorringe* [1897] 1 Ch 182 (CA); *Melluish v BMI (No 3) Ltd* [1996] AC 454.

69 *SSD Act* (n 10) s 28(1).

70 The promoter's position is even worse, at least as regards remedies, if it acquired the assets as a trustee for the company: the asset is then treated as belonging to the company in equity from the outset, with the result that the promoter cannot take any benefit from the sale to the company and so has to disgorge the difference between the initial purchase price and the price at which he sold to the company. Where the property was not bought while the defendant occupied a fiduciary position, this remedy is not so clearly available: *Re Cape Breton Co* (1885) 29 Ch D 795, 804–5 (Cotton LJ) (CA) ('*Cape Breton*'); *Erlanger* (n 5) 1235 (Lord Cairns LC).

71 *Erlanger* (n 5) 1229 (Lord Penzance), 1239 (Lord Cairns LC), 1255–6 (Lord O'Hagan).

72 *Rothschild v Brookman* (1831) 2 Dow & Cl 188; 6 ER 699, 702 (HL).

> profit, any contracts by which effect has been given to such purposes come, I cannot but think, within this protective enactment.[73]

2 *Other Companies Related to the Developer*

It is less clear how this analysis applies where the infrastructure is installed, and the contract with the OC is entered into, by a subsidiary of the developer; or, as is perhaps even more likely, by a subsidiary of a parent company which also owns the developer. The use of separate corporate entities is a normal practice of corporate groups, and the connected ownership does not automatically translate the developer's fiduciary status and duties onto the other members of the corporate group.

If a member of a corporate group were created with the very purpose of taking up an opportunity that the developer could not itself exploit, because of the developer's fiduciary duties, then the developer could potentially be held liable for the profit made by the other company on the basis that the company was operating as an agent for the developer,[74] and the other company might be held liable as a knowing participant in that breach of duty by the developer.[75] However, the mere fact of creating separate companies within a corporate group to take on different activities of the group, on the basis that it can insulate potential liabilities, does not normally justify that sort of analysis.

The use of related companies can, nonetheless, create problems when one of those companies owes fiduciary duties to an outsider. In the present context, the developer might itself still be in breach of its fiduciary duties if it recommends to the OC that the OC should enter into the contract with another member in the developer's corporate group: that could constitute a conflict between the developer's duty to the OC as its promoter, and the developer's personal interests. 'The interests of the fiduciary that are involved in a conflict … may be the fiduciary's interest in acquiring a benefit for itself, *or it might be the fiduciary's interest in having a benefit arise for a third party that it favours.*'[76]

Further, if the developer has breached its fiduciary duty by convincing the OC to enter a service contract with a company related to the developer, the related company could be exposed to an 'ancillary liability'[77] if it *assisted* in the developer's breach of fiduciary duty.[78] However, this sort of constructive trustee liability will only arise in Australia if the developer's breach of fiduciary duty amounted to a

---

73 *Twycross v Grant* (n 35) 538.

74 Lynton Tucker, Nicholas Le Poidevin and James Brightwell, *Lewin on Trusts* (Sweet and Maxwell, 20th ed, 2020) [45-085].

75 *Warman International Ltd v Dwyer* (1995) 182 CLR 544, 564–5 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ) ('*Warman*'), discussing *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 397 (Gibbs J).

76 *Perpetual Trustee Co Ltd v Shambrook* [2024] QSC 105, [62] (Applegarth J) (emphasis added). See also *Haywood v Roadknight* [1927] VLR 512, 517, 519 (Dixon AJ); *Settlement Agents Supervisory Board v Property Settlement Services Pty Ltd* [2009] WASCA 143, [71] (McLure JA) ('*SASB*').

77 *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609, 626 [72] (Leeming JA) (CA) ('*Hasler*').

78 The related company is unlikely to be liable as a knowing *recipient*, as there has not been a transfer of property to it made in breach of trust or fiduciary duty: *Evans v European Bank Ltd* (2004) 61 NSWLR 75. (Although see *Westpac Banking Corp v Bell Group Ltd (in liq) (No 3* (2012) 44 WAR 1, 391–3 [2159]–[2169] (Drummond AJA); but cf Jamie Glister, 'Security Interests and Knowing Receipt' (2023) 43(4) *Legal Studies* 624, 634.)

'dishonest and fraudulent design'.[79] While dishonesty is a high threshold, it simply means 'a transgression of ordinary standards of honest behaviour'.[80] '[A] person may have acted dishonestly, judged by the standards of ordinary, decent people, without appreciating that the act in question was dishonest by those standards.'[81] If the developer has committed a breach of fiduciary duty, and ordinary decent people would consider the developer to have transgressed ordinary standards of honesty, the related company may be liable as a constructive trustee if it assisted the developer to commit the breach and was aware of the breach.

Alternatively, if the related company *induced* or *procured* the developer's breach of fiduciary duty by intentional conduct, then the related company could be liable even if the developer's breach was not itself dishonest,[82] provided the related company knew facts that would indicate to a reasonable person that the developer was acting in breach of its fiduciary duty.[83]

B *Contracts between an Owners Corporation and Third Parties*

We now turn to consider what implications a developer's fiduciary status has for contracts entered by the OC with *third-party* service providers. The lack of connection to the developer makes it less obvious that the developer's fiduciary status holds any ramifications for such contracts, but our analysis in this section suggests that view might be deceptive.

The industry practice described above, of service providers paying developers for contracts in cash or kind, suggests that developers enter a *separate agreement* with the third-party service provider, in advance of the OC entering into its service contract with the third-party.[84] Where a fiduciary agent enters a contract on behalf of their principal in return for a payment, the payment is generally referred to as a 'bribe', and the agent has acted in breach of fiduciary duty. The payment places the agent in a position where their personal interest conflicts with the duty

---

79 *Barnes v Addy* (1874) LR 9 Ch App 244, 252 (Lord Selborne LC). See *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 164 [179] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ) ('*Farah*').

80 *Hasler* (n 77) 636 [124] (Leeming JA).

81 *Farah* (n 79) 162 [173] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

82 *Pittmore Pty Ltd v Chan* (2020) 104 NSWLR 62 ('*Pittmore*'). See also *Farah* (n 79) 159 [161] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *Hasler* (n 77) 627 [77]–[78] (Leeming JA).

83 *Pittmore* (n 82) 102 [194] (Leeming JA).

84 By way of example, we have seen at least one OC embedded network contract to provide 'retail services' (ie, selling electricity) via the network to apartment owners, which required the parties to the contract to secure assignment of the contract to the OC after the OC's first AGM. That obligation makes sense if it is owed by the developer, rather than the OC, but the contract is drafted as a contract between the third-party energy provider and the OC. The developer is not named as a party, but the contractual term only makes sense if the developer is also subject to obligations regarding the contract. Similarly with obligations in the contract requiring the OC to instal the infrastructure necessary for the network to operate; that is an obligation that cannot sensibly be owed by an OC.
There must be some form of agreement between the developer and the service provider, although it remains unclear whether that agreement is a formal contract or merely an informal arrangement to the effect that benefits will be provided by the service provider (at a reduced rate, or for free) in return for the developer providing encouragement and assistance in arranging a contract for the service provider with the OC.

they owe to their principal,[85] and it constitutes a profit received by the agent by reason of their fiduciary position.[86] Thus, while bribery is a clear case, the receipt by an agent of *any* benefit which is obtained by reason of the fiduciary position, or which creates a conflict between the agent's duty and their personal interest, will mean the agent has acted in breach of fiduciary duty. It does not matter whether the benefit is by way of monetary payment or some other valuable benefit: '[t]he benefit of a business connection is such a benefit'.[87] Thus, for example, a sub-contract given by one party to the agent of the other party has been regarded as a bribe of the agent.[88] 'In its ordinary meaning, the word bribe includes *any reward* given with a view to perverting the judgment or conduct of the recipient.'[89] As Finn noted, '[i]n a profit-making activity a calculable saving in cost can readily be equated with a profit: the one produces the other'.[90]

Irrespective of the form of the benefit, as the developer is in a fiduciary position vis-à-vis the OC, any benefit that the developer receives from a third party in return for third-party–OC contracts can be seen as creating a conflict between the developer's duty to the OC and the developer's personal interest, or as constituting a profit made from the developer's fiduciary position. On either view, the developer breaches its fiduciary duty unless it obtains the fully informed consent of the OC to that conflict or profit.

There are two ways in which this activity raises fiduciary concerns. First, when the developer negotiates (or agrees to) the terms of a third-party–OC contract, the developer does so on behalf of the OC, the intended contracting party. The developer is not acting formally as agent for the OC, in part because the OC does not yet exist, but that is what makes the developer's position analogous to that of a company promoter. If those contracts are then presented to the OC by the developer without the developer getting authorisation for any conflict or profit, then the developer is acting in breach of its fiduciary duty.

Second, when the developer presents the draft contract to the OC, there is an implicit (if not explicit) recommendation of the contract as commercially competitive and appropriate. That can potentially be considered as advice to the OC to enter the contract, and providing advice may have fiduciary consequences if the developer is not free of conflicting interests. Advisers do not always owe fiduciary duties to their advisees,[91] but the developer is already recognised as a fiduciary, and

---

85 *Shipway v Broadwood* [1899] 1 QB 369, 373 (Collins LJ) (CA). It is *irrelevant* whether the bribe had any effect on the mind of the person to whom it was paid: *Shipway* at 373; *Re a Debtor* [1927] 2 Ch 367, 373 (Lord Hanworth MR) (CA); Steven Elliott (ed), *Snell's Equity* (Sweet and Maxwell, 35th ed, 2025) [7-053].

86 *Parker v McKenna* (1874) LR 10 Ch App 96, 118 (Lord Cairns LC); *Boston Deep Sea Fishing & Ice Co v Ansell* (1888) 39 Ch D 339 (CA); *Hopcraft v Close Bros Ltd* [2025] 3 WLR 423, 447 [71] (Lord Reed PSC, Lord Hodge DPSC, Lord Lloyd-Jones, Lord Briggs and Lord Hamblen JJSC).

87 *Ancient Order* (n 56) 12 [7] (Kiefel CJ, Keane and Edelman JJ); see also 32–3 [75] (Gageler J). See also *Chan v Zacharia* (n 58) 198–9 (Deane J); *Hospital Products* (n 9) 110 (Mason J); *Warman* (n 75) 558 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

88 *Panama & South Pacific Telegraph Co v India Rubber, Gutta Percha, and Telegraph Works Co* (1875) LR 10 Ch App 515, 527 (James LJ) ('*Panama*'). See also *Fawcett v Whitehouse* (n 40) 57 (Lyndhurst LC): '[i]f it was a conditional gift, still it was a benefit to this party'.

89 *Petrotrade Inc v Smith* [2000] 1 Lloyd's Rep 486, 489 (Steel J) (emphasis added).

90 Paul Finn, *Fiduciary Obligations* (Law Book Company, 1977) 129 [288].

91 See, eg, *Pilmer* (n 47) 195–8 [69]–[75] (McHugh, Gummow, Hayne and Callinan JJ).

can fairly be said to be 'guiding or influencing'[92] the OC to enter the contract, particularly if the developer represents to the OC that there is no alternative.[93] Where a fiduciary adviser represents, even if only implicitly, that the terms presented are competitive and appropriate, in circumstances where the advisee is vulnerable to abuse of its position by the adviser, there is a reasonable basis for expecting the advice to be provided without conflicting interests.[94]

Even a canvassing or introducing agent, whose role is merely to bring parties together, can owe fiduciary duties if they assume a responsibility to promote the interests of one principal (or both principals).[95] As with company promoters, where the company cannot choose its representative when it does not exist, so with the OC that cannot choose who will occupy the fiduciary advisory position that the developer takes on when it creates a strata scheme.[96] Having somewhere to live is a necessity for everyone — it is not an optional consumer item,[97] and homeowners must choose something from the limited offerings on the market. The non-optional nature of housing makes strata title owners, and the OC which they comprise, particularly vulnerable to rent-seeking activity on the part of developers.

V Authorisation of Owners Corporation Contracts

It is also important to consider how the OC contract is entered, as that can have an impact on whether any breach of fiduciary duty might be avoided.

A *Timing Of Entry into the Owners Corporation Contracts*

During the 'initial period', between registration of the strata plan (at which point the OC comes into being) and the time when one-third of the apartment titles have been transferred to owners,[98] the OC is prohibited from engaging in particular activities. These include:

---

92 Ibid 198 [75] (McHugh, Gummow, Hayne and Callinan JJ).

93 This seems to be common industry practice: see Evidence to New South Wales Legislative Assembly Committee on Law and Safety, *Embedded Networks in New South Wales*, Parliament of New South Wales, Sydney, 12 August 2022, 9, 13 (Stephen Brell, Strata Community Australia), 10 (Karen Stiles, Owners Corporation Network).

94 See, eg, *Medsted Associates Ltd v Canaccord Genuity Wealth (International) Ltd* [2019] 1 WLR 4481, 4490 [32] (Longmore LJ) (CA). See also Finn (n 90) 175–6 [406]–[408].

95 Peter G Watts and Francis MB Reynolds, *Bowstead and Reynolds on Agency* (Thomson Reuters, 23rd ed, 2024) 238 [6-037]. See also *Premium Real Estate Ltd v Stevens* [2009] 2 NZLR 384, 397–8 [23]–[24] (Elias CJ), 409 [68] (Blanchard, McGrath and Gault JJ) (SC); *Regier v Campbell-Stuart* [1939] 1 Ch 766, 768–70.

96 A fiduciary relationship can arise where a person assumes the authority of an agent, even if that authority has not been given voluntarily by the principal: see, eg, Michael Bryan, '*Boardman v Phipps* (1967)' in Charles Mitchell and Paul Mitchell (eds), *Landmark Cases in Equity* (Bloomsbury, 2012) 581, 588. That must always be so with company promoters, and similarly strata developers.

97 Of course, some apartments are purchased by investors, but generally so they can be rented out to other people who need somewhere to live and perhaps cannot afford to purchase an apartment. Either way, the developer's breach of fiduciary duty has an impact on those who live in the building.

98 *SSM Act* (n 20) s 4(1).

- incurring a debt (which entry into a contract generally does[99]) for an amount that exceeds the sum then available in the OC's administrative fund or capital works fund;[100] and
- appointing a strata or building manager or any other person to assist with the management, maintenance and repair of common property, for a term that would extend beyond the first AGM.[101]

These provisions, designed to protect owners, generally mean that developers avoid using their control of the OC to form contracts in the initial period.

After the initial period ends, the first AGM of the OC will be held,[102] at which point the OC must decide which contracts to enter for the services the strata scheme will need.

1 *If the Developer Controls a Majority of Votes at the Annual General Meeting*

At that stage, the developer will normally own only a small proportion (if any) of the apartments, but if the development process has not gone well, or the developer intentionally retains apartments for letting, it is possible that the developer might still own a large number of the apartment lots. At the first AGM, therefore, it is possible for the developer to own up to 65% of the apartments and thus be able to exercise majority voting power. Notwithstanding that the developer may be a fiduciary, the developer is permitted to vote in its own interests, similar to shareholders in a company even if the shareholder is also a director of the company and has a personal interest in the transaction that a general meeting is authorising.[103] That is not so, however, if the shareholder's vote amounts to a fraud on the minority.[104] The mere fact that the person controls the vote and is interested is insufficient, on its own at least, provided the contract price is fair,[105] but they 'must not exercise their vote so as to appropriate to themselves or some of themselves property, advantages or rights which belong to the company',[106] or in a way that is beyond the purpose for which the voting power has been conferred or is otherwise oppressive.[107] Although the principle of fraud on the minority is difficult to define,

---

99 See *Bondlake Pty Ltd v Owners – Strata Plan No 60285* (2005) 62 NSWLR 158.

100 *SSM Act* (n 20) s 26(1)(b).

101 Ibid s 26(1)(c).

102 Ibid s 14(1).

103 See, eg, *North-West Transportation Co Ltd v Beatty* (1887) 12 App Cas 589, 593, 601 (Baggallay LJ for the Court) (PC) ('*Beatty*'); *Burland v Earle* [1902] AC 83, 94 (PC).

104 *Beatty* (n 103) 593–4, 600 (Baggallay LJ for the Court); *Ngurli Ltd v McCann* (1953) 90 CLR 425, 439 (Williams ACJ, Fullagar and Kitto JJ) ('*Ngurli*').

105 Note the observation that the price in *Beatty* 'was not excessive or unreasonable': *Beatty* (n 103) 596 (Baggallay LJ for the Court).

106 *Ngurli* (n 104) 439 (Williams ACJ, Fullagar and Kitto JJ).

107 *Gambotto v WCP Ltd* (1995) 182 CLR 432, 444 (Mason CJ, Brennan, Deane and Dawson JJ), 452 (McHugh J). In *Estmanco (Kilner House) Ltd v Greater London Council*, the Council was effectively the promoter of a company title scheme for the sale of what were previously council flats: [1982] 1 WLR 2. Megarry V-C held that when control of the Council changed following local council elections, it could constitute a fraud on the minority for the newly-elected council to exercise its exclusive voting power in the company to stultify a substantial part of the purpose for which the

it has been applied to strata voting,[108] and might potentially be applied to a decision like this if the developer uses its majority vote to cause the OC to approve conduct that would otherwise amount to a breach of fiduciary duty by the developer. That would be analogous to the company law context, where:

> The majority can choose to excuse breaches of duty by directors, provided that the majority have not used their voting powers to confer benefits upon themselves in breach of duty and are not using the self-same powers to prevent the company from recovering the loss caused to it, in effect expropriating the minority in the process. … the 'fraud on the minority' exception prevents directors from improperly benefitting themselves at the expense of the company.[109]

2 *If the Developer Does Not Control a Majority of Votes at the Annual General Meeting*

It will be more common that the developer will not control a majority or any votes at the first AGM. That will mean the OC's decision to enter a contract with the third-party service provider appears to be separate from the developer, and free from any fiduciary problem. However, as described above, because of the assistance given to developers by third-party service providers, in cash or kind, it is common for the developer to have a role in convincing the OC to enter the contract with a third-party service provider: the developer will arrange for the OC to be given the hitherto unseen contracts at the first AGM, explaining that they are necessary for the functioning of the development. Any benefit that the developer has received from the service provider, albeit earlier in time (as with most bribes), can mean that the developer is acting in breach of fiduciary duty. As James LJ said:

> any surreptitious dealing between one principal and the agent of the other principal is a fraud on such other principal, cognizable in this Court. That I take to be a clear proposition, and I take it … to be equally clear that the defrauded principal, if he comes in time, is entitled, at his option, to have the contract rescinded, or, if he elects not to have it rescinded, to have such other adequate relief as the Court may think right to give him.[110]

The work of convincing the OC to enter the service contract may be done by the strata manager, rather than the developer itself. That may make it less obvious that the developer is getting a benefit from the service provider, but questions will still remain as to why the strata manager is recommending the OC enter the contract. The role of strata managing agent involves a fiduciary responsibility to the OC, and ultimately therefore to the owners for whom the OC holds the common property as agent.[111] That is why the strata manager must disclose before its appointment any

company title scheme was created by the previous council administration, as that would bring disadvantage to the shareholders in the company who had already bought flats under the scheme: at 16.

108 *Houghton v Immer (No 155) Pty Ltd* (1997) 44 NSWLR 46, 53–4 (Handley JA) (CA); *Thoo v Owners Strata Plan No 50276* (2011) 15 BPR 29,309, 29,350 [178], 29,351 [180], 29,351 [182] (Slattery J). See also *Owners Strata Plan 50276 v Thoo* (2013) 17 BPR 33,789, 33,829 [186] (Tobias AJA), overturning the 2011 decision, but affirming the accuracy of the principles there described.

109 *Harris v Microfusion 2003-2 LLP* [2017] 1 BCLC 305, 317 [33] (McCombe LJ) (CA).

110 *Panama* (n 88) 526. See also *Alexander v Webber* [1922] 1 KB 642, 644 (Bray J).

111 *SSD Act* (n 10) s 28(1).

connections that it has with the original owner of the development,[112] as well as 'any direct or indirect pecuniary interest in the strata scheme (other than an interest arising only from the prospective appointment)'.[113] But fiduciary principles will continue to apply to strata managers after appointment, with the consequence that they may be in breach of fiduciary duty if they act with a conflict between duty and interest, or otherwise make a profit by reason of their fiduciary position.

> A conflict of interest and duty can arise where the personal interest of the fiduciary is pecuniary or non-pecuniary, direct or indirect. A non-pecuniary interest includes an interest by way of association, whether by way of kinship or business connection. Whether the interest is within the conflict rule will depend on (inter alia) the nature, intensity and duration of the association.[114]

If the strata manager recommends a contract to the OC because it considers that will be to the benefit of the developer, the strata manager may itself be acting in breach of its fiduciary duty to the OC, bearing in mind the interaction and connection between the developer and the service provider. This breach of fiduciary duty by the strata manager is in addition to any breach committed by the developer.

B *Authorisation for Breach of Fiduciary Duty*

If there is a breach of fiduciary duty in the way that an OC contract with a third-party service provider was formed, the developer (or strata manager) can protect itself and others by making full disclosure to the OC of all material facts regarding the conflict or profit, and getting informed consent from the OC to the conflict or profit. The OC must actually consent: a breach of fiduciary duty is cured by consent, not merely by disclosing facts which constitute the breach.[115] And the burden of convincing the court that fully informed consent was given lies with the fiduciary.[116]

'What 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.'[117] The materiality of information is determined not by whether it would have altered the principal's decision to enter the transaction,[118] but rather by whether it might have affected his decision.[119] This will generally require disclosure, not merely of the fact of benefit or conflict, but also disclosure of the *nature* of that benefit or interest: 'a man declares his interest,

---

112 *SSM Act* (n 20) s 71(2)(a).

113 Ibid s 71(2)(b).

114 *SASB* (n 76) [71] (McLure JA). See also the text and cases above at n 76.

115 Cf *Eastmark* (n 4) [159]–[160] (Stevenson J).

116 *Maguire v Makaronis* (n 61) 466 (Brennan CJ, Gaudron, McHugh and Gummow JJ).

117 Ibid. See also *Gray v New Augarita Porcupine Mines Ltd* [1952] 3 DLR 1, 14 (Privy Council) ('*Gray*').

118 Although, if it would have been done so, then it clearly was material: eg, *Imperial Mercantile Credit Association (in liq) v Coleman* (1873) LR 6 HL 189, 205 (Lord Cairns) ('*IMC*').

119 *Gray* (n 117) 14–15; *Commonwealth Bank of Australia v Smith* (1991) 42 FCR 390, 394 (Davies, Sheppard and Gummow JJ); *Gemstone Corp of Australia Ltd v Grasso* (1994) 62 SASR 239, 243 (Matheson J), 252–3 (Olsson J); *Johnson v EBS Pensioner Trustees Ltd* [2002] Lloyd's Rep PN 309, 320 [70] (Dyson LJ). This is consistent with the High Court's decision in *Maguire v Makaronis* (n 61), although, as the High Court noted, the causal effect of the fiduciary's failure to disclose a material fact may affect the remedies that are available: see *Maguire v Makaronis* (n 61) 467–8 (Brennan CJ, Gaudron, McHugh and Gummow JJ). Cf *Walden Properties Ltd v Beaver Properties Pty Ltd* [1973] 2 NSWLR 815.

not when he states that he has an interest, but when he states what his interest is'.[120] Importantly, this will require full disclosure of whatever benefit the developer (or strata manager) has received in connection with its encouragement to the OC to enter into the contract. Contrary to assumptions in the strata industry,[121] it will not suffice to disclose the terms of the contract which the developer is recommending that the OC enter with the service provider, as that wholly fails to reveal the nature of the conflicting interest or profit that the developer has obtained in connection with the contract.

The requirement that the principal's consent be fully informed ensures that the principal can fully understand the risk that the transaction carries and determine for themselves 'that [they] would rather run the risk'.[122] Fiduciary duties

> are prophylactic in the sense that they tend to prevent the disease of temptation in the fiduciary — they preserve or protect the fiduciary from that disease … The prevention of or protection from the relevant disease is assisted by the strictness of the standard imposed and the absence of defences justifying departures from it.[123]

However, the 'reason why the law permits the rule to be relaxed is obvious … If the person entitled to the benefit of the rule is content with that position *and understands what are his rights in the matter*, there is no reason why he should not relax the rule'.[124] In allowing the fiduciary principle to be relaxed, equity is balancing respect for autonomous decisions with the protective function that fiduciary doctrine serves.

A couple of points merit attention in this context. First, in *Meriton Apartments Pty Ltd v Owners Strata Plan No 72381* ('*Meriton Apartments*') Slattery J said that 'if the profit "being realised by [the fiduciary is] within reasonable limits and [is] not such as to cast doubt on the viability of the venture, there would have been no undisclosed material fact"'.[125] This could be taken to suggest that a profit or benefit for the developer need not be disclosed to the OC if it is reasonable in amount. It is important, however, to recognise that Slattery J was discussing a contract for *the developer* to provide caretaking services to the strata development. As Slattery J said, 'any purchaser should have assumed that [the

---

120 *IMC* (n 118) 205 (Lord Cairns). See also *Gray* (n 117) 14.

121 For example, at the New South Wales Parliamentary inquiry into embedded networks, when asked about disclosure of 'inducements or sweeteners' (at 45) paid to developers by ENOs, the General Manager of Centralised Energy Services and New Property at Origin Energy said:

> Yes, I think that's an easy question to answer. Yes, there should be transparency. The agreements that are put in place between the developer and the retail embedded network operator that then, at the first annual general meeting, get discussed and get novated — they should have all the information there. Should that be disclosed earlier, when a new apartment owner is buying their apartment? We think it should. There should be nothing to hide, absolutely.
>
> Evidence to New South Wales Legislative Assembly Committee on Law and Safety, *Embedded Networks in New South Wales*, Parliament of New South Wales, Sydney, 12 August 2022, 45–6 (Andrew Cameron).

This answer fundamentally confuses disclosure of the contract that provided a benefit to the developer with the disclosure of the OC–ENO contract.

122 *Christophers v White* (1847) 10 Beav 523; 50 ER 683, 684 (Lord Langdale MR).

123 *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 409 [413]–[414] (Heydon JA).

124 *Boulting v Association of Cinematograph Television & Allied Technicians* [1963] 2 QB 606, 637 (Upjohn LJ) (emphasis added) (CA).

125 *Meriton Apartments* (n 4) 88 [450] (Slattery J), quoting *ABCOS* (n 48) 512 (Wilcox and Lindgren JJ).

developer] as caretaker was going to make a profit'[126] and so might be taken to consent (even if only implicitly) to that profit provided it is reasonable in size. Even that approach, however, runs up against the traditional fiduciary doctrine which requires disclosure, not merely of the fact that the fiduciary has a conflicting interest, but also of the nature of that interest. As Austin J said in *Aequitas v AEFC*, in a case involving sophisticated commercial parties, in order to get informed consent to a promoter's conflict of interest, disclosure required revelation at the very least of the price differential involved in the transaction 'and also the nature and amounts of the benefits which the joint venturers would receive from the transaction'.[127] Furthermore, particularly where the developer's interest arises by reason of benefits that are wholly separate from the contract that the OC is entering into with the service provider, even the fact (let alone the nature) of the benefit that the developer has obtained in connection with the contract may well not be apparent and what Slattery J said in *Meriton Apartments* cannot save the developer.

Second, as the High Court of Australia noted in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd*, 'the sufficiency of disclosure can depend on the sophistication and intelligence of the persons to whom disclosure must be made'.[128] If the fiduciary's principals are not sophisticated business people, then a term tucked away in a sub-clause of standard terms and conditions that the principal is unlikely to read may not suffice.[129] Without meaning any disrespect, apartment owners are generally a disparate and often inexperienced group, particularly when compared with the 'professionals' that have strong vested interests in securing these lucrative contracts. OC contracts can relate to complex plant and equipment and the lay apartment owners are heavily reliant on the advice of the developer and strata manager as to which contracts the OC needs. Apartment owners would not expect the developer to receive a commission or other form of benefit from the service provider for introducing the service provider to the OC, unless the developer tells them.

The statutorily mandated strata development structure, which provides for the creation of the OC to act as a kind of trustee holding the common property for the benefit of the apartment owners,[130] is designed to ensure that the common property will be held and managed for the benefit of the apartment owners. The OC is not created as a profit-centre for the developer. Any steps that the developer takes in connection with the OC are reasonably expected to be undertaken in the best interests of the apartment owners for whose benefit the OC exists. For that reason, the developer occupies a fiduciary position vis-à-vis the OC and, for that reason, the developer cannot benefit from transactions that it causes the OC to enter — unless that benefit has been clearly revealed to the apartment owners when the OC meets, and then agreed to by them.

126 *Meriton Apartments Pty Ltd v Owners of Strata Plan No 72381 (No 2)* [2016] NSWSC 819, [68].
127 *Aequitas* (n 35) 1066 [325] (Austin J).
128 *Farah* (n 79) 139 [107] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).
129 See, eg, *Maguire v Makaronis* (n 61).
130 *Brookfield* (n 10) 195 [10] (French CJ).

VI Remedies

The potential remedial consequences of the foregoing analysis are not completely straightforward. Where a benefit arises from a contract that the developer *itself* entered with the OC, if the benefit was not disclosed and consented to by the OC then, by analogy with company promoters, the OC will be able to rescind that contract.[131] Company promoter cases suggest that if the contract is not rescinded, courts refuse to rewrite the bargain,[132] even if the contract is not rescinded for reasons outside the company's control.[133] This suggests that the OC may not be entitled to an account of any profits that the developer makes from the contract if it is not rescinded.[134]

The main focus of our analysis in this article, however, is on profits or benefits which the developer has obtained from a third party. It is clear from *Arrow Asset Management*, that where that profit is a payment to the developer from someone who is not a party to the fiduciary relationship between the developer and the OC, the developer can be required to disgorge that profit through an account of profits.[135] An account may be difficult where the benefit is in-kind, as it may be hard to quantify its value,[136] but that does not relieve the court of its obligation to make a reasonable approximation of the profit or benefit.[137]

Even where the benefit is a direct bribe or secret commission, stripping that benefit from the developer through an account of profits does not avoid the contract between the OC and *the service provider*, which the OC may wish to do. The developer's role as an intermediary between the OC and the service provider means

---

131 *Tracy* (n 34) 245 (Dixon CJ, Williams and Taylor JJ).

132 *Cape Breton* (n 70) 803–5 (Cotton LJ); *Re Lady Forrest (Murchison) Gold Mine Ltd* [1901] 1 Ch 582, 589–90 (Wright J) ('*Lady Forrest*'); *Burland v Earle* (n 103) 99 (Lord Davey for the Court).

133 *Ladywell Mining* (n 35) 408 (Cotton LJ), 416 (Lopes LJ). The refusal to rewrite the contract applies most clearly where the promoter sold an asset to the company which the promoter had acquired for itself before promotion of the company began, and thus which the promoter held for its own benefit rather than in a fiduciary capacity for the company: *Lady Forrest* (n 132132) 588–9 (Wright J); *Burland v Earle* (n 103) 98 (Lord Davey for the Court). The promoter's profit can be stripped, even if the contract is not rescinded, if the promoter has sold property to the company which it acquired in a fiduciary capacity for the company: *Gluckstein v Barnes* (n 48); *Peninsular & Oriental Steam Navigation Co v Johnson* (1938) 60 CLR 189, 246–7 (Dixon J) ('*Peninsular*').

134 *Tracy* (n 34) 239–241 (Dixon CJ, Williams and Taylor JJ); *Meriton Apartments* (n 4) 77–8 [401], 79–80 [408]–[414], 86–7 [444] (Slattery J). A line of case law suggests that equitable compensation for the company's loss might be available in such cases, given the promoter has acted in breach of its duty, but that remains unclear: see *Re Ambrose Lake Tin & Copper Mine Co; Ex parte Taylor; Ex parte Moss* (1880) 14 Ch D 390, 394 (James LJ), 398–9 (Cotton LJ) (CA); *Lydney and Wigpool Iron Ore Co v Bird* (1886) 33 Ch D 85 (CA) ('*Lydney*'); *Cavendish Bentinck* (n 55) 661–2 (Lord Herschell), 665–6 (Lord Watson); *Re Leeds* (n 41) 825 (Vaughan Williams LJ); *Peninsular* (n 133) 213 (Latham CJ), 246 (Dixon J), 250; *Meriton Apartments* (n 4) 87 [446] (Slattery J); Matthew DJ Conaglen, 'Equitable Compensation for Breach of the Fiduciary Dealing Rules' (2003) 119 (April) *Law Quarterly Review* 246.

135 *Arrow Asset Management* (n 4).

136 This does not mean quantification is necessarily impossible — in many of these cases, services and infrastructure that have been provided to the developer will have a commercial value which could be used to quantify the value of the developer's unauthorised benefit (eg, the price that the service provider has foregone recovering from the developer for the services or infrastructure in return for the developer's assistance in ensuring the OC later enters into a valuable contract with the service provider).

137 *Warman* (n 75) 558 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

that the developer's breach of fiduciary duty will only permit the OC to rescind the resultant contract if the service provider was aware of the facts that constitute the developer's breach. The service provider need not have acted dishonestly, nor with the intention of corrupting the developer,[138] but it must be aware of (or wilfully blind to[139]) the fact that the OC has been 'deprived of the disinterested advice of their agent by or at least to the knowledge of the'[140] service provider. Given the service provider will generally be an experienced strata player, and often the party that provided the benefit to the developer, there may well be sufficient knowledge on the service provider's part for rescission of the contract.

Furthermore, a third party in this situation:

> if he takes the hazardous course of paying a sum to the buyer's agent in order to secure his help, and does not himself communicate it, he must at least accept the risk of the agent's not doing so. He has taken a course which can be validated only by actual disclosure to the opposite principal.[141]

If the service provider does not itself disclose to the OC the benefits that it has provided to the developer, the service provider 'cannot afterwards defend the transaction by claiming that [it] believed the agent [developer] to be an honest man who would disclose it himself'.[142] For this reason, the use of 'anti-bribery' clauses in the contract between the OC and the service provider — clauses requiring each party to ensure and confirm that its representatives have not given or received any bribe or secret commission — will be ineffective to protect the service provider against rescission: if the OC was not made aware of the developer's secret benefit, it cannot confirm the lack of that benefit, and it cannot have given informed consent to the benefit, of which the service provider is itself aware notwithstanding its assertion to the contrary in the contract.

Rescission of the service provider contract would remove the OC's right to receive that particular service, but this remedy would leave the OC free to renegotiate a new contract for that service on terms which have not been influenced by the secret benefits that the developer received. However, the remedy of rescission requires that there be *restitutio in integrum*,[143] which means that the 'parties are released from the obligations created by the contract, have returned to them any advantages transferred under the contract, and are indemnified for any detriments incurred pursuant to the contract'.[144] This could be difficult, in practical terms, in respect of many service contracts. For example, where the service provider installed infrastructure in the development, it may not be possible to remove it. The courts

---

138 It is also 'immaterial whether the initiative for the agent's taking an interest of his own came from the agent himself or from the other party to the transaction': *Logicrose Ltd v Southend United Football Club Ltd* [1988] 1 WLR 1256, 1261 (Millett J) (Ch D) ('*Logicrose*'). That question might, however, be relevant if the service provider is sued for inducing the developer's breach of fiduciary duty.

139 Ibid.

140 Ibid.

141 *Grant v Gold Exploration & Development Syndicate Ltd* [1900] 1 QB 233, 249 (Collins LJ) (CA).

142 *Logicrose* (n 138) 1262 (Millett J).

143 *Maguire v Makaronis* (n 61) 467, 474–5 (Brennan CJ, Gaudron, McHugh and Gummow JJ); *Erlanger* (n 5) 1278 (Lord Blackburn).

144 Dominic O'Sullivan, Steven Elliott and Rafal Zakrzewski, *The Law of Rescission* (Oxford University Press, 3rd ed, 2023) 295 [13.02].

have sometimes dealt with this sort of difficulty, where an asset cannot be returned (for example, because it was sold before rescission was sought), by ordering payment of the value of the asset: where rescission is provided as an equitable remedy, as it is following a breach of fiduciary duty, 'it is not necessary to restore the parties precisely to their former position if, by the exercise of the powers of the Court, a substantial restitution can be achieved'.[145] Another challenge might be the provision of services that are not assets: it will not be possible, for example, to return electricity that has already been used in apartments or common property. Again, this could be resolved by payment of a sum reflecting the value of the services : '[u]pon rescission the party providing the services will become entitled to an account for the expenses incurred in providing the services, or perhaps their value including a profit element, with an allowance for any sums received'.[146]

Another remedial option might be for the court to rescind the contract for the future only, leaving untouched anything that has already been done. This is not how equitable rescission normally works — one of the key distinctions between equitable rescission and termination of a contract for breach is that the former sets aside the transaction *ab initio*, whereas the latter only operates *de futuro*[147] — but there are (admittedly limited) instances of equitable remedies being awarded prospectively only.[148] However, this approach would not necessarily resolve issues regarding ownership of, and payment for, plant and machinery that the service provider installed, which may still require payments of the sort discussed in the paragraph above.

A further potential difficulty with rescission is the potential for an estoppel by convention, between the OC and the service provider, to counteract rescission. This issue is highlighted in the *Arrow Asset Management* case, where a management agreement was terminated at the end of the initial period unless it was disclosed and ratified at the first AGM. McDougall J held that the disclosure had been inadequate,[149] with the consequence that the agreement had not been ratified, but he held that both parties had assumed the agreement was in force, so an estoppel by convention bound them.[150] If the OC is entitled to rescind a contract, it obviously denudes the right to rescind of any value if the OC will nonetheless be bound by an estoppel by convention. We suggest, however, that this ought not to be the result where a right to rescind has arisen because of a breach of fiduciary duty. While estoppel by convention can generate a legal relationship between parties where none existed,[151] where the OC seeks to rescind a contract it entered because the developer acted in breach of fiduciary duty to the knowledge of the service provider, the

---

145 *McKenzie v McDonald* [1927] VLR 134, 146 (Dixon AJ). See also *Alati v Kruger* (1955) 94 CLR 216, 223–4 (Dixon CJ, Webb, Kitto and Taylor JJ).

146 O'Sullivan, Elliott and Zakrzewski (n 144) 339 [15.39], see also 418 [18.99].

147 See, eg, *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457, 469–70 (Starke J), 476–7 (Dixon J); *Johnson v Agnew* [1980] AC 367, 396 (Lord Wilberforce); *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827, 844 (Lord Wilberforce).

148 See, eg, the constructive trust recognised in *Muschinski v Dodds* (1985) 160 CLR 583, 623 (Deane J) (and see 598 (Gibbs CJ), 599 (Mason J), 615 (Deane J)).

149 The *effect* of the agreement must be disclosed: *Hudson Property Group Pty Ltd v Community Association DP 270238* [2005] NSWCA 374.

150 *Arrow Asset Management* (n 4) [170]–[187] (McDougall J).

151 Patrick Keane, *Estoppel by Conduct and Election* (Thomson Reuters, 3rd ed, 2023) 123–4 [8-001], 128–9 [8-006].

position is different from *Arrow Asset Management*. In the present context, there *is* a contract between the OC and the service provider, *but* the service provider's participation in the developer's breach of fiduciary duty justifies that contract being set aside. The conscience of the service provider is affected by its participation in the developer's breach of fiduciary duty: if that is not the case, then the OC will not be entitled to rescission; if it is the case, then rescission is justified in equity — in neither case should equity recognise an estoppel by convention.

These potential difficulties could provide courts a reason to refuse rescission because substantial *restitutio in integrum* is impossible. That then raises the question whether the OC could recover equitable compensation for any loss caused by the developer's breach of fiduciary duty. A line of case law, most famously associated with the English Court of Appeal's decision in *Re Cape Breton Co* ('*Cape Breton*'),[152] suggests that equitable compensation is not available as a remedy where a fiduciary has entered into a transaction with its principal in breach of fiduciary duty: the breach entitles the principal to rescind the transaction, but the principal cannot affirm the transaction and at the same time seek compensation for its loss. Courts do not want to rewrite the contract between the fiduciary and principal,[153] which is understandable where the principal, with full knowledge of the facts constituting the breach, chooses to affirm the transaction.[154] But the English courts applied the doctrine in *all* circumstances where rescission was impossible, including where it had become impossible through no fault of the principal.[155] Thus, the fiduciary has breached its duty by entering into a transaction with its principal without adequate disclosure, but the principal's inability to rescind the transaction leaves it with no remedy. For that reason, there are suggestions in the House of Lords' speeches on appeal from *Cape Breton* that a compensatory remedy might be available and is not precluded simply because rescission is not possible.[156] As Austin J observed in *Aequitas v AEFC*, although the *Cape Breton* line of cases

> has an established pedigree … the reasoning underlying these cases is unsatisfactory, especially where rescission has become impossible. … In such a case an order for an account of profits or equitable compensation is not directed to re-writing the contract, but to addressing the consequences of conduct of the defendant that was collateral to the contract.[157]

We suggest that this view applies *a fortiori* where an OC is unable to rescind a contract with a *third-party* service provider, but the contract was formed through the disloyal intermediation of a developer. Here, the situation differs from that in the *Cape Breton* cases, as the problem lies in the contract with a third-party service

---

152 *Cape Breton* (n 70). For other relevant authorities, see above nn 132–3.

153 See above n 132.

154 See, eg, *Cape Breton* (n 70) 801, 805 (Cotton LJ), 811–13 (Fry LJ); *Lydney* (n 134) 94 (Lindley LJ for the Court).

155 *Ladywell Mining* (n 35) 408 (Cotton LJ), 416 (Lopes LJ).

156 *Cavendish Bentinck* (n 55) 661–2 (Lord Herschell), 666 (Lord Watson), 669 (Lord Macnaghten). Part of the difficulty with the older cases in this line is that they concerned mines: the speculative nature of mines led some judges, such as Cotton LJ, to think the asset had no market price (see, eg, *Cape Breton* (n 70) 805); but even judges who did not take that extreme view recognised the difficulty in placing an accurate market value on such assets: see, eg, Bowen LJ's dissent in *Cape Breton* (n 70) 809–10; *Cavendish Bentinck* (n 55) 667 (Lord FitzGerald).

157 *Aequitas* (n 35) 1086 [428] (Austin J). See also *Murdoch v Mudgee Dolomite & Lime Pty Ltd (in liq)* (2022) 398 ALR 658, 695–6 [178] (Leeming JA) ('*Murdoch*').

provider being unable to be rescinded, which in turn causes a loss to the principal (the OC), and so the objection that the court does not like to rewrite contracts that fiduciaries have made with their principals does not apply.[158] If the OC suffers loss as a result of that contract, it ought to be able to recover that loss by an award of equitable compensation against the disloyal developer. For example, if the contract with the service provider cannot be rescinded, and the OC is required to pay above market rate for services, or for plant and machinery, the difference between the contract price and the market rate could be recovered from the developer as equitable compensation. Indeed, even if rescission of the contract *is* possible, if the OC suffers loss as a result of the contract, it is arguable that the OC ought to be able to recover that loss from the developer in addition to any rights that the OC has to rescind the contract. If, for example, rescission of the service contract required payments to be made by the OC, the OC might seek compensation from the developer for the amount of those payments.

VII Conclusion

The Australian housing market is in the midst of an affordability crisis for both owners and tenants.[159] Economists,[160] and in turn governments,[161] have become convinced that the solution to the crisis is increased supply and that the best way to deliver supply is through medium- to high-density development.[162] As a result of these policies, millions more Australians will call strata title dwellings home in the coming century, and it matters that the property titles they acquire are functional, affordable and fair. Consistent consumer complaint about strata title suggests that this is not currently so.

When assessing whether land titles are functional and fair, it is essential to remember that residential land is not an optional consumer item. If people do not like what the market offers, they cannot choose nothing: they must buy or rent something because a secure and stable home is a prerequisite for any kind of decent life.[163] Further, land is finite. If we do not like the terms on which it is offered, such as developer-negotiated contracts that bind the land and future owners for long periods of time on commercially uncompetitive terms, we do not have unlimited other choices. We are restricted to what the market offers, and in the context of strata title, that can be markedly uniform.

---

158 Indeed, the New South Wales Court of Appeal has held that the objection does not apply to a contract between the fiduciary and principal for the supply of *services* that is incapable of rescission: *Murdoch* (n 157) 696 [181]–[182] (Leeming JA).

159 Alan Kohler, 'The Great Divide: Australia's Housing Mess and How to Fix It' (2023) 92 *Quarterly Essay* 1.

160 Ross Kendall and Peter Tulip, 'The Effect of Zoning on Housing Prices' (Research Discussion Paper 2018-03, Economic Research Department, Reserve Bank of Australia, March 2018).

161 Productivity Commission (NSW), *Building More Homes Where People Want to Live* (May 2023); Productivity Commission (NSW), *Building More Homes Where Infrastructure Costs Less: Comparing the Marginal Costs of Servicing Growth in Different Areas of Sydney* (August 2023); Productivity Commission (NSW), *What We Gain by Building More Homes in the Right Places* (February 2024).

162 NSW Government (n 2).

163 Laura Underkuffler-Freund, 'Property: A Special Right' (1996) 71(5) *Notre Dame Law Review* 1033, 1039; Jeremy Waldron, 'Homelessness and the Issue of Freedom' (1991) 39(2) *UCLA Law Review* 295.

Property law has always recognised that because land is both essential and finite, current owners cannot be given unlimited power to regulate and burden land in ways that harm non-owners and future generations. Under all its torturous technicality, much property doctrine (for example, the rule against perpetuities, the prohibition on positive obligations binding freehold land, even the *Statute of Quia Emptores 1290*) is designed to prevent that sort of burdening of land for future owners.[164] It limits current owners' freedom to deal with their land in order to protect future owners' freedom and use. However, strata title legislation creates a significant exception to that general rule through the statutory obligation to pay levies and the creation of an OC, a separate legal entity that can make contracts which both current and future apartment owners will need to discharge. Using the strata form, original landowners (that is, developers) can effectively burden strata titles with obligations that would be prohibited for other types of land titles. This makes owners of apartments vulnerable to the kind of exploitative OC contracts that we have described in this article.

Governments are alive to the potential for exploitation and have attempted to legislate to protect owners: for example, by imposing restrictions on what developers can cause an OC to do in the initial period. However, statutory provisions are static; developers' lawyers can draft around them, and industry practice can find other avenues, for example by presenting new and inexperienced owners with contracts at the first AGM, which owners are advised are essential for the strata scheme. As a result, equitable doctrines become important, particularly those that have protected parties (including parties in commercial relationships) against the 'danger … of the person holding a fiduciary position being swayed by interest rather than by duty, and thus prejudicing those whom he was bound to protect'.[165]

For the same reasons that company promoters owe fiduciary duties to the companies they create, strata developers owe fiduciary duties to the OCs they create when they register strata plans. Those duties are designed to protect against the risk that the developer will exploit the relationship that it has with the OC, sacrificing the OC on the altar of profit. The developer's fiduciary position means it cannot take an unauthorised benefit for itself and cannot allow itself to occupy a position where its self-interest and duty conflict. Industry practices regarding the developer's role in the formation of contracts between the OC and third-party service providers involve activities that may breach the developer's fiduciary duties, attracting remedies that can potentially deprive the service provider of the benefit of those contracts or subject the developer to significant pecuniary remedies.

[164] Sherry, *Strata Title Property Rights* (n 11) 47–72; AWB Simpson, *A History of the Land Law* (Clarendon Press, 2nd ed, 1986).

[165] *Bray v Ford* [1896] AC 44, 51 (Lord Herschell).

George Winterton Memorial Lecture 2025

The Evolution of the Australian Electoral System as a Constitutional Process

Stephen Gageler AC*

Abstract

The form of popular sovereignty empowered by the *Australian Constitution* was framed to be government by 'the people' in constitutive and routine manifestations, both sustaining and sustained by the system of government it called into existence. It was framed to be dynamic — the design of the electoral system according to which the people would act in those distinct manifestations having been entrusted to development by ordinary legislation made by the Commonwealth Parliament. And this form of popular sovereignty can be seen to have evolved: through the development of a broad franchise and through the establishment of a system of compulsory and preferential voting by which that broad franchise has come to be exercised. The form of popular sovereignty empowered by the *Australian Constitution* can accordingly be seen today to be government by 'the people' writ large. In this lecture, I trace this evolution as a process by which ordinary legislation has built out the constitutional structure empowering popular sovereignty.

Please cite this lecture as:

Chief Justice Stephen Gageler AC, 'Winterton Lecture: The Evolution of the Australian Electoral System as a Constitutional Process' (2025) 47 *Sydney Law Review* 21122: 1–17 <https://doi.org/10.30722/slr.21122>.

* Chief Justice of Australia. This is an edited version of the 2025 George Winterton Memorial Lecture delivered in the Banco Court at the Supreme Court of New South Wales on 19 February 2025. Thanks are due to Flyn Wells and Priyanka Banerjee for their careful research and substantial contributions to the structure and content.

I Introduction

In an essay entitled 'Popular Sovereignty and Constitutional Continuity' published towards the turn of the millennium, George Winterton commented on what had then recently been observed to have been a 'fundamental paradigm shift' in Australian constitutionalism from 'parliamentary sovereignty' to 'popular sovereignty'.[1] Winterton identified the concept of 'sovereignty' as having been used in two distinct senses: 'the first referring to the source from which the *Constitution* derives its authority, and the second to the location of the power to amend the *Constitution*'.[2] Asking why such a paradigm shift had occurred almost a century after Federation, he noted that attention had been focused in and after 1986 on the *Australia Acts*[3] marking the end of Imperial parliamentary sovereignty.[4]

Winterton pointed out that the popular underpinnings of the *Australian Constitution* in fact dated back to Federation. He referred to the approval of a draft of the *Constitution* at referenda in 1899 and 1900 by electors referred to in the preamble to the *Constitution* as 'the people' who had 'agreed to unite in one indissoluble Federal Commonwealth'.[5] Winterton quoted historian John Hirst's description of the movement to Federation as 'the quintessential republican moment in our history', and Hirst's observation that 'the Australian people were more involved in the making of their national constitution than the people of any of the other great democracies'.[6] Conceding the legal authority of the *Constitution* to have been derived originally from its enactment by the Imperial Parliament, Winterton pointed out that the 'destiny of the *Commonwealth Constitution*' had always lain 'in the hands of the Australian people acting directly through referenda and indirectly through their representatives in the Commonwealth Parliament'.[7]

Just how successive generations of Australians have been empowered by the *Australian Constitution* to act as 'the people' has been facilitated by and mediated through the electoral system, according to which membership of the Senate and the House of Representatives has been chosen in periodic elections and according to which the constitutional text itself has, on rare occasions, been altered in referenda. The legislative realisation of the federal electoral system is the topic I now address. My claim is that the legislative evolution of the electoral system has a constitutional dimension: it can be seen as the outworking of the constitutional empowerment of popular sovereignty; it can be seen to have contributed to the representative nature and contemporary functioning of the Commonwealth Parliament; and it can meaningfully be said to be a constitutional aspect of our national identity.

---

1 George Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26(1) *Federal Law Review* 1, 1 ('Popular Sovereignty and Constitutional Continuity'), earlier published as George Winterton, 'Popular Sovereignty and Constitutional Continuity' in Charles Sampford and Carol-Anne Bois (eds), *Sir Zelman Cowen: A Life in the Law* (Prospect Publishing, 1997) 42.

2 Winterton, 'Popular Sovereignty and Constitutional Continuity' (n 1) 4.

3 *Australia Act 1986* (Cth); *Australia Act 1986* (UK).

4 Winterton, 'Popular Sovereignty and Constitutional Continuity' (n 1) 1–5.

5 Ibid 5.

6 Ibid.

7 Ibid 9. See also at 5–8.

II The Constitutional Empowerment of Popular Sovereignty

In his *We the People* trilogy,[8] Bruce Ackerman has emphasised the role of the American people not only in creating, but also in sustaining and changing, the *United States Constitution*. Ackerman has portrayed American constitutional history in terms of popular movements in which 'constitutional moments' have led the people to engage in 'higher lawmaking', sometimes leading to formal constitutional amendment but oftentimes leading to informal, yet no less enduring, constitutional change.[9] In a similar vein, Akhil Reed Amar has chronicled the contributions of generations of Americans in fulfilling the founding-era vision of the *United States Constitution* as profoundly democratic for its time, despite what can be seen in retrospect to have been its original shortcomings and problematic history.[10]

The form of popular sovereignty empowered by the *Australian Constitution* is more integrated. In its terms, the *Australian Constitution* makes provision not just for its own amendment in constitutional moments of higher lawmaking, but also for the development of the democratic principles it embodies during non-constitutional periods of ordinary lawmaking.

The *Australian Constitution*, as I have noted in the past,[11] refers to 'the people' in two manifestations. The first is 'the people' acting as nation-builders in rare and important moments of constitutional time. In that manifestation, the people are those described in the preamble to the *Constitution* as having 'agreed to unite in one indissoluble Federal Commonwealth' and who, since becoming so united, have on rare occasions agreed in referenda to make alterations to the constitutional text. The second is 'the people' whose government is regulated and sustained by the *Constitution*. In that manifestation, the people are those by whom the constitutional text requires the senators and members of the House of Representatives to be directly chosen in periodic elections and to whom the two Houses of Parliament are by those means directly accountable.

Despite providing in ss 7 and 24 for senators and members of the House of Representatives to be 'directly chosen by the people' and in s 128 for a proposed law for the alteration of the *Constitution* to be 'submitted to the electors', the *Constitution* left much that is important to Australian democracy to be developed legislatively from time to time by the Commonwealth Parliament. It did so through repeated use of the expression 'until the Parliament otherwise provides' combined with empowerment by s 51(xxxvi) of the Commonwealth Parliament to make laws with respect to 'matters in respect of which this *Constitution* makes provision until the Parliament otherwise provides'.

---

8 See Bruce Ackerman, *We the People: Foundations* (Harvard University Press, 1993); Bruce Ackerman, *We the People: Transformations* (Harvard University Press, 2000); Bruce Ackerman, *We the People: The Civil Rights Revolution* (Harvard University Press, 2018).

9 Ackerman, *We the People: Foundations* (n 8) ch 1.

10 See, eg, Akhil Reed Amar, *America's Unwritten Constitution: The Precedents and Principles We Live By* (Basic Books, 2012) ch 7.

11 Stephen Gageler, 'Foreword' in Benjamin B Saunders, *Responsible Government and the Australian Constitution: A Government for a Sovereign People* (Hart Publishing, 2023) v.

By s 30, until the Commonwealth Parliament otherwise provided, the qualification of electors of members of the House of Representatives would be in each State that which was prescribed by the law of the State as the qualification of electors of the more numerous House of Parliament of that State. And by s 8, the qualification of electors of senators was to be that prescribed as the qualification of electors of members of the House of Representatives. Sections 9 and 31 made corresponding transitional provision for the Parliament of each State to make laws prescribing the 'method of choosing senators' for that State and for laws in force in each State 'relating to elections' for the more numerous House of the Parliament of the State to apply to elections in the State of members of the House of Representatives. Section 41, a transitional provision[12] of significance having regard to women's suffrage having been secured by Federation in South Australia and Western Australia but not yet in other States, provided that no adult person having a right to vote at elections for the lower house of a State Parliament was to be prevented by any Commonwealth law from voting at elections for either house of the Commonwealth Parliament.[13]

Inherent in the transitional nature of these provisions was that the development of the franchise and of the method of choosing senators and members of the House of Representatives would be taken up by the Commonwealth Parliament after its coming into existence. This approach emerged in response to the original form of s 30 proposed at the 1891 National Australasian (Constitutional) Convention in Sydney. In its original form, the clause was described by Sir Samuel Griffith as having adopted 'the American system' according to which the qualification of electors of the national legislature was left to the States.[14] In response, Edmund Barton proposed that the clause 'operate for the first election' after which the Commonwealth Parliament was to be 'competent ... to take its own course as to this matter'.[15] Barton remarked that 'if you are going to trust the Parliament of the Commonwealth at all, you must trust it to fix its own franchise'.[16] Barton's proposal was ultimately reflected in the revised form of the clause submitted to the 1897 Australasian Federal (Constitutional) Convention and in the enacted text of s 30 of the *Constitution*.

The design of the electoral system through which 'the people' would act in constitutive and routine manifestations was accordingly entrusted to the Commonwealth Parliament. So, the form of popular sovereignty empowered by the *Australian Constitution* to be government by 'the people' was framed to be dynamic and self-sustaining.

III The Outworking of Popular Sovereignty

Around the same time George Winterton was writing about popular sovereignty and constitutional continuity, David Malouf was speaking in his Boyer Lectures about

12 See *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254.
13 *Australian Constitution* s 41.
14 *Official Report of the National Australasian Convention Debates*, Sydney, 2 April 1891, 613 (Sir Samuel Griffith).
15 Ibid 619 (Edmund Barton).
16 Ibid.

the making of the Australian consciousness.[17] The features of Australian society that Malouf then identified as 'visibly alive in the present' yet so much taken for granted that 'we fail sometimes to see how rare they are' included what he described as 'the saving grace of lightness and good humour, the choice of moderation over the temptation to any form of extreme'.[18] 'Consider', he said, 'the atmosphere in which election days are celebrated here'.[19] His description of that atmosphere was as follows:

> Voting for us is a family occasion, a duty fulfilled, as often as not, on the way to the beach, so that children, early, get a sense of it as an obligation but a light one, a duty casually undertaken. And it can seem casual. But the fact that voters so seldom spoil their vote, either deliberately or by accident, in a place where voting is compulsory and voting procedures are often extremely complicated, speaks for an electorate that has taken the trouble to inform itself because it believes these things matter, and of a citizenship lightly but seriously assumed.[20]

Developing much the same theme in an institutional context, Adrienne Stone drew attention in her 2022 High Court of Australia Public Lecture to the existence of a distinctive 'Australian constitutional identity' entailing an 'inclusive', if 'incomplete', approach to the franchise.[21] Features of the electoral system she identified as contributing to that distinctively Australian constitutional identity included Saturday voting, compulsory voting, preferential voting, continuous direct updating of the electoral rolls, as well as the establishment of an independent Electoral Commission.[22] Notably, none of those features is to be found in the text of the *Australian Constitution*. All have emerged within the framework of the *Constitution* through developments and innovations enacted by the Commonwealth Parliament.

Arranged chronologically, the main developments and innovations can be seen to have occurred across three periods. The first period was in the immediate post-Federation era, marked by a consciousness on the part of the architects of the relevant developments of the solemn constitutional function entrusted to the Commonwealth Parliament for the design of the electoral system along with an innovative and inclusive exercise of that function. The second period, from 1911 to 1924, saw momentous building out of government by the people through reforms originally framed and presented as mere 'machinery' measures and debated and enacted with corresponding and distinctive mundanity. The third period, taking place from 1948 through to 1983, realised in fact the Federation-era vision of a profoundly inclusive system and contributed to the perception of a paradigm shift to popular sovereignty, which Winterton preferred to explain as the outworking of 'constitutional destiny'.[23]

---

17 David Malouf, *A Spirit of Play: The Making of the Australian Consciousness* (Boyer Lecture Series, Lecture 6, 20 December 1998).

18 David Malouf, *A Spirit of Play: The Making of the Australian Consciousness* (ABC Books, 1998) 111.

19 Ibid.

20 Ibid 112.

21 Adrienne Stone, 'More Than a Rule Book: Identity and the *Australian Constitution*' (2024) 35(2) *Public Law Review* 127, 133.

22 Ibid.

23 Winterton, 'Popular Sovereignty and Constitutional Continuity' (n 1) 13.

A *The Immediate Post-Federation Period*

As Barton had foreshadowed in 1891, the newly established Commonwealth Parliament came to enact the *Commonwealth Franchise Act 1902* (Cth) ('*Franchise Act*') a year after it was first summoned to meet, terminating the operation of the transitional provisions in ss 8 and 30 of the *Constitution* by establishing a national uniform franchise. The inaugural Parliament had been elected in 1901 according to the rules in force at that time in the various States. As recounted by Marian Simms in her edited volume *1901: The Forgotten Election*, that meant that only South Australian and Western Australian women were entitled to vote, while a property qualification continued to apply in Tasmania.[24] Tasmania voted according to its unique 'Hare-Clark' form of preferential voting; a 'contingent vote' form of preferential voting was used in Queensland (effectively a two-round run-off election); while a first-past-the-post system prevailed in the remaining States.[25] The 1901 poll was taken on two separate days across the nation: in New South Wales, Victoria, Tasmania and Western Australia on Friday 29 March and in South Australia and Queensland the following day.[26] This patchwork of electoral administration formed the backdrop to the enactment of the *Franchise Act*.

The Bill for the *Franchise Act* was presented to the Senate by Richard O'Connor. In the second reading speech, O'Connor noted the Constitutional Conventions to have 'determined that there should be a National House representing the whole of the people of Australia entitled to vote, and a States House representing the same people voting on the same franchise but grouped together as States'.[27] He emphasised that it was 'an essential part of that plan that the basis of the representation should be uniform throughout Australia'.[28] He recorded that '[w]e are often asked — "Why cannot you leave things as they are; both Houses have been elected upon the State franchises, why not leave them alone?"'.[29] His response to that frequently asked question was to say that

> [i]f that implies that it is the duty of this Parliament under the *Constitution* to leave the election of senators and members of the House of Representatives to be conducted on the existing franchises for all time, it is an absolutely mistaken view of our duty as representing the people of the Commonwealth.[30]

The *Franchise Act* provided for a uniform franchise throughout the Commonwealth on a sweeping scale. Section 3 declared as 'entitled to vote at the election of Members of the Senate and the House of Representatives': all persons not under 21 years of age whether male or female, married or unmarried, who had lived in Australia for six months continuously, who were natural born or naturalized subjects of the King, and whose names were on the electoral roll for any electoral

---

24 Marian Simms, 'Voting and Enrolment Provisions' in Marian Simms (ed), *1901: The Forgotten Election* (University of Queensland Press, 2001) 28.

25 Joan Rydon, 'Electoral Methods' in Marian Simms (ed), *1901: The Forgotten Election* (University of Queensland Press, 2001) 21.

26 See generally Marian Simms, 'Election Days: Overview of the 1901 Election' in Marian Simms (ed), *1901: The Forgotten Election* (University of Queensland Press, 2001) 1.

27 Commonwealth, *Parliamentary Debates*, Senate, 9 April 1902, 11450 (Richard O'Connor).

28 Ibid.

29 Ibid.

30 Ibid.

division. Having been framed against the backdrop of the women's suffrage movements of the 1880s and 1890s in New Zealand, South Australia and Western Australia, O'Connor remarked in his address to the Senate that 'the question of reform in the direction of women's suffrage has already won its way'.[31] Responding to another Senator pointing to the unsuccessful movements in New South Wales and Victoria, O'Connor noted that a Bill extending the franchise to women had passed the Legislative Assembly of each State but had been rejected by its Legislative Council, each of which O'Connor noted to be 'a nominated body'.[32] He argued that women's suffrage would then have been law in nearly all the States but for what he described as 'a certain hesitancy to march with reform' found 'in all the Upper Houses in Australia'.[33] Returning to the function of the *Franchise Act*, O'Connor pointed out that there were then three-quarters of a million women in the Commonwealth, who in South Australia or Western Australia would be entitled to vote, but who were 'disfranchised in the other States'[34] and that 'uniformity [could] only be brought about by extending the franchise to all women'.[35] The result, he predicted, '[would] be infinitely to strengthen the means by which we shall get a true record of the real opinions of Australia upon all the different questions that will come up for settlement'.[36]

Marian Sawer has pointed out that the immediate effect of the *Franchise Act* was to double the electorate across much of the country.[37] Yet the inclusive vision was impaired and lamentably would remain so for more than half a century. The marginal note to s 4 of the *Franchise Act*, titled '[d]isqualification of coloured races', provided that '[n]o [A]boriginal native of Australia Asia Africa or the Islands of the Pacific except New Zealand' was entitled to be enrolled. That was so despite Indigenous Australians having been entitled to vote at the 1901 Election, most States having by then enfranchised them.

The *Commonwealth Electoral Act 1902* (Cth) ('*1902 Electoral Act*') complemented the *Franchise Act* by establishing the nationally uniform electoral system according to which the broad national uniform franchise would be exercised. Part II of the Act established an electoral office to be administered by the Chief Electoral Officer for the Commonwealth, responsible to the Minister administering the Act. Functions to be performed by the office included: preparing and keeping electoral rolls of the electors in each State; facilitating the taking of the poll including by administering polling places; and ascertaining the result of the polling by scrutiny. Although the electoral office would not be reconstituted as a statutory body formally independent of the Executive Government of the Commonwealth until 1984, it has been observed that among the 'continuities ... of federal electoral administration' following the establishment of the electoral office under an ordinary departmental

31 Ibid 11452.
32 Ibid.
33 Ibid.
34 Ibid 11451.
35 Ibid 11452.
36 Ibid 11451.
37 Marian Sawer, 'Enrolling the People: Electoral Innovation in the New Australian Commonwealth' in Graeme Orr, Bryan Mercurio and George Williams (eds), *Realising Democracy: Electoral Law in Australia* (Federation Press, 2003) 52, 56 ('Enrolling the People').

structure was 'the degree of independence' that prevailed.[38] The establishment of the electoral office in 1902 facilitated the early development of what Marian Sawer described as 'professionalism of electoral administration'.[39] She referred to the enrolment in 1903 of '[a]lmost two million names ... believed to be some 96 per cent of the adult population' as 'undoubtedly the most comprehensive enrolment of any nation up to that time ... undertaken by a fledgling government with only a skeleton public service'.[40] The enrolment of the national uniform electorate enfranchised by the *Franchise Act* in the absence of sophisticated administrative architecture was facilitated instead by the enlistment, pursuant to a proclamation made under the *1902 Electoral Act*, of State police forces to canvass the continent door to door.

One function not conferred on the electoral office was electoral distribution and redistribution. The *1902 Electoral Act* instead made provision in Pt III for the Governor-General to appoint one person in each State to be the Commissioner for the purpose of electoral distribution. Although the Commissioner would hold office during the pleasure of the Governor-General,[41] without any formal guarantee of independence, this basic structure for distribution stood in contrast to the approach in comparable jurisdictions, including the United States where districting was then and has since remained largely the responsibility of legislatures themselves. Graeme Orr has observed that assigning responsibility for electoral distribution and redistribution to non-parliamentary commissioners mitigated the risk that inheres in such responsibility being assigned to legislatures precisely because the legislators who comprise those legislatures are subject to the ultimately controlling influence of the electoral choice that is distributed and redistributed through its performance.[42] The *1902 Electoral Act* also prescribed the decision-making process of the Commissioners in making any distribution, which was to be constrained by a quota of electors to be ascertained by dividing the whole number of electors in a State by the number of members of the House of Representatives to be chosen in that State, with a very small margin of allowance for departure.[43] By this means, the Act added explicit protections against manipulation of electoral distribution and redistribution to the institutional protections which arose from assigning the function to non-parliamentary commissioners.

B *1911 to 1924*

A decade on from Federation, accumulation of experience in electoral administration had exposed a range of imperfections in the system. The professionalisation of electoral administration facilitated by the establishment of the electoral office came over the ensuing decade to inform legislative developments framed to address some of those imperfections.

---

38 Colin A Hughes, 'The Independence of the Commissions: The Legislative Framework and the Bureaucratic Reality' in Graeme Orr, Bryan Mercurio and George Williams (eds), *Realising Democracy: Electoral Law in Australia* (Federation Press, 2003) 205, 205–6.

39 Sawer, 'Enrolling the People' (n 37) 62–3. See also Marian Sawer, 'Pacemakers for the World?' in Marian Sawer (ed), *Elections: Full, Free and Fair* (Federation Press, 2001) 1, 16.

40 Sawer, 'Enrolling the People' (n 37) 52–3.

41 *Commonwealth Electoral Act 1902* (Cth) ('*1902 Electoral Act*') s 14.

42 Graeme Orr, *The Law of Politics: Elections, Parties and Money in Australia* (Federation Press, 2nd ed, 2019) 35.

43 *1902 Electoral Act* (n 41) ss 15, 16.

In a paper prepared by the Chief Electoral Officer in 1911, the system established by the *1902 Electoral Act* was noted 'not [to] permit of the adoption of a continuous system of compulsory enrolment'.[44] The door-to-door canvassing across the continent during the immediate post-Federation period was said to have introduced 'a considerable degree of compulsion ... without reference to Parliament'.[45] According to the Chief Electoral Officer,

> [t]he existing system of voluntary enrolment during the currency of a Roll, supplemented by official action to remedy errors and omissions … [was] inherently weak, in that it create[d] something in the nature of a divided responsibility [leading] many people to believe that it [was] the duty of the Electoral Administration to follow them from place to place …[46]

The opinion of the Chief Electoral Officer was accordingly that 'a thoroughly efficient Roll can only be continuously preserved under a system of compulsory enrolment'.[47]

The opinion of the Chief Electoral Officer was presented to the Senate by Sir George Pearce in October 1911 in support of an Act to amend the *1902 Electoral Act* to make provision for a system of compulsory enrolment, among other measures. The reform was submitted by Pearce to be 'a machinery measure',[48] as if following inexorably from the Chief Electoral Officer's 'official view'.[49] Within the ensuing parliamentary debate, the 'question of compulsion' was considered primarily in terms of 'the administrative advantages it was designed to achieve'.[50] Pearce, however, articulated his 'own reasons for the change' at the level of principle.[51] Although he emphasised that the question of compulsory voting was not itself before the Parliament, he ventured to say that 'in a country like Australia, where we recognise that every man and woman should have the right to vote, that right becomes more than a privilege — it becomes a duty'.[52] The outcome was that the *1902 Electoral Act* was amended to provide for the Governor-General, by proclamation, to 'declare that ... new Rolls shall be prepared under a system of compulsory enrolment'.[53]

Another imperfection in the electoral system which had by then become apparent was that of three or more candidates resulting in 'vote-splitting' and leading to unrepresentative outcomes, as an incident of the first-past-the-post form of simple majority voting. Whilst the original form of the Bill for the *1902 Electoral Act* had provided for a form of preferential voting for both Houses designed to avoid such outcomes, the relevant provisions had then been amended in favour of first-past-the-

---

44 Chief Electoral Officer, *Compulsory Enrolment* (Government of the Commonwealth of Australia, Parliamentary Paper No 27, 1911) 1.

45 Neil Gow, 'The Introduction of Compulsory Voting in the Australian Commonwealth' (1971) 6(2) *Politics* 201, 201.

46 Chief Electoral Officer (n 44) 2.

47 Ibid.

48 Commonwealth, *Parliamentary Debates*, Senate, 6 October 1911, 1176 (George Pearce).

49 Ibid 1178 (George Pearce).

50 Gow (n 45) 203. See also at 205.

51 Commonwealth, *Parliamentary Debates*, Senate, 6 October 1911, 1178 (George Pearce).

52 Ibid 1179 (George Pearce).

53 See *Commonwealth Electoral Act 1911* (Cth) s 7.

post voting both for the House of Representatives and the Senate after the preferential voting provisions failed to gain widespread support.[54]

The issue of vote-splitting was considered in 1915 by the Royal Commission upon the Commonwealth Electoral Law and Administration, appointed by Sir Joseph Cook's Liberal Government against the backdrop of what Benjamin Reilly has described as '[t]he increasing incidence of minority Labor candidates beating a divided field of conservatives'.[55] Although attention had thus been drawn to the issue 'more by considerations of partisan advantage than by the finer points of electoral theory',[56] the Royal Commission reported that in principle

> [t]here must necessarily be many shades of political opinion, which, in a democratic country, should be given expression to in the freest possible manner [and] [i]n order that public opinion may be portrayed in distinct broad tones of thought, we strongly urge the adoption of preferential voting for the House of Representatives.[57]

The recommendation to adopt preferential voting for the House of Representatives was one of a suite of reforms enacted in the *Commonwealth Electoral Act 1918* (Cth) ('*1918 Electoral Act*'), which superseded the *Franchise Act* and the *1902 Electoral Act*. The form of preferential voting then introduced was that described by political scientists as the 'alternative vote' model, as distinct from the other differing forms adopted historically in Queensland and Tasmania. Although the alternative vote model is well familiar to us more than a century later, the terms in which the reform was introduced by Patrick Glynn bear repeating:

> The preferential method ... provides a remedy for a party split, gives the result of a second poll of the same voters, and scope for the expression of wider electoral opinion ... The significance of this method is that the elector declares in advance his choice in each of the possible contingencies. In advance he says 'These are my contingent choices.' Where three candidates are standing for one seat the elector says in effect 'Number 1 is my choice of the three; I prefer him, but if Number 1 is not in the running I shall give my vote to Number 2.' ... The candidate is returned by an absolute majority of operative votes, and he then represents the majority of the division.[58]

The *1918 Electoral Act* prescribed a form of ballot paper for the House of Representatives on which electors would record their order of preference and also contained specific commands relating to scrutiny under the new preferential system, including that

> [i]f no candidate has received an absolute majority of first preference votes ... the candidate who has received the fewest first preference votes shall be

---

54 See generally David M Farrell and Ian McAllister, '1902 and the Origins of Preferential Electoral Systems in Australia' (2005) 51(2) *Australian Journal of Politics and History* 155; David M Farrell and Ian McAllister, *The Australian Electoral System: Origins, Variations and Consequences* (UNSW Press, 2006) 30–36 ('*The Australian Electoral System*').

55 Benjamin Reilly, 'Preferential Voting and Its Political Consequences' in Marian Sawer (ed), *Elections: Full, Free and Fair* (Federation Press, 2001) 78, 85. See also Farrell and McAllister, *The Australian Electoral System* (n 54) 36–40.

56 Reilly (n 55) 78, 85.

57 *Report from the Royal Commission upon the Commonwealth Law and Administration* (1915) 7 [11].

58 Commonwealth, *Parliamentary Debates*, House of Representatives, 4 October 1918, 6678 (Patrick Glynn).

> excluded, and each ballot-paper counted to him shall be counted to the candidate next in the order of the voter's preference [a process which was to] be repeated until one candidate has received an absolute majority of votes …[59]

It has been observed that, in combination with the convention of government being formed by the party or parties having majority support in the House of Representatives, the alternative vote would thereafter function to ensure that the party or parties with majority support in the most electoral divisions nationwide formed government.[60]

Another imperfection exposed by the accumulation of experience in electoral administration was low voter turnout. The historically low turnout of 58% at the 1922 General Election proved to be the catalyst for change. While the Royal Commission upon the Commonwealth Electoral Law and Administration had considered compulsory voting to be 'a natural corollary of compulsory enrolment',[61] the reform had yet to be taken up at the federal level. It had, however, been introduced in Queensland in 1914. Anne Twomey has noted how '[t]he experiment of compulsory voting ... in Queensland had proved so successful in creating a culture of voting that over 82% of electors in Queensland voted at the 1922 [F]ederal [E]lection, without legal compulsion'.[62] That statistic was seized upon when a Bill to establish compulsory voting was presented to the Senate in 1924.[63] The Bill was introduced by Herbert Payne, a backbencher in the Senate, as a private Member's Bill. It passed through both Houses on the voices without significant debate. In the words of Geoffrey Sawer, '[n]o major departure in the federal political system had ever been made in so casual a fashion'.[64]

But whilst what little debate there was can fairly be described as mundane – the introduction of compulsory voting having been submitted to be 'the natural corollary to compulsory enrolment' – more than just a hint of principle can be discerned. Given that 'Parliament is supposed to be a reflex of the mind of the people', argued Senator Payne, 'a Parliament elected by less than one-half of the electors ... surely is a travesty on democratic government'.[65] Steering the Bill through the House of Representatives, backbencher Edward Mann provided a principled answer to what he identified as a principled objection that compulsory voting was an interference with liberty. He did so by adopting the distinction drawn by James Bryce between 'individual liberty' ('consist[ing] in exemption from legal control') and 'political liberty' ('consist[ing] in participation in legal control').[66]

---

59 *1918 Electoral Act* s 136(6) (as made 21 November 1918).

60 Patrick Dunleavy, Mark Evans, Harry Hobbs and Patrick Weller, 'Situating Australian Democracy' in Mark Evans, Patrick Dunleavy and John Phillimore, *Australia's Evolving Democracy: A New Democratic Audit* (LSE Press, 2024) 33, 45.

61 *Report from the Royal Commission upon the Commonwealth Law and Administration* (n 57) 10 [31].

62 Anne Twomey, 'Compulsory Voting in a Representative Democracy: Choice, Compulsion and the Maximisation of Participation in Australian Elections' (2013) 13(2) *Oxford University Commonwealth Law Journal* 283, 287. See also Lindsay Smith, 'Compulsory Voting in Australia' in Richard Lucy (ed), *The Pieces of Politics* (Macmillan, 3rd ed, 1983) 235, 240.

63 See Commonwealth, *Parliamentary Debates*, Senate, 17 July 1924, 2179–80.

64 Geoffrey Sawer, *Australian Federal Politics and Law 1901–1929* (Melbourne University Press, 1956) 237.

65 Commonwealth, *Parliamentary Debates*, Senate, 17 July 1924, 2180 (Herbert Payne).

66 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 July 1924, 2448, quoting James Bryce, *Modern Democracies* (Macmillan, 1921) vol 1, 55.

'Individual liberty', Mann argued, 'is less likely to be invaded when the legal control is that exercised by a real majority of the people'.[67]

A constitutional challenge to compulsory voting as introduced in 1924 was unanimously rejected by the High Court of Australia two years later. The Commonwealth Parliament, as the 'community organised', Isaacs J then said, 'being seised of the subject matter of parliamentary elections and finding no express restrictions in the *Constitution*, may properly do all it thinks necessary to make elections as expressive of the will of the community as they possibly can be'.[68]

By the middle of the interwar period, the Commonwealth Parliament had thus exercised its legislative power to build out the form of popular sovereignty empowered by the *Australian Constitution* by establishing a system of preferential and compulsory voting according to which 'the people' would be both empowered and required to make an effective choice of government through the ranking of their preferences for candidates for election to the House of Representatives. Neither development featured quite the controlling presence of conscious statecraft or awareness of such ordinary lawmaking operating on a higher plane as the enactment of the *Franchise Act*. In each, mundanity combined with innovation in a distinctively Australian way.

C *1948 to 1983*

The aftermath of the Second World War saw impetus both to reform the system of voting for the Senate and to continue the expansion of the electorate towards universal adult suffrage, which had been imperfectly realised in 1902.

Writing in 1910, Harrison Moore had observed with evident dismay that 'no scheme of "proportionate representation"' in the Senate had then 'received favourable consideration' and that the first-past-the-post system enacted by the *1902 Electoral Act* was 'open to the objection that it enable[d] an organized plurality of voters to secure the whole representation, though it [had] only a small majority of votes, or, even in the case of a large number of candidates, [was] an actual minority of the electors voting'.[69] Amendment of the *1918 Electoral Act* in 1919[70] to introduce preferential voting in the Senate in the form of 'block voting' was seen only to exacerbate 'the so-called "windscreen-wiper effect", which delivered almost all contested Senate seats in each state to whatever political party achieved a majority'.[71] The Royal Commission on the Constitution of the Commonwealth in 1929 reported that this state of affairs was 'undesirable' and that 'the Senate would be better qualified to act as a chamber of revision if senators were elected under a system of proportional representation'.[72]

---

67 Commonwealth, *Parliamentary Debates*, House of Representatives, 24 July 1924, 2448.

68 *Judd v McKeon* (1926) 38 CLR 380, 385.

69 W Harrison Moore, *The Constitution of the Commonwealth of Australia* (Sweet & Maxwell, 2nd ed, 1910) 115.

70 *Commonwealth Electoral Act 1919* (Cth).

71 John Uhr, 'Why We Chose Proportional Representation' in Marian Sawer and Sarah Miskin (eds), *Representation and Institutional Change: 50 Years of Proportional Representation in the Senate* (Department of the Senate, Papers on Parliament No 34, 1999) 13, 16.

72 *Report of the Royal Commission on the Constitution* (1929) 267.

However, it was not until 1948 that the Chifley Government, facing electoral defeat at an impending general election, introduced the Bill for the amending Act that ultimately introduced proportionate representation for the Senate.[73] In the second reading speech for the Bill, Dr Evatt said:

> The great defect, from the representation aspect, of both the old "first past the post" and the more recently used "block majority" is that at an election, generally all seats in a State are won by candidates of the one party, leaving a minority of between 40 to 50 per cent of the electors without any representation at all in the Senate. … It has [been] decided that, in relation to the election of senators, where each State votes as one electorate, the fairest system and the one most likely to enhance the status of the Senate is that of proportional representation.[74]

The 'single transferrable vote' form of preferential voting introduced by the 1948 amending Act involved voters ranking candidates in order of preference on the ballot paper in the same manner as the alternative vote with scrutiny proceeding by dividing the number of seats contested to establish a quota of votes needed to elect a single candidate, treating candidates achieving the quota as elected and then redistributing preferences, both from the surplus votes of elected candidates and from candidates with the least votes, until all seats were filled.[75]

Unlike the alternative vote in elections for the House of Representatives, which had from 1918 functioned to ensure that the party or parties with majority support in the most electoral divisions nationwide formed government in the House of Representatives, the single transferable vote in elections for the Senate would function from 1948 to match party votes within each State with Senate seats for each State.[76] The enduring outcome, as John Uhr summed it up, has been that 'the Senate which from its beginnings has represented the minor States now also represents minorities within the States: within the big States as well as smaller ones'.[77]

By 1949, Indigenous Australians could vote only if they were otherwise entitled to do so for State elections or if they had served, or were serving, in the Australian military.[78] This meant that the many civilian Indigenous Australians in Queensland, Western Australia and the Northern Territory still could not vote.[79] National organisations such as the Federal Council for Aboriginal Advancement, as well as State-based groups such as the Aborigines Advancement League in Victoria and the Aborigines and Torres Strait Islanders' Advancement League in Queensland, campaigned to extend the franchise to all Indigenous Australians.[80] With domestic

---

73 *Commonwealth Electoral Act 1948* (Cth).

74 Commonwealth, *Parliamentary Debates*, House of Representatives, 16 April 1948, 965 (Dr Herbert Evatt).

75 *Commonwealth Electoral Act 1948* (Cth) (n 73) s 3. See also *Day v Australian Electoral Officer (SA)* (2016) 261 CLR 1, 9 [10].

76 Dunleavy et al (n 60) 45–6.

77 Uhr (n 71) 42.

78 *Commonwealth Electoral Act 1949* (Cth) s 3.

79 Will Sanders, 'Delivering Democracy to Indigenous Australians: Aborigines, Torres Strait Islanders and Commonwealth Electoral Administration' in Marian Sawer (ed), *Elections: Full, Free and Fair* (Federation Press, 2001) 158, 159.

80 See John Chesterman, *Civil Rights: How Indigenous Australians Won Formal Equality* (Queensland University Press, 2005) 62–3.

and international comparisons being made to apartheid in South Africa,[81] the campaign reached a crescendo in 1961 when the House of Representatives established the Select Committee on Voting Rights of Aboriginals. On 19 October 1961, the Select Committee finally recommended that the national franchise be so extended.[82]

The amending Act which implemented that recommendation the following year was spare in its terms.[83] The second reading speech noted, however, that while it was a short piece of legislation, its implications were 'of the greatest significance' in that it 'would proclaim to the world that the representatives of all sections of the Australian community are determined to ensure that the [A]boriginal people of Australia enjoy complete political equality with the rest of the community'.[84] Under the heading '[p]ersons entitled to enrolment and to vote', the critical provision simply stated that '[s]ection thirty-nine of the [*1918 Electoral Act*] is amended by omitting sub-section (6)',[85] sub-section (6) having contained the express disqualification of Indigenous Australians from entitlement to enrol — a disqualification which had persisted since the *1902 Electoral Act*. Indigenous Australians would accordingly be entitled to enrol and, if in fact enrolled, would be subject to the provision for compulsory voting in the *1918 Electoral Act*. The arc of Indigenous Australian enfranchisement was finally completed in 1983 when compulsory enrolment was legislated for Indigenous Australians,[86] as it had been for other Australians almost 70 years beforehand.

Another broadening of the franchise during this period was the lowering of the minimum voting age. Since the enactment of the *Franchise Act*, the age of eligibility had been set at 21 years, reflecting that of most comparable jurisdictions. While there had been murmurs about lowering the voting age since the First World War, it was the Second World War which led to palpable agitation towards a lower voting age, as many Australian military personnel were younger than 21. In response, the Parliament first enacted the *Commonwealth Electoral (War-time) Act 1943* (Cth), which extended the right to vote to active and discharged military personnel who had served overseas and who were under 21. With the coming of the Vietnam War and the introduction of compulsory national service, calls for lowering the voting age to 18 grew louder still. The rationale was pithily captured in the slogan: 'Old enough to fight, old enough to vote'.[87] But calls persisted for the voting age to be lowered for all citizens, not simply those who had served in the military. By 1971, the United Kingdom, the United States and Canada, for instance, had all lowered the voting age to 18. Ultimately, in 1973 during the period of the Whitlam

81 Ibid 63–4.

82 House of Representatives Select Committee on Voting Rights of Aboriginals, Parliament of Australia, *Report from the Select Committee on Voting Rights of Aborigines* (Part I — Report and Minutes of Proceedings, October 1961).

83 *Commonwealth Electoral Act 1962* (Cth).

84 Commonwealth, *Parliamentary Debates*, Senate, 2 May 1962, 1050–51 (Harrie Wade).

85 *Commonwealth Electoral Act 1962* (Cth) (n 83) s 2.

86 *Commonwealth Electoral Legislation Amendment Act 1983* (Cth) ('*1983 Amendment Act*').

87 See Ian McAllister, 'The Politics of Lowering the Voting Age in Australia: Evaluating the Evidence', (2014) 49(1) *Australian Journal of Political Science* 68, 73.

Government, Australia followed suit: legislation to amend the *1918 Electoral Act* was passed unanimously by the Commonwealth Parliament, without debate.[88]

A little over a decade later, following the election of the Hawke Government and the establishment and reporting of the Joint Select Committee on Electoral Reform, a comprehensive package of amendments came to be made to the electoral legislation by the *Commonwealth Electoral Legislation Amendment Act 1983* (Cth) ('*1983 Amendment Act*'). That Act provided, among other things, for the registration of political parties, the printing of their names on ballot papers, and the division of the Senate ballot paper by a line allowing the option of above-the-line voting for political parties or groups and below-the-line voting for individual candidates.

The *1983 Amendment Act* also introduced compulsory enrolment of Indigenous Australians together with mobile polling booths. As Senator Gareth Evans noted during the parliamentary debates, arrangements for mobile polling booths were part of the set of 'provisions to enable people to vote who were previously disenfranchised'.[89] Like Saturday voting, the legislative requirement for which had been introduced in 1911 at the same time as the introduction of compulsory enrolment,[90] mobile polling booths were aimed at making voting easier.[91] For Saturday voting, that ease was through reducing what an economist would call the opportunity cost of voting as more people could readily access voting without needing to arrange for time off work or other responsibilities during the working week. Similarly, mobile polling would reduce what an economist would call the transaction costs of voting as it became more readily accessible.

Another important reform introduced by the *1983 Amendment Act* was the establishment of the Australian Electoral Commission ('AEC') as an independent statutory authority which would be 'seen to operate independent of political influence'.[92] The AEC was to exercise functions which included those of the Australian Electoral Office, the most recent incarnation (as a statutory office since 1973)[93] of the electoral office originally set up by the *1902 Electoral Act*. The AEC was also to assume responsibility for electoral redistribution, meaning that 'for the first time the electoral commissioners [would] be totally independent' in securing 'fair' redistributions.[94] An AEC-appointed Redistribution Committee for each State would determine redistributions to commence 'whenever the Electoral Commission so direct[ed]'.[95] Moreover, proposed redistributions by the Redistribution Committee had to be justified with reasons and then the proposed electoral map(s) together with the reasons and other materials were required to be publicly displayed and objections able to be lodged by any person or organisation.[96] An 'augmented'

88 *Commonwealth Electoral Act 1973* (Cth).
89 Commonwealth, *Parliamentary Debates*, Senate, 30 November 1983, 3062 (Gareth Evans).
90 *Commonwealth Electoral Act 1911* (Cth) (n 53) s 12.
91 See Lisa Hill, 'Australia's Electoral Innovations' in Jenny M Lewis and Anne Tiernan (eds), *The Oxford Handbook of Australian Politics* (2021) 75, 83–4.
92 Joint Select Committee on Electoral Reform, Parliament of Australia, *First Report* (September 1983) 39 [2.30]. See also *1983 Amendment Act* (n 86) s 7.
93 See *Australian Electoral Office Act 1973* (Cth).
94 Commonwealth, *Parliamentary Debates*, Senate, 30 November 1983, 2990 (Michael Macklin).
95 *1983 Amendment Act* (n 86) s 9, substituting new pt IIIA and see especially s 25K.
96 Ibid ss 25L, 25T, 25U, 25V.

composition of the AEC was then required to determine any objections lodged against any proposed redistribution.[97]

Yet another function of the AEC established by the *1983 Amendment Act* which bears emphasis in its support of representative government was the express statutory function to promote public awareness of electoral and parliamentary matters through 'education and information programs' as well as other means.[98] An active educative function was viewed by the Joint Select Committee as essential to inform the people 'as to their rights, responsibilities and entitlements as electors'.[99] Greater voter education was viewed as a means of informing people both as to their right to vote and, perhaps more significantly given the compulsory enrolment of all adult Australians following the 1983 amendments, enabling 'improved' voting in the sense that electors would better understand how to vote, which would in turn lead to fewer informal votes being cast.[100]

The cumulative effect of compulsory enrolment, compulsory voting and voter education as part of the constitutional process of empowering Australians to act as 'the people' can be seen in contemporary statistics. As at 31 December 2024, around 98% of eligible Australians were enrolled to vote.[101] In the 2022 Federal Election, around 90% of those enrolled turned out to vote.[102] By way of international comparison, the most recent enrolment and turnout figures for Canada were around 95%[103] and 63%[104] respectively, and for New Zealand were around 89%[105] and 77%[106] respectively. For the United Kingdom, the comparable figures were as low as 86%[107] and 60%[108] respectively. In the United States, around 64% of the eligible voting population voted in the most recent Presidential election.[109]

---

97 Ibid s 25W.

98 *1983 Amendment Act* (n 86) s 9, substituting new s 7A(1)(c).

99 Joint Select Committee on Electoral Reform (n 92) 41 [2.38].

100 Commonwealth, Parliamentary Debates, Senate, 30 November 1983, 2981.

101 Australian Electoral Commission, 'Enrolment Statistics' (Web Page, 23 January 2025) <https://www.aec.gov.au/enrolling_to_vote/enrolment_stats/>.

102 Australian Electoral Commission, 'Voter Turnout – Previous Events' (Web Page, 7 November 2023) <https://www.aec.gov.au/Elections/federal_elections/voter-turnout.htm>.

103 Elections Canada, 'National Register of Electors – Updates: November 2024 Annual Lists of Electors' <https://www.elections.ca/content.aspx?section=pol&document=index&dir=ann/upd&lang=e>.

104 Elections Canada, 'Voter Turnout at Federal Elections and Referendums' <https://www.elections.ca/content.aspx?section=ele&dir=turn&document=index&lang=e>.

105 See Electoral Commission (Te Kaitiaki Take Kōwhiri) (New Zealand), 'Enrolment by General Electorate' (31 December 2024) <https://www.elections.nz/stats-and-research/enrolment-statistics/enrolment-by-general-electorate/>.

106 See Electoral Commission (Te Kaitiaki Take Kōwhiri) (New Zealand), '2023 General Election: Voter Turnout Statistics' (Web Page, 2023) <https://elections.nz/democracy-in-nz/historical-events/2023-general-election/voter-turnout-statistics/>.

107 See Office for National Statistics (UK), 'Estimates of the Population for the UK, England, Wales, Scotland, and Northern Ireland' (8 October 2024) <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/datasets/populationestimatesforukenglandandwalesscotlandandnorthernireland>; Office for National Statistics, 'Dataset: Electoral Statistics for the UK' (11 April 2024) <https://www.ons.gov.uk/peoplepopulationandcommunity/elections/electoralregistration/datasets/electoralstatisticsforuk>.

108 'UK General Election 2024: What Happened and What's Next?', *Reuters* (6 July 2024) <https://www.reuters.com/world/uk/uk-election-what-happened-2024-07-05/>.

109 James M Lindsay, 'The 2024 Election by the Numbers', *Council on Foreign Relations* (18 December 2024) <https://www.cfr.org/article/2024-election-numbers>.

IV Conclusion

The *Australian Constitution* empowered a form of popular sovereignty in which 'the people' as 'electors' sustain and are sustained by a system of representative government. It expressly left the contours of the electoral system — pursuant to which 'the people' were to exercise that sovereignty — to the Commonwealth Parliament to develop by ordinary legislation.

The democratic and inclusive Federation-era vision for the form of popular sovereignty empowered by the *Constitution* has been realised through Commonwealth legislation which has shaped and reshaped our national electoral system in a process which has both reflected and contributed to the representative nature of the Commonwealth Parliament and which has both reflected and contributed to a constitutional dimension of our distinctive national identity. The liberty the Australian people nurture, to repeat the words of James Bryce, is 'political liberty'. An Australian is an 'elector': to be Australian is to vote.

Before the High Court

Reputation, Confusion and Discretion in Australian Trade Mark Law: *Taylor v Killer Queen LLC*

Robert Burrell[*] and Michael Handler[†]

Abstract

In *Taylor v Killer Queen LLC*, the High Court of Australia will have the opportunity to address three complex and unresolved issues under the *Trade Marks Act 1995* (Cth). The first issue relates to one of the key grounds for cancellation of a trade mark registration, namely that another mark had acquired a reputation at the registered mark's priority date and that the use of the later mark at that time would have caused confusion. The appeal will require consideration of how to determine when a trade mark has acquired a reputation and when the use of a similar mark, but in a different commercial field, will cause confusion. The second issue relates to a separate cancellation ground that applies where the use of the registered mark has come to cause confusion post-registration, and will require the High Court to clarify the nature of the use that needs to be considered. The third issue goes to the interpretation of a provision that gives the court discretion not to order the cancellation of a registration, even if one of the aforementioned grounds of cancellation has been made out. We explore each of these issues, highlighting the main areas of uncertainty on which it would be useful to receive guidance from the High Court. We pay particular attention to the third issue, arguing that the provision in question should be interpreted so that it does not in fact give a court *any* discretion to refuse cancellation where the application for cancellation is based on the first cancellation ground at issue in this case.

Please cite this column as:

Robert Burrell and Michael Handler, 'Reputation, Confusion and Discretion in Australian Trade Mark Law: *Taylor v Killer Queen LLC*' (2025) 47 *Sydney Law Review* 21428: 1–15 <https://doi.org/10.30722/slr.21428>.

[*] Professor, Melbourne Law School, University of Melbourne, Victoria, Australia; Professor, Intellectual Property and Information Technology Law, Faculty of Law, University of Oxford, Oxfordshire, England. Email: robert.burrell@unimelb.edu.au; ORCID iD: https://orcid.org/0000-0002-4076-2582.

[†] Professor, School of Private and Commercial Law, Faculty of Law & Justice, UNSW Sydney, Australia. Email: m.handler@unsw.edu.au. ORCID iD: https://orcid.org/0000-0001-8980-5099.

I Introduction

Australian trade mark disputes are often characterised by 'byzantine complexity',[1] an epithet that can also be applied to the *Trade Marks Act 1995* (Cth) ('*TM Act*') itself.[2] In *Taylor v Killer Queen LLC*,[3] the High Court of Australia will be required to resolve uncertainties over the operation of some of the more complicated provisions of the *TM Act*, in the context of heavily contested litigation[4] involving a quite remarkable set of facts.

The dispute in question is between:

- Katie Taylor (the appellant), an Australian fashion designer whose birth name is Katie Perry; and
- the globally famous American entertainer Katy Perry (the stage name adopted by Katheryn Hudson in 2002) and a number of companies associated with Hudson, namely Killer Queen LLC, Kitty Purry Inc and Purrfect Ventures LLC (the respondents).

Taylor adopted the trade mark 'Katie Perry' in early 2007 and subsequently applied under the *TM Act* to register the word mark KATIE PERRY for 'clothing', with a priority date of 29 September 2008. Before that time, and especially from around June 2008, Hudson (as Katy Perry) had come to develop a reputation in Australia as a pop music artist and performer — notably, she had the number one single in the country from mid-July to late August 2008.[5] However, by Taylor's priority date Hudson had not sold any 'Katy Perry' branded clothes in Australia. Hudson threatened to, but did not, oppose the registration of Taylor's mark, and after the parties failed to reach a co-existence agreement, Taylor's mark was entered on the Register of Trade Marks in mid-2009. From the early 2010s, and during a period of time when Katy Perry's global fame grew rapidly, a merchandising company engaged by Hudson and her associated companies sold 'Katy Perry' branded clothing and merchandise in Australia. It was only in October 2019 that Taylor sued Hudson and her associated companies for various acts of infringement of the KATIE PERRY mark, dating back to 2014. The respondents cross-claimed for the cancellation of the registration of the KATIE PERRY mark on 20 December 2019.

In the Federal Court of Australia, the primary judge relevantly found that the merchandising company had infringed the registered KATIE PERRY mark on various occasions, with one of the three companies associated with Hudson being liable as a joint tortfeasor.[6] Importantly, her Honour also rejected the respondents'

---

1 *Fanatics, LLC v FanFirm Pty Ltd* [2025] FCAFC 87, [305] (Burley, Jackson and Downes JJ).
2 *Trade Marks Act 1995* (Cth) ('*TM Act*').
3 *Taylor v Killer Queen LLC* (High Court of Australia, Case No S49/2025).
4 *Killer Queen LLC v Taylor* (2024) 306 FCR 199, 206 [4] (Yates, Burley and Rofe JJ) ('*Killer Queen (FCAFC)*').
5 Australian Recording Industry Association ('ARIA'), 'All the ARIA Singles Chart #1s', *ARIA* (Web Page) <https://www.aria.com.au/charts/news/all-the-aria-singles-chart-1s>.
6 *Taylor v Killer Queen, LLC (No 5)* (2023) 172 IPR 1, 106–12 [390]–[407], 119–20 [443], 137 [516] (Markovic J) ('*Taylor (FCA)*').

arguments that the registration of KATIE PERRY should be cancelled.[7] On appeal, the Full Court of the Federal Court of Australia ('Full Federal Court') found that Hudson was also a joint tortfeasor in relation to the infringing conduct of the merchandising company.[8] Critically, however, it held that the KATIE PERRY registration was liable to be cancelled under both s 88(2)(a) and s 88(2)(c) of the *TM Act*.[9] The Full Federal Court also found that the discretion not to cancel the registration under s 89 of the of the *TM Act* was not enlivened,[10] and that even if it had been enlivened, it would not have exercised its discretion in Taylor's favour.[11] The effect of this was that Hudson and her associated company avoided liability for infringement.

The High Court has granted Taylor special leave to appeal on three issues that relate solely to the cancellation of the KATIE PERRY registration. The first issue relates to the cancellation ground in s 88(2)(a), which provides that an application for cancellation can be made on 'any of the grounds on which the registration of the trade mark could have been opposed under this Act'. One effect of this provision is to turn s 60 of the *TM Act* into a cancellation ground. Section 60 provides:

> The registration of a trade mark in respect of particular goods or services may be opposed on the ground that:
>
> (a) another trade mark had, before the priority date for the registration of the first-mentioned trade mark in respect of those goods or services, acquired a reputation in Australia; and
>
> (b) because of the reputation of that other trade mark, the use of the first-mentioned trade mark would be likely to deceive or cause confusion.

The ss 88(2)(a)/60 issue is, therefore, whether the Full Federal Court erred in finding that the registration of KATIE PERRY for 'clothing' should be cancelled because, before 29 September 2008, a 'Katy Perry' trade mark had acquired a reputation in Australia and, because of that reputation, the use of KATIE PERRY for 'clothing' would have been likely to have caused confusion at that time.

The second issue relates to the cancellation ground in s 88(2)(c). This provides for cancellation where, 'because of the circumstances applying at the time when the application for rectification is filed, the use of the trade mark is likely to deceive or cause confusion'. The application for cancellation was filed on 20 December 2019. The High Court will have to determine whether, at that time, Taylor's *actual* use or, in the alternative, the *notional normal and fair* use of KATIE PERRY would have caused confusion.

The third issue, which arises if at least one of the s 88 cancellation grounds is made out, relates to the interpretation of s 89(1). This subsection provides:

---

7 Ibid 187–91 [740]–[753] (on *TM Act* (n 2) ss 88(2)(a)/60), 195 [770]–[773] (on ss 88(2)(a)/42(b) and 43), 198–200 [783]–[796] (on s 88(2)(c)).

8 *Killer Queen (FCAFC)* (n 4) 230–2 [110]–[121] (Yates, Burley and Rofe JJ)

9 Ibid 258–63 [271]–[302] (on *TM Act* (n 2) ss 88(2)(a)/60), 267–8 [331]–[339] (on s 88(2)(c)).

10 Ibid 263–5 [303]–[317], 268 [340]–[342].

11 Ibid 265–6 [318]–[323], 269 [343]–[344].

> (1) The court may decide not to grant an application for rectification made:
>
> (a) under section 87; or
>
> (b) on the ground that the trade mark is liable to deceive or confuse (a ground on which its registration could have been opposed, see paragraph 88(2)(a)); or
>
> (c) on the ground referred to in paragraph 88(2)(c);
>
> if the registered owner of the trade mark satisfies the court that the ground relied on by the applicant has not arisen through any act or fault of the registered owner.[12]

If the High Court addresses s 89, the key questions it will need to consider are what constitutes an 'act or fault' on the part of the registered owner, and whether the Full Federal Court was wrong to find that either or both of the cancellation grounds arose through Taylor's acts or fault. If the High Court finds that the Full Federal Court erred, it will still need to consider whether the Full Federal Court committed a '*House v The King* error'[13] when it stated, in obiter dicta, that even if the discretion had been enlivened it would not have exercised it in Taylor's favour.[14]

Each of the above three issues will be discussed in Parts II to IV. Our view is that the Full Federal Court's finding that the KATIE PERRY registration should be cancelled under ss 88(2)(a)/60 is perhaps open to question, but that its conclusion that cancellation should be ordered under s 88(2)(c) is clearly correct. That said, we have no commitment to the outcome of the case. The cancellation grounds at issue turn on fact-intensive enquiries and we confine our comments to matters on which it would be useful to receive guidance from the High Court. In particular, we suggest that the first two issues present the High Court with a valuable opportunity to clarify the complex relationship between 'reputation' and 'confusion' in ss 60 and 88(2)(c) and, in relation to the latter ground, the nature of the registered owner's use that must be considered. It is the third issue, concerning the discretion under s 89, that is of greatest legal significance and on which the High Court's guidance would be particularly welcome. We argue that the Full Federal Court reached the right conclusion that the s 89 discretion was not enlivened in relation to either s 88 cancellation ground, due to the existence of a disqualifying act or fault on the part of Taylor. However, we suggest that in relation to the ss 88(2)(a)/60 ground, this is for a different reason than that on which the respondents seek to rely before the High Court.[15] In essence, we argue that, despite the text of s 89(1)(b), s 89 can *never* in fact be enlivened where the application for cancellation was made under s 60, or other opposition grounds such as s 43.[16] We explain this redundancy by reference to

---

12 See further *TM Act* (n 2) s 89(2); *Trade Marks Regulations 1995* (Cth) reg 8.2.

13 See *House v The King* (1936) 55 CLR 499, 504–5 (Dixon, Evatt and McTiernan JJ).

14 We do not seek to comment on whether the Full Federal Court's exercise of its discretion miscarried.

15 Killer Queen LLC et al, 'Respondents' Submissions', Submission in *Taylor v Killer Queen LLC*, High Court of Australia, Case No S49/2025, 27 June 2025, [41]–[44] ('Respondents' Submissions').

16 Section 43 of the *TM Act* (n 2) is a ground of opposition to registration by virtue of s 57, and provides:

> An application for the registration of a trade mark in respect of particular goods or services must be rejected if, because of some connotation that the trade mark or a sign contained in the trade mark has, the use of the trade mark in relation to those goods or services would be likely to deceive or cause confusion.

the convoluted history of s 89 and the High Court's decision in *Campomar Sociedad, Limitada v Nike International Ltd* ('*Campomar*').[17] In our view, the High Court in *Taylor v Killer Queen LLC* should not strain to interpret 'act or fault' in s 89 to give the section work to do in cases where cancellation is sought under s 88(2)(a). We also briefly discuss a counter-factual not considered by the Full Federal Court — that is, whether the s 89 discretion might be enlivened where only the cancellation ground under s 88(2)(c) is made out — and explain why a disqualifying act or fault can still be found in such circumstances.

II *Trade Marks Act 1995* (Cth) ss 88(2)(a)/60

Section 60 is unsatisfactory in a number of respects. We have written about the difficulties of this provision at length elsewhere,[18] but in outline the problems with this provision include:

(1) It is subject to a range of different interpretations. The provision is now understood to have a broad sphere of operation, in that there is no requirement that the reputation in the earlier mark be specific to the goods or services that are the subject of the application for registration.[19] This interpretation is, however, by no means inevitable. One might read the reference in s 60(a) to a mark having acquired a reputation 'in respect of *those* goods or services' (emphasis added) to be a reference back to the applicant's goods or services in the opening words of the section. The punctuation of s 60(a) tends against this reading, but it is an interpretation that remains open on the text.

(2) The standard of the reputation required under s 60(a) is not particularly exacting, being judged by reference to the market for the opponent's goods or services. This means, for example, that it can be enough for an opponent to demonstrate reputation in a geographically restricted area, at least in cases where the goods or services are generally provided at a local level.[20] Again, however, this reading is not inevitable. One might readily read the reference to a trade mark having acquired a reputation 'in Australia' as setting a high bar. In the European Union ('EU') it has been said that '[i]n practical terms, the threshold for establishing whether a trade mark is well known or enjoys reputation will usually be the same'.[21] This statement of EU law might admittedly be said to lack nuance, but our point here is simply that almost identical wording under the harmonised European regime has been held to

---

17 *Campomar Sociedad, Limitada v Nike International Ltd* (2000) 202 CLR 45 ('*Campomar*').

18 See, eg, Robert Burrell and Michael Handler, *Australian Trade Mark Law* (LexisNexis, 3rd ed, 2024) [7.2]–[7.11], [8.17]–[8.19]; Robert Burrell and Michael Handler, 'The Intersection between Registered and Unregistered Trade Marks' (2007) 35(3) *Federal Law Review* 375, 382–6.

19 See, eg, *Killer Queen (FCAFC)* (n 4) 258 [277] (Yates, Burley and Rofe JJ).

20 See *Toddler Kindy Gymbaroo Pty Ltd v Gymboree Pty Ltd* (2000) 100 FCR 166, 175–7 [26]–[31], 194 [94] (Moore J).

21 European Union Intellectual Property Office ('EUIPO'), *Trade Mark Guidelines* (2025) pt C s 5 [2.1.2], citing World Intellectual Property Organization ('WIPO'), *Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks*, WIPO Doc 833(E) (29 September 1999) art 2(2)(b)–(c) (on the threshold for 'well-known' marks) and *General Motors Corporation v Yplon SA* (C-375/97) [1999] ECR I-5421, I-5446 [26] (on the threshold for marks with a reputation).

set a much higher bar and does not extend to protect the sort of local reputation that has been held to be sufficient for the purposes of s 60.

(3) In more conceptual terms, the role of s 60 seems confused. It is a provision that doubles to allow owners of earlier unregistered marks to keep later conflicting marks off the Register and owners of well-known (usually registered) marks to prevent registration of similar marks for unrelated goods or services. Neither of these aims is controversial. On the contrary, it is clearly desirable that owners of earlier marks that would be entitled to an injunction to prevent a later mark from being used in the marketplace ought to be able to prevent the later mark from being registered. As Learned Hand J put it in 1928, '[i]t would plainly be a fatuity to decree the registration of a mark whose use another could at once prevent'.[22] The problem is that s 60 has a sphere of operation that overlaps with, but is by no means coterminous with, either passing off / misleading or deceptive conduct under the *Australian Consumer Law*[23] or s 120(3) of the *TM Act*, which provides for infringement of a 'well-known' registered trade mark. Other jurisdictions, in contrast, have ensured that the legal standards that apply at the opposition stage adhere as closely as possible to those that apply in enforcement proceedings,[24] bearing in mind that, even then, differences in the sorts of evidence that are likely to be available mean that decisions will map imperfectly.

We raise these points not out of concern with where the law stands. On the contrary, it seems to us that tribunals have generally done a good job of making sense of an unsatisfactory provision.

One should, however, be unsurprised that a strange and unfortunately worded provision can cause real difficulties in application. This is particularly true in cases like the one at hand, where courts are trying to work out how consumers might have responded — at a point many years in the past — to the notional use of a mark across the full range of specified goods or services. Understanding this complexity helps explain where the primary judge erred. In particular, the primary judge downplayed the 'notional use' aspect and focused too much on elements of Taylor's actual use of her mark, including placing too much weight on the absence of confusion at and after the priority date, since that was very much the product of Taylor's limited use on a narrow category of clothing (specifically, luxury loungewear).[25] The Full Federal Court was therefore right to step in and form its own view as to the likelihood of confusion at the priority date. It also seems clear beyond question that Hudson enjoyed a reputation as a pop music artist and performer at that date and, as the Full Federal Court found, this was a reputation in 'Katy Perry' *as a trade mark* in relation to a limited range of entertainment services[26] — anyone booking tickets to see Katy

22 *Yale Electric Corporation v Robertson*, 26 F 2d 972, 974 (2nd Cir, 1928).

23 *Competition and Consumer Act 2010* (Cth) sch 2 ('*Australian Consumer Law*') s 18(1).

24 See, eg, *Trade Marks Act 1994* (UK) ss 5(3)–(4), 10(3).

25 *Taylor (FCA)* (n 6) 188 [743], 190–1 [751]–[752] (Markovic J). See also at 28 [112] for the description of Taylor's clothes as 'luxury loungewear'.

26 *Killer Queen (FCAFC)* (n 4) 260 [289] (Yates, Burley and Rofe JJ). The Full Federal Court referred to the 'Katy Perry' mark enjoying a reputation in relation to 'entertainment services', but this is to

Perry in concert at the relevant date would have been expecting to enjoy services delivered by Hudson and not some other person.

The question is therefore how far reputation in a mark for a limited range of entertainment services translates into a likelihood of confusion where a close variant of that mark is used on clothing in a normal and fair manner.[27] This might be characterised as a purely factual question, but this would be to downplay the extent to which findings as to likelihood of confusion are infused by legal (and hence normative) standards. What seems inarguable is that, at the priority date, the hypothetical consumer seeing 'Katie Perry' displayed prominently on the sort of merchandise authorised by pop stars (t-shirts, baseball caps, etc) would have been given cause to wonder whether it had been produced under licence from Hudson, given the reputation of the 'Katy Perry' mark. It is therefore perfectly possible to imagine scenarios in which Taylor could have caused confusion in September 2008, such as placing 'Katie Perry' prominently on the front of a t-shirt. We also know that there was (and is) a practice of using trade marks for clothing in this way, a trend that has been variously in and out of fashion and that has been complicating the use as a trade mark enquiry since the late 1980s.[28] It is, however, much more of a leap to say that other, more typical, uses of KATIE PERRY as a trade mark for clothing (for example, on the label of a pair of travel pants) would have given rise to a real, tangible danger of confusion in September 2008. In reaching the view that such a risk was likely, the Full Federal Court was apparently persuaded by evidence that a small number of very famous performers move from selling merchandise to establishing their own clothing labels.[29] But at the priority date, Hudson's fame was of a much lower order of magnitude.

Consequently, one question for the High Court is how the assessment of use of a mark in a 'normal *and* fair manner' across the full breadth of the specification is to be carried out. There has been surprisingly limited analysis of what 'normal and fair' use means,[30] including whether the phrase should be read disjunctively. The

---

overstate the position. At the relevant date, Hudson enjoyed a reputation as a pop singer and not, say, as a children's magician or performer of Kabuki theatre. One problem with the Full Federal Court's decision is that it at times conflates the questions of the scope of reputation with the likelihood of confusion. This conflation can be seen in the finding at 260–1 [290]–[291] that Taylor also had a reputation in clothes, which is better understood as going to the issue under s 60(b) of whether Taylor's use would have caused confusion given the relationship between the relevant subset of entertainment services (in which Hudson had a reputation) and clothing (Taylor's specified goods).

27 Taylor has sought to argue that the Full Federal Court erred in placing weight on the marks being 'deceptively similar' in finding s 60 to have been made out: Katie Taylor, 'Appellant's Submissions', Submission in *Taylor v Killer Queen LLC*, High Court of Australia, Case No S49/2025, 30 May 2025, [43]–[45] ('Appellant's Submissions'). However, the close similarity between the marks is clearly a relevant (albeit not determinative) consideration under s 60(b) in assessing whether the use of the later mark would have caused confusion.

28 *Unidoor Ltd v Marks and Spencer plc* [1988] RPC 275, 278 (Whitford J) ('*Unidoor*') (the law must take cognisance of the practice of placing clothing marks 'boldly on the article in question').

29 *Killer Queen (FCAFC)* (n 4) 260–1 [291] (Yates, Burley and Rofe JJ).

30 The language of 'normal and fair' can be traced back to *Re Smith Hayden and Co Ltd's Application* (1946) 63 RPC 97, 101 (Evershed J). It has been generally adopted by Australian tribunals since at least *Gardenia Overseas Pte Ltd v The Garden Co Ltd* (1994) 29 IPR 485, 493 (Lindgren J) ('notional normal and fair use'), but with little analysis of what might fall outside the scope of what is 'normal and fair'.

High Court might need to consider whether it covers use that, although plausible and potentially even able to be described as 'normal', would not be undertaken by any bona fide trader keen to avoid confusion and build their own brand.[31] It might take the view that the Full Federal Court, in reaching its conclusion on the link between reputation and confusion, conflated the sale of merchandise bearing the name of a pop star with conduct that more obviously involves trade mark use but that would only be undertaken by a pop star with the sort of well-developed reputation that Hudson did not have at the relevant time. The High Court might want to signal that lower courts need to be careful in too readily assuming that mere fame as an entertainer (which in many cases will be ephemeral) gives a broad right to prevent third party use of that name or a close variant as a trade mark on 'clothing', let alone on other goods that are further removed from traditional merchandising activity.

III *Trade Marks Act 1995* (Cth) s 88(2)(c)

Even if the High Court finds that cancellation under ss 88(2)(a)/60 is not made out, this does not determine the question of whether the separate ground under s 88(2)(c) can be established. Subsection 88(2)(c) contemplates the possibility that the use of a mark that was not problematic at its priority date *becomes* confusing after the registration of that mark. This might occur where a situation is allowed to develop post-registration where another party comes to develop such a reputation in a similar mark that any use by the registered owner of its mark would cause confusion — this is, in essence, the scenario that was considered by the High Court in *New South Wales Dairy Corporation v Murray Goulburn Co-operative Co Ltd* ('*Moove*') under former legislation.[32]

A critical factor in the case at hand is that at the time the rectification proceedings were filed in December 2019, the reputation of the 'Katy Perry' mark in Australia had grown enormously from September 2008, including in relation to clothing.[33] This factor, coupled with the close resemblance between the 'Katy Perry' and KATIE PERRY marks, would seem to give rise to a strong case that any use of the latter mark on 'clothing' as at December 2019 would have given consumers cause to wonder about a commercial connection with Hudson.

---

[31] In a similar vein, in relation to s 12 of the *Trade Marks Act 1938* (UK) Blanco White and Jacob said that 'it is convenient to consider the applicant's mark as used upon goods in a plain get-up; not one chosen to be easily confused with the opponent's, nor one specially chosen to distinguish from it': TA Blanco White and Robin Jacob, *Kerly's Law of Trade Marks and Trade Names* (Sweet & Maxwell, 10th ed, 1972) 175. They also said that where there *is* evidence of how the applicant intends to use its mark where this use would increase the risk of confusion, this evidence can be relied on 'to prevent such use being dismissed as unfair or fanciful' (at 175). We might add that, on our reading of *Taylor (FCA)* (n 6), there was no finding of fact that Taylor used her mark 'boldly on [any] article' (*Unidoor* (n 28) 278) after the time at which Hudson's reputation became firmly established. The only evidence of 'bold' use of the 'Katie Perry' mark on the front of a t-shirt was from a photoshoot in mid-July 2008 (see *Taylor (FCA)* (n 6) 29–30 [116] (Markovic J)), at a time Hudson's reputation in the 'Katy Perry' mark in Australia was first emerging (see at 12 [33]–[34], 17–19 [62]–[72], 182 [723(1)–(3)]).

[32] *New South Wales Dairy Corporation v Murray Goulburn Co-operative Co Ltd* (1990) 171 CLR 363 ('*Moove*').

[33] In addition to continued merchandising activity, Hudson launched 'Katy Perry' shoes in 2018: *Taylor (FCA)* (n 6) 66–7 [241], 198 [785] (Markovic J).

In arguing that the s 88(2)(c) ground is not made out, Taylor suggests that the provision is to be interpreted by reference to the registered owner's *actual* use of its mark at the time of the rectification proceedings, rather than the notional 'normal and fair use' it might have made.[34] This is contrary to the position adopted by the primary judge,[35] although the Full Federal Court did not form a settled view as to whether the provision needed to be interpreted this way.[36] Taylor points to the fact that s 88(2)(c) looks to the 'circumstances' applying at the relevant time,[37] and asks whether the use 'is likely' to cause confusion, rather than 'would be likely' (which is the phrase used in s 60).[38] Taylor argues that the limited use of her mark on a range of clothes over a 10-year period (described at trial as 'luxury loungewear and other women's clothes'[39]), without any evidence of actual confusion, meant that the s 88(2)(c) ground was not made out.[40] In the alternative, Taylor argues that even if the test is based on notional use, the strength of the reputation of the 'Katy Perry' mark by late 2019 *reduced* any likelihood of confusion, with the effect being that notional consumers of clothes provided under the KATIE PERRY mark would notice the difference in spelling between the marks and not be confused.[41]

Taylor's novel reading of s 88(2)(c) as turning on the registered owner's actual use is open, and the High Court will have a valuable opportunity to resolve the ambiguity around how the subsection is to be interpreted. In our view, there are good reasons for rejecting Taylor's reading, and for affirming the Full Federal Court's reasoning and conclusion. It has long been accepted that when assessing whether a mark should be entered onto or remain on the Register attention needs to be paid to the scope of the statutory monopoly. The *TM Act* confers a right to use a mark in relation to the goods and/or services in respect of which it is registered,[42] and this right serves as a defence to an action for infringement[43] and a partial defence to any claim brought in passing off.[44] The cancellation ground has to be tied to the scope of the monopoly that the owner is claiming. Any other approach would also increase the evidential burden on the party seeking cancellation, and might give rise to serial litigation and difficult questions of claim preclusion as the trade mark owner's use shifts over time. Here it should also be remembered that Taylor had the opportunity to narrow her specification to limit her mark to the goods she actually makes and sells, but declined to do so, presumably for strategic reasons.

---

34 Appellant's Submissions (n 27) [55].
35 *Taylor (FCA)* (n 6) 199 [787].
36 *Killer Queen (FCAFC)* (n 4) 268 [339] (Yates, Burley and Rofe JJ) (but finding against Taylor under both interpretations). For other decisions in which the notional 'normal and fair use' approach has been taken in interpreting s 88(2)(c), see *Dunlop Aircraft Tyres Ltd v Goodyear Tire & Rubber Co* (2018) 262 FCR 76, 114 [180] (Nicholas J); *Firstmac Ltd v Zip Co Ltd* [2023] FCA 540, [377]–[378] (Markovic J), affirmed in *Firstmac Ltd v Zip Co Ltd* [2025] FCAFC 30, [165] (Katzmann and Bromwich JJ, Perram J agreeing at [1]) ('*Firstmac (FCAFC)*').
37 Appellant's Submissions (n 27) [50].
38 Ibid [51].
39 *Taylor (FCA)* (n 6) 198 [781] (Markovic J).
40 Appellant's Submissions (n 27) [56]–[57].
41 Ibid [58]. See also *Taylor (FCA)* (n 6) 199–200 [789]–[795] (Markovic J).
42 *TM Act* (n 2) s 20(1).
43 Ibid s 122(1)(e).
44 Ibid s 230(2).

Taylor's alternative argument is still less convincing. There are indeed occasions when the fame of a mark is such that confusion becomes less, rather than more, likely. This is not because there is any separate legal rule to this effect, rather it is a necessary corollary of how we assess what consumers are likely to (mis)remember. When one is dealing with a famous mark — such as, say, MALTESERS for chocolate products — the memory of the mark is likely to be relatively fixed in the minds of consumers. Consequently, no ordinary consumer is likely to be confused by the use of MALTITOS for identical goods.[45] It has, however, never been accepted that consumer recollection of a famous mark is likely to be so fixed that use of an aurally identical mark with a minor variation in spelling is not capable of causing confusion. MALTITOS for chocolate products may be acceptable, MALTEASERS is not.

IV *Trade Marks Act 1995* (Cth) s 89

If the High Court finds that either or both of the s 88 cancellation grounds are made out, it will need to consider the third issue on appeal. This is whether the Full Federal Court erred in finding that s 89 was not enlivened because the cancellation grounds arose due to Taylor's 'act or fault', such that it had no discretion not to grant the application for cancellation.

Section 89 is a complex provision 'aimed at dealing with some well-known difficulties that were encountered in the construction of relevant provisions of the [*Trade Marks Act 1955* (Cth)]' ('*1955 Act*').[46] It applies in three scenarios. It is relatively easy to see what role s 89 might play in two of these scenarios:

- under s 89(1)(a), when cancellation is sought under s 87 (which primarily deals with situations where the registered mark became generic after its registration date); and
- under s 89(1)(c), when cancellation is sought under s 88(2)(c) (which contemplates situations where the registered owner's use of its mark became confusing, post-registration).

In these two scenarios, it would be harsh to order cancellation where the mark became generic or confusing through no act or fault of the registered owner. But it is much less obvious how s 89 has a role to play in the third scenario:

- under s 89(1)(b), where cancellation is sought under ss 88(2)(a)/60.

Here, the cancellation ground has arisen not because of a post-registration set of circumstances, but because there was a conflict with an earlier mark at the registered owner's priority date. In such circumstances, it is unclear how it can be said that 'the *ground* relied on … has not arisen through any *act or fault* of the registered owner',[47] since it would seem to be the registered owner's very act of applying to register that

---

45 *Delfi Chocolate Manufacturing SA v Mars Australia Pty Ltd* (2015) 115 IPR 82, 90 [28]–[29] (Jessup J).
46 *Anchorage Capital Partners Pty Ltd v ACPA Pty Ltd* (2018) 259 FCR 514, 547 [142] (Nicholas, Yates and Beach JJ).
47 *TM Act* (n 2) s 89(1) (emphasis added).

is the 'act' that gave rise to the conflict and thus the resulting cancellation ground. This gives rise to a further, uncomfortable question: is it the case that the discretion can *never* be enlivened when the cancellation ground turns on s 60 (or, for that matter, s 43), notwithstanding s 89(1)(b)?

The Full Federal Court found that the disentitling 'act' for the purposes of s 89 was Taylor's act of applying for registration with knowledge of Hudson, her reputation and her mark, in circumstances where Taylor knew of the practice of popular entertainers licensing their marks for use on merchandise.[48] On appeal, the respondents have sought to defend this reasoning.[49] However, the difficulty with this reasoning is that the test under s 89 looks to whether the cancellation *ground* has not arisen through any 'act or fault' of the registered owner. Taylor's knowledge was irrelevant to whether the s 60 ground (that is, whether there was a likelihood of confusion) was made out. This point has been recognised by Taylor,[50] although we would disagree with her suggestion that 'something more' than the act of filing for registration is needed for there to be a relevant 'act or fault',[51] since that suggestion suffers from exactly the same problem as the Full Federal Court's decision in looking beyond the act that gave rise to the cancellation ground.

Obviously, statutes should be interpreted to avoid redundancy whenever possible. However, in this case, when the complex history of what s 89 was designed to achieve, together with the previously unacknowledged impact of the High Court's decision in *Campomar*, are properly understood, our view is that s 89 contains a redundancy.

To explain, in 1992 the Working Party appointed by the Government to consider potential reform of Australia's trade mark laws recommended various new opposition grounds, including one for 'inherently deceptive' signs and another in a form similar to what would become s 60 of the *TM Act*.[52] The Working Party also recommended two separate rectification grounds: the first based on the opposition grounds;[53] and the second applying where the owner's use was likely to deceive at the time of the rectification proceedings.[54] Only the latter ground was recommended to be made subject to a 'fault' proviso. This was an attempt to deal with uncertainties arising out of the *Moove* decision.[55] In that case, a majority of the High Court held that a mark could be removed from the Register on the basis of confusion that had arisen post-registration, but only where the owner had engaged in 'blameworthy

48 *Killer Queen (FCAFC)* (n 4) 265 [317] (Yates, Burley and Rofe JJ).
49 Respondents' Submissions (n 15) [42]–[44].
50 Appellant's Submissions (n 27) [65].
51 Ibid [64].
52 Working Party to Review the Trade Marks Legislation, *Recommended Changes to the Australian Trade Marks Legislation* (Australian Government Publishing Service, 1992) 45 (Recommendation 6A(3)), 47 (Recommendation 8A(6)).
53 Ibid 95 (Recommendation 36A(1)).
54 Ibid 96 (Recommendation 36A(5)).
55 *Moove* (n 32).

conduct', with different understandings being put forward as to what that might involve.[56]

The Working Party's recommendations were not adopted in the short-lived and never-commenced *Trade Marks Act 1994* (Cth) ('*1994 Act*').[57] Understanding the rectification provisions in the *1994 Act* provides the key to understanding s 89 of the *TM Act*.

Subsection 89(2)(a) of the *1994 Act* contained a single rectification ground based on the opposition grounds — there was no separate ground based on the owner's use being likely to deceive or cause confusion at the time of the rectification proceedings. Importantly, however, the effect of s 89(3)(b) was to make the s 89(2)(a) rectification ground, to the extent it was based on an opposition ground 'that the trade mark is liable to deceive or confuse', subject to a 'no act or fault' proviso in s 89(3). To understand why this approach was taken, it is worth saying more about the rectification ground in issue in *Moove*. That case required the High Court to consider whether, in rectification proceedings, one of the *opposition* grounds (the 'use would be likely to cause confusion' ground in s 28(a) of the *1955 Act*) could be interpreted not only by reference to the situation at the mark's priority date, but also by reference to whether the use would cause confusion at the time of the rectification proceedings. A majority of the Court held this to be the case, subject to the 'blameworthy conduct' doctrine.[58] Parliament's expectation in enacting s 89(2)(a) of the *1994 Act* must have been that it would be read in light of *Moove*. That is, s 89(2)(a) was designed to enable an applicant for rectification to argue that an opposition ground would have been made out *either* at the priority date, *or* on the basis of the mark being likely to deceive or cause confusion at the time of the rectification proceedings due to circumstances arising post-registration. Given the latter possibility, it made sense to make s 89(2)(a) subject to a 'no act or fault' proviso.

However, a difficulty with what was set up in the *1994 Act* is that it did not contain an equivalent of s 28(a) of the *1955 Act* — there was no ground of opposition applying simply where the use of the mark would be likely to cause confusion. The closest such ground in the *1994 Act* was s 42(2), which provided a ground of opposition based on the use of the mark being

> likely to deceive or cause confusion regarding:
>
> (a) the nature, quality, origin, intended purpose, or some other characteristic, of the goods or services; or
>
> (b) any connection or relationship that they may have with any particular person.

---

56 Ibid 375–84, 387–8 (Mason CJ), 388–93 (Brennan J), 401–14 (Dawson and Toohey JJ). See also at 399–400 (Deane J), 414 (Gaudron J) (either not accepting or doubting that a mark could be removed from the Register on the basis of post-registration confusion, but agreeing in the alternative with Dawson and Toohey JJ's understanding of 'blameworthy conduct').

57 Prior to its commencement, the *Trade Marks Act 1994* (Cth) was repealed: *TM Act* (n 2) s 5.

58 See above n 56.

Such a ground could have had a continuing operation, like s 28(a) of the *1955 Act*, in rectification proceedings. It is, however, worth noting that the opposition ground in s 61 of the *1994 Act* (the equivalent to s 60 of the *TM Act*) could *never* have been interpreted to cover 'post-registration confusion' in a rectification action. Unlike s 28(a) of the *1955 Act*, s 61 of the *1994 Act* explicitly turned on the existence of an earlier mark having a reputation at the *filing date* of the later mark, and on confusion by the use of the later mark resulting from that reputation.

The key point to note from this analysis is that there was an internal logic to the treatment of the rectification grounds in the *1994 Act*. Given that ss 89(2)(a)/42(2) of the *1994 Act* could have been raised as a rectification ground in relation to some types of use that were not confusing at the priority date but had come to cause confusion at the time of the rectification proceedings, the s 89(3)(b) 'no act or fault' proviso had some work to do in this scenario — albeit not in a case where the rectification ground was brought under ss 89(2)(a)/61.

This is vital in understanding how we ended up with s 89(1)(b) of the *TM Act* and, critically, why it might have been redundant from the very commencement of the *TM Act* or, in any event, why it became entirely redundant after *Campomar* in 2000. Sections 88(2)(a) and 89(1)(b) of the *TM Act* were simply transpositions of ss 89(2)(a) and 89(3)(b) of the *1994 Act*. However, the *TM Act* arguably adopted a different understanding of rectification based on the opposition grounds. The adoption of the new, separate rectification ground in s 88(2)(c) of the *TM Act*, which explicitly refers to use causing deception or confusion at the time of the rectification proceedings, strongly suggests that, for the purposes of s 88(2)(a), the opposition grounds were to be interpreted as applying *only* at the owner's filing/priority date, and that they were not intended to have a continuing operation.[59] This meant that there was no longer any need for an 'act or fault' proviso to modify s 88(2)(a). On this reading, s 89(1)(b) of the *TM Act* was an unnecessary hangover from the *1994 Act*, and should be seen as nothing more than an unfortunate drafting error.

Even if s 88(2)(a) of the *TM Act* had been drafted on the assumption that, at the very least, the 'confusing connotation' ground of opposition in s 43 could have a continuing operation in rectification proceedings, based on the majority approach in *Moove* (such that s 89(1)(b) might have had some limited work to do), that reading of s 88(2)(a) became unsustainable after *Campomar*. In that case, the High Court unanimously rejected the majority's approach in *Moove*, holding that s 28(a) of the *1955 Act* did *not* have a continuing operation.[60] This also removed any suggestion that s 43 of the *TM Act* could have a continuing operation.[61] In other words, even if s 89(1)(b) might have had some work to do in the first few years of the *TM Act* in cases where an applicant for cancellation sought to rely on ss 88(2)(a)/s 43, pointing

---

59 This reading is further supported by the original wording of s 88(2)(c) of the *TM Act* (n 2), which before its amendment by the *Trade Marks Amendment Act 2006* (Cth) applied where the use of the registered mark was likely to deceive or cause confusion 'for a reason other than one for which … the application for the registration of the trade mark could have been rejected under section 43 or 44; or … the registration of the trade mark could have been opposed under section 60'.

60 *Campomar* (n 17) 76–7 [72]–[74] (Gleeson CJ, Gaudron, McHugh, Gummow, Kirby, Hayne and Callinan JJ).

61 See *McCorquodale v Masterson* (2004) 63 IPR 582, 588 [23] (Kenny J).

to confusion arising at the time of the rectification proceedings, s 89(1)(b) became entirely redundant after *Campomar*.

Consequently, there are sound reasons for the High Court to find in *Taylor v Killer Queen LLC* that s 89 can *never* be enlivened where the application for cancellation is made under ss 88(2)(a)/60 (or s 43). Finding otherwise will involve introducing a degree of incoherence into the legislative regime, in that courts will be required to look for 'acts or fault' that have no logical bearing on whether the cancellation ground in question applies or whether confusion would be likely to result from the use of the mark.

We recognise that there is an unfortunate consequence of our reading. Whereas a registered owner who finds that its registration is liable for cancellation under s 88(2)(a) on opposition grounds other than those falling within the scope of s 89(1)(b) (for example, for lack of distinctiveness under s 41) can seek to persuade the court to exercise its 'at large' discretion under s 88(1) not to order the cancellation of the registration, this opportunity is not open to registered owners where the opposition grounds fall within the scope of s 89(1)(b) (for example, under ss 43 and 60). To our mind, this demonstrates that s 89 needs to be addressed by the legislature, with the simplest solution being to repeal s 89(1)(b). This approach is preferable to one that stretches the meaning of 'act or fault' in s 89 beyond breaking point.

Finally, there remains the separate issue of whether the Full Federal Court was correct to find that s 89 was not enlivened in relation to the application for cancellation under s 88(2)(c). This will be critical if the High Court finds that the ss 88(2)(a)/60 cancellation ground is not made out, but that the s 88(2)(c) ground is made out on the basis that any confusion arose only in light of post-registration circumstances. Our view is that the Full Federal Court was correct on this issue, although its reasoning might have been clearer. The Court identified two post-priority date factors as relevant to whether it would have exercised its discretion not to order the cancellation of the KATIE PERRY registration had s 89 been enlivened, namely: that Taylor at times sought to align herself with Hudson to obtain a commercial benefit;[62] and that Taylor rejected a co-existence agreement.[63] As the respondents have submitted,[64] these factors can be more relevantly characterised as being 'acts' or 'fault' that contributed to the s 88(2)(c) cancellation ground, such that s 89 was not in fact enlivened. More generally, the fact that Taylor did not take action to enforce her rights against the respondents for more than 10 years, although understandable for financial reasons, must be considered to be a 'fault' that gave rise to the cancellation ground.[65] If the High Court is required to interpret 'act or fault' in s 89 in this scenario, we would hope that it takes a broader approach than looking for what can be characterised as 'blameworthy conduct' as this concept was understood by courts interpreting differently-worded former legislation.[66]

---

62 *Killer Queen (FCAFC)* (n 4) 265 [319] (Yates, Burley and Rofe JJ).
63 Ibid 265–6 [322].
64 Respondents' Submissions (n 15) [45].
65 See Burrell and Handler, *Australian Trade Mark Law* (n 18) [9.22].
66 Ibid, quoted in *Firstmac (FCAFC)* (n 36) [174] (Katzmann and Bromwich JJ, Perram J agreeing at [1]).

V Conclusion

The litigation between Taylor and Hudson and her associated companies has given rise to a range of complex questions and issues under the *TM Act*, not all of which are before the High Court. Some of these are matters on which guidance from the High Court would be welcome in a future case, such as: how to interpret the specification of goods and services in respect of which a mark is registered;[67] who can rely on the 'own name' defence to infringement;[68] and what is the meaning of 'good faith' in the defences to infringement.[69] For other issues, reform of the *TM Act* may be needed, such as whether the prevailing interpretation of the defence to infringement in s 122(1)(fa), which applies where the prima face infringer would be able to obtain registration of its mark in its own name, renders it largely nugatory.[70] Notwithstanding this, *Taylor v Killer Queen LLC* will still provide the High Court with a rare and valuable opportunity to consider, and hopefully resolve, important questions going to the three fundamental concepts of reputation, confusion and discretion, as they arise under the *TM Act*.

[67] On some of the problems with the prevailing Australian approach, see Robert Burrell and Michael Handler, 'Who Reads the Trade Marks Register?' (2025) 45(2) *Oxford Journal of Legal Studies* 272.
[68] See Burrell and Handler, *Australian Trade Mark Law* (n 18) [12.4]–[12.5].
[69] Ibid [12.7].
[70] Ibid [12.13]–[12.14].

Case Note

Cessnock City Council v 123 259 932 Pty Ltd: Clarifying Wasted Expenditure, A Facilitation of Proof

Sofia Mendes*

Abstract

In *Cessnock City Council v 123 259 932 Pty Ltd* ('*Cessnock*'), the High Court of Australia provided long-awaited clarity regarding the method of proving damages for wasted expenditure in an action for breach of contract. The plurality did so by presenting a new framework for assessing such damages where a wrongdoer's breach causes or increases uncertainty regarding the position the plaintiff would have been in 'but for' the breach — a principle of facilitation of proof. This case note examines the High Court's treatment of wasted expenditure, analysing the method of proving wasted expenditure and considering the application of *Hadley v Baxendale*. Further, *Cessnock* prompts consideration of how damages should be assessed, and why they are awarded. I argue that while the decision appears to provide an elegant solution to difficulties faced by plaintiffs in proving damages where a defendant causes or increases uncertainty as regards the plaintiff's loss, the solution is impractical and inconsistent with earlier authority.

I Introduction

The ruling principle on the recovery of compensatory damages for consequential loss following a breach of contract is that 'where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed'.[1] But how can loss be compensated, and damages assessed, where it is uncertain what position the plaintiff would have been in had the contract been performed? In *Cessnock City*

Please cite this article as:

Sofia Mendes, '*Cessnock City Council v 123 259 932 Pty Ltd*: Clarifying Wasted Expenditure, A Facilitation of Proof' (2025) 47 *Sydney Law Review* 21399:1–18 <https://doi.org/10.30722/slr.21399>.

* BEc/BAdvStudies (Hons I) (*Syd*), LLB (Hons I) (*Syd*); Researcher to the Equity Division, Supreme Court of New South Wales. ORCID iD: https://orcid.org/0009-0004-3121-2687.
Thank you to Professor Kimberlee Weatherall, Associate Professor David Winterton and Dr Adam Waldman for their helpful feedback and guidance in the preparation of this case note.
A version of this case note was awarded the 2024 Peter Paterson Prize for the best Bachelor of Laws or Juris Doctor student contribution to the Sydney Law Review unit of study.

1 *Robinson v Harman* (1848) 1 Ex 850; 154 ER 363, 365 (Parke B) ('*Robinson v Harman*'). The High Court of Australia affirmed this proposition in *Cessnock City Council v 123 259 932 Pty Ltd* (2024) 98 ALJR 719, 724 [6] (Gageler CJ), 732 [48] (Gordon J), 735 [60] (Edelman, Steward, Gleeson and Beech-Jones JJ), 759 [190] (Jagot J) ('*Cessnock*').

Council v 123 259 932 Pty Ltd ('*Cessnock*'),[2] the High Court of Australia considered that question in the context of a claim for 'wasted' expenditure.

The High Court considered how damages for breach of contract are assessed where a plaintiff has incurred expenditure in reliance on the expectation that the defendant will perform its contractual obligations, but the defendant fails to perform its obligations rendering the expenditure 'wasted'. In four separate judgments (the joint judgment of Edelman, Steward, Gleeson and Beech-Jones JJ and the separate judgments of Gageler CJ, Gordon and Jagot JJ) the High Court unanimously dismissed the Council's appeal, allowing the plaintiff to recover expenditure incurred and 'wasted' due to the Council's breach of contract. Yet, a divide in reasoning appears, with the disagreement reflecting a difference in the underlying rationale for awarding damages for wasted expenditure and the method of calculating loss.

This case note examines the High Court's decision in *Cessnock* as regards the Court's introduction of a principle of facilitation of proof for proving loss in instances of wasted expenditure, but also more broadly where a wrongdoer's breach causes (or increases pre-existing) uncertainty as to loss. In Part II I trace the High Court's jurisprudence on wasted expenditure prior to *Cessnock*. In Part III I set out the case's background, outlining the decision at trial and before the New South Wales ('NSW') Court of Appeal. In Part IV I summarise the High Court's approach to the recovery of wasted expenditure, beginning with its characterisation, then the method of proof, before turning to a consideration of remoteness. I argue that the plurality presented a new method for facilitating the proving of wasted expenditure, which has a low threshold for enlivenment and appears to impose a fluctuating burden of proof that is impractical and inconsistent with precedent. In Part V I then discuss the fundamental divide that has arisen over how loss ought to be calculated. Underlying this divide is the question of why damages are awarded. I argue that despite the division, the ruling principle in *Robinson v Harman* — to place plaintiffs in the position they would have been in but for the breach — remains the lodestar.

II The State of the Law Prior to *Cessnock*

Until *Cessnock*, the leading High Court case on the assessment of damages in the context of wasted expenditure was *Commonwealth v Amann Aviation Pty Ltd* ('*Amann*').[3] However, the six separate judgments in *Amann* left the law on damages claimed for wasted expenditure in a state of disarray.[4] To understand how *Cessnock* attempts to clarify the confusion, it is important to understand the position of the Court to date. Cases like *McRae v Commonwealth Disposals Commission* ('*McRae*')[5] and *Amann* are frequently discussed in this context, however, cases like

---

2 *Cessnock* (n 1).

3 *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64 ('*Amann*').

4 Andrew Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs* (Oxford University Press, 2019) 80; GH Treitel, 'Damages for Breach of Contract in the High Court of Australia' (1992) 108 (April) *Law Quarterly Review* 226, 234.

5 *McRae v Commonwealth Disposals Commission* (1951) 84 CLR 377 ('*McRae*'). See also Gerald Ng, 'The Onus of Proof in a Claim for Reliance Damages for Breach of Contract' (2006) 22(2) *Journal of Contract Law* 139, 150–4.

Carr v JA Berriman Pty Ltd ('*JA Berriman*')[6] and *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* ('*TC Industrial*')[7] are not so well understood. This section traces those decisions, referred to by the Court in *Cessnock*, to begin to understand the rationale behind the Court's recent reasoning and illustrate circumstances where damages for wasted expenditure have been recognised.

Damages for wasted expenditure have been recognised by the High Court of Australia since at least 1951, when Dixon and Fullagar JJ in *McRae* accepted that where a breach of contract makes it 'impossible'[8] to assess the value of what was promised and what was received, 'damages are to be measured by reference to expenditure incurred and wasted in reliance' on the promise,[9] with the burden 'thrown' to the defendant to prove that, if there was no breach, the plaintiff would not have recouped their expenditure.[10]

Two years later, the Court once again recognised the availability of damages for wasted expenditure, this time alluding to its availability as a unique head of damage. In *JA Berriman*, a builder entered a contract to build on land owned by T Carr & Co. However, Carr failed to excavate and deliver the site, preventing the builder from commencing work. In the meantime, the builder had incurred expenditure to employ labourers in anticipation of commencing building works. Fullagar J, with whom Dixon CJ, Williams, Webb and Kitto JJ agreed, found that the builder validly rescinded the contract and was therefore entitled to damages.[11] His Honour affirmed the assessment of damages awarded by Owen J at first instance, which included three heads of damage, with 'expenditure incurred and wasted' treated as a unique head.[12] Although Fullagar J appears to treat wasted expenditure as a unique head of damage, it is important to recognise that his Honour did not consider the issue because 'the amount awarded under this head was not challenged'.[13]

A decade on, Kitto, Windeyer and Owen JJ in *TC Industrial* expressed a preference for a 'single calculation' of damages, rejecting the notion of the necessity of making an election between wasted expenditure and loss of profits.[14] In *TC Industrial*, a buyer purchased a defective stone crushing machine and sought to recover damages for wasted expenditure and loss of profit from the seller. The buyer purchased the machine to fulfil a government contract to supply a large quantity of crushed stone to the Commonwealth. The machine did not meet the required

---

6 *Carr v JA Berriman Pty Ltd* (1953) 89 CLR 327 ('*JA Berriman*').
7 *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* (1963) 180 CLR 130 ('*TC Industrial*').
8 *McRae* (n 5) 414 (Dixon and Fullagar JJ, McTiernan J agreeing).
9 Ibid 415 (Dixon and Fullagar JJ, McTiernan J agreeing). In *McRae*, the plaintiffs incurred expenditure on a salvage operation after purchasing an oil tanker from the Commonwealth Disposals Commission. The Commission provided the plaintiffs with the supposed coordinates of the tanker and the plaintiff incurred expenditure on a salvage operation 'on the faith of the promise that there was a tanker in that place': at 414. However, the tanker did not exist.
10 Ibid 414 (Dixon and Fullagar JJ, McTiernan J agreeing); *CCC Films (London) Ltd v Impact Quadrant Films* [1985] 1 QB 16, 38, 40 (Hutchison J) ('*CCC Films*'); Ng (n 5) 148; *Amann* (n 3) 106 (Brennan J).
11 *JA Berriman* (n 6) 352.
12 Ibid.
13 Ibid.
14 *TC Industrial* (n 7) 142–3.

standards and as a result the buyer was unable to fulfil its contract. This resulted in the Commonwealth terminating the agreement. The seller relied on the English decision of *Cullinane v British "Rema" Manufacturing Co Ltd* ('*Cullinane*')[15] to argue that the buyer 'could not recover under both heads of damages' and needed to elect between damages for the 'expenditure uselessly incurred' due to the breach and 'the loss of the profits' it would have earned under the Commonwealth contract.[16] In *TC Industrial*, the High Court rejected this submission and in turn the English position that required election between damages for loss of profits and capital expenditure.[17] The Court reasoned that the majority's requirement in *Cullinane* that the plaintiff elect between the heads of damage, flowed from: first, the plaintiff's failure to show that his expenditure would have been recouped;[18] and second, the confusing use of the word 'profits' when what was intended appears to be 'gross profits', as in revenue or 'gross receipts'.[19] To allow the plaintiff to recover damages for gross receipts, in addition to the capital expenditure, would have been to allow double recovery.[20] The High Court suggested that had the majority in *Cullinane* considered a claim for the capital expenditure plus the 'profits that would have remained after recouping' the expenditure (that is, net profits), the claim likely would have been accepted,[21] putting the plaintiff in the position they would have been in had the contract been performed and preventing double recovery.[22]

The unanimous judgment in *TC Industrial* makes two important contributions. First, it rejects the premise that a plaintiff needs to elect between damages for wasted expenditure and loss of profits.[23] Second, their Honours make clear that the question of damages is best resolved through 'a single calculation', by subtracting the total expenditure the buyer would have incurred performing the Commonwealth's contract from the 'total receipts the plaintiff would have obtained under the contract', thereby treating profits as net profits and eliminating concerns of double recovery.[24] The High Court in *TC Industrial* thus, indicated that there ought to be just one measure of consequential loss.

---

15 *Cullinane v British "Rema" Manufacturing Co Ltd* [1954] 1 QB 292 ('*Cullinane*').

16 *TC Industrial* (n 7) 138.

17 Ibid 142–3. Cf *Cullinane* (n 15), affirmed in *Anglia Television v Reed* [1972] 1 QB 60, 64 (Lord Denning MR).

18 *TC Industrial* (n 7) 141–2.

19 David Campbell and Roger Halson, 'Expectation and Reliance: One Principle or Two?' (2015) 32(3) *Journal of Contract Law* 231, 242; Donald Harris, *Remedies in Contract and Tort* (Weidenfeld and Nicolson, 1988) 103–5; AI Ogus, *The Law of Damages* (Butterworths, 1973) 352–4.

20 Harris (n 19) 105; Ogus (n 19) 354.

21 *TC Industrial* (n 7) 140; GH Treitel, *The Law of Contract* (Stevens & Sons, 3rd ed, 1970) 797; Edwin Peel, *Treitel: The Law of Contract* (Sweet & Maxwell, 14th ed, 2015) 1129 [20-035].

22 Harris (n 19) 105. See also *Cessnock* (n 1) 732–3 [49] (Gordon J).

23 *TC Industrial* (n 7) 142; affirmed in *Amann* (n 3) 85 (Mason CJ and Dawson J).

24 *TC Industrial* (n 7) 143. See the discussion of gross receipts versus net profits in Campbell and Halson (n 19) 242.

In sum, prior to *Amann* the position appeared to be:

(1) damages for wasted expenditure were available where the position that the plaintiff otherwise would have been in was impossible to assess;[25] and

(2) that a plaintiff did not need to elect between damages for wasted expenditure and loss of profits, nor plead them in the alternative.

In *Amann*, the Commonwealth entered a contract with Amann Aviation Pty Ltd, whereby Amann Aviation would provide aerial surveillance over the northern Australian coastline for three years. However, the Commonwealth purported to terminate the contract six months after the contract was awarded (and on the day surveillance operations commenced). Unfortunately, Amann Aviation had already incurred expenditure in preparing for performance, namely acquiring and fitting out 14 specially equipped aircrafts. Amann Aviation sought damages for breach of contract, including on a reliance basis.

The result in *Amann* was a 'cacophony of the six different judgments'[26] making it difficult to discern a ratio decidendi. The position appeared to be that a 'presumption of recoupment' gave rise to a rebuttable presumption that a plaintiff would recoup its expenses incurred in reliance on the contract, with the defendant required to rebut the presumption by proving that the plaintiff would not have been able to recoup that expenditure even if the contract had been performed.[27] However, the treatment of damages claimed for wasted expenditure nonetheless remained uncertain.

In this article I do not aim to deal with the complexities of *Amann*, since this has been attempted elsewhere[28] and the importance of these complexities has undoubtedly been diminished by the decision in *Cessnock*. However, I do identify and consider two unresolved questions flowing from *Amann*. The first is whether this 'presumption of recoupment' exists. The second is what the content and application of the 'presumption' could be. *Cessnock* answers both questions.

---

25 This question was not considered in *JA Berriman* or *TC Industrial*. However, the Court appeared to accept that damages for wasted expenditure were available, even though damages would not have been impossible to calculate: *TC Industrial* (n 7) 143; *JA Berriman* (n 6) 352.

26 Ng (n 5) 140. See also *Cessnock* (n 1) 729 [28] (Gageler CJ).

27 *Amann* (n 3) 86–90 (Mason CJ and Dawson J), 105–7 (Brennan J), 126–7 (Deane J); *Meetfresh Franchising Pty Ltd v Ivanman Pty Ltd* [2020] NSWCA 234, [30]–[31] (Macfarlan JA, Bell P and Meagher JA agreeing) ('*Meetfresh*'). Cf HK Lücke, 'The So-Called Reliance Interest in the High Court' (1994) 6(2) *Corporate and Business Law Journal* 117, 145.

28 See generally, David Winterton, 'Reassessing "Reliance Damages": The High Court Appeal in *Cessnock City Council v 123 259 932 Pty Ltd*' (2024) 46(1) *Sydney Law Review* 87, 93–7; JW Carter, Wayne Courtney and GJ Tolhurst, 'Issues of Principle in Assessing Contract Damages' (2014) 31(3) *Journal of Contract Law* 171, 177–9; David McLauchlan, 'Reliance Damages for Breach of Contract' [2007] (3) *New Zealand Law Review* 417, 430–40; Treitel, 'Damages for Breach of Contract in the High Court of Australia' (n 4).

III Background

A *Facts*

In the early 2000s, Cessnock City Council sought to redevelop Cessnock Airport. To achieve this, the Council, as a developer and the registered proprietor, lodged a development application ('DA') to consolidate the airport land, then subdivide it.[29] The DA was approved on the condition that the subdivided lots be connected to the reticulated sewerage system. However, the subdivision was never registered by the Council.[30] After the subdivision DA approval, a further development application was lodged to develop an aircraft hangar on one of the proposed subdivided lots (Lot 104).[31] The hangar DA was granted. The appellant and respondent negotiated an agreement whereby the appellant promised to grant the respondent a 30-year lease for the proposed Lot 104 the day after the subdivision plan was registered. Under the agreement, the respondent was to pay an annual licence fee and undertake extensive works to develop the land.[32] The lease was subject to the registration of the subdivision plan and required the Council to take all reasonable actions to apply for and obtain the registration by the sunset date. If the plan was not registered by that date, either party could terminate the agreement.[33] The contract also allowed the Council to acquire the hangar for $1 on termination or expiry of the contract.[34]

The respondent undertook significant works to develop the hangar, estimated to be about $3.7 million.[35] Once construction was complete, the respondent operated three businesses from the hangar, none were profitable. The respondent then ceased operation and was deregistered by ASIC for non-payment of fees. The appellant decided that connecting the proposed subdivided lots to sewerage was too costly; as a result, the land was not subdivided by the sunset date. The appellant then terminated the contract acquiring the hangar for $1 from ASIC.[36] Cutty Sark was reinstated by order and commenced proceedings against the Council for breach of contract claiming that the Council failed to take all reasonable actions to apply for and obtain registration of the subdivision plan by the sunset date.[37]

B *Trial*

At first instance, Adamson J concluded that the Council breached its obligations under the contract because it had failed to take all reasonable action to register the subdivision plan.[38] The plaintiff, Cutty Sark, sought 'reliance damages' at trial,[39] seeking the wasted expenditure incurred in reliance on the Council's obligation to

29 *Cessnock* (n 1) 738 [76] (Edelman, Steward, Gleeson, Beech-Jones JJ).
30 Ibid 738 [80] (Edelman, Steward, Gleeson, Beech-Jones JJ).
31 Ibid 738 [82] (Edelman, Steward, Gleeson, Beech-Jones JJ).
32 Ibid 738 [84] (Edelman, Steward, Gleeson, Beech-Jones JJ).
33 Ibid 738 [85] (Edelman, Steward, Gleeson, Beech-Jones JJ).
34 Ibid 738 [84] (Edelman, Steward, Gleeson, Beech-Jones JJ).
35 Ibid 736 [63] (Edelman, Steward, Gleeson, Beech-Jones JJ).
36 Ibid 736 [63] (Edelman, Steward, Gleeson, Beech-Jones JJ).
37 Ibid 741 [103] (Edelman, Steward, Gleeson, Beech-Jones JJ).
38 *123 259 932 Pty Ltd v Cessnock City Council (No 2)* [2021] NSWSC 1329, [178]–[179].
39 Ibid [210].

take all reasonable steps to apply for and obtain registration of the subdivision plan. However, Adamson J refused to award substantive damages on two bases. First, the presumption in *Amann* did not arise because the Council's breach did not render it impossible to calculate the expenditure that would have been recouped if the agreement had not been breached.[40] Second, the damages sought did not fall within either limb of *Hadley v Baxendale* ('*Hadley*').[41] Thus, Cutty Sark was awarded only nominal damages of $1 and the quantum of Cutty Sark's expenditure was not assessed.[42]

C *Court of Appeal*

On appeal, Cutty Sark sought to challenge Adamson J's finding that it was only entitled to nominal damages. Cutty Sark argued that it ought to have been awarded substantial reliance damages for expenditure incurred constructing the hangar. The Court of Appeal (Brereton JA, Macfarlan and Mitchelmore JJA agreeing)[43] unanimously set aside the judgment below, finding:

(1) the presumption in *McRae* and *Amann* had been engaged;[44]

(2) the Council had failed to rebut the presumption;[45] and

(3) the damages fell within the second limb of *Hadley*.[46]

The appeal was allowed, and judgment entered in favour of Cutty Sark for $3,697,234.41.[47]

The Court of Appeal concluded that the presumption in *McRae* and *Amann* arose because Cutty Sark was entitled to recover reasonable expenditure incurred in relying on the Council's contractual promise to take all reasonable action to procure and obtain registration of the subdivision plan.[48] The Court found that the expenditure incurred did not need to be confined to expenditure incurred pursuant to or required by the contract.[49] Adopting the view taken by Macfarlan JA (Bell P and Meagher JA agreeing) in *Meetfresh Franchising Pty Ltd v Ivanman Pty Ltd*,[50] the Court of Appeal rejected the trial judge's conclusion that wasted expenditure was only recoverable where expectation damages were unquantifiable. Further, the Court concluded the presumption was not rebutted as the Council could not prove that over the 30-year lease Cutty Sark would not have recouped its expenditure had the Council registered the subdivision plan.[51] Moreover, the nature of the wasted expenditure could reasonably be supposed to have been contemplated by both parties

40 Ibid [215], [221].
41 Ibid [225], citing *Hadley v Baxendale* (1854) 9 Ex 341; 156 ER 14 ('*Hadley*').
42 *123 259 932 Pty Ltd v Cessnock City Council (No 2)* [2021] NSWSC 1329, [227].
43 *123 259 932 Pty Ltd v Cessnock City Council* (2023) 110 NSWLR 464 ('*Cessnock (NSWCA)*').
44 Ibid 503–4 [121]–[124] (Brereton JA, Macfarlan JA agreeing at 466 [1], Mitchelmore JA agreeing at 519 [171]).
45 Ibid 509 [135], 511 [140] (Brereton JA).
46 Ibid 514–15 [149] (Brereton JA).
47 Ibid 518–19 [170] (Brereton JA).
48 Ibid 485 [64] (Brereton JA).
49 Ibid 485–6 [65] (Brereton JA).
50 Ibid 493 [92] (Brereton JA), quoting *Meetfresh* (n 27) [30]–[31].
51 Ibid 509 [135] (Brereton JA).

at the time of contracting, meaning the nature of the wasted expenditure fell within the scope of the second limb in *Hadley*.[52] The Court then assessed the quantum Cutty Sark expended on the construction of the hangar including overheads and miscellaneous expenses as $3,697,234.41.[53] This was the quantum of reliance damages Cutty Sark was entitled to.

IV The High Court's Decision

On appeal, the High Court was faced with two questions:

- whether 'a presumption arose that the respondent would at least have recouped its wasted expenditure if the contract between the [Council] and the respondent had been performed';[54] and
- whether 'the presumption was not rebutted in the circumstances of this case'.[55]

All four judgments recognise the recoverability of expenditure wasted in reliance on the promise the defendant would perform its obligations. However, disagreement arose over the characterisation of wasted expenditure, including:

(a) whether it is an independent head of damage or a 'proxy' for expectation loss;

(b) how a plaintiff should prove a wasted expenditure claim; and

(c) how such a claim is to be limited to 'reasonable expenditure'.

A *One Measure of Consequential Loss*

The plurality, Edelman, Steward, Gleeson and Beech-Jones JJ wrote a joint judgment stating that 'it is now well established that there is only one measure of consequential losses for a breach of contract'.[56] Their Honours reasoned that expenditure wasted in anticipation of, or reliance on contractual performance is best characterised as a 'proxy' for or 'species of' expectation loss.[57] While Gordon J, writing separately, stated that damages for wasted expenditure are 'not a separate measure or category of expectation damages but a method of calculating damages consistent'[58] with the principle in *Robinson v Harman*. All five judges shared a common goal — to place the plaintiff in the position they would have been in had the contract been performed.[59] Jagot J also shared the same goal, though she did not

52 Ibid 514–15 [149] (Brereton JA).
53 Ibid 517 [159] (Brereton JA).
54 *Cessnock* (n 1) 743 [115] (Edelman, Steward, Gleeson and Beech-Jones JJ).
55 Ibid.
56 Ibid 743 [117] (Edelman, Steward, Gleeson and Beech-Jones JJ).
57 Ibid 744 [119] (Edelman, Steward, Gleeson and Beech-Jones JJ) (citations omitted).
58 Ibid 733 [51] (Gordon J).
59 Ibid 743 [114], 758 [182] (Edelman, Steward, Gleeson and Beech-Jones JJ) quoting *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] 1 Lloyd's Rep 526, 553 [188] (Leggatt J), 733 [52] (Gordon J).

explicitly restrict the recovery of consequential loss to a single measure, nor did she explicitly permit the recovery of anticipatory expenditure.[60]

Gageler CJ's view is at odds with the plurality's characterisation of wasted expenditure. His Honour asserted that '[w]asted expenditure is itself a category of damage'.[61] This position aligns with the recent decision of *Soteria Insurance Ltd v IBM United Kingdom Ltd*, where the Court of Appeal of England and Wales treated a claim for wasted expenditure as distinct from a claim for loss of profits in determining that a clause excluding claims for loss of profit did not exclude a claim for wasted expenditure.[62] However, his Honour thought it unnecessary to go as far as Fuller and Perdue to recognise a distinction between reliance and expectation interests, nor the object of 'reliance interests' in putting a plaintiff in the same position as before the promise was made.[63] Instead, Gageler CJ argued that the plaintiff was entitled to compensation because the defendant's non-performance caused the plaintiff to incur expenditure that was 'thrown away'.[64] His Honour framed this as a 'legally cognisable respect in which the plaintiff is worse off as a result of non-performance in comparison to performance'.[65]

Nonetheless, by recognising and awarding damages for wasted expenditure as a unique head of damage, Gageler CJ initially placed the plaintiff in the position they would have been in before the contract was made: that is, their historical position.[66] This is a plaintiff's 'prima facie entitlement',[67] but may place a plaintiff in a 'better position than if the defendant had performed' the contract, for example, where a plaintiff sought to recover wasted expenditure under a loss-making contract.[68] Against this, and consistent with the approach taken by the New South Wales Court of Appeal, a defendant may challenge a plaintiff's prima facie entitlement, with the entitlement reduced to the extent the defendant proves the counterfactual: that the expenditure would not have been recouped, even if the contract was performed.[69] Where a plaintiff's entitlement nevertheless exceeds the position they would have been in had the contract been performed, Gageler CJ imposes a 'ceiling on the overall damages recoverable',[70] which caps a plaintiff 'at

60 *Cessnock* (n 1) 759 [191]–[192] (Jagot J); David Winterton, 'Clarifying the Basis for Recovering Reliance Expenditure as Damages for Breach of Contract in Australia' (2025) 141 (January) *Law Quarterly Review* 19, 21–2 ('Reliance Expenditure as Damages').

61 *Cessnock* (n 1) 725 [9] (Gageler CJ).

62 *Soteria Insurance Ltd v IBM United Kingdom Ltd* [2022] 2 All ER (Comm) 1082 ('*Soteria*').

63 *Cessnock* (n 1) 725 [12] (Gageler CJ). See also Winterton, 'Reliance Expenditure as Damages' (n 60) 23–4; LL Fuller and WR Perdue, 'The Reliance Interest in Contract Damages: 1' (1936) 46(1) *Yale Law Journal* 52; American Law Institute, *Restatement (Second) of Contracts* (1981) § 349.

64 *Cessnock* (n 1) 725 [12] (Gageler CJ).

65 Ibid.

66 McLauchlan (n 28) 419.

67 *Cessnock* (n 1) 723 [3] (Gageler CJ).

68 AI Ogus, 'Notes of Cases: Damages for Pre-Contract Expenditure' (1972) 35(4) *The Modern Law Review* 423, 424.

69 *Cessnock* (n 1) 723–4 [2]–[3] (Gageler CJ); *Cessnock (NSWCA)* (n 43) 487–8 [73], 513 [146] (Brereton JA).

70 *Cessnock* (n 1) 726 [16] (Gageler CJ).

the expectation position'.[71] This ensures consistency with the principle in *Robinson v Harman*.[72]

A fundamental divide thus arises in the High Court between the treatment of wasted expenditure, reflecting the underlying disagreement over the purpose and calculation of damages for wasted expenditure.

B *A Principle of Facilitation of Proof*

Edelman, Steward, Gleeson and Beech-Jones JJ reframed how to prove damages for wasted expenditure, through 'a principle of facilitation of proof'.[73] Importantly, the principle has potential for broad application, serving as a general framework regarding the 'allocation of the evidentiary and legal burdens of proof'[74] where a defendant has caused (or increased) uncertainty as to loss.[75]

The starting point is uncontroversial. The initial legal onus lies with the plaintiff to prove a breach of contract resulted in loss, measured against the position the plaintiff would have been in had the contract been performed.[76] A facilitation of proof then occurs where 'a breach of contract has resulted in (namely, caused or increased) uncertainty about the position that the plaintiff would have been in if the contract had been performed'.[77] This marks a significant expansion from *Amann*, which suggested that a presumption would only arise where proof was difficult.[78] The principle facilitates the discharge of the plaintiff's legal burden of proof by 'assuming (or inferring) in their favour that, had the contract been performed', expenditure reasonably incurred in anticipation of, or reliance on performance of the contract would have been recovered.[79]

Their Honours justify this facilitation principle by explaining that its rationale is to overcome the 'uncertainty in proof of loss occasioned to the plaintiff by the

---

71 Adam Kramer, 'The New Leading Case on Reliance or Wasted Expenditure Damages in Contract: *Cessnock City Council v 123 259 932 Pty Ltd* [2024] HCA 17' (2024) 39(2) *Journal of Contract Law* 62, 65.

72 *Cessnock* (n 1) 724 [6] (Gageler CJ), citing *Haines v Bendall* (1991) 172 CLR 60, 63.

73 *Cessnock* (n 1) 746–7 [127] (Edelman, Steward, Gleeson and Beech-Jones JJ). See also *Allen v Tobias* (1958) 98 CLR 367, 375.

74 *Haley v Laing O'Rourke Australia Management Services Pty Ltd (No 8)* [2024] FedCFamC2G 779, [48] (Manousaridis J).

75 *Cessnock* (n 1) 747 [129]. See ibid [53]–[56] (Manousaridis J) where the principle was applied, in the context of an employment contract, to determine whether the contract was terminated lawfully. See also *Commonwealth v Sanofi* (2024) 99 ALJR 213, 221 [14] (Gordon A-CJ, Edelman and Steward JJ). Cf *Kisun v New Zealand* [2024] FCAFC 118, [44], [46] (Bromwich, Abraham and Halley JJ).

76 *Cessnock* (n 1) 735–6 [61], 746 [127] (Edelman, Steward, Gleeson and Beech-Jones JJ).

77 Ibid 735 [61] (Edelman, Steward, Gleeson and Beech-Jones JJ).

78 *Amann* (n 3) 89 (Mason CJ and Dawson J), 126 (Deane J); *L Albert & Son v Armstrong Rubber Co*, 178 F 2d 182, 189 (2nd Cir, 1949). See also *Omak Maritime Ltd v Mamola Challenger Shipping Co Ltd* [2011] 1 Lloyd's Rep 47, 51 [22] (Teare J).

79 *Cessnock* (n 1) 735–6 [61] (Edelman, Steward, Gleeson and Beech-Jones JJ).

defendant's breach'.[80] This principle is framed as an 'evidentiary onus'[81] or 'prima facie inference'[82] rather than a 'presumption' that parties in commerce recoup their expenses, which is 'unrealistic' as 'bad bargain[s]' are 'not uncommon in the ordinary course of commercial dealings'.[83]

Curiously, the strength of the assumption or inference in favour of the plaintiff depends on the extent of the uncertainty resulting from the defendant's breach.[84] The implication is that the defendant's burden of proof — when rebutting the inference that the plaintiff would have recovered their expenditure — depends on the extent to which the breach causes uncertainty as to the plaintiff's position under the relevant, non-breach counterfactual. This means that the defendant's burden will be heaviest where the uncertainty as to the plaintiff's counterfactual position derives entirely from the breach, but will be lighter where the breach only results in some uncertainty when assessing the plaintiff's position 'but for' the breach. Thus, in *Cessnock*, the Council was required to 'lead substantial evidence' to prove that the plaintiff would not have recouped its wasted expenditure.[85] It failed to, and the plaintiff was successful in establishing that it would have recovered its wasted expenditure.[86]

The principle of facilitation of proof represents a principled and conceptually coherent approach that draws on cases from the law of torts, the law of contract, as well as cases concerning statutory claims. Arguably, the flexibility of the approach has some appeal given its potential to serve as a general framework for addressing cases where a defendant creates uncertainty about a plaintiff's position, but for the breach. However, Edelman, Steward, Gleeson and Beech-Jones JJ's analysis has two shortcomings. First, their Honours fail to satisfactorily justify why the principle of facilitation of proof will be enlivened merely because a defendant's 'breach of contract has resulted in (namely, caused or increased) uncertainty'.[87] Second, the majority's fluctuating burden is unsupported by precedent and there are legitimate concerns that it is impractical. It seems likely that further clarification in subsequent cases will be necessary to understand how the principle ought to work in practice.

1 *The Threshold for Enlivening the Principle*

It is difficult to justify the low threshold for enlivening the principle of facilitation of proof, particularly given contract claims tend to involve 'a degree of conjecture'

---

80 Ibid. See also *Amann* (n 3) 142 (Toohey J).

81 *Cessnock* (n 1) 747 [128] (Edelman, Steward, Gleeson and Beech-Jones JJ), citing *Amann* (n 3) 142 (Toohey J), 156 (Gaudron J), 165 (McHugh J); *Berry v CCL Secure Pty Ltd* (2020) 271 CLR 151, 169 [29] (Bell, Keane and Nettle JJ) ('*Berry*'). See also *Masson v Parsons* (2019) 266 CLR 544, 575–6 [32] (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

82 *Cessnock* (n 1) 747 [128]; *Amann* (n 3) 165–6 (McHugh J); *Amann Aviation Pty Ltd v Commonwealth* (1990) 22 FCR 527, 571.

83 *Cessnock* (n 1) 751 [150] (Edelman, Steward, Gleeson and Beech-Jones JJ). See also Winterton, 'Reliance Expenditure as Damages' (n 60) 20. Cf *Amann* (n 3) 81, 87 (Mason CJ and Dawson J), 156 (Gaudron J).

84 *Cessnock* (n 1) 735–6 [61] (Edelman, Steward, Gleeson and Beech-Jones JJ).

85 Ibid 758 [184] (Edelman, Steward, Gleeson and Beech-Jones JJ).

86 Ibid 759 [186] (Edelman, Steward, Gleeson and Beech-Jones JJ).

87 Ibid 735 [61] (Edelman, Steward, Gleeson and Beech-Jones JJ).

where 'it can be said that it is the defendant's breach of contract that has made conjecture necessary'.[88]

The facilitation principle appears to derive from *Armory v Delamirie* ('*Armory*').[89] *Armory* concerned a claim for trover (that is, conversion), where a goldsmith (the defendant) wrongfully deprived the rightful owner (the plaintiff) of his possessory title to a jewel. The defendant refused to produce the jewel. In turn, Pratt CJ directed the jury to 'presume the strongest against [the defendant]' when determining its value and assessing damages.[90] This was because the defendant's wrongdoing, in withholding the jewel, was the sole cause of the uncertainty as to the jewel's market value.[91]

Although *Armory*, and cases like it, affirm that the facilitation of proof against a wrongdoer is not inherently novel,[92] similarities between *Cessnock* and *Armory* are far from obvious. In *Armory*, the defendant actively withheld evidence that would have answered the question of loss. By contrast, in *Cessnock* the defendant Council was arguably in no better position than the plaintiff to produce evidence that would assist in assessing the plaintiff's position had the contract been performed.[93]

Moreover, the lower threshold for the principle's application is difficult to justify because the cases relied upon by their Honours confine the application of the principle to instances where a defendant's wrongdoing has 'made quantification difficult'[94] or impossible,[95] for example where a defendant destroys evidence,[96] or where the defendant's wrongdoing 'preclude[s] the ascertainment of the amount of damages with certainty'[97] and instances where it is 'very hard to learn what the value of the performance would have been'.[98] Modern English authorities, by contrast, are concerned with instances where a defendant's breach causes 'considerable

---

88 *Porton Capital Technology Funds v 3M UK Holdings Ltd* [2011] EWHC 2895 (Comm) [244] (Hamblen J) ('*Porton*').

89 *Armory v Delamirie* (1722) 1 Strange 505; 93 ER 664 ('*Armory*'); *Cessnock* (n 1) 747 [130] (Edelman, Steward, Gleeson and Beech-Jones JJ). Cf *McCartney v Orica Investments Pty Ltd* [2011] NSWCA 337, [210] (Young JA) ('*McCartney*').

90 *Armory* (n 89) 664.

91 Ibid.

92 See also *Porton* (n 88) [237]–[245]; *Browning v Brachers* [2005] EWCA Civ 753, [205] (Parker LJ); *Double G Communications Ltd v News Group International Limited* [2011] EWHC 961 (QB), [99] (Eady J).

93 In this case, the Council may have been better placed to produce evidence, though generally defendants are not: see, eg, *Blatch v Archer* (1774) 1 Cowper 63; 98 ER 969, 970 [65]; *Porton* (n 88) [244].

94 *Cessnock* (n 1) 748 [132] (Edelman, Steward, Gleeson and Beech-Jones JJ), quoting *Murphy v Overton Investments Pty Ltd* (2004) 216 CLR 388, 416 [74].

95 *Amann* (n 3) 86 (Mason CJ and Dawson J), 105 (Brennan J), 126 (Deane J), 154 (Gaudron J); *McRae* (n 5) 414 (Dixon and Fullagar JJ, McTiernan J agreeing). See also *CCC Films* (n 10) 38 (Hutchinson J).

96 *Berry* (n 81) 169 [29] (Bell, Keane and Nettle JJ). See also *White v Lady Lincoln* (1803) 8 Ves Jun 363; 32 ER 395 (Lord Eldon LC); *Gray v Haig* (1855) 20 Beav 219; 52 ER 587 (Romilly MR); *Lupton v White* (1808) 15 Ves Jun 432; 33 ER 817 (Lord Eldon LC); *Indian Oil Corporation Ltd v Greenstone Shipping SA (Panama)* [1988] QB 345, 369 (Staughton J); *McCartney* (n 89) [208], [214] (Young JA).

97 *Story Parchment Co v Paterson Parchment Paper Co*, 282 US 555, 563 (1931), quoted in *Cessnock* (n 1) 747 [131] (Edelman, Steward, Gleeson and Beech-Jones JJ).

98 *L Albert & Son v Armstrong Rubber Co* (n 78) 189, quoted in *Cessnock* (n 1) 748 [136] (Edelman, Steward, Gleeson and Beech-Jones JJ).

uncertainty'[99] or the 'practical impossibility of proving loss'.[100] A facilitation principle that arises merely because the defendant's wrongdoing occasions *some* uncertainty as to the plaintiff's position is a significant jump from existing case law considered by their Honours.[101]

2 *A Fluctuating Burden that is Impractical and Inconsistent with Precedent*

Edelman, Steward, Gleeson and Beech-Jones JJ asserted that '[n]aturally … the greater the difficulty in proof that results from the defendant's wrongdoing, the stronger the inference the court will be prepared to draw against the wrongdoer'.[102] To overcome the potential overreaction of shifting the entire burden to the defendant, where only minimal uncertainty as to loss is caused, their Honour's appear to impose a fluctuating burden that depends on the degree of uncertainty as to loss caused by the defendant's wrongdoing. The rationale is that the wrongdoer, rather than the injured party, ought to bear the 'the risk of uncertainty that results' from the wrongdoing.[103] Yet, this framework is difficult to justify with case law, and in practice. In support of the premise, their Honours rely on *Porton Capital Technology Funds v 3M UK Holdings Ltd* ('*Porton*').[104] However, the reliance on *Porton* is overstated as in that case Hamblen J rejected the application of the principle in *Armory*, stating that as a matter of principle *Armory* 'should not be extended further than is necessary'.[105] Nor did Hamblen J consider the critical question of whether the strength of the burden placed on the defendant varied according to the uncertainty of loss resulting from their wrongdoing.

It is not only inconsistent with precedent, but also impractical to impose a burden on the defendant that varies according to the extent their wrongdoing affects the uncertainty of the plaintiff's counterfactual position. Jagot and Gordon JJ, writing separately, were critical of that approach. Gordon J stressed that it is not the role of a trial judge to 'undertake a forensic assessment of the gravity of the wrongdoer's conduct' and 'assess the *extent* of the uncertainty that results from the breach' to adjust the burden placed on the wrongdoer to prove the plaintiff would still have made a loss.[106] Instead, a trial judge's task is to assess the evidence before them to identify the counterfactual position.[107] As Jagot J acknowledges, this assessment may be influenced by the 'nature of the particular contract or the

---

99 *Yam Seng Pte Ltd v International Trade Corporation Ltd* [2013] 1 Lloyd's Rep 536, 553 [188] (Leggatt J), quoted in *Cessnock* (n 1) 752 [152] (Edelman, Steward, Gleeson and Beech-Jones JJ).

100 *Omak Maritime Ltd v Mamola Challenger Shipping Co* (n 78) 52–3 [33] (Teare J), quoting *CCC Films* (n 10) 40 (Hutchinson J). See *Cessnock* (n 1) 752 [152] (Edelman, Steward, Gleeson and Beech-Jones JJ).

101 See generally *Pitcher Partners Consulting Pty Ltd v Neville's Bus Service Pty Ltd* (2019) 271 FCR 392, 418 [116] (Allsop CJ, Yates and O'Bryan JJ); *McCartney* (n 89) [148]–[161] (Giles JA, Macfarlan JA agreeing); [198]–[218] (Young JA).

102 *Cessnock* (n 1) 748 [132] (Edelman, Steward, Gleeson and Beech-Jones JJ).

103 Ibid 748 [131] (Edelman, Steward, Gleeson and Beech-Jones JJ).

104 Ibid 749 [138] (Edelman, Steward, Gleeson and Beech-Jones JJ), citing *Porton* (n 88) [349].

105 *Porton* (n 88) [244].

106 *Cessnock* (n 1) 735 [58] (Gordon J) (emphasis in original).

107 Ibid.

allocation of risks under it', but the strength of the 'presumption' remains fixed.[108] On the other hand, Gageler CJ, perhaps also appreciating these difficulties, simplifies a plaintiff's task of proving and quantifying loss, by treating wasted expenditure as a unique head of damage,[109] thereby avoiding the imposition of a threshold of uncertainty, difficulty or impossibility, and the need to shift burdens.

The expansion of a facilitation of proof to circumstances where a defendant causes uncertainty as to the plaintiff's loss is therefore both impractical and inconsistent with precedent. Nevertheless, when the facilitation of proof principle is extended to cases where the defendant's wrongdoing causes uncertainty as to loss, Gordon J's approach ought to be favoured as it successfully clarifies the confusion in *Amann* by largely adopting the principle of facilitation of proof presented by Edelman, Steward, Gleeson and Beech-Jones JJ. However, Gordon J's approach avoids the challenges that flow from an everchanging burden placed on wrongdoers that varies according to the uncertainty resulting from their breach and is particularly unwieldly in cases like *Cessnock* and *Amann* where the defendant's breach is not the sole cause of the uncertainty as to loss, but adds to pre-existing uncertainty.[110]

C *Reasonable Expenditure*

Damages for wasted expenditure have traditionally been limited to expenditure that has been 'reasonably incurred'.[111] However, it is unclear precisely what this limitation denotes and, in particular, the extent to which it derives from the principle articulated in *Hadley*. Although the appellants in *Cessnock* did not allege that the expenditure was not reasonably incurred, their Honours nonetheless expressed some views on the question of remoteness in obiter dicta.

Both Gageler CJ and Jagot J, writing separately, adopted *Hadley* in relation to the contemplation of wasted expenditure. Jagot J found that the expenditure wasted by Cutty Sark fell within the second limb of *Hadley*, meaning that at the time of contracting, the loss could reasonably have been contemplated by the parties as a probable result of the breach.[112] Similarly, Gageler CJ, was of the view that 'the Court of Appeal was correct'[113] in applying the 'standard limiting principles, such as remoteness and mitigation' to damages for wasted expenditure.[114]

Edelman, Steward, Gleeson and Beech-Jones JJ proposed an alternative method of applying *Hadley*, suggesting that perhaps the remoteness limit should be applied to the plaintiff's lost potential *revenue* rather than its wasted expenditure.[115] This is consistent with their position that wasted expenditure is a proxy for expectation loss and only used to enliven the principle of facilitation of proof.[116] In

---

108 Ibid 768 [236] (Jagot J).
109 Ibid 728 [25] (Gageler CJ).
110 Cf *Armory* (n 89); *McRae* (n 5).
111 *Amann* (n 3) 81 (Mason CJ and Dawson J). See also *McRae* (n 5) 412–13 (Dixon and Fullagar JJ, McTiernan J agreeing).
112 *Cessnock* (n 1) 769 [238] (Jagot J).
113 Ibid 723 [3] (Gageler CJ).
114 Ibid 724 [3] (Gageler CJ). See also at 727 [23] (Gageler CJ), citing *McRae* (n 5) 413.
115 *Cessnock* (n 1) 743 [114] (Edelman, Steward, Gleeson and Beech-Jones JJ).
116 Ibid.

practice, it means that the remoteness limit applies to the overall expectation interest, the lost potential revenue, rather than wasted expenditure. This also seems to address the concerns that the foreseeability of wasted expenditure may not be in the contemplation of the parties at the time of contracting, while 'the prospect of a loss of future potential revenue would plainly be within the[ir] knowledge'.[117] Moreover, the plurality acknowledge the application of the rules of mitigation of loss, which, in addition to the rules of remoteness of loss, limit 'loss which is due to unreasonable or improvident actions of the plaintiff', with the onus of proof falling on the defendant.[118]

Gordon J, consistently with earlier authorities,[119] recognised the existence of a reasonableness criterion to prevent damages for wasted expenditure becoming a 'form of insurance'.[120] However, her Honour avoided referencing *Hadley*, despite assessing reasonable expenditure by considering whether the 'nature and extent of the expenditure … was in the contemplation of the parties'.[121] Her Honour then considered the distinction between essential and incidental expenditure. She concluded that the reasonableness criterion is sufficient to limit any remote damages and extended that reasoning to expenditure incurred 'in performing or preparing to perform the contract', which she found ought to be recoverable as wasted expenditure, so long as it was still subject to the reasonableness criterion.[122] For example, in *McRae*, the expenditure was incurred 'so that they could derive benefit from the contract', even though the 'expenditure was not required by … any contractual obligation', the expenditure was nonetheless wasted and recoverable.[123] Where a wrongdoer shows that the wasted expenditure is not reasonable, either because of the type of expenditure, or the amount expended, and the 'plaintiff's expenditure was, on the balance of probabilities, wasted anyway', that expenditure would not be recoverable.[124] *Hadley* remains relevant in limiting the damages recoverable to expenditure that is reasonably incurred.

V The Fundamental Divide

A fundamental divide arose between the plurality and Gageler CJ over how loss and damage ought to be determined. Edelman, Steward, Gleeson and Beech-Jones JJ adopt an approach that is forward looking, aiming to compensate the deterioration of a plaintiff's projected financial position, to place the plaintiff in the factual position they would have been in had there been no breach. On the other hand, Gageler CJ's approach is backward looking, aiming to compensate the harm caused

---

117 Ibid 743 [114] (Edelman, Steward, Gleeson and Beech-Jones JJ).
118 Ibid 744–5 [120]–[121] (Edelman, Steward, Gleeson and Beech-Jones JJ), citing *Arsalan v Rixon* (2021) 274 CLR 606, 624–5 [32]; *TC Industrial* (n 7) 138.
119 *McRae* (n 5) 412–3 (Dixon and Fullagar JJ, McTiernan J agreeing); *Amann* (n 3) 81 (Mason CJ and Dawson J).
120 *Cessnock* (n 1) 734 [55] (Gordon J).
121 Ibid. Cf Marc Owen, 'Aspects of the Recovery of Reliance Damages in the Law of Contract' (1984) 4(3) *Oxford Journal of Legal Studies* 393, 411.
122 Ibid 734 [53] (Gordon J).
123 Ibid 734 [54] (Gordon J)
124 Ibid 734 [56] (Gordon J).

by reliance on a contract that was breached, (at least initially) placing the plaintiff in the position had the contract not been entered.[125]

The distinction can be explained by reference to Campbell and Halson's universal formula for contractual damages:

> **E = d = e + r**
>
> **E** is the overall expectation interest.
>
> **d** is contractual damages
>
> **e** is the net profit concept of expectation interest
>
> **r** is the reliance interest, which is taken to be 'investment the parties may make (part-) performing their obligations' which is wasted due to the breach.[126]

Gageler CJ treated wasted expenditure and the net profit concept of expectation interest, as separate heads of damage, which are combined to determine the overall contractual damages. His Honour identified wasted expenditure as the amount expended by the plaintiff in reliance on the expectation of performance, which was wasted upon the defendant's breach.[127] This requires looking backwards and puts the plaintiff in the position had the contract not been entered, while the expectation interest looks forward, placing the plaintiff in the position had the contract been performed. By treating wasted expenditure as a unique head of loss, Gageler CJ determined the plaintiff's prima facie entitlement by reference to a historical approach to the calculation of loss, arguing that '[c]ompensable damage lies in the simple fact that the plaintiff has incurred expenditure which, because of non-performance, is incapable of yielding any benefit or gain to the plaintiff'.[128] To avoid over-compensation, the overall contractual damages are then 'capped at the expectation position',[129] that is E, the overall expectation interest. This ensures adherence to the fundamental principle in *Robinson v Harman*. But it remains unclear how Gageler CJ calculates the ceiling on recovery, that is the overall expectation interest.[130]

In contrast, Edelman, Steward, Gleeson and Beech-Jones JJ calculated E, the overall expectation interest, directly, with wasted expenditure only used as a proxy to assist in the calculation of the expectation interest. This method is supported by economic theory, which suggests that 'perfect expectation damages' is the best remedy as it encourages the performance of contracts and disincentivises breach or repudiation.[131] However, because this method is entirely forward-looking, it is often difficult to estimate the position the plaintiff would have been in had the contract been performed. For that reason, Gageler CJ's approach is appealing as it simplifies

---

125 See generally the discussion on the components of compensatory damages in *Moore v Scenic Tours Pty Ltd* (2020) 268 CLR 326, 348–9 [63]–[64] (Edelman J). See also Nicholas Tiverios and David Winterton, 'The Nature and Availability of "Negotiating Damages" for Breach of Contract' (2025) 48(3) *Melbourne University Law Review* (forthcoming).

126 Campbell and Halson (n 19) 233. See also at 235.

127 *Cessnock* (n 1) 724 [3] (Gageler CJ).

128 Ibid 725–6 [12] (Gageler CJ).

129 Kramer (n 71) 65, citing; ibid 726 [16] (Gageler CJ).

130 Winterton, 'Reliance Expenditure as Damages' (n 60) 23–4.

131 Robert Cooter and Thomas Ulen, *Law and Economics* (Berkeley Law Books, 6th ed, 2016) 291.

a plaintiff's method of proving wasted expenditure and does not require the defendant's wrongdoing to occasion uncertainty when proving loss.[132]

However, the treatment of wasted expenditure as a unique head of damage, is difficult to reconcile with Australian precedent. Gageler CJ argued that his position accords with the reasoning of the High Court in *McRae*, *JA Berriman* and *TC Industrial*.[133] But at best, on a close reading of these cases, the reasoning merely alludes to treating wasted expenditure as a distinct category of loss.[134] Whilst, at worst, *TC Industrial* could be taken to suggest the opposite, with the Court favouring a single calculation of loss aimed at placing a plaintiff in the position they would have been in had the contract been performed.[135]

Nevertheless, there is some principled basis for Gageler CJ's approach. In England and Wales, for example, the object of an award of wasted expenditure has been recognised 'to compensate the aggrieved party for expenses incurred and losses suffered in reliance on the contract'.[136] Notably, Owen also suggests that even where a plaintiff enters a 'deliberate bad bargain',[137] they should still be entitled to damages for wasted expenditure, albeit subject to a cap of expectation loss.[138] For example, where a plaintiff enters a contract that is initially loss-making with the expectation of future contracts, a plaintiff should be entitled to wasted expenditure if 'the breach has made the prospect of future profits significantly lower than it would have been had the contract been fully performed'.[139] This is because 'an innocent party's reasonable reliance'[140] ought to be protected. On a practical level, the emphasis placed on wasted expenditure, rather than an expectation interest, may be because 'losing what one previously possessed is commonly regarded as more serious than failing to get something one was promised'.[141] Moreover, damages for wasted expenditure as a unique head of damage, is easier to prove, given it is the actual amount expended in reasonable reliance on the contract.

In practice, there may be little difference between the ultimate outcome under the plurality's approach or Gageler CJ's approach[142] given Gageler CJ imposes a ceiling on the overall damages recoverable, which is the plaintiff's overall expectation position. This ceiling is the overall expectation interest the plurality seeks to calculate directly. In the end, both approaches ground themselves in the orthodoxy of *Robinson v Harman*: the plurality places the plaintiff in the position they would have been in but for the breach, while Gageler CJ ensures the plaintiff is in no better position than they would have been in but for the breach.

---

132 *Cessnock* (n 1) 726 [14] (Gageler CJ).
133 Ibid 727 [21] (Gageler CJ).
134 *JA Berriman* (n 6) 352.
135 *TC Industrial* (n 7) 143.
136 *Surrey County Council v Bredero Homes Ltd* [1993] 1 WLR 1361, 1369 (Steyn LJ) quoted in *Soteria* (n 62) [43].
137 Owen (n 121) 405.
138 Ibid 409.
139 Ibid.
140 Ibid 395.
141 Winterton, 'Reliance Expenditure as Damages' (n 60) 24.
142 But compare *Soteria* (n 62), which may be inconsistent with the plurality in *Cessnock*.

VI Conclusion

The High Court's decision in *Cessnock* is significant for several reasons. Not only does the decision clarify how plaintiffs should prove damages for wasted expenditure, but it also offers a general principle for dealing with the allocation of evidential and legal burdens in circumstances where a defendant's wrongdoing has caused (or increased) uncertainty regarding the plaintiff's non-breach position. *Cessnock* nonetheless raises fundamental questions about the rationale for awarding damages for breach of contract and, despite clarifying how damages for wasted expenditure ought to be proven, many questions remain unanswered. For example, how a Court will respond to a claim for both loss of profits and wasted expenditure, and how it will treat non-pecuniary benefits.[143] The principle of facilitation of proof aims to offer a general method of proof 'to address and minimise the forensic disadvantage of a party'.[144] However, the principle does not emerge with clarity from precedent. Instead, greater complexity is sown into and permitted to invade the field.[145]

143 Kramer (n 71) 65.
144 *Willmot v Queensland* (2024) 98 ALJR 1407, 1434 [102] (Edelman J).
145 Adopting the language and warning of Jagot J in *Cessnock* (n 1) 760 [193].

Case Note

The High Court of Australia's Constructional Choice in *Greylag Goose Leasing 1410 Designated Activity Co v PT Garuda Indonesia Ltd*

Eden McSheffrey*

Abstract

In *Greylag Goose Leasing 1410 Designated Activity Co v PT Garuda Indonesia Ltd*, the High Court of Australia made a five to two split decision that the *Foreign States Immunities Act 1985* (Cth) ('*FSI Act*') s 14(3) — an exception to foreign State jurisdictional immunity in proceedings relating to the bankruptcy, insolvency or winding up of a body corporate — operated in a confined way and did not apply to 'separate entities' of a foreign State. The majority further considered s 22 of the Act to substantively confer jurisdictional immunity upon State separate entities. This decision demonstrates the role of extrinsic material in informing the constructional choice presented by generally worded statutory provisions and affirms the importance of the Australian Law Reform Commission's 1984 *Foreign State Immunity* report in interpreting the *FSI Act*. In this case note, I examine the majority and dissenting approaches to the statutory construction of s 14(3) and comment on the potential uncertainty left for creditors of State 'separate entities' in light of the decision.

I Introduction

In *Greylag Goose v PT Garuda Indonesia* ('*Greylag Goose*'),[1] the High Court of Australia split on the application of an insolvency exception to a foreign State's immunity from jurisdiction in the *Foreign States Immunities Act 1985* (Cth) ('*FSI Act*').[2] By a majority of five to two, the High Court held that the *FSI Act* ss 14(3)(a) and 22 do not apply to a proceeding for the winding up of a body corporate under the *Corporations Act 2001* (Cth) pt 5.7 ('*Corporations Act*') if that body corporate

Please cite this case note as:
Eden McSheffrey, 'The High Court of Australia's Constructional Choice in *Greylag Goose Leasing 1410 Designated Activity Co v PT Garuda Indonesia Ltd*' (2025) 47 *Sydney Law Review* 21439: 1–16 <https://doi.org/10.30722/slr.21439>.

* BA (Hons I) LLB (Hons I) (*Syd*). ORCID iD: https://orcid.org/0009-0005-3152-8304.
The original version of this case note was written for the 2024 Sydney Law Review unit of study. I want to thank Professor Chester Brown SC for his advice on the preparation of this case note. All errors are my own.

1 *Greylag Goose Leasing 1410 Designated Activity Co v PT Garuda Indonesia Ltd* (2024) 98 ALJR 828 ('*Greylag Goose v PT Garuda (HCA)*').

2 *Foreign States Immunities Act 1985* (Cth) ('*FSI Act*').

is a 'separate entity' of a foreign State. This means that the insolvency exception has taken on a narrow meaning, its purpose being limited to allowing Australian courts to adjudicate insolvency disputes in which a foreign State has a proprietary interest. Beyond the case's obvious implications for such entities, it demonstrates how placing emphasis on extrinsic material can lead a court to a constructional choice that, at first glance, appears strained when faced with the plain language of the statute. The case also demonstrates the tension inherent within discussions of State immunity between the requirement to afford foreign States and their emanations due respect for their sovereign equality by extending them immunity, and the desire to retain sovereign territorial control over entities within the jurisdiction. A further practical consequence of *Greylag Goose* is the creation of some uncertainty for creditors of foreign State separate entities, owing to the narrow focus of the High Court on s 14(3) as opposed to the broader commercial transactions exception found within the *FSI Act* s 11.

In *Greylag Goose*, Gageler CJ, Gleeson, Jagot, and Beech-Jones JJ wrote a joint majority judgment, while Edelman J delivered a separate judgment agreeing with the majority. Gordon and Steward JJ issued a joint dissenting judgment. The majority upheld the finding of the New South Wales ('NSW') Court of Appeal[3] and the first instance decision in the NSW Supreme Court.[4] In Part II of this case note, I discuss the appellate context of the High Court's decision, including the decisions at first instance and in the Court of Appeal. In Part III, I explore the division in the High Court on the *FSI Act* ss 14 and 22, the High Court's use of extrinsic material, and the corporate and insolvency considerations that were raised in the decision. In Part IV, I argue that the majority reasoning is a principled, if imperfect, development in the law of foreign State immunity and appropriately aligns with the legislative context of s 14(3). In Part V, I conclude the case note by drawing out the key points of significance from the *Greylag Goose* decision.

II The Appellate Context of *Greylag Goose*

A *Background to the Greylag Goose proceedings*

PT Garuda (the respondent in the High Court) is a company incorporated in the Republic of Indonesia and is the national airline of that State. The appellants in the High Court (collectively, 'Greylag Goose') are two companies incorporated in the Republic of Ireland that lease aircraft to PT Garuda.[5] The dispute concerns PT Garuda's alleged failure to pay certain sums, together totalling over USD 437 million under leasing agreements.[6] Greylag Goose had sought orders under the *Corporations Act* for the winding up of PT Garuda on the basis that PT Garuda was unable to pay

3 *Greylag Goose Leasing 1410 Designated Activity Co v PT Garuda Indonesia Ltd* (2023) 111 NSWLR 550 ('*Greylag Goose v PT Garuda (NSWCA)*').

4 *Greylag Goose Leasing 1410 Designated Activity Co v PT Garuda Indonesia Ltd* [2022] NSWSC 1623 ('*Greylag Goose v PT Garuda (NSWSC)*').

5 *Greylag Goose v PT Garuda (HCA)* (n 1) 831 [5].

6 Ibid 831 [6]–[9].

its debts, and alternatively on the basis that it was just and equitable to do so.[7] By notice of motion, PT Garuda asserted immunity from the jurisdiction of the NSW Supreme Court under the *FSI Act* s 9.[8] Part II of the *FSI Act* recognises certain exceptions to this immunity. It was the construction of a particular exception found in s 14(3) relating to insolvency and winding up that split the High Court.

B *Relevant Statutory Provisions*

Interpreting the proper 'concurrent operation' of the *FSI Act* ss 14 and 22 was critical to resolving the issues before the High Court.[9] The *FSI Act* s 9 grants a general jurisdictional immunity for foreign States (subject to the pt II exceptions), with s 22 extending that immunity to 'separate entities' of States: '[t]he preceding provisions of this part (other than [certain provisions]) apply in relation to a separate entity of a foreign State as they apply in relation to the foreign State'.[10] In a 2011 decision, the Full Federal Court of Australia found that PT Garuda was a 'separate entity' of a foreign State within the meaning of s 22.[11] This finding was not challenged on appeal (nor in the present proceedings).[12] This 'separate entity' status therefore permitted PT Garuda to assert jurisdictional immunity before Australian courts in accordance with ss 9 and 22, subject to the exceptions in the *FSI Act* pt II. The relevant exception in *FSI Act* s 14 relating to insolvency and winding up proceedings provides:

> **14 Ownership, possession and use of property etc**
>
> …
>
> (3) A foreign State is not immune in a proceeding in so far as the proceeding concerns:
>
> (a) bankruptcy, insolvency or the winding up of a body corporate; or
>
> (b) the administration of a trust, of the estate of a deceased person or of the estate of a person of unsound mind.

The question before the High Court was whether s 14(3)(a), in referring to 'the winding up of a body corporate', contemplated that 'body corporate' being a separate entity of a State, and hence whether PT Garuda fell within the exception, thus barring it from asserting jurisdictional immunity.

---

7 *Corporations Act 2001* (Cth) ss 583(c)(i)–(ii), 585(a) ('*Corporations Act*'); *Greylag Goose v PT Garuda (HCA)* (n 1) 831 [7]–[9].

8 *Greylag Goose v PT Garuda (HCA)* (n 1) 831 [10].

9 Ibid 834 [26] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), 855 [145] (Edelman J).

10 *FSI Act* (n 2) s 22. The provisions that are exceptions to s 22 are ss 11(2)(a)(i), 16(1)(a), and 17(3), none of which are relevant to the issues considered by the High Court.

11 *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2011) 192 FCR 393, 430 [170]–[171] (Rares J, Lander and Greenwood JJ agreeing at 396 [1], 404 [49]) ('*PT Garuda v ACCC (FCAFC)*').

12 *PT Garuda Indonesia Ltd v Australian Competition and Consumer Commission* (2012) 247 CLR 240, 255 [47] (Heydon J) ('*PT Garuda v ACCC (HCA)*'); *Greylag Goose v PT Garuda (HCA)* (n 1) 831 [10].

C *The First Instance Decision*

At first instance, Hammerschlag CJ in Eq answered that question in the negative.[13] PT Garuda is a foreign company registered under the *Corporations Act* pt 5B.2 div 2,[14] and hence was 'indisputably' a body corporate.[15] Greylag Goose argued at first instance that the words 'body corporate' included the foreign State or separate entity referred to in the chapeau of s 14(3), with the indefinite article 'a' demonstrating the legislature's intention to capture such entities.[16] PT Garuda's reply, and the reason with which his Honour ultimately agreed, was that the foreign State and its separate entities *cannot* be the bodies corporate to which s 14(3)(a) makes reference.[17] This was because although a literal reading of the clause might lend itself to the construction advanced by Greylag Goose,[18] such a reading imported an 'unlikely intention to refer to the same person in two different ways'.[19] Further, it was a strained interpretation because it would require the provision to operate against PT Garuda, which 'when practically read … says Garuda has no immunity in winding up proceedings against a body corporate'.[20] His Honour also made reference to the consequence of upholding Greylag Goose's construction with respect to natural persons under the section: namely, that people such as the head of a foreign State could be bankrupted in Australia in circumstances where no other *FSI Act* pt II exception applied.[21] For Hammerschlag CJ in Eq, this added force to the conclusion that the *FSI Act* s 14(3) did not operate against such persons or bodies corporate.[22]

D *The NSW Court of Appeal Decision*

In the NSW Court of Appeal, Bell CJ, Meagher and Kirk JJA unanimously upheld the first instance decision.[23] The appellants (Greylag Goose) had contended that the plain and literal meaning of s 14(3), as well as the context and purpose of the *FSI Act*, supported their construction.[24] That context and purpose was the restrictive theory of State immunity. Since the critical English cases *Playa Larga v I Congreso del Partido*[25] and *Trendtex Trading Corporation v Central Bank of Nigeria*,[26] the restrictive theory (as opposed to the theory of absolute immunity) has come to define

13 *Greylag Goose v PT Garuda (NSWSC)* (n 4) [17] (Hammerschlag CJ in Eq).
14 Ibid [10].
15 Ibid [12].
16 Ibid [13].
17 Ibid [14], [17].
18 Ibid [21].
19 Ibid [23].
20 Ibid.
21 Ibid [25].
22 Ibid. Cf *Greylag Goose v PT Garuda (HCA)* (n 1) 846–7 [98]–[99] (Gordon and Steward JJ).
23 *Greylag Goose v PT Garuda (NSWCA)* (n 3) 555 [13], 569 [78] (Bell CJ), [79] (Meagher JA), [80] (Kirk JA).
24 Ibid 554–5 [10]–[11] (Bell CJ).
25 *Playa Larga v I Congreso del Partido* [1983] 1 AC 244, 260–2 (Lord Wilberforce) ('*I Congreso del Partido*').
26 *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] QB 529, 558 (Lord Denning MR).

the boundaries of State immunity in contemporary international legal practice.[27] The restrictive theory arose out of States' involvement with commercial and private law transactions and, as expressed by Lord Wilberforce in *I Congreso del Partido*, has two central foundations:

> (a) It is necessary in the interest of justice to individuals having such transactions with states to allow them to bring such transactions before the courts. (b) To require a state to answer a claim based upon such transactions does not involve a challenge to or inquiry into any act of sovereignty or governmental act of that state. It is, in accepted phrases, neither a threat to the dignity of that state, nor any interference with its sovereign functions.[28]

The restrictive theory is made reference to in both the Australian Law Reform Commission's 1984 *Foreign State Immunity* report ('*ALRC FSI Report*')[29] on which the *FSI Act* was based,[30] and in the second reading speech of the *FSI Act*.[31] Greylag Goose contended that, in line with this theory, it was the legislature's intention to facilitate the winding up of insolvent entities in Australia, regardless of whether they were a foreign State or separate entity.[32]

Bell CJ disapproved of the construction contended for by Greylag Goose.[33] In coming to this conclusion, his Honour drew upon the leading cases on statutory interpretation to emphasise that the *legal* meaning of a provision is not necessarily its *literal* meaning, with the construction exercise requiring 'full consideration of the language of the statute viewed as a whole and the context, general purpose and policy of the statute or a provision within it, to the extent that that is separately discernible'.[34] Giving effect to the legal meaning, in light of this context, accords with the statutory requirement in the *Acts Interpretation Act 1901* (Cth) s 15AA.[35]

---

27 See *Firebird Global Master Fund II Ltd v Nauru* (2015) 258 CLR 31, 79 [169] (Nettle and Gordon JJ) ('*Firebird*'); Stefan Kröll, 'Enforcement of Awards' in Marc Bungenberg, Jörn Griebel, Stephan Hobe and August Reinisch (eds), *International Investment Law: A Handbook* (Nomos/Hart, 2015) 1482, 1486, 1500; Hazel Fox, 'The Restrictive Rule of State Immunity – The 1970s Enactment and Its Contemporary Status' in Tom Ruys, Nicolas Angelet and Luca Ferro (eds), *The Cambridge Handbook of Immunities and International Law* (Cambridge University Press, 2019) 21, 30–1; James Crawford, 'Execution of Judgments and Foreign Sovereign Immunity' (1981) 75(4) *American Journal of International Law* 820, 847–50; Hazel Fox and Philippa Webb, *The Law of State Immunity* (Oxford University Press, 3rd rev ed, 2015) 146.

28 *I Congreso del Partido* (n 25) 262 (Lord Wilberforce), quoted in *Firebird* (n 27) 80 [171] (Nettle and Gordon JJ) and *Greylag Goose v PT Garuda (HCA)* (n 1) 840 [70] (Gordon and Steward JJ).

29 See Australian Law Reform Commission ('ALRC'), *Foreign State Immunity* (Report No 24, 1984) ('*ALRC FSI Report*').

30 *Greylag Goose v PT Garuda (NSWCA)* (n 3) 556 [19] (Bell CJ), citing the *FSI Act* (n 2) second reading speech: Commonwealth, *Parliamentary Debates*, House of Representatives, 21 August 1985, 141 (Lionel Bowen, Attorney-General).

31 *Greylag Goose v PT Garuda (NSWCA)* (n 3) 554–5 [11].

32 Ibid 555 [12].

33 Ibid 555 [13].

34 Ibid 555 [14], citing *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ); *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 320 (Mason and Wilson JJ); *Sydney Seaplanes Pty Ltd v Page* (2021) 106 NSWLR 1, 10 [26] (Bell P) ('*Sydney Seaplanes*').

35 *Greylag Goose v PT Garuda (NSWCA)* (n 3) 555–6 [15]–[16].

Bell CJ noted (as the High Court has recognised)[36] that the *FSI Act*'s legislative context is, in large part, to be found in the *ALRC FSI Report*.[37] While the Report does make reference to the restrictive theory, his Honour emphasised that the significance of the report extends 'far beyond the purpose of the Act expressed at a very high level of generality'.[38] Instead, the *ALRC FSI Report* was held to support the conclusion that the *FSI Act* was not intended to subject a *foreign* body corporate to winding up proceedings in Australia.[39] Section 14(3) should instead be read to refer to bodies corporate 'in and of the Commonwealth' per the *Acts Interpretation Act 1901* (Cth) s 21(1)(b) (a finding not relied upon by PT Garuda in the High Court).[40] Coupled with the definition of a 'foreign State' under the *FSI Act* s 3(3) (which includes entities such as provinces and executive government organs — entities not subject to bankruptcy or insolvency proceedings), this militated against the conclusion that s 14(3) applies to the State or its separate entities:[41] '[i]t follows that the "proceeding" to which s 14(3) is referring cannot be a proceeding concerning the foreign State's bankruptcy or insolvency … the foreign State is the subject and not the object of s 14(3)(a)'.[42]

According to the NSW Court of Appeal, the better view was that s 14(3) was designed such that State immunity would not prevent the adjudication of conflicting claims to the property of an insolvent corporation where, for example, a State had an interest in the property or company.[43] Bell CJ considered the *ALRC FSI Report* in detail, concluding that the consequence of Greylag Goose's construction would mean that the *FSI Act* implemented a 'quite radical legislative initiative', and to this end 'one would have expected the thorough and scholarly ALRC Report of Professor Crawford to have gone into the merits of such a legislative initiative in considerable detail … [i]n that context, part of the contextual significance of the ALRC Report lies in what it *does not say*'.[44]

This was the end for Greylag Goose's case in the Court of Appeal (with Meagher and Kirk JJA ultimately agreeing with Bell CJ).[45] Special leave to appeal to the High Court was subsequently granted by Gordon and Jagot JJ.[46]

---

36 *Firebird* (n 27) 81 [173] (Nettle and Gordon JJ); *Spain v Infrastructure Services Luxembourg Sàrl* (2023) 275 CLR 292, 306 [11] (Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ) ('*Infrastructure Services*'); *PT Garuda v ACCC (HCA)* (n 12) 245 [7] (French CJ, Gummow, Hayne and Crennan JJ).

37 *Greylag Goose v PT Garuda (NSWCA)* (n 3) 556–7 [19]–[22].

38 Ibid 561 [43].

39 Ibid 561–2 [44]–[45].

40 Transcript of Proceedings, *Greylag Goose Leasing 1410 Designated Activity Co v PT Garuda Indonesia Ltd* [2024] HCATrans 13, 1163–70 (PD Herzfeld SC) ('*Greylag Goose* HCATrans'). See also Greylag Goose Leasing 1410 Designated Activity Co, 'Appellants' Submissions', Submission in *Greylag Goose Leasing 1410 Designated Activity Co v PT Garuda Indonesia Ltd*, Case No S135/2023, 7 December 2023, [46]–[49] ('Appellants' Submissions').

41 *Greylag Goose v PT Garuda (NSWCA)* (n 3) 562 [46]–[47].

42 Ibid 562 [47].

43 Ibid 568 [71], [74]–[75], 569 [78].

44 Ibid 568 [75]–[76] (emphasis in original).

45 Ibid 569 [79] (Meagher JA), 569 [80] (Kirk JA).

46 Transcript of Proceedings, *Greylag Goose Leasing 1410 Designated Activity Co v PT Garuda Indonesia Ltd* [2023] HCATrans 144, [1] (Gordon and Jagot JJ).

III The High Court of Australia's Division on Construction

A *The Decision on the Foreign States Immunities Act 1985 (Cth) ss 14 and 22*

The joint majority of the High Court (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ) held that the *FSI Act* s 14(3) exception did not apply to PT Garuda.[47] Their Honours reasoned that because s 14(3) applied in relation to the foreign State, which was hence the *object* of the exception, the 'body corporate' to which s 14(3)(a) refers could only be a different entity whose winding up was the subject-matter of the exception.[48] Greylag Goose's construction (that there was no reason to exclude State entities from the ambit of 'body corporate' referred to in s 14(3)) was said to be dependent upon an incorrect understanding of s 22: '[s]ection 22 is not definitional; it is substantive'.[49] This means that functionally s 22 is not treated as merely reading 'separate entity' into the *FSI Act* pt II regime in place of 'foreign State', but instead that the '*same immunity* from jurisdiction' that the State benefits from is conferred upon the separate entity.[50] The joint majority placed emphasis on a passage in the *ALRC FSI Report* that explained that the policy of s 22 was to ensure that a State's 'separate entities should be treated in the same way as foreign States' when it comes to jurisdictional immunity.[51] This was an issue because Greylag Goose's argument would mean that the availability of s 9 immunity to the separate entity would depend upon the vehicle by which a State carries on a particular activity in the forum: a body corporate could be wound up, whereas a government department could not.[52] This would mean the separate entity would have an attenuated form of jurisdictional immunity when compared to the State, which defied the substantive operation of s 22.[53] Therefore the joint majority analysis of s 22 required the subject matter of s 14(3)(a) to be the same across its application to both foreign States and separate entities such that the 'body corporate' referred to in s 14(3)(a) must be other than the separate entity that was the object of the exception. Like the NSW Court of Appeal, the High Court considered s 14(3)(a) to operate as a limited exception to jurisdictional immunity, designed to deny immunity where a State had an interest in a body corporate other than the State's separate entity being subject to winding up.[54]

This is a difficult construction to grapple with. It does not necessarily accord with the plain language of s 14(3) and so much is acknowledged by the separate judgment of Edelman J, who agreed with the joint majority but acknowledged that PT Garuda's construction was 'textually strained'.[55] His Honour posited two possible constructions of s 14(3) — narrow and broad — and noted that the text of

---

47 *Greylag Goose v PT Garuda (HCA)* (n 1) 831 [2] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).
48 Ibid 834 [27]–[28].
49 Ibid 834 [30].
50 Ibid (emphasis added).
51 Ibid 834 [31], quoting *ALRC FSI Report* (n 29) xx [31].
52 *Greylag Goose v PT Garuda (HCA)* (n 1) 835 [31].
53 Ibid 835 [34].
54 Ibid 838–9 [54]–[60] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ); *ALRC FSI Report* (n 29) xx [29], 69–70 [116]–[117].
55 *Greylag Goose v PT Garuda (HCA)* (n 1) 849 [115] (Edelman J).

the provision itself could support either view.[56] The narrow construction would be the development of a confined historical exception, whereas a broad construction was more consistent with the 'overall objective of the series of provisions of which s 14 is a part': to generally exempt commercial activity from the immunity regime.[57] Edelman J ultimately agreed with the joint majority that the *ALRC FSI Report* evinced an intention to create a limited exception to ensure that courts can adjudicate conflicting property claims where a State might have an interest in the relevant property.[58] This speaks to the reason for the key divide between the majority and minority: namely, the emphasis placed upon extrinsic material (as will be discussed in Part III(B) below).

In dissenting, Gordon and Steward JJ favoured Greylag Goose's construction.[59] Their Honours held that the reference to 'body corporate' in the *FSI Act* s 14(3)(a) included a foreign State's separate entity.[60] They held that it was more consistent with the context and purpose of the provision for it be read to remove the general immunity conferred by s 9.[61] The text of s 14(3) did not support any basis to limit the general application of the words 'winding up of a body corporate'.[62] This was especially so when compared to sub-ss (1) and (2) of s 14, which were provisions in which the legislature had limited the application of an exception to situations where a foreign State held an interest in property — a manoeuvre not replicated in sub-s (3).[63] Gordon and Steward JJ emphasised a different aspect of the *FSI Act* that was not directly considered by the majority: namely, the Act's deliberate attenuation of immunity for separate entities of foreign States (contrasted with 'organs' or 'departments') in the context of a foreign State's immunity from execution in respect of its property.[64] Part IV of the *FSI Act* governs the immunity from execution of such property, which is conferred by s 30 and is subject to limited exceptions in ss 31–3. However, s 35 explicitly provides that pt IV (including the initial conferral of immunity) only applies to a separate entity if it is a central bank, monetary authority, or if it lost its jurisdictional immunity via waiver under s 10 and submitted to the jurisdiction of the Australian court.[65] Section 35 therefore operates to significantly curtail the immunity claimable over the property of a foreign State's separate entities.[66] As Gordon and Steward JJ identified, this suggests a deliberate attentiveness on the part of the legislature to the circumstances of State separate entities, which in an enforcement context 'expressly chose *not* to extend the immunity in s 30 to all separate entities of foreign States generally'.[67] This accorded

56 Ibid 848 [109] (Edelman J).
57 Ibid.
58 Ibid 853–4 [137].
59 Ibid 840 [68] (Gordon and Steward JJ).
60 Ibid 842 [78].
61 Ibid.
62 Ibid 842 [80].
63 Ibid 842 [81].
64 Ibid 843 [85]. See also *FSI Act* (n 2) s 3(1) (definition of 'separate entity'); *PT Garuda v ACCC (FCAFC)* (n 11) 421 [128] (Rares J).
65 See M Davies, AS Bell, PLG Brereton and M Douglas, *Nygh's Conflict of Laws in Australia* (LexisNexis Butterworths, 10th ed, 2020) 267 [10.41].
66 *Greylag Goose v PT Garuda (HCA)* (n 1) 843 [85] (Gordon and Steward JJ). See *ALRC FSI Report* (n 29) 84 [138].
67 *Greylag Goose v PT Garuda (HCA)* (n 1) 843 [85] (emphasis in original).

with the restrictive theory of immunity and the approach of the ALRC,[68] and the finding that State separate entities were subject to winding up under the provision was 'neither a threat to the dignity of a foreign State, nor an interference with its sovereign functions'.[69]

Gordon and Steward JJ disagreed with the implications of finding that s 22 conferred a substantive immunity. In their Honours' view, while s 22 conferred the same immunity upon a State's separate entities, it should not be understood 'to operate in exactly the same way, in practice, as against a separate entity as it does against a foreign State'.[70] They added that it should not be understood to confer *equal* immunity to the separate entity, and the field of operation of the immunity would necessarily be different: '[t]here can be no complete identity of operation of the Act to what is defined under the Act to be a "foreign State", let alone between a "foreign State" and a "separate entity"… the [*FSI Act*] expressly recognises that to be so'.[71] Gordon and Steward JJ also concluded that on a proper understanding of the restrictive theory of immunity, it was no objection that a bankruptcy of a head of a foreign State might be possible under s 14(3)(a).[72] Their Honours noted that the s 9 immunity applies to those individuals when acting in a *public* capacity — with their private affairs being determined in accordance with the *FSI Act* s 36 and the *Diplomatic Privileges and Immunities Act 1967* (Cth).[73]

B *Extrinsic Material and the ALRC Foreign State Immunity Report*

The approach of Gordon and Steward JJ demonstrates a fidelity to the text and structure of the *FSI Act*, as well as the underlying policy of the restrictive theory of foreign State immunity. However, their Honours placed less emphasis on the *ALRC FSI Report* and other instruments similar to the *FSI Act* (like the *State Immunity Act 1978* (UK)) when compared with the majority. Rather than demonstrating any error in the majority's reasoning, however, this exhibits more the process of a constructional choice made by the majority and the minority. The phrase 'constructional choice' reflects the 'legal indeterminacy that is avoided only with difficulty in statutory drafting',[74] and the fact that context can reveal that statutory language is 'capable of a range of potential meanings … [t]he choice between alternative meanings then turns less on linguistic fit than on evaluation of the relative coherence of the alternatives with identified statutory objects or policies'.[75] This is

---

68 Ibid; *ALRC FSI Report* (n 29) 84 [138].
69 *Greylag Goose v PT Garuda (HCA)* (n 1) 845 [93] (Gordon and Steward JJ).
70 Ibid 846 [99] (Gordon and Steward JJ).
71 Ibid 847 [101] (Gordon and Steward JJ).
72 Ibid 846 [98].
73 Ibid.
74 *Momcilovic v The Queen* (2011) 245 CLR 1, 50 [50] (French CJ).
75 *Taylor v Owners – Strata Plan No 11564* (2014) 253 CLR 531, 557 [66] (Gageler and Keane JJ) ('*Taylor v SP 11564*'). See also *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 375 [38] (Gageler J); *Friends of Leadbeaters Possum Inc v VicForests* (2018) 260 FCR 1, 15 [44] (Mortimer J). See generally *Esso Australia Pty Ltd v Australian Workers' Union* (2017) 263 CLR 551, 589 [71] (Gageler J); Gordon Brysland and Suna Rizalar, 'Constructional Choice' (2018) 92(2) *Australian Law Journal* 81.

an appropriate prism through which to view the divide in the High Court, because both interpretations are reasonable in view of the general drafting of s 14(3).

Being more explicit with his approach to construction, Edelman J unpacked the necessity of having regard to the context and purpose of a provision. In *Taylor v Owners – Strata Plan No 11564*, French CJ, Crennan and Bell JJ considered that the question of whether the Court was justified in reading in or omitting words from statute was 'a judgment of matters of degree'.[76] On the permissible side, correction was appropriate in instances where drafting errors might defeat the object of the provision.[77] What would be impermissible would be a construction that 'fills "gaps disclosed in legislation"'[78] or made insertions '"too much at variance with the language in fact used by the legislature"'.[79] Edelman J emphasised that this latter quote did not signal a 'clarion call for textual fundamentalism without regard for context or purpose'.[80] Instead, the right way to interpret the majority's remarks in *Taylor v SP11564* was to understand that the legislature communicates to the public via the (usually) carefully chosen words found in legislation.[81] Legislative text, context, and purpose exist in a symbiotic relationship, and for Edelman J, 'if context and purpose clearly require a variance from the range of literal meanings of the text, then the text can bear even the opposite of its literal meaning(s)'.[82] In light of this, as well as the purpose explained in the *ALRC FSI Report*, his Honour preferred the narrow construction. In adopting this view, however, Edelman J recognised that PT Garuda (and hence the approach taken by the joint majority and lower courts) presented a strained reading of s 14(3) where it could 'comfortably',[83] without the context of the *ALRC FSI Report*, be read as applying to the winding up of *any* body corporate.[84]

There was marked disagreement in the High Court about the general policy that the *FSI Act* exceptions to jurisdictional immunity. Greylag Goose advanced an argument that the structure of the *FSI Act* pt II exhibited a legislative intent to implement a broad policy of removing immunity for general commercial or trading activities of foreign States.[85] The joint majority called this argument 'fundamentally erroneous' and 'diametrically opposed' to the ALRC's justification for the pt II exceptions.[86] The joint majority held, similar to Bell CJ in the court below, that the ALRC intended to implement a 'more complex set of distinctions' in the pt II exception regime, rather than a blanket governmental/commercial dichotomy.[87] The minority issued a direct parry to the joint majority's unequivocal rejection of the position that the exceptions in pt II reflected a general policy: '[t]hese enumerated exceptions generally reflect the overarching policy that "commercial or trading

---

76 *Taylor v SP 11564* (n 75) 548 [38] (French CJ, Crennan and Bell JJ).
77 Ibid.
78 Ibid, quoting *Marshall v Watson* (1972) 124 CLR 640, 649 (Stephen J).
79 Ibid, quoting *Western Bank Ltd v Schindler* [1977] Ch 1, 18 (Scarman LJ).
80 *Greylag Goose v PT Garuda (HCA)* (n 1) 849 [116] (Edelman J).
81 Ibid.
82 Ibid 849 [117].
83 Ibid 849 [114].
84 Ibid 849 [114]–[115].
85 Ibid 836 [39] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).
86 Ibid 836 [41].
87 Ibid 836–7 [43]–[45], quoting *ALRC FSI Report* (n 29) 26 [46].

activities conducted by or on behalf of foreign governments *should not* attract the special jurisdictional immunity enjoyed by foreign States"'.[88] This sharp split demonstrates that while both the majority and minority consulted the *ALRC FSI Report*, the latter view the restrictive theory of foreign State immunity more as a substantive guiding principle underpinning the *FSI Act*.

The drafters of the *ALRC FSI Report* had regard to how other jurisdictions dealt with State immunity and foreign State interests in property in the forum. The report noted that the *State Immunity Act 1978* (UK), *European Convention on State Immunity*,[89] *State Immunity Act 1979* (Singapore), *State Immunity Ordinance 1981* (Pakistan) and International Law Commission's 1983 *Draft Articles on Jurisdictional Immunities of States and Their Property*[90] all contained provisions denying immunity in situations where a forum court is administering or supervising the administration of property in which a State has an interest.[91] The rationale for such a denial was that it is appropriate that the forum courts remain able to adjudicate on all conflicting claims to such property, with the ALRC explicitly identifying 'bankruptcy, insolvency, [and] the winding up of companies' as situations in which the necessity of this exception might be found.[92] Accordingly, it recommended Australia likewise implement such an exception in its *FSI Act*.[93] The joint majority examined the ALRC's thorough assessment of the international development of the exception[94] and concluded that 'it could hardly be clearer that the ALRC did not intend' to adopt anything other than PT Garuda's view of s 14(3).[95] Their Honours were of the view that it was not to the point that Parliament could have been clearer in its framing.[96] It is the ratio decidendi of the High Court that ss 14(3)(a) and 22 create an exception from jurisdictional immunity that will apply to a *Corporations Act* pt 5.7 proceeding only if and insofar as the proceeding concerns the winding up of a body corporate that is not the State's separate entity.[97]

An Aside on the Re-Enactment Principle and a 'Judicial Swallow'

One point that was made clear in both the joint majority judgment and Edelman J's judgment was that there was no legislative endorsement of Greylag Goose's construction. The argument was made on the principle of statutory construction known as the re-enactment principle (sometimes called a presumption): 'where the

---

88 *Greylag Goose v PT Garuda (HCA)* (n 1) 841 [74] (emphasis in original) (Gordon and Steward JJ), see also 841–2 [75]–[76]. Cf ibid 836 [41] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

89 *European Convention on State Immunity*, opened for signature 16 May 1972, ETS No 74 (entered into force 11 June 1976).

90 See International Law Commission, *Report of the International Law Commission on the Work of Its Thirty-Fifth Session* (3 May–22 July 1983), UN GAOR, 38th sess, Supp No 10, UN Doc A/38/10, reproduced in Yearbook of the International Law Commission (1983), vol II(2), 21–38.

91 *ALRC FSI Report* (n 29) 69 [117] n 132.

92 Ibid 69 [117].

93 Ibid.

94 *Greylag Goose v PT Garuda (HCA)* (n 1) 837–8 [49]–[57] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

95 Ibid 839 [59]. See also Fox and Webb (n 27) 426, 430; Jrög Philipp Terhechte, 'Article 13' in Roger O'Keefe and Christian J Tams (eds), *The United Nations Convention on Jurisdictional Immunities of States and Their Property: A Commentary* (Oxford University Press, 2013) 225, 225–7, 229, 232.

96 *Greylag Goose v PT Garuda (HCA)* (n 1) 839 [59] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

97 Ibid 839 [61].

legislature has indicated its approval or disapproval of an interpretation placed upon an Act by the court'.[98] The difficulty in the principle is discerning the existence of parliamentary approval.[99] Supposed approval of a particular judicial interpretation by the legislature is harder to prove than rejection (it is fairly straightforward to discern when a judicial interpretation is reversed by an enactment).[100] The trouble for Greylag Goose was that this argument was made by reference to an unreported *ex tempore* interlocutory decision before a single judge in 1992,[101] giving rise to the joint majority's allusion to the *Nichomachean Ethics*: 'one judicial swallow does not make a legislative summer'.[102] The amendments were made in 2009 and 2022, they did not have a bearing on the relevant provisions, the 1992 judgment cited was not mentioned in the legislative extrinsic materials, and so this argument failed.[103]

C *Corporate Considerations and 'Startling Insolvency Consequences'?*

One final theme emerging from the High Court's decision in *Greylag Goose* is the discussion of principles applicable to the *Corporations Act* and the 'startling insolvency consequences'[104] that were alleged by Greylag Goose if PT Garuda's interpretation was to be accepted.[105] The minority judges considered there to be force in this submission, concluding that PT Garuda's construction would lead to the result that a separate entity of a foreign State could 'continue to trade in Australia while insolvent without the ability of its creditors to insist on winding up'.[106] Their Honours reasoned that a separate entity, engaging in commercial activity in Australia, has deliberately submitted itself to the requirements the *Corporations Act* in carrying on that business in Australia,[107] and pursuant to s 583 of the Act, a pt 5.7 body (such as PT Garuda) could be wound up on the grounds of insolvency. Winding up such a body corporate in Australia would only affect that company's status within the country, and would not affect its corporate status in its home jurisdiction.[108] Such an understanding also accords with the restrictive theory of immunity and the fact that the operation of the *Corporations Act* is not displaced by the *FSI Act*.[109] Gordon and Steward JJ pointed to the fact that, for example, directors' duties still apply to

98 Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis, 10th ed, 2024) 142 [3.59]. See *Re Alcan Australia Ltd; Ex parte Federation of Industrial, Manufacturing and Engineering Employees* (1994) 181 CLR 96, 106–7; *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1, 20–1 [52] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

99 *Greylag Goose v PT Garuda (HCA)* (n 1) 835–6 [38] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ), quoting *Flaherty v Girgis* (1987) 162 CLR 574, 594. See also *Director of Public Prosecutions Reference No 1 of 2019* (2021) 274 CLR 177, 186 [15] (Kiefel CJ, Keane and Gleeson JJ).

100 Pearce (n 98) 142 [3.59]; *Bushell v Repatriation Commission* (1992) 175 CLR 408, 425 (Brennan J).

101 *Adeang v Nauru Phosphate Royalties Trust* (Supreme Court of Victoria, Hayne J, 8 July 1992).

102 *Greylag Goose v PT Garuda (HCA)* (n 1) 836 [38] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ).

103 Ibid 835–6 [38]. See also 856 [148]–[149] (Edelman J).

104 Ibid 848 [110] (Edelman J). See also Appellants' Submissions (n 40) [35].

105 *Greylag Goose v PT Garuda (HCA)* (n 1) 847 [103], 848 [110]. See also Appellants' Submissions (n 40) [35].

106 *Greylag Goose v PT Garuda (HCA)* (n 1) 843 [83] (Gordon and Steward JJ).

107 Ibid 844 [88].

108 Ibid 845 [93].

109 Ibid 844 [89].

directors of a foreign company,[110] as well as the duty to prevent insolvent trading by *Corporations Act* s 588G.[111] Their Honours considered the ALRC's rationale for s 11 to similarly apply with great force in the context of insolvency:

> This idea — that a foreign State that has elected to participate in a body set up under local Australian laws can hardly complain when Australian laws apply to such a body and such a body is capable of supervision by Australian courts — applies with equal, if not greater, force in relation to a separate entity registered as a foreign company in Australia which is deemed insolvent. Such a separate entity should not be permitted to carry on business in Australia.[112]

These are significant considerations, and ones not addressed in the joint majority judgment. If they are correct, then in situations where multiple creditors seek to execute in relation to their debts over a State separate entity, the *Corporations Act*'s objective of 'securing equality of distribution amongst creditors of the same class' may be thwarted, and those creditors could face a '"race to the courthouse"' (contrary to the orderly and rateable distribution contemplated by the formal winding up of the entity).[113] However, Edelman J's judgment illuminates both why this may not be the case and why the strained reading of the insolvency exception may not likely be replicated in a future case.

For Edelman J, the concerns about insolvent trading were misplaced; there was a real possibility that the proper application of the *FSI* Act ss 11 and 22 precluded those consequences from eventuating.[114] His Honour noted that if it were the case that such insolvency consequences were the consequence of PT Garuda's submissions, then this would have created a 'significant inconsistency' with the objective of the pt II exceptions.[115] However, the commercial transaction exception found in s 11 was said to 'potentially' overlap with s 14, subject to non-commercial situations such as where just and equitable grounds (eg, management deadlock) arise.[116] This overlap provided one basis for his Honour to conclude that the scope of ss 11(1) and 22 provides a reason to doubt that the serious insolvency consequences advanced by Greylag Goose would be sustained.[117] This finding demonstrates one unusual aspect of the present case: s 11 was not argued by Greylag Goose, leading to a very confined assessment of s 14(3) without regard to the broad commercial transactions exception (which, while it was not necessary to decide, seems to have been thought by Edelman J to capture commercial insolvency).[118] Edelman, Steward, and Beech-Jones JJ each asked counsel for Greylag Goose in oral argument about s 11,[119] and in this respect this case appears to serve as a cautionary tale for creditors of State separate entities who do not attempt to utilise the broad

---

110 Ibid 845 [92].
111 Ibid.
112 Ibid 845 [91].
113 Ibid 846 [95], quoting *G & M Aldridge Pty Ltd v Walsh* (2001) 203 CLR 662, 675 [30].
114 *Greylag Goose v PT Garuda (HCA)* (n 1) 848 [110] (Edelman J).
115 Ibid.
116 Ibid 852 [130].
117 Ibid 855 [143], [146].
118 Ibid 855 [146].
119 *Greylag Goose* HCATrans (n 40) 458 (Steward J), 1452–6 (Beech-Jones J) 1703–7 (Edelman J).

commercial transactions exception in s 11. In this case '[a] choice was made'[120] that may have lost Greylag Goose their claim.

IV Which is the Better 'Constructional Choice'?

The modern purposive approach to statutory interpretation 'by legislative fiat' of the *Acts Interpretation Act 1901* (Cth) s 15AB,[121] begins with the context of a given statutory provision:

> The statutory text must be considered in its context. That context includes legislative history and extrinsic materials. Understanding context has utility if, and in so far as, it assists in fixing the meaning of the statutory text. Legislative history and extrinsic materials cannot displace the meaning of the statutory text. Nor is their examination an end in itself.[122]

With this in mind, the majority decision in *Greylag Goose* represents a principled and contextually situated development in the interpretation of the *FSI Act*. All three prior High Court decisions that considered the Act have paid extensive regard to the *ALRC FSI Report*,[123] and for good reason. In an area where the sensitive political consequences of a revocation of sovereign immunity are drawn precisely by the legislature – as they have been in the *FSI Act*, which has as its subject matter 'the foreign relations of Australia as a nation'[124] — reliance upon the Crawford co-authored *ALRC FSI Report* is something to be welcomed in construing the *FSI Act*. It was noted in *Firebird Global Master Fund II Ltd v Nauru* that the *ALRC FSI Report* is 'significant' in helping courts ascertain 'the legislative context and purpose and the particular mischief that the [*FSI Act*] is seeking to remedy'.[125] However, the minority's approach in *Greylag Goose*, which places more emphasis on the *FSI Act*'s treatment of 'separate entities' and the use of the restrictive theory, is compelling. This is particularly so when reading the plain text of the statute and looking to the structure of the *FSI Act*. That being said, when having regard to the extrinsic material relied up on by the majority, it is clear that the intention of the drafters was the limited exception that the majority and the Court of Appeal favoured, and so the decision in *Greylag Goose*, while imperfect, is likely the correct one.

One practical difficulty that emerges from the decision, however, is the majority judgment's silence on the uncertainty with respect to the potential 'startling

---

120 Ibid 462 (Steward J), 467 (PD Herzfeld SC).

121 *Sydney Seaplanes* (n 34) 11 [33] (Bell P); *Greylag Goose NSWCA* (n 3) 556 [16] (Bell CJ).

122 *Federal Commissioner of Taxation v Consolidated Media Holdings Ltd* (2012) 250 CLR 503, 519 [39] (French CJ, Hayne, Crennan, Bell and Gageler JJ), quoting *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue (NT)* (2009) 239 CLR 27, 46 [47] (Hayne, Heydon, Crennan and Kiefel JJ).

123 See *Greylag Goose v PT Garuda (NSWCA)* (n 3) 557–8 [25]–[26] (Bell CJ); *PT Garuda v ACCC (HCA)* (n 12) 245 [7], 247–8 [18] (French CJ, Gummow, Hayne and Crennan JJ); *Firebird* (n 27) 41–3 [5]–[11] (French CJ and Kiefel J), 72–3 [140]–[142] (Gageler J), 81–9 [173]–[198] (Nettle and Gordon JJ); *Infrastructure Services* (n 36) 306 [11], 307–8 [17]–[18] (Kiefel CJ, Gageler, Gordon, Edelman, Steward, Gleeson and Jagot JJ).

124 *Zhang v Zemin* (2010) 79 NSWLR 513, 540 [159] (Allsop P) ('*Zhang v Zemin*').

125 *Firebird* (n 27) 81 [173] (Nettle and Gordon JJ). See also *Greylag Goose v PT Garuda (NSWCA)* (n 3) 557 [22]; *Zhang v Zemin* (n 124) 537–9 [138]–[148] (Spigelman CJ), 540 [158] (Allsop P).

insolvency consequences' alleged by Greylag Goose.[126] Greylag Goose's decision not to plead the much broader commercial transactions exception found in *FSI Act* s 11 confined the issues narrowly, limiting the Court's scope to consider that question. However, counsel for PT Garuda were pushed into a quick submission on s 11 in oral argument:

> EDELMAN J: So, you would then be arguing that — in an abstract claim that is said to be brought within section 11(1), based on a foreign entity's commercial transaction that leads to alleged insolvency, you would say, then, that section 14, because of its specific purpose, covers the field in relation to winding up, even for that specific commercial transaction.
>
> [Counsel for PT Garuda]: Yes.[127]

This submission was not taken further and should it come before the courts again, it should be rejected. It has been recognised that while the pt II exceptions to jurisdictional immunity are to be read disjunctively, they do overlap.[128] If it was considered that s 14 covered the field with respect to insolvency situations, it would never be the case that separate entities of a foreign State would be subject to winding up proceedings, and hence could continue to trade while insolvent in Australia. A separate entity is an 'agency' or 'instrumentality' of a foreign State, but those terms are not defined in the *FSI Act.*[129] This was the subject of the previous Full Federal Court decision involving PT Garuda, where Rares J noted that an entity may be a 'separate entity' (and hence benefit from jurisdictional immunity) even for a 'one off-transaction, act or activity' provided the entity is 'acting for, or being used by, the foreign State as its means to achieve some purpose or end of that State'.[130] Given the permissiveness of this definition, it is very likely that a large number of entities might benefit from jurisdictional immunity in this way, increasing the potential scope of the issue. As the separate judgment of Edelman J identified, however, the reality is that the 'elasticity of the concepts of a "commercial transaction" and "a separate entity of a foreign State"' likely cover the majority of commercial situations in which an application for winding up would occur.[131] However, without the majority's weighing in on this issue, the insolvency consequences accepted by the minority remain at large. What is left then, from *Greylag Goose* is a result that is unlikely to be repeated, and a case that showcases the difficulty of raising the spectre of 'dramatic insolvency consequences' in the abstract, without hearing submissions on the reality of those consequences materialising.

The High Court's split, while one concerning construction and the emphasis placed on extrinsic materials, ultimately sounds in a political consequence: how much control does (or should) Australia retain over foreign State-owned corporations within its territory? Can any body corporate that subjects itself to the Australian corporate legislative regime be wound up? For the joint majority, the

---

126 *Greylag Goose v PT Garuda (HCA)* (n 1) 848 [110] (Edelman J). See also Appellants' Submissions (n 40) [35].

127 *Greylag Goose* HCATrans (n 40) 1703–9. See also 1711–27.

128 *Greylag Goose v PT Garuda (HCA)* (n 1) 837 [46] (Gageler CJ, Gleeson, Jagot and Beech-Jones JJ); *Firebird* (n 27) 55 [62] (French CJ and Kiefel J); *ALRC FSI Report* (n 29) 50–1 [88].

129 *FSI Act* (n 2) s 3(1) (definition of 'separate entity').

130 *PT Garuda v ACCC (FCAFC)* (n 11) 421 [128].

131 *Greylag Goose v PT Garuda (HCA)* (n 1) 855 [146] (Edelman J).

answer is no: sovereign immunity has been drawn in a way that precludes absolute oversight over bodies corporate in Australia. For the minority, the *FSI Act*'s limiting of immunity for State separate entities and the practical assumption of risk and legal responsibility that a foreign State undertakes by choosing to carry on business in Australia is sufficient justification to conclude that immunity was not intended to prevent the winding up of those entities. The tension here is as old as State immunity itself. Since foreign State immunity is derived from the sovereign equality of States, 'exceptions to the immunity of the State represent a departure from the principle of sovereign equality [yet] [i]mmunity may represent a departure from the principle of territorial sovereignty and the jurisdiction which flows from it'.[132] The degree to which the *FSI Act* favours one or the other, especially when its language is capable of supporting either construction, is ultimately a point upon which reasonable minds might (and have) differed.

V Conclusion

The High Court's decision in *Greylag Goose* demonstrates the fine constructional split that can occur when presented with statutory provisions drafted in general language. The role of context and extrinsic material continues to be emphasised in cases concerning the *FSI Act* and this is a positive trend because of the sensitivity of the subject matter. The case was ultimately concerned with the operation of an insolvency exception found in the *FSI Act* s 14(3), which was held by the majority to have a very limited scope of operation. That scope permits Australian courts to adjudicate on property disputes in which a State has an interest, in instances of a bankruptcy, insolvency, or the winding up of a body corporate *other* than a State's separate entity. Their Honours also held that the *FSI Act* s 22 operated substantively to require the application of immunity in the same terms as between a State and its separate entity. The dissenting justices placed emphasis on the open language of the provision, the *FSI Act*'s pt IV restriction on immunity for such State entities, and the general restrictive theory of sovereign immunity to conclude that the exception should be read to include foreign State separate entities. The decision may however produce some uncertainty, particularly for the creditors of State separate entities within Australia. I suggest that Edelman J's assessment of the situation, however, likely reduces this risk, in view of the operation of *FSI Act* s 11. This conclusion also demonstrates the general cautionary tale that *Greylag Goose* presents, of a failure to run the broad commercial transactions exception in insolvency suits against State emanations.

[132] *Jurisdictional Immunities of the State (Germany v Italy:Greece intervening) (Judgment)* [2012] ICJ Reports 99, 124 [57]. See also *Greylag Goose v PT Garuda (HCA)* (n 1) 849–50 [119] (Edelman J).

Comment

Removal Pending Visas: The Australian Parliament's Answer to the End of Indefinite Detention

Ibrahim Khan*

Abstract

The High Court of Australia ruled in 2023 that the Commonwealth lacked the power to indefinitely detain aliens as it had done since the 2004 decision in *Al-Kateb v Godwin*. In response, the Australian Government released from immigration detention 149 aliens lacking any real prospect of being deported in the foreseeable future. The Australian Parliament swiftly enacted two immigration amendments to apply to these released aliens. The amending Acts placed the aliens on 'removal pending visas' bearing conditions ranging from daily curfews to constant monitoring. These visa conditions were imposed not by reviewable administrative decision, but by force of statute. A year later, the High Court invalidated two of the conditions. In a rapidly shifting space, this comment pauses to examine the unique process by which the removal pending visas were imposed, to illuminate: (i) the unique amenability of aliens to Commonwealth legislative power; and (ii) how a constitutional limitation on that power tempers that amenability.

I Introduction

In November 2023, the High Court of Australia unanimously held in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* ('*NZYQ*')[1] that it was beyond the Commonwealth's legislative power to detain aliens indefinitely. The stateless plaintiff who had been held in immigration detention for over five years awaiting deportation had pleaded that the Court should reopen and overrule the constitutional holding from its 2004 decision of *Al-Kateb v Godwin* ('*Al-Kateb*').[2] *Al-Kateb* had controversially enabled the Commonwealth to indefinitely detain non-

Please cite this comment as:
Ibrahim Khan, 'Removal Pending Visas: The Australian Parliament's Answer to the End of Indefinite Detention' (2025) 47 *Sydney Law Review* 21481:1–17 <https://doi.org/10.30722/slr.21481>.

* BA/LLB (*Syd*) (Hons II); ORCID iD: https://orcid.org/0009-0002-5164-4845.
Thank you to my supervisor, Dr Emily Hammond, for all her invaluable guidance and support.
A version of this comment was awarded the 2024 Sir Peter Heydon Prize for the best undergraduate contribution to the Sydney Law Review unit of study in the field of Constitutional, Administrative or International Law.

1 *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 280 CLR 137 (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ) ('*NZYQ*').

2 *Al-Kateb v Godwin* (2004) 219 CLR 562 ('*Al-Kateb*'). However, the Court declined to reopen the statutory construction holding from *Al-Kateb*.

citizens who it was unable to remove from Australia, such as NZYQ. The High Court agreed with NZYQ, holding that the *Migration Act 1958* (Cth) ('*Migration Act*')[3] could not validly authorise detention of aliens with no real prospect of removal from Australia in the foreseeable future. Detention so described contravened Ch III of the *Australian Constitution*.

In response, the Australian Government released from immigration detention 149 persons whom it had determined that the ruling applied to (the '*NZYQ*-affected cohort'). A scramble for a legislative response followed the decision. The Australian Parliament sought to amend the *Migration Act* to preserve the Government's ability to remove the *NZYQ*-affected cohort from Australia once it became practicable and to maintain community safety given concerns that those in the cohort with criminal convictions may reoffend once released.[4] Ten days after the decision in *NZYQ*, an amending Act came into force, and another followed suit 20 days thereafter.[5] The amending Acts deemed that following their release, the entire cohort was subject to Subclass 070 Bridging (Removal Pending) Visas ('removal pending visas') bearing up to 21 conditions. The non-citizens were required to disprove that they posed a risk to the community for any conditions to be removed. Breaches of certain visa conditions were punishable by mandatory imprisonment.

One cohort member challenged the validity of two such visa conditions subjecting him to daily curfews and constant electronic monitoring in *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* ('*YBFZ*').[6] As these conditions had been imposed by the Commonwealth Executive not the Judiciary, YBFZ contended that they violated the constitutional principle applied in *NZYQ*: that executive detention is only valid if it serves a legitimate and non-punitive purpose achievable in fact. The High Court agreed and extended the constitutional limitation originally applied to extra-judicial detention to curfews and electronic monitoring imposed by the Executive; Ch III provides that certain interferences with liberty and bodily integrity are exclusively exercisable by Commonwealth courts.

While migration law evolves at a relentless pace, the legislation enacted in response to *NZYQ* is worth isolating to dissect: (i) the process by which the removal pending visas were imposed on the *NZYQ*-affected cohort reveals that aliens are uniquely amenable to Commonwealth legislative power despite the finding in *NZYQ*; and (ii) the High Court's invalidation of the two visa conditions in *YBFZ* illustrates that this amenability is tempered by a constitutional limitation invalidating certain interferences with liberty and bodily integrity. In Part II of this comment, I contextualise how the end of indefinite detention culminated in the enactment of and challenge to the amending Acts. In Part III, I analyse issues (i) and (ii) to illustrate

---

3 *Migration Act 1958* (Cth) ('*Migration Act*').

4 Explanatory Memorandum, Migration Amendment (Bridging Visa Conditions) Bill 2023 (Cth) 4–5; Brett Worthington, 'Decades after a Boat Arrived in Australia, The Government Suddenly Found Itself with an Immigration Detention System in Disarray', *ABC News* (online, 14 April 2024) <https://www.abc.net.au/news/2024-04-14/nzyq-immigration-detention-timeline-high-court-government/103699478>.

5 *Migration Act (Bridging Visa Conditions) Act 2023* (Cth) ('*Visa Conditions Act*') and *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Act 2023* (Cth) ('*Serious Offenders Act*'): collectively, 'the amending Acts'.

6 *YBFZ v Minister for Immigration, Citizenship and Multicultural Affairs* (2024) 99 ALJR 1 ('*YBFZ*').

the significance of this legislative scheme. In Part IV, I conclude by discussing how the law may continue to develop.

II Background

The decision in *NZYQ* was handed down on 8 November 2023, ordering the release of the plaintiff from immigration detention.[7] Before the High Court released its written reasons 20 days later, a cohort of other non-citizens had been released from detention and were subject to a new legislative scheme. In this Part, I: (A) trace Australia's history of indefinite detention until *NZYQ*; (B) outline how Parliament responded to *NZYQ* by enacting two amending Acts; and (C) introduce how *YBFZ* invalidated part of these Acts.

A NZYQ *and the End of Indefinite Detention*

Indefinite detention is the product of a legislative scheme introduced in 1994 and interpreted by the High Court in *Al-Kateb*.[8] Under s 189(1) of the *Migration Act*, Commonwealth officers are obliged to detain 'unlawful non-citizen[s]'. These are persons in Australia without Australian citizenship or a visa that is in effect.[9] Section 196(1) stipulates that their detention must continue, inter alia, until they are granted a visa or removed from Australia. As constructed by the High Court in *Al-Kateb*, and affirmed in *NZYQ*, an unlawful non-citizen's detention is an ongoing state of affairs that must continue until one of these stipulated events occurs.[10] Detention becomes indefinite when neither can be realised. For example, if an unlawful non-citizen's application for a visa has been finally determined in the negative, Commonwealth officers are obliged to remove them from Australia as soon as reasonably practicable.[11] However, if the non-citizen is stateless such as Al-Kateb or, due to Australia's international non-refoulement obligations, cannot be returned to their country of origin where they are liable to be subjected to persecution such as NZYQ, their removal can become impossible. *Al-Kateb* provided in 2004 that this legislative scheme was constitutional even if it resulted in non-citizens being indefinitely detained.[12] *NZYQ* overturned this proposition 19 years later.

NZYQ, a stateless man with no prospects of removal from Australia who had been held in immigrant detention for over five years, successfully pleaded that the High Court should reopen and overrule the constitutional holding in *Al-Kateb*.[13] The

---

7 Transcript of Proceedings, *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] HCATrans 154, 9104–9120 ('*NZYQ* Transcript of Proceedings').

8 *NZYQ* (n 1) 148 [11], citing *Migration Legislation Amendment Act 1994* (Cth).

9 *Migration Act* (n 3) ss 5(1) (definition of 'migration zone'), 5(1) (definition of 'non-citizen'), 13(1), 14(1).

10 *Al-Kateb* (n 2) 638–9 [226] (Hayne J, McHugh J agreeing at 581 [33]); *NZYQ* (n 1) 148 [12], 149 [14], 152 [23].

11 *Migration Act* (n 3) s 198(6); *Al-Kateb* (n 2) 581 [34] (McHugh J), 633 [206], 638–9 [226]–[227] (Hayne J); *NZYQ* (n 1) 146–7 [4], 148–9 [13].

12 *Al-Kateb* (n 2) 580–1 [31], 581 [34] (McHugh J), 651 [268] (Hayne J).

13 *NZYQ* (n 1) 146 [1]–[2], 156 [37].

Court ruled that these sections of the *Migration Act*, insofar as they authorised his continuing detention, were invalid as they contravened Ch III of the *Constitution*.[14]

The High Court restated in *NZYQ* the overarching principle that absent judicial mandate, the Executive could only detain persons if authorised by valid statutory provisions.[15] As the Court held in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* ('*Lim*'),[16] these provisions will only be valid to the extent that the detention they authorise is 'reasonably capable of being seen to be necessary for a legitimate *and* non-punitive purpose'.[17] Beyond this, detention under Australia's constitutional system is an incident of the exclusively judicial function of adjudicating and punishing criminal guilt.[18] Applying *Lim*, the Court in *NZYQ* therefore held that:

> a Commonwealth statute which authorises executive detention must limit the duration of that detention to what is reasonably capable of being seen to be necessary to *effectuate an identified statutory purpose which is reasonably capable of being achieved*.[19]

Putting aside the different approach of Edelman J,[20] six members of the High Court held that this constitutional limitation 'would be devoid of substance' if there was no real prospect of achieving in the reasonably foreseeable future the legislative objects that the Commonwealth identified as providing the requisite legitimate and non-punitive purpose.[21] The six justices identified two legitimate and non-punitive purposes for detaining NZYQ: (i) enabling the determination of his visa application; and (ii) removing him from Australia.[22] As NZYQ's application for a protection visa had been finally determined in the negative,[23] the justices turned their attention to the second purpose. The Commonwealth had conceded at the initiation of the case that NZYQ could neither be removed from Australia nor was there a 'real prospect of [him] being removed from Australia in *the reasonably foreseeable future*'.[24] This refuted the existence of the second purpose.[25]

The High Court rejected the Commonwealth's alternative submission that separation from the Australian community constituted a legitimate and non-punitive purpose. As the six justices wrote, that 'impermissibly conflates detention with the purpose of detention'.[26] As the application of ss 189(1) and 196(1) to NZYQ was unconstitutional, the Court ordered his release from his unlawful detention.[27]

---

14 Ibid 147–8 [9], 166 [71].
15 Ibid 153 [27], citing *Williams v The Queen* (1986) 161 CLR 278, 292 (Mason and Brennan JJ), *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 520–1 (Mason CJ, Wilson and Dawson JJ), 528 (Deane J).
16 *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 ('*Lim*').
17 *NZYQ* (n 1) 157 [39] (emphasis added). See also 154–5 [31].
18 Ibid 157 [39]. See also 153 [28].
19 Ibid 157 [41], quoting *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514, 625 [374] (Gageler J) (emphasis added).
20 See *NZYQ* (n 1) 160–2 [51]–[54].
21 Ibid 158 [45] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).
22 Ibid 158–9 [46] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).
23 Ibid 146–7 [3]–[4].
24 Ibid 164 [63] (emphasis added). See also 166 [70].
25 Ibid 158–9 [46] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).
26 Ibid 159 [49].
27 Ibid 166 [71].

Before *NZYQ*, the High Court had declined to reopen *Al-Kateb* on three occasions.[28] However, Gageler CJ designated *NZYQ* the first case that his court would hear.[29] The hearing took place on 7–8 November 2023. Sixteen minutes after it concluded, His Honour revealed that 'at least a majority' of the Court favoured the announced order that effectively overturned *Al-Kateb*.[30] The reasons were only handed down on 28 November 2023.

B *The Legislative Response to* NZYQ

Following the release of the High Court's orders in *NZYQ*,[31] the Commonwealth sought to identify the *NZYQ*-affected cohort: those persons in immigration detention for whom the Commonwealth's duty to remove from Australia under s 198 of the *Migration Act* had been enlivened and who had no real prospect of such removal becoming practicable in the reasonably foreseeable future. The Department of Home Affairs ultimately identified 149 such persons who were progressively released over the next month.[32]

On 16 November 2023, the Labor Government proposed to Parliament an immigration Bill that specifically applied to the *NZYQ*-affected cohort.[33] In exchange for several amendments to the Bill, the Government secured the support of the Coalition Opposition to pass the Bill through the Senate.[34] The Bill was assented to the next day and the *Migration Act (Bridging Visa Conditions) Act 2023* (Cth) ('*Visa Conditions Act*')[35] came into force on 18 November 2023,[36] ten days after the orders in *NZYQ*. On 27 November 2023, the day before the High Court released its written reasons, the Government introduced to Parliament another Bill amending the *Migration Act*.[37] Again with support from the Opposition, the *Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders*

---

28 *Plaintiff M47/2012 v Director-General of Security* (2012) 251 CLR 1; *Plaintiff M76/2013 v Minister for Immigration, Multicultural Affairs and Citizenship* (2013) 251 CLR 322; *Plaintiff M47/2018 v Minister for Home Affairs* (2019) 265 CLR 285.

29 Michael Pelly, 'Gageler Puts a Firm Stamp on "News" High Court', *Australian Financial Review* (online, 10 November 2023) <https://www.afr.com/politics/federal/gageler-puts-early-stamp-on-new-high-court-20231108-p5eidn>.

30 *NZYQ* Transcript of Proceedings (n 7) 9075. See also *NZYQ* (n 1) 147 [8].

31 *NZYQ* (n 1) 167–8 [74].

32 Department of Home Affairs (Cth), *Information Provided in Response to A Request from Senator James Paterson and Senator the Hon Michaelia Cash in relation to High Court Decision in NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs & Anor* (Report, 12 February 2024) 6.

33 'Migration Amendment (Bridging Visa Conditions) Bill 2023', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7114>.

34 Paul Karp, 'Labor Accused of Caving to Dutton as "Draconian" Bill Restricting Released Detainees Is Passed', *The Guardian* (online, 16 November 2023) <https://www.theguardian.com/australia-news/2023/nov/16/labor-emergency-immigration-detention-bill-strict-visa-conditions-electronic-monitors-curfews>.

35 *Visa Conditions Act* (n 5).

36 Ibid s 2.

37 'Migration and Other Legislation Amendment (Bridging Visas, Serious Offenders and Other Measures) Bill 2023', *Parliament of Australia* (Web Page) <https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r7128>.

and Other Measures) Act 2023 (Cth) ('*Serious Offenders Act*')[38] came into force on 8 December 2023.[39] Together, the amending Acts created a new legislative scheme.

The first amending Act, the *Visa Conditions Act*, was enacted to: (i) facilitate the removal of members of the *NZYQ*-affected cohort from Australia once it became practicable; and (ii) manage those non-citizens until said removal eventuates (if ever).[40] Until *NZYQ*, once the Commonwealth identified a country that would accept a non-citizen that it had a statutory duty to remove from Australia, it could effectuate that removal as it had that non-citizen in immigration detention. As that was no longer the case, the new legislative scheme provided alternative means for the Commonwealth to track members of the *NZYQ*-affected cohort so they could be re-detained when a real prospect of their removal becoming practicable in the reasonably foreseeable future eventuated.

The *Visa Conditions Act* subjected the entire cohort to removal pending visas allowing them to remain in Australia.[41] Media reporting at the time suggested that cohort members had been released from immigration detention both with and without bridging visas.[42] The Act inserted a new section into the *Migration Act* that ceased, by operation of law, any removal pending visas that cohort members were on before the section came into effect and placed each of them on a new such visa.[43] Further, by operation of law, the *Visa Conditions Act* imposed, with each removal pending visa, several mandatory conditions, the majority of which were introduced by the Act specifically for the *NZYQ*-affected cohort.[44] As soon as the Act came into force, cohort members were immediately required to comply with 21 different visa conditions.[45] These conditions enabled the Commonwealth to track a non-citizen's movements and financial circumstances to facilitate their re-detention, the first object of the Act.

However, given that the *NZYQ*-affected cohort had no real prospect of removal from Australia in the reasonably foreseeable future, the second object of the *Visa Conditions Act* was managing the cohort until that real prospect eventuated (if ever). The Government was largely concerned by the potential of cohort members to threaten community safety, particularly given that 144 of the 149 members had served criminal sentences for previous convictions for serious offences, including murder, attempted murder, sexual offences, domestic violence, people smuggling, kidnapping, serious drug offending, and armed robbery.[46] NZYQ himself had

---

38 *Serious Offenders Act* (n 5).

39 Ibid s 2; Paul Karp, 'Labor's Preventive Detention Regime Passes Senate as Third Freed Immigration Detainee Arrested', *The Guardian* (online, 5 December 2023) <https://www.theguardian.com/australia-news/2023/dec/05/immigration-detention-detainee-arrested-dandenong-breached-bail>.

40 Explanatory Memorandum (n 4) 2, 4–5.

41 *Migration Act* (n 3) s 76A(5)(b), as inserted by *Visa Conditions Act* (n 5) sch 1.

42 Stephanie Borys, Detainees Released without Visas after High Court Decision in Immigration Revelation', *ABC News* (online, 15 November 2023) <https://www.abc.net.au/news/2023-11-15/detainees-released-without-visas-after-high-court-decision/103107738>.

43 *Migration Act* (n 3) s 76A, as inserted by *Visa Conditions Act* (n 5) sch 1.

44 *Migration Act* (n 3) s 76A(5)(c), as inserted by *Visa Conditions Act* (n 5) sch 1.

45 *Migration Regulations 1994* (Cth) sch 2 cl 070.612A ('*Migration Regulations*'); *Visa Conditions Act* (n 5) sch 2 item 13.

46 Department of Home Affairs (Cth) (n 32) 10.

pleaded guilty to a sexual offence against a child.[47] After completing his criminal sentence, he was placed in immigration detention as his conviction had persuaded the relevant delegate that he posed a danger to the community and, thus, to deny his application for a protection visa.[48] This safety concern largely motivated the enactment of the second amending Act, the *Serious Offenders Act*. Its objective was to strengthen relevant migration laws in response to *NZYQ* to keep the community safe.[49] It contained new offences for breaching certain mandatory visa conditions. Together the amending Acts introduced six criminal offences for such breaches, the maximum penalty for all offences being five years' imprisonment, 300 penalty units ($93,900 at the time of the Acts' enactments), or both.[50]

The only avenue available to non-citizens to remove any condition is to apply for a new less onerous removal pending visa without that condition.[51] The Minister of Immigration would need to be satisfied that said condition was not reasonably necessary for protecting any part of the Australian community.[52] This ministerial decision was not subject to procedural fairness requirements.[53]

It should be noted that discussion of the *Serious Offenders Act* in this comment is limited to migration law. The Act amended other Commonwealth legislation to introduce a Community Safety Order ('CSO') Scheme under which non-citizens falling within the *NZYQ*-affected cohort who have committed serious violent or sexual offences may be re-detained or placed under additional surveillance if the Commonwealth satisfies a court that such action is necessary to protect the community.[54] This scheme is analogous to existing legislative schemes at the Commonwealth and State level that have already been the subject of a significant amount of discussion.[55] However, the application of the CSO Scheme is limited to non-citizens falling within the *NZYQ*-affected cohort.

Unlike the removal pending visas, the CSO Scheme does not apply to the whole cohort due to their immigration status, but rather to individual non-citizens due to the nature of their prior criminal offending. Additionally, the Scheme likely does not offend the constitutional limitation recognised in *Lim*. As the High Court stated in *NZYQ*, the decision did not 'prevent detention of [NZYQ] on some other applicable statutory basis, such as under a law providing for preventive detention of a child sex offender who presents an unacceptable risk of reoffending if released from custody'.[56] In contrast, the High Court held a year later in *YBFZ* that the application of the removal pending visas to a cohort member was unconstitutional.

---

47 *NZYQ* (n 1) 146 [2].
48 Ibid 146 [2]–[3].
49 Explanatory Memorandum, Migration Amendment (Bridging Visas Conditions and Other Measures) Bill 2023 (Cth) 2–3.
50 *Migration Act* (n 3) ss 76B, 76C, 76D, 76DAA, 76DAB, 76DAC, as inserted by *Visa Conditions Act* (n 5) sch 1 and *Serious Offenders Act* (n 5) sch 1; *Crimes (Amount of Penalty Unit) Instrument 2023* (Cth) ss 2, 5.
51 *Migration Act* (n 3) ss 76E(1), (4), as inserted by *Visa Conditions Act* (n 5) sch 1.
52 *Migration Act* (n 3) s 76E(4), as inserted by *Visa Conditions Act* (n 5) sch 1.
53 *Migration Act* (n 3) s 76E(2), as inserted by *Visa Conditions Act* (n 5) sch 1.
54 *Serious Offenders Act* (n 5) sch 2.
55 See, eg, Madeleine McNeil and Ashwini Ravindran, 'Innocent until Predicted Guilty: *Garlett v Western Australia* (2022) 404 ALR 182' (2023) 44(1) *Adelaide Law Review* 662.
56 *NZYQ* (n 1) 166 [72].

C YBFZ *and the Validity of the Amending Acts*

The plaintiff in *YBFZ* was a stateless alien released from immigration detention following *NZYQ* and placed on a series of removal pending visas following an assessment by the Department of Home Affairs that there was no real prospect of his removal becoming practicable in the reasonably foreseeable future.[57] All these visas included conditions requiring him to: (i) remain at a notified address for eight-hour periods ('the curfew condition'); and (ii) constantly wear an electronic device that could determine and monitor his location ('the monitoring condition').[58] YBFZ unsuccessfully applied to the Minster to reissue a removal pending visa without these conditions.[59] Having exhausted all avenues available to him under the amending Acts to remove these visa conditions, YBFZ successfully challenged their validity; a majority of the High Court ruled in November 2024 that the visa conditions infringed Ch III of the *Australian Constitution*.[60]

The plurality in *YBFZ*, consisting of Gageler CJ, Gordon, Gleeson and Jagot JJ, held that the constitutional limitation applied in *NZYQ* is not confined to its original application in *Lim* to involuntary detention; instead, any exercise of Commonwealth power characterised as *punishment* may only exist as an incident of the exclusively judicial function of adjudging and punishing criminal guilt ('the *Lim* principle').[61] The *Constitution* vests the power to order such punishment exclusively in the Judiciary, not the Executive.[62] To ascertain which involuntary hardships administered by the Executive infringe Ch III, the plurality asked a single question of characterisation of whether the hardship is 'properly characterised as punitive and therefore as exclusively judicial'.[63] The hardship will be properly characterised as punitive if: (i) its character is prima facie punitive; and (ii) it is not reasonably capable of being seen as necessary for a legitimate and non-punitive purpose.[64] The plurality characterised the curfew and monitoring conditions as punishment as they were: (i) prima facie punitive; and (ii) lacked a legitimate non-punitive purpose to displace that character.[65]

This *Lim* principle is derived from the fundamental principle that the exercise of an exclusively judicial function other than by the Judiciary contravenes Ch III.[66] However, whether by the legislative enactment of s 76A of the *Migration Act* or administrative action under s 76E, YBFZ and other members of the *NZYQ*-affected cohort were made subject to the curfew and monitoring conditions by extra-judicial mechanisms. The courts' only role under the amending Acts was judicially

---

57 *YBFZ* (n 6) 16 [39]–[43] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

58 Ibid 13–14 [26], 14–15 [30], 16 [42]–[43] (Gageler CJ, Gordon, Gleeson and Jagot JJ), citing *Migration Regulations* (n 45) sch 2 cl 070.612A.

59 *YBFZ* (n 6) 16–17 [44] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

60 Ibid 9 [4]–[5] (Gageler CJ, Gordon, Gleeson and Jagot JJ), 43 [170]–[171] (Edelman J).

61 Ibid 12 [17], quoting *Lim* (n 16) 27 (Brennan, Deane and Dawson JJ).

62 *YBFZ* (n 6) 9 [6], 12 [16] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

63 Ibid 12 [16], quoting *Jones v Commonwealth* (2023) 280 CLR 62, 82 [43] (Kiefel CJ, Gageler, Gleeson and Jagot JJ)). See also *YBFZ* (n 6) 54 [227]–[228], 55–6 [237]–[239] (Beech-Jones J).

64 *YBFZ* (n 6) 12 [16]–[18] (Gageler CJ, Gordon, Gleeson and Jagot JJ), 55–6 [237]–[239], 59 [251] (Beech-Jones J).

65 Ibid 23 [83] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

66 See, eg, *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434.

reviewing ministerial decisions to grant new visas or to enforce criminal sanctions for breaches of visa conditions. As the two visa conditions had been imposed on the cohort without judicial order, they were invalid.

III Analysis

Within a year of *NZYQ*, the two amending Acts were enacted in response and had been ruled partially unconstitutional in *YBFZ*. In this Part, I employ the Acts to illustrate: (A) the unique amenability of aliens such as members of the *NZYQ*-affected cohort to Commonwealth legislative power; and (B) the effect of the *Lim* principle on the exercise of this power to constrain the liberty of aliens.

A *The Amenability of Aliens to Commonwealth Legislative Power*

NZYQ and YBFZ were not just non-citizens at the time of their hearings; they were aliens. Alienage is conceptually distinct from a lack of statutory citizenship as the Australian Parliament lacks legislative power under the *Constitution* to characterise a person as an alien if they do not meet the ordinary understanding of the word.[67] In reality, however, most non-citizens are aliens,[68] and are subject to the Commonwealth's powers with respect to aliens.

The fundamental difference between aliens and non-aliens under the *Australian Constitution* lies in the former's vulnerability to exclusion or deportation from Australia by the Commonwealth without contravening Ch III.[69] The power to remove aliens in s 198 of the *Migration Act* is incidental to the Commonwealth's sovereignty over its territory.[70] Post-*NZYQ*, the Commonwealth is empowered to detain aliens to remove them from Australia,[71] so long as there exists a real prospect of that removal becoming practicable in the reasonably foreseeable future.[72] Such a power does not exist for non-aliens.

An alien's status, rights, and immunities differ from those of non-aliens in other ways. For example, those aliens who are non-citizens may have distinct rights in the employment market or marriage rights. Most of these differences are products of statute. As the *Constitution* empowers the Australian Parliament to make laws with respect to 'naturalization and aliens',[73] Parliament has broad discretion when legislating aliens' interests only fettered by constitutional limitations, such as the *Lim* principle.

The breadth of the Commonwealth's legislative power is not itself unique to aliens. Through the High Court's broad readings of the heads of power, the modern Commonwealth regulates nearly every facet of the lives of aliens and non-aliens

67 See, eg, *Pochi v Macphee* (1982) 151 CLR 101, 109–10 (Gibbs CJ).
68 Cf *Love v Commonwealth* (2020) 270 CLR 152.
69 *NZYQ* (n 1) 154 [29], quoting *Lim* (n 16) 29 (Brennan, Deane, and Dawson JJ).
70 *Lim* (n 16) 29 (Brennan, Deane, and Dawson JJ).
71 Ibid 30–2 (Brennan, Deane, and Dawson JJ).
72 *NZYQ* (n 1) 158 [44]–[45] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).
73 *Australian Constitution* s 51(xix).

alike.[74] This is at least partially driven by the trust placed by the *Australian Constitution* in the political process, not the courts, to hold the government accountable, fashion appropriate legislation, and curb abuses of power. The *Constitution* accordingly provides for a robust democratic system of government chosen by 'the people'.[75] However, with the limited exception of non-citizen British subjects who were registered Commonwealth electors in 1984, Commonwealth elected representatives are chosen exclusively by non-aliens.[76] As Deane J wrote in *Cunliffe v Commonwealth*, while 'an alien [in Australia] enjoys the protection of the ordinary law, including the protection of some of the *Constitution's* guarantees, directives and prohibitions, he or she *stands outside the people of the Commonwealth*'.[77] An alien is therefore amenable to legislation affecting their interests that they play no role in enacting. They are reliant on the electoral choices of non-aliens to influence government policies that affect them, but not non-aliens. The enactment of the amending Acts illustrates how this reliance plays out in practice. In this Part, I analyse: (1) the process by which members of the *NZYQ*-affected cohort were made subject to the removal pending visas; (2) the onerous conditions attached to those visas; and (3) the cumulative effect of this exercise of legislative power.

1 *The Imposition of Removal Pending Visas*

The corollary of the Commonwealth's power to exclude an alien from Australia is the power to issue visas stipulating the terms upon which the alien can enter and remain in Australia.[78] The Commonwealth often carves out different rights for an alien by attaching conditions to their visa. The legislative scheme that the amending Acts implemented was no different. Section 76A of the *Migration Act*, inserted by the *Visa Conditions Act*, imposed unique visa conditions on aliens in the *NZYQ*-affected cohort by simultaneously: (i) ceasing a prior existing visa of the alien, irrespective of whether it had any conditions attached; and (ii) placing them on a new removal pending visa with 21 mandatory conditions. These two steps were executed by operation of law and without an application from either the alien concerned or the Commonwealth.

Section 76A is the only such decision by operation of law in the *Migration Act*. It lacked the usual routes for administrative review available under the Act. Judicial review was unavailable despite the effect on the alien's interests as the imposition of the new removal pending visa did not constitute a decision under an enactment; the enactment was the decision.[79] It was not subject to requirements of procedural fairness. Merits review was unavailable. As *YBFZ* demonstrated, the only redress available to an alien subject to a removal pending visa with the mandatory conditions was: (i) satisfying the Minister that the conditions sought to be removed

---

74 See, eg, *Victoria v Commonwealth* (1971) 122 CLR 353, 396–7 (Windeyer J).
75 *Australian Constitution* (n 73) ss 7, 24.
76 *Commonwealth Electoral Act 1918* (Cth) s 93.
77 *Cunliffe v Commonwealth* (1994) 182 CLR 272, 335–6 (emphasis added) (citations omitted).
78 See, eg, *Lim* (n 16) 25–6 (Brennan, Deane and Dawson JJ).
79 *Australian Constitution* (n 73) ss 75(iii), (v); *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 3(1) (definition of 'enactment'); *Griffith University v Tang* (2005) 221 CLR 99, 130–1 [89] (Gummow, Callinan and Heydon JJ).

were not reasonably necessary for the protection of any part of the Australian community under s 76E; or (ii) challenging the constitutional validity of s 76A. If an alien's application under the former option failed, it was not subject to procedural fairness requirements, in contrast to other immigration decisions.[80]

Not all decisions under the *Migration Act* require procedural fairness: for example, the cancellation of an alien's visa under s 501.[81] This section requires that the Minister consider a visa-holder's character and decide to cancel their visa if satisfied that they are not of good character. Despite this discretion, the Minister is required by s 501(3A) to decide to cancel the visa if the visa-holder is currently serving a criminal sentence and either: (i) committed a child sexual offence; or (ii) has a 'substantial criminal record'.[82] This includes the visa-holder having been sentenced to more than 12 months' imprisonment for any offence.[83] Section 501(3A) converts visa-holders from 'lawful non-citizens' to 'unlawful non-citizens', thereby enlivening Commonwealth officers' duty to detain them and remove them from Australia as soon as reasonably practicable.[84] However, despite the harsh consequences of such a decision, there are more routes available to aliens to challenge it than the imposition of a removal pending visa by s 76A. Unlike s 76A, a mandatory visa cancellation under s 501(3A) is a decision made under an enactment and is thus amenable to judicial review, even if judges cannot consider procedural fairness.

Similar to the newly introduced s 76E, s 501CA provides an opportunity for an alien to satisfy the Minister that adverse action should not be taken against them. Section 501CA is enlivened if a visa is cancelled under s 501(3A).[85] The Minister is required to invite the visa-holder to make representations as to their character. If the Minister is satisfied that despite the visa-holder's criminal conviction(s) that enlivened the mandatory cancellation, they are of good character, the Minister may decide to revoke the cancellation, thereby reinstating their visa. Unlike a decision made under s 76E to issue a new removal pending visa, the decision to revoke a mandatory visa cancellation is not amenable to merits review.[86] Despite this difference, the process by which the amending Acts made aliens subject to new removal pending visas is analogous to the sections of the *Migration Act* mandating the cancellation of visas for aliens with substantial criminal records. The former, however, was distinct as it: (i) was self-executing, thus lacking judicial oversight; (ii) was enlivened by aliens' immigration status, not their criminal record; and (iii) could result in future criminal liability.

---

80 *Migration Act* (n 3) ss 76E(2), 338(4)(c).

81 Ibid s 501(5), discussed in *Plaintiff M1/2021 v Minister for Home Affairs* (2022) 275 CLR 582, 592–3 [10] (Kiefel CJ, Keane, Gordon and Steward JJ) ('*Plaintiff M1/2021*').

82 *Migration Act* (n 3) s 501(7).

83 Ibid s 501(7)(c).

84 Ibid ss 189, 198, discussed in *Plaintiff M1/2021* (n 81) 593–4 [12]–[13] (Kiefel CJ, Keane, Gordon and Steward JJ).

85 *Migration Act* (n 3) s 501CA(1), discussed in *Plaintiff M1/2021* (n 81) 594 [14] (Kiefel CJ, Keane, Gordon and Steward JJ).

86 *Migration Act* (n 3) s 338(4)(c).

2 *Criminal Liability for Breaching Visa Conditions*

Aliens subject to removal pending visas would be particularly incentivised to challenge the imposition of certain onerous visa conditions, breaches of which constitute criminal offences with a maximum penalty of five years' imprisonment and a $93,900 penalty, and a mandatory minimum penalty of one year's imprisonment.[87] These conditions included: (i) the curfew condition;[88] (ii) the monitoring condition;[89] and (iii) a condition requiring an alien to engage with the Department of Home Affairs by notifying, reporting to, or attending it in specified ways at specified times and places.[90]

As noted above, the *Visa Conditions Act* inserted these three conditions into the *Migration Act* to specifically apply to the *NZYQ*-affected cohort.[91] Cohort members were suddenly required to comply with these onerous conditions as a result of their immigration status. Analogous conditions with analogous penalties for breaches exist under other legislative schemes that may apply to other non-citizens. The difference is that the conditions attached to a removal pending visa apply not due to previous criminal offending, but because of the Commonwealth's inability to remove the person from Australia. Some cohort members caught by the legislative scheme lacked a criminal record. All were burdened with the onus of proving they had reasonable excuses for even slight breaches of these conditions to avoid criminal liability.[92] The cumulative application of these conditions to an alien restricts their liberty. In Part III(B), I discuss the constitutionality of two of the 21 conditions. However, regardless of whether an alien can be subjected to this legislative scheme, there is a normative question of whether they should be.

3 *The Exercise of Commonwealth Legislative Power*

Under Australia's system of government, non-aliens decide through elected representatives how the Commonwealth should treat aliens. From one perspective, unlawful non-citizens chose to subject themselves to the exercise of this legislative power by entering Australia without a visa. This sentiment was recently reflected by the High Court's 2022 decision in *SDCV v Director-General of Security* ('*SDCV*'), where it ruled that there was no practical injustice in the Commonwealth not providing adverse security information to a migrant because he had made choices to potentially expose himself to a decision based on such information, particularly his decision to seek the privilege of a visa.[93] *SDCV* suggests there may be no practical injustice inflicted by imposing on an alien a removal pending visa that bears all the

87 Ibid s 76DA.
88 Ibid s 76C; *Migration Regulations* (n 45) sch 8 item 8620.
89 *Migration Act* (n 3) ss 76D; *Migration Regulations* (n 45) sch 8 item 8621.
90 *Migration Act* (n 3) ss 76B.
91 See above n 44 and accompanying text.
92 *Migration Act* (n 3) ss 76B(2), 76C(2), 76D(6).
93 *SDCV v Director-General of Security* (2022) 277 CLR 241, 254 [12] (Kiefel CJ, Keane and Gleeson JJ) ('*SDCV*'). The High Court recently affirmed *SDCV* in *MJZP v Director-General of Security* (2025) 99 ALJR 1108, 1111 [5], 1112–13 [12] (Gageler CJ, Gordon, Steward, Gleeson, Jagot and Beech-Jones JJ).

mandatory conditions because it is the result of the choice of the alien whose interests were affected to be subject to the legislative scheme.

From another perspective, all non-citizens are subject to removal from Australia, and it is not desirable for the *NZYQ*-affected cohort to receive different treatment because that removal cannot be effectuated. Creating criminal offences for breaches of certain visa conditions promotes compliance where the incentive of avoiding deportation for breaches has been negated by *NZYQ*. Compliance may be particularly desirable where the condition is designed to protect victims of crimes that cohort members have committed.[94] The community safety concerns that drove the enactment of the amending Acts may be legitimised by the fact that several cohort members have reoffended.[95]

This comment does not opine whether any or all unlawful non-citizens in the *NZYQ*-affected cohort should be subject to onerous visa conditions. Rather, it draws attention to the process by which the Australian Parliament, by enacting s 76A, subjected cohort members to conditions as a consequence of their immigration status that they may face imprisonment for breaching. The Minister and their delegates are better placed to determine what conditions (if any) cohort members require attached to their visas based on their individual circumstances. While s 76E allows for ministerial discretion to make such determinations if cohort members apply for new removal pending visas, they are still subject to every condition unless and until that discretion is exercised. Regardless, courts should have retained the power to supervise the process by which the conditions were initially imposed.

The two amending Acts were rushed through Parliament, suggesting a clear mandate for their enactment. It is, however, unclear that non-aliens endorse or are aware of the Commonwealth's power to instantaneously affect a group's interests and deny them procedural fairness by virtue of the status of the group members. It is questionable whether non-aliens would authorise Commonwealth power to be exercised in this manner to affect their own interests, particularly to restrict their liberty. The amending Acts typify the unique amenability of an alien to Commonwealth legislative power. Their interests are often shaped by statutes whose enactment they cannot directly influence and whose operation they have limited options for challenging. The result is that, except for constitutional limitations such as the *Lim* principle, aliens are amenable to broad Commonwealth legislative power while in Australia. The application of the *Lim* principle, however, appears to be expanding.

B *Constitutional Limitations on Extra-Judicial Punishment*

The *Lim* principle primarily developed through a series of High Court decisions concerning the constitutionality of various forms of detention, such as indefinite detention. Before *NZYQ*, the High Court had extended the principle beyond involuntary detention in 2022, when it ruled in *Alexander v Minister of Home Affairs*

94 *Migration Act* (n 3) ss 76DAB, 76DAC.

95 Paul Karp, 'Two Immigration Detainees Charged after Release due to High Court Ruling', *The Guardian* (online, 4 December 2023) <https://www.theguardian.com/australia-news/2023/dec/04/two-immigration-detainees-charged-after-release-due-to-high-court-ruling-ntwnfb>.

that Ch III precluded the Commonwealth from stripping a person's citizenship.[96] In *YBFZ*, the Court ruled that the curfew and monitoring conditions infringed Ch III. As previously mentioned, the plurality in *YBFZ* held that the *Lim* principle applies to invalidate any exercise of executive power properly characterised as punitive and that therefore only exists as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.[97] The curfew and monitoring conditions were properly characterised as punitive as (1) they had a prima facie punitive character and (2) this character was not reasonably capable of being seen to be appropriate and adapted to a legitimate and non-punitive purpose.[98] Imposing these visa conditions on the *NZYQ*-affected cohort thus constituted an unconstitutional exercise of executive power. In this Part, I analyse the plurality's application of steps (1) and (2) to explicate the latest expansion of the *Lim* principle, before (3) deriving its implications for the constitutional protection of liberty.

1 *Prima Facie Characterisation*

The plurality in *YBFZ* noted that certain laws will have an unassailable default character as punitive, particularly laws providing for involuntary detention.[99] If not punitive by default, their Honours went on to say that the amending Acts would still be prima facie punitive if they materially interfered with liberty or bodily integrity of YBFZ and other members of the *NZYQ*-affected cohort.[100] Not all interferences with individual liberty or bodily integrity, however, engage the *Lim* principle;[101] the plurality's analysis of the curfew and monitoring conditions illuminate which interferences are unconstitutional.

The curfew condition required that YBFZ remain at a notified address between 10pm and 6am the next morning, or another eight-hour period as specified by the Minister, every day for 12 months.[102] While he could alter his notified address, he had to provide the Minister with the requisite notice.[103] Non-compliance without a reasonable excuse attracted a mandatory minimum sentence of one year's imprisonment, and a maximum of five years' imprisonment, and a financial penalty.[104] The plurality held that the 'essential character' of this condition was 'the confinement of [YBFZ's] movement, every night, to a single location',[105] which

96 *Alexander v Minister of Home Affairs* (2022) 276 CLR 336, 349 [3] (Kiefel CJ, Keane and Gleeson JJ), 376–7 [98] (Gageler J).

97 *YBFZ* (n 6) 12 [16]–[18]. See also *Benbrika v Minister for Home Affairs* (2023) 280 CLR 1, 16 [35] (Kiefel CJ, Gageler, Gleeson and Jagot JJ).

98 *YBFZ* (n 6) 12 [16]–[18] (Gageler CJ, Gordon, Gleeson and Jagot JJ), 55–6 [237]–[239], 59 [251] (Beech-Jones J).

99 Ibid 12 [16]. See also *NZYQ* (n 1) 157 [40] (Gageler CJ, Gordon, Edelman, Steward, Gleeson, Jagot and Beech-Jones JJ), citing *Lim* (n 16) 27–8 (Brennan, Deane and Dawson JJ).

100 *YBFZ* (n 6) 12 [18].

101 Ibid 11–12 [15] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

102 Ibid 17 [48] (Gageler CJ, Gordon, Gleeson and Jagot JJ) discussing *Migration Regulations* (n 45) sch 8 item 8620.

103 *Migration Regulations* (n 45) sch 8 item 8620(3), discussed in *YBFZ* (n 6) 17 [48]] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

104 *Migration Act* (n 3) ss 76C, 76DA, discussed in *YBFZ* (n 6) 17–18 [50]–[51] (Gageler CJ, Gordon, Gleeson and Jagot JJ).

105 *YBFZ* (n 6) 17 [49].

further constrained his movements for the other two-thirds of the day.[106] Their Honours characterised the condition as prima facie punitive because it involved 'material and relatively long-term' deprivation of his liberty.[107]

The monitoring condition required that YBFZ for 12 months constantly wore an electronic monitoring device that would appear to other persons as an ankle cuff.[108] Non-compliance without a reasonable excuse attracted the same criminal sanctions as the curfew condition.[109] The plurality found that the effects of the operation of the condition on YBFZ's bodily integrity were 'material and relatively long-term';[110] he would suffer 'a real physical and a real psychological and emotional burden' as he would always be aware of the device's physical presence and surveillance,[111] it required three hours of daily charging, and it affected his choice of clothing for fear of stigmatisation.[112] Their Honours also noted that installing the device would otherwise be a tort of trespass to the person.[113] This was compounded by an encroachment on personal liberty as the charging requirement limited the YBFZ's mobility, and his movements were limited by the constant tracking and stigmas associated with the ankle cuff.[114] The monitoring condition was prima facie punitive.[115]

The plurality eschewed generalised statements about the validity of categories of executive action, such as invalidating all curfews, and comparisons to other executive actions, particularly detention.[116] Their Honours instead extracted both the legal and practical operation of the amending Acts on YBFZ's behaviour and psychological state to ascertain the law's prima facie character. As their analysis of the operation of the monitoring condition especially demonstrated, a broad range of practical effects, such as the impact on his choice of clothing or consciousness of surveillance, are relevant to characterisation. Parts of the amending Acts were prima facie punitive as their legal and practical effects caused a material and relatively long-term restraint on liberty and bodily integrity; they infringed Ch III of the *Constitution* unless that character was displaced.

2 *A Legitimate and Non-Punitive Purpose*

The plurality in *YBFZ* held that if an executive exercise of power bears a prima facie punitive character, the power must have a legitimate and non-punitive purpose and be reasonably appropriate and adapted to achieving that purpose to escape that characterisation and not infringe Ch III.[117] 'Legitimate' means that the power is

106 Ibid 18 [51].
107 Ibid 18 [52].
108 Ibid 18–19 [56], 19 [58] (Gageler CJ, Gordon, Gleeson and Jagot JJ), discussing *Migration Regulations* (n 45) sch 8 item 8621.
109 *Migration Act* (n 3) ss 76B, 76D, 76DA, discussed in *YBFZ* (n 6) 19 [59], 19 [61] (Gageler CJ, Gordon, Gleeson and Jagot JJ).
110 *YBFZ* (n 6) 19 [60].
111 Ibid.
112 Ibid 19 [59]–[60].
113 Ibid 19 [57].
114 Ibid 19–20 [61]–[62] (Gageler CJ, Gordon, Gleeson and Jagot JJ).
115 Ibid 20 [63] (Gageler CJ, Gordon, Gleeson and Jagot JJ).
116 Ibid 17 [46]–[47], 18 [55].
117 Ibid 12 [18], 20 [64].

compatible with the constitutionally prescribed system of government and 'non-punitive' means that it is not directed at adjudging and punishing criminal guilt.[118] The imposition of the curfew and monitoring conditions, however, lacked a legitimate non-punitive purpose.

The plurality concluded that the purported purpose of imposing the curfew and monitoring conditions was 'the protection of any part of the Australian community' as expressed in the amending Acts.[119] While community protection has been recognised as a legitimate and non-punitive purpose by the High Court before,[120] the amending Acts were distinct: a ministerial decision under s 76E of the *Migration Act* to issue a new removal pending visa without the curfew and monitoring conditions was not calibrated to protecting the Australian community from a particular nature, degree, or extent of harm.[121] The plurality noted that the harm sought to be protected from need not even involve the commission of a criminal offence.[122] Their Honours thus concluded that the purported purpose was too elastic to be legitimate.[123] The prima facie punitive character of the curfew and monitoring conditions had not been displaced.

While the plurality's analysis focused on the administrative decision to place YBFZ on a removal pending visa with the curfew and monitoring conditions, it is worth remembering that the amending Acts deemed that all non-citizens in the *NZYQ*-affected cohort would be subject to removal pending visas bearing those conditions. The imposition of those conditions was similarly not tied to any particular risk of harm that each non-citizen posed to the Australian community. Rather, it was a consequence of their immigration status.

3 *The Expanded Application of Lim Principle*

The plurality in *YBFZ* stressed that not every interference with personal liberty will engage the *Lim* principle.[124] However, the category of interferences requiring justification is no longer closed. The invalidated curfew and monitoring conditions were prima facie punitive because they respectively restricted YBFZ's liberty and bodily integrity materially and for a relatively lengthy period. This does not mean that a less restrictive curfew or monitoring condition would necessarily engage the *Lim* principle, nor does it preclude another visa condition from requiring a legitimate and non-punitive purpose for validity. The assessment is on the materiality and length of each restriction.

The *Australian Constitution* was enacted without an express protection of liberty. However, with the expanded application of the *Lim* principle beyond detention, Ch III of the *Constitution* precludes the Commonwealth from exacting certain interferences with personal liberty that are prima facie punitive, such as

118 Ibid 10 [8] (Gageler CJ, Gordon, Gleeson and Jagot JJ); *NZYQ* (n 1) 157 [39]–[40].
119 *YBFZ* (n 6) 20 [65], 22 [76].
120 See, eg, *Garlett v Western Australia* (2022) 277 CLR 1, 24–5 [46] (Kiefel CJ, Keane and Steward JJ), 113 [313] (Gleeson J).
121 *YBFZ* (n 6) 20 [65], 22 [76] (Gageler CJ, Gordon, Gleeson and Jagot JJ).
122 Ibid 23 [82].
123 Ibid 23 [81], 23 [83].
124 Ibid 9 [6], 11–12 [15].

imposing the curfew and monitoring conditions of the *NZYQ*-affected cohort. In effect, the Commonwealth would need to justify every extra-judicial exercise of power that sufficiently restricted liberty or bodily integrity to attract a prima facie punitive character by demonstrating reasonable necessity for a legitimate and non-punitive purpose. Without said justification, that restriction may only be enforced by an exercise of judicial power. Unlike exercises of legislative and executive power, such as s 76A and s 76E of the *Migration Act*, exercises of judicial power are accompanied by safeguards such as procedural fairness.[125] In this way, *YBFZ* signifies an expanding constitutional protection for the manner in which the Commonwealth can affect personal liberty.

The expansion of the *Lim* principle may have a normative effect on how Commonwealth statutes that affect liberty and bodily integrity are drafted. For example, ministerial discretion such as in s 76E or s 501CA of the *Migration Act* would need to be confined to be exercised in service of a legitimate and non-punitive purpose if it was prima facie punitive. When the Australian Parliament legislates to seriously restrict a person's liberty or bodily integrity, the imposition of restrictions should bear greater consideration and scrutiny than the rushed enactment of the amending Acts. However, the potential for invalidity and constitutional challenges was flagged at the time of the amending Acts' enactment.[126] Parliament's decision to nonetheless legislate suggests an appetite for statutes applying prima facie punitive hardships to aliens that may be invalidated. In this way, aliens may continue to be uniquely vulnerable to Commonwealth legislative power.

IV Conclusion

This comment leveraged the amending Acts to illustrate: (i) the amenability of aliens to Commonwealth legislative power, and (ii) how the *Lim* principle may invalidate certain exercises of that power. In further response to *NZYQ*, the Department of Home Affairs this year started resettling members of the *NZYQ*-affected cohort in Nauru.[127] As the migration policy continues to shift, attention needs to be paid to (i) new legislation uniquely applying to aliens and (ii) whether application of the *Lim* principle continues to expand to invalidate said legislation for constituting punishment. As *YBFZ* demonstrates, the extent of the Australian Parliament's power to enact statutes affecting personal liberty is actively being clarified by the courts.

---

125 *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 354 [54] (French CJ).

126 See, eg, Michael Bradley, 'Government's NZYQ Migration Amendments are Unconstitutional — I'm Sure of It', *Crikey* (online, 23 November 2023) <https://www.crikey.com.au/2023/11/23/nzyq-migration-amendments-unconstitutional/>.

127 Tom Crowley and Olivia Caisley, 'Nauru to Take Non-Citizen NZYQ Cohort Freed from Immigration Detention', *ABC News* (online, 16 February 2025) <https://www.abc.net.au/news/2025-02-16/nauru-agrees-to-settle-group-of-nzyq-cohort/104942562>.

Book Review

The Legal Recognition of Animal Sentience: Principles, Approaches and Applications by Jane Kotzmann and MB Rodriguez Ferrere (eds) (2024) Hart Publishing, 360 pp, ISBN 9781509970452

Debbie Rodan*

> 'Judge Rivera would have recognised [the elephant] Happy's *habeas corpus* rights on the basis that she is "a sentient being, who feels and understands, who has the capacity, if not the opportunity, for self-determination"'.[1]

The Legal Recognition of Animal Sentience is an edited book offering an extensive discussion about the state of legal recognition of animal sentience in various international jurisdictions. The book's subtitle — *Principles, Approaches and Applications* — cleverly delineates the contexts in which those meanings of animal sentience manifest, the implications and consequences of which are worked through. The dissenting judgement of Rivera J in *Breheny*,[2] referred to above, is one example of developing judicial and common law arguments for future decisions to follow in expanding the rights of sentient animals held in captivity.

The most interesting aspect of the book is that it offers some clarity about the state of animal law for readers who would like a deeper understanding of how the concept of sentience works in the common law. As the book's co-editor, Rodriguez Ferrere, points out in the last chapter: 'Often, the recognition of animal sentience in legislative instruments is labelled as symbolic, broadly meaning that such recognition was not intended to have any direct legal consequences'.[3]

Please cite this book review as:

Debbie Rodan, 'Book Review: *The Legal Recognition of Animal Sentience: Principles, Approaches and Applications* by Jane Kotzmann and MB Rodriguez Ferrere (eds)' (2025) 47 *Sydney Law Review* 21198:1–5 <https://doi.org/10.30722/slr.21198>.

* Honorary Associate Professor, School of Arts and Humanities, Edith Cowan University, Perth, Western Australia. Email: d.rodan@ecu.edu.au; ORCID iD: https://orcid.org/0000-0002-0770-1833.

1 Joe Wills, 'Common Sense: Animal Sentience and the Common Law' in Jane Kotzmann and MB Rodriguez Ferrere (eds), *The Legal Recognition of Animal Sentience: Principles, Approaches and Applications* (Hart Publishing, 2024) 97, 112 , quoting Rivera J (dissenting) in *In the Matter of Nonhuman Rights Project Inc v Breheny*, 197 NE 3d 921, 968 (NY, 2022) ('*Breheny*').

2 *Breheny* (n 1).

3 MB Rodriguez Ferrere, 'The Utility (or Otherwise) of Symbolic Legislation' in Jane Kotzmann and MB Rodriguez Ferrere (eds), *The Legal Recognition of Animal Sentience: Principles, Approaches and Applications* (Hart Publishing, 2024) 297, 297.

Most citizens in liberal representative democracies tend to view legislation, in the practice of the law, as being exact, and literal. This is simply not the case with regard to the legal recognition of animal sentience. Drawing on Rodriguez Ferrere's outline of the advantages and disadvantages of such symbolic legislation, I conclude, optimistically, that legislation of this kind has the potential for protracted incremental change; however, pessimistically, it remains ineffectual.

The chapters in this edited book, in large measure, explain why animals are still managed under property law. Sadly, under property law the recognition of sentience makes little difference to the lives of living, breathing, embodied creatures. This is not an introductory book to the legal recognition of sentience; however, for animal studies readers, the varied and nuanced definitions of sentience provided in each of the chapters and how these play out in the law are well worth reading for the valuable insights they afford. What I gained was a deeper understanding of how the law works in a wide range of jurisdictions in relation to animal protection and recognition of sentience. By the end of the book, I was keen to pursue the question of where in the common law it might be possible to change the legal status of non-human animals.

Some contributions expand on how certain non-human animals — mainly companion animals — in some jurisdictions potentially occupy a 'third category' under property law.[4] The first category deals with 'animals as merely legal things, property of the legal person'.[5] The second category makes a distinction between '"animals" on the one hand' and '"legal things" or "goods"' on the other.[6] The third category is considered to be an 'an unusual conceptual space as *property* that possess unique animate qualities',[7] and that would mean 'of neither persons nor things', but rather "'quasi-things'".[8] Could such an expanded definition of property, as the editors suggest, unleash a paradigm shift of how sentient animals' interests are spoken about, debated, and ultimately recognised in the community and the courts? It is still a long way from personhood and legal standing,[9] which many animal advocates are pushing for.

The overall purpose of the collection, as the editors explain, is to explore four aspects:

> the theoretical principles that might underpin the legal recognition of animal sentience, the legal implications of sentience recognition, the different experiences of sentience recognition in diverse jurisdictions, and what sentience recognition means for animals that are frequently discriminated against (if anything).[10]

In a nutshell, this volume is concerned with 'the effectiveness of the recognition of animal sentience'[11] in the law and it does indeed measure this in each of the book's three parts.

---

4 Eva Bernet Kempers, 'Owning Sentient Beings: The Potential of Sentience Recognition in Continental Law' in Jane Kotzmann and MB Rodriguez Ferrere (eds), *The Legal Recognition of Animal Sentience: Principles, Approaches and Applications* (Hart Publishing, 2024) 81.

5 Ibid.

6 Ibid.

7 Daniel Goldsworthy and Ian Robertson, 'Drafting and Interpreting Sentience Provisions: Incorporating Modern Science in Animal Welfare Law as a Legislative Requirement' in Jane Kotzmann and MB Rodriguez Ferrere (eds), *The Legal Recognition of Animal Sentience: Principles, Approaches and Applications* (Hart Publishing, 2024) 47, 54 (emphasis in original).

8 Bernet Kempers (n 4) 81.

9 Wills (n 1) 110.

10 Jane Kotzmann and MB Rodriguez Ferrere, 'Introduction' in Jane Kotzmann and MB Rodriguez Ferrere (eds), *The Legal Recognition of Animal Sentience: Principles, Approaches and Applications* (Hart Publishing, 2024) 1, 3.

11 Rodriguez Ferrere, 'The Utility (or Otherwise) of Symbolic Legislation' (n 3) 298.

The book also assesses whether animal sentience recognition in the law is 'merely a trend' or is the 'beginning of a paradigm shift'.[12] Perhaps some readers might consider this an ambitious aim. The authors of each chapter, from my reading, did not directly assess this; they did, however, provide clarifications, definitions, examples, and illustrations from the common law. Some chapters were more difficult in terms of understanding legal concepts, but, crucially, I found several were a very useful starting point or building block in understanding the very limited rights of non-human animals in the law.

The book organises the 17 individual (co-)authored chapters under three parts. To a certain degree, this supports the overall purpose of the book. This approach allows for theoretical ideas, legal cases, and the application of legislation to become apparent. The author contributions from legal scholars and those who work in the courts might not seem to be clearly differentiated to some readers. However, the way the contributors weave across legal resources and concepts is specifically how the book points to an array of legal perspectives about the recognition of animal sentience in the law.

Part One focuses on the first principles that inform the recognition of animal sentience in the law. I saw Part One as setting the scene or providing the context for the other two parts of the book. Broader definitions of animal sentience are provided and the direct or indirect effects of the legal recognition of animal sentience are outlined in Chapter 1. Chapter 2 discusses the connection between sentience and empathy and how legal recognition of sentience can enable humans to foster empathy. The relationship between animal welfare science and animal welfare law is examined in Chapter 3 in the context of drafting legislation. The value of recognising animal sentience in the law is deliberated in Chapter 4. Such a discussion might be beneficial to: (a) animal advocacy organisations wanting to change the legal status of animals; and (b) community and concerned citizens wanting to debate how to advocate for animal interests.

Part Two provides a survey of the legal frameworks of several countries or jurisdictions that have recognised animals as sentient beings in one form or another. I found the case studies in chapters 5–13 engaging because they illustrate several varied approaches in trying to apply the recognition of sentience in different jurisdictions. Each chapter begins with a short history of when and how the relevant Animal Welfare Act and animal sentience legislation were introduced into the country. One of the strong points of the book, for an international audience, is that the main jurisdictions examined encompass a variety of countries: European Union, Brazil, India, Pakistan, New Zealand, Québec (Canada), Spain, United Kingdom, and Oregon State (USA).

Part Three focuses on specific applications, limitations, and advantages of sentience legislation. Chapter 14 investigates how legal recognition of animal sentience in the case of commercial farm animals has the potential to affect the basic legal protection these animals receive. Chapter 15 focuses on the potential effects of applying the 'legal precautionary principle' with the aim of protecting sentient animals who are invertebrates.[13] Chapter 16 delves into how the legal recognition of sentient animals used in various kinds of scientific and medical research may have a bearing on public perceptions. Chapter 17 outlines the advantages and disadvantages of the legal recognition of sentience in the law as mainly symbolic legislation.

---

12 Kotzmann and Rodriguez Ferrere (n 10) 7.

13 Paulien Christiaenssen, 'Err on the Side of Sentience: The European Precautionary Principle, Article 13 of the *Treaty on the Functioning of the European Union*, and Invertebrates' in Jane Kotzmann and MB Rodriguez Ferrere (eds), *The Legal Recognition of Animal Sentience: Principles, Approaches and Applications* (Hart Publishing, 2024) 261, 262.

One of the strengths of the book is that it presents varied definitions of animal sentience as the authors of each chapter give 'their preferred definition of sentience'.[14] Some readers might see this breadth as a flaw — that the definitions in the book are too diffuse for lawmaking. What becomes apparent after reading several chapters is that legal scholars, judges, and the courts may interpret the concept of sentience 'in several ways, some broader and others narrower'.[15] Even when limited to biological needs, sentience can be interpreted in different ways; the most limited is 'pain-focused'.[16] In relation to defining animal sentience, I found much to think about, especially about how such a concept cannot be fully pre-determined.

Readers already familiar with the broader interpretation of sentience and its everyday meaning may come away with a much richer understanding of how the concept could be interpreted in the law — through judges, courts, and legislators — and among scholars, which has the potential to reshape human and non-human animal relations.

Most readers of this kind of book will be well aware that currently, as noted above, animals are still managed under property law. Several chapters examine a number of different countries' legislative changes which explicitly declare that non-human animals are 'not things'; however, such changes exist within legal systems that continue to treat animals as property in practice.[17] This goes some way to seeing sentient animals as no longer being classified as part of the category of things. So, in many common law cases, animals have become a special category under property law. Nevertheless, as Kotzmann and Ferdowsian note, '[r]ecognising that animals are sentient does not necessarily change their legal status as property'.[18]

For the general, educated reader (not legal scholars or those working in the courts) — who is very much interested in how sentience is applied to non-human animals in the law — the language of the law might require some readers to do a lot of work in order to gain an in-depth insight into how animal law works in various jurisdictions. I made a time commitment to understand how the law works in relation to the three categories of animals: domesticated (companion and farmed), wild, and animals used in experiments.[19] Reading the book in this way highlighted for me the valuable and productive insights it affords.

As is often the case with animal welfare, it is companion animals who most benefit from legislation that recognises animal sentience.[20] Animals who are farmed,[21] used in

---

14 Kotzmann and Rodriguez Ferrere (n 10) 3.

15 Michaël Lessard, 'A Field Trip into Québec Law: Exploring the Theoretical Ramifications of Sentience Recognition' in Jane Kotzmann and MB Rodriguez Ferrere (eds), *The Legal Recognition of Animal Sentience: Principles, Approaches and Applications* (Hart Publishing, 2024) 173, 185.

16 Ibid.

17 Ibid 173.

18 Jane Kotzmann and Hope Ferdowsian, 'Animal Sentience Recognition and Theoretical Connotations: Possible Implications for Animals in Research' in Jane Kotzmann and MB Rodriguez Ferrere (eds), *The Legal Recognition of Animal Sentience: Principles, Approaches and Applications* (Hart Publishing, 2024) 281, 292.

19 Vanessa Gischkow Garbini, 'All Roads Lead to Sentience: The Past, Present and Future of Animal Legal Protection in Brazil' in Jane Kotzmann and MB Rodriguez Ferrere (eds), *The Legal Recognition of Animal Sentience: Principles, Approaches and Applications* (Hart Publishing, 2024) 121, 125.

20 Gischkow Garbini (n 19) 123–4. See also Rachel Dunn and Joshua Jowitt, 'The Animal Sentience Committee: Evolution or Revolution in the Recognition of Animal Sentience in the UK?' in Jane Kotzmann and MB Rodriguez Ferrere (eds), *The Legal Recognition of Animal Sentience: Principles, Approaches and Applications* (Hart Publishing, 2024) 207, 207–8.

21 Steven White, 'Sentiency, Exceptionalism and Farm Animal Protection' in Jane Kotzmann and MB Rodriguez Ferrere (eds), *The Legal Recognition of Animal Sentience: Principles, Approaches and Applications* (Hart Publishing, 2024) 245, 248.

sports,[22] used for scientific and medical research experiments,[23] and used for religious or cultural purposes[24] hardly benefit at all because the legislation has not led to 'systemic change'.[25] In the chapters that analysed and gave specific examples of where the courts upheld animal interests, it is mainly companion and wild animals held in captivity that benefited from the recognition of sentience in the law.

I very much welcome this book for its content on legal recognition of sentience, which is ideal for gaining an overview of current legal and scholarly debates, issues, philosophical ideas, and critiques in animal law. The particular appeal of the book is that it is well-situated within a longer set of conversations across several interdisciplinary fields of study, to name a few: animal studies, critical animal studies, legal studies, environmental studies as well as interpretative communities. As the authors document how the issue of animal sentience works in the law, this is a very important book right now for animal advocates and concerned citizens wanting to expand their knowledge and vocabulary for the purpose of talking about the problems around animal sentience in the law.

It is a book that I recommend to others interested in understanding how animal sentience works in the law; it is also one I will pull off the shelf to re-read specific chapters, cite in my academic articles, and tell my colleagues about.

---

22 Gischkow Garbini (n 19) 126–30.

23 MB Rodriguez Ferrere, 'Legal Recognition of Sentience in New Zealand' in Jane Kotzmann and MB Rodriguez Ferrere (eds), *The Legal Recognition of Animal Sentience: Principles, Approaches and Applications* (Hart Publishing, 2024) 155, 159.

24 Hira Jaleel, 'The Judicial Recognition of Animal Sentience: Developments in Pakistan and India' in Jane Kotzmann and MB Rodriguez Ferrere (eds), *The Legal Recognition of Animal Sentience: Principles, Approaches and Applications* (Hart Publishing, 2024) 135, 149–154.

25 Rodriguez Ferrere, 'Legal Recognition of Sentience in New Zealand' (n 23) 171.

Book Review

Contempt by David Rolph (2023) Federation Press, 960 pp, ISBN 9781760024659

Glenn Martin AM*

> JUDGE: Are you trying to show contempt for this court?
> MAE WEST: No, I'm doin' my best to hide it.[1]

Proceedings for contempt of court are not a common event in Australia. Perhaps that is why the stories of mistakes made during contempt proceedings are legion. There has been uncertainty about whether to proceed, when to proceed and how to proceed. Those uncertainties have been laid to rest by this monumental work by Professor David Rolph.[2] His scholarship and the ease with which he exposes and explains the law of contempt make this a singular work — it is an essential resource for anyone wanting (or having) to dip their toes into the formerly turbid waters of contempt.

The book starts, sensibly enough, with an introduction to the law of contempt, an examination of the nature of contempt, and the sources of jurisdiction for its use. As the author observes, the jurisdiction to deal with contempt of court has existed from time immemorial. It is not surprising, then, that the jurisdiction has not developed in a single, simple line, but has exhibited all the hallmarks of common law doctrines that develop over time. While common lawyers perceive a certain charm in that form of evolution, it can present difficulties for those seeking to find answers to particular problems.

One of the book's major achievements is the creation of a sensible and manageable classification of the various types of contempt that can arise. Those who have previously ventured into this field know that there has been a lack of structure, which has led to the types of criticism seen in the Victorian Law Reform Commission's 2019 Consultation Paper on this topic.[3]

Until the publication of Rolph's book it was not unfair to describe the treatment of the law in this area as amorphous and inconsistent. While there may still be valid complaints about the nature of the process and its application, the detailed structure advanced by the author, together with the clear-headed examination under each division now provides anyone with a logical path for consideration.

Please cite this book review as:

Glenn Martin, 'Book Review: *Contempt* by David Rolph' (2025) 47 *Sydney Law Review* 21385: 1–2 <https://doi.org/10.30722/slr.21385>.

* Senior Judge Administrator, Supreme Court of Queensland.

1 *My Little Chickadee* (Universal Studios, 1940).

2 David Rolph, *Contempt* (Federation Press, 2023) ('*Rolph on Contempt*').

3 Victorian Law Reform Commission, *Contempt of Court* (Consultation Paper, May 2019).

The author provides detailed consideration of:

- the distinction between civil and criminal contempt;
- sub judice contempt;
- scandalising the court;
- disclosure of jury deliberations;
- interference with the administration of justice;
- contempt in the face of the court;
- disclosure of journalists' sources;
- civil contempt;
- frustrating/subverting court orders;
- procedure; and
- penalties and relief.

While the mere size of the book may appear daunting, there is no reason to be concerned. The information and examination of principle is conveyed in bite-sized chunks that are accessible to both the seasoned practitioner and to those approaching (with some trepidation) this area. The value of the work is magnified by a comprehensive index and a detailed table of contents. Each chapter is preceded by its own list of contents that allows the reader to easily examine the deeper levels of this hierarchically organised treatment of the law.

Apart from the careful categorisation of the law referred to above, Rolph also uncovers the sometimes-minor differences in the various courts in the Australian federation when dealing with contempt. An invaluable chapter (which is, naturally, not available in the standard English texts) contains consideration of contempt of other decision-making bodies such as Royal Commissions, administrative and other tribunals, and Coroners Courts.

It should not surprise anyone that *Rolph on Contempt* has already been cited several times — in the High Court of Australia, the Supreme Courts of various States and the Federal Court of Australia. That is explained by the fact that the book is designed to be used by practitioners and judges alike. It deals with the practical legal difficulties that arise and it does so from the point of view of someone who is seeking a solution. It is written by someone who fully understands that contempt proceedings can arise unexpectedly, that they can be impressed with the need for expedition, and that the path to resolution of a contempt proceeding is strewn with hazards. Rolph shows the reader where the hazards are and how they can be met. It is an Australian classic.

Review Essay

What Indeed Has Rome To Do with Australia?

Roman Law Under the Southern Cross: Sidere Ius Civile Mutato by Arthur R Emmett AO KC (2025) Federation Press, 494 pp, ISBN 9781760025335

PT Babie*

Abstract

This review essay of Arthur Emmett's *Roman Law Under the Southern Cross: Sidere Ius Civile Mutato* exhorts Australian lawyers to gain a better understanding of Roman law for one reason: a firm grasp of the classical world allows the ancient Romans to speak to us from the past, offering sage advice for dealing with modern problems to which law must respond. The historical Roman law shows us how we might think about our own law in light of the approaches that the ancient Romans took to problems which arose so long ago, but seem always to be present.

I Introduction

In his 1996 inaugural lecture as Regis Professor of Civil Law at the University of Cambridge, 'The Renewal of the Old',[1] David Johnston suggested that Roman law retains modern relevance, not only for those legal systems which trace their origins to the historical law found in Justinian's *Corpus Iuris Civilis*,[2] but also for the

Please cite this article as:

PT Babie, 'What Indeed Has Rome To Do with Australia?' (2025) 47 *Sydney Law Review* 21667: 1–7 <https://doi.org/10.30722/slr.21667>.

* Bonython Chair in Law, Adelaide Law School, The University of Adelaide, Adelaide, South Australia, Australia. Email: paul.babie@adelaide.edu.au. ORCID iD: https://orcid.org/0000-0002-9616-3300.

My title for this review essay is a very loose adaptation of Tertullian, *De Praescriptione Haereticorum* [On the Prescription of Heretics], ch 7: 'What indeed has Athens to do with Jerusalem?'.

1 For the revised lecture as published, see David Johnston, 'The Renewal of the Old' (1997) 56(1) *Cambridge Law Journal* 80.

2 [Body of Civil Law]. Comprised of the four major components of the law enacted by the Emperor Justinian between 529AD and 534AD: the *Codex Justinianus*, the *Digesta*, the *Institutiones*, and the *Novellae Constitutiones*. See further Wolfgang Kaiser, 'Justinian and the *Corpus Iuris Civilis*' in David Johnston (ed), *The Cambridge Companion to Roman Law* (Cambridge University Press, 2015) 119.

common law. The title of that lecture might lead one to think that Johnston meant that the contemporary relevance of Roman law comes through the adoption of Roman legal concepts to deal with modern problems; in fact, however, Johnston meant that its contemporary relevance lies

> not with the recovery of the old but with its renewal, not with an archaeological attempt to recover ancient remains but with the attempt to build on ancient foundations. [One seeks] the nourishment which we have derived, or can today derive, from the past.[3]

We can, Johnston argued, 'learn … much … from legal history and from the methods and approaches of our predecessors'.[4] Johnston summarised the three ways in which the Roman law continues to teach, even those of us who think the Roman law has nothing to do with the common law:

> First, the structure supplied by Roman law equips modern legal systems with the rigour necessary to allow them to develop coherently and consistently to face new challenges. That applies well beyond those countries which employ Civil Codes based on Roman law. … Second, to a remarkable extent legal history does repeat itself, in the sense that the same legal figures and forms appear, adapted for new and changed contexts. Legal history does therefore supply a fund of rules and principles ready for exploitation and not constrained simply because they were shaped and formulated in societies quite remote or contexts quite different. Third, in adapting those legal figures, rules and principles to new contexts, there is much to be learned from the adventurous and creative spirit in which our predecessors worked, reshaping legal rules, redeploying them, even misunderstanding them constructively, to meet new ends and new challenges.[5]

Roman law certainly provided the inspiration for innovation in the English law. In 1839, Charles Gale published a treatise on the English law of easements[6] that was heavily influenced by Roman and Continental law, both through borrowings from those systems in Bracton,[7] as well as the direct recourse[8] that Gale had to Justinian's *Digest*.[9] All of which prompted Barry Nicholas to write that 'English law here reveals an obvious debt, the law of easements being perhaps the most Roman part of English law'.[10] And it is possible that Roman law provided the inspiration for Australian legal innovation at some points in its past too — the perpetual Crown lease, for instance, seems very like the Roman concept of *emphyteusis*, which allowed for private use and occupation of state land for a perpetual rent. Whether *emphyteusis* goes beyond inspiration for the perpetual lease remains questionable, but there is no doubt that its origins in the Roman law were a response to the same considerations that faced Australia's late-Victorian legislators: the need to retain

---

3 Johnston (n 1) 81.
4 Ibid.
5 Ibid 95 (citations omitted).
6 CJ Gale and TD Whatley, *A Treatise on the Law of Easements* (S Sweet and Hodges and Smith, 1st ed, 1839).
7 Henry de Bracton, *De Legibus et Consuetudinibus Angliae*, ed GE Woodbine, trand revd SE Thorne (Harvard University Press, 1968–77 ed) [first published 1569]).
8 AWB Simpson, *A History of the Land Law* (Oxford University Press, 2nd ed, 1986) 261; Barry Nicholas, *An Introduction to Roman Law* (Oxford University Press, 1962) 148.
9 Alan Watson (ed), *The Digest of Justinian* (University of Pennsylvania Press, 1998) vols 1–4.
10 Nicholas (n 8) 149.

state control of land while simultaneously allowing for its private use as part of a larger objective of economic development.[11]

But Gale's contributions to the English law of easements and the Australian perpetual Crown lease are almost two centuries old. If we are to follow Johnston's advice in Australia, and adopt his methodology for using the historical Roman law, where to start when Roman law has long since disappeared from the elective offerings let alone the core curriculum of our law schools?[12] Until now, the only place to turn has been WW Buckland's detailed and brilliant comparative analysis of the points of contact between Roman and English law;[13] but that work focused solely on the English law as representative of the common law tradition.

Now, though, the new book by Arthur Emmett AO KC, *Roman Law Under the Southern Cross: Sidere Ius Civile Mutato*,[14] provides both the answer and the source for a uniquely Australian approach to the study of Roman law. As Emmett (Challis Lecturer in Roman Law at the University of Sydney) writes, the importance of the book's contribution lies in 'an understanding of the principles of law laid down by Justinian in the first half of the 6th century AD constitutes a solid foundation for the understanding of the legal complexities that are encountered today in the modern common law'.[15] And, as Johnston might add, that foundation allows us not only to understand those complexities, but also to answer the many new questions that emerge therefrom. The sub-title of the book means, literally, 'civil law under a changed star' (under the Southern Cross) and in this splendid book, Emmett shows how the ancient law speaks still to us today in Australia. This review essay provides a brief overview of Emmett's project, why it matters, and why Australian common lawyers should take note.

II Why Australian Lawyers Should Know Something about Roman Law

Before turning to the institutional scheme of the law and its substantive content,[16] Emmett begins with enjoyable chapters on the historical context and sources of the Roman law,[17] on its principle architect, the Emperor Justinian, and on the Roman law after Justinian (which reveals its spread, including to England).[18] The book is more than a mere compendium of the law found in Justinian's *Corpus Iuris Civilis*, it is also a deeply compelling *apologia* for the study of Roman Law. That begins in Emmett's Prologue, a marvellous statement of the value of a classical education.[19]

---

11 PT Babie, 'Rome in the Antipodes: *Emphyteusis* and the Australian Perpetual Lease' in Joe Sampson and Stelios Tofaris (eds), *Essays in Law and History for David Ibbetson: Querella* (Hart Publishing, 2024) 205. Emmett also points to the connections between *emphyteusis* and the Australian perpetual lease: Arthur R Emmett, *Roman Law Under the Southern Cross: Sidere Ius Civile Mutato* (Federation Press, 2025) 204 [726]–[727], 321 [1148].

12 On this, see Babie (n 11) 212–13.

13 WW Buckland and Arnold D McNair, *Roman Law and Common Law: A Comparison in Outline* (Cambridge University Press, 2nd ed (FH Lawson), 1952).

14 Emmett (n 11).

15 Ibid xxiv.

16 Ibid chs VI–XX.

17 Ibid chs II–III.

18 Ibid chs IV–V.

19 Ibid xxii–xxiv.

While suffering a somewhat tarnished image in our modern universities,[20] the classics, if seen as part of the wider humanities, retain value as a part of a liberal education.[21] Assuming we agree, what can the Roman law add to that value? Well, for a start, our study of Rome's place within the classical tradition may be confined to the Roman law as

> the only literature of the Romans that has any claim to originality and one that has most profoundly influenced modern thought. Roman law is pretty well the only original thing that the Romans produced. Their other literature is generally a copy of Greek literature, their architecture is, for the most part, copied from Greek architecture, some of their engineering was original and some of their military techniques were original but the great contribution that the Romans made to modern society is their law …[22]

But more substantively, Emmett writes,

> Roman law has considerable ethical value. It has been said that a lawyer had not really obtained the best professional training for practice unless that professional training has included a study of Roman law because Roman law can assist to develop a recognition of what is just and right.[23]

The Chief Justice of New South Wales, Andrew Bell, who writes an equally powerful vindication for the value of Roman law in the book's Foreword, adds, in words evoking Johnston

> In some instances, the common law's borrowing from Roman law's schema is clear; in others, the different means of addressing the same problem inevitably broadens the mind and gives important insight into the fact that equally legitimate legal solutions may be applied to solve universal problems.[24]

Time and again Emmett demonstrates throughout the book the ways in which the Roman law can be found in the Australian common law, and why that matters. Here I want to consider just one example of the use of Roman law as a means of better understanding our modern common law, and of how we may look at it through ethical lenses that seek to find what is just and right: the modern liberal conception of property adopted by the Anglo-Australian common law as its primary vehicle for allocating resources.

The liberal conception of property constitutes an abstraction that denies any importance to the thing to which property attaches, looking instead to a conceptual/theoretical bundle of rights that operate among legal persons in respect of things. This is understood as the 'sophisticated', rights-orientated conception of property, to be distinguished from the 'popular' view, which sees property primarily as things.[25] The Roman law, however, begins with things; indeed, its treatment of

---

20 Consider the controversy over the Ramsay Centre for Western Civilisation: Andrew Glesson, 'What the Vulgar Feud around the Ramsay Centre Doesn't Grasp about "Western Civilisation"', *ABC Religion and Ethics* (9 July 2019) <https://www.abc.net.au/religion/ramsay-centre-western-civilisation-and-its-discontents/11293684>.

21 See Helen Small, *The Value of the Humanities* (Oxford University Press, 2013).

22 Emmett (n 11) 1–2 [3].

23 Ibid 4 [11].

24 Chief Justice Andrew S Bell, 'Foreword' in Arthur R Emmett, *Roman Law Under the Southern Cross: Sidere Ius Civile Mutato* (Federation Press, 2025) v, v.

25 See Stephen R Munzer, *A Theory of Property* (Cambridge University Press, 1990) 15–17.

property is known as the Law of Things, covered in Book 2 of Justinian's *Institutiones*.

The Romans made a number of distinctions concerning the classification of property and property rights,[26] which Emmett explains in prose[27] and diagrammatic form.[28] First, they distinguished between property that was not capable of being owned by private individuals, and that which was. Two categories fell within the former class: public property and *res nullius*. Public property was divided into three types:

1. air, flowing water, the sea and seashore, which belong to everyone;
2. rivers and harbours, which belonged to the state; and
3. places of public entertainment, such as theatres, *stadia*, and racecourses, belonged to the local citizen body or the city.

Res nullius was also divided into three classes:

1. *res sacrae*, things dedicated to the gods;
2. *res religiosa*, the place where a corpse was buried, and
3. *res sanctae*, things so important to the welfare of the community, such as defensive walls, that they could not belong to anyone.

Having sorted out whether something was capable of private ownership, one could determine whether a thing could be held under either a corporeal or an incorporeal form of property, as a moveable or an immoveable thing.[29]

As he does throughout the book, Emmett offers an example of the operation of these distinctions found in Australian law: 'the principle that there can be no private property in flowing water'.[30] In 2009, in *ICM Agriculture Pty Ltd v Commonwealth*,[31] the High Court of Australia 'confirmed that the common law position in relation to flowing water adapted Roman law doctrine that flowing water is *publici iuris* in the sense that no one has property in the water itself, but a simple usufruct while it passes along'.[32] Indeed, this principle enjoys a long lineage in the English law 'reflect[ing] Blackstone's classification of water as a "moveable, wandering thing" that was "common" property and, as a such, was beyond individual appropriation and alienation'.[33]

Why does the thing matter? Why should we care about the subject-matter of property rights? Because ignoring it can lead to iniquitous and abhorrent results:

---

26 See also Paul J du Plessis, *Borkowski's Textbook on Roman Law* (Oxford University Press, 6th ed, 2020) 154–6.
27 Emmett (n 11) 137–40 [487]–[499].
28 Ibid xviii (Figure 2).
29 Ibid 137–40 [487]–[499].
30 Ibid 138 [491].
31 *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140 ('*ICM*').
32 Emmett (n 11) 138 [491].
33 Ibid quoting *ICM* (n 31) 173 [55], citing William Blackstone, *Commentaries on the Laws of England* (1766) bk 2, ch 2, 18.

- human persons treated as property through slavery;[34]
- the environment treated as a common dumping ground for waste such as air and water pollutants and greenhouse gases;[35]
- land inhabited by Indigenous persons treated as not being inhabited or possessed by those persons or, indeed, being treated as no one at all inhabited it;[36]
- land the ownership of which is restricted through the use of racial restrictive covenants;[37]
- or land otherwise available for public accommodation restricted to members of defined racial groups through an owner's claims to be free to suit one's own preferences.[38]

Sometimes the subject-matter of personal and real property interact in surprising ways over the long-term. Early in 2023, activists in Georgia in the United States of America ('US') sought to prevent the development, for residential use, of a parcel of land that had been the location for The Weeping Time — the largest single auction of enslaved people in US history, which occurred in Savannah 150 years ago.[39] What began as the subject-matter of personal property (slaves), has become the subject-matter of real property (the place where the auction was held and its preservation as the location of The Weeping Time). In both of its manifestations, the subject-matter of property in The Weeping Time remains absolutely essential if we are not to lose sight of the ethical and moral implications of property.

The Romans' approach to the thing provides the moral and ethical dimension to the way we understand property — it is not mere abstraction, a bundle of rights alone. Rather, those rights attach to, control, and so have an effect on the thing to which they attach. And so the Romans, by showing us that there are simply some things in which property should not be possible, demonstrate how we can see what is just and right in the development of property as it responds and adapts to changing

---

34 Bruce Ziff, *Principles of Property Law* (Thomson Reuters/Carswell, 7th ed, 2018) 15–16, 61.

35 Hidefumi Imura, *Environmental Systems Studies: A Macroscope for Understanding and Operating Spaceship Earth* (Springer, 2013) ch 7 ('The Environment as a Commons: How Should It Be Managed?').

36 *Mabo v Queensland [No 2]* (1992) 175 CLR 1, which abolished the morally abhorrent doctrine of fictional *terra nullius*. In 2023, I visited the site of the Eumeralla Wars of 1830–60 in which British colonists massacred large numbers of the Gunditjmara Aboriginal people in what is now south-west Victoria, Australia. If there was no one on the land, of course, there would have been no need of a war with those non-existent people, which demonstrates the evils attendant upon ignoring the thing when using a functional approach.

37 Ziff (n 34) 450–3. See also Fred de Sam Lazaro, 'How the Twin Cities Is Trying to Close the Racial Gap in Home Ownership', *PBS NewsHour* (13 August 2021) <https://www.pbs.org/newshour/show/how-the-twin-cities-is-trying-to-close-the-racial-gap-in-home-ownership>.

38 Joseph William Singer, 'We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom' (2015) 95(3) *Boston University Law Review* 929.

39 Benedict Moran, 'Activists Fight to Memorialize Site of Largest Slave Auction in American History', *PBS NewsHour* (28 December 2022) <https://www.pbs.org/newshour/show/activists-fight-to-memorialize-site-of-largest-slave-auction-in-american-history>.

social, economic, and political circumstances.[40] And this, but one of the many ways that Emmett reveals in this remarkable book, is what Johnston referred to when he argued that we still have much to learn from the Romans and their law.

III Conclusion

For anyone with an interest in classical antiquity and its inheritance in our own world, Emmett's book is a joy to read. And if you have never before spent any time immersing yourself in the Roman law, this book is your opportunity to do so in a way that demonstrates the connections between the ancient civil law and our 21st century Australian common law. It allows us to take up the classical world with Johnston's suggestion that we allow the Romans to speak to us from the past, offering their sage advice as ways of dealing with our modern problems. But more than that, it can show us how we might think about our own law in light of the approaches that the ancient Romans took to problems which arose so long ago, but seem always to be present, as the example of property shows. It may seem a strange thing to say, but this book deserves a place on every Australian lawyer's intellectual bookshelf. It is, simply, a beautiful book. Johnston concluded his inaugural lecture by saying of Roman law what we might also say about Emmett's book: '[w]ith all this to offer, the past is assured of a bright future'.[41]

[40] See PT Babie, 'The Thing and Judicial Methodology in Resolving Novel Property Claims: It Matters When It Matters' (2023) 61(1) *Alberta Law Review* 69.

[41] Johnston (n 1) 95.