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EQUALITY PROCUREMENT: THE NEXT FRONTIER OF DISCRIMINATION LAW?

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Government procurement offers significant opportunities for advancing equality in Australia. This article evaluates how equality procurement might be integrated as part of positive equality duties, drawing on an empirical case study of the Gender Equality Act 2020 *(Vic). It argues that equality procurement appears under-developed in Australia but could be strengthened by more explicit legislative provisions to prompt, require and support equality procurement.*

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I INTRODUCTION

In 2022–23, the Australian federal government's AusTender procurement information system recorded 83,625 procurement contracts, with a combined value of $74.8 billion.[1] That same financial year, the Victorian government spent $27.3 billion on goods and services, and $21.8 billion on construction and infrastructure.[2] Across Australia, then, government procurement represents potentially hundreds of billions of dollars of investment each year.

Government procurement therefore offers significant opportunities for advancing equality. While Australian scholarship has considered the public law limits of government contracting[3] and the extent to which contracting might be subject to judicial review,[4] the link between public procurement and equality in Australia is under-explored. Indeed, as Wright and Conley argue, the link between procurement and equality has received less academic attention than the potential to enforce employment standards through procurement.[5] And yet, procurement can, and is, being used to advance equality in Australia.

Equality procurement might be integrated as one aspect of positive equality duties. Positive equality duties have significant potential to create a proactive, systemic approach to advancing equality, putting the responsibility on organisations (not individuals) to identify and proactively address inequality and discrimination.[6] Applying positive duties to procurement could substantially increase their reach and impact. As positive duties are increasingly embedded in Australian equality law — now adopted as part of equality law in Victoria, the Northern Territory, the

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[1] Department of Finance, 'Statistics on Australian Government Procurement Contracts' (28 November 2023) <https://www.finance.gov.au/government/procurement/>.

[2] Department of Government Services, 'Introducing the Social Procurement Framework Annual Report 2022-23' (26 April 2024) <https://www.buyingfor.vic.gov.au/social-procurement-annual-report-2022-23/introducing-social-procurement-framework-annual-report-2022-23>.

[3] KM Hayne, 'Government Contracts and Public Law' (2017) 41 *Melbourne University Law Review* 155.

[4] Daniel Stewart, 'Statutory Authority to Contract and the Role of Judicial Review' (2014) 33(1) *University of Queensland Law Journal* 43.

[5] Tessa Wright and Hazel Conley, 'Advancing Gender Equality in the Construction Sector through Public Procurement: Making Effective Use of Responsive Regulation' (2020) 41(4) *Economic and Industrial Democracy* 975, 976 ('Advancing Gender Equality in the Construction Sector through Public Procurement').

[6] See generally Sandra Fredman, *Human Rights Transformed: Positive Rights and Positive Duties* (Oxford University Press, 2008) ('*Human Rights Transformed*'); Sandra Fredman, 'The Public Sector Equality Duty' (2011) 40(4) *Industrial Law Journal* 405; ibid; Sandra Fredman, 'Breaking the Mold: Equality as a Proactive Duty' (2012) 60 *American Journal of Comparative Law* 265 ('Breaking the Mold'); Alysia Blackham, 'Positive Equality Duties: The Future of Equality and Transparency?' (2021) 37(2) *Law in Context* 98 ('Positive Equality Duties'); Alysia Blackham, *Reforming Age Discrimination Law: Beyond Individual Enforcement* (Oxford University Press, 2022) ('*Reforming Age Discrimination Law*').

Australian Capital Territory, and under the *Sex Discrimination Act 1984* (Cth), and awaiting commencement in Queensland — it is critical to consider how equality procurement might be integrated as part of positive equality duties.

This article, therefore, addresses a critical and under-explored aspect of public procurement in Australia: the extent to which it can be used to advance social and economic equality. It draws linkages, too, between the literature on positive equality duties[7] and literature on public procurement, drawing on an empirical case study of the use of equality procurement under the *Gender Equality Act 2020* (Vic). Drawing on 44 qualitative semi-structured interviews with 47 participants who were key players and stakeholders involved in the development and implementation of the *Gender Equality Act 2020* (Vic), the article considers how equality procurement is currently operating in Victoria, and the existing linkages between the positive duty under the *Gender Equality Act 2020* (Vic) and equality procurement. This article argues that equality procurement could be a critical tool for advancing social and economic equality in Australia. It frames positive equality duties as a key means for mainstreaming equality considerations into procurement. However, at present, these links between equality and procurement are underdeveloped. This article therefore proposes ways in which equality procurement could be strengthened in Australia, particularly given the growing adoption and expansion of positive equality duties.

In Part II, we explore the idea of equality procurement as it has been developed in the literature to date, and link this to the use and development of positive equality duties in Part III, with particular consideration of the situation in the United Kingdom ('UK'), where positive equality duties are established aspects of the discrimination law framework. In Part IV, we examine the extent to which equality procurement is embedded in positive equality duties in Australia, focusing on case studies of the federal *Workplace Gender Equality Act 2012* (Cth) in Part V and the Victorian *Gender Equality Act 2020* (Vic) in Part VI. In Part VII we develop the method of our empirical case study, before presenting our results relating to equality procurement in Part VIII. Part IX concludes.

[7] For a summary of the Australian context, see Blackham, 'Positive Equality Duties' (n 6).

II EQUALITY PROCUREMENT

Public procurement is the power of public sector organisations 'to purchase works, goods, and services from the private sector'.[8] 'Equality procurement', then, is the use of government purchasing power to advance equality and non-discrimination.[9] Equality procurement is of growing significance as government services are increasingly outsourced and delivered by private providers.[10] For Wright and Conley, social procurement can be seen as a form of responsive regulation, particularly when linked to positive equality duties.[11] It is also, arguably, a type of equality "mainstreaming", pushing public entities to consider equality in all aspects of their operation as part of their day-to-day business.[12]

As Barnard argues, in the context of the European Union ('EU'), '[p]rocurement is no longer just about securing equal treatment of tenderers and transparency in the procurement process but it is also about delivering social (and environmental) objectives'.[13] Procurement is not just about purchasing; it can also fulfill a regulatory function, overcoming the limits of other regulatory tools (like individual complaints and agency enforcement).[14] Procurement is therefore one means of addressing the difficulties of enforcing discrimination and equality law via individual enforcement mechanisms.[15] For McCrudden, '[t]he power of using procurement lies in the employer's economic interest in obtaining business from public authorities'.[16] Procurement can therefore be a complementary enforcement tool, that supports and reinforces other forms of enforcement.[17]

Procurement entails a series of decisions by government entities:[18] as Sarter summarises, equality considerations might play into *what* is procured (the design of the good or service), *how* it is procured (the conditions of procurement), and *who* it

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[8] Christopher McCrudden, 'Procurement and Fairness in the Workplace' in Linda Dickens (ed), *Making Employment Rights Effective: Issues of Enforcement and Compliance* (Hart Publishing, 2012) 87, 87.
[9] Christopher McCrudden, *Buying Social Justice: Equality, Government Procurement, and Legal Change* (Oxford University Press, 2007) 3 ('*Buying Social Justice*').
[10] Ibid 10–12.
[11] Wright and Conley (n 5) 976.
[12] McCrudden, *Buying Social Justice* (n 9) 20.
[13] Catherine Barnard, 'To Boldly Go: Social Clauses in Public Procurement' (2017) 46(2) *Industrial Law Journal* 208, 211 ('To Boldly Go').
[14] Ibid 212.
[15] On these difficulties, see Blackham, *Reforming Age Discrimination Law* (n 6).
[16] McCrudden, 'Procurement and Fairness in the Workplace' (n 8) 98.
[17] Ibid.
[18] EK Sarter, 'Marketization, Regulation, and Equality: Towards an Analytical Framework for Understanding the Equality Impact of Public Procurement' (2024) 31(1) *Social Politics: International Studies in Gender, State & Society* 1, 6 ('Marketization, Regulation, and Equality').

is procured from.[19] More specifically, equality might be embedded in procurement in:

- Informing the decision of what to purchase at the preparation stage;
- Describing the works, services or supply at the technical specification stage;[20]
- Selecting the supplier, including by excluding certain suppliers,[21] or preferring some suppliers over others. This might involve a review of their past performance, ability to deliver the contract (including their existing equality policies) and/or their future commitments;
- Setting requirements or conditions for the delivery or performance of the works, services or supply (in relation to workforce composition, for example);[22]
- Assessing performance under the contract, including in considering future procurement, and/or whether to renew the contract.[23]

Sarter categorises proactive equality procurement measures as falling into two categories: first, those that aim to foster equality in the workplace (such as quotas for women's employment);[24] and, second, measures that focus externally to the workplace (as in measures focusing on the delivery of a service and its equality impacts).[25] In framing equality procurement, though, McCrudden prompts us to think more broadly, to consider: which groups or grounds are included (ie gender, disability, or all grounds protected by equality law)? Which contexts will the procurement rules apply to (ie employment, or more generally)? Are procurement rules designed to support existing legal obligations, or to go beyond them? How will we ensure compliance with procurement rules?[26]

In a practical sense, equality procurement might move from a "light touch" approach to a more prescriptive application of these ideas. "Light touch" equality procurement might involve requiring organisations to provide a statement in tender documents about how they might advance equality in their workforce or delivery of the service or product. A more stringent approach might require organisations to show compliance with other (equality) laws, to support compliance and enforcement

[19] Ibid 3.
[20] McCrudden, 'Procurement and Fairness in the Workplace' (n 8) 94.
[21] Ibid 95.
[22] Ibid 97.
[23] Cf the limits under EU law: Barnard (n 13).
[24] Sarter (n 18) 10.
[25] Ibid 10–11.
[26] McCrudden, *Buying Social Justice* (n 9) 92–94.

through other measures. This approach might give financial "teeth" to other regulatory regimes. More onerous again would be to require organisations to set — and meet — equality targets or quotas, including in relation to workforce or board composition. For example, from 2025, the Australian government has started requiring businesses with 500 or more employees to select and report on three gender equality targets as part of reporting under the *Workplace Gender Equality Act 2012* (Cth), including targets relating to board composition, the gender pay gap, flexible work, parental leave, consultation regarding gender equality and addressing sexual harassment.[27] In Canada, too, under the Federal Contractors Program ('FCP'), those who work with the government must achieve and maintain a representative workforce; and contractors with 100 or more staff who bid on government contracts over $1 million in value must commit to employment equity.[28] Failing to meet these provisions can result in a contract being cancelled or a company being unable to bid on future contracts. Concerns have been expressed, though, about how the FCP has been designed and enforced, being under-funded and over-complex.[29] Another approach would be to target funding to, or first approach, under-represented groups and organisations, including those run by Aboriginal and Torres Strait Islander peoples and First Nations groups.[30]

Unlike the strictly regulated situation in the EU,[31] there appear to be few limits on social procurement in Australia. As former High Court justice Kenneth Hayne concludes,

> Subject to some important but largely unexplored limits, government can set its own tender rules. And because government can set its own criteria for determining who is an acceptable counterparty, government can, as already explained, pursue and secure whatever economic or social policy goals it sees fit by requiring those counterparties to abide by those policies.[32]

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[27] *Workplace Gender Equality Amendment (Setting Gender Equality Targets) Act 2025* (Cth); Workplace Gender Equality (Gender Equality Targets) Instrument 2025 (Cth).

[28] Employment and Social Development Canada, 'Federal Contractors Program', *Government of Canada* (policies, 11 April 2020) <https://www.canada.ca/en/employment-social-development/corporate/ portfolio/labour/programs/employment-equity/federal-contractors.html>.

[29] Andrew Erridge and Ruth Fee, 'The Impact of Contract Compliance Policies in Canada: Perspectives from Ontario' (2001) 1(1) *Journal of Public Procurement* 51.

[30] See, eg, National Indigenous Australians Agency, *Indigenous Procurement Policy* (December 2020) <https://www.niaa.gov.au/resource-centre/indigenous-procurement-policy>.

[31] Barnard (n 13).

[32] Hayne (n 3) 165 (footnotes omitted). On these limits, see *Combet v Commonwealth* (2005) 224 CLR 494.

Thus, the limits of equality procurement in Australia are largely set by government itself. At present, though, the Australian *Commonwealth Procurement Rules* ('CPRs') appear hostile to equality procurement;[33] 'discrimination' in procurement is prohibited. The rules state:

> 5.3 The Australian Government's procurement framework is non-discriminatory.
>
> 5.4 All potential suppliers to government must, subject to these CPRs, be treated equitably based on their commercial, legal, technical and financial abilities and not be discriminated against due to their size, degree of foreign affiliation or ownership, location, or the origin of their goods and services.

This idea of 'discrimination', though, appears distinct from the understanding in discrimination law. Further, setting standards or targets, or conditions of performance would not breach these rules. Selection of a specific provider based on equality considerations, though, may require an amendment to the rules.

Overall, then, McCrudden argues that public procurement remains an 'underused tool'.[34] Even when regulations provide for the possibility of equality procurement, these provisions are not always fully utilised in practice, especially if they are voluntary.[35] For McCrudden, then, the successful adoption of equality procurement reflects a framework of: motivations for engagement (including, for example, positive duties); addressing political and legal barriers; political commitment and leadership; strategic planning; and monitoring implementation.[36] To this, Wright and Conley add training and support.[37]

III Positive Equality Duties and Equality Procurement

Equality procurement might be integrated as one aspect of positive equality duties, and positive equality duties can drive and prompt engagement with equality procurement.[38] Positive equality duties represent a "next generation" approach to advancing equality.[39] They focus on proactive, preventative measures that can be

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[33] Department of Finance, *Commonwealth Procurement Rules 2024* (1 July 2024) <https://www.finance.gov.au/sites/default/files/2024-06/Commonwealth_Procurement_Rules-1-July-2024.pdf>.
[34] McCrudden, 'Procurement and Fairness in the Workplace' (n 8) 88, also 107.
[35] EK Sarter, 'The Development and Implementation of Gender Equality Considerations in Public Procurement in Germany' (2020) 26(3) *Feminist Economics* 66, 68.
[36] McCrudden, 'Procurement and Fairness in the Workplace' (n 8) 100–107.
[37] Wright and Conley (n 5) 976.
[38] McCrudden, 'Procurement and Fairness in the Workplace' (n 8) 100, 108.
[39] Sandra Fredman, *Discrimination Law* (Oxford University Press, 2nd ed, 2011) 299–302.

taken by organisations to prevent discrimination and advance equality.[40] Positive equality duties seek to take the burden of enforcement of discrimination law off individuals, instead placing the burden of advancing equality on those in the best position to make substantive change: organisations.[41] Originally pioneered in Northern Ireland, positive equality duties are now established features of UK discrimination law (the UK public sector equality duty ('PSED'))[42] and have been subsequently adopted in several Australian jurisdictions (discussed in Part IV).

Applying positive duties to procurement could substantially increase the reach and impact of positive equality duties themselves, particularly where positive duties only apply to the public sector. Through procurement, it might be possible to extend the higher standards of equality which apply to the public sector (including under positive equality duties) to organisations in the private sector.[43]

In the UK, McCrudden argues that the PSED has been effective in driving the inclusion of equality in procurement.[44] In a survey of local authority procurement departments in England, published in 2009, the vast majority of respondent equalities departments in local authorities in England (87%) thought that progress towards equality procurement had been driven by positive equality duties.[45] Indeed, public entities may need to introduce equality procurement provisions to comply with the PSED;[46] the Northern Ireland duty has also been interpreted as requiring consideration of equality issues in procurement.[47] However, for a positive duty to have a clear impact on procurement, it is important to provide clear guidance to public authorities about what equality procurement can and should entail.[48] In case studies of local authorities in England, progress towards equality procurement was supported by leadership buy-in and commitment, knowledge and expertise, and integration of procurement and equalities functions.[49] That said, a lack of guidance

[40] Fredman, 'Breaking the Mold' (n 6) 271.
[41] Ibid 266.
[42] *Equality Act 2010* (UK) s 149.
[43] Wright and Conley (n 5) 975.
[44] McCrudden, 'Procurement and Fairness in the Workplace' (n 8) 100–101.
[45] Equality and Human Rights Commission, *Equalities and Procurement Research: Summary* (2009) 2.
[46] Wright and Conley (n 5) 982.
[47] Equality Commission for Northern Ireland, *Equality of Opportunity and Sustainable Development in Public Sector Procurement* (Equality Commission for Northern Ireland, 2008) 7–8, 21. See further Christopher McCrudden, 'Procurement and the Public Sector Equality Duty: Lessons for the Implementation of the Equality Act 2010 from Northern Ireland?' (2011) 11(1–2) *International Journal of Discrimination and the Law* 85 ('Procurement and the Public Sector Equality Duty').
[48] McCrudden, 'Procurement and Fairness in the Workplace' (n 8) 109.
[49] Equality and Human Rights Commission (n 45) 2.

may also lead to innovation and experimentation by a 'vanguard' of public entities,[50] if organisations have strong leadership and commitment to equality.

In Scotland and Wales, specific equality duties are in place in relation to procurement. Public authorities must have due regard to whether the award criteria and conditions for performance for contracting should include considerations relevant to the performance of the PSED.[51] In Scotland, though, this imposes no obligations where the requirement is not related to and proportionate to the subject matter.[52] This likely reflects the limits of EU law on social considerations in public procurement,[53] which are arguably less relevant to the UK following Brexit. Despite these provisions and obligations, in a 2014 review of the PSED in Wales, organisations appeared to have less understanding of how the PSED was being applied to the process of procurement.[54] In part, this may reflect the fact that the person responsible for procurement is often different to the person responsible for equalities.[55]

It is arguable, then, that the potential of positive duties in relation to procurement has yet to be realised in the UK. Manfredi and others argue that while employment and service delivery have already been sensitised to equality issues, the same cannot be said for procurement; rather, procurement is still embedded in a market paradigm, which seeks and prioritises value for money.[56] This may represent a fundamental disjunction between the aims of equality law and systems of procurement: 'not only are equality values alien to the economic discourse which is expressed purely in utilitarian terms, but they may even be conflicting with the market logic which prevails in this sub-system'.[57] Regardless, Manfredi and others still identify examples where equality considerations have been integrated into procurement,[58] indicating that this disjunction is not insurmountable. Further, Wright and Conley consider how equality procurement might be used to advance

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[50] McCrudden, 'Procurement and Fairness in the Workplace' (n 8) 110.
[51] Equality Act 2010 (Statutory Duties) (Wales) Regulations 2011 (Wales) SI 1064/2011 (W155) reg 18; Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 (Scot) SI 2012/162 reg 9.
[52] Equality Act 2010 (Specific Duties) (Scotland) Regulations 2012 (Scot) SI 2012/162 reg 9(3).
[53] See further Christopher McCrudden, 'EC Public Procurement Law and Equality Linkages: Foundations for Interpretation' in Sue Arrowsmith and Peter Kunzlik (eds), *Social and Environmental Policies in EC Procurement Law: New Directives and New Directions* (Cambridge University Press, 2009) 271; McCrudden, *Buying Social Justice* (n 9).
[54] Martin Mitchell et al, *Review of the Public Sector Equality Duty (PSED) in Wales* (2014) 28–9.
[55] Ibid.
[56] Simonetta Manfredi, Lucy Vickers and Kate Clayton-Hathway, 'The Public Sector Equality Duty: Enforcing Equality Rights Through Second-Generation Regulation' (2018) 47(3) *Industrial Law Journal* 365, 384 ('The Public Sector Equality Duty').
[57] Ibid.
[58] Ibid.

gender equality in the construction industry, drawing on a case study of the UK Women into Construction project.[59]

These examples also show the potential ripple effect of the PSED to the private sector: 'the regulatory stimulus sent to the private sector through the procurement process can set in motion a chain reaction and percolate down through the supply chain to other businesses'.[60] Government has substantial capacity to shape and improve the employment of diverse workers through its procurement of goods and services.[61] In procurement, governments can ask suppliers to demonstrate their commitment to workforce diversity strategies, non-discriminatory recruitment, and the setting and reporting on voluntary targets.[62] Thus, explicitly including procurement within the scope of positive duties is critical, both for its potential impact and for the internal logic of positive duties themselves, as it prevents governments evading their equality responsiblities through outsourcing.[63]

Procurement can also go hand-in-hand with other obligations under positive equality duties; for example, Wright and Conley argue that including a duty to consult can strengthen obligations around procurement, as unions and civil society organisations can act as a check on the way procurement terms are drafted and enforced.[64]

IV Equality Procurement and Positive Equality Duties in Australia

Positive equality duties are increasingly being embedded in Australian equality law. Positive duties are now part of the law in Victoria,[65] the Northern Territory ('NT'),[66] the Australian Capital Territory ('ACT'),[67] and under the *Sex Discrimination Act 1984* (Cth) ('SDA'),[68] and are awaiting commencement in Queensland.[69] It is therefore critical to consider how equality procurement might be integrated as part of positive equality duties in Australia specifically, particularly given the UK experience. At

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[59] Wright and Conley (n 5).
[60] Manfredi, Vickers and Clayton-Hathway (n 56) 385.
[61] Australian Human Rights Commission, *Willing to Work: National Inquiry into Employment Discrimination Against Older Australians and Australians with Disability* (2016) 15 ('*Willing to Work*').
[62] Ibid.
[63] Bob Hepple, Mary Coussey and Tufyal Choudhury, *Equality: A New Framework: Report of the Independent Review of the Enforcement of UK Anti-Discrimination Legislation* (Hart, 2000) 84, [3.74] ('*Equality*').
[64] Wright and Conley (n 5) 991.
[65] *Equal Opportunity Act 2010* (Vic) s 15.
[66] *Anti-Discrimination Act 1992* (NT) s 18B.
[67] *Discrimination Act 1991* (ACT) s 75.
[68] *Sex Discrimination Act 1984* (Cth) s 47C.
[69] *Respect at Work and Other Matters Amendment Act 2024* (Qld) s 25 inserting *Anti-Discrimination Act 1991* (Qld) ch 5C ss 131H–J, originally due to commence on 1 July 2025, but now delayed.

present, though, procurement is rarely explicitly included as part of positive equality duties in Australia.

The Victorian positive equality duty, which has been emulated in the NT, ACT, Queensland and under the SDA,[70] says:

> A person must take reasonable and proportionate measures to eliminate … discrimination, sexual harassment or victimisation as far as possible.[71]

This general duty is broad enough to encompass the advancement of equality through procurement. There is no guidance, though, to support organisations to adopt equality procurement as part of their compliance with the duty.

Unlike in the UK, too, these duties apply to organisations in the public *and* private sectors; the scope is broad, encompassing all 'who [have] a duty [under the Act] not to engage in discrimination, sexual harassment or victimisation'.[72] Equality procurement is therefore less critical for extending positive equality duties and equality standards to the private sector; indeed, these duties and standards already apply to the private sector.

The exception to this broad scope lies in the *Gender Equality Act 2020* (Vic), which creates more significant equality obligations and more onerous positive equality duties for the public sector in Victoria. Under that Act, equality procurement might be used to extend these equality obligations to the private sector. Where positive equality duties are broadly framed, however, and encompass both the public and private sectors, equality procurement might be focused instead on securing compliance with the laws (as under the *Workplace Gender Equality Act 2012* (Cth)). These two cases are considered in more detail in the sections below.

V THE *WORKPLACE GENDER EQUALITY ACT 2012* (CTH) FRAMEWORK

The *Workplace Gender Equality Act 2012* (Cth) arguably creates positive duties of transparency to advance gender equality in Australia.[73] The *Workplace Gender Equality Act 2012* (Cth) framework applies to federal public sector and private sector employers[74] and higher education providers with 100 or more employees.[75]

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[70] See Alysia Blackham, 'Promoting Innovation or Exacerbating Inequality? Laboratory Federalism and Australian Age Discrimination Law' (2023) 51(3) *Federal Law Review* 347 ('Promoting Innovation or Exacerbating Inequality?').
[71] *Equal Opportunity Act 2010* (Vic) s 15(2).
[72] *Equal Opportunity Act 2010* (Vic) s 15(1).
[73] See Blackham, 'Positive Equality Duties' (n 6).
[74] Since the passage of the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Act 2022* (Cth) sch 6.
[75] *Workplace Gender Equality Act 2012* (Cth) s 4.

Employers are required to report[76] on topics including equal pay, gender composition of the workforce, gender composition of governing bodies, flexible work arrangements, consultation in relation to gender equality, and sexual and sex-based harassment and discrimination (including relevant policies and training that are in place).[77] Employers who fail to lodge a report or provide misleading information in a report will be deemed to be non-compliant and may be named by the Workplace Gender Equality Agency.[78] Since 2024, the Workplace Gender Equality Agency has been empowered and tasked with publicly reporting on the reports made under the Act,[79] allowing the aggregated analysis and comparison of different employers and their progress towards gender equality.

Employers who fail to comply with the *Workplace Gender Equality Act 2012* (Cth) framework may be prevented from contracting with the Commonwealth government. This is not specifically provided for in a provision of the Act, other than the simplified outline in s 18 of pt IVA. Section 18 relevantly says:

> Relevant employers failing to comply with this Act may not be eligible to compete for contracts under the Commonwealth procurement framework and may not be eligible for Commonwealth grants or other financial assistance.

In this sense, equality procurement is used to strengthen the limited enforcement mechanisms otherwise in place in the *Workplace Gender Equality Act 2012* (Cth) framework. Consequences of non-compliance otherwise include being named by the Workplace Gender Equality Agency.[80] While 'naming and shaming' might be an effective enforcement mechanism in some cases, it is a fairly limited tool compared to the powers of escalation given to other regulatory agencies, like the Fair Work Ombudsman. Equality procurement, in this context, becomes a critical complement to the limited regulatory powers of the Workplace Gender Equality Agency.

The use of equality procurement connected with the *Workplace Gender Equality Act 2012* (Cth) framework is set out in the Workplace Gender Equality Procurement Principles.[81] Under the principles, relevant employers must submit a letter of compliance showing that they have complied with the *Workplace Gender Equality*

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[76] Ibid s 13.
[77] Ibid ss 3, 13. See further Workplace Gender Equality (Matters in Relation to Gender Equality Indicators) Instrument 2023 (Cth).
[78] *Workplace Gender Equality Act 2012* (Cth) ss 13A, 16, 19B, 19C, 19CA, 19D.
[79] Ibid s 15A. See *Workplace Gender Equality Amendment (Closing the Gender Pay Gap) Act 2023* (Cth).
[80] *Workplace Gender Equality Act 2012* (Cth) s 19D.
[81] Department of the Prime Minister and Cabinet, *Workplace Gender Equality Procurement Principles and User Guide* <https://www.wgea.gov.au/sites/default/files/documents/PMC-WGE-Procurement-Principles. pdf>.

Act 2012 (Cth) framework before tendering or entering into a supplier contract with the federal government above the procurement threshold. They must also notify the government if they become non-compliant during the term of the contract.

Under the 2024 CPRs,[82] the procurement thresholds are:

a. for non-corporate Commonwealth entities (other than for construction): $80,000;
b. for prescribed corporate Commonwealth entities (other than for construction): $400,000; or
c. for procurements of construction services: $7.5 million.

The Workplace Gender Equality Procurement Principles also specify model contractual clauses, which must be included in request documentation and contracts above the procurement threshold, to embed these requirements.[83]

A review of the *Workplace Gender Equality Act 2012* (Cth) ('Review'), conducted in 2021, recommended the government also review the Workplace Gender Equality Procurement Principles.[84] The Review report noted 'widespread feedback that the current compliance and enforcement mechanisms [under the Act] are inadequate and need to be improved'.[85] Rather than recommending stronger compliance mechanisms (as recommended by a number of stakeholders),[86] though, the Review instead identified a need to review the procurement principles.[87] Additional enforcement powers were only recommended to be considered in future reviews if there was a reduction in the current (high) compliance rate with the *Workplace Gender Equality Act 2012* (Cth) framework.[88] The Review clearly saw procurement policies as preferable to other, 'punitive' enforcement tools, like financial penalties, compliance or improvement notices, which were not recommended by the Review.[89] However, consultations conducted for the Review showed concern that 'the current procurement principles are not consistently applied or effective for all organisations', leading to stakeholder calls for a review of the procurement

[82] Department of Finance, *Commonwealth Procurement Rules 2024* (n 33).
[83] Department of the Prime Minister and Cabinet, *Workplace Gender Equality Procurement Principles and User Guide* (n 81) 14–16.
[84] Department of the Prime Minister and Cabinet, *WGEA Review Report: Review of the Workplace Gender Equality Act 2012* (December 2021) 16 <https://www.pmc.gov.au/resources/wgea-review-report>.
[85] Ibid 10.
[86] Ibid.
[87] Ibid.
[88] Ibid.
[89] Ibid.

principles.[90] Reconsidering the procurement principles, though, was largely to ensure their requirements were more clearly framed:

> Stakeholders strongly support making it clearer that relevant employers must comply with WGEA's reporting obligations to receive Commonwealth procurement contracts and grants. As there are not many enforcement mechanisms in the Workplace Gender Equality Act it is important they are clear and effective. That is why it is recommended that relevant employers must comply with WGEA's reporting obligations for Commonwealth grants eligibility and Commonwealth procurement participation.[91]

Further, since grants and procurement operate differently, it was suggested that the *Workplace Gender Equality Act 2012* (Cth) might be amended to specifically require compliance with the Act to be eligible for Commonwealth grants.[92]

The government committed to implement the recommendations of the Review in 2022. A review of the Workplace Gender Equality Procurement Principles was subsequently commenced in 2023, to consider: how the procurement principles are applied in practice; opportunities to strengthen the principles, to encourage compliance with the *Workplace Gender Equality Act 2012* (Cth); and the broader contribution of procurement to gender equality outcomes. The review reportedly found high levels of compliance with the Workplace Gender Equality Procurement Principles but committed to better transparency and reporting on compliance. The Office for Women has committed to revising the Workplace Gender Equality Procurement Principles in 2025.[93]

As it stands, then, while equality procurement is a key enforcement mechanism for the *Workplace Gender Equality Act 2012* (Cth), and is seen as compensating for the general absence of other enforcement mechanisms, the way equality procurement currently works is unclear and potentially inconsistent. There is significant scope to strengthen these provisions, and to use equality procurement in a more effective way to strengthen the *Workplace Gender Equality Act 2012* (Cth). In particular, including general provisions relating to procurement and grants, in some form, in the Act itself would help ensure equality procurement is used consistently and predictably at the federal level. Further, using equality procurement simply to achieve compliance with the legislative framework does not achieve the full

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[90] Ibid 75.
[91] Ibid 53.
[92] Ibid.
[93] Department of the Prime Minister and Cabinet, 'Review of the Workplace Gender Equality Procurement Principles' (2025) <https://www.pmc.gov.au/office-women/womens-economic-equality/workplace-gender-equality/wge-procurement-principles-review>.

potential or scope of equality procurement. Provisions could be used in a number of other ways, as mapped in Part II, to address discrimination and advance equality in federal procurement. Finally, these procurement measures are solely focused on gender; equality procurement could also be targeted to advancing equality on the basis of other protected grounds and characteristics.

While the *Workplace Gender Equality Act 2012* (Cth) is a piece of federal legislation, it is having a broader impact on procurement in some states and territories. For example, in Western Australia, the *General Procurement Direction 2024/02* now mandates the inclusion of a gender equality disclosure clause in procurement documentation with an estimated contract value of $250,000 and above. Respondents are asked to disclose whether they comply with the *Workplace Gender Equality Act 2012* (Cth).[94] This could support the enforcement of the Act in other contexts, and offers an important complement to federal procurement rules.

VI THE *GENDER EQUALITY ACT 2020* (VIC)

Another approach to equality procurement is evident in the *Gender Equality Act 2020* (Vic). Unlike the *Workplace Gender Equality Act 2012* (Cth), the *Gender Equality Act 2020* (Vic) is confined to the public sector: it creates a positive equality duty for defined entities (public sector organisations, universities and local councils with more than 50 employees)[95] to,

> in developing policies and programs and in delivering services that are to be provided to the public, or have a direct and significant impact on the public—
>
> (a) consider and promote gender equality; and
>
> (b) take necessary and proportionate action towards achieving gender equality.[96]

The *Gender Equality Act 2020* (Vic) requires defined entities, in developing and reviewing policies, programs, and services, to conduct a gender impact assessment.[97] While a gender impact assessment could encompass consideration of the impacts of procurement, and procurement policies themselves, this is not explicitly required in the statute. According to the Victorian Commission for Gender Equality in the Public Sector, a gender impact assessment on a procurement policy

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[94] Department of Finance, *Gender Equality in Procurement: Disclosure Clause For the Purposes of General Procurement Direction 2024/02* (2024) <https://www.wa.gov.au/system/files/2024-07/gender-equality-in-procurement-disclosure-clause-july-2024.PDF>.
[95] *Gender Equality Act 2020* (Vic) s 5.
[96] Ibid s 7.
[97] Ibid s 9.

is not required 'unless you are funding another organisation to deliver a policy, program or service directly to the public', but might still be done voluntarily.[98]

Given the scope of the *Gender Equality Act 2020* (Vic) is confined to the public sector, equality procurement becomes a critical tool to extend the equality measures in the Act to the private sector (as discussed in Part II). The Act does raise the possibility of equality procurement: s 49 provides that the Minister 'may issue guidelines relating to procurement policies and practices for the purposes of promoting and advancing gender equality', and a defined entity subject to the guidelines must have regard to them. However, the Minister has not issued procurement guidelines to date.

The absence of procurement guidelines under the *Gender Equality Act 2020* (Vic) may be explained by the fairly comprehensive provisions already contained in the Victorian Social Procurement Framework. Women's equality and safety is one of seven social procurement objectives contained in the Framework, which is linked to two corresponding social outcomes: adoption of family violence leave by Victorian Government suppliers; and gender equality within Victorian Government suppliers.[99] The Framework includes recommended actions potentially advancing gender equality:

> For individual procurement activities valued at or above $1 million (regional) or $3 million (metro or State-wide) up to $20 million (exclusive of GST), government buyers ask suppliers:
>
> - whether they offer family violence leave in weighted framework criteria
> - to demonstrate gender equitable employment practices in weighted framework criteria.
>
> For individual procurement activities valued at or above $20 million (exclusive of GST), government buyers ask suppliers:
>
> - whether they offer family violence leave in weighted framework criteria
> - to include performance standards or industry appropriate targets for labour hours performed by women.[100]

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[98] Commission for Gender Equality in the Public Sector, 'Applying a Gender Impact Assessment to a Procurement Policy' (20 July 2023) <https://www.genderequalitycommission.vic.gov.au/applying-gender-impact-assessment-procurement-policy>.

[99] Victorian Government, 'Detailed Guidance for Women's Equality and Safety', *Buying for Victoria* (5 July 2023) <https://www.buyingfor.vic.gov.au/detailed-guidance-womens-equality-and-safety>.

[100] Ibid.

The model approach requires suppliers to complete a 'gender equitable business practices self-assessment checklist' and provide a current workforce/contract staff profile. The checklist covers items like having:

- a gender equality strategy
- gender-inclusive culture (such as flexible work options)
- gender equality in leadership and management
- gender composition of teams
- equal remuneration
- gender equality audits.

Under the model approach, suppliers are asked to commit to targets for employment and/or training outcomes for Women's Equality and Safety, and to explain how they will support Women's Equality and Safety to achieve employment and training outcomes.[101]

The Victorian Social Procurement Framework clearly goes further than the federal framework. In addition to these provisions relating to women's equality and safety, the Victorian framework also includes provisions relating to Aboriginal and Torres Strait Islander peoples' businesses, disability enterprises, and inclusive employment practices (relating to disability).[102] Equality procurement, therefore, goes beyond just gender. The gap in Victoria, though, is that the Social Procurement Framework is not yet closely linked to the *Gender Equality Act 2020* (Vic). The potential for the procurement framework to support, reinforce and extend the higher standards of equality that apply to the public sector has not yet been realised.

VII The Empirical Method

As noted in Part V, little is known about how equality procurement operates in the federal sphere. To investigate how it is working in Victoria, particularly since the introduction of the *Gender Equality Act 2020* (Vic), we conducted a mixed methods study of the implementation of the Act over the second half of 2021.[103]

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[101] Ibid.

[102] Victorian Government, 'Social Procurement Framework Requirements and Expectations', *Buying for Victoria* (5 September 2023) <https://www.buyingfor.vic.gov.au/social-procurement-framework-requirements-and-expectations>.

[103] This discussion of research methods is adapted from Alysia Blackham, Lauren Ryan and Leah Ruppanner, 'Enacting Intersectionality: A Case Study of Gender Equality Law and Positive Equality Duties in Victoria' (2023) 49(3) *Monash University Law Review* 40. This research had ethics approval from the Human Research Ethics Committee of the University of Melbourne (ID number 2021-22402-21620-4).

Data were collected through 44 qualitative semi-structured interviews with 47 participants who were key players and stakeholders involved in the development and implementation of the Act. Forty-four of the participants identified as women, with the other three identifying as men. The participants came from 40 different organisations including metropolitan, regional and rural councils; state government departments; unions; TAFEs; universities; hospitals and health care providers; women's health sector; women's NGOs; sporting organisations; ministerial staff and gender-based consultants.

The first round of respondents were contacted using lists provided by the Commission for Gender Equality in the Public Sector that represented key stakeholder groups and previously engaged entities and supporting organisations. Building on this initial list, additional respondents were contacted and engaged using snowballing techniques and targeted desktop research to find a broader sample of participants from across a range of different entities and with a range of experiences. Additional participants were sought to diversify the sample across a range of factors include geographical location, size and type of entity/organisation, level of maturity with respect to the implementation of the Act, and a broader gender split.

Interview respondents were assigned a randomised number to preserve their anonymity throughout the process. Interviews were conducted online using Zoom due to the COVID-19 pandemic. Interviews lasted between 30 minutes and 75 minutes in duration, with the average being 45–60 minutes. Research memos were completed by the interviewer at the end of each interview and covered content including key themes from the conversation, notes on the participant's demeanour and any standout quotes, opinions or experiences. Data were transcribed using Otter.ai transcription software, then checked manually for accuracy. Using the software platform Dedoose, data then underwent multiple open and focused rounds of flexible coding using Deterding and Waters's methodology for indexing, analytical coding, and theoretical testing/refinement.[104]

Interview questions focused on developing a broader understanding of a) how the Act evolved, and the social, economic and political conditions that encouraged its adoption; b) how the Act was being implemented, examining the work of the Commission and of defined entities; and c) how the Act's future success could best be secured, drawing on the experiences of defined entities, as well as other

[104] Nicole M Deterding and Mary C Waters, 'Flexible Coding of In-Depth Interviews: A Twenty-First-Century Approach' (2021) 50(2) *Sociological Methods & Research* 708 ('Flexible Coding of In-Depth Interviews').

jurisdictions nationally and internationally. Procurement was not directly raised by the interview questions in the interview schedule, but was used as a prompt in some interviews to draw out further insights from respondents. In particular, respondents raised concerns around the limited strength of the procurement requirements within the Act in response to questions seeking insight into aspects of the Act that they felt were missing and/or examples of where they felt the Act could have gone further to ensure success in meeting its intended aims. We also conducted documentary analysis of legislative materials (such as second reading speeches and parliamentary debates), inquiries, submissions, and Commission documents, to complement and inform the qualitative interviews.[105]

The *Gender Equality Act 2020* (Vic) commenced on 31 March 2021, meaning this study was conducted at a critical juncture in the implementation of its provisions. As we conducted this study, defined entities were being asked to develop their first workplace gender audit and Gender Equality Action Plan, meaning this research was timed to capture the first reactions of defined entities as the implementation of the Act progressed. In this article, we focus on the implications of the Act for equality procurement, drawing on the findings from the qualitative semi-structured interviews. We consider the gaps and challenges of embedding equality procurement in Victoria, and building linkages between equality procurement and a new positive equality duty. We then consider how these gaps and challenges can best be addressed.

VIII PROCUREMENT AND THE *GENDER EQUALITY ACT 2020* (VIC): EMPIRICAL FINDINGS

In the interviews, respondents repeatedly identified procurement as a gap in the provisions of the *Gender Equality Act 2020* (Vic). Overall, 21 of 47 respondents raised procurement as a key issue relating to the Act and its implementation. As one respondent noted:

> I think, from my perspective, the Act probably doesn't go far enough. ... I know you've got to start somewhere. But I think that government's got a lot of levers that it can pull … I think that we probably could have gone a little bit further, particularly [around procurement]. … government procures a lot of services. … I think there's lots of things we could do … to drive more women on boards or, you know, you know, procurement processes. … Those things could have been strengthened.[106]

[105] Other quantitative aspects of the project are not reported here.
[106] Respondent 1, also Respondent 15.

For some respondents, their focus on procurement only came after the passage of the Act, as they realised the gaps or areas that needed further development in implementing the Act itself:

> [A]t the time, like, I don't think there [were] additional things that we argued for particularly strongly that aren't included, but in hindsight, I think, you know, additional levers that the State can pull, particularly around funding and procurement. I think is an area perhaps we should push further on.[107]

For other respondents, procurement had been an ongoing concern, raised in consultations, that was then not fully embedded in the Act:

> I was surprised that procurement wasn't more deliberately called out because it was in a lot of discussions ... that I was aware of at the time. And particularly because, you know, [the Act is] targeting, you know, public entities, for whom procurement is a big part of their expenditure.[108]

Respondents repeatedly identified procurement as a way to extend the Act's provisions beyond the public sector and defined entities,[109] and to capture workplaces beyond the public sector, such as manufacturing, hospitality and retail, typified by precarious and low paid work,[110] and workplaces where migrant and refugee women work:[111]

> [I]f you want to mainstream [gender equality] across government, in the way that we're trying to do and, and lead the way … governments and these entities ... are a huge part of the economy in Victoria, a huge part of the employment, they're a huge part of everything. So I think [there is] the opportunity to really lead that level of change and make it sustainable in this way. And then things may follow [in] other sectors and things.[112]

Procurement, then, could help to compensate for and partially overcome the limited scope of the Act, which respondents saw as one of its key limitations and areas for future development.[113]

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[107] Respondent 4.
[108] Respondent 34.
[109] Respondent 17, 25, 27, 34, 39, 44.
[110] Respondent 27.
[111] Respondent 27.
[112] Respondent 25.
[113] Respondent 8, 10, 15, 19, 25, 26, 27, 31, 32, 36, 37, 38, 39.

Several respondents therefore desired stronger provisions in the Act relating to procurement:[114] 'just saying that the minister "may" do this, if they're so inclined, I think is probably [not enough]'.[115] In particular, there was a sense that procurement provisions could impose more 'definite requirements',[116] reflecting the need for clarity and clear guidance to advance equality procurement. While procurement might be addressed in gender impact assessments, respondents sought an explicit requirement to review procurement processes under the Act,[117] which should be embedded in the Act itself[118] (rather than being left to guidelines). The absence of legislative provisions relating to procurement was therefore seen as both a gap and a missed opportunity for the Act.[119]

Further, respondents identified the need for tailored guidance, clear examples and case studies, to support the implementation of equality procurement more broadly across the public sector,[120] and to encourage its adoption:[121] 'we could just share, share, share, share. So that's just been a massive missed opportunity.'[122] Further, respondents noted that equality procurement was often more resource intensive for the procurement team, and this additional demand had not been factored into their job description or their resourcing.[123] Respondents with expertise in equality were often also uncertain about entering into the procurement space,[124] reflecting both the complexity of procurement, and a disconnect between equality and procurement functions in defined entities.

Finally, for one respondent, equality procurement needs to

> have more than targets, because the experience, for instance, in the Indigenous procurement space, where they set targets for in construction, is that it hasn't delivered the outcome that was intended because it's bullshit without other measures. Targets basically create incentives for organizations to try and meet targets, but not to make change. So we [need] other broader measures that will result in cultural change or change that is substantive to organisations.[125]

[114] Respondent 1, 4, 15, 17, 34, 44.
[115] Respondent 15.
[116] Respondent 44.
[117] Respondent 34.
[118] Respondent 6.
[119] Respondent 34, 6.
[120] Respondent 30.
[121] Respondent 39.
[122] Respondent 30.
[123] Respondent 30.
[124] Respondent 33.
[125] Respondent 15.

The challenge, then, is to embed or "mainstream" equality in decision-making in a way that achieves structural change, rather than simply seeking to achieve headline targets. This might require proactive measures and strategies to build capacity in organisations that might benefit from equality procurement.

IX CONCLUSION

Government procurement offers significant opportunities for advancing equality in Australia. The emergence of positive equality duties in some Australian jurisdictions could help to drive and prompt engagement with equality procurement in government entities. Equality procurement could be a key tool for extending the reach and impact of positive equality duties, even where positive equality duties bind both the public and private sectors. Given positive equality duties have not yet been adopted in some Australian states and territories, or in relation to grounds other than sex at the federal level, equality procurement could extend the jurisdictional reach of equality measures and requirements to other jurisdictions. Further, equality procurement might be used as an additional enforcement mechanism for other legislation, as under the *Workplace Gender Equality Act 2012* (Cth). Equality procurement therefore represents a potentially powerful tool for advancing equality and strengthening positive equality duties.

At present, though, equality procurement appears under-developed in Australia, and underspecified in Australian legislation. In this sense, our empirical findings relating to the implementation of the *Gender Equality Act 2020* (Vic) echo the UK literature relating to equality procurement. While equality procurement has great potential, its practical impact is still under-realised. In the absence of specific and clear obligations in positive equality duties relating to procurement, the potential of positive equality duties is likely to remain under-realised. As the example of the *Gender Equality Act 2020* (Vic) illustrates, without clear guidance, organisations lack a strong steer as to how equality considerations should be embedded within procurement. The absence of clear provisions relating to procurement was therefore seen as a missed opportunity for the *Gender Equality Act 2020* (Vic). Both the *Gender Equality Act 2020* (Vic) and *Workplace Gender Equality Act 2012* (Cth) could therefore be strengthened by more explicit legislative provisions to prompt, require and support equality procurement, as is the case in Scotland and Wales. Indeed, more explicit requirements for equality procurement would strengthen all positive duties in Australia.

Overall, then, this article demonstrates the need to revisit the drafting and guidance relating to positive equality duties in Australia, to ensure procurement is embedded at the heart of organisations' obligations to advance equality. This could take the form, for example, of specific duties relating to procurement, as in Wales or Scotland. That said, Australian positive equality duties could go further, to mandate the inclusion of equality considerations in procurement. To be effective, any requirement for equality procurement should be complemented by the provision of tailored guidance, clear examples and case studies, to support organisations to understand and implement their obligations. While the Victorian Commission for Gender Equality in the Public Sector has issued a case study on equality procurement,[126] more can be done to educate and upskill defined entities about the potential for and practical use of equality procurement. Our empirical findings from the Victorian context illustrate that some public entities have clear enthusiasm and desire for equality procurement, to strengthen equality in the private sector. However, embedding this in practice will require stronger alignment between procurement and equality divisions in public sector entities, and a stronger legislative framework to align procurement with positive equality duties. As government spending and procurement continues to grow, the federal government commits to reviewing its procurement guidelines, and with the ongoing implementation of a new positive duty under the *Sex Discrimination Act 1984* (Cth), it is more than timely to renew our focus on equality procurement and its ability to advance equality in Australia.

[126] Commission for Gender Equality in the Public Sector (n 98).

A PRINCIPLED APPLICATION OF AUSTRALIA'S IMPLIED FREEDOM TO COMMUNICATIONS ABOUT THE JUDICATURE

BEN HINES*

Whilst the controversy surrounding Australia's implied freedom of political communication has largely retreated from scepticism as to its existence, disagreements remain as to the precise scope of protected communication. One striking example of such uncertainty is the fact that, despite occasional judicial contemplation, it is not settled whether communications pertaining to the judicature, itself often considered the third branch of "government", are protected by such a "freedom". This article argues that the implied freedom extends to relevant "public" discourse relating to the judicature by virtue of that relation. This, it contends, is logically consistent with present conceptions of the freedom as well as the text and structure of the Constitution *insofar as such communications are, where intrinsically of public relevance, likely to bear on electoral choice or, alternatively, relate to the extended process of exercising constitutional powers provided to the legislature and executive.*

* BCom, BAdvStud (Hons I, Medal), LLB (Hons I) (Syd). I wish to express my gratitude even after all this time to Vanessa Li, Tim Berney-Gibson, and Tom Manousaridis. All errors are, of course, my own.

I INTRODUCTION

To the extent that the laws of the land as implemented by Parliament cannot be conclusively applied to individuals under Australia's democratic system without the work of the judicature, the courts cannot truly be separated from constitutional notions of government powers or, most importantly, electoral choices. Nonetheless, Australia, perhaps owing to its Westminster heritage,[1] continues to consider the judicature as apolitical, its actions as generally unrelated to electoral politics,[2] and its decisions as fundamentally independent from the exercise of legislative or executive power. Courts are seen as above politics and external to government in the constitutional sense of the phrase. The appointments of judges by the government, unlike for example those to the United States Supreme Court,[3] are generally not mired by public battles regarding the judges' opinions on political issues or government policy. The courts exercise Chapter III power, and are not, in applying the law, acting directly in relation to Chapters I and II of the *Constitution*, so the argument goes. Perhaps then it is understandable that analysis has considered commentary on the judicature as not being "political" and the judicature itself as not entangled with the wider electoral or governmental ecosystem.

At the same time, the Australian constitutional arrangement is idiosyncratic amongst developed democracies insofar as it lacks formal guarantees of numerous human rights.[4] Whereas, for example, the United States sees freedom of speech explicitly protected by the First Amendment,[5] Australia has witnessed the development of an 'implied freedom of political communication'[6] protecting the flow of information necessary for direct elections.[7] With this concept not found explicitly within the *Constitution*, the High Court must rely on implications to define its scope. In the modern day, this does not appear to inhibit consensus regarding the status of

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[1] John Williams, 'Judges' freedom of speech: Australia' in HP Lee (ed), *Judiciaries in Comparative Perspective* (Cambridge University Press, 2011) 153, 154.

[2] Anthony Gleeson 'A Core Value' (Speech, Annual Colloquium of the Judicial Conference of Australia, 6 October 2006); HP Lee and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2012) 5.

[3] Alex Badas and Elizabeth Simas, 'The Supreme Court as an electoral issue: evidence from three studies' (2021) 10(1) *Political Science Research and Methods* 49, 49.

[4] See, eg, *Coleman v Power* (2004) 220 CLR 1, 81 [208] (Kirby J) ('*Coleman v Power*').

[5] *United States Constitution* amend I.

[6] Ronald Sackville, 'How Fragile are the Courts? Freedom of Speech and Criticism of the Judiciary' (2005) 31(2) *Monash University Law Review* 191, 203. For the purposes of this article, the 'implied freedom of political communication' will be referred to as the 'implied freedom of political communication', the 'implied freedom', or simply 'the freedom' interchangeably.

[7] Anne Twomey, 'The application of the implied freedom of political communication to state electoral funding laws' (2012) 35(3) *University of New South Wales Law Journal* 625, 626.

the freedom as good law.[8] What speech is or is not protected, however, at least at the boundaries, is often unclear. [9]

The question of whether communications relating to the judicature are protected, for example, is not entirely settled, even where various cases, arguably epitomised by *APLA Ltd v Legal Services Commissioner (NSW)*,[10] have considered the issue. In this context, the present article proposes that relevant communications which relate to the judicature will fall within the scope of the implied freedom by virtue of that relation. It suggests as much not due to abstract notions of what is "governmental" or "political",[11] nor from any structural imperatives derived from Chapter III or the judicature itself. Rather, it derives the proposition from the very same textual grounds as the implied freedom as presently conceived is derived. It does so on two main bases.

First, even though the judicature is not provided for by the provisions of the *Constitution* which provide the freedom, communications regarding its functions

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[8] It also does not usually inhibit consensus that the freedom exists more generally. One notable exception to this observation is current member of the High Court Steward J, who stated in *LibertyWorks Inc v Commonwealth* (2021) 274 CLR 1, 95 at [249] ('*LibertyWorks*') that 'it is arguable that the implied freedom does not exist'. This view was similarly adverted to in *Babet v Commonwealth* [2025] HCA 21 at [205], and most recently was taken further in *Ravbar v Commonwealth* [2025] HCA 25 ('*Ravbar*') where his Honour at [273] stated that 'I thus not only retain serious doubts about [the implied freedom's] cogency but am now convinced that it is very wrong.' Such sentiments are also found in his Honour's extra-curial writings. Justice Steward's view was, however, disapproved of in the strongly worded reasons of Gageler CJ in *Ravbar*, who wrote at [23]–[25] that '[n]o party or intervener sought leave to reopen the unanimous decision in *Lange v Australian Broadcasting Corporation* which confirmed the implied freedom of political communication…None sought leave to reopen any of the thirty decisions in which this Court has elaborated and applied the implied freedom of political communication in the nearly thirty years since *Lange*…Unless and until such an application is made, and if made is determined in favour of reopening and overruling, the duty of each member of this Court as constituted from time to time is to apply *Lange* and the decisions which have elaborated upon it, "not to be convinced by it"'.' The other members of the Court also did not adopt Steward J's position. Still, as seen in *Ravbar*, Steward J's scepticism has not precluded his Honour from applying the analysis insofar as the principle itself seems to be settled law, with his Honour conceding that the implied freedom must be applied, outlining at [295] that 'in the present matter, no party sought to dispute the existence of the implied freedom of political communication, and I, like Callinan J, am also obliged to apply it. It was on that basis that in both *LibertyWorks* and *Babet* I faithfully applied the implied freedom doctrine…But that said, as I explained in *LibertyWorks* and for the foregoing reasons, a reconsideration (with leave if necessary) of the implied freedom's existence may be justified and a matter for full argument on another occasion.'

[9] Justice James Edelman, 'Implications' (Spigelman Public Law Oration, Supreme Court of New South Wales, 21 April 2022) 5. See also the comments of Edelman J in *Ravbar* (n 8) at [212]–[225] regarding the effect of changing views relating to "structured proportionality" on the scope of communications that freedom will, in practice, protect.

[10] *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 ('*APLA*').

[11] Indeed, to apply this form of top-down reasoning would be inconsistent with the High Court's implied freedom jurisprudence: See below nn 46–49.

and actions are intrinsically and distinctly likely to bear on electoral choice. Thus, for voters to exercise democratic rights as necessitated by the *Constitution* they must be afforded a freedom of communication on "public"[12] matters relating to the judicature. Second, in any event, the relevant actions of the judicature are intertwined with the exercise of powers afforded by the provisions grounding the implied freedom. Insofar as commentary on the powers of the legislature and executive appear to have been accepted as prima facie political and therefore protected, commentary on the *application* of these powers to the citizenry, which occurs through the judicature,[13] must also fall within the ambit of the freedom.

This article proceeds as follows. Part II defines the "judicature" and the communications of relevance to its argument, before briefly outlining two relevant jurisprudential considerations arising from the development of the freedom. Part III explores previous judicial consideration of the present question, both in the High Court and below, to demonstrate that it presently remains unsettled. Part IV proposes that the implied freedom does, on principle and by definition, apply to relevant communication about the judicature by virtue of that relation. It addresses arguments raised against this proposition by courts, and presents in detail the two grounds for inclusion described above.

II DEFINITIONS AND ORIGINS: LAYING THE FOUNDATION

It is important to first define what is meant by the "judicature", both to avoid uncertainty[14] and to outline the scope of the relevant communications this article contends are protected by the implied freedom. Having done so, this Part will then outline two relevant clarifications to the operation of the freedom.

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[12] In this article, the term 'public' is used in the same sense as, for example, Mason CJ, Toohey and Gaudron JJ in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 ('*Theophanous*'). That is, referring to 'public affairs' and matters relating to the body politic so as to fall within the definition of 'political discussion', rather than necessarily being made "publicly". This distinction is relevant insofar as these 'public' matters are those likely to be intertwined with other branches of government and bear on electoral choice, as opposed to personal choices.

[13] Dan Meagher, 'What is "Political Communication"? The Rationale and Scope of the Implied Freedom of Political Communication' (2004) 28(2) *Melbourne University Law Review* 43, 452.

[14] See, eg, Matthew Joyce, 'The Nationhood Power and the Prerogative: Three Unanswered Questions from Pape' (2025) 36(2) *Public Law Review* 157, 158**;** *Davis v Minister for Immigration, Citizenship, Migration Services, and Multicultural Affairs* (2023) 97 ALJR 214, 240 [117] (Edelman J).

A *The Judicature and Relevant Communications Defined*

The term "judicature", in addition to its ordinary meaning,[15] elicits recollection of a number of well-known documents, such as Chapter III of the *Constitution*[16] and the various *Judicature Acts*.[17] Indeed, the scope of such documents and the matters to which they relate provide useful guidance for defining the ambit of concepts this article will refer to as the "judicature". Similar guidance is provided by Mason CJ in *Cunliffe v Commonwealth*,[18] where the Chief Justice described that the '[implied] freedom necessarily extends to the workings of the *courts and tribunals which administer and enforce the laws of this country*'.[19] Noting this, for the purposes of this article, the term judicature will encompass courts and tribunals themselves, judges, specific exercises of judicial power, judicial proceedings, and other matters incidental to the function and nature of each.[20] This term is therefore a broad one, reflecting the institutions, individuals, and instances involved in the administration of justice. Noting as we will the increasingly "integrated" nature of state and federal affairs,[21] as well as the "integrated" nature of state and federal judicatures,[22] the term is not limited merely to federal matters,[23] but also their state-based equivalents.

The above definition naturally informs the scope of communications which are argued to be protected by the implied freedom. This article reasons that any communication about these matters may fall within the scope of the freedom in the same way that they would if made about the executive or legislature. That is, if they take on a sufficiently 'public' nature, insofar as they may bear on electoral choice or relate to the extended process involving the application of the constitutional powers of the legislature or executive.[24] If they relate, conversely, to personal decision-making or preferences, and are not disseminated in a manner potentially informing 'public' acts or decisions such as voting, then they shall not be protected.[25] As will be outlined, this position may slightly differ for applications of judicial power to the common law or non-statutory equitable principles, where the implied freedom

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[15] *Australian Law Dictionary (3rd ed)* (online at 9 June 2025) 'Judicature'.
[16] *Constitution* Ch III.
[17] 38 & 39 Vict c 77.
[18] *Cunliffe v The Commonwealth* (1994) 182 CLR 272 ('*Cunliffe*').
[19] Ibid 298 (emphasis added).
[20] See above n 15.
[21] See below nn 226–228.
[22] *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 84 (Dawson J), 101–3 (Gaudron J), 112–4 (McHugh J), 137–143 (Gummow J) ('*Kable*'). See also Matt Harvey et al, *Australian Constitutional Law and Government* (LexisNexis, 2021) 244.
[23] Cf generally *Constitution* Ch III.
[24] See below Part II(B).
[25] See, eg, below nn 59–63.

might not apply;[26] this however does not affect the general principles this article proffers.

This proposition widens the scope of communications which might fall under the freedom when compared to current High Court orthodoxy. It presently appears that only communications about the judicature which relate directly to the government are captured by the freedom.[27] Comments on the exercise of judicial power or other matters relating to the judicature which do not directly involve the other branches of government will not, under this orthodoxy, be protected. This article argues for a broader conception of this scope although does so based on the same principled grounds. Importantly, however, it does not argue that the freedom needs to be "extended", and does not seek to justify an "extension" on policy grounds or by reference to practical benefits. Rather, it argues that the appropriate interpretation of the underlying jurisprudential approaches taken to derive and apply the freedom to date does capture relevant communications about the judicature.

B *The Practical Applicability of this Proposition*

In questioning the utility of this article one might challenge its practical applicability. Two main points are made in response. First, as Daniel Reynolds notes, High Court jurisprudence shows that the fact something may be an uncommon or even exceptional form of political communication, or a unique topic thereof, 'is no reason to reject the need to protect it'[28] under the implied freedom.

Second, and perhaps of greater practical relevance, is the fact that a variety of examples are apt to demonstrate that actually this question is not merely academic, but may foreseeably arise in a number of scenarios. Such examples are, of course, not exhaustive but are sufficiently indicative for present purposes.[29]

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[26] See below Part IV.

[27] See below Part III.

[28] Daniel Reynolds, 'An Implied Freedom of Political Observation in the *Australian Constitution*' (2018) 42(1) *Melbourne University Law Review* 199, 228.

[29] It is worth noting that the fact such communications may fall within the ambit of the implied freedom does not mean they shall be protected in practice. It is readily foreseeable that many present "justified" burdens on communication may be permitted under the second limb of the *Lange* test. This article does not argue that this should therefore render all laws which burden these communications as invalid, but only that the communications are prima facie capable of being protected by the scope of the freedom. That is, the question in practice will be one which revolves around the nature of any specific law which infringes this communication. This inclusion of the judicature, as we will see, is distinct from current High Court orthodoxy. Indeed, even if one argued that this may over-extend the freedom, given the constitutional provisions from which it is derived, this would nonetheless be consistent with the general approaches of providing rights with broad and beneficial construction

The most readily envisaged example is laws which relate to contempt.[30] Individuals engaging in conduct which may be considered contempt in the face of the court[31] might, in certain instances, be engaging in verbal or symbolic[32] communication about the judicature.[33] Contempt by publication, *sub judice*[34] or in contravention of an order,[35] of specific matters relating to judicial proceedings alongside contempt by scandalising the court[36] all readily fall within the envisaged bounds as communication about the judicature with a 'public' element.[37] It may be so that contempt laws as generally in force would remain validly in force owing to a structured proportionality analysis, but this does not mean that the communications they limit would not prima facie fall within the scope of the implied freedom,[38] or that proposed expansions of such laws would not potentially be invalid on that basis. In a related sense, allegedly defamatory comments made about judicial officers may fall into this realm, bringing defamation laws into consideration.[39]

Furthermore, commentary made regarding judicial decisions or determinations, including the performance of a specific officer, falls within this article's definition, and laws which restricted this communication would burden the freedom. This might include prevention of communications regarding the correctness of the decision, or perhaps the effects and ramifications it may have. Similarly, protests against these decisions or the courts themselves, such as those in the aftermath of the United States Supreme Court decision in *Dobbs v Jackson Women's Health Organization*[40] which overturned *Roe v Wade*,[41] would be captured as relevantly

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and the principles of legality. It is also of principled benefit insofar as drawing a distinct line between what is and is not political, at the margins, is difficult and an overly cautious approach would err on the side of restricting such rights when the practical detriments of such an approach would be alleviated by structured proportionality analysis anyway. This article will later return to consider arguments against an overly broad freedom, and in particular the concerns raised by Steward J in *Ravbar* (n 8).

[30] See, eg, below n 101.

[31] See David Rolph, *Contempt* (Federation Press, 2023) 414–466.

[32] For more on symbolic political communication, see, eg, *Levy v Victoria* (1997) 189 CLR 579, 595 (Brennan CJ); 638 (Kirby J) ('*Levy*').

[33] See, eg, *Elzahed v Kaban* [2019] NSWSC 670; *Prothonotary of the Supreme Court of New South Wales v Shane Dowling* [2017] NSWSC 664.

[34] See Rolph (n 31) 162–231.

[35] See ibid 703–749.

[36] See ibid 253–289.

[37] See, eg, below n 101.

[38] See above n 29.

[39] See, eg, below n 111.

[40] 597 US 215 (2022).

[41] 410 US 113 (1973).

political speech for the purposes of the implied freedom and a law which sought to prohibit such behaviour would be open to challenge.

There may also be tangible application of the doctrine to instances where reporting, coverage, or discussion of specific legal matters is restricted. For example, in instances where the court may be able, or required, to move *in camera* or where suppression of media coverage is mandated by statute. Again, as with contempt laws this may be justified as proportionate, for example, as a response to terrorism or to protect vulnerable parties, yet it may nonetheless *burden* communications within the ambit of the implied freedom.[42]

However, even if there were not so many examples of situations where this question might arise, or these examples would be captured under the freedom in other ways, it is argued that this article would still be of value in extending the specificity with which the implied freedom is understood. Even if it *were* largely academic, which it is not, the question would remain an important one.

C *Important Features of the Freedom's Derivation and Clarification*

Various authors have produced historical accounts of the implied freedom and its evolutions.[43] This article does not seek to provide such a comprehensive outline. Rather, it shall reiterate two developments of relevance to the present enquiry.

First is the direct grounding of the freedom in the specific text of the relevant provisions of the Constitution rather than abstract notions. After uncertainty in the early 1990s, the Court would distil the nature of the implied freedom through the middle of the decade. Of particular note is the seminal analysis of McHugh J in *McGinty v Western Australia*.[44] In rejecting implications of equal voting power in Australia's democracy, McHugh J rejected a 'free standing' notion of 'representative democracy' in the *Constitution* that could be relied upon as the basis of any constitutional analysis.[45] His Honour outlined that 'top-down reasoning' is not a

[42] After all, this article considers the character of speech relating to the judicature and questions if it falls within the metes and bounds of the implied freedom. It does not seek to analyse the laws which burden this protected speech on a case by case basis, and appreciates that many laws burdening this speech might be upheld as valid not because they did not burden political communication, but because they were legitimate and proportionate in doing so.

[43] See, eg, James Stellios, *Zines and Stellios's The High Court and the Constitution* (The Federation Press, 7th ed, 2022) 598–634; Rebecca Ananian-Welsh et al, *Blackshield and Williams Australian Constitutional Law and Theory* (Federation Press, 8th ed, 2024) 1352–1434; Hon Geoffrey Nettle AC, 'Whither the Implied Freedom of Political Communication?' (2021) 47(1) *Monash University Law Review* 1, 2–23.

[44] (1996) 186 CLR 140 ('*McGinty*').

[45] Ibid 236 (McHugh J).

legitimate approach to interpreting the *Constitution*,[46] meaning any 'representative government' must be found in the *Constitution* itself, rather than be overlaid onto its provisions as a guiding principle.[47] Such an approach would 'arguably' become the 'fulcrum upon which [High Court] free speech jurisprudence has turned'.[48] This is particularly pertinent for the present enquiry; in ascertaining an implied freedom of communication concerning the judicature, it will not be sufficient to point to abstract notions — be they 'representative government' or 'responsible government' — and seek to demonstrate that the judicature falls within their ambit. An approach grounded in the provisions of the *Constitution* and what they necessitate is required.[49]

This was further affirmed in *Lange v Australian Broadcasting Corporation*,[50] the 'modern starting point' of the implied freedom.[51] *Lange* is notable amongst other key developments[52] for its continued grounding of a textualist freedom[53] and departure from borrowed, Americanised notions of free speech.[54] The Court found that, as McHugh J noted in *McGinty*, it was not a question of what is 'required by representative and responsible government' as a concept, but a question of what the actual, and specific, 'terms and structure of the *Constitution*, prohibit, authorise or require'.[55] In this process, the phrases 'directly chosen by the people' in ss 7 and 24 and 'submitted…to the electors' in s 128 were given particular emphasis in grounding the freedom.[56] Thus, *Lange* held that the freedom must protect communications which could, or might, influence the exercise of the functions afforded to voters under the relevant provisions.[57] That is, communication was protected '*because it is a means* by which electors may inform themselves…and

[46] Ibid 232 (McHugh J).
[47] Ibid.
[48] Nicholas Aroney, 'Justice McHugh, Representative Government and the Elimination of Balancing' (2006) 28(3) *Sydney Law Review* 505, 505.
[49] For further analysis of the Australian "bottom-up" approach, see, eg, the comments of Gummow J in *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 544–545 [73], which cite McHugh J's reasoning in *McGinty* (n 44) with approval.
[50] (1997) 189 CLR 520 ('*Lange*').
[51] Stellios (n 43) 608.
[52] Such as the agreement by the court that the implied freedom, unlike the First Amendment in the United States, did not provide a personal right, but was rather a limit on powers of the state: *Lange* (n 50) 560.
[53] Richard Jolly, 'The Implied Freedom of Political Communication and Disclosure of Government Information' (2000) 28(1) *Federal Law Review* 41, 42.
[54] Meagher (n 13) 445.
[55] *Lange* (n 50) 567; Costa Avgoustinos, 'Deriving Constitutional Implications: The Role of "External" Sources in the Text and Structure Approach' (2022) 50(2) *Federal Law Review* 249, 249–250.
[56] *Lange* (n 50) 557; Anne Twomey, '"Expansion or Contraction": A Comment' (1998) 20(1) *Adelaide Law Review* 147, 149–150.
[57] *Lange* (n 50) 560.

thereby exercise a free and informed choice'.[58] The link was made to the act of electoral choice, as required specifically by the relevant sections (as opposed to the Chapters as a whole).

The second development of importance relates to the requisite public nature of communications. The Court has appeared to distinguish between communications which relate to political *choices* — which are protected — and communications merely on topics which are *politically controversial*. For example, in *Clubb v Edwards; Preston v Avery*,[59] Kiefel CJ, Bell and Keane JJ noted that certain conversations about abortion might pertain to ethical choices or be politically sensitive, but if they speak to individual decisions as opposed to bearing on electoral choice then they would not be protected.[60] This has implications for the extent to which communications about the judicature might be protected. Nonetheless, noting 'public debate' was distinguished from 'individual choices',[61] it is eminently more likely that discussion of the judicature would relate to matters of public discourse rather than the behaviour of an individual privately.[62] After all, judges do not respond or adjust their behaviour in response to criticism,[63] meaning that such commentary or critique will generally be aimed to the public to influence their views or actions instead, especially as the personal actions of the individual citizen hearing the commentary are precisely limited to their engagement with the public sphere. They cannot, in their private actions, act in any way in response to the acts of the judicature spoken of, except in their engagement in public life.

III Previous Consideration of Communication about the Judicature

Amongst the litany of cases dealing with the freedom to date, a number have questioned whether or not communication about the judicature may find protection within the *Constitution*. However, these authorities have not conclusively answered this question.

A *The High Court*

It is useful to begin by noting that to date there exists no High Court case the *ratio* of which stands for the proposition that the implied freedom does not encompass communications regarding the judicature. That is not to say that this question has

[58] Reynolds (n 28) 201.
[59] (2019) 267 CLR 171 ('*Clubb*').
[60] Ibid 191 [29].
[61] Ibid.
[62] Sackville (n 6) 204.
[63] *Peek v Channel Seven Adelaide Pty Ltd* (2006) 94 SASR 196, 226 [95] (Besanko J) ('*Peek*').

not been considered, nor that the comments to which this article turns do not carry persuasive or even precedential value. Still, it would not be required to re-open any case should this article's reasoning be adopted.[64]

1 APLA

As indicated previously, the formative High Court case in which this issue has seen judicial consideration is *APLA*. *APLA* was not, however, a case in which the relevant inhibited communications pertained to the judicature. Rather, the plaintiffs took issue with the impugned regulations under the *Legal Profession Act 1987* (NSW) which prevented advertisement of certain legal services.[65] To that extent, the case did not turn on the application of the freedom to the judicature itself. Nonetheless, the plaintiff's contentions were made, inter alia, on the basis that prohibited communications either fell within the traditional implied freedom, or that Chapter III of the *Constitution* provided a distinct yet parallel implied freedom of communication about legal rights.[66]

Chief Justice Gleeson and Heydon J delivered a joint judgment acknowledging that the phrase 'government or political matters' was imprecise,[67] but holding that regulations limiting the marketing of professional services by lawyers did not inhibit political communication.[68] Writing individually, Gummow and Hayne JJ each held that such advertisements did not attract the freedom as they were not sufficiently 'political'.[69] Justice Callinan, while maintaining scepticism as to the implied freedom generally, outlined that nothing in the relevant communications could reasonably influence exercises of electors' rights or the actions of elected representatives.[70] The direct question of whether the implied freedom applied to comments about the judicature was only considered by two Justices: McHugh and Kirby JJ.

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[64] It is also acknowledged that, whilst the comments of Mason CJ in *Cunliffe* (n 18) that the freedom 'necessarily extends to the workings of the courts and tribunals', the findings in *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 ('*Nationwide News*') that commentary regarding the Industrial Relations Commission was protected by the freedom, and the judgment of Mason CJ, Toohey and Gaudron JJ in *Theophanous* (n 12) which considered discussion of the 'judicial process' to be 'political discussion' all support the inclusion of the judicature in the scope of the freedom, these cases pre-date the reformulation in *Lange* (n 50) placing emphasis on the constitutional text and the approach in *McGinty* (n 44), and therefore it is likely appropriate not to deal with, nor rely on, these cases in depth *as precedent*: Meagher (n 13) 440. That said, this article argues that they were correct to include the judicature in this manner, and that elements of their reasoning remain persuasive.

[65] *APLA* (n 10) 358 [55] (McHugh J).

[66] Ibid 358.

[67] Ibid 350 [27] (Gleeson CJ and Heydon J).

[68] Ibid 351 [29] (Gleeson CJ and Heydon J).

[69] Ibid 403 [218] (Gummow J); 450–1 [378]–[379] (Hayne J).

[70] Ibid 480 [457] (Callinan J).

In deciding the case, McHugh J found that the impugned cl 139 was invalid as its object and effect was 'to reduce litigation in respect of personal injury in…courts exercising federal jurisdiction'.[71] His Honour did, however, elsewhere explicitly consider the scope of the *Lange* freedom. That portion of the judgment begins in a manner characteristic of McHugh J's influential perception of the implied freedom, framing the analysis by noting that the freedom 'arises by necessary implication from the text of certain sections of the Constitution…[not] from any general notion of representative government'.[72] These 'certain sections' were described as

> necessary to give effect to the requirements of direct elections for the Senate and the House of Representatives in ss 7 and 24 respectively, the involvement of electors in a referendum under s 128, the exercise of executive power by Ministers who are members of the House of Representatives or Senate and thus responsible to the electorate under ss 62 and 64, and the control of supply to the Executive by the Parliament in s 83.[73]

I pause here briefly to emphasise McHugh J's focus vis-à-vis ss 7 and 24. His Honour acknowledges that the freedom is derived not from the sections themselves providing for the Senate and House of Representatives *as institutions*, which are also provided for elsewhere in Chapter I, but from the need to 'give effect' to direct elections as a *process*.[74] Nor did his Honour argue that the freedom was provided for by the relevant Chapters themselves. There is a difference between ensuring that the Houses existed and functioned as provided by the relevant provisions on one hand, and ensuring that their composition was 'directly chosen' by the electorate on the other. The same is true of his Honour's analysis of s 128, and is the reason the executive was included by virtue of its accountability to the electorate.

Nonetheless, by emphasising the derivation of the implied freedom from the totality of these provisions, McHugh J distinguishes 'government' as a term used when describing protected speech in the implied freedom sense from the term 'government' used broadly.[75] The former was described as referring only to 'acts and omissions of the kind that fall within Chapters I, II and VIII of the Constitution'.[76] This, to his Honour, did not mean that the freedom extended to 'the exercise of…judicial power', as it was said not to be tied to the powers granted by the provisions from which the freedom was derived but was rather found elsewhere,

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[71] Ibid 357 [52] (McHugh J).
[72] Ibid 358 [56] (McHugh J).
[73] Ibid 360 [61] (McHugh J).
[74] Ibid 362 [61], [68] (McHugh J).
[75] Ibid 360 [63] (McHugh J).
[76] Ibid.

namely in the unrelated Chapter III.[77] Interestingly, to some extent this appeared to differ from his Honour's earlier emphasis on giving effect to direct elections, as opposed to exercising powers afforded to specific bodies under Chapters I, II, and VIII, being the parts of the *Constitution* containing the provisions from which the freedom is derived.

Justice McHugh did caveat the exclusion of the judicature, however, stating that:

> Discussion of the appointment or removal of judges, the prosecution of offences, the withdrawal of charges, the provision of legal aid and the funding of courts, for example, are communications that attract the *Lange* freedom. That is because they concern, expressly or inferentially, acts or omissions of the legislature or the Executive Government…However, communications concerning the results of cases or the reasoning or conduct of the judges who decide them are not ordinarily within the *Lange* freedom. In some exceptional cases, they may be. But when they are, it will be because in some way such communications also concern the acts or omissions of the legislature or the Executive Government.[78]

That is, commentary regarding the judicature may concern the executive or legislature, and thus would be covered to his Honour only by virtue of concerning the latter two institutions, but communications relating only to the judicature are not sufficiently tied to the relevant provisions to be protected.[79]

Justice Kirby was of the opposite opinion. Whilst his Honour acknowledged that 'consideration by this Court…has been directed to…the legislatures of the representative democracy which the Constitution establishes (Ch I) and the accountable executive government for which it provides (Ch II)',[80] he did not find that the freedom was limited to this by necessity. Rather, Kirby J made explicit reference, inter alia, to the comments of Mason CJ in *Cunliffe* referred to above,[81] before going on to state that the protection of communication regarding the judicature 'cannot be doubted'.[82]

A considerable portion of Kirby J's analysis was directed to whether such a freedom could alternatively be derived from Chapter III.[83] This was conducted with reference, inter alia, to the historical derivation of implications defensive of the judicature from

[77] Ibid.
[78] Ibid 361 [65] (McHugh J).
[79] Ibid.
[80] Ibid 438 [342] (Kirby J).
[81] See above nn 19, 64.
[82] *APLA* (n 10) 439 [346] (Kirby J).
[83] His Honour would hold that it could.

that Chapter,[84] and the 'assumption of a high level of unimpeded communication' underpinning the *Constitution*.[85] This analysis, however, ought not be confused as stating that such a freedom could only be derived independently of that in *Lange*. Whilst, respectfully, at times the lines do appear blurred in his Honour's judgment, the distinction is made clear in principle when Kirby J held '*[e]ven if* this Court were to confine *Lange* to a principle protective of communications about the legislature and the executive, a separate implication of similar or identical scope *would* arise to protect communications necessary to the operation of the Judicature provided for in Ch III of the Constitution'.[86] Reliance on *Lange* and Chapter III were advanced as alternative yet co-existent.

Regarding the former, relevantly for present purposes Kirby J held that 'courts are part of government…[t]hey resolve issues that are, in the broad sense, political, as this case clearly demonstrates',[87] and therefore fall within the *Lange* ambit. In doing so his Honour acknowledged that 'it may be true that re-expressing the *Lange* rule as I would favour, so that it applies to the judicial branch of government as much as to the legislative and executive, would involve a new step'.[88] However, this was followed by the conclusion that this was inherent in, and consistent with, the *Lange* principles as understood.[89]

2 Hogan v Hinch

After *APLA*, it cannot be said that the High Court had reached any conclusion, binding or not.[90] Two Justices had each commented on the matter, and such comments were in disagreement.[91] The High Court would however again consider the question in *Hogan v Hinch*.[92]

In that case, the defendant was charged with contravening suppression orders made under the *Serious Sex Offenders Monitoring Act 2005* (Vic) by publishing information which might enable identification of certain offenders. Among other grounds, Mr Hinch alleged that s 42 of that Act infringed the implied freedom by preventing the ability to '(a) criticise legislation and its application in the courts; and (b) to seek

[84] *APLA* (n 10) 439 [344]–[346] (Kirby J).
[85] Ibid 439 [346] (Kirby J).
[86] Ibid 441 [350] (Kirby J) (emphasis added).
[87] Ibid 440 [347] (Kirby J).
[88] Ibid 444 [358] (Kirby J).
[89] Ibid.
[90] Williams (n 1) 172.
[91] Even if one of those Justices was, largely, in dissent in the overall case.
[92] (2011) 243 CLR 506 ('*Hogan v Hinch*').

legislative and constitutional changes in court practice by public assembly and protest, and the dissemination of factual data concerning court proceedings.'[93]

In considering whether s 42 did infringe the implied freedom, Gummow, Hayne, Heydon, Crennan, Kiefel, and Bell JJ described that communications 'concerning the exercise of judicial power stand apart in the sense discussed in detail by McHugh J in *APLA*'.[94] Their Honours reproduced McHugh J's comments that courts, judges, and the exercise of judicial power were not covered by the freedom, and noted again that acts which related to the courts are protected only by virtue of their relation to other arms of government.[95] A majority of the Court thus appeared to prefer McHugh J's analysis over that of Kirby J. Insofar as the matter has not received consideration in the High Court since, it appears that the approach represents the Court's current orthodoxy.

However, despite this apparent approval, the analysis was not actually applied but was instead merely noted. It was certainly not analysed critically. Indeed, the application of the implied freedom to the judicature was once again not actually at issue in *Hogan v Hinch*. Rather, the defendant submitted that the relevant communications *did* concern the legislature and executive.[96] The majority 'accepted that an affirmative answer should be given to' the first *Lange* question.[97] The Court would hold that the legislation causing the burden, being incidental in its inhibition of the speech characterised by the defendant, satisfied the second limb of the *Lange* test, and therefore was upheld.[98] Nonetheless, there had been a burden found, rendering the comments regarding *APLA* best considered akin to *obiter*.

As a result, the ramifications of *Hogan v Hinch* are mixed. On one hand, the majority lent credence to McHugh J's view in *APLA*, even if only cursorily. However, on the other, there was not an extensive analysis or actual application of these principles. To that extent, even *Hogan v Hinch* cannot be said to answer our present question.[99] After considering the findings of the High Court, therefore, we are left only with cases

[93] Ibid 527 [2] (French CJ).
[94] Ibid 555 [92] (Gummow, Hayne, Heydon, Crennan, Kiefel, and Bell JJ).
[95] Ibid 555 [93] (Gummow, Hayne, Heydon, Crennan, Kiefel, and Bell JJ).
[96] Ibid 556 [94] (Gummow, Hayne, Heydon, Crennan, Kiefel, and Bell JJ).
[97] Ibid 556 [95] (Gummow, Hayne, Heydon, Crennan, Kiefel, and Bell JJ).
[98] Ibid 556–7 [96]–[100] (Gummow, Hayne, Heydon, Crennan, Kiefel, and Bell JJ).
[99] Although even if it were the case that the comments in *Hogan v Hinch* (n 92) formed part of the ratio, the argument made in this article would remain in its current form. In practice, however, the High Court might then need to expressly depart from this previous reasoning or reopen its earlier findings.

in which points made were not necessary for the decisions, and therefore 'cannot be authority'.[100]

B *Notable Appellate Court Decisions*

Judicial consideration of the present question has also arisen in appellate courts on various occasions both before and after *APLA*'s influential discussion.

1 *Pre*-APLA

The relationship between the judicature and the implied freedom came before the New South Wales Court of Appeal several years before the High Court heard *APLA* in *John Fairfax Publications Pty Ltd v Attorney-General (NSW)*.[101] In that case, the NSW Attorney-General had charged Fairfax with contempt for publishing articles including allegations regarding a man faced with impending drug charges. On appeal, Fairfax sought declarations of invalidity for the contempt provisions of the *Supreme Court Act 1970* (NSW).[102]

Chief Justice Spigelman (with whom Priestley JA agreed regarding 'the *Lange* point')[103] responded directly to the submission that 'judges and courts are…bodies about whom the freedom could be exercised',[104] holding that the 'conduct of courts is not, of itself, a *manifestation of* any of the provisions…upon which the freedom is based.'[105] That is, much like McHugh J would find in *APLA*, the judicature of Chapter III stood separately from the structures *created by* the provisions elsewhere in the *Constitution* which are relied upon to derive the freedom and therefore not protected.

The reliance by the appellant on cases outlining the public interest in communications regarding public officials, including the judiciary, was distinguished as applying for the purposes of the qualified privilege defence, rather than to the implied freedom.[106] Moreover, the fact that Chapter III could be amended by referendum, and therefore may be linked to s 128, was deemed 'too tenuous',[107]

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[100] *MZAPC v Minister for Immigration and Border Protection* (2021) 273 CLR 506, 579 [198] (Edelman J); *CSR Ltd v Eddy* (2005) 226 CLR 1, 11 [13] (Gleeson CJ, Gummow, and Heydon JJ).
[101] (2000) 181 ALR 694 ('*Fairfax*').
[102] Ibid 696 [2].
[103] Ibid 721 [157] (Priestley JA).
[104] Ibid 709 [82] (Spigelman CJ).
[105] Ibid 709 [83] (Spigelman CJ) (emphasis added).
[106] Ibid.
[107] Ibid 710 [84] (Spigelman CJ).

as in theory any matter may be the subject of a constitutional amendment.[108] His Honour did, however, accept that the institution and conduct of proceedings by the Attorney-General would be a 'governmental and political matter' for the purposes of the freedom.[109] Ultimately, however, the relationship between the judicature and the implied freedom was not determinative to the appeal, which was nonetheless successful in invalidating ss 101A(7), (8)(a), and (9).[110]

The Victorian Court of Appeal was faced with similar questions in *Herald & Weekly Times Ltd v Popovic*,[111] where a Deputy Chief Magistrate sought damages for libel in response to an article which allegedly imputed that she subverted the law, bullied a prosecutor, and warranted removal from office. Winneke ACJ expressed the view that criticism of the performance of a magistrate, even if strong enough to imply unfitness for office, 'is not a discussion of government or political matters',[112] referring to the grounding of the freedom in the text of the *Constitution* and its enabling of communication allowing for free and informed electoral choice.[113] His Honour would go on to discuss *Fairfax*, outlining that 'the conduct of courts "is not, of itself, a manifestation of any of the provisions relating to representative government upon which the freedom is based", the conduct of individual judicial officers is carried out independently of the legislative and executive', and that more general relations between the judicature and other government branches

> do not carry with them the implication that a discussion about the discharge by a judicial officer of his or her function in a particular case is a discussion concerning political or government matters in the relevant sense…. Such comment and criticism could, in my view, have no impact or influence upon the choice of [elected] representatives.[114]

To that extent Winneke ACJ more directly dealt with the content of the provisions grounding the freedom and the need to give effect to those *processes*,[115] being direct election, as opposed to reasoning simply that the judicature itself was not provided

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[108] It might be argued that the fact something is already within the *Constitution* may provide a greater nexus to the power of referendum to amend that *Constitution*, as opposed to a vague notion that "anything" could be subject to a referendum because anything could in theory be added to it. This would capture Ch III and the judicature. This question remains outside the scope of this article, however.

[109] *Fairfax* (n 101) 713 [107] (Spigelman CJ). This appears again to have been reflected in McHugh J's judgment in *APLA* (n 10) and the caveat discussed above: see above n 78.

[110] *Fairfax* (n 101) 718 [134] (Spigelman CJ); 722 [162] (Priestley JA).

[111] (2003) 9 VR 1 ('*Popovic*').

[112] Ibid 8–9 [6] (Winneke ACJ).

[113] Ibid 9 [7] (Winneke ACJ).

[114] Ibid 10 [9] (Winneke ACJ).

[115] See above n 74.

for by the provisions from which the freedom was derived.[116] This is, as jurisprudential development would prove, the correct approach. In drawing this conclusion however, Winneke ACJ expressed the significant necessary assumption that such commentary could 'have no impact or influence' on the exercise of voting powers.[117] As this article will argue,[118] this assumption is, respectfully, misplaced, and renders his Honour's conclusion *non sequitur*.

That said, the caveat which would later arise in McHugh J's *APLA* reasoning was to follow, with his Honour accepting that communication which 'impacts directly or indirectly on the executive government itself…may well bear the characteristics of one which is capable of informing and shaping the views of the electors about the performance of their elected representatives'.[119]

The reasoning of Winneke ACJ was largely agreed with by Warren AJA, who also appropriately explained that the fact the separation of powers was often referred to as 'three arms of government' did not mean that the *Lange* doctrine extended to the judiciary.[120] Her Honour engaged in both an exegesis of *Lange* — where 'repeated use of the expressions "government" and "politics" [were] always in a legislative or executive context, never…a judicial one'[121] — and a historical exploration of the 'separation of powers' itself to demonstrate a difference in the nature of the 'objective'[122] judiciary from that of the other branches of 'government'.[123] Her Honour ultimately rejected the inclusion of the judiciary in the defence of qualified privilege, but did so with significant reference to policy grounds and political theory, specifically the need to maintain confidence in an independent judiciary, rather than in reliance on the terms of the *Constitution*.[124] As *McGinty* and other cases had demonstrated, this approach would not be appropriate in the context of the implied freedom, grounded in the text and structure of the document.[125] Moreover, cases have been clear that qualified privilege is not necessarily co-extensive with the implied freedom.[126]

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[116] Cf Spigelman CJ in *Fairfax* (n 101): see above n 105.
[117] *Popovic* (n 111) 10 [9] (Winneke ACJ).
[118] See below Part IV.
[119] *Popovic* (n 111) 10–11 [10] (Winneke ACJ).
[120] Ibid 103 [500] (Warren AJA).
[121] Ibid.
[122] Ibid 104 [503] (Warren AJA).
[123] Ibid 103 [501] (Warren AJA).
[124] Ibid 105 [507] (Warren AJA).
[125] See above nn 45–49, 55.
[126] *Fairfax* (n 111) 709 [83] (Spigelman CJ); *Coleman v Power* (n 4) 79 [199] (Gummow and Hayne JJ); *Peek* (n 63) 218 [66] (Besanko J).

Justice Gillard took an alternative approach. To his Honour, even though communications regarding a magistrate acting in that capacity were not political, they were still 'governmental' and could be covered by the implied freedom.[127] His Honour took the term 'political and governmental' and reasoned from the meaning of 'government'[128] that the administration of justice is a vital component of said government,[129] and therefore the public has a 'real and legitimate interest' in knowing of the conduct of this 'vital and essential ingredient in the system of government'.[130] In doing so, his Honour concluded, albeit provisionally, that the information fell 'within the meaning of the *Lange* defence'.[131]

2 *Post*-APLA

The decisions of intermediate courts after *APLA* further demonstrate that the question of the inclusion of the judicature in the implied freedom remained, and remains, alive.

In *Catch the Fire Ministries Inc and Ors v Islamic Council of Victoria Inc*,[132] Neave JA briefly referred to *Popovic*, noting that commentary on judicial officers was held as generally not covered by the freedom, except insofar as it affects the executive government.[133] This was not, however, applied but was merely referred to descriptively.

The extension of the freedom to the courts was expressly considered by the Full Court of the Supreme Court of South Australia in *Peek*. There, both Debelle J and Besanko J (with whom Duggan J agreed) decided that the freedom did not encompass the judicature. Justice Debelle began his consideration of the implied freedom by recognising that the 'expression "communication about a government and political matter"…is imprecise'.[134] However, his Honour went on to state that '[a]lthough the judiciary is one of the three arms of government, it does not follow that remarks concerning a court…concern[] government and political matters'[135] as the implied freedom 'was grounded on provisions in the *Constitution* which

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[127] *Popovic* (n 111) 53 [252]–[253] (Gillard AJA).
[128] Ibid 52 [249] (Gillard AJA).
[129] Despite his Honour taking, respectfully, what has been now shown to be an incorrect jurisprudential approach, the reasoning that the judiciary *does* implement the powers provided for by the relevant provisions of the *Constitution*, and the fact that the role of the judiciary in the administration of justice *may* influence electoral choice, render Gillard AJA's reasoning of persuasive value: see below Part IV.
[130] *Popovic* (n 111) 53 [250] (Gillard AJA).
[131] Ibid 53 [253] (Gillard AJA).
[132] (2006) 15 VR 207.
[133] Ibid 265 [207] (Neave JA).
[134] *Peek* (n 63) 199 [6] (Debelle J).
[135] Ibid 199 [7] (Duggan J).

concerned the legislative and executive arms of government as well as…referend[a].'[136] This was stated with reference to McHugh J's judgment in *APLA*,[137] and appears reminiscent of the analysis of Spigelman CJ in *Fairfax*.[138] It also subsequently involved describing that Kirby J in *APLA* 'fail[ed] to give due weight to the grounds on which the implied freedom rests'.[139] His Honour also provided his support for the reasoning of Winneke ACJ in *Popovic* and Besanko J in *Conservation Council of SA Inc v Chapman*,[140] a case decided prior to *APLA* which broadly agreed with *Fairfax* to find that the fact a publication referred to the Federal Court and court orders was insufficient to ground constitutional protection.[141]

Justice Besanko would reiterate his own view from *Chapman* that judicial power is neither an element of representative nor responsible government as:

> Judges are not elected; nor do they advance or apply policies in the course of discharging their duties. They do not respond to criticisms of particular decisions they may make. Leaving aside the power of removal, they are not accountable to parliament for those decisions…[they are] not themselves elements of representative or responsible government.[142]

His Honour also dealt with the contention that the communication in that case was implicitly about the legislature or the executive, as it was criticism of the court system which can only be addressed by the other arms of government.[143] His Honour held, however, that the call for remedial action was not a reasonable inference from the specific communication before the court.[144] Nonetheless, it was Besanko J's opinion that the relevant communications were not about the court system, and therefore these comments were once again not determinative of the present question.[145]

The New South Wales Court of Appeal returned its mind to the implied freedom in two 2018 hearings which considered a judgment of the Supreme Court that found the applicant guilty on three charges of contempt.[146] The first hearing, before

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[136] Ibid.
[137] Ibid 199 [7]–[8] (Duggan J).
[138] See above n 105.
[139] *Peek* (n 63) 200 [9] (Duggan J).
[140] (2003) 87 SASR 62 ('*Chapman*').
[141] *Peek* (n 63) 201 [10], [11], [18], [20] (Debelle J).
[142] Ibid 226–7 [95] (Besanko J).
[143] Ibid 227 [98] (Besanko J).
[144] Ibid.
[145] Ibid 227 [96] (Besanko J).
[146] *Prothonotary of the Supreme Court of New South Wales v Shane Dowling* [2017] NSWSC 664.

Leeming JA, was an application for bail.[147] At first instance, Wilson J had referred to *Fairfax* to state that '[d]iscussion of or comment upon the role of judges or the work that an individual judge has undertaken could not be regarded as communication concerning political or government matters'.[148] Justice Leeming was not so ready to accept that the answer was this straightforward. Rather, his Honour noted that 'it is reasonably arguable that the relationship between the so-called implied freedom of political communication and the three counts on which Mr Dowling has been convicted is a little more complex'.[149] His Honour would go on to outline:

> I do not regard communications…concerning the judicial officers of a State court, as necessarily outside the scope of the implied freedom. *Nationwide News* needs to be read carefully, predating as it does the reformulation in *Lange*, but it concerned the conduct of a federal industrial tribunal. More relevantly, I respectfully agree with Winneke ACJ that political communication for the purposes of the immunity is capable of extending to the discussion of a judicial officer of a State court. I consider there is at least a reasonable argument that may be made contrary to the *in limine* rejection of the *Lange* "defence".[150]

At this point his Honour concluded that 'the submissions based on *Lange*…may be of greater complexity than has hitherto been addressed',[151] yet did not find that this conceptual question would reasonably impugn the convictions themselves.[152]

The points regarding the implied freedom were taken up in the appeal itself.[153] Justice Basten, with whom Meagher JA agreed, did not consider whether communications regarding the judicature were captured by the freedom. Rather, his Honour concluded that stripping the powers to prevent contempt would 'deprive the court of an essential characteristic of a superior court of record'.[154] Thus 'reliance on the implied freedom [was] misplaced'.[155] Justice Macfarlan did engage with the implied freedom, referring to *Hogan v Hinch*,[156] its approval of McHugh J's

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[147] *Dowling v Prothonotary of the Supreme Court of New South Wales* [2018] NSWCA 233.
[148] *Prothonotary of the Supreme Court of New South Wales v Shane Dowling* [2017] NSWSC 664, [57] (Wilson J).
[149] *Dowling v Prothonotary of the Supreme Court of New South Wales* [2018] NSWCA 233, [23] (Leeming JA).
[150] Ibid [24] (Leeming JA).
[151] Ibid [30] (Leeming JA).
[152] Ibid.
[153] *Dowling v Prothonotary of the Supreme Court of New South Wales* (2018) 99 NSWLR 229.
[154] Ibid 234 [15] (Basten JA).
[155] Ibid 234 [16] (Basten JA).
[156] Ibid 252–3 [107] (Macfarlan JA).

observations in *APLA*,[157] and the opinion of Winneke ACJ in *Popovic*.[158] Thus, to his Honour, as the relevant communications concerned judicial officers, they were not protected by the implied freedom based on those authorities alone.[159] His Honour did not however, respectfully, engage with the question in any more depth than brief reference to precedent.

IV A Principled Application of Present Jurisprudence

Under present orthodoxy, it appears that there are three main contentions against including the judicature within the ambit of the implied freedom. The first is that the judicature is not a manifestation of the provisions or chapters which ground the freedom (described as '[an] implication arising from ss 7, 24, 62, 64 and 128'[160]). The second is that the judicature is not part of representative and responsible government (as it is not elected nor responsible to the elected representatives, save for the power of removal). The third is that communications about the judicature without direct reference to the legislature or executive will not rationally bear on electoral choice. Through the lens of *APLA*, this Part will first address these three concerns responsively. A fourth, albeit less prominent, contention may be derived from Steward J's recent comments in *Ravbar* which lamented that the implied freedom had become 'too broad'.[161] That is, that the inclusion of the judicature is a continuation of the 'ongoing march of the implied freedom'[162] and would leave its ambit impermissibly wide. Whilst this Part respectfully considers this contention to be less persuasive than those noted above, it will also address Steward J's concerns before turning to the remaining contentions.

The argument made subsequently in this Part is not that a novel derivation must be made from Chapter III,[163] but rather that the requirements of the relevant constitutional provisions do necessitate protection of the judicature. Indeed, as Gageler J (as the Chief Justice then was) alluded to, the question turns on if the relevant communications 'are capable of bearing on electoral choice',[164] which the judicature is particularly likely to do, rather than if the communications relate to the

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[157] Ibid.
[158] Ibid 253 [108] (Macfarlan JA).
[159] Ibid 253 [109] (Macfarlan JA).
[160] *Farm Transparency International Ltd v New South Wales* (2022) 277 CLR 537, 586 [152] (Gordon J) ('*Farm Transparency*').
[161] *Ravbar* (n 8) [273] (Steward J).
[162] Ibid [275] (Steward J).
[163] As argued for by Kirby J in *APLA*.
[164] *Brown v Tasmania* (2017) 261 CLR 328, 384 [188] (Gageler J) ('*Brown v Tasmania*'); *Farm Transparency* (n 160) 569 [88] (Gageler J).

institutions of Chapters I, II, and VIII as a prerequisite or if the judicature is itself part of representative and responsible government.

A *Judicial Reservations Addressed*

1 *The Steward J concern: unacceptable breadth?*

As noted above, Steward J in *Ravbar* once again raised doubts as to the correctness of the implied freedom. This article addresses one specific concern raised by his Honour, being that the freedom has grown 'too broad, ungainly and uncontrollable'.[165] It does so not to mount a fully formed defence of the freedom itself, or to respond to every point made by his Honour, but as concerns about unacceptable breadth may similarly arise when considering if the freedom extends to the judicature.

In a section of the judgment headed '*Its breadth is problematic*', Steward J characterises a broad implied freedom as 'just not sustainable'.[166] This is because

> even outside of the electoral process it must be accepted that politics touches, whether directly or indirectly, upon so many diverse issues; it is a boundless field of discourse. Any law which burdens, howsoever lightly, that vast field of political communication potentially presently triggers an application of the implied freedom.[167]

But contrary to this being a reason for confining the scope of the freedom, it is an apt indication of why the breadth is in fact so necessary. If one accepts, as the Court has for decades and so this article will continue to, that the implied freedom exists generally, then to constrain what may enliven its operation while simultaneously accepting that the direct choice is informed by a wider breadth of communications is to fly in the face of the very touchstone of necessity vis-à-vis the relevant provisions that is so central. Either the provisions by necessity require communication on matters which inform the choice (and are broad), or they do not ground any necessary binding freedom at all. There cannot be a middle ground where *some* communications which influence the process necessitated are protected. This may be a question of discerning just what could influence that choice, and not everything can, but it is not a reason to rely on the breadth of influential communications to restrict the ambit of the freedom.

Justice Steward's concern for breadth also arises in the practical contention that '[i]t is difficult, with respect, to see how any of the foregoing impugned laws might have

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[165] *Ravbar* (n 8) [272] (Steward J).
[166] Ibid [273] (Steward J).
[167] Ibid [277] (Steward J).

substantially affected the *Constitution*'s guarantee of a direct choice by the people in a federal election'.[168] Even accepting a broad conception of the implied freedom, this might be a valid contention in certain cases regarding certain laws.[169] But it speaks to the specific laws in question. It may even speak to the correctness of previous decisions regarding the implied freedom. It does not, however, at the level of law or principle, demonstrate error in a broad understanding of what might actually 'substantially affect[] the *Constitution*'s guarantee of a direct choice'. It certainly is not a contention that demonstrates the judicature cannot fall within this scope, if it is shown that the communications in question do bear on that direct choice.

And so, taking the above reasoning, one is then able to agree fully with the reasoning of Steward J, but come to a different conclusion:

> Naturally, there are many who may think that there is much to admire about an implied freedom with this breadth of application. There are no doubt many who would say that such a guarantee of freedom enhances and protects our democratic institutions. But the merits of the implication are not what matters. What matters is whether it is necessarily mandated by the *Constitution*…[170]

And what is necessarily mandated by the *Constitution* is a broad conception of communications which enliven the implied freedom, not only to protect democratic institutions, but to protect the democratic processes enshrined therein.[171]

A concern is then raised that this means in many cases a burden is either easily discerned or is conceded to exist.[172] Justice Steward, citing the observations of Heydon J in *Wotton v Queensland*,[173] laments the fact that the trend of the burden limb being satisfied 'meant that the second limb of *Lange* — being that of justification — had thereby assumed much greater prominence in the jurisprudence

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[168] Ibid [280] (Steward J).

[169] Save, perhaps, for the introduction of the "substantially" qualifier, which might better be considered, as appears to be orthodoxy, at later stages of the implied freedom inquiry. Indeed, in the cases his Honour refers to, this is how the Court reasoned.

[170] *Ravbar* (n 8) [283] (Steward J).

[171] This article will not engage in depth with Steward J's contention at [284] regarding 'necessity' that '[t]he capacity of a democratic society to preserve for itself its own shared values explains why our democratic institutions were able to thrive for so long without the implied freedom. In that sense the implied freedom is a remedy that we have never really needed; it is a constitutional device designed to battle imaginary demons', except to say that various examples of democratic backsliding throughout the world and throughout history would tend to indicate otherwise. See, eg, Brett Milano, 'When democracies backslide', *Harvard Law Today* (online, 25 March 2025) <https://hls.harvard.edu/today/when-democracies-backslide/>.

[172] *Ravbar* (n 8) [279] (Steward J).

[173] (2012) 246 CLR 1, 23 [53] (Heydon J).

of this Court and had led to "sharp divisions".'[174] In response to this argument, this article gratefully adopts the persuasive reasoning of Gageler CJ:

> Neither the breadth of the concepts employed, nor the lack of unanimity amongst members of the Court…as to…the third stage…detracts from the orthodoxy of [the implied freedom] inquiry…Unresolved differences as to how the third stage of the inquiry is best undertaken cannot undermine the common ground upon which those differences have emerged — that the inquiry must be undertaken.[175]

Or, put another way adjusted for present purposes, the emerging doctrinal differences regarding structured proportionality do not provide justification to limit the breadth of the implied freedom or raise concerns for the impact of such breadth.

It must also here be noted that there are various practical matters which stand in the way of any potential floodgates-style argument that a broad conceptualisation of the freedom is problematic or unsustainable, as it will lead to litigants raising the issue in a wide variety of cases which do not warrant it, or will devolve into a mass of cases requiring the Court to apply its third stage analysis. The existence of the special leave mechanism; the ability to refuse, dismiss, or summarily remit cases in the Court's original jurisdiction; the costs involved in running such an argument (and even more so in doing so unsuccessfully or vexatiously); and the obviousness in many cases of the third stage analysis (such as where the burden is enlivened yet trivial) to either the potential applicant or the Court, would all work to constrain recourse to the implied freedom in such a scenario. The practical experience of the United States of America, a context correctly differentiated by his Honour,[176] is also telling. The First Amendment protects speech generally, without Australia's limitation to 'political communication',[177] and is therefore broader even than Steward J's description of the 'boundless field'[178] of political discourse. Yet the United States court system is not overrun with First Amendment litigation, often for some of the reasons cited above in relation to the hypothetical in Australia.

Respectfully, therefore, even leaving aside Steward J's scepticism as to the implied freedom more generally, it cannot be said that concerns for unacceptable breadth militate meaningfully against the judicature's inclusion in its scope. Indeed, if the question to be asked is "where should the line be drawn?" in terms of the scope of the implied freedom, then the answer is clear: somewhere, yes, but plainly not here.

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[174] *Ravbar* (n 8) [282] (Steward J).
[175] Ibid [28]–[29] (Gageler CJ).
[176] Ibid [283] (Steward J).
[177] *United States Constitution* amend I.
[178] *Ravbar* (n 8) [277] (Steward J).

2 *The McHugh J approach: processes or institutions?*

Given the status of McHugh J's comments in *APLA* — both as High Court *dicta* and their having been met with approval in later decisions — that case stands as perhaps the largest obstacle to this paper's propositions. To a significant extent by addressing that reasoning one may simultaneously address the appellate cases his Honour appeared to follow and those which later relied on *APLA* as authority, insofar as the reasoning appears largely consistent.[179] Therefore, and most respectfully, we will now turn to consider the correctness of his Honour's reasoning in the modern context and noting subsequent jurisprudential developments.

This article does not cavil with McHugh J's statement that 'the extent to which communications…are protected'[180] is dictated by the provisions which ground the freedom, nor that the limitation is to that which is '*necessary*' for the 'effective operation' of what those provisions provide for.[181] The issue, it appears, is one of interpreting whether communication regarding the judicature is so *necessary* for those provisions.

As alluded to above,[182] in seeking to exclude the judicature, McHugh J, with respect, appears to conflate, or at the least take, two approaches to interpreting the derivation of the freedom and its scope, even where appropriately maintaining the textual grounding required. His Honour initially claims that the freedom protects that which is provided for by the relevant provisions of the *Constitution* — being a direct election by the people of their 'representative' government — and thus protects what is required to 'give effect' to that *process*.[183] This, naturally, would encompass the free flow of information which may bear on electoral choice, as accepted in other decisions of the High Court,[184] and would leave our present enquiry focused on the third contention above regarding electoral choice.

His Honour then, however, restricts this operation to that which directly relates to the *institutions created by* the Chapters containing these provisions (or, on a more

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[179] Considering the contentions put forward by various decisions of state and federal courts is a considerably easier exercise having addressed the reasons of McHugh J in *APLA* in depth, insofar as cases which preceded *APLA* have largely seen their reasoning adopted in that judgment, and cases following *APLA* largely rely on it as authority to outline the supposedly applicable principles.
[180] *APLA* (n 10) 358 [56] (McHugh J).
[181] Ibid 359 [57] (McHugh J); *Lange* (n 50) 561 (emphasis added).
[182] See above nn 74–77.
[183] *APLA* (n 10) 360 [61] (McHugh J).
[184] See, eg, above n 164.

generous reading, the institutions created by the provisions themselves), being the specific elements of the system of government:[185]

> *Lange* refers to "political or government matters". But those words must be read in the context of the decision. That context leaves no doubt that the term "government" is used to describe acts and omissions of the kind that fall within Chs I, II, and VIII …
>
> …
>
> *Lange* confined the scope of freedom of communication by requiring a relationship of necessity between the provisions giving rise to the freedom and the communication to be protected. The provisions that the Court identified as giving rise to an implied freedom of communication necessitate some level of communicative freedom in Australian society about matters relevant to executive responsibility and an informed electoral choice. The ends required the means. The requirement of necessity indicates that the communication must bear a close relationship to the Ch I, II and VIII sections from which the protection flows.

This therefore begins to shift the goalposts for inclusion within the implied freedom. Rather than restrict the analysis to the third argument against the inclusion of the judicature outlined above, McHugh J introduces a subject matter requirement that underpins the additional first two arguments above regarding the specific provisions grounding the freedom and notions of 'responsible government'. Essentially, his Honour confines what must "inform" electoral choice only to matters relating to those specific bodies to which the relevant provisions relate and their powers. This is so even where it is couched in the language of only having to 'bear a close relationship' thereto.[186] This reflects the contentions made earlier in *Fairfax* and *Popovic*, and would appear to inform those made later in *Chapman* and *Peek*, regarding the matters relevant being those flowing *from* the provisions.[187]

However, it is, and was, well-trodden ground that the freedom was derived from the 'requirement for free and direct elections' to which McHugh J referred two paragraphs prior. This requirement not only grounded the freedom but defined its scope.[188] Yet McHugh J, respectfully, appears to confine the scope of a free election, even if only in the 'constitutional sense', to an election where votes are only cast based on information that his Honour deemed as relevant and necessary insofar as

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[185] *APLA* (n 10) 360–2 [63]–[68] (McHugh J).
[186] Ibid 362 [68] (McHugh J).
[187] To that extent, the responses offered here also relate directly to the reasoning of, and weight afforded to, those cases.
[188] *APLA* (n 10) 360 [61] (McHugh J).

it relates to the relevant constitutionally-created institutions. That is, to his Honour, the communication may only validly, or constitutionally, influence electoral choice if it 'bear[s] a close relationship to the Ch I, II, and VIII sections from which the protection flows'.[189] This however falls victim to the same issues as the aforementioned appellate judgments insofar as it neglects that to 'give effect' to the *process* of direct election, the relevant information flows *to* the process provided by those provisions. The fact it does not relate to the institutions of the relevant chapters does not mean it cannot legitimately, and constitutionally, inform that process. Taking the *McGinty* approach, it is imperative to focus on what is *required* by the text of the specific provisions, rather than trying to restrict the content of that requirement to what is 'governmental', even if in a constitutional sense.[190]

The question of 'what is necessary to give effect to the term "directly chosen by the people" under ss 7 and 24?'[191] is not the same as 'what can the elected representatives do once they are "directly chosen by the people" under the relevant Chapters?".[192] It is not the acts or omissions of the bodies created by the *Constitution* which are most relevant, but rather the acts and rights specifically provided for by the sections of the *Constitution* from which the freedom is derived, namely the direct election of representatives *by the voters themselves*. The freedom is not derived from the aspects of those sections pertaining to the nature of the bodies. It is derived from the nature of the mechanism by which they are elected and its requirement of the free flow of information. Thus, questions of whether the judicature is related to the institutions of Chapters I, II, and VII, or is part of representative government, are relevant only insofar as they impact the likelihood that communications about the judicature bear on electoral choice relating to those institutions, not because they form an excluding pre-requisite of the implied freedom.

The effective function of the 'free and informed' decision-making relies on a wider conception of 'political' matters than is accepted by McHugh J's judgment, and by extension those in *Fairfax*, *Popovic*, *Chapman, Peek*, and in the cases which cite these authorities. The structures provided for in ss 7, 24, 64, and 128 necessitate as much. They provide the structure and *mechanism* required, being a direct and free choice, but not the content which animates them. As Adrienne Stone argues, perhaps this is a limitation of the textual derivation of Australia's freedom in this area,[193] yet

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[189] Ibid 362 [68] (McHugh J).
[190] See above nn 44–49.
[191] Being the specific phrase within, in particular, ss 7 and 24 from which the freedom is derived.
[192] Which would accord more closely to the reasoning that the relevant communications must relate to the institutions created by the provisions and the powers they may exercise.
[193] Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668, 696.

nonetheless it is a necessary consequence thereof that a free and informed choice *in the constitutional sense* be informed by more than just the specific enumerated powers or institutions of the legislature and executive.

Indeed, in *APLA*, McHugh J notes that the 'ends require the means' and accepts that the freedom exists specifically to enable an informed electoral choice.[194] Even the imposition of the 'constitutional' qualifier regarding the system of government does not speak to the nature of a direct choice made by a voter as necessitated *by the Constitution*. At no point in ss 7 and 24 is the qualifier 'on grounds based in the structures they are voting for' added to the requirement that representatives be 'directly chosen' by the people.[195] To give effect to this text is to ask, as modern jurisprudence has, if the content of a communication may find itself within this political mechanism with causative or disruptive effect.[196] To protect the function of the provisions means that one must protect the mechanism *as such*. It may be that the *Constitution* might not protect speech which might enhance the qualities of a voter leading to an 'enlightened and well-reasoned ballot',[197] yet it is clear that it does protect that which may *influence* the specific casting of that vote.

Even accepting a requirement of some relation to the systems of government required by the *Constitution*, it is, respectfully, not for the Court to determine the basis on which an elector might exercise their vote, or what information they may require to make that choice. To artificially restrict the freedom in such a way represents judicial incursion into the validity of the electoral choices made by each individual voter, and undemocratic judicial dictation of what information is necessary, or indeed valid, to ground an electoral decision. An elector is not required to exercise their right to vote based on considerations relating to Chapters I, II, and VIII, and therefore it is unrealistic and inappropriate to say that only information of that kind bears the sufficient 'necessity' to protect the electoral mechanism. If this approach requires a broad conception of the relevant communications, then it is argued that this is inherent in the provisions of the *Constitution* relied upon and the derivation of the freedom itself.

One need not resort to the absolutist position that *all* communication is 'capable' of bearing on electoral choice to further the proposition that communication regarding the judicature would fall within the ambit of such a threshold by virtue of that

[194] *APLA* (n 10) 362 [68] (McHugh J).
[195] *Constitution* ss 7 and 24.
[196] See, eg, above n 164.
[197] Meagher (n 13) 451.

relation.[198] As has been and will be outlined, even if '[c]ourts and judges and the exercise of judicial power are not themselves subjects that are involved in representative or responsible government in the *Constitutional sense*',[199] that does not mean that discussion of those matters cannot, or indeed are unlikely to, bear influence on the free and direct election of that government. Discussion of the judicature — based on its position in the structure of government, the power it possesses and exercises, and the consequences of its actions — is acutely likely to influence this direct choice even on a more limited reading.[200] In that sense, it can be considered independently without resorting to the wider proposition.

Thus, the phrase 'directly chosen by the people' must be read as imparting a wider protection than merely for communications relating to the structures created by the provisions in which it is found. This no doubt extends to communications about the judicature. To take the approach *APLA* appears to stand for is to introduce one of two assumptions: either the assumption that the only electoral choices that are protected by the implied freedom are those based on information relating to the Chapters grounding the freedom, or that only information relating to the Chapters grounding the freedom could influence any electoral choice. The former, it is argued, is jurisprudentially incorrect. The latter, meanwhile, falls down on the facts. It therefore becomes clear that the first two contentions described above fall away, or are at least subsumed by the third contention. Whether a certain relationship exists with the specific provisions of the *Constitution*, or whether a body is part of 'responsible government', will be relevant to the extent it informs the influence of electoral choice, not as a mandatory prerequisite. At the end of this section, therefore, we are left to consider more closely the third and final argument.

B *Grounds for a Novel Application*

Having provided responsive reasoning to previous consideration of this issue, this section shall provide active rationale for why the judiciary should, or perhaps more strongly does, fall under the implied freedom.[201]

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[198] Though to some extent, as recognised somewhat ironically for present purposes in the concerns raised in judgments such as that of Steward J in *Ravbar*, this may be a necessary logical conclusion of implied freedom jurisprudence.

[199] *APLA* (n 10) 361 [66] (McHugh J) (emphasis added).

[200] Zoë Guest, 'The judiciary and the freedom of political communication: the protection of judgment on Australia's judges' (2006) 17 *Public Law Review* 5, 8. See also below Part IV(B)(1).

[201] It also without further comment adopts the points made by Leeming JA in *Dowling v Prothonotary of the Supreme Court of New South Wales* [2018] NSWCA 233, as well as his Honour's reference to *Nationwide News* and similar holdings.

1 *Propensity to bear on electoral choice*

To this juncture the point has been laboured that the need to 'give effect' to the mechanisms provided for in the *Constitution* means that the scope of the implied freedom must apply, where relevant, to matters which may bear on electoral choice. This section will outline why discussion of the judicature is inherently likely to bear on this choice.

It is also necessary to briefly note that the fact that that the judicature is not representative does not undermine the following analysis insofar as the reliance placed by this article when discussing the "electoral choice basis" is on the ability for communications about the judicature to affect the electoral process for *other* branches of government which are representative. The free flow of information about the judicature is required to allow for the free flow of full information informing the election of other branches of government. The relevant structural imperatives need not translate directly *to* the judicature to arise in their appropriate contexts by virtue of consideration *of* the judicature.

(a) Political nature of court functions

Whilst it is no doubt the case that subject matter will not fall under the implied freedom merely on account of being 'political' in the general sense of the term,[202] actions of the courts shall generally take on a constitutionally 'political' element in that they are likely to bear on electoral choices when discussed in a 'public' sense. The work of the Court will, in almost all its manifestations, have political consequences the nature of which are sufficient to inform electoral outcomes, even if on a small scale or to specific individuals. This means that comments on these actions, both in terms of their correctness and their normative desirability, lead to political consideration.

This is perhaps most clear in constitutional contexts, owing to the relation to the allocation of State power and their subject matter more generally. For a clear example one need only look to the recent decision in *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs*.[203] The decision to overrule *Al-Kateb v Godwin*[204] may not have been made for political reasons or as part of the political process, but discussion of the decision and its ramifications would no doubt be political both in the traditional sense and in that it could rationally affect voting decisions. These discussions were tied to matters of migration and the treatment of

[202] Noting the textual grounding of the freedom makes no reference to 'political' subject matter, but rather only the mechanism of direct choice.
[203] (2023) 97 ALJR 1005 ('*NZYQ*').
[204] (2004) 219 CLR 562.

aliens in terms removed from discussion of the government and focusing solely on the effect of the *decision* on society.[205] Discussion of the correctness of the decision itself then also spoke to the efficacy of previous government policy and legislation, in much the same way that any court decision overruling or denying policies would, and more broadly any judicial decision on legislation implemented by the government could.[206] Discussion of the role of the Court spoke to the function of the system of government and was fundamental to the way that governments operate within the legal system *as adjudicated by the judicature*;[207] the way that new legislation was subsequently imposed;[208] and so on and so forth. Even in instances these discussions did not specifically relate to the executive or legislature in the vein of McHugh J's caveat in *APLA*,[209] they were intrinsically political in nature and bore the capacity to influence consideration of the apparatus of the state. This applied to all forms of communication; discussion of the legal sphere, discussion of the decision itself, discussion of the ramifications, and discussion of the role of the Court in the migration realm all manifested in ways that were likely to influence future electoral decisions. Granted, cases such as *NZYQ* are more extreme, yet the principles remain the same for almost all constitutional cases, even if not attracting such widespread public controversy.

Similarly, one can imagine the full spectrum of decisions applying statute law, both federal and (in the *Coleman v Power* sense) state, having the propensity to prompt engagement with political realities and how the political state impacts individuals' lives.[210] Each decision would necessarily reflect the status quo of the system of laws

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[205] Lorraine Finlay, 'Hasty detainee laws raise human rights concerns', *Australian Human Rights Commission* (online, 7 December 2023) <https://humanrights.gov.au/about/news/opinions/hasty-detainee-laws-raise-human-rights-concerns>; Brett Worthington, 'The landmark High Court ruling that's left Anthony Albanese in a political pincher', *ABC News* (online, 9 November 2023) <https://www.abc.net.au/news/2023-11-09/twenty-year-detention-laws-overturned-in-high-court/103081400>.

[206] 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>; George Williams, 'Perilous legal path through migrant detention quagmire', *The Australian* (online, 19 April 2024) <https://www.theaustralian.com.au/commentary/perilous-legal-path-through-migrant-detention-quagmire/news-story/>.

[207] Mick Tsikas, 'The government is fighting a new High Court case on immigration detainees. What's it about and what's at stake?', *The Conversation* (online, 20 March 2024) <https://theconversation.com/the-government-is-fighting-a-new-high-court-case-on-immigration-detainees-whats-it-about-and-whats-at-stake-226120>.

[208] The Honourable Andrew Giles MP, 'Legislation in response to NZYQ high court decision', *Minister for Immigration, Citizenship and Multicultural Affairs* (Media Release, 16 November 2023).

[209] See above n 78.

[210] Immediately, examples such as the application of criminal laws, sentencing and punishment, defamation laws, laws relating to liability or negligence, and many more.

and their operation, an area of responsibility, at least in formulation and creation, of the government that implemented them or had not altered or removed them. The representatives elected under the *Constitution*, and about whom electoral choice is exercised, have an electoral responsibility for the contents of statutes and a constitutional power to change that law. Even if the judicial adjudication of these laws was not itself the same as the role of the government, it is so intertwined as to rationally bear on decisions and opinions about those who were responsible for it. Communications about such decisions would then too take on this 'political' element capable of bearing on electoral choice. Examples include questions of applying criminal statutes and determining what is or is not criminalised under the present law, particularly when involving particularly heinous crimes or the antiquated criminalisation of now-accepted behaviour, the adequacy of a compensation regime provided for by statute; and the issues in drafting laid bare by judicial interpretation. It may be that discussion of these matters would, if couched in those terms, be captured by the implied freedom under current orthodoxy. This article argues that even if discussed in a less direct form, such as through commentary on the judge's interpretation or the decision itself, such indirect discussion will prompt reflection and consideration, even internally within individuals, that will have the propensity to influence their electoral choice. This is so with or without a clear call for remedial action or intent to influence discussed in past cases.

This propensity to prompt engagement may be particularly potent when decisions are made on policy grounds or based on policy considerations 'about which the community [might have] strongly divergent views'.[211] Consider a decision to permit or to prohibit a protest,[212] a decision in which the sentence given to one individual convicted differs compared to another,[213] and the manner in which each decision affects the rights and obligations of citizens. Such examples, and more, demonstrate that even decisions with less reverberating ramifications than *NZYQ*, and which might not prompt specific commentary on the government, shall have political elements in the constitutional sense which cannot be separated. Discussion of these matters is not merely "political", but would affect the electorate's view of its elected representatives and their work, or lack thereof, in these spaces. This is so even relating to more "mundane" areas of law governed by statute. A comment that a certain outcome is appropriate, or, more strongly, is inappropriate or bewildering,

[211] Guest (n 200) 8.
[212] See, eg, *Bassi v Commissioner of Police (NSW)* (2020) 283 A Crim R 186; *Commissioner of Police, New South Wales Police Force v Kumar (OBO National Union of Students)* [2020] NSWSC 804; *Commissioner of Police v Thomson* [2020] NSWSC 1424; *Commissioner of Police (NSW) v Gibson* [2020] NSWSC 953.
[213] Particularly if there is some feature distinguishing those convicted, such as race.

particularly where commercial or financial matters are involved, begs questions of why or how the law is the way it is. Where this is the result of statute, being within the purview of the government, this may, regardless of the subject area, prompt electoral reflection. Even the commentary that the application of a certain law was unjust, or that the way in which it operates in a certain case was unfair, is tied to the legislative and legal scheme presided over by the government and applied by the judicature. Commentary on this system in practice is especially likely to affect the electoral views on those who are responsible for it. It may lead to questions as to why one, some, or all parties do or do not have particular policies, for example. It may influence the assessment of policies announced at a future date. This is a divergence from the views expressed in *APLA* and *Hogan v Hinch*, which allowed for the possibility that where directly and clearly referable to the executive or legislature this potential exists. This article argues that this potential is considerably more potent and of wide application. Just because the terms used are not direct, this does not mean that the communications are not targeted at, or at the least likely to, influence this choice. This is particularly so where individuals in the communication's audience may react differently.

Despite the High Court noting that an issue merely being one with the potential to be politically controversial shall not bring it within the freedom, these comments have been made in situations where the relevant commentary was not 'public' in nature and therefore unlikely to influence the choice provided in the constitutional mechanism.[214] The same is not necessarily applicable to the judicature, exercising public power in a public setting. The political consequences and discussion thereof of court decisions *are* directed toward the public; the only way they can be impactful is by informing actions in the public (including through elected representatives and the executive). Of course, considering the analysis of the Court, in particular this distinction between public and private choices,[215] not *all* commentary relating to the judicature is going to fall within this article's conception of the implied freedom. Indeed, conceivably comments made might not have a sufficient nexus to electoral choice. However, an assessment of, or commentary on, the judicature in its exercise of this State power, or its ability to impact citizens in some way, no doubt shall. It is only comments outside this scope with no public element which would not.[216]

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[214] For example, comments made to an individual about their choice regarding abortion: *Clubb* (n 59) 191 [31].

[215] Ibid.

[216] For example, commentary on the appearance of a judicial officer, or on the emotion felt in response to something by an individual, or even, in perhaps the most borderline of examples, that the judicial officer was generally incompetent or wrong in a particular decision (which arguably may still fall

The point was made earlier that decisions relating to the common law or non-statutory principles of equity may not be captured by this revised conceptualisation of the implied freedom. This point will be of greater relevance when considering the second basis under which it is contended the judicature may fall under the freedom, being the extended exercise of constitutional power. In terms of considering the "electoral choice basis", cases concerning the judge-made law ought to be considered similarly captured. In the same way that commentary on existing laws can influence views on those with the power to change them (as distinct here, when considering judge-made law, from those that made them), commentary on a state of law that the government is uniquely placed to change will have the same influence. If there is a decision made that the people do not like, this reflects on the fact that the government has not fixed, or cannot fix, the legal position. It reflects on political groups that have proposed to fix the issue, or have not made such a proposal. Even if all political groups have the same position, or no position, it speaks to a need in the eyes of the electorate for this issue to enter political discourse.

(b) Integrated governmental system

Much was made in cases such as *Lange* and *Coleman v Power* of the fact that the scope of matters which may inform electoral choice is broadened by the integrated nature of the federal polity.[217] For example, state matters may inform assessment of federal matters, or the Police may inform assessment of the responsible executive cabinet.[218] The fundamental effect of this analysis is that matters which are *not* provided by the relevant provisions in text may nonetheless be protected by the implied freedom if they bear on them in effect. Interestingly, in the analysis posited in support of this principle, it is not said that the commentary needs to explicitly, or even particularly implicitly, relate to the federal system in theory. It is only required, using the example of state police from *Coleman v Power*, that the commentary would have this effect at the federal political level in practice.[219]

The transposition of this approach to the judicature is particularly fruitful. This is so both "vertically", being the integration of state and federal matters, and "horizontally", being the integration of matters concerning the judicature with the exercise of the powers of the other 'branches of government'. Little needs to be said

within this ambit to the extent it reflects on those appointing them, though this would likely turn on the specific commentary made), might not be captured by the implied freedom. It would of course be strange if to some extent communications might not be considered political, but may be "spoken into protection" merely by adding "magic words" relating to the judicature. Indeed, such an approach was expressly disclaimed in *APLA* with reference to the legislature and executive.

[217] *Coleman v Power* (n 4) 44 [77] (McHugh J) citing *Lange* (n 50) 572.

[218] *Coleman v Power* (n 4) 44 [77] (McHugh J).

[219] *Lange* (n 50) 571.

regarding the former, which appears broadly accepted in wider jurisprudence.[220] We will focus then on the latter.

The integrated nature of the federal governmental system necessarily includes the judicature, even if it is not a component of the 'arms of government' the freedom is constitutionally derived from (neither are state governments) and is ostensibly independent thereof (as in theory are state governments in a federal polity[221]). The imposition of government, as an institution and in its powers as enumerated in the Chapters often referred to by the courts, on the populace is intrinsically intertwined with the judicature. In particular, the emphasis placed in the case law was on not only the integration of government, but on the integration of the 'social, economic, and political life of Australia'.[222] Each and every one of these areas is directly influenced by, and involves the discussion of, the exercise of authoritative judicial functions, even in individual cases.[223] Moreover, the judicature itself forms part of those areas that are integrated in the Australian body politic.

The integration of the judicature and the other branches of government in practice is plain. These bodies appoint the members of the judicature. The judicature acts to interpret and apply the legislation, and this practical application reflects directly on those who conceived, drafted, and passed it. The very fact that judges are unelected, independent, and have security of tenure directs the ire or support of the affected citizen to their elected representatives who can remedy perceived issues. It is for this reason that often the response to a decision which is disagreed with, and to particular consequences which are deemed unacceptable, is that calls are made to amend or introduce legislation rather than to dismiss the judicial officers. The workings of the court are outside the realm of specific recourse from citizens, and so these decisions are likely to influence electoral behaviour as this is the only way to respond. With respect to Besanko J, who as noted above held that a specific remedial call to action would be required to link the judicature to the other arms of government,[224] such specificity would not be required to rationally and capably bear on electoral choice. After all, it may not be that remedial action is called for specifically for other gripes with the elected government. It may also be the case that the rational elector, having heard this commentary on the judicature which reflects

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[220] See the discussion in *Kable* (n 22).
[221] Henry M Hart Jr, 'The Relations between State and Federal Law' (1954) 54(4) *Columbia Law Review* 489, 491; Roderick M Hills Jr, 'Federalism in Constitutional Context' (1998) 22(1) *Harvard Journal of Law & Public Policy* 181, 186.
[222] *Lange* (n 50) 571.
[223] Itself a curious qualifier often used in the case law, as after all single cases can be substantially influential and form binding precedent in later cases.
[224] See above n 144.

on the directly elected representatives, exercises their electoral choice having considered this communication, even if the call for remedial action was not explicit. They may even read in this call for action themselves, and yet the communication will still have influenced their electoral choice. Often the ballot box is where such a call is made, and the sounding and spreading of discontent or support, so as to influence the exercise of that direct choice, will be what is relied upon. Communicating that it is unjust, for example, that sentencing trends disproportionately impacted a specific group without more may still impact a voter to prefer a party who has campaigned elsewhere on similar issues, even if there is no *specific remedial call* within the commentary on the case itself. It might be that it demonstrates the pressing nature of those issues, which may have the electoral effect given wider political contexts. This is a reflection of the fundamental integration of these separate bodies exercising separate powers.

The point was raised above in discussing the analysis of Gillard AJA that his Honour was respectfully in error in considering that the inclusion of the judicature as a branch of 'government' alone rendered it within the scope of the implied freedom.[225] That said, whilst this taxonomical inclusion is insufficient in isolation, the perception of the judicature, even where independent, as falling within 'government' naturally bolsters the point that consideration of its actions or performance will, in the eyes of the public, reflect on the 'government'. It impacts their perception of the apparatuses of the State. It is all too easy to picture a voter who feels "hard done by", be it through the laws themselves or the impact of the justice system or wider society, who places the blame at the feet of the government, and in doing so laments all three branches as one. Their decisions in engaging in that system, including democratically, are likely to be significantly impacted. This is especially so with regards to the judicature, which as we shall see will apply the laws that cause this reaction directly. Judges may be seen as archaic, uncaring, contemptuous, and as the servants of the state who implement the laws of the land. Discussion of the judicature, therefore, is likely to have the potential to influence the perceptions and actions of voters exercising their democratic rights because of this integration.

This point may be further borne out by closer analysis of the reasoning in *Coleman v Power*, where the implied freedom was held by McHugh, Gummow, and Hayne JJ to apply to communications about the police, notwithstanding that the police are not themselves directly responsible to Parliament.[226] Justice McHugh would explicitly

[225] See above nn 127–131.

[226] *Coleman v Power* (n 4) 45 [80] (McHugh J); 78 [197] (Gummow and Hayne JJ). See also 88–9 [229] (Kirby J). This concept was cited with approval by the majority in *Unions New South Wales v New*

note in *Coleman v Power* that '[t]he conduct of State police officers is relevant to the system of representative and responsible government set up by the *Constitution*. State police officers are involved in the administration and enforcement of federal as well as State criminal law.'[227] This is plainly relevant when considering the judicature. Federal and State criminal laws, as well as civil laws, are administered and enforced through the courts and by judges. Without the courts, the administration and application cannot be complete, nor finally imposed on the citizenry. The judicature's role in the administration and enforcement of the law is, therefore, of similar importance to the role played by the police. To that extent, the judicature must necessarily be 'relevant to the system of representative and responsible government',[228] even if one argues that the judicature is not a *part* of that system in the constitutional sense.

The bases of this reasoning were expanded further by McHugh J, stating that '[p]ublic evaluation of the performance of Federal Ministers…may be influenced…by the manner in which State police officers enforce federal law and investigate federal offences. Allegations that members of the Queensland police force are corrupt…may undermine public confidence in the administration of the federal, as well as the State, criminal justice system.'[229] Thus, the inclusion of the police within the scope of the implied freedom was not merely by virtue of their nominal inclusion within the executive. Rather, it was additionally grounded in the way the evaluation of Federal Ministers and the general public's confidence in the administration of justice *may* be influenced by discussion of the police. This was so even where the communications were not specifically about ministers; such was the strength of the connection between the police and the evaluation of the government that commentary on the former alone was indirectly linked. Each of these reasons apply similarly to the judicature. The analysis above about the manner in which the judicature is intrinsically intertwined, in practice and in perception, to the federal government demonstrates that assessment of the courts may come to bear on assessing said government. This is only bolstered by the fact that the government approves the appointment of judges. Regarding the latter basis, it would plainly be untenable to claim that allegations of corruption, or even incompetence, vis-à-vis the judiciary, as distinct from the police, would not undermine confidence in the

South Wales (2013) 252 CLR 530, 549–550 [23] (French CJ, Hayne, Crennan, Kiefel, and Bell JJ) ('*Unions NSW v NSW*').

[227] *Coleman v Power* (n 4) 45 [80] (McHugh J).

[228] Ibid; *Levy* (n 32) 622 (Gaudron J).

[229] *Coleman v Power* (n 4) 45 [80] (McHugh J).

administration of federal and state criminal justice systems[230] in the sense contemplated by McHugh J.

Ultimately, in practice the integration of the facets of public life and of the implementation of the laws of the land means that the actions of the judicature and commentary thereon are of significant influence on public opinion and are likely to rationally bear on electoral decisions. Thus, they would be covered by the implied freedom.

(c) The courts as an institution

In addition to the commentary described above vis-à-vis court decisions or the actions of judicial officers specifically, it is also worth clarifying the inclusion of commentary about the institutional elements of the judicature: courts and tribunals, their structure and operations, and matters such as their legitimacy. To the extent these are fundamentally either matters of the exercise of government power or constitutional issues, it is argued they ought also be protected. If a communication related to the former, such as the appointment of certain judges or statutory decisions relating to judicial bodies, then under the McHugh J formulation they would be protected. It is argued that if they fall under the latter, then there is a sufficient nexus to the idea of a need for constitutional amendment, necessarily via referendum, to also be protected under s 128. Unlike the findings of Besanko J described above where this nexus was not an inference from the relevant speech, it should be argued that any speech claiming an issue exists in the *Constitution* is speech which could, and would be likely to, influence either the perception that constitutional change is needed or the perception in a particular referendum that a vote should be cast in a certain way. There is no other way to interpret this speech — a complaint that the status quo is inadequate will prompt reflection on how to fix that issue, and when the issue is constitutional the answer is a referendum, which is political speech under the freedom. This can be distinguished from situations of seeking to say anything could be subject to a referendum, which may very well be true. It may therefore be valid to say that this is too vague to render it protected. The ability to distinguish this case comes from the fact the issue is already constitutional, and claiming the provisions are wrong or something needs to change can only be changed by the specific mechanism of a referendum, unlike any issue that is not already in the *Constitution* which may have alternative, non-constitutional, remedies.

[230] Tom Bathurst, 'Community Confidence in the Justice System: The Role of Public Opinion' (2014) 12(1) *The Judicial Review* 27, 38.

2 *Relation to and extension of relevant constitutional provisions*

In addition to the propensity to bear on electoral choice, it can be argued that as the courts exist as a repository of the powers of the state and act to apply that power to the individual, their actions are an inseparable element of the legislative and executive powers afforded by the relevant sections of the *Constitution* and therefore commentary on the judicature would be relevantly protected. That is, if commentary on the exercise of these constitutional powers is captured by the implied freedom, and the actions of the judicature represent a component of the extended process of applying these powers, being necessary to actually enforce and apply them, then the judicature is also captured by the freedom.

Much attention in implied freedom jurisprudence has been paid to the fact that the provisions from which the freedom is derived are those which provide for a constitutional system of 'representative and responsible government'.[231] Of course, as we have seen it is not the notion itself which gives rise to any protection, but that which is necessary to give effect to their content or ensure their effective function *as provided by the provisions of the Constitution*. These provisions are found, as noted, in Chapters I, II, and VIII but not Chapter III. This fact has often been used to exclude the judicature from the ambit of the freedom. Yet despite courts warning against the use of the term 'representative and responsible government' as a touchstone, there is an interesting focus on what institutions are provided for by very specific sections, which are noted as forming such a 'government'. Indeed, in this context a blind eye is then often turned as to how these institutions interact in practice with institutions created elsewhere in the very same document which are necessary for the former's effective function in practice. The fact is, the judicature exists as a body implementing the same powers and provisions about which commentary is essentially deemed prima facie captured by the implied freedom.

Despite not being created by Chapters I, II, and VII, the judicature cannot be separated from notions of 'responsible and representative government'.[232] This is so not in the sense that the phrase might ordinarily be understood, but as the phrase is derived from the *Constitution*.[233] Accepting that the freedom is based on ss 7, 24, 64, and 128 does not mean that the judicature must be excluded. Rather, the very same provisions, even where not creating the judicature, are responsible for its inclusion. The courts are, at their most fundamental level, the body which enables the application of legislative and executive power upon citizens and without which

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[231] See above Part II.

[232] Guest (n 200) 8.

[233] This approach, even where perhaps appearing at first intuitively similar, can therefore be distinguished from that taken by Gillard AJA and criticized above.

considerable elements of these powers could not be enacted. Even where exercising judicial power as contemplated by Chapter III in their actions, it is these actions which form a part of the exercise of the functions of the legislature and executive. A criminal statute being *implemented* is a far greater process than its mere passing onto the statute books, but rather involves its passing,[234] its policing by the executive,[235] and its formal application to the rights of citizens by the courts.[236] The legislature cannot pass laws which will not have an effect determined by the judicature. The executive cannot apply these laws to the citizenry without the judicature, at some stage, interpreting and applying these laws to ascertain the relevant legal position.[237] The decisions of the judicature are inextricably linked to the powers of the legislature and executive. Commentary on the former is, in essence though with exception, commentary on the latter.

Leaving aside momentarily scenarios relating to the common law or non-statutory equitable principles, the judicature does not act on areas of law which are not subject to the powers of legislation and enforcement provided for in the *Constitution*, except in applying constitutional analysis *directly to* the legislature and executive. The former renders this judicial exercise a manifestation of, and tied to, the provisions which ground the freedom. The latter renders the judicial exercise directly captured by McHugh J's caveat in *APLA* discussed above.

The powers and structures provided for in the relevant provisions grounding the implied freedom find manifestation in the judicature. As Professor Stellios (as his Honour then was) described, the authoritative and applicable meaning of legislation, itself captured by the implied freedom as a manifestation of the powers of the elected government, is not that which is passed by Parliament, but that which is interpreted and applied by the courts.[238] Moreover, courts act to 'maintain the federal compact' and the function of the structures provided for in the *Constitution*, including those in Chapters I, II, and VIII, as part of a 'division of legislative power between differently constituted bodies politic'.[239] Even if this in itself does not mean that the freedom applies to the judicature, it speaks to the fact that commentary on

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[234] At this stage, the legislature who passed the law are uncontroversially within the scope of the freedom.
[235] The police, of course as outlined in *Coleman v Power* (n 4), falling within the scope of the freedom.
[236] RA Duff, 'A Criminal Law We Can Call Our Own' (2017) 11(6) *Northwestern University Law Review* 1491, 1497–8.
[237] Even in cases where the executive passes laws giving itself powers which impact rights and do not require judicial decision-making, such as the power to cancel visas, these decisions are still amenable to judicial review and even the constitutionality of the law itself may be subject to judicial decision.
[238] Stellios (n 43) 622.
[239] James Stellios, 'Using Federalism to Protect Political Communication: Implications from Federal Representative Government' (2007) 31(1) *Melbourne University Law Review* 239, 246–7.

the exercise of this judicial authority is commentary on the implementation of these provisions, and is relevant to exercising a free choice on such matters especially insofar as it is commentary on how they, as citizens living in a society, will be affected by the powers of the state.[240]

Again as foreshadowed previously, this analysis does not hold in instances where the judicature is applying the common law or non-statutory principles of equity, insofar as the common law is not law created by a government and therefore its application is not an extension of these powers. Still, this article would argue for the reasons discussed vis-à-vis the "electoral choice basis" that this is not necessarily fatal to including communications about such decisions within the freedom.

Overall, however, if one accepts that commentary on the powers and actions of the legislature and executive as provided for in Chapters I and II are by their intrinsic nature within the scope of the implied freedom of political communication, one should consider that commentary on the extended process of implementation and application of these powers, the process that sees the powers translated from mere declaration into legally binding constitutional action, is similarly within that scope.

V CONCLUSIONS

Questions pertaining to the metes and bounds of the communications protected by an *Australian Constitution* which lacks a formal bill of rights have provided fruitful ground for jurisprudential debate for decades. Yet in a context where the High Court's recent consideration of the issue has focused around the 'march of structured proportionality',[241] this article has sought to wade back into more qualitative discussion and argue that communications relating to the judicature ought to be considered within the scope of the implied freedom of political communication.

The application of the freedom to communications about the judicature is concomitant with the historical derivation and development of the implied freedom as presently understood. It affords due deference to the continued emphasis of the High Court requiring that the implied freedom be confined to a scope provided for by the terms of the *Constitution*. This focus, reasoning that any protection must not be derived from ambiguous notions of 'representative and responsible government',[242] but directly found in the text itself,[243] militates in favour of the

[240] See above Part IV(B)(1).
[241] *Palmer v Western Australia* (2021) 272 CLR 505, 552 [141] (Gageler J).
[242] *McGinty* (n 44) 229–230 (McHugh J).
[243] Ibid 168 (Brennan CJ).

inclusion of the judicature under the ambit of the implied freedom; the direct election of representatives, or free voting in referenda, requires that discussion of an issue so intrinsically linked to the state and matters of an electorally political nature, or which plays such a significant role in societal discourse, be free and unincumbered by the legislature. In any event, insofar as the judicature acts as an indispensable element of the process of applying the powers of the legislature and executive to the citizenry, commentary on the judicature will be captured as being commentary on issues covered by the relevant constitutional provisions.

Whilst the balance of comments made by the High Court and intermediate appellate courts do stand opposed to the reasoning of this article, it has respectfully been suggested that the modern-day political realities in which the *Constitution* operates and the development in implied freedom jurisprudence over decades following *APLA* mean that these opinions should be revisited. Commentary on the judicature plainly has the significant ability to affect the choice of electors in the free and direct election of their representative and responsible government, and the judicature is the institution which enables and finally applies the powers afforded to the legislature and executive to the citizenry.

Thus, it can be concluded that should the opportunity arise again for the High Court to consider this issue, it ought to accept that the requirements of the text and structure of the *Constitution* extend beyond present conceptions of the implied freedom to communications relating to the judicature. After all, even if the arguments made in the present article run against previous decisions to some extent, as Kirby J once opined, '[i]t may be true that re-expressing the *Lange* rule as I would favour, so that it applies to the judicial branch of government as much as to the legislative and executive, would involve a new step. However, it is one inherent in the principle that *Lange* expresses.'[244]

[244] *APLA* (n 10) 444 [358] (Kirby J).

POSTHUMOUS GAMETE RETRIEVAL AND REGULATORY DISCONNECTION: AN ANALYSIS OF AUSTRALIAN CASE LAW

CLAIRE MCGOVERN*

In light of the Western Australian Supreme Court decision in Ex parte CH *(2023), this article examines the use of human tissue legislation to authorise posthumous gamete retrieval across Australia. While courts routinely rely on these statutes to permit retrieval, their application is flawed in this context given that many jurisdictions prohibit the subsequent use of gametes in posthumous conception. Through an analysis of statutory frameworks and relevant case law, the article argues that current legislative approaches are misaligned. It calls for a unified legal regime that regulates both retrieval and use, to ensure coherence and prevent unnecessary litigation for surviving partners.*

I INTRODUCTION

On 21 December 2023, Seaward J of the Supreme Court of Western Australia delivered a written judgment authorising the retrieval of sperm from a deceased man.[1] The facts of *Ex parte CH*[2] are particularly distressing. The couple were married for 40 years and had two children together, both of whom had died in separate tragic accidents not many years apart.[3] The applicant testified that prior to her husband's death, the couple had a settled intention of using his sperm with a surrogate to have another child.[4] Indeed, the couple had visited fertility experts in this regard and had

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[1] *Re Section 22 of the Human Tissue and Transplant Act 1982* (WA); *Ex parte CH* [2023] WASC 487 ('*Ex parte CH')*.

[2] Ibid.

[3] Ibid [6]–[7].

[4] Ibid [11].

considered the applicant's cousin as a potential surrogate.[5] Despite these preliminary plans, extenuating circumstances including COVID-19 and the death of the applicant's mother-in-law prevented the couple from storing the deceased's sperm before he passed, leading to the present application.[6]

This case is not unique, and the issue of posthumous gamete retrieval has been considered by courts across Australia on several occasions, including in Western Australia ('WA').[7] This particular case garnered media attention due to the age of the surviving partner.[8] The applicant, aged 62, is significantly older than the typical claimant in these types of cases.[9] Generally speaking, requests for posthumous gamete retrieval come from surviving partners of reproductive age and in circumstances where they will carry the pregnancy themselves.[10] This case therefore raises ethical concerns on the use of surrogacy with posthumous conception and sparks broader debate on the morality of aging parenthood in the age of assisted human reproduction. Beyond these concerns, however, what this case has truly highlighted is a growing trend of regulatory disconnect across Australia in posthumous gamete retrieval cases, and such is the central issue considered by this article.

Posthumous gamete retrieval is not specifically governed by legislation in WA. In *Ex parte CH*,[11] the Court followed a line of factually similar cases and deemed the retrieval of sperm lawful under section 22 of the *Human Tissue and Transplant Act*

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[5] Ibid [8].
[6] Ibid [10].
[7] See *Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte C* [2013] WASC 3 ('*Ex parte C*'); *Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte H* [2020] WASC 99 ('*Ex parte H*'); *Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte M* [2008] WASC 276 ('*Ex parte M*'); *Re Section 22 of the Human Tissue and Transplant Act 1982 (WA); Ex parte P* [2022] WASC 477 ('*Ex parte P*'); *S v Minister for Health (WA)* [2008] WASC 262.
[8] Royce Kurmelovs, 'Western Australian woman, 62, permitted to have sperm removed from her dead husband', *The Guardian* (online, 3 January 2024) <https://www.theguardian.com/australia-news/2024/jan/03/wa-woman-sperm-removed-dead-husband-fertilisation-wa-supreme-court>; Rachel Siden, 'Australian court allows 62-year-old woman to have dead husband's sperm collected', *PET Bionews* (online, 8 January 2024) <https://www.progress.org.uk/australian-court-allows-62-year-old-woman-to-have-dead-husbands-sperm-collected/>.
[9] Ibid.
[10] Although this is not always the case and there has been a recent increase in cases whereby surviving parents have requested the retrieval of gametes from their deceased children with the aim of using the gametes in posthumous conception to have genetic grandchildren. See *R (on the application of Mr and Mrs M) v Human Fertilisation and Embryology Authority* [2016] EWCA Civ 611; *Petithory Lanzmann v France*, App No 23038/19 (ECtHR, 12 November 2019); *Re Estate of Nikolas Colton Evans*, No C-1-PB-09-000304, 2009 WL 7729555 (Tex Prob 7 April 2009); Georgia Canton, 'Woman Uses Dead Son's Sperm for IVF Grandchildren', *Bionews* (online, 19 February 2018) <https://www.bionews.org.uk>; Anthony Starza-Allen, 'Texan Judge Permits Post-Mortem Sperm Collection', *Bionews* (online, 14 April 2009) <https://www.bionews.org.uk/>.
[11] *Ex parte CH* (n 1).

1982 (WA).[12] This provision permits designated officers to harvest 'tissue' from a corpse for specified purposes, at the request of the deceased's most senior available next of kin.[13] Despite this finding however, any subsequent use of the harvested gametes is currently prohibited in WA.[14] This is due to ministerial directions that prevent state licence holders from using, or authorising the use of, gametes in assisted reproduction after the gamete source has died.[15] As such, if the applicant in *Ex parte CH* does intend to use the gametes in the future, she will need to pursue further litigation and have the sperm transferred to a storage facility in a jurisdiction where posthumous conception is lawful.[16] The Court alluded to this reality in its judgment and emphasised that the terms of the current order were limited to gamete retrieval only, and did not pertain to any future use of the gametes by the applicant in WA.[17]

To date, several cases across Australia have seen courts closely scrutinise the relevant jurisdiction's human tissue legislation, leading to varied conclusions on whether the statutes may be used for posthumous gamete retrieval.[18] *Ex parte CH* represents yet another example in a line of divided litigation where an Australian court *has* invoked state human tissue legislation in this context.[19] However, given that the gametes cannot be used by the applicant in WA for the very purpose for which they were harvested, ie for posthumous conception, it seems implausible that the legislation was intended for such use.[20] The ability to harvest sperm under the

[12] *Human Tissue and Transplant Act 1982* (WA) s 22(1)–(2)(b); *Ex parte CH* (n 1) [25]–[26], citing the decisions in n 7 above.
[13] *Human Tissue and Transplant Act 1982* (WA) s 22(1)–(2)(b). The specific purposes for which tissue can be harvested are outlined in s 22(1)(b). They include use of the tissue for therapeutic, medical, or scientific purposes.
[14] Western Australia, *Human Reproductive Technology Act 1991* Directions, No 201, 30 November 2004, 5435 Direction 8.9 ('Direction 8.9').
[15] Ibid.
[16] This has been the general trend in the case law: *Kate Jane Bazley v Wesley Monash IVF Pty Ltd* [2010] QSC 118; *Re Estate of Edwards* (2011) 81 NSWLR 198; *Re H, AE (No 3)* [2013] SASC 196 ('*Re H, AE*'); *Roblin v Public Trustee for the Australian Capital Territory* [2015] ACTSC 100; *Re Cresswell* [2019] 1 Qd R 403; *Chapman v South Eastern Sydney Local Health District* [2018] NSWSC 1231 ('Chapman'); Amy Thomasson and Marco Rizzi, 'Consent in Posthumous Reproduction: Giving the Deceased a Voice without Drowning out the Living in Cases of Unexpected Death' (2021) 48 *University of Western Australia Law Review* 557, 558.
[17] *Ex parte CH* (n 1) [30].
[18] See, eg, *Re Gray* [2001] 2 Qd R 35; *Baker v Queensland* [2003] QSC 2; *Y v Austin Health* (2005) 13 VR 363; *Re Cresswell* (n 16); *Chapman* (n 16).
[19] Ibid [25]–[28].
[20] Direction 8.9 (n 14).

statute is merely a technicality, highlighting a classic case of regulatory disconnection.[21]

In light of the ruling in *Ex parte CH*, this piece questions the applicability of Australian human tissue legislation to posthumous gamete retrieval. Part II introduces the concept of regulatory disconnection and outlines how it manifests in cases of posthumous gamete retrieval. It then provides a comprehensive overview of the regulatory context for posthumous gamete retrieval and conception across Australia. Part III critiques the case law on this issue and examines whether human tissue statutes are appropriately invoked in these cases. The case law considered in Part III focuses exclusively on posthumous sperm retrieval. This is due to the lack of available case law on the retrieval and use of female gametes in posthumous conception. In addition, the case law considered is limited to *post-mortem* sperm retrieval and does not consider the retrieval of gametes from comatose or dying patients. Ultimately, this article argues that human tissue legislation was not drafted with assisted human reproduction in mind and is therefore being misapplied by Australian courts in these cases. It proposes that posthumous gamete retrieval should be regulated independently from human tissue statutes and should align with any existing state or territory laws governing the use of gametes in posthumous conception. This will ensure that gametes are not harvested in circumstances where they cannot be used.

II Regulatory Disconnection and Posthumous Conception

This Part introduces the concept of regulatory disconnection and outlines how this can arise in cases of posthumous gamete retrieval. In addition, this Part provides an overview of the regulatory context for posthumous gamete retrieval and conception across Australia. It examines the national regulation of artificial reproductive technology ('ART'), and explores how state and territory laws, alongside the National Health and Medical Research Council ('NHMRC') guidelines, specifically address posthumous gamete retrieval and conception. In doing so, this Part provides context for which the case law can be later critiqued.

[21] Rosalind Croucher, 'Laws of Succession versus the New Biology: Reflections from Australia' (2017) 23(1) *Trusts and Trustees* 66, 67; Christopher Mills, 'Australia after Cresswell and Chapman: A Legal and Regulatory Paradox, or an Opportunity for Uniformity?' (2020) 27(3) *Journal of Law and Medicine* 741, 741.

A *Regulatory Disconnection*

Regulatory disconnection has been described as the mismatch between current laws and new technologies.[22] It occurs when regulatory approaches are designed for the technological landscape of the past and require 'reconnection'.[23] This can be seen when new technologies are not covered by existing laws and enter a regulatory void, or alternatively, when older technologies morph beyond the forms that were originally contemplated by earlier regulatory regimes and there is ambiguity regarding the application of existing regulations.[24] The latter scenario is evident in gamete retrieval cases across Australia, where courts have been inconsistent on whether human tissue legislation can be used in this context.[25]

The regulatory disconnection across Australia stems directly from the legal distinction made between posthumous gamete retrieval and its subsequent use. For viable sperm to be procured from a deceased man, the retrieval must be carried out promptly, ideally within the first 24 to 36 hours after death.[26] Thus, courts typically treat requests for posthumous gamete retrieval on an interlocutory basis. If the application for retrieval is granted, the Court can deal with the matter of using the gametes in posthumous conception at a later stage.[27] When the gamete retrieval procedure is considered by courts in isolation, judges need not consider the wider regulatory context and any subsequent use of the tissue by the applicant is not determined until a later date.[28] It is this distinction between retrieval and use that creates a regulatory gap and leads to inconsistent decisions such as in *Ex parte CH*, where courts can (by technicality) utilise human tissue statutes to authorise posthumous gamete retrieval even when the gametes cannot be lawfully stored or used in that jurisdiction by virtue of ancillary laws.[29]

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[22] Roger Brownsword, *Rights, Regulation and the Technological Revolution* (Oxford University Press, 2008) 160.
[23] Lyria Bennett Moses, 'How to Think about Law, Regulation and Technology: Problems with "Technology" as a Regulatory Target' (2013) 5(1) *Law, Innovation and Technology* 1, 7.
[24] Ibid.
[25] Mills (n 21) 741; Benjamin Kroon et al, 'Post-Mortem Sperm Retrieval in Australasia' (2012) 52 *Australian and New Zealand Journal of Obstetrics and Gynaecology* 487, 488.
[26] Cappy Miles Rothman, 'A Method for Obtaining Viable Sperm in the Postmortem State' (1980) 34(5) *Fertility and Sterility* 512, 512.
[27] Croucher (n 21) 67. See, eg, *Re Denman* [2004] QSC 70; *Y v Austin Health* (n 18).
[28] This reasoning formed the basis of Habersberger J's decision in the Victorian Supreme Court case of *Y v Austin Health* (n 18) [68]. The Judge noted that if the Court had refused the widow's application for posthumous sperm retrieval, then she could never become pregnant by the deceased. However, if the application was granted, the possibility of using the sperm in the future remained open to the plaintiff, pending further consideration by the court.
[29] Shelly Simana, 'Creating Life after Death: Should Posthumous Reproduction be Legally Permissible Without the Deceased's Prior Consent?' (2018) *Journal of Law and Biosciences* 329, 331.

B *The Regulatory Context*

1 *Regulation of ART in Australia*

The Commonwealth of Australia is a federation consisting of six states: New South Wales ('NSW'), Queensland, South Australia ('SA'), Tasmania, Victoria, and WA, and two mainland self-regulating territories: the Northern Territory ('NT') and Australian Capital Territory ('ACT'). Under the federal system of government, the power to make law is divided between a central parliament and regional parliaments.[30]

It is not within the remit of the Australian federal Parliament to enact national laws on ART. Like many matters in relation to health, legislating on the use of ART falls within the power of individual state and territory parliaments.[31] In this regard, each Australian state and territory has separate laws relating to ART.[32]

Table 1

State/Territory	**Artificial Reproductive Technology Statute**
Victoria	*Assisted Reproductive Treatment Act 2008* (Vic)
New South Wales	*Assisted Reproductive Technology Act 2007* (NSW)
Queensland	*Assisted Reproductive Technology Act 2024* (Qld)
South Australia	*Assisted Reproductive Treatment Act 1988* (SA)
Western Australia	*Human Reproductive Technology Act 1991* (WA)
Tasmania	No ART legislation
Northern Territory	No ART legislation (adopts South Australian law)
Australian Capital Territory	No ART legislation

[30] Parliamentary Education Office and Australian Government Solicitor, *Australian Constitution with Overview and Notes by the Australian Government Solicitor* (October 2010) 4 <https://www.pmc.gov.au/sites/default/files/foi-logs/foi-2021-017.pdf>/

[31] Despite this, in 2002, the Council of Australian Governments agreed to pass nationally consistent laws which prohibited human cloning and other unacceptable practices associated with reproductive technology. The *Prohibition of Human Cloning for Reproduction Act 2002* (Cth) bans certain practices in relation to human embryos and cloning. In addition, the *Research Involving Human Embryos Act 2002* (Cth) regulates the creation and use of human embryos outside of the human body and imposes sanctions on those who misuse embryos. These are national statutes and are applicable to all Australian states and external territories: Sonia Magri, 'Research on Human Embryos, Stem Cells and Cloning: One Year Since the Passing of Australian Federal Legislation: Australia, Around the World, and Back Again' (2003) 10(4) *Murdoch University Electronic Journal of Law* 35, 35.

[32] Belinda Bennett, 'Posthumous Reproduction and the Meaning of Autonomy' (1999) 23(2) *Melbourne University Law Review* 286.

States such as WA and Victoria have enacted extensive ART legislation in the form of the *Human Reproductive Technology Act 1991* (WA) and the *Assisted Reproductive Treatment Act 2008* (Vic). The *Human Reproductive Technology Act 1991* (WA) establishes a Reproductive Technology Council[33] and provides for a Code of Practice to set out the rules and guidelines for ART in WA.[34] The legislation also establishes a licencing system for ART providers in the state[35] and prohibits certain practices in relation to human cloning, the use of human gametes, and embryo research.[36] Likewise, Victoria's *Assisted Reproductive Treatment Act 2008* (Vic) is an extensive statute that establishes the Victorian Assisted Reproductive Treatment Authority[37] and Patient Review Panel.[38] In addition, the Act provides for a mandatory system of registration for ART clinics[39] and regulates a range of ART practices such as surrogacy,[40] the use of gametes and embryos, and posthumous conception.[41]

The ART legislation in NSW and SA is not as comprehensive. The *Assisted Reproductive Technology Act 2007* (NSW) establishes a system of registration for ART providers.[42] However, the NSW statute only regulates certain aspects of ART such as the use of gametes and embryos,[43] and surrogacy.[44] Similarly, the *Assisted Reproductive Treatment Act 1988* (SA) merely provides for a system of registration for ART providers.[45] Queensland has more recently enacted the *Assisted Human Reproductive Treatment Act 2024* (Qld), which introduces a licensing and oversight regime for ART providers.[46] However, the Act has only been partially commenced, and as such, its regulatory framework is not yet fully operational.[47]

The NT does not have any specific ART legislation in place. However, the NT tends to adopt the position at law in SA. The NT Department of Health requires that clinics in that jurisdiction comply with the SA ART statute, provided such compliance does not

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[33] *Human Reproductive Technology Act 1991* (WA) pt 2 s 8.
[34] Ibid pt 3.
[35] Ibid pt 4 div 1.
[36] Ibid pt 4A–4B.
[37] *Assisted Reproductive Treatment Act 2008* (Vic) pt 10.
[38] Ibid pt 9.
[39] Ibid pt 8.
[40] Ibid pt 4.
[41] Ibid pt 5.
[42] *Assisted Reproductive Technology Act 2007* (NSW) pt 2 div 1 s 6.
[43] Ibid pt 2 div 3.
[44] Ibid pt 3 div 3.
[45] *Assisted Reproductive Treatment Act 1988* (SA) pt 2.
[46] *Assisted Human Reproductive Act 2024* (Qld) pt 2 div 1.
[47] 'Guidance for Assisted Reproductive Technology Providers on Commencement, Assisted Reproductive Technology Act 2024', *Queensland Health* (Web Page, 2024) <https://www.health.qld.gov.au/__data/assets/pdf_file/0023/1360832/assisted-reproductive-technology-guidance.pdf>.

conflict with any NT laws.[48] Tasmania and the ACT do not have any legislation which regulates the use of ART. These regions tend to follow national guidelines and codes of practices closely.[49]

2 *Regulation of ART practice and research*

The regulation of clinical practice and medical research varies considerably throughout the country. WA follows a licencing system.[50] Any clinic conducting ART in WA must be in receipt of a licence granted by the Commissioner of Health.[51] Likewise, ART legislation in Queensland will require clinics to have a licence.[52] However, this part of the statute has yet to commence.[53] SA, Victoria, and NSW adhere to a system of registration. It is expected that clinics who provide ART services in these states are registered with the appropriate body.[54] The NT also follows a system of registration by virtue of the requirements in SA. ART Treatment centres in Tasmania, and the ACT are self-regulated. They are not required to be licenced or registered to provide ART services.[55]

At a national level, the Fertility Society of Australia ('FSA') is the self-regulating body that represents doctors, researchers and consumers in reproductive matters across the country.[56] In 1987, the FSA established a subcommittee, the Reproductive Technology Accreditation Committee ('RTAC'), to set standards for the use of ART across Australia and to offer accreditation to treatment centres that adhere to national standards and the FSA Code of Practice.[57] The current code of practice was revised in 2024. Its primary objective is to continually monitor and improve the quality of care offered to people receiving fertility treatment.[58] The code outlines criteria which must be adhered to by clinics to achieve accreditation from the

[48] SA laws then in force continue to apply in the NT (unless repealed or inconsistent): *Northern Territory Interpretation Act 1978* (NT) s 3.
[49] Ibid.
[50] *Human Reproductive Technology Act 1991* (WA) pt 4 div 1.
[51] Ibid s 27.
[52] *Assisted Human Reproductive Act 2024* (Qld) pt 2 div 1.
[53] *Queensland Health* (n 47).
[54] *Assisted Reproductive Treatment Act 1988* (SA) pt 2; *Assisted Reproductive Treatment Act 2008* (Vic) pt 8; *Assisted Reproductive Technology Act 2007* (NSW) pt 2 div 1 s 6.
[55] Samantha Pillay, 'Assisted Reproductive Technology in Australia: The Legal Landscape', *Barry Nillsson* (Blog Post, 18 June 2025) <https://bnlaw.com.au/knowledge-hub/insights/assisted-reproductive-technology-in-australia-the-legal-landscape/>.
[56] 'About FSA', *Fertility Society of Australia* (Web Page, 2019) <https://www.fertilitysociety.com.au>.
[57] 'RTAC', *Fertility Society of Australia* (Web Page, 2019) <https://www.fertilitysociety.com.au/rtac/>.
[58] The Fertility Society of Australia and New Zealand Reproductive Technology Accreditation Committee, *Code of Practice for Assisted Reproductive Technology Units* (December 2024) 2.

RTAC.[59] It also provides general standards for clinical practice.[60] Accredited clinics are audited each year and a failure to comply with national standards can result in loss of accreditation.[61] Registration laws in some states require that treatment centres are accredited by the RTAC. For instance, in Victoria registered ART providers must first have prior accreditation from the RTAC.[62]

The National Health and Medical Research Council ('NHMRC'), which is Australia's specialist body for health and medical research, is also relevant here. It is the primary funding body for medical research in Australia and is responsible for setting and maintaining quality standards in relation to public health and health research.

The NHMRC issues guidelines on a range of issues such as clinical practice, public and environmental health, research and ethics.[63] In terms of ART, the NHMRC first published the *Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* in 2017.[64] These guidelines are intended for clinicians and researchers, and outline various ethical standards for the use of ART.[65] The guidelines deal with matters relating to the storage and donation of gametes and embryos[66] and also provide guidance on more ethically contentious issues such as surrogacy, sex selection and posthumous conception.[67] In addition, the guidelines contain a set of principles which guide the general practice of ART and support clinicians in decision making.[68]

The NHMRC guidelines are intended to be read in conjunction with existing federal, state or, territory legislation. They create an expansive framework for the use of ART across Australia.[69] It is expected that all Australian clinics engaging in ART procedures will abide by these principles. However, the guidelines do not have legislative force.[70] The strength of their influence is determined by the RTAC

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[59] Ibid 2.
[60] Ibid 1.
[61] Ibid 6.
[62] *Assisted Reproductive Treatment Act 2008* (Vic) s 74. Regulations in SA also require RTAC accreditation for the purposes of registration: *Assisted Reproductive Treatment Regulations 2010* (SA) cl 6.
[63] 'About Us', *National Health and Medical Research Council* (Web Page) <https://www.nhmrc.gov.au/about-us>.
[64] National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research 2017* (updated 2023) ('NHMRC').
[65] Ibid 14.
[66] Ibid 37 and 39.
[67] Ibid 45, 48 and 55.
[68] Ibid 14.
[69] Ibid 11.
[70] Anita Stuhmcke, 'The Legal Regulation of Foetal Tissue Transplantation' (1996) 4 *Journal of Law and Medicine* 131, 135.

accreditation process which requires compliance with the guidelines.[71] As such, only practitioners in states such as SA and Victoria are legally obligated to follow the guidelines and could incur fines if they fail to do so.[72] Other states which have legislation for ART in place simply use the guidelines as an overarching framework for conducting ART procedures.[73]

3 *Regulation of posthumous conception under state and territory legislation*

At present, the states of Victoria, Queensland, and NSW are the only jurisdictions in Australia whose ART legislation makes provision for posthumous conception.

Table 2

State/Territory	**Provisions for Posthumous Conception**
Victoria	Use permitted under ss 46–48 *Assisted Reproductive Treatment Act 2008* (Vic)
New South Wales	Use permitted under ss 17–23 *Assisted Reproductive Technology Act 2007* (NSW)
Queensland	Use permitted under ss 26-31 *Assisted Reproductive Technology Act 2024* (Qld)
South Australia	NHMRC guidelines
Western Australia	Posthumous use of gametes entirely prohibited under Direction 8.9 pursuant to *Human Reproductive Technology Act 1991* (WA)
Tasmania	NHMRC guidelines
Northern Territory	NHMRC guidelines
Australian Capital Territory	NHMRC guidelines

[71] Keith Harrison et al, 'Continuous Improvement in National ART Standards by the RTAC Accreditation System in Australia and New Zealand' (2017) 57 *New Zealand Journal of Obstetricians and Gynaecologists* 49, 50.

[72] SA has given the guidelines some legislative force by virtue of their statutory registration requirements: Sonia Allen, 'Post-Humous Use of Gametes' (2018) *Health Law Central, Information, Education, Research and Policy* <http://www.healthlawcentral.com/assistedreproduction/post-humous-use-gametes/>; *Assisted Reproductive Treatment Regulations 2010* (SA) cl 6. Compare *Assisted Reproductive Treatment Act 2008* (Vic) s 74.

[73] Croucher (n 21) 72.

The laws in Victoria, Queensland, and NSW are restrictive and require that pre-mortem written consent has been obtained from the gamete provider prior to undertaking the procedure.[74] In both Victoria and Queensland, additional approval is also required from an independent Patient Review Panel before the gametes or embryos can be used.[75] The requesting party must also have undergone professional counselling prior to the procedure. ART legislation in NSW further requires the person receiving treatment to acknowledge and provide written consent to the use of the deceased's gametes.[76]

ART legislation in WA does not regulate posthumous conception.[77] However, as noted earlier in this article, directions published by the Minister for Health do not permit licence holders to knowingly use or authorise the use of gametes in treatment after the source has died.[78] Thus, in WA, posthumous conception is entirely prohibited.[79] Other states and territories do not have any statutory provisions in place to either permit or forbid the practice of posthumous conception. As such, they rely on the NHMRC guidelines on this issue.[80]

4 *Regulation of posthumous conception under NHMRC Guidelines*

The NHMRC *Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* were most recently updated in 2023 and include specific provisions regarding posthumous conception.[81] The guidelines deem posthumous conception to be a controversial practice that raises specific ethical issues.[82] Clinics are required to have clear policies in place for the storage of gametes or embryos, and the source should clearly stipulate their position on what is to be done with stored cells in the event of death.[83] Unless a particular state or territory prohibits the continued storage of gametes or embryos after death, the guidelines provide that the cells should remain in storage and be made available for use, or be disposed of in accordance with the wishes of the deceased as expressed in their storage consent form.[84] There is an express prohibition on the posthumous use of stored gametes or

[74] *Assisted Reproductive Treatment Act 2008* (Vic) s 46(b); *Assisted Reproductive Technology Act 2007* (NSW) s 23(a); *Assisted Reproductive Technology Act 2024* (Qld) s 22(1)(a).
[75] *Assisted Reproductive Treatment Act 2008* (Vic) s 47; *Assisted Reproductive Technology Act 2024* (Qld) s 31(3).
[76] *Assisted Reproductive Technology Act 2007* (NSW) s 23(c).
[77] *Human Reproductive Technology Act 1991* (WA).
[78] Direction 8.9 (n 14).
[79] Ibid.
[80] Croucher (n 21) 72.
[81] NHMRC (n 64).
[82] Ibid 42.
[83] Ibid 55.
[84] Ibid 57.

embryos if the deceased has expressed an objection to this throughout their lifetime.[85]

The guidelines further provide for limited instances in which the absence of consent will not act as a bar to treatment. This is in cases where the gametes or embryos in question were placed in storage prior to the publication of the guidelines. As clinics were not previously required to document the source's views on posthumous conception, the source's wishes may not be available.[86] Furthermore, the guidelines acknowledge that gametes can be harvested from the deceased post-mortem. Thus, their views in this respect may be unknown.[87] In these scenarios, consent requirements are not as demanding, and the guidelines provide that clinics may provide treatment if the request comes from the deceased's surviving spouse or partner and there is some evidence that the deceased would have supported the application, or at the very least, there is no indication that they would have objected.[88]

5 *Posthumous gamete retrieval*

The only ART statute in Australia that provides for posthumous gamete retrieval is Queensland's *Assisted Reproductive Technology Act 2024* (Qld).[89] Although legislation in both Victoria and NSW provides for the use of gametes and embryos in posthumous conception, neither statute legislates for the retrieval of gametes post-mortem.[90] The NHMRC guidelines do provide for clinics to harvest gametes after death if the request comes from the deceased's surviving partner and there is no evidence that the deceased would have objected.[91] The guidelines advise that court approval is sought prior to the retrieval, and further state that courts should have an appropriate legal basis in which to grant the order.[92] In this regard, much of the case law focuses on whether human tissue legislation is an acceptable legal basis in this context.[93]

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[85] Ibid.
[86] Ibid 56.
[87] Ibid.
[88] Ibid 57.
[89] *Assisted Reproductive Treatment Act 2024* (Qld) s 31.
[90] *Assisted Reproductive Treatment Act 2008* (Vic) s 46; *Assisted Reproductive Technology Act 2007* (NSW) s 23(a).
[91] NHMRC (n 64) 56.
[92] Ibid.
[93] See, eg, *Re Estate of Edwards* (n 16); *Re H, AE* (n 16); *Ex parte C* (n 7); *Re Gray* (n 18); *Baker v Queensland* (n 18); *Re Cresswell* (n 16).

All Australian states and territories have distinct human tissue legislation (see Table 3). There are subtle differences across the statutes. However, in every human tissue statute across the country, the term 'tissue' has been defined broadly to include: an organ; a part of the human body; or a *substance* which has been extracted from, or from a part of, the human body.[94] The only instance in which sperm and ova are precluded from this definition of tissue is for the purpose of the donation of tissue by a living person. Thus, for certain legislative purposes, gametes will fall under the definition of 'tissue'.[95]

Table 3

State/Territory	**Provision for Removal of Human Tissue**
Victoria	Section 26 *Human Tissue Act 1982* (Vic)
New South Wales	Section 23 *Human Tissue Act 1983* (NSW)
Queensland	Section 22 *Transplantation and Anatomy Act 1979* (Qld)
Southern Australia	Section 21 *Transplantation and Anatomy Act 1983* (SA)
Western Australia	Section 22 *Human Tissue and Transplant Act 1982* (WA)
Tasmania	Section 23 *Human Tissue Act 1985* (Tas)
Northern Territory	Section 19(A) *Transplantation and Anatomy Act 1979* (NT)
Australian Capital Territory	Section 27 *Transplantation and Anatomy Act 1978* (ACT)

[94] *Human Tissue and Transplant Act 1982* (WA) s 3; *Human Tissue Act 1982* (Vic) s 3; *Human Tissue Act 1983* (NSW) s 4; *Transplantation and Anatomy Act 1979* (Qld) s 4; *Transplantation and Anatomy Act 1983* (SA) s 5; *Human Tissue Act 1985* (Tas) s 3; *Transplantation and Anatomy Act 1978* (ACT) s 2; *Transplantation and Anatomy Act 1979* (NT) s 4.

[95] Nicola Peart, 'Life Beyond Death: Regulating Posthumous Reproduction in New Zealand' (2015) 46(3) *Victoria University of Wellington Law Review* 725, 744.

Each statute grants designated officers the authority to harvest 'tissue' from a corpse.[96] If the deceased has not consented to the harvesting of tissue after their death, the provisions permit the deceased's most senior available next of kin to consent on the deceased's behalf. Prior to carrying out the extraction, the designated officer must make sufficient inquiries and be satisfied that the deceased would not have objected to this.

In addition, all statutes require that the tissue is harvested for the purposes of transplantation into the body of another living person, or for use in other therapeutic, medical, or scientific purposes.[97] It is this aspect of the respective statutes which has prevented some courts from using human tissue legislation as a basis for gamete retrieval.[98] Courts have been divided on whether the retrieval of gametes for use in posthumous conception falls under one of these designated purposes.[99] Notably, since the partial commencement of Queensland's *Assisted Reproductive Technology Act 2024* (Qld), the *Transplantation and Anatomy Act 1979* (Qld) no longer applies to the retrieval of gametes for posthumous conception in Queensland.[100]

III An Analysis of Gamete Retrieval Cases

This Part provides an analysis of leading cases on posthumous gamete retrieval and critiques the courts' use of human tissue legislation in these cases. In doing so, this Part demonstrates how the lack of uniform laws on both posthumous gamete retrieval and conception has led to several instances of regulatory disconnection across Australia. The result has been inconsistent rulings, whereby courts authorise gametes to be retrieved posthumously under human tissue statutes, but the gametes cannot be used by the applicant in that jurisdiction by virtue of ancillary laws.

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[96] *Human Tissue and Transplant Act 1982* (WA) s 22; *Human Tissue Act 1982* (Vic) s 26; *Human Tissue Act 1983* (NSW) s 23; *Transplantation and Anatomy Act 1979* (Qld) s 22; *Human Tissue Act 1985* (Tas) s 23; *Transplantation and Anatomy Act 1978* (ACT) s 27; *Transplantation and Anatomy Act 1979* (NT) s 19(A).

[97] *Human Tissue Act 1982* (Vic), s 26(1)(a)–(b); *Human Tissue and Transplant Act 1982* (WA) s 22(1)(a)–(b). The *Transplantation and Anatomy Act 1979* (NT) s 19(A) states that the tissue must be removed from the deceased for an 'authorised purpose'. 'Authorised purpose' is defined in s 4(a) of that Act as 'transplantation to another person's body, use for other therapeutic purposes and use for other medical or scientific purposes'. See further *Transplantation and Anatomy Act 1978* (ACT) s 27(1)(a); *Transplantation and Anatomy Act 1979* (Qld) s 22(1)(c); *Transplantation and Anatomy Act 1983* (SA) s 21(1)(a)–(b); *Human Tissue Act 1985* (Tas) s 23(1)(a); *Human Tissue Act 1983* (NSW) s 23(1)(a).

[98] *Re Gray* (n 18); *Baker v Queensland* (n 18).

[99] *Re Gray* (n 18); *Y v Austin Health* (n 18); *Re Cresswell* (n 16).

[100] *Assisted Reproductive Treatment Act 2024* (Qld) s 32.

The traditional approach of courts was to reject applications for posthumous gamete retrieval.[101] For example, in the Queensland Supreme Court case *Re Gray*,[102] Chesterman J held that there was no legislation in Queensland which could be used to authorise the removal of gametes from a deceased man.[103] The Court, considering an *ex parte* application for the retrieval of sperm from a man who died suddenly, held that ART treatment did not qualify as a 'therapeutic, medical or scientific purpose'.[104] Thus, the harvesting of sperm for use in posthumous conception by the deceased's widow could not be authorised under s 22 of the *Transplantation and Anatomy Act 1979* (Qld).[105] The same approach was taken in a factually similar case by the Queensland Supreme Court in *Baker v Queensland*.[106] Here, the applicant sought the urgent extraction of sperm from her husband who died unexpectedly.[107] Despite clear evidence as to the couple's intention to start a family together, the court could not distinguish the facts of this case from those in *Re Gray.* Muir J found there was no legislative authority in Queensland allowing for the extraction of sperm from a deceased man for later use by his widow in assisted reproduction.[108] This reasoning is not unique to courts in Queensland with the same rationale has been applied by courts elsewhere, for example in NSW.[109] However, to date, there is no consensus on the matter, and courts in several Australian jurisdictions have deemed state human tissue legislation a lawful basis for authorising posthumous gamete retrieval. This is on the understanding that assisted reproduction falls under the meaning of a 'medical purpose' under the relevant state statutes.[110]

In the Victorian Supreme Court case of *Y v Austin Health*,[111] Habersberger J made a distinction between the removal of tissue after death for the purposes of transplantation into the body of another living person, and the removal of tissue after death for use in other medical purposes.[112] The Judge held that the extraction of sperm from a deceased man for later use by his widow in assisted reproduction could not be regarded as the removal of tissue for the purposes of transplantation.[113]

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[101] Tony Keim, 'Life after Death: Providing Hope for Shattered Lives or Creating a Lifetime of Unintended Consequences?' (2019) 39(7) *Proctor* 22, 22.
[102] *Re Gray* (n 18).
[103] Ibid [5].
[104] Ibid [22].
[105] Ibid.
[106] *Baker v Queensland* (n 18).
[107] Ibid [1].
[108] Ibid [4].
[109] *Chapman* (n 16); Keim (n 101) 22.
[110] *Re Estate of Edwards* (n 16); *Re Floyd* [2011] QSC 218; *Re H, AE* (n 16); *Ex parte C* (n 7).
[111] *Y v Austin Health* (n 18).
[112] Ibid [36].
[113] Ibid.

In the Court's view, a 'transplantation' involved the removal of a body part or product from one person and replacing it into the body of another, in order to perform the same function. It was noted that the sperm in this case would be removed from the deceased and used by the applicant to become pregnant. This could not be characterised as a transplantation.[114] Nevertheless, the Court observed that 'fertilisation procedures' are referred to as 'medical procedures' in the *Infertility Treatment Act 1995* (Vic).[115] Thus, the Judge was satisfied that the procurement of sperm for use in posthumous reproduction met the requirement of 'medical purpose' under s 26 of the *Human Tissue Act 1982* (Vic).[116] The same interpretation was applied by the NSW Supreme Court in *Re Estate of Edwards.*[117] Here, the Court held that it was lawful to harvest sperm from a deceased man under s 23 of the *Human Tissue Act 1983* (NSW) on the basis that the later use of the sperm by the deceased's surviving partner in assisted reproduction fell under the meaning of a 'medical purpose'.[118]

With respect however, the courts' application of the human tissue statutes in these cases is questionable. ART legislation in both Victoria and NSW prohibits the use of gametes in posthumous conception without express consent from the deceased.[119] In both cases, the Court authorised sperm to be harvested at the request of the deceased's surviving partner in the absence of consent.[120] This is despite the fact that making use of the gametes in posthumous conception in those states would be unlawful.[121] Given that the gametes could not be used for the very purpose in which they were harvested, the rulings are, with respect to the Court, arguably misconceived.

Despite this, there is a line of authorities across several states and territories which has interpreted the procurement of gametes for use in posthumous conception as a 'medical purpose' under the relevant jurisdiction's human tissue legislation.[122] The decision of Brown J in the Queensland Supreme Court case of *Re Cresswell*[123] is

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[114] Ibid [37].
[115] Ibid [38].
[116] Ibid [39].
[117] *Re Estate of Edwards* (n 16).
[118] Ibid [32].
[119] *Assisted Reproductive Treatment Act 2008* (Vic) s 46; *Assisted Reproductive Technology Act 2007* (NSW) s 23(a).
[120] *Y v Austin Health* (n 18); *Re Estate of Edwards* (n 16).
[121] *Assisted Reproductive Treatment Act 2008* (Vic) s 46; *Assisted Reproductive Technology Act 2007* (NSW) s 23(a).
[122] Croucher (n 21) 67–8. The retrieval of sperm was categorised as a medical purpose in the state of Victoria in *AB v AG Victoria* [2005] VSC 180; in NSW in *Re Estate of Edwards* (n 16); in Queensland in *Re Floyd* (n 110); in SA in *Re H, AE* (n 16); and in WA in *Ex parte C* (n 7).
[123] *Re Cresswell* (n 16).

significant. This case concerned an application for an order granting the applicant possession of sperm posthumously harvested from her late partner.[124] Before determining whether the applicant was entitled to possession of the sperm, the court first considered whether the sperm had been harvested lawfully.[125] Brown J referenced several factually similar cases across Australia and in particular, considered the relevance of human tissue legislation in those states and territories to the retrieval of gametes after death.[126] The Court noted that under Queensland's *Transplantation and Anatomy Act 1979*, the legislative phrase 'medical purpose' did not apply to the deceased, and could be applied to third parties.[127] Furthermore, the Court held that the phrase 'medical purpose' extended beyond the provision of medical treatment. The Court noted that the process of assisted reproduction interferes with the normal operation of a physiological function. Therefore, it falls under the definition of a 'medical purpose' and the procurement of gametes for use in assisted conception may be authorised under section 22 of the Queensland Act.[128]

Brown J further rejected the Queensland Government's *Guidelines for Removal of Sperm from Deceased Persons for IVF: Consent Authorisation and Role of IVF Organisations*,[129] which advise that prior court authorisation is necessary to proceed with posthumous gamete retrieval.[130] The Court was of the view that the statutory regime in Queensland does not require parties to apply to the court, but rather the correct process is to acquire consent for the retrieval in accordance with the *Transplantation and Anatomy Act 1979* (Qld).[131] This position also appears to go against the NHMRC guidelines on this issue which advise that court approval should be sought prior to gamete retrieval.[132] In this respect, many superior court judges have made comments regarding judicial involvement in the process of posthumous gamete retrieval, noting that if the authority to harvest gametes after death derives from state legislation, the court has no role in authorising the retrieval.[133] This has

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[124] Ibid [1]–[9].
[125] Ibid [17]–[96].
[126] Ibid [17]–[47].
[127] Ibid [77].
[128] Ibid.
[129] State Coroners Guidelines, *Guidelines for Removal of Sperm from Deceased Persons for IVF: Consent, Authorisation and Role of IVF Organisations* (2022) ch 4. These guidelines were amended in December 2022; however, the version referred to by the Court in the judgment was the 2013 version: *Re Cresswell* (n 16) [162].
[130] *Re Cresswell* (n 16) [162]; Stephen Page, 'Two Worlds Colliding: The Science and Regulation of Assisted Reproductive Treatment' (2020) 156 *Precedent* 32, 37.
[131] *Re Cresswell* (n 16) [47]; Page (n 130) 37.
[132] NHMRC (n 64) 57.
[133] See, eg, Mills (n 21) 746–7; Thomasson and Rizzi (n 16) 560; *Chapman* (n 16) [58]; *Re Estate of Edwards* (n 16) [30]. Even in *Re Gray* (n 18), Chesterman J held that if the authority to harvest sperm

been the case even in judgments from WA where the subsequent use of gametes in posthumous conception is unlawful.[134]

Re Cresswell[135] has been applauded by commentators for clearly outlining the applicability of state human tissue legislation to the retrieval of gametes after death.[136] Lupton argues the judgment has brought welcome clarity to what was previously a confused area.[137] In addition, Mills suggests that the approach taken by the court appears to be the one originally intended by the state's human tissue statute, noting that

> the HTA in all jurisdictions provides specifically that foetal tissue, sperm (or semen) and ova are excluded from the definition of 'tissue' for the purposes of *living* tissue donation. The HTAs contain no such exclusionary clauses with regard to posthumous tissue donation.[138]

Thus, Mills suggests that human tissue statutes across Australia were in fact designed to cover the retrieval of gametes after death.[139]

Nevertheless, the recently enacted *Assisted Reproductive Technology Act 2024* (Qld) now expressly rejects this interpretation. The statute provides that posthumous gamete retrieval is not to be authorised under the state's human tissue legislation, and instead sets out specific consent and procedural requirements within the ART statute itself.[140] This legislative development directly overrules the approach taken in *Re Cresswell*[141] and removes any ambiguity as to how such procedures are to be regulated in Queensland.

Indeed, the position of the Court in *Re Cresswell*[142] is also increasingly doubtful in states and territories that have both human tissue and ART legislation such as Victoria, NSW, and WA.[143] In the NSW Supreme Court decision of *Chapman v South Eastern Sydney Local Health District* ('*Chapman*'),[144] the Court correctly identified

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from a deceased man did derive from statute, then there would be no need for the court to play a role: at [22].

[134] See, eg, *Ex parte H* (n 7) [18]; Thomasson and Rizzi (n 16) 561.

[135] *Re Cresswell* (n 16).

[136] 'IVF and Legal Precedent: Re Cresswell Qld', *Rule of Law Institute of Australia* (Web Page, 1 August 2018) <https://www.ruleoflaw.org.au/ivf-and-legal-precedent-re-cresswell-qld/>; Mills (n 21) 746.

[137] Michael Lupton, 'The Post-Mortem Use of Sperm: Some Clarity at Last' (2019) 3(6) *International Journal of Medical Science and Health Research* 1, 2.

[138] Mills (n 21) 746.

[139] Ibid.

[140] *Assisted Reproductive Technology Act 2024* (Qld) ss 31–2.

[141] *Re Cresswell* (n 16).

[142] Ibid.

[143] This was highlighted by the Court in *Chapman* (n 16) [68].

[144] Ibid.

the conflict that exists between the state's human tissue and ART statutes.[145] The Court accepted that posthumous gamete retrieval can technically be authorised by the deceased's next of kin under s 23(2) of the *Human Tissue Act 1983* (NSW). However, the Judge further observed that the subsequent preservation and storage of sperm without the deceased's prior consent would be unlawful under s 25 of the *Assisted Reproductive Technology Act 2007* (NSW).[146] Thus, while in theory human tissue legislation in NSW makes the collection of gametes after death (without prior consent from the source) permissible, it is merely a technicality given the prohibition in another statute. In *Chapman*, Fagan J rightly observed that it is unlikely the human tissue statute was drafted with the intention that it would be applied in this way.[147] Ultimately, the authorisation by next of kin for the removal of gametes from a deceased person under s 23(2) of the *Human Tissue Act 1983* (NSW) will be ineffective, given it will result in a breach of the NSW ART legislation.[148] It is simply a case of regulatory disconnection that one piece of legislation could be used to authorise collection, while another prohibits it.

A similar point could be raised in relation to the co-existing human tissue and ART statutes in other jurisdictions. As discussed earlier, Victoria's ART statute requires express consent from the deceased for posthumous conception.[149] Thus, in the absence of express consent from the deceased, gametes harvested posthumously under the *Human Tissue Act 1982* (Vic) cannot be lawfully used in that state.[150] The gametes will therefore need to be exported elsewhere to be used for the purpose in which they were retrieved, as was the case in *Y v Austin Health.*[151] The same issue arises in WA due to the ministerial direction that forbids posthumous conception in that state.[152] This position may change in the future. In 2023, the WA Ministerial Expert Panel recommended continuing the collection of gametes from deceased persons, while also permitting posthumous use under a clear consent framework.[153]

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[145] Ibid; Talitha Fishburn, 'Birthing a Legal Lacuna: The Extraction and Use of Sperm Without Consent' (2018) 49 *Law Society of NSW Journal* 84, 84.
[146] *Chapman* (n 16) [68]. Section 25 of the *Assisted Reproductive Technology Act 2007* (NSW) makes it an offence to continue to store the gametes of a deceased person without their consent: Fishburn (n 145) 84.
[147] *Chapman* (n 16) [68].
[148] Ibid.
[149] *Assisted Reproductive Treatment Act 2008* (Vic) s 46.
[150] Ibid.
[151] *Y v Austin Health* (n 18).
[152] Direction 8.9 (n 14).
[153] Government of Western Australia Department of Health, *Ministerial Expert Panel on Assisted Reproductive Technology and Surrogacy Final Report* (2023) Recommendations 19–20.

The WA Government has given *in principle* support to this, though no policy change has occurred to date.[154]

As such, the current position remains, where gametes can be retrieved but not lawfully used in WA. Using WA's human tissue legislation to authorise the retrieval of sperm post-mortem, as has been done in a line of case law including most recently in *Ex parte CH*,[155] merely creates a scenario in which the applicant must transfer the gametes away from WA to be used. Middleton and Buist describe this as a 'paradox'.[156] The authors argue that if gametes cannot be lawfully used in a state, then it should not be the case that they can be lawfully harvested.[157] Simana makes the related point that when laws do not specifically deal with both the retrieval *and* use of gametes in posthumous conception it can lead to inconsistent outcomes, whereby gametes can be retrieved after death, but cannot be used in posthumous conception.[158]

What's more, the applicants in these cases are then required to engage in further litigation, and have the harvested gametes deemed as 'property', so that they can be transferred to a jurisdiction where they can be used in assisted conception.[159] And whilst it is not the purpose of this particular article to discuss the theoretical difficulties with treating posthumously retrieved gametes as property, I have argued elsewhere that the categorisation of gametes (which have been harvested post-mortem, and which have never been within the control of the source during their lifetime) as property, is problematic.[160] Indeed, it lends further support to the argument that human tissue legislation should not be used in this context.

Nevertheless, courts across Australia have continued to use human tissue legislation as a means of authorising posthumous gamete retrieval, even when doing so conflicts with relevant state ART statutes or rules.[161] In the NSW Supreme Court case

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[154] Government of Western Australia Department of Health, *MEP on ART and Surrogacy: Government Response to MEP Report Recommendations* (undated) 6–7 <https://www.health.wa.gov.au/~/media/Corp/Documents/Health-for/ART/Government-Response-to-MEP-Report-Recommendations.pdf>. I am grateful to the anonymous reviewer for directing me towards these reports.

[155] *Ex parte C* (n 7); *Ex parte H* (n 7); *Ex parte M* (n 7); *Ex parte P* (n 7); *S v Minister for Health (WA)* (n 7); *Ex parte CH* (n 1).

[156] Sarah Middleton and Michael Buist, 'Sperm Removal and Dead or Dying Patients: A Dilemma for Emergency Departments and Intensive Care Units' (2009) 190(5) *Medical Journal of Australia* 244, 245.

[157] Ibid 246.

[158] Simana (n 29) 331.

[159] *Y v Austin Health* (n 18); *Re Estate of Edwards* (n 16); Thomasson and Rizzi (n 16) 558.

[160] Claire McGovern, 'Reproduction after Death: The Ethical and Legal Challenges in the Regulation of Posthumous Conception in Ireland' (PhD Thesis, National University of Ireland Maynooth, 2022).

[161] See *Re Vernon* [2020] NSWSC 608; *Noone v Genea Ltd* [2020] NSWSC 1860.

of *Re Vernon*,[162] Rothman J rejected the observations of the Court in *Chapman*[163] entirely, and suggested that the storage of sperm from a deceased man without his consent did not automatically breach s 25 of the *Assisted Reproductive Technology Act 2007* (NSW).[164] In the Court's view, the wording of s 25, which requires consent from the 'gamete provider' to legally store gametes, did not necessarily translate to mean the 'gamete source'. The Court held that the consent required for storing gametes could be provided by the deceased's surviving partner who *supplied* the clinic with the sperm.[165] However, this is a considerably expansive interpretation of the wording in this section, under which there are no clear limits on who the gamete provider may be. Indeed, in the subsequent case of *Noone v Genea Ltd*,[166] counsel for the NSW Attorney-General put forward arguments that the interpretation of 'gamete provider' as construed by the court in *Re Vernon*[167] should not be adopted.[168]

It seems the most recent approach is for courts to grant automatic possession of the gametes to the applicant, so that the gametes can be removed to another jurisdiction. This was the reasoning of the Court in *Re Adams*.[169] The Court cited *Re Vernon*[170] with approval and held that so long as the applicant is granted property rights in respect of the gametes, there is no breach of ART legislation while arrangements are made to transport the tissue.[171] Despite this observation, the Court did not engage in any detailed property analysis, but rather accepted that there was existing precedent for awarding the applicant possession of the gametes.[172] There was no mention of treating the harvested gametes as property in the most recent judgment of *Ex parte CH*.[173] However, given that the law in WA will not permit the gametes to be used,[174] it is inevitable that the Court will be required to engage in a similar property analysis should the case progress. This is of course, in itself problematic when, as I have argued elsewhere, the arguments used by courts to justify finding property in posthumously retrieved gametes are not necessarily well founded.[175]

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[162] *Re Vernon* (n 161).
[163] *Chapman* (n 16).
[164] *Re Vernon* (n 161) [56], [58].
[165] Ibid [58].
[166] *Noone v Genea Ltd* (n 161).
[167] *Re Vernon* (n 161).
[168] *Noone v Genea Ltd* (n 161) [49].
[169] *Re Adams (a pseudonym) (No 2)* [2021] NSWSC 794.
[170] *Re Vernon* (n 161).
[171] *Re Adams (a pseudonym) (No 2)* (n 169) [37].
[172] Ibid [36].
[173] *Ex parte CH* (n 1).
[174] Direction 8.9 (n 14).
[175] McGovern (n 160).

Of course, regulatory disconnection is not inherently problematic, and many innovations can and do fall comfortably within the scope of an existing regulatory framework.[176] The difficulty with regulatory disconnection arises when there is insufficient consideration of the potential harms and benefits of a new technology. In such cases, existing laws may begin to be applied to novel contexts by default. Over time, this practice can create expectations or presumptions that this is the most appropriate legal approach. As a result, it can become difficult, if not politically or practically impossible, to introduce regulatory changes later, even when the implications of the technology have become clearer.[177]

Furthermore, there are sometimes principled reasons why certain issues should be regulated separately. This is an argument that could be raised in the case of gametes as they are distinct from, and should potentially be treated differently to, organs and other human tissue. Marshall notes that there are substantial differences between organs and gametes.[178] Firstly, organs are considered lifesaving and gametes are not. Furthermore, gametes have the potential to create new life and contain readily usable genetic information.[179] Bills makes a similar observation, claiming that gametes should not be likened to organs, and that unlike with harvesting organs, posthumous gamete retrieval is not for the greater good, but rather for the benefit of the deceased's next of kin.[180] This distinction was highlighted by the New Zealand High Court in the case of *Re Lee*.[181] Here, the Court considered the applicability of New Zealand's *Human Tissue Act 2008* to the retrieval of gametes after death. The Court stated that New Zealand's Parliament made a deliberate decision to exclude gametes from the statutory definition of 'human tissue' for the purposes of the statute. Heath J recognised that the harvesting of gametes will raise different 'ethical and public interest issues' to the retrieval of other bodily tissue.[182]

The distinction between organs and gametes aside, however, the problem with human tissue legislation across Australia being used to authorise the harvesting of gametes from the dead is that it creates a mismatched situation in many jurisdictions, whereby the gametes can be lawfully retrieved, but they cannot be

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[176] Anna Butenko and Pierre Larouche, 'Regulation for Innovativeness or Regulation of Innovation?' (2015) 7(1) *Law, Innovation and Technology* 52, 68; Moses (n 23).
[177] Butenko and Larouche (n 176) 69.
[178] Lorna Marshall, 'Intergenerational Gamete Donation: Ethical and Societal Implications' (1998) 178 *American Journal of Obstetrics and Gynaecology* 1171, 1172.
[179] Ibid. See also Neil Maddox, 'Limited, Inclusive and Communitarian: In Defence of Recognising Property Rights in the Human Body' (2019) 70(3) *Northern Ireland Legal Quarterly* 289.
[180] Katrina Bills, 'The Ethics and Legality of Posthumous Conception' (2005) 9 *Southern Cross University Law Review* 1, 11.
[181] *Re Lee* [2018] 2 NZLR 731 (HC).
[182] Ibid [63].

lawfully stored or used in posthumous conception absent the deceased's consent.[183] Kroon and others note that posthumous gamete retrieval in Australia has simply been 'unexpectedly caught' by laws that were intended to deal with other issues.[184] Indeed, both Fishburn and Cherkassky separately describe it as a legal lacunae that the retrieval of gametes for use in posthumous conception has been deemed lawful across Australia in this way.[185] If human tissue statutes were truly intended to allow the harvesting of gametes after death for use in posthumous conception, then the provisions relating to the retrieval of gametes would be consistent with legislative provisions relating to the storage and use of gametes in posthumous conception. This is not the case.[186] Instead, human tissue legislation has merely provided a loophole for some courts in Australia to grant requests for posthumous gamete retrieval in the absence of consent from the deceased.[187] This is undesirable when the later use of the tissue might be prohibited.

IV CONCLUSION

This article has provided an overview of the legal landscape on posthumous gamete retrieval and conception across Australia, and has critiqued the courts' use of human tissue legislation in gamete retrieval cases. The case law demonstrates a very clear case of regulatory disconnection — whereby state or territory human tissue legislation is being used as a means to authorise posthumous gamete retrieval despite not being drafted with the technology in mind. What we learn from these cases is that ART laws on posthumous conception need to specifically address the retrieval of gametes. This will give physicians clarity on the validity of retrieving gametes and will prevent the issue from reaching the courts entirely. Furthermore, specific regulation of gamete retrieval will stop instances of regulatory disconnection, whereby the harvesting of gametes after death is caught by laws which are designed to regulate other areas. Most importantly, laws on the retrieval of gametes after death must align with laws that regulate the storage and use of gametes in posthumous conception. Otherwise, we are left with the kind of legal paradox seen in *Ex parte CH*[188] where a court authorises the removal of gametes yet

[183] Simana (n 29) 331.
[184] Kroon et al (n 25) 488.
[185] Fishburn (n 145) 84; Lisa Cherkassky, 'Is Interference with a Corpse for Procreative Purposes a Criminal Offence?' (2021) 85(3) *Modern Law Review* 577, 582.
[186] Middleton and Buist (n 156) 246.
[187] Croucher (n 21) 70.
[188] *Ex parte CH* (n 1).

makes it clear that the tissue cannot be used in the very jurisdiction that permitted its retrieval.[189]

This disconnect does more than just complicate legal reasoning. It also has practical and emotional consequences for grieving partners who are then compelled to pursue further litigation to have the gametes exported. If posthumous conception is to be regulated coherently, retrieval and use must be governed by a unified legal framework and not by repurposed statutes applied out of context. Queensland's recent enactment of the *Assisted Reproductive Technology Act 2024* (Qld) is a welcome example of such reform, explicitly rejecting the use of human tissue legislation for this purpose and instead placing posthumous gamete retrieval within a clear ART-based regulatory regime.[190]

[189] Ibid [30].
[190] *Assisted Reproductive Technology Act 2024* (Qld) ss 31–2.

RECONCILING INCONSISTENCY: NATIVE TITLE RIGHTS AND STATE AGREEMENT RATIFICATION

NATALIE BROWN*

The Western Australian Supreme Court of Appeal ('WA SCA') and the Federal Court's interpretation of Western Australia's State Agreement ratification provisions has diverged over the last decade resulting in conflicting decisions. Since 2003, the operation of these provisions and the Government Agreement Act 1979 *(WA) ('*GA Act*') was settled in the state context. However, in 2016, the issue became important in the Native Title jurisdiction, requiring the Federal Court to examine State Agreement ratification. In 2021, in a minority decision, Edelman J of the High Court provided a different approach to interpreting the* GA Act *and ratification provisions. Applying this interpretation would significantly affect future decisions that examine this aspect of State Agreements. It would mean that some WA SCA precedents must be overruled, and some Federal Court decisions were wrong. This article examines the jurisprudence of the High Court, the WA SCA and the Federal Court discussing State Agreement ratification and considers the effect of applying Edelman J's interpretation in the future. Justice Edelman's approach could provide new avenues and arguments for Native Title holders and other litigants challenging rights granted pursuant to State Agreements.*

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I INTRODUCTION

For many years after the enactment of the *Government Agreement Act 1979* (WA) ('*GA Act*'), the question of whether the ratification provision of an Act authorising a government agreement with a third party (the 'authorising Act') conferred sufficient authority on the attached scheduled agreement to modify state laws seemed settled in Western Australia ('WA'). The authorising Act could ratify the scheduled agreement as contract or legislation — both types of ratification ensured the operation of the agreement. These ratified agreements, whether authorised as legislation or contract, are commonly referred to as 'State Agreements'. However, the interpretation of the scheduled agreements as contract or legislation became once again important in the Native Title context. In the Federal Court of Appeal ('FCA') Full Court decision of *State of Western Australia v Graham on behalf of the Ngadju People* ('*Ngadju*')[1] the key issue before the Court was the effect of the *Nickel Refinery (Western Mining Corporation Limited) Act 1968* (WA) ('*WMC*') authorising Act's ratification provisions in relation to the source of statutory authority to grant a mining lease. The question was whether the source of statutory authority for the grant of the mining lease arose from the *WMC* scheduled agreement or the *Mining Act 1904* (WA) ('*Mining Act 1904*').[2] If the agreement was ratified as a contract, then the source of authority was the *Mining Act 1904*; if the agreement was ratified as legislation, then the *WMC* agreement was the source of authority.[3]

Of particular interest in the *Ngadju* decision is the FCA's interpretation of the *Iron Ore (Mount Goldsworthy) Agreement Act 1964* (WA) ('*Goldsworthy*') authorising Act's ratification provisions applying *Brown (on behalf of the Ngarla People) v State of Western Australia* ('*Brown FCAFC*').[4] The Court distinguished the *Goldsworthy* ratification from the *WMC* ratification, stating that, in contrast to *WMC*, the

[1] *State of Western Australia v Graham on behalf of the Ngadju People* (2016) 330 ALR 534 ('*Ngadju*').
[2] Ibid [24]–[25].
[3] See below Part II for the explanation of contract and legislative State Agreement terms and the source of authority for a land or mineral grant.
[4] *Brown (on behalf of the Ngarla People) v Western Australia* (2012) 208 FCR 505 ('*Brown FCAFC*'). On a subsequent appeal to the High Court in *Western Australia v Brown* (2014) 253 CLR 507 ('*Brown HC*'), the issue of ratification was not discussed. Consequently, the Court in *Ngadju* followed the reasoning of the Federal Court in *Brown FCAFC.*

Goldsworthy scheduled agreement clause conferring the right to a mining lease provided statutory authority for the grant.

The Federal Court's interpretation in *Brown FCAFC* and *Ngadju* sits uneasily with the WA State Supreme Court of Appeal ('WA SCA') decisions of *Re Michael; Ex parte WMC Resources* ('*Re Michael*')[5] and *Hancock Prospecting Pty Ltd v BHP Minerals Pty Ltd* ('*Hancock*').[6] In *Re Michael,* Parker J determined that the ratification provisions, which were very similar to the *Goldsworthy* ratification provision as discussed in *Ngadju*, ratified the agreement terms as contract terms.[7] Notably in *Hancock,* the WA SCA interpreted the *Iron Ore (Mount Newman) Agreement Act 1964* (WA) ('*Newman'*) ratification, which is identical to the *Goldsworthy* ratification, as authorising the scheduled agreement as a contract.[8]

Justice Edelman recently called into question the veracity of the lower courts' interpretation of ratification provisions in his reasoning in the High Court of Australia decision of *Mineralogy Pty Ltd v Western Australia* ('*Mineralogy HC*').[9] His Honour stated that the WA SCA interpretation of s 3 of the *GA Act* in the *Re Michael* decision should be overruled, at least in part.[10] Justice Edelman's reasoning raises questions about WA SCA decisions following the *Re Michael* interpretation, particularly in relation to the *GA Act*, and the correctness of the *Ngadju* decision itself.

First, this article describes the operation of State Agreements and explains the *Ngadju* decision. Next, the various types of ratification provisions are examined. I then consider and compare the jurisprudence relating to State Agreement ratification and the *GA Act* s 3 in the WA SCA and the Federal Court and find that the reasoning diverges, before I examine Edelman J's alternative interpretation in *Mineralogy HC*. Lastly, I analyse the ramifications of overruling *Re Michael* and the application of Edelman J's interpretation of the *GA Act* s 3 in the future.

II How State Agreements Operate

The WA government uses State Agreements to facilitate major resource projects, particularly in remote areas that require the proponent to develop significant infrastructure. The statutory authorisation allows the agreement clauses to modify

[5] *Re Michael; Ex parte WMC Resources* [2003] WASCA 288 ('*Re Michael*').
[6] *Hancock Prospecting Pty Ltd v BHP Minerals Pty Ltd* [2003] WASCA 259 ('*Hancock*').
[7] *Re Michael* (n 5) [21].
[8] All early 1960s WA State Agreements have this type of ratification: see also *Iron Ore (Hamersley Range) Agreement Act 1963* (WA) ('*Hamersley*').
[9] *Mineralogy Pty Ltd v Western Australia* (2021) 274 CLR 219 ('*Mineralogy HC*').
[10] Ibid [136].

other state Acts or laws that may otherwise regulate and restrict large-scale mining projects, such as the size and duration of a mining lease, the construction of roads and railways, or rights to take water for mining purposes.[11] Important to the operation of State Agreements (and this discussion) is the source of the authority to dispose of land or minerals. The disposal of Crown land and minerals requires statutory authority because the United Kingdom ('UK') Parliament vested those rights by statute in the State's colonial legislature.[12] The UK Parliament vested authority in the WA Parliament as follows:

> The entire management and control of the waste lands of the Crown in the colony of Western Australia, and of the proceeds of sale, letting, and disposal thereof, including all royalties, mines and minerals, shall be vested in the legislature of that colony.[13]

The conferral of power from the UK legislature to the WA colony's legislature means statutory authority (legislation) is required to dispose of the State's land or minerals; in other words, it is not within the power of the executive to dispose of lands or minerals unless that authority is conferred by statute. Consequently, there must be a legislative source of power that authorises the grant of mineral rights or land, from either the mining legislation or the State Agreement depending on whether the agreement is ratified as a contract or legislation. For example, the *Mining Act 1978* (WA) ('*Mining Act 1978*') confers the authority on the executive to dispose of minerals by granting a mining lease.

A State Agreement has two parts: the 'authorising Act' that ratifies the agreement, and the agreement itself, which is scheduled to the authorising Act. After Parliament enacts the State Agreement, the authorising Act and the scheduled agreement are publicly available on the Parliament website.[14] The development proposal fleshes out the project in detail for approval by the Minister for Jobs, Tourism, Science and Innovation WA ('JTSI').[15] This document is part of the State Agreement,[16] but is not

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[11] Natalie Brown, 'Pilbara Iron Ore State Agreements and Mine Closure Regulation' (2023) 42(2) *Australian Resources and Energy Law Journal* 44, 46 [2] ('Brown 2023').
[12] *Western Australia Constitution Act 1890* (UK, 53 & 54 Vict c.26) s 3 ('*WA Constitution Act*'). See *Nicholas v Western Australia* [1972] WAR 168, 172, 174 ('*Nicholas*').
[13] *WA Constitution Act* (n 12) s 3.
[14] Department of Justice and Parliamentary Counsel's Office (WA), *Western Australian Legislation* (Web Page) <https://www.legislation.wa.gov.au/>.
[15] The executive government department, currently the Department of Jobs, Tourism, Science and Innovation ('JTSI'), has had many iterations such as the Department of State Development, and the Department of Industry Development. For reading ease, this article refers to the executive department as JTSI.
[16] *Government Agreements Act 1979* (WA) s 2 ('*GA Act*').

available to the public or Parliament.[17] The development proposal is an important document that details and confirms the parties' rights and obligations.[18] The main focus of this discussion is the effect of the authorising Act's ratification on the scheduled agreement provisions. I will touch on future research about the development proposal in the closing Part because the transparency of State Agreements and access to documents is a contentious issue.[19]

The authorising Act is sometimes amended to ratify subsequent additional scheduled agreements ('supplementary agreements'). Supplementary agreements can amend or modify the principal agreement and confer or impose additional rights or obligations, or enable entirely separate new projects. Like the primary agreement, the supplementary agreement is ratified by the authorising Act. For example, the *WMC* State Agreement has two supplementary agreements ratified in 1970 and 1974 respectively.[20]

The authorising Act's ratification provision allows the terms of the agreement to modify other state laws. The ratification provision may authorise the scheduled agreement as contract or legislation. The accepted position in WA, post the enactment of the *GA Act* and the decision of *Re Michael*, is that the scheduled agreement clauses, regardless of whether operating as contract or legislation, have the capacity to modify state Acts and laws.[21] The reasoning is as follows. The phrasing of the ratification provision will determine whether the scheduled agreement clause has the force of contract or statute. A statutory scheduled

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[17] Brown 2023 (n 11) 46 [2.1]; Natalie Brown, 'Regulation of Mine Closure Planning and Pilbara Agreements Case Study', *CRC Transformations in Mining Economies* (Project 1.3, May 2022) 7, 36 </https://crctime.com.au/macwp/wp-content/uploads/2022/06/Project-1.3-Report_Pilbara-Agreements-Case-Study-1.pdf> ('Brown CRC TiME').

[18] Ibid.

[19] Natalie Brown and Alex Gardner, 'Still Waters Run Deep: The 1963–64 Pilbara Iron Ore State Agreements and Rights to Mine Dewatering' (2016) 35(1) *Australian Resources and Energy Law Journal* 55, 58, 74; Natalie Brown, 'Still Waters Run Deep, Pilbara Iron Ore State Agreement Rights to Mine Dewatering and Water Law Reform' (PhD Thesis, University of Western Australia, 2018) 296–8 ('Brown 2018'); Office of the Auditor General (WA), *Ensuring Compliance with Conditions on Mining* (Report 8, September 2011) 7, 9, 21; Office of the Auditor General (WA), *Ensuring Compliance with Conditions on Mining: Follow-up* (Report 20, November 2014) 8, 10, 18–19; Office of the Auditor General (WA), *Compliance with Mining Conditions* (Performance Audit, Report 11 2022–2023, 20 December 2022) 15. See especially Standing Committee on Estimates and Financial Operations, Parliament of Western Australia, *Provision of Information to Parliament* (Report No 62, 19 May 2016).

[20] *Nickel Refinery (Western Mining Corporation Limited) Act 1968* (WA) schs 2, 3 ('*WMC*'). The authorising Act is amended to include a provision that ratifies the supplementary agreement. For example, the *WMC* sch 3 agreement is ratified by the *WMC* authorising Act s 3B (inserted by *Nickel Refinery (Western Mining Corporation Limited) Agreement Act Amendment Act 1974* (WA) s 3).

[21] *GA Act* (n 16) s 3. However, note *Re Michael* (n 5), holding that a term operating as contract may not modify subsequent legislation as intended by the parties because it lacks statutory force: see [45], [53]–[54].

agreement clause has statutory force so it can authorise the grant of leases or licences for lands or minerals. In contrast, a contract scheduled agreement clause requires the executive decision-maker who has authority under the relevant statute to grant a licence or lease 'as of right' in accordance with the agreement.[22] For example, a contract State Agreement clause provides that the proponent will be granted a mining lease grant of 300 square kilometres. The *Mining Act 1978*'s application provision provides that the Act applies consistently with State Agreement terms.[23] The State Agreement clause in conjunction with the application provision requires the Minister for Mines to exercise their authority and grant a lease in compliance with the clause. The source of the authority is the *Mining Act 1978*, but the State Agreement clause requires the Minister for Mines to grant the lease 'as a right' consistent with the clause. This distinction between the operation of contractual versus legislative State Agreement clauses was pivotal to the *Ngadju* decision.

III THE *NGADJU* DECISION: INTRODUCTION

In the *Ngadju* decision the central issue was whether the scheduled agreement or the *Mining Act 1904* was the source of the authority to grant the mining lease. The important question was whether the additional rights conferred by the *Mining Act 1978* accrued when that Act commenced in 1982, thus avoiding the future act provisions in the *Native Title Act 1993* (Cth) ('*Native Title Act*').[24] Consequently, the interpretation of the ratification provision in the authorising Act and its effect on scheduled agreement was the deciding factor.[25]

The Federal Court reasoned that if the *WMC* scheduled agreement clause permitting the mining lease had been ratified as statute the agreement itself would authorise the grant of the mining lease, but if the clause was ratified as contract the *Mining Act 1904* authorised the grant of the mining lease in accordance with the *WMC* agreement.[26] If the *WMC* agreement was the source of the authority, the proponent

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[22] Brown CRC TiME (n 17) 14.

[23] *Mining Act 1978* (WA) ('*Mining Act 1978*') s 5. The application provision also preserves State Agreement rights granted under the *Mining Act 1904* (WA) ('*Mining Act 1904*').

[24] *Native Title Act 1993* (Cth) ss 223, 24IB, 24IC ('*Native Title Act*'); *Ngadju* (n 1) [61], [107]–[112], [116], [128], [130], [137], [147], [150] regarding s 26DI, [152].

[25] *Ngadju* (n 1) [25].

[26] The *Mining Act 1978* (n 23) s 5(2) preserves State Agreement rights under the *Mining Act 1904* (n 23). The UK Parliament vested Western Australian State waste land and minerals in the legislature, which means statutory authority is required to dispose of the State's land or minerals: *WA Constitution Act* (n 12) s 3; see *Nicholas* (n 12) 172, 174. The importance of compliance with a statutory regime disposing of the State's land and resources is discussed in *Forrest & Forrest v Wilson* (2017) 262 CLR 510, [7], [64] ('*Forrest*'), citing *Nicholas* (n 12).

mining company ('proponent')[27] was constrained by the terms of the agreement. If the *Mining Act 1904* was the source, then the proponent could accumulate the additional rights available under the *Mining Act 1978* transition provisions.[28] The Court decided the leases in question were granted as a matter of contract pursuant to the *WMC* agreement, but the *Mining Act 1904* provided the necessary legislative authority.[29]

The *Mining Act 1904* separated resources such as gold and coal, and required minerals to be specified for each lease.[30] It also regulated the size and duration (two 21-year terms or 42 years) of the mineral lease.[31] The *WMC* agreement modified the *Mining Act 1904* by requiring the grant of a mining lease for nickel, copper, lead, cobalt, silver, zinc, and molybdenum, and by allowing a larger lease area and a right to apply for successive lease terms beyond the 42 years prescribed by that Act.[32]

The *Mining Act 1978* repealed the *Mining Act 1904*, but preserved the rights conferred by State Agreements by providing that any such mining tenements or rights of occupancy granted pursuant to a State Agreement continued 'as though the [the *Mining Act 1904*] had not been repealed'.[33]

Distinct from the *Mining Act 1904*, the *Mining Act 1978* did not distinguish between gold, coal or other minerals, or require the mining tenement to specify the mineral rights.[34] The proponent argued that because they held a current mining lease under the *Mining Act 1904* they had a priority right to apply for the lease under the *Mining Act 1978* transitional provisions,[35] and after transition the lease would be subject to the provisions of that Act, not the terms of the *WMC* agreement. Therefore, the mining lease grant could include additional minerals because the transitioned leases were now subject to the *Mining Act 1978*, and those leases were not subject to the limitation on minerals prescribed by the *WMC* agreement terms.[36] The Ngadju

[27] The proponents in this case were St Ives Goldmining Company Pty Ltd and BHP Billiton Nickel West Pty Ltd.
[28] *Ngadju* (n 1) [62]–[63], [74]–[79], [81]–[82]; *Mining Act 1978* (n 23) s 5(2). The section provides 'notwithstanding anything in schedule 2', sch 2 being the transitional provisions.
[29] *Ngadju* (n 1) [45].
[30] *Mining Act 1904* (n 23) s 51.
[31] Ibid ss 50, 53.
[32] *WMC* (n 20) sch 1 cl 5(3); see also the definitions of 'mining lease' and 'mining area' in sch 1 cl 1. See also *Ngadju* (n 1) [92].
[33] *Mining Act 1978* (n 23) s 5(2).
[34] Ibid s 110: the Minister retains the discretion in the public interest to restrict the lease rights and specify minerals.
[35] *Mining Act 1978* (n 23) sch 2 cl 2(2).
[36] *Ngadju* (n 1) [81]–[82], [91].

people argued that the mining leases continued to be subject to the mineral constraints imposed by the *WMC* agreement.

The Federal Court decided that the source of the power to grant the *WMC* lease was under the *Mining Act 1904* not the agreement itself, so transitioning the lease to the *Mining Act 1978* provided additional and cumulative rights to the *WMC* agreement proponents.[37] The Court stated as follows:

> Nevertheless, it seems to be common ground that the leases granted under the 1904 Act and subject to the [*WMC*] 1968 Agreement, as initially granted at least, were restricted to the mining of minerals consistent with those specified in the 1968 Agreement. On that basis, when the [*Mining Act*] 1978 Act came into force, cl 2(1) of the Second Schedule operated to remove that restriction.[38]

The Court stated that 'the leases were to be granted, as a matter of contract, pursuant to the contractual provisions of the [*WMC* scheduled agreement] but otherwise, as a matter of power, under and subject to the 1904 Act'.[39] In other words, if the clause conferring the mining lease had statutory force, then the *WMC* agreement conferred the lease on its own authority and the agreement terms would confine the mining lease rights to the specified minerals. Conversely, if the term was contract, the authority to grant the lease was an executive action under the *Mining Act 1904* in accordance with the *WMC* agreement terms. The Court decided the *WMC* authorising Act ratified the agreement as a contract. The *WMC* agreement was understood to have required the executive decision-maker (the Minister for Mines) to grant the mining lease under the *Mining Act 1904*. Therefore, the *Mining Act 1904* was the source of the legislative authority for the grant.

The *Mining Act 1904* was repealed by, and was subject to, the *Mining Act 1978* that allowed the proponent to transition the leases under the *Mining Act 1904* to the *Mining Act 1978.* Therefore, the *Mining Act 1978* applied to the *WMC* transitioned mining leases and the mineral restriction did not apply, providing the proponent with 'additional rights' to mine any minerals.

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[37] Ibid [92].
[38] Ibid [90].
[39] *Ngadju* (n 1) [45]. See also *WMC* agreement (n 20) sch 3 cl 3(2)(b)(i).

IV RATIFYING A SCHEDULED AGREEMENT: LEGISLATION OR CONTRACT

The WA Parliament has passed authorising Acts that ratify State Agreements in a variety of ways. To understand the divergent interpretation of ratification provisions in the WA SCA and the Federal Court, this Part explains and defines the distinct types of ratification phrasing, and the relevant sections of the *GA Act*.

What words of ratification determine the operation of the scheduled agreement clauses as legislation or contract? The courts agree that a ratification provision that provides that the agreement is 'as if enacted in this Act' gives the clauses of the agreement statutory force ('legislative ratification').[40] It is also not contentious that ratification that simply states 'this agreement is authorised' or 'ratified' ('bare approval') is a contract and will not validly modify state laws.[41] Post-1980, the ratification phrase commonly used in WA State Agreements states that without limiting the *GA Act* 'the agreement takes effect notwithstanding any other Act or Law' ('takes effect' ratification). This form of ratification was adopted from the *GA Act* s 3, which provides as follows:

> **3 Operation and effect of Government agreements**
>
> For the removal of doubt, it is hereby expressly declared that —
>
> (a) each provision of a Government agreement shall operate and take effect, and shall be deemed to have operated and taken effect from its inception, according to its terms notwithstanding any other Act or law; and
>
> (b) any purported modification of any other Act or law contained, or provided for, in such a provision shall operate and take effect so as to modify that other Act or law for the purposes of the Government agreement, and shall be deemed to have so operated and taken effect from its inception, according to its terms notwithstanding any other Act or law.

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[40] Eg *Iron Ore (McCamey's Monster) Agreement Authorisation Act 1972* (WA) s 3 ('*McCamey's*'); *Mineralogy HC* (n 9) [127]; *Brown FCAFC* (n 4) [128]; *Re Michael* (n 5) [21]. See also *Commonwealth Aluminium Corporation Ltd v Attorney-General* [1976] Qd R 231, 234; *West Lakes Ltd v South Australia* (1980) 25 SASR 389, 402 ('*West Lakes*').

[41] *Mineralogy HC* (n 9) [124]; *Sankey v Whitlam* (1978) 142 CLR 1, 31, 76–77 ('*Sankey*'); *Re Michael* (n 5) [22], discussing *Sankey; Margetts v Campbell-Foulkes* [1979] WASC 250 ('*Margetts*'). See also *Placer Development Ltd v Commonwealth* (1969) 121 CLR 353, 357, 368; *Davis & Sons Ltd v Taff Vale Railway Co* [1895] AC 542, 552–3. For full discussion of *Sankey* see Part V(B) below.

WA jurisprudence has consistently decided that 'takes effect' ratification in the authorising Act, or the *GA Act* s 3, authorises the agreement as a contract, albeit a contract with clauses that can validly modify state laws.[42]

The ratification provision analysed in this article is commonly used in State Agreements ratified in the 1960s ('1960s ratification'). It is in the interpretation of the 1960s ratification where we see a divergence between the reasoning of the WA SCA and the Federal Court. The WA SCA decided that 1960s ratification authorises the agreement as a contract. In contrast, the Federal Court decided that 1960s ratification provides statutory force to at least some of the agreement terms.

The ratification provision of the 1960s *Goldsworthy* agreement is used as an example because the High Court and the Federal Court have considered this State Agreement. Section 4 of the *Goldsworthy* authorising Act ratifies the scheduled agreement as follows:

> **4 Agreement approved and provisions to take effect**
>
> (1) The Agreement is approved.
>
> (2) *Notwithstanding any other Act or law*, and without limiting the effect of subsection (1), —
>
> (a) the Joint Venturers shall be permitted to enter upon the lands mentioned in paragraph (c) of clause 2 of the Agreement, to the extent, and for the purposes, by that paragraph provided; and
>
> (b) the provision of *subclause (2) of clause 3 of the Agreement shall take effect*. [emphasis added]

The ratification phrase used in s 4(1), 'this agreement is approved', is a 'bare approval'.[43] Our focus is on s 4(2), which uses the same operational phrases as the 'takes effect' ratification. Section 4(2) states that 'not withstanding any Act or law' cl 3(2) of the scheduled agreement 'shall take effect' — effectively the same wording as the *GA Act* s 3, or post-1980s, 'takes effect' ratification.

[42] *Re Michael* (n 5) [28]–[30]; *Hancock* (n 6) [67], [71]–[75]. Cases confirming *Re Michael* and *Hancock* include: *Commissioner of State Revenue v Oz Minerals Ltd* [2013] WASCA 239; (2013) 46 WAR 156, [179] ('*Oz Minerals*'); *Kidd v Western Australia* [2014] WASC 99, [111]–[112], [120] ('*Kidd*'); *Mineralogy Pty Ltd v Western Australia* [2005] WASCA 69, [13]–[14] ('*Mineralogy 2005*').

[43] This type of approval received retrospective statutory support from the *GA Act* (n 16) s 3 in 1979.

Importantly, cl 3(2) is part of the scheduled agreement; it is not in the authorising Act. Clause 3(2) specifies other clauses in the agreement 'shall take effect as though …enacted by the ratifying Act'.[44] Because cl 3(2) purports to legislate I shall refer to this type of clause as an 'enacting clause'. However, cl 3(2) is not a section of the authorising Act, it is a clause of the scheduled agreement. Therefore, in my opinion, the capacity of cl 3(2) to designate the other agreement clauses as legislation is dependent on the effect given to it by the authorising Act's 'takes effect' ratification provision.

The 1960s ratification has 'takes effect' ratification in the authorising Act, with an 'enacting clause' in the scheduled agreement. The Federal Court and the WA SCA diverge when interpreting the 1960s ratification. The WA courts find these agreements are contracts, but the Federal Court's view is that the 'enacting clause' distinguishes the 1960s ratification from other agreements that have 'takes effect' ratification or incorporate or rely on the *GA Act* s 3 for support.

This raises the question: can an 'enacting clause' in a scheduled agreement authorise other clauses in the scheduled agreement to operate as legislation? Or must the phrasing of the ratification provision in the authorising Act confer that authority by providing that the 'enacting clause' is legislation? In my opinion, if an 'enacting clause' is ratified as contract it cannot by itself provide legislative force to the clauses it designates as 'enacted by the ratifying Act'. As a contract term, an 'enacting clause' cannot effectively insert additional sections into the authorising Act.[45] The 'enacting clause' (cl 3(2)) can only have that operation if the authorising Act has ratified the clause as legislation. So, this leads to a crucial question: what is the operation of 'takes effect' ratification with an 'enacting clause'? It is on this point the decisions of the lower courts are not easily reconciled.

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[44] *Iron Ore (Mount Goldsworthy) Agreement Act 1964* (WA) ('*Goldsworthy')* sch 1 cl 3(2) specifies that cls 8(2)(a), 9(3)(f)–(i), 9(3)(k), 10(m), 21, 23, 24, and 27 operate as legislation by providing as follows:
'3. Ratification and operation
(2) If the Bill to ratify this Agreement is passed as an Act before the date or later date if any referred to in sub-clause (1) of this clause the following provisions of this clause shall notwithstanding the provisions of any Act or law thereupon operate and take effect namely —
(a) the provisions of clause 8 the proviso to paragraph (a) of subclause (2) of clause 9 subclause (3) of clause 9 paragraphs (a) (f) (g) (h) (i) (k) and (m) of clause 10 and clauses 21, 23, 24, and 27 *shall take effect as though the same had been brought into force and had been enacted by the Ratifying Act*' (emphasis added).

[45] On this point see *Re Michael* (n 5) [52]–[54]. Justice Parker found the State Agreement contract term could not affect the operation of legislation, but the clause could have had effect if it had been ratified as legislation.

V THE CASE LAW INTERPRETING RATIFICATION PROVISIONS

To understand the *Ngadju* decision, and the divergence between the WA SCA and Federal Court jurisprudence, it is useful to review the cases and historical context of State Agreement decisions chronologically. Between 1973 and 2024, the High Court, the Federal Court, and the WA SCA have expressed inconsistent views on how to interpret 'takes effect' ratification with an 'enacting clause' and the *GA Act* s 3.

A *The* Dredging Lease Case *1973*

In 1973, Mason J considered the question regarding the validity of the *Goldsworthy* scheduled agreement clauses to grant a seabed lease by modifying the *Land Act 1933* (WA) s 116 in the decision of *Goldsworthy Mining Ltd v Commissioner for Taxation (Cth)* (commonly known as the '*Dredging Lease Case*').[46] Importantly, this decision occurred prior to the enactment of the *GA Act* in 1979.

Justice Mason proceeded on the basis that the *Goldsworthy* agreement had the authority to confer the right to the seabed lease because the *Goldsworthy* 1960s ratification provision in conjunction with the 'enacting clause' in the scheduled agreement provided statutory authority to cl 8 that modified the *Land Act 1933*.[47]

If Mason J had made this decision after the commencement of the *GA Act*, he may have been more definitive about the operation of 'takes effect' ratification because it would have applied to all the *Goldsworthy* scheduled agreement clauses. Arguably, if 'takes effect' ratification provides statutory force, the 'enacting clause', while not invalid, is redundant after 1979 because the *GA Act* s 3 would also provide statutory force to the *Goldsworthy* agreement cl 8 that modified the *Land Act 1933*.

In 1977, Mason J considered a ratified Commonwealth government contract in relation to airline permits.[48] However, a definitive answer to the question of what phrasing in State Agreement ratification provisions was sufficient to authorise the scheduled agreement clauses to modify other state Acts or laws remained.

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[46] *Goldsworthy Mining Ltd v Commissioner for Taxation (Cth)* (1973) 128 CLR 199, 205–206 ('*Dredging Lease Case*'); *Goldsworthy* (n 44) sch 1 cl 8(3)(b).

[47] *Dredging Lease Case* (n 46) 205–6; *Goldsworthy* (n 44) s 4(2), sch 1 cls 3(2)(a), 8(3)(b). Justice Mason also noted that cl 9(4), which is not nominated in the 'enacting clause', detailed the precise terms of the lease, but cl 8(2) provided the primary obligation: see *Dredging Lease Case* (n 46) 208.

[48] Mason J, in the case of *Ansett Transport Industries Pty Ltd v Commonwealth*, was of the opinion that in some circumstances all forms of State Agreement ratification provisions could validly authorise the scheduled agreement clauses to demise Crown land, but other members of the Court did not endorse this view: *Ansett Transport Industries Pty Ltd v Commonwealth* (1977) 139 CLR 54, 76–8. For discussion see Leigh Warnick, 'State Agreements: The Legal Effect of Statutory Endorsement' (1982) 4(1) *Australian Mining and Petroleum Law Journal* 1, 44, 46.

B Sankey v Whitlam *and* Margetts v Campbell-Foulkes *1978–1979*

In 1978, the High Court, in the decision of *Sankey v Whitlam*,[49] raised serious doubts about the capacity of 'bare approval' ratification provisions, which merely stated the scheduled agreement was 'approved' or 'ratified', to modify other state Acts.[50] In WA, the issue came to a head in 1979,[51] when environmental protestors disrupted work at the Wagerup refinery. The 'bare approval' ratification provision of the State Agreement authorising the refinery provided the scheduled agreement was 'hereby ratified'.[52] The protestors appealed their conviction under the *Police Act 1892* (WA) for obstructing an activity carried out pursuant to state law.[53] The appellants argued that the State Agreement was not a state law.[54] The WA SCA decided the case on an alternative point, but the case exposed the potential deficiency in State Agreements' authority to modify or vary other Acts or laws for the purposes of the agreement. The WA Government responded decisively to the dilemma by passing the *GA Act* in 1979. The Act rectified potentially invalid executive government actions and illegal proponent actions, carried out under the purported authority of the State Agreements, by retrospectively shoring up State Agreement ratification provisions.[55] The *GA Act* phrasing was adopted by post-1980s principal and supplementary agreements that use the 'take effect' ratification without limiting the operation of the *GA Act.* For example, '[w]ithout limiting or otherwise affecting the application of the *Government Agreements Act 1979*, the Agreement shall operate and take effect notwithstanding any other Act or law'.[56] After the enactment of the *GA Act,* the debate about the validity of State Agreements appeared settled, at least in WA.

C Western Australia v Ward *2002*

For the purposes of discussing the 1960s ratification, the next relevant case occurred two decades later when the High Court considered the grant of mining leases in *Western Australia v Ward* ('*Ward*').[57] In the case of *Ward*, the WA State Agreement 1960s ratification (of which the *Goldsworthy* agreement is our example) received some relevant obiter from the High Court. In *Ward*, the joint judgment, citing the

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[49] *Sankey* (n 41).
[50] Ibid 89–90.
[51] *Margetts* (n 41).
[52] *Alumina Refinery (Wagerup) Agreement and Acts Amendment Act 1978* (WA) s 2.
[53] *Police Act 1892* (WA) s 67(4): see 1978 reprint.
[54] *Margetts* (n 41).
[55] *GA Act* (n 16) s 3.
[56] *Iron Ore (Hope Downs) Agreement Act 1992* (WA) s 4(3).
[57] *Western Australia v Ward* (2002) 213 CLR 1 ('*Ward*').

Dredging Lease Case, refers to the 1960s State Agreements to distinguish the Ord River Irrigation project.

> The Project developed in a piecemeal fashion. It did not proceed by way of implementation of an agreement between the State and a [corporation]…for the development and operation of infrastructure, being an agreement to which statutory force was given by the Parliament of the State. Statutes such as the *Iron Ore (Hamersley Range) Agreement Act 1963* (WA), the *Iron Ore (Mount Newman) Agreement Act 1964* (WA) and the *Iron Ore (Mount Goldsworthy) Agreement Act 1964* (WA) gave statutory force to agreements of this description and specifically modified a range of general legislation so as to vest the land and mineral interests necessary for the particular project. In that sense, and in contrast to the development at the Ord River, expressions such as the "Mount Newman Project", the "Mount Goldsworthy Project" and the "Hamersley Project" had a defined statutory content, beyond the identification of a particular geographical area or particular economic activities conducted there.[58]

Unfortunately, the High Court did not need to extrapolate further on the operation of the 1960s agreement ratification provisions because the relevant State Agreement, the *Diamond (Argyle Diamond Mines Joint Venture) Agreement Act 1981* (WA), clearly differentiates its legislative terms from its contract clauses — the legislative terms are in the Act and contract clauses are in the schedule.[59] The Court appears to endorse the view of Mason J by describing the 1960s State Agreement Acts (*Goldsworthy*, *Hamersley*, and *Newman*) as giving 'statutory force' to the agreements, but does not make a definitive statement about the operation of 'takes effect' ratification or differentiate between the general agreement terms and those specified by the 'enacting clause'.

Numerous other cases before and after the *Ward* decision refer to the *Dredging Lease Case*, but not to interpret 1960s State Agreement ratification provisions.[60]

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[58] *Ward* (n 57) [144], Gleeson CJ, Gaudron, Gummow, and Hayne JJ. See *Ward* at n 251, citing the *Dredging Lease Case* (n 46) 205–7, and *Goldsworthy Mining Ltd v Commissioner for Taxation (Cth)* (1975) 132 CLR 463. The other references to the *Dredging Lease Case* in *Ward* discuss Mason J's interpretation of the reservations on the leases: see *Ward* at nn 625–627, 663, 878, 1013, 1048 and 1065. Note the Court also cites *Wik Peoples v Queensland* (1996) 187 CLR 1, 251–7, discussing the *Commonwealth Aluminium Corporation Pty Limited Agreement Act 1957* (Qld) s 3, which ratified the agreement as legislation. The Ord River Irrigation project should not be confused with the Ord River hydro-electricity project that is the subject of a State Agreement: *Ord River Hydro Energy Project Agreement Act 1994* (WA).

[59] *Diamond (Argyle Diamond Mines Joint Venture) Agreement Act 1981* (WA) ss 1–29.

[60] The case is usually discussed or cited in the context of leases (exclusive possession, covenants or reversions), the meaning of 'land', or taxes. See, in chronological order, *West Coast Council v Coverdale* [2014] TASSC 42, [16], [20], citing *Risk v Northern Territory* (2000) 105 FCR 109 [34]; *Goodwin v*

D Re Michael *2003 and Subsequent WA Cases*

In WA, the enactment of the *GA Act* in 1979 resolved any issues about the legal capacity of State Agreements to modify other legislation. However, there was speculation about the *GA Act*'s potential conferral of statutory status on the scheduled agreements. In 2003, the distinction between contract and statutory ratification and the operation of the *GA Act* s 3 was confirmed in the State jurisdiction in the case of *Re Michael*.

In the case of *Re Michael,* the WA SCA ruled on the effect of the *GA Act* s 3, and the 'takes effect' ratification provision in the *Goldfields Gas Pipeline Agreement Act 1994* (WA) s 4 ('*Pipeline Agreement Act*').[61] The Court decided that the *GA Act* s 3 and the *Pipeline Agreement Act* ratification s 4, separately or in combination, did not give the agreement clauses the force of law — the clauses were contract terms.[62] In the same year, one month after the *Re Michael* decision, in the case of *Hancock*, the Court construed the 1960s *Newman* scheduled agreement as a contract.[63] Importantly for our purposes, the *Newman* agreement has the 1960s ratification identical to the *Goldsworthy* ratification, that is, 'takes effect' ratification with an 'enacting clause'.[64]

Western Australian Sports Centre Trust [2014] WASC 138, [50]; *Re Pescott and Inspector-General in Bankruptcy* (2013) 137 ALD 128, [129] n 143; *Banjima People v State of Western Australia (No 2)* (2013) 305 ALR 1, [1046], [1059]; *Re Willmott Forests Ltd (receivers and managers appointed) (in liq)* (2012) 36 VR 472 [80] n 56; *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* (2009) 239 CLR 27, [7] n 18; *Chief Commissioner of State Revenue v Pacific National (ACT) Ltd* (2007) 70 NSWLR 544, [75], citing *Risk v Northern Territory of Australia* (2002) 210 CLR 392, [31]–[32] (Gleeson CJ, Gaudron, Kirby, and Hayne JJ); *L & T (Sales) Pty Ltd v Chief Commissioner of State Revenue* (2007) 67 ATR 569, [30]–[31]; *Tolhurst Druce & Emmerson (a firm) v Maryvell Investments Pty Ltd (in liq)* (2007) VSC 271, [141] n 1; *Nashvying Pty Ltd v Giacomi* [2007] QSC 257, [23]; *Trust Co of Australia Ltd v Chief Commissioner of State Revenue* (2006) 66 NSWLR 551, [38]; *Equuscorp Pty Ltd v Belperio* [2006] VSC 14, [204]–[206]; *Gumana v Northern Territory of Australia* (2005) 141 FCR 457, [69]; *Reef Networks Pty Ltd v Deputy Commissioner of Taxation* [2003] FCA 1552, [23], [25]; *Wilson v Anderson* (2002) 213 CLR 401, [194] n 192; *Risk v Northern Territory of Australia* (2002) 210 CLR 392, [40], [42], [81], [120]; *Byrnes v Jokona Pty Ltd* [2002] FCA 41, [60]; *Bufalo Corp Pty Ltd v Leone* [2001] VSC 505, [45]–[46]; *City of Rockingham v PMR Quarries Pty Ltd* [2001] WASCA 317, [44], [47], [56], [68]–[69]; *Risk v Northern Territory of Australia* (2000) 180 ALR 705, [33]–[34], [44], [46]–[48], [52], [61]; *Hawkesbury Nominees Pty Ltd v Battik Pty Ltd* [2000] FCA 185, [35]–[36]; *Wik Peoples v Queensland* (1996) 187 CLR 1, 37, 74, 78, 117, 152 nn 564–565, 728, 887; *Commonwealth v Newcrest Mining (WA) Ltd* (1995) 130 ALR 193, 234; *Lewis v Bell* (1985) 1 NSWLR 731, 734; *Dampier Mining Co Ltd v Federal Commissioner of Taxation* (1981) 35 ALR 335, 337; *Dampier Mining Co Ltd v Federal Commissioner of Taxation* (1979) 27 ALR 579, 584–586; *ICI Alkali (Australia) Pty Ltd (in vol liq) v Federal Commissioner of Taxation* (1976) 11 ALR 324, 396.

[61] *Re Michael* (n 5).

[62] Ibid [28]–[30].

[63] *Hancock* (n 6) [67], [71]–[75], considering *Iron Ore (Mount Newman) Agreement Act 1964* (WA) ('*Newman*').

[64] In *Hancock* (n 6), the Court did not directly apply *Re Michael* (n 5) but did find that both the *GA Act* (n 16) and the *Newman* agreement (n 63) ratification did not provide statutory force to the scheduled agreement, and contract interpretation applied [64]–[67]. The agreement was interpreted as a

The WA SCA and the WA Supreme Court have followed and approved the precedents of *Re Michael*,[65] and *Hancock,*[66] in subsequent decisions that required the interpretation of State Agreement ratification.[67]

The WA state courts have consistently decided that the post-1980 'takes effect' ratification, the *GA Act* s 3, and the *Goldsworthy* or 1960s 'takes effect' ratification with an 'enacting clause', do not ratify the scheduled agreement (or specific clauses of the agreement) as legislation. Consequently, in the State jurisdiction, only 'legislative ratification' — when the authorising Act states the scheduled agreement takes effect 'as though enacted in this Act' — provides statutory force to the scheduled agreement.[68] Notably, the decisions of *Re Michael* and *Hancock* do not refer to the *Dredging Lease Case* or the obiter in *Ward*. So, should the WA SCA have considered *Ward* and the *Dredging Lease Case* when deciding the operation of the *GA Act* s 3,[69] and the *Pipeline Agreement Act's* 'takes effect' ratification provision, or, at least, the *Newman* agreement 1960s ratification as considered in *Hancock*?

E *The Federal Court Cases of* Brown *2012 and* Ngadju *2016*

In contrast to the State decisions of *Re Michael* and *Hancock*, the FCA Full Court considered the *Dredging Lease Case* decision in the case of *Brown FCAFC*,[70] and distinguished that case in *Ngadju*. In the later appeal of the *Brown FCAFC* decision to the High Court the 1960s ratification was not discussed.[71] So, when deciding *Ngadju,* the Federal Court followed the interpretation in *Brown FCAFC.* In 2012, in the case of *Brown FCAFC,* the Federal Court deliberated on the *Goldsworthy* agreement in the Native Title rights context, and discussed the interpretation of the *Goldsworthy* ratification provision in the *Dredging Lease Case*. In 2016, in the case of *Ngadju*, the Court applied *Brown FCAFC* to distinguish the *WMC* agreement ratification from the *Goldsworthy* agreement 1960s ratification.

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contract, according to the rules of contract. The Court did not differentiate clauses nominated by the enacting clause (sch 1 cls 9(2), 9(3)) as having statutory force, or comment that the agreement had both contract and legislative terms. One of the relevant clauses discussed was cl 9(2), nominated by the enacting clause as 'enacted', see *Newman* sch 1 cl 3(2)(a). However, the whole agreement was interpreted as a contract.

[65] *Oz Minerals* (n 42) [179]; *Kidd* (n 42) [111]–[112]. See also *Ngadju* (n 1) [31]–[35].

[66] *Kidd* (n 42) [120]; *Mineralogy 2005* (n 42) [13]–[14].

[67] Ibid.

[68] See for example, *Re Michael* (n 5) [21], citing the *McCamey's* agreement (n 40) s 3.

[69] Note the contrary opinion of Heenan J discussed at *Re Michael* (n 5) [68], referring to *Southern Cross Pipelines Australia Pty Ltd & Ors v Kenneth Comninos Michael Western Australian Independent Gas Pipelines Access Regulator & Anor* [2002] WASC 149 [29]–[30]. Heenan J decided the issues on the well-established principle that a present parliament cannot bind a future parliament's legislative powers (at [56], also discussed in *Re Michael* (n 5) [45]–[47]).

[70] *Brown FCAFC* (n 4).

[71] *Brown HC* (n 4).

In the *Brown FCAFC* decision, the operation of the *Goldsworthy* scheduled agreement terms as legislation or contract was not a deciding factor. The issue was whether the *Goldsworthy* agreement mining leases conferred the right of exclusive possession and,[72] if the mining leases did not, were the competing rights of the proponent and the Native Title claimants inconsistent? In this context, the operation of the scheduled agreement clauses as legislation or contract was not pivotal to the proponents' State Agreement rights. The substantive question was the nature of the rights conferred by the leases, in particular, the proponents right to exclusive possession, not the source of the authority to grant the mining lease.[73] Accordingly, in the subsequent appeal to the High Court, the Court refers to the *Dredging Lease Case* in relation to the nature of lease rights, but does not discuss the *Goldsworthy* authorising Act's ratification provision.[74]

In *Brown FCAFC,* Greenwood J, under the heading 'Aspects of the agreement', discussed the passage in *Ward* quoted above, noting the 'bespoke' statutory arrangements of the 1960s State Agreements.[75] The Court considered the *Dredging Lease Case* because the respondent had raised this authority in their submissions. Justice Greenwood noted the operation of the *Goldsworthy* agreement ratification as follows:

> Section 4(1) of the 1964 Act gave general legislative approval to the agreement made by the executive and s 4(2)(b), without limiting the scope of that approval, gave immediate effect to cl 3(2) of the agreement. Clause 3(2)(a) provides that upon enactment of the 1964 Act ratifying the agreement cl 8 (which makes provision for the grant of mineral leases…among other things), and other nominated clauses of the agreement, shall take effect as though those clauses had been enacted by the ratifying 1964 Act.[76]

Justice Greenwood referred to Mason J's note that the *Goldsworthy* scheduled agreement's 'enacting clause' (cl 3(2)) in conjunction with the 'takes effect' ratification in the authorising Act (s 4(2)(b)) gave statutory force to cl 8.[77]

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[72] *Goldsworthy* (n 44) sch 1 cls 8(2)(a), 11(6).
[73] The deciding factor was that the lease rights were subject to a *Goldsworthy* agreement term that provided for third party access, thus, precluding the proponent's right to exclusive possession. See *Brown HC* (n 4) [8], [45].
[74] *Brown HC* (n 4) [43]. The Court did not discuss Mason J's interpretation of the *Goldsworthy* authorising Act's ratification provision that allowed the scheduled agreement cl 8 to operate as legislation as opposed to contract: see reference at n 64 citing the *Dredging Lease Case* (n 46) 212–9. The Court also cited *Wade v NSW Rutile Mining Co Pty Ltd* (1969) 121 CLR 177, 192–3 for the same purpose.
[75] *Brown FCAFC* (n 4) [132].
[76] Ibid [128].
[77] *Brown FCAFC* (n 4) [394].

Greenwood J commented on a number of occasions that the leases were not granted under the *Mining Act 1904*, and that the leases were granted under the *Goldsworthy* State Agreement.[78] However, Greenwood J did not differentiate between the operation of contract and legislative clauses, as prescribed by the 'enacting clause'.[79]

Under the subsequent heading '[t]he provisions of the agreement, the Mining Act 1904 (WA) and the Mining Act 1978 (WA)', Greenwood J observed:

> It is important to remember that the Mount Goldsworthy leases were not granted under the *Mining Act 1904*. They were granted, as appears later in these reasons, under cls 8(2)(a) and 11(6) of the agreement (together with renewal entitlements) given force by the 1964 [State Agreement] Act.[80]

In my opinion this observation is not strictly accurate, even when proceeding on the *Dredging Lease Case* precedent, because the 'enacting clause' does not specify cl 11(6) as legislation.[81] The *Goldsworthy* agreement mining leases (ML 235, ML 249) were conferred by cls 8(2)(a) and 11(6).[82] ML 235 is conferred by cl 8, which is nominated by the 'enacting clause'. In contrast, ML 249 is conferred by cl 11(6), which is not nominated by the enacting clause as legislation. In addition, cl 1 defines a mineral lease granted pursuant to cl 11(6) as a cl 8 lease,[83] but cl 1 is also not specified in the 'enacting clause'. So where does the authority for cl 11(6) to operate as legislation originate?

If the definition (cl 1) is a contract term, its capacity to assert cl 11(6) is a legislative cl 8 lease is questionable. Greenwood J discussed mining lease clauses (cls 1, 8, 11(6)), and the mineral leases (ML235 and ML 246) together.[84] The Court did not

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[78] Ibid [266], [338], [341], [349], [394].
[79] *Goldsworthy* (n 44) sch 1 cl 3(2)(a).
[80] *Brown FCAFC* (n 4) [153].
[81] *Goldsworthy* (n 44) sch 1 cl 3(2)(a).
[82] *Brown (on behalf of the Ngarla People) v Western Australia (No 2)* (2010) 268 ALR 149 [10]–[12].
[83] *Goldsworthy* (n 44), cl 1 defines a mineral lease as follows: '"mineral lease" means the mineral lease referred to in cl 8(1) hereof or 8(2)(a) hereof and includes any renewal thereof and where the context so permits shall extend to and be deemed to include a mineral lease granted under the provisions of clause 11(6) hereof and any renewal thereof'.
[84] *Brown FCAFC* (n 4). See for example, the discussion of *Goldsworthy* (n 44) cl 9(2)(a), a statutory clause, and cl 9(2)(b), a contract clause, at [383]–[384], or the discussion of cl 8, a statutory clause, and cl 11(6), a contract clause, at [153]; or the discussion of ML 235 and ML 249 at [184]–[197]. On appeal to the High Court the leases are also discussed together, however, the issue of the terms ratification as legislation or contract is not raised by the proponent or respondent and thus not an issue. See *Brown HC* (n 4) [22], [46], see also [5]–[8] nn 27–33.

refer to the distinction between cls 8 and 11(6) or explain how cls 1 and 8 operate to confer statutory force on cl 11(6).[85]

Importantly on this point, Greenwood J did not consider that at the time Mason J decided the *Dredging Lease Case* the *GA Act* was not in force. In 1973, the 'enacting clause' of the agreement was authorised by 'takes effect' ratification and other clauses were only approved.[86] So Mason J had to determine whether the agreement itself provided statutory authority for the lease grant. In *Brown FCAFC*, Greenwood J discussed the *GA Act* s 4 (which creates an offence for trespass on State Agreement lands)[87] but not s 3, which validates State Agreements by providing they 'take effect' not withstanding any other Act or law. So, the effect of the *GA Act* 'takes effect' ratification support on the clauses not nominated by the enacting clause (such as cls 1 and 11(6)) was not discussed or compared to the ratifying provision in the authorising Act.

Justice Greenwood concluded that the sea-bed land issue decided in the *Dredging Lease Case* did not 'provide, ultimately, any determinative guidance'.[88] While Greenwood J took on the task of explaining the ratification provisions in the *Goldsworthy* State Agreement, Mansfield and Barker JJ did not challenge or comment on this interpretation.

On appeal, the High Court did not need to examine the source of the authority to grant the leases so did not discuss the *Goldsworthy* 1960s ratification, or the *Dredging Lease Case*, or the *GA Act*.[89] In the subsequent case of *Ngadju,* in a unanimous decision (Mansfield and Dowsett JJ concurring with the reasons of Jagot J), the FCA Full Court relied on *Brown FCAFC* and the *Dredging Lease Case* as authorities to distinguish the *WMC* agreement ratification from the *Goldsworthy* agreement 1960s ratification.

In contrast to *Brown FCAFC*, in the case of *Ngadju*, the central issue was the source of the authority to grant the mining lease, and the deciding factor was whether the scheduled agreement clause conferring the mining lease operated as contract or legislation.[90] The authorising Act in the *WMC* agreement ratifies the agreement by

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[85] Note Justice Mason had a similar dilemma in the *Dredging Lease Case* (n 46) that he resolved. See the explanation at n 47 above.
[86] *Goldsworthy* (n 44) ss 4(1), 4(2)(b).
[87] *Brown FCAFC* (n 4) [198]–[202]. This provision was to prevent protestors entering lands subject to State Agreement rights, such as those at the Wagerup refinery (the subject of the *Margetts* (n 41) case).
[88] *Brown FCAFC* (n 4) [404] (Greenwood J).
[89] *Brown HC* (n 4).
[90] *Ngadju* (n 1) [25].

providing '[t]he Agreement is approved, and subject to its provisions shall operate and take effect'. It is unlikely this form of ratification is sufficient to validly modify other legislation because it lacks the words that indicate the agreement operates 'not withstanding any other Act or law' common to 'takes effect' ratification. Therefore, the *WMC* agreement would rely on the *GA Act* s 3 to support its ratification. The *Ngadju* decision cited with approval *Re Michael* and the other relevant State authorities (except for *Hancock*) for the propositions that 'takes effect' ratification authorises the scheduled agreement as a contract, and the *GA Act* does not elevate the State Agreements to legislation.[91] The reason given was that 'takes effect' ratification lacks the vital words 'as if enacted'.[92] The Court distinguished the *Goldsworthy* 1960s ratification by applying the reasoning of Greenwood J in the *Brown FCAFC* decision, stating that 'the ratifying statute in *Brown*, as explained at [127] and [128], included a provision that the agreement took effect "as though those clauses had been enacted by the ratifying 1964 [State Agreement] Act"'.[93] In my opinion this statement is not accurate. The *Goldsworthy '*ratifying statute' (the authorising Act) does not contain the phrase 'as though those clauses had been enacted'; that phrase is in the 'enacting clause' of the scheduled agreement.

The Court quoted Greenwood J in *Brown FCAFC* to distinguish the *Goldsworthy* leases from the *WMC* leases. In *Brown FCAFC* Greenwood J stated that the *Goldsworthy* leases fell into the category of special leases described in *Ward* and 'were granted under the Agreement itself with the authority of the [*Goldsworthy*] 1964 adopting Act'.[94] The Court in *Ngadju* then reconciled the *Brown* decision with the WA authorities, as follows:

> The reasoning in Brown is thus consistent with that in the other cases referred to above. In particular, there is a critical difference between a government agreement which, by statute, is approved and operates and takes effect according to its terms, notwithstanding any other Act or law and a government agreement which, by statute, is itself enacted. In the former case, the government agreement is of contractual force and effect only. The State cannot, by contract, give to itself a right to alienate Crown land. Accordingly, the government agreement in such a case cannot be the source of power to grant a mining lease. The source of power remains the 1904 [Mining] Act.[95]

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[91] *Ngadju* (n 1) [31]–[35], citing (in this order) *Oz Minerals* (n 42) [179], *Re Michael* (n 5) [20]; *Kidd* (n 42) [110]–[112]. See also the discussion of the *GA Act* (n 16) at [40]–[41].
[92] *Ngadju* (n 1) [37]–[39].
[93] Ibid [37].
[94] *Ngadju* (n 1) [37], quoting *Brown FCAFC* (n 4) [349].
[95] *Ngadju* (n 1) [38].

This reasoning is not consistent with WA court decisions, which have maintained that only agreements which ratify the agreement 'as though enacted' in the authorising Act confer legislative force on the scheduled agreement.[96] Further, the Court in *Ngadju* assumed the enacting phrase is in the ratifying Act, which it is not. This leaves an uneasy dichotomy; if 'takes effect' ratification or the *GA Act* 'takes effect' ratification support does not authorise the 'enacting clause' as legislation, but merely contract, where does the authority of the 'enacting clause' to legislate come from?

The case of *Hancock* illustrates the divergence between the State and Federal Court decisions. The WA SCA considered the *Newman* agreement 1960s ratification that has an identical ratification and 'enacting clause' to the *Goldsworthy* agreement. One of the relevant clauses discussed was cl 9, specified in the 'enacting clause'.[97] The Court did not differentiate the specified clauses as having statutory force or comment that the agreement had both contract and legislative terms.[98] The agreement was interpreted as a contract.

F *Justice Edelman's Interpretation*

The decisions of lower courts did not go unnoticed by Edelman J. The *Mineralogy HC* case mostly discussed constitutional issues and manner and form;[99] however, at least impliedly, the parties' arguments allowed Edelman J to comment at length on State Agreement ratification and the *GA Act* s 3.[100]

In this case the High Court considered the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) ('*Mineralogy*'). The *Mineralogy* authorising Act ratified the scheduled agreement with a 'takes effect' provision as follows:

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[96] *Re Michael* (n 5) [21], citing *McCamey's* (n 40) s 3.
[97] *Newman* (n 63) sch 1 cl 3(2)(a).
[98] *Newman* (n 63) sch 1 cll 9(2), 9(3); *Hancock* (n 6) [7], [67].
[99] The key issue was whether the *Iron Ore Processing Mineralogy Pty Ltd) Agreement Amendment Act 2020* (WA) could validly amend the *Iron Ore Processing (Mineralogy Pty Ltd) Agreement Act 2002* (WA) ('*Mineralogy*'). For further discussion see Murray Wesson et al, 'How Clive Palmer could challenge the Act designed to stop him getting $30 billion', *The Conversation* (online, 2 September 2020) <https://theconversation.com/how-clive-palmer-could-challenge-the-act-designed-to-stop-him-getting-30-billion-145098>; Natalie Brown, 'Clive Palmer takes a Sovereign Risk challenging the authority of WA Parliament', *AUSPUBLAW* (online, 9 September 2020) <https://auspublaw.org/2020/09/clive-palmer-takes-a-sovereign-risk-challenging-the-authority-of-wa-parliament/> ('Brown 2020').
[100] *Mineralogy HC* (n 9) [119]–[120]. The State proceeded on the basis the agreement clauses were contract. The plaintiffs argued that the authorising Act imbued at least some of the agreement provisions as statute law.

> **4 Agreement ratified and implementation authorised**
>
> The Agreement is ratified.
>
> The implementation of the Agreement is authorised.
>
> Without limiting or otherwise affecting the application of the Government Agreements Act 1979, the Agreement operates and takes effect despite any other Act or law.

Justice Edelman considered the jurisprudence on State Agreement ratification and explained the two approaches that imbued the clauses with either contractual or statutory force.[101] The first approach is that the clauses only have contractual force and are only enforceable as a matter of contract law.[102] His Honour commented that State Agreements with bare approval (for example, the agreement is merely authorised or ratified) plainly intended to adopt the first approach.[103] Justice Edelman stated that legislative ratification that provides the agreement is 'as if enacted' in the authorising Act clearly intends all of the agreement clauses to have contractual and statutory force (the second approach).[104] The second approach also includes 'takes effect' ratification or the *GA Act* s 3 (or both), which provides that some (or all) of the agreement clauses have statutory force in addition to contractual force.[105]

His Honour then examined the *GA Act* s 3, stating that the 'overarching purpose…was to give statutory effect, where it was needed, to the provisions of Government agreements',[106] and noting that the WA Legislative Council stated the Act's purpose was to '"put…beyond legal doubt" that a Government agreement would become the law of the State'.[107] Consequently, the *GA Act* s 3, which provides the agreement 'takes effect' not withstanding any other Act or law, gives statutory effect to a State Agreement clause to the extent that it modifies another Act or law.[108] In a nutshell, the modification of other Acts or laws is only possible if the clause has statutory force.[109]

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[101] Ibid [123]–[125].
[102] Ibid [123]–[124]. His Honour commented that '[t]he legislative effect [the ratification of the contract] is only the removal of any common law or statutory obstacles to the enforceability of the agreement, such as a lack of power of a contracting party or the illegality of any of the contractual provisions'.
[103] Ibid [124].
[104] Ibid [127].
[105] Ibid [125].
[106] Ibid [132].
[107] Ibid.
[108] Ibid [134].
[109] Ibid.

In my opinion, it is difficult to refute the plain logic of this argument. Justice Edelman applies the principle that only legislation can modify legislation, therefore a contract term cannot modify legislation. Consequently, any terms of the scheduled agreement that purport to modify Acts or laws must be given statutory force by the ratifying Act or the *GA Act* s 3. His Honour finds support for his opinion in Parliament's intention, as stated by the Legislative Council, that after the enactment of the *GA Act*, a State Agreement would 'become a law of the State'.

His Honour disagreed with the proposition that the authorising Act (in this case referred to as the State Act) merely modified laws to provide contractual effect to clauses in the agreement that were inconsistent with other laws.[110] His Honour explained '[t]he intention of Parliament to give effect to [the scheduled agreement clauses that] expressly or impliedly modify other laws must include an intention to give those [clauses] the force of law'.[111] Justice Edelman stated it would be 'a verbal nonsense' to speak of the authorising Act (or the *GA Act*) as merely removing or modifying inconsistent laws to give contractual effect to the agreement provisions.[112]

His Honour commented that for the purposes of interpretation there 'is rarely any magic in statutory interpretation in the use of particular words': simply interpret the words in context, having regard to Parliament's purpose.[113] Justice Edelman interpreted s 3 by applying the standard principles of statutory interpretation and drawing on the Hansard debate to determine the objective intention of the WA Parliament.

In short, Edelman J was of the opinion that only clauses with statutory force can modify other Acts or laws. This opinion reflects the rule that Parliament's power cannot be fettered by the executive,[114] or a previous parliament, and only legislation

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[110] Ibid [142]; *Mineralogy* (n 99). See ibid [141]–[142] (Edelman J): 'there are numerous provisions of the State Agreement that cannot "operate[] and take[] effect" merely by removal of statutory obstacles: those provisions modify other laws and require the force of statute law to take effect according to their terms. The intention of Parliament to give effect to those contractual provisions which expressly or impliedly modify other laws must include an intention to give those contractual provisions the force of law. Numerous examples can be given of provisions in the State Agreement which expressly or impliedly modify other laws and as to which it would be a verbal nonsense to speak of the State Act as merely removing inconsistent State laws to give contractual effect to the provisions'. His Honour then noted a number of *Mineralogy* agreement clauses and the Acts the clauses expressly or impliedly modify, including the *Mining Act 1978* (n 23)*, Land Administration Act 1997* (WA) and the *Aboriginal Heritage Act 1972* (WA).

[111] *Mineralogy HC* (n 9) [141] (Edelman J).

[112] Ibid [142].

[113] Ibid [138].

[114] For discussion of the separation of powers between the executive and legislature, see Brown 2020 (n 99); Michael Crommelin, 'State Agreements: Australian Trends and Experience' (1996) 16

has the capacity to amend or modify legislation.[115] Hence, State Agreements that are hybrids of contract and legislation present challenges to straightforward statutory interpretation because the contract terms rely on the authority of the ratifying Act and do not have statutory force in themselves.[116] Agreement terms ratified as contract do not always operate as the parties intended because the term lacks statutory force.[117] Justice Edelman resolved these conflicts by interpreting the plain words of the *GA Act* s 3 — the phrase 'takes effect despite any other Act or law'[118] provides statutory authority to State Agreement terms that modify other Acts or laws.

Justice Edelman concluded that 'context, purpose and ordinary meaning' of the *GA Act* s 3 ratification support reflects the second approach (legislative ratification).[119] His Honour stated that the decisions in *Re Michael, Ngadju,* and other cited authorities, were incorrect in relation to the capacity of the *GA Act* to provide statutory force to agreement clauses.[120] His Honour stated that 'neither in *Re Michael* nor in the cases that followed it, did the courts closely consider the context purpose or ordinary meaning of the words'.[121] The authorities were correct in finding that

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Australian Mining and Petroleum Law Yearbook 328, 331; Nicholas Seddon, *Government Contracts: Federal, State and Local* (5th ed, 2013) [5.16]; Warnick (n 48); Murray Wesson and Ian Murray, 'Explainer: why did the High Court rule against Clive Palmer and what does the judgment mean?', *The Conversation* (online, 13 October 2021) <https://theconversation.com/explainer-why-did-the-high-court-rule-against-clive-palmer-and-what-does- he-judgment-mean-169633>; *Mineralogy HC* (n 9); *Attorney-General (WA) v Marquet* (2003) 217 CLR 545 [153]–[156]; *Kartinyeri v The Commonwealth* (1998) 195 CLR 337, 355 [13]; *McCawley v The King* (1920) 28 CLR 106, 107, 122–5. See also *South Eastern Drainage Board (South Australia) v Savings Bank of New South Wales* (1939) 62 CLR 603, 618, 623, 625, 636; *Nicholas* (n 12). See, for an example of a State Agreement term attempting to fetter Parliament, *Alumina Refinery (Mitchel/Plateau) Agreement Act 1971* (WA) sch 1 cl 3(3)(f): 'no future Act of the said State will operate to increase the Company's liabilities or obligations'. On sovereign risk, see Brown 2018 (n 19) 58–9.

[115] For discussion on the point that only legislation can modify legislation, see *Sankey* (n 41) and the discussion in Part V(B) above. As a further example, Parliament may provide in legislation executive powers to make subsidiary legislation such as rules or regulations, but this subsidiary legislation must conform with the authorising Act and is subject to Parliamentary disallowance. See *Interpretation Act 1984* (WA) ss 42, 43. Statutory provisions that purport to provide the executive with legislative authority are known as Henry VIII clauses, which are beyond the scope of this discussion.

[116] *Hancock* (n 6); *Re Michael* (n 5).

[117] *Re Michael* (n 5) [45]–[47], [52]–[54] (Parker J).

[118] For this paraphrase of the *GA Act* (n 16) s 3, see *Mineralogy HC* (n 9) [120] (Edelman J).

[119] *Mineralogy HC* (n 9) [136].

[120] Ibid [136]. The *Ngadju* case (n 1) [41] is cited at n 151. In this paragraph the Court states the *GA Act* (n 16) s 3 does not provide the agreement is enacted and thus does not give the agreement statutory force. See also n 151, Justice Edelman citing the following authorities that had followed this interpretation: *Oz Minerals* (n 42) 189–190 [179], 204 [275]; *Western Australia v Graham* (2016) 242 FCR 231, 240 [41]. Cf *West Lakes* (n 40) 398.

[121] *Mineralogy HC* (n 9) [136].

clauses continue to have contractual effect, but incorrect when finding that s 3 cannot imbue State Agreement clauses with additional statutory force, and on that point should be overruled.[122]

In a nutshell, Edelman J decided the effect of the *GA Act* and 'takes effect' ratification is that the clauses in the scheduled agreement that expressly or impliedly modify other Acts or laws must have statutory force.[123] Ipso facto, if the clause does not modify other Acts or laws, it will not attract s 3, and remains a contract term.[124] This is a significantly different interpretation to both the WA SCA and Federal Court. The WA SCA has followed the principle that the *GA Act* and 'takes effect' ratification created contract clauses that had the capacity to modify inconsistent laws; the Federal Court distinguished State Agreement 1960s ratification that had an 'enacting clause' but followed the same reasoning as *Re Michael* in relation to the *GA Act.* In the light of Edelman J's reasoning, an 'enacting clause' (at least after the enactment of the *GA Act*) is redundant because any clause that modifies other Acts or laws will have statutory force as per the *GA Act.* State Agreements prior to the *GA Act* are subject to that Act because it retrospectively applies to the earlier State Agreement Acts,[125] and State Agreement ratification provisions post the *GA Act* include the words 'without limiting the operation' of the *GA Act* and adopt the 'takes effect' ratification. Therefore, all WA State Agreements have 'takes effect' ratification or attract the operation of the *GA Act* and,[126] applying Edelman J's interpretation, all clauses that modify Acts or laws would have statutory force in addition to contractual force.

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[122] Ibid [136].
[123] Ibid [141].
[124] Ibid [143]–[145]. In this case Edelman J found that the relevant clause (cl 32) did have statutory force because it altered the manner in which a provision can 'have effect'. The clause allowed for variation by Parliamentary disallowance.
[125] In accordance with statutory interpretation principles, it also prevails over earlier State Agreement Acts.
[126] There may be some query about the prospective operation of the *GA Act* (n 16). In my opinion the statutory interpretation presumption that legislation applies prospectively (only retrospective legislation needs to be express) is the natural interpretation. In any event, for the purposes of this article it is not necessary to explore this aspect because post-1980s State Agreements adopted the *GA Act* 'takes effect' ratification.

Table 1: Interpretation of ratification provisions and the GA Act *s 3*

Ratification provision	**Bare approval 'approved' or 'ratified'**	**'As if enacted in this Act'**	**'Takes effect despite any other Act or Law'**	**'Takes effect' ratification with an 'enacting clause'**	**GA Act s 3 'takes effect' ratification support**
WA SCA	Contract only cannot modify other Acts or laws — needs *GA Act* support	Legislation	Contract	Contract	Contract
Federal Court	Contract only cannot modify other Acts or laws — needs *GA Act* support	Legislation	Contract	Legislation (at least some clauses)	Contract
Edelman J	Contract only cannot modify other Acts or laws — needs *GA Act* support	Legislation	*GA Act* s 3 applies — legislation if the clause is modifying another Act or law[127]	*GA Act* s 3 applies — legislation if the term is modifying another Act or law	Legislation if the clause is modifying another Act or law

[127] Edelman J does not engage in a lengthy discussion of the meaning of 'takes effect' ratification in the State Agreement authorising Act, or those with an the 'enacting clause', as his interpretation of the *GA Act* (n 16) s 3 makes the discussion redundant. The retrospective application of the *GA Act* and its preservation in later State Agreements means that all State agreements are subject to the *GA Act* s 3. In any event, it is reasonable to assume Edelman J would endorse the view that 'takes effect' ratification in the authorising Act would have the same effect as the *GA Act* s 3. For Edelman J's discussion of bare approval and 'as though enacted' ratification see *Mineralogy HC* (n 9) [124], [127]–[129].

VI RECONCILIATION OF THE INCONSISTENT DECISIONS OF THE LOWER COURTS

Justice Edelman reconciled the inconsistency between the state and federal courts' interpretation of State Agreement ratification by finding that both incorrectly interpreted the *GA Act* s 3. In addition, his reasoning does not disturb the *Dredging Lease Case* decision that was made prior to the enactment of the *GA Act*. While the application of State Agreement clauses as potentially only contractual (if the law is not modified) or a contract clause with additional statutory force (if the law is modified) may seem complex, it is preferable to the current inconsistencies in the lower courts' decisions. If we apply the Federal Court's interpretation of the 1960s ratification, there are some agreements where clauses with purported statutory force have been amended by clauses in supplementary agreements that only have contractual force. Justice Edelman's interpretation resolves the issue of clauses enacted by 'enacting clauses' being amended by clauses ratified as contract — any clause that modifies Acts or laws will have statutory force.

In the Native Title jurisdiction, this interpretation almost certainly means the pivotal issue in the *Ngadju* case was wrongly decided. The *WMC* authorising Act's ratification provision did not include the important phrase 'notwithstanding any other Acts or laws'. Consequently, this agreement cannot validly modify other Acts or laws without the support of the *GA Act* s 3. The clause under consideration modified the grant of the mining lease under the *Mining Act 1904.* Therefore, on Edelman J's reasoning the clause must have statutory force. The Federal Court reasoned that if the agreement clause had statutory force, then the agreement was the source of the authority, ipso facto additional rights available under the *Mining Act 1978* would be a future act under the *Native Title Act*. Applying Edelman J's reasoning, the Federal Court's decision that the clause did not have statutory force is wrong.

A further consideration resulting from Edelman J's interpretation is the issue of judicial review. Only legislative provisions attract judicial review. The question is: would the scheduled agreements be interpreted in accordance with contract or statutory interpretation? In WA the precedent in *Re Michael* has potentially precluded judicial review of many State Agreement clauses because most agreements are interpreted as contract,[128] while only the 1970s and some late 1960s State Agreements are legislative.[129] Applying Edelman J's interpretation, judicial

[128] The application of judicial review is as yet untested even for legislative WA State Agreements that provide all the clauses are 'as if enacted' in the ratifying Act.

[129] Two significant 1972 agreements are the *McCamey's* agreement (n 40) and *Iron Ore (Rhodes Ridge) Agreement Authorisation Act 1972* (WA). Mines under other 1972 agreements have either ceased operation, or the rights have been transferred to other agreements: Brown 2018 (n 19) 138–140.

review could apply to scheduled agreement clauses that modify other Acts or laws. So, the question arises, are clauses that have statutory force subject to judicial review? That is, for the purposes of judicial review are the clauses interpreted as contract, or statute, or contract *and* statute? If a clause is subject to statutory interpretation, can third parties with standing apply for judicial review for a breach of the clause? Or does the clause's characteristic as contract continue to prevent applications for judicial review?

Let us reconsider the *Ngadju* case in light of Edelman J's interpretation in relation to judicial review and whether the grant of the mining lease was valid. The High Court refused the *Ngadju* applicants special leave for appeal,[130] and now time limitations could preclude judicial review.[131] However, the incapacity to take an action will not resolve or cure an invalid grant.

Native Title rights claimants or holders would have standing to commence a judicial review action. The case of *Forrest & Forrest v Wilson* may provide judicial support.[132] In that case, the High Court found that the *Mining Act 1978* must be strictly construed because it provided for the disposal of interests in the State's resources, therefore failure to observe the regime was apt to disadvantage the public interest and individuals.[133] The error was the failure to attach the mineralisation report to the mining lease application, which the Court deemed invalidated the grant because the executive acted outside of its statutory authority.[134] The Court interpreted the words 'accompanied by' as requiring the proponent to submit the documentation contemporaneously with the application.[135] On receipt of a valid application the decision-maker could grant the tenement. Consequently, the decision-maker had considered an invalid application, resulting in a jurisdictional error. The *WMC* application for mining leases under the *Mining Act 1978* and the transition and grant of those leases were potentially invalid because the *Mining Act 1978* is subject to the *Native Title Act*.[136] Applying Edelman J's approach, the leases should not have been transitioned or granted under the *Mining Act 1978* until after the provisions of the

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[130] *Graham & Ors on Behalf of the Ngadju People v St Ives Gold Mining Company Pty Ltd & Ors* [2016] HCATrans 241 (14 October 2016) ('*Ngadju* HCATrans'). The main ground argued in the *Ngadju* leave to appeal application in the High Court was the interpretation of the *Mining Acts 1904* and *1978* (n 23) in relation to the *WMC* agreement (n 20).

[131] *Rules of the Supreme Court 1971* (WA) ord 56 r 1(1)(a).

[132] *Forrest* (n 26).

[133] Ibid [64]–[65], [82], [84].

[134] Ibid [26], [67], [83], [88].

[135] Ibid [67].

[136] *Commonwealth Constitution* s 109. In addition, the *Mining Act 1978* (n 23) s 125A expressly includes a term recognising 'liability for payment of compensation to native title holders'. Native Title holders has the same meaning as in the *Native Title Act 1993* (n 24): see s 125A(3).

Native Title Act were satisfied because the transition and grant provided new and additional rights that the proponent intended to exploit. Alternatively, the mining lease grant should have been subject to the restrictions imposed by the *WMC* agreement that authorised the original lease under the *Mining Act 1904*. Arguably, the consideration of the application, or the grant of the leases, by the decision-maker under the *Mining Act 1978* may be invalid because the applicant had not satisfied the *Native Title Act* requirements and thus the decision to grant would be subject to judicial review. The incapacity of Ngadju Native Title holders to challenge an invalid grant does not mean the grant is somehow valid. Nor can the WA Parliament rectify the potentially invalid grant, because the *Native Title Act* is Commonwealth legislation.[137] If the lease grant is invalid so are the actions of the proponent's mining activities in relation to the lease.

If, in the future, Edelman J's interpretation is successfully argued by a litigant and adopted by the lower courts and the High Court, this would mean that the WMC proponents' continued reliance on an invalid mining lease grant could be challenged. For example, in *Re Wakim; Ex parte McNally*,[138] while the High Court would not grant certiorari to quash the grant of a cross-vesting power to the Federal Court because of the effect on third parties,[139] the Court issued a writ of prohibition to prevent further actions based on that authorisation.[140] There is no general immunity for persons relying on invalid decisions,[141] so other common law actions are not precluded.[142] Simply because a decision has not been quashed does not mean it has the effect it purports to have.[143] The assessment of whether continuing mining based on a potentially invalid grant of a mining lease under the *Mining Act 1978* could give rise to an action for the Ngadju people is not within the scope of this discussion. However, even the potential grant of such a remedy may open the door for the Ngadju people to negotiate with the *WMC* proponents.

In WA the potential of judicial review opens the door for third parties, such as Native Title holders or claimants, or environmental groups to challenge breaches of State Agreement clauses. To the author's knowledge, a third party has not attempted a judicial review action for breach of a legislative scheduled agreement clause. Such actions may require JTSI or the proponent to reveal the details of mysterious

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[137] *Commonwealth Constitution* s 109.
[138] (1999) 198 CLR 511.
[139] Ibid [165].
[140] Ibid 513(3). For the prohibition order see [313] under 'Re Brown Ex parte Amann' order 3.
[141] Benjamin Cole, 'Beyond "Validity": The Effect of Legally Infirm Administrative and Judicial Decisions' (2017) 24(3) *Australian Journal of Administrative Law* 158, 176.
[142] Ibid 167. For example, equity or property law actions.
[143] Ibid.

development proposals, or other documents currently publicly unavailable. The public and even Parliament cannot access development proposals (and other State Agreement-related documentation) because the agreements are commercially confidential.[144] Commentators and the WA Auditor General have noted the difficulties caused by the State Agreement regime's lack of transparency.[145] The *GA Act* includes the development proposals (among other documents) as part of the State Agreement.[146] Future actions challenging breaches of State Agreement clauses raise the potential for the disclosure of previously confidential contract-related documents, at least in part, to a third party taking an action if the disclosure is necessary for evidence of compliance with the State Agreement clause. Future research could explore judicial review in the State Agreement context, and the potential exposure of currently unavailable documents. The environmental concerns about Alcoa's rehabilitation or clearing of native jarrah forests under their State Agreement may provide an interesting and topical case-study for this research.[147] The question is, what rules of interpretation will apply? If statutory interpretation applies to the State Agreement clause, it is likely judicial review is available.

VII CONCLUSION

The next question is, will litigants pursue Edelman J's interpretation as a line of argument in the future? Justice Edelman's reasoning should now be on the radar of litigants as a potential argument in State Agreement actions. How soon that will occur depends on when a party raises the issue of State Agreement ratification as legislation or contract. While it is impossible to say when, it is likely that the interpretation of ratification provisions will eventually come before the Federal Court or a state Supreme Court and may find its way to the High Court.

The High Court has not considered State Agreement ratification provisions in-depth since *Sankey v Whitlam* in 1978. Since that decision the WA Parliament enacted the *GA Act* and adopted the 'takes effect' ratification in later State Agreements. In my opinion, some definitive guidance from the High Court is overdue. The *Ngadju*

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[144] Brown CRC TiME (n 17) 37; Brown 2018 (n 19) 248–9, 296–7.

[145] See the Auditor General reports cited at n 20 above.

[146] The *GA Act* (n 16) s 2(c) definition of Government agreement includes 'any document or instrument, including any grant, lease, licence, permit, approval, authorisation, right, concession, or exemption, or any other thing made, executed, issued, or obtained for the purposes of that agreement or its implementation'.

[147] 'The Leeuwin Group of scientists slams Alcoa for mining in Western Australia's jarrah forests', *ABC News* (online, 17 November 2023) <https://www.abc.net.au/news/2023-11-27/the-leeuwin-group-scientists-stop-alcoa-mining-wa-jarrah-forests/103155496>.

special leave to appeal hearing was an opportunity to see whether the High Court would hear the argument because the central and deciding issue was whether the State Agreement clause was contract or legislation. Justice Gordon during the *Ngadju* special leave to appeal hearing had the following exchange with the appellant. The appellant referred to the agreement as 'something given effect by statute', to which Gordon J responded, '[but] it is not given statutory force by the *Government Agreements Act*'. The appellant responded, 'it depends on what one means by "not given statutory force"'. Her Honour responded, 'Section 3 says that, does it not?'.[148] The appellant did not argue the interpretation of s 3,[149] so whether Gordon J is stating an opinion, asking a question, or opening the door for argument on the point is unclear.

The majority in *Mineralogy HC* did not endorse or comment on Edelman J's reasons.[150] This may be because the parties did not squarely put the interpretation of the ratification provision or the *GA Act* s 3 before the Court,[151] or because consideration of the issue was not appropriate for the 'special case procedure' invoking the original jurisdiction of the High Court.[152] The plaintiff's argument was that the relevant clause was a 'law' that had both contractual force (because it was a contract) and statutory force (flowing from the authorising Act).[153] The authority of 'legislative' or 'contract' type ratification provisions to modify other laws was not

[148] *Ngadju* HCATrans (n 130) [125]–[130].
[149] Ibid [130]–[135]. The exchange continued with the plaintiff replying, 'No, what it is given effect to and, in our submission, when a statute gives effect to a contract it is not superfluously doing that which the common law had already done'. Justice Gageler responded, 'Recognising the importance of the issue, you really need to convince us that there is an arguable case that the Full Court was wrong on the construction of the Second Schedule of the 1978 Act'.
[150] On this point see Edelman J's comments at *Mineralogy HC* (n 9) [106].
[151] Ibid 223. The *Mineralogy HC* Commonwealth Law Report summary states, 'The plaintiffs' principal allegation was that the Amending Act was invalid in its entirety on the basis that its enactment contravened s 6 of the *Australia Act 1986* (Cth) because the requirements of cl 32 of the State Agreement, which it was alleged prescribed a requirement as to the "manner and form" in which a law was to be made by the Parliament of Western Australia, was not complied with. The plaintiffs challenged the validity of the Amending Act on the additional basis that it exceeded limitations on the legislative power of the Parliament of Western Australia arising from "the rule of law and deeply rooted common law rights". The plaintiffs also alleged that various provisions in pt 3 of the State Act, including ss 9(1)–(2) and 10(4)–(7), were incompatible with Ch III of the *Constitution* because they involved an exercise of judicial power. The plaintiffs further alleged that ss 9(1)–(2) and 10(4)–(7) of the State Act were incompatible with s 118 of the *Constitution* because they conflicted with s 35(1) of the *Commercial Arbitration Act* in force in each of New South Wales, Queensland, South Australia, Tasmania and Victoria'.
[152] *Mineralogy HC* (n 9) [51]–[62]. For the 'questions appropriate to determine' see [62]–[71] (the operation of the State Act (the authorising Act) and the amending Act (that was standard legislation)).
[153] Ibid [125].

expressly raised as a key issue.[154] The Commonwealth Solicitor-General, acting as intervener, submitted that the issues before the Court were the State legislature's right to abrogate the plaintiff's rights, whether the Act abrogating those rights contravened Chapter III of the *Constitution*, and the manner and form required in a state Act to fetter the right of the State Parliament to legislate.[155] Members of the Court invited the parties to explain the effect of, or comment on, the *GA Act* during submissions.[156] However, ultimately, the majority took a prudential approach to avoid 'the risk of premature interpretation of statutes on the basis of inadequate appreciation of their practical operation', recognising that the Court's opinion is 'not advisory but adjudicative'.[157] The majority decided it was unnecessary to examine the question of whether the clause of the scheduled agreement was a law made by Parliament because the clause did not prescribe a manner and form requirement.[158] This may explain why the other members of the Court did not disagree, endorse, or comment on Edelman J's reasons, and why his opinion was not included in the

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[154] Ibid [9]–[11]. The majority of the Court noted that the relief was framed to focus on the amending Act and the State Agreement's authorising Act (called the State Act). The plaintiffs were confined to the identified challenges: see [5].

[155] Ibid 228–231.

[156] Ibid 224. For example, the plaintiff submitted that the relevant clause of the State Agreement 'is a law made by the Parliament which is given the force of law by the [authorising Act]'. The ratification sections 'provide that the State Agreement operates and takes effect despite any other Act or law'. Chief Justice Kiefel responded, '[t]he form that is adopted here says that it operates despite any other Act or law, which suggests that its purpose is to overcome any obstacles posed by other statutes. That inevitably means amendment of a law. What the provisions are saying is that, in the areas covered by the State Agreement, the result is that the law is as provided for by the Agreement. That is accentuated by the terms of s 3 of the [*GA Act*]'. See also the exchange between the WA Solicitor General and Gageler J at 226. Gageler J asks, 'What work do you give the *Government Agreements Act*?'. The Solicitor General replies, 'Section 3 of the *Government Agreements Act* is no different in substance from the operation of the type of [ratification seen in the State Agreement]. The operation of the [*GA Act*] or the State [Agreement] prevents a statute that would otherwise impede the performance of the contractual obligations of the State Agreement from having that effect.'

[157] Ibid [57]–[58]. The majority further stated in relation to the prudential approach, '[u]nderlying it also is recognition that performance of an adjudicative function in an adversary setting "proceeds best when it proceeds if, and no further than is, warranted to determine a legal right or legal liability in the controversy"': at [58].

[158] Ibid. It was unnecessary to consider whether the clause (cl 32) was a law (at [75]–[76]); the clause, the State Act and the *GA Act* (n 16) did not prescribe a limit on the legislature's freedom to legislate (at [79]–[80]). On cl 32, the majority (at [80]) quoting and discussing *West Lakes* (n 40) 398 stated: 'Adapting language used by King CJ in *West Lakes Ltd v South Australia* to describe the operation of a provision of a contract entered into by the Government of South Australia which was required by a South Australian statute to "be carried out and have effect as if the provisions thereof…were agreed to between the parties thereto and expressly enacted", cl 32 of the State Agreement "is a provision controlling the amendment of the [contract] by agreement", making "no reference, either expressly or impliedly, to the amendment by parliament of the [statute] itself"'. The clause in *West Lakes* was ratified as legislation, so the majority is potentially pointing out that whether cl 32 is contract or legislation it does not fetter Parliament.

Commonwealth Law Report headnote as a dissent or a 'per' and remains only interesting obiter.

Justice Edelman took the opportunity presented to express his opinion on ratification provisions, and the reasoning in *Re Michael* and *Ngadju.* Edelman J agreed with the restrained approach of the majority,[159] but noted members of the Court may have different views on the practice of adjudication in particular cases.[160] His Honour listed several considerations that may require broader adjudication:

> One consideration that can weigh powerfully in favour of broader adjudication is whether a decision upon an otherwise undecided ground could have a significant effect upon the interests of a party.…A second consideration is whether there is a division within the Court leaving a minority of Justices for whom "it is necessary to deal with a range of issues to dispose of the appeal". It would be desirable in those circumstances for the range of issues to be considered by the whole Court. A third consideration concerns the role of this Court. Whilst the primary role of this Court is to resolve disputes between the parties, this Court does so by developing the law in a principled way that aims to guide both the public and lower courts.[161]

Justice Edelman further commented on minority and majority reasoning, stating that '[j]ust as it can be undesirable for a majority of Justices to avoid adjudication of a point that it is necessary for a minority of Justices to decide, so too it can be undesirable for a minority of Justices to express views on a point that is not necessary for their decision'.[162] However, for Edelman J the question of whether the scheduled agreement clause (cl 32) was a law that could prescribe a manner and form requirement could not be decided until it was determined that the operation of cl 32 was either contract or legislation.[163] In that sense, the majority had avoided adjudicating a point that Edelman J considered necessary to disposing of the appeal, and it would have been desirable for the whole Court to have considered the issue.

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[159] *Mineralogy HC* (n 9) [96].
[160] Ibid [100], citing *Zhang v Commissioner of the Australian Federal Police* (2021) 273 CLR 216, 230 [23].
[161] *Mineralogy HC* (n 9) [101]–[103], quoting *Kimberly-Clark Australia Pty Ltd v Arico Trading International Pty Ltd* (2001) 207 CLR 1, 20 [34]. Edelman J further notes: 'A fourth consideration is the sense of injustice to the parties that could be engendered by the feeling that this Court's decision has not matched the procedure in which they participated, particularly if the decisive ground in the Court's reasons is only peripheral to the submissions made by the parties': at [104].
[162] *Mineralogy HC* (n 9) [106] (Edelman J).
[163] Ibid [118]–[120].

Adopting Edelman J's interpretation of State Agreement ratification and the *GA Act*, s 3 resolves the inconsistency in the lower court decisions and provides a logical application of statutory interpretation principles. However, the lower courts are likely to resile from overruling significant decisions such as *Re Michael* and *Ngadju.* So, it will require a litigant with determination to test the argument in the High Court. In my opinion, Edelman J's interpretation should be adopted, and if adopted, may lead to greater transparency of the regime and fairness to Native Title holders and claimants, and third parties. The WA courts have noted that State Agreements confer significant rights and concessions on the proponent that are not available to the general public and for that reason should be subject to strict interpretation.[164] In addition, the High Court has significantly broadened its view in relation to Native Title rights over the last decade.[165] The *Ngadju* decision appears to be a case of having your cake and eating it too, in that the proponent, after enjoying significant bespoke rights under the *WMC* agreement not available to other members of the public, could also take advantage of additional rights under the *Mining Act 1978* without previously complying with the requirements of that regime (such as higher rents and royalties), or recognising the underlying Native Title holders' rights.

A future action in the High Court based on Edelman J's interpretation of 'takes effect' ratification and the *GA Act* s 3 would, at minimum, provide definitive guidance about the operation of State Agreement clauses to enable the lower courts to apply a cohesive and consistent approach. The *Ngadju* decision severely disadvantaged the Ngadju people and the impact of the case on future Native Title decisions could be significant. If Edelman J's approach is adopted, it would provide greater recognition of Native Title rights in the State Agreement mining context moving forward, and it would raise serious questions about the veracity of the *Ngadju* decision and thus the proponent's failure to acknowledge the Ngadju people's Native Title rights or comply with the *Native Title Act* (because the Federal Court's *Ngadju* decision should be overruled).[166] Furthermore, this interpretation could provide increased transparency of the regime by removing some aspects of commercial confidentiality and by allowing affected third parties to challenge the scope of the State Agreement clauses via judicial review.

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[164] *Mineralogy 2005* (n 42) [68] (McLure J); *Mount Margaret Nickel Pty Ltd v WMC Resources Ltd* [2001] WAMW 6, [57].
[165] *Akiba (on behalf of the Torres Strait Regional Seas Claim Group) v Commonwealth* (2013) 250 CLR 209; *Karpany v Dietman* (2013) 252 CLR 507; *Brown HC* (n 4); *Northern Territory v Griffiths* (2019) 269 CLR 1; *Commonwealth of Australia v Yunupingu* [2025] HCA 6.
[166] *Mineralogy HC* (n 9), *Ngadju* cited at n 151.

In my opinion, the High Court majority should have taken the opportunity presented in *Mineralogy HC* to join Edelman J and provide essential guidance on this complicated and confused area of the law that is now affecting Native Title decisions. In the words of Edelman J, '[t]he greater the magnitude of the issue involved, and the more pressing the matters that it raises, the more compelling will be the case for this Court to consider the issue rather than to leave it in the shadows to await future adjudication'.[167]

[167] Ibid [103] (Edelman J).

AN ANALYSIS AND CRITIQUE OF THE FAILURE TO PREVENT MODEL OF CORPORATE LIABILITY

RORY O'SULLIVAN*

The failure to prevent model of corporate liability has sought to address many of the challenges faced by traditional models of corporate liability when it comes to holding corporations to account for their misconduct. This article engages with judicial decisions to critically analyse the failure to prevent model as it has been introduced in the United Kingdom. This model is comprised of a modified strict liability first limb which is satisfied on the commissioning of some predicate offence by a person relevantly associated to the corporation. This is subject to the second limb which presents corporations with an opportunity to point to procedures it had in place to prevent the misconduct from occurring which may relieve the corporation from fault. The model has led to many regulatory successes which is largely attributable to its modified strict liability first limb. However, courts are still searching for a human repository of fault and applying difficult-to-define notions of culture when applying the model's second limb. This article supports the adoption of the Systems Intentionality model of corporate liability as a means of better understanding the conduct of the corporation for the purposes of the second limb of the failure to prevent model of corporate liability.

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I INTRODUCTION

Traditional models of corporate liability have been largely ineffective in holding corporate entities responsible for their misconduct.[1] This comes despite the prevalence of corporate wrongdoing,[2] and the continued growth of these entities in terms of number, power, and complexity.[3] A key reason for this failing is that the criminal law evolved with a concern for natural persons with natural states of mind: individuals who possess knowledge and intent.[4] Yet, corporations lack this same natural mind. This has raised conceptual and practical challenges in holding corporations to account.[5]

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[1] Brent Fisse and John Braithwaite, *Corporations, Crime and Accountability* (Cambridge University Press, 1993) 57–8 ('*Corporations, Crime and Accountability*'); Penny Crofts, 'Three Recent Royal Commissions: The Failure to Prevent Harms and Attributions of Organisational Liability' (2020) 42(4) *Sydney Law Review* 395; Jonathan Clough, 'Bridging the Theoretical Gap: The Search for a Realist Model of Corporate Criminal Liability' (2007) 18(3-4) *Criminal Law Forum* 267. The High Court of Australia recently examined the relationship between corporate systems and processes and offending behaviour, namely unconscionable conduct, in *Productivity Partners Pty Ltd (t/as Captain Cook College) v Australian Competition and Consumer Commission* [2024] HCA 27, [124]–[141] (Gordon J), [207]–[219] (Edelman J) ('*Productivity Partners*').

[2] *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 136–45 ('FSRC'); *Royal Commission into the Casino Operator and Licence* (The Report, October 2021) vol 1, 194 [216] ('RCCOL'); Parliament of New South Wales, *Report of the Inquiry under section 143 of the* Casino Control Act 1992 *(NSW)* (Report, February 2009) vol 1, 232 [153] ('Bergin Inquiry'); Joint Standing Committee on Northern Australia, *A Way Forward: Final Report into the Destruction of Indigenous Heritage Sites at Juukan Gorge* (Final Report, October 2021) 1–2.

[3] Australian Law Reform Commission, *Final Report: Corporate Criminal Responsibility* (Report No 136, April 2020) 30–3 ('ALRC Report 136'); Gregg Barak, *Unchecked Corporate Power: Why the Crimes of Multinational Corporations are Routinized Away and What We Can Do About It* (Taylor & Francis Group, 2017) 3–5; Phillip Blumberg, *The Multinational Challenge to Corporation Law: The Search for a New Corporate Personality* (Oxford University Press, 1993) 153–4.

[4] Olivia Dixon, 'Corporate Criminal Liability: The Influence of Corporate Culture' (Sydney Law School Legal Studies Research Paper No 17/14, University of Sydney, February 2017) 1; ALRC Report 136 (n 3) 56 [2.31].

[5] ALRC Report 136 (n 3) 33 [1.20]; *Productivity Partners* (n 1) [199] (Edelman J).

The failure to prevent ('FTP') model of corporate liability has sought to address these challenges. Introduced in the United Kingdom in 2010, the model is a continuation of the United Kingdom's adoption of omissions liability, which follows the 'failure to disclose' and 'failure to protect' offences.[6] The FTP model has received considerable support over the following decade of its application.[7] In light of its success in holding even some of the largest conglomerates to account,[8] other jurisdictions including Australia have subsequently implemented the model.[9]

This article engages with recent judicial decisions to critically analyse the FTP model as it has been introduced in the United Kingdom. It focuses on the model's application by the courts in the United Kingdom, the extent to which the model as currently applied overcomes the issues presented by traditional, individualistic models of corporate liability, and ways in which the model might be refined. Part II examines the importance of state of mind with a focus on the criminal law context. It will then provide an overview of several traditional models of corporate liability, highlighting key issues which have largely contributed to our inability to hold corporations to account for their misconduct. Part III outlines the two limbs of the FTP model and critically analyses key cases in which the FTP model has been applied. A theme which pervades these judgments is a persistent reliance on an individualistic, anthropomorphic state of mind enquiry. This has led to the FTP model's failure to properly convey the culpability and criminality associated with wrongful corporate conduct. Part IV draws on the preceding analysis to explore

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[6] *Bribery Act 2010* (UK) ('*Bribery Act*'); *Terrorism Act 2000* (UK) ss 19, 21A, 38B; *Proceeds of Crime Act 2002* (UK) ss 330, 331; *Domestic Violence, Crime and Victims Act 2004* (UK) s 5; *Criminal Finances Act 2017* (UK) ss 45, 46 ('*Criminal Finances Act*').

[7] Select Committee on the Bribery Act 2010, House of Lords, *The Bribery Act 2010: Post-Legislative Scrutiny* (HL Paper 303, 2019) 52 [171]; Liz Campbell, 'Corporate Liability and the Criminalisation of Failure' (2018) 12(2) *Law and Financial Markets Review* 57, 60; Jonathan Clough, '"Failure to Prevent" Offences: The Solution to Transnational Corporate Criminal Liability?' in Elise Bant (ed), *The Culpable Corporate Mind* (Bloomsbury, 2023) 395 ('The Solution to Transnational Corporate Criminal Liability'); Steven Montagu-Cairns, 'Corporate Criminal Liability and the Failure to Prevent Offence: An Argument for the Adoption of an Omissions-Based Offence in AML' in Katie Benson, Colin King and Clive Walker (eds), *Assets, Crimes and the State: Innovation in 21st Century Legal Responses* (Taylor & Francis Group, 2020) 185, 199.

[8] Clough, 'The Solution to Transnational Corporate Criminal Liability' (n 7) 396–7, citing *Serious Fraud Office v Rolls-Royce plc* [2017] Lloyd's Rep FC 249.

[9] *Crimes Legislation Amendment (Combatting Foreign Bribery) Act 2024* (Cth) ('*Combatting Foreign Bribery Act*'); Explanatory Memorandum, Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023. See also *Malaysian Anti-Corruption Commission Act 2009* (Malaysia) s 17A. The elements that comprise the failure to prevent model, described in Part III(A) below, have varying definitions and degrees of application between jurisdictions. This article focuses on the FTP model as applied by the United Kingdom as part of the *Bribery Act 2010* (UK).

the potential for a novel corporate liability model, 'Systems Intentionality', to refine the FTP model in a principled and practically workable manner.

Although the focus of this article is on the FTP model as applied in the United Kingdom, the following discussion and analysis are also relevant for those jurisdictions which have implemented the FTP model or are seeking to do so in the near future.

II CORPORATE LIABILITY

A *Censure, State of Mind and Culpability*

State of mind considerations are central to regulating serious civil and criminal misconduct.[10] First, liability is traditionally founded upon the commissioning of an illegal act with an accompanying fault element, such as intention or recklessness.[11] These fault elements are often intertwined with a particular state of mind. For example, the High Court of Australia defined intention as having an 'ultimate purpose or design' in mind.[12] Recklessness involves a general intention to engage in particular conduct, knowledge of the outcome that that conduct may produce and the breach of a normative conduct reasonableness standard.[13] Identifying the offender's state of mind is therefore an integral component of establishing fault, and consequently, liability.[14] The defendant's state of mind is also relevant to many defences, such as honest and reasonable mistake; again, involving a mental state inquiry into what the defendant knew at the time of the alleged wrongdoing.[15]

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[10] Elise Bant, 'Culpable Corporate Minds' (2021) 48(2) *University of Western Australia Law Review* 352, 356–8; The Harvard Law Review Association, 'Developments in the Law: Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions' (1979) 92(6) *Harvard Law Review* 1227, 1239 ('Regulating Corporate Behavior'), citing *Morissette v United States*, 342 US 246, 254 (1952), in turn quoting Max Radin, 'Intent, Criminal' (1937) 8 *Encyclopedia of the Social Sciences* 126, 130.

[11] Glanville Williams, *Criminal Law: The General Part* (Stevens and Sons Ltd, 2nd ed, 1961) 1–2 ('*Criminal Law: The General Part*'); Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 3rd ed, 1999) 98 ('*Principles of Criminal Law*').

[12] *Zaburoni v The Queen* (2016) 256 CLR 482, 489, cited in *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, [15]–[17] (Kiefel CJ, Nettle and Gordon JJ), [101] (Edelman J). See also *Automotive Invest Pty Ltd v Commissioner of Taxation* [2024] HCA 36, [112] quoting *News Ltd v South Sydney District Rugby League Football Club Ltd* (2003) 215 CLR 563, 573 [18] (Gleeson CJ).

[13] Elise Bant, 'Modelling Corporate States of Mind through Systems Intentionality' in Elise Bant (ed), *The Culpable Corporate Mind* (Bloomsbury, 2023) 231, 235 ('Modelling Corporate States'); Williams, *Criminal Law: The General Part* (n 11) 53.

[14] Hannah Arendt, *Eichmann in Jerusalem: A Report on the Banality of Evil* (Penguin Books, 2006) 277, cited in Elise Bant, 'Corporate Evil: A Story of Systems and Silences' in Penny Crofts (ed), *Evil Corporations: Law, Culpability and Regulation* (Routledge, 2024) 286, 289 ('Corporate Evil').

[15] *CTM v The Queen* (2008) 236 CLR 440, 447 [8], 453 [27] (Gleeson CJ, Gummow, Crennan and Kiefel JJ), 491 [174] (Hayne J), 497 [199] (Heydon J); *Bergin v Stack* (1953) 88 CLR 248, 261–3

Further, where wrongdoing is established, state of mind often affects the penalty imposed by the court.[16] As a result, the state of mind enquiry remains relevant even for strict liability offences.

Second, identifying state of mind is essential for the criminal law given its coercive nature. The criminal law is a communicative tool that censures and announces publicly that a particular act is wrongful and that should it be perpetrated the actor is morally reprehensible and deserving of punishment.[17] In other words, culpable. The culpability of the actor is, in part, contingent on the actor's mental state at the time of the wrongdoing.[18] This is reflected in the Latin maxim *actus non facit reum nisi mens sit rea* ('an act does not make a man guilty of a crime unless his mind be also guilty').[19] For example, the individual who negligently destroyed property is less culpable than the individual who did so wilfully.[20] The criminal law must accurately communicate culpability not just to preserve the legitimacy and efficacy of its communicative function, but also to punish the offender appropriately, and to

(Fullagar J, Williams ACJ agreeing at 253, Taylor J agreeing at 277), citing *R v Prince* (1875) LR 2 CCR 154, 169–70 (Brett J).

[16] Elise Bant and Jeannie Marie Paterson, 'Intuitive Synthesis and Fidelity to Purpose? Judicial Interpretation of the Discretionary Power to Award Civil Pecuniary Penalties under the Australian Consumer Law' in Prue Vines and Scott Donald (eds), *Statutory Interpretation in Private Law* (Federation Press, 2019) 154, 174–7 ('Intuitive Synthesis'); Andrew von Hirsch, 'The "Desert" Model for Sentencing: Its Influence, Prospects, and Alternatives' (2007) 74(2) *Social Research: An International Quarterly* 413, 414–15 ('The "Desert" Model for Sentencing'); Karen Yeung, 'Quantifying Regulatory Penalties: Australian Competition Law Penalties in Perspective' (1999) 23(3) *Melbourne University Law Review* 440, 452.

[17] Mihailis Diamantis and William Laufer, 'Prosecution and Punishment of Corporate Criminality' (2019) 15(1) *Annual Review of Law and Social Science* 453, 463; A P Simester and Andreas von Hirsch, *Crimes, Harms, and Wrongs: On the Principles of Criminalisation* (Hart Publishing, 2011) 12; Andrew Ashworth, 'Four Threats to the Presumption of Innocence' (2006) 10(4) *International Journal of Evidence and Proof* 241, 251 ('Four Threats to the Presumption of Innocence'); Brent Fisse, 'Reconstructing Corporate Criminal Law: Deterrence, Retribution, Fault, and Sanctions' (1983) 56(6) *Southern California Law Review* 1141, 1153; Penny Crofts, 'Crown Resorts and the Im/moral Corporate Form' in Elise Bant (ed), *The Culpable Corporate Mind* (Bloomsbury, 2023) 55, 58 ('Crown Resorts and the Im/moral Corporate Form'); Ashworth, *Principles of Criminal Law* (n 11) 18; ALRC Report 136 (n 3) 180–181 [5.39]–[5.41]; Bant, 'Regulating Corporate Behavior' (n 10) 1241; European Commission, *Reinforcing Sanctioning Regimes in the Financial Services Sector* (Communication from the Commission to the European Parliament, The Council, The European Economic and Social Committee and The Committee of the Regions, 2010) 14.

[18] Yeung (n 16) 452, citing Andrew von Hirsch and Kathleen Hanrahan, *The Question of Parole: Retention, Reform or Abolition?* (Ballinger Publishing Company, 1979) 16; Bant, 'Regulating Corporate Behavior' (n 10) 1241; Kelly Shaver, *The Attribution of Blame: Causality, Responsibility, and Blameworthiness* (Springer-Verlag, 1985) 67–8.

[19] *R v Morris* (2002) 128 A Crim R 110, 113–14 [12], quoting *Haughton v Smith* (1973) 58 Cr App R 198, 206–7 (Lord Hailshom).

[20] As reflected in the different sentences imposed by both offences: see *Criminal Code Act Compilation Act 1913* (WA) ss 444(1)(b), 445 ('*Criminal Code* (WA)'). See also Andrew Ashworth, 'The Elasticity of Mens Rea' in Colin Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (Butterworths, 1981) 45, 54 ('Elasticity of Mens Rea').

respect the harm suffered by the wronged individual.[21] Understanding the offender's state of mind is essential for the criminal law to carry out these functions. This is one reason why corporations are quick to label disasters putting their reputation at risk as 'processing errors' or the result of 'poor IT infrastructure... [and] legacy system issues'.[22] It is why corporate executives repeatedly deny intent or knowledge of wrongful conduct.[23] Without these mental states, or by denying these mental states, culpability is capped at lower echelons of fault.

In the context of corporate defendants however, a sticking point in the law has been how this mental state component translates from natural persons who think, believe, plan, and scheme, to artificial corporate persons which lack a natural mind. Current laws respecting mental states evolved with a concern for natural persons with natural minds, not artificial persons.[24] Accordingly, traditional models of assessing corporate responsibility search for a human repository of fault within the corporation who represents the corporation's mental state, and from whom the corporation's liability can hang. These traditional models include vicarious liability, the identification doctrine, the *Meridian* model, the *Trade Practices Act* ('TPA') model, and the aggregation model. This article will briefly consider each in turn.

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[21] Andrew von Hirsch, *Censure and Sanctions* (Clarendon Press Oxford, 1993) 9–12 ('*Censure and Sanctions*'); Ashworth, 'Four Threats to the Presumption of Innocence' (n 17) 247; Ashworth, 'Elasticity of Mens Rea' (n 20) 55–6; Simester and von Hirsch (n 17) 19–20.

[22] FSRC (n 2) 138–9, quoting Mr Wayne Byres (Chair of the Australian Prudential Regulation Authority) and Mr Andrew Thorburn (CEO of NAB) in response to the fees for no services scandal. See generally Penny Crofts, 'Strategies of Denial and the Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry' (2020) 29(1) *Griffith Law Review* 21.

[23] Commonwealth, *Hansard*, Joint Standing Committee on Northern Australia, 7 August 2020, 6–7 (Jean-Sebastian Jacques, Rio Tinto Chief Executive); Commonwealth, *Hansard*, Joint Standing Committee on Northern Australia, 16 October 2020, 9–10 (Simone Niven, Rio Tinto Group Executive, Corporate Relations); Deanna Kemp, Kathryn Kochan and John Burton, 'Critical Reflections on the Juukan Gorge Parliamentary Inquiry and Prospects for Industry Change' (2023) 41(4) *Journal of Energy & Natural Resources Law* 379, 391–2; Rebecca Turner, 'Crown Perth Directors Deny Knowledge of Alleged Multi-Million-Dollar Money Laundering Account', *ABC News* (online, 30 July 2021) <https://www.abc.net.au/news/2021-07-30/crown-perth-directors-deny-knowledge-of-money-laundering-account/100332860>; Kate Holton and Georgina Prodhan, 'New Evidence Points to Cover-up at Murdoch Tabloid', *Reuters* (online, 18 August 2011) <https://www.reuters.com/article/newscorp-hacking-coverup-idUSLDE77G0FZ20110817>. See also Shaver, *Attribution of Blame* (n 18) 71: 'In the minds of the persons who ask the questions, *answerability*, not causality, is the issue.'

[24] Dixon, 'The Influence of Corporate Culture' (n 4) 1; ALRC Report 136 (n 3) 56 [2.31].

B *Traditional Models of Corporate Liability*

A person may be held responsible directly for their own wrongs, or vicariously for the wrongs of others for whom that person is responsible.[25] Originating in tort law, vicarious liability is a model of responsibility founded on the relationship between the principal and the agent, which holds the principal legally and strictly responsible for the wrongs of its agents.[26] Unlike the identification doctrine model (below), vicarious liability maintains a distinction between the principal (the corporation) and the agent (the employee) as separate legal persons.[27] As a result, the corporation is ultimately liable for the wrongdoing of another, not its own wrongdoing.[28]

Direct liability models focus instead on the liability of a company for its own wrongdoing. For example, the identification doctrine is a highly anthropomorphic approach to corporate liability which recognises the company's directors and particular senior executives as its 'directing mind and will'.[29] The states of mind of those individuals are attributed to the company, thereby reflecting a direct form of corporate liability.[30]

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[25] See generally *CCIG Investments Pty Ltd v Schokman* [2023] HCA 21, [65] (Edelman and Steward JJ) ('*CCIG Investments v Schokman*'); *Pioneer Mortgage Services Pty Ltd v Columbus Capital Pty Ltd* (2016) 250 FCR 136, 147–9 [48]–[58] (Davies, Gleeson and Edelman JJ) ('*Pioneer Mortgage*'); Paula Giliker, *Vicarious Liability in Tort: A Comparative Perspective* (Cambridge University Press, 2010) 16–8.

[26] *CCIG Investments v Schokman* (n 25) [48]–[81] (Edelman and Steward JJ); *Pioneer Mortgage* (n 25) 147–9 [48]–[58] (Davies, Gleeson and Edelman JJ); *Lister v Hesley Hall Ltd* [2001] UKHL 22, [14] (Lord Steyn); Pamela Bucy, 'Corporate Ethos: A Standard for Imposing Corporate Criminal Liability' (1991) 75 *Minnesota Law Review* 1095, 1102–5.

The United States has favoured the *respondeat superior* form of vicarious liability, which imputes criminal liability to the company on the basis of an offence committed by a person acting within the scope of their employment with the intent to benefit the corporation. See *New York Central & Hudson River RR Co v United States*, 212 US 481 (1909); Law Commission, *Corporate Criminal Liability: An Options Paper* (Options Paper, June 2022) 62–5 ('Law Commission Options Paper').

[27] Ross Grantham, 'Attributing Responsibility to Corporate Entities: A Doctrinal Approach' (2001) 19(3) *Company and Securities Law Journal* 168, 171.

[28] The issues with this are discussed in greater detail in Part II(C).

[29] *Lennard's Carrying Co v Asiatic Petroleum Co* [1915] AC 705, 713 (Viscount Haldane LC) ('*Lennard's*'); *HL Bolton (Engineering) Co v TJ Graham & Sons* [1957] 1 QB 159, 172 (Denning LJ); *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153, 170–2 (Lord Reid); Jonathan Clough and Carmel Mulhern, *The Prosecution of Corporations* (Oxford University Press, 2002) 89; Grantham (n 27) 170; Law Commission Options Paper (n 26) 27–44; *Brambles Holdings Ltd v Carey* (1976) 15 SASR 270, 279 (Bright J) cited with approval in *Krakowski v Eurolynx Properties Ltd* (1995) 183 CLR 563.

[30] The doctrine is traditionally the preferred model in the United Kingdom, as well as Canada albeit a broader version which extends to 'senior officers', see *R v Pétroles Global Inc* (2013) QCCS 4262, 42. Australia has also applied the model, see *R v Haley* [2012] TASSC 86, [29] (Wood J); *Nationwide News Pty Ltd v Naidu & Anor; ISS Security Pty Ltd v Naidu & Anor* (2007) 71 NSWLR 471, 505–6 [234]–[237] (Beazley JA); *Hamilton v Whitehead* (1988) 82 ALR 626, 630 (Mason CJ, Wilson and Toohey JJ).

In light of various flaws the identification doctrine was modified in *Meridian Global Funds Management Asia Ltd v Securities Commission*,[31] such that attribution was instead determined based on the 'terms and policies of the substantial rule'.[32] Rather than an attribution of mental state from only the most senior company officers like the identification doctrine, the *Meridian* model determines and applies whoever's state of mind, including potentially lower-level employees, the relevant cause of action or legislative provision intended to be attributed to the corporation.[33] Making this determination is ultimately a question of statutory interpretation.

Another modified form of the identification doctrine is the Australian TPA model, which deems the conduct of company directors, employees or agents to be the conduct of the corporation.[34] First appearing in s 84 of the *Trade Practices Act 1974* (Cth), several variations have proliferated Australian Commonwealth statute.[35] In effect, both the *Meridian* and TPA model reformulations of the identification doctrine cast different sized nets to capture more or fewer agents of the corporation, depending on the relevant rule or statute in question. Fundamentally however, the search for a corporate mental state is linked to the mental state of individuals.

The aggregation model ('Aggregation') emerged as an attempt to better recognise the reality of large corporate structures, where the corporate state of mind may be located in more than one individual.[36] Aggregation seeks to address some of the shortfalls of the identification doctrine and its offshoots by amalgamating the knowledge of various individuals within a corporation and imputing the sum of that knowledge to the corporation.[37] Whilst the aggregation approach holds some

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[31] [1995] 2 AC 500, 511 (Lord Hoffmann) ('*Meridian*'); *Director of Public Prosecutions (Vic) Reference No 1 of 1996* [1998] 3 VR 352, 517 (Callaway JA); *ABC Developmental Learning Centres Pty Ltd v Joanna Wallace* [2006] VSC 171, [6]–[15] (Bell J). See generally Rachel Leow, 'Equity's Attribution Rules' (2021) 15(1) *Journal of Equity* 35, 36–42; Rachel Leow, '*Meridian*, Allocated Powers and Systems Intentionality Compared' in Elise Bant (ed), *The Culpable Corporate Mind* (Bloomsbury, 2023) 119, 119–23 ('*Meridian*, Allocated Powers and Systems Intentionality Compared').

[32] *Meridian* (n 31) 511 (Lord Hoffmann).

[33] Ibid 507 (Lord Hoffmann).

[34] ALRC Report 136 (n 3) 39 [1.43], citing Duke Arlen, *Corones' Competition Law in Australia* (Lawbook Co, 7th ed, 2019) 300.

[35] See, eg, *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* (Cth) s 65(1); *Taxation Administration Act 1953* (Cth) s 8ZD.

[36] *United States v Bank of New England*, 821 F 2d 844, 855 (1987). See generally, ALRC Report 136 (n 3) 256–9; Eli Lederman, 'Models for Imposing Corporate Criminal Liability: From Adaptation and Imitation Toward Aggregation and the Search for Self-Identity' (2000) 4(1) *University of California Press* 641, 661–77; Rebecca Faugno, 'Ideas of Corporate Culture from the Perspective of Penalties Jurisprudence' in Elise Bant (ed), *The Culpable Corporate Mind* (Bloomsbury, 2023) 159, 161–2.

[37] Mihailis E Diamantis, 'Corporate Criminal Minds' (2016) 91(5) *Notre Dame Law Review* 2049, 2069–71.

appeal, the model is not free from conceptual challenges.[38] In the context of corporate unconscionable conduct for example, Edelman J in the Federal Court's *Commonwealth Bank of Australia v Kojic* decision considered that '[i]t is not easy to see how a corporation, which can only act through natural persons, can engage in unconscionable conduct when none of those natural persons acts unconscionably'.[39] Similar reasoning has led courts to reject submissions that a corporation has acted fraudulently where no individual has done so in cases of deceit,[40] and that a corporation has acted contumeliously where no individual has done so in determining exemplary damages.[41]

C *Issues with the Traditional Models of Corporate Liability*

These traditional models of corporate liability are individualistic insofar as they equate the state of mind of one or more individuals with the state of mind of the company itself. They thereby fail to account for the corporation's own wrongdoing on a holistic level. This presents several issues.

First, an individualistic approach can lead to a misalignment of blameworthiness and wrongdoing. A conviction entails a finding of criminal guilt and is a means for the criminal law to censure conduct and communicate blame.[42] It is the state's strongest condemnation of conduct. A system which sends such a strong condemnatory message, which intervenes so coercively, and which restricts individual autonomy so stringently, should be accurate and fair in conveying the extent of the perpetrator's culpability.[43] This is to protect the perpetrator from unjust punishment, but also to recognise the harm that has been suffered by the victim.[44] An individualistic approach can result in an under or over communication

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[38] Jeremy Gans, 'Can Corporations be Dishonest?' in Elise Bant (ed), *The Culpable Corporate Mind* (Bloomsbury, 2023) 273, 291–4.
[39] [2016] FCAFC 186, [112] (Edelman J) ('*Kojic*').
[40] *Anglo-Scottish Beet Sugar Corporation Ltd v Spalding Urban District Council* [1937] 2 KB 607, 625 (Armstrong J), quoted in *Kojic* (n 39) [113] (Edelman J); *Armstrong v Strain* [1951] 1 TLR 856, 872 (Devlin J), quoted in *Kojic* (n 39) [113] (Edelman J).
[41] *Port Stephens Shire Council v Tellamist Pty Ltd* (2004) 135 LGERA 98, 200 [408] (Ipp J), quoted in *Kojic* (n 39) [113] (Edelman J).
[42] Simester and von Hirsch (n 17) 3–5, 10–4; Von Hirsch, *Censure and Sanctions* (n 21) 9–12; Susan Easton and Christine Piper, *Sentencing and Punishment: The Quest for Justice* (Oxford University Press, 2005) 61–2.
[43] Ashworth, 'Elasticity of Mens Rea' (n 20) 55–6; Jeremy Horder, 'Rethinking Non-Fatal Offences against the Person' (1994) 14(3) *Oxford Journal of Legal Studies* 335, 338–9. See generally regarding the principle of 'fair labelling' in the criminal law context Glanville Williams, 'Convictions and Fair Labelling' (1983) 42(1) *Cambridge Law Journal* 85 ('Convictions and Fair Labelling').
[44] Von Hirsch, *Censure and Sanctions* (n 21) 10; Ashworth, 'Elasticity of Mens Rea' (n 20) 55–6.

of culpability by the criminal law.[45] "Innocent" organisations may be held liable, thereby blamed, for the actions of rogue individuals.[46] Conversely, "bad" organisations may escape or minimise blameworthiness and liability by diffusing knowledge or replacing executives.[47] Accordingly, by focusing on the individuals as opposed to the organisation, the criminal law fails to appropriately censure corporate conduct.

Second, from a practical perspective, identifying the human within the corporation from whom the mental state can be derived is notoriously difficult.[48] This is particularly the case when large organisations with diffuse resources and horizontal organisational structures are involved.[49] Consider Crown Casino, whose anti-money laundering processes were analysed first by Patricia Bergin SC in the *Report of the Inquiry under section 143 of the* Casino Control Act 1992 *(NSW)* ('Bergin Inquiry')[50] and subsequently by Commissioner Finkelstein in the *Royal Commission into the Casino Operator and Licence* ('RCCOL').[51] Crown's casino cage staff in Melbourne and Perth recorded patron deposits into a database by aggregating multiple deposits into a single database entry. This aggregation system precluded anti-money laundering staff from identifying the number of deposits made in a single entry, and from accurately identifying the nature of those deposits including whether they reflected any money-laundering indicia.[52] Applying an individualistic approach,

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[45] ALRC Report 136 (n 3) 219 [6.7]; Elise Bant, 'The Culpable Corporate Mind: Taxonomy and Synthesis' in Elise Bant (ed), *The Culpable Corporate Mind* (Bloomsbury, 2023) 3, 12 ('Taxonomy and Synthesis').

[46] Bucy (n 26) 1103–5, citing *United States v Hilton Hotels Corp*, 467 F 2d 1000 (9th Cir, 1972), *cert denied*, 409 US 1125 (1973).

[47] John Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (Taylor & Francis Group, 1984) 308; Ben Butler, Lorena Allam and Calla Wahlquist, 'Rio Tinto CEO and Senior Executives Resign from Company After Juukan Gorge Debacle', *The Guardian* (online, 11 September 2020) <https://www.theguardian.com/business/2020/sep/11/rio-tinto-ceo-senior-executives-resign-juukan-gorge-debacle-caves>.

[48] Letter from Serious Fraud Office Director Mark Thompson to Chair of the Treasury Select Committee Hon Nicky Morgan MP, 16 July 2018 <https://www.parliament.uk/globalassets/documents/commons-committees/treasury/Written_Evidence/sfo-corporate-liability-160718.pdf>; Jennifer Hill, 'Corporate Criminal Liability in Australia: An Evolving Corporate Governance Technique' (2003) 1 *Journal of Business Law* 1, 8–9.

[49] William S Laufer, *Corporate Bodies and Guilty Minds: The Failure of Corporate Criminal Liability* (University of Chicago Press, 2006) 145–6 ('*Corporate Bodies and Guilty Minds*'); James Gobert, 'Corporate Criminality: Four Models of Fault' (1994) 14(3) *Legal Studies* 393, 401; Campbell (n 7) 58; Montagu-Cairns (n 7) 187, quoting Alison Saunders, 'Statement from the Crown Prosecution Service: No Further Action to be Taken on Operation Weeting or Golding', *Crown Prosecution Service* (online, 11 December 2015) <https://web.archive.org/web/20151218214838/www.cps.gov.uk/news/latest_news/no_further_action_to_be_taken_in_operations_weeting_or_golding/>.

[50] Bergin Inquiry (n 2).

[51] RCCOL (n 2).

[52] Ibid 83 [113]–[117], 175 [89]–[93]; Bergin Inquiry (n 2) 209 [31]–[33].

Commissioner Bergin rejected allegations that Crown was turning a blind eye to money laundering activity as 'the Crown team were looking. They were not looking away. It was just that they could not see.'[53] Crown's aggregation system precluded the identification of money laundering knowledge in any one individual. Consequently, applying an individualistic approach, Crown's liability could not be established.[54]

There is evidently a need for a model of corporate liability which is capable of assessing the corporation's own uncontaminated culpability, while overcoming the obstacles presented by modern corporate structures and conduct. The corporate culture and "Systems Intentionality" models, discussed below, attempt to do just that.

D *Organisational Models of Corporate Liability*

1 *Corporate Culture*

The corporate culture model ('Corporate Culture') is a form of organisational fault grounded in Australia's *Criminal Code Act 1995* (Cth) ('*Criminal Code* (Cth)').[55] The model is premised on the notion that a corporation's culture reflects the corporation's state of mind.[56] Accordingly, under the *Criminal Code* (Cth), a corporation whose culture leads to, directs, encourages or tolerates misconduct, or fails to require compliance with the *Criminal Code* (Cth), should be taken to have intended for that misconduct or noncompliance to have occurred.[57] In contrast to individualistic models, as a direct, organisational form of liability, Corporate Culture reflects organisational fault.[58] It is the corporation as a whole and in its own capacity that has developed its own blameworthiness, independent of any individuals.

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[53] Bergin Inquiry (n 2) 233–4 [160]–[170].

[54] In contrast, applying Systems Intentionality to the RCCOL, Commissioner Finkelstein determined that there was 'a compelling challenge to the proposition that Crown's facilitation of money laundering...was inadvertent': see RCCOL (n 2) [96]–[101].

[55] *Criminal Code Act 1995* (Cth) pt 2.5 s 12.3 ('*Criminal Code* (Cth)'); Law Commission Options Paper (n 26) 73–4.

[56] See generally Dixon (n 4); Vicky Comino, 'Corporate Culture is the "New Black": Its Possibilities and Limits as a Regulatory Mechanism for Corporations and Financial Institutions?' (2020) 44 *University of New South Wales Law Journal* 295; Faugno (n 36).

[57] Bucy (n 26) 1099, 1121–64.

[58] Comino (n 56) 300; Brent Fisse and John Braithwaite, 'The Allocation of Responsibility for Corporate Crime: Individualism, Collectivism and Accountability' (1988) 11(3) *Sydney Law Review* 468, 479.

Unfortunately, despite Corporate Culture provisions existing in Australia for some 25 years, there has not been a single case which has applied the provisions through trial to judgment.[59] It has to date been a failure as a model of corporate liability in the sense of its practical workability.[60] The reason for this is, first, culture is a vague concept which may ask more questions than it answers.[61] There must be some conceptual certainty and consistency in identifying a corporation's culture objectively. Select organisational structures, such as the corporation's incentive programs, leadership training, staff recruitment processes and conflict resolution procedures, may be of assistance in identifying culture objectively;[62] however when it comes to applying these structures to comprehensively determine culture in a consistent manner, the model is still in its infancy.[63] Second, assuming one can objectively identify a company's corporate culture, how can prosecutors translate what may be regarded as a "bad" corporate culture into a corporate state of mind and subsequent fault element? How does a "bad" corporate culture reflect negligence as opposed to recklessness, dishonesty, or intention? It comes as no surprise, therefore, that the Law Commission (England and Wales) recently rejected Corporate Culture as an attribution model for the United Kingdom.[64] Assuming a model is theoretically robust and can assess culpability, it must also be practically workable from investigation through to trial and judgment.[65] This said, the promise of Corporate Culture as a means of establishing organisational liability has not been lost on the Australian Law Reform Commission which put forward two corporate fault reform options that rely to various degrees on Corporate Culture concepts.[66]

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[59] ALRC Report 136 (n 3) 232 [6.49], 245–6 [6.108], citing Transcript of Proceedings, *R v Potter & Mures Fishing Pty Ltd* (Supreme Court of Tasmania, Blow CJ, 14 September).
[60] Law Commission Options Paper (n 26) 77 [6.20]. Cf Bucy (n 26) 1101.
[61] Faugno (n 36) 159–60; Dan Awrey, William Blair and David Kershaw, 'Between Law and Markets: Is There a Role for Culture and Ethics in Financial Regulation?' (2013) 38 *Delaware Journal of Corporate Law* 191, 205; Ann Wardrop, David Wishart and Marilyn McMahon, 'Regulating Financial Institutional Culture: Reforming the Regulatory Toolkit' (2016) 27(3) *Journal of Banking and Finance Law and Practice* 171, 173.
[62] Elizabeth Arzadon, 'Observations in Relation to Deloitte Culture Review of Crown: Expert Opinion' (Perth Casino Royal Commission October 2021) 10.
[63] Faugno (n 36) 159–60. Systems Intentionality, discussed in Part III(D)(2) below, provides a more nuanced and practical approach to identify fault, and identifiable components of 'culture'.
[64] Law Commission Options Paper (n 26) 77 [6.20].
[65] Consistently, the ALRC has made reform recommendations to facilitate greater practical workability, see ALRC Report 136 (n 3) 228–50.
[66] ALRC Report 136 (n 3) 228 (Recommendation 7).

2 *Systems Intentionality*

The Law Commission (England and Wales) took a more favourable stance towards Systems Intentionality, a model of corporate liability developed by Professor Elise Bant.[67] Systems Intentionality is premised on the idea that systems are relied upon by corporations to conduct their business and activities, as without these systems corporations would be largely inert.[68] Systems entail those various practices, processes, policies and checks that work cohesively to produce an outcome.[69] This includes positive elements that drive towards particular outcomes, as well as negative elements (omissions) that allow those outcomes to occur.[70] Systems inherently manifest a general intention to engage in particular conduct, as they are adopted purposively to undertake that conduct.[71] Accordingly, rather than search for a human actor, Systems Intentionality relies on objective characterisations of the corporation's deployed systems of conduct to reveal and give effect to the corporation's state of mind.[72] As put by Commissioner Finkelstein in the RCCOL: '[s]ystemic and sustained change is needed for a culpable corporation to reform its character, *as revealed through its systems, policies, and processes*'.[73]

This is not to say that what individuals knew or did is irrelevant in a Systems Intentionality inquiry.[74] This evidence remains significant as to what it shows about the company's systems as deployed on the ground; even more so where an individual is in a position of seniority with respect to the corporation or relevant system.[75] However, such evidence is not relied upon to impute the individuals' states of mind to the company. In this way, Systems Intentionality is not an anthropomorphic model, but a truly organisational model, which reflects a direct, organisational form of liability.

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[67] Law Commission Options Paper (n 26) 79–80 [6.35]–[6.36]. See generally on Systems Intentionality Elise Bant, 'Systems Intentionality: Theory and Practice' in Elise Bant (ed), *The Culpable Corporate Mind* (Bloomsbury, 2023) 183, 183–207 ('Systems Intentionality Theory and Practice'). Systems Intentionality was recently (at the time of writing) applied by the High Court of Australia in *Productivity Partners* (n 1) [106]–[111] (Gordon J), [236]–[248] (Edelman J).

[68] Bant, 'Systems Intentionality Theory and Practice' (n 67).

[69] Bant, 'Modelling Corporate States' (n 13) 245; *Australian Securities and Investments Commission v AGM Markets Pty Ltd (in liq) (No 3)* (2020) 275 FCR 57, [389]–[391] (Beach J) ('*AGM Markets*').

[70] Rebecca Faugno and Elise Bant, 'Corporate Culture, Conscience and Casinos' (2024) 33(4) *Griffith Law Review* 484, 492.

[71] Bant, 'Systems Intentionality Theory and Practice' (n 67) 183–207.

[72] Ibid 187.

[73] RCCOL (n 2) 178 [101] (emphasis added).

[74] Bant, 'Taxonomy and Synthesis' (n 45) 10.

[75] Elise Bant, 'Corporate Mistake' in Jodi Gardner et al (eds), *Politics, Policy and Private Law: Volume II: Contract, Commercial and Company Law* (Bloomsbury, 2025) 123, 139–41.

Systems Intentionality's analytical starting point is that by deploying the relevant system the corporation intended to undertake the conduct that as a matter of course resulted from that system.[76] From here, a corporation can be held liable for substantive criminal offences. Recall that Crown's systematic aggregation of deposits and separation of business units meant no individual could be identified with the requisite knowledge or mental state to find fault on the part of Crown.[77] However, knowledge of the outcome that this system produces can be identified through an objective assessment of what Crown knew about the system in order for it to operate. Specifically, it was open that Crown knew that aggregating deposits and separating business units would substantially impair (if not completely undermine) its capacity to identify money laundering.[78] This comes particularly in light of the numerous third party warnings of the possibility of Crown's aggregation system facilitating money laundering.[79] Applying Systems Intentionality, Crown's system evinces both a general intention to engage in deposit aggregation and knowledge of an outcome that that conduct would produce. From these two building blocks a fault element, be it recklessness, maybe even intent, begins to take shape.

It follows that Systems Intentionality may serve to better identify components of 'culture' as those systems that comprise the corporation, and to translate those components into fault elements. Furthermore, Systems Intentionality could also act as a standalone model of corporate liability. Nevertheless, while the Law Commission (England and Wales) commented positively on Systems Intentionality, it ultimately preferred the FTP model.[80]

III THE FAILURE TO PREVENT MODEL OF CORPORATE LIABILITY

A *FTP Model Overview*

1 *Section 7(1) offence*

The FTP model is an organisational, omissions-based model of corporate criminal liability that was introduced in the United Kingdom as part of the *Bribery Act 2010* (UK) ('*Bribery Act*').[81] The FTP model follows the omissions path to liability which

[76] Bant, 'Systems Intentionality Theory and Practice' (n 67); Bant, 'Modelling Corporate States' (n 13) 246–7.
[77] See above Part II(C).
[78] Leow, 'Meridian, Allocated Powers and Systems Intentionality Compared' (n 31) 135.
[79] Bergin Inquiry (n 2) 181–2 [185], 210 [38]–[39].
[80] Law Commission Options Paper (n 26) 82–3 [6.51]–[6.54].
[81] *Bribery Act* (n 6). See generally Campbell (n 7); Celia Wells, 'Corporate Failure to Prevent Economic Crime: A Proposal' (2017) 6 *Criminal Law Review* 426; Jeremy Horder and Gabriele Watts, 'The Scope of Liability for Failure to Prevent Economic Crime' (2021) 10 *Criminal Law Review* 851.

the United Kingdom has adopted in other areas of the law including the 'failure to disclose' offences, and 'failure to protect' offences.[82] Section 7(1) of the *Bribery Act* makes a corporation's failure to prevent bribery a criminal offence. The offence requires the commissioning of a predicate offence (bribery) by an 'associated person',[83] for the purpose of obtaining or retaining business or an advantage for the corporation. The corporation is strictly liable for its failure to prevent this predicate offence occurring.

Section 7 has resulted in a number of high profile successes.[84] The United Kingdom's Serious Fraud Office ('SFO') successfully prosecuted Sweett Group plc in 2016 and Skansen Interiors Ltd in 2018, both for failing to prevent bribery under s 7.[85] Furthermore, the SFO entered into deferred prosecution agreements ('DPAs') with Standard Bank plc in 2015,[86] Sarclad Ltd in 2016,[87] Rolls-Royce plc in 2017,[88] and Airbus SE in 2020,[89] all in connection with failures to prevent bribery.

These successes are largely attributable to the FTP model's modified strict liability nature. The removal of fault from the positive limb of the offence reduces the distinction between various criminal conduct. For example, it is the fault element of intent that separates murder from manslaughter.[90] This removal presents prosecuting agencies with fewer evidential demands, supposedly leading to fewer opportunities for acquittal and fewer grounds for appeal.[91] This is particularly advantageous as against large, complex, multi-jurisdictional conglomerates who are often capable of insulating themselves from liability.[92] To illustrate, in 2016 the SFO commenced an investigation into Airbus which was suspected of failing to prevent

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[82] *Terrorism Act 2000* (UK) ss 19, 21A, 38B; *Proceeds of Crime Act 2002* (UK) ss 330, 331; *Domestic Violence, Crime and Victims Act 2004* (UK) s 5; *Criminal Finances Act* (n 6). See generally Andrew Ashworth, 'Positive Duties, Regulation and the Criminal Sanction' (2017) 133 *Law Quarterly Review* 606.

[83] A person who is performing services on the corporation's behalf: see *Bribery Act* (n 6) s 8.

[84] Clough, 'The Solution to Transnational Corporate Criminal Liability' (n 7) 396–7.

[85] *Serious Fraud Office v Sweett Group plc* (Crown Ct (Southwark), Beddoe J, 19 February 2016); *R v Skansen Interiors Ltd* (unreported, 2018, Southwark Crown Court) ('*Skansen*').

[86] *Serious Fraud Office v Standard Bank plc (now known as ICBC Standard Bank plc)* (Preliminary) [2016] Lloyd's Rep FC 91 ('*Standard Bank*'). On deferred prosecution agreements generally, see Campbell (n 7) 59.

[87] *Serious Fraud Office v Sarclad Ltd* (Preliminary) (Crown Ct (Southwark), Leveson LJ, 8 July 2016) ('*Sarclad*'); *Serious Fraud Office v XYZ Ltd* [2016] Lloyd's Rep FC 517 ('*XYZ*').

[88] *Serious Fraud Office v Rolls-Royce plc* [2017] Lloyd's Rep FC 249 ('*Rolls-Royce*').

[89] *Director of the Serious Fraud Office v Airbus SE* [2021] Lloyd's Rep FC 159 ('*Airbus*').

[90] *Criminal Code* (WA) (n 20) ss 279, 280.

[91] Ashworth, 'Elasticity of Mens Rea' (n 20) 68–9; Andrew Simester, 'Is Strict Liability Always Wrong?' in Andrew Simester (ed), *Appraising Strict Liability* (Oxford University Press, 2005) 26–7.

[92] See Part II(C) above.

bribery.[93] To give a sense of the scale and complexity of the investigation, Airbus is a corporation registered in the Netherlands and is the ultimate parent company of the Airbus Group. Airbus conducted operations through various subsidiaries and the predicate offences involved Airbus, its subsidiaries, and third-party intermediary corporations. The investigation involved over 30.5 million documents,[94] and covered bribery offences in numerous countries across Asia and Africa.[95] President Sharp aptly described Airbus as possessing a 'complex corporate history and structure'.[96] Nevertheless, in 2020 the SFO and Airbus reached a DPA which was ultimately approved by President Sharp in *Director of the Serious Fraud Office v Airbus SE* ('*Airbus*').[97] *Airbus* thereby reflects the practical workability that the FTP model offers, which can overcome many of the evidentiary challenges faced by prosecution agencies even when prosecuting large, multi-jurisdictional, and highly diffused conglomerates.

Notably, this s 7 offence (and the FTP model more generally) is not a model of liability attribution.[98] The failure to prevent bribery is an offence in and of itself, distinct from the predicate offence that occurred. This is an important feature for recognising the offending corporation's own blameworthiness, as opposed to the corporation merely being attributed with the blameworthiness of another actor.

2 *Section 7(2) defence*

Section 7(2) of the *Bribery Act* imports the second limb of the FTP model; a defence where the corporation proves on the balance of probabilities that it had in place adequate procedures designed to prevent associated persons from undertaking bribery.[99] This second limb encourages corporations to invest in precautions that proactively guard against the commissioning of offences.[100]

[93] *Airbus* (n 89).
[94] Ibid [36].
[95] Ibid [3].
[96] Ibid [15].
[97] *Airbus* (n 89); Serious Fraud Office, 'SFO Enters into €991m Deferred Prosecution Agreement with Airbus as Part of a €3.6bn Global Resolution' (Media Release, 31 January 2020).
[98] ALRC Report 136 (n 3) 296 [7.63].
[99] *Bribery Act* (n 6) s 7(2).
[100] ALRC Report 136 (n 3) 297 [7.68], 298 [7.74].

The UK Ministry for Justice provided guidance on the precautions a corporation can take (the 'Guidelines').[101] Many of these precautions and principles are not particularly novel. They are consistent with the systems, policies and processes analysed through a Systems Intentionality analysis; the organisational structures that are indicative of a corporation's culture; not to mention with common sense for guarding against the commissioning of bribery (or at least one would hope so of a global conglomerate executive). President Leveson in approving Rolls-Royce's reformed ethics and compliance procedures in *Serious Fraud Office v Rolls-Royce plc* ('*Rolls-Royce*')[102] alluded to many of these principles.[103] His Honour noted the inclusion of independent compliance officers and business divisions; the use of both internal and external due diligence, and ongoing monitoring of intermediary cooperation; the implementation of procedures tailored to specific high-risk scenarios with the provision of guidance for those operating in those scenarios; and the creation of risk assessment resources and guides to support business approval decision-makers.[104] Further, his Honour identified that ethics and compliance training should familiarise employees with the policies and procedures, with more regular training for those tasked with anti-bribery and corruption monitoring and investigations.[105] These policies, procedures, and training were to be continually reviewed and updated to ensure they are embedded in on the ground practices and continue to operate as intended.[106] However, the mere existence of policies, procedures and training is insufficient. In the context of the *Bribery Act*, these precautions must be 'adequate',[107] which, somewhat unhelpfully from the perspective of achieving consistency and uniformity, is interchanged with 'effective'[108] or 'appropriate' in the Guidelines and various judgments in which the FTP model in applied.[109] Nevertheless, a theme that emerges from the courts and the Guidelines is an outcome-focussed approach,[110] which focuses on the compliance

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[101] Ministry of Justice, 'The Bribery Act 2010: Guidance' (Government Guidance, 2011) ('Bribery Act Guidelines'). See also Ministry of Justice, 'Tackling Tax Evasion: Government Guidance for the Corporate Offences of Failure to Prevent the Criminal Facilitation of Tax Evasion' (Government Guidance, 2017). Australia has also released guidance on establishing adequate 'procedures': see Attorney-General's Department, 'Guidance on Adequate Procedures to Prevent the Commission of Foreign Bribery' (Media Publication, 2024).
[102] *Rolls-Royce* (n 88).
[103] Ibid [44], [129]–[131].
[104] Ibid.
[105] Ibid.
[106] Ibid [130].
[107] *Bribery Act* (n 6) s 7; *Sarclad* (n 87) [23], [41]; *Airbus* (n 89) [5]; *Standard Bank* (n 86) [20].
[108] *Sarclad* (n 87) [45], [62].
[109] *Sarclad* (n 87) [80]; *Airbus* (n 89) [100], [119]; *Rolls-Royce* (n 88) [87], [93]; *Standard Bank* (n 86) [46]; Bribery Act Guidelines (n 101).
[110] Bribery Act Guidelines (n 101) 20.

systems that have in fact been deployed and achieve an end, as opposed to those systems that are merely preached or are 'cosmetic' in their effect.[111]

Consider *Serious Fraud Office v Standard Bank plc* ('*Standard Bank*'),[112] which involved Standard Bank failing to prevent a USD $6 million payment to Tanzanian government officials. The payment was allegedly a bribe to secure Standard Bank's financing services for a Tanzanian government initiative.[113] Standard Bank and the Standard Bank Group more widely both had a number of anti-bribery policies, procedures and committees in place at the time of offending.[114] Nevertheless, those policies lacked clarity and had not been communicated or reinforced to the relevant staff.[115] Accordingly, Standard Bank staff were unable to appreciate the bribery and corruption risks associated with the transaction. When put into practice, Standard Bank's precautions had negligible impact on predicate offending, and accordingly, it was unable to raise a defence.

Another example is *Airbus*, where the global conglomerate Airbus was charged with multiple instances of failing to prevent bribery in Malaysia, Sri Lanka, Taiwan, Indonesia and Ghana over a four-year period.[116] At the time of offending, Airbus had been awarded an anti-corruption compliance certificate for its anti-bribery compliance program design.[117] In light of this, Airbus was supposedly an outstanding corporate citizen. Yet Airbus staff were deliberately circumventing both Airbus' internal and external compliance procedures.[118] President Sharp subsequently concluded that 'Airbus *did not prevent*, or have in place at the material times adequate procedures *designed to prevent*' the offences.[119] Despite Airbus' awards, its precautions as instantiated on the ground were inadequate.

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[111] William Laufer, 'Corporate Liability, Risk Shifting, and the Paradox of Compliance' (1999) 52 *Vanderbilt Law Review* 1341; Kimberly Krawiec, 'Organisational Misconduct: Beyond the Principal-Agent Model' (2005) 32(2) *Florida State University Law Review* 571, 580; Brandon Garrett, 'Structural Reform Prosecution' (2007) 93(4) *Virginia Law Review* 853, 876; Todd Haugh, 'The Criminalization of Compliance' (2017) 92(3) *Notre Dame Law Review* 1215, 1217–18.

[112] *Standard Bank* (n 86).

[113] See Part III(B) below for a more detailed description of *Standard Bank*.

[114] *Standard Bank* (n 86) [20]; Statement of Facts, *Serious Fraud Office v Standard Bank plc (now known as ICBC Standard Bank plc)* (Preliminary) (Crown Ct (Southwark), Leveson LJ, 30 November 2015) [191]–[197] ('*Standard Bank Statement of Facts*').

[115] *Standard Bank* (n 86) [20]; *Standard Bank Statement of Facts* (n 114) [199].

[116] See Part III(B) below for a more detailed description of *Airbus*.

[117] Statement of Facts, *Regina v Airbus SE* (Crown Ct (Southwark), Dame Sharp, 31 January 2020) [24] ('*Airbus Statement of Facts*').

[118] *Airbus* (n 89) [65].

[119] Ibid [5] (emphasis added). President Leveson makes a similar distinction between precaution outcome and design: see *Standard Bank* (n 86) [20].

Evidently, the courts are assessing the relevant precaution's adequacy based on how it is deployed and operated, and on the outcome that is achieved.[120] To be 'adequate' the precaution must achieve an objectively ascertainable outcome: that is, the rolled-out precaution must have a demonstratable impact on predicate offending. The mere existence of precautions is insufficient. Such an approach has a notable advantage. Corporations like Airbus may avoid liability by establishing 'cosmetic' systems that are prima facie robust, particularly to the untrained eye, but knowingly insufficient and destined to fail.[121] Assessing adequacy based on what the rolled-out system achieves, as President Sharp has done, overcomes this cosmetic compliance issue.[122]

The outcome-focussed application of the FTP model's second limb imposes a high burden on corporations seeking to rely on the defence. Even more so given that the interpretation of 'adequate' appears to be assessed post-offence, rather than in light of the circumstances at the time.[123] This approach of hinging 'adequacy' on a hindsight assessment of the success of the precautions — in a failure to prevent case where those precautions necessarily failed — suggests the limb may lack utility. This was precisely the concern contemplated by the House of Lords Select Committee in their 2019 post-legislative scrutiny report:

> We therefore have to decide whether, notwithstanding what was intended, there is a danger that 'adequate' in the Bribery Act will be interpreted too strictly, so that a company which had in place anti-bribery procedures in all the circumstances but did not in fact prevent bribery taking place might be unable to avail itself of this defence. We think such an interpretation is very unlikely…any judge would surely instruct the jury to take the surrounding circumstances into account.[124]

As it turns out, such a direction was not passed on to the jury in *R v Skansen Interiors Ltd*, the first contested s 7 case.[125] In light of the language implemented by the judges above in *Rolls-Royce* and *Airbus*, it appears the Select Committee's concern may have eventuated. Without greater direction from the courts, the language of s 7(2) by itself appears insufficient to provide any real assistance to corporations.

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[120] Such an outcome-based conceptualisation of adequacy is further demonstrated by the judgments in both *Sarclad* (n 87) [45], [62] and *Airbus* (n 89) [119], noting that in both cases the adequacy standard was re-characterised as 'effective'.
[121] See above n 110.
[122] Bant, 'Corporate Evil' (n 14) 296.
[123] As is the language used by the comparable provisions in the *Criminal Finances Act 2017* (UK); see ss 45(2)(b) and 46(3)(b).
[124] Select Committee on the Bribery Act 2010, House of Lords, *The Bribery Act 2010: Post-Legislative Scrutiny* (HL Paper 303, 2019) [210], see also [204].
[125] Ibid [203]; *Skansen* (n 85).

B *An "Organisational" Model of Liability*

Recall that the FTP model is not a model of liability attribution, but an offence that is distinct from, albeit contingent on the commissioning of, a predicate offence. Consistently, in the process of determining culpability for the purposes of penalty assessment, President Leveson in *Rolls-Royce* distinguished the fault of the mid-ranking Rolls-Royce employees who were responsible for the predicate corrupt conduct, and that of Rolls-Royce itself which was responsible for the failure to 'instil within the wider business a culture of compliance'.[126] This reflects the inherent distinction between the fault of the individuals responsible for the predicate offending and the fault of the corporation who is responsible for failing to prevent those predicate offenders. Further, it demonstrates that in applying the FTP model, the courts are adopting an organisational blame approach to liability and looking at the corporation's culpability more holistically.

Furthermore, while the FTP model does not require fault in the positive sense (ie it had knowledge or intent of the predicate offence), a lack of fault is still relevant under the second limb. Accordingly, the FTP model is not a "no fault" liability model. Notably, the approach to organisational blame adopted by President Leveson above relies on corporate culture as a descriptor of the corporation's fault: specifically, the lack of a 'culture of compliance'.[127] This judicial reliance on corporate culture to characterise fault is a recurring theme through several cases that apply the FTP model.[128] Despite the vagueness and practical difficulties with the concept of corporate culture discussed above,[129] in each of these cases the courts have identified the corporation's culture (or lack thereof) in order to determine the corporation's culpability for the purposes of sentencing and deciding whether to approve a DPA.[130] This suggests the courts have been capable of identifying this supposedly elusive concept.[131] Furthermore, the courts were able to translate the identified culture into a specific mental state. For example, President Sharp

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[126] Ibid [102].

[127] Comparable characterisations of culture have been made by Australian courts in the context of the Australian Consumer Law: see *Australian Competition and Consumer Commission v MSY Technology Pty Ltd* [2017] FCA 1251, [118] (Markovic J); *Australian Competition and Consumer Commission v Domain Name Corp Pty Ltd* [2018] FCA 1269, [51] (McKerracher J).

[128] *Sarclad* (n 87) [62]; *Rolls-Royce* (n 88) [102]; *Standard Bank* (n 86) [21]; *Airbus* (n 89) [65].

[129] See Part II(D)(1) above.

[130] *Airbus* (n 89) [108]; *Rolls-Royce* (n 88) [104]; *Sarclad* (n 86) [62]; *XYZ* (n 87) [50]; *Standard Bank* (n 86) [21].

[131] As Australian courts have done for decades in applying the presence or absence of a 'culture of compliance' as one of the 'French factors' to be taken into account at sentencing in civil penalties jurisprudence: see *Trade Practices Commission v CSR Ltd* (1991) ATPR 41-076, [42] (French J).

concluded that Airbus had a culture of 'permitting' bribery, indicating knowledge.[132] President Leveson referred to both Rolls-Royce and Sarclad as having a culture of failing to act 'wilfully', thereby suggesting corporate knowledge and intent.[133] Meanwhile, Standard Bank lacked an anti-corruption culture.[134] President Leveson reinforced that while Standard Bank had not acted intentionally, the risks should have been anticipated, thereby suggesting knowledge of the surrounding circumstances.[135]

Unfortunately, while the courts have adopted organisational liability language through corporate culture, analysis of key decisions suggests that the approach taken by the courts to identify this culture follows an individualistic methodology. Specifically, courts show a reliance on the identification of (predominantly senior) individuals within the corporation who possess relevant knowledge and who engage in specific conduct in order to conclude on the relevant corporate culture. Some examples follow.

Sarclad Ltd made and exported steel manufacturing technology to Asia.[136] Over nine years, Sarclad procured 28 out of 74 contracts (representing £17.24 million or 15.81% of total turnover) in foreign jurisdictions through the payment of bribes.[137] Another 18 contracts were regarded as suspicious.[138] Sarclad achieved this by engaging intermediary agents within the relevant foreign jurisdiction to offer and pay the bribe on behalf of Sarclad.[139] President Leveson characterised Sarclad's corporate culture over the relevant time period as a 'wilful disregard as to the commission of offences by employees or agents with no effort to put effective systems in place...there was no attempt on the part of Sarclad to put effective systems in place and there was a wilful disregard as to the need to do so'.[140] President Leveson is thereby capable of identifying a mental state on the part of Sarclad. The corporation had knowledge of the need to install effective systems. Its lack of effort to do so reflected wilful blindness as to this need.[141] However, while this

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[132] *Airbus* (n 89) [108].
[133] *Rolls-Royce* (n 88) [104]; *Sarclad* (n 87) [62]; *XYZ* (n 87) [50].
[134] *Standard Bank* (n 86) [21].
[135] Ibid [21], [47]–[48].
[136] Statement of Facts, *Serious Fraud Office v Sarclad Ltd* (Preliminary) (Crown Ct (Southwark), Leveson LJ, 8 July 2016) [6] ('*Sarclad Statement of Facts*').
[137] *Sarclad* (n 87) [7], [21]; *XYZ* (n 87) [7], [9].
[138] *Sarclad* (n 87) [7]; *XYZ* (n 87) [7].
[139] *XYZ* (n 87) [8].
[140] *Sarclad* (n 87) [62].
[141] *Baden Delvaux & Lecuit v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1992] 4 All ER 161, 235, 242–3 (Gibson J) ('*Baden Delvaux*'), endorsed in *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* [2007] HCA 22 (unreported, Gleeson CJ, Gummow,

characterisation reflects culpability on the part of Sarclad as an organisation, President Leveson relied on several indicia to reach this conclusion which were tied to individual knowledge and actions within Sarclad. For example: 'approving the offering of bribes was an accepted way of doing business for the company over the relevant time period and knowledge of such conduct was held, and authorised, *namely by senior executives who represented its controlling mind*'.[142] Further, Sarclad's wilful disregard as to the need to establish effective anti-bribery and corruption systems was 'evidenced by the seniority of those involved'.[143]

This reliance on the identified knowledge and actions of the relevant corporation's senior staff is further demonstrated by President Leveson's *Rolls-Royce* judgment. Rolls-Royce was charged with five counts of failing to prevent bribery across various foreign jurisdictions over several years.[144] President Leveson described Rolls-Royce as exhibiting 'a culture of wilful disregard of the commission of [bribery] offences'.[145] President Leveson's conclusion was based on the noted involvement of 'controlling minds of the company' in the predicate bribery and corruption conduct, as well as the knowledge of that conduct held by Rolls-Royce's employees over a two year period.[146] Further and in particular, his Honour noted that the newly introduced 'senior management and those responsible for the strategic direction of Rolls-Royce are different to those [who were previously] responsible for the running of the company (and its culture) during the period when the events... occurred'.[147] Evidently, his Honour's conceptualisation of corporate culture is that it is run by senior management. Accordingly, the identification of knowledge and actions of, at the least senior management, is necessary to make a finding of an impugnable corporate culture.

Recall *Airbus*, where Airbus was charged with failing to prevent bribery offences in Malaysia, Sri Lanka, Taiwan, Indonesia, and Ghana between 2011 and 2015. President Sharp identified 'a corporate culture which permitted bribery by Airbus business partners and/or employees to be committed throughout the world'.[148] Again, while this culture connotes responsibility on the part of Airbus, President Sharp relies on a highly individualistic approach to arrive at this conclusion. For

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Callinan, Heydon and Crennan JJ, 24 May 2007) [174]–[178] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

[142] *Sarclad* (n 87) [60] (emphasis added).

[143] Ibid [46], [62].

[144] *Rolls-Royce* (n 88) [97], [102]–[107].

[145] Ibid [104].

[146] Ibid [4], [35], [104].

[147] Ibid [51].

[148] *Airbus* (n 89) [65].

example, while the identities of individuals involved in the investigation were anonymous, President Sharp made clear that their identities had been disclosed privately so that her Honour could 'assess their comparative seniority *and, thus, the responsibility of Airbus*'.[149] President Sharp identified that Airbus' policies and compliance procedures were easily and deliberately bypassed or breached by 'a number of very senior, senior and other employees, including employees with compliance responsibilities'.[150] This noting of seniority permeates her Honour's reasoning, with individuals involved in the offences labelled as 'senior'[151] or 'very senior'.[152] Accordingly, Airbus' corporate culture and corporate responsibility are ultimately contingent upon the identification of knowledge and involvement of senior officers within the company.

An assessment of individuals is not an issue in its own right in the determination of corporate blameworthiness. This is particularly the case for individuals who have a central role in the establishment or operation of a particular system, policy or practice. However, to properly identify organisational blameworthiness on the part of the corporation, these individuals should be used as indicia of the intent behind the corporate system, policy or practice, as opposed to the individual's mental state being anthropomorphically applied as the corporation's own.

President Sharp's identification of relevant individuals to conclude on corporate responsibility is consistent with her Honour's conceptualisation of corporations as mere artificial shells rather than morally responsible agents in their own right.[153] To substantiate this her Honour cited President Leveson's judgment in *Serious Fraud Office v Tesco Stores Ltd*,[154] where his Honour stated: '[i]t is important to underline that a company is a structure which can only operate through its directors, employees and agents. Stripping out the human beings, a company itself can have no will or ability to decide how it should behave.'[155] Despite the increasing commentary and movement towards models of organisational liability,[156] this preserved

[149] Ibid [13] (emphasis added).
[150] Ibid [65].
[151] Ibid [44], [47], [55].
[152] Ibid [44], [65].
[153] Cf *Productivity Partners* (n 1) [108] (Gordon J), where her Honour describes corporations as thinking and acting through their systems. See also Celia Wells, *Corporations and criminal responsibility* (Oxford University Press, 1993) 151; Christian List and Philip Pettit, *Group Agency: the possibility, design, and status of corporate agents* (Oxford University Press, 2011); ALRC Report 136 (n 3) 132–5; Bant, 'Taxonomy and Synthesis' (n 45) 3; Crofts, 'Crown Resorts and the Im/moral Corporate Form' (n 17).
[154] [2017] 4 WLUK 558.
[155] *Airbus* (n 89) [77], quoting *Serious Fraud Office v Tesco Stores Ltd* [2017] 4 WLUK 558, [53] (Leveson LJ).
[156] See, eg, Fisse and Braithwaite, *Corporations, Crime and Accountability* (n 1).

conceptualisation of corporations as mere shells is ultimately limiting our ability to understand and control aberrant corporate activities and personalities.

Standard Bank[157] provides a somewhat different scenario. The Government of Tanzania sought to raise finance for its 'Five Year Development Plan'.[158] Standard Bank and its sister company Stanbic Bank Tanzania Ltd ('Stanbic') submitted a proposal to the Tanzanian Government in February 2012, quoting a combined fee of 1.4% of gross proceeds raised. This fee was increased to 2.4% in September 2012 with the additional 1% (approximately USD $6 million) going to a 'local partner', Enterprise Growth Markets Advisors Ltd ('EGMA').[159] No documents demonstrated that EGMA had any role associated with the proposal to represent any consideration for the US $6 million.[160] Further, EGMA's chairman was a serving member of the Tanzanian Government.[161] The SFO alleged that the USD $6 million was a bribe serving to induce senior Tanzanian government members to favour Standard Bank's and Stanbic's proposal to secure their role in financing the Five Year Development Plan. Standard Bank was allegedly responsible for the failure to prevent this intended bribery committed by senior officials of Stanbic as a result of 'the inadequacy of its own compliance procedures and failure to recognise the risks inherent in the proposal'.[162] President Leveson was reluctant to describe Standard Bank's culture as wilful as his Honour did in both *Sarclad* and *Rolls-Royce*. This was a result of the inability of 'the evidence [to] demonstrate with the appropriate cogency that anyone within Standard Bank knew that two senior executives of Stanbic intended the payment to constitute a bribe, or so intended it themselves'.[163] His Honour subsequently re-asserted: 'I repeat: the evidence does not reveal that executives or employees of Standard Bank intended or knew of an intention to bribe',[164] and again, 'Standard Bank's employees involved in the transaction did not express adequate awareness about the bribery risks in the transaction'.[165] Accordingly, as individuals within Standard Bank lacked knowledge and intention, Standard Bank itself could not be attributed with knowledge or intention. In contrast, but with consistent reasoning, President Leveson concluded with respect

[157] *Standard Bank* (n 86).
[158] Ibid [9].
[159] Ibid [10].
[160] Ibid [12].
[161] Ibid [10].
[162] Ibid [26].
[163] Ibid.
[164] Ibid [46].
[165] Ibid [48].

to Stanbic that knowledge of the likely effect of the bribe on public officials was 'well understood at least by two senior executives of Stanbic *and, thus, Stanbic*'.[166]

So what was Standard Bank's culture? In contrast to a wilful or permissive culture, Standard Bank was at fault because 'an anti-corruption culture was not effectively demonstrated'.[167] This stemmed from Standard Bank's failure to identify and respond to obvious bribery and corruption risks, which should have been anticipated given 'Standard Bank's experience in emerging markets'; the fact that Standard Bank's deal team was 'fully aware' that the payment was a significant one; and that Tanzania had been identified by international bodies as having a high bribery risk.[168] While each of Sarclad's, Rolls-Royce's and Airbus' respective fault stemmed from individuals who had knowledge of bribery and corruption, Standard Bank's fault was connected with individuals *lacking* this knowledge. In sum, President Leveson's characterisation of Standard Bank's mental state is akin to constructive knowledge.[169] Again, this conclusion is founded upon the knowledge (or in this case the lack thereof) of individuals within the corporation.

In light of the above, at first glance the FTP model's strict liability nature tends to present it as an attractive alternative for avoiding the problems associated with state of mind enquiries and attribution.[170] Yet as illustrated above, despite the FTP model's strict liability nature the courts have nevertheless explored corporate states of mind in order to decide on DPA approval and penalty determination. The courts' reliance on knowledge and actions of individuals in assessing the corporate mental state means that issues that plague many of the individualistic traditional models of corporate liability remain inherent in the FTP model. In particular, the possible misalignment between a corporation's true blameworthiness and its culpability as communicated by the criminal law. Two examples of this follow.

First, the corporation is in a position to control its own exculpatory narrative by implementing structural information silos. In asserting Standard Bank's lack of intention, President Leveson repeatedly noted the inability to identify individuals within the corporation with the requisite knowledge and intent.[171] This stemmed from Standard Bank's 'unclear' anti-corruption policies and anti-corruption training that was 'not reinforced effectively'.[172] While these factors led to a failure to

[166] Ibid [47] (emphasis added).
[167] Ibid [21].
[168] Ibid [47]–[48].
[169] *Baden Delvaux* (n 144) 235, 242–3 (Gibson J); Bant, 'Modelling Corporate States' (n 13) 239–40.
[170] See Part II(C) above.
[171] *Standard Bank* (n 86) [26], [46], [48].
[172] Ibid [20].

demonstrate an 'anti-corruption culture', the culpability and fault (arguably negligence) associated with this falls short of the more intentional 'culture of wilful disregard' seen in *Sarclad* and *Rolls-Royce*. By implementing information silos and insulating employees from knowledge of relevant facts and risks, corporations may impair the courts' ability to determine a culture of compliance, and accordingly, cap their liability at lower echelons of fault.

Second, the connection of individuals to corporate fault leads to a revolving door of executives which partially frees the corporation from blame.[173] As identified by President Leveson in *Standard Bank*, a factor in his Honour's decision to award the DPA was 'the fact that [Standard Bank] in its current form is effectively a different entity from that which committed the offence'.[174] His Honour used identical language in *Sarclad*, and both his Honour and President Sharp used similar reasoning in *Rolls-Royce* and *Airbus* respectively.[175] Yet, in line with ideas of Systems Intentionality, if the cause of offending or anti-compliance culture is a systemic issue resulting from the nature of the industry, the corporation's strategic plans and procedures, or its relationships, then a change in personnel will not necessarily, and certainly not alone, be sufficient to correct or improve these causal factors.[176] The culpability communicated by the criminal law is connected to the fault of individuals and is no longer aligned with the corporation's actual culpability, which in truth is tied more to its internal systems.

C *Fair Labelling and a Convergence of Criminal and Civil Law*

The criminal law has a communicative function that censures particular wrongful conduct, which reflects its expressive and retributive nature.[177] Comparatively, civil law penalties principally deter relevant conduct and induce compliance.[178] It is this communicative function of the criminal law which largely distinguishes it from its

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[173] As put by 'Standard Bank Employee G' (emphasis added), 'I think most seasoned bankers would be wise enough to know that if [a compliance breach] was caused by you or your team, *you would have been shown the door very quickly and the bank would have used you as the scapegoat*.' See *Standard Bank Statement of Facts* (n 114) 51; *Corporate Crime in the Pharmaceutical Industry* (n 47) 308; Laufer, *Corporate Bodies and Guilty Minds* (n 49) 145–6; Fisse and Braithwaite, *Corporations, Crime and Accountability* (n 1) 40.

[174] *Standard Bank* (n 86) [34].

[175] *Sarclad* (n 87) [43]; *Rolls-Royce* (n 88) [49]–[51]; *Airbus* (n 89) [76]–[78].

[176] Simon Bronitt, 'Rethinking Corporate Prosecution: Reviving the Soul of the Modern Corporation' (2018) 42(4) *Criminal Law Journal* 205, 206.

[177] See above n 16.

[178] *Commonwealth of Australia v Director, Fair Work Building Industry Inspectorate* (2015) 258 CLR 482, [55], citing *Trade Practices Commission v CSR Ltd* [1990] FCA 762, [40] (French J).

civil law counterpart.[179] The proven prosecutorial advantages of the FTP model come at a cost from the perspective of the criminal law fulfilling its communicative function. As fault is removed from the criminal offence, a conviction for failing to prevent may capture any of a number of states of mind, thus rendering the criminal law less capable of communicating graduations in offenders' culpabilities.[180]

Consider and contrast the cases of *Sarclad* and *Standard Bank*. *Sarclad* involved 28 contracts procured through the payment of bribes with another 18 suspected of the same.[181] As noted by President Leveson, this misconduct was significantly graver than Standard Bank's, 'which concerned the failure to prevent a single (albeit very substantial) incident of bribery by a sister company in the same corporate family'.[182] There is also a stark difference in the mental states of the two companies. Discussed above,[183] Sarclad had a culture of wilful disregard reflecting an intention to facilitate bribery. Comparatively, Standard Bank is better characterised as possessing constructive knowledge of the surrounding risks and circumstances, with President Leveson repeatedly emphasising the absence of intention. Nevertheless, both Sarclad and Standard Bank were charged with, and agreed to, DPAs respecting, the same offence of failing to prevent bribery. The culpability communicated by the offence itself was equal, reflecting a stifled ability of the criminal law to accurately communicate blame and graduations in culpability. This removal of fault reflects a convergence of criminal and civil regimes.[184]

Civil regulation as a means of controlling corporate conduct has considerable support, as noted by the ALRC: '[w]here breaches occur, the initial response should be to persuade and educate [the corporation] as to the appropriate behaviour. Such an approach promotes self-regulation and the wish to preserve reputation.'[185] However the convergence of civil and criminal regimes has issues.[186] First,

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[179] Easton and Piper (n 42) 61–2, 162; Bucy (n 26) 1106, 1114–16; Von Hirsch 'The "Desert" Model for Sentencing' (n 16) 414.
[180] 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. Notably, this offends the 'fair labelling principle', where an offence should accurately characterise the offender's wrongdoing, harm, and culpability: see Ashworth, 'Elasticity of Mens Rea' (n 20) 56; Horder (n 43) 338–9; Williams, 'Convictions and Fair Labelling' (n 43) 85, 91; James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71(2) *Modern Law Review* 217.
[181] *Sarclad* (n 87) [7], [21]; *XYZ* (n 87) [7], [9].
[182] *XYZ* (n 87) [22].
[183] See Part III(B) above.
[184] Bant, 'Regulating Corporate Behavior' (n 10) 1369.
[185] Australian Law Reform Commission, *Principled Regulation: Federal Civil & Administrative Penalties in Australia* (Report No 95, 2002) [2.40]–[2.70]; ALRC Report 136 (n 3) 169 [5.7], 178 [5.31]; Law Commission Options Paper (n 26) 172–4 [11.87].
[186] ALRC Report 136 (n 3) 172 [5.15]–[5.16], 174–5 [5.21]–[5.23]; Law Commission Options Paper (n 26) 174–5 [11.88].

convergence contributes to over-complication of the corporate regulatory system, impairing the ability of both law enforcement to prosecute and corporations to comply.[187] As identified by Commissioner Hayne in the context of the Financial Services Royal Commission:

> The more complicated the law, the easier it is for compliance to be seen as asking 'Can I do this?' and answering that question by ticking boxes instead of asking 'Should I do this? What is the right thing to do?' And there is every reason to think that the conduct examined in this report has occurred when the only question asked is: 'Can I?'.[188]

Second, convergence erodes the expressive nature of the criminal law and provides corporations with an out for serious criminal conduct.[189] In combination with the strategies of denial which corporations regularly implement to downplay the culpability associated with their malfeasance,[190] an environment is created where corporations can soften the significance and criminality of their misconduct.[191] The criminal law has an important role in delineating and censuring the most serious wrongful conduct. As corporations have repeatedly shown a capacity for such conduct,[192] the author considers that the development of any corporate criminal liability model must preserve this function.

IV SYSTEMS INTENTIONALITY AND THE FTP MODEL

The following section explores Systems Intentionality as a model of corporate liability which has the capacity to determine graduations in corporate mental states free of any individual within the corporation.[193] This enables corporations to be held to account for their own blameworthy conduct in an organisational sense, and in turn, facilitates the preservation of criminal and civil law regimes as separate systems of law. As will be shown, the nuance of Systems Intentionality also facilitates accommodation for mistake and bona fide error.[194] Further, with Systems

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[187] ALRC Report 136 (n 3) [3.48], [5.18]–[5.23].
[188] *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Interim Report, September 2018) vol 1, 290.
[189] ALRC Report 136 (n 3) 167 [5.1]; FSRC (n 2) 433 (Commissioner Hayne).
[190] See Part II(A) above.
[191] Penny Crofts, 'The Horror of Corporate Harms' (2022) 38(1) *Australian Journal of Corporate Law* 23.
[192] Braithwaite (n 47); Barak (n 3).
[193] Elise Bant and Jeannie Paterson, 'Systems of Misconduct: Corporate Culpability and Statutory Unconscionability' (2021) 15(1) *Journal of Equity* 63, 90–1.
[194] Bant, 'Modelling Corporate States' (n 13) 248–9.

Intentionality's recent judicial application in Australia,[195] one can now point to the practical workability of the model.

A *Assessing Graduations in Fault and State of Mind*

Systems Intentionality commences with a general intention to engage in conduct, as the establishment and operation of a system is inherently purposive.[196] Systems Intentionality then relies on objective facts, such as the existence or non-existence of precautions, to establish a specific fault element and state of mind.[197] This is necessary to depict grades of culpability. An inability to determine graduations of mental states places fault elements such as specific intention, recklessness, unconscionability, or dishonesty beyond the realm of corporate liability. The criminal law would thereby be unable to accurately convey blame.

Consider Systems Intentionality's potential to identify specific intent. Professor Bant describes specific intention arising where a system 'is apt to (calculated to, designed to, of a nature to) produce some outcome, and does always or usually produces that outcome'.[198] This conclusion is stronger where there are no or few other alternatives but for that specific outcome to occur from the conduct.[199] Applying this to *Australian Securities & Investments Commission v National Exchange Pty Ltd*,[200] National Exchange sent unsolicited off-market offers to members of a demutualised company (Aevum Ltd) to buy their shares substantially below market value.[201] The offers were sent to specific vendors on the basis that the members had not paid for the shares so would be more likely to sell and less likely to understand the true value of their shares.[202] The offer was accepted by 257 members.[203] The Full Court of the Federal Court of Australia found that 'National Exchange set out to systematically implement a strategy to take advantage of the fact that amongst the official members there would be a group of inexperienced persons who would act irrationally from a purely commercial viewpoint and would accept the offer'.[204] National Exchange's system — sending unsolicited under-value offers to commercially inexperienced individuals — objectively manifested knowledge of the vulnerabilities of a specific

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[195] *Productivity Partners* (n 1) [106]–[111] (Gordon J).
[196] Ibid [108] (Gordon J); Bant, 'Modelling Corporate States' (n 13) 245–6.
[197] See Part II(D)(2) above and associated footnotes.
[198] Bant, 'Modelling Corporate States' (n 13) 247.
[199] Ibid.
[200] [2005] FCAFC 226 ('*National Exchange*'), discussed in Bant, 'Systems Intentionality Theory and Practice' (n 67) 189–90.
[201] *National Exchange* (n 203) [3].
[202] Ibid [33], [43].
[203] Ibid [3].
[204] Ibid [43].

group of people and a predatory intention to exploit those vulnerabilities. This is because the system could only work (the offers would only be accepted) if those vulnerable people existed and the model functioned to exploit their vulnerabilities. Therefore, through Systems Intentionality, National Exchange's system of conduct manifested a specific, predatory intent.[205]

A comparable example is *Productivity Partners Pty Ltd v Australian Competition and Consumer Commission*. Captain Cook College (the 'College') relied upon marketing and sales agents to recruit students for its online tuition courses.[206] The College remunerated agents on condition that the student passed the census date (the point at which the student incurred a tuition debt).[207] Further, the courses were conducted online.[208] This business model bore the risk that a student would enrol in the course, then disengage with studies, but pass the census date such as to incur a debt. The College had two processes in place to guard against this risk. First, an outbound 'quality assurance call' to ensure the student understood their commitment and financial obligations.[209] Second, a withdrawal mechanism by which students with insufficient attendance would be withdrawn from the course.[210] In April 2015 the College removed both of these processes.[211] Before the removal, all students who passed the census date were maintaining contact with the College and were engaging in their studies, however the College had declining enrolments and profitability.[212] After the removal, enrolments increased significantly with the College's monthly revenue by December having surged by 5000%.[213] However, the College had 1859 students pass the census date (thereby owe tuition fees) then fail to maintain any contact with the College.[214] The High Court of Australia concluded that the College had engaged in unconscionable conduct contravening s 21 of the Australian Consumer Law.[215] Justice Gordon's judgment provides a useful illustration of Systems Intentionality.[216] Her Honour concluded that the College's removal of the systems was designed to achieve an end: to increase enrolments of 'unwitting and unsuitable students' to increase revenue.[217] Further, that this was an

[205] Bant, 'Systems Intentionality Theory and Practice' (n 67) 189–90.
[206] *Productivity Partners* (n 1) [26]–[27].
[207] Ibid [27].
[208] Ibid [29]–[30].
[209] Ibid [33].
[210] Ibid [34].
[211] Ibid [37].
[212] Ibid [35].
[213] Ibid [35]–[41].
[214] Ibid [39].
[215] Ibid [11] (Gageler CJ and Jagot J), [144] (Gordon J), [200] (Edelman J), [340] (Beech-Jones J).
[216] Ibid [96]–[195] (Gordon J).
[217] Ibid [143], [156].

'inevitable consequence' of this action from which 'it may be inferred that the College "mean[t] to produce" that end. And it did.'[218] Her Honour identified a specific intent on the part of the College without needing to point to an individual to do so.[219]

Recklessness is another fault element relied upon by many fault-based offences.[220] As Professor Bant argues, through a Systems Intentionality lens the failure of a corporation to amend a system in light of repeated harms may manifest a recklessness as to their occurrence (or arguably even a specific intention to produce those harms).[221] Recall that Crown arguably had knowledge of both the possibility of money laundering and the unreasonable risk of that outcome occurring by aggregating deposits.[222] This knowledge was reinforced by the repeated warnings from banks of money laundering red flags.[223] In light of those known risks Crown proceeded with, and failed to update, its aggregation system. This arguably reflects recklessness as to the occurrence of money laundering, or even a specific intent to facilitate money laundering.

Systems Intentionality thereby has the capacity to assess graduations of states of mind which can be analysed by the courts to assess culpability in a more nuanced manner.[224] Proof of knowledge or culpability on the part of an individual is not required, though depending on the role of an individual within the corporation's systems and processes, individual understanding may in some (but not all) instances be valuable evidence of the corporation's embedded systems, policies and practices. Accordingly, Systems Intentionality may serve the courts in applying the FTP model by providing greater clarity on the circumstances in which individual states of mind may be relevant, clarifying the ways in which they are relevant, and avoiding an overreliance on individuals to establish state of mind.

Considering this function, it is worth highlighting that Systems Intentionality is not necessarily a standalone model. Rather, it may benefit other models of liability by providing a more nuanced means to identify state of mind.[225] For example, the analysis of systems of conduct and patterns of behaviour may serve as indicia of organisational culture, replacing the need to focus on conduct and mental states of

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[218] Ibid [143], quoting *Smith v The Queen* (2017) 259 CLR 291 at 319–320 [57].
[219] Ibid [111].
[220] See, eg, *Criminal Code* (Cth) (n 55) s 103.1 (financing terrorism), s 115.4 (recklessly causing serious harm); Bant, 'Modelling Corporate States' (n 13) 235–9.
[221] Bant, 'Modelling Corporate States' (n 13) 247–8.
[222] See Part II(D)(2) above and associated footnotes.
[223] Bergin Inquiry (n 2) 181–2 [185], 210 [38]–[39].
[224] Bant, 'Modelling Corporate States' (n 13) 245–53.
[225] Bant, 'Taxonomy and Synthesis' (n 45) 7–29.

individuals in making these culture determinations.[226] With respect to the FTP model, Systems Intentionality analysis may evidence the corporate state of mind behind failure to prevent the predicate offence. No longer would the offence be a mere failure to prevent, but rather an intentional or reckless failure to do so.

The courts in the United Kingdom have already relied on systems-like language in the FTP model's application. *Sarclad*, *Airbus* and *Rolls-Royce* all feature conduct described as accepted business practices and systems of conduct.[227] In *Rolls-Royce* the 'extensive systematic bribery and corruption' was a result of, inter alia, the multi-jurisdictional instances of bribery which were spread across Rolls-Royce's business divisions and were persistent over 24 years.[228] Airbus' 'established business practice' comprised bribery which 'took place over many years', 'extend[ed] into every continent in which Airbus operate[d]' and which was 'endemic in two core business areas'.[229] In *Sarclad*, President Leveson found the 28 contracts which involved bribes to be a 'conspiracy involv[ing] a course of systematic conduct over eight years. It implicates seven agents in as many jurisdictions, generated some £6.5 million of gross profit (£2.5 million net) and caused detriment to other potential competitors. It was, therefore, part of Sarclad's established business conduct.'[230] The courts are inherently adopting systems language, particularly where there is a pattern of behaviour over an extended period of time. A Systems Intentionality-like approach is also seen through the outcome-focussed interpretation and assessment of the FTP model's second limb precautions defence, which is consistent with Systems Intentionality's focus on embedded systems, policies and practices.

B *Some Worked Examples involving Systems Intentionality and the* Bribery Act

In *Rolls-Royce*, Rolls-Royce was charged (among other offences) with failing to prevent bribery pursuant to s 7 of the *Bribery Act*. This included, first, engaging an intermediary company to pay bribes to a competitor and an Indonesian state-owned company to win a long-term service agreement with that company in an open

[226] Australian courts have interpreted and applied these concepts following their insertion into the *Australian Securities and Investments Commission Act 2001* (Cth) s 12CB(4)(b). See, eg, *Australian Competition and Consumer Commission v EDirect Pty Ltd* [2012] FCA 1045 [88] (Reeves J); *AGM Markets* (n 69) [385]–[392] (Beach J).
[227] *Rolls-Royce* (n 88) [35]; *Sarclad* (n 87) [7], [34], [60]–[61]; *XYZ* (n 87) [7], [22], [49]; *Airbus* (n 89) [60].
[228] *Rolls-Royce* (n 88) [35].
[229] *Airbus* (n 89) [60], [64].
[230] *Sarclad* (n 87) [7], [34].

competitive tender.[231] Second, engaging an intermediary to make payments to Nigerian public officials to gain favour towards winning supply agreements for two oil and gas projects in Nigeria.[232] Third, engaging an intermediary to make payments to Garuda senior employees to secure engine and aircraft supply contracts.[233] This conduct all occurred between 2011 and 2013.

A pattern involves examining the external manifestations of behaviour to determine whether an intelligible sequence can be derived such that it may be possible to predict further behaviour.[234] Rolls-Royce persistently secured (or was in a position to secure) high value contracts with foreign corporations and governments through the payment of bribes via intermediaries to key decision-makers.[235] A pattern of behaviour is discernible from these outcomes. In isolation, patterns are merely occurrences of outcomes and neutral as to intention.[236] However, systems of conduct are designed such that its various components and processes work cohesively to produce those outcomes.[237] The existence of a pattern of behaviour, like Rolls-Royce's above, supports the conclusion that there is an underlying system of conduct which is purposefully producing the pattern of outcomes, or that is reckless as to their occurrence.[238] Specifically, Rolls-Royce was operating in areas that it knew were prone to corruption.[239] There was knowledge of corrupt intermediary behaviour and a pattern of bribery conduct.[240] Comparable to Crown, Rolls-Royce's failure to address the risks of bribery despite the knowledge held by the corporation manifests recklessness, or alternatively a specific intention, as to the facilitation of bribery. This recklessness is held by Rolls-Royce at an organisational level, separate from the state of mind of any one or more individuals involved in Rolls-Royce's operations.

How does this function in the context of a one-off event where no pattern of behaviour exists? Consider the case of a single bribe as occurred in *Standard Bank*. Professor Bant has described a system of conduct as 'the internal method or

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[231] *Rolls-Royce* (n 88) [103]; Statement of Facts, *Serious Fraud Office v Rolls-Royce plc* (Crown Ct (Southwark), Leveson LJ, 17 January 2017) [191] ('*Rolls-Royce Statement of Facts*').
[232] *Rolls-Royce* (n 88) [104]; *Rolls-Royce Statement of Facts* (n 234) [209].
[233] *Rolls-Royce* (n 88) [105]; *Rolls-Royce Statement of Facts* (n 234) [234].
[234] *Unique International College Pty Ltd v Australian Competition and Consumer Commission & Anor* (2018) 362 ALR 66, [104]; *AGM Markets* (n 69) [386] (Beach J); Bant, 'Systems Intentionality Theory and Practice' (n 67) 190–2.
[235] *Rolls-Royce* (n 88) [35].
[236] Leow, 'Meridian, Allocated Powers and Systems Intentionality Compared' (n 31) 126.
[237] Bant, 'Modelling Corporate States' (n 13) 245; *AGM Markets* (n 69) [389]–[391] (Beach J).
[238] *AGM Markets* (n 69) [390] (Beach J).
[239] *Rolls-Royce* (n 88) [102], [105].
[240] Ibid [105]; *Rolls-Royce Statement of Facts* (n 234) [208], [259].

organised connection of elements operating to produce the conduct or outcome. It is a plan of procedure, or coherent set of steps that combine in a coordinated way in order to achieve some aim (whether conduct or, additionally, result).'[241] Standard Bank lacked audits, approval checks or a clear compliance policy despite these being critical to compliance with financial crimes laws and obligations.[242] These omissions are a design choice which in cohesion with the high risks of bribery inherent in the context of the transaction manifests an intention to facilitate, or a recklessness as to the occurrence of, bribery.

Recall one of the issues with the second limb of the FTP model, at least in how it has been applied to date, is that the outcome-focussed approach of the defence largely negates the defence even where there was a mistake or bona fide error. Assume for example that Airbus and its award-winning compliance precautions was genuinely an outstanding corporate citizen.[243] What if Airbus was merely undermined by rogue agents? Where there is a failure of the deployed system, the court must determine whether the offence was inevitable because it was unforeseeable, unavoidable, a mistake, or a system error; or alternatively, because the precautionary measure was deliberately insufficient. The adequate precautions limb of the FTP model may be better served through an analysis of a corporation's systems, policies and processes. The capacity for Systems Intentionality to assess corporate state of mind, specifically to pinpoint knowledge or intent, may provide the necessary nuance to the FTP model to properly provide a safeguard against rogue employees and bona fide mistakes.[244]

Systems Intentionality provides valuable insights into determining graduations in mental states at an organisational as opposed to an individualistic level. A focus on the objective, deployed systems and practices as opposed to the individuals within a corporation may assist courts in pinpointing specific mental states, and to more accurately establish culpability and fault. By doing so, corporations can be held to account for their own blameworthy conduct, while the criminal law's function of expressing moral obloquy can be preserved. Appreciating the need for a practically workable model of corporate liability, which the FTP model has proved itself to be,

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[241] Bant, 'Modelling Corporate States' (n 13) 245.
[242] *Standard Bank* (n 86) [20]–[21]; *Standard Bank Statement of Facts* (n 114) [199]–[200].
[243] See Part III(A)(2) above.
[244] Bant, 'Corporate Mistake' (n 75); 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* (Bloomsbury, 2023) 255–71.

the examples discussed also point to Systems Intentionality as such a workable model.

V CONCLUSION

Year after year, corporations have proven themselves capable of inflicting significant harms on our communities, while insulating themselves from liability. This is partly because they choose to, and partly because they are allowed to.

The absence of a positive fault element in the FTP model better enables regulators to hold corporations to account no matter the size, complexity, or power. However, this does not ground the FTP model in the realm of no fault liability models. The corporation can still identify the absence of fault by pointing to procedures it had in place that were designed to prevent the commissioning of the underlying misconduct.

Systems Intentionality offers a more nuanced approach to identifying these procedures by focusing on the embedded systems, policies and practices as adopted and implemented by the corporation, rather than on those cosmetic procedures or those individuals who comprise the corporation. Accordingly, Systems Intentionality can support the development of the FTP model as a truly organisational and effective model of imposing criminal liability.

THE NEW SERVICE OFFENCE OF CYBERBULLYING: DEFINING THE SCOPE OF SECTION 48A OF THE *DEFENCE FORCE DISCIPLINE ACT 1982* (CTH)

COLETTE LANGOS*

Two years have passed since the new service offence of 'cyberbullying' was enacted. Interestingly, not a single case has been tried by a superior military tribunal. In the absence of precedent, this article provides detailed commentary on the characteristics of s 48A of the Defence Force Discipline Act 1982 *(Cth) and offers guidance on existing uncertainties surrounding its application. The analysis presented may aid the development of internal Australian Defence Force ('ADF') policy in this area of military discipline law to ensure ADF members, those authorised to lay charges, and those who will hear cyberbullying matters in the future are confident in the application of the new offence in promoting good order and discipline within the Defence Force.*

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I INTRODUCTION

It has long been recognised that the maintenance and enforcement of discipline among an armed force lies at the heart of an effective military justice system.[1] As noted by the Honourable Richard Tracey, '[t]he instinctive adherence to the norms of conduct which are essential for success on the battlefield is a feature of military life which sets it apart from most civilian pursuits'.[2] The *Defence Force Discipline Act 1982* (Cth) ('*DFDA*') is the primary legislative basis for Australia's military discipline system. This system functions during times of peace and armed conflict, operating 'both within Australia and when forces are deployed away from Australia, during routine operations, exercises and other activities as well as when the defence force is being employed in its combat role'.[3] Members of the Australian Defence Force ('ADF') are, hence, subject to both Australian military discipline law and domestic civilian law.[4] The requirement for ADF members to abide by a code of behaviour that supports good order and discipline is fundamental to unit cohesion and morale, operational efficiency, and reputation. This context is important to bear in mind for the purposes of this article, which explores the creation of a new offence — the offence of 'cyberbullying' — introduced with the overarching goal of supporting the maintenance and enforcement of discipline through deterrence.[5] While only Defence Force members are subject to this offence, it is useful for the civilian population to understand its application and how members of the ADF are held accountable for engaging in cyberbullying, a phenomenon associated with a range of significant negative implications.[6]

Part II of the article examines the creation of the new service offence, before considering the characteristics of s 48A of the DFDA, including its elements and most notable features. Part III then addresses potential uncertainties surrounding the application of the offence. By referring to relevant statutes and case law, insight into the meaning of terms referenced in s 48A (with an emphasis on construing the term 'offensive' for the purposes of s 48A) is provided. Furthermore, original commentary

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[1] Robyn Creyke, Dale Stephens and Peter Sutherland, *Military Law in Australia* (Federation Press, 2nd ed, 2024) 113.
[2] Richard Tracey, 'Military Discipline Law' in Robyn Creyke, Dale Stephens and Peter Sutherland (eds), *Military Law in Australia* (Federation Press, 1st ed, 2019) [8.2].
[3] Ibid.
[4] Defence Force Discipline Act 1982 (Cth) ('DFDA').
[5] Explanatory Memorandum, Defence Legislation Amendment (Discipline Reform) Bill 2021(Cth) 31.
[6] See, eg, Colette Langos, 'Cyberbullying: The Shades of Harm' (2015) 22(1) *Psychiatry, Psychology and Law* 106, 106; Jing Wang, Tonja R Nansel and Ronald J Iannotti, 'Cyber and Traditional Bullying: Differential Association with Depression' (2011) *Journal of Adolescent Health* 48(4) 415, 417; Sameer Hinduja and Justin W Patchin, 'Bullying, Cyberbullying and Suicide' (2010) *Archives of Suicide Research* 14(3) 206, 216.

is offered on the objective standard by which the use of a social media service or relevant electronic service is measured. Readers are assisted in better understanding the application of the 'reasonable person' test by examining two hypothetical examples that demonstrate how the offence operates practically.

II THE OFFENCE

The creation of the offence of cyberbullying was part of a suite of recent reforms to the Australian military discipline system, introduced through the *Defence Legislation Amendment (Discipline Reform) Act 2021* (Cth).[7] In terms of procedural history, the Defence Legislation Amendment (Discipline Reform) Bill ('the Bill') was introduced into the Commonwealth Parliament House of Representatives on 12 August 2021, referred to the Senate Foreign Affairs, Defence and Trade Legislation Committee ('Senate Committee') on 26 August 2021, passed by both Houses on 1 December 2021 and received assent on 13 December 2021.[8] It came into force on 13 December 2022. The offence is provided for in s 48A of the *DFDA*.[9]

A *Section 48A*

The Explanatory Memorandum accompanying the Bill acknowledged that '[c]yberbullying by a member in any form is conduct corrosive to good order and discipline; it is contrary to the Defence Value of respect towards others and has a negative impact on morale, operational effectiveness and reputation of the ADF'.[10] Further, it was recognised that 'the risks of emotional, mental, and physical harm are high where such offending occurs, and in severe cases, can result in tragic consequences for persons affected by cyberbullying'.[11] A fundamental aim of the offence, then, is to 'protect the people who choose to serve in our Defence Force'.[12] Its introduction is regarded as a necessary measure, one which sends an unequivocal

[7] Note that the reforms introduced a range of new offences including 'Failure to comply with removal order' as per s 48B of the *DFDA* (above n 4). This provision provides that a service tribunal may make a content removal order if a member is convicted under s 48A. Failure to remove the content constitutes an offence under s 48B. The aim of the provision is to facilitate expedient removal of cyberbullying material where practicable. This article will not explore the scope of s 48B as it is comparatively less complex in its application.

[8] Department of Parliamentary Services (Cth), Bills Digest (Digest No 33 of 2021–22, 22 November 2021) 1, 3; Commonwealth, *Acts of Parliament Assented To: Act No. 132 to 142 of 2021*, No 133, 20 January 2022.

[9] *DFDA* (n 4) s 48A.

[10] Explanatory Memorandum, Defence Legislation Amendment (Discipline Reform) Bill 2021(Cth) 9 [28].

[11] Ibid 31.

[12] Commonwealth, *Parliamentary Debates*, House of Representatives, 12 August 2021, 8106 (Andrew Gee, Minister for Defence Personnel and Minister for Veterans' Affairs).

message to ADF members that 'the use of social media to cyberbully another person is unacceptable and will not be tolerated in the Australian Defence Force'.[13]

The specific wording of the offence provided in s 48A of the *DFDA* is included below:

> **Section 48A Cyber-bullying**
>
> (1) A defence member commits an offence if:
>
> (a) the member uses a social media service or relevant electronic service; and
>
> (b) the member does so in a way that a reasonable person would regard as offensive or as threatening, intimidating, harassing, or humiliating another person.
>
> Maximum punishment: Imprisonment for 2 years.[14]

The offence of cyberbullying is a 'service offence',[15] as distinct from an 'infringement'.[16] Specifically, it is characterised as a 'Schedule 1A offence',[17] as opposed to a 'serious service offence'[18] or a 'prescribed offence'[19]; this means that for ADF members of or below 0–4 rank (Lieutenant Commander/Major/Squadron Leader), there is no upfront right of election for a trial by court martial ('CM') or Defence Force Magistrate ('DFM').[20] This enables a summary authority to deal with Schedule 1A offences. Summary authorities in the military discipline system are military officers who are not legally qualified.[21] Thus, they have limited powers of

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[13] Ibid.
[14] *DFDA* (n 4) s 48A.
[15] See *DFDA* (n 4) s 3(1) for the definition of 'service offence'. Service offences are crafted as criminal law offences and utilise the criminal responsibility provisions in Chapter II of the *Criminal Code Act 1995* (Cth).
[16] *DFDA* (n 4) s 9D(1). Note, this includes specific forms of misconduct of a minor nature.
[17] See *DFDA* (n 4) s 3(1) for the definition of 'Schedule 1A offence'.
[18] *DFDA* (n 4) s 101(1).
[19] Ibid s 104.
[20] Ibid ss 131(1)–(2), 111B(2)(c); a charged member must be provided with an opportunity to elect to have that charge tried by a Cour Martial or Defence Force Magistrate where, during trial by summary authority, the summary authority forms the view that there is sufficient evidence to support a charge and, that if the charged member is convicted of that charge, then it would be appropriate to impose an 'elective punishment'. Elective punishments are more severe than the summary authority's normal powers of punishment; see *DFDA* (n 4) s 3(1) for the definition of 'elective punishment'.
[21] Office of the Judge Advocate General, Submission No 2 to Senate Standing Committee on Foreign Affairs, Defence and Trade Legislation, Parliament of Australia, *Inquiry Into the Provisions of the Defence Legislation Amendment (Discipline Reform) Bill 2021* (8 September 2021) 2 [5] ('JAG-ADF Submission').

punishment and, generally, deal with less serious offences[22] in an expeditious manner.

B *Scrutiny*

The new provision came under significant scrutiny, leading to the enactment of the military discipline reforms. A 'note of caution' pertaining to the (then proposed) offence, initially flagged in the Judge Advocate General's ('JAG') Report for the period 01 January to 31 December 2020 ('Annual Report') by Rear Admiral His Honour Justice MJ Slattery AM RAN, and echoed by Rear Admiral JT Rush RFD QC RAN in the JAG-ADF Submission to the Senate Committee, related to the fact that the offence requires 'no connection to the discipline of the Defence Force beyond the accused being a member of the Defence Force'.[23] This was highlighted as 'exceptional' as *DFDA* offences 'generally have either an explicit connection to service in the Defence Force or have a close civilian criminal law counterpart with equivalent penalties'.[24] Whilst a similar civilian offence exists in the form of 'using a carriage service to menace, harass, or cause offence',[25] the maximum penalty for that Commonwealth offence is three years imprisonment (exceeding the two-year maximum term of imprisonment prescribed under s 48A).[26] Rear Admiral JT Rush RFD QC RAN also questioned the suitability of the offence being a Schedule 1A offence, commenting that it is unfair for members not to have the right of an upfront election for a hearing by a superior tribunal[27] and that hearing a cyberbullying matter 'involves [complex] legal considerations beyond the reasonable competence of lay summary authorities'.[28]

Contrasting perspectives were offered. For example, the Defence Submission to the Senate Committee argued it is unnecessary for there to be a connection to good order and discipline beyond an accused being a Defence member;[29] that is, there need not be additional criteria to satisfy the nexus.[30] Furthermore, it was

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[22] *DFDA* (n 4) ss 68B, 69C.
[23] JAG-ADF Submission (n 21) 1 [2] citing Judge Advocate General, *Report for the period 01 January to 31 December 2020* (Annual Report, 2021) [93].
[24] JAG-ADF Submission (n 21) 1 [2].
[25] *Criminal Code Act* 1995 (Cth) sch 1 s 474.17 ('*Criminal Code*').
[26] A discussion about the Commonwealth offence is included in the next section of this article.
[27] JAG-ADF Submission (n 21) 2 [6].
[28] Ibid 2 [5].
[29] Department of Defence, Submission No 5 to Senate Standing Committee on Foreign Affairs, Defence and Trade Legislation, Parliament of Australia, *Inquiry in to the provisions of the Defence Legislation Amendment (Discipline Reform) Bill 2021* (17 September 2021) 8 ('Defence Submission').
[30] See also Centre for Military and Security Law, ANU, Submission No 3 to Senate Standing Committee on Foreign Affairs, Defence and Trade Legislation, Parliament of Australia, *Inquiry into the Provisions*

emphasised that the ADF's needs require that alleged cyberbullying conduct be managed promptly, especially in deployed environments.[31] For this reason, it was submitted that it was highly appropriate that the offence be crafted as a Schedule 1A offence capable of being tried by a summary authority.[32] The Defence Submission also elucidated that serious instances of cyberbullying can be heard by a superior tribunal or can be referred to civilian police (even as a Schedule 1A offence); the discipline system is sufficiently flexible to ensure that the most appropriate body deals with serious instances.[33] In the most serious cases, a charge can also be brought under the *DFDA* as a 'territory offence' (an accused can be prosecuted in a civilian criminal court).[34]

Similarly to the Defence Submission to the Senate Committee, the Office of the Inspector-General of the Australian Defence Force ('IGADF') Submission observed that '[g]iven the Australian Defence Force's predominantly digitally-literate, young adult demography, mechanisms to allow lower level cyberbullying offending to be tried summarily are desirable'.[35] It was highlighted that members charged under s 48A have protections available, including 'automatic review and appeal mechanisms, and oversight not only by the Judge Advocate General but also my office'.[36]

Ultimately, the Senate Committee, in its Report released on October 14, 2021, concurred with and supported the introduction of the offence as a Schedule 1A offence, recognising the need for better management of disciplinary breaches and enhanced protections for members tried summarily. Now, let us examine some of the most notable features of the offence to better understand its operation.

C *Notable Features*

As a *DFDA* service offence, the general principles of criminal responsibility apply as per the *Criminal Code Act 1995* (Cth) ('*Criminal Code*').[37] As such, the prosecution must prove the following elements of s 48A beyond reasonable doubt:

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of the Defence Legislation Amendment (Discipline Reform) Bill 2021 (16 September 2021) 4 ('Centre for Military and Security Law'); *Private R v Cowen* (2020) 271 CLR 316, 345 [81].

[31] Defence Submission (n 29) 9.

[32] Ibid 8–9.

[33] Ibid 8. See also Centre for Military and Security Law (n 30) 5.

[34] See *DFDA* (n 4) s 3(1) for the definition of 'territory offence'.

[35] Inspector-General of the Australian Defence Force, Submission No 7 to Senate Standing Committee on Foreign Affairs, Defence and Trade Legislation, Parliament of Australia, *Inquiry into the Provisions of the Defence Legislation Amendment (Discipline Reform) Bill 2021* (16 September 2021) 1–2.

[36] Ibid 2.

[37] *Criminal Code* (n 25) sch 1 s 10.

1. That the charged member was **a defence member**[38] or that the charged member was reckless to the fact that he or she was a defence member (default fault element of recklessness);[39] and
2. The charged member used a social media service[40] or relevant electronic service;[41] and
3. That the charged member **intended to use** a **social media service** or **relevant electronic service** (default fault elements of intention);[42] and
4. That the use of the service by the charged member was done in a way that a **reasonable person** would regard as **offensive or as threatening, intimidating, harassing, or humiliating** another person (physical element of circumstance); and
5. That the charged member was **reckless** as to the fact that a **reasonable person** would regard the use of the service by the member as **offensive or as threatening, intimidating, harassing, or humiliating** another person (default fault element of recklessness).[43]

To better understand how the provision operates, it is helpful to consider some of the most notable features that emerge when examining the above elements.

1 *Captures conduct by a defence member which occurs off-duty and not on service land*

The fact that a defence member is off duty when the alleged conduct occurs does not preclude the member from being charged under s 48A. The provision stipulates (see element 1 above) that the person must be a defence member (or was reckless to that fact); there is no additional requirement that the defence member also be on duty at the time of carrying out the offence. Further, there is no requirement that the electronic service used is on service land; the location of the social media service or relevant electronic service is not limited.

[38] *DFDA* (n 4) s 3.
[39] *Criminal Code* (n 25) sch 1 s 5.2(1).
[40] *DFDA* (n 4) s 48A (2)(a).
[41] Ibid s 48A (2)(b).
[42] *Criminal Code* (n 25) sch 1 s 5.4(1).
[43] Ibid.

2 *Captures communications accessible by end users inside and outside of Australia*

Definitions pertaining to 'social media service' and 'relevant electronic service' provided for in s 48A (see element 2 above) incorporate meanings provided for in the *Online Safety Act 2021* (Cth) ('*Online Safety Act*'),[44] facilitating consistent use of statutory terms. Essentially, a social media service is one that enables online interaction between two or more end-users, allowing users to post material on the service.[45] Well-known examples of such services include Facebook, Instagram, and Snapchat. A relevant electronic service allows end users to communicate with other users through email, instant messaging, short message service ('SMS'), multimedia message service ('MMS'), chat service, or a service enabling online gaming.[46] Interestingly, definitions of these terms are broader under the service offence of cyberbullying than those provided in the *Online Safety Act* as s 48A is designed to encompass not only material accessible to end-users in Australia but also that which is accessible outside of Australia.[47] In this manner, defence members are accountable when material deemed to fall within the scope of the offence is accessible overseas (meeting the disciplinary needs of the ADF in deployed environments).

3 *Unintentional use is not captured by the offence*

A defence member must use a social media service or a relevant electronic service intentionally to fall within the ambit of the offence. This means that where, for example, a defence member's social media account or email has been hacked and the post or communication appears (incorrectly) to be communicated by the defence member, the default fault element of intention will not be established on the facts; the defence member cannot be charged under s 48A.

4 *Must the recipient actually feel offended or feel threatened, intimidated, harassed or humiliated?*

It is not a requirement of the offence that the recipient of the material actually be offended, threatened, intimidated, harassed, or humiliated as a result of the conduct. Rather, the physical element of circumstance (element 4 above) requires consideration of the accused's *use* of a social media service or relevant electronic service by evaluating whether a 'reasonable person' would find the accused's use offensive or threatening, intimidating, harassing, or humiliating to another person and whether the accused was reckless regarding that fact (element 5 above). 'Use' of

[44] *Online Safety Act 2021* (Cth) s 13, 13A ('*Online Safety Act*').
[45] Ibid s 13(1)(a).
[46] Ibid s 13A(1).
[47] *DFDA* (n 4) 48A(2)(a)(b).

a social media or relevant electronic service refers to the 'method of use or the content of a communication or both'.[48]

Given the dearth of ADF cyberbullying cases heard to date, there are likely to be some uncertainties surrounding the application of s 48A. The next Part considers some potential 'pain points' for those deciding whether to lay a charge under s 48A of the *DFDA* and those hearing future cyberbullying matters. The commentary provided could assist in shaping internal Defence policy (guidance) on this offence.

III Potential Uncertainties Surrounding the Offence of Cyberbullying

To date, a charge of cyberbullying has not been heard by a superior tribunal. This is somewhat surprising given that cyberbullying has been regarded as 'a phenomenon that is occurring in the Australian Defence Force, as it is in the wider society'.[49] One possible explanation for the scarcity of cases being tried is that personnel authorised to lay charges are uncertain about what constitutes using a social media or relevant electronic service in an 'offensive' or 'threatening, intimidating, harassing, or humiliating' way. Since the terms are not defined in the *DFDA*, there are no specific statutory definitions that provide guidance on how to construe these terms for the purposes of s 48A. Furthermore, while the offence stipulates that an objective standard should measure the use of the service, no guidance as to the application of the 'reasonable person' test is provided. Hence, it is possible that alleged conduct falling within the scope of the new offence is, instead, being dealt with via an alternate charge or is being handled administratively. Sections A and B below provide a brief analysis of these uncertain aspects of the offence, which may assist those authorised to lay charges and, equally, those trying matters in the future.

A *Meaning of 'Offensive' or 'Threatening, Intimidating, Harassing, or Humiliating' Another Person*

Construed in accordance with its ordinary definition, the term 'offensive' means 'displeasing', 'annoying' or 'insulting'.[50] Further, 'threatening' means 'to try to influence a person by menaces';[51] 'intimidating' means 'to inspire with fear';[52] 'harassing' means 'unwarranted speech or behaviour causing annoyance, alarm or distress';[53] and 'humiliating' means 'to lower the dignity or self-respect' of the

[48] See eg, *Smart v The Queen* [2021] WASCA 175, [38] ('*Smart*').
[49] Defence Submission (n 29) 9.
[50] *Oxford English Dictionary* (online at December 2024) 'offensive' (adj, def 3).
[51] *Oxford English Dictionary* (online at December 2024) 'threaten' (v, def 2a).
[52] *Oxford English Dictionary* (online at December 2024) 'intimidating' (v, def 1).
[53] *Oxford English Dictionary* (online at December 2024) 'harassing' (adj, def 1).

subject.[54] Of these terms, 'offensive' reflects the widest literal meaning and has the potential to encompass broadly reaching acts, including conduct which is merely annoying or displeasing. Lack of guidance on scope may lead to uncertainty as to the uses of a social media service or a relevant electronic service deemed sufficiently serious to fall within the bounds of the new service offence.

The following paragraphs consider how some of these terms have been defined within relevant statutes — that is, legislation that, like s 48A DFDA, prohibits conduct deemed either offensive, menacing, or harassing — and interpreted by the courts hearing matters concerning similarly crafted civilian criminal offences. Notably, 'offensive', being the term with the broadest literal construction, has received significant attention from policymakers and the judiciary in regard to how the term ought to be construed in relation to similar criminal provisions as discussed below.

1 *'Offensive' as per the* Online Safety Act

It is useful to consider whether any statutory guidance regarding the scope of the meaning of the term 'offensive' can be found in the *Online Safety Act*, noting that several definitions applicable to s 48A — for example, 'social media service' and 'relevant electronic service' — are found within that Act. Notably, s 8 of the *Online Safety Act* stipulates how the term 'offensive' is to be understood when the eSafety Commissioner (Australia's independent online safety regulator established under the *Online Safety Act*) considers whether particular material targeting an Australian adult would be regarded as menacing, harassing or *offensive* and, in turn, whether adult cyber abuse has occurred under the Adult Cyber Abuse Scheme.[55] The provision stipulates that the 'standards of morality, decency and propriety generally accepted by reasonable adults', the 'literary, artistic and educational merit of the material' and 'the general character of the material (including whether it is of a medical, legal or scientific character)' are matters to be taken into account when determining whether particular material is 'offensive'.[56] This statutory meaning, therefore, requires that both the inherent nature of the material and its value be considered and measured against generally accepted societal standards. The Adult Cyber Abuse Scheme Regulatory Guidance (2025) suggests that the eSafety Commissioner will consider material as 'offensive' when 'it is calculated to, or likely to, cause significant anger, significant resentment, outrage, disgust, or hatred, and it

[54] *Oxford English Dictionary* (online at December 2024) 'humiliating' (v, def 2).
[55] *Online Safety Act* (n 45) s 7(1); eSafety Commissioner, *Adult Cyber Abuse Scheme Regulatory Guidance* (Regulatory Guidance, January 2025) 5.
[56] *Online Safety Act* (n 45) s 8(1).

does more than simply hurt or wound a person's feelings'.[57] This construction substantially narrows the meaning of 'offensive' from one that encompasses fleeting emotional reactions of mere annoyance or displeasure to one that requires a more *significant effect* on a person. Whilst not binding for the purposes of s 48A, consideration of how the term is treated per the eSafety civil enforcement scheme may, nevertheless, assist those ADF members authorised to lay and hear charges to determine an appropriate threshold that conduct should rise to for it to fall within the scope of the service offence.

2 *'Offensive' as per the* Criminal Code

Section 474.17 of the *Criminal Code* — 'using a carriage service to menace, harass or cause offence' — is the most comparable criminal offence to s 48A of the *DFDA.* A perpetrator commits this federal indictable offence if they use a carriage service (which includes 'making a telephone call, sending a message by facsimile, sending an SMS message, or sending a message by email or some other means of using the Internet')[58] to 'menace, harass or cause offence' to a victim (based on an objective standard). The physical and fault elements of s 474.17 operate in the same way as they do in regard to s 48A of the *DFDA*. Two noteworthy points of distinction between the two offences are that: a) s 474.17 'is not tailored to support the Australian Defence Force to maintain good order and discipline',[59] since proceedings under s 474.17 of the *Criminal Code* would likely be significantly more protracted than those under s 48A *DFDA* where a summary authority can hear a cyberbullying matter promptly (this is critical in deployed environments); and b) the maximum punishment under s 474.17 is three years whereas the maximum punishment under s 48A is two years imprisonment.

The offence lies within Part 10.6 of the *Criminal* Code which, by way of s 474.3, provides some statutory guidance on the meaning of the term 'offensive' for the purposes of s 474.17. Interestingly, the same factors included in s 8 of the *Online Safety Act* (referenced above) are to be taken into account when determining whether material is offensive for the purposes of s 474.17. Arguably, this strengthens the case that this matrix of factors ought to be considered when construing the meaning of 'offensive' for the purposes of s 48A.

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[57] eSafety Commissioner (n 56) 5.
[58] Explanatory Memorandum, Crimes Legislation Amendment (Telecommunications Offences and Other Measures) Bill (No 2) 2004 (Cth) 32.
[59] Defence Submission (n 29) 9.

3 *Case law on 'offensive', 'menacing', and 'harassing'*

Further contextualisation of several of the above listed terms — namely 'offensive', 'menacing' and 'harassing' — may be gleaned by considering relevant case law. In the High Court decision of *Monis v The Queen*,[60] the joint judgement of Crennan, Kiefel and Bell JJ considered the meaning of the term 'offensive' in the context of whether a reasonable person would regard use of a postal or similar service to be, in all the circumstances, menacing, harassing or offensive under s 471.12 of the *Criminal Code*. They held that it was important to note the subjection of the three words to the same objective standard of assessment for the purposes of that offence suggest that 'what is offensive will have a quality at least as serious in effect upon a person as the other words convey'.[61] They went on to posit more specifically:

> The words 'menacing' and 'harassing' imply a serious potential effect upon an addressee, one which causes apprehension, if not a fear, for that person's safety. For consistency, to be 'offensive', a communication must be likely to have a serious effect upon the emotional well-being of an addressee.[62]

This construction of the term 'offensive' aligns with the statutory meaning of the *Online Safety Act* and the *Criminal Code* (discussed above), the common thread being that 'offensive' excludes hurt feelings or momentary reactions, and rather encompasses uses of a service which are likely to have a significant effect on a person. Hayne J also provided some insight on the term 'menacing', suggesting it connotes 'uttering or holding out threats'.[63] This would appear to sit within the bounds of the literal meaning of the term and the meaning as opined by the majority in *Monis*. Arguably, this term is synonymous with the term 'threatening' used in s 48A of the *DFDA*. Thus, although the word 'menacing' is not specifically referred to in s 48A, it is helpful to consider the judicial interpretation of 'menacing' to better understand that the uttering of a threat is likely to be regarded as falling within the scope of s 48A (being a menacing use of a social media service or relevant electronic service). In regard to 'harassing', Hayne J suggested that the term 'connotes troubling or vexing by repeated attacks',[64] which arguably significantly narrows the literal meaning afforded to the term. In line with this construction, use of a service objectively viewed as being a mere annoyance is unlikely to reach the level of seriousness required.

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[60] (2013) 249 CLR 92 ('*Monis*').
[61] Ibid 310.
[62] Ibid.
[63] Ibid 154.
[64] Ibid.

In the more recent matter of *Smart v The Queen*, the Western Australian Supreme Court of Appeal also considered the terms 'menacing' and 'harassing' as they related to s 474.17 of the *Criminal Code* (note, 'offensive' was not assessed in this particular case).[65] Here, it was held that 'menacing' means 'a communication of such a nature that it is likely to cause a person of normal stability and courage to become apprehensive for their own safety and wellbeing. It must be something more than a communication which is distasteful or causes a sense of unease'.[66] 'Harassing' was held to mean 'to trouble or vex by repeated communications that are again, likely to cause a person of normal stability and courage to become apprehensive for their own safety and wellbeing'.[67] The main distinction between these two descriptions appears to be the aspect of repeated communications connected with 'harassment'. Both fall within the ambit of the meanings espoused in *Monis*. It is safe to argue that use of a social media service or relevant electronic service to communicate either a single or repeated communication likely to cause apprehension or fear will likely be encompassed by s 48A *DFDA*.

Only two terms referred to in s 48A, namely 'intimidating' and 'humiliating', lack guidance from relevant statute or case law. It would be prudent for those laying a s 48A charge and those hearing a cyberbullying matter to apply their literal meanings (offered above).

Of course, the other uncertainty not yet addressed relates to application of the *objective test* in determining whether the particular use of a social media service or relevant electronic communication is offensive or threatening, intimidating, harassing or humiliating from the perspective of a *reasonable person*. The following section addresses how this test may be applied for the purposes of s 48A.

B *The Reasonable Person Test Explained in a s 48A Context*

Reference to the 'reasonable person' in s 48A means that use of a social media service or a relevant electronic service is to be measured by an objective standard — it imports an objective but qualitative criterion on criminal liability. Application of a reasonable person (objective) test to a statutory provision has deep historical

[65] *Smart* (n 48) [1], [7], [8], [9].
[66] Ibid [40].
[67] Ibid.

roots,[68] both in criminal law and tort law (negligence).[69] So who is the reasonable person?

Scholar Mayo Moran comments that 'looking at the reasonable person across his many appearances makes at least one thing clear — he is most often the common or ordinary man'.[70] The characteristics of the reasonable person were considered more recently by the High Court in *Monis.* French CJ noted:

> The characteristics of the reasonable person, judicially constructed for the purpose of such statutory criteria, have been variously described. A 'reasonable man' in *Ball v McIntyre*[71] was 'reasonably tolerant and understanding, and reasonably contemporary in his reactions'. A reasonable person was said, in the Supreme Court of New South Wales, to be 'neither a social anarchist, nor a social cynic'.[72] The reasonable person is a constructed proxy for the judge or jury. Like the hypothetical reasonable person who is consulted on questions of apparent bias,[73] the construct is intended to remind the judge or the jury of the need to view the circumstances of allegedly offensive conduct through objective eyes and to put to one side subjective reactions which may be related to specific individual attitudes or sensitivities.[74]

As espoused in the majority judgement of Crennan, Kiefel and Bell JJ, the reasonable person reflects 'contemporary societal standards, including those relating to robust debate'.[75] In the context of s 48A, then, the assessment as to whether particular use of a social media service or relevant electronic service would be regarded as offensive or as threatening, intimidating, harassing, or humiliating another person is made objectively from the perspective of a person who is reasonably tolerant of contemporary societal standards and opinion and refrains from measuring the alleged conduct against their own subjective sensibilities.

What follows are two examples designed to help better understand how the reasonable person test may apply in relation to the service offence of cyberbullying. The reader may assume that fault elements one to three (see Part IIC above) are established. What is to be determined for the purposes of the examples relates to

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[68] Eric Colvin, 'Ordinary and Reasonable People: The Design of Objective Tests of Criminal Responsibility' (2001) 27(2) *Monash University Law Review* 197, 223.
[69] Mayo Moran, 'The Reasonable Person: A Conceptual Biography in Comparative Perspective' (2010) 14(4) *Lewis & Clark Law Review* 1233, 1234, 1236.
[70] Ibid 1236.
[71] *Ball v McIntyre* (1966) 9 FLR 237, 245 (Kerr J).
[72] *Spence v Loguch* (Supreme Court of New South Wales, Sully J, 12 November 1991).
[73] *Johnson v Johnson* (2000) 201 CLR 488, 492 [12] (Gleeson CJ, Gaudron, McHugh, Gummow and Hayne JJ).
[74] *Monis* (n 60) 122–3 [44] (French CJ).
[75] Ibid 210 [336] (Crennan, Kiefel and Bell JJ).

element four — being the physical element of circumstance (application of the objective standard which determines whether an accused uses a social media service or relevant electronic service in a way a reasonable person would regard as offensive or as threatening, intimidating, harassing, or humiliating another person) and element five – being the default fault element of recklessness (that the accused was reckless as to the fact that a reasonable person would regard the use of the service by the member as offensive or as threatening, intimidating, harassing, or humiliating another person).

1 *Video and comment post to 'friends' on social media*

> Flight Lieutenant ('FLTLT') X, being a defence member with a ten-year service history, posts to Facebook a video clip showing graphic images of a person being subjected to physical torture and comments 'this is how Squadron Leader ('SQNLDR') Y treats his subordinates'. SQNLDR Y is a senior officer in FLTLT X's Unit.
>
> FLTLT X intends the post (comprising a video and comment) to be a joke; there is no truth to the comment. FLTLT X's post can only be seen by his 'Facebook friends' who are all in the same Unit.
>
> One of the Facebook friends reports the conduct and FLTLT X is subsequently charged under s 48A *DFDA*.

(a) Element four analysis

FLTLT X's use of Facebook in the manner described is highly likely to be regarded as offensive or threatening, intimidating, harassing, or humiliating another person. Whilst the video itself is likely to be 'removable' content based on Meta Terms of Service,[76] falling afoul of Community Standards,[77] viewed holistically, the post (comprising the video and comment) is, at the very least, likely to offend an ordinary person reasonably tolerant of contemporary societal standards and opinions, putting aside their own subjective sensibilities.

The graphic video and the accompanying post suggest that a senior officer in the ADF engages in practices akin to torture. The inherent (general) nature of the content and the complete absence of any literary, artistic and educational merit factor into a reasonable person's assessment as to whether an offence under s 48A

[76] Meta, *Terms of Service* (Web Page) <https://www.facebook.com/terms/>.
[77] Meta, *Community Standards* (Web Page) <https://transparency.meta.com/en-gb/policies/community-standards/>.

of the *DFDA* has occurred. This particular use of Facebook is highly likely to be regarded as more than a mere annoyance or a displeasure and is likely to have a significant effect on a reasonable person (more than a fleeting emotional reaction). It is irrelevant to consider if FLTLT X intended this post to be 'a joke'; subjective intention of the accused is not an element of the offence. The fact that the material was restricted to FLTLT X's 'Facebook friends' (as opposed to being accessible by the public at large) is a factor which can be taken into account. However, in this case, it is unlikely to make any difference in a reasonable person's assessment of FLTLT X's use of Facebook; the post is so gravely offensive that it is likely to be deemed as falling within the scope of the offence whether directed at one or multiple 'Facebook friends'.

(b) Element five analysis

To establish element five, it must be shown that FLTLT X was aware (that is, had foresight) of a substantial risk that his use of Facebook would be regarded as offensive and that he was unjustified in taking that risk. A substantial risk has been described as 'real and apparent on the evidence presented … not a risk that is without substance or which is fanciful or speculative'.[78] It is not sufficient to demonstrate that the risk that reasonable persons would regard the Facebook post as being offensive was obvious or well known.[79] It also does not matter if FLTLT X subjectively believed he was justified in taking the risk (for example, the post was only accessible by my Facebook friends and they will get the joke).[80]

Sharing content depicting torture or mistreatment of others and commenting on that material in a manner that suggests a senior officer in the ADF condones and engages in such practices lies in deep contradiction to Defence Values. On the facts, it is highly likely that FLTLT X had a conscious awareness that there was a legitimate risk (more than a possibility) that his use of Facebook would be regarded as offensive given his position as an ADF officer and the duration of his service experience in the ADF.

This is a situation where the member's conduct will likely fall within the scope of the service offence of cyberbullying.

[78] *Hann v DPP* (2004) 144 A Crim R 534, [25] (Gray J).
[79] *Smart* (n 48) [41].
[80] Ibid.

(c) Additional comment

Notably, if the material was posted *before* s 48A came into effect on 13 December 2022 and remained on Facebook (noting that, presumably, the content would have been taken down by Facebook), FLTLT X could still be charged under s 48A at a time *after* 13 December 2022. The justification here lies in the fact that the physical element of circumstance requires consideration of FLTLT X's use of Facebook. Use is not isolated to FLTLT X clicking 'post' on his device. Rather, use in this instance relates to both the act of posting and the accessible content itself.

2 *The Skype messages*

> Leading aircraftwoman ('LACW') X receives a Skype Business ('Skype') text message from Leading aircraftman ('LAC') Y, stating 'Don't forget we have a 5 km run this morning. Hope you didn't eat over the weekend; you wouldn't want to die trying to run (laughing emoji)'. LACW feels upset by this comment, but replies 'I'm sure I'll be fine, bought an energy drink with me'.
>
> After the run, LAC Y messages LACW X on Skype again and states 'You must be near death, why do you even bother with the ADF when you know fitness is important. You will never be able to pass your fitness test if you don't start shedding some massive pounds — you run like a fat sick cow (laughing emoji)'.
>
> The following morning, LAC Y messages LACW X on Skype again: 'The fat cow is alive (laughing emoji)! Eat much last night?'.
>
> LACW X reports the behaviour of LAC Y. She is deeply affected by these comments and requests leave. A charge under s 48A *DFDA* is laid.

(a) Element four analysis

LAC Y's use of the Skype messaging service in the manner described is highly likely to be regarded as offensive or threatening, intimidating, harassing, or humiliating to another person. Whilst the comments directed at LACW X are likely humiliating in that the belittling remarks serve to lower the dignity of LACW X, they are also, at the very least, likely to offend an ordinary person reasonably tolerant of contemporary societal standards and opinions, putting aside subjective sensibilities.

The general nature of the comments, being inherently belittling and derogatory to LACW X, and the complete absence of any literary, artistic and educational merit factor into a reasonable person's assessment as to whether an offence under s 48A of the *DFDA* has occurred. The fact that LAC Y's use of Skype involved multiple

comments (rather than just one) can also be taken into account, suggesting that this use of a service is likely to be regarded as more than a mere annoyance or displeasure. The repetitive nature of the remarks is likely to have a significant effect on a reasonable person (more than a fleeting emotional reaction). Including laughing emojis in the comments may be an indication that LAC Y intended the comments to be jovial banter. However, his subjective intention is irrelevant in establishing element four.

(b) Element five analysis

Based on the information available, it is likely that this element can also be established. It is likely that LAC Y had a conscious awareness that there was a real risk, beyond a speculative risk, that his use of Skype would be perceived as reflecting acutely disrespectful discourse, likely to offend a reasonable person. On the facts, there is no plausible justification for LAC Y taking the risk; LAC Y's belief that the comments were mere jovial banter, as shown by his inclusion of laughing emojis in each of the comments, is not a valid justification.

This is a situation where the member's conduct will likely fall within the scope of s 48A of the *DFDA*.

The potential scenarios of a defence member's use of a social media service or relevant electronic service are seemingly limitless. It is important to note that even where a charge under s 48A could be laid against an accused, it does not automatically follow that the charge will be laid. Ultimately, it will be open to Command to determine how to best manage the accused's conduct in accordance with available options under policy.

IV CONCLUDING REMARKS

The new service offence of cyberbullying is a novel addition to the *DFDA*, enacted as part of the recent reforms to the military discipline system to ensure that those who use social media (or another relevant service) to cyberbully another person are held accountable and punished swiftly and fairly. Given that not a single cyberbullying case has been heard by a superior tribunal to date, this article offers guidance on the operation of s 48A of the *DFDA*. The article highlights how references to relevant statutes and case law examining similar offences provide a solid foundation for understanding the meaning of 'offensive' use of a social media or relevant electronic service for the purposes of the provision, a meaning which is narrower than a literal interpretation suggests. Furthermore, guidance for better understanding the reasonable person test (by which the use of a social media service or relevant electronic service is measured) is provided by drawing on relevant case law.

Hypothetical scenarios then give the reader a practical perspective through which to view the application of the objective standard. Ultimately, this article aims to frame or influence internal Defence policy guidance for members, those authorised to lay charges, and those who will hear future cyberbullying matters in furtherance of promoting good order and discipline in the Defence Force.

AUTISM: CRIMINALLY RESPONSIBLE OR INSANE? SYMPTOMATIC OFFENDING PATTERNS AND DEFENCE DEFICIENCIES

THOMAS RAY OLIVER*

This article examines the key criminal defences that are either advanced by, or open to, defendants with Autism Spectrum Disorder ('ASD individuals') in Australia. These defences include insanity, mistake of fact, accident, and self-defence. A doctrinal analysis of five recent Australian cases indicates that these defences are deficient for ASD individuals, even where ASD symptomology is the underlying cause of offending. This is due to the tantalising, albeit futile, endeavour that pleading insanity poses, and the discriminatory objective reasonability elements embedded in the other defences. The research behind this article has found that defence lawyers are either unwilling or lack the ASD understanding to advance the available defences, and instead opt for early pleas of guilty, despite expert evidence finding a realistic possibility of success. Instead of dealing with ASD inconsistently at sentencing, on a post-conviction mercy basis, this article offers a Model ASD Defence to protect this vulnerable sub-class of offenders, who are more likely to be victims than perpetrators, and who are not insane.

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I INTRODUCTION

New Yorker Darius McCollum has been obsessed with the public transport system for as long as he can remember.[1] As a child, Darius was taught to drive trains by employees of the New York MTA. As an adult, he began boarding and operating trains and buses, getting his passengers from A to B, all in perfect timing, all passengers satisfied with the service.[2] The only problem: Darius was not employed by the MTA, yet he saw his acts as providing a philanthropic helping hand.[3]

Darius was charged with impersonating a federal employee and imprisoned. Upon his release, his obsession persisted, leading him to operate trains and buses repeatedly, perpetuating the cycle. Darius has now been arrested more than thirty times,[4] and has spent most of his adult life incarcerated and segregated from society.[5]

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[1] *People v McCollum*, 2018 NY Slip Op 51424(U).
[2] Ibid 34: Darius has admitted to operating 5000 trains and over 1000 buses in this fashion.
[3] Lawrence Osborne, *American Normal: The Hidden World of Asperger Syndrome* (Copernicus Books, 2002) 4.
[4] Jose Martinez, 'Transit-Obsessed Queens Man Will Not Be Released Back Into Community', *Spectrum News NY1* (online, 5 October 2018) <https://ny1.com/nyc/all-boroughs/transit/2018/10/05/transit-obsessed-queens-man-will-not-be-released-back-into-community>.
[5] Kiah Fields, '"Off the Rails" Director Adam Irving Talks Darius McCollum, New York's Notorious Transit Imposter', *The Source* (online, 27 April 2016) <https://thesource.com/2016/04/27/off-the-rails-director-adam-irving-talks-darius-mccollum-new-yorks-notorious-transit-imposter/>.

Darius pled insanity, which was successful; however, after assessing his mental condition, Justice Ruth Shillingford ruled that Darius 'suffers from a dangerous mental disorder'.[6] As such, he was committed to a secure psychiatric centre.[7] Last known records indicate that Darius resides in the Rochester Forensic Psychiatric Hospital, where he is classified as 'Track 1', a classification reserved for the most dangerous and violent inmates.[8]

Darius was diagnosed with 'autism', which colloquially refers to Autism Spectrum Disorder ('ASD'), a life-long neurodevelopmental condition that impacts upon development, the main areas of which are social interaction, communication, and repetitive patterns of behaviour.[9] ASD is also frequently associated with sensory sensitivities and sensory processing difficulties.[10] Here, Darius' otherwise harmless interest in trains rendered him susceptible to impersonating a federal employee and imprisonment, a particularly disappointing and preventable outcome of an obsessive interest that is symptomatic of ASD. Whilst this article is Australian-focused, this United States case illustrates the issues at play.

World-renowned medical professionals have long established unique vulnerabilities of autistic people, which increase their vulnerability in criminal justice systems ('CJS') worldwide, due to behaving differently from other, neurotypical people.[11] For example, Hans Asperger, who ran a combination children's clinic and residential school in 1930s Vienna,[12] remarked that autistic people displayed social awkwardness, precocious abilities, and a fascination with rules, laws, and schedules.[13] They seemed immune to external expectations, yet paradoxically, they pursued their own goals with intense, focused determination.[14] They were sophisticated and naive, precocious and childish, standoffish but lonely and clumsy but formal.[15] They had grave, serious dispositions, and were disturbed by changes,

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[6] *People v McCollum*, 2018 NY Slip Op 51424(U), 35.
[7] See Martinez (n 4).
[8] Eli Yudin, 'How A Boy's Undiagnosed Asperger's Led To 30 Arrests For Piloting Public Transit Vehicles', *Cracked* (online, 27 June 2022) <https://www.cracked.com/article_34435_how-a-boys-undiagnosed-aspergers-led-to-30-arrests-for-stealing-public-transit-vehicles.html>.
[9] Department of Justice (WA), *Equal Justice Bench Book* (2021) 219 ('*Equal Justice Bench Book*').
[10] Ibid.
[11] See, eg, Rachel Slavny-Cross et al, 'Autism and the Criminal Justice System: An Analysis of 93 Cases' (2022) 15(5) *Autism Research* 904; Po-See Chen et al, 'Asperger's Disorder: A Case Report of Repeated Stealing and the Collecting Behaviours of an Adolescent Patient' (2003) 107(1) *Acta Psychiatrica Scandinavica* 73.
[12] Steve Silberman, *NeuroTribes: The Legacy of Autism and the Future of Neurodiversity* (Penguin Books, 2015) 5.
[13] Ibid 93.
[14] See, eg, ibid 101–2, 104–6.
[15] Ibid 94.

particularly to their routines or schedules, which defied their expectations.[16] Others failed in school on account of their pedantic nature and because their ignoring of instructions was misconstrued as wilful insurrection.[17] In those times, the most disabled of ASD individuals were confined to asylums and labelled as feeble-minded.[18]

The children were extremely regimented, acting as though their routinised manner could ward off chaos itself.[19] They sourced pleasure from repetition by acquiring huge collections of treasured objects, sometimes as mundane as matchboxes.[20] Some of the autistic children Asperger diagnosed were referred for behaviours commensurate with conduct disorder.[21]

According to the 2022 Australian Bureau of Statistics Survey of Disability, in Australia, there exists a prevalence of ASD of 1.1%,[22] a 41.8% rise from 0.8% in 2018.[23] This 2022 figure roughly translates to 1 in 100 Australians with ASD.[24]

A corollary of this rise in ASD prevalence is the increasing number of accused persons raising an ASD diagnosis in criminal proceedings, and the growing number of investigations into ASD and its links with criminality.[25] Moreover, concerningly, ASD individuals are seven times more likely to intersect with the CJS,[26] albeit research is clear that ASD prevalence in prison is unrepresentative of ASD individuals in the general population, the vast majority of whom are law-abiding.[27]

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[16] Ibid 93.
[17] Ibid.
[18] Ibid.
[19] Ibid 94.
[20] Ibid.
[21] Kathrin Hippler and Christian Klicpera, 'A Retrospective Analysis of the Clinical Case Records of "Autistic Psychopaths" Diagnosed by Hans Asperger and his Team at the University Children's Hospital, Vienna' (2003) 358(1430) *Philosophical Transactions of the Royal Society B* 291, 301.
[22] Australian Bureau of Statistics, *Survey of Disability, Ageing and Carers: Summary of Findings*, *2022* (11 October 2024).
[23] Australian Bureau of Statistics, *Disability, Ageing and Carers: Summary of Findings*, *2018* (29 November 2019).
[24] *Equal Justice Bench Book* (n 9) 219.
[25] Caitlin Eve Robertson, 'Autism Spectrum Disorder: Forensic Aspects and Sentencing Considerations' (PhD Thesis, Deakin University, 2017) xviii, ch 6.1; Colleen Berryessa, 'Brief Report: Judicial Attitudes Regarding the Sentencing of Offenders with High Functioning Autism' (2016) 46(8) *Journal of Autism and Developmental Disorders* 2770, 2770 ('Attitudes'); Tessa Grant et al, 'Criminal Responsibility in Autism Spectrum Disorder: A Critical Review Examining Empathy and Moral Reasoning' (2018) 59(1) *Canadian Psychology* 65, 65.
[26] See Colleen Berryessa, 'Judiciary Views on Criminal Behaviour and Intention of Offenders with High-functioning Autism' (2014) 5(2) *Journal of Intellectual Disabilities and Offending Behaviour* 97, 99 ('Judiciary Views').
[27] Lorna Wing, *The Autistic Spectrum: A Guide for Parents and Professionals* (Robinson, 1996) 175; Neil Brewer and Robyn Young, *Crime and Autism Spectrum Disorder: Myths and Mechanisms* (Jessica

The reason for this is that ASD individuals tend to have fervently conventional moral views, adhere rigidly to learnt rules,[28] and are more likely to be victims than perpetrators.[29]

Contextually, it has been increasingly held that the culpability of ASD individuals in offending is not equal to non-affected offenders.[30] The nature of offending in most ASD individuals can be linked to three overarching ASD characteristics, all of which are described in, and consistent with, the fifth edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ('*DSM-5*') comprising criteria for ASD,[31] which render them more susceptible to being caught up in the CJS.[32] In most instances, they are the underlying cause of their crimes.[33] These three overarching ASD characteristics are: an inability to read or respond to social cues and social naivety;[34] hypersensitivities;[35] and obsessive interests.[36]

Yet this article acknowledges that there are many cases where there is no causal link between the individual's ASD symptoms and their criminal offending behaviour. This is especially so for violent offences not common from the characteristics expressed from the ASD condition,[37] such as in many murder cases.[38] Resultantly, this article does not purport to, nor attempt to, apply to such offenders who have ASD somewhat by happenstance to their offending.

Kingsley Publishers, 2015) 39 ('*Myths*'); Kathrin Hippler et al, 'Brief Report: No Increase in Criminal Convictions in Hans Asperger's Original Cohort' (2010) 40(6) *Journal of Autism and Developmental Disorders* 774, 777 ('Hippler Brief').

[28] Wing (n 27); *Myths* (n 27); Hippler Brief (n 27).

[29] Thomas Mayes, 'Persons with Autism and Criminal Justice: Core Concepts and Leading Cases' (2003) 5(2) *Journal of Positive Behaviour Interventions* 92, 94.

[30] Ian Freckelton and David List, 'Asperger's Disorder, Criminal Responsibility and Criminal Culpability' (2009) 16(1) *Psychiatry, Psychology and Law* 16, 17, 20, 33 ('Culpability').

[31] American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (American Psychiatric Publishing, 5th ed, 2013) 299.0 ('*DSM-5*').

[32] See Berryessa, 'Judiciary Views' (n 26) 98.

[33] Ibid.

[34] See, eg, *R v Wilson* [2022] ACTSC 7; *Vucemillo v Western Australia* [2017] WASCA 37.

[35] See, eg, *Shortland v Stone* [2019] WASC 217; *R v Chapman* [2018] NSWSC 1741.

[36] See, eg, *Cluett v The Queen* [2019] WASCA 111.

[37] See M Ghaziuddin, Luke Tsai and N Ghaziuddin, 'Brief Report: Violence in Asperger Syndrome: A Critique' (1991) 21(3) *Journal of Autism and Developmental Disorders* 349, 351.

[38] See, eg, *Mack v The State of Western Australia* [2014] WASCA 207, [171], [177], [205], [214]: Expert evidence found no causal link between the appellant's ASD and the murder offence, outside of finding ASD to be a significant impairment. See also *Davies v The Queen* [2019] VSCA 66, wherein the ASD individual was convicted of five counts of arson, however expert evidence cited PTSD, depression, and anxiety as culminating in his resentment towards 'society', and thereby his offending.

This article, through a doctrinal analysis of literature and case law, will focus on the defences raised by ASD individuals in Australia: primarily insanity, but including mistake of fact, accident, and self-defence. This will illuminate how all the defence options are deficient for ASD individuals. The author then offers an alternative protective ASD defence scheme, which reflects the objectives of the CJS and the specific needs of ASD individuals.

To this author's knowledge, to date, two relevant articles exist globally, both of which were published in the United States, in 2009,[39] and 2011.[40] These articles contemplate the inadequacies of the mistake of fact and insanity defences for accused ASD individuals, before proffering the need for an 'autism defence'. Unhelpfully however, in one article, the proposed defence is effectually too limited and restrictive for use by ASD individuals and poses an even higher threshold to meet than the already deficient insanity defence for ASD individuals.[41] In the other, the proposed autism defence applies simplistically where the ASD individual cannot understand the basic underlying facts and consequences of personal conduct.[42]

Whilst both recommendations serve as milestones in a positive direction, neither provides the necessary degree of completeness when considering the three-dimensional nature of ASD symptomology. This serves to highlight a severe research gap in this area. This article examines the need for an ASD-specific defence in Australia, as applicable to ASD symptomology: not a catch-all 'autism defence' merely by virtue of having such a diagnosis, without regard to any causal link stemming from the condition.

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[39] See generally Heather Strickland, 'Autism and Crime: Should Autistic Individuals Be Afforded the Use of an "Autism" Defense?' (2011) 14 *The University of the District of Columbia Law Review* 1.

[40] See generally Brian Wauhop, 'Mindblindness: Three Nations Approach the Special Case of the Criminally Accused Individual with Asperger's Syndrome' (2009) 27(3) *Penn State International Law Review* 959.

[41] Strickland (n 39) 13.

[42] Wauhop (n 40) 988–9. But see Christine Cea, 'Autism and the Criminal Defendant' (2014) 88(7) *St John's Law Review* 495, 509–17, 529, which rejects ASD being used as an affirmative defence in general, except for use in specific 'minor crimes', under the arguably defeatist, inappropriate rationales that: (1) ASD is a spectrum disorder and thus an ASD defence would be too 'difficult' to 'draw the line' in legislating for; (2) a conviction and sentencing is required for rehabilitation; and (3) the mere availability of an ASD defence would somehow neglect 'moral blameworthiness' of all ASD individuals. This article asserts that to apply an ASD defence to 'minor crimes' would be to pre-emptively peer into a crystal ball in legislating what 'minor crimes' are/are not excusable for ASD individuals, and without knowledge of the specific factual circumstances, as not all ASD individuals express identical ASD symptoms in the same exact way, by virtue of it being a spectrum disorder.

Part II of this article will review the literature on the intersection between ASD symptomology and offending behaviour, before discussing five Australian cases involving an ASD defendant to highlight the contemporary experience of ASD individuals caught up in the CJS. Part III will then analyse and apply the four key defences used by ASD individuals in the cases discussed in Part II, to shed light on their inadequacies. Lastly, Part IV will offer a drafted model ASD defence scheme and propose reforms to promote equality for ASD individuals caught up in the CJS.

II ASD Symptomology and Case Studies

The current standardized criteria for ASD are found in the *DSM-5*.[43] A distillation of these diagnostic criteria gives rise to three overarching ASD symptoms: an inability to read or respond to social cues and social naivety; hypersensitivities; and obsessive interests.

A *Inability to Read or Respond to Social Cues and Social Naivety*

The social naivety and immaturity that is symptomatic of ASD gives rise to a pervasive vulnerability to being 'set up' by peers, who encourage and influence ASD individuals to engage in offending behaviour.[44] This susceptibility to being influenced is by virtue of their neurological differences, causing them to crave friendship and social acceptance.[45] Thus, they are more likely to be the prey in any predator-prey relationship.[46]

It is well-established that ASD individuals tend to be impaired in understanding and responding to social cues, meaning that they tend to struggle with cognitive empathy,[47] in being unable to interpret or understand emotions in others.[48] Further, they tend to express deficits with engaging in reciprocal conversation, comprehending and utilising non-verbal communicative techniques including, but not limited to, eye-contact, body language and facial expressions, understanding

[43] *DSM-5* (n 31) 299.0.
[44] Daniel Murrie et al, 'Asperger's Syndrome in Forensic Settings' (2002) 1(1) *International Journal of Forensic Mental Health* 59, 64, 69.
[45] Wing (n 27) 176; Patricia Howlin, *Autism and Asperger Syndrome: Preparing for Adulthood* (Routledge, 2nd ed, 2004) 306, cited in Gabrielle Wolf, 'Growing Enlightenment: Sentencing Offenders with Autism Spectrum Disorder in Australia' (2021) 44(4) *UNSW Law Journal* 1701, 1706.
[46] Murrie (n 44) 64, 69.
[47] As distinguished from emotional empathy.
[48] See Monica Mazza et al, 'Affective and Cognitive Empathy in Adolescents with Autism Spectrum Disorder' (2014) 8 *Frontiers in Human Neuroscience* 791.

sarcasm, and understanding when and how to "read between the lines" instead of interpreting speech literally.[49]

As a corollary of their social naivety and immaturity, ASD individuals tend not to harm others with intent.[50] This naivety can also reduce their ability to comprehend and apply laws relevant to their situation.[51] To exacerbate their direly vulnerable disposition, they can lack impulse control, coping and conflict resolution skills, and the ability to forecast the impact of their actions, along with exhibiting high anxiety deriving from their characteristic social naivety.[52]

Research suggests that offending by ASD individuals can arise from inaccurately presuming that they are in danger and need to defend themselves, due to an inability to interpret and predict the intentions, actions, and speech of others.[53] Moreover, ASD individuals may offend while conducting a psychological experiment to explore another person's reactions that they do not understand, thereby learning social skills.[54] Some ASD individuals may ruminate over past injustices and seek resolution or revenge against perceived immorality via illegal means.[55]

There are four contemporary theories with substantial empirical research providing a unified understanding of the symptomatic expressions of ASD.[56] The first is the Theory of Mind ('ToM'), referring to their lack of capacity to recognise, understand and predict the beliefs, thoughts, emotions, intentions, and behaviour of others,[57] or 'mindblindness'.[58] The second is the Theory of Executive Dysfunctions ('EF'), referring to their lack of capacity to undergo higher order cognitive processes,[59]

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[49] Robertson (n 25) ch 2.1.1–2.1.2.
[50] Howlin (n 45) 303. Cf Marc Woodbury-Smith et al, 'High Functioning Autistic Spectrum Disorders, Offending and Other Law-Breaking: Findings from a Community Sample' (2006) 17(1) *Journal of Forensic Psychiatry & Psychology* 108, 116: Exceptions arise where the individual forms a desire to avenge social rejection or bullying, which can provoke intentional offending.
[51] Wing (n 27) 175; Robertson (n 25) ch 3.3.2.1.
[52] Berryessa, 'Attitudes' (n 25) 2797–8; Freckelton and List, 'Culpability' (n 30) 21; Howlin (n 45) 302; Ian Freckelton, 'Asperger's Disorder and the Criminal Law' (2011) 18(4) *Journal of Law and Medicine* 677, 680, 693; Robertson (n 25) chs 3.3.2.2, 3.3.2.5; 'Hippler Brief' (n 27) 775.
[53] Grant (n 25) 66; Robertson (n 25) ch 3.3.2.6.
[54] Tony Attwood, *The Complete Guide to Asperger's Syndrome* (Jessica Kingsley Publishers, rev ed, 2015) 348.
[55] Ibid 347, 352, citing Digby Tantam, 'Adolescence and Adulthood of Individuals with Asperger Syndrome' in Ami Klin, Fred Volkmar and Sara Sparrow (eds), *Asperger Syndrome* (New York: Guilford Press, 2000) 367.
[56] Fred Volkmar et al, 'An Introduction to Autism and the Autism Spectrum' in Fred Volkmar et al (eds), *Handbook of Autism Spectrum Disorder and the Law* (Springer, 2021) 1, 11 ('Volkmar Introduction').
[57] Attwood (n 54) 124.
[58] See Simon Baron-Cohen, *Mindblindness: An Essay on Autism and Theory of Mind* (MIT Press, 1995) ('*Essay ToM*').
[59] Volkmar Introduction (n 56) 12.

including working memory, flexibility, inhibition, organising, planning, and initiating behaviour.[60]

The third is the Weak Central Coherence Theory, referring to an ASD individual's deficits in processing information and drawing meaning from their environment.[61] This theory states that ASD individuals tend to concentrate on detailed parts rather than the whole of input.[62] The fourth is the Extreme Male Brain Theory, which is based on the premise that ASD individuals present with an extreme form of the male brain — increased systemising and decreased empathising.[63]

B *Hypersensitivities*

Research confirms an unusually delicate pattern of sensory perception and reaction in ASD individuals.[64] For ASD individuals, the most common hypersensitivity is to specific sounds, yet hypersensitivity also exists towards tactile experiences and light intensity, including the taste and texture of food and specific aromas.[65] Hypersensitivity can also exist in ASD individuals towards pain and discomfort.[66]

Research demonstrates that the senses of ASD individuals can be easily overloaded,[67] and in situations that are not perceived as aversive or are even enjoyable for neurotypical individuals.[68] ASD individuals are especially prone to 'sensory overload',[69] or 'meltdowns', wherein the ASD individual temporarily loses control of their behaviour,[70] for they tend to be hyperattentive to objects or environmental stimuli that others either selectively filter out or fail to notice.

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[60] Elisabeth Hill, 'Executive Dysfunction in Autism' (2004) 8(1) *Trends in Cognitive Sciences* 26.
[61] Volkmar Introduction (n 56) 13.
[62] Uta Frith, 'Autism and "Theory of Mind"' in Christopher Gillberg (ed), *Diagnosis and Treatment of Autism* (Springer, 1989) 33. See, eg, James Hoy et al, 'Weak Central Coherence: A Cross-domain Phenomenon Specific to Autism?' (2004) 8(3) *Autism* 267.
[63] Volkmar Introduction (n 56) 13: systemising is the drive to analyse and study the world and the details that make it up, to understand how its system operates.
[64] James Harrison and Dougal Hare, 'Brief Report: Assessment of Sensory Abnormalities in People with Autistic Spectrum Disorders' (2004) 34 *Journal of Autism and Developmental Disorders* 727, 727–30. See also Michelle Suarez, 'Sensory Processing in Children with Autism Spectrum Disorders and Impact on Functioning' (2012) 59(1) *Pediatric Clinics of North America* 203.
[65] Attwood (n 54) 283–4. See also *DSM-5* (n 31) 50, 54; Wing (n 27) 47–8, 50–2.
[66] Attwood (n 54) 284.
[67] See generally Suarez (n 64). See also Jewel Crasta et al, 'Sensory Processing and Attention Profiles Among Children with Sensory Processing Disorders and Autism Spectrum Disorders' (2020) 14(22) *Frontiers in Integrative Neuroscience* 1, 7.
[68] Jo Bromley et al, 'Mothers Supporting Children with Autistic Spectrum Disorders: Social Support, Mental Health Status and Satisfaction with Services' (2004) 8(4) *Autism* 409: eg supermarkets, school corridors, city centres, and playgrounds.
[69] Osborne (n 2) 15.
[70] 'National Autistic Society', *Meltdowns* (Web Page, 20 August 2020) <https://www.autism.org.uk/advice-and-guidance/topics/behaviour/meltdowns> ('*Meltdowns*').

Further, pursuant to the Weak Central Coherence Theory,[71] they possess a deficiency in shifting focus from smaller details to their larger environment.[72]

Sensory overload can trigger extreme symptoms, including restlessness, anxiety and fear; irritability or anger; over-excitement, muscle tension, increased heart rate, rapid breathing, sweating, hypervigilance, covering of the ears or eyes to block stimulus input; and not wanting to be touched or approached.[73]

ASD-typical reactions to sensory overload include:[74] sensory-avoidant behaviours (ie, escaping from stimuli); sensory-seeking behaviours; self-stimulatory behaviours (stimming) to self-soothe (repetitive behaviours such as rocking, spinning, pacing or the repeating of words or phrases);[75] and distraction behaviours (engaging intensely with a favourite sensation).

As for offending, ASD individuals are more likely to overreact and become distressed and upset when their structure or routines are interrupted or deviated from,[76] or when unexpected change occurs, which can come with high anxiety.[77] This overreaction, which can result in aggression, predisposes ASD individuals to the commission of offences that the individual had not contemplated,[78] and thus, causing a result that the ASD individual did not intend.[79]

The emotional intensity of expression can increase in severity rapidly, often in response to an objectively trivial event, due to inhibited emotional regulation,[80] rather than increase gradually as seen in neurotypical individuals.[81] Accordingly, when feeling angry, there is often an instantaneous physical response without

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[71] Volkmar Introduction (n 56) 13.
[72] Crasta (n 67) 7; Frith (n 62) 33.
[73] See generally Stefan Schevdt and Ian Needham, 'Possible Signs of Sensory Overload' (2017) 44(3) *Psychiatrische Praxis* 128.
[74] Carolyn McCormick et al, 'Sensory Symptoms in Children with Autism Spectrum Disorder, Other Developmental Disorders and Typical Development: A Longitudinal Study' (2016) 20(5) *Autism* 572, 572.
[75] Zsanett Péter, 'Motor Stereotypies: A Pathophysiological Review' (2017) 11(171) *Frontiers in Neuroscience* 1, 4.
[76] Wauhop (n 40) 965. *DSM-5* (n 31) 50, 54; Wing (n 27) 47–8, 50–2.
[77] Tony Attwood and Michelle Garnett, 'Attwood & Garnett Events', *Understanding Challenging Behaviour in Classic Autism* (Web Page, 2022) <https://www.attwoodandgarnettevents.com/blogs/news/understanding-challenging-behaviour-in-classic-autism>.
[78] Howlin (n 45) 306; Wauhop (n 40) 965.
[79] Wauhop (n 40) 965.
[80] Attwood (n 54) 157. This is speculated to be caused by a dysfunction of the amygdala in ASD individuals — which functions in the perception and regulation of emotions, especially fear and anger.
[81] Ibid 155.

careful thought, due to a blind rage, whilst being unable to see the signals indicating that it would be appropriate to stop.[82]

In conflict, strategies of negotiation, compromise and co-operation may not be obvious to ASD individuals, who may rely on immature strategies of confrontation and the use of threats or acts of violence to control their experience, in circumstances where the ASD individual may not know what else to do.[83]

C *Obsessive Interests*

ASD individuals often have a highly restricted, repetitive range of behaviours, with an unusual level of intensity and fixation on their interests or focus.[84] Accordingly, they often present as having narrow, unusual or eccentric fields of interests.[85] This is characteristically coupled with an obsessive desire to accumulate and catalogue collectables such as objects, facts and/or information associated with their 'special interest', with the interest tending to dominate the individual's free time or conversation.[86]

As the number of collectables accumulate, ASD individuals grow a need to develop a cataloguing system, which can be logical yet idiosyncratic.[87] The logical ordering and symmetry is calming to ASD individuals, who find difficulty coping with changing patterns or expectations in life.[88] Due to their weak central coherence, their interests are an attempt to achieve elusive coherence out of apparent chaos.[89]

ASD special interests have several functions outside of pleasure (through being linked to a memory of a happier or simpler time,[90] or mastering a skill to provide personal validation and growth).[91] These functions can be to: provide relaxation, comfort and security, ensure greater predictability and certainty in life which they crave to allay anxiety, help understand the physical world (rather than the social

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[82] Ibid.
[83] Ibid 156.
[84] *Equal Justice Bench Book* (n 9) 219.
[85] Government of Western Australia, Department of Health, 'Healthy WA', *Asperger syndrome* (Web Page) <https://www.healthywa.wa.gov.au/Articles/A_E/Asperger-syndrome>, cited in *Equal Justice Bench Book* (n 9) 220.
[86] Attwood (n 54) 184–5.
[87] Ibid 191.
[88] Ibid 197.
[89] Ibid.
[90] Ibid 195, citing Tantam (n 55).
[91] Céline Mercier, Laurent Mottron and Sylvie Belleville, 'A Psychosocial Study on Restricted Interest in High Functioning Persons with Pervasive Developmental Disorders' (2000) 4(4) *Autism* 406, 413, 416.

one),[92] create a sense of identity with self-esteem,[93] occupy time, facilitate conversation and indicate intellectual ability.[94]

Unfortunately, where the special interest pertains to something of a criminal nature, such as child exploitation material ('CEM'),[95] fire,[96] weapons, or drugs, or when said obsession simply renders them more susceptible to committing crimes, such as obsessive interests in people (and thus stalking or harassment),[97] or theft (to fund the special interest),[98] then the ASD individual may find themselves inadvertently caught up in the CJS.[99] For example, coding can become a special interest of ASD individuals, which can lead to charges for hacking, and which may have been committed as an intellectual exercise and not necessarily to steal money.[100] Risks can also arise from the intensity of ASD special interests, as the denial of access to the source material can lead to anger and extreme agitation, which can result in the ASD individual conflicting with the law.[101]

The extremity of the fixation on the ASD special interest leads to a tendency to ignore social and legal consequences.[102] Fortunately, steps can be taken to terminate, replace, or at the very least, modify the interest.[103] An inability to control the time devoted to the special interest can be indicative of the development of an obsessive-compulsive disorder, which is common amongst ASD individuals.[104]

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[92] Ami Klin et al, 'Circumscribed Interests in Higher Functioning Individuals with Autism Spectrum Disorders: An Exploratory Study' (2007) 32(2) *Research and Practice for Persons with Severe Disabilities* 89, 98.
[93] Kerri Nowell et al, 'Characterization of Special Interests in Autism Spectrum Disorder: A Brief Review and Pilot Study Using the Special Interests Survey' (2021) 51(8) *Journal of Autism and Developmental Disorders* 2711, 2712.
[94] Attwood (n 54) 199, 212.
[95] See, eg, *Cluett v The Queen* [2019] WASCA 111; *Vucemillo v Western Australia* [2017] WASCA 37. See also Clare Allely, Sally Kennedy and Ian Warren, 'A Legal Analysis of Australian Criminal Cases Involving Defendants with Autism Spectrum Disorder Charged with Online Sexual Offending' (2019) 66 *International Journal of Law and Psychiatry* 1, 1.
[96] See, eg, *Davies v The Queen* [2019] VSCA 66.
[97] Attwood (n 54) 199, 212.
[98] Ibid 201.
[99] Tom Oliver, 'Autism is Not a Crime' (TED Talk, TEDxMandurah, 19 October 2021) 00:06:29-00:06:49 <https://www.youtube.com/watch?v=i_j5jOadcVc&t=1s>.
[100] Attwood (n 54) 350.
[101] See generally Chen (n 11).
[102] See Barbara Haskins and Arturo Silva, 'Asperger's Disorder and Criminal Behavior: Forensic-Psychiatric Considerations' (2006) 34(3) *The Journal of the Academy of Psychiatry and the Law* 374, 378.
[103] Carol Gray, 'Social Stories and Comic Strip Conversations with students with Asperger Syndrome and High-Functioning Autism' in Eric Schopler, Gary Mesibov and Linda Kunce (eds), *Asperger Syndrome or High-Functioning Autism* (Plenum Press, 1988) 167.
[104] Attwood (n 54) 212.

D *Case Studies: Facts and Expert Evidence*

Five Australian cases wherein ASD individuals were charged with criminal offences have been chosen covering each of the three overarching ASD characteristics: an inability to read or respond to social cues and social naivety; hypersensitivities; and obsessive interests.[105] As such, the selected cases involve a variety of offences. All the judgments were delivered in the year 2017 and onwards and involve a defendant diagnosed with ASD before the judgment was delivered.

1 *Inability to read or respond to social cues and social naivety*

(a) Vucemillo v Western Australia

Vucemillo v Western Australia[106] involved one count of using electronic communication with intent to procure a person believed to be under 16 to engage in sexual activity, and one count of possession of CEM under the *Criminal Code Act Compilation Act 1913* (WA) ('*Criminal Code (WA)*'),[107] and a conviction after trial.[108] The appellant placed an advertisement on Craigslist for young girls, and police responded by posing as a 14-year-old girl to obtain evidence of sexually explicit conversations.[109] The appellant was arrested during an arranged meeting with the 'young girl',[110] and CEM was later discovered in his house.[111] The appellant was sentenced to 2 years and 6 months imprisonment, and he appealed his sentence after having been diagnosed with ASD.[112]

Expert evidence was submitted by a psychiatrist, Dr Brett, and a psychologist, Ms Zuin, both of whom concurred that the appellant believed he was communicating with an adult role-playing as a 14-year-old girl, as the website was for adults only, due to his stunning naivety and inability to comprehend unwritten rules.[113] Further, the appellant found it easier to communicate with others through his computer, due to difficulties interpreting non-verbal gestures,[114] and a demonstrated lack of ToM.[115] Regardless, the appeal from sentence was dismissed.[116]

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[105] *DSM-5* (n 31) 299.0.
[106] [2017] WASCA 37.
[107] *Criminal Code Act Compilation Act 1913* (WA) ss 204B(2)(b), 220 ('*Criminal Code (WA)*').
[108] *Vucemillo v Western Australia* [2017] WASCA 37, [67].
[109] Ibid [5]–[14].
[110] Ibid [11].
[111] Ibid [13].
[112] Ibid [30].
[113] Ibid [17], [33].
[114] Ibid.
[115] Ibid [33].
[116] Ibid [57].

(b) R v Wilson

R v Wilson[117] involved one count of aggravated robbery,[118] in the company of a co-offender who was under the age of 18.[119] The victim was lured by the two offenders to a fictitious address using an internet dating site, where the user claimed to be a 15-year-old girl, and the victim knew he was being "set-up", but wanted to expose the person doing so.[120] At the fictitious address, the co-offender threatened the victim with a steak knife while aggressively calling the victim a 'paedophile'.[121]

Both offenders demanded money, before walking the victim to an ATM where he withdrew $100.[122] The co-offender told the victim that he would contact him within a week to collect a further $200, or else threatened to expose the victim as a paedophile.[123] The offender pled guilty,[124] and expressed remorse for his actions.[125] The offender was sentenced to imprisonment for 12 months, suspended for 12 months subject to good behaviour.[126]

Professor Boer submitted the offender had a provisional diagnosis of ASD, ADHD,[127] and a history of recent suicide attempts.[128] Boer also found that the offender's ASD symptoms resulted in a difficulty in understanding the negative intentions of his co-accused.[129] Unusually though, his Honour concluded that the offender's unmedicated ADHD, paranoid schizophrenia and depression, as opposed to his ASD, was the cause of the offender acting as the follower in the offending, despite established ASD literature on this characteristic.[130]

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[117] [2022] ACTSC 7.
[118] *Criminal Code 2002* (ACT) s 310.
[119] *R v Wilson* [2022] ACTSC 7, [1].
[120] Ibid [2].
[121] Ibid [5].
[122] Ibid [6], [7].
[123] Ibid [8].
[124] Ibid [27].
[125] Ibid [19].
[126] Ibid [33]–[34].
[127] Ibid [20].
[128] Ibid.
[129] Ibid.
[130] Ibid [20], [29]; Attwood (n 54) 347; Murrie (n 44) 69.

2 *Hypersensitivities*

(a) Shortland v Stone

Shortland v Stone[131] involved one charge of wilfully driving a motor vehicle in a reckless manner and one charge of escape from lawful custody,[132] for which the appellant was sentenced to 6 months and 2 years imprisonment, respectively, served concurrently, after pleading guilty.[133]

The appellant was driving a rental car at 2:15 am, which had been reported as stolen.[134] He was stopped by police, who parked in front of and behind him.[135] After the appellant repeatedly refused to leave and unlock the rental car, Senior Constable Herbert reached through the window to open the door, before the appellant wound his window up and started the vehicle.[136] Herbert subsequently sprayed pepper spray through a small gap in the window.[137] The appellant reversed his rental car, accelerating heavily, before striking a police vehicle, causing significant damage to it.[138] He then fled and dumped the rental car, before surrendering to police.[139]

Whilst the appellant knew that the vehicle was lawfully hired, he nonetheless feared being arrested.[140] The appellant had ASD, and his counsel contended that this rendered him unable to read people and caused difficulties in expressing himself.[141] Undesirably however, the defence failed to provide the Court with any medical reports, and so his Honour was not satisfied that there was a nexus between the appellant's ASD and the offending.[142]

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131 [2019] WASC 217.
132 See *Road Traffic Act 1974* (WA) s 60(1A)(b); *Criminal Code (WA)* (n 107) s 146.
133 *Shortland v Stone* [2019] WASC 217, [1].
134 Ibid [6].
135 Ibid.
136 Ibid.
137 Ibid.
138 Ibid.
139 Ibid.
140 Ibid [7].
141 Ibid [7], [37].
142 Ibid [37].

(b) R v Chapman

R v Chapman[143] involved one count of manslaughter,[144] for which the accused was sentenced to 6 years imprisonment with a non-parole period of 3 years,[145] after pleading guilty.[146] One evening, after repeatedly ignoring his parents calling him to dinner,[147] 20-year-old Daniel Chapman emerged to explain that he would come when he was ready, as he was participating in an online game.[148] After increasing frustration,[149] when Daniel's father went to his bedroom to remove the cables from his computer,[150] Daniel picked up a knife from his medieval weaponry collection,[151] and stabbed his father.[152] Daniel's mother reported that Daniel and his father had physical altercations in the past,[153] and that his father 'was not a good father'.[154] Further, his Honour was satisfied that Daniel would not re-offend.[155]

Dr Nielssen reported that Daniel suffered from a depressive illness, ASD,[156] and possible emerging psychotic illness.[157] Dr Nielssen remarked that the combination of his ASD and depressive illness together with possible Selective Serotonin Reuptake Inhibitor ('SSRI') withdrawal led to an abnormality of mind such that he was unable to consider the potential consequences of his actions, nor control his actions.[158] Dr Nielssen confirmed that Daniel's ASD caused him to view the events in a more catastrophic way than another person, thereby causing an extreme overreaction.[159]

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143 [2018] NSWSC 1741.
144 *Crimes Act 1900* (NSW) s 24.
145 *R v Chapman* [2018] NSWSC 1741, [42].
146 Ibid [30].
147 Ibid [7].
148 Ibid [1]–[2], [7].
149 Ibid [8].
150 Ibid [9].
151 Ibid [4], [21].
152 Ibid [9].
153 Ibid [14].
154 Ibid [16].
155 Ibid [28].
156 See also ibid [5].
157 Ibid [22].
158 Ibid.
159 Ibid [37]. Cf ibid [23]: Professor Greenberg, who did not examine Daniel, expressed that Daniel's anger was not irrational but was goal-directed towards his father, with there being no causal connection between his conditions and the offending.

3 *Obsessive Interests*

(a) Cluett v The Queen

Cluett v The Queen[160] involved one count of possession of CEM, and two counts of using a carriage service to access child pornography material.[161] The 61-year-old appellant was of prior good record.[162] He pled guilty,[163] and was sentenced to 9 months imprisonment,[164] to be released after 6 months.[165] The appellant appealed on the ground that immediate imprisonment was manifestly excessive,[166] and was released forthwith.[167]

The appellant was sitting outside a delicatessen in a hunched over position, watching a video on his phone.[168] Police drove past, parking nearby, and the appellant walked away but was stopped.[169] On the phone, police observed a video of a young girl without clothing from the waist down.[170] The appellant asserted that the video was in relation to 'study'.[171]

Data extraction of his mobile phone located 28 images of CEM.[172] The phone also contained images of Nazi death camps depicting naked and undernourished adults and children, including piles of bodies.[173]

Psychiatrist Dr Bala concurred with other experts in indicating a likely diagnosis of ASD,[174] in having:[175]

1. *deficits in developing, maintaining and understanding relationships*: which resulted in him preferring his own company and engaging in solitary activities;[176]

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[160] [2019] WASCA 111.
[161] See *Criminal Code (WA)* (n 107) s 220; *Criminal Code* (Cth) s 474.19(1)(a)(i).
[162] *Cluett v The Queen* [2019] WASCA 111, 2.
[163] Ibid [21].
[164] Ibid [1].
[165] Ibid [2], through a recognisance order.
[166] Ibid [3].
[167] Ibid.
[168] Ibid [7].
[169] Ibid, after repeated requests.
[170] Ibid [9].
[171] Ibid [10].
[172] Ibid [12]–[13].
[173] Ibid [14].
[174] Ibid [30], [32], [35].
[175] *DSM-5* (n 31) 299.0.
[176] *Cluett v The Queen* [2019] WASCA 111, [32] para (a).

2. *restricted, repetitive patterns of behaviour and interests*: in his stereotyped motor movements, eccentric fixation on young children, childhood trauma, war and military, and a preoccupation with researching and writing about this;[177] and

3. some intellectual impairment.[178]

Dr Bala stated that he possessed a small amount of CEM, accessed through a mainstream website, rather than a CEM specific website or forum.[179] The Court accepted that the appellant's offences were not motivated by a sexual attraction towards children,[180] and instead found that the fixation on his 'research' led him to access the CEM.[181] Whilst there was no rational basis for viewing the CEM for that purpose, the appellant's lack of rationality was a product of his ASD.[182]

III COMMON ASD DEFENCES, DEFICIENCIES THEREOF

This article will now introduce the main defences commonly open to ASD individuals, being insanity, mistake of fact, accident, and self-defence. As three of the five key cases analysed happen to have been from the Western Australian jurisdiction, the *Criminal Code (WA)* will be the focus of the analysis for the various defences.

A *Insanity*

Per s 27 of the *Criminal Code (WA)*, a defendant is not criminally responsible for an act or omission on account of unsoundness of mind if, at the time of the impugned act or omission, the defendant was in a state of mental impairment such that there was an absence of the:[183]

1. capacity to understand what they are doing;

2. capacity to control their actions; or

3. capacity to know that they ought not to do the act or make the omission.

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[177] Ibid [32] para (b).
[178] Ibid [32] para (c).
[179] Ibid [33].
[180] Ibid [68].
[181] Ibid [74].
[182] Ibid. See also ibid [34].
[183] *Criminal Code (WA)* (n 107) s 27(1).

One of these capacities must be absent for the defence to apply,[184] and evidence of insanity is admissible to negate the specific intention element of the offence.[185] The first capacity relates to the inability to understand the physical effects of one's act(s). The second capacity, to control one's actions, relates to conduct that is independent of the exercise of will; it accepts the 'uncontrollable' or 'irresistible' impulse medical theory as falling into the insane category.[186] The third consideration assesses the capacity to know that the act (or omission) was against the moral standards of the community, 'having regard to the everyday standards of reasonable people'.[187]

Every person is presumed to be of sound mind at any time, until the contrary is proved,[188] on the balance of probabilities.[189] Contrastingly, for all other defences, the evidentiary onus is on the accused, and subsequently, the persuasive onus is on the prosecution to disprove the defence beyond reasonable doubt.[190] If the defence is successful, a verdict of 'not guilty by reason of unsoundness of mind' is to be returned,[191] and the individual will be given a custody order, a community supervision order, or an order that they be released unconditionally.[192]

B *Mistake of Fact*

The mistake of fact defence arises from section 24 of the *Criminal Code (WA)*, the elements of which are that a person does, or omits to do, an act under an honest and reasonable, albeit mistaken, belief in the existence of any state of things. Where all these elements are met, the person is not criminally responsible for any act or omission to any greater extent than if the real state of things had been as the person believed them to exist.[193]

There exists conflicting authority on whether the state of things must be in the 'present'.[194] Further, the accused person must have had an actual, positively held

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[184] See generally *Hawkins v R* (1994) 179 CLR 500.
[185] Ibid [13]. See also Ian Freckelton, 'Autism Spectrum Disorder: Forensic Issues and Challenges for Mental Health Professionals and Courts' (2013) 26(5) *Journal of Applied Research in Intellectual Disabilities* 420, 428–9, 431 ('Forensic').
[186] *R v Moore* (1908) 10 WALR 64, 66; *Wray v R* (1930) 33 WALR 67.
[187] *R v Porter* (1933) 55 CLR 182, 190. See also *Sodeman v R* (1936) 55 CLR 192, 215; *Stapleton v R* (1952) 86 CLR 358.
[188] *Criminal Code (WA)* (n 107) s 26.
[189] *R v Falconer* (1990) 171 CLR 30, 42.
[190] *Loveday v Ayre* [1955] St R Qd 264, 267–8; *R v Taiters* [1997] 1 Qd R 333, 338.
[191] *Criminal Procedure Act 2004* (WA) s 146.
[192] *Criminal Law (Mental Impairment) Act 2023* (WA) ss 45, 249.
[193] *Criminal Code (WA)* (n 107) s 24.
[194] See, eg, *R v Gould and Barnes* [1960] Qd R 283; *R v Pacino* (1998) 105 A Crim R 309, 320. See also Haskins (n 102) 378: the defence can be used where the operative mistake relates to the future consequences/outcomes of an ASD individual's actions, such as on another person's mental state.

belief when subjectively and objectively assessed.[195] Albeit, a person who is ignorant of 'the state of things' cannot use this defence.[196] Finally, a mistake will not be reasonable if the belief is not based on any solid information.[197]

C *Accident*

This defence is prescribed in s 23B(2) of the *Criminal Code (WA)* such that: 'A person is not criminally responsible for an event which occurs by accident.' Said 'event' refers to the result or consequence of the person's conduct.[198] Three elements emerge from *Kaparonovski v The Queen*,[199] being that the mistake was:

1. not intended by the accused;
2. not foreseen by the accused; and
3. not reasonably foreseeable.

When testing the reasonable foreseeability element, a jury is to be directed that, in considering the possibility of an outcome, it should exclude possibilities that are no more than remote or speculative.[200]

D *Self-defence*

A harmful act is lawful if the act is done in self-defence.[201] A person's harmful act is done in self-defence, if:[202]

1. they believe their act is necessary to defend themselves, or another person, from a harmful act, including a harmful act that is not imminent;
2. their harmful act is, subjectively, a reasonable response in the circumstances as they believe them to be; and
3. there are objectively reasonable grounds for those beliefs.

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[195] *G J Coles & Coy Ltd v Goldsworthy* [1985] WAR 183. See also *Daniels v The Queen* (1990) 2 WAR 435.
[196] See, eg, *Larsen v G J Coles and Co Ltd* (1984) 13 A Crim R 109. But see *R v TS* (2008) EWCA Crim 6, [34], which acts as authority for the proposition that evidence of a defendant's ASD would help a court in understanding why a defendant acted under an honest and reasonable belief in what the defendant believed the situation to be, even where the facts are as the victim said they were.
[197] See *Larsen v G J Coles and Co Ltd* (1984) 13 A Crim R 109.
[198] *Kaporonovski v The Queen* (1973) 133 CLR 209, 231.
[199] Ibid. See also *R v Taiters* [1997] 1 Qd R 333, 338.
[200] *R v Taiters* [1997] 1 Qd R 333. See also *Stanik v The Queen* (2001) 125 A Crim R 372; *R v Seminara* (2002) 128 A Crim R 567.
[201] *Criminal Code (WA)* (n 107) s 248(2).
[202] Ibid s 248(4).

E *Case Studies: Defences*

This article will now evaluate whether ASD individuals are adequately protected by these four common defences, using each of the five key cases, where ASD symptomology is the cause of offending. Most of the publicly available judgments used are appeals of sentencing, and so if defences are not explicitly raised in a case, this article will nonetheless test the application of defences that are open, based on ASD symptomology and the impugned offence.

1 *Inability to read or respond to social cues and social naivety*

(a) Vucemillo v Western Australia

Interestingly, the appellant, upon receiving his ASD diagnosis post-sentencing, opted to appeal his sentence. Had the appellant appealed his criminal liability, insanity and mistake of fact could have been considered, albeit this article submits both would have been unsuccessful.

(i) Insanity

The appellant had the capacity to understand the physical effects of what he did, despite the appellant's deficits in socio-emotional reciprocity, in making conversation and in non-verbal communication.[203] These deficits saw him spending much of his time on his computer to interact with the world around him.[204] Nonetheless, the appellant was not perceiving a different subjective reality and thus an altered state of mind.[205]

As for the capacity of control, despite operating under what Dr Brett described as 'stunning naivety',[206] and a 'limited range of interests',[207] it is unlikely that his conduct would be declared a result of any 'irresistible impulse',[208] or 'overwhelming compulsion' from his ASD.[209]

In terms of the capacity to understand the wrongfulness of his conduct, despite Dr Brett submitting that the appellant is a stickler for rules whilst not understanding unwritten rules, he would be found as having been rationally able to understand why

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[203] *Vucemillo v Western Australia* [2017] WASCA 37, [57], [33] (Dr Brett).
[204] Ibid.
[205] Justin Barry-Walsh and Paul Mullen, 'Forensic Aspects of Asperger's Syndrome' (2004) 15(1) *The Journal of Forensic Psychiatry & Psychology* 96, 98.
[206] *Vucemillo v Western Australia* [2017] WASCA 37, [40].
[207] Ibid [33].
[208] *Wray v R* (1930) 33 WALR 67. See also *R v Moore* (1908) 10 WALR 64, 66.
[209] Alexander Westphal and Rachel Loftin, 'Autism Spectrum Disorder and Criminal Defense' (2017) 47(12) *Psychiatric Annals* 584, 586.

ordinary people deem his actions to be wrong.[210] Concerningly, this is despite common sense dictating that if one cannot understand basic unwritten rules, one cannot understand morality (also unwritten). Further, the appellant had a demonstrated lack of ToM,[211] which is vital for moral reasoning capacity.[212] Moreover, studies show that ASD individuals can be unaware of the impact of CEM offences on victims,[213] and can even fail to consider CEM as being illegal.[214]

(ii) Mistake of fact

A 'state of things' is present here, in the appellant's mistaken belief that the 'young girl' was an adult simply role-playing as a 14-year-old.[215]

However, the Court found that the appellant's mistaken belief was not an honest one,[216] and did so in direct contradiction to Dr Brett's submission,[217] which Dr Brett supported by citing the appellant's 'stunning naivety',[218] in believing that the website was for adults only, as an example of how his ASD brain functions.[219] This is due to his ToM deficiency, which equated to an inability to conceive that another person would breach the website's rule of having to be an adult to use it, seeing as the appellant himself rigidly adheres to learnt rules.[220]

Necessarily, the Court did not need to consider the reasonableness of the appellant's mistake, which would have unlikely been met anyhow.[221] This is asserted as the standard of the objective test in it being reasonable for the individual to have made the mistake, is unlikely to be reduced for individuals whose capacity for reasonable judgement is limited or impaired, but which does not amount to insanity.[222] This

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[210] Ibid. See also *R v Chaulk* (1991) 62 CCC (3d) 193; *Willgoss v R* (1960) 105 CLR 295.
[211] Ibid.
[212] Grant (n 25) 66–70, 73; Robertson (n 25) ch 7.
[213] Allely (n 95) 1.
[214] Gary Mesibov and Melissa Sreckovic, 'Child and Juvenile Pornography and Autism Spectrum Disorder' in Lawrence Dubin and Emily Horowitz (eds), *Caught in the Web of the Criminal Justice System: Autism, Developmental Disabilities, and Sex Offenses* (Jessica Kingsley Publishers, 2017) 64, 76.
[215] *Vucemillo v Western Australia* [2017] WASCA 37, [17].
[216] Ibid [41], [51].
[217] Ibid [33].
[218] Ibid [40].
[219] Ibid [33].
[220] Wing (n 27) 175; *Myths* (n 27) 39; 'Hippler Brief' (n 27) 777.
[221] See, eg, *Hopper v The Queen* [2003] WASCA 153, which acts as authority for the proposition that ASD-attributable impairments cannot excuse misinterpreting clear and unequivocal commands. But see *R v TS* (2008) EWCA Crim 6, [34]: except for when the situation is sufficiently vague enough that the defendant's ASD could compromise the defendant's ability to adequately understand the victim's intention.
[222] *R v Richards and Gregory* [1998] 2 VR 1. See also *R v Mrzljak* [2004] QCA 420, [24]; *Aubertin v Western Australia* [2006] WASCA 229, [42].

view is bolstered by the extreme rarity of instances wherein a mistake of fact defence is successful for accused individuals with a mental impairment,[223] even though 'disabilities' are relevant to an assessment of reasonableness for the defence.[224]

(b) R v Wilson

Had the offender not pled guilty, only insanity could have been considered, albeit this article submits that it would have been unsuccessful.

(i) Insanity

The capacity of the offender to understand the physical effects of what he did was unlikely to be found as absent,[225] for the offender's deficits in 'social relatedness' and communication[226] were unlikely to amount to the offender having perceived a different subjective reality and thus an altered state of mind.[227]

The offender also had the capacity to control his actions.[228] Despite the offender's difficulty in navigating social cues, this did not amount to any 'irresistible impulse' or 'overwhelming compulsion' arising from his ASD.[229]

What is most contentious is whether the offender had the capacity to understand the wrongfulness of his conduct. The expert evidence suggested that the offender had deficits in 'social relatedness' and communication, including 'a potential inability to understand the negative intentions of his co-accused'.[230] This was in circumstances where his Honour found the offender to have been the follower rather than the leader in the offending.[231]

Ultimately, the offender would have rationally been found to have been able to understand why ordinary people deem his actions to be wrong:[232] especially seeing

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[223] *R v Mrzljak* [2004] QCA 420, [24] (McMurdo P): 'I have been able to find no example since the passing of the *Criminal Code Act 1899* (Qld) where a person who makes an honest mistake of fact because of a natural mental infirmity causing the person to do an act which would otherwise constitute an offence has been able to avoid criminal responsibility'.
[224] See *Aubertin v Western Australia* [2006] WASCA 229, [43].
[225] The same three elements of insanity apply in the ACT jurisdiction as they do in WA: *Criminal Code 2002* (ACT) s 28.
[226] *R v Wilson* [2022] ACTSC 7, [20].
[227] Barry-Walsh (n 205) 98.
[228] This is notwithstanding the offender's unmedicated ADHD which causes the offender 'hyperactivity-impulsivity': *R v Wilson* [2022] ACTSC 7, [20].
[229] Westphal (n 209) 586.
[230] *R v Wilson* [2022] ACTSC 7, [20].
[231] Ibid [5], [20]. This proclivity is consistent with ASD literature on offending: Attwood (n 54) 347; Murrie (n 44) 64, 69.
[232] *R v Porter* (1933) 55 CLR 182, 190.

as the offender expressed remorse for his actions in the legal proceedings,[233] notwithstanding this remorse likely being mutually exclusive of the offender's capacity for remorse at the time of the offending, due to ToM deficiencies.[234]

2 *Hypersensitivities*

(a) Shortland v Stone

Had the appellant not pled guilty, insanity, accident, and self-defence could have been considered, albeit this article submits that these defences would have been unsuccessful.

(i) Insanity

The appellant had the capacity to understand the physical effects of what he did, for the appellant's inability to 'read people'[235] did not amount to the appellant having perceived a different subjective reality and thus an altered state of mind.[236]

What is most contentious here is that the appellant had the capacity to control his actions, despite the appellant's symptomatically-ASD hypersensitivities.[237] The appellant being sprayed with pepper spray, after Constable Herbert reached through the appellant's vehicle window, would have caused great pain and discomfort to which ASD individuals are notoriously hypersensitive.[238] ASD individuals symptomatically overreact and become distressed upon experiencing a sensory overload.[239] This drove the appellant to adopt the sensory-avoidant behaviour of escaping from the stimuli,[240] hence why he accelerated away from the sensory input, and thereby committed a crime he had not contemplated,[241] due to his loss of control.[242] The fact that the appellant surrendered to police later that day is consistent with this. Nonetheless, this is unlikely to have been found to amount to any 'irresistible impulse', or 'overwhelming compulsion' arising from his ASD.[243]

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[233] *R v Wilson* [2022] ACTSC 7, [19].
[234] *Essay ToM* (n 58) 51. See also Henry Schlinger, 'Theory of Mind: An Overview and Behavioural Perspective' (2009) 59(3) *The Psychological Record* 435, 436.
[235] *Shortland v Stone* [2019] WASC 217, [37].
[236] Barry-Walsh (n 205) 98.
[237] Sally Rogers and Sally Ozonoff, 'Annotation: What Do We Know About Sensory Dysfunction in Autism? A Critical Review of the Empirical Evidence' (2005) 46(12) *Journal of Child Psychology and Psychiatry* 1255, 1255–68. See also Suarez (n 64).
[238] Attwood (n 54) 284.
[239] See generally Suarez (n 64). See also Crasta (n 67) 7.
[240] McCormick (n 74) 574.
[241] Howlin (n 45) 306; Wauhop (n 40) 965.
[242] *Meltdowns* (n 70).
[243] Westphal (n 209) 586.

The appellant would also be found to have had the capacity to understand the wrongfulness of his conduct. It is dubious how the defendant could have grasped the immorality of his actions if he failed to interpret Herbert's actions in the first place,[244] perhaps due to reduced ToM capacity,[245] which is vital for moral reasoning.[246] Nonetheless, the appellant would be found to be capable of understanding why ordinary people deem his actions to be wrong.[247]

(ii) Accident

In respect of the reckless driving charge being an accident, the appellant intended to escape from what he found as the overwhelming sensory stimulus of Herbert reaching into the appellant's vehicle window and spraying pepper spray at the appellant. In escaping, he adopted a sensory-avoidant behaviour to cope with his sensory overload.[248]

Likewise, the appellant did not foresee, at the time of his mistake, that he could cause damage to the police vehicle, due to losing control temporarily of his behaviour from the pain and discomfort to which he was hypersensitive.[249] This would have clouded his judgement of being able to escape without driving in such a reckless manner. This is especially so when ASD symptomatically renders deficiencies in foreseeing the impact of one's actions.[250]

However, the appellant's mistake that he could escape the overwhelming sensory input without driving in a reckless manner, was reasonably foreseeable, as objectively, there were police vehicles both in front of and behind the appellant's vehicle.

(iii) Self-defence

Research suggests that ASD offending can arise from inaccurately presuming that they are in danger and need to defend themselves, due to an inability to interpret and predict the intentions, actions, and speech of others.[251] Here, the appellant knew that the vehicle was not stolen, yet he nonetheless feared being arrested,[252] and due to difficulties in expressing himself, he was unable to convey this to police.[253]

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[244] *Shortland v Stone* [2019] WASC 217, [7], [37].
[245] See *Essay ToM* (n 58) 51. Schlinger (n 234) 436.
[246] Grant (n 25) 66–70, 73; Robertson (n 25) ch 7.
[247] *R v Porter* (1933) 55 CLR 182, 190.
[248] McCormick (n 74) 574.
[249] Attwood (n 54) 284.
[250] See Wauhop (n 40) 965, 983; Strickland (n 39) 13.
[251] Grant (n 25) 66; Robertson (n 25) ch 3.3.2.6.
[252] *Shortland v Stone* [2019] WASC 217, [7].
[253] Ibid [7], [37].

Further, the fact that five police officers arrived at the scene incrementally would have been especially intimidating for the appellant. Thus, when Herbert reached into his vehicle window and sprayed him with pepper spray, the appellant was perceiving a different subjective reality,[254] to the effect that he was in danger and needed to escape.[255]

The appellant's senses tritely became overstimulated when he was sprayed with pepper spray.[256] This was quickly channelled into aggression and an instantaneous physical response without careful thought,[257] thus, causing him to strike a police vehicle in the course of escaping from lawful custody.[258] Nonetheless, self-defence was not viable here, including because escaping from lawful custody or reckless driving are not 'reasonable' harmful acts for the purposes of self-defence.[259] Furthermore, Herbert's pepper spraying here was likely a lawful act in the course of Herbert's role as a police officer.[260]

(b) R v Chapman

Had Daniel not pled guilty, insanity and self-defence could have been considered. Whilst his Honour found that the control element of the insanity defence was satisfied, this article argues that a plea of self-defence would have been unsuccessful.

(i) Insanity

His Honour observed that the insanity defence was irrelevant in this case due to the plea of guilty to manslaughter, rather than murder.[261] Insightfully, his Honour concluded that Daniel was unable to control himself in what was 'a momentary lapse that resulted from accumulated frustrations over many years' with his father, which was 'particularly associated' with his ASD, SSRI withdrawal and depressive illness.[262]

Accordingly, *R v Chapman*[263] operates as an extremely rare instance wherein an Australian court acknowledges that ASD-associated symptoms resulted in a defendant being unable to control offending behaviour. While spasmodic, it

[254] Barry-Walsh (n 205) 98.
[255] Grant (n 25) 66; Robertson (n 25) ch 3.3.2.6.
[256] *Shortland v Stone* [2019] WASC 217, [6].
[257] Attwood (n 54) 155.
[258] *Shortland v Stone* [2019] WASC 217, [6].
[259] *Criminal Code (WA)* (n 107) s 248(4)(b).
[260] Ibid s 248(5).
[261] *R v Chapman* [2018] NSWSC 1741, [36].
[262] Ibid.
[263] See generally ibid.

demonstrates the potential for insanity to be a successful defence for ASD individuals.

(ii) Self-defence

Daniel's senses evidently became overwhelmed, causing him to overreact on account of distress and high anxiety,[264] which stemmed from the frustration, irritation and discomfort of his father removing the cables from his computer whilst he was in the middle of a computer game,[265] to which he was hypersensitive.[266] This was quickly channelled into aggression and an instantaneous physical response without careful thought,[267] which saw him stab his father with his medieval weapon.[268] Nonetheless, self-defence was not viable here, as Daniel's act of stabbing was not objectively reasonable in the circumstances.[269]

3 *Obsessive interests*

(a) Cluett v The Queen

Had the appellant not pled guilty, only insanity could have been considered, albeit it is submitted that insanity would have been unsuccessful.

(i) Insanity

It is unlikely that the appellant lacked the capacity to understand the physical consequences of his actions, for his deficits in 'understanding relationships' with 'some intellectual impairment'[270] were unlikely to amount to the appellant having perceived a different subjective reality and thus an altered state of mind.[271]

The appellant's capacity for control, which is the most contentious element, was also unlikely to be found as being non-existent, as despite his obsessive preoccupation with researching young children, childhood trauma, war, and the military,[272] this is unlikely to have been found as amounting to an 'irresistible impulse', or 'overwhelming compulsion' arising from his ASD.[273]

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[264] Wauhop (n 40) 965. See also *DSM-5* (n 31) 50, 54; Wing (n 27) 47–8, 50–2.
[265] *R v Chapman* [2018] NSWSC 1741, [9].
[266] Attwood (n 54) 284.
[267] Ibid 155.
[268] *R v Chapman* [2018] NSWSC 1741, [4], [9], [21].
[269] *Crimes Act 1900* (NSW) s 418(2)(a).
[270] *Cluett v The Queen* [2019] WASCA 111, [32].
[271] Barry-Walsh (n 205) 98.
[272] *Cluett v The Queen* [2019] WASCA 111, [32].
[273] Westphal (n 209) 586.

Ultimately, the Court found that his fixation on his 'research' led him to obtain access to the CEM.[274] This is consistent with the literature, in that the extremity of the fixation on the ASD obsessive interest leads to a tendency to ignore social and legal consequences.[275] It is unlikely, however, that the Court would have found an absence of his capacity for control, as a corollary of finding his ASD to have been a mere 'contributing factor' to his offending.[276] That said, an inability to control the time devoted to an obsessive interest is indicative of the development of an obsessive-compulsive disorder, which is common in ASD individuals.[277] As can be observed in *People v McCollum*, where according to one Dr Tarle, Darius McCollum thought about the transit system '85 percent of the time. He says he tried to stop. He can go about a month and then the urge is too great, he has to do it again.'[278]

As for the appellant's capacity to understand the wrongfulness of his conduct, he 'experience[d] limited sexual pleasure and failed to understand the greater impact of his decision to download [CEM], as he does not complicate life with emotions'.[279] This is consistent with the literature, which shows that ASD individuals can be unaware of the impact of CEM offences on victims,[280] and can even fail to consider CEM as being illegal.[281] Further, as is symptomatic of ASD,[282] the appellant's CEM-based research developed from a curiosity to understand relationships and emotions.[283]

Unfortunately for the appellant, he remarked that he could not have achieved this research by any legal means and was going to delete the CEM.[284] This awareness meant that he was found as 'appreciat[ing] the illegality of his conduct'.[285] Again, this was despite reduced ToM capacity in ASD individuals,[286] which is vital for moral reasoning.[287]

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[274] *Cluett v The Queen* [2019] WASCA 111, [74].
[275] See Haskins (n 102) 378.
[276] *Cluett v The Queen* [2019] WASCA 111, [74].
[277] Attwood (n 54) 212.
[278] 2018 NY Slip Op 51424(U), 16.
[279] *Cluett v The Queen* [2019] WASCA 111, [35] (Ms Sweeny's psychological report).
[280] Allely (n 95) 1.
[281] Mesibov (n 214) 76.
[282] Attwood (n 54) 205.
[283] *Cluett v The Queen* [2019] WASCA 111, [19], [36].
[284] Ibid.
[285] Ibid [74].
[286] *Essay ToM* (n 58) 51. See also Schlinger (n 234) 436.
[287] Grant (n 25) 66–70, 73; Robertson (n 25) ch 7.

IV FINDINGS, PROPOSED REFORMS AND NOVEL ASD DEFENCE

A *Defence Availability for ASD Symptomology Based on Key Cases*

1 *Insanity*

Pursuant to the key cases analysed in this article, not only is it is most difficult for ASD individuals to meet the 'complete deprivation' threshold for any of the three insanity capacities, additionally, ASD is unlikely to be found as a mental impairment within the insanity defence in the first place. For instance, according to the common law, the term 'mental impairment' in s 27(1) of the *Criminal Code (WA)* encompasses mental diseases or psychoses, such as schizophrenia.[288] The concept of mental impairment has even been extended to: psychomotor epilepsy;[289] hyperglycaemia;[290] arteriosclerosis;[291] and *delirium tremens*.[292] Ultimately, research demonstrates that insanity caters predominantly to those with psychotic illnesses, and is not designed to address ASD.[293] This is despite the fact that as many as a quarter of all ASD individuals develop a psychotic illness.[294] Nonetheless, insanity remains the most suitable existing defence for ASD individuals.

The analysis of all five key cases found that no ASD individual perceived a different subjective reality and thus possessed an altered state of mind,[295] in respect to the absence of the capacity to understand, despite ToM deficiencies.[296] As for the control capacity, the 'irresistible impulse' standard was too high a threshold to meet.[297] Albeit, per *R v Chapman*,[298] rare examples do exist wherein Australian courts acknowledge that ASD-associated symptoms can result in a defendant being unable to control offending behaviour.[299] As for the capacity to understand the wrongfulness of their acts or omissions, even where the ASD individual was unable to distinguish right from wrong,[300] they were nonetheless rationally able to at least understand why ordinary people deemed their actions to be wrong.[301]

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[288] See *Bratty v Attorney-General (Northern Ireland)* [1963] AC 386, 412.
[289] Ibid.
[290] See *R v Hennessy* [1989] 2 All ER 9, 14.
[291] See *R v Kemp* [1957] 1 QB 399.
[292] A disease associated with alcohol ingestion. See, eg, *Dearnley v R* [1947] St R Qd 51, 61.
[293] Westphal (n 209) 586.
[294] *R v Chapman* [2018] NSWSC 1741, [22] (Dr Nielssen).
[295] Barry-Walsh (n 205) 98.
[296] See *Essay ToM* (n 58) 51.
[297] *Wray v R* (1930) 33 WALR 67. See also *R v Moore* (1908) 10 WALR 64, 66.
[298] [2018] NSWSC 1741.
[299] Ibid [36].
[300] Allely (n 95) 8.
[301] *R v Porter* (1933) 55 CLR 182, 190.

This article found that in the cases of *Vucemillo v Western Australia*[302] and *R v Wilson*,[303] which involved offences caused by the social naivety ASD symptom, the capacity to understand the wrongfulness of one's act was the most favourable and contentious element for the ASD individuals. This is consistent with the literature on ASD individuals symptomatically lacking ToM capacity,[304] with ToM being vital for any moral reasoning capability.[305]

As for the offending in *Shortland v Stone*[306] and *R v Chapman*,[307] which was caused by the hypersensitivity ASD symptom, the capacity for control was the most contentious element. This is also consistent with the literature showing that ASD individuals symptomatically overreact and become distressed upon experiencing a sensory overload,[308] which predisposes the ASD individuals to committing crimes not contemplated,[309] and thus causing an unintended result,[310] due to their loss of control.[311]

Likewise, the offending in *Cluett v The Queen*[312] was caused by the obsessive interest symptom, and the capacity for control was the most contentious element. This is consistent with literature demonstrating that ASD obsessive interests are coupled with the obsessive desire to accumulate and catalogue objects, facts or information associated with one's special interest,[313] so much so that legal risks arise from the intensity and nature of the obsessive interest.[314]

Moreover, an inability to control the time devoted to an obsessive interest is indicative of the development of an obsessive-compulsive disorder, which is common in ASD individuals.[315] Accordingly, the literature disagrees with the Court's finding in *Cluett v The Queen*,[316] such that his ASD was the *cause* rather than a mere

[302] [2017] WASCA 37.
[303] [2022] ACTSC 7.
[304] See *Essay ToM* (n 58) 51. See also Schlinger (n 234) 436.
[305] Grant (n 25) 66–70, 73; Robertson (n 25) ch 7.
[306] [2019] WASC 217.
[307] [2018] NSWSC 1741.
[308] See generally Suarez (n 64). See also Crasta (n 67) 7.
[309] Howlin (n 45) 306; Wauhop (n 40) 965.
[310] Wauhop (n 40) 965.
[311] *Meltdowns* (n 70).
[312] [2019] WASCA 111.
[313] Attwood (n 54) 184.
[314] See, eg, Chen (n 11).
[315] Attwood (n 54) 212.
[316] [2019] WASCA 111.

contributing factor.[317] Overall, insanity is deficient for use by ASD individuals, with rare success.[318]

2 *Mistake of fact*

The mistake of fact defence is also inadequate for ASD use.[319] The ASD individual may not meet the honest belief element due to ToM deficiencies, which can cause the ASD individual to be ignorant of 'the state of things'.[320] Unsuitably, the reasonable belief element serves as the major hurdle, as the standard for the objective test is unlikely to be reduced for ASD individuals,[321] and the mistake is unlikely to be based on any solid information,[322] due to ToM deficits and difficulties in understanding social cues.[323] Ultimately however, punishing a lack of foresight based upon an honest mistake of facts is an unacceptable goal for the CJS.[324]

3 *Self-defence*

Self-defence is unfeasible for ASD use, as the third element, the need for objectively reasonable grounds for the belief in the reasonableness of the response, is unlikely to be met.[325] This can be explained by the fact that an ASD individuals' emotional intensity of expression can increase rapidly, often in response to an objectively trivial event, due to faulty emotional regulation.[326] This is coupled with their inability to see the signals indicating that it would be appropriate to stop.[327] Hence why they are susceptible to committing a 'harmful act' that is not objectively reasonable on account of an overreaction caused by hypersensitivities.[328]

Alternatively, ASD individuals are prone to inaccurately presuming that they are in danger and need to defend themselves, due to an inability to interpret and predict the intentions, actions, and speech of others,[329] which could cause a harmful act to be committed from a perceived need for self-defence.

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[317] Ibid [74].
[318] See Westphal (n 209) 586; Strickland (n 39) 14.
[319] See, eg, *Vucemillo v Western Australia* [2017] WASCA 37.
[320] See, eg, *Larsen v G J Coles and Co Ltd* (1984) 13 A Crim R 109.
[321] *R v Richards and Gregory* [1998] 2 VR 1. See also *R v Mrzljak* [2004] QCA 420, [24]. But see *Aubertin v Western Australia* [2006] WASCA 229, [42].
[322] See *Larsen v G J Coles and Co Ltd* (1984) 13 A Crim R 109.
[323] See, eg, *Vucemillo v Western Australia* [2017] WASCA 37, [33].
[324] See Victor Tadros, *Criminal Responsibility* (Oxford University Press, 2005) 251.
[325] See, eg, *Shortland v Stone* [2019] WASC 217; *R v Chapman* [2018] NSWSC 1741.
[326] Attwood (n 54) 157.
[327] Ibid 155.
[328] Ibid 283–4. See also *DSM-5* (n 31) 50, 54; Wing (n 27) 47–8, 50–2.
[329] Grant (n 25) 66; Robertson (n 25) ch 3.3.2.6.

For instance, in *Shortland v Stone*,[330] the ASD individual's act of escaping from lawful custody does not qualify as a 'reasonable' harmful act,[331] and the police officer was acting lawfully and so his actions were not harmful.[332] Whilst in *R v Chapman*,[333] Daniel stabbing his father in response to his father unplugging his computer cables was not objectively reasonable.[334] Evidently, the stars need to align for self-defence to be open on the facts for ASD individuals, in there needing to be a harmful act, and a harmful act in self-defence, that is reasonable.

4 *Accident*

The defence of accident is also deficient for ASD use, as whilst ASD individuals' mistakes tend to be unintended, due to difficulties in foreseeing the impact of their actions,[335] mistakes can be made in the course of being overwhelmed by sensory stimuli, that are deemed as reasonably foreseeable. An example can be seen in *Shortland v Stone*,[336] where the ASD individual's mistaken belief that he could escape the overwhelming sensory input without driving in a reckless manner, was reasonably foreseeable. This belief was reasonably foreseeable, as there were police vehicles both in front of and behind his vehicle.

B *Proposed Novel ASD Defence Scheme*

This article has found that pre-existing defences are deficient or non-applicable to ASD individuals.[337] Hence why an affirmative, specific, three-limbed novel defence, catering to each of the three overarching ASD symptoms, ought to be available where an individual's ASD symptoms are the underlying cause of their crimes,[338] as drafted below. However, where none of the major ASD symptoms act as the cause of offending,[339] the novel defence would be non-applicable, moral culpability would exist, and criminal liability will be inevitable.

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330 [2019] WASC 217.
331 *Criminal Code (WA)* (n 107) s 248(4)(b).
332 Ibid s 248(5).
333 [2018] NSWSC 1741.
334 *Crimes Act 1900* (NSW) s 418(2).
335 See Wauhop (n 40) 965, 983; Strickland (n 39) 13.
336 [2019] WASC 217.
337 See also Westphal (n 209) 586.
338 Not where a stereotypical ASD offence or 'minor crime' was committed, as is recommended in Cea (n 42) 509–17, 529. Ideally, this prospectively introduced defence scheme would be adopted into the Australian state, territory, and commonwealth criminal codes.
339 See, eg, *Davies v The Queen* [2019] VSCA 66, [632], [683].

When successful, such a defence would trigger an order being given to treat the underlying symptom causing the offending, as ASD individuals require specialised services to meet their specific responsivity needs.[340] For instance, by way of obsessive interests causing offending, research demonstrates that whilst not an easy task,[341] steps can be taken to terminate, replace, or at the very least, modify the interest.[342] Albeit, due to the hitherto limited research into ASD offending, in the words of legal theorist Roger Cotterrell, 'rules cannot achieve perfect clarity in advance of all applications of them'.[343]

Moreover, critics in favour of criminal liability even where ASD is the cause of offending, might raise concerns to the effect that imprisonment is a necessity,[344] yet studies show that ASD individuals do not respond effectively, nor even adequately, to mainstream correctional settings.[345] They are also at an extremely high risk of manipulation, victimisation and bullying from other prisoners on account of their eccentricities and deficits in social communication.[346]

Other sceptics may ponder that if we have a specific ASD defence, that, as a matter of consistency, there should be a specific ADHD, acquired brain injury, or diabetes-related defence, or any other medical category that is ill-served by current criminal defences. Such sceptics may question why one of the pre-existing defences, such as insanity (the most viable defence for ASD use), cannot be amended to attend to the contemporary scientific knowledge existent on ASD.

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[340] Strickland (n 39) 14.
[341] Attwood (n 54) 204.
[342] Gray (n 103) 167.
[343] Roger Cotterrell, *The Politics of Jurisprudence: A Critical Introduction to Legal Philosophy* (Oxford University Press, 2nd ed, 2003) 131.
[344] Jill Pozzo, Matthew Roche and Steven Silverstein, 'Violent Behavior in Autism Spectrum Disorders: Who's at Risk?' (2018) 39 *Aggression and Violent Behaviour* 53, 53.
[345] Donald Andrews and James Bonta, *The Psychology of Criminal Conduct* (Anderson Publishing, 5th ed, 1994); Ann Browning and Laura Caulfield, 'The Prevalence and Treatment of People with Asperger's Syndrome in the Criminal Justice System' (2011) 11(2) *Criminology & Criminal Justice* 165, 173. See also Lauren E Gook, 'Offenders with Autism Spectrum Disorder: Screening, Characteristics and Staff Awareness' (PhD Thesis, Deakin University, 2014) 68.
[346] Jospeter Mbuba, 'Lethal Rejection: Recounting Offenders' Experience in Prison and Societal Reaction Post Release' (2012) 92(2) *The Prison Journal* 231; Gook (n 345) 68. See, eg, *Cluett v The Queen* [2019] WASCA 111, [76]. See also *R v Chapman* [2018] NSWSC 1741, [33], [38], wherein the ASD individual had been bashed by an inmate, rendering him hospitalised for six days, needing twelve stitches in his mouth and lip, with a broken tooth, and bruising.

By way of a response, this article's scope has strictly focused on defences open to ASD individuals and has demonstrated that, along with the rise in the number of accused persons raising ASD diagnoses,[347] pre-existing defences are deficient or non-applicable to ASD individuals, where their symptoms are the underlying cause of their offending.[348] If such literature exists on other conditions, as has been set out for ASD in this article, then this article recommends that such reforms be advocated for.

Secondly, this article's proposed ASD defence is not idiosyncratic or unprecedented in the sense that the defence of insanity caters to psychotic illnesses, such as schizophrenia,[349] and has been extended to: psychomotor epilepsy;[350] hyperglycaemia;[351] arteriosclerosis;[352] and *delirium tremens*.[353] However, the legal definition has not advanced significantly since 1843.[354] This is also not the first article to propose a novel ASD defence.[355]

Moreover, as has been highlighted, the three established capacities comprising the insanity defence are deficient for ASD use as, even where offending is caused by one of the three overarching ASD symptoms, none of the three insanity capacities are found to be absent, per the aforementioned. Accordingly, there is no room to amend the insanity defence to cater for ASD individuals, without major upheaval.

Conceptually, attention is needed towards enhancing the accessibility of criminal defences, such that they are responsive to the diversity of human experience, of which ASD is one element. That enhancement has already been achieved for the process of sentencing ASD individuals, via the Verdins principles.[356]

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[347] Robertson (n 25) ch 6.1; Berryessa, 'Attitudes' (n 25) 2770; Grant (n 25) 65.
[348] Westphal (n 209) 586.
[349] See *Bratty v Attorney-General (Northern Ireland)* [1963] AC 386, 412.
[350] Ibid.
[351] See *R v Hennessy* [1989] 2 All ER 9, 14.
[352] See *R v Kemp* [1957] 1 QB 399.
[353] See, eg, *Dearnley v R* [1947] St R Qd 51, 61.
[354] *M'Naghten's Case* [1843] All ER Rep 229.
[355] See, eg, Strickland (n 39); Wauhop (n 40).
[356] See Wolf (n 45) 1736; *R v Verdins* (2007) 16 VR 269. See also Jamie Walvisch, 'Mandated Treatment as Punishment: Exploring the Second Verdins Principle' in Claire Spivakovsky, Kate Seear and Adrian Carter (eds), *Critical Perspectives on Coercive Interventions: Law, Medicine and Society* (Routledge, 1st ed, 2018) 185, 186.

C *Model ASD Defence*

1. An ASD individual is not criminally responsible for an act or omission, where appropriately qualified expert evidence deems that a nexus exists between the individual's ASD symptomology and their offending, such that the dominant cause of their offending is attributable to at least one of the following three ASD symptoms:

    (a) **an inability to read or respond to social cues or general social naivety**, such that the individual is unaware of the wrongfulness of their act or omission at the time it was committed, which can include:

        (i) the individual's literal interpretation of any input;

        (ii) an inability to decipher the intentions, actions, speech, emotions, or the wrongful or immoral acts of another;

        (iii) an inability to comprehend or forecast the impact or consequences of their actions;

        (iv) an inability to comprehend the basic underlying facts pertaining to their actions; or

        (v) any other presentation associated with an inability to read or respond to social cues or general social naivety.

    (b) **hypersensitivities**, such that the individual temporarily loses control of their behaviour by being unable to cope, from the individual's senses being prone to overload from hyper-attentiveness to environmental stimuli that non-ASD individuals can filter out or fail to notice. Said overstimulating environmental stimuli can include:

        (i) specific sounds, tactile experiences, light intensity, food texture, or specific aromas;

        (ii) pain or discomfort;

        (iii) an unexpected change or interruption to their structure or routine; or

        (iv) any other stimulus the individual is hypersensitive towards.

The individual's act or omission can be an uncontemplated and unintended overreaction to objective triviality, such that in the course of sensory-avoidant, sensory-seeking, self-stimulatory, or sensory distraction behaviours, the individual initiates an instantaneous physical response (to prevent further sensory input), such as in the form of pre-emptive self-defence.

(c) **obsessive interests**, such that the individual is unable to control their offending due to the individual's highly restricted, fixed interest that is of abnormally high intensity, which causes the individual to ignore the social and legal consequences of their act or omission.

The individual's act or omission can be committed as a result of engaging in their obsessive interest, either through the obsessive interest being of an offending nature, or merely through the obsessive interest rendering the individual more susceptible to offending behaviour.

2. If any of subsections (1)(a), (b), or (c) are met, then the ASD individual is to be given a mandatory order, without any conviction, as tailored to treat the relevant ASD symptom that rendered the ASD individual susceptible to their offending.

D *Further Recommendations for Law Reform*

1 *Expert evidence*

As demonstrated by *Shortland v Stone*,[357] it is crucial that medical reports are submitted by an ASD individual's counsel, for judicial officers to be able to assess the culpability of the ASD individual in terms of the nexus between the individual's ASD and their offending,[358] or else pleading any defences will be futile.

Further, as a matter of common sense, this article asserts that judicial officers and juries are not as qualified nor equipped to determine whether a causal nexus exists between ASD and offending, as psychiatrists or psychologists are. Thus, this article recommends judges and juries be precluded, or at least limited, in making findings in direct contradiction to expert evidence as to the nexus between an individual's

[357] [2019] WASC 217, [37].
[358] Freckelton, 'Forensic' (n 185) 431.

ASD and their offending, where such evidence is unequivocally asserted,[359] unlike what unjustly occurred in *Vucemillo v Western Australia*.[360]

2 *Self-defence accessibility*

Contrary to the Tasmanian Law Reform Institute's view that a delusion arising from a mental illness cannot be the basis for self-defence on account of insanity being for that purpose,[361] this amounts to ASD individuals remaining unprotected from liability when ASD individuals can symptomatically overreact in defending themselves, due to hypersensitivities to sensory input which can overwhelm them.[362]

Insofar as self-defence could be accessible for ASD individuals, this article submits that ASD would need to be recognised, with expert evidence presented, to bridge the gap between the legal requirements of self-defence and the ASD individual's evidence.[363] In this way, this article recommends special recognition that ASD individuals are more likely than non-ASD individuals to possess a heightened perception of risks to their safety, which can amount to pre-emptive strikes,[364] in assessing the tests for necessity and reasonableness in self-defence.

By way of comparison, expert evidence relating to the battered spouse syndrome has been held to be admissible in respect of self-defence.[365] The Tasmanian Law Reform Institute has previously proposed to broaden the range of evidence presented where self-defence is raised in family violence situations.[366] Thus,

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[359] Cf *R v Turner* [1975] QB 834, 841 (Lawton LJ): 'The fact that an expert witness has impressive scientific qualifications does not by that fact alone make his opinion on matters of human nature and behaviour within the limits of normality any more helpful than that of the jurors'. See also *Griffiths v TUI (UK) Ltd* [2021] EWCA Civ 1442, which held that courts are not bound to accept the evidence of an expert witness, even where it has not been controverted by other expert or factual evidence, and the expert was not cross-examined.

[360] [2017] WASCA 37, [17], [20], [33], [41], [51], wherein both the psychiatrist and the psychologist were directly contradicted by the Court as to the assertion that the appellant's 'autistic brain' caused him to believe that the website was an adults-only website, and thereby precluding a mistake of fact defence.

[361] Peta Carlyon, 'Law Reform Spotlight on Self-defence in Domestic Violence Cases', *ABC News* (online, 17 October 2015) <https://www.abc.net.au/news/2015-10-16/law-reform-spotlight-on-self-defence-in-domestic-violence-cases/6861946>.

[362] See generally Suarez (n 64). See also Crasta (n 67) 7; Howlin (n 45) 306; Wauhop (n 40) 965.

[363] See also Elizabeth Sheehy, Julie Stubbs and Julia Tolmie, 'Securing Fair Outcomes for Battered Women Charged with Homicide: Analysing Defence Lawyering in *R v Falls*' (2014) 38(2) *Melbourne University Law Review* 666, 691, on self-defence as it applies to domestic violence.

[364] Attwood (n 54) 158.

[365] *Osland v R* [1998] HCA 75, [50]–[60]; *R v Secretary* (1996) 86 A Crim R 119. See also *Crimes Act 1958* (Vic) s 322M. See generally Sheehy (n 363).

[366] Carlyon (n 364).

meaning their overreaction is not necessarily taken as that which negates self-defence. This article recommends an analogous outcome for ASD individuals.

3 *Sentencing: unsustainable post-conviction mercy*

Sentencing considerations are an alternative way of addressing the injustice where ASD symptomology is the cause of offending, and it is also the most common one in recent years.[367] This requires the judiciary to be cognisant of ASD as a mitigating factor that lessens moral culpability. Concerningly though, recent Australian research found marked deficiencies in judicial officers' understanding of ASD symptoms, along with their forensic relevance.[368] It even found that notwithstanding any willingness to rely on expert evidence, the judiciary sentenced ASD individuals in an inconsistent and unenlightened manner.[369]

This article submits that dealing with ASD in sentencing post-conviction, where ASD symptomology is the cause of offending, is highly injurious, for it involves the ASD individual procuring a criminal record and relying on unpredictable post-conviction mercy, which is dependent upon a random judge, is not legally reliable, and is inconsistently awarded.[370]

For example, in *R v Wilson*,[371] the ASD individual pled guilty,[372] and his sentence was suspended for the full term of his imprisonment anyhow.[373] This, however, was not an appropriate means nor end, seeing as the ASD individual procured a criminal record, thereby hindering his ability to gain meaningful employment in circumstances where 18.2% of ASD individuals are unemployed, almost six times the rate of individuals without a disability.[374] Thus, rendering it an unsustainable mechanism through which to achieve justice for ASD individuals caught up in the CJS.

[367] Freckelton, 'Forensic' (n 185) 431.
[368] See generally Wolf (n 45).
[369] Ibid.
[370] Cf Cea (n 42) 511.
[371] [2022] ACTSC 7.
[372] Ibid [27].
[373] Ibid [33]–[34].
[374] Australian Bureau of Statistics, *Survey of Disability, Ageing and Carers: Summary of Findings*, *2022* (11 October 2024).

V CONCLUSION

All five key cases explored in this article entailed ASD symptomology as the cause of offending,[375] and yet the embedded requirement for objective reasonability thematically functioned as an untenable obstacle for ASD individuals invoking defences, including mistake of fact,[376] self-defence,[377] and accident.[378] Insanity was the only remaining viable defence in the ASD individuals' artillery without an objective element, which nonetheless posed a tantalising, yet unreachable hurdle.[379]

The outcome of this doctrinal legal analysis is consistent with previous cross-jurisdictional research, which found that even where expert evidence espoused ASD symptomology as the cause of offending, an exculpatory defence was not advanced, notwithstanding a realistic possibility of success.[380] Case in point: the ASD individuals in all five key cases pled guilty to their offences and did not attempt to plead any defences. Instead, defence lawyers opted for a risk-averse early plea of guilty and its associated sentence reduction benefits.[381]

This could be because defence lawyers do not have faith in the likelihood of success of any pre-existing defences to 'roll the dice' with,[382] or they loathe the consequences that follow from an insanity determination.[383] It could also be due to defence lawyers, the judiciary, or even prosecutors possessing a limited understanding of ASD symptomology.[384] Regardless of the cause for defence lawyers failing to advance feasible, exculpatory defences for ASD clients, this practice is impeding upon, if not halting, the growth of this research area, and the longer this trend perpetuates, the longer ASD individuals will go without accessibility to criminal defences.

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[375] See also Berryessa, 'Judiciary Views' (n 26) 98.
[376] See, eg, *Vucemillo v Western Australia* [2017] WASCA 37.
[377] See, eg, *Shortland v Stone* [2019] WASC 217; *R v Chapman* [2018] NSWSC 1741.
[378] See, eg, *Shortland v Stone* [2019] WASC 217.
[379] See *Vucemillo v Western Australia* [2017] WASCA 37; *R v Wilson* [2022] ACTSC 7; *Shortland v Stone* [2019] WASC 217; *Cluett v The Queen* [2019] WASCA 111. Cf *R v Chapman* [2018] NSWSC 1741.
[380] See Barry-Walsh (n 205) 104. See, eg, *Vucemillo v Western Australia* [2017] WASCA 37, [33], wherein the appellant, upon receiving an ASD diagnosis, opted to appeal his sentence as opposed to his criminal liability, despite expert evidence linking ASD to his offending.
[381] See, eg, *Sentencing Act 1995* (WA) s 9AA.
[382] See Westphal (n 209) 586; Strickland (n 39) 14.
[383] Freckelton and List, 'Culpability' (n 30) 32.
[384] See, eg, Slavny-Cross (n 11) 908: This study, of defence lawyers from 12 nations who had defended an ASD client, found that the participants indicated that 59% of prosecutors and 46% of judges said or did something during the trial that made the defence lawyers concerned for the judiciary's inadequate understanding of ASD. See also Keeley Blanchard, 'Defending Someone on the Autism Spectrum Who Has Been Charged with a Crime', *Blanchard Law* (Blog Post, 26 June 2018) <https://blanchard.law/defending-autism-spectrum-charged-crime>: hiring someone with experience in defending ASD individuals is sometimes not possible.

Interestingly, the ASD individuals in all five key cases had a limited prior record of offending, if any at all. This further adds credence to this article's analysis that ASD individuals are both more likely to be victims than perpetrators,[385] and tend to commit offences inadvertently as caused by ASD symptomology they are born with.

This assertion is supported by the fact that the ASD individuals in the cases explored by this research tended to believe, to a lesser or greater extent, that their actions were appropriate and justified under the circumstances,[386] or they belatedly came to the realisation that it was wrong,[387] which was perceived as a lack of remorse.[388] This is consistent with past research.[389]

Alarmingly, as police often lack knowledge of ASD and may not recognise potentially subtle ASD symptoms as requiring consideration,[390] most ASD individuals are not diagnosed until after they have been arrested and charged with an offence,[391] and no standardised screening assessments are currently used in any jurisdiction to screen for ASD at any stage of the CJS.[392] Accordingly, further research is urgently needed in this field, as for justice to be served, ASD needs to be diagnosed for expert evidence to be submitted in the first place, on the nexus between the individual's ASD and their offending.

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[385] Mayes (n 29) 94.
[386] See, eg, *Cluett v The Queen* [2019] WASCA 111, [36]; *Vucemillo v Western Australia* [2017] WASCA 37, [20], [52].
[387] *R v Chapman* [2018] NSWSC 1741, [31]; *R v Wilson* [2022] ACTSC 7, [19]. See also *Shortland v Stone* [2019] WASC 217, [6]: the ASD individual turned himself in to police, but a belated 6 days after his offending.
[388] See, eg, *Vucemillo v Western Australia* [2017] WASCA 37, [20], [52].
[389] Barry-Walsh (n 205) 105.
[390] Brenda Stoesz, 'Review of Five Instruments for the Assessment of Asperger's Disorder in Adults' (2011) 25(3) *The Clinical Neuropsychologist* 376, 378; Gook (n 345) 68.
[391] Wauhop (n 40) 990.
[392] Isabella Michna and Robert Trestman, 'Correctional Management and Treatment of Autism Spectrum Disorder' (2016) 44(2) *The Journal of the American Academy of Psychiatry and the Law* 253, 254.

#AUSTRALIANJURY#SOCIALMEDIA — NATURAL JUSTICE ON TRIAL

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The participation of laypersons in the judicial process is considered essential to ensuring that justice is served in criminal trials. It also aims to render the legal process less intimidating, more accessible, and impartial for the accused, who is judged by a panel of peers. However, today, the question is whether it is indeed fair to have a jury, given that jurors have abundant access to communication technology with far-reaching potential for abuse of their supposed role in the judicial system as impartial finders of fact. Indeed, there is now a serious question of the need or desirability of lay participants as adjudicators in the legal process. An institution initially introduced to make the process more just and fair may now yield the opposite result. This paper explores these issues and proposes recommendations for reform, with its centrepiece being a model of jury education and competence testing.

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I INTRODUCTION

A fundamental principle of natural justice in any jurisdiction is that an accused in a criminal proceeding is entitled to a fair trial. A person is presumed innocent until proven guilty, and this fundamental right should not be eroded at any price. The introduction of jurors as representatives of a cross-section of society has ensured that legal outcomes align with community expectations of justice and fairness.[1] Indeed, trial by jury is a mainstay of the notion of a "fair trial" in that it seeks to eliminate bias, which might reside in a single trier of fact (a judge) as opposed to being judged by one's peers.

In Australia, s 80 of the *Constitution* provides that a trial on indictment for Commonwealth offences shall be by jury. Furthermore, the criminal laws across the states and territories govern most criminal offences, with provisions for jury trials in cases involving serious indictable offences. Although a detailed examination of these provisions across jurisdictions is beyond the scope of this article, it suffices to note that the jury system is a well-established and integral feature of the Australian criminal justice system.[2] Accordingly, the presence of juries plays a significant role in maintaining fairness within the system.

However, the widespread use of social media and its extensive real and virtual reach now poses a significant threat to the fairness of jury trials. Online influences have the potential to bias jurors far more extensively than traditional print media due to the constant and pervasive nature of online information. Consequently, the principle of natural justice — access to a fair trial — faces significant erosion when jurors, contrary to their instructions, rely on external online information instead of limiting their consideration to the evidence presented during the trial.

Although the constitutional right to trial by jury for Commonwealth indictable offences is recognised as fundamental, and jury trials are the norm for non-Commonwealth indictable offences across Australian jurisdictions, there remains insufficient regulation of juror conduct in the digital age. While codes of conduct exist, few laws explicitly address the challenges posed by jurors accessing or being influenced by online or social media information during their deliberations.

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[1] Valerie P Hans, 'Jury Systems Around the World' (2008) 4 *Annual Review of Law and Social Science* 275, 276.

[2] Michael Chesterman, 'Criminal Trial Juries in Australia: From Penal Colonies to a Federal Democracy' (1999) 62(2) *Law and Contemporary Problems* 69, 72–4.

Traditionally, conduct rules have focused on ensuring fair reporting by the media to prevent undue influence on jurors.[3] For example, the common law offence of sub judice contempt makes it an offence for a juror to independently investigate or inquire about matters related to a case while it is before the court.[4] Further, traditional media understood that no commentary should be made about the accused's prior criminal history.[5] The status quo of these conventions has been significantly challenged by the ubiquitous use of social media, which has proliferated in both the variety and magnitude of its use and reach.[6]

The High Court of Australia's decision in *Hinch v Attorney-General for Victoria* addressed the concept of responsible behaviour when reporting for traditional media.[7] It was a case of fundamental importance to the media regarding the test employed by the courts to determine contempt of court. In this case, the High Court was careful to ensure a balance between the fair administration of justice and the public interest in freedom of speech. The Court found that the fundamental test for determining contempt was an inquiry into whether there was a real and definite tendency to prejudice the ongoing proceedings.[8] The justices in the High Court emphasised that it was essential to demonstrate a genuine risk of prejudice to a fair trial to constitute contempt.[9]

The rules of sub judice contempt aim to protect a juror from exposure to prejudicial media publicity prior to and during the trial, although such news may be lingering in the minds of those jurors while the case is ongoing.[10] Historically, the rule has tended to be more strictly enforced against the media than against jurors, which may pose a challenge given that jurors have increasingly more access to news through social media and can publish damaging information themselves. It is this possibility that will be explored further in this article. The following sections will address: (1) notable cases involving jury misconduct on social media; (2) the

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[3] Eg Supreme Court of Western Australia, *Guidelines for the Media: Reporting in Western Australian Courts* (25 October 2022) <https://www.supremecourt.wa.gov.au/_files/Guidelines for the Media.pdf>.

[4] *A-G v Times Newspapers Ltd* [1973] 3 All ER 54, 77–8 (Lord Morris).

[5] Jane Johnston et al, *Juries and Social Media: A Report Prepared for the Victorian Department of Justice* (Report, January 2013) 1.

[6] Amy J St Eve, Charles P Burns and Michael A Zuckerman, 'More from the #Jury Box: The Latest on Juries and Social Media' (2013) 12(1) *Duke Law & Technology Review* 64, 67–9.

[7] *Hinch v A-G (Victoria)* (1987) 164 CLR 15, 26–7.

[8] Ibid 34 (Mason CJ).

[9] Ibid 34 (Mason CJ), 86 (Wilson J). See Anne Twomey, 'Derryn Hinch v Attorney-General for the State of Victoria' (1988) 16(3) *Melbourne University Law Review* 683.

[10] Felicity Robinson, '"No, No! Sentence First: Verdict Afterwards": Freedom of the Press and Contempt by Publication in *Attorney-General for the State of New South Wales v X*' (2001) 23(2) *Sydney Law Review* 261, 261–3.

impact of such misconduct on trial outcomes; and (3) the future of trial by jury in the context of social media challenges, concluding with proposed reforms to uphold the integrity of the jury system.

II THE JURY SOCIAL MEDIA CASES

The jury's role is to determine the innocence or guilt of the accused based only on the evidence tendered in a criminal proceeding. This is a fact-finding exercise.[11] It prohibits the jury member from conducting their own research to arrive at their decisions or forming preconceived biases.[12] Although there is such a prohibition, there is evidence, as will be discussed shortly, to suggest that jurors do, in fact, conduct such research. The risk of this unauthorised research ("information in") occurring is becoming more prevalent with the increasing use of social media.[13] Besides this risk, the risk of unauthorised reporting of case proceedings ("information out") is also becoming more prevalent. The latter is a burgeoning concern, and the lack of regulations surrounding this area is problematic.

The prevalence of the risks of "information in" and "information out" can be observed with the increasing number of such cases worldwide. In 2014, the murder trial of Lawrence Alfred Gaskell before the Supreme Court of Queensland had to be abandoned when it became known that one of the jurors had used Facebook to investigate the defendant in that case. According to the law in Queensland, it was a criminal offence for a sworn juror to inquire about the defendant in a trial before a verdict was passed.[14]

In 2016, the Supreme Court of Western Australia dealt with a high-profile case which involved the murder of Travis Benjamin Mills, who was killed with a baseball bat and set ablaze in his car's boot.[15] The day the trial was to commence, Justice Hall had called a juror to the Bench for an explanation of a Facebook post that read, 'At Perth District Court, guilty!' Justice Hall censured the juror by stating that the action was 'inappropriate and foolish'.[16] His Honour added that the juror had

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[11] *Brown v The Queen* (1986) 160 CLR 171, 187 citing *Patton v United States,* 281 US 276, 312 (1930).

[12] Kristin R Brown, 'Somebody Poisoned the Jury Pool: Social Media's Effect on Jury Impartiality' (2012) 19(3) *Texas Wesleyan Law Review* 809, 813–4.

[13] Nancy S Marder, 'Jurors and Social Media: Is a Fair Trial Still Possible' (2014) 67(3) *SMU Law Review* 617, 626–7.

[14] *Jury Act 1995* (Qld) s 69A(1). See also Lucy Thackray, 'Juror could face jail after admitting to researching murder suspect on Facebook: forcing the Supreme Court to abandon trial', *Daily Mail Australia* (online, 9 August 2014) <https://www.dailymail.co.uk/news/article-2720537/Murder-trial-stopped-juror-admits-researching-suspect-victim-Facebook.html>.

[15] See *Ruthsalz v Western Australia* [2018] WASCA 178.

[16] Sol Dolor, 'Are Jury Trials on the Way Out?', *Australasian Lawyer* (online, 6 October 2016)

disrespected the legal process and dismissed her on the grounds that he did not believe she could be a fair juror.[17]

In 2021, a perjury trial of a police officer was aborted in the District Court of Queensland when it was discovered that a juror had acted inappropriately by looking up external sources through his mobile phone, contrary to the directions given by the Judge.[18] In 2022, the High Court in *Hoang v The Queen* unanimously allowed an appeal from the Court of Criminal Appeal of the Supreme Court of New South Wales concerning the discharge of a juror who had engaged in misconduct.[19] The case concerned an indictment for 12 counts of sexual offences against children, allegedly committed when the appellant was a mathematics tutor. During the trial, the prosecution led evidence to indicate that the appellant did not hold a valid Working with Children Check.[20] Later, during jury deliberation, a note was passed to the trial judge stating that a juror had consulted Google to find the meaning of the Working with Children Check and all relevant legislation.[21] By this time, the jury had delivered a verdict for eight counts.[22] It was only before the remaining counts were deliberated on that the juror had Googled for the meaning.[23] The juror concerned was discharged before verdicts on the remaining counts were handed down. The appellant appealed on the grounds of a miscarriage of justice, which the Court of Criminal Appeal dismissed.[24] However, this decision was overturned on appeal by the High Court unanimously, and it was stated that the juror had engaged in misconduct and that the trial judge had erred in considering the earlier verdicts before discharging the juror.[25] Although this case does not explicitly involve social media, it demonstrates how online activity, whether through social media or other digital platforms, can negatively affect the fairness of a trial. This makes the case a

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<https://www.thelawyermag.com/au/news/general/are-jury-trials-on-the-way-out/200902>. See Joanna Menagh, 'Four found guilty in Perth body-in-boot killing', *ABC News* (online, 12 September 2016) <https://www.abc.net.au/news/2016-09-12/travis-mills-four-found-guilty-of-murder/7831936>.

[17] Dolor (n 16); Heather McNeill, 'Calls to overhaul WA jury system after juror dismissed for Facebook post', *WA Today* (online, 13 October 2016) <https://www.watoday.com.au/national/western-australia/calls-to-overhaul-wa-jury-system-after-juror-dismissed-for-facebook-post-20161012-gs0wwa.html>.

[18] Talissa Siganto, 'Jury dismissed in senior police officer's perjury trial after juror "disobeyed" judge's directions' *ABC News* (online, 9 June 2021) <https://www.abc.net.au/news/2021-06-09/qld-court-police-officer-michelle-stenner-jury-dismissed/100201172>.

[19] *Hoang v The Queen* (2022) 276 CLR 252 ('*Hoang*').

[20] Ibid [4].

[21] Ibid [6]–[8].

[22] Ibid [7].

[23] Ibid.

[24] Ibid [9]; *Hoang v The Queen* [2018] NSWCCA 173.

[25] *Hoang* (n 19) [39]–[41], [43].

pertinent example for discussing the broader implications of juror misconduct in the digital age.

This phenomenon is not peculiar to Australian jurisdictions. In the United States city of Baltimore, where the courts were called upon to consider a political corruption trial against the former Mayor of Baltimore, it was discovered that five jurors had accessed social media to discuss the trial while it was still in progress. The former Mayor's conviction was overturned as a result of a challenge to the jury's verdict.[26]

In *Dimas-Martinez v State,*[27] the Arkansas Supreme Court addressed the impact of a juror's posted comments on X (formerly Twitter), including remarks such as 'Choices to be made. Hearts are to be broken. We each define the great line.'[28] Despite being admonished by the trial judge to cease such activity, the juror persisted. Following the jury's guilty verdict and the imposition of the death sentence, the trial court denied the defendant's motion for a new trial.[29] However, the Arkansas Supreme Court reversed the trial court's decision on appeal.[30] The appellate court emphasised the importance of ensuring that jurors refrain from sharing their thoughts or any trial-related information on social media platforms due to the high potential for prejudice.[31] This concern was amplified in that case because one of the juror's X followers was a journalist,[32] allowing the media to receive advance notice of the jury's sentencing decision before its formal announcement in court. The Supreme Court deemed the trial court to have erred in not adequately investigating the extent of the juror's extra-judicial communication as well as its impact on the juror's ability to properly serve as a juror and whether

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[26] See *State of Maryland v Sheila A Dixon: Verdict Sheet* (Circuit Court for Baltimore City, No 110141032, 1 December 2009) <https://msa.maryland.gov/megafile/msa/speccol/sc5300/sc5339/000113/012000/012811/unrestricted/20100688e-003.pdf>. On 5 January 2010, Ms Dixon entered an Alford plea in Baltimore City Circuit Court to one count of perjury. She was given probation before judgment in a plea agreement that required her to resign from office as of 4 February 2010; receive four years of unsupervised probation and not seek another office during the period of probation; contribute 500 hours of community service; and donate $45,000 to charity: see 'Baltimore mayor resigns under plea deal' *NBC News* (online, 8 January 2010) <https://www.nbcnews.com/id/wbna34752353>. See also Julie Bykowicz, '5 Dixon Jurors Recalled As Witnesses' *Baltimore Sun* (online, 30 December 2009) <http://www.baltimoresun.com/news/maryland/baltimore-city/balmd.dixon30dec30,0,92298.story>; David Aaronson and Sydney Patterson, 'Modernizing Jury Instructions in the Age of Social Media' (2013) 27(4) *Criminal Justice Review* 26.

[27] *Dimas-Martinez v State,* 385 SW 3d 238 (Ark, 2011).

[28] Ibid 246.

[29] Ibid 242.

[30] Ibid 243.

[31] Ibid 247–8.

[32] Ibid 248.

such information was shared with other jurors. It was not sufficient to inform the parties once the judge had learned of this activity and then wait for a jury verdict, as happened in that case.[33]

In the United Kingdom, in the case of *R v Karakaya,*[34] which concerned alleged rape and indecent assault of the defendant's daughter, a juror researched the subject 'rape' and brought those materials into the room for jury deliberations.[35] Evidently, the juror was not satisfied with the evidence presented in court and decided to conduct their own research on the matters argued. There have also been instances in the United Kingdom when a juror has been discharged when details of the trial were posted on social media by them.[36]

A few distinct types of conduct can be discerned from the above case discussions. These are that jurors: (1) use the social media platform to research the case and/or the parties ("information in"); (2) establish contact with parties or their legal representatives involved in the case, or discuss the case with jurors in an unauthorised manner (eg outside the jury room) or with persons who are not jurors while the proceeding is still ongoing; and (3) post details concerning the proceedings ("information out"). All these instances are forms of misconduct and breaches of the duty imposed on jurors.

III IMPACT OF SOCIAL MEDIA MISCONDUCT

As alluded to in the discussion above, the internet, technology, and social media present significant challenges in the context of jury trials. The cases discussed illustrate that it is becoming a somewhat Herculean task to prevent a juror from researching the parties, terms, or details of the case, despite strict instructions given by the trial judge prior to the commencement of a trial by indictment. Furthermore, in an era where most connectivity is through social media, the all-too-human urge to connect with various parties on social networks, including those involved in ongoing proceedings, appears too much for some jurors to overcome. From a juror's lay perspective, this may not be an issue as connecting with parties may not seem to be something that will prejudicially impact the jury. Alternatively, it may also be habitual to post almost anything on social media, including court proceedings or even commentaries of the people involved in the process.

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[33] Ibid 247–9.
[34] *R v Karakaya* [2005] 2 Cr App Rep 77 (EWCA).
[35] Ibid [13], [26]–[27].
[36] See, eg, Nicola Haralambous, 'Educating Jurors: Technology, the Internet and the Jury System' (2010) 19(3) *Information & Communications Technology Law* 255, 259.

Such misconduct by jurors through the internet or social media erodes the fundamental principles that govern jury service. These principles are that jurors should only discuss matters concerning the trial during their deliberations in the jury room and not otherwise, and all their decisions must be based on the evidence tendered in court and the meaning they attribute to it, based on their unprejudiced impressions of such evidence.[37] There is no room for any form of research or experiment on the juror's part.[38] These principles are communicated to jurors when the trial judge gives the jury instructions.[39] Misconduct on the part of a juror may increase the risk of a miscarriage of justice in the given trial. A juror may deliver verdicts based on external materials they comprehend poorly or due to the influence of the people they have connected with and deliberated with in a social context, who were not privy to all the evidence tendered in court. The most profound impacts of such misconduct are the potential for a mistrial, which undermines the integrity of the trial court and delays justice for the accused, or, worse, results in a wrongful conviction.[40] The dismissal of one or more jurors from the panel is an option available to judges in cases of juror misconduct.[41] However, suppose this leaves an insufficient number of jurors to deliberate, or that a dismissed juror's misconduct has tainted the deliberations of other jurors; this often also necessitates dismissing all jurors, vacating the trial, and instituting a new one[42] (and only if the prosecution is willing to retry the matter, which is often not the case if key prosecution witnesses, including the complainant, are unable or unwilling to give evidence). This not only results in significant financial and resource burdens on the court and the parties involved, [43] but also extends the

[37] NSW Sheriff's Office, 'Reaching a Verdict' (Fact Sheet, 2025) <https://courts.nsw.gov.au/content/dam/dcj/ctsd/courtsandtribunals/courts-and-tribunals/jury-service/>; Queensland Courts, 'Your Responsibilities as a Juror' (Fact Sheet, 2024) <https://www.courts.qld.gov.au/__data/assets/pdf_file/0003/808590/your-responsibilities-as-a-juror.pdf>. See, eg, Rebecca K Helm, 'Evaluating Witness Testimony: Juror Knowledge, False Memory, and the Utility of Evidence-Based Directions' (2021) 25(4) *The International Journal of Evidence & Proof* 264, 269–270; Jill Hunter, 'The Secrecy of Jury Deliberations' (1996) 1(2) *Newcastle Law Review* 1.

[38] *Jury Act 1995* (Qld) s 69A(1); *Jury Act 1977* (NSW) ss 68B–68C; *Juries Act 2000* (Vic) s 78A; *Jury Act 1967* (ACT) s 42BA. No specific provision is provided in the Jury Acts of WA, SA, NT and Tas.

[39] Greg Byrne, 'Juries and the 'Detective Juror': Improving Public Discussion About Juries And Jurors' (2023) 48(3) *Alternative Law Journal* 185, 186.

[40] Emily M Janoski-Haehlen, 'The Courts are All a Twitter: The Implications of Social Media Use in the Courts' (2011) 46(1) *Valparaiso University Law Review* 43, 45–7.

[41] Nick Taylor and Roderick Denyer, 'Judicial Management of Juror Impropriety' (2014) 78(1) *Journal of Criminal Law* 43, 51.

[42] Paul Dore, 'The Judge is Your Google: Reframing Our Understanding of Juror Misconduct: And How to Manage It' (2023) (179) *Precedent* 4, 5.

[43] Janoski-Haehlen (n 40) 47.

duration of incarceration for the accused,[44] an especially troubling outcome if the individual is ultimately found to be innocent.

Even in the absence of a mistrial, juror misconduct — such as posting updates about the trial — can shape public discourse and potentially impact the parties' litigation strategies, thereby undermining the integrity of the trial process.[45]

IV FUTURE OF A TRIAL BY JURY

Calls for reform of the jury system have intensified amid growing concerns about juror misconduct, particularly the use of social media to access or disseminate extraneous information during trials. Under early English common law, jury instructions were minimal, as jurors were expected to rely on their personal knowledge and community norms.[46] Judicial directions, if provided, were considered merely advisory. However, modern common law has shifted toward a more structured approach, requiring judges to deliver clear, authoritative instructions to ensure the law is properly applied and to uphold the right to a fair trial.

In Australia, enhancing the clarity and delivery of jury directions has been identified as a key measure to mitigate juror misconduct, including improper social media use during proceedings. As former Justice Virginia Bell has noted, the traditional complexity and opacity of jury instructions often undermine their effectiveness.[47] This recognition has led to reform efforts aimed at improving juror understanding and compliance. The Jury Directions Project in Victoria exemplifies such efforts, showing that simplified and repeated instructions — especially those

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[44] Ibid.

[45] Tom Percy, 'Are Jury Trials on the Way Out?' *Australasian Lawyer* (online, 19 October 2016) <https://www.thelawyermag.com/au/news/general/are-jury-trials-on-the-way-out/200902>. As noted by Percy, around the time of the juror misconduct in the Travis Mills trial referred to above, prominent members of the legal profession in Western Australia commented about the end of the jury system being nigh, with Tom Percy QC, the president of Australian Lawyers Alliance, remarking: 'The day of the jury may well be nearly over' and 'It's too seductive for a [juror] to go home at night and go, "geez what about this bloke, Bill Smith, I'll just go and Google him…". They find out about him and what he does, they go on Facebook and look him up there and if they don't disclose that...they are armed with knowledge that's not in evidence at the trial that may well be considerable prejudice [sic] to the accused.'

[46] Eric Robinson, 'Jury Instructions for the Modern Age: A 50-State Survey of Jury Instructions on Internet and Social Media' (2011) 1 *Reynolds Courts & Media Law Journal* 307, 308.

[47] Virginia Bell AC, 'Jury Directions: the Struggle for Simplicity and Clarity' (Banco Court Lecture, Supreme Court of Queensland, 20 September 2018) 4–5, 28 <https://www.hcourt.gov.au/assets/publications/speeches/ current-justices/bellj/bellj20Sep2017.pdf>.

emphasising the prohibition on independent research or information sharing — can positively influence juror behaviour and help preserve trial integrity.[48]

A *Pre-empanelment Information for Jurors*

A recent comprehensive review by the Tasmanian Law Reform Institute ('TLRI')[49] on juries and social media focused on pre-empanelment instructions as well as directions delivered by the Bench at the commencement and throughout the trial. The TLRI's recommendations included ongoing updates to pre-empanelment training and information for jurors, with a pre-recorded induction video expressly addressing the use of social media and other internet platforms by jurors, both "in" and "out". This would include explanations of the rationale behind prohibiting such information (eg notions of fairness and fair trial in terms explicit to a case rather than abstract notions of justice), as well as making clear the consequences of the use of such information (eg mistrial resulting in a waste of time and resources, and also personal consequences such as fines or imprisonment), reiterating such information in subsequent judicial instructions, and providing written versions of this information.[50]

Pre-empanelment information arguably allows key concepts to "sink in" before the judge delivers directions to the jury. This early exposure reinforces those directions and provides a frame of reference that is, by then, familiar to jurors, now understood within the context of the trial rather than as abstract principles.

B *During the Trial: Judicial Instructions*

Although literature suggests that instructions have been given to juries for a long time, there is no evidence to suggest that these have been uniform.[51] These instructions were left to judges' discretion, who drew on their past experiences on the Bench. Due to either juror ignorance or blatant disregard for instructions when given, the courts have over time admonished juries on their duties and responsibilities at the beginning of each trial,[52] and often reminded them of these obligations at subsequent stages of the trial. This is becoming increasingly common with the advent of social media and extensive use of, and access to, internet

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[48] Victorian Law Reform Commission, *Jury Directions: Final Report* (Report No 17, September 2009) 30–1.
[49] Tasmanian Law Reform Institute, *Jurors, Social Media and the Right of an Accused to a Fair Trial* (Final Report No 30, January 2020) ('TLRI'). See also Jemma Holt and Terese Henning, *Jurors, Social Media and The Right of an Accused to a Fair Trial* (Tasmanian Law Reform Institute Issues Paper No 30, January 2020).
[50] TLRI (n 49) 72–4.
[51] Victorian Law Reform Commission, *Jury Directions: Final Report* (n 48) 38, 39.
[52] Aaronson and Patterson (n 26) 31.

services. What is clear is that these instructions need to keep abreast of changes in communications technology and be taken very seriously if the jury institution is to survive the test of time.

Carving out a standard jury instruction can be onerous and challenging, as it requires ensuring compliance across various courts, individual judges, and different jurisdictions. However, it is essential to note that guidance must be provided to jurors, particularly regarding the use of social media during the trial and post-proceedings. The TLRI has recommended implementing a standardised approach similar to that of New South Wales and Victoria, involving standard or model judge's directions to be delivered at the trial's commencement and reiterated in brief before extended trial adjournments and during jury deliberations.[53] These directions could include various aspects: explicit reference to social media usage; identification of prohibited internet and social media platforms (beyond merely 'Facebook'); clarification on forbidden activities related to both information "in"' and "out"; explanations outlining the rationale behind these restrictions; cautionary advisories regarding the repercussions of juror misconduct, emphasising its impact on the trial and the individual juror; and prompts urging jurors to report any irregularities and providing guidance on the reporting process. It was recommended that all this information be compiled in written form, disseminated to individual jurors, and prominently displayed in the jury room.[54]

Bench books in various jurisdictions in Australia provide suggested wording for judges when giving their directions to the jury.[55] Judges are not compelled to use this format and can express their directions in their own words, but the use of the Bench book is recommended for consistency.[56]

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[53] TLRI (n 49) 96.
[54] Ibid.
[55] See, eg, Judicial Commission New South Wales, 'Criminal Trial Courts Benchbook' (2002 updated April 2025) <https://www.judcom.nsw.gov.au/bench-books-resources/bench-books-handbooks/criminal-trial-courts-bench-book> [1.490]; Supreme Court of Queensland, '4B Jury Provided with Transcripts' (29 April 2024) <https://www.courts.qld.gov.au/__data/assets/pdf_file/0004/746518/sb-bb-4b-jury-provided-with-transcripts.pdf> [4B.3]; Supreme Court of Western Australia, 'Equal Justice Bench Book' (2021) <https://www.supremecourt.wa.gov.au/_files/Equal_Justice_Bench_Book.docx> [5.5.10]; Supreme Court of South Australia, 'South Australian Criminal Trials Bench Book' (July 2021) <https://www.courts.sa.gov.au/wp-content/uploads/wp-download-manager files/documents/bench%20books/> [4.12.8B]. See also Jonathan Clough et al, *The Jury Project 10 Years On: Practices of Australian and New Zealand Judges* (Research Paper, April 2019) 36.
[56] Ibid.

It might be suggested that providing jurors with information before their selection and issuing directions during trials about the misuse of social media might unintentionally trigger a 'forbidden fruit' effect.[57] This effect could potentially encourage jurors to pursue inquiries they might not have otherwise considered or felt tempted to explore. However, it is argued that this possible consequence is outweighed by the imperative of ensuring jurors fully comprehend the regulations concerning both "information in" and "information out".[58] Feedback from jurors indicates that explicit directives against social media usage were a primary factor in dissuading them from succumbing to this temptation.[59] Additionally, such instructions prevented inadvertent social media usage due to a lack of awareness about the rules.[60]

Some advocates have called for harsher punishments to address juror misconduct, ranging from steeper fines to a greater willingness by judges to impose incarceration.[61] The English case of *Attorney-General v Fraill*[62] serves as a pertinent example of the latter approach. Joanne Fraill, a juror in a prolonged multimillion-pound drug trial, was sentenced to eight months imprisonment for contempt of court after contacting a defendant, Jamie Sewart, via Facebook and engaging in online discussions, including topics related to jury deliberations. She also conducted independent internet searches on the defendants and other trial participants, introducing external information into the jury process.

While the High Court of England and Wales acknowledged that Fraill's actions were not motivated by malice or an intent to influence the verdict,[63] it concluded that her behaviour fundamentally compromised the principles of a fair trial, which require that the verdict be based solely on the evidence presented in court.[64] The punishment was not for the mere use of social media or conducting research but for her disregard of these foundational principles.[65] In similar cases within Australian jurisdictions, such misconduct could constitute contempt of court under common law or a breach of relevant statutory offences.[66]

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[57] TRLI (n 49) 57.
[58] Ibid 83.
[59] Ibid 22.
[60] Ibid.
[61] Thaddeus Hoffmeister and Ann C Watts, 'Social Media, the Internet, and Trial by Jury' (2018) 14 *Annual Review of Law and Social Science* 259, 267.
[62] *A-G v Fraill* [2011] 2 Cr App R 21 (EWCA).
[63] Ibid [55].
[64] Ibid [29].
[65] Ibid. See also David Harvey, 'The Googling Juror: The Fate of the Jury Trial in the Digital Paradigm' [2014] *New Zealand Law Review* 203, 213.
[66] *Jury Act 1967* (ACT) s 42C(2); *Jury Act 1977* (NSW) s 68B(1); *Juries Act 1962* (NT) s 49A(2);

Some commentators have suggested that jurors sign written statements, possibly under oath, committing to refrain from external research or communication, with the threat of sanctions for non-compliance.[67] However, such measures present significant challenges, particularly in preventing jurors from conducting independent research at home. This approach would only be practical if jurors were fully sequestered for the trial period, including restricted access to their devices—an impractical solution in most cases.[68]

Such punitive measures for addressing juror misconduct may be seen as overly harsh, potentially undermining the perception of jurors as responsible, rational individuals tasked with impartial fact-finding. The TLRI observed that, in practice, prosecutions for juror misconduct, whether under common law or statutory offences, are exceedingly rare.[69] This reluctance to prosecute often stems from several interrelated factors. First, jurors are generally individuals striving to fulfil their civic duties to the best of their abilities, and their misconduct is often the result of misguided or inadvertent actions rather than deliberate wrongdoing. Second, jury service is a fundamental civic responsibility that should be encouraged and supported rather than discouraged by the threat of punitive measures. Third, juror misconduct may reflect systemic shortcomings, such as failures by the court system or trial judges to adequately educate jurors about their duties and the significance of adhering to proper courtroom procedures. Finally, the risk of criminal penalties for misconduct could deter jurors from self-reporting irregularities, reporting others' misconduct, or even participating in jury service altogether, thereby undermining the effective operation of the jury system.[70]

The TLRI acknowledged the limited effectiveness of sequestering mobile phones during the trial day,[71] but recommended continuing this practice. Even if it does not eliminate the risk of jurors accessing external information, it minimises distractions during the trial and deliberations. Additionally, it reduces the temptation for jurors to resort to quick online searches during heated deliberations to resolve disputes, a behaviour commonly observed in social contexts.

Jury Act 1995 (Qld) s 70(4); *Juries Act 2000* (Vic) s 78(1); *Juries Act 2003* (Tas) s 58(1); *Juries Act 1957* (WA) s 56B(1).

[67] Aaronson and Patterson (n 26) 30.

[68] Justin C Dawson et al, *Strategies to Mitigate the Impact of Electronic Communication and Electronic Devices on the Right to a Fair Trial* (Research Paper, Rand Corporation, 2018) 11.

[69] TLRI (n 49) 121–2.

[70] Ibid 123.

[71] Ibid 101.

Ultimately, as the TLRI emphasised and as the authors agree, the solution lies in juror education rather than imposing stricter laws, sequestering jurors overnight, or entirely banning access to electronic devices. Education equips jurors to understand the importance of their role, the necessity of basing their verdicts solely on courtroom evidence, and the risks associated with relying on external information.[72]

C *Trial by Judge Alone?*

Finally, while this may be a subject for future research, it is essential to consider whether juries should be entirely replaced with judge-alone trials. This is possible and available in some Australian jurisdictions for indictable non-Commonwealth (state) offences.[73] The authors reside in Western Australia, where judge-alone trials are available upon application of either the prosecution or the accused.[74] Notably, this region has hosted two notorious and widely publicised judge-alone trials in recent memory, namely the Lloyd Rainey murder trial,[75] and the Claremont serial killer trial.[76] Some Australian jurisdictions have only recently enacted laws for judge-alone trials for indictable offences, such as Victoria in 2022,[77] which was too late for the trial of the late Cardinal George Pell, who was found guilty of five sex offences by a jury on 11 December 2018[78] when judge-alone trials were not available in that jurisdiction. Although a unanimous High Court decision on appeal ultimately exonerated Pell,[79] after an unsuccessful application to the Court of Appeal of Victoria which upheld the conviction in a 2:1 decision,[80] it is tempting to speculate that a verdict of not guilty would have been more likely to be handed down in the first place at a judge-alone trial. Indeed, it is naïve to believe that a juror could be found who had not been exposed to some form of publicity

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[72] Ibid 125.

[73] *Criminal Procedure Act 1986* (NSW) ss 132–3; *Criminal Code Act 1899* (Qld) s 614; *Juries Act 1927* (SA) s 7; *Criminal Procedure Act 2004* (WA) s 118; *Supreme Court Act 1933* (ACT) s 68BA. Judge-alone trials are not generally permitted in Victoria: see *Criminal Procedure Act 2009* (Vic). Temporary provisions introduced during the COVID-19 pandemic have since lapsed. There are no judge-alone provisions for indictable offences in Tasmania or the Northern Territory. For Commonwealth offences, see *Australian Constitution* s 80, which mandates trial by jury for indictable offences.

[74] *Criminal Procedure Act 2014* (WA) s 118(1). Prejudice to an accused is not cited as a specific ground but is covered by the broad term in the 'interests of justice': s 118(4).

[75] *Western Australia v Rayney [No 3]* [2012] WASC 404 (accused acquitted).

[76] *Western Australia v Edwards [No 7]* [2020] WASC 339 (accused convicted).

[77] Justice Legislation Amendment (Trial by Judge Alone and Other Matters) Act 2022 (Vic).

[78] See *Pell v The Queen* [2019] VSCA 186 ('*Pell VSCA*').

[79] *Pell v The Queen* (2020) 268 CLR 123.

[80] *Pell VSCA* (n 78). See also 'The Legal Trials of George Pell: Timeline', *The Guardian* (online, 7 April 2020) <https://www.theguardian.com/australia-news/2019/feb/26/rise-fall-george-pell-timeline>.

surrounding the facts of the case and the controversial figure of George Pell before the trial, even if exposure to extra-judicial information during the trial could be managed.

Of course, a judge-only trial is always only an option; it is not a complete substitute for jury trials, and better jury education is likely to limit the damage of social media abuse by jurors. However, finding an "untainted" juror is impossible for highly publicised trials such as the two Western Australian cases mentioned above (and, arguably, the Pell case in Victoria). Arguably, justice can only be served by a judge-only trial. This conclusion rests on the premise that judges, with their more profound understanding of the legal rules, are less likely to be influenced by social media and are better equipped to act as impartial arbiters in court. Of course, judges, like jurors, are only human and may well hold pre-conceived views that challenge their impartiality. However, unlike jurors, they have years of training to put such views aside when reaching a verdict. This is not the case for jurors who are relatively new to this self-imposed form of cognitive dissonance (giving precedence to facts and logic over feeling), perhaps only becoming aware of this for the first time when they hear the Judge's directions at the beginning of the trial about limiting the information they rely on for their deliberations only to what transpires in those proceedings and nothing whatsoever outside of that.

D *It's Jury Education, Stupid!*

Of all the proposed reforms to the jury system, jury education emerges as the most significant, serving as a foundation that underpins and enhances the effectiveness of other initiatives. An informed juror is less likely to engage in misconduct, whether through ignorance or wilful intent, particularly when reminded of their solemn duties and the potential consequences of non-compliance. Efforts in jury education have traditionally focused on pre-empanelment information and jury directions, as previously discussed. However, it is submitted that a classroom-style educational model, specifically designed to address the challenges that lay jurors face in understanding complex subject matter, is warranted. These challenges stem from the adversarial nature of litigation and jurors' traditionally passive role during trials.[81] This model recommends the appointment of an unbiased educator, selected through a process akin to appointing arbitrators, to provide jurors with foundational knowledge and relevant terminology in a neutral, classroom-like setting before trial proceedings. It is arguable that, particularly in complex litigation, an educational environment encouraging active participation through

[81] Niamh Howlin, 'Passive Observers or Active Participants? Jurors in Civil and Criminal Trials' (2014) 35(2) *Journal of Legal History* 146, 148.

questions, note-taking, and discussions under judicial oversight can equip jurors with the necessary tools to navigate intricate evidence and legal concepts. This approach reduces reliance on instinct and fosters informed and fair verdicts. While there may be concerns about the additional time required for this process, proponents contend that pre-trial education ultimately streamlines trial proceedings by minimising confusion and enhancing overall efficiency.[82] The authors argue that such a model could also mitigate issues of jury misconduct, including inappropriate use of social media, by ensuring jurors are better prepared and fully aware of their responsibilities.

While jury education is undeniably valuable, it does not guarantee that jurors will fully understand the instructions provided to them. There is a dearth of literature evaluating juror comprehension of jury instructions. Existing research highlights that even when simplified, standardised instructions remain challenging for jurors to understand.[83] Current methods for assessing juror comprehension, such as requesting summaries or using multiple-choice tests, tend to focus on memory rather than genuine understanding, potentially overestimating comprehension levels. Researchers have advocated for the use of hypothetical scenarios to evaluate jurors' ability to apply instructions,[84] as application reflects comprehension. Additional barriers, such as a lack of attention, motivation, or alignment with the instructions, may further impede jurors' ability to apply them effectively.[85]

The authors argue that assessing juror competency is a critical reform that warrants serious attention. Other stakeholders in a trial, apart from the parties themselves, undergo rigorous assessments of their professional qualifications. Lawyers must meet stringent standards to practice, and judges are drawn from the senior ranks of the legal profession. It is striking that jurors, who bear the crucial responsibility of making factual findings and determining a verdict, are subject to no formal testing of their suitability for the task. While some might advocate for judge-alone trials as a logical extension of this critique, given that judges are professionally qualified fact-finders, a compelling counterargument is that a jury of peers brings diverse life experiences and societal perspectives that legal professionals alone cannot provide.

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[82] Eg Keith Broyles, 'Taking the Courtroom into the Classroom: A Proposal for Educating the Lay Juror in Complex Litigation Cases' (1996) 64(4) *The George Washington Law Review* 714, 742–4.
[83] Chantelle M Baguley, Blake M McKimmie and Barbara M Masser, 'Re-Evaluating How to Measure Jurors' Comprehension and Application of Jury Instructions' (2020) 26(1) *Psychology, Crime & Law* 53, 60.
[84] Ibid.
[85] Ibid 55–6.

Nevertheless, the authors contend that the gravity of a juror's role necessitates an induction into the hermetically sealed world of the courtroom. This distinct environment operates under its own carefully controlled rules of evidence and often employs counterintuitive logic. An induction program would ensure that jurors understand their role and are equipped to engage meaningfully with the legal process. The authors propose a minimum one-day orientation and a test to evaluate comprehension. While this proposal may seem radical and could result in a reluctance to participate in jury service, it is suggested that even a minimal approach, such as online learning modules with quizzes to assess understanding, should become a standardised requirement. Such measures could be enshrined in legislation or implemented as subsidiary rules of court practice. Excess jurors, who are typically empanelled but not seated, could be discharged if they fail to meet competency standards. Admittedly, this could be a convenient "out" for those who want to avoid jury duty. Still, if they are willing to deliberately flunk a test to evade their civic responsibility of serving on a jury, perhaps they are not the kind of person anyone would want in a jury room anyway. Conversely, it is arguable that if a juror has had to "earn" their spot through passing competency standards, they are likely to be more engaged and take their responsibilities seriously. Testing would not be something designed to trip up potential jurors or try to select the "best of the best", but rather to inform and support them in their role as a juror. A similar approach to online workplace induction programs could be employed, where an inductee has the opportunity to retake the test a limited number of times until they pass it.

An alternative to the proposal for pre-trial induction programs is to integrate jury education into the Humanities and Social Sciences (HASS) curriculum at the high school level. By incorporating it into the syllabus and assessing it through standardised testing, students would gain a foundational understanding of the jury system and their potential responsibilities as jurors. Given that jury service is a compulsory civic duty for citizens,[86] this measure would prepare future jurors in advance, instilling the necessary knowledge and skills long before they are called to serve. This proactive approach not only complements existing education reforms but also ensures that civic education includes practical preparation for one of the most significant participatory roles in a democratic society.

[86] Eg *Juries Act 1957* (WA) s 4. See Jane Goodman-Delahunty, 'The Jury Box and the Urn: Containing our Expectations' (2015) *Pandora's Box* 9, 10–11.

Providing this foundational understanding during high school could alleviate the burden of extensive pre-trial education, and jurors would arrive at court with a baseline competence in legal concepts and the mechanics of jury service. This approach, while ambitious, aligns seamlessly with the overarching goal of enhancing the fairness and efficacy of the jury system. It ensures that jurors are not only representative of society but also adequately equipped to engage thoughtfully and meaningfully with their critical duties, contributing to a more robust and just judicial process. However, a potential drawback of this proposal is that the current pool of eligible jurors may not have benefited from such an education, making the interim measures proposed a practical and necessary solution in the meantime.

E *What a Standard Induction Program Could Look Like*

A standardised induction program might include the following modules:

> **Module 1**: An introduction to the nature of the courtroom and its special form of logic and rules of evidence, which dictate that facts can only be found based on admissible evidence, with illustrated examples of what is considered evidence (exhibits, admissions of fact, things said on oath by a witness) and what is not (judicial directions, assertions made by counsel in their submissions). The rationale for this seemingly strange hermetically sealed environment would be explained (ie preventing information from influencing a proper finding of the fact from sources that might not be reputable or opinions of others who have not had the benefit of being privy to the whole of the facts presented in the case), as would the fact that it is ultimately designed to promote fairness to the accused and ensure they are given a fair trial (which is something all of us would want).
>
> **Module 2**: Education about the types of "information in" which are prohibited, with particular emphasis on speaking to others and consulting social media, given the knee-jerk impulse of most people to consult others and Google information online to find out answers to almost everything. Emphasis must be placed on awareness of this impulse and the importance of keeping it in check in the trial setting.
>
> **Module 3**: Education about the types of "information out", again focusing on communication with others and using social media to report things. For those who have social media accounts, the focus should be on controlling the impulse to post information, for which awareness training is essential.

> **Module 4**: Focus on real-life case studies that illustrate the serious consequences of juror misconduct. These include mistrials, which may have devastating effects on victims who are then faced with the difficult choice of whether to endure the stress of a retrial. Some may ultimately choose not to proceed, denying them closure or justice. The impact on the accused can also be significant, particularly where misconduct results in extended periods on remand, sometimes for months or even years longer than necessary. This is especially troubling in cases where the individual is ultimately found not guilty.

V CONCLUSION

In summary, the hazard of social media for juries cannot be understated. Jury misconduct using the internet and social media has far-reaching impacts. The cost of such actions is dire. Hence, serious efforts should be made to curtail such happening moving forward.

The days of trial by jury in Australia may not be numbered, as it is a constitutional right, at least in Commonwealth indictable offences, and a mainstay of a fair trial for state indictable offences.[87] However, the need to regulate how these trials are conducted must be carefully considered. Given that use of social media is so ubiquitous now, it is difficult to think how a juror can properly discharge their obligations without doing what we all do instinctively every day — looking something up on the net. The temptation must be enormous, and the possibility of an inadvertent slip extremely high. Therefore, it behoves us to front-end jury education as much as possible and assess that the message has sunk in.

While the authors support the recommendations outlined in the TLRI's 2020 report, particularly those on jury education, they advocate for an additional reform: a system of testing to evaluate juror competence. This proposed measure is perceived as a reasonable requirement, drawing parallels to similar induction training and testing practices within organisational workplaces. Such practices aim to acknowledge the potential harm an individual can cause within that space, encompassing aspects like work health and safety, breach of copyright, and damage to the employer's reputation. Similarly, an errant juror's misuse of "information in" or "information out" can significantly impact a criminal trial, leading to substantial time, cost, and immense stress for trial stakeholders or potential personal consequences, including contempt of court charges and potential incarceration.

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[87] See generally Keith Thompson, 'Should We Reform the Jury? An Australian Perspective' (2023) 33(1) *Washington International Law Journal* 165.

Finally, the authors suggest the implementation of a standardised induction training and testing model, aiming for uniform legislation or subsidiary legislation across all Australian jurisdictions. This standardised approach seeks to ensure proven competence among jurors before they undertake their crucial duties. Similar to how individuals must demonstrate competence through obtaining a driving licence before operating a motor vehicle, jurors should also be taught and required to exhibit competence in this vital domain, considering the livelihoods and substantial implications at stake.

BOOK REVIEW

BENJAMIN GEVA AND SAGI PEARI, *INTERNATIONAL NEGOTIABLE INSTRUMENTS* (OXFORD PRIVATE INTERNATIONAL LAW SERIES, OXFORD UNIVERSITY PRESS, 2020)

PETER HANDFORD*

Books on conflict of laws range widely in scope, from general treatises such as the magisterial two-volume *Dicey and Morris*[1] and many other texts, classical and modern, to individual studies of particular aspects of the subject such as jurisdiction, contracts, and torts. Well represented also are theoretical studies of the choice of law process, with one of the present authors having already provided a recent addition to this notable corpus of scholarship.[2] The present work, however, is devoted to a sub-category of one of the major choice of law categories; it is the first study of the conflict of laws relating to negotiable instruments since the work of Ernest Lorenzen over a hundred years ago.[3] As such, it is a notable addition to the scholarly literature on conflict of laws.

However, the book is far from being simply a study of the relevant choice of law rules. It is avowedly reformist in character. The authors take the view that the current rules in England, Australia, the United States and elsewhere have become isolated from the general trend of developments in the rules governing contracts and movable property generally: they have remained ossified as a result of codification by legislation such as Chalmers' *Bills of Exchange Act 1882* in the United Kingdom and its equivalents in Australia and Canada, the *Restatement of the Conflict of Laws* and the *Uniform Commercial Code* in the United States, and various international conventions. This legislation commonly distinguishes between different issues such as formal validity, extrinsic validity and interpretation, and the various stages through which a bill or other negotiable instrument passes following creation, such as indorsement, negotiation and delivery. The connecting factors applied by the

* Emeritus Professor, University of Western Australia Law School. While the book under review was published in 2020, the 2025 release of several updated chapters attests to the significance of its contribution: see <https://academic.oup.com/oxford-law-pro/book/57030/chapter/ 523022753>.

[1] Lord Collins of Mapesbury and Jonathan Harris (gen eds), *Dicey, Morris and Collins on the Conflict of Laws* (Sweet & Maxwell, 16th ed, 2022).

[2] Sagi Peari, *The Foundation of Choice of Law: Choice and Equality* (Oxford University Press, 2018).

[3] Ernest Lorenzen, *The Conflict of Laws Relating to Bills and Notes* (Yale University Press, 1919).

various rules usually point to a territorial location, such as the place of making or the place of acceptance, rather than personal connecting factors associated with the parties, such as their residence or place of business.

The core argument in this work is that the existing rules should largely be abandoned in favour of reuniting the choice of law rules relating to negotiable instruments with those relating to contracts generally, and the closely related area of movable property. The authors trace the important development forward from the work of Beale and the *First Restatement*,[4] adopting principles that choice of law rules in the area of contract should be fixed, certain, and independent of any element of party choice, to the *Second Restatement*,[5] which abandoned Beale's approach in favour of a general principle of party autonomy, supported by reference to the most significant relationship ('MSR') principle in the absence of party choice, with various presumptions to assist this process. The same trend can be seen at work in Anglo-Australian conflicts law, with most matters now being referred to the proper law of the contract, which the parties are free to choose, or the law of closest connection if they fail to do so.

The case for this change in approach is convincingly argued in Chapters V and VI, and the book ends with a 'suggested framework' after the manner of a summary of recommendations in a law reform commission report. However, all the chapters contribute to the argument being advanced. Chapter I introduces readers (many of whom may not be overly familiar with the law relating to negotiable instruments) to core concepts such as negotiability, together with a brief history of the codification of the law relating to the principal negotiable instruments — bills, notes and cheques — in England, the United States, and elsewhere. This chapter reveals the breadth of the comparative approach adopted by the authors, which ranges over not only all the major common law systems but also the civil law world, dominated by the Geneva Conventions and the various Rome treaties of the European Union. Chapter II provides a learned historical perspective, outlining the story of bills, notes, and cheques from their origins in the ancient world, through the Jewish Talmud, Islamic law, and Roman law, to medieval Europe and their reception in England — on the way demolishing the 'myth' that there was once a commonly accepted body of rules sourced from the 'law merchant'. This historical perspective is extremely valuable in its own right, but is far from being just an add-on bonus to a work devoted to conflict

[4] American Law Institute, *Restatement of Conflict of Laws* (1934); Joseph H Beale, *A Treatise on the Conflict of Laws* (Baker, Voorhis & Co, 1935).
[5] American Law Institute, *Restatement (Second) of Conflict of Laws* (1971).

of laws principles: historical considerations become important planks in the argument at various points, for example in para [5.49].

Chapter III provides background of another kind by setting out the general principles relating to choice of law, both generally and in the context of contract, adopting the same wide comparative approach. The authors give prominence to the process already referred to, by which Beale's vested rights theory that dominated the original Restatement was replaced by a more flexible approach giving rein to party autonomy and the MSR principle. Chapter IV then outlines the existing choice of law rules applicable to negotiable instruments, again considered comparatively.

Chapters V and VI, as noted, contain the core of the authors' argument for a new approach to choice of law in this field. This approach brings negotiable instruments into line with the choice of law rules now followed for contracts generally and movable property, and makes it possible for the parties to choose the law by which the transaction is to be governed, in the absence of such a choice looking to the law of the MSR. Chapter V also contains another significant proposal: that the orthodox precondition that opens the door to the application of conflicts principles — that the case should be one which involves a foreign element — should be relaxed or eliminated in this context. The authors argue convincingly that the distinction drawn between 'inland' and 'foreign' bills by legislation such as s 72 of the *Bills of Exchange Act* is now outmoded. This section of Chapter V, allied with the earlier discussion in Chapter III, shows that the authors are clearly in sympathy with those who have argued that conflict of laws should perhaps not be reserved simply for cases involving a foreign element, but may have a wider role to play, explaining which laws apply even in purely 'domestic' cases.[6]

Chapter VII supports the principal recommendations by dealing with a number of more detailed matters. It challenges the idea (found in the existing choice of law rules for contract) that the general approach should be modified in relation to particular issues, such as capacity or formal validity, in order to provide other avenues by which contracts may be validated in difficult cases. It confirms that the proposed reforms should have a wide scope, applying to most issues involving negotiable instruments, including property aspects, and questions involving remedies and limitation periods. And it argues that the rules should be applied not only to traditional negotiable instruments but also to documents of title to goods such as bills of lading, and securities such as shares and bonds, on the ground that they share some of the characteristics of negotiable instruments, such as

[6] See, eg, Josef Unger, 'The Unknown Province of the Conflict of Laws' (1957) 43 *Transactions of the Grotius Society* 87.

negotiability. The interesting discussion in this chapter is then followed by an equally interesting argument in Chapter VIII that the authors' proposed approach is entirely capable of being applied to negotiable instruments in the electronic age, even though there is no longer any paper document to be created, signed, and delivered in the traditional manner.

The authors have provided a stimulating and original approach to a long-neglected topic. Their proposals deserve serious consideration by bodies such as the Law Commission of England and Wales, which, during the time conflict of laws scholar Peter North was a member, reformed and modernised many areas of this subject. The book is a worthy addition to the Oxford Private International Law Series, an allegiance confirmed by the handsome hard cover binding. It is not perfect; there are a number of typographical and language errors and some strange missing case references, all of which could have been eliminated in the editing process, but none of which distract the reader from the important arguments being put forward. The book shows that it is still possible — in conflict of laws at any rate — for scholars to survey the broad field of the common law, rather than concentrating on a single jurisdiction. The authors are particularly well qualified for this task, having each received their early legal education in Israel, one now being an established scholar in Canada, the other having moved on from Canada to Australia, and both having published widely including in United States journals: to complete the picture, this book has been published by a leading English publisher. Fortunately, it is not necessary to apply the MSR principle to this work; it deserves to be read widely throughout the common law world.

BOOK REVIEW

DANIELLE IRELAND-PIPER (ED), *NATIONAL SECURITY LAW IN AUSTRALIA* (FEDERATION PRESS, 2024)

PHIL GLOVER*

This national security educator has likely not been alone in lamenting the absence of a single, Australia-focused, "reference" text addressing relevant law, policy and live issues, and featuring contributions from globally renowned experts from which modular, "scaffoldable" topic learnings can be offered to cross-disciplinary students.[1] Thankfully, rejoicing is now in order following the arrival of this indispensable edited collection. The credentials and subject-matter expertise of the editor and the contributors she has assembled need no restatement here.[2]

Contextualising national security law marks a logical starting point for educators and students alike. In Chapter 1, the editor asks, 'What is National Security Law in Australia?', observing that 'notions of…[it]…are broadly conceived…[engaging] …with the work of philosophers, ethicists, scientists, economists, political scientists and technology specialists'.[3] It would be a lazy reviewer, however, who simply plagiarised the succinct chapter summaries the author goes on to offer, so I revisit them here from the perspective of a national security law researcher and unit coordinator for the cross-disciplinary unit 'Security and Intelligence Governance'.

In Chapter 2, 'History, Concepts and Constructs in National Security Law', James Mortensen[4] examines the evolution of 'collective security' in the debates accompanying League of Nations attempts to establish a system of international law. He then 'interrogates the outcome of these debates (such as it impacted our understanding of "security") by comparing…(then Oxford Professor and Westminster MP) Arthur Salter and…[German academic and Nazi Grand Jurist]… Carl Schmitt'.[5] This is used to 'demonstrate the importance of law to security, both in the way in which security evolved historically, and how the debates of that history

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1 In his foreword, Professor Rory Metcalfe, Head of the National Security College at the Australian National Security College, states that the collection 'merits a place, not only in law curricula, but in the reading lists of any institution teaching Australian security'.

2 See 'About the Contributors' in Danielle Ireland-Piper (ed), *National Security Law in Australia* (Federation Press, 2024) xi–xv.

3 At 2.

4 Senior Lecturer, National Security College, Australian National University.

5 At 25.

may better inform the way security is enacted today'.[6] In addition to providing an appropriate foundation for understanding Australia's national security legal architecture, the key learning outcome for critical thinkers appears in his profound conclusion:

> An important but difficult question those involved in national security must ask themselves is "from where does the legitimacy of our law derive, and how will this act/law affect that legitimacy?" Too often the answer…becomes simplistic — "the social contract" (vaguely construed), for example…our security laws and practices have an enduring effect on the sort of nation that is continually being created and recreated through legislation and public discourse. It is important therefore to consider what effect an act will have not only in practice but in…our deeper notion of law…Regardless of what is chosen to place as the justifying notion of law or state action, creating exceptions to legal norms-something that is often the purview of national security law — challenges by its very existence the normative function that law serves…any weighing up of the freedom of individuals against the needs of the state, or the proportionality of a law against existing norms is worthwhile. However, when a security policy or law is analysed, it should also be considered how it is that rights, security, and the state we seek to secure is underwritten.[7]

In Chapter 3, 'Powers and Functions of National Security Agencies', Australia's current Independent National Security Law Monitor ('INSLM'), Jake Blight, not only comprehensively fulfils the title's mandate, but supplements this with measured and pertinent analysis regarding the rule of law. For those expecting "boilerplate" fare wherein *all* executive conduct is likely justiciable, his observation that 'agencies are largely exempt from most of the other forms of regulation and oversight that apply to Commonwealth government agencies…[meaning that]…[t]here is almost no practical avenue for judicial review of any type',[8] is both sobering and confronting, and resurrects Mortensen's Chapter 2 conclusion.

In Chapter 4, 'The Separation of Judicial Power and National Security', Rebecca Ananian-Welsh[9] reinforces the INSLM's observations. She examines the erosion, primarily due to judicial deference, of formerly clearer constitutional boundaries between the executive and judicial arms. She concludes that '[p]reventive constraints on liberty…once thought of as extreme, even unthinkable, []now have a

[6] Ibid.
[7] At 38.
[8] At 40.
[9] Associate Professor, TC Beirne School of Law, University of Queensland.

settled place within "the judicial power of the Commonwealth"'.[10] In another sobering and confronting section, 'Secret Evidence, Closed Justice', she compellingly critiques the seemingly infinite scope and at times authoritarian impact of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).[11] Her analysis draws on the most serious examples of the Act's application to court proceedings ('Witness K' and the Solzhenitsyn-like 'Witness J' proceedings),[12] as well as the jurisprudence affirming the Act's constitutionality (*R v Lodhi*[13] and *Assistant Commissioner Condon v Pompano Pty Ltd*).[14] Her next section, 'Preventive Justice',[15] critically examines the Control Order and Preventative Detention schemes within the *Criminal Code Act 1995* (Cth), again providing scholars with the essential case law illustrating the scheme's impact and constitutionality.[16] Perhaps more than in any other chapter in the collection, the author's writing *demands* critical thinking from today's scholars, who are, after all, tomorrow's practitioners and reformers. Her unmissable conclusions are pure 'truth to power',[17] culminating with a call for judges to 'dig in and get their hands dirty…to defend the rule of law'.[18]

In Chapter 5, 'Executive Power and National Security', Patrick Emerton[19] asserts that the executive's powers in national security matters 'remain a matter of ambivalence in Australian law'.[20] Drawing on French CJ's description of executive power in *Williams v Commonwealth*,[21] he opines that

> [while] the executive's power is sourced in the Constitution…it can be explained by reference to constitutional law and profound constitutional principles…[those]…same constitutional considerations give rise to uncertain exceptions to the limits on that power, when what is at stake is national security…[thus risking]…unprincipled, even arbitrary, exercises of executive power…[and even] departures from the rule of law.[22]

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[10] At 93.
[11] At 81–6.
[12] Citation unavailable, however the proceedings are examined in Independent National Security Legislation Monitor, 'The Operation of Part I, Division I of the *National Security Information (Criminal and Civil Proceedings) Act 2004* as it applies in the Alan Johns matter' (2022).
[13] [2006] NSWSC 571.
[14] (2013) 252 CLR 38.
[15] At 57.
[16] See *Thomas v Mowbray* (2007) 233 CLR 307; *Benbrika (No 1)* (2021) 272 CLR 68.
[17] At 93.
[18] Ibid.
[19] Professor, Deakin Law School.
[20] At 94.
[21] (2012) 248 CLR 156, 184–5 [22].
[22] At 95.

Given the compelling evidence of this provided by Ananian-Welsh, Emerton's chapter might have been better placed *before* hers, but the point is moot. In concluding that the 'mechanism of parliamentary democracy',[23] including current oversight arrangements, 'provides a solution to the ambivalent status of executive power',[24] it is difficult to avoid the inference he is not fully convinced. Chapters 3 and 4 provide solid grounds as to why.

In Chapter 6, 'Australian Federalism and National Security Law', the editor and James Mortensen combine to introduce federalism and its constitutional underpinnings. Following on from a succinct yet comprehensive 'Historical Context' section,[25] the *Australian Constitution*'s enumerated and plenary legislative national security powers are discussed,[26] followed by sections on the heads of Commonwealth legislative power ('defence' and 'external affairs'),[27] constitutional restrictions on said powers,[28] and the effect of s 119,[29] where leading case law is used effectively to illustrate the influence of the judicial arm in shaping the operational environment. Understanding the 'rigorously contested'[30] and 'politically and legally charged'[31] nature of Australian federalism is essential introductory reading.

No treatise on national security is complete without reference to internationally recognised human rights norms and the various imperatives to ensuring states' laws in the national security arena do not unduly infringe them. In Chapter 7, 'Human Rights and National Security', Maria O'Sullivan[32] concisely outlines Australia's international obligations (the 'International Bill of Rights' and supplementary 'soft law' principles)[33] and Australia's domestic human rights framework,[34] before outlining the domestic context, noting the 'problem' regarding full implementation of international norms posed by Australia's dualist system and illustrating the dearth of case law (other than terrorism cases) that has addressed human rights aspects of national security before federal courts.[35]

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[23] At 113.
[24] Ibid.
[25] At 117–125.
[26] At 125–7.
[27] At 127–131.
[28] At 131–3.
[29] At 133–8.
[30] At 139.
[31] Ibid.
[32] Associate Professor, Deakin Law School.
[33] At 141–2.
[34] At 143–5.
[35] At 153.

In Chapter 8, 'Gender and National Security', Susan Harris-Rimmer[36] and Elise Stephenson[37] offer a feminist critique of Australia's national security law, policy and culture, asserting that 'heteronormative, cis-gendered male experience underpins Australian national security policy and law, while masquerading as ungendered and neutral'[38] and that 'key documents, policies, laws and principles remain mostly created by men'.[39] The assertion that 'sovereignty (as a national security concept) has completely ignored or marginalised First Nations conceptualisations of sovereignty'[40] should prick consciences and merits further discussion (indeed a chapter on First Nations perspectives in this collection would have been welcome), as do the propositions that domestic violence and extreme misogyny represent national security threats.[41]

In Chapter 9, 'Citizenship and National Security', Sangeetha Pillai[42] outlines the history of citizenship-stripping as a national security tool, and critically assesses the Commonwealth legislature's bipartisan efforts to draft statutory measures conforming with Australia's *Constitution* and international instruments such as the *Principles on Deprivation of Nationality as a National Security Measure*.[43] The irony that, despite the political attractiveness of deploying citizenship deprivation as a "tough on terrorism" policy tool, and the enactment of several iterations of citizenship deprivation laws in response to adverse judicial findings such as those in *Benbrika,*[44] 'everyone who has been stripped of their Australian citizenship on national security grounds since 2015 now has that citizenship back' is made crystal clear. [45]

In Chapter 10, 'Counter Terrorism and National Security', the doyens of scholarship in this domain, George Williams AO[46] and Keiran Hardy,[47] explore Australia's now labyrinthine and perennially politicised counterterrorism legislation architecture, stated as comprising almost 100 statutes.[48] Whilst affirming the necessity for counterterrorism measures, they highlight the reality of the at times

[36] Professor, Griffiths University.
[37] Deputy Director, Global Institute for Women's Leadership, Australian National University.
[38] At 165.
[39] At 166.
[40] Ibid.
[41] Ibid.
[42] UNSW, Senior Research Associate, Andrew and Renata Kaldor Centre for International Refugee Law.
[43] At 212–6. For the principles, see Institute on Statelessness and Inclusion, *Principles on Deprivation of Nationality as a Security Measure* (2020) <DOnehttps://files.institutesi.org/PRINCIPLES.pdf>.
[44] *Benbrika v Minister for Home Affairs* [2023] HCA 33.
[45] At 212.
[46] Vice Chancellor and President, Western Sydney University.
[47] Associate Professor, School of Criminology and Criminal Justice, Griffith University.
[48] At 217.

disproportionate infringements of national security laws on internationally recognised human rights norms, further reinforcing the numerous examples in prior chapters.

In Chapter 11, 'Espionage, Foreign Interference and Foreign Influence', Dominique Dalla-Pozza[49] offers a topical, valuable and plain-English deconstruction of how the Australian government understands these three relatively recent concepts, her descriptive nous meaning that scholars new to them can readily acquire understanding. The *National Security Legislation Amendment (Espionage and Foreign Interference) Act 2018* (Cth) and the *Foreign Influence Transparency Scheme Act 2018* (Cth) schemes are explained, the author noting that both were drafted in response to intelligence community advocacy that the three distinct forms of conduct posed a threat to 'Australia's "way of life"',[50] as opposed to actual lives.[51] Her postscript highlights a recurring theme in this collection, namely that of "legislate in haste, repent at leisure", observing that in 2024 the Parliamentary Joint Committee on Intelligence and Security found the *Foreign Influence Transparency Act* 'largely ineffective',[52] making fourteen recommendations for reform.[53]

In Chapter 12, 'Cyberspace and National Security', Samuli Haataja[54] and Dan Sventesson's[55] opening sentence almost understates the relevance and crucial importance of an effective cybersecurity strategy to address cyber threats to national security.[56] The authors outline key aspects of Australia's cybersecurity legal framework, noting the absence of a single statute and 'a patchwork of rights and obligations', again a recurring theme in this collection. They then examine international law's influence on states' national security activities in cyberspace.

In Chapter 13, 'Biosecurity as National Security', Wendy Bonython[57] addresses the sobering reality manifested in the recent Covid-19 pandemic that biosecurity measures are an essential pillar in broader national security law and policy. Readers are introduced to the distinct concepts of biological warfare, bioterrorism, and biocrime, in commendably plain-English prose. Following a context-setting

[49] Senior Lecturer, Australian National University Law School.
[50] At 232, quoting Mike Burgess, 'Director-General's Annual Threat Assessment' (Speech, Canberra, 9 February 2022).
[51] Ibid.
[52] At 260, discussing Parliamentary Joint Committee on Intelligence and Security, Commonwealth Parliament, *Review of the Foreign Influence Transparency Scheme Act 2018* (Report, March 2024) [4.10]–[4.11] ('Parliamentary Joint Committee').
[53] At 260, discussing Parliamentary Joint Committee (n 51) [4.13]–[4.123].
[54] Associate Professor, Griffith Law School.
[55] Professor, Faculty of Law, Bond University.
[56] At 284.
[57] Associate Professor, Faculty of Law, Bond University.

chronology of states' biosecurity measures (principally quarantine-driven), there is a useful overview of Australian biosecurity legislation (the *Biosecurity Act 2015* (Cth) and *National Health Security Act 2007* (Cth)) and reference to the influential Beale Report which influenced both.[58] Oddly, the section is headed 'Key *Cases* and Materials'[59] yet contains no case law. This oversight does not detract from the chapter's analytical depth however, with the following section educating readers on relevant international and other legal instruments relevant to Australia's biosecurity.[60] The chapter confronts head on some of the ethical and moral debates that arose during 2021–22 in relation to the Covid-19 pandemic,[61] and offers balanced as opposed to emotive analysis. Biosecurity arguably plays second fiddle (in terms of perceived importance) to cybersecurity concerns. The author's contribution to this collection compellingly corrects that injustice.

For anyone positing that the use of lethal weapons by domestic law enforcement agencies might fall outside the umbrella of "national security" law, in Chapter 14, Brendan Walker-Munro[62] cleverly deploys "core" national security law (s 4 of the *Australian Security and Intelligence Organisation Act 1979* (Cth)) to counter-argue. In an era where security is being increasingly impacted by developments in AI, quantum computing, and other technological developments, the author provides readers with a comprehensive overview of the legal bases (common law and statutory) for the use of lethal force by law enforcement agents,[63] and by the Australian Defence Force ('ADF') in support of law enforcement;[64] and the legal and policy debates addressing states' use of lethal force by autonomous weapons.[65] Given the lethality discussed, his cogent conclusions are instructive.

In Chapter 15, 'The Law of the Sea and Maritime Security', Keilin Anderson[66] and Douglas Guilfoyle[67] firstly articulate what 'maritime security' means,[68] before outlining the international law of the sea and state jurisdiction,[69] and Australia's maritime security architecture (principally the Guide to Australian Maritime

[58] At 293–303.
[59] At 294.
[60] At 303–9.
[61] At 303–314.
[62] Senior Lecturer, Faculty of Business, Law and Arts, Southern Cross University.
[63] At 321–6.
[64] At 326–9.
[65] At 329–334.
[66] Senior Legal Officer, Australian Government Attorney-General's Department and Sessional Academic at Australian National University.
[67] Professor, UNSW Canberra.
[68] At 339–342.
[69] At 343–6.

Security Arrangements and the Civil Maritime Security Strategy). The role of the Maritime Border Command (a division of the perhaps better known Australian Border Force) is explained.[70] The matrix of relevant legislation is also succinctly explained.[71] In addition to case studies on the oft-controversial media favourites of 'unauthorised maritime arrivals'[72] and 'illegal, unreported and unregulated'[73] fishing (a key UN Food and Agriculture Organisation issue), there is a short, yet high-value articulation of Australia's 'dedicated regime for the protection of submarine cables'.[74] This is an effective complement to Chapter 12, the role of submarine cables in critical infrastructure and cybersecurity discussions being regularly under-discussed.

In Chapter 16, 'International Humanitarian Law and National Security', Lauren Sanders[75] explores 'the nexus between…global, regional and national security'[76] as impacted by international humanitarian law, particularly in light of the expeditionary activities of the ADF.[77] It might be argued that these activities are less about protecting Australia's national security than contributing to global efforts towards peacekeeping, but the author's chapter convincingly demonstrates the relevance of international humanitarian law applicable to national security (not least the state's monopoly on the use of violence) as well as its application to ADF operations beyond, but on behalf of Australia. The section addressing detention,[78] prisoners of war[79] and internment[80] adds genuine educational value to national security law scholarship, and the inclusion of a comprehensive synopsis of international law, domestic legislation and leading relevant cases completes the reader's immersion in this area.

Chapter 17, the final chapter, entitled 'Space Law and National Security', addresses the final frontier in national security. It opens with Melissa de Zwart[81] compellingly articulating *why* space constitutes a national security issue and the leading relevant theories.[82] The following section on regulation is short, primarily because of the

[70] At 344.
[71] At 346–350.
[72] At 350–3.
[73] At 353–5.
[74] At 355–6.
[75] Adjunct Associate Professor, TC Beirne School of Law, University of Queensland.
[76] At 360.
[77] See ibid.
[78] At 371–2.
[79] At 372–4.
[80] At 374–5.
[81] Professor, Space Law and Governance, University of Adelaide.
[82] At 390.

place of space as perhaps a last bastion of national security operational secrecy — the opaque space-related provisions of the *Space (Launches and Returns) Act 2018* (Cth) and *Security of Critical Infrastructure Act 2018* (Cth) used as evidence.[83] The chapter focuses instead on the relationship between space technology and military technology, international regulation of space, and even "games" national security situations potentially arising from a return to the Moon. The increasing role of non-government entities in space is also discussed.[84]

By way of closing (dispensable) "quibbles" to offset the gushing and deserved praise lavished on the collection so far, the first is that its content and ultimate importance to the literature has been arguably undersold by its title, which more accurately might read, 'Australia's National Security: Law, Policy and Contemporary Issues' given its inclusion of chapters discussing human rights, separation of powers, lethal autonomous weapons in policing, and gender. Furthermore, the absence of dedicated contributions discussing climate change and Indigenous Australian perspectives is noticeable. To conclude in this way would be churlish, however. This is a collection of the highest quality scholarship in the national security discipline in Australia, edited and contributed to by an eminent scholar. It is an essential addition to the national security literature that will appeal domestically and internationally, across many disciplines beyond law.

[83] At 391.
[84] At 401–7.