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Please address all enquiries to:
The Editor, ONYX
Blackstone Society Inc.
c/- Faculty of Law M253
The University of Western Australia
25 Stirling Highway
CRAWLEY WA 6009

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The Blackstone Society Acknowledges that the Univeristy of Western Australia is situated on the land of the Wadjuk people of the Nyoongar Nation. We acknowledge that this land was stolen, never ceded, and pay our respects to Elders past, present and emerging.

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FROM THE EDITOR

Welcome to the 2020 issue of Onyx, the Blackstone Society's academic journal. Originally established in 1992, Onyx presents an opportunity to publish a selection of outstanding research conducted by law students at the University of Western Australia.

This year has been unique for everyone and certainly highlighted the technology theme focused in Volume 29 (2019). This year a number of the submissions highlighted flaws and substantial changed within our legal system, as well as the administration of justice within that scope. I believe the prominence of these subjects within student's submissions demonstrates the growing awareness of academics to important societal issues.

Firstly, I must thank the members of the Blackstone Society who ensured this year's publication made it to the printer. It has been an honour to work with Roderick Gillis throughout the year and I am certain he steered me in a direction that made this publication one I am proud of. His assistance and encouragement cannot be stated enough. I would also like to extend thanks to Karnabi Hughes and Blackstone's marketing team, for encouraging students to submit their papers, without whom there likely would be a much smaller publication.

Secondly, I would like to thank Patricia Cahill SC, who kindly agreed to pen this year's foreword for Onyx. Patricia needs no introduction, but is an alumni of the UWA Law School, joining the Bar in 2004, being

appointed Senior Counsel in 2009. Patricia has demonstrated the many qualities we should aspire for in law school, continuing into practice within the profession. Patricia is incredibly generous, offering her time and advice to those who need it but will stand for what she believes in, even if they are divisive issues such as has arisen during COVID-19. Patricia's compassion, generosity and belief in the legal system to deliver justice led me to ask for her input on this publication in the form of a foreword. I feel her contribution highlights the themes of many submissions and I cannot thank her enough for her time and effort and am delighted to have her words preface this year's journal.

Lastly, I would like to thank every student who submitted their papers to Onyx this year, I would include many more within this publication if I could. Without these students there would be no publication, and as always, the quality of submissions was impressive, they should all be incredibly proud of their achievements.

I hope that you enjoy reading this year's articles as much as I enjoyed curating them and putting them together. This year's edition was made during some of the weirdest time's of my life, a mixture of isolation and absurd normality, but I think technology has ensured that despite COVID-19, Volume 29 is one Blackstone can be proud of.

Elliot Lawrence Holland

Editor

FOREWORD

The idea for this foreword came about a few weeks ago. At the end of another busy day, a few barristers at Francis Burt Chambers came together, as we do from time to time, to swap stories about our adventures during the week and to discuss the big and small things of mutual interest to us.

There was, unsurprisingly for the times, a fair bit of Covid-related chatter; the High Court challenge to WA's hard border, all the (quite literally) weird and wonderful changes to court appearances the pandemic has caused. In that context, we debated whether it was important for litigants and judges to be together physically when a case is heard. That then led us into a broader discussion about justice and, specifically, our best experiences of it in our professional lives so far.

On that last topic, it was interesting to note that some of our most memorable experiences of justice administered or received had occurred in the everyday 'mundane' work of the legal system.

There are, thankfully, many examples that spring readily to mind of justice being administered well on big occasions, with the system fully on show. A recent example was the trial of Bradley Robert Edwards. What a magnificent effort from judge, prosecutor and defence counsel, all striving to make sure that the accused received a fair trial and verdict and that both were perceived as such by the community.

As to the smaller occasions, only a couple of illustrations are needed to make the point.

Take the self-represented party appearing in an administrative tribunal. Their case was hopeless. However, they were treated with respect, consideration and, most importantly, fairness by both the decision-maker and the legal practitioner representing their opponent. Although unsuccessful, the self-represented person gained insight into and respect for the decision-making process and the decision itself. They left the process technically 'unsuccessful' but restored.

That is a great example of the administration of justice working well.

Take the elderly woman whose fractious relationship with her brother over many decades had caused her no end of unhappiness. A dispute over some jointly held property of relatively small value was the vehicle through which they continued to bicker and provoke each other. The lawyers on each side worked together to reach an agreed outcome that allowed brother and sister to go their separate ways and finally move on. The elderly woman reported to her lawyer that the outcome had changed her life and set her free.

The lawyers in that case managed to negotiate an outcome that proceeding to trial and judgment could not. They not only resolved the dispute before the court but brokered a wider peace between the siblings. It is easy to see how well justice was delivered on that occasion.

There are many other such examples that occur every day in courts and tribunals across the country, in barristers' chambers, in law firms and in sole practices. Oftentimes the issues and disputes that are being attended

to are not of any great value or moment to anyone other than the parties involved. But the willingness and ability of the legal system to strive to deliver justice on each and every occasion is a marvellous thing to see in action.

In reading the articles in this year's edition of *Onyx,* I look forward to unearthing discussions about our legal system and the administration of justice on both the big and small occasions. I hope you do too.

Patricia Cahill

16 October 2020

JOURNAL ARTICLES

NEGLIGENCE LAW AND THE HEALING OF INTERGENERATIONAL TRAUMA

Ranya Al-Doori

I INTRODUCTION

The suffering of the survivors of the Stolen Generations is still felt by their children and grandchildren today. The devastating effects of the violence, abuse, and forceful deculturalisation suffered by many of the Aboriginal and Torres Strait Islander people have manifested in forms of poor physical and mental health, substance abuse, behavioural problems, attachment issues, family violence and self-harm.[1] These forms of historical trauma that have been transmitted across generations are described as 'intergenerational trauma' by the Healing Foundation.[2] Justice Gray's decision in *Trevorrow v South Australia [No 5]* (*'Trevorrow'*),[3] followed by the South Australian Court of Appeal's decision in *South Australia v Lampard-Trevorrow* (*'Lampard'*),[4] brought hope to the survivors of the Stolen Generations as the first successful case where a court found for a Stolen Generations victim, and awarded him damages. These decisions highlighted the potential of negligence law as a powerful tool for compensatory justice. However, the extent to which

[1] Patricia Anderson and Edward Tilton, 'Bringing Them Home 20 years on: an action plan for healing' (Report, The Healing Foundation, 23 May 2017), 4.
[2] Ibid, 22.

[3] *Trevorrow v South Australia (No 5)* (2007) 98 SASR 136 ('*Trevorrow*').

[4] *South Australia v Lampard-Trevorrow* (2010) 106 SASR 331 ('*Lampard*').

negligence law can contribute to the healing of intergenerational trauma is hindered by both, the litigation process, as well as the needs of the healing process.

II DIFFICULTIES OF LITIGATION PROCESS

Bringing an action in negligence requires proving a breach of duty.[5] Any claims by Stolen Generations survivors of breach of statutory duty are assessed according to the 'standards of the time'.[6] This approach, also taken by the High Court,[7] requires the judge/s to consider the legislative intent at the time the events took place. In *Trevorrow*, Gray J found that 'the imposition of a duty would not "cut across" the legislative intent'.[8] Although Gray J's finding was in favour of the plaintiff, its significance for other Stolen Generation survivors is unclear as the court in *Lampard-Trevorrow* attributed this finding to the wording of South Australia's *Aborigines Act*,[9] which explicitly refers to the 'protection and welfare of Aborigines and Aboriginal children'.[10] Although the 'standards of the time' was not injurious to Bruce's claim due to the clear wording of the

[5] Thalia Anthony, 'FRAMEWORKS FOR INCLUDING INDIGENOUS ISSUES IN TORTS: STOLEN GENERATIONS CASE STUDY' (2012) 4 *Ngiya: Talk the Law* 30, 36.

[6] Chris Cunneen and Julia Grix, 'The Limitations of Litigation in Stolen Generations Cases' (Research Discussion Paper No 15, Australian Institute of Aboriginal and Torres Strait Islander Studies, 2004) 41.

[7] *Kruger v Commonwealth* (1997) 190 CLR 1, 36–7 (Brennan CJ), 52–3 (Dawson J).

[8] *Trevorrow* (n 3) [1043].

[9] *Aborigines Act 1934* (SA).

[10] *Lampard* (n 4) 406 [366]–[367] (Doyle CJ, Duggan and White JJ).

legislation in question, the courts had previously applied this approach to find against Stolen Generation claimants.[11] This significantly impacts the ability of Stolen Generation survivors to seek redress through negligence law as the willingness and the ability of the common law to 'adjudicate historical wrongs of the state' are limited by precedent.[12] Nonetheless, the courts' findings in *Trevorrow* and *Lampard-Trevorrow* present the potential of common law, specifically negligence law, as 'a significant site for the adjudication of these important, enduring harms'.[13]

Claims by Stolen Generations survivors arising from negligence are subject to statutory limitation periods. The courts can extend limitation periods, however, they may refuse to exercise this discretionary power on the grounds that it would result in an 'overwhelming prejudice' to the defendant.[14] In *Trevorrow*, the limitation period bar was lifted as the State's conduct was found to have 'materially contributed to the delay in bringing proceedings at the outset'[15] and that any prejudice to the state 'is materially offset by the comprehensive and voluminous records kept by officers of the Aborigines Department, Department of Aboriginal Affairs and of the Child Guidance Clinic'.[16] To this effect, Bruce Trevorrow's success in bringing an action against the State was made

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[11] *Cubillo v Commonwealth* (2000) 103 FCR 1 ('Cubillo'), 483 [1561] (O'Loughlin J).
[12] Honni van Rijswijk and Thalia Anthony, 'Can the Common Law Adjudicate Historical Suffering', (2012) 36 *Melbourne University Law Review* 618, 621.
[13] Ibid, 620.

[14] Ibid, 636.

[15] *Trevorrow* (n 3) [938].

[16] Ibid, [945]

possible largely due to comprehensive and accessible documentation relating to his removal. However, for the large majority of Stolen Generations survivors, such documentation no longer exists, or it never did. Genovese and Reilly state that 'Australian legal history, as far as cases involving Indigenous parties are concerned, is about absence, about what is not available'.[17] The lack of documentary evidence relating to the removals of Aboriginal and Torres Strait Islander children impedes their ability to seek legal action. Additionally, Lino suggests that 'where evidence does exist, its content may not accurately reflect the realities and power relations surrounding acts of Indigenous child removal.'[18]

Stolen Generation claimants must also endure the length and costs of litigation. Bruce Trevorrow was represented by The Aboriginal Legal Rights Movement for over a decade. He received funding from the now-abolished Aboriginal and Torres Strait Islander Commission and the department of the Attorney General, which covered millions of dollars in legal fees and court costs.[19] It is not uncommon for litigation to be costly, however, as asserted by Lino, the costs 'are especially relevant in light of the layers of disadvantage generally experienced by Aboriginal

[17] Ann Curthoys, Ann Genovese and Alexander Reilly, *Rights and Redemption: History, Law and Indigenous People* (UNSW Press, 2008) 141.

[18] Dylan Lino, 'MONETARY COMPENSATION AND THE STOLEN GENERATIONS: A CRITIQUE OF THE FEDERAL LABOR GOVERNMENT'S POSITION' (2010) 14(1) Australian Indigenous Law Review 18, 23.

[19] Thalia Anthony, 'Shaky Victory for Stolen Generations', ABC NEWS (online at 10 Nov 2010) <https://www.abc.net.au/news/2010-11-10/shaky_victory_for_stolen_generations/40912>.

people'. [20] The majority of Stolen Generations claimants cannot independently cover such costs and turn to Indigenous organisations for funding. The Australian Institute for Aboriginal and Torres Strait Islander Studies ('AIATSIS') provides that Stolen Generations 'cases have consumed significant resources of Indigenous organisations throughout Australia… this has meant the allocation of resources which are no longer available for other programs or support'. [21] This is especially problematic, as this directly impacts the ability of such organisations to effectively enact healing programs and provide support to those impacted by intergenerational trauma due to a serious lack in resources. Furthermore, AIATSIS provides that costs of this 'resource intensive' litigation are increased due to delays in litigation.[22]

Taking legal action also brings emotional costs to Stolen Generations claimants. Cunneen and Grix of the AIATSIS describe these additional costs as 'the emotional and psychological trauma experienced by claimants in the hostile environment of an adversarial court system'.[23] The adversarial nature of court processes can lead to the re-traumatisation of Stolen Generations survivors and those already suffering from intergenerational trauma. Those seeking to prove the negligence of the State in their treatment or removal must endure belligerent cross-examination and recount the traumas that they suffered in an emotionless

[20] Lino (n 18) 23.

[21] Cunneen and Grix (n 6) 37.

[22] Ibid.

[23] Ibid, 4.

and largely apathetic setting. In *Trevorrow*, the plaintiff's psychological history was publicly disclosed and thoroughly considered by the court.[24] This troubling adjudication process means that the experiences of survivors like Bruce are subject to the scrutiny of the public and the psychological nature of the harm they suffered is not only divulged and dissected but can also be used to undermine their credibility. Consequently, those seeking redress from the courts often suffer additional trauma at the hands of the legal system. This is a serious impediment to the healing process as those seeking justice for the wrongs that they suffered find themselves further traumatised by the process.

III Healing Needs of Intergenerational Trauma Sufferers

It is also important to discuss the needs of the healing process, and whether any recourse in negligence law can significantly contribute to the relief of intergenerational trauma. In *Bringing Them Home 20 years on*, the Healing Foundation refers to intergenerational trauma as 'cumulative emotional and psychological wounding'.[25] The Healing Foundation finds that the actions of the government in addressing the healing needs of intergenerational trauma sufferers have 'been neither adequate in resources or the commitment required to create real

[24] *Trevorrow* (n 3) [610]-[1163].

[25] Anderson and Tilton (n 1) 22.

change',[26] and suggests an action plan for healing intergenerational trauma which includes 'funding of Aboriginal and Torres Strait Islander organisations to deliver healing responses to Stolen Generations and their families' as well as 'adequate mental health, social and emotional wellbeing funding'.[27] To that effect the compensatory nature of negligence law has the capacity to significantly contribute to the underfunded healing process and relieve successful claimants of some of the economic burden that resulted from the trauma they suffered. However, this capacity of negligence law is often unrealizable, and Bruce Trevorrow remains to date the only Stolen Generations claimant to successfully sue a state.

However, this is not to say that the precedent set in the *Trevorrow* and *Lampard-Trevorrow* decisions has no healing value for Stolen Generations survivors. Buti suggests that 'success in the courts invariably will place pressure on governments to devise a non-judicial reparations scheme'.[28] In November 2015, the government of South Australia established an $11 million Stolen Generations Reparations Scheme.[29] The establishment of this fund eight years after Bruce Trevorrow's successful claim was driven by the 2013 parliamentary committee report

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[26] Ibid, 26.

[27] Ibid, 41-43.

[28] Antonio Buti, 'The Stolen Generations and Litigation Revisited' (2008) 32(2) *Melbourne University Law Review* 382.

[29] Isabel Dayman, 'Stolen Generations .members to have access to $11 million fund announced by South Australian Government', ABC NEWS (online at 19 Nov 2015) <https://www.abc.net.au/news/2015-11-19/sa-government-announces-11m-stolen-generation-reparation-fund/6954494>.

which concluded that 'a reparation fund would be cheaper for the government than fighting legal claims and meant victims could avoid court'. [30] Other states, like New South Wales, followed with the establishment of a $73 million scheme including a 'grant-based Stolen Generations healing fund… used to support healing centres, memorials and keeping places'.[31] Although members of the Stolen Generations have doubted the adequacy of state compensation schemes to make a significant change, stating that 'You could trip over a pavement in the street and be paid more in compensation than what they're offering…',[32] the establishment of these schemes nonetheless elucidates the power of negligence law to adjudicate historical wrongs and drive positive, albeit slow, change.

IV Conclusion

The capacity of negligence law remains hindered by a largely inaccessible litigation process due to the evidentiary, monetary and emotional burden on Stolen Generations claimants; however, the

[30] Ibid.

[31] Leslie Williams, 'MORE THAN $73 MILLION FOR REPARATIONS TO STOLEN GENERATIONS SURVIVORS', (Media Release, NSW Government, 2 December 2016) https://www.aboriginalaffairs.nsw.gov.au/pdfs/minister/Leslie%20Williams%20med%20rel%20-%20More%20than%20$73%20million%20for%20reparations%20to%20Stole....pdf.

[32] Jens Korff, 'Compensation for Stolen Generation members', Creative Spirits (online at 8 February 2019) <https://www.creativespirits.info/aboriginalculture/politics/stolen-generations/compensation-for-stolen-generation-members>.

Trevorrow and *Lampard-Trevorrow* decisions are steps in the right direction. Although adequate redress through a national reparations scheme is still needed, judicial acknowledgment and adjudication of negligence by a statutory authority as well as ensuing state compensation schemes can begin to provide some closure for survivors of the Stolen Generations, and positively contribute to the healing of intergenerational trauma.

A RIVER WITH A VOICE: THE INDIGENISATION OF RIVER IN THE YARRA RIVER PROTECTION ACT AND TE AWA TUPUA ACT

Rupert Williamson

I INTRODUCTION

While researching this paper I stumbled across a video of a news broadcast from New Zealand. When I clicked on it I thought I had suffered a sudden aphasia. I did not understand the words. Soon after I realised the announcer was speaking in Maori. As a white Australian, I was not used to seeing all the trappings of a regular news broadcast – suits, neat hair, microphones – but hearing no English.

Somewhere in the middle of the broadcast it cut to what I presume is the New Zealand lower house. There were Maori Iwi singing in the galleries. I re-watched that part, even though I still didn't understand the words.

Pierre Legrand asserts that the task of comparative law is to "focus on the cognitive structures of a given legal culture and, more specifically, on the epistemological foundations of that cognitive structure."[1] What should we do if we come across a country with not one, but two, very distinct legal cultures? What should we do if we want to compare two such countries?

[1] Pierre Legrand 'European Legal Systems are not Converging' (1996) 45 *International and Comparative Law Quarterly* 52, 60.

Australia and New Zealand might appear to be very similar. Both are former British colonies and common law jurisdictions and both have rich and vibrant indigenous cultures. Recently, these two apparently similar jurisdictions implemented apparently similar legislation to manage river governance. The Victorian state government enacted the *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017*,[2] and the New Zealand parliament enacted the *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017*.[3] Both purport to be a significant step in recognition of indigenous rights to water. In fact there are significant differences between them.

In this paper I argue that within their respective legal cultures, Te Awa Tupua more effectively indigenises the meaning of river than the Yarra River Act. First, I discuss the meaning of 'indigenise.' Then I move directly to compare the two statutes. This comparison is scaffolded by the work of Katie O'Bryan. A hermeneutical analysis reveals that despite some notable provisions in the Yarra River Act, particularly the establishment of the Birrarung Council, it often falls short of indigenisation. By contrast, Te Awa Tupua, though imperfect, has several innovative and transformative features.

[2] *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) 'Yarra River Act.'

[3] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) 'Te Awa Tupua Act.'

II WHAT IS INDIGENISATION?

Indigenisation is employed across a dizzying array of topics and different scholars in different disciplines adopt different definitions.[4] In legal scholarship indigenisation often serves as a loose proxy for advancing social justice in an area of indigenous concern rather than a precise theoretical term.[5]

However, given our hermeneutical project, we must have a working theoretical understanding of the word. Morphologically, 'indigenisation' refers to the process of making something indigenous. Beyond that, it is helpful to note two complimentary impulses in indigenisation. First, as social work scholar Yuk-Lin Wong notes, "most importantly, [indigenisation] challenges the cultural and colonial hegemony of Eurocentric knowledge."[6] Secondly, much of the literature emphasises a

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[4] As a sample, these include linguistics: Chantal Zabus *The African Palimpsest: Indigenization of Language in the West African Europhone Novel* (Amsterdam and New York Press, 2nd ed, 2007); social work: Yuk-Lin Renita Wong 'Reclaiming Chinese Women's Subjectivities: Indigenizing 'social Work with Women' in China through Postcolonial Ethnography.' (2002) 25(1) *Women's Studies International Forum* 67; legal education: Amy Maguire and Tamara Young 'Indigenisation of Curricula: Current Teaching Practices in Law' (2015) 25 *Legal Education Review* 95; and even museum governance: Conal McCarthy 'Chapter 2: Indigenisation: Reconceptualising Museology' in Simon Knell (ed) *The Contemporary Museum: Shaping Museums for the Global Now* (Taylor & Francis Group, 2018).

[5] J Ransley and E Marchetti 'The Hidden Whiteness of Australian Law: A Case Study' (2001) 10(1) *Griffith Law Review* 139; Danielle M Conway 'Indigenizing Intellectual Property Law: Customary Law, Legal Pluralism, and the Protection of Indigenous Peoples' Rights, Identity, and Resources' (2009) 15(2) *Texas Wesleyan Law Review* 207; Saskia Vermeylen 'Law as a Narrative: Legal Pluralism and Resisting Euro-American (Intellectual) Property Law through Stories', (2010) 61 Journal of Legal Pluralism & Unofficial Law 55.

[6] Wong, above n 4, 68.

creative and transformative aspect. In the words of Glowczewski, indigenisation requires "imagination in terms of how to weave different worlds in respect of their singularities always in becoming, how to recreate outsideness in our minds."[7] So in short, indigenisation has both deconstructive and creative dimensions.[8] Indigenisation both de-centres the dominant culture and engages it in meaningful dialogue in an effort to transform or create something new.

Thus, for a law to indigenise the meaning of river would mean a productive interaction of settler legal culture and indigenous legal culture. As hegemonic discourse is unspooled, the meaning of river becomes a product of both the indigenous legal understanding and that of the dominant legal culture.

III Comparison

I now use this understanding of indigenisation to compare the two acts. In her 2019 article, Katie O'Bryan notes four differences between the Yarra River Act and Te Awa Tupua Act.[9] O'Brien's analysis is perceptive and illuminating, but her focus is elsewhere and she quickly moves on to

[7] Barbara Glowczewski *Indigenising Anthropology with Guattari and Deleuze* (Edinburgh Univ Press, 2019) 77.

[8] See also Wong, above n 4, 68; Anthony Moran 'As Australia Decolonizes: Indigenizing Settler Nationalism and the Challenges of Settler/indigenous Relations.' (2002) 25(6) *Ethnic and Racial Studies* 1013, 130-133.

[9] Katie O'Bryan 'The Changing Face of River Management in Victoria: The Yarra River Protection (Wilip-gin Birrarung murron) Act 2017 (Vic)' (2019) 44(6) *Water International* 769, 778.

other matters. In this section, I take these four differences as starting points for a hermeneutical comparison.

A *The Status of the River*

The first point of comparison is the status of the river.[10] This section has three parts. First, I argue the recognition of the integrated character of the river delivers some degree of indigenisation in both acts. Second, I argue that the Yarra River Act fails to consolidate this with substantive provisions. Finally, I consider arguments for and against the indigenising quality of the Te Awa Tupua's grant of legal personhood, concluding that it is an effective tool of indigenisation.

1 *Alive and Integrated*

It could be argued that both acts indigenise the meaning of river. The Yarra River Act declares the river is "one living and integrated natural entity,"[11] and Te Awa Tupua calls the river an "indivisible and living whole."[12] These two statements could be seen to embrace a holistic and spiritual understanding of the river. Holism is a key part of both the Australian Aboriginal and Maori river ontology. This is evident in the concepts of *Country* and *taonga*. The Wurundjeri people have traditionally lived on the banks of the Yarra; to them, both the lands and

[10] Ibid.

[11] *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) ss 1(a), 5(b).

[12] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 12.

the waters are all part of *'Country'* (*Biik*).[13] *Country* does not denote a nation state, or mere landscape. Rather, it is a rich metaphor which attempts to capture the interconnectedness of land, spirituality, culture and custom.[14] In short "country touches and is everything."[15] In Maori culture, rivers are *taonga*.[16] *Taonga* is a complex term with various shades of meaning. It can be used narrowly to describe property, but it also translates to 'treasure.'[17] Furthermore, like in Aboriginal Australian culture, the river cannot simply be separated from the land and Maori iwi have reciprocal obligations to the whole environment.[18] Both the river as *Country* and the river as *taonga* illustrate a holistic worldview in which divisions between the banks, the riverbed, and the waters are artificial impositions. Consequently, when the two Acts emphasise the integrated nature of the river[19] and its indivisibility[20] they appear to be embracing this holism.

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[13] Mandy Nicholson and David Jones ' Wurundjeri-Al Narrm-u (Wurundjeri's Melbourne): Aboriginal Living Heritage in Australia's Urban Landscapes' in Kapila Silva (ed) *The Routledge Handbook on Historic Urban Landscapes in the Asia-Pacific* (Taylor & Francis Group, 2020) 508, 512.

[14] Irene Watson 'Kaldowinyeri - Munaintya - In the Beginning' (2000) 4(1) *Flinders Journal of Law Reform* 3, 6.

[15] Nicholson and Jones, above n 13, 512.

[16] Waitangi Tribunal *The Stage I Report on the National Freshwater and Geothermal Resources Claim* (2012) 76.

[17] Waitangi Tribunal *Mohaka iver Report* (1992) 10.

[18] Waitangi Tribunal *The Stage I Report on the National Freshwater and Geothermal Resources Claim* (2012) 34.

[19] *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) ss 1(a), 5(b).

[20] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 12.

2 *Limits of the Yarra River Act*

However, the extent of the transformation is extremely limited in the Yarra River Act. Firstly, other provisions in the Yarra River Act undermine the apparent allegiance to holism evident in s 1(a), splitting the river into bed, soil, banks, and adjoining land.[21] Secondly, even to the extent that the Yarra River Act does reflect and Aboriginal Australian ontology, ss 1(a) and 5(b) confer no substantive or procedural rights. They are essentially symbolic. Thirdly, the river is still epistemically constructed through doctrine. Aboriginal Australian law is not simply doctrinal, but is constructed through narrative. For Watson, "the law is not written down; knowledge of the law comes through the living of it. Law is lived."[22] As such, it could be said the Yarra River Act epistemically sanitizes the meaning of river. Consequently, the significance of the Yarra River Act declaring the Birrarung "one living and integrated natural entity,"[23] is arguably quite limited. If indigenisation requires some degree of interweaving or transformation, it would appear with regards to the character of the river, the Yarra River Act is largely tokenistic.

[21] *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) s 3.

[22] Watson, above n 14, 4

[23] *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) ss 1(a); 5(b).

3 *Personhood*

By contrast, Te Awa Tupua not only declares the river is a single living entity,[24] it also takes the extraordinary step of making the river a legal person.[25] As such, the Whanganui may bring actions against persons who cause it harm, and enter into agreements which could give it decision making power.[26] Accordingly, in contrast to the Yarra River Act, Te Awa Tupua gives legal substance to the character of the river. This shield Te Awa Tupua from the three criticisms outlined above.

On the other hand, it could be argued the grant of personhood degrades the spiritual and cosmological status of the river. For instance, Jackson argues New Zealand law "redefines [Maori] rights . . . within a pluralistic common law, rather than in Maori authority."[27] Accordingly, it could be said that making the river a person incorporates the Whanganui into the dominant legal culture of New Zealand, in the process losing its special significance in Maori culture. Rivers are cultural treasure (*taonga*)[28] and spiritual ancestors (*tupuna*);[29] yet once they are a legal person, they find

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[24] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 12.

[25] Ibid s 14(1)

[26]Katie O'Byran 'Giving a Voice to the River and the Role of Indigenous People: The Whanganui River Settlement and River Management in Victoria' (2017) 20 *Australian Indigenous Law Review* 48, 58-59.

[27] M Jackson 'Justice and political power: Reasserting Maori legal processes' in (K Hazlehurst ed) *Legal Pluralism and the colonial legacy: Indigenous experiences of justice in Canada, Australia, and New Zealand* 243, 243.

[28] Waitangi Tribunal *Mohaka iver Report* (1992) 166-167.

[29] James D. K. Morris and Jacinta Ruru. 'Giving Voice to Rivers: Legal Personality as a Vehicle for Recognising Indigenous Peoples' Relationships to Water' (2010) 14(2) *Australian Indigenous Law Review* 49, 49.

themselves in the same mundane legal category as a corporation. Consequently, they might become increasingly defined by the dominant legal discourse, rather than the Maori cultural discourse.[30] While personhood might offer substantive protections for the river, it offers those protections within the system of the dominant legal culture. As such, it could be argued that in fact, legal personality westernises the meaning of river more than it indigenises it.

This is a legitimate concern, but I believe it is misguided. I want to make two points. First is the transgression of the person-thing divide. At common law, rivers are property: specifically, *res communes*, or common property.[31] As Supio notes, Western legal systems divide into " two distinct parts: on the one hand things, on the other hand persons. This *summa divisio* goes back a long way and is deeply embedded in our legal culture."[32] Yet in granting the Whanganui personhood it ceases to be understood as *res* and instead becomes a person, transgressing the *summa divisio*. Second, is the productive capabilities of personhood. As a person, the Whanganui may now enter joint management agreements with local authorities pursuant to s 36B of the *Resource Management Act (1991),*[33] which would endow it with responsibilities and powers over consent in

[30] Erin O'Donnell *Legal Rights for Rivers: Competition, Collaboration and Water Governance* (Routledge, 2018), 188-190.

[31] Poh-Ling Tan 'The Changing Concepts of Property in Surface Water Resources in Australia' (2002) 13(4) *Journal of Water Law* 269, 270–2.

[32] Alain Supiot *Homo Juridicus* (Verso, 2007) 21.

[33] *Resource Management Act 1991 (NZ)* 'RMA.'

relation to the river.[34] In other words, the river is not circumscribed purely by the legislation, but has subjective autonomy. It is a river with a voice. Once again, Supio is helpful: "a subject is one who is the cause of something… he or she speaks, and the spoken word is law."[35]

This argument does not seek to destroy those who would argue legal personhood fails to capture the ontology of the river as *taonga* and *tupua*. Rather, it seeks to re-frame their criticism. Essentially, such critics miss this bigger point; namely, that the meaning of the river as *taonga* and *tupua* also irrevocably changes the meaning of legal person as a category. If indigenisation requires not simply recognition of difference, but a creative or transformative element, then the grant of personhood appears to be an archetypal example of indigenisation.

Ultimately then, when considering the status of the river, Te Awa Tupua meaningfully indigenises river. The Yarra River Act aspires to something similar in its recognition the river is "one living and integrated natural entity."[36] However, it fails to break free of the epistemic bounds of doctrinal law and ultimately offers little more than a symbolic acknowledgment of holistic and spiritual dimensions of river.

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[34] Ibid s 36B.

[35] Supiot, above n 32, 17.

[36] *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) ss 1(a), 5(b).

B *Guiding Principles*

The second point of comparison between the two acts is that they are both governed by guiding principles. The principles in both acts broadly endorse indigenous values, but in the Yarra River Act, they are largely tokenistic. Even though Te Awa Tupua escapes tokenism, both sets of principles are hamstrung by failure to effect deep cultural change.

4 *Both Endorse Broadly Indigenous Values*

It could be argued the guiding principles of both acts perform an indigenising function. The Yarra River Act provides for the Yarra River Protection Principles (Protection Principles). These acknowledge the importance of protecting Aboriginal Australian "cultural values, heritage and knowledge"[37] This would seem to create space to foreground the holistic and spiritual character of the river.[38] Similarly, Te Awa Tupua includes four principles called *Tupua Te Kawa*. For instance, the third principle enshrines a traditional saying of the Whanganui Iwi, "I am the River and the River is me."[39] As a direct statement of Maori cosmology, its indigenous character is self-evident. So to a degree, the principles which govern both acts can be said to indigenise the meaning of river.

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[37] Ibid s 12(1).

[38] Ambelin Kwaymullina & Blaze Kwaymullina 'Learning to read the signs: law in an Indigenous reality' (2010) 34(2) *Journal of Australian Studies* 195, 196.

[39] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 13(c).

5 *Tokenism in the Yarra River Act*

However, the Yarra River Act clearly does not enshrine this indigenisation with any real depth. Its Protection Principles make only the most general references to Aboriginal culture amongst a plethora of principles protecting other stakeholders.[40] In sharp contrast, the principles of Tupua Te Kawa are all intrinsically Maori and all directly express a different dimension of the meaning of river. Clearly, the Protection Principles provide only a very limited indigenisation of river when compared to Tupua Te Kawa.

6 *Lack of Substantive Weight in Both Acts*

Unfortunately, neither acts offers substantive support to their principles. In the Yarra River Act, responsible public bodies "must have regard" to the Protection Principles.[41] However, "must have regard" simply requires "an active intellectual process"[42] and that the matter be given "genuine"[43] consideration. All a decision maker need do is actively consider the principle. Thus, even to the limited extent that the Protection Principles embody Aboriginal Australian understandings, they are a frail shield.

While Te Awa Tupua Act might appear on first gloss to offer more substantial provisions, these too are ultimately flimsy. Under Te Awa

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[40] *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) ss 7-13.

[41] Ibid s 1(d).

[42] *Tickner v Chapman* (1995) 57 FCR 451, 462 (Black CJ).

[43] *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, [105] (Gleeson CJ and Gummow J).

Tupua Act, most decision-makers "must recognise and provide for"[44] Tupua Te Kawa. Admittedly, there has been sporadic judicial opinion that this would require the principles to be reflected in the outcome and amount to a substantive right.[45] This might appear to support the claim that Tupua Te Kawa helps to indigenise the meaning of river.

The argument fails when put in context. In theory and in practice, principles like Tupua Te Kawa fail to bring substantive change because they lie on top of legal culture rather than having a deep effect. Guiding principles embodying the Maori worldview are not new in New Zealand. Indeed the *RMA*, the cornerstone of New Zealand water governance,[46] includes various Maori values as guiding principles.[47] However, as Jacinta Ruru notes, the vast majority of Maori cases brought on the basis of such provisions fail.[48] The problem is that these principles in themselves do not change anything about the system within which they operate. This argument applies as strongly to Te Awa Tupua Act as it does to the Yarra River Act. Both are ultimately statements of principle lain on top of an unchanged legal culture.

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[44] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 15(2).

[45] *Bleakley v Environmental Risk Management Authority* [2001] 3 NZLR 213, [72] (McGechan J); but note contra *Takamore Trustees v Kapiti Coast District Council* [2003] 3 NZLR 496, [89] (Ronald Young J).

[46] Andrew Fenemor 'Water Governance in New Zealand – Challenges and Future Directions' (2017) 3(1) *New Water Policy & Practice* 9, 9; Linda Te Aho 'Te Mana o Te Wai: An Indigenous Perspective on Rivers and River Management' (2019) 35(10) *River Research and Applications* 1615, 1617.

[47] *Resource Management Act 1991 (NZ)* s 7.

[48] Jacinta Ruru 'Listening to Papatūānuku : a Call to Reform Water Law' (2018) 48(2) *Journal of the Royal Society of New Zealand* 215, 219.

A contrast with the grant of legal personhood is instructive. Whereas legal personhood offers a dynamic and transformative interaction between Maori ontology and western legal personhood, the Protection Principles and Tupua te Kawa are static. We are concerned here with a thick understanding of law,[49] and it is difficult to see how these principles penetrate beneath the thin surface of the black letter law.

The principles in the Yarra River Act and Te Awa Tupua do not indigenise the meaning of river. The Yarra River Protection Principles only reflect Aboriginal Australian understanding of the river in a narrow sense, and are of limited enforceability. As for Tupua Te Kawa, while they embrace a Maori ontology of the river, this perspective is comprehensively marginalised within the epistemology of the dominant legal culture.

C *Bilingualism*

The third point of comparison identified is the bilingualism of the two statutes. Both acts are remarkable for their bilingualism. The Yarra River Act is the first piece of Victorian legislation to contain an Aboriginal language.[50] The Aboriginal language of Woi-Wurrung appears both in

[49] Legrand, above n 1, 60.

[50] Victorian State Government *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (8 June 2020) Victoria State Government: Environment, Land, Water and Planning <https://www.water.vic.gov.au/waterways-and-catchments/protecting-the-yarra/yarra-river-protection-act>.

the title and in the pre-amble of the Yarra River Act.[51] Even in translation, the preamble evocatively describes the significance of the river:

> The Birrarung is alive, has a heart, a spirit and is part of our Dreaming. We have lived with and known the Birrarung since the beginning. We will always know the Birrarung.[52]

Similarly, Te Awa Tupua prominently features the Maori language. The text is littered with Maori words, which appear both in provisions and as the title to sections.[53] Notably, the principles of Tupua Te Kawa appear first in Maori then followed by English translations.[54] The Woi-Wurrung and Maori passages in each act assert an indigenous understanding of river. But one could legitimately ask whether this is indigenisation. Once again, a flat bicultural opposition does not demonstrate transformation or interweaving. Instead, I will now argue the statutory bilingualism should be understood by the cognitive psychology of metaphor. This reveals the indigenising potential of bilingualism.

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[51] *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) title, preamble.

[52] Ibid preamble.

[53] See e.g. *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 7.

[54] See e.g. *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 13; sch 8.

Since the 1980s, there has been an abundance of research[55] suggesting that far from being a linguistic ornament, metaphor lies at the heart of cognition.[56] I will focus on two particular aspect of this paradigm. Firstly, concepts are determined in relation to an existing set of thought patterns.[57] In other words, there is no transcendent signified; rather, meaning is grounded. Accordingly, the meaning of river in a given legal culture can be thought of as determined in relation to the meaning of the words in the statute. The second relevant aspect is that people do not sort concepts into neat categories. Instead, concepts are radial: at the centre are prototypical examples of the class, and towards the periphery are those that sit less well within the concept.[58] In other words, a concept is not like water in a glass, it is more like water slowly soaking through fabric. Accordingly, while the meaning of river is determined by what the law says, it also has an imaginative capacity and can be pushed and pulled by other determinants. When river is defined in a bilingual statute, the true meaning of river does not reside in either definition, but sits somewhere in between; it is grounded in both. This offers us an escape

[55] See e.g. George Lakoff and Mark Johnson *Metaphors We Live By* (University of Chicago Press, 1980); George Lakoff and Mark Turner *More Than A Cool Reason: A Field Guide To Poetic Metaphor* (University of Chicago Press, 1989); Joseph Grady *Metaphor And Blending* in Gerard J Steen and Raymond W Gibbs (eds) *Metaphor In Cognitive Linguistics* (John Benjamin Publishing, 1997) 101; Mark Johnson 'Mind, Metaphor, Law' (2007) 58(3) *Mercer Law Review* 845; Beat Hampe *Metaphor: Embodied Cognition and Discourse* (Cambridge University Press 2017).
[56] Lakoff and Johnson, above n 55, 3; Hampe, above n 55, 3.

[57] George Lakoff *Women, Fire, and Dangerous Things: What Categories Reveal About The Mind* (University of Chicago Press, 1987), 68-76.
[58] Ibid 83-84.

from the paradigm of static biculturalism and instead presents us with a metaphor of the river that might be indigenised by language.

Seen in this light, the relative prominence of Woi-Wurrung and Maori are significant. Once again, it appears as though Yarra River Act offers a more limited indigenising effect. While it would be wrong to understand metaphor as merely a linguistic creation, a linguistic metaphor can be an expression of a conceptual metaphor.[59] Two significant observations flow from this fact. First, whereas Te Awa Tupua has a Maori title first following in parentheses, the Yarra River Act has an English title followed by the Woi-Wurrung title in parentheses. The symbolic inference is clear. Secondly, the Yarra River Act merely includes Woi-Wurrung in the preamble. While there is admittedly a growing acceptance that preambles may provide useful context for statutory construction,[60] that view is far from ubiquitous.[61] Furthermore, Aboriginal Australians are increasingly sceptical of preamble recognition.[62] In his detailed survey of the case law, Ahu raised a similar concern about the unenforceability of preambles has dogged Maori bilingual statutes.[63] In that context, it is all the more significant that Te

[59] Linda L Berger 'What Is the Sound of a Corporation Speaking - How the Cognitive Theory of Metaphor Can Help Lawyers Shape the Law' (2004) 2 *Journal of the Association of Legal Writing Directors* 169, 174-175.

[60] *Wacando v Commonwealth* (1981) 148 CLR 1, 23 (Mason J).

[61] Ibid 15 (Gibbs CJ).

[62] Uluru Statement from the Heart (National Constitutional Convention, 26 May 2017).

[63] Tai Ahu *Te Reo Māori As A Language Of New Zealand Law: The Attainment Of Civic Status* (LLM Thesis, University of Wellington, 2012), 60-70.

Awa Tupua Act includes substantive provisions which define the river in Maori. While we should not forget the majority of the act remains in English, this would appear to be a more significant step beyond preamble recognition. Ultimately, in reading the river as a metaphor, the linguistic construction of each act reveals a different emphasis, and a different river.

D *The Voice of the River and the Face of the River*

The fourth point of comparison is the Birrarung Council in the Yarra River Act, and Te Pou Tupua in Te Awa Tupua. The Birrarung Council has two main responsibilities. It provides advice to the minister on a wide variety of matters,[64] and advocates for the protection and preservation of the river.[65] O'Bryan suggests that although traditional owners do not form a majority on the council, they retain at least as strong a voice as any of the other stakeholders.[66] As for Te Pou Tupua its role is not to act for Maori Iwi, but rather to act specifically for the Whanganui River.[67] It is comprised of two representatives, one nominated by Maori Iwi and one by the Crown.[68] O'Byran notes two issues with this arrangement. Firstly, Te Pou Tupua does not give Maori people a management role as of

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[64] *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) s 48(1)(a).

[65] Ibid s 48(1)(b).

[66] Ibid s 49(1)(a); O'Bryan, above n 9, 780.

[67] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 19(1)(h).

[68] Ibid ss 20(1)-(2).

right.[69] Second, Te Awa Tupua represents the river, not Maori people.[70] While Whanganui Iwi nominate the representative on the council, once they are appointed, they are to act on behalf of Te Awa Tupua. This might leave Maori Iwi alienated from the river. By contrast, Wurrundjeri people have a direct influence over management via their mandated presence on the Birrarung Council.

To understand the significance of these observations for our purposes we must switch to a hermeneutic lens. I argue the concept of participatory justice best illustrates how the Birrarung Council and Te Pou Tupua might indigenise river. Simply put, participatory justice means involving those effected by a legal decision in making that decision.[71] Although it can deployed in a court, we are here interested with it is a policymaking tool. In this context, participatory justice aims to remove institutionalised barriers that exclude some citizens from policymaking.[72] It is argued this is necessary to ensure authentic engagement and prevent tokenism or uninformed policy. [73] Participatory justice is particularly suited to indigenous populations in Australia and New Zealand. In particular, it echoes the process based epistemology evident in both Aboriginal

[69] O'Bryan, above n 9, 779.

[70] Ibid.

[71] Michael Giuduce 'Asymmetrical Attitudes and Participatory Justice' (2006) *Cardozo Public Law, Policy and Ethics Journal* 15, 28-30.

[72] Leon Tikly and Angeline M Barrett 'Social Justice, Capabilities and the Quality of Education in Low Income Countries' (2011) 31(1) *International Journal of Educational Development* 3, 6.

[73] N Fraser *Scales of Justice: Reimagining Political Space in a Globalizing World* (Polity Press, 2008) 16.

Australian and Maori cultures. For instance, Irene Watson uses the term 'raw law' to describe the different epistemological character of Aboriginal Australian law. To Watson, raw law helps capture the embodied character of Aboriginal law, "undressed of the layers of rules and regulations modem societies have come to accept in their legal systems."[74] Likewise, Maori law is steeped in ceremony,[75] such as through the use of symbolic violence to resolve real disputes.[76] These are legal systems which operate along different epistemological lines to Western legal cultures. The dominant epistemology is not doctrinal. This gives participatory justice an advantage over more traditional legal solutions. As such, the Birrarung Council can play an important role in giving voice to Aboriginal Australian concerns and understandings. Its direct management and consultative role can be contrasted with Te Pou Tupua, which may not directly engage Maori interests by virtue of its membership and lack of direct management responsibilities. So it would seem that at least in this respect, the Yarra River Act might have the capacity to indigenise the meaning of river in a way Te Awa Tupua Act does not provide for.

However, there is one wrinkle in this conclusion. Namely, focussing on the the Birrarung Council and Te Pou Tupua ignores two other bodies created by Te Awa Tupua. Te Kopuka is a seventeen member council

[74] Watson, above n 14, 13.

[75] Alex Frame and Paul Meredith 'Performance and Māori Customary Legal Process' (2005) 114(2) Journal of the Polynesian Society 135, 135-139.

[76] Ibid 145-147.

with five Maori seats and responsible for developing the strategic plan that will govern management of the Whanganui.[77] Additionally, Te Karewao is a three person advisory body with two Maori members and responsible for advising Te Pou Tupua.[78] Peculiarly, O'Byran makes little mention of these two bodies in her discussion. I would suggest they at least partially address the claim that Te Pou Tupua provide only limited Maori involvement in management. Te Kopuka offers an opportunity for Maori interests to directly influence the management regime of the Whanganui, and Te Karewao assuages some concerns that Te Pou Tupua might not act in Maori interests. On balance, then, the relative advantage of the Birrarung Council is diminished. The multiple bodies created by Te Awa Tupua Act, when considered together, do seem to embrace a degree of participatory justice. Time will tell whether these participatory justice measures perform an indigenising function; both statutes are in their infancy. Yet it is clear that both have the potential to meaningfully indigenise the river through advancing alternative, non-doctrinal epistemologies.

IV Conclusion

In this paper, I have argued that within their respective legal cultures, Te Awa Tupua more effectively indigenises the meaning of river than the Yarra River Act. Hermeneutical analysis reveals that while the Yarra

[77] *Te Awa Tupua (Whanganui River Claims Settlement) Act 2017* (NZ) s 30(1).

[78] Ibid s 28(1).

River Act provides noteworthy opportunities for participatory justice through the Birrarung Council, this is undermined by its more tokenistic sections. In particular, it has shortcomings in the character of the river, limited bilingualism, and cosmetic guiding principles. Although Te Awa Tupua does not escape the relative shallowness of guiding principles, the cognitive psychology of metaphor and Supio's conception of legal personhood reveal its indigenising magnetism.

THE EFFECT OF THE TIMBER CREEK DECISION

Samantha Gates

I INTRODUCTION

Indigenous relationships to land are holistic and comprise of a spiritual connection to Country not bounded by time.[1] This fundamentally different worldview to that held by Anglo-Australians poses challenges in assessing cultural-loss for Native Title compensation,[2] particularly quantifying loss of this relationship produced by compensable acts ('acts') into a monetary figure.[3] The unanimous High Court decision *Northern Territory of Australia v Griffiths ('Timber Creek')* overcame these difficulties by adopting Indigenous perspectives in its cultural-loss assessment to ensure compensation on just terms.[4] The High Court's affirmation of a broad statutory approach enabled both holistic reasoning and a close examination of Indigenous experience, signifying an end to

[1] See Ambelin Kwaymullina, 'Aboriginal Nations, the Australian nation-state and Indigenous international legal traditions' in Irene Watson (ed), *Indigenous Peoples as Subjects of International Law* (Routledge, 2017) 5, 6 ('Aboriginal Nations').

[2] Brendan Edgeworth, 'Valuable, invaluable or unvaluable? The High Court on native title compensation' (2019) 93 *Australian Law Journal* 438, 444 ('Valuable, invaluable or unvaluable').

[3] *Northern Territory v Griffiths* [2019] HCA 7, [217] ('*Timber Creek'*).

[4] Edgeworth, 'Valuable, invaluable or unvaluable' (n 2) 442.

reductionist approaches in analysing Indigenous systems.[5] This ultimately allowed for an inclusive assessment of the Claim Group's spiritual, non-linear relationship with Country and captured the complexities of the cultural-loss endured.[6]

II BROAD STATUTORY INTERPRETATION

Timber Creek endorsed a broad statutory approach as it recognised that cultural-loss assessments should correspond with the perspectives of the Claim Group in question.[7] The Court held that compensation on just terms, as demanded by s 51(1) of *Native Title Act ("NTA")*, could not be achieved by an interpretation of statute that imposed temporal and physical limits which contradicted Indigenous worldviews.[8] Additionally, *Timber Creek* established that land statutes were not prescriptive, allowing the Court to examine the Claim Group's experience beyond the terms of statute,[9] and the common lawyer.[10] *Timber Creek* marks a rejection of the historically restrictive approach of

[5] Ambelin Kwaymullina, 'Indigenous Legal Systems and Native Title', (LAWS4101, University of Western Australia Law School, 10 February 2020) Slide 7 ('Indigenous Legal Systems').

[6] Ibid 445.

[7] Kwaymullina, 'Indigenous Legal Systems' Slide 14.

[8] *Timber Creek* (n 3) [216].

[9] Edgeworth, 'Valuable, invaluable or unvaluable' (n 2) 444.

[10] *Timber Creek* (n 3) [153] quoting *Western Australia v Ward* (2002) 213 CLR 1, 64-5.

the High Court ('HC') to Native Title decisions,[11] setting precedent for future inquiries to adopt local Indigenous perspectives to appropriately award the loss of their unique connection to Country.[12] The perspectives adopted by *Timber Creek* in its analysis of the holistic, spiritual connection to Country and non-linear time relationships are examined below.

III COUNTRY

A *Holistic Analysis: Collateral Detrimental Effect*

Indigenous Australians have a spiritual relationship with Country which stems from a holistic understanding of Country, people and Dreaming ancestors as parts of an indissoluble whole.[13] The Dreaming ancestors travelled over the land performing modifications which tell the narrative that governs correct behaviour between people and country.[14] Thus, Indigenous spiritual relationships to Country encompass all the land.[15] Conversely, Anglo-Australians strictly view land as a resource to be exploited,[16] with land rights solely arising from ownership.[17] Anglo-

[11] Kwaymullina, 'Indigenous Legal Systems' (n 6) Slide 10.

[12] *Timber Creek* (n 3) [217].

[13] Ibid [153] quoting *Western Australia v Ward* (2002) 213 CLR 1, 64-5.

[14] *Timber Creek* (n 3) [170]; Kwaymullina, 'Indigenous Legal Systems' (n 6) Slide 12.

[15] *Timber Creek* (n 3) [175].

[16] Kwaymullina, 'Aboriginal Nations' (n 1) 9.

[17] Vicki Grieves, 'Aboriginal Spirituality: Aboriginal Philosophy the Basis of Aboriginal Social and Emotional Wellbeing' (2009) *Co-operative Research Centre for Aboriginal Health, Discussion Paper Series No 9* 13 ('Aboriginal Spirituality').

Australian bounded ownership ultimately contrasts to Indigenous holistic spiritual-connection. Thus, the challenge for the Courts in assessing cultural-loss is adopting a holistic rather than fragmented approach.[18] *Timber Creek* overcame this challenge by affirming what the Full Court described as a collateral detrimental effect,[19] a holistic analysis of acts as cumulatively eroding connection to Country.[20] This disregarded the lot by lot approach favoured by the appellants, demanding proof of a direct connection between an act on a plot of land and the consequent effect on the Claim Group.[21] *Timber Creek* recognised the Claim Group's connection to Country as a complex web of relationships and thus it would be wrong to impose this burden of proof.[22] The decision stressed the importance of adopting a holistic approach, analogising the collateral detrimental effect to a damaged painting.[23] The analogy demonstrates the perspective of the indissoluble whole, that one act implicates a wider geographical area and the Claim Group's corresponding relationship with that land.[24] This form of analysis has been critiqued as relying too heavily on intuition, resulting in unreliable reasoning which will ensue further

[18] *Timber Creek* (n 3) [153] quoting *Western Australia v Ward* (2002) 213 CLR 1, 64-5.

[19] Ibid [200].

[20] Ibid.

[21] Ibid [199].

[22] Ibid [164].

[23] Ibid [219].

[24] Ibid [204].

complex litigation in determining compensation.[25] Whilst intuition is applied,[26] the collateral detrimental effect is reasoned in a clear order of: principles, finding and evidence and three considerations.[27] The three considerations provide close analysis of acts impacting the *Wirip* Dingo Dreaming path, illustrating how spiritual relationships are not bound by location and can be impacted by acts on adjacent lands.[28] These considerations were reinforced by the HC as an example of how the collateral detrimental effect should be approached.[29] Thus, *Timber Creek* provides analysis beyond intuition and endorses the collateral detrimental effect as an appropriate holistic analysis of cultural-loss.

B *Indigenous Experiences: Spiritual Consequences*

Contrasting to western religion, Indigenous Australians do not separate the sacred from the profane as spirituality exists in Country.[30] Indigenous custodianship of Country is a spiritual responsibility which includes duties such as stewardship of the land and execution of proper ritual

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[25] Aaron Moss and William Isdale, 'Where to Next? Native Title Compensation following Timber Creek', AUSPUBLAW (Web Page, 3 April 2019) < https://auspublaw.org/2019/04/where-to-next-native-title-compensation-following-timber-creek/?-native-title-compensation-following-timber-creek> ('Where to Next?').

[26] *Timber Creek* (n 3) [163].

[27] Ibid [160].

[28] Ibid [200].

[29] Ibid [223].

[30] Grieves, 'Aboriginal Spirituality' (n 16) 11.

practice.[31] Spirituality thus informs each member's relationship and role within the world.[32] Another difficulty in cultural-loss determinations is quantifying the consequences of a physical compensable act when its implicates the metaphysical.[33]

Timber Creek overcame this challenge by conducting close analysis of anthropological and lay evidence which allowed assessment of Indigenous spiritual loss in a multifaceted way. Reference to the anthropological Palmer and Asche 2004 Report established that acts on sacred sites have repercussions beyond the physical.[34] The report described sacred sites as a meta-place, "a place is also a reference to a whole range of spirituality and associated imperatives that inform social exchanges, cultural activity and determine priorities."[35] Recognising the complex relationship the Claim Group had with sacred sites, acknowledging that the effects of acts did not have to be direct,[36] and treating oral evidence from the claimants as prominent,[37] ultimately allowed the trial judge to infer further spiritual hurt from acts effecting these locations.[38] The HC affirmed the trial judge's assessment of

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[31] Ibid 13.

[32] Mary Graham, 'Some Thoughts about the Philosophical Underpinnings of Aboriginal Worldviews' (2008) 45 *Australian Humanities Review* 181, 183; Grieves, 'Aboriginal Spirituality' (n 16) 7.

[33] *Timber Creek* (n 3) [199].

[34] Ibid.

[35] Ibid [172] quoting the Palmer and Asche 2004 Report.

[36] Ibid [165].

[37] Ibid [166].

[38] Ibid [165].

multiple aspects of spiritual hurt felt by Claim Group members including the pain of loss of connection,[39] shame in the failed sense of responsibility to look after Country,[40] and the impairment of passing on knowledge.[41] As spirituality is the core of Indigenous identity,[42] giving weight to evidence from the report and the claimants on the spiritual hurt experienced was important in understanding the nature of cultural-loss .[43]

IV Non-Linear Time

C *Holistic Analysis: Incremental Effect*

Indigenous systems appreciate time as non-linear; events occurring in space rather than on a timeline as viewed by Anglo-Australians.[44] Linear conceptions of time accordingly view consequences of events as radiating into the future,[45] whereas consequences in a non-temporal frame impact relationships.[46] Progress is thus measured by the restoration of relationships.[47] The effects of acts on Indigenous connection transmit

[39] Ibid [194].

[40] Ibid [180].

[41] Ibid.

[42] Grieves, 'Aboriginal Spirituality' (n 16) 7.

[43] *Timber Creek* (n 3) [188].

[44] See Kwaymullina, 'Aboriginal Nations' (n 1) 6.

[45] See Kwaymullina, 'Indigenous Legal Systems' (n 6) Slide 12, 13.

[46] Kwaymullina, 'Indigenous Legal Systems' (n 6) Slide 12.

[47] Ibid.

through time and impact societies in complex ways.[48] This implicates assessment of acts as their effects are not simply felt at one time and by one form of membership of the Claim Group.

Timber Creek addressed non-linear time relationships by recognising that cultural-loss is not bounded by time and is incrementally worsened as dispossession continues.[49] The trial judge noted that previous settlement acts before 1975 had largely impaired the Claim Group's connection to land,[50] a significant acknowledgment of the temporal boundaries to equal rights imposed by the *Racial Discrimination Act 1975*. This contextualised the extent of cultural-loss before acts post-1975, demonstrating the incremental aggravation of hurt experienced by the Claim Group.[51] *Timber Creek* recognised that the hurt experienced throughout time was still keenly experienced in the present day and would continue to reverberate until the relationship with Country was healed.[52]

D *Indigenous Experiences: Future Generations*

In consideration of the claimant's incremental hurt and anthropological analysis,[53] *Timber Creek* additionally considered the entitlement of the

[48] See Kwaymullina, 'Aboriginal Nations' (n 1) 7.

[49] *Timber Creek* (n 3) [190].

[50] Ibid [163].

[51] Ibid.

[52] *Timber Creek* (n 3) [198]; Kwaymullina, 'Aboriginal Nations' (n 1) 12.

[53] *Timber Creek* (n 3) [190].

Claim Group's future descendants in the award. The HC's affirmation of compensation as a communal entitlement was significant in establishing Indigenous spiritual-loss as intergenerational.[54] Lay evidence was supported by the Palmer and Asche Report in illustrating that acts were not statically felt at one time and by some members of the Claim Group.[55] Effects of loss are experienced differently by Claim Group members depending on connection, ritual knowledge, and obligation to Country at any one time,[56] referencing the importance of spiritual relationships in non-linear time understandings.[57] The decision to include future generations in the award has been argued as lacking sufficient reasoning, specifically critiquing the lack of direction in calculating this consideration.[58] Such an argument is based in linear time perspectives as *Timber Creek* does not aim to make projections on what loss will be experienced in the future,[59] but recognises the continuing cycle of intergenerational loss.[60] The decision affirms that relationship-based considerations of time must be considered in compensation and sets a future precedent for a broad interpretation of the term "native title holders" as including all members past, present and future.[61]

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[54] Ibid [230].

[55] Ibid.

[56] Ibid.

[57] Kwaymullina, 'Indigenous Legal Systems' (n 6) Slide 12.

[58] Moss and Isdale, 'Where to Next?' (n 24).

[59] Ibid.

[60] *Timber Creek* (n 3) [230].

[61] Ibid [229].

V CONCLUSION

Timber Creek overcame the difficulties of assessing cultural loss from a Western worldview by engaging with Indigenous perspectives. Broad statutory interpretation, holistic analysis and consideration of the Claim Group's experience regarding their spiritual, non-temporal relationship with Country ultimately allowed for the conferment of a significant award. The decision speaks to the changing legal landscape in Australia regarding Native Title, moving away from historically restrictive approaches and conferring a social judgement that the Australian community deems appropriate.[62]

[62] Ibid [237].

AUSTRALIAN LAW'S INADEQUATE PROTECTION OF ABORIGINAL CULTURAL EXPRESSION

Amara Chaudhry

I INTRODUCTION

Aboriginal and Torres Strait Islander traditional cultural expression is inadequately protected by narrow legalistic principles that govern Australian intellectual property law. This poses concern for suitable protection of Aboriginal cultural heritage, particularly the protection of Aboriginal artistic expression within the Australian legislative regime. [1] Aboriginal artistic works contain significant cultural information vital to the preservation and education of Aboriginal history, identity and values. [2] Aboriginal arts and culture constitute a million-dollar industry, with Aboriginal art contributing a significant monetary consignment to the trade. [3] Further, Aboriginal art is a nationalistic symbol for Australia, therefore the protection of this work is significant for the maintenance of Australian identity. Unauthorised reproduction of Aboriginal artistic

[1] Andrew Stewart et al, *Intellectual Property Law in Australia* (LexisNexis Butterworths, 6th ed 2018) 17 ('Intellectual Property').

[2] Terri Janke, 'Protecting Australian indigenous arts and cultural expression: A matter of legislative reform or cultural policy?' [1996] 7(3) *Culture and Policy* 13, 14 ('Protecting Australian Indigenous Arts').

[3] Colin Golvan, 'Aboriginal Art and the Protection of Indigenous Cultural Rights' [1992] 7 *EIPR* 227 ('Aboriginal Art').

works is rapidly increasing within Australia. This unauthorised reproduction is causing concern within the Aboriginal community. The main purpose of this reproduction is commercialisation rather than the education of Aboriginal culture. [4] There has been judicial recognition on the issue of insufficient protection of Aboriginal intellectual property ('AIP') within Australia.[5] However, the present legislative framework *Copyright Act* 1968 (Cth) ('*Copyright Act*') does not provide adequate protection of Aboriginal cultural expression ('ACE'). The Act is not equipped to understand the scope of ACE. Therefore, rigid western notions of intellectual property law sourced from the *Copyright Act* are applied to protect ACE. The divergence between western and traditional conceptions on cultural expression mean basic requirements for the satisfaction of copyright subsistence for Aboriginal artistic expressions are met with difficulty. [6] This essay will discuss the ill-suited regime for the protection of ACE. Firstly, it will look at the Indigenous intellectual property in comparison to western notions of intellectual property law protection. Secondly, judicial discussion concerning ACE will be explored. Thirdly, this essay will look at current measures in place for the protection of ACE as well as recommendations.

[4] Intellectual Property (no 1) [1.25].

[5] Colin Golvan, 'Aboriginal Art and the Public Domain' (1998) 9(1) *Journal of Law, Information and Science* 122.

[6] Intellectual Property (n 1) [1.25] ('Aboriginal Art').

II ABORIGINAL UNDERSTANDING OF CULTURAL PROPERTY

A *Customary Laws and Practices*

Cultural heritage consists of 'intangible and tangible aspects of the whole body of cultural practices, resources and knowledge systems developed, nurtured and refined by Indigenous people and passed on by them as expressing their cultural identity'. [7] Heritage is inclusive of literary, performances, artistic works and comprises of 'objects, sites and knowledge the nature or use of which has been transmitted or continues to be transmitted from generation to generation, and which is regarded as pertaining to a particular Indigenous group or its territory'. [8] Under customary law, the ownership of cultural heritage is vested within the traditional custodians of a particular Indigenous community. [9] Artistic expressions are associated with the artistic manifestation of 'ancestral spirits, ancestral events or tracts of land associated with ancestral spirit or an ancestral event'. [10] This power to manifest pre-existing designs is vested in persons who are associated with particular ancestral beings

[7] Terri Janke, 'Managing Indigenous Knowledge and Indigenous Cultural and Intellectual Property' (2005) 36(2) *Australian Academic & Research Libraries* 95, 96 ('Managing Indigenous Knowledge').

[8] Terri Janke, 'Respecting Indigenous Cultural and Intellectual Property Rights' (1999) 22(2) *Forum—Legal Perspectives on Reconciliation* 631, 6323 ('Respecting Indigenous Cultural').

[9] Protecting Australian Indigenous Arts (n 2) 14.

[10] Ibid 15.

through descent which form part of a clan or group. [11] Approval for the reproduction of a pre-existing design must be sought and validated before an individual seeks to reproduce a certain aspect of a design. If consent is not granted, the reproduction is seen to be a threat to the Aboriginal clan or community who holds the rights to ancestral cultural heritage. [12] Further, once the approval is sought from the clan, the author of the artistic expression must not distort or misuse the given information without the authority of the clan. [13] The rights to the artistic work are considered collective or communal in nature, therefore are collectively owned and collectively exercised. [14] This complex system of ownership is rigorous in application and must be adhered to protect the diverse nature of ACE. [15] However, the concept of collective ownership is not recognised under the *Copyright Act*.

B *Copyright Protection Requirements*

The *Copyright Act* imposes strict criterion requirements which must be complied with for an artistic work to be protected through copyright. The artwork must be original for copyright to exist, it must not be copied from

[11] Dean A Ellinson, 'Unauthorised Reproduction of Traditional Aboriginal Art' (1994) 17(2) *UNSW Law Journal* 327, 331 ('Unauthorised Reproduction').

[12] Ibid.

[13] Protecting Australian Indigenous Arts (n 2) 16.

[14] Aboriginal Art (n 3) 230.

[15] Ibid.

another work.[16] Indigenous artwork is communally and collectively developed over time and is based off pre-existing designs passed down from generation to generation. [17] This originality requirement imposes difficulty concerning the scope of originality of the artwork inspired or developed as a result of pre-existing designs. [18] The communal nature of ACE raises the issue of whether a compilation of works sourced from pre-existing deigns and traditions is original in nature, or if it is sourced from a multitude of pre-existing designs. However, the issue of originality and pre-existing designs is settled by the judicature. Justice von Doussa in *Milpurrurru v Indofurn* (‘*Carpet’s Case’*) [19] states the reproduction of pre-existing designs of cultural heritage is original in nature as it suggests a degree of skill and labour to be used for the creation of the new artistic work.[20]

The *Copyright Act* suggests there must be an identifiable author of the artistic work. This requirement is inhospitable towards the nature of Aboriginal artwork. Firstly, Aboriginal artwork was created multiple years ago, this suggests there is no specific identifiable author for these works. [21] Secondly, ownership is vested in an individual person. This

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[16] *Copyright Act 1968* (Cth) s 32 (‘*Copyright Act’*).

[17] Maiko et al, *Legal Protection of Indigenous Knowledge in Australia* (Supplementary Paper 1, 2017) 6 (‘Legal Protection of Indigenous Knowledge’).

[18] Terri Janke, (*New Tracks: Indigenous Knowledge and Cultural expression and the Australian intellectual property system*) (Response to: Finding the Way: a conversation with Aboriginal and Torres Strait Islander peoples, 2012) 9 (‘New Tracks’).

[19] (1994) 54 FCR 240 (‘*Carpet Case’*).

[20] Ibid.

[21] New Tracks (n 18) 6.

does not accommodate to the communal nature of ACE's, particularly where ideas are collectively created and expressed in comparison to individualistic. [22] Therefore, copyright legalistic principles in Australia protect the expression of the idea rather than idea itself. [23] The narrow requirement for an identifiable author creates difficulty in protecting works which do not meet the requirement of an identifiable author. For example, the Wandjini and Mimi figures on ancient rocks do not satisfy the identifiable author requirement. [24] Therefore, they are not protected and are subject to unauthorised reproduction which is unjust to the clan who are the caretakers of these ancestral figures. [25] Another rigid requirement the *Copyright Act* imposes is through s 33(2). Section 33(2) states 'copyright that subsists in a literary, dramatic, musical artistic work by virtue of this Part continues to subsist until the end of 70 years after the end of the calendar year which the author of the work died'. [26] This time limit requirement is inadequate for the protection of Aboriginal artwork, which has been in existence in some cases such as the Dreamtime. [27] Difficulties in identifying an author coupled with the time limit restriction create great difficulties in satisfying copyright

[22] Legal Protection of Indigenous Knowledge (n 17) 10.

[23] Unauthorised Reproduction (n 11) 334.

[24] Legal Protection of Indigenous Knowledge (n 17) 10.

[25] Ibid.

[26] *Copyright Act* s 33(2).

[27] Protecting Australian Indigenous Arts (n 2) 18.

requirements therefore are indicative of the inadequate protection of the cultural expression of Aboriginal persons.

Section 22(1) of the *Copyright Act* requires works to be produced into material form for copyright to subsist. [28] An idea and expression dichotomy exist between artistic works created by Aboriginal persons and the material form requirement persisted by the *Copyright Act*. [29] This is particularly disadvantageous to aspects of Indigenous culture as it is displayed through intangible forms, for example song, dance and stories. [30] In terms of artistic works, body painting is not reduced to material form as it is temporary therefore this form of cultural expression is not adequately protected. This material form, tangible requirement and the protection of an idea rather than expression means whomever reduces the idea to a material form will ultimately have ownership rights towards the property. [31] Therefore, ownership can be vested in members of society who are not the authorised custodial owners of the cultural heritage. [32] This creates a power imbalance between the custodial owners and the persons seeking to reduce the idea into material form. Persons who have resources and skills to reduce the idea into material form will have ownership to that idea/expression and therefore will exercise monopoly rights on the artwork.

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[28] *Copyright Act* s 22(1).

[29] Unauthorised Reproduction (n 11) 334.

[30] New Tracks (n 18) 10.

[31] Ibid 11.

[32] Ibid.

III JUDICIAL DISCUSSION

In countenance to the inadequate protection by the legislative branch, the judiciary has taken measures to provide recognition on AIP. However, judicial recognition is inadequate as the decisions made in most cases mentioned below are ruled for matters other than copyright infringement. The first case which sought to provide recognition of the intangible nature of Aboriginal cultural heritage was *Foster v Mountford*. [33] In this case an ex parte injunction was sought to halt publication of book which consisted of cultural heritage. [34] The injunction was not granted on the basis of a copyright infringement, rather for a tortious claim for breach of confidence. [35] Secondly, the case of *Yumbul v Reserve Bank of Australia*[36] has been considered by the judicature for the protection of ACE. In this case Terry Yumbul was an Aboriginal painter who had received authority to paint the 'Morning Star Pole' by his clan. [37] The 'Morning Star Pole' is a sacred ceremonial piece, through which the dead are taken to the Morning Star and returned to their ancestral home. [38] The authority to reproduce this sacred work was met after the complex initiation and completion of ceremonies and customary practices by the

[33] *Foster v Mountford* (1976) 29 FLR 233.

[34] Ibid.

[35] Ibid.

[36] (1991) 21 IPR 481 ('*Yumbul*').

[37] Ibid.

[38] Ibid [30].

relevant clan. [39] Mr Yumbul brought the action against Reserve Bank of Australia for the reproduction of the 'Morning Star Pole' on a ten dollar note for the purpose of bicentennial celebrations. [40] The action was overturned due to evidential matters relating to the license agreement Mr Yumbul had executed with the Reserve Bank of Australia agent in regard to the reproduction of the painting. [41] However, copyright subsisted within the artistic piece through the satisfaction of the originality requirement. In this case French J noted Australia's inadequacy to provide recognition for Aboriginal community claims:

> it may be also that Australia's copyright law does not provide adequate recognition of the Aboriginal community claims to regulate the reproduction and use of works that are essentially communal in origin. But to say this is not to say that there has been established in the case of any cause of action. [42]

The *Carpet Case* and *Bulun Bulun v R & T Textiles Pty Ltd ('Bulun Bulun')* [43] indirectly recognised the communal/collective nature of ownership vested within AIP. In the *Carpet Case* the respondent company had manufactured and imported into Australia woollen carpets

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[39] Ibid.

[40] Ibid.

[41] Duncan Miller, 'Collective Ownership of the Copyright in Spiritually-Sensitive Works: *Milpurrurru v Indofurn* Pty Ltd' (1995) 6(1) *Australian Intellectual Property Journal* 185, 192 ('Collective Ownership').

[42] *Yumbul* (n 35) 490.

[43] (1998) 41 IPR 513 ('*Bulun Bulun')*.

containing the reproduction of artworks from Aboriginal artists. [44] This work was reproduced without the consent of the artists and the carpets were imported into Australia for sale. The landmark judgement by von Doussa J stated damages were granted to the plaintiffs in a group rather than separately, this was a recognition of the communal nature of the artworks. [45] Secondly von Doussa J identified the compensable 'personal and cultural hurt' suffered by the persons involved in the ordeal and awarded a collective award for personal damages. [46] Secondly in *Bulun Bulun* the artists shared the sum of damage awarded to them equally, despite the varying levels of infringement each artist within the case suffered. *Bulun Bulun* alongside *Yumbul* shows a judicial the recognition of the communal/collective nature of the Aboriginal community and intellectual property. [47] However, this recognition by the judicature is merely recognition, it does not consider the scope of AIP and the difficulties with the application of AIP in alignment of the current *Copyright Act*.

[44] *Carpet Case* (n 19) 240.

[45] Ibid.

[46] Ibid 244.

[47] *Bulun Bulun* (n 42) 513.

IV AUSTRALIAN PROTECTION OF ABORIGINAL INTELLECTUAL PROPERTY

The current measures for the protection of ACE are inclusive of the *Copyright Act*, judicial precedent and section 51(xvii) of the *Australian Constitution*. This section enables the federal government to make laws with respect to intellectual property. [48] However, the active use of this provision for the protection of AIP is unclear. Australia has not enacted specific laws for the protection of AIP. Rather there has been discussion concerning implementation of measures to protect AIP, however this implementation has not proceeded. [49] Firstly, the implementation of a Working Party on the Protection of Aboriginal Folklore. [50] This report discussed the creation of an Aboriginal Folklore Act to protect the unauthorised usage of Aboriginal cultural heritage and the facilitation of payments, however it was not implemented. [51] An Issues Paper: *Stopping the Rip-Offs: Intellectual property Protection for Aboriginal and Torres Strait Islander Peoples* [52] and a proposed report on the protection of

[48] *Australian Constitution* s 51(xvii).

[49] Michael Blakeney, 'Protecting the Knowledge and Cultural Expressions of Aboriginal Peoples' (2015) 39(2) *University of Western Australia Law Review* 180, 200 ('Protecting the Knowledge').

[50] Ibid, 201.

[51] Department of Home Affairs and Environment, *Report on the Working Party on the Protection of Aboriginal Folklore'* (Report No 1 1981) 4.

[52] Attorney-General's Department, '*Stopping the Rip-Offs: Intellectual Property Protection for Aboriginal and Torres Strait Islander Peoples* (Issues Paper No 1 October 1994).

indigenous knowledge titled *Our Culture: Our Future* [53] by Terri Janke has been released. However, these recommendations have not been followed nor implemented by the Australian government. The United Nations introduced a *sui generis* resolution titled *United Nations Declaration on the Rights of Indigenous Peoples* ('*UNDRIP*').[54] The purpose of *UNDRIP* is to promote the protection and recognition of indigenous cultural systems and traditions and prevent unauthorised usage of Indigenous cultural heritage. [55] Australia voted against *UNDRIP*, with senator Marise Payne stating the Australian law adequately protected cultural heritage however Kevin Rudd stated his support for this enactment.[56] However, it is unclear how this non-binding text will have an impact upon providing protection of AIP. Further, how it will co-exist with the current copyright regime. Therefore, the current measures in place for the protection of Aboriginal cultural heritage are inhospitable.

[53] Terri Janke, '*Our Culture, Our Future: Proposals for the Recognition and Protection of Indigenous Cultural and Intellectual Property*' (Report No 1, December 1997).

[54] GA Res 61/295, UN Doc A/RES/61/295 (13 September 2007) [1] – [11].

[55] Ibid.

[56] Protecting the Knowledge (n 48) 204.

V RECOMMENDATIONS

C *Legislation*

Legislative reform, or the introduction of specific legislation must be implemented to adequately recognise ACE within Australia. Legislative reform through the amendment of the *Copyright Act* must be commissioned. Amendments to recognise the communal/collective nature of Indigenous cultural expression must be incorporated within the legislation, however issues of scope arise with this amendment for reasons mentioned below. A plausible, repercussion free amendment is suggestable to the duration of the copyright period to allow Aboriginal cultural expression to have no time limit. This perpetuity period would protect the unique nature of Aboriginal cultural expression. Specific legislation is another viable recommendation for the protection of ACE. [57] This new legislation would deal with the specific issues of contention within the *Copyright Act*, such as communal rights, intangibility and customary laws. [58] However, issues of scope and flexibility arise with the proposal of such legislation. For example, which clan has the authority to reproduce a cultural design and which members would have the authority to bring an action in copyright if this provision was breached. [59] Further, the criterion for the selection of these members who authorise reproduction of an artwork and the monitorisation of members with this

[57] Protecting Australian Indigenous Arts (n 2) 19.

[58] Ibid.

[59] Ibid.

authority. [60] A specific body can be set up to regulate these matters, however the issue of limited resources presents itself. Lastly, the co-existence of this new legislation with existing copyright legislation. How would this new legislation adhere or differ from the requirements of the previous legislation? This specific legislation could also raise issues of injustice within society who may claim the specific legislation as advantageous to specific groups.

D *Cultural Protocols*

Non-legislative measures such as compliance/creation of cultural protocols is a suitable recommendation to protect the diverse nature of ACE. Protocols established by Indigenous Australians provide a guide to deal with cultural customs in a correct manner, including the protection of cultural expression and the methods to address cultural customs. [61] Individuals or companies dealing with the reproduction of ACE should develop protocols or understand them as a means of correct communication with Indigenous Australians. [62] Terri Janke and Company has produced cultural protocol guides for the Aboriginal and Torres Strait Islander Arts Board. [63] These protocols are inclusive of respect, Indigenous control, communication, consent, integrity,

[60] Ibid.

[61] Managing Indigenous Knowledge (n 7) 100.

[62] Ibid.

[63] Ibid.

confidentiality, attribution, proper returns and continuing cultures. [64] Indigenous control and communication are indicative of authority being placed within the hands of the Indigenous members of society who will be as a result of this protocol, consulted and communicated with before the reproduction of the work. [65] Consent for the reproduction of this work must be sought before the reproduction of a work. [66] Attribution, interpretation and confidentiality protocols include the correct method of attribution to the specific clan who owns cultural heritage, confidentiality of sensitive information and authenticity relating to the relevant expression. [67] Cultural protocols are not binding in nature; therefore, they will pose difficulty in implementation, however if the procedure of cultural protocols becomes widespread and normalised, the prospect for legislative implementation recognising protocols will be high.

VI Conclusion

The protection of Aboriginal cultural expression provided by the Australian legislative regime such as the *Copyright Act* is inadequate. The legislative regime does not protect ACE in a manner which encompasses the diverse scope of Aboriginal traditions and cultural heritage. For example, the complex communal and collective nature of

[64] Ibid 101—102.

[65] Ibid 101.

[66] Ibid.

[67] Ibid 102.

cultural expression, the material form requirement, the duration of Aboriginal artworks and the customary traditions and laws. Further, judicial discussion surrounding ACE concerns recognition, rather than suggested reform. Proposed amendment to the current copyright legislation and the enactment of specific legislation must be endorsed to facilitate the promotion of the diverse nature of ACE. Further, cultural protocols must be enacted to help guide the correct method of the usage of Aboriginal cultural heritage. Recognition and adequate protection of Aboriginal and Torres Strait Islander cultural expression is mandatory for the just treatment and protection of Indigenous Australians and their identities.

THE AUTHORLESS VOID IN COMPUTER-GENERATED WORKS: AN ANALYSIS OF AUSTRALIAN COPYRIGHT LAW AGAINST A BACKDROP OF ENGLISH CASE LAW

Pragya Srivastava

I INTRODUCTION

'[A] plane with its autopilot engaged is flying itself'.[1] However, 'whether piloted by human or software, the plane is still flying to the designated destination, as directed. The question is: who set the coordinates?'[2] This proficiently mirrors the topical debates across many jurisdictions regarding authorship and copyright protection for computer-generated works. The underlying aim of copyright law is to protect material forms in which ideas are expressed and to allow owners 'to exploit their work through reproduction and/or public dissemination without others being allowed to copy that creative input'.[3] In Australia and the United Kingdom (UK), copyright protection is a bundle of rights given to authors and are traditionally available for literary, dramatic, musical and

[1] *Telstra Corporation Ltd v Phone Directories Co Pty Ltd (Appeal)* (2010) 194 FCR 142, 144[1] (Justice Perram) ('*Directories Appeal*').

[2] Jani McCutcheon, 'The Vanishing Author in Computer-Generated Works: A Critical Analysis of Recent Australian Law' (2013) 36(3) Melbourne University Law Review 915, 944 ('Vanishing').

[3] *Copyright Act 1968* (Cth) ('*CA'*); Andrew Stewart et al, *Intellectual Property in Australia* (LexisNexis Butterworths, 6th ed, 2018) p 135 ('Intellectual Property in Australia').

artistic works, along with sound recordings, films, broadcasts, and published editions of works.[4]

One particular type of works that is becoming extremely common in today's world is computer-generated works. Computer-generated works are autonomously generated by software and have been defined in some legislature as works 'generated by computer in circumstances such that there is no human author of the work'.[5] One form of such works is vastly emerging as a result of Artificial Intelligence (AI), which is the 'science of making computers do things that require intelligence when done by humans'.[6] This could range from production of images by satellites to generative art using computer programs to musical intelligence software.[7] A recent example is the Next Rembrandt, a 2016 portrait created by AI on analysis of existing works by the Dutch painter, Rembrandt.[8] The development of AI technology to act autonomously without human creativity has posed major challenges for intellectual property and principles of authorship across jurisdictions.[9] The issues

[4] *CA* (n 3) ss 32, 85, 86, 87, 88; *Copyright, Designs and Patents Act 1988* ('*CDPA*').

[5] Vanishing (n 2) 929; CDPA (n 4) s 178.

[6] Nina Fitzgerald et al, 'An In-depth Analysis of Copyright And The Challenges Presented By Artificial Intelligence, *AI; understanding the IP* (Web Page Article, 11 March 2020) https://www.ashurst.com/en/news-and-insights/insights/an-indepth-analysis-of-copyright-and-the-challenges-presented-by-artificial-intelligence/ ('In-Depth').

[7] Vanishing (n 2) 930.

[8] In-Depth (n 6).

[9] Tony Bond and Sarah Blair, 'Artificia`l Intelligence & Copyright: Section 9(3) Or Authorship Without an Author' (2019) 14(6) *Journal of Intellectual Property Law & Practice 2019* p 423 ('Bond').

surrounding copyright protection for computer-generated works entail identifying the author who can enjoy the exclusive rights of such works. This paper will present a comparative analysis of the elements of authorship in computer-generated works, and its application to works created by technology such as AI, as outlined in the jurisdictions of Australia and UK to show that copyright laws in Australia are limited in terms of the forthcoming highly automated computer-generated works.

II COMPARISON OF ELEMENTS OF AUTHORSHIP

Although the Australian legislature was principally derived from the UK legislature in 1956, there are major differences in application of authorship and existence of copyright subsistence for computer-generated works between the two regimes.[10] The requirement of human authorship in Australia is stated in Part III of the *Copyright Act 1968* (Cth) ('CA'), which requires a natural (human) author for copyright subsistence in original literary, dramatic, musical and artistic works.[11] Pursuant to CA, copyright subsists in an original Part III work if the author is a 'qualified person,' who is an Australian citizen or a person resident in Australia.[12] Authorship is not extensively defined in Australian legislation beyond these provisions, hence its application must be found in case law. Contrarily, in *Copyright, Designs, Patents Act 1988*

[10] *Copyright Act 1956* (UK).

[11] *CA* (n 3) s 32.

[12] Ibid s 32(4).

(UK) ('CDPA'), which was the first statute in the world to consider copyright of computer-generated works, 'author' is defined in CDPA for computer-generated works as the person 'by whom the arrangements necessary for the creation of the work are undertaken'.[13] 'Computer-generated work' is defined in CDPA as work that 'is generated by computer in circumstances such that there is no human author of the work'.[14] Whether the two provisions allow copyright to subsist in computer-generated works depends on the interpretation by UK courts of 'arrangements necessary for the creation of the work'. The distinction in principles of authorship between the two regimes can be broken down into two broad elements, the test for originality and the independent intellectual effort that is required to establish originality.

A *Originality Criterion*

Authorship is extremely weaved together with the concept of originality because the author is the source of originality.[15] Therefore, it is firstly important to consider the originality criterion in both regimes. *IceTV Pty Ltd v Nine Network Australia Pty Ltd* ('*IceTV*') was a cornerstone in Australian jurisdiction regarding originality, following *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* ('*Desktop*').[16] Pursuant to *Desktop*, originality for a work in Australia could be satisfied

[13] Bond (n 9); *CDPA* (n 4) s 9(3).

[14] Ibid s 178.

[15] *IceTV Pty Ltd v Nine Network Australia Pty Ltd* (2009) 239 CLR 458 ('*IceTV*').

[16] '*IceTV*' (n 16); (2002) 119 FCR 491 ('*Desktop*').

by establishing 'sweat of the brow' of the author, comprising of hard labour, pure investment in time and money, economic risk, and organising and maintenance.[17] *IceTV* heavily rejected the 'sweat of the brow' doctrine and articulated the new 'independent intellectual effort' test for originality, whereby the author must exercise independent intellectual effort and direct it to the expression of the work.[18] Consequently, 'sweat of the brow' is no longer supported under Australian copyright laws.[19] The way this test unravels in practice is discussed in the next section with reference to cases that grapple with the causation element. The 'independent intellectual effort' test in *IceTV* is mirrored in the UK regime to an extent, where the contents of a literary work consisting of a database must be selected or arranged by the 'author's own intellectual creation' in order to satisfy originality.[20] However, the UK regime is more lenient by also considering the 'labour, skill and judgement' exercised by the author, placing more importance on the author's 'sweat of the brow' than Australian courts.[21] In practice, UK jurisdiction assesses the 'process of creation and the identification of the skill and labour' contributed to the work while evaluating 'own intellectual creation' with discretion and as a minimum threshold rather

[17] *Desktop* (n 16).

[18] IceTV (n 15) 480 [52].

[19] Ibid.

[20] CDPA (n 4) s 3A(2).

[21] *Newspaper Licensing Agency Ltd v Meltwater Holding BV* [2011] EWCA Civ 890 ('*Meltwater*').

than a strict test.[22] The difference in originality tests, along with statutory differences, parallels in the application of authorship principles to computer-generated works with regards to interpretation of the causal link between the author's effort and the final output.

B *Causal Link Between Independent Intellectual Effort And Expression*

In addition to changing the originality criterion, *IceTV* also responded to the non-contested issue of authorship in *Desktop*.[23] Although authorship was not directly considered in *IceTV*, the High Court's obiter reinforced the significance of authorship while recognising that the 'technological developments of today throw up new challenges in relation to the paradigm of an individual author'.[24] In *IceTV*, Nine Network ('Nine') brought action against IceTV for allegedly infringing copyright in Nine's television program schedules, arguing that their titles and times were original works which were substantial parts of their weekly schedule.[25] Nine's schedule was generated by entering 'programming decisions' into a computer database, albeit it was unknown who designed this database and how it precisely worked to 'select, arrange and present' programming

[22] Ibid.

[23] Vanishing (n 2) 922.

[24] Ibid 470 [23].

[25] *Nine Network Australian Pty Ltd v IceTV Pty Ltd* (2008) 168 FCR 14, 41-2 [113] (Black CJ, Lindgren and Sackville JJ) ('*Nine*').

decisions to create the schedule.[26] The judgment discussed this evidentiary gap, along with the lack of a provision in CA equivalent to s 9(3) of CDPA regarding the author of a computer-generated work, to conclude that the author of Nine's schedule 'was unknown' and hence there was no author.[27] It can arguably be gathered from the emphasis on the lacuna of an equivalent provision that had there been such a provision in CA, and if the person making arrangements was known, perhaps the court would have deemed Nine an author of computer-generated works such as Nine's schedule, and copyright protection would have been available for such works.

Nevertheless, the judgment added that even if the person who created the Nine Database was known, he/she would still not be the author because the arrangement of the programming information to create the schedule occurred 'automatically' by the 'computer program' and not by a person.[28] As a result, Nine's efforts were too anterior to the ultimate manifestation of the expression of the schedule, creating a weak causal link between the intellectual effort and the expression such that the effort was not directed to the 'particular form of expression'.[29] Although this was the obiter discussion in *IceTV* and the vitiating effect of computer-generated works on authorship was only first seriously considered in

[26] *IceTV* (n 16) 507 [149].

[27] Ibid 508 [151]; *CDPA* (n 4) s 9(3).

[28] IceTV (n 15) 507 [151], quoting Mark J Davidson, *The Legal Protection of Database* (Cambridge University Press, 2003) 21.

[29] IceTV (n 15).

Australia in *Telstra Corporation Ltd v Phone Directories Co Pty Ltd* ('*Directories*'), the latter did not deviate largely from the former.[30] The same principles were also mirrored in *Acohs Pty Ltd v Ucorp Pty Ltd* ('Acohs').[31]

Directories, a case concerning copyright subsistence in computer-generated telephone directories published by Telstra's subsidiary, Sensis Ltd, recognised difficulty in identifying the persons who contributed to the work and the lack of human authorship, concluding against copyright subsistence.[32] The directories were computer-generated by processes of the Genesis Computer System and the content entry '[the] Rules' for creation, and modification of the directories' form and content.[33] The input of the human agents who assisted in producing the directories was not considered intellectual because their decisions were merely in accordance with 'the Rules' and they did not control 'the nature of the material form produced by' the software.[34] The agents only carried out the maintenance and operation of computer systems, hence their effort was not directed to the 'particular form of expression' of the directories and they did not predict the final output.[35] The ultimate manifestation of

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[30] *Telstra Corporation Ltd v Phone Directories Co Pty Ltd* (2010) 264 ALR 617 ('*Directories*').

[31] *Acohs Pty Ltd v Ucorp Pty Ltd* (2010) 86 IPR 492, 511 [48] ('*Acohs*')

[32] *Directories* (n 31) 621 [5]; *Directories (Appeal)* (n 1) 178-9 [118]; Vanishing (n 2) 924.

[33] *Directories* (n 31) 628 [35].

[34] Ibid 649 [123]; *Directories (Appeal)* (n 1) 171 [89],178-9 [118].

[35] *Directories* (n 31) 657 [165].

expression was materialised and controlled by 'transformative steps' of 'the Rules', thus it was 'the Rules' that provided independent intellectual effort and not the human agents, failing to establish their authorship.[36] In addition to these principles, *Acohs* added that the author must be identified at the point where the work first takes its material form.[37] *Acohs* was concerned with the copyright subsistence and authorship of source codes generated by the Acohs software and Justice Jessup did not attribute authorship to the software controller.[38] This is because the controller merely entered data into the Acohs database instead of actually writing the source code, which he/she did without the source code in mind, preventing him/her from directing his/her efforts towards the 'particular form of expression' of the source code.[39] Evidently, the authorship test for a work under the Australian regime is almost two-fold. The author must engage in independent intellectual effort in the ultimate manifestation of the expression of the work. Additionally, the author's independent intellectual effort must also be directed to the particular form of expression of the final output and cannot be too anterior in the production process to this output.

On the other hand, the only case in UK to seriously consider authorship of computer-generated works was *Nova Productions Ltd v Mazooma Games Ltd* ('*Mazooma*'). *Mazooma* was concerned with originality of

[36] Ibid 657 [163]; *Directories (Appeal)* (n 1) 190 [167].

[37] *Acohs* (n 32) 511 [48].

[38] Ibid 511-12 [50].

[39] Ibid.

computer-generated 'composite frames' of animation that would display on the screen in electronic pool games once they were 'called up' by 'bitmap graphics', which were primarily designed by Mr Jones.[40] The contentious issue was whether authorship of the computer-generated composite frames could be attributed to Mr Jones.[41] Pursuant to s 9(3), the UK court deemed Mr Jones as the person who undertook the 'arrangements necessary for the creation of the' composite frames, attributing authorship to him.[42] The court refused to attribute authorship to the player of the game because of his/her lack of contribution of 'skill or labour of an artistic kind', in other words, his/her failure to undertake 'arrangements necessary for the creation of frame images'.[43] In reaching this conclusion, the UK court, not unlike Australian originality principles, placed weight on rewarding intellectual effort of Mr Jones instead of the mere fixer of the work.[44]

Yet, the extent of consistency between the two jurisdictions stops there. Mr Jones was deemed the author because he had 'devised the appearance of the elements of the game and the rules and logic by which each frame is generated and he wrote the relevant computer program'.[45] Under the

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[40] Jani McCutcheon, 'Curing the Authorless Void: Protecting Computer-Generated Works Following IceTV and Phone Directories' (2013) 37(28) Melbourne University Law Review 46, 65 ('Curing'); [2006] RPC 378 [101] ('*Mazooma*').

[41] Curing (n 41) 66; *Mazooma* (n 41) 398-9 [105].

[42] Mazooma (n 41) 398-9 [105].

[43] Ibid 399 [106].

[44] Curing (n 41) 66.

[45] *Mazooma* (n 41) 389-9 [105].

Australian regime, his efforts in designing the bitmap files would not be considered as directed to the 'particular form of expression' of the composite frames because the frames were produced by the program and the bitmap files, not Mr Jones.[46] It would follow that Mr Jones would not have devised the bitmap files with the exact appearances of the composite frames in mind, therefore he would not be deemed to have reduced the frames to their material form.[47] This anterior intellectual effort by Mr Jones to the ultimate manifestation of the expression of the frames would not have been sufficient to establish a causal link between the effort and the expression, therefore authorship would not have been attributed to him had this been in the Australian jurisdiction.[48] However, the broader interpretation by UK courts of 'arrangements necessary for the creation of the work' is such that the preparatory work by the programmer in writing the computer program is contemplated by the term 'arrangements' and is not considered too anterior to the expression of the frames, thus is sufficiently directed towards the expression of the composite frames. This echoes the broader originality criterion of the UK regime as it considers the 'labour, skill and judgement' exercised by the programmer, which can be analogised to 'sweat of the brow', in addition to discretionally taking into account his 'own intellectual creation' as no more than a minimum threshold.[49]

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[46] *IceTV* (n 16).

[47] *Directories* (n 31) 657 [165].

[48] *IceTV* (n 16).

[49] *Meltwater* (n 22).

This comparison highlights the principles that are at the heart of the two regimes. The causal link between independent intellectual effort and the final expression of the work is approached much more strictly by Australian judges, who are extremely careful as to not undermine principles of creativity in society by rewarding works that are arguably "less creative" and inhibit more 'sweat of the brow'. This is possibly due to Australian jurisdiction's intention to continue incentivising people to create by providing economic, social and cultural benefits, and the mindset that rewarding low-creativity labour in programming computer-generated works will mitigate the incentives to create.[50] On the other hand, UK courts consider 'process of creation and the identification of the skill and labour' as important aspects in materialising an expression of a work, and are happy to reward these efforts along with intellectual creation without being overtly careful to avoid encroaching on 'sweat of the brow' doctrine.[51]

III Application Of Regimes To Other Computer-Generated Works

The current case law in Australia, however, only addresses limited types of computer-generated works. With increasingly fast development of technology, computer-generated works are becoming extremely

[50] Stephen M Stewart, 'International Copyright and Neighbouring Rights' (Butterworths, 2nd ed, 1989) 3-4 ('Stewart').

[51] *Meltwater* (n 22).

autonomous, more than the works discussed above, one form being works that are created by AI.[52] The contrasting application of authorship under the Australian and UK regimes would also translate to AI-created works, such as The Next Rembrandt or images produced by satellites. Australian courts would find that the efforts of the programmers in setting parameters of The Next Rembrandt or satellites are not directed to the 'particular form of expression' of the 3D textured output or the images of the 'contours of the Earth, weather formations, the movements of planets or the structure of galaxies' respectively.[53] Consequently, the actual form of these outputs would be 'unpredictable' and the programmers would not have contemplated the exact design and form of the outputs when setting the parameters of the machines, failing to reduce the works to their material forms.[54] They would have had such a trivial control over the nature of the material forms, that it would fail to establish a causal link between effort and expression.[55] Since the efforts of these machine are of 'such overwhelming significance' to the material form, rewarding the programmer's efforts under the Australian regime would be praising their 'sweat of the brow' and economic risk rather than rewarding independent intellectual effort, which would be inconsistent

[52] Sunny J. Kumar and Niall J. Lavery, 'Does AI generated work give rise to a copyright claim?', December 18 2019, The National Law Review. K&L Gates ('Kumar').

[53] In-depth (n 6); Vanishing (n 2) 930.

[54] *Directories* (n 31) 657 [165]; *Directories (Appeal)* (n 1) 178-9 [118].

[55] *IceTV* (n 16)

with Australian authorship principles.[56] Therefore, the question of authorship in the Next Rembrandt or satellite images would have the same answer as the directories in *Directories (Appeal)*, and there would be no authorship due to lack of human intervention.

The lack of human intervention in the productions of the 3D textured output or the images by a satellite would not, contrarily, sway UK courts to refuse authorship to the programmers. The programmers of AI machines would be analogous to Mr Jones in *Mazooma* such that their efforts in setting the parameters would be regarded as undertaking the 'arrangements necessary for the creation of the' 3D textured outputs and the images of the satellite.[57] The programmers' efforts would be sufficiently directed to the 'particular form of expression' of the outputs created, therefore would not be regarded as too anterior to the ultimate manifestation of their expressions.[58] Assessing the application of the UK authorship regime with the backdrop of Australian authorship doctrines helps highlight the fact that UK courts would view authorship of the same computer-generated works through a broader lens of 'labour, skill and judgement' along with 'intellectual creation' than that of the Australian test of independent intellectual effort that rejects the 'sweat of the brow' doctrine.

[56] *Directories (Appeal)* (n 1) 191 [169]; *IceTV* (n 16).

[57] *Mazooma* (n 41) 398-9 [105].

[58] *IceTV* (n 16).

IV RECOMMENDATIONS

Evidently, the conventional principles of authorship continue to guide Australian copyright law, failing to currently protect computer-generated works. As a result, as the level of human intervention in computer-generated works will decrease, it will become progressively trickier to attribute authorship to a person and hence to provide copyright protection to such works under the current Australian copyright laws.[59] This will create an enormous disparity between protected and unprotected works in a world where computer-generated works are becoming a commercial reality through the use of advanced programming, deep learning algorithms and recognition techniques in a climate of cheap and accessible processing power.[60] The strict rejection of sweat of the brow in works was rational with respect to traditional copyright works that involved little to no computer intervention, where labour by a person was in fact truly 'sweat of the brow' and lacked creativity. The distinction between 'sweat of the brow' and independent intellectual effort used to be well-defined in cases such as *Desktop*, where the effort in question was merely organising the names, address and facts together in the White Pages, and the rejection of this as a copyright work in *IceTV* was justified.[61] However, it cannot be said that it is identical or even similar to apply the rejection of the judgment in *Desktop* by *IceTV* as a blanket

[59] Kumar (n 64).

[60] Bond (n 40).

[61] Desktop (n 16).

rule to all computer-generated works that exist now. In light of 'advances in machine learning and the growth of computing power' that have occurred since *IceTV*, AI in today's society is evidently producing works which are enabled by persons engaging in much more creativity than just 'sweat of the brow' of organising White Pages, TV schedules or Directories.[62] As computer-generated works nowadays are departing more from those in the earlier Australian cases, the failure to provide copyright protection for such works would be inconsistent with the underlying policies of copyright laws that aim to provide 'natural justice' by rewarding creators of works with 'fruits of their labour', economically incentivise individuals to create, and enliven the culture and social climates of communities, nations and the world.[63] These underlying policies allude to various arguments in favour of copyright protection for computer-generated works in Australia, however that is outside the scope of this paper. As a result, this paper puts forward the recommendation that Australian authorship regime should be reviewed and amended to allow copyright protection for the vast number of computer and AI-generated works that exist in Australia in today's age.

V CONCLUSION

As demonstrated above, the UK regime is broader than the Australian regime with respect to authorship of computer-generated works. Since

[62] In-Depth (n 6); IceTV (n 15); Desktop (n 16); Directories (n 30).

[63] Stewart (n 50).

the rejection of the 'sweat of the brow' doctrine in *IceTV*, Australian law has been and will continue to deny copyright protection for computer-generated works on the basis that the independent intellectual effort is usually too anterior to the ultimate manifestation of the expression of the final outcome.[64] On the other hand, UK statute and courts provide copyright protection for computer-generated works as they reward labour, skill and judgment of the author along with their 'own intellectual creation' involved in creating the works. Therefore, a computer-generated work in the UK will have copyright protection as long as the author is the person 'by whom the arrangements necessary for the creation of the work are undertaken' and their preparatory work will not be considered too anterior to the expression even if it is eventually the computer software that creates the expression of the work.[65] This, in turn, would be viewed by the Australian jurisdiction as rewarding 'sweat of the brow' of the author and as a result, undermining the importance of creativity in society. However, with the increasing development of computer-generated works of extraordinary level of sophistication and intelligence, the Australian authorship principles are beginning to become outdated and inconsistent with the underlying policies and principles at the heart of copyright laws.[66] In concluding that the current Australian copyright laws are fairly limited in relation to computer-

[64] *IceTV* (n 15).

[65] *CDPA* (n 4) s 9(3).

[66] AI Generated Works and Copyright Protection (August 2019) Katarina Klaric, Stephen Lawyers & Consultants ('Klaric').

generated works, this paper recommends the review of Australian authorship regime in order to provide copyright protection for computer-generated works that are just as creative and otherwise original as traditional forms of works and are being unjustly deprived of copyright protection due to an artificial 'lack of authorship'.[67]

[67] Vanishing (n 2) 950.

IS MEDIATION 'LAW'?: A HART-IAN PERSPECTIVE

JING ZHI WONG

Mediation, as a form of dispute resolution, is widely practiced. Nations across the world recognize it as one form of dispute resolution. But the existential question remains. Can we rightly ascribe the word 'law' to the processes and rules of Mediation? This essay makes one qualified proposition. Mediation is an extra-legal process, unless it is used to realize the law (and justice). This is for two reasons. First, Mediation's rules, processes and mediated outcomes do not in themselves cause judges' obeisance and adherence. Mediated Settlements must rely on the law of contract for its validity and efficacy. Second, even if Mediation is legislated to form part of our law, it is extra-legal. It does not comport with the minimum content of natural law in that it does not guarantee nor realize the law (and justice). If we are to regard Mediation as law, Mediation must be used to realize the law (and justice).

I INTRODUCTION

Mediation has been lauded as a forum for efficient and amicable dispute resolution. It promises to be able to preserve working relationships between parties in dispute, allow parties control of the outcomes of the resolution process. Part of its allure is its ability to facilitate focus on 'commercial solutions'.[1] These are perhaps reasons why there has been growing support from industrial nations for the *United Nations*

[1] *Parliamentary Debates*, *Official Report* (6 August 2018) <https://sprs.parl.gov.sg/search/fullreport?sittingdate=6-8-2018> at 56-57 (accessed 16 November 2018) (K Shanmugam, Minister for Law, Singapore); Edwin Tong, 'The Singapore Convention on Mediation and the Future of Appropriate Dispute Resolution' (Conference Panel Discussion, American Society of International Law Virtual Annual Meeting, 25 June 2020) [17:00]–[17:30].

Convention on International Settlement Agreements Resulting from Mediation [2] (*Singapore Convention*). [3] There have been substantial literature extolling the wonders of mediation.[4] However, these claims appear overstated.

This essay offers a critique through the schema of HLA Hart's legal system.[5] This essay points out the dichotomies Mediation pose. This inquiry questions whether Mediation can be considered legitimate *norms* or *rules* of law,[6] and whether it can be considered a legitimate part of our *legal system*.[7] This essay makes the case for one qualified proposition –

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[2] *Convention on International Settlement Agreements Resulting from Mediation*, opened for signature 7 August 2019 ('Convention'); See also, Settlement of commercial disputes – International Commercial Mediation: draft model law on international commercial mediation and international settlement agreements resulting from mediation, note by the secretary, UNCITRAL 51st session, 2 March 2018, A/CN.9/943, Art 15-19.

[3] 'About the Convention', *Singapore Convention on Mediation* (Webpage) <https://www.singaporeconvention.org/about-convention.html>.

[4] See generally, John Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford University Press, 2002); John Braithwaite, 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts' (1999) 25 *Crime & Justice* 1, 82-3; Robyn Carroll, 'Appointing decision-makers for incapable persons – What scope for Mediation' (2007) 17 JJA 75, 81, referring to L Boulle, *Mediation: Principles, Process, Practice* (Butterworths, 1996) 35; Kathy Douglas and Rachel Field, 'Looking for Answers to Mediation's Neutrality Dilemma In Therapeutic Jurisprudence' (2006) 13 *eLaw Journal* 177.

[5] HLA Hart, *The Concept of Law* (Oxford University Press, 2nd ed, 1994).

[6] See, eg, Christine Harrington, 'Socio-Legal Concepts in Mediation Ideology' (1985) 9 *Legal Studies Forum* 33, 35-8; Andrew Morrison, 'Is Divorce Mediation the Practice of Law – A Matter of Perspective' (1987) 75(3) *California Law Review* 1093; Douglas Lind, 'On the Theory and Practice of Mediation: The Contribution of Seventeenth-Century Jurisprudence' (1992) 10(2) *Mediation Quarterly* 119.

[7] Joseph Raz, *The Authority of Law* (Clarendon Press, 1979) 79-84; I make the assumptions that rules are intelligible: Charles J Ten Brink, 'A Jurisprudential

that mediation has an *extra-legal* characteristic, and it can only be considered as 'law' if it realizes the law. This ontological legal theory exploration does not only provide an account law's nature but posits how we ought to behave and what we ought to pursue.[8]

II WHAT IS MEDIATION?

There exist a wide and sparse patchwork of mediation practices in different contexts.[9] It is widely accepted to mean a process that parties, with the assistance of a mediator, identify the disputed issues, develop options, consider alternatives and endeavour to reach an agreement.[10] The role which mediators play vary. In *facilitative* mediation, Mediators are facilitator of the process rather than an authority figure who provides substantive advice or pressure to settle. In *evaluative* mediation, the mediator is hired as an authority figure who will evaluate the case and offers advice on how the dispute should be resolved. In *transformative* mediation, Mediators foster empowerment and recognition in the parties this is done by encouraging the parties to communicate and make

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Approach to Teaching Legal Research' (2005) 39 *New England Law Review* 307, 311-4.

[8] Legal theory is in this sense useful. For justification, see, Kevin Toh, 'Jurisprudential Theories and First-Order Legal Judgments' (2013) 8(5) *Philosophy Compass* 457, 457-8.

[9] Nadja Alexander, 'Mediation and the Art of Regulation' (2008) 8(1) *Queensland University of Technology Law Journal* 10; Tania Sourdin, *Alternative Dispute Resolution* (Lawbook Co, 2002) 25.

[10] Carroll (n 4) 81.

decisions more effectively, subject to their own choices and limits.[11] Mediators exercise a degree of authority in mediation.

The role which Mediators play is a simple but essential: they act as 'agent of reality' who impresses upon the parties the benefits but also the costs and detriments of failing to reach a negotiated agreement.[12] Sometimes (particularly in *evaluative* mediation), the mediator imposes acts as a figure of authority that imposes settlements. Successful mediation usually results in an exchange of promises – a contractual settlement.[13]

III MEDIATION'S PROMISE AND PREMISE

A *Promise*

Mediation offers several lauded *benefits*. First, it offers a cost-and-time effective[14] fix – a more efficacious means of resolving (or avoiding)

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[11] David Spencer, *Essential Dispute Resolution* (Cavendish, 2nd ed, 2005) 65; David Spencer and Michael Brogan, *Mediation Law and Practice* (Cambridge University Press, 2006) 48-74; Carroll (n 4) 82 (footnotes omitted).

[12] Jennifer Brown and Ian Ayres , 'Economic Rationales for Mediation' (1994) 80 *Virginia Law Review* 323, 325.

[13] Jing Zhi Wong, 'Singapore Convention on Mediation: Better Enforcing Cross-Border Mediation Agreements', *Perth International Law Journal – UWA International Law Society Blog* (Blog, 18 November 2018) <https://www.perthilj.com/blog/2019/2/19/singapore-convention-on-mediation-better-enforcing-cross-border-mediation-agreements>; Timothy Schnabel, 'The Singapore Convention on Mediation: A Framework for the Cross-Border Recognition of Mediated Settlements' (2019) 19(1) *Pepperdine Dispute Resolution Law Journal* 42.

[14] Lord Bingham, *The Rule of Law* (Penguin, 2011) 85-6; Christopher Hill, *Liberty Against the Law* (Allen Lane, 1996) 266, referring to John Cook, *Unum Necessarium: or, the Poore Man's Case* (Matthew Walbancke, 1648).

disputes than traditional forums, ie: litigation.[15] Second, it delivers a *feeling* of *procedural justice* (not to be confused with procedural fairness) to disputants.[16] Implicit in its growth is the recognition of the high costs of litigation and potential of mediation to *deal* with both legal and non-legal issues more quickly and informally.[17]

Mediation promises to resolve disputes by freeing disputants from the 'encumbrances of formal rules' in view of 'fostering a relationship of mutual respect, trust and understanding',[18] enabling them to meet 'shared contingencies without formal prescriptive rules'.[19] Carroll describes the Mediation process as one that is: interests focused, voluntary, consensual, flexible, participatory, informal, norm-creating, collaborative, relationship-oriented, private, confidential and transparent. [20] Underpinning these are five philosophical tenets that illuminate these capacities – voluntariness, confidentiality, neutrality, empowerment, and

[15] Eg, *Bolitho v Banksia Securities Limited (No 7)* [2020] VSC 204, [22]-[27].

[16] Tim Cowen, 'Justice Delayed is Justice Denied' (Conference Paper, World Justice Forum, 2-5 July 2008) 18, 19, 24, 25; Lord Bingham (n 14) 88-9; National Alternative Dispute Resolution Advisory Council (NADRAC), *A Framework for Standards* (2001) 4, 70-71.

[17] See generally, Kathy Douglas and Jennifer Hurley, 'The Potential of Procedural Justice in Mediation: A Study Into Mediator's Understanding' (2017) 29(1) *Bond Law Review* 69, 71; See also, Rebecca Hollander-Blumoff and Tom Tyler, 'Procedural Justice and the Rule of Law: Fostering Legitimacy in Alternative Dispute Resolution' [2011] (1) *Journal of Dispute Resolution* 1.

[18] Lon Fuller, 'Mediation – Its Forms and Functions' (1970-1) 44 *Southern California Law Review* 305, 325-6.

[19] Ibid.

[20] Carroll (n 4) 81.

unique solutions.[21] The authoritative sources of literature on Mediation all agree that the benefits of Mediation accrue from the underlying and fundamental conception of freedom to consent. Mediation is consent based, and its efficacy and effectiveness rely upon party's consent.

B *Premise; and Underlying Tension*

Herein lies a key problem. Mediation's claim to legitimate authority and legitimacy lies upon the free and informed consent of parties, and the ability of parties to do so free: from want or fear of prejudice or collateral disadvantage,[22] from coercion,[23] to determine one's own solution from bias,[24] and to resolve disputes creatively and free from rigid legal rules.[25] When parties, operating under a relationship of mutual respect, trust and understanding, fully consent, a justiciable dispute does not arise, even though the bargain consented to is unjust.[26] Free Consent, in this context, cures all defects.

There is dissonance between the utopian narratives extolling the wonders of Mediation, and the reality of Mediation. Mediation's legitimacy is consent based, but yet, the very reason parties choose to go to Mediation vitiates consent. Mediation is a process that entice

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[21] Ruth Charlton, *Dispute Resolution Guidebook* (LBC Information Services, 2000) 15; Spencer and Brogan (n 11) 48-74.
[22] Confidentiality; Spencer and Brogan (n 11) 85-7.
[23] Voluntariness; Ibid, 87-8
[24] Neutrality, as impartiality and equidistance from dispute; Ibid, 88-98.
[25] Unique solution; Ibid, 99-100.
[26] Lon Fuller, 'Mediation – Its Forms and Functions' (1970-1) 44 *Southern California Law Review* 305, 325-6.

because it looks economical. Parties who 'freely' agree to use it to resolve their disputes consent to it, even if it is unjust, because they operate under the assumpsit that not to do so would result in more detriments. Consent in the context of Mediation is not free, but *relatively* free. It is a choice one makes between the frying pan and the fire (or between a rock and a hard place). Corollary, there is a fundamental disagreement here. The premise of the utopian promises of Mediation can never really be attained, because its internal conditions of legitimacy can never be absolutely satisfied.

On the other hand, law in a democratic society makes a claim to legitimate authority and legitimacy premised upon a social contract between the governed who consent to law's authority based on law's promise of justice it can deal to the its subjects.

Two tension resonate throughout this paper: 1. Tension between what parties subjectively feel justice is and justice embodied in rules; 2. tension between justice *inter-partes*[27] (justice subjectively considered; or justice as an end between parties) and a public conception of justice (justice objectively considered; or justice as understood as an end of a legal system).

IV Is Mediation 'Lawl'? An External Criteria of Law in Legal System

[27] Eg, *ASIC v Kobelt* [2019] HCA 18.

C *Rule of Recognition: An External Criteria of 'Law' in 'Legal System'*

1 *The idea of a Rule of Recognition*

Mediation's growth signals society's intention to regard Mediation as *law*. However, not all apparent obeisance to rules is evidence of 'law'. There is distinction between habitual practice that is congruent with the law, and positive acknowledgement and adherence to law. Hart argues that the foundations of a legal system do not consist of habits of obedience to a legally unlimited sovereign (Austin) on the threat of sanctions,[28] but instead consist of *adherence* to, or *acceptance* of, an ultimate *rule of recognition* by which the validity of any primary rules (rules which require members of the community to do or forbear from doing certain things[29]) or secondary (rules that govern the operation of the rule-system itself[30]) rule may be evaluated.[31]

Central to Hart's thesis is that the *rule of recognition* is a set of criteria by which officials determine which rules are or are not part of the legal system.[32] The *rule of recognition* of a identifies those features a rule must possess if it is to count as a legal rule of the system in question.[33]

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[28] Brian Bix, *Jurisprudence: Theory and Context* (Sweet & Maxwell, 7th ed, 2015) 38.

[29] Julie Dickinson, 'Is the Rule of Recognition Really a Conventional Rule?' (2007) 27(3) *Oxford Journal of Legal Studies* 373, 375.

[30] Bix (n 28) 39.

[31] H L A Hart, *The Concept of Law* (Clarendon Press, 1994) 110.

[32] Bix (n 28) 40-1.

[33] Dickinson (n 29) 375; Hart (n 31) 109-11.

2 *The Criterion of Validity*

(a) Sufficient Criteria of Exact Reason

A rule, assessed against Hart's *rule of recognition*, is a valid part of a legal system when that rule is treated by the Court as a normative[34] *reason* or *justification* (can be moral or otherwise, but must be 'legal'[35]) for the its decision.[36] A rule is valid as law only if practiced by the courts and accepted as law.[37] In this sense, there must be positive judicial *acceptance* of that rule for a rule to be law in its use as *reasons* and *justification* for a decision, but a valid rule need not always be *adhered* to, *accepted*, or *practiced*.[38]

This criteria has been met with criticism from Raz and Dworkin, who argues that it does not explain how rules can be reasons for action.[39] Both Raz and Dworkin argues Hart's *rule of recognition* does not explain the normativity of rules or authority of rules outside strict confines of judicial decision-making.[40]

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[34] Dickinson (n 29) 375; Hart (n 31) 55-7, 83-91, 102-3, 109-10, 111, 116-7.

[35] In the triadic sense, see Alec Stone Sweet, 'Judicialization and the Construction of Governance' (1999) 32(2) *Comparative Political Studies* 147, 163-4; Dickinson (n 29) 379-81.

[36] Ibid 376; Hart (n 31) 103-5.

[37] Dickinson (n 29) 383.

[38] Ibid 384.

[39] Joseph Raz, *Practical Reasons and Norms* (Hutchinson of London, 1975) 56–8.

[40] Ibid 57; Dickinson (n 29) 388.

(b) Necessary Criteria of Some Reason

Recognizing pluralism in the law, Marmor[41] proposes a slightly different but not inconsistent criteria of Hart's *rule of recognition* for identifying law. He regards *rules of recognition* as 'constitutive conventions wherein a necessary reason for following a rule which is a social convention consists in the fact that others follow it too',[42] and 'are actually practiced in the (law-making and judicial) community'.[43]

This is not to say that every social practice is a valid rule and is valid 'law'.[44] Judges must look to those common recognition practices in order to identify the content of the recognition rule that they must follow.[45] In Marmor's conception of Hart's *rule of recognition*, the idea and criteria of rules of recognition are constitutive conventions of partly autonomous social practices[46] – practices that have some acceptance and adherence to by the judiciary.[47] The distinction between Marmor and Hart are that in Marmor's view, the rule does not need to provide reasons or justification for why Judges must follow them – it is enough that Judges do recognize and follow them albeit for reasons and justifications that may outside of

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[41] Dickinson (n 29) 394; Andrei Marmor, *Positive Law and Objective Values* (Oxford University Press, 2001).

[42] Marmor (n 41) 5, 22, 24.

[43] Ibid.

[44] Dickinson (n 29) 394.

[45] Ibid 396; Hart (n 31) 108, 254-68.

[46] Dickinson (n 29) 393.

[47] Ibid 394.

that rule.[48] Marmor infers from the fact that when Judges give effect to a certain rule, it implies the existence of and correlation with *some* reason and justification that it be law.

(c) Convergence and Divergence in these Criterion

i. Hart: An official who regards a rule as valid must treat that rule as a *reason* or *justification* for his decision and official practices. Common official practice as regards that rule supplies officials with reasons why they ought to accept and follow that rule.

ii. Marmor: Common official practice allows the identification of what judges must follow in order to adhere to the rule of recognition of their legal system, not necessarily supply them with reasons. An official who regards a rule as valid could treat that rule as a reason of justification for his decision, or an auxiliary reason, or not at all. Judges may do so for a variety of different reasons stemming from, for example, morality, religious belief or self-interest,[49] that could be (but not required to be) incommensurable with that rule.[50]

Marmor's reading of Hart's *rule of recognition* is broad and all-encompassing. A rule that seems to attract judges' obeisance, or a

[48] Ibid 396.

[49] Marmor (n 41) 32-3; Dickinson (n 29) 398.

[50] Dickinson (n 29) 400.

customary practice by judges in faith of some rules, while in Hart's *Concept* would not necessarily constitute valid law (Hart requires a higher threshold of judicial recognition of the rule), could in Marmor's reading, be valid law. The divergence of Marmor's account from Hart, lies in the role to which the rule plays in reasons for Judges' decision. In Hart's view, rules of law must be the *exact* reason or justification for Judges' decision. Judges' must appeal to the rule in normative language. In Marmor's view, rules of law need not be the *exact* or *direct* reason or justification. It is enough that some reason supports its classification as law.

Where Hart's and Marmor's account collide, is in the basic requirement that legal rules must be recognised by the judiciary (state) as being enforceable as part of a triadic dispute-resolution process (between parties and the state).[51] Consistent with this is Kantorowicz's *Definition of Law*: law as 'a body of rules prescribing external conduct and considered justiciable'.[52] Practices that are pure dyadic (as in between private individuals without any state recognition of it) cannot be, in both Hart's and Marmor's view, valid law.

D *Can Mediation Be Considered Law?*

Successful mediation results in a contractual settlement agreement. The Courts may then hand down consent orders. While Mediation outcomes

[51] Sweet (n 35) 147, 163-4.

[52] Hermann Kantorowicz, *The Definition of Law* (Cambridge University Press, 1958) 21.

are enforced, it is not the rules or processes of mediation that are recognized as legitimate nor given value as 'law'.[53] Courts enforce the contract or agreement that result from Mediation, either through a consent order, or by enforcing the contract.[54] Here, Courts recognize first and foremost the sanctity of the contract and the freedom of contract, and the public policy to not to interfere with that freedom,[55] subject to the usual vitiating factors.

This view is supported by provisions of the *Singapore Convention*. Crucially, Articles 4 and 5 requires that settlement agreements are signed, [56] and with it, evidence that the agreement resulted from Mediation.[57] Article 5 puts mediation in a position deferential to contract law. Article 5 provides that Mediation agreements should not be enforced, where the processes and rules of Mediation leading to the creation of agreement are not up to standard (breaches and failures by mediator or mediation ethics), or contrary to public policy.[58]

It might be dogmatic to consider that Mediation, its rules and processes, is law just because they can be logically implied as part of the 'law' by

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[53] Nadja Alexander, 'Mediating in the Shadow of Australian Law: Structural Influences on ADR' (2006) 9 *Yearbook of New Zealand Jurisprudence* 332, 335, 340-1; In Western Australia, parties cannot be ordered to go to mediation where they are liable for mediator remuneration. See *Rules of Supreme Court 1971* (WA) O 29.2.

[54] See Part III.A and IV.A

[55] Alfred Denning, *The Road to Justice* (Steven & Sons, 1955) 88-9.

[56] Convention (n 2) Art 4(1)(a).

[57] Ibid Art 4(1)(b).

[58] Ibid Art 5.

other connected rules the validity of which has already been recognized.[59] But under Marmor's account, Mediation has some force as 'law' because its outcomes are enforced. In this sense Mediation can be described as law because of its correlation with its outcome being capable of enforcement.

However, terming Mediation 'law' would be an abuse, even under Marmor's account. It is not a body of enforced and enforceable rules, but a mass of *real facts*[60] of which only its outcome in the form of a contract is enforceable. Mediation – its processes and rules – are not the objects directly and *triadically* enforced as the reasons for judicial decision. It is the outcome – contracts, or agreements, and the associated costs-and-time savings which result from Mediation – that is being given consideration as law.[61] If we accept and receive Mediation into our definition of law because there are associated reasons why it could be 'law', law would be a body of rules the coherence of which is its own guarantee,[62] reliant on a vicious cycle of circular and fallacious reasoning for its legitimacy. It is paramount, that if we are to regard Mediation as functionally law, it must realize or actualize the law.

[59] Kantorowicz (n 52) 31.

[60] Ibid.

[61] Eg, *Bolitho v Banksia Securities Limited (No 7)* [2020] VSC 204, [22]-[27].

[62] Kantorowicz (n 52) 31.

E *Limitation of This Analysis*

While the analysis concludes that Mediation itself cannot be considered *law* now, it does not definitively proscribe that Mediation will never become law in the future. Hart's and Marmor's conception of the *rule of recognition* is tool used to discover the *existence* of a rule at the time of an analysis. Mediation, its processes and rules, may be valid law if the law changes.

V Is Mediation 'Law'? An Internal Criteria of Law in Legal System

F *Rule of Change and The Internal Criterion of Law*

Mediation may, in form, constitute valid law when it is, through a legal system's *rule of change*, received into law. The enquiry then evolves into whether Mediation, its processes and rules, should ever be regarded as valid law.[63]

Hart claims that legal rules, as an *existential* condition going to the internal criterion of law, must exhibit some specific conformity with morality or justice, or must rest on a widely diffused conviction that there is a moral obligation to obey it – ie: *minimum content of natural law*.[64] If law is to command obeisance, there is a necessary condition of a *minimum content of natural law* – of justice or of morality.

[63] Hart (n 31) 95-6; Bix (n 28) 38-41.

[64] Hart (n 31) 185.

I do not press a particular concept of justice or morality. Instead, to make my point that Mediation has an *extra-legal* character, I need only show that the necessary condition is not met – Mediation does not *guarantee* justice nor morality.

G *The Language of Mediation v Law: Power v Rules*

Mediation assumes that no case is certain until litigated.[65] Indeed, no case is certain until recognized by an authority capable of promulgating one side as the correct side.[66] As the oft-quoted adage goes, 'disputants [often] bargain in the shadow of the law ... when the law itself is shadowy'[67], and where 'they have little basis to estimate what ... is fair [or correct]'.[68]

With Position of law and of fact premised as uncertain, the language which is actualizes law – rights, duties, justice, power and authority, entitlements, rules and principles[69] – shifts to non-juristic, non-legal terms of greater apparent certainty – interests:[70] needs, concerns, fears and aspirations. The latter group of terms embody the motivations of parties taking a position perhaps (but not definitively) backed by law.

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[65] Matt Harvey, Maria Karras and Stephen Parker, *Negotiating by the Light of the Law* (Themis Press, 2012).
[66] Lon Fuller, *The Morality of Law* (Yale University Press, 1965).
[67] Robert Mnookin and Lewis Kornhauser, 'Bargaining in the shadow of the law: the case of Divorce' (1979) 88 *Yale Law Journal* 950.
[68] Ibid.

[69] Hart (n 31) 172.

[70] Nadja Alexander and Jill Howieson, *Negotiation: Strategy Style Skills* (LexisNexis, 2nd ed, 2010) ch 3.

This shift in *language* signifies a shift from a rules-based enquiry to a power-based enquiry. This poses two concerns:

(d) Administration of Justice

To administer the law not in the language embodying law, but in terms of the motivations for why disputants use and rely on the law, with little regard for the law substantive, would make it difficult to reconcile the practice of Mediation with the overarching pursuit of law.[71] To practice the law without the law describes a process that Fisher and Ury describes as a means of merely getting parties to agree and 'say yes'.[72] If we are to reconcile the practice of Mediation as actualizing and fulfilling the law (and justice[73]), we must refrain from regarding Mediation as a discourse describing the law, but a process or forum where law can and should be administered, in different but incommensurable terms.[74]

(e) The Pursuit of Justice: Power, Not Rules

Secondly, to couch the language of dispute resolution, not in terms of the law, but motivations that are more objectively certain but rests

[71] Eg, Hart (n 31) ch 2; R M Hare, *The Language of Morals* (Oxford University Press, 1952);

[72] Roger Fisher and William Ury, Getting to Yes (Penguin, 3rd ed, 2011); cf Omer Shapira, 'Joining Forces in Search for Answers: The Use of Therapeutic Jurisprudence in the Realm of Mediation Ethics' (2008) 8(2) *Pepperdine Dispute Resolution Law Journal* 243, 24-8; See also Waldman (n 78) 159-60.

[73] Positivists would say law is separate and apart from the idea of justice.

[74] I have conscientious reservations to this perspective of law.

outside the law or perhaps thinly veiled by uncertain law, we relegate questions of legal uncertainty, correctness and righteousness to be dealt with at a latent stage, or not at all.

Mediation is a game of needs and concerns, of power and attrition, feelings and emotions, divorced from legal notions of correct and right. Needs and concerns, when addressed by options generation, or alternatives, may resolve the perceived interests which caused the conflict, re-validating core concerns and the emotions that comes with the invalidation of the core concerns.[75] A dispute may be resolved in this manner, but it is no measure of the morality, correctness and legality of the resolution. The radical difference between traditional forums of dispute resolution (ie: litigation and arbitration) and Mediation lies in the realization of different forms of justice. In Litigation, the focus is on justice embodied in the rules of law. In Mediation, the focus is on therapeutic justice, not justice as the rules of law requires.

(f) Focus on Therapeutic Justice

Mediation places emphasis on feelings, premised on the idea that people care more about emotions in bargaining over rights than do the unemotional inhabitants of neoclassical rational actor models.[76] In this sense, Mediation place the individual at the heart of the process and tries

[75] Daniel Shapiro and Roger Fisher, Beyond Reason: Using Emotions as you Negotiate (The Penguin Group, 2005).

[76] See generally, Peter Huang, 'Reasons within Passion: Emotions and Intentions in Property Rights Bargaining' (2000) 79 *Oregon Law Review* 435, 438.

to improve the relationship between parties.[77] Mediation is borne out of a desire to maximize the emotional, psychological, and relational wellbeing of the individuals and communities involved in each legal matter.[78] Mediation focuses on satisfying the parties' needs, not legal rights, responsibilities, duties, obligations, and entitlements. This allows better response to psychological and emotional needs instead of focusing solely on the legal aspects of the dispute.[79]

A corollary of this view is that emotions such as fear and anger disrupt normal rational thought and reasoning capabilities.[80] Mediation can help to filter out the non-legal issues from a dispute by re-focusing on the competing interests and concerns, and thereby allowing for focused attention onto the legal issues.[81] However, there is much skepticism about how much of a dispute can be resolved in this way.[82] If

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[77] Shapira (n 72) 247.

[78] Shapira (n 72) 249; See also Ellen Waldman, 'Therapeutic Jurisprudence/Preventive Law and Alternative Dispute Resolution: Substituting Needs for Rights in Mediation: Therapeutic or Disabling?' (2005) 5 *Psychology, Public Policy, and Law*. 1103, 1105-6.

[79] Shapira (n 72) 249; See also Ellen Waldman, 'Therapeutic Jurisprudence/Preventive Law and Alternative Dispute Resolution: Substituting Needs for Rights in Mediation: Therapeutic or Disabling?' (2005) 5 *Psychology, Public Policy, and Law*. 1103, 1105-6.

[80] Ibid, 439; See also, Robert Adler et al, 'Emotions in Negotiation: How to Manage Fear and Anger' (1998) 14 *Negotiation Journal* 161, 168-74; See generally, George Loewenstein, 'Out of Control: Visceral Influences on Behavior' (1996) 65 *Organizational Behavior and Human Decision Processes* 272, 288.

[81] See eg, Timothy Bowen, 'Using Mediation in Situations of Withholding or Withdrawing Life-sustaining Treatment: A New South Wales Perspective' (2009) 17 JLM 74, 74-76.

[82] Huang (n 76) 438-41.

Mediation's goal is to make disputes go away, it reeks more of dispute avoidance, than doing justice to parties in dispute.

(g) Forum and Mediator Bias

Mediation practices do not squarely meet its underpinning philosophies. Charlton notes that these tenets are *fictions*[83] – concepts that have variously 'mutated by being expanded or contracted'.[84] Notably, 'freedom' in mediation seems to be an illusion. There appears to be an element of coercion involved (apart from *relative* freedom discussed in Part III.B),[85] particularly with non-facilitative forms of mediation, ie: where the mediator advises and evaluates.[86] Condliffe refers to research that shows mediator neutrality to be a myth and a 'linguistic device' used to 'legitimize' mediation.[87] Mediation ignores the quality of justice.[88] Mediation prides itself as a flexible forum where parties can tailor the process to their needs *inter partes*. Such lack of formality, lack of procedural rules, and the absence of effective legal monitoring on the work of mediators risks abuse.[89] The principle of mediator neutrality

[83] Lon Fuller, *Legal Fictions* (Stanford University Press, 1967) 7-14.
[84] Spencer and Brogan (n 11) 84; Charlton (n 21) 15.
[85] C W Moore, *The Mediation Process: Practical strategies for resolving conflict* (Jossey-Bass, 1986) 5.
[86] Eg, settlement mediation, compromise mediation, and evaluative mediation; see Spencer and Brogan (n 11) 101-2.
[87] Peter Condliffe, *Conflict Management: A Practical Guide* (LexisNexis, 4th ed, 2012) [7.10] 253.
[88] Ibid, [7.10] 254-6, referring to Roman Tomasic, 'Formalized 'Informal' Justice — A Critical Perspective on Mediation Centres' (Seminar Paper, Sydney University Institute of Criminology, March 1982).
[89] Ibid, 251.

guides the mediator to avoid control over the choice of issues because such behaviour might jeopardize his appearance of impartiality. A choice of agenda made by the mediator is more likely to be interpreted by the parties as bias than is a choice made by the parties themselves or with their active involvement.[90] Neutrality, however, is not possible in the context of mediation.

The reality of mediation practice is that mediators often adopt a facilitative style in conjunction with elements of transformative or evaluative mediation. The mediator adopts an advisory or evaluative role that involves intervening in the content and outcome of the mediation, as a 'value-add' service,[91] especially where efficiency is a primary goal.[92] (This is an obvious inference. Why choose a particular mediator if he/she does not add value to a service?) Here, Mediators often pressure parties to change their positions, to make concessions, and to settle.[93] Mediators use pressure tactics for a variety of reasons. Most crucially, Mediators have an interest in an agreement obtained by the parties because the legal industry and many mediators consider an agreement to be evidence of a successful process and view a lack of

[90] Ibid 258.

[91] See generally, Ellen Waldman, 'The Evaluative-Facilitative Debate In Mediation: Applying the Lens of Therapeutic Jurisprudence' (1998) 82 *Marquette Law Review* 155.

[92] Douglas and Hurley (n 17) 71.

[93] Shapira (n 72) 260; See also, Jacqueline Nolan-Haley, 'The Merger of Law and Mediation: Lessons from Equity Jurisprudence and Roscoe Pound' (2004) 6 *Cardozo Journal of Conflict Resolution* 57, 68.

agreement as a failure of both the process and the mediator.[94] Pressure tactics can take many forms. Most commonly, Mediators pressure disputants by aggressive evaluation, by setting a close deadline for decision making, by making use of power differences between himself and the parties, or by shuttling between parties, forcing parties to make quick, often ill-thought compromises – eg, 'Chinese wall' caucusing.[95] Such pressure is incompatible with ethical mediation.[96] First, pressure by mediators jeopardizes the parties' autonomy because the purpose is to reduce their freedom to choose between alternatives and to direct them towards an end preferred by the mediator.[97] Secondly, pressure tactics affect the quality of consent given by the parties to continue their participation in the process or to accept its outcome.[98] Thirdly, putting pressure on the parties is unfair. It is the opposite case of treating them with dignity and respect.[99] Lastly, by pressuring the parties, the mediator risks losing his appearance of impartiality (and in my opinion, Mediators tend to do so).[100] All these are an affront to the philosophical tenets of voluntariness, confidentiality, neutrality, empowerment, and unique

[94] Shapira (n 72) 261-2.

[95] See Brown and Ayres (n 12) 326.

[96] To my knowledge, UWA PhD Candidate Sergey Kinchin is writing his doctoral thesis on ethically questionable practices in Mediation.

[97] Shapira (n 72) 261-2.

[98] Ibid.

[99] Ibid.

[100] Ibid.

solutions,[101] which Mediation supposedly prides itself on. Here, doubts on the neutrality and legitimacy of Mediation are not unfounded.[102] Mediation attempts to 'legitimize' new forms of social control under the auspices of a false premise of voluntary participation.[103]

Unsurprisingly, Fisher and Ury describes Mediation as means of merely procuring consensus and agreement.[104] While there is a sense of justice felt by disputants, resolutions reached by mediation are neither a measure nor description of the law nor justice.[105] Uncertainty in the law is not the only limitation on guarantees of justice in Mediation. Mediator play a huge role in facilitating and impeding access to justice.

(h) Remarks

Mediation is not a *legal* process. There is no *guarantee* of justice. If disputants are to resolve any legal conflict – conflicts of rights, principles and duties, it would require greater skill and opposition to the views of the Mediator. Justice in this *extra-legal* process is dependent

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[101] Charlton (n 21) 15; Spencer and Brogan (n 11) 48-74.

[102] See, Kathy Douglas and Rachel Field, 'Looking for Answers to Mediation's Neutrality Dilemma In Therapeutic Jurisprudence' (2006) 13 *eLaw Journal* 177.

[103] Harrington (n 6) 35.

[104] Roger Fisher and William Ury, *Getting to Yes* (Penguin, 3rd ed, 2011); John Murray, Alan Rau and Edward Sherman, *Processes of Dispute Resolution: The Role of Lawyers* (Foundation Press, 1989) 111-3.

[105] Robert Mnookin and Lewis Kornhauser, 'Bargaining in the Shadow of the Law: The Case of Divorce' (1979) 88(5) *Yale Law Journal* 950; See generally *Moore and Moore* [2008] FamCA 32, [760]; *Loddington and Derringford (No 2)* [2008] FamCA 925, [193]; *MacKillop and MacKillop* [2007] FamCA 851, [9]; Lord Bingham (n 14) 86; *Financial Integrity Group Pty Ltd v Farmer (No 4)* [2014] ACTSC 145; James Goh, 'The Self-represented Litigants' Challenge: A Case Study' (2018) 43(1) *Alternative Law Journal* 48.

on how disputants (or their legal representative) control, tailor, and manipulate the process to achieve justice embodied in rules. It is the 'common fate of the indolent to see their rights become prey to the active [and informed], misused or abused'.[106] Disputants must muster the moral courage to name and recognize injustices in Mediation,[107] to call it out when we see them, to do what is right and not what is easy, and to keep the streams of justice pure.[108] This obviously requires skill. Its apt to note that 'superior wisdom alienates mere peasants'.[109]

H *Mediation Practice and Justice: 'Superior Wisdom Alienates Mere Peasants'*

3 *Mediation Susceptible to Fallacies*

Mediation emphasizes interests (wants) over positions (law and legal entitlements),[14] focusing on motivations and reasons behind a position held – ie: asking 'why'.[110] In stark contrast to litigation where facts and evidence are thoroughly examined to get to the bottom of the matter, to seek truth, etc; Mediation focuses on making parties disclose reasons for

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[106] Denning (n 55) 88-9.

[107] Baroness Hale, 'Moral Courage in the Law' (Speech, Worcester Lecture 2019, Worcester Cathedral, 21 February 2019) 1, 9, referring to St Helens Borough Council v Derbyshire & Ors [2007] UKHL 6, [2007] 2 AC 31.

[108] Simon Lee, 'Lord Denning, Magna Carta and Magnanimity' (2015) 27 *Denning Law Journal* 106, 128,
referring to Lord Denning, *The Discipline of Law* (Butterworths, 1979) 314.

[109] Phrase articulated in Janet Albrechtsen, 'High Court in the Crossfire of Runaway Judicial Activism', *The Australian* (14 February 2020).

[110] Raz (n 39) 15-21; Lind (n 6) 123-4.

their motivations. This is perhaps to allow attack on those reasons with rationality and to disputants as unreasonable in attempt to persuade or inveigle conflict resolution.

But this is fallacious – the process of Mediation assumes that there is only one reason or one tract of reasons for a position taken. It assumes that rules of law itself are not a reasonable nor valid reasons for action. This makes us jump to false conclusions based on subjectivity and heuristics.[111] As Kahneman and Ranadive describes this as the "what-you-see-is-all-there-is" phenomenon, or law of small numbers.[112] It makes us 'infer and invent causes and intentions', even if they are untrue.[113]

In similar vein, Raz observes that in conversations, 'we never make a full and complete statement of our reasons'.[114] All we do is 'state part of them, based on how much the hearer already knows, what he wants to know, the strength of the reason,[115] and to what extent we are willing to take him into our confidence'.[116] To assume that disputes arise from solely one (or tract of) reason(s), without regard for other equally important reasons, may result in resolutions tainted by the fallacy of essentializing – resolutions that are misconceived, incorrect, irrational or

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[111] See Ameet Ranadive, 'What I learned from "Thinking fast and slow"', *Medium* (online), 21 February 2017 <https://medium.com/leadership-motivation-and-impact/what-i-learned-from-thinking-fast-and-slow- a4a47cf8b5d5>.

[112] Ibid; Daniel Kahneman, *Thinking Fast and Slow* (Penguin, 2011).

[113] Raz (n 39).

[114] Ibid, 22.

[115] Ibid, 25.

[116] Ibid, 22.

unreasonable. The decisions made are only as good as the reasons disclosed. Efficiency in Mediation entrenches hasty decision making.

Mediation is an approach susceptible to cherry-picking, misleading and deceptive conduct, and positional anchoring. Such approach could allow parties to cherry-pick points to argue, usually arguing to easy-to-win points and ignoring the tougher-to-prove points, to paint the other side as unreasonable, as an oft-successful attempt to fallacies the dispute.[24] It allows one to assume any reason (regardless of its truth) – raise a straw man – as a means of getting what he wants.[25]

4 *Outcomes Depend on Advocates Skill; Integrity and Trust in the Mediator*

The promise of fast efficient dispute resolution, quick and efficient administration of justice weighs heavily on the skill and agility of the advocate to optimize, strategize and play the game of decision theory and game theory in a fast pace, impulsive atmosphere. The skills of a lawyer (and where absent a lawyer, the disputant themselves) play a quintessential role in ensuring that client (or the disputant themselves) obtains justice. Processes of mediation imposes huge obligations on legal representatives to be competent in negotiation/mediation, and an even more tenuous obligation on litigants themselves.[117]

Where the Mediation process prohibits disputants' access to legal

[117] Eg, see, John Allison, 'Five Ways to Keep Disputes out of Court' (1990) *Harvard Business Review* 166.

representation, or where a disputant cannot afford legal representation, disputants are at the mercy of those who have access to legal representation, or the Mediator. This is a concern, especially considering pervasive literature that highlight that majority of mediation processes do not allow or limit the role of lawyers in representing clients in Mediation. As a matter of practice, the presence of attorneys at a mediation proceeding is extremely rare. All mediators prefer mediation without lawyers present.[118]

Mediators are also concerned that lawyers' impact on mediation may also involve a focus on legal rights instead of on the needs and interests of the parties, and direct negotiation between the lawyers instead of direct communication between the parties, with the assistance of the mediator.[119] Such dominant involvement of the parties' representatives is incompatible with mediators' and academics' view on an ethical conduct of mediation.[120]

Mediators are often suspicious of lawyers.[121] Lawyers, who have their

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[118] Randy Kandel, ''Developmental Appropriateness' as Law in California Child Custody Mediation' (1995) 35 *Journal of Legal Pluralism and Unofficial Law* 75; See generally, Kevin Farmer, 'An Investigation into the Effect Representatives have on their Client's Perception of Justice in Mediation' (PhD Thesis, University of Massachusetts Amherst, 2006).

[119] Shapira (n 72) 264.

[120] Ibid.

[121] Ken Yin, 'The Re-Killing (Perhaps) of the Donoghue Gastropod – And Sone Suggestions to Tinker With The First-Year Legal Education Curriculum' (2017) 10 *Journal of the Australasian Law Teachers Association* 189, 189; Lionel Murphy, 'The Responsibility of Judges', Opening Address for the First National Conference of Labor Lawyers, 29 June 1979 in G Evans (ed), *Law, Politics and the Labor Movement* (Melbourne: Legal Service Bulletin, 1980) 5.

clients best interests in mind, from a legal point of view, are viewed by Mediators to disrupt the conduciveness of Mediation as a process of dispute resolution.[122] Mediators are concerned about the lawyer being a barrier between the mediator and parties, in that the lawyer may direct his or her client to withhold information from the mediator and limit cooperation with the mediator. Mediators are concerned that lawyers' presence reduces the psychological well-being of the parties because the mediator would not be able to do his job and thus the likelihood of a successful mediation diminishes.[123]

Restricting disputants' access to legal representation and competent legal advice in a bid to allow parties to settle disputes amongst themselves, to pressure them into conflict resolution without adequate assistance to navigate the complexities of the Mediation process that has been deliberately designed to create environments conducive to settlement is plainly unjust.

VI Conclusion: Can Mediation be Understood as Law?

Mediation cannot be understood as law. There is little if not no guarantee of a *minimum content of natural law* in its rules and processes. In a positivist sense, 'rules are applicable in an all-or-nothing fashion'.[124] Corollary, a rule is either law or not law at all. Mediation is only

[122] Shapira (n 72) 266-7.

[123] Ibid.

[124] Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977) 24, 27.

legitimate in and of itself. It is not a legitimate source of law nor valid 'legal system' in the eyes of our law. If we are to regard mediation as law, there is an impetus that mediation be used to realize the law (and justice).

A COMPARATIVE PERSPECTIVE OF FOOTBALL

Cameron Bunney

I INTRODUCTION

Australian officials have dealt with anti-social behaviour from supporter groups of football clubs since the National Soccer League ('NSL') in the 1980s and 1990s.[1] The Football Federation Australia (FFA) sought to reduce the ethnic divide that was creating conflict among supporter groups, which culminated in the launching of the Hyundai A-League ('the A-League'), including "only clubs without ethnic alliances."[2] More recently, especially following the introduction of Western Sydney Wanderers ('WSW') to the A-League in 2012, there have been concerns from police about the development of hooligan groups in the nascent A-League.[3] Further, the future remains uncertain regarding existing league policies around fan misbehaviour, with the A-League set to be governed

[1] John Hughson, 'The Boys in Blue and the Bad Blue Boys: A Case Study of Interactive Relations Between the Police and Ethnic Youth in Western Sydney' (1999) 34(2) *The Australian Journal of Social Issues* 167, 170.

[2] Ibid; Patrick Galloway, 'Fanning the flame', *ABC* (online at 25 October 2019) <https://www.abc.net.au/news/2019-10-25/western-sydney-wanderers-rbb-unique-opportunity-for-aleague/11618220?nw=0>.

[3] Yoni Bashan, 'Police in Australia have heightened fears that the A-League is experiencing its first hooligan groups', *The Daily Telegraph* (online at 4 January 2014) <https://www.dailytelegraph.com.au/news/nsw/police-in-australia-have-heightened-fears-that-the-aleague-is-experiencing-its-first-hooligan-groups/news-story/14b0a9413d66fb4f6ed43ccd262c4436>.

independently from the FFA following a 2019 deal.[4] The FFA currently regulates fans of the A-League through the *Spectator Code of Behaviour*, which is their model for dealing with unruly fan behaviour.[5] With "growing hope [that] active support will be encouraged more"[6] following A-League self-ownership, the government and police may look to introduce legislative measures to deal with the potential rise in fan violence at football matches.

In Italian football, the introduction of *Divieto di Accedere alle manifestazioni Sportive* ('DASPOs') and *arresto differito* ('deferred arrest') have been effective measures in addressing violence perpetrated by *ultras* at Serie A matches, the top division of football in Italy.[7] The translation of DASPOs is a ban on access to sporting events, whilst deferred arrest refers to the ability to detain suspects, who may be involved in football-related violence, for an extended period.[8]

There should be a transplant of Italian laws combatting violence at football matches into Australia. Comparisons of *ultra* and hooligan

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[4] Vince Rugari, 'FFA to relinquish control of A-League after independence deal reached', *The Sydney Morning Herald* (online at 1 July 2019) <https://www.smh.com.au/sport/soccer/ffa-to-relinquish-control-of-a-league-after-independence-deal-reached-20190701-p522vy.html>.

[5] Alexandra Veuthey and Lloyd Freeburn, 'The Fight Against Hooliganism in England: Insights for Other Jurisdictions?' (2015) 16(1) *Melbourne Journal of International Law* 203, 252.

[6] 'A-League clubs push to rebuild active support numbers', *SBS: The World Game* (online at 10 October 2019) <https://theworldgame.sbs.com.au/a-league-clubs-push-to-rebuild-active-support-numbers>.

[7] Alberto Testa and Gary Armstrong, 'Purity and Danger: Policing the Italian Neo-Fascist Football UltraS' (2010) 23(3) *Criminal Justice Studies* 219, 222.

[8] Ibid.

history in both Italy and Australia, as well as existing legislation and popular attitudes in Australia, demonstrate that this can take place.

II HOOLIGANS, ULTRAS AND THEIR SIMILARITIES

The similarities between Australian hooligans and Italian *ultras* demonstrates that there should be a transplant of Italian laws combatting violence at football matches into Australia. Of significance is the opposition to authority figures, both within clubs they support and within government and the police force.

Italian football adopted the term *ultra* in the late 1960s, "a period of intense political violence, known as the 'Anni di Piombo', the 'Years of Lead'."[9] What remains from this period is a legacy of *ultras* who still fight, and feel that they are "defending their town and city squares from outsiders."[10] The violence borne from this defensive nature has partially led to *ultras* perceiving themselves "as noble outlaws who lived outside a system of control."[11] This notion has become further entrenched in recent years, with actions from the governing body of Italian football, Federazione Italiana Giuoco Calcio ('FIGC'). [12] Following the suspension of the league over the death of a police officer, and then no

[9] James Montague, *1312: Among the Ultras* (Ebury Press, 2020) 57.

[10] Ibid 61.

[11] Ibid 65.

[12] Ibid 70

similar response to the death of a fan at the hands of police, the main rival of ultras "was now the state and its perceived repression."[13]

Whilst the origins of hooligan groups in Australia are markedly different from the Years of Lead in Italy, the core principle of being against authority figures prevails. As James Montague writes, "the *ultra* movement that had begun in 1968 had taken root around the world, and flourished in the most unexpected places."[14] Indeed, Australia boasts some supporter groups similar to the *ultras* of Italy, such as the Bad Blue Boys (BBB) of former NSL side, Sydney United in the 1990s.[15] This group would find themselves, as with Italian *ultras*, "under the scrutiny of the police."[16]

Presently, the Red and Black Bloc ('RBB') supporter group of WSW provide the league's closest link to modern Italian *ultras* and carry the legacy of the BBB. In 2016 the group were responsible for a $50,000 fine issued to their club and a suspended points deduction following the ignition of flairs, detonators, and the display of "unauthorised banners" at a match in Melbourne.[17] Subsequently, closure of the RBB's active support area at WSW's home stadium led to statements attacking the A-

[13] Ibid.

[14] Ibid 92.

[15] Hughson (n 1) 170.

[16] Ibid 171.

[17] Mike Hytner, 'Western Sydney hit by $50,000 fine and suspended three-point deduction over flare use', *The Guardian* (online at 11 February 2016) <https://www.theguardian.com/football/2016/feb/11/western-sydney-hit-by-50000-fine-and-suspended-three-point-deduction-over-flare-use>.

League, the FFA and club CEOs.[18] Members of the RBB "wore T-shirts to the [Sydney] derby emblazoned with FCK FFA, and held aloft a variety of signs including some that read 1312 – alphabetical code for 'All Cops Are Bastards'."[19] In this way, Italian *ultras* and Australian hooligans are alike, and especially united in their disregard for authority. This suggests that it will be important for the newly-independent A-League to have measures in place to pre-emptively tackle football violence. Whilst "Australia has experienced relatively little hooliganism" [20] to date in the A-League, the situation in Italy is not one that authorities will wish to replicate.

To prevent active support groups from progressing to the stature of Italian *ultras*, with violence "an accepted by-product"[21] of active supporter groups, there should be a transplant of Italian laws combatting violence at football matches into Australia.

[18] Tom Smithies, 'Under threat Red and Black Bloc launch fiery riposte in wake of active area closure by Wanderers', *The Daily Telegraph* (online at 28 February 2018) <https://www.dailytelegraph.com.au/sport/football/a-league/under-threat-red-and-black-bloc-launch-fiery-riposte-in-wake-of-active-area-closure-by-wanderers/news-story/b5b3f129bbe243dd2be828fafc8d66dc>.

[19] Ibid.

[20] Veuthey and Freeburn (n 5) 248.

[21] Montague (n 9) 69.

III Ethnic Violence and 'Campanilismo'/Regional Violence

Comparisons of football-related violence sprouting from ethnic divides in Australia and the *Campanilismo* of Italy suggest that there should be a transplant of Italian laws into Australia to combat violence at football matches.

Campanilismo is an Italian concept referring to the local pride arising from an individual's town or region.[22] When *ultras* emerged during the Years of Lead, the "age-old local and regional elements"[23] remained a heavy focus with inter-group rivalries. Further, the political party Lega Nord found growing popularity in the 1980s, with an ethos of regional superiority and disdain for Southern Italians.[24] This hostility that proliferated in the north also infiltrated *ultras*, with phrases such as '*Negro di Merda*' ('black shit') being levied due to the proximity of Southern Italy to the North of Africa.[25] Whilst many of these regional divides are presently ignored as the *ultras* focus on the state and police, some Southern teams such as Napoli "still endured a torrent of racist

[22] Fabrizio Nevola, 'Introduction: Locating Communities in the Early Modern Italian City' (2010) 37(3) *Urban History* 349, 349.

[23] Alberto Testa and Gary Armstrong, 'Words and Actions: Italian Ultras and Neo-Fascism' (2008) 14(4) *Social Identities* 473, 475.

[24] Christos Kassimeris, 'Fascism, Separatism and the Ultras: Discrimination in Italian Football' (2011) 12(5) *Soccer & Society* 677, 680.

[25] Ibid.

abuse, exposing the schism between the wealthy north of the country and the poorer south."[26]

Australia does not have the same level of division between states as within Italy's regions, with most inter-state footballing rivalries being inconsequential. The A-League's biggest inter-state rivalry, played between the two biggest clubs of Melbourne Victory and Sydney FC, pales in comparison to similar derbies in Europe.[27] However, more analogous to attitudes of *Campanilismo* and regional violence found in Italy is the history of "externally-sourced ethnic conflicts"[28] rekindled within Australian football.[29]

Immigrants from European nations such as the former Yugoslavia, Italy, and Greece were the driving force behind the growth of football in post-war Australia.[30] Italian and Greek migrants were often viewed as 'Mediterranean scum', experiencing hostility from Anglo-Australian workers and unions alike.[31] Many immigrants carried the pride for their

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[26] Montague (n 9) 73.

[27] Joey Lynch, 'How the 'Big Blue' became the A-League's most compelling rivalry', *The New Daily* (online at 11 may 2019) <https://thenewdaily.com.au/sport/football/2019/05/11/how-the-big-blue-became-the-a-leagues-most-compelling-rivalry/>.

[28] Veuthey and Freeburn (n 5) 248.

[29] Ibid.

[30] Farida Fozdar, ''The Golden Country': Ex-Yugoslav and African Refugee Experiences of Settlement and 'Depression'' (2009) 35(8) *Journal of Ethnic and Migration Studies* 1335, 1338; Hughson (n 1) 170.

[31] Rosario Lampugnani, 'Postwar Migration Policies with Particular Reference to Italian Migration to Australia' (1987) 33(3) *Australian Journal of Politics & History* 197, 198.

national and ethnic heritage, with the BBB of Sydney United heavily representing their Croatian origins and South Melbourne FC being rooted in Melbourne's Greek community.[32] However, an image developed of football fans, particularly these 'ethnic' supporter groups, co-opting football stadiums as forums for violence.[33] Whilst disturbances would occur, it was a phenomenon magnified by the media to appear like violence seen at European football matches.[34] Alongside media exaggerations of the 'ethnic' football violence, was a nationalist rhetoric from Prime Minister John Howard, who was pushing "for a return to a simplistic monocultural way of life … for the Anglo place that Australia supposedly once was."[35]

Subsequently, the intention behind ending the NSL and replacing it with the A-League was to remedy the perceived negative influence of 'ethnic' groups.[36] However, these 'ethnic' groups may return in coming years, with South Melbourne FC campaigning for a return to the A-League and many RBB members boasting proud European heritages.[37] Further,

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[32] 'The Origins of South Melbourne Hellas' *Official Website of South Melbourne FC* (webpage) <https://www.smfc.com.au/club/history/>; Hughson (n 1) 170.

[33] Chris Hallinan and John Hughson, 'The Beautiful Game in Howard's 'Brutopia': Football, Ethnicity and Citizenship in Australia' (2009) 10(1) *Soccer & Society* 1, 1.

[34] Ibid 1.

[35] Ibid 2.

[36] Patrick Galloway, 'Fanning the flame', *ABC* (online at 25 October 2019) <https://www.abc.net.au/news/2019-10-25/western-sydney-wanderers-rbb-unique-opportunity-for-aleague/11618220?nw=0>

[37] Anna Harrington, 'A-League expansion: Why unlucky teams missed out, FFA remains open to more expansion', *Fox Sports* (online at 13 December 2018) <https://www.foxsports.com.au/football/a-league/aleague-expansion-why-unlucky-

earlier in 2019 the FFA removed its "longstanding national club-identity policy, which stopped clubs branding themselves with their ethnic heritage."[38] Additionally, the perception of violent, 'ethnic' football supporter groups remains in Australia, similarly to the ongoing presence of *Campanilismo* in Italy despite the attention given towards the state and police.[39]

Parallels exist between the violence that has occurred around football matches in Australia, especially the exaggerated perception in the media, and the region-based violence in Italy. These parallels demonstrate that Australia should transplant Italian laws combatting violence around football matches, to prevent escalation of the violence to the degree present in Italy.

IV Desire to Harness Hooliganism and Ultras

Australia should transplant Italian laws surrounding football violence to ensure that by harnessing active support, they do not follow the mistakes made by football authorities in Italy when accepting violent behaviours from *ultras*.

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teams-missed-out-ffa-remains-open-to-more-expansion/news-story/d0f142bb769cd706da90edcb9c974cc7>; Galloway (n 36).

[38] Galloway (n 36).

[39] Jorge Knijnik and Ramon Spaaij, 'No Harmony: Football Fandom and Everyday Multiculturalism in Western Sydney' (2017) 38(1) *Journal of Intercultural Studies* 36, 41-44.

Whilst it was only "a few seasons ago"[40] that the FFA "waged war on active supporter groups,"[41] there is a growing belief that they will see a return following the A-League's independence from the FFA.[42] Senior figures within the league administration have also stated an interest in bringing active fans back to stadiums to improve the matchday experience.[43] The situation is reminiscent of the development of the first *ultras* in Italy, especially *il Moschettieri* ('the Musketeers') who supported Inter Milan.[44]

In the 1960s, Inter Milan hired Helenio Herrera, a coach from Argentina who "wanted to harness the '12th man' in the stadium"[45] to gain a competitive advantage, the '12th man' referring to supporters.[46] The President of the club at the time engaged with an organised group of supporters to form *il Moschettieri*, with the group being brought to away games to intimidate opposition players during matches.[47] However, the dynamic between clubs and *ultras* has evolved over the decades and led

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[40] Mike Tuckerman, 'The death of active support will be the death of the A-League', *The Roar* (online at 1 December 2019) <https://www.theroar.com.au/2019/12/02/the-death-of-active-support-will-be-the-death-of-the-a-league/>.

[41] Ibid.

[42] (n 6).

[43] Michael Lynch, 'A-League hopes to woo back active fans to improve match-day experience', *The Sydney Morning Herald* (online at 8 October 2019) <https://www.smh.com.au/sport/soccer/a-league-hopes-to-woo-back-active-fans-to-improve-match-day-experience-20191008-p52yob.html>.

[44] Montague (n 9) 67.

[45] Ibid.

[46] Ibid.

[47] Ibid.

to a situation in which both "the ultras, and the management, [know] they [are] indispensable to the product, to the show [Serie A]."[48] There appears an unspoken acceptance from all parties in Italy that violence is a "by-product of the deal,"[49] and something which comes with the impressive atmosphere of Serie A matches created by *ultras*.

The enabling of *ultras* to a point that violence has become acceptable is not uniquely Italian, with prominent supporter groups in South American countries formerly organised by clubs also being heavily involved in violent and illicit activities.[50] It will be one consideration for the independent A-League should they choose to further promote active supporter groups at A-League clubs. The league will need to find methods of controlling fans who have been involved in violent or anti-social behaviours at matches, as well as those who are likely to be further involved in violence or anti-social behaviour at future matches. If the fans cannot be controlled, then there will be fears that encouraging the return of active supporter groups to the A-League could lead to the development of groups akin to Italian *ultras*.[51]

Australia should transplant Italian laws aimed at curbing football violence at matches to help ensure that any attempts to promote active support in the independent A-League will be less likely to lead to violent *ultras* or football hooligans in Australia.

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[48] Ibid 69.

[49] Ibid 69.

[50] Ibid 49-51.

[51] Lynch (n 43).

V REACTIVE OR PROACTIVE LEGAL RESPONSE

The commonalities of the Australian and Italian legal systems show that Australia could and should transplant Italian laws relating to violence at football matches, especially the laws relating to DASPOs and *arresto differito*.

Labelled as a common law system, Australia employs both statutory materials and judge-made law to develop the law of both the State and Commonwealth jurisdictions.[52] The judicial branch interprets and develops the law implemented by the legislature in a fluid manner, reacting to the different factual scenarios presented.[53] Unfortunately, the criminal law lacks uniformity, as in some States it is based within the common law whilst others have adopted a criminal code which is interpreted by the courts.[54] Further, some States within Australia already have Acts to deal with sporting events where others do not or they differ, with no State incorporating legislation that mirrors the DASPOs and *arresto differito*.[55] As such, and given that the A-League is a national competition, Australia should transplant Italian laws regarding football violence as part of Commonwealth criminal legislation.

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[52] Leslie Zines, 'The Common Law in Australia: Its Nature and Constitutional Significance' (2004) 32(3) *Federal Law Review* 337, 342.

[53] Ibid 343.

[54] *Encyclopaedic Australian Legal Dictionary* (online at 25 May 2020) 'common law jurisdictions' (def 2).

[55] Veuthey and Freeburn (n 5) 250-251.

The first laws combatting football violence were introduced to Italy in 1989, following the death of a fan due to a cardiac arrest brought on by attacks from opposition supporters.[56] This was four and a half years after 32 Italian fans were killed whilst fleeing English hooligans, when a stadium wall collapsed on them during a European Cup final in Belgium.[57] However, it took the actions of Italian fans in Italy for the realities of matchday violence to become relevant. Whilst Australia has never experienced a death at a football match, there is an opportunity to learn from the Italian experience and enact legislation before a death does occur.

The Italian legal system is labelled a civil law system, like much of mainland Europe.[58] Consequently, laws around football fan violence are part of a civil code which evolved over time through "urgent Decree-Laws issued by the government and changed at a later date,"[59] though these changes have complicated matters.[60] It has been suggested that constant "ad hoc intervention has created a large body of laws and modifications of pre-existing laws that have proved difficult to implement."[61] However, where Italy has struggled to develop coherently

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[56] Testa and Armstrong (n 7) 221.

[57] Tom Mullen, 'Heysel disaster: English football's forgotten tragedy?', *BBC News* (online at 29 May 2015) <https://www.bbc.com/news/uk-england-merseyside-32898612>.

[58] Enrico Albanesi, 'Codification in a Civil Law Jurisdiction: An Italian Perspective' (2017) 19(4) *European Journal of Law Reform* 264, 264.

[59] Testa and Armstrong (n 7) 221.

[60] Ibid.

[61] Ibid.

when expanding the law dealing with football violence, Australia could borrow the most appropriate measures for refined legislation.

The benefit of a common law jurisdiction is that the federal government could develop a statutory framework which mirrors the best of the Italian laws, which may then be expanded by the courts. The excessive modifications from Decree-Laws that have caused confusion could be removed, leaving a streamlined solution which learns from Italy's mistakes. In addition, the laws could be interpreted by the courts in accordance with the legislature's intent and thereby develop organically before the courts.[62]

Where the Italian legal system has developed tangled legislation that is difficult to implement in reaction to a problem, Australia could proactively implement the more practicable sections of Italy's laws and allow for natural development within the courts. As such, Australia should and could transplant the Italian laws relating to violence at football matches, since the measures could be applied productively in Australia.

VI Fan Violence and Terrorism

The way that the government and media view fan violence and terrorism in both Australia and Italy demonstrates that Australia could transplant laws combatting football fan violence from Italy.

As discussed, Italy experienced domestic terrorism through the 1970s and 1980s, with disputes between political factions involving acts of

[62] Zines (n 52).

violence against political figures and innocent civilians alike.[63] Australia has not experienced domestic terrorism to the same extent as Italy, where the most deadly incident, the bombing of the train station in Bologna in 1980, resulted in 85 deceased and a further 200 injured.[64] The most serious terrorist incident involving Australians was abroad, with 88 Australians killed in the Bali bombings of 2002 and hundreds more injured.[65]

A major element of *ultra* displays, and a maligned element of the active support in Australia, is the use of pyrotechnics and flares.[66] The only death to occur inside an Italian football stadium was a fan who was struck in the eye by a flare.[67] Similarly to Italy, active supporters of A-League clubs have been sanctioned on numerous occasions for the use of illegal flares.[68] Whilst laws exist to prevent the use of flares in both countries, the anti-authority ethos of *ultras* and hooligans means that these measures are largely ineffective in preventing fans from bringing them to

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[63] Camillo Regalia et al, 'Forgiving the Terrorists of the Years of Lead in Italy: The Role of Restorative Justice Beliefs and Sociocognitive Determinants' (2015) 18(5) *Group Processes and Intergroup Relations* 609, 610.

[64] 'Bologna massacre: 39 years on questions remain over Italy's deadliest postwar terrorist attack', *The Local (it)* (online at 2 August 2019) <https://www.thelocal.it/20190802/bologna-massacre-38-years-on-questions-remain>.

[65] National Museum of Australia, *Defining Moments: Bali bombings* (Web page) <https://www.nma.gov.au/defining-moments/resources/bali-bombings>.

[66] Montague (n 9) 59.

[67] Ibid 63.

[68] Avani Dias, 'Is soccer dying in Australia?', *Triple J Hack* (online at 9 April 2018) <https://www.abc.net.au/triplej/programs/hack/will-legal-smoke-canisters-save-soccer-in-australia-football/9634860>.

games. The stubbornness has led to football federations attempting to find safer alternatives to flares, to allow for a similar, yet safer, atmosphere.[69] However, whilst flares are dangerous projectiles, these displays are not alike acts of terrorism.

The deputy director of Italian sports newspaper *la Gazzetta dello Sport* has suggested, "that if anyone imposes fear in a *curva* [Football terrace] and masterminds a strategy of terror then he is a terrorist."[70] He was speaking of the intent to use fear against a group of individuals, arguing further that the acts of some *ultras* were anarchical, with stadium stewards and police helpless to interfere.[71] However, there is a difference between intimidation and fear imposed by *ultras* or hooligans and by terrorist organisations. Pyrotechnic displays and banners in the stadium are for the primary purpose of representing a team and a locale.[72] The *ultras* support their team, and any intimidation or instillation of fear is intended solely for opposition players.[73]

Contrarily, terrorism involves "the use of methods to induce terror, especially the use of violence against persons … to coerce a government or to intimidate a civilian population … to achieve political or social

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[69] Ibid; AP, 'German football fans allowed to set off single smoke bomb before match', *Euronews* (online at 4 February 2020) <https://www.euronews.com/2020/02/04/german-football-fans-allowed-to-set-off-single-smoke-bomb-before-match>.

[70] Alberto Testa, 'Contested Meanings: The Italian Media and the *UltraS*' (2010) 2(1) *Review of European Studies* 15, 16.

[71] Ibid 17.

[72] Montague (n 9) 67.

[73] Ibid 90.

objectives."[74] In Italy, the violence outside of stadiums is not against a civilian population to achieve political or social goals. If ever there is political action, it involves demonstrations against the State in protest of restrictions or against the death of fans at the hands of police.[75] In Australia, the violence has not escalated to such a level either, although, as in Italy, the media portrays football fans as violent or seeking to instil fear in others.[76]

As such, it is not the actions themselves but the similar popular perceptions of actions by Italian *ultras* and Australian hooligans which suggest that Australia could successfully transplant Italian laws combatting violence at football matches.

VII Anti-Ultra Laws and Anti-Terror Laws

Existing similarities between DASPOs in Italy for football fans and control orders in Australia to combat terrorism suggest that a transplant of Italian laws combatting violence at football matches into Australia could succeed.

Control orders generally involve the restriction of an individual's liberty on grounds of suspicion that they may be involved in "terrorism-related activity in order to prevent future terrorist acts."[77] Similarly, the DASPOs

[74] *Macquarie Dictionary* (online at 26 May 2020) 'terrorism' (def 1).

[75] Montague (n 9) 69.

[76] Hughson (n 1) 171; Smithies (n 18).

[77] Lisa Burton and George Williams, 'What Future for Australia's Control Order Regime?' (2013) 24(3) *Public Law Review* 182, 182.

in Italy were created to prevent future violence from being perpetrated by individuals who had been convicted of, or been considered instrumental in, violence relating to football matches.[78] Control orders may also involve an individual being "required to report to police several times a week or stay in his or her home between midnight and dawn, or may be prohibited from contacting certain people."[79] Again, this mirrors the DASPOs, which may require a person to present to a police station at one or more specified times on days of sporting events.[80] Additionally, breach of a DASPO has the potential to lead to a large fine or a custodial sentence of a few years, similarly in Australia it is a criminal offence to breach a control order.[81]

Division 104 of the *Criminal Code Act 1995* (Cth), introduced in 2005, provides the Australian government with a regime to enact anti-terrorism control orders.[82] State and Territory governments also considered the regime when they established their own legislation to combat organised crime through the use of control orders.[83] These anti-terrorism control orders were initially introduced as "'extraordinary' measures … needed

[78] Testa and Armstrong (n 7) 222.

[79] Burton and Williams (n 77) 182.

[80] Testa and Armstrong (n 7) 222.

[81] Ibid; Burton and Williams (n 77) 182; Nicola McGarrity, 'From Terrorism to Bikies: Control Orders in Australia' (2012) 37(3) 166, 166.

[82] Nicola McGarrity, 'From Terrorism to Bikies: Control Orders in Australia' (2012) 37(3) 166, 169.

[83] Ibid.

to deal with the 'extraordinary' threat of terrorism." [84] However, McGarrity suggest that the anti-terror control orders 'normalised' the use of such measures.[85] This provided the precedent for similar approaches to deal with broader criminal behaviour, which allowed for the implementation of control orders to combat organised crime.[86]

Following such normalisation of control orders, and considering that non-terrorist groups such as bikie gangs have become subject to similar measures, it may not be unreasonable to adopt measures for violent football fans.[87] A major concern would be that in Italy, "support groups accused the police of issuing them [DASPOs] like confetti for petty and often ridiculous reasons."[88] There has been a considerable backlash to the law in general and it is strongly opposed by *ultras* and the wider football community. [89] However, given the previously discussed disdain for authority exhibited by *ultras* and hooligans, it may be that the government chooses to ignore their protestations for what they believe to be in the best interest of other football fans. Indeed, observing how uncontrollable and accepted violence and pyro displays have become in Italy may be sufficient to suggest to government that these measures are necessary to prevent escalation.

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[84] Ibid.

[85] Ibid.

[86] Ibid 170.

[87] Ibid 169

[88] Montague (n 9) 59.

[89] Testa and Armstrong (n 7) 222.

The existing similarities between DASPOs in Italy and anti-terror control orders in Australia suggest that a transplant into Australia's criminal law could take place. The normalisation of control orders, being adapted to broader behaviours around organised crime, suggests that this would be possible.

VIII Habeas Corpus and Protections Against Unjust Detention

Similarities between the common law principle of *habeas corpus* in Australia and the constitutional protection against unjust detention in Italy suggest that *arresto differito* could be transplanted in Australia to deal with violence at football matches.

Arresto differito has been employed in Italy to detain individuals "suspected of involvement in football-related violence up to 36 hours after the perpetration of the crime."[90] Usually, there must be some video evidence or photographic evidence, though allowance is made for undefined 'objective elements' also.[91] This is despite Article 13 of the Italian Constitution offering a right to personal liberty, stating that:

> "[Translated] Personal liberty is inviolable. No form of detention, inspection, or personal search nor any other restriction of personal freedom is admitted, except by a reasoned measure issued by a judicial authority, and only in the cases and the manner provided for by law. …"92

[90] Ibid 222-223.

[91] Ibid 223.

[92] *Costituzione della Repubblica Italiana* [Constitution of the Italian Republic] art 13.

The powers afforded to police officers under the law regarding *arresto differito* appear subversive of this constitutional right afforded to ordinary Italian citizens.

Similarly, in Australia there is a common law right to *habeas corpus* within the courts, despite a lack of express inclusion of the accompanying writ in the Commonwealth Constitution.[93] *Habeas corpus* refers to the principle whereby an accused may be released from detention unless there are lawful grounds for that detention, inferring an evidentiary basis to be held for extended periods.[94] However, the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) gave the Australian Security Intelligence Organisation (ASIO) powers to detain people without judicial warrant for up to seven days.[95] Australia has not exclusively ignored the right of individuals to *habeas corpus* in relation to suspected terrorism offences either, with Australia's mandatory detention of illegal immigrants further abrogating an individual's rights to *habeas corpus*.[96]

These examples of Australian neglect of the common law right to *habeas corpus* mirror the way that *arresto differito* successfully violates the constitutional right to personal liberty in Italy. Whilst not a desirable

[93] David Clark, 'Jurisdiction and Power: Habeas Corpus and the Federal Court' (2006) 32(2) *Monash University Law Review* 275, 282.

[94] *Encyclopaedic Australian Legal Dictionary* (online at 30 May 2020) 'habeas corpus' (def 1).

[95] Mark Rix, 'Australia's Anti-Terrorism Legislation: The National Security State and the Community Legal Sector' (2006) 24(4) *Prometheus* 429, 432.

[96] Clark (n 93) 275.

outcome, and one which has led to criticism of Australia in the international community, it comes from the government deeming these threats to be "so serious and imminent that the most effective way of dealing with it is to drastically curtail the rights and freedoms of the Australian people."[97] Consequently, should the government also deem the potential threat of a burgeoning hooligan or *ultra* movement in Australia to the public as sufficiently serious, then it may be that they would be willing to curtail rights and freedoms in relation to suspected proponents of football-related violence also.

The similar nature of the Italian curtailment of the right to personal liberty and Australian curtailment of the right to *habeas corpus* suggests that if there was a sufficient fear of hooligans in Australia, then Australia could transplant *arresto differito* to prevent football-related violence.

IX Conclusion

There should be a transplant of Italian laws combatting *ultra* violence at football matches into Australia, specifically DASPOs and *arresto differito*. Comparisons of Australian hooligans and Italian *ultras*, popular attitudes towards both groups, and existing Australian legislation demonstrate that this can take place. The anti-authority position of *ultras* in Italy has led to an escalation violence which has been likened to terrorism by the media. Australia does not have a hooligan issue to the same extent as the *ultras* problem in Italy, although there are some

[97] Rix (n 95) 430.

current groups that may look to emulate the *ultras* as well as historic instances of violence at football matches in Australia. Public perceptions, media narratives, and government and police attitudes towards hooligans in Australia are like those of the Italian *ultras*. If the government seeks to prevent Australian hooligans from developing to similar levels of violence and anti-social behaviour exhibited by Italian *ultras*, they should transplant Italian laws combatting *ultra* violence. Australia currently has laws allowing for anti-terror control orders and lengthened detention of suspected terrorists. These laws demonstrate that within the existing legal framework Australia could transplant DASPOs and *arresto differito* to

MEDIA, MYSELF AND I:
Why Australia Should Not Adopt the United Kingdom's Tort of Misuse of Private Information

Bridget Rumball

I INTRODUCTION

In 2016, the Courier Mail exclusively reported the proceedings of a high profile murder trial, wherein the prosecution used the accused's eight-year-old son as a witness.[1] Without the family's consent, the Courier Mail published the child's real name, the accused's name and the alleged location of the murder.[2] This information was splashed across the front page of both newspaper and website, with the publication arguing that the child did not have a reasonable expectation of privacy.[3] While this argument is legally sound in Australia, it illustrates the absence of any tangible cause of action for individuals whose private information is misused by the media. This is not the case in the United Kingdom ('UK'), where a common law tort of misuse of private information ('MPI tort') has been judicially approved.[4] Although the Australian Law Reform Commission ('ALRC') proposed the implementation of a statutory cause

[1] Australian Press Council, *Adjudication 1683: Complainant/The Courier-Mail (September 2016)* (Web Page, 3 Sep 2016) <https://www.presscouncil.org.au/document-search/adj-1683/>.

[2] Ibid.

[3] Ibid.

[4] See *Campbell v MGN* [2004] 2 AC 457 ('*Campbell*').

of action in 2014 addressing misuse of private information,[5] Australia remains reluctant to emulate the UK.

This essay argues that transplanting the UK's MPI tort into Australia would not provide individuals with an adequate cause of action against privacy invasions by the Australian sensationalist media. While similarities between the countries suggest a transplant could occur, Australia lacks the aggressive 'tabloid culture', positivist understanding of free speech and cultural attitude towards personal invasion seen in the UK. By taking the MPI tort out of its original context and placing it into Australia's comparatively 'more private' milieu, Australian press freedoms may be adversely strengthened. This would allow the sensationalist media greater liberty to publish individuals' private information without consent. After establishing Australian and UK attitudes to privacy, this essay will consider the sociological, political and economic influence of 'tabloid culture' on the development of the common law tort. Finally, this consideration will be extended, as this essay reflects on broader differences in both countries' positions on privacy invasion, freedom of speech and surveillance.

[5] Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (Report No 123, 3 September 2014), 81 [5.36].

II LEGAL CONSIDERATIONS

A *Development of Privacy*

Australia and the UK share many legal and historical similarities with regard to privacy. Both are 'common law countries' who do not recognise a right to privacy.[6] Superior courts in Australia consistently deny the existence of a cause of action against invasions of privacy and look to established legal principles to address privacy issues as they arise; whereas inferior courts have, at times, broadly interpreted case law to manifest a direct cause of action.[7] The UK judiciary has expressed similar tentativeness, but has had to explicitly recognise a 'right to private life' due to the domestic introduction of the *Human Rights Act 1998* (UK) ('*HRA*')[8] and the incorporation of the European Convention on Human Rights ('ECHR').[9] For a time, this resulted in a disjunctive approach to invasions of privacy, where domestic violations of Article 8 had no effective remedy at common law.[10]

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[6] *Victoria Park Racing & Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479; *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 ('*Lenah*'); *Kaye v Robertson* [1991] FSR 62; *Wainwright v Home Office* [2004] 2 AC 406 ('*Wainwright*').

[7] e.g. *Wilson v Ferguson* (2008) 24 VR 1; *Giller v Procopets* [2015] WASC 15.

[8] *Human Rights Act 1998* (UK) ('*HRA*').

[9] *Convention for the Protection of Human Rights and Fundamental Freedom*, open for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953), as amended by *Protocol No 11 to the Convention for the Protection of Human Rights and Fundamental Freedom*, opened for signature 11 May 1994, ETS No 155 (entered into force 1 November 1998) ('*ECHR*'); *Wainwright* (n 6).

[10] Ibid 823, 825; see also *Peck v United Kingdom* (2003) 36 Eur Court HR (ser A) 41.

This has led both the UK and Australia to adapt areas of general law to provide plaintiffs with indirect redress for violations of their privacy. Both jurisdictions amended equitable remedies such as breach of confidence, in order to offer a slightly 'more suitable pathway' for protecting an individual's privacy.[11] However, English courts continued to adapt the equitable jurisdiction beyond where Australia stopped. Several high-profile test cases extended breach of confidence principles into the private sphere,[12] birthing a direct cause of action for those whose private information is misused by others – a 'tort of misuse of private information'.

B *Statutory Recommendations*

The ALRC and Australian Competition and Consumer Commission have both previously suggested that Australia adopt an MPI tort in statutory form.[13] The proposed model is derivative of the UK's common law MPI tort. [14] However, media stakeholders expressed concern about the proposal due to (a) the limited number of complaints about privacy invasion under existing broadcasting codes of practices [15], (b) the

[11] *Lenah* (n 6).

[12] e.g *Campbell* (n 4); *Douglas v Hello! Ltd (No 3)* [2006] QB 125; 'Cox privacy case 'a watershed'', *BBC News* (online at 7 June 2003) < http://news.bbc.co.uk/2/hi/uk_news/2971330.stm>.

[13] Australian Law Reform Commission (n 5); Australian Competition and Consumer Commission, *Digital Platforms Inquiry* (Final Report, 26 July 2019).

[14] Australian Law Reform Commission (n 5), 148.

[15] SBS, Submission No 123 to Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* 2.

certainty of the tort causing a 'chilling effect' on press freedom[16] and (c) the potential for the judiciary to 'over-reach' in its application.[17] The British media voiced similar dissatisfaction regarding the MPI tort, submitting that the unelected judiciary's 'shoehorning' of ECHR privacy requirements into a cause of action was 'bringing in privacy law by the back door' and creating 'worrying implication for the democratic process'.[18] A statutory version of the MPI tort would allow elected members of Parliament to shape the tort to address public concerns; however, the similarities between the UK and Australia may beget a more simple, direct transplant of the MPI tort into Australia's common law.

III 'TABLOID CULTURE'

Sensationalist media in the UK and Australia operates for a commercial purpose. Both industries view personhood as a commodity, taking advantage of humankind's voyeurism to generate sales and appease advertisers.[19] The publication of people's private information serves this purpose well; as Kyllonen notes, the media seek to expose such

[16] Peter Bartlett, Submission No 79 to Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (9 May 2014) 1–2.

[17] Law Council of Australia, Submission to the Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (14 May 2014) 3; News Corp Australia, Submission No 112 to Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era* (12 May 2013) 6.

[18] 'Mail editor accuses Mosley judge', *BBC News* (online at 10 November 2008) <http://news.bbc.co.uk/2/hi/uk_news/7718961.stm>

[19] Hanna Kyllonen, 'The Darker Side of Fame: Celebrity Deaths, Tabloid Culture and the Death Industry' (2010) 8(3) *The International Journal of the Humanities* 129, 130.

vulnerability to sell their stories to more readers.'[20] However, the growth of the UK's sensationalist media industry has fostered the concept of 'tabloid culture' – a uniquely British term for the aggressive, raucous and invasive nature of the press.[21] 'Tabloid culture', and the sociological, philosophical and political factors which underpin it, has continued to protect the UK sensationalist press from the consequences of invading individuals' privacy for the sake of a 'scoop'.[22] This protection has consequentially influenced the domestic use of common law MPI tort, with the tort having been judicially designed to accommodate 'tabloid culture'. The relative absence of 'tabloid culture' in Australia may result in an unbalanced implementation of a common law MPI tort, such that invasions of privacy by sensationalist media sources are protected rather than neutered.

C *National Identity*

The development of the UK's 'tabloid culture' demonstrates how the media can come to play a dominant role in a country's national expression. By acting as a 'voice of the people', sensationalist media continues to play a part in the UK's national identity in a distinguishing fashion to Australia.

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[20] Ibid.

[21] Ibid; Charlie Beckett, 'The tabloids – a particularly British beast', *The Guardian* (online at 30 July 2011) < https://www.theguardian.com/commentisfree/2011/jul/30/tabloids-british-phone-hacking>.

[22] Ibid.

1 *Class and Culture*

The inaugural publication of the *Daily Express* in the UK in 1900 heralded the 'grafting [of] American branch on… British oak', with British entrepreneurs seeking to commercialise their existing newspaper format in keeping with the successful development of the American 'Yellow Press'.[23] Its success can be attributed to its astute 'embodiment of the mass political culture of the mid-century'[24] – attracting new readers by capitalising on increases in political interest in the young working class.[25] This continued with Rupert Murdoch's 1969 revitalisation of *The Sun,* which broadened the *Daily Mirror's* approach by reporting on a much wider range of popular culture that was intimately accessible to everyone, regardless of class or social standing.[26] This expansion began to intertwine the British national identity with 'tabloid culture', in a way which has not manifested in Australia. While Australia experienced a similar period of popular journalism in the mid 19th century, the growth of Australian sensational media industry lagged behind its British and American counterparts.[27] This allowed Australian

[23] R. D. Blumenfeld, *The Press in My Time* (Rich and Cowan, 1994) 102-12

[24] Martin Conboy, 'Tabloid culture: the political economy of a newspaper style' in Martin Conboy and John Steel (eds) *the Routledge Companion to British Media History* (Taylor and Francis, 2014) 220.

[25] Sofia Johansson, *Reading Tabloids: Tabloid Newspapers and Their Readers* (Södertörn University Press, 2007) 14.

[26] Conboy (n 24) 221.

[27] Murray Goot, 'Stripped bare: A short historiography of the Australian tabloid' (2011) 38(2) *Australian Journal of Communication* 2, 11-12; David Rowe, 'Obituary for the newspaper? Tracking the tabloid' (2011) 12(4) *Journalism* 449, 452.

editors and executives to observe the birth of the UK sensationalist media industry from afar, and deliberately prevent 'tabloid culture' from becoming a defining element of national consciousness as it had in the UK.[28]

2 *Vernacularisation*

This process was spearheaded by a process which Conboy calls 'vernacularistion', where stories are written in the coarser, less refined voice of the ordinary person.[29] This allowed the print to create a popular voice which embodied the everyday identity of its blue-collar readers,[30] helping to personalise topics which were traditionally domains of the upper class. As a result, 'tabloid culture' came to be synonymous with social participation and belonging, thereby reflecting the collective identity of the ordinary, non-elite British person.[31] This continues to allow UK tabloids to act as a 'voice of the people' – even in situations where they do not.[32] This was best demonstrated during the recent Brexit

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[28] Rowe (n 27) 458.

[29] Conboy (n 24) 221; Martin Conboy, *Tabloid Britain: Constructing a Community Through Language* (Routledge, 2005) 197-198.

[30] Ibid; Conboy (n 24); Olivia Smith, *The Politics of Language*: *1719 – 1819* (Clarendon, 1984) 203.

[31] Mascha K. Brichta, *Love it or Loathe it: Audience Responses to Tabloids in the UK and Germany* (Transaction Publishers, 2014) 95; Rodrigo Uribe and Barrie Gunter 'Research Note: The Tabloidization of British Tabloids' (2004) 19(3) *European Journal of Communication* 387, 392-398.

[32] Brichta (n 31) 96; Jonathan Leader Maynard, 'Nasty piece of work: The Sun's nationalism is doing England great harm', *The Conversation* (online at 2 July 2014) < https://theconversation.com/nasty-piece-of-work-the-suns-nationalism-is-doing-england-great-harm-28426>.

referendum. Linguistic analysis revealed that sensationalist media portrayed 'the British people' as hardworking, simple people who were being antagonised by domestic and international 'enemies'.[33] By promoting this dynamic, tabloids 'reflect[ed] the fears of the British electorate'[34] and delegitimised the Remain campaign as a threat to the British identity-[35] despite the actual 'British person' possessing little contextual understanding of Brexit.[36]

Australian sensational media did not experience this process, as executives at the helm of the Australian 'tabloid discipline' were careful to distinguish their publications from the much-denigrated 'red tops' of the UK.[37] Although they reported on popular culture in the same manner as the UK, they did so without adopting a 'popular voice' of the lower class. This prevented such publications from accumulating 'cultural capital',[38] meaning that Australian sensationalist news never embodied the socio-cultural structures inherent in the UK's 'tabloid culture'.[39] In

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[33] UK Electoral Commission, *Referendum On Membership Of The European Union: Question Testing* (Report, October 2013); Leader Maynard (n 32).

[34] Jane Martinson, 'Did the Mail and Sun help swing the UK towards Brexit?', *The Guardian* (online at 24 June 2016) <https://www.theguardian.com/media/2016/jun/24/mail-sun-uk-brexit-newspapers>

[35] Ros Taylor, 'From Euroscepticism to outright populism: the evolution of British tabloids', *#LSEThinks* (Blog Post, 4 January 2019) <https://blogs.lse.ac.uk/brexit/2019/01/04/from-euroscepticism-to-outright-populism-the-evolution-of-british-tabloids/>.

[36] UK Electoral Commission (n 33).

[37] Rowe (n 27) 458.

[38] Ibid.

[39] David Rowe, 'Tabloidization: Form, Style and Socio-Cultural Change' in Verica Rupar (ed) *Journalism and Meaning-making: Reading the Newspaper* (Hampton Press, 2010) 149.

critiquing the UK's 'tabloid culture', executives ensured that Australia's national identity remained distinct from sensationalist media – maintaining cultural hegemony in the process.[40]

3 *Geographical Audience*

Further, Australian sensationalist media tends to be dominated by metropolitan rather than national publications.[41] While most of Australia's 'tabloid-esque' publications are nationally operated, the publications themselves tend to cater to regional markets, not the entire nation. This is apparent in the array of print 'tabloid' media between Perth (*West Australian),* Melbourne (*Herald Sun)* and Sydney (both the *Sydney Morning Herald* and *Daily Telegraph),* as well as in regional areas such as Newcastle (*Newcastle Herald);* by contrast, British publications such as *The Sun* and *The Mirror* appeal to a nationwide market.[42] As ex-editor Adrian Deamer notes, predecessors to the *Herald Sun* 'knew Melbourne better than any other paper knew its city. [They] presented Melbourne to Melbourne.'[43] Although these publications, as part of the broader sensationalist media, generally utilise the same article

[40] Rowe (n 27) 458.

[41] Ibid 453.

[42] Ibid.

[43] Rodney Tiffen, 'From irreverence to irrelevance: the rise and fall of the bad-tempered tabloids', *The Conversation* (online at 1 April 2019) <https://theconversation.com/from-irreverence-to-irrelevance-the-rise-and-fall-of-the-bad-tempered-tabloids-113656>.

composition, headlines and images as similar UK publications,[44] this localised approach made it harder to reflect the collective national identity as a 'voice of the people'.

D *Public Interest*

Another critical aspect of UK 'tabloid culture' is the sensationalist media's historical role as a protector of the 'public interest'. British media, as a whole, has always held the dissemination of truth as one of its key tenets, acting as a check on power and enabling informed democratic participation.[45] This is no different to Australia, where the media at large embodies the same values of accuracy, clarity, balance and truth-seeking.[46] This has resulted in the media in both countries adopting an implicit duty to 'set the record straight', such that the public are aware of, and protected from, the immoral or unjust actions of those who hold power.[47]

4 *Punishment and Harm*

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[44] Rowe (n 27) 456.

[45] The Honourable Lord Justice Brian Leveson, *An Inquiry into the Culture, Practices and Ethics of the Press* (Report No HC779, 29 November 2016) 64-65 ('*Leveson Inquiry'*)

[46] Australian Press Council, *Standards of Practice* (Web Page) <https://www.presscouncil.org.au/standards-of-practice/>.

[47] *Campbell* (n 4) [126]; Paul Wragg, 'Enhancing Press Freedom through Greater Privacy Law: A UK Perspective on an Australian Privacy Tort' (2014) 36 *Sydney Law Review* 619, 627; Brian Chama, 'Tabloid journalism and philosophical discourses surrounding the right to privacy and press freedom' (2015) 11(1) *International Journal of Media & Cultural Politics* 105, 106.

Protecting the 'public interest' has remained a key tenant of the UK sensationalist press.[48] However, mid-century changes in how stories were communicated resulted in this duty being interpreted with a broad brushstroke.[49] Publications such as the *Daily Mirror* and *The Sun* began to favour the publication of 'exposès', considering themselves entitled to 'put the record straight' where a 'public figure' chooses to lie to the public at large.[50] This was accompanied by an expansion in the definition of 'public figure' to include not only those in positions of political power – parliamentarians, judges and Royals – but also those with social power, such as celebrities and sportspeople.[51] As Wragg notes, 'what might be dismissed initially as celebrity gossip… may be categorised… as a morally driven claim about higher society generally.'[52] This goes far beyond the original conception of 'public interest', as the press does not fulfil its vital function of supporting democracy when reporting on a celebrity's private life – even when that celebrity is well known to the public.[53]

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[48] Wragg (n 47); Gavin Phillipson, 'Press freedom, the public interest and privacy' in Andrew Kenyon (ed), *Comparative Defamation and Privacy Law* (Cambridge University Press, 2016).

[49] Jacob Rowbottom, 'A landmark at a turning point: *Campbell* and the use of privacy law to constrain media power' (2015) 7(2) *Journal of Media Law* 170, 172-173. Phillipson (n 48) 151.

[50] Ibid; Chama (n 47); Wragg (n 47) 639-40; Phillipson (n 47) 144.

[51] Wragg (n 47) 640; Phillipson (n 48) 152-153.

[52] Phillipson (n 48) 152.

[53] Ibid.

This position echoes English philosopher John Stuart Mill's liberalist construction of the 'harm principle', which asserts that the public are justified to protect others from any individual whose private actions are prejudicial to either themselves or those with whom they associate.[54] Such harm is broad enough to include harm to society.[55] As the immoral actions of an individual may prejudicially harm society, such harm ought to be exposed by the sensationalist press, and the individual subject to social or legal punishment 'in the public interest'.[56] In simpler terms, a person who privately cheats on their partner should be embarrassed on the front page of *The Sun*; anything less would be 'an unashamed reversal of centuries of moral and social thinking, [placing] the rights of the adulterer above society's age-old belief that adultery should be condemned.'[57]

Australian sensationalist publications have somewhat avoided this expansive approach to 'public interest'. In an effort to distinguish themselves from the British 'red tops', executives of Australian publications deliberately emphasised quality journalism over the aggressive 'exposè' format.[58] The record of popular culture was still

[54] Chama (n 47) 106; Rebecca Moosavian, 'Deconstructing 'Public Interest' in the Article 8 vs Article 10 Balancing Exercise' (2014) 6(2) *Journal of Media Law* 234, 247; Paul Wragg, 'Mill's Dead Dogma: The Value of Truth to Free Speech Jurisprudence' (2013) 26 *Public Law* 363, 381–2; John Stuart Mill, *On Liberty* (Hackett Publishing, 1978) 9.

[55] Mill (n 54) 10.

[56] Ibid.

[57] Paul Dacre, 'The threat to our press', *The Guardian* (online at 10 November 2008) <https://www.theguardian.com/media/2008/nov/10/paul-dacre-press-threats>

[58] Goot (n 27) 10.

being 'put straight'; however, publications were 'far from being vehicles of entertainment … offering a significant proportion of news in the more serious areas of politics and finance, while [still] giving a degree of attention to social issues.'[59] This resulted in 'public figures' remaining aligned with the original, political interpretation of 'protecting the public interest' – providing a check on democratic process, not publicly punishing those who lie about their private immorality.[60] Although modern sensationalist media sources have more readily embraced the UK's favouritism of the 'celebrity exposè', it is characterised by a narrower definition of 'public interest' which has '[stuck] closely to narrow conceptions of… democratic participation.'[61]

5 *Judicial Response*

The UK judiciary has supported the position of sensationalist press as 'protector', shaping the MPI tort to include a 'public interest' exception. This provides that the deliberate disclosure of people's private information will be permitted, if there is public interest in doing so.[62] 'Public interest' has been interpreted broadly, such that any invasion

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[59] John Henningham, 'The shape of daily news: A content analysis of Australia's metropolitan newspapers' (1996) 79 *Media International Australia* 22, 32.

[60] Ibid; Goot (n 27) 10; Wragg (n 46) 638-639.

[61] Wragg (n 47) 639.

[62] *Campbell* (n 4) [56], [65].

which exposes a person 'misleading the public' is acceptable.[63] This position has been attributed to a social and cultural importance of UK's 'tabloid culture', and efforts by the court to allow 'considerable latitude in their intrusions into private grief so that [tabloids] can maintain circulation, and the rest of us can continue to enjoy [them].'[64]

Australian courts have not had cause to interpret 'public interest' in the same way, having more in common with the United States in narrowly defining the term. In doing so, only stories which are explicitly political in nature would be 'in the public interest'.[65] By directly transplanting the UK's MPI tort – including its 'public interest' exception – Australian sensationalist publications would gain access to a Pandora's box of jurisprudence, wherein invasions of privacy are generously protected and 'public interest' is extended to include gossip and the condemnation of immoral behaviour.[66] This would only strengthen press freedom 'through

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[63] Wragg (n 47) 636; Paul Wragg, 'Protecting private information of public interest: *Campbell*'s great promise, unfulfilled' (2015) 7(2) *Journal of Media Law* 225, 231; Moosavian (n 53) 248; George Eustice, 'A privacy law is vital for the future of the British media', *The Guardian* (online at 9 April 2012) <https://www.theguardian.com/media/2012/apr/08/privacy-law-vital-media-future>.

[64] *Campbell* (n 4) [143].

[65] Dan Meagher, 'What is 'Political Communication'? The Rationale and Scope of the Implied

Freedom of Political Communication' (2004) *Melbourne University Law Review* 438, 451; Jane Johnston 'Whose interests? Why defining the 'public interest' is such a challenge', *The Conversation* (online at 22 September 2017) < https://theconversation.com/whose-interests-why-defining-the-public-interest-is-such-a-challenge-84278>.

[66] Wragg (n 47) 637.

greater recognition of the broader democratic participation and self-fulfilment values at stake.'[67]

IV 'PRIVACY CULTURE'

As aforementioned, Australia and the UK are similar in their legal approaches to privacy protection. However, the UK's political and social relationship with privacy has fostered a more unregulated 'privacy culture' – where personal privacy is regularly sacrificed in exchange for national security, surveillance and broad rights protections in aid of press freedom.[68] The common law MPI tort was developed with this context in mind. This is compared to Australia, where an individuals' right to privacy often outweighs the need for freedom of expression.[69] Regular surveillance is tolerated less by the public, whereas press freedom is both protected and regulated by law.[70] This has resulted in a more stringent, better regulated 'privacy culture' than the UK. However, the domestic introduction of the MPI tort may undermine this stringency. By providing 'a ready-made source of principles for the courts to apply',[71] the tort

[67] Ibid.

[68] Jonathan Freedland, 'Why Surveillance Doesn't Faze Britain', *The New York Times* (online at 8 November 2013) < https://www.nytimes.com/2013/11/09/opinion/why-do-brits-accept-surveillance.html>.

[69] Roger Patching, 'Privacy in the age of no privacy', *The Conversation* (online at 20 July 2011) <https://theconversation.com/privacy-in-the-age-of-no-privacy-2363>.

[70] Ibid; Joel Kininmonth, Nik Thompson, Tanya McGill and Anna Bunn, 'Privacy Concerns and Acceptance of Government Surveillance in Australia' (Conference Paper, Australasian Conference on Information Systems, 4 December 2018).

[71] Wragg (n 47) 629.

would quickly and explicitly enshrine stronger rights to freedom of expression into domestic law. This, in turn, may provide the Australian sensationalist media with a stronger justification for invading individual's privacy.

E *Press Freedom*

6 *Culturally Positive, Legally Negative*

The UK and Australia both legally recognise the philosophical value of individual self-fulfilment and autonomy, and acknowledge the free-flow of ideas, information and public debate as a necessary part of a strong democracy.[72] However, free speech has tended to be viewed culturally as a negative right in Australia; or, freedom *from* government intrusion.[73] The press is able to express themselves relatively freely, as the executive and judiciary are limited in how they can inhibit communication. This position is reflected in the historical structure and text of the Commonwealth Constitution, which impliedly protects the right to

[72] Ibid 634; *R v Secretary of State for the Home Department; ex parte Simms* [2000] 2 AC 115, 126; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, [46].

[73] Rosalind Croucher, 'Australians expect freedom of speech, so let's make it our right', *The Australian* (online at 14 November 2019), < https://www.theaustralian.com.au/commentary/australians-expect-freedom-of-speech-so-lets-make-it-our-right/news-story/8be42ad9952fc2e004a8493ed8baa069>.

political communication from abrogation by the government.[74] This is opposed to the UK, where free speech has tended to culturally be viewed as a positive right; or, a right *to* freely express oneself.[75] Press executives have argued that both the executive and judiciary should be required to protect publications' freedom to publish any content, due to the UK's championing of free speech for 'as long as, if not longer than… any other country in the world.' [76] This includes permitting the invasion of individual's privacy and the publication of their private information, as although 'publications may cause needless pain, distress and damage to individuals… a freedom which is restricted … is no freedom.'[77]

As the legal rights protections offered by the Commonwealth Constitution involve protecting people's freedom of speech through negative rights, Australia's sociocultural and legal perspectives are married. [78] Australians have consequentially accepted the implied freedom as part of the country's 'privacy culture', understanding that both individual privacy and freedom of speech can culturally coexist.[79] One need look no further than the public outcry and awareness campaign

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[74] Michaela Whitbourn, 'How free is the press in Australia?', *The Sydney Morning Herald* (online at 12 June 2019) < https://www.smh.com.au/national/how-free-is-the-press-in-australia-20190612-p51wvi.html>.

[75] Rowbottom (n 49) 191; Wragg (n 47) 630.

[76] *Attorney General v Guardian (No 2)* [1990] 1 AC 109; Eustice (n 63); Paul Wragg, 'The Benefits of Privacy-Invading Expression' (2013) 64(2) *Northern Ireland Legal Quarterly* 187, 187-188.

[77] *R v Central Independent Television plc* (1994) Fam 192, [204].

[78] Whitbourn (n 74).

[79] Ibid; Ken McKinnon, 'Balancing Privacy and Press Freedom' (May 2001) *Australian Press Council News* 11.

associated with recent raids of News Corp journalist Annika Smethurst and the Australian Broadcasting Commission,[80] wherein Liberal Senator Eric Abetz commented that 'most Australians would… give as much leeway as possible to a journalist, because freedom of the press is one of the foundations of our democracy'.[81]

The 2000 incorporation of the ECHR into British law enshrined similar legal freedom of speech protections in the UK to those in Australia. The legal rights protections contained in the ECHR are framed negatively, outlining the series of limitations that enable it to be restricted in a broad range of circumstances.[82] Article 10 provides a right to freedom of expression as 'necessary in a democratic society'[83]; however, it is dependent on Article 8's right to respect for private and family life.[84] The adoption of these Articles via the *HRA* consequently created discord between the UK's sociocultural and legal views of freedom of speech,

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[80] Whitbourn (n 74); 'ABC raid: Outcry as Australian police search public broadcaster', *BBC News* (online at 5 June 2019) <https://www.bbc.com/news/world-australia-48522729>; Your Right To Know, *When government keeps the truth from you, what are they covering up?* (Web Page) <https://yourrighttoknow.com.au/media-freedom/>; Rebecca Ananian-Welsh, 'Australian need a Media Freedom Act. Here's how it could work', *The Conversation* (online at 22 October 2019) < https://theconversation.com/australia-needs-a-media-freedom-act-heres-how-it-could-work-125315>.

[81] Matthew Doran, 'Home Affairs chief's words stir fears of a 'chilling effect' on whistleblowers and journalists', *ABC News* (online at 16 August 2019) <https://www.abc.net.au/news/2019-08-16/analysis-press-freedom-battle-on-show/11419300>.

[82] ECHR (n 9); Moosavian (n 54) 243.

[83] ECHR (n 9) art 10.

[84] Ibid art 8; *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression* (April 2013) UN Doc A/HRC/23/40, [24], [79].

with a culturally positivist public expressing their distaste for the negative privacy limitations imposed by the ECHR.[85] Although neither Article has precedence over the other,[86] concerns were raised by media executives that the *HRA* was attaching more weight to Article 8's right to privacy than to the cultural right to freedom of expression embodied by Article 10.[87] None were so loud as those who helmed the sensationalist press, with former *Daily Mail* editor Paul Dacre arguing that the 'terminal tension between the right to privacy and the public's right to know' would continue to 'undermin[e] the ability… to sell newspapers in an ever more difficult market.'[88] This has meant that the individual's right to privacy is often diminished to counteract Article 8's influence on cultural ideals of freedom of speech.

The UK's MPI tort, and its surrounding jurisprudence, was developed with this dualism in mind. As a result, Australia's adoption of the tort would be accompanied by an implicitly positivist cultural conception of

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[85] Moosavian (n 54) 240; Editorial Board, 'British Press Freedom Under Threat', *The New York Times* (online at 14 November 2013) < https://www.nytimes.com/2013/11/15/opinion/british-press-freedom-under-threat.html>; Dan Sabbagh, 'How combative tabloid morality has fuelled the privacy debate', *The Guardian* (online at 11 May 2011) < https://www.theguardian.com/media/2011/may/10/privacy-journalism-media-legislation>.

[86] *Re S (A Child) (Identification: Restrictions on Publication)* [2004] UKHL 47, [17].

[87] Sabbagh (n 85); Steve Foster, 'Balancing Privacy with freedom of speech: press censorship, the European Convention on Human Rights and the decision in *Mosley v United Kingdom'* (2011) 16(3) *Communications Law* 100, 103-104.

[88] Dacre (n 57); 'Paul Dacre's speech at the Leveson inquiry - full text', *The Guardian* (online at 12 October 2011) <https://www.theguardian.com/media/2011/oct/12/paul-dacre-leveson-speech>.

free speech. This would introduce an expanded standard of press freedom, diminishing individual's privacy in a manner contrary to the desired outcome of the MPI tort.

7 *Regulation*

These differences are bolstered by both countries' approaches to press regulation. Regulating the press can only occur where the relationship between the state and the press has been refined to a point where one trusts the other.[89] The correlation between Australia's negative cultural and legal understanding of free speech has allowed domestic 'privacy culture' to accommodate a regulatory system that equally balances press freedom and statutory oversight.[90] This trend has not been seen in the UK.[91]

Despite membership to the Australian Press Council (APC) being voluntary, 95% of publications are members and abide by the statutory media standards it enforces.[92] This includes sensationalist publications created by News Corp, Fairfax and Bauer Media Group,[93] who are bound

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[89] Tom O'Malley, 'The regulation of the press' in in Martin Conboy and John Steel (eds) *The Routledge Companion to British Media History* (Taylor and Francis, 2014) 228, 236.

[90] Sunanda Creagh, 'Leveson inquiry into the UK press: the experts respond', *The Conversation* (online at 30 November 2012) <https://theconversation.com/leveson-inquiry-into-uk-press-the-experts-respond-11082>.

[91] O'Malley (n 89).

[92] Australian Press Council, *Who Are Our Members?* (Web Page) <https://www.presscouncil.org.au/who-are-our-members/>.

[93] Ibid.

to the standards of the APC for a four year rolling period.[94] The equivalent British regulatory body, the Independent Monitor for the Press ('IMPRESS'), is also voluntary and supported by statute.[95] However, any historical attempts to establish statutory regulation of press standards have provoked fierce industry resistance, in part due to the influence of the ECHR and the imposing 'threat' of Article 8.[96] Further, almost all major publications – including sensationist mastheads such as the *Sunday Times* and *Daily Mail* – have refused to become members of IMPRESS.[97] This tension is evident in the public and industry reaction to the UK government's damning *Inquiry into the Culture, Practices and Ethics of the Press* ('the Inquiry'). Recommendations calling for an independent press regulator – what became IMPRESS – were met with fears that over-regulation would kill the commercially viable press and 'put democracy itself in peril.'[98] This was opposed to Australian public reaction, which

[94] Australian Press Council, 'Publishers Agree on Major Strengthening of the Press Council' (Media Release, 5 April 2012).
[95] Independent Monitor for the Press, *About Us* (Web Page) < https://www.impress.press/about-us/>.
[96] O'Malley (n 89) 235; Oliver Wright, 'The Leveson Report: The victims' reactions', *The Independent* (online at 29 November 2012) < https://www.independent.co.uk/news/media/press/the-leveson-report-the-victims-reactions-8368639.html>.

[97] Roy Greenslade, 'Goliath fears David: why newspaper publishers are scared by Impress', *The Guardian* (online at 26 October 2016) < https://www.theguardian.com/media/greenslade/2016/oct/25/goliath-fears-david-why-newspaper-publishers-are-scared-by-impress>; 'High court rejects challenge to status of UK press regulator', *The Guardian* (online at 12 October 2017) <https://www.theguardian.com/media/2017/oct/12/high-court-rejects-challenge-to-status-of-impress-uk-press-regulator>; Independent Monitor for the Press, *Regulated Publications* (Web Page) <https://www.impress.press/regulated-publications/?>.
[98] Dacre (n 88).

praised the Inquiry's findings and recognised that such an attitude was only 'a cover for commercial self-interest.'[99] Differences in each country's attitudes towards privacy – manifested here in reactions to press regulation – demonstrate how much more stringent Australia's 'privacy culture' really is.

F *Surveillance and Security*

These differences in 'privacy culture' are also apparent in both countries' approaches to surveillance and security. The UK public has traditionally sacrificed their individual privacy more than other Western democracies, using mass surveillance in order to 'feel secure' as a collective.[100] This approach is partially attributable to the UK becoming a terrorism target, with 27% of Britons changing their opinions on surveillance based on domestic terrorist activity.[101] However, it is predominantly attributable to the UK's 'privacy culture', wherein regular invasions of privacy have been normalised.[102] Although such surveillance is counterintuitive to the UK's broader protections of free speech and autonomy,[103] this 'culture

[99] Creagh (n 90).
[100] Freedland (n 68); Adam Santariano, 'Real-Time Surveillance Will Test the British Tolerance for Cameras', *The New York Times* (online at 15 September 2019) <https://www.nytimes.com/2019/09/15/technology/britain-surveillance-privacy.html>.
[101] Kininmonth et al (n 70) 4.
[102] Freedland (n 68); Santariano (n 100); Matthew Weaver, 'UK public must wake up to risks of CCTV, says surveillance commissioner', *The Guardian* (online at 7 January 2015) <https://www.theguardian.com/world/2015/jan/06/tony-porter-surveillance-commissioner-risk-cctv-public-transparent>; Kenan Malik, 'As surveillance culture grows, can we even hope to escape its reach?', *The Guardian* (online at 19 May 2019) <https://www.theguardian.com/commentisfree/2019/may/19/as-surveillance-culture-grows-can-we-even-hope-to-escape-its-reach>.
[103] Harriet Agerholm, 'UK mass surveillance programme violates human rights, European court rules', *The Independent* (online at 13 September 2018)

of complacency' has emerged as a *result* of such protections; allowing those in power – including sensationalist media sources – to invade people's privacy without strong repercussions.[104] In fact, 63% of Britons support the *expansion* of surveillance powers of British intelligence and government organisations.[105] Indeed, every UK CCTV camera accounts for 11 people – the highest CCTV activity per capita of any other European country.[106]

Mass surveillance trends in Australia reflect a similar utilitarian need to 'feel secure', particularly in light of similar increases in domestic terrorist activity. However, the Australian public are much less complacent in relinquishing their privacy to do so. Only 52% of a surveyed sample of Australians described themselves as accepting of government surveillance, provided the surveillance is necessary and trustworthy.[107] If it is not, Australians are more likely to take basic measures to 'hide' themselves from surveillance than those in the UK.[108] Although domestic CCTV monitoring is still extreme – one CCTV camera for every 25

<https://www.independent.co.uk/news/uk/politics/uk-mass-surveillance-gchq-eu-human-rights-echr-edward-snowden-a8535571.html>.

[104] Nicola Woolcock, 'Students turn against free speech amid 'culture of conformity'', *The Times* (online at 11 November 2019) <https://www.thetimes.co.uk/article/students-turn-against-free-speech-amid-culture-of-conformity-tfrnzx8kt>.

[105] Kininmonth et al (n 70) 3.

[106] Ivana Davidovic, 'Should we be worried by ever more CCTV cameras?', *BBC News* (online at 18 November 2019) <https://www.bbc.com/news/business-50348861>.

[107] Anna Bunn and Nik Thompson, 'Australians accept government surveillance, for now', *The Conversation* (online at 5 February 2019) <https://theconversation.com/australians-accept-government-surveillance-for-now-110789>.

[108] Ibid.

people[109] – Australia's 'privacy culture' has kept the Australian public comparatively more responsive to invasions of privacy than their UK counterparts.[110] Domestically introducing the MPI tort may counteract this responsiveness, providing sensationalist media sources with greater jurisprudential support to forcibly push into people's private spheres.

A Sticky Situation - an Analysis of a Legal Transplant of Singapore's Chewing Gum Laws

Norman Jacka

> If you can't think because you can't chew, try a banana – Lee Kwan Yew[1]

I INTRODUCTION

The goal of this paper is to examine whether it would be possible to transplant the laws of Singapore as respects used chewing gum being stuck in public places to Western Australia. To that end it will compare the legal responses in both jurisdictions to the problem using several points. It will propose that a comparative analysis of the problems shows a legal transplant would not be feasible.

This is a concurrent, neo-functionalist transplant study. To measure the level of fit, it will use three comparative factors from Hofstede's cultural dimensions theory, namely the Power Distance Index (PDI), Individualism v Collectivism (IDV) and Uncertainty Avoidance (UAI). This is because of their richness and longstanding use in cross-cultural comparisons. This has been combined with a literature review to update my knowledge of Singapore in particular. Where there is no relevant

[1] Elle Metz, 'Why Singapore banned chewing gum', *BBC News Magazine*, (online, 28 March 2015) <https://www.bbc.com/news/magazine-32090420>.

comparison data, it will look at Australia as a whole on the basis that Western Australian mores are broadly the same.[2]

A *My perspective*

I lived in Singapore for seventeen years and have lived in Western Australia for twenty-two years. Whilst I understand a lot about both jurisdictions, things have inevitably moved on in Singapore since I left so I may view it through the lens of what it was then, rather what it is now. I have fairly liberal views about civic freedoms and favour democratic governance over authoritarian systems.

II CURRENT LAWS

B *Singapore*

There is a distinction under Singaporean law between the importation and possession of chewing gum. It is illegal to import chewing gum into Singapore. This comes from *Regulation of Imports and Exports (Chewing Gum) Regulations 1995* (Sin) which prohibits the importation chewing gum unless it is transiting to West Malaysia, or from West Malaysia to a third country, or for research purposes.[3] Even then, this can only be done with the express permission of the government.[4]

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[2] For example, Hofstede looks only at countries rather than their internal divisions.

[3] *Regulation of Imports and Exports (Chewing Gum) Regulations 1995* (Sin) Reg 4.

[4] Ibid.

The penalties for breach this law are, in keeping with the general legal culture of Singapore, harsh. A first offence attracts a fine of up to $100,000 or 2 years or both and subsequently a fine of up to $200,000, or 3 years imprisonment, or both.[5] The ban on importation was intended to pre-empt the courts having to deal with chewing gum as litter.

In contrast, it has never been illegal to possess or chew chewing gum.[6] The problem the laws were crafted to address was its improper disposal through littering. The relevant legislation here is the *Environmental Health Act 1987* (Sin) section 17. Subsections (1)(a), (b) and (g) of which lay out a comprehensive list of improper ways of disposing of "any other article or thing". Generally, "first-time offenders…are liable for a $300 fine."[7]

C *Western Australia*

Western Australia, like all other jurisdictions, does not have and never has had laws restricting the importation of chewing gum. As part of a federation, the regulation of what may be imported into the country is a federal matter beyond the legislative competence of the states, whilst the conditions of sale once inside Australia is beyond the legislative

[5] Ibid, Reg 7.

[6] Leo Benedictus, 'Gum control: how Lee Kuan Yew kept chewing gum off Singapore's streets', *The Guardian* (online, 24 March 2015) <https://www.theguardian.com/lifeandstyle/shortcuts/2015/mar/23/gum-control-how-lee-kuan-yew-kept-chewing-gum-off-singapores-streets>.

[7] 'Littering and Jaywalking', *Gloria James-Civetta & Co* (Web Page) <https://www.singaporecriminallawyer.com/littering-jaywalking/>.

competence of the Commonwealth. Western Australia has no laws restricting the sale of chewing gum. Like Singapore it has laws that govern littering offences that would apply to the disposal of chewing gum. The offences relating to littering are found in sections 23 to 25 of the *Litter Act 1979* (WA) (the *Litter Act*) which cap the maximum fine for individuals at $5000 for individuals and $10,000 companies.

However, the normal penalties are found in schedule 1 of the *Litter Regulations 1981* (WA) which set the standard fine at $200 for individuals and $500 for companies. There is a separate offence of "litter creating a public risk" attracting a fine of $500 for individuals and $2000 for companies. This latter offence covers items such as "[b]reaking glass, metal or earthenware, littering of car bodies and car parts, batteries, hazardous chemicals or medicines, fridges and freezers with doors attached, tyres, lit cigarettes and syringes."[8]

III SOCIAL CONTEXT

The laws are a manifestation of their social context. This encompasses a wide range of factors beyond the scope of this paper. This necessitates zooming in on three differences that aid understanding each jurisdiction's laws are as they are.

D *History*

[8] Government of Western Australia, *Litter Laws* (Web page) <https://www.kabc.wa.gov.au/resources/for-local-government/litter-laws>.

Much of the mindset of both places was formed out of their differing experiences of being colonised by Britain. Western Australia had started under military rule and was granted responsible government with a parliament in 1890. Even before democracy was enacted, the settlers brought with them the cultural framework of the English liberal tradition. Thus liberal-democratic norms were already deeply entrenched. We will see this in the scores on the Hofstede indicators later in the paper.

Singapore has been governed as part of India, Malaya (as it then was) and as a separate colony after WWII. In 1948 the British declared a state of emergency and enacted regulations in response to the threat the Malaysian Communist Party posed to their rule.[9] These morphed into the *Internal Security Act* 1960 (Malaysia) which Singapore inherited upon independence from Malaysia in 1965.[10] The Act has long been used to repress internal dissent. When the ruling Peoples' Action Party came to power prior to independence it inherited the mindset of the colonial authorities that preventing communism taking hold was paramount, this necessitated strict authoritarianism, anyone opposing measures taken was framed as a dangerous subversive who would face a range of criminal and civil penalties.[11] As we shall see, this fits with Singapore's Hofstede scores. It was this mindset that the party took into dealing with all the

[9] Chris Lydgate, *Lee's Law: How Singapore Crushes Dissent* (Sribe, 2003) 25-26.

[10] Ibid.

[11] See for instance, *Chee Soon Juan v Public Prosecutor* [2003] 2 SLR (R) 445 (HC) ('*Chee Soon Juan v Public Prosecutor*').

problems facing Singapore, including the lack of hygiene and cramped conditions most Singaporeans lived in.

E *Space*

At independence Singapore suffered from a lack of civic planning outside the areas where the British and the upper echelons of the local civil service lived. Slum conditions naturally bred disease – cholera, typhus and dengue fever were rife.[12] Recognising this was a major problem to development, the government rapidly expanded the community housing for the masses started in a few areas on the outskirts of the city under the British.[13]

Concurrent public health campaigns targeted numerous problems causing disease. Public health inspectors began inspecting individual homes for pools of stagnant water such as flowerpot bases, to stop mosquitoes breeding, issuing spot fines for breaches. Later additions were inspectors in public toilets who would wait outside toilets to make sure people flushed them and fine them if they did not. In the early 1980s a major clean-up of the polluted Singapore River began, improving the general amenity of the area as well increasing public health. Campaigns

[12] Ministry of National Development, 'Past Living Conditions' (Web page) <https://www.mnd.gov.sg/our-city-our-home/our-early-struggles>.

[13] Ibid.

against spitting[14] and public urination[15] were also waged, in the latter case offenders risked having their photo put on the front page of the Straits Times to shame others into complying with the laws.[16] There were also courtesy campaigns[17] aiming to increase civility in the average Singaporean.[18] It was in the context of these authoritarian measure to clean up Singapore that chewing gum was banned, as people had been sticking it to the doors of MRT trains which impacted their serviceability. Western Australia by contrast occupies a third of continent. The tyranny of distance was the issue successive governments faced, not overcrowding and squalor. Old maps of Perth show how the basic plan of the city and inner suburbs was in place by the early 20th century. Sanitation during this time was of a much higher standard than in Singapore. Population density in the cities was far lower than in Singapore. Furthermore, for much of its history the majority of the population lived outside of Perth as agriculture and mining were the major industries. This meant that the Western Australian focus of public health was long centred around diseases that were passed on by livestock

[14] Roots, '*Anti-spitting Campaign booklet*' (Web page) <https://www.roots.sg/learn/collections/listing/1324976>.

[15]David Needham and Robert Dransfield, *Business Studies* (Stanley Thornes, 2nd ed, 1995) 706.

[16] Hoe Pei Shan, 'Caught in the act of urinating in Pinnacle@Duxton lift', *The Straits Times* (online, 19 June 2018) <https://www.straitstimes.com/singapore/caught-in-the-act-of-urinating-in-pinnacleduxton-lift>.

[17] Tham Kok Wing, *National Campaigns in Singapore Politics* (National University of Singapore, 1983).

[18] These were a favourite target of mockery by Malaysians.

rather than urban pests. Singaporean-style health measures were simply not needed in Western Australia particularly during the post-war period as context was completely different.

F *Federal Liberalism versus Unitary Neoconfucianism*

A final point of contextual comparison of each jurisdiction's context is the political philosophy that underpins them.

Western Australia is state within Australia with a bicameral parliament, Singapore is a unitary republic with a unicameral parliament. This alone is a reflection of the basis of each jurisdiction. In a Western Australian context, it means that power is divided – the government of the day will often not have a majority in the Legislative Council and so will have to negotiate to get legislation through parliament or risk having it rejected. The liberal-democratic tradition it is part of endorses this fragmentation to stop one person or party having too much control. It recognises there will be divisions arising from people having different interests which will need to be accommodated. This flows through to littering laws which give power to local governments to tackle the issue rather than centralising it in the hands of the police.

In Singapore meanwhile the mentality of suppressing dissent coupled with the genuine need to improve living standards and public health came to be explained as New (or sometimes Neo) Confucianism.[19] This was

[19] Sophie Pezzutto, 'Confucianism and Capitalist Development: From Max Weber and Orientalism to Lee Kuan Yew and New Confucianism' (Pt Routledge) (2019) 43(2) *Asian Studies Review* 224-238.

championed by Singapore's first post-independence leader Lee Kuan Yew during his 31 years in power. Lee rejected liberal democracy as unsuited to Asia.[20] The emphasis was on creating a harmonious society, requiring obedience to one's elders and government and in turn a wise government focused on social welfare. Disagreement undermined harmony and in a new nation like Singapore where people saw their ethnicity rather than their nationality as their primary identity, firm measures were needed in the minds of its leaders to promote that social welfare.[21] Again Neoconfucianism manifests clearly in Singapore's PDI, IDV and UAI scores.

IV PROBLEM SOLVED?

Clearly Singapore's solution was effective. Chewing gum in locks, on doors and under seats is a thing of the past. The only way it gets in is via private travellers bringing it back for personal use. Doubtless the Singaporean government would count this as effective. However, after nearly twenty years there is some evidence that society is moving on and tiring of top-down regulation per se.[22] There is however a paucity of data

[20] Warren Fernandez Han Fook Kwang, Sumiko Tan, *Lee Kuan Yew: The Man and His Ideas* (The Straits Times Press, 1998).

[21] Pezzutto (n 19).

[22] '6 Well-Argued Reasons Why Singapore Should Lift the Ban on Chewing Gum', *Goody Feed* (Web Page) <https://goodyfeed.com/6-well-argued-reasons-why-singapore-should-lift-the-ban-on-chewing-gum/>.

about the cost of the ban, both of enforcement and especially about the externalities of trade and tax on chewing gum sales and imports.

In Western Australia similarly it is difficult to find clear data about the extent of the problem, the Western Australian Local Government Association (WALGA) has requested that chewing gum be included on the National Litter Index, an index of the volume of different types of litter as it is expensive to manage.[23] However the 2018-2019 index excludes chewing gum.[24] It may be too much to infer that this is because Keep Australia Beautiful does not think it an issue. Nevertheless, the lack of inclusion remains mysterious. Overall however the index has dropped,[25] meaning Western Australia is cleaner than it was, presumably organic litter has likely declined as well, but this ultimately uncertain. Obviously, this obviates proper comparison, hence the best approximation of comparison comes from publicly available costs elsewhere and anecdote. In this we see Adelaide City Council spent

[23] WALGA, *Keep Australia Beautiful WA (KABWA) Draft Litter Prevention Strategy 2014-19 MWAC Submission (February 2014)* (Web page).

[24] Keep Australia Beautiful National Association, 'National Litter Index 2018 - 2019 Western Australia Results', *Keep Australia Beautiful WA* (Web page) <https://www.kabc.wa.gov.au/library/file/NLI/Western-Australia-NLI-2018-19.pdf>.

[25] Stephen Dawson, 'Plastic bag litter has fallen in latest rubbish index report' (Media release, 26 September 2019) <https://www.mediastatements.wa.gov.au/Pages/McGowan/2019/09/Plastic-bag-litter-has-fallen-in-latest-rubbish-index-report.aspx>.

$200,000 on cleaning up chewing gum in 2013,[26] unless Adelaide is an outlier, similar costs for Perth are conceivable.

Local councils in Sydney which deal with chewing gum in a similar way [27] agree it is a problem that costs thousands to deal with, however there is clear opposition to a ban; with one Mayor saying "[t]he answer lies in education and signage" and another saying that a ban would be "ridiculous".[28] Arguably this is because the status quo is better suited to local conditions.

V STATUS QUO BENEFITS

Notwithstanding this, both jurisdiction's approaches have their benefits. As mentioned, Singapore's laws have stopped the problem. In concert with the other measures outlined they have made it a much cleaner place than cities in neighbouring countries. They are also a better fit with character with Singapore's society as discussed in the next section.

Western Australia's softer, education-based approach meanwhile changes behaviour without the need for extensive and coercive measures

[26] 'Council spends $200k on gum control', *ABC News* (online, 14 January 2013) <https://www.abc.net.au/news/2013-01-14/council-spends-24200k-removing-chewing-gum/4463616>.

[27] i.e. chewing gum littering is dealt with by local government rather than the New south Wales police and fines are broadly similar to Western Australia.

[28] 'More gum than you can shake a stick at', *Sydney Morning Herald* (online, 25 February 2005) <https://www.smh.com.au/national/more-gum-than-you-can-shake-a-stick-at-20050225-gdkt0k.html>.

that are costly to enforce, both in terms of social capital and money.[29] Especially when inculcated in the young, the behavioural change can last a lifetime, making it more sustainable. Importantly the police in Western Australia are freed up to focus on more serious crimes that the public sees important to society.

VI SINGAPOREAN LAWS IN WESTERN AUSTRALIA – COMPARISON AND PROBLEMS

G *Costs*

The transplant necessitates a significant shift. Specifically, enforcement through prosecution of the *Litter Act* is currently done through authorised officers of the local governments. Whilst they can fine people under the Act, they cannot arrest people sticking chewing gum. They cannot compel people to give their names and addresses. Whilst this works well with fixed premises such as a shop or restaurant, it is hard to enforce with people on the street. The only way to detain people or compel information for an infringement is to ask the person to wait while the officer calls the police. In a society that ranks high on the individualist metric of Hofstede's IDV scale (90% in Australia to Singapore's 20%) [30] this would be ridiculous.

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[29] '*Litter Congress Green Paper*', (Web page) <https://www.kabnsw.org.au/wp-content/uploads/2019/03/LC18_GreenPaper.pdf>.

[30] 'Country Comprison', *Hofstede Insights* (Web page) <https://www.hofstede-insights.com/country-comparison/australia,singapore/>.

Therefore, the transplant's success requires adoption not just of the laws themselves but the administrative system behind them, in other words responsibility for the *Litter Act* would have to be transferred to the police. It is difficult to quantify how many extra police would need to be recruited to effectively enforce these laws across a third of the Australian continent, but it suffices to say it would be a very significant number. Singapore by contrast is a small, densely populated, highly urbanised country with virtually no hinterland. This makes enforcement much easier.

Comparing Singapore and Australia in Hofstede's PDI, we see Australia comes in at 38% to Singapore's 74%.[31] An Australian's deference to authority is approximately half that of the average Singaporean. Consequently, resistance to any government expanding police numbers to such a degree is likely. With the attendant salary costs to the Western Australian taxpayer, few would see this as value for money.

The alternative is to greatly expand video surveillance, as in the United Kingdom. This is likely to find greater acceptance, as seen by the lack of protest when the City of Perth rolled out facial recognition cameras at Optus Stadium.[32] Again, there is the financial cost of installing and maintaining the cameras. Given their purpose, many would say the money could be better spent elsewhere.

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[31] Ibid.

[32] Rebecca Turner, 'City of Perth rolls out new facial recognition CCTV cameras, but is it surveillance by stealth?', *ABC News* (online, 8 June 2019) <https://www.abc.net.au/news/2019-06-08/city-of-perth-rolls-out-new-facial-recognition-cctv-cameras/11147780>.

H *An unlikely fit?*

Singapore's chewing gum ban and strict fines for people who stick it to chairs etc are the product of its history and culture. One of the issues facing their potential transplant to Western Australia is their "fit". Applying three of Hofstede's Insights - PDI, IDV & UAI highlights not just differences but incompatibilities between the two.[33]

I *PDI*

Australia's PDI is 38%,[34] up from 36% when Hofstede first conducted his research in 1980.[35] Singapore's by comparison is 74%.[36] This means Singaporeans are comfortable with significant power disparities, which leads to more deference, indeed submission[37] towards their superiors and authority in general and a tendency towards autocratic styles of management and governance.[38] One party has governed Singapore since independence, the state media and idiosyncratic electoral system frequently produce parliaments devoid of an opposition MP.[39]

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[33] The scale measures national trends but for comparative purposes as a part of Australia, Western Australia's social context is broadly the same as overall national results.

[34] 'Country Comprison' (n 29).

[35] William H. Murphy, 'Hofstede's National Culture as a Guide for Sales Practices Across Countries: The Case of a MNC's Sales Practices in Australia and New Zealand' (Pt SAGE Publications) (1999) 24(1) *Australian Journal of Management* 37-58.

[36] 'Country Comprison' (n 29).

[37] Murphy (n 34).

[38] Ibid.

[39] See generally, Lydgate (n 8) 128-131.

In Australia by contrast, a score of less than half of Singapore's indicates general preferences for greater equality between citizens and citizens and their government. This flows on to more democratic social and governmental structures and higher level of trust that others will do the right thing.[40] Popular culture is replete with disdain for "tall poppies"[41] and politicians are often held in low regard.[42]

A blanket ban on chewing gum and heavy fines for sticking chewing gum fits perfectly with an authoritarian political system, which is what is needed to enforce it. A government in such circumstances can legislate with little fear of a popular backlash. In the Western Australian context of a liberal democracy and much lower PDI, these laws first would need to be proposed as part of a party's policy platform or would be one of issues (maybe the issue) that voters would vote on at the next election. This requires political will. Oppositions in particular tend to adopt a small target strategy at elections,[43] so the proposal would likely be controversial. Success requires a sufficiently high level of buy-in from the electorate, otherwise the party transplanting the laws risks losing the election and/or the laws themselves might just be ignored. For example,

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[40] Murphy (n 34).

[41] Bert Peeters, 'Tall poppies and egalitarianism in australian discourse: From key word to cultural value' (2004) 25(1) *English World-Wide* 1-25.

[42] 'Australians' trust in politicians and democracy hits an all-time low: new research', *The Conversation* (online, 5 December 2018).

[43] Phillip O'Neill and Pauline McGuirk, 'Prosperity along Australia's Eastern Seaboard: Sydney and the geopolitics of urban and economic change' (2002) 33(3) *Australian Geographer* 241-261.

it is illegal to sell e-cigarettes in Western Australia[44] and yet they are commonplace, with people simply buying them online. It is quite foreseeable, given the more egalitarian[45] nature of Western Australian society that something similar would happen with a chewing gum ban.

J *IDV*

As mentioned, the two societies are almost total opposites on whether the individual or the group is primary, 90% to Singapore's 20%.[46] Collectivist societies will often veer to more authoritarian modes of government, including laws,[47] whereas this is not the case for individualistic societies.[48] This translates into a "law and order" mentality that legitimises anger and aggression against those who deviate from social norms and conventions."[49] This is very much the case in Singapore, as can be seen by case of Amos Yee, who uploaded a video to YouTube criticising Lee Kwan Yew shortly after his death. This was widely seen as a major social transgression and Yee was pursued by the

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[44] Department of Health, 'Electronic cigarettes (e-cigarettes)', *Department of Health WA* <https://healthywa.wa.gov.au/Articles/A_E/Electronic-cigarettes-e-cigarettes>.

[45] Jill Blackmore, 'Equity and Social Justice in Australian Education Systems: Retrospect and Prospect' in William T. Pink and George W. Noblit (eds), *International Handbook of Urban Education* (Springer Netherlands, 2007) 249-264.

[46] 'Country Comprison' (n 29).

[47] This is not always the case however, Taiwan, South Korea and Japan have similar scores on the index and have robust liberal democracies.

[48] Markus Kemmelmeier et al, 'Individualism, Collectivism, and Authoritarianism in Seven Societies' (Pt SAGE Publications Inc) (2003) 34(3) *Journal of Cross-Cultural Psychology* 304-322.

[49] Ibid.

government and was harassed to the point that he ultimately had to seek asylum in the United States.[50]

In Western Australia, a law and order or tough on crime stance has often been limited to points when there is a general perception that there is a threat/problem, such as with the Northbridge curfew between 2003 and 2012.[51] Even then the policy was ultimately abandoned under a Liberal government that had significant focus on law and order issues.[52] Just as the commonality of e-cigarettes is a manifestation of Western Australia's less hierarchical society, it also demonstrates its greater degree of individualism. Extrapolating from this, compared to Singapore there would be less adherence to the proposed laws. The incongruity of the two societies' orientation on this aspect speaks to a greater likelihood for the transplant to be rejected in the host society.

K *UAI*

UAI measures each country's tolerance for uncertainty, here a seeming paradox arises, Singapore scores 8% to Australia's 51%.[53] This bucks

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[50] 'Amos Yee, Singapore blogger granted US asylum, released from custody', *ABC News* (online 27, September 2017) <https://www.abc.net.au/news/2017-09-27/singapore-teen-granted-asylum-released-from-us-custody/8993564>.

[51] Renee Zahnow, 'FactCheck: did the Northbridge WA curfew see a 'dramatic drop' in crime?', *The Conversation* (online, 24 November 2017) <https://theconversation.com/factcheck-did-the-northbridge-wa-curfew-see-a-dramatic-drop-in-crime-87016>.

[52] Gary Adshead, 'Barnett team's end-of-term review', *The West Australian* (online, 24 January 2017) <https://thewest.com.au/politics/state-politics/barnett-teams-end-of-term-review-ng-b88353455z>.

[53] 'Country Comprison' (n 29).

previous measures however as Hofstede Insights explains: "in Singapore people abide to many rules not because they have need for structure but because of high PDI. Singaporeans call their society a "Fine country. You'll get a fine for everything".[54] Philosophically this sits comfortably with the dominant religion, Buddhism which shares, along with Hinduism (also a significant religion) the concept of non-exclusivity. This is a pragmatic acceptance of different perspectives rather than relativism as such - best encapsulated in the famous phrase from the Rig Veda: "truth is one; sages call it by various names."[55] Indeed this "[c]haos is seen as source of creativity and dynamism. Since the ultimate reality is an integrally unified coherence, chaos is a relative phenomenon that cannot threaten or disrupt the underlying coherence of the cosmos."[56] Zooming in from the cosmological to the mundane, this makes Singaporeans more relaxed about the 'chaos' of litter than Australians. As highlighted, other factors can override this.

Western Australia by contrast has less tolerance for uncertainty offset by a more egalitarian society. Again, this to some extant draws on its dominant religion of Christianity, whose exclusivism is famously expressed in Jesus' statement that "I am the way, the truth, and the life: no man cometh unto the Father, but by me."[57] As with Singapore the underlying religious assumptions find echoes in common perspectives.

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[54] Ibid.

[55] Rig Veda Samhita 1.164. 46.

[56] Rajiv Malhotra, *Being Different an Indian Challenge to Western Universalism* (Harper Collins, 2011).

[57] John 14:6.

An exclusivist world view could leads to less tolerance for confounding things, situating these as "a ceaseless threat both psychologically and socially – something to be overcome by control or elimination."[58] Which might suggest an entry point for some acceptance of Singaporean-style laws which greatly reduce uncertainty in the form of the 'chaos' of littering, but the comparative lack of hierarchy supervenes to mean a legal transplant would be out of place.

L *A sledgehammer for a walnut?*

Two further key problems arise at this point – is this widely seen as pressing issue and if so, would a legal transplant be likely to be seen as a proportionate response to the problem?

There was a previous proposal to ban the sale of chewing gum elsewhere in Australia. Fed up with clean-up costs, Adelaide City council proposed a ban.[59] This was not a result of any popular groundswell from the citizens but rather driven by the Council. This did not move forward and instead the Council proposed asking manufacturers to fund a campaign aimed at educating the public about how to dispose of chewing gum or pay for the clean-up.[60] In response "Wrigley's said the correct disposal

[58] Malhotra (n 33).

[59] 'Chewing gum ban considered for Adelaide', *The World Today* (online, 29 September 2009) <https://www.abc.net.au/radio/programs/worldtoday/chewing-gum-ban-considered-for-adelaide/1446836>.

[60] Rex Jory, 'Jory: Adelaide City Council spends more than $200k a year cleaning gum from footpaths', *The Advertiser* (online 13 January 2013) <https://www.adelaidenow.com.au/news/opinion/jory-adelaide-city-council-spends-

of chewing gum was a personal responsibility and councils and other authorities should enforce existing litter laws." [61] Apart from this proposal the idea of complete ban finds little support as a solution. Sydney Airport has such ban based on similar reasons to Singapore's and retailers find people frequently ask to buy gum to chew on the planes to stop their ears popping, only to be surprised that it is not available.[62] Given this it would be hard to characterise chewing gum as a pressing issue for the great majority of Western Australians.

Following on from this, even if was an issue, it is likely that the public would see Singaporean-style laws as disproportionate. Here, analogising with another issue of personal choice will prove instructive of how the legal transplant might be received. In 2007, the Commonwealth government attempted to legislate for the blocking of numerous websites.[63] This was raised as a solution to the problem of child abuse images online. It soon emerged the blocked list of websites contained many other websites that had no connection to anything illegal.[64] It could

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more-than-200k-a-year-cleaning-gum-from-footpaths/news-story/c4364149e2b8803abc3d87042b0769b1>.

[61] Ibid.

[62]'Airport's ban on chewing gum a pain in the ear', *Sydeney Morning Herald* (online, 16 January 2005) <https://www.smh.com.au/national/airports-ban-on-chewing-gum-a-pain-in-the-ear-20050116-gdki32.html>.

[63] 'Conroy announces mandatory internet filters to protect children', *ABC News* (online, 31 December 2007) <https://www.abc.net.au/news/2007-12-31/conroy-announces-mandatory-internet-filters-to/999946>.

[64] Karlis Salna, 'Website blacklist leaked on internet', *Sydney Morning Herald* (online, 19 March 2009) <https://www.smh.com.au/national/website-blacklist-leaked-on-internet-20090319-931c.html>.

be changed at any time without public oversight.[65] Polling showed public understanding that there was a problem but there was a strong backlash against the proposal as grossly disproportionate to that problem.[66] The proposal was ultimately abandoned.

Based off the foregoing comparisons between Singapore and Australia using Hofstede's metrics as well as the historical examples of the abandonment of the only serious proposal to introduce a ban in Australia and the popular response to the proposed compulsory internet filter, we can extrapolate that even if chewing gum was widely thought to be an issue worthy of governmental attention, Singaporean-style bans and fines would be disproportionate and would indeed be seen as using a sledgehammer to crack a walnut.

VII CONCLUSION

The clear disjuncture between Singapore's political, social and legal culture and that of Western Australia means that top-down, nannying laws are of their place. An attempt to graft them on to a society with an incompatible context is to force square peg into a round hole. It presupposes the acceptance that the issue is a sufficiently important

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[65] Asher Moses, 'Conroy admits blacklist error, blames 'Russian mob'', *Sydney Morning Herald* (online, 27 March 2009) <https://www.smh.com.au/technology/conroy-admits-blacklist-error-blames-russian-mob-20090327-gdtfyy.html>.

[66] Asher Moses, 'Web censorship plan heads towards a dead end', *Sydney Morning Herald* (online, 27 February 2009) <https://www.smh.com.au/technology/web-censorship-plan-heads-towards-a-dead-end-20090227-gdtdzo.html?page=fullpage>.

problem and that Singapore has the solution. It also requires a significant expansion of police power and general willingness to adhere to the laws. This seems unlikely. On the contrary, Western Australians would see such laws as unnecessary and petty. Consequently, a transplant of Singapore's laws into Western Australia should not proceed.

REMOTE SENSING GOVERNANCE: PROPOSITIONS FOR A LEGAL FRAMEWORK TO HARNESS COMMERCIAL POTENTIAL

Roderick Gillis

I INTRODUCTION

Remote sensing is defined as the acquisition and measurement of information about certain properties of phenomena, objects, or materials by a recording device, not in physical contact with the features under surveillance.[1] The first Earth remote sensing satellites were launched in the 1950s.[2] During the Cold War, global superpowers, the United States of America and the Soviet Union had used remote sensing satellites for reconnaissance, meteorology and communications.[3] Remote sensing has since been used for natural resource management, land use, urban planning and even evidence in court.[4] Now, satellite remote sensing is set to be one of the most commercialised applications of outer space, valued at USD 21.62 Billion by 2022.[5] The growing commercialisation

[1] Khorram et al, *Remote Sensing*, (Springer, 2012) 2.

[2] Ibid. See also Frans von der Dunk, 'International space law' in von der Dunk (ed*) Handbook of Space Law* (Edward Elgar, 2015) 507.

[3] See eg Operation Corona in Colleen Hanley, 'Regulating Commercial Remote Sensing Satellites Over Israel: A Black Hole in the Open Skies Doctrine' (2000) 52(1) *Administrative Law Review* 423, 427. See also 'CORONA: Declassified', *Central Intelligence Agency* (Web Page) <https://www.cia.gov/news-information/featured-story-archive/2015-featured-story-archive/corona-declassified.html>.

[4] von der Dunk (n 2) 505.

[5] Markets and Markets, *Remote Sensing Services Market by Platform (Satellites, UAVs, Manned Aircraft, and Ground), End User (Defense and Commercial), Resolution*

of remote sensing has called for improvements to the current legal framework by experts such as John Pelton and Ram Jakhu. The current legal framework is made up of international law, national regulation and varying data policy.[6] Currently, the framework is not suited for the downstream commercialisation of remote sensing satellite data. There is a great deal of legal uncertainty.[7] Uncertainty is a blockade to successful commercialisation.[8] This paper will explore two propositions as to how there can be greater certainty in remote sensing legislation. The first proposition is that the *Principles Relating to Remote Sensing of the Earth from Outer Space* ('Principles')[9] become a binding treaty. The second proposition is that the United Nations Committee on the Peaceful Uses of Outer Space (UNCOPUOS) adopts a model national legal framework to facilitate harmonised domestic responses. The purpose of this paper is to critically analyse both propositions. Firstly, this paper will describe current issues of remote sensing governance, such as inharmonious international law, environmental impacts, and sovereignty. Secondly,

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(Spatial, Spectral, Radiometric, and Temporal), and Region - Global Forecast to 2022 (Report, 2017).

[6] von der Dunk (n 2) 507.

[7] K.R Srighara Murthi and V Gopalakrishnan 'Trends in Outer Space Activities - Legal and Policy Challenges' in R.Venkata Rao, V Gopalkrishnan and Kumar Abhijeet (eds.) *Recent Developments in Space Law: Opportunities and Challenges* (Springer Nature Singapore, 2017) 40.

[8] Ram Jakhu and Joseph Pelton (eds.) *Global Space Governance: An International Study* (Springer International Publishing, 2017) 293.

[9] *Principles Relating to Remote Sensing of the Earth from Outer Space,* GA Res 41/65, UN Doc A/RES/41/65 (3 December 1996).

this paper will discuss the strengths and weaknesses of both propositions, and finally offering recommendations for which proposal better governs the commercialisation of remote sensing.

II ISSUES AFFECTING REMOTE SENSING GOVERNANCE

A *Inharmonious National Regulation*

States adopt national space law and regulation to ensure implementation of and compliance with international obligations, as well as to organise, supervise and control the space activities of the subjects under their jurisdiction.[10] Accordance with international space law is founded upon Art VI of the Outer Space Treaty.[11] Article VI makes States internationally responsible for national space activities carried out either by governmental agencies or by non-governmental entities.[12] Further, a State is required to authorise and continuously supervise the activities of their non-governmental actors.[13] The issue is States have differing national regulations according to their national values.[14] The following

[10] von der Dunk (n 2) 525.

[11] *Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies,* 27 January 1967, 610 UNTS 205, 18 UST 2410, TIAS No. 6347, 6 ILM 386 (entered into force on 10 October 1967) art VI ('*Outer Space Treaty*')

[12] Ibid.

[13] Ibid.

[14] Ram Jakhu and Joseph Pelton (n 8) 108. von der Dunk (n 2) 370.

section will demonstrate how different nations have shaped their remote sensing laws pursuant to differing values and ideologies.

1 *United States*

The United States legal framework is a compromise of two values. Firstly, to promote the commercialisation of satellite remote sensing.[15] And secondly, for national security.[16] *The Land Remote Sensing Policy Act 1992,* which was recodified as Title 51 – National and Commercial Space Programs ('*Policy Act*')[17] is the chief legal authority for governing remote sensing in the United States.[18] The Policy Act was revolutionary by allowing private actors to build and operate remote sensing satellites for the first time.[19] In March 1994, the United States' position on commercialisation of remote sensing data was solidified by the presidential directive - "U.S. Foreign Policy on Access to Remote Sensing Space Capabilities".[20] The directive allowed for foreign access to remote sensing data and satellites.[21] Despite the liberalisation of

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[15] Francis Lyall and Paul Larsen, *Space Law: A Treatise 2nd Edition* (Routledge, 2nd ed, 2017) 382 citing Colleen Hanley (n 2).

[16] Lyall and Larsen (n 15) citing M.R. Hoversten, 'US National Security and Government Regulation of Commercial Remote Sensing from Outer Space' (2001) 50 Air Force L. Rev 382.

[17] *National and Commercial Space Programs*, 51 USC (U.S. Government Publishing Office 2010).

[18] von der Dunk (n 2) 529.

[19] Colleen Hanley (n 3) 428.

[20] Ibid 429.

[21] Ibid.

remote sensing law, national security remains to be the priority for the U.S. Specifically; a private-sector party is not granted a license to operate remote sensing systems if the party is not compliant with the U.S.'s national security interests.[22] Furthermore, the U.S. retains what is colloquially known as "shutter control".[23] Shutter control is the ability of the U.S. to shut down satellite systems that threaten national security concerns.[24] The U.S. used shutter control to prevent licence holders from imaging Israel at high resolutions by enacting s 1064 of the National Defense Authorization Act 1997 (Kyl-Bingaman Act), entitled 'Prohibition on Collection and Release of Detailed Satellite Imagery Relating to Israel'.[25] The existence and use of the shutter control power show that the U.S. strongly values the use of their satellites and data, but not at the cost of their national security.[26] The effect of strong regulation on 'national security' has issues for domestic private entities. Foreign operators can still supply the world market with data prohibited by U.S. law. They are undermining both local private entities bottom line, and the U.S. shutter control system.

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[22] *National and Commercial Space Programs*, 51 USC § 60210 (U.S. Government Publishing Office 2010).

[23] Colleen Hanley (n 3) 429.

[24] Ibid 430.

[25] Ibid.

[26] See *US National Space Policy*, <http://www.fas.org/irp/offdocs/nspd/space.html> (Web Page, 3 August 2006).

2 *Australia*

Despite Australia being a relatively new player in the space market, its laws have been hailed as constituting one of the most comprehensive national legal frameworks.[27] However, before the *Space Activities Amendment (Launches & Return) Act 2018* (Cth), Australia's primary legislation was the *Space Activities Act 1998* (Cth). In the superseded act, there was a specific delimitation of 100 km above sea level, before an object would be in outer space.[28] The effect of which alienated foreign nationals from investing in Australia.[29] Unfortunately, despite a new Act, Australia has retained the delimitation.[30] Without an express delimitation on airspace, Australia could freely advertise their geographical advantages.[31] Ironically, Australia is correct in advocating for a delimitation on Airspace. A delimitation is beneficial for commerciality and uniformity in space governance, which will be discussed later in this paper. Australia being "correct" in a pragmatic and normative sense, yet, still remaining disadvantaged, demonstrates how the uniformity of governance is not so much about what is correct, but what is universally accepted.

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[27] Jakhu and Pelton (n 8) 90.

[28] *Space Activities Act 1998* (Cth) s 8.

[29] Australia New Zealand Space Law Interest Group, Ssubmission No 19 to Senate Standing Committees on Economics, Parliament of Australia *Space Activities Amendment (Launches and Returns) Bill 2018* (25 July 2018) 4.

[30] *Space Activities Amendment (Launches & Return) Act 2018* (Cth) s 8.

[31] Ibid 6. See also *Review of Australia's Space Industry Capability* (Report, March 2018) 35-36.

3 *France*

France values the sustainability of space exploration. Specifically, the risks satellites pose to the environment and public health.[32] The *Loi no 2008-518 du thre juin 2008 relative aux operations spatiales* ('FSOA') only grants authorisations for 'launching, controlling and transferring control of a space object' upon verification the launching party complies with France's technical regulations and Frances international commitments.[33] Notably, for launch systems, a technical regulation is a measure for how a party will mitigate space debris.[34] The technical regulation is in response to France's international commitment to the U.N. *Space Debris Mitigation Guidelines*.[35] Comparatively, Australia has binding legislation to implement space debris mitigation requirements through upcoming rules,[36] but because there are no rules yet to review, there is still uncertainty as to how onerous or to which international standard Australia's space debris mitigation requirements will be.[37] Australia potentially has different debris mitigation rules, and

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[32] Ram Jakhu and Joseph Pelton (n 8) 94.

[33] *Loi no 2008-518 du 3 juin 2008 relative aux operations spatiales* [Law Relating to Space Operations] (France) art 4.

[34] See *relatif aux autorisations délivrées en application de la loi n° 2008-518 du 3 juin 2008* [Decree on Technical Regulation issued pursuant to Act n°2008-518 of 3rd June 2008, 31 March 2011] (France) art 40.

[35] Ibid.

[36] Space Activities Amendment (Launches and Returns) Bill 2018, Division 3, subsection 34 and Division 5, subsection 46G.

[37] Senate Economics Legislation Committee, Parliament of Australia *Space Activities Amendment (Launches and Returns) Bill 2018 [Provisions]* (Report, August 2018) 17 [2.39].

the legal uncertainty which follows demonstrates the need for harmonised national legislation.

Nations with different rules are unconducive to effective remote sensing governance. A wide divergence in national laws creates a divide on key issues and principles.[38] This divide makes it difficult for international law to be identified and enforced.[39]

B *Outdated Principles*

The Principles are the only international legal instrument specific to remote sensing governance.[40] However, the Principles are outdated and do not sufficiently cover technological and social changes in space. First, the Principles' status as customary law is inconclusive and rort with debate. Secondly, there is uncertainty as to the scope of the principles.

4 *Are the Principles Binding?*

It could be argued that the Principles do not need to become a treaty, as they are customary international law. This argument is inconclusive and still debated. The Principles are derived from the U.N. General Assembly Resolution, Resolution 41/65 of 3 December 1986. Resolutions are

[38] Ram Jakhu and Joseph Pelton (n 8) 108

[39] Ibid.

[40] von der Dunk (n 2) 517.

generally not binding.[41] The Principles are recommendatory and left to the States whether to implement them into their national law.[42] Various international space law scholars view the resolution as constituting customary international law.[43] This is because of confirmation in State practice and posited *opinio juris*. Space Law Scholar, Frans von der Dunk makes special note of the Principles being unanimously adopted by a General Assembly Resolution as relevant to the existence of *opino juris*.[44] The late Bin Cheng, a prolific authority on Public International Law, posited unanimous General Assembly Resolutions to be 'instant customary law'. [45] However, classifying the Remote Principles as customary international law is premature. Firstly, the International Court of Justice does not classify General Assembly Resolutions as express sources of international law.[46] Secondly, General Assembly Resolutions normative qualities ought to contribute to customary international law conservatively, because States 'doesn't mean it' when they pass a resolution.[47] Furthermore, States may not 'mean it' to a greater extent for resolutions adopted by consensus. Notably, UNCOPUOS only adopts

[41] von der Dunk (n 2) 517.

[42] *Charter of the United Nations* art 10,11.

[43] von der Dunk (n 2) 517.

[44] Ibid 519.

[45] Bin Cheng, *Studies in international Law* (Oxford University Press, 1997) 233.

[46] Cf *Statute of the International Court of Justice* art 38(1).

[47] Rosalyn Higgins, *Problems & Process International Law and How We Use It* (Oxford University Press, 1994) 26 citing Gaetano Arangio-Ruiz, *The Normative Role of the General Assembly of the United Nations and the Development of Principles of Friendly Relations* (Sijthoff & Noordhoff International Publishers 3rd rev ed, 1979) 431.

resolution per consensus. This includes UNCOPUOS' 29th session, which drafted the Principles.[48]

5 *Scope of the Principles*

Even if the Principles were binding, it would have little effect on the effective governance of the downstream use of satellite remote sensing data. The Principles are a product of the 1980s and were focused on the rights between sensed and sensing States.[49] The vague nature of the Principles and lack of precision fails to govern remote sensing in light of rapid commercialisation. The Principles have three express purposes: improving natural resource management, land use and protection of the environment.[50] Commercial uses such as urban planning, agriculture and verification fall outside of the scope of the current regime and therefore are not governed by any international law instrument.[51] This is an issue. Without a relevant governing regime, there is no hope of legal certainty.[52]

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[48] Rosalyn Higgins (n 48) citing Stephen Schwebel, *The Effect of Resolutions of the UN General Assembly on Customary International Law* (Cambridge University Press, 1979) 302.

[49] von der Dunk (n 2) 525.

[50] *Principles Relating to Remote Sensing of the Earth from Outer Space,* GA Res 41/65, UN Doc A/RES/41/65 (3 December 1996) 1.

[51] von der Dunk (n 2) 504.

[52] Ram Jakhu and Joseph Pelton (n 8) 350.

C *Data Processing*

There is no unified international regime with respect to satellite remote sensing data. [53] Admittedly, the Principles cover 'primary' and 'processed' data, as well as data analysis, acquisition, storage and processing activities.[54] The problem is, with technological advancement, the process of generating and supplying data has become too elaborative for the Principles to govern.[55] The Principles do not sufficiently govern the supply and acquisition of data for the following reasons:

i. There is no legislative responsibility imposed on the use of data once it is purchased;[56]

ii. All remote sensing is permissible. Under the Principles, sensed States have no say as to who receives their data and no preferential access to data.[57] This is an issue as wealthy countries

[53] von der dunk (n 2) 512.

[54] *Principles Relating to Remote Sensing of the Earth from Outer Space,* GA Res 41/65, UN Doc A/RES/41/65 (3 December 1996) 1.

[55] von der dunk (n 2) 512

[56] Joanne Gabrynowicz 'One half century and counting: The evolution of U.S. National Space Law and Three Long-term Emerging Issues. 4(2) *Harvard Law and Policy Review* 405, 416.

[57] Stephen Krafft, 'In Search of a Legal Framework for the Remote Sensing of the Earth from Outer Space' (1981) 4(2) *Boston College International and Comparative Law Review* 453,

such as the U.S. may impose 'cheque book shutter control', outbidding sensed States for their own data;[58] and

iii. Ownership and intellectual property rights are uncertain as access and pricing policies are decided independently by data generators.[59]

The amalgamation of these issues creates uncertainty for a commercial environment. The effect of which is a misallocation of resources and parties not enjoying the full benefits of remote sensing.[60]

D *Sovereignty and National Security Concerns*

No State has sovereignty in space.[61] Space is a 'global commons'. Coupled with the fact no State can prohibit another State (including domestic nationals) from taking images of their national territory, raises concerns of national security. The concern for national security is the primary driving force as to why new treaties have not been introduced.[62]

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[58] Ibid.

[59] Ibid.

[60] Dimitri Linden, 'The Impact of National Space Legislation On Private Space Undertakings: A Regulatory Competition Between States?' (Working Paper No 190, Leuven Centre for Global Governance Studies, September 2017) 21.

[61] Outer Space Treaty (n 11) art II.

[62] P.J Blount, 'Renovating Space: The Future of International Space Law' (2011) 40(1) *Denver Journal of International Law & Policy* 515, 522.

E *Environment*

Sustainable use of space is an ancillary issue of satellite remote sensing. With more actors launching satellites, there poses a greater risk of collision and threat to the Space environment.[63] Currently, there are over 500,000 pieces of 'space junk' moving at 15 km/s, over ten times greater than the speed of a bullet.[64] There is fear debris will collide with other objects, creating more debris, to the point where a belt of debris is created in an orbital zone, and no objects are able to pass through it.[65] This phenomenon is known as 'Kessler syndrome'. UNCOPUOS has addressed space debris mitigation to a certain extent through the *Space Debris Mitigation Guidelines of the Committee on the Peaceful Uses of Outer Space*.[66] However, the guidelines are vague. Space-users are left to decide how many design and operational changes are reasonable to limit debris production, minimise break-up potential, reduce the probability of accidental collision and avoid satellite destruction in ways that produce long-lived debris.[67]

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[63] Ram Jakhu and Joseph Pelton (n 8) 472.

[64] 'Astromaterials Research & Explorative Science' *Frequently Asked Questions* (Web Page) <https://orbitaldebris.jsc.nasa.gov/faq/#>.

[65] See generally Rada Popova and Volker Shaus, 'The Legal Framework for Space Debris Remediation as a Tool for Sustainability in Outer Space' 2018 5(2) *Aerospace* 55, 56-65.

[66] *Space Debris Mitigation Guidelines of the Committee on the Peaceful Uses of Outer Space*, UNGA Res. 62/217 (22 December 2007)

[67] R.Venkata Rao, V Gopalkrishnan and Kumar Abhijeet (n 7) 48.

III STRENGTHS AND WEAKNESSES OF THE PROPOSITIONS

F *Strength of a Binding Treaty*

A treaty poses the simplest means of regulating space activities internationally.[68] If done correctly, a treaty will minimise issues of interpretation, facilitate consistency, and provide accountability for space actors.[69] For a treaty to be created – it would need to be an extension of the Principles. The Principles are representative of compromise and development resulting from fifteen years of COPUOS debate.[70] Major space-faring actors would not ratify a treaty that did not incorporate the Principles.[71] A treaty is especially important in light of rapid commercialisation. Current policy is predicated on self-restraint, self-regulation and will undoubtedly lead to self-interest.[72] Sustainability issues such as space debris mitigation, are more comprehensively addressed in a binding treaty.[73] A treaty provides the necessary accountability mechanisms for compliance and assurance, affording all

[68] Bin Cheng (n 46) 644.

[69] Dimitri Linden (n 61) 30.

[70] Harry Feder, 'The Sky's the Limit - Evaluating the International Law of Remote Sensing' (1991) 23(2) *NYU Journal of International Law and Politics* 599, 658

[71] Ibid.

[72] Ram Jakhu and Joseph Pelton (n 8) 20.

[73] Eligar Sadeh 'International Space Governance: Challenges for the Global Space Community' in R.Venkata Rao, V Gopalkrishnan and Kumar Abhijeet (eds.) *Recent Developments in Space Law: Opportunities and Challenges* (Springer Nature Singapore, 2017) 43.

members of the global space community confidence for assured access to space.[74]

G *Weaknesses of a Binding Treaty*

The first issue regarding the *Principles* becoming a treaty is the actual process for the Principle's to become a treaty. Despite the five core treaties being negotiated under the auspices of UNCOPUOS, treaties relevant to space activities can be negotiated autonomously between States.[75] An example is the pantheon of bilateral agreements currently in force.[76] The reason for States to negotiate contracts without relying on UNCOPUOS is because of the committee's requirement of negotiating treaties based on consensus.[77] As more States have become space-faring nations, and as commercial entities have gained prominence, negotiations and decision making under the guise of UNCOPUOS can become too broad in order to accommodate all parties or negotiation is simply paralysed. [78] The effect of which is dichotomies in national legal frameworks, which is not conducive to harmonised international law. UNCOPUOS has 95 State members and was founded upon a rich history

[74] Ibid.

[75] Ram Jakhu and Joseph Pelton (n 8) 37.

[76] See eg Ibid 37.

[77] Ibid.

[78] Ibid.

of global space governance.[79] If there were to be any multilateral agreement, it would be through UNCOPUOS. Unfortunately, that also means the treaty will be subjected to UNCOPUOS' stringent requirement of consensus.

The second issue is that even if a treaty could be achieved through consensus, the States would still need to sign and ratify the treaty. This is especially difficult as States are driven by values and national security policy.[80] A State has an obligation to its people not to compromise its own security. Therefore, any treaty that could potentially inhibit a State from completing its obligation will not be accepted.[81] This defeats the purpose of a binding treaty.

H *Strengths of a Model Law*

The model law is an instrument of soft law.[82] A model law's 'soft' nature is more likely to be agreed upon than a binding international treaty. The

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[79] 'United Nations Office for Outer Space Affairs', *Committee on the Peaceful Uses of Outer Space: Membership Evolution* (Web Page) <https://www.unoosa.org/oosa/en/ourwork/copuos/members/evolution.html>.

[80] See above n 14.

[81] Note 'Legal Models of Arms Control: Past Present and Future' (1987) 100(6) *Harvard Law Review* 1326, 1328.

[82] Cassandra Steer, 'Sources and Law-Making Processes Relating To Space Activities' in Ram Jakhu and Paul Dempsey (eds) *Routledge Handbook of Space Law* (Routledge, 2017) 3, 8. Henry Gabriel, 'The Advantages of Soft Law in International Commercial Law: The Role of UNIDROIT, UNCITRAL, and the Hague Conference' (2009) 34(3) *Brooklyn Journal of International Law* 655, 659.

lack of obligation allows States to pursue goals without the risk of binding themselves.[83] The previous Chair of UNCOPUOS, David Kendall, had Stated 'the only foreseeable way forward is national legislation and soft law'.[84] This is in response to the issues of space-faring States reaching a consensus. Galloway believes the era of treaty formation of law is over and is replaced by more specific and incremental steps including memoranda of understandings, framework agreements and voluntary regimes.[85] These incremental steps can lead into binding law in the future.[86] Increments of progression via an evolving model law, s an increasingly attractive means of creating legal frameworks on topics which have highly technical developments, ad revolve around issues of national security. Space technology is rapidly growing, and there are equal concerns over national security. Thus, one could argue, the proposition of a model law is the best means of governance.

I *Weaknesses of a Model Law*

A model law is not binding, and therefore not enforceable. Without a mechanism of enforceability, there is a severe lack of certainty.[87]

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[83] P.J Blount (n 62) 525.

[84] Anja Nakarada 'Pecujlic European Space Policy Institute's Comprehensive Analysis on Adopting New Binding International Norms Regarding Space Activities in R.Venkata Rao, V Gopalkrishnan and Kumar Abhijeet (eds.) *Recent Developments in Space Law: Opportunities and Challenges* (Springer Nature Singapore, 2017) 145.

[85] Ibid.

[86] Anja Nakarada (n 84) 150.

[87] Francis Lyall and Paul Larsen (n 15) 46.

Certainty and predictability is the purpose of global space governance.[88] Soft law allows for different participants to have different interpretations which are unconducive to certainty and predictability.[89] A model law would be predicated upon compliance.[90] It has already been established that in a commercial and sustainability context, States would not self-regulate issues detrimental to their economic advantage.[91] This is called a 'race-to-the-bottom', where given the opportunity, entities will further decrease their standards for a competitive advantage.[92] If the model law is founded upon compliance, and it is in the interests of States not to comply with the model law, the model law is superfluous. Thus, a model law is not conducive to effective governance.

IV THE BETTER PROPOSITION

This paper is not about what proposition is more *likely* to be implemented, but what proposition is more *effective* for the downstream use of remote sensing data. It would be foolhardy, of course, not to consider the practical limitations of implementing a treaty. However, the

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[88] Committee on the Peacedul Uses of Outer Space Scientific and Technical Subcommittee *Fiftieth anniversary of the United Nations Conference on the Exploration and Peaceful Uses of Outer Space: the Committee on the Peaceful Uses of Outer Space and global space governance*, 53rd sess UN Doc A/AC.105/C.1/2016/CRP.4 (16 February 2016) 6.

[89] Francis Lyall and Paul Larsen (n 15) 47.

[90] Ibid.

[91] See above n 72.

[92] Dimitri Linden (n 61) 22.

commercial use of satellite remote sensing needs certainty, accountability and to be sustainable. The best means of achieving this goal is through the implementation of an international agreement. The rest of this paper is discussing the proposition of turning the Principles into a binding treaty.

V RECOMMENDATIONS

A strict treaty would not be flexible enough for the constant technological changes in space.[93] A model law does not have the binding authority to prevent States deviating from soft law because it clashes with their self-interests.[94] However, there is something to gain from having a binding treaty that facilitates national legislation. The quintessence of an international treaty facilitating national legislation is the provisions regarding liability, registration, and responsibility in the Outer Space Treaty and its succeeding treaties.[95] As previously mentioned, a nation will legislate to protect their national interests, and, uphold their international obligations. The foundation of which, is the recognition of State liability.

Capitalising on State liability, whilst giving States enough autonomy to protect their national interests, is the best way to address remote sensing

[93] Ram Jakhu and Joseph Pelton (n 8) 18.

[94] See above n 72.

[95] Outer Space Treaty (n 11) art VI, VIII.

governance issues. Harry Federer believes 'current deficiencies in the legal regime would be cured by having a single international agency operating all remote sensing satellites and disseminating information openly'.[96] Such an ideal, while possibly true, is unrealistic. President Giscard d'Estang of France proposed an establishment of a central authority on remote sensing data. Despite its technical and financial feasibility, it was shut down by superpowers worried of their *national security*.[97] While a central agency may not be possible, it's theory is sound. Having centralised data addresses issues of access, certainty and accountability.

VI SOMETHING DIFFERENT

I propose for the Principles, when becoming a treaty, to include proviso where any trade of data for financial return, *must* be through the medium of the UNCOPUOS governed electronic marketplace, tentatively named the U.N. Remote Sensing Data Market Place ('UNDMP'). The purpose of which, is to centralise data, and use States liability obligations to facilitate effective national legislation for commercialisation and sustainability of space. In order for a marketplace to work, other amendments to the Principles would need to be made.

[96] Harry Feder (n 70) 655.

[97] Ibid.

A delimitation on space is a priority, especially for the commercial use of outer space.[98] As previously mentioned, data acquired in outer space is not subject to any State's sovereignty. However, a country has jurisdiction and sovereignty over its airspace.[99] What a set delimitation will do, will give clarity as to when data has been appropriated in space, and therefore not subject to Air Law, a completely different legal framework.[100]

VII The Marketplace

The way the UNDMP would work, is that it will provide government and non-government entities a platform to advertise and sell satellite remote sensing data. In order to trade on the UNDMP, certain binding conditions need to be met. These conditions work as a kind of 'terms of service' for vendors and buyers. They are as follows:

1. *Selling data is defined as the transfer of any data, with the intention of compensation between two or more States.*
    a. This means giving data away, without gain, is not subject to the sales condition of the treaty. Companies that give away remote sensing data, such as Google, will not be adversely affected on an

[98] Ram Jakhu and Joseph Pelton (n 8) 108.

[99] Bin Cheng (n 46) 450.

[100] Ibid.

international level.[101] Thus, facilitating the free flow of information initially contemplated by UNCOPUOS.[102]

b. States are able to have full autonomy for sale within their respective countries as the UNDMP will only be for international sale.

2. *A party may only sell or buy data on the UNDMP if their respective State is a party to the Remote Sensing Treaty.*

a. This puts pressure on States to sign to the treaty. States will want to sign onto a treaty if it assists their economy and does not harm their national security.[103] National security is addressed in the next provision.

3. *A vendor must have express or implied authority from their home State to be a part of the UNDMP.*

a. This allows for nations to have discretion in their respective licensing. A State is able to retain the ability to authorise licenses to vendors, based on national interests and security concerns.[104]

b. Commercially, States will need to relax licensing requirements in order to stay competitive. This may lead to the 'race down' of

[101] Ram Jakhu and Joseph Pelton (n 8) 367.

[102] Outer Space Treaty (n 11) art I.

[103] Dimitri Linden (n 69) 21.

[104] See eg von der Dun (n 2) 526.

standards.[105] However, using State liability provisions, the race down should be curbed as described later in this paper.

4. *The sale of data on the UNDMP must be in accordance with international law and must not contravene the legitimate rights or national security of a sensed State.*
    a. In congruence with this, is the need for a firm expression of what a sensed State's national security concerns are to facilitate certainty.

5. *The satellite which sensed the data, must have been procured in accordance with the Debris Mitigation Guidelines.*
    a. This provision means vendors cannot 'forum shop' for satellites that are of a lesser standard than what is necessary for sustainable space usage if they wish to use the UNDMP.[106]

6. *Breach of any of these conditions will result in sanctions from the Secretary-General of the United Nations.*
    a. A sanction could be as faint as a fine, or as severe as a suspension from trading. This acts as an accountability mechanism for compliance, creating trust in the market and its parties.[107]

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[105] Ibid.

[106] Cf Ram Jakhu and Joseph Pelton (n 8) 130.

[107] Ram Jakhu and Joseph Pelton (n 8) 131.

7. *States operating remote sensing satellites shall bear international responsibility for their activities ... irrespective of whether such activities are carried out by governmental or non-governmental entities. This extends to any sanctions ordered by the Secretary-General of the U.N.*
    a. This provision is an amended extension of Principle XIV. As States are liable also for sanctions, they will want to facilitate their national parties not to do anything which can contravene Provisions 4 and 5.

8. *The degree of liability is to be determined in consideration of what the current industry standard is, feasibility, and technological capabilities for remote sensing activities.*
    a. Provision 8 is inspired by the 'Professional Practice Defence' in Australia's various Civil Liability Acts.[108] Like space actors, medical professionals were unsure of what standard is necessary to avoid liability.[109] Both medicine and space exploration are life endangering endeavours. There are a multitude of issues outside

[108] *Civil Liability Act 2002* (WA) s 5PB(1). *Wrongs Act 1958* (VIC) s 59(1). *Civil Liability Act 1936* (SA) s 41(1). *Civil Liability Act 2003* (QLD) s 22(1).

[109] Catherin Mah, 'A Critical Evaluation of the Professional Practice Defence in the Civil Liability Acts' (2014) 37(2) *University of Western Australia Law Review* 74, 76-80. See generally R.Venkata Rao, V Gopalkrishnan and Kumar Abhijeet (eds.) *Recent Developments in Space Law: Opportunities and Challenges* (Springer Nature Singapore, 2017) 1.

of human control. Things do, and will go wrong in space.[110] Having a clear defence will mean space faring nations increase their standard of licensing to capitalise on the defence. Clarity is ascertained as the standard for space travel will be the industry standard.[111]

b. Having an industry standard play such a crucial role in governance, is in order to include *lex mercatoria* into international law.

c. *Lex mercatoria* is essential for space actor's liability. Space technology, like medicine, is constantly evolving. The current rate of technological advancement, means specific laws will quickly be out of date. *Lex mercatoria* allows the possibility for private actors to contribute to custom.[112] Further, incorporating industry standards into international law, means that the law can catch up with technological advancement through the autonomy of States wishing to avoid liability.

[110] See generally Jessica Boddy 'From shrinking spines to space fungus: The Top Five Dangers of Space Travel' (Web Page, 2 December 2016) < https://www-sciencemag-org.ezproxy.library.uwa.edu.au/news/2016/12/shrinking-spines-space-fungus-top-five-dangers-space-travel>.

[111] Cf Ram Jakhu and Joseph Pelton (n 8) 260.

[112] Anja Nakarada (n 84) 150.

d. Practically, this provision is to incentivise States to legislate and issue licenses with the current standards of safety in mind. Without keeping up to date with remote sensing industry standards, States run the risk of incurring greater liability.

VIII CONTRADICTION

Electronic marketplaces are paradoxical to the 'non-discriminatory' obligation per Principle XII. A marketplace makes it is easy, and cost effective to discriminate.[113] Thus, Principle XII would either need to be closely revised or removed all together. A counter-argument to having a market, is that affecting Principle XII disadvantages developing countries that need the Principle to enjoy the benefits of remote sensing.[114] However, there is a trend of States already prioritising their national security, over the non-discriminatory Principle.[115] With commercialisation, there has been a shift of focus from 'what' data is used to 'who' is using the data.[116] It is now a façade that data is disseminated on a non-discriminatory basis. However, a market place could address the changing attitudes of States, while having capacity to

[113] Martin Bandulet and Karl Morasch 'Would you like to be a Prosumer? Information Revelation, Personalization and Price Discrimination in Electronic Markets' (2005) 12(2) *International Journal of the Economics of Business* 251, 252.

[114] Harry Feder (n 69) 614.

[115] Joanne Gabrynowicz, *The Land Remote Sensing Laws and Policies of National Governments:A Global Survey* (Report, 3 January 2007) 11-15.

[116] Ibid 14.

mitigate the potential issues of developing countries not being able to receive their sensed data.

Outside of the express terms of services, UNCOPUOS can introduce mechanics into the marketplace to address other concerns. There are still a plethora of issues to consider such as dispute resolution, financing, space traffic management, misuse of data, insurance, intellectual property etc. Yet, the purpose of the last section is to give a theoretical framework as to how an international treaty could facilitate national legislation in hopes of harmonised and certain space governance. No treaty could cover every issue rising out of remote sensing. However, facilitating harmonised and sustainable national legislation gives a sufficient platform for the future commercial and sustainable use of remote sensing.

IX Conclusion

Firstly, understanding outer space alone is difficult. On top of that, having to consider the legal implication of utilising space for commercial gain – is a herculean task. Throughout this paper, issues of governance were first analysed, and it became clear that nations will legislate in their own interests, and uphold their international obligations. What became apparent was nations will prioritise their national security, and then work their commercial capabilities around it. The strengths and weaknesses of both a proposition for a model law, and a treaty were discussed. Conceptually, a binding treaty will be more effective for legal certainty and sustainability, but given the current political climate, it is more of an

impossibility. The proposition of a model law, while more realistic, does not have the binding quality to overcome States working in their best interests. The result of which is States working in space unsustainably. The possibility of using a treaty to ease the creation of national legislation was later pondered. The conclusion of which, is that theoretically, State's predispositions to avoid liability and to oversee their national security, can be used advantageously for global governance. Using a mechanism, like a marketplace, where there are strict 'terms of service' but also large economic gains, will force States to legislate in ways which will keep them in the marketplace for fear of missing out on the economic benefits. Fortunately, using States self-interests, allows for compliance with terms of service which facilitates a safer, fairer and more sustainable way to use and procure remote sensing data.

THE ROLE OF THE ICJ IN INTERNATIONAL LAW

David Hinder

I INTRODUCTION

The International Court of Justice (the **ICJ**) stands as the principal judicial organ of the United Nations. The Court was created to settle legal disputes that arise between states, and also has an advisory function that UN organs and agencies can utilise. One such legal dispute was between Australia and Japan over the issue of the Japanese whaling program in the Antarctic.[1] This case provides a useful lens through which to assess the performance of the roles and functions of the ICJ. Looking at the history of the ICJ and its constitutive documents, one can extract two core roles for the world Court: the peaceful settlement of disputes, and the development and refinement of international law and norms. Ultimately, for a number of reasons, the utility of the ICJ is limited. The Court does not regularly deal with disputes that, but for the work of the ICJ, would descend into armed conflict. Two issues restrain the Court from effectively performing the role of developing international law: compliance and jurisdiction issues. Additionally, the Court is structurally inclined towards conservatism. This is not inherently negative but it can impede the development of the law. Finally, the changing nature of the international system has seen the rise in importance of non-state actors. However, only states may be

[1] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (Judgment) [2014] ICJ Rep 226 (the **Whaling Case**).

parties to cases before the Court, and this limits the relevance of the ICJ in a changing world.

II THE HISTORICAL CONTEXT OF THE ICJ

The historical context of the ICJ is an essential factor in determining the ICJ's roles and functions. As Nagendra Singh, a former judge of the ICJ, has argued, 'the role of an institution is, to some extent at least, influenced by the events leading to its birth'.[2] Importantly, the ICJ was preceded by the Permanent Court of International Justice (the **PCIJ**), and so the history of that court will also be relevant. Although they are separate institutions, the ICJ is not merely a spiritual successor to the PCIJ. Giladi and Shany argue that the ICJ 'inherited much of [the PCIJ's] late nineteenth century outlook on international adjudication and law—and on the international society governed by international law'.[3] Thus, to understand the ICJ, the context of the PCIJ's creation is relevant as well. There are, of course, many factors that feed into the development of such an international body. However, given the constraints of this essay, I will confine my examination to the most significant factors.

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[2] Nagendra Singh, *The Role and Record of the International Court of Justice* (Martinus Nijhoff Publishers, 1989) 5.

[3] Rotem Giladi and Yuval Shany, 'The International Court of Justice' in Yuval Shany (ed) *Assessing the Effectiveness of International Courts* (Oxford University Press,

Robert Kolb has argued that one of the biggest factors was that the nature of war changed. It morphed, Kolb argued, from 'a fairly limited device for the settlement of a dispute' into a 'wholly different phenomenon, both in its destructive reach and in its perception'.[4] The horrendous outcomes of two World Wars drove the international community to find a way to prevent this from happening again. Out of this grew a desire for the peaceful resolution of international disputes through legal means, and the idea of international courts began to form. The PCIJ (and, by extension, the ICJ) was founded in this ideal of using the law to resolve international conflicts.[5] This gave momentum to the project of establishing an international court. However, this aversion to war was not strong enough to counteract the international order, where the state was supreme and there was a hostility to the idea of a body with authority *over* states.[6] This has been a significant factor in the development of the ICJ, especially in regard to the jurisdiction of the Court.

[4] Robert Kolb, *The Elgar Companion to the International Court of Justice* (Edward Elgar, 2014) 2.

[5] James Scott, *The Project of a Permanent Court of International Justice and Resolutions of the Advisory Committee of Jurists: Report and Commentary* (Carnegie Endowment for International Peace, 1920) 49.

[6] Armin von Bogdandy and Ingo Venzke, 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority' (2013) 26 *Leiden*

III THE ROLES OF THE ICJ

This historical context has led to the ICJ as it exists today. From this, in addition to the ICJ's constitutive documents, we can begin to see what the ICJ's goals might be. Interestingly, neither the *Charter of the United Nations* (the **UN Charter**) nor the *Statute of the International Court of Justice* (the **ICJ Statute**) set out a clear statement of the purpose or purposes of the ICJ. Therefore, we must look carefully at these constitutive documents and extrapolate when the information is incomplete. Article 38 of the ICJ Statute states that the Court's function is to 'decide in accordance with international law such disputes as a submitted to it'. Giladi and Shany argue that from this one can infer that the ICJ has two main roles: dispute settlement, and the encouragement of 'primary norm development'.[7] Dealing first with the latter, this idea of norm development is an important feature of any international court. The process of adjudication can help to strengthen the 'compliance pull of the norms in question'[8] because the process itself generates information that helps states to understand the actual content of the norm to which they are expected to adhere.[9] If the content of norms can be identified, it is easier for states to adjust their behaviour to ensure compliance. Furthermore, in the process of adjudication an international

[7] Giladi and Shany, above n 3, 164.

[8] Yuval Shany, 'The Goals of International Courts' in Yuval Shany (ed) *Assessing the Effectiveness of International Courts* (Oxford University Press, 2014) 39.

[9] Thomas Franck, *The Power of Legitimacy Among Nations* (Oxford University Press,

court may adapt existing norms to circumstances that were unforeseen when the norm first emerged.[10] A norm that does not adapt to change in the international system is a norm that will not be followed.

The concept of dispute resolution is founded in the idea of the peaceful resolution of disputes between states. Given the history behind the development of the ICJ, it is perhaps unsurprising that this idea of *peaceful* resolution is quite a prominent feature. While not explicitly mentioned in the ICJ Statute, it does feature in the UN Charter. Article 1 of the Charter, which details the purposes of the UN, notes the need to 'bring about by peaceful means … adjustment or settlement of international disputes or situations which might lead to a breach of the peace'. This goal could be imparted to the ICJ by virtue of its being a chief organ of the UN.[11] The ICJ's role in promoting peaceful dispute resolution has been described by academics and commentators as being part of the broader UN international peace and security regime.[12] Even the judges of the ICJ itself have expressed this opinion in their judgements. For example, in *Democratic Republic of the Congo v Rwanda* the Court noted that it was 'mindful of the purposes and principles of the … Charter and of its own responsibilities in the

[10] von Bogdandy and Venzke, above n 6, 55–57.

[11] Imparting to the ICJ the stated goals of the UN is not a controversial idea. Javier Pérez de Cuéllar, the former Secretary-General of the United Nations, has written that 'the International Court of Justice must have a central role in implementation of [the UN's] mandate': Javier Pérez de Cuéllar, 'Forward' in Nagendra Singh, *The Role and Record of the International Court of Justice* (Martinus Nijhoff Publishers, 1989) xi.

[12] Gibler and Shannon, above n 3, 165.

maintenance of peace and security of the Charter and the Statute'.[13] Similarly, in *Nicaragua v United States of America*, the Court expressed the following:

It is for the Court, the principal judicial organ of the [UN], to resolve any legal questions that may be in issue between the parties to the dispute, and the resolution of such legal questions by the Court may be an important, and sometimes decisive, factor in promoting the *peaceful settlement* of the dispute.[14]

Thus, for the purposes of this essay, I consider that the two main goals of the ICJ are peaceful dispute resolution between states, and the development and refinement of primary norms in international law.

IV Assessment of the ICJ's Performance

The question I now seek to answer is *How well has the ICJ carried out these two main roles of peaceful dispute resolution and the development of international law and norms?*

A *Peaceful Resolution of Disputes*

One of the principal purposes of the ICJ (and its predecessor, the PCIJ) is to encourage the peaceful resolution of disputes between states. Effectively, the Court is supposed to be an alternative to states engaging

[13] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Rwanda) (Provisional Measures)* [2002] ICJ Rep 219, 241.

[14] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United*

in acts of war against each other. It offers a neutral and impartial ground to which states can bring their disputes. However, the Court does not always live up to that lofty goal. Giladi and Shany have argued that since the creation of the ICJ, 'the propensity of states to refer disputes to ICJ adjudication may stand in inverse relations to the gravity of the problem at hand'.[15] This assessment could certainly be applied to the *Whaling Case*. Australia's decision to initiate proceedings against Japan could not, according to one commentator, 'be rationally explained'. The impetus for the Australian Government's action was fuelled by domestic politics.[16] Former Prime Minister Kevin Rudd promised action on Japan's whaling activities in the Antarctic during the 2007 election campaign.[17] It was not an issue that significantly affected Australian international interests. In fact, in launching the action, Australia faced the real risk that the status of Australia's claim (that is, the Australian Antarctic Territory) would be open to question by the court.[18] It was certainly not an issue which, had diplomatic action failed, would have lead to war between Australia and Japan.

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[15] Giladi and Shany, above n 3, 171.

[16] Phillip Dorling, '"Doomed" whaling fight aimed at saving Labor vote' *The Sydney Morning Herald* (online) 5 January 2011 <https://www.smh.com.au/environment/conservation/doomed-whaling-fight-aimed-at-saving-labor-vote-20110104-19f52.html>.

[17] Frank Walker, 'Labor Faces a Whale of a Decision' *The Sydney Morning Herald* (online) 2 December 2007 <https://www.smh.com.au/environment/conservation/labor-faces-whale-of-a-decision-20071202-gdrq8j.html>.

[18] Shirley Scott 'Australia's Decision to Initiate *Whaling in the Antarctic*: Winning the Case Versus Resolving the Dispute' (2014) 68 *Australian Journal of International*

However, a counterpoint to this is that the ICJ is just one among many international institutions dedicated to advancing the cause for peace. Indeed, the ICJ is just one part of the broader UN strategy for international peace and security.[19] It is too simplistic to claim that because not every serious dispute is put before the ICJ, that it is failing to fulfil its primary role. The increasing interdependence of states in a globalised world has meant that armed conflict between states — especially between democracies — has become rare.[20] States have a greater need than ever to even avoid the escalation of serious disputes to the point where they require an impartial adjudicator. Ultimately, this issue may not be reflective of any failure on the part of the ICJ to fulfil its role, but of the success of the broader international system in helping to foster peaceful relations between states.

B *Issues of Compliance*

One of the main criticisms levelled at the ICJ is that it is an ineffective institution. It lacks a traditional mechanism to enforce its judgements, relying primarily on the cooperation of the states that are party to a dispute to respect and carry out the decisions of the Court. Cymie Payne notes that the parties in the *Whaling Case* did not agree on the meaning

[19] Giladi and Shany, above n 3, 165.

[20] Anthony McGrew, 'Globalization and Global Politics' in John Baylis, Steve Smith, and Patricia Owens (eds) *The Globalization of World Politics: An Introduction to International Relations* (Oxford University Press, 6th ed, 2014)

of the judgement.[21] Japan interpreted it as the ICJ requiring Japan to withdraw its existing permits and take into account the ICJ judgement in issuing new ones. Australia argued that the Court provided scientific criteria that the International Whaling Commission must use in the review of whaling proposals. New Zealand's opinion was that the case meant that Japan must simply end its whaling program completely. Such competing understandings of a judgement are common even in domestic courts. However, in the international sphere these disagreements complicate the issue of party compliance, particularly because the Court lacks a traditional enforcement structure.

If a party fails to perform an obligation imposed by a judgement, the other party may petition the UN Security Council.[22] This method of enforcement is, however, unreliable because it is essentially a political exercise.[23] In *Nicaragua v United States*,[24] the ICJ held that the USA violated international law by, among other things, aiding and supplying a rebellion against the Nicaraguan Government. The Court rejected an argument from the USA that the ICJ lacked the jurisdiction to hear the case and, as a result, the USA refused to participate further in the case. The USA then prevented the Security Council from enforcing the

[21] Cymie Payne, 'ICJ Halts Antarctic Whaling – Japan Starts Again' (2015) 4 *Transnational Environmental Law* 181, 190.

[22] *Charter of the United Nations* art 94.

[23] Aloysius Llamzon, 'Jurisdiction and Compliance in Recent Decisions of the International Court of Justice' (2008) 18 *European Journal of International Law* 815.

[24] *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United*

adverse judgement.[25] This is an extreme example because the USA is a permanent member of the Security Council and thus has veto power over any proposed resolution. However, it is a significant illustration that the effectiveness of the Court can be tenuous. Nevertheless, Giladi and Shany argued that the Court's decisions 'enjoy relatively high judgement-compliance rates—regardless of a few celebrated instances of open defiance'.[26] They do note, however, that determining whether a judgement has been complied with is quite difficult. Robert Jennings phrased the difficulty as such:

More work needs to be done here. It is ironic that the Court's business up to the delivery of judgement is published in lavish detail, but it is not at all easy to find out what happened afterwards.[27]

The question of compliance remains and is a significant issue for an institution which is the principal judicial organ of the UN.

C *Issues of Jurisdiction*

A closely related issue to that of compliance is the jurisdictional issues that face the ICJ. The Court's jurisdiction is dependant on the consent of states, and it is well aware of this fact. In the *East Timor* case, the

[25] Fred Morrison, 'Legal Issues in The Nicaragua Opinion' (1987) 81 *American Journal of International Law* 160.

[26] Giladi and Shany, above n 3, 182.

[27] Robert Jennings, 'Presentation' in Connie Peck and Roy Lee (eds) *Increasing the Effectiveness of the International Court of Justice: Proceedings of the ICJ/UNITAR Colloquium to Celebrate the 50th Anniversary of the Court* (Martinus Nijhoff

Court stated that 'one of the fundamental principles of [the ICJ Statute] is that [the Court] cannot decide a dispute between States without the consent of those States to its jurisdiction'.[28] There are four ways in which the ICJ can gain jurisdiction over a dispute:

1. Compulsory jurisdiction (for future cases) by agreement;
2. Compulsory jurisdiction (for future cases) by the Optional Clause System;
3. Optional jurisdiction (after a dispute has arisen) by way of Special Agreement; or
4. Optional jurisdiction (after a dispute has arisen) based on *forum prorogatum* (that is, by informal or tacit acceptance).[29]

Each of the four grants jurisdiction to the ICJ in different ways, but the common thread is that it requires consent at some stage by all states party to a case. In the *Whaling Case* (which was accepted under the Optional Clause System[30]) a jurisdictional argument was raised. Japan sought to persuade the Court that Australia had excluded 'exploitation of a disputed maritime area' from the Court's jurisdiction. The Court rejected this argument.[31] Giladi and Shany have argued that jurisdictional issues are a bar to the effectiveness of the ICJ.[32] In many

[28] *East Timor (Portugal v Australia)* (Judgment) ICJ Rep 1995, 101 [26].

[29] Kolb, above n 4, 188–202.

[30] *Statute of the International Court of Justice* art 36(2).

[31] *Whaling in the Antarctic (Australia v Japan: New Zealand intervening)* (Judgement) [2014] ICJ Rep 226, 242–244 [35–35].

[32] Giladi and Shany, above n 3, 171.

ways, they said, the voluntary jurisdiction design of the ICJ ascribes it the quality of a 'voluntary service provider'.[33] The idea that the ICJ is simply an arbiter waiting on the sidelines for states to bring their disputes to it is an odd concept for a court, especially one supposedly at the apex of the international legal order.

The consensual nature of the ICJ's jurisdiction is not always viewed as a negative, however. Robert Kolb has argued that it actually strengthens the ICJ's function because if states consent to the Court's jurisdiction, then the court does not need to worry about enforcement.[34] The ICJ lacks traditional infrastructure to enforce its judgements (such as a police force). Kolb argues that imposed jurisdiction would eventually 'incurably' affect the Court's reputation and efficacy because it would deliver judgements that would simply be ignored. The Court's legitimacy derives in part from its symbolic value as an institution dedicated to the advancement of the rule of law.[35] Thus, a consent-based jurisdiction may be the best way to prevent damage to the Court's image of authority. This jurisdiction issue may become less problematic with the passage of time, however. Geoffrey Palmer has noted that there is 'something of an increasing tendency' towards treaties containing provisions imposing the jurisdiction of the ICJ to those states party to

[33] Ibid.

[34] Kolb, above n 4, 185–186.

[35] Eric Posner, 'The Decline of the International Court of Justice' (Working Paper No

the treaty.[36] As such clauses proliferate throughout the world's treaties, the ICJ may gain jurisdiction over a wide variety of disputes through the backdoor.

D *Conservatism on the Court*

Several basic underlying facts have resulted in the ICJ being a fairly conservative court. These include a consent-based jurisdiction, as well as the lack of traditional enforcement methods. Franklin Berman has argued that the Court thus considers its task is to produce fair, reasoned, and legally-sound judgements that have the best prospects of being followed.[37] That is, it is more concerned with producing a judgement that will be complied with rather than developing the law. The Court itself has reinforced this view: in the *Icelandic Fisheries* case, it said that 'the Court, as a court of law, cannot render judgment *sub specie legis ferendae*, or anticipate the law before the legislator has laid it down.'[38] This is a significant point because one of the roles of the ICJ is the development of international laws and norms. This shows a reluctance to engage in judge-made law, and was also evident in the *Whaling Case*. Sonia Rolland was critical of the majority decision in

[36] Geoffrey Palmer, 'Perspectives on International Dispute Settlement from a Participant,' (2012) 43 *Victoria University of Wellington Law Review* 39, 44.

[37] Franklin Berman, 'The International Court of Justice as an 'Agent' of Legal Development?' in Christian Tams and James Sloan (eds) *Development of International Law by the International Court of Justice* (Oxford University Press, 2013) 90–91.

[38] *Fisheries Jurisdiction (United Kingdom v Iceland)* (Judgement) [1975] ICJ Rep 3,

this case, particularly with regard to what she considered a severe circumscription of the majority's legal reasoning in developing the reasonableness standard.[39] While accepting that the Court 'justifiably shuns judicial activism', she nevertheless argued that the Court was too conservative in refusing 'the opportunity to grapple with more contentious and perhaps more amorphous legal issues'.[40] Even some judges of the ICJ agree that the Court can be too conservative. In a dissenting judgement, Judge Christopher Weeramantry wrote that 'If international law is to grow and serve the cause of peace as it is meant to do, the Court cannot avoid that responsibility in an appropriate case'.[41] This tension between developing the law and ensuring the integrity of the Court is not impugned is not easy to resolve. However, given that developing the law is one of the core roles of the ICJ, continuing to be too conservative in its approach may ultimately do more harm to the Court's reputation.

E *Only States May be Parties to a Case*

Only states may be parties to cases before the ICJ.[42] This restriction applies even to participation as an 'intervenor' (as New

[39] Sonia Rolland, 'Whaling in the Antarctic (Australia v. Japan: New Zealand Intervening)' (2014) 108(3) *American Journal of International Law* 496.

[40] Ibid 502.

[41] *Aerial Incident at Lockerbie (Libyan Arab Jamahiriya v United Kingdom and Libyan Arab Jamhiriya v United States of America)* (Judgement) [1998] ICJ Rep 119, 180.

Zealand was in the *Whaling Case*).[43] As such, the bringing of an action to the ICJ is entirely at the discretion of the affected state. In the *Whaling Case*, the Australian Government, led by the Labor Party, commenced the action. However, by the time the judgement was handed down there had been a change of government. This made it unlikely that Australia would take Japan back to the ICJ if it recommenced whaling activities in the Antarctic.[44] Given the particular historical context in behind the ICJ, this restriction is understandable. However, it is the subject of criticism. International law affects more than just states, including individuals, corporations, and other non-governmental organisations.[45] These non-state actors are becoming increasingly important in international law and relations. Therefore, disputes involving non-state actors requiring impartial adjudication are also becoming increasingly common.[46] Fergus Green has argued that the ICJ's approach to non-state actors is flawed and is

[43] *Statute of the International Court of Justice* arts 62, 63.

[44] Phillip Clapham, 'Japan's Whaling Following the International Court of Justice Ruling: Brave New World – Or Business as Usual? (2015) 51 *Marine Policy* 238, 240; Michelle Grattan and Andrew Darby 'Abbott Rejects Whaling Legal Bid' *The Age* (online) 12 January 2010 <https://www.theage.com.au/national/abbott-rejects-whaling-legal-bid-20100111-m2oe.html>.

[45] Robert Jennings, 'The International Court of Justice after Fifty Years' (1995) 89(3) *American Journal of International Law* 493, 504; Pierre-Marie Dupuy, 'Article 34' in Andreas Zimmermann (ed), *The Statute of the International Court of Justice: A Commentary* (Oxford University Press, 2006) 545, 549.

[46] See generally Francisco Vicuña, *International Dispute Settlement in an Evolving Global Society: Constitutionalization, Accessibility, Privatization* (Cambridge

fragmenting the international legal system.[47] In regards to the *Whaling Case*, non-state actors were crucial in forcing the issue to be dealt with. One organisation, the International Fund for Animal Welfare (IFAW), played a central role in promoting a pro-conservation strategy to influence governments to pressure Japan.[48] That the IFAW was successful in that Australia eventually took action belies the underlying issue. Unless a state is willing to take action in the ICJ, such issues will not be resolved in that forum. This means that, despite the growing importance of non-state actors in the international system, the ICJ can only be relevant if the states allow it to be so.

V CONCLUSION

The effectiveness of the ICJ in the performance of its two core roles is compromised by several factors. The kinds of disputes submitted to the ICJ are not ones that would normally lead to armed conflict. This undermines the claim that the Court assists in the prevention of such conflict. The ICJ is also impeded from carrying out fully the role of developing the law by compliance and jurisdiction issues. The Court is further constrained by the structural inclination towards conservatism evident throughout the ICJ's history. Finally, the rise in the importance

[47] Fergus Green, 'Fragmentation in Two Dimensions: The ICJ's Flawed Approach to Non-State Actors and International Legal Personality' (2008) 9 *Melbourne Journal of International Law* 47.

of non-state actors in the international system has rendered the restriction that only states may appear in cases before the Court an anachronism. Together, these all limit the utility of the ICJ as a world Court. However, this does not mean that the Court is a complete failure. There are ways in which the Court could be improved and its effectiveness increased. However, until that occurs the ICJ will continue to be of limited relevance and influence in the world.