The Blackstone Society's
Equity, Diversity and Social Justice
Publication

Volume 3

2019

IGNITE

A BLACKSTONE PUBLICATION

The Blackstone Society acknowledges that the UWA Law School is situated on the land of the Wadjuk Noongar people, and that Noongar people remain the spiritual and cultural custodians of their land, and continue to practice their values, languages, beliefs and knowledge.

Cite as *Blackstone's Ignite Journal*

ISSN 2652-1830 (Online)
ISSN 2652-1822 (Print)

Printed by UniPrint

Editor's Preface

Welcome to volume 3 of the *Ignite Journal*. Much like its namesake, this volume covers topics with equity, diversity and social justice perspectives.

The Blackstone Society recognizes the importance of creating conversations about the law. The law is about, and fundamentally affects, people. As actors within this sociological construct,[1] we should be concerned with whether the law is fostering a fair and equitable society. Raising awareness about how the operation of the law may be unfair and inequitable allows us to ask: 'how can we change the law', and 'how can we change the way law is applied and enforced'. It allows us to challenge the 'absolutist',[2] 'narrow, rigid and … soul-crushing ideolog[ies]'[3] of centralized legalism, formalism and positivist law.

Ignite was first published in 2015 as the Blackstone Society's premier equity, diversity and social justice publication. Volume 2 was published in 2017. *Ignite* is currently in its third volume. *Ignite* aspires to remain an accessible and inclusive forum for discussions on issues that matter, and one that supports and promotes student scholarship.

I would like to thank A/Prof Stella Tarrant, Dr Marilyn Bromberg, Prof Robyn Carroll, Dr Renae Barker, Liam Elphick, Heidi Rees, and the authors for their insightful contributions. I would also like to thank the Blackstone Equity Portfolio, Aidan Ricciardo, Ambelin Kwaymullina, Dylan

[1] See generally, Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, tr Walter Moll (Harvard University Press, 1936) 391-2.
[2] Pierre Legrand, 'How to Compare Now' (1996) 16 *Legal Studies* 232, 240.
[3] I owe this thought to Professor Camilla Andersen and Jessica Kerr; Pierre Legrand, 'Negative Comparative Law' (2015) 10(2) *Journal of Comparative Law* 405, 406.

Lino, Bridget Rumball (2019 Onyx Editor), Samuel Bartlett (2019 Blackbird Editor), Abdi Hassan and James Bordi (2018 Publications Committee), and the 2019 Comparative Law class for inspiration and their encouragement. Finally, huge thanks must go to Elle de Koning (Mental Health Law Centre), Elise De Haas and Xander Sinclair (UWA Guild), and the Blackstone Committee (especially Paige Pittorino, Monty Phillips, Genevieve Rose, Andrew McDade and Mike Myers) for their invaluable assistance.

I hope you enjoy this third instalment of the Journal and find it as interesting to read as it was to put together!

Jing Zhi (Ben) Wong

Crawley, 14 October 2019

Contents

Foreword: Taking Up the Mantle

Liam Elphick[♣]

I am thrilled and honoured to provide the foreword to the Blackstone Society's third issue of *Ignite*. As a now-crucial staple of student publications at the UWA Law School, it's hard to believe that *Ignite* only came into existence four short years ago. Back in 2015, I was still a baby-faced LLB student (yes, we hadn't yet died out by then), trying to figure out what on earth I wanted to do when I left law school. I had also come out as gay just a year earlier, and was still finding my way in a career and a world that I was scared would reject me for who I was. I hid my sexuality in interviews and clerkships, terrified that it would limit my opportunities and restrict the career I wanted for myself.

Throughout that period, the law school was my sanctuary. With a supportive group of friends and the warmth shown by so many of my lecturers (Kate Offer, I'm looking at you), it was a place to be myself, and to call home. But for all the implicit inclusion I felt in the law school in 2015, there was far less by way of explicit, bold, public showings of support for equity and diversity. It truly was a wonderful environment for those who

♣ Adjunct Research Fellow, UWA Law School; PhD Candidate, University of Melbourne Law School.

went looking for it, but less so for those who needed an arm around their shoulder and a helping hand to bring them along.

Flash forward four years, and as a law school we have come so far. As discussed in this very issue (Monty Phillips, p 77), we are now onto our fourth Blackstone Queer Officer, and we run regular LGBTIQ events. We have amazing staff members filling equity and diversity roles in the law school, including LGBTIQ Advisor (Aidan Ricciardo), Indigenous Advisor (Ambelin Kwaymullina) and Equity & Diversity Advisor (Stella Tarrant). We have built formal connections between staff and students who fill equity and diversity roles to ensure greater synergy and connection. We have an Equity & Diversity Pathway to the Juris Doctor program. We have law school representatives on University-level equity and diversity committees. Under Ambelin's brilliant leadership, we are world-leaders with our Indigenisation of the Juris Doctor curriculum. In 2017 we were the only law school in the country to publicly and institutionally support marriage equality. A huge number of our staff have undergone training to become LGBTIQ allies at the University. And the Blackstone Society has now published the third issue of a student-run publication focused on equity, diversity and social justice perspectives.

All of these would have been near-unthinkable to a closeted and terrified 21-year old Liam just a year before the first issue of *Ignite* was published. But they are all, now, reality. They are reality because, for years, so many of our students and staff have fought for equity, diversity and social justice. Whether

through supporting the marriage equality 'Yes' campaign, ensuring Indigenous voices are not lost in legal discourse, lobbying for greater access and support for students who have faced significant hurdles, marching at the Perth Pride Parade, working with the profession to address gender imbalances, resisting those groups who seek to use our university to promulgate hate speech, or standing up for vulnerable friends who need our help, students, staff and alumni of this law school have been champions of equity, diversity and social justice. Our leaders, particularly Natalie Skead, Tash Terbeeke and various Blackstone presidents, have paved the way for us.

As law students, law graduates and lawyers, we have a unique opportunity to continue this legacy of equity, diversity and social justice. We leave this university with a highly sought after, highly regarded and influential degree which the vast majority of the population do not have the opportunity to pursue. Wherever we end up – the legal profession, the public sector, policy, research, the not-for-profit sector, consulting, finance, academia, or any other of a countless number of paths we can follow – we will be in a privileged position to help others. We can use our law degree, and our experiences in this law school, to give a voice to the voiceless, stand up for the defenseless, and fight for those who have given their all. This does not have to be through the sort of explicit, bold, public showings of support to which the law school is now so well-versed. It also does not have to be through specific equity or diversity roles. It can be done through all sorts of everyday contact you will encounter in your post-law school lives.

The importance of equity, diversity and social justice can be expressed through the sympathetic interview of a client who is a victim of intimate partner violence (Stella Tarrant, p 5). It can be expressed through working inside public sector departments to rectify the disproportionate impact of certain laws on Aboriginal and Torres Strait Islander people (Lennox Saint, p 9). It can be expressed through tireless work on health issues that affect certain populations, whether through advocacy and social media campaigns (Marilyn Bromberg, p 52) or through volunteering your time at community legal centres (Heidi Rees, p 65). It can be expressed through challenging assumptions underlying legal concepts and doctrines, ensuring their disparate effect on vulnerable groups is constantly evaluated and corrected, and making sure that our laws shape a fair and equitable society that we can be proud to live in (almost every other article below!). This issue of *Ignite* provides an important and timely insight into how we can live, breathe and champion equity, diversity and social justice. For this, the authors and editor of this issue should all be proud.

Since I left Perth at the end of last year, I have taught, guest lectured and/or researched at four other law schools. Those experiences have shown me that what we have at the UWA Law School is truly special. The shared commitment – from staff, students and alumni alike – to ensuring our law school is an open, welcoming and inclusive environment for all is something we should never take for granted. And it is a mantle which we should all take up, run with, and never let go.

Transforming Legal Understandings of Intimate Partner Violence

A/Prof Stella Tarrant♠

Editor's Note: This article is a Transcript of a Speech delivered by the Author at the launch of The Australian National Research Organisation for Women's Safety (ANROWS) Research Report, June 2019.

Good evening and welcome to everyone, thank you for coming. I acknowledge the Whadjuk Noongar people – custodians of the Country on which we're meeting. The report we're launching this evening is the result of a continuation of a legal test case that Professor Julia Tolmie and I were assisting Chamari Liyanage and George Giudice (Chamari's legal counsel) with,[1] to bring an appeal to the High Court of Australia in 2018. Because there was a prospect of a new trial as an outcome of the appeal process, Chamari determined for herself that the cost of this justice process had become too high, and so she withdrew her appeal.

The research project we continued with was a very close look at how the law of self-defence is being applied where a person who has been the target of very serious or extreme violence

♠ Associate Professor, UWA Law School.

[1] For context, see generally, Stella Tarrant, 'Self Defence Against Intimate Partner Violence: Let's Do the Work to See It' (2018) 43(1) *University of Western Australia Law Review* 196; *Liyanage v The State of Western Australia* [2017] WASCA 112.

over an extended period of time, responds to that violence with force used to defend themselves.

In many ways the report is still shaped in the way the High Court test case was developing – it describes, and models, what it is we would urge criminal courts to think about, and act upon.

When a person acts in self-defence they are not guilty of anything; that's the law. In Western Australia that law is contained in s 248 of the *Criminal Code*. What that section says, essentially, is that if a person acts reasonably; if they believed, on reasonable grounds, they needed to do as they did to defend themselves or another person against a harmful act, they haven't committed a crime.

We're not applying this law properly where the violence a person says they defended themselves against was directed at them over time, by one other person, who had intimate access to them.

Traditionally, the only form of violence recognized as violence that could be the basis of a self-defence claim, was the form of violence that occurs in a 'fight' – two people 'having it out'. ('fist-y cuffs' violence). But intimate partner violence is not capable of being encapsulated in that notion – of a 'fight'. Intimate partner violence is not the same phenomenon, not the same 'thing' as a 'fight' – or as a series of 'fights'. The impossible 'fit' between these concepts becomes especially clear if we consider intimate partner sexual violence. Sexual

coercion of and violence against a person over time is not in the same conceptual universe as a 'fight', or series of fights.

This means that if the claims of victims of intimate partner violence (mainly women, and very disproportionately Aboriginal women) to have acted in self-defence are assessed as *if* they are claiming to have been in a 'fight' – quite simply, their claims of self-defence will make no sense. And being nonsensical, their claims will disappear in law.

In fact, since 2008, the law in s 248 of the *Criminal Code* explicitly addresses this problem. Those reforms made it clear that self-defence applies also where the 'harmful act' a person was defending themselves against was 'non-imminent'. But altered words in the statute haven't on their own altered the way the law is being applied. Our report examines why this is so, and which models of violence and ways of approaching the problem are necessary to effect the law reform that was intended.

Fear and intimate partner violence go together. Fear is central to the experience of intimate partner violence, and it is also central to the thinking about intimate partner violence. And this includes the thinking about intimate partner violence that occurs in the criminal justice process. An entrenched fear in the area of self-defence law, is that if we stop clinging to the single paradigm (violence-as-a-'fight') we will unleash something terrible. That somehow people will get hurt very badly. But the opposite is true. If we stopped clinging to the single paradigm, we would be acknowledging that people have been hurt, very

badly --- and we would, in fact, be letting the law of self-defence in s 248 of the *Criminal Code* properly do its work.

It takes a confident society (and a confident criminal justice system) to acknowledge a form of violence that we all very much wish had not happened, and to let our thinking about the law proceed from that acknowledgment.

The report[2] we're launching tonight was not written with the aim of formulating recommendations that could be quickly implemented by legislators or policy makers. It was written to examine these 'ways of thinking' that influence how the law is being applied. We hope it will contribute as an education-information resource in helping to change automatic patterns of thought that influence justice in unhelpful ways.

[2] Stella Tarrant, Julie Tolmie and George Giudice, *Transforming Legal Understandings of Intimate Partner Violence* (Australian National Research Organisation for Women's Safety, 2019) <https://www.anrows.org.au/project/transforming-legal-understandings-of-intimate-partner-violence>.

The Inadequacies of Western Australia's Fines Enforcement Law

Lennox Saint♦

I *Introduction*

This article critically evaluates reform options relating to unpaid fines in order to address the disproportionate impact of Western Australia's criminal justice response to this issue on Aboriginal and Torres Strait Islander people.

Western Australia's (WA's) criminal justice system's response to unpaid infringement notices and court-ordered fines (collectively, 'fines') has disproportionately impacted Aboriginal and Torres Strait Islander (ATSI) people. A pertinent issue debilitating Indigenous Australians is imprisonment for defaulting on fines. Indigenous Australians are overrepresented in prisons. Further, unpaid fines may also involve the issuance of License Suspension Order (LSO) as a means of enforcing the payment of these fines.

Since a driver's license is an indispensable mean of transport and livelihood for many, it is suggested that reform should repeal LSOs and replace them with Work and Development Orders (WDOs). Further reform should be made ensure greater security of the person and to make it less possible for offenders

♦ 1st year Juris Doctor student. BA *W. Aust*. The usual caveats apply.

to be imprisoned for simple fine defaults. This, as this article suggests, can be done by amending the *Fines, Penalties and Infringement Notice Enforcement Act 1994* (WA) (FPINE Act) and *Sentencing Act 1995* (WA).

Before proceeding, it is important to note that this analysis concerns the disproportionate impacts of WA's response to unpaid fines by ATSI peoples. It makes no comment on the disproportionality between offences and punishments. Discourse on the latter is omitted.

II *Infringement Notices*

Assuming an offender does not elect to have the matter heard before a magistrate, there are several steps that must occur before an offender's license can be suspended for defaulting on an infringement notice:

Firstly, a notice is issued.[1] *Second*, if the offender does not pay for the infringement within 28 days, a final demand notice is issued.[2] *Third*, if the offender does not pay within an additional 28 days, a 'Court Order to Pay or Elect' is issued.[3] *Fourth*, if the offender still does not pay after a further 28 days, a 'Notice

[1] *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) ('**FPINE Act**') s 14(1); 'Infringement Notices', Department of Justice (Web Page) <https://courts.justice.wa.gov.au/I/infringement_notices.aspx?uid=4916-1423-2566-8813>.
[2] FPINE Act (n 4) s 14(4).
[3] Ibid s 17(3).

of Intention to Enforce' will be issued.[4] *Lastly*, if the offender still does not pay after a further 28 days, a Registrar may then make an LSO in respect of the offender.[5]

III *Court Ordered Fines*

A Warrant of Commitment (WoC) 'directs the Police to arrest [the offender] and orders [him/her] to serve time in prison to settle the outstanding debt'.[6] As with Infringement Notices, there are several steps that must take place in order for a warrant to be issued after failing to pay a court-ordered fine:

First, a court fine must be issued.[7] If the offender does not pay within 28 days, a Notice of Intention to Enforce is issued.[8] Second, if the offender fails to pay this within the following 28 days, either a LSO[9] or an Enforcement Warrant[10] is issued. *Third*, if this is ignored by the offender, a Registrar may cancel the LSO and/or enforcement warrant and issue a WDO.[11] *Fourth*, a WoC is issued seven days after the offender was served with a WDO.[12]

[4] Ibid s 18(1).
[5] Ibid s 19(1).
[6] 'Court-ordered fines', Department of Justice (Web Page) <https://courts.justice.wa.gov.au/C/court_fines.aspx>.
[7] FPINE Act (n 4) s 33(2).
[8] Ibid s 42(4).
[9] Ibid ss 42(3)(a), 43(1).
[10] Ibid ss 42(3)(b), 45(1).
[11] Ibid ss 47(4), 47A(3).
[12] Ibid s 53(2).

IV *Disproportionate Impact*

The consequence of Indigenous vulnerability to fine defaulting is truly startling. This may be appropriately exemplified through a hypothetical scenario: Ted is an Aboriginal man who belongs to the Yungngora community, located in the Kimberley region of Western Australia. Mail is often severely delayed and even lost in remote communities like Ted's.[13]

One day in June of 2015 Ted was on his way to work in Broome for the weekend when, unbeknown to him, he was flashed by a speeding camera. Three months later he visited the local post office to discover two letters in his PO box titled 'Final Demand Notice' and 'Notice of Intention to Enforce' respectively. The latter stated that Ted has 28 days to pay for a $600 traffic infringement. Ted never received an infringement notice or Court Order to Pay or Elect and knows the Final Demand Notice must have been delivered earlier in the day because he checked his mail yesterday. He becomes extremely worried because his average weekly income, like many other Aboriginal people living in remote communities, is $398.[14]

[13] Australian Law Reform Commission, *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (Report No 133, December 2017) vol 1, 388 [12.28]; 'Yungngora', *Morra Warra Warra Aboriginal Corporation* (Web Page) <https://www.mww.org.au/yungngora>.
[14] 'Income', *Aboriginal and Torres Strait Islander Health Performance Framework 2017 Report* (Web Page) <https://www.pmc.gov.au/sites/default/files/publications/indigenous/hpf-2017/tier2/208.html>.

Two months later, after failing to pay for the fine and ultimately having his license suspended, Ted was (illegally) driving to Broome for work as he had no means of earning money in Yungngora. During his journey he was pulled over by a policeman, who issued a $600 fine for driving unlicensed.[15] The policeman noticed Ted was extremely distressed and told him that if he is unable to pay the fine, he could instead do community service under a WDO.[16]

Two months later, Ted receives a letter in his PO box titled 'Warrant of Commitment', stipulating that the Registrar believes imprisonment is the most effective way for Ted to pay his fine.[17]

Ted is subsequently arrested and incarcerated. There, Ted will become the 7,463rd person to enter a correctional center for fine default in WA since July 2006 (as at 1 May 2019).[18] Moreover, he will join other WA ATSI people who comprise 51% of the prison population for fine default, despite constituting 3.3% of the state's total population.[19]

This scenario depicts how a 'cycle of unauthorized driving following the suspension of a driver license due to fine defaults [can lead] to court-imposed license disqualification, further

[15] *Road Traffic Act 1974* (WA) s 49.
[16] FPINE Act (n 4) s 47(1).
[17] Ibid s 55D(1)(f).
[18] Office of the Inspector of Custodial Services, *Fine Defaulters in the Western Australian Prison System* (2016) v.
[19] Ibid.

fine defaults and – potentially – imprisonment'.[20] It also exemplifies how WA's fine enforcement system is disproportionately impacting Indigenous people living in regional areas as they have an increased reliance on driving but a reduced capacity to pay a fine.

V *Reform Option #1*

The exacerbated effects of license suspension on ATSI people living in remote communities clearly raises concern.[21] Thus, one option to mitigate the disproportionate impacts of this component of WA's fine enforcement system is to remove it entirely. This would involve repealing numerous sections of the FPINE Act which permit license suspension after an Aboriginal Offender has defaulted on an infringement notice or court-ordered fine.[22] This measure has been met with both support and criticism. Those who endorse it, such as the National Aboriginal and Torres Strait Islander Legal Services and NSW Bar Association, believe it will disrupt the cycle of reoffending

[20] Kathleen Clapham et al, 'Addressing the Barriers to Driver Licensing for Aboriginal People in New South Wales and South Australia' (2017) 41(3) *Australian and New Zealand Journal of Public Health* 280, 280.
[21] 'Submission to the Australian Law Reform Commission's Inquiry into the Incarceration Rates of Aboriginal and Torres Strait Islander peoples', *National Aboriginal and Torres Strait Islander Legal Services* (Online PDF) <http://www.natsils.org.au/portals/natsils/NATSILS%20%20ALRC%20Submission_%20at%2022082017_new.pdf?ver=2017-09-22-152515-350>.
[22] See for eg, FPINE Act (n 4) ss 17-19, 42-44.

that often occurs in remote communities, as seen in Ted's scenario.[23]

Contrarily, those who oppose the measure, such as the NT and NSW Government, believe its implementation should be confined to regional communities because license suspension orders have proved to be an effective enforcement measure in urban areas.[24] Clearly, the prevention of reoffending and the continuance of debt recovery are central interests of both parties. However, there has been a failure to recognize the impact of LSOs on ATSI people living in built-up areas. The fact that these Indigenous Australians may not be required to travel hundreds of kilometers each weekend to earn money does not mean the disqualification of their license will not have a disproportionate impact. For instance, the suspension of one license in an 'Indigenous' household can have dire consequences on the family's access to education and employment.[25]

Worryingly, it would be more difficult for an Indigenous than non-Indigenous family member to obtain their own driver's license due to the existence of various individual and systemic barriers, such as financial cost, literacy issues and proof of identity documents.[26] This is reflected in the fact that less than

[23] *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (n16) 406 [12.103].
[24] Ibid 406 [12.104-5].
[25] Ibid.
[26] Patricia Cullen et al, 'Challenges to driver licensing participation for Aboriginal people in Australia: a systematic review of the literature' (2016) 15(104) *International Journal for Equity in Health* 1, 3-6.

half of all eligible ATSI people have a driver's license compared with 70% of the non-Indigenous population.[27]

WA's current legislative framework permits the conversion of a court-ordered fine into community work.[28] However, this is prohibited for infringement notices.[29] In light of this and the interests of both parties to the 'license suspension argument', it is suggested that Work and Development Orders (WDOs) replace license suspension orders in Part 3 Division 2 of the FPINE Act. The amendment, inter alia, would allow for the 'payment' of an infringement notice through the performance of activities such as community work, programmes for drug or alcohol addiction and counselling.[30] The potential of this change can be seen in NSW's introduction of WDOs in 2009. Between this time and October 2016, "$9 million of the $44 million that had been waived through the WDO scheme [had] been in 'Aboriginal communities'".[31]

These figures suggest that the implementation of changes to the FPINE Act would protect the economic interests of governments while also ensuring that Indigenous Australians

[27] Audit Office of New South Wales, *New South Wales Auditor-General's Report: Performance Audit— Improving Legal and Safe Driving among Aboriginal People* (2013) 2, 21.
[28] Eg, FPINE Act (n 4) s 42.
[29] Department of Justice (n 1).
[30] *Sentencing Administration Act 2003* (WA) s 85(2)(a)-(c).
[31] Senate Finance and Public Administration References Committee, Parliament of Australia, *Aboriginal and Torres Strait Islander Experience of Law Enforcement and Justice Services* (2016) [6.10].

in every part of WA can continue to use their driver's licenses as a tool to overcome disadvantage.

VI *Reform Option #2*

The disproportionate impact of WA's laws on court-ordered fine enforcement became the subject of public debate following the death of Ms Dhu in 2014 and the coronial inquest that ensued two years later.[32] Ms Dhu was an Aboriginal woman whose death occurred in police lock-up after she was arrested for fine defaulting. As Ms Dhu's inquest focused on 'the quality of her supervision, treatment and care while she was in the custody of police', it ultimately proved to catalyze criticism of WA's enforcement of unpaid fines by way of imprisonment.[33] In her report, the Coroner suggested the abolition of such laws entirely[34] as supported by the ALRC,[35] Law Council of WA and Law Society of WA.[36] However, it

[32] 'Ms Dhu's family to sue state over death in custody', ABC News (Web Page) <https://www.abc.net.au/news/2017-07-20/ms-dhu-family-to-sue-wa-over-death-in-custody/8728620>.
[33] *Inquest into the Death of Ms Dhu (11020–14)* (Unreported, WACorC, 16 December 2016) 4.
[34] Ibid 151.
[35] *Pathways to Justice—An Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples* (n 13) 389 [12.30].
[36] 'Joint statement: Law Council of Australia and Law Society of Western Australia regarding imprisonment for unpaid fines', The Law Society of Western Australia (Web Page) <https://www.lawsocietywa.asn.au/news/joint-statement-law-council-of-australia-and-law-society-of-western-australia-regarding-imprisonment-for-unpaid-fines/>; The Law Society of Western Australia, 'Imprisonment of Defaulters' (Briefing Paper, 2016).

seems as though the legislature is hesitant to amend the law, despite suggesting otherwise, as the power of a Registrar to issue a WoC remains uninterrupted.[37] Thus, if it is not plausible to nullify sections within the FPINE Act that permit incarceration for fine default, the next best alternative is to make it more difficult for this type of incarceration to occur.

There are two ways to achieve this. The first pertains to the Sentencing Act 1994 (WA). Section 53 of the Act allows a court to consider the offender's ability to pay a fine.[38] However, s 57 stipulates that if the process of fine enforcement is occurring under the FPINE Act, s 53 can be disregarded.[39] This loophole was significantly criticized by the Coroner in Ms Dhu's inquest because it ignores a judicial officer's power to prevent the execution of a warrant of commitment.[40] Repealing s 57 of the Sentencing Act is one way to limit imprisonment for fine defaulting. Another relates to s 55D of the FPINE Act, which allows a Registrar to 'use [the] most effective enforcement means'.[41] In essence, this permits a WoC being issued before an LSO, WDO or enforcement warrant.[42] As seen in Ted's scenario, s 55D can accelerate the process of imprisoning someone for fine defaulting. Repealing this

[37] Western Australia, *Parliamentary Debates*, Legislative Assembly, 20 September 2017, 188–207 (John Quigley).
[38] *Sentencing Act 1994* (WA) s 53(1), (3).
[39] Ibid s 57(2).
[40] *Inquest into the Death of Ms Dhu (11020–14)* (Unreported, WACorC, 16 December 2016) 151.
[41] FPINE Act (n 4) s 55D.
[42] Ibid s 55D(1).

section of the FPINE Act would help achieve the overall objective of making it more difficult to incarcerate someone for failing to pay a court-ordered fine as it would ensure a Registrar follows each of the five steps before mentioned. It may be argued that the WA Government has already implemented similar measures through the *Sentencing Legislation Amendment Act 2016* (SLA Act).[43] The SLA Act introduced suspended fine provisions, meaning 'a court would be able to suspend a fine for a period of up to 24 months'.[44] Further, it negates the requirement for the offender to pay the fine unless the offender commits another offence during the suspension period.[45] While this is of great merit, the unchanged nature of s 57 means that it is still possible for a WoC to be issued under the FPINE Act without the oversight of a judicial officer.[46]

VII *Conclusion*

WA's response to unpaid fines in the FPINE Act, which permits an LSO for defaulting on an infringement notice and a WoC for defaulting on a court-ordered fine, is manifestly unfair. The importance of a driver's license and overrepresentation of Indigenous people in prison for fine

[43] Pt 4 Div 3.
[44] *Inquest into the Death of Ms Dhu (11020–14)* (Unreported, WACorC, 16 December 2016) 150.
[45] *Sentencing Legislation Amendment Act 2016* (WA) s 52.
[46] Ibid s 151.

defaulting are major factors in leading to the conclusion that the Criminal Justice system's response is 'disproportionate'.

Therefore, the first reform option that suggested was to repeal and replace all sections pertaining to LSOs in the FPINE Act with WDOs. A second reform option was recommended to address the issue of imprisonment. This involved two legislative amendments that would ultimately make it more difficult for a WoC to be issued.

The key to resolving the issue of unfair consequences resulting from unpaid fines in WA is to change the law. This will prevent the intolerable situations that entrenches disadvantage for Aboriginal and Torres Strait Islander people.

Central Desert Native Title Services

Winter 2019

Taylor Watson♦

I first learnt of the Aurora Internship Program through a university careers handbook for law students – which published an article about working in native title law. The author said the program would be a great opportunity for anyone desiring experiences "in remote Australia that you can only dream of." I didn't fully know what that meant then but following the completion of my Aurora internship at Central Desert Native Title Services (CDNTS), I certainly do now.

After emailing CDNTS asking about volunteer opportunities (to which I was informed interns are hosted through Aurora) and receiving yet another encouragement from a university lecturer who promoted the program one day, I finally did what I knew I had to do - and applied for the winter 2019 round. Being assigned to CDNTS – the very place I wanted to volunteer several months earlier – was perhaps the best outcome that could have resulted from my application. Situated in the vibrant, leafy streets of East Perth, the CDNTS office – reminiscent of an old school building – was unlike any legal environment I had ever been introduced to before. The office

♦ 2nd year Juris Doctor student. The usual caveats apply.

staff demonstrated to me that they are warm, welcoming, cheerful and relaxed – despite the significant workloads and clearly under resourced nature of the representative work they undertake.

Throughout my four weeks part-time in the office – I conducted legal research, helped draft documents, took notes and minutes, attended meetings, read legislation, summarised cases, and attended an annual native title user group conference alongside some of the brightest minds in the profession. However, the highlight of my placement was the incredible opportunity I had to go out on country for a claim group meeting hosted in Leonora (3 hours' drive from Kalgoorlie). To me, this was the experience of a lifetime, but to the CDNTS lawyers that accompanied me, it was just another day at work. I now understand that this is what work as a rep body lawyer is like – and indeed, these unique experiences spanning every corner of our beautiful desert are such that others really can only dream about them.

I would recommend this program to anyone who is even so much as wondering what native title law is all about, or looking to experience an area of law that is incredibly relevant yet rarely discussed at law school. Not only did I come away from my internship with a far greater knowledge of the *Native Title Act 1993* (Cth) and fundamental principles of native title law, I also have a new-found appreciation for alternative legal pathways post-graduation, which is perhaps even more valuable. I cannot thank the CDNTS staff enough for sharing their work with me

and showing me that there are so many possibilities for a career in the law that is dynamic, rewarding, meaningful and impacting of real, tangible social change.

More information about the Aurora Internship Program can be found at https://auroraproject.com.au/about-internship-program. Applications for the summer 2019/20 round will be open from 5 through 30 August.

The Road to Justice: Western Australian Apprentices as Employees

Jing Zhi Wong♠

I *Introduction*

This article examines the rights of apprentices in Western Australia, within the state system of industrial law.[1] In particular, this article explores some of the difficulties apprentices face when seeking recourse for unpaid allowances, unfair dismissal and denied apprenticeship benefits. It observes that the Courts have traditionally regarded apprenticeships as not being one 'of service'. Consequently, apprentices are unable to seek recourse under the state's *Industrial Relations Act 1979* (WA). This article argues that there is an emerging trend of cases which acknowledges that apprenticeships can also be one of 'employment' or 'service'. Ultimately, precedent should be fulfilled to give apprentices the right to seek recourse to the Western Australian Industrial Relations Commission.

♠ 2nd year Juris Doctor student. BSc *W. Aust*. I would like to thank Mark Cox and Elisha Butt for useful discussion. The usual caveats apply.

[1] This article does not examine apprentices' rights under the Commonwealth system of employment laws, ie: The *Fair Work Act 2009* (Cth).

II *Apprenticeships*

Apprenticeships have come under the spotlight in recent times, in part due to the Morrison Government's federal election promises of boosting apprenticeship opportunities in regional areas,[2] and in part due to revelations of widespread abuse and mistreatment of Apprentices nationwide.[3]

Apprenticeships (or Traineeships) boost local work opportunities, create jobs, and provide opportunities for youths to get employed, or learn a skill or trade. In Medieval times, apprentices were indentured to a master. An apprentice would work and serve his master for a period time in return for training, room and board. The contemporary apprentice would, while no longer indentured to his master in the same sense as that of the medieval era, essentially perform work for his "employer"[4] in return for training and some living allowances (in layman terms, as "reduced wages"[5]).

[2] Eg, Andrew Tillett, 'PM adds $60m to rural apprentice plan', *Financial Review* (Online, 25 April 2019) <https://www.afr.com/politics/federal/pm-adds-60m-to-rural-apprentice-plan-20190425-p51h95>.

[3] Eg, Brittany Evins, 'Bullying, Initiation rituals and dangerous pranks haunt Australia's blue-collar Apprentices', *ABC News* (Online, 3 March 2019) <https://www.abc.net.au/news/2019-03-03/stories-of-hazing-rituals-for-apprentices-revealed/10821874>; For a historical account of abuse and mistreatment of Apprentices, see Chris Minns and Patrick Wallis, 'Rules and Reality: Quantifying the Practice of Apprenticeship in Early Modern England' (2012) 65(2) *Economic History Review* 556.

[4] We refer to the master in a contemporary master-apprentice relationship as 'Employee'.

[5] I am hesitant to characterize the living allowances as wages. That is because the living allowances were, from medieval times, not intended for the purpose of 'supporting a wife and three children in "frugal comfort"', but for personal

In general, apprentices are subject to the same level, if not more, control and supervision as employees.[6] They generally do the same work as employees in similar circumstances, plus a little more of training.[7] They do not receive wages like most employees but receive training and living allowances (akin to reduced wages[8]) in lieu. While apprentices, like employees, play an essential role in their employer's/master's businesses, they are not afforded the same protection or employment rights as employees. While there are a number of reasons for this, the most obvious reason is that if apprentices were afforded the same labour protections as employees, there will be no

use; See *Ex Parte H V McKay* ('Harvester Decision') (1907) 2 CAR 1; *R v Barger* (1908) 6 CLR 41. Notwithstanding, it is open to the Court to find that moneys paid to apprentices are wages for the purpose of 'supporting a wife and three children in "frugal comfort".

[6] Eg, Employees in common parlance and within meaning of the *Fair Work Act 2009* (Cth).

[7] Eg of such recognition: Neil Foster, 'Personal civil liability of company officers for company workplace torts' (2008) 16 *Torts Law Journal* 20, 43-4, 43 (n 138); Richard Johnstone and Therese Wilson, 'Take me to your Employer: The Organisational Reach of Occupational Health and Safety Regulation' (2006) 19 *Australian Journal of Labour Law* 59, 60-1.

[8] See footnote 5. For the same reasons I am hesitant to characterize this as 'reduced wages'. There is a principle in scientific inquiry called "Occam's Razor" which posits that the simplest explanation that fits the facts is preferred to a more complicated one. To follow the simplest or most apparent reason may be erroneous. It is easy to characterize these allowances as wages, especially when both are quantified by money and presumably used to support the apprentice. The distinction between 'allowances' and 'wages' here is the purpose it is meant or intended to fulfil. See generally, Chan Sek Keong, 'Judicial Review – From Angst to Empathy' (2010) 22 *Singapore Academy of Law Journal* 469, 474 [14]. Cf James Edelman, 'The Meaning of Loss and Enrichment' in Robert Chambers, Charles Mitchell and James Penner (eds), *The Law of Unjust Enrichment* (Oxford University Press, 2009) 211, 211-2.

incentive for businesses to hire and train apprentices.[9] Implicit in this is the recognition that there is a wage-subsidy paid to businesses by apprentices, in the form below-minimum-wage labour,[10] and the foregoing of certain rights,[11] eg: minimum wage, and rights of standing to remedies of unfair dismissal and breaches workplace rights.

A significant employment right not afforded to Apprentices is the right to seek recourse for denied contractual benefits in WA's system of industrial law under the *Industrial Relations Act 1979* (WA). Traditionally, apprentices were not regarded to be in a relationship 'of service' with their employer. They are regarded to be in a special relationship of master-servant, which falls outside the contractual relationship 'of service'.[12] Courts have been quick to place these relationships outside the range of known definitions of employment.[13] Quite frequently, the Courts have held that no contract (of service) existed between apprentices (trainees) and their employers. This is largely because apprentices and trainees were not hired to do work as 'employees, but engaged to train in … practices and …

[9] Stephen Kikiros, 'Dichotomy or Trichotomy? Defining Employees and Independent Contractors in an Evolving Market' (2019) 45(1) *University of Western Australia Law Review* 158, 160.

[10] Ibid.

[11] James Penner, 'Aristotle, Arendt, and the Gentleman: How the Conception of Remuneration Figures in Our Understanding of a Right to Work and Be Paid', in V Mantouvalou (ed), *The Right to Work: Legal and Philosophical Perspectives* (Hart, 2014) 87.

[12] William Wedderburn, *The Worker and the Law* (Pelican Books, 3rd ed, 1986) 120.

[13] Ibid 119.

gain working experience'.[14] While some statutory provisions have expanded scope of 'contract of service' to include contracts such as those pertaining to apprenticeships and on-the-job training,[15] this is not the case with the WA system of industrial law – the *Industrial Relations Act 1979* (WA). There is a large degree of uncertainty in Western Australia. It is unclear whether apprentices are 'employees' under the state system of industrial law. Without a 'contract of service' recognized under the IR Act,[16] apprentices and trainees are unable to make a claim of denied contractual benefits under the WA system of industrial law.

This meant that if apprentices and trainees were dismissed and owed unpaid entitlements, or unfairly dismissed, they may not have recourse to justice under the WA system of industrial law. This has very unjust consequences. An apprentice or trainee who is dismissed, unfairly treated and constructively dismissed, or otherwise unfairly dismissed, does not complete his or her training contract, and will face difficulties gaining employment. In instances of unfair dismissal for alleged misconduct, this can put a mark on the apprentice's or trainee's

[14] Ibid 119-20; See also *Wiltshire Police Authority v Wynn* [1980] ICR 649, 656; *Hawley v Fieldcastle* [1982] IRLR 223; *Daley v Allied Suppliers* [1983] IRLR 14; *Glasgow City D C v McNulty* (1984) 251 IRLIB 11; See also, *Horan v Hayhoe* (1904) 1 KB 288.
[15] Eg, *Workers' Compensation and Injury Management Act 1981* (WA) s 5 'worker'; LexisNexis, *Halsbury's Laws of Australia* (online at 31 July 2019) Workers' Compensation, '(2) Person's entitled to workers' compensation – Western Australia' [450-12200].
[16] *Industrial Relations Act 1979* (WA) ('**IR Act**') s 29(1)(b).

reputation,[17] who by 'reason of his [or her] being dismissed during his [or her] apprenticeship with a slur on his [or her] character, naturally would experience a greater difficulty in getting employment elsewhere'.[18] The state system of industrial law may not allow them an opportunity to take any legal action, nor challenge an unfair dismissal or unsubstantiated claim of misconduct.

Recently, there has been an emerging trend of case law which suggests that Apprentices may be (re)characterised as being both apprentices/trainees and employees. Notwithstanding the formalist or positivist distinctions between 'employees' and 'apprentices', or that the intention was for the employer and apprentice to enter into an employer-apprentice or master-apprentice relationship (one of work-for-training relationship, and therefore not 'of service'), Australian Courts have been willing exercise judicial creativity to find that an agreement/contract of service exists to do justice.[19] It reflects a shift in jurisprudence, that law and society had developed from status to contract.

[17] Eg, *Maw v Jones* (1890) 25 QBD 107, 108-9 (Lord Coleridge CJ).
[18] Ibid.
[19] Kikiros (n 9) 160-1; Timothy Jones, 'Judicial Review and Codification' (2000) 20 *Legal Studies* 517, 529. cf R C J Cocks, *Sir Henry Maine: A Study in Victorian Jurisprudence* (Cambridge University Press, 1988) 61: In recent times, the Courts have been willing to look away from broad generalizations of the status of the parties and focus instead on the contractual relationship. See also Henry Maine, *Ancient Law* (JM Dent & Sons, 1917) 179.

III *Statutory Framework*

Under the s 29(1)(b) of the *Industrial Relations Act 1979* (WA) (**IR Act**), an industrial matter claim may be referred to the Western Australian Industrial Relations Commission (WAIRC) by an *employee* that[20] —

[20] IR Act s 7 defines 'apprentice', 'employee', and 'industrial matter' as:

> **apprentice** means a person who is an apprentice under a training contract registered under the Vocational Education and Training Act 1996 Part 7 Division 2.
>
> **employee** means — (a) any person employed by an employer to do work for hire or reward including an **apprentice**; or (b) any person whose usual status is that of an employee; or (c) any person employed as a canvasser whose services are remunerated wholly or partly by commission or percentage reward; or (d) any person who is the lessee of any tools or other implements of production or of any vehicle used in the delivery of goods or who is the owner, whether wholly or partly, of any vehicle used in the transport of goods or passengers if he is in all other respects an employee; and generally does not include persons engaged in domestic service in a private home.
>
> **industrial matter** means any matter affecting or relating or pertaining to the work, privileges, rights, or duties of employers or employees in any industry or of any employer or employee therein and, without limiting the generality of that meaning, includes any matter affecting or relating or pertaining to —
>
> (a) the wages, salaries, allowances, or other remuneration of employees or the prices to be paid in respect of their employment;
>
> (b) the hours of employment, leave of absence, sex, age, qualification, or status of employees and the mode, terms, and conditions of employment including conditions which are to take effect after the termination of employment;
>
> (c) the employment of children or young persons, or of any person or class of persons, in any industry, or the dismissal of or refusal to employ any person or class of persons therein;
>
> (ca) the relationship between employers and employees

> (i) has been harshly, oppressively or unfairly dismissed from his employment; or
>
> (ii) that he has not been allowed by his employer **a benefit**, not being a benefit under an award or order, to which he is entitled **under his contract of employment**.
>
> (emphasis added)

An apprentice is semantically an *employee* for the purposes of the IR Act,[21] and has standing to refer an industrial matter to the WAIRC. However, for an apprentice to make a claim under

> (d) any established custom or usage of any industry, either generally or in the particular locality affected;
>
> (e) the privileges, rights, or duties of any organisation or association or any officer or member thereof in or in respect of any industry;
>
> (f) in respect of apprentices, these additional matters —
>
> (i) their **wage rates** and, subject to the Vocational Education and Training Act 1996 Part 7 Division 2, other conditions of employment; and
>
> (ii) the wages, allowances and other remuneration to be paid to them, including for time spent in performing their obligations under training contracts registered under the Vocational Education and Training Act 1996 Part 7 Division 2, whether at their employers' workplaces or not; and
>
> (iii) without limiting subparagraphs (i) and (ii), those other rights, duties and liabilities of them and their employers under such contracts that do not relate to the training and assessment they are to undergo, whether at their employers' workplaces or not;

[21] IR Act s 7 'employee'.

s 29 of the IR Act, his or her claim must arise from dismissal from his contract of service or denied benefits to which he or her is entitled to under his contract of service.

Under s 60A of the *Vocational Education and Training Act 1996* (WA) (**VET Act**), an apprentice is defined as a 'person who is named in a training contract as the person who will be trained under the contract, whether the person is termed an apprentice, a trainee, a cadet, an intern or some other term'. A training contract is defined to mean 'a contract that complies with [VET Act] section 60E'.[22] Thus, a person who has a training contract that complies with s 60E VET Act is an apprentice,[23] who is also an employee under the IR Act who may have recourse to the WAIRC if his or her claim relates to an 'industrial matter' which arises from his or her training contract, and his or her training contract is a 'contract of service'.[24]

Can an apprentice's training contract be properly characterised as a 'contract of service'? Can apprentices bring a claim under

[22] VET Act s 60A.

[23] In Western Australia, a contract which purports to be one of apprenticeship, but does not comply with s 60E VET Act is not a valid contract of apprenticeship at all. There are no *common law apprenticeships* in Western Australia. Notwithstanding what might otherwise be characterised as a "common law contract of apprenticeship", Lucev J in *Fair Work Ombudsman v D'Adamo Nominees Pty Ltd (No.4)* [2015] FCCA 1178, at [129]-[132] held that WA State law overrode that "common law contract of apprenticeship", and deemed the "notional apprentice" not to be an apprentice at all, because of a failure to comply with the *Industrial Training Act 1979*.

[24] See *Martin v Wildflower Electrician and Refrigeration Services Pty Ltd* [2019] WAIRC 00232.

the IR Act? There are currently no appellate Western Australian authorities or precedent to support the proposition that apprentices are 'employees' or hold a 'contract of service'. However, rules of statutory interpretation and precedent from other Australian States and the Federal Court appear to support this proposition as being the law extant in Western Australia.

IV *Is a Training Contract a 'Contract of Service'?*

The central enquiry here is whether a training contract is also a contract of employment, a collateral contract of service, a contract which incorporated the apprentice being an employee of the employer, or at least contain a term of service.

A *Training Contracts are Capable of Contemplating Separate Obligations of Training and Service*

The VET Act provides that a contract is a training contract when it complies with s 60E of the VET Act.[25] The words of section 60E does not exclude an apprentice from being engaged in employment. In fact, a training contract is one that is capable of contemplating both training as well as employment. A

[25] VET Act s 60A.

training contract is one which the employer agrees to do all of the following:[26]

> (i) that a person who is or will be an employee will be **employed while he or she fulfils the requirements of the contract in order to obtain a class A or class B qualification**; (ii) to train the employee in accordance with the contract; (iii) to permit the employee to fulfil his or her **obligations under the contract** and **to be trained and assessed in accordance with the contract**; (iv) that any time spent by the employee in performing his or her obligations under the contract and in being trained and assessed under the contract, whether at the employer's workplace or not, is to be taken for all purposes (including the payment of remuneration) to be time spent working for the employer;
>
> (emphasis added)

In particular, the words of section 60E(1)(a) provides that the employer agrees to 'permit the employee to fulfil his or her *obligations under the contract* and *to be trained and assessed in accordance with the contract*'. This contemplates training and doing work for the benefit of the employer (host company) as separate obligations. A training contract is one that has at the statutory minimum, terms that contemplate both training and employment obligations. An apprentice who holds a training contract, is thus both under a contract of service,[27] where he or she will do work for the benefit of the employer, and

[26] Ibid s 60E.
[27] Ibid s 60E(1)(a)(i).

simultaneously under a contract of apprentice, where he or she will be trained by the employer.[28]

Under s 29 of the IR Act, an *employee* may bring an *industrial matter claim*, where *inter alia* the *employee* has been denied a benefit under his or her *contract of employment*. Here the definition of *employee* under the IR Act includes 'apprentices'.[29] Crucially, the definition of 'industrial matter' in s 7 of the IR Act refers to both 'wages, allowances and other remuneration' to be paid under a training contract registered under the VET Act, and 'those other rights, duties and liabilities of them and their employers under such contracts that do not relate to the training and assessment they are to undergo, whether at their employers' workplaces or not'.

If we apply the established rules of (purposive) statutory construction to these Acts, and construe s 29 of IR Act so that it is 'consistent with the language and purpose of all the provisions of the statute[s] (both IR Act and VET Act)'[30] and 'strive to give meaning to each word of the provision' in context of both the IR Act and VET Act,[31] there is clear statutory support for the propositions that disputes arising out of a training tontract (registered under the VET Act) is an *industrial matter*, a training contract is a *contract of employment* under the IR Act, and consequently, disputes

[28] Ibid s 60E(1)(a)(iii).
[29] IR Act s 7.
[30] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381-2 (McHugh, Gummow, Kirby and Hayne JJ).
[31] Ibid 382.

arising out of a Training Contract should be justiciable under the IR Act.[32]

Corollary, for the purposes of the IR Act, there is clear statutory support for the propositions that an apprentice is an *employee* and an apprentice's training contract (registered under the VET Act) can be characterised as being wholly or collaterally a contract of employment (and of service).[33]

B *VET Act is in pari materia with other Apprenticeship Acts in Australia*

In the New South Wales case of *Shaw*,[34] Basten JA, quoting the purpose of the *Apprenticeship and Traineeship Act 2001* (NSW) (**AT Act**), recognised that a training contract may have provisions contemplating employment and can be regarded as a contract of service, at least for the purpose of extending employee protections to apprentices:[35]

[32] Law is and should be a 'body of social rules prescribing external conduct and considered justiciable': Hermann Kantorowicz, *The Definition of Law* (Cambridge University Press, 1958) 76-9.
[33] Such recognition is consistent with the approach taken in respect of determining the ownership of copyright of works created by apprentices in the *Copyright Act 1968* (Cth) s 17: 'For the purposes of this Act, … the employment of a person as an apprentice, under a law of the Commonwealth or of a State but otherwise than under a contract of service or contract of apprenticeship shall be treated as if that employment were employment under a contract of service or employment under a contract of apprenticeship, …'.
[34] *Shaw v Bindaree Beef Pty Ltd* [2007] NSWCA 125.
[35] Ibid, [122].

> The purpose of the definition of "employee" in the 2001 Act is probably to ensure that trainees, like apprentices, are not excluded from protections available to employees and may thus be applied generally and not just within the 2001 Act.

The Western Australian VET Act when read with the IR Act can be said to achieve a similar purpose as the New South Wales AT Act:

> to provide for people, such as apprentices, to be trained for some occupations under training contracts with employers (VET Act s 4(g)) to provide a system of fair wages and conditions of employment (IR Act s 6(ca)) to facilitate the efficient organisation and performance of work according to the needs of an industry and enterprises within it, balanced with fairness to the employees in the industry and enterprises (IR Act s 6(af)).

Corollary, it is open to the Western Australian Courts to adopt the approach of the New South Wales Court of Appeal.

C *Traditional Common Law Position Untenable*

As a general rule in the law of master and servant (law of servitudes), the traditional position is that if the parties appear to have contemplated the relation of master and apprentice, then the contract must be considered as one of apprenticeship. If it be an imperfect apprenticeship it cannot be treated as a contract of hiring and service. If on the other hand it appears

that the parties contemplated the relation of master and servant, then it must be deemed a contract of hiring and service.[36]

In Western Australia in the present day, the traditional position is no longer tenable. It is necessary to look at the relevant legislation pertaining to Industrial and Workplace Relations.[37]

In *Richardson,*[38] the court held that WA State law overrode the concept of "common law contract of apprenticeship". In *D'Adamo*,[39] the Federal Court adopted a similar approach. The Federal Court held that a contract that purports to train a person is not a training contract under the VET Act if it does contain the statutory minimum conditions in s 60E. It is a contract of common law apprenticeship.[40] Is not capable of being registered under the VET Act and is void ab initio.[41] Notwithstanding what might otherwise be characterised as a "common law contract of apprenticeship", WA State law overrode that "common law contract of apprenticeship", and deemed the "notional apprentice" not to be an apprentice at all, because of a failure to comply with the *Industrial Training Act* (since repealed and replaced by the VET Act).[42] The common

[36] *Horan v Hayhoe* (1904) 1 KB 288, as referred to in *Richardson v Sedemuda Pty Ltd (T/as South West Ceramics*) (1985) 65 WAIG 2229.
[37] As observed in *Richardson v Sedemuda* (n 36).
[38] Ibid; See also *Fair Work Ombudsman v D'Adamo Nominees Pty Ltd (No.4)* [2015] FCCA 1178, [130].
[39] *D'Adamo* (n 38) [129].
[40] Ibid.
[41] Ibid.
[42] Ibid, [130], referring to and affirming *Richardson* (n 35).

law position, as espoused in *Horan* and similar cases, is not the law in Western Australia.

Apprenticeships are regulated under the VET Act. Insofar as constructional choices properly open, a construction should be preferred which is consistent with the purpose of the VET Act. Consequently, it is open to the Courts to follow the authority of *Shaw* where appropriate (See Part IV.B). The following cases support the construction that training contracts are contracts of service or contain a collateral contracts of service.

D *Cases Supporting Proposition that Training Contracts are 'Contracts of Service'*

1 *Shaw v Bindaree Beef Pty Ltd*

The New South Wales case of *Shaw* provides some guidance on whether a 'training contract' is a 'contract of employment'.[43] The NSW Court of Appeal held that apprentices are 'employees' within meaning of NSW Apprenticeship legislation. In *Shaw*, the Appellant submitted that the AT Act established particular kinds of contract, a training contract and a traineeship contract, distinct from a contract of employment because it directed not to the employee working for the benefit of the employer but to the employer

[43] *Shaw* (n 34).

training the employee and the employee receiving the training as a teaching/learning process. This argument was rejected by Giles JA (with whom Spiegelman CJ agrees).

Giles JA held that the terminology used to describe an apprenticeship contract ('Training Contract') does not exclude a finding that it is, in reality, a contract of employment. A training contract, while it contains primarily terms for the apprentices' training, is also capable of sustaining terms of employment:[44]

> 'compliance with the [AT] Act would ordinarily mean that a training contract and a traineeship contract were in writing, **but that does not exclude a finding that in reality the employer under the contract was an entity other than that stated in the writing**. It is necessary first to identify the contract, including the person who under the contract is the employer of the trainee. The definition of "employer" takes its content from that identification, not from a name written in the application to which s 7 of the [AT] Act refers. I recognise that this means that on occasions the Commissioner or Tribunal may approve or dismiss an application for establishment of a traineeship on a false basis, **but I do not think that negates regard to the trainee's true employment relationship**.
>
> (emphasis added)

Basten JA did not rule on this issue. However, implicit in His Honour's opinion is that a training contract relationship

[44] Ibid, [66]-[67].

between the employer and apprentice may involve a 'contract of service', albeit in obiter.[45] His Honour also held that there may be circumstances where a training contract will not involve employment or an apprenticeship. However, a feature of such cases is that a potential employer pays the costs of the cadet or trainee to undertake full-time study in circumstances where there is no contract of service nor on the job training.[46] That, however, was not the case here.

Because the AT Act is *in pari materia* with the VET Act in relation to the definition of a training contract, *Shaw* provides valuable guidance in determining if a training contract is a contract of service, and provides ample support for the proposition that an apprentice's training contract is a contract of service.

2 *Coxon v Kat*

In *Coxon v Kat*,[47] Bleby J of the South Australian Supreme Court (with whom Duggan and White JJ both agree) adopted a similar approach as that expressed in *Shaw*. At common law, there is a distinction between a contract of service and a contract of apprenticeship depending on whether the primary

[45] Ibid, [121].
[46] Ibid, referring to *State Planning Authority (NSW) v Nash* [1974] 1 NSWLR 684.
[47] *Coxon v Kat* [2009] SASC 28.

purpose of the contract is the performance of work for the master or the teaching of a trade.[48]

Accordingly, a contract is either one or the other. However, His Honour noted that it was never suggested that there could be two contracts in parallel — a contract of employment and a separate contract of apprenticeship. It follows then, that a contract of apprenticeship could always provide, as a secondary purpose, for the performance of work or service for the employer such that the apprentice was also an employee.[49] Bleby J, agreeing with Morgan P in *Junior Constables*, held that apprentices are 'clearly employees',[50] and 'the fact that an apprentice (or other person) is performing duties under a contract, the primary purpose of which is to teach that person an occupation, does not prevent that person from being an employee.[51]

Bleby J went on to analyse the *Vocational Education, Employment and Training Act 1994* (SA) ('**VEE&T Act**'). His Honour held that it does not follow that the apprentice has a separate contract of employment. Contracts of apprenticeship or contracts of training, as they are now known under the VEE&T Act, are carefully regulated under that Act. His Honour observed that ss 30 and 32 of the VEE&T Act that

[48] Eg, *Wiltshire Police Authority v Wynn* [1981] 1 QB 95.
[49] *Coxon* (n 47) [19], referring to *Junior Constables Case* (1943) 17 SAIR 334).
[50] *Coxon* (n 47) [20].
[51] Ibid, [21].

contemplate employment concurrently with training.[52] His Honour further observed that Part 4 of the VEE&T Act were replete with the language of a contract of employment or service.[53]

Sections 60A and 60E of the VET Act (WA) is *in pari materia* with sections 30 and 32 of the VEE&T Act which contemplates employment concurrently with training. Reasoning by analogy, those sections of the VET Act can also be said to be replete with the language of a contract of employment or service.

In most employer-apprentice relationships, there is only one contract between them – the Training Contract. Bleby J held that the training contract, as required by the VEE&T Act, requires that the employer both employ and teach and instruct the trainee.[54] This requirement is also present in s 60(1)(a)(i) of the VET Act (WA). Consequently, an apprentice who holds a training contract, for the purposes of WA Law, can be characterised as an employee with employment obligations under his or her training contract. Following *Coxon*, an apprentice employed in WA could have recourse to the WAIRC.

[52] Ibid [22], [23], [25].
[53] Ibid [24].
[54] Ibid [26].

3 *Fair Work Ombudsman v D'Adamo Nominees Pty Ltd (No.4)*

D'Adamo considered the law of apprenticeships in Western Australia.[55] Following the position in *Richardson*, The Federal Court held that the state industrial law (then the *Industrial Training Act* – now repealed and replaced by the IR Act) overrode the concept of 'common law contract of apprenticeships'.[56] There are no 'common law apprentices', only apprentices under the VET Act, whose training contracts are registered under the VET Act.[57]

D'Adamo considered apprentices to be employees under a contract of service. The Federal Court observed that the *Industrial Training Act 1975* (WA) (replaced by VET Act), following *Richardson*, represent:[58]

> an attempt to codify the law relating to apprentices in this State subject only to the limited authority given to the Industrial Relations Commission in respect of the matters last referred to. The whole of the legislative history in relation to apprentices and apprenticeship has proceeded on the assumption that **an apprentice is properly to be regarded as a person working under a contract of service with his master**. There is no longer any scope for the consideration of an apprenticeship outside of the law as declared by the IT Act.

[55] *D'Adamo* (n 38).
[56] Ibid [130].
[57] Ibid [132].
[58] Ibid [131], referring to *Richardson* (n 36) 430.

The Federal Court also observed that in *CFMEU v Master Building*, apprentices were required to enter into contracts of training as an express terms of their contracts of employment to attend trade school.[59] This, in the Federal Court's view, supports the proposition that a Training Contract can be both a contract of training and a contract of employment.[60] The Federal Court also clarified that while the common law position espoused in *Horan* is no longer the law in Western Australia. This imperfect relationship of master and apprentice is now, by the operation of the VET/IR Acts, classified as both of employment and of apprenticeship.

The Federal Court also made a few significant observations, which supports the proposition that an apprenticeship can give rise to a contract of employment, or, at least, a contract which incorporated the apprentice being an employee of the employer (host company):[61]

> (a) the authorities: *Rowe – Federal Court*; *Australian Railways Union*; *South West Ceramics* [*Richardson*] and *Coxon*, show that in Australia apprentices have historically been considered to be employees, or, at least, in an employment relationship;

[59] Ibid, [133], referring to *Construction Forestry Mining & Energy Union (Construction & General Division) v The Master Builders Group Training Scheme Inc* [2007] FCAFC 165.
[60] Ibid, referring and following *Australian Railways Union & Ors v Public Transport Corporation (Vic) & Ors* (1993) 47 IR 119, 129; *Coxon v Kat*; *Rowe v Capital Territory Health Commission* (1982) 62 FLR 383, 403 (affd' Rowe v Capital Territory Health Commission (1982) 2 IR 27).
[61] *D'Adamo* (n 38) [143].

(b) the history of apprenticeships in Western Australia under the *IA Act* and the *IR Act* shows that apprentices have been deemed to be employees in Western Australia for more than a century;

(c) the *IT Act* expressly provides that apprentices are employees, and in that respect goes further than the *VET (SA) Act* considered in *Coxon*, which nevertheless found that apprentices were employed;

The Federal Court was seemingly also of the opinion that in training contracts, a contract of training as a term of the training contract is ancillary to the contract of service in the training contract. If, for whatever reason an apprenticeship arrangement is void ab initio (eg, training contract unregistered, or is unregistrable because it had not been duly executed by all parties concerned, or does not comply with s 60E VET Act), the contract of service still remains in force.[62] A person who holds a Training Contract is thus capable of being both an apprentice (trainee) and an employee. There is strong persuasive authority in WA Courts and Tribunals for the proposition that an Apprentice's training contract is a contract of service, or at least, contains a contract of service.

[62] Ibid, [181]-[182].

4 *Martin v Wildflower (WAIRC)*

In *Martin v Wildflower*, Senior Commissioner McKenna of the WAIRC observed that, consistent with *Richardson*[63] and *D'Adamo*,[64] the common law position of apprenticeship has been altered by statute. An apprentice is an employee, and corollary holds a contract of service.[65]

Senior Commissioner McKenna observed that the position in *Coxon* is law in Western Australia. The VEE&T Act (SA) is *in pari materia* with the VET Act (WA).[66] The issue which *Martin* adjudicated upon was whether an independent contractor could also be an apprentice.

The WA IRC found that an independent contractor cannot also be concurrently an apprentice for the purposes of a training contract under s 60E of the VET Act, because of the differences in the level of instruction, control and oversight required in an apprenticeship arrangement.[67] However, *Martin* left open the conclusion that an apprentice could also be an employee under the VET Act.

Following *Coxon*, the WAIRC held that an apprentice could also be an employee.[68] This likely because of the consistency

[63] *Richardson* (n 36).
[64] *D'Adamo* (n 38).
[65] *Martin* (n 24) [19].
[66] Ibid, [20].
[67] Ibid, [23].
[68] Ibid, [25].

in the level of instruction, control and oversight between arrangements of employment and of apprenticeships.[69]

V *Conclusion*

At common law (in all States except Western Australia, where a cloud of uncertainty overhangs),[70] apprentices have been held to be employees. The Courts of various Australian States and the Federal Court have been willing to move away from general status-based characterizations of labour relations,[71] and to recharacterize based on the salient contractual features of the apprenticeship relationship and recognize that within an apprenticeship, there can exist, as a matter of law, a relationship of service and employment.[72] However, whether an apprentice really is an employee, in fact, depends on a number of salient factors of the employment relationship: *inter alia*, the scope of

[69] Cf Independent Contractors; Cf *Martin* (n 24) 23.
[70] Law common to the commonwealth realm, made by judges; See M.D.A Freeman, *Lloyd's Introduction to Jurisprudence* (Sweet & Maxwell, 7th ed, 2001) 1; Hans Kelsen, *General Theory of Law and State* (Harvard University Press, 1946) 113-4; Michelle Sanson, David Worswick and Thalia Anthony, *Connecting With Law* (Oxford University Press, 2009) 164, 260; Christopher Weeramantry, *An Invitation to the Law* (Butterworths, 1982) 45-6, 50-52, 183, 265-71, 284.
[71] Maine (n 19) 179.
[72] Ibid.

his or her obligations and the specific terms of his or her contract.[73]

As the cases in Part IV above have shown, there are strong persuasive precedent for the Western Australian Courts to fulfil and affirmatively rule that apprentices are also employees of their employer (host company).[74] For a claim at the WAIRC to be brought, the denied contractual benefit must arise from a term in the training contract. There is strong persuasive authority that an apprentice's training contract under the VET Act would also constitute a contract of service or contain within it a collateral contract of service. The historic common law position in *Horan*[75] which has regarded imperfect relationship of training and service in apprenticeships as solely that of training is no longer law in Western Australia.

The law in Western Australia, as recognized by the Courts of other Australian States, The Federal Court and the statutory WAIRC body, has at least for the last century, recognized that a training contract are arrangements of both training and service. From a socio-legal perspective,[76] this is as good as

[73] The multi-factor test in *Stevens v Brodribb Sawmilling Company Pty Ltd* (1986) 160 CLR 16. Law is necessarily vague. See eg, Timothy Endicott, 'Law is Necessarily Vague' (2001) 7 *Legal Theory* 379, 380-4.
[74] Rupert Cross, *Precedent in English Law* (Oxford University Press, 2nd ed, 1968) 146, 176-8, 181-190, 211-6. See Neoh (n 78).
[75] *Horan* (n 36).
[76] See generally, Hans Kelsen, *General Theory of Law and State*, tr Anders Wedberg (Russell & Russell, 1961) vii-x, xi; Eugen Ehrlich, *Fundamental Principles of the Sociology of Law*, tr Walter Moll (Harvard University Press, 1936) 391-2. In Ehrlich's view, common norms and attitudes should be regarded as law.

saying that this is the law in Western Australia. From a formalist and positivist perspective of the law, this is strong evidence that this is the law extant in Western Australia.[77]

Consequently, an apprentice should be able to make a s 29(1)(b) claim at the WAIRC for denied contractual rights arising out of his or her training contract.

This, however, has not been tested in the appellate courts in Western Australia. However, it is open (and strong persuasive authorities support this) to the Western Australian Courts to follow and fulfil precedent,[78] and develop the law in comity with other Australian jurisdictions.[79] As Ronald Dworkin posits, 'questions of law can always be answered by looking in the books where the records of institutional decisions are kept'.[80] As such, Western Australian Courts should positively

[77] See especially, *D'Adamo* (n 38); See also, Michael Zander, *The Law-Making Process* (Butterworths, 4th ed, 1994) 285-9; See generally, Laurence Goldstein, 'Four Alleged Paradoxes in Legal Reasoning' (1979) 38(2) *Cambridge Law Journal* 373; P J Evans, 'The status of rules and precedent' (1982) 41(1) *Cambridge Law Journal* 162; Peter Aldridge, 'Precedent in the Court of Appeal' (1984) 47(2) *Modern Law Review* 187; HLA Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) 103-5, 108.

[78] Judges as fulfillers, not followers, of precedent; See specifically, Joshua Neoh, 'The Rhetoric of Precedent and Fulfillment in the Sermon on the Mount and the Common Law' (2016) 12(2) *Law, Culture and the Humanities* 419, 419, 420, 437-9 (n 99), 441-4; See generally, Anthony Kronman, 'Precedent and Tradition' (1990) 99 *Yale Law Journal* 1029. cf Timothy Endicott, 'Are There Any Rules?' (2001) 5 *Journal of Ethics* 199, 203-4.

[79] Timothy Endicott, 'Comity Among Authorities' (2015) 68 *Current Legal Problems* 1, 3-11, 17-20.

[80] Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) 7; Paul Kahn, *Making the Case: The Art of the Judicial Opinion* (Yale University Press, 2016) 106-8.

recognize that an Apprentice's training contract are capable of being arrangements of both training and service. This will positively give rights to Western Australian apprentices and enable them to pursue justice. Such a conclusion closely 'fits'[81] with established precedent and is consonant with accepted custom of developing the law by natality,[82] incrementalism[83] and established principles of justice.[84]

[81] An apt elaboration of the word 'fit' can be found in Gaudron and McHugh JJ's opinion in *Breen v Williams* (1996) 186 CLR 71, [46]: 'Advances in the common law must begin from a basic line of accepted principle and proceed by conventional methods of legal reasoning, Judges have no authority to invent legal doctrine that distorts or does not extend or modify accepted legal rules and principles. Any changes in legal doctrine, brought about by judicial creativity, must "fit" within the body of accepted rules and principles. … In a democratic society, changes in the law that cannot logically or analogically be related to existing common law rules and principles are the province of the legislature. From time to tie it is necessary for the common law courts to reformulate existing legal rules and principles to take account of changing social conditions. Less frequently, the courts may even reject the continuing operation of an established principle. But such steps can be taken only when it can be seen that the "new" rule of principle that has been created has been derived logically or analogically from other legal principles, rules and institutions.'; See also, Edelman (n 8) 211 (n 2); Hart, *The Concept of Law* (n 74): 'rule of recognition'.

[82] Kahn (n 80) 108-17.

[83] Eg, *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 481 (Brennan J): 'reasoning incrementally and by analogy'; *Breen v Williams* (1996) 186 CLR 71, [46].

[84] Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977) ch 4; See also, Edelman (n 8) 211.

Igniting Change Regarding Body Image

Dr Marilyn Bromberg[♥]

How often have you felt bad about your body? That it does not conform to society's expectations about what it should look like? How many people do you know who dislike their bodies - who may spend considerable time dieting or exercising to modify their body? I often ask these questions of my audience when I speak about one of my main research topics: Body Image Law.

The number of people who raise their hands to the above questions often astounds and saddens me. It also inspires me to continue with this research. You may now be thinking - body image and law? What do the two have in common?

Many health researchers, such as Bury et al., found that when some people (particularly women) see images of people who are extraordinarily thin, they often compare themselves to the images. If they think that they are larger than the image that they see, this can result in them developing poor body image. In turn, the poor body image can result in eating disorders.

The images of the kind that I just described are ubiquitous. They are hard to avoid unless you live under a rock (and chances are, these days, even if you live under a rock, you may

♥ Senior Lecturer, UWA Law School. The usual caveats apply.

also have a mobile phone under there with an NBN connection that you can use to access social media, which has countless images of unhealthily thin people).

The federal governments of two countries passed laws to address the proliferation of images of extraordinarily thin people. Israel was the first country to pass such a law. It passed a law that required models to have a minimum BMI to model. Also, if an image is modified to make the model appear slimmer, the image must have a warning on it that states that the image was modified. The law is civil. In contrast, France passed a Body Image Law that is criminal and states that models should maintain a healthy body weight and images must have a similar warning to that of Israel's.

There are problems with the Body Image Laws that were passed. For example, Paraskeva et al. found that a key part of the Body Image Laws, the warnings on images of models who are unhealthily thin, do not counteract the damage that seeing the images of the unhealthily thin models can create.

Australia does not have law in this area. It has a code of conduct that encourages using models who are a diverse array of sizes. Boyd and Moncrieff-Boyd found that this code is not being sufficiently implemented. Poor body image is a significant problem in Australia, as are eating disorders. Should the Australian Government pass a Body Image Law? Perhaps the impact of Israel and France's laws should be considered before forming an opinion. Answering this question could form a topic

for an interesting and important honours thesis in Law and Society.

Some argue that legislation is not the answer. That education is. That industry should solve this problem. Certainly, education and media literacy are necessary to improve body image. Industry should be on board as a solution, also. Industry chooses the models whose images the public sees. Perhaps legislation has a part to play, but what exactly? I do not know at this point in time.

I started writing about Body Image Law in 2014. Israel passed its Body Image Law around that time. Since then, there have been changes in this area. For example, I have seen the rise of 'fitspo' – the idea that women should have fit and strong bodies, as opposed to unhealthily thin ones. 'Fitspo' images are increasingly common online and in print magazines. However, Slater et al. found that such 'fitspo' bodies are normally bodies of unhealthily thin people with muscles and that seeing these images does not help with body image issues.

There is also the rise of the body positivity movement, which encourages people to have positive body image. There are countless grassroots body positivity actions that people are undertaking to help improve body image. Slater et al found that messages of compassion toward bodies can help women's body satisfaction. That is one reason why, in 2017, I started a body positivity Facebook page with others, @beautyisonlyphotoshopdeep with the aim of improving body image. I post positive messages, images, articles and research

about this area generally. UWA Law graduate, Grace Ritter, started a body positivity project herself, Weigh Free May, https://www.weighfreemay.com/, a fantastic project encouraging people not to weigh themselves during the month of May.

One of the many reasons why I love researching this area is because it can have a positive impact on an important problem faced by many – including some people who I know personally. I encourage you, if you can, to pursue work in an area in which you can truly make a difference. Law is a useful tool to help you.

Evaluating the Operation of Indigenous Land Usage Agreements in Australia

Shamina Rozario♦

I *Introduction*

Indigenous Land Use Agreements (ILUAs), provide a semblance of good faith workings between native title holders and non-native title parties, except a deeper analysis into the nature of these agreements, and the machinations concerning how they manifest and at what cost, needs further critical perusal. This article puts forth five fundamental issues with ILUAs.

Firstly, Non-native parties often fail to recognize systemic, ecological complexity and how land can rarely be viewed in isolation from another part of nature. *Secondly*, ILUAs signed by Indigenous representatives are often undemocratic. *Thirdly*, the promise of immediate compensation given by a party to a native title holder can be a coercive method of dealing. *Fourthly,* compensation given to the Indigenous in exchange for a relinquishment of their rights is not done on an equitable basis. *Lastly*, native title holders are forced to operate within a statutory that is fundamentally at odds with them.

♦ 1st year Juris Doctor Student. The usual caveats apply.

II *Non-native parties fail to recognize how land can rarely be viewed in isolation from nature*

According to Soraya Pradhan, ILUAs often lack a meaningful, equitable and positive basis; they fail to allow native communities to participate in negotiations, specifically concerning accessibility to land, social management and environmental oversight.[1] The ecological impacts of poorly structured ILUAs are points of criticism, especially when one considers the importance of the land in that it is fundamentally at the heart of Indigenous culture. ILUAs often do not comprehensively oversee the complexity of ecology, in that areas of land cannot be viewed in isolation from other areas. Mining effluvia for example, often permeates the air, land and water and leaches into surrounding areas the party in question is not entitled to. The ramifications of land development, when done without proper ecological foresight, can have drastic effects on land – this includes land that has not been subject to an ILUA, and land the Indigenous have native title to, which further hinders them economically, socially, culturally and environmentally. This is an issue that is often overlooked in ILUAs and excluding the Indigenous from the process of ecological negotiation is in essence, irresponsible dealing that does not demonstrate adequate or holistic care for the environment.

[1] Soraya Pradhan, 'A review of the effectiveness of indigenous land usage agreements' (Conference Paper, Australasian Council of Undergraduate Research, 27-28 September 2017) 78, 82.

III *ILUAs signed by Indigenous representatives are often undemocratic*

Is it not ethically questionable to allow ILUAs to be signed by Indigenous representatives or senior traditional owners who are asked to sell their land on behalf of all the native title claimants and extended Indigenous community, both at present, and also the future? The Indigenous community is subject to its own heterogeneity and social complexity,[2] making the ILUA process (that involves one or few representatives of an Aboriginal community) problematic, as the outcome of these agreements may not result in a situation that is supported by the community at large. The social dynamics within the Indigenous community is such that may result in an ILUA being signed, which is not wholly representative of the community at large. If the agreement asks the Indigenous community to relinquish a right to land, does a representative at the current moment have the right to relinquish the title of property belonging to a collective culture – property that belongs to a culture in the present moment, in the past and potentially in the future? Why should an ILUA proceed when the majority of the community may not wish it to proceed, but cannot speak on the issue because the agreement does not make the Indigenous community at large, a party – only a representative, that is offered a financial benefit the community itself is not privy to?

[2] Danielle Campbell and Jane Hunt, 'Achieving broader benefits from Indigenous Land Use Agreements: community development in Central Australia' (2012) 48(2) *Community Development Journal* 197, 201.

IV *The promise of immediate compensation can be a coercive method of dealing*

Relinquishment of the value of permanent native title hardly equates to a short-term compensation, which further raises concerns over why short-term compensation is generally the kind being offered in ILUAs, which suggests financial compensation is a coercive and inducing means by which to satisfy an agreement. It is also especially coercive for this culture, given that 'Aboriginal people are the poorest and most disadvantaged sector of Australian society'.[3] Further, immediate financial compensation is likely to have a coercive effect insofar that native title holders will agree to terms they do not support, for example, clauses within an agreement that make it 'inapplicable' to negotiate in land use procedures; a euphemistic manner of suggesting native parties cannot intervene once operations are underway.[4] Further, a land base is often necessary for the Indigenous to be able to implement activities that better their economic and financial situation. A short-term compensation in exchange for a long- term relinquishment of rights to land, seems unjust, especially since this land could (if developed by the Indigenous themselves) foster long term economic benefits for this culture.

[3] Larissa Behrendt and Nicole Watson, 'Shifting Ground: Why Land Rights and Native Title have not delivered Social Justice' (2007) 8 *Journal of Indigenous Policy* 94, 101.
[4] Richard Bartlett, *Native Title in Australia* (LexisNexis, 3rd ed, 2015) 747.

V *Inequitable Compensation for the relinquishment of native title rights*

Consider the Argyle Diamonds' ILUA, a mining agreement formed in 2005. In essence, native title holders agreed to consent to and support the development of a mine on their land in exchange for financial benefits.[5] One might consider the $300 000 provided by the mine, and given to the Indigenous annually, to be a small payment in comparison to the financial profit the mine would make over the course of its operation. Campbell *et al* reiterates that the marginalization of the Indigenous people from mining wealth, particularly in the Pilbara region, exemplifies legalized, Indigenous exploitation.[6] Even if one was to consider these ILUA payments to be substantial and fair, at present, will it be significant enough to warrant ecological damage that is oftentimes irreversible? Can these compensations warrant a destruction of the land base the Indigenous could use for their own monetary development, if given an opportunity to foster their own culture on their own land? It is not good enough 'compensation' to offer the Indigenous money they already should have a right to, to further relinquish more of their rights. This injustice is reiterated by Behrendt when she states, 'why should Aboriginal people be expected to sell off their interests in land by leasing

[5] Ibid 746.
[6] Campbell and Hunt (n 2) 198.

it to other people when the federal government underspends on Indigenous health by $750 million?'.[7]

VI *Native title holders are forced to operate within a statutory framework that is fundamentally at odds with them*

An issue society must also reconcile with in order to provide land justice, is the legal hostility the Indigenous face in regards to proving connection with the land of a native title claim. In the *Noongar case*, the Court was particularly concerned with historical and oral evidence that would prove the Indigenous indeed, had native title to the land in question.[8] Because a significant portion of Indigenous culture is oral, and courts view the evidentiary value of written, physical evidence being superior to oral exchanges, it can be difficult for the Indigenous to prove native title. Furthermore, Indigenous cultures are often nomadic, and it is therefore difficult to legally prove this culture has occupied, overseen, or territorially claimed a space, if they have not physically lived in or developed that space for a time. This may bring to light further issues for the Indigenous, concerning adverse possession, and claimants of land or property. According to common law, claimants of property (such as land) must demonstrate an to claim that land, for example, by erecting fences or modifying the landscape.

[7] Behrendt and Watson (n 3) 99.
[8] Ibid 97.

Because some tribes are nomadic, and do not modify the land in a way that might indicate an intention to permanently occupy the space, it can be difficult for the Indigenous to operate effectively within a jurisdiction that is fundamentally built on different customs and frameworks of thinking in regards to property law, possession and rights. In short, the Indigenous have experienced, and will continue to experience issues in claiming native title, when the jurisdiction by which they must make a claim or prove title, is based on euro-centric principles.

VII *Concluding Remarks*

In nuce, to mitigate the negative implications of ILUAs in future, given the above detriments, it would be prudent to uphold Indigenous rights to negotiate, regarding current and future developments of land use, according to the *Native Title Act 1993* (Cth).[9] Furthermore, to alleviate environmental degradation and to protect native land, a more comprehensive ecological framework should be incorporated into agreements, to such degree that benefits the parties' values equally. It might prove a more equitable contract, if a third party, by law, can objectively oversee such agreements and evaluate the tenements in a way that upholds the values of both parties, equally. This third party should therefore be detached from both parties, or not financially connected with either parties'

[9] Bartlett (n 3) 748.

interests in order to evaluate the integrity of ILUAs effectively and fairly.

It is also imperative society understands that providing land back to the Indigenous is not a panacea.[10] A solution to Indigenous injustice never involves fostering a culture where corporations are exploiting the Indigenous and their right to land, or taking from them, their land base through ILUAs accommodating strictures not in accordance with the NTA. In assessing future ILUAs it may be beneficial to consider the fact that native land is an asset the Indigenous can develop and oversee for their own long-lasting benefit. It is also important to note that an ILUA is ironic in the sense that fundamentally, it claims to provide the Indigenous with beneficial compensation in the form of financial, social, educative and cultural benefits, however it counterintuitively comes at the cost of those very concepts – by removing the Indigenous from the right to their land, which they are financially, socially, academically and culturally dependent on. In assessing the operation of ILUAs in future and reconciling them with the NTA and the rights the Indigenous have to their land, it would therefore be vital to manifest them on the basis of Indigenous benefit, first and foremost, before corporate interests. Because policies are predisposed to favour political interests,[11] it may also be beneficial to restructure this system to create a more accommodating environment for the first people of this

[10] Behrendt and Watson (n 3) 102.
[11] Ibid 97.

country, instead of favoring corporations, lobbyists and politicians who may misconstrue the law for interests the law itself was never designed to uphold. It should instead work toward justice and certainty for all inhabitants of Australia.

Mental Health Law Centre (WA)

Heidi Rees♦

The difficulties facing persons suffering from a mental illness are undeniable, and for most, unimaginable. These difficulties are only intensified when that person becomes subject to either legislative orders that deny their capacity and prohibit their ability to make decisions for themselves, or legal proceedings that arise as a result of the mental health issues they are experiencing. The involvement in legal proceedings has an undeniable link to causing significant emotional stress on any person, and involuntary admission to hospital can feel overwhelming, unfair and unjust. For somebody suffering from a mental illness, their involvement in either involuntary treatment in hospital or the legal system (or sometimes, both) can create a complicated cycle of stress and anxiety with a number of ongoing consequences.

The Mental Health Law Centre of Western Australia (MHLC) is a state-wide community legal centre offering legal advice, representation and education for persons suffering from a diagnosed mental illness. The core focus of MHLC is to engage with those suffering from mental illness and provide support

♦Heidi is a Casework Paralegal, Mental Health Law Centre. This article outlines the work that the Centre does and the volunteer opportunities it offers to law students and post-graduate law students. The usual caveats apply.

and guidance to them when navigating through the complexities of the legal system.

MHLC is structured by a team of lawyers, administration staff and paralegals operating the Telephone Advice Line (TAL). The Telephone Advice Line is run by volunteer paralegals who are either completing or have completed a law degree. TAL paralegals conduct all initial intake with clients, conducting interviews to obtain the appropriate information required to open a matter and assign an appropriate lawyer. Paralegals also draft correspondence, court documents, draft legal advice for approval by a lawyer, and assist lawyers in communicating with clients to update them on their matters and schedule appointments. Volunteers who are completing their Practical Legal Training (PLT) are also given the opportunity to take on some of their own matters and engage in further casework under lawyers' supervision. With the approval of the Mental Health Tribunal, PLT paralegals are allowed to represent clients in MHT hearings.

I *The Mental Health Act*

The scope of the services provided by MHLC extend to a variety of areas in which those suffering from a mental illness may have difficulty accessing the legal system. Primarily this includes advising patients who have been admitted to hospital either voluntarily or involuntarily of their rights under the *Mental Health Act 2014* (WA) and representing them in review

of involuntary treatment orders. Subject to the Act, patients are entitled to have their involuntary treatment order reviewed periodically before the Mental Health Tribunal in order to determine whether the order they are on meets the legislative criteria and is the least restrictive treatment option available to the client. The Tribunal also holds jurisdiction to approve Electro-Convulsive Therapy (ECT) treatment of patients.

Receiving treatment for severe mental health issues can be daunting for our clients, and in most cases involves quite a significant restriction on a patient's personal freedoms. The role of the Mental Health Law Centre in these proceedings is to help explain the process to our clients so that they understand the process and are aware of their rights, and to provide a voice for them to express their views before the Tribunal, or advocate on the behalf of clients who may not be able to advocate for themselves.

Representation at Mental Health Tribunals is one of the key services provided by MHLC and is not a service that is highly accessible through other legal centres or private firms. Additionally, the nature of having a mental illness and being admitted into hospital for varied periods of time can have a significant impact on the financial status of our clients. Providing this as a free service enables access to the system for those who can't necessarily afford a private lawyer.

The assistance provided by the lawyers at MHLC extends beyond just an understanding of the legal principles involved in our client's matters, and requires an understanding of mental

health diagnoses, symptoms and psychosocial factors on mental health issues. This plays into the other areas of law for which MHLC provides advice, assistance and representation for.

II *Guardianship and Administration*

Pursuant to the *Guardianship and Administration Act 1990* (WA), persons who are deemed incapable of making personal or financial decisions in their own best interests, and who are vulnerable to exploitation, may have Guardianship or Administration orders imposed upon them, or in some cases both. These orders can vary in the extent to which they restrict a person's independent decision making and can have a significant impact on our client's everyday lives. The Mental Health Law Centre provides assistance for such matters at each stage of the process, including contesting initial applications for orders to be imposed, conducting merits reviews to determine whether there are grounds to apply for an early review of orders, or providing representation at scheduled periodic reviews before the State Administrative Tribunal. Reviews of Guardianship and Administration orders may result in the modification of the conditions of an order, appointment of a different guardian or administrator, or even a full revocation of the orders resulting in full independence being restored.

III *Criminal, VRO and MIARB Matters*

Another area in which MHLC offers assistance is for criminal offences that occur as a direct result of mental health issues. These can include offences under the *Criminal Code WA,* the *Road Traffic Act 1974* (WA) and the *Misuse of Drugs Act 1981* (WA). One of the key strengths of MHLC's assistance in this area is a strong understanding of the correlation of mental health issues and criminal offences, including those offences that occur within the process of receiving mental health treatment. Importantly, MHLC lawyers are able to demonstrate their understanding in highlighting some of the unique principles and circumstances that arise when mental health issues are present, and the importance of finding a sentencing outcome that takes into account the differing requirements to ensure long-term rehabilitation and prevention of re-offending. MHLC is able to provide advice and representation from the point of arrest through to sentencing or in some cases Trial. The MHLC also works very closely with the START Court sentencing program for those with mental health issues.

While these are the core areas in which MHLC is able to offer advice and representation, there are a number of other complex areas in which MHLC lawyers assist. MHLC can also provide representation for clients who are objecting to a Violence Restraining Order or Family Violence Restraining Order that has been brought against them. Additionally, our lawyers represent clients who are completing their sentences in their reviews before the Prisoners Review Board and Mentally

Impaired Accused Board (for clients subject to Custody Orders under the *Criminal Law (Mentally Impaired Accused) Act*.

IV *RUAH Centre*

The MHLC works closely with RUAH Community Service to offer a wrap-around psycho-social service for both legal matters and client's personal needs. The RUAH Centre operates in Northbridge as a drop-in support centre for people who are homeless, or are at risk of becoming homeless. The centre is open from 9am to 12pm every weekday, providing vulnerable people with access to food, showers, internet and telephone facilities as well as information and referrals to services such as accommodation, doctors, legal services and government agencies such as Centrelink.

MHLC attends the RUAH Centre every Monday to offer free legal advice and assistance to those that need it. The attending lawyer, with the assistance of a paralegal, can offer specialised advice on criminal and mental health law, guardianship and administration matters, violence restraining orders as well as generalised advice on other areas of law. In instances where the advice sought is outside the scope of MHLC or covered more comprehensively by another legal service, the attending lawyer can provide warm referrals to assist the client.

V *Community Legal Education*

In the course of providing their services to the community, MHLC also engages in providing information and education through brochures and online resources, Community Legal Education presentations to both professionals and students, and even the training of law students and graduates through their volunteer paralegal program. Additionally, the Centre conducts research into the current laws and policies that are in place, highlighting shortfalls in the system and developing reform submissions to improve the system and promote access to justice for MHLC clients

How Might an Apology Feature in the New Religious Freedom Bill?[+]

Prof Robyn Carroll[♠] & *Dr Renae Barker*[♣]

Sometimes legal disputes are about more than money. Sometimes what is really wanted is an apology – an acknowledgement of wrongful treatment. As former President of the Human Rights and Equal Opportunity Commission, Sir Ronald Wilson, said in *White v Gollan*,[1] an apology can restore a complainant's "sense of dignity and self-worth".

If the federal government's proposed Religious Discrimination Bill becomes law, a person seeking an apology for religious discrimination will have a new avenue to do so.

As the law stands, the only federal protection against religious discrimination is in the *Fair Work Act 2009*.[2] While a court can order remedies such as reinstatement or monetary compensation, there appears to be no case under the Fair Work Act which an employer has been ordered by a court to apologise

[+] First published in *The Conversation*, 10 September 2019. Reproduced with permission of the authors. <http://theconversation.com/how-might-an-apology-feature-in-the-new-religious-freedom-bill-122873>. We acknowledge with thanks research assistance by Katherine Swann, JD student. The usual caveats apply.

[♠] Professor of Law, UWA Law School.
[♣] Senior Lecturer, UWA Law School

[1] [1990] HREOCA 7 (19 June 1990).

[2] *Fair Work Act 2009* (Cth).

(2019) 3 Blackstone's Ignite Journal

for unlawful termination on the basis of discrimination – religious or otherwise.

In contrast, an apology can be ordered under the proposed Religious Discrimination Act in conjunction with the existing remedy provisions of the *Australian Human Rights Commission Act 1986* (Cth).

The Religious Discrimination Bill has been modelled, in part, on the *Racial Discrimination Act 1975* (Cth). Like the *Racial Discrimination Act*, complaints made under the proposed Religious Discrimination Act will be made initially to the Australian Human Rights Commission. They may then be referred to the Federal Court if the parties are unable to resolve their dispute.

One of the orders the Federal Court can make is for an apology. The Human Rights Commission Act allows a court to make an order requiring a respondent "to perform any reasonable act or course of conduct to redress any loss or damage suffered by an applicant". This can include an order to make a private and/or public apology.

There are several cases in which a court has ordered an apology for racial discrimination.[3] In *White v Gollan*, for example, a publican was ordered to send a written apology and publish an apology in a newspaper circulating in the district after he

[3] Robyn Carroll, 'Sometimes an Apology is Worth More than Money', *Right Now* (Online, 13 March 2012) <http://rightnow.org.au/opinion-3/sometimes-an-apology-is-worth-more-than-money-monday/>.

refused to serve two people in the public bar because they were Aboriginal.

Courts consider that the aims of anti-discrimination legislation sometimes can be advanced by an order to apologise for unlawful discrimination.

In this respect, Israel Folau's case[4] highlights a difference between orders made under the *Fair Work Act* and orders that will be available under the proposed Religious Discrimination Act.

Earlier this year,[5] Folau called for an apology from Rugby Australia. He said:

> First and foremost I am hoping for an apology from Rugby Australia and an acknowledgement that even if they disagree with my views I should be free to peacefully express my religious beliefs without fear of retribution or exclusion.

Israel Folau's lawyer, George Haros, has said an apology would "come a long way to resolving the dispute".[6]

[4] Jack Anderson, 'Explainer: does Rugby Australia have Legal Grounds to Sack Israel Folau for Anti-Gay Social Media Posts?', *The Conversation* (Online, 30 April 2019) <https://theconversation.com/explainer-does-rugby-australia-have-legal-grounds-to-sack-israel-folau-for-anti-gay-social-media-posts-116170>.
[5] <https://www.abc.net.au/news/2019-06-28/israel-folau-calls-for-apology-from-rugby-australia/11259956>.
[6] Staff Writers and AAP, 'Why Raelene Castle Won't Apologise to Israel Folau', *Fox Sports* (online, 16 August 2019)

However, Rugby Australia's Chief Executive, Raelene Castle, has so far ruled out an apology, saying:

> …inclusion means inclusion for everybody, and we've got portions of our community who were very hurt and upset by Israel's comments, hence why we are in this situation.

The parties to the Folau case go to mediation on December 13. If that fails, the case will go to court in February next year. In his statement of claim, Folau has sought an apology. He will need to persuade the court that an apology order is necessary to "remedy" the effects of wrongful termination under the Act. However, obtaining an apology as an order rather than by negotiation is a long shot.

Given Rugby Australia's reluctance to apologise so far, even if the court ordered an apology, would there be any point?

Some state tribunals[7] have recognised that a distinction can be drawn between a personal, sincere and heartfelt apology, which cannot be compelled, and an apology that is an acknowledgement of wrongdoing under anti-discrimination legislation.

Despite the fact some judges regard an ordered apology as a contradiction in terms,[8] identified benefits include a

<https://www.foxsports.com.au/rugby/why-raelene-castle-wont-apologise-to-israel-folau/news /story/2be78a374b822224bf61ac3dea13b8a2>.
[7] *Burns v Radio 2UE Sydney Pty Ltd & Ors* [2005] NSWADT 24.
[8] *Jones v Scully* [2002] FCA 1080.

complainant receiving the remedy they seek, and public acknowledgement of unlawful conduct, which in turn promotes the aims of anti-discrimination laws.

Further, some cases show that once wrongdoing is found, those initially unwilling to apologise may be willing to do so. Finally, an ordered apology may restore a party's sense of self-worth and dignity.

Undeniably, monetary compensation can be an important to remedy for the harmful effects of discrimination. Yet the opportunity to receive an apology order may prove to be an important additional remedy under the proposed legislation.

Blackstone Equity Portfolio: Queer Officer 2019

Monty Phillips♠

I was very excited to take over the Queer Officer role from 2018's Hannah Kim. I was fortunate enough to see and appreciate the work that had gone into the role from the previous year and wanted to contribute. From early meetings with collaborators for events, I decided that the theme for this year's Queer Portfolio was to be "continued support and acceptance". The Blackstone Society had extremely strong and cohesive LGBTI+ effort and representation by its then President, Joshua Sanchez-Lawson, and other members of the society. Appreciating the amount of work, energy, and passion that went into orchestrating these new events, I thought that it would be my task to keep the flame burning and to make these events an annual occurrence, solidifying the Blackstone Society as one of the strongest student bodies championing LGBTI+ representation.

The first Queer Portfolio event of the year was the 'Love is Love' Marriage Equality event, sponsored by MinterEllison. The inaugural 'Love is Love' event was held last year to celebrate Australia finally achieving marriage equality by amending the definition of marriage within the *Marriage Act*

♠ Monty is the Blackstone Society's Equity Officer. The usual caveats apply.

1961 (Cth). I thought it was important to let students know that the Law School's support for LGBTI+ rights and causes was not contemporaneous. The Law School is dedicated to supporting students who identify as being part of the LGBTI+ community, and this event commemorates one of the largest achievements of our community. With the continued sponsorship of MinterEllison, we aim to hold a celebratory "Wedding Anniversary" event each year as part of the Queer Portfolio for the Blackstone Society, inviting students and staff to celebrate this achievement for the LGBTI+ community.

In addition to this, the Blackstone Society collaborated with Allens' LGBTI+ Working Group (ALLin) to provide a networking event for identifying and ally students. Having attended the event last year, I was more than thrilled to participate in the promotion and planning of the event. Out of all the networking events I have been to in the past two years, this one stands out for its accepting and inclusive atmosphere, bringing out more personality and joy in all those who attend. With it being the last event in the Queer Portfolio of the Blackstone Society, I decided to give a speech about the impact that outspoken and visible support can do for members of the community. I believe that programs like ALLin are extremely important for providing opportunities and inclusive spaces for LGBTI+ individuals in a corporate environment.

This year, it has been an absolute joy to be a part of the Blackstone Society. I feel like I have been able to uphold and maintain the achievements of the 2018 Queer Officer and

fellow Blackstone members, and hope that the following years' Queer Officer and committee will uphold the newly founded traditions and create a few new ones.

Crash Course on the Responsibility to Protect (R2P) Doctrine[+]

Jessica Bennett[♦]

The Trojan Horse is an ancient tale dating back to the Trojan war. Legend has it that the Greeks built a giant wooden horse and hid their soldiers inside. The horse entered the city of Troy, the soldiers emerged and the Greeks won the war.

Today the Trojan Horse, is a metaphor that has come to represent something that is a facade or a stratagem. Some argue that the Responsibility to Protect Doctrine (**R2P**) is simply a Trojan Horse, enabling international military intervention whilst masking the self-interested motivations of interveners. With past 'humanitarian intervention' efforts in countries such as Libya and Iraq, it is clear to see why the metaphor of the 'Trojan Horse' has been used in conjunction with the R2P doctrine.

So, what exactly is R2P?

[+] First published in *JusT Cogens*, blog of the UWA International Law Society, 8 October 2018. Reproduced with the Author's permission. <https://www.perthilj.com/blog/2019/2/19/crash-course-on-the-responsibility-to-protect-r2p-doctrine>. The usual caveats apply.

[♦] BA *W. Aust*.

I *The Responsibility to Protect*

The late 90s was an era of humanitarian crisis. Notably, the Rwanda genocide in 1994 saw the slaughter of 800,000 in 100 days.[1] The global community's inability to intervene sparked 'soul searching' within the international community.[2] The lack of efforts to step up and step in for countries and people facing humanitarian devastation led to the introduction of the R2P doctrine in 2001 by the International Commission on Intervention and State Sovereignty – concerted effort to safeguard human rights through foreign intervention.[3] The R2P doctrine, as outlined in the UN Outcome Document of 2005,[4] consists of three pillars:

1. The state carries the primary responsibility for protecting its populations from genocide, war crimes, crimes against humanity and ethnic cleansing and their incitement;

[1] A J Bellamy, *Responsibility To Protect* (Cambridge: Polity Press, 2009), 1.
[2] Nathan Beriro, Interview with Jennifer Welsh, UN Special Adviser on the Responsibility to Protect (20th Commemoration of the Rwanda Genocide, 15 April 2014).
[3] International Commission on Intervention and State Sovereignty, 'The Responsibility to Protect (Report, International Commission on Intervention and State Sovereignty, December 2001) 11-12.
[4] Responsibility To Protect, 2005 World Summit Outcome (15 September 2005) < http://responsibilitytoprotect.org/world%20summit%20outcome%20doc%202005(1).pdf>.

2. The international community has a responsibility to encourage and assist states in fulfilling their responsibility;

3. The international community has a responsibility to use appropriate diplomatic, humanitarian and other means to protect populations from these crimes.[5]

II *Case Study: Iraq Invasion 2003*

The idea of the international community protecting one another through humanitarian crusades, out of altruism, is a warming idea.

But is this realistic?

In reality, the majority of interventions occur when it suits the intervening state, and with strategies in places that are influenced by their own interests. Intervention masked by R2P can be seen in events such as the Iraq invasion of 2003. The basis of intervention was 'freedom' – Former President George W. Bush stated that "the world is better off without Saddam Hussein in power, as are 25 million people who now have the

[5] International Coalition for The Responsibility to Protect, *An Introduction to the Responsibility to Protect,* 30 April 2018. < http://www.responsibilitytoprotect.org/index.php/about-rtop>.

chance to live in freedom".[6] However, it's been posited that the basis of US intervention in Iraq was more than just achieving 'humanitarian aid' by liberating Iraqis from Saddam's rule. A number of red flags arise when the invasion is justified purely by humanitarian justifications. Why would a foreign country altruistically aid another in peril?

Oil, exploitation of Iraq's resources, retaliation after 9/11, and taking out a rival are more realistic explanations of why the USA and its allies invaded Iraq, without the United Nations Security Council's approval. The question of whether the US and allies carried out a genuine humanitarian intervention influenced by the R2P principle will always be debated.

III *The Unknown Place of R2P*

There are many complex theories and debates surrounding the R2P doctrine. Is R2P creating a new legal duty, calling on states in the international community to respond to humanitarian atrocities?

Peters writes that R2P has contributed to the evolution of a legal obligation on the UNSC and states to intervene for

[6] Patrick Baert, 'Bush defends legacy in new memoir', *The Sydney Morning Herald* (online) 10 November 2010 <https://www.smh.com.au/world/bush-defends-legacy-in-new-memoir-20101110-17max.html>.

humanitarian purposes.[7] However, if it was an obligation there would be corresponding harsh legal sanctions for noncompliance, yet there is currently none.[8] Evidence would actually suggest that whilst R2P is a beautiful idea, arguably R2P is not a legal concept with corresponding legal duties for states. If anything, it is there for states to use as a 'Trojan Horse' to shift emphasis away from the unjustified intervention they are plotting for their own interests.

IV *The Future of R2P*

For R2P to be successful, the interveners must achieve short term and long-term goals. The short-term goal is to immediately alleviate human suffering and deliver aid to civilians. The long-term goal is to focus on how far the intervention has addressed the root causes of human suffering, and implementing constructive state-building. These goals can only be achieved by an intervener whom is solely intervening for R2P purposes, otherwise the situation will end up much like Iraq and Libya. Most states are unwilling or unable (or a mixture of both) to achieve these short and long term goals, as it would be a drain on a state's time and resources. The R2P

[7] Anne Peters, 'Humanity at the A and {OMEGA} of Sovereignty', (2009) 20(3) *European Journal of International Law* 513, 540.
[8] Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?' (2007) 101(1) *American Journal of International Law* 99, 109.

doctrine requires a renewed focus on employing peaceful intervention at an early stage in a crisis, and to analyse the possible consequences of various courses of action before action occurs.

Sea Shepherd – Defenders of International Law?[+]

Evangeline Ward[♣]

Sea Shepherd is a non-profit conservation organisation known throughout the world for their hands-on and sometimes violent approach to the protection of ocean habitats and the creatures within. While they have missions to defend all ocean creatures great and small, it is not Operation Krill putting them in the news. Causing all the controversy is aptly named Operation Nemesis: their mission to protect the Minke Whales of the Southern Ocean.

While whaling has been around since the 9th century, it became problematic in the early 1900s as whale numbers began to severely decline. People just couldn't get enough of whales, using their blubber, bones and meat for a whole range of things from candles to cosmetics. In 1927 the League of Nations made an attempt to regulate whaling by proposing an international whaling conference. Whilst this didn't come to fruition, pressure continued to build for international action until the 1946 *International Convention for the Regulation of Whaling*

[+] First published in *JusT Cogens*, blog of the UWA International Law Society, 14 May 2017. Reproduced with the Author's permission. <https://www.perthilj.com/blog/2019/2/16/sea-shepherd-defenders-of-international-law>. The usual caveats apply.

[♣] Evie is a first year Juris Doctor student. BA *W. Aust*.

(**ICRW**) founded the International Whaling Commission (**IWC**) that regulates the whaling industry today.

By 1986, whaling was regarded as barbaric and outdated and, despite regulations, was putting some species of whale at risk of endangerment. In response, the IWC passed a moratorium on whaling that has stood ever since. This means that the slaughter of whales for commercial fishing is illegal under international law and therefore all whales of the ocean may exist in peace, right? Wrong.

Despite being signatory to the ICRW, Japanese whalers have continued to capture and kill whales thanks to a loophole in Article 8 of the ICRW that stipulates governments may grant special permits to kill and take whales for scientific research. Despite this, there is 'overwhaleming' evidence to suggest that scientific research is not the sole purpose of their whaling expeditions. Japan argues that photography and non-lethal testing is not sufficient for the research they require concerning fish species stabilisation, and the capture and kill method is the only way. But, following the supposed 'research' they carry out, the meat of the whales is then processed and sold domestically, earning around $USD61 million per year. Aside from this enormous profit, the Institute of Cetacean Research, the government-funded agency who runs the whaling program, has not produced a single peer-reviewed scientific paper that demonstrates the deaths of thousands of whales was worthwhile. While this may sound pretty suspicious, thanks to

the loophole, none of Japan's actions are *technically* in direct violation of the ICRW, but Australia has argued they are committing an abuse of rights.

In 2001 the IWC decided that an abuse of rights, defined as "the fictitious exercise of a right for the purpose of evading a rule of law or a contractual obligation", should not be tolerated. While this is usually extremely difficult to prove, in 2014 Australia decided enough was enough and took Japan to the International Court of Justice (**ICJ**). Australia won the case and the ICJ ruled Japan's Antarctic whaling program, JARPA II, was illegal. Although the ruling was only specific to that program, which they have now ceased, the ICJ set a number of tests that would determine if future programs were purely scientific. In 2015 a panel of experts decided that their new 'scientific' program, NEWREP-A, did not meet the test requirements and was therefore illegal.

Unfortunately, Japan ignored these findings and recently returned to port after taking a full quota of 333 Minke whales. As a result, Sea Shepherd decided to take matters into their own hands. In the words of Sea Shepherd's founder, Paul Watson: "governments are not enforcing the laws, so we have to!"

Enforce it they have! While some of the practices of Sea Shepherd have pushed the boundaries of legality - sinking boats, firing smoke canisters, disabling propellers and more. In their protection of species, they claim to be acting under a mandate to assume a law enforcement role provided by the

United Nations Charter for Nature, adopted by the General Assembly in 1982. While many see Sea Shepherd as heroic defenders of the ocean, Japan see them simply as 'eco-terrorists' and have even issued arrest warrants for many of their members. But, while they undertake their missions primarily for conservation reasons, they really are defending an international law ruling.

So, what can be done?

Countries such as Australia can put diplomatic pressure on Japan or consider another claim to the ICJ. The problem is that while Australia strongly disapproves of the whaling, they are still hesitant to do anything that will damage their bilateral relationship with Japan. While some say the actions of Sea Shepherd toe the line of legality, the Japanese have arguably overstepped that line by a whale length, which means Sea Shepherd may well be the only hope for the poor, beleaguered whales.

The World-Wide War: Analyzing Whether Self-Defence can Be Used in Response to a Cyber-Attack[+]

Eve Aycock[♥]

In a society characterised by the coexistence of cyberspace and reality, cyber-attacks pose an increasingly menacing risk. The contemporaneity of this threat is evidenced by the recent global Ransomware cyber-attack, which was unprecedented in scale.[1] The key legal question in ascertaining the lawfulness of self-defence in response to a cyber-attack is whether such an attack can be considered an "armed attack".[2]

In detailing the legal framework determining a nation's right to self-defence in the face of a cyber-attack, it is prudent to refer to the UN Charter. Article 2(4) of the UN Charter[3] stipulates the absolute prohibition on the threat or use of force in

[+] First published in *JusT Cogens*, blog of the UWA International Law Society, 27 August 2017. https://www.perthilj.com/blog/2019/2/20/the-world-wide-war-analysing-whether-self-defence-can-be-used-in-response-to-a-cyber-attack. Reproduced with the Society's permission. The usual caveats apply.

[♥] Eve was an exchange student at UWA. LLB *Groningen*.

[1] 'Cyber-attack: Europol Says it Was Unprecedented in Scale' (BBC News, 13 May 2017) <http://www.bbc.com/news/world-europe-39907965&gt>; accessed 13 May 2017.

[2] Oona A. Hathaway & Rebecca Crootof, 'The Law of Cyber-Attack' (2012) 100 *Yale Journal of International Law* 817, 844.

[3] *Charter of the United Nations*, Article 2(4).

international relations;[4] a *jus cogens* norm.[5] An armed attack would fall under the Article 2(4) proviso of "use of force".

However, self-defence is an exception to the prohibition on the use of force. This exception is embodied in both Article 51 of the UN Charter and customary international law.[6] Both Article 51 and the customary international law of self-defence concur that an armed attack triggers the right to self-defence.[7]

Two further conditions must be fulfilled for self-defence to be lawful: necessity and proportionality.[8] Necessity entails that there is no time to undertake non-forcible measures with a reasonable prospect of preventing the attack. Proportionality relates to how much force is allowed.[9]

[4] *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v US*) (Merits) *(Judgment)* [1986] ICJ 14, [209].

[5] Sondre Torp Helmersen, 'The Prohibition on the Use of Force as *Jus Cogens*: Explaining Apparent Derogations' (2014) 61 *Netherlands International Law Review* 167.

[6] Michael N. Schmitt, 'Cyber Operations in International Law: The Use of Force, Collective Security, Self-Defence, and Armed Conflicts' in *Proceedings of a Workshop on Deterring Cyberattacks: Informing Strategies and Developing Options for U.S. Policy* (1st ed, National Academies Press 2010) 162.

[7] For a state to use force in self-defence, it must thus prove that it has been the victim of an armed attack. The idea that self-defence can only occur in response to an armed attack excludes the contested right to anticipatory or pre-emptive self-defence. Nicholas Tsagourias, 'Cyber Attacks, Self-Defence and the Problem of Attribution' (2012) 17 Journal of Conflict and Security Law 229; Malcolm N. Shaw, *International Law* (7th edn, Cambridge University Press 2014) 825.

[8] *Nicaragua* (n 4) [176].

[9] *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ 226, [42].

In answering the question of whether a cyber-attack can constitute an "armed attack" triggering self-defence rights,[10] I will analyse three differing approaches.[11]

The instrument-based approach espouses that a cyber-attack alone is unlikely to constitute an armed attack; thus, a cyber-attack without use of military weapons would not trigger a state's right to self-defence.[12] However, the instrument-based approach is incredibly archaic, as it disregards the fact that even if cyber-attacks do not deploy traditional military weapons, they nevertheless have the capacity to engender fatal consequences.[13]

Secondly, the target-based approach articulates that a cyber-attack may be categorised as an armed attack only if it targets an adequately important computer system, e.g. a critical national infrastructure system.[14] Consequently, under this approach a cyber-attack intending to disrupt such a system

[10] Matthew C. Waxman, 'Self-Defensive Force Against Cyber Attacks: Legal, Strategic and Political Dimensions' (2013) 89 International Law Studies 109, 111.
[11] Hathaway & Crootof (n 2) 845.
[12] Duncan B. Hollis, 'Why States Need an International Law for Information Operations' (2007) 11 *Lewis & Clark Law Review* 1023, 1042.
[13] Sean M. Condron, 'Getting it Right: Protecting American Critical Infrastructure in Cyberspace' (2007) 20 *Harvard Journal of Law & Technology* 403, 415-16; Jan Klabbers, *International Law* (1st edn, Cambridge University Press 2013) 211.
[14] Karsten Friis & Jens Ringsmose, *Conflict in Cyber Space: Theoretical, Strategic and Legal Perspectives* (1st edn, Routledge 2016) 18.

would fall within the meaning of an armed attack, enabling self-defence.[15]

Finally, the effects-based approach determines whether a cyber-attack is an armed attack based on the gravity of its effects.[16] For example, the 2010 US Stuxnet incident aimed at Iranian nuclear facilities purportedly caused substantial property damage. It was deduced that Stuxnet constituted an armed attack;[17] potentially indicating that self-defence could be used under this approach. However, it remains ambiguous which type of effects justify self-defence.[18] Whilst some advocates of this approach contend that the impact of a cyber-attack must involve kinetic violence, others find it important to consider the magnitude and immediacy of the attack.[19]

The extant law appears to prescribe that a cyber-attack not entailing a risk of death or injury cannot constitute an armed attack enabling forceful self-defence.[20] This is evidenced by the current state of affairs: no state has yet asserted that a cyber-attack comprised an armed attack triggering a right of self-defence under Article 51.[21] Nevertheless, it is widely accepted that an armed attack involves a use of force, which is

[15] Hathaway & Crootof (n 2) 846.
[16] Ibid.
[17] Schmitt (n 6) 58.
[18] Hathaway & Crootof (n 2) 847.
[19] Waxman (n 10) 111.
[20] Schmitt (n 6) 164.
[21] Hathaway & Crootof (n 2) 840.

determined by its gravity and effects rather than the instrument utilised.[22]

Therefore, the prevailing opinion is that a cyber-attack causing significant detriment can be classified as an armed attack for purposes of self-defence, signalling that the effects-based approach is the most accepted.[23]

Lastly, it is salient to scrutinise whether self-defence in response to a cyber-attack could fulfil the *jus ad bellum* principles of necessity and proportionality. The application of necessity and proportionality to state responses to cyber-attacks is somewhat challenging.[24] This is because in order to examine the necessity of self-defence, the attack must be attributed to a designated source, i.e. a state.[25] As the recent 'WannaCry' cyber-attack has shown,[26] it is normally extremely difficult to identify the attacker.[27] Concerning proportionality, a forceful defensive operation must be proportionate in that the extent and nature of a state's response is restricted to ensuring that it is no longer the subject of attack.[28]

[22] Tsagourias (n 7) 231.
[23] Waxman (n 10) 113.
[24] Ibid.
[25] Yoram Dinstein, 'Computer Network Attacks and Self-Defence' (2002) 76 *International Law Studies* 99, 109.
[26] 'North Korea Says Linking Cyber Attacks to Pyongyang is "Ridiculous"' (*The Telegraph*, 20 May 2017) <http://www.telegraph.co.uk/technology/2017/05/20/north-korea-says-linking-cyber-attacks-pyongyang-ridiculous/&gt>; accessed 20 May 2017.
[27] Schmitt (n 6) 167.
[28] Ibid.

To conclude, in determining whether a cyber-attack would enable the exercise of self-defence, the cyber-attack must constitute an armed attack. The characterisation of a cyber-attack as an armed attack largely depends on the approach adopted. In my opinion, it is archaic to stipulate that a cyber-attack not causing death, injury, or even physical damage cannot constitute an armed attack. I maintain that a cyber-attack can be classified as an armed attack in various circumstances and can therefore potentially trigger a state's right to self-defence – even if the cyber-attack does not have violent consequences.

Ultimately, international law must evolve in accordance with the increasingly digitalised society that it governs. In order for this to transpire, there must be acknowledgement of the fact that cyber-attacks render it possible to cause considerable damage through non-destructive means.[29]

[29] Nicholas Tsagourias & Russell Buchanan, *Research Handbook on International Law and Cyberspace* (1st edn, Edward Elgar Publishing 2015) 254.

The Phantom Menace: The Changing Role of Civilians in International Armed Conflicts[+]

Adam Miatke[♣]

In February 2014, heavily armed, professional, and anonymous 'little green men' appeared in Crimea. On 4 March 2014, President Putin of the Russian Federation was asked if these men were Russian soldiers; his reply was that "[t]hose were local self-defense units," whilst later admitting these were Russian military forces. In August 2014, the NATO Supreme Allied Commander in Europe stated that "[i]f we see these actions taking place in a NATO nation and we are able to attribute them to an aggressor nation, that is Article 5. Now, it is a military response." The key in this statement is that it requires proof of state attribution and responsibility – that the individuals are in fact members of a State military and not simply armed civilians. The importance of this was noted in the International Court of Justice (ICJ) *Nicaragua* case regarding the United States (US) backing of 'Contra' rebels in Nicaragua.[1] The ICJ stated that for state attribution and legal

[+] First published in *JusT Cogens*, blog of the UWA International Law Society, 6 November 2016. Reproduced with the Society's permission. The usual caveats apply. <https://www.perthilj.com/blog/2019/2/20/the-phantom-menace-the-changing-role-of-civilians-in-international-armed-conflicts>.

♣ JD *W.Aust.*

[1] *Military and Paramilitary Activities in and Against Nicaragua* (*Nicaragua v US) (Merits) (Judgment)* [1986] ICJ 14.

responsibility to the US, it would "have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed."

Increasingly, new categories of people are emerging as separate groups within the field of International Humanitarian Law (IHL). As a result of this, the old IHL distinctions of military and non-military in an International Armed Conflict (IAC), or 'fighter' and 'civilian' in a Non-International Armed Conflict (NIAC), no longer function to an acceptable degree, and change must be enacted to provide legal clarity on the battlefield. These new groups include direct civilian combatants, cheaper civilian contractors within militaries (both armed and unarmed), and the use by Governments of apparently quasi-civilian forces to achieve strategic goals – little green men. Civilians are not a defined group within IHL, and are only distinguished as being non-combatants, with it being required that civilian objects shall not be the object of attack or of reprisals. Somewhat confusingly however, the International Committee of the Red Cross also states that the majority of military contractors (PMC/PMSCs) fall within the category of civilians as defined by IHL.

To put this problem into context, consider how the nature of warfare has changed. During the Second World War, with some exceptions soldiers and civilians were well defined groups, with the conflict being about organised military forces in combat. Contrast this with modern conflicts in Somalia, Iraq,

and Afghanistan. In these conflicts we see that an organised force is quickly destroyed by US and allied military superiority, thus the forces opposing the American and allied forces must engage in asymmetric warfare, which includes being able to blend in with civilian populations in order to successfully execute 'hit and fade' strikes. This isn't about desire, but simply survival, and is currently the only successful tactic employed.

Consider that one day your country is attacked by a technologically superior force. Your military crumbles faster than Donald Trump's composure – what do you do? You still need to survive, but you also want this foreign force out. You may choose to work during the day as a regular person and engage in attacks against this enemy at night. Are you a civilian or a combatant? If you're a combatant, do you retain your combatant status during your daytime job where you have no intention of attacking anyone, even though you are a threat as soon as you leave work? What if, due to security concerns, you have to carry a weapon with you at all times? This makes you a clear potential threat, and yet you're protected due to your civilian status. The problem is that AP1 Article 51(3) states that civilians are protected "unless and for such time as they take a direct part in hostilities," but this time it is not defined.

In a world of shrinking Western defence budgets and a pro-privatisation ideology, PMC's are very much on the rise. It is noted that PMCs are judged as being civilian on the same criteria as any other person or group, unless they have been

incorporated into the armed forces of a party to the conflict in either a formal or de-facto manner. This appears an odd result however – whilst the individuals are indeed civilians, these contractors are taking up roles previously filled by military personnel who would have been legitimate targets. Thus, the result would seem to be the continued diminishment of the number/type of legitimate targets, and increasingly making distinction difficult for opposing forces. This itself could lead to a relaxing of civilian protections, based on the argument that the forces in question thought they were targeting civilians assisting opposing forces.

As per the use of Putin's 'little green men', in an era of mass surveillance via various means and the associated US drone strikes in places such as Pakistan and Yemen it is incredibly dangerous to outright identify yourself as a combatant for a particular state, as required under the law of armed conflict. Indeed the modus operandi of groups such as Daesh/ISIL/ISIS/IS is asymmetric warfare that relies on terrorising a civilian populace in order to ensure compliance, or at least destruction of enemy forces regardless of collateral damage. It is unreasonable to expect these 'terrorist' groups to abide by targeting and distinction guidelines, nor to be deterred by legal mechanisms such as an International Criminal Court prosecution for war crimes. Legalities must reflect reality, otherwise the law itself risks becoming so out of touch as to be irrelevant.

Mass Surveillance and International Law[+]

Kylie Mathews[♦]

As a part of the UWA International Law Society's (then the UWA International Law Club) Seminar Series, students who present will be interviewed on their research topic. Isabella Bogunovich[♣] presented at the first ever Seminar Series, presenting on Mass Surveillance and International Law. Isabella was also the editor-in-chief of the inaugural volume of the Society's *Perth International Law Journal*.

Isabella Bogunovich was a sixth year LLB and Arts student with an Arts major in Political Science and International Relations. As part of her law degree, she took Public International Law and participated in the 2016 Philip C. Jessup International Law Moot. When asked about her career goals, she joked about wanting to be Amal Clooney (don't we all), but also talked about the possibility of working in the public sector, where most of the opportunities for international law in Australia lie. Isabella presented on "Mass Surveillance and International Law" at the ILC's first Seminar Series. She first

[+] First published in *JusT Cogens*, blog of the UWA International Law Society, 29 May 2016. Reproduced with the Society's permission. The usual caveats apply. <https://www.perthilj.com/blog/2019/2/19/seminar-series-interview-1-mass-surveillance-and-international-law>.

[♦] BA *W. Aust*.
[♣] BA LLB(Dist) *W. Aust*.

(2019) 3 Blackstone's Ignite Journal

developed an interest in the topic after studying it over the summer as a part of the Jessup Moot.

"It's such an interesting and topical area. The Snowden revelations came to light in 2013, and there's a lot written on mass surveillance in the digital age, but it's still quite new and there's not a lot of consensus."

The right to privacy is covered in international law under Article 17 of the International Covenant on Civil and Political Rights (ICCPR), which protects an individual from unlawful or arbitrary interferences with their right to privacy.

"Arbitrariness looks at whether the interference is necessary and proportional to a legitimate aim," she explains. "Something such as combating terrorism has been recognised as a legitimate aim almost universally in places like the United Nations General Assembly, the European Court of Human Rights and Reports by Special Rapporteurs."

The issue is that the ICCPR was adopted in 1966 and was originally legislated around phone tapping. If a phone line was tapped, the one ongoing conversation was recorded, and the invasion of privacy was limited. The fact is that international law has failed to evolve at the same rate as technology. The ICCPR is the legal equivalent of parents on Facebook: it isn't one hundred percent wrong, but it's navigation of the technological landscape of the twenty-first century is awkward at best and embarrassing at worse.

"Today we live so much of our lives online, and the information that we send is potentially recoverable by intelligence agencies. There are instances in the US where government agencies have asked companies like Google or Facebook to turn over users' data. Interferences with privacy are no longer about tapping a single landline but having access to a person's emails, texts, calls, transactions and search histories. What some would call 'your whole life' could be accessed, so it's very interesting that the legal protections we have for privacy at international law are over half a century old. I don't know if back in the sixties the drafters of the ICCPR could have envisaged the technological landscape and the amount of user data available now."

Reports were released alleging an entire 97% of the information the NSA is processing is irrelevant to national security concerns. Where does the law enter in regard to innocent people whose information is screened, and whose privacy is thus being violated?

"This is covered under the element of proportionality which falls under whether an interference with privacy is arbitrary. When you're considering mass surveillance and its ability to find threats and combat terrorism, you're essentially opting in for a needle-in-a-haystack hunt. You are looking at a huge population, a very minute percentage of which could be potentially complicit in contributing towards terrorism or committing a terrorist act. When considering whether this surveillance and interference with privacy is necessary or

legitimate in combating terrorism, you have to consider the effect it has on the haystack as a whole, not just on the needle."

To some extent, domestic law accounts for privacy laws. In the US, a case was brought under an amendment regarding unlawful governmental search and seizure, as outlined in the US bill of rights. However, most of the work written on the topic resides in European law journals, and a lot of case law regarding the right to privacy falls under the European Convention on Human Rights, which has a provision very similar to Article 17 of the ICCPR.

In Australia, mass surveillance made national news when new metadata retention laws were legislated by the Australian government.

"Metadata isn't the actual communication, it is the details about the communication. For example, if I sent a message to you it wouldn't say what that message was, but it would say what time it was sent, how long it was, and that it was from me to you. It's the descriptive stuff. However, the European Union Court of Justice has considered that if a large enough amount of descriptive information were taken, that could constitute a breach of privacy because there is enough there to draw conclusions about the contents or the user's life."

Domestic law must be compliant with international law. In Australia, search warrants are required to access information regarding phones, but the new laws to do not outline the same

condition for accessing metadata. Can international law make adjustments for this?

"Domestic laws must, as a general rule, comply with international law. In order for interference with privacy to not be 'unlawful' within the meaning of Article 17, the interference must comply with the interfering State's internal laws and those laws must specify the precise circumstances in which interference is permitted This means that domestic law has to be sufficiently precise and could require noting under what circumstances recourse can be had to that metadata, for what reasons it can be accessed, how long it can be accessed and stored and from what time period the data can originate.

One issue which could arise in this context is that whilst legislation in most countries is generally readily available online and new legislation is frequently reported on, the way in which intelligence agencies interpret that legislation when collecting data may be different to how most citizens would interpret the legislation. If, for example, an intelligence agency took an expansive approach as to what data it could collect or obtain it could be argued that a higher percentage of threats might be caught. The downside of this is that citizens may not be aware of how pervasive the data collection is which may mean that it is in fact not sufficiently 'lawful'. It really is a balancing act and there is a wide variety of views from human rights bodies, courts and states as to when this sort of situation would contravene Article 17.

It's why Snowden is such a polarising figure. Some people think he's a hero, and some people think he's a traitor."

But interviews are all about asking the hard-hitting questions, so I have to ask the weighted one: was Snowden right to reveal the information that he did?

"It's a very difficult question to answer. He has been charged with every serious data security theft offences and espionage. Generally, the idea of having whistle-blowers and protections for whistle-blowers is that they can provide an important check on the government and organisations, particularly where the only evidence of wrongdoing lies with the organisation itself. At the same time though, Snowden's actions allegedly break very serious laws and the nature of the information leaked, given that it was confidential or covert, does have the potential to endanger operatives or compromise specific security operations. It's one of those things where there is no simple answer to whether it's right or wrong, I think in a way it could be considered both right and wrong."

Spoken like a true lawyer.

BLACKSTONE
SOCIETY