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MINISTERIAL ADVISERS AND THE AUSTRALIAN CONSTITUTION

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Ministerial advisers are relatively new institutional actors within the Commonwealth Executive. Ministerial advisers were not envisaged at federation and pose a challenge to constitutional theory, which largely focuses on the position of public servants and Ministers. This article analyses the position of ministerial advisers within the constitutional framework of the Australian Executive. It also considers the constitutional basis for the employment of ministerial advisers at the Commonwealth level, including the appropriation of their salaries and the power to contract for their employment. In doing so, it illustrates the practical operation of the tests in the cases of Williams v Commonwealth and Pape v Commissioner of Taxation. The author argues that ministerial advisers have become integrated within the constitutional framework of the Executive such that their activities fall within the ordinary and well-recognised functions of government as they play an integral role in assisting in the administration of a government department.

Key Words: ministerial advisers, ministerial staff, constitutionality, appropriations, executive power

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I Introduction

[Ministerial advisers] operate in an area which strict constitutional theory does not recognize as existing.¹

Ministerial advisers, personally appointed by Ministers and working out of their private offices, have become an integral part of the political landscape in the last 30 years. Ministerial advisers at the Commonwealth level are subject to legislation concerning their employment ² as well as a Code of Conduct. ³ Traditionally ministerial advisers are seen to be mere emanations of their Minister and therefore accountable to their Minister personally, while the Ministers are accountable to Parliament. ⁴ Although ministerial advisers are personally employed by Ministers in their private offices, they perform public functions, including advising on public policy, media, political, parliamentary management and party management matters. ⁵ A Commonwealth Senate Select Committee found that ‘it can no longer be assumed that advisers act at the express direction of ministers and/or with their knowledge and consent. Increasingly, advisers are wielding executive power in their own right’. ⁶

In 2012, Jennifer Westacott, the Chair of the Business Council of Australia launched a scathing attack on ministerial advisers, claiming that public servants were ‘undermined by political gatekeepers, often with little expertise and no accountability’. ⁷ In 2013, Terry Moran, former Secretary of the Department of the Prime Minister and Cabinet, stated that ministerial advisers ‘are becoming a black hole of accountability within our parliamentary democracy’. ⁸ This is a contemporary issue that is deserving of further analysis.

Ministerial advisers operate within the public sphere but have thus far largely been subject to private law accountability frameworks, that is dismissal through a

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² Members of Parliament (Staff) Act 1984 (Cth).
⁵ The Herald and Weekly Times Pty Limited v The Office of the Premier (General) [2012] VCAT 967 [22].
personal employment contract with the Minister. Given the phenomenon of ministerial advisers arose long after the Constitution was developed, their position in relation to the Executive is unclear, including accountability for their public actions and interactions with the public service.

Ministerial advisers were not envisaged at federation and pose a challenge to constitutional theory, which largely focuses on the position of public servants and Ministers. As RFI Smith stated:

No matter how skilled and tactful ministerial advisers are, their position cannot be accommodated readily in either theory or practice. They are a response to anomalies generated by problems of contemporary government and their position is itself anomalous. It is also one that is likely to persist.  

As ministerial advisers are now institutionalised as significant actors within our system of government, it is desirable to scrutinise the constitutional position of ministerial advisers. Although at federation there was no concept of ministerial advisers and they have not been incorporated into the constitutional framework, the question is whether ministerial advisers could nevertheless be said to be validly employed in accordance with the Constitution.

Previous research on ministerial advisers has been predominantly in the field of political science. There has not been a comprehensive constitutional analysis of the position of ministerial advisers. This article will examine the constitutional position of ministerial advisers within the Australian Executive, as well as the constitutionality of employing ministerial advisers and appropriating their salaries from public money. It is desirable to have a deeper understanding of these constitutional issues because the salaries of ministerial advisers are appropriated from public funds, and it is thus important to precisely outline their position within the constitutional framework, as well as constitutional basis for their employment.

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9 Attempts to compel ministerial advisers to appear before parliamentary committees at the Commonwealth level have been resisted on the basis that there is a constitutional convention preventing their appearance. Yee-Fui Ng, ‘Dispelling Myths about Conventions: Ministerial Advisers and Parliamentary Committees’ (2016) 51(3) Australian Journal of Political Science 512.


and the appropriation of their salaries. Further, the emergence of ministerial advisers and their institutionalisation are a phenomenon that post-dates the Constitution, so it is illuminating to consider on what basis the Commonwealth Parliament is able to legislate in relation to ministerial advisers. In addition, the cases of Williams v Commonwealth (“Williams (No 1)”)* and Pape v Commissioner of Taxation (“Pape”)* throw new light on the Commonwealth Executive’s power of appropriation and expenditure under the Constitution, and it is desirable to examine the position of ministerial advisers following these cases. In conducting this examination, the exceptions to statutory authorisation in Williams and scope of appropriations after Pape is analysed in more detail. This in turn provides some illumination of the practical operation of the tests in Williams and Pape.

To analyse the constitutionality of the appropriation of salaries and employment of ministerial advisers, there are a few questions that will be explored. First, how do ministerial advisers fit within the constitutional framework of the Executive? Second, is the Members of Parliament (Staff) Act 1984 (Cth) (‘MOPS Act’) constitutionally valid (Part II)? Third, how is the salary of ministerial advisers appropriated (Part III)?

The article finds that the salary of ministerial advisers is validly appropriated and the power to expend money on the salaries of ministerial advisers falls within the scope of the ordinary and well-recognised functions of government. Nevertheless, due to Professor Geoffrey Lindell’s ‘new activity’ test discussed below, statutory authorisation may still be required for the expenditure on the salaries of ministerial advisers. This is provided by the MOPS Act, which is valid as part of the incidental scope of the executive power under section 51(xxxix).

II Position Of Ministerial Advisers Within The Constitutional Framework

There is express recognition of both the positions of Ministers and the public servants employed by departments in sections 64 and 67 of the Constitution. However, there is no constitutional recognition of the position ministerial advisers. This is not surprising, as the position of ministerial advisers did not exist during federation and has evolved over the years.

* 12 Williams v Commonwealth (2012) 248 CLR 156 (the School Chaplain’s Case).
Ministerial advisers occupy an uncertain position in the operation of the Executive arm of government as they are employed by Ministers personally and report directly to the Minister. It is unclear if their accountabilities extend beyond accountability to the Minister as part of a normal employment contract. Ministerial advisers clearly perform public functions that affect the governing of the nation. Nevertheless, they are external to the public service, with a separate employment framework.

The employment of ministerial advisers is a relatively new occurrence which started in the last 40 years which has only gradually became formalised and institutionalised through explicit recognition in legislation. This means that theConstitution(8,11),(993,985) will generally not reflect the position of ministerial advisers. Hence, to ascertain the constitutional position of ministerial advisers in relation to the Executive, it is necessary to analyse the constitutional provisions relating to public servants and public service departments and to assess whether the employment of ministerial advisers could potentially fall within the scope of these provisions. The main provisions dealing with public servants and departments are the public service transfer provisions (sections 69 and 52(ii)), section 67 and section 61 of the Constitution.

A Transfer of State Public Service Departments to the Commonwealth

1 Section 69

At the inception of the Commonwealth, certain public service departments, public servants and properties were transferred from the States to the Commonwealth Government under section 69 of the Constitution. Other departments not listed in section 69 but within the heads of legislative power of the Commonwealth also came under the control of the Commonwealth when the Commonwealth Government chose to authorise their transfer. Section 69 also contemplated the creation of new departments of service on the establishment of the Commonwealth, such as those attending to the Commonwealth Parliament and Commonwealth Executive.

14 The departments listed are posts, telegraphs, and telephones, naval and military defence, lighthouses, lightships, beacons, and buoys, quarantine; and customs and of excise. Australian Constitution s 69.

15 For example, departments relating to astronomical and meteorological observations (section 51(vii)), census and statistics (section 51(xi)), currency and coinage (section 51(xii)), bankruptcy and insolvency (section 51(xviii)), copyrights, patents and trademarks (section 51(xviii)). The Commonwealth Parliament may also be able to assume control of other departments if the States referred their powers over the subject matter under section 51(xxxxvii). John Quick and Robert Randolph Garran, The Annotated Constitution of the Australian Commonwealth (Sydney, Angus & Robertson, 1901) 817.

16 Ibid 818-9.
However, given that the various Commonwealth departments have now been transferred, sections 84 and 85 are spent provisions, except for transfers of departments when States refer their powers to the Commonwealth. This referral provision is not relevant to ministerial advisers as there are separate employment regimes for Commonwealth and State ministerial advisers.

Section 52(ii)

Section 52(ii) provides that the Commonwealth Parliament shall have exclusive power to make laws for the peace, order, and good government of the Commonwealth for ‘matters relating to any public service department transferred to the Commonwealth Executive Government’. The purpose of this section is to provide the Commonwealth Parliament with exclusive power to make laws with respect to departments transferred under section 69, to the exclusion of State Parliaments. Thus, the transferred departments were subject to the laws of the State until exclusive power was vested in the Commonwealth Government, but the State Parliaments had no power to alter or repeal these laws since federation. Quick and Garran note that this subsection would prevent a State from subsequently establishing a competing postal service or authorise a corporation to do so and make legislative mandates to those departments. This exclusive power would seem to continue in contemporary times such that States would not be able to set up competing departments to undermine the Commonwealth public service departments transferred under section 69 of the Constitution.

The question is whether ‘matters relating to any department’ could include the employment of ministerial advisers. This could mean that the Commonwealth had exclusive power over the employment and classification of ministerial advisers for departments transferred under section 69. Quick and Garran opine that ‘matters relating to any department’ would include all matters relating to the organisation, equipment, working and management of the department, the appointment, classification and dismissal of officers, and the general body of law relating to its conduct and administration, and would cover the machinery, procedure and regulation, ‘without which a public department would be impotent’. However, it

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17 Ibid 661.
18 Ibid 661.
19 Ibid 660.
20 Ibid 660.
does not cover the whole of the principal and substantive law dealing with the matters controlled or controllable by the department.\textsuperscript{21}

From Quick and Garran’s list, it would seem that the ‘matters relating to a department’ largely relate to \textit{internal} matters and operations within a department, rather than external mechanisms that assist in the communication between the department and the Minister, such as ministerial advisers. Ministerial advisers are a category of employees who sit outside the public service employment framework and are not an internal part of a department. Hence it does not appear that ministerial advisers would fall within the ambit of section 52(ii).

Section 52(ii) does not seem to be of relevance to ministerial advisers as it is intended to grant the Commonwealth exclusive power over transferred departments to the exclusion of States. There is no problem with this for ministerial advisers, as there is a strong separation between the employment framework of ministerial advisers at the Commonwealth and State level. As ‘matters relating to any department’ do not include the employment of ministerial advisers, ministerial advisers do not fall within the transfer provisions in the \textit{Constitution}. At any rate, these provisions are largely obsolete.

\textbf{B Section 67}

Section 67 of the \textit{Constitution} provides for the appointment by the Governor-General of civil servants as ‘officers of the Commonwealth Executive Government’ until this power is provided to another authority. Public servants are distinguished from the politicians by section 44 of the \textit{Constitution}, which prohibits a person holding any office of profit under the Crown from being Members of Parliament.

The question is whether ministerial advisers can be considered to be civil servants appointed under section 67 of the \textit{Constitution}. I argue that section 67 does not cover ministerial advisers. The constitutional convention debates show that the framers envisaged that civil servants would be apolitical and free from appointment based on political patronage. For instance, Wise, who sat on the Civil Service Commission in his colony, moved for an amendment to section 67 to add the words ‘provided that no such officer shall be removed except for cause assigned’.\textsuperscript{22} His concern was that civil servants may be removed from office for purely political reasons to ‘make room for political friends’, which is akin to the

\textsuperscript{21}Ibid 660.
‘spoils’ system in the United States, where the spoils go to the victor.\textsuperscript{23} In the spoils system, high and low official positions were used to reward friends and offer incentives to work for the political party.\textsuperscript{24} This resulted in a system that was corrupt and inefficient.\textsuperscript{25} Max Weber has criticised the American system for its low level of competence and endemic corruption:

\begin{displayquote}
[T]here were 300,000-400,000 party members, who could show no other qualification than their good service to the Party. This situation could not persist without enormous disadvantages; corruption and waste without any parallel which could only be tolerated by a country with at the time unlimited economic opportunities.\textsuperscript{26}
\end{displayquote}

However, Sir George Turner optimistically said that the American situation is not likely to happen in Australia, as Australia has an Executive which is responsible to Parliament, and a Minister who tried to remove public servants for the purpose of ‘putting their friends in high places’ would be removed by Parliament.\textsuperscript{27} Turner and Isaacs also pointed out that the amendment would not provide proper protection for public servants at any rate, as if the government ‘were so corrupt as to put their supporters in office they would take very good care to find some reason for making [public service] dismissals.’\textsuperscript{28}

These comments suggest that civil servants are meant to be apolitical and the employment of ministerial advisers based on political partisanship would be highly undesirable and beyond the scope of the provision.\textsuperscript{29} Thus, ministerial advisers were not intended to be within the ambit of that provision at federation. Ministerial advisers are often employed for the express purpose of being partisan advisers and sometimes as a reward for their political support.\textsuperscript{30} The framers would have

\begin{footnotes}
\textsuperscript{24} The spoils system in the United States is generally associated with the presidency of Andrew Jackson (1829-37) and Martin Van Buren (1837-41). See Edward C Page, Political Authority and Bureaucratic Power: A Comparative Analysis (2nd ed, Harvester Wheatsheaf, Hertfordshire, 1992) 27.
\textsuperscript{25} For instance, Thomas Swartwout, an appointee of President Andrew Jackson to the Customs Service in New York, embezzled $1.25 million, while his successor, Van Buren, stole $200,000. Ibid 27.
\textsuperscript{26} Max Weber, Wirtschaft und Gesellschaft (5th ed, Tubingen, JCB Mohr, 1972) 846.
\textsuperscript{27} Official Report of the National Australasian Convention Debates, Adelaide, 19 April 1897, 917.
\textsuperscript{29} The framers’ intentions may be relevant ‘for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged’. Cole v Whitfield (1988) 165 CLR 360, 385. See generally Patrick Emerton, ‘Political Freedoms and Entitlements in the Australian Constitution: An Example of Referential Intentions Yielding Unintended Legal Consequences’ (2010) 38 Federal Law Review 169; Jeffery Goldsworthy, ‘Originalism in Constitutional Interpretation’ (1997) 25 Federal Law Review 1.
\textsuperscript{30} Maria Maley, Partisans at the Centre of Government: The Role of Ministerial Advisers in
\end{footnotes}
disapproved of the role of the partisan ministerial adviser and would not have imagined that it would be entrenched in the system of government to such an extent that it could be regarded as an ordinary and well-recognised function of government.

Since federation, some of the framers’ fears have been borne out. For example, senior public servants are now in fixed term contracts and are able to be removed by the government without just cause as long as the principles of procedural fairness are complied with.\(^{31}\) This means that senior public servants are able to be removed for political purposes and replaced with political appointees by the government of the day.

Despite this, the traditional distinction between an apolitical public service and partisan ministerial advisers has been maintained in terms of employment provisions, with public servants and ministerial advisers being employed under separate legislative regimes. The impartiality of public servants is also emphasised in the Australian Public Service Values.\(^{32}\) Therefore, ministerial advisers are not covered by section 67 of the Constitution relating to civil servants.

C Executive Power (Section 61)

The constitutional framework for the Executive is set out in Chapter II of the Constitution. The source of executive power in Australia is section 61 of the Constitution, rather than the prerogative as in Britain.\(^{33}\) ‘The executive power of the Commonwealth’, says section 61, ‘extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth’.\(^{34}\) French CJ in Pape elaborated on the content of executive power in section 61, which are:

- powers granted by statutes made under the Constitution;
- prerogative powers possessed by the Crown;
- non-prerogative ‘capacities’ of the Commonwealth that may be possessed by persons other than the Crown; and

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\(^{33}\) Pape (2009) 238 CLR 1, 60 (French CJ), 83 [214], 89 [234] (Gummow, Crennan and Bell JJ);

\(^{34}\) Australian Constitution s 61.
• the capacity to engage in enterprises and activities that ‘serve the proper purposes of a national government’ (dubbed the ‘nationhood power’ by commentators). 35

Thus, Commonwealth executive power thus includes powers conferred on the Commonwealth by statute, as well as non-statutory powers, such as the prerogative powers, capacities of the Commonwealth and the nationhood power. The aspects of executive power most relevant to this article is the prerogative power and capacities of the Commonwealth that are shared with other legal persons.

1  Prerogative Power

It has long been recognised that the Crown has the power to employ and dismiss public servants at pleasure as part of the prerogative 36 or as an implied term of the employment contract. 37 This prerogative is likely to extend to ministerial advisers as well. This is because ministerial advisers are servants of the Crown, who are employed by the Commonwealth in an official capacity and are subject to the instructions of the Minister. 38 Thus, even without legislation, there would be the prerogative power to employ and dismiss ministerial advisers.

Nevertheless, the prerogative may be abrogated by legislation. 39 For instance, Australian courts have held that the Australian public service legislation supplanted any operation of the common law right to dismiss a Crown servant ‘at pleasure’ without any notice or reason. 40 The relationship between public servants and the executive is thus governed by the provisions of public service legislation. 41 Invalid termination of employment could lead to damages for repudiation of the employment contract. 42 Likewise, the Members of Parliament (Staff) Act 1984 (Cth) (‘MOPS Act’) (discussed in Part II below) would supplant the prerogative power to employ and dismiss ministerial advisers.

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35 Pape (2009) 238 CLR 1, 59-63 (French CJ).
36 Parker v Miller (SC(WA), Full Court, 8 May 1998, unreported, 29).
38 Sneddon v State of New South Wales [2012] NSWCA 351, [204]-[207]. Ministerial advisers are also ‘officers of the Commonwealth’ under section 75(v) and part of ‘the Commonwealth’ under section 75(iii) of the Constitution. Ng, above n 11, 80-8.
42 Lucy v Commonwealth (1923) 33 CLR 229.
Another relevant facet of executive power is the capacity of the Commonwealth Executive to contract for the employment of ministerial advisers. The case of *Williams (No 1)*, affirmed by *Williams (No 2)*, resolved the question of whether the Commonwealth Executive had an unlimited power to contract or was constrained by the scope of the Commonwealth’s legislative powers, and whether statutory authorisation was required for contracting and spending public money. The majority in *Williams (No 1)* held that the Commonwealth Executive requires statutory authorisation to enter into contracts and spend money; with French CJ and Crennan J flagging several exceptions to this principle. This meant that the categories of cases in which the Commonwealth Executive may spend and contract without statutory authorisation is dramatically narrower than was previously understood by commentators. Nevertheless, French CJ and Crennan J flagged several exceptions to this principle. These exceptions have not been accepted by the majority of a court, but may provide good insight into how future jurisprudence may develop. French CJ and Crennan J held that the Commonwealth may contract and spend without statutory authority in the following areas:

- prerogative powers, e.g. the power to enter a treaty or wage war (Crennan J);
- ordinary and well-recognised functions of government: the power to carry out the administration of departments of State under section 64 of the *Constitution* (French CJ) and in the ordinary course of administering a recognised part of the Commonwealth government (Crennan J);
- nationhood power, i.e. activities that may ‘properly be characterised as deriving from the character and status of the Commonwealth as a national government’ (French CJ); and
- doing all things that are necessary or reasonably incidental to the execution and maintenance of a valid law of the Commonwealth once that law has taken effect (French CJ). However, this is not a real exception as, by definition, this aspect of incidental power is reliant on valid legislation. Thus, statutory authorisation is required.

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44 Ibid 342 [484] (Crennan J).
45 Ibid 191 [34] (French CJ).
46 Ibid 342 [484] (Crennan J).
47 Ibid 191 [34] (French CJ).
48 Ibid 191 [34] (French CJ).
As prerogative power has already been discussed, the other significant exception to statutory authorisation is the ordinary and well-recognised function of government. This is because all explicitly recognised nationhood cases have been concerned with legislative power\(^49\) and the incidental power exception actually requires legislation.

If the employment of ministerial advisers falls within the scope of the ordinary and well-recognised functions of government that flow from section 64 in administering Commonwealth departments, then the Commonwealth Executive is able to contract for their employment without statutory authorisation. The employment of public servants would clearly fall within the scope of the ordinary functions of government, given that public servants are explicitly recognised in the Constitution under section 67 and are an integral part of administering a department of State under section 64 of the Constitution. However, the position is less clear for the employment of ministerial advisers, who are less obviously linked to governmental departments.

As French CJ indicated, the content of what constitutes the ordinary and well-recognised functions of government could be illuminated by section 64 of the Constitution, which includes the power for the maintenance and administration of the Commonwealth public service.\(^50\) Thus, section 64 sets out elements of executive power referred to in section 61.

The scope of section 64 is unclear and is said to vary according to governmental practice over the years. Nevertheless, case law does provide some illumination of the content of section 64 and what constitutes the ordinary and well-recognised functions of government. The plaintiff and defendant in Williams (No 1) agreed that executive power exercised as part of the ordinary course of administering a recognised part of the Commonwealth government or with the incidents of the ordinary and well-recognised functions of government would vary from time to time, but would include:

\[\ldots\] the operation of the Parliament, and the servicing of the departments of State of the Commonwealth, the administration of which is referred to in s 64 of the Constitution, including the funding of activities in which the departments engage or consider engagement.\(^51\)

\(^49\) Eg AAP Case (1975) 134 CLR 338; Davis (1988) 166 CLR 79; Pharmaceutical Benefits Case (1945) 71 CLR 237; Pape (2009) 238 CLR 1.
\(^50\) Williams (2012) 248 CLR 156, 191 [34] (French CJ); Community and Public Sector Union v Woodward (1997) 76 FCR 551.
\(^51\) Williams (2012) 248 CLR 156, 233 [139] (Gummow and Bell JJ).
Further examples of ordinary administration of government are given in *New South Wales v Bardolph* (‘*Bardolph*’), which include entering into government advertising contracts, leasing premises and purchasing books in the library of the Attorney-General’s Department.\(^52\)

French CJ, Hayne and Crennan JJ in *Williams (No 1)* distinguished *Bardolph*, as it was based on a unitary constitution (namely, that of New South Wales) that did not involve a relationship between the Commonwealth and State Executives; nor did it involve the relationship between executive power under section 61 and section 64 of the *Constitution*.\(^53\) However, the High Court did not overrule *Bardolph* and in fact French CJ, Crennan and Kiefel JJ held, consistently with *Bardolph*, that Commonwealth executive power does extend to the power to carry out the ordinary administration of government.\(^54\)

In *Bardolph*, the High Court ruled that the advertising contracts for the Tourism Bureau were within the scope of the ordinary and well-recognised functions of government. From the judgments, a number of factors were relevant to what was considered to be an ordinary and well-recognised function of government: it is a part of government that has been around for a lengthy period (the Court did not define what timeline would constitute a sufficiently long period) (Rich, Evatt and Dixon JJ).\(^55\) Parliament regularly appropriates funds for this purpose (Evatt and Dixon JJ),\(^56\) and staff are employed whose ordinary and regular duties include performing the function (Starke, Evatt and Dixon JJ).\(^57\)

The formulation of ‘ordinary and well-recognised functions of government’ has been criticised by Professors Enid Campbell and Leslie Zines because it requires the courts to distinguish between the traditional functions of government compared to extraordinary governmental functions.\(^58\) This is a line that is difficult

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\(^{52}\) *New South Wales v Bardolph* (1934) 52 CLR 455.


\(^{54}\) French CJ held that Commonwealth executive power included the administration of departments of State under section 64 of the *Constitution*, while Crennan J held that the Commonwealth executive had powers that derived from the capacities of the Commonwealth as a juristic person, such as capacities to enter a contract and spend money, when exercised in the ordinary course of administering a recognised part of the Commonwealth government, and Kiefel J held that Commonwealth executive power extended to the essential functions and administration of a constitutional government. *Williams* (2012) 248 CLR 156, 191 [34] (French CJ), 342 [484] (Crennan J), 370 [582] (Kiefel J).

\(^{55}\) *Bardolph* (1934) 52 CLR 455, 462 (Rich J), 472 (Evatt J), 507 (Dixon J).

\(^{56}\) Ibid 472 (Evatt J), 507 (Dixon J).

\(^{57}\) Ibid 472 (Evatt J), 502-3 (Dixon J), 507 (Starke J).

to draw as it varies according to government practices and would create uncertainty for those who deal with the government. Consequently, it is uncertain how broadly this exception will be interpreted.

Another potential avenue for deciphering the content of the ‘ordinary and well-recognised functions of government’ is to consider how the expression ‘ordinary annual services of the government’ in sections 53 and 54 of the Constitution has been interpreted. However, sections 53 and 54 serve different constitutional purposes and are worded slightly differently; hence this may not be a perfect analogy.

The expression ‘ordinary annual services of the government’ refers to annual appropriations that are necessary for the continuing and settled operations of government, as opposed to major projects and new policies. Section 54 of the Constitution states that a proposed law appropriating money for the ordinary annual services of the government can deal only with such appropriations, while section 53 provides that the Senate may not amend proposed laws appropriating revenue or moneys for the ordinary annual services of the government. There is thus an incentive for the government to adopt an expansive meaning of ‘ordinary annual services’ to avoid parliamentary scrutiny. However, in the Compact of 1965, which sets out the agreement between the government and Parliament, the categories that are not part of the ordinary annual services of government include:

- the construction of public works and buildings;
- the acquisition of sites and buildings;
- items of plant and equipment clearly definable as capital expenditure;
- grants to the States under section 96 of the Constitution; and
- new policies not authorised by special legislation.

The list of categories that constitute extraordinary services of government thus includes significant new projects, capital infrastructure and policies, as well as activities relating to the States.

An analogous test was proposed by Professor Geoffrey Lindell, who suggested that Crennan J’s judgment in Williams (No 1) can be seen to propose a ‘new activity’


test which can be utilised to identify what constitutes an extraordinary contract requiring parliamentary approval, based on the ‘new’ nature of the activity that falls outside the recognised categories of contracts and payments. This test has only been expounded by one High Court judge to date, but represents the only elaboration of the doctrine. The ‘new activity’ test means that new policies or technologies would require parliamentary approval. For instance, if a government revamps the workplace relations system to focus on enterprise bargaining rather than individual employment contracts, this would need to be scrutinised by Parliament. On the other hand, policies which are pre-existing such as the policy to pay public servants’ wages appropriated from public funds do not require legislation to support them beyond the appropriation of the funds in question.

Nevertheless, even the ‘new activity’ test is not entirely clear cut. The High Court in Combet has acknowledged that it was difficult to ascertain the boundaries of appropriations and even examining parliamentary history and practice in appropriations did not assist in delineating the boundary of what constituted ordinary services of government compared to ‘new activities’ and major projects. For instance, contrary to the ‘new activity’ test, in Bardolph legislative approval for the advertising contracts was never required and successive appropriations were sufficient to render the contracts an ordinary function of government.

Lindell queried whether the contracts for advertising for Work Choices in Combet would constitute a contract relating to a new policy that required further legislative approval, given that it advertised a new policy platform for workplace relations. It is debatable whether the advertising for Work Choices can be viewed as regular advertising of government activity or advertising a novel and controversial government activity. If advertising Work Choices is seen to be merely normal governmental advertising, then it would not constitute a new activity. Alternatively, if the Work Choices policy was passed by Parliament through legislation (which was not the case in Combet), then advertising the new policy, which has been scrutinised by Parliament, would be less controversial. However, if advertising Work Choices is seen to be advertising a novel and controversial government policy, then it would be a new activity that requires legislative approval. The expenditure on government advertising of proposed new workplace relations

62 Combet (2005) 224 CLR 494, 531 (Gleeson CJ), 575-6 (Gummow, Hayne, Callinan and Heydon JJ).
64 Combet (2005) 224 CLR 494, 495.
policies without legislative approval besides the *Appropriation Act* was upheld by the High Court in *Combet*.65

However, it should be noted that *Bardolph* and *Combet* were decided before *Pape*, at a time when the *Appropriations Acts* were considered to be a sufficient form of statutory authorisation for spending. Thus, the ‘new activity’ test may represent a new requirement for statutory authorisation after *Pape* and *Williams (No 1)*. The ‘new activity’ test reduces the scope of the exception to statutory authorisation as fewer activities would fall within the definition of ‘ordinary and well-recognised functions of government’. This means that after *Pape* and *Williams (No 1)*, statutory authorisation may be needed for new policies and activities of government.

The question now is whether contracting for the employment of ministerial advisers by the Commonwealth government without statutory authorisation is constitutionally valid as part of the ordinary and well-recognised functions of government. In other words, can the employment of ministerial advisers, which is a relatively new phenomenon that post-dates the *Constitution*, nevertheless be part of the ordinary and well-recognised functions of government?

It is possible that the functions of persons and bodies could be part of the ordinary and well-recognised functions of government even if their existence post-dates the *Constitution*, provided the factors in *Bardolph* and the ‘new activity’ test in *Williams (No 1)* are met. Applying the considerations in *Bardolph*, it can be observed that ministerial advisers have been part of the political landscape for 40 years, although their position has only been explicitly recognised in statute since 1984 with the *MOPS Act*. Further, there has been a yearly appropriation of ministerial adviser salaries in Parliament at least since 1980 as part of the ‘ordinary services of government’ in *Appropriation Act (No 1)*. Ministerial adviser salaries are classified under *Appropriation Act (No 1)*, which is reserved for the ordinary annual services of the Government, while *Appropriation Act (No 2)* covers new policies.66 There have not been any challenges in Parliament to the classification of the salaries of ministerial advisers as part of the ordinary annual services of government; which are distinct from appropriations for departments. This shows that ministerial adviser salaries are considered by Parliament to be part of the ordinary services of government.

Further, utilising the agreed factors in *Williams (No 1)* of whether ministerial advisers are part of the servicing of Commonwealth departments, ministerial advisers play a role in advising their Ministers on government and departmental policies from a strategic and political angle. They also provide a link between the Minister and the public service. In *Re Australian Education Union; Ex parte Victoria*, the High Court recognised the position of ministerial advisers as being in the higher echelons of government, along with Ministers, heads of departments, high level statutory office holders, parliamentary officers and judges. Hence, I argue that ministerial advisers are an integral part in assisting in the administration of a government department. Therefore, it can be argued that due to a situation in the modern world where government has become large and complex and Ministers are unable to handle the various matters under their portfolios without the assistance of specialised partisan ministerial advisers, the current practices of government mean that efficient and effective government administration now includes ministerial advisers as an integral part of the Executive. Hence contracting for the employment of ministerial advisers would fall within the scope of section 64 of the Constitution as their duties are part of the ordinary and well-recognised functions of government.

To sum up, the employment of ministerial advisers falls within the scope of the ordinary functions of government. However, based on the analysis of *Williams (No 1)* that results in the ‘new activity test’, statutory authorisation could have been required if ministerial advisers were employed for the first time in Australia, if employing them would be regarded as a new activity distinct from employing public servants. The employment of public servants is sanctioned by the Constitution, but the employment of press secretaries and political advisers could have represented a new activity that required legislative approval. Statutory authorisation has been acquired in this case through the *MOPS Act*, provided that the statute is valid. I will now show that the *MOPS Act* is valid.

III IS THE MEMBERS OF PARLIAMENT (STAFF) ACT 1984 (CTH) CONSTITUTIONALLY VALID?

There is a legislative framework governing the employment of ministerial advisers, which is the *Members of Parliament (Staff) Act 1984 (Cth)* (‘*MOPS Act*’). The *MOPS Act* provides for the employment of consultants and staff by Ministers, certain office-holders, Senators and Members of the House of Representatives.

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68 Ng, above n 11.
Ministerial advisers are employed under section 13 of the *MOPS Act*, as personal staff employed by Ministers. The same provision also provides for the employment of parliamentary staff by the Leader and Deputy Leader of Opposition in the Senate and House of Representatives. Thus, section 13 encompasses the employment of both executive and parliamentary staff. The source of power to employ these two categories of staff is different. For parliamentary staff, section 49 of the *Constitution* imports the powers, privileges, and immunities of the United Kingdom House of Commons in 1901, including the power to employ parliamentary officers. In terms of ministerial advisers, who are part of the Executive, the source of power is arguably based on a combination of executive power under section 61 and incidental power under section 51(xxxxix). I will focus on the employment of ministerial advisers and explore case law on executive power and incidental power under section 51(xxxxix).

### A Case Law on Executive Power and Incidental Power under Section 51(xxxxix)

Case law has established that the Commonwealth has the power to legislate in the area of internal security and to protect against seditious and subversive conduct, either supported by section 51(xxxxix) combined with executive power, or as an inherent part of the Commonwealth’s existence as a political institution. The weight of authority points towards section 51(xxxxix) combined with section 61 as the source of power to legislate against subversive activities, with only Dixon J promoting the inherent power approach. The incidental power under section

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70 *Members of Parliament (Staff) Act* 1984 (Cth) s 13.
72 Latham CJ in *Burns v Ransley* and *R v Sharkey* (Webb J agreeing in *R v Sharkey*) affirmed that section 51(xxxxix) combined with executive power enables Parliament to make laws ‘to protect and maintain the existing Government and the existing departments and officers of the Government in the execution of their powers’. This power also extends to the power to protect organs of the Executive and Legislature against ‘physical attack and interference’, as well as against utterance of words ‘intended to excite disaffection against the Government’ or to prevent activities impeding defence and war-like activities. *Burns v Ransley* (1949) 79 CLR 101, 109-10 (Latham CJ); *R v Sharkey* (1949) 79 CLR 121, 135 (Latham CJ), 163 (Webb J). McTiernan J in *R v Sharkey* also found that section (xxxix) supported legislation protecting Commonwealth governmental institutions from seditious words. *R v Sharkey* (1949) 79 CLR 121, 157 (McTiernan J).
73 Dixon J found a Commonwealth power to legislate against subversive conduct arising ‘out of the very nature and existence of the Commonwealth as a political institution’, rather than being sourced from a combination of section 51(xxxxix) and other constitutional powers. As Dixon J held in the *Communist Party Case*: ‘As appears from *Burns v Ransley* and *R v Sharkey*, I take the view that the power to legislate against subversive conduct has a source in principle that is deeper or wider than a series of combinations of the words of s. 51(xxxxix) with those of other constitutional powers’. *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 187-8 (Dixon J). See *Burns v Ransley* (1949) 79 CLR 101, 116 (Dixon J); *R v Sharkey* (1949) 79 CLR 121, 148 (Dixon J).
51(xxxix) may be used in conjunction with executive power to protect the existence of the Commonwealth as a polity because such matters strike at ‘the very foundation of the Constitution’. These cases show that the protection and maintenance of the Constitution is a duty of the Executive, and Parliament may legislate to create criminal offences in support of this.

Following this, there was a series of nationhood cases that relied on executive power in conjunction with the incidental power to validate legislation. Mirroring the case law on subversion, there are two mooted possible sources of the nationhood power: an implied legislative nationhood power or a combination of section 61 and incidental power under section 51(xxxix).

Case law has since established that the only source of nationhood power is the combination of sections 61 and 51(xxxix). This means that legislative power only exists to the extent that it can be viewed as incidental to a valid exercise of executive power. In Pape, there did not seem to be much support for an implied legislative nationhood power. Hayne and Kiefel JJ upheld the existence of the implied legislative power in respect of subversive activities. However, as discussed above, the subversion cases were largely based on the incidental scope of executive power under section 51(xxxix). In addition, prerogative power does extend to the suppression of subversive activities. Therefore there is no need for an independent legislative nationhood power to support the suppression of subversive activities.

The scope of executive power combined with incidental power under section 51(xxxix) is limited. Brennan J in Davis held that section 51(xxxix) only confers

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74 Davis (1988) 166 CLR 79, 102 (Wilson and Dawson JJ).
76 In Davis, Wilson, Dawson and Toohey JJ held that a combination of sections 61 and 51(xxxix) was the only source of the nationhood power, while Mason, Deane and Gaudron JJ decided that, in addition to the incidental power in section 51(xxxix), there may also exist an implied legislative nationhood power. Brennan J did not decide on the issue. Davis (1988) 166 CLR 79, 95 (Mason, Deane and Gaudron JJ), 117 (Toohey J), 101-2 (Wilson and Dawson JJ).
78 The existence of an implied legislative nationhood power was not resolved in Pape. French CJ did not find it necessary to discuss an implied legislative nationhood power, while Gummow, Crennan and Bell JJ did not discuss this issue. Hayne and Kiefel JJ decided that there may be an implied legislative nationhood power for the Commonwealth Executive to handle subversive activities and endeavours such as in R v Sharkey and Burns v Ransley, but found that this implied legislative power was of limited scope and did not extend to regulating the national economy. Pape (2009) 238 CLR 1, 63-4 [133] (French CJ), 125 [363]-[364] (Hayne and Kiefel JJ), 177 [510].
a power to make a law in respect of a matter incidental to the exercise of executive power, rather than a broader power to legislate with respect to a general subject matter or even a matter incidental to the subject matter.\textsuperscript{81} As will be shown below, the incidental power under section 51(xxxix) has been interpreted restrictively, in a way that limits the scope of the nationhood power based on considerations of federalism, with a cautious reading of coercive laws. This is desirable to reduce the scope of non-statutory executive power.

B \textit{Is the MOPS Act Supported by Sections 61 and 51(xxxix)?}

The source of power to employ ministerial advisers will now be considered. Section 51(xxxix) provides the Commonwealth Parliament with the power to legislate with respect to matters incidental to the execution of any power vested by the Constitution in the Commonwealth Government, or in any department or officer of the Commonwealth.\textsuperscript{82} There are two aspects of the definition of incidental power under section 51(xxxix) that will be explored separately in regards to the MOPS Act. It will be considered whether the MOPS Act is legislation in respect of:

- matters incidental to the execution of executive power; or
- matters incidental to the execution of any power vested in any ‘officer of the Commonwealth’.

First, I will examine whether the MOPS Act is legislation that is incidental to the execution of executive power. To this end, it is necessary to ascertain whether contracting for the employment of ministerial advisers is a matter incidental to the execution by Ministers of their powers under section 64 of the Constitution in administering departments of State.

It is strongly arguable that contracting for the employment of ministerial advisers is incidental to Ministers exercising executive power and administering departments of State. This is because ministerial advisers assist and advise Ministers in their performance of executive and statutory powers.\textsuperscript{83} Thus, the employment of ministerial advisers is incidental to Ministers’ exercise of their powers under the Constitution.

Another question is whether the MOPS Act is valid on the basis that it falls within the incidental power to legislate under section 51(xxxix) with respect to matters incidental to the execution of any power vested by the Constitution in an

\textsuperscript{81} Davis (1988) 166 CLR 79, 111 (Brennan J).
\textsuperscript{82} Australian Constitution s 51(xxxix).
\textsuperscript{83} Ng, above n 11.
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‘officer of the Commonwealth’. In the language of section 51(xxxix), Ministers certainly do ‘execute’ executive and statutory powers. Both Ministers and public servants are recognised in sections 64 and 67 of the Constitution respectively as officers of the Executive Government of the Commonwealth. Thus, it can be argued that Ministers and public servants are ‘officers of the Commonwealth’ under section 51(xxxix). This is supported by the fact that Ministers are clearly part of ‘the Commonwealth’ under section 75(iii). Relevantly, as Ministers are ‘officers of the Commonwealth’ under section 51(xxxix), the question is whether the MOPS Act is incidental to assisting Ministers in the exercise of the powers vested in them by the Constitution. As discussed above, ministerial advisers assist Ministers in carrying out their executive and statutory functions; hence the employment of ministerial advisers would be part of the incidental scope of assisting Ministers as ‘officers of the Commonwealth’ under section 51(xxxix).

C Are there any Limitations on the Scope of Executive Power and Incidental Power under section 51(xxxix) that apply to the MOPS Act?

This article will now consider whether there are any limitations on the scope of executive power and incidental power under section 51(xxxix) identified in case law that apply to the MOPS Act.

Federalism

Judges in the nationhood cases have noted the federal distribution of powers as a concern in interpreting the nationhood power combined with incidental power, although they accord this consideration varying weight. For example, in Pape, despite the split 4:3 decision, all judges unanimously stated that executive power must be limited by considerations of federalism. This approach is a consolidation of views from previous judgments.

84 Bank of New South Wales v Commonwealth (1948) 76 CLR 1, 275 (Rich and Williams JJ), 367 (Dixon J).
85 Pape (2009) 238 CLR 1, 63 [132] (French CJ), 83 [214], 85 [220] (Gummow, Crennan and Bell JJ), 119 [336]-[339] (Hayne and Kiefel JJ), 190 [541], 134 [397] (Heydon J), quoted with approval by Hayne J in Williams (2012) 248 CLR 156, 251-2 [197]-[198].
86 Eg in the AAP Case, Mason J noted that the scope of executive power to engage in activities based on the existence and character of the Commonwealth as a national polity was narrow and should not subvert the legislative distribution of powers between the Commonwealth and the States, as it was only based on the incidental power in section 51(xxxix): AAP Case (1975) 134 CLR 338, 397-8 (Mason J). In Davis, Brennan J remarked that in determining whether an enterprise or activity lies within the executive power of the Commonwealth, consideration should be given to the sufficiency of State powers to engage effectively in the enterprise or activity and the need for national action (whether unilateral or in cooperation with the States), and Deane J held that the existence of Commonwealth executive power extending beyond the heads of Commonwealth legislative power is most likely to be found where
Hence, the High Court will adopt a restrained approach towards approving incidental power as a head of legislative power. This is because there is a more tenuous link between legislation utilising incidental power and Commonwealth legislative power, as it does not fall within the other enumerated heads of legislative power. A broad interpretation of executive power and the incidental head of legislative power can undermine the federal compact and the distribution of powers between the Commonwealth and States.

The question is whether the national character of the Commonwealth Executive impinges on the ability of the State Executives to co-exist as distinct polities in terms of the power to employ ministerial advisers. There is no reason to think that the employment of Commonwealth ministerial advisers has a negative impact on the executive power of the State Executives. The Commonwealth scheme of employing ministerial advisers does not impede State executive power, as the States have their own employment structures for ministerial advisers that are completely separate from the Commonwealth.

2 Coercive v Facultative Laws

There is another potential limitation to the scope of incidental power regarding coercive compared to facultative laws. It is notable that the nationhood cases examined by the court involved facultative legislation, such as allowing celebration of a bicentenary, national symbols and organisations, and tax bonus payments. French CJ remarked in *Pape* that the Court is likely to approach future questions about the application of executive power to coercive laws, absent statutory authority made under a head of power other than section 51(XXXIX), conservatively due to the admonition of Dixon J in *Australian Communist Party v Commonwealth* (‘Communist Party Case’) that:

> History … shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected.88

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This signals a change in approach from the previous sedition cases to a more conservative approach against further extending the reach of section 51(xxxxix). Therefore, the ability of section 51(xxxxix) in conjunction with executive power to authorise coercion should ideally be seen as being confined to protection of the State against subversive behaviour, with very few exceptions to that principle.

Thus, the scope of Commonwealth legislative power based on nationhood and incidental power may be limited by whether the nature of the law is facultative or coercive. Although the combination of nationhood power and section 51(xxxxix) is able to authorise coercive activity, the court would be cautious about extending this power.

In terms of the validity of the MOPS Act, the MOPS Act is facultative as it facilitates the power of Ministers to employ ministerial advisers, and does not involve any coercive elements. Therefore, it is clear that the MOPS Act is able to validate the employment of ministerial advisers, as it is supported by a combination of executive power under section 61 and incidental power under section 51(xxxxix) and there are no relevant limitations that apply.

IV Appropriation of and Expenditure on Salaries of Ministerial Advisers

In addition to a valid constitutional basis for the spending, the appropriation for salaries of ministerial advisers also needs to be valid. Appropriations involve:

- annual appropriation legislation, which comprises the budget and authorises government expenditure within one year; or
- permanent appropriation legislation, which provides an indefinite standing authority for government expenditure.

The salaries of ministerial advisers are paid out of an annual appropriation made to the Department of Finance. The relevant appropriation in 2016-17 was made for the purpose of ‘[s]upport for Parliamentarians and others as required by the Australian Government through the delivery of, and advice on, entitlements and targeted assistance’ by Appropriation Act (No 1) 2016-17 (Cth). The Portfolio Budget Statement by the Department of Finance provides additional content to the

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89 The power to protect the State against subversive behaviour may now be covered under the defence power. Thomas v Mowbray (2007) 223 CLR 307.

90 See eg Burns v Ransley (1949) 79 CLR 101, 109-10 (Latham CJ), 116 (Dixon J); R v Sharkey (1949) 79 CLR 121, 148 (Dixon J); Davis (1988) 166 CLR 79, 99 (Mason CJ, Deane and Gaudron JJ).


92 Appropriation Act (No 1) 2016-17 (Cth), Schedule 1, Department of Finance, Outcome 3.
Appropriation Act and can be used as an interpretive guide. According to the Department of Finance Portfolio Budget Statement 2016-17, ministerial adviser salaries formed part of the line item appropriation for ‘Electorate and Ministerial Support Costs’. The appropriations for ministerial adviser salaries go back to at least 1980 with the Appropriation Act (No 1) 1980-81 (Cth). It is more difficult to ascertain appropriations prior to this period as appropriations before 1980 involved a lump sum appropriation for each department, without specifying line items for the appropriations. The quantum of the salaries for ministerial advisers has increased significantly. In 1980-81, the appropriation for salaries and payments in the nature of salaries to ministerial advisers was $11,084,200, while in 2015-16, the government spent $241,782,000 on ministerial adviser staff and payroll-related costs. When adjusted for inflation, this is an increase of 479%. There have been regular appropriations for the salaries of ministerial advisers at least since 1980. The question is whether the appropriations are valid. The relevant sections of the Constitution pertaining to appropriations are sections 81 and 83. Section 81 provides that funds received by the Commonwealth Executive shall form a consolidated revenue fund, and that money appropriated from consolidated revenue has to be ‘for the purposes of the Commonwealth’. Section 83 provides that).

Section 4 of the Appropriation Act (No 1) 2012-13 (Cth) explicitly incorporates the Portfolio Statements by declaring that these are ‘relevant documents’ for the purposes of section 15AB of the Acts Interpretation Act 1901 (Cth). Section 15AB of the Acts Interpretation Act 1901 (Cth) provides that extrinsic material can be used to interpret the provisions of an Act to determine the meaning of an Act, including where an Act declares a document to be a ‘relevant document’. Australian Government Department of Finance, Portfolio Budget Statements 2016-17 (2016) Budget Related Paper No 1.8, Finance Portfolio, ‘Ministerial and Parliamentary Services’, program 3.1, 52 http://www.finance.gov.au/sites/default/files/2016-17-pbs-full.pdf?v=1. The appropriations of salaries of ministerial advisers are distinct from the appropriation of salaries for public servants within a department. The salaries of public servants form part of ‘departmental appropriations’ for each department and are appropriated as part of the ordinary annual services of government in Appropriation Act (No 1). On the other hand, ministerial advisers’ salaries are classified separately from that of public servants, as ministerial advisers’ salaries are considered to be an ‘administered item’, rather than a ‘departmental item’. An ‘administered item’ is to be applied for expenditure for the purpose of contributing to achieving a budget outcome. In the case of ministerial adviser salaries, as stated above, the stipulated outcome is to provide support for Parliamentarians.

83 provides that appropriations have to be made by law, which means that appropriations have to be made through a valid Commonwealth statute, that is, with parliamentary authorisation.\footnote{Commonwealth v Colonial Combing, Spinning & Weaving Co Ltd (1922) 31 CLR 421, 450 (Isaacs J); \textit{Brown v West} (1990) 169 CLR 195, 205 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); John Waugh, ‘Evasive Control of Parliamentary Spending: Some Early Case Studies’ (1998) 9 \textit{Public Law Review} 28; Enid Campbell, ‘Parliamentary Appropriations’ (1971) 4(1) \textit{Adelaide Law Review} 145.} The appropriations provisions were included in the \textit{Constitution} as an evolved written form of an English convention about the fiscal supervision of the Parliament over the Executive.\footnote{Quick and Garaan, above n 15, 812; Gabrielle Appleby, ‘There Must be Limits: The Commonwealth Spending Power’ (2009) 37(1) \textit{Federal Law Review} 93, 116.} The control of expenditure by Parliament is said to be the ‘most ancient, as well as the most valued, prerogative of the House of Commons’.\footnote{Alpheus Todd, \textit{Parliamentary Government in England} (London, Marston, 1892) vol 2, 96. See A J V Durell, \textit{The Principles and Practice of the System of Control over Parliamentary Grants} (Portsmouth, Gieves, 1917) 3.}

The key question about the validity of an appropriation for the salaries of ministerial advisers is how the phrase ‘purposes of the Commonwealth’ in section 81 of the \textit{Constitution} should be interpreted in relation to the salaries of ministerial advisers. Previously the High Court had differing views about whether section 81 should be interpreted broadly to encompass any purpose determined by Parliament as a ‘purpose of the Commonwealth’,\footnote{Pharmaceutical Benefits Case (1945) 71 CLR 237, 266 (Starke J), 271 (Dixon J), 282 (Williams J); AAP Case (1975) 134 CLR 338, 360–3 (Barwick CJ), 373–4 (Gibbs J).} or should be limited based on the distribution of legislative powers in the \textit{Constitution}.\footnote{Pape (2009) 238 CLR 1, 75 [185], 82 [210] (Gummow, Crennan and Bell JJ).} In \textit{Pape}, the High Court judges still did not have a united view on whether the scope of the appropriations was limited by the phrase ‘purposes of the Commonwealth’. Gummow, Crennan and Bell JJ preferred the broad view that appropriations could be for any purpose and were not limited by the enumerated heads of Commonwealth legislative power,\footnote{Ibid 103 [290].} while Hayne and Kiefel JJ seemed to prefer the broad view that appropriations were not likely to be limited by the heads of legislative power, but did not rule definitively on the issue.\footnote{Ibid 55–6 [111], [113] (French CJ), 213–4 [608] (Heydon J). Cf \textit{Pape} (2009) 238 CLR 1, 111 [317] (Hayne and Kiefel JJ). See Andrew McLeod, ‘Case Note: The Executive and Financial Powers of the Commonwealth- \textit{Pape v Commissioner of Taxation}’ (2010) 32(1) \textit{Sydney Law Review} 123, 130.} On the other hand, French CJ and Heydon J preferred the narrow view that appropriations were limited by the scope of Commonwealth legislative power.\footnote{Attorney-General (Vic) ex rel Dale v Commonwealth (1945) 71 CLR 237, 254 (Latham CJ), 273 (McTiernan J) (‘Pharmaceutical Benefits Case’); Victoria v Commonwealth and Hayden (1975) 134 CLR 338, 367–9 (McTiernan J), 396 (Mason J), 417 (Murphy J) (‘AAP Case’). See also Commonwealth, Royal Commission on the Constitution of the Commonwealth, \textit{Report of the Royal Commission on the Constitution} (1929) Minutes of Evidence, pt 1, 69; Cheryl Saunders, ‘The Development of the Commonwealth Spending Power’ 11 \textit{Melbourne University Law Review} 369, 372, 373, 401, 403.}
This article will elaborate on French CJ’s narrow view in *Pape*. This is because, as French CJ adopts the narrowest view, if the test of French CJ is satisfied, the appropriation would be valid for the rest of the judges who adopt a broader and more generous view of appropriations as being in essence unlimited. Heydon J adopted essentially the same position as French CJ, of appropriations being limited by the scope of Commonwealth legislative power.\(^{108}\)

For French CJ the ‘purposes of the Commonwealth’ could be created by specific legislation or the *Constitution*:

> The ‘purposes of the Commonwealth’ are the purposes otherwise authorised by the *Constitution* or by statutes made under the *Constitution*.\(^{109}\)

French CJ explicitly distinguished the validity of the appropriation from the subsequent expenditure of public funds. He found that sections 81 and 83 do not confer power; rather the source of legislative power must be found elsewhere in the *Constitution* or other statutes:

Substantive power to spend the public moneys of the Commonwealth is not to be found in s 81 or s 83, but elsewhere in the Constitution or statutes made under it. That substantive power may be conferred by the exercise of the legislative powers of the Commonwealth. It may also be an element or incident of the executive power of the Commonwealth derived from s 61, subject to the appropriation requirement and supportable by legislation made under the incidental power in s 51(xxxix).\(^{110}\)

This approach was unanimously agreed by the High Court in *Pape*, who held that although the power to appropriate money is broad, sections 81 and 83 are not sufficient bases for the power to spend.\(^{111}\) Rather, the power for the Commonwealth Executive to spend must be found in valid legislation or in the *Constitution*.\(^{112}\) This means that section 81 is not a substantive head of power, and authority for spending decisions must be found in statutes or within the scope of incidental power supported by legislation.

\(^{108}\) Heydon J stated that the words ‘by law’ in section 83 limit the power of appropriation to what can be done by enactment of a valid law, which implied a limitation on the appropriation power to what can be achieved under Commonwealth legislative power. Ibid 213-4 [608] (Heydon J).

\(^{109}\) Ibid 56 [113] (French CJ).

\(^{110}\) Ibid 55 [111] (French CJ).

\(^{111}\) Ibid 55 (French CJ), 73 [178], 75 [186] (Gummow, Crennan and Bell JJ), 103, 105 [296] (Hayne and Kiefel JJ), 210, 213 (Heydon J).

\(^{112}\) Ibid.
Thus, French CJ’s judgment can be seen to introduce a two-step test. First, he utilised the ‘purposes of the Commonwealth’ to establish a valid appropriation by considering whether appropriations are supported by valid legislation under sections 51 and 52 of the Constitution or by section 61, rather than section 81. Second, there must be valid legislation that authorises expenditure. Often the same legislation that establishes a valid appropriation in Step 1 will authorise the expenditure in Step 2. However, this is not necessarily the case. For example, in Pape, a tax bonus was paid as part of a fiscal stimulus package as part of a valid appropriation under the Taxation Administration Act 1953 (Cth), read with section 3 of the Tax Bonus for Working Australians Act (No 2) 2009 (Cth), while section 61 of the Constitution in combination with section 51(xxxix) established the legislative head of power for the expenditure.

French CJ’s test will now be applied to appropriations for the salaries of ministerial advisers. As mentioned above, for French CJ the ‘purposes of the Commonwealth’ can be created by specific legislation. To establish Step 1, the MOPS Act makes the appropriation of ministerial adviser salaries a ‘purpose of the Commonwealth’, provided that the MOPS Act is supported by a valid head of legislative power. The MOPS Act is constitutionally valid (as shown in Part II); hence the appropriation is valid. For ministerial advisers, the legislation that authorises the appropriation also authorises the expenditure. Hence, in Step 2, the MOPS Act may authorise contracting and expenditure provided that the MOPS Act has a valid source of constitutional power. As stated above, the MOPS Act is constitutionally valid. Therefore, French CJ would find that the appropriation of and expenditure on the salaries of ministerial advisers are permissible under the MOPS Act. As French CJ has the narrowest test, the other judges would also have no issue with the salaries of ministerial advisers given that the broad view allows for any purpose determined by Parliament to be a ‘purpose of the Commonwealth’.

Thus, whichever interpretation of the scope of appropriations under section 81 is adopted, the appropriation of and expenditure on the salaries of ministerial advisers would be valid. This is because, as shown in Part II, the Commonwealth has the power to legislate for the employment of ministerial advisers under section 51(xxxix) and executive power under section 61. Therefore, there has been a valid appropriation and expenditure of the salaries of ministerial advisers at least since 1980. Even before this period, there would be the prerogative power to hire and fire ministerial advisers as servants of the Crown.

V CONCLUSION
The traditional actors within the Executive of the Governor-General, Ministers and public servants are no longer the only actors who engage in public functions. The scope of governmental activity has increased over the years. Governing has become more complex and demanding following the 24/7 news cycle such that Ministers are unable to cope with the workload themselves and employ ministerial advisers to assist them.

The idea of partisan advisers for Ministers was denigrated by the framers of the Constitution as being corrupt and undesirable.\footnote{Official Report of the National Australasian Convention Debates, Adelaide, 19 April 1897, 916-7 (Bernhard Ringrose Wise); 917 (Sir George Turner).} The ideal of the impartial public service continues to this day in spirit, as seen in the Australian Public Service Values.\footnote{Australian Public Service Values < http://www.apsc.gov.au/aps-employment-policy-and-advice/aps-values-and-code-of-conduct/code-of-conduct/aps-values>.} However, partisan ministerial advisers have slowly and steadily grown as an institutionalised source of advice — a phenomenon which would not have been imaginable at federation. There has been a distinct shift in attitude towards partisan political advisers being a formalised part of government, with their position officially recognised through statute. Fundamental questions arise, such as what is the nature of the Executive Government? What is the constitutional basis of new institutional actors such as ministerial advisers?

In this article, it has been shown that the Commonwealth Executive has the power to expend public funds and contract to employ ministerial advisers through Commonwealth executive power under section 61. In addition, this article establishes that the MOPS Act is constitutionally able to support the employment of ministerial advisers under section 51(xxxix) as a subject incidental to the scope of executive power in section 61. It has also been shown that contracting for the employment of ministerial advisers has become part of the ‘ordinary and well-recognised functions of government’, as they are now an essential part of the administration of departments, being a conduit between the Ministers and the public service. Therefore, there has been a shift from the time of federation, where the idea of ministerial advisers would have been denigrated, to a situation where ministerial advisers are now an integral and institutionalised aspect of governing the nation. Their numbers have steadily increased and they play an integral role as a link between the Ministers and the public service. Their position has been legislatively recognised and their salaries have been appropriated from public funds at least since 1980. Thus, ministerial advisers are significant new actors in the Executive government. As their roles expand and their numbers grow, it is necessary to ensure that legal principles keep up with political realities. The law
can no longer afford to ignore the operation of ministerial advisers within our system of government.
ALL-EMBRACING APPROACHES TO CONSTITUTIONAL INTERPRETATION & ‘MODERATE ORIGINALISM’

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This paper is separated into two parts. First, the author examines some of the normative considerations for and against judges openly enunciating and consistently applying all-embracing approaches to constitutional interpretation – a development that Justice Kirby has previously advocated. In this regard, the author also recounts a number of recent and historical examples of the at times inconsistent and ad hoc approaches applied when interpreting the Constitution. Second, the author turns to examine some of the alternative methods available in constitutional interpretation. The author argues that a form of ‘moderate originalism’ is the most useful and justified of these approaches. In this respect the author draws on the contributions of various theorists, as well as responding to some recent criticisms made of originalist theory.

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I INTRODUCTION

In 2000 Kirby J proclaimed that ‘[t]here is no task performed by a Justice of the High Court which is more important than the task of interpreting the Constitution’. 1 In Eastman v The Queen, a case decided that same year, his Honour proffered curially the supposed desirability of adopting a single approach to constitutional interpretation ‘lest the inconsistencies… of whichever result produces a desired outcome’ perpetuate. 2 Gummow J and others have disagreed with this view. 3 To date the High Court has not taken heed of Kirby’s advice. Single unifying approaches have not been embraced.

This paper is separated into two parts. First, the author critically examines Kirby’s assertion that judges should adhere to a single, coherent approach to constitutional interpretation - the primary claim. Arguments for and against such a development are evaluated. Ultimately it is argued that the enunciation of, and adherence to, single all-embracing approaches would be a positive development. Second, the author turns to examine some possible alternative interpretive approaches, including the non-originalism that Kirby has advocated - the secondary claim. It is argued that a form of ‘moderate originalism’ 4 is the most useful and

1 Justice Michael Kirby, ‘Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?’ (2000) 24 Melbourne University Law Review 1, 8. As our fundamental law the Constitution allocates and regulates government power, as well as affording some rights protections. Therefore, interpretation can have profound consequences. (Mis)interpretation cannot be easily ‘corrected’ through the formal amendment procedures in s 128.
2 (2000) 203 CLR 1, 79-81
4 The learned writer Jeffrey Goldsworthy has used the term ‘moderate originalism’ to describe his preferred method of constitutional interpretation. I use the phrase here to describe that same method. The approach will be examined further in the succeeding pages, however I could not claim that this essay is any way a substitute for Goldsworthy’s prodigious contribution to the field. Other writers have also advocated a similar approach to that put forward by Goldsworthy. See also, e.g., Craven, above n 3; Lawrence B Solum, ‘District of Columbia v Heller and Originalism’ (2009) 103 Northwestern University Law Review 923, 933; Keith F Whittington ‘The New Originalism’ (2004) 2 Georgetown Journal of Law and Public Policy 599, 605. Some have questioned whether this new approach really differs from traditional iterations of originalism, see e.g., Richard S Kay ‘Original Intention and Public Meaning in
justified of these alternatives. By ‘moderate originalism’ the author refers to an interpretive approach sitting between strict versions of originalism and versions of non-originalism. This moderate approach does not exclude the use of other interpretive techniques, unlike other stricter versions of originalism. Rather, moderate originalism requires that judges have regard to the objectively ascertained (or ascertainable) original intentions of the constitutional framers before resorting to new and alternative meanings. The content of this approach is described in greater detail below. The author also examines some perceived methodological issues with the originalist approach – including this moderate originalism. It is submitted that the arguments advanced in this regard, while merited, are not fatal to the approach proposed in this article.

II THE PRIMARY CLAIM: AN ALL-EMBRACING APPROACH

A An All-Embracing Approach?

This Court should adopt a single approach to construction of the basic document placed in its care. Constitutional elaboration, above all, should be approached in a consistent way, lest the inconsistencies of an originalist approach here and a contemporary approach there be ascribed to the selection of whichever approach produces a desired outcome.5

What did Kirby J mean by this? Are these criticisms justified? Would the adoption of a single, unified approach to constitutional interpretation be a positive development? In this section the author attempts to provide some possible answers to these question. First, the meaning of Kirby J’s dictum is examined by drawing on his Honour’s extra-curial contributions to this topic. Second, the author provides three examples of the at times, and with respect, varying and ad hoc approaches adopted when resolving constitutional disputes. In this respect, the author suggests that Kirby J’s criticisms are indeed justified. Finally, the author turns to examine arguments for and against the adoption of all-embracing approaches to constitutional interpretation. It is ultimately argued that a satisfactorily comprehensive methodology does now exist, and that the greater coherency engendered by consistent use of this approach, is indeed a good thing. In this respect also, the author agrees with Kirby J.

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5 Eastman v The Queen (2000) 203 CLR 1, 81 [245] (Kirby J) (emphasis in original).
Kirby J’s view

In the context of his Honour’s judgment in *Eastman* the above quoted passage appears, with respect, almost desultory. In the preceding paragraphs Kirby J briefly recounts the reasons of the majority in *Mickelberg v The Queen* and the then accepted meaning of ‘appellate jurisdiction’, the meaning of that term being relevant to the question before the Court in *Eastman*. His Honour then turns to note Deane J’s criticism of the *Mickelberg* decision along with the cases preceding it. Kirby J then enunciates the general principle that “… it is to misconceive the role of this Court in constitutional elaboration to regard its function as being that of divining meaning of the language of the text in 1900, whether as understood by the founders, the British Parliament, or ordinary Australians of that time.” In support of the non-originalist approach that Kirby J is well known as having favoured, his Honour cites the contributions of Andrew Inglis Clark and Deane J, arguing that Clark ‘acknowledged the “living force” of the Constitution which otherwise would be a “silent and lifeless document”’. Kirby J then cites a number of decisions that his Honour suggests support a non-originalist reading. The cases cited include *Cheatle v The Queen*, which concerned the essential features of a jury trial for the purposes of s 80 of the *Constitution*; *Sue v Hill*, which held that the reference to ‘subject or a citizen of a foreign power’ in s 44(i) of the *Constitution* was applicable to the United Kingdom; and finally *Cole v Whitfield*, which concerned the meaning of s 92 of the *Constitution*. The author will return to the decision in *Cole* later in this article, albeit for a different purpose. With that said, the author wishes to note as an aside that the decisions in *Cheatle*, *Sue v Hill*, and *Cole* can equally be used as examples where the Court has favoured an originalist approach, as Professor Goldsworthy has elsewhere suggested.

Ultimately, it is not clear from Kirby J’s judgment in *Eastman* whether his Honour is advocating that the Court adopt a single, unified approach to which all

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6 (1989) 167 CLR 259.
7 See (1989) 167 CLR 259, 270 (Mason CJ).
9 Ibid 79.
11 (1993) 177 CLR 541.
Justices adhere, or whether his Honour is suggesting that each Justice should develop their own approach that they themselves would come to consistently apply in all constitutional cases.

Kirby J’s earlier remarks at the 1999 Sir Anthony Mason Honorary Lecture are instructive in this respect. These comments reveal that, rather than suggesting that the Court enunciate a single method or rule of interpretation to be applied into the future, his Honour instead favours that ‘each Justice (indeed each reader of the Constitution) should have a theory of constitutional interpretation’ that they themselves apply in a uniform and consistent way. It is this development that the author now turns to evaluate.

2 Some examples

The primary claim delineated above is comprised of two elements, each requiring some closer consideration. First, what might be termed a positive claim: that is, whether it is in fact the case that Justices have brought varying and ad hoc approaches to constitutional adjudication and interpretation? Second, a normative claim: whether this is a problem.

The author turns first to examine the positive claim. It will be shown that this particular criticism is well grounded. The author briefly recounts three examples. First, the decisions of Mason J – later Mason CJ – with respect to the meaning of s 92 of the Constitution. Second, the interpretation and application of ‘representation’ by Dawson J with respect to s 80 and later with respect to equality of representation in state parliaments. Third, the 2013 decision of the High Court with respect to the meaning of marriage and s 51(xx). The author notes that these are not the only such examples.

15 Kirby, above n 1, 8.
16 Another example can be taken from the judgments of Deane J in various cases over the period of time that his Honour was a Justice of the High Court. In Cole v Whitfield (1988) 165 CLR 360 at 385-92 and in Breavington v Godleman (188) 169 CLR 41 at 132-3 Deane J relied extensively on the Convention Debates when construing meaning. Whereas only two years later his Honour cast doubt as to the permissibility of relying on the ‘intentions or understanding of those who participated in or observed the Convention Debates’: New South Wales v Commonwealth (1990) 169 CLR 482, 511. Finally in Theophanous v The Herald & Weekly Times (1993) 182 CLR 104 Deane J denies that the Convention Debates are at all relevant because the Constitution is a living document. All cited by Justice Selway, below n 58. Still a further example is to be found in the reasons of Windeyer J in various cases. Windeyer J expressed at various times the need to consider the present day consequences of one interpretation or another when constructing meaning. For example, in Jones v The Commonwealth (No 2) (1965) 112 CLR 206 at 237 his Honour urged that ‘the very nature of the subject-matter makes it appropriate for Commonwealth control regardless of State boundaries’. Further, in Spratt v Hermes (1965) 114 CLR 226 at 227 and in Bonser v La Macchia (1969) 122 CLR 177 at 224 his Honour emphasised the importance of reading the Constitution to meet ‘national needs’. These passages can be contrasted to his Honour’s reasons in a number of other cases. For example, in the earlier case of Ex...
(a) **Section 92 and Cole v Whitfield**

Section 92 of the *Constitution* guarantees free movement of goods between the states and territories. In the 1988 decision of *Cole v Whitfield*, the High Court attempted to devise a definitive test of invalidity under s 92. The test, which has been affirmed in a number of subsequent cases, was deduced from an expansive review of the drafting history of the section including, critically, the *Convention Debates*.

This approach marked a clear departure from the settled rule that the *Convention Debates* were not admissible for the purposes of interpreting the text of the *Constitution*. Whereas in *Cole* the Court *per curiam* enunciated a formula that adopted the (limited) use of historical sources, including the *Convention Debates*:

Reference to the history of s 92 may be made, not for the purpose of substituting for the meaning of the words used the scope and effect – if such could be established – which the founding fathers subjectively intended the section to have, but for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the

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18 See especially *Castlemaine Tooveys Ltd v South Australia* (1990) 169 CLR 436 and *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418.
nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged. \(^{21}\)

As can be seen, the Court in *Cole* draws a distinction between legitimate and illegitimate uses of historical sources. According to this formula, reference to historical sources is permissible for three purposes. First, in order to discover what a word or phrase meant at the time of federation. Second, to identify the subject that a particular provision was directed towards. Third, to illuminate the general objectives of the federation movement. It follows that it is legitimate to construe meaning consonant with these bases. On the other hand, the use of historical sources to discern what the founders *subjectively intended* a provision to mean – or the effect that they subjectively intended it to have – is not permissible. The author will return to this distinction when examining the moderate originalist approach that this paper advocates. For present purposes, it is only necessary to contrast the *per curiam* decision in *Cole* – lead by Mason CJ – from his Honour’s earlier decisions concerning resort to the *Convention Debates*.

In *North Eastern Dairy Co Ltd v Dairy Industry Authority of New South Wales* – a case decided some 13 years before *Cole* – Mason J (as he then was) held that the ‘freedom guaranteed by s 92 [of the Constitution] is not a concept of freedom to be ascertained by reference to the doctrines of political economy which prevailed in 1900; it is a concept of freedom which should be related to a developing society and to its needs as they evolve over time’. \(^{22}\) Four years later in *Permewan Wright Consolidated Pty Ltd v Trewhitt*, his Honour cited his earlier judgement in *North Eastern Dairy Co* and commented further: ‘… it is incorrect to confine the application of the language of a constitutional provision by reference to the meaning which it had in 1900. But, quite apart from this… we should recognize that the organized society which s 92 assumes is not the society of 1900 but the Australian community as it evolves and develops from time to time.’ \(^{23}\) This *dictum* is, respectfully, difficult to reconcile with his Honour’s later judgment in *Cole*.

(b) Dawson J, s 80 and McGinty

Section 80 of the Constitution confers an obligation that trials on indictment for a Commonwealth offence shall be by jury. \(^{24}\) In *Cheatle v R* \(^{25}\) the Court – constituted of Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ – held *per curiam* that an essential feature of a jury is that it be representative of the wider


\(^{22}\) (1975) 134 CLR 559, 615.

\(^{23}\) (1979) 145 CLR 1, 35.

\(^{24}\) Cf a ‘right’: *Brown v The Queen* (1986) 160 CLR 171, 197 (Brennan J), 207 (Deane J), 214-6 (Dawson J).

\(^{25}\) (1993) 177 CLR 541.
community. Significantly, the Court held that elements of this concept varied according to ‘contemporary standards and perceptions’. On this basis the Court held that a constant element of this feature is the random or impartial selection of jurors.²⁶

The per curiam judgment of the Court in Cheatle – of which Dawson J was a member – is to be contrasted with, for example, his Honour’s judgment in the case of McGinty v Western Australia.²⁷ The plaintiffs in McGinty challenged a number of provisions of Western Australian electoral legislation on the basis that the legislation failed to provide for substantially the same number of electors in each electorate. The plaintiffs argued that these disparities violated the principle of representative democracy and political equality inherent in the Commonwealth Constitution and, or alternatively, the principle of voting equality embodied in the Constitution Act 1889 (WA). A majority comprising Brennan CJ, Dawson, McHugh and Gummow JJ rejected these arguments. Dawson J’s judgment in McGinty is cast in what might be described as ‘originalist’ terms, that is, as giving primacy to the meaning and intentions ascribed to the words of the text at the time of enactment: ‘[T]he qualifications of electors are to be provided for by parliament under ss 8 and 30 and may amount to less than universal suffrage, however politically unacceptable that may be today’.²⁸ His Honour then cites with approval the decision of Barwick CJ in McKinlay v The Commonwealth (1975) 135 CLR 1 when pointing out that ‘no Australian colony at the time of federation insisted upon practical equality in the size of electoral divisions and the view was then plainly open… [to] justify different numerical sizes in electoral divisions.’²⁹ Dawson J suggests that ‘it would be unwise to freeze into a constitutional requirement a particular aspect of an electoral system the attraction of which might vary at different times, in different conditions and to different eyes.’³⁰ On this basis inter alia Dawson J joined with the majority in rejecting the challenge.

Without intending to reflect on the merits or otherwise of these decisions, the author wishes to respectfully note the apparent incongruity between Dawson J’s judgment in McGinty as compared to Cheatle. The author also appreciates the different subject matter (and different language) falling for consideration in each case: Cheatle concerned the meaning of an express conferral of an obligation by the Commonwealth Constitution; and McGinty, a challenge to electoral laws based on implications drawn from constitutional texts. Nonetheless, Cheatle evidences a willingness on the part of his Honour to construe a text in light of contemporary meaning and standards, even where that interpretation is antithetical to the understood

²⁶ Cheatle v R (1993) 177 CLR 541, 560 (emphasis added).
²⁷ (1996) 186 CLR 140.
²⁸ McGinty v Western Australia (1996) 186 CLR 140, 183 (emphasis added).
²⁹ Ibid, 185 (emphasis added).
³⁰ Ibid 186.
meaning at the time of enactment: ’some aspects of trial by jury, as it existed in the
Australian Colonies, at the time of Federation, are inconsistent with both the
contemporary institution, and generally accepted standards of modern democratic
society.’\textsuperscript{32} Critically, his Honour arrived at this conclusion in \textit{Cheatle}, even where the
implication is not apparent from the constitutional text, nor necessary to give content
and meaning. Whereas in \textit{McGinty}, his Honour rejected the contention that new
meaning should be imbued on the basis of contemporary expectations or standards
where such an implication is ‘neither apparent nor necessary’\textsuperscript{32}.

(c) The marriage power and same-sex marriage

The final example is a more recent iteration. In \textit{Commonwealth v Australian
Capital Territory}\textsuperscript{33} the Court held \textit{per curiam} that the whole of the \textit{Marriage Equality
(Same Sex) Act 2013 (ACT)} was inconsistent with the \textit{Marriage Act 1961 (Cth)} and
was therefore of no effect. As Professor Anne Twomey has noted, the judgment was
‘surprising’\textsuperscript{34} in a number of respects. This is despite the Court reaching what might
be considered the conventional \textit{conclusion}. The reasoning was, Professor Twomey
considers, unconventional in two respects. First, although not strictly necessary to do
so,\textsuperscript{35} the Court chose to consider the scope of the marriage power contained in s
51(xxi) of the \textit{Constitution}. Second, and relevantly for present purposes, the approach
taken in construing the head of power was incongruous to the conventional
interpretive approaches adopted by the Court from time to time. In construing the
meaning of the term ‘marriage’, the Court explicitly eschewed consideration of both
the original intended meaning and contemporary meaning.\textsuperscript{36} Instead the Court
resolved to interpret the power as a “topic of juristic classification” and interpreted
the power by reference to ‘laws of a kind “generally considered, for comparative
private law and international law, as being the subjects of a country’s marriage
laws”’.\textsuperscript{37} That is, the scope of the marriage power is to be interpreted by reference to the
laws of other countries and that interpretation should not ‘fix either the concept of
marriage or the content and application of choice of law rules according to the state of
the law at federation’\textsuperscript{38}.

\textsuperscript{31} \textit{Cheatle v R} (1993) 177 CLR 541, 560 (emphasis added and footnotes omitted).
\textsuperscript{32} \textit{McGinty v Western Australia} (1996) 186 CLR 140, 186.
\textsuperscript{33} (2013) 250 CLR 441.
\textsuperscript{34} Anne Twomey, ‘Same-Sex Marriage and Constitutional Interpretation’ (2014) 88 \textit{Australian Law
Journal} 613.
\textsuperscript{35} Ibid. Neither party regarded it as necessary to determine the scope of the marriage power because the
validity of the \textit{Marriage Act 1961 (Cth)} was not in question. See also, \textit{Commonwealth v Australian
Capital Territory} (2013) 250 CLR 441, 454-5.
\textsuperscript{36} \textit{Commonwealth v Australian Capital Territory} (2013) 250 CLR 441, 455.
\textsuperscript{37} \textit{Commonwealth v Australian Capital Territory} (2013) 250 CLR 441, 459 quoting \textit{Attorney-General
(Vic) v The Commonwealth} (1962) 107 CLR 529, 579 (Windeyer J).
\textsuperscript{38} Ibid.
As Professor Twomey has noted, construing the constitutional text as a ‘juristic concept’ or ‘topic of juristic classification’, the content of which is identifiable by reference to the laws of other countries, ‘is not a familiar one’.39 Perhaps the Court felt that this approach was open – or even to be preferred – as it had been earlier adopted by Windeyer J in his Honour’s dissenting judgment in Attorney-General (Vic) v The Commonwealth.40 In this respect, the author notes also the sporadic application of this approach in earlier cases. For example, in The Grain Pool of Western Australia v The Commonwealth41 where a majority comprising Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ cited with apparent approval the various passages from the previously cited judgment of Windeyer J. With this said, it is arguable that all Windeyer J had meant in Attorney-General (Vic) v The Commonwealth was that in identifying the meaning of ‘marriage’ as at federation, one discovers that the terms settled legal meaning ‘derived from that European Christian inheritance, particularly from the United Kingdom’.42 If this reading of Windeyer J’s judgment is preferred, it leaves the approach taken in Commonwealth v Australian Capital Territory – interpretation informed by the meaning as presently prescribed in other countries – on an even more tenuous footing.

As this paper and others have explained, construction of meaning in light of historical context and usage is an established canon of construction. Similarly, attributing present day meaning as that meaning is understood in Australia is a well-established approach. However, identifying the content and scope of a constitutional term by ‘reference to changes in the law in other countries… is unusual.’43

Again, the author is not intending to comment on the normative attraction or otherwise of the approach taken by the Court in this case, or to make comment on the merits of the decision itself. Rather, this exposition is included as the last of three examples proffered to illustrate Kirby J’s observations.

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39 Twomey, above n 34, 615.
40 Ibid, 455 quoting Attorney-General (Vic) v The Commonwealth (1962) 107 CLR 529, 578. Professor Twomey suggests that the High Court ‘developed its own new method of interpretation: above n 34, 614. To the extent that the approach adheres to that taken of Windeyer J in the earlier case, and also a number of other cases, the author argues, with respect, that the approach is not ‘new’. In this regard see also the cases cited by the Court in the 2013 case: Attorney-General (NSW) v Brewery Employees’ Union (NSW) (1908) 6 CLR 469, 610-2 (Higgins J); Grain Pool (2000) 202 CLR 479, 492-5 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See further H Burmester, ‘Justice Windeyer and the Constitution’ (1987 17 Federal Law Review 65.
42 Ibid.
43 Ibid.
3 Arguments For and Against

The late Justice Selway, writing extra-curially in 2003, suggested that over the High Court’s recent history only Kirby and McHugh JJ have sought to articulate and at least attempted to consistently apply their own identified approaches to constitutional adjudication. The paper now turns to consider normative arguments for and against all members of the Court following that path.

(a) The Kirby view

Kirby advances a number of propositions when extolling the virtues of Justices adopting single, all-embracing approaches to constitutional disputes. His Honour first stresses the importance of constitutional adjudication in the wider context of the work undertaken by the High Court. This, his Honour contends, carries with it an obligation ‘to do more than to stumble about looking for a solution to the particular case.’ With this background, his Honour argues that it is vital that ‘each Justice (indeed each reader of the Constitution) should have a theory of constitutional interpretation’ and that only such a development will ‘afford a steady guide to a consistent approach to the task. In the absence of a theory, inconsistency will proliferate.’ Justice Kirby also warns that ‘[t]he Justice will be castigated, perhaps correctly, for saying incompatible things at different times and construing the same words at different times in inconsistent ways.’ From these passages it is possible to identify two primary reasons favouring the adoption of a single, coherent approach. First, such a development would ensure a degree of consistency that in turn engenders certainty. Second, it is argued that this consistency and certainty will enhance institutional integrity and public confidence in the judicial process.

Kirby is not alone in these respects. Professor Adrienne Stone has argued, in the context of disagreement regarding the foundation and scope of express and implied constitutional rights, that ‘readings of the Constitution which rely on controversial modes of constitutional interpretation or which seem to run contrary to one of the established modes will be much less secure.’ With specific reference to the implied freedom of political communication, Stone argues that controversy among members

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44 Justice Selway, below n 58, 244 and that paper generally. Justice Selway cites as an example of the possible failing of McHugh J in this regard, see McGinty v Western Australia (1995) 186 CLR 140, 232 Cf Kable v Director of Public Prosecutions (1996) 189 CLR 51, 118-9. With respect to the other Justices see by way of example Sir Anthony Mason, ‘Constitutional Interpretation: Some Thoughts’ (1998) 20 Adelaide Law Review 49, 49.
45 Kirby, above n 1, 8.
46 Ibid.
47 Ibid.
of the High Court as to the existence, and later the application, of the implied freedom has inspired controversy and doubt. A comparison can be drawn between these controversies – specifically disagreement between judges – and the ad hoc or inconsistent approaches adopted by various members of the Court that Kirby identifies. This author would argue that the same vulnerabilities identified by Professor Stone are equally applicable to the latter. A similar comparison can be drawn with concerns expressed by McHugh J in *Theophanous v The Herald & Weekly Times*: ‘[i]f this Court is to retain the confidence of the nation as the final arbiter of what the *Constitution* means, no interpretation of the *Constitution* by the Court can depart from the text of the *Constitution* and what is implied by the text and the structure…’. This *dicta* can be separated into two discreet elements: first, his Honour puts forward his preferred approach to constitutional interpretation, albeit in very broad and general terms. Second, his Honour suggests that failure to adhere to this approach risks undermining the integrity of, and confidence in, the Court. Putting aside the supposed merits of the particular approach advocated by McHugh J, the basis claim accords with the concerns expressed by Kirby that have been outlined above.

(b) Gummow J and others

Questions of construction of the *Constitution* are not to be answered by the adoption and application of any particular, all-embracing and revelatory theory or doctrine of interpretation. Nor are they answered by the resolution of a perceived conflict between rival theories, with the placing of the victorious theory upon a high ground occupied by the modern, the enlightened and the elect.

This strong *dictum*, appearing in the judgment of Gummow J in *SGH Ltd*, was recently cited with approval *per curiam* in the previously cited *Commonwealth v Australian Capital Territory*. Underpinning Gummow J’s view was his Honour’s view that the ‘provisions of the *Constitution*, as an instrument of federal government, and the issues which arise thereunder… are too complex and diverse’ for an all-embracing theory – or resolution between rival theories – to satisfactorily discharge ‘the mandate which the *Constitution* itself entrusts to the judicial power of the

49 With respect to doubt as to the implication itself see *Australian Capital Television v Commonwealth (No 2)* (1992) 177 CLR 106, 186 (Dawson J) and with respect to the application of the implied right see *Theophanous v The Herald & Weekly Times* (1993) 182 CLR 104; *McGinty v Western Australia* (1996) 186 CLR 140, 235-6 (McHugh J), 291 (Gummow J); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566; despite unanimous affirmation of the implied right by the High Court in *Lange* its existence is not beyond question: see, e.g., *Lenah Game Meats v Australian Broadcasting Corporation* (2001) 208 CLR 199, 331 (Callinan J).


Commonwealth’.\(^{53}\) In his 2007 Sir Maurice Byers Lecture, Justice Heydon expressed agreement with Gummow J on this point.\(^{54}\) Doubtlessly others have, too.

Other arguments against what this author has termed the ‘Kirby view’ can also be made. Identifying a particular Justice as ‘originalist’ or ‘progressive’, or any other label, invites a species of partisanship that has not previously manifested in the High Court of Australia, at least relative to in other jurisdictions. Speaking in 2009, Chief Justice French (as he then was) alluded to this phenomenon: ‘Changes in the composition of the Court are sometimes scrutinised to ascertain whether a change of methodology or a particular balance of methodologies will follow. That kind of scrutiny…. gives rise to far more acute debates in connection with the selection process for Supreme Court judges in the United States’.\(^{55}\) The implication of his Honour’s remarks was that such a development is undesirable. To that extent this author agrees.

As outlined above, one of the primary arguments advanced favouring the adoption of single, all-embracing theories of interpretation is the integrity and confidence that doing so would yield. Conversely, others have argued – consistent with the aforementioned views of Gummow J – that the very nature of the constitutional text and the multifarious issues that arise from time to time necessitates a degree of flexibility. Critically, as Justice Selway notes, no consensus – in Australia or elsewhere – has yet been reached as to any single interpretive approach. Rather, each of the approaches yet developed has been subject to criticism. For this reason, along with the other considerations outlined above, the argument can be persuasively put that rigid adherence to a single approach – and the attendant outcomes that would result from this – would undermine institutional integrity and confidence. And therefore, adherence to one approach would at this time not be a positive development.

(c) An approach meriting all-embracing application

The ‘flexible’ approach that has been adopted by most\(^{56}\) Justices of the High Court is vulnerable to criticism. That much is self-evident from the preceding discussion. The critical issue, as this author sees it, is one of degree: some degree of

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\(^{54}\) Justice J D Heydon, ‘Theories of Constitutional Interpretation’, below n 59, 76.


\(^{56}\) Since at least the Gleeson court, Justice Selway has identified only McHugh J and Kirby J as attempting to enunciate and consistently apply a single approach to interpretation: see, Justice Selway, below n 58.
flexibility is needed to avoid plainly absurd or unworkable outcomes;\(^5^7\) however a level of adherence to a particular method promotes consistency, certainty, and openness. Perhaps critical to the preceding discussion, as Justice Selway has identified, is that no single approach has yet been developed that is comprehensive and cohesive enough to satisfactorily accommodate the competing values and demands placed on the custodians of our constitutional text. For the remainder of this paper the author advocates for a theory of interpretation labelled ‘moderate originalism’. For reasons outlined below, it is argued that this approach can satisfactorily accommodate the flexibility that many have identified as critical in constitutional adjudication – not least Gummow J. With this said, the approach also anchors meaning in a way that provides a degree of certainty and consistency, and accords to the other important principles in constitutional jurisprudence. To this extent, the author argues that ‘moderate originalism’ is an approach meriting all-embracing application.

III THE SECONDARY CLAIM: NON-ORIGINALISM AND ALTERNATIVE METHODS

This section begins by introducing three broad ideas: literalism, originalism, and non-originalism.\(^5^8\) It then turns to examine in greater detail the approach identified in this paper as ‘moderate originalism’.

In simplest terms, originalists argue that meaning should be anchored in ‘ascertainable facts of the intentions of the drafters…’.\(^5^9\) Or, put another way, that constitutions mean what they originally meant unless subsequently amended.\(^6^0\) This broad idea is to be contrasted to non-originalism. Non-originalist approaches are

\(^{5^7}\) Some might include ‘undesirable’, however that word trespasses very close into a territory many jurists would hasten not to enter.

\(^{5^8}\) Of course, there are countless more approaches to constitutional interpretation—some conforming closely to these three broad ideas, others less so. The content of these labels have elsewhere been labelled under different names. The author does not contend that these three general terms encompass the broad gamut of interpretive approaches from time to time employed in the High Court. The author does not attempt to cover the entire gamut of interpretive theories. Rather, the author intends to use these terms as a framework to scrutinize to introduce and analyse certain concepts before moving to a more detailed discussion about ‘moderate originalism’. With this said, see for example, along with the other sources cited, Justice Bradley M Selway, ‘Methodologies of Constitutional Interpretation in the High Court of Australia’ (2003) 14 Public Law Review 234; Craven, above n 3, 167-8; Justice Michael McHugh, ‘The Constitutional Jurisprudence of the High Court: 1989-2004’ (2008) 30 Sydney Law Review 5; Justice J B Heydon, ‘Theories of Constitutional Interpretation: A Taxonomy’ (Speech delivered at the Sir Maurice Byers Lecture, New South Wales Bar Association, 3 May 2007).

\(^{5^9}\) Kirby, above n 1, 11; see also, Goldsworthy, ‘Constitutional Interpretation: Originalism’, above n 16, 685.

\(^{6^0}\) And, continuing the theme, those amendments would then be taken to mean at the time of their enactment. See generally, Goldsworthy, ‘Interpreting the Constitution in its Second Century’, above n 16, 678. See also, Lael K Weis, ‘What Comparativism Tells Us About Originalism’ (2013) 11 International Journal of Constitutional Law 842, 845-8.
underscored by the conception that a constitution is a ‘living tree which continues to grow and to provide shelter in new circumstances...’\textsuperscript{61} That is, a constitution should be interpreted in light of contemporary meaning, needs, and expectations.\textsuperscript{62}

A Questions

For presently relevant purposes, two questions must be answered:\textsuperscript{63} firstly, whether meaning should be determined by the words of the text alone; secondly, whether provisions should be interpreted as having the same meaning as when first enacted. If so, whose meaning is relevant?

B Application

1 Literalism

The author argues that strict or bare literalism alone is deficient as a method of constitutional interpretation. The arguments supporting this proposition are straightforward. It is self-evident that the literal and intended meaning of communication can be different.\textsuperscript{64} Critically in the context of legal disputes, giving effect to the intentions of the lawmaker has been – and is still – recognised as central to the interpretive process.\textsuperscript{65} As Lord Russell put it: ‘[the purpose of interpretation is] to give effect to the intention of the [law-maker] as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed.’\textsuperscript{66} This maxim has been described as ‘the only rule’,\textsuperscript{67} ‘the paramount rule’,\textsuperscript{68} ‘the cardinal rule’,\textsuperscript{69} and ‘the fundamental rule of interpretation, to which all others are subordinate’.\textsuperscript{70} In the context of statutory interpretation, Mason CJ and Wilson J in \textit{Cooper Brookes (Wollongong) Pty Ltd v FCT} put it: ‘[t]he fundamental object of statutory construction in every case is to ascertain the legislative intention’.\textsuperscript{71} More recently in \textit{Wilson v Anderson} Gleeson CJ put it: ‘... the object of a

\textsuperscript{61} Kirby, above n 1, 11.

\textsuperscript{62} See, e.g., \textit{Re Wakim; Ex parte McNally} (1999) 198 CLR 511, 600 (Kirby J).

\textsuperscript{63} Again, a number of other questions might be asked, however these two questions provide a useful framework through which to analyse the issues for the relevant purposes of this paper. Academic and judicial commentary in this field proliferates. For a more detailed discussion of these and other issues in constitutional interpretation, see e.g., Goldsworthy, ‘Constitutional Interpretation: Originalism’, above n 16; Goldsworthy, ‘Interpreting the Constitution in its Second Century’, above n 16.


\textsuperscript{66} \textit{Attorney-General v Carlton Bank} [1899] 2 QB 158, 164 (Lord Russell).

\textsuperscript{67} \textit{Sussex Peerage Case} (1844) 8 ER 1034, 1057 (Tindall CJ).

\textsuperscript{68} \textit{Attorney-General (Canada) v Hallet & Carey Ltd} [1952] AC 427 (Lord Diplock).

\textsuperscript{69} \textit{Mills v Meeking} (1990) 169 CLR 214, 234 (Dawson J).

\textsuperscript{70} \textit{Amalgamated Society of Engineers v Adelaide Steamship Co Ltd} (1920) 28 CLR 129, 161 (Higgins J).

\textsuperscript{71} (1981) 147 CLR 297, 320.
court is to ascertain, and give effect to, the will of Parliament.\(^{72}\) In limiting the sources of meaning to the bare text itself, strict literalism (in the sense that the word is used here) is unable to account for authorial intention. This maximises indeterminacy and frustrates the intentions and purpose behind the law.\(^{73}\) Therefore, the first question is answered in the negative – meaning should not, or perhaps cannot, be determined from the words of the text alone.\(^{74}\)

2 ‘Collective Legislative Intention’

Before turning to a more detailed comparison between originalist and non-originalist theory it is necessary to dispense with doubts expressed from time to time regarding the existence and identification of ‘legislative intention’.\(^{75}\) It is necessary to deal with these doubts here because legislative intention is a critical part of the ‘moderate originalism’ advocated below.

In a 2014 paper on this topic Professor Richard Ekins and Professor Jeffrey Goldsworthy persuasively account for the existence of a legislature’s ‘objective’ intention. Ekins and Goldsworthy argue – in that paper and elsewhere – that identifying and giving effect to these intentions should be the primary object of statutory (and the author suggests constitutional) interpretation.\(^{76}\) It is unnecessary to recite here each of the aspects covered in the paper with respect to the existence of legislative intentions. Rather, it is enough for present purposes to recite the following critical passage:

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\(^{72}\) (2002) 213 CLR 401, 418.


\(^{74}\) Some may suggest that the dominant interpretive approach of the High Court has been a literalist one, at least since the decision in Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (1920) 28 CLR 129, 141-2 (Knox CJ, Isaacs, Rich, and Starke JJ). Other examples can be taken from Queensland Electricity Commission v Commonwealth (1985) 159 CLR 192, 230-1 (Brennan J); Richardson v The Forestry Commission (1988) 164 CLR 261, 307 (Deane J). Though of course, as Professor Saunders has noted, ‘[e]ven in the heyday of strict legalism judges clearly made choices which were policy driven and sometimes quite dramatic ones, as a range of cases show…’: Cheryl Saunders, ‘Interpreting the Constitution’ (2004) 15 Public Law Review 289. Some examples include, Melbourne Corporation v Commonwealth (1947) 74 CLR 31 and Parton v Milk Board (Vic) (1949) 80 CLR 229. See further, Craven above n 3, 171-3, 175; Weis, above n 60. See also Goldsworthy, ‘Interpreting the Constitution in its Second Century’, above n 16, 688-9. Finally for a critique of the literalist approach, also see, Ruth Sullivan, 'Statutory Interpretation in the Supreme Court of Canada' (1999) 30 Ottawa Law Review 175, 181. See also McCamish, above n 20, 639.


Hence, when reasonable legislators vote for or against a Bill, they understand what is before them not to be a text with a sparse literal meaning, but a complex and reasoned plan to pursue a particular means to achieve certain ends… when they vote for or against it, they vote for or against not only the text, but the plan that the text has been designed by their colleagues to communicate. The plan is “open” to them; in that they could learn more about it if they wanted to, by using much the same methods as subsequent interpreters, who infer the plan from its text and publicly available contextual evidence of its purpose…

Ultimately, these intentions are not ‘fictitious’ or the mere product of judicial explication. Instead, what is meant by the relevant legislative intention ‘is what the legislature as a whole is reasonably taken to have intended, due to the supporting structure of interlocking individual intentions that constitute the legislature’s secondary or standing intentions.’ In that sense this concept is a discernible, static product of legislative action. It is a concept equally available and applicable in interpreting a constitution.

3 Originalism and non-originalism

Given then that judges should look beyond the words of the constitutional text it is necessary to ask what sources should be considered? Are these considerations to be only historical ones, or is interpretation ‘cut wholly adrift from historical context’?

(a) Moderate Originalism

The balance of this paper advocates a ‘moderate’ form of originalism. This approach is superior to ‘orthodox’ or strict versions of originalism in a number of respects.

First, the moderate approach requires meaning be derived from the founders’ publicly known intentions as opposed to subjective intention. As argued above, the Constitution must be understood in the context of the purposes for which it was enacted. With this said, law can only provide a useful and fair framework of social rules if its meaning is publicly known, or least readily ascertainable. Similarly,

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77 Ekins and Goldsworthy, above n 65, 67.
78 Ibid.
79 A phrase borrowed from Kirk, above n 4, 364.
80 Originalism can and has taken multiple forms. As previously warned the purpose of this paper is not to examine in great detail the many approaches that originalist theory has taken. However a good discussion of these many iterations can be found in, as well as in the other sources, Mitchell N Berman, ‘Originalism is Bunk’ (2009) 84 New York University Law Review 1, 14.
81 Along with the other sources cited, see Goldsworthy, ‘Originalism in Constitutional Interpretation’, above n 16, 8-20.
82 See ‘literalism’ above.
imposing penalties for breaches of unknowable law is clearly unjust.\textsuperscript{83} Therefore, the interpretation of a legal term should be guided principally by its publicly understood or understandable meaning. In this respect, legal interpretation is much like everyday communication. For these reasons, knowledge of the lawmakers’ publicly knowable intentions, along with conventional semantic content, is necessary to draw meaning. However, interpretation cannot depend on the unknown subjective intentions that stricter forms of originalism recognise.\textsuperscript{84} Further to this, evidential limitations mean recourse to subjective intentions is often futile. The arguments put forward here regarding subjective intention have been approved by the High Court. For example, in \textit{Pape v Federal Commissioner of Taxation} Heydon J noted that ‘\textit{r}eference to history is not permitted for the purpose of substituting for the meaning of the words in the Constitution the scope and effect which the framers \textit{subjectively intended} the \textit{Constitution} to have.’\textsuperscript{85} This \textit{obiter} sits comfortably within the framework enunciated by the Court in \textit{Cole v Whitfield},\textsuperscript{86} that framework having been considered earlier in this paper. In this respect, the moderate approach advocated for in this paper lies between stricter forms of originalism that hold meaning must be anchored in subjective intention, and non-originalism which holds interpretation is cut adrift from original meaning. The author notes at this point some, what might be termed, ‘methodological’ issues in applying this distinction.\textsuperscript{87} These issues are discussed in Part III.

Second, only the founders’ ‘enactment intentions’ are relevant. A distinction is to be made between intentions concerning what provisions were anticipated to mean and ‘expectation’ or ‘application’ intentions, which concern the intended interpretation and application to a particular controversy.\textsuperscript{88} The object of interpretation is to uncover ‘the meaning of the norms the founders enacted, not to discover their beliefs about how those norms ought to be applied’.\textsuperscript{89} Kay expressed


\textsuperscript{85} (2009) 238 CLR 1, 148 (emphasis added).

\textsuperscript{86} (1988) 165 CLR 360, 385.

\textsuperscript{87} See, e.g., McCamish, above n 20.


the distinction as: ‘intentions about the extent and consequences within the legal system of the rule that the constitution-makers were creating [are the relevant intentions]. They are not intentions about the resolutions of specific controversies.’

There are several reasons for applying this distinction. First, concepts of separation of powers and judicial independence are at the centre of the constitutionally-prescribed system of government: lawmakers (in this instance the constitutional framers) make law, while the judicial branch applies it. Admitting ‘application intention’ as a guide to interpretation clearly violates this separation. Further to this, the lawmakers’ intentions concerning how law should apply may be erroneous, especially in the context of contemporary problems and needs.

Finally, and as further discussed below, judicial creativity has a legitimate role to play in moderate originalism. It is argued that stricter forms of originalism leave insufficient scope for flexible interpretation.

Justice Kirby has suggested the High Court ‘has, for a long time, turned its back on originalism’. At the outset the author submits that this is, with respect, not supported by the decided cases. The arguments favouring moderate originalism over non-originalism will now be examined.

(i) Dead Hand of the Past?

Non-originalists argue ‘[o]ur Constitution belongs to the 21st century, not the 19th’, and that it should be read accordingly. The author, with respect, refutes this proposition. Firstly, this is an argument – when taken to its logical extreme – against
having a constitution altogether. Constitutions empower by providing an established and accepted framework through which binding laws are made. Corollary to this is that constitutions restrict decisions and decision-making. It is the essence of law that decisions today are regulated by norms and rules laid down previously. To say we should not be ruled by the ‘dead hand of the past’ suggests that these established norms and rules could, or should, be disregarded or changed in order to ‘discover’ and establish new rules. Non-originality, the author argues, seeks to evade these restrictions. In doing so the compact of the constitutional system of government is undermined leading, ultimately, to the ‘collapse of the Constitution and the loss of the empowerment it provided’. The originalist might well ask the non-originalist, if the Constitution should change with new interpretation, why enact one in the first place? Secondly, the author notes that the Constitution can be altered by popular referendum through s 128. Therefore, the author argues that we are not bound by the ‘dead hand’ of the past in any invidious sense as proponents of non-originalism seek to suggest.

Bagaric suggests both sides of what might be labelled ‘the dead hand’ debate rely on utilitarian logic that cannot, in and of itself, validate one approach over the other. That is, non-originalists argue interpretation ‘in light of contemporary standards will supposedly make for a more liveable and prosperous community’. Whereas originalists argue ‘whatever short term benefits are derived… they are likely to be more than offset by the detriment in the form of a reduced level of political and legal stability’. Given the incalculable nature of these considerations it is in reality impossible to quantify which of these approaches – non-originalism or some form of originalism – can yield greater utility. Therefore, ‘subordinate principles’ must be evaluated.

(ii) Subordinate principles

The author argues that an originalist approach – whether strict or moderate – better respects the source of legal authority of the Constitution. Non-originalists argue that the legal authority of the Constitution stems from acceptance by the people

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95 See, e.g., Bagaric, above n 16, 179. See also, e.g., Goldsworthy, ‘Constitutional Interpretation: Originalism’, above n 16, 687: ‘... it is the essence of law that decisions are governed by norms laid down in the past. Taken to its logical extreme, it is an argument not only that judges should ignore the law, but also that everyone else should ignore the judges, since they owe their authority to the laws laid down by the “dead hand of the past”’; Goldsworthy, ‘Originalism in Constitutional Interpretation’, above n 16, 27.
97 Bagaric, above n 16, 180.
98 It has been argued that a constitution should be interpreted consistent with the source of its authority. To interpret the document otherwise risks delegitimising it. See, e.g., Michael Moore ‘Natural Rights, Judicial Review, and Constitutional Interpretation’ (Paper presented at the Conference on Legal Interpretation, Judicial Power and Democracy, Melbourne, 12-14 June 2000) cited in Ibid 181. See also, Kirby above n 1, 7: ‘...[the Constitution’s foundation] must affect approaches to the ascertainment of its meaning’.
living today. Corollary to this is that constitutional interpretation should primarily be directed to contemporary understanding, needs, expectations, and so on. This author argues, respectfully, that this is to misidentify the legal authority underlying constitutional instruments. Instead the author argues that the continued source of legal authority derives from the community’s continued abidance to, what can best be described as, the rule of law. By this the author means: one, we accept that validly made law binds us until it is validly changed or repealed; two, we accept that a validly made law can only be changed or repealed through the mandated amendment or repeal process; three, we also accept that the Constitution is such a valid law. From this it follows that the Constitution cannot be changed except through the mandated amendment process (being s 128). This is the source of continued legal authority of the Constitution. The author argues that originalism better respects this fact. As Goldsworthy argues: the ‘prescribed amending procedure should not be evaded by lawyers and judges disguising substantive constitutional change as interpretation’. While the non-originalist might respond that changing the meaning of words is not to amend the Constitution this is, with respect, begging the question. To change the meaning of law is to change the law. Using interpretation to achieve this change circumvents the constitutionally-prescribed amendment procedure and, in so doing, subverts the rule of law. The late Justice Scalia put it: ‘[a constitution’s] whole purpose is to prevent change – to embed certain rights in such a manner that future generations cannot readily taken them away.’ While our own constitution and that of the United States differ in a number of respects, not least with respect to substantive rights protections, this underlying principle is common to both. Justice Scalia went on: ‘By trying to make the Constitution do everything that needs doing from age to age, we shall have caused it to do nothing at all.’

Similarly, originalism – again, whether in a stricter or moderate form – better respects the principles of democracy and federalism. The Constitution shares power

100 Goldsworthy, ‘Constitutional Interpretation: Originalism’, above n 16, 688.
103 Scalia, A Matter of Interpretation, above n 88, 40. See also, Bagarich, above n 16, 185: ‘The purpose of a constitution is to prevent change. It aims to prevent departure from certain principles and values that its authors deem to be so basic that they should go beyond alteration by transient majorities…’. See also, Helen Irving, ‘Outsourcing the Law: History and the Disciplinary Limits of Constitutional Reasoning (2015) 84 Fordham Law Review 957, 965-6.
104 Scalia, A Matter of Interpretation, above n 88, 47.
and responsibility between the Commonwealth and the states. Constitutional amendment requires consent by electors with special majority requirements. These special requirements were designed to protect state interests. In this sense, and as alluded to above, a constitution empowers as well as restricts future generations. Judges effecting constitutional change through new interpretations risk usurping these foundation principles. This is illustrated by the fact successive reinterpretation by the High Court has, it is argued by this author and others, centralised legislative and executive power. This has taken place despite being anathema to the federal compact envisioned at federation. This has taken place without engagement of s 128.

Finally, non-originalist interpretation arguably involves judges making law and hence exceeding their power within the separation of powers. As Justice Scalia writing extra-curially put it: ‘the main danger in judicial interpretation of the Constitution… is that judges will mistake their own predilections for the law’.

(iii) Flexibility?

Originalist approaches have been criticised as unable to accommodate the changing circumstances of the times. The author submits, with respect, that these arguments are mislaid.

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105 It has been recognised judicially that the founders envisaged a federal structure far more ‘state-centric’ than the one that has developed since federation. See, e.g., Commonwealth v Tasmania (1983) 158 CLR 1, 126 (Mason J).
106 See s 128 of the Commonwealth Constitution and the commentary.
107 See, e.g., Stephen Holmes, Passions and Constraint: On the Theory of Liberal Democracy (University of Chicago Press) cited in Goldsworthy, ‘Constitutional Interpretation: Originalism’, above n 16, 688; Goldsworthy, 'Interpreting the Constitution in its Second Century', above n 16, 683. Interestingly on this point, some have viewed the s 128 amendment procedures as manifestly unable to secure the changes needed to the Constitution as Australia has developed, see e.g., Geoffrey Sawer, Australian Federalism in the Courts (Melbourne University Press, 1967) 208. If one accepts this proposition it is only a small step to then argue that these deficiencies should be redressed through revised interpretation, see e.g., Victoria v Commonwealth (1971) 122 CLR 353, 396 (Windeyer J).
108 Originalism, it is argued would realign the federal balance. On these points see, e.g., Goldsworthy, ‘Interpreting the Constitution in its Second Century’, above n 16, 684; see further, e.g., James Allan and Nicholas Aroney, 'An Uncommon Court: How the High Court of Australia has Undermined Australian Federalism' (2008) 30 Sydney Law Review 245; Stephen Gageler, ‘Foundations of Australian Federalism and the Role of Judicial Review’ (1987) 17 Federal Law Review 162, and the sources referenced therein. See also, e.g., Craven, above n 3, 170, 174, 176. These are by no means the only commentaries on this point.
109 Justice Antonin Scalia, ‘Originalism: the Lesser Evil’ (1989) 57 Cincinnati Law Review 849, 863. Non-originalists have responded that discovering the framers’ intentions leaves sufficient scope for a judge to adopt their own values and, in that sense, originalism achieves little more than other methods of interpretation, see e.g., Brest, above n 99, 280-1. A discussion regarding whether judges do or should ‘make law’ is beyond the scope of this paper, save to say that where a statutory or constitutional scheme exists, the author would argue that the primary function is to give effect to that law—not supplant it.
Firstly, moderate originalism recognises the need for creative interpretation.\footnote{112} In hard cases original meaning does not provide enough answers in order to settle the question at hand. In these instances ‘general legal doctrines and principles, public policy, and [notions of] justice…’ serve a legitimate function.\footnote{117} All that is required is that when judges are still ‘finding’ meaning\footnote{114} that they exhaust, and be guided by, the original public meaning before recourse to these other considerations.\footnote{115}

Secondly, flexible interpretation is supported by the principle of stare decisis. That is, moderate originalism accepts that it is legitimate to overturn a prior decision when a decision is considered to have been wrong.\footnote{116}

Thirdly, the moderate approach recognises that departure from literal meaning may be necessary in order to fulfil original purpose. Goldsworthy argues that ‘courts may stray from the literal meaning of such a provision, without violating the constitution’s amendment procedure, provided they do so only in an incremental fashion necessary to achieve the provision’s original purpose.’\footnote{117}

Fourthly, the distinction between ‘enactment’ and ‘application’ intentions that has been discussed in the preceding part\footnote{118} – that is, application of original intentions can allow for flexibility without changing meaning. For example, the original meaning of the external affairs power\footnote{119} likely extended to implementing treaties ratified by the government.\footnote{119} At the time of federation the few treaties entered into meant this power was limited. As the number and scope of treaties has increased the power has evolved into one with a greater ambit and impact. This is despite the fact

\footnote{112} As pointed to in the preceding section.
\footnote{113} Goldsworthy, ‘Originalism in Constitutional Interpretation’, above n 16, 20.
\footnote{114} That is, before meaning has been exhausted in the hard case. See, e.g., Goldsworthy, ‘Interpreting the Constitution in its Second Century’, above n 16, 681.
\footnote{116} A good example can be taken from the United States of America. In \textit{Plessy v Ferguson} (1896) 195 US 138 the Supreme Court of the United States upheld the constitutionality of state laws requiring segregation in public (Harlan J in dissent). Later in \textit{Brown v Board of Education} (1954) 347 US 483 the Court, in a \textit{per curiam} decision, overruled the earlier decision declaring that state laws establishing separate public schools for white and black students were unconstitutional. Though even this case has been repudiated by some originalists: see, e.g., Weis, above n 60, 850 and the sources cited therein.
\footnote{117} Goldsworthy, ‘Constitutional Interpretation: Originalism’, above n 16, 690 (emphasis added).
\footnote{118} Goldsworthy uses the example of \textit{United States Constitution} art I s 8, which vests exclusive power in the Congress to raise and maintain ‘Armies’ and Navies’. As Goldsworthy rightfully notes, the provision’s original purpose would have been frustrated if courts had denied Congress power to raise and maintain an air force after aircraft were developed. See also, Craven above n 3, 168.
\footnote{119} Also labeled ‘expectation’ intentions in the preceding section.
\footnote{119} \textit{Commonwealth Constitution} s 51(xxix).
the interpretation of the power, as a constitutional expression, has (arguably) not significantly changed – at least in respect of presently relevant purposes.\footnote{This distinction is discussed in the preceding part. See further Goldsworthy, ‘Constitutional Interpretation: Originalism’, above n 16, 690-1. See also, Koowarta v Bjelke-Petersen (1982) 153 CLR 168, 216-7, 229 (Stephen J); R v Burgess; Ex parte Henry (1936) 55 CLR 608, 640-1 (Latham CJ). Though on this point, the external affairs power also provides a useful illustration of how the High Court has, arguably, expanded the scope of Commonwealth powers beyond its original meaning, see e.g., Commonwealth v Tasmania (1983) 158 CLR 1 and the related commentary.}

(b) Methodological Issues for the Originalist

In this final section some of the objections pointed at the originalist theory are evaluated.\footnote{See, e.g., Saul ak, ‘Meaning and Understanding in the History of Constitutional Ideas: The Intellectual History Alternative to Originalism’ (2013) 82 Fordham Law Review 721, 722. For a rigorous examination of the perceived problems in the Australian jurisprudence see, Helen Irving, ‘Constitutional Interpretation, The High Court, and the Discipline of History’ (2013) 41 Federal Law Review 95. See also, Schoff, above n 89. I raise some of these objections in this section because they must be considered when assessing whether originalism continues to be a useful approach.} The objections discussed here are primarily directed towards limitations inherent in the use of historical sources. For this reason, this author refers to them as ‘methodological’.

(i) Can Judges ‘Do’ History?

That judges are not well equipped to analyse competing historical accounts is not a novel concern.\footnote{See, e.g., Haywood Jefferson Powell, ‘Rules for Originalists’ (1987) 73 Virginia Law Review 659, 661.} Objectors argue judges are not well trained in historical research and that therefore, they must rely on secondary accounts written by historians possessing varying degrees of competency. William Novak, for example, writes that ‘if one does not have any previous independent experience with a substantial range of primary sources’ it is not possible to know which account is most ‘accurate, convincing, and authoritative.’\footnote{William Novak, ‘Constitutional Theology: The Revival of Whig History in American Public Law’ (2010) Michigan State Law Review 623, 642.}

Helen Irving argues that these criticisms misidentify the chief ‘problem’ with the originalist approach.\footnote{Irving acknowledges that judges might well be capable of engaging with ‘history’ stating that ‘[t]here is nothing about being a historian that is beyond the capacity of a judge.’: Irving, ‘Outsourcing’, above n 103, 959.} Irving argues instead that the principal issue is whether, as a matter of ‘disciplinary legitimacy’, ‘judges have the right to apply history in resolving legal disputes’.\footnote{Ibid.} Irving’s argument, simply put, is that the judge acting as a historian ceases to be a judge. Or put another way, the supposed differences between the concerns and inquiries of law and history render the judge unable to fulfil the judicial
task while at the same time engaging with the historical one. What then ‘is’ history? Is the historical task really inimical to judging?

The task of the judge and the historian differ in a number of respects. The judge is responsible for deciding the legal dispute. She or he must do this based on relevant, correct and, current authority. Judges do not choose the questions to pursue. They cannot, Irving argues, answer the questions based on their own historical research or theory. Historical inquiries, dissimilarly, are animated by contemporary and individual concerns. The historian seeks to explain why the past and the present differ. They answer these questions through research and unique interpretive lenses. History, it has been said, is a ‘sceptical discipline’: a ‘range of possible meanings’ may have existed at a particular point in history. While it is important to recognise that the existence of alternative historical interpretations does not render every historical account questionable, the reality is that history is an indeterminate field. The use of history as the basis for determining questions of law is at odds, it is argued, with these realities – judges must provide conclusive resolutions to a dispute; a range of ‘historical meanings’ can only help so much. Likewise, history demands time and resources beyond which the judge can devote.

Other issues have also been raised. For instance, surveys of the decided cases suggest reliance on historical accounts has largely been incomprehensive and judges have on occasion reached flawed historical conclusions. Irving goes further contending that judges effectively outsource judging when they draw on secondary sources to reach interpretive conclusions.

(ii) Responses

There are not sufficient words here to deal comprehensively with every argument. Instead some possible rebuttals are briefly put forward.

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128 Ibid 961: ‘[the historian] must be on the alert for tendentiousness and particularly wary of any historical claims of which politically interested parties, either in the past or the present, have made use.’
129 Cornell, above n 122, 728.
130 See, e.g., Novak, above n 124, 628.
131 See, e.g., Brest, above n 99, 237.
132 Irving, ‘Outsourcing’, above n 103, 961. For example, disputes must be resolved as expeditiously as possible. Judges cannot devote many years to a historical inquiry before deciding a case.
135 Ibid 961, 965.
Respectfully, it is argued that Irving’s ‘outsourcing’ argument is misdirected. Whether reliance is placed on primary or secondary sources, an originalist judge does not substitute himself or herself for the historian. Rather, the historical account merely forms part of the reasons behind a decision. Further, this characterisation undermines non-originalist interpretation as much as it does originalist approaches. It could well be rejoined that the activist judge ‘outsources’ at least parts of their function when reference is made to ‘policy’ and other considerations. Similarly, non-historical sources can be equally hard to engage with as historical ones.

Secondly, even where alternative meanings exist, it is possible to distil meaning specific enough to aid interpretation. Goldsworthy, for instance, points out that ‘it will always be possible to rule out at least some other meanings...’ In this way, history does help the interpretive caravan travel along the road of ascribing meaning.

Finally, objectors themselves accept that history can play a useful and legitimate part in constitutional interpretation. Irving herself concedes as much warning that ‘if judges are to use historical accounts to reach their legal conclusions, they should do so carefully... They should say why they have chosen particular historians over others and on what basis they have found a particular historical account more persuasive than others’. Given the preceding discussion this author agrees.

(iii) Objective and Subjective Intentions

The seminal statement of the High Court in Cole v Whitfield permitting and regulating use of the Convention Debates has been referred to earlier in this article. The distinction between subjective and objective intentions was made again when outlining what is required by the moderate originalist approach that this author favours. Despite this, criticisms have been made that this distinction is unworkable, illusory, or even meaningless. Others have argued that the distinction is a logical, discernible, and rational delineation of legitimate and illegitimate interpretive aids. For current purposes it is enough to note that in applying the moderate originalist
approach, the primary question is which historical materials may be referred to and which are not permissible.

**IV CONCLUSION**

This paper has advanced two primary ideas.

First, that the identification and application of all-embracing approaches to constitutional interpretation by Justices – a development previously advocated by Justice Kirby – would be, on balance, positive. Related to this, a number of examples have been recounted of the at times varying and *ad hoc* application of the numerous interpretive approaches by various Justices.

Second, and related to this, the paper has argued that ‘moderate originalism’ provides a satisfactorily comprehensive and coherent method of interpretation to be applied in matters arising for constitutional adjudication. In doing so, it was argued that strict literalism alone is deficient as an all-embracing method of constitutional interpretation. From this, it was then argued that this moderate originalism is the approach most consistent with the way common law courts approach statutory interpretation and which the courts, including the High Court, have regularly employed in interpreting the *Constitution*.\(^{141}\) This approach is also normatively persuasive, engendering consistency, along with better respecting democracy, the rule of law, and the functional purpose of the *Constitution*. Originalism also limits opportunity for activist interpretation in evasion s 128. With all this said, sufficient scope is left for flexible interpretation and the development of constitutional expressions where the evolution of meaning is necessary in light of changed circumstances. The observed objections, while merited, are not insurmountable. Instead they serve as a reasonable warning that interpretation must be approached with care and caution, and the interpretive choices made clearly and openly identified and explained.

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\(^{141}\) *Eastman v The Queen* (2000) 203 CLR 1, [140] (McHugh J): ‘Probably, most Australian judges have been in substance what Scalia J of the United States Supreme Court once called himself — a faint-hearted originalist. Speaking of the United States situation, Scalia J said that he was a member of “a small but hardy group of judges and academics … [who] believe that the Constitution has a fixed meaning, which does not change: it means today what it meant when it was adopted, nothing more and nothing less”’ citing Antonin Scalia, ‘The Role of a Constitutional Court in a Democratic Society’ (1995) 2 *The Judicial Review* 141, 142.
A PROPORTIONATE BURDEN: 
REVISITING THE CONSTITUTIONALITY OF OPTIONAL PREFERENTIAL VOTING 

ERIC CHAN

In Day v Australian Electoral Officer (SA), the High Court unanimously upheld the constitutional validity of the Senate voting reforms legislated by the Commonwealth Parliament in the lead-up to the 2016 federal election, which allowed for optional preferential voting. The clarity of the Court’s judgment obscures the fact that the plaintiff in Day failed to prosecute the best case possible against the reforms, making full use of the judgments in Roach v Electoral Commissioner and Rowe v Electoral Commissioner. That argument is that the likely incidence and effect of vote exhaustion under optional preferential voting constituted an effective burden upon the franchise. This article elucidates and then assesses that argument. Ultimately, it is concluded in light of the actual outcomes of the 2016 federal election and the Court’s recent decision in Murphy v Electoral Commissioner that the argument would not have succeeded, optional preferential voting being proportionate to the empowerment of voters and the simplicity and transparency of the Senate electoral system.

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I INTRODUCTION

For its devising and early adoption of numerous innovations in electoral system design, Australia has been dubbed the world’s ‘democratic laboratory’.1 The 2016 federal election saw the conduct of its latest experiment: optional preferential voting. As at every federal election since 1984,2 the Senate ballot was bisected horizontally, with parties listed above the line and their candidates listed beneath.3 The novelty lay in the voting method: as a minimum, voters were instructed to rank-order six parties or 12 candidates.4 Their vote could only contribute to the election of those parties for which, or candidates for whom, they expressly intended to vote.

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1 These innovations include the secret ballot, compulsory voting, universal adult suffrage and the widespread of preferential voting systems: see, eg, David Farrell and Ian McAllister, *The Australian Electoral System: Origins, Variations and Consequences* (UNSW Press, 2006) 47.
2 This being the first election held under the *Commonwealth Electoral Act 1918* (Cth) as amended by the *Commonwealth Electoral Legislation Amendment Act 1983* (Cth), which commenced on 21 February 1984.
3 *Commonwealth Electoral Act 1918* (Cth) s 210.
4 Ibid s 239(1)–(2).
Previously, full preferential voting was required. Voters numbered every box below the line or employed the shortcut introduced in 1983,\(^5\) numbering one box for a party above the line. In the latter case, voters’ preferences would flow according to predetermined group voting tickets, after which this system was dubbed ‘ticket voting’. Given the sheer mechanical laboriousness involved in casting a valid below the line vote,\(^6\) the vast majority voted above the line.\(^7\) ‘Faceless’ party executives, holding de facto, if not de jure, power over the determination of their parties’ group voting tickets,\(^8\) were thus given the ability to determine how the lion’s share of preferences flowed, both within and between political parties.

Consequently, parties entered into labyrinthine preference-swapping arrangements, including numerous small parties\(^9\) conglomerated under the banner of the ‘Minor Party Alliance’. Alliance members placed other members ahead of non-members on their group voting tickets, such that upon the elimination of one, votes would flow to another. The cumulative effect of this ‘preference harvesting’ was expected to result in one amongst them being elected to the Senate.\(^10\) In fact, the Alliance was successful on two fronts: in Victoria, the Motoring Enthusiast Party’s Ricky Muir was elected despite receiving only 0.51 per cent of the primary vote; and in Western Australia, Wayne Dropulich of the Sports Party was elected with 0.2 per cent.\(^11\) Significantly, the quota for election was 14.3 per cent.

Following the Joint Standing Committee on Electoral Matters’ \textit{Interim Report} into the election,\(^12\) the \textit{Commonwealth Electoral Act 1918} (Cth) (‘Electoral Act’) was amended to eliminate ticket voting and allow for optional preferential voting above and below the line.\(^13\) In short order, South Australian Senator Bob Day commenced proceedings in the High Court, seeking declarations that the 2016 amendments infringed the \textit{Commonwealth Constitution} (‘Constitution’) and were

\(^6\) For instance, voters in New South Wales at the 2013 federal election were required to rank-order 110 Senate candidates.
\(^7\) Over 95 per cent of voters voted above the line in the five federal elections between 2001 and 2013.
\(^9\) Many of these were front parties established solely for the purpose of preference harvesting: Joint Standing Committee on Electoral Matters, Parliament of Australia, \textit{Interim report on the inquiry into the conduct of the 2013 Federal Election: Senate voting practices} (2014) 23–24.
\(^10\) Ibid 18–25.
\(^11\) The Western Australian Senate election was subsequently voided in \textit{Australian Electoral Commission v Johnston} [2014] HCA 5 (18 February 2014) and reran on 5 April 2014.
\(^12\) Joint Standing Committee on Electoral Matters, above n 9.
\(^13\) \textit{Commonwealth Electoral Amendment Act 2016} (Cth). This Act also made provision for the printing of party logos onto ballot papers, and prohibited a person from simultaneously being the registered officer of multiple political parties.
therefore invalid. This article considers the arguments Senator Day made and, perhaps more importantly, did not make.

In *Day v Australian Electoral Officer (SA)*, Senator Day’s application was unanimously dismissed in a pithy 58 paragraphs. The outcome was unsurprising; his arguments were obfuscatory where they were not bordering on the incomprehensible. Many of his submissions impugned features of the unamended system — such as above and below the line voting and the Droop quota — the constitutionality of which had been upheld on multiple occasions. Those submissions also omitted an argument making best use of *Roach v Electoral Commissioner* and *Rowe v Electoral Commissioner*, two cases in which the Court broadened the scope for review of the Commonwealth Parliament’s electoral lawmaking. Consequently, an important unanswered question — whether the rate of exhaustion associated with optional preferential voting constitutes a constitutionally impermissible disenfranchisement — lies at the heart of *Day*, which this article will pose and then answer.

Three propositions will be articulated over the course of this article. The first is that the High Court has shown a diminishing deference to the Commonwealth Parliament’s electoral lawmaking. Part one examines the Court’s approach to the scrutiny of such laws, highlighting the turn in *Roach* and *Rowe* away from the preceding century of ‘doctrinal deference’. The scene is thus set for part two, which delves into the plaintiff’s arguments and the judgment in *Day*. The second proposition is that the plaintiff should have put to the Court a much more pivotal argument, that the higher incidence of vote exhaustion associated with optional preferential voting constitutes an unconstitutional disenfranchisement, contravening the expanded notion of representative government enunciated by the majorities in *Roach* and *Rowe*. Part three addresses this argument, in the course of which the recent decision in *Murphy v Electoral Commissioner* becomes relevant. The third proposition, and ultimate conclusion, is that the argument would likely

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14 [2016] HCA 20 (13 May 2016) (‘*Day*’). Proceedings were also brought by electors in each of the other states and territories against their respective Australian Electoral Officers and the Commonwealth, to ensure the judgment would bind them all. Each Australian Electoral Officer filed a submitting appearance; the case was argued by the Commonwealth.


16 This is the formula by which the quota for election is determined under *Electoral Act* s 237(8), being the number of valid votes divided by one more than the number of seats, plus one.


18 (2007) 233 CLR 162 (‘*Roach*’).

19 (2010) 243 CLR 1 (‘*Rowe*’).

20 [2016] HCA 36 (5 September 2016) (‘*Murphy*’).
not succeed if put to the Court today, optional preferential voting being a measure justified by substantial reasons.

II DECLINING DEFERENCE IN VOTING LAW SCRUTINY

For much of its history, the High Court generally declined to impose restrictions upon the Commonwealth Parliament’s electoral lawmaking. This flowed from the conception of voting rules as fundamentally and inextricably of a ‘political nature’, decisions about which ought to be ‘entrusted to … elected legislatures rather than to [the] Court’. Consequently, constitutional guarantees were read down and potential constitutional limitations on electoral lawmaking were given minimum content, interpreted in a fashion benign to legislative will. R v Pearson; Ex parte Sipka, concerning s 41 of the Constitution, exemplifies the erosion of apparent constitutional guarantees, and Attorney-General (Cth) ex rel McKinlay v Commonwealth illustrates the Court’s reluctance to read into the Constitution limitations such as the principle of ‘one vote, one value’.

More recently, the Court has demonstrated a greater willingness to intervene. As Roach and Rowe evidence, it has done this not by imposing standalone limitations on Commonwealth legislative power, but by embracing a more fulsome conception of the constitutionally prescribed notion of representative government. Promulgation of proportionality analysis in these cases has also fundamentally changed the Court’s approach to these questions, representing a diminishing observance of parliamentary sovereignty and an increasing readiness to scrutinise laws curtailing access to the vote. While this is not at all a novel observation, the ensuing discussion is nonetheless important as a means of establishing the law at the time Day was argued and emphasising themes bearing upon the balance of this article.

A The Nature Of Judicial Deference

Judicial deference is a necessary concomitant of parliamentary sovereignty, described by Dicey as the ‘legal fact’ that Parliament has ‘the right to make or unmake any law whatever; and, further, that no person or body … [has] a right to
override or set aside [its] legislation’. 26 This theory of legislative omnicompetence

demands ‘deference as submission’, 27 with the validity of legislation considered

unjusticiable. Clearly, the Australian judiciary does not exercise deference of this

sort. Courts are entrusted with the review of laws under the auspices of the

Constitution, which imposes procedural and substantive constraints on the

legislature. As Justice Kenneth Hayne wrote:

\[
\text{the whole system of Government in Australia is constructed upon the recognition that}
\text{the ultimate responsibility for the final definition, maintenance and enforcement of}
\text{the boundaries within which governmental power may be exercised rests upon the}
\text{judicature.} 28
\]

Alternatively, to borrow the phraseology of Keith Mason, ‘parliaments may be

supreme, but they are not sovereign’. 29

However, the concept of deference is not entirely irrelevant to the relationship

between the legislature and judiciary in Australia. Deference extends beyond

obeisance, to ‘deference as respect’. 30 This requires courts to recognise

Parliament’s legislative power and give weight to its reasons for acting. Of course,

the degree of weight given to those reasons is variable, as is the corresponding

degree of deference. Properly understood, judicial deference exists along a

spectrum, with the abdication of judicial responsibility at one extreme and the

usurpation of legislative power at the other. The contemporary debate is fought in

the sensible centre, between those supporting a general doctrine of deference 31 and

those who argue weight should be determined on a case-by-case basis, this being

referred to as ‘epistemic deference’. 32 The resolution of that debate is, happily,
beyond scope. It is sufficient for present purposes to borrow the language of that

scholarship, and the understanding that judicial deference is variable.

30 Dyzenhaus, above n 7, 286.
31 This is the notion that courts have a duty of minimal deference and should acquiesce to legislative action

B A Century Of Deference

Over the 20th century, the Court adopted an ‘abstentionist’ approach in cases concerning the validity of voting laws. The reported decisions, though relatively few in number, overwhelmingly evidence this. One can look to cases like Judd v McKeon, where the Court refused to read into s 9 of the Constitution that the ‘choice’ to which the provision refers must be voluntary, upholding the constitutionality of compulsory voting, or McKenzie, in which Gibbs CJ concluded that the Constitution neither expressly nor impliedly prohibited ticket voting. Another is Langer v Commonwealth, in which it was held that the Commonwealth Parliament was empowered to enact full preferential voting. Two cases will be examined below in more fulsome detail. The first is Ex parte Sipka, where the Court deviated egregiously from the text of s 41 of the Constitution to diminish the right that that provision appears to guarantee. The second is McKinlay, where the Court refused to imply into s 24 of the Constitution ‘one vote, one value’ as a limitation on Commonwealth legislative power.

1 Ex parte Sipka: the emasculation of s 41

The Constitution contains no express right to vote. The closest analogue is s 41, entitled ‘rights of electors of States’, which provides:

No adult person who has or acquires a right to vote at elections for the more numerous House of the Parliament of a State shall, while the right continues, be prevented by any law of the Commonwealth from voting at elections for either House of the Parliament of the Commonwealth.

On its face, s 41 seems to provide a ‘permanent’ constitutional guarantee of continuing effect, rendering nugatory any attempt by the Commonwealth Parliament to prescribe a franchise narrower than that under a less restrictive state

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34 (1926) 38 CLR 380 (‘Judd’). As an aside, the Court by majority (Knox CJ, Isaacs, Gavan Duffy, Rich and Starke JJ, Higgins J dissenting) determined in this case that conscientious objection did not constitute a ‘valid and sufficient’ reason for failing to vote. On this point, see also *Faderson v Bridger* (1971) 126 CLR 271 (‘Faderson’), in which the Court determined that having no preference for any of the candidates was not a ‘valid and sufficient’ reason, either.
35 Currently, the duty to vote is found in *Electoral Act* s 245.
36 R v Jones (1972) 128 CLR 221, 231–3 (Barwick CJ), 246 (Menzies J). In this case, ‘adult person’ was interpreted to mean a person of 21 years or older. On that basis, s 41 could not come to the aid of the three plaintiffs who were not ‘adult persons’ within the meaning of the provision, who sought to be included on the federal roll after South Australia lowered its voting age to 18.
law. Effectively, under such an interpretation, state laws set a floor, below which Commonwealth legislation cannot descend. The floor is shifting: a state legislature could unilaterally confer upon a previously excluded subset a right to vote at state elections and, by virtue of s 41, they would be entitled to vote at the federal level, too. Read in this way, s 41 significantly fetters the Commonwealth Parliament’s power to enact legislation restricting the franchise.

However, the majority in *Ex parte Sipka*[^38] adopted a considerably narrower construction. The applicants, who had failed to enrol prior to the closure of rolls for the 1983 federal election, sought to avail themselves of s 41. They argued that as they had subsequently had their names placed on the New South Wales electoral roll[^39], they could not be barred from voting at federal elections. The majority disagreed. Their Honours’ construction of s 41 sought to preserve the Commonwealth’s power to legislate for a uniform franchise[^40], which their Honours considered as being constitutionally prescribed once enlivened by Commonwealth legislation. A reading of s 41 that would have allowed a state parliament to subsequently introduce disuniformity in favour of its electors would, accordingly, be impermissible.[^41] Instead, guided by Quick and Garran’s interpretation[^42], the majority reduced s 41 to a mere transitional provision, which ensured only that rights acquired up until the point the Commonwealth legislated for a uniform franchise were reflected in that federal franchise.[^43] It did so in 1902[^44]. All those whose rights were guaranteed by s 41 would have died by 1983, and s 41 has consequently become a spent provision.[^45]

In dissent, Murphy J’s labelled this narrow view a ‘pedantic interpretation’ that ‘make[s] a mockery’ of the constitutional guarantee for which s 41 plainly provides.[^46] His Honour regarded the majority’s reliance on Quick and Garran’s interpretation as misguided given the selectiveness of their account of the relevant Convention debates,[^47] in respect of which it has been suggested that ‘[t]he Convention debates are … illuminating only to the extent that they show there was

[^38]: Consisting of Gibbs CJ, Mason, Wilson, Brennan, Deane and Dawson JJ, Murphy J dissenting.
[^39]: Pursuant to s 23 of the *Parliamentary Electorates and Elections Act 1912* (NSW), a person who is enrolled to vote acquires an entitlement to vote.
[^40]: Sections 8 and 30 of the Constitution contemplate the passage by the Commonwealth Parliament of a uniform franchise.
[^43]: For instance, the Commonwealth Parliament could not have excluded women from the franchise, as female suffrage had been granted in South Australia in 1895 and in Western Australia in 1899: ibid 261 (Gibbs CJ, Mason and Wilson JJ).
[^44]: *Commonwealth Franchise Act 1902* (Cth).
[^46]: Ibid 268–71 (Murphy J).
[^47]: Ibid 272 (Murphy J).
no clear rationale behind s 41’.48 Anne Twomey argues the narrow construction is ‘clearly unwarranted from the text of the provision’, describing the deference to the Commonwealth Parliament as ‘uncalled for’.49 Notwithstanding the significant departure from a literalist interpretation and the questionable historical analysis upon which that departure was justified, the deferential narrow reading of s 41 appears entrenched as a matter of precedent, having been affirmed in Snowdon v Dondas (No 2)50 and cited with approval in Roach.51

2 McKinlay: the denial of ‘one vote, one value’

The ‘one vote, one value’ cases also illustrate the Court’s deferential proclivities. The Constitution provides that ‘each elector shall vote only once’,52 thus prohibiting plural voting.53 Arguably, this principle of ‘one person, one vote’ would be rendered otiose without ‘one vote, one value’ — that is, unless each voter’s vote is of equal weight to that of every other voter. This was certainly the view of the United States Supreme Court, which held by majority in Wesberry v Sanders54 that art I § 2 of the United States Constitution contained an implication that ‘as nearly as is practicable, one [person’s] vote in a congressional election is to be worth as much as another’s’.55

Inspired by the appellant’s success in Wesberry, the plaintiffs in McKinlay challenged the validity of certain Electoral Act provisions concerning the drawing of electoral boundaries for the House of Representatives.56 As it then stood, s 19 of the Electoral Act57 permitted the number of electors in each electorate to vary by up to 10 per cent from the mean. In fact, given the time lag between redistributions, the malapportionment was significantly greater in many, with the largest electorate being almost twice as populous as the smallest.58 As each returns only one member to the lower house, the vote of those in more populous electorates is of lesser relative value than the vote of those in less populous electorates. The plaintiffs

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49 Ibid 133.
52 Constitution ss 8, 30.
53 Prior to Federation, plural voting on the basis of property ownership was permitted in Queensland, Western Australia and Tasmania.
54 376 US 1 (1964) (‘Wesberry’).
57 The provision is now found in Electoral Act s 66(3).
58 The division of Wimmera, for example, had slightly fewer than 50 000 electors, while the division of Diamond Valley had almost 90 000. On this basis, Barwick CJ, Gibbs, Stephen and Mason JJ declared Representation Act 1905 (Cth) s 12(a) invalid, despite upholding s 19 of the Electoral Act.
contended that s 24 of the Constitution implicitly required each electorate to contain, as far as practicable, the same number of electors to ensure relatively equal vote-weighting. Accordingly, the Commonwealth Parliament could not legislate to permit such wide variances.

The majority held that the purported implication was unfounded and had no basis in the text of s 24. Reliance on Wesberry was rejected for compellingly simple reasons: Wesberry was based on a particular (and contested) view of American history. Those historical circumstances are irrelevant to the Australian experience and could not inform an interpretation of the Australian Constitution.

In obiter, McTiernan, Jacobs and Mason JJ suggested that, despite the lack of a constitutional basis for ‘one vote, one value’, gross malapportionment could offend the ‘directly chosen by the people’ stipulation. Given the extent of malapportionment patent on the facts before the Court, the bar to judicial intervention is high and the utility of s 24 as a protection of voting power is dubious.

McKinlay is pertinent not only as a ‘classic example of [the Court] deferring to parliamentary sovereignty’, but also for the enunciation by several justices of the Court’s general approach to the scrutiny of electoral laws. Barwick CJ, for instance, contrasted the American and Australian constitutional traditions. In comparison to the United States Constitution, the adoption of which was precipitated by a declaration of independence and a revolutionary war fought against British institutions and ideals, his Honour noted the relative pacificity of the Australian experience, resulting in a Constitution built upon confidence in a [British-style] system of parliamentary Government with ministerial responsibility … [t]hus, discretions in parliament are more readily accepted in the construction of the Australian Constitution.

Similarly, Stephen J observed that as the Constitution entrusted to elected legislatures rather than to this Court … wide powers of shaping … the details of [Australia’s] electoral system, it is not for this Court to intervene so

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59 McKinlay (1975) 135 CLR 1, 17 (Barwick CJ), 39–40 (McTiernan and Jacobs JJ), 45 (Gibbs J), 57–8 (Stephen J), 61 (Mason J); cf 70–1 (Murphy J).
61 McKinlay (1975) 135 CLR 1, 23 (Barwick CJ), 47 (Gibbs J), 63 (Mason J).
62 Ibid 36–7 (McTiernan and Jacobs JJ), 61 (Mason J).
63 Compare the electorates of Wimmera and Diamond Valley in footnote 63.
64 Graeme Orr, The Law of Politics (Federation Press, 2010) 27.
65 McKinlay (1975) 135 CLR 1, 24 (Barwick CJ).
long as what is enacted is consistent with the existence of representative democracy …

In keeping with these non-interventionist credos, the ‘directly chosen by the people’ stipulation was given a relatively spare interpretation, guaranteeing only that elections are direct and popular. Under the majority’s approach, the implication of any additional limitations on the Commonwealth Parliament’s electoral lawmaking would have amounted to the imposition of judicial preference in an area falling squarely within the Commonwealth Parliament’s purview, and in which the Parliament has a wide degree of constitutional latitude. Overall, these comments quite clearly evince doctrinal deference, where the starting position, from which the Court was loath to depart, was one of judicial subordination.

C Increasing interventionism

Reflecting in 2003 on the High Court’s role in the federal electoral system, Gerard Carney noted the Court’s general deferential approach, observing that ‘[i]t will require an activist court to depart from this traditional deference in matters where electoral rights are threatened’. These comments foreshadowed Roach and Rowe, cases in which an interventionist shift in the Court’s approach emerged. This shift had two important, interrelated elements. First, the constitutionally prescribed notion of ‘representative government’ was widened, thus widening the bases for judicial intervention in electoral lawmaking. Secondly, proportionality analysis was adopted as an interpretative technique. By its nature, proportionality invites courts to consider and assign weight to the reasons underlying a particular enactment (showing the legislature epistemic, rather than doctrinal, deference) and, as James Allan opined in his blistering critique of the majorities’ approaches in Roach and Rowe, ‘clearly compounds the scope for debatable judicial value judgements’.

Before examining those cases, it is useful to reflect briefly upon the implied freedom cases, the reasoning in which formed the foundation of the majority judgments in Roach and Rowe. In Nationwide News Pty Ltd v Wills and Australian

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66 Ibid 57–8 (Stephen J).
67 Ibid 21 (Barwick CJ).
70 (1992) 177 CLR 1.
Capital Television Pty Ltd v Commonwealth,\textsuperscript{71} the Court derived from the Constitution an implied freedom of political communication, which it refined in Lange v Australian Broadcasting Corporation.\textsuperscript{72} The phrase ‘directly chosen by the people’ in ss 7 and 24, the reasoning went, established a system of representative democracy, an inherent part of which is the periodic conduct of free elections.\textsuperscript{73} This necessitates the free exchange of views on matters of state between electors, and between electors and their representatives, to allow them to cast their vote in an informed way.\textsuperscript{74}

The implied freedom does not operate as an absolute restriction on Commonwealth legislative power.\textsuperscript{75} Significantly, the Court applied a two-stage proportionality test: first, it must be shown that the impugned law burdens freedom of communication about government or political matters; and secondly, it must be shown that the law was not ‘reasonably appropriate and adapted to serve a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government’.\textsuperscript{76} A majority of the Court recast this test in McCloy v New South Wales.\textsuperscript{77} The first question remains the same. However, the second question was restructured: a plaintiff must demonstrate that the purpose of the law or the means adopted are not compatible with the maintenance of the constitutionally prescribed system of representative government, or that the law is not reasonably appropriate and adapted to that legitimate end in the sense of being unsuitable, unnecessary or not adequate in its balance.\textsuperscript{78} The significance of this development to the present enquiry will become apparent in the final part, with the potential adoption in Murphy of structured proportionality in cases where the impugned law burdens the franchise.

1 Roach: proportionality testing and the evolutionary nature of representative government

Roach concerned the 2006 exclusion of all serving prisoners from the franchise.\textsuperscript{79} Previously, only those serving a term of three years imprisonment or

\textsuperscript{71} (1992) 177 CLR 106.
\textsuperscript{72} (1997) 189 CLR 520 (‘Lange’).
\textsuperscript{73} Ibid 557 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).
\textsuperscript{74} Ibid 559–60 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).
\textsuperscript{75} Ibid 561 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).
\textsuperscript{76} Ibid 561–2, 567–8 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).
\textsuperscript{77} (2015) 325 ALR 15 (‘McCloy’).
\textsuperscript{78} Ibid 18–19 (French CJ, Kiefel Bell and Keane JJ).
\textsuperscript{79} Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006 (Cth) sch 1 item 15.
longer were excluded. By majority, the blanket exclusion was invalidated. Borrowing from Brennan CJ’s judgment in *McGinty v Western Australia*, the majority held that any enactment disenfranchising a particular group of citizens must be based on a ‘substantial reason’ to comply with the constitutional stipulation of choice by the people. However, their Honours differed as to what requirement for a ‘substantial reason’ entailed. As in *Lange*, Gummow, Kirby and Crennan JJ held that the law must be ‘reasonably appropriate and adapted to serve an end which is consistent or compatible with the maintenance of the constitutionally prescribed system of representative government’, concluding that the disqualification’s indiscriminate nature meant it went beyond what was constitutionally permissible. Gleeson CJ instead asked whether the provisions ‘broke the rational connection necessary to reconcile the disenfranchisement with the constitutional imperative of choice by the people’. His Honour answered this affirmatively, thus agreeing with the plurality.

All of the majority justices, conversely, upheld the previous exclusion as constitutionally proportionate. The crucial distinction is that, unlike the blanket ban, it discriminated on the basis of culpability — only those serving a sentence of three years or longer were disqualified. The disqualification was justified in that the higher level of offending reflected in the sentence rendered the prisoner ‘unfit … to participate in the electoral process’ — or, as the Chief Justice stated:

> represents such a form of civic irresponsibility that it is appropriate for Parliament to mark such behaviour as anti-social and to direct that physical separation from the community will be accompanied by symbolic separation in the form of loss of a fundamental political right.

Short-term prisoners were therefore entitled to vote in the 2007 federal election. The differing treatment of these two measures demonstrates epistemic, as opposed to doctrinal, deference towards the Commonwealth Parliament, with the Court considering and assigning weight to the reasons underpinning each.

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83 Ibid 199 (Gummow, Kirby and Crennan JJ).
84 Ibid 201–2 (Gummow, Kirby and Crennan JJ).
85 Ibid 182 (Gleeson CJ).
86 Ibid 179–80 (Gleeson CJ), 204 (Gummow, Kirby and Crennan JJ).
87 Ibid 200–1 (Gummow, Kirby and Crennan JJ).
88 Ibid 176–7 (Gleeson CJ).
Contrary to the strict originalism pervading 20th century judicial thought on the ‘directly chosen by the people’ stipulation, the majority in Roach adopted an ‘evolutionary’ approach. For instance, Gummow, Kirby and Crennan JJ remarked that ‘the Constitution makes allowance for the evolutionary nature of representative government as a dynamic rather than purely static institution’. Professor Twomey provides a useful distinction between an evolutionary approach and the ‘living tree’ approach with which the majority judgments in Roach and Rowe have also been associated: under the living tree approach, the ambit of voting rights can broaden or narrow as changing contemporary standards demand, while under the evolutionary approach, ‘[e]ach liberalising step sets the new benchmark from which there can be no retreat, at least without a substantial reason’. This unidirectional approach is most evident in the Chief Justice’s reasoning. His Honour affirmed obiter dicta in McKinlay, McGinty and Langer, where several justices argued that as a result of the broadening of the franchise since Federation to include all adult citizens, universal adult suffrage was now entrenched as a constitutional imperative. A federal election conducted on the basis of any narrower franchise ‘could not now be described as a choice by the people’.

Given the preceding century of doctrinal deference, the significance of Roach cannot be understated. As Graeme Orr and George Williams observed:

For the first time, a majority of the Australian High Court … held that the requirement in sections 7 and 24 of the Australian Constitution that the Houses of Federal Parliament be “directly chosen by the people” imposes meaningful limitations on Parliament’s ability to delimit the franchise.

2 Rowe: increasing interventionism confirmed

Rowe concerned the constitutional validity of provisions curtailing the statutory grace period in which a person could enrol or transfer their enrolment

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89 Hayne and Heydon JJ’s dissenting judgments harkened back to this originalism, with Hayne J asserting that ‘[h]istory provides the only certain guide’: ibid 206. See also ibid 224 (Heydon J).
90 Ibid 186–7 (Gummow, Kirby and Crennan JJ).
93 (1975) 135 CLR 1, 36 (McTiernan and Jacobs JJ).
94 (1996) 186 CLR 140, 201 (Toohey J), 221–2 (Gaudron J).
following the issuance of the writs. The unenrolled were given until 8pm on the
issuing day to enrol, and those wishing to transfer their enrolment had until 8pm on
the third day thereafter.98 Previously, a seven-day period applied to both enrolments
and transfers. This seven days’ grace was statutorised in 1983,99 prior to which the
long-standing, consistent executive practice of announcing the election some days
before the formal issuance of writs gave voters an effective grace period of variant
length.100

By majority,101 the Court held the relevant amendments were an invalid,
disproportionate exercise of Commonwealth legislative power, restoring the seven-
day grace period that remains in place today.102 The majority accepted the
 truncation of the grace period, while not expressly disqualifying electors, would
 nonetheless in their practical operation disenfranchise an estimated 100 000 people
who were otherwise eligible to vote.103 In so holding, the majority rejected the
Commonwealth’s contention that the disenfranchisement was justified because the
earlier closure of the rolls was necessary to guard against fraud. That the
Commonwealth was unable to demonstrate the risk of fraud as anything other than
a mere potentiality led to the conclusion that it was not a substantial reason to
disenfranchise such a large proportion of the electorate.104 Similarly, the majority
dismissed the argument that the measure, in giving the Commission additional time
to process late enrolment applications, was reasonably appropriate and adapted to
the enhancement and improvement of the electoral system. Evidence showed the
Commission was more than capable of executing its statutory functions.105 In all,
the majority concluded there was no sufficient reason justifying the detrimental
impact upon the franchise.

While the conclusion should not be overstated, given the majority’s acceptance
of the ‘considerable discretion’ the Commonwealth Parliament has in electoral
lawmaking,106 the majority’s decision in Rowe clearly bedded down the two
interventionist elements that emerged in Roach: proportionality testing was
applied;107 and the constitutionally prescribed notion of ‘representative

98 Electoral and Referendum Amendment (Electoral Integrity and Other Measures) Act 2006 (Cth) sch 1
items 20, 24, 28, 41, 42, 43, 44, 45, 52.
100 See, eg, Rowe (2010) 243 CLR 1, 12 (French CJ).
102 Electoral Act s 155.
103 Rowe (2010) 243 CLR 1, 20 (French CJ), 56–7 (Gummow and Bell JJ), 119 (Crennan J); cf 75 (Hayne
J), where his Honour distinguished between the legal opportunity to participate and factual participation,
the latter of which his Honour held was outside the purview of constitutional law.
104 Ibid 38–9 (French CJ), 119–21 (Crennan J).
105 Ibid 38–9 (French CJ), 119–21 (Crennan J).
106 Ibid 22 (French CJ), 49–50 (Gummow and Bell JJ), 106 (Crennan J).
107 Ibid 12, 19–20 (French CJ), 59 (Gummow and Bell JJ), 118–19 (Crennan J).
government’ was given a richer, more fulsome interpretation, with the endorsement of the evolutionary view.108

Kiefel J, dissenting in Rowe, also applied proportionality analysis.109 However, her Honour’s conclusion differed from the majority’s, observing that ‘[i]t should not be assumed that the application of identifiable tests of proportionality will lead to widening, impermissibly, the scope of review of legislation’.110 Naturally, whether proportionality has this effect depends on the notion of representative government seen as being constitutionally prescribed: that is the touchstone against which impugned laws are tested. However, given the coinciding broadening of that notion by the majority, it is inarguably the case that, after a century in which the High Court displayed a scrupulous deference to the Commonwealth Parliament’s electoral lawmaking, at no point in history has the Court’s appetite to scrutinise voting laws, and its willingness to invalidate them in aid of voting rights, been greater.

This is the context in which Day was argued.

III OPTIONAL PREFERENTIAL VOTING AND THE BURDEN ON THE FRANCHISE

Having determined the state of the law at the time Day was argued, the next step is to develop the ‘missing argument’ — that the higher incidence of vote exhaustion under optional preferential voting is a constitutionally impermissible disenfranchisement. This part begins by bringing to the forefront the defects in Senator Day’s case. The missing argument will then be set out. The mechanism by which votes exhaust; the likely incidence of exhaustion; and its impact on voter participation will each be analysed. It will be argued that the notion of representative government has evolved to the point that full preferential voting is now constitutionally entrenched, whether because of its status as a ‘durable legislative development’ or because ss 7 and 24 require maximisation of participation. Optional preferential voting is therefore constitutionally impermissible unless justified with a substantial reason.

The intent is to uncritically state that argument at its highest, constructing a case based on the law and facts available when Day was argued. Though perhaps artificial, the endeavour demonstrates that there was an alternative argument the plaintiff should have advanced, which was free of the deficiencies in those he

108 Ibid 18–19 (French CJ), 48 (Gummow and Bell JJ), 106–7 (Crennan J).
109 Ibid 145-7 (Kiefel J).
110 Ibid 140 (Kiefel J).
actually put to the Court. Subsequent developments — the outcomes of the 2016 federal election and the decision in Murphy — will be considered in the next part.

It would be remiss not to note Professor Twomey’s recent contribution to the Sydney Law Review, in which she outlined a similar argument. In addition to being expressed in more elaborate detail, the analysis in this part departs from Professor Twomey’s in relation to the significance of the voluntary nature of the purported disenfranchisement.

A The arguments in Day

1 Argument A: multiple methods of voting

First, the plaintiff alleged a breach of s 9 of the Constitution, which provides that ‘Parliament … may make laws prescribing the method of choosing senators, but so that the method shall be uniform for all the States’. Emphasis was placed on the word ‘method’, expressed in the singular. Conversely, the plaintiff asserted that ‘[f]or the first time since Federation, the Parliament in Form E has prescribed for use by electors … a ballot paper which requires voters to exercise … a choice between two prescribed methods of voting’. The plaintiff characterised these as separate, substantively distinct methods, describing above the line voting as the ‘party list’ method and below the line voting as the ‘candidate list’ method. In aid of this submission, the plaintiff referred to the Electoral Act definition of ‘dividing line’ — meaning the ‘line on a ballot paper that separates the voting method described in subsection 239(1) from the voting method described in subsection 239(2)’ as amounting to a legislative concession of the correctness of the argument. However, French CJ described this in oral argument as ‘trying to use a statutory tail to wag a constitutional dog’.

The Court rejected this argument, describing it as imposing a ‘pointlessly formal constraint on parliamentary power’ and holding that ‘method’ is a

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111 Anne Twomey, ‘Day v Australian Electoral Officer (SA): Senate Voting Reforms under Challenge’ (2016) 38 Sydney Law Review 231, 239–41. As the editors note, Professor Twomey’s contribution was received prior to the decision in Day and was not rewritten following the handing down of the Court’s judgment. For that reason, her note is speculative and does not consider the Court’s reasons.

112 Day, ‘Written Submissions of Plaintiff’, Submission in Day v Australian Electoral Officer (SA), S77/2016, 5 April 2016, 1–2. This assertion is incorrect. Voters have been choosing between voting above the line or below the line since the 1984 federal election.

113 Ibid 3.

114 Electoral Act s 4(1) (emphasis added).

115 Transcript of Proceedings, Day v Australian Electoral Officer (SA) [2016] HCATrans 97 (2 May 2016) 245–6 (French CJ).
constitutional term to be construed broadly allowing for more than one way of indicating choice within a single uniform system.

2

**Argument B: indirect choosing of Senators**

Secondly, the plaintiff argued that in allowing voters to select from parties above the line, the 2016 amendments contravened the stipulation in s 7 of the *Constitution* that Senators must be ‘directly chosen’. While acknowledging that above the line votes are counted as votes for candidates, the plaintiff emphasised the word ‘direct’, contending that the choosing of Senators must be conducted ‘without the intervention of an intermediary or third party or other obstacle’. In the plaintiff’s view, a (direct) vote for a party above the line was an indirect vote for candidates, which is constitutionally proscribed. Disposing of this ‘untenable’ argument, the Court cited the construction of ‘directness’ in *McKinlay* as implying only that the choice cannot be conducted via an electoral college or similar body.

3

**Argument C: disproportionality and the Droop quota**

Thirdly, the plaintiff argued the 2016 amendments breached an implied constitutional requirement of ‘directly proportional representation’ — that the notion of representative government requires a party’s vote-share to bear some relation to its seat-share. The plaintiff sought to derive this principle from the stipulation in s 24 of the *Constitution* that the number of members of the House of Representatives for each state must be proportional to its population, extending this principle to the Senate because of the nexus between the two houses required by that provision. Also relied upon was the requirement in s 128 that, where a referendum proposes to diminish a state’s proportionate representation, voters in the affected state must approve the proposal by majority. However, this is an equivocation: the proportionality s 24 requires is between a state’s population and its parliamentary representation. The relationship between a party’s vote-share and its parliamentary representation is another thing entirely. The Court concluded that no such relationship was constitutionally prescribed and did not concern itself

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116 Day [2016] HCA 20 (13 May 2016), [44].
117 Pursuant to Electoral Act s 272(2), above the line votes are taken to have been marked as if the voter had voted for candidates below the line in the order listed on the ballot paper.
119 Day [2016] HCA 20 (13 May 2016), [48]–[50].
further with the argument. For the sake of completeness, several comments may be made.

The plaintiff’s complaint related to the counting of the vote and, in particular, the formula by which quotas for election are determined, being the Droop method. The plaintiff contended that, in dividing the number of valid votes by one more than the number of seats available, the Droop method leaves an ‘unrepresented rump’ of approximately 14.3 per cent at a normal half-Senate election. An alternative, the Hare method, does not exhibit this ‘defect’, with the number of votes being instead divided by the number of seats available. Further, in requiring fewer votes for election, the Droop quota leaves a larger surplus to be transferred to successful candidates’ compatriots. This ‘springboard effect’, Senator Day argued, unfairly disadvantaged independents and minor party candidates.

The ‘unrepresented rump’ argument is obfuscatory. The ‘rump’ consists of those preferring the losing candidate for the last seat. It could equally be said that each lower house contest, which ends after one candidate receives a majority, leaves an unrepresented rump of almost 50 per cent. As a matter of political science, the ‘springboard effect’ argument is sound. However, it is another thing entirely to suggest the existence of an implied constitutional requirement of proportional representation, met by the Hare quota but in respect of which the Droop quota falls short. The plaintiff made no case as to where the line between constitutional and unconstitutional disproportionality is to be drawn, and did not develop an argument to the effect that the Constitution requires maximisation of proportionality.

4 Argument D: misleading instructions

Fourthly, the plaintiff argued the instructions on the Senate ballot paper were misleading and burdened the implied freedom of political communication in two ways. First, in instructing voters to vote either above or below the line, the ballot paper impliedly precluded other ways of voting, such as the ‘just vote one’ option.

121 Day [2016] HCA 20 (13 May 2016), [54].
122 Electoral Act s 273(8): the number of valid votes in each state and territory is divided by the number of seats available plus one, to which one is added.
123 Day, ‘Written Submissions of Plaintiff’, Submission in Day v Australian Electoral Officer (SA), S77/2016, 5 April 2016, 9–10. The ‘unrepresented rump’ would be 7.7 per cent at a double dissolution election and 33.3 per cent at elections for territory Senators.
124 Ibid 10–11.
125 It is accepted that the Droop quota is less advantageous to small parties and results in less proportionate outcomes: see, eg, Arend Lijphart, ‘Degrees of Proportionality of Proportional Representation Formulas’ in Bernard Grofman and Arend Lijphart (eds.) Electoral Laws and their Political Consequences (Agathon Press, 1986) 169, 175–6.
126 The prescribed form of the ballot paper is Form E in Electoral Act sch 1: Electoral Act s 209(1).
Secondly, in instructing voters to number at least six boxes above or twelve boxes below the line, the ballot paper failed to inform voters that their vote could exhaust if they expressed an insufficient number of preferences. The Court held that neither of the alleged burdens were made out: the ballot paper accurately reflected the Electoral Act requirements, and the plaintiff, in arguing the savings provisions provided for alternative ways to vote, mischaracterised those provisions.

5 Argument E: the ‘catch all’

Finally, the plaintiff argued the 2016 amendments impaired the principle of representative government and the implied freedom. The plaintiff did not pursue this point in oral argument. Accordingly, the Court’s treatment of this argument was cursory, describing it as a ‘catch all’ proposition that merely repeated the plaintiff’s other arguments. At this juncture, other than to indicate that in the plaintiff’s submissions here can be found the germ of the unanswered question that this paper will now turn to articulate, nothing can be added to the Court’s reasoning.

B The unanswered question: vote exhaustion and the burden on the franchise

1 The distinction between optional and full preferential voting

The first three arguments could equally have been levelled against ticket voting, first upheld in McKenzie. Senator Day did not invite the Court to overturn McKenzie, which was decided by a single justice. In fact, the Court in Day cited

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128 Electoral Act s 279.
129 Ibid ss 268(1)(b) and 269(1)(b) provide, respectively, that a ballot paper with six squares completed below the line or one square completed above the line is not invalid.
130 Day [2016] HCA 20 (13 May 2016), [56].
132 The Commonwealth’s observation that the argument had been abandoned was not met with any resistance: Transcript of Proceedings, Day v Australian Electoral Officer (SA) [2016] HCATrans 98 (3 May 2016) 2800 (N J Williams SC).
133 Day [2016] HCA 20 (13 May 2016), [57].
134 Ibid [37].
135 In fact, in each case where the constitutionality of ticket voting was impugned, the matter was decided by a single justice: in Abbotto, Dawson J sat alone as the Court of Disputed Returns, and in McClure and Ditchburn, the Court was constituted solely by Hayne J.
McKenzie with approval, determining for the first time the constitutionality of ticket voting with the conclusive force of a unanimous full bench decision. Perhaps the plaintiff’s approach was intended to avoid the irresistible concession that would follow — that, as the Solicitor-General put it, ‘Senator Day is, in fact, not Senator Day: he is Mr Day. He has been sitting invalidly in the Senate for the last three years’.

Whatever the reason, the plaintiff sought instead to distinguish McKenzie on the basis that the voting system then under scrutiny involved full preferential voting and allowed voters to vote above the line for ‘groups’ as opposed to ‘parties’. The latter of these is a distinction without a difference: the 2016 amendments did not modify s 168 of the Electoral Act, which provides that candidates can opt to be grouped together on the ballot paper, whether or not they are members of a political party registered under the Electoral Act. In general, the distinction is unconvincing. In all respects material to the first three arguments, ticket voting and optional preferential voting are indistinguishable: both allow voters to vote above or below the line; both allow voters to vote for candidates through groups or parties; and both employ the Droop quota. The plaintiff’s case demonstrates that no argument against the constitutionality of the 2016 amendments could have prevailed so long as it could also have been levelled against ticket voting.

The distinguishing feature of optional preferential voting is the higher incidence of vote exhaustion. Since 1948, the Senate system has been a variant of the single transferable vote, a preferential voting system. Rather than allowing voters to make a single choice between candidates, voters have the opportunity to choose multiple candidates and identify the order in which they would prefer to see them elected. Subsequent preferences come into play at two junctures of the count. First, upon the election of a candidate, any votes surplus to quota are distributed according to voters’ subsequent preferences at a fractional transfer value.

136 Day [2016] HCA 20 (13 May 2016), [23].
139 Electoral Act pt XI.
142 Electoral Act s 273(9). The method currently employed to obtain the transfer value is the ‘inclusive Gregory method’, by which the number of surplus votes is divided by the total number of ballot papers held by the candidate. All of the elected candidate’s ballots are transferred at the fractional transfer value, to voters’ next preferred candidate.
Secondly, upon the exclusion of a candidate, those candidate’s votes are distributed according to voters’ subsequent preferences, at the value at which they were obtained.143 If a ballot paper is to be transferred, but the voter has not indicated a subsequent preference for any candidate remaining in the count, their ballot paper is set aside as exhausted.144

The 2016 amendments limited the extent of the choice required by the Electoral Act, removing the injunction that voters must rank-order every candidate on the ballot paper. Instead, voters must now indicate six preference above or 12 preferences below the line.145 Though the proportion is inestimable, it is a reasonable proposition that the vast majority would simply comply with the minimum statutory requirement, reflected in the instructions on the ballot paper and the educative advertising campaign conducted by the Electoral Commission.146 Also, the prevalence of above the line voting under the previous system suggests voters will apply the principle of least effort in casting their votes, as does the experience of optional preferential voting in elections to the New South Wales Legislative Council. Following the 1999 ‘tablecloth election’,147 at which a number of minor party candidates were elected with preferences ‘harvested’ through complex inter-party arrangements, the New South Wales Parliament implemented optional preferential voting for its upper house elections.148 Voters are required to indicate at least one preference above the line,149 or at least 15 preferences below the line.150 At the 2015 state election, approximately 83 per cent took the path of least resistance, indicating only one above the line preference.151 Therefore, while Senator Day could not have produced exact figures, it could have been argued with confidence that most voters would not have indicated the full gamut of preferences.

One would expect that many ballots would exhaust, some of which would have had no purpose in the count except for determining when the voter’s preferred candidate or candidates were excluded. Again, it would have been difficult for the plaintiff to prospectively determine the incidence of exhaustion; necessarily, argument must be by analogy to previous experience and deference to expertise.

143 Ibid s 273(13AA).
144 Ibid s 273(26).
145 Ibid s 239(1)–(2).
147 So called because the number of candidates (264) stretched the size of the ballot paper to the legislatively stipulated maximum of 70 by 100 centimetres.
149 Parliamentary Electorates and Elections Act 1912 (NSW) s 103(4).
150 Ibid s 103(3).
Final round exhaustion rates at each of the four elections to New South Wales Legislative Council under optional preferential voting are set out in Table 1.

<table>
<thead>
<tr>
<th>Year</th>
<th>Exhausted votes</th>
<th>Formal votes</th>
<th>Exhaustion</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003</td>
<td>359,328</td>
<td>3,721,457</td>
<td>9.66%</td>
</tr>
<tr>
<td>2007</td>
<td>350,384</td>
<td>3,811,245</td>
<td>9.19%</td>
</tr>
<tr>
<td>2011</td>
<td>312,602</td>
<td>4,076,024</td>
<td>7.67%</td>
</tr>
<tr>
<td>2015</td>
<td>305,744</td>
<td>4,316,498</td>
<td>7.08%</td>
</tr>
</tbody>
</table>

**Table 1:** Final round exhaustion rates, 2003–15 New South Wales Legislative Council elections

By the final round of counting at the 2015 election, at which four out of 21 members of the Legislative Council were elected, 305,744 votes exhausted — about seven per cent of the formal votes. Previous elections saw similar exhaustion rates.

While these figures may have given some indication of the exhaustion rate to be expected at the 2016 federal election, the comparison is imperfect — for one, the Senate ballot paper encourages voters to express a greater number of preferences. In general, how voters would vote and for whom they would vote are both unknowns that would influence the exhaustion rate. One political scientist, Nick Economou, hazarded an estimate that between 14 and 20 per cent of ballots could potentially exhaust. It is unclear how Dr Economou arrived at his conclusion. Nonetheless, actors such as the 3 Million Voices campaign and the Australian Labor Party associated themselves with the figure. Certainly, the rate of exhaustion would be much higher than at elections under ticket voting, where votes only exhausted by the operation of savings provisions for otherwise invalid below the line votes.

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155 3,000,000 Voices (2016) (<http://3mv.net.au>).
Vote exhaustion and voter disenfranchisement

Why might the higher exhaustion rate be constitutionally problematic? Essentially, voters whose votes exhaust do not participate as fully in the election. The concern is particularly acute for those whose votes exhaust at full value, through the elimination of their preferred candidates. Arguably, in practical effect those voters are not participating in the electoral process at all. To a lesser extent, those whose votes exhaust at a fractional value, after the election of at least one of their preferred candidate or candidates, are also deprived of the opportunity to participate as fully in the electoral process as would have been the case before the 2016 amendments.

In Langer, in which the Court unanimously upheld the constitutionality of a provision criminalising the encouragement of informal voting,157 several justices extolled the conceptual centrality of voters expressing full preferences in a preferential voting system. For example, Toohey and Gaudron JJ observed that

[o]ne matter that furthers the democratic process is full, equal and effective participation in the electoral process … a voter does not participate either fully or equally with those who indicate an order of preference for all candidates if his or her ballot-paper is filled in in such a way that it is earlier exhausted.158

The reasons a voter may have for participating to a lesser extent are irrelevant. As Brennan CJ opined, ‘[i]t is not to the point that, if a ballot paper were [only partially] filled in … the vote would better express the voter's political opinion’.159 McHugh J went as far as to say that ‘[t]he system is as effectively undermined by filling in a ballot-paper in a way that does not indicate the voter's complete order of preferences as it is by a vote that is wholly informal’.160 Of course, these dicta cannot be determinative of the case against optional preferential voting. The system of which their Honours spoke required full preferential voting; Langer could simply be distinguished on that basis.161 It is necessary to demonstrate that this parliamentary prescription has taken on the mantle of a constitutional fiat. The majority judgments in Rowe bridge this gap.

157 The provision — Electoral Act s 329A — was enacted in the Electoral and Referendum Amendment Act 1992 (Cth) s 27 and repealed in the Electoral and Referendum Amendment Act 1998 (Cth) sch 1 item 161.
159 Ibid 317 (Brennan CJ).
160 Ibid 339 (McHugh J).
161 This point was made by counsel for the Commonwealth: Transcript of Proceedings, Day v Australian Electoral Officer (SA) [2016] HCATrans 98 (3 May 2016) 2766-71 (N J Williams SC).
(a) The constitutionalisation of durable legislative developments

According to French CJ’s view that the ‘directly chosen by the people’ stipulation is evolutionary, ‘durable legislative developments’ become constitutionalised and cannot be diminished absent a substantial reason.\(^{162}\) If durability is the touchstone, full preferential voting surely satisfies the criterion, having been in place since the introduction of the single transferable vote in 1948. It is of greater durability than the seven-day grace period upheld in \textit{Rowe}, enacted in 1983,\(^{163}\) and of significantly greater durability than the disenfranchisement of prisoners serving terms of three or more years upheld in \textit{Roach}, enacted in 2004.\(^{164}\) Full preferential voting, in requiring that voters indicate the order in which they would prefer to see each candidate elected, ensures all voters cast votes equally fulsome in detail, such that votes do not prematurely exhaust. The 2016 amendments, in facilitating optional preferential voting, diminish this durable legislative development and would be constitutionally impermissible unless justified with a substantial reason.

(b) Maximisation of voter participation

An alternative basis upon which Senator Day could have argued the \textit{Constitution} requires full preferential voting is the idea expressed in Gummow and Bell JJ’s joint judgment in \textit{Rowe}, that ss 7 and 24 require maximisation of voter participation. Their Honours indicated that

\begin{quote}
the legislative selection of the ballot system of voting and provisions for the efficacy of that system is not an end in itself but the means to the end of making elections as expressive of the will of the majority of the community as proper practical considerations permit.\(^{165}\)
\end{quote}

To reiterate Toohey and Gaudron JJ’s comments in \textit{Langer},\(^{166}\) voter participation is self-evidently maximised when significant proportions of the votes do not exhaust during the course of the count. As a means of maximising voter participation, optional preferential voting is less effective than full preferential

\(^{162}\) \textit{Rowe} (2010) 243 CLR 1, 18 (French CJ).
\(^{163}\) \textit{Commonwealth Electoral Legislation Amendment Act 1983} (Cth) s 45.
\(^{164}\) \textit{Electoral and Referendum Amendment (Enrolment Integrity and Other Measures) Act 2004} (Cth).
\(^{165}\) \textit{Rowe} (2010) 243 CLR 1, 52 (Gummow and Bell JJ).
\(^{166}\) (1996) 186 CLR 302, 334 (Toohey and Gaudron JJ).
voting and is constitutionally impermissible unless justified with a substantial reason.

(c) Political equality?

Finally, the notion of political equality might mean the exhaustion rate under optional preferential voting is constitutionally problematic. In McCloy, each justice\(^1\) cited Harrison Moore’s observation that ‘[t]he great underlying principle [of the Constitution] is, that the rights of individuals are sufficiently secured by ensuring, as far as possible, to each a share, and an equal share, in political power’.\(^2\) A voter whose ballot remains in the count participates in the election of more Senators than a voter whose ballot exhausted at an earlier point. Arguably, whether or not the first voter’s preferred candidates are successful, their continued participation in the count gives them a greater share in political power.

However, the extent to which the Constitution requires political equality is unclear. In McCloy, Professor Moore’s comment was evoked at the balancing stage,\(^3\) with the joint majority concluding that the impugned provisions were compatible with political equality in ensuring those with a higher capacity to make political donations could not unduly influence government.\(^4\) McCloy is not authority for the proposition that, for example, the constitutionally prescribed notion of representative government requires political equality. Whether and how this notion will be developed remains to be seen.

3 The self-inflicted nature of the disenfranchisement

It should not escape comment that the disenfranchisement alleged is not a formal disenfranchisement as in Roach. Voters can still cast a full and effective vote that will not exhaust. However, as the majority in Rowe recognised, regard must be had to the practical operation of the impugned law.\(^5\) Here, the introduction of optional preferential voting allows and encourages the diminution of the extent to which voters participate in the election of Senators and has an

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\(^1\) McCloy (2015) 325 ALR 15, 24 (French CJ, Kiefel, Bell and Keane JJ), 43 (Gageler J), 67 (Nettle J), 87–8 (Gordon J).


\(^3\) The Court accepted that the impugned provisions of the Election Funding, Expenditure and Disclosure Act 1981 (NSW) that capped political donations, limited ‘indirect campaign contributions’ and prohibited the making of such donations by ‘prohibited donors’ burdened the implied freedom: McCloy (2015) 325 ALR 15, 20 (French CJ, Kiefel, Bell and Keane JJ).

\(^4\) Ibid 25–9, 29–30 (French CJ, Kiefel, Bell and Keane JJ).

\(^5\) Rowe (2010) 243 CLR 1, 12 (French CJ), 56–7 (Gummow and Bell JJ), 119 (Crennan J).
adverse practical effect upon the exercise of the entitlement to vote, even though the legal opportunity to participate fully is not hindered. It is immaterial that vote exhaustion occurs because the voter chooses to indicate only a limited number of preferences.

It is here the argument departs from that articulated by Professor Twomey. Professor Twomey distinguishes disenfranchisement caused by vote exhaustion from the disenfranchisement in *Roach* and *Rowe*, writing that the 2016 amendments [do not require] that votes exhaust. In *Roach* and *Rowe*, the impugned laws prevented voters who wished to vote from voting. The opposite is the case in relation to the 2016 Act. Voters continue to have the right and power to give full preferences when they vote.172

However, the legal opportunity to participate fully is not determinative of the issue at hand. In *Rowe*, the majority rejected as constitutionally insignificant the argument that those who failed to enrol or transfer in time were, as Heydon J put it, ‘authors of their own misfortunes’.173 While recognising the factual accuracy of the argument, the majority focused on the law’s practical effect. Their Honours concluded that, notwithstanding that the plaintiffs were burdened not by the law but by their own inaction, the truncated grace period constituted ‘a significant detriment in terms of the constitutional mandate’.174 The practical effect of optional preferential voting is that votes will likely exhaust, limiting voter participation.

Another useful analogy is compulsory voting.175 If the Commonwealth Parliament introduced non-compulsory voting, voters would have the choice to not vote. The experience with voluntary voting elsewhere indicates that large swatches of the voting population would voluntarily cease to participate in the electoral process.176 Though the constitutionality of non-compulsory voting did not arise in *Rowe*, Gummow and Bell JJ remarked that compulsory voting ‘furthers the constitutional system of representative government by popular choice’.177 Given their Honour’s conception of ss 7 and 24 as requiring maximisation of participation, their Honours would seem to be of the view that compulsory voting is constitutionally entrenched. Voluntary voting would be impermissible if not justified with a substantial reason, notwithstanding that the legal opportunity to vote would be in no way diminished. Therefore, that voters have the legal opportunity

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172 Twomey, above n 1, 241.
174 Ibid 38–9 (French CJ).
175 *Electoral Act* s 245, upheld in *Judd and Faderson*.
176 For instance, turnout at United States presidential elections is generally around 55 to 60 per cent, and Western Australian local government elections see around 30 per cent of electors voting.
177 *Rowe* (2010) 243 CLR 1, 50–1 (Gummow and Bell JJ).
to guard against the exhaustion of their vote under optional preferential voting by casting a full vote is no answer to the argument that many will not do so.

4 The nexus with the constitutional question

Finally, one criticism levelled against the majority’s reasons in Rowe is, as Professor Twomey argues, that ‘the process of reasoning … has now taken primacy over the constitutional question that needs to be determined, to such an extent that the constitutional question is now regarded as irrelevant’. In relation to Rowe, the complaint is essentially that the question of when the rolls close is too far removed from the question of when a Senator is said to be ‘chosen by the people’. Conversely, the impact of vote exhaustion on the extent to which Senators are chosen by the people is more readily apparent: to refer once more to the results in the 2015 New South Wales state election by way of example, the last four Members of the Legislative Council elected were chosen by a narrower electorate — one that excluded the seven per cent whose votes had exhausted prior to the final round of counting.

In this part, it has been argued that Senator Day should have contended that the rate of vote exhaustion associated with optional preferential voting is contrary to ss 7 and 24 of the Constitution and the notion of representative government. Full preferential voting is either a constitutionally entrenched legislative development, or required as a measure maximising voter participation. Therefore, optional preferential voting is constitutionally impermissible unless justified by a substantial reason. The next part will examine those reasons, and will consider the impact of the Court’s recent decision in Murphy on the efficacy of the argument.

IV The Proportionality of Optional Preferential Voting

This final part addresses the unanswered question in Day, as to the constitutionality of optional preferential voting given the higher rates of vote exhaustion with which it is associated. While the scope of the previous part was limited to the facts and law then available to Senator Day, this part asks how the argument would fare today. Two developments impact upon the inquiry. Briefly, exhaustion rates at the 2016 federal election will be analysed, throwing into stark relief the difference between the prediction that up to three million voices would be lost and what actually occurred. The decision in Murphy will then be examined in

relation to whether the Constitution requires maximisation of participation, and the applicable form of proportionality testing. Though the Court was unclear on this latter point, structured proportionality testing will then be used to evaluate the constitutionality of optional preferential voting as a method promoting transparency in reasoning. Ultimately, it will be concluded that optional preferential voting, notwithstanding the burden it imposes on the franchise, is justified by substantial reasons — the empowerment of voters and the transparency and simplicity of the electoral system — and is suitable, necessary and adequate in its balance.

A Developments since Day 1

Vote exhaustion at the 2016 federal election

Following the rejection of three government Bills by the Senate, Prime Minister Malcolm Turnbull advised the Governor-General that both Houses of Parliament should be dissolved pursuant to s 57 of the Constitution. Consequently, the 2016 federal election — the seventh double dissolution election since Federation and the first since 1987 — was held on 2 July, with each state returning 12 Senators and each of the territories returning two. Across the country, 7.52 per cent of votes had exhausted by the final round — on par with the proportions seen at New South Wales state elections, and well below the range of figures suggested by Dr Economou. Exhaustion rates at the final rounds of counting are set out in Table 2.

<table>
<thead>
<tr>
<th></th>
<th>Exhausted votes</th>
<th>Formal votes</th>
<th>Exhaustion</th>
</tr>
</thead>
<tbody>
<tr>
<td>NSW</td>
<td>414 656</td>
<td>4 492 197</td>
<td>9.23%</td>
</tr>
<tr>
<td>VIC</td>
<td>300 283</td>
<td>3 500 237</td>
<td>8.58%</td>
</tr>
<tr>
<td>QLD</td>
<td>208 964</td>
<td>2 723 166</td>
<td>7.67%</td>
</tr>
<tr>
<td>WA</td>
<td>85 766</td>
<td>1 366 182</td>
<td>6.28%</td>
</tr>
<tr>
<td>SA</td>
<td>21 556</td>
<td>1 061 165</td>
<td>2.03%</td>
</tr>
<tr>
<td>TAS</td>
<td>9 531</td>
<td>339 159</td>
<td>2.81%</td>
</tr>
<tr>
<td>ACT</td>
<td>109</td>
<td>254 767</td>
<td>0.04%</td>
</tr>
<tr>
<td>NT</td>
<td>0</td>
<td>102 027</td>
<td>0%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>1 040 865</strong></td>
<td><strong>13 838 900</strong></td>
<td><strong>7.52%</strong></td>
</tr>
</tbody>
</table>

179 Building and Construction Industry (Improving Productivity) Bill 2013 (Cth); Building and Construction Industry (Consequential and Transicional Provisions) Bill 2013 (Cth); Fair Work (Registered Organisations) Amendment Bill 2014 (Cth).
180 Under the Senate (Representation of Territories) Act 1973 (Cth), each territory is represented by two Senators, serving until the next general election.
Table 2: Final round exhaustion rates, 2016 federal election\(^{181}\)

As would be expected, the exhaustion rate largely correlates with the number of candidates and parties in each state and territory:\(^{182}\) as the number of candidates and parties rises, the proportion of voters who choose candidates or parties other than those ultimately elected will increase. Two factors militate against the extent of exhaustion. First, some of the figures are inflated by votes that exhausted in counts occurring after the identity of the final winner had become beyond doubt.\(^{183}\) After this point, the election is effectively concluded. Discounting exhaustion at those counts, the rate of exhaustion falls to 5.08 per cent. Table 3 gives the exhaustion rates after the round of counting at which the final winners were determined.\(^{184}\)

<table>
<thead>
<tr>
<th>State</th>
<th>Exhausted votes</th>
<th>Formal votes</th>
<th>Exhaustion</th>
</tr>
</thead>
<tbody>
<tr>
<td>NSW</td>
<td>326 849</td>
<td>4 492 197</td>
<td>7.28%</td>
</tr>
<tr>
<td>VIC</td>
<td>180 896</td>
<td>3 500 237</td>
<td>5.17%</td>
</tr>
<tr>
<td>QLD</td>
<td>115 685</td>
<td>2 723 166</td>
<td>4.25%</td>
</tr>
<tr>
<td>WA</td>
<td>49 043</td>
<td>1 366 182</td>
<td>3.59%</td>
</tr>
<tr>
<td>SA</td>
<td>21 556</td>
<td>1 061 165</td>
<td>2.03%</td>
</tr>
<tr>
<td>TAS</td>
<td>9 531</td>
<td>339 159</td>
<td>2.81%</td>
</tr>
<tr>
<td>ACT</td>
<td>109</td>
<td>254 767</td>
<td>0.04%</td>
</tr>
<tr>
<td>NT</td>
<td>0</td>
<td>102 027</td>
<td>0%</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>703 669</strong></td>
<td><strong>13 838 900</strong></td>
<td><strong>5.08%</strong></td>
</tr>
</tbody>
</table>

Table 3: Effective exhaustion rates, 2016 federal election\(^{185}\)


\(^{182}\) NSW: 40 groups, 151 candidates; VIC: 37 groups, 115 candidates; QLD: 37 groups, 122 candidates; WA: 27 groups, 79 candidates; SA: 23 groups, 64 candidates; TAS: 21 groups, 58 candidates; ACT: 10 groups, 22 candidates; NT: 7 groups, 19 candidates.

\(^{183}\) In Western Australia, for instance, the distribution of Louise Pratt’s surplus votes between the three remaining candidates made clear that Rod Culleton and Rachel Siewert would be elected. The subsequent exclusion of Kado Muir was unneeded, inflating the exhaustion rate by 2.7 per cent. The may be contrasted against the Tasmanian contest, where the final round of the count was necessary to determine the identity of the state’s 12th Senator: the distribution of Catryna Bilyk’s surplus votes could either have elected Nick McKim or Kate McCulloch. Ultimately, Senator McKim prevailed.


Secondly, it is important to note that the figures given in Tables 2 and 3 reflect the number of votes that exhausted, not the number of individual voters’ ballots. Significantly more ballots exhausted, at a fractional value after having elected a Senator or Senators. The number of exhausted ballots and exhausted votes at the final determinative round of counting in each state and territory, and the average value at which ballots exhausted, is represented in Table 4.

<table>
<thead>
<tr>
<th>Exhausted votes</th>
<th>Exhausted ballots</th>
<th>Average value at exhaustion</th>
</tr>
</thead>
<tbody>
<tr>
<td>NSW</td>
<td>326 849</td>
<td>1 171 459</td>
</tr>
<tr>
<td>VIC</td>
<td>180 896</td>
<td>536 861</td>
</tr>
<tr>
<td>QLD</td>
<td>115 685</td>
<td>360 625</td>
</tr>
<tr>
<td>WA</td>
<td>49 043</td>
<td>169 874</td>
</tr>
<tr>
<td>SA</td>
<td>21 556</td>
<td>142 605</td>
</tr>
<tr>
<td>TAS</td>
<td>9 531</td>
<td>108 617</td>
</tr>
<tr>
<td>ACT</td>
<td>109</td>
<td>109</td>
</tr>
<tr>
<td>NT</td>
<td>0</td>
<td>0</td>
</tr>
</tbody>
</table>

Table 4: Effective vote and ballot exhaustion and average value at exhaustion, 2016 federal election\textsuperscript{186}

The figures in Table 4 suggest that a significant proportion of the exhausted rates were made up of ballots exhausting at miniscule values, with an average value at exhaustion of as low as 0.088 in Tasmania. Few ballots would have exhausted without the voter having participated in the election of at least one Senator.\textsuperscript{187} The upshot of the above is that, while the rate of exhaustion at the 2016 was not insignificant, it should equally not be overstated.

2 The decision in Murphy

In Murphy, the plaintiff impugned Electoral Act provisions\textsuperscript{188} giving a person seven days after the issuance of the writs to enrol or transfer their enrolment, after


\textsuperscript{187} However, the exact number cannot be easily quantified on data publicly released by the Australian Electoral Commission.

\textsuperscript{188} Electoral Act ss 94A(4), 95(4), 96(4), 102(4), 103A(5), 103B(5), 118(5).
which the rolls would close. This was the grace period left standing after a truncated period was invalidated in *Rowe*. The plaintiff argued the seven-day period fell foul of ss 7 and 24 of the *Constitution*, the inherent notion of representative government in which requires maximisation of participation. In light of technological advances and the proven viability of less burdensome provisions elsewhere, the plaintiff contended that the Commonwealth Parliament had failed to fulfil the constitutional mandate by imposing any cut-off date for enrolments and transfers. The special case put to the Court was answered ex tempore after two days of hearings; unanimously, the provisions were upheld. It would be another four months until reasons were delivered, in six separate judgments. Those judgments are of direct relevance to the constitutionality of optional preferential voting in two respects: the rejection of an implication that the *Constitution* requires maximisation of participation, and the divergence as to the applicable method of proportionality testing.

(a) Maximisation of participation

The plaintiff relied heavily on Gummow and Bell JJ’s dictum in *Rowe* that the constitutionally prescribed notion of representative government requires maximisation of participation. Their Honours’ passing comment, that ‘developments in technology and availability of resources [may] support the closure of the Rolls at a date closer to election date’, became the plaintiff’s clarion call.

Bell J, writing with French CJ, seemingly resiled from her Honour’s position in *Rowe*, rejecting the premise that the Commonwealth Parliament’s failure to allow for polling day enrolment burdened the franchise. More explicitly, Kiefel and Nettle JJ both observed simply that neither *Roach* nor *Rowe* were authority for the proposition that the *Constitution* requires maximisation of participation. Similarly, Keane J read down Gummow and Bell JJ’s dictum. To these points, Gordon J added the observation that the plaintiff’s submission ‘[found] no support

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189 Under the *Parliamentary Electorates and Elections Act 1912* (NSW) and the *Electoral Act 2002* (Vic), a person can enrol at any time up to and including on polling day.
192 *Rowe* (2010) 243 CLR 1, 52 (Gummow and Bell JJ).
194 *Murphy* [2016] HCA 36 (5 September 2016), [42] (French CJ and Bell J).
195 Ibid [58] (Kiefel J), [240] (Nettle J).
196 Ibid [186] (Keane J). His Honour observed that ‘their Honours were not endorsing the view that ss 7 and 24 contemplate a “sans-culottes” frenzy of the spontaneous manifestation of the popular will’.
or foundation in the text or structure of the *Constitution*, or elsewhere*. Gageler J was critical of what his Honour viewed as the plaintiff’s attempt to ‘have … the Court compel the Parliament to maximise the franchise by redesigning the legislative scheme to adopt what the plaintiffs put forward currently to be best electoral practice’. 

The Court gave short shrift to the associated notion, described by Keane J as ‘creeping unconstitutionality’, that an enactment can be invalidated as the feasibility of alternative measures becomes apparent. According to French CJ and Bell J, this would ‘allow a court to pull the constitutional rug from under a valid legislative scheme upon the court’s judgment of the feasibility of alternative arrangements’. 

It is now abundantly clear that the notion of representative government does not require maximisation of voter participation. The fact that alternative and less burdensome arrangements are, or become, technically possible does not lead to the conclusion that those arrangements are constitutionally prescribed.

(b) The form of proportionality testing

Another issue confronted by the Court was as to the form of proportionality testing applicable in determining whether enactments burdening the franchise are justified by a substantial reason. In place of the ‘reasonably appropriate and adapted’ test applied in *Roach and Rowe*, the plaintiff contended that the joint majority’s reformulation in *McCloy* should be adopted. The test, a structured form of proportionality analysis, asks whether a law burdening a particular guarantee, immunity or freedom is nonetheless valid, as being a measure suitable, necessary and adequate in its balance.

With one crucial exception, the Court in *Murphy* split along the same lines as it did in *McCloy*. French CJ and Bell J held that the approach in *McCloy* can be used to adjudge the validity of laws ‘burdening or infringing a constitutional guarantee, immunity or freedom’ including the ‘constitutional mandate of choice by the people’. Ultimately, however, their Honours determined that the question

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199 Ibid [191] (Keane J).
200 Ibid [42] (French CJ and Bell J).
203 *Murphy* [2016] HCA 36 (5 September 2016), [38] (French CJ and Bell J).
of proportionality did not arise, as the plaintiff failed to establish a burden on the franchise.\textsuperscript{204} Kiefel J, conversely, was prepared to accept that the plaintiff had met this threshold.\textsuperscript{205} Her Honour endorsed a structured proportionality test, as under the alternative ‘reasonably appropriate and adapted’ test, ‘[value] judgments and the method of reasoning are not required to be exposed’.\textsuperscript{206} Kiefel J concluded that the impugned provisions were proportionate, being suitable in that they bore a rational connection to the purpose of facilitating the efficient conduct of elections; necessary in that there was no equally practicable and less burdensome alternative; and adequate in their balance, when considering the certainty and efficiency that the provisions promote, against the voluntary nature of the disenfranchisement.\textsuperscript{207}

Three other justices declined to transplant the \textit{McCloy} test. Gageler J reiterated the reservations about structured proportionality that his Honour expressed in \textit{McCloy},\textsuperscript{208} describing it as ‘at best an ill-fitted analytical tool [that] has become the master, and has taken on a life of its own’.\textsuperscript{209} Along similar lines, Gordon J confined the operation of the \textit{McCloy} test to its constitutional context — the implied freedom. In her Honour’s view, the necessity stage, involving an examination into alternative measures that would achieve the same purpose as the impugned law, renders structured proportionality testing inappropriate in the electoral lawmaking context, where Parliament has a great deal of constitutional latitude.\textsuperscript{210} Nettle J applied the reasonably appropriate and adapted test without proffering any reason against structured proportionality.\textsuperscript{211} Indeed, his Honour’s judgment in \textit{McCloy} bespeaks a certain indifference towards this methodological question; in his Honour’s view, ‘[i]t is enough to observe that each approach involves questions of judgment’.\textsuperscript{212} Gageler, Nettle and Gordon JJ each arrived at the conclusion that the closure of the rolls, if it burdened the franchise, was justified by a substantial reason, being reasonably appropriate and adapted to the orderly and efficient conduct of elections.\textsuperscript{213}

Finally, Keane J eschewed proportionality analysis entirely, notwithstanding that his Honour had joined in the majority judgment in \textit{McCloy}. His Honour distinguished the implied freedom context, involving an enquiry into the scope of a constitutional implication, from the electoral lawmaking context, which concerns

\begin{footnotesize}
\begin{enumerate}
\item Ibid \cite{204}–\cite{42} (French CJ and Bell J).
\item Ibid \cite{60} (Kiefel J).
\item Ibid \cite{64} (Kiefel J).
\item Ibid \cite{66}–\cite{74} (Kiefel J).
\item \textit{McCloy} (2015) 325 ALR 15, 49–52 (Gageler J).
\item \textit{Murphy} [2016] HCA 36 (5 September 2016), [101] (Gageler J).
\item Ibid \cite{297}–\cite{303} (Gordon J).
\item Ibid \cite{244} (Nettle J).
\item Ibid \cite{255} (Nettle J).
\item Ibid \cite{103}–\cite{104} (Gageler J), \cite{245}–\cite{250} (Nettle J), \cite{324}–\cite{332} (Gordon J).
\end{enumerate}
\end{footnotesize}
the scope of express constitutional provisions. In the latter case, his Honour determined that no form of proportionality testing is warranted:

The considerations which gave rise to the formulation of the *Lange* test are not engaged here … [t]he only question is whether the impugned laws can be seen to be compatible with the requirements of ss 7 and 24 of the *Constitution*, bearing in mind Parliament’s powers under ss 8, 9, 27, 29, 30 and 51(xxxvi). 214

Seemingly, Keane J’s view is that proportionality is (or ought to be) separate from the question of compliance with ss 7 and 24 of the *Constitution*. His Honour sought to recast the majority judgments in *Rowe* in this image, describing French CJ and Crennan J’s use of proportionality analysis as being a means of ‘explaining’ or ‘testing’ their Honours’ conclusions as to validity, rather than being determinative of the question. 215 Similarly, Gummow and Bell JJ’s application of proportionality testing was described as a ‘checking exercise’. 216 With respect, these remarks are questionable, not least because French CJ and Bell J in *Murphy* quite clearly regard proportionality testing as an integral part of the reasoning process: it is not an extraneous superfluity, but a criterion of validity. 217

What conclusions can be drawn on this question? While there is a clear majority in favour of proportionality analysis, the Court has diverged in relation to the applicable methodology, with the Court (Keane J excepted) evenly divided between those supporting structured proportionality analysis in the electoral lawmaking context and those who regard the continued application of the ‘reasonably appropriate and adapted’ test as sufficient. Clarity on this issue from the Court would be welcomed.

B Testing the proportionality of optional preferential voting

The final substantive exercise is to test whether the 2016 amendments are justified by a substantial reason in light of the developments noted above. A variant of the *McCloy* test will be used. Although it may not have received the endorsement of a majority in *Murphy*, the transparency in reasoning that structured proportionality testing offers is self-evident, rendering it a suitable analytical tool for present purposes. Value judgements are made explicit and are situated within in a framework of objective analysis. Further, the imposition of structure ensures the

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214 Ibid [205] (Keane J).
215 Ibid [206]–[207], [209]–[210] (Keane J).
216 Ibid [208] (Keane J).
217 Ibid [26]–[36] (French CJ and Bell J).
balancing exercise is not approached ‘as a matter of impression’, with the outcome ‘pronounced as a conclusion, absent reasoning’. The outcome, in this case, is that optional preferential voting is constitutionally permissible as a measure suitable, necessary and adequate in its balance, notwithstanding the burden it places on the franchise.

1 Burden

The first stage of the inquiry asks whether the impugned law effectively burdens the franchise in its terms, operation or effect. As argued in the previous part, the higher exhaustion rate under optional preferential voting burdens the franchise in that voters do not participate as fully in the electoral process as under full preferential voting — full preferential voting being required because it is entrenched as a ‘durable legislative development’, or because the Constitution requires maximisation of participation. While the decision in Murphy now suggests that maximisation of participation is not constitutionally prescribed, the correctness of French CJ’s dictum that durable legislative developments become constitutionalised was not called into question. In fact, Gageler J seemed to lend his support to it, writing that ‘judicial discernment of the content of the requirements of ss 7 and 24 … [must] have regard to stable and enduring developments that have occurred within our system of representative government’. On that basis, it can still be said that optional preferential voting burdens the franchise.

2 Compatibility testing

‘Compatibility testing’ asks whether the impugned law’s purpose and the means adopted to achieve it are legitimate, in the sense of being compatible with the maintenance of the constitutionally prescribed system of representative government. According to the majority in McCloy, this is a low bar: the means and ends will be compatible with representative government if they do not ‘adversely impinge upon [its] functioning’.

219 Ibid 18 (French CJ, Kiefel, Bell and Keane JJ).
220 Murphy [2016] HCA 36 (5 September 2016), [92] (Gageler J).
222 Ibid 18–19, 32–3 (French CJ, Kiefel, Bell and Keane JJ).
The legislative purpose underpinning the introduction of optional preferential voting can be found enunciated in the explanatory memorandum to the Commonwealth Electoral Amendment Bill 2016 (Cth),\(^{223}\) which relevantly provides:

To provide confidence to voters that their vote goes to the intended candidate, the Bill will introduce partial optional preferential ... [t]he Bill will also empower voters, returning control of their preferences to them, by abolishing individual and group voting tickets. Together, these amendments will improve transparency and simplify the Senate voting system, thereby improving the franchise, and supporting the democratic process.\(^{224}\)

Giving voters greater control over their preferences and improving the transparency and simplicity of the electoral system are clearly objects that do not detract from, and are thus compatible with, representative government.

3  \textit{Proportionality testing}

\begin{itemize}
\item \textit{(a) Suitability}
\end{itemize}

The first step in proportionality testing is suitability. To be ‘suitable’, the law must bear a rational connection to — or ‘contribute to the realisation of’\(^{225}\) — its purpose.\(^{226}\)

Optional preferential voting gives voters greater control over inter-party preferences: unless the voter so intends, preferences cannot flow between parties. Voters are neither required to express preferences for each candidate, and nor are they taken to have done so by their adoption of a group voting ticket — this being predicated on the flawed assumption\(^{227}\) that voters would familiarise themselves with their chosen party’s preferred flow of preferences. Optional preferential voting also facilitates greater voter control over the allocation of intra-party preferences. By simplifying the act of voting below the line, voters are better placed to disturb parties’ predetermined order of candidates. The election of Lisa Singh in Tasmania provides a striking example. Senator Singh won a fifth seat for the Australian Labor Party notwithstanding her demotion to the sixth position on the party’s ballot. Her victory occurred despite her not receiving any of the Labor Party’s above the line

\(\textit{footnotes}\)

\(^{223}\) Explanatory Memorandum, Commonwealth Electoral Amendment Bill 2016 (Cth).

\(^{224}\) Ibid 2.


\(^{226}\) Ibid 19 (French CJ, Kiefel, Bell and Keane JJ).

\(^{227}\) Joint Standing Committee on Electoral Matters, above introduction n 9, 2.
votes, and made her the first candidate to win a Senate seat out of order since 1953.  

Furthermore, optional preferential voting bears a rational connection to the transparency of the electoral system, displacing a system under which most votes flowed according to opaque inter-party preference arrangements. In the reformed system, a vote can no longer be appropriated by any candidate for whom the voter did not expressly intend to vote. Finally, optional preferential voting bears a rational connection to the simplicity of the electoral system. Arguably, in requiring the expression of a greater number of preferences above the line, the 2016 amendments complicate the act of voting. At the same time, however, voting below the line is substantially simplified by the removal of the need to express a preference for each candidate. That the vast majority of votes no longer flow according to group voting tickets adds a degree of complexity to the counting process, but the simplicity towards which the 2016 amendments were adapted appears to be directed to simplifying the electoral process for voters (rather than facilitating the efficient conduct of an election, as was the case in Murphy).

The nexus between optional preferential voting and the legitimate ends sought to be achieved is obvious and manifold. The suitability criterion is met.

(b) Necessity

An enactment will be ‘necessary’ if there are no obvious and compelling alternative means of achieving the same purpose that are both reasonably practicable and less burdensome on the franchise. An obvious alternative is to revert to the system used between 1949 and 1983, requiring full preferential voting without the shortcut of ticket voting. Full preferential voting curtails the extent of exhaustion, ensuring that ballots remain active throughout the count. However, this alternative would not necessarily be less burdensome on the franchise. The prime motivation for the enactment of ticket voting was the view that the rate of informal voting had become unacceptably high at 9.87 per cent at the 1983

229 Under optional preferential voting, each ballot paper must be data-entered, whereas under the previous system, only below the line votes required data entry. The Australian Electoral Commission used a semi-automated process to conduct the 2016 Senate count, with ballots first scanned and then verified by Commission staff: Australian Electoral Commission, ‘Central Senate Scrutiny frequently asked questions’ (2016) <http://www.aec.gov.au/elections/candidates/files/counting/css-faqs.pdf>.
230 Explanatory Memorandum, Commonwealth Electoral Amendment Bill 2016 (Cth) 2.
231 Murphy [2016] HCA 36 (5 September 2016), [66]–[74] (Kiefel J), [103]–[104] (Gageler J), [245]–[250] (Nettle J), [324]–[332] (Gordon J).
233 As argued above, the retention of ticket voting would be contrary to the empowerment of voters.
Since 1983, the number of candidates vying for Senate seats has only risen,\(^{235}\) suggesting that the reintroduction of full preferential voting would result in even higher rates of informality. Rather than being less burdensome, this alternative might even be adverse to the franchise.

Another alternative — an intermediate measure between full preferential voting and optional preferential voting as implemented in the 2016 amendments — is to increase the number of preferences required. As the number of preferences expressed rises, ballots remain in the count for longer and exhaustion rates decline. Simultaneously, however, informality would rise as voting becomes more unwieldy. There is no obvious answer how this balance should be struck. In that sense, the alternative is not a compelling one. The ‘obvious and compelling’ qualification emphasises that the question of necessity is a tool of analysis, not an invitation for courts to tinker at the margins of enactments. As the majority in *McCloy* warned, ‘[c]ourts must not exceed their constitutional competence by substituting their own legislative judgments for those of parliaments.’\(^{236}\) There being no obvious and compelling alternative, the 2016 amendments satisfy the necessity criterion.

(c) **Adequacy in its balance**

Finally, to be adequate in its balance, there must be congruence between the importance of the impugned law’s purpose and the extent of the disenfranchisement. This is invariably a value judgement, rather than one based on principle.\(^{237}\) Accordingly, reasonable minds may differ.

At risk of overstating the case, laws resulting in the empowerment of voters over their vote and the transparency and simplicity of that system would improve any democratic system. The ends underlying the adoption of optional preferential voting are incontrovertibly and self-evidently desirable.

These ends are to be balanced against the extent of the disenfranchisement — which, while not as drastic as had been predicted, was nonetheless not insignificant. Approximately one million votes exhausted at full or fractional value. A number of

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\(^{234}\) Over 75 per cent of the informal votes were unintentional errors attributable to the arduousness of rank-ordering each candidate: Joint Select Committee on Electoral Reform, Parliament of Australia, *First Report* (1983) 62–4.

\(^{235}\) Between the 1983 and 2016 federal elections, the total number of candidates increased by 2.5 times (from 250 to 631). In New South Wales, the most contested state, the number of candidates increased from 62 to 151. The increase in each other jurisdiction was as follows: ACT: 8 to 22; NT: 6 to 19; QLD: 42 to 122; SA: 35 to 64; TAS: 17 to 58; VIC: 50 to 116; and WA: 30 to 79.


countervailing observations may be made. First, according to Kiefel J in *Murphy, it is permissible at this stage of the inquiry to account for the self-inflicted nature of the disenfranchisement. Therefore, that votes exhaust because voters consciously decide to express only a limited number of preferences is relevant as a factor militating against the extent of the disenfranchisement. Secondly, vote exhaustion arguably serves the purpose of the enactment. Allowing voters to, in effect, opt out of the electoral process when their preferred candidates are elected or eliminated is entirely consistent with the purpose of voter empowerment. Full preferential voting may ensure that voters participate fully in the choosing of Senators throughout the entirety of the count, but if a voter genuinely has no preference between the remaining candidates, to ascribe to them such a preference is an artifice.

Therefore, optional preferential voting is suitable, necessary and adequate in its balance. Justified as it is by substantial reasons, the measure would, if again challenged, likely be upheld notwithstanding the burden it imposes on the franchise.

V CONCLUSION

In this article, it has been argued that the plaintiff in *Day* failed to prosecute the best case possible against the Commonwealth Parliament’s provision for optional preferential voting — but that argument, if put to the Court today, would not have succeeded. The argument proceeded in three stages.

First, the development of the relevant jurisprudence was canvassed. After a century in which the Court afforded the Commonwealth Parliament an almost absolute degree of latitude to make electoral laws, the majorities’ decisions in *Roach* and *Rowe* evinced a greater appetite for intervention. The inherent notion of representative government in ss 7 and 24 of the *Constitution* was given fuller content, with an evolutionary view being adopted. Durable legislative measures became entrenched and maximisation of participation became, it appeared, constitutionally prescribed. Further, proportionality testing emerged as a means by which the Court could call into question the Commonwealth Parliament’s lawmaking.

That body of law was then applied to the facts, highlighting the glaring omission from Senator Day’s case. The likely incidence and effect of vote exhaustion under optional preferential voting were analysed. It was argued that this, notwithstanding its essentially self-inflicted nature, constituted an effective burden.

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238 *Murphy* [2016] HCA 36 (5 September 2016), [74] (Kiefel J).
upon the franchise, constitutionally impermissible unless justified by a substantial reason.

That argument was appraised in the third part, having regard to the actual outcomes of the 2016 federal election and the decision in *Murphy*. In *Murphy*, the Court split as to whether the reformulated test in *McCloy* was applicable in cases of voter disenfranchisement. Nonetheless, for the transparency in reasoning it promotes, the structured test was employed to test the validity of the measure. Ultimately, it was concluded that optional preferential voting is proportionate to the empowerment of voters and the simplicity and transparency of the electoral system, being necessary, suitable and adequate in its balance.

Given the Court has already adjudged the constitutionality of optional preferential voting, and done so emphatically, one might question the import of this conclusion. However, history demonstrates that these matters are frequently relitigated. For example, ticket voting was upheld in *McKenzie*, which did not prevent those laws being again impugned in *Abbotto, McClure* and *Ditchburn*; and in *McKinlay*, the plaintiff sought unsuccessfully to rely on a constitutional implication of ‘one vote, one value’, as did the plaintiffs in *McInty* some two decades later. The constitutionality of optional preferential voting may one day come back before the Court, and the Court may be called upon to address the argument that ought in the first place to have been advanced by Senator Day. This article proffers a view of the outcome that might be expected in such circumstances.
LONDON & NEW MASHONALAND EXPLORATION CO LTD V NEW MASHONALAND EXPLORATION CO LTD: IS IT AUTHORITY THAT DIRECTORS CAN COMPETE WITH THE COMPANY?

DOMINIQUE LE MIERE

There is confusion concerning the ability of directors to compete with the company. There is uncertainty about whether a different rule or a relaxed application of the conflict rule is applied to directors competing with the company in contrast to other fiduciaries, such as trustees personally competing with the trust business. This stems from a preoccupation with the 1891 decision of New Mashonaland Exploration Co Ltd v New Mashonaland Exploration Co Ltd (‘New Mashonaland’) and a misunderstanding of the conflict rule. Courts and academics have expressed unease about this decision and uncertainty about the scope and meaning of the ‘New Mashonaland principle’, which provides that directors can compete with the company. This article aims to clarify the scope and meaning of the principle. In doing so it will be argued that the New Mashonaland principle is a limited one which does not answer whether a director can compete with the company; rather a director competing with the company is one application of the conflict rule. A proper understanding of the conflict rule reveals why a director competing with the company will not inevitably breach the rule. This article suggests a three step approach for applying the conflict rule that shifts attention away from New Mashonaland and back onto the unique facts and circumstances, which equitable doctrines and principles must accommodate.

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1 London & Mashonaland Exploration Co Ltd v New Mashonaland Exploration Co Ltd [1891] WN 165.
INTRODUCTION

The 1891 decision of London & Mashonaland Exploration Co Ltd v New Mashonaland Exploration Co Ltd (‘New Mashonaland’) has been cited as authority for the rule that it is ‘not impermissible per se for a director of a company to be at the same time a director of a competitor or to personally carry on a competing business’ (the ‘New Mashonaland principle’). The New Mashonaland principle has created uncertainty and confusion about the ability of directors to compete with the company. Courts and academics have expressed reservations about the New Mashonaland decision and principle. In many cases the court has expressed uncertainty with the New Mashonaland principle but found it unnecessary to decide the issue, or assumed its correctness, or stated that as a judge sitting at first instance they must accept it. Others have called for a reconsideration of the New Mashonaland principle labelling it an ‘aberration’ and ‘somewhat difficult to defend.’ Dal Pont and Ford, Austin and Ramsay suggest that there would ordinarily be a conflict where a director competes with the

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2 London & Mashonaland Exploration Co Ltd v New Mashonaland Exploration Co Ltd [1891] WN 165.
3 See eg GE Dal Pont, Equity and Trusts in Australia (Lawbook, 2015, 6th ed, 2015) 122 [4.115].
4 See eg, Ross Grantham, ‘Can Directors Compete with the Company?’ (2003) 66 (1) Modern Law Review 109, 109 where Ross Grantham described the status of New Mashonaland as ‘a long standing conundrum of company law’ but one which has ‘stood for over a hundred years’; Plus Group ltd v Pyke [2002] EWCA Civ 370; [2003] BCC 332, 347 [75] where Brooke LJ referred to the ‘unease with which some modern text book writers have viewed the New Mashonaland case’ before stating that it was ‘unnecessary to resolve the controversy in the present decision because of its unusual facts; Eastland Technology Australia Pty Ltd v Whisson (2005) 223 ALR 123, 137 [69] where McLure JA found that while there was ‘uncertainty’ about the ability of directors to compete with the company, ‘there was authority [New Mashonaland] in favour of directors being permitted to compete with the company.’ However, her Honour stated that ‘courts and commentators’ had ‘expressed unease with that view.’
6 Mordecai v Mordecai (1988) 12 NSWLR 58, 62-63 (Hope JA).
7 Links Golf Tasmania Pty Ltd v Sattler (2012) 213 FCR 1, 190 [562] (Jessup J).
company but that the *New Mashonaland* principle has relaxed the position for directors.\(^9\) With respect many of these arguments arise from a misconception of the principle and or the conflict rule. This issue warrants further attention. The issue of competition continues to be relevant; for example in the Western Australian mining industry a number of directors sit on the boards of multiple junior mining companies. The issue has arisen in recent cases\(^10\) and is addressed in many textbooks\(^11\) and articles\(^12\) but remains unsettled.

This article argues that the *New Mashonaland* principle is a limited one which does not answer the issue of competition. Rather, applying the conflict rule does and there are circumstances where a director competing with the company will breach the conflict rule and circumstances where they will not. There is no unique rule or standard that applies to directors; what changes is the facts and circumstances to which the conflict rule is applied. This argument will be established in three parts. Part one explores the *New Mashonaland* decision and whether it is authority for a general principle. Part two examines whether *New Mashonaland* is good law in Australia and what for. It addresses the scope and meaning of the *New Mashonaland* principle and whether it answers the issue of competition. Part three establishes the correct approach for determining whether a director can compete with the company. In doing so Part three resolves some issues in applying the conflict rule and proposes a three step process for applying it.

II THE NEW MASHONALAND DECISION

A Facts of the case

The director (Lord Mayo) was the director and chairman of the plaintiff company. The plaintiff company alleged that the defendant company had issued a

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\(^9\) G E Dal Pont, *Equity and Trusts in Australia* (LawBook, 6th ed, 2015) 122-123 [4.120]-[4.125] where Dal Pont states that strict application of fiduciary duties in the director-company context sits ‘uncomfortably with the judicial recognition of the commercial reality of multiple directorships’; R P Austin, Ian M Ramsay, H A Ford, *Ford Austin & Ramsay’s Principles of Corporations Law* (LexisNexis, at October 2015) [9.410] where it is argued that a director competing with the company appears logically to go beyond a real and sensible possibility of conflict but that the courts have (for practical reasons) relaxed the position for directors.


prospectus, in which Lord Mayo’s name was listed as a director. The companies were rival companies incorporated for similar objects. The plaintiff applied for an interim injunction restraining the defendant from publishing any announcement that Lord Mayo was one of its directors and to restrain Lord Mayo from authorising or permitting such a publication and from acting as a director of the defendant company. Chitty J refused the motion. However, there appears to be contention about Chitty J’s reasoning and the basis for his Lordship’s decision.

B What did New Mashonaland decide; did it state any general fiduciary principle?

Despite the use of the decision to explain the ability of directors to compete with their company, this article argues that the decision did not establish any general rule because it was not decided on the basis of fiduciary duties and has no currency today in relation to directors’ duties.

1 New Mashonaland is not about fiduciary duties but whether an interlocutory injunction should be ordered

New Mashonaland is cited as authority for the New Mashonaland principle or rule. This principle has been formulated in different ways. This will be discussed further in Part two. However, generally it is cited as authority for the principle that directors are permitted to compete with the company. The decision is an ‘inadequately reported’ decision which has been misinterpreted for a general principle for which it is not authority. The case was reported in both the Weekly Notes and the Times. However, until the Hong Kong Court of Final Appeal decision in Poon Ka Man Jason v Cheng Wai Tao (‘Poo Ka Man’) cases have exclusively referred to the less detailed Weekly Notes report.

13 Although unclear from the Weekly Notes report, it is clear from the Times report that the application was for an interim injunction, as the report states, ‘The plaintiff accordingly moved for an interim injunction.’
14 See eg, GE Dal Pont, Equity and Trusts in Australia (LawBook, 6th ed, 2015) 122 [4.120].
15 Links Golf Tasmania Pty Ltd v Sattler (2012) 213 FCR 1, 190-191 [562]; Streeter v Western Areas Exploration Pty Ltd (No 2) (2011) 278 ALR 291, 303 [69].
16 Gower & Davies, Principles of Modern Company Law (Sweet & Maxwell, Thomson Reuters, 9th ed 2012) 605 [16-166].
17 London and Mashonaland Exploration Co Ltd v New Mashonaland [1891] WN 165.
18 London and New Mashonaland Exploration Co v New Mashonaland Exploration Co and the Earl of Mayo reported in The Times, 10 August, 1891, 3 (See appendix 2).
The case was decided on the basis of whether an injunction should be ordered. This is particularly clear from the more detailed *Times* report. In both reports Chitty J describes the case as ‘unprecedented.’ However the *Times* report illustrates that this was a reference to the circumstances in which an injunction could be granted.\(^{21}\) This is apparent from Chitty J’s reference to the case of *Whitwood Chemical Company v Hardman*\(^{22}\) in the *Times* report (but not the *Weekly Notes* report). *Whitwood Chemical Company v Hardman*\(^{23}\) concerned the circumstances in which an injunction would lie.

Chitty J decided that the circumstances of the case did not warrant the granting of an interlocutory injunction. An injunction is a discretionary remedy and one of the principles for granting an interlocutory injunction is that the applicant would suffer irreparable harm for which damages would not be adequate compensation if the injunction were not granted.\(^{24}\) Chitty J found that the plaintiff company had not established that it would suffer sufficient damage and hence had not proved that relief was required. The plaintiff company was not likely to suffer irreparable harm because it could prevent any harm by calling for Lord Mayo’s resignation or removing him as director. Hence, an injunction was not required because the Company had ‘the most appropriate remedy in its own hands.’\(^{25}\)

Chitty J’s finding (in both reports) that counsel’s analogy to a partnership was ‘incomplete’\(^{26}\) has been interpreted as an analogy in relation to fiduciary principles. That is a comparison of the ability of partners to compete with the partnership compared to the ability of directors to compete with the company.\(^{27}\) This article rejects that interpretation. The *Times* report (but not the *Weekly Notes* report) shows that the comparison was a reference to the inability of the plaintiff company to establish that it would suffer irreparable harm in comparison to the harm that a partnership would likely suffer if an injunction were not granted to prevent a partner competing with the partnership. Chitty J explained that this was because the plaintiff Company could seek the director’s resignation or have him removed without affecting the company, whereas removing an offending partner would

\(^{21}\) See, *Cheng Wait Tao v Poon Ka Man Jason* [2016] HKCFA 23 [99] (Spigelman NPJ).

\(^{22}\) *Whitwood Chemical Company v Hardman* [1891] 2 Ch 416.

\(^{23}\) *Whitwood Chemical Company v Hardman* [1891] 2 Ch 416.

\(^{24}\) *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 218 [13] (Gleeson CJ). See also *Earl of Ripon v Hobart* (1834) 3 My & K 169, 174; (1834) 40 ER 65, 67 (Brougham LC). See also *Attorney General v Hallett* (1847) 16 M & W 577; (1847) 153 ER 1316 where an injunction was refused because an injunction before trial is only granted to prevent irreparable injury.

\(^{25}\) *The Times*, 10 August, 1891, 3.

\(^{26}\) *The Times*, 10 August 1891, 3; *London and Mashonaland Exploration Co Ltd v New Mashonaland* [1891] WN 165.

likely result in dissolution of the partnership to the loss of the injured partner or partners.\textsuperscript{28}

The \textit{Weekly Notes} report refers to no case being made out that Lord Mayo was about to disclose to the defendant company any confidential information. It is apparent from the \textit{Times} report that the reference to confidential information was not about the ability of a director to compete with the company so long as he or she did not disclose any confidential information. Rather it was about the requirements for establishing that an injunction should be ordered. The \textit{Times} report states that an injunction would have been available if Lord Mayo’s conduct had been of a ‘grosser kind,’ ‘such as’ but not limited to ‘betraying secrets.’ If an injunction were not granted in the case of such grosser conduct the company would likely suffer irreparable harm for which damages would be inadequate. However, that was not the position on the facts before Chitty J.

Although unclear from the \textit{Weekly Notes} report, it is clear from the \textit{Times} report that the \textit{New Mashonaland} decision concerned an application for an ‘interlocutory’ injunction.\textsuperscript{29} To obtain an interlocutory injunction a plaintiff need only prove a prima facie case.\textsuperscript{30} The Court is not always required to decide difficult questions of law which the case depends on\textsuperscript{31} and it is not required to make final findings of fact.\textsuperscript{32} This lessens the precedential value of the decision.

\section{New Mashonaland was decided in a different time}

\textit{New Mashonaland} is a product of its time and social, legal and corporate developments since mean that it is no longer relevant to directors’ duties.

Chitty J’s finding that the plaintiff company could remove Lord Mayo as director without affecting the company is a reflection of the times. At that time lords were often appointed as non-executive directors to promote a company’s

\textsuperscript{28} The \textit{Times}, 10 August 1891,3.

\textsuperscript{29} The \textit{Times}, 10 August 1891, 3 states that the plaintiff company moved for an ‘interim injunction’ whereas the \textit{Weekly Notes} report refers only to an ‘injunction.’ see also, Len Sealey and Sarah Worthington, \textit{Sealy & Worthington’s Cases and Materials in Company Law} (10th ed, 2013, Oxford University Press) 406.


\textsuperscript{31} Cohen \textit{v Peko-Wallsend Ltd} (1986) 68 ALR 394, 397 (Gibbs CJ, Mason and Wilson JJ).

profile. They had no active role in the company. Removing a director like Lord Mayo who was not appointed for any specific skill set and who had never attended (and would likely never attend) a board meeting would not affect the company in the same way it would today given the large sums of money now often paid to directors for their particular expertise.

Directors were historically subject to a very low standard of care under the common law. It was framed subjectively in terms of what could be reasonably expected from a person of their knowledge and experience. It seemed to be framed in light of a non-executive director who had no serious role in the company.

Directors are now subject to higher standards. Directors have a duty of skill, care and diligence under both s 180 (1) of the Corporations Act 2001 (Cth) and the general law. The standard is essentially the same. While the standard expected of the director adjusts depending on differences (such as their position in the company) there is a minimum standard now set by statute and informed by the common law. Directors are now expected to attend all meetings unless there are exceptional circumstances such as illness.

Today, a director would breach their duty of care and diligence to the company if they acted like Lord Mayo, in never attending a board meeting and having no active role in the company. The factual situation in New Mashonaland is unlikely

33 Gower & Davies, Principles of Modern Company Law (Sweet & Maxwell, Thomson Reuters, 9th ed 2012) 518 [16-25].
34 Gower & Davies, Principles of Modern Company Law (Sweet & Maxwell, Thomson Reuters, 9th ed 2012) 518 [16-25].
37 The most extreme example can be seen in the case of Re Cardiff Savings Bank [1892] 2 Ch 100 where the Cardiff Savings Bank collapsed because of irregularities in its lending operations. Proceedings were brought against the Marquis of Bute for neglecting to perform his duties. He was held not liable despite being appointed president of the bank at only six months of age and attending only one board meeting in the next 38 years. His family owned Cardiff Castle and he was likely appointed merely to promote the company’s image. see also, Gower & Davies, Principles of Modern Company Law (Sweet & Maxwell, Thomson Reuters, London, 9th ed 2012) 518[16-25].
38 Section 180(1) of the Corporations Act 2001 (Cth) provides that a director or other officer of a company must exercise their powers and discharge their duties with the degree of care and diligence that a reasonable person would exercise if they were a director or officer of a company in the company’s circumstances and occupied the office held by, and had the same responsibilities within the company as, the director or officer.
to arise again and is out of step with modern times.\textsuperscript{42} The law has evolved from the ‘very undemanding’ duty that the older cases placed on directors to participate in the management of the company because of changes in public governance and corporate attitudes.\textsuperscript{43}

In addition to the development of directors’ duties since 1891, judicial attitudes toward equity have changed. The dominant judicial thinking at that time placed emphasis on contract law rather than equity.\textsuperscript{44} This is evident in Chitty J’s focus on the company articles and the existence of any negative stipulation as a basis for granting an injunction.

The modern corporation is vastly different to corporations in 1891. Modern companies are characterised by a separation of control and ownership with shareholdings dispersed among large numbers of people. Earlier corporations often had entrepreneurs both owning and managing them.\textsuperscript{45} The transformation of the modern corporation means that the potential for a conflict of interest or a conflict of duty is greater.\textsuperscript{46} That is because the controllers have a less significant beneficial interest in the company. Consequently there are now more similarities between trustees and directors, requiring a greater emphasis to be placed on a director’s fiduciary duties.\textsuperscript{47} Other changes include the degree of shareholder control. Chitty J was likely influenced by the old model of corporate decision-making in finding that the company could prevent itself suffering any harm by removing Lord Mayo as a director. Under the old model shareholders had effective control over the choice of directors. This gave rise to the belief that if the shareholders chose poor directors the remedy lay in their hands.\textsuperscript{48} Today, shareholders in most public companies do not enjoy the same control over boards of directors.\textsuperscript{49}

\textsuperscript{48} Gower & Davies, Principles of Modern Company Law (Sweet & Maxwell, Thomson Reuters, 9th ed 2012) 518 [16-25].
\textsuperscript{49} Gower & Davies, Principles of Modern Company Law (Sweet & Maxwell, Thomson Reuters, 9th ed 2012) 518 [16-25].
III IS NEW MASHONALAND GOOD LAW IN AUSTRALIA AND WHAT FOR?

Despite criticism of *New Mashonaland*\(^{50}\) and its lack of currency, Australian courts have endorsed it.\(^{51}\) This Part examines how the decision has been endorsed and what for. In particular whether the *New Mashonaland* principle answers the question of whether directors can compete with the company.

Although the case was reported in both the *Weekly Notes*\(^{52}\) and the *Times*\(^{53}\) Australian courts (and English)\(^{54}\) have focused exclusively on the less detailed *Weekly Notes* report.\(^{55}\) The exclusive focus on the *Weekly Notes* report and its misconceived endorsement in *Bell v Lever Brothers*\(^{56}\) has resulted in an incorrect interpretation of *New Mashonaland*.

As explained in Part one, the case did not state any general principle relevant to fiduciary duties. Nevertheless, Australian courts have cited it and its subsequent endorsement by Lord Blanesburgh in *Bell v Lever Brothers*\(^{57}\) as authority for the ‘*New Mashonaland* principle.’ It was Lord Blanesburgh who gave life to the principle after citing the *Weekly Notes* report of *New Mashonaland* as authority for the principle that:

> where it was held that, it not appearing from the regulations of the company that a director’s services must be rendered to that company and to no other company, and it not be established that, it not appearing from the regulations of the company he was at liberty to become a director even of a rival company and it not being established that he was making to the second company any disclosure of information obtained confidentially by him as a director of the first company he could not at the instance of that company be restrained in his rival directorate. What he could for a rival company, he could of course, do for himself.\(^{58}\)


\(^{51}\) *Streeter v Western Areas Exploration Pty Ltd (No 2)* (2011) 278 ALR 291.

\(^{52}\) *London and Mashonaland Exploration Co Ltd v New Mashonaland* (1891) WN 165.

\(^{53}\) *The Times* of 10 August 1891, 3.


\(^{56}\) *Bell v Lever Brothers* [1932] AC 161.

\(^{57}\) *Bell v Lever Brothers Ltd* [1932] AC 161.

\(^{58}\) *Bell v Lever Brothers Ltd* [1932] AC 161, 195 (Lord Blanesburgh).
Not only is Lord Blanesburgh’s interpretation misconceived in light of the comments in Part one but also the reference to *New Mashonaland* was obiter. *Bell v Lever Brothers* was not about fiduciary duties. The case was decided on the basis of ‘mistake’ and a servant’s duty to disclose misconduct.\(^{59}\)

Despite Lord Blanesburgh’s misinterpretation of *New Mashonaland*, older Australian cases have endorsed the *Bell v Lever Brothers* formulation of the *New Mashonaland* principle.\(^{60}\) Recent formulations of the principle have dropped the reference to confidential information, citing *New Mashonaland* (often with *Bell v Lever Brothers*) as authority for the principle that a director is permitted to occupy board positions in competing companies\(^{61}\) or that a director will not necessarily be precluded from engaging in a competitive business on his or her own account.\(^{62}\)

The principle is a limited one, which has been misconceived as having wider implications than it does. It has been argued that directors holding multiple positions on competing companies is the most obvious example of a possible conflict of duty and duty because there is a possibility of conflict at every board meeting the director attends where the strategy of the other company is discussed.\(^{63}\) However, such arguments are based on a misconception. *New Mashonaland* is not authority for some absolute rule that allows directors to compete with the company or for a different rule in relation to directors. Rather, it is a limited principle which merely means that there is no rigid rule that a director cannot compete with the company. It is a general starting point that requires further inquiry to be made.

This is evident from a number of recent decisions, which have stated the heavily qualified nature of the principle or its narrow effect\(^{64}\) or found that it exists but does not advance the situation any further because it does not elucidate any new or different test to be applied.\(^{65}\) The courts have not applied a different test in the context of alleged competition. They apply the conflict rule.

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\(^{59}\) *Bell v Lever Brothers Ltd* [1932] AC 161, 213 (Lord Atkin), see also also counsels arguments at 164-167.

\(^{60}\) *Mordeacia v Mordecai* (1988) 12 NSWLR 58, 63 (Hope JA); *On the Street Pty Ltd v Cott* (1990) 101 FR 234, 242 (Powell J); *Rosetex Co Pty Ltd v Licata* (1994) 12 ACSR 779, 782 (Young J).

\(^{61}\) *Streeter v Western Areas Exploration Pty Ltd* (No 2) (2011) 278 ALR 291, 303 [69] (McLure P).

\(^{62}\) *Links Golf Tasmania Pty Ltd v Sattler* (2012) FCR 1 [564].


\(^{64}\) *Links Golf Tasmania Pty Ltd v Sattler* (2012) 213 FCR 1.

\(^{65}\) *Streeter v Western Areas Exploration Pty Ltd* (No 2) (2011) 278 ALR 291, 304 [70] (McLure P). McLure P notes the existence of the *New Mashonaland* rule but then applies what her honour believes to be the proper approach.
This is clearly illustrated by McLure P’s judgment in *Streeter v Western Areas Exploration Pty Ltd (no 2) (‘Streeter’).* McLure P does appear to endorse *New Mashonaland* as authority for the proposition that a director is permitted to occupy board positions in competing companies. Her Honour uses it as an example of what she says others have observed as a relaxing of the application of the conflict rule in relation to directors. However, her Honour merely acknowledges this observation and then turns to examine what she calls the ‘principled basis for any narrowing of fiduciary rules applicable to directors.’ Thus, her Honour makes the observation that the *New Mashonaland* principle has been endorsed but then applies the conflict rule as it is applied in all cases. That is a director competing with the company is one of the applications of the conflict rule.

Another application is a trustee competing with the trust business. For instance, in *Re Thomson,* a case where the plaintiffs applied for an injunction to restrain an executor and trustee from operating a business in competition with the trust business, Clauson J did not apply a rule of competition but applied the conflict rule to the particular facts of the case. *Re Thomson* is cited as authority for the principle that trustees cannot personally compete with the business of the trust or estate. This position is often contrasted to the *New Mashonaland* principle that a director can compete with the company. However, this article rejects that there is a different rule or approach applied to directors and trustees. As demonstrated both require the application of the conflict rule. The *New Mashonaland principle* does not represent some separate competition rule or modified standard for directors compared to other fiduciaries; rather a director competing with the company is one of the applications of the conflict rule.

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66 *Streeter v Western Areas Exploration Pty Ltd (No 2) (2011) 278 ALR 291.*
68 *Streeter v Western Areas Exploration Pty Ltd (No 2) (2011) 278 ALR 291, 304 [70] (McLure P).*
69 *Re Thomson [1930] 1 Ch 203, 216 (Clauson J).*
70 *Re Thomson [1930] 1 Ch 203, 214 (Clauson J).*
Although, a number of cases have explored the status of *New Mashonaland*, the author was unable to find any decision in which it was relied on as part of the ratio of the decision. For the majority of cases it is approved (often tentatively) without being necessary for the determination of the case, either because the case could be distinguished or because it could be decided on other grounds.\(^{72}\) For instance, a finding that there was no competition\(^{73}\) or that the director had already resigned\(^{74}\) or that the claim was barred by laches.\(^{75}\)

### IV THE CORRECT APPLICATION OF THE CONFLICT RULE TO DETERMINE IF A DIRECTOR CAN COMPETE WITH THE COMPANY

In Part two it was argued that application of the conflict rule and not the *New Mashonaland* principle answers the question whether a director can compete with the company. This Part explains how the conflict rule is properly applied to determine this question and in doing so suggests a three step process for applying it. This Part demonstrates why a director will not necessarily breach the conflict rule by competing with the company.

#### A What is the conflict rule?

The conflict rule has been formulated in different ways. On its strictest formulation, the rule precludes a fiduciary from entering into engagements in which he or she has a personal interest (or duty to a third party) conflicting or which possibly may conflict with interests of those whom he or she is bound to protect\(^ {76}\) or put another way a fiduciary must not place himself in a position where his duty and interest may conflict.\(^ {77}\)

Application of this strict formulation of the rule would mean that where a fiduciary has any loyalty to some interest or party other than that of the principal, the fiduciary would be in breach of the rule. Such a strict formulation is supported

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\(^{72}\)See eg, *Eastland Technology Australia Pty Ltd v Whisson* (2005) 223 ALR 123, 137 [70] (McLure JA); *Links Golf Tasmania Pty Ltd v Sattler* (2012) 213 FCR 1; *On the Street Pty Ltd v Cott* (1990) 101 FLR 234, 242; *Streeter v Western Areas Exploration Pty Ltd* (2011) 278 ALR 291.

\(^{73}\) *Eastland Technology Australia Pty Ltd v Whisson* (2005) 223 ALR 123, 137 [70] (McLure JA).


\(^{75}\) *Streeter v Western Areas Exploration Pty Ltd* (No 2) (2011) 278 ALR 291.

\(^{76}\) *Aberdeen Railway Co v Blaikie Brothers* [1843] All ER Rep 249; (1854) 2 Eq Rep 1281; 1 Macq 461.

\(^{77}\) *Boardman v Phipps* [1967] 2 AC 46 at 123 Lord Upjohn referring to the ‘the fundamental rule of equity’
by a number of high authorities. Reliance on this strict formulation is likely to lead to the belief that directors who compete with the company will inevitably breach the conflict rule. However, courts no longer apply that formulation strictly. It has been mitigated by the requirement that there be a ‘real and sensible possibility of conflict’ rather than a possibility no matter how insignificant. Hence the rule that is now applied by courts is that the fiduciary must avoid an actual or a real and sensible possibility of conflict or as it is sometimes put a real and substantial possibility of conflict. Other formulations of this more qualified standard include a ‘significant possibility of conflict’ or ‘a real or substantial possibility of conflict.’

The duty and duty limb of the conflict rule has received less attention and as a result there is some uncertainty in its application. It has been suggested that the conflict rule is applied differently in the context of the duty and duty limb and that this explains why directors can occupy multiple directorships in competing companies. However, the same general principles apply to both the conflict of duty and interest and the conflict of duty and duty limbs. There is no separate doctrine for the duty and duty limb as has been suggested. Both limbs require either an actual conflict or a real and sensible possibility of conflict.

78 Bray v Ford [1896] AC 44 at 51 (Lord Herschell); New Zealand Netherlands Society "Oranje" Inc v Kuys [1973] 1 WLR 1126, 1129; Boardman v Phipps [1967] 2 AC 46, 123 (Lord Upjohn); Aberdeen Railway Co v Blaikie Bros (1854) 1 Macq 461; [1843-60] All ER Rep 249 (Lord Cranworth LC).
80 Chan v Zacharia (1984) 154 CLR 178, 198 (Deane J); Hospital Products Ltd United Surgical Corp (1984) 156 CLR 41, 103 (Mason J). In Boardman v Phipps [1967] 2 AC 46 at [124] Lord Upjohn, explained that in his view the phrase ‘possibly may conflict’ meant that ‘the reasonable man looking at the relevant facts and circumstances of the particular case would think that there was a real sensible possibility of conflict; not that you could imagine some situation arising which might, in some conceivable possibility in events not contemplated as real sensible possibilities by any reasonable person, result in a conflict.
81 Hospital Products Ltd v United States Surgical Corp (1984) 156 CLR 41, 103 (Mason J); Cham v Zacharia (1984) 154 CLR 178, 198 (Deane J). See also, The Bell Group Ltd (in liq) v Westpac Banking Corporation (No 9) (2008) 39 WAR 1, 558-559 [4506]-[4507] where Owen J referred to the ‘real and sensible possibility’ formulation and also the ‘real and substantial’ or ‘real and significant’ formulations. An appeal from the judgment of Owen J was partly allowed and partly dismissed: Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3) (2012) 44 WAR 1.
82 P D Finn, Fiduciary Obligations (Law Book, 1977) 253 [582].
B What is required to breach the conflict rule; does it require ‘pursuit’ of a conflict?

Other issues in the application of the conflict rule may explain some of the uncertainty surrounding the New Mashonaland rule. One such issue is whether the conflict rule requires the fiduciary to ‘pursue’ the conflict or merely occupy a position of conflict or possible conflict. There is a divergence in opinion about whether it is sufficient for a fiduciary to merely occupy a position of conflict or possible conflict to amount to a breach of the rule, or whether the fiduciary must act in a position of conflict and actually pursue or prefer a personal interest (or one duty over another). This article submits that there is no requirement that the fiduciary pursue the conflict.

The term ‘pursuit’ has been used in different ways resulting in further confusion. It could mean pursuit in the sense of obtaining a benefit or advantage or it could mean actually preferring a personal interest or duty to a third party whether or not that results in a benefit. This article argues that neither of these is required. It is sufficient that the director or other fiduciary occupy a position of conflict or a position where there is a real and sensible possibility of conflict. Suggestions that the director must ‘pursue’ the conflict to amount to a breach of the conflict rule arise from a conflation of the profit rule with the conflict rule, or the phrasing of the conflict rule in light of the remedy of an account of profits.

The profit rule and the conflict rule overlap but they are not identical. They are two themes or sub rules. It would make little sense to speak of a conflict rule at all if it was identical to the profit rule. There are cases which have been decided on the basis of the conflict rule alone. The conflict rule has a wider scope than the profit rule. The conflict rule, as explained above, is breached not only where there is an actual conflict but where there is a real and sensible possibility of conflict. It could be seen as having two limbs- the real and sensible possibility limb and the actual

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86 Rosemary Teele Langford and Ian M Ramsay, ‘Directors’ conflicts: Must a conflict be pursued for there to be a breach of duty?’ (2015) 9 Journal of Equity 281.


conflict limb. The real and sensible possibility limb is not merely ‘a counsel of prudence.’ It has been applied in cases.  As Edelman J found in Agriculture Land Management v Jackson, this real and sensible possibility of conflict limb negates suggestions that ‘pursuit’ is required. In that case the directors were acting on both sides of a transaction. There was no evidence that they had actually preferred one duty over the other or that they had actually obtained any benefit or profit but Edelman J found that that was not required to engage the conflict rule.

In addition to conflating the profit rule and the conflict rule, the framing of the conflict rule in light of the remedy of an account of profits has likely lead to the misguided conclusion that a fiduciary must ‘pursue’ a conflict. In order to obtain an account of profits it is clear that some profit must be made. It is clear that where a plaintiff seeks an account of profits they must prove that the defendant has made a gain or profit by reason of their breach of fiduciary duty. However, an account of profits is not the only remedy available. A plaintiff can seek an injunction. For an injunction to be awarded it is not necessary to show that the fiduciary has made some gain or profit in breach of their duties. A fiduciary does not need to actually pursue a position of conflict by making a profit. Often they will but this is not essential to satisfy a breach of the conflict rule.

This is further confirmed by appreciating the objective of the rule. It is submitted that the objective of the conflict rule is to prevent a person who has undertaken to act for or on behalf of another in some matter from allowing any undisclosed personal interest (or duty to a third party) to sway them from the proper performance of that undertaking. On the other hand the profit rule has a different objective. Its objective is to prevent a person from actually misusing the position.

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89 Black J in Re Colorado applied Sir Federick Jordan’s approach as argued in Sir Frederick Jordan, Select Legal Papers, (Legal Books, 1983) 115. Sir Frederick Jordan argued that it was merely a counsel of prudence. See Justice Ashley Black, ‘Equitable and Statutory regulation of conflicts of interests and duty (Paper presented at the University of New South Wales Law School, 10 May 2016); M Scott Donald, ‘Managing the “Possibility” of Conflict’, [2015] (June) Superannuation Law Bulletin 89.

90 See eg, Re Thomson [1930] 1 Ch 203.

91 Agricultural Land Management Ltd v Jackson (No 2) (2014) 48 WAR 1, 51-54 [265]-[275] (Edelman J).

92 Rosemary Teele Langford and Ian M Ramsay, ‘Directors’ conflicts: Must a conflict be pursued for there to be a breach of duty?’ Journal of Equity (2015); Agricultural Land Management Ltd v Jackson (No 2) (2014) 48 WAR 1, 51-52[267] (Edelman J).

93 An account of profits is an order that requires the defendant to account to the plaintiff for the profits of a wrong (i.e. for any profit made in breach of their fiduciary duties), see: LexisNexis, Halsbury’s Laws of Australia (at 29 October 2015) 185 Equity, ‘4 Fiduciaries’ [185-815].

94 P D, Fiduciary Obligations (Law Book, 1977 ) 200 [464]-[465]; Bray v Ford [1896] AC 44, 51-52; Settlement Agents Supervisory Board v Property Settlement Services Pty Ltd [2009] WASCA 143 [74] (McLure JA); Chan v Zacharia (1983) 154 CLR 178, 198-199. Although there are different opinions about the object of the conflict rule, (see for example, Matthew Congalen, Fiduciary Loyalty: Protecting the Due Performance of Non-Fiduciary Duties (Hart Publishing, 2010) this is the more established view.
Can Directors Compete with the Company?

their undertaking has given them to further their own interests. The profit rule focuses on the fiduciary actually preferring their personal interest. The conflict rule is breached where there is a possibility that the fiduciary will be swayed by a personal interest or a duty to a third party at the expense of performing their duty/undertaking to the principal. However, it would extend to an actual conflict where the fiduciary does prefer their personal interest or a duty to a third party over the performance of their duty to the principal. The actual conflict limb is likely to overlap with the profit rule. The profit rule would be breached where the fiduciary actually prefers their personal interest or a duty to a third party and in doing so makes a profit or gain. The conflict rule in a sense catches the issue at an earlier stage, before any gain is made, by ensuring there is no risk to the performance of their duty. This is evident from Settlement Agents Supervisory Board v Property Settlement Services Pty Ltd96 (‘Settlement Agents’), where McLure JA states that the extension of the conflict rule to cover a real and sensible possibility of conflict ensures that an anticipatory breach of the conflict rule can be restrained that is, the fiduciary can be restrained before an actual conflict occurs.97

It has been suggested that the conflict of duty and duty limb of the rule requires an actual conflict and that this explains why directors can occupy multiple directorships in competing companies. For example, Finn advocates that in the context of a duty and duty conflict, the fiduciary is permitted to occupy a position where there is a possibility of conflict so long as that possibility remains a possibility ‘however real that possibility may be.’99 He argues that an actual conflict is required in this context. However, it is submitted that that is incorrect. As explained above the same general principles apply to both limbs of the conflict rule. One of the key authorities Finn relies on to assert that the duty and duty limb of the conflict rule requires an actual conflict is Blythe Chemicals Ltd v Bushnel. The comments of the High Court that actual competition was required and not a mere apprehension of competition have been interpreted as showing that there must be an actual conflict. However, such arguments fail to appreciate the context in which the Court made those statements. Although, it was a case where the employee owed

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95 P D Finn, Fiduciary Obligations (Law Book, 1977) 200 [464].
96 Settlement Agents Supervisory Board v Property Settlement Services Pty Ltd [2009] WASCA 143.
99 P D Finn, Fiduciary Obligations (Law Book, 1977) 253 [582].
100 P D Finn, Fiduciary Obligations (Law Book,1977) 253 [582].
102 Blythe chemicals v Bushnell (1933) 49 CLR 66.
fiduciary duties because he was a senior employee (a manager) the court was not expressing what was required to constitute a breach of the conflict rule but what constituted ‘misconduct’ warranting dismissal. The Court found that to amount to misconduct there had to be actual conduct on the part of the employee that was inconsistent with his duty.\textsuperscript{103} The Court explicitly commented that if there had been a finding that the employee had taken steps in preparation to compete with the company then that may have warranted dismissal.\textsuperscript{104} The case has to be considered in light of the remedy being sought, just as statements about the conflict rule requiring the fiduciary to obtain a benefit are often framed in light of an account of profits and should not be taken to be a requirement in all cases of alleged breach of the conflict rule where an account of profits is not being sought.

The real and sensible possibility limb of the conflict rule allows a principal to restrain a possible conflict by applying for an injunction.\textsuperscript{105} However, it may not allow other remedies to be sought such as an account of profits or the dismissal of an employee on the grounds of ‘misconduct.

\textbf{C Proper application of the conflict rule; determining if a director who competes with the company breaches the conflict rule}

Even once the correct standard or formulation of the conflict rule is determined, there are still difficulties in applying the conflict rule. Like all equitable principles, the conflict rule must accommodate the facts of the particular case.\textsuperscript{106} The process suggested by this article ensures proper attention is placed on the facts of each case rather than a preoccupation with labeling the case as one of ‘competition.’ Competition is not determinative. Merely characterising the alleged breach as one arising because of ‘competition’ does not necessarily mean that there is an actual or real and sensible possibility of conflict. Similar to the debates surrounding ‘proximity’ in the context of tort law,\textsuperscript{107} ‘competition’ is a label and what must be focused on is the particular nature of that business in the particular case to determine if it gives rise to a conflict with the director’s duty to the company in the particular case.

\textsuperscript{103} Blythe chemicals v Bushnell (1933) 49 CLR 66, 82 (Dixon and McTiernan JJ).
\textsuperscript{104} Blythe chemicals v Bushnell (1933) 49 CLR 66, 82 (Dixon and McTiernan JJ)
\textsuperscript{105} Settlement Agents supervisory Board v Property Settlement Services Pty Ltd [2009] WASCA 143 [72] (McLure JA); Re Thomson [1930] 1 Ch 2013.
The process suggested by this article involves engaging with the particular facts of the case in a three step process. First, what is content of the fiduciary duty or what is the subject matter over which the fiduciary obligation extends? Second, what is the personal interest or duty to a third party that is allegedly in conflict? Third, is that personal interest or duty to a third party inconsistent with or in opposition to the director’s undertaking to the company?

1. **Step one – ascertain the content or scope of the fiduciary duty**

The first step is to determine the content of the fiduciary duty owed by the director to the company or as it is sometimes put the subject matter or scope of the fiduciary obligation.108 This step has been described as ‘fundamental.’109 It is fundamental because the fiduciary duty which a fiduciary owes to avoid a conflict or a real and sensible possibility of conflict may not (and usually will not) attach to every aspect of the fiduciary’s conduct.110 Therefore, it is necessary to determine what conduct is within the scope of the duty.

A director and company is an established fiduciary relationship. However, identifying that there is an established category or class of fiduciary relationship will not itself elucidate the content of the fiduciary duty. Directors usually have broad and general duties. The particular duties the director owes to the company must be identified with greater precision.111 Identification of the content of the fiduciary duty is always necessary even where the fiduciary relationship falls within an established fiduciary relationship. The content of the fiduciary duty is not explained by some general obligation of loyalty; fiduciaries do not owe a general obligation to act in the interests of the beneficiary.112 The conflict rule is prescriptive in nature.113 The director must not place themselves in a position of an actual or real and sensible possibility of conflict between their duty to the company and their personal interest or duty to a third party. The concept of ‘duty,’ which the conflict rule refers to is really a reference to the director’s undertaking to the

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113 **Breen v Williams (1996) 186 CLR 71**, 289 (Gaudron, McHugh JJ).
company.\(^{114}\) Essentially the fiduciary duty to avoid a conflict or a real and sensible possibility of one exists within bounds and those bounds are ascertained by reference to the function or responsibility the director has undertaken to perform for the company in the particular case.

Given that the concept of ‘duty,’ which the conflict rule refers to is really a reference to the director’s undertaking to the company it is necessary to determine what functions and responsibilities the director has undertaken to perform for the company. This is determined objectively by looking at particular features of the relationship, including the existence of a contract, such as an employment contract or a contract of agency, the company constitution, the course of dealing between the parties and the circumstances of the fiduciary’s appointment.\(^{115}\) Accordingly, the scope of the fiduciary’s obligation is not uniform in all cases. There will be differences both between and within different classes of established fiduciary relationships.\(^{116}\)

It is logical that the actual function or responsibility assumed by the director will determine the subject matter over which the fiduciary obligation to avoid a conflict of interest and duty or duty and duty extends.\(^{117}\) It is logical because the core of a fiduciary relationship is the notion that a person undertakes to act for or on behalf of another in some matter or matters.\(^{118}\) Some aspects of the fiduciary’s conduct will not fall within the scope of that undertaking and hence it will not fall within the scope of their fiduciary duty.\(^{119}\) With this in mind it is apparent that the duty must be stated with some precision and specificity by reference to the particular facts of the case.\(^{120}\) It is therefore nonsensical to suggest that a director who competes with the company will always breach the conflict rule, or will never

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\(^{114}\) *Grimaldi v Chameleon Mining NL (No 2) (2012) 200 FCR 296 [179] (Finn, Stone and Perram JJ).*

\(^{115}\) *Streeter v Western Areas Exploration Pty Ltd (No 2) (2011) 278 ALR 291, 304 [70] (McLure P) ; Chan v Zacharia (1984) 154 CLR 178, 196, 204; Birchrell v Equity Trustees Executors and Agency Co Ltd (1992) 42 CLR, 408 (Dixon J).*

\(^{116}\) *United Dominions Corporation Ltd v Brian Pty Ltd (1985) 157 CLR 1, 11 (Mason, Brennan and Deane JJ).*

\(^{117}\) *Grimaldi v Chameleon Mining NL (No 2) (2012) 200 FCR 296, (Finn, Stone and Perram JJ).*

\(^{118}\) *Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41, 102 - 104; Walden Properties Ltd v Beaver Properties Pty Ltd [1973] 2 NSWLR 815, 833; Settlement Agents Supervisory Board v Property Settlement Services Pty Ltd [2009] WASCA 143 [68] (McLure P); Justice James Edelman, ‘The Importance of the Fiduciary Undertaking (Paper presented at the conference on fiduciary law, University of New South Wales, 22 March 2013) 4-5; P D Finn, *Fiduciary Obligations* (Law Book 1977) 201 [467].*

\(^{119}\) *United Dominions Corporation Ltd v Brian Pty Ltd (1985) 157 CLR 1, 11 (Mason, Brennan and Deane JJ); Noranda Australia Ltd v Lachlan Resources NL (1988) 14 NSWLR 1, 15 (Bryson J); Streeter v Western Areas Exploration Pty Ltd (No 2) (2011) 271 ALR 291, 303 [70]; Grimaldi v Chameleon Mining NL (No 2) (2012) 200 FCR 296 (Finn, Stone and Perram JJ).*

\(^{120}\) *Grimaldi v Chameleon Mining NL (No 2) (2012) 200 FCR 296, (Finn, Stone and Perram JJ); Howard v Commissioner of Taxation (2014) 253 CLR 83.*
breach the conflict rule, without determining the scope of their fiduciary duty in the particular case. For instance, if it is a director’s duty to safeguard and further the interests of the company then a personal interest which might sway the director from the proper performance of their duty is one which if pursued by the director would harm the interests of the company. However, as explained the director’s duty will not usually be that broad and hence it is unlikely that a director holding any personal interest or any duty to a third party whatever will fall foul of the conflict rule. It is only those interests which fall within the bounds of the fiduciary obligation which will engage the conflict rule. Similarly in the case of a duty and duty conflict it is only those duties to a third party, which are or sensibly may be in opposition to, or inconsistent with the particular duty/undertaking owed by the director, which will fall within the scope of the conflict rule.

A review of the case law demonstrates that this first step sometimes resolves the whole issue. In *Howard v Commissioner for Taxation*, the High Court drew attention to the need to state the content of the director’s duty with some specificity. The High Court explicitly stated that the appellant had stated the director’s duty too broadly. The High Court found that in the particular circumstances the director’s duty was to take appropriate steps to give effect to a decision of the directors to try and bring the company in as the ultimate purchaser of the golf course. This distinction was important for determining if there was a conflict of interest and duty or duty and duty between the director’s duty to the company, his self interest and his duty to the joint venturers. Crennan and Hayne JJ illustrated how the content of the duty would influence the outcome of whether there was a conflict of interest or duty by contrasting the result where the duty was defined differently because of a change in the circumstances of the case.

The judgment of McLure P in *Streeter* is another example of how the content of the fiduciary duty can resolve the issue. Her Honour found no relevant provisions in the company constitution. However, she looked in detail at the nature of the directors (Mr Cooper and Mr Streeter) appointment and at the course of dealing between them and the company. In looking at the circumstances of Mr Streeter’s appointment, her Honour noted that the reason he was appointed was because of his ‘reputation as an astute investor of seed capital in the mining industry’ and

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122 *Noranda Australia Ltd v Lachlan Resources NL* (1988) 14 NSWLR 1, 15 (Bryson J).
125 *Streeter v Western Areas Exploration Pty Ltd (No 2)* (2011) 278 ALR 291, 304 [70] (McLure P);
126 *Streeter v Western Areas Exploration Pty Ltd (No 2)* (2011) 278 ALR 291.
that that investment was usually accompanied by him being given board representation. Her honour looked at the nature of investing seed capital in a start up company such as WAE, and said that it was speculative, particularly here given WAE’s history of failed attempts to raise funds. Further, in looking at the director’s responsibilities, the President found that the company had no employees, limited operations and had began divesting itself of its mining tenements. The company had been dormant since 1998. Although, she does not explicitly state, it is clear that the director of such a company will have quite limited responsibilities. In looking at the circumstances of their appointment and the course of dealings, her Honour came to the conclusion that it was,

far-fetched and fanciful to suggest that the parties intended that, from the commencement of Mr Streeter and Mr Cooper’s involvement with WAE, all future investments by Mr Streeter (or Mr Cooper) in the mining industry in this State or elsewhere had to be with, or through, WAE.127

It would seem that the directors had limited responsibilities to the company and that there was an implicit acceptance or recognition that Mr Streeter would pursue other opportunities in the mining industry, given the nature of investing seed capital and her Honour’s others findings. The content of Mr Streeter’s duty resolved the issue.

Another illustration of the importance of this first step is in Re Colorado.128 The director of Colorado Products was alleged to have breached her fiduciary duty. It was argued that she had breached the conflict rule by placing herself in a position where she was the owner, director and controlling mind both of Colorado’s landlord and Colorado’s major supplier of goods. This would seem to give rise to a conflict given that a manufacturer or lessor’s interests (particularly as to pricing and timing of payments) will often not align with those of its distributor or lessee. However, Black J accepted that a necessary step in determining whether the conflict rule had been breached was to ascertain the subject matter of the relevant fiduciary obligation.129 His Honour found that the company constitution and the course of dealing between the parties informed the scope of the director’s fiduciary obligation to Colorado. In particular Black J found that the scope of the conflict rule was narrowed by the parties deliberately adopting a particular structure. They chose a structure which involved the director of Colorado Products being also the director of the company that manufactured the goods it sold and also the director of the company that leased its premises to it.

127 Streeter v Western Areas Exploration Pty Ltd (No 2) (2011) 278 ALR 291.
An extreme example of the importance of this first step in determining whether there is a conflict of interest and duty or duty and duty is found in the English Court of Appeal decision of *In Plus Group Ltd v Pyke*.\(^\text{130}\) The appellant was appealing a decision that there had been no breach of fiduciary duty by Mr Pyke. The claimant company sought equitable relief on the ground of Mr Pyke’s activities in setting up a new company in competition with it. In fact the company Mr Pyke established carried on business with the claimant company’s most important customer. The Court expressed concern with the *New Mashonaland* principle. Brooke LJ stated that it was not an appropriate case to examine the scope of the principle. Sedley LJ also expressed considerable concern with the principle and found that it stood for only a very limited principle. In any event the Court went on to apply the conflict rule to determine if the director could conduct this business without breaching his fiduciary duty to the company. The focus of the decision was on this first step of ascertaining the scope of the fiduciary obligation, by reference to the director’s duty or undertaking to the company. The Court engaged in a considerable examination of the facts of the case. In particular they looked at the nature of the relationship between Mr Pyke and the company and the course of dealing between them. They found that since having a stroke Mr Pyke had been excluded from the company.\(^\text{131}\) As Parker LJ and Sedley LJ stated:

> for all the influence Mr Pyke had, he might as well have resigned as a director. The defendant’s role as a director of the claimant was throughout the relevant period entirely nominal... in the sense that he was entirely excluded from all decision-making and all participation in the claimant company’s affairs.\(^\text{132}\)

The result of Mr Pyke being excluded was that there was no duty with which Mr Pyke’s personal interest or duty to another party could conflict. Essentially, the course of dealings between the parties revealed that Mr Pyke had no responsibilities to perform for the company. He owed no duty to the company and as a result the scope of his fiduciary duty had been limited to such an extreme degree that it had no content at all.

Dal Pont incorrectly asserts that *In Plus Group v Pyke* demonstrates that where a director holds directorships in companies that are in direct competition with each other there is a ‘clear conflict of interest’ but that the director will not commit a fiduciary breach where they have been excluded from the company.\(^\text{133}\) This first

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\(^{130}\) *In Plus Group Ltd v Pyke* [2002] EWCA Civ 370.


\(^{133}\) 123 [4.125]
step illustrates that that interpretation is incorrect. The reason there was no fiduciary breach was because there was no conflict.

It is submitted that New Mashonaland would have been decided similarly to In Plus Group v Pyke if Chitty J had made a final determination on the application of the conflict rule. Given that Lord Mayo had no active role in the company, he would unlikely have owed the company any duty with which his duty to another company could conflict.

Another factor that might influence a director’s duties is whether they are an executive or non-executive director. The court in Woolworths v Kelly stated that the role of the director was important. For instance, the chairman of directors has greater responsibilities than other directors. However, it is preferable to look behind these labels to determine the directors’ actual role and responsibilities as described above. However, an executive director is subject to an employment contract and their duties are defined by reference to that contract, which may contain both express and implied terms. Hence that contract will affect the scope of their fiduciary duty.

A director may avoid breaching the conflict rule if they make full disclosure of the facts to the company and the company consents to the fiduciary acting in a way that would otherwise place him or her in a position of conflict or real and sensible possibility of conflict. Thus, a director may be permitted by the company to compete with it.

It was explained in Part two that the same approach is applied in all cases of a fiduciary competing with the business of the beneficiary. Accordingly, step one should be applied in all conflict cases, whether it involves a director, trustee, agent or partner.

A clear example of this first step being undertaken in a case involving a trustee is Re Thomson. In Re Thomson Clauson J had to decide whether an executor and trustee had breached the conflict rule by taking out a lease for premises from which he was going to establish a business in competition with that of the beneficiaries under the will. Clauson J stated that executors and trustees have duties of a fiduciary

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135 Woolworths Ltd v Kelly (1991) 22 NSWLR 189.
136 Woolworths Ltd v Kelly (1991) 22 NSWLR 189, 225 (Mahoney JA).
137 Woolworths Ltd v Kelly (1991) 22 NSWLR 189, 225 (Mahoney JA).
nature. Clauson J then determined what the executor/trustee’s particular duty was in the circumstances of the case. He found that it was to ‘carry on the business of the testator to the best advantage of the beneficiaries.’ That is quite broad, but it was determined by reference to the executor/trustee’s obligation under the will.

In the case of partnerships the scope of the obligation must similarly be ascertained. Indeed in *Chan v Zacharia*\(^{139}\) Deane J made the observation that:

> It is conceivable that the effect of provisions of a particular partnership agreement, in the context of the nature of the particular partnership, could be that any fiduciary relationship between the partners was excluded.

McLure P in *Streeter* observed that real estate agents are permitted to act for multiple vendors of real estate despite the vendors being in competition for purchasers in the same geographic or other relevant market.\(^{140}\) The basis for this is not that a different standard applies to them or any rule of competition. Rather, it is the result of ascertaining the scope of the fiduciary obligation. In the case of real estate agents, their relationship with the vendor is defined by a contract of agency. Therefore, it is necessary to examine the particular contract of agency. Given the nature of the real estate business, it has been held that there is an implied term in a contract between real estate agent and vendor that the agent is entitled to act for other principals selling similar properties and to keep confidential information obtained from each principal.\(^{141}\) Thus, the conflict rule applies equally to real estate agents but the content of that duty is modified so that it does not extend to the situation of a real estate agent acting for multiple vendors in the same geographical location. The fiduciary principle accommodates itself to the terms of the contract.\(^{142}\)

It would be illogical to jump to step three and ask whether there is a conflict or a real and sensible possibility of conflict, without first identifying what the duty is that falls within the scope of that rule. That is you cannot determine whether a duty to a third party or a personal interest conflicts with the fiduciary’s undertaking/duty without first determining the content of that duty. It is perhaps because of a failure to appreciate the importance of this first step that some have wrongfully argued that there is an inherent conflict in a director serving on multiple boards in companies that are direct competitors\(^{143}\) or that there would ordinarily be a conflict

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\(^{139}\) *Chan v Zacharia* (1983) 154 CLR 178.

\(^{140}\) *Streeter v Western Areas Exploration Pty Ltd* (No 2) (2011) 278 ALR 291, 303 [69] (McLure P).

\(^{141}\) *Kelly v Cooper* [1993] AC 205, 214.

\(^{142}\) *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 97 (Mason J).

or possible conflict but that the *New Mashonaland* rule has allowed directors to compete with the company.144

2 **Step two—identify the nature of the fiduciary’s personal interest or duty to a third party**

The second step is to identify the nature of the interest or duty that is allegedly in conflict with the fiduciary’s duty or undertaking. This is a similar enquiry to step one but on the other side. This step must be undertaken for two reasons. First, it is necessary to determine if it falls within the scope of the duty identified in step one. The point of determining the scope of the conflict rule is that the personal interest (or duty to a third party) must fall within it. As explained the ‘duty’ in the conflict rule really refers to the director’s undertaking to the company. Thus, the conflict rule only encompasses conduct taken in exercising those responsibilities and duties the director has undertaken to perform for the company. Hence, while the personal interest does not need to be actually pursued or preferred it has to be a personal interest that exists in the exercising of a particular function, power or duty rather than in some abstract and general sense. The second reason is that in the real and sensible possibility limb of the conflict rule, it is necessary to examine the nature and or intensity or duration of the particular interest or duty to ensure that it is not too insubstantial or remote.145

Accordingly, the personal interest of a fiduciary or duty they have to a third party must be stated with some specificity and detail. For instance if the personal interest is the running of a business, it would be necessary to ascertain what is involved in running that business, or if it is a duty to a third party, it would need to be ascertained what that particular duty is.

It is also not sufficient in the case of say a director of a company which transacts with another company, in which they hold shares, to simply define the personal interest as a share holding. It would be necessary to examine the size of that shareholding. If the shareholding is too insignificant it may not realistically amount to a personal interest in the matter and hence would be unlikely to sway the fiduciary. An example of stating the interest with some specificity can be seen in the example given by McLure JA in *Settlement Agents*. Her Honour stated that there


145 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 103 (Mason J); *Settlement Agents Supervisory Board v Property Settlement Services Pty Ltd* [2009] WASCA 143 [72] (McLure P).
would be an actual conflict where ‘a director had to consider a resolution that the company enter into a financially significant transaction with another company in which the director has a controlling interest.’ McLure JA did not simply say ‘interest’ but stated that it was a ‘controlling interest.’ Her Honour looked at the intensity of the interest and the nature of the transaction.

Another illustration of this requirement is in the situation where Company A enters into a transaction with Company B for the sale and purchase of some property and a director of Company A holds shares in Company B. The shareholding could be so insubstantial that the director could not realistically be said to have a relevant personal interest.146 Although not identical an analogy can be made to cases of actual or apprehended bias. In Ebner v Official Trustee in Bankruptcy (‘Ebner’)147 the High Court emphasised that a judge is not automatically disqualified from presiding over a matter because they have any interest in the matter however small it may be. The High Court explained that the aim of the rule is to ensure that the judge will bring an impartial mind to the resolution of the question they are required to decide. Accordingly, it is only those interests, associations or other circumstances which have the potential to bring into question the independence or impartiality of the judge which would disqualify the judge on the basis of bias or apprehended bias.148 In such cases of bias the court will look at the nature and degree of the association and potential interest that might exist.149 In the two appeals heard together in Ebner the judge was described as having a ‘fairly modest’ shareholding in the public company involved in the proceedings before him.150 The High Court found that in neither case could the outcome of the proceedings affect the value of the judge’s shares or his interest in them. Thus, he was not automatically disqualified from presiding over either of the cases.151 Of course, as Gaudron J said in Ebner, ‘minds may differ as to what constitutes a substantial holding or financial interest in a company.’152

146 P D Finn, Fiduciary obligations (Law Book, 1977) 203 [472].
147 Ebner v Official Trustee in Bankruptcy; Clenae Pty Ltd v Australia and New Zealand Banking Group Ltd (2000) 205 CLR 337.
148 Ebner v Official Trustee in Bankruptcy; Clenae Pty Ltd v Australia and New Zealand Banking Group Ltd (2000) 205 CLR 337, 348 [22], 356 [54], 358 [59] (Gleeson CJ, McHugh, Gummow and Hayne JJ) 366 [94] (Gaudron J).
150 Ebner v Official Trustee in Bankruptcy; Clenae Pty Ltd v Australia and New Zealand Banking Group Ltd (2000) 205 CLR 337, 359 [65] (Gleeson CJ, McHugh, Gummow and Hayne JJ), 367 [99] (Gaudron J).
Similarly, in applying the conflict rule minds may differ as to what constitutes an interest or duty to a third party which is real and sensible or substantial and not remote. Just as the inquiry in Ebner centered on what the objective of the rule is (ensuring that the judge is impartial) it is helpful to consider what the objective of the conflict rule is in considering if the interest or duty is too remote and theoretical. There is contention about the purpose of the conflict rule. However, the more established view is that the object of the rule is to ensure the fiduciary is not swayed from the proper performance of their duty or undertaking to the company (which was ascertained in step one). Therefore, the interest has to be one that is significant enough to sway the director from the performance of their duty. It has to be an interest significant enough that the director might sensibly pursue it at the expense of their duty to the company.

An example of undertaking this second step where the personal interest is the running of a rival business is Re Thomson. Clauson J did not stop at describing the personal interest as the operation of a rival business. Rather, his Honour examined in detail what the nature of that industry was and what was involved in conducting the business. The business was that of a yacht agent or broker. Clauson J found that a yacht agent operated similarly to a real estate agent. His Honour found that a yacht agent would enter into a contract with a yacht owner. The contract would provide that if they were the first yacht agent to secure a purchaser, they would obtain a benefit in the form of a commission. Clauson J then importantly observed that the nature of the yacht agent’s business was that most of the yachts on the market were on the books of all yacht agents at the same time. However, it is only the agent to first secure a purchaser who receives a commission. Accordingly, every yacht agent was in competition with every other yacht agent. This step was essential to determining the third step. Without knowing what was involved in running that business, Clauson J would have been unable to determine the affect of that personal interest on the executor/ trustee’s duty to the beneficiaries.

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The requirement that the personal interest or duty to a third party give rise to a real and sensible possibility of conflict rather than any theoretical or possible conflict is one of the ways the strictness of the rule is mitigated.  

3  Step three- is the personal interest or duty to a third party inconsistent with or in opposition to the director’s undertaking to the company?

Once it is determined what the director’s undertaking/duty to the company is in the particular case and what the particular personal interest or duty to a third party is it must be determined whether they are inconsistent or in opposition with each other.

The objective of the conflict rule is to prevent a person who has undertaken to act on behalf of another to be swayed from the proper performance of that undertaking or duty. Hence, the focus is on ensuring the director will perform their undertaking to the company. There will be an actual conflict where the director owes duties that are adverse or inconsistent with each other or a personal interest that is inconsistent with their duty to the company.

The real and sensible possibility of conflict limb requires analysing in step two as explained above whether the interest or duty is of such a nature that it is likely to sway the director. That is, can it realistically be described as a personal interest in the matter? Can it be realistically said that if certain events happen (such as the establishment of a rival business of a particular kind) that the director will have a personal interest in the particular matter. Then in step three it must be determined whether the interest and duty or duty and duty are in opposition or inconsistent with each other by asking whether the director can properly fulfill both. Can the director further their personal interest and also act in accordance with their undertaking to the company? Can the director properly carry out their duty to the company and their duty to a third party? Or does one undermine the other? Does their duty require them to act in a particular way for the company or to exercise certain responsibilities which will be undermined by the existence of this other interest or duty?

Given that these issues are highly fact dependent and difficult to define in the abstract, it is useful to illustrate this step through an example. As previously

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explained *Re Thomson* was a case about a trustee and executor competing with the company. His duty was defined by reference to the terms of the will. The executor and trustee’s duty or undertaking to the beneficiaries was to conduct the yacht agency business to the best advantage of the beneficiaries (step one). Clauson J then examined the nature of the personal interest. That is the nature of running his own business as a yacht agent (step two). After determining what this article has described as steps one and two, Clauson J then looked at the impact of that interest (personally operating the yacht agency business) on the executor and trustee’s duty to conduct the yacht agency business to the best advantage of the beneficiaries (step three). Clauson J found that the nature of the yacht agent industry was that all of the yachts on the market were on the books of all the yacht agents but only the agent who first obtained a sale would obtain the commission. The executor and trustee’s personal interest in pursuing the sale on behalf of his own business to obtain the commission for himself was inconsistent with his duty to the beneficiaries under the will. There was a real and sensible possibility that if the executor established a business as a yacht agent he would have a conflict between his interest in obtaining the sale and commission for himself and his duty to the beneficiaries to pursue yacht sales on their behalf. The nature of the industry meant that if he established his personal business it would be competing for the same sales as the business he was conducting on behalf of the beneficiaries and he could not obtain the sale for both himself and the beneficiaries. Hence his personal interest in obtaining the commission for himself was in opposition with his duty to the beneficiaries. Step three depends on the proper factual analysis being undertaken in steps one and two. Then it is determined if the director can properly serve both his or her personal interest or duty to a third party and his or her duty to the company.

The three step process suggested here demonstrates why there is no inevitable conflict in serving as a director of rival companies or personally competing with the company. It is because of this process and not the *New Mashonaland* principle or a less stringent fiduciary duty that a director may or may not be permitted to compete with company.

V Conclusion

*New Mashonaland* has generated much attention and caused confusion about the permissibility of directors to compete with the company. As argued in Part one, the decision no longer has any currency in relation to directors’ duties and did not state any general fiduciary principle. It was a case about an interlocutory injunction. However, through misinterpretation it has come to be endorsed in Australia as authority for a general principle that a director is permitted to compete with the company. The principle has caused much confusion. Perhaps this is because it is
divorced from the actual findings and reasons of Chitty J or because it seems out of step with modern standards. While these are both true, the real confusion stems from a misunderstanding of what that principle means and how the conflict rule is applied. As demonstrated in Part two, it is a limited principle that answers few questions. It does not answer the question of whether a director is permitted to compete with the company. It simply means that they will not automatically be prohibited from doing so. It requires further analysis to be undertaken of the facts of the case, by applying the conflict rule as in all other established fiduciary relationships. The High Court has warned against too strict an application of general doctrines and principles of equity without an appreciation of the need to adjust them to the particular facts.159 In Part three this article suggests adopting a three step process for applying the conflict rule. This process requires the identification of the duties or interests that are alleged to be in conflict or to present a real possibility of conflict and the alleged manner of the conflict.160 It shifts attention back onto a proper consideration of the circumstances of each case, which seems to have been lost by a pre-occupation with the New Mashonaland principle.

160 Hayne and Crennan JJ emphasised the importance of these steps in Howard v Commissioner of Taxation (Cth) (2014) 253 CLR 83, 107 [61].
In Wilmington Trust Company (Trustee) v The Ship “Houston” [2016] FCA 1349 the Federal Court of Australia considered the proper construction of s 4(2)(a)(i) of the Admiralty Act 1988 (Cth), which provides that claims ‘relating to possession of a ship’ are proprietary maritime claims, and therefore capable of supporting an action in rem against the vessel. Specifically, Siopsis J held that claims for delivery up of a ship and for damages for conversion and/or detinue fell within that definition. This note summarises the facts of the case and his Honour’s reasoning, and critically analyses the link between each of those claims and possession of a vessel. Although a claim for damages for conversion does not at first sight concern possession in the same way as a claim in detinue, his Honour’s conclusion is clearly correct in light of the authorities giving a broad interpretation to the words ‘relating to’.

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I INTRODUCTION

In Wilmington Trust Company (Trustee) v The Ship “Houston” [2016] FCA 1349, the Federal Court of Australia (Siopsis J) held that claims for delivery up of a ship and for damages for conversion and/or detinue were properly characterised as claims ‘relating to possession of a ship’ within s 4(2)(a)(i) of the Admiralty Act 1988 (Cth). Justice Siopsis reached this conclusion in respect of the claims in conversion and/or detinue on the basis that such claims seek to vindicate the plaintiff’s right to possession. While claims in conversion and/or detinue are not claims for possession,1

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** LLB (Hons I)/BCom (Accounting) (University of Queensland).
they clearly relate to possession. The effect of this is that such claims are ‘proprietary maritime claims’ and therefore are sufficient to found the court’s jurisdiction to entertain an action in rem against the vessel.

II FACTS

By a bareboat charterparty\(^2\) dated 29 September 2010 Woolmington Trust Company (the “first plaintiff”), chartered its US-registered vessel, The Houston (“Vessel”) to Teras BBC Ocean Navigation Enterprise Houston LLC (“TBONE”). The charter allowed TBONE full use and control of the vessel, and required the payment of hire. It stipulated that TBONE was to redeliver the vessel at the expiration of the charterparty, and entitled the plaintiffs to withdraw the vessel from the service of TBONE and terminate the charter if TBONE failed to pay hire. In the event of such a termination the charter gave the plaintiffs the right to ‘repossess the Vessel from [TBONE] at her current or next port of call, or at a port or place convenient to [it]’.\(^3\)

On 2 December 2015 Teras BBC Houston (BVI) Ltd (the “second plaintiff”), acting on behalf of the first plaintiff, served a notice on TBONE stating that it was in default in the payment of hire, terminating the charter with immediate effect, and withdrawing the vessel from service. It stated that it required redelivery ‘at the next immediate port of call’.\(^4\) TBONE responded with an allegation that the first plaintiff had breached ‘the covenant of good faith inherent’\(^5\) in the charter by wrongfully arresting the vessel in Virginia. TBONE thereby gave notice to the first plaintiff of early redelivery of the vessel, and it nominated the date of 17 December 2015 as the date of redelivery at Port Hedland, Western Australia. The vessel was carrying locomotives which were to be discharged at that destination. TBONE also stated that all hire had been paid up to that date.

The first plaintiff later advised TBONE that it rejected those allegations, but the parties nevertheless engaged in correspondence relating to the means of effecting redelivery. On 15 December 2015 TBONE advised the first plaintiff that redelivery had been delayed to 28 December 2015 because of the plaintiffs’ ‘continued bad faith conduct’.\(^6\) It also sought confirmation that the second plaintiff would not interfere by court action with the unloading of the vessel’s cargo at Port Hedland. It maintained that redelivery was to occur because of the plaintiffs’ breach. On 16 December 2015 a representative of the plaintiffs wrote to TBONE asserting the validity of the plaintiffs’

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1. Although as is discussed below, a claim in detinue can include a claim for specific restitution of the chattel.
4. Ibid [13].
5. Ibid [14].
6. Ibid [17].
right to terminate. The letter claimed the outstanding hire and alleged that TBONE had on various occasions ignored demands for the immediate redelivery of the Houston at various ports of call. The requested assurance was not given.

On 22 December 2015 TBONE’s solicitors filed a caveat against arrest of the vessel, and undertook that if a proceeding to which the caveat applied were commenced against the vessel, it would enter an appearance and comply with any obligations as to the payment of bail. This caveat was sent to the plaintiffs’ solicitors, along with an email advising that the vessel’s estimated time of arrival in Port Hedland was 26 December 2015 and that cargo discharge was likely to be completed on 30 December 2015. On 24 December 2015 the plaintiffs commenced an action in rem against the defendant claiming, inter alia, the following relief:

1. loss and damage arising from the detention and/or conversion of the vessel from on or about 2 December 2015; and
2. delivery up of the vessel forthwith.

The action in rem was brought in purported reliance on ss 16 and 18 of the Admiralty Act 1988 (Cth). TBONE entered an appearance as the bareboat charterer and disponent owner of the defendant vessel. By interlocutory application dated 11 January 2016, TBONE sought an order that the writ be set aside for want of jurisdiction, or that the proceeding be dismissed for that reason.

III DECISION

For the purposes of s 16, the court would only have jurisdiction to entertain the action in rem if the claims were properly characterised as 'proprietary maritime claims', as defined in s 4(2) of the Act. That section relevantly provides:

(2) A reference in this Act to a proprietary maritime claim is a reference to:

(a) a claim relating to:

(i) possession of a ship;

7 In accordance with rule 9 of the Admiralty Rules 1988 (Cth).
8 Acting in its capacity as trustee for the Teras BBC Houston Trust, and Teras BBC Houston (BVI) Ltd.
9 Other relief claimed, which is not of present importance, included unpaid hire, an indemnity, interest and costs.
10 The Admiralty Act 1988 (Cth) sets out exhaustively when actions may be commenced as proceedings in rem (s 14). One such instance is where the action is in a proceeding on a proprietary maritime claim concerning a ship or other property (s 16). Another is where the action is in a proceeding on a general maritime claim and a relevant person was the owner or charterer of, or in possession or control of, the ship when the cause of action arose, and the demise charterer when the proceedings are commenced (s 18).
11 If the requirements of a provision allowing the plaintiffs to commence an action in rem could not be satisfied, the court would not have jurisdiction to hear and determine the action (s 10).
The plaintiffs submitted that each of the claims referred to were claims ‘relating to possession of a ship’ within the meaning of s 4(2)(a)(i). They relied on the decision of the High Court in Owners of the Ship “Shin Kobe Maru” v Empire Shipping Company Inc (“Shin Kobe Maru”). In that case, the High Court held that a claim by a plaintiff that, in accordance with the terms of a joint venture agreement with the defendant, ownership of a vessel be transferred to the joint venture company (or another joint venture company in which the plaintiff and defendant had an interest) was a proprietary maritime claim within s 4(2)(a) of the Act.

In so holding, the High Court determined that the words ‘relating to’ in s 4(2)(a) were to be given a wide meaning, and therefore s 4(2)(a) embraced a claim by a party who asserted a third party’s right to ownership in a vessel. The High Court said:

In their natural and ordinary meaning, the words “a claim...relating to...ownership” are wide enough to encompass a claim that a third party is or has been or is entitled to become the owner of the property in question. In this regard, the expression “a claim...relating to...ownership” may be contrasted with “a claim to ownership” or “a claim for ownership”, which latter expressions would ordinarily indicate a claim as to one’s own ownership, not that of another.

Justice Siopsis held, referring to Shin Kobe Maru and Elbe Shipping SA v The Ship Global Peace, that under the Act, establishing jurisdiction does not depend upon any factual precondition, but on establishing that the particular claim has the legal character required by s 4(2)(a). In the latter case, Allsop J (as his Honour then was) said:

In The Shin Kobe Maru the only “fact” that needed to be shown was the existence of a claim that bore “the legal character” of the kind referred to in s 4(2)(a)(i) and (ii) of the Act. The claim might fail for any number of reasons, but as a claim, that is as a body of assertions, it bore the legal character or answered the description of “a claim relating to possession of, or title to or ownership of a ship.”

TBONE, having entered an appearance for the defendant vessel, submitted that neither of the plaintiffs’ claims could properly be characterised as proprietary maritime claims. TBONE advanced a number of submissions which depended upon acceptance of its version of the facts, or were otherwise contentious. Justice Siopsis

13 Ibid 427.
15 Ibid 418.
16 Ibid 426-7.
18 Ibid.
found that these submissions comprised various ways in which the plaintiffs’ claims might fail. They went to the merits of the claims and not the legal characterisation of those claims. Accordingly, the submissions were not relevant to determining whether the court had jurisdiction under s 16 of the Act.

The correct inquiry was whether the plaintiffs’ claims could properly be characterised as ‘claims relating to possession of a ship’. In answering that question in the affirmative, his Honour said:

This is because the claim for delivery up of the “Houston” is a claim for the delivery up of possession of the “Houston” and is, therefore, a claim for possession of a ship, and so, clearly, falls within the ambit of cl 4(2)(a) of the *Admiralty Act*.

Further, the body of assertions comprising the claims for damages for the torts of conversion and/or detinue comprises the plaintiffs’ assertion of TBONE’s interference in the first plaintiff’s right to possession of the “Houston” after 2 December 2015. The claim is founded upon an assertion that TBONE by its conduct after 2 December 2015, and whilst the “Houston” was in its actual possession, denied the first plaintiff’s right to possession. In my view, that claim is to be characterised as being a claim “relating to possession” of a ship, as it seeks to vindicate the first plaintiff’s asserted right to possession of the “Houston”, consequent upon its notice of 2 December 2015, in which it claimed to terminate the charterparty.

The requirements of s 16 were therefore met and the court had jurisdiction to entertain the action in rem. His Honour’s conclusion with respect to s 16 meant he did not have to consider whether the court had jurisdiction pursuant to s 18.\(^{19}\) The application was dismissed.

### IV COMMENT

This decision establishes that the following three types of claims are to be characterised as claims ‘relating to possession of a ship’:

1. claims for delivery up of a vessel;
2. claims in detinue; and
3. claims for damages in conversion.

The first two of these propositions are relatively uncontroversial. It is the third which, at first glance, appears more contentious.

#### A Claim for Delivery up of the Vessel

\(^{19}\) The plaintiffs had relied on s 4(3)(f) and (w) in this respect.
It is undoubtedly the case that a claim for delivery up of a vessel is a ‘claim relating to possession of a ship’. By its claim, the plaintiff asserts that it is entitled to possession and seeks the court’s assistance in acquiring it. This aspect of his Honour’s decision is clearly correct.

**B  Claim in Detinue**

It is also easy to understand why a claim in detinue should be categorised as relating to possession. Detinue is an ancient action, traceable to the twelfth century. It is essentially a proprietary action, and is the only common law action which allows the plaintiff to seek specific restitution of the chattel concerned. It is not available as of right, however; the court has a discretion to make such an order where the chattel has some special value or interest. The proprietary nature of the action, and the possibility of regaining possession of the chattel itself, demonstrates why it is apt to be characterised as a claim relating to possession.

It is worth noting that TBONE did not actually seek specific restitution of the vessel in its claim in detinue. Rather, it sought damages for the detention of the Vessel, making the claim akin to one in conversion. Whether such a claim should be characterised as one ‘relating to possession of a ship’ is discussed below.

**C  Claim for Damages in Conversion**

The classification of claims for damages in conversion as relating to possession is more problematic. Like detinue, this tort protects the plaintiff’s possession, or immediate right to possession, of the chattel. However, it differs in that a successful action in conversion can only result in an award of damages, and not specific restitution of the chattel. It is thus clear that an action in conversion, whether successful or unsuccessful, can never change possession of the chattel itself. On that

21 *Kettle v Bromsall* (1738) Willes 118; *Bellinger v Autoland Pty Ltd* [1962] VR 514, 519 (Herring CJ). See also D J Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999) 108. The Court’s power to grant specific restitution was first introduced by the *Common Law Procedure Act 1854* (UK). It is now to be found in s 80 of the *Civil Proceedings Act 2011* (Qld) and its equivalents. There was a time at which delivery in specie was available as of right, but before 1854 it could not be insisted upon: *McKeown v Cavalier Yachts Pty Ltd* (1988) 13 NSWLR 303, 307.
23 This issue could not arise in England, where detinue has been abolished: *Torts (Interference with Goods) Act 1977* (UK) s 2.
25 Balkin and Davis, above n 20, 62 fn 11.
basis, it might be argued that a claim for damages in conversion is not one relating to possession.

Support for this argument can be found in the jurisprudence relating to claims for damages arising out of a breach of contract for the sale of a vessel. Such a claim is not a ‘claim relating to possession of a ship’, as ownership is not being claimed. It lacks the necessary proprietary connection. In Paul Allison & APAI Pty Ltd v The Ship Greshanne, the Supreme Court of Tasmania (Zeeman J) considered the question of whether ‘an action for an agreed price payable on the sale of a ship, in circumstances where unqualified title and possession have passed to the purchaser’ could properly be categorised as a ‘claim relating to possession of a ship’. His Honour answered that question in the negative:

Without reference of authority, it seems plain to me that a mere action for the price in the circumstances of the present case does not fall within those parts of the definition. The proposition that it does is novel and not remotely supported by any authority which I have been able to locate … The second plaintiff's claim does not relate to the possession of the ship. The applicant is in possession of it and neither plaintiff seeks, by the action, to disturb that possession.

By analogy, it might be argued that in an action for conversion the plaintiff is not seeking to disturb the possession of the defendant, but merely to claim damages for the infringement of his or her right to possession. As such, it should not be classified as a claim relating to possession.

Against this, however, is the fact that the section speaks not of ‘claims for possession’, but of ‘claims relating to possession’. The High Court in Shin Kobe Maru has given an expansive interpretation to the words ‘relating to’. The same point was made about the words ‘in relation to’ by Lord Keith in Gatoil International Inc v Arkwright-Boston Manufacturers Mutual Insurance Co:

It is necessary to attribute due significance to the circumstance that the words of the relevant paragraphs [are] “in relation to” not “for” … The meaning must be wider than would be conveyed by the particle “for”.

By giving the same expansive interpretation to the words ‘relating to’ in s 4(2)(a), it becomes clear that the conclusion reached by Siopsis J is correct. A claim

27 (1996) 6 Tas R 137.
for damages in conversion is correctly characterised as a ‘claim relating to possession’ because it operates to vindicate the plaintiff’s asserted right to possession.

V CONCLUSION

_Wilmington Trust Company (Trustee) v The Ship “Houston”,_ as far as the authors are aware, is the only case to directly consider whether claims for damages in conversion and/or detinue are to be characterised as claims relating to possession of a ship. The effect of Siopsis J’s conclusion that such claims bear the legal characterisation of a claim relating to the possession of a ship is that the _in rem_ jurisdiction of the court is available under s 16 of the Act. His Honour’s approach, which focuses on the fact that such claims seek to vindicate the plaintiff’s asserted right to possession, is clearly correct when viewed in light of the authorities giving a broad interpretation to the words ‘relating to’.

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30 The English equivalent of ss 4(2)(a)(i) and 16 is in similar terms, and is to be found in ss 20(2) and 21(2) of the _Senior Courts Act 1981_ (UK). This decision is therefore likely to be equally applicable in the United Kingdom.
INTIMIDATION, CONSENT AND THE ROLE OF HOLISTIC JUDGMENTS IN AUSTRALIAN RAPE LAW

JONATHAN CROWE* AND LARA SVEINSSON†

This article examines the circumstances in which intimidation will vitiate consent to sex under Australian rape law. It begins by summarising the legislative provisions in the various Australian jurisdictions, before surveying recent appellate case law. Existing cases can usefully be grouped into a number of categories based on the kinds of intimidation involved. There is, however, almost always some degree of overlap between the various different forms of intimidation and other factors relevant to determining consent. The article concludes by examining the reasoning process utilised by the courts in these kinds of cases. It is argued that judges rely heavily on a holistic assessment of the facts of each case to determine whether consent is legally effective. This has important consequences for how statutory definitions of rape are interpreted and applied.

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I INTRODUCTION

The crime of rape (or the equivalent offence) is defined throughout Australia essentially as sexual intercourse without free and voluntary consent.1 The various Australian states and territories have all adopted legislative provisions designed to clarify the circumstances in which consent to sex is taken not to be freely and voluntarily given. These provisions all recognise that at least some forms of

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1 Crimes Act 1900 (NSW) ss 61I, 61HA; Crimes Act 1958 (Vic) ss 34C, 38; Criminal Code 1899 (Qld) ss 348(1), 349; Criminal Code 1902 (WA) ss 319(2), 325; Criminal Law Consolidation Act 1935 (SA) ss 46(2), 48; Criminal Code Act 1924 (Tas) ss 2A, 185; Criminal Code Act 1983 (NT) s 192; Crimes Act 1900 (ACT) ss 54, 67(1).
intimidation or threats will vitiate consent for legal purposes. This issue is dealt with slightly differently in each jurisdiction, but there is significant overlap between the provisions and some recurring themes can be identified in the case law.

The incidence of appellate case law on intimidation and consent in rape law differs widely between jurisdictions. There are a number of recent Queensland cases, but relatively few in New South Wales and Victoria. The situation is complicated by the fact that there is typically a combination of factors that operate at any one time to vitiate consent to sexual activity, such as physical violence, threats or incapacity due to alcohol or drugs. The present article focuses on intimidation, not because it operates in isolation, but because in some cases it is a crucial factor in determining consent. It also provides an instructive case study through which to examine the approach of courts to interpreting rape provisions more broadly.

The article begins by summarising the legislative provisions in the various Australian states and territories, before surveying recent appellate case law. Existing cases can usefully be grouped into a number of categories based on the different forms of intimidation involved. The article concludes by examining the reasoning process utilised by the courts in these kinds of cases. It is argued that judges rely heavily on a holistic assessment of the facts of each case to determine whether consent is freely and voluntarily given. This has important consequences for how statutory definitions of rape are interpreted and applied.

II LEGISLATIVE FRAMEWORKS

All Australian jurisdictions have enacted legislation defining the scope and meaning of consent as it relates to rape law. Common to all of these is the requirement that consent be either ‘freely and voluntarily given’ or, in the cases of Victoria, the Northern Territory and Tasmania, that it equates to ‘free’ or ‘free and voluntary’ agreement. Similarly, each jurisdiction then provides a non-exhaustive list of circumstances in which consent is not deemed to be free and voluntary. Included among each of these is consent obtained by way of threats or

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2 For a similar analysis focusing on fraud, see Jonathan Crowe, ‘Fraud and Consent in Australian Rape Law’ (2014) 38 Criminal Law Journal 236.

3 Crimes Act 1900 (NSW) s 61HA; Crimes Act 1958 (Vic) s 34C; Criminal Code 1899 (Qld) s 348(1); Criminal Code 1902 (WA) s 319(2); Criminal Law Consolidation Act 1935 (SA) s 46(2); Criminal Code Act 1924 (Tas) s 2A(1); Criminal Code Act 1983 (NT) s 192. The Australian Capital Territory provision does not expressly use these terms, but otherwise defines consent similarly to other jurisdictions: Crimes Act 1900 (ACT) s 67(1).
intimidation. However, the exact scope of these provisions differs significantly between jurisdictions.

The broadest provisions on the role of intimidation and threats in vitiating consent to sex are those found in New South Wales, Queensland and Western Australia. These provisions effectively cover intimidation or threats of any kind. The New South Wales legislation provides that a person does not freely and voluntarily consent to sex where the consent is induced by ‘threats of force or terror’, but the provision now also goes on to state that lack of consent may also be established by ‘intimidatory or coercive conduct’ or other threats not involving force. The Queensland and Western Australian provisions, meanwhile, simply make a general reference to threats and intimidation as vitiating consent for these purposes.

The equivalent provisions in other jurisdictions are restricted to threats of certain specified kinds, rather than intimidation and threats generally. The narrowest sections are those found in Victoria and the Northern Territory, which only recognise threats of force or harm as overriding consent. The three other jurisdictions (South Australia, Tasmania and the Australian Capital Territory) fall somewhere in between, recognising some combination of intimidation by status or position, threats of force or harm, and threats to degrade, humiliate, disgrace or harass. The wording of the various state and territory provisions dealing with intimidation and consent to sex can therefore be summarised as follows:

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4 Crimes Act 1900 (NSW) s 61HA(4)(c).  
5 Crimes Act 1900 (NSW) s 61HA(6)(b).  
6 Criminal Code 1899 (Qld) s 348(2)(b); Criminal Code 1902 (WA) s 319(2)(a).  
7 Crimes Act 1958 (Vic) s 34C(2)(b); Criminal Code Act 1983 (NT) s 192(2)(a).  
8 Criminal Code Act 1924 (Tas) s 2A(2)(e); Crimes Act 1900 (ACT) s 67(1)(b).  
9 Criminal Law Consolidation Act 1935 (SA) s 46(3)(a)(i); Crimes Act 1900 (ACT) s 67(1)(b).  
10 Criminal Law Consolidation Act 1935 (SA) s 46(3)(a)(ii); Crimes Act 1900 (ACT) s 67(1)(d).  
11 The Tasmanian provision refers to being ‘overborne by the nature or position of another person’: Criminal Code Act 1924 (Tas) s 2A(2)(e).
It is important to bear in mind that the lists of vitiating factors in all states and territories are non-exhaustive. This raises the prospect that courts may consider forms of intimidation not explicitly mentioned in the provisions. The variations in wording nonetheless seem to be reflected in the breadth of case law arising in the different jurisdictions. The Queensland provisions have been widely applied, resulting in a range of cases dealing with intimidation. Other jurisdictions, such as Victoria, have seen a very limited number of cases before the appellate courts. The courts in some jurisdictions have expressly alluded to differences in wording as a factor in their approaches. For example, the New South Wales Court of Appeal in *R v Aiken*\(^\text{12}\) declined to follow the reasoning in the Queensland case of *R v PS Shaw*\(^\text{13}\) due to the more expansive wording of the Queensland provision at the time.

### III RELEVANT CASE LAW

The Australian appellate case law dealing with intimidation and threats in rape law is somewhat limited, but a range of examples can be identified. The cases can usefully be grouped into four categories. This section begins by looking at cases involving physical intimidation, before considering cases dealing with verbal intimidation or threats. It turns next to cases involving intimidation by status or position, then finally examines cases where intimidation was established based on the physical environment. Cases of the former two kinds would be captured by the legislative provisions in all Australian jurisdictions. However, cases of the third kind would seem to fall outside the strict wording of provisions in Victoria, South Australia and the Northern Territory, while cases of the fourth kind appear only to be captured by the broad wording in New South Wales, Queensland and Western Australia.

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\(^\text{12}\) *R v Aiken* (2005) 63 NSWLR 719, [20]. The difference has now been removed through amendments to the New South Wales provision. See *Crimes Act 1900* (NSW) s 61HA(6)(b).

\(^\text{13}\) [1995] 2 Qd R 97.
One question that therefore arises is whether courts should be willing to recognise forms of intimidation capable of vitiating consent that fall outside the strict wording of the provisions. This question has arisen in a series of cases discussed later in this article and has given rise to differences of opinion among the judges.\textsuperscript{14} We noted above that the lists of vitiating factors in all Australian jurisdictions are non-exhaustive; this potentially allows the courts to rely on the overarching standard that consent must be freely and voluntarily given. Furthermore, as we argue later in the article, the courts can and do properly rely on a holistic assessment of the facts of each case to determine whether consent is legally effective.

\textit{A Physical Intimidation}

A consistent theme in the various Australian legislative provisions is the separate references to force, threats and intimidation as circumstances capable of overcoming consent. Nonetheless, these issues are often treated cumulatively: that is, past or present use of physical force may strengthen the court’s conclusion that consent was vitiated by threats or intimidation. Similarly, physical intimidation, combined with threats, an intimidating environment or a history of controlling behaviour, may combine to create the overall conclusion that consent was legally ineffective. This holistic approach to the facts of the case, discussed in more detail later in this article, is characteristic of the case law in this area.

An example is provided by the Queensland case of \textit{R v IA Shaw}.\textsuperscript{15} The appellant in that case was a guest in the complainant’s family home. He had been drinking heavily, so the complainant agreed to drive him home. He directed her to drive to a remote and unfamiliar bushland area, where he had sex with her. The coercive circumstances of the case were constituted by threats of violence by the appellant against the complainant, along with the appellant’s ongoing intimidation of the complainant with a knife and the intimidating circumstances constituted by the remoteness of the location and the appellant’s physical strength and appearance.\textsuperscript{16} The court took a holistic view of these factors to find that it was clearly open to the jury to conclude that the complainant’s consent was secured by intimidation.


\textsuperscript{15} [1996] 1 Qd R 641.

\textsuperscript{16} [1996] 1 Qd R 641, 646 (Davies and McPherson JJA).
The more recent Queensland case of *R v CV* indicates a similar form of reasoning. The appellant in that case was the complainant’s brother in law, who had intercourse with her on three separate occasions in his home. The complainant stated in evidence that she had not felt able to resist his advances due to his physical size, intimidating behaviour and repeated threats of consequences if she did not ‘keep her fucking mouth shut’. It was argued on appeal that none of these circumstances, taken alone, could override the complainant’s consent. However, the Court of Appeal rejected that argument, ruling that the cumulative conduct of the appellant was sufficient to vitiate the complainant’s consent and finding it unnecessary to consider whether each factor could have that result individually.

Cases from other Australian jurisdictions raise similar issues. The Victorian case of *R v Rajakaruna*, for example, concerned a man convicted of multiple rapes against sex workers in St Kilda. One of the counts occurred when he said he would pay for sex, but failed to do so. However, the counts also involved physical intimidation and threats of violence. The Court of Appeal upheld the convictions, finding there was sufficient evidence to show that the intimidation and threats induced the sex workers to provide services without charge. Similarly, in the South Australian case of *R v Moss*, the complainant sex worker had originally consented to sexual acts for which she had been paid, but refused repeatedly to have sex without a condom. The appellant then became aggressive, threatening her verbally and with a gun. The Court of Appeal took a holistic view of the appellant’s behaviour, finding that the complainant’s response established a lack of consent in the circumstances.

A series of recent Queensland decisions illustrate that a context of force, threats and intimidating conduct may override consent even if the conduct occurs over an extended period. The appellant and complainant in *R v Everton*, for example, had begun a sexual relationship after meeting at the caravan park in which they both lived. After a number of weeks, the appellant’s behaviour towards the complainant became abusive and threatening; he regularly called her a ‘witch’, controlled her behaviour and finally forced her to leave her son at a police station. The conduct intensified when the two began travelling together,

19 [2004] QCA 411, [40] (Jones J).
with the appellant regularly becoming violent and not allowing the complainant to leave.

The Queensland Court of Appeal noted that the complainant’s lack of resistance to sexual encounters that occurred over this period of intensifying behaviour stemmed from fear of both further physical force and other harm to herself and her son.\(^{25}\) The evidence of significant physical violence by the appellant allowed the court to more easily conclude that the complainant had not willingly consented. The Court reiterated, however, that even where individual sexual acts did not directly follow specific acts of violence, it was reasonable for the jury to conclude that ‘at all times after the [initial] assault […] the complainant must have been terrified’ and that this terror alone was sufficient to establish that consent was not genuine.\(^{26}\) The court also cited the appellant’s ‘domination over the complainant’ alongside his use of force as a legitimate factor for consideration by the jury.\(^{27}\)

The mode of analysis adopted in *Everton* makes sense in cases where threats or intimidating behaviour escalate at a later time into actual violence. This question commonly arises in cases where the appellant and complainant have an ongoing intimate or family relationship, perhaps with a long history of abusive or controlling behaviour. A situation of this kind arose in *R v Motlop*,\(^{28}\) where the appellant and the complainant were in a de facto relationship. The appellant threatened the complainant that he ‘could kill [her] right now and no one would even know that you’re gone’ and threatened her with a knife on multiple occasions early in one evening.\(^{29}\) The Court of Appeal emphasised that the number of hours intervening between this behaviour and the later sexual intercourse did not preclude a finding by the jury that the complainant had been intimidated into giving consent.\(^{30}\)

A more extended pattern of abuse was considered in *R v Parsons*.\(^{31}\) The appellant in that case was charged with several counts of rape against his stepdaughter. The complainant stated in evidence that she had not offered resistance to these acts due to the fear created by a history of ongoing violence and threats against herself and her family, which the court found had ‘intimidated [her] into silence’.\(^{32}\) This ongoing history involved previous acts of violent rape

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\(^{25}\) [2016] QCA 99, [49] (Fraser JA).
\(^{26}\) [2016] QCA 99, [46] (Fraser JA).
\(^{27}\) [2016] QCA 99, [50] (Fraser JA).
\(^{28}\) [2013] QCA 301.
\(^{30}\) [2013] QCA 301, [42] (Boddice J).
\(^{32}\) [2000] QCA 136, [13].
by the appellant, as well as physical intimidation with knives and a gun. The court
did, however, find that a lack of temporal connection between intimidating
conduct and sexual intercourse could provide a basis for a defence of mistake of
fact, since the appellant could reasonably think the complainant was consenting.\textsuperscript{33}
The appeal in \textit{Parsons} was therefore upheld on the basis that mistake of fact
should be have been left to the jury.\textsuperscript{34}

\textit{R v C} provides an example of a case where physical intimidation was held to
exist in the absence of any verbal threats of violence.\textsuperscript{35} The complainant in that
case was a wheelchair-bound female who was assaulted by a taxi driver in her
apartment. The complainant verbally expressed her lack of consent to the initial
sexual contact, but thereafter remained silent. The Court of Appeal accepted that
the expression of lack of consent to the initial act was sufficient to establish lack
of consent to all the subsequent acts.\textsuperscript{36} The complainant’s later silence was found
to reflect physical intimidation by the able-bodied, male taxi driver, coupled with
the belief that he would not leave her home until the assault was completed.\textsuperscript{37}

\textit{B Verbal Intimidation}

Many of the cases discussed above involved a combination of verbal threats
and physical intimidation. We have seen that the courts have been willing to
consider these factors in a holistic manner. Cases where physical or verbal
intimidation occurs in isolation are less common, although \textit{R v C} is an example of
a case involving physical intimidation without verbal threats. An example of a
case involving verbal intimidation without overt physical intimidation or threats
of violence is \textit{R v PS Shaw}.\textsuperscript{38} The complainant in that case was the appellant’s
sister-in-law. She had been staying with her sister and the appellant at their home
in Innisfail. The appellant had sexually molested the complainant on a number of
previous occasions. He then threatened that he would not let her return to her
home in Melbourne unless she agreed to be videotaped having sex with him.

The court found that it was reasonably open to the jury at trial to conclude
that any consent the complainant gave was not freely and voluntarily given, as it
was induced by the complainant’s isolation at the appellant’s house and her fear
of being unable to return home. McPherson JA emphasised that the phrase ‘threats

\textsuperscript{33} \textit{Criminal Code 1899} (Qld) s 24.
\textsuperscript{34} For strong criticism of this decision, see Jonathan Crowe, ‘Consent, Power and Mistake of Fact in
Queensland Rape Law’ (2011) 23(1) \textit{Bond Law Review} 21, 34-5.
\textsuperscript{35} [2005] QCA 306.
\textsuperscript{38} [1995] 2 Qd R 97.
or intimidation’ in s 348(2) of the Queensland Criminal Code could be interpreted broadly to account for such factors as the environment in which an incident occurred. The court also stressed that the language of the section did not require an objective determination that a person ‘of average fortitude, maturity or determination’ would have felt sufficiently intimidated or threatened by the appellant’s conduct for consent to be vitiated. Rather, the question is whether the conduct subjectively induced the complainant’s consent in the case at hand.39

The verbal threat in PS Shaw, although highly significant, did not occur in isolation. Rather, it occurred against a backdrop of previous sexual assaults and was reinforced by the physical and social isolation of the environment. The case therefore illustrates the importance of holistic assessments of the factual circumstances. A further illustration of this point is provided by the case of Michael v Western Australia.40 The appellant in that case separately told two female sex workers that he was a police officer, threatening that he would ‘make trouble for them’ if they refused his sexual demands. The intimidation caused by the appellant’s apparent position of authority, coupled with the direct verbal threats, induced the complainants to reduce or waive their fees and allow behaviour (such as kissing or licking their face and breasts) they would not normally tolerate from clients.41

The Court of Appeal in Michael held by a two judge majority that fraudulent representations accompanied by verbal threats could vitiate consent to sex under Western Australian law. Steytler and Miller JJ both found that the deception of the accused was instrumental to facilitating the threats which induced the victims’ consent. The complainants only acquiesced to sexual intercourse on the terms they did because they thought the appellant was a police officer. Steytler J took the view that the deception did not itself induce consent, other than by enabling the resulting threats or intimidation.42 Miller J, by contrast, thought that it was impossible to separate the deception from the threats or intimidation and the facts must be viewed as a whole.43 Heenan AJA dissented, finding that the kind of deception perpetrated in this case did not fall within the Western Australian provision.44 We will discuss this difference of opinion in further detail later in this article.

44 [2008] WASCA 66, [376].
A related fact scenario arose in the New South Wales case of \(R \text{ v Aiken}^45\). The complainant in that case was induced to perform sexual acts on the accused due to her mistaken belief that he was an undercover security guard who had witnessed her shoplifting. An issue arose in the case as to whether this kind of deception was covered by the statutory definition. The Court of Appeal found that ‘non-violent threats’ of the kind made by the appellant did not fall within the list of coercive factors in the New South Wales legislation; the appellant’s conviction was therefore overturned.\(^46\) This issue has now been addressed by statutory amendments that significantly widened the scope of the New South Wales provision.\(^47\)

C \textit{Intimidation by Authority}

A further category of cases involves circumstances where the complainant was intimidated into consenting to sexual acts by the accused’s position of authority. The cases of \textit{Michael} and \textit{Aiken} discussed above could both plausibly be placed into this category, although the claims to authority in those cases were false and the courts’ reasoning focused more on the subsequent threats than the deceptive claims that preceded them. Criminal statutes in some jurisdictions, such as the Australian Capital Territory,\(^48\) distinguish abuse of a position of authority as a specific circumstance in which consent may be overridden. Others jurisdictions, such as Western Australia, make no explicit reference to authority as a factor that can vitiate consent to sex.\(^49\) However, the Court of Appeal in \textit{Stubley v Western Australia} held that Western Australian law can accommodate this possibility.\(^50\)

The appellant in that case was a psychiatrist who had intercourse with a number of patients in his office over a period of years. Two of these patients were the complainants. The appellant contended that all the sexual acts had been consensual. However, the patients testified to having been intimidated by his position of power and authority, angry temperament, control over the clinical environment or, in some cases, direct verbal threats. The Court of Appeal appeared to accept that intimidation by authority could legitimately be considered as a factor in rendering consent not free and voluntary.\(^51\) The judges also held that while a person who is angry may intimidate another person, the significant factor

\[^{45}\text{(2005) 63 NSWLR 719.}\]
\[^{46}\text{(2005) 63 NSWLR 719, [33] (Studdert J).}\]
\[^{47}\text{Crimes Act 1900 (NSW) s 61HA(6)(b).}\]
\[^{48}\text{Crimes Act 1900 (ACT) s 67(1)(h).}\]
\[^{49}\text{Criminal Code 1902 (WA) s 319.}\]
\[^{50}\text{[2010] WASCA 36.}\]
\[^{51}\text{[2010] WASCA 36, [357] (Buss JA).}\]
in respect to consent to sexual acts is not merely that anger is expressed, but that it is conveyed ‘in a context which induces some action (or inaction) by the person intimidated’.52

It is now well established that fraudulent representations as to the medical nature of a sexual act can render consent not freely given.53 There has, however, been relatively little consideration, beyond the comments in Stubley, of those circumstances where the position, control and behaviour of a practitioner may constitute a form of intimidation. A further case of this kind is R v Wilson,54 where the appellant committed a large number of sexual assaults on clients in the course of his practice as a naturopath. The evidence given by the complainants suggested that their failure to take further steps to avoid the acts was due to the appellant’s status as a medical professional, rather than any positive belief about the medical benefits of the procedure. A similar point could be made about cases such as R v Mobilio (where the appellant conducted intravaginal ultrasounds while falsely claiming them to have a medical purpose)55 and R v BAS (where sexual molestation was falsely represented as physical therapy).56 The central issue in the latter cases was the fraudulent claims by the appellants, but it could equally be said that consent was induced by intimidation resulting from their authority, social standing and claimed expertise.57

Cases involving sexual assault by sports coaches could also be placed into this category. The Australian Capital Territory case of R v King,58 for example, concerned a fifty-five year old cricket coach charged with twenty-five counts of sexual assault against minors aged between ten and sixteen. The accused, who spent significant time coaching the complainants in private, was stated to have prominence in the community and was responsible for the complainants’ selection into various teams.59 Complainants stated in evidence that they ‘found his persuasive manner and size was intimidating’.60 Reference was made to the intimidating nature of the appellant’s ability to influence the complainant’s selection prospects. The case therefore involved intimidation arising from a combination of social standing, physical presence, influence and authority. These

52 [2010] WASCA 36, [131] (Pullin JA). The appellant’s conviction was later overturned by the High Court due to the role played by evidence of uncharged assaults on patients other than the complainants: Stubley v Western Australia (2011) 242 CLR 374.
53 See, for example, R v Flattery (1877) 2 QBD 410; R v Williams [1922] All ER 433.
57 For further discussion, see Crowe, above n 2, 240-1.
59 [2013] ACTCA 23, [32].
60 [2013] ACTCA 23, [33].
factors were sufficient to vitiate the complainants’ consent to the sexual acts, even in the absence of overt threats or violence.

D Intimidating Environments

The previous sections have discussed a number of cases where the intimidation or threats that induced the complainant’s consent were compounded or strengthened by an intimidating or isolated physical environment. The case of IA Shaw, where the complainant was directed to drive to a remote and isolated bushland area, provides an example. Cases such as CV, PS Shaw and Stubley also made reference to the accused’s ability to control the physical environment of his home (CV and PS Shaw) or office (Stubley). The physical setting of the assaults in these cases formed part of a holistic assessment by the courts by of whether, all things considered, the complainant’s consent was not freely and voluntarily given.

A further case where physical location played a critical role was the Queensland decision of R v R.61 The fifteen year old complainant in that case had gone into an unfamiliar pool hall to ask directions. The complainant stated that the comparative size of the appellant had caused her to feel intimidated and threatened. The unfamiliar environment of the pool hall (which was perceived as being controlled by the appellant) also reinforced the perception that she had no choice but to allow the sexual acts.62 The appellant alleged that the acts had been consensual, but the court found that it was open for the jury to conclude that such an environment would be sufficiently intimidating to render any consent legally ineffective.

The sexual offences in R v Ibbs63 occurred after the complainant had moved into the home of the appellant and his wife as a tenant at short notice. The complainant received unwanted sexual advances from the appellant on multiple occasions, before giving grudging consent to the effect of ‘let’s get it over with’.64 However, the complainant then withdrew her consent by words and actions during the act. The appellant was convicted on the basis that the complainant’s initial consent had been effectively withdrawn, but the trial judge commented on the appellant’s abuse of the position of power which he occupied over the complainant, noting that intimidation need not involve overt force or threats of violence.65 The appellant’s position of power in this case was constituted

63 Unreported, WACCA, 16 July 1987, discussed in Ibbs v The Queen (1987) 163 CLR 447 (appeal against sentence upheld by the High Court).
substantially by his control over the complainant’s place of residence and physical environment.

A similar finding was made by the Queensland Court of Appeal in *R v Kovacs*. The appellant in *Kovacs* ran a takeaway shop in Weipa with his wife, a Philippine national. The appellant and his wife had arranged for the complainant, also a Philippine national, to travel to Weipa to live with them and work in the shop. As soon as the complainant arrived, the appellant began to sexually molest her; this continued over several months. The complainant was in Australia illegally, knew little English and had no independent means of support. It seems clear that the appellant systematically abused her dependence on him, which included (but was not limited to) his control over her physical location. The Court of Appeal recognised the complainant’s physical isolation as a factor to be considered within a broader holistic assessment of the circumstances which facilitated the abuse.

IV A HOLISTIC ASSESSMENT?

A consistent theme in the cases discussed above is the use by the courts of a holistic assessment of the various coercive circumstances that may render consent to sex legally ineffective. This holistic assessment may take account of various forms of intimidation, including physical intimidation, verbal threats, positions of authority and physical environments. It may also place intimidation alongside other coercive factors, such as physical violence or a history of controlling behaviour. This approach makes it challenging to disentangle various kinds of intimidation as they appear in the case law, although in some cases specific features of the factual scenario seem to have carried particular weight in the court’s reasoning.

The use of these kinds of holistic assessments in judicial reasoning is by no means confined to rape cases. There is reason to think that holistic judgments of the facts and law relevant to a case are widespread in judicial decisions. There is now a substantial body of research, exemplified by the work of Amos Tversky,

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66 [2007] QCA 143.
67 The facts in this case seem to form part of a wider pattern of predatory behaviour on the part of the appellant. See the unrelated case of *R v Kovacs* [2007] QCA 441.
68 The appellant’s conviction was ultimately overturned on the ground that the defence of mistake of fact under s 24 of the *Criminal Code 1899* (Qld) should have been left to the jury. For strong criticism of this aspect of the case, see Crowe, above n 34, 35-6.
Jonathan Haidt and Daniel Kahneman,70 suggesting that holistic judgments play a central role in practical decision-making. This research draws on dual process models of cognition, which distinguish two different kinds of thought processes. The first (often called System 1) involves fast, intuitive snap judgments, while the second (System 2) involves controlled, reflective deliberation.71

A series of experiments conducted by Haidt and his collaborators demonstrates that System 1 processes are central to ethical judgments.72 People typically react to ethical dilemmas by first forming snap judgments and then rationalising or modifying these judgments through further reflection. The resulting picture of ethical reasoning differs considerably from the traditional idea of a reflective, considered process. People do not usually respond to an ethical dilemma in a purely reflective way by weighing up the different options. Rather, they use System 1 thinking to form a holistic judgment about the case at hand. These snap judgments are not arbitrary, but are generally based on rough rules of thumb or heuristics that enable us to deal with complex situations in a cognitively efficient way. The soundness of the judgments will then depend on the reliability of the heuristics involved.73

System 1 thinking, then, is typically the first component of a decision-making process. It is not necessarily the end of the process, since decision-makers will often employ System 2 thinking to reflect upon and perhaps modify their conclusions. However, even in such cases, decision-makers nonetheless begin their reflective reasoning with a preconceived sense of the relevant factors and, in many cases, at least a presumptive outcome. The decision-making process can then be understood as involving a dialectical movement between holistic snap judgments and reflective considerations, where the outcome reflects a kind of balance or equilibrium between these factors.74 The outcome of this process may

71 See, for example, John A Bargh and Tanya L Chartrand, ‘The Unbearable Automaticity of Being’ (1999) 35 American Psychologist 462; Shelly Chaiken and Yaakov Trope, Dual Process Theories in Social Psychology (Guilford, 1999).
74 Compare Crowe, ‘The Role of Snap Judgments’, above n 69.
evolve over time as the decision-maker considers new information and perspectives.

The body of research discussed above helps us to make sense of judicial reasoning in rape cases. It seems likely that judges in such cases will begin their reasoning by making a holistic assessment of the relevant coercive factors, guided at least partly by System 1 thinking. These judgments will not be devoid of legal content; rather, they are likely to involve an overall evaluation based on the judges’ understanding of both the facts of the case and the applicable law. The judges will then typically reflect upon this initial assessment and apply the relevant legal categories in a more considered way. However, the overall outcome in the case will still be influenced by the initial snap judgment. It is therefore likely to depend on a range of interlocking and mutually reinforcing considerations.

The role of holistic judgments in judicial decision-making might seem to raise worries about the transparency or consistency of this form of reasoning. However, these concerns should not be overstated. Appellate court judges are highly trained legal specialists and the heuristics they use to form holistic judgments will reflect their legal training and experience in the courtroom. Their judgments are therefore likely to track the legal rules at both a rule-based and principled level. There is empirical literature to suggest that the use of holistic judgments is indicative of high levels of skill among trained experts in a range of fields, including professional athletes, chess players, dancers, surgeons and writers. Furthermore, if such judgments do play a role in judicial decisions—as the preceding discussion suggests—transparency favours being open about this mode of reasoning.

77 Kate M Hefferon and Stewart Ollis, “Just Clicks”: An Interpretive Phenomenological Analysis of Professional Dancers’ Experience of Flow’ (2006) 7 Research in Dance Education 141.
79 Susan K Perry, Writing in Flow (Writer’s Digest, 1999).
V INTERPRETIVE PRINCIPLES

The role of holistic judgments in rape law also helps to make sense of some debates that have arisen about the interpretation of the statutory provisions in various jurisdictions. A series of recent cases in this area have raised issues about whether the legislative definitions of rape should be read in a restrictive or purposive fashion. The decision of the Queensland Court of Appeal in Pryor, for example, concerned a burglar who broke into a house and assaulted a woman who was sleeping there. 81 The woman initially mistook the burglar for her usual sexual partner, who was also asleep in the house at the time. Section 347 of the Queensland Criminal Code, as it then was, provided that sexual intercourse would amount to rape where consent was induced through any of a list of coercive factors, including ‘by means of false or fraudulent representations as to the nature of the act, or, in the case of a married female, by personating her husband.’ 82 However, the victim in Pryor was not married, but mistook the burglar for a person described as her ‘sole sexual partner’. 83

A majority of the Court of Appeal, comprising Williams JA and Dutney J, ruled that the burglar’s conviction could nonetheless be upheld. Their Honours considered that, even if the facts of Pryor fell outside the strict wording of the section in relation to impersonation, the conviction could still be sustained based on the more general standard that the victim’s consent was not freely and voluntarily given. Byrne J dissented and would have overturned the conviction. The majority and minority judges effectively differed on whether the list of coercive factors in s 347, the precursor to the current s 348(2), should be regarded as exhausting the grounds on which consent to sex may be considered legally ineffective. 84

A related issue arose in the more recent Queensland Court of Appeal case of R v Winchester. 85 The case concerned sexual activities between the accused and a girl who had volunteered at his horse stables since she was twelve years old. The victim gave evidence at trial that she submitted to sexual acts with the accused on multiple occasions because he had promised to give her a racehorse, which in fact he did not own. The accused was convicted of multiple counts of rape and indecent treatment of a child under sixteen, as well as one

82 Criminal Code 1899 (Qld) s 347 (prior to 27 October 2000).
84 The Queensland Parliament introduced amendments in 2000 aimed at overcoming this difficulty. Section 348(2)(f) now refers to ‘a mistaken belief induced by the accused person that the accused person was the person’s sexual partner.’
count of maintaining a sexual relationship with a child. The Court of Appeal treated the promises to the girl as a type of fraud not covered by the reference in s 348(2) of the Criminal Code (the successor to the former s 347) to fraud involving the ‘nature or purpose of the act’.

Nonetheless, Muir and Fryberg JJ were prepared to consider the fraudulent promises as relevant to the broader issue of whether consent was ‘freely and voluntarily given’ within s 348(1). Their Honours took the view that a holistic assessment must be made of the victim’s life history and circumstances in considering whether consent obtained after a promise or offer should be considered free and voluntary. This may involve consideration of the victim’s maturity, intellectual ability, emotional state and relationship history with the accused. Fryberg J remarked that where a woman is systematically controlled by her partner this might influence whether fraudulent representations rendered consent not freely and voluntarily given. The power dynamics between the parties are therefore part of the wider context to be considered. Chesterman J, by contrast, took the narrow view that fraud can only vitiate consent to sexual activity if it falls within the technical wording of s 348(2). His Honour was unprepared to rely on the overarching standard that consent must be ‘freely and voluntarily given’.

A similar division of opinion can be perceived in the Western Australian Court of Appeal decision in Michael, discussed earlier in this article. The majority judges in Michael, as we saw previously, took a holistic view of the case by regarding the appellant’s deception and threats as relevant to the broader issue of whether consent was free and voluntary within the meaning of the Western Australian Criminal Code. The dissenting judge, Heenan AJA, took a more formalistic view. His Honour held that the reference to ‘deceit, or any fraudulent means’ in s 319(2)(a) of the Code should only extend to fraud concerning the nature or purpose of the act, the identity of the accused or their legal status as a spouse. He would have allowed the appeal on the basis that the jury was not properly directed by the trial judge to separate out the deception of the accused from the threats or intimidation.

87 [2011] QCA 374, [135].
88 [2011] QCA 374, [101].
89 The Court of Appeal ultimately upheld the appeal on the basis that the trial judge’s direction to the jury had been inadequate.
91 [2008] WASCA 66, [376] (Heenan AJA). For criticism, see Crowe, above n 2, 246.
The differences of opinion in Pryor, Winchester and Michael all follow a similar pattern.\(^9^2\) In each of these cases, a two judge majority took a holistic view of the case to find that legally effective consent was not present, despite some technical challenges posed by the wording of the legislative provisions. The third dissenting judge in each case took a more formalistic view, finding that the conviction could only be sustained if it fit strictly within the enumerated legal categories, precluding a finding that consent was not freely and voluntarily given. We have suggested in the earlier sections of this article that the holistic approach adopted by the majority judges in these decisions is more consistent with the general approach of the Australian courts to intimidation and related coercive factors in rape cases.

Holistic judgments play a central role in determining whether consent to sex is legally effective. The complex and interlocking factors that often arise in such cases make such a holistic outlook both necessary and desirable. Furthermore, as discussed above, judgments of this kind are far from arbitrary. They reflect the heuristics that judges have developed over time in applying the relevant legal categories. Experienced criminal court judges are well placed to make overall assessments of whether consent to sex is legally effective.\(^9^3\) These judgments should, of course, be guided by the coercive factors enumerated in legislation, but these lists are worded non-exhaustively in all Australian jurisdictions. They should not be applied in such a way as to frustrate the overarching legal requirement that sexual activity must only take place with the free and voluntary consent of all parties.

VI CONCLUSION

This article has considered the role of intimidation and threats in vitiating consent to sex for the purposes of Australian rape law. We began the article with an overview of the relevant statutory provisions throughout Australia, noting the minor differences in wording between jurisdictions. We then surveyed the appellate case law, noting that the cases can be grouped into four overlapping categories: physical intimidation, verbal intimidation or threats, intimidation by authority and intimidation based on the physical environment. We further noted a

\(^9^2\) For further discussion, see Crowe, above n 2, 243-5.

\(^9^3\) There is certainly a risk that the content of holistic judgments may be influenced by the judges’ social and cultural outlook, although a similar concern applies to more reflective forms of reasoning. The role played by snap judgments is one reason why is it important to promote gender and cultural diversity among the judiciary. Compare Jennifer Temkin, ‘Prosecuting and Defending Rape: Perspectives from the Bar’ (2000) 27 Journal of Law and Society 219; Erika Rackley, Women, Judging and the Judiciary: From Difference to Diversity (Routledge, 2013) 185-6.
tendency by the courts in all these cases to take a holistic approach to the factual circumstances, viewing various forms of intimidation and other coercive factors as part of an overall assessment as to whether consent is freely and voluntarily given.

The final parts of the article examined this reasoning process in more detail. We argued that there is empirical evidence from other fields to support the view that judges rely on holistic assessments in deciding rape cases. This kind of reasoning is far from arbitrary; indeed, it makes sense as a way of analysing the complex and overlapping factors often present in rape trials. The role of holistic assessments in such cases favours a purposive approach to the applicable legislative provisions that emphasises the overall question of whether consent is freely and voluntarily given, rather than a formalistic emphasis on the lists of coercive factors found in the various statutory provisions. This is consistent with the approaches of the majority judges in recent cases such as Pryor, Winchester and Michael.

94 Compare Crowe, above n 2, 246-7.
This article examines the impact of Young Offender’s Act 1994 (WA) ‘YOA’ s126. It does this by considering the text, context and purpose of the provision when juxtaposed with the sentencing jurisprudence that underpins the sentencing of young people. The sentencing process of young people is ordinarily complicated. The goal of this article is to shed light on the history and application of this provision in light of that ordinarily complicated sentencing process.

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I INTRODUCTION

Western Australia is unique\(^2\) in having additional punitive\(^3\) sentencing legislation for criminal juvenile recidivists. Section 126 of the Young Offender’s Act 1984 (WA) ‘hereafter YOA’ is significant because it provides the power for a...
court to impose additional punishment beyond what would ordinarily be considered proportionate to the offending, to a juvenile who:

1. has served two prior periods of custody; and
2. because of their history of re-offending, is likely to serve another period of custody.

If satisfied, then the Court may make a special order which imposes an additional fixed term of 18 months’ imprisonment or detention to the sentence already imposed.

Since its enactment, the Children’s Court of Western Australia has never made a special order under section 126, despite a number of applications having been made. To date there has been an absence of any scholarly review on special orders and only one first instance decision. Given the potential significant consequences for juveniles in the event that a special order were to be made, it would be of some benefit to examine its intended function and the circumstances governing its application. The focus of this legislative note is how the textual construction of section 126 operates in the context of established sentencing jurisprudence.

II THE UNIQUENESS OF SECTION 126 AND THE SENTENCING AIMS OF CHILDREN GENERALLY

Whilst the jurisdictions of the Northern Territory and Western Australia both have indefinite imprisonment legislation for adults, there is an argument that these provisions serve a preventative detention function, rather than an extra punitive one. An example of such is the Dangerous Sexual Offenders Act 2006 (WA),

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4 Under Young Offenders Act 1994 (WA), section 128(1) the words, inter alia, state that “…the court, when disposing of” a matter.

5 At the date of writing in the history of the Children’s Court and the Young Offenders Act 1994 (WA), no section 126 order has ever been granted. It is not known by comparison how many applications have been sought by the Office of the Director of Public Prosecutions other than that they have been made.

6 State of WA v ZL [2010] WACC 18. The author, William Yoo discloses that he was signatory on some of the submissions, counsel on some of the hearing dates, as well as the file manager of this matter. Research reveals that ZL is the only judicial authority on section 126, albeit in the first instance. P (A child) v R (1997) 94 A Crim R 593, 597 which was a Court of Criminal Appeal decision quoted the section but did not examine its operation.

7 See for example Sentencing Act (NT), section 65; Sentencing Act (WA), sections 98-101, Part 14. Although section 126 YOA is punitive, it can also be described as ‘protective’ and as to the blurring distinction between the two, see Hands, L ‘Constitutional imitations on detention ‘at her Majesty’s pleasure’ Pollentine v Attorney-General [2014] HCA 30’ (2015) UWA Law Review 442 at 449-450.
which allows for the continuing incarceration of offenders who are serving terms of imprisonment for ‘serious sexual offence.’ Such legislative schemes have been found to be a permissible exercise of preventative detention. However, no other jurisdiction has an equivalent sentencing provision for child offenders, which permits an extra period of fixed incarceration by applying a “predictive test” based on the service of past custodial terms. Further, as noted section 126 only applies to the imposition of an additional fixed term. Accordingly it would appear that section 126 operates to increase the sentence due to past offending and antecedents rather than imposing continuing detention for preventative or community protection purposes.

At the time, the Attorney General in his second reading speech noted that the cognate provision under *Crime (Serious and Repeat Offenders) Sentencing Act 1992* (WA) was introduced as a response to ‘lenient sentences’ that arose from high speed chases by child offenders resulting in deaths of other road users. One potential difficulty with the cognate provision was that it applied a mandatory formula in determining a sentence. There is nothing to suggest that the additional fixed term is for rehabilitative purposes or that an offender’s risk of reoffending can be adequately addressed during that additional period of incarceration. This is consistent with the stated purpose behind the cognate provision and supports the proposition that section 126 has its origins in legislative policy that was not intended to apply preventative detention principles but, rather, solely for the purposes of increasing or ‘firming up’ sentences that were considered to be too ‘lenient.’

When section 126 was being read for a second time, the Attorney General stated, inter alia, that:

> The special measures to be introduced in this Bill will be applied when two conditions are met. Firstly, the offender must be charged with a serious offence as defined in a schedule. This is known as the triggering offence. Secondly the offender’s pattern or

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8 As defined within section 3 of the *Dangerous Sexual Offenders Act 2006* (WA). For an overview as to what criteria operate to govern this consideration, see section 7 of that Act.

9 That is, a pre-condition to the application of the *Young Offenders Act 1994* (WA), section 126 is the application of section 124. In relation to section 124(1)(d), which requires the Court to take into account a young person’s history of re-offending, after release from custody and the Court’s satisfaction that there is a high probability that the young person would commit further offences of a kind for which custodial sentences could be imposed, that it was legislation that “…involves the court in making a prediction…Rather, the provision is directed to an hypothetical future event, about which the court is satisfied taking into account…” see *JSA v State of WA* (2012) 42 WAR 473, 496 (Murphy JA).


11 Ibid.
history of previous periods of detention and opportunity time must indicate that there is a high probability of re-offending within a short period of release from detention. Provided these conditions are met, two special provisions of the Bill which are intended as circuit breakers may be applied. These are the special principle and the special order. The special principle allows the court to give primary considerations to the protection of the community in sentencing decisions.12

Prima facie, the punitive aim of section 126 appears to produce a natural tension with the ordinary rehabilitative principles which apply when sentencing juveniles.13 The Full Court of Western Australia in State of WA v A Child14 explained this concept of rehabilitation:

The Act places significant emphasis on the sentencing objective of rehabilitation: WO (a child) v Western Australia (2005) 153 A Crim R 352 at 362. As stated in that case, underlying the emphasis on rehabilitation is the long established understanding that the community is best protected by determined efforts to effect the rehabilitation of young offenders. Although retribution, punishment and general deterrence are also relevant sentencing objectives under the Act, they are ordinarily given significantly reduced weight particularly when the offender is still a child.

Accordingly, it would appear that the making of a special order is a legislative alteration of the normal sentencing aim for young persons established under the YOA.

III JUDICIAL CONSIDERATION

The only guidance that the Children’s Court has provided in relation to the interpretation and scope of section 126 is from a single first instance decision by the President of the Children’s Court of Western Australia.15 In State of WA v ZL, Reynolds P outlined the criteria before a section 126 application is granted:

1. Exceptional circumstances need to be shown before a special order can be imposed because of a young person’s sense of time and age16 and because

12 Ibid.
13 As per the unanimous ruling by the Court of Appeal WO (A Child) v Western Australia [2005] WASCA 94; (2005) 153 A Crim R 352, 362. Research does not reveal that this position has been overruled or found to have been in error. This follows an established line of authority since Ainsworth v D (a Child) (1992) 7 WAR 102.
16 Reflected under Young Offenders Act 1984 (WA), section 7(k), State of WA v ZL [2010] WACC 18, [61].
18 Ibid, [64]. This is the ‘exceptional circumstances’ threshold for adult sentences and indefinite sentences under Sentencing Act 1995 (WA), sections 98-101.
19 Ibid, [56].
20 Ibid, [61]-[62].
21 Ibid, [28]. This is analogous to the requirement of consideration of parole as a second and separate step after the fixing of an appropriate sentence see P (A Child) v R 960053C, Court of Criminal Appeal, 17 applying Archibald v R (1989) 40 A Crim R 228; Swain v R (1989) 41 A Crim R 214.
22 State of WA v ZL [2010] WACC 18, [56].
23 Ibid, [79]. This mirrors the position of mitigating factors to be taken into account in relation to adult Aboriginal offenders: see State of WA v Richards (2008) 37 WAR 229, [45] (Steytler P). This would have to be taken into account, given the position that young persons who commits an offence cannot be treated more severely for that offence than the person would have been treated if an adult: Young Offenders Act 1994 (WA), section 7(c).
24 State of WA v ZL [2010] WACC 18, [86].
25 Ibid, [82].
extent to which a young offender has complied with programs affects whether or not a special order should be made.\textsuperscript{26}

What these criteria show is that judicial discretion\textsuperscript{27} undoubtedly remains even after the enlivening criteria of section 126 are established. By considering the legislative purpose and context, there is rationality in how the discretionary criteria under section 126 is to be applied. Certainly it appears arguable from the considerations outlined by Reynolds P above at [5] and [6] that the court will be more inclined to exercise its discretion and make a special order if it is demonstrated that rehabilitation is more likely to be achieved during the service of the additional 18 month term. This is notwithstanding that, as outlined above, the stated legislative purpose for section 126 appears to be punitive rather than rehabilitative.

IV Statutory Context of Section 126 YOA and Analysis

Despite the apparent tension between the intended punitive operation of section 126 and the manner in which it has been interpreted in ZL\textsuperscript{28}, this interpretation is seen to be entirely consistent when section 126 is considered in the statutory context of its placement within the YOA.

Section 126 is contained under Division 9, which is a division ‘Dealing with young persons who repeatedly commits serious offences’. Immediately this suggests that recidivist juveniles are to be placed in a separate category to non-recidivists. This appears to be consistent with the legislative purpose of section 126 as per the second reading speech, namely, that recidivists were to be treated, with separate consideration and be the subject of a ‘firming up’ of sentences, regardless of their prospect of rehabilitation. Section 126 however must be considered to operate in the wider statutory context that governs the sentencing process of children.

In Western Australia, a Court must take into account a number of statutory provisions when sentencing children namely:

1. The express objectives of the YOA;\textsuperscript{28}

\textsuperscript{26} Ibid [80].  
\textsuperscript{27} House v The King (1936) 55 CLR 499.  
\textsuperscript{28} Young Offenders Act 1984 (WA), section 6.
2. The principles of juvenile justice;  
3. That an immediate custodial detention sentence is a sentence of last resort and when it is imposed it must be for as short as time as possible;  
4. The requirement to obtain reports before making various orders.

It is against this framework and drawn from the text that the procedural and substantive elements that the prosecution are required to prove are:

1. The Director of Public Prosecutions is required to give an offender notice, and then submit to a Court that it intends to apply for a special order;  
2. The Children’s Court, if it is constituted by or so as to include a Magistrate cannot make the order. Consequently it is only the President who can decide whether to make such an order;  
3. The Prosecution must prove the application of section 124, i.e. Division 9. The application of Division 9 in turn leads to the application of section 125 YOA, termed the ‘special principle’. That special principle effectively re-prioritises the protection of the community ahead of all the other principles and matters referred to in section 46 YOA. The application of this principle does not imply abandonment of sentencing principles that apply to children, but it suggests that punishment and general deterrence, principles that would ordinarily be applicable in the sentencing of adults, gains greater priority. This is how a Court would shift the standard criterion for sentencing juveniles;  
4. Fulfilment of the Court’s discretionary criteria. That discretionary criteria is contained in section 126(1), which states, inter alia:

...when disposing of the matter, may also make a special order in accordance with this Division’ [emphasis added].

29Ibid, section 7 and incorporated via section 46(1)(b) in dealing with matters for young persons found guilty of an offence.  
30Ibid, sections 120 and 7(h).  
31Ibid, section 48.  
32Ibid, section 126(3).  
33Ibid, section 126(5).  
34Ibid, section 125. As to the test of whether section 125 and 125 applies see JSA v State of WA (2012) 42 WAR 473, 488 (Buss JA).  
36See Interpretation Act 1984 (WA), section 56(1), which states that “Where in a written law the word may is used in conferring a power, such word shall be interpreted to imply that the power so conferred may be exercised or not, at discretion.”
Continuing on, section 126(2) then states that in:

...deciding whether to make a special order the court is to have regard to the periods that have elapsed before the offender has re-offended after being released from previous custodial sentences.

This internal tension is reflected in the very placement of section 126 in Part 7 of the YOA for the purpose of punishing young persons while at the same time still incorporating the rehabilitative principles of juvenile justice. It is also difficult to see how section 126 fits with regular and well established principles with respect to adult sentencing, where concepts of general deterrence, punishment and protection of the community factor in as part of the intuitive synthesis of the fixing of a term that is proportionate to the offending; the imposition of a further term, after that process has taken place, due to the antecedents and prior offending of the offender, is unique and seems equally incongruous with the rehabilitative focus of the YOA.

In light of State of WA v ZL it seems that a Court will be resistant to granting a special order. Indeed a high threshold has been imposed; one that is not necessarily expressly stated as being part of the criteria imposed by the operative provisions. This only seems natural given the general principles of juvenile justice and that section 126 seems to operate for the purpose of displacing those general principles, with significant consequence to the juvenile offender. By confining the exercise of judicial discretion, the Court has understandably concluded that it will only be granted in the most exceptional circumstances, above and beyond those imposed by section 126, which will justify departure. As noted above, since its inception, to date no Court has been satisfied that those exceptional circumstances exist.

In particular, the decision in ZL is consistent with the rehabilitative jurisprudence in sentencing children under the YOA. Express words would be needed under section 126 to abrogate a fundamental common law right of rehabilitative jurisprudence. The express wording of section 126 has arguably not abrogated the common law position. This is so, especially notwithstanding the placement of section 126 under a division related to dealing with young persons who repeatedly commit serious offences and where, in light of the second reading

37 It is worth noting that in ZL the court granted an application for section 125 YOA to have effect in the sentencing process see State of WA v ZL [2010] WACC 18, [91].
38 "B" (A Child) v The Queen (1995) 82 A Crim R 234, 244.
speech, there may have been some legislative intention to single out and place these recidivist juvenile offenders into a different category for sentencing purposes.40

The application of section 126 relies on the Prosecution proving section 125 YOA which in turn re-prioritises the protection of the community. In the authors’ submission, the application of section 125 effectively adopts and gives weight to principles that would ordinarily apply in the sentencing process for adults, but arguably appears to go even further.41 This partly explains why section 126 has not been applied – section 125 already achieves this deterrent aspect.

The other explanation is that a principle of juvenile justice is that no child should be treated more harshly than an adult42 and yet no WA statute has an equivalent sentencing disposal process for adults. That absence in the adult sentencing process represents a contradiction of one of the principles of juvenile justice. This helps to explain the high threshold before a section 126 order is granted.

Having considered the statutory context of section 126, the next part of the note undertakes a ‘comparative’ legislative analysis with the Northern Territory. This ‘comparative’ legislative analysis highlights the unique nature of section 126.

V COMPARABLE LEGISLATION? THE NORTHERN TERRITORY

While this section is termed ‘comparable legislation’ it should be noted that there is no true comparison between section 126 and anything else.43 Currently in

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40 Further offences which are defined as ‘serious offences’ under section 124(3) and Schedule 2 under Young Offenders Act 1994 (WA), “...may lead to the application of the provisions relating to offenders who repeatedly commit offences resulting in detention.” This implies that the statutory context of section 126 alongside sections 124 and 125 implies that Parliament intended that a section 126 order could possibly activate upon the application of these statutory factors.

41 So, for example in drugs cases it has been held that personal circumstances and antecedents are reduced where deterrence is the dominant sentencing consideration: Tulloh v The Queen [2004] WASCA 169; (2004) 147 A Crim R 107 [46]. In the case of sex offences the dominant sentencing consideration is general deterrence with matters personal being less important: see for example DKA v The State of WA [2015] WASCA 112, [35]-[36].

42 As per Young Offenders Act 1994 (WA), section 7(g).

43 In ACT, the Children and Young People Act 2008 (ACT) does not re-prioritise the sentencing principles. In Victoria, Children, Youth and Families Act 2005 (Vic), section 362 sets out matters to be taken into account solely with no re-prioritization of sentencing principles and is not expressly legislatively altered. In NSW the Children (Criminal Proceedings) Act 1987 (NSW), section 6 and 33; Young Offenders Act 1997 (NSW), section 7 provide the basis of sentence with no re-prioritisation. In QLD, the Youth Justice Act 1992 (Qld), Part 7, Divisions 1 and 4, sections 3 and 175 in particular maintain the sentencing principles with no prioritization detected. In South Australia the Young Offenders Act 1993 (SA) does not re-prioritise sentencing principles. Nor does the Northern Territory
the Northern Territory, a Court in sentencing a youth may order the youth to participate in a program approved by the Minister.\textsuperscript{44} If the Court so orders, then the Minister may, by notice in the Gazette, approve a program,\textsuperscript{45} described by the Northern Territory cognate provision as a ‘punitive work order’.\textsuperscript{46} The Australian Law Reform Commission criticized the cognate provision because it rendered young offenders to:

\begin{quote}
..discrimination, victimization and retribution from other members of the community. They are likely to harden criminal behavior because they stigmatise the young offender in the eyes of the community and in his or her own eyes\textsuperscript{47}
\end{quote}

While the second reading speech does not shed any light on whether the current Minister’s programs under the \textit{Youth Justice Act} (NT) are indeed punitive in nature,\textsuperscript{48} it is clear that the Northern Territory provision does not impose a further fixed punishment on top of what is already being sentenced for by the Court. Indeed, the operation of section 126 does not in any way mandate what programs ought to be made available to the juvenile offender, other than to note the remarks of Reynolds P in \textit{ZL} outlined above.

While perhaps the most noteworthy comparison, the Northern Territory legislation does not assist in determining why section 126 has not been applied in WA. The prospect of an additional 18 months in custody makes the potential consequence of section 126 distinctive without comparison.

\section*{VI Conclusion}

Section 126 has partially achieved what it set out to do by applying the special principle of sentencing under section 125. However, the consequences of section 126 on young offenders in the context of the ordinary aims of rehabilitative sentencing principles, accounts for the Court’s reluctance to impose section 126 orders and, in light of \textit{ZL}, if there is any chance of a special order being made, it will be in circumstances where rehabilitation of the juvenile offender is likely to be

\textsuperscript{44} \textit{Youth Justice Act} (NT), section 83(1)(e).
\textsuperscript{45}Ibid, section 90.
\textsuperscript{46} Formerly imposed under the \textit{Juvenile Justice Act 1983} (NT) sections 53AH-AM.
promoted. It is difficult to see circumstances in which that position may be achieved.

Segments of the community quite validly voice a need to target hard-core recidivist offenders. Notwithstanding, it is an equally valid requirement that legislation relating to children equally prioritises their rehabilitation into society. Given the non-application of section 126 to date, it is questionable whether its function is able to meet its purpose. This is especially so when one considers that the statutory context in which section 126 has been inserted is specifically to target core recidivist young persons and yet a section 126 order has never been granted.
When an Australian court grants exemplary damages, the defendant must pay this amount to the plaintiff. If the defendant is unwilling to pay, the judgment needs to be enforced against his assets. However, if the debtor has no or insufficient assets in Australia, enforcement might have to take place abroad, for instance in the European Union (EU) Member State where the judgment-debtor does have assets. The authors use several examples ranging from ‘defective’ products to sport injuries to discuss the intercontinental enforcement of the remedy of exemplary damages. The article first examines to what extent and under which circumstances exemplary damages are available in Australia. The answer to this question subsequently paves the way for the far more prominent issue regarding the enforcement of exemplary damages in the EU Member States. The analysis shows that this can be problematic considering that the traditional stance in the EU with regard to the enforcement of exemplary damages is one of hostility and aversion. There are, however, signs of acceptance in some EU countries. The article discusses the current position in five important EU Member States: Germany, Italy, Spain, France and England. When enforcement of the Australian judgment containing exemplary damages in Europe becomes necessary, the victim’s chances (as far as the exemplary damages are concerned) thus depend on the location of the wrongdoer’s assets.

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The article focuses on the enforcement of Australian exemplary damages in the European Union (EU). Exemplary damages punish the defendant for conduct that involves a certain degree of aggravation and deter him and others from similar misbehaviour in the future. When an Australian court orders exemplary damages against the defendant, he or she must pay the amount due to the plaintiff. If a debtor is unwilling to pay, the judgment needs to be enforced against his assets. However, it is conceivable that the debtor has no or insufficient assets in Australia. As a consequence, enforcement might have to take place outside Australia, for instance in the EU Member State where the judgment-debtor does have assets. Several examples show that this cross-border legal scenario is not purely hypothetical and that parties at one point or another might be confronted with this situation.

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3 In this regard, Tilbury and Luntz conclude that ‘[i]n Australian law, we tend to speak of “exemplary” rather than “punitive” damages. At first sight, this seems a mere matter of terminology; it is, however, much more. The distinction points to the origins of our modern law of exemplary damages, and to some of the difficulties occasioned by those origins’ (Michael Tilbury and Harold Luntz, ‘Punitive Damages in Australian Law’ (1995) 17 (4) The Loyola of Los Angeles International and Comparative Law Review 769, 773). The article, therefore, uses exemplary damages to refer to punitive damages.
Product liability, for instance, offers an interesting perspective from which to study the intercontinental enforcement of the remedy of exemplary damages. Australia is an important economic and trading partner for the EU and the converse is even more true. Despite the fact that the EU and Australia are ‘like-minded partners who share many common concerns in today’s international trade environment’, problems can arise when defective or unsafe products manufactured in EU Member States cause damage, harm or physical injuries to consumers buying these products on the Australian market. If the European manufacturer of the defective product is merely exporting its goods, it mostly has no corporate presence in Australia and, therefore, no assets. In such a case, enforcement will need to take place in the European country where the manufacturer has its seat or possibly in any other European country where it holds assets. The PIP breast implant case can be taken as an illustration. The case concerned a French company (Poly Implant Prothèse) which produced defective breast implants. As of 2001, manufacturers of breast implants were only allowed by French legislation to use one type of medical silicone gel for their products. However, PIP did not comply with this requirement. It developed an elaborate scheme of deceit and continued to use sub-standard industrial silicone gel for breast implants in order to cut costs. Hundreds of thousands of PIP breast implants filled with sub-standard silicone gel were distributed around the world including Australia. Currently, Australian women face ruptures of the implants which might cause physical injuries. In this regard, reference can be made to the Fimez case. In that case an American citizen claimed damages in Alabama from an Italian manufacturer of a defective crash helmet for harm suffered due to its malfunctioning and had to enforce the judgment in Italy. Although having its roots in the United States (U.S.), the Fimez litigation shows

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4 It should be noted that the applicable law in international product liability disputes may not always be Australian even if the defendant manufacturer is an EU company and the plaintiff an Australian consumer. However, for the purposes of this article we assume that Australian law governs cross-border cases involving products manufactured in the EU. Similarly, the question whether damages is classified as substance or procedure in Australia is not the cornerstone of this article. Therefore, we start from the hypothesis that in both cases (substance and procedure), Australian law exclusively applies.


6 Ibid.


that the enforcement of a judgment awarding exemplary damages following injuries caused by defective products might at one point become necessary in the EU.9

Another situation in which Australian victims might have to seek enforcement in the EU of an Australian ruling awarding exemplary damages can occur in the field of sports. Take the example of a rugby player who tackles an opponent during a professional game in Australia. Those tackles can be committed with the intention to hurt the other player or with disregard for the latter’s safety. Once the victim has filed a law suit to recover the damages he suffered following such a deliberate act, it is conceivable that exemplary damages become available.10 Given the unpredictable nature of professional athletes’ careers and the structure of the global rugby market, it is possible that by the end of the suit the tortfeasor has transferred to another club in an EU Member State (think of major rugby nations such as France, Spain, Italy and England11) and that enforcement outside of Australia thus becomes necessary.

Finally, an analogy with decisions in the United States awarding punitive damages is particularly interesting. It is, for instance, not unthinkable that a U.S.-like ‘stiletto case’ or other cases in which visiting foreigners (and more specifically: EU citizens) cause physical injuries to local residents can occur in Australia. In the ‘stiletto case’ of 2014, a Belgian female tourist wounded an American girl at a party in a hotel in New York by stabbing her with her stiletto. The victim brought proceedings in New York, requesting punitive damages in addition to compensation. As the Belgian girl was merely visiting the United States and has since returned to her home country, the necessity of enforcing the judgment in Belgium becomes probable.12 Likewise, reference can be made to a recent Florida jury verdict that hit Gawker Media and its founder with $25 million in punitive damages for publishing a sex tape of ex-pro wrestler Hulk Hogan.13 An EU citizen or a media company with assets in the European Union might also violate an Australian citizen’s privacy when publishing a similar tape. If the Australian court awards exemplary damages in such a case, the plaintiff might have to seek their enforcement in Europe.

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9 See for a discussion of the case infra part III.B.2.
11 These nations are all in the top 10 of the current rugby world ranking (see for more information: <http://www.worldrugby.org/rankings>).
13 This has been reported in several (online) newspapers (e.g. Tamara Lush, ‘Hulk Hogan-Gawker Jury Awards $25M in Punitive Damages’ (22 March 2016) ABS News <http://abcnews.go.com/Entertainment/wireStory/jury-punitive-damages-hogan-sex-tape-lawsuit-37807856>).
The article examines to what extent and under which circumstances exemplary damages would be available in Australia (part II). The answer to this question subsequently paves the way for the far more prominent issue regarding the enforcement of exemplary damages in the EU Member State where the defendant has its assets. The analysis shows that this can be problematic considering that the traditional stance in the EU with regard to the enforcement of exemplary damages is one of hostility and aversion. The article discusses the current position in five important EU Member States, both in terms of size and in terms of economy and export: Germany, England, France, Spain and Italy (part III). The main findings of the article are then summarised in the conclusion (part IV).

II  GENERAL CONSIDERATIONS ON EXEMPLARY DAMAGES IN AUSTRALIA

After a discussion of the notion and availability of exemplary damages in Australia (part A), it is shown that several restrictions exist with regard to awarding such damages (part B). Despite these restrictions, exemplary damages might, nevertheless, become available which makes a study of their enforcement in the European Union highly relevant. Finally, both elements are combined in a concluding framework, which opens the door for a thorough analysis of the enforcement of Australian exemplary damages in the selected EU Member States (part C).

A Use and Availability of Exemplary Damages in Australia

Exemplary damages provide civil plaintiffs with additional monetary relief beyond the value of the harm incurred. They are thus awarded in excess of any compensatory or nominal damages. The remedy transcends the corrective objective of re-establishing an arithmetical equilibrium of gains and losses between the injurer and the injured. The attitude with regard to exemplary/punitive damages in Australia and in several other common law countries such as the United States is quite different than the (current) stance in civil law countries.

In both civil law and common law systems, the victim of a tort committed by another person, a legal entity or the government is entitled to be placed in the situation he or she would have been in had the tort not taken place.17 The tortfeasor must pay damages to compensate for the harm suffered by the plaintiff as a result of the tort. These compensatory damages (also referred to as actual damages) are further categorised into patrimonial and non-patrimonial damages. The former serve to reimburse the plaintiff’s quantifiable monetary losses such as property damage and medical expenses. The latter compensate for non-monetary forms of damage, with physical or emotional pain and suffering and loss of reputation as most common examples.18 Exemplary damages, on the other hand, are not (primarily) intended to compensate the plaintiff for harm done. They extend beyond the amount needed to compensate the victim. In contrast to their acceptance within common law jurisdictions, they are said to be relatively non-existent in civil law countries. Civil law countries in the European Union are wary of exemplary damages as they are administered in civil proceedings but pursue objectives which are traditionally the focus of criminal law. Exemplary damages are also held to be anathema to the principle of strict compensation and are seen as resulting in an unjust enrichment of the plaintiff.19

Several Australian decisions have held that the purpose of exemplary damages is punishment and deterrence. They are awarded to punish the wrongdoer and deter others from behaving in the same way.20 A similar picture emerges when taking a brief comparative look at the United States. The Second Restatement of Torts and Black’s Law Dictionary also define punitive damages as ‘damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future’.21 The U.S. Supreme Court views punitive damages as ‘private fines levied by civil juries to punish reprehensible conduct and to deter its future

19 See in that regard the case law elaborated upon infra in part III.
21 Restatement (Second) of Torts § 908 (1979); Garner, above n 14, 175.
occurrence’. In sum, punitive damages focus on the socio-legal significance of the wrongdoing and on the importance of discouraging its repetition.

However, exemplary damages are not always available in Australia. It is required that the defendant committed a ‘conscious wrongdoing in contumelious disregard of another’s right’. Exemplary damages only apply where the conduct of the defendant merits punishment, which is considered to be the case where his conduct is wanton (e.g. fraud, malice, violence, cruelty or insolence). Australian law does not restrict exemplary damages to any particular section of the law or a specific tort. The remedy is available whenever the plaintiff shows that the defendant acted with contumelious disregard of the former’s rights. It is thus no surprise that exemplary damages have already been awarded for trespass to the person, deceit or defamation. More importantly, exemplary damages are also available in case of negligence but only when the defendant acted consciously in contumelious disregard of the plaintiff’s rights. Consequently, exemplary damages cannot be awarded in a case of alleged negligence when there is no conscious wrongdoing by the defendant. This implies that the question with regard to the availability of exemplary damages will not arise in most cases of simple negligence.

The situation in Australia is once again not surprising within a comparative legal approach. The fact that the defendant has acted in an unlawful manner equally does not suffice for punitive damages to be awarded in the United States. The conduct in question must involve a degree of aggravation. The Restatement of

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23 Quarta, above n 16, 280.
24 In this regard, Legg concludes that as ‘a result there must be something more than a tort for which damages are permissible’ under Australian law (Legg, above n 20, 305).
26 Harvey McGregor, Mayne and McGregor on Damages (Sweet & Maxwell, 1961) 196.
28 Gotanda, above n 25, 408; Kirchengast, above n 20, 100.
Torts emphasises that ‘punitive damages may be awarded for conduct that is outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others’.32 Across the different U.S. states various terminology is employed to express this required high standard of misconduct: ‘egregious’, ‘reprehensible’, ‘bad faith’, ‘fraud’, ‘malice’, ‘outrageous’, ‘violent’, ‘wanton’, ‘wicked’ and ‘reckless’.33 Mere negligence can never form the basis for a punitive damages award.34 Some states allow punitive damages in cases where the tortfeasor’s behavior amounts to gross negligence, but then the negligence must be so gross that there was a conscious indifference to the rights and safety of the plaintiff.35

B Restrictions on the Availability of Exemplary Damages in Australia

Besides the requirement that the defendant’s behaviour needs to qualify as conscious wrongdoing in contumelious disregard of another’s right, there are three other limitations on the availability of exemplary damages in Australia.

Firstly, exemplary damages are not available if the defendant has already been substantially punished for the same conduct in criminal proceedings. This is because the purposes for awarding exemplary damages, namely punishment and deterrence, have already been met if substantial punishment is imposed by criminal law.36

Secondly, there are restrictions with regard to the amount of exemplary damages that can be awarded. Any relevant fact may be considered (e.g. the nature of the defendant’s conduct, the extent of the injury caused by the defendant and the latter’s capacity to pay exemplary damages) to establish the amount of exemplary damages. The principal focus, however, is on the wrongdoer and not on the wronged party or the tort.37 More importantly, Australia prohibits excessive awards of exemplary damages. In general, an award of exemplary damages is excessive if

32 Restatement of Torts, § 908.
35 Schlueter and Redden, above n 34, 161; Sebok, above n 33, 155.
no reasonable jury could have arrived at the number or if the award is out of all proportion to the circumstances of the case.\textsuperscript{38} In this regard, Gotanda even concludes that ‘Australian courts have expressed concern about the size of punitive damages awards and, as a result, they have insisted that juries be appropriately instructed on the need for restraint and moderation’.\textsuperscript{39}

Thirdly, the ‘power of courts to award punitive damages’ has been restricted in several cases by legal constraints.\textsuperscript{40} Although legislation can explicitly stipulate that courts are allowed to award exemplary damages in specific circumstances,\textsuperscript{41} their availability is subjected to limitations in other fields. For instance, the Defamation Act in New South Wales prevents courts from awarding exemplary damages in defamation claims.\textsuperscript{42} In the field of product safety, Section 87ZB of the Australian Consumer Law, which applies to manufacturers of goods with safety defects, contains one of the most important limitations. The Section stipulates that a court is not allowed to grant exemplary damages or aggravated damages in respect of death or personal injury.\textsuperscript{43} The prohibition applies to negligently and intentionally caused personal injury.\textsuperscript{44} Although Section 87ZB does not apply to all sections of the ACL,\textsuperscript{45} it includes Division 2 of Part 3.5. of the ACL dealing with defective goods actions against manufacturers.\textsuperscript{46} Consumers thus need to find recourse in other grounds to claim exemplary damages from the manufacturer. This is once again quite challenging. All the Australian Parliaments, for instance, enacted Tort Reform legislation, which imposes tests for the availability of damages and caps on their quantum.\textsuperscript{47} The Northern Territory Parliament even prohibited ‘exemplary damages in respect of a personal injury’.\textsuperscript{48} Several other States have implemented legislation which places limits on the award of exemplary damages under the tort of negligence. In Queensland, Section 52 of the Civil Liability Act 2003 provides that a court cannot award exemplary damages in

\textsuperscript{38} Coyne v Citizen Finance Ltd (1991) 172 CLR 21 1, 238 as referred to in Legg, above n 20, 306. See on the discussion of the amount of exemplary damages: Tilbury and Luntz, above n 3, 789-792.

\textsuperscript{39} Gotanda, above n 25, 410-411 with further references in footnote 111.

\textsuperscript{40} Mendelson, above n 30, 158.

\textsuperscript{41} See in this regard the discussion and references infra in footnote 66 to the new Commonwealth Act that would provide for a statutory cause of action for serious and intentional invasions of privacy.

\textsuperscript{42} Defamation Act 2005 (NSW) s 35 as reported in https://www.alrc.gov.au/publications/11-remedies-and-costs/exemplary-damages#_ftn32

\textsuperscript{43} Competition and Consumer Act 2010 – Schedule 2 (Australian Consumer Law), s 87ZB.

\textsuperscript{44} Mendelson, above n 30, 158.

\textsuperscript{45} Section 87ZB (2) of the ACL stipulates that the ‘section does not affect whether a court has power to award exemplary damages or aggravated damages: (a) otherwise than in respect of death or personal injury; or (b) in a proceeding other than a proceeding to which this Part applies’.

\textsuperscript{46} Katy Barnett and Sirko Harder, Remedies in Australian Private Law (Cambridge University Press, 2014) 324.

\textsuperscript{47} Mendelson, above n 30, 158.

\textsuperscript{48} Personal Injuries (Liabilities and Damages) Act 2003 (NT), s 19 as reported in Mendelson, above n 30, 158.
relation to a personal injury claim unless the act causing injury was an unlawful intentional act done with intent to cause personal injury. Some States (e.g. New South Wales and the Northern Territory) even went further and abolished exemplary damages for negligence claims. At the same time, there are States (e.g. Tasmania, Southern Australia and Western Australia) where legislation dealing with civil liability does not (explicitly) refer to exemplary damages in relation to either intentionally or negligently inflicted personal injuries. This implies that exemplary damages might still be available for negligence in those states and governed by common law.

C Exemplary Damages Down Under Before the Enforcement in the European Union?

Australian legislation can impose restrictions on the amount or availability of exemplary damages in Australia. Moreover, the award of exemplary damages in case of mere negligence raises ‘difficult questions’. The defendant’s conduct must have been deliberate in order for exemplary damages to be awarded. This is not always required in cases of simple negligence. In this regard, Australian courts have ruled that exemplary damages are not limited to intentional torts but that the defendant’s action must be reckless or deliberate before liability for exemplary damages for non-intentional torts such as negligence can be imposed. Exemplary damages can be granted if the defendant had a conscious appreciation of the risk and was subjectively reckless. A defendant must have engaged in conscious

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50 New South Wales, Civil Liability Act 2002 (NSW), s 21.

51 Personal Injuries (Liabilities and Damages) Act 2003 (NT), s 19.


53 Civil Liability Act 2002 (Tas).

54 Civil Liability Act 1936 (SA), s 70 (2).

55 Civil Liability Act 2002 (WA), s 6(1); Civil Liability Act 2002 (WA), s 3A(1)(a) and (b).

56 Barnett & Harder, above n 46, 317 with references in footnote 88.

57 Mendelson, above n 30, 159; Ian R. Freckelton and Kerry Anne Petersen, Disputes and Dilemmas in Health Law (Federation Press, 2006) 402.

58 Barnett & Harder, above n 46, 317.

59 See in this regard the discussion above in part II.B. See for example: Gray v. Motor Accident Commission (1998) 196 C.L.R. 1, 9-10 & 27-29 as reported in Barnett & Harder, above n 46, 317. See for a discussion of exemplary damages in case of negligence: Mulheron, above n 29, 69 concluding that following the decision in Gray ‘the High Court confirmed that there may be rare cases, framed in negligence, in which the defendant can be shown to have acted consciously in contumelious disregard of the rights of the plaintiff’.

60 Barnett and Harder, above n 46, 317 with references in footnote 88.
wrongdoing or must have acted with contumelious disregard of the plaintiff’s rights.\textsuperscript{61} Although it remains challenging for plaintiffs to establish such behaviour, exemplary damages might, nevertheless, become available under the examples previously mentioned.

This situation can, for instance, present itself in cases of defective products imported from the EU into Australia. In the PIP case, the founder and former CEO Jean-Claude Mas of the French company admitted filling the implants with an unapproved homemade recipe made of industrial-grade silicone gel. Mas and four PIP executives, including the chief financial officer, have recently been charged with aggravated fraud by a French court.\textsuperscript{62} Such charges can amount to conscious wrongdoing or behaviour with contumelious disregard of the plaintiff’s rights. In this regard, the American \textit{Ford Pinto} case illustrates that it is not unthinkable that exemplary damages become available if a manufacturer knows that its products are defective. The driver of a Ford Pinto was killed when the car exploded after a rear-end collision and his passenger was badly burned and scarred for life. The jury’s original punitive damages verdict amounted to $125 million. This award was reduced on appeal to $3.5 million. The plaintiffs alleged that the car’s design allowed its fuel tank to easily be damaged in the event of a rear-end collision resulting in an explosion. Ford was aware of this design flaw and the corresponding risk but failed to undertake an $11 repair as it reasoned that it would be cheaper to pay off possible lawsuits for resulting deaths.\textsuperscript{63}

Similarly, a professional rugby player’s assault of an opponent during a sports game might be qualified as conduct with contumelious disregard of the plaintiff’s rights. In \textit{Rogers v. Bugden}, for instance, the defendant was found to have assaulted Rogers during a rugby match. The trial judge found that Bugden had delivered a blow to Rogers’s head with his forearm. It ruled that the assault was done deliberately with the intent to hurt and that it constituted an infringement of the

\begin{itemize}
  \item \textsuperscript{63} \textit{Grimshaw v. Ford Motor Co.}, 119 Cal.App.3d 757, 174 Cal. Rptr. 348 (1981) as discussed by Andrew Morrison and Mary Sheargold, ‘“The reports of my death are greatly exaggerated”: Exemplary damages in Australia’, (10 December 2007) \textit{Clayton Utz, Product Risk Insights} <www.claytonutz.com/publications/newsletters/product_risk_insights/20071210/the_reports_of_my_death_are_greatly_exaggerated_exemplary_damages_in_australia.page>. This phenomenon is referred to as a ‘lucrative wrong’ (‘faute lucrative’ in French). Punitive damages are a tool to combat such behaviour and to convey the message to the wrongdoer and to the public at large that ‘tort does not pay’.
\end{itemize}
rules of the game. An appeal to the Court of Appeal in New South Wales was dismissed and damages were even increased. Bugden was eventually ordered to pay $79,154.60, which included $7500.00 in exemplary damages.64

Finally, the dissemination of a sex tape by a publisher in the EU involving an Australian citizen might be qualified as an exceptional circumstance, which both seriously and intentionally or recklessly infringes the plaintiff’s privacy. In this regard, the proposal for a new Commonwealth Act that provides for a statutory cause of action for serious and intentional invasions of privacy is particularly topical.65 The Australian Law Reform Commission proposed that a court should be given discretion to award exemplary damages in exceptional circumstances. If the court does indeed decide to grant exemplary damages for the publication of such a tape infringing the privacy of an Australian citizen, the question of enforcement in the EU becomes particularly relevant.66

III ENFORCEMENT OF AUSTRALIAN EXEMPLARY DAMAGES IN THE EUROPEAN UNION

Once a final judgment has been rendered in Australia, the subsequent step is to obtain payment through the execution of the judgment. If the defendant does not have any (or insufficient) assets in Australia, enforcement of the judgment within the EU might become necessary. The venue for enforcement can be located in the EU Member State where the defendant has its seat or in any other Member State where the individual or company holds property (in the broadest sense of the word).

The compensatory damages awarded in Australia will generally not pose any problems in terms of enforcement in the European Union.67 The exemplary damages granted by the Australian court, however, are a far more tricky issue given the divergent views on the exequatur of exemplary/punitive damages within the European Union. Traditionally, the European Member States have exhibited an attitude of distrust and antipathy towards exemplary/punitive damages. However,

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67 Enforcement could of course be rejected for reasons of procedural public policy such as a violation of the rights of defence.
judicial decisions in Spain and France indicate an increased openness for this controversial remedy.

In this article, we discuss the enforcement chances of exemplary damages in five EU countries: Germany, Italy, Spain, France and England. The selection of these five Member States is inspired by two considerations. First, over 60% of the European Union’s population lives on the territory of any of these five nations. Moreover, these countries represent the five largest economies of the European Union. Second, in an area of law where the available case law is sparse, Italy, Germany, France and Spain are particularly interesting because the Supreme Courts of those countries have decided on the issue of the enforceability of (American) punitive damages. Their approaches represent the different sides of the spectrum. England is also included because of its familiarity with exemplary damages. As English law provides for exemplary damages, it is interesting to get acquainted with its private international law position on foreign exemplary damages.

It should be noted that the cases discussed below all originated in the United States. In the five EU Member States that fall within the scope of this article courts have, at least as far as the reported case law is concerned, thus far only had to deal with American awards for punitive damages. The inferences that can be drawn from these decisions are, nevertheless, equally valid for Australian awards for exemplary damages. Therefore, the references to punitive damages in the following paragraphs should be read as applying to exemplary damages as well unless indicated otherwise.

First, the pivotal mechanism of (international) public policy is discussed. The (international) public policy exception plays a crucial role in the enforcement process as it is the argument used to deny exequatur to punitive damages awards (part A). Subsequently, the judgments of the German and Italian Supreme Court with regard to the enforcement of punitive damages are scrutinised. The Supreme Courts of both Germany and Italy have demonstrated a negative stance toward American punitive damages (part B). Conversely, decisions of the Spanish and French Supreme Courts provide for a much more tolerant attitude toward such

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70 *Rookes v. Barnard*, [1964] 1 All E.R. 367, 410-11 (H.L.) (punitive damages can be awarded in three categories of cases: abuses of power by government officials, torts committed for profit or express statutory authorisation).
damages, although the openness is by no means unbridled (part C). Finally, the situation in England, the birthplace of common law punitive damages, is elaborated upon. Despite the current legal uncertainty, the outlook tends be more positive than negative (part D).

A International Public Policy Exception

There is no treaty between the European Union and Australia arranging for the mutual recognition and enforcement of judgments. Individual Member States equally have not concluded bilateral or multilateral conventions with Australia. The only exception is the United Kingdom (of which England forms a part). There is an Agreement regarding reciprocal recognition and enforcement of civil and commercial judgments between the UK and Australia but this instrument does nothing more than enumerating the legislation under which each party recognizes and enforces the judgments of the other nation. The recognition and enforcement of Australian decisions in the examined EU Member States is, therefore, governed by the respective countries’ national rules of private international law.

The decision whether to grant enforcement to Australian awards of exemplary damages or to refuse it boils down to the question whether exequatur of the award would be compatible with the public policy of the requested forum. Contrariety to public policy is a ground for refusal in all five selected EU Member States. The notion of public policy should, however, be understood as international public policy.

In private international law, we deal with a more restricted form of public policy, namely international public policy. A legal system is required to be more tolerant in cross-border matters than in purely domestic affairs. International

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71 Gotanda, above n 25, 398.
public policy is, despite its name, a purely national concept.\(^{75}\) It contains those fundamental rules of internal public policy that a legal system wants respected in international cases as well.\(^{76}\) International cases thus trigger the more narrow concept of international public policy. This is the appropriate yardstick when dealing with cases which are not purely domestic.

It is under the umbrella of this (international) public policy exception that the enforceability of foreign punitive damages is assessed and objections against punitive damages are formulated. The (international) public policy mechanism thus plays a pivotal role in the case law elaborated upon below. Unfortunately, courts and scholars sometimes fail to make the appropriate distinction between public policy and the narrower concept of international public policy. More often, they realise the existence of a division but, nevertheless, muddy the waters by also employing the term public policy when referring to international public policy. The terminological confusion, however, does not weaken the messages the national courts want to convey in their respective judgments.

**B Traditional Hostility**

In the European Union several countries have rejected the enforcement of U.S. punitive damages based on the conservative view that such damages are a violation of (international) public policy. These jurisdictions include Germany (part 1) and Italy (part 2).

1 *A Clear German ‘Nein’*

When it comes to the enforcement of foreign punitive damages, a loud ‘Nein!’ resonates throughout the German legal system. In Germany, the Supreme Court has put forward the idea that punitive damages are contrary to public policy and should thus be prohibited from entering the German legal order via a foreign judgment (part a). It has, however, left the door open for punitive damages to the extent that they pursue a compensatory function (part b).

(a) *Principled Refusal*

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\(^{76}\) Amaury S. Sibon, ‘Enforcing Punitive Damages Awards in France: Facing Proportionality within International Public Policy’ <http://ssrn.com/abstract=2382817>. Both concepts can be visualised as two concentric circles, with domestic public policy being the larger of the two. All principles belonging to international public policy also have domestic public policy status but not vice versa.
The first landmark case on the enforcement of punitive damages took place in Germany. The German Supreme Court’s decision in John Doe v. Eckhard Schmitz of 4 June 1992 exemplifies the European courts’ deeply ingrained disapproval of punitive damages. The Bundesgerichtshof’s judgment denied enforcement of the punitive damages portion of a California judgment on the basis of the public policy clause of article 328 (1), 4 of the German Code of Civil Procedure.

The case involved a fourteen year old boy, a California resident, who had been the victim of sexual abuse. The defendant, also living in Stockton, California, had been sentenced in California to a lengthy prison term for the sexual misconduct. The victim sought to recover damages from the culprit. Before the case was tried before the civil courts, the perpetrator, who had dual (American and German) citizenship, fled to Germany where he owned property. He did not appear in the civil case and left no property in California. The California Superior Court (County of San Joaquin) awarded the victim USD 150,260 for past and future medical expenses. For anxiety, pain and suffering the Court held an amount of USD 200,000 to be appropriate. In addition to these compensatory damages, the culprit had to pay USD 400,000 in punitive and exemplary damages. The California Court ruled that 40% of the entire award represented the plaintiff’s lawyer’s fees. The lack of any assets in the U.S. forced the victim to enforce the judgment against the perpetrator’s assets in Germany. During these enforcement proceedings the question arose as to whether a decision containing a punitive award could be enforced on German territory. This issue had never been addressed before as previous awards against German parties did not need to be enforced in Germany because the defendants had sufficient assets in the U.S.

At the first instance level, the judgment was allowed complete enforceability in Germany by the Landgericht Düsseldorf. On appeal, the Oberlandesgericht (Court of Appeal) Düsseldorf confirmed this decision with regard to the medical expenses but rejected the USD 200,000 for pain and suffering on the basis that it was excessive in light of German public policy. It reduced the award to USD

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78 Tolani, above n 18, 186.

79 Zekoll, above n 79, 656.

70,000. The Court also limited the punitive damages award to USD 55,065, an amount the Court believed represented acceptable lawyer’s fees awarded in the guise of punitive damages.81

The Bundesgerichtshof upheld the lower courts’ ruling on the medical expenses. However, it reversed the appellate court’s decision regarding the damages for pain and suffering and the punitive damages. The Court accepted the full USD 200,000 for pain and suffering but rejected the punitive award in its entirety on the basis of the public policy clause.82 In addressing the fate of the punitive award, the German Supreme Court stated that a foreign judgment awarding lump sum punitive damages of a not inconsiderable amount in addition to the damages for material and immaterial losses generally cannot be enforced in Germany.83 The judgment was thus declared enforceable for an amount of USD 350,260.

The Court then elaborated on the reasons why the punitive damages awarded to the American plaintiff violated the public policy standard. These arguments led the Bundesgerichtshof to the conclusion that the punitive damages were unenforceable because they violated essential fundamental principles of German law. The German private law system provides compensation for damage suffered but does not intend an enrichment of the victim.84 The Court held the legal principle of awarding the victim damages with the sole purpose of reimbursing what he has lost to be a fundamental principle of German law.85 Punishment and deterrence, the main objectives pursued by punitive damages, are aims of criminal law rather than of civil law. Punitive damages allow a plaintiff to act as a private public prosecutor. This interferes with the state’s monopoly on penalisation. Besides, the defendant cannot rely on the special procedural guarantees provided for in criminal law.86

The Bundesgerichtshof noted the existence of a penal institution within German civil law. Contractual penalties provide for punishment in civil law.87 This

84 Wolfgang Kühn, ‘Rico Claims in International Arbitration and their Recognition in Germany’ (1994) 11 Journal of International Arbitration 37, 44.
87 Article 340-341 BGB (German Civil Code).
finding could have dismantled the civil-criminal division that the Court embraced and could have created an opening for punitive damages. However, contractual penalties originate from a legal agreement between parties and are, therefore, irrelevant in the eyes of the German Supreme Court.88

It was further held that the core aims of punitive damages, punishment and deterrence, cannot be compared with the function of satisfaction or gratification ("Genugtuungsfunktion"). The latter function is a component in the assessment of damages for pain and suffering in cases of bodily harm.89 Damages for pain and suffering are meant to compensate the plaintiff but also to satisfy his feelings.90 The Genugtuungsfunktion addresses the victim’s need for (legal) redress after having been violated.91 The Bundesgerichtshof denounced the idea that the punitive award could be enforced because it could be viewed as comparable to the Genugtuungsfunktion.92 It stated that the primary factor in the assessment of damages is not the function of satisfaction but rather the degree and duration of the pain and suffering. Furthermore, because the function of satisfaction is inextricably linked with the function of compensation, the Genugtuungsfunktion does not give the damages for pain and suffering an immediate penal effect.93 The German Supreme Court specified that punitive damages would be enforceable if they are intended to compensate for immaterial damage. The general amount awarded on top of the tangible and intangible damages, however, does not correspond to the Genugtuungsfunktion. The latter had already been served by the separate award for pain and suffering.94 We agree with the reasoning of the Bundesgerichtshof on this point. The Genugtuungsfunktion should be viewed as a representation of the plaintiff’s interest in the preservation of his subjective rights. A violation of that interest leads to an autonomous injury which requires compensation.95

Finally, the Bundesgerichtshof developed the argument that enforcement of the punitive damages award should be rejected because their availability in the U.S. and subsequent enforcement in Germany would put foreign creditors in a better position than domestic creditors. The former would be able to gain access to the

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89 Article 253 BGB; BGH 29 November 1994, BGHZ 128, 117; Nettetesheim and Stahl, above n 88, 421.
91 Stiefel, Stürner and Stadler, above n 92, 794; Nettetesheim and Stahl, above n 88, 421.
92 Nettetesheim and Stahl, above n 88, 421.
95 Jansen and Rademacher, above n 88, 79-80.
assets of German debtors to a considerably greater extent than the latter would be able to, even if the latter had suffered more damage. The fact that foreign creditors can obtain punitive damages leads, according to the Court, to a lack of equal treatment.\textsuperscript{96,97} It thus seems that the \textit{Bundesgerichtshof} tried to protect the German industry from U.S. litigation.\textsuperscript{98} The Court also pointed to the significant economic consequences on the insurance industry resulting from excessive punitive damages.\textsuperscript{99}

We can turn the reasoning of the \textit{Bundesgerichtshof} around and look at the policy-oriented argument from the point of view of an American competitor of the German judgment debtor. We can wonder why the German debtor (who is active on the American territory) should receive immunity from liability for punitive damages incurred in the United States whereas an American market participant cannot escape this liability. Furthermore, the enforcement of American pain and suffering awards seems to be unproblematic in Germany, even if they are substantially larger than the amounts German courts would grant. This would make the foreign creditor better off than the domestic one but the Court does not make mention of this scenario.\textsuperscript{100} This line of thought applies \textit{mutadis mutandis} to Australian exemplary damages. It seems difficult to justify that German (and by extension European) companies which place their products on the Australian market would be shielded from claims for exemplary damages by Australian consumer while at the same time Australian companies would be held liable for such damages on the basis of the same type of behaviour.

The \textit{Bundesgerichtshof} also noted that the application of the public policy clause requires a strong link between the facts of the case and the forum where enforcement is sought.\textsuperscript{101} For the public policy exception to apply a connection between the case and the requested state is needed. This connection is referred to as \textit{Inlandsbeziehung} or \textit{Inlandsbezug}. The weaker the connection, the less likely the exception will apply and the more likely enforcement will be granted.\textsuperscript{102} If the connection to the forum country is low, that country has less interest in a close

\textsuperscript{96} BGH 4 June 1992, \textit{NJW} 1992, 3104.
\textsuperscript{101} BGH 4 June 1992, \textit{BGHZ} 118, 348.
\textsuperscript{102} Requejo Isidro, above n 99, 245-246.
policing of its public policy. In John Doe v. Eckhard Schmitz, there was no close connection to Germany. The crime was committed in the U.S. The young victim was a U.S. citizen. The perpetrator had dual citizenship but had only moved to Germany after being convicted of the crime. Under these circumstances one would expect the public policy exception to be more restrained. The rejection of punitive damages despite the slight connection of the case to the forum indicates a strong German antipathy towards this type of damages. Australian lawsuits for defective products on the Australian market have a weak factual link to the German territory. The judgment of the Bundesgerichtshof, however, learns that a low level of connection does not prevent a fully-fledged application of the public policy. The rejection in Germany of exemplary damages granted in Australia is thus highly likely.

Although the finding of incompatibility with public policy was reason enough to reject the punitive award, the Supreme Court, nevertheless, continued its analysis. It looked at the punitive damages to determine whether they would pass the proportionality test. This principle gives German courts the responsibility to ensure that a damage award does not exceed the amount needed to compensate the injured party. The Court did emphasise the compensation of the victim as the sole appropriate aim of a civil action. It expressed its disapproval of sums of money imposed on top of the compensation for damages. Such an approach would leave no room for any amount of punitive damages. However, the Court found that enforcement of the punitive damages award in the case before it would be excessive because the punitive damages awarded are higher in amount than the sum of all the compensatory damages. This statement leads us to believe that the Bundesgerichtshof views a 1:1 ratio between compensatory and punitive damages as the maximum allowed. This opinion was merely academic for the John Doe v. Eckhard Schmitz case. However, the Bundesgerichtshof’s opinion on proportionality will prove to be crucial if the compatibility of punitive damages with (German) international public policy can be demonstrated. Indeed, if the compatibility of the concept of punitive damages with international public policy can be demonstrated, the excessiveness check is the only obstacle remaining before

103 Baumgartner, above n 79, 205, footnote 189.
106 Nettesheim and Stahl, supra n 88, 423-424.
108 In our opinion the French Cour de Cassation adopted the same 1:1 ceiling 18 years later in Fountaine Pajot (see the discussion infra in part III.C.2.).
the judgment can be enforced. The Bundesgerichtshof’s judgment gave no explicit indication as to the consequences of a finding of excessiveness for the enforcement of the non-excessive part of the punitive damages award, although it did mention that a court should not cut up the punitive award at its own free discretion.

(b) An Opening for Exemplary Damages Pursuing Compensation

The Bundesgerichtshof carved out an exception to the unenforceability of punitive damages. It ruled that it would allow the enforcement of punitive damages if and to the extent that the punitive award serves a compensatory function. Punitive damages in the U.S. can, perhaps surprisingly, serve a compensatory function. The underlying idea is that punitive damages can offer compensation for injuries that were not fully redressed by compensatory damages. In recent years scholars have rediscovered the value of punitive damages in forcing wrongdoers to reimburse the victim for all losses suffered. It is possible that material and/or legal obstacles prevent the recovery of full compensation. The impossibility to prove the extent of the loss sustained can, for instance, be classified as a material obstacle.

It was to this example that the German Supreme Court most notably referred in its judgment. Under the U.S. system, the prevailing party cannot recoup legal costs from the losing party. In the United States system each party is responsible for its own attorney’s fees, except if specific authority granted by contract or statute allows the recovery of these costs. Whereas the winning party in a litigation in almost every Western democratic country can recover the attorneys’ fees from the losing side, the American rules do not allow such transfer of costs. The Bundesgerichtshof, however, refused to accept that one of the reasons for

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109 Interestingly, in its decision the Bundesgerichtshof rejected punitive damages of ‘a not inconsiderable amount’. This is surprising because the amount should have been irrelevant to the German Supreme Court, given that the non-compensatory nature of the remedy alone was enough to refuse enforcement: Behr, above n 85, 159. It might indicate an opening for punitive damages after all.

110 BGH 4 June 1992, NJW 1992, 3104. Likewise, the French Supreme Court in Fountaine Pajot seems to have decided that the exceeding of the maximum ratio leads to the rejection of the whole punitive award (see the discussion infra in part III.C.2).


114 The Federal Magnuson-Moss Warranty Act forms one of the many exceptions to the default rule. It allows the prevailing consumer to obtain reimbursement of the reasonable legal costs.
awarding punitive damages is invariably the shifting of the victorious party’s legal costs onto the losing party.\textsuperscript{115}

Rather than acknowledging an automatic fee shifting intention in every punitive award, the German Supreme Court required that the foreign judgment clearly indicates the (partly) compensatory purpose of the punitive award.\textsuperscript{116} Unless the foreign court provides clear and comprehensible information itself, the German enforcing court cannot ascertain the motives behind the award, as doing so would run counter to the prohibition of \textit{révision au fond} laid down in article 723, (1) of the German Code of Civil Procedure. The \textit{Bundesgerichtshof} did not find any reliable information in the California judgment or in the transcript to support the finding that the punitive damages were intended to cover the legal costs incurred by the plaintiff. Although the American court had awarded 40\% of the judgment to the plaintiff’s lawyer, the German Supreme Court argued that, since the 40\% related to the \textit{entire} judgment, it could not exclude the possibility that the sums paid as compensatory damages – which the \textit{Bundesgerichtshof} appeared to find generous – already included an element addressing those costs.\textsuperscript{117,118} The \textit{Bundesgerichtshof} therefore could not deviate from the conclusion that the punitive award in its entirety should be rejected.\textsuperscript{119}

The exception for legal costs is unlikely to be of great importance for Australian judgments granting exemplary damages as the sole purpose of exemplary damages in Australia is punishment and deterrence.\textsuperscript{120} Moreover, as Australia does not follow the American rule on distribution of costs\textsuperscript{121} but instead gives courts the power to award costs in civil proceedings at their discretion\textsuperscript{122}, there is no corresponding need to circumvent a prohibition on transfer of costs through the guise of exemplary damages.

\textsuperscript{115} Hay, above n 102, 747; BGH 4 June 1992, \textit{NJW} 1992, 3103.
\textsuperscript{116} Zekoll, above n 79, 657.
\textsuperscript{117} Nagy, above n 106, 8.
\textsuperscript{118} BGH 4 June 1992, \textit{NJW} 1992, 3103.
\textsuperscript{120} Francis Trindale and Peter Cane, \textit{The Law of Torts in Australia} (Oxford University Press, 1985) 243; Mendelson, above n 30, 148; Legg, above n 20, 304.
\textsuperscript{121} Mary V. Capisio and Henry Cohen, \textit{Awards of Attorneys Fees by Federal Courts, Federal Agencies \& Selected Foreign Countries} (Nova Science Publishers, 2002) 137.
2 Similar Rejecting Attitude in Italy

In the first Italian case dealing with the enforcement of American punitive damages, the Italian Supreme Court (Corte di Cassazione) took the same stance as the German Bundesgerichtshof. The decision of the Italian Supreme Court centred around the public policy exception found in article 64, g) of Law Number 218 of 31 May 1995.123

The matter originated in the U.S. state of Alabama. In September 1985, fifteen year old Kurt Parrott got involved in a traffic accident in the city of Opelika, Alabama. A car did not give way and hit the boy’s motorcycle, causing him to be thrown off his bike. The buckle of his helmet failed and his unprotected head hit the pavement, resulting in instant death. His mother, Judy Glebosky, sued the driver, the American distributor of the helmet as well as some additional defendants for the amount of USD 3 million before the District Court of Jefferson County in Alabama. Fimez SpA, the Italian manufacturer of the helmet, was later also brought into the proceedings. At trial all parties agreed to a settlement, the amount of which remains undisclosed. Fimez SpA, however, had abandoned the case before this settlement agreement. In a judgment of 14 September 1994 the District Court of Jefferson County in Alabama held the defendant liable for the negligent design of the defective crash helmet.124 The District Court awarded the victim’s mother USD 1 million in damages, without further specification.125

When the case reached Italy’s highest court in 2007, the Corte di Cassazione first explained that the classification of the USD 1 million damages depends on the facts of the individual situation. This analysis is left to the Court of Appeal whose factual finding cannot be reserved.

The Court of Appeal of Venice had found that the foreign judgment lacked a rationale, making it impossible to understand the grounds on which the amount was awarded, the nature of the damages recovered and the basis for the recovery of damages. It was, therefore, unable to establish and assess the criteria used by the Alabama Court to qualify the nature of the damages awarded and to quantify those damages. This led the Venice Court to the conclusion that the damages awarded

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124 The District Court had already rendered the USD 1 million award in a non-final decision of 1 April 1991 or 1 January 1991 (the Venice Court of Appeal’s judgment mentions both dates throughout its text). The judgment of 14 September 1994 confirmed the previous order, declared it final and added reasons for it.
were punitive in nature, even though the U.S. Court did not expressly qualify them as such.\textsuperscript{126}

The Venice Court of Appeal must have been unaware of the exact meaning of the Alabama wrongful death statute,\textsuperscript{127} which applied in this case.\textsuperscript{128} Under this unique rule the descendants or heirs are only allowed to recover punitive damages for wrongful death. Compensatory damages are not available. The Alabama Supreme Court, however, explained that the remedy serves multiple functions.\textsuperscript{129} It provides a ‘mere solatium to the wounded feelings of surviving relations, [or] compensation for the [lost] earnings of the slain’\textsuperscript{130} but it also aims ‘to prevent homocides’\textsuperscript{131} by making the amount of damages dependent on ‘the gravity of the wrong done’\textsuperscript{132}\textsuperscript{133}. It was, therefore, clear that the award rendered against Fimez SpA pursued a compensatory objective, in addition to the sanctioning and deterring purposes.\textsuperscript{134} The Venice Court did not consider this and instead seems to have based the penal classification of the judgment on the amount awarded.\textsuperscript{135} This judicial mistake, nevertheless, does not affect the Venice Court’s message as to the unacceptability of punitive damages. Besides, in light of the Alabama wrongful death statute, the American court would have probably classified the damages as punitive if it had decided to label the damages it awarded.

Although it could not have intervened even if it wanted to, the Supreme Court indicated that the Venice Court of Appeal’s finding of a violation of public policy seemed justified in this case. The Supreme Court is only entitled to reverse matters of law such as a different definition of public policy. However, the Supreme Court did not find fault with the interpretation of public policy rendered by the Venice Court.\textsuperscript{136}

\begin{thebibliography}{99}
\bibitem{127} Alabama Code § 6-5-410 (1975).
\bibitem{128} Quarta, above n 16, 276.
\bibitem{130} Savannah & Memphs Railroad v. Shearer, 58 Ala. (1877), 680.
\bibitem{131} South & North Alabama Railroad v. Sullivan, 59 Ala. (1877), 278.
\bibitem{132} Estes Health Care Ctrs Inc v. Bannerman, 411 So2d (1982), 113.
\bibitem{133} Quarta, above n 132, 6-7.
\bibitem{134} Quarta, above n 16, 276; Quarta, above n 132, 7.
\bibitem{135} Requejo Isidro, above n 99, 248; Nagy, above n 106, 7.
\end{thebibliography}
The Supreme Court further disagreed with the appellant’s contention that the U.S. decision did not violate public policy because the Italian liability system contains several legal institutions such as penalty clauses and moral damages, which pursue punitive objectives.

It held that penalty clauses are not punitive in nature and do not have a retributive aim. They serve to strengthen a contractual relationship and quantify damages in advance. The Supreme Court noted that the amount of the contractual penalty can be reduced if the judge finds an abuse of the parties’ freedom of contract contrary to the principle of proportionality. It concluded that penalty clauses cannot be compared to punitive damages, despite the penalty being due regardless of proof of the damage suffered and a strong correlation with the extent of the damage. Punitive damages are an institution that is not only connected to the tortfeasor’s conduct and not to the damage suffered but is also unjustifiably disproportional to the harm actually incurred.\(^{137}\)

The Court rejected the suggested equivalence between punitive damages and moral damages as well. Moral damages reflect a loss suffered by the victim and recovery is based on that loss. The focus of moral damages lies on the injured party, not on the wrongdoer. Compensation is the primary objective of moral damages whereas in the case of punitive damages there is no relation between the damages awarded and the harm incurred.\(^{138}\)

According to the Italian Supreme Court, damages in private law are unrelated to the idea of punishment or to the wrongdoer’s misconduct. These damages are intended to restore damage incurred by the injured party by eliminating the consequences of the inflicted harm through the award of a sum of money. This is true for every type of civil damages, moral damages included, which are not influenced by the victim’s conditions and the wrongdoer’s wealth but require concrete and factual evidence of the loss suffered.\(^{139}\) In other words, Italy’s highest court made a clear distinction between compensatory and punitive damages, with absolutely no room for overlap whatsoever. Compensatory damages, such as moral damages, focus on the victim, relate to his or her loss and intend to make him or her whole. Punitive damages, on the other hand, centre around the wrongdoer’s

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behaviour, are not connected to the damage suffered, and pursue the punishment of the tortfeasor.

In sum, the Supreme Court dismissed the analogy between penalty clauses and moral damages on the one hand and punitive damages on the other, as had the German Supreme Court in *John Doe v. Eckhard Schmitz*. It confirmed the Venice Court of Appeal’s view that punitive damages are in violation of public policy and declined to enforce the Alabama USD 1 million award.\(^{140}\) As a result, the plaintiff was left without any compensation. It has been argued that such an outcome is inconsistent with Articles 24 and 25\(^{141}\) of the Italian Constitution and contrary to public policy.\(^{142}\) Furthermore, given the Court’s reasoning, there should be no doubt about the enforcement of compensatory damages. As long as the compensatory damages are clearly distinguished from the punitive damages, the enforcement should not pose any public policy concerns.\(^{143}\)

The Italian Supreme Court affirmed its position in a judgment of 8 February 2012.\(^{144}\) The Middlesex Superior Court in Massachusetts had ordered an Italian company to pay USD 8 million to an employee who had suffered injuries in an accident at the Italian corporation’s U.S. subsidiary. The judgment did not mention punitive damages nor the criteria used to quantify the award. As was the case in *Fimez*, the Italian courts were confronted with a global award without further specification or demarcation. The Court of Appeal of Turin declared the whole award enforceable because the judgment did not refer to punitive damages and the amount was reasonable and fair in light of the seriousness of the employee’s injuries. The Supreme Court, however, overturned the Court of Appeal’s decision. It yet again labelled the damages as punitive in nature despite the fact that the U.S. judgment never discussed punitive damages. The Court reiterated that the Italian civil liability system is strictly compensatory and not punitive. The USD 8 million

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\(^{141}\) Article 24 provides: ‘Anyone may bring cases before a court of law in order to protect their rights under civil and administrative law. Defense is an inviolable right at every stage and instance of legal proceedings. The poor are entitled by law to proper means for action or defense in all courts. The law shall define the conditions and forms of reparation in case of judicial errors.’ Article 25 reads: ‘No case may be removed from the court seized with it as established by law. No punishment may be inflicted except by virtue of a law in force at the time the offence was committed. No restriction may be placed on a person’s liberty save for as provided by law.’ English translation available at <https://www.senato.it/documenti/repository/istituzione/costituzione_inglese.pdf>.

\(^{142}\) Nagy, above n 106, 7; Quarta, above n 132, 8.

\(^{143}\) Nagy, above n 106, 7.

\(^{144}\) Supreme Court 8 February 2012, Soc Ruffinatti v Oyola-Rosado, no. 1781/2012, *Danno resp* 2012, 609.
in damages awarded was thus unenforceable on the basis of the public policy exception.145

In both Germany and Italy the odds of getting an Australian award for exemplary damages enforced are not very high. The Bundesgerichtshof’s willingness to embrace punitive damages with a compensatory purpose seems of little use for Australian exemplary damages.

C More Welcoming Approaches

As exemplified by the jurisdictions of Germany and Italy, the majority of EU countries will not accept punitive damages awards for enforcement. There are, however, EU Member States which adopt a far more receptive attitude toward these extra-compensatory damages. The analysis of the selected countries reveals that both Spain (part 1) and France (part 2) exhibit this new-found stance.

1 Reversing ‘¡No Pasarán!’ in Spain

The Spanish Supreme Court (Tribunal Supremo) was the first to move away from the conservative position displayed in the other European countries.146 In the case of Miller Import Corp. v. Alabastres Alfredo, S.L. of 13 November 2001, the Spanish Supreme Court dealt with a request for enforcement of a U.S. judgment containing punitive damages.147 At the time, the civil division of the Spanish Supreme Court had exclusive jurisdiction over a request for enforcement of judgments coming from abroad.148 Litigation between the plaintiffs Miller Import

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146 At least as far as the countries selected in this article are concerned. In 1999 the Greek Supreme Court (Areopag), for instance, ruled on the enforceability of a Texas judgment awarding punitive damages. The Areopag accepted that punitive damages are not as such a violation of (international) public policy. Instead, it investigated the possible excessiveness of the punitive damages. It found that the punitive award was disproportionate to the compensatory part as the amount of the punitive damages was more than the damage sustained. See: Greek Supreme Court, decision no. 17/1999, Nomiko Bina i Miniaion Nomikon Periodikon 2000, 461-464; Christos D. Triadafillidis, ‘Anerkennung und Vollstreckung von punitive damages – Urteilen nach kontinentalem und insbesondere nach griechischem Recht’ (2002) IPRax 236, 236-238; Marta Requejo Isidro, ‘Punitive Damages: How Do They Look Like When Seen From Abroad?’ in Lotte Meurkens and Emily Nordin, (eds.), The Power of Punitive Damages – Is Europe Missing Out? (Intersentia, 2012) 326; Requejo Isidro, above n 99, 247; Nagy, above n 106, 9.


Corp. (domiciled in the U.S.) and Florence S.R.L. (domiciled in Italy) and defendant Alabastres Alfredo, S.L. (domiciled in Spain) arose before the Federal District Court for the Southern District of Texas (Houston Hall) in Houston. The plaintiffs alleged that the Spanish defendant had infringed intellectual property rights by manufacturing falsified labels of a registered trademark in Spain. In a judgment of 21 August 1998, the American court followed the plaintiffs’ arguments and awarded treble damages.149 Before the Supreme Court the defendant argued, among other things, that enforcement should be refused on public policy grounds.

The section of the Supreme Court’s judgment addressing the punitive damages is at times very confusing and incoherent. It offers very little structure and leaves the reader to find his own way through the vague sentences in an attempt to retrieve the Court’s reasoning. After noting that punitive damages are not acknowledged in Spanish law, the Supreme Court first emphasised that its intent was not to usurp legislative competence in the matter but rather to assess the foreign judgment under substantive public policy as identified by Spanish courts.150

It noted that the Texas money award contained some damages that did not serve a compensatory objective but were more punitive, sanction-like and preventive in nature. The Court classified compensation for injuries as part of (Spanish) international public policy. However, it added that coercive, sanctioning mechanisms are not uncommon in the areas of (Spanish) substantive law, specifically contract law, and procedure. According to the Court, the presence of such punitive mechanisms in private law to compensate the shortcomings of criminal law is consistent with the doctrine of minimum intervention in penal law. This doctrine is embedded in the Spanish legal system and requires the legislature to first counter unwanted conduct by employing less invasive remedial intervention, such as civil penalties. Criminal penalties should only be used as ultimum remedium.151 Furthermore, it is often difficult to differentiate concepts of compensation. The example of moral damages to which the Court refers makes this point clear. Moral damages fulfil a compensatory role (the reparation of moral damage) as well as a sanctioning function and it is not easy to distinguish between the two.152 In Spanish law, a minimal overlap between civil law (compensation)

149 Federal District Court for the Southern District of Texas (Houston Hall) 21 August 1998, unpublished and archived. The exact amount of the treble damages is unknown as it is not mentioned in the judgment of the Spanish Supreme Court.
151 Quarta, above n 132, 10.
152 Nagy, above n 106, 9.
and criminal law (punishment) is thus not completely unknown.153,154 In making their public policy analysis, the Court finally added, courts should not lose sight of the connection between the matter and the (Spanish) forum. This is of course a reference to the theory of *Inlandsbeziehung*, which regulates the strength of the public policy exception according to the case’s proximity to the forum.155 All these reasons led the Court to the revolutionary conclusion that punitive damages as a concept do not oppose public policy.156

This finding, however, did not end the public policy test. The principle of proportionality was the second and final yardstick the award needed to overcome before enforcement could be allowed. The Court considered two elements to be relevant when assessing the (potentially) excessive nature of the treble damages: (1) the predictability of the award and (2) the nature of the interests protected.157

The Court first referred to the fact that the treble damages arose *ex lege*. The legal provisions sanctioning infringements of the intellectual property rights at hand took the intentional character and the gravity of the defendant’s behaviour into account and foresaw a tripling of the amount of compensatory damages. This reliance on the statutory origin of the punitive damages begs the question whether punitive damages developed by case law would be predictable enough for the Spanish Supreme Court.158 In our opinion, the absence of a written provision would not automatically rule out the enforcement of the judgment.159 Whether Australian exemplary damages arise from case law or are based on a statute thus does not matter.

It should be remarked that legality leads to foreseeability but it does not guarantee proportionality. Furthermore, a foreign country’s idea of proportionality may vary from the Spanish legislature’s estimation.160 In any case, Australian exemplary damages should in general pose less problems than American punitive damages judgments when it comes to excessiveness. A 2005 survey of trials in state courts in the United States’ seventy-five most populous counties indicates that in
27% of cases in which punitive damages were awarded the amount granted exceeded USD 250,000. In 13% of the matters the quantum went above USD 1 million.\textsuperscript{161} In contrast, the numbers in Australia are significantly lower. In personal injury cases exemplary damages are modest, often below AUD 10,000 (around USD 7,000).\textsuperscript{162} There have been awards for more than AUD 100,000 (around USD 70,000)\textsuperscript{163} but as far as the authors are aware up until today no multi-million dollar awards have been reported.

As to the second aspect of the proportionality criterion the Court argued that in a market economy the safeguarding of intellectual property rights is important. Moreover, this interest in offering protection to such rights is not strictly local but is shared universally by countries that harbour similar judicial, social and economic values.\textsuperscript{164} The common desire to protect the interests at stake justified the awarding of an amount of twice the compensatory damages on top of the compensation granted.\textsuperscript{165} The importance of the underlying ratio legis will thus determine the outcome of the proportionality analysis.\textsuperscript{166} Other rights of high importance outside the field of intellectual property could for instance be: environmental protection, protection of human rights, freedom, legal certainty and dignity.\textsuperscript{167} With regard to Australian exemplary damages for product liability one could argue that many countries around the world attach importance to the underlying goal of consumer protection. Consumer rights could be added to the category of important rights, triggering a high level of tolerance towards the amount of the Australian exemplary award.

2 France Follows Spanish Openness

In a much anticipated ruling in 2010 in the case \textit{Schlenzka & Langhorne v. Fountaine Pajot}, the French Supreme Court (\textit{Cour de Cassation}) showed a willingness to accept foreign punitive damages awards.\textsuperscript{168} A decade before the judgment, a California couple, Peter Schlenzka and Julie Langhorne, purchased a 56-foot Marquises catamaran from Rod Gibbons’ Cruising Cats USA, an authorised dealer and agent for the French manufacturer, Fountaine Pajot S.A. The

\textsuperscript{162} Tilbury and Luntz, above n 3, 791.
\textsuperscript{165} Jablonski, above n 153, 230.
\textsuperscript{166} Requejo Isidro, above n 149, 328.
\textsuperscript{167} Requejo Isidro, above n 151.
sale price amounted to USD 826.009. At delivery, the couple believed the catamaran to be in excellent condition. However, the vessel had suffered extensive damage in a storm while moored in the port of La Rochelle, where it was manufactured. The seller had not disclosed this information to the buyers and had performed superficial repairs. The structural problems were, however, not resolved and the buyers soon experienced issues with the catamaran.169

On 26 February 2003 the California Superior Court (Alameda County) found in favour of the plaintiffs and awarded USD 1,391,650.12 in actual damages. It further ruled that Fountaine Pajot’s behaviour in relation to the sale amounted to fraud under California law. It determined that USD 1,460,000 in punitive damages would be sufficient to punish and deter the French company without causing financial ruin. Lastly, the court decided to allow an exception to the American rule on attorneys’ fees which states that each party shall bear their own costs, even if they prevail in the law suit. On the basis of the federal Magnuson-Moss Warranty Act170 a victorious consumer may recover reasonable legal costs. The plaintiffs were awarded USD 402,084.33 in attorneys’ fees, bringing the total amount to USD 3,253,734.45.171

The American couple then had to enforce the judgment against the defendant’s assets in France. The matter eventually ended up in France’s Supreme Court which for the first time had to take a stance on punitive damages. On 1 December 2010 it ruled: ‘[…] le principe d’une condamnation à des dommages interest punitifs, n’est pas, en soi, contraire à l’ordre public, il en est autrement lorsque le montant alloué est disproportionné au regard du préjudice subi et des manquements aux obligations contractuelles du débiteur […]’ (‘[…] the principle of awarding punitive damages is not, in itself, contrary to public policy; this is not the case when the amount awarded is disproportional to the loss suffered and to the contractual breach of the debtor […]’) (own translation).172 According to the French Supreme Court, punitive damages are in themselves not contrary to (international) public policy. Foreign punitive damages (like Australian exemplary damages) can therefore in principle be enforced in France. The Court’s ruling makes it clear that objections against the enforcement of punitive damages based on the idea that they violate the divide

169 The facts of the case are to be found in the judgment of the French district court of Rochefort: Tribunal de Grande Instance Rochefort, Peter Schlenzka & Julie Langhorne v. S.A. Fountaine Pajot, 12 November 2004, no. 03/01276, unpublished decision.
170 15 USC 2310(d)(2).
171 California Superior Court 26 February 2003, Schlenzka v. Pajot, case no. 837722-1; Janke and Licari, above n 75, 782.
between criminal and private law should be dismissed. This liberal, welcoming attitude of France’s Supreme Court appears at first sight to be very progressive.

The Cour de Cassation’s acceptance of punitive damages is, however, by no means absolute. The French Supreme Court attaches an important caveat to the general rule. Punitive damages do violate international public policy when their amount is ‘disproportional to the damage suffered and the breach of the contractual obligations of the debtor’ (own translation). In other words: although the concept of punitive damages conforms to international public policy, the proportionality of the award is still a rule of international public policy. The centre of the public policy analysis shifts from the incompatibility of the concept of punitive damages itself to an investigation of their amount. The real obstacle for punitive damages under the (international) public policy test is no longer the compensation dogma but rather the distinct issue of excessiveness. This corresponds to the attitude of the Spanish Supreme Court in Miller Import Corp. v. Alabastres Alfredo, S.L.

The Supreme Court’s judgment in Fountaine Pajot did not contain specific criteria on how to determine the excessiveness of a foreign punitive award. It merely stated that punitive damages should not be disproportionate in relation to the injury suffered and the breach of the contractual obligations of the debtor. The lack of practical guidance leaves lower judges wondering at which point punitive damages become disproportional. As the determination of the proportional nature of the award lies in the discretion of the lower courts, the absence of a bright-line standard creates uncertainty.

On the one hand, one could argue that the French Supreme Court required a comparison between the amount of punitive damages and the amount of compensatory damages awarded (or in the words of the Court: the injury suffered (‘prejudice subi’)). The Cour de cassation concluded in that regard that the punitive damages largely exceeded the compensatory damages (the difference between both

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175 Sibon, above n 77.
176 Janke and Licari, above n 75, 794-795.
179 Sibon, above n 77.
This could be interpreted as establishing a 1:1 maximum ratio between punitive and compensatory damages. Such a 1:1 boundary stands in sharp contrast with the single digit rule (i.e. a maximum ratio of 9:1) established by the U.S. Supreme Court when setting limits to punitive awards in the US. In Australia courts have called for restraint and moderation but exemplary damages need not be proportional to the amount of compensatory damages. Although the California Superior Court in the case at hand complied with the U.S. Supreme Court’s delineations, the exceeding of a 1:1 limit by only a handful of percentage points proved fatal for the punitive award’s chances of enforcement.

On the other hand, one cannot simply ignore the Cour de Cassation’s reference in Fountaine Pajot to the defendant’s breach of contract (“des manquements aux obligations contractuelles du débiteur”). The Court presumably means the seriousness of the defendant’s breach of contract. It is of course the contractual nature of the dispute between the U.S. litigants and Fountaine Pajot that inspired the language of the Court. The Supreme Court is in principle bound by the description of the facts laid out by the Court of Appeal. However, most punitive damages in the U.S. originate in tort cases. Punitive damages in contract cases are possible if the behaviour constituting the breach of contract is also a tort for which punitive damages are available. Expanding upon the terminology of the Court in an attempt to formulate a general rule applicable to punitive damages, the notion could perhaps be read as the seriousness of the debtor’s wrongful behaviour, the degree of culpability or the blameworthiness of the fault. The Court could have used the suggested language, notwithstanding the contractual origin of the litigation, because the punitive damages were probably more connected to

181 It could be argued that the amount awarded for attorneys’ fees (in casu USD 402,084, 33) should be added to the compensatory damages when calculating the ratio. Legal costs are in essence also a form of loss caused by the defendant. Of course, this scenario is quite exceptional because US litigants almost always bear their own costs, even if they win the case.
185 See XL Petroleum, 155 C.L.R. 471 (citing Merest v. Harvey (1814) Taunt 442, where minimal compensatory damages were awarded but substantial amount of punitive damages were assessed against the defendant).
186 Janke and Licari, above n 75, 801 and footnote 113.
187 Bernard and Salem, above n 74, 19; Nagy, above n 106, 9.
188 Janke and Licari, above n 75, 776.
190 Meyer Fabre, above n 185, 4; Nagy, above n 106, 9.
Fountaine Pajot’s fraudulent and deceitful conduct surrounding the breach of contract than to the actual breach (the non-conformity of the vessel).  

Under this second view, in addition to the amount of compensatory damages given to the victim, the defendant’s conduct should thus be taken into account when assessing whether the punitive portion of a foreign judgment is excessive. In our view, this could mean that the enforcement judge can modulate the 1:1 maximum ratio according to reprehensibility of the defendant’s conduct. This approach, however, encounters a fundamental problem: it seems to allow a revival of révision au fond which was abolished in 1964.

Despite suggesting the breach of contract as one of the two factors to measure the proportionality of the punitive damages, the Cour de cassation did not take the defendant’s conduct into account. It merely stated that the Court of Appeal could have rightfully concluded that the punitive award was manifestly disproportionate because the punitive damages largely exceeded the purchase price and the cost of the repairs. As the plaintiffs had not requested enforcement of only the compensatory damages in case the punitive damages were deemed unacceptable, the Cour de cassation could not allow partial enforcement but instead had to reject the US judgment in its entirety. The prohibition on ultra petita rulings thus left the US plaintiffs empty-handed.

When the enforcement of an Australian judgment containing exemplary damages is requested in Spain or France, the likelihood of enforcement appears to be much higher than in Germany and Italy. In the latter countries, the focal issue is no longer the contrariety of the concept of punitive damages with (international) public policy but rather the question of proportionality or excessiveness of the punitive award. How Spanish and French courts will shape this excessiveness assessment in future cases remains to be seen and is difficult to predict.

**D England’s Mixed Approach**

Under the English law of enforcement of judgments a distinction is made between the enforcement of multiple damages and the enforcement of punitive damages sensu stricto. Multiple damages are a form of punitive damages arrived at

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191 Meyer Fabre, above n 183, 9, footnote 25.
192 Nagy, above n 106, 9.
193 Cass. Civ. 1st, 7 January 1964, Munzer, Bull., I, no. 15; Numerous authors note that the proportionality test reintroduces a révision au fond: Bernard and Salem, above n 74, 19; Juvénal, above n 181, 142; Janke and Licari, above n 75, 801-802.
194 Meyer Fabre, above n 185, 4.
by multiplying the amount of the compensatory damages. The category of punitive damages *sensu stricto*, therefore, contains all other punitive awards that are not calculated by reference to the compensation granted. Against this background, the following paragraphs shed light on the treatment of foreign multiple damages in English enforcement proceedings (part 1). Afterwards, an attempt to lay bare the English position on the enforcement of foreign punitive damages *sensu stricto* is made (part 2).

1. **Protection of Trading Interest Act 1980 Not Relevant for Australian Judgments**

The Protection of Trading Interest Act (PTIA) is a statute from 1980 which prohibits the enforcement of multiple damages in England. PTIA attempts to thwart the exercise of U.S. extraterritorial jurisdiction over foreign citizens. It provides in its section 5 that a judgment of an overseas country cannot be registered and no court in the UK may entertain proceedings at common law for the recovery of any sum payable under such a judgment, where that judgment is for multiple damages.

The rule represents the British belief that the treble damages which are recoverable under U.S. antitrust law are penal in nature and should not be available to private plaintiffs prosecuting as private attorneys general. Section 5 aims to neutralise the treble damages incentive for private parties in U.S. legislation in that it forces private litigants to weigh the benefits and costs of such an action given the unenforceability in the UK. Although intended to apply to multiple damages (treble damages) arising out of antitrust litigation, a literal reading of the Act prohibits the enforcement of any type of multiple damages irrespective of the underlying cause of action. The Act only applies to multiple damages and does not cover other punitive damages. It has to be noted that section 5 of PTIA renders the compensatory element of a multiple damages award unenforceable as well. This follows from a textual interpretation of the Act and is supported by Dicey and Morris who state that: ‘Judgments caught by section 5 are wholly unenforceable, and not merely as regards that part of the judgment which exceeds the damages actually suffered by the judgment creditor’.

However, the American concept of multiple damages (such as treble damages) is not used in Australia. Due to the absence of this type of damages in the Australian

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196 Kahn, above n 199, 479, 489, 510, 513 and 515.

197 Lawrence Collins (ed.), *Dicey & Morris on the conflict of laws* (Sweet and Maxwell, 2000) 566.
legal system, PTIA has no bearing on the enforcement of Australian exemplary damages awards. The enforceability of Australian judgments containing exemplary damages will, therefore, depend on the interpretation of the public policy exception.

2  **Punitive Damages an Infringement of English (International) Public Policy?**

Forms of punitive damages which do not involve the multiplication of the compensatory damages are outside the ambit of PTIA and thus follow a different regime. As mentioned before, the enforcement of Australian judgments in England can fall under the Administration of Justice Act 1920 or the Foreign Judgments (Reciprocal Enforcement) Act 1933. Both statutes contain a public policy mechanism (section 9(2)(f) and section 4(1)(a)(v) respectively), similar to the one found in the other four EU jurisdictions. English common law equally employs a similar (international) public policy exception. It is, therefore, enriching to include the English common law approach in our analysis as it can serve as useful guidance.

It is well settled in England that an English court will not lend its aid to the enforcement of a foreign penal law. By imposing a penalty a state exercises its sovereign power. Such an act of sovereignty cannot have any effect in the territory of another nation. English courts will, therefore, not enforce a foreign judgment when it is given in respect of a fine or penalty. However, a sum payable to a private individual is not a fine or penalty. The crucial criterion to determine whether a foreign measure is a penalty therefore appears to be the receiver of the sums. If the money goes to the foreign state, the sum has to be classified as penal.

This formalistic approach was confirmed in *S.A Consortium General Textiles v Sun and Sand Agencies Ltd.*, the only case touching upon the issue of the enforceability of punitive damages. A French company had sold clothing to English merchants but after delivery the buyers failed to pay the agreed price. The seller brought its payment claim before the Commercial Court of Lille. In addition, it

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199 See for example: *Folliott v Ogden* [1790] 3 Term Rep, 726; *Huntington v Atrill* [1893] AC, 150; *Raulin v Fisher* [1911] 2 KB, 93.
sought a further 10,000 francs as ‘résistance abusive’, a head of damages awardable in France where a defendant has unjustifiably opposed the plaintiff’s claim. The Lille court gave judgment in default of appearance for the plaintiffs for the amount claimed, interest and costs. Enforcement of the judgment in England was then governed by the Foreign Judgments (Reciprocal Enforcement) Act 1933 which regulates enforcement for judgments originating in countries with which the UK has a mutual recognition treaty. The defendants resisted enforcement of the 10,000 francs (awarded as a result of the unreasonable refusal by the defendants to pay a plain claim) in England on the ground that the French judgment imposed a penalty. Under section 1(2)(b) of the Act sums payable in respect of a penalty are excluded from enforcement. The defendants further relied on section 4(1)(a)(v) which states that enforcement should be denied when it would violate public policy of the requested state. As to the characterisation of the sum for the ‘abusive résistance’, all three judges in the Court of Appeal agreed that the amount for the unreasonable withholding of sums under a valid claim was compensatory, not penal and therefore enforceable. Lord Denning believed it to be compensation for losses not covered by an award of interest, such as loss of business caused by want of cash flow, or for costs of the proceedings not covered by the court’s order for costs. He, however, expanded *obiter dictum* upon the issue and summarised the defendants’ argument as sustaining that the 10,000 francs were punitive or exemplary damages which amounted to a penalty and were therefore unenforceable under section 1(2)(b) of the 1933 Act. He repeated the conventional idea that a fine or other penalty only referred to sums payable to the state by way of punishment and that a sum payable to a private individual was not a fine or penalty.

Although given in *dicta*, Lord Denning’s statements relating to punitive damages are interesting given the hybrid nature of punitive damages. They are awarded to punish the wrongdoer for reprehensible conduct. However, they are not payable to the state. Lord Denning’s remark seems to explicitly support the view that, despite their inherent criminal nature, for enforcement purposes in England punitive damages avoid the penal label because they are awarded to a private person instead of to the state. Lord Denning further ruled that English public policy does not oppose the enforcement of a claim for exemplary damages because these are ‘still considered to be in conformity with the public policy in the United States and many of the great countries of the Commonwealth’. He thereby indicated that punitive damages do not pose a problem under (international) public policy

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203 Article 1153 of French Civil Code.
204 The other judges in the case, Goff L.J. and Shaw L.J., did not refer to the notion ‘punitive damages’.
206 Collins, above n 208, 476.
either. However, the *obiter* character of his elaboration should be underlined, leading to the conclusion that, at the very least, the enforceability of punitive and exemplary damages in the UK has not yet been definitively settled.

IV CONCLUSION

The contribution at hand focused on the enforcement of Australian exemplary damages in several EU Member States. It has been shown that the availability of exemplary damages in Australia is subjected to restrictions. However, the examples that have been discussed in this article illustrate that exemplary damages can become available if the defendant engaged in conscious wrongdoing or acted with contumelious disregard of the defendant’s rights.

The awarding of exemplary damages in Australia against a foreign defendant does not end the matter. When enforcement of the award for exemplary damages in Europe becomes necessary, the award might be blocked on the basis of public policy considerations. The article discussed the various approaches towards the enforcement of U.S. punitive damages taken by the Member States Italy, Germany, France, Spain and England. The European experience with U.S. punitive damages is useful to draw lessons from for Australian judgments for exemplary damages which – to our knowledge – are yet to reach the EU borders.

It became clear that every country has construed the international public policy exception differently. The Supreme Courts in Italy and Germany have rejected punitive damages because they argued that the concept itself violates international public policy. Already in 1992, in the case of *John Doe v. Eckhard Schmitz*, the *Bundesgerichtshof* ruled that U.S. punitive damages awards cannot be enforced in the German territory. The German Supreme Court referred to various arguments underlying this decision. It underlined the compensatory function of German private law and noted that enrichment of the plaintiff is prohibited. The Supreme Court further held that punishment and deterrence are objectives that belong in the realm of criminal law. Punitive damages interfere with the state’s monopoly on penalisation because a private person acts as public prosecutor. The defendant cannot rely on the fundamental guarantees that are available to him in criminal law proceedings. The *Bundesgerichtshof* also rejected the parallel between penalty clauses and punitive damages. In 2007 in *Glebosky v. Fimez* the Italian *Corte di Cassazione* refused to accept that Italian private law holds any punitive damages.

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208 The same conclusion was reached by the Supreme Court of Australia (Full Court) and the British Columbia Court of Appeal: *Benefit Strategies Group Inc v Prider* [2005] SASC, 194 and *Old North State Brewing Co v Newlands Services Inc* [1999] 4 WWR, 573.
considerations. It found that penalty clauses and moral damages are not comparable to punitive damages. Five years later it reiterated this position by stating that the Italian civil liability rules only pursue compensatory, and not punitive, aims. The likelihood of recovering Australian exemplary damages in Italy or Germany is, therefore, virtually nil.

France and Spain, on the other hand, have accepted the compatibility of punitive damages with international public policy. The Spanish Tribunal Supremo was the first one to accept the enforceability of punitive damages in the case of Miller v. Alabastres in 2001. It acknowledged the existence of punitive elements in Spanish private law. The presence of these punitive mechanisms demonstrates that Spanish civil law sometimes concerns itself with punishment in addition to compensation. Punitive damages could thus not be viewed as a violation of international public policy. Around a decade later the French Supreme Court in Schlenka & Langhorne v. Fountaine Pajot reached the same conclusion. Australian exemplary damages awards, therefore, stand a better chance at being granted enforcement in Spain and France.

Both the Spanish and the French Supreme Court subsequently focused on an investigation of the amount granted by the foreign court. Excessive punitive damages are problematic in light of the international public policy exception. In France the Cour de cassation seems to have limited its tolerance of punitive damages to an amount equal to the compensatory damages granted, although it is unclear to what extent the blameworthiness of the defendant’s conduct can be taken into account. In Spain the level of acceptance is much higher as the Tribunal Supremo allowed the enforcement of the American treble damages judgment. It put forward two criteria to assess the excessiveness of the award: (1) the predictability of the award and (2) the nature of the interests protected. It is very difficult to predict at which point foreign punitive damages will be deemed intolerable in light of public policy considerations. It is equally unclear if and how the excessiveness test proposed in the judgments of the Spanish and French Supreme Courts will be applied to Australian exemplary damages.

England offers an interesting outlook on the enforcement of third state punitive damages as it provides for exemplary damages itself. Whether Australian exemplary damages can survive the English courts’ scrutiny is uncertain. Foreign fines or penalties are not enforceable in England. Lord Denning’s obiter dictum in S.A. Consortium General Textiles v Sun and Sand Agencies Ltd. explained that punitive damages cannot be equated to a fine or a penalty because they are not awarded to the state. That reasoning seems to indicate that Australian exemplary damages would meet little resistance in English enforcement proceedings.
Furthermore, according to Lord Denning, English public policy does not oppose punitive damages awards. Further case law is, nevertheless, needed to confirm this welcoming attitude.

When enforcement of the judgment containing exemplary damages in Europe becomes necessary, the victim’s chances (as far as the exemplary damages are concerned) thus depend on the location of the wrongdoer. Whether the defective products exported into Australia were made in France or a few kilometres across the border in Italy might thus make an important difference for Australians affected by these products.
LEGAL DUTIES FOR ENVIRONMENTAL WATER PROVISIONS IN WESTERN AUSTRALIA

JEANETTE JENSEN AND ALEX GARDNER*

Western Australia has not delivered on its promises to make environmental water provisions (EWPs), including to restore environmentally sustainable flows of water to waterways and wetlands. WA has prioritised water supply for consumptive use under pressure from a growing population. Urban areas draw a significant amount of water from outside urban regions to the detriment of the natural environment. This article reviews the implementation of EWPs under Western Australian law by testing the operation of the current legislation on a case study of the catchment of a Ramsar listed wetland in south-west Western Australia and suggests solutions to the legal deficiencies. We find that National and State policies on EWPs are not being complied with, including statutory recognition of legally secure EWPs and the return to environmentally sustainable levels of extraction. WA has not implemented transparent water allocation planning; instead, it has discarded early environmental impact assessment approval conditions in favour of confidential processes of water licensing to administer small summer releases. We argue that restoration aspirations are more likely to be achieved if there are clear justiciable duties on the Minister for Water to provide EWPs and propose how this may be done.

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I INTRODUCTION

Western Australia (‘WA’) has not delivered on its environmental water promises. More than twenty years ago, the WA Government committed to a national policy of formally determining allocations of water ‘for the environment as a legitimate user of water’.¹ In 2006, the WA Government agreed to the redefined national water policy objectives in respect of formal allocations of water to the environment; namely, to:

- make statutory provision for environmental and other public benefits, and
- return all over-allocated and overused systems to environmentally sustainable levels of extraction.²

WA has not implemented either of these objectives, not even for high conservation value wetlands that are listed under the Convention on Wetlands of International Importance (‘Ramsar Convention’).³ WA has prioritised water supply for consumptive use under pressure from a growing (mostly urban) population.⁴ Urban areas draw a significant amount of water from outside urban regions to the detriment of the natural environment. With the impacts of climate change now being felt, especially in a drying south-west of the State,⁵ we argue that WA’s water resources legislation needs to enact enforceable legal duties to restore all systems to environmentally sustainable levels of extraction. Fulfilling these duties could drive water use efficiency and innovation in supply for consumptive use.

From a broad practical perspective, how has this situation arisen and what response is required? In Australia, waterways and wetlands are mostly public resources, their beds and banks and flow of water vested in the Crown in the rights of the States. Public authorities under broad legislative powers regulate private rights in respect of water resources. The flow regimes of many of these waterways and wetlands have been altered for human use, which is ‘the most pervasive and

³ Convention on Wetlands of International Importance especially as Waterfowl Habitat, opened for signature 2 February 1971, 996 UNTS 245 (entered into force 21 December 1975); Australian Treaty Series No. 48 (‘Ramsar Convention’).
⁴ Department of Water, ‘Water for Growth: Urban – Western Australia’s water supply and demand outlook to 2050’ (Government of Western Australia, June 2016) 9, 25 (‘Western Australia’s water supply and demand outlook to 2050’).
⁵ Michael Bennett and Alex Gardner, ‘Regulating Groundwater in a Drying Climate: Lessons from South West Australia’ (2015) 33 Journal of Energy and Natural Resources Law 293.
deleterious’ factor in waterway and wetland degradation. Such degradation is exacerbated by climate change through increased drying of water resources, but it ‘will not be as severe as the impacts of river regulation’. The flow regimes require significant ecological restoration, but what does that mean for the natural and legal regimes?

There has been extensive discussion of what ‘restoration’ means in terms of identifying the benchmark level of degradation and the goal or level of restoration. The two main approaches to environmental water provisions are based on either hydrology or ecology. The hydrology-driven approach attempts to describe and reinstate the water regime prior to development, i.e. based on historic data. The ecology-driven approach, on the other hand, bases the allocations on the estimated environmental water requirements (‘EWRs’) of species, communities and ecosystem processes (herein referred to as ‘rehabilitation’). A key advantage of this rehabilitation approach is that it is ‘easily defensible in trade-off situations’, such as those involving increasing demand under climate change, as it directly

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10 Ibid 24.
addresses the current ecological values and issues facing the water resource. WA, in particular, faces this challenge of balancing increasing water demand with EWRs under a drying climate and has so far adhered to the ecology-driven approach. Roberts et al. consider it possible to restore some ‘smaller, discrete’ wetlands to their pre-development water regimes, whereas they consider such restoration impossible for large wetland systems downstream of consumptive demand for water in Australia. In these cases, they argue that rehabilitation rather than restoration is a more realistic goal. There are physical (hydrological) constraints to achieving restoration or rehabilitation in some areas in the form of declining water flow due to climate change but, in many cases, what is achievable or desirable depends on social and political resolution. For this reason, we adopt the term ‘ecological restoration’ to mean the environmental water provisions (‘EWPs’) that are determined by governmental resolution, whether that be for hydrological restoration or ecological rehabilitation (as described above).

EWPs may be defined as ‘the water regimes that are provided as a result of the water allocation decision-making process taking into account ecological, social and economic impacts’. In the surface water context, EWPs refer to the ‘specific volumetric allocations and/or releases from storages’. According to national water policy, the goal or purpose of EWPs is both to ‘sustain and where necessary restore ecological processes and biodiversity of water dependent ecosystems’ (emphasis added). The national policy also declares, in addition to the objectives identified above, the principle that EWPs should have ‘statutory recognition’ with the ‘same degree of security as water access entitlements for consumptive use and be fully accounted for’. According to Kingsford, ‘[l]egal recognition of environmental flows remains an important first step’ for the recovery of flow regimes to sustain downstream ecosystems in highly regulated river basins.

12 Ibid 57-58.
14 Roberts et al., above n 13, 7.
15 Ibid.
16 Water and Rivers Commission, ‘Environmental Water Provisions Policy for Western Australia’ (Statewide Policy No. 5, 2000) 2 (‘Environmental Water Provisions Policy for Western Australia’).
19 CoAG, NWI, above n 2, [35(i)]
20 Kingsford, above n 6, 218.
WA law does not comply with national water policy. A review of this law in 2006\(^{21}\) found that there was the lack of ‘a general statutory priority for the determination and implementation of [EWPs] over the allocation and abstraction of water for consumptive uses’.\(^{22}\) This is still true in 2016. Furthermore, there is a history of breaching such EWPs as are provided in order to supply water for human consumptive use.\(^{23}\) Therefore, we argue that the enactment of binding public legal duties on relevant public and private parties to make, deliver and report on EWPs will create better prospects of achieving ecological restoration of waterways and wetlands.

Public legal duties create political expectations that can influence executive government action. If those legal duties are effectively expressed, then they will create justiciable obligations that can be enforced by proceedings for judicial review in a court of law. Judicial review typically offers one or more remedies as the outcome of finding that a public body or government officer has not acted according to law: (i) an order that quashes a decision that has been made;\(^{24}\) (ii) an order that prohibits a decision being made or acted on; or (iii) an order that mandates government action. Our argument here addresses the third and most delicate of these remedies – orders that mandate executive government action. Such orders may take either of two forms:

(a) An order that a decision about some application or function be made without the court saying what the outcome of that decision should be; and
(b) An order that directs not only that a decision be made or function be performed but says also what should be the outcome of the decision or function.

An order in the second form is more contentious because courts are wary of directing public authorities about how they should perform their function lest they enter the political fray. A court will only give such an order if the legislation is very clear that a function should not only be performed, but that it should be performed in a particular manner to result in a specified outcome.\(^ {25}\) To use a simple example, an applicant for a driver’s licence generally has a right to the issue of the licence if the standard criteria are satisfied and the applicant suffers no disqualifying attributes.

\(^{21}\) Gardner (2006), above n 18, 208.
\(^{22}\) Ibid 235.
\(^{24}\) See, eg, Coastal Waters Alliance of Western Australia (Inc) v Environmental Protection Authority [1996] LGERA 136 and Save Beeliar Wetlands (Inc) v Minister for Environment [2015] WASC 482.
As the WA Government is preparing water resources law reform, it is timely to contemplate how to ensure EWPs for our waterways and wetlands in a way that meets national water policy and fulfils our Ramsar Convention obligations to maintain the ecological character of listed wetlands and restore the adverse effects of human activities. It is also important to consider how the Commonwealth Government can exercise its authority to fulfil the Convention obligations, which we do in a separate article.

In this article, we review the implementation of EWPs under WA law by testing the operation of the current legislation on a case study in south-west WA and suggesting solutions to the legal deficiencies. Our case study is an analysis of the failure to provide EWPs to the Ramsar-listed Peel-Harvey Estuary and related waterways, in particular the dammed North Dandalup and Harvey Rivers. As the fastest growing region in WA, the Peel Region faces the distinct challenges of increasing water scarcity induced by the drying climate and an increasing demand for water supply. In the 1990s, surface water stored in south-west dams constituted at least 40% of urban water supply throughout the state. In contrast, surface water currently constitutes merely 7% of the state’s water supply (September 2016). This reflects the lower inflows rather than a reduction in diversions as such. Although we acknowledge the link between water quantity and quality management, and the particular problems of water quality in the Peel-Harvey system, this article can consider only the challenges for water quantity restoration.

27 Jeanette Jensen and Alex Gardner, ‘Is there an international legal duty to restore wetlands by environmental water allocations?’ (2017) 1 Chinese Journal of Environmental Law (forthcoming). These obligations include providing adequate water to sustain wetlands as functioning ecosystems, including in response to adverse effects of anthropogenic climate change.
29 PHCC et al., ‘Peel-Yalgorup System Ramsar Site Management Plan’ (Government of Western Australia, 2009) 4 (‘Peel-Yalgorup System Ramsar Site Management Plan’). The listing is made under the Ramsar Convention, above n 3.
31 Department of Water, ‘Water for Growth: Urban – Western Australia’s water supply and demand outlook to 2050’ (Government of Western Australia, June 2016) 9, 25 (‘Western Australia’s water supply and demand outlook to 2050’).
32 Ibid 11.
33 ‘Sources’ on Water Corporation, Residential, Water supply & services <https://www.watercorporation.com.au/water-supply-and-services/rainfall-and-dams/sources>. See also Western Australia’s water supply and demand outlook to 2050, above n 31, 22 (Figure 9).
35 Kelsey et al., above n 8.
We present our argument for State legal duties to make, deliver and report on EWPs by:

1. giving an overview of the current WA regulatory framework for EWPs to show the lack of legal duties to make EWPs;
2. describing and analysing the case study, asking whether EWPs were actually made and delivered in the absence of such duties; and
3. reflecting on the key points from the case study and recommending legislative reforms to create enforceable legal duties to make EWPs.

We conclude with comments that link this discussion of EWP duties in WA state law and the role of the Commonwealth in giving effect to the Ramsar Convention obligations in WA.

II THE CURRENT REGULATORY FRAMEWORK FOR EWPs IN WA

Water resources management is traditionally the responsibility of states due to their plenary powers of natural resources management.36 The Commonwealth lacks the legislative powers to regulate water resources directly,37 but may directly and indirectly affect water resources management by virtue of several of its legislative powers. The most relevant power for present purposes is that concerning external affairs, which authorises the Commonwealth Government to make international treaties and the Commonwealth Parliament to legislate to implement them.38 The external affairs power supports a range of provisions in the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (‘EPBC Act’),39 including the provisions that implement the Ramsar Convention.40 As explored in another article, those provisions include neither a duty to restore or rehabilitate Ramsar-listed wetlands nor even a duty to make EWPs for them,41 even though such provisions are contained within the Water Act 2007 (Cth) for the Murray-Darling Basin.42

In WA, it is only national and state policies that advocate ecological restoration in the form of EWPs described above. We reiterate, the national policy goals for environmental water are to:

- make statutory provision for EWPs (for environmental and other public

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37 See, eg, Gardner et al. (2009), above n 2, 81.
38 Stoeckel et al., above n 36, 5; Gardner et al. (2009), above n 2, 81.
39 Gardner et al. (2009), above n 2, 95.
40 Environment Protection and Biodiversity Conservation Act 1999 (Cth) ss 3(2)(f), 11, 16(1)-(2), 333(2), and pt 15 div 2.
41 See further Jeanette Jensen and Alex Gardner, ‘Protecting Ramsar Wetlands from Urban Growth’ (forthcoming).
42 Gardner et al. (2009), above n 2, Chapter 14.
benefits),

- give EWPs the same legal security as water access entitlements, and
- return all over-allocated and overused systems to environmentally sustainable levels of extraction.\(^43\)

The discussion that follows outlines the State policy and the State statutory framework for giving effect to that policy.

A \textit{The State Policy Framework}

The basic premise of the policy principles for EWPs is that river regulation for consumptive use alters the flow regime of rivers and streams ‘with the inevitable result that instream and wetland processes have been adversely affected’\(^44\). The policy goal is to limit those adverse effects. The current WA policy for EWPs was made in 2000 (‘State Policy’) by the Water and Rivers Commission (‘WRC’) and is now adopted by the successor agency, the Department of Water (‘DoW’).\(^45\) The State Policy says, in accordance with the 1996 national policy,\(^46\) that the ‘overall goal in providing water for the environment is to sustain and where necessary restore processes and biodiversity of water dependent ecosystems’.\(^47\) While that goal remains, the State Policy has not been updated to accord with the broader and stronger national policy principles for EWPs expressed in the 2004 national water policy.\(^48\) For example, the State Policy does not reiterate the national principles for statutory recognition of EWAs with the same legal security as consumptive use entitlements.\(^49\) Important State policy principles include:

1. EWRS constitute the basis of EWPs and so EWRS should be determined on the basis of best available scientific information;\(^50\)
2. Where such information is limited, interim EWRS and EWPs should be estimated adopting the ‘precautionary principle’,\(^51\) and then reviewed when monitoring and further research information becomes available;\(^52\)
3. ‘Only water that is in excess of EWPs (by definition) may become available for consumptive use’ and, thus, in ‘some areas of high conservation value, it might be determined that all water should be allocated to ecological

\(^{43}\) CoAG, NWI, above n 2, [23(iii)-(iv)] and [35(i)]. The propositions of [35(ii) and (iii)] are not addressed here.
\(^{44}\) \textit{National Principles for the Provision of Water For Ecosystems}, above n 17, 13 (Principle 1).
\(^{45}\) The \textit{Water Resources Legislation Amendment Act 2007 (WA)} abolished the WRC and established the Department of Water instead, see ss 204-7.
\(^{46}\) \textit{National Principles for the Provision of Water For Ecosystems}, above n 17.
\(^{47}\) \textit{Environmental Water Provisions Policy for Western Australia}, above n 16, 3.
\(^{48}\) CoAG, NWI, above n 2, especially [35], [41]-[44]. See also, Gardner (2006), above n 18, 212-214.
\(^{49}\) \textit{Environmental Water Provisions Policy for Western Australia}, above n 16.
\(^{50}\) Ibid 4.
\(^{51}\) Ibid 3-4.
\(^{52}\) Ibid 8.
values, such as is proposed for the Shannon River';
4. EWPs may ‘be less than EWRs where some ecological impact is accepted,
provided key ecological values are protected’;
5. Social water requirements are subordinate to environmental requirements
and will only form part of EWPs, ‘where they do not unacceptably impact
on significant ecological values’;
6. The allocation planning and licensing processes will allow for ‘regular
review of allocations and EWPs to consider the implications of improved
knowledge of hydrology, ecology, climate variation and community values
for water management issues’;
7. The DoW ‘will require effective management and monitoring to ensure
EWPs are being met and that environmental values are being protected’;
8. Finally, transparency is fundamental to the DoW’s approach to providing
water for the environment.

The State Policy supplements a statutory planning and licensing process for
making EWPs, to which we now turn.

B Overview of State law for EWPs

The Minister for Water and the DoW have assumed the general responsibilities
of the former Commission, which include the functions or duties to conserve,
protect, manage, and assess water resources. While ‘water resources’ are
declared, none of the functional terms are defined in the Water Agencies (Powers)
Act 1984 (WA) (‘WAP Act’), which means that they have the ordinary meaning
given to them. The ordinary definition of ‘conserve’ is to ‘protect (something of
environmental or cultural importance) from harm or destruction’ and ‘prevent the
wasteful overuse of (a resource)’; and ‘protect’ is to ‘keep safe from harm or
injury’. It may be argued that restoration, or at least rehabilitation, is implicit in
the term ‘conserve’ if degradation has occurred after imposing this duty, but it may
also be argued that it is not. In performing these functions or duties, the Minister

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53 Ibid.
54 Ibid 7.
56 Ibid 5.
57 Ibid.
58 Ibid.
59 Water Agencies (Powers) Act 1984 (WA) ss 3(1) (definition of ‘functions’), 9, 11; ‘Managing our
waterways’ on Department of Water, Government of Western Australia, Water topics, Waterways
60 Water Agencies (Powers) Act 1984 (WA) s 3(1) ‘water resources’ are defined to include, inter alia,
waterways, wetlands, estuaries, and inlets as well as drainage, surface and surplus water.
(definitions of ‘conserve’ and ‘protect’).
has the ‘power to do all things necessary or convenient to be done for or in connection with the performance of the Minister’s functions’. 62 These functions and powers create no clear duties to restore or rehabilitate waterways and wetlands.

In any case, those functions and powers are additional to any functions and powers that the Minister has under other ‘relevant Acts’, which includes the Rights in Water and Irrigation Act 1914 (WA) (‘RiWI Act’). 63 The RiWI Act addresses in more detail the statutory functions and powers with regard to regulating the flow of water, including restoration or rehabilitation of waterways and wetlands affected by water developments. The Environmental Protection Act 1986 (WA) (‘EP Act’) is also important because it provides for environmental impact assessment (‘EIA’) of proposals that may have a significant impact on the environment, including proposals that may significantly affect the natural flow of water. These Acts are the focus of our analysis below. The analysis will not include the newly enacted Biodiversity Conservation Act 2016 (WA) or the Peel-Harvey Catchment Management Bill 2014 (WA) as, disappointingly, neither of them mention environmental water or flow or anything directly about water quantity management.

In 2006, the regulatory framework for EWPs was assessed to ascertain whether there was a duty to make EWPs – in any locations, at any level, or at all, and in priority to the determination of allocations for consumptive uses. 64 That analysis focused on the RiWI Act and the EP Act, 65 as they were the only two acts that could directly regulate the flow of water in waterways and wetlands. 66 With regard to EWPs, these acts have not changed in the passing decade, so the outcome of the 2006 analysis is summarised briefly.

Focusing first on the RiWI Act, the answer is ‘no’. How can that be when, according to the State Policy, the RiWI Act ‘specifically provides for water for the environment’ through its objects and mechanisms? 67 The objects of the Act include ‘to provide for management of water resources, and in particular -

(i) For their sustainable use and development to meet the needs of current and future users; and

(ii) For the protection of their ecosystems and the environment in which water resources are situated, including by the regulation of activities detrimental

65 Ibid 220-34. Other potentially relevant statutes include the Waterways Conservation Act 1976 (WA), Conservation and Land Management Act 1984 (WA), Wildlife Conservation Act 1950 (WA), and the Planning and Development Act 2005 (WA), but none of these Acts provides specifically for the flow of water in wetlands and waterways.
66 Bennett and Gardner (2014), above n 23, discuss the operation of this legislation for Ramsar listed wetlands.
67 Environmental Water Provisions Policy for Western Australia, above n 16, 1-2.
to them’. 68

The legal effect of objects depends on statutory duties giving effect to them. The Minister is under a duty to ‘seek to ensure’ that the objects are achieved along with other persons ‘to the extent that they have relevant functions under this Part [III]’. 69 Although the term ‘seek to ensure’ is stronger than the term ‘have regard to’, it does not constrain discretion in operative provisions to any significant extent. Those operative provisions create three key mechanisms to fulfil the objects with regard to EWPs: 70

a. A statutory planning process requiring broad public consultation in plan development and ministerial approval before implementation of plans;
b. The option to make protection of the environment a licence condition and to make directions for the same purpose; and
c. The power to make local by-laws applicable to a particular water resource area with basic rules stipulating EWPs. 71

The statutory planning process inserted in 2000 is the only express statutory mechanism for making EWPs. It has not been used, which is the outcome of leaving this mechanism entirely to ministerial discretion. 72 Instead, the State has made only non-statutory plans for selected areas with variable EWPs as policy goals, which have very limited legal effect and certainly create no duty to implement the EWPs. 73 Regardless of the application of a non-statutory plan, the State can apply licence conditions for EWPs to major facilities like dams. 74 One could say that these licence conditions are made in fulfilment of the duty to seek to ensure that the objects are achieved, but there is no duty in the actual licensing provisions to impose such conditions. Finally, under the RiWI Act, the local by-laws power was proposed for use in 2006, 75 but there is no evidence that such by-laws have ever been made and we will consider this mechanism no further. The RiWI Act objects and mechanisms do not provide specific duties to make EWPs.

The EP Act procedures for EIAs provide the facility for setting EWPs on approval of plans and of proposals to construct and licence large works for the

68 Rights in Water and Irrigation Act 1914 (WA) s 4(1).
69 Rights in Water and Irrigation Act 1914 (WA) s 4(3).
70 Environmental Water Provisions Policy for Western Australia, above n 16, 2.
71 Rights in Water and Irrigation Act 1914 (WA) ss 26L – 26N; Gardner (2006), above n 18, 221.
72 Gardner (2006), above n 18, 221.
74 Rights in Water and Irrigation Act 1914 (WA) sch 1 cl 7 and 15, app to sch items 2, 9; Gardner (2006), above n 18, 221.
75 Gardner (2006), above n 18, 221.
taking of water by the “ministerial statement” of conditions.\(^{76}\) Again, this option is entirely the creature of Government discretion and imposes no duty to make EWPs.\(^{77}\) The \textit{EP Act} also authorises the making of environmental protection policies (‘EPPs’) that have the force of law.\(^{78}\) The \textit{Environmental Protection (Peel Inlet – Harvey Estuary) Policy Approval Order 1992} was aimed at addressing serious problems of nutrient pollution causing algal blooms that degraded the estuary. Notably, there is no mention of water flow in the setting of water quality objectives, or in the, largely, general land management measures.

In summary, the \textit{RiWI Act} and the \textit{EP Act} create no duties to make EWPs in any place or at any level. If a duty is imposed under a water licence or EIA ministerial condition, then it may be binding in theory, but practically difficult to enforce.\(^{79}\) The detailed conditions of water licences are not publicly available and legal standing to enforce licence conditions is limited.\(^{80}\) Further, the Supreme Court has shown itself reluctant to enforce EIA ministerial conditions.\(^{81}\) A water licence and EIA ministerial condition may also require monitoring and reporting, but the imposition of any such obligations are also at the discretion of the respective ministers.\(^{82}\)

What is the record of providing EWPs over the past decade in the absence of legal duties to make and implement them? We address this question in relation to the case study. We examine the extent to which the above mechanisms of water planning and licensing, and EIA ministerial conditions, have provided EWPs to limit the North Dandalup and Harvey Dams’ impact on the downstream environment, including the Peel-Harvey Estuary. In other words, we will test how EWPs have operated without clear duties to provide them.

\(^{76}\) The ministerial statement of conditions records the ‘implementation agreement or decision’ on the approval, or not, of a proposal: 45(5) of \textit{Environmental Protection Act 1986} (WA), see \textit{Environmental Impact Assessment (Part IV Divisions 1 and 2) Administrative Procedures 2012} (WA) cl 16. See also, Alex Gardner, ‘Water Resources Law Reform in Western Australia – Implementing the CoAG Water Reforms’ (2002) 19 \textit{Environmental and Planning Law Journal} 6, 20; Gardner (2006), above n 18, 221.

\(^{77}\) Gardner (2006), above n 18, 225.

\(^{78}\) See, eg, \textit{Environmental Protection (Peel Inlet – Harvey Estuary) Policy Approval Order 1992} cl 2(b).


\(^{80}\) \textit{Rights in Water and Irrigation Act 1914} (WA) s 5E(1)(a), (2)(a); Gardner (2006), above n 18, 225-26; Jensen and Gardner (2016), above n 78, 33-43.

\(^{81}\) See, eg, Bridgetown/Greenbushes Friends of the Forest v Conservation and Land Management (1997) 18 \textit{WAR} 126, 128, 141-42 (Murray J); Gardner (2006), above n 18, 227-29.

\(^{82}\) Jensen and Gardner (2016), above n 79, 45-9
III THE CASE STUDY: WERE EWPS ACTUALLY MADE AND DELIVERED?

In this case study, we introduce hydrology and ecological values of the Peel-Harvey Estuary and then ask whether EWPs were actually made for the estuarine wetlands and the waterways that flow to them. We find that the regulatory instruments made under the EP Act and the RiWI Act do provide for some ‘riparian’ and ‘social’ EWPs, but not EWPs for the ecological restoration of the waterways and wetlands. We complete the case study by asking whether the riparian and social EWP releases were actually delivered.

A Introduction to the Peel-Harvey Estuary

The Peel-Harvey Estuary (‘the Estuary’) forms part of the Peel-Yalgorup System (‘PYS’), which was included on the list of Wetlands of International Importance under the Ramsar Convention in 1990. The PYS is listed for, inter alia:

- its ecological value in south-west WA as the ‘largest and most diverse estuarine complex’;
- being one of very few locations in the world where living thrombolites occur in inland waters; and
- its importance for more than 20,000 waterbirds, including providing a drought refuge.

The PYS wetlands are representative of the Swan Coastal Plain wetlands, 80% of which have been lost to clearing and infilling for agricultural and urban development purposes. In 2011, wetland vegetation on the Swan Coastal Plain was being lost or degraded at a rate of more than 300 hectares per year. Apart from being significant per se, the environmental qualities of wetlands are significant to the wellbeing of humans. Wetlands may play a vital role in climate change mitigation by their capacity to sequester and store carbon, and coastal
wetlands have the greatest potential as ‘carbon sinks’. Indeed, wetlands play an important role in Australia’s national response strategy to climate change. Another important feature is their capacity to improve water quality by working as biological filters of nutrients. However, this capacity is finite, which emphasises the need for unpolluted freshwater inflows. Finally, wetlands, particularly internationally significant wetlands, are also important economic assets for tourism.

The Estuary is located approximately 80 km south of Perth and consists of the circular Peel Inlet (approximately 10 km in diameter) and the long narrow Harvey Estuary (approximately 20 km x 2-3 km), which are connected by a narrow deep channel. Despite being a marine embayment, the Estuary is a surface water-dependent wetland, as the oceanic exchange on an annual basis is a net outflow. The Estuary is mainly recharged through direct rainfall (15%) and surface water runoff generated elsewhere in the catchment (85%). Groundwater contributes less than 0.5% of total flows to the Estuary, but the Peel-Harvey waterways have large contributions from groundwater, the North Dandalup River being an exception.

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89 Ibid 7.
91 Government of Western Australia, Environmental Protection Authority (‘EPA’), ‘Water Quality Improvement Plan for the Rivers and Estuary of the Peel-Harvey System - Phosphorus Management’ (Government of Western Australia, November 2008) 38 (‘Peel-Harvey Water Quality Improvement Plan’).
95 Hale and Butcher, above n 93, 46.
96 Ibid 45 (citation omitted).
97 Hale and Butcher, above n 93, 45-46.
98 Ibid 46; Kelsey et al., above n 8, 122.
99 Hall et al., above n 86, 32. While the majority of this River on the Coastal Plain (downstream of the North Dandalup Dam) does receive groundwater discharges, they are not large, see Aquatic Research Laboratory, ‘Stream Fauna Studies – North Dandalup, Canning Reservoir, Lower Canning River, and Stinton Creek Catchments’ (Appendices to Reports ARL 009, 010, 011 and 012, Department of Zoology, The University of Western Australia, 1988) 51 (Figure 1) (‘1988 Stream Fauna Studies’); EPA, ‘Next Major Water Supply Source for Perth (post 1992) – Water Authority of Western Australia – Report and Recommendations of the Environmental Protection Authority’ (Bulletin 343, August 1988) app 4, 9 (‘Next Major Water Supply Source for Perth (post 1992)’).
The three major rivers that recharge the Estuary are the Murray, Serpentine, and Harvey, all with their source in the Darling Range (‘the hills’), which are supplemented by seven rivers or main drain systems. The Murray River is the biggest and most significant inflowing river, which discharges into the Peel Inlet. It has been estimated to contribute twice the flow of the Serpentine. The Dandalup River, which begins at the confluence of the North and South Dandalup Rivers, feeds the Murray shortly before it reaches the Inlet. The Harvey River discharges into the Harvey Estuary and was estimated in 2007 to contribute approximately one third of total river inflows. The Harvey, Serpentine, and the North and South Dandalup Rivers all contain major dams. In fact, there are 15 dams in the Peel-Harvey catchment. The case study focuses on the North Dandalup Dam to test the operation of the current regulatory framework, as it is the newest dam serving Perth and because its condition and management have been the subject of recent public concern. We also consider aspects of the operation of Harvey Dam, which supplies water for agricultural irrigation.

Modification of water flows by dams and weirs is a general threat to estuaries and wetlands. More specifically, large water-supply dams, farm dams, flow diversion, and groundwater pumping, among others, alter the amount, quality and timing of freshwater inflows to estuaries and wetlands. Such modifications ‘will have profound effects on estuarine conditions’, including, inter alia, potentially causing saline water to intrude farther upstream, and/or ‘alter the accessibility and

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101 Hale and Butcher, above n 93, 46.
102 Ibid.
103 Ibid 46; Bradby, above n 100, 9.
104 Hale and Butcher, above n 93, 46.
105 Ibid.
106 Kelsey et al, above n 8, 19.
110 Arthington, above n 94, 195; The Report of the World Commission on Dams (WCD) and its relevance to the Ramsar Convention, Ramsar Resolution VIII.2, 8th Meeting of the COP (18-26 November 2002) para 5.
111 Arthington, above n 94, 195.
availability of important nursery habitats … thereby influencing recruitment and subsequent abundance of estuarine species’. Indeed, ‘[t]here is generally a close connection between water quantity and the spatial extent of wetland habitat’. More particularly, it is essential to understand the quantity of water, timing, duration and frequency of inundation of a wetland’s water regime in order to define an adequate environmental flow regime.

The reduction in flows brought about by the dams in the Peel-Harvey catchment is bound to have a continuing effect on the Peel-Harvey Estuary. The authors have, however, not been able to obtain any direct scientific information on the impact of reduced flows to the Estuary. The reason for this may be only the lack of publicly available baseline data, including of EWRs, and monitoring data for the Estuary. On the other hand, the impact of climate change clearly illustrates a dwindling flow scenario. The south-west of WA experienced the lowest rainfall on record since at least 1900 during the period 1 April 1997 to 31 March 2010. There was then a record drought in 2010. Rainfall in the Peel-Harvey catchment has declined by 15% since 1975 and has predicted a 20-30% decline by 2030. Studies have shown that ‘for a given change in rainfall, there is generally a threefold change in streamflow’. Indeed, it was estimated in 2010 that mean annual streamflow will have decreased by 12-63% compared to 1990 in south-west WA. Run-off in the hills catchments may already have declined by as much as 64% since 1975 and

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112 Ibid 196 (citations omitted).
113 Davis et al., above n 9, 24.
114 Arthington, above n 94, 197 (citations omitted).
115 See below, Section 2.2.1, 18-19; Peel-Yalgorup System Ramsar Site Management Plan, above n 29, 24-26 (Tables 8 and 9), 29.
119 Streamflow trends in south-west Western Australia, above n 8, 6; Commonwealth Scientific and Industrial Research Organisation (CSIRO), ‘Surface water yields in south-west Western Australia’ (Report to the Australian Government, 2009) iv.
120 Department of Water, ‘The effects of climate change on streamflow in south-west Western Australia’ (Report no. HY34, Surface water hydrology series, Government of Western Australia, 2010) vii (citations omitted). See also, State of the Environment 2011 Committee, above n 8, 251; ‘Climate change impacts in Western Australia’ on Department of the Environment and Energy, Australian Government, Topics, Climate change, Climate science, Climate change impacts <https://www.environment.gov.au/climate-change/climate-science/impacts/wa>.
some estimates indicate that it could cease altogether.\textsuperscript{121} According to Harvey Water, the operator of Harvey Dam, some of the local brooks that used to flow throughout the year now dry up in December and January; other local brooks, including the Harvey River in 2006, 2010 and 2015, only retain some summer flows because of releases from the dams.\textsuperscript{122} In 2011, a hydrological modelling of the Peel-Harvey catchment found that ‘stream restoration needs to be pursued’.\textsuperscript{123}

As noted by the Hon Justice Brian Preston: ‘The existence of the current baseline pressures that ecosystems, habitats and species face is evidence that the existing laws are inadequate’.\textsuperscript{124} For this reason, ‘identification and reform of the limitations in the existing laws are needed in order to reduce the baseline pressures and prevent, control and mitigate new pressures’.\textsuperscript{125}

\textbf{B Were EWPs actually made?}

The construction of the North Dandalup Dam was given environmental approval in 1990\textsuperscript{126} and completed in 1994. The Stirling-Harvey redevelopment scheme was approved in 1999 and saw the existing Harvey Weir upgraded to the (New) Harvey Dam by 2002.\textsuperscript{127} At the time of the respective environmental approvals, public water authorities’ access to water resources was regulated by the water services legislation.\textsuperscript{128} The metropolitan water services legislation provided that the then Water Authority:

\begin{quote}
[M]ay divert, intercept, and store all water coming from the streams, watercourses, and other sources within the boundaries of any such reserve or
\end{quote}

\textsuperscript{121} Hick, above n 118, 19. See also, Department of Water, ‘Annual Report 2015’ (Government of Western Australia, September 2015) 24; Climate Commission, above n 117, 2-4; ‘Climate change impacts in Western Australia’ on Department of the Environment and Energy, Australian Government, \textit{Topics, Climate change, Climate science, Climate change impacts} <https://www.environment.gov.au/climate-change/climate-science/impacts/wa>.

\textsuperscript{122} Email from Stephen Cook, Harvey Water to Jeanette Jensen and Alex Gardner, 25 July 2016. For example, Banceill brook now dries in summer, while Drakes and Logue brooks retain a flow from dam releases.

\textsuperscript{123} Kelsey et al., above n 8, 122.


\textsuperscript{125} Ibid 376.

\textsuperscript{126} Minister for the Environment, ‘Next major water supply source for Perth (Post 1992) – Stage 1’ (Ministerial Statement No 111, 3 October 1990) (‘Ministerial Statement for the North Dandalup Dam’).


catchment area, and alter the course of any stream or watercourse, and may take any water found on or under such land (emphasis added).\textsuperscript{129}

There were then no statutory qualifications on this power of Water Authority to take all the water of a catchment, not even for the protection of riparian rights of landholders downstream of the dam. That changed in 2001; amendments to the \textit{RiWI Act} introduced the requirement for the Water Corporation (the successor to the Water Authority) to obtain a water licence to take water and operate the dam in accordance with the requirements of the licence.\textsuperscript{130} This means that, chronologically, the \textit{EP Act} EIA provisions were the only means of assessing and determining EWPs when the North Dandalup and Harvey Dams were approved. The implementation of those EWPs seems to have been taken over by the DoW after the introduction of the \textit{RiWI Act} licensing provisions.

1 \textit{The EP Act EIA Regime}

EWPs were not set or required upon ministerial approval of the North Dandalup Dam. This was so even though the environment was recognised as a legitimate user of the water,\textsuperscript{131} and research by the Aquatic Research Laboratory (ARL) had recommended consideration of the adoption of a flow release regime.\textsuperscript{132} Nor did the ministerial statement of approval mention the PYS, although it was Ramsar listed approximately four months prior to approval.\textsuperscript{133} Instead, the ministerial statement imposes on the proponent two basic legal duties relevant to environmental water flows:

1. To adhere to the proposal for the North Dandalup River as assessed by the EPA and fulfil the commitments made in the Environmental Review and Management Programme (‘ERMP’), the most relevant here being commitments 7 & 8;\textsuperscript{134} and

2. Prior to construction, to prepare and implement an Environmental Management Programme, also known as an Environmental Management Plan (EMP) ‘to the satisfaction of the Minister for the Environment on

\textsuperscript{129} \textit{MWSSD Act} s 14 and \textit{CAWS Act} s 11. Compared to the common law regime, the water supply legislation did not have regard for environmental sustainability and natural flow, see, eg, Gardner et al. (2009), above n 2, 201.

\textsuperscript{130} \textit{MWSSD Act} s 14 and \textit{CAWS Act} s 11 were made subject to s 5C of the \textit{RiWI Act} by inserting the following subsection: ‘A licensee shall not exercise the powers conferred by subsection (1) in relation to water to which section 5C of the Rights in Water and Irrigation Act 1914 applies, except under a licence or right granted or conferred under Part III of that Act’ (s 14(2)).

\textsuperscript{131} \textit{Next Major Water Supply Source for Perth (post 1992)}, above n 99, app 4, 1.

\textsuperscript{132} Aquatic Research Laboratory, ‘Stream Fauna Studies – North Dandalup, Canning Reservoir, Lower Canning River, and Stinton Creek Catchments’ (Department of Zoology, The University of Western Australia, 1988).

\textsuperscript{133} The PYS was listed on 7 June 1990, see Ramsar, ‘The List of Wetlands of International Importance’ <http://www.ramsar.org/sites/default/files/documents/library/sitelist.pdf>.

\textsuperscript{134} Ministerial Statement for the North Dandalup Dam, above n 126, Condition 1.
advice of the Environmental Protection Authority and the Department of Conservation and Land Management [‘CALM’] (emphasis added), which must include details of, inter alia, ‘the management of environmental impacts in the reservoir, dam and immediate downstream sections of the river and valley during and following the construction phase including the mitigation of impacts upon habitats’.136

Commitment 7 imposes a duty on the Authority to determine a satisfactory arrangement for the domestic, stock and garden water requirements of the downstream landowners. Even though Commitment 7 recites the statutory proposition that the ‘Water Authority is not required by law to release any water stored behind the proposed dam’,137 the Water Authority undertook to review ‘present’ use of the river flow and determine ‘a satisfactory arrangement for meeting the genuine and reasonable domestic, stock and garden watering requirements of the landowners’ in consultation with existing riparian owners due to ‘the possible adverse impact [of the dam] on riparian users’ of the North Dandalup River.138 This may be construed to mean that the Water Authority undertook a duty to release water for these purposes. Commitment 7 goes on to say that: ‘If the arrangement arrived at is to release prescribed flows, the amount released would not exceed the natural stream flow into the reservoir at the time and no water would be released in periods when the natural stream flow ceased altogether’ (emphasis added).139 The ‘if’ in this context may be construed to mean that a release regime may not be necessary following the interpretation of ‘satisfactory’, ‘genuine’, and ‘reasonable’. On the other hand, it may be argued that the ‘if’ means that there is no such duty, regardless, as it is the prerogative of the Authority. However that may be, while such releases may, to some extent, serve as EWPs, this is a side effect and not their main purpose.

Commitment 8 prescribes that the proponent will design and undertake ‘an ecological study and monitoring programme … to assess stream flow-related requirements of local fish and other aquatic fauna … and to detect changes in their populations which might be related to the operation of the dam’, and that such information will be used to plan future water supply projects and to manage river flows in ways most beneficial to aquatic fauna.140 While this commitment does not directly provide EWPs either, it authorises and, arguably, requires the Authority to

135 Ministerial Statement for the North Dandalup Dam, above n 126, Condition 2.
136 Ibid Condition 2(3).
137 Ibid Commitment 7, which reflects Section 14 of the MWSSD Act.
138 Ibid.
139 Ibid.
140 Ibid Commitment 8.
provide them on the basis of the study and monitoring programme. In other words, the information should facilitate adaptive management in terms of providing EWPs.

These two commitments have been implemented in the EMP adopted by the Water Authority in 1991. Three issues emerge from the EMP: the provision of summer riparian releases from the North Dandalup Dam; the provision of flows from the Harvey Diversion Drain into the Harvey River to compensate for the reduced flows from the North Dandalup River into the Estuary; and the establishment of a monitoring program.

The EMP provides for a summer riparian release regime to fulfil the **Commitment 7 duty** to determine a satisfactory arrangement for landowners. The proponent undertook ‘to make annual releases through the dam in summer months from December to March’, which would be ‘in quantities typical of summer flows over the last 15 years and … additional to any overflows during winter months’. The regime would see releases of 215 ML in December, 82 ML in January, 15 ML in February, and 14 ML in March, which in total comes to 326 ML. Although the 1991 EMP recognised that it is ‘important to manage the system so that further degradation does not occur, and that habitat for existing aquatic species is enhanced’, the flow and ecosystem health of the North Dandalup River were not addressed in determining the riparian release regime because the dam’s adverse impact on the stream environment was considered to be ‘relatively small’ due to ‘the already degraded nature of the River on the Swan Coastal Plain [downstream of the Dam]’ and the ‘intermediate levels of disturbance due to the impact of the pipehead dam’. In contrast, the ARL study conducted during the EIA in 1988 found that the nature of the North Dandalup River was worthy of conservation, that winter flow in the North Dandalup River would be reduced in all years except those in which the dam would overflow continuously, and so recommended the consideration of a release regime that would mimic the seasonality of the natural flow regime. Notwithstanding that recommendation, the EMP’s summer release regime gained the approval of the Minister for the Environment and relevant agencies. It would constitute merely 2.3% of the projected annual flow reduction from the river.

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141 Water Resources Directorate, ‘North Dandalup Dam Environmental Management Plan’ (Report No WP 112, Water Authority of Western Australia, August 1991) (‘North Dandalup Dam Environmental Management Plan’). We have no evidence of the Minister’s approval of this Plan.
142 Ibid 29.
143 Ibid.
144 Ibid 30 (underlining emphasis added).
145 North Dandalup Dam Environmental Management Plan, above n 141, 35 [11.1].
146 Ibid.
148 ARL, ‘North Dandalup – Stream Fauna Study: Results and Recommendations 1985-1987’ (Report 9, Department of Zoology, The University of Western Australia, 1988) 58 (Table 6) (‘North Dandalup Stream Fauna Study’).
A key reason for agreeing to prescribe only the summer release regime was the new deal to provide for compensating flows from the Harvey River to the Estuary. In contrast to the ministerial statement of approval, the EMP defines a release regime that was also intended to ‘ensure that on average there is no net reduction in water flows to the Peel-Harvey Estuary’.149 As the dam was estimated to reduce mean annual river flows to the Peel Inlet by about 14,000 ML/year,150 and because the dam was only expected to ‘fill to near overflowing once every two or three years’,151 the riparian release regime was far from sufficient to ensure no reduction in flows to the Estuary. For this reason, the Water Authority also undertook to release 13,000 ML/year on average from the Harvey Diversion Drain ‘back into the Harvey River and consequently to the Estuary’.152 These EMP undertakings concerning the Estuary were a ‘result of representations to the Minister for Water Resources regarding the perceived impact that the North Dandalup project would have on the Peel-Harvey Estuary’.153 However, the EMP explains that the undertaking for the Harvey Diversion Drain release should be referred as a separate proposal for EIA and subject to the approval of the Minister for Environment.154 As explained below, this EMP undertaking was partly delivered in 1994, but there is no evidence that it has been assessed and approved. It has been discarded.

The EMP also gives effect to the Commitment 8 duty to design and undertake an ecological study and monitoring programme, which is implemented through two sections of the EMP.155 The first sets out the environmental data concerning aquatic fauna in terms of the general impact of dams, the existing quality of the North Dandalup River, and the specific predicted impacts of the North Dandalup Dam.156 It is recognised that dam construction, generally, contributes to a decline in species diversity and abundance caused by lower and less variable flows.157 The likely or anticipated specific impacts of the dam include an amplification of these impacts and a shift in the ecological community to be more representative of still or low flow environments, the extent of which depends on, inter alia, the release regime of the dam.158 This is the accepted risk of dam construction and, of the four options or areas considered for development, the North

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151 North Dandalup Dam Environmental Management Plan, above n 141, 12 [3.3].
152 Ibid 29-30.
153 Ibid 29.
154 Ibid 30.
155 North Dandalup Dam Environmental Management Plan, above n 141, 7 [2.12].
156 Ibid 15-9 [3.6].
157 Ibid 15 [3.6.1].
158 Ibid 18 [3.6.3].
Dandalup Dam proposal was estimated to have the ‘least significant impact on the natural environment’.159

The second relevant EMP section contains the actual environmental monitoring programme to manage such impacts.160 Thus, the purpose of the programme is ‘to determine any changes which might take place during the development and operation of the project’.161 The ARL quality description of the North Dandalup River provides the baseline data for (future) biological monitoring of the dam’s impact.162 The ARL study also enables ‘the detection of long-term changes in community structure associated with climatic change’.163 The obligations of the proponent in this regard are to ‘keep the EPA informed of the progress of these studies, and … consult with it prior to the implementation of any strategy’,164 to compare monitoring observations of scheme operation with baseline descriptions of the vegetation,165 and to implement a vertebrate fauna monitoring programme that would ‘assess the impacts on amphibians, birds, reptiles, small and medium size mammals’.166 At the time, the proponent was also developing a monitoring system, which was likely to include ‘monitoring of stream velocities on a regular basis’ to enable it ‘to determine the amount a [sic] water that should be released from the reservoir throughout the year’.167 Notably, the Water Authority committed to discuss with the EPA and other appropriate authorities before modifying the programme on the basis of monitoring results.168

Finally, the proponent made a general undertaking to report to the EPA on ‘progress with implementing the various aspects of the EMP … on an annual basis, with a post construction report to be completed, including data, following the first six months of operation’.169 If one considers this promise with Ministerial Condition 2 stating that the EMP must provide for the management of ‘environmental impacts in the reservoir, dam and immediate downstream sections of the river and valley during and following the construction phase’, it is uncertain that the EMP was setting up a regime for ongoing monitoring, reporting and adaptive management to minimise the Dam’s long term impact on the North Dandalup River and in turn the Peel-Harvey Estuary. The Department of Water

159 Next Major Water Supply Source for Perth (post 1992), above n 99, 6, 54.
161 Ibid 38.
164 North Dandalup Dam Environmental Management Plan, above n 141, 36 [11.1].
165 Ibid 37 [11.2].
166 Ibid [11.3].
167 Ibid 36 [11.1].
168 Ibid 38 [11.6].
169 Ibid.
One outcome of the EMP monitoring regime appears to be the defining of EWRs for the riverine environment downstream of the North Dandalup Dam in 1998, four years after it started operating. The 1988-89 EIA for the North Dandalup Dam studied the environmental condition and, to some extent, the hydrology of the catchment, but it did not determine the EWRs of the North Dandalup River or the Estuary. It simply recommended consideration of the adoption of a ‘compensation’ flow release regime from the dam to cause the least environmental impact. The reason for not determining the Estuary’s EWRs in this connection seems to be that the Dam was only expected to reduce total flows to the Peel Inlet by 2.6%, which loss would be compensated by “releases” from the Harvey River Diversion Drain to the Harvey River and Estuary. In 1998, the EWRs of the North Dandalup River were determined during the process of determining environmental flow regimes for the New Harvey Dam (‘Harvey Dam’). Still, only the EWRs of the two Rivers were determined, not of the Peel-Harvey Estuary. Instead, the environmental objective for the Estuary was simply to maintain current inflows.

The 1998 study proposed a flow allocation regime for the North Dandalup Dam with a total annual volume of releases of 7,024 ML, which would see significantly higher releases during winter, and the colder months in general, than those of summer months. In fact, August-October were found to be ‘critical months for reproduction and movement of native fish of the lower North Dandalup system’ and the estimated minimum daily flow requirement during these months was 23.84 ML. The flows of this 1998 proposed regime were, generally, regarded as ‘minimum requirements’, as is evident from the percentile values being generally ‘well below the 50th percentile’, which means that they are well below 50% (or the median) of flow observations. The 1998 proposal was never adopted formally as an EWP, which left only the 1991 EMP summer release regime, totalling 326 ML and merely 4.6% of the proposed 1998 regime.

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170 Email from Renee Rowling, Department of Water of Western Australia, to Alex Gardner, 1 March 2017.
171 Davies et al., above n 100, Chapter 5.
172 1989 Stream Fauna Studies, above n 163, 19.
175 Davies et al., above n 100, 83, 93, 102; North Dandalup Dam Environmental Management Plan, above n 141, 29 [8.1].
176 Davies et al., above n 100. 79 (Table 4.12).
177 Ibid 74-76.
178 Ibid 80.
The volumes of releases from the North Dandalup Dam are now (2016) even lower and the consumptive use diversions of water from the Harvey River much higher. The 1991 EMP (and the ministerial approval statement) seems to have been overtaken by 1999 statement of ministerial approval of the Stirling-Harvey redevelopment scheme and the 2001 water law reforms. The approval authorised the construction of the Harvey Dam to store 60 GL for irrigation and the diversion of an additional 34 GL/year from the Stirling Dam (within the Harvey River Basin) to the Perth Metropolitan Water Supply Scheme. Although the EWRs of the North Dandalup River were determined in the assessment for this scheme, the ministerial approval made no EWP for the waterways or the Estuary. Instead, it is a condition that the proponent ‘[c]onfirm the release [from Harvey Dam] of aesthetic flows to the Tourism Precinct [about three kilometres below the Dam] are in accordance with the requirements of the WRC’ in order to maintain amenity within the precinct.179 The proponent also committed to ‘[p]repare and implement an investigations program to verify the adequacy of the environmental water provisions downstream from the proposed new dam wall’ (emphasis added).180 It is not clear whether the ‘adequacy’ of the EWPs refers only to amenity goals. There is no mention of the North Dandalup 1991 EMP undertaking to provide compensation flows from the Harvey River Diversion Drain to the Harvey River.181

Why were no EWPs made for the Harvey River below the Tourism Precinct and for the Estuary? The following points come from 1998 assessment study and the 1998 Proposed Harvey Basin Surface Water Allocation Plan (‘proposed Plan’),182 which found that EWPs were not required for three main reasons. First, thus far clearing and draining of land had caused an overall increase in flows in the lower rivers of the Harvey catchment (and, therefore, to the Harvey Estuary) compared to pre-European conditions.183 Secondly, streamflow upstream of the Dam was not considered to contribute to key water-dependent ecosystems of the Harvey River, as ‘almost all overflow from the Harvey Weir is diverted down the Harvey Diversion Drain to the Indian Ocean’.184 This disregards the undertaking of the North Dandalup Dam EMP, as this exact flow was meant to provide compensatory releases to the Estuary. Thirdly, the study recommended that a

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179 Ministerial Statement for the Stirling-Harvey Redevelopment Scheme, above n 127, sch 2 (P33).
180 Ibid sch 2 (P15).
181 Ibid sch 2; Gardner (2006), above n 18, 227.
182 Water and Rivers Commission, ‘Proposed Harvey Basin Surface Water Allocation Plan’ (WRAP Report No. 14, Government of Western Australia, 1998) i (‘Proposed Harvey Basin Surface Water Allocation Plan’). While there is no evidence of its formal approval, according to personal correspondence between Alex Gardner and Mr. Roy Stone, Department of Environment, this Plan was formally approved by the Board of the Water and Rivers Commission: see, Alex Gardner and Vivian Chung, ‘The Law and Policy of Environmental Water Allocations in Western Australia’ (Draft of Paper for presentation to the EDO Water Law Conference, 8 July 2005) 13 (footnote 71).
183 Davies et al., above n 100, 88.
184 Proposed Harvey Basin Surface Water Allocation Plan, above n 182, ii.
‘compensation sub-catchment [be] quarantined from resource development’, 185 including a number of un- and semi-regulated tributaries of the Harvey River, 186 ‘until environmental water provisions are established for these streams’. 187 The study also recognised that releases might become necessary. 188 The then state water resource regulator, the WRC, believed ‘that 95% of the mean annual flow of semi-regulated and unregulated streams (other than Wellesley Creek) should be provided to the environment’ 189 and that ‘release strategies from existing storages should be developed to maximise the benefits of future restoration’. 190 The proposed Plan also stated that EWRs and EWPs should be reviewed ‘as information becomes available from monitoring and research’. 191 Further, a consultant’s report to the Water Corporation in 2000 cited the uncertainty around the effect of the ‘increased salinity resulting from the [Dawesville] cut’ on the estuarine water quality and the lower reaches of the Harvey River, but it still suggested that ‘increased winter flows from the Harvey River could have the potential to partly ameliorate [those] effects’. 192

Ultimately, the state agencies and ministers favoured water resources development and deferred making the necessary hard choices for EWPs in reliance on dim past perceptions and distant future forecasts. The proposed Plan seems to have adopted as the environmental objective for the Estuary the EWRs of the estuarine wetlands in the catchment; namely, to maintain ‘existing salinity and water levels’. 193 It estimated that the drying climate would ‘reduce overall source yields or consumptive use allocations by about 10-15% per year’ based on the 1975-95 rainfall sequence. 194 However, a reduction in streamflow was considered likely to be acceptable ‘provided that flows were not reduced below pre-European settlement levels’. 195

In the decade that followed, the compensation sub-catchment for the Harvey Dam was not quarantined from water resource development. 196 The Proposed

185 Davies et al., above n 100, 102.
186 Ibid. The tributaries included the Weekes, Clarke, Logue, Bancell and Samson brooks.
187 Proposed Harvey Basin Surface Water Allocation Plan, above n 182, iii.
188 Davies et al., above n 100, 103.
189 Proposed Harvey Basin Surface Water Allocation Plan, above n 182, iii.
190 Ibid; EPA, ‘Harvey Basin Surface Water Allocation Plan – Water and Rivers Commission – Advice to the Minister for the Environment from the Environmental Protection Authority under Section 16 (e) of the Environmental Protection Act 1986’ (Bulletin 910, November 1998) (withdrawn) 15.
191 Proposed Harvey Basin Surface Water Allocation Plan, above n 182, 38.
192 Email from Renée Rowling and Ben Drew, Department of Water, Government of Western Australia, to Alex Gardner, 3 March 2017, referring to a report by Streamtech for the Water Corporation in 2000 on the adequacy of EWPs for the Harvey River downstream from the New Harvey Dam site.
193 Proposed Harvey Basin Surface Water Allocation Plan, above n 182, 40 (Table 9), 41.
194 Ibid 33.
195 Ibid 41.
Harvey Basin Surface Water Allocation Plan was not approved by the Minister;¹⁹⁷ no other water resource plans (statutory or non-statutory) have been made for the Peel-Harvey surface water catchments; and the EIA ministerial approvals have languished. As the climate dried dramatically, the process of making and delivering EWPs receded to the confidential controls of the RiWI Act licence regime.

2 The RiWI Act Licence Regime

In the absence of any approved RiWI Act statutory plans or non-statutory water resource plans, we turn to the RiWI Act licensing regime for the North Dandalup and Harvey Dams.

The current water licence for the North Dandalup Dam, the term of which is 16 November 2012 to 30 June 2017,¹⁹⁸ does not directly mention any EWP. However, the licence is conditional upon the licensee’s compliance with ‘the commitments or requirements of the operating strategy as prepared by the licensee and approved by the Department of Water … [in November 2012], including any modifications … approved during the term of the licence’.¹⁹⁹ In fact, the operating strategy is the Water Resource Management Operation Strategy 2012-2017 (‘WRMOS’) for the Integrated Water Supply Scheme (‘IWSS’), with annual amendment addenda. The IWSS supplies Perth, Mandurah, the Goldfields and Agricultural Areas, and some South West towns. The IWSS water sources are regulated by more than 30 groundwater licences and 15 surface water licences, and is also integrated with supply from seawater desalination and groundwater replenishment using recycled wastewater. The scheme is integrated by a network of pipes that allows desalinated water to be stored in hills dams and coastal groundwater to be supplied to inland agricultural areas. The total estimated supply for 2012-13 was 302GL with a baseline groundwater component of 120GL and an estimated annual growth of 3.5GL/year. While the ‘water year’ runs from 1 July to 30 June, there is monthly and annual reporting with key water supply decisions scheduled for October after assessment of winter recharge. There are EWPs for some groundwater and some surface water sources.

The WRMOS is a complex description of a complex scheme, utilised mainly as a flexible internal operating guide applied by annual agreement with the DoW for the principal purpose of maintaining security of supply to Water Corporation customers in compliance with licence conditions, including the ‘entitlements’ to maximum annual take of water from each source. The groundwater licence

¹⁹⁷ Above n 182.
¹⁹⁸ Department of Water, Water Register, ‘Licence to take water’ (Instrument No. SWL56735(10) from 16 November 2012 to 30 June 2017) held by the Water Corporation. Obtained via email from Ben Drew, Department of Water, Government of Western Australia, to Alex Gardner and Jeanette Jensen, 27 November 2015.
¹⁹⁹ Ibid.
entitlements are adjusted by an annual licensing process and, of course, the supply from surface water sources depends on winter recharge. The take from these natural sources is clearly being adjusted over the 2012-17 term of the WRMOS as the desalination and groundwater replenishment assets have been developed, but this is not explained in detail. The document is ‘confidential’, but it has been kindly supplied by the Water Corporation to assist this research.200

The WRMOS describes the North Dandalup Dam as a ‘large storage reservoir’ and ‘a major Metropolitan base load source’ with a capacity of 74.85GL/year and annual entitlement of 22.2GL/year.201 The WRMOS distinguishes between surface water riparian releases and surface water EWPs.202 The North Dandalup Dam is included in the dams named for riparian releases but not for EWPs.203 The riparian releases are essentially designed to meet the interests of downstream riparian landholders over summer and, while they may also serve certain ecological values, they are not primarily designed to achieve EWP purposes.

The WRMOS provides distinct regimes of releases for ‘standard’ and ‘low rainfall’ years, though the detailed character of the releases varies for the different dams. The WRMOS made in 2012 set the ‘standard’ / ‘low rainfall’ marker at greater or less than 670 mm of rainfall between 1 May and 30 August, but in 2014 that marker was reduced for a number of dams (including North Dandalup) to 622 mm. In standard years, 1 ML/day is released from 15 November to 20 December, then releases increase to 2 ML/day with the possibility of increasing to 3 ML/day for a short period depending on the weather.204 This regime runs until 60 mm cumulative rainfall has been received after 1 April, but releases may be recommenced upon a phone call from the landholders’ representative.205 Discarding the potential increase to 3 ML/day and assuming that releases continue until 1 April, this amounts to a total of 239 ML.206 In low rainfall years, the release volumes are half the standard.207

It is apparent that this WRMOS release regime is different from the EMP

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201 WRMOS, above n 200, sections 1.2.6, 1.3.1.  
202 WRMOS, above n 200, sections 6.2, 6.3. Appendix 4 of the WRMOS summarises the riparian and EWP releases to be made, including the triggers for commencing and ceasing those releases, and their volumes. Notably, the WRMOS does not use the language of the State Policy, which includes riparian releases or releases for social values under the term ‘EWPs’, see Environmental Water Provisions Policy for Western Australia, above n 16, 7.  
203 WRMOS, above n 200, sections 1.3.1.  
204 Ibid 40 (app 4).  
205 Ibid.  
206 ((16+19 days) x 1 ML) + ((12+31+28+31 days) x 2 ML) = 239 ML.  
207 Ibid 41.
release regime. The volume of releases is spread more evenly over the months November to March and the minimum total summer releases would be less than under the EMP: 239 ML compared to 326 ML. According to the DoW, the 1999 and 2001 IWSS WRMOSs prescribed similar release regimes in both timing and volume.  

It appears that the WRMOS has overtaken the 1991 EMP provisions as the basis of making riparian releases from North Dandalup Dam. More so than the EMP, the WRMOS release regime seems designed to meet riparian landholders’ interests in water supply rather than mimicking the natural drying through summer. We are not aware of any EP Act authorisation to reduce the total volume of the summer releases, though the change in the distribution of the flows may be permitted by the EMP provision that ‘[w]hile the total volume of releases is regarded as relatively fixed … there would be some scope to vary the distribution between the months and also within the months’.  

Could the reduced total releases be important? The North Dandalup Dam releases were originally designed to flow as far as the summer groundwater discharges to the North Dandalup River and facilitate flows from there to the Estuary. According to the DoW, the environmental objective for releases was ‘to ensure that high value pools were maintained and that river connectivity continued as far downstream as possible to provide drought refuge for fish and crayfish’. However, the groundwater discharges have been receding downstream and the environmental objectives were severely tested in the winter of 2015, a very dry season. In June 2015, the North Dandalup River did not flow, which angered North Dandalup farmers into accusing the DoW of environmental vandalism. It should be noted, however, that inflows to the dam did not commence until July that year, which means that the lack of flow reflected the natural regime. The environmental objective has since been limited to maintaining the high value pools downstream of the dam, and the DoW has put in place late autumn releases to maintain pools as refuges for aquatic biota until streamflow commences following

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208 Email from Renée Rowling and Ben Drew, Department of Water, Government of Western Australia, to Alex Gardner, 3 March 2017.
209 North Dandalup Dam Environmental Management Plan, above n 141, 30 [8.2].
210 Telephone correspondence with Katherine Bennett, Department of Water, Government of Western Australia (16 February 2016).
211 Email from Ben Drew, Department of Water, Government of Western Australia, to Alex Gardner and Jeanette Jensen, 27 November 2015. See Appendix below.
212 Telephone correspondence with Katherine Bennett, Department of Water, Government of Western Australia (16 February 2016).
213 Strutt, above n 108.
214 Email from Renée Rowling and Ben Drew, Department of Water, Government of Western Australia, to Alex Gardner, 3 March 2017.
215 Meeting with Ben Drew and Katherine Bennet from the Department of Water at the Department of Water on Thursday 26 May 2016.
rainfall, which we suspect may also please the farmers. The DoW considers that further releases would not be a ‘wise use of water’. According to the DoW, EWPs to meet the hydrological and ecological values of the Estuary were considered when determining the release regime for North Dandalup Dam, but they were not made as ‘the objectives would never have been achieved’. Further:

The current release regime balances what is practical in a drying climate given declining inflows and the volume of water that would be required to reach the estuary. The releases support multiple objectives including providing water for Perth’s public water supply, some downstream use and ecological value as well as helping to protect the river below the dam from declining groundwater inputs across the coastal plain.

The authors are not qualified to comment on the scientific substance of this explanation. With respect, our critique is more concerned with the logic of the explanation and the process of the decision-making. There should have been formal adoption of EWPs even if their objectives would be well short of meeting the EWRs. Further, the DoW is referring to multiple competing objectives to be considered in determining the level of releases, which is constrained by provision for public water supply not made in support of it. Most importantly, these decisions have been made through confidential licensing processes rather than by transparent water planning processes with clear political accountability, which would be a better process to meet the challenges of a drying climate.

The Harvey Dam is one of four dams in the Harvey River catchment. It is owned and operated by the Water Corporation but the water is taken for agricultural irrigation by Harvey Water, an irrigation co-operative, under a current (March 2013-June 2018) licence for a maximum 56 GL/year. Before 2006, the water licence itself contained a condition: ‘The licensee will distribute water in a way that maintains traditional patterns of flow within watercourses … until such time as an

216 Email from Renée Rowling and Ben Drew, Department of Water, Government of Western Australia, to Alex Gardner, 3 March 2017. We did not receive any further information as to when this was decided or implemented, how much water the releases consist of, or whether the WRMOS has been/will be updated to reflect this.
217 Meeting with Ben Drew and Renee Rowling from the Department of Water at the University of Western Australia on Monday 30 November 2015; Email from Renée Rowling and Ben Drew, Department of Water, Government of Western Australia, to Alex Gardner, 3 March 2017.
218 Email from Renée Rowling and Ben Drew, Department of Water, Government of Western Australia, to Alex Gardner, 3 March 2017.
219 Email from Renée Rowling and Ben Drew, Department of Water, Government of Western Australia, to Alex Gardner, 3 March 2017.
220 Department of Water, Water Register, ‘Surface Water Licence 98950’ held by South West Irrigation Management Co-operative, which trades as Harvey Water. The licence covers water taken from Harvey Dam, Logue Brook Dam and Wokalup Pipehead Dam, plus some releases from the upstream Stirling Dam. The licence allocation is 55.5 GL/year for commercial irrigation; 0.5 GL/year for industrial and commercial purposes; 0.9 GL/year for distribution losses, and both metered and unmetered livestock and non-potable domestic uses. Obtained via email from the Harvey Water General Manager to Alex Gardner, 30 January 2017.
updated approach is approved by the Department’.  

The current licence requires compliance with a separate temporary operating strategy adopted in 2013, the Harvey-Waroona Irrigation – Water Resource Management Operating Strategy (‘HWI WRMOS’), which was to be replaced by July 2014.  

The HWI WRMOS includes an EWP but it consists mainly of social water requirements to maintain ‘an aesthetically attractive flow’ over the summer period through the Harvey tourist precinct about three kilometres below the Dam.  

The terms of the HWI WRMOS EWP are uncertain in volume and effect. In response to complaints from the local community, the original EWP of 25 L/sec through the Harvey River tourist precinct was increased to 62.5 L/s (‘additional flow provisions’). This was done mainly to maintain social rather than ecological values. That EWP flow is to be ‘partitioned between Harvey Diversion Drain and the Harvey River (Main Drain) downstream of the diversion drain’, which is about 500 metres downstream of the tourist precinct. The HWI WRMOS recognises that this EWP flow is ‘insufficient to stop vegetation encroachment or weed invasion along the watercourse … [m]uch higher release rates (made outside the irrigation season) would be required’. There are no releases outside the summer irrigation season that might maintain EWPs. The DoW considers higher releases to be an inefficient use of water and ‘believes appropriate river restoration and maintenance programs would be effective in meeting community expectations for this reach of the river [below the dam]’. There was also the belief, expressed in the HWI WRMOS, that ‘any runoff below the Harvey Dam’ could contribute to achieving the flow requirements’ of the EWP releases.

However, according to the HWI WRMOS itself, the intended EWP flows were not being achieved because of a lack of infrastructure to divert the ‘additional’ releases into the Harvey River from the Diversion Drain. As an alternative, a pipeline was constructed in 2010 to direct water from an irrigation pipeline into the Harvey River below the Diversion Drain; so this flow occurs only during the summer irrigation season and does not flow through the tourist precinct. Further,
the lack of any gauging stations meant that actual flows were not known. While the HWI WRMOS reflects the outcome of the ecological studies from 1998, the irrigation pipeline flow directed to the Harvey River in no way matches the Water Authority’s 1991 EMP undertaking to compensate the reduced North Dandalup Dam flows by releasing 13,000 ML/year from the Diversion Drain to the Harvey River. It is unclear whether the lack of infrastructure may have affected the capacity of the Water Corporation or Harvey Water to fulfil that 1991 EMP undertaking.

The HWI WRMOS adopted in 2013 was temporary and to be replaced by July 2014 after reviews of certain issues by Harvey Water and the DoW. Harvey Water was to review EWP releases from the Harvey Dam. The DoW promised to re-evaluate, on the basis of drying climate projections, water source yields and environmental provisions with a view to revision of water entitlements that have diminishing levels of allocation reliability. These reviews are continuing as part of a broader Surface Water Review of releases from all dams, including from the North Dandalup Dam. Harvey Water acknowledges that its rolling five year average allocation is now at 62% of its entitlement (compared to 100% in 1996) and that the 2013 temporary release regime is still operating, subject to adjustments made in consultation with the DoW as part of the annual allocations to irrigation shareholders. Ultimately, the authors cannot interpret the HWI WRMOS to require winter releases. Yet, a 2016 publication by Harvey Water asserts such releases:

Harvey Water is required to release water year round … We release a base level of water from the … Harvey Dam which we negotiated with the DoW. These releases used to be topped up by fish breeding flows to permit fish to move upstream and bank overflows to help the fringing vegetation survive. We were successful in having these winter releases made more flexible in the WRMOS due to the exceptionally low inflows to the dams.

In summary, the water licences for the North Dandalup Dam and Harvey Dam do not contain specific conditions for EWPs. Rather, the licences contain conditions

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230 Ibid. Also, email from Katherine Bennett, Department of Water, Government of Western Australia, to Jeanette Jensen, cc Stephen Cook, Harvey Water, 8 June 2016.
231 HWI WRMOS, above n 222, 13.
232 HWI WRMOS, above n 222, 14.
233 Ibid 8.
234 Email from Renee Rowling, Department of Water of Western Australia, to Alex Gardner, 1 March 2017.
235 HWI WRMOS, above n 222, 8. The annual allocation process treats all the water resources licensed to Harvey Water as one pool: email from Stephen Cook, Harvey Water Operations Manager, to Alex Gardner, 24 January 2017, and from the General Manager, 30 January 2017.
236 Harvey Water, ‘The Harvey Water “Furphy”’ (vol. 13, 3rd ed, July 2016). On 28 February 2017, the DoW provided monitoring data for Harvey Dam releases that showed only summer releases were expected and, with limited exceptions for the early winter months of May- July, the releases by Harvey Water are in the summer.
that require implementation of the respective operating strategies containing water release regimes. Although there are environmental objectives for such releases, the regimes reflect mainly social (riparian and tourist precinct) needs rather than broader environmental values. In the face of a drying climate, some adjustments have been made to enhance the releases for the social (riparian and tourist) values, but the provisions for broader environmental values for the rivers have, if anything, been reduced – the informal environmental purposes of the riparian releases from the North Dandalup Dam have been reduced and the proposed review of EWP releases from Harvey Dam appear, from Harvey Water statements, to have resulted in reductions of informal EWP winter releases. The 1991 North Dandalup EMP undertaking to make significant compensating flow diversions to the Harvey River and Estuary appears to have been omitted from the HWI WRMOS. There is no evidence that the Harvey Water irrigation entitlement has been reduced, though annual allocations have been. All of these decisions have been made by confidential water licensing processes and instruments without formal public consultation and without any apparent EIA process.

C Were the Riparian and EWP Releases actually delivered?

We lack information on monitoring and reporting on fulfilment of the EIA ministerial statements of approval for the North Dandalup and Harvey Dams. We have limited information about fulfilment of the terms of the water licence operating strategies for the North Dandalup and Harvey Dams. The Water Corporation’s North Dandalup water licence conditions require annual and three yearly reporting to DoW on dam monitoring data and an analysis of impacts from abstraction, and we expect a similar condition applies to the Harvey Water licence. This type of report is generally not public, but the DoW kindly provided monitoring data of releases from the North Dandalup Dam over the decade 2006-07 to 2015-16 (see Appendix) and monitoring data for releases by Harvey Water from Harvey Dam and from the irrigation pipeline below the Diversion Drain in the period 2013-14 to 2015-16. The data and information that we have illustrates six important points.

First, the EWPs of the 1991 North Dandalup EMP appear to have been overtaken by the reduced release regimes of the North Dandalup and Harvey water licences and their respective operating strategies. In particular, the operating strategies have not implemented the North Dandalup EMP undertaking to

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237 Interestingly, the WRMOS Table 5.2 ‘surface water monitoring requirements’ is blank, see above n 200.

238 Email from Ben Drew, Department of Water, Government of Western Australia, to Alex Gardner and Jeanette Jensen, 2 November 2015. See Appendix below.

239 The Department of Water kindly provided the Harvey Water monitoring data on 28 February 2017.
compensate for the reduced North Dandalup River flows to the Estuary with diversions from the Harvey Diversion Drain to the Harvey River. There does not seem to be a ministerial decision on this under the EP Act.

Secondly, the summer release regime of the North Dandalup WRMOS has largely been complied with. During the period July 2006 to June 2016, the average summer (December-March) releases were 68.2 ML/month and in total 272.9 ML. It bears repeating that the volumes of WRMOS summer releases delivered follow a more even pattern over summer than the EMP release regime and that the total volume of summer releases is 16.3% less than the 1991 EMP. On the other hand, the average of actual releases has been slightly higher than the 239 ML standard minima of the WRMOS release regime. The temporary release regime for Harvey Dam under the HWI WRMOS has also largely been complied with.

Thirdly, 2006-2016 releases from North Dandalup Dam averaged 21.2% of inflow. This number is skewed by the very dry years of 2010-11 and 2015-16 where releases were 126.4% and 43.7% of inflow, respectively. The other eight years’ releases were on average less than 6% of inflow. We do not have Harvey Dam data on the proportion of the volume of releases to inflow; however, the combined volume of expected releases (959 ML/year or .959 GL/year) is less than 2% of the licensed annual extraction of 56 GL/year. According to general scientific studies, an instantaneous stream flow regime of less than 10% of the average flow results in “catastrophic degradation to fish and wildlife resources and harms both the aquatic and riparian environments”. 10% of the average flow ‘is a minimum instantaneous flow recommended to sustain short-term survival habitat for most aquatic life forms’ (emphasis added). This information has been misconstrued to mean that 10% of the average flow is an acceptable minimum. Long-term, 10% of the average flow will significantly reduce channel widths, depths, and velocities; degrade aquatic habitat; ‘islands will no longer function as wildlife nesting, denning, nursery, and refuge habitat’; fish will be crowded into the deepest pools;

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240 This conclusion is arrived at by adding the four monthly averages for the ten-year period and dividing by four. It can be seen that the releases for February 2011 and February and March 2013 were below what would be the monthly minima of 2 ML/day x the number of days for those months.
241 272.9 ML/(326 ML/100%) = 83.7%.
242 Email from Ben Drew, Department of Water, Government of Western Australia, to Alex Gardner and Jeanette Jensen, 2 November 2015 (see Appendix below).
243 Ibid.
244 Ibid.
245 Donald Leroy Tennant, ‘Instream Flow Regimes for Fish, Wildlife, Recreation, and Related Environmental Resources’ (1976) 1 Fisheries 6, 10.
247 E.g., Christopher Gippel, ‘The international transfer of environmental flow methods’ (Speech delivered at the International Riversymposium, New Delhi, 12-14 September 2016).
and natural beauty and stream aesthetics will be badly degraded.\textsuperscript{248} The recommended base flow to sustain ‘good survival conditions for most aquatic life forms and general recreation’ is 30\% of the average flow,\textsuperscript{249} while the ideal environmental flow releases from dams and other diversion structures are 60\% of the average flow, which will ‘provide excellent to outstanding habitat for most aquatic life forms during their primary periods of growth and for the majority of recreational uses’.\textsuperscript{250}

Fourthly, the actual releases for both the North Dandalup Dam and the Harvey Dam have inverted the natural seasonal distribution of river flows.\textsuperscript{251} Even with the cessation of winter flows from 2011, the average of monthly releases from April-November (2006-16) was 28 ML,\textsuperscript{252} i.e. less than half of the average monthly summer releases (68.2 ML). While one may think that releasing more water during a formerly dry period would be beneficial, ‘it generally has a range of adverse effects on aquatic and riparian species and ecosystem function’.\textsuperscript{253} Indeed, the EIA identified the dam’s likely impact of ‘unseasonal fluctuations in regulated flow regime’ as a problem.\textsuperscript{254} The EWPs of the two water licence regimes do not reflect the environmental water requirements for either of the rivers or the estuaries. Hence, although the policy commitment to the environment has not been kept, the commitment to North Dandalup riparian landowners has largely been met despite the fact that the relevant ministerial condition stated that ‘the amount released would not exceed the natural stream flow into the reservoir at the time and no water would be released in periods when the natural stream flow ceased altogether’. Summer stream flows would have ceased years ago.

Fifthly, the drying climate has led to a significant reduction in releases from the North Dandalup Dam over the past decade. Winter releases, including September, were made between July 2006 and June 2011, but then ceased altogether.\textsuperscript{255} As the EMP and the WRMOS included only summer releases, the origin and purposes of the winter releases are not clear. The record low 2010 winter inflows to IWSS dams, including the North Dandalup Dam were merely 11\% of

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{248} Tennant, above n 245, 9.
\item \textsuperscript{249} Ibid 6, 9.
\item \textsuperscript{250} Ibid 9.
\item \textsuperscript{251} Email from Ben Drew, Department of Water, Government of Western Australia, to Alex Gardner and Jeanette Jensen, 2 November 2015 (see Appendix below); \textit{1988 Stream Fauna Studies}, above n 99, 53 (Figure 3); Arthington, above n 94, 86. Harvey Dam monitoring data was provided by an email from Renee Rowling, Department of Water, Government of Western Australia, 28 February 2017.
\item \textsuperscript{252} Email from Ben Drew, Department of Water, Government of Western Australia, to Alex Gardner and Jeanette Jensen, 2 November 2015 (see Appendix below).
\item \textsuperscript{253} Arthington, above n 94, 86 (citations omitted).
\item \textsuperscript{254} \textit{North Dandalup Stream Fauna Study}, above n 148, 58 (Table 6).
\item \textsuperscript{255} Email from Ben Drew, Department of Water, Government of Western Australia, to Alex Gardner and Jeanette Jensen, 2 November 2015 (see Appendix below).
\end{enumerate}
\end{footnotesize}
the previous 10 years’ average.\textsuperscript{256} This resulted in the 2010-11 releases from the North Dandalup Dam being set to 50% of previous years – it was found too detrimental to reduce releases further.\textsuperscript{257} Even so, releases that year were 126.4% of the inflows to the dam, but that included winter releases. In the following four years without winter releases, total annual releases averaged less than 5%. In 2015-16, the dry 2015 winter season sees estimated releases jump again to 44% of inflows. Certainly, the drying climate has made meeting the riparian flows and EWPs much more difficult. Water licence annual allocations to consumptive use have also, inevitably, declined, though it is not clear that licence entitlements have been reduced. These challenges have not been addressed by a focused and transparent decision-making process under either the \textit{EP Act} EIA provisions or by water resources planning. The management response under the water licence operating strategies has been to prioritise water for consumptive use and social values, including water for riparian users, and disregard water for non-social environmental values.

Sixthly, the credibility of EWP accounting depends on the publication of EWP conditions and monitoring data. Across the entire period of the case study, there has been no transparent and legally binding determination of EWPs for waterway and wetland environmental values (including Ramsar values) of the Peel-Harvey catchment. Instead, the release regimes that have been determined have proven malleable to confidential negotiations rather than legally binding. Further, there is no transparent accounting of the releases that are made. Our analysis of the releases from Harvey Dam is limited to statements in the confidential HWI WRMOS and some public statements of Harvey Water. Even when adopted in 2013, the HWI WRMOS stated that the intended release regime could not be delivered because of inadequate infrastructure and could not be verified because there were no gauging stations. Furthermore, the EWPs appear to operate under an ostensibly interim HWI WRMOS with no public evidence of the outcome of the proposed revision. There is no clear indication in the HWI WRMOS of a winter releases regime and no adoption of the North Dandalup Dam EMP undertaking to redirect up to 13,000 ML per year from the Diversion Drain to the Harvey River (Main Drain) for flows to the Estuary. Indeed, the only record found of that undertaking being implemented is a 1994 media release stating that, in the winter of 1994, 7,000 ML was diverted from the Harvey River Diversion Drain back into the Harvey River to offset an equivalent reduction from the North Dandalup Dam.\textsuperscript{258} The Harvey Dam overflowed in 2013 and 2014 (not a regular occurrence), yet there is no evidence

\textsuperscript{256} Email from Ben Drew, Department of Water, Government of Western Australia, to Alex Gardner and Jeanette Jensen, 27 November 2015.
\textsuperscript{257} Ibid.
\textsuperscript{258} Paul Omodei, ‘Diversion of water to Harvey River offsets reduction through new dam’ (Media Statement, 1 November 1994).
that these flows were directed to the Harvey River and Estuary. General statements in a Harvey Water newsletter are no substitute for the publication of official monitoring data.

IV Key Points in Reflections on the Regulatory Framework and Reforms

What are the key points from the above analysis and what could be the legal response?

First, as found in 2006, there is no legal duty to provide EWPs, to make them at a certain level, or to make them in priority to the allocation and delivery of water to consumptive purposes. Nor is there a duty to restore or rehabilitate degraded waterways and wetlands affected by water development projects. The duties on the Minister for Water and the DoW to conserve, protect, manage and assess water resources are, as mentioned above, very general duties that give the responsible authorities extensive discretion, which is difficult for courts to review except where it may be shown that the Minister has abdicated performance of a function. Even then, it would be difficult to fashion an effective remedy to produce an EWP outcome. The RiWI Act and EP Act provisions likewise confer broad discretions that lack a duty of ecological restoration.

The case study clearly shows the effect of the current state framework that lacks statutory duties to make, deliver and report EWPs. National and State policies on EWPs are not being complied with, including statutory recognition of legally secure EWPs, the precautionary principle, the principles that only water in excess of EWPs may become available for consumptive use, that social water requirements are subordinate to environmental requirements, that the DoW will require effective monitoring and management to ensure adequate EWPs, regular review of allocations and EWPs to consider improved knowledge of hydrology, ecology, and climate variation, and the fundamental principle of transparency. The need for EWPs for environmental purposes was recognised in the ecological studies of both dams undertaken for regulatory purposes. Yet, there are no effective EWPs defined in the regulatory instruments and there are no EWPs being delivered for environmental values of the rivers and the Ramsar-listed wetlands downstream of the two dams. In short, the current EWP regulatory framework has failed.

The state law needs to implement the three central national policy goals; there needs to be (i) statutory provision for (ii) legally secure EWPs, and (iii) statutory

259 Gardner (2006), above n 18, 227; Kelsey et al., above n 8, 38. To the knowledge of the authors, Harvey Dam has overflown three times in the past decade, see, Water Corporation of WA, ‘Harvey Dam peaks’ (Media release, 9 November 2005); Water Corporation of WA, ‘Harvey Dam is overflowing for the second time in two years’ (Media release, 1 October 2014).

duties to return over-allocated and overused systems to environmentally sustainable levels of extraction. We acknowledge the political difficulty of achieving these goals, especially in a drying climate. Fulfilment of these national policy goals is made more difficult because the national policy does not give good guidance on how to address the impacts of a drying climate. Clearly, we need to devise innovative responses to the increasing water demand and decreasing water resources, as already advocated by the DoW. The current investment in developing alternative water sources needs strengthening. The impetus for increasing such investment can be driven by implementing an effective regulatory framework for EWPs that precludes governments and agencies from compromising environmental values for short-term socio-economic purposes. That framework must include an objective of ecological restoration and duties on the Minister for Water to implement a transparent and authoritative statutory water resources planning regime that:

- determines in binding plans for all developed water sources, on a catchment wide basis, EWRs and EWPs to achieve the objective, taking into account priorities for high conservation value wetlands (especially Ramsar-listed wetlands) and the impacts of climate change projections; and
- specifies the time frame for implementing the EWPs, including by adjustment of water entitlements to achieve ecological restoration.

Each of these duties involves particular challenges for legal definition and enforcement in ways that courts can review and remedy with the customary respect for the limits of judicial review. Equally, the legislation will need to specify time limits for the performance of these key duties so that executive government cannot avoid the task. Determining the EWRs is an essential component of the ecology-driven approach to rehabilitation by EWPs, which is the favoured approach by WA and, quite possibly, the more realistic approach in a drying climate. Knowing the EWRs is a prerequisite for determining EWPs and the seeming lack of this EWR knowledge regarding the Estuary would have contributed to a failure to provide EWPs. Yet ecological studies can be costly in time and human resources, just as

261 Western Australia’s water supply and demand outlook to 2050, above n 31.
262 Michael Bennett, Alex Gardner and K. Vincent, ‘Regulatory Renovation for managed aquifer recharge of alternative water sources – a Western Australian perspective’ (2014) 24 Water Law 5;
263 In 2008-09, the average cost of a surface water assessment was $76,735, and four to five assessments were conducted for allocation planning per year and, approximately, 12 for licensing, see Department of Water, ‘Annual report 2008-2009’ (Government of Western Australia, September 2009) 12, 16-7; Quantum Management Consulting & Assurance, ‘Department of Water’s Processes – Report for the
reaching political agreement on the level of EWPs can be fraught with political risks that delay decisions. So, the legislation will need to provide default propositions as precautionary alternatives amenable to judicial determination.

It is recommended that the Parliament set default EWPs that will apply within a specified time (e.g. within three years for high conservation waterways and wetlands and five years for others) after the enactment comes into force. The default EWPs could take account of the conservation priority of the relevant waterways and wetlands; for example, allocating to Ramsar wetlands 50% of the average flow for the past ten years, with adjustment for climate change projections. The default EWP for named lower conservation priority wetlands could be 30% based on a similar calculation. Furthermore, the operative provisions of the default EWP could be prescribed by a schedule to the Act that would come into effect with the default EWP and require adjustment of water entitlements within ten years, for example. Such default operative provisions would need to address the sensitive political issues of compensation for those entitlement holders who suffer a reduction of entitlements for ecological restoration. The default EWPs would apply unless or until the Minister adopted, pursuant to statutory process, a water plan for the water source. While this recommendation may seem ambitious, there is now significant water planning experience in Australia and it is practical to charge the parliament with coming to appropriate model provisions that would have only interim operation pending scientific determination of EWRs and political agreement on EWPs.

Finally, water resources law needs reform for effective consideration of future water resources development proposals. As there are no water allocation plans, statutory or non-statutory, for the Peel-Harvey catchment, and no public record of water licence conditions (including operating strategies) and monitoring data, the environmental basis of the existing North Dandalup and Harvey release regimes are not subject to public scrutiny. The DoW’s position that further releases from those dams for environmental purposes would not be a wise use of water has not been tested with the public. The DoW should, henceforth, be legally obliged to determine public EWRs of waterways and wetlands impacted by new water development projects and the Minister should be bound to determine EWPs before issuing a licence. The EP Act EIA procedures can assist with these tasks because such proposals should be referred for assessment. However, the EIA process should not be relied on to repair the omissions of inadequate water resources law.

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Economic Regulation Authority Inquiry into water resource management and planning charges’ (Final Report, 12 March 2010) 53-4.

The deficiencies of the EP Act also need to be addressed. In Save Beeliar Wetlands (Inc) v Minister for Environment (‘Roe 8 case’), the WA Court of Appeal found that EPA non-statutory policies (procedures and guidelines) were simply ‘permissive relevant considerations’.

The EIA process needs better guidance than this, especially after the procedures and guidelines were reformed in late 2016. As the EP Act recognises that non-statutory procedures and guidelines may be made (i.e. instruments for which there is no specific statutory provision for a process to make and apply them), it would be better to have an express statutory declaration that such procedures and guidelines are, or may be designated by the EPA as, mandatory relevant considerations. Further, as the case study shows, there is a need for members of the public to be able to seek a review of a ministerial statement of approval and for the Minister, on EPA advice, to be able to revoke all or part of a ministerial statement that has been breached or has no current application, possibly triggering a new assessment for an ongoing project.

V Conclusion

The current WA regulatory framework for EWPs and ecological restoration has failed in the Peel-Harvey Estuary waterways and wetlands, especially by failing to provide flows from those rivers that are dammed for consumptive use. There are no clear, statutory duties to make, deliver and report on EWPs. This law is contrary to national and state policy, as well as the Ramsar Convention obligations. To fulfil those policies and the international obligations, the WA water resources law reform could state an objective of ecological restoration and impose clear justiciable duties on the Minister for Water to implement a transparent and authoritative statutory water resources planning regime that:

- determines in binding plans for all developed water sources, on a catchment wide basis, EWRs and EWPs to achieve the objective, taking into account priorities for high conservation value wetlands and climate change projections;
- specifies a time frame for implementing the EWPs, including by adjustment to water entitlements, and
- provides a default statutory schedule of EWPs that the Minister must implement if the Minister fails to approve water plans within a specified period of a few years, subject to displacement by later approval of a plan.

265 Jacob v Save Beeliar Wetlands (Inc) [2016] WASCA 126, [61].
The proposed reforms are politically ambitious, but we cannot continue to defer important decisions simply because they are difficult. Should the State fail to enact reforms that achieve ecological restoration of waterways and wetlands, then attention should turn to the role of the Commonwealth in ensuring the implementation of national water policy goals and international obligations, as it has done in the Murray-Darling Basin.
**APPENDIX: Releases (ML) from North Dandalup Dam**

<table>
<thead>
<tr>
<th>Year</th>
<th>Jul</th>
<th>Aug</th>
<th>Sep</th>
<th>Oct</th>
<th>Nov</th>
<th>Dec</th>
<th>Jan</th>
<th>Feb</th>
<th>Mar</th>
<th>Apr</th>
<th>May</th>
<th>Jun</th>
<th>Total</th>
<th>Percentage of inflow (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006–2007</td>
<td>67.5</td>
<td>28.4</td>
<td>–</td>
<td>14.0</td>
<td>51.9</td>
<td>53.5</td>
<td>89.7</td>
<td>84.3</td>
<td>91.5</td>
<td>89.8</td>
<td>94.2</td>
<td>83.6</td>
<td>784.4</td>
<td>11.5</td>
</tr>
<tr>
<td>2007–2008</td>
<td>71.5</td>
<td>20.4</td>
<td>–</td>
<td>–</td>
<td>21.4</td>
<td>69.4</td>
<td>59.8</td>
<td>68.3</td>
<td>72.9</td>
<td>64.7</td>
<td>9.9</td>
<td>–</td>
<td>458.3</td>
<td>3.6</td>
</tr>
<tr>
<td>2008–2009</td>
<td>–</td>
<td>–</td>
<td>2.6</td>
<td>22.1</td>
<td>51.0</td>
<td>52.7</td>
<td>79.2</td>
<td>90.6</td>
<td>81.8</td>
<td>75.0</td>
<td>82.8</td>
<td>84.1</td>
<td>621.9</td>
<td>7.4</td>
</tr>
<tr>
<td>2009–2010</td>
<td>87.8</td>
<td>3.3</td>
<td>–</td>
<td>16.9</td>
<td>32.8</td>
<td>50.6</td>
<td>87.1</td>
<td>77.2</td>
<td>84.8</td>
<td>84.2</td>
<td>87.4</td>
<td>55.1</td>
<td>667.2</td>
<td>3.9</td>
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<td>2010–2011</td>
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<td>39.1</td>
<td>37.6</td>
<td>36.1</td>
<td>36.2</td>
<td>48.7</td>
<td>63.2</td>
<td>53.3</td>
<td>69.2</td>
<td>60.5</td>
<td>54.8</td>
<td>1.9</td>
<td>549.1</td>
<td>126.4</td>
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<tr>
<td>2011–2012</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>16.5</td>
<td>42.9</td>
<td>70.4</td>
<td>86.3</td>
<td>77.6</td>
<td>74.8</td>
<td>10.3</td>
<td>–</td>
<td>378.8</td>
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<tr>
<td>2012–2013</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>12.2</td>
<td>22.6</td>
<td>64.3</td>
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<td>51.2</td>
<td>45.9</td>
<td>24.1</td>
<td>–</td>
<td>261.6</td>
<td>3.5</td>
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<tr>
<td>2013–2014</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>35.1</td>
<td>75.1</td>
<td>80.7</td>
<td>67.5</td>
<td>78.4</td>
<td>70.3</td>
<td>57.6</td>
<td>–</td>
<td>464.7</td>
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<tr>
<td>2014–2015</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>12.6</td>
<td>50.1</td>
<td>78.1</td>
<td>84.2</td>
<td>85.0</td>
<td>74.5</td>
<td>27.5</td>
<td>–</td>
<td>412.0</td>
<td>2.9</td>
</tr>
<tr>
<td>2015–2016</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>–</td>
<td>25.0</td>
<td>39.5</td>
<td>51.5</td>
<td>70.5</td>
<td>61.5</td>
<td>62</td>
<td>58</td>
<td>37.5</td>
<td>–</td>
<td>405.5</td>
</tr>
<tr>
<td>Average</td>
<td>27.5</td>
<td>9.1</td>
<td>4.0</td>
<td>11.4</td>
<td>30.9</td>
<td>51.7</td>
<td>74.3</td>
<td>71.5</td>
<td>75.4</td>
<td>69.8</td>
<td>48.6</td>
<td>22.5</td>
<td>500.4</td>
<td>21.2</td>
</tr>
</tbody>
</table>

Average monthly total 2006–2016: 41.7
Average yearly total 2011–2016: 384.5
Average monthly total 2011–2016: 32

Information kindly provided by the Department of Water.
* This number is based on estimates of releases rather than on actual releases, which the table shows.
BOOK REVIEW

LARRY A. DIMATTEO, INTERNATIONAL BUSINESS LAW AND THE LEGAL ENVIRONMENT. A TRANSACTIONAL APPROACH (TAYLOR & FRANCIS LTD, 3D ED. 2016)

(ISBN10 1138850985)

BRUNO ZELLER

This book presents in a well organised and thoughtful manner the legal environment in which global trade takes place. It is a text which is suitable for law and business students, academics and practitioners. It is ordered into seven distinct parts covering the legal environment, trade regulations, doing business in the European Union and China, Comparative legal Systems, contract and Sales law, Exporting, importing and trade finance, Licencing and intellectual property rights and foreign direct investment and e-commerce. Each part is broken down in chapters highlighting the essential features of the part.

As an example, in Part II (trade regulations) the following chapters are included: International Trade Regulations, National Import and Export Regulations and Free trade agreements.

This book contains several special features which are important not only in the learning environment but also as a tool for quick references by professionals.

First the managerial perspective is focused on business transactions as practices in real world situations. It includes case studies, checklists, forms, tables, and summaries.

In addition, terminology in international business needs to be understood and hence text boxes providing definitions of key legal and nonlegal terminology is provided throughout the text. Key terms and concepts covered in each chapter are summaries at the end of each chapter.

Cases are not merely listed but at the end of each chapter case highlights are provided. These capsules provide a list of principles of law, concepts, and business practices which are presented in the case. This method makes sure that the readers
understands the key issues presented by the chosen cases. A further use is to use the case material as a starting point for more in-depth discussions. This exercises are further enriched by the provisions of end of chapter problems. These excises are not only book based but Professor DiMatteo also provides useful web sites and internets addresses which can be used for extended study and research projects.

Fittingly for an international business law text international and foreign sources are provided. Reference is made to over 20 countries and their legal structures hence the book lends itself to comparative studies as well as illustrating variations in laws between major countries such as the European Union, China and the United States.

In sum, the book provided extensive coverage on all facets of international trade and is a must for any library and is not only suitable as a text book but also a quick reference guide for any consultants and professionals in the space of international trade.
Climate change and agriculture are interrelated. Temperature and rainfall changes impose obvious stresses upon the growth of crops and livestock, but they also contribute to plant diseases and pest infestation. At the same time, agricultural practices contribute to climate change by the utilisation of water, emissions of greenhouse gasses and the conversion of marginal land into arable land. This book looks at the extent to which agricultural laws and policies can address climate mitigation and adaptation.

The opening chapter by Professor Angelo surveys the link between climate change and food security. Key ingredients in this relationship are the one-third growth of global population by 2050 at a time when climate change is reducing land available for cultivation. The solutions proposed in this chapter are greenhouse gas mitigation strategies and adaptation strategies, principally through land use planning. An adaptation strategy which is hinted at, but not discussed in the book, is the breeding of plant new varieties and the possibility of the compulsory licensing of useful varieties.

Climate change and agriculture under the United Nations Framework Convention on Climate Change (UNFCCC) is addressed by Jonathan Verschuuren in chapter 2. His depressing conclusion is that the UNFCCC “unfortunately does not provide a powerful stimulus to adopt and implement climate smart agriculture policies, and there is little attention to reducing emissions from agriculture”.

The resilience and transformation of agro-ecosystems in the face of climate change is explored by Lance H Gunderson in chapter 3. He looks at the response of agriculture to major pest infestations, and plant diseases, as well as the
adoption of new crops such as sugar. The responses to these incidents, he suggests carry useful policy lessons for the current climate change problems.

The application of governance theory to climate-related agricultural changes is explored by Paul Martin in chapter 4. He introduces to governance theory, “autopoiesis”, or the ability of systems to generate internal change. He concludes with the positive observation that incremental climate-friendly agricultural practices and supply-chain strategies can reduce the climate footprint of agriculture.

The role of water law in agriculture is detailed by Robert W. Adler in chapter 5. He looks at the domestic water law of the USA as an example, as well as international water law. He concludes that significant adaptations will be needed in the laws and institutions governing water resources to address the expected impacts of climate change on agriculture.

In chapter 6, Elodie Le Gal looks at climate change and Australian invasive species law.

A potentially important solution to the climate change problem is the genetic modification (GM) of crops. This is examined by Rebecca M Bratspies in chapter 7. She suggests that the claims for this technology “have been extravagant” and that track record of GM crops is “tepid”. Notwithstanding her pessimism, life sciences companies have been busy patenting so called “climate ready genes”, such that for example approaching 80 per cent of the rice genome is the subject of patent applications by those companies.\(^1\)

Keith H. Hirokawa looks in chapter 8 at adapting agriculture to climate change through land use controls. This chapter looks mainly at US examples, including the Climate Change Adaptation Plan of the Environmental Protection Authority.

A US perspective is also taken to intensive animal agriculture and methane emissions by Michelle Nowlin and Emily Spiegel in chapter 9. Their general conclusion is that the US livestock industry has been slow to change its production and management practices to adapt to climate change. To some

\(^1\) See M. Blakeney ‘Climate change and gene patents’ (2012) 1(2) Queen Mary Journal of Intellectual Property, 2.
extent this is because of technological difficulties, but in chapter 10 Christian Häberli describes the adaptation of agricultural trade and investment rules to climate change. Then in chapter 11 J.B. Ruhl looks at agriculture and payments for ecosystem services in the climate change era.

The shift of food producers into biofuels is a factor exacerbating food insecurity. Sérgio Sauer and colleagues in chapter 12 describe the shift of Brazilian sugar producers into agrofuels.

The role of law in assisting smallholder farmers to adapt to climate change in Kenya is described by Robert Kibugi in chapter 13. At the time of writing the relevant legislation was yet to be enacted: the Climate Change Bill 2014, although there are a number of national policies which have a potential bearing on the subject.

A direct conflict between agriculture and the extraction of energy resources is seen in the exploitation of coal seam gas in rural areas. This conflict in Australia is discussed in detail in chapter 14 by Amanda Kennedy and Amy Cosby, which looks at the North-West region of NSW as a case study. Other Australian examples which might be explored are its debates over carbon pricing and carbon sequestration.

In the final chapter, Akachi Odoemene looks at the inter-relationship between climate change and land acquisition. He suggests that land grabbing has been exacerbated by the increased demand for food and thus has a relationship with climate change, much as the slave trade had with colonialism.

This book is a useful introduction to the research which is being undertaken in the area of climate change and agricultural law. A subject which might have been addressed in this space is the relationship between climate change and food waste. A 2013 FAO report *Food wastage footprint: Impacts on natural resources* estimated that the direct economic cost of food wastage of agricultural products (excluding fish and seafood) was about $US 650 billion, equivalent to the GDP of Switzerland. The United Nations Secretary-General’s High-Level Panel on Global Sustainability estimated that food wasted by consumers in high-income countries is roughly equal to the entire food production of sub-Saharan Africa and that the water used for irrigation to produce the food which is wasted annually would be enough to meet the domestic water needs of 9 billion
people. Food waste also has significant environmental impacts. Rotting food produces an estimated 3.3 billion tonnes of greenhouse gases, approximately 14% of the world’s CO2 emissions. Food left to rot in landfills also impacts land biodiversity around the landfill, polluting waterways and groundwater. Thus, reducing food waste can go some way towards meeting the shortfall in food supplies which is in prospect.