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Articles

ROMANCING THE PPSA: CHALLENGES FOR INSTRUCTORS IN TEACHING AND RECONCILING NEW CONCEPTS WITH TRADITIONAL NORMS

FRANCINA CANTATORE^{*} AND IAN STEVENS^{**}

Abstract

Over the past two years the teaching of Personal Property Law has undergone a major transformation. At this point in time, after the end of the two year transitional period of the Personal Property Securities Act 2009 (Cth) ('PPSA') it is clear that the traditional common law principles now need to be examined in the context of a statute based approach. The PPSA has made significant inroads into the way personal property is dealt with in commercial transactions. Not only has the PPSA impacted on various types of security agreements such as mortgages, charges and pledges, but it also reaches into areas such as leases, liens and bailments. Probably the most important effect the PPSA has had on the way property ownership is perceived is the way it has disenfranchised the concept of nemo dat quod non habet, where personal property securities are involved. The dilemma for educators teaching in the area of

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personal property transactions is to make sense of these ground breaking developments in a way students can understand. The challenge is to do so in a way that familiarises students with the traditional common law concepts, while teaching them the ground rules and intricacies of the PPSA as they apply to personal property.

This article examines the challenges in teaching new statute-based law in relation to existing common law principles, and proposes a two-step approach: Firstly, it recommends a contextual teaching approach and secondly, it advocates a practice-based or experiential learning approach for educators.

I INTRODUCTION

The *Personal Property Securities Act 2009* (Cth) ('PPSA') has made significant inroads into the way personal property is dealt with in commercial transactions. The area of Personal Property Transactions ('PPT') is an important area of property law taught in universities. Due to the impact of the *PPSA*, PPT requires a consideration of this innovative piece of legislation and the impact of a statute regulating personal property securities, in a context that historically has had a strong common law focus. In the past PPT generally involved teaching the principles and application of the *Sale of Goods Act*, the concept of *nemo dat quod non habet* ('*nemo dat*'), bailment, property torts, retention of title agreements and charges. The introduction of the *PPSA* has altered that position significantly, and has challenged educators to marry new and unknown concepts with established common law practice,¹ to inform students about changes in personal property securities law. Not only has the *PPSA* impacted on various types of security agreements such as mortgages, charges, and pledges, but it also

¹ For example, the generic concept of a 'security interest' described in s 8 is a new and ground breaking aspect of the *PPSA*.

reaches into areas such as leases, liens and bailments.² Probably the most important effect the *PPSA* has had on the way property ownership is perceived, is the way it has disenfranchised the concept of *nemo dat* (meaning ‘you cannot give what you do not have’), in commercial transactions where security interests exist in personal property.³ The *PPSA* has effectively changed this long held principle; you can now give what you don’t have and ownership is no longer ‘king’.⁴ Ownership no longer means that a person will have the strongest property interest, if there is a registered secured party with a higher priority interest under the *PPSA*.⁵

As observed by Justice Allan in New Zealand’s High Court:

[T]he registration regime introduced by the Act has altered the long-established priority principles grounded in notions of legal title. Irrespective of title, it is paramount that security interests be the subject of registration if priority is to be preserved.⁶

Relevantly, in one of the first cases decided in Australia in the *PPSA* arena, Justice Brereton also clarified that parties relying on ownership to recover personal assets can no longer do so and that the concept of *nemo dat* has been fundamentally altered by the provisions of the *PPSA*.⁷

² See *PPSA* ss 8(1), 12(1), (2)(i), (3)(c). Also see below, Part II.

³ Bruce Whittaker, ‘Retention of Title Clauses under the Personal Properties Securities Act 2009 (Cth)’ (2010) *Journal of Banking and Finance Law and Practice* 273, 283–4.

⁴ *Maiden Civil (P&E) Pty Ltd (in rec) v Queensland Excavation Services Pty Ltd* (2013) 277 FLR 337 (‘*Maiden Civil*').

⁵ *PPSA* s 55.

⁶ *Waller v New Zealand Bloodstock Ltd* [2005] 2 NZLR 549 (HC), 569 [98].

⁷ *Maiden Civil* (2013) 277 FLR 337, 360–1.

In Australia the *PPSA* is a relatively new piece of legislation,⁸ and follows the approach in the Canadian and New Zealand statutes, which preceded Australia.⁹ For example, in 2004, owners of transportable buildings in New Zealand had to come to terms with this fundamental change in the law in the leading New Zealand case of *Graham v Portacom New Zealand Ltd*,¹⁰ as did the owner of the stallion Generous in *Waller v New Zealand Bloodstock Ltd*.¹¹ Both property owners found that mere ownership did not provide protection within the statutory regime.

This change alone can be a hard pill to swallow, especially for students, who may have learnt in property law that property is a bundle of rights and the owner generally has the strongest rights or ‘the biggest stick in the bundle’.¹² The dilemma for educators is to make sense of these ground breaking developments in a way students can understand. The challenge is to do so in a way that familiarises students with the traditional common law concepts, while teaching them the ground rules and intricacies of the *PPSA* over the course of a semester. Additionally, statute-based law can be

⁸ The *PPSA* was enacted in 2009 and came into operation on 31 January 2012. The transitional provisions under ch 9 ceased to operate on 31 January 2014.

⁹ Each Canadian Province (except Quebec) has enacted separate legislation. The first was Ontario, with legislation enacted in 1967 and coming into operation in 1976: *Personal Property Security Act*, RSO 1990, c P-10. Most Canadian legislation is based on the Saskatchewan Model enacted in 1982: *Personal Property Security Act*, SS 1993, c P-6.2.

¹⁰ [2004] 2 NZLR 528.

¹¹ [2004] 2 NZLR 549.

¹² The ‘bundle of rights’ concept first accepted in Australia in the case of *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 268 (Rich J) and more recently referred to in *Yanner v Eaton* (1999) 201 CLR 351, 365–6 [17] (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

perceived as ‘dry’ by students and could present difficulties in interpretation and application, especially as many students have limited experience with commercial dealings.

Jason Harris and Nick Mirzai suggest that the *PPSA* is a new law that breaks from the previous traditional common law regime thereby it would be ‘erroneous to commence its interpretation by starting with pre-*PPSA* forms’.¹³ They further suggest that approaching the *PPSA* with common law principles in mind is ill advised.¹⁴

However, the *PPSA* specifically recognises¹⁵ that the general law, as well as Commonwealth and State-based statutes can apply concurrently with the *PPSA* if there is no direct inconsistency between that law and the *PPSA*.¹⁶ Section 254 is an important provision in the *PPSA*, which indicates that common law and equitable principles are recognised under the *PPSA*. Furthermore, from a teaching perspective, there is a need to provide students with an understanding of the common law to provide them with a solid foundation in the principles of PPT. This need is reflected in the *PPSA* where in defining the core concept of a ‘security interest’ the statute relies on common law examples (eg, charges, chattel mortgages and conditional sale agreements).¹⁷

¹³ Jason Harris and Nicholas Mirzai, *Annotated Personal Property Securities Act 2009 (Cth)* (2nd ed, CCH Australia Ltd, 2014) Introduction III, xxiii.

¹⁴ *Ibid* xxxiii.

¹⁵ *PPSA* s 254(1).

¹⁶ *PPSA* s 254(3).

¹⁷ *PPSA* s 12(2).

Drawing analogies with the Torrens System of land registration may be useful if students are familiar with that concept,¹⁸ as registration (as a method of perfection, alternative to possession) under the *PPSA* (albeit for notice only) is perceived as the ‘Holy Grail’ in the realms of attaining superior protection in personal property security.

II IMPACT OF THE *PPSA*

The significance of the *PPSA* cannot be underestimated. Even though, strictly speaking, the *PPSA* generally only affects personal property transactions if they create ‘security interests’, and when a competing interest of a third party (such as in a purchaser of personal property subject to a security interest or creditor in a priority dispute over the property or in an insolvency situation) becomes involved, these implications are not immediately evident to participants in all personal property transactions. Parties entering into commercial personal property transactions need to ensure that they are sufficiently protected under the *PPSA* in terms of their security interests, even where no third party interest is in evidence at that point.

Significantly, the *PPSA* does not affect the contractual relationship between the parties,¹⁹ but when a third party interest competes with a property interest arising under those transactions that are affected by the *PPSA*, the party with the stronger interest may prevail,²⁰ despite the underlying contract between the parties. Thus the *PPSA* should be a consideration when entering into personal property contracts, and security interests may be an issue to be addressed at that stage to protect parties’ interests, even where a party is the apparent ‘owner’ of goods. For example in a ‘retention of title’

¹⁸ See *Land Title Act 1994* (Qld) Pt 4; *Real Property Act 1861* (Qld).

¹⁹ *PPSA* s 18(1).

²⁰ As per *PPSA* s 55.

situation, security interests need to be perfected to achieve maximum protection under the *PPSA*, which may require further steps to be taken under the *PPSA*.²¹

The *PPSA* impacts on a number of areas of law including corporations law, insolvency law, securities law, credit law and of course personal property law. Students therefore need to understand the scope of the legislation as well as the application of it in the context of personal property securities. This makes teaching the *PPSA* all the more challenging.

Some examples of significant changes in the law are outlined below.

A Lien

A ‘general law’²² (including common law) lien, for example one arising by an innkeeper, mechanic, accountant or a lawyer is excluded from the provisions of the *PPSA* as it is not ‘provided for by a transaction’ as required by s 12(1) of the *PPSA*.²³ However, consensual liens that arise by contract will generate a security interest under s 12 and thereby be regulated by the *PPSA*. As such, consensual liens will have no power unless perfected. This can be done either by possession and/or registration.²⁴ Thus, where liens are specifically included in terms of trade, they require perfection under the *PPSA* to preserve security holder rights,²⁵ however, when they arise from a common law right then no such step is required.

²¹ For example, registration requirements, as per *PPSA* s 153.

²² *PPSA* s 10 (definition of ‘general law’): ‘means the principles and rules of the common law and equity’.

²³ See also *Bank of Montreal v 414031 Ontario Ltd* (1983) 2 PPSAC 248, [5]–[6].

²⁴ *PPSA* s 21.

²⁵ *Ibid.*

B Retention of title agreements

An area of law that has been significantly altered is 'retention of title' agreements (also known as conditional sale agreements or Romalpa Clauses) ('ROT'). As the concept of *nemo dat* is now 'dead' in the context of these agreements, the holder of title can no longer rely on this common law concept to protect their rights.²⁶ Under the *PPSA*, the ROT agreement gives rise to a security interest and,²⁷ thereby, if the supplier wishes to preserve their rights then their interest will require perfection by registration.²⁸ This has been a dramatic change for thousands of small businesses who rely on these types of clauses in their terms of trade.²⁹

C Consignment

A typical example of a consignment is where the owner of goods supplies those goods to retailers for sale but there is no transfer of property. The difference between consignments and ROT agreements is that under a consignment goods may be returned if not sold and the seller does not incur a liability for unsold goods. For example, an artist who provides paintings to an art gallery for display and sale is an arrangement which would be seen to be a consignment and thereby fall within the definition of a security interest and therefore needs to be registered to preserve rights.³⁰ Previously the seller would rely on the common law principle of *nemo dat* to protect their interest, but under *PPSA* provisions this is no longer the case as long as the consignment is commercial in

²⁶ *Royal Bank v Moosomin Credit Union* (2003) 7 PPSAC (3d) 118.

²⁷ *PPSA* s 12(2); see also s 12(1).

²⁸ *Ibid* s 21.

²⁹ See above n 2.

³⁰ *Ibid*.

nature.³¹ If this is the case, the consignment will come within the *PPSA*'s provisions as a 'deemed security interest'³² and gain 'super priority' as a purchase money security interest ('PMSI').³³ It is clear that students require an understanding of the common law application of these concepts in order to fully appreciate the ramifications of the *PPSA*. Arguably this historical review will become less and less necessary as time goes by, and users become more familiar with the workings of the *PPSA*.

III A NOVEL CONCEPT

Many new and interesting definitions have surfaced in this novel piece of legislation. These definitions can be confusing for students who may be familiar with the equivalent common law concepts. For example:

- *The reverse definition of 'personal property' (any property excluding land),³⁴ and other confusing definitions (eg, the definition of 'land' which excludes fixtures).³⁵* Under the common law the definition of land includes improvements on the land (including fixtures), so in this respect the *PPSA* departs from traditional norms.³⁶ The various Australian

³¹ See also *Farm Credit Corp v Valley Beef Producers Co-operative Ltd* (2001) 3 PPSAC (3d) 26.

³² *PPSA* s 12(3).

³³ *Ibid* s 14(1)(d).

³⁴ *Ibid* s 10 (definition of 'personal property').

³⁵ *Ibid* s 10 (definition of 'land').

³⁶ Allens et al, 'Review of the Personal Property Securities Act' (Submission to Attorney-General, 25 July 2014) 4 <www.ag.gov.au/2FConsultations%2FDocuments%2FPPSARReviewSubmissionsRound2%2F042-AllensAshurstHerbertSmithFreehillsKingWoodMallesonsAndNortonRoseFulbright.doc>.

‘Land Acts’ also have an inclusionary definition of land, which differ from the *PPSA* definition.³⁷

- ‘Collateral’ has a more specific definition than its traditional meaning.³⁸ Under the *PPSA* collateral is only created once the prerequisite attachment has taken place.³⁹
- The novel concept of a ‘security interest’ and the idea of ‘substance over form’, which includes transactions previously not registrable and specifically notes no regard need be taken as to the identity of the person who has title to the property.⁴⁰
- The concept of ‘super priority’ enjoyed by certain security interests called *PMSIs*⁴¹ — a special security interest created by financiers for the acquisition of the property or sellers of personal property protected by agreements such as a retention of title agreement.

³⁷ See, eg, *Real Property Act 1900* (NSW) s 3 (definition of ‘land’):

Land, messuages, tenements, and hereditaments corporeal and incorporeal of every kind and description or any estate or interest therein, together with all paths, passages, ways, watercourses, liberties, privileges, easements, plantations, gardens, mines, minerals, quarries, and all trees and timber thereon or thereunder lying or being unless any such are specially excepted.

³⁸ See *PPSA* s 10 (definition of ‘collateral’). Cf Oxford University Press, *Oxford Dictionaries* ‘Collateral’ <www.oxforddictionaries.com/definition/english/collateral>: ‘something pledged as security for repayment of a loan, to be forfeited in the event of a default’.

³⁹ *PPSA* s 10 (definition of ‘collateral’).

⁴⁰ *Ibid* s 12(1).

⁴¹ *Ibid* s 14.

IV THE ABSENCE OF PRECEDENT

At the time of this article there are only a limited number of Australian decisions on the *PPSA*.⁴² As a result Australian educators are largely reliant on Canadian and New Zealand precedent, which of course are persuasive rather than binding on Australian courts. This leaves scope for uncertainty and argument. To date, judges seem content in following their brethren in the Canadian and New Zealand jurisdictions,⁴³ while some (see, for example, Justice Le Miere of the Supreme Court of Western Australia)⁴⁴ revert to the basics of statutory interpretation.

As Dietrich notes, many lawyers don't like statutes nor it would seem do law students.⁴⁵ He cites the observation of Justice Finn, of the Australian Federal Court, that:

If there was much to be said about the relationship [between common law and statute] it did not seem worthy of significant

⁴² Francina Cantatore, 'Intellectual Property Rights and the PPSA: Challenges for Interest Holders, Creditors and Practitioners' (2015) 15 *Australian Intellectual Property Journal* 141, 142 n 7. See, eg, *Re Hastie Group Ltd (No 3)* [2012] FCA 719; *Maiden Civil (P&E) Pty Ltd (in rec) v Queensland Excavation Services Pty Ltd* [2013] NSWSC 852; *NCO Finance Australia Pty Ltd v Australian Pacific Airports (Melbourne) Pty Ltd* [2013] FCCA 2274; *Albarran v Queensland Excavation Services Pty Ltd* [2013] NSWSC 852; *Auto Moto Corporation Pty Ltd v SMP Solutions Pty Ltd* [2013] NSWSC 1403; *Cirillo v Registrar of Personal Property Securities* [2013] AATA 733; *Central Cleaning Supplies (Aust) Pty Ltd v Elkerton* [2014] VSC 61; *Pozzebon (Trustee) v Australian Gaming and Entertainment Ltd* [2014] FCA 1034.

⁴³ See, eg, *Maiden Civil* (2013) 277 FLR 337, 345.

⁴⁴ *White v Spiers Earthworks Pty Ltd* (2014) 99 ACSR 214.

⁴⁵ Joachim Dietrich, 'Teaching Torts in the Age of Statutes and Globalisation' (2010) 18 *Torts Law Journal* 141.

consideration in legal scholarship nor in the curricula of law schools.⁴⁶

Due to the lack of case law precedent, students could be required to engage in extensive statutory interpretation, an art sadly lacking in some undergraduate students, from the authors' experience. This may be a foreign concept to some students but it is a very pertinent issue in this space where students are dealing with a new horizon, such as presented by the *PPSA*.

Thus the crucial issue faced by the educator is how to present the traditional common law principles associated with PPT with the statutory provisions of the *PPSA* in a balanced and logical way. Educators have to reflect and ask these questions:

- How much history should be taught? Are we teaching history because that is what we know or because the students need to know it? Teaching PPT today demands a restructuring of what we used to know, when considering the implications of security interests. The *PPSA* has altered the landscape of commercial dealings significantly and a modern approach is called for, but can we ignore traditional concepts and principles? The answer to the last question must be an emphatic 'no', but we only have a semester or less and so time is limited.
- In what depth should educators teach the common law principles? For example, to understand ROT it is arguable that students need to understand the history and common law principles to fully appreciate the relationships between

⁴⁶ Paul Finn, 'Statutes and the Common Law: The Continuing Story' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 52, quoted in Joachim Dietrich, 'Teaching Torts in the Age of Statutes and Globalisation' (2010) 18 *Torts Law Journal* 141, 141.

the parties, before teaching them how statute impacts on these relationships.

- How do we deal with the ‘chameleons’ of the *PPSA* such as pledges and liens, where some transactions are included under the Act and others are not?

Clearly, both common law principles and statutory provisions need to be clarified to give students a complete understanding of how these concepts are dealt with in practice.

V TEACHING IN CONTEXT

From the discussion above it has been clear that a contextual teaching approach is required. As Resnick notes:

contextualised practice is needed both to tune skills and knowledge to their environments of use and to provide motivation for practicing abilities that in isolation might seem purposeless or meaningless.⁴⁷

Maranville similarly emphasises:

Context is arguably important for three reasons. First, students are more interested in learning when the information they are studying is placed in a context they care about. Second, when teachers provide context for their students, they increase the likelihood that students will understand the information. Third, and especially significant for the law school context, in learning information, we may organize [sic] and store it in

⁴⁷ Sally Kift and Geoffrey Airo-Farulla, ‘Throwing Students in the Deep End, or Teaching Them How to Swim? Developing “Offices” as a Technique of Law Teaching’ (1995) 6 *Legal Education Review* 53, 56.

memory differently for the purpose of studying for a test than we do in order to retrieve it for legal practice.⁴⁸

In order to establish context in legal education, students must be familiar with the institutions, legal doctrines and practices that give rise to disputes and must be exposed to real life factual circumstances where knowledge of the legal doctrine can be applied.⁴⁹

The impact of the *PPSA* on the common law can only be adequately illustrated and understood if students are familiar with common law concepts. From the above it is also evident that this presents some degree of difficulty for educators, yet it can be argued that some knowledge of the foundational aspects of PPT should be required in order to make sense of the *PPSA*. If students have not been endowed with this knowledge from a prior property law subject, these principles and concepts may need to be taught prior to embarking on the *PPSA* journey. For students to assimilate their newly acquired knowledge in a logical and useful manner, and in proper context, educators need to ensure that the course is structured in a way that promotes this approach. Commencing with common law concepts in this way corresponds with Wolski's suggestion that skills teaching should commence with 'abstract conceptualisation'.⁵⁰ The common law concepts provide grounding for theoretical concepts such as 'security interests' and demonstrate why a system of PPT and common law security interests first emerged. Teaching these concepts further enables students to identify why law reform was required through the *PPSA*.

⁴⁸ Deborah Maranville, 'Infusing Passion and Context into the Traditional Law Curriculum Through Experiential Learning' (2001) 51 *Legal Education Review* 51, 56.

⁴⁹ Ibid 56.

⁵⁰ Bobette Wolski, 'Integrating Skills Teaching and Learning' (2002) 52 (1/2) *Journal of Legal Education* 287, 292.

Further, students should be provided with ‘anchor points’⁵¹ to ground their learning and to facilitate recall outside the classroom. Familiarity with common law concepts, often learnt to some extent in earlier law subjects, can provide students with ‘anchor points’ of divergence, duality or concurrence. In many instances, the earlier common law concepts are either reflected in the *PPSA*, elements of the concept have been altered by the *PPSA* or the concepts no longer have any legal currency. However, in other instances the common law will continue to apply, as in the case of common law liens, demonstrating the need to teach common law principles.

Specifically, *PPSA* definitions may need to be explained in the context of both the Act and the common law, where the same terminology may have a different interpretation, for example the definition of ‘land’.⁵² Additionally, the application of concepts such as pledges and liens, regulated by the *PPSA* in certain instances and not in others, need to be explained in both *PPSA* and common law contexts. Finally, concepts like common law ROT agreements no longer operate in the traditional sense.

Experiential learning via exercises that simulate real-situations should follow this theoretical conceptualisation.⁵³ To facilitate skills teaching, educators must establish a ‘reflexive’ relationship between theory and practice.⁵⁴ Teaching in context therefore serves four distinct purposes:

First, students come to understand the purposes or uses of knowledge they are learning. Second, they learn by actively using knowledge rather than passively receiving it. Third, they

⁵¹ Maranville, above n 48, 57.

⁵² See above nn 37, 36 and accompanying text.

⁵³ See below Part VI.

⁵⁴ Wolski, above n 50, 263.

learn the different conditions under which their knowledge can [and can not] be applied ... Fourth, learning in multiple contexts induces the abstraction of knowledge, so that students acquire knowledge in dual form, both tied to the contexts of its uses and independent of any particular context. This unbinding of knowledge from a particular context fosters its transfer to new problems and new domains.⁵⁵

VI A PRACTICE-BASED APPROACH

Experiential learning is well recognised as an effective teaching method.⁵⁶ Kolb best describes it as ‘the process whereby knowledge is created through the transformation of experience. Knowledge results from the combination of grasping and transforming experience’.⁵⁷

Because of student perceptions of largely statute-based teaching as ‘dry’,⁵⁸ the challenge lies in demonstrating the practical application of statutory provisions. The best way to create an understanding of *PPSA* principles in the context of discussing securities relating to personal property transactions, is to provide students with practical learning experiences. The authors propose three avenues that can be utilised by educators to provide students with experiential learning:

⁵⁵ Allan Collins, John Seely Brown and Susan E Newman, ‘Cognitive Apprenticeship: Teaching the Crafts of Writing, Reading and Mathematics’ in L Resnick (ed), *Knowing, Learning and Instruction* (Lawrence Erlbaum Associates, 1989) 453, 487.

⁵⁶ See, eg, Tammy Johnson and Francina Cantatore, ‘Equipping Students for the Real World: Using Scaffolded Experiential Approach to Teach the Skill of Legal Drafting’ (2013) 6 *Legal Education Review* 3.

⁵⁷ David A Kolb, *Experiential Learning: Experience as the Source of Learning and Development* (Prentice Hall, 1984) 41.

⁵⁸ See above nn 39–40 and accompanying text.

simulation exercises, engagement with practitioners and practical in-class learning.

A Simulation Exercises

Problem-solving tutorials and exercises based on ‘real life’ scenarios, eg, presenting a ROT problem based on commercial dealings and then applying the *PPSA*, which is in effect a ‘concrete experience’ in the Kolb model.⁵⁹ This can then be expanded by transforming that experience through generating ideas (possibly utilising group learning) solving problems and learning from the hands on experience. This approach implements the definition of experiential learning provided by the authors of *Best Practices for Legal Education* where they suggest it should be the integration of theory and practice ‘by combining academic inquiry with actual experience’.⁶⁰ The authors propose that this is best approached in small tutorial or seminar groups as this will allow educators to provide students with prompt feedback, ‘widely acknowledged to be an important component in effective learning’.⁶¹

B Engagement with Practitioners

Engaging guest lecturers from legal practice to provide examples of how the statute applies in practice. As McCall notes:

⁵⁹ David A Kolb, Richard E Boyatzis and Charalampos Mainemelis, ‘Experiential Learning Theory: Previous Research and New Directions’ in Robert J Sternberg and Li-fang Zhang (eds), *Perspectives on Thinking, Learning and Cognitive Styles* (Lawrence Erlbaum Associates, 2001) 227, 228.

⁶⁰ Robert Dinerstein, ‘Experiential Legal Education: New Wine and New Bottles’ (2013) 44(2) *Syllabus* <www.americanbar.org/publications/syllabus_home/volume_44_2012-2013/winter_2012-2013/experiential_legealeducation.html>.

⁶¹ Maranville, above n 48, 72.

providing students with more stimulating opportunities for interaction with visiting practitioners ... can help create an improved environment for learning in the somewhat 'lifeless' world of commercial and property subjects.⁶²

However, whilst McCall is critical of utilising practitioners as lecturers,⁶³ the authors are of the opinion that in the context of the *PPSA*, practitioners are best suited to teach students. As there is an absence of precedent case law, practitioners can elucidate to students the practical significance of what is being taught. Further, as students will already have been taught the theoretical background underpinning the *PPSA* regime, the role of the practitioner is not to act so much as a legal educator but as a window of insight into practice.

C Practical In-class Learning

In-class learning sessions where practical aspects of the legislation are demonstrated are also an avenue that can be implemented by educators. Students could, for example, be taught how to register a security interest on the Personal Property Securities Register ('PPSR'). Students could also be taught how to conduct a search on the PPSR to confirm if there are any charges over items of personal property, such as a second hand car or a boat. This would amount to experiential learning as students will be actively engaged in an experience that will have consequences.⁶⁴ While it would be preferable for students to engage with the PPSR via clinical

⁶² Ian McCall, 'Breathing Life into Commercial and Property Subjects: Visiting Practitioners Creating the Right Learning Environment' (2003) 14 *Legal Education Review* 93, 94.

⁶³ Ibid.

⁶⁴ Michael Blissenden, 'Service Learning: An Example of Experiential Education in the Area of Taxation Law' (2006) 16 *Legal Education Review* 183, 185.

experience, this is usually not possible due to the status of PPT as a core subject and resources constraints. However, ‘using simulations is better than including no experiential learning opportunities’.⁶⁵

The 2007 Carnegie Foundation report into legal education supports the concept that students should be educated with the goal in mind that they be armed with the practical skills required by a practitioner. The report recommends that the ‘bottom line’ of their efforts in learning law will not be what they know but what they can do.⁶⁶

VII CONCLUSION

The answers to the questions on the perceived ‘tug of war’ between statute and common law, posed above, are not always clear, and generally a case by case decision may be required. However, it is suggested that a contextual, practice-based approach offers the best opportunity of creating a balance and informing students effectively. To ignore foundational common law principles will create confusion for students who are still unfamiliar with these concepts when introduced to the *PPSA*, and prevent educators from adequately explaining the *PPSA* in the context of the general law.

As the Australian *PPSA* matures and generates its own common law, academics may be able to move away from traditional (pre-*PPSA*) common law references which no longer apply in the same contexts. There is, however, we would argue, a strong need for providing the concepts of pre-*PPSA* personal property security

⁶⁵ Maranville, above n 48, 68.

⁶⁶ Susanne Owens and Gary Davis (eds), ‘Some Innovations in Assessment in Legal Education’ (Report, Australian Learning and Teaching Council and Council of Australian Law Deans, July 2009) 4.

systems to students. The depth of that analysis is the real question. A close relationship with those educators who come before and teach the pre-requisite of property law subject is paramount.⁶⁷ This partnership allows the student to gain a grounding in the property concepts (eg, *nemo dat*) prior to embarking on the *PPSA* journey. It is suggested that, how much of the history should be taught and in what depth to teach the common law concepts relating to personal property securities should be assessed by individual educators, may be based on:

- The prescribed curriculum of the tertiary institution;
- the prior knowledge and skill-set of the students, depending on what they have been taught to date in other subjects; and
- the length of the course and teaching time available to elaborate on common law concepts (as noted, in the authors' experience time is usually limited when students have to be introduced to the *PPSA* from inception).

Certainly having students revisit their statutory interpretation skills will be useful in the *PPSA* context, and provides a fertile ground for discussion. Again, time constraints may not allow for in-depth discussion and a practice-based approach may be most effective.⁶⁸ This approach also ties in with the very real impact the *PPSA* has had on commercial transactions involving personal property security, and allows students to consider how they may protect their future clients in these types of transactions. The romance with the *PPSA* may be a troubled one for modern day academics, but the effort of equipping students with a sound statute-based foundation in

⁶⁷ Which is evident at Bond University and also other universities, such as the Property Law A subject at Griffith University. The Property Law subject at Bond University (a pre-requisite for Personal property Transactions) includes teaching students foundational concepts, for example ownership, bailment and mortgages.

⁶⁸ Maranville, above n 48, 68.

personal property securities law — in addition to established common law concepts — certainly provides a point of difference for students entering an ever increasing competitive work place.

SUMPTUARY LAW AT THE MOVIES: THE *ENTERTAINMENTS TAX ACT 1916* (CTH)

CAROLINE DICK^{*}

Abstract

Sumptuary law tends to be regarded as an archaic form of governmental intervention, which regulated public attire and luxuries for the purpose of economic, social and moral control. Because of this, sumptuary law has never been considered to have had a place in Australian history. This article goes against this view to argue that sumptuary law has indeed been used in Australia in the form of the Entertainments Tax Act 1916 (Cth), which was introduced during World War I to tax admission to various entertainments, including picture shows.

The article explains the role the British Government had in the shaping of, and hasty introduction of, the Entertainments Tax Act 1916 (Cth). Various newspaper articles and parliamentary debates are used to explore the justification of the Act and the tax it introduced, as well as the criticisms it attracted. Those in favour of the tax argued for its place based on various grounds, including morality, national duty and luxury. Those against the tax argued that it was unfair to tax picture shows, which were widely

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considered to be working class entertainment, leaving the wealthier class untouched. These opinions and debates are used to assert the Act's role as a disciplinary project that had the same intentions as traditional sumptuary law.

I INTRODUCTION

Sumptuary law is frequently considered an archaic form of governmental intervention that targeted the personal lives of early modern people, and as having no significance in modern times. This article challenges these views, and suggests that sumptuary projects were particularly alive and well in Australia during the First World War.

This wartime period was one of national crisis in Australia and was marked by numerous social and economic anxieties. The Federal Government became intensely preoccupied with national security, the implementation of wartime measures concerning the regulation of personal freedoms and the morality of its citizens. This article argues that these anxieties and preoccupations were similar to those that prompted the creation of the English sumptuary laws of the early modern period. Throughout the war years, the Federal Government was constantly looking to the 'mother country' for political guidance and moral succour. When Britain adopted sumptuary measures to regulate the personal lives of its citizens during the war, the nascent Commonwealth of Australia closely followed its lead by instituting similar sumptuary measures. This article argues that the *Entertainments Tax Act 1916* (Cth) was one such sumptuary measure. This legislation not only focused on the wartime taxing of amusements but it was also characterised by an impulse for moral regulation that operated in response to wider governmental concern for Australia's public well-being and economic future.

While the English sumptuary laws of the early modern period were mostly ‘appearential’¹ in that they mostly aimed at regulating public attire, such laws also frequently targeted other forms of private behaviour and consumer practices. As Hunt explains in his foundational work on English sumptuary laws; these laws were never simply about the regulation of personal appearance and rules relating to dress.² Sumptuary law ‘came in many varieties’³ and at times targeted the private consumption of food and alcohol, social ceremonies, entertainment and economic wealth.⁴ While these laws often aimed to limit or regulate the private expenditure of citizens,⁵ they were also concerned with the social manifestations of consumption. Furthermore, they consistently involved some combination of social, economic and moral regulation.⁶

The purpose of this article is to briefly explore a ‘non-appearance’ sumptuary project in the context of war time conditions in Australia: the *Entertainments Tax Act 1916* (Cth). Drawing on the various wartime media and parliamentary discourses that surrounded the creation of this Act, this article will highlight that while the Act ostensibly focused on the raising of revenue by taxing public amusements, it evinces the same impulse for moral regulation apparent in those sumptuary projects that were targeted by early English sumptuary laws. This article will also illustrate that this impulse for moral regulation was, in most part, a response to a wider concern which the government, in a time of crisis, had for the public

¹ See Alan Hunt, *Governance of the Consuming Passions: A History of Sumptuary Law* (MacMillan Press Ltd, 1996). ‘Appearential’ is Hunt’s term and it is a reference to those sumptuary laws that related to appearance, dress and clothing.

² Ibid 1.

³ Ibid.

⁴ Ibid 7.

⁵ Ibid 2–3.

⁶ Ibid 7.

well-being and economic future of the Australian population. The use of sumptuary lens adds a level of understanding to the regulatory impulse underpinning government measures during World War I.

Whilst Alan Hunt's and Frances Baldwin's⁷ research has largely shaped the current literature on English sumptuary law of the early modern period, there is, to the author's best knowledge, no scholarship concerning the presence of sumptuary regulation, in any form, in the Australian context. However, there is evidence that sumptuary imperatives underpinned various wartime regulatory projects such as the enactment of the *Entertainment Tax Act 1916* (Cth). This evidence has been found in material collected from various Australian newspapers as well as from parliamentary debates.

II SHARPENING THE TAX KNIFE

I am quite sure that people who patronize picture shows and sports of different kinds will be quite prepared to pay their share of taxation for the conduct of the war.⁸

Parliamentary Debates, 18 December 1916

In 1916, it cost an ordinary family of four as little as threepence⁹ (3d) each to be seated in the stalls to watch *The Floorwalker*, the

⁷ Alan Hunt, *Governance of the Consuming Passions: A History of Sumptuary Law* (MacMillan Press Ltd, 1996); Frances Baldwin, *Sumptuary Legislation and Personal Regulation in England* (Johns Hopkins Press, 1926).

⁸ Commonwealth, *Parliamentary Debates*, Senate, 18 December 1916, 53 (Senator Newlands).

⁹ Also known as 'thruppence'.

latest Charlie Chaplin movie.¹⁰ In this movie, Chaplin, adopting his traditional ‘tramp’ persona, attempts to leave a shopping establishment with half the luxury goods from the lace counter in his pockets. When a store detective (the eponymous floorwalker) attempts to apprehend him, chaos breaks out and this results in the inevitable comedic chase on a ‘running staircase’¹¹ and a hilarious mirror scene.

These kinds of light-hearted movies were the most popular and, in most cases, the only form of public amusement for working-class families during the war years.¹² Although the national standard of living had slightly improved over the previous 30 years,¹³ this social class did not have much disposable income.¹⁴ However, many could just afford to scrape together just enough pennies to attend the movies once a week in order ‘to get a little relaxation from the humdrum course’¹⁵ of their everyday lives and to enjoy a break

¹⁰ ‘Entertainments’, *Geelong Advertiser* (Victoria), 15 August 1916, 5. If the family wanted more comfortable seats they could spend up to a shilling each for seats in the dress circle. See Mandy Burrows, *Old English Money* (2013) British Life and Culture <<http://resources.woodlands-junior.kent.sch.uk/customs/questions/moneyold.htm>>. For an explanation of currency during this period, see Lawrence Officer and Samuel Williamson, *Five Ways to Compute the Relative Value of Australian Amounts, 1828 to the Present*, Measuring Worth <measuringworth.com>.

¹¹ ‘Entertainments’, above n 10, 5.

¹² There was some suggestion that there used to be ‘formerly’ a lot of dancing but this type of amusement was considered not to be suitable for families. See Commonwealth, *Parliamentary Debates*, House of Representatives, 15 December 1916, 147 (Mr Mathews).

¹³ Ibid 148 (Mr Archibald).

¹⁴ Ibid 132 (Mr Kelly).

¹⁵ Commonwealth, *Parliamentary Debates*, Senate, 18 December 1916, 55 (Senator Guy).

away from wartime anxieties.¹⁶ The more ‘well-to-do’ classes had a wider choice of entertainment: they had the luxury of being able to afford to attend what the elite considered to be the only ‘legitimate drama’: live theatre, concerts and opera. Moreover, they could afford to pay an extra booking fee to reserve their seats in theatres.¹⁷ They could also enjoy tax-free entertainment in their homes: ‘they [had] their balls and parties, with bands playing; they [had] their pianos and pianolas’.¹⁸ Unlike people of ‘small means’, the elite classes generally did not patronise ‘picture entertainments’¹⁹ and, if they did, they would not be compelled to purchase the 3d or 6d tickets for the stalls.²⁰

¹⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 15 December 1916, 134 (Mr Fenton).

¹⁷ Commonwealth, *Parliamentary Debates*, Senate, 18 December 1916, 68 (Senator Findley). Senator Findley suggested that many of the lower classes were willing to suffer the inconvenience and discomfort of waiting outside places of entertainment because they were not in a position financially to pay for higher-priced seats. The richer classes, on the other hand, only occasionally patronised ‘picture entertainments’ because they preferred to go to the theatres and could ‘usually pay a booking-fee in addition to the price of the ticket in order to engage their seats beforehand’.

¹⁸ Ibid 44 (Senator Stewart).

¹⁹ Ibid 68 (Senator Bakhap).

²⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 15 December 1916, 148 (Dr Maloney). Another Member of Parliament (Mr Hannan) advised the House that, as a well-paid politician, he could with his wife and children visit ‘picture shows, the drama, musical comedies, and the vaudeville’. He could afford ‘to pay any price that [was] put on as a result of this taxation’. However, five years before he entered Parliament, when he was working for 8s 6d per day just ‘as the biggest section of [the community]’ was now doing, he could not afford to pay for this type of entertainment. See Commonwealth, *Parliamentary Debates*, House of Representatives, 15 December 1916, 159 (Mr Hannan).

During the first two decades of the 20th century, the American movie industry flourished and there was a corresponding growth in the volume of importation of American movies into Australia.²¹ To accommodate this new form of what many considered to be mainly working class entertainment, thousands of picture theatres appeared in both urban and rural areas throughout Australia.²² For instance, in 1916, Sydney and its surrounding suburbs had 113 picture theatres with an overall average weekly attendance of 427 000.²³ Allowing for an average charge of sixpence for admission, this attendance meant that there was approximately £11 000 spent each week on this form of entertainment.²⁴ These theatres provided evening sessions on most nights, as well as various sessions during the day for families with younger children.²⁵ Yet, despite the enormous popularity of ‘moving pictures’ in Australia during the war, the high costs of movie importation,²⁶ advertising and theatre hire, meant that many picture show proprietors made only a bare living.²⁷ They

²¹ P W Appleby, ‘Picture Shows’, *The West Australian* (Perth), 3 May 1916, 8. In May 1916, the average number of pictures ‘released’ in Perth was about 40.

²² ‘Picture Shows’, *Northern Star* (Lismore, New South Wales), 29 April 1916, 3.

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ One critic suggested that ‘the picture shows’ were running all day and ‘practically all night’. See Commonwealth, *Parliamentary Debates*, House of Representatives, 18 December 1916, 75 (Mr Corser).

²⁶ There were 50% customs duties imposed on imported films. See ‘An Amusement Tax’, *The Register* (Adelaide), 11 September 1916, 4.

²⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 15 December 1916, 139 (Mr Mathews). Mr Mathews suggested that he doubted whether many proprietors made more than 8% on the money they had invested. He also suggested that attendance numbers

feared their incomes would be further curtailed after the State and Federal governments imposed tax on the price of admission.²⁸

III WAR GAMES

This is not the time to play games, for we are engaged in a life and death struggle for the existence of the Empire.²⁹

The Register (Adelaide), 31 August 1914

During the war, Australian governments were anxious to find all possible opportunities to raise revenue and, in most circumstances, they tended to follow the austerity measures implemented by the British Government. An amusements or entertainments tax was one such measure:³⁰ '[w]ar conditions have brought about a change of circumstances in taxation, as in everything else, and we are quite justified in adopting every available source of income.'³¹

In 1916, the British Government had imposed an inflexible entertainments tax on 'amusements' as part of its policy to raise

had dwindled since the beginning of the war because many 'who had gone to the Front' had patronised these shows.

²⁸ This was not a concern for many politicians who argued that this level of profit was due to mismanagement rather than the loss of patronage. See Commonwealth, *Parliamentary Debates*, House of Representatives, 15 December 1916, 148 (Mr Archibald).

²⁹ 'Lord Robert's Warning: No Time for Games', *The Register* (Adelaide), 31 August 1914, 9. Whilst Lord Roberts was specifically referring to cricket and football, this exhortation was part of the rhetoric used by those who opposed various forms of amusements during the war. See Commonwealth, *Parliamentary Debates*, Senate, 18 December 1916, 55 (Senator Lynch).

³⁰ Ibid 44 (Senator Stewart).

³¹ Ibid 49 (Senator De Largie).

revenue to fund the war effort.³² Surprisingly, it seemed to work well, in that it boosted wartime revenue and ‘the people [in the Old Land] were cheerfully putting up with it’.³³ Following Britain’s lead, and expecting the same success, the Australian Government resolved to impose a similar sumptuary tax and brought the Entertainments Bill 1916 (Cth) before Parliament at short notice.³⁴ A Senate Committee, appointed to examine the viability of this proposed tax, originally suggested that it would be just to impose 1d tax on a sixpence (6d) entertainment ticket and that the threepence (3d) ticket should be exempted from tax.³⁵ As it was to be a ‘temporary tax’,³⁶ one that ‘would not have been heard of but for the war’,³⁷ the government anticipated that people would ‘rather welcome [this] taxation’³⁸ or at least ‘not seriously oppose it’.³⁹ In

³² See Commonwealth, *Parliamentary Debates*, House of Representatives, 15 December 1916, 144 (Mr Burchell).

³³ Commonwealth, *Parliamentary Debates*, Senate, 18 December 1916, 53 (Senator Newlands). Mr Matthews argued that this assertion was questionable. He contended that ‘we often get information [about what is happening in Britain] that is not correct’. See Commonwealth, *Parliamentary Debates*, House of Representatives, 15 December 1916, 139 (Mr Mathews).

³⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 15 December 1916, 132 (Mr Kelly). The Bill was assented to on the 21 December 1916. *The Entertainments Tax Act 1916* (Cth) is often mistakenly referred to as a 1917 Act because it commenced in 1917.

³⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 December 1916, 79 (Mr Sampson). The original proposal included a tax on the 3d tickets. However, according to Mr Sampson, there was a strong protest about a tax which targeted ‘kiddies’. There were some exemptions, such as when no admission fee was charged.

³⁶ Commonwealth, *Parliamentary Debates*, Senate, 18 December 1916, 46 (Senator Findley).

³⁷ *Ibid.*

³⁸ *Ibid* 51 (Senator Turley).

the 27 September 1916 Federal Budget statement, the government predicted that this new tax would yield £1 000 000 in six months.⁴⁰

The tax was to be paid on all admission to 'entertainment', which included 'any exhibition, performance, lecture, amusement, game or sport'.⁴¹ An exemption was made for shows where the Tax Commissioner was satisfied that the takings would be devoted to philanthropic, religious or charitable purposes or if the entertainment was of 'a wholly educational character'.⁴² There would also be no tax on entrainment 'intended for children' and where the charge was less than sixpence per person.⁴³

The Federal Government decided not to tax the proprietors controlling the entertainments, as it presumed that proprietors would, in all likelihood, just pass the tax onto their clientele.⁴⁴ This was a disingenuous concern, as tax was nonetheless added directly

³⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 15 December 1916, 143 (Mr Massy-Greene).

⁴⁰ 'Federal Budget: Heavy New Taxation', *Wodonga and Towong Sentinel* (Wodonga, Victoria), 29 September 1916, 3. This estimate was later considered to be incorrect as it had been 'based on an error'. A more correct estimate of the revenue which the government expected to raise from this form of taxation was £350 000 in a half year. See Commonwealth, *Parliamentary Debates*, Senate, 18 December 1916, 44 (Senator Russell).

⁴¹ *Entertainments Tax Assessment Act 1916* (Cth) No 36 of 1916 s 2.

⁴² *Ibid* ss 12(a)–(b).

⁴³ *Ibid* s 2(c). There was a further exemption for entertainment that was provided for partly educational or partly scientific purposes by a society, institution, or committee not conducted or established for profit. See *Entertainments Tax Assessment Act 1916* (Cth) No 36 of 1916 s 12(d).

⁴⁴ Commonwealth, *Parliamentary Debates*, Senate, 3 October 1916, 12 (Senator Findley).

to the price of admission to picture shows, theatres and sporting fixtures.⁴⁵ A number of states had already passed this type of legislation,⁴⁶ and by 1917, many consumers were facing double taxation on their entertainments.⁴⁷ Proprietors expected to experience ‘manifest inconvenience’ dealing with their additional responsibilities with the introduction of the tax.⁴⁸

They were obliged to exhibit a notice on each entrance to the entertainment stating the amount of charge for admission and the amount of federal tax payable on the charge.⁴⁹ They were also to act as collection and enforcement agents for the Federal Government,⁵⁰

⁴⁵ Ibid.

⁴⁶ These included South Australia and Tasmania. See *The Amusements Duty Act 1916* (Tas) and *Stamp Act Further Amendment Act 1916* (SA).

⁴⁷ ‘Entertainment Tax Bungle’, *The Advertiser* (Adelaide), 3 March 1917.

⁴⁸ ‘An Amusement Tax’, *The Register* (Adelaide), 11 September 1916, 4.

⁴⁹ ‘Entertainments Tax: In Force on January 1’, *The Sydney Morning Herald* (Sydney), 23 December 1916, 10.

⁵⁰ ‘The New Taxes: How They Will Affect the Picture Shows’, *The Bathurst Times* (New South Wales), 3 October 1916, 3. Tickets, with no stamp duty attached, had to be purchased from the government at an increased price. See also ‘Entertainments Tax’, *Northern Star* (Lismore, New South Wales), 30 December 1916, 4. Proprietors had increased reporting obligations (particularly those using ‘automatic barriers’) and had to render returns to the Commissioner of Taxation. The proprietors also had to give security to the Commissioner that the full amount taxation would be paid to the Taxation Office. See ‘Entertainments Tax: In Force on January 1’, *The Sydney Morning Herald* (Sydney), 23 December 1916, 10. See also ‘State Amusement tax: Provisions of the Bill’, *The Mercury* (Hobart), 8 December 1916, 8.

and faced heavy fines if they did not perform these duties.⁵¹ Offences under the *Entertainment Tax Assessment Act 1916* (Cth) included forging of dye and stamps (14 years imprisonment); making paper in imitation of stamp paper (imprisonment for seven years); unlawful possession of stamp paper (imprisonment three years); and fraudulent acts (imprisonment for one year).⁵²

Officials were resolute and diligent when enforcing penalties for breaches of the Act. For instance, Frank O'Dowd, of the Prahran 'Pops', was charged in March 1917 with failing to forward all stamped tickets to the Deputy Commissioner of Taxation by 19 February 1917.⁵³ He was also charged with failing to ensure that all persons purchasing tickets above 6d paid the relevant stamp duty. On each charge he was fined £5, with £1/1/ costs.⁵⁴ Another proprietor, Mendel Saider of the Armidale Picture Theatre, was charged with two similar offences and on each charge was fined £10 with £2/2/ costs.⁵⁵ On 1 December 1917, another proprietor was accused of being guilty of behaviour that amounted 'almost to a swindle in the manipulation of tickets'.⁵⁶

IV A CLASS TAX

An entertainments tax was considered by the government as ostensibly 'one of the easiest methods possible' to raise revenue for the war effort.⁵⁷ Potentially, an entertainments tax could raise an

⁵¹ 'Amusements Tax', *Prahran Chronicle* (Victoria), 24 March 1917, 5.

⁵² *Entertainment Tax Assessment Act 1916* (Cth) ss 14–8.

⁵³ 'Amusements Tax', above n 51.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ 'Amusements Tax Evaded', *The Argus* (Melbourne), 13 December 1917, 4.

⁵⁷ Commonwealth, *Parliamentary Debates*, Senate, 18 December 1916, 46 (Senator Findley).

enormous amount of revenue from social activities that had not been previously taxed⁵⁸ and because Australians, in varying degrees, had more surplus income than before the war.⁵⁹ By 1916, a very large amount of money was changing hands in Australia 'in connexion with outdoor and indoor entertainments'.⁶⁰ Government officials argued that, because of their popularity, an enormous amount of revenue could be raised per annum by taxing those who frequented movies. They considered that the tax on this type of amusement was justified because it was a 'levy upon a luxury'.⁶¹

Some members of the government sought to defend the tax by arguing that people were inclined to forget that Australia was at war.⁶² Those who supported the populist creed that the war should be won at 'any cost' considered it that it was only fair that everyone, including the working man, should make some form of sacrifice 'to carry on the war'.⁶³ The Treasurer, Alexander Poynton, argued that this platitude alone justified the imposition of a form of 'sumptuary'

⁵⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 December 1916, 79 (Mr Sampson).

⁵⁹ Commonwealth, *Parliamentary Debates*, House of Representatives, 15 December 1916, 132 (Mr Kelly).

⁶⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 December 1916, 79 (Mr Sampson).

⁶¹ As reported in 'South Australian Parliament: Legislative Council', *The Advertiser* (Victoria), 20 September 1916, 11.

⁶² 'Amusement Tax', *Newcastle Morning Herald and Miners' Advocate* (New South Wales), 2 October 1916, 5.

⁶³ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 December 1916, 79 (Mr Sampson). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 18 December 1916, 81 (Mr Higgs). Mr Higgs supported the tax and argued that:

[w]hile we are as a community are attending picture theatres and other establishment the price of admission to which is 6d or 1s, there are men in the trenches in Europe who have to be provided for, and we can provide for them only by taxation.

or consumption tax.⁶⁴ He maintained that if people could not afford to pay the tax when they attended the movie theatres, they should go less frequently to these places of entertainment.⁶⁵ This justificatory discourse became a strong validation for a wartime sumptuary tax, even though it mainly targeted the working classes. Walter Massy-Greene MP insisted that those who had such ‘surplus cash’ after:

the ordinary demands of life [had] been met, and used it to patronise places of amusement, should be expected to ‘cheerfully acquiesce’ to a tax that would meet the extra demands of the war.⁶⁶

Matthew Charlton MP, the Labor party member for the Hunter region, argued that while some Australians were doing their patriotic duty by ‘going to the front’, others could be equally patriotic by ‘finding the money for the prosecution of the war’.⁶⁷

While the government considered that amusements, particularly picture shows, were an easy target, critics objected to the tax and complained that it was easy ‘to tax the poorest’⁶⁸ when picture shows were such a popular and modest ‘luxury’ with the lower

⁶⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 15 December 1916, 148 (Mr Poynton). In October 1916, the Treasurer Mr Higgs resigned because of the split in his party over conscription. Mr Poynton was then appointed Federal Treasurer.

⁶⁵ Ibid 147 (Mr Mathews). See also ‘Federal Finances and New Taxation’, *Daily Herald* (Adelaide), 29 September 1916, 4. The reporter in this article suggested that this not a compulsory levy:

[but] the only means of escape is to abstain from patronising public entertainments, which are almost as necessary for the mental wellbeing of the community as is food to keep body and soul together.

⁶⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 December 1916, 142 (Mr Massy-Greene).

⁶⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 6 December 1916, 133 (Mr Charlton).

⁶⁸ Ibid.

classes. The tax was described as indirect taxation ‘of the worst kind’ and as a ‘miserable tax’⁶⁹ because it was mainly targeted at one class:⁷⁰ the working class. Although this consumption tax was to apply to many types of entertainment, it would, according to some parliamentarians, mainly ‘clip’ the amusements of the very poor while ‘allowing those of the very rich to go free’.⁷¹

James Fenton MP criticised the Federal Government for apparently having no compunction about ‘continually heaping [tax] on the shoulders of those least able to bear it’, even when the State governments were doing the same.⁷² Fenton maintained that ‘the picture show’ was ‘the working man’s entertainment’ and that, before the ‘pictures’ came into existence, it was rare for workers to enjoy any leisure activities⁷³ and that the relative low admission price to the movies meant that ‘father, mother and children could go at least once per week’.⁷⁴

Senator Edward Findley argued that taxation on sixpenny (6d) tickets would mean a great deal of hardship to a working man with a

⁶⁹ Ibid 55 (Senator Guy).

⁷⁰ Commonwealth, *Parliamentary Debates*, Senate, 18 December 1916, 46 (Senator Findley).

⁷¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 15 December 1916, 148 (Mr Fenton). Others disputed this argument. Mr Archibald MP, for instance, contended that ‘the cost of war comes largely out of the revenue obtained from the income tax and the land tax’. This was countered by the argument by Mr Burns that such taxes were ‘passed onto them’. See also comments by Dr Maloney who suggested that government might consider taxing the ‘guzzling’ which was carried on at Lord Mayors’ banquets and other large dinner parties.

⁷² Ibid 135 (Mr Poynton).

⁷³ Ibid 134 (Mr Fenton).

⁷⁴ Ibid.

family,⁷⁵ and that this type of an impost had the potential to ‘farther and farther remove’ any sort of luxury of life from the masses.⁷⁶ Joseph Hannan MP described it as a ‘class tax’ on one section of the community ‘which believed in having some form of social enjoyment’.⁷⁷ Others declared that they had no doubt that the tax primarily sought to target those who patronised picture show movies.⁷⁸

[This is] an irritating class levy which has proved to be exceedingly unfair in its incidence, even in London and other large cities, where places of amusement are attended by tens of thousands of a floating population upon whom — as well as the resident population — the burden of the tax falls.⁷⁹

James Mathews MP condemned those who advocated that there should be no enjoyment during the war period and those who intimated that everyone should ‘be in sackcloth and ashes’.⁸⁰ He insisted that the working classes had already been savagely hit by large increases in the cost of their furniture, food and rent, and the proposed tax sought to squeeze them even more by increasing the cost of the only cheap form of amusement they had been able to afford.⁸¹ Matthews even went so far as to suggest that the entertainments tax was only a subterfuge to compel the closing

⁷⁵ Ibid.

⁷⁶ Commonwealth, *Parliamentary Debates*, Senate, 18 December 1916, 46 (Senator Findley).

⁷⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 15 December 1916, 159 (Mr Hannan).

⁷⁸ ‘The Amusement Tax: The Government Proposals’, *The Advertiser* (Victoria), 30 August 1916, 11.

⁷⁹ ‘An Amusement Tax’, *The Register* (Adelaide), 11 September 1916, 4.

⁸⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 15 December 1916, 139 (Mr Mathews).

⁸¹ Ibid 147 (Mr Mathews).

down of places of entertainment, thus forcing male employees to enlist.⁸²

Some State and Federal politicians disputed that the tax was a ‘class tax’ because it would apply to all forms of amusements (including racing, cricket and football). Others, such Mr William Archibald MP, suggested that the working classes were well able to pay the tax because they were in a much better position than they had been in previous years. He contended that:

[o]ne has only to look at our working classes, and especially our women folk, and to note the way that they dress, to satisfy oneself that this talk of poverty amongst the workers is all claptrap.⁸³

William Higgs, a former Federal Treasurer, suggested that if people wanted entertainment, they need not necessarily go to a picture show or a theatre:

Following the advice of Buskin [sic] they might sit on a hill and watch the clouds on a beautiful afternoon, or spend the evening in watching the stars. If they prefer a theatre, what is to prevent their coming to this House, admission to which is free.⁸⁴

However, this uncompromising taxing policy was not welcomed by certain pro-tax politicians who believed that, as a consequence of the combined operation of both the Federal and State amusement taxes, there might be a danger that anticipated revenue from this tax

⁸² Ibid.

⁸³ Commonwealth, *Parliamentary Debates*, House of Representatives, 25 December 1916, 148 (Mr Archibald).

⁸⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 December 1916, 81 (Mr Higgs).

might 'dry up altogether'.⁸⁵ William Johnson MP suggested that this position might be further exacerbated if the tax were to dislocate 'that branch of industry' and close up many places of amusements.⁸⁶ Some politicians, including Hannan, claimed that the imposition of this type of tax was short-sighted. Hannan suggested that the tax would not only adversely affect patrons but would also discourage those involved with the entertainment industry from continuing to provide their services and facilities gratuitously in raising funds for the war effort.⁸⁷ He claimed that the tax would adversely affect 'tens of thousands' of people who were, directly and indirectly, engaged in the theatre, and show business in Australia; the tax would 'strike a blow' and could mean the 'absolute ruination' of that section of the entertainment industry.⁸⁸

⁸⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 8 December 1916, 123 (Mr Johnson).

⁸⁶ Ibid. There was also a concern that the government would lose the benefit of customs duty on the importation of films, accessories and machinery associated with the film industry. See 'Picture Shows', *The Brisbane Courier* (Brisbane), 22 January 1916, 7. It was feared that the tax might mean the closing down of 90 out every 100 picture show theatres and would have an enormous impact on the 7000 workers in the industry. See 'Amusement Tax', *Newcastle Morning Herald and Minors' Advocate* (New South Wales), 2 October 1916, 5.

⁸⁷ Ibid.

⁸⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 15 December 1916, 159 (Mr Hannan).

V TAXING MORALS

Picture shows are becoming a cancer which is eating into the very vitals of our national, domestic, and religious life, and poisoning the whole.⁸⁹

Illawarra Mercury (New South Wales), 3 March 1916

When the entertainments tax was being proposed in 1916, much of the economic discourse surrounding its introduction was also coupled with a form of moralising discourse from politicians, the media and church officials. This moralising discourse was analogous to the opinions expressed by those reformers of the early modern period who had pressed for the introduction of sumptuary laws.⁹⁰ There was no doubt in many minds that the morals of ‘the masses’ were a significant target of this tax, even though the government insisted that the tax was introduced as a war measure to assist with ‘prosecuting’ the war.⁹¹

This type of moralising discourse invoked concerns about ‘present’ moral danger in a time of national crisis and appealed for urgent government intervention to alleviate these anxieties in what was considered to be a time of social and political exigency, for, as Mr Archibald suggested, ‘[n]o sensible man would approve of this method of raising revenue in normal times, but it is necessary to meet a special emergency’.⁹²

⁸⁹ ‘Picture Shows Condemned’, *Illawarra Mercury* (Wollongong, New South Wales), 3 March 1916, 1.

⁹⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 December 1916, 77 (Mr Rodgers).

⁹¹ Commonwealth, *Parliamentary Debates*, Senate, 18 December 1916, 46 (Senator Findley).

⁹² Commonwealth, *Parliamentary Debates*, House of Representatives, 15 December 1916, 148 (Mr Archibald).

During the war, the Federal Government was already predisposed to intervene in ever widening spheres of social and economic life.⁹³ As anxieties intensified in Parliament and in the press about war-time spending, so did public attacks increasingly focus on luxury and extravagance, which were seen as the ‘enemy’ of all righteous Australians who valorised both thrift and self-sacrifice as crucial patriotic virtues.⁹⁴ For such patriots, an amusement was a luxury, and they queried: ‘why should not people pay [tax on] a luxury?’⁹⁵

Some politicians considered that the tax would not only raise revenue but could act as a regulatory project that could target extravagance, luxury and the erosion of morals in Australia.⁹⁶ Many supported the imposition of a tax on amusements because they were fearful that the hegemonic social order was increasingly being challenged by new forms of popular culture and leisure activities.⁹⁷ They were concerned mostly about the ‘profligate’ lower classes, because:

[a]s ... people of a non-saving disposition, having money in their pockets will do, they will naturally go out and try and get the best they can out of life.⁹⁸

⁹³ The government used the *War Precautions Act 1914* (Cth) to control immigration, price fixing, internment of ‘alien’ enemy and the censorship of publications and letters.

⁹⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 25 December 1916, 148 (Mr Archibald).

⁹⁵ Commonwealth, *Parliamentary Debates*, Senate, 18 December 1916, 46 (Senator Findley).

⁹⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 15 December 1916, 132 (Mr Kelly).

⁹⁷ Ibid.

⁹⁸ Ibid.

Movies were particularly beleaguered by these politicians and the press, as being an evil or a vice that caused a ‘dreadful effect’ on the young mind.⁹⁹ One commentator suggested that the quality of the subjects presented in popular movies was not conducive ‘to the best results of the juvenile mind’ and that the increased popularity of movies was threatening to become a kind of ‘national disease’ that needed to be excised.¹⁰⁰

Others insisted that picture shows pandered to lust by depicting incidents that bordered on the indecent, or at least encouraged ‘an inane mirth’, which they considered was quite inconsistent with the gravity of the war years.¹⁰¹ They argued that only a class of movie, which was imbued with convincing moral lessons or those movies which were ‘clean, sweet and wholesome’, should be shown to the public.¹⁰² Similar opinions were expressed at all levels of governance. For instance, at a meeting of Malvern Council on 17 April 1916, counsellors were told that police were concerned that ‘the pictures’ could lead children of ‘tender years’ to a life of crime.¹⁰³ Councillor E Thompson insisted that ‘when a child saw a picture it was at once impressed upon its brain’.¹⁰⁴ The press blamed picture shows for causing children to neglect their homework and

⁹⁹ Ibid 139 (Mr Mathews). Mr Mathews contended that the same thing had been said about the dreadful effect of the ‘Deadwood Dick’ yarns found in ‘dime novels’ published between 1877 and 1897 by Edward Lytton Wheeler. These were also referred to as the ‘penny dreadfuls’. See ‘The Picture Shows’, *Western Mail* (Perth), 7 July 1916, 31–2.

¹⁰⁰ ‘Children and Picture Shows’, *Newcastle Morning Herald and Miners’ Advocate* (New South Wales), 21 October 1916, 12.

¹⁰¹ ‘Picture Shows’, *The West Australian* (Perth), 3 May 1916, 8.

¹⁰² Ibid.

¹⁰³ Reported in ‘Picture Shows’, *Malvern Standard* (Victoria), 22 April 1916, 3.

¹⁰⁴ Ibid.

rendering them 'quite unfit for ordinary school work'.¹⁰⁵ One journalist suggested that movies had a detrimental effect on children's eyesight and should be attributed 'in some measure' for the very large percentage of children who wore spectacles.¹⁰⁶ Others proposed that persons aged under 11 should not be allowed in picture theatres after 8.00pm¹⁰⁷ and that films be licenced and 'tested' in police dark rooms before they were permitted to be shown¹⁰⁸ and that anyone displaying an unlicensed film should be prosecuted.¹⁰⁹

While some politicians would not go so far as to demand that movies be banned, they nevertheless sought a precautionary approach. Even though Senator James Guy and Mr Massy-Greene contended that people should not be denied *every* kind of amusement, because it would 'reduce them to a state of melancholy and possibly worse',¹¹⁰ they nonetheless insisted that amusements ought to be either 'rational'¹¹¹ or 'pure, elevating and

¹⁰⁵ 'Picture Shows', *Gisbourne Gazette* (Victoria), 11 August 1916, 2.

¹⁰⁶ 'Picture Shows and Eyesight', *The Border Morning Mail and Riverina Times* (Albury), 17 July 1916, 3. See also 'Picture Shows', *Gisbourne Gazette* (Victoria), 11 August 1916, 2.

¹⁰⁷ 'Picture Shows', *The Advertiser* (Adelaide), 5 August 1916, 8.

¹⁰⁸ Mr Black, New South Wales Chief Secretary and Minister for Public Health suggested that the police would be in a better position to deal with the film question than the customs authorities, who did have the dark rooms to test the films. See 'Picture Shoes: New Censorship', *Sydney Morning Herald* (Sydney), 8 May 1916, 10.

¹⁰⁹ 'Sunday Picture Shows', *Kadina and Wallaroo Times* (Kadina, South Australia), 13 September 1916, 2.

¹¹⁰ Commonwealth, *Parliamentary Debates*, Senate, 18 December 1916, 55 (Senator Guy).

¹¹¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 15 December 1916, 143 (Mr Massy-Greene).

educational'.¹¹² And while Senator Guy acknowledged that sports such as cricket and football were 'good and healthy',¹¹³ he told Parliament that he remained fearful that 'moving pictures', as the *new* form of popular entertainment, would generate an insidious effect on the moral and social order.¹¹⁴ Guy argued that the government ought to 'exercise a supervisory control' over various types of amusements 'to prevent anything objectionable creeping in'.¹¹⁵ Similarly, Arthur Rodgers MP acknowledged that, whilst 'on the whole' he thought picture shows to be instructive, he still wanted to be cautious.¹¹⁶ He advised Parliament that he would not let his 'kiddies' go to them until he knew what they were going to see.¹¹⁷ Despite this 'sensible approach', he still considered that Parliament, as an important site of moralist authority, should 'review the whole question of picture shows' as he considered that there was a side of them that was 'unclean'.¹¹⁸

Church officials also expressed their grave concern about the 'unhealthy moral tone' of many of the films being shown at the picture theatres.¹¹⁹ They called for some form of restrictive action by

¹¹² Commonwealth, *Parliamentary Debates*, Senate, 18 December 1916, 55 (Senator Guy). Senator Guy suggested that good music, whether vocal or instrumental, as well as a fine piece of elocution had educational effect on audiences.

¹¹³ *Ibid.*

¹¹⁴ Reported in 'Sunday Schools and Picture Shows', *The Richmond River Express and Casino Kyogle Advertiser* (Casino New South Wales), 26 September 1916, 2.

¹¹⁵ Commonwealth, *Parliamentary Debates*, Senate, 18 December 1916, 55 (Senator Guy).

¹¹⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 December 1916, 77 (Mr Rodgers).

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

the government.¹²⁰ For some of these church officials, this form of governmental intervention meant the introduction of ‘sane, intelligent [and] moral’ censorship, similar to that introduced in New Zealand, was necessary to ‘expurgate’ or ban pernicious films and ‘bad, sensational literature’.¹²¹ While some officials did not object to children being taken at reasonable intervals to see ‘clean, wholesome representations’, others considered that it was a ‘grave evil’ to permit the minds of the young generation to be ‘contaminated by prurient productions, whether in the shape of books or picture shows’.¹²² The latter maintained that children were especially in need of protection from the evil influence of the ‘Sunday trader’ who ‘flouted God’s holy day’.¹²³ They blamed movies for ‘working havoc’ with the minds of children and being responsible to some extent for ‘the leakage’ from Sunday Schools.¹²⁴

The child who frequented the picture show soon lost his desire for all that was noble, simple and good ... the evil of the picture show was becoming not only a Sunday School menace but a national question ... Sunday School teachers should refrain from visiting picture shows.¹²⁵

Not all politicians believed that movies were an evil that needed sanction by the imposition of a fiscal impost. Dr William Maloney

¹²⁰ See, eg, ‘The Picture Shows’, *Western Mail* (Perth), 7 July 1916, 31–2.

¹²¹ ‘Censorship of Picture Shows’, *Tribune* (Melbourne), 23 November, 1916, 5.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ ‘Sunday Schools and Picture Shows’, *The Richmond River Express and Casino Kyogle Advertiser* (Casino, New South Wales), 26 September 1916, 2.

¹²⁵ ‘Sunday Picture Shows’, *The Kadina and Wallaroo Times* (Kadina, South Australia), 13 September 1916, 2.

MP, a movie aficionado, made it very clear that he resented the actions of the ‘wowsers’ element who he considered to be members of an ‘aristocracy of religion’, who, having no regard for the pleasures of others, found their only pleasure within ‘the narrow limits of the churches’.¹²⁶ Similarly, Hannan argued that the tax was pressed by ‘wowsers’ who did not go to any ‘entertainments’ but sought, through their letters to the press, to condemn and penalise ‘tens of thousands of young Australians’ who went to the movies, football matches and plays.¹²⁷ He contended that ‘wowsers’ did not ‘believe’ in theatricals or pictures shows, and would eventually seek the closure of such places of entertainment.¹²⁸ Hannan suggested that these ‘wowsers’ were the same type of moralists who considered that a woman who took her children to a picture show was not ‘respectable’ or the sort who wrote letters to the press about the ‘immoral’ practice of ‘mixed bathing’.¹²⁹

Some politicians, such as Dr Maloney, argued that movie-making should, in fact, be celebrated because it had enormous potential as an uplifting educative tool for the community.¹³⁰ Dr Maloney maintained that ‘movies’ could display to audiences the scenery and ‘manufactures’ of many lands, as well as demonstrate to them the devastating effect of war on life and property.¹³¹ He insisted that:

¹²⁶ Commonwealth, *Parliamentary Debates*, House of Representatives, 15 December 1916, 159 (Dr Maloney). Dr Maloney sarcastically suggested that a tax be levied on the ‘threepenny bit’ collected in the churches.

¹²⁷ *Ibid.*

¹²⁸ *Ibid.*

¹²⁹ *Ibid.*

¹³⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 15 December 1916, 159 (Dr Maloney).

¹³¹ *Ibid.*

Patrons ... have ... learnt more of history, geography and science, more of the arts and mysteries of trade and manufacture, more of the manners and customs of other peoples, more of the world in which they live, than they have learned from books and all other sources of information.¹³²

While many movies were not always considered educational, some argued that they were, nevertheless, very interesting and enjoyable.¹³³ Even if they were at times 'suggestive', they were, according to some politicians, considered no more 'suggestive' than live stage shows and what was seen in everyday life.¹³⁴ One journalist at the *Brisbane Courier* demanded that the government should not deny 'harmless pleasure' to the younger generation, and that it was far better for them to attend pictures than for them to 'be walking the streets and hanging around hotels till all hours'.¹³⁵

Senator Findley contended that in earlier years, the lower classes had had few opportunities for 'mental improvement' or the 'privilege' of the sort of pleasures 'which fell to the lot of a certain favoured section of the community'.¹³⁶ Mr Mathews MP suggested that the government should go so far as to sponsor amusements in the country 'in order to give people in isolated portion of [the] continent an opportunity of seeing some life instead of having their lives restricted'.¹³⁷ Similarly, Earle Page MP, the future Leader of the Country and Prime Minister (1939), insisted that the movies provided the opportunity for audiences to participate in palpable

¹³² 'The Picture Shows', *Western Mail* (Perth), 7 July 1916, 31–2.

¹³³ Commonwealth, *Parliamentary Debates*, House of Representatives, 15 December 1916, 139 (Mr Mathews).

¹³⁴ Ibid.

¹³⁵ 'Picture Shows', *Brisbane Courier* (Brisbane), 22 January 1916, 7.

¹³⁶ Commonwealth, *Parliamentary Debates*, Senate, 18 December 1916, 46 (Senator Findley).

¹³⁷ Commonwealth, *Parliamentary Debates*, House of Representatives, 15 December 1916, 139 (Mr Mathews).

forms of emotional release, particularly in times of personal disquiet. He argued that:

When an amusing picture is shown on the screen, the theatre is filled with that sweetest sound on earth ... the rippling laughter of children. I never hear it without feeling myself a better man; and those who think that the human heart cannot be touched by pictures have only to look round when a sad play is being shown to see the handkerchiefs raised surreptitiously in the darkened hall.¹³⁸

Eventually, on 21 December 1916, the *Entertainments Tax Act 1916* (Cth) gained assent. The Act came into operation on 1 January 1917.¹³⁹ However, after a flurry of deputations from the entertainment industry and a huge backlash from the public concerning the possible imposition of tax on 3d and 6d tickets,¹⁴⁰ the government altered its original proposal and declared that the tax on admission tickets over 6d would be as follows:

- Tickets costing more than sixpence, but not exceeding one shilling would attract 1d tax.
- Tickets costing more than one shilling, the rate of tax was 1d for the first shilling, and one half-penny for every

¹³⁸ Ibid 142 (Mr Maloney). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 18 December 1916, 76 (Mr Page). Mr Page said that the ‘rippling laughter of children’ who attended picture shows gave him enjoyment.

¹³⁹ ‘Entertainments Tax’, *Northern Star* (Lismore, New South Wales), 30 December 1916, 4. Pending the printing of ‘Federal stamp tickets’ all proprietors of entertainments were to affix on admission tickets, in postage stamps, the amount of tax payable, before tickets were presented at the entrance to the entertainment.

¹⁴⁰ Commonwealth, *Parliamentary Debates*, House of Representatives, 18 December 1916, 46 (Mr Findley).

sixpence or part of sixpence by which the payment exceeded one shilling.¹⁴¹

This tax, although initially purported to be only a wartime measure, continued to be a lucrative source of government revenue for 17 years, until it was repealed in 1933.¹⁴² Over that period, the rates of tax varied¹⁴³ and some further exemptions and exceptions were provided. These included exemptions for entertainments that funded the erection, maintenance or furnishing of halls for public purposes or memorial halls for the use of returned servicemen.¹⁴⁴

VI CONCLUSION

Sumptuary regulation has never been limited to the regulation of appearance: at various times it also extended to the regulation of other aspects of social life, including food, alcohol and entertainment. This article explores the debates around the *Entertainments Tax Act 1916* (Cth), a legislative project that was distinctively marked by sumptuary characteristics. This tax responded to perceived threats of social disorder and moral laxity, and proposed a particular ‘imagined social order’ during a period of uncertainty and anxiety.

The discourse that surrounded the creation of this sumptuary tax was linked with a wartime narrative concerning the notions of luxury, morality and national duty. This article has illustrated that the *Entertainment Tax Act 1916* (Cth) was a disciplinary project which

¹⁴¹ *Entertainments Tax Act 1916* (Cth) s 4.

¹⁴² *Financial Relief Act 1933* (Cth).

¹⁴³ See *Entertainments Tax Act 1918* (Cth); *Entertainments Tax Act 1919* (Cth); *Entertainments Tax Act 1922* (Cth); *Entertainment Tax Act 1925* (Cth). In 1922, tax was abolished on tickets costing less than a shilling.

¹⁴⁴ *Entertainments Tax Assessment Act 1924* (Cth).

targeted the choices made by individuals about their consumption practices, particularly certain individuals in the lower or working classes. Furthermore, this article also demonstrates the manner in which the tax was intimately linked with wider concerns that government had for national well-being during a period of social and economic crisis.

Whilst the tax on amusements was repealed in 1933, it is interesting to note that a similar form of tax was imposed on entertainments during World War II. A comparative study of both taxes would constitute a valuable and instructive future research project concerning wartime taxation¹⁴⁵ and would deepen the understanding of similar sumptuary regulation during the even greater state of crisis represented by World.

¹⁴⁵ See *Entertainments Tax Act 1942-1949* (Cth); *Entertainment Tax Assessment Act 1942-1949* (Cth).

ANTI-AVOIDANCE RULES FOR IMPUTATION CREDITS: A PATCHWORK OF NECESSARY COMPLEXITY

ADRIAN HANRAHAN*

Abstract

Taxation systems often require layers of anti-avoidance measures to protect the revenue base from clever and contrived arrangements. For imputation credits these measures include the general anti-avoidance rule known as pt IVA and a complementary tier of specific integrity measures. A taxpayer in breach of these integrity measures will not be entitled to receive an imputation credit attached to a dividend distribution.¹

Relative to pt IVA (which places the burden on the Commissioner of Taxation to prove a non-compliant scheme is in place), integrity measures that are self-activating provide an efficient, transparent and objective means of taxation compliance.

This paper will highlight the necessity of self-activating integrity measures by reviewing the law surrounding

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¹ A tax offset can be cancelled under sub-div 207F of the *Income Tax Assessment Act 1997* (Cth) (*ITAA 1997*) where the imputation rules have been manipulated.

Soubra and Commissioner of Taxation,² an Administrative Appeals Tribunal (AAT) decision that examined the qualified person provision, a self-activating integrity measure for imputation credits. Notwithstanding the complexity behind the taxpayer's arrangement in that case, the AAT ultimately relied on a mathematical statement of fact to determine non-compliance (using a concept known as delta), without needing to establish that a pt IVA scheme was in place.

The case highlights that, for an efficient taxation system, the two sets of integrity measures are complementary, not supplementary.

I A BACKGROUND TO THE IMPUTATION SYSTEM

Prior to 1 July 1987, Australia's income taxation system tolerated a pertinacious outcome of double taxation in which companies would pay tax on profits and shareholders would pay tax on the dividends from these profits at their marginal rates of tax.

Taxation Laws Amendment (Company Distributions) Bill 1987 removed double taxation for resident shareholders by introducing imputation credits that equalled the tax paid by the distributing company. In 1987 the company tax rate and the top marginal rate of tax were aligned at 49 per cent, which meant all taxpayers receiving fully franked dividends would not pay additional tax, with some taxpayers on lower marginal rates receiving credits towards their remaining taxable position.

² [2009] AATA 775 ('*Soubra case*').

II PART IVA AND IMPUTATION CREDITS

The imputation system was designed to allow for a degree of ‘wastage’, that is some shareholders were ineligible to utilise these credits due to their foreign residency or if they were caught by pt IVA or one of the specific anti-avoidance measures.

Part IVA is the general anti-avoidance rule within Australia’s income tax legislation that is designed to combat ‘*blatant, artificial or contrived*’ tax avoidance activities.³ Part IVA confers on the Commissioner of Taxation (‘the Commissioner’) discretion to deny a taxpayer the ‘tax benefit’ of a scheme the taxpayer has entered into.⁴ Part IVA is likely to apply to an arrangement when the answers to the following two questions is *yes*:

- Did the taxpayer obtain a tax benefit⁵ from a scheme⁶ where that benefit would not have been available if the scheme was not entered into?
- After considering the eight matters listed in pt IVA,⁷ would it be objectively concluded that the taxpayer entered into the scheme for the sole or dominant purpose of obtaining the tax benefit?

For imputation credits, pt IVA is contained in s 177EA of the *Income Tax Assessment Act 1936* (‘*ITAA 1936*’). The application of s 177EA is unusually broad for a general anti-avoidance provision

³ Explanatory Memorandum to Income Tax Laws Amendment Bill (No 2) 1981 (Cth).

⁴ The Commissioner can deny a tax benefit by making a determination under s 177F, s 177EA(5) or s 177EB(5) of the *Income Tax Assessment Act 1936* (Cth) (‘*ITAA 1936*’).

⁵ *Ibid* s 177C.

⁶ *Ibid* s 177A.

⁷ *Ibid* s 177D(2).

as it simply requires a purpose (other than an incidental purpose) of enabling a taxpayer to obtain (an imputation credit) tax benefit.⁸ This is unusually broad when we consider that the general anti-avoidance provision for non-imputation credit schemes captured by pt IVA requires a ‘dominant purpose’ to obtain a tax benefit.⁹

III THE QUALIFIED PERSON SAVING PROVISION

In response to practices that allowed taxpayers to receive these credits while minimising their exposure to the risks of holding shares, in July 1997 the government introduced an additional integrity measure requiring a taxpayer to be a ‘qualified person’ to be eligible for the imputation credit.¹⁰

The dividend imputation rules were substantially repealed from *ITAA 1936* and rewritten into the *Income Tax Assessment Act 1997* (*‘ITAA 1997’*) with effect from 1 July 2002, with a further amendment effective from 1 July 2011 as a result of a landmark decision in the High Court (*‘Bamford decision’*).¹¹ While the *qualified person* integrity measures were not also rewritten into *ITAA 1997*, a self-activating saving provision (*‘saving provision’*) was included to deny a taxpayer the tax benefit from an imputation credit if that taxpayer would not be a qualified person for the purposes of div 1A of former pt IIIA of *ITAA 1936* (as in force on 30 June 2002).¹²

⁸ Ibid s 177EA(3).

⁹ Ibid s 177A.

¹⁰ Ibid ss 160APHO, 160APHP and either 160APHR or 160APHT.

¹¹ *Commissioner of Taxation v Bamford* (2010) 240 CLR 481.

¹² Sections 207-145 and 207-150 of *ITAA 1997*.

IV SELF-ACTIVATING LAWS: A SELF-EVIDENT NECESSITY?

When determining whether s 177EA applies, the fundamental issue to consider is, after having regard to the relevant circumstances of the scheme, whether it would be concluded there was more than an incidental purpose of facilitating an imputation tax benefit under the scheme.¹³

At the time the qualified person integrity measures were introduced there was concern that it would be difficult to apply, costly to administer and could expose innocent taxpayers to double taxation.

In the article ‘The 45 day holding period rule — the ultimate walnut crusher’¹⁴ the authors Mark J Laurie, Liam Collins and John Murton argued whether our taxation system required two sets of imputation credit anti-avoidance measures; given that s 177EA was adequately drafted to reflect the qualified person integrity rules. The basis of their argument is that s 177EA(14) is sufficiently wide to capture all schemes and to consider all relevant circumstances.

However, s 177EA is not self-activating, meaning that the purpose to derive an imputation credit tax benefit must be *established* and then *pursued* to cancel the taxation benefit. The two sets of measures are complementary, not supplementary.

The discretion afforded the Commissioner to pursue an action arises as a result of the wording of the statute which says:

¹³ Section 177EA(17) of *ITAA 1936*.

¹⁴ Mark J Laurie, Liam Collins and John Murton, ‘The 45 day holding period rule — the ultimate walnut crusher’ [1999] *Journal of Australian Taxation*.

The Commissioner *may* make ... a determination that no imputation benefit is to arise in respect of a distribution payment.¹⁵

As a result the Commissioner has two hurdles to overcome. Firstly, he must establish that the purpose of the scheme contravenes the anti-avoidance provision, and secondly, the Commissioner may then decide to use his discretion to cancel the taxation benefit. Such an anti-avoidance provision is clearly inefficient when it does not exist alongside other self-activating measures, as it would be uneconomic for the Commissioner to actively prosecute all taxpayers in breach of the rules.

It should be noted that not all uses of the word '*may*' in a taxation statute will necessarily confer a discretion in the natural or ordinary sense of the word, and in some circumstances it will be interpreted a mandatory must.¹⁶

This was the interpretation in *Finance Facilities Pty Ltd v FCT*¹⁷ in which the relevant provision stated that the Commissioner 'may allow' a tax offset in relation to an imputation credit.¹⁸ In this decision, the word '*may*' was demarcated by a range of conditions that had to be satisfied for the imputation rebate to be allowed. The High Court held that if those conditions were satisfied, then the Commissioner was obliged to provide the rebate, despite use of the words '*may allow*'.

¹⁵ Section 177EA(5)(b) of *ITAA 1936*.

¹⁶ Nicole Wilson-Rogers and Dale Pinto, 'Reviewing the discretion in Part IVA of *ITAA 1936*: Why the devil is in the lack of detail: Part One' [2009] *Journal of Applied Law and Policy*.

¹⁷ (1971) 127 CLR 106.

¹⁸ Former s 46(3) of *ITAA 1936*.

However this can be contrasted with s 177EA where the discretion stands separate from any precondition that would bind the Commissioner and remove any unfettered discretion. This interpretation is supported by the subsequent subsections to s 177EA(5) that begin by saying ‘If the Commissioner makes a determination under subsection (5) ...’. It is clear that a true discretion was intended, reinforcing the view that this broad anti-avoidance provision is not self-activating.

V INTEGRITY MEASURES NEED TO BE OBJECTIVE IN DESIGN & APPLICATION

Before the Commissioner makes a pt IVA determination, the matter is first referred to the Tax Counsel Network (‘TCN’), a department within the Australian Tax Office, for consideration. If TCN agrees that pt IVA may apply, it is then referred to the GAAR Panel (‘Panel’) for advice before a final decision is made.¹⁹

From a policy perspective, the cumbersome pt IVA process highlights the importance of specific anti-avoidance measures to ensure an effective taxation system. Further, self-activating anti-avoidance measures ensure there is a degree of objectivity to the application of these integrity measures — in contrast to a cumbersome pt IVA determination.

There are examples when the Commissioner has appeared to clear a particular arrangement in private rulings without any mention of a potential pt IVA issue, only to strike down all such arrangements later under a pt IVA determination (with the Commissioner having an apparent change in view).

¹⁹ ATO Practice Statement Law Administration 2005/24.

This was highlighted in 2013 after the Government announced legislative changes to ensure that dividend washing could not be exploited to provide a doubling up of imputation credits.²⁰ Historically, a rule of the market allowed a two-day period for settlement of option trades which was exploited by sophisticated investors selling a parcel of shares (ex-dividend) while immediately buying another parcel of the same shares in the cum-dividend market. This resulted in a taxpayer being able to claim two sets of imputation credits.

Prior to the Government announcement, the Commissioner had previously affirmed such arrangements in two private binding rulings ('PBRs'), with no mention of pt IVA concerns. These PBRs were used as the basis for many taxpayers undertaking this strategy.

After the Government announced it would legislate specific provisions in sub-div 207F to prevent such arrangements, the Commissioner released Taxation Determination 2014/10 ('TD 2014/10') with the view that such arrangements would be caught under the pt IVA provisions for imputation credits.²¹

It should be noted that the Government considered it necessary to add specific integrity measures in *ITAA 1997* to complement the pt IVA rules, despite the subsequent statements made by the Commissioner under TD 2014/10.

It is also interesting to note that the Commissioner considered the two Private Binding Rulings did not create a general administrative

²⁰ *Tax and Superannuation Laws Amendment (2014 Measures No 2) Act* (Cth) inserted s 207-145(1)(da), s 207-150(1)(ea) and s 207-157 of *ITAA 1997*. This change was legislated with the amendments applying to distributions after 1 July 2013.

²¹ Section 177EA of *ITAA 1936*.

practice (ie, *the Commissioner's public view on the matter*). In the Compendium to TD 2014/10 the Commissioner stated:

It is clear that a general administrative practice is not established where there is mere silence by the Commissioner (paragraph 3 of TD 2011/9) or where there are a few private rulings on a matter (paragraph 50 to 52 of TD 2011/19). PSLA 2011/27 provides similar guidance at paragraph 39.

The views in TD 2014/10 caught many taxpayers by surprise as the Commissioner's view appeared inconsistent with the earlier PBRs. Efficient and effective taxation systems should rarely surprise taxpayers and anti-avoidance rules should be objective in their design and application.

Before examining the *Soubra* case which highlights the necessity for complex self-activating integrity measures, this paper will provide a brief overview of the eligibility rules for imputation credits, the mechanics of net delta positions, and the rules which apply when trust structures are interposed.

VI ELIGIBILITY AS A QUALIFIED PERSON

A key principle of the imputation system is that the benefits of imputation credits should only be available to the true economic owner of the shares (ie, the person who bears the economic risk of loss and the opportunity for gain).

To be eligible for the tax benefit²² attached to an imputation credit, the saving provision in *ITAA 1997* operates to ensure the *qualified person provisions* under div 1A of former pt IIIAA of *ITAA 1936* continue to apply.²³

²² Section 207-20(2) of *ITAA 1997*.

²³ *Tax Laws Amendment (Repeal of Inoperative Provisions) Act 2006* (Cth) sch 6 pt 2 item 10 provides that if the operations of a provision

The *qualified person* provisions are satisfied when a taxpayer:

- 1 Holds shares (or interests in shares) for a prescribed number of days (at risk) during a qualification period;²⁴ or
- 2 Holds interests in shares through a widely-held trust for an approved number of days;²⁵ or
- 3 Elect to have an imputation credit ceilings applied.²⁶

This paper will review the first point which is known as the holding period rule ('HPR') and then review the second point in relation to widely-held trusts.

VII HOLDING PERIOD RULE

The HPR is satisfied when a taxpayer holds shares (or an interest in shares) *at risk* for at least 45 days in the qualification period.²⁷ In the case of preference shares, a taxpayer is required to hold shares at risk for a period of 90 days in the qualification period. The HPR rule does not apply if the taxpayer claims less than \$5000 imputation credits in a year (this is known as the small shareholder rule which is one of the imputation credit ceilings).

The HPR operates on a last-in-first-out ('LIFO') basis, so that shareholders will be deemed to have disposed of their most recently acquired shares first for the purposes of working out whether they have held shares at risk for at least 45 days.²⁸

of any Act depends to any extent on a provision that is repealed, the repeal is disregarded.

²⁴ Former s 160APHO of *ITAA 1936*.

²⁵ *Ibid* s 160APHP.

²⁶ *Ibid* s 160APHR or s 160APHT.

²⁷ *Ibid* s 160APHN.

²⁸ Practice Statement Law Administration PS LA 2007/9, 'Share buy-backs' by the Australian Tax Office.

With regard to dividends flowing through *some types* of trusts, beneficiaries are taken to have acquired (disposed) of a share at the same time that the trustee acquired (disposed) of the shareholding.²⁹ Thus, if the trustee satisfies a HPR so will the beneficiaries.

VIII THE QUALIFICATION PERIOD

The qualification period begins the day after the acquisition of the shares and ends on the 45th day after the day on which the shares go ex-dividend.³⁰ The practical application of this is that the periods are 47 days and 92 days respectively (due to the acquisition and disposal days being excluded from the calculation).

IX THE RELATED PAYMENTS RULE

The qualified person rules also include a related payment provision. A related payment is a payment that passes on the benefit of the franked dividend to another taxpayer.³¹

If this rule applies and the taxpayer does not hold the shares at risk for a period of 45 days (90 days for preference shares), the taxpayer is prevented from receiving a tax offset in relation to the franking credits. This rule applies even if the taxpayer meets the small shareholder rule.

X RISK REDUCTION

A taxpayer with a holding of shares has the potential for a loss or gain on those shares. If a taxpayer manipulates the risk associated with holding those shares, that period of manipulation will not be

²⁹ Former s 160APHL(8) of *ITAA 1936*.

³⁰ *Ibid* s 160APHD.

³¹ See above n 27.

counted as time that the taxpayer has held those shares *at risk*. For example, when a taxpayer uses options to minimise the potential loss from holding those shares, it can affect the ability to qualify for imputation credits.

This element of the qualified person provisions has had little judicial consideration given that compliance is a question of fact (mathematics). This paper will explain briefly the arithmetic behind this legislative provision, to help provide context to the *Soubra* case, one of the few judicial decisions in this area.

A taxpayer is considered to have sufficient exposure to a loss (or opportunity for gain) providing the net position of the holding (as measured by delta) is 0.3 or greater.³² This means that the taxpayer will have manipulated their risk exposure and breached this integrity provision if the net delta position is less than 0.3.

Delta is not defined under taxation law, nor has it been judicially considered and it takes on its ordinary meaning (borrowed from the investment management community).

A 'position' is defined in statute as an arrangement that has a delta in relation to a shareholding.³³ Examples include a short sale of shares, an option to buy or sell shares, a non-recourse loan to buy shares and an indemnity or guarantee in respect of shares.³⁴

A taxpayer's net position is calculated by deducting the delta of the short position from the delta of the long position.³⁵ Under taxation

³² Former s 160APHM(2) of *ITAA 1936*.

³³ *Ibid* s 160APHJ(2).

³⁴ *Ibid*.

³⁵ *Ibid* s 160APHJ(5).

law, a long position has a positive delta and a short position has a negative delta.³⁶

For example, an individual taxpayer holding an ordinary share will have a long position, and a positive delta of +1.³⁷ When that taxpayer adds a risk reduction strategy (ie, use of options to reduce the risk exposure) then that taxpayer will then also have a short position, with a negative delta.

If the risk reduction strategy reduces too much risk such that the net delta is less than 0.3, then the taxpayer will not hold those shares 'at risk' for the period that risk reduction strategy is in place.

Deeming rules apply for certain trusts. A beneficiary's interest in a trust is taken to have a long position (+1) in relation to itself,³⁸ and a short position (-1) equal to this long position for certain trusts (such as widely-held trusts) and another long position³⁹ (+1) only where that interest in a trust is a (vested and indefeasible) fixed interest.⁴⁰ Without a fixed interest in a widely-held trust, the net delta position will be less than 0.3 and not taken to be held 'at risk'.

The deemed short position (-1) does not apply to family trusts, meaning the net position for a beneficiary of a family trust will be (+1) and will satisfy the requirement to hold the (interest in the) shares 'at risk'.

³⁶ Ibid s 160APHJ(3).

³⁷ Ibid s 160APHJ(4).

³⁸ Ibid s 160APHL(7).

³⁹ Ibid s 160APHL(10).

⁴⁰ Ibid s 160APHL(11).

XI OPTIONS — FURTHER EXPLAINED

An option is a type of investment instrument known as a derivative. A derivative is an investment that derives its value from an underlying asset.

An option is best thought of as a contract that provides one party the right (but not the obligation) to undertake a particular transaction with another party on particular terms. This was the approach in *Commissioner of Taxes (Qld) v Camphin*:

An option given for value is an offer, together with a contract that the offer will not be revoked during the time, if any, specified in the option. If the offer is accepted within the time specified a contract is made and the parties are bound. If the offeror, in breach of his agreement, purports to revoke his offer, his revocation is ineffectual to prevent the formation of a contract by the acceptance of the offer within the time specified.⁴¹

The owner of a call option has the right to acquire an underlying asset at a particular price within a particular timeframe, and the owner of a put option has the right to sell an underlying asset at a particular price within a particular timeframe. There are four possible option positions:

Long Call	Short Call
The buyer of a call option – right to buy an underlying asset	The seller of a call option – obligation to sell an underlying asset

Long Put	Short Put
The buyer of a put option – right to sell an underlying asset	The seller of a put option – obligation to buy an underlying asset

⁴¹ (1932) 57 CLR 127, 132.

XII DELTA POSITIONS — FURTHER EXPLAINED

A long position (ie, holding ordinary shares) is assigned a positive delta as that position will increase in value when that share price rises in value, and will reduce in value when the share price reduces in value.

A short position (ie, risk reduction strategy) is assigned a negative delta as the position will rise in value when the share prices decreases in value, and will drop in value when the share price increases in value.

If a taxpayer buys a call option (has the choice to buy shares in future at an agreed price), then the share price increases, so does the option value. This is a (+) delta.

If the taxpayer buys a put option (ie, has the choice to make the counterparty buy shares at an agreed price in the future), then increases in the share price will see the value of the option decrease. This is a (-) delta.

It is important to note that examining the (+) and (-) signs can fail to tell the full story. For example, if a taxpayer uses an option strategy and is long a call or a put (ie, purchased to open a position), then the put will be (-) delta and the call (+) delta. The signs are reversed for short put and short call.⁴²

⁴² Adrian Hanrahan, 'Franking credits — more than meets the eye' [2010] *Journal of Financial Advice*.

Long Call	Short Call
(+) delta	(-) delta

Long Put	Short Put
(-) delta	(+) delta

Illustration 1 — holding an ordinary share with a put option

Rebecca buys AAB shares which are currently trading at \$4.25. Rebecca has the option to buy a \$4.00 put option (assumption: delta of -0.20) or a \$4.50 put option (assumption: delta of -0.85).

AAB Share \$4.25	Long Position	Short Position	Net Position	Eligible > 0.3
\$4.00 put	1.00	-0.20	0.80	Yes
\$4.50 put	1.00	-0.85	0.15	No

In this example, the period during which Rebecca held the \$4.50 put option would not count towards the HPR, as the net delta position would be less than 0.3.⁴³

Illustration 2 — holding an ordinary share with numerous options

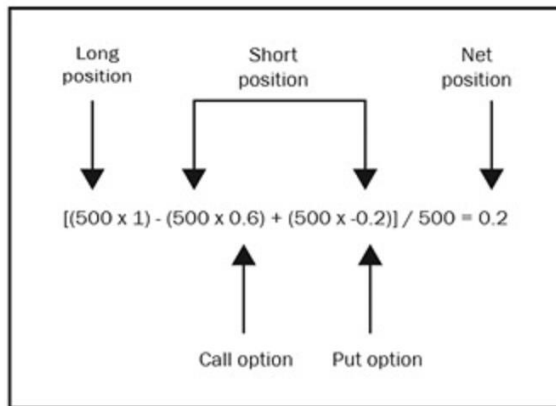
The net position can operate in the same manner, even if there are numerous concurrent risk reduction strategies in place to materially diminish the risk of holding those shares.

Matilda holds 500 ordinary shares in BBC. Matilda wishes to reduce her risk of loss with respect to this holding, and she writes a

⁴³ Ibid.

call option (assumption: delta of 0.60) and also buys a put option (assumption: delta of 0.20).

Matilda's net position will be calculated by subtracting her short positions (ie, call and put options) from the delta of her long position (ie, holding of an ordinary share):



As Matilda's net delta position is less than 0.30, she is taken to have materially diminished her risk of loss (or opportunity for gain) in relation to her holding for that period.⁴⁴

XIII TRUSTS

The taxation of trusts and the anti-avoidance measures specific to trust structures is an area that justifies a standalone article. This article will only examine the areas relevant to the *Soubra* case.

When imputation credits flow through trust structures, it is necessary to examine the type of trust, the terms of the trust instruments and the nature of a taxpayer's interest in that trust.

⁴⁴ Ibid.

Generally, beneficiaries of income of the trust estate can be entitled to the attached imputation credit if they are presently entitled to that category of trust income. The *Bamford* decision led to the Government amending the law to recognise that trustees may have the power under the trust deed to appoint or stream capital gains and franked distributions to specific beneficiaries.

For a trustee to stream gains or distributions, the beneficiary must be specifically entitled to them.⁴⁵ For tax purposes, consideration is also given to their proportionate entitlement to the distribution to which no beneficiary is specifically entitled.⁴⁶

The beneficiary must receive or be expected to receive an amount equal to the '*net financial benefit*' referable to the franked distribution in the trust and the entitlement must be recorded in its character as such in the records of the trust.⁴⁷

A beneficiary who has a present entitlement can reasonably be expected to receive an amount or it has been set aside exclusively for the beneficiary (ie, not presently entitled but there is a reasonable expectation the beneficiary will become entitled to it). It is not possible to stream separately franked distributions and imputation credits.

XIV PRESENT ENTITLEMENT

The significance of whether a beneficiary is presently entitled to income of a trust cannot be understated, as such a determination

⁴⁵ Section 207-58 of *ITAA 1997*.

⁴⁶ *Ibid* s 207-55(4).

⁴⁷ Explanatory Memorandum, Tax Laws Amendment (2011 Measures No 5) Bill 2011 (Cth).

goes to the fundamental question of who should be liable for a taxation assessment (and entitled to any associated imputation credits).

The relevant taxation provisions for present entitlement are found in div 6 of pt III *ITAA 1936*,⁴⁸ which outline the liability to tax, either in the hands of the trustee or the hands of the beneficiary (who is presently entitled to the income of the trust).

The nature of a beneficiary's interest in a trust estate dates back to fundamental principles of equity.⁴⁹ Developing on concepts established in earlier decisions,⁵⁰ the High Court in *Harmer v Federal Commissioner of Taxation*⁵¹ considered that a beneficiary is presently entitled to trust income when:

- (a) the beneficiary has an interest in the income which is both vested in interest and vested in possession; and
- (b) the beneficiary has a present legal right to demand and receive payment of the income, whether or not the precise entitlement can be ascertained before the end of the relevant year of income and whether or not the trustee has the funds available for immediate payment.

XV VESTED AND INDEFEASIBLE — FURTHER EXPLAINED

The first limb of present entitlement requires the beneficiary to have a vested and indefeasible interest in the income of the trust estate.

⁴⁸ Subject to special rules concerning the streaming of distributions contained in sub-div 207-B of *ITAA 1997* that apply for the 2011 and later income years.

⁴⁹ *Taylor v Federal Commissioner of Taxation* (1970) 119 CLR 444.

⁵⁰ *Federal Commissioner of Taxation v Whiting* (1943) 68 CLR 199; *Taylor v Federal Commissioner of Taxation* (1970) 119 CLR 444; *Federal Commissioner of Taxation v Totledge Pty Ltd* 82 ATC 4168.

⁵¹ [1991] HCA 51.

Hill J in *Dwight v Federal Commissioner of Taxation*⁵² outlined the definition of the terms ‘vested’ and ‘indefeasible’ noting that each were technical terms of limitation, which have a well understood meaning to property conveyancers.

With respect to whether an interest is ‘vested’, it was held that:

Estates may be vested in interest or vested in possession, the difference being between a present fixed right of future enjoyment where the estate is said to be vested in interest and a present right of present enjoyment of the right, where the estate is said to be vested in possession.

This concept is best illustrated by the following example. If property was transferred to Adam on trust for Ben (life estate) and thereafter to Charles, both Ben’s and Charles’ interests would be vested interests. However, only Ben’s interest would be vested in both interest and in possession.

With respect to whether an interest is ‘indefeasible’, it was held that:

An interest is said to be defeasible where it can be brought to an end and indefeasible where it cannot.

In *Colonial First State Investments Ltd v Commissioner of Taxation* it was affirmed that an interest is indefeasible when it cannot be terminated, invalidated or annulled.⁵³ In contrast, an interest is defeasible if it can be brought to an end or defeated, in whole or in part, by the operation of a condition subsequent or conditional limitation.⁵⁴

⁵² (1992) 37 FCR 178.

⁵³ [2011] FCA 16 (‘*Colonial First State*’).

⁵⁴ *Walsh Bay Developments Pty Ltd v Federal Commissioner of Taxation* 95 ATC 4378.

Under taxation legislation, an interest in certain trust holdings can be deemed to be defeasible if the beneficiary's interest in the trust may be redeemed (under the terms of the trust) for less than its value, or whether the value of the interest can be materially reduced by the further issue of units or the creation of other interests under the trust.⁵⁵

However, the mere fact that units may be redeemable or that further units can be issued, does not necessarily cause the interest to be defeasible if that interest is otherwise held to be a fixed entitlement to that income.⁵⁶

A trust is a fixed trust if the beneficiaries have fixed entitlements to all of the income and capital of the trust.⁵⁷ A beneficiary who has a vested and indefeasible interest will have a fixed entitlement in the trust. However, the *Colonial First State* case also affirmed that very few trusts can satisfy the current definition of a fixed trust if such an interest can be defeated if the power to defeat the interest arises from statute or the trust instrument.

While the Commissioner has discretion to deem a beneficiary as having a fixed entitlement to income, this saving provision is not an effective avenue for taxpayer compliance.⁵⁸ A more appropriate avenue would be removing the 'indefeasible' limb and replacing it with a self-activating requirement, such as the interest not having been defeated at the time period it is considered. This is an area that

⁵⁵ Former s 160APHL(12) of *ITAA 1936*.

⁵⁶ *Ibid* sub-s 272-5(2) in sch 2F.

⁵⁷ *Ibid* sub-s 272-65 in sch 2F.

⁵⁸ *Ibid* sub-s 272-5(3) in sch 2F.

the government recognises as unsustainable and further legislative amendment is expected in this area.⁵⁹

XVI PRESENT LEGAL RIGHT — FURTHER EXPLAINED

The second limb of present entitlement requires the income to be legally available for distribution. In *Pearson v Commissioner of Taxation*⁶⁰ it was held that:

A beneficiary is presently entitled to a share of the income of the trust if ... the beneficiary has a present legal right to demand and receive payment of the income, whether or not the precise entitlement can be ascertained before the end of the relevant year of income and whether or not the trustee has the funds available for immediate payment.

XVII DISCRETIONARY TRUSTS

When a dividend flows through a trust to a beneficiary, the beneficiary's entitlement to an imputation credit is subject to the rules outlined in sub-div 207B of *ITAA 1997*.

A beneficiary will only be eligible for franking to the extent that they have a fixed (vested and indefeasible) interest in the trust. Practically, this precludes a discretionary trust as a beneficiary of a discretionary trust only has a right to be considered by the trustee.

It is important to note that compliance with these anti-avoidance rules can also hinge on the self-activating deeming provisions. For example, the deeming provisions for the net delta position in respect

⁵⁹ A discussion paper *A more workable approach for fixed trusts* was released by Treasury (Cth) in July 2012 for industry consultation, with no legislative response from the government.

⁶⁰ [2006] FCAC 111.

of discretionary trusts will always be zero — failing a key limb of the holding period rule. The only exception to the above rules for a discretionary trust is when the beneficiary is entitled to the small shareholder exemption or if the trust has made the family trust election.⁶¹

XVII CLOSELY AND WIDELY-HELD TRUSTS

A trust is a closely held trust where 20 or less people have interests in the trust that together entitle them to 75% or more of the beneficial interests in the income of the trust.⁶²

If a trustee of a closely held trust enters into a position with respect to a shareholding, all of the beneficiaries of the trust are deemed to have entered a proportionate position with respect to their interests, at the time the beneficiary acquired the interest in the trust.

A widely-held trust is a fixed trust that is not a ‘closely held trust’. Importantly, beneficiaries of these trusts do not need to be concerned whether the trustee has taken a position with respect to a shareholding. The beneficiary will be a qualified person if they personally satisfy the qualification period while holding the shares (or interest in shares) at risk.

XVII *Soubra and Commissioner of Taxation*

*Soubra and Commissioner of Taxation*⁶³ is a pertinent example that endorses the need for these self-activating integrity measures.

⁶¹ Section 272-80(1) of sch F to *ITAA 1936*.

⁶² *Ibid* s 102UC.

⁶³ [2009] AATA 775 (‘*Soubra*’).

A Key Facts

- Ms Soubra was a beneficiary of an employee benefits trust (the ‘Trust’) in which she was provided units recognising her interest in the Trust assets.
- Ms Soubra received distributions from the Trust, including franked distributions received by the trustee of the Trust.
- Ms Soubra sought a private ruling seeking the Commissioner’s view as to whether she was entitled to tax offsets equal to her share of the imputation credits on the franked distribution from the Trust under s 207-45 of *ITAA 1997*. The Commissioner of Taxation considered she was not so entitled, and then also disallowed her objection to the decision.
- Ms Soubra sought a review of the Commissioner’s decision at the Administrative Appeals Tribunal (‘AAT’) which considered two issues. The first was whether Ms Soubra was entitled to a tax offset under sub-div 207-B of *ITAA 1997*. The second issue was whether sub-div 207-F would operate to cancel the entitlement to a tax offset.

B Judgment

In order to be eligible for the tax offset, Ms Soubra needed to satisfy the conditions set out in sub-div 207B of the *ITAA 1997*. Section 207-45 (within sub-div 207B) provides that an entity to whom a franked distribution flows indirectly in an income year is entitled to a tax offset which is equal to the imputation credit on the distribution.

The AAT found that Ms Soubra would appear to be entitled to a tax offset in respect of the franked dividend distribution, subject to compliance with sub-div 207F, which is the provision that deems a

cancellation of a tax offset if the imputation rules have been manipulated.

Section 207-150 (within sub-div 207F) sets out that if a franked distribution flows indirectly to an entity which is not a qualified person for the purposes in relation to the distribution, then the entity is not entitled to a tax offset under this subdivision.

The qualified person deeming provisions are usually focused on the holding period rules⁶⁴ for individuals or the widely-held trust rules for beneficiaries.

In Ms Soubra's circumstances the widely-held trust rules for a qualified person apply, which in essence, are focused on whether she has held the interest in those shares at risk for a continuous period of not less than 45 days.

Ms Soubra needed to satisfy a fixed interest (defined as a 'vested and indefeasible interest')⁶⁵ in the Trust to ensure the deeming rules provided she had a net delta position greater than 0.3. Without a fixed interest in the Trust, she is taken to have a long position in relation to her interest in the trust, and an equal and offsetting short position in relation to her long position, providing a net delta position of zero.

It was observed that the trust deed of the Trust contained a number of provisions and powers demonstrating that Ms Soubra's interest in the trust was subject to modification and alteration by the exercise of absolute discretion of the trustee. It was noted that former s 160APHL(12) deems certain interest in a trust to be defeasible, if

⁶⁴ Former s 160APHO of *ITAA 1936*.

⁶⁵ *Ibid* s 160APHL(11).

those interests could be redeemed for less than its value or materially reduced in relation to new units or interests in the trust.

The AAT affirmed the decision under review, as Ms Soubra was not a qualified person within the meaning of div 1A of former pt IIIAA of *ITAA 1936* as she was taken to have materially diminished risk, and therefore could not satisfy the condition of holding her interest in the Trust *at risk* for a continuous period of at least 45 days. This was because the trust deed, as drafted, rendered her interest in the trust defeasible. On that basis Ms Soubra could not satisfy a fixed interest in the trust, with a net delta position less than 0.3.

C Conclusion

While broad anti-avoidance provisions such as s 177EA are an important anti-avoidance foundation, mature taxation systems require complementary and self-activating provisions to more easily enforce compliance. An efficient taxation system should require little involvement from the Commissioner.

While additional layers of integrity measures can increase complexity, taxation laws should not be reduced to the point of inadequacy in the quest for simplicity. For an efficient taxation system, perceived complexity can be an unavoidable necessity.

This paper rejects the argument that the Commissioner is afforded substantial powers in s 177EA which should adequately address clever and contrived arrangements. The integrity of a law should be paramount to any desire for simplicity.

As the *Soubra* case illustrates, self-activating laws are an efficient and transparent mechanism for taxpayer certainty.

From a policy perspective, the *Soubra* decision illustrates an aspect of objectivity to the way in which the qualified person provisions apply. Mathematical equations such as net delta positions are the ultimate statement of fact, removing ambiguity of needing to prove a taxpayer's intention to ensure compliance.

ETHICAL LEGAL PRACTICE ACROSS SOCIETIES: WESTERN VIS-À-VIS CHINESE

NOLAN SHARKEY* AGNIESZKA DEEGAN** AND
EDMOND WONG***

Abstract

China's domestic economic growth and the extent of its international investment have led to an increased level of interactions with the international community across many different dimensions. This paper analyses the ethical duties and issues for Chinese lawyers practising in China and overseas particularly when acting for family, friends and closely related persons. It does so while comparing and contrasting them to the ethical obligations of Western lawyers with the view of their wider adoption in China and its potential consequences. The paper argues that it cannot be uncritically assumed that the adoption of Western legal ethics in the form of a written code of conduct in China would mean that Western ethical institutions and approaches would be replicated there in substance. Significant differences between the Chinese and Western

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societies and their understanding of what constitutes ethical behaviour may lead to unexpected outcomes of such attempts.

While Western legal ethical rules allow lawyers, albeit reluctantly, to practice the ethics of care and represent relatives, friends and closely related parties, in China it is not uncommon that a lawyer will have a close relationship with a client as only such a relationship promotes trust and confidence. However, the practice of guanxi in China may potentially hamper the effectiveness and benefits of the ethics of care.

Western lawyers are cognisant of the realities of practicing law in China and the necessity to develop personal relationships with Chinese clients. Therefore ethical positions or professional rules that prevent them from doing so will hamper Australian and other Western lawyers' success in developing a Chinese client base.

Finally, the inherent difference between the social institutional context in China and the West will present a material obstacle to achieving a harmonious global profession guided by uniform legal ethics.

I ETHICS IN LEGAL PRACTICE

A Lawyers' Personal Ethics

A central premise of the literature on ethics in legal practice is that lawyers should be guided in their actions not just by the law and professional rules but also by their personal ethics.¹ The subtext of this assertion is that simply obeying the formal rules is not enough to ensure that the 'right thing' will always be done. It must follow from

¹ C Parker and A Evans, *Inside Lawyers' Ethics* (Cambridge University Press, 2007) ch 1.

this assertion that if lawyers follow their personal ethics rather than just the rules, the ‘right thing’ will be more likely to be done.² The logic of this conclusion appears self-evident from a linguistic perspective given that many would equate an ‘*ethical action*’ with a ‘*good action*’.³ However, we submit that such an approach is contestable and a more nuanced understanding of the nature of ethics is needed to develop scholarship in the area of ethics in legal practice particularly in the context of globalisation and multiculturalism.

Leading ethicists such as Christine Parker and Adrian Evans acknowledge that different individuals have different ethics.⁴ However, while they maintain the premise that ‘ethical’ is ‘good’, they do not investigate in detail what ethics actually are. The concepts of ethics, morals, values, culture and norms and the distinctions between them are unclear.⁵ The terminology is not adequately distinct. What is clear is that a person’s sense of what is right and wrong may be innate, may be based on personal thought and experience, may be socially imparted or may be based upon law and regulations.⁶ To the extent that innate and personally formed views are held in common with other members of society, they are likely to overlap with those socially imparted. Debate about which of these positions are values, ethics or morals is likely to be reduced to little more than a debate on the meaning of words. However, the key point is that members of a society will have a shared understanding

² J Oakley and D Cocking, *Virtue Ethics and Professional Roles* (Cambridge University Press, 2001) 21–36.

³ Refer to definitions in the *Oxford Dictionary of English* (Oxford University Press, 2010).

⁴ Parker and Evans, above n 1, 3–5.

⁵ The standard use in day to day language may differ considerably from that used in, sociology for example. See, the definitions in N Abercrombie, S Hill and B S Turner, *Dictionary of Sociology* (Penguin, 2000).

⁶ N Preston, *Understanding Ethics* (Federation Press, 2001) ch 1.

of what is right and wrong. This understanding creates social institutions that are capable of regulating human behaviour to a very significant degree.⁷ Any person departing from the commonly conceived correct behaviour will be viewed as immoral or unethical.⁸ Thus, the best way to conceive of the behaviour that is expected to generate a good outcome is within the paradigm of social institutions. These will vary subtly with social context and the relevant group but they are ultimately based upon shared understanding of the right way to act. Further investigation as to what constitutes ethics in particular circumstances and contexts is required. In this paper we do so by considering issues of acting for relatives and friends, and the wider issue of relational lawyering, that have attracted attention in relation to ethical professional legal practice, to determine whether and if so, how they are impacted by Chinese ethics and social institutions.

B Representing Relatives, Friends And Related Persons

It is a commonly held belief that representing persons with whom you have a close emotional attachment is undesirable and possibly unethical. Arguments in support of this position derive from psychological literature,⁹ as well as the professional ethics in other disciplines such as medicine,¹⁰ psychology and counselling.¹¹ It is usually asserted that a close emotional attachment will compromise

⁷ D C North, *Institutions, Institutional Change and Economic Performance* (Cambridge University Press, 1990) 3.

⁸ M Granovetter, 'The Impact of Social Structure on Economic Outcomes' (2005) 19(1) *Journal of Economic Perspectives* 33.

⁹ B Mellers, A Schwartz and A Cooke, 'Judgment and Decision Making' (1998) 49 *Annual Review of Psychology* 447, 453.

¹⁰ AMA Council on Ethical and Judicial Affairs, *Code of Medical Ethics* (American Medical Association, 2000) E-819.

¹¹ J O'Connell, 'Keeping Sex Out of the Attorney-Client Relationship: A Proposed Rule' (1992) 92 *Columbia Law Review* 887, 891–2.

the quality of the professional services delivered due to potential conflicts of interest and a lack of objectivity that is otherwise achieved through personal detachment. There are essentially three dimensions to this. First, the emotional attachment is seen as preventing lawyers from either perceiving what is objectively best for the client or being able to say no. Second, lawyers may be pressured to act in a way that goes against their professional judgment through non-professional connections. Third, the general blurring of the lines between the professional and the personal raises a number of difficulties in determining when professional duties begin and end.¹²

The approach of the Law Institute of Victoria, Australia echoing these concerns is a good practical illustration. In Victoria, acting for friends or family is considered a risk and the Law Institute of Victoria strongly recommends that lawyers should adopt strategies to minimise such risks.¹³ Accordingly, the Law Institute of Victoria warns its members that:

It can ... be unwise to act where you have only a social relationship with the client, simply because your impartiality may be called into question and your usual professional judgment may be inadvertently impaired. However, this is not a blanket prohibition.¹⁴

¹² S L Buhai, 'Emotional Conflicts: Impaired Dispassionate Representation of Family Members' (2008) 21 *Georgetown Journal of Legal Ethics* 1159.

¹³ Law Institute of Victoria, 'Practitioners who Act for Friends or Family Need to Exercise Caution' (2012) 86(1/2) *Law Institute Journal* 81.

¹⁴ Law Institute of Victoria, *Common Ethical Dilemmas — Communication* <<http://www.liv.asn.au/For-Lawyers/Ethics/Common-Ethical-Dilemmas/Communication>>.

Internationally, professional lawyers' organisations and their rules take different approaches to the issue. Some warn against the dangers of acting for related persons while others take more direct measures in order to counteract the negative consequences that may potentially result from such behaviour.

Generally, representing closely related persons is not explicitly disallowed. For example, such representation by a solicitor is permitted under the *Professional Conduct and Practice Rules* in the State of New South Wales, Australia.¹⁵ However, despite this, as the Victorian example demonstrates, some jurisdictions present warnings in relation to it.

Furthermore, though formally allowed, it can be argued that such representation will potentially violate three specific rules/duties: the lawyer's fiduciary duty, the duty to exercise independent professional judgment and the duty to avoid conflicts of interest. Dal Pont warned Australian lawyers intending to act for a family member or associate to take particular care as in such situation their judgment is compromised and the risk of a conflict of interest arising is heightened.¹⁶ Furthermore, he contended that such lawyers:

may be tempted to cut corners, accept work beyond their competence, or be less exact with issues of professional responsibility (for instance, the duty of confidentiality).¹⁷

In Canada, on the other hand, the Federation of the Law Societies of Canada takes a more direct approach. In December 2012 it approved the *Model Code of Professional Conduct* ('*Model Code for Canada*')

¹⁵ Law Society of New South Wales, *New South Wales Professional Conduct and Practice Rules 2013* ('*NSW Solicitors' Rules*'). The relevant rules are largely contained in rr 4, 7–16.

¹⁶ G E Dal Pont, *Lawyers' Professional Responsibility* (Thomson Reuters, 4th ed, 2010) 147.

¹⁷ *Ibid* 377.

where in relation to a general prohibition to act in case of a conflict of interest,¹⁸ the commentary provides that such conflict may arise where a lawyer has a sexual or close personal relationship with a client because:

Such a relationship may conflict with the lawyer's duty to provide objective, disinterested professional advice to the client. The relationship may obscure whether certain information was acquired in the course of the lawyer and client relationship and may jeopardise the client's right to have all information concerning their affairs held in strict confidence. The relationship may in some circumstances permit exploitation of the client by their lawyer.¹⁹

Notably, Canadian provinces including Upper Canada and British Columbia, have adopted this proposal.

Until October 2014, the *Rules of Professional Conduct* of the Law Society of Upper Canada were another example of a move away from implicit approval by not prohibiting acting for related parties to an explicit caution in such circumstances:

Where a lawyer is acting for a friend or family member, the lawyer may have a conflict of interest because the personal relationship may interfere with the lawyer's duty to provide objective, disinterested professional advice to the client.²⁰

The Law Society of Upper Canada by convocation on 23 October 2013 adopted the *Model Code for Canada*. Consequently, the r 2.04

¹⁸ Federation of the Law Societies of Canada, *Model Code of Professional Conduct* (as amended in October 2014) r 3.4-1.

¹⁹ Federation of the Law Societies of Canada, *Model Code of Professional Conduct* (as amended in October 2014) commentary [11](d)(i) to r 3.4-1.

²⁰ Law Society of Upper Canada, *Rules of Professional Conduct* (Effective 1 November 2000 as amended on 24 October 2013) Commentary to r 2.04(1).

of the *Rules of Professional Conduct* and the accompanying commentary has been superseded as of 1 October 2014²¹ and replaced by new r 3.4-1 based on the *Model Code for Canada* replicating the approach as discussed above.²²

Similarly to Upper Canada, British Columbia adopted the *Model Code of Canada*²³ including the r 3.4-1 with its more direct and explicit expression of the real possibility of a conflict of interest resulting from sexual or close relationship between the lawyer and the client.²⁴ However, British Columbia retained additional specific prohibitions related to acting for relatives and related parties.

Until 1 January 2013, the relevant rule was the r 1 of the *Professional Conduct Handbook* ('BC Handbook'). It expressly prohibited a lawyer from performing legal services for a client if (i) the lawyer's direct or indirect *financial interest* was involved, or (ii) in case of a direct or indirect *financial interest* of a defined related party (anyone including a relative, partner, employer, employee, business associate or friend) if it would reasonably be expected that it could affect the lawyer's professional judgment.²⁵

²¹ Law Society of Upper Canada, *New Rules of Professional Conduct* <<http://www.lsuc.on.ca/new-rules/>>.

²² Law Society of Upper Canada, *Rules of Professional Conduct* (Effective 1 October 2014) r 3.4-1 and Commentary [8](e)(i).

²³ Federation of the Law Societies of Canada, *Code of Professional Conduct* (as amended in October 2014).

²⁴ Federation of the Law Societies of Canada, *Code of Professional Conduct* (as applicable in December 2012) commentary [8](e) to r 3.4-1 (currently [11](d)(i)).

²⁵ Law Society of British Columbia, *Professional Conduct Handbook* (June 2011) ch 7 Conflicts of Interest between Lawyer and Client, r 1.

As from 1 January 2013, the *BC Handbook* was replaced by the *Code of Professional Conduct for British Columbia*²⁶ ('BC Code'), which adopted an even more stringent requirement not limited to involvement of a financial interest:

A lawyer must not perform any legal services if there is a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's

(a) relationship with the client, or

(b) interest in the client or the subject matter of the legal services.

Commentary

[1] Any relationship or interest that affects a lawyer's professional judgment is to be avoided under this rule, including ones involving a relative, partner, employer, employee, business associate or friend of the lawyer.²⁷

In Australia, the Federal Magistrates Court of Australia decision in *Temby v Chambers Investment Planners Pty Ltd*,²⁸ delivered in 2010, is a good example of moving further along the scale towards prohibition. The Federal Magistrates Court restrained not only the applicants' son who was a lawyer, but also members of his law firm from representing his parents in court proceedings. Federal

²⁶ That is based on, but differs from the Federation of the Law Societies of Canada's Model Code of professional conduct: see Law Society for British Columbia, *The Introduction to the Code of Professional Conduct for BC* <<https://www.lawsociety.bc.ca/page.cfm?cid=2642&t=Introduction-to-the-Code-of-Professional-Conduct-for-BC>>.

²⁷ Law Society of British Columbia, *Code of Professional Conduct for British Columbia* (Effective 1 January 2013 as amended in November 2013) r 3.4-26.1 Conflicts with Clients.

²⁸ *Temby v Chambers Investment Planners Pty Ltd* [2010] FMCA 783 ('*Temby*').

Magistrate Toni Lucev appeared to be astounded that he had to decide this matter for in his opinion, in ‘modern times’²⁹ the ‘potential conflict of interest is so obvious’.³⁰

The Federal Magistrate reasoned that there was a dearth of authority and therefore he was bound to decide on ‘general principles’³¹ concluding that:

- (i) the personal relationship under consideration was of the ‘closest kind’,³² a familial blood relationship between parent and child;
- (ii) such a personal relationship may be ‘pivotal’³³ in the conduct of the his parents’ court proceedings;
- (iii) although existing authorities concerning conflicts of interest involved real estate or loan securities those principles also applied to litigation proceedings; and
- (iv) although independent counsel was retained, it was subject to availability and therefore this did not prevent the son from influencing the outcome of decisions during his parents’ anticipated court proceedings.

Either as an additional element or a separate test, the Federal Magistrate added that:

The Court has reached the view that a fair-minded, reasonably informed member of the public would consider it appropriate in the interests of justice to restrain [the son] from acting as a lawyer because of the actual or likely conflict of interest arising from acting for his parents.³⁴

²⁹ Ibid [19].

³⁰ Ibid [19].

³¹ Ibid [28].

³² Ibid [28].

³³ Ibid [28].

³⁴ Ibid [29].

Furthermore, the applicant's law firm was also restrained from acting for the parents as there was no undertaking given nor evidence presented to substantiate the claim that the applicant would not take part in the future conduct of the litigation commenced by his parents by collaborating with his office colleagues.³⁵

Sande Buhai, who shares the sentiments expressed in the *Temby* decision, argued that lawyers' rules of professional conduct should specifically prohibit the representation of persons with whom the lawyer has an emotional relationship except in exceptional circumstances.³⁶ The rationale of this argument, according to Buhai, is that in most cases such representation would lead to ethical/professional rules violations.

In summary, the discussion above shows that while Western professional legal ethics permit lawyers to represent relatives and friends, it is considered acceptable only in exceptional cases. Some jurisdictions warn against, while others prohibit, such behaviour in circumstances where it constitutes a potential source of a conflict of interest or a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by existence of such relationship. In some places there are measures put in place to dissuade lawyers from doing so such as the limitation of professional indemnity insurance coverage.³⁷

³⁵ Ibid [28].

³⁶ Buhai, above n 12.

³⁷ D Pinnington, *Beware the Dangers of Acting for Family and Friends*, CBA Practice Link <<http://www.cba.org/cba/practicelink/tips/family.aspx>>.

C Ethic of Care and Relational Lawyering

An alternative model for ethical legal practice put forward in literature is the ethic of care or relational lawyering. The concept of an ethic of care is contrasted with strict adversarialism.³⁸ Carol Gilligan raised this concept as a feminist critique of adversarialism;³⁹ it has also been put forward as representing a Christian approach to lawyering.⁴⁰ The essence of an ethic of care is that the lawyer, when advising a client, considers fully the matrix of relationships involved in the matter including those of the client, other parties and the lawyer. Consequently, the resulting advice weighs up all the interests instead of simply pushing for a 'win' as would be the case with adversarialism. In this way, the most socially harmonious outcome is achieved for the benefit of all.⁴¹ In accordance with its proponents, the superiority of this approach lies in its being more ethical because it looks at group harmony and happiness rather than conflict and winning. At this level, it is easy to see its appeal as seeking social harmony rather than encouraging of conflict appears self-evidently better and more ethical.

However, Stephen Ellmann and others questioned whether the ethic of care could be an ethic for lawyers.⁴² Ellmann synthesised from Gilligan's treatise that caring based on emphasising people's mutual

³⁸ Parker and Evans, above n 1, 31–7.

³⁹ C Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, 1982).

⁴⁰ T L Shaffer, *On Being a Christian and a Lawyer: Law for the Innocent* (Brigham, 1981).

⁴¹ Parker and Evans, above n 1, 31–7.

⁴² S Ellmann, 'The Ethic of Care as an Ethic for Lawyers' (1993) 81 *Georgetown Law Journal* 2665 n 3; S Daicoff, 'On Butlers, Architects, and Lawyers: The Professionalism of "The Remains of the Day" and "The Fountainhead"' (2011) 17 *Journal of Law, Business and Ethics* 23, 35–6.

connections is the natural situation, while ‘detachment is *the* moral problem’.⁴³ In recognition of these multifaceted connections, an ethic of care cannot produce an exclusive and comprehensive set of ethical guidelines for lawyers, but it can provide only a framework for moral judgment. He diverges from Gilligan in that in the context of lawyering, an ethic of care cannot mean a caring attitude towards everyone.⁴⁴ Ellmann argues that every situation may present its own unique set of facts that would require a different response; therefore caring for all is psychologically implausible for lawyers.⁴⁵ Lawyers, just like everybody else will care more for some, in particular for family and friends than they would for strangers.⁴⁶ Notably, it is hard to reconcile a suggestion that a person should not act for closely related persons with a relationship-based ethics of care approach, whereas it reconciles readily with a detached adversarial approach.⁴⁷ After all, the ethic of care emphasises the benefit of relationships as its underling basis, whereas the adversarial model avoids relationships.

The ethic of care can be considered to be a form of ‘moral lawyering’ as opposed to ‘amoral lawyering’. Susan Daicoff defined these approaches as comprising the following characteristics:⁴⁸

- Moral Lawyering: lawyering with an ethic of care, objectivity, honourable legal analysis and Atkinson’s Type 3;
- Amoral Lawyering: instrumentalism, utilitarianism, the technocratic lawyer, partisanship, the client centred

⁴³ Ellmann, above n 42, 2668.

⁴⁴ Ibid 2681.

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid 2682.

⁴⁸ Daicoff, above n 42, 40–4.

approach or client orientation, neutral partisanship, zealous advocacy and Atkinson's Type 1.

Daicoff critiques these two groupings by identifying their advantages and disadvantages, which we summarise in the tables below:⁴⁹

TABLE 1: ADVANTAGES AND DISADVANTAGES OF MORAL LAWYERING

Moral Lawyering	
Advantages	Disadvantages
<ul style="list-style-type: none"> • Seen as valuable in achieving better legal advice because the lawyers are permitted to include their life experiences, values and beliefs when representing clients; • Fosters collaboration and moral dialogue between the lawyer and client; • Improves mental health of lawyers by relieving them of the pressure of having to do something contrary to their values; • Enhances the integrity of the relationship between the lawyer and client. 	<ul style="list-style-type: none"> • May deny clients equal access to legal representation because lawyers may have more scope to refuse to represent; • Not all lawyers may be receptive to this type of lawyering preferring the amoral approach. The amoral approach provides legitimacy for taking on a client contrary to their personal ethics.

⁴⁹ Ibid.

**TABLE 2: ADVANTAGES AND DISADVANTAGES OF AMORAL
LAWYERING**

Amoral lawyering	
Advantages	Disadvantages
<ul style="list-style-type: none">• Upholds impartiality of lawyers which facilitates access to justice;• Serves as a check on paternalistic behaviour by lawyers;• Lawyers will not be able to deny unpopular clients or causes access to the courts;• Relieves lawyers of having to decide between conflicts with their personal values and their client's goals.	<ul style="list-style-type: none">• Amoral lawyers representing immoral clients can lead to immoral or illegal consequences contributing to an erosion of public confidence in lawyers and legal institutions;• It does not support the lawyers providing advice based on their life experiences including their values and beliefs. Consequently the quality of advice may suffer;• Lawyers may suffer personal stress by not being able to separate their personal values and beliefs from the representation of their client.

This led Daicoff to conclude that the:

consequences of overreliance on the amoral role have been disastrous; what we are doing in the legal profession is no longer working for lawyers or society in general.⁵⁰

If an ethic of care is to be adopted by legal practitioners, it will have consequences beyond the issue of whether a lawyer can act for family or friends. The ethic of care will also dictate the manner in which the lawyer should act for closely related clients. One critical aspect of this relationship is considering others when advising the client. Rachel Vogelstein posits in her paper that the American ethical rules for lawyers would have to be amended, if the ethic of care was to be adopted, to provide additional grounds for lawyers to

⁵⁰ Daicoff, above n 42, 53.

be allowed to disclose confidential information they receive from their clients.⁵¹ Permitting disclosure would allow third parties' interests to be taken into account when the lawyers are caring for their clients.⁵² Ellmann also makes this point when he argues that lawyers' code of ethics should be 'subject to exceptions when considerations of care justify making them'.⁵³ This would involve inserting into the written code for lawyers, the rationale for these exceptions to be provided or declined in accordance with the requirements of the ethic of care.⁵⁴ Furthermore, it would require a change of understanding of what means 'in the best interest of the client' in the context of lawyers' fiduciary obligations; currently considering interests of others falls beyond such duties and potentially may breach them.

Ethic of care is not new to Western legal practices. Following research on female lawyers in the State of Queensland in Australia and their accounts of ethics in practice, Francesca Bartlett and Lyn Aitken concluded that the professional rules of lawyers are in many respects 'ambivalent about — they neither prohibit nor mandate — a caring approach to lawyering'.⁵⁵ Ellmann similarly concludes that from an American perspective 'the lawyer-client relationships that the ethic of care calls for are not vastly different from those permitted under existing rules'.⁵⁶

⁵¹ R Vogelstein, 'Confidentiality vs Care: Re-Evaluating the Duty to Self, Client, and Others' (2003) 92 *Georgetown Law Journal* 153.

⁵² *Ibid.*

⁵³ Ellmann, above n 42, 2724.

⁵⁴ *Ibid.*

⁵⁵ F Bartlett and L Aitken, 'Competence in Caring in Legal Practice' (2009) 16(2–3) *International Journal of the Legal Profession* 241, 250.

⁵⁶ Ellmann, above n 42, 2726.

In summary, Western professional legal ethics permit a lawyer to act in accordance with an ethic of care; there are persuasive reasons to do so such as the deficiencies of the current practice of adversarialism.⁵⁷ However, there is ambivalence at present as to the widespread adoption of an ethic of care evident in the fact that the professional conduct rules for lawyers neither encourage nor discourage such approach while a form of it is already practiced by some but not all.

II ASSESSING ETHICAL ARGUMENTS IN COMPARATIVE SOCIAL PERSPECTIVE

This Part will focus on Chinese society and its institutions casting a comparative social lens on the ethics of representing friends and family, and an ethic of care. It will highlight several issues related to these ethical principles from two different perspectives. First, we will demonstrate that the ethics of Chinese society may be in conflict with the position adopted in the West: that representing people to whom you have an emotional tie is unethical or undesirable. Second, through the matrix of Chinese society, we will show that the *prima-facie* ‘good’ of the ethical critiques put forward under the ethic of care cannot be assumed. It is likely that, in the context of the inherent differences of the Chinese society and the evolution of its institutional context, the wide scale allowance for an ethic of care advocated by some Western scholars may result in significant ethical problems both for lawyers practising in China and Chinese lawyers practising overseas. In order to consider these issues we will also look at the evolution of comparable legal institutions in China and the professional practice for lawyers practising within Chinese society.

⁵⁷ C Parker and A Evans, *Inside Lawyers Ethics* (Cambridge University Press, 2nd ed, 2014) 25–9.

A Chinese Ethics and Society

The structure of Chinese society, both traditionally and contemporaneously, is fundamentally different to Western society.⁵⁸ Its ethical traditions also stand in marked contrast to the West. These traditions are inextricably intertwined with Chinese social institutions in the manner that Christianity is interwoven with Western ethics and social institutions.⁵⁹ Thus while a Western person may proclaim atheism and a Chinese person may have little specific knowledge of Confucius, their ethical outlook and the social institutions that shape their actions are likely to be heavily influenced by these factors. Chinese society can be described as a relationship society⁶⁰ because it places a far greater significance upon the network of relationships in which an individual is enmeshed than the Western society does.⁶¹ By contrast, Western society is individualistic and is becoming ever more so. Consequently, what is generally perceived as right and wrong in the two societies differs in material respects.

It must be noted that, since 1949, China has been subject to significant change that has, at times, sought to fundamentally alter its society. Most notably, the changes carried out and attempted during the strictly communist period from 1949 to 1978 which reached a

⁵⁸ L E Eastman, *Family, Fields and Ancestors* (Oxford University Press, 1998).

⁵⁹ S Blum, *Lies that Bind: Chinese Truth, Other Truths* (Rowman & Littlefield Publishers, 2006).

⁶⁰ See the differential mode of association model in: X Fei, *From the Soil: The Foundation of Chinese Society* (Hsiang t'u Chung-kuo trans, University of California Press, 1992) [trans of: Xiangtu Zhongguo (first published 1947)] 60–71.

⁶¹ H Hendrichske, *The Role of Social Capital, Networks and Property Rights in China's Privatization Process: Chinese Enterprise Models* (Centre for Chinese Studies, University of New South Wales, 2002).

high point during the Cultural Revolution. During the latter many aspects of Chinese tradition, culture and society were specifically targeted for attack as they were thought to hamper the communist revolution. However, what has been noted since 1978 is the resilience of Chinese social institutions and values which have made a strong return and underpin much of China's success. The attacks of other ideologies have, indeed, made resort to Chinese traditional institutions ultimately stronger in many ways. Of course, values shift and alter with the times. In more recent decades, the one child policy has raised a challenge to the ideas of family. However, the society has adapted its values to the changed environment and has in no way disappeared.

In Chinese society right and wrong in any given situation will be judged with significant reference to the relationship between the parties and their relations to others. Prominent Chinese sociologist Fei Xiaotong went as far as asserting that in Chinese society there is no scope for purely individual rights.⁶² In addition, with reference to Confucius and Mencius, Fei Xiaotong argued that correct action must always be judged subject to the relationships and positions of persons and that in Chinese society there is no scope for a universal moral position.⁶³ In Western society, by contrast, he argues that there is a strong objective standard of right and wrong.⁶⁴

It should be noted that this does not equate to Chinese society being communal. On the contrary, the focus on an individual's network of relationships in determining ethical behaviour leaves little scope for overarching community. This is consistent with the lack of an objective standard of right and wrong other than the ethical standard of supporting those you have a relationship with. In contrast,

⁶² Fei, above n 60.

⁶³ Ibid 77–9.

⁶⁴ Ibid.

Western society's individualism is coupled with the significant role of the state and ideas of public good.

As a consequence, litigation, as well as reliance on law and strict formalism, has always been avoided in Chinese society. In fact, taking a strong legal action in itself may be viewed as unethical.⁶⁵ In addition it is considered as an embarrassing display of the breakdown of personal relationships and loss of face for all parties. An insistence on strict contractual or other legal rights when they are 'unreasonable' will also be avoided.⁶⁶ Social institutions that are in many ways as powerful as formal institutions will enforce 'correct' or ethical behaviour in Chinese society, which will inevitably reinforce personal relationships and a matrix of interests. Even if resort to formal institutions is sought (assuming the facts occur in China), it is likely that these too will support the ethical position of reinforcing relationships and expected interests in the context of existing relationships.

The aversion to use formal institutions to resolve disputes is not limited to members of the Chinese public. In some circumstances, local and central governments can take steps designed to divert members of the public away from formal institutions. For example, local governments concerned about the spiralling costs of compensation and a high administrative burden, physically prevented petitioners from pursuing their claims with higher authorities.⁶⁷

⁶⁵ A E S Tay, 'From Confucianism to the Socialist Market Economy: The Rule of Man vs the Rule of Law' in A E S Tay and G Doeker-Mach (eds), *Asia-Pacific Handbook* (Nomos Verlagsgesellschaft, 1998) vol 1, People's Republic of China, 81.

⁶⁶ B Krug and H Hendrischke, *China Incorporated: Property Rights, Privatisation, and the Emergence of a Private Business Sector in China* (INSEAD Euro-Asia Centre, 2002).

⁶⁷ J Benney, 'Lawyers, Not Law? A Taxonomy of the Legal Profession in China' (Working Paper Series No 175, Asia Research Institute,

Furthermore, the central government has been funding alternative dispute resolution mechanisms in order to deal with local disputes outside of the court system.⁶⁸

A different aspect of Chinese social institutions is that people will only seek to place reliance on and trust in those with whom they have a strong personal relationship.⁶⁹ Such persons are used in business and other important affairs.⁷⁰ This practice is intimately tied to the lack of belief in universal moral standards and the consequent lack of trust in the public as a whole, and the State and its formal institutions. Given that there are no strong abstract conceptions of right and wrong outside existing relationships, it is highly undesirable to place reliance on and resources in the hands of unrelated parties.

When individuals in Chinese society have no related person with a required skill set, they will seek to identify an appropriate possible person through their relationship network and then they will seek to generate sentiment with such a person before deciding to rely upon them.⁷¹ It means they will attempt to build a personal relationship with such candidate initially through socialising, gifts, and seeking commonality. Once the sentiment is established, the reliance will be

2012) 4, citing Y Xie and W Shan, 'China Struggles to Maintain Stability: Strengthening Its Public Security Apparatus' (East Asian Institute, National University of Singapore, 2011).

⁶⁸ Ibid.

⁶⁹ A B Kipnis, *Producing Guanxi: Relationships, Subjects and Subcultures in a Rural Chinese Village* (Ann Arbor, 1991) 329.

⁷⁰ D L Wank, *Commodifying Communism: Business, Trust, and Politics in a Chinese City* (Cambridge University Press, 1999).

⁷¹ M M Yang, *Gifts, Favors and Banquets: The Art of Social Relationships in China* (Cornell University Press, 1994).

placed;⁷² only the friend's involvement is a guarantee of the best possible outcome.⁷³ This is enforced by social institutions that require the society to 'punish' those who do not act ethically in the best interests of a friend. As a result, the distinction between the private sphere and the business or formal sphere is very unclear in a Chinese society.⁷⁴

These relationships in Chinese society are called 'guanxi'. In English, *guanxi* has been translated into a number of different meanings and has been the subject of study by many academic disciplines.⁷⁵ It is still an open question as to whether *guanxi* equates to corruption as understood by Western societies. Chris Provis contends that although there are differences between the two, *guanxi* can be manipulated to amount to corruption.⁷⁶ Ling Li on the other hand asserts that *guanxi* constitutes a form of institutionalised corruption.⁷⁷ In her research she examined various forms of practices of *guanxi* and concluded that they are designed to 'overcome the

⁷² M M Yang, 'The Resilience of Guanxi and Its New Deployments' (2002) 170 *China Quarterly* 459.

⁷³ A B Kipnis, *Producing Guanxi: Sentiment, Self, and Subculture in a North China Village* (Duke University Press, 1997).

⁷⁴ T Gold, D Guthrie and D Wank, *Social Connections in China: Institutions, Culture, and the Changing Nature of Guanxi* (Cambridge University Press, 2002).

⁷⁵ T Drew and A Kriz, 'Institutional Reform and the Case of Guanxi' (Working Paper Series No 3, Sion-Australian Business Research Centre, University of Newcastle, 2011).

⁷⁶ C Provis, 'Guanxi and Conflicts of Interest' (2008) 79 *Journal of Business Ethics* 57, 58 citing Y Luo, *Guanxi and Business* (World Scientific Publications, 2000).

⁷⁷ L Li, 'Performing Bribery in China: Guanxi Practice, Corruption with a Human Face' (2011) 20(68) *Journal of Contemporary China* 1, 20.

legal, moral and cognitive barriers⁷⁸ that if present would have obstructed the corruption from taking place.⁷⁹

If *guanxi* is a form of corruption breaking down moral barriers, the question whether it is also practised by the legal profession in China arises. We believe that the answer is in the affirmative as we will elaborate in Part III.

B Conceptual Development of Legal Ethics Concepts Based on the Chinese Perspective

The preceding review of aspects of Chinese society and ethics raises a number of issues in relation to the legal ethics of acting for relatives and friends, and relational lawyering. First, the Chinese perspective on the use of persons with an emotional attachment stands in marked contrast with the position of Western commentators such as Buhai.⁸⁰ The Chinese perspective sees the use of a person you have a relationship with as resulting in superior performance and increased trust. This can be contrasted with the Western perspective as in Australia, Canada and the United States where the use of a related person can be perceived as resulting in inferior performance, and lead to possible breaches of fiduciary duties and trust. This inconsistency means that either one of the positions is incorrect, or they are dependent on social context and/or situation. If the latter applies, then the law makers and proponents of professional legal ethics codes will need to refine their views and adopt less fundamental positions to reflect the reality that using a lawyer to whom you are closely related to may bring significant benefit in certain situations and detriment in others. If the correct approach is socially relative then any discussion of the principles needs to be

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ Buhai, above n 12.

carefully expressed to ensure that this is clear. If either position is fundamentally wrong, then much more research is needed.

Second, it is submitted that Chinese society is clearly one where an ethic of care focused on relationships already exists and it significantly overrides individual rights focused adversarialism. One leading ethicist has gone so far as to proclaim that ‘Confucian ethics is a care ethics’⁸¹ although there are contrary views.⁸² Despite the differences between the two, we contend that most will agree that the central focus of both is on relationships.

The importance of relationships in Chinese society and the ‘unpleasant’ consequences of not being part of the network of relations was revealed in research conducted by Yan on how good Samaritans were being extorted by people whom they helped.⁸³ A number of reasons can be presented to explain this. However, as already discussed, traditional Chinese society is organised through a differentiated mode of association and a stranger, even a Good Samaritan, falls outside that mode and therefore is vulnerable to exploitation. The extortioner is not necessarily acting unethically but is rather simply following the prevailing ethic that does not care about those outside the network of relationships. This attitude may have equally negative consequences in the context of giving legal

⁸¹ C Li, ‘The Confucian Concept of Jen and the Feminist Ethics of Care: A Comparative Study’ (1994) 9 *Hypatia* 70, 81.

⁸² D Star, ‘Do Confucians Really Care? A Defense of the Distinctiveness of Care Ethics: A Reply to Chenyang Li’ (2002) 17 *Hypatia* 78; L Yuan, ‘Ethics of Care and Concept of Jen: A Reply to Chenyang Li’ (2002) 17(1) *Hypatia* 107; C Li, ‘Revisiting Confucian Jen Ethics and Feminist Care Ethics: A Reply to Daniel Star and Lijun Yuan’ (2002) 17(1) *Hypatia* 130.

⁸³ Y Yan, ‘The Good Samaritan’s New Trouble: A Study of the Changing Moral Landscape in Contemporary China’ (2009) 17(1) *Social Anthropology* 9.

advice as a person on the other side of a deal or conflict who is not a part of *guanxi* will be equally vulnerable to exploitation as the Samaritan. On the other hand, this may be seen as an exaggerated manifestation of Ellmann's criticism that lawyers cannot care equally for all therefore depending on the configuration of the involved interests the outcome may be different in each case despite of the similarity of the facts.

Chinese society and contemporary China are far more dominated by relationships and decision-making that is made within the context of a matrix of relationships than is the case with Western societies. Thus, it corresponds more closely with the idea of relationship lawyering and an ethics of care, as supported by writers such as Gilligan⁸⁴ and Shaffer.⁸⁵ As such it allows contrast with Western society in terms of what is ethical and ultimately enables discussion about the desirability of widespread adoption of ethic of care principles in the professional legal codes of ethics. However, such discussion will have to acknowledge that some of the most significant problems identified with China today are in many ways manifestations of its social institutions. The lack of a meaningful rule of law, the problem of corruption and the role of *guanxi* are intertwined and linked with the society and its institutions. What transpires is that if problems and conflicts are not resolved on the basis of established and transparent rights and law but broadly defined interests, there is scope for uncertainty, corruption and unfairness. The weighing up of right and wrong by assessing a complex matrix of interests and relationships is fraught with difficulty whether the weighing up is done by an official or a lawyer. These difficulties need to be considered by those who propose that strict rights based adversarialism should be supplanted by a relationship based ethic of care. However, this proposition does not

⁸⁴ Gilligan, above n 39.

⁸⁵ Shaffer, above n 40.

dismiss such proposals, but rather highlights that what may seem to be clearly a desirable ethical position of adopting an ethic of care may not lead to superior (more ethical) outcomes when put into widespread practice in a society without a meaningful rule of law and the continued influence of *guanxi*.

In summary, Chinese society is fundamentally different to Western society. A far greater emphasis is placed on relationships in China than in the West. In Chinese society, whether a lawyer is ethical or unethical depends not only on the relationship between lawyer and client but also on their relationships to others. Consequently a lawyer representing a friend or relative would be an expected occurrence. Such a lawyer in Chinese society may be viewed as ethical. However, the negative side of this ethical outlook is manifested in the problems identified with corruption and *guanxi* in contemporary China. *Guanxi* is after all about relationships.

III RELEVANCE OF LAWYERS' ETHICS IN A GLOBAL AND MULTICULTURAL WORLD

This Part focuses on the ethical duties of lawyers in the context of the development of a Western style legal profession in China and the development of a harmonious global legal profession. We believe this ethics perspective provides a more in depth understanding of how the Chinese legal system operates within and outside of China⁸⁶ than the mechanical and isolated analysis of China's adoption of the 'rule of law' or the organisation of China's legal system involving

⁸⁶ J Benney, 'Lawyers, Not Law? A Taxonomy of the Legal Profession in China' (Working Paper Series No 175, Asia Research Institute, 2012) 3; X Ding, 'Chinese Corporate Lawyers Face Challenges in Maintaining Corporate Social Responsibility in the Age of Globalization' (2011) 21 *Indiana International and Comparative Law Review* 509.

aspects such as an independent judiciary or the role of ‘barefoot lawyers’.⁸⁷

A Development of a Western Style Legal Profession in China

Teaching and practising law was a life threatening pursuit when in 1949 Mao Zedong, the leader of the People’s Republic of China, sought to ‘destroy the entire legal culture’.⁸⁸ In 1978, under the leadership of Deng Xiaoping, the legal culture was reinvigorated in two phases. First came the institutional phase that involved: the reopening of law schools, the reinstitution of law advisory offices to provide legal services to the public, the resumption of legal research, promulgation of the ‘Provisional Regulations on the Lawyers of the People’s Republic of China’ which defined lawyers as ‘workers of the state’, the establishment of a form of a self-regulatory body of the All China Lawyers’ Association and the introduction of a licensing examination for lawyers.⁸⁹ Next followed the self-development phase with the adoption of a code of ethics by the All China Lawyers’ Association, the promulgation of the *Law of the People’s Republic of*

⁸⁷ W Alford, ‘Tasselled Loafers for Barefoot Lawyers: Transformation and Tension in the World of Chinese Legal Workers’ (1995) 22 *China Quarterly* 22; G J Clark, ‘An Introduction to the Legal Profession in China in the Year 2008’ (2008) XLI *Suffolk University Law Review* 833; S Wilson, ‘Law Guanxi: MNCs, State Actors, and Legal Reform in China’ (2008) 17(54) *Journal of Contemporary China* 25.

⁸⁸ C L Baraban, ‘Inspiring Global Professionalism: Challenges and Opportunities for American Lawyers in China’ (1998) 73 *Indiana Law Journal* 1247, 1257.

⁸⁹ C W H Lo and E Snape, ‘Lawyers in the People’s Republic of China: A Study of Commitment and Professionalization’ (2005) 53 *American Journal of Comparative Law* 433, 442.

*China on Lawyers*⁹⁰ that redefined a lawyer from a worker of the State to a provider of legal services to society, and the privatisation of legal services through the abolition of State owned legal advisory services.⁹¹

As China's economy has grown, developed, modernised and become more sophisticated, so has its legal profession embraced stratification and specialisation. Some suggested that there is a strong correlation between China's economic development and development of its legal system and legal profession.⁹² This led Randall Peerenboom to conclude that in China:

The newness of the profession, the lack of an understanding about the role of lawyers, the relatively high levels of corruption typically found in middle-income countries, and the dire economic straits of some lawyers have led to numerous violations of legal ethics and sharp practices.⁹³

Various codes of conduct and ethics were introduced by China's central government's Ministry of Justice and by the self-regulatory industry.⁹⁴ In 2011 the All China Lawyers' Association published the *Code of Conduct for Practicing Lawyers* (2011 Revision) ('*Lawyers' Code of Ethics*') with 108 articles.

In light of this legal renaissance, Carlos Wing-Hung Lo and Ed Snape examined the development of professionalism of the legal

⁹⁰ 中华人民共和国律师法 (Peoples Republic of China) Standing Committee of the National People's Congress, Order No 76, 15 May 1996 (revised) ('*Lawyers' Law*').

⁹¹ Lo and Snape, above n 89.

⁹² R Peerenboom, 'Economic Development and the Development of the Legal Profession in China' (13 February 2009) Social Science Research Network <<http://ssrn.com/abstract=1342287>>.

⁹³ Ibid 26.

⁹⁴ Lo and Snape, above n 89, 444–5; Baraban, above n 88.

profession in China.⁹⁵ The researchers identified a number of hallmarks of professionalism including the presence of an ethics code, which allowed them to conclude that in ‘some respects’⁹⁶ China’s development had ‘elements in common with the West’.⁹⁷ Their research focused on how these developments affected the daily experiences and attitudes of practising lawyers. In their interviews of lawyers in Guangzhou, China, 65 per cent of the surveyed respondents agreed with the statement: ‘Sometimes in my job I am asked to do things which run counter to my professional judgment.’⁹⁸ The authors believe the use of *guanxi* in Chinese society is the reason behind this.

As already noted above, there is ample evidence of the significant role of *guanxi* in China. There is also evidence of its influence on the legal profession specifically. In addition to Lo and Snape’s study, Li considered the impact of *guanxi* on the legal profession while branding it a form of corruption. She documents an example of a situation where five judges from three different courts in China received identical letters from a lawyer who was keen to acquire new business.⁹⁹ This letter translated into English by Li read as follows:

I would like to have friendly cooperation with you ... to share the litigation resources and the profits. You are welcome to introduce me to litigants in cases that you preside over ... under the following conditions: (1) the claim of the dispute is more than RMB300 000; (2) the litigant has not retained a lawyer or it is possible to have that lawyer replaced; (3) the litigant is likely to win the case or to have the damages claimed by the

⁹⁵ Lo and Snape, above n 89.

⁹⁶ Ibid 453.

⁹⁷ Ibid.

⁹⁸ Ibid 450.

⁹⁹ Li, above n 77.

other party reduced ... I will let you share 40% of the retainer as your commission fee.¹⁰⁰

The judges forwarded the letters to the Beijing Bureau of Justice and the lawyer was disbarred for breaching the Chinese *Lawyers' Law*.¹⁰¹ It was later reported that one of the judges found this method of approach to be 'really exceptional'.¹⁰² Li argues that this and other examples illustrate that *guanxi* involves certain rules and code of conduct that constitutes an 'informal institutional mechanism facilitating the contracting process of corrupt exchange'.¹⁰³

Given the role of relationships in Chinese society, it would be expected that there would be significant challenges in applying a code of ethics in China that calls for detached independence from social relationships. It may be tantamount to 'asking them to act counter to traditional cultural norms'.¹⁰⁴

Thus the question of whether a Western-style code of ethics can work in Chinese society arises. Provis considered aspects of *guanxi* and observed that following it could lead to conflicting obligations and interests.¹⁰⁵ Provis identified three methods traditionally applied by Western ethicists in resolving conflicts of interests.¹⁰⁶ He proposed that they can also be applied to situations where there may be a conflict between *guanxi* based obligations and institutional

¹⁰⁰ Ibid 2.

¹⁰¹ Ibid 2 citing 'Subtle entanglement between judges and lawyers', 21st Century Economic Report, (30 June 2005).

¹⁰² Ibid.

¹⁰³ Ibid.

¹⁰⁴ J A McMorro, 'Professional Responsibility in an Uncertain Profession: Legal Ethics in China' (2010) 43 *Akron Law Review* 1081, 1096.

¹⁰⁵ Provis, above n 76.

¹⁰⁶ Ibid 62.

obligations. The Western methods of resolution are: (i) avoidance of conflict, by removing the interest or the decision requirement; (ii) disclosure, to allow others to decide whether to continue to accept the decision-maker's role; and (iii) ensuring the decisions are made on the basis of clear criteria and discernible reasons.

A formal code of ethics may provide for these methods. Indeed, there are already examples in place in China. The All China Lawyers' Association's *Lawyers' Code of Ethics* includes rules in relation to disclosing conflicts of interest for example.¹⁰⁷ Outside of law, the *Notice of the China Banking Regulatory Commission on Issuing the Guidance on the Professional Conduct of Practitioners of Banking Financial Institutions*¹⁰⁸ simply requires that banking professionals avoid corrupt practices,¹⁰⁹ and that banks and senior officers make efforts to discourage corrupt activities amongst their employees, raise awareness and educate them appropriately.¹¹⁰ It also encourages education of the public as to their rights and available processes.

Although arguably positive, a formal code of ethics by itself is insufficient to instil a sense of foreign ethical behaviour in lawyering whether in China or any other country, culture, society or a grouping of like-minded people. It does however provide a reference point of minimum standards for Chinese lawyers to comply with and allows Chinese actors on the world stage to be able to pronounce that similarly to other developed markets there are ethical standards in China analogous to those in more mature legal markets.

¹⁰⁷ *Lawyers' Code of Ethics*, art 51.

¹⁰⁸ 中国银监会关于印发《银行业金融机构从业人员职业操守指引》的通知 (People's Republic of China) Banking Regulatory Commission, No 12, 2 May 2009 (revised 2011) ('*Bankers' Guidance*').

¹⁰⁹ *Ibid* art 16.

¹¹⁰ *Ibid* arts 14, 17.

Judith McMorow identified the following ‘constraints’¹¹¹ to the development of legal ethics in China:

- (i) pressure to graduate and to make money and studying legal ethics at university is not viewed as the appropriate path to take;¹¹²
- (ii) teaching law predominantly at the undergraduate and not postgraduate or professional level, and therefore legal education offers limited clinical and skills education or practical insights to the application of law;
- (iii) different understanding of the role of law, legal system and lawyers in the society;¹¹³
- (iv) formation of legal consciousness through exposure to and understanding of the legal system both by law students and clients;¹¹⁴
- (v) dearth of widely acceptable main stream legal heroes as role models;¹¹⁵
- (vi) the role of relationships or *guanxi*;¹¹⁶
- (vii) corruption and incompetence of lawyers, prosecutors and courts;¹¹⁷ and
- (viii) pre-rule-of-law legal system.¹¹⁸

We concede that these are very persuasive factors that influence the effectiveness of a code of ethics. The introduction of a code of ethics

¹¹¹ McMorow, above n 104, 1084.

¹¹² Ibid 1084–6.

¹¹³ Ibid 1089.

¹¹⁴ Ibid 1090–1.

¹¹⁵ Ibid 1091–5.

¹¹⁶ Ibid 1095–6.

¹¹⁷ Ibid 1096–7.

¹¹⁸ Ibid 1097.

is not an answer in itself but one component of the overall comprehensive solution. McMorrow also acknowledges that some of these factors are also present in the United States, a mature legal market.¹¹⁹ Most notably these would be the pressure to graduate, make money and succeed in this limited commercial sense.

In recognition of the necessity to have more than just a written code in order to raise awareness of professional ethics amongst Chinese lawyers, the Great Britain China Centre's Code of Conduct project in 2006–07 comprised of: moot court simulations, demonstrating different perspectives on the disciplinary hearings for attorney's rights; research and discussion of professional ethics in different legal cultures and models of professional conduct codes.¹²⁰ The impact of initiatives such as the Great Britain China Centre's are, of course, limited by their small scale and would need to be extensively pursued to make any substantive change.

Furthermore, to be effective and relevant, any code must be enforced. There is doubt as to whether in China the relevant regulatory authorities (government and industry associations) have the sufficient resources and conviction to do so, particularly that compliance must occur in an environment where the rules and ethics are ever evolving and in a society averse to use formal avenues of dispute resolution. According to Ding Xiangshun, Associate Professor at Renmin University of China, '[j]ustice authorities are remote from actual legal practice, and lawyers' associations are often very passive regarding ethics'.¹²¹ There are ultimately a number of

¹¹⁹ Ibid.

¹²⁰ Great Britain China Centre, *Strengthening Defence Skills* <<http://www.gbcc.org.uk/strengthening-defence-skills.aspx>>.

¹²¹ Ding, above n 86, 520.

challenges in relying on written codes in the face of the existing professional and social environment.¹²²

Beyond the legal industry codes, there is a role for firms themselves. Etherington and Lee proposed initiatives that a law firm itself can adopt in order to promote an ethical culture rather than relying simply on codes of ethics:

- Recruitment process: filtering new recruits based on an ethical behavioural model that looks at character traits;
- Training programme: ethical training through formal sessions such as role playing supported by tutors or mentors and socialisation where informal peer discussions and observations can take place;
- Codified guidance and support: reinforcement on a daily basis of ethical considerations through knowledge management systems (eg, precedents and file opening procedures such as conflict searches);
- Rotation of lawyers: all of the above can be enhanced by the rotation of lawyers to different offices and practice groups.¹²³

These initiatives would be ideally appropriate for a well-resourced multi-jurisdictional law firm practising law with clients across the globe; this theme will be developed further in Part IV.

Leland Benton, a Western trained law lecturer teaching at Peking University School of Transnational Law, China, suggests other

¹²² L Etherington and R Lee, 'Ethical Codes and Cultural Context: Ensuring Legal Ethics in the Global Law Firm' (2007) 14 *Indiana Journal of Global Legal Studies* 95, 109; D Hwang et al, 'Confucian Culture and Whistle-Blowing by Professional Accountants: An Exploratory Study' (2008) 23 *Managerial Auditing Journal* 504.

¹²³ Etherington and Lee, above n 122, 112–14.

initiatives to improve the professionalism of Chinese lawyers. These initiatives include the improvement of legal education by teaching legal practice rather than theory¹²⁴ and improving of the rule of law.¹²⁵ He also advocates the strengthening of lawyers' associations by becoming independent from the government to further promote lawyers' interests, and enforce their members' compliance with ethical standards.¹²⁶ These suggestions rely on the lawyers' willingness to increase their participation in their associations. However, even Benton acknowledges that 'some of ... [these] suggestions ... are untenable given the current political climate and context in which Chinese lawyers operate'.¹²⁷

In the context of Chinese social institutions it is difficult to envisage the evolution of a legal profession in China that meets the ethical standards expected in the West as demonstrated through the examples of acting for relatives and friends, and wider relational lawyering. The practice of law in China by Chinese lawyers will inevitably be conducted in the context of a society with its particular 'ethic of care' and the requirement to take into account relationships not limited to the lawyer and client. This is arguably reflected in the All China Lawyers' Association's *Lawyers' Code of Ethics* that requires lawyers to 'safeguard social fairness and justice'¹²⁸ and prohibits them from acting in a way which 'violate[s] social morality'.¹²⁹ Social institutions will influence legal professionals so they respect social relationships, informal networks, hierarchy and

¹²⁴ L Benton, 'From Socialist Ethics to Legal Ethics: Legal Ethics, Professional Conduct, and the Chinese Legal Profession' (2011) *UCLA Pacific Basin Law Journal* 210, 236.

¹²⁵ *Ibid* 237–8.

¹²⁶ *Ibid* 235.

¹²⁷ *Ibid* 234.

¹²⁸ *Lawyers' Code of Ethics*, art 6.

¹²⁹ *Ibid* art 14.

the ‘face’ of the powerful. Consideration of this situation should dominate the discussion of the development of the legal profession and the standards of professional responsibility in China.

The discussion thus far may have resulted in an impression that the co-existence in China of values of *guanxi* and a professional legal fraternity are paradoxical. However managing paradoxes is not new for China, its people and institutions. Guy Faure and Tony Fang in their interpretation of Chinese values concluded that although China’s social behaviour is changing, it ‘has never given up its single most important cultural characteristic, the ability to manage paradoxes’.¹³⁰ Faure and Fang identified eight pairs of paradoxical values existing within Chinese society; in their opinion it was not a matter of choosing one over the other but an ongoing process of integrating contradictory elements.¹³¹

In addition to issues of general society, the interrelationship of the profession with the Communist Party and its relationship with society also creates challenges in China. For example, the professionalism of lawyers in China was allegedly compromised when in 2012 the Chinese Communist Party through the Ministry of Justice required lawyers to swear an oath pledging to ‘uphold the leadership of the Chinese Communist Party’.¹³² Reactions to this new requirement have been mixed from the benign for it adds nothing new to the heightened concern for it may be an indicator of the Party’s attempt to control rebelliousness of those members of the legal fraternity who may be contemplating representing clients with

¹³⁰ G O Faure and T Fang, ‘Changing Chinese Values: Keeping up with Paradoxes’ (2008) 17 *International Business Review* 194.

¹³¹ Ibid.

¹³² S Lubman, *Lawyers’ New Party Loyalty Oath: A Sign of Weakness* (26 March 2012) <<http://blogs.wsj.com/chinarealtime/2012/03/26/lawyers-new-party-loyalty-oath-a-sign-of-weakness/>>.

interests considered contrary to those of the Chinese Communist Party.¹³³ The scope of this new requirement remains unclear. It does not seem to be limited to traditional litigious matters of violations of human rights. A leading expert on China, Stanley Lubman, has posited that it could extend to commercial litigation, so that the lawyer may not be able to act for a wholly foreign owned enterprise if the other party, a State owned enterprise alleges that it is damaging the Chinese economy and therefore the leadership of the Chinese Communist Party.¹³⁴

In response to this ethical uncertainty, a law firm based in Hong Kong publically announced that although Hong Kong is a part of China, its lawyers operate under different ethical rules and are not required to take that oath. This difference in approach to the new oath lead to a situation where:

many overseas clients prefer to take advice as to their overall strategy and structuring of China operations from Hong Kong lawyers where they know they will receive independent advice based solely upon the client's best interests.¹³⁵

The different approaches in Hong Kong and the rest of China provide an interesting scenario given the increasing economic and social integration of Hong Kong with the rest of China. On the one hand, as has been suggested above, Hong Kong lawyers may provide advice and services in relation to the mainland unavailable from mainland lawyers. However, it would be expected that Hong Kong

¹³³ Ibid.

¹³⁴ Ibid.

¹³⁵ R Healy, *Mainland Chinese Lawyers Required to Take an Oath of Loyalty to the Communist Party* (13 April 2012) Oldham, Li & Nie <<http://www.olin-law.com/index.php/en/pz/item/96-mainland-chinese-lawyers-required-to-take-an-oath-of-loyalty-to-the-communist-party?tmpl=component&print=1>>.

will have difficulty isolating itself from mainland practice given the integration and interaction of the economies.

In summary, a Western style legal profession has been developing in China and it has led to the adoption of a written code of ethics. However, the emerging profession only resembles and is not a replica of the Western model due to the influence of Chinese social and formal institutions. Chinese legal ethics in practice are unlikely to be the same as in the West despite identical words appearing in the respective written codes of ethics.

B Western Lawyers' Perception

At the outset we have submitted that ethics is relative to society. If lawyers feel that it is unethical for them to represent clients with whom they have a relationship or are reluctant to blur the boundaries between their professional and private lives, it is unlikely that they will be successful in building up a practice serving Chinese clients and that they will succeed in China. Success in retaining Chinese clients in relation to significant matters in which the lawyer takes on a major responsibility will require them to socialise with Chinese clients and develop personal relationships with them. Thus an ethical position or professional rules that prevent acting for related parties will hamper the lawyers' success in obtaining business from Chinese clients.

Eli Wald, an American Professor of Law teaching legal ethics at the Tsinghua School of Law in Beijing, learnt first-hand from his students that a lawyer in China, as a friend to a client, is a 'viable idea, as an ideal, and as an aspiration'.¹³⁶ This caused him to reflect

¹³⁶ E Wald, 'Notes from Tsinghua: Law and Legal Ethics in Contemporary China' (2008) 23 *Connecticut Journal of International Law* 369, 378; also see R J Condlin, "'What's Love Got to Do with

on his teaching and reconsider the orthodoxy in the United States that lawyers are merely unattached service providers and businesspersons. In the Australian context, Kieran Tranter and Lillian Corbin commented that:

[s]urely it is beneficial that lawyers have friends, and therefore conceivable that some of these friendships will result in lawyer/client relationships.¹³⁷

Australian lawyers servicing Chinese clients, whether located in China¹³⁸ or in Australia, are cognisant that detachment and indifference are not endearing attributes that will attract Chinese clients to them. Dr Geoff Raby, an adviser and a co-chair of the China practice of Corrs Chambers Westgarth made the following comment on the importance of relationships in doing business in China:

The things that matter more in China than they do in the West is relationships ... [They] are the corner stone to doing business in China. Often western businesses think that once they sign a contract that's the end of the process. Well, the reality is, in China ... signing a contract is just the beginning of the process. Where we draw heavily on black-letter law in the West, in China relationships are necessary to underpin the business

It?" – "It's Not Like They're Your Friends for Christ's Sake": The Complicated Relationship between Lawyer and Client' (2003) 82 *Nebraska Law Review* 101.

¹³⁷ K Tranter and L Corbin, 'Lawyers, Clients and Friends: A Case Study of the Vexed Nature of Friendship and Lawyering' (2008) 11(1) *Legal Ethics* 67.

¹³⁸ A Godwin, 'The Professional "Tug of War": The Regulation of Foreign Lawyers in China, Business Scope Issues and Some Suggestions for Reform' (2009) 33 *Melbourne University Law Review* 132.

deals and to build the links throughout the system to enable you to do business.¹³⁹

Similar comments were made by Stuart Fuller, the Global Managing Partner of King & Wood Mallesons, who emphasised that ‘the right contacts, connections’¹⁴⁰ are vitally important for generation of business and ultimately successful practice in China.¹⁴¹ Therefore Fuller contended that having physical presence in China by Western law firms is ‘essential to form networks and individual relationships required to guide clients through the deal’.¹⁴² Admittedly, it is also fundamental if not indispensable in acquiring the deal in the first place when retaining Chinese clients. As Nigel Clark of Minter Ellison acknowledged, a lot of work is sourced through the law firm relationships rather than through intermediaries.¹⁴³

For further illustrative purposes we note that the quoted representatives are partners or lawyers in Australian international law firms who also practice in the State of New South Wales in Australia. The applicable code of ethics does not expressly prohibit New South Wales lawyers to act for friends or family. However, if these lawyers were subject to the code of ethics of lawyers in the province of British Columbia, there would be less tolerance for such relationships.

In summary, Australian lawyers are cognisant of the realities of practicing law in China and having Chinese clients whether based in China or in Australia and the necessity to develop personal relationships with them. An ethical position or development of

¹³⁹ B Everett, ‘Chasing China’, *Lawyers Weekly* (online), 5 April 2012 <<http://www.lawyersweekly.com.au/features/chasing-china>>.

¹⁴⁰ *Ibid.*

¹⁴¹ *Ibid.*

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

professional rules that prevents them from doing so will hamper Australian and other Western lawyers' success in developing a Chinese client base.

*C Conflicting Ethical Requirements —
Australian Experiences*

The ethical duties of lawyers practising in China and Australia are not mere theoretical concerns. On 1 March 2012, King & Wood, a top tier Chinese commercial law firm, merged with a top tier Australian commercial law firm to form King & Wood Mallesons. At the time of the merger it was the 'only law firm in the world to practice People's Republic of China, Australian and UK law'.¹⁴⁴ Stuart Fuller, the Global Managing Partner of the merged firm was reported saying that:

there is 'very little difference' between the ethical standards required at both firms. King & Wood is a private law firm, and because its client base is at least 50 per cent western, it operates like all good law firms to the same standards that clients require,' he said. 'King & Wood lawyers have to meet the same ethical standards as Australian lawyers'.¹⁴⁵

However despite those assertions in order to alleviate further potential ethical concerns, particularly that the Chinese government

¹⁴⁴ G Tan, 'King & Wood Mallesons Now in Business' on *The Wall Street Journal Blogs, Deal Journal Australia* (2 March 2012) <<http://blogs.wsj.com/dealjournalaustralia/2012/03/02/march-merger-madness/>>.

¹⁴⁵ R Prasad, *Analysis: The King's Ransom*, Asian Legal Business (online), 20 February 2012 <<http://www.legalbusinessonline.com/news-analysis/analysis-king's-ransom/64061>>.

may be able to access the merged law firm's clients' confidential information,¹⁴⁶ it was reported that:

- the Chinese partnership will be kept out of the firm's network system;
- documents can be shared between the partnership if the client's consent was obtained;
- partners will be identified by jurisdiction with CN, HK or AU added to their names on the merged firm's global address list to indicate the partnership that they work in.¹⁴⁷

These practical steps were taken to avoid the necessity to comply with Chinese confidentiality requirements by ensuring documents will not fall within their scope, but also to provide transparency of dealings for existing and potential clients.

However it is important to remember that conflicts of ethical standards between different countries are not new or unique to China. One solution is for lawyers licensed in a particular jurisdiction to comply with the ethical rules prescribed by that jurisdiction wherever they practice the law. Another view is for the lawyers to adopt the ethical rules of the jurisdiction they currently practice in.¹⁴⁸ Generally, foreign lawyers wishing to practise foreign law as in Australia as Australian-registered foreign lawyers would be

¹⁴⁶ Benton, above n 124; X Xu, 'A Comparative Study of Lawyers' Ethics in the US and PRC: Attorney-Client Privilege and Duty of Confidentiality' (2009) 1 *Tsinghua China Law Review* 46.

¹⁴⁷ Y Krieger, 'King & Wood and Mallesons Iron out Confidentiality Issues Ahead of Merger', *The Lawyer*, 28 February 2012.

¹⁴⁸ A S Perksey, 'Despite Globalization, Lawyers Find New Barriers to Practicing Abroad', *ABA Journal* (online), 1 November 2011 <http://www.abajournal.com/magazine/article/the_new_world_despite_globalization_lawyers_find_new_barriers_to_practicing/>.

subject to Australian ethical requirements.¹⁴⁹ However, the situation is not as straightforward as: (i) not every foreign lawyer practising in Australia becomes an Australian-registered foreign lawyer, some chose to practise on a fly in/fly out basis,¹⁵⁰ (ii) even those that do may be held to a lesser standard than their Australian counterparts. Chinese lawyer who wishes to give legal advice on Chinese law in NSW can do so either on a temporary basis known as ‘fly in/fly out’ or as an Australian-registered foreign lawyer. Lawyers intending practising 90 days or less in NSW, can provide legal advice on the ‘fly in/fly out’ basis without any requirement to register with the Law Society of NSW. The registration requirement arises only if such lawyer exceeds cumulatively 90 days in any period of 12 months.¹⁵¹ Equivalent solutions exist in all Australian jurisdictions. The Law Council of Australia recognised that it has significant consequences for the ethical obligations of foreign lawyers, as they are different depending on the basis on which a foreign lawyer practices in Australian jurisdictions.¹⁵²

¹⁴⁹ Law Council of Australia, *Foreign Lawyers and the Practise of Foreign Law in Australia — An Information Paper* (1 March 2008) 8 <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/Foreign-Lawyers-and-the-practise-of-foreign-law.pdf>>.

¹⁵⁰ *Legal Profession Uniform Law* (NSW) s 60(1).

¹⁵¹ Law Council of Australia, Submission to Department of Foreign Affairs and Trade to Australia-India Comprehensive Economic Cooperation Agreement, 30 January 2012, 16 <<http://www.dfat.gov.au/fta/aifta/submissions/law-council-australia.pdf>>.

¹⁵² *Ibid.*

TABLE 3: WHEN LOCAL ETHICAL PRACTICE STANDARDS APPLY

Fly in/Fly Out	Australian registered foreign lawyer
<p>Subject to ethical and practice standards of home jurisdiction.</p> <p>Complaints received by Australian regulatory authorities will be referred to home jurisdiction.</p>	<p>Subject to the same ethical and practice standards (and complaints and disciplinary procedures) in the way they practise foreign law in Australia as those applicable to an Australian legal practitioner practising Australian law.</p>

Although not replicated in the *Legal Profession Uniform Law* (NSW), it is rather interesting that up until 1 July 2015 s 190 of the *Legal Profession Act 2004* (NSW) (repealed) applied additionally to any Chinese lawyer with a status of an Australian-registered foreign lawyer giving legal advice on Chinese law in NSW:

190 Application of Australian professional ethical and practice standards:

- (1) An Australian-registered foreign lawyer must not engage in any conduct in practising foreign law that would, if the conduct were engaged in by an Australian legal practitioner in practising Australian law in this jurisdiction, be capable of being professional misconduct or unsatisfactory professional conduct.
- ...
- (4) Without limiting the matters that may be taken into account in determining whether a person should be disciplined for a contravention of subsection (1), the following matters may be taken into account:
 - (a) whether the conduct of the person was consistent with the standard of professional conduct of the legal

- profession in any foreign country where the person is registered,
- (b) whether the person contravened the subsection wilfully or without reasonable excuse.

This section potentially resulted in lowering the standards of ethics to which Australian-registered foreign lawyers, including Chinese, were practically held up to. It seems that s 190(4) of the *Legal Profession Act 2004* allowed a Chinese lawyer who is an Australian-registered foreign lawyer to practise Chinese law in Australia not according to Australian but to certain extent Chinese ethical standards. It is uncertain whether ‘standard of professional conduct’ was a reference to the All China Lawyers’ Association’s *Lawyers’ Code of Ethics* only or whether it also encompassed *guanxi* as practiced by lawyers in China? As a matter of statutory interpretation, in our opinion, s 190(4) of the *Legal Profession Act 2004* should not be interpreted so as to make s 190(1) of the *Legal Profession Act 2004* meaningless in cases where it still may apply.¹⁵³

D *Development of a Harmonious Global Legal Profession*

It is clear that the state-by-state regulation does not meet the requirements of the global legal profession. As the Western international law firms spread their geographical reach to a very different legal and ethical environments some have called for the establishment of a code of ethics spanning a number of countries to help clarify foreign lawyers’ obligations in the global market.¹⁵⁴ A recent incarnation is that proposals are the *International Principles on Conduct for the Legal Profession* (28 May 2011) advocated by

¹⁵³ *Interpretation Act 1987* (NSW) s 33.

¹⁵⁴ M Majumdar, ‘Ethics in the International Arena: The Need for Clarification’ (1995) 8 *Georgetown Journal of Legal Ethics* 439; R O’Brien, ‘Global Ethics: Beyond Local Leadership’ (2009) 2(1) *Journal of International Business Ethics* 102.

the International Bar Association. However, a number of its proposed global ethical rules are subject to the applicable rules of professional conduct and therefore ethical rules of different jurisdictions that are in conflict remain irreconcilable. The scope of the conflict will continue to increase as Chinese based law firms have been expanding beyond the traditional destinations and in support of Chinese cross-border investment opportunities they have established presence in Africa and Latin America.¹⁵⁵

With the growth of China's significance in the world, the possibility of a conflict of ethics should not be underestimated as Chinese domestic institutions evolve for global activity. If the legal profession in China does not function in the same way as in Western countries, can it be assumed that the global profession will function as it does in Western countries? Or rather will the expanding Chinese legal profession impact the Western style of practice? We believe that the global legal profession will be impacted by the Chinese legal profession as a constituent part of it.

In summary, the social institutions in China are not the same as for example in Australia and therefore this will be a material obstacle in obtaining the goal of global legal ethics in order to bring about a harmonious global profession.¹⁵⁶ Furthermore, we believe that it will be the Chinese legal profession that will make an impact on the global one.

¹⁵⁵ M Purzycki, 'Chinese Lawyers Head West', Hildebrandt Institute (28 February 2012) <<http://hildebrandtblog.com/tag/chinese-law-firms/>>.

¹⁵⁶ Baraban, above n 88; S Mark, 'Harmonization or Homogenization? The Globalization of Law and Legal Ethics — An Australian Viewpoint' (2001) 34 *Vanderbilt Journal of Transnational Law* 1173.

IV CONCLUSIONS AND OBSERVATIONS

The ethical issues of lawyers acting for relatives and friends and the wider issue of relational lawyering have been considered in light of the perspective of Chinese ethics and social institutions. Western legal ethics in more mature legal markets permit a lawyer to represent relatives and friends but it is generally frowned upon and in some cases either prohibited or subject to measures put in place to dissuade lawyers from doing so. Those same markets permit lawyers to act in accordance with an ethic of care or lawyering based on relationships, however there is general reluctance to do so.

We turned to Chinese society to cast a comparative social lens on the ethics of representing friends and family and an ethic of care. Chinese society is fundamentally different to Western society. In Chinese society, whether a lawyer is ethical or unethical depends on the relationship between lawyer and client and their relationships to others; consequently, a lawyer representing a friend or relative is not an uncommon but an expected occurrence.

In considering how ethics apply to the legal professional in China and Western lawyers acting for Chinese clients, we have found that Western style legal profession is developing in China. However it only resembles it and is not a replica as, in China, the practice of *guanxi* influences legal ethics to the extent that they are unlikely to be the same as those in the West despite identical words and concepts appearing in their respective written codes of ethics.

Australian and Western lawyers are cognisant of the realities of practising law in China and having Chinese clients including the necessity to develop personal relationships with them. An ethical position or development of professional rules that prevents them from doing so will hamper Australian and Western lawyers' success in developing a Chinese client base.

Finally, the social institutions in China are not the same as the west, for example in Australia, and therefore this will be a material obstacle in obtaining the goal of global legal ethics in order to bring about a harmonious global profession.

This paper has covered a large number of topics and raised issues that are not often considered in the discourse about ethics in the legal profession. It raises a number of issues that may be explored in future research projects. Future researchers may need to carry out further fieldwork to consider how Chinese society is impacting the development of its legal profession. The development of Chinese social institutions needs greater attention and they should be studied and not just be assumed to be converging with western institutions. Theoretical work needs to be conducted to consider if, and how, a global profession might emerge in view of the different societies. Finally research might consider other non-western societies from a similar perspective.

TWENTY YEARS OF STALLED REFORM: IMPRISONMENT FOR NON-PAYMENT OF FINES IN THE WESTERN AUSTRALIAN CRIMINAL JUSTICE SYSTEM — A BRIEF HISTORY

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Abstract

This paper seeks to outline the scope and extent of the problem which arises from the imprisonment for non-payment of fines in Western Australia. It first examines the history of recommendations that have been made for law reform in this area. It then considers the current legislative framework, in particular the changes that were implemented in 2009 to improve the administration of legislation enabling the collection of fines. Analysis will demonstrate that the laws deviate significantly from the various recommendations. Finally, the paper recommends that, rather than simply reverting to the pre-2009 administration of fines enforcement, Parliament should embrace the opportunity for a radical re-configuration of fines and fines enforcement legislation.

I INTRODUCTION

In August 2014, Ms Julieka Dhu was serving a four-day term of imprisonment to ‘cut out’ a \$1000 fine. The fine was the outstanding amount of a \$2150 fine that was imposed four and a half years earlier, when Ms Dhu was 18, for her involvement in a minor scuffle with a police officer.¹ Ms Dhu died in police custody after having

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been taken from lockup to the Hedland Health Campus three times. On the third occasion that she was taken — in the back of a police car — it is unclear if she was breathing or had a pulse.²

Ms Dhu's case is a particularly tragic example of the wider phenomenon of high rates of incarceration among Western Australia's Indigenous population. It is apparent that Western Australia's system of incarceration for unpaid fines is having a disproportionate effect on the rates of incarceration of Indigenous people, in particular Indigenous women.³

This paper seeks to outline the scope and extent of the problem which arises from the imprisonment for non-payment of fines in Western Australia. It first examines the history of recommendations that have been made for law reform in this area. It then considers the current legislative framework, in particular the changes that were implemented in 2009 to improve the administration of legislation enabling the collection of fines. Analysis will demonstrate that the laws deviate significantly from the various recommendations.

¹ Paige Taylor and Michael McKenna, 'Death-in-custody woman 'didn't deserve to be in jail'', *The Australian* (online), 12 March 2014 <<http://www.theaustralian.com.au/national-affairs/indigenous/death-in-custody-woman-didnt-deserve-to-be-in-jail/story-fn9hmlpm-1227142572200>>.

² Cathryn Gribbin and Dale Owens, 'Ms Dhu death: Family distressed by details of WA lockup death amid calls for urgent inquiry', *ABC* (online), 30 October 2014 <<http://www.abc.net.au/news/2014-10-23/family-distressed-by-details-of-wa-death-in-custody-ms-dhu/5835084>>.

³ Wayne Martin, 'Indigenous Incarceration Rates — Strategies for much needed reform' (Speech delivered at the Law Summer School, The University of Western Australia, 2015) <http://www.supremecourt.wa.gov.au/_files/Speeches_Indigenous_Incarceration_Rates.pdf>.

Finally, the paper recommends that, rather than simply reverting to the pre-2009 administration of fines enforcement, Parliament should embrace the opportunity for a radical re-configuration of fines and fines enforcement legislation.

II THE CAUSES, NATURE AND EXTENT OF THE PROBLEM

In Western Australia, persons who are sentenced to a fine have 28 days to pay that fine.⁴ An application can be made to the Fines Enforcement Registry for an allowance to pay off a fine in instalments over time. Those who do not pay or cannot pay a fine in instalments can enter into a Work Development Order ('WDO') to clear their fine by engaging in an equivalent amount of community service work.⁵ Those who default on payment or the WDO are subject to having a warrant of commitment issued by the Registrar of the Fines Enforcement Registry, which requires that the fine be 'cut out' by serving a certain number of days in prison.⁶

Western Australian Member of Parliament, the Hon Paul Papalia published a discussion paper in November 2014 entitled *Locking in Poverty: How Western Australia drives the poor, women and Aboriginal people to prison*.⁷ The paper pointed out that changes to the management of Community Service Orders⁸ have meant that many more people were being imprisoned for fine default than was the case prior to the amendments in 2009. It noted the number of

⁴ *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) s 45.

⁵ *Ibid* s 47.

⁶ *Ibid* s 53.

⁷ Paul Papalia, 'Locking in Poverty — How Western Australia drives the poor, women and Aboriginal people to prison' (Discussion Paper, WA Labor, 26 November 2014).

⁸ As will be later discussed in this paper, the administration of WDOs and CSOs are functionally equivalent.

receptions into Western Australia's prisons for fine default alone had risen from 194 in 2008 before the change to 666 in 2009 after the change. For every year between 2010 and 2013 inclusive, more than 1100 people have been imprisoned for fine default alone in each of those years.⁹

The paper also pointed out that the very significant increases in imprisonment for fine default have disproportionately affected women and Aboriginal people. In 2008, only 3 per cent of Aboriginal people who entered into custody did so for fine default alone. As at 2013, a full 16 per cent of Aboriginal people entered into custody for fine default. Raw figures disclose that 101 Aboriginal people entered into custody for fine default in the 2008 calendar year. 590 Aboriginal people were incarcerated for fine default in the 2013 calendar year. Strikingly, if the rate of imprisonment for fine default had not increased between 2008 and 2013, the real number of Aboriginal people who entered into incarceration in Western Australia would have declined. The increase in the rate of imprisonment for fine default is thus a substantial driver of the real increase in the number of incarcerated Aboriginal people in Western Australia.

Similar figures are found when we examine the number of women who are incarcerated for fine default. In 2008, 44 women were imprisoned for fine default, representing 4.8 per cent of the total reception of women into Western Australian prisons in that year. In 2013, 358 women, a full 27 per cent of total receptions into prisons, were incarcerated for fine default. It follows that, while the total number of women per year who were imprisoned in Western Australia increased by approximately 40 per cent between 2008 and 2013, the total number of receptions for fine default increased by some 813 per cent. Again, if the number of women incarcerated for

⁹ Papalia, above n 7.

fine default had remained stable between 2008 and 2013, the total number of women received into our prisons would have grown by only 9 per cent. Given that Western Australia's population of women grew at a rate of about 15 per cent in that period,¹⁰ but for the increase in incarcerations for fine default, the rate of incarceration of women in Western Australia would have declined on a per capita basis.

Finally, considering specifically the overlap represented by Aboriginal women, we find that rates of incarceration have increased some 576 per cent. Whereas 33 Aboriginal women were incarcerated for fine default in 2008, the number of Aboriginal women incarcerated was 223 in 2013. It is trite to state that the number of Aboriginal women in WA has not increased by 576 per cent in that time.

These figures derived from papers tabled in the Western Australian Parliament give a striking exposition of the state of the problem. It is clear that the amendments to the processing of Community Service Orders in 2009 have had an immediate, dramatic and ongoing effect on the number of people incarcerated in Western Australia. Moreover, it is clear from these figures that women and Aboriginal people, in particular Aboriginal women, have been disproportionately affected by the changes.

Since rates of imprisonment for fine default are intractably linked to the legislative provisions respecting fines and their administration, detailed comparison between Western Australia and other jurisdictions must take account of the differing legal frameworks

¹⁰ Australian Bureau of Statistics, *Australian Demographic Statistics, Sep 2014* (26 March 2015) Australian Bureau of Statistics <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/3101.0Sep%202014?OpenDocument>>.

existing in each State. Section IV B of this paper will contain more detailed comparisons between Australian jurisdictions. It will suffice at this point to note that Western Australia's rates of incarceration for fine default are extremely high in comparison to the other States. New South Wales, Victoria and South Australia have effectively abandoned the practice of imprisonment for fine default — data for 2011 indicate that those States received 0, 72 and 0 fine defaulters respectively, compared with Western Australia's 1,115 receptions for fine defaults.¹¹

III A HISTORY OF RECOMMENDATIONS

The phenomenon of women and Indigenous people, in particular Indigenous women, being disproportionately affected by imprisonment for non-payment of fines is not a new one. Indeed, the broader phenomenon of the injustice of imprisonment for regressive fines has been recognised in various forms as early as the 1960s.¹² In the early 1990s, two Australian reports specifically examined the system of the imposition of fines, fines enforcement and imprisonment for non-payment of fines, and made a series of recommendations in order to address this imbalance.

A Royal Commission

The National Report of the Royal Commission into Aboriginal Deaths in Custody ('RCIADIC') dealt with the issue of the disproportionate impact of fines on Indigenous people in the Western Australian context specifically. Dealing first with the nature of fines generally, the report noted that, since the amount of any fine imposed for the breach of a criminal law in Western

¹¹ See Part IV B.

¹² Derek A Westen, 'Fines, Imprisonment, and the Poor: "Thirty Dollars or Thirty Days"' (1969) 57(3) *California Law Review* 778.

Australia was determined solely by the nature of the offence without reference to the offender's capacity to pay, fines necessarily operated in a regressive manner. It specifically noted that:

the practice of imprisoning those who do not or cannot pay fines imposed upon them, without proper regard to their ability to do so, emphasises the injustice of existing sentencing policies to poor people, among whom Aborigines figure so prominently.

The report continued by stating that:

the imprisonment of those whose poverty prevents them [from] paying fines, in all likelihood imposed with little regard to means to pay, is grossly offensive in any modern society.¹³

Putting aside for the moment the question of the imposition of fines generally, the report also noted difficulties with respect to the mechanisms for converting a fine to a period of imprisonment. It specifically identified problems with respect to the communication of the nature and effect of legal orders to Aboriginal people, the lack of administrative capacity to administer alternatives to imprisonment for fine default in remote communities, and the general disconnect between the law that had been applied in practice between Metropolitan Perth and regional areas. The Commission noted:

It is unsatisfactory that there should be one law applying in Halls Creek and another in metropolitan Perth. It would be wholly unacceptable if the socially and economically disadvantaged in remote areas should be further disadvantaged by the delivery of a third-rate legal system, permitted largely

¹³ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *Regional Report of Inquiry into Individual Deaths in Custody in Western Australia* (1991) vol 1 [4.2.5.2].

because they were politically powerless and therefore could be considered 'out of sight, and out of mind'.¹⁴

B Gender Bias and the Law Taskforce Report

The question of the impact of fines on Aboriginal women was considered in the 1994 report of the Chief Justice's Taskforce on Gender Bias ('Gender Bias Taskforce Report').¹⁵ Chapter 4 of the report focused specifically on the issues faced by Aboriginal women in our justice system. With respect to the imposition of fines, the report noted that 'the imposition of fines which is a frequent penalty often indirectly discriminates against Aboriginal women and has resulted in a disproportionate number of Aboriginal women being imprisoned'.¹⁶ The report made a series of recommendations to deal with this issue, including *infra* a whole review of the 'system of fines and default payment of fines'.¹⁷ It questioned whether the imposition of a fine was ever appropriate when the offender's only source of income is social service payments.¹⁸ The report concluded that a new system of dealing with fine defaulters should be established. Chapter 9 of that report also concluded that the rates of

¹⁴ Ibid.

¹⁵ Chief Justice's Taskforce on Gender Bias, 'Chief Justice's Taskforce on Gender Bias' (Report, 30 June 1994) <<http://www.wlwa.asn.au/images/stories/dmdocuments/Introduction,%20terms%20of%20reference%20etc.pdf>>.

¹⁶ Chief Justice's Taskforce on Gender Bias, 'Taskforce sub-committee: Aboriginal women and the law' (Report, 30 June 1994) <<http://www.wlwa.asn.au/images/stories/dmdocuments/Chapter%204%20Aboriginal%20women%20and%20the%20law.pdf>>.

¹⁷ Ibid 110.

¹⁸ Ibid.

receipt into prison for fine defaults were substantially higher among non-Aboriginal women than among non-Aboriginal men.¹⁹

Both the RCIADIC and the Gender Bias Taskforce Report made recommendations on how the problems they identified in their report could be addressed. A full overview of every recommendation of the RCIADIC which impacts upon the imposition and administration of fines as well as the consequences for fine default is beyond the scope of this paper. Nevertheless, a number of key recommendations can be identified. These include:

103 That in jurisdictions where a Community Service Order may be imposed for fine default, the dollar value of a day's service should be greater than and certainly not less than, the dollar value of a day served in prison.

117 That where in any jurisdiction the consequence of a breach of a community service order, whether imposed by the court or as a fine default option, may be a term of imprisonment, legislation be amended to provide that the imprisonment must be subject to determination by a magistrate or judge who should be authorised to make orders other than imprisonment if he or she deems it appropriate.

120 That governments consider introducing an ongoing amnesty on the execution of long outstanding warrants of commitment for unpaid fines.²⁰

¹⁹ Chief Justice's Taskforce on Gender Bias, 'Final report of the working group convened to examine issues in respect of "Punishment of Women"' (Report, 30 June 1994) <<http://www.wlwa.asn.au/images/stories/dmdocuments/Chapter%209%20Punishment%20of%20women.pdf>>.

²⁰ Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 5, [103], [117], [120].

Similarly, a selection of the relevant recommendations in the Gender Bias Taskforce Report include:

32 There be a review of the whole system of fines and default of payment of fines and the replacement of fines where practical by culturally appropriate sentencing options, eg, work orders to be performed with Aboriginal organisation.

33 When fines are imposed the courts take more account of the ability of the offender to pay the fine, eg, if the offender's only source of income is social service payments, is a fine ever appropriate? Query the effect of a fine on the provision of necessities for the offender's children.

34 A new system of dealing with fine defaulters be established — eg, a muster day at each local authority for the assignment of appropriate tasks.²¹

With respect to these recommendations, it is worth noting that, in many respects, the present situation for fines enforcement has changed little since the early 1990s. In particular recommendation 103 of the RCIADIC has not been implemented. Currently, the dollar value of a day's service in prison to 'cut out' a fine is \$250.²² While notionally higher than the rate at which a fine is 'cut out' by a WDO (\$300),²³ a person determining to 'cut out' a fine by imprisonment over the weekend can remove \$1000 in effectively two days, as the part days of processing on Friday and Monday, which are counted as full days, will be taken into account for the full

²¹ Chief Justice's Taskforce on Gender Bias, above n 19, 110.

²² *Fines, Penalties and Infringement Notices Enforcement Regulations 1994* (WA) reg 6BAA; Cf Papalia, above n 7, 3.

²³ *Fines, Penalties and Infringement Notices Enforcement Regulations 1994* (WA) reg 6B; Cf Papalia, above n 7, 3.

\$250.²⁴ This is of course not in keeping with the recommendation made following the RCIADIC in 1991.

IV RESPONSES TO PREVIOUS RECOMMENDATIONS

A Gender Bias Taskforce Report

In 1997, the State government responded to the recommendations of the Gender Bias Taskforce Report.²⁵ That response noted in particular that amendments to the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) ('*FPINE Act*') had 'been successful in reducing the number of women imprisoned for fine default',²⁶ and that:

the *Sentencing Act* requires ... courts to take account of offenders' financial circumstances and allows for such information to be provided in pre-sentence reports.²⁷

It also noted that the new *Sentencing Act 1995* (WA) had been developed and was anticipated to 'be of significant benefit to women offenders'.²⁸

The response, however, was misleading in at least one respect. In fact, the *Sentencing Act 1995* (WA) does not 'require' courts to take

²⁴ *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) s 53(7).

²⁵ Women's Policy Development Office, 'Gender Bias Taskforce Report — Progress Report' (Report, Government of Western Australia, April 1997) 18 <<http://www.wlwa.asn.au/images/stories/dmdocuments/19970400%20pp1-30%20Gender%20Bias%20Taskforce%20Progress%20Report.pdf>>.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid.

account of an offender's financial circumstances. Indeed, the relevant section of the Act notes:

53 Considerations when imposing a fine

(1) Subject to Division 1 of Part 2, if a court decides to fine an offender then, in deciding the amount of the fine the court must, as far as is practicable, take into account —

- (a) the means of the offender; and
- (b) the extent to which payment of the fine will burden the offender.

(2) A court may fine an offender even though it has been unable to find out about the matters in subsection (1).

It is arguable that, in practice, this position represents is a departure from the ordinary common law principle that a fine which is beyond an offender's capacity to service should not be imposed. It is interesting to note that the common law position assumes a legislative framework under which an offender will *not* be imprisoned for non-payment of a fine. In *R v Rahme*,²⁹ the Court noted:

it is trite to say that a court generally should not impose a fine which the offender does not have the means to pay, even though these days failure to pay a fine does not lead to imprisonment but to a civil execution for its non-payment.³⁰

The Court continued, with respect to the general position regarding the imposition of fines, by citing *Jamieson*:³¹

That case is authority for the broad proposition that once a determination has been made that a fine should be imposed the correct procedure in assessing the appropriate amount of the fine is to determine it by reference to the gravity of the offence for which it is imposed. If the court is satisfied that the offender

²⁹ (1989) A Crim R 81.

³⁰ Ibid 86.

³¹ (1975) 60 Cr App R 318.

would be unable to pay the amount determined it may reduce it to take account of the offender's means in impecuniosity ...³²

In *R v Rahme*, the Court imposed a significant fine on the offender — some \$20 000 — as part of the sentence handed down for possessing and cultivating prohibited substances, namely marijuana plants and seeds. The judge at first instance noted that the accused gave an absurd account of his reasons for being in possession of the prohibited substances. The Court on appeal considered that the appellant's account together with the serious nature of the offending and other mitigating circumstances did not render the initial sum of \$20 000 inappropriate. However, the judge noted that the second requirement in assessing a fine — taking into account the circumstances of the offender — was not properly considered. On this basis, and also having regard to the fact that the offender was of limited means, the fine was substantially reduced.

One of the effects of s 53(2) is that it allows fines to be imposed even in circumstances where the capacity of an offender to service a fine has not been ascertained.³³ Indeed, the plain language of s 53(1) seems to impose a requirement for the amount of a fine to take into account the means of the offender only so 'far as is practicable',³⁴ although it should be noted that limited judicial consideration of s 53 means that it is unclear how much less onerous this formulation is compared to its common law counterpart.³⁵ In any event, the

³² (1989) A Crim R 81, 86–7.

³³ *Sentencing Act 1995* (WA) s 53(2).

³⁴ *Ibid* s 53(1).

³⁵ *Huseni v Szolnoski* (2013) 227 A Crim R 586; Constraints of length prohibit a fuller treatment of the issue of how s 53(2) interacts with the common law principles in this area. Nevertheless, it should be noted that *El Noor v The Queen* (2001) 123 A Crim R 123 and *Proust v La Rosa* [2007] WASC 160 (unreported) both dealt with s 53(2) only in terms of a broader consideration of whether a fine imposed

was manifestly excessive or inadequate respectively. No direct consideration was given to the interaction between s 53(2) and the common law position prior to that enactment. It is also worth noting that, Kirby P, as he then was, opined that excessive fines might be restrained by the *Bill of Rights* 1688 (Eng) in *Smith v R* (1991) 56 A Crim R 148. So far as the author is aware, this argument has not been pursued with respect to the operation of s 53(2) in Western Australia. This is a notable omission, since the operation of the *Bill of Rights* 1688 (Eng) is preserved by the saving provision in s 57 of the *Constitution Act 1889* (WA) and consequently falls for consideration in cases of this kind. Famously, the *Bill of Rights* includes prohibitions in terms ‘that excessive bail ought not to be required nor excessive fines imposed nor cruel and unusual punishment inflicted’. As Kirby P notes, ‘the operation of the Bill of Rights prohibition on excessive fines was recognised by Windeyer J in *Australian Consolidated Press Ltd v Morgan* (1965) 112 CLR 483 at 497.’ With respect to the imposition of fines *proportionate* to the offender’s means, he notes as a general principle that ‘a fine which is so great that it cannot possibly be paid by the offender will be “excessive” in the sense referred to in the common law and the Bill of Rights’. Even in jurisdictions with constitutional prohibitions on excessive fines — like the United States — courts have recognised that the judgment of the legislature in setting a maximum fine should not be overridden by that prohibition, except in very clear cases: *State v Staub* 162 So 766 at 768; 182 La 1040 (1935) per Odom J. Thus, the operation of statute will, in most cases, have the effect of rendering fines set pursuant to that statute immune to appeal on the basis that the fine is manifestly excessive, and hence contrary to the common law principle or *Bill of Rights*. However, this does not mean that the imposition of any *particular* fine may not be open to challenge on the grounds that it represents a manifestly excessive fine *in the circumstances*. That is, the authority under statute in the *Sentencing Act* to impose a fine even in circumstances where the means of the offender is unknown to the court does not expressly oust the purported common law principle or the terms of the *Bill of Rights* which prohibit excessive fines. In the absence of such an express derogation from that principle, a coherent

Second Reading Speech in relation to pt 8 of the *Sentencing Act 1995* (WA), which contains s 53, does not discuss the impact of that section on the existing common law rule. The Second Reading Speech with regard to this part reads in its entirety as follows:

Part 8 will enable a court to fine an offender. Clause 55 will enable a court to apportion fines among offenders. In a further response to the needs of victims of crime, clause 56 will allow a court to award a victim of an assault the proceeds of a fine or part of it. Enforcement of fines will generally be done under the Fines, Penalties and Infringement Notices Enforcement Act 1994, but this part provides that in limited cases a court may order that the offender be imprisoned until the fine is paid or that the offender be imprisoned if the fine is not paid. The power to imprison a person until a fine is paid would normally be invoked only where, for example, the court believes that the offender has ample funds or may be expected to leave the State

reading of law is to be preferred. Thus, it may be that imposition of fines in any particular case is still subject to the general proposition that the fine must not be excessive in the way noted by Kirby P. Referring to both *R v Rahme* and *Smith v R*, Rothman J in *Mahdi Jahandideh v R* [2014] NSWCCA 178 noted at [31] that ‘I have considered these cases and remain of the view that the defendants’ capacity to pay was a relevant consideration, but not decisive’. In that case, the Court was, in any event, not persuaded that the fine imposed was excessive by reference to the offender’s means. While *Mahdi Jahandideh v R* may stand for the proposition that the offenders’ means does not by itself *determine* the extent of permissible fines, it nevertheless is wholly consistent with a proposition that fines may be excessive and on that basis objectionable. For example, it remains possible that a court could be persuaded that the quantum of a fine was not excessive even with reference to the offender’s means, given the circumstances of the commission of the offence. However, inversely, this implies that, where the offence is not manifestly grave, an argument that the fine is excessive relative to the offender’s means may well be successful.

or country. The power to order imprisonment if a fine is not paid is restricted to the District or Supreme Courts or where an indictable matter is heard summarily ...³⁶

The absence of any specific consideration of the principles relating to the imposition of a fine in circumstances where an offender may be unable to pay is particularly telling given the assertion in the Second Reading Speech which notes:

The Bills reflect the [G]overnment's 'tough but fair' approach to law and order and its commitment to a system of laws which is just and fair, and is accessible by and responsive to the needs of the community.³⁷

It is also notable that the Second Reading Speech did not explicitly consider the effects that the statute might have with regard to altering the existing common law principles relating to the application of fines. It also made no explicit reference to relevant recommendations in the Gender Bias Taskforce Report.

From this material, it appears that the progress report given to the Gender Bias Taskforce did not square with the actual impact of the legislation. In any event, the recommendations for a wholesale review of fines imposition and enforcement — and the question of whether fines were ever appropriate for a person on income support — were not taken up.

B Royal Commission

As noted above, the RCIADIC recommended:

legislation be amended to provide that ... imprisonment must be subject to determination by a magistrate or judge who

³⁶ Western Australia, *Parliamentary Debates*, Legislative Assembly, 25 May 1995, 4258 (Cheryl Edwardes, Attorney-General).

³⁷ Ibid 4254.

should be authorised to make orders other than imprisonment if he or she deems it appropriate.³⁸

The *Sentencing Act 1995* (WA) contains ss 58 and 59, which reserve to a superior court in the case of s 59, and either a superior court or a court of summary jurisdiction constituted by a magistrate in the case of s 58, the power to order imprisonment until a fine was paid or imprisonment if a fine was not paid respectively.³⁹ Both of these provisions were broadly in keeping with the recommendation made in the National Report of the RCIADIC, which opined that only a judge or magistrate should be entitled to imprison a person for non-payment of fines.

Nevertheless, s 57 still made the general enforcement of fines subject to the *FPINE Act*. Under the *FPINE Act* as passed — and still under the provisions of that Act today — the Fines Enforcement Registry is empowered under s 53 to issue a warrant of commitment with respect to a person who fails to pay a fine by virtue of their defaulting on a WDO.⁴⁰ Since there is no requirement for the registrar of the Fines Enforcement Registry to be a Judge or Magistrate, it follows that there has always been at least one way in which a person might be imprisoned for non-payment of fines which does not require a judge or magistrate to order their imprisonment directly.

It is unclear the extent to which the legislature appreciated this result. At face value, it is not in keeping with the statement made by the then Attorney-General in her Second Reading Speech with respect to the *Sentencing Bill 1995* that:

³⁸ Royal Commission into Aboriginal Deaths in Custody, above n 20, [103], [117], [120].

³⁹ *Sentencing Act 1995* (WA) ss 58–9.

⁴⁰ *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) s 53.

the power to order imprisonment if a fine is not paid is restricted to the District or Supreme Courts or where an indictable matter is heard summarily.⁴¹

In any event, the original intention of the *Sentencing Act 1995* (WA) appears to have been that a judge or magistrate would oversee the vast bulk of applications for imprisonment with respect to unpaid fines, despite at least one other pathway to imprisonment, without the necessity for direct judicial oversight persisting under the *FPINE Act*. Questions about the general suitability of the proposed *FPINE Act* were raised by the Chief Stipendry Magistrate. Referring in the House to a letter written to the Attorney-General, the Leader of the Opposition asked:

How does she reconcile that statement with a letter she received from the President of the Stipendiary Magistrates Society yesterday which says the magistrates —

(a) object to the legislation which effectively gaols people without judicial process; (b) object to the legislation which interferes with the traditional separation of powers; (c) object to the removal of their role to examine an offender's ability to pay; and (d) see the real potential for notices sent to offenders in compliance with the Bill, not to reach the offenders, with the result that people may be unwittingly apprehended for the serious offence of driving while disqualified?⁴²

Further objection to this point was taken by the then Leader of the Opposition during debate on the Bill. He noted that the inclusion of provisions like s 53 would mean:

we will now see in Western Australia public servants employed under the Public Service Act with the power to imprison

⁴¹ Parliament of Western Australia, above n 36.

⁴² Western Australia, *Parliamentary Debates*, Legislative Assembly, 30 November 1994, 8224 (Jim McGinty, Leader of the Opposition).

citizens in Western Australia without reference to a judicial officer.⁴³

Despite this, no amendment to the legislation was taken, and the system prevails today.

Some references to the RCIADIC were made in the Second Reading Speech for the *FPINE Act*. The Attorney-General noted:

The Royal Commission into Aboriginal Deaths in Custody noted the high proportion of Aboriginal prisoners held for traffic offences, good order offences, property offences and for the group of offences known as ‘justice procedures’ which includes breaches of orders and fine default ... The Fines, Penalties and Infringement Notices Enforcement Bill will do much to redress the imbalance ...⁴⁴

Despite this, specific reference to the recommendations of the National Report of the RCIADIC was not made. The Attorney-General only spell out in very broad terms the expected effect of the legislation on Indigenous people. No reference was made to the report of the Chief Justice’s Gender Bias Taskforce either. Interestingly, on the same day the Bill to enact the *FPINE Act* was introduced, debate on the *Dairy Industry Amendment Bill* was also conducted. That debate included direct and extensive reference to the specific recommendations made by the 1982 Honorary Royal Commission appointed to inquire into dairy products and market milk.⁴⁵ Indeed, it is worth noting for posterity that the day’s Hansard included five references to the Honorary Royal Commission

⁴³ Western Australia, *Parliamentary Debates*, Legislative Assembly, 1 December 1994, 8374 (Jim McGinty, Leader of the Opposition).

⁴⁴ Western Australia, *Parliamentary Debates*, Legislative Assembly, 23 November 1994, 7502 (Cheryl Edwardes, Attorney General).

⁴⁵ Ibid 7543 (Barry Blakie); Cf Western Australia, Honorary Royal Commission appointed to inquire into dairy products and market milk, *Report* (1982).

appointed to inquire into dairy products and market milk and six references to the Royal Commission into Commercial Activities of Government and Other Matters. The RCIADIC is mentioned only once.

Since the enactment of the *FPINE Act* and the *Sentencing Act 1995* (WA), two major sets of amendments have been undertaken. The first was the *Acts Amendment (Fines Enforcement and Licence Suspension) Bill 2000* (WA). Although the Bill amended five areas of concern which had arisen in the administration of the fines enforcement procedures, it mostly related to the procedure for suspending motor vehicle licenses for non-payment of fines. The Second Reading Speech⁴⁶ did not make reference to the RCIADIC and the Gender Bias Taskforce report, nor did it follow up on the objections taken to the *FPINE Act* at its inception.

The second major set of amendments came with the introduction of the *Fines Legislation Amendment Bill 2006* (WA). Again, that Bill did not take up the previous objections to the *FPINE Act* with respect to the judicial status of the registrar of the Fines Enforcement Registry. It also did not address the situation with respect to the common law position on fines. The Explanatory Memorandum and Second Reading Speech to that Bill did however note the following:

This Bill will amend the Sentencing Act 1995 so that the minimum number of hours will be reduced to 10. This will allow courts to impose community service order sanctions on a wider range of good order and minor matters, and it will improve the capacity of Aboriginal offenders, including those in remote and regional areas, to access this penalty option, thus

⁴⁶ Western Australia, *Parliamentary Debates*, Legislative Assembly, 28 June 2000, 8408 (Dan Barron-Sullivan).

reducing the likelihood of them being imprisoned for fine default only.⁴⁷

The Fines Legislation Amendment Bill 2006 will deliver a more just and efficient system of fine administration. This will result in a reduction of imprisonment for fine default only and provide a greater opportunity for offenders to repay their fines appropriately to the community.⁴⁸

Notwithstanding these two comments, the debates surrounding the Bill make no reference to the RCIADIC or the Gender Bias Taskforce Report. That Bill was assented to on 12 March 2008.

It is not suggested, of course, that the recommendations of Royal Commissions are, or should be, binding in any relevant sense. Of course, Parliament is sovereign and recommendations made to it are merely that — recommendations. Nevertheless, unlike other reports to government, Royal Commissions generally take on matters of particular public importance. Their mandate necessarily involves recommendations as to appropriate law reform, and the structure of, and resources allocated to Royal Commissions mean that they are uniquely placed to recommend effective policy action.

The issue is not merely that Parliament has not implemented the recommendations of the Royal Commission. Indeed, it may arise that Parliament has good reasons to reject the findings of anybody making recommendations to it.⁴⁹ The mere existence of a

⁴⁷ Explanatory Memorandum, *Fines Legislation Amendment Bill 2006* (WA).

⁴⁸ Western Australia, *Parliamentary Debates*, Legislative Assembly, 13 September 2006, 5855, 5857 (Jim McGinty, Attorney-General).

⁴⁹ Indeed, in Part V B, this paper notes that recommendations made by the law reform commission with respect to the desirability of unit or day fines ought not to have been accepted on the basis that they were made after limited and cursory examination of the relevant literature.

recommendation by a law reform body is not itself a good argument for the adoption of that recommendation.

With respect to the specific recommendations of the RCIADIC and the Gender Bias Taskforce Report, two features ought to be noted however. The first, as noted, is that successive governments have specifically stated that they intend to implement the recommendations of those reports. As identified, throughout the parliamentary debates of the various proposed legislative changes, successive governments have — albeit generally and obliquely — referenced the RCIADIC and the Gender Bias Taskforce Report positively. Indeed, general support for the recommendations of those reports abounds, even in the absence of specific reference to those recommendations.

It is against this backdrop of a general rhetoric of acceptance of the recommendations in the reports that we must scrutinise Parliament's actions in deviating from those recommendations. Such deviations would be understandable if they were specifically articulated and justified. For example, Parliament may well have generally supported the recommendations of the RCIADIC yet had a cogent reservation informing its decision to retain the power of a non-judicial officer to incarcerate people, which was contrary to the RCIADIC's recommendations. However, no such reservation was articulated; in fact, legislative deviations from the recommendations in the reports are simply not acknowledged.

This leads us to a scenario whereby Parliament endorses the reports in general terms, but then deviates from the specifics of those reports without providing or acknowledging a reason. One might reasonably wonder whether this silence reflects the possibility that Parliament was actually unaware the legislation it implemented had the final effect of deviating from those recommendations it had generally agreed with.

V ADMINISTRATION OF FINES ENFORCEMENT — SOME RECENT CHANGES

A Statutory and Common Law Position

Examination of the legislative framework would not be complete without a discussion of how fines are in practice enforced by that legislation. If a person does not pay a fine within 28 days of the issue of a notice of intention to enforce that fine, s 45 of the *FPINE Act* entitles the registrar of the Fines Enforcement Registry to issue an enforcement warrant for that fine.⁵⁰ Where the offender is an individual, and not a body corporate, s 47 empowers the registrar to issue an order for the offender to attend for work and development.⁵¹ Section 49 provides that a WDO is an order that the offender comply with s 76 of the *Sentencing Administration Act 2003* (WA).⁵²

The *Sentencing Administration Act 2003* (WA) sets out the mechanisms for enforcing WDOs. The obligations on the offender under the *Sentence Administration Act 2003* (WA),⁵³ which provides for the management of an offender under a WDO, are exactly the same as a community order, a sentence of a CSI, a parole order or an RRO,⁵⁴ irrespective of the fact that these orders are imposed by the courts as non-custodial punishments in their own right rather than as a special alteration to what would be a prohibitively burdensome fine.

⁵⁰ *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) s 45.

⁵¹ *Ibid* s 47.

⁵² *Ibid* s 49.

⁵³ *Sentence Administration Act 2003* (WA) s 76.

⁵⁴ *Ibid* s 75.

Thus, for a WDO to be administered under the current arrangements, a harmonious application of the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA), the *Sentencing Act 1995* (WA) and the *Sentencing Administration Act 2003* (WA) is required. This is despite an attempt to simplify the process when updating the *Sentencing Administration Act 1995* (WA). Indeed, in the Second Reading Speech to that Bill, the then Attorney-General noted that a key objective of the package of legislation introduced to the Parliament was to simplify the law applicable to sentencing:

At any one time the sentencer and others involved in the process are required to draw on a wide range of legislation, including the *Criminal Code*, the *Justices Act 1902*, the *Prisons Act 1981*, the *Police Act 1892* and the *Offenders Community Corrections Act 1963*. This situation is unwieldy for the courts and difficult for the community to understand ...⁵⁵

Notwithstanding the ambition in the 1995 Act, one might reasonably contend that in the 20 years since we have regressed to a position where the rules for the application and administration of fines and WDOs remain intolerably complex. The 2013 review of the *Sentencing Act 1995* (WA) described the process of administration of the WDO as ‘cumbersome’,⁵⁶ a description that was somewhat kindly in the circumstances.

It is into this complex system of inter-referenced statutory provisions that the then Attorney-General Christian Porter introduced a shift in the administration of persons on community service orders (‘CSOs’). In his answer to a question in Parliament on 10 June 2009, the Attorney-General said:

⁵⁵ Parliament of Western Australia Parliamentary Debates, 22 August 1995, 4255–6.

⁵⁶ Western Australia, *Statutory Review of the Sentencing Act 1995 (WA)* 2013, 42.

The new policy is a very simple, easy-to-understand policy. If a person misses his community work once, he receives a warning; and, if he gives an excuse, it will have to be given within 24 hours. If a person misses it twice — it need not be a consecutive omission — the presumption will be that he has breached, and he will be sent back to court for re-sentencing ...⁵⁷

As noted above, the legislative framework links the administration of CSOs, which are directly ordered by a court, and WDOs, which are entered into as an alternative to payment of a monetary fine for persons who are impecunious. A change to the administration of one such system necessarily entails a change to the administration of both. However, it is unclear whether the Attorney-General intended such changes to flow through to persons who were cutting out a fine by entering into a WDO. Indeed, there is no reference to the WDO system in the Attorney-General's answer. Rather, he notes:

We have nearly double that number [of persons who are imprisoned] in the community who are being supervised on one form of order or another — parole, community-based orders or intensive supervision orders. To those orders attaches very often the requirement of community work. Having community confidence in that system and sentencing confidence on the part of the judiciary in that system is absolutely critical.⁵⁸

Whatever one thinks of the effect of the more stringent administration of the policy with respect to persons sentenced by a court to undertake a CSO, it is unclear whether the same rationale applies to persons who are on a WDO for non-payment of fines but happen to be captured by the legislation. That is, persons who find

⁵⁷ Western Australia, Parliamentary Debates, Legislative Assembly, 10 June 2009, 4833b–34a, 7498–9 (Christian Porter, Attorney-General).

⁵⁸ Ibid.

themselves on a WDO for non-payment of fines are almost by definition impecunious persons and will in almost all circumstances have had their licence suspended, which more often than not limits their capacity to attend scheduled community work parties. This is a concern especially for those who are on WDOs and are required to report to a regional Community Corrections Centre. Additionally, women are more likely to have caring and nurturing duties with respect to children or other relatives.

This particular point is compounded by the fact that there is limited access to childcare services for women who are subject to a WDO. There is no information on the Department of Corrective Services website with respect to child care arrangements.⁵⁹ This lack of childcare arrangements leaves us in the perverse situation whereby a woman who is unable to undertake a WDO due to the lack of available child care services may find it preferable to ‘cut out’ fines by undertaking a period of incarceration.

Demonstrably, there has been a dramatic increase in the number of persons entering prison for fine default alone since these administrative changes.⁶⁰ One might reasonably conclude that this more stringent application of the policies for the non-attendance of persons subject to a WDO is one cause of this increase.

The suggestion to de-couple community service work done under a WDO from that undertaken under a CSO is not a novel idea. Indeed, it was recommended by a number of stakeholders in the 2013 review of the *Sentencing Act 1995* (WA). In particular, submissions from the DPP argued:

⁵⁹ Department of Corrective Services, Government of Western Australia, <<https://www.correctiveservices.wa.gov.au/default.aspx>>.

⁶⁰ Papalia, above n 7, 5.

It may be preferable to make Community Service Work a sentencing option in its own right. Doing so may raise the profile of Community Service Work as a sentencing option and, consequently, reduce imprisonment rates due to the failure to pay fines ...⁶¹

This recommendation recognises that combined treatment of WDOs and CSOs may have been a cause of the increased rate of imprisonment for non-payment of fines. However, there is currently insufficient evidence to make definitive conclusions about such a causal link. More detailed study of this area could confirm the veracity of this conclusion.

The other — perhaps unintended — consequence of the legislative coupling of WDOs and CSOs is that the capacity for persons on WDOs to undertake activities permitted in s 85 of the *Sentencing Administration Act 2003* (WA) is limited by the rules relating to the implementation of CSOs. Walsh notes:

In recognition of the special needs of these offenders, some jurisdictions in Australia, including Victoria (see *Sentencing Act 1991* (Vic) s 38) and Tasmania (see *Sentencing Act 1997* (Tas) s 28), permit offenders to attend education, treatment or counselling sessions as part of their community service order, that is, attendance at these sessions is credited to them as community service work.⁶²

While this is possible under the framework of the Western Australian Act, the issue is complicated by the reference to the *Sentencing Administration Act 2003* (WA). Essentially, as noted above, a WDO issued for non-payment of an infringement is

⁶¹ Department of the Attorney-General, above n 57.

⁶² Tamara Walsh, 'Won't Pay or Can't Pay? Exploring the Use of Fines as a Sentencing Alternative for Public Nuisance Type Offences in Queensland' (2005) 17(2) *Current Issues in Criminal Justice* 217, 230.

undertaken using the legislative framework applicable to CSOs. As a consequence, all the rules applicable to CSOs are carried across to WDOs. These include provisions such as s 79(2) of the *Sentence Administration Act 2003* (WA), which provides that no more than a quarter of the hours of community service set by a court may be undertaken as approved community corrections activities under s 85(2) of that Act. While this may be an appropriate provision with respect to offenders who have been sentenced by a court to undertake a certain number of hours of a CSO, the rationale for such an explicit restriction breaks down when applied to persons serving a WDO. This is particularly relevant since persons serving a WDO may be serving significantly fewer hours than persons serving a CSO. As a consequence, a day-long program comprising an equivalent of 8 hours of the WDO is only available to a person who is serving at least 40 hours. Since fines are cut out at a rate of \$300 per day,⁶³ the capacity to undertake a day-long program under the auspices of a WDO is only, in practice, available to a person who has been levied with a fine exceeding \$1500. There seems to be no cogent rationale for suggesting that a person who is levied a fine smaller than this ought not to be able to or will gain no benefit from attending a relevant program otherwise authorised and administered under the provisions of s 85.

The Attorney-General's statements defending the changes to the administration of persons on orders mirrors the general problem with respect to the recommendations made by the RCIADIC and the Gender Bias Taskforce Report. That is, the rationale given for implementing a stricter administration of persons on orders relates only to persons specifically sentenced to those orders. It may be that there are reasons to extend similarly strict treatment to breaches by persons serving a WDO for fine default. However, these reasons are

⁶³ *Fines Penalties and Infringement Notices Enforcement Regulations 1994* (WA) reg 6B; Cf Papalia, above n 7, 3.

not articulated by the Attorney-General. Indeed, as noted, this effect of the administrative changes goes unmentioned. Once again, one might reasonably query whether this silence reflects a tacit argument for the stricter administration of persons serving WDOs for fine default, or whether it reflects the Attorney-General's incognisance of this particular consequence of the change in administration. In the absence of specific acknowledgement of this consequence, let alone an argument seeking to justify it, it is difficult to assess the basis of the Attorney-General's reasoning.

B Comparison to Other Australian Jurisdictions

Standing in contrast to the position in Western Australia, three states — South Australia, New South Wales and Victoria — have effectively abandoned the practice of imprisonment for fine default. In New South Wales, the practice of imprisonment for fine default has been functionally abandoned. While it is still technically possible for a person to be imprisoned for non-payment of a fine as it is consequent upon a further breach of the CSO imposed in lieu of that fine, commentators note that 'since the *Fines Act 1996* (NSW) was enacted no one has been imprisoned under s 125'.⁶⁴ New South Wales' aversion to imprisonment for fine default crystallised after the tragic incident in which Jamie Partlic, a young man imprisoned for fine default, was severely assaulted while undertaking a four-day term of imprisonment in Long Bay prison in 1987.⁶⁵ Mr Partlic was left in a coma suffering severe brain damage after that assault.

⁶⁴ Sophie Clarke, Suzie Forrell and Emily McCarron, *Fine but Not Fair: Fines and Disadvantage* (November 2008) Law and Justice Foundation of New South Wales <[http://www.lawfoundation.net.au/ljf/site/articleids/0f689939cc1763feca2575710005194a/\\$file/ji3_fines_web.pdf](http://www.lawfoundation.net.au/ljf/site/articleids/0f689939cc1763feca2575710005194a/$file/ji3_fines_web.pdf)>.

⁶⁵ *Ibid.*

Following the incident, the New South Wales legislature reformed the law on imprisonment for fine default.

Despite legislation that enables the incarceration of offenders for non-payment of fines to be contingent upon future non-compliance with a CSO,⁶⁶ South Australia has also more or less abandoned the practice. In 2009–10, there were seven receptions for fine default in South Australia, with none of those receptions being Aboriginal and only one being a woman. In 2010–11, South Australia had 8 receptions for fine default, with two of those receptions being occupied by Aboriginal men and another one by a non-Indigenous woman. In 2011–12, there were no receptions for fine default in South Australia.

Between 2001–2 and 2012–13, the number of persons received for fine or infringement default alone in Victoria was relatively low — between 5 and 74 persons each year.⁶⁷ The Victorian Sentencing Council notes that the law in Victoria has been significantly modified over the years, moving from a system of automatic

⁶⁶ *Criminal Law (Sentencing) Act 1988* (SA) s 71. As an aside, this is at odds with a suggestion in the Victorian Sentencing Council's 2014 report at p 183 that 'imprisonment is not permitted for fine or penalty default in South Australia'. This report appears to have overlooked the capacity for imprisonment for fine default that is consequent upon non-compliance with a CSO, even though this distinction was captured when the council examined the position in New South Wales. Interestingly, the report also noted — again incorrectly — that imprisonment was only permitted for court fine default in Western Australia. This error may speak to the complexity of the legislative framework in Western Australia.

⁶⁷ Felicity Stewart, Donald Ritchie and Emma O'Neill, 'Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria' (Report, Sentencing Advisory Council, 30 May 2014) 180.

incarceration for fine default to a system of incarceration at the discretion of the Court in 2000. The Council opined that:

By making imprisonment discretionary, parliament sought to enhance the fairness of the infringements enforcement system, increase access to justice for the disadvantaged, and harmonise the imprisonment provisions for infringement penalty and court fine default. Parliament has therefore taken significant steps to better align the imprisonment provisions for fine and penalty default, but some key policy issues remain.⁶⁸

In any event, Victoria's pre-reform legislation still retained the general principle respecting court fine default that:

Imprisonment is not to be imposed for court fine default if a person does not have the capacity to pay the fine, or has another reasonable excuse for non-payment. In addition, the court will be empowered to discharge a person's fine, under amendments to the Sentencing Act, if the person can no longer pay a fine due to a change in circumstances, or if the circumstances of the person were wrongly stated or not accurately presented when the fine was ordered. The policy underlying the Sentencing Act is that imprisonment should only be imposed for wilful default.⁶⁹

In Victoria, the *Fines Reform Act 2014* (Vic) was introduced with the intention of streamlining existing fines enforcement procedures. It followed the extensive *The Imposition and Enforcement of Court Fines and Infringement Penalties in Victoria Report*, published in May 2014, which advocated for alternative methods to imprisonment for dealing with fine default. Additionally, the Explanatory Memorandum to that Bill notes that 'for those people experiencing disadvantage and hardship, the Bill will introduce a

⁶⁸ Ibid 183.

⁶⁹ Ibid 186.

new scheme for dealing with fine-related debt to operate in addition to existing options that have been strengthened'.⁷⁰

Finally, as noted by the Victorian Sentencing Council, comparison with other jurisdictions reveals that:

Western Australia appears to be the only Australian jurisdiction that does not incorporate the 'last resort' principle into its fines enforcement legislation. In that state, the court may issue a warrant of commitment in preference to other enforcement options if the warrant is more likely to result in the payment or recovery of the amount owed than other enforcement options.⁷¹

VI THE PATH FORWARD — WHAT A RE-IMAGINING OF FINES MIGHT LOOK LIKE

A The Necessity of Root and Branch Reform

Some recommendations have been proposed to remedy the current difficulties with the legislation and its implementation, particularly with respect to the imprisonment for non-payment of fines. The *Locking in Poverty* Discussion Paper argues:

There is a clear need for a review of the impact of legislation and regulation governing fines enforcement and community service orders. An independent authority such as the Law Reform Commission is best placed to complete such a review. Any review should include a holistic assessment of the effectiveness and value to the community of fine default management, including the cost and consequences of imprisoning people solely for fine default. The review should recommend possible changes to legislation or regulation that

⁷⁰ Explanatory Memorandum, *Fines Reform Bill 2014* (Vic) [2].

⁷¹ Ibid 185.

will reduce unnecessary and ineffective imprisonment of fine defaulters.⁷²

The paper also opines that:

Additional funding could be targeted at the geographical locations with the highest rates of fine default leading to imprisonment. This would, in effect, be a form of justice reinvestment with the crime hotspots identified and the funding sourced via the redirection of resources otherwise dedicated to imprisonment.⁷³

Such a review has already been undertaken in part. In 2013, a statutory review of the *Sentencing Act 1995* (WA) was undertaken. That review, as noted above, called for a separation of WDOs from the broader system of administration of CSOs.⁷⁴

Ultimately, it would appear that a more serious re-configuration of the legislative framework is necessary. While de-coupling the administration of WDOs from CSOs would avoid the problem of tougher administration of CSOs having unintended consequences for those on WDOs, ultimately what is needed is some mechanism — perhaps a less onerous one — for enforcement of WDOs. The question is one of change in degree, rather than in kind.

A preferable approach may involve an examination beyond the management of fine default. Instead, serious questions remain about the *implementation* of fines more generally. This paper has already noted that the effect of the statutory intervention on the common law position that excessive fines ought not to be imposed. Practically,

⁷² Papalia, above n 7.

⁷³ Paul Papalia, 'Locking in Poverty — How Western Australia drives the poor, women and Aboriginal people to prison' (Discussion Paper, WA Labor, 26 November 2014) 10.

⁷⁴ Department of the Attorney-General, above n 57.

s 53(2) of the *Sentencing Act 1995* (WA) dramatically undermines the capacity for judges when imposing fines to take account of an offender's means. In practice, lower courts — in particular the Magistrates' Court — are often not able to ascertain the information necessary in order to determine the impact of a fine. This problem is particularly acute with unrepresented accuseds, who may be unaware of the application of the sentencing provisions, as Williams and Gilbert note:

As legal aid is not usually available when the defendant is not at risk of imprisonment, defendants may appear unrepresented. In addition, the disorganisation of many offenders and their reluctance to disclose their financial circumstances means that courts often do not have complete information about income, debts, family obligations and community expectations. In particular, judicial officers may be unaware of unpaid fines, as they are not routinely provided with this information by fines enforcement agencies ...⁷⁵

This situation is particularly perverse with respect to persons who are disadvantaged, since the reason that they are not getting legal representation is that their sentence is unlikely to result in a period of incarceration, and precisely because of this lack of legal representation, such persons are more likely to be in a position where they default on a fine and become at risk of imprisonment for non-payment. Again, it is worth noting that the common law position in *R v Rahme* noted that fines which cannot be serviced ought not to be imposed 'even though these days failure to pay a fine does not lead to imprisonment but to a civil execution for its non-payment'.⁷⁶ The obvious implication of this position is that the

⁷⁵ Mary Williams and Robyn Gilbert, 'Reducing the unintended impacts of fines' (Current Initiatives Paper No 2, Indigenous Justice Clearinghouse, January 2011) <<http://www.indigenousjustice.gov.au/initiatives/initiative002.pdf>>.

⁷⁶ (1989) A Crim R 81, 86–7.

policy rationale for not imposing an overly onerous fine is strengthened in circumstances where failure to pay a fine may lead to imprisonment.

Yet the position is further eroded by other statutory provisions, as Walsh notes with respect to the situation in New South Wales:

Even where information is available about the defendant's means to pay, a judicial officer may have to impose a fine that the defendant is unable to pay, either because legislation sets out a minimum penalty, or because there is no other sentencing option available. A survey of NSW magistrates revealed that 44% of respondents sometimes or often impose a fine knowing that the defendant cannot or will not pay, usually because it was the only sentencing option available ...⁷⁷

It therefore follows that, despite alignment between the common law rule and the legislative provision in s 53(1), the practical reality of its operation is directly repugnant to the common law position. Again, this is despite the fact that the Second Reading Speech to the Bill discloses no clear intention to depart from the common law principle. As a consequence, statutory provisions are requiring the imposition of fines in circumstances where the common law would deem it unjust. While, of course, Parliament is sovereign and therefore quite entitled to alter the common law rule, there seems to have been no active consideration of the consequences that might flow in deviating from this principle.

This issue is compounded by the ubiquity of fines as a punishment in our criminal justice system. Referring to the Western Australia Office of the Director of Public Prosecutions' comparative sentencing tables, the authors of the 2014 Gender Bias Taskforce Report note that 'across all offence types, fines are overwhelmingly the most common penalty handed down upon conviction for all

⁷⁷ Williams, Gilbert, above n 75.

adults regardless of gender’,⁷⁸ and ‘fines currently make up over 80 per cent of all sentencing outcomes in Western Australian Magistrates Courts’.⁷⁹ It follows that, even if only a small proportion of fines are being administered to persons who are impecunious, the sheer volume of fines issued will mean that a large number of people will be issued with fines they cannot service.

Consequently, unless policy makers are willing to engage in a radical re-imagining of the imposition of fines, it is likely that any amendments to the process for enforcing fines will involve little more than tinkering at the edges of the problem. It should be acknowledged that, while the other features of the legislative framework surrounding fines are necessary to create this undesirable outcome, the root cause of the issue still remains the imposition of fines beyond the offender’s capacity to service.

It follows that any changes to the imposition of fines that will decrease the instances of offenders being sentenced to a fine beyond their capacity to service would have the substantive effect of reducing the number of persons incarcerated for non-payment of fines. This is the case even in the absence of other legislative amendments. It is with this in mind that we now turn to consider the viability of a system of unit or day fines as an alternative methodology for the imposition of fines.

⁷⁸ Steering Committee, ‘20th Anniversary Review of the 1994 Chief Justice’s Gender Bias Taskforce Report’ (Review Report, Women Lawyers of Western Australia, September 2014) 546 <http://www.wlwa.asn.au/2014_GenderBiasReviewReport_September2014.pdf>.

⁷⁹ Ibid 573.

B Day Fines — A Possible Alternative

Bartl describes the German *Tagessatzsystem* or ‘day fine system’ as requiring a two-step analysis. In the first instance, the court determines a fine imposed of between 5 and 365 ‘daily units’, which is dependent on the seriousness of the offence and any other relevant circumstances.⁸⁰ The dollar value of the fine is calculated by multiplying the number of daily units by the daily net income of the offender. As a consequence, the actual fine imposed is the product of both consideration of the severity of the offence and the relative impact of the fine upon the accused. In this way, the German system secures both comparative equal treatment by imposing like ‘day fines’ for like offences and ensures the relative equal treatment of offenders with differing capacities to service a fine by imposing the quantum of the fine that is relative to their means. As Bartl describes, there are sophisticated mechanisms that take into account other relevant circumstances, such as dependents and the situation of the offender, with respect to the calculation of the daily net income.⁸¹

The consequence of this approach to fines is twofold. Firstly, it will ensure that the imposition of fines on persons of modest means will not be unduly burdensome. It is a manifestly undesirable feature of the current Australian system to the imposition of fines that a fine levied with the intention of treating like offenders in a like way — that is, a fine which takes account of the circumstances of the

⁸⁰ Benedict Bartl, ‘The “Day” Fine — Improving Equality before the law in Australian Sentencing’ (2012) 16 *University of Western Sydney Law Review* 48, 64. Note that Bartl’s detailed analysis of the Australian fines system more generally provides a useful resource for further consideration of the issues herein in the context of other Australian jurisdiction.

⁸¹ *Ibid* 66–7.

offence plus any aggravating or mitigating factors — might in fact treat offenders quite differently as a consequence of circumstances not relevant to the commission or gravity of the offence. Although it is unlikely that a wealthy person will ever need to be incarcerated for non-payment of fines, the evidence discloses that impecunious persons on the other hand are being incarcerated even in circumstances where the offences are of equal seriousness in the court's estimation.

Secondly, and as a corollary of securing equal treatment, it follows that the imposition of unit fines will serve the purpose of ensuring that notionally equivalent fines have equal punitive effect. Again, as Bartl puts it, the German system of unit fines ensures that fines so levied have 'like punitive bite'.⁸² While the public's imagination is often captured by stories of European countries administering notionally very high fines for relatively minor offences like traffic violations, it is rare for public commentary accompanying such stories to argue that the imposition of such differential and high fines is unjust. Support for such fines is very high in their native countries, with some 80 per cent of the Finnish people expressing support for day fines.⁸³ Bartl notes in a recent submission to the Tasmanian Parliament that support for the introduction of day fines exists in that jurisdiction.⁸⁴

⁸² Ibid 49.

⁸³ Joe Pinsker, 'Finland, Home of the \$103 000 Speeding Ticket', *The Atlantic* (online), 12 March 2015 <<http://www.theatlantic.com/business/archive/2015/03/finland-home-of-the-103000-speeding-ticket/387484/>>.

⁸⁴ Benedict Bartl, Submission No 008 to Select Committee on the Cost of Living, 16 March 2012.

Day fines were considered and ultimately rejected by the statutory review of the *Sentencing Act 1995* (WA) in 2013.⁸⁵ It must be noted that very limited consideration was given to the possibility of adopting a day fine mechanism for the imposition of sentences. The report noted only that the objections raised could be summarised by similar rejection of day fines in the 1996 report of the New South Wales Law Reform Commission, which argued that the imposition of day fines was problematic because:

The day fine places too great a restriction on the discretion of the sentencing court to impose the sentence which is most appropriate given all the circumstances of an individual case. It may also prove too complex and consequently unworkable in practice, as the experience of other jurisdictions suggests. Moreover, it may be too time-consuming for courts to make an accurate assessment of the offender's financial means ...⁸⁶

This analysis is regrettably truncated. In particular, the charge that day fines impose restrictions on the discretion of the sentencing judge appears to misconceive the mechanism for the imposition of day fines. Since, as noted above, the fine is a product of the number of days fined and the daily net income of the offender, the number of days fined is determinably flexible, and having regard to the relevant aggravating and mitigating factors, there seems to be no relevant restrictions on a sentencing court's discretion. Indeed, the situation is directly analogous to the present situation existing under the *Road Traffic Act 1974* (WA), which provides that 'penalty units' rather than a dollar amount are imposed,⁸⁷ with those penalty units

⁸⁵ Department of the Attorney-General, above n 56.

⁸⁶ New South Wales Law Reform Commission, *Sentencing*, Report No 79 (1996) [3.14].

⁸⁷ See generally, *Road Traffic Act 1974* (WA) s 50, which subjects a learner driver who drives in an unauthorised manner to a penalty of 6 PU (penalty units). Multiplying by \$50, as required by s 5 of the Act, provides for a total penalty of \$300.

having their dollar amount fixed from time to time by an amendment of s 5. Correctly understood, the day fine system is functionally identical from the court's perspective, with the only change being that the dollar amount is fixed by calculation of daily net income, rather than a figure set by the Act.

Addressing the issue of complexity requires noting that two difficulties inevitably arise in relation to the imposition of unit fines. The first is having to contend with the situation of persons who may have considerable assets but very limited income. This scenario is not unknown to the German system, and capacity exists for a judge to take account of the 'real' economic situation of an offender by reference to their assets as well as their income. It must be borne in mind that the calculation of the final amount imposed under a 'day fine' is dependent on one's net, rather than gross, income.⁸⁸ Consequently, questions as to a person's real income, dependants or other required spending are already taken into account when the calculations are performed. The second issue is how the courts might go about obtaining this information. This is of particular concern given that, at least at common law and by reference to s 53 of the *Sentencing Act 1995* (WA), judges ought to be taking account of a person's capacity to pay — and consequently considering their income and expenditure — when administering fines under the current regime. However, evidence suggests that this is not occurring in any systematic way. It follows that, if failure to take these issues into consideration is occurring now,⁸⁹ a mere change in the law by itself may not be sufficient to deal with the structural issues that are preventing these considerations from being raised at the moment.

⁸⁸ Bartl, above n 80, 66.

⁸⁹ See generally Australian Law Reform Commission, *Sentencing of Federal Offenders*, Discussion Paper No 70 (2005) 110 [7.15].

C Day Fines and Incarceration

Income-dependent fines do not, of course, preclude the possibility of imprisonment for fine default. Conceptually, it is perfectly possible to have a system of income-dependent fines and also a system whereby persons who default on those fines are subject to imprisonment in much the same terms as they currently are in Western Australia. Indeed, such a system exists in Germany, which dispenses punishment through both day fines and the possibility of incarceration for non-payment of fines.⁹⁰ Nevertheless, we can reasonably expect that income-dependent fines would in practice reduce the number of persons entering prison for fine default, even in the absence of other legislative changes.

The expectation that a regime of income-dependent fines would lead to fewer incarcerations for non-payment of fines is based on two assumptions. The first assumption is that persons who enter prison for fine default often do so only after attempting — and succeeding in many cases — to pay part of the fine owed. Indeed, this was precisely the situation Ms Julieka Dhu found herself in; she had discharged nearly half the value of her initial fine. It follows that she may never have had occasion to enter prison for fine default had her initial fine been lower.

The second assumption is that the lower limit of fines will be reduced. That is to say, the implementation of a system of income-dependent fines would not only push the value of fines up for individuals with high incomes, but would also bring the value of fines down, and in some cases significantly, for individuals of

⁹⁰ Richard S Frase, *Sentencing in Germany and the United States: Comparing Apfel with Apples* (2001) Max Planck Institute for Foreign and International Criminal Law, 11 <<https://www.mpicc.de/shared/data/pdf/frase-endausdruck.pdf>>.

limited means. This indicates that the rate currently being administered for fines assumes that an offender is of average means. Consequently, if we wished to maintain an equivalent 'punitive bite' between current fines and fines under any potential income-dependent system, it would follow that fines implemented currently ought to represent the amount which attracts to an offender of average means.

In May 2015, the mean weekly ordinary time earnings in Western Australia was \$1691.20.⁹¹ Further breakdown of this figure gives us a good starting point for analysing how income-dependence might impact the quantum of fines more generally. As already acknowledged, there has been a disproportionate increase in the number of women incarcerated for non-payment of fines since the administrative changes in 2008. It is worth noting in this context that Western Australia has a significant disparity in the mean weekly ordinary time earnings received between men and women — \$1857.2 for men and \$1373.2 for women.⁹² Even accounting for no other differences, we might reasonably expect that an income-dependent system of fines would see a general reduction in the quantum of fines imposed on women, as it would be commensurate with their weekly ordinary time earnings.

It is also worth noting that a single person without children in receipt of a Newstart allowance is entitled to \$519.20 per fortnight, or \$259.60 per week.⁹³ This represents 60 per cent of the average

⁹¹ Australian Bureau of Statistics, *Average Weekly Earnings, Western Australia (Dollars) — Trend* (May 2015) Australian Bureau of Statistics <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/6302.0May%202015?OpenDocument>>.

⁹² Ibid.

⁹³ Department of Human Services, *Payment Rates for Newstart Allowance* (18 September 2015) Australian Government Department

ordinary time earnings for men in Western Australia. Assuming for simplicity's sake that no changes are made to the system of fines save that which is necessary to hold the current rate of fines steady for persons earning the mean ordinary time earnings in Western Australia and to ensure that proportionate fines are levied for those earning more or less than that amount, we would on the basis of these numbers expect that persons in receipt of Centrelink benefits like Newstart would receive 60 per cent of the total fines levied on those on average earnings.

The corollary of this is that a system of income-dependent fines has the capacity to significantly dis-incentivise opting for incarceration as a method of paying out a fine. Under the German system, where people enter prison to 'cut out' a fine, those fines are 'cut out' based on the number of days in prison as compared to the number of notional 'days' imposed in the fine. Thus, regardless of a person's income there is no particular financial incentive to serve a period of imprisonment rather than paying the fine. The number of days which an offender must work in order to pay a fine is in almost all cases equivalent to the number of days they would spend incarcerated to 'cut out' a fine.

By contrast, as noted above, fines are cut out at a rate of \$250 dollars per day in Western Australia. On the basis of the figures noted above, the average ordinary time wage for West Australians in May 2015 works out to approximately \$241.60 per day. In simple terms, the current Western Australian system financially incentivises lower income earners to opt to 'cut out' a fine by imprisonment since the fine is reduced at a rate greater than their daily earnings — this is the case even before factors such as tax or the effect of part-

of Human Services <<http://www.humanservices.gov.au/customer/enablers/centrelink/newstart-allowance/payment-rates-for-newstart-allowance>>.

days are considered. That incentive is significantly heightened for persons on Centrelink benefits. Consider that a day of imprisonment ‘cuts out’ a fine at a rate of \$250 per day; that figure represents more than a week’s income for a person on benefits.

A similar, albeit less dramatic, situation arises when we consider persons who are on the minimum wage. While a person who earns the minimum wage is considerably better off than someone on Centrelink benefits — earning some \$656.90 per week compared to the benefit rate of approximately \$259.60 per week — that person is still financially incentivised by the current system to opt to cut out a fine.⁹⁴ The capacity to ‘cut out’ a fine by a period of imprisonment at a rate of \$250 a day compares with their notional daily income of some \$93.84 per day.

These comparisons demonstrate in practical terms the impact of regressive fines. That is to say, while the ‘cut out’ rate for a period of imprisonment is roughly equivalent to the notional mean ordinary time daily income for Western Australian men, that figure is three times higher than the notional daily income of a person on minimum wage. Persons in receipt of Centrelink benefits will find that the rate at which a fine is ‘cut out’ by a period of imprisonment represents almost 10 times their notional daily income. This is a stark reminder that, for low-income earners, even a relatively modest fine will represent a very substantial portion of their income.

Concretely, assuming that any adjustment to our fines system held current fines constant for average income earners and adjusted those fines proportionately for persons on whose income is higher or lower, we would expect to see a significant reduction in the fines administered on people who earn low incomes. Imprisonment for fine default has had a disproportionate effect on groups of people

⁹⁴ *Annual Wage Review* [2015] FWCFB 3500.

whose financial means are, on average, limited, in particular Indigenous people and women. It therefore follows that, if our system of fines administration was altered to address the regressive impact of fines, we can expect that the principal beneficiaries of such adjustment would be those same classes of persons. It is essentially this rationale which has led to recommendations of income-dependent fine systems by various bodies including the Law Society of New South Wales, the Tasmanian Social Policy Council, the Tasmanian Greens, the Australian Capital Territory Alcohol, Tobacco and Other Drugs Association, the Australian Capital Territory Council of Social Services and the Victorian Council of Social Services, among others noted in this paper.⁹⁵

VII CONCLUSION

It is apparent that the issue of persons being imprisoned for non-payment of fines has been a perennially vexing one. Its difficulty is compounded by the sheer complexity of the legislation which enables and enforces the collection of fines. Additionally, it appears that there is no mechanism for ensuring that reports which call for law reform are considered by the legislature when relevant proposed legislation come up for consideration. This is extremely regrettable, particularly with respect to reports which carry enormous social and political importance such as the RCIADIC report. As it stands, whether a Royal Commission's recommendations are specifically considered and in detail seems to correlate largely with whether the Members of Parliament engaged in the debate have had a personal involvement with the Royal Commission in question — this

⁹⁵ Bernadette Saunders et al, 'An Examination of the Impact of Unpaid Infringement Notices on Disadvantaged Groups and the Criminal Justice System — Towards a Best Practice Model' (Report, Criminal Justice Research Consortium, February 2013) 37 <http://www.cjrc.monash.org/unpaidfines/unpaid_infringements_final_report.pdf>.

certainly explains the detailed reference to the 1982 Honorary Royal Commission appointed to inquire into dairy products and market milk when contrasted with the scant references to the RCIADIC report, which were made in circumstances where legislation relating to both were considered on the same day in Parliament. Clearly, it would be preferable if important recommendations were specifically considered by Parliament. If such considerations had been undertaken in relation to the legislation considered in this article, we may have had legislation which differed in relevant respects.

Similarly, the complexity of the interrelated statutory provisions means that, unless a genuine attempt to simplify the legislation is undertaken, it is likely that changes to the way that legislation is administered will continue to have unintended consequences. This appears to be at the heart of the present issue — the increases in incarcerations being clearly correlated with, and probably a direct result of, the administrative changes directed by the Attorney-General in 2009.

Nevertheless, any changes to the legislative framework will not address the central difficulty with ubiquitous fines. That is, so long as fines remain uncoupled from an offender's financial circumstances, they will remain regressive. Consequently, fines will continue to have excessive punitive bite with respect to persons who are impecunious or on low incomes. It appears that legal reform in this area could be greatly advanced by serious consideration of the extent to which the broader problem of imprisonment for non-payment of fines can be fixed by removing the regressive nature of fines, generally through the implementation of a day fine system.

SPOUSAL PRIVILEGE — NOT A PRINCIPLE WELL ESTABLISHED AT COMMON LAW? *ACCC V STODDART* [2011] HCA 47

KEITH THOMPSON*

Abstract

It is unusual that a decision of the High Court of Australia runs so clearly in the face of expectation.¹ But decisions that surprise get publicity especially when their concepts are readily intelligible in the lay community. Though Legal Professional and Self-Incrimination Privilege have been narrowed and abrogated by Australian legislatures during the last 50 years,² press reports

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¹ See, eg, Legal Eagle, *Spousal right to silence abolished in Australia* (3 December 2011) Skeptic Lawyer <<http://skepticlawyer.com.au/2011/12/03/spousal-right-to-silence-abolished-in-australia/>>, which presents a variety of reactions to the High Court decision. See especially the disappointed reaction of Terry O’Gorman from the Council of Civil Liberties, contra to UNSW’s Frank Bates who is said to have found the ruling ‘entirely predictable’. Legal Eagle says that though the High Court has ‘overturned the right to refuse to give evidence against one’s spouse at common law ... marital confidentiality will still be protected by breach of confidence laws’, which is said to have been affirmed in *Duke of Argyll v Duchess of Argyll* [1967] Ch 302.

² See Australian Law Reform Commission, *Client Privilege and Federal Investigatory Bodies*, Discussion Paper No 73 (2007). The Commonwealth Attorney-General, Philip Ruddock’s referral of legal

suggest that the High Court decision in ACCC v Stoddart,³ which declared that there never was a spousal incrimination privilege in Australia, have been shocking to the community and even to the profession.⁴ There may be other larger issues caught up in this decision, for the High Court has normally been reluctant to change longstanding common law rules seeing such policy changes as the

professional privilege to the Australian Law Reform Commission in 2006 implicitly acknowledged both that legal professional privilege had been modified or abrogated to facilitate the performance of a number of Australian Commonwealth investigatory functions in the past, and that the practice of such modification and abrogation had raised human rights and other concerns: 3–4; Queensland Law Reform Commission, *The Abrogation of the Privilege Against Self-Incrimination*, Discussion Paper No 57 (2003). The Hon R Welford MP tasked the Queensland Law Reform Commission to: '[e]xamine the various statutory provisions abrogating [self-incrimination] privilege in Queensland ... to [e]xamine the bases for abrogating the privilege [and to] ... [r]ecommend whether there is ever justification for the abrogation of the privilege and, if so, in what circumstances and before what type of forum': 1. The Commission then identified all the provisions in that state 'that abrogate, or may have the effect of abrogating, the privilege': chs 3–8.

³ *Australian Crime Commission v Stoddart* [2011] HCA 47 (30 November 2011) ('*Stoddart*').

⁴ See, eg, ABC Radio National, 'High Court rules spouses have no right to privacy', *PM*, 30 November 2011 (Ashley Hall) <<http://www.abc.net.au/pm/content/2011/s3380420.htm>>; Sean Rubinsztein-Dunlop and Michael Collett, *Court overturns wife's right to silence* (30 November 2011) ABC News <<http://www.abc.net.au/news/2011-11-30/court-overturns-wife27s-right-to-silence/3703892>>. The two separate ABC reports summarised that the High Court had 'overturned hundreds of years of common law tradition' which had developed the spousal privilege 'to respect the sanctity of communication within a marriage'.

constitutional province of the federal legislature.⁵ Was the opportunity to modernise the spousal privilege law in Stoddart the real reason for this decision and if so should the High Court have been more transparent in the reasons it gave in this case?

In Part I, I will outline the facts of the case and then I will analyse the three separate judgments. Justices French and Gummow wrote the leading judgment. Justices Crennan, Kiefel and Bell concurred but wrote more extensively about the history and their view of when a common law principle may be said to be established. Justice Heydon wrote a long dissent that canvassed all the issues and disagreed about almost everything.

In Part II, I will review the Australian context and history for the Stoddart case since the legislation involved was less than a decade old⁶ and there had been recent related cases in the Queensland Supreme Court⁷ and the Federal Court;⁸ cases which were heard respectively in the Queensland Court of Appeal⁹ and the Full Federal Court.¹⁰ I will also review the academic article published in

⁵ See, eg, *Daniels Corporation v ACCC* (2002) 213 CLR 543, [11]. The joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ stated:

Legal professional privilege is not merely a rule of substantive law. It is an important common law right or, perhaps more accurately, an important common law immunity. It is now well settled that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect.

⁶ *Australian Crime Commission Act 2002* (Cth).

⁷ *Callanan v Bush* [2004] QSC 88 (8 April 2004).

⁸ *S v Boulton* [2005] FCA 821; (2005) 155 A Crim R 152.

⁹ *Callanan v B* [2004] QCA 478; [2005] 1 Qd R 348.

¹⁰ *S v Boulton* [2006] FCAFC 99; 151 FCR 364.

the University of New South Wales Law Review by David Lusty¹¹ which came between the Queensland and Federal Court cases because it swayed the Queensland Court of Appeal,¹² irritated Justice Kiefel as she then was, in the Federal Court¹³ and impressed Justice Heydon in the High Court.¹⁴

In Part III, I will review the English history surrounding the question of spousal privilege, but with particular emphasis on R v Inhabitants of All Saints, Worcester¹⁵ since all six justices deciding the Stoddart case in 2011 were agreed it was the critical decision.¹⁶ That discussion will review the analysis of that case and history in all three judgments and will conclude that Justice Heydon got it right; even though he dissented and even though the majority overruled his scholarly treatment of the subject matter.

In Part IV, I will separately consider the argument between Justice Heydon and his sister justices as to whether in the 21st century, a common law principle can only be said to be established if it has been through the crucible of a line of cases in litigation.

The article will then conclude with an assessment of the policy future of statutory spousal privilege in Australia now that the High Court has decided against it at common law.

¹¹ David Lusty, 'Is There a Common Law Privilege against Spouse-Incrimination?' (2004) *University of New South Wales Law Journal* 1; (2004) 27(1) *University of New South Wales Law Journal* 1.

¹² *Callanan v B* [2005] 1 Qd R 348, 352 [6].

¹³ *S v Boulton* [2005] FCA 821, [7]–[8], [22]–[23], [25].

¹⁴ *Stoddart* [2011] HCA 47 n 259.

¹⁵ *R v Inhabitants of All Saints, Worcester* [1817] Eng R 404; (1817) 6 M&S 194; 105 ER 1215 ('*All Saints*').

¹⁶ *Stoddart* [2011] HCA 47, [29] (French CJ and Gummow J), [73]–[130] (Heydon J), [208]–[220] (Crennan, Kiefel and Bell JJ).

I *ACCC v STODDART* [2011] HCA 47*A The Facts*

Mrs Stoddart had provided part-time secretarial assistance in her husband's accounting practice.¹⁷ 'On 3 April 2009 [she] ... appeared in response to a summons issued under s 28(1) of the *Australian Crime Commission Act* 2002 (Cth) ... to give evidence of "federally relevant criminal activity" involving named corporations and persons including'¹⁸ her husband of more than 20 years.¹⁹ 'Section 28(5) empowered the Examiner to take evidence on oath or affirmation.'²⁰ Mrs Stoddart chose to be legally represented and to take the oath. Though '[t]he law relating to legal professional privilege [wa]s preserved by s 30(9)', ss 30(4)–(5) limited the scope of the privilege against self-incrimination in proceedings before the Commission. She claimed the benefit of the limited self-incrimination privilege available 'and the Examiner extended to her what he called "a blanket immunity"'.²¹ However, during 'the course of her examination by counsel assisting [the Commission, when] ... asked whether she was aware of invoices prepared at the premises of her husband's practice for services provided by other entities ... [h]er counsel ... objected that her client claimed "the privilege of spousal incrimination" and chose not to answer the question'.²² She then 'commenced a proceeding in the Federal Court ... [seeking] an injunction restraining the Examiner from asking her questions relating to her husband and a declaration that "the common law privilege or immunity against spousal incrimination

¹⁷ Ibid [1].

¹⁸ Ibid [2], [4].

¹⁹ Ibid [1].

²⁰ Ibid [7].

²¹ Ibid [9].

²² Ibid [15].

has not been abrogated by [the Act]’.”²³ ‘Reeves J dismissed [her] application’ but the Full Federal Court allowed her appeal.²⁴

The Australian Crime Commission submitted there was no spousal privilege at common law, and that even if such privilege did exist, it had been abrogated by s 30 of the Act²⁵ and in any event, such privilege was not available outside a court setting.²⁶ The High Court ultimately did not have to consider the questions whether spousal privilege was abrogated by the Act or whether it applied outside of court setting since it found there was no convincing evidence that spousal privilege existed at common law in the first place.²⁷

B *The Judgments and the Argument*

The *Australian Crime Commission Act 2002* (Cth) had not abolished spousal privilege at common law either by clear and unambiguous words or by necessary implication.²⁸ Spousal privilege was not mentioned in its text. The difference between the High Court judges in *Stoddart* was about whether spousal privilege existed at common law in the first place. Chief Justice French and Justice Gummow found that there were times in common law history when spouses

²³ Ibid [16].

²⁴ Ibid [17].

²⁵ *Australian Crime Commission Act 2002* (Cth) s 30.

²⁶ *Stoddart* [2011] HCA 47, [18].

²⁷ Ibid.

²⁸ See, eg, *Daniels Corporation v ACCC* (2002) 213 CLR 543, [11]. The joint judgment of Gleeson CJ, Gaudron, Gummow and Hayne JJ stated:

Legal professional privilege is not merely a rule of substantive law. It is an important common law right or, perhaps more accurately, an important common law immunity. It is now well settled that statutory provisions are not to be construed as abrogating important common law rights, privileges and immunities in the absence of clear words or a necessary implication to that effect.

were neither competent nor compellable witnesses, but that there was no common law rule establishing a separate spousal privilege. Justices Crennan, Kiefel and Bell went further, perhaps to make it very clear that they had considered and dismissed Justice Heydon's reasons in dissent. They said that a common law privilege was not established unless there was a well settled line of cases in its favour. In her earlier decision in the Federal Court, Justice Kiefel had said reluctantly, that if spousal privilege existed, she would have been inclined to call it 'a rule of evidence [rather] than a substantive rule of law'.²⁹ Justice Heydon disagreed with both majority judgments.

Justices French and Gummow considered that the Queensland Court of Appeal and Professor Julius Stone had both erred in failing to distinguish between 'the concept[s] of competence and compellability [and] ... of testimonial privilege'.³⁰ They observed that there was no suggestion in *Stoddart*, that Mrs Stoddart was incompetent or non-compellable.³¹ Nor was there any suggestion that a marital communications privilege applied in this case since Mrs Stoddart sought only to avoid giving evidence which might incriminate her husband.³² Though Justice Heydon observed that the Common Law Commissioners had only given 17 pages to the full law of evidence in their Second Report in 1853, and had not dealt with legal professional privilege or self-incrimination privilege either,³³ Justices French and Gummow thought the lack of any mention of spousal privilege by those Commissioners was significant and told against the existence of any such rule in English common law history.³⁴

²⁹ *S v Boulton* [2005] FCA 821, [45].

³⁰ *Stoddart* [2011] HCA 47, [19].

³¹ *Ibid* [20].

³² *Ibid* [22].

³³ *Ibid* [139].

³⁴ *Ibid* [27].

Before French CJ and Gummow J treated the *All Saints* case³⁵ as ‘the critical authority’,³⁶ they qualified their analysis with the observation that most ‘cases decided before the mid-Victorian era of statutory reform’ saw evidence of communications between husband and wife or which might incriminate each other, excluded on competence and compellability grounds. But *All Saints* was a little different. Here the wife wanted to give testimony against her husband but neither spouse was a party to the litigation in question. They interpreted Bayley J’s decision allowing the wife to testify, as an exception to the rule that she was not compellable.³⁷ In their view, later text writers had similarly interpreted the decision. The rule that a wife could not be compelled to give evidence did not apply in cases where neither spouse was a party to the case. Though these Justices noted Starkie’s qualification in commentary that a spouse was competent ‘[w]here neither of them is either a party to the suit, [and not] interested in the general result ... provided the evidence does not directly criminate the other’,³⁸ they did not discuss Bayley J’s actual words at all. They relied completely on secondary sources.

Crennan, Kiefel and Bell JJ found that:

[n]o question of compellability arises in this case. The first respondent was a competent witness ... and was compelled by the provisions of that Act to [respond, and] ... No privilege of the kind claimed could be raised in answer to that obligation.³⁹

³⁵ *All Saints* [1817] Eng R 404; (1817) 6 M&S 194; 105 ER 1215.

³⁶ *Stoddart* [2011] HCA 47, [29].

³⁷ *Ibid* [35].

³⁸ *Ibid* [37], quoting Thomas Starkie, *A Practical Treatise on the Law of Evidence* (3rd ed, 1842) 551.

³⁹ *Ibid* [233].

They said that it was necessary to distinguish between ‘competence, compellability and privilege’.⁴⁰ They relied on *Cross on Evidence* for this distinction⁴¹ between a mere rule of evidence and a fundamental right.⁴² Once established at common law, a ‘true privilege’ operated as a substantive rule of law and then had status as a fundamental right. But such rights come into existence only after they had become ‘well settled’ following consideration by many minds.⁴³

Heydon J said that:

a competent and compellable witness ... [does] have a common law right to refuse to ... [answer questions having] a tendency to expose his or her spouse to conviction for a crime.⁴⁴

Heydon J rejected the view of Crennan, Kiefel and Bell JJ that a common law principle including a privilege was only well established at common law after it had been the ‘subject of series of determinations’,⁴⁵ explaining that the common law was not simply the product of lines of cases that had become ‘well settled’. He said ‘it [wa]s not true that there is “no trace in the decided cases of spousal privilege”’.⁴⁶ The common law was the product of the legal profession including the text writers⁴⁷ and ‘[t]heir works reveal[ed] a general professional consensus’⁴⁸ that there was a spousal privilege

⁴⁰ Ibid [183].

⁴¹ Ibid [184].

⁴² Ibid [186].

⁴³ Ibid [232].

⁴⁴ Ibid [44].

⁴⁵ Ibid [232].

⁴⁶ Ibid [127], [141]–[150].

⁴⁷ Ibid [133]–[134].

⁴⁸ Ibid [135].

at common law. Crennan, Kiefel and Bell JJ dismissed that consensus as a mere ‘assumption’.⁴⁹

II CASES ABOUT SPOUSAL PRIVILEGE IN AUSTRALIA

There had been a series of decisions in Australia about spousal privilege in the context of legislation which abrogated some privileges expressly but without making reference to spousal privilege. At one level or another, each of these cases also considered the meaning of the *All Saints* case. The first of these cases was *Callanan v Bush*⁵⁰ heard in the Supreme Court of Queensland in 2004. Like the later majority of the High Court in *Stoddart*, Douglas J decided that there was no spousal privilege at common law and Mrs Bush must answer the questions put to her under s 190 of the *Crime and Misconduct Act 2001* (Qld).⁵¹ The Queensland Court of Appeal indicated it had been inclined to dismiss the appeal,⁵² but a learned article written by David Lusty and published in the *University of New South Wales Law Review* before the Court of Appeal hearing had convinced them otherwise. According to Lusty:

Douglas J of the Supreme Court of Queensland concluded that there was no relevant ‘spousal privilege’ at common law. However, this conclusion was merely based on an assumption to the effect that the common law *rule of spousal non-compellability* was confined to judicial proceedings. Justice Douglas did not specifically consider the availability in non-judicial contexts of a wider common law *privilege against*

⁴⁹ Ibid [231].

⁵⁰ *Callanan v Bush* [2004] QSC 88 (Unreported, Douglas J, 8 April 2004).

⁵¹ *Crime and Misconduct Act 2001* (Qld) s 190.

⁵² *Callanan v B* [2004] QCA 478.

spouse-incrimination or refer to any authorities on this privilege.⁵³

Douglas J therefore held the wife guilty of contempt for ‘refusing to incriminate her husband’.⁵⁴ Lusty comprehensively reviewed all the common law authority in England, Canada, New Zealand, the United States and Australia as well as a variety of commentary including commentary from Law Reform Commissions. He concluded that:

The historical and comparative authorities referred to in this article demonstrate that there is a common law privilege against spouse-incrimination. With a clear lineage dating back to the 13th century, the privilege is analogous to, yet separate and distinct from, the privilege against self-incrimination and it can only be abrogated by ‘a clear, definite, and positive enactment’.⁵⁵

Additionally, the Supreme Court of the United States observed in *Trammel v United States*:⁵⁶

[T]he long history of the privilege suggests that it ought not to be casually cast aside. That the privilege is one affecting marriage, home, and family relationships — already subject to much erosion in our day — also counsels caution.⁵⁷

In the Queensland Court of Appeal decision in *Callanan v B*,⁵⁸ McPherson JA provided the unanimous judgment of that court. Their honours overruled Douglas J’s decision below and deferred to Lusty’s article for his reasoning with the following comments:

⁵³ Lusty, above n 11, 25.

⁵⁴ *Ibid.*

⁵⁵ *Ibid*, citing *Callanan v Bush* [2004] QSC 88 (Unreported, Douglas J, 8 April 2004).

⁵⁶ 445 US 40 (1980) (‘*Trammel*’).

⁵⁷ Lusty, above n 11, 30, citing *Trammel* 445 US 40 (1980).

⁵⁸ *Callanan v B* [2004] QCA 478.

I would have been disposed to agree with th[e] conclusion [of Douglas J] were it not for having seen a very recent paper by Mr David Lusty published in 2004 in vol 27 of the *University of New South Wales Law Journal* 1, entitled ‘Is there a Common Law Privilege against Spouse Incrimination?’. Mr Lusty’s answer, which he supports by cogent authority and careful research, is that the common law has recognised such a ‘spousal privilege’ for a very long time, going back to the 17th century and beyond.⁵⁹

Questions about the existence of spousal privilege at common law came before the courts again two years later. In the Federal Court in *S v Boulton*,⁶⁰ an examiner acting under the authority of the *Australian Crime Commission Act 2002* (Cth) acknowledged the privilege which had been recognised in *Callanan v B*, but sought to distinguish it on the grounds that the person claiming the privilege was not married to the person under investigation. Ultimately Kiefel J (as she then was) accepted the Crime Commissioner’s distinction and held that the spousal privilege did not apply in the case of a de facto spouse. But on the way to that decision, she was clear that she was reluctant to follow the Queensland Court of Appeal in *Callanan v B* but considered she had no option. She said:

[I]t has been held that an intermediate appellate court — *and even more so a single judge* — should not depart from a decision of another Australian intermediate appellate court in an area where uniformity is desired, unless the court is convinced that the reasoning is plainly wrong: *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 112 ALR 627 at 629 (‘*Marlborough*’). Australia has a unified common law: *Kable v Director of Public Prosecutions for New South Wales* (1996) 189 CLR 51 at 112, and the need for

⁵⁹ Ibid [6].

⁶⁰ *S v Boulton* (2006) 1 FCR 364.

certainty therefore arises ... It follows in my view that I should apply *Callanan v B*.⁶¹

Kiefel J said she considered there was no spousal privilege at common law because the common law had evolved since Coke (right or wrong) said that spouses were incompetent to testify against one another.⁶² Whether there was a spousal privilege depended 'upon the words used in the *All Saints* case'⁶³ and she said that those words meant no more than that 'competence [did not] mean ... compellability'.⁶⁴ She said those judges did not refer 'to a privilege [because] ... they had no reason to venture into that domain'.⁶⁵ She said there had been confusion about competence, compellability and privilege, but there was 'no text or authority, apart from *Callanan v B* which has discussed the existence of a spousal privilege'.⁶⁶ In the United States 'the common law rule was changed to a privilege, but there is nothing in the English cases to support such an evolution'.⁶⁷

In *S v Boulton*, the case was appealed to the Full Federal Court (Black CJ, Jacobson and Greenwood JJ)⁶⁸ and those judges upheld Kiefel J's decision at first instance because the spousal privilege which Kiefel J was obliged to acknowledge and follow after the Queensland Court of Appeal's decision in *Callanan v B*,⁶⁹ did not

⁶¹ Ibid [30]–[32], citing *Australian Securities Commission v Marlborough Gold Mines Ltd* (1993) 112 ALR 627, 629; *Kable v Director of Public Prosecutions for New South Wales* (1996) 189 CLR 51, 112.

⁶² Ibid [26].

⁶³ Ibid [27].

⁶⁴ Ibid [28].

⁶⁵ Ibid.

⁶⁶ Ibid [30].

⁶⁷ Ibid [28].

⁶⁸ *S v Boulton* [2006] FCAFC 99.

⁶⁹ Ibid [21]–[28].

extend to de facto spouses no matter how long they had been together.⁷⁰

By the time the *Stoddart* case came before the courts in 2010, Kiefel J had been elevated to the High Court and her views in *S v Boulton* were influential in the High Court's consideration.⁷¹ She did not agree with David Lusty's argument that there was a spousal privilege at common law⁷² but Heydon J considered that Lusty's article was 'first class'⁷³ and was an example of the fact that text writers 'are capable of constituting a source of law in their own right'.⁷⁴

But again, all the High Court judges who considered the matter were agreed that the *All Saints* case was the critical authority.⁷⁵ For that reason, it is now reviewed in detail.

⁷⁰ Ibid [50].

⁷¹ *Stoddart* [2011] HCA 47. French CJ and Gummow J noted her view that the *All Saints* case was 'the critical authority': at [29]. Crennan, Kiefel and Bell JJ referred to the Full Court's decision on appeal which upheld her decision to follow the Queensland Court of Appeal in *Callanan v B*: at [175]. Much of Heydon J's judgment seems focused on rebutting the Crennan, Kiefel and Bell JJ view saying that, '[a] well settled legal doctrine embodies the work of many minds': at [232], quoting Oliver W Holmes, *The Collected Works of Justice Holmes* (University of Chicago, 1995), vol 1, 213. Indeed he suggested that Holmes' comments had been taken out of context by that majority judgment: at [53]–[55].

⁷² *S v Boulton* [2005] FCA 821, [25]; *S v Boulton* [2006] FCAFC 99, [18].

⁷³ *Stoddart* [2011] HCA 47, n 259.

⁷⁴ Ibid [135].

⁷⁵ *Stoddart* [2011] HCA 47, [29] (French CJ and Gummow J), [53]–[55], [73]–[130] (Heydon J), [175], [208]–[220] (Crennan, Kiefel and Bell JJ).

III ALL SAINTS

French CJ and Gummow J explained some of the context for the case. Before the poor law reforms in the 1830s,⁷⁶ the *Poor Relief Act* of 1662 required ‘that a parish must maintain its settled poor’.⁷⁷ ‘[N]on-settled destitute people could be removed to their parish of settlement’;⁷⁸ in most cases where they were born. But the parish of removal and the parish of settlement were often in contest because neither really wanted to receive another destitute person whom they would have to maintain. In a case heard at Quarter Sessions, the Cheltenham parish ‘had confirmed an order for removal of Esther Newman’⁷⁹ back to the All Saints parish. The All Saints parish had appealed on the ground that Esther Newman was in fact married to George Willis of Cheltenham and the marriage trumped the removal rule making her husband’s parish (Cheltenham) the parish responsible for her care under the 1662 law. In defence, the Cheltenham parish called Ann Willis as a witness to prove that Esther could not be legally married to George since she, Ann, was his legal wife. As French CJ and Gummow J state, ‘[n]either Ann nor George Willis was a party to the litigation and neither had any interest in the decision’.⁸⁰ But the judges in *All Saints* saw that if they agreed that it was proper for the trial judge to have admitted Ann’s testimony against George, Ann’s testimony and the court’s decision would create a record of the fact of his bigamy and that could incriminate him. Here is what Bayley J said:

Ann Willis was a competent witness, and I found this opinion not upon the order of time in which she was called, for in my

⁷⁶ *Stoddart* [2011] HCA 47, [30], citing the *Poor Law Amendment Act 1834* (French CJ and Gummow J).

⁷⁷ *Ibid.*

⁷⁸ *Ibid.*

⁷⁹ *Ibid* [33].

⁸⁰ *Ibid* [35].

judgment she would have been equally competent after the second wife had given her testimony. It does not appear that she objected to be examined, or demurred to any question. If she had thrown herself upon the protection of the Court on the ground that her answer to the question put to her might criminate her husband, in that case I am not prepared to say that the Court would have compelled her to answer; on the contrary, I think she would have been entitled to the protection of the Court. But as she did not object, I think there was no objection arising out of the policy of the law, because by possibility her evidence might be the means of furnishing information, and might lead to enquiry, and perhaps to the obtaining of evidence against her husband. It is no objection to the information that it has been furnished by the wife.⁸¹

Bayley J's treatment of the issue does not use the High Court's modern 'competent, compellable or privileged' analysis. Bayley J notes that Ann was willing to testify and then considers whether she could be compelled to answer and says 'on the contrary', that if she changed her mind and did not wish to testify, the Court would have protected her. He does not say on what basis the Court would have provided that protection, but he says that protection would have been afforded. Though Bayley J used the word 'compelled', French CJ and Gummow J in *Stoddart*, acknowledged that the concept of 'a compellable witness' in anything like the modern sense of that phrase was not coined until 1851 when the *Evidence Act* (UK) was passed.⁸² And in that act, the term was used to confirm that while a spouse could be a competent witness contrary to old law, it did not necessarily follow that the relevant spouse was also compellable as a witness. Indeed the 1851 Act confirmed the law as Bayley J had expressed it. He observed that Ann Willis was willing to testify despite the fact that she could not be compelled to

⁸¹ Ibid [73] (Heydon J), quoting *All Saints* (1817) 6 M&S 194, 200–1; [105 ER 1215], 1217–18 (Bayley J).

⁸² Ibid [21].

do so. He considered whether she was competent to testify, or whether her evidence should be excluded on grounds, as we might say, of public policy. Should the court find her incompetent because of the State's interest in preserving the sanctity of marriage? In this case, it was self-evident that there was no meaningful marriage left to preserve and the witness was willing to testify. Perhaps the best 'modern' way to explain the case is to say that Bayley J (and his brother judges) found that Ann Willis was competent to testify despite the old rule that she could not be compelled to testify. However the question before the Australian High Court, because of the way Louise Stoddart's case had been pleaded, was whether she had a privilege that protected her from testifying if she chose not to do so.

IV MODERN CATEGORIES

In the High Court of Australia's judgments in *Stoddart*, only Heydon J could see that the practical result in *All Saints* confirmed that a form of spousal communications privilege was affirmed. While it must be accepted that all the judges in *Stoddart* had to work out whether the common law rule in *All Saints* had been abrogated or remained intact in light of the *Crime Commission Act*'s mandate that all witnesses were compellable, the majority ignored Bayley J's insistence that Ann Willis retained her right to court protection despite the exception Bayley J and his brethren allowed in the face of her willingness to testify. The majority judges in *Stoddart* appear to have been focused on the modern categories — was Ann Willis competent, compellable or privileged?

Before *All Saints*, it had been held that a spouse like Ann Willis simply could not be called to give evidence that might incriminate her husband in any way. If a woman was not competent to give evidence against her husband, it is syllogistically true to say that she did not have a privilege protecting her from giving evidence against

her husband. But that ‘privilege statement’ begs the underlying question. Which rule is more effective in making sure a wife does not testify against her husband or vice versa? A ‘true privilege ... [which] operates as a rule of law and not as an evidence rule’⁸³ or a rule that a spouse is not competent to testify at all in such a case? Similarly, is the spouse witness better protected if she is not compellable at all or not compellable in relation to matters deemed sensitive for public policy reasons — namely, that the State is more anxious not to drive a wedge into the relationship between husband and wife than that a Court should have access to every scrap of relevant evidence? Further, what is the difference in practice between saying a witness is not compellable in relation to certain subject matter on policy grounds and saying that she is privileged and does not have to give evidence on grounds of that same public policy?

Crennan, Kiefel and Bell JJ said that authorities which demonstrated that a wife could not be compelled to testify, in a manner which would incriminate her husband, does not ‘equate to a privilege’.⁸⁴

While it was true on 30 November 2011 that spousal privilege and a right not to be compelled to give evidence were not the same thing, if Louise Stoddart was before Lord Ellenborough CJ, Bayley and Abbott JJ on 30 November 2011 and decided not to testify, then those judges, to quote Bayley J, ‘would [not] have compelled her to answer’⁸⁵ and she would not have had to testify.

It is submitted that this insight exposes an anachronism which was embedded in the majority judgments and which Heydon J sought to

⁸³ Ibid [186] (Crennan, Kiefel and Bell JJ).

⁸⁴ Ibid [206].

⁸⁵ *All Saints* [1817] Eng R 404; (1817) 6 M&S 194, 200–1; [105 ER 1215], 1217–18.

avoid. The common law did provide authority that could have protected Louise Stoddart, but the majority of the High Court chose not to follow it.

That most of the members of the High Court in *Stoddart* did not understand is evident in repeated statements appearing in the joint judgment of Crennan, Kiefel and Bell JJ. By way of example, they stated:

The passage from Dalton and the first commentary raise the question whether the wife should give evidence in a case where her husband was a party to an offence, but is not charged, where that evidence would be relevant against his co-offenders. Dalton suggests that the court would not require her to give evidence in such a circumstance. This does not equate to a privilege.⁸⁶

Dalton's work, *Countrey Justice*,⁸⁷ was published in 1619 before even Coke wrote upon the issue.⁸⁸ That text was written at a time when a husband and wife were considered 'one flesh' in law. That assumed historical understanding of the common identity of a husband and wife is not obvious or clear in the words Crennan, Kiefel and Bell JJ quoted from both Dalton and Coke in the early 17th century. They are correct. The word privilege does not appear in any of the historical material that they quoted. Nor were the references to competence framed in modern terms. But that does not mean that Dalton or Coke would have agreed with the way that these modern justices generalised the statements those historical common law authorities did make. It is not difficult to imagine how either Dalton or Coke would have responded to a modern question

⁸⁶ *Stoddart* [2011] HCA 47, [203].

⁸⁷ Michael Dalton, *Countrey Justice* (The Law Book Exchange Ltd, 1619) 270.

⁸⁸ Sir E Coke, *Commentary upon Littleton*, 1628 as quoted in *Stoddart* (30 November 2011) [195].

as to whether wives were privileged from giving evidence in court that might incriminate their husbands. If they did not answer outright 'yes', it would be because they would have explained that the question would never have gone that far. The privilege question would have been absolutely trumped by the fact of wives' incompetence to testify in such a matter, and that is a stronger protection for a spouse than any form of privilege even though it is framed differently.

Even though Heydon J's dissent does not fully consider the inapplicability of the modern categories in the old cases, he bristled against the absurdity of stating that there was no recognition of spousal privilege in common law before 2002 because there were not enough cases to have developed the law on the point.⁸⁹ But the anachronism by Crennan, Kiefel and Bell JJ continues. They generalise Bayley J's decision in *All Saints* so that it holds that:

[T]he rule of competency does not extend to a case where the evidence of a spouse may only indirectly incriminate the other spouse.⁹⁰

This gloss completely ignores Bayley J's '[o]n the contrary' statement that he would still have protected this wife from testifying on matters that would have incriminated her husband if she had changed her mind about testifying once she came into the witness box. Certainly the waiver principle to which these learned High Court Justices have pointed is one conclusion that can be drawn from *All Saints*, but it is not the only one and it is inaccurate and

⁸⁹ *Stoddart* [2011] HCA 47, [53]–[55], [69]–[139]. Heydon J cited commentary from many learned legal minds to demonstrate that spousal privilege was well recognised in fact, if not in modern name and form. In Part III I will discuss whether Crennan, Kiefel and Bell JJ are correct to state that a common law principle is not established unless it is set out fully in the decisions in reported cases.

⁹⁰ *Ibid* [210].

misleading as it stands. Their following statement is also misleading:

It may be that the question of the wife's compellability had not been the subject of much consideration by the time of *All Saints*, given that the antecedent question as to the operation of the rule of competency had not been resolved. This may explain what Lord Edmund-Davies later observed in *Hoskyn*, that Bayley J expressed his view 'in notably tentative language'. These matters do not suggest the existence at this point of a recognised, freestanding privilege in a spouse as a witness as likely.⁹¹

This is a remarkable conclusion. Lord Ellenborough CJ, Bayley and Abbott JJ in *All Saints* did not have to decide whether Ann Willis was compellable. *R v Inhabitants of Cliviger*⁹² said a wife was not competent to give evidence that would rebut evidence already provided by her husband. In *All Saints*, the judges had to decide whether there should be an exception to *Cliviger*, which allowed Ann Willis, as a wife, to give evidence if she voluntarily chose to do so when her husband was not directly involved in the case as either a witness or a party. Was she excluded absolutely or should she be allowed to testify if she wanted to? Clearly judges in the early 19th century and legal commentators earlier, saw the question of spousal testimony in a holistic way. Though the word 'privilege' was not used in the report of the argument the *All Saints* court heard in the three separate judgments issued by that court, those judges discussed the same issue moderns consider under the heading of 'privilege' in terms of a wife's competence and compellability in cases where her evidence might contradict her husband or tend to incriminate him. That consideration was germane to the question before the court in *Stoddart* because Mrs Stoddart refused to give evidence that she considered might incriminate her husband. In *All*

⁹¹ Ibid [214].

⁹² [1788] Eng R 80; (1788) 2 TR 263 [100 ER 143] ('*Cliviger*').

Saints, those judges considered whether a wife could be forced to testify against her husband if that would incriminate him and their answer was ‘not unless she wants to’. Mrs Stoddart did not wish to testify against her husband and the legislation before the High Court did not expressly abrogate any ‘protection’ that remained to her in the common law either by ‘clear words or necessary implication’.

The application of modern paradigms of judicial thought to an early 19th century case is also evident in the Crennan, Kiefel and Bell JJ statement that Bayley J’s reference ‘to [Ann Willis] seeking the protection of the court’⁹³ suggests ‘that he had in mind an exercise of the court’s power’ rather than that ‘Bayley J had something like a privilege in mind’.⁹⁴ It is very difficult to work out what an early 19th century judge had in mind if you try and interpret his words using 21st century legal concepts with scant regard to the facts and context of the case, the practical concerns he expressed, and the outcome of his decision.

French CJ and Gummow J did a little better, but their reasoning was also anachronistic. They distinguished the *All Saints* decision by saying that those judges decided that:

[I]t was not necessary to dispute the rule that spouses could not be witnesses for or against each other ... [because] this rule was limited to cases when the interest of the spouses was in controversy, as was the case where either was a party to the record.⁹⁵

In effect, they said *All Saints* did not prove a privilege because the judgments were obiter dicta on the point. Ann Willis in fact gave evidence and so she did not avail herself of any available privilege. But this generalisation of the *All Saints* decision also ignores the

⁹³ *Stoddart* [2011] HCA 47, [213].

⁹⁴ *Ibid.*

⁹⁵ *Ibid* [36].

concern of those 19th century judges as to whether an exception should be allowed against an established legal principle and policy. That principle and policy would ordinarily have prevented Ann Willis from testifying if:

her evidence might be the means of furnishing information, and might lead to enquiry, and perhaps to the obtaining of evidence against her husband.⁹⁶

All three *All Saints* judges surely believed they were making a ratio decidendi decision that an exception to the normal rule was justified if the other spouse was not a party to the litigation and the witness spouse was willing to testify. It is also clear from the *All Saints* judgments that all three of those judges were well aware of the established principle of spousal incompetence, but considered that an exception was justified in the *All Saints* case since Ann Willis had chosen to testify when she did not have to do so.

Heydon J was right to caution that:

it is generally not safe to embark on an examination of pre-19th century authorities in the law of evidence without the assistance of modern legal historians.⁹⁷

But the High Court's mistaken view of the meaning and significance of the decision in *All Saints* has larger significance than just for spousal privilege in Australia. The argument between Heydon J and Crennan, Kiefel and Bell JJ, as to how a common law principle is established, has ramifications that potentially extend beyond the law of evidence. French CJ and Gummow J did not consider it necessary to enter into this debate.

⁹⁶ Ibid [73] (Heydon J), quoting *All Saints* (1817) 6 M&S 194, 200–1; [105 ER 1215, 1217–18] Bayley J.

⁹⁷ Ibid [70].

V WHAT IS COMMON LAW AND WHEN IS A PRINCIPLE
'WELL SETTLED'?

Crennan, Kiefel and Bell JJ said that a principle was only an established principle of common law if it had been so established by a long line of cases. They said:

The observations of Justice Oliver Wendell Holmes concerning the creation of legal doctrine are apposite here. He spoke of a statement of principle occurring only after a series of determinations on the same subject matter and by a process of induction and went on to say, 'And this statement is often modified more than once by new decisions before the abstracted general rule takes its final shape. A well settled legal doctrine embodies the work of many minds, and has been tested in form as well as substance by trained critics whose practical interest it is to resist it at every step.' No such developments are evident in the cases and materials to which reference has been made in this case. They suggest, at most, that a spouse might seek a ruling from the court that he or she not be compelled to give evidence which might incriminate the other spouse.⁹⁸

Heydon J did not agree that Justice Holmes meant that a legal doctrine was well settled only if it has been tested by 'litigation lawyers seeking to advance the material interests of their clients'.⁹⁹ He asked whether that 'preclude[d] legal doctrines at earlier stages of their evolution from embodying rules of law?',¹⁰⁰ He also did not accept that the "'well settled legal doctrine" theory',¹⁰¹ was 'an exhaustive test for identifying common law rules' and he said it did 'not explain how one ascertains what the law is before it becomes

⁹⁸ Ibid [232].

⁹⁹ Ibid [53].

¹⁰⁰ Ibid.

¹⁰¹ Ibid.

“well settled”¹⁰² He noted that Justice Holmes also said both ‘that the outcome of legal problems could often be reached almost instinctively’,¹⁰³ and that the law is ‘nothing more pretentious [than] ... prophecies of what the courts will do in fact’.¹⁰⁴ He continued:

[T]he materials available for consideration before the prophecy is made will [often] not be any long stream of decided cases having a relevant ratio decidendi or even one such case. Rather the materials may include only prior dicta, arguments by analogy, arguments seeking to avoid incoherence, moral criteria, the teachings of practical pressures, and the opinions of learned writers.¹⁰⁵

Heydon J then set out his view of what did constitute the common law that needed to be considered in *Stoddart*. His most obvious difference with Crennan, Kiefel and Bell JJ was that he would have paid much more attention to the learned legal treatises in the absence of the well settled line of cases they were looking for. In essence, he noted that all the text writers believed there was a spousal privilege until 1980 when, perhaps because of doubts expressed by the English Law Reform authorities in 1967 and 1972, the tide of certainty ebbed a little. But he was not troubled by that uncertainty probably because he did a lot more research on the point than was done by either of those law reform bodies.

The burden of his judgment is that the common law is an amalgam of legal opinion, case law and custom, but not statutes. He took issue with Lord Diplock’s statement in *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation*¹⁰⁶ that the common law in the United Kingdom concerning self-incrimination privilege had been

¹⁰² Ibid.

¹⁰³ Ibid [54].

¹⁰⁴ Ibid [55].

¹⁰⁵ Ibid.

¹⁰⁶ [1978] AC 547.

declared by s 14(1) of the *Civil Evidence Act 1968*,¹⁰⁷ because for Heydon J, ‘the concept of a statutory provision “declaring” the common law is a contradiction in terms’.¹⁰⁸

A statute may preserve the common law. It may modify the common law. It may abolish the common law. But it cannot declare the common law. It is another branch of government which declares the common law.¹⁰⁹

Whether Heydon J is correct in this generalisation is doubtful,¹¹⁰ but that issue does not invalidate his point that the common law is composed of a lot more than the well settled doctrines which result from lines of cases.

¹⁰⁷ Ibid 637–8.

¹⁰⁸ *Stoddart* [2011] HCA 47, [126].

¹⁰⁹ Ibid.

¹¹⁰ See, eg, A Keith Thompson, *Religious Confession Privilege and the Common Law* (Martinus Nijhoff Publishers, 2011) 39–42, 207–10; *Akins v Abigroup Ltd* (1998) 45 NSWLR 539, 547–8; *R v Young* (1999) 46 NSWLR 681, [205], [326]. Thompson discusses the interaction of pre-reformation statutes and the common law, and the later discussion of the idea that statutes may exercise gravitational pull on the common law in other jurisdictions. While the way in which statutes influence ‘the rest of the common law’ has changed since they were much more clearly a part of its evolution before the Reformation, it is still somewhat legalistic to rely on separation of powers doctrine in political theory to assert that statutes are separate and distinct from the common law. One example of the way in which statutes still interact with and influence other elements of the greater common law is the comparatively recent idea that statutes exercise gravitational pull on the common law in other jurisdictions as was suggested by Mason P (as he then was) in *Akins v Abigroup Ltd*. The ‘gravitational pull’, which statutes exert upon the common law in other jurisdictions, was also discussed by Beazley JA and James J in *R v Young*.

Heydon J quoted Hale and Simpson in support of his view that the common law included the ideas and customary practices of the legal profession.¹¹¹ From Blackstone he noted ‘that the “chief corner stone” of the laws of England was “general immemorial custom, or common law, from time to time declared in the decisions of the courts of justice”’.¹¹² But further, that ‘a key mechanism for the transmission of traditional ideas and the encouragement of orthodoxy was the treatise, written by practitioners for practitioners’.¹¹³ The ‘caste of expert lawyers’¹¹⁴ and the body of written work that constituted the common law thus included not only the reports of decided cases but also the authoritative legal treatises, which ‘reveal[ed] a general professional consensus’.¹¹⁵ These sources, coupled with decided legal cases from around the common law world, all confirmed that there was a spousal privilege. In particular he noted from Simpson that the common law is no less and is possibly more ‘well settled’ when there is such consensus that there is no need for cases in argument.¹¹⁶ He concluded that in the

¹¹¹ *Stoddart* [2011] HCA 47, [133].

¹¹² *Ibid* [134].

¹¹³ *Ibid*.

¹¹⁴ *Ibid* [133]–[134].

¹¹⁵ *Ibid* [134]–[136].

¹¹⁶ *Ibid* [151], quoting Alfred W B Simpson, ‘The Common Law and Legal Theory’ in Alfred W B Simpson (ed), *Oxford Essays in Jurisprudence, Second Series* (Oxford: Clarendon Press, 1973) 77, 98–9; see also Alfred W B Simpson, ‘Legal Education and Legal History’ (1991) 11(1) *Oxford Journal of Legal Studies* 106, 109, citing *Hadley v Baxendale* (1854) 9 Ex 341. Heydon J might also have quoted Simpson’s 1991 article where he wrote of the fanciful notion that:

[T]he common law system and the rules and principles are in fact nothing more than the products of an inexorable Darwinian movement towards economic efficiency, which for some reason lay dormant for six hundred years or so, but suddenly burst forth out of the 19th century to produce the tort of negligence and the rule in *Hadley v Baxendale* and other marvels.

early 19th century ‘there was no need for authority about spousal privilege’¹¹⁷ because it was simply accepted.

Whether spousal privilege statutes in other Anglo-American common law jurisdictions were enacted to confirm, establish or clarify the existing law, they exist as part of the greater common law context and confirm Heydon J’s clear view that it was wrong to say that spousal privilege was not recognised at common law in Australia before 2002, though the *Stoddart* decision undoubtedly changes that position. But despite this question about how we define the common law, Justice Heydon was correct to disagree with Lord Diplock:

that there ‘is no trace [of spousal privilege] in the decided cases’ and ‘no textbook old or modern’ suggesting that the privilege against self-incrimination applied beyond the incrimination of the person claiming it.¹¹⁸

Heydon J’s materials demonstrate that the common law would not coerce a spouse to testify in Louise Stoddart’s position and also confirm that self-incrimination privilege was always extended to the spouse, save, beginning in the *All Saints* case, when the proposed witness spouse voluntarily chose to give the relevant evidence.

He continues that the one system view of legal history has been outgrown so that:

[T]here is now a generous sympathy with the idea that you cannot really understand law without attending to both its history, and to the way in which the operation of the various legal systems and the professional culture of lawyers, interacts with what may ... be called society generally. At a theoretical level, what is involved is the denial of the notion that law is in a sense autonomous, [and] that its development can be understood ... by an analysis of legal reasoning alone.

¹¹⁷ Ibid [151].

¹¹⁸ Ibid [127], quoting *Rio Tinto Zinc Corporation v Westinghouse Electric Corporation* [1978] AC 547, 637–8 (Diplock LJ).

The view of Crennan, Kiefel and Bell JJ expressed in *Stoddart* is simply that common law principles may only be said to exist if they have been established by a line of cases.

VI WHAT THEN OF SPOUSAL PRIVILEGE IN AUSTRALIA?

Some colleagues have informally suggested to the writer that the underlying reason for this decision was that the underlying law needed to be modernised; that it was no longer appropriate that a common law rule which belonged in and before the 19th century when women were subservient to men, should apply or have substantive rule of law status in the 21st century. But that view does not explain the High Court decision in *Stoddart*.

The first reason why that cannot be correct is that no member of the High Court anywhere said anything like that. The second reason that belief must be incorrect is because the High Court did not consider that it had to even consider whether Parliament intended to abrogate an existing privilege by clear and unambiguous words or necessary implication.¹¹⁹ It is thus unhelpfully speculative to suggest that there were subliminal and unstated reasons behind what was actually said

¹¹⁹ See, eg, *Stoddart* [2011] HCA 47. In their judgment, Crennan, Kiefel and Bell JJ noted that the ‘principle of legality’ claim would ‘require clear and definite statutory language to affect or negate’ the claim to a spousal immunity or privilege: at [180]–[182]. But they concluded that issue did not arise for consideration since they could find no evidence of such immunity or privilege in the historical record: at [182], [191]. French CJ and Gummow J did not address the issue because they did not consider the historical record substantiated the common law claim. Since Heydon J found that spousal privilege was established common law, it followed that it could not ‘be removed “save by a clear, definite and positive enactment”’ and that as there was no ‘necessary implication’ that it had been abolished, it stood and Louise Stoddart was entitled to refuse to testify: at [165]–[169].

— and it is unlikely in such a strong dissent, that Heydon J would have omitted reference to such reasons if they formed part of the High Court’s deliberative process even if they were not expressed in either of the majority judgments.

Therefore, in the wake of the High Court decision in *Stoddart*, the only way that a spousal incrimination privilege could arise in the future in Australia, is if such privilege were created anew by a future legislature. To date, no Australian legislature has taken any step to create a new spousal privilege so it would seem that the High Court’s expression of the common law with regard to spousal privilege has satisfied the Australian State and Federal parliaments. That is, despite the surprise initially expressed in some quarters,¹²⁰ a spousal incrimination privilege is a rule of law that we can do without.

VII CONCLUSION

Perhaps the time for a spousal privilege has passed. No one in modern Australian society thinks of spouses as ‘one flesh’ anymore, and that justification for any privilege surely grates in contemporary consciousness. But there remains a view that says there is still a place for common law privileges in our legal system. That view holds, for example, that legal professional privilege and spousal privilege are justified by the public interest in the administration of justice on the one hand, and the public interest in preserving the marital relationship on the other.

Of greater concern is the High Court’s inaccurate treatment of the historical materials which were at the heart of the *Stoddart* decision. Does it matter that the majority of the High Court misinterpreted those materials as this article maintains? Or are 200 year old legal

¹²⁰ ABC Radio National, above n 4.

materials wholly irrelevant to modern jurisprudence? Part of the justification in writing this article, is to draw the attention of barristers and judges to the discipline that is legal history — and the need to ensure that history be given a higher profile in legal syllabi in the future. The legal history errors made in the majority judgments in the *Stoddart* case, demonstrate that a failure to understand legal history can prejudice the accuracy and therefore the quality of our jurisprudence. Why legal history is not well understood, including whether that is because legal history is no longer a compulsory subject in the curricula of most law schools, is a question beyond the scope of this paper.¹²¹ However, Justice Holmes has said that it is revolting to have no other reason for deciding something than that it was so laid down in an earlier time.¹²² But to simply agree with Holmes on that point is to miss his essential message. For as Heydon J pointed out with a more complete quotation from Holmes than appeared in the judgment of Crennan, Kiefel and Bell JJ in *Stoddart*, the fullness of Holmes' message is that the study of history, and legal history in particular, is an essential prerequisite to a truly informed study and understanding of the law. Holmes said:

History must be a part of the study of [the law], because without it we cannot know the precise scope of rules which it is our business to know ... it is part of the rational study, because it is the first step towards an enlightened skepticism, that is, towards a deliberate reconsideration of the worth of those rules ... It is revolting to have no better reason for a rule of law than

¹²¹ See generally Justice Michael Kirby, 'Is Legal History Ancient History?' (Speech delivered at the Geoffrey Bolton Lecture, Government House Perth Western Australia, 20 October 2008); Helen Irving, 'Constitutional Interpretation and the Discipline of History' (Research Paper No 13/41, Sydney Law School, June 2013) <<http://ssrn.com/abstract=2280210>>.

¹²² Oliver W Holmes Jr, *The Path of Law* (Applewood Books, first published 1897, 1996 ed) 21.

that it was so laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists because of blind imitation of the past.¹²³

If Holmes' counsel had been heeded in *Stoddart*, more holistic notice would have been taken of the fact that spouses were never allowed to testify against one another until some exceptions were made in the early 19th century. The exception created by the court in the *All Saints* case was a deliberate act of precedent creation by the three judges involved. They said that Ann Willis did not have to testify if she did not want to, even if she changed her mind at the last minute in the witness box. That common law rule should have allowed Louise Stoddart to refuse to testify in her 2010 case. The majority judges in her High Court Case did not understand the common law rule because they applied anachronistic categories from modern evidence law when they tried to interpret it. Ellenborough CJ, Bayley and Abbott JJ would not have forced Louise Stoddart to testify against her husband. If the High Court justices in *Stoddart* did not believe the common law rule in *All Saints* should be applied in Louise Stoddart's case they should have reviewed the rationales behind that decision and struck them down one by one. But that might have been a problem, since that might look more like judicial legislation than simply [mis]interpreting some old precedents. The decision on whether to strike down the spousal privilege under the *Australian Crime Commission Act 2002* (Cth) should have been left to the Federal Parliament.

¹²³ Ibid 20–1.

Book Reviews

Review of: *Tax Avoidance in Australia*

Donovan Castelyn*

Title & Edition:	<i>Tax Avoidance in Australia</i>
Author:	G T Pagone
Publisher:	The Federation Press, 2010
Format:	Paperback/214 pages
ISBN:	9781862877948
Retail Price:	\$125.00 (including GST)

1 Authors' Background

The Honourable G T (Tony) Pagone is a Judge on the Federal Court of Australia and a Professorial Fellow of the Melbourne Law School. Prior to this appointment, he was a judge of the trial division and the judge in charge of the Commercial Court of the Supreme Court of Victoria. Justice Pagone is renowned as an authority on the tax administration and publishes extensively on this subject and more broadly on tax avoidance and uncertainty. Justice Pagone is also an active academic, lecturing various post-graduate courses at the Melbourne Law School and the Law Faculty at Monash University.

2 Introduction

In his publication, 'Part IVA: The General Anti-Avoidance Provisions in Australian Taxation Law', Justice Pagone stated that:

General anti-avoidance provisions occupy a very special role in tax laws because their role is to underpin the effectiveness of

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the primary operative provisions when those primary operative provisions fail to achieve their purpose.¹

His recent work and subject of this review, *Tax Avoidance in Australia*, provides a comprehensive analyses of the complexities engendered by the main general anti-avoidance provisions in Australia for income tax and GST. A practical explanation for the application of these provisions is placed in the context of the perceived deficiencies with previous provisions and the somewhat nebulous distinction between ‘tax avoidance’, ‘tax evasion’ and permissible ‘tax mitigation’. The book identifies the elements necessary for the application of the anti-avoidance provisions and explains how the provisions have been interpreted and applied by the Courts and by the Commissioner. The book concludes by revisiting the obligations upon practitioners when advising upon or acting for taxpayers and draws the reader’s attention to the potential liability they may face in the provision of such advice.

3 Chapter Summaries

Chapters one, two and five educate the reader as to the fluidity and debate that surround the origins and constructions of Australia’s general anti-avoidance provisions.

Chapter One, entitled *Tax Avoidance* is instrumental in establishing the construction and design of the general anti-avoidance regime. The central thesis of this chapter is encapsulated in the opening two paragraphs of the book:

Laws designed to prevent tax avoidance presume a mischief capable of sufficiently precise identification, and a rule sufficiently adapted, to deal with the mischief. In practice, however, it is difficult to

¹ (2003) 27 *Melbourne University Law Review* 770, 771.

identify the mischief with adequate precision or to formulate adequately the rules to deal with mischief.²

The author mandates that the concept of ‘tax avoidance’ must necessarily be distinguished from other concepts like ‘tax evasion’ and ‘tax mitigation’.³ However, the author acknowledges, citing the authority of *Inland Revenue Commissioner v Willoughby*,⁴ that such distinctions may be easier to state in theory than apply in practice.⁵ Summarily, the author identifies that the ultimate difficulty lies in crafting, interpreting and applying rules which reliably and predictably identify, and strike at, impermissible ‘avoidance’.⁶

The difficulty to which the author alludes is explained within this chapter by way of reference to the ‘uneasy’ relationship between the need and operation of the anti-avoidance provisions and proper interpretation and application of the provisions to be avoided.⁷ The author affirms that in interpreting taxing provisions, consistent with all statute, the explicit requirement is to effect the intention of the Parliament.⁸ Furthermore, the author notes that the intent and effect of the general anti-avoidance provisions is to tax circumstances which were not subject to tax either on a literal or purposive interpretation and application of the primary provisions.⁹ By way of example the author applies these principles of interpretation through reference to s 177F,¹⁰ citing the determinative power vested within

² G T Pagone, *Tax Avoidance in Australia* (The Federation Press, 2010) 1.

³ Ibid 3.

⁴ [1997] 1 WLR 1071.

⁵ Above n 2.

⁶ Ibid.

⁷ Ibid.

⁸ Ibid 17; *Acts Interpretation Act 1901* (Cth) s 15AA.

⁹ Ibid 18.

¹⁰ *Income Tax Assessment Act 1936* (Cth).

the Commissioner to deem certain amounts assessable or deny certain deductions.

Chapter two, entitled *Statutory General Anti-Avoidance Rule in Australia* investigates the substantial judicial authority exposing the numerous limitations entrenched within the former s 260.¹¹ The author reasons that:

The broad thrust of the policy enacted in Part IVA was to incorporate into tax law a general proscription against arrangements entered into for the sole or dominate purpose of obtaining a reduction in the tax that would otherwise be payable.¹²

Chapter five, entitled *Purpose of Tax Avoidance* compliments the above proposition, contending that the lynchpin to the operation of pt IVA is the conclusion required by s 177D that the dominant purpose of a person who entered into or carried out the ‘scheme’ was to enable a taxpayer to obtain a ‘tax benefit’.¹³

In both chapter two and five, emphasis is placed on the Privy Council’s judgment in *Newton v Federal Commissioner of Taxation*.¹⁴ The ‘prediction test’¹⁵ to which their Lordships referred is identified by the author as the nexus between s 260 and the current

¹¹ *Income Tax Assessment Act 1936* (Cth); G T Pagone, *Tax Avoidance in Australia* (The Federation Press, 2010) 24.

¹² G T Pagone, *Tax Avoidance in Australia* (The Federation Press, 2010) 22–3; Explanatory Memorandum, Income Tax Laws Amendment Bill (No 2) 1981 (Cth), 9551–2.

¹³ *Ibid* 72.

¹⁴ (1958) 98 CLR 1 (‘*Newton*’).

¹⁵ *Ibid* 8–9 (Viscount Simonds, Lord Tucker, Lord Keith of Avonholm, Lord Somervell of Harrow and Lord Denning).

pt IVA.¹⁶ In light of *Newton*, chapter two sign posts the eventual demise of s 260 by reasoning through the categories of limitations exposed by subsequent judicial decisions.¹⁷ In ch five, the author describes the test enunciated in s 177D as effectuating the position to counter tax avoidance akin to the decision in *Newton*.¹⁸

Chapter five practically outlines the operation of s 177D. Exploring the construction of the provision, the author reasons that, to conclude whether the dominate purpose of a taxpayers engagement in a scheme was for the purposes of attracting a tax benefit, it is necessary to focus on the objective facts and circumstances by which the tax benefit was obtained.¹⁹ In doing so, consideration as to how the scheme was entered into or carried out is paramount to determine whether the dominate purpose of that engagement was for avoidance.²⁰

Chapter three and four entitled *Scheme* and *Tax Benefit* respectively, draw the reader's contemplation to the challenges faced by the judiciary in discerning whether tax avoidance has arisen. Chapter eight, *Cancelling Tax Benefits* complements these chapters by exploring the various discretions and action available to the Commissioner.

¹⁶ G T Pagone, *Tax Avoidance in Australia* (The Federation Press, 2010) 26.

¹⁷ Ibid 23–36; Explanatory Memorandum, Income Tax Laws Amendment Bill (No 2) 1981 (Cth), 9552.

¹⁸ Ibid 72.

¹⁹ Ibid 72–8.

²⁰ Ibid 78–93; *Federal Commissioner of Taxation v Spotless Services Ltd* (1996) 186 CLR 404; *Federal Commissioner of Taxation v Hart* (2004) 217 CLR 216; *Federal Commissioner of Taxation v Consolidated Press Holdings Ltd* (2001) 207 CLR 235.

Chapter three evaluates the definition, function and identification of a scheme, necessary for the application of pt IVA.²¹ The author notes that the terms used to define ‘scheme’ within s 177A are widely construed.²² The case of *Federal Commissioner of Taxation v Peabody*²³ is central to the author’s discussion of the conflicting position that may exist between the Commissioner’s discretionary authority to identify a scheme and that taken by the Courts.²⁴ Summarily, the position posited by the author, by way of reference to relevant judicial authority is thus,

The correct identification of a scheme serves the critical function of determining whether there is the required connection between entering into and carrying out the scheme and the tax benefit.²⁵

Context is provided in ch four where the author discusses the concept of obtaining a tax benefit.²⁶ Whether a scheme engenders a ‘tax benefit’ is discussed with relation to s 177C. The terms, ‘expressly provided for’²⁷ and ‘attributable’²⁸ are discussed in great depth as the chapter progresses. The following statement lends itself, by way of summary to the preface of this chapter:

The basic integers which went to make up the basis of tax were those contemplated and identified as tax benefits for the potential operation of the anti-avoidance provision. The provisions now also contemplate and identify as tax benefits

²¹ Ibid 38.

²² Ibid 40; *Income Tax Assessment Act 1936* (Cth).

²³ (1994) 181 CLR 359.

²⁴ *Income Tax Assessment Act 1936* (Cth) s 177F(1); G T Pagone, *Tax Avoidance in Australia* (The Federation Press, 2010) 42.

²⁵ Ibid 40.

²⁶ Ibid 47.

²⁷ Ibid 64–5.

²⁸ Ibid 66.

the incurrence of a capital loss²⁹ and the allowance of a foreign income tax offset.³⁰

Chapter six, entitled *Dividend Stripping* along with ch seven, entitled *Franking Credits and Dividend Streaming* discuss the operation and construction of s 177E and s 177EA. As extensions of pt IVA, their operation is important.³¹ The author expresses the nature of dividend stripping by way of reference to the Privy Council's decision in *Newton*.³² Chapter six attends to several situations in which s 177E may effect operation.³³ Most interestingly in relation to disposal of property.³⁴ Chapter seven recollects numerous circumstances where transactions may enliven the operation of s 177EA.³⁵ Most notably, where the dominant purpose of an engagement allows the taxpayer to obtain an imputation benefit.³⁶

The first eight chapters of the book focus mainly on the operation of pt IVA to transactions with income tax consequences. Chapter nine, entitled *Goods and Services Tax (GST)* applies a similar methodology, with discussion centred around the operation of div 165 of *A New Tax System (Goods and Services Tax) Act 1999* (Cth).

²⁹ *Income Tax Assessment Act 1936* (Cth) s 177C(1)(ba).

³⁰ G T Pagone, *Tax Avoidance in Australia* (The Federation Press, 2010) 48; *Income Tax Assessment Act 1936* (Cth) s 177C(1)(bb).

³¹ *Ibid* [94], [111]; Explanatory Memorandum, Income Tax Laws Amendment Bill (No 2) 1981 (Cth), 9554.

³² *Ibid* 100; (1957) 96 CLR 577, 657.

³³ *Ibid* 103–10.

³⁴ *Ibid* 103.

³⁵ *Ibid* 111–23.

³⁶ *Ibid* 117–20.

Division 165 is modelled on pt IVA of the *ITAA36*.³⁷ In essence, the mischief div 165 seeks to avoid is akin to that of pt IVA.³⁸ Division 165, as expounded upon by the author, is expressly aimed at deterring ‘artificial or controversial schemes’³⁹ from generating a GST benefit.⁴⁰ The chapter serves mainly comparative with respect to the operation of pt IVA.

Chapter 10, entitled, *Advising on Tax Avoidance* is a welcomed tool in any practitioners arsenal. The chapter prescribes many of the statutory duties incumbent on advisors when advising on matters of taxation.⁴¹ Instructively, the chapter comments on the risks and liability a practitioner may face by way of penalty or sanction should they advise in a manner that may trigger the operation of pt IVA (or other general anti-avoidance rules).⁴²

The chapter also provides information where taxpayers and advisors alike may seek ‘some measure of comfort and certainty’⁴³ for advice given or relied upon by way of reference to tax rulings and previous decisions of the General Anti-Avoidance Rules Panel.⁴⁴

4 Analysis And Conclusion

On 29 June 2013, the pt IVA amendments in the *Tax Laws Amendment (Countering Tax Avoidance and Multinational Profit*

³⁷ Explanatory Memorandum, A New Tax System (Goods and Services Tax) Bill 1998 (Cth), para 6.313.

³⁸ G T Pagone, *Tax Avoidance in Australia* (The Federation Press, 2010) 141.

³⁹ *Ibid* 142–3.

⁴⁰ *Ibid*.

⁴¹ *Ibid* 164.

⁴² *Ibid* 169–75.

⁴³ *Ibid* 178.

⁴⁴ *Ibid* 179.

Shifting) Bill 2013 (Bill) were granted royal assent and have now since passed into law.

The amendments predominantly centred on changes to the tax benefit test under pt IVA. The amendments were intended to apply retrospectively to schemes entered into or carried out on or after 16 November 2012. The Act introduced new sub-ss 177CB and 177D to the *Income Tax Assessment Act* 1936 (Cth) and in doing so, repealed the old sub-ss 177CA and 177D.

Importantly, the wording of the ‘tax benefit test’ under s 177C was preserved. Similarly, the ambit of s 177D with respect to the ‘sole or dominant purpose test’ remained consistent.

Whilst this work does not directly address the amended regime. The impact of such amendments do not limit the utility of this book as an aid to practitioners.

The words of the former Commissioner of Taxation, Michael D’Ascenzo (in reference to *Tax Avoidance in Australia*) echo that point, stating;

Exploring and illuminating the complexities of Australia’s anti avoidance provisions in a lucid and meticulous work of scholarship is no small feat, and I know your book will quickly become an indispensable reference on the subject. Your book helps us narrow any gap in the views of reasonable people as to the application of these provisions.

There are few words to be offered in addition to the above sentiment. *Tax Avoidance in Australia* masterful explores the operation and construction of Australian anti-avoidance provisions. The work is skilfully drafted so as to captivate even those most adverse to the subject of taxation. A welcomed addition to the library of any

practitioner or scholar attempting to navigate their way through the application of Australian anti-avoidance provisions.

Review of: *Philosophical Explorations of Justice and Taxation*

Žemyna Kuliukas *

Title:	<i>Philosophical Explorations of Justice and Taxation</i>
Editors:	Helmut P Gaisbauer, Gottfried Schweiger and Clemens Sedmak
Publisher:	Springer, 2015
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1 Introduction

Philosophical Explorations of Justice and Taxation is a topical and important book about how we should look at taxation through the lens of global justice and morality. In a time where an enormous income gap exists between the world's richest and poorest,¹ where tax avoidance is common² and where poverty is rife,³ it is vital to look at the future of taxation on a global scale and discuss the

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¹ Evan Hillebrand, *Poverty, Growth and Inequality Over the Next 50 Years* (26 June 2009) Food and Agriculture Organization of the United Nations 8 <www.fao.org/documents/en>.

² United Nations Economic Commission of Africa, 'Illicit Financial Flow: Report of the High Level Panel on Illicit Financial Flows from Africa' (Report, UNECA, 2015) 21, 34.

³ Hillebrand, above n 1, 2.

potential solutions to these problems. This book undertakes this in a well-structured and convincing manner.

The book is divided into three parts: one dedicated to an overview of the idea of tax justice, the next to various types of taxation and their benefits, and the final part to international and global taxation, looking particularly at possible strategies to overcome global injustice. Each chapter is written about a particular topic, with a brief abstract to introduce the reader to the arguments that will be made. The layout of the book allows the reader to read from start to finish or select a particular topic, as each chapter can be read independently.

2 About the Editors

Helmut P Gaisbauer has been a senior scientist at the Centre for Ethics and Poverty Research at the University of Salzburg for over four years.⁴ He previously held the position of assistant professor at the University of Salzburg, teaching in the area of Political Theory and History of Ideas, complimentary to his thesis on European Integration.⁵

Gottfried Schweiger has been a senior scientist at the Centre for Ethics and Poverty Research at the University of Salzburg for over two years.⁶ He has completed a thesis on the dialectical philosophy

⁴ *Helmut P Gaisbauer* University of Salzburg <<http://www.uni-salzburg.at>>.

⁵ *Ibid.*

⁶ *Gottfried Schweiger* University of Salzburg <<http://www.uni-salzburg.at>>.

of nature.⁷ Schweiger is also a research fellow at the ifz, the international research centre for social and ethical issues.⁸

Clemens Sedmak has been FD Maurice Professor for Moral Theology and Social Theology at Kings College in London for 10 years.⁹ He has completed doctorates in philosophy, theology and social theory.¹⁰ He was also a research fellow in Chicago for two years and took up the Chair for Epistemology and Philosophy of Religion at the University of Salzburg for four years.¹¹

3 Main Points

Chapter 1, written by Helmut P Gaisbauer, Gottfried Schweiger and Clemens Sedmak, explains the importance of taxation and outlines its main issues. The chapter identifies various problems that are explored more thoroughly throughout the book, including inequality in wealth, the financial crisis, tax evasion and the obligation of wealthier countries to help those in poverty.¹² The chapter then explains key concepts including the state,¹³ citizenship,¹⁴ property,¹⁵ justice¹⁶ and trust.¹⁷ Summarily, the chapter provides an overview of

⁷ Ibid.

⁸ Ibid.

⁹ *Professor Clemens Sedmak* King's College London
<<http://www.kcl.ac.uk>>.

¹⁰ Ibid.

¹¹ Ibid.

¹² Helmut P Gaisbauer et al, 'Outlining the Field of Tax Justice' in Helmut P Gaisbauer et al (eds), *Philosophical Explorations of Justice and Taxation* (Springer, 2015) 1, 1–3.

¹³ Ibid 5.

¹⁴ Ibid 6.

¹⁵ Ibid.

¹⁶ Ibid 7.

¹⁷ Ibid 7–8.

the following chapters, outlining the purpose and points of each one. It offers a concise yet thorough overview of tax justice and illustrates the book's importance.

A Part I: Grounding Taxation

Chapter 2, written by Clemens Sedmak and Helmut P Gaisbauer, explores the relationship between formal frameworks and informal networks, and looks at the important role of trust. The chapter evaluates the concept of 'self-made' successful business individuals and their reliance on both formal frameworks and informal networks, demonstrating the importance of trust in both.¹⁸ It then discusses the need for trust in the area of tax, looking at the culture of suspicion towards tax and possible solutions to this problem.

Chapter 3, written by Gottfried Schweiger, evaluates taxation and its role in the fight against poverty. The chapter discusses the issue of poverty in detail, exploring the notion that members of society should have the right to central capabilities and functionings that provide them with the same opportunities as wealthier people.¹⁹ It then discusses taxation as a solution to poverty, asserting that states, as opposed to charity organisations, have an obligation to fight poverty, and argues for progressive taxation as the optimal system to support people with lower income.²⁰

¹⁸ Clemens Sedmak and Helmut P Gaisbauer, 'Fiscal Justice and Justified Trust' in Helmut P Gaisbauer et al (eds), *Philosophical Explorations of Justice and Taxation* (Springer, 2015) 17, 19–23.

¹⁹ Gottfried Schweiger, 'Taxation and the Duty to Alleviate Poverty' in Helmut P Gaisbauer et al (eds), *Philosophical Explorations of Justice and Taxation* (Springer, 2015) 33, 35–8.

²⁰ Ibid 40.

Chapter 4, written by Dietmar von der Pfordten, considers taxation as a justifiable policy in relation to justice and equality. The chapter is divided into four parts. The first part explores ‘formal relations of justice’, stating the unique feature of justice to be its reliance on relations with people.²¹ It then discusses the various relations of justice established by philosophers such as Aristotle and Plato.²² The second part considers material principles of justice, justifying collective decision-making.²³ Thirdly, the chapter discusses the consequences for the justice of taxation, exploring various taxation principles and supporting the equivalence principle with a progressive tax rate.²⁴ Conclusively, the chapter expands on the relations of justice discussed in the first part to look at global communities.

Chapter 5, written by Bruno Verbeek, argues against the ‘Warren argument’ for taxing the extremely rich. He looks at an argument made by Elizabeth Warren, senator for Massachusetts, in which she argues that the extremely rich benefit disproportionately from the state, and should therefore be taxed extremely.²⁵ Verbeek deconstructs this argument into six parts and reveals their weaknesses,²⁶ and offers an alternative argument concurrent with the ability-to-pay principle.²⁷

²¹ Dietmar von der Pfordten, ‘Justice, Equality and Taxation’ in Helmut P Gaisbauer et al (eds), *Philosophical Explorations of Justice and Taxation* (Springer, 2015) 47, 48.

²² Ibid.

²³ Ibid 55.

²⁴ Ibid 55–61.

²⁵ Elizabeth Warren, *Elizabeth Warren’s ‘You Didn’t Build That Speech’ as made famous by Obama* (2 September 2012) YouTube <<https://www.youtube.com/watch?v=i-P-CoSNYalI>>.

²⁶ Bruno Verbeek, “‘You did not Build that Road’ — Reciprocity, Benefits, Opportunities and Taxing the Extremely Rich’ in Helmut P

Chapter 6, written by Benjamin Alarie, discusses the issue of tax avoidance, focusing on large American corporations. Alarie introduces the chapter by ruling out the possibilities of raising or lowering tax rates as potential solutions, instead suggesting that international cooperation and base broadening techniques are the best options.²⁸ He refers to arguments made by Raskolnikov,²⁹ arguing against a ‘one size fits all’ approach and instead suggesting taxpayers identify themselves as ‘gamers’ or ‘non-gamers’: those who actively avoid tax or those who generally comply.³⁰ He also looks at asymmetries between taxpayers and government in terms of concentration of stakes, information and resources devoted to avoidance or enforcement.

B Part II: Justifying Different Types of Taxation

Chapter 7, written by Xavier Landes, analyses arguments for consumption tax. Landes starts by stating that he will discuss the question of what taxation method is most appropriate by looking at

Gaisbauer et al (eds), *Philosophical Explorations of Justice and Taxation* (Springer, 2015) 67, 70–6.

²⁷ Ibid 77–80.

²⁸ Benjamin Alarie, ‘The Challenge of Tax Avoidance for Social Justice in Taxation’ in Helmut P Gaisbauer et al (eds), *Philosophical Explorations of Justice and Taxation* (Springer, 2015) 83, 86.

²⁹ Alex Raskolnikov, specifically Alex Raskolnikov, ‘Crime and punishment in taxation: Deceit, deterrence, and the self-adjusting penalty’ (2006) 106 *Columbia Law Review* 569; Alex Raskolnikov, ‘Revealing choices: Using taxpayer choice to target enforcement’ (2009) 109 *Columbia Law Review* 689.

³⁰ Ibid 87.

Robert Frank's proposal for an incremental tax on consumption.³¹ He then looks at the justification of this form of taxation based on a few ideas, including the idea that individuals are influenced by social standards in regards to the amount they should spend and the idea that people generally consume too much.³² He then analyses each justification of consumption tax that Frank claims; efficiency, paternalism and equality. Landes then evaluates each of these areas objectively and discusses each area's strengths and weaknesses.

Chapter 8, written by Daniel Halliday, also discusses consumption tax. Halliday introduces consumption tax as generally being a deterrent tax to discourage people from purchasing harmful products such as tobacco and alcohol.³³ He then identifies the regressive nature of consumption taxes and analyses the reasons for regressive tax being considered unfair,³⁴ suggesting that, as progressive tax is generally considered to be fair, regressive tax is often automatically considered the opposite.³⁵ Halliday challenges this view and states that, especially when considering the paternal justification for consumption tax, the regressive nature may in fact be preferable.³⁶ He then clarifies that the main objection to consumption tax may not necessarily be its regressive nature, but the idea that the most vulnerable people, those with less income, are being imposed a larger burden than higher income individuals.³⁷ He then responds to

³¹ Xavier Landes, 'Why Taxing Consumption?' in Helmut P Gaisbauer et al (eds), *Philosophical Explorations of Justice and Taxation* (Springer, 2015) 101, 102.

³² Ibid 103–5.

³³ Daniel Halliday, 'Egalitarianism and Consumption Tax' in Helmut P Gaisbauer et al (eds), *Philosophical Explorations of Justice and Taxation* (Springer, 2015) 119, 119.

³⁴ Ibid 120–1.

³⁵ Ibid 121.

³⁶ Ibid 124–5.

³⁷ Ibid 125–6.

this objection by discussing the benefits of licenses as a way of discouraging harmful products without incurring large costs, as well as hypothecation as a way of empowering taxpayers and providing more transparency.³⁸

Chapter 9, written by Douglas Bamford, argues for calculating tax on an hourly average basis.³⁹ Bamford introduces the chapter by discussing two ideas that often clash against each other; redistribution from the economically advantaged, and the desire for an efficient economy.⁴⁰ He then discusses multiple egalitarian approaches and the reasons why their principles align with a progressive and efficient tax system.⁴¹ He then introduces the concept of hourly averaging, a system that calculates tax-rates on a lifetime basis based on 'hour credits'.⁴² Bamford explores the various advantages to the system including the smoothing of net income, a high incentive for people to work and a high tax rate for the wealthy.⁴³

Chapter 10, written by Rajiv Prabhakar, explores the opposition of the public towards inheritance taxes. Prabhakar starts by discussing the unpopularity of income taxes, referring to various surveys concluding that the majority of American respondents would have the tax repealed.⁴⁴ Prabhakar states that this is surprising considering

³⁸ Ibid 126–31.

³⁹ Douglas Bamford, 'Ethical Taxation: Progressivity, Efficiency and Hourly Averaging' in Helmut P Gaisbauer et al (eds), *Philosophical Explorations of Justice and Taxation* (Springer, 2015) 135.

⁴⁰ Ibid 135–6.

⁴¹ Ibid 137–41.

⁴² Ibid 141–3.

⁴³ Ibid 145–7.

⁴⁴ Rajiv Prabhakar, 'Why Do the Public Oppose Inheritance Taxes?' in Helmut P Gaisbauer et al (eds), *Philosophical Explorations of Justice and Taxation* (Springer, 2015) 151, 152.

the large amount of revenue the tax collects, as well as the fact that the tax only affects a wealthy minority.⁴⁵ He then goes on to state the importance of analysing public opinion, especially in the area of tax, given the significant relationship between government and taxpayers.⁴⁶ He then discusses the various potential reasons for public opposition to inheritance taxes, including rational choice theory, behavioural economics and a lack of trust for the government's use of tax money.⁴⁷ Prabhakar suggests that the public's opposition towards tax isn't necessarily limited to inheritance tax, and that a solution might be addressing the disconnection between tax and its benefits as well as illustrating to the public how taxes fit alongside one another.⁴⁸

Chapter 11, written by Kirk J Stark, discusses the puzzling inconsistency between the American public's attitudes towards income inequality and distributive tax. Stark cites various surveys to conclude that most American respondents support the concepts that everyone should have equal opportunities, economic inequality has gotten worse, and wealthier people should have a larger tax burden than poorer people.⁴⁹ Considering this data, he discusses the odd nature of American voters in their support of the infamous 2001 tax cuts introduced by the George W Bush administration, and questions why citizens would vote against their own self-interest.⁵⁰ He goes on to explore possible answers, including the belief that regressive tax systems may eventually benefit lower income people; the idea that

⁴⁵ Ibid.

⁴⁶ Ibid.

⁴⁷ Ibid 153–8.

⁴⁸ Ibid 158–62.

⁴⁹ Kirk J Stark, 'The Role of Expressive Versus Instrumental Preferences in US Attitudes Toward Taxation and Redistribution' in Helmut P Gaisbauer et al (eds), *Philosophical Explorations of Justice and Taxation* (Springer, 2015) 167, 170–4.

⁵⁰ Ibid 173.

small cuts to lower income people may be valuable enough to overcome the downsides of a regressive system; and the possibility that voters may simply be confused or misguided.⁵¹ Stark then considers that voters acting instrumentally may not be appropriate, and explores the alternative, that people are voting expressively. He discusses this idea in detail, giving various examples as to why voting may be an expressive gesture.⁵²

C Part III: International and Global Taxation

Chapter 12, written by Gillian Brock, discusses the argument that first world countries have a duty to assist areas that are afflicted by poverty. Brock starts by establishing the main needs that everyone should have satisfied: basic needs, protection for basic liberties, fair terms of cooperation, and background conditions.⁵³ She then says that, despite global justice generally being discussed as a whole, the role of states are very important.⁵⁴ This leads to a discussion about the challenges third-world countries have in terms of taxation. These include problems such as weak tax administration, workers being employed informally, low tax morale, and the lowering of tax rates in order to be seen as a 'tax haven'.⁵⁵ She also states that in many countries, the money made from trade would be enough to support citizens if the revenue was actually dealt with effectively.⁵⁶ She then tackles these challenging issues by suggesting solutions such as dealing with third world countries more transparently, and sharing

⁵¹ Ibid 174–8.

⁵² Ibid 178–80.

⁵³ Gillian Brock, 'What Burden Should Fiscal Policy Bear in Fighting Global Injustice?' in Helmut P Gaisbauer et al (eds), *Philosophical Explorations of Justice and Taxation* (Springer, 2015) 185, 186.

⁵⁴ Ibid 187.

⁵⁵ Ibid 189–90.

⁵⁶ Ibid 190.

information in regards to technological innovations in tax collection and monitoring.⁵⁷ The latter half of the chapter discusses tax solutions dedicated to raising revenue in order to finance medicines for ill citizens of third world countries. The two solutions she focuses on are the air-ticket tax, a tax which is currently in place and she suggests would benefit from expansion, and a currency transaction tax.⁵⁸

Chapter 13, written by Timothy Mawe and Vittorio Bufacchi, proposes the Global Luxuries Tax (GLT) as a potential solution to global poverty. The chapter starts by stating that poverty is not a natural phenomenon, it is instead man-made and so the solution too must be implemented by human strategies.⁵⁹ It then goes on to discuss various proposals that have been made in regards to assisting poverty-stricken countries, including Pogge's Global Resources Dividend.⁶⁰ The 'unintended consequences objection' is then discussed, explaining that most solutions will have consequences that may reduce their effectiveness.⁶¹ The basis behind the GLT is then introduced; the idea that the burden to do something about poverty should lie with the wealthy who can afford luxuries, and emphasis is placed on wealth generally being due to inheritance, injustice and luck.⁶² The GLT is described as a small tax placed on luxuries such as air travel and financial transactions which would go towards a Global Poverty Fund. The system is purposely designed

⁵⁷ Ibid 191–3.

⁵⁸ Ibid 194–6.

⁵⁹ Timothy Mawe and Vittorio Bufacchi, 'The Global Luxuries Tax' in Helmut P Gaisbauer et al (eds), *Philosophical Explorations of Justice and Taxation* (Springer, 2015) 203, 203.

⁶⁰ Ibid 204.

⁶¹ Ibid 205–6.

⁶² Ibid 206–7.

as a global tax rather than a charity, and is designed to tax wealthy individuals rather than wealthy states.

Chapter 14, written by Teppo Eskelinen and Arto Laitinen, discusses the justification of taxation. The chapter contends that in times of tax assessment, various taxes are compared without looking at the justification behind them.⁶³ It introduces the concept of tax by looking at its relationship with democracy, stating that one couldn't exist without the other, giving examples such as the use of public funds being a crucial role of government.⁶⁴ It then explores the reasons behind taxation, discussing them initially at State level, then expanding to explain their relevance on a global level. The first justification explained is minimum claims — the idea that everyone's basic needs must be met.⁶⁵ The second justification, public goods, refers to various public assets such as pavements, jurisdictions, police and so on.⁶⁶ The third justification, distribution, discusses the need for tax to move money from the wealthy to those in need. The final justification; normative guidance via incentives and disincentives, discusses examples of Pigovian taxes designed to discourage people from purchasing harmful products such as alcohol or scarce resources.

4 Analysis

Philosophical Explorations of Justice and Taxation is an assembly of thought-provoking opinions of various academics from around

⁶³ Teppo Eskelinen and Arto Laitinen, 'Taxation: Its Justification and Application to Global Contexts' in Helmut P Gaisbauer et al (eds), *Philosophical Explorations of Justice and Taxation* (Springer, 2015) 219, 220.

⁶⁴ Ibid 224–5.

⁶⁵ Ibid 227.

⁶⁶ Ibid 229.

the globe. The three-part structure enables even a novice to gain an overview of the purpose of tax, before being guided through increasingly narrow topics and ideas, until the conclusion of global tax is presented. Each author has an individual writing style, however all are captivating, logical and clear.

The goal of this book is to stress the importance of tax in terms of justice, explore various problems in the world of tax today and look at solutions to these problems on a State and global level. It has achieved this goal, and explores a wide variety of possible strategies everywhere from conservative to experimental. More specific goals are achieved by the individual essays that make up the book, from proving the essential nature of taxation to exploring the reasons behind the public's general hostility towards inheritance taxes.

A wide variety of sources are used to back up the writers' arguments, from historical ideas to modern commentary. For example, early philosophers such as Aristotle and Plato are referred to by von der Pfordten in ch 4 in establishing community relations in terms of justice.⁶⁷ These philosophers' principles are utilised effectively to take the reader's mind away from modern statistics, and instead remind the reader of the fundamental reasons for taxing individuals. The writers of this book also frequently refer to modern commentators such as Liam B Murphy and Thomas Nagel in order to allow the reader to gain a perspective of current criticisms of modern taxation. A few chapters, such as chs 6 and 7, are dedicated entirely to tackling a particular argument or opinion, such as the Warren Argument and Robert Frank's consumption tax proposal.⁶⁸

⁶⁷ Dietmar von der Pfordten, 'Justice, Equality and Taxation' in Helmut P Gaisbauer et al (eds), *Philosophical Explorations of Justice and Taxation* (Springer, 2015) 47, 48.

⁶⁸ Helmut P Gaisbauer et al (eds), *Philosophical Explorations of Justice and Taxation* (Springer, 2015) 101–33.

The length of these chapters are spent breaking the argument into elements and considering each element objectively, allowing the reader to gain a different perspective on these principles. In a subject as abstract as the philosophy of taxation, these sources were used fittingly to support the writers' arguments.

Philosophical Explorations of Justice and Taxation would be appropriate for a variety of audiences. For those unfamiliar with the role of tax and the justification behind it, the early chapters provide a comprehensive introduction to the reasons behind tax and the various problems it has. Later chapters such as ch 10, 'Why Do the Public Oppose Inheritance Taxes?', are particularly valuable, as they clearly illustrate the importance in questioning why a tax is being introduced, as well as the importance in forming one's own opinion of various taxes rather than assuming that all are a necessary evil. However, considering the complicated discussions explored in some chapters, as well as the frequent utilisation of technical jargon, the book would likely be more suited towards academics and students than members of the general public.

The book would also be just as, if not more, appropriate for scholars, policy makers and experts in the area of tax. The new ideas introduced in the later chapters still have various questions that need to be answered and there are many steps that must be taken before some of them can be implemented. Researchers and specialists looking for solutions to poverty, tax evasion and a lack of trust in government would benefit greatly from reading this book, as it suggests answers to these questions but also invites the reader to think about the bigger picture, which might in itself lead to more solutions.

5 Conclusion

Philosophical Explorations of Justice and Taxation is a far-reaching, universal and relevant book. It demonstrates the flexible and controversial role tax has, the ethical justification behind it and the opportunities it has to fight poverty.

The book covers a wide variety of topics, beginning with an exploration of why tax exists, moving on to numerous issues and ideas regarding tax in the modern world, and concluding with the urgent issue of poverty and the role of first-world countries in fighting it. The issues covered in the book are varied and interesting, covering many ideas from well-known problems such as the large income gap between rich and poor, to new ideas such as taxation on an hourly average basis. Due to its reasonable price and varied content, it is likely that *Philosophical Explorations of Justice and Taxation* would be a worthwhile and valuable purchase for anyone with an interest in tax, philosophy or politics.

Case Notes

***CHEATLE v THE QUEEN* (1993) 177 CLR 541**

YUNG XING LEONG^{*}

I INTRODUCTION

*Cheatle v The Queen*¹ was a seminal case that considered the nature of the jury trial embodied in s 80 of the *Constitution*.² The case held that unanimity was a strictly required component of the jury trial for indictable offences against Commonwealth law. While the Court's decision has become entrenched in Australia's legal doctrine, a closer examination of the rationale underpinning that decision reveals that the requirement for unanimity is not without its undesirable aspects.

II FACTS

The appellants, Harvey and Beryl Cheatle, were convicted in the Central District Criminal Court of South Australia by a majority verdict of a jury consisting of 12 members for conspiracy to defraud the Commonwealth, an indictable offence under s 86A of the *Crimes Act 1913* (Cth).³ They initially appealed to the South Australian Court of Criminal Appeal but were 'unanimously dismissed'.⁴ They then appealed to the High Court of Australia on the ground that their convictions 'were a nullity by reason of s 80 of the ... *Constitution*',⁵ which provides for 'the trial on indictment of

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¹ (1993) 177 CLR 541.

² *Australian Constitution* s 80.

³ *Cheatle v The Queen* (1993) 177 CLR 541, 547.

⁴ *Ibid* 548.

⁵ *Ibid*.

any offence against any law of the Commonwealth ... [to] be by jury’.

The appellants argued that, because unanimous verdicts were indispensable to the institution of trial by jury in England, s 80 should be ‘construed as an adoption of ... all that was connoted by ... [the] phrase’.⁶ Furthermore, as jury trials serve an important function of protecting accuseds against State oppression, the unanimity of 12 persons will simply become a mere procedural matter if ‘[the] state can reduce the number who must be satisfied to whatever it likes’.⁷

On the other hand, the respondents argued that unanimity was a rule which governed the way jury trials were conducted in the 19th century.⁸ As a rule, it had evolved to encompass majority verdicts and had been ‘applied in Commonwealth trials without being raised’;⁹ hence it was not essential to their operation. The respondents further argued that, as the ‘requirement of unanimity no longer relate[d] to a sufficiency of proof’, the satisfaction of an accused’s guilt could be demonstrated by apparent, rather than substantial, unanimity.¹⁰

III ISSUE

The issue before the Court was whether ‘a requirement that any conviction [had to] be by the agreement ... of all the persons

⁶ Ibid 542.

⁷ Ibid 543.

⁸ Ibid 544.

⁹ Ibid 533.

¹⁰ Ibid 544.

constituting the jury' was inherent to the jury trial prescribed in s 80 of the *Constitution*.¹¹

IV JUDGMENT

In a joint judgment by Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ, the Court held that such a requirement existed. For this reason, s 57 of the *Juries Act 1927* (SA), which permitted a jury failing to reach a unanimous verdict after four hours of deliberation to enter a majority verdict, could not apply to the jury trial of an indictable offence against a Commonwealth law. The order of South Australian Court of Criminal Appeal was set aside and a new trial in that Court was ordered.¹² The Court justified its decision by reference to three criteria: history, principle and authority.

A History

The Court held that unanimity was 'a basic principle of the administration of criminal justice' in each of the colonies prior to Federation and had been 'assumed rather than specifically prescribed' in the legislation of each colony.¹³ This position was strengthened by the existence of 'express [legislative] provision [authorising] ... [a jury to be discharged if it could not agree]' in New South Wales, Victoria, Queensland and Tasmania.¹⁴ The Court also held that:

the interpretation of [our *Constitution*] is ... influenced by the fact that its provisions are framed in the language of the

¹¹ Ibid 548.

¹² Ibid 549.

¹³ Ibid 551.

¹⁴ Ibid 552.

English common law, and [thus] are to be read in the light of ... [its] common law ... history.¹⁵

It referred to the *Anonymous Case*¹⁶ of 1367 which held that jury verdicts must be unanimous.¹⁷ The case occurred at a time when jurors acted as witnesses, and either confirmed or contradicted the testimony of an accused based on both the local and their personal knowledge.¹⁸ Although criticism emerged over this practice's lack of legitimacy due to it being commonplace for witnesses to be thrown into wagons and 'starved and frozen into agreement',¹⁹ the case of *Winsor v The Queen*²⁰ settled the controversy in 1866 when it held that unanimity could only be achieved if the agreement came from a juror's own conviction.²¹

B Principle

The Court held that the 'representative character and collective nature of the jury ... [had to be] carried forward'.²² In order for this to occur, the requirement of a unanimous verdict had to 'be observed'.²³ The Court pointed out that 'it would ... be surprising if ... a jury of two persons selected by lot from a panel of half a dozen laymen' was deemed as an adequate representation of the community.²⁴ The Court continued its rationale by noting that majority verdicts involved a greater likelihood that evidence had not

¹⁵ Ibid 552.

¹⁶ (1346) 41 Lib Assissarum 11.

¹⁷ *Cheatle v The Queen* (1993) 177 CLR 541, 550.

¹⁸ Ibid.

¹⁹ Ibid 550.

²⁰ (1866) LR 1 QB 289.

²¹ *Cheatle v The Queen* (1993) 177 CLR 541, 555.

²² Ibid 553.

²³ Ibid 549.

²⁴ Ibid.

been fully critiqued, and the deliberative process had been hastened due to minority views being ignored.²⁵

The Court also saw that unanimity reflected a fundamental criminal law idea, which is that ‘a person accused of a crime should be given the benefit of any reasonable doubt’.²⁶ Assuming that all jurors acted reasonably, a majority verdict would suggest the existence of reasonable doubt in at least one of the jurors, and thus carried a ‘risk of conviction of the innocent’.²⁷ In that regard, the requirement for unanimity actually afforded ‘an important protection of the citizen against wrongful conviction’.

C Authority

It appeared to the Court that the modicum of judicial authority existing in England, the United States and Australia overwhelmingly favoured the view that unanimous verdicts were essential and guaranteed in the right to trial by jury.

The Court referred to the comments of Cockburn CJ in *Winsor v The Queen* where he said unanimity was ‘one of those principles that lie at the foundation of our law’, and that formed ‘the very essence of the verdict’.²⁸ The Court pointed out the comments of Lord Hewart CJ in *R v Armstrong*²⁹ who said that “‘the inestimable value” of the verdict of a criminal jury “is created only by its unanimity””.³⁰

²⁵ Ibid 553.

²⁶ Ibid.

²⁷ Ibid.

²⁸ Ibid 555.

²⁹ [1922] 2 KB 555.

³⁰ *Cheatle v The Queen* (1993) 177 CLR 541, 555.

The Court also cited the American authority of *American Publishing Co v Fisher*.³¹ The Supreme Court in that case held that the guarantee of trial by jury contained in the Seventh Amendment³² did not permit a majority verdict, and so the verdict of the nine jurors was incorrect. Brewer J said that unanimity was a:

peculiar and essential feature of trial by jury at the common law ... [and] a statute which destroys this substantial and essential feature ... is one abridging the right [of an accused].³³

The Court approved the comments made by Griffith CJ in *R v Snow*³⁴ that s 80 should be interpreted as incorporating prima facie all those essential features connoted with trial by jury.³⁵ In that case, the Crown's attempt to appeal the acquittal of the accused was rejected because the inability to appeal non-guilty verdicts had been an absolute guarantee of the institution of trial by jury. Unanimity was therefore required in the appellants' case as it was deemed, like the non-appeal of acquittals, to be a wholly essential feature. The Court also drew support from Evatt J's comments in *Newell v The King*³⁶ in which he said:

[i]n the United States, the principle of unanimity has been treated as an integral part of the constitutional guarantee of the jury system, and a similar guarantee (in respect of offences against the laws of the Commonwealth) is contained in s 80 of the Commonwealth Constitution.³⁷

³¹ *American Publishing Co v Fisher*, 166 US 464 (1897).

³² The Seventh Amendment of the United States Constitution enshrines the right to jury trial and prohibits courts from overturning a jury's finding of facts.

³³ *Cheatle v The Queen* (1993) 177 CLR 541, 556.

³⁴ (1915) 20 CLR 315.

³⁵ *Cheatle v The Queen* (1993) 177 CLR 541, 549.

³⁶ (1936) 55 CLR 707.

³⁷ *Cheatle v The Queen* (1993) 177 CLR 541, 558.

V COMMENTARY

Cheatle v The Queen set a precedent that had to be followed in all future cases involving the commission of an indictable offence against Commonwealth law. The few cases that came shortly after the decision was handed down illustrate this point. In *El-Asmar v The Queen*,³⁸ the appellant was convicted by a majority verdict for importing heroin in breach of s 233B of the *Customs Act 1901* (Cth), and a re-trial was ordered because the verdict was inconsistent with the guarantee of unanimity that was embodied in s 80 of the *Constitution*. *Aston v The Queen*,³⁹ which involved the appellant being charged with conspiracy to defraud the Commonwealth, held that the precedent set by *Cheatle v The Queen* rendered the jury's majority verdict void, and thus, the conviction was quashed and an appeal was allowed.

Turning our attention to the legal landscape today, we can see *Cheatle v The Queen*'s lasting impact being demonstrated in the recent case of *Rizeq v Western Australia*.⁴⁰ In this case, the accused was charged with intent to sell and supply MDMA and methyl amphetamine under s 6(1)(a) of the *Misuse of Drugs Act 1981* (WA).⁴¹ The accused had argued that a unanimous verdict was required because s 68(2) of the *Judiciary Act 1903* (Cth) vested federal jurisdiction in the District Court of Western Australia, and thus s 80 of the *Constitution* applied.⁴² However, the accused had failed to appreciate that s 68(2) and s 80 of the *Constitution* were

³⁸ (1994) 122 FLR 84.

³⁹ (1995) 69 ALJR 776.

⁴⁰ [2015] WASCA 81.

⁴¹ Mazza JA, *Rizeq v The State of Western Australia*, 29 April 2015, Supreme Court of Western Australia, [3] <<http://decisions.justice.wa.gov.au/supreme/supcdcsn.nsf/PDFJudgments-WebVw/2015WASCA0081/%24FILE/2015WASCA0081.pdf>>.

⁴² Ibid [10].

directed only to Commonwealth indictable offences and not State indictable offences. The Court thus upheld the majority verdict.

The overwhelming sentiment amongst the authorities cited by *Cheatle v The Queen* was that the principle of unanimity must always be upheld because it helped to secure an important objective of jury trials — the protection of an accused from State oppression. As was argued by the appellants, what this means is that the Commonwealth Government should not be able to arbitrarily impose the number of jurors needed to deliver a verdict of guilt. The case of *Brownlee v The Queen*⁴³ provides good authority that such an event is unlikely to happen. Although it was held that a reduction from 12 to 10 jury members was permissible so long as the verdict was unanimous, Callinan J cautioned, however, that ‘there may come a point at which a smaller number could not, in any real sense, be regarded as a jury’.⁴⁴ The Court in *Cheatle v The Queen* acknowledged that there was ‘no logical inconsistency involved in the co-existence of the criminal onus of proof and majority verdicts of guilt’.⁴⁵ Given this admission, it is questionable whether the insistence that an accused ‘be given the benefit of any reasonable doubt’ actually helps the justice being served.⁴⁶ Despite its extolled advantages, unanimous verdicts have some potentially crippling drawbacks. They cannot guarantee that the collective verdict of a jury always has the full and unqualified support of each juror, or that every genuinely held opinion has been heard, dissected and deliberated. They are also unable to safeguard against jurors acting unreasonably. Other considerations such as the strength and complexity of evidence at hand and a jury screening process that is hardly foolproof establish further logical hurdles for unanimous

⁴³ (2001) 207 CLR 278.

⁴⁴ Ibid 341.

⁴⁵ (1993) 177 CLR 541, 553.

⁴⁶ Ibid.

verdicts to overcome, and demonstrate that perhaps the requirement for unanimity is an unrealistic ideal.⁴⁷ The strict requirement for unanimity may actually prevent the jury from carrying out its other objectives, thus impeding its ability to be an effective instrument in the administration of justice.

VI CONCLUSION

Cheatle v The Queen distinguished between features that were essential and inessential to the operation of the jury trial contained in s 80 of the *Constitution*. While the Court's interpretation that jury verdicts must have the consensus of all the jurors will remain a fixture of the jury trials of Commonwealth indictable offences, the adoption of majority verdicts by the various States, including for murder in New South Wales, has opened up the purported merits of unanimous verdicts to scrutiny. In *Brownlee v The Queen*, the Court stated that the:

classification ... of [a feature of] ... trial by jury [as essential necessarily] involves an appreciation of the objectives ... [that the institution] advances or achieves.⁴⁸

Given that unanimous verdicts have the concomitant effect of promoting and hindering different functions of trial by jury, a serious question is thus raised as to whether unanimity, in its currently understood form, is truly essential to the operation of jury trials, or whether it can undergo modification to better achieve the different objectives of jury trials.

⁴⁷ New South Wales Law Reform Commission, *Majority Verdicts*, Report No 111 (2005) [2.36].

⁴⁸ (2001) 207 CLR 278, 285–6.

***RONEN v THE QUEEN* [2004] NSWCCA 176**

YUNG XING LEONG^{*}

I INTRODUCTION

*Ronen v The Queen*¹ takes a close look at a seemingly beneficial yet highly controversial mechanism of jury trials — peremptory challenges. A peremptory challenge is an objection that is made during the selection of a jury, where both parties to a proceeding can arbitrarily prevent a potential juror from taking their seat in the jury box without needing to state a reason. While the case has clarified the law regarding peremptory challenges in New South Wales and the constitutionality of that law in Commonwealth jury trials, questions are raised about the justice delivered by a jury system which operates differently not only at the Federal and State level, but also across the various States.

II FACTS

The appellants, Ida, Nitzan and Izhar Ronen, were charged under ss 86A and 86(2) of the *Crimes Act 1914* (Cth) with conspiracy to defraud the Commonwealth of \$14 512 206.95 in income tax between 1992 and 2001.² An application was made at trial requesting the provision of an extract of the names and occupations of persons on the jury panel list prior to the selection of the jury.³ The appellants argued that ‘an accused facing a trial by jury ... [was] entitled to know the identity of the jurors’,⁴ and on that basis,

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¹ [2004] NSWCCA 176.

² Ibid [2].

³ Ibid [3].

⁴ Ibid [5].

ss 29 and 37 of the *Jury Act 1977* (NSW) did not prevent ‘the trial judge from ordering the sheriff to make ... [the] extract’ available.⁵ Although it appeared to run counter to their argument, the appellants accepted that s 37 protected panel members from being required to disclose their name or any other matter that would lead to their identification, and that s 29(4) operated similarly by requiring panel members who are present in court to be identified only by their identification number.⁶

III ISSUE 1

The first issue raised by the appellants was:

whether ... the *Jury Act 1977* (NSW) ... [precluded] an accused person from being supplied with the names and occupations of the members of the jury panel prior to the selection of the jury.⁷

A Finding at trial

Whealy J ruled in the affirmative that the *Jury Act 1977* (NSW) contained such an exclusionary effect.⁸ He rejected the appellants’ argument on the basis that the legislative intent behind ss 29 and 37 was to preserve the anonymity of persons ‘from ... [whom] a jury would be selected in a criminal trial’.⁹ He also stated that ss 67A and 68 protected that intent by prohibiting a person from inspecting or making available information in a panel or card prepared by the sheriff which identifies those involved in the finding of guilt in a criminal proceeding.

⁵ Ibid [7].

⁶ Ibid.

⁷ Ibid [1].

⁸ Ibid [6].

⁹ Ibid [9].

Whealy J stated that the word ‘juror’ in s 68 was broad enough to embrace a potential juror or panel member.¹⁰ He surmised that mischiefs such as ‘jury tampering’ and ‘danger to jury members’ could potentially materialise/transpire if the names and occupations of panel members and subsequent jurors somehow became known to those/came into the knowledge and possession of those with ‘less scrupulous hands’.¹¹ For this reason, it could not be envisaged that the sheriff could thwart the express language of the legislation when considered in the light of its policy context. An exemption, however, applies if the provision of names and occupations are necessary to the ‘investigation or prosecution of ... [the] contempt of court or ... [another] offence relating to a juror or a jury’.¹²

B Finding at Appeal

The Court of Criminal Appeal, composed of Ipp JA, Grove and Howie JJ, concurred with the findings of Whealy J. The Court upheld, on the same basis as the trial judge, that the provisions:

[did] not allow the sheriff to prepare an extract from the panel or cards, ... [which reflected] the names and occupations of potential jurors, or to make that extract available to the accused.¹³

The Court further stated that ‘there can be no doubt’ the amendments to ss 29 and 37 had the purpose of preserving juror anonymity, and reference was made to the Second Reading Speech and Explanatory Note to the *Jury Amendment Bill 1997* (NSW) to illustrate this point.¹⁴ Past experience indicated that jurors had been

¹⁰ Ibid.

¹¹ Ibid [8].

¹² *Jury Act 1977* (NSW) s 68(4). See generally, ss 62, 62A, 63, 67, 68B.

¹³ *Ronen v The Queen* [2004] NSWCCA 176, [26].

¹⁴ Ibid [14].

harassed numerous times, and in one instance threatened, combined with the complaints regarding the viability of a practice to give names and addresses in open court at the risk of jury safety had ultimately provided the impetus for change.¹⁵ The provisions consequently defeated the appellants' contention that the 'names of jurors were traditionally called in New South Wales'.¹⁶

A minor contention held by the appellants was that the practice under s 48 of drawing cards from a ballot box and calling out the identification numbers of panel members to select juries breached s 28(3), as under that section, cards had to contain the names and other particulars of the panel members. The Court agreed but held that it did not materially affect the issue at hand.¹⁷ Grove J concurred on this point, noting that the practice was simply 'an administrative failure to appreciate the precise mandate of the statute',¹⁸ and simply needed to be brought 'into compliance with the Act'.¹⁹

Although s 67A prevented any person from inspecting the panel list, the Court held that there was a 'discernible potential benefit' in having the identification information of panel members available to the presiding judge, as it helped in formulating the opinion that a jury had been unfairly composed and was thus to be discharged under s 47A.²⁰ The Court also said there was 'no inconsistency between a requirement for express authority for disclosure to a court

¹⁵ Ibid [15].

¹⁶ Ibid [12].

¹⁷ Ibid [23].

¹⁸ Ibid [106].

¹⁹ Ibid [109].

²⁰ Ibid [107].

in s 68 and the availability of particulars to the judge presiding at trial'.²¹

IV ISSUE 2

The second issue raised by the appellants was whether the provisions of the *Jury Act* had infringed s 80 of the *Constitution*²² in 'purport[ing] to apply to a federal trial by jury'.²³

The appellants argued that the right to challenge was an essential element of trial by jury,²⁴ and this right 'would be negated by a failure to provide ... [the] names and occupations of potential jurors'.²⁵ It was contended that jurors should not be anonymous to the accused, and history indicated that an accused had a right to know the names of jurors.²⁶ The rationale was that, in order to mount peremptory challenges effectively, an accused had to be privy to certain necessary information so that they can 'disqualify people who for ... reasons they consider will not render a fair judgment'.²⁷

On the other hand, the respondent argued that the provision of the names and occupations of potential jurors was not 'an inviolate constituent of the right to challenge',²⁸ nor was it 'integral' to its exercise.²⁹ In accordance with Barwick CJ's comments in *Johns v The Queen*,³⁰ the 'opportunity ... to see and observe the jurors took

²¹ Ibid [108].

²² *Australian Constitution* s 80.

²³ *Ronen v The Queen* [2004] NSWCCA 176, [4].

²⁴ Ibid [28].

²⁵ Ibid [27].

²⁶ Ibid [31].

²⁷ Ibid [34].

²⁸ Ibid [35].

²⁹ Ibid [36].

³⁰ (1979) 141 CLR 409.

precedence over information that gave insight into their identity.³¹ It was further argued that the institution of trial by jury was intended to be flexible enough to accommodate changing circumstances, and present societal conditions dictated a necessity to protect jurors from harassment and threats.³²

A Finding at Trial

Whealy J held that the provisions did not infringe on an accused's right to challenge. The three accused were not entitled to the names and occupations of jurors.³³ On principle, Whealy J also saw this information as potentially misleading in terms of any relevance it had to making a challenge.³⁴ The reason for this was because the process of challenging is a thoroughly subjective one and 'could not be done ... with any [real] certainty'.³⁵ It therefore did not matter whether an accused invoked the challenge 'on rational or irrational grounds',³⁶ that is to say, with or without the information.

In addition, there was no historical support for the contention that knowing the information had been a right in New South Wales despite the custom of 'potential jurors in criminal trials ... [being called], for the purposes of empanelment, by name'.³⁷ The judge agreed with the Crown's submission that the *Constitution* '[needed] to respond to changing circumstances and conditions',³⁸ and the 1997 amendments to the *Jury Act* were a response to those changes. Although it was not expressly stated, it can be inferred that

³¹ *Ronen v The Queen* [2004] NSWCCA 176, [36].

³² *Ibid* [37].

³³ *Ibid* [39].

³⁴ *Ibid* [38].

³⁵ *Ibid* [32].

³⁶ *Ibid* [33].

³⁷ *Ibid* [38].

³⁸ *Ibid*.

Whealy J fundamentally agreed with Barwick CJ's comments in *Johns v The Queen*.

B Finding at Appeal

The Court of Criminal Appeal agreed with the appellant's proposition that the right to invoke a peremptory challenge was 'fundamental to ... [the] system of trial by jury',³⁹ and that its denial would render a verdict void.⁴⁰

As to whether there was a right to the names and occupations of prospective jurors, the Court considered that such a right did not exist in England or in Australia. The Court referred to established authority such as *R v Dowling*,⁴¹ in which Erle J said that no person on trial for a felony had the right to have a panel list read over or inspected despite the practice of calling out and accounting for panel members' names in court.⁴² The Australian case of *R v Baum*,⁴³ which ruled an argument that a refusal of panel inspection had amounted to a denial of right as historically and statutorily unfounded,⁴⁴ was cited by the Court as 'powerful authority' in dispelling the appellants' contention of a 'long-standing right to ... [the]... names of potential jurors'.⁴⁵ The Court was unable to find any authority relating to the provision of occupations, but reasoned that if there was no right to know of panel members' names, there was 'hardly a right to know their occupations'.⁴⁶

³⁹ Ibid [41].

⁴⁰ Ibid [40].

⁴¹ (1848) 3 Cox CC 509.

⁴² *Ronen v The Queen* [2004] NSWCCA 176, [53].

⁴³ (1927) 27 SR (NSW) 401.

⁴⁴ *Ronen v The Queen* [2004] NSWCCA 176, [61].

⁴⁵ Ibid [63].

⁴⁶ Ibid [71].

The Court also turned its attention to the ambulatory nature of jury trials. It was said in *Brownlee v The Queen*⁴⁷ that ‘the function of jury trial is not such as to make it essential that the common law rule be preserved in its full rigour’.⁴⁸ This meant that certain rules of practice and procedure, while compatible with the objectives advanced by trial by jury at one point in time, may clash with those same objectives at a later time.⁴⁹ Deane J in *Brown v The Queen*⁵⁰ defined the essential objective of trial by jury as the ‘administration of criminal justice ... [which] has the appearance of being ... unbiased and detached’.⁵¹ Given the rise of social media and its numerous platforms, information that was once privately held is now ubiquitous and accessible.⁵² While an accused can undoubtedly benefit from knowing the names and occupations of panel members when exercising their right to peremptory challenges, the breakdown of barriers to communication can potentially place:

the institution ... [of trial by jury in jeopardy] if jurors were to be [made] susceptible to intimidation [and undue pressure] that could influence their findings.⁵³

Ultimately, as the provisions of the *Jury Act 1977* (NSW) secured juror impartiality and anonymity by preventing the names and occupations of panel members from being disclosed, they did not offend against s 80 of the *Constitution*. The appeal was thus dismissed.

⁴⁷ (2001) 207 CLR 278.

⁴⁸ Ibid [21].

⁴⁹ *Ronen v The Queen* [2004] NSWCCA 176, [74].

⁵⁰ (1986) 160 CLR 171.

⁵¹ *Ronen v The Queen* [2004] NSWCCA 176, [86].

⁵² Ibid [87].

⁵³ Ibid [94].

V COMMENTARY

Ronen v The Queen confirms that, at least in the jury trials of Commonwealth indictable offences, the essential jury characteristics of impartiality and anonymity will be upheld. As the *Jury Act 1977* (NSW) did not attempt to supplant the understanding of *Cheatle v The Queen*⁵⁴ that the jury trials of Commonwealth indictable offences came with certain inherent and inextinguishable features, it was deemed compatible with s 80 of the *Constitution*. While the case cements the legal position in New South Wales regarding peremptory challenges and its compatibility with the *Constitution*, it raises questions about the operation of the jury trials of State indictable offences.

It has been established that, in New South Wales, an accused criminal does not ever have the right to know the names and occupations of panel members. However, a different position holds true for an accused in Victoria and Western Australia. Under s 30 of the *Juries Act 1957* (WA),⁵⁵ there is an express right of parties to inspect the list of summoned jurors at 8:00 am on the day that the trial is scheduled to take place. This right is however qualified by s 43A, which provides that if it is necessary to protect the security of panel members, the court can make an order that partially or fully restricts the inspection of the panel list.⁵⁶ In Victoria, s 36 of the *Juries Act 2000* (Vic) provides that the name or number, and occupation of panel members must be called.⁵⁷ Like Western Australia, s 36 is subject to a qualification contained in s 31(3), which provides that panel members be called out by their identification number if the court feels that their names should not

⁵⁴ (1993) 177 CLR 541.

⁵⁵ *Juries Act 1957* (WA) s 30.

⁵⁶ *Ibid* s 43A.

⁵⁷ *Juries Act 2000* (Vic) s 36.

be called.⁵⁸ However, this does not apply to panel members' occupations which must be called.

Although the Court in *Ronen v The Queen* had no latitude to make the kind of discretionary decisions permitted by the Victorian and Western Australia *Juries Acts*, it is interesting to note that the right to know the names and occupations of panel members exists in one jurisdiction and no such right in another jurisdiction places doubt on the soundness of provisions like ss 67A and 68. While jury trials are necessary to guard 'the liberty of the accused', the Court stated that they served 'a wider purpose and function' by acting as 'the community's guarantee of sound administration of criminal justice'.⁵⁹ If that is the case, having different formulations of the State *Jury Acts* which secures the anonymity of panel members and jurors in one jurisdiction whilst mandating for their identities to be announced in another may well undermine this 'sound administration' of justice. The inability to make peremptory challenges adequately will diminish confidence in the outcome of a trial and ultimately in the legitimacy of the criminal justice system.

Ronen v The Queen also raises questions about peremptory challenges generally. Detractors of peremptory challenges criticise their use as they are often based on unfounded stereotypes and a person's subjective views, and therefore have the potential to 'result in a jury that is ... biased against one party'.⁶⁰ However, it must not be forgotten that when jurors act partially at any point in their deliberations, there has been a failure in the pre-trial selection process to prevent those who are unsuitable from carrying out jury duty, not a failure with peremptory challenges themselves. The Court

⁵⁸ Ibid s 31(3).

⁵⁹ (1993) 177 CLR 541, [86].

⁶⁰ Law Reform Commission of Western Australia, *The Juror Selection Process*, Discussion Paper (2009) 29–30.

noted in *Ronen v The Queen* that s 38(7) of the *Jury Act 1977* (NSW) called upon panel members ‘to apply to excuse themselves if they consider that they are not able to give impartial consideration to the case’ at hand,⁶¹ and found the appellants’ argument that s 38(7) was inadequate to guard against bias difficult to accept. It appears the Court may well be overestimating human nature in saying ‘it would be going far ... to assert that [jurors on the panel] cannot be relied upon to comply with s 38(7)’.⁶² The case of *Webb v The Queen*,⁶³ where a jury member brought flowers to a murder trial and asked the deceased’s fiancée to give them to his mother, is strong indication that jurors cannot necessarily be counted on to excuse themselves due to a personal inability to perceive their intrinsic and entrenched biases.

VI CONCLUSION

The case of *Ronen v The Queen* held that the prohibition in *Jury Act 1977* (NSW) preventing the appellants from obtaining the names and occupations of potential jury members was not incompatible with the *Constitution* because the names and occupations of jurors were not essential to the operation of the jury trial that was enshrined. The anonymity of jurors can never be abrogated at the federal level due its essentiality to Commonwealth jury trials. In State jury trials, however, the clash between protecting jurors’ privacy and security on the one hand, and providing necessary information about jurors to enable confidence in the impartiality of the selected jury on the other, will continue to persist so long as peremptory challenges remain a part of the law. Although the various States can align the operation of their jury trials by enacting the necessary legislative amendments, the inconsistency between the

⁶¹ [2004] NSWCCA 176, [83].

⁶² *Ibid* [84].

⁶³ (1994) 181 CLR 41.

operation of the jury trial at the Commonwealth and State level appears to be one that can never be reconciled.