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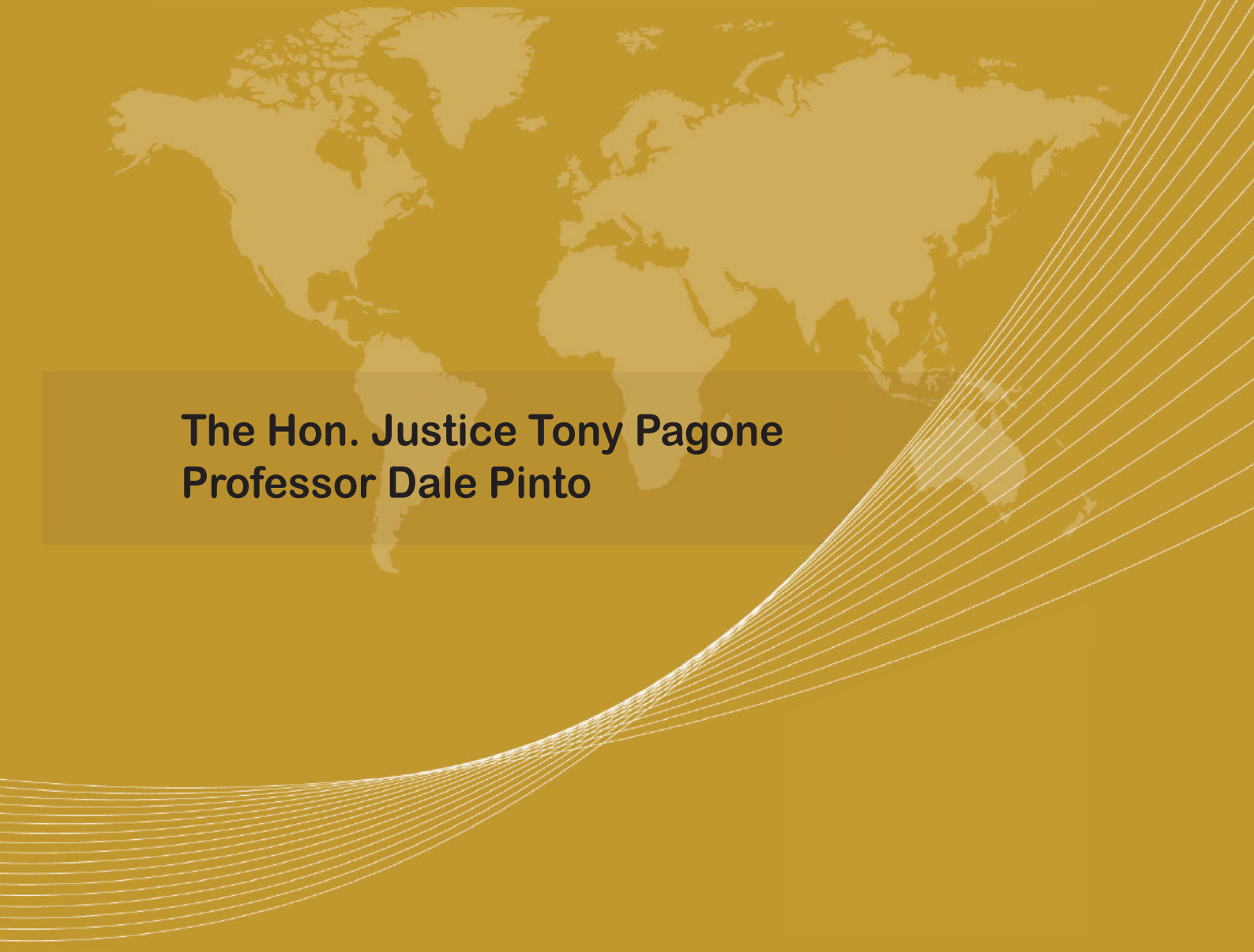
CURTIN LAW and TAXATION REVIEW



The Hon. Justice Tony Pagone
Professor Dale Pinto

CURTIN LAW AND TAXATION REVIEW

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The *Curtin Law and Taxation Review* ('CLTR') is a scholarly general law journal which also publishes articles that deal with taxation law and articles and case notes as well as book reviews in both general law areas and in taxation law. The Review's scholarly works are directed to academic staff, legal scholars, practitioners, justice professionals and postgraduate researchers who have to deal with different aspects of the law.

This volume has been edited at the Curtin Law School, Perth, Western Australia. The Editor-in-Chief for the Review is The Honourable Tony Pagone QC and Professor Dale Pinto from the Curtin Law School is the Associate and Academic Editor. The Review also comprises an International Editorial Board of eminent national and international scholars from the European Union, United States, Australia and Asia which has been ably supported by its Student Editorial Board.

EDITORIAL TEAM

FOREWORD

The contributions to this edition were mostly written and conceived well before the Coronavirus and before any thought about the tax consequences arising from a pandemic and the measures put in place and their economic effects. There will, no doubt, be many interesting articles yet to be written dealing with those consequences.

The edition begins with an article of ever greater importance even in times of pandemics. The domestic impact, particularly in developing countries, of supra-governmental international organisations, which is the focus of the article by Tambunan, Rosdiana and Irianto. The article critically analyses the challenges of setting tax policies in developing countries due to the international tax regime and the Organisation for Economic Co-Operation and Development ('OECD')/G20 Base Erosion Profit Shifting ('BEPS') Project and offers insightful commentary into the geopolitical and domestic circumstances which may require greater consideration to better enable international organisations to continue providing leadership for tax reform.

The article by Bourke considers yet another fascinating topic. The article examines Western Australia's approach to criminalisation of image based sexual abuse in contrast to other Australian states. The article is both timely and relevant and build upon an evolving body of research in this

The article of Han Li uncovers and sheds light on aspects of Australian tax policy intimately linked with migration and racial tensions. It records an important part of Australian history and highlights the role played by taxation in that history. It is a timely article with interesting parallels today when Chinese influence has assumed a more powerful economic force than the worker migration of the poll taxes considered in the article. The analysis of the poll taxes in the article also provides an interesting and useful insight into the difficulties of taxation by that method.

The article by Al Bhadily and Guthrie provides another perspective into an issue that has had much discussion in the context of tax. Foreign workers in Australia have been the subject of much discussion about how their tax obligations should be met and what special arrangements

Australia should put in place to encourage or to discourage income earning activity by this group. The authors of this article, however, focus upon the impact of long shifts and occupational health and safety upon that group of individuals. The article enables us to look at different aspects of an issue which has not so far focused upon the health and well-being of those whose tax position has received much discussion and debate.

The article by Deem and van Doore provides a different insight into public policy connected with the administration of tax. The author does that through an interesting analysis of the works of Foucault and Latour and the role played by surveillance in controlling taxpayer behaviour to comply with obligations by awareness of being watched. The imposition of tax has always relied heavily upon voluntary compliance with the risk of detection largely dependent upon random audits. Taxpayers before self-assessment were required to disclose sufficient information for the Commissioner to assess the correct amount of tax due by taxpayers. The self-assessment regime subsequently shifted the emphasis of the Commissioner's role from that of checking the details disclosed by taxpayers to targeted audits based upon risk assessments. That system relies less upon the principles discussed by Foucault and Latour of total knowledge and visibility than upon the risks of uncertainty and potential detection. Deem and van Doore's article raises interesting questions about the impact of tax compliance by increased surveillance based upon the theories of Foucault and Latour and their potential application to tax administration. It is encouraging to see ideas from other disciplines being considered within the tax context.

The final article by Al Bhadily and Monterosso addresses the prevalence of modern slavery in supply chains global with particular focus on Australia's response in the context of the *Modern Slavery Act 2018* (Cth) ('*Australian Act*') and Bangladesh-sourced products. A harrowing reminder of the need to further advance protection of often exploited and marginalised workers, who sadly remain dispensable in a modern society fixated on low-cost consumer goods production.

The book review by Eeson considers the Matthew Warren text *Blackout: How is Energy-Rich Australia Running Out of Electricity?* which explores the National Energy Market ('NEM') in Australia's Eastern States. The review is both comprehensive and insightful and offers a positive recommendation of the text.

There are eight case notes in this edition ranging over a number of different topics. Each of the

cases is significant and reminiscent of how familiar chestnuts continue to be the matter of intense litigation although the principles by which the tax applications are to be determined have been laid down often and over many years.

The editors are to be congratulated for the articles which they have gathered, together with the informative case notes. Case notes in academic journals are a means of elevating particular cases for attention from the great number of cases which are decided and get reported.

G.T. PAGONE

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GLOBAL CONSENSUS AND THE CHANGE IN THE TAX LANDSCAPE IN DEVELOPING COUNTRIES: A REVIEW OF SUPRA-GOVERNMENTAL INSTITUTION PROPOSALS

MARIA RUD TAMBUNAN,[*] HAULA ROSDIANA[**] AND EDI SLAMET IRIANTO[***]

ABSTRACT

This study analyses the challenges of setting tax policies in developing countries due to the international tax regime and the Organisation for Economic Co-Operation and Development ('OECD')/G20 Base Erosion Profit Shifting ('BEPS') Project. This study applies a qualitative method with data gathered through a literature review. The research shows that global tax policy has converged due to international tax consensus led by the OECD. The OECD's initiative — specifically, the BEPS Project — is the reflection of how an international body has taken a considerable role in reshaping the global tax landscape and has forced developing countries to adjust their domestic tax policies. However, in fact, the global consensus proposed by this supra-government institution does not take into account the current problems faced by developing countries. Having mapped the challenges actually faced by the developing countries, those factual challenges consist of: (i) managing tax incentives and tackling tax competition appropriately to attract investment; (ii) improving transfer pricing rules to ensure a fair share of tax is paid in each jurisdiction with respect to the country most common transaction; (iii) modifying permanent establishment provisions on income generated from the mobile economy; and (iv) bringing about global transparency through the exchange of information. Therefore, developing countries need to select elements of the existing global tax consensus based on their actual problems.

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I INTRODUCTION

Globalisation has led to the interdependency of each country on others in numerous ways. Many argue that at least in the economic realm, governments have lost much of their independence. This economic realm has a positive impact, as it has expanded the playing field for particular countries and enables them to enhance new potential and opportunities, for example, by magnifying the size of their market. The use of the so-called 'self-contained box' to describe international trade policy seems to already be a thing of the past.[1] In addition, it also provides the possibility to benefit from a competitive price for inputs, efficient labour and expanded access to new technology and foreign capital. Globalisation also leads to: the possibility for cultural exchange; co-operation on legal and tax issues; and solutions to problems that a country might face due to the openness of the economy.[2]

However, globalisation also tends to put pressure on the level of taxation.[3] Hines (2009) supported the premise that mobile capital reacts to favourable tax treatment. This is also verified by the phenomenon of reducing the statutory corporate tax rate in recent decades.[4] A similar pattern also exists in the Organisation for Economic Co-Operation and Development ('OECD').[5] The pressure from globalisation has forced governments to spend more when it is more costly to raise tax revenue. Leviner (2011) added that the tax pressures are not only limited to the nations, but also generally impact additional parties such as corporate entities,

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1 Jeffrey Owens, 'Globalization: The Implication for Tax Policies' (1993) 14(3) *Journal of Applied Public Economics* 21.

2 A number of publications have discussed the impact of globalisation on many aspects known as the open economy. For example several articles are discussed by Vito Tanzi, 'Globalization and the Need for Fiscal Reform in Developing Countries' (Working Paper No 6, Institute for the Integration of Latin America and the Caribbean and the Integration, Trade and Hemispheric Issue Division of the Integration and Regional Program Department of IDB, October 2004); Ian Roxan, 'Limits to Globalization: Some Implications for Taxation, Tax Policy and the Developing World' (Working Paper No 3/2012, Department of Law, London School of Economics and Political Science, 2012); Miranda Stewart, 'International Tax, the G20 and the Asia Pacific: From Competition to Cooperation' (2014) 1(3) *Asia & The Pacific Policy Studies* 484 ('From Competition to Cooperation').

3 Isabel Calich, 'The Impact of Globalization on the Position of Developing Countries in the International Tax System' (PhD Thesis, London School of Economics, 2011); Leonce Ndikumana, 'International Tax Cooperation and Implications of Globalization' (Research Paper No 24, Committee for Development Policy, December 2014).

4 James R Hines and Lawrence H Summers, 'How Globalization Affects Tax Design' (Working Paper No 14664, National Bureau of Economic Research, January 2009).

5 Michael P Devereux and Alan J Auerbach, 'Taxing Corporate Income' (Working Paper No 14494, National Bureau of Economic Research, November 2008).

households and individuals.[6]

For developing countries where tax revenue is considered important, the revenue loss caused by a significant reduction in tax rates, tax base erosion and special economic zones/free trade zones[7] has created difficulties in the efforts to replace it as a source to cover public expenditure.[8] International tax competition has generated a significant reduction in the marginal tax rates for personal income and corporate taxes. The common perception in the literature reveals that governments have a weak ability to set their tax policies independently. As the tax base is mobile, a government choice of tax policies will be affected by the sovereignty beyond its borders, as well as the actions of other jurisdictions — a phenomenon commonly recognised as tax competition. In practice, governments tend to offer reduced tax rates or special tax incentives.[9]

The current tax reform carried out by developing countries might be also closely related to global trade, investment, capital flow and production. This means that the tax reform carried out by a country needs to aim at being consistent with the international tax regime.[10] Formerly, the extent to which national tax law had to be adapted to the 'world tax system' was the subject of debate. Before the 1998 OECD report on harmful tax competition and the issue of globalisation,[11] Owen (1993) identified at least three profound implications of globalisation for the tax system, as detailed below.[12]

1) The base for taxes on income and wealth will be more geographically mobile, and thus will be more sensitive to tax differentials. This, in turn, will lead to the greater danger

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6 Sagit Leviner, 'The Intricacies of Tax and Globalization' (2011) 5(2) *Columbia Journal of Tax Law* 207.

7 Yariv Brauner, 'The Future of Tax Incentives for Developing Countries: Tax, Law and Development' in Yariv Brauner and Miranda Stewart (eds), *Tax, Law and Development* (Edward Elgar Publishing, 2013) 25.

8 T Dagan, 'The Tragic Choice of Tax Policy in a Globalized Economy: Tax, Law and Development' in Yariv Brauner and Miranda Stewart (eds), *Tax, Law and Development* (Edward Elgar Publishing Ltd. 2013) 57.

9 Roxan (n 2).

10 Stewart, 'From Competition to Cooperation' (n 2); Miranda Stewart, 'Global Trajectories of Tax Reform: Mapping Tax Reform in Developing and Transition Countries' (Working Paper No 29, University of Melbourne Public Law and Legal Theory, 31 May 2002) ('Global Trajectories of Tax Reform').

11 In 1998 the Organisation for Economic Co-Operation and Development ('OECD') issued a significant document which noted that an effect of globalisation is the possibility of tax competition. OECD, Committee on Fiscal Affairs, *Harmful Tax Competition: An Emerging Global Issue* (Report, 1998).

12 Owens (n 1).

of tax competition between countries, with each country seeking to attract a larger share of the global tax base.

2) It will be more difficult to determine and collect taxes on activities that take place outside a country's tax jurisdiction. This is a question not just of an increase in the volume of cross-border transactions, but also of their changing nature.
3) The ways in which tax administrations carry out their activities will change. New technologies open up new ways to assess and collect taxes, as well as for co-operation between tax administrations in other countries.

The standardised international tax regime or customary international tax law adopted by a country can include, for example: (i) the jurisdiction to tax a non-resident after the existence of legal obligation, even though this practice led to heated debates concerning digital economic activities; (ii) the norm of non-discrimination, under which the non-resident country should not be treated negatively and different to residents; (iii) the arm's length standard, which is applied to most transfer pricing to determine the proper allocation of profit; and (iv) the existence of a foreign tax credit or exemption rule for foreign-source income even in the absence of an applicable income tax treaty.[13]

The formation of an international tax regime has been created unconsciously after passing the following steps detailed below.[14]

1) The OECD member countries and several selected non-OECD countries are critical players or market leaders that 'created' international norms (known as quasi-legal rules). These few powerful countries interact and co-operate on a continuous basis, such that their interaction produces legal outputs or consensus that the outputs will become soft international law (e.g. the OECD Model Tax Convention '(OECD Model') and the Commentary thereon) even though there has not been time to receive systemic feedback from the global community of tax advisors and tax scholars. The OECD can thus be seen as a vehicle to minimise the cost of collective action to generate soft international tax law.
2) As the documents released by the major players are also enriched by input from many

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13 Reuvan S Avi-Yonah, *International Tax as International Law* (Cambridge University Press, 2007).

14 Eduardo Baistrocchi, 'The International Tax Regime and the BRIC World: Elements for a Theory' (2013) 33(4) *Oxford Journal of Legal Studies* 733.

scholars globally, most countries are willing to adopt and use the OECD Model and other OECD documents: (i) as a template for their own tax treaty negotiations and relevant related domestic law; and (ii) as a source of innovation in their tax treaty network without the need considerable effort for negotiation. As a result, the OECD Model and related documents become soft international law, which is, in turn, a key driving force in the international tax regime. This is because once the OECD Model and related documents are integrated into a particular country's tax law, they become hard law.

3) Countries are habitually engaged in international tax competition within a compatible standard rather than between incompatible standards. The current compatible standard is the OECD Model, which channels international tax competition into areas that are not regulated by the OECD Model, such as corporate tax rates.
4) The OECD Model has the standard features of all network markets, namely network externalities, expectations and lock-in effects.
5) The OECD Model's compatible standard is capable of destroying incompatible standards and including other, different, but compatible standards to gradually converge towards the OECD Model.

It is probably not surprising that globalisation drives convergence specifically in the context of income tax, as considering the factors affecting the structural consideration of income tax has been forced into similar design and administration among jurisdictions.[15] The similarity of income tax design does not necessarily occur because of fewer differences among countries, but it is solely globalisation that plays a significant role in most levelling of the playing field, even though another more positive sign is that globalisation is also a catalyst and a proof of beneficial open markets worldwide. These convergent factors will probably become considerable new challenges and obstacles to developing countries.

This article analyses the change in tax policies in developing countries caused by international taxation norms. It also examines the debates and challenges associated with changes in the tax landscape in developing countries, as a base framework and whether the international tax regime promoted by a recognised international organisation — such as the OECD — has enabled developing countries to deal with their problems in addressing globalisation. In

15 Leviner (n 6).

addition, this article will shed light on the practical problems currently faced by developing countries. The findings of this research will also reveal further areas for comprehensive future research that are relevant for developing countries.

II RESEARCH METHOD

This research applies a constructivist paradigm using a qualitative method. The research conducted in this study consisted of a literature review, such that data was collected through a literature review and documentation study. This research intended to find avenues for potential further study or issues needing to be scrutinised in developing countries regarding the extent that the tax landscape has been reshaped due to globalisation. The potential further study is constructed based on a reflection of the global organisation proposal to be followed by the developing countries and what the factual taxation problems faced by these developing countries are.

III DISCUSSION: INTERNATIONAL TAX REGIME, THE CHANGE IN THE TAX LANDSCAPE AND ITS DEBATE FROM THE PERSPECTIVE OF DEVELOPING COUNTRIES

A *The Dynamic Principle of Fairness in Levying Taxes*

In taxing international income, fundamentally two basic questions need to be asked, namely: (i) what is the appropriate level of taxation that should be levied on income from cross-border activities; and (ii) how is the resulting income to be divided among taxing jurisdictions. The premise of the first question is that income generated from cross-border activities should be taxed once, thereby taking into account the traditional goal of avoiding double taxation, as well as avoiding under-taxation and non-taxation. Then, the answer to the second question is that the allocation of the tax base should be based on the benefit principle.

Under the benefit principle, the resident jurisdiction has the primary right to tax passive income, while the source jurisdiction has the primary right to tax active income (i.e. business income). For multinational entities, source-based taxation should be preferable, as it is consistent with the benefit perspective that the entity receives benefits from infrastructure, the economic climate, educated employees, affordable labour wages and various government policies (e.g. keeping the exchange rate stable or interest rates relatively low). In short, businesses benefit from the host country, while the government bears the cost of providing

benefits to earn money from it.[16] In practice, the structure of the international tax regime — as it concerns levying taxes on income-generating activities in a country's jurisdiction — is summarised in Table 1 below.

It has been argued that the traditional principle of fairness in taxation gave rise to the 'benefit-received' principle and the 'ability-to-pay' approaches. According to this concept, the benefit principle is an approach to determining the amount that should be paid by a taxpayer to a jurisdiction so as to reflect the amount of benefits it obtains from that jurisdiction. The ability to pay approach reflects the amount of tax payable as the measure of the taxpayer's resources, including wealth, consumption or some other appropriate metric. However, when applying these approaches, it is quite challenging to obtain precise information, as the amount of benefit received by each taxpayer will be different due to the distributive effect of taxation as a source of public goods and services.[17]

The tax levying principles of 'benefit received' and 'ability-to-pay' have been abused in this international tax regime era, namely when each country reduces its tax rate and tax burden to attract investment. Li (2010) cited the work of Easson, who noted that the current allocation regime is not based on any real agreement between nations and cannot be rationalised by any 'obvious principle of fairness'. In fact, the current allocation regime is biased in favour of capital-exporting nations who devised the rules of the game.[18]

The classical concept of the benefit principle is meant to justify income taxation with respect to the support granted by a country to the generation of income in its territory. Similarly, in connecting the jurisdiction and benefit principle, it is argued that taxes should be considered as a contribution to the benefits provided through the state.[19] This principle is, in particular, invoked by source countries to legitimise taxation in the jurisdiction where the taxpayer is not

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16 Reuvan S Avi-Yonah, 'Tax Competition, Tax Arbitrage and International Tax Regime' (2007) 61(4) *Bulletin for International Taxation* 130 ('Tax Competition, Tax Arbitrage and International Tax Regime').

17 Roxan (n 2).

18 Jinyan Li, 'Tax Sovereignty and International Tax Reform: The Response' (2004) 52(1) *Canadian Tax Journal* 141.

19 Eric CCM Kemmeren, 'Source of Income in Globalizing Economies: Overview of the Issues and a Plea for an Origin-Based Approach' (2006) 60(11) *Bulletin for International Taxation* 430.

resident, but carries on all or part of its income-generating activities.[20]

B *A Review of the Existence of the International Tax Regime*

Regarding the shaping or reshaping of the international tax regime, capital-importing countries have not played any meaningful role in developing the current international tax system, for example, through the conclusion of tax treaties around the world which have been driven by developed countries and have been pressed by business interests.[21] Citing Brooks and Krever (2015) with regard to the conclusion process of a treaty:

> Tax treaty then has become a sufficient legal framework through which countries might bilaterally bargain a different allocation of taxing rights than the allocation that they could achieve through unilateral legislation. However, since the source state always has the initial potential taxing jurisdiction, this arrangement can only ever result in the sacrifice of taxing rights by the source state …[22]

Further, the capital-importing countries have no actively engaged institution, such as the OECD, that can represent their tax interests effectively. The United Nations ('UN') has not functioned as a world tax organisation in any sense. The model tax treaty offered by the UN changes incrementally and a change took place only recently by the release the 2017 UN Model.[23] For example, the few key changes in the 2017 edition of the UN Model introduced a new article (art 12A) covering tax on technical services fees which was rendered from about 100 tax treaties signed by the developing countries. Indeed, under domestic law, they would be able to levy this withholding tax. In the absence of the article in the model, it has commonly been considered that income earned by foreign contractors providing services to the firm in the country could only be taxed under art 7 if only the permanent establishment threshold had been

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20 Wolfgang Schon, 'International Tax Coordination for a Second-Best World (Part I)' (2009) 1(1) *World Tax Journal* 67.

21 Referring to Kim Brooks and Rick Krever (2015), with a myriad number of tax treaties concluded (over 3,000 bilateral income tax treaties), it solely sounds of the success of developed countries to negotiate vis-à-vis to transfer the tax revenue from low-income countries to high-income countries and from low-income countries to multinationals. See Kim Brooks and Rick Krever, 'The Troubling Role of Tax Treaties' in Victor Thuronyi and Geerten Michielse (eds), *Tax Design Issues Worldwide* (Kluwer Law International, 2015) 159, 160.

22 Ibid 162.

23 Martin Hearson, Joy W Ndubai and Tovony Randriamanalina, 'The Appropriateness of International Tax Norms to Developing County Context' (Background Paper No 3, International Centre for Tax and Development, July 2020) 12.

met.

Moreover, low-income countries compete with each other to offer tax incentives for foreign direct investment, even though the effectiveness and efficiency of many such tax incentives are doubtful. Following the UN Economic and Social Commission for Asia and the Pacific (2017) research, for the developing countries — on its willingness to take a role on international tax norms with respect to foreign investment attraction, the important concern should be given to the assessments of whether investment incentives and the potential of tax base erosion lead by tax competition have been stated factually.[24] Within relevant taxation literature, it seems difficult for these countries, as a group, to end the race-to-the-bottom type of tax competition on their own and this 'sound fact' has been emphasised by various literature.[25]

Besides offering a more favourable tax treatment, a tax treaty can also be a signal of a developing country's commitment to offering a favourable investment environment to its foreign investors.[26] Numerous developing countries believe that one of the most visible obstacles to cross-border investment is the double taxation of foreign-source income. Investors desire stability, especially fiscal and legal certainty, and this can be realised through a tax treaty. In addition, tax treaties ensure that investors will not be doubly subjected to taxation in both host and resident countries. Moreover, concluding tax treaties also signalises to investors that the host country seeks to go beyond the issue of mere taxation and has acquired international economic recognition or a badge of international economic respectability.[27] In spite of positive signals sent by the countries and the tax treaty being conducted based on agreed negotiation — meaning that there is room to manoeuvre — the lower-income countries commonly have not managed to take advantage of grabbing greater taxing rights, and tend to surrender them by signing the tax treaty, especially for the countries that have not historically been involved or have taken the role as rule-makers on the international tax agenda. To enter into the international community, these countries must face a trade-off between benefiting adherence

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24 Joosung Jun, 'Tax Incentive and Tax Base Protection in Developing Countries' (Background Paper, UN Economic and Social Commission for Asia and the Pacific, 2017).

25 Li (n 18).

26 Julia Braun and Martin Zagler, 'An Economic Perspective on Double Tax Treaties with(in) Developing Countries' (2014) 6(3) *World Tax Journal* 242.

27 Eric Neumayer, 'Do Double Taxation Treaties Increase Foreign Direct Investment to Developing Countries?' (2007) 43(8) *Journal of Development Studies* 1501.

to the international arena and retaining the gain from unilateralism.[28]

The existence of the international tax regime, which rests mainly on the tax treaty network, has become a significant pressure to change the domestic tax policy landscape through a conclusion of tax treaty or a referring to OECD or UN proposal while creating domestic tax regulation.[29] In addition, for international tax matters, countries are bound by treaty to behave in a certain way.[30] For instance, the source country has been limited its taxing rights on passive income such as dividend, interest and royalty paid to the capital owner in the resident country. Further, the existence of tax treaty also has brought a source country to not be able to tax business income generated by a foreign firm — non-resident that has insufficiently created permanent establishment as a means of significant economic presence.[31] In addition, currently, this fact leads to the situation where the international enterprise may take use of mismatch of national tax regulation and international tax law to escape from its tax obligation in higher tax jurisdiction.[32] The freedom of most countries to adopt international tax rules is severely constrained. Emphasising how the international tax regime has been affected, Avi-Yonah (2007) proposes several situations to consider in which countries will follow a rule, but do so

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28 Martin Hearson, 'Corporate Tax Negotiations at the OECD: What's at Stake for Developing Countries in 2020?' (Summary Brief, Institution Centre for Tax and Development, 2020).

29 Basically, the nature of international tax rules is in the form of soft law. This soft law to a large proportion was created by the OECD members that then adopted by the United Nation's ('UN') Committee of Experts. This soft law was adopted by the treaty party through the conclusion of tax treaty. With another mode of reshaping, a country may refer to UN/OECD documents in formulating their domestic tax rule(s). See Martin Hearson (n 28).

30 The developing countries in concluding a particular tax treaty must face at least three challenges: (1) the starting point for any tax treaty discussion is based on an existing set of norms that has been developed mostly without their inputs; (2) the OECD and currently the role of the G20 members play dominant agenda-setting at the system level; and (3) the internal challenges — mostly relate to the ability and capacity to limit the opportunity to negotiate: see Hearson, Ndubai and Randriamanalina (n 23). Brooks and Krever (2015) even argued in a more straightforward way that, in their view, the principle purpose of a tax treaty that is to reallocate the taxing rights between the parties even leads to the removing of source country taxing rights. This has brough two important issues: first, whether the tax treaty is in the interests of developing countries to give up the taxing rights in favour of capital exporting countries; and second — which arises only if the tax treaty is concluded that the benefit of forgoing taxing rights outweighs the cost of lost tax revenue — is whether this should be done by way of treaty or through unilateral action by a capital importing source country. See Brooks and Krever (n 21).

31 Brooks and Krever (n 21).

32 Camilla Berkesten Hägglund, 'The Definition of a Permanent Establishment in the BEPS Era' (LLM Thesis, Uppsala University, 2017).

only out of a sense of legal obligation:[33]

1) Jurisdiction to tax: may a country simply decide to tax the foreign source income of non-residents that have no connection to such country? The answer is clearly no.
2) Non-discrimination: the non-discrimination norm that non-residents from a treaty country should not be treated worse than residents, is embodied in all tax treaties.
3) Arm's length standard: the transfer pricing standard applied in all tax treaties to determine the proper allocation of profits between related entities. Under this standard, transactions between related parties may be adjusted by the tax administration to the reflect terms that would have been agreed had the parties been unrelated to each other.
4) Foreign tax credit versus deduction: many economists argue that countries should grant only a deduction for foreign taxes rather than a credit. However, countries generally grant either an exemption for foreign source income or a credit for foreign taxes paid. Remarkably, in most cases, this is done even in the absence of a tax treaty.

Similarly, several previous studies have also predicted that an evolution in the form of national economic policies would assimilate to the new changes in national law.[34] In addition, global political and economic forces considerably impacted the balance of the authority of the state to impose taxes in an international context, as well as the moral, legal, political and economic limits on that authority.[35] In the process of adapting, countries might consider that (i) certain matters should be dealt at an international level and (ii) particular matters that had previously been regulated at the national level should be consistent with international norms. In practice, the allocation of taxing rights involves a decision regarding how to tax the foreign income of residents and the domestic source income of non-residents, as in both situations there is more than one jurisdiction that could claim the right to tax such income. A problem arises when both jurisdictions claim the right to tax the same income in the hands of the same legal person. Tax treaties, therefore, have not only influenced domestic law, but also assumed a dominant position in determining the allocation of taxing rights at the international level. In most

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33 Avi-Yonah, 'Tax Competition, Tax Arbitrage and International Tax Regime' (n 16).

34 Ramon J Jeffery, *The Impact of State Sovereignty on Global Trade and International Taxation* (Kluwer Law International, 1 March 1999); Marian Omri, 'Jurisdiction to Tax Corporations' (2013) 54(4) *Boston College Law Review* 1613; Stewart, 'Global Trajectories of Tax Reform' (n 10).

35 Cees Peters, *On the Legitimacy of International Tax Law* (International Bureau Fiscal Documentation, 2014).

countries, tax treaties come before domestic tax law in the hierarchy of laws.

National sovereignty in taxation refers to the ability of a nation to pursue whatever tax policy it chooses, even though complete sovereignty is impossible. McLure (2001) argued there are at least four generic types of limitations on national sovereignty in the taxation of income from capital.[36] First, in the case of market-induced voluntary limitations on sovereignty, the government would voluntarily utilize its ability to tax to offer favourable treatment when it becomes aware that its jurisdiction has become the location of economic activities and financial investment. In addition, the shifting of the tax base and the choice of tax structure by taxpayers would seem to be adjusted to follow the market. Second, negotiated limitations on national sovereignty might be realised through the extensive work of tax treaties. Third, in the case of externally imposed limitations on sovereignty, the limitation on taxing power is induced by market forces or accepted in negotiations for an international agreement. Finally, there are also limitations on administrative independence.

C *Changes in the Tax Landscape Due to Globalisation*

As an impact of globalisation, it has been predicted that fiscal erosion would take place through economic activities such as electronic commerce, intra-company trade, offshore financial centres, tax havens and the inability to tax financial capital. Facing this situation, the task of the tax administration would be more complicated and challenging and would impact future effective and legitimate governance. With regard to this situation, however, it is very difficult to empirically prove the decline in the role of the state, as proving a direct relationship between globalisation and tax revenue is also not an easy task. In addition, the mere ability to impose taxes in a changing environment is still affected by additional factors besides globalisation. It is also similarly difficult to show a clear link between increasing economic integration and economic spending.[37]

Avi-Yonah has highlighted dramatic changes brought about by globalisation. One example is the increase in the ability of both individuals and corporations to earn low-taxed income overseas, for example as a result of the reduction or abolition of withholding taxation.

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[36] Charles E McLure, 'Globalization, Tax Rules and National Sovereignty' (2001) 55(8) *Bulletin for International Taxation* 328.

[37] Peters (n 35).

Regarding globalisation and foreign direct investment, when levying tax on a subsidiary, the permanent establishment concept has allowed the countries to have an opportunity to obtain a substantial tax base from the outflow of income from capital. This also applies to financial income from capital (interest, royalties, dividends) and to the return on foreign direct investment (business profit).[38] The concern which needs to be taken into account is that the shift in the location of economic activity implied by globalisation will mean increasing amounts of goods and services will be sold in developing countries without a need for the seller to have any physical presence in therein.[39]

It is needed to note the significant circumstances in which countries have to limit their tax sovereignty due to market forces, pragmatic concerns, treaty negotiations and other external influences. The limited sovereignty is indicated by the following situation which occurred as a sequence or series of change:[40]

1) The high mobility of capital has led countries to generally set their withholding tax on portfolio income and corporate income tax rates at a competitive level. In fact, the corporate tax rates among OECD countries have recently moved closer together. Similarly, countries voluntarily limit their jurisdictional claims to economic activities located in that country or persons residing in that country;
2) Countries also give up tax sovereignty through bilateral treaty negotiations. In reality, the existence of an extensive treaty network, which is based on OECD Model, means that countries have to agree to a common set of international tax rules irrespective of differences in their domestic tax laws. There is little sovereignty left when it comes to the meaning of 'permanent establishment' once the prerequisite has met; withholding taxes on dividends, interest and royalties; and other issues covered by tax treaties. More significantly, with respect to the allocation of international business profits earned by multinational enterprises, the OECD Model has been widely adopted in bilateral tax treaties and the interpretation of the Model provisions is largely governed by guidance prepared by the OECD. For many developing countries that are

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38 RS Avi-Yonah, 'Globalization, Tax Competition and the Fiscal Crisis of the Welfare State' (2000) 113(7) *Harvard Law Review* 1573.

39 Roxan (n 2).

40 Li (n 18).

formulating their own international tax rules, there is really no option other than to follow the OECD guidance;

3) While maintaining national tax sovereignty, many countries change their tax rules to ensure that they do not impose burdens on mobile factors dissimilar to those imposed by other countries or that their anti-avoidance rules are as effective as those in other countries; and,
4) External forces could cause a country to relinquish its sovereignty. For example, the OECD led the harmful tax competition campaign. Tax haven jurisdictions that are considered to have engaged in harmful tax competition are 'encouraged' to mend their ways. If that fails, the OECD apparently intends to propose that its members undertake joint efforts to place pressure on tax havens. Therefore, sovereignty is limited not only for an individual tax haven country, but also for each OECD member country. This example also demonstrates that OECD countries are prepared to sacrifice their sovereignty for the purpose of a common good. Another example of external forces limiting tax sovereignty is the rise of electronic commerce. Many OECD member and non-member countries have formally or informally followed the lead of the OECD in this area.

Avi-Yonah (2007) made strong statements in asserting that an international tax regime exists through the number of concluded tax treaties and their adoption into domestic tax law. This means that each country is not able to set its domestic tax rules independently. Furthermore, the government should consider the direction of international norms and should adopt only the basic norms as the premises of their domestic law. In practice, for example, most domestic tax rules have adopted the common concept of jurisdiction to tax, the non-discrimination principle, the arm's length standard and foreign tax credit versus deduction.[41] This evidence shows that the structure of taxation driven by globalisation has become convergent and coordinated even though taxation should be on a nation sovereignty basis,[42] specifically in the context of income tax, considering that the factors affecting the income tax structure have been forced into more

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41 Avi-Yonah, 'Tax Competition, Tax Arbitrage and International Tax Regime' (n 16).

42 Sol Picciotto, 'Is the International Tax System Fit for Purpose, Especially for Developing Countries?' (Working Paper No 13, International Centre for Tax and Development, 2013) ('Is the International Tax System Fit for Purpose, Especially for Developing Countries?').

similar design and administration among jurisdictions.[43] However, the attempt to scrutinise this issue is meant to ensure that each person pays a fair share of tax in the cross-border ecosystem or simply to ensure that global business entities have settled their tax obligations fairly.

D *Supra-Governmental Role in Shaping the Tax Landscape*

Regarding governmental and supra-governmental institutions, the OECD and UN play a role as the acceptable global institutions that have been justifiable: (i) to ensure that the taxpayer cooperates with attempts to ascertain whether the taxpayer complies with its tax obligations; and (ii) to prevent unfair behaviour.[44] The framework of international convergence was much influenced by the OECD and UN model tax treaties and related guidance. Initially, the Models drafting was solely aimed at international portfolio investment, far different from today, for instance, when the Models also consider direct business investment that is controlled by the capital owner, as well as business carried out by an affiliate or performed by a branch.

Then, in 1933, as additional provisions, Mitchell B Carroll of the League of Nations Fiscal Committee introduced a new adjustment, embodied in both national tax law and tax treaties, applicable to transnational capital inflows that are continuously developed (currently known as transfer pricing adjustments), along with methods for determining transfer prices.[45] However, the existence of these provisions could not prevent the potential problem of the allocation of taxing rights to diminish tax leakage. Moreover, multinational companies have been able to adapt to the rules and are able to exploit loopholes in tax treaties to minimise their tax obligations.

The OECD Fiscal Affairs Committee was initially created in 1956 to improve on what the UN had started, and in the 1960s started to take over the coordination that the UN should have done. The Model Tax Convention was created by the OECD, and the OECD has promoted that Model such that it immediately became the dominant model. As a result of its popularity, the Model was able to influence discussions on a wide range of issues concerning tax policy and

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43 Leviner (n 6).

44 Sigrid JC Hemels, 'Fairness and Taxation in a Globalized World' (26 February 2015) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2570750>.

45 Sol Piccotto, *International Business Taxation: A Study in the Internationalizaton of Business Regulation* (Cambridge University Press, 2013); Raffaele Petuzzi, 'The Arm's Length Principle: Between Legal Fiction and Economic Reality' in Michael Lang, Alfred Storck and Raffaele Petruzzi (eds), *Transfer Pricing in a Post-BEPS World* (Kluwer Law International, 2016).

tax administration for at least the last 20 years.[46]

The OECD next published a description of general tax avoidance schemes such as the practices of channelling payment flows through different entities located in jurisdictions where that kind of payment would be subjected to low or no taxation. Subsequently, the OECD released a proposal (originally put forth by the United Nations and Germany) that was intended to prevent tax avoidance, namely proposed controlled foreign corporation (CFCs) rules. The proposal mainly consisted of three main items that are more challenging to identify in this globalized world, namely: (i) the primary control of multinational enterprises due to the integration of supply chains; (ii) the source of passive income and location of business operations; and (iii) the establishment of a CFC that is resident in a low-tax country.

Then, in 1979 the OECD introduced the concept of the arm's length price in its document titled *Transfer Pricing and Multinational Enterprises*. The 1979 guidance required demanding efforts involving complex details and was difficult to apply — even in the United States, the jurisdiction where the concept originated with less effective results. Even though the concept of transfer pricing is not directly in the OECD Model Convention, with a variety of methods to assess the arm's length nature of business transactions on a case-by-case basis, the OECD guidance has been recognised as the international consensus which was immediately adopted by tax administrations and tax policy makers, such that it is now embedded in national tax rules.

Notably, Picciotto[47] emphasised that the OECD took the leading role in proposing the arm's length principle as an international consensus, as the main efforts by the UN Tax Committee to deal with transfer pricing problems involved less intensive discussions. With recent developing of transfer pricing issue which has been coated trough BEPS Project, the transfer pricing framework has emphasised 'aligning transfer pricing outcomes with value creation'. This updated work is focused on the problems with transaction involving intangibles, allocation of risk and profit allocation in the situation of lack of commercially viable. This problem has not sufficiently included the major important challenges of developing countries that currently

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46 Sol Picciotto, *The G20 and the Base Erosion and Profit Shifting (BEPS) Project* (Discussion Paper No 18, German Development Institute, April 2017).

47 Picciotto, 'Is the International Tax System Fit for Purpose, Especially for Developing Countries?' (n 42) 22.

still merely focus on implementing the transfer pricing rule[48] with many issues related to technical challenges and limited resources of tax administration.[49] This also is including recent Country-by-Country Reporting in which most of countries have committed to implement on their domestic rule.[50] For developing countries, the lack of resources and available data (needed to apply transfer pricing methods), exacerbated by weak capabilities in tax administration, have been obstacles that need to be addressed and overcome in order to implement the OECD guidance. As a consequence, disputes between tax administrations and taxpayers continuously arise, for example simply involving the determination of a comparable method that is easy to administer in confirming acceptable transactions. This is similar to the tax dispute situation in India and China.

The UN re-entered the arena in 1967, led by the Ad Hoc Group of Experts on International Cooperation in Tax Matters. This group was engaged to take the OECD Model and adjusted it based on the needs of developing countries. However, pressures to create an organising international tax norm then resulted in only a slight improvement of this body to a Committee of Experts in 2004. Furthermore, the group remained severely under-resourced and was able to play only a supplementary role in work on tax treaties. The Committee also has very limited time and resources dedicated to the Annual Session with very small secretariat to support the activities even though it bears broad range of mandates.[51]

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48 Based on a publication made by the OECD Observer, for the technical aspect needing to be addressed which by this way may be able to reduce of resources could be given to the enhancing legislation of transfer pricing method focusing on specific TP method related to the most common types of transactions and sectors contributed considerably to the developing countries economics such as extractive industry, manufacturing and supporting services. See Caroline Silberztein, 'Transfer Pricing: A Challenge for Developing Countries' (December 2009) *OECD Observer*.

49 David McNair, Rebecca Dottey and Alex Cobham, 'Transfer Pricing and the Taxing Rights of Developing Countries' (Conference Paper, Tax Justice Network Africa Research Conference, April 2010) <https://www.christianaid.ie/sites/default/files/2017-08/transfer-pricing-november-2010_0.pdf>.

50 Further, the TPG also could not sufficiently reflect the fair contribution of the firm located in their country to the global value creation — as mentioned by India and China, they must incorporate the concept of marketing intangibles and location-specific advantages into their transfer pricing assessment. With these steps in assessment, the cost of implementing transfer pricing rule(s) would be quite considerable. See Hearson, Ndubai and Tovony (n 23).

51 Michael Lennard, 'The Purpose and Current Status of the United Nations Tax Work' [2008] (January/February) *Asia Pacific Tax Bulletin* 23. The broad range of the Committee's mandate as cited from Lennard (2008) consists of: (i) reviewing and updating the UN Model Double Taxation Convention and the Manual for the Negotiation of Bilateral Tax Treaties between Developed and Developing Countries; (ii) providing a framework for dialogue with a view to enhancing and promoting international tax co-operation among national tax authorities; (iii) considering how new and emerging issues could affect international co-

The release of the BEPS Action Plan followed by the outputs of the BEPS Project and the BEPS Inclusive Framework might be considered as the first notable comprehensive effort to reform the international tax regime since it was initiated in the 1920s. The idea behind the BEPS Action is to shorten the gap between the ideas of global administration and technical complexity. However, based on publication by The BEPS Monitoring Group specifically on the tax consequence of the highly digitalised economy with regard to the issues relevance for developing countries, BEPS Inclusive Framework which currently is still on negotiation process, dominated by OECD member gives more favour to residence jurisdiction, since with current digitalised matters it even becomes problematic to the developing countries as source countries.[52] Quoting the United Nations, The BEPS Monitoring Group '[t]hey long ago pointed out the defects of a purely physical definition of a permanent establishment, particularly with the dematerialisation of economic activities, reflected in the shift from goods to services, now exacerbated by digitalization'.[53] It means, with current negotiation to nexus to taxing rights on highly digitalised business, may be giving less benefit to the source country.[54]

Notably, in addition to the international norm that reluctantly has to be the global governing rule, as Burgers (2017) posed, there is a different principle of fairness for taxing business between developed and developing countries, primarily as regards the following two different perspectives.[55]

A different perspective on economic fairness. In this regard, first, the government has the main rights to tax revenue collection from business entities as compensation for government

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operation in tax matters and develop assessment, commentaries and appropriate recommendations; (iv) making recommendations on capacity-building and the provision of technical assistance to developing countries; and (v) giving special attention to developing countries.

52 The BEPS Monitoring Group, *Tax Consequences of the Digitalized Economy – Issue of Relevance for Developing Countries* (Report, June 2020) <https://www.un.org/development/desa/financing/sites/www.un.org.development.desa.financing/files/2020-06/CRP%2025%20-%20BEPS%20.pdf>.

53 Ibid.

54 The UN pointed out that the digitalisation should also cover and give priority to developing a new definition of taxable nexus for automated digital services. To cover the services performance in general, the UN proposes to consider reviewing art 5 of the UN Model, specifically: point 5.3.b which allows the levying of tax on income from services delivered through the presence of personnel; the principle of force attraction in art 7.1; and the provision for fractional apportionment in art 7.4.

55 Irene Burgers and Irma Johanna Mosquera Valderrama, 'Fairness: A Dire International Standard with No Meaning?' (2017) 45(12) *Intertax* 767, 779.

protection. Burgers (2017) emphasised that this thought came from the wide acceptance of Adam Smith's principles, worsened by the fact that the largest proportion of total government revenue comes from corporate income tax. Second, although tax incentives in the form of favourable tax provisions are considerable favoured policies to attract capital inflows, their implementation remains flawed with a high degree of discretion. Third, from the perspective of developing countries, more tax revenue must come from the digital economy, as it seems that the digital economy has a higher return compared to the traditional economy. Fourth, there are concerns regarding the allocation of taxing rights on business profits, specifically the income of permanent establishments, in line with UN Model. The premise of this concept is to limit profit erosion related to the allocation of profit earned by a permanent establishment. Regarding transfer pricing aspects, developing countries emphasise the importance of simplicity in implementing transfer pricing rules. Adopting the recommendations under BEPS Actions 8-10 and adjusting them to create domestic rules is too ambitious.

A different perspective on juridical fairness. First, withholding tax on passive income has been quite high. Second, legal certainty, clarity of the law and the principle of non-retroactivity are quite different, as developing countries tend to prefer simple laws. All of these might happen due to a lack of sufficiently trained tax administrators and judges, combined with a lack of administrative guidance, rulings and concepts. These were identified in a number of cases heard by tax courts in tax disputes involving, for example, transfer pricing provisions or the application of beneficial ownership provisions. Adopting even the BEPS Inclusive Framework actually brings a more challenging task.

In 1988, the OECD formulated the Ottawa principles of taxation by taking Adam Smith's canons of taxation: neutrality, efficiency, certainty, simplicity, flexibility, effectiveness and fairness. However, currently, as the OECD explains, the principle of fairness has been shifting as, 'the potential for tax evasion and avoidance should be minimised while keeping counter-acting measures proportionate to the risks involved'.[56]

Based on the World Bank public discussion to highlight the tax issues faced by developing countries, the issues currently faced by developing countries can be summarized as follows: (i) to what extent does tax competition affect the ability of developing countries to enforce a

[56] OECD, *The Implementation of the Ottawa Taxation Framework* (Report, 2003) 12.

legitimate contract between the government and a taxpayer; (ii) how can tax rules be improved to keep pace with rapid changes in the global business environment; and (iii) to what extent is tax co-operation (including possible regional and global arrangements) necessary. However, the results of the World Bank discussion were not released and need to be followed up with further actions. Burgers and Mosquera (2017) argued that there was no clear discussion to deal with the problem in the scope of the allocation of taxing rights in the BEPS Action Plan, specifically in Action 15 on the development of a multilateral instrument. However, the G20 and developing countries did not bring attention to the need to to open discussions at the OECD meeting about the inclusion of their concerns in the multilateral instrument, understanding that the existence of their concern could not be taken into consideration by the OECD.[57]

E *Re-Identify the Existing Tax Challenges of Developing Countries*

Although the transnational legal order was initially intended to solve a global problem, it has often created or triggered new problems, as the landscape of the implemented ecosystem is quite heterogeneous. This is why a solution to a particular problem could give rise to a new problem in another aspect. Cross-border tax issues, while related to cross-border investment, are found on the two constellations of international double taxation and international tax competition. Measures to minimise the double taxation effect, tend to intensify tax competition and vice versa.[58] Generally, each government would have faced the three-headed dilemma of tax sovereignty, double taxation and tax competition. *A government cannot solve the twin problem of double taxation and tax competition and preserve national tax sovereignty at the same time.* One of the three goals simply must give; a government can mitigate double taxation and preserve national sovereignty largely intact, but then have to face increased tax competition; it can mitigate tax competition in a sovereignty-preserving manner by increasing double taxation; or it can solve both problems simultaneously, but then have to pool sovereignty at the international level. For a summary by Rixen and Genschel (2015) of a government's three-headed dilemma, see Figure 1. Further, for practical aspect, the factual challenges faced by the developing countries with respect to the investment and tax competition

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57 Irma Mosquera Valderrama et al, 'Rule of Law and the Effective Protection of Taxpayer's Rights in Developing Countries' (Research Paper No 10, WU International Taxation Research Paper Series, 2017).

58 Philipp Genschel and Thomas Rixen, 'Settling and Unsettling the Transnational Legal Order of International Taxation' in Terence C Halliday and Gregory Shaffer (eds), *Transnational Legal Orders* (Cambridge University Press, 19 January 2015) 154.

is to smaller the incentive effect that imply the lower revenue cost.[59]

Based on the study by Buss (2015) which was published by the OECD, up to 80 developing countries declared their commitment to implement the output of BEPS Project in their jurisdictions and — based on the latest update in August 2015 — there are 117 countries that have signed the agreement to implement the BEPS Inclusive Framework.[60] However, with the presence of BEPS Projects, it seemed it has nothing to do with the re-examination on principle of norms underlying in international tax regime or the consideration to shift the residence-based to source-based taxation.[61] With recent BEPS Inclusive Framework, it seems impossible for lower income countries to fully participate due to the complexity of proposal.[62] The mechanism of actual commitment is also revealed by their level of involvement in the Global Forum Tax Transparency, the Global Forum on Transfer Pricing, the Task Force on Tax and Development, special meeting on BEPS, regional consultations, direct participation on the Committee on Fiscal Affairs ('CFA') and as a technical member as part of a working party. However, in the context of implementing the output of BEPS Project, research has revealed the following challenges:[63]

- the characteristic of cross-border tax planning performed in developing and developed countries may be different;
- there is a lack of necessary legislative measure to deal with BEPS problem relevant to the problems faced by developing countries;
- being able to access and gather relevant information on developing countries might take considerable effort;
- there is a need to improve tax expertise and administrative capability to implement considerably more complex international rules and international provisions;

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59 Jun (n 24).

60 Heike Buss, 'The BEPS Project and the Engagement with Developing Countries: The Politics of Fighting Tax Avoidance and Tax Evasion' (Working Paper, OECD Centre for Tax Policy and Administration, 23 June 2015) 5.

61 Brooks and Krever (n 21) 178.

62 See Hearson, Ndubai and Randriamanalina (n 23) who are very concerned with the political and technical complexity of the Inclusive Framework proposal and the timing of the process that aims for global agreement by the end of 2020, which means it is extremely challenging for many members of developing countries and lower-income countries to participate.

63 Buss (n 60) 5.

- there is a need for support and impetus from the political realm to achieve effective measures to deal with BEPS challenges; and,
- there is acute pressure faced by developing countries to attract investment, and this can is trigger tax competition that leads to the so-called race to the bottom.

Even though the output of BEPS Project has become the international consensus for almost all of countries around the world and it seems to be a prescriptive solution, the implementation cannot be done by using similar strategies from one country to the next, specifically in developing countries, as the issues facing developing countries do not align with the challenges for which BEPS Project was launched in the first place. Peters (2015) articulated the aspiration of developing countries with regard to implementation of the BEPS Action Plan:

> Developing countries also face issues related to BEPS, though the issue may manifest differently given the specificities of their legal and administrative frameworks. The UN participates in the tax work of the OECD and will certainly provide useful insights regarding the particular concerns of developing countries.[64]

Research (Valderrama, 2017) shows that there is a lack of output legitimacy for developing countries to implement the BEPS Inclusive Framework and its four minimum standards. Currently, developing countries need to focus on dealing with their domestic taxation problems. Even though country-by-country reporting sounds like a prescription for the transfer pricing problem, such reporting is not the specific solution needed by developing countries. In addition, as each cluster or region of developing countries has its own specific problems, the BEPS Inclusive Framework cannot possibly be a one-size-fits-all solution.[65]

Before the release of the BEPS Inclusive Framework, the OECD introduced a standard of transparency and exchange of information such as that contained in art 26 of the OECD Model Tax Convention and Model Agreement on Exchange of Information on Tax Matters. Other measures include the Global Forum on Transparency and Exchange of Information for Tax Purposes, intergovernmental agreements and the US Foreign Account Tax Compliance Act ('FATCA'). The OECD proposed that 'better transparency and information exchange for tax purpose are key to ensuring that taxpayers have no safe haven to hide their income and assets

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64 Peters (n 35) 375.

65 Irma Mosquera Valderrama, 'Output Legitimacy Deficits and the Inclusive Framework of the OECD/G20 Base Erosion and Profit Shifting Initiative' (2018) 72(3) *Bulletin for International Taxation* 1.

and that they pay the right amount of tax in the right place'.[66] For the technical implementation, the OECD and G20 issued standardized guidance in 2014, the *Standard for Automatic Exchange of Financial Account Information: Common Reporting Standard*, followed by the release by the OECD of another document setting forth tax-related guidance, namely the *Standard for Automatic Exchange of Financial Account Information in Tax Matters*.[67]

The consequence of this forced soft law is that each country should review its domestic law and find the appropriate way to incorporate this global consensus into its revised domestic tax rules. In fact, the challenges faced by developing countries have been quite different from those of the global initiative of the OECD, even though the OECD agreed to assist developing countries in implementing the output of BEPS Project on eliminating harmful tax practices in their domestic law.[68] Developing countries continue to struggle to improve administrative capacity, to enhance the substance rule for permanent establishments and to implement transfer pricing rules with an appropriate arm's length principle to identify the possible tax planning propensity of multinational enterprises. However, with these kinds of challenges, recently almost 150 jurisdictions – ranging from OECD, G20 and small developing countries – signed the agreement on the work of the Global Forum.[69]

Several selected studies examined changes in the tax landscape in developing countries and problems faced by developing countries due to the pressure of globalisation. To shed light on this discourse, three aspects should be considered: (i) the problem faced by developing countries with regard to international interaction, (ii) the proposed global tax policy and (iii) the global consensus that has been adopted. Details on the studies and the relevant references can be found in Table 2.

The taxation problems faced by developing countries with regard to international interaction

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66 OECD, 'Promoting Transparency and Exchange of Information for Tax Purposes' (Background Information Brief, 19 January 2010) 2 <http://www.oecd.org/newsroom/44431965.pdf>.

67 Diane M Ring, 'Transparency, Disclosure and Developing Countries' (2017) 6 *Brigham Young University Law Review* 1767.

68 Irma Mosquera Valderrama, 'International Tax Law Developments in the Tax Treatment of Interest, Royalties and Other Flows of Income: The Case of Suriname' (Research Paper, SDU Fiscale and Financiële Uitgevers, 2010).

69 OECD, *Tax Transparency 2017: Report on Progress* (Report, Global Forum on Transparency and Exchange of Information for Tax Purposes, 2017).

include:

- managing tax incentives and dealing with tax competition, especially with neighbouring countries; the concern should be given to how to lower revenue cost; how to set a conformity with regard to effective tax rate with neighbouring countries with similar economic situation in order to tackle the increase of profit shifting commonly performed by MNEs.
- improving transfer pricing rules including the technical and administrative matters following the majority types of industries/sectors operating in its country and the most relevant transfer pricing method to its most common types of transactions; for the developing countries, typically they are the home for contract manufacturing and they perform exploitation of natural resources/extractive industries.
- redefining the scope of the concept of permanent establishment with regard to significant economic physical presence[70] with the current existence of international business dynamics; and,
- global tax transparency and exchange of information as part of global commitment has been agreed.

Whereas, the proposed global tax policy consists of:

- the BEPS Inclusive Framework or commonly called Minimum Standards, namely (i) managing harmful tax competition,[71] (ii) prevention of tax treaty abuse, (iii) adopting transfer pricing documentation requirements and country-by-country reporting and (iv) adopting dispute resolution mechanisms; and,
- global tax transparency, including (i) exchange of information and (ii) the US Foreign Account Tax Compliance Act ('FATCA').

Then, based on the proposed global policy, developing countries are forced to adopt the entire global tax consensus, similarly, to proposed global tax policy. A summary of this study can be

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70 The concept of PE without digitalisation context has eroded the taxing rights on business income then the existence of digitalization era — now under the Inclusive Framework for BEPS even made clear that digitalization exacerbates the existing problems. See The BEPS Monitoring Group (n 52).

71 In fact, tax competition from a developed countries' perspective has been aligned by the European Union; the Commission is actively using its powers in the field of state aid to tackle targeted tax competition. See Jukka Snell and Jussi Jaakkola, 'Economic Mobility and Fiscal Federalism: Taxation and European Responses in a Changing Constitutional Context' (2016) 22(6) *European Law Journal* 772.

found in Table 3.

Based on the above, it is clear that the ultimate challenges faced by and the interest of developing countries do not closely correspond with the proposed global tax consensus to be incorporated into their domestic law. This means that developing countries must first fix their own problems regardless the limited resources, and in the same time they have to commit to implement global tax consensus as the consequence of their declaration/commitment to join with the current international tax norm.

IV THE MOVE FORWARD FOR THE OECD ROLE IN DEVELOPING COUNTRIES

The existence of the OECD/G20 BEPS Project has been frequently challenged. From a representational perspective, the governance structure of the OECD has lacked institutional components and it has not covered how the concept of supra-governmental should be defined due to the absence of formal rules, procedural principles and dispute resolution mechanisms.[72] On one hand, it might be said that there is no penalty for not adopting the outputs of the BEPS Project, yet on the other hand, the OECD has reinforced its strong position as the main player in shaping the international tax landscape.[73] Citing Peter Essers[74] with regard to the BEPS Project, citizens can only discuss the result of the drafting process and offer comments on various proposals. There is a lack of interactive involvement throughout the decision-making process.

OECD initiatives, especially the BEPS Project, are frequently challenged as regards their legitimacy as global rules, as decisions have been made by the OECD even though implementation takes place in individual countries. The so-called equal footing between OECD, G20 and non-OECD countries needs to improve further developed standards, as it would be more challenging for developing countries that have fewer resources to incorporate outputs of the BEPS Project into their domestic law without sufficient dialogue.[75] In

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72 Sissie Fung, 'The Questionable Legitimacy of the OECD/G20 BEPS Project' (2017) 10(2) *Erasmus Law Review* 76.

73 Adrián Grant, 'On the Legitimacy of the OECD to Set the Global Tax Agenda', *GLOBTAXGOV* (Blog Post, 5 November 2018) <https://globtaxgov.weblog.leidenuniv.nl/2018/11/05/on-the-legitimacy-of-the-oecd-to-set-the-global-tax-agenda/>.

74 Peter Essers, 'International Tax Justice between Machiavelli and Habermas' (2014) 68 *Bulletin for International Taxation* 54.

75 Fung (n 72).

undertaking supra-governmental initiatives such the BEPS Project, the involvement of stakeholders and actors in shaping the formulation of initiative outputs is extremely critical. The OECD must play a role in organizing global public discussions and inviting increased participation from many perspectives (government officials, member of legislative bodies, business associations, academia, NGOs that might be able to play a role in upgrading intergovernmental bodies).

In formulating international rules, an international institution should democratically gather sufficient information on domestic governance of nations, including structural components. As a result, the global initiative would be compatible and would be able to support the domestic tax system. Thus, developing countries might be able to present their agenda and policy priorities. The current initiative, by establishing a platform for collaboration among international organisations as the means of dialogue and support, will serve to create a friendly global policy environment and to ensure effective international tax collaboration.[76]

V CONCLUSION

In this globalized world, tax policy has converged due to international tax consensus and norms led by a recognised international organisation, namely the OECD through tax treaty model and other modes of proposed soft law. OECD recently undertakings such as the BEPS Project reflect how an international body has taken on a considerable role in shaping the global tax landscape. Developing countries are strongly encouraged to adopt the international consensus proposed by this organisation. The recent international tax consensus proposed by the OECD to be adopted by developing countries is related to the BEPS Minimum Standards and global transparency. Assessing the literature examining the OECD's agenda, specifically on the BEPS Project, it is apparently that the global initiatives have not fully considered the current problems faced by developing countries.

In fact, the global consensus proposed by the OECD has not taken considerably into account the current problems that arise in developing countries. Developing countries struggle to deal with problems related to: (i) managing tax incentives and tackling tax competition to attract investment; (ii) redefining the scope of the concept of permanent establishment with regard to

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[76] United Nations, Inter-Agency Task Force on Financing for Development, 'The Platform for Collaboration on Tax' (Web Page, July 2016) <https://www.un.org/esa/ffd/wp-content/uploads/2016/01/The-Platform-for-Collaboration-on-Tax_IMF-OECD-UN-WBG_IATF-Issue-Brief.pdf>.

economic physical presence with the current existence of international business dynamics; (iii) including income generated from the digital economy; and, (iv) implementing global transparency through exchange of information. In addition, developing countries also need to actively participate in the global forum so as to present their policy priorities and they should also evaluate their current tax policies to reflect their policies choices taken whether the policy still have corresponded with their factual problems.

This research contributes to the early stage of international tax study that considers developing country perspectives. It shows the mismatch of global tax initiatives and highlights the significant aspects of taxation that developing countries should be aware of when setting their tax policy agenda. Regarding areas for further research, this initial finding can be used as a premise to scrutinise the actual problems faced by countries due to supra-government initiatives and proposals and the extent to which a government should adopt the global tax consensus.

WESTERN AUSTRALIA'S REGULATION OF IMAGE-BASED SEXUAL ABUSE: AN ISSUE OF CONSTRUCTION OR SOMETHING MORE?

KEANE BOURKE*

ABSTRACT

In response to the proliferation of non-consensual sharing of intimate images, better known as 'revenge pornography', amendments to Western Australia's Criminal Code came into effect in mid-2019 making it a criminal offence to share intimate images of a person without their consent. While other jurisdictions have seen hundreds of prosecutions each year after introducing similar laws, Western Australia has only recorded a handful of reported prosecutions at the time of writing. This article considers the construction and effectiveness of similar provisions, domestically and internationally, to contend that while Western Australia's legislation is well-drafted to deal with this growing problem, opportunities were missed to better empower victims to come forward.

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I INTRODUCTION

A modern scourge for legislators has been the growth of the internet and the plethora of harms it facilitates. While some consider efforts to regulate these harms 'too difficult',[1] countries around the world have shown a particular inclination to address image-based sexual abuse ('IBSA').[2] This focus can be linked with the prevalence of the issue, with research showing that between 2016 and 2019, the number of Australians who have been a victim of at least one form of IBSA jumped from one in five to one in three.[3] The Philippines was one of the first to pass such a law in 2009,[4] before Israel, Japan, Canada, the UK and New Zealand had all followed suit by 2015.[5] Amendments to the *Criminal Code* (WA) came into effect in April 2019,[6] leaving WA's introduction some years behind jurisdictions like Victoria, where offences were introduced in 2007,[7] but ahead of, for example, Queensland, which passed equivalent laws in 2019.[8]

A universal definition of what comprises IBSA proves elusive, for reasons outlined below. In this paper IBSA is used to collectively refer to the actual or threatened taking or distribution of intimate images without the consent of the person depicted. This also includes sexualised photoshopping, upskirting, and other similar acts. This article does not seek to limit this term

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1 Carys Afoko, 'Government Can't Regulate Facebook – It's Up to All of Us', *The Guardian* (online, 2 April 2019) <https://www.theguardian.com/commentisfree/2019/apr/01/government-regulate-facebook-mark-zuckerberg-social-media>; Sara Solmone, 'Regulate Social Media? It's a Bit More Complicated Than That', *The Conversation* (Forum Post, 3 October 2018) <https://theconversation.com/regulate-social-media-its-a-bit-more-complicated-than-that-103797>.

2 Image-based sexual abuse is the term preferred by many academics in this space: Sophie Maddocks, 'From Non-Consensual Pornography to Image-Based Sexual Abuse: Charting the Course of a Problem with Many Names' (2018) 33(97) *Australian Feminist Studies* 345, 349–350; Clare McGlynn, 'Beyond "Revenge Porn": The Continuum of Image-Based Sexual Abuse' (2017) 25(1) *Feminist Legal Studies* 25.

3 Anastasia Powell et al, *Image-Based Sexual Abuse: An International Study of Victims and Perpetrators* (Summary Report, February 2020).

4 *Anti-Photo and Video Voyeurism Act of 2009* (Philippines).

5 Nicola Henry and Anastasia Powell, 'Sexual Violence in the Digital Age: The Scope and Limits of Criminal Law' (2016) 25(4) Social and Legal Studies 397, 401.

6 *Criminal Law Amendment (Intimate Images) Act 2019* (WA).

7 *Summary Offences Amendment (Upskirting) Act 2007* (Vic).

8 *Criminal Code (Non-consensual Sharing of Intimate Images) Amendment Act 2019* (Qld).

by reference to the motives of the person who commits the offence, or by the nature of their relationship to the victim.

This definition closely accords with the scope of Western Australia's IBSA offences, which are concerned with 'intimate images' of a person, which show a person's genital or anal area, or breasts, whether bare or covered by underwear, or a person engaged in a private act, in circumstances in which they would reasonably expect to be afforded privacy.[9] A private act is defined to mean being in a state of undress, using the toilet, showering or bathing, or being engaged in a sexual act.[10] The offence does not have regard to the relationship between the victim and perpetrator, nor the perpetrator's motive.[11] It also specifically provides for images which have been 'created or altered' to appear to show a person in any of the above situations to be treated as intimate images.[12]

The potential effects of the distribution of private images cannot be understated. Neild AJ addressed these concerns in sentencing two Australian Defence Force Academy cadets who made headlines in 2013 as some of the first people to be prosecuted for image-based sexual abuse in Australia. They were found guilty of 'using a carriage service in a manner which is offensive'[13] – a provision of the *Criminal Code 1995* (Cth) which has long been seen as a way of prosecuting IBSA offences that occur across jurisdictions, or in a jurisdiction which has not passed specific IBSA offences. The utility of this provision will be discussed later in this article.

In sentencing both men to 12-month good behaviour bonds, His Honour stated:

> As [the victim] said, her whole world has been shattered, her dignity stolen, her self-worth and self-respect destroyed. She became known as "the Skype slut". She was ridiculed by other members of the armed forces. She became depressed and she was prescribed medication by psychiatrists and referred for counselling by psychologists. … The offenders abused and degraded the complainant for their own perverse satisfaction and they are responsible, and no-

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9 *Criminal Code Act Compilation Act 1913* (WA) s 221BA ('*Criminal Code* (WA)').

10 Ibid.

11 Consideration of motive is expressly forbidden by the *Criminal Code* (WA) (n 9) s 23(2).

12 *Criminal Code* (WA) (n 9) s 221BA.

13 Pursuant to the *Criminal Code Act 1995* (Cth) s 474.17.

one else is responsible, for the effect that what they did has had upon the complainant.[14]

However, despite all of this, Western Australia has seen seemingly very few prosecutions of image-based sexual abuse offences since it was criminalised in mid-2019,[15] with only about three resulting in a conviction.[16] This stands in stark contrast to both the UK and Victoria, whose experiences are explored below.

In this article it will be argued that the legislative approach taken by the Western Australian parliament in introducing these offences has addressed almost all of the major concerns raised by authors in this area. As a result, the legislation is effective at facilitating the reporting of IBSA offences. However, it will also be argued that the law's implementation, including by WA Police and the Department of Justice, has severely stunted its effectiveness in practice. This can primarily be seen by the seemingly lower number of IBSA offences being prosecuted in Western Australian courts, compared to jurisdictions like Victoria. Despite this, it is also argued that the Western Australian experience shows the importance of taking a multi-pronged approach to this complex issue.[17]

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14 *R v Deblaquiere & McDonald* (Supreme Court of the Australian Capital Territory, Neild AJ, 23 October 2013) [34]–[36].

15 By the introduction of the *Criminal Law Amendment (Intimate Images) Act 2019* (WA).

16 Charlotte Hamlyn, 'First Person Convicted Under New WA "Revenge Porn" Laws Avoids Jail Sentence', *ABC News* (online, 22 July 2019) <https://www.abc.net.au/news/2019-07-22/mitchell-brindley-first-person-in-wa-sentenced-for-revenge-porn/11331022>; Jon Bassett, 'Doubleview Father Matthew James Ashley-Cooper, 31, Fined $5000 Under New Revenge Porn Laws After Sending Image of Partner to Friend', *The West Australian* (online, 26 January 2020) <https://thewest.com.au/news/crime/doubleview-father-matthew-james-ashley-cooper-31-fined-5000-under-new-revenge-porn-laws-after-sending-image-of-partner-to-her-friend-ng-b881442294z>; Erin Parke, 'Kimberley Police Detective Found Not Guilty of Breaching Western Australia's "Revenge Porn" Laws', *ABC News* (online, 19 February 2020) <https://www.abc.net.au/news/2020-02-19/wa-police-trial-semi-naked-photo-woman-broome-christine-frey/11976076>; Shannon Hampton, 'Perth Man Mark Stephen Nash Jailed for Eight Months for Producing "Revenge Porn" of Housemate', *The West Australian* (online, 25 October 2020) <https://thewest.com.au/news/crime/perth-man-mark-stephen-nash-jailed-for-eight-months-for-producing-revenge-porn-of-housemate-ng-b881700869z>; Liam Beatty, 'Jason Alan Golding Jailed for 10-day Ordeal Against Ex-Partner in Geraldton', *The West Australian* (online, 24 December 2020) <https://thewest.com.au/news/geraldton-guardian/jason-alan-golding-jailed-for-10-day-ordeal-against-ex-partner-in-getraldton-ng-b881752534z>.

17 See Henry and Powell (n 5) 411; Thomas Crofts and Tyrone Kirchengast, 'A Ladder Approach to Criminalising Revenge Pornography' (2019) 83(1) *Journal of Criminal Law* 87, 95.

A *Terminology*

Before continuing, it is important to address the issue of terminology in this space. Revenge pornography, the term overwhelmingly preferred by the media, [18] can be traced back to Hunter Moore and his infamous website 'isanyoneup', which hosted private sexual images of people posted without their consent.[19] 'It is this particular narrative, and set of gendered characterisations, that became the paradigmatic story around which the legality of disclosure of private-sexual images was debated,' was the conclusion reached by Dymock and van der Westhuizen about the origins of the term, and its lasting impact on this issue.[20]

Further, McGlynn suggests that 'revenge pornography', generally describes a male ex-partner posting consensually created sexual photos or videos of their former partner without their consent to exact revenge.[21] However, the issue is much broader than this. Private images may be shared or created without consent to blackmail an ex-lover,[22] or to try and pressure a person into a relationship,[23] to take two recent Western Australian cases as examples. Revenge porn is also said to not capture the use of an intimate image 'as a means of intimidating, silencing or otherwise extending power and control over victims of domestic and sexual violence'.[24]

An alternative label may be 'technology-facilitated sexual violence', where technology is used as a tool to 'blackmail, control, coerce, harass, humiliate, objectify or violate another person'.[25]

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[18] A search of the Factiva database of Australian news sources over the previous five years returned 732 results for 'revenge porn' and only 15 which mentioned 'image-based sexual abuse'.

[19] Alex Dymock and Charlotte van der Westhuizen, 'A Dish Served Cold: Targeting Revenge in Revenge Pornography' (2019) 39 *Legal Studies* 361, 362.

[20] Ibid.

[21] McGlynn (n 2) 29.

[22] Joanna Menagh, 'Married Father of Two Jailed for Revenge Porn Offence Against Lover', *ABC News* (online, 28 August 2020) <https://www.abc.net.au/news/2020-08-28/married-man-armandeep-singh-jailed-for-revenge-porn/12607492>.

[23] Shannon Hampton, 'Perth Man Mark Stephen Nash Jailed for Eight Months for Producing "Revenge Porn" of Housemate', *The West Australian* (online, 25 October 2020) <https://thewest.com.au/news/crime/perth-man-mark-stephen-nash-jailed-for-eight-months-for-producing-revenge-porn-of-housemate-ng-b881700869z>.

[24] Henry and Powell (n 6) 398.

[25] Ibid.

However, this term is not preferred because it places emphasis on the technology, rather than the image, misdirecting blame for the harm caused.[26]

In contrast, image-based sexual abuse is generally defined in broad terms, encompassing 'all forms of the non-consensual creation and/or distribution of private sexual images', including revenge porn, digitally altered images, sexual extortion, upskirting and voyeurism, among others.[27]

Maddocks criticises the term 'revenge pornography' for reducing 'severe harms to a simple "scorned ex-boyfriend" narrative [which] … implies that victims are to blame for causing perpetrators to seek revenge'.[28] As will be explored later, public perceptions of the issue, and in particular perceptions of victims of IBSA, is a critical factor in ensuring the success of attempts at regulation.[29] There is also a perceived risk that the use of terms like this lead to the public seeing IBSA as 'a "harmless prank" undertaken by "misunderstood tricksters"'.[30] Use of the term 'pornography' has also been criticised for placing undue attention on the "perceived actions by the victim"[31] or lending 'a sense of choice and legitimacy [that] does not sufficiently capture the non-consensual nature of the practices'.[32]

On the other hand, image-based sexual abuse is preferred because it 'focuses attention on the mental and physical pain caused to victims'.[33]

Referring to this issue as a form of sexual abuse has also been preferred because it places the act on a continuum of sexual violence, an idea first proposed by Kelly in 1988.[34] By considering these acts on a continuum, rather than as discrete categories, it is suggested a more

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26 Ibid.

27 McGlynn (n 2) 28.

28 Maddocks (n 2) 347.

29 McGlynn (n 2) 39.

30 Ibid quoting Emma A Jane, 'You're a Ugly, Whorish, Slut' (2014) 14 *Feminist Media Studies* 531, 539.

31 Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Phenomenon Colloquially Referred to as 'Revenge Porn'* (Report, February 2016) 49 [5.4].

32 McGlynn (n 2) 38.

33 Maddocks (n 2) 349–350.

34 Liz Kelly, *Surviving Sexual Violence* (Polity Press, 1988) 76.

comprehensive approach can be taken in legal, political and public discourse.[35] McGlynn adapted this concept to suggest as 'continuum of image-based sexual abuse' which itself is on a continuum with other forms of sexual violence, recognising that 'the common character in sexual abuse is the "abuse, intimidation, coercion, intrusion, threat and force" used to control (predominantly) women'.[36]

II REGULATING IMAGE-BASED SEXUAL ABUSE

This article will primarily focus on the effectiveness of specifically criminalising IBSA, rather than considering the myriad of other legal approaches to the issue. It has been recognised that many existing offences are 'ill-suited' to prosecute IBSA,[37] the costs associated with civil remedies make them unavailable to most,[38] the deterrent effect of civil remedies are limited at best,[39] and that specific offences play an important role in acknowledging the harm experienced by victims and may provide 'complete redress to victims of these crimes instead of minimising the harms or blaming the victims for their own (legal) behaviour'.[40] Specific offences also aid in conveying 'the proper level of social condemnation for this behaviour'.[41] McGlynn also warns that 'shoe-horning' IBSA cases into conventional offences 'risks obscuring the nature of the abuse and reducing any potential expressive effect of the criminal law'.[42]

Specifically, this section will consider the regimes currently in force in the UK, Victoria and Western Australia with regard to how each approach either facilitates or hinders the reporting of IBSA offences.

The ability of these offences to encourage or discourage reporting sits alongside a number of other factors that affect victims' responses to the crime, including a fear of victim-blaming,

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35 McGlynn (n 2) 26–28.

36 Ibid quoting Kelly (n 34).

37 Henry and Powell (n 6) 402.

38 Ibid 404; Dymock and van der Westhuizen (n 19) 368.

39 Dymock and van der Westhuizen (n 19) 368.

40 Henry and Powell (n 6) 403.

41 Danielle K Citron and Mary A Franks, 'Criminalizing Revenge Porn' (2014) 49(2) *Wake Forest Law Review* 345, 349.

42 McGlynn (n 2) 31.

harm minimisation and having to show police the images.[43] How the law is constructed may either help overcome, or further entrench, these factors.

This analysis will support the sections that follow, which consider other influences on the effectiveness of these offences.

A *The UK*

The UK's IBSA laws[44] came into effect on 13 April 2015 and made it an offence to disclose a 'private sexual photograph or film' without the consent of the person pictured with the intention of causing that person distress.[45] Private is defined as showing 'something that is not of a kind ordinarily seen in public'.[46] An image is 'sexual' for the purposes of the offence if it shows a person's exposed genitals or pubic area, or if it shows something a reasonable person would consider to be sexual, or if as a whole, the image would be considered sexual by a reasonable person.[47] A person found guilty of an offence under s 33 is liable to two years' imprisonment, if charged on indictment, or one year is the offence was charged summarily.

As a result, the UK's laws have been criticised for having 'several weaknesses', each of which may discourage the reporting of offences.[48]

Key among these weaknesses is the intention element, which requires the private sexual photograph or film to have been distributed with the intention of causing distress.[49] This intention, however, is not proved 'merely because that was a natural and probable consequence of the disclosure'.[50] The key concern here is that the offence will only capture IBSA that falls within the stereotypical 'revenge porn' scenario, and does not acknowledge the much broader

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43 Nicola Henry, Asher Flynn and Anastasia Powell, 'Policing Image-Based Sexual Abuse: Stakeholder Perspectives' (2018) 19(6) *Police Practice and Research* 565, 574.

44 *Criminal Justice and Courts Act 2015* (UK) ss 33–35.

45 Ibid s 33(1).

46 Ibid s 35(2).

47 Ibid s 35(3).

48 Aislinn O'Connell, 'Image Rights and Image Wrongs: Image-Based Sexual Abuse and Online Takedown' (2020) 15(1) *Journal of Intellectual Property Law and Practice* 55, 56.

49 *Criminal Justice and Courts Act 2015* (UK) s 33(1)(b).

50 Ibid s 33(8).

range of motivations for sharing sexual images of another person.[51] This may include to 'blackmail, control and humiliate victims'[52] or for 'fun, sexual gratification, social status or monetary gain'.[53] Additionally, IBSA may also be used as a form of coercive control in domestic violence situations, as a way to 'shame and coerce' the woman captured.[54] The fact that these types of IBSA are not captured by the UK offences clearly inhibits the availability of legal support to victims because there is no action that can be taken against offenders in such situations.

This element has also been subject to criticism for having 'the potential to bring to the table a discussion, or at least a consideration, of what the victim did to *deserve* this'.[55] Concerns have been raised about the impact of this element on victims, who may be deterred from pursuing charges once they become aware evidence of their distress may need to be collected and debated at trial.[56]

The UK government has also been criticised for failing to take steps to treat s 33 offences as sexual, rather than privacy or communications-based offences, which one author suggests 'inhibits recognition of the gendered, sexualised and abusive nature' of the offence.[57] A key impact of this, beyond terminology, is that victims are not afforded anonymity, which stakeholders have repeatedly argued prevents more victims coming forward.[58] The government has rejected changing the law in this regard on the basis that the offence 'requires no element of sexual contact, sexual intent or gratification',[59] although critics argue 'sexual offences are so because of the *mode* of perpetration (sexual acts), rather than the *motive*' and so should

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51 O'Connell (n 48) 56.

52 Maddocks (n 2) 346-7.

53 Henry and Powell (n 6) 400.

54 Heather Douglas, Bridget A Harris and Molly Dragiewicz, 'Technology-Facilitated Domestic and Family Violence: Women's Experiences' (2019) 59(3) *The British Journal of Criminology* 551, 563.

55 Dymock and van der Westhuizen (n 19) 370 (emphasis in original).

56 Aysegul Harika, 'Banning Revenge Pornography: Florida' (2014) 39(1) *Nova Law Review* 65, 80.

57 McGlynn (n 2) 36.

58 'Revenge Porn: One in Three Allegations Dropped', *BBC News* (online, 14 June 2018) <https://www.bbc.co.uk/news/uk-england-44411754>.

59 '"Revenge Porn" is Not a Sexual Offence, Minister Tells Yorkshire Victim', *The Yorkshire Post* (online, 18 January 2016) <https://www.yorkshirepost.co.uk/news/crime/revenge-porn-not-sexual-offence-minister-tells-yorkshire-victim-1805932>.

encompass the IBSA offence.[60] McGlynn is particularly critical of this formulation, writing that it fails to properly characterise IBSA as a form of sexual violence, to the detriment of victims who would otherwise report if afforded the protections they would receive if it were categorised as a sexual offence.[61]

While the UK's legislation does apply to 'images that have been altered in any way',[62] an image will not fall within its ambit if 'it is only private or sexual by virtue of the alteration'.[63] As such, images which are altered to superimpose the victim's face onto a sexual image would not be illegal under this provision in the UK, despite the consequences of such an image being shared being almost identical to the effects of a real image being distributed.[64] Again, this limits the scope of the offence, and so too the victims it may protect.

Section 33 has also been criticised for failing to provide any remedy against threats of distributing private and sexual images.[65] Threats are of particular concern to many activists and support workers, who say they are particularly 'deployed as a means of intimidating, silencing or otherwise extending power and control over victims of domestic and sexual violence.[66] This form of coercive control is a growing concern for academics, authorities and support services alike,[67] and it seems inexplicable that the law fails to protect victims before the offence is committed, even though the harm to victims is largely the same as that experienced when the images are actually distributed.[68]

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60 McGlynn (n 2) 37.

61 Ibid.

62 *Criminal Justice and Courts Act 2015* (UK) s 34(5).

63 Ibid s 35(5)(b).

64 McGlynn (n 2) 33.

65 Dymock and van der Westhuizen (n 19) 367.

66 Henry and Powell (n 6) 400.

67 Douglas, Harris and Dragiewicz (n 54).

68 Majid Yar and Jacqueline Drew, 'Image-Based Abuse, Non-Consensual Pornography, Revenge Porn: A Study of Criminalization and Crime Prevention in Australia and England & Wales' (2019) 13(2) *International Journal of Cyber Criminology* 578, 584.

Finally, the UK's definition of 'private and sexual' images which are contemplated by the offence has been met with mixed responses.[69] An image is private if it includes anything 'not ordinarily seen in public'[70] and is sexual if its shows a person's 'exposed genitals or pubic area',[71] or if part of the image, or the image as a whole, would be considered sexual by a reasonable person.[72] While this allows for some flexibility in the scope of what constitutes a sexual image, and so prevents issues where the text of the provision is too restrictive, a key criticism is that the use of the 'reasonable person' test ignores the victim's experience of sexuality and nudity and replaces it with that of the public.[73] Additional concerns have been raised about the offence failing to account for images that might be considered private but not sexual, for example, images of a Muslim woman without a headscarf, when she usually chooses to wear one while in public.[74] The ambiguity here again militates against victims reporting offences, because of the possibility that they will have to endure telling their story to police and prosecutors without any guarantee of success.

B *Victoria*

IBSA was first criminalised in Victoria by the introduction of ss 40 to 41G of the *Summary Offences Act 1966* (Vic) in 2007. This included s 41A, which criminalised the use of a device to observe another person's genital or anal regions where it would be reasonable for that other person to expect such observation would not occur. Similarly, s 41B criminalised capturing another person's genital or anal region where it would be reasonable to expect that would not occur. Section 41C also criminalises a person who captures an image of another's genital or anal region and distributes that image.

An offence under s 41A carries a maximum penalty of three months' imprisonment, while ss 41B and 41C each carry a two-year maximum.

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69 Jolien Beyens and Eva Lievens, 'A Legal Perspective on the Non-Consensual Dissemination of Sexual Images: Identifying Strengths and Weaknesses of Legislation in the US, UK and Belgium' (2016) 47 *International Journal of Law, Crime and Justice* 31, 37.

70 *Criminal Justice and Courts Act 2015* (UK) s 35(2).

71 Ibid s 35(3)(a).

72 Ibid s 35(3)(b)–(c).

73 Beyens and Lievens (n 69) 40.

74 Crofts and Kirchengast (n 15) 95; Henry and Powell (n 6) 402.

Following the Victorian Parliament's Inquiry into Sexting,[75] amendments which introduced ss 41DA and 41DB to Victoria's *Summary Offences Act 1966* (Vic) came into effect on 3 November 2014.

Section 41DA(1) makes it an offence to distribute an intimate image of a person in a way that is 'contrary to community standards of acceptable conduct' and carries a maximum penalty of two years' imprisonment. It does not, however, apply to situations where a person over 18 years of age had 'expressly or impliedly consented, or could reasonably be considered to have expressly or impliedly consented' to both the distribution, and the manner of distribution, of the image.[76] This relatively unique position, in Australia at least, has been met with wariness by some commentators, who suggest it could 'allow stereotypes to feed into judgements about when consent could be reasonably implied'.[77] In effect, it must be proven that the perpetrator intentionally distributed the image, but it is not necessary to prove they knew consent had not been given.[78]

Section 41DB makes it an offence to make a threat to distribute an intimate image of another person in a way that would be contrary to community standards. The maximum penalty for an offence under this provision is one-year imprisonment.

Community standards of acceptable conduct, in this context, includes consideration of 'the nature and content of the image', the circumstances in which the image was taken and distributed, the circumstances of the person depicted and the 'degree to which the distribution of the image affects the privacy of [the] person depicted'.[79] An intimate image is defined in more narrow terms than in other jurisdictions as depicting 'a person engaged in sexual activity; or a person in a manner or context that is sexual; or the genital or anal region of a person or, in the case of a female, the breasts'.[80]

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75 Law Reform Committee, Parliament of Victoria, *Inquiry into Sexting* (Final Report, May 2013).

76 *Summary Offences Act 1996* (Vic) s 41DA(3).

77 Crofts and Kirchengast (n 15) 96.

78 Ibid 99.

79 *Summary Offences Act 1966* (Vic) s 40.

80 Ibid.

Importantly, however, to 'distribute' under Victorian law includes publishing, exhibiting, communicating and supplying and making available for access.[81] This would appear to extend liability for intimate image abuse beyond the person sharing the image initially to any website or other publication that further shares, or enables the sharing, of that image.[82] Importantly, this would seem to encourage reporting, because victims will be supported in pursuing the removal of images, in addition to punishing the original offender.

Victoria's legislation lacks a provision specifically addressing the issue of altered images. While the definition of 'intimate image' uses the word 'depicts',[83] which may be interpreted broadly as including these types of fake images and videos, the definition of 'community standards of acceptable conduct' uses the words 'circumstances in which the image was *captured*',[84] suggesting the law would not be interpreted so broadly. Regardless, the position remains unclear, and thus serves to dissuade victims of this type of IBSA from reporting.

Another key criticism of the Victorian approach is that it is limited to summary offences. The 'ladder of offences' approach proposed by Crofts and Kirchengast suggests that while there is a place for summary offences in regulating IBSA, it is equally as important to provide an indictable offence where the crime is more serious.[85] This was also reflected in a recent report from Victoria's Sentencing Advisory Council, which attributed part of the attrition between reported and sentenced offences to the limits imposed on police when investigating a summary offence, particularly with regard to search powers and using computer systems to obtain evidence.[86] Again, where victims cannot have confidence that the offence committed against them will be properly reported, they are much less likely to report that offence in this first

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81 Ibid.

82 Des Butler, 'Revenge Pornography: Are Australian Laws up to the Challenge?' (2017) 8(1) *International Journal of Technoethics* 56, 59.

83 *Summary Offences Act 1966* (Vic) s 40.

84 Ibid (emphasis added).

85 Crofts and Kirchengast (n 15) 102.

86 Sentencing Advisory Council, *Sentencing Image-Based Sexual Abuse Offences in Victoria* (Report, October 2020) 18.

place.[87] This restriction is therefore another way in which the Victorian laws act as a barrier against the reporting of offences.

C *Western Australia*

Western Australia's legislative response to IBSA came into force on 15 April 2019, and so have been subject to limited academic and judicial review. However, the formulation of the offence of 'distribution of intimate image' addresses many of the criticisms levelled at the statutes in force in both the UK and Victoria.

Most notably, s 221BD of the *Criminal Code* (WA) does not require any intent element on the part of the accused. Rather, the offence is made out if the accused 'distributes an intimate image of another person' and 'the depicted person does not consent to the distribution.[88] Consent is extensively defined in the seven subsections of s 221BB to be 'freely and voluntarily given'[89] and not 'obtained by force, threat, intimidation, deceit or any fraudulent means'.[90] It also specifies that consent to distribution in a particular way or on a particular occasion does not amount to consent for other distribution,[91] and that a person under 16 cannot consent to the distribution of an intimate image.[92]

This approach has been criticised for creating an offence that is 'too broad', because it captures too wide a range of levels of culpability.[93] Crofts and Kirchengast suggest that while such an approach is appropriate in the case of sexual assault, where the victim's lack of consent is clear, the fact that non-consensual distribution may take place while not physically with the victim may make it more difficult for the perpetrator to 'appreciate the full consequences and harms

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87 Elizabeth Moore, 'Public Confidence in the New South Wales Criminal Justice System: 2019 Update' (Crime and Justice Bulletin No 227, NSW Bureau of Crime Statistics and Research, June 2020) 2 <https://www.bocsar.nsw.gov.au/Publications/CJB/2020-Report-Public-Confidence-in-NSW-Criminal-Justice-System-CJB227.pdf>.

88 *Criminal Code* (WA) (n 9) s 221BD(2).

89 Ibid s 221BB(1).

90 Ibid s 221BB(2).

91 Ibid s 221BB(3)–(5).

92 Ibid s 221BB(6).

93 Crofts and Kirchengast (n 15) 101.

of the behaviour'.[94] While this may be true, it is submitted that this approach may serve to relieve the perpetrator of too much responsibility by leaving open the question of whether or not they *believed* there to be consent. When the stakes are as high as they are in relation to IBSA, a clear message must be sent to the community – anything short of complete and unequivocal consent is not sufficient consent. This again encourages reporting by victims, who are more likely to feel heard, and to trust that their case stands a real chance of success, when the offence captures a wider range of behaviour.

Additionally, in contrast to the UK's approach of treating IBSA as a privacy or communications offence, Western Australia seems to treat s 221BD as a sexual offence,[95] and the provisions were described as criminalising 'a form of image-based sexual abuse' when introduced into Parliament.[96] However, the issue does not yet appear to have been judicially considered.

In relation to altered images, WA has taken an opposite approach to the UK, and the issue formed a key part of the government's messaging around the introduction of the offence.[97] An intimate image may be one that has been 'created or altered to appear to show' anything that, if the photo were unaltered, would make that photo intimate.[98] It follows then that 'deepfake' videos or other photoshopped images would also be regulated by this provision. This is an area of law that has been identified as 'contentious' because of the specific language necessary to prevent the over-regulation of deepfakes produced for a legitimate purpose.[99] It is argued that despite this, the relevant provision in Western Australia appropriately regulates deepfakes, by permitting their lawful use, so long as they are not used as a form of IBSA. Again, this facilitates the reporting of offences because victims do not have to guess whether their situation falls within the realm of the offence, as they may have to in the United Kingdom.

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94 Ibid.

95 Parke (n 16); Hamlyn (n 16).

96 Western Australia, *Parliamentary Debates*, Legislative Assembly, 28 June 2018, 4156 (John Quigley).

97 Eliza Laschon, 'Revenge Porn Crackdown Announced by WA Government Offers Hope for Victims', *ABC News* (online, 28 June 2018) <https://www.abc.net.au/news/2018-06-28/revenge-porn-crackdown-announced-by-wa-government/9920560>; Western Australia, *Parliamentary Debates*, Legislative Assembly, 28 June 2018, 4157 (John Quigley).

98 *Criminal Code* (WA) (n 9) s 221BA.

99 Tyrone Kirchengast, 'Deepfakes and Image Manipulation: Criminalisation and Control' (2020) 29(3) *Information and Communications Technology Law* 308, 313.

In introducing these reforms, WA also amended its definition of criminal threat to include the distribution of intimate images.[100] While addressing the policy reasons for this reform, Attorney-General John Quigley spoke of the fact that 'threats to distribute intimate images are often used in the context of relationship breakdowns and family violence situations as a means to coerce, control or manipulate a victim'.[101] Again, this facilitates victim reporting by creating an avenue for authorities to become involved earlier in the situation and prevent the actual distribution from occurring, rather than being forced to wait until after the offence is committed to act.

Finally, WA's *Criminal Code* provides a broad definition of images the offence is concerned with, including: whether bare or covered by underwear, a person's genital and anal areas, as well as a female's breasts; in addition to a person engaged in a private act.[102] A private act means a person 'in a state of undress', showering, bathing, using the toilet or engaging in a sexual act.[103] For such images to be intimate, they must show the person in circumstances where they 'would reasonably expect to be afforded privacy.[104] 'Female' includes transgender and intersex people identifying as female,[105] and images include those altered to 'appear to show' anything that makes an image intimate.[106] Again, by framing the offence in quite broad terms, victims can clearly understand whether what they experienced was illegal or not, and so feel a greater sense of confidence that their case will succeed at trial.

D *Critical Discussion*

It is argued that the above discussion of the criminal offences regulating IBSA in the UK, Victoria and Western Australia shows Western Australia's legislation is more than appropriate to the task at hand, and is constructed to make it easier for victims to feel their experience falls within the ambit of the law and so will be taken seriously. This in turn facilitates greater

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100 *Criminal Law Amendment (Intimate Images) Act 2019* (WA) s 5 amended the *Criminal Code* (WA) (n 9) s 338 in this way.

101 Western Australia, *Parliamentary Debates*, Legislative Assembly, 28 June 2018, 4158 (John Quigley).

102 *Criminal Code* (WA) (n 9) s 221BA.

103 Ibid.

104 Ibid.

105 Ibid.

106 Ibid.

reporting of offences to authorities. This is because the relevant provisions capture a far wider spectrum of behaviour than other laws, and do not require a number of subjective elements to be satisfied. In contrast, because Western Australia's laws are much more objective, victims can know with far greater certainty how their case is likely to be determined by the court. The primary issue then is sentencing, not finding whether the offence is made out.

This is important not only in a practical sense, but because 'these laws may also have a positive impact through better articulating community standards about digital exchanges'[107] and 'convey the proper level of social condemnation for this behaviour'.[108] As such, how IBSA offences are formulated has the potential to send a message to victims about what degree of abuse is tolerated, and when abuse will cross the line into criminal and inappropriate. This in turn changes how victims understand their own experiences and choose how to deal with them.

While Victoria's legislation addresses many of the issues raised by the UK's approach, the attention given to 'community standards' has rightly been described as problematic.[109] In response, Crofts and Kirchengast suggest that by considering whether the images breach community standards, 'overreach of the criminal law' may be avoided.[110] It is argued, however, that such considerations are best considered as defences, rather than elements of the offence. In this way, it is made clear that the provision is of little relevance to most cases, and that only in rare circumstances will the distribution of such an image be acceptable. Again, as noted above, this provides victims with greater certainty as to how the offence is likely to be seen by the court.

Clearly, whether such laws should extend to private, but not sexual, acts 'depends on the purpose of these criminal offences'.[111] The Scottish Government, for example, was of the view that to extend IBSA laws to include these acts would lead to ambiguity and difficulties in practice.[112] While it is argued that there are clearly private, but not sexual, images which should

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107 Henry and Powell (n 6) 404.

108 Citron and Franks (n 41) 349.

109 Beyens and Lievens (n 69) 40.

110 Crofts and Kirchengast (n 15) 94.

111 Ibid.

112 Scottish Government, 'Abusive Behaviour and Sexual Harm (Scotland) Bill: Policy Memorandum' (Memorandum, 2015) 7 [37] <http://www.parliament.scot/parliamentarybusiness/Bills/92672.aspx>.

be covered by similar laws, McGlynn notes the primacy that should be given to addressing sexual images because of the 'specific sexual harms perpetrated against women through the attack on their sexual self, sexual autonomy and agency'.[113]

Another critical issue is the powers authorities are granted to remove images after they are posted online, and to prosecute those who support their distribution. In the UK, remedies are limited to the original uploader, and do not extend to other publishers. Additionally, the offence's 'narrow focus makes it an undesirable avenue for removal of images from online'.[114] This is in contrast to both the Victorian and Western Australian offences, under which a person other than the original distributor may be liable for an images promulgation.[115] WA's legislation goes one step further by specifically giving a court the power to order a person charged with an intimate image offence to 'take reasonable actions to remove, retract, recover, delete, destroy or forfeit to the State any intimate image to which the offence relates'.[116] The power to grant such an order exists regardless of whether the person is convicted of an offence or not.[117]

This specific grant of power, separate from the powers exercised by Australia's eSafety Commissioner explored below, recognise the lasting damage that is done when intimate images are shared online without consent. While the initial posting or distribution will clearly be cause for concern, it is often the long-term uncertainty about when the images will next crop up online that will 'leave victims in a lifelong battle to preserve their integrity'.[118] 'Victims must cope with long-term personal and psychological consequences, given that the disseminated photographs or videos may continue to haunt them throughout their lives,' wrote two psychiatrists.[119] This is exacerbated by the increasingly 'networked nature' of IBSA,[120] in that 'building one's self online … is not simply an individual and personal task … but also one that

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113 McGlynn (n 2) 39.

114 O'Connell (n 48) 56.

115 *Criminal Code* (WA) (n 9) s 221BC; *Summary Offences Act 1966* (Vic) s 40.

116 *Criminal Code* (WA) (n 9) s 221BE(2).

117 Ibid 221BE(3).

118 Mudasir Kamal and William J Newman, 'Revenge Pornography: Mental Health Implications and Related Legislation' (2016) 44(3) *The Journal of the American Academy of Psychiatry and the Law* 359, 362.

119 Ibid.

120 Maddocks (n 2) 356.

is produced and managed through data collection and circulation via information networks and algorithmic processes'.[121] This is exacerbated by the societal 'double standard' that exists with regard to sexual behaviour, and leaves women carrying a heavy social stigma for 'engaging in activities that their male counterparts regularly undertake with minimal negative (and often positive) consequences'.[122]

Most critically though, all of these issues may amount to a barrier which prevents women from accessing the legal recourse they are entitled to.

In summary, while Western Australia's offence provide little resistance to victims who are willing to come forward, especially in comparison to the UK's offence, there are still improvements that could be made. Ultimately, it is argued that based on the discussion above, the construction of WA's offence is unlikely to act as a barrier to potential prosecutions.

III DIFFERING EXPERIENCES

While the formulation of IBSA offences is undeniably significant, what is more important is their use by police and prosecutors.

In the UK, more than 1,100 incidents were reported to police in the first seven months of s 33's operation.[123] The BBC reported that only 11 per cent of incidents resulted in charges being laid, with 61 per cent resulting in no further action taken.[124] The Crown Prosecution Service reports that in the law's first year of operation in 2015-16 there were 206 prosecutions commenced,[125]

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121 Ganaele Langlois and Andrea Slane, 'Economies of Reputation: The Case of Revenge Porn' (2017) 14(2) *Communication and Critical/Cultural Studies* 120, 130.

122 Zak Franklin, 'Justice for Revenge Porn Victims: Legal Theories to Overcome Claims of Civil Immunity by Operators of Revenge Porn Websites' (2014) 102(5) *California Law Review* 1303, 1308–1309.

123 Peter Sherlock, 'Revenge Pornography Victims as Young as 11, Investigation Finds', *BBC News* (online, 27 April 2016) <https://www.bbc.com/news/uk-england-36054273>.

124 Ibid.

125 Crown Prosecution Service, *Violence Against Women and Girls Crime Report 2015-16* (Report, September 2016) 11 ('*Violence Against Women Report 2015-16*').

followed by 465 in 2016-17[126] and 464 in 2017-18.[127] No data is available to show the outcomes of these prosecutions.

Statistics for Victoria paint a less clear picture, but still shine some light on the issue. Between 1 January 2015 and 18 July 2017, there were 415 cases of non-consensual distribution of an intimate image,[128] resulting in 62 arrests, and 144 cases of threatening to distribute an intimate image,[129] resulting in 52 arrests.[130] Of these, 255 offences were reported in 2016.[131] Additional data contained in a submission to the Parliament of Queensland shows that between January 2015, when the laws were introduced, and June 2017, 117 people were charged with non-consensual distribution of an intimate image in Victoria.[132] Together, this suggests that each offender was charged with, on average, 3.5 counts of the offence.

Both of these jurisdictions stand in contrast to Western Australia where media reports indicate only five prosecutions under the amended *Criminal Code*,[133] with all but one resulting in a conviction.[134] A fifth case involved a prosecution under a recently-introduced provision of the *Criminal Code Act 1995* (Cth).[135]

There are a number of difficulties in using media reports to estimate the number of prosecutions commenced in Western Australia, particularly because research from Victoria shows that

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126 Crown Prosecution Service, *Violence Against Women and Girls Crime Report 2016-17* (Report, November 2017) 17.

127 Crown Prosecution Service, *Violence Against Women and Girls Crime Report 2017-18* (Report, September 2018) 17.

128 Contrary to *Summary Offences Act 1966* (Vic) s 41DA.

129 Contrary to *Summary Offences Act 1966* (Vic) s 41DB.

130 Henry, Flynn and Powell (n 43) 570.

131 Crime Statistics Agency, Department of Justice and Community Safety (Victoria), *Spotlight: Sexual Offences* (Report, 2017) 6.3.

132 Terry Goldsworthy et al, Submission No 14 to the Legal Affairs and Community Safety Committee, Parliament of Queensland, *Inquiry Into the Criminal Code (Non-Consensual Sharing of Intimate Images) Amendment Bill 2018* (10 September 2018) 11 <https://research.bond.edu.au/files/28730353/Submission_of_Assoc_Prof_Goldsworthy_and_Asst_Prof_Raj_and_Crowley_re_intimate_images_Qld.pdf>.

133 Parke (n 16); Hamlyn (n 16); Hampton (n 23); Emily Moulton, 'But the Pic Had No Bad Parts?', *The West Australian* (Perth, 7 September 2019) 30.

134 Hamlyn (n 16); Hampton (n 23); Moulton (n 133).

135 Armandeep Singh was sentenced to 20 months' jail after pleading guilty to contravening the *Criminal Code Act 1995* (Cth) s 474.17A(1). See Menagh (n 22).

state's offences are most commonly charged in domestic violence cases,[136] which are rarely able to be reported by the media.[137] However, because the Western Australian media seem to be more keen to report IBSA offence cases than other jurisdictions,[138] it serves as an indication of at least roughly how many offences are reaching the courts. It is also interesting to note here that almost all of the Western Australian cases reported by the media have been in relation to trials where the only charges were IBSA-related. This stands in contrast with the Victorian experience and, promisingly, shows a willingness to prosecute IBSA offences by themselves.[139]

TABLE 1 – PROSECUTION RATES FOR IBSA OFFENCES

JURISDICTION	YEAR	POPULATION	PROSECUTIONS[140]	PROSECUTION RATE PER MILLION
UK	2015–2016	65,648,100[141]	206[142]	3.138
Victoria	2015–2016	5,926,624[143]	40[144]	6.749
Western Australia	2019–2020	2,474,410[145]	5[146]	2.021

136 Sentencing Advisory Council (n 86) 38.

137 See 'Reporting on Domestic and Family Violence', *Australian Broadcasting Corporation* (Document, 15 February 2016) <http://about.abc.net.au/wp-content/uploads/2016/03/Final-DFV-Fact-Sheet-15-Feb-2016.pdf>.

138 Based on searches for Australian news reports containing the words 'revenge porn' in the Factiva database.

139 See Henry, Flynn and Powell (n 43).

140 While different jurisdictions choose to use different metrics in their reporting, this table shows the number of prosecutions commenced, each of which may have been comprised of multiple offences.

141 Neil Park, 'United Kingdom Population Mid-Year Estimate', *Office for National Statistics* (Web Page, 26 June 2019) <https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/timeseries/ukpop/pop>.

142 Crown Prosecution Service, *Violence Against Women Report 2015-16* (n 125) 11.

143 Australian Bureau of Statistics, '2016 Census QuickStats: Victoria' (Web Page, 12 July 2019) <https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/2?opendocument>.

144 Goldsworthy et al (n 132) 11.

145 Australian Bureau of Statistics, '2016 Census QuickStats: Western Australia' (Web Page, 12 July 2019) <https://quickstats.censusdata.abs.gov.au/census_services/getproduct/census/2016/quickstat/5?opendocument>.

146 Hampton (n 23); Hamlyn (n 16); Bassett (n 16); Parke (n 16); Beatty (n 16).

IV UNDERSTANDING THE WESTERN AUSTRALIAN EXPERIENCE

Building on the argument explored above, that WA's IBSA laws are comprehensive and cover a wide-range of IBSA offences, serious questions arise as to how so few prosecutions and convictions have been achieved. While it is acknowledged that those cases which are tried have almost always resulted in a conviction, the seemingly low number of cases reaching trial remains concerning. A number of potential arguments for this situation are outlined below.

Perhaps frustratingly, however, there is no one clear reason why Western Australia's laws have resulted in so few prosecutions. While the arguments outlined below suggest factors which may have influenced the number of prosecutions, many too were present in Victoria and, to a lesser extent the UK.

A *Lack of Public Awareness*

One of the most concerning findings of a 2019 survey by Powell et al was that across Australia, New Zealand and the UK only 45.7 per cent of respondents believed it was a crime to take intimate images without consent, while 48.7 per cent believed it was illegal to share images of another person without their consent.[147] Bothamley and Tulley note that this lack of awareness has two distinct effects: victims 'will be unaware of the procedures that are in place to protect them' and 'if they are not prosecuted, perpetrators are free to repeatedly commit such crimes, creating more harm'.[148] They specifically suggest that an increase in public awareness will almost certainly result in an increase in reporting rates, because of greater awareness of the remedies available.[149]

Another potential issue in this regard is the media's preference for terms like 'revenge pornography', which connote a specific 'narrative, and set of gendered characterisations' through which the issue is understood.[150] Dymock and van der Westhuizen suggest that this approach 'does not offer the practical redress needed by victims' and instead 'reinforces the

147 Powell et al (n 3) 9.

148 Sarah Bothamley and Ruth J Tulley, 'Understanding Revenge Pornography: Public Perceptions of Revenge Pornography and Victim Blaming' (2018) 10(1) *Journal of Aggression, Conflict and Peace Research* 1, 3.

149 Ibid.

150 Dymock and van der Westhuizen (n 19) 362.

gendered power relations of heterosexual socio-cultural scripts'. [151] Fay describes this in terms of the blame that is often placed on the victim for sending the photograph, which she says is 'simply a modern twist on the antiquated notion that a rape victim "asked for it" by wearing promiscuous clothing'.[152] In practical terms, this may mean that victims of image-based sexual abuse that was not motivated by revenge may not understand that the relevant offence captures more than just revenge porn, and that the law provides recourse against their abuser.[153]

In addition, the introduction of IBSA offences in Western Australia was not connected to any high-profile cases where such abuse was not able to be criminally prosecuted. This is the opposite of jurisdictions like the UK, where similar laws were introduced in response to public pressure following such cases.[154] Sweeny et al suggest that publicity of such cases is crucial to increasing IBSA reporting and prosecution rates:

> Making the suffering of cyber-harassment and revenge pornography victims public knowledge is therefore extremely important. Although victims are often reluctant to make their suffering public due to shame and embarrassment, once they do, they are often met with sympathy, particularly by other women. … because men are not the typical victims of cyber-harassment and revenge pornography, they are unaware of how serious these offenses can be. More exposure to victims' stories – complete with detailed descriptions of the communications they have been subjected to – can lead to men fully understanding what the victims have suffered.[155]

It is suggested that such publicity would have two key effects: increasing awareness of the remedies available to victims (and so too the offences perpetrators may be liable for), as well as changing public perception of the issue.

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151 Ibid 368.

152 Meghan Fay, 'The Naked Truth: Insufficient Coverage for Revenge Porn Victims at State Law and the Proposed Federal Legislation to Adequately Redress Them' (2018) 59(5) *Boston College Law Review* 1839, 1844.

153 McGlynn (n 2) 40; Dymock and van der Westhuizen (n 19) 368.

154 Dymock and van der Westhuizen (n 19) give the example of Tulisa Contostavlos, who successfully sued her ex-boyfriend after he posted several sexual images of her following their breakup in 2014: at 362.

155 JoAnne Sweeny et al, 'Gendered Violence and Victim-Blaming: The Law's Troubling Response to Cyber-Harassment and Revenge Pornography' (2017) 8(1) *International Journal of Technoethics* 18, 25.

As Marganski points out, 'knowing that consequences to behaviour exist is not always enough to deter the behaviour'.[156] Instead, people learn best 'by observing the actions of others and the outcomes associated with the behaviour', especially in small groups.[157] In effect, people are the most important factor in influencing change — not the law itself.[158]

It is suggested that while the introduction of Western Australia's IBSA offences could have been used as an opportunity to leverage this 'people power' to dramatically change perceptions of 'revenge porn' and associated harms, the opposite has taken place. Rather than highlighting the harms of IBSA through prosecutions and the publicity around them, the status quo that existed before the introduction of the legislation may have been reinforced. It is argued that, having seen the relatively low number of offences that were prosecuted, offenders now may be less concerned about the law being enforced, while victims may be less confident their claims will be prosecuted if they bring them to the attention of police.

Additionally, while this effect could have been mitigated by raising awareness of the reforms in other ways, little appears to have been done in this regard. The WA Department of Justice's Annual Report for the year the offence was introduced contains a page titled 'Keeping WA Informed About Revenge Porn'.[159] This page outlines the Department's efforts to 'spread the word' about the new legislation, and refers to the Acting Commissioner for Victims of Crime visiting every region in the state to speak at town halls, public forums, schools, not-for-profit organisations, as well as speaking to media across the state. Assuming this was the extent of the Department's campaign to raise awareness of the new offences, the omission of any advertising campaign, whether in traditional or digital media, seems glaring. The UK's 'Be Aware B4 You Share' campaign is an example of an alternative approach that could have been taken, and included advertising on social media as well as pornographic websites.[160]

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156 Alison Marganski, 'Sexting in Poland and the United States: A Comparative Study of Personal and Social-Situational Factors' (2017) 11(2) *International Journal on Cyber Criminology* 183, 188.

157 Ibid.

158 Ibid.

159 Department of Justice, *Annual Report 2018/19* (Report, 23 September 2019) 53.

160 Molly Rose Pike, '"Be Aware B4 You Share" Revenge Porn Campaign Launched Today', *PinkNews* (online, 12 February 2015) <https://www.pinknews.co.uk/2015/02/12/be-aware-b4-you-share-revenge-porn-campaign-launched-today>.

That high-school-aged children are the group that is perhaps the most sensitive to the consequences of IBSA is self-explanatory and justifies the significant focus the WA Department of Justice placed on raising awareness of these offences with high school students. However, they are not the group that is most likely to be the victim of IBSA — that group is people between the ages of 20 and 29.[161] Accordingly, it is suggested that not enough was done to raise awareness of these new offences generally, but particularly with regard to the group of people who would find them most useful.

While there is little investigation into the exact link between knowledge of offences and reporting rates, it is widely considered that part of the reason why IBSA is under-reported is because of a lack of widespread knowledge about the offences under which it may be prosecuted.[162] In response, Sweeny proposes that because of the gendered nature of the harm experienced by IBSA victims, education should be significantly focused on men.[163] She highlights the importance of making instances of IBSA, and its associated harms, more visible to men in order to achieve change.[164]

> [B]ecause men are not the typical victims of cyber-harassment and revenge pornography, they are unaware of how serious these offenses can be. More exposure to victims' stories – complete with detailed descriptions of the communications they have been subjected to – can lead to men fully understanding what the victims have suffered.[165]

It is perhaps this type of confronting, but highly effective, education that will help men better understand the implications of sharing IBSA material, while also ensuring victims fully understand the recourse available to them, should they become a victim.

Providing this type of education could also help victims feel more comfortable coming forward to police.[166]

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161 Powell et al (n 3) 3.

162 Bothamley and Tulley (n 148) 3; McGlynn (n 2) 31.

163 Sweeny et al (n 155) 25.

164 Ibid.

165 Ibid.

166 Henry, Flynn and Powell (n 43) 574.

It is suggested that this education program be targeted primarily at high school-aged students, with some elements aimed at the broader community. By principally aiming the program at this age group, young people are more likely to be fully aware of the consequences of their actions, and the recourse available, by the time they are most likely to perpetrate or be victim to IBSA in their young adult years.[167] It would also go some way to mitigating the risks of being involved in IBSA at a young age, and would also be practical because of the ease of reaching teenagers through school-based programs.

While it is acknowledged that the law *could* have had the effect of dramatically reducing the number of cases of IBSA occurring within Western Australia, in which case there would be far fewer instances to prosecute, this explanation seems unlikely. The number of people who were victims of IBSA has almost doubled between 2016 and 2019, showing these laws are doing little to prevent the abuse occurring in the first place.[168]

B *Effectiveness of Federal Measures*

Another potential impact which is worth mentioning briefly is that of Australia's eSafety Commissioner, whose powers were expanded in 2018 to include 'administering a complaints and objections system for non-consensual sharing of intimate images'.[169] The same amending act also introduced the offence of 'aggravated offences involving private sexual material — using a carriage service to menace, harass or cause offence'.[170] It is suggested that these changes may mean that IBSA incidents are being dealt with under this federal regime, rather than under state laws.

The amendments, and in particular the powers given to the eSafety Commissioner to order the removal of IBSA material, have been applauded as 'innovations yet to be seen in any other legislation around image-based abuse'.[171] The amendments mean the Commissioner may now

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167 Powell et al (n 3) 3.

168 Ibid 10.

169 The *Enhancing Online Safety (Non-Consensual Sharing of Intimate Images) Act 2018* (Cth) s 2 amended the *Enhancing Online Safety Act 2015* (Cth).

170 The offence is contained in the *Criminal Code Act 1995* (Cth) s 474.17A.

171 Yar and Drew (n 68) 583.

issue warnings or infringement notices, and seek injunctions or civil penalties from courts, in relation to both individuals and corporations.[172]

In 2017-18, the Commissioner was successful in removing 80 per cent of the 259 reports of IBSA material it received[173] — a number that jumped to 90 per cent of 849 reports received after its new powers came into effect in mid-2018.[174]

One of the first prosecutions under the new aggravated offence, which builds on the existing offence of 'using a carriage service to menace, harass or cause offence'[175] was sentenced to 20 months' jail in August 2020 — more than two years after the offence was created.[176] It is suggested that this offence was preferred because the perpetrator acted over an extended period of time towards a victim who was located overseas, and because the offence carries a higher maximum penalty than the West Australian offence.[177]

While the significant scale of this issue makes it clear that the eSafety Commissioner cannot account for the lack of prosecutions under Western Australian law, it is important to note in the context of Australia's approach to IBSA, and the alternative ways in which offences may be dealt with.

C *Lack of Trust in Process*

The issue of under-reporting of sexual assaults has been explored at length,[178] and it is argued that many of those insights extend into the underreporting of IBSA because of the shared harms experienced by victims, particularly with regard to shame and embarrassment.[179] This understanding of IBSA is expressed by authors like McGlynn who consider it as part of a

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172 Ibid 585.

173 *Office of the eSafety Commissioner Annual Report 2017-18* (September 2018) 125–126.

174 *Office of the eSafety Commissioner Annual Report 2018-19* (September 2019) 207–209.

175 Contrary to the *Criminal Code Act 1995* (Cth) s 474.17.

176 Menagh (n 22).

177 Five years, compared to three: *Criminal Code Act 1995* (Cth) s 474.17A; *Criminal Code* (WA) (n 9) s 221BD(2).

178 See, eg, Briana M Moore and Thomas Baker, 'An Exploratory Examination of College Students' Likelihood of Reporting Sexual Assault to Police and University Officials: Results of a Self-Report Survey' (2018) 33(22) *Journal of Interpersonal Violence* 3419.

179 Ibid 3423; Citron and Franks (n 41); McGlynn (n 2) 36.

'continuum of sexual violence'.[180] It is also suggested that in addition to a fear of victim-blaming and harm minimalisation also displayed by victims of sexual assault,[181] people who have experienced IBSA also fear going to police because of the humiliation associated with showing officials the relevant images.[182] This has the potential of re-exposing the victim to the 'guilt, shame and embarrassment' they have already experienced.[183] While these are issues that affect the reporting of sexual offences in any jurisdiction, they are nonetheless worthy of considering in this context.

For people under the age of 18, there may also exist a wariness of reporting instances where they have been victims of IBSA out of fear of being convicted of child pornography offences. This is a relevant consideration, given a recent survey found 45.3 per cent of people aged 16 to 18 had been victims of IBSA — only five per cent less than the 20 to 29 cohort.[184] These offences have come under criticism from academics in this space, including in a 2015 study that found the majority of teenagers who engaged in sending sexually explicit images did so consensually.[185] On this issue, Murray et al wrote that the policy emphasis in this regard should focus on 'problematising the behaviour of those who breach the trust of their sexting partner'.[186]

In Western Australia, while the IBSA offence does not itself criminalise sexting between young people,[187] child exploitation material offences still apply to images of children under the age of 16.[188] In addition to this messaging being prevalent within schools, the Western Australian

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180 McGlynn (n 2).

181 Moore and Baker (n 178) 3423.

182 Henry, Flynn and Powell (n 43) 574.

183 Moore and Baker (n 178) 3423.

184 Powell et al (n 3) 3

185 Lee Murray et al, 'Sexting Among Young People: Perceptions and Practices' (Trends & Issues in Criminal Justice No 508, Australian Institute of Criminology, December 2015) 7.

186 Ibid 8.

187 *Criminal Code* (WA) (n 9) s 221BD(2)(a) specifies the image must be 'of another person' and is concerned only with distribution, not possession. See also Western Australia, *Parliamentary Debates*, Legislative Assembly, 28 June 2018, 4158 (John Quigley).

188 Per the definition of 'child' in *Criminal Code* (WA) (n 9) s 217A. This is despite official government advice stating sexting is illegal until the age of 18: see WA Health Department, 'Sexting', *Get the Facts* (Web Page) <https://www.getthefacts.health.wa.gov.au/keeping-safe/sexting>.

government's 'Get the Facts' website tells young people it is illegal to take or send images of a person under 18 years of age 'even if the photo or video is of yourself', in conflict with the relevant statutory provision.[189]

For children under the age of 16 who become victims of IBSA then, they are faced with the very real possibility that reporting their experience could lead to them also being prosecuted for producing the image concerned. Although it would be difficult to imagine police taking such action against a victim, the potential of being placed on the sex offender register remains open and may be enough to dissuade a victim from taking action.[190] However, the fact that the discretion of police and prosecutors is the only factor keeping these cases out of court[191] may be deterrent enough.

It is also suggested that, for some victims, the feeling that because complete removal of the private material is almost always impossible, the emotional trauma often associated with the criminal justice system will not be worth it. Maddocks criticises this failure of many jurisdictions to provide complete solutions to IBSA, suggesting that 'overlooking the gendered and networked nature of intimate image abuse allows those in power to stop at superficial solutions'.[192] The networked nature she refers to here is the sense that the process of building an identity online occurs 'through data collection and circulation via information networks and algorithmic processes'.[193]

Finally, it is argued that two of the publicised cases of IBSA which have come before Western Australian courts have provided victims with little reason to have faith in the judicial system in this regard.

In July 2019, Michell Joseph Brindley became the first person to be charged under these laws.[194] In the Fremantle Magistrates Court, he pleaded guilty to creating a false Instagram page and posting seven images in the victim's name without her consent, before creating four

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189 WA Health Department (n 188).

190 Pursuant to the *Community Protection (Offender Reporting) Act 2004* (WA).

191 Murray et al (n 185) 8.

192 Maddocks (n 2) 356.

193 Langlois and Slane (n 121) 130.

194 Hamlyn (n 95).

other account on which a total of 10 images were posted.[195] Magistrate Potter, in handing down a sentence imposing a 12-month intensive supervision order, said Brindley has been in the 'depths of despair' at the time, after his relationship with the woman broke down and he believed she had described him as a 'basket case'.[196] Magistrate Potter also noted that a term of imprisonment was not appropriate because the images had not been used to extort the victim.[197]

The second case was, it is argued, nothing more than a 'test case'. It concerned Detective Senior Constable Christine Fey, who showed two colleagues an image of a partially naked woman on her phone, in the context of discussing concerns that a child had seen the image.[198] The child had been given the phone to play with by the officer concerned as a way of keeping it occupied while she completed paperwork.[199] The issue before Magistrate Langdon was effectively whether such a distribution, which occurred outside work hours, was still related to her work as a police officer. Senior Constable Frey was found not guilty.[200]

It is argued that, together, these incidents severely diminish the effectiveness of Western Australia's IBSA laws within the community. In effect, there has been only one prosecution of the kind envisioned by Attorney-General John Quigley when he introduced the laws into the Western Australian Parliament. The case of Detective Senior Constable Christine Fey was, as described above, nothing more than a test case which stood no real chance of conviction.

The law's effectiveness then, in the eyes of the public, must be judged with regard to the case of Michael Joseph Brindley. It is suggested that as a result of no fine or term of imprisonment being imposed, his case sends a message that IBSA will be tolerated in WA where the accused produces evidence that they were 'in the depths of despair'[201] at the time they committed the offence. Such an approach seems to minimise the immeasurable harm experienced by the victim and instead continues the narrative that the victim may have done something to deserve

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195 Ibid.

196 Ibid.

197 Ibid.

198 Parke (n 95).

199 Ibid.

200 Ibid.

201 Hamlyn (n 95).

this outcome by directing blame away from the perpetrator, naturally pushing it back on the victim themselves.[202] Such an approach seems to take the view that where a perpetrator is upset by the actions of their partner or ex-partner, some allowance will be made for the distribution of these images, and that as such, it is for that partner or ex-partner to not act in a way that leads to the material being shared. To have the law enforced in this way goes against the very purpose for which it was introduced by failing to fully protect victims in a situation that has arisen through no fault of their own.

When considered in conjunction with the fact that the only significant punishment handed down in this area was as a result of a prosecution under the Commonwealth offence,[203] it seems clear that the Western Australian public will almost certainly see the state's IBSA offences as being unfit for purpose and providing little support or protection for victims, discouraging those who have experienced IBSA from seeking protection and redress from police.

V CONCLUSION

While Australia's approach has been applauded for addressing IBSA 'through a continuum of direct criminal and regulatory sanctions',[204] it is clear that Western Australia's legislation is falling short of the potential role it could play in this continuum.

The formulation of Western Australia's offence is not perfect but does not come close to explaining the surprisingly low number of prosecutions commenced since the amendments to the *Criminal Code* came into effect. Instead, it is argued, steps have not been taken as they should have been, to raise community awareness about not only the existence of these new provisions, but also their effectiveness in punishing those who perpetrate IBSA. Providing the community with first-hand accounts of the significant harm IBSA can have, implementing wide-spread advertising campaigns highlighting these harms, in addition to the potential punishments, and working closer with victims' groups to promote the reporting of these offences may all have the result of increasing the visibility of these offences, and so dissuade people from engaging in similar behaviour. Particular steps must also be taken to engage with

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202 Dymock and van der Westhuizen (n 19) 370.

203 As mentioned above, Armandeep Singh was sentenced to 20 months' jail for breaching section 474.17A of the *Criminal Code Act 1995* (Cth): see Menagh (n 22).

204 Yar and Drew (n 68) 588.

vulnerable communities, who often harbour a general mistrust of police,[205] in addition to being victims of IBSA at a disproportionate rate.[206] However, the Western Australian justice system should still be commended not only for the formulation of these laws, but also for the fact that almost all cases brought to trial have succeeded, and that many of the occurrences of IBSA reported on by the media have been charged as standalone offences, rather than in conjunction with other charges. Both factors show there is a bright future ahead for the effective prosecution of IBSA offences in Western Australia.

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[205] Toby Miles-Johnson, 'Confidence and Trust in Police: How Sexual Identity Difference Shapes Perceptions of Police' (2013) 25(2) *Current Issues in Criminal Justice* 685; James Carmody, 'Police Commissioner Chris Dawson Apologises to WA Aboriginal People for Past Mistreatment', *ABC News* (online, 12 July 2018) <https://www.abc.net.au/news/2018-07-12/wa-police-commissioner-apologises-to-aboriginal-people/9984154>.

[206] Powell et al (n 3) 4.

THE POLL TAX ON CHINESE IMMIGRANTS IN AUSTRALIA AND NEW ZEALAND

HAN LI*

ABSTRACT

In 1855, the Victorian government established a ten-pound poll tax to be paid by Chinese who entered the colony. The aim of the tax was to reduce the number of Chinese immigrants and was rooted in anti-Chinese sentiment. In the years that followed, all other colonies in Australia and New Zealand enacted their own versions of the tax. At least one tax remained in place until 1944, when New Zealand finally repealed their version. This article tells the story of the taxes enactment, examines their historical context and explains how they worked. It aims to show that while the taxes were generally successful at reducing Chinese immigration, they were flawed pieces of law with ambiguously written provisions. It also aims to show that these flaws probably did not matter in practice, as the taxes were administered irregularly on the Chinese population. The poll taxes reflected the inexperience of the colonial law-making bodies and their unrefined views on race. They are an important part of the legal history of the colonies, because, in the process of targeting the Chinese (who were the most visible immigrant minority at the time), the colonies learned to act in unity around an understanding of their young societies identity, and who they did not see as part of it (the Chinese). This understanding would have a lasting effect on how each colony came to see itself, and influenced the ethnic makeup of each colony for generations.

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I INTRODUCTION

From 1855 to 1944, a poll tax (alternatively referred to as a 'head tax' or 'entry fee') on Chinese immigrants existed in some part of the Australian colonies and New Zealand. The reason for these taxes were not revenue. Instead, they were established to reduce Chinese immigration to the colonies. For this purpose, the taxes worked, but they were not the solution the colonies were after. The poll taxes were eventually repealed, and replaced by further legislation which virtually stopped Chinese immigration. No similar tax was levied against any other ethnicity.

This article is a legal history of the poll taxes. It tells the political story of the taxes, from the first tax in 1855 (when part of the money collected went into a fund supporting Chinese integration), to the last in 1896 (which aimed to stop all Chinese immigration). It also gives a legal analysis of the taxes, explaining how they worked and what their deficiencies were.

This article is divided into three waves of legislation. The first wave was centred in the eastern Australian colonies and was enacted partly to manage the Chinese gold miners already there. The second wave covered most of the Australian colonies and New Zealand and aimed to prevent further immigration. The third wave covered all colonies, most of which abolished the poll tax for harsher laws that aimed to stop all Chinese immigration. A brief history is then given about the repeal process of the taxes and what happened afterwards.

The poll tax and its enactment process are important as a reflection of early colonial sentiment towards the Chinese, who were their most visible immigrant minority. The sentiment that was reflected in the taxes were formative for the development of each colony's identity, and who they thought did not belong within it. The taxes also provide a snapshot of the early colonial law-making process, which was a combination of a frenzied populace relentlessly pushing for the Chinese to be gone, an inexperienced law-making body incrementally refining their tax and a stern Crown trying to keep its colonies in line. Lastly, the taxes show that racism towards the Chinese is deeply rooted in the histories of Australia and New Zealand.

II THE FIRST WAVE OF POLL TAX LEGISLATION (1855–1865)

A *Background to the Arrival of Chinese to Australia and New Zealand*

In 1842, the British Empire defeated China in the First Opium War. At that time, the British Empire was in the midst of its 'imperial century' and near the height of its influence.[1] China, after years of complacency, corruption and lack of reform, was in decline and vulnerable.[2] Britain instigated the war in retaliation for China's destruction of its imported opium, and decisively defeated their weaker navy. As a result, China was forced to sign the *Treaty of Nanking*, paying out huge indemnities to Britain and opening up ports for foreign trade.[3] Significantly, subjects of China were also given the right to travel to, enter into and settle within British colonies.[4] These rights would restrain the future law-making powers of Britain, as well as its Australasian colonies.

Britain's arrogant manner during the war and subsequent treaty negotiation process reflected an attitude of British superiority and contempt for the Chinese. The British saw themselves as appointed by God to civilise the world.[5] The Chinese were viewed unfavourably as 'inferior people who did not know the white man's superior laws … took wealth out of the country … and drove Europeans out of work'.[6] These attitudes would be inherited by the white inhabitants of its Australasian colonies and form the basis of their anti-Chinese sentiment.

Guangdong province in Southern China was most affected by the Opium War. As a result of the *Treaty of Nanking*, its capital Canton (Guangzhou) lost its status as the only Chinese city open to foreign trade and fell into economic depression. Soon after, a series of internal rebellions caused millions of deaths and social chaos.[7] These disruptions, combined with

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1 See generally Simon C Smith, *British Imperialism 1750-1970* (Cambridge University Press, 1998).

2 See generally Ray Huang, *China: A Macro History* (Taylor & Francis, 2nd ed, 1997).

3 Ibid.

4 Nigel Murphy, *The Poll-Tax in New Zealand: A Research Paper* (Office of Ethnic Affairs, 2nd ed, 2002).

5 Robert Huttenback, 'Racism and Empire: White Settlers and Colored Immigrants in the British Self-Governing Colonies 1830-1910' (1976) 4(8) *Cornell University Press* 359; *Treaty of Nanking*, United Kingdom-China, signed 29 August 1842.

6 James Ng, *Windows on a Chinese Past* (Otago Heritage Books, 1991) 105.

7 Manying Ip et al, *Unfolding History: Evolving Identity: The Chinese in New Zealand* (Auckland University Press, 1st ed, 2003) 5.

overpopulation and the availability of relatively cheap passages abroad, led to many Cantonese males deciding to leave China to seek fortune.[8] Many headed to a group of British colonies in the South Pacific, where gold had just been discovered.

B *The First Poll Tax in Victoria*

What are currently the Australian states used to be separate colonies. The first was New South Wales, which was established as a convict colony after the arrival of the first fleet in 1788. Convict colonies were also established in Tasmania in 1803, Queensland in 1825 and Victoria in 1826. Convict-free settlements were established in the Northern Territory in 1824, Western Australia in 1829 and South Australia in 1836, though Western Australia subsequently resorted to convict labourers. After failed attempts to develop the Northern Territory, it was annexed by South Australia with the approval of the British government.[9] By 1851, the population of the colonies had reached 430,000 Europeans, of which only 15 per cent had arrived as convicts.[10] During this time, population data for Aboriginal Australians was not kept.

Until their Federation in 1901, the Australian colonies were separate political entities. They enacted laws by passing bills through both the upper house (typically appointed by the governor or elected by those with large amounts of property) and the lower house (either elected through semi-universal male suffrage or by those with small amounts of property).[11] The colonies had freedom to make laws relating to their internal affairs, but were overseen by the Colonial Office, a British government department, for any laws relating to constitutional amendments, foreign relations or external trade. The Colonial Office had the power to deny the Royal Assent to bills which they felt contravened the interests of the British Empire, such as those which would affect its relationship with China.[12]

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8 Murphy (n 4) 1.

9 Alan W Powell, 'Government and Society', *Britannica* (online, 11 January 2018) <https://www.britannica.com/place/Northern-Territory/Government-and-society#ref43527>.

10 See generally Stuart Macintyre, *A Concise History of Australia* (Cambridge University Press, 2009).

11 Charles A Price, *The Great White Walls Are Built* (Australia National University Press, 1974).

12 Murphy (n 4) 9.

In 1851, gold was discovered in Victoria. News of the discovery reached Guangdong the year after and a steady stream of Chinese miners started to arrive. 3,000 had landed by 1854 and were greeted not by mountains of gold, but declining yields and a community of white miners annoyed at the extra competition. In June 1854, police were called to prevent uprisings of white miners against the Chinese. The disturbances led to the Victorian government commissioning an inquiry into the Chinese presence. After listening to the thoughts of European miners, the inquiry was concerned at the growing number of Chinese immigrants to the colony and recommended that a poll tax be established to 'check and diminish the influx'.[13] A Bill was introduced and passed through both houses with only gentle objections from pastoralists, who were at the time, reliant on Chinese labour.[14]

The subsequent legislation, *An Act to make provision for certain Immigrants 1855* (Vic) ('*Victoria 1855 Act'*), was the first poll tax passed in the Australasian colonies and imposed a fee of GBP10 on every 'Chinese' who entered.[15] It was also the foundational poll tax that outlined the basic operation and definitions upon which future taxes would be based.

1 *The Charging Clause*

A poll tax was enacted in section 4 of the *Victoria 1855 Act*:

> On arrival in any port of Victoria of any ship having any Immigrants on board before making entry the master shall pay to the Collector or other proper Officer of Customs a rate of ten pounds for every such Immigrant arrived in such ship and no entry shall be deemed to have been legally made or to have any legal effect whatever until such payment shall have been made.[16]

This section put an obligation on the master of the ship to pay GBP10 to the relevant tax official for every Immigrant on board. While the tax is targeted at 'immigrants', the definition of this term, as will be seen below, clearly encompassed Chinese people only. For simplicity, 'Chinese' will be used in place of 'Immigrant' during the rest of the analysis.

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13 Victoria, *Gold Fields' Commission of Enquiry* (Report No 76, 29 March 1855) 11 ('Gold Fields' Report').

14 Price (n 11) 69.

15 *An Act to Make Provision for Certain Immigrants 1855* (Vic) ('*Victoria 1855 Act*').

16 Ibid s 4.

The GBP10 tax rate was substantial. Adjusting for inflation, GBP10 in 1855 is equivalent to approximately AUD1,980 today.[17] Gold miners in Victoria in that time averaged around GBP35 of earnings per year, however, this average is skewed by a small number of miners with very high earnings.[18] A more stable comparison would be the average wage of an agricultural labourer, which was around GBP25 per year.[19] It would have taken most Chinese months to make back the poll tax sum.

While the poll tax was targeted at Chinese, the actual payer of the tax was the master of the ship. The reason for this seems to be administrative convenience. It would have been simpler and more efficient for the official to collect the poll tax from the master, rather than from each individual Chinese on board. Doing so would have saved the official from the difficult task of individually tracking which Chinese had paid the tax.

The money from the poll tax was put into a fund that was used for the 'relief, support and maintenance' of Chinese.[20] This fund paid the salary of government protectors, who organised mining villages for Chinese to live in, settled disputes and facilitated communication between Chinese and authorities. These measures were generally successful at reducing friction between Chinese and Europeans.[21] The existence of the fund reflected the dual purposes of the first poll tax, which aimed both to reduce Chinese immigration *and* manage the Chinese already in the colony. Future acts would not have as altruistic a purpose.

2 *Definitions*

To work out exactly who paid the tax and how much they had to pay, we must consider what 'master', 'Immigrant' and 'ship' mean. These terms were defined in section 1 of the Act.

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17 'Value of £10 from 1855 1855 to 2020', *UK Inflation Calculator* (Web Page, 11 February 2018) *FinanceRef Inflation Calculator* <http://www.in2013dollars.com/1855-GBP-in-2020?amount=10> ('Inflation Calculator').

18 Adam Bialowas, 'Gold and Australia's Economic Development', *Minerals Council of Australia* (Web Page, 2017) <http://www.minerals.org.au/resources/gold/gold_and_australias_economic_development>.

19 'Wages Through History', *History of Wages* (online, 10 February 2011) <https://historyofwages.blogspot.co.nz/2011/02/agricultural-labourers-wages-1850-1914.html>.

20 *Victoria 1855 Act* (n 15) s 5.

21 Price (n 11) 70.

'Master' was defined as 'any person in command of any vessel'.[22] This made it clear that the poll tax was levied on the master of the ship attempting to enter Victoria.

'Immigrant' was defined as: any male adult native of China or its dependencies or of any islands in the Chinese Seas or any person born of Chinese parents.[23]

It can be seen that females and those under the age of 21 were not subject to the poll tax.[24] However, this would have been insignificant in practice as Chinese immigrants were predominantly single, adult men. Very few women or children immigrated.[25]

The definition of 'Chinese' had a number of problems. Before going over them, it should be noted that they are primarily technical in nature. Those administering the Act probably did not know of or care about these problems and would likely have determined someone as 'Chinese' based on appearance alone. Chinese who fell into the legal ambiguities created by these problems would likely have not known about them either. This can only be assumed though as there is little information on how the Act was actually administered. Nevertheless, the definition had a number of problems.

Firstly, the phrase 'native of China' was ambiguous. It was not clear whether this meant only people born in China, or whether it also included naturalised Chinese. If it meant only those born in China, then ethnically Chinese persons born outside of China would not have been subject to the poll tax, although they were likely intended to have been.

Secondly, the phrase 'any islands in the China Seas' was also ambiguous. If we take a wide understanding of this phrase as geographically encompassing both the South China Sea and East China Sea, the definition could include people native to Japan and territories of the Philippines. These people were clearly not Chinese. However, this would have been an insignificant problem in practice as very few people from these groups immigrated to Victoria.

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22 *Victoria 1855 Act* (n 15) s 1.

23 Ibid.

24 Law Reform Commission of Ireland, 'The Law Relating to the Age of Majority, the Age for Marriage and Some Connected Subjects', *Law Reform* (Web Page, 1977) <http://www.lawreform.ie/_fileupload/consultation%20papers/wpAgeofMajority.html>.

25 Price (n 11) 55–56.

Thirdly, the phrase 'Chinese parents' was also ambiguous. It was not clear whether this referred to ethnically Chinese parents, or parents who were Chinese nationals. If it was the former, then a person born in Victoria to Chinese parents would be subject to the poll tax, even though they were not an immigrant. Chinese had been living in Australia since 1818, so such a situation was a real possibility.[26]

Lastly, it was unclear whether both parents needed to be Chinese. The use of the plural 'parents' suggested that someone with only one Chinese parent would not come under the definition of 'Chinese'. Thus, it appears that a Chinese person of mixed race would not have been subject to the Act.

'Ship' was defined as: any sea going vessel of any kind or description.[27]

The definition of Ship as 'sea going vessel' suggested that only vessels which were used on the sea, or designed for use on the sea, were subject to the poll tax. The intention of this may have been to ensure that Chinese using boats on shallower waters (e.g. for fishing) were not caught by the Act and taxed repeatedly. This would have been a possibility as there was no mechanism in the Act to keep track of which 'Chinese' had already had the poll tax paid for them.

3 *Tonnage Restrictions*

The Act placed a restriction on the number of 'Chinese' that ships entering Victoria could carry. This number was tied to the registered tonnage of the ship. Registered tonnage was a measurement of the volume of a ship's enclosed cargo areas. One registered ton was equal to 100 cubic feet.[28] This calculation was technical and varied depending on the type and size of the ship. No information can be found on the average tonnage of ships used to transport Chinese to Australia at the time. However, the *Afghan*, which was used to transport Chinese thirty years

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26 Sing-Wu Wang, 'The Organization of Chinese Emigration, 1848-1888, With Special Reference to Chinese Emigration to Australia' (Thesis, Australian National University, 1969) 197; James Jupp, *An Encyclopedia of the Nation, Its People and Their Origins* (Cambridge University Press, 2001).

27 *Victoria 1855 Act* (n 15) s 1.

28 *Merchant Shipping Act 1854* (UK) pt II s 20.

after, had a registered tonnage of 2,200.[29] It can be assumed that most ships had a similar registered tonnage.

Section 3 of the Act specified that if any 'Chinese' were carried on the ship, then the proportion of total passengers on the ship (including crew and master) could not exceed one person per ten tonnes of the ship's registered tonnage. If this tonnage restriction was exceeded, the master of the ship was liable to a penalty not exceeding GBP10 for each person in excess.

The tonnage restriction had two aims. The first was to reduce the number of Chinese immigrating to Victoria. The second was to maintain the health and safety of those on board, reflected by the tonnage restriction counting all passengers, not just Chinese. Passenger ships often carried as many Chinese passengers as possible on each journey, which led to overcrowding, bad hygiene and sometimes death on the journey to Australia.[30]

4 *Penalties*

To encourage compliance with the Act, a number of penalties were established.

'Chinese' were liable for a penalty of GBP5, or a period in prison not exceeding two months if they were guilty of breaching any rule in the Act.[31] Interestingly, as the poll tax was imposed on the master, there was no penalty on 'Chinese' who entered Victoria without having the poll tax paid for them. This gave room for Chinese to evade the poll tax if they had not already paid it to the master, by escaping from their ship and making their own way to land. Once on land, Chinese were unlikely to be penalised as there was no method for officials to determine if they had had the poll tax paid for them.

5 *Amendments to Victoria's First Poll Tax*

The first Victorian poll tax failed to reduce Chinese immigration. Ships avoided the tax by landing Chinese in New South Wales or South Australia instead and walking the Chinese across the border to the Victorian gold mines. There was no poll tax for entry by land. Almost

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29 Allen Tony, 'Afghan Cargo Ship 1877-1889', *Wrecksite* (Web Page, 12 May 2016) <https://www.wrecksite.eu/wreck.aspx?248810>.

30 Fiona Ritchie, *Guichen Bay to Canton Lead: The Chinese Trek to Gold* (District Council of Robe, 2004).

31 *Victoria 1855 Act* (n 15) s 9.

20,000 Chinese men landed in Robe, South Australia and walked 400 km through bush to the goldmines in Ballarat, Victoria. The walk was arduous and hundreds died along the way.[32] This did not deter more Chinese from arriving. By 1857, Chinese in Victoria numbered 40,000, one-sixth of the adult male population.[33] Their greater presence increased tensions, and in June that year, a riot occurred at Buckland River on the east side of Victoria, resulting in the forcible expulsion of 2,000 Chinese by 500 Europeans, who burnt tents and destroyed equipment. Juries acquitted all but four of the Europeans, reasoning that their feelings were 'understandable' and that evidence given by Chinese translators were unreliable.[34] The riot, combined with constant petitioning and the failure of their first poll tax, led to the Victorian government passing two more Acts, *An Act to Regulate the Residence of the Chinese Population in Victoria* (Vic) *('Victoria 1857 Act')* in 1857 and *An Act to Consolidate and Amend the Laws Affecting the Chinese Emigrating to or Resident in Victoria* (Vic) *('Victoria 1859 Act')* in 1859.[35] These Acts refined the operation of the first poll tax and added additional obligations on the Chinese.

6 *Land Entry Poll Tax*

The *Victoria 1859 Act* introduced an obligation on 'Chinese' to pay GBP4 to the official if entering Victoria by means other than a ship.[36] Unlike the tax for entry by ship, this tax could be paid by 'Chinese' themselves. It was passed to prevent the aforementioned evasion method, where masters landed their ships in a different colony, then walked their Chinese passengers into Victoria.[37] Only 'Chinese' 'entering Victoria for the purpose of residing therein' were obligated to pay.[38] This suggests that Chinese merely passing through Victoria did not need to pay the tax, though it was unclear how they could have proved this.

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32 Price (n 11) 71.

33 Ibid.

34 Ibid 72.

35 *An Act to Regulate the Residence of the Chinese Population in Victoria 1857* (Vic) ('*Victoria 1857 Act*'); *An Act to Consolidate and Amend the Laws Affecting the Chinese Emigrating to or Resident in Victoria* 1859 (Vic) ('*Victoria 1859 Act*').

36 *Victoria 1859 Act* (n 35) s 4.

37 Price (n 11) 73.

38 Ibid 36.

7 *Penalties*

The *Victorian 1859 Act* also introduced another range of penalties to deal with evasion of the poll tax. These penalties were on both 'Chinese' and ship masters and were rigidly enforced. Over 6,000 Chinese were fined or imprisoned using the penalties.[39]

'Chinese' who entered or attempted to enter Victoria without paying or having the poll tax paid for them were liable for a penalty of GBP10 in addition to the poll tax sum. Those who could not afford this were taken before a judge who could take bail for their appearance at the nearest court or remand them in court until they produced a certificate of payment.[40] This was the first instance of Chinese being penalised for not paying the poll tax.

There was a practical problem with this penalty. 'Chinese' were liable if their ship master did not pay the poll tax for them, even if they had given the poll tax money to the master. Thus, Chinese were in a position of vulnerability and reliant on the honesty of their master paying the sum for them. A dishonest master could have taken the poll tax money for himself and abandoned the Chinese person to the authorities. The likelihood of this happening was mitigated by the GBP10 penalty a master was liable for if they did not pay the poll tax.[41] However, it is not clear how strictly officials followed procedure. A master could have landed his passengers and then left Victoria before officials were aware of any non-payment.

C *Repeal of the First Victorian Poll Tax*

The amended poll tax Acts were more effective at reducing immigration.[42] At the same time, many Chinese had made enough money to return to China and gold prospects in neighbouring New South Wales improved. This led to Chinese numbers in Victoria declining, from 42,000 in 1858 to 23,000 in 1861.[43] As numbers declined, anti-Chinese sentiment did too and a repeal movement was able to gain a louder voice. This movement was led by pastoralists (who still valued Chinese labour) and humanitarians (who saw discrimination against Chinese as unjust).

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39 Ibid.

40 *Victoria 1859 Act* (n 35) s 15.

41 Ibid s 8.

42 Price (n 11) 74.

43 Ibid.

They succeeded in influencing the government. In 1863, the poll tax was suspended for two years[44] before being repealed altogether in 1865, along with the tonnage restrictions.[45]

D *First Wave Poll Tax in Other Colonies*

1 *South Australia*

In 1856, South Australia had its first major influx of Chinese from ships landing in the colony to avoid Victoria's poll tax. Around 20,000 Chinese landed, but almost all quickly left on their long march to the Victorian goldfields. Nevertheless, the volume of arrivals caused enough alarm that the government was willing to agree to Victoria's request that they pass restrictive legislation.[46] In 1857, a Bill was introduced. It passed through both houses with little discussion, enacted as *An Act to make provision for levying a charge on Chinese arriving in South Australia 1857* (SA) *('South Australia 1857 Act')*.[47] The *South Australia 1857 Act* was a simplified version of the *Victorian 1855 Act*, with only minor modifications that refined how the poll tax worked.

The poll tax was targeted at 'Chinese' unlike the Victorian Acts, which were targeted at 'Immigrants'.[48] While the actual wording of the definition remained the same, the switch of term was a significant change in labelling and took away any plausible deniability about who the Act was aimed at. It also meant the definition became circular.[49] Whether someone was 'Chinese' required an analysis on whether a person was born of 'Chinese parents'. However, there was no way to know what 'Chinese parents' meant as it was part of the definition of 'Chinese'. This created an illogical loop which could not be closed, and which would be repeated by all future poll tax legislation. However, this technical problem was unlikely to have

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44 *An Act to amend an Act intituled 'An Act to Consolidate and Amend the Laws Affecting the Chinese Emigrating to or Resident and Victoria' 1863* (Vic).

45 *Chinese Immigrants Statute 1865* (Vic).

46 Price (n 11) 74–75.

47 *An Act to make provision for levying a charge on Chinese arriving in South Australia 1857* (SA) ('*South Australia 1857 Act*').

48 Ibid s 1.

49 Siew Mei Ou Yang, 'The Chinese Poll Tax in New Zealand' (LLB (Hons) Dissertation, University of Auckland, 2004).

had much effect in practice. Tax officials probably decided who was Chinese based on appearance alone, without a close legal reading of the definition.

The Act also modified how the tonnage restriction operated.[50] While the Victorian tonnage restriction counted *all* passengers on ships when calculating the proportion of passengers to tonnage, the *South Australia 1857 Act* only counted Chinese. This modification was small and actually allowed more Chinese to enter the colony. However, it confirmed the tonnage restriction as something aimed at reducing the numbers of Chinese entering, rather than improving health and safety. This modification would also be the basis for heavier restrictions on Chinese in future Acts.

The Act was successful in reducing the number of Chinese landing in the colony. Ships that landed in South Australia with the intention of evading the Victorian poll tax landed in New South Wales instead.[51]

With no gold in the colony, Chinese had no reason to land in South Australia. In 1861, only around 40 resided in the colony. In this environment, humanitarians started a movement to repeal the Act. The chief arguments made were that the Act was pushed on South Australia by Victorians who were after extra tax revenue and that it was disgraceful in spirit.[52] Opposition to repeal came from working-class members of the lower house, who attacked the Chinese as immoral, unhygienic and of creating 'a nation within a nation'.[53] Nevertheless, the Act was narrowly repealed, with the speaker casting the deciding vote.[54]

2 *New South Wales*

New South Wales was the oldest of the Australian colonies and had a more experienced law-making body. It also had a milder gold rush, which led to a slower influx of Chinese immigrants. In 1856, less than 700 Chinese were in the colony, in contrast to the thousands in

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50 *South Australia 1857 Act* (n 47) s 3.

51 Price (n 11) 73.

52 Ibid 75–76.

53 Ibid 76.

54 Ibid.

Victoria.[55] Because of these factors, New South Wales took a slower path towards their first poll tax. As was typical, the first attempt at restrictive laws coincided with an increase in Chinese immigration in 1858. The increase led to the government introducing a Bill modelled on the Victorian Acts into the lower house. This Bill was supported by members of the business community, most notably Henry Parkes. Parkes would go on to be a dominant figure in the politics of New South Wales, serving as the Premier of the colony five times, as well as being an early promoter for the federation of the Australian colonies. He was also staunchly anti-Chinese.[56] At this time he was the owner of *The Empire* newspaper, which vocally supported the passage of restrictive legislation.

The Bill passed the lower house but was postponed by the upper house who instead commissioned a Select Committee report. The report found that Chinese were peaceful and law-abiding, a contrast from the uncivilised characterisations of them in the press. The Bill subsequently failed.[57]

By 1861, continued immigration saw the number of Chinese in New South Wales increasing to 13,000. Tensions increased as well, leading to riots at Lambing Flat goldfield west of Sydney. 2,000 Europeans drove 200 Chinese off the fields, beating them and destroying their camps. The media frenzy arising from the disturbance led to the Premier introducing another poll tax Bill. Miners and the working class were unanimous in their opposition to the 'immoral and treacherous' Chinese, who they saw to be their economic rivals.[58] Pastoralists and industrialists – many of whom relied on Chinese labour – were more divided, arguing against restrictions on the basis of economic expediency and natural justice.[59] Notably, no Chinese were ever involved in these debates, nor any future debates, and no consultation from any Chinese person was ever sought. Eventually, further demonstrations and newspaper campaigns

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55 Ibid 77–78.

56 Bede Nairn, *Australian Dictionary of Biography* (Melbourne University Press, 1974) 5.

57 Price (n 11) 79.

58 D Lucas, 'Chinese Immigration Regulation Bill', *Sydney Morning Herald* (online, 9 March 1861) 7 <https://trove.nla.gov.au/newspaper/article/13053874/1486762>.

59 Price (n 11) 84.

drowned out those against the Bill and it was enacted into law as the *Chinese Immigration Regulation and Restriction Act of 1861* (NSW) *('NSW 1861 Act')*.[60]

The *NSW 1861 Act* was modelled on the South Australian and Victorian statutes, establishing a GBP10 poll tax (like Victoria), and a tonnage restriction on Chinese passengers (like South Australia). It also refined certain parts of the poll tax's operation, introducing a certificate of exemption for Chinese already in the colony and preventing Chinese from being naturalised.[61]

The *NSW 1861 Act* was effective in reducing the level of Chinese immigration to the colony, with arrivals falling from 2,574 in 1861 to 1,030 in 1862.[62] Chinese already residing in the colony also started to depart, with an average of 1,000 leaving each year after the passing of the Act.[63] Gold became scarce, and the Chinese who stayed moved into other occupations and became more integrated into white society. This led to anti-Chinese sentiment dwindling. In 1863, some towns even asked the government to encourage Chinese to return to the goldfields to help stimulate their struggling economies. Working-class agitators were not as vocal in this environment and pastoralists, the usual opposition to restrictive legislation, were able to lobby the government into repealing the Act in 1867.[64] By the end of that year, there was no poll tax legislation on Chinese in the Australian colonies. The first wave of poll tax legislation was over.

III THE SECOND WAVE OF POLL TAX LEGISLATION (1877–1887)

A *The Years Between the Waves*

De facto British sovereignty over New Zealand began in 1840 with the signing of the *Treaty of Waitangi*.[65] By 1852, 27,000 Europeans lived in the colony along with 63,000 Indigenous

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60 *Chinese Immigration Regulation and Restriction Act of 1861* (NSW) ('*NSW 1861 Act*').

61 Ibid ss 8–9.

62 Price (n 11) 87.

63 Ibid.

64 *Chinese Immigration Act Repeal Act 1867* (NSW).

65 *Treaty of Waitangi (English Version)*, signed 6 February 1840.

Māori.[66] That year, the British government would enact the *New Zealand Constitution Act 1852*, which established a partly representative system of government in the colony.[67] In this system, the Crown appointed Governor ran the executive. He appointed the upper house of the legislature (the Legislative Council) while elections determined the lower house (the House of Representatives).[68]

Gold was first discovered in New Zealand in 1857, six years after Australia. After its discovery, rumours of Chinese travelling to the colony from Victoria set off a frenzy. In Nelson, a vigilante committee was organised to prevent their landing, but no Chinese actually arrived. Before Chinese goldminers were even resident, anti-Chinese sentiment existed within the colony.[69]

In 1861, a gold rush started in Otago. By 1863, over 24,000 European miners were on the goldfields, half of which came from Victoria. To support them, the Otago Provincial Council borrowed money to build roads and other infrastructure.[70] However, gold yields subsequently declined and by 1865 the Provincial Council was having difficulty repaying its loans. Seeking to strengthen the economy, they decided a solution would be to sponsoring the immigration of Chinese from Victoria. By 1869, over 2,000 had arrived. This increase in numbers, in combination with an economic recession, stirred up anti-Chinese sentiment again.[71] In 1871, the Arrowtown Miners Association pushed for restrictions, stating 'we are free men, they are slaves; we are Christians, they are heathens; we are Britons, they are Mongolians!'.[72] In response to public pressure, a Select Committee was commissioned to investigate the Chinese 'problem'; however, just like in New South Wales, the report found that Chinese were orderly

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66 'Long-Term Data Series: A Population', *Statistics New Zealand* (Web Page, 6 March 2008) *Internet Archive WayBack Machine* <http://web.archive.org/web/20080305185447/http://www.stats.govt.nz/tables/ltds/ltds-population.htm>.

67 *New Zealand Constitution Act 1852* (NZ).

68 Michael Littlewood, 'The History of Death Duties and Gift Duty in New Zealand' (2012) 18 *New Zealand Journal of Taxation Law and Policy* 66.

69 Price (n 11) 93.

70 Ibid.

71 Ibid 95.

72 'Otago Witness', *Papers Past* (online, 26 August 1871) 15 <https://paperspast.natlib.govt.nz/newspapers/OW18710826.2.52?end_date=31-12-1901&items_per_page=10&phrase=2&query=they+are+mongolians&snippet=true&start_date=01-01-1839> ('Otago Witness').

and harmless. No Bill was introduced, and when immigration subsequently slowed, hostility dwindled.[73]

In Australia, hostility towards the Chinese reduced after the repeal of the first wave poll taxes. From 1861 to 1871, Chinese numbers declined from 38,000 to 28,000.[74] Many Chinese went back to China or moved from the goldfields to urban areas and into other occupations. In a reflection of the changing attitudes, the governments of Western Australia and South Australia tried to encourage Chinese labourers to develop their northern regions, which had tropical climates that Europeans were not accustomed to. The Western Australian government even subsidised Chinese to work in their colony.[75] This relatively mild period was not to last.

B *The First Second Wave Poll Tax in Queensland*

In 1867, gold was discovered in Queensland. Chinese started to arrive from Victoria and New South Wales, increasing Queensland's Chinese population from 600 in 1864 to 2,600 in 1868.[76] The population remained at this level until 1875, when gold was found at Palmer River in the far-north. Its tropical location and mountainous terrain meant Europeans were unenthusiastic about mining there. Chinese were less deterred and 8,000 had entered the area by 1876, outnumbering Europeans 4:1.[77] Unlike the earlier influx, many of these Chinese had arrived directly from China.

This increase led to a change in public opinion, and in reaction, the Queensland government passed a Bill that banned Chinese from new goldfields for two years and required them to pay higher mining license fees.[78] This Bill however was denied the Royal Assent by the Colonial Office at Westminster on the grounds that it breached the Anglo-Chinese treaties.[79] The majority of Queenslanders were furious at this interference and after the arrival of another 9,000 Chinese in 1877, the Government passed another Bill, this one based on the first wave

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73 Price (n 11) 95–96.

74 Ibid 107.

75 *Imported Labour Registry Acts 1874* (WA).

76 Price (n 11) 156.

77 Ibid.

78 *Gold Fields Amendment Bill 1876* (Qld).

79 Price (n 11) 157–158.

poll tax legislation in the other colonies. This Bill was granted the Royal Assent and became *The Chinese Immigrants Regulation Act of 1877* (Qld) ('*Queensland 1877 Act*').[80]

The *Queensland 1877 Act* was the first of the second wave poll tax acts, and the wording of its sections would be used as a foundation by the other colonies for their own acts. Due to the similarity of its main provisions to the other colonies' Acts, it is more useful to analyse them as a group later.

C *The Second Wave Poll Tax in Other Australian Colonies*

In 1878, anti-Chinese sentiment increased again in New South Wales and Victoria after Australasian Steam Navigation – one of New South Wales' largest companies – decided to hire cheaper Chinese labourers instead of Europeans. In response, the Seaman's Union (which covered Queensland, Victoria and New South Wales) went on strike. They received support from other unions around the Australian colonies and from the Premier of Queensland, who negotiated a deal with the company to phase out the Chinese hires.[81] The strike inflamed tensions and started a movement for the imposition of harsher laws against the Chinese. Later that year, an intercolonial trade union conference unanimously called for a heavy poll tax and a prohibition on further Chinese workers entering.[82] Anti-Chinese leagues also reappeared across the colonies, with the Victorian league demanding the 'complete prohibition of Chinese immigration and discontinuance of trade with those already here.'[83]

In response to the public pressure, the governments of Victoria, Queensland and South Australia introduced poll tax Bills to the legislature, but these Bills all failed to pass the upper house. There was an even bigger push in New South Wales. There, Henry Parkes had been elected Premier and introduced a Bill in 1879 reviving the previous poll tax. It too failed in the upper house. However, a further increase in Chinese arrivals in 1881 led to Parkes deciding to

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80 *The Chinese Immigrants Regulation Act of 1877* (Qld) ('*Queensland 1877 Act*').

81 AT Yarwood, *Asian Migration to Australia: The Background to Exclusion 1896-1923* (Melbourne University Press, 1967).

82 Price (n 11) 164.

83 Oddie, 'Chinese in Victoria', *The Age* (online, 24 January 1879) 5 <https://trove.nla.gov.au/newspaper/article/199355764?searchTerm=complete%20prohibition%20of%j20Chinese%20immigration>.

invite the other colonies (including New Zealand) to an intercolonial conference.[84] The purpose of this conference was to discuss the possibility of uniform poll tax legislation.

In New Zealand, new gold findings on the West Coast in 1877 slightly increased Chinese immigration. This increase coincided with the election of Richard Reeves and Richard Seddon to Parliament.[85] These two MPs had arrived in New Zealand from the Victorian goldfields and thus harboured strong anti-Chinese views. They pushed for restrictions, aggressively lobbying the Premier George Grey.[86] Grey himself was a man with an 'almost religious devotion' to the idea of New Zealand being an 'uninjured and unmixed' Anglo-Saxon nation, which he felt was the only way to preserve New Zealand's future.[87] He introduced a Bill modelled on the Queensland restrictions but subsequently resigned before it could receive its second reading.[88] However, New Zealand would send a representative to the intercolonial conference, where the 'Chinese question' would be discussed further.

The 1881 intercolonial conference was where the colonies united around a solution to the 'Chinese question'. At the conference, the colonies reached agreement on four major proposals. Firstly, Britain should renegotiate its treaties with China, so colonies would have more freedom to legislate. Secondly, Chinese immigration should be restricted. Thirdly, this should be done

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84 Price (n 11) 166.

85 Richard Reeves (1836–1910) was born in Ireland and arrived in New Zealand from Sydney. He was a Member for Parliament ('MP') for Grey Valley from 1878–1881 and MP for Inangahua from 1887–1893, serving as a member of the Liberal Party for the last three years. In 1895, Reeves was appointed to the Legislative Council upon which he served until his death. See 'Richard Reeves (New Zealand Politician)', *Wikipedia* (Web Page) <https://en.wikipedia.org/wiki/Richard_Reeves_(New_Zealand_politician)>; Richard Seddon (1845–1906) immigrated to New Zealand from Victoria as a gold-miner. He entered politics as Mayor of Kumara in 1877, before becoming an MP in 1879. In 1893, Seddon was elected Premier, a position he held until his death. At various times during his premiership, he was also Colonial Treasurer and Minister for Immigration. Seddon was the dominant political figure of his time and was known for his appeal to the working class, who nicknamed him 'King Dick'. See David Hamer, 'Seddon, Richard John' in *Dictionary of New Zealand Biography* (Ministry for Culture and Heritage, 1993).

86 George Grey (1812–1898) served as Governor of New Zealand twice, from 1845–1853, and 1860–1868. During his governorships he oversaw many conflicts with Indigenous Māori, including the Māori Land Wars. His second term as Governor ended with his sacking after he ignored instructions from the Crown. He returned as an MP in 1875 and was elected Premier in 1877 but resigned before his term was finished. See Keith Sinclair, 'Grey, George' in *Dictionary of New Zealand Biography* (Ministry for Culture and Heritage, Wellington, New Zealand) 1990.

87 Gold Fields' Report (n 13) 201; New Zealand, *Immigration of Chinese Into the Colony* (Appendix to the Journals of the House of Representatives, 1879, sess 1, D-03).

88 Price (n 11) 203.

using a GBP10 poll tax and tonnage restrictions. Finally, crews, British subjects and Chinese already resident in Australia should be given exemptions from the restrictions.[89] A draft Bill was drawn up reflecting these points.

The colonies also disagreed, mostly on a resolution put forth by Victoria and New South Wales stating that the introduction of *any* Chinese to the colonies was undesirable. At the time, Queensland, South Australia and Tasmania were to some degree reliant on Chinese labour and objected. Instead, they wanted the resolution to state that the introduction of Chinese *in large numbers* was undesirable. This disagreement was the primary reason that the colonies passed legislation which differed from each other.

The colonies did still pass law though, and the second wave poll tax was almost uniform across the Australian colonies and New Zealand. In order of enactment, the Acts passed were *The Chinese Immigration Regulation Act 1877* (Qld) (*'Queensland 1877 Act'*), *The Chinese Immigrants Regulation Act of 1881* (SA) (*'South Australia 1881 Act'*), *Influx of Chinese Restriction Act of 1881* (NSW) (*'NSW 1881 Act'*), *The Chinese Immigrants Act 1881* (NZ) (*'New Zealand 1881 Act'*), *The Chinese Act 1881* (Vic) (*'Victoria 1881 Act'*), *An Act to regulate and restrict Chinese Immigration 1886* (WA) (*'Western Australia 1886 Act'*) and *The Chinese Immigration Act 1887* (Tas) (*'Tasmania 1887 Act*'). These Acts were the most refined versions of the poll tax to be put into law, closing major loopholes and establishing a variety of penalties to help enforcement. They were also the first poll taxes in New Zealand, Queensland, Western Australia and Tasmania. Their operation is described below.

1 *Charging Clauses*

All colonies passed a poll tax for entry by sea and land, except New Zealand, Tasmania (which, as islands, could only be entered by sea at that time) and Victoria (which only passed a sea poll tax).

The poll taxes operated in the same way as the first wave legislation. For entry by sea, an obligation was imposed on the master of the vessel to pay GBP10 for every 'Chinese' on

89 Ibid.

board.[90] For entry by land, 'Chinese' had an obligation to pay GBP10 to the tax official upon entry.[91]

All colonies retained the first wave penalty imposed on masters who neglected to pay the poll tax or permitted any 'Chinese' to land or 'escape' from the vessel (Chinese were not allowed off the vessel unless the poll tax had been paid). However, unlike the first wave legislation, all colonies except New Zealand made this a strict liability offence. This was harsh and meant a master would be liable for the penalty even if they were not at fault for 'Chinese' leaving their vessel. New Zealand's penalty operated the same way as the first wave legislation in Victoria, where a master was only liable if they had the intent to evade the poll tax. The penalty that masters had to pay varied between the colonies. In Queensland, South Australia, New Zealand and Tasmania, the penalty was GBP20 per 'Chinese'.[92] In Victoria, New South Wales and Western Australia, it was GBP50 per 'Chinese'.[93]

2 *Definitions*

The definitions of 'Chinese' used by the colonies were an improvement from the first wave definitions, but still had theoretical problems. This reflected the unrefined understanding of race in the colonies at the time. Each colony had a different definition of 'Chinese'. These definitions can be generally grouped into two categories: race-based and non-race based. Within these categories, the variations in wording were minor and so the definitions can be analysed through these groups.

South Australia, New South Wales and Tasmania based their definition of 'Chinese' on the phrase 'any person of the Chinese race'. Additionally, Tasmania limited their definition to 'male persons' and South Australia excluded those who were British subjects. These definitions

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90 *Queensland 1877 Act* (n 80) s 4; *The Chinese Act 1881* (Vic) ('*Victoria 1881 Act*') s 3; *The Chinese Immigrants Regulation Act of 1881* (SA) ('*South Australia 1881 Act*') s 5; *Influx of Chinese Restriction Act of 1881* (NSW) ('*NSW 1881 Act*') s 4; *The Chinese Immigrants Act 1881* (NZ) ('*New Zealand 1881 Act*') s 5; *An Act to regulate and restrict Chinese Immigration 1886* (WA) ('*Western Australia 1886 Act*') s 4; *The Chinese Immigration Act 1887* (Tas) ('*Tasmania 1887 Act*') s 4.

91 *Queensland 1877 Act* (n 80) s 5; *South Australia 1881 Act* (n 90) s 6; *NSW 1881 Act* (n 90) s 5; *Western Australia 1886* (n 90) s 5.

92 *Queensland 1877 Act* (n 80) s 4; *South Australia 1881 Act* (n 90) s 5; *New Zealand 1881 Act* (n 90) s 6; *Tasmania 1887 Act* (n 90) s 4.

93 *Victoria 1881 Act* (n 90) s 3; *NSW 1881 Act* (n 90) s 4; *Western Australia 1886 Act* (n 90) s 4.

had a few theoretical problems. Like some of the first wave definitions, they were circular. We cannot find out what the Act meant by 'Chinese race' as this would require us to refer back to the definition itself. We can substitute another word for 'Chinese' for the purposes of analysis. But even after this, a major issue remained.

The definitions' use of the concept of 'race' was problematic. There is no biologically accurate way to categorise a person as being of a certain race. 'Race' is instead regarded as a social construct, with no inherent physical or biological meaning. No 'race' has been found to have a monopoly over certain characteristics.[94] As a social construct, society's understanding of 'race' changes over time and is incapable of exact definition. This can be seen by the Arrowtown Miners Association's previously mentioned characterisation of Chinese as 'Mongolians'.[95] Chinese are not seen as Mongolian today, but in those times, they were placed in the same racial category. Further problems arise when you consider the status of multiracial Chinese. Thus, a race-based definition can lead to ambiguity in application.

Western Australia, New Zealand and Queensland each defined 'Chinese' in non-race based ways, using similar wording to the first wave definitions. Western Australia defined Chinese identically to the *Victoria 1855 Act,* except that it included Chinese of both genders and all ages, instead of just adult males. Thus, the definition suffered from the same issues as the *Victoria 1855 Act*, namely ambiguity regarding the meaning of 'native', 'island in the Chinese seas', and 'British and Chinese parents'. It was also circular.

New Zealand defined 'Chinese' as meaning 'any person born of Chinese parents, and any native of China or its dependencies, or of any island in the China seas, born of Chinese parents'.[96]

This definition had the same problems as Western Australia's one discussed above. There was also additional ambiguity over the scope of the definition due to the repetition of the phrase 'born of Chinese parents'. The key confusion was whether the second use of 'or' created a separate clause in the definition or whether it was meant to be read as part of an existing clause.

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94 Alan W Powell, *Encyclopaedia Britannica* (online, 25 October 2020) race | Definitions, Ideologies, Constructions & Facts <https://www.britannica.com/topic/race-human>.

95 Otago Witness (n 72).

96 *New Zealand 1881 Act* (n 90) s 2.

If it was meant to be read as part of an existing clause, then the entire second half of the definition was redundant, as the first half already covered it by specifying 'any person born of Chinese parents'. This made the New Zealand definition especially difficult to understand compared to those found in other colonies.

Queensland defined 'Chinese' as meaning: any native of the Chinese Empire or its dependencies, not born of British Parents.[97]

By using 'Chinese' in relation to its Empire, rather than ethnicity or race, the Queensland definition avoided being circular like those found in other colonies. It was also the narrowest definition, not including persons born in islands in the Chinese seas or outside of China. However, it had the same problem as other colonies regarding the ambiguous meaning of 'native'.

So, all colonies had theoretical problems with their definitions of 'Chinese'. However, it should again be noted that these issues were unlikely to have been a major problem in practice. The unrefined attitudes towards race at that time (shown by the definitions) meant officials probably determined who was Chinese based on their appearance alone. Meanwhile, Chinese who fell into the legal ambiguities created by the definitions were probably not aware or were not able to convince officials that they did. All colonies also had a section which allowed judges to decide – in the unlikely event that a Chinese person took an official to court – whether someone was 'Chinese' under the Act using 'their own view and judgment'.[98] This section gave the judge broad discretionary power in determining what was 'Chinese'. As mentioned previously, the judiciary were unlikely to have ruled in a Chinese person's favour. Unfortunately, it was not possible to find any case law relating to these sections.

'Vessel' was defined in every colony except Tasmania as meaning 'any ship or other sea-going vessel of whatsoever kind or description'.[99]

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97 *Queensland 1877 Act* (n 80) s 1.

98 Ibid s 9; *South Australia 1881 Act* (n 90) s 11, *NSW 1881 Act* (n 90) s 8; *Western Australia 1886 Act* (n 90) s 9; *Tasmania 1887 Act* (n 90) s 9; *New Zealand 1881 Act* (n 90) s 12.

99 *Queensland 1877 Act* (n 80) s 1; *South Australia 1881 Act* (n 90) s 1; *NSW 1881 Act* (n 90) s 1; *Western Australia 1886 Act* (n 90) s 1; *Victoria 1881 Act* (n 90) s 1; *New Zealand 1881 Act* (n 90) s 2.

Tasmania's definition was identical except that 'sea-going' was omitted.[100] The definition of vessel was partly circular. This created problems when determining if smaller boats fell under the definition. For example, it would be difficult to determine whether a boat that was not designed for sea use but used on the sea anyway was a 'sea-going vessel'. This was because the definition of vessel included the word itself.

'Master' was defined in every colony as meaning 'the person, other than a pilot, for the time being in actual command or charge of any vessel'.[101]

As in previous acts, the poll tax was levied on the master of the vessel. This definition differentiated the master from the pilot of the vessel, who was generally a local who would help safely navigate a vessel to the dock using their knowledge of the area.

3 *Tonnage Restrictions*

All colonies established tonnage restrictions. These operated in the same way as the *South Australia 1857 Act*, where the number of 'Chinese' on board could not exceed a certain proportion of a vessel's tonnage. Reflecting the disagreements at the intercolonial conference, the exact proportion of the tonnage restriction and the penalty for breaching it varied between the colonies.

The harshest restriction was found in New South Wales and Victoria, which both specified a tonnage proportion of one 'Chinese' per 100 tonnes of registered tonnage. A master would be fined GBP100 for each 'Chinese' in excess.[102] This harshness reflected their belief that any Chinese presence at all was undesirable. In New South Wales, Parkes had also tried to pass a harsh quarantine on ships arriving with Chinese passengers (due to fear of disease) and a section prohibiting Chinese from owning land. He said this was needed as Chinese were an

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100 *Tasmania 1887 Act* (n 90) s 1.

101 *Queensland 1877 Act* (n 80) s 1; *South Australia 1881 Act* (n 90) s 1; *NSW 1881 Act* (n 90) s 1; *Western Australia 1886 Act* (n 90) s 1; *Tasmania 1887 Act* (n 90) s 1; *Victoria 1881 Act* (n 90) s 1; *New Zealand 1881 Act* (n 90) s 2.

102 *NSW 1881 Act* (n 90) s 2; *Victoria 1881 Act* (n 90) s 2.

'eternal curse' that must not be allowed to settle.[103] However, these clauses were dropped by the upper house.

Tasmania also specified a tonnage proportion of one 'Chinese' per 100 tonnes of registered tonnage. However, they only fined a master GBP10 for each 'Chinese' in excess.[104] This slightly more lenient provision reflected the reluctance of the Tasmanian government to pass the poll tax. Tasmania's Chinese population was very small and regarded as valuable to the mining industry. Tasmania was the last colony to pass the poll tax in 1887, after pressure from trade unions.[105]

Queensland, South Australia and New Zealand all specified a lower tonnage proportion of one 'Chinese' per 10 tonnes of registered tonnage with a fine of GBP10 on the master for each 'Chinese' in excess.[106] Queensland passed its Act before the intercolonial conference and so used the same tonnage proportion as the first wave acts. In South Australia, the anti-Chinese Premier tried to push for a tonnage proportion of one Chinese per 50 tonnes of tonnage but was overruled by the upper house. In New Zealand, opposition to the Chinese was strong but not at the levels of New South Wales or Victoria, which is why it had a relatively lighter tonnage restriction.

Western Australia specified a tonnage proportion of one 'Chinese' per 50 tonnes of registered tonnage with a fine of GBP100 on the master for each 'Chinese' in excess.[107] Their Act was passed in response to the discovery of gold in 1886. The government still wanted Chinese to develop their northern areas but did not want them on the goldfields. For this reason, their restriction was not as harsh as those found in Victoria and New South Wales.[108]

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103 New South Wales, *Parliamentary Debates*, House, 2 August 1881, 414–417 (Henry Parkes, Premier).

104 *Tasmania 1887 Act* (n 90) s 3.

105 Price (n 11) 170, 184–185.

106 *Queensland 1877 Act* (n 80) s 3; *South Australia 1881 Act* (n 90) s 4; *New Zealand 1881 Act* (n 90) 3.

107 *Western Australia 1886 Act* (n 90) s 3.

108 Price (n 11) 182–183.

4 *Penalties*

All colonies had penalties on Chinese who entered without paying or having the poll tax paid for them. The exact penalty varied between the colonies. Victoria, New South Wales, Queensland, New Zealand, Tasmania and South Australia all set the penalty at GBP10.[109] Chinese in New South Wales and Victoria could also be imprisoned for 12 months if the poll tax was not paid, while Queensland and New Zealand allowed Chinese to be remanded in court until such payment was produced. Western Australia's penalty was GBP20 or 12 months imprisonment.[110] These penalties had the same problems as the amended first wave penalties on Chinese in that they left Chinese vulnerable to their ship master's dishonesty.

5 *Exemptions*

In all colonies except Victoria, Chinese already within the colony when the Acts were passed were able to obtain certificates of exemption. All colonies also allowed Chinese to obtain a temporary exemption certificate exempting them from payments under the Act for a set period of time, provided they could satisfy an official that they were a resident of the colony when the Act came into force and that they needed to be absent for a temporary purpose. The exemption lasted for the length of the temporary purpose.[111] This certificate was difficult to obtain. Chinese needed a separate certificate for each colony they wished to enter, while the process of obtaining one could take months, with officials having wide discretion to decline applications.[112]

Chinese who were 'British subjects' could obtain an exemption from the Act in all colonies except New Zealand and Queensland.[113] To obtain an exemption, Chinese had to produce evidence to an official satisfying them that they were a British subject. Some guidance was

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109 *Victoria 1881 Act* (n 90) s 4; *NSW 1881 Act* (n 90) s 6*; Queensland 1877 Act* (n 80) s 8; *New Zealand 1881 Act* (n 90) s 9; *Tasmania 1887 Act* (n 90) s 7; *South Australia 1881 Act* (n 90) s 4.

110 *Western Australia 1886 Act* (n 90) s 8.

111 *Queensland 1877 Act* (n 80) s 10; *NSW 1881 Act* (n 90) s 9; *South Australia 1881 Act* (n 90) s 12; *Western Australia 1886 Act* (n 90) s 10; *Tasmania 1887 Act* (n 90) s 10; *New Zealand 1881 Act* (n 90) s 14.

112 Ian Welch, 'Alien Son: The Life and Times of Cheok Hong Cheong (Zhang Zhuoxiong) 1851-1928' (PhD Thesis, Australia National University, 2003).

113 *Victoria 1881 Act* (n 90) s 5; *NSW 1881 Act* (n 90) s 10; *Western Australia 1886 Act* (n 90) s 11; *Tasmania 1887 Act* (n 90) s 12.

given on what this meant. Victoria specified that a certificate from the Governor of any British colony was satisfactory, while New South Wales, Western Australia and Tasmania also allowed a certificate from a British Consul. The high-level nature of these documents suggests that the exemption was aimed at affluent, English speaking, anglicised Chinese. It seems unlikely that working-class Chinese – which the majority of immigrants were – would have been able to obtain this exemption, even if they were born in a British Colony such as Hong Kong and were thus British subjects.

IV THE THIRD WAVE OF POLL TAX LEGISLATION (1888–1896)

A *The Second Intercolonial Conference and the Third Wave of Poll Tax Legislation in the Australian Colonies*

The passing of the Tasmanian poll tax in 1887 meant that the Australian colonies and New Zealand had mostly uniform restrictions in place. Around the same time, a new wave of anti-Chinese sentiment was developing. A publicised report into the poll tax laws by the Chinese Investigation Commission (appointed by the Chinese government) found that they were in clear breach of the Anglo-Chinese treaties.[114] This embarrassed the British government and annoyed the Australian colonies. At the same time, the Victorian government became aware that many Chinese were evading the poll tax by buying naturalisation papers from those returning to China. This further annoyed the Australian colonies.[115]

In 1888, anti-Chinese leagues in the Australian colonies became active again. They set up meetings around the colonies and lobbied parliament, arguing that the Chinese were socially and economically dangerous. These leagues gained the support of the trade unions and newspapers, who repeatedly published articles about the dangers Chinese immigration posed. In reality, while Chinese immigration had slightly increased, it was at much lower levels than the 1870s. Nevertheless, reports of Chinese ships carrying smallpox led to the South Australian government imposing a 21-day quarantine on all vessels arriving from China and calling for another intercolonial conference.[116]

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114 Myra Willard, *History of the White Australia Policy to 1920* (Melbourne University Press, 1967) 74–77.

115 Price (n 11) 186.

116 Ibid 188.

One of the ships affected by this quarantine was the *Afghan*, which responded by redirecting its journey from Adelaide to Melbourne. Upon arriving in Melbourne, 48 Chinese on board were found to have fraudulent naturalisation papers. To avoid prosecution, the ship master struck a deal with the Premier, agreeing to leave Melbourne without landing even his legitimate passengers. The *Afghan* sailed on to Sydney where, with its arrival well-heralded, it was met by enormous demonstrations. In reaction to this, Premier Parkes decided to ignore the existing law and refuse permission for any Chinese to land, including legitimate passengers who had paid the poll tax. In response, Chun Teeong Toy, a Chinese immigrant who was on board, filed proceedings against the Victorian government. The Supreme Court of Victoria ruled that Parkes' actions were unconstitutional and awarded damages to Toy.[117] However, this was overruled on appeal by the Privy Council on grounds that Toy was an alien and thus had no right to bring an action.[118] Despite the ruling in his favour, Parkes introduced a new Bill anyway which indemnified the government against any future proceedings. This Bill was delayed by the upper house because the intercolonial conference, which would discuss a uniform poll tax, was about to begin.[119]

Delegates from all colonies except New Zealand attended the 1888 intercolonial conference. They agreed on four major issues. Firstly, that Chinese immigration should be virtually prohibited. Secondly, that this should be done by abandoning the poll tax and instituting a tonnage restriction of one Chinese per 500 tonnes of registered tonnage. Thirdly, that it should be an offence for Chinese to move across the borders of the colonies without a permit. Lastly, that British Chinese (e.g. those from Hong Kong or Singapore) were just as 'Chinese' as those from the mainland and thus should not be given exemptions. A draft Bill was drawn up reflecting these points.[120]

After the intercolonial conference, all Australian colonies except Tasmania and New South Wales passed legislation based on the conference draft Bill.[121] Tasmania did not agree with the

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117 *Musgrove v Chun Teeong Toy* [1891] AC 272.

118 Ibid117.

119 Price (n 11) 189.

120 Ibid 190.

121 *The Chinese Immigration Restriction Act 1888* (Qld) ('*Queensland 1888 Act*'); *The Chinese Immigration Restriction Act 1888* (Vic) ('*Victoria 1888 Act*'); *Chinese Immigration Restriction Act 1888* (SA) ('*South Australia 1888 Act*'); *The Chinese Immigration Restriction Act 1889* (WA) ('*Western Australia 1889 Act*').

resolutions at the conference and did nothing. Meanwhile, New South Wales passed the Bill that Parkes had introduced before the conference.[122] These Acts were the last set of restrictive legislation specifically aimed at Chinese that the Australian colonies passed. As South Australia removed an exemption for the Northern Territory found in their second wave Act, the new set of Acts also meant that restrictions were now uniform across the whole Australian continent.

1 *Tonnage Restrictions*

The main method the Australian colonies used to restrict Chinese immigration was increased tonnage restrictions. They did not change how the restriction operated, instead, they modified the tonnage proportions. South Australia, Queensland, Western Australia and Victoria raised their tonnage proportion to one 'Chinese' per 500 tonnes of tonnage.[123] Their previous proportions were 10, 50 and 100 tonnes respectively. New South Wales raised their tonnage proportion from 100 tonnes to 300 tonnes.[124]

In addition to the stricter ratio, all Australian colonies increased the penalty on masters who breached the tonnage restriction to GBP500 for every 'Chinese' in excess, an extremely high fine. Queensland also added an additional penalty of 12 months imprisonment.[125] These tonnage changes severely restricted the amount of Chinese who could enter the colonies. As an example, the *Afghan* had a registered tonnage of 2,200 tonnes. It would have only been able to carry four Chinese immigrants after the Acts, when it had previously carried hundreds.

2 *Charging Clause*

All Australian colonies except New South Wales abolished the poll tax. They did so because it was seen as unnecessary after the increase in tonnage restrictions.[126] The fact that these colonies

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122 *Chinese Restriction and Regulation Act of 1888* (NSW) ('*NSW 1888 Act*').

123 *South Australia 1888 Act* (n 121) s 5; *Queensland 1888 Act* (n 121) s 5; *Western Australia 1889 Act* (n 121 s 8; *Victoria 1888 Act* (n 121) s 7.

124 *NSW 1888 Act* (n 122) s 5.

125 *Queensland 1888 Act* (n 121) s 5124.

126 Murphy (n 4) 16.

gave up the potential for extra tax revenue reflected how keen they were to stop Chinese immigration.

New South Wales increased the poll tax on Chinese entering the colony from GBP10 to GBP100.[127] This equates to around AUD19,800 today.[128] The penalty levied on a master who neglected to pay the tax, or permitted unpaid Chinese to land, was also increased from GBP100 to GBP500.[129] Penalties on Chinese who entered without having the poll tax paid for them were also increased from GBP10 to GBP50. The operation of the poll tax was kept the same. The reason New South Wales retained the poll tax was because Premier Parkes was able to push his pre-intercolonial conference Bill through, with the promise that he would repeal the poll tax after other colonies passed their third wave Acts. He did not keep this promise.

3 *Definitions*

The only notable definitional change in the third-wave Acts related to the meaning of 'Chinese'. All Australian colonies changed to a race-based definition which defined 'Chinese' as meaning 'every person of Chinese race not exempted from the provisions of this Act'.[130] This had the same problems as the race-based definitions used in the second wave legislation. Western Australia, Queensland and Victoria had previously used a non-race based definition, but the new definition made little practical difference as those colonies retained the same exemptions from their previous Acts.

4 *Restriction on Intercolonial Movement*

South Australia, Queensland, Western Australia and Victoria restricted Chinese movement by making it an offence for Chinese to enter their colony by land without a permit from a Governor appointee. If convicted of doing so, Chinese were liable for a penalty between GBP5 and

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127 *NSW 1888 Act* (n 122) ss 6–7.

128 Inflation Calculator (n 17).

129 *NSW 1888 Act* (n 122) ss 6–7.

130 *NSW 1888 Act* (n 122) s 17; *Queensland 1888 Act* (n 121) s 1; *South Australia 1888 Act* (n 121) s 1; *Victoria 1888 Act* (n 121) s 3; *Western Australia 1889 Act* (n 121) s 4.

GBP20 (except in Queensland where the penalty was GBP50) and could also be deported back to the colony they entered from.[131]

The draft Bill had specified imprisonment as the penalty for entering a colony without a permit. However, in all Australian colonies except Queensland, the upper houses substituted a penalty fee instead.[132] Automatic imprisonment was seen as a burden on resources.[133] This penalty functioned as a quasi-poll tax for Chinese who attempted to cross colonial borders. Meanwhile, the colonies without movement restrictions across borders (Tasmania, New South Wales) subjected Chinese to an actual poll tax.

5 *Exemptions*

All colonies except New South Wales followed the draft Bill by removing exemptions for British subjects from the Act. This meant that Chinese immigrants from Hong Kong and Singapore came under the Act. However, none of the colonies were able to abolish the second wave exemptions for Chinese already resident in the colony, crews of ships, government representatives and those with existing exemption certificates.[134]

The draft Bill had removed exemptions for Chinese already resident in the colonies or with existing exemption certificates. However, the upper house of each colony reinserted these exemptions on the basis that removing them would reflect badly on the Australian colonies and be unfair to Chinese who made the effort to obtain naturalisation papers.[135]

Thus, by the end of 1889, the Australian colonies had restrictive laws on Chinese immigration across their whole continent, though only Tasmania and New South Wales used the poll tax. With their entry virtually prohibited, the Chinese population started to steadily decline.

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131 *South Australia 1888 Act* (n 121) s 6; *Queensland 1888 Act* (n 121) s 9; *Western Australia 1889 Act* (n 121) s 10; *Victoria 1888 Act* (n 121) s 9.

132 In Queensland, the fee was an alternative to imprisonment.

133 Price (n 11) 194.

134 *South Australia 1888 Act* (n 121) s 2; *Queensland 1888 Act* (n 121) s 3; *Western Australia 1889 Act* (n 121) s 5; *Victoria 1888 Act* (n 121) s 4.

135 Price (n 11) 194.

B *The Final Poll Taxes in New Zealand*

The effect of New Zealand's first poll tax was unclear. Numbers of Chinese immigrants reduced, but it was uncertain whether this was due to the poll tax or New Zealand's economic recession. It was likely a mixture of both. Anti-Chinese sentiment remained though. After the *Afghan* incident, rumours spread that the Chinese on the ship would land in New Zealand instead. Protestors gathered to stop their entry but just like in 1857, no Chinese arrived. Nevertheless, the unrest spurred the government into action. Before the 1888 intercolonial conference, Reeves and Seddon lobbied the Premier, who introduced a Bill to Parliament modelled on the *NSW 1881 Act.* This Bill was then criticised by Seddon and his allies for being too lenient compared to the harsher restrictions about to be introduced in the Australian colonies. On the other side, humanitarians argued that the Bill was unnecessary, especially with the number of Chinese in New Zealand declining since the first poll tax.[136]

The *Chinese Immigrants Amendment Act 1888* (NZ) that was eventually passed simply amended the *NZ 1881 Act* (unlike the Australian third wave legislation which repealed and re-enacted their laws).[137] It left the poll tax as it was, but increased the penalty on the master for letting unpaid Chinese land from GBP10 to GBP50 and changed it to a strict liability offence.[138] It also raised the tonnage proportion to one 'Chinese' per 100 tonnes of registered tonnage (from one 'Chinese' per 10 tonnes) and increased the penalty for every 'Chinese' in excess to GBP100 (from GBP10).[139]

New Zealand still had appetite for one last poll tax. In 1893, Richard Seddon was elected Premier with support from anti-Chinese leagues around New Zealand (who were in turn supported by most of the trade unions). He repeatedly introduced Bills raising the poll tax to GBP100 and extending it to all 'Asiatics'.[140] In 1896, one of these Bills passed both houses but was denied the Royal Assent by the Colonial Office.[141] Unperturbed, Seddon introduced a

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136 Price (n 11) 211.

137 *Chinese Immigrants Amendment Act 1888* (NZ) ('*NZ 1888 Act*').

138 Ibid s 5.

139 Ibid s 4.

140 Widely defined as 'any native of any part of Asia' in *Asiatic Restriction Act 1896* (NZ) s 2 (definition of 'asiatic').

141 Murphy (n 4) 29.

similar Bill targeted only at Chinese, which was subsequently granted the Royal Assent and became law.[142] This Act increased the poll tax from GBP10 to GBP100,[143] and the penalty on Chinese who entered without paying from GBP10 to GBP100.[144] It also raised the tonnage proportion to one 'Chinese' per 200 tonnes of registered tonnage.[145] This was the final poll tax to be enacted in the Australian colonies or New Zealand.

V A BRIEF POST POLL TAX HISTORY

A *Australia*

In 1896, another intercolonial conference was held regarding immigration. There, the Australian colonies attempted to extend the laws restricting Chinese immigration onto all non-white persons. Bills along these lines were passed by New South Wales, South Australia and Tasmania but the Colonial Office denied them the Royal Assent.[146] It was clear though that something had to give; the colonies were getting more aggressive in wanting to control their immigration policy, and Westminster was finding it harder to placate them.

In 1901, a solution of sorts was found. The Australian colonies federated, becoming the Commonwealth of Australia. This made it easier to enact uniform legislation regarding immigration. One of the first Acts passed by the new Commonwealth was the *Immigration Restriction Act 1901* (Cth). It got around the race issues which concerned the Colonial Office by subjecting arrivals to a 50-word dictation test in any European language chosen by the immigration officer.[147] For Asian immigrants, the language would always be deliberately chosen so that they would fail. The passing of the Act bought to a halt Chinese immigration to Australia and began the period of 'White Australia'. With the new Act making the poll tax

142 *Chinese Immigrants Amendment Act 1896* (NZ).

143 Ibid s 2.

144 Ibid s 3.

145 Ibid s 4.

146 Murphy (n 4) 16.

147 *Immigration Restriction Act 1901* (Cth) s 3.

redundant, New South Wales and Tasmania, the final two states with a tax, repealed them in 1903.[148]

The White Australia policy was gradually dismantled through the 1950s (with the repeal of the *Immigration Restriction Act 1901*) and 1960s (with further easing of restrictions) before legally ending in 1973 when the government implemented a race-blind immigration policy.[149]

In recent years, there have been calls for the Australian government to apologise for poll tax legislation.[150] The Victorian government did so in 2017,[151] however, no other states have apologised, nor has the Federal government.

B *New Zealand*

Between 1896 and 1901, the number of Chinese in New Zealand declined from 4,300 to 2,900. However, tensions still existed. By 1907, Anti-Chinese leagues around the country were calling for further restrictions, including raising the poll tax to GBP1,000. The government were against this only because they thought Chinese would end up staying in New Zealand longer to pay back the high tax amount. Instead, they instituted a reading test for immigrants from China and decided to decline all applications for naturalisation from Chinese to prevent certificates being used to evade the poll tax.[152]

In 1920, Chinese immigration would stop completely after the government passed the *Immigration Restriction Amendment Act 1920* (NZ). Under this Act, immigrants could only gain entry to New Zealand by applying to the Minister of Customs, who had complete

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148 Murphy (n 4) 17.

149 *Fact Sheet 8 – Abolition of the 'White Australia' Policy* (Australian Department of Home Affairs, November 2010).

150 Esther Han, 'Chinese Australians Call for an Apology', *Sydney Morning Herald* (online, 30 June 2011) <https://www.smh.com.au/national/chinese-australians-call-for-an-apology-20110629-1gr1t.html>.

151 Iskhandar Razak, 'Victoria Apologises to Chinese Community for Racist Policies During Gold Rush Era', *Australian Broadcasting Corporation* (online, 25 May 2017*)* <http://www.abc.net.au/news/2017-05-25/victoria-apologises-to-chinese-for-racism-during-gold-rush-era/8558998>.

152 Murphy (n 4) 30.

discretion over whether to grant a permit. There was no discussion or right to appeal. By 1926, the government had ceased issuing entry permits to Chinese.[153]

Despite the 1920 Act stopping Chinese immigration completely, the poll tax was not repealed, with the Prime Minister seeing it as an 'additional safe guard'.[154] However, due to its redundancy, payment of the poll tax was waived in 1934.[155] In 1944, the tax was finally abolished by the Labour government, 63 years after it had come into force. New Zealand (now a Dominion) was the last of the former Australasian colonies to abolish the tax.

In 1991, the New Zealand Chinese Association raised the possibility of seeking an apology from the government for previous anti-Chinese legislation. Formal contact with the government regarding this was made in 2001.[156] In 2002, the Prime Minister made a formal apology on behalf of the government for the poll tax and other discrimination.[157] A poll-tax heritage trust was established as part of the apology.[158]

VI CONCLUSION

The poll taxes were generally successful at keeping the Chinese out of Australia and New Zealand. By the time the last poll tax was repealed, Chinese numbered 20,000 across the former colonies, their lowest level since the discovery of gold in 1855.[159] The various legislation were flawed pieces of law from a legal perspective, with imprecise definitions and unfair penalties. The taxes were also not the solution to the "Chinese question" the colonies were looking for. To fulfil their goal of keeping Chinese out completely, the poll taxes had to be replaced with even more restrictive and uniform legislation.

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153 Ibid 35.

154 New Zealand, *Parliamentary Debates*, House, 14 September 1920, 908 (William Massey, Prime Minister).

155 Murphy (n 4) 36.

156 David Fung, 'The Tragi-Comedy of the NZ Chinese Poll-Tax Issue: Background to the NZ Government's Apology', *StevenYoung* (Web Page, 2002) <http://www.stevenyoung.co.nz/index.php?option=com_content&task=view&id=124&Itemid=75>.

157 Murphy (n 4) 56.

158 Ou Yang (n 49) 60.

159 Price (n 11) 277.

The technical flaws in the legislation show the inexperience of the law-making bodies at the time, as well as their unrefined understanding of race. This was most notably seen in the problems surrounding the definition of 'Chinese', which were never completely remedied. However, these technical issues did not appear to be a significant problem in practice. The reduction in the Chinese population and lack of court cases clarifying problematic sections leads one to assume that authorities applied the law in a simplistic manner, without stringent adherence to the wording.

These laws are a little-known yet important part of each nations' legal history. They were used by the populace at a formative stage of each colony's development to define who they thought belonged and were the prelude to long periods of racial exclusion. The effect of the laws on the ethnic makeup and identity of Australia and New Zealand will be their lasting legacy.

UNDERPAID FOREIGN WORKERS IN AUSTRALIA: THE IMPACT OF LONG HOURS SHIFTS ON OCCUPATIONAL HEALTH AND SAFETY

MOHAMMED AL BHADILY[*] AND ROBERT GUTHRIE[**]

ABSTRACT

This paper reviews current literature and reporting in relation to vulnerable visa holders, revealing underpayment and poor working conditions in a number of industries and concentrated among international student workers. The authors note the current focus in much of the literature and reporting is on improving the enforcement of rights in relation to hours of work, payment of wages and rights to termination payments. The paper noted an area of reform not yet fully developed, namely the enforcement of rights in relation to occupational health and safety and workers compensation entitlements for visa holders. This paper considers these areas and makes some proposals for reform.

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I INTRODUCTION

The International Labour Organisation estimates there over 150 million migrant workers worldwide.[1] According to the World Bank, there will be an estimated 3 per cent increase in the number of migrant workers in developed countries by 2025.[2] This will contribute to a USD356 billion increase in the global economy, constituting 0.6 per cent of the global income.[3] There are over 1.5 million people of foreign descent that are eligible to work in Australia.[4]

In the last three decades, there has been a policy shift from permanent to temporary migration in a number of developed countries, including Australia.[5] This policy departure is driven by the apparent flexibility of foreign workers in addressing labour and skills shortages within the local labour market.[6] Evidence has shown migrant workers contribute to the capacity and functionality of the labour market by undertaking jobs that are undesirable to local workers in the host country.[7] In Australia, there are currently different classes of visas enabling visa holders to perform certain types of jobs.

Several recent reports have shown that foreign workers employed in Australia have been subjected to exploitation and abuses in forms of low-rate payment, long hour shifts, physical and verbal abuse and sexual harassment.[8] The Australian Federal Government has taken steps to combat the exploitation of foreign workers by conducting inquiries and introducing

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1 International Labour Organization, *ILO Global Estimates on Migrant Workers* (Report, 2015) xi.

2 The World Bank, *World Development Report: Development and the Next Generation* (Report, 2007) 192.

3 The World Bank, *Global Economic Prospects 2006: Economic Implications of Remittances and Migration* (Report No 34320, 2006) 31.

4 Department of Immigration and Border Protection, *Temporary Entrants and New Zealand Citizens in Australia* (Report, 30 September 2016). Details of this information can be found in Table 1 below.

5 Harriet Spinks, *Australia's Migration Program* (Background Note, 29 October 2010) 8.

6 Ibid.

7 Susanne Bahn, Llandis Barratt-Pugh and Ghialy Yap, 'The Employment of Skilled Migrants on Temporary 457 Visas in Australia: Emerging Issues' (2012) 22(4) *Labour and Industry* 379, 383.

8 Senate Education and Employment References Committee, Parliament of Australia, *A National Disgrace: The Exploitation of Temporary Migrant Workers* (Report, March 2016) ('*A National Disgrace Report*'); Laurie Berg and Bassina Farbenblum, *Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey* (Research Report, November 2017); Alexander Reilly et al, *International Students and the Fair Work Ombudsman* (Research Report, 2017).

legislation that addresses these concerns.[9] This paper does not intend to address those issues in detail.

There is a substantial body of empirical research from Australia, Europe and the United States that links shift work and excessive working hours with workplace injuries and disease.[10] Despite these findings, foreign workers are often required to work excessive hours in unsociable shift conditions to increase their income, often as a consequence of underpayment of wages. The connection between excessive work hours, shift work and under-payment of wages has not yet been the focus of detailed academic research.

This paper will examine the impact of excessive work hours and shift work on the occupational health and safety of foreign workers in Australia. The first part of the paper details the types of visas that allow people of foreign descent to work in Australia. The second part will examine the alleged exploitation of foreign workers in Australia, with a particular focus on long hour shift use. The final part of this paper will address the relationship between long hours and shift work and the occupational health and safety of foreign workers in Australia.

II WORKING VISAS IN AUSTRALIA

A *Temporary Work Visa*

This section will provide an overview of the various foreign worker visas entitling holders to work in Australia. One of the most controversial visas in this regard is the 'Skilled Workers Subclass 457' visa ('457 visa'). This visa was introduced in 1996 by the Howard Conservative Government to allow businesses to sponsor skilled foreign workers to meet the apparent shortages in skilled labour that was unmet by local Australian workers.[11] The 457 visa was later considered a pathway for permanent residency. 457 visa holders depended upon their employers for visa status, thus creating an environment where foreign workers became vulnerable to exploitation by Australian employers.[12] As at 30 September 2016, there were

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9 Senate Education and Employment References Committee, *A National Disgrace Report* (n 8).

10 Allard Dembe et al, 'The Impact of Overtime and Long Work Hours on Occupational Injuries and Illnesses: New Evidence from the United States' [2005] 62(9) *Occupational and Environmental Medicine* 588, 589.

11 Spinks (n 5).

12 Stefanie Toh and Michael Quinlan, 'Safeguarding the Global Contingent Workforce? Guest Workers in Australia' (2009) 30(5) *International Journal of Manpower* 453; Mohammed Al Bhadily and Kyle Bowyer,

172,190,457 visa holders.[13] The five countries with the largest number of holders were: India (37,430 visa holders), the United Kingdom (28,710 visa holders), China (11,830 visa holders), Philippines (10,880 visa holders) and Ireland (8,150 visa holders).[14] The 457 visa was abolished by the Turnbull Conservative Government in April 2017 and replaced by the 'Temporary Work (Skilled)' visa.[15] This visa allowed businesses to sponsor foreign skilled workers for 2 years and permitted an extension of the visa for an extra 2 years, thereby reducing the prospect of the applicant applying for permanent residency.[16]

'Subclass 444' is a special category visa, introduced on 1 September 1994 as a temporary visa allowing New Zealand citizens to work in Australia.[17] It could be obtained on arrival, as long as the New Zealand citizen held a valid passport and met the relevant health and character requirements.[18] It was valid until the visa holder left Australia and allowed the holder to work in Australia without restrictions on the types of jobs available or number of hours worked.[19] As at 30 September 2016, there were 648,993 Subclass 444 visa holders.[20]

B *Cultural Exchange and Holiday Work Visas*

In August 2008, due to the apparent shortage of labour in the horticulture industry, the Rudd Labor Government introduced the Pacific Seasonal Worker Pilot Scheme, which was replaced in 2012 by 'Seasonal Worker Programme' (416 Subclass).[21] This visa allows seasonal workers who are citizens of Timor-Leste, Kiribati, Nauru, Papua New Guinea, Samoa, Solomon Islands,

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'The Exclusion of Sub-Class 457 Visa Workers from the Protection of the Fair Entitlements Guarantee: Human Rights Issues' (2017) IV *Curtin Law and Taxation Review* 72.

13 Department of Immigration and Border Protection (n 4).

14 Ibid 2.

15 'Temporary Work (Skilled) Visa (Subclass 457)', *Department of Home Affairs* (Web Page, 17 March 2020) <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/repealed-visas/temporary-work-skilled-457>.

16 Ibid.

17 'Subclass 444 Special Category Visa (SCV)', *Department of Home Affairs* (Web Page, 17 September 2020) <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/special-category-visa-subclass-444>.

18 Ibid.

19 Ibid.

20 Department of Immigration and Border Protection (n 4).

21 Joint Standing Committee on Migration, Parliament of Australia, *Seasonal Change: Inquiry into the Seasonal Worker Programme* (Report, May 2016) 3.

Tonga, Tuvalu and Vanuatu to apply for a visa if they have been invited by a sponsor-employer to participate in a Seasonal Work Programme.[22] The aim of this visa is to allow sponsored citizens to contribute to the economic development of their home countries by providing them with work opportunities in the Australian agriculture and accommodation industries.[23] Sponsorship can last anywhere from 14 weeks to 6 months and visa holders are guaranteed a minimum of 30 hours work per week.[24] For the year 2014 until 31 May 2015, there were 2,801 sponsored workers under the 416 visa in Australia.[25] However, this visa closed to new applications on 19 November 2016.[26] Some workers may now be eligible for the 'Temporary Work (International Relations)' visa (Subclass 403) or 'Temporary Activity' visa (Subclass 408).

The 'Working Holiday and Work' and 'Holiday Subclass 417 and 467' visas were introduced in 1975 to allow eligible young persons aged 18 to 30 years from 39 specified countries to holiday and work in Australia for up to a year.[27] The objective of these visas is to encourage cultural exchange between Australia and the specified countries.[28] The holders of these visas are allowed to work for up to 12 months, but cannot work for the same employer for more than 6 months.[29] The majority of these visa holders work in the Australian hospitality and horticulture industries and may be granted a second holiday visa for up to 12 months.[30] As at 30 September 2016, there were 214,583 Working Holiday visa holders in Australia.[31] The 5 countries with the largest number of such visa holders were: the United Kingdom (26,970 visa

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22 Ibid.

23 Ibid.

24 Ibid 12. Senate Education and Employment References Committee, *A National Disgrace Report* (n 8) 10.

25 Joint Standing Committee on Migration (n 21) 14.

26 'Special Program Visa (Subclass 416)', *Department of Home Affairs* (Web Page, 17 March 2020) <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/repealed-visas/special-program-visa-subclass-416>.

27 Senate Education and Employment References Committee, *A National Disgrace Report* (n 8).

28 '(Subclass 417) Working Holiday Visa', *Department of Home Affairs* (Web Page, 22 April 2020) <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/work-holiday-417>; 'Subclass 462 Work and Holiday', *Department of Home Affairs* (Web Page, 22 April 2020) <https://immi.homeaffairs.gov.au/visas/getting-a-visa/visa-listing/work-holiday-462>.

29 Ibid. Department of Immigration and Border Protection (n 4).

30 Ibid. Joint Standing Committee on Migration (n 21) 22.

31 Department of Immigration and Border Protection (n 4).

holders), Taiwan (17,440 visa holders), South Korea (16,080 visa holders), Germany (13,680 visa holders) and France (12,330 visa holders).[32]

C *Students and Work Visas*

On 1 July 2016, the Turnbull Government introduced a new student 'Subclass 500' visa, which replaced both the graduate 'Subclass 570' visas and the postgraduate 'Subclass 576' visas.[33] The 'Subclass 500' is a comprehensive visa enabling student applicants to study in primary school through to PHD courses on a full time basis in recognised Australian education institutions.[34] To receive this visa grant, applicants must satisfy specific prerequisites including proof of financial capability to cover course fees and living expenses and evidence of English language skills.[35] Once granted, the visa entitles student holders to work in Australia.[36] Undergraduate students may work up to 20 hours per week whilst attending their course, and unlimited hours during course breaks.[37] Meanwhile, postgraduate students are entitled to work unlimited hours, whether attending their course or during course breaks.[38] As at 30 September 2016, there were 470,810 full-fee paying international students in Australia.[39] The 5 countries with the largest number of student visa holders were: China (125,850 visa holders) India (55,960 visa holders), Vietnam (21,990 visa holders), Malaysia (19,980 visa holders) and Nepal (19,930 visa holders).[40] There is no accurate data available regarding the proportion of these international students in paid work.

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32 Ibid 1.

33 'Subclass 500 Student Visa', *Department of Home Affairs* (Web Page, 16 October 2020) <https://www.border.gov.au/Trav/Visa-1/500-#tab-content-1>.

34 Ibid.

35 Ibid.

36 Ibid.

37 Ibid.

38 Ibid.

39 Department of Immigration and Border Protection (n 4).

40 Ibid.

TABLE 1 – FOREIGN VISA HOLDERS IN AUSTRALIA AS AT 30 SEPTEMBER 2016[41]

VISA CATEGORY	**NUMBER OF HOLDERS**
New Zealand (subclass 444)	648 993
Temporary skilled (subclass 457) visa holders	172,190
Working Holiday Maker visa holders	214, 583
Student visa holders	470,810
Temporary Graduate (subclass 485) visa holders	38,640
TOTAL	**1,545,216**

III EXPLOITATION OF FOREIGN WORKERS

The exploitation of foreign workers is not a new phenomenon and is not restricted to Australia. It is a widespread global concern affecting many countries.[42] In Australia, foreign worker exploitation has been more prevalent since the Howard Government introduced working visas allowing foreign workers to undertake work in Australia without proper safeguards from exploitation. Australia has a history of foreign worker exploitation which existed well before the current day.[43] In the 1860's, the Queensland Government decided to recruit the Pacific Islanders to work in the sugar plantations in North Queensland.[44] There is evidence some of these workers were unpaid, abducted, kidnapped or brought to Queensland by deception.[45] Arguably, these workers were living in slave-like conditions.[46] Between 1943 and 1966, thousands of foreign workers, primarily consisting of Italian persons, were employed in the Wittenoom asbestos mine in Western Australia.[47] A research study found Italian workers in

41 Ibid 3.

42 Minderoo Foundation, *Global Slavery Index 2018* (Report, 2018) 3.

43 Tracey Flanagan, Meredith Wilkie and Susanna Iuliano, 'Australian South Sea Islanders: A Century of Race Discrimination under Australian Law', *Australian Human Rights Commission* (Web Page, 1 January 2003) <http://www.humanrights.gov.au/erace-archives-australian-south-sea-islanders>.

44 'The History of the Sugar Industry', *Australian Sugar Heritage Centre* (Web Page, 2010) <http://www.sugarmuseum.com.au/the-history-of-the-sugar-industry/>.

45 Ibid.

46 Flanagan, Wilkie and Iuliano (n 43).

47 Angela Di Pasquale, 'Sistemazione and Death: The Role of the Wittenoom Asbestos Mine in the Lives and Deaths of Italian Transnational Workers' (Thesis, April 2013) 95 <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.889.9462&rep=rep1&type=pdf>.

Wittenoom had a higher exposure to asbestos than their Australian and UK-born counterparts.[48] Higher levels of asbestos exposure have also been correlated with higher risks of cancer.[49]

Recent media reports have revealed several cases of foreign workers exploitation occurring in Australia. The Australian Broadcasting Commission ('ABC') and Fairfax produced the Four Corners programme, '7-Eleven: The Price of Convenience', which was televised in August 2015.[50] The program showed 7-Eleven workers, many of whom were foreign students, being underpaid, working long hour shifts of up to 16 hours without a break, being intimidated and in some cases, abused.[51] The program aired allegations 7-Eleven did not pay their workers the legally required hourly rate, varied their payments and paid them differently, depending on the store they worked at.[52] The payment rates at 7-Eleven ranged from AUD10–AUD16 per hour, which is below the current minimum wage of AUD24 per hour.[53]

Franchisees of 7-Eleven allowed students to work more than 20 hours a week and in some cases, allowed them to work 60 hours a week — thereby exceeding the maximum 20 hours permitted by their visas conditions.[54] For those who worked 40 hours per week, 7-Eleven paid for only 20 hours of the time worked to give the illusion of visa compliance.[55] This 'half pay scam', was supported by payslips showing that the workers had been paid the correct award rate, but for only half of the hours actually completed.[56] After the 'Four Corners' scandal,

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48 'Vulnerable Workers Research Forum 17 August 2015 Discussion Summary', *Institute for Safety, Compensation and Recovery Research* (Forum Post, 2015) 2 <http://www.iscrr.com.au/__data/assets/pdf_file/0018/343161/vulnerable_worker_forum_summary_final.pdf>.

49 Di Pasquale (n 47) 316.

50 Australian Broadcasting Corporation, '7-Eleven: The Price of Convenience', *Four Corners* (Web Page, 30 August 2015) <http://www.abc.net.au/4corners/7-eleven-promo/6729716> ('7-Eleven').

51 Ibid.

52 Ibid.

53 'Minimum Wages', *Fair Work Ombudsman* (Fact Sheet, 2020) <https://www.fairwork.gov.au/how-we-will-help/templates-and-guides/fact-sheets/minimum-workplace-entitlements/minimum-wages#current-national-minimum-wage>.

54 Australian Broadcasting Corporation, 7-Eleven (n 50).

55 Ibid.

56 Ibid.

franchisees were forced to pay the award rate to their workers.[57] However, it has been revealed some workers were asked to pay back half of the payment to their employers, in what was termed a 'cash back scam'.[58]

These illegal practices are not restricted to 7-Eleven employees but extend to other industries. A survey titled 'Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey' ('Wage Theft Survey'), investigated the underpayment of foreign workers and found 4 per cent of the participants had back-paid wages to their employers.[59] Some foreign workers were required to make payments to their employers in the form of bank deposits and sham training fees.[60] A second ABC Four Corners investigation titled, 'Slaving Away: The Dirty Secrets Behind Australia's Fresh Food' unveiled the widespread exploitation of foreign workers employed in Australian fruit and vegetable corporations such as Coles, Woolworths, Aldi and IGA and some fast food outlets such as Red Rooster, KFC and Subway.[61] The investigation revealed workers in these industries were often underpaid, overworked and abused.[62] Some women workers were asked to perform sexual favours in exchange for visas and in some cases, workers were paid less than AUD4 per hour and worked 22-hour shifts.[63]

Restaurants have also been the focus of exploitation allegations. According to a survey conducted by the University of Sydney Business School, 80 per cent of international students were exploited whilst working in restaurants across Sydney.[64] Up to 35 of the surveyed international students were underpaid as low as AUD12 per hour and some students were paid

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57 Paul Karp, '7-Eleven Workers Beaten and Forced to Pay Back Wages, Senate Inquiry Hears', *The Guardian* (online, 5 February 2016) <https://www.theguardian.com/australia-news/2016/feb/05/7-eleven-workers-beaten-and-forced-to-pay-back-wages-senate-inquiry-hears>.

58 Ibid.

59 Berg and Farbenblum (n 8) 45.

60 About 5 per cent of the participants paid deposits and 6 per cent of them paid training fees: see Berg and Farbenblum (n 8) 43.

61 Australian Broadcasting Corporation, 'Slaving Away: The Dirty Secrets behind Australia's Fresh Food', *Four Corners* (Web Page, 4 May 2015) <http://www.abc.net.au/4corners/stories/2015/05/04/4227055.htm>.

62 Ibid.

63 Ibid.

64 Eryk Bagshaw, '80 Per Cent of International Students in Restaurants Paid Below Minimum Wage, Survey Finds', *The Sydney Morning Herald* (online, 21 April 2016) <http://www.smh.com.au/national/education/80-per-cent-of-international-students-in-restaurants-paid-below-minimum-wage-survey-finds-20160421-gobkzh.html>.

nothing during their 'training', which lasted for as long as a month.[65] A University of Adelaide survey investigated why the majority of international students do not lodge complaints with the Fair Work Ombudsman ('FWO') for non-compliant work conditions and payments.[66] The survey concluded 60 per cent of the participants performed unpaid work for over 1 week, and more than 30 per cent of the students were involved in unpaid work for as long as 6 months.[67]

According to the Senate Education and Employment References Committee, international students were forced to work more than the legal requirement of 20 hours a week, and in some cases, were forced to work more than 40 hours.[68] Some employers encouraged workers to breach their visa conditions in order to work more than 20 hours per week.[69] This allowed employers to exploit their workers by threatening to report them to the Department of Immigration for this breach of their visa conditions.[70] One international student explained:

> I was being paid $15 an hour – [the award is, at a minimum, $23.64] – but I was under the threat to get sacked, I couldn't complain to anyone. They knew I was working more than 20 hours a week, and they said, 'We will report you to immigration.[71]

In 2014, JobWatch received 43 calls from 457 visa holders and underpayment of wages was one of the frequent inquiries.[72] It is submitted the failure to address foreign workers rights and the ineffective enforcement of existing relevant legislations has encouraged foreign worker exploitation.[73] Toh and Quinlan argue foreign worker vulnerability has been aggravated by the

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65 Ibid.

66 Reilly et al (n 8) 4.

67 Ibid 45.

68 Senate Education and Employment References Committee, *A National Disgrace Report* (n 8) 210.

69 Ibid.

70 Ben Doherty, 'Revealed: The Systemic Exploitation of Migrant Workers in Australia', *The Guardian* (online, 29 October 2016) <https://www.theguardian.com/australia-news/2016/oct/29/revealed-the-systemic-exploitation-of-migrant-workers-in-australia>

71 Ibid.

72 JobWatch, Submission No 36 to Education and Employment References Committee, Parliament of Australia, *The Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders* (May 2015) 6 <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/Submissions>.

73 Ibid.

regulatory standards governing foreign workers, especially temporary workers, because these standards are not as rigorous as those provided to Australian resident workers.[74] An example of this disparate treatment is the exclusion of 457 visa holders and other foreign workers from the Fair Entitlements Guarantee ('FEG') coverage — a taxpayer funded scheme aimed at protecting workers entitlements in the event of an employer's insolvency.[75] The reason for the exclusion of foreign workers is their lack of citizenship or residency status.[76] In some cases, government policies have unintentionally contributed to the vulnerability of foreign workers. In 2016, the Federal Government amended the *Migration Regulations 1994* (Cth) by changing condition 8107.[77] Under this amendment, 457 visa holders were given 60 as opposed to the original 90 calendar days to find a new employer.[78] This deadline is near impossible to achieve, given the Department of Home Affairs (Immigration and Citizenship) takes an average of 54 days to allocate an officer to look at the case of a new employer for a visa holder.[79] This dilemma might in turn, cause foreign workers to think twice before lodging a complaint that puts their employment and visa at risk. Foreign worker vulnerability has not been helped by the perception held by some managers and directors of companies that foreign workers would do and accept any work offered to them, even if it is contrary to the law and in the form of exploitation.[80] This view has been noted in a Workplace Ombudsman investigation into Hanssen Pty Ltd; a Western Australian construction company.[81] In *Jones v Hansen Pty Ltd*,[82] the Federal Magistrates Court heard evidence the Hanssen management believed employees 'would sign anything' because they 'are frightened of ... being sent back'.[83] These practices keep foreign workers vulnerable, exploitable and deny them access to legal support and

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74 Toh and Quinlan (n 12) 458.

75 Al Bhadily and Bowyer (n 12) 74.

76 Ibid 90.

77 *Migration Legislation Amendment (No. 4) Regulation 2016* (Cth) sch 1.

78 Ibid.

79 'Changes to Australian 457 Visa Condition 8107 – Four Problems 8107 Causes and How a Solution Could be Found', *Work Visa Lawyers* (Web Page, 19 November 2016) <https://www.workvisalawyers.com.au/news/457-news/changes-to-australian-457-visa-condition-8107-four-problems-8107-causes-and-how-a-solution-could-be-found.html>.

80 *Jones v Hanssen Pty Ltd* [2008] FMCA 291 [8].

81 Ibid.

82 [2008] FMCA 291.

83 Ibid [8].

protection. Bissett and Landau note the allegations some 457 visa workers sign contracts before coming to Australia that include a clause prohibiting them from joining a trade union under threat of termination of employment.[84] Such a practice is contrary to Australian law.

Comprehensive research commissioned by Safe Work Australia has been obtained by Fairfax Media through the accessibility provisions of the *Freedom of Information Act 1982* (Cth).[85] The research reveals foreign workers, refugees and permanent migrants are frequently hired to engage in unskilled jobs such as food processing and farm works.[86] They work long shifts below the minimum wage and suffer deadly workplace injuries at a higher rate than other workers.[87] Underpayment and long hours shifts are the most prevalent characteristics of foreign worker exploitation.[88] A substantial proportion of foreign workers were paid below the minimum wage and worked excessive hours to make ends meet.[89]

A *Long Hour Shifts*

The above discussion indicates low payments and long hour shifts are pervasive forms of exploitation for foreign workers in Australia. The Wage Theft Survey observed about 2 out of 5 low paid foreign workers worked more than 21 hours a week and were paid AUD12 per hour or less.[90] Some of these matters have now been dealt with by the Federal Magistrates Court. For example, in *Fair Work Ombudsman v Kentwood Industries Pty Ltd (No 2)*[91], Kentwood Industries was fined AUD462,000 for the exploitation of 457 sponsored tradesmen who lived in overcrowded accommodation, including 3 men who shared a bedroom in a house rented

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84 Michelle Bissett and Ingrid Landau, 'Australia's 457 Visa Scheme and the Rights of Migrant Workers' (2008) 33(3) *Alternative Law Journal* 142, 457; Australian Broadcasting Corporation, 'Filipino Workers Back Union in Face of Criticism', *The World Today* (Transcript, 19 October 2006) <http://www.abc.net.au/worldtoday/content/2006/s1769137.htm>.

85 Nick Toscano, 'Fears over Rise in Migrant Workers Killed, Injured in Industrial Accidents', *The Sydney Morning Herald* (online, 26 August 2016) <http://www.smh.com.au/business/workplace-relations/sharp-rise-in-migrant-workers-killed-maimed-in-industrial-accidents-20160825-gr117u.html>.

86 Ibid.

87 Ibid.

88 Ibid.

89 Senate Education and Employment References Committee, Parliament of Australia, *Corporate Avoidance of the Fair Work Act* (Report, September 2017) 67 ('*Corporate Avoidance Report*').

90 Ibid.

91 (2010) 201 IR 234.

from the company.[92] The Federal Court heard evidence workers were forced to sleep on the floor and work up to 11 hours a day, for 6 to 7 days a week without any days off.[93] They were not paid penalty rates, did not have annual leave entitlements, did not get paid for months and paid substantial amounts to Kentwood or its agent for their visas.[94] In *Fryer v Yoga Tandoori House Pty Limited*[95], an Indian worker, Anbalagan Rajendran, was brought to Australia on a 457 visa. He worked in a restaurant and was dependent on his employer for accommodation, food and money.[96] He worked a minimum of 14 hours a day, 7 days a week for 40 days without a day off.[97] Each day, he worked in 3 restaurants in different locations owned by the same employer.[98] He was forced to work whilst ill and was told he did not get paid for a year because his employer paid his airfare to Australia.[99] The employer was fined a total of AUD18,200 for various breaches of the *Fair Work Act 2009* (Cth) relating to wage payments.[100]

Long hours of work is a common workplace abuse encountered by foreign workers.[101] Underpayment and long hour shifts are interwoven and often, one leads to the other. It has been established foreign workers are often forced to work longer shifts in order to make up for low hourly rates because it is unlikely that they could survive on low rates payment without increasing their working hours substantially.[102] The Wage Theft Survey found unauthorized workers are more likely to be paid less than other foreign workers.[103] The survey concluded 46

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92 Ibid 227.

93 Ibid 116, 234.

94 Ibid 234, 237.

95 [2008] FMCA 288.

96 Ibid [12].

97 Ibid.

98 Ibid.

99 Ibid.

100 Ibid [47].

101 Cathy Zimmerman, Ligia Kiss and Nicola Pocock, 'Health and Human Trafficking in the Greater Mekong Subregion. Findings from a Survey of Men Women and Children in Cambodia, Thailand and Vietnam', *International Organization for Migration and London School of Hygiene and Tropical Medicine* (Survey Findings, 2014) 69 <http://publications.iom.int/system/files/pdf/steam_report_mekong.pdf>.

102 Loretta Florance and Ashlynne McGhee, 'High Fees, Low Pay: International Students "shocked" by Australian Working Conditions', *Australian Broadcasting Corporation* (online, 13 July 2016) <http://www.abc.net.au/news/2016-07-13/international-students-underpaid-australian-working-conditions/7586452>.

103 Berg and Farbenblum (n 8) 47.

per cent of unauthorised workers were paid AUD12 or less per hour and most worked more than 21 hours a week.[104] One 417 visa holder commented on the long hours those workers endured:

> The minimum was 12 hours every day … the longest was on Saturday until Sunday. The hours were very long. One time we started at 5 pm on Saturday and worked until 11 am on Sunday. This is a long day.[105]

Underhill and Rimmer examined the impact of the precarious conditions experienced by foreign harvest workers on their occupational health and safety.[106] Approximately 40 per cent of the study participants were paid on a piece rate, with an average hourly payment considerably less than the minimum wage.[107] The low piece rates resulted in participants failing to take meal breaks or drink water.[108] Although this practice allowed workers to increase their output, it put them at risk of injury as they were:

- four times less likely to stabilise a ladder before climbing it (orchards typically have uneven terrain);
- two times more likely to work in extreme heat;
- three times more likely to carry excessive loads such as climbing a ladder with a heavy bag of fruit; and
- two times more likely to be discouraged from taking lunch breaks.[109]

Working long hours and shifts have health and safety implications such as increased physical injuries and mental health decline. These issues will be discussed in the following section.

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104 Ibid.

105 Senate Education and Employment Committee References Committee, *A National Disgrace Report* (n 8) 175.

106 Elsa Underhill and Malcolm Rimmer, 'Itinerant Foreign Harvest Workers in Australia: The Impact of Precarious Employment on Occupational Safety and Health' (2015) 13(2) *Policy and Practice in Health and Safety* 25, 26.

107 Ibid 38.

108 Ibid.

109 Ibid.

IV HEALTH AND SAFETY IMPACTS FROM EXTENDED HOURS OF WORK

Financial insecurity has a significant impact on foreign workers' health. Studies in Australia, Europe and the United States have linked long hours shift work, which has been driven in most cases by low payments, to detrimental health and safety implications.[110]

In the United States, a national survey found workers with overtime have a 61 per cent higher chance of injuries than those without.[111] Workers employed for at least 12 hours are exposed to 37 per cent more injuries and hazards.[112] Another American study examined the adverse health effect of long hours and night shifts on healthcare workers.[113] This study found that these workers have an increased risk of injuries, obesity and a wide range of chronic diseases.[114]

Dembe and Yao used data covering 32 years of job history (i.e. the period 1978 to 2009) to investigate the correlation between long hour shifts and chronic disease risk.[115] The study concluded working long shifts for more than 40 hours a week over a 32 year period was a significant factor increasing the risk of heart disease, skin cancer, diabetes and arthritis.[116] A similar study conducted in Europe surveyed 85,494 working men and women in the period of 1991–2004 to examine the effects of long hour shifts on atrial fibrillation, which is one of the most common risk factors for strokes.[117] This study found participants who worked for 55 hours

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110 Dembe et al (n 10) 588; Claire Caruso, 'Negative Impacts of Shiftwork and Long Work Hours' (2014) 39(1) *Rehabilitation Nursing* 16, 17; Ana Maria Buller et al, 'Labour Exploitation, Trafficking and Migrant Health: Labour Exploitation, Trafficking and Migrant Health Multi-Country Findings on the Health Risks and Consequences of Migrant and Trafficked Workers', *International Organization for Migration and London School of Hygiene and Tropical Medicine* (Research Report, 2015) 3; Education and Health Standing Committee, Parliament of Western Australia, *The Impact of FIFO Work Practice on Mental Health* (Final Report, 2015) i.

111 Dembe et al (n 10) 592.

112 Ibid 588.

113 Caruso (n 110) 1.

114 Ibid.

115 AE Dembe and X Yao, 'Chronic Disease Risks from Exposure to Long-Hour Work Schedules Over a 32-Year Period' (2016) 58(9) *Journal of Occupational and Environmental Medicine* 861.

116 Ibid 866.

117 Mika Kivimaki et al, 'Long Working Hours as a Risk Factor for Atrial Fibrillation: A Multi-Cohort Study' (2017) 38(34) *European Heart Journal* 2621, 2621.

or more per week had a 40 per cent higher risk of atrial fibrillation compared to those who were working a 35–40 hour week.[118]

A study undertaken by the International Organization for Migration examined the impact of migrant worker exploitation on their health and safety in the textile, construction and mining industries in Argentina, Pure and Kazakhstan. The study observed:

> Workers in each study country experienced common risk exposures similar to those described in previous research on migrant worker health. Long hours with limited break time are among the most significant risk factors for work-place accidents; interviewees in our study appeared to labour extremely long hours in jobs they knew or suspected were harmful to their health because of individual financial aspirations and payment methods (that is, per garment, based on a percentage of the gold extracted per day, or based on edifice constructed).[119]

Zimmerman et al conducted a survey to examine the health consequences of 1,102 people who were trafficked into various labour sectors in the Greater Mekong Subregion.[120] The findings of the survey noted:

> Over two thirds of participants reported working seven days per week for a mean of 13.8 hours per day, with many made to work many more hours per day, such as domestic workers (15 hours on average) and fishermen (nearly 19 hours on average). Over half reported having few or no breaks. These long work hours without breaks have significant implications for occupational safety and increased risk of injury, as well as longer-term effects of exhaustion, illness and poor mental health.[121]

Salminen reviewed 12 studies concerning the effect of working long hours on the risk of injures in countries like Australia, the USA, South Korea, the UK, Singapore and India.[122] He concluded individuals working 12 hours a day will increase the risk of occupational injury by 38 per cent compared to those who work only 8 hours a day.[123] On the other hand, working a

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118 Ibid 2625.

119 Buller et al (n 110) 9.

120 Zimmerman, Kiss and Pocock (n 101) 1.

121 Ibid 69.

122 Simo Salminen, 'Long Working Hours and Shift Work as Risk Factors for Occupational Injury' (2016) 9 *The Ergonomics Open Journal* 15, 16.

123 Ibid 21.

10-hour shift will increase the risk of workplace injury by 15 per cent compared to those only working 8 hours per day.[124]

Likewise, the increase in road accidents involving truck drivers in Australia has drawn the attention of relevant authorities and sparked public debate on how to reduce the number of fatalities caused by truck accidents.[125] According to a Safe Work Australia report concerning truck accidents from 2003 to 2012, there were 2,608 work-related truck fatalities.[126] Fatigue and speeding were the major causes of truck accidents; one-quarter of accidents are caused by speeding and 12 per cent of crashes are caused by fatigue.[127] These are similar to the findings of the Major Accidents Research Report 2013.[128] Tight delivery and imposing deadlines on drivers are contributing factors to drivers' speeding and fatigue.[129] Mayhew, Quinlan and Ferris investigated the effects of subcontracting in transport, hospitality, building and childcare on the occupational health and safety of workers in those industries.[130] They noted a key feature of subcontracting was these workers received payment on results or output rather than receiving hourly rates, as is the case with employees.[131] According to the authors, this explained why subcontractors worked excessive hours and thus experienced high levels of fatigue.[132] These health issues have detrimental consequences on the occupational health and safety of subcontractors.[133] The study concluded subcontracted truck drivers suffered higher levels of physical injuries than other employees, including chronic back injury, foreign body fragments

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124 Ibid.

125 Australian Broadcasting Corporation, 'This Trucking Life', *Four Corners* (Web Page, 3 February 2014) <http://www.abc.net.au/4corners/interview-with-suzanne-de-beer-wife-of-albert-de/5236014>.

126 'Work-Related Fatalities Involving Trucks, Australia 2003 to 2012', *Safe Work Australia* (Research Findings, May 2014) 3 <https://www.safeworkaustralia.gov.au/system/files/documents/1702/work-related-fatalities-involving-trucks.pdf>.

127 Ibid 1.

128 Ibid.

129 Ibid.

130 Claire Mayhew, Michael Quinlan and Rande Ferris, 'The Effects of Subcontracting/Outsourcing on Occupational Health and Safety: Survey Evidence from Four Australian Industries' (1997) 25(1–3) *Safety Science* 163, 169.

131 Ibid 165.

132 Ibid.

132 Ibid 173.

in the eye and leg injury.[134] These workers are also faced with mental health concerns arising from the pressure of deadlines and managing their own businesses.[135] The aforementioned Australian and international studies therefore support the conclusion that extended hours of work have deleterious effects on the health of workers.

A *The Effects of Extended Hours Work on the Mental Health of Foreign Workers*

The injuries experienced by foreign workers due to long hour shifts are not confined to physical injuries. Evidence has shown long hour shifts have an enormous effect on workers' mental health. On this point, a 7-Eleven worker stated:

> Mr Ullat Thodi stated that he was successful in his first two semesters, getting high distinctions and working between 50 and 55 hours a week. However, once he became aware that he was being underpaid and exploited by his employer, it greatly affected his mental health. As a result of trying to deal with the emotional consequences of being exploited at work, Mr Ullat Thodi began failing his subjects at university. Further, having failed several subjects, Mr Ullat Thodi calculated that he had already paid almost $100 000 for his degree, and he still had one subject to take in 2016.[136]

In 2017, a United States workplace mental health report titled 'Mind the Workplace' reviewed data from 17,000 employees across 19 industries.[137] The study found nearly 78 per cent of respondents were not paid what they deserved.[138] Furthermore, 77 per cent of participants believed their skills were not recognised and 81 per cent reported that work stress had affected their familial relationships.[139] 63 per cent of participants stated workplace stress had a significant impact on their mental and behavioural health, with some having engaged in

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134 Ibid.

135 Ibid.

136 Senate Education and Employment Committee References Committee, *A National Disgrace Report* (n 8) 222–223.

137 Michele Hellebuyck et al, *Mind the Workplace* (Research Report, 11 October 2017) 1.

138 Ibid 6.

139 Ibid 6–7.

unhealthy behaviour such as alcohol consumption and/or drug use.[140] 35 per cent of participants stated they were isolated due to hostile workplace environments.[141]

A report by the Western Australian Education and Health Standing Committee titled 'Impact of Fly in Fly Out Work Practice on Mental Health' ('FIFO Report') examined the impact of fly-in-fly-out work practices on the mental health of Western Australians.[142] The report found higher compression rosters, such as 3 weeks on and 1 week off or long hours and nights shifts increase fatigue, lower morale, and result in a loss of concentration, which in turn leads to injuries, depression and sometimes suicide.[143] Higher compression rosters also have social and other ramifications such as divorce and alcoholic dependency.[144] A UK study which examined the effect of a 2 weeks offshore shift working pattern on the North Sea offshore oil and gas industry workers made similar findings to those in the FIFO Report, showing increased work injuries resulting from fatigue and mental health concerns.[145]

Finally, according to a study commissioned by the Victorian Health Promotion Foundation which surveyed 1,139 migrants from diverse backgrounds, about two-thirds of participants experienced discrimination and racism in the previous twelve months.[146] This study concluded racism and discrimination is associated with a decline in mental health.[147]

V REPORTING INJURIES CONCERNS

Employers are required to provide visa workers with workers compensation coverage regardless of whether they are casual, part-time or full-time workers.[148] In all States and

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140 Ibid 7–8.

141 Ibid 8.

142 Education and Health Standing Committee (n 110).

143 Ibid 65.

144 Ibid 66.

145 Katharine Parkes, 'Working Hours in the Offshore Petroleum Industry' (Research Paper, University of Oxford, 15 March 2007) 15.

146 Angeline Ferdinand, Margaret Kelaher and Yin Paradies, *Mental Health Impacts of Racial Discrimination in Victorian Culturally and Linguistically Diverse Communities* (Report, March 2013) 5.

147 Ibid.

148 See State Insurance Regulatory Authority, 'All Workers on s457 Visa Entitled to Workers Comp' (Media Release, 12 February 2015).

Territories, a failure to do so will expose an employer to criminal sanctions.[149] In any event, they would be liable to pay compensation as an uninsured employer.[150] If the employer is unable to pay compensation, some form of State or Territory indemnity will apply to ensure the worker is covered.[151] In effect, an uninsured employer who cannot pay the required compensation will impose a burden, not just upon the workers who may have to wait for complicated claims to be processed, but ultimately upon the public purse.

There are also other concerns foreign workers might encounter in the case of a workplace injury. Research has shown foreign workers are reluctant to report their workplace injuries.[152] One explanation is employers discourage foreign workers from submitting compensation claims in order to prevent higher compensation premiums.[153] Employers may also use threats to deter foreign workers from reporting workplace injuries; and as discussed above, threating tactics have been used to silence workers who intend to complain about work conditions and payments.[154] This is particularly evident in instances where workers have breached their visa conditions as a result of working more hours than legally allowed, as is the case for international students and holders of tourist visas undertaking unauthorised farm works. Gino Lopez, the head of Migrant International, which represents Filipino workers in Australia, stated that 457 visas provide employers with an opportunity to 'treat employees badly' and further that 'if the bosses are able to get more sweat out of the workers, many of them will do it … they are afraid of saying something to their boss, because they fear they will be sent home.'[155]

The Wage Theft Survey concluded that 3 per cent of participants were threatened with being reported to the relevant authority by their managers.[156] This tactic was used is to deter

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149 Ibid.

150 Ibid.

151 Ibid.

152 Robert Guthrie and Michael Quinlan, 'The Occupational Safety and Health Rights and Workers' Compensation Entitlements of Illegal Immigrants: An Emerging Challenge' (2005) 3(5) *Journal Policy and Practice in Health and Safety* 41, 42.

153 Toh and Quinlan (n 12) 465.

154 Ibid.

155 Matthew Moore and Malcolm Knox, 'Exploitation of Skilled Migrants Exposed' *The Sydney Morning Herald* (online, 28 August 2007) <http://www.smh.com.au/news/national/exposed-exploitation-of-migrants/2007/08/27/1188067034448.html>.

156 Berg and Farbenblum (n 8) 43.

participants from complaining about exploitation or demanding their rights.[157] Threats are not restricted to management. 1 per cent of the participants were threatened by co-workers as well.[158] According to a survey conducted by Reilly et al, 11.7 per cent of participants were discouraged from making complaints regarding their working conditions or payment rates.[159] Foreign workers unwillingness to report injuries to the relevant authority can be attributed to the fear of losing their jobs.[160] As Professor Kahn-Freund pointed out:

> The law has important functions in labour relations, but they are secondary if compared with the impact of the labour market (supply and demand) and, which is relevant here, with the spontaneous creation of social power on the workers' side to balance that of management. Even the most efficient inspectors can do but little if the workers dare not complain to them about infringements of the legislation they are seeking to enforce.[161]

The Australian Bureau of Statistics reported for the 2013–2014 financial year that there were 531,800 work-related injuries.[162] Of this figure, only 183,200 or 34 per cent of those injured claimed and received workers' compensation.[163] However, 20 per cent of those injured did not claim workers compensation because they believed they were not eligible or feared a claim might negatively impact on their working relationship with their employer.[164] An Australian survey examined the correlation between work-related injuries and workers' country of birth.[165] This study found job insecurity caused foreign born workers to fear the loss of their job, thus deterring them from reporting issues concerning working conditions and occupational

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157 Toh and Quinlan (n 12) 465.

158 Berg and Farbenblum (n 8) 43.

159 Reilly et al (n 8) 50.

160 Guthrie and Quinlan (n 152); Andrew Clarke, *Are Immigrant Workers Safer Workers? The Prevalence of Non-Fatal Workplace Injuries Among Foreign Born Workers in Australia* (Report, 27 July 2015) 7.

161 Otto Kahn-Freund, *Labour and the Law* (Stevens & Sons, 1st ed, 1972) 10.

162 Australian Bureau of Statistics, *Work-Related Injuries July 2013 to June 2014* (Catalogue No 6324.0, 19 November 2014).

163 Ibid.

164 Alex Collie and Amanda Sampson, 'Inquiries into Migrant Worker Rights Show Same Old Problems – But We Already Have Solutions', *The Conversation* (Forum Post, 24 September 2015) <https://theconversation.com/inquiries-into-migrant-worker-rights-show-same-old-problems-but-we-already-have-solutions-46683>.

165 Alison Reid et al, 'Taking Risks and Survival Jobs: Foreign Born Workers and Work-Related Injuries in Australia' (2014) 70 *Safety Science* 378.

health and safety.[166] Suffering injuries in itself, could result in a loss of employment. For example, Toh and Quinlan reported in a case study that a worker who broke his wrists during the course of employment had his contract terminated by his sponsors.[167] In another example, a Filipino worker who was sponsored under the 457 visa was terminated after becoming ill.[168]

In addition, some employers have taken extreme measures against workers intending to claim worker's compensation. In 2007, the New South Wales District Court ordered employers Kyung Ja Song and Jin Ho Park to pay AUD96,788 in aggravated damages to their employee, Jae Sik Kim, for the injuries he sustained following their kidnapping and assault of him.[169] Kim, a South Korean citizen, was sponsored under the 457 visa to work as a tiler in Australia by Song and Park as a part of their Campsie Kyo Group of companies.[170] In the course of his employment, Kim fell down a staircase and suffered serious back injuries, leaving him unable to work.[171] After making a formal complaint about not receiving worker's compensation, his employers reported him to the former Department of Immigration, which resulted in Kim being deported from Australia.[172] He returned to Australia with his brother's passport to pursue his entitlement to worker's compensation to cover his medical expenses. When Kim demanded his workers compensation entitlements from Song and Park, they assaulted and kidnapped him.[173] Foreign workers may have entitlements to workers compensation notwithstanding they are working contrary to visa conditions.[174] As such, Kim successfully sued Song and Park for false imprisonment and assault, resulting in the above award. According to the aforementioned

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166 Ibid 384; Clarke (n 160) 7.

167 Toh and Quinlan (n 12) 458.

168 Australian Broadcasting Corporation, 'Filipino Worker Unfairly Sacked over Illness: Union', *ABC News* (online, 20 January 2008) <http://www.abc.net.au/news/2008-01-20/filipino-worker-unfairly-sacked-over-illness-union/1017588>.

169 'Guest Worker Wins Compo After Assault', *The Sydney Morning Herald* (online, 22 September 2007) <https://www.smh.com.au/national/guest-worker-wins-compo-after-assault-20070922-gdr5yn.html>.

170 Ibid.

171 Ibid.

172 Ibid.

173 'Foreign Worker Awarded $96k Kidnapping Compensation', *ABC News* (online, 21 September 2007) <http://www.abc.net.au/news/2007-09-21/foreign-worker-awarded-96k-kidnapping-compensation/677246>.

174 Underhill and Rimmer (n 106) 40.

Underhill and Rimmer study, 40 per cent of farm workers who needed medical attention for injuries have paid their own medical costs.[175]

VI EVALUATION

There is no empirical evidence detailing the nexus between foreign workers long shifts and workplace injuries. Foreign worker exploitation has been established by parliamentary reports and studies.[176] Despite the entitlement of all workers to the minimum wage, one of the pervasive forms of exploitation is the underpayment of foreign workers.[177]

Underpaid foreign workers have undertaken long shifts to compensate for the losses they have accrued.[178] Long hour shifts result in a higher risk of injury, as well established by Australian and international studies.[179] This indicates a strong correlation between long shifts and occupational health and safety. There are two key factors contributing to this dilemma: visa dependency and lack of English proficiency and awareness of the Australian legal system.[180]

A *Visa Dependency*

In Australia, there are subclass visas applying to foreign workers, which make them dependent on their sponsors.[181] In some cases, the dependency begins with sponsoring the job application and progresses to permanent residency applications, which some visa holders are eligible for.

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175 Ibid.

176 Department of Immigration and Citizenship, *Visa Subclass 457 Integrity Review* (Final Report, October 2008); Senate Education and Employment Committee References Committee (n 8); Berg and Farbenblum (n 8); Reilly et al (n 8).

177 Joo-Cheong Tham, 'We've Let Wage Exploitation Become the Default Experience of Migrant Workers', *The Conversation* (Forum Post, 22 March 2019) <https://theconversation.com/weve-let-wage-exploitation-become-the-default-experience-of-migrant-workers-113644>; Senate Education and Employment References Committee (n 89) 59.

178 Senate Education and Employment References Committee, *Corporate Avoidance Report* (n 89) 67.

179 Senate Education and Health Standing Committee, *Corporate Avoidance Report* (n 89); Kivimaki et al (n 117); Caruso (n 110); Hellebuyck et al (n 137).

180 Senate Education and Employment Committee References Committee, *A National Disgrace Report* (n 8) 62.

181 See Toh and Quinlan (n 12); Al Bhadily and Bowyer (n 12) .

This continuum of dependency creates an environment where foreign workers are subjected to exploitation such as underpayment of wages.[182]

Likewise, working holiday visa holders can work for up to 12 months in hospitality and horticulture and can be granted a second holiday visa for up to 12 months.[183] The requirement for visa holders to establish a work pattern often leads to exploitation by employers, who demand tireless hours if the employee wants to be granted a second holiday working visa.[184] As discussed above, media reports have shown some farm workers were paid as low as AUD4 per hour and in some cases, women workers were asked to perform sexual favours in exchange for visas.[185]

Visa dependency not only affects foreign worker payments and poses a threat to international student workers being reported to the relevant authority, but it also prevents foreign workers from reporting their workplace injuries due to the fear of losing their employment, and in turn, their visa. JobWatch and the Human Rights Council of Australia report 457 visa workers are extremely reluctant to seek recourse under workplace laws for the apparent contravention by their employer of their employment rights because of fears about their visa status.[186]

Moreover, a terminated worker is given only 60 consecutive days to find another employer in the case of a termination of a 457 visa holder's employment.[187] As noted above, this is difficult to achieve, given that the Department of Immigration/Home Affairs takes 54 calendar days to allocate an officer to look at the nomination of a new employer case.[188] This dilemma further contributes to the visa dependency where foreign workers are hesitant to take any steps that might jeopardise their employment and visa status.

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182 Senate Education and Employment Committee References Committee, *A National Disgrace Report* (n 8) 159.

183 Department of Immigration and Border Protection (n 4).

184 Australian Broadcasting Corporation, 7-Eleven (n 50).

185 Ibid.

186 Senate Education and Employment Committee References Committee, *A National Disgrace Report* (n 8) 150.

187 *Migration Legislation Amendment (2016 Measures No. 4) Regulation 2016* (Cth) sch 1.

188 Work Visa Lawyers (n 79).

B *Language and Awareness of the Australian Legal System*

Another factor playing a vital role in foreign workers exploitation is the lack of access to legal information and support. Workers from non-English speaking Asian countries in particular, are affected by language barriers that contribute to further isolation and exploitation.

Howe, Reilly and Stewart noted that language and cultural barriers result in foreign workers being less likely to understand their rights and entitlements, thereby contributing significantly to their vulnerability.[189] This view is supported by the Four Corners programme 'Slaving Away', which shows the lack of English language proficiency and awareness of the Australian legal system, particularly the law concerning the employment of working holiday visa workers, has contributed to their exploitation.[190]

Language barriers and lack of awareness of the Australian legal system not only increase the likelihood of exploitation, but also limit workers' access to justice. JobWatch pointed out that 'migrant workers often have limited English language skills and knowledge of and access to the legal system which can make asserting their workplace rights even more difficult.'[191]

The vulnerability of foreign workers has been recognised in the FWO's 'Guidance Note to Litigation Policy'.[192] It states that 'vulnerability' which includes, among other things, people who are recent immigrants, people with literacy difficulties and people from non-English speaking backgrounds, may be taken into account when considering whether or not to commence proceedings.[193]

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189 Joanna Howe, Alexander Reilly and Andrew Stewart, Submission No 11 to Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Framework and Operation of Subclass 457 Visas, Enterprise Migration Agreements and Regional Migration Agreements* (26 April 2013) 36.

190 Australian Broadcasting Corporation, 7-Eleven (n 50).

191 JobWatch (n 72) 9.

192 Fair Work Ombudsman, *Guidance Note 1: Litigation Policy of the Office of the Fair Work Ombudsman* (Policy Note, 20 July 2011).

193 Ibid 11.

One of the issues addressed by the Joint Standing Committee on 'Migration Into Temporary Business Visas' was the English language requirements.[194] The Committee report highlighted the need for applicants to have appropriate language skills in order to communicate effectively in the workplace and have better awareness of Occupational Health and Safety.[195] The report stated:

> The Committee recommends that, in referring specific cases for formal English language testing with a focus on occupations with a high occupational health and safety (OH&S) risk or history of sponsor noncompliance, the Department of Immigration and Citizenship also take into account that the need for 457 workers to have a higher level of English language proficiency for OH&S and broader communication reasons remains relevant, regardless of the sector or region in which they work.[196]

VII WHAT IS THE SOLUTION?

Visa dependency is a significant factor contributing to the exploitation of foreign workers. The issue could be tackled by imposing harsh penalties on employers who breach their sponsorship. Besides barring them from future sponsorship, heavy civil and criminal conventions could be imposed on employers. This cannot be achieved without improving monitoring, reporting and enforcement arrangements. Taskforce Cadena ('TF Cadena'), established in June 2015, is an agency consisting of the Australian Border Force, FWO , Federal Police, Australian Taxation Office and other relevant agencies.[197] The aim of TF Cadena is to target criminals organising visa fraud, illegal work and the foreign worker exploitation.[198] The establishment of TF Cadena is a significant step towards protecting foreign workers.

The FWO could play a strong role in monitoring compliance with the foreign workers visa. However, this could not be accomplished without increasing the resources provided to the

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194 Joint Standing Committee on Migration, Parliament of Australia, T*emporary Visas: Permanent Benefits Ensuring the Effectiveness, Fairness and Integrity of the Temporary Business Visa Program* (Final Report, August 2007) 18.

195 Ibid. See Recommendation 13.

196 Ibid.

197 'Taskforce Cadena', *Australian Border Force* (Web Page) <https://www.homeaffairs.gov.au/australian-border-force-abf/taskforce-cadena>.

198 Ibid.

FWO, which currently has 250 inspectors to inspect 2.1 million workplaces.[199] Moreover, the FWO needs more power to investigate and prosecute companies under the accessorial liability and sham contracting provisions within the *Fair Work Act 2009* (Cth).

Other factors which play a role in the vulnerability of foreign worker are language barriers and the lack of awareness of the Australian legal system. English proficiency would not only help foreign workers communicate effectively in the workplace but would also help them understand their rights and entitlements. In 2010, the FWO introduced various measures designed to overcome language and legal barriers and increase foreign workers' access to relevant legal information.[200] Examples of such measures include the translation of worker rights and entitlements in Australia to different languages and the provision of information regarding legal services and protection offered to foreign workers.[201] In 2017, the FWO produced 6 videos on the topic of worker rights that had been translated into 16 languages.[202] It would be more efficient to provide this relevant information prior to foreign workers travelling to Australia and translated into each of their own languages.

However, greater awareness of the Australian system legal system and improved English proficiency would not necessarily motivate foreign workers to report employer breaches. There are other factors to be considered. One of these factors is visa dependency. As discussed above, employees are reluctant to report a non-compliant employer because of the fear of losing employment and visa status. This reluctance is compounded by the lack of work opportunities available to foreign workers, especially international students. Despite over 39 per cent of student participants being paid below the minimum wage, they are reluctant to complain because they feel lucky to have a job and are grateful to their employers for the opportunity.[203]

Aside from promoting awareness of the Australian legal system and taking measures to overcome language barriers, it is therefore vital for agencies such as FWO and TF Cadena to

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199 Chris F Wright and Stephen Clibborn, **'**Australia is at Risk of Losing Migrants Who are Vital to the Health of our Economy', *The Conversation* (Forum Post, 21 October 2016) <https://theconversation.com/australia-is-at-risk-of-losing-migrants-who-are-vital-to-the-health-of-our-economy-67455>.

200 Fair Work Ombudsman, *Annual Report 2010-2011* (Report, 15 September 2011) 30.

201 Ibid.

202 Fair Work Ombudsman, 'More In-Language Resources Now Online to Help Migrant Workers Understand Their Rights' (Media Release, 2 November 2017).

203 Reilly et al (n 8) 4–5.

be proactive in monitoring and enforcing the law in relation to foreign worker sponsors. This has been asserted in the Senate inquiry into the Framework and Operation of Subclass 457 Visas, which stated:

> Evidence from the department indicated that the compliance monitoring and enforcement effort in relation to the 457-visa program has recently undergone a shift in focus from education of sponsors to detection and enforcement activities.[204]

VIII CONCLUSION

In Australia, there are a significant number of foreign workers eligible to work under various types of visas. Their contribution to the economy has been acknowledged by business leaders and politicians alike. However, the vulnerability of these workers, being at risk of losing their employment and fear of deportation, puts them at risk of exploitation and injury. Poor language skills and lack of awareness of the Australian legal system play a vital role in their exploitation. Evidence suggests it is a widespread phenomenon existing across industries nationwide.

A body of research, investigation and reporting shows foreign workers have been underpaid, worked long shifts, abused and, in some cases, encouraged to work more hours than what their visa conditions allow so that employers can threaten them with deportation if they complain about their exploitation. Low payment is the predominant form of exploitation foreign workers endure. Media reports reveal businesses use different methods to scam their workers. Some businesses have used 'half pay' and 'cash back' scams to pay their workers lower than the minimum wage. Often, low paid workers have undertaken long hour shifts to compensate for the low wages they are barely able to survive on.

The correlation between long hour shifts and the likelihood of being injured is well established in the USA, Australia and Europe. It has an enormous effect on the health and safety of foreign workers. Aside from the impact on their mental health which is now well established by numerous Australian and international studies noted above (including issues relating to

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[204] Legal and Constitutional Affairs and References Committee, Parliament of Australia, *Framework and Operation of Subclass 457 Visas, Enterprise Migration Agreements and Regional Migration Agreements* (Report, June 2013) 57.

depression, domestic violence, alcohol, drug abuse and suicides), higher levels of work-related physical injuries are also a significant factor contributing to the exploitation of these workers.

The predicament of foreign workers does not end with injury from exploitation. Their vulnerability extends further by preventing them from reporting work injuries. This is attributed to workers' reluctance to report injuries due to their fear of losing employment and employers discouraging their foreign workers from reporting workplace injuries.

A review of recent reports and papers in this area highlights the exploitation of visa holders in a range of industries, thus drawing attention to the operations of the FWO as instrument of enforcement in relation to wages and conditions of work.[205] Little attention has been paid to occupational health and safety and workers compensation. This is probably a result of the relevant enforcement authorities being state rather than nationally based. The provision of information by State and Territory WorkSafe and WorkCover authorities is patchy.[206] Many visa workers originate from countries where occupational health laws are rudimentary and poorly enforced and where workers compensation rights are restricted and claims not encouraged.[207] We consider there are a range of options that State WorkCover and WorkSafe authorities can adopt to address some of the concerns highlighted above. For example, borrowing from the work of Reilly et al, we recommend WorkCover and WorkSafe authorities:[208]

1) Produce materials for distribution in conjunction with the immigration department dealing with workers' rights to workers compensation and occupational health;
2) Provide accessible online reporting procedures for compensation claims and occupational work hazards;
3) Develop strategies to provide assistance to claimants; and

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205 See, eg, Berg and Farbenblum (n 8); Reilly et al (n 8); Toh and Quinlan (n 12); Australian Broadcasting Corporation, 7-Eleven (n 50); Senate Education and Employment References Committee, *Corporate Avoidance Report* (n 89); Underhill and Rimmer, (n 106); Howe, Reilly and Stewart (n 189); Joint Standing Committee on Migration (n 194).

206 See 'Migrant Workers', *Safework Australia* (Web Page) <https://www.safeworkaustralia.gov.au/migrant-workers>; 'The Basics: Your Rights at Work', *Safework NSW* (Web Page) <https://www.safework.nsw.gov.au/resource-library/the-basics-your-rights-at-work>

207 Ibid.

208 Reilly et al (n 8) 7.

4) Provide case studies on accessible websites which illustrate the range of entitlements available, highlighting it is not illegal for visa workers to make claims for workers compensation.

One day, these foreign workers might go back to their home countries. Some will leave with sorrow of being exploited and abused, which, in time, might be forgotten. However, those who leave with injuries or a mental illness might never heal.

SURVEILLANCE AND SELF-ASSESSMENT: FOUCAULT AND LATOUR IN THE AUSTRALIAN TAXATION SYSTEM

JACOB DEEM* AND DR KATHRYN E VAN DOORE**

ABSTRACT

Building on previous research, this article explores possible avenues for reform by approaching the Australian Taxation Office's powers through Foucault and Latour's respective theories of surveillance and disciplinary power. It discusses the problem of making the taxpayer 'visible', which was recently placed under scrutiny by the Standing Committee on Tax and Revenue's inquiry. First, it considers the body of the taxpayer, and how the micro-physics of power in taxation administration creates an identity in the person obliged to pay tax. Second, it turns to Foucault's idea of panopticism, and Latour's alternate oligopticism, discussing the ways in which the ATO's auditing powers can be understood as systems of surveillance and explaining how the self-assessment system of tax administration is not only possible, but goes beyond what Foucault himself would have ever imagined. Finally, having demonstrated the links between the ATO's functioning and surveillance theories, this article explores how this new understanding can be used to guide substantive reform, primarily suggesting that compliance can be increased by helping taxpayers re-see the tower of the Panopticon.

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I INTRODUCTION

The Australian Taxation Office ('ATO') is undergoing a process of reinvention and substantive change, in an effort to improve the relationship between taxpayers and the ATO, in turn increasing compliance and reducing the costs associated with enforcing taxpayer obligations.[1] These changes come after a recent parliamentary report revealed that taxpayers have suffered immense financial, emotional and mental strain in lengthy audits and legal disputes with the ATO.[2] The Committee noted that, while the ATO generally does a good job, there is certainly room for improvement.[3] In particular, it noted claims of the ATO engaging in 'bullying and unprofessional conduct', behaving like 'zealots', holding 'a presumption of guilt that the taxpayer is hiding something', and carrying out 'audits [that] are conducted like "fishing expeditions" rather than with a specific focus'.[4] In its response, the government recognised a need for change,[5] but generally ruled out legislative or other major avenues for reform. In the absence of legislative reform, it is therefore necessary to consider how fairer outcomes can be achieved, while still operating within the constraints of the current system. In this article, we consider this question through two lenses. First, we consider Michel Foucault's theories of surveillance and disciplinary power.[6] Second, we supplement these insights by considering

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1 See, eg, Chris Jordan, 'Reinventing the ATO' (Speech, Tax Institute of Australia 29th National Convention, 27 March 2014) <https://www.ato.gov.au/Media-centre/Speeches/Commissioner/Commissioner-s-address-to-TIA/>; Geoff Leeper, 'Tax Administration Transformation: Reinventing the ATO' (Speech, National Tax Practitioner Conference, 18 June 2014) <https://www.ato.gov.au/Media-centre/Speeches/Other/Tax-administration-transformation--Reinventing-the-ATO/?page=1#Reducing__or_even_eliminating__the_administrative_burden_for_individuals_with_simple_tax_affairs>; David Hughes, 'ATO Communication Improving? Fingers Crossed' (Speech, Small Myers Hughes Tax & ATO News, 24 February 2014) <http://www.smhtaxlawyers.net.au/blogs/Tax-ATO-News-Australia-1>.

2 Commonwealth of Australia, *House of Representatives Standing Committee on Tax and Revenue: Tax Disputes* (Final Report, Commonwealth of Australia, 2015) ('*Tax Disputes Report*'). See also Nassim Khadem, 'Parliamentary Inquiry Told of ATO's Unequal Treatment of Small Business', *Sydney Morning Herald* (online, 25 November 2014) <http://www.smh.com.au/business/parliamentary-inquiry-told-of-atos-unequal-treatment-of-small-business-20141124-11slto.html>.

3 Tax Disputes Report (n 2) 6–7.

4 Ibid 9.

5 Ibid.

6 See, eg, Michel Foucault, *Discipline & Punish: The Birth of the Prison*, tr Alan Sheridan (Random House Inc, 1995) ('*Discipline & Punish'*); Michel Foucault, *Society Must Be Defended: Lecture at the College de France 1975-1976*, tr David Masey (Picador, 2003) ('*Society Must Be Defended*').

Bruno Latour's oligopticon.[7] While Latour is best known for his actor-network theory, his less famous challenge to Foucault's Panopticon is equally important. These perspectives provide an insight into the ATO's actions and powers, and highlight mechanisms for reform. We must note at the outset that we do not necessarily seek to criticise or defend the ATO for taking an approach favouring administrative reform. Rather, we take a pragmatic approach, attempting to improve the system within its current parameters by using theory to explain the present and optimise the future.

Applying Foucault's theories to tax administration is not without risk. Foucault himself stated that taxation was not a form of surveillance, as it did not meet his requisite for continuity.8 Additionally, we undertake our inquiry cognisant of the dangers of extracting Foucault's work from the context in which it was developed, and of applying it where it should not be applied. In this respect, Koopman and Matza caution against a 'straightforward application of Foucault'.[9] In particular, they are critical of many projects which treat Foucault's highly context-specific concepts as universal.[10] However, Koopman and Matza do not argue against 'push[ing] Foucault beyond Foucault';[11] indeed they suggest it 'poses numerous opportunities'.[12] Several scholars around the world have seen the opportunity posed by applying Foucault to tax administration, and have identified important parallels between modern tax systems and Foucauldian ideas of surveillance and discipline.[13] In the Australian context, Robert Whait recently used a Foucauldian perspective to explain the ATO's co-operative compliance model. We build on Whait's work by adding legal and social psychological perspectives to the application of Foucault to Australian taxation. We also draw

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7 Bruno Latour, *Reassembling the Social: An Introduction to Actor-Network Theory* (Oxford University Press, 2005); Bruno Latour, Emilie Hermant and Patricia Reed, *Paris: Invisible City* (Online Project, 2006) <http://www.bruno-latour.fr/virtual/EN/index.html>.

8 Foucault, *Society Must Be Defended* (n 6) 36.

9 Colin Koopman and Tomas Matza, 'Putting Foucault to Work: Analytic and Concept in Foucauldian Inquiry' (2013) 39(4) *Critical Inquiry* 819.

10 Ibid.

11 Ibid 835.

12 Ibid 820.

13 See, eg, Robert Whait, 'Exploring Innovations in Tax Administration: a Foucauldian Perspective on the History of the Australian Taxation Office's Compliance Model' (2014) 12(1) *eJournal of Tax Research* 130; Karen Boll, 'Shady Car Dealings and Taxing Work Practices: An ethnography of a Tax Audit Process' (2014) 39 *Accounting, Organizations and Society* 1.

on Boll's recent study of the Danish tax system. Boll used an ethnographic study of the Danish Tax and Customs Administration to demonstrate how Foucault's panopticon and Latour's oligopticon can be used together to explain tax administration in practice. We develop this idea, applying it in an Australian context to better understand problematic behaviour by the ATO.

We then take these theoretical insights and use them to identify ways in which the system can be improved. Given the government's expressed preference for administrative rather than legislative remedies, we take this as the focus of our proposals. We pay particular attention to strategies for increasing voluntary compliance and awareness of the legal system; the rationale there is that greater rates of compliance will reduce the burden on the already strained ATO, enabling the Tax Office to engage in auditing practice that is less zealous.

We begin by identifying and explaining the key problem for tax administration: what knowledge does the ATO have about a taxpayer's affairs, and what can they reasonably be expected to uncover? This serves as a foundation for our discussion of panopticism and oligopticism, two theories that address how state actors can use knowledge and surveillance as power. From this theoretical discussion, we then build on Whait and demonstrate how the tax system in general uses Foucauldian techniques to encourage tax compliance. However, we also highlight how Latour's oligopticon also offers useful insights, and suggest that many of the ATO's conduct problems stem from tensions between administrators acting as 'all-knowing' in the Foucauldian Panopticon, when in reality their actions better align with the narrower view of the oligopticon. Finally, we explore how the understandings gained by examining the Australian taxation system in light of Foucault and Latour's theories can be used to guide reform. In particular, we suggest that increasing the perception of surveillance in the minds of taxpayers will increase compliance, and in turn reduce the cost of enforcing tax law, but that at the same time the ATO must acknowledge that it is not truly panoptic in its audits. We offer a number of possible ways this could be achieved, drawing on social psychological research and media techniques.

II GAZING AND REVENUE RAISING: HOW TO MAKE THE TAXPAYER VISIBLE?

The timeless problem for tax collectors and auditors is identifying the monies owed to the state, a task made all the more difficult because 'citizens employ considerable creativity both in developing sly concealment operations and in trying to make their taxable activities

invisible'.[14] The task for tax administrators, including the ATO, is to render the taxpayer visible.[15] The ATO has a range of techniques available to it in this regard (which are discussed in the next section), varying from the relatively unobtrusive data-mining of risk management, to intense audits and litigation processes. In applying these techniques, the ATO must create the impression that, where taxpayers seek to conceal any wrongdoing, this will be discovered. However, in doing so, especially in an audit, they must admit to the taxpayer that they do not have the full story. To manage this tension, auditors will use the information they have to set themselves up in a position of power, and then push the explanatory obligations onto the taxpayer.

This was highlighted for Boll in her ethnographic study of the Danish tax system. Sitting in on an interview with John, a taxpayer suspected of failing to report income made from used-car sales, Boll observed the tax inspector say: 'There is one person at this table who is best placed to remember [she looks at John]. I've marked the central cash deposits. For these I want an explanation. It is you who can give me the best explanations'.[16]

While this example comes from Denmark, rather than Australia, the reasoning is very similar to that employed by the ATO (*you* are best placed to know, therefore *you* must provide the information). Further, the ATO is supported by a troubling feature in the Australian legal system: when reviewing or appealing a tax assessment made by the ATO, the taxpayer bears the onus of proving that the assessment was incorrectly made.[17] In many respects, the taxpayer may therefore be considered guilty until proven innocent, a notion that is uncomfortably at odds with broader ideals of justice in Australian law. In *Gauci v Federal Commissioner of Taxation* (1975) 135 CLR 81,[18] Mason J confirmed that in a taxpayer's appeal against an assessment, the ATO has no obligation to produce evidence to support its position, and that instead the onus is on the taxpayer:

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14 Boll (n 13).

15 See, eg, Penelope Tuck, 'The Changing Role of Tax Governance: Remaking the Large Corporate Taxpayer into a Visible Customer Partner' (2013) 24 *British Journal of Management* S116, on making the British corporate taxpayer visible.

16 Boll (n 13) 13 (emphasis in original).

17 *Taxation Administration Act 1953* (Cth) ss 144ZZK, 14ZZO.

18 *Gauci v Federal Commissioner of Taxation* (1975) 135 CLR 81.

> The Act does not place any onus on the Commissioner to show that the assessments were correctly made … The implication of such a requirement would be inconsistent with [the predecessor to s 14ZZO] for it is a consequence of that provision that unless the appellant shows by evidence that the assessment is incorrect, it will prevail.[19]

If the taxpayer is to meet this burden of proof, they must meticulously keep records about their tax affairs. This was a problem that the recent Parliamentary Report identified, and it recommended that in some cases this reverse onus be removed.[20] The government did not support this recommendation.[21]

The problem for Australian tax administration is that the ATO, in trying to make the taxpayer visible and negate the difficulty of such a task, has taken an overzealous approach to its use of power. What should be a reasonable investigation can often descend into a 'fishing expedition' where the ATO holds 'a presumption of guilt that the taxpayer is hiding something'.[22]

How, then, are we to reconcile and explain how the ATO can be considered both all-knowing and fallible, and how can we improve outcomes for both taxpayers and the Tax Office? The answer lies in consideration of the works of Foucault and Latour. Our discussion begins by providing an overview of the major contributions of these theorists. Then, we demonstrate how these theories can be applied to taxation administration in Australia by looking at the ATO's powers over the 'body of the taxpayer' through the registration of Tax File Numbers ('TFN') and through auditing powers, and at how panopticism and oligopticism can explain taxpayers behaviour in self-assessment of tax responsibility and in reviewing the ATO's assessment.

III THE BODY OF THE TAXPAYER: THE DISCIPLINARY POWER OF TAXATION

In *Discipline & Punish*, Foucault presented an analysis of the way power in the criminal justice system was transformed from open and bloody displays of sovereign power in the form of public executions to the more discreet but pervasive disciplinary power of the prison system.[23] The key to this shift, Foucault argued, was a change in the way the state surveyed and gained

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19 Ibid 89 (per Mason J).

20 *Tax Disputes Report* (n 2).

21 Ibid.

22 Ibid 9.

23 Foucault, *Discipline & Punish* (n 6) 3–6.

knowledge of subjects.[24] Indeed, the rise of disciplinary power was associated with, even predicated on, an increase in surveillance and observation, and the knowledge of subjects that came with it.[25] In *Discipline & Punish*, Foucault takes Bentham's Panopticon,[26] the perfect prison, and explains how it can be used as a model for society, and to examine how surveillance and disciplinary power interact. Bentham designed the Panopticon as a prison where cells are arranged in a circle around a central tower so that the prison warden, standing in the tower, can easily observe any prisoner in any cell at any time, but the prisoners cannot observe one another, nor can they see into the tower themselves.[27]

Foucault's later lecture 'Governmentality', sought to address some of the critiques of *Discipline & Punish* that emerged.[28] In particular, this 'rationality of government'[29] provided an account of the importance of 'economy' in governance, and the shift from the family unit as a model for governance to a means to attaining knowledge.[30] While these additional insights may be useful to our observations on the Australian tax system below, we generally avoid applying 'Governmentality' in this paper because, with few exceptions,[31] the existing literature on Foucault and taxation to which we seek to contribute, has primarily focused on *Discipline & Punish*. We therefore aim to establish our argument within the confines of current research, and leave it to future studies to explore the insights of Foucault's later works.

The key aspect of *Discipline & Punish* (which was not contradicted in 'Governmentality') is Foucault's description of how the panoptic model of surveillance, applied to prisons, schools, factories and hospitals, resulted in a new form of power and control.[32] The key to this control

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24 Ibid.

25 Ibid 192. See also Gerard Delanty, 'Michel Foucault' in Anthony Elliot and Larry Ray (eds), *Key Contemporary Social Theorists* (Wiley-Blackwell, 2002) 123.

26 Jeremy Bentham and Miran Bozovic, *The Panopticon Writings* (Verso, 1995).

27 Foucault, *Discipline & Punish* (n 6) 200.

28 Michel Foucault, 'Governmentality' in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (University of Chicago Press, 1991) ('Governmentality'). See also Colin Gordon, 'Governmental Rationality: An Introduction' in Graham Burchell, Colin Gordon and Peter Miller (eds), *The Foucault Effect: Studies in Governmentality* (University of Chicago Press, 1991) 4.

29 Gordon (n 28) 3.

30 Foucault, 'Governmentality' (n 28).

31 Tuck (n 15).

32 Foucault, *Discipline & Punish* (n 6) 203.

was the permanent visibility of the subject.[33] Reality is often far removed from this ideal, however. Conscious and critical of this limitation, Latour proposed the 'oligopticon' which, as the Greek 'oligo' designates, provides a limited or narrow picture. Latour stated that 'from oligoptica, sturdy but extremely narrow views of the (connected) whole are made possible'.[34] For Latour, the oligopticon is a fragile construct that relies on a series of connections and transformations that link the real and its representation. Take, for example, the organisation of school or university timetables.[35] Rooms, lecturers, students and hours of the day are transformed into grids and cells on a sheet of paper so that an administrator (or nowadays a computer program) can seamlessly organise the movement of people and facilitate learning. The entire goings on of the institution are rendered visible to the administrator, but only if they are transformed and reduced into marks on a page. This departs from what Latour calls the paranoia and megalomania of the panopticon,[36] where the subject is visible in its entirety. The entire body of students and staff of the university cannot be visible if they are physically present in the administrator's office,[37] while the inmates of the panoptic prison must always be physically observable by the warden.

Both Foucault and Latour's works have been applied to tax administration, and indeed some scholars have used the two theories in conjunction.[38] We find the combined approach to be the most useful. To avoid misapplying Foucault's analysis of discipline by removing it from the very specific historical development Foucault outlines, we first highlight some of the history of taxation. In doing so, we reveal that despite operating in very different contexts, taxation and punishment have several distinct parallels. We therefore begin, as Foucault does in *Discipline & Punish*, by comparing two scenarios, one historical and one modern, in order to highlight changes in the administration of taxation and how power has been exercised over time. First, we have a passage from the Palmerno Stone, an Ancient Egyptian artefact, describing the 'following of Horus':

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33 Ibid 196.

34 Latour (n 7) 181.

35 Latour, Hermant and Reed (n 7).

36 Latour (n 7) 181

37 Latour, Hermant and Reed (n 7).

38 Boll (n 13).

> The 'following of Horus' is most likely to have been a journey taken by the king or his officials at regular intervals for the purpose of tax collection … It has been suggested that the biennial royal progress allowed the king to exercise his judicial authority, perhaps deciding important legal cases, as well as permitting the detailed assessment and collection of tax revenues … It provided a regular forum in which the common people could pay homage, both personal and fiscal, to the ruler and his circle.[39]

Tax collection in Ancient Egypt was a public spectacle, not unlike the execution described by Foucault in *Discipline and Punish*.[40] The people came to catch a glimpse of their Pharaoh, and pay the revenue owed to him. Moreover, the tax was collected in the literal sense of the word; taxation was assessed and collected completely externally to the taxpayer, whose only obligation was to pay the tax due on demand.

This stands in stark contrast to the ATO's stated approach to tax collection:

> Our system of self-assessment allows you to assess the amount you must pay or are to be refunded through the lodgement of the relevant return for the reporting period. This applies when you lodge your income tax return … Even though we accept the return it may still be subject to review at a later stage.[41]

Tax administration has now taken on a far more internal nature: the taxpayer assesses their own tax liability, while the collector is relegated to supervising and reviewing the collection. Fundamental to Foucault's discussion in *Discipline & Punish*, is his observation of the inversion of the private and public aspects of criminal procedure. Historically, 'the entire criminal procedure, right up to the sentence, remained secret',[42] while the sentence itself was necessarily a public spectacle. However, as the hold over the body lessened, the trial and sentencing became public, while the carrying out of the sentence became private.[43] A similar observation may be made in taxation administration. Where historically tax was a very public affair (as exemplified by the following of Horus), assessment is now intrinsically private and performed by the taxpayer, often in the confines of their own home. It is clear, therefore, that

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39 Toby Wilkinson, *Early Dynastic Egypt* (Routledge, 1999) 189.

40 Foucault, *Discipline & Punish* (n 6) 8.

41 Australian Taxation Office, *Compliance in Focus 2013-14* (Report, 2013).

42 Foucault, *Discipline & Punish* (n 6) 35.

43 Ibid 35.

a transformation in the administration of tax occurred that mirrors the transformation in the penal system.

On its own, this observation is perhaps trite. However, just as Foucault argued that the transformation in the penal system corresponded with a shift in the way power operated on the criminal (or indeed, all citizens), it is argued that power also manifests differently in the self-assessment system compared with historical notions of taxation. Consider Foucault's description of the 'micro-physics of power' in *Discipline & Punish*: 'this power is not exercised simply as an obligation or prohibition on those who 'do not have it'; it invests them, is transmitted by them and through them'.[44]

The power of taxation was invested in the body of the taxpayer, and in doing so the disciplinary power of taxation was born.

IV PANOPTICISM AND OLIGOPTICISM IN THE TAX SYSTEM

A *Registration and Returns: Surveillance Through Tax File Number*

According to Foucault, for surveillance to operate effectively as a means of ensuring discipline, it must be grounded in 'a system of permanent registration'.[45] In the Australian taxation system, taxpayers are registered through a TFN,[46] a unique numeric sequence given to an individual[47] that allows them to be identified quickly and efficiently.[48] The TFN helps to create the identity of the taxpayer as discussed above. Though it would be rare for a taxpayer to even be able to readily recite their TFN, the fact that they have one strengthens their identification with the system itself. However, the TFN system also demonstrates Foucault's argument that power is not negative (in the sense of exclusion or absence); rather it produces reality, and the individual belongs to this production.[49] On issuing an individual with a TFN,[50] the Commissioner realises

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44 Ibid 27.

45 Ibid 196.

46 *Income Tax Assessment Act 1936* (Cth) pt VA ('*ITAA 1936*').

47 Ibid s 202A.

48 Ibid s 202.

49 Foucault, *Discipline & Punish* (n 6) 194.

50 *ITAA 1936* (n 46) s 202BA.

the relationship between the individual and a simple number sequence. The taxpayer *becomes* their TFN.

Conversely, the TFN system might also be understood through Latour's theory. The reduction from individual taxpayer to TFN is similar to the use of student ID numbers in producing timetables, or a driver's license being used as creation and proof of identity.[51] This is crucial because, just as the school administrator cannot actually control whether the lecturer will arrive at their assigned room on time, the ATO cannot exercise the same physical control over the body as the warden can over the prisoner.[52] The ability of the ATO to create the taxpayer identity through the TFN is thus very important. Further, in some ways this form of registration is more powerful than mere bodily control, as the TFN system allows the ATO to easily monitor individuals as they transition through different occupations and forms of income, and even follow them as they move overseas or have no income for a period.[53] The taxpayer is therefore in a state of permanent registration, at all times identifiable by the ATO. It is therefore already apparent that Australian tax administration is both panoptic and oligoptic. On the one hand, the system of permanent registration is fundamental to Foucault's characterisation of the Panopticon as 'a system of individualising and permanent documentation';[54] like the offender, the taxpayer becomes an individual to know, and is the object of possible knowledge.[55] On the other hand, the TFN renders taxpayers visible to an ATO agent from the comfort of their office, without the taxpayer being physically visible.

Further, it is worth exploring Foucault's distinction between the offender (the body to whom the facts of the offence are attributed) and the delinquent (the object of biographical investigation, of which the offence is but one part).[56] The TFN helps the ATO to establish the biography of the taxpayer. It becomes possible to trace the individual's history, to detect

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51 Latour, Hermant and Reed (n 7) panel 13.

52 Departure Prohibition Orders are a limited exception here.

53 See, eg, *Data-matching Program (Assistance and Tax) Act 1990* (Cth).

54 Foucault, *Discipline & Punish* (n 6) 250.

55 Ibid 251.

56 Ibid 252.

anomalies in returns, to see career and even lifestyle changes. To paraphrase Foucault, 'it establishes the [taxpayer] as existing before the [return] and even outside it'.[57]

B *The All-Seeing Eye: Audit Powers of the ATO*

Of course, registration is but a minor part in Foucault's overall consideration of panopticism. The true power of the Panopticon lies in the complete visibility of the subject, in the watcher's ability to observe anyone at any time.[58] To some extent, the Australian taxation system achieves this through tax returns, which are arguably administrative cells in which the taxpayer is 'alone, perfectly individualised' and in which their tax affairs are 'constantly visible',[59] in the sense that the ATO can, at any time, choose to access and examine the file of a particular individual.[60] Whait argues that the ATO's practices of market segmentation and risk analysis based on taxpayer occupation are further examples of defined spaces of observation.[61] The key to this observation, and panopticism, is surveillance. The ATO has a number of methods for watching taxpayers. Whait focussed his discussion on risk management techniques, especially data gathering procedures.[62] Advances in Information Technologies and increased use of electronic lodgement of tax returns has made data-matching an increasingly powerful method of detecting tax avoidance.

To these methods, we also add discussion of the ATO's investigative and auditing powers. These grant the Commissioner broad observation abilities. Section 263 of the *Income Tax Assessment Act 1936* (Cth) states that the Commissioner, or an authorised officer, 'shall *at all times* have *full and free access* to all buildings, places, books, documents and other papers'.[63]

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57 Ibid.

58 Ibid 200.

59 Ibid. See also Clare O'Farrell, *Michel Foucault* (Sage Publications, 2005); Anne Schwan and Stephen Shapiro, *How to Read Foucault's Discipline and Punish* (Pluto Press, 2011).

60 While the ATO can ordinarily only audit and amend taxpayers' returns for up to two to four years from the date of assessment: *ITAA 1936* (n 46) s 170(1). If the Commissioner is of the opinion that the taxpayer engaged in fraud or evasion, these time limits do not apply. Thus, the individual is always visible; even their past cannot be hidden from the gaze of the ATO.

61 Whait (n 13)149.

62 Ibid.

63 *ITAA 1936* (n 46) s 263(1) (emphasis added).

Essentially, the ATO has the power to observe any taxpayer (or non-taxpayer, in the case of tax avoidance) at any time.

The powers under s 263 were spectacularly and dramatically demonstrated in 1988, when thirty-seven officers, including a locksmith, raided Citibank premises in search of documents related to an alleged tax avoidance scheme.[64] While the legal proceedings that followed concerned whether legal professional privilege could apply to some documents, the actual use of the power was never in dispute.[65] Even more crucially, however, s 263 does not require the officer to know precisely what documents they are looking for, allowing the ATO to engage in fishing expeditions in a search for any evidence of non-compliance.[66] This is a broader power than even a police search warrant, which must at least describe the kind of evidence sought.[67]

At first, these powers are reminiscent of Foucault's sovereign authority, as they are direct and visible. Recent accusations of heavy-handedness by the ATO revealed in the parliamentary inquiry support such a view.[68] However, Boll prefers to explain tax audits as a combination of panopticism and oligopticism.[69] Throughout the process, auditors present an image of holding a 'god's eye' view over the taxpayer; being in a state of permanent registration means that documents and details of the taxpayer's private life are immediately accessible to the auditor. Thus, Boll observed a Danish inspector, 'with her papers scattered over the table in front of us, we can see John's bank statements, the dealt cars, copies of letters, the Inverted Invoices from the auction house and case minutes…provokes the references to Foucault's work'.[70] This desire to present a panoptic image of omniscience and omnipotence was also revealed by the inquiry into the ATO's handling of audit processes. One taxpayer recalled an auditor saying 'I am the sheriff and I am the law', and even when that omniscience was called into question (the taxpayer proved that they did not own a 'tinny boat', contrary to the ATO's view), the auditor

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64 *Deputy Federal Commissioner of Taxation v Citibank Ltd* (1988) 93 FLR 469 ('*Deputy FC of T v Citibank Ltd*'); Robert O'Connor, 'Commissioner's Access under s263' (1988) 23(5) *Taxation in Australia* 277.

65 *Deputy FC of T v Citibank* (n 64).

66 Robert Williams, 'Income Tax – Discipline or Revenue?' (Working Paper No 31, University of Wollongong, 1992).

67 See, eg, *Police Powers and Responsibilities Act 2000* (Qld) s 156(1)(c).

68 *Tax Disputes Report* (n 2).

69 Boll (n 13) 15.

70 Ibid.

sought to maintain an image of power, claiming that 'a tinny might be all you have left by the time I am finished with you'.[71]

Against this panoptic view, Boll presents an oligoptic aspect, departing from 'the majority of Foucauldian-inspired tax studies in that these tend not to show this blind and fragile side of the state'.[72] She makes two core arguments here. First, her observations of the Danish auditors' meetings show that tax inspectors are not all-seeing, and they must instead narrow their view to clearly identifiable and measurable tax activities (in her study, the broad issue of taxpayers underreporting profits made from selling used cars was narrowed to detecting taxpayers not reporting cars sold at auction houses by studying Inverted Invoices from the auction houses). Second, Boll sees the sturdiness and narrowness of the oligptic image as a precondition for discipline, as piecing together the individual slices of a taxpayer's affairs through the audit process allows the tax inspector to step into the 'central tower' of the panopticon. While this oligpotic practice can produce robust visions where they are connected, Latour notes that while 'nothing it seems can threaten the absolutist gaze of panoptica…the tiniest bug can blind oligoptica'.[73] In other words, if the auditor's vision is wrong, their ability to discipline may be compromised.

C *Self-Assessment of Tax: The Victory of Panopticism*

Bentham's Panopticon was a piece of architectural and political ingenuity, and its mechanism for surveillance promised to reform morals, preserve health and invigorate industry.[74] However, its most revolutionary feature was that the observer could not himself be observed,[75] and the effect this had on the subject,[76] be that prisoner, student, worker or, for present discussion, taxpayer. The prisoner in their cell, at all times visible, could never see the watcher,

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71 Khadem (n 2).

72 Boll (n 13) 16.

73 Latour (n 7) 181.

74 Bentham and Bozovic (n 26).

75 Ibid.

76 Foucault, *Discipline & Punish* (n 6) 201.

could never know if or when they were being watched.[77] According to Foucault, this causes the prisoner to watch themselves:

> He who is subjected to a field of visibility, and who knows it, assumes responsibility for the constraints of power; he makes them play spontaneously upon himself; he inscribes in himself the power relation in which he simultaneously plays both roles; he becomes the principle of his own subjection.[78]

By internalising the surveillance, the subject regulates themselves, and power functions automatically.[79]

The operation of self-surveillance and self-regulation is exemplified perfectly in Australia's self-assessment system of taxation. As discussed at the beginning of this article, taxpayers calculate their tax obligations themselves, with very little input from the ATO. To the historical model of power, of the imposition of the sovereign (and tax), such a system is unfathomable. However, with the rise of disciplinary power, the creation of the taxpayer identity, and the ATO's intimidating auditing powers, the self-assessment system is not only possible, but it (generally) operates effectively. Foucault's theory of panopticism explains why this is the case. Like the prisoner in the Panopticon, who is aware that they can be observed at any time, but has no way of knowing if they are actually being observed; the taxpayer is aware that they could be audited for any tax year, but do not know if they will be audited. Thus, prisoner and taxpayer act as if they are being watched at all times; 'the surveillance is permanent in its effects, even if it is discontinuous in its action'.[80] The victory of panopticism is therefore its efficiency. This is especially so in the taxation system, where the sheer volume of returns would make it impossible to audit every taxpayer or calculate their returns for them. In 1984, prior to the introduction of the self-assessment system in Australia, the average salary return received about one minute of scrutiny from assessors.[81] As it stands, the ATO audits very few taxpayers, and rarely makes use of the powers afforded to it under section 263. In fact, of over 12 million

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77 Ibid; Bentham and Bozovic (n 26).

78 Foucault, *Discipline & Punish* (n 6) 202–203.

79 Ibid 201.

80 Ibid.

81 Treasury, Commonwealth of Australia, *Report on Aspects of Income Tax Self Assessment* (Report, August 2004) 2; Michael Dirkis and Brett Bondfield, 'ROSA's Last Gasp: The Final Steps in Self Assessment's 21 Year Journey' (2008) 3(2) *Journal of the Australasian Tax Teachers Association* 202.

taxpayers[82] in Australia, less than 750,000 were audited or reviewed in the 2012-13 financial year, with the substantial majority (~449,000) being simple data-matching reviews.[83] Thus, while in reality the chances of being audited are quite low (about 8 per cent), most taxpayers will comply with their tax obligations, acting as if they were under constant surveillance.

D *Beyond Foucault: Self-Surveillance in Review*

Interestingly, the taxation system goes further than even Foucault contemplated by actually relying on the taxpayers' self-monitoring in the event of a review or objection. This is a significant development of Foucault's ideas, and an important extension to Whait's discussion. Of course, Foucault never had to consider such an eventuality, as the penal system is quite different from administrative law. Further, Foucault did not consider that the prisoner might have a right of recourse against the warden.[84] Instead, the only guarantee against the prison degenerating into tyranny was ever expanding spheres of surveillance; just as the prisoner is monitored by the warden, the warden may himself be the subject of surveillance through unexpected inspections.[85] In administrative law, however, the taxpayer does not have to rely on external inspectors to protect them: they themselves have rights of review, provided by *Taxation Administration Act 1953* (Cth).[86] To some degree, then, the see/being seen dyad that is so crucial to the Panopticon is destroyed; the taxpayer can render the ATO visible.

However, even when the taxpayer seeks administrative review and brings the ATO into their gaze, the system forces the taxpayer to self-observe. As previewed above, sections 14ZZK and 14ZZO of the *Taxation Administration Act 1953* (Cth) place the onus of proof on the taxpayer in a review of or appeal against the Commissioner's decision. This is, in some ways, a logical requirement: if anyone is to have proof of an aspect of the dispute, it will be the taxpayer. However, to put this in a Foucauldian example, this would be like the warden saying to the prisoner 'I wasn't watching, prove to me you were not misbehaving'.

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82 Both individuals and legal entities.

83 Australian Taxation Office, Commonwealth of Australia, *How We Check Compliance* (2013) <https://www.ato.gov.au/General/How-we-check-compliance/>.

84 Foucault, *Discipline & Punish* (n 6) 207.

85 Ibid.

86 *Taxation Administration Act 1953* (Cth) pt IVC.

In *Discipline & Punish*, Foucault describes how panopticism was used in education to monitor students. While students regulated their own behaviour under surveillance, it was the role of the teacher to record the student's aptitude and progress. The disciplinary system in the school not only 'guaranteed the movement of knowledge from the teacher to the pupil, but it extracted from the pupil a knowledge destined and reserved for the teacher'.[87] In the tax system, this is transformed. The taxpayer is no longer simply the object of knowledge; now the taxpayer must keep records of that knowledge. The knowledge of one's tax affairs, normally destined and reserved for the ATO, now becomes something the taxpayer must record themselves. They monitor themself, not only because the ATO *might* be watching, but because the ATO *might not* have been watching at the time.

V REFORM: TOWARDS A COMPLETE AND AUSTERE INSTITUTION

The above account of the ATO's power creates the impression that tax administration is complete. In reality, such an image is under attack from all angles. On the one hand, while taxpayers are permanently visible through registration and TFNs, the ATO will not be able to observe (by audit) every subject all the time. While IT advances through data-matching and the dissociation of the see/be seen dyad helps to some degree by making the subject act as if they are being watched even when they are not, there will always be those who are willing to gamble on not being seen. Indeed, thousands of cases of tax evasion and fraud are uncovered each year, while many more likely go undetected. On the other hand, the recent Parliamentary Report revealed serious problems with the ATO's current practice, highlighting instances where tax officers acted in a heavy-handed manner, or where their panoptic view of a taxpayer's affairs was wrong or incomplete.

These observations demonstrate the need for reform of ATO practice. In this section, we draw on the theories presented above to suggest possible avenues for reform. It is important to note two constraints at the outset, however. First, as our discussion has shown Foucault's model of disciplinary power is well suited to tax administration; it has the benefit of being both efficient and generally accepted. The problem, then, has been in its application. In exploring reform options, we are therefore careful to avoid undermining the panoptic ideal; in our view it is crucial that the self-governance of taxpayers be preserved where possible. Accordingly, we

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87 Foucault, *Discipline & Punish* (n 6) 186.

propose changes that will address current concerns about the ATO's behaviour but that do not weaken its surveillance powers or public perceptions of those powers.

Second, we develop these reform options within the constraints of the current legal system. The government has already rejected recommendations of legislative change,[88] so we instead seek administrative and cultural reform within the ATO itself. Additionally, it is useful to note Foucault's observation that mercantilism in the seventeenth century was blocked because 'the instruments of mercantilism used were laws, decrees and regulations: that is to say, the traditional weapons of sovereignty. The objective was sovereign's might…which by its very nature stifled them'.[89] Thus, even if legislative reform had not been taken off the table, it may be an undesirable avenue.

In light of these constraints, we pursue non-legislative reform that will maintain or increase the perception amongst taxpayers of the ATO as all-knowing (thus encouraging compliance), but that protects taxpayers against zealous behaviour on the part of the ATO. The solution, as we see it, lies in the theories of Foucault and Latour. Our discussion above has demonstrated how tax administration can be interpreted as both panoptic and oligoptic. The problem has been that, in many cases, the ATO has only seen itself as panoptic, as omniscient and all-powerful. In doing so it has, to paraphrase Latour, bought into the megalomania of the Panopticon.[90] To address this issue, the ATO must, internally, recognise that it is not as all-knowing as it would like to believe, and that instead its practices might be better understood as oligoptic rather than panoptic, especially during the audit process. At the same time, it must encourage taxpayers to see the ATO as panoptic, in order to increase self-regulation and voluntary compliance. Accordingly, we call for reform to ATO practices that are panoptic when dealing with taxpayers broadly, and oligoptic when dealing with taxpayers at an individual level (i.e. in the audit process). Doing so will maximise the benefits of Foucault's disciplinary theory, whilst avoiding or minimising current behaviours in the ATO that are problematic.

In terms of the ATO acting in a way that, internally, acknowledges that it is not all-knowing, there is little that we can suggest beyond pointing out the theoretical insights of Latour and

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88 *Tax Disputes Report* (n 2).

89 Foucault, *Discipline & Punish* (n 6) 98.

90 Latour (n 7) 181.

Boll. Additionally, it was noted in the Parliamentary Report that 'the ATO is undergoing a process of cultural change',[91] and one tax law practitioner giving evidence to the report noted that 'if the current commissioner stays for a long tenure, then the culture will change over time'.[92] Accordingly, the rest of our focus in this section is dedicated to the former suggestion for reform: increasing the impression of panopticism in the minds of Australian taxpayers.

Here, there are two possible solutions. The first is to increase the ATO's actual surveillance; to increase the number of auditors, and to make greater use of information gathering powers. The reasoning behind such a solution is that the ATO will be able to monitor greater numbers of taxpayers, and therefore increase its chances of detecting tax evasion. However, this solution is unsatisfactory for a number of reasons. Firstly, recent political debate on government debt has emphasised significant reductions to government spending, with public service squarely in the firing line.[93] The ATO in particular has been the target of personnel cuts, with 2,100 officers set to lose their jobs.[94] Therefore, there is no scope in the current economic climate to increase the ATO staff by the amount that would be required to give effect to this proposal (or at all). Secondly, the integrity and ability of some ATO officers has been called into question by the Parliamentary Report;[95] indeed, the ATO's reinvention process is aimed at addressing improper conduct.[96] Thus, increasing the ATO's physical presence may not necessarily overcome the problem, and may in fact worsen the situation. Finally, the ATO may be unwilling to exercise its power to the full extent. This is understandable, as excessive use of these extreme powers may be perceived as over-the-top or heavy-handed, and breed further distrust in an already unpopular institution. Indeed, the adoption of a co-operative compliance model was designed

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91 *Tax Disputes Report* (n 2) 79.

92 Ibid.

93 See, eg, Noel Towell and Phillip Thomson, 'ATO Braces for More Work, Less Money', *Sydney Morning Herald* (online, 14 May 2014) <http://www.smh.com.au/national/public-service/ato-braces-for-more-work-less-money-20140514-zrbz9.html>.

94 Australian Broadcasting Commission, 'More Than 2,500 Jobs Axed at ATO, Foreign Affairs Department', *ABC News* (online, 14 May 2014) <http://www.abc.net.au/news/2014-05-14/dfat-ato-jobs-cut/5453146>.

95 *Tax Disputes Report* (n 2). See also Greg Hoy, '"Draconian" ATO Accused of Bullying Taxpayers', *ABC News* (online, 1 November 2012) <http://www.abc.net.au/news/2012-11-01/draconian-ato-accused-of-bullying-taxpayers/4344720>; Chris Seage, 'What Are Your Rights With the Taxman? Call to Clean up ATO "Disgrace"', *Crikey* (online, 19 July 2013) <http://www.crikey.com.au/2013/07/19/what-are-your-rights-with-the-taxman-call-to-clean-up-ato-disgrace/?wpmp_switcher=mobile>.

96 Jordan (n 1); Leeper (n 1).

to move away from such force.[97] Thus, while we recognise that increasing the use of the ATO's surveillance powers should, in theory, improve compliance, we do not consider this a viable avenue for reform.

The second reform option draws more heavily on Foucault's theory than the first, seeking to maximise the effects of panopticism and self-monitoring. Essentially, the idea is to increase the *perceived* surveillance, and to make taxpayers think they are more likely to be caught if they do not comply with their obligations. To put this in Foucauldian terms, taxpayers need to re-see the dark tower of the Panopticon;[98] to be reminded that they are being watched. Thus, taxpayers will be encouraged self-monitor without the need to actually increase the ATO's actual capacity to observe. Such reform is not without risk: Foucault noted that increased visibility of the state's power can lead to increased resistance from subjects. Thus, there is a fine balance to be struck between highlighting the ATO's powers to increase compliance, and overstating these powers such that taxpayers resist them.

The question remains, however, as to how this balance could be achieved in practice. The answer may lie in social psychology. The application of psychological theory to Foucault's work is not a surprising one; Foucault's analytics of ethnology and genealogy are social sciences, into which psychology also fits.[99] Thus, we use psychology as a lens through which to examine surveillance and discipline in practice, allowing us to bridge the gap between Foucault's theory and applying it in a modern setting. Further, although the law has historically held a disdain for experimental psychology,[100] there is an emerging trend for policymakers to consider the insights offered by psychological research.[101] Psychological science therefore has much to offer in guiding reform.

Within the field of psychology, the phenomenon known as the 'availability heuristic' may be particularly relevant to our current endeavours. The availability heuristic suggests that people

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97 Whait (n 13).

98 Foucault, *Discipline & Punish* (n 6) 207.

99 Koopman and Matza (n 9) 830.

100 Hugo Münsterberg, *On the Witness Stand: Essays on Psychology and Crime* (Doubleday, Page & Co, 1908).

101 See, eg, Gerd Gigerenzer and Christoph Engel (eds), *Heuristics and the Law* (MIT Press, 2007).

tend to overestimate the likelihood of an event occurring if it is recalled more easily.[102] Thus, if an event is distinctive or easily remembered, people will think that event is more likely to occur than it does in reality. The classic example used is a shark attack. While a person is far more likely to have a motor vehicle accident on the way to the beach than they are to be attacked by a shark, the ease with which the details of shark attacks are recalled causes people to vastly overestimate their chances of being attacked. Similarly, a plane crash is a distinctive event, and is more readily recalled than the millions of flights that arrive safely at their destinations. Thus, when people think about flying, it is cognitively much easier to recall examples of airline fatalities than innocuous safe flights, which in turn leads people to overestimate the chances of a plane crashing and can create a fear of flying.

In theory, the availability heuristic could apply to taxation as well. As with plane crashes or shark attacks, the odds of a taxpayer being audited are quite slim. An ATO audit is therefore a potentially distinctive event. By harnessing the power of availability heuristics, it should therefore be possible to cause people to overestimate their chances of being audited. Then, returning to Foucault, this increased perception of being audited (or, watched) would lead to greater self-monitoring and tax compliance. Indeed, there is already some evidence that it can work: Whait describes how public seminars to the taxi industry dramatically improved compliance in that sector.[103]

These findings may be utilised more broadly in the context of ATO compliance activity. If greater awareness of an event contributes to greater perceived risk of that event occurring, it should be possible to influence behaviour by increasing media attention to an issue. The first, if unreliable avenue, is to encourage media coverage of the ATO successfully discovering instances of tax evasion; doing so is likely to increase taxpayers' perceived chances of being detected (and in turn increase compliance). Currently, the media generally only focuses on

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102 See, eg, Kathleen Galotti, *Cognitive Psychology: In and Out of the Laboratory* (Thomson Wadsworth, 4th ed, 2008) 467; Norbert Shwarz et al, 'Ease of Retrieval as Information: Another Look at the Availability Heuristic' (1991) 61(2) *Journal of Personality and Social Psychology* 195; Amos Tversky and Daniel Kahneman, 'Availability: A Heuristic for Judging Frequency and Probability'(1973) 5(2) *Cognitive Psychology* 207; Graham Vaughan and Michael Hogg, *Social Psychology* (Pearson Australia, 6th ed, 2011) 77.

103 Whait (n 13) 150.

cases of huge corporate evasion, or 'Celebrity Tax Cheats'.[104] This creates the impression that only the rich and famous will be caught by the ATO, and may even cause everyday taxpayers to underestimate their chances of being detected if they seek to avoid their obligations. Thus, the availability heuristic would lead taxpayers to overestimate the chances that they too would be caught by the ATO if they do not pay their taxes. This would be a highly cost-effective method of increasing compliance, as any expense would largely be borne by the media industry. Of course, such an approach is risky, as it relies on the media covering mundane issues of tax evasion. In an era where the media increasingly exists to entertain and make profit, there may be little incentive to engage with such stories. Accordingly, other options must be considered.

A slightly more involved technique would be to engage in media campaigns around the end of the financial year, highlighting the ATO's information gathering powers, penalties for non-compliance, and emphasising recent ATO successes in prosecuting tax evasion. To some extent, the ATO already engages in this activity through online media releases. However, this are often highly technical, and do not usually reach out to most citizens. We therefore propose a more direct use of mainstream and social media, for example through advertising. This would not only facilitate the availability heuristics described above, but may also actively change taxpayer behaviour. Again, social psychology offers some insight into the potential effectiveness of such a campaign. Research shows that media campaigns are more likely to change behaviour if they promote episodic or one-off behaviours (rather than ongoing behaviour), are time limited, are not competing with product marketing, and if the behaviour is complemented by available services or policies.[105] A compliance campaign conducted by the ATO would meet many of these criteria. Completing tax returns correctly is generally an episodic behaviour (especially in cases where the temptation is to over-claim deductions or under-report income), would be limited to a time period surrounding the end of financial year, and would be complemented by the harsh penalties for failure to comply. This kind of technique was recently implemented in the UK, which conducted an Orwellian advertising campaign,

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104 See, eg, Elizabeth Black, 'In Honor of Tax Day: The 12 Sexiest Celebrity Tax Evaders Ever!', *VH1+ Celebrity* (online, 12 April 2012) <http://www.vh1.com/celebrity/2012-04-12/in-honor-of-tax-day-the-12-sexiest-celebrity-tax-evaders-ever/>.

105 Melanie Wakefield, Barbara Loken and Robert C Hornik, 'Use of Mass Media Campaigns to Change Health Behaviour' (2010) 376 *Lancet* 1261.

complete with 'watching eye' graphics and slogans such as 'New technology, access to data and extra staff means we can find tax dodgers easier than ever before'.[106] As we have highlighted above, this practice may cause its own issues, as it may lead taxpayers to resist the ATO's powers. Accordingly, it would be important to learn lessons from the UK's experience with its campaign.

A final option for increasing the perceived level of surveillance would be to create an ATO-centred reality television program, in the same vein as shows such as *Border Security*,[107] which documents administrative bodies in action. Admittedly, detecting tax evasion does not hold the same viewing appeal as busting international drug syndicates, and accused tax frauds may be unwilling to have the details of their tax affairs broadcast on national television. However, as the *Citibank Case* demonstrates, the ATO is more than capable of engaging in the dramatic raids conducted by other government agencies, and *Border Security* seemingly has little trouble finding subjects willing to be filmed despite its equally sensitive subject matter. Additionally, Boll's ethnographic study of tax investigations in the Danish used car industry would be a prime candidate for an episode, highlighting the 'behind the scenes' process from identification of an issue to successfully tracking down tax evaders.[108] Therefore, it is not outside the realms of possibility for a tax-based reality show to take off.

In his book analysing the public relations industry, Bob Burton considers the effectiveness of *Border Security*, describing both its commercial success, and the public image benefits for the Department of Immigration and Multicultural and Indigenous Affairs.[109] Part of the success of the show was to allow the viewing public to see Australian Customs officers in an enforcement role, something that most members of the public would rarely encounter in ordinary life.[110] The

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106 Her Majesty's Revenue and Customs, 'HMRC is Closing the Net on Tax Dodgers' (Web Page) <https://www.gov.uk/sortmytax>.

107 *Border Security: Australia's Front Line* is an Australian factual television program on commercial television depicting the enforcement work of the Australian Customs and Border Protection, the Australian Quarantine and Inspection Service, and the Department of Immigration and Citizenship.

108 Careful editing would ignore the part where the Danish tax office ultimately concluded that this particular investigation was not cost-effective: see Boll (n 13).

109 Bob Burton, *Inside Spin: The Dark Underbelly of the PR Industry* (Allen & Unwin, 2007) 194.

110 Australian Customs Service, Australian Government, *Annual Report 2004-05* (Report, 4 October 2005) 121.

show provides example after example of Customs officers operating effectively; successfully detecting drug traffickers, illegal immigrants and other instances of non-compliance.

However, Burton is critical of the Department's veto power in its contract with Channel 7, arguing that the post-production editing allows the government to remove any footage of officers acting improperly, making mistakes, or being the subject of unfavourable judicial review.[111] Additionally, the show does not show the inevitable cases that officers fail to detect; the drug traffickers that slip through the cracks. For Burton, approaching the issue with a view to exposing an out-of-control Public Relations industry, this is a real problem, as it creates an inflated illusion of effectiveness of the Department and Customs Service.[112] In a discussion of government accountability and transparency, Burton is certainly correct in raising these concerns. However, from the perspective of Foucault's theory, and with a view to increasing compliance through increased perceptions of surveillance, Burton's concerns serve to reinforce the workability of this solution.

There are also, of course, broader ethical questions about surveillance and manipulating citizen perceptions and attitudes. One of the key failings in Foucault's work is that it does not account for individual rights or privacy. To some extent, this is understandable; in the context of criminal justice, prisoners' rights are a notoriously low priority. Foucault presents his theory of surveillance simply as a description of what is, rather than what ought to be. When discussion turns to the surveillance of ordinary civilians, of taxpayers, there is a greater expectation that individual rights will be protected.

As discussed earlier, taxpayers have some recourse against maladministration through the administrative review process. However, as was pointed out, even this protection has been subverted by the disciplinary power of surveillance. Furthermore, there is some criticism that the current legislation strikes the wrong balance between the ATO's need to gather information and citizen's rights. It is argued that taxpayers are completely vulnerable to arbitrary assessments and that they should not be put in a position where they have to seek review of a decision just to protect their rights, especially when the cost of challenging an assessment can

111 Burton (n 109) 195–196.

112 Ibid.

be prohibitive. Why, if the ATO itself admits that it needs to seriously reconsider its practices, should citizens trust it with greater surveillance power, perceived or actual?

We contend that increasing the perceived power of the ATO will have the result of increasing compliance. An increase in compliance would result in a reduction for the need for the ATO to exercise their powers. It would also allow the ATO to allocate further resources to their auditing processes thus minimising the risk of making mistakes, and those mistakes being visible to the public. With less exposure of vulnerability, the perceived effectiveness of the ATO is increased thereby creating even greater compliance. We can view this as an actualisation of the hypothetical, idealised world of Foucault's theory, where the cycle eventually results in one hundred per cent compliance.

VI CONCLUSIONS

The ATO's recent focus on reform and reinvention opens discussion into how the Australian taxation system can be administered more effectively. Such a discussion takes place in the context of a stated need to increase compliance, but without the resources to satisfy the cost of doing so. This article has built on Whait's recent work[113] and approached the question of reform from a novel perspective, considering how Foucault's theories of surveillance and discipline might sit alongside Latour's oligopticon to inform reform options. In order to do so, we first dealt with the preliminary issue of understanding how the taxpayer is rendered visible by the ATO. To highlight the parallels between *Discipline and Punish* and the Australian tax system, the article then described the way that differs to the way tax is administered in modern society, maped closely to Foucault's observations about changes to punishment and the penal system over time.

Having demonstrated the disciplinary power of taxation in the current system, the article then turned to Foucault's ideas regarding surveillance and panopticism, extending Whait's discussion of Foucault in the ATO's co-operative compliance model. In particular, we noted that Tax File Numbers place taxpayers in a state of permanent, individual and biographical registration, and also contribute to their identity as taxpayer, and that the ATO's considerable powers of observation under the *Income Tax Assessment Act 1936* (Cth), are analogous to

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113 Whait (n 13).

surveillance in the Panopticon. Crucially, section 263 gives the Commissioner and his officers the ability to observe taxpayers at any time. It was argued that this causes taxpayers to watch themselves, and is thus a prime example of panopticism at work. Alongside these insights, we demonstrated how Latour's oligopticon offers an alternate interpretation of these powers, and argued that the ATO's practice is best understood with reference to both theories. We also observed that Australia's taxation system goes even further than Foucault thought that panopticism would operate. By placing the onus of proof on the taxpayer in a review, the taxpayer watches himself and keeps records, not only because the ATO might be watching, but in case the ATO might not be watching and the taxpayer will have the burden of proving their case.

Using these observations, we explored possible solutions to the ATO's issues with detecting non-compliance and the counter-issue that the ATO has recently been accused of zealous and heavy-handed practice. We proposed that these problems could be addressed by changing the culture of the ATO, such that they encourage perceptions that the ATO is all-knowing when dealing with taxpayers at large, but acknowledge that they are in fact more oligoptic when dealing with individual taxpayers in the audit process. Focussing on the ATO's panoptic image, we dismissed the possibility of increasing actual surveillance by hiring extra audit officers as inefficient, especially in light of the current economic climate. Instead, we relied heavily on the theories behind panopticism to propose that compliance could be increased by raising taxpayers' perceptions of surveillance. We argue that any of the reform options discussed would be likely to lead taxpayers to overestimate the ATO's ability to detect non-compliance, which would in turn lead to greater taxpayer compliance. While we recognise that there are valid ethical arguments against these reforms, and that citizens quite rightly have little reason to trust a Tax Office in damage control, we contend that the increased compliance would allow the ATO to use its limited resources more effectively, thus fostering community trust in the taxation system. In describing the completeness of disciplinary power in society, Foucault asked: 'Is it surprising that prisons resemble factories, schools, barracks, hospitals ...?'[114] As we have observed, one might easily add the taxation system to this list. Taxation in Australia is a truly disciplinary mechanism, so one would do well to pay their taxes, lest the ATO be watching.

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[114] Foucault, *Discipline & Punish* (n 6) 228.

BANGLADESHI READY-MADE GARMENT INDUSTRY SUPPLIERS TO AUSTRALIAN COMPANIES: THE IMPLICATIONS OF THE MODERN SLAVERY ACT

MOHAMMED AL BHADILY* AND STEPHEN MONTEROSSO**

ABSTRACT

The prevalence of modern slavery in supply chains has become a significant global concern, prompting numerous countries such as the United Kingdom, France and United States of America to implement legislative measures specifically designed to address the issue. Australia has recently followed suit, enacting the Modern Slavery Act 2018 (Cth) ('Australian Act'). Section 16 of the Australian Act purports to address supply chain slavery by requiring companies to publish an annual statement on their website that addresses slavery and human trafficking in their supply chain. However, section 16 does not impose an obligation on companies to take steps towards eradicating the slavery present in their supply chains.

Given Australian companies' significant dependence on Bangladesh-sourced products, this paper focuses on modern slavery existing in Bangladesh. It will also address the implications, following enactment of the Australian Act, for Bangladesh Ready-Made Garment workers who frequently encounter exploitation, abuse and unsafe work environments. It will assess similar approaches that have been adopted in other jurisdictions and conclude that modern slavery laws modelled on the French legislation may be more effective in combatting modern slavery.

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I INTRODUCTION

Consumers in Western countries, including Australia, have become increasingly dependent on low-cost products primarily produced in Asia. In addition to environmental implications, the most concerning consequences of outsourcing products to Asian countries is human rights abuse and slavery-like conditions in unsafe work environments. This has been demonstrated by International Labour Organization ('ILO') and other studies, all of which indicate that unsafe work practices, child labour and human rights abuse are widespread in South-Asian countries.[1] For example, the 2018 Global Slavery Index illustrates that over 40 million people worldwide are living in slavery conditions, with approximately 25 million living in the Asia-Pacific region alone.[2] Australia's major trading partners where slavery persists are: India (7,989,000 slave workers), China (3,864,000 slave workers), Pakistan (3,186,000 slave workers), Indonesia (1,220,000 slave workers), Thailand (610,000 slave workers) and Bangladesh (592,000 slave workers).[3]

In addition to the international instruments targeted at combatting slavery[4], domestic and international legislation have been introduced to address the issue. Some countries have taken a leading role in enacting legislation, including the United Kingdom ('UK'), France, Netherlands, India and the United States ('US').[5] Similarly, the Australian government enacted

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1 International Labour Office, *Global Estimates of Child Labour: Results and Trends, 2012-2016* (Report, 2017); 'International Labour Standards on Forced Labour', *International Labour Organization* (Web Page) <http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/forced-labour/lang--en/index.htm>; Cathy Zimmerman, Ligia Kiss and Nicola Pocock, 'Health and Human Trafficking in the Greater Mekong Subregion. Findings from a Survey of Men Women and Children in Cambodia, Thailand and Vietnam', *International Organization for Migration and London School of Hygiene and Tropical Medicine* (Survey Findings, 2014) 69 <http://publications.iom.int/system/files/pdf/steam_report_mekong.pdf>.

2 Minderoo Foundation, *Global Slavery Index 2018* (Report, 2018) 3 ('*Global Slavery Index 201*8').

3 Ibid.

4 *Convention to Suppress the Slave Trade and Slavery*, signed 25 September 1926, 60 LNTS 254 (entered into force 9 March 1927) ('*Convention to Suppress the Slave Trade and Slavery*'); *Convention Concerning Forced or Compulsory Labour, 1930 (No.29)*, signed 28 June 1930, 14th sess (entered into force 1 May 1932) ('*Convention Concerning Forced or Compulsory Labour*'); *Convention Concerning the Abolition of Forced Labour, 1957 (No. 105)*, signed 25 June 1957, 40th sess (entered into force 17 January 1959) ('*Convention Concerning the Abolition of Forced Labour*').

5 *Modern Slavery Act 2015* (UK); *LOI no 2017 Devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre (1)* (France) JO, 27 March 2017 ('*Corporate Duty of Vigilance Law* (France)'); *Wet zorgplicht kinderarbeid* 2019 [Child Labour Due Diligence Act] (Netherlands) 24 October 2019; *Trafficking*

the *Modern Slavery Act 2018* (Cth) ('Australian Act'), which was influenced by the UK's Modern Slavery Act 2015 ('UK Act'). The New South Wales government has also enacted a *Modern Slavery Act 2018* (NSW) ('NSW Act'). It should be noted that there are some key differences between these legislative initiatives. The UK and NSW Act respectively include a GBP66 million and AUD50 million threshold for company reporting.[6] This is significantly lower than the threshold under the Australian Act, which is set at AUD100 million.[7] Furthermore, the Australian and NSW Acts both impose more reporting criteria than the UK Act. For example, the UK and Australian Acts do not impose any non-compliance penalties, while the NSW Act imposes a financial penalty for companies that do not comply with their disclosure obligation.[8] More discussion on these issues will be conducted in the section below. Nevertheless, these legislative initiatives have been hailed as a significant step towards reducing slavery and improving workers' rights globally, particularly in relation to the Asia-Pacific region.[9]

Section 16 of the Australian Act deals with risks of modern slavery in the supply chain. It requires Commonwealth entities that are either Australian entities or entities conducting business in Australia, and which have minimum annual earnings of AUD100 million, to publish annual public reports on the actions they have taken to address modern slavery supply chain risk. The provision does not impose any penalties on companies who do not comply with the disclosure obligation. However, under section 16A(4) of the Act, the Minister can 'name and shame' non-compliant entities, thus exposing them to reputational damage.[10] This lack of enforceability leaves the issue of addressing supply chain abuse to the discretion of companies,

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of Persons (Prevention, Protection and Rehabilitation) Bill 2018 (India); *California Transparency in Supply Chains Act of 2010,* Cal. Civ. Code, § 1714.43.

6 See *Modern Slavery Act 2015* (UK) s 54 ('*UK Act*'); *Modern Slavery Act 2018* (NSW) s 24(1) ('*NSW Act*').

7 See *Modern Slavery Act 2018* (Cth) s 5 ('*Australian Act*').

8 See *NSW Act* (n 6) s 24.

9 See, eg, Fiona McGaughey, 'Australia's Proposed Modern Slavery Act for Business Reporting – Part of an International Trend in Business and Human Rights' (2018) 36(3) *Australian Resources & Energy Law Journal* 29; 'The Australian Modern Slavery Act 2018 – Will it Live up to Expectations?', Business and Human Rights Centre (Opinion Piece, 1 December 2018) <https://www.business-humanrights.org/en/blog/the-australian-modern-slavery-act-2018-will-it-live-up-to-expectations/>.

10 *Australian Act* (n 7) s 16A(4).

many of whom have been responsible for the unfair payment, abuse and exploitation of supply chain workers where slavery exists.

This paper focuses on Ready-Made Garment ('RMG') workers in Bangladesh. In addition to the oppressive working conditions these supply chain workers commonly experience, Bangladesh RMG workers are exposed to significant hazards. This was observed in the Rana Plaza disaster where an RMG factory collapsed, killing and injuring thousands of workers and thus exposing the unfairness and exploitation endured by such workers.[11] Moreover, Bangladesh is a country with elevated levels of slavery, ranking 4th overall within the Asia-Pacific region for the number of people enslaved.[12] Many Australian companies outsource their products to Bangladesh, making the country Australia's main garment supply source after China.[13]

Modern slavery is defined as exploitative practices such as forced labour, sexual slavery, forced marriage, child labour, slavery or slavery like practices.[14] This paper explores the background of modern slavery prior to discussing the international instruments and domestic legislation relevant to the issue. The paper will then proceed to examine the Bangladesh RMG industry and the challenges experienced by RMG workers. In analysing these challenges, the preference towards low-cost production by suppliers, outsourcing companies and the Bangladesh government will be considered in conjunction with the measures taken to address these challenges. The paper will then focus on section 16 of the Australian Act, examining its effectiveness in protecting Bangladeshi RMG workers from modern slavery risks. Finally, the paper will assess the utility of the French legislative equivalent and conclude that the French approach may, in fact, be a more useful model to eradicate modern slavery.

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11 'Four Years After Rana Plaza: Steps in the Right Direction But a Lot Remains to be Done', *Clean Clothes Campaign* (Web Page, 26 April 2017) <https://cleanclothes.org/news/2017/04/21/four-years-after-rana-plaza>.

12 *Global Slavery Index 2018* (n 2).

13 Deloitte Access Economics, *A Living Wage in Australia's Clothing Supply Chain– Estimating Factory Wages as a Share of Australia's Retail Price* (Report, 20 September 2017) 13.

14 McGaughey (n 9) 1.

II THE NOTION OF MODERN SLAVERY

Slavery or unpaid forced labour has persisted for thousands of years in all civilisations and is premised on the illegitimate under-pricing of labour, a key resource, for economic advantage.[15] Nowadays, slavery is driven by globalisation.[16] Although the use of slave labour may appear anachronistic and irrelevant in modern society, slavery exists in various guises in the modern commercial environment, including human trafficking, bonded and forced labour.[17] Modern slavery however, differs from traditional or classic forms of slavery due to the absence of legal ownership in the master-slave relationship.[18] Further, modern slavery is grounded in capitalism, with wage-labour being the central driver.[19] Typical features of modern slavery include coercion[20], exploitation of labour power, and violence or force inflicted upon another by an individual or company that causes the victim to forfeit their freedom and control.[21]

More specifically, modern slavery in supply chains includes circumstances of exploitation and deprivation of liberty in any aspect of the supply chain, ranging from raw material extraction to final sale for service provision or final production purposes.[22] It includes contract slavery, which entices workers into trafficking and enslavement through the offering of fake employment contracts; physical harm or threatening behaviour to workers; confinement to a workplace or restriction of movement more generally; withholding of payment or wage reductions in violation of previous agreements; confiscation of worker passports or identity documentation; debt or loan bondage which forces workers to work off debts instead of

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15 Andrew Crane, 'Modern Slavery as a Management Practice: Exploring the Conditions and Capabilities for Human Exploitation' (2013) 38(1) *Academy of Management Review* 49; Kevin Bales, 'Testing a Theory of Modern Slavery' (Research Paper, Free the Slaves, February 2006) <http://www.freetheslaves.net/Document.Doc?id=14>.

16 David Androff, 'The Problem of Slavery: An International Human Rights Challenge for Social Work' (2010) 54(2) *International Social Work* 210.

17 Crane (n 15) 49.

18 Kate Manzo, 'Modern Slavery, Global Capitalism & Deproletarianisation in West Africa' (2005) 32(106) *Review of African Political Economy* 522, 524.

19 Paula Beiguelman, 'The Destruction of Modern Slavery: A Theoretical Issue' (1978) 2(1) *Review* 77.

20 Manzo (n 18) 522.

21 Kamala Kempadoo, 'The Modern-Day White (Wo)Man's Burden: Trends in Anti-Trafficking and Anti-Slavery Campaigns' (2015) 1(1) *Journal of Human Trafficking* 10.

22 Stefan Gold, Alexander Trautrims and Zoe Trodd, 'Modern Slavery Challenges to Supply Chain Management' (2015) 20(5) *Supply Chain Management: An International Journal* 487.

payment of wages; and threat of exposure to authorities in circumstances where workers have an uncertain immigration status.[23]

III INTERNATIONAL INSTRUMENTS

There is a significant history of international efforts to eliminate slavery. These efforts have taken various forms, including the introduction of international conventions and domestic legislation, some of which will be outlined below.

The first international instrument addressing slavery was the *1815 Declaration Relative to the Universal Abolition of the Slave Trade*, which aimed to free slaves in the US and European colonies while stopping Atlantic slave-trade.[24] Additionally, the *1926 Convention to Suppress the Slave Trade and Slavery* was an international treaty established by the League of Nations, aimed at eliminating slavery and forced labor in the signatories' territories.[25] The *1948 Universal Declaration of Human Rights* is another significant international instrument that was created to protect fundamental human rights. Article 4 of the Declaration states '[n]o one shall be held in slavery or servitude … slavery and the slave trade shall be prohibited in all their forms'.[26]

The International Labour Organisation ('ILO') has played a vital role in combatting slavery though various measures it has implemented. The ILO's *Forced Labour Convention, 1930 (No. 29)* requires ratified members to work towards eliminating all forms of forced labour.[27] 'Forced labour' is defined by article 2(1) of the convention as '[a]ll work or service which is exacted from any person under the menace of penalty and for which the said person has not offered himself voluntarily.' Further, the ILO's *Abolition of Forced Labour Convention, 1957 (No. 105)* requires ratified members to abolish forced and compulsory labour, utilising all reasonable measures necessary to achieve this aim.[28] The *International Covenant on Civil and Political*

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23 Ibid; Stephen New, 'Modern Slavery and the Supply Chain: The Limits of Corporate Social Responsibility' (2015) 20(6) *Supply Chain Management: An International Journal* 698.

24 David Weissbrodt and Anti-Slavery International, *Abolishing Slavery and its Contemporary Forms* (Review, No HR/PUB/02/4, 2002) 3.

25 *Convention to Suppress the Slave Trade and Slavery* (n 4).

26 *Universal Declaration of Human Rights* (1948) art 4.

27 *Convention Concerning Forced or Compulsory Labour* (n 4) art 1.

28 *Convention Concerning the Abolition of Forced Labour* (n 4) art 1–2.

Rights also prohibits all forms of slavery, slaved-trades and forced labour.[29] Under the UN *Guiding Principles on Business and Human Rights* ('UNGPs'), there is an expectation that businesses, in their operation and supply chains, will respect human rights including the prevention and elimination of modern slavery.[30]

The issue is that not all member states have implemented these instruments and principles in their domestic legislation which is designed to combat slavery and child labour. As an example, a recent media report revealed there are over 2 million children in Uganda engaged in slave labour conditions, despite the existence of anti-exploitation laws.[31] This shortcoming suggests that some governments lack sufficient will to implement these laws appropriately due to economic and political pressure.[32] On this point, the Fashion Transparency Index states that enforcement is often absent, implementation is weak and there is little opportunity to address violations through the courts.[33]

IV MODERN SLAVERY LEGISLATION

In circumstances where governments are unwilling to take measures to protect vulnerable workers as described above, there is a moral and ethical obligation on developed countries to enact legislation to protect exploited workers in supply chains.[34] Accordingly, some developed countries have passed business reporting laws to address modern slavery.[35] Although there are

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29 *International Covenant on Civil and Political Rights,* signed 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 8.

30 Business and Human Rights Resource Centre, *Modern Slavery in Company Operation and Supply Chains: Mandatory Transparency, Mandatory Due Diligence and Public Procurement Due Diligence* (Report, September 2017) 24; Australian Lawyers for Human Rights, Submission No 67 to Joint Standing Committee on Foreign Affairs, Defence and Trade, *Inquiry into Establishing a Modern Slavery Act in Australia* (27 April 2017) 17.

31 Alex Gitta, 'Uganda: Child Labor Continues Despite New Anti-Exploitation Laws', *Deutsche Welle* (Web Page, 8 February 2018) <http://www.dw.com/en/uganda-child-labor-continues-despite-new-anti-exploitation-laws/a-42500637>.

32 Ibid.

33 Fashion Revolution, *Fashion Transparency Index 2019* (Review, 24 April 2019) 78.

34 Ibid 78.

35 Ibid.

still some variations in the legal obligations imposed on outsourcing companies, these business reporting laws represent a positive development in the protection of vulnerable workers.[36]

A number of legislative changes have been adopted throughout the world to protect supply chain workers. This legislation can be classified into two groups. The first group comprises of mandatory transparency, which requires certain businesses to publicly disclose the steps it has taken to combat modern slavery in its supply chain(s).[37] Examples include the California Transparency in Supply Chains Act 2010 ('California Act'), the Australian Act and the UK Act, which is based on the California Act.[38] However, as will be discussed in more detail below, mandatory transparency does not necessarily impose obligations on companies to prevent or implement measures to eliminate slavery.[39] Companies can, intriguingly, meet the requirements imposed by mandatory transparency merely by making a public disclosure that they have not taken actions or steps to address supply chain slavery.[40]

The second group of legislative initiatives is mandatory due diligence, which imposes obligations on companies to address and prevent modern slavery in their supply chain(s).[41] Examples include the NSW Act, which imposes financial penalty for non-compliance, the 2015 US Trade Facilitation and Trade Enforcement Act, which bans imports of slave-made products, and the French Corporate Duty of Vigilance Law.[42] Companies failing to comply with the requirements of this legislation may be liable to civil or criminal remedies.[43]

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36 See Australian Lawyers for Human Rights (n 30) 18.

37 Business and Human Rights Resource Centre (n 30).

38 Australian Lawyers for Human Rights (n 30).

39 Business and Human Rights Resource Centre (n 30).

40 Ibid 16.

41 Ibid 4.

42 See *Trade Facilitation and Trade Enforcement Act 2015* (US) s 910; *Corporate Duty of Vigilance Law* (France) (n 5) art 2.

43 *Corporate Duty of Vigilance Law* (France) (n 5).

V RMG INDUSTRY IN BANGLADESH

Over the last three decades, the RMG industry has played a pivotal role in the development of Bangladesh's economy. This has required years of dedicated planning, work and persistence by the Bangladesh government, private sector and, most importantly, the RMG workers.

In the 1970s, the Bangladesh government decided to denationalise its economy and encourage private sector investment.[44] Notably, this policy was only implemented after food prices increased following a period of severe flooding which led to the deaths of 1 million people due to starvation.[45] Another contributing factor was the reduced demand for jute fibre, one of Bangladesh's most exported products at that time.[46]

The modernisation of this industry was initiated by Korean companies who became involved in the Bangladesh RMG industry. In 1978, Desh Garment Ltd ('Desh'), a Bangladeshi company, and Daewoo, a South Korean company, entered into a joint venture, which provided for 130 Bangladeshi textile workers and management staff to be trained for 6 months in South Korea.[47] With Korean technology and training, Desh was able to establish a modern factory in Bangladesh which employed 600 workers and produced 5 million pieces annually.[48]

To further enhance its privatisation policy, the Bangladesh government established an incentive policy in the early 1980's to issue duty free licences to companies that imported machinery and equipment for textile export purposes.[49] This initiative facilitated the growth of the Bangladesh RMG industry. From 1984–1985, the number of RMG factories increased to 632, leading to a significant increase in exports from USD1.3 million to US116.2 million.[50]

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44 Nurul Momen, 'Implementation of Privatization Policy: Lessons from Bangladesh' (2007) 12(2) *The Innovation Journal: The Public Sector Innovation Journal* 3.

45 Ibid.

46 Dean Spinanger, 'Will the Multi-Fibre Arrangement Keep Bangladesh Humble?' (1986) 10(1) *World Economy* 75, 76.

47 Mohammad Yunus and Tatsufumi Yamagate, *The Garment Industry in Bangladesh, Dynamic of the Garment Industry in Low-Income Countries: Experience of Asia and Africa* (Report, 2012) 4.

48 Ibid.

49 Ibid.

50 Ibid.

Currently, the RMG industry contributes more than 80 per cent of Bangladesh's total exports.[51] During the 2016–2017 financial year, the RMG sector generated over USD28 billion in exports, which was 7.7 per cent higher than the previous year.[52] In July-December 2018, there was over 15 per cent growth in export earnings from the RMG sector.[53] The growth of the Bangladesh economy has created more than 1 million jobs annually since 2003.[54] The Bangladesh RMG industry has also grown rapidly from 600,000 in 2003 to 3.2 million employees in 2010.[55] Currently, there are over 4 million workers employed by more than 7,000 RMG factories in Bangladesh.[56]

This rapid growth was, and remains, driven by low labour costs, which provide an attractive inducement for companies to outsource the production of their products to Bangladesh.[57] However, this expansion has led to unfortunate outcomes for Bangladeshi RMG industry workers, who endure long working shifts, low wages, abuse, exploitation of child labour and unsafe working environments, in an industry driven by growth, regardless of the human cost.

A *RMG Industry Challenges*

Well documented reports and studies have examined the RMG industry's industrial conditions, revealing widespread practices of exploitation, abuse and insufficient wages in textile factories.[58] This paper will now turn to an examination of the extent of these inhumane practices.

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51 The World Bank, *Bangladesh Development Update: Towards More, Better and Inclusive Jobs* (Report, September 2017) 7.

52 Akhi Akter, 'An Overview of Bangladesh RMG 2016', *Textile Today* (Web Page, 15 February 2017) <http://www.textiletoday.com.bd/overview-bangladesh-rmg-2016/>.

53 'Bangladesh's RMG Exports Rise Over 15% in July-December', *Textile Today* (Web Page, 3 January 2019) <https://www.textiletoday.com.bd/bangladeshs-rmg-exports-rise-15-july-december/>.

54 The World Bank (n 51) 7.

55 Ibid.

56 Kaniz Farhana and Munir Syduzzaman, 'Present Status of Workers in Readymade Garments Industries in Bangladesh' (2015) 11(7) *European Scientific Journal* 564; Sarah Labowitz and Dorothee Baumann-Pauly, *Beyond the Tip of the Iceberg: Bangladesh's Forgotten Apparel Workers* (Report, December 2015) 21.

57 Mohammed Al Bhadily, 'Does the Bangladesh Accord on Building and Fire Safety Provides a Sustainable Protection to Ready-Made Garment Workers?' (2015) 4(4) *Review of Integrative Business and Economics Research* 161.

58 Ibid. Björn Claeson, *Deadly Secrets* (Report, December 2012).

B *Low Wages*

The Bangladesh RMG industry is attractive to many Western brands. A key factor influencing companies to outsource to Bangladesh is low-cost production. In 2013, 29 chief purchasing officers in both Europe and the USA, whose annual outsourcing value is USD39 billion, participated in a survey that discovered that 86 per cent of participants considered labour costs as a major reason for their preference to outsource to Bangladesh.[59] Labour costs in Bangladesh amount to 7 per cent of total factory production costs, which is the lowest among garment producing countries.[60] However, this low-cost factor comes at the expense of worker exploitation. Furthermore, unlike other fixed cost elements such as rent, machinery and utilities, labour is effectively the only cost component that factories can control and reduce in circumstances where profits are extremely marginal.[61] To further reduce labour costs, some garment factories force workers to complete longer shifts without receiving overtime payments, while other factories employ child labourers.[62]

In a complex business environment with profit margins as low as 2 per cent (the lowest among RMG producers),[63] Bangladesh factory owners are arguably reluctant to pay wages that adequately remunerate workers. This has been compounded by the Bangladesh government's refusal to increase the country's minimum wage. Historically, the Bangladesh government did not voluntarily increase minimum wage levels until forced by worker protests.[64] For example, the Bangladesh government most recently increased the minimum wage in 2013 from AUD39 to AUD68 per month, following dissent and pressure from factory workers in the aftermath of the Rana Plaza collapse.[65] Despite this increase, the effects have not been distributed to all workers and there remains allegations that some RMG factories are still failing to pay the

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59 Achim Berg, Benedikt Berlemann and Saskia Hedrich, *The Global Sourcing Map – Balancing Cost, Compliance, and Capacity* (Survey Findings, October 2013) 1.

60 Deloitte Access Economics (n 13) 14.

61 Labowitz and Baumann-Pauly (n 56) 24.

62 Ibid.

63 Deloitte Access Economics (n 13) 7.

64 'Wage Struggle in Bangladesh', *Clean Clothes Campaign* (Fact Sheet, February 2017) 2 <https://cleanclothes.org/resources/background/background-wage-struggle-bangladesh-december-2016>.

65 Ibid 1.

minimum wage.[66] Moreover, the current minimum wage is considered one-fifth of Bangladesh's 'living wage' – the amount required by workers to sustain a normal standard of living.[67] The wage is therefore insufficient to cover workers' daily expenses such as rent, food, medicine and other necessities.[68]

This is exacerbated by the fact that Bangladesh RMG workers are the lowest paid amongst all textile producing countries. For instance, the minimum wage was increased in Cambodia, the second lowest paid RMG working nation (following Bangladesh), from AUD140 to AUD153 on 29 September 2016.[69] This is, in fact, more than double the Bangladesh minimum wage. Arguably, low wages make RMG workers more vulnerable to modern slavery and expose them to traffickers who tempt them with a promise of a better wages and working conditions.

1 *Dangerous Workplaces, Fire Hazards and the Accord*

The most serious hazards RMG workers are exposed to include defective, dangerous workplaces and fire that, in some cases, can be lethal. As an example, the collapse of the Rana Plaza factory on 24 April 2013 resulted in the deaths of over 1,100 workers and injuries to thousands more.[70] This accident was considered the worst industrial disaster in Bangladesh's history and directed attention toward the RMG industry's health and safety regimes.[71] This, in turn, prompted changes to the RMG industry's fire safety issues, as will be discussed below. Despite the Rana Plaza disaster, fire safety accidents are not a new phenomenon in Bangladesh's RMG factories. There is a history of incidents occurring in the industry.

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66 Stirling Smith, 'Is Bangladesh's New Minimum Wage Enough?', *Ethical Trading Initiative* (Web Page, 15 November 2013) <https://www.ethicaltrade.org/blog/bangladeshs-new-minimum-wage-enough>.

67 World Economic Forum, *Beyond Supply Chains Empowering Responsible Value Chains* (Report, January 2015) 24.

68 Ibid.

69 Prak Chan Thul, 'Cambodia Raises 2017 Minimum Wage for Textile Industry Workers', *Reuters* (Web Page, 29 September 2016) <https://www.reuters.com/article/cambodia-garment/cambodia-raises-2017-minimum-wage-for-textile-industry-workers-idUSL3N1C51OD>.

70 'The Rana Plaza Accident and its Aftermath', *International Labour Organization* (Web Page) <https://www.ilo.org/global/topics/geip/WCMS_614394/lang--en/index.htm#>.

71 Ibid.

The first documented fire incident occurred in 1990 at Saraka Garments in Dhaka, Bangladesh, where more than 32 workers were killed and over 100 workers injured.[72] 3 additional factory fires occurred during 1997 at the Nouvelle Garments, Florence Fabric and Modern Garments factories, each located in Dhaka.[73] These incidents caused the deaths of 5 workers and a further 50 injuries.[74] In 2000, the Chowdhury Knitwear and Garments Factory fire resulted in the deaths of 52 people, most of which were young women and children.[75] Moreover, on 24 November 2012, a fire in the Tazreen Fashion factory in Dhaka killed 112 workers and injured 150 more, deeming it one of the worst fire accidents in Bangladesh's history.[76] On July 2017, a boiler explosion in an RMG factory in Gazipur killed 10 workers and injured dozens.[77]

Following the Rana Plaza collapse, the Bangladesh RMG industry was the centre of international spotlight and attracted lengthy criticism regarding the health and safety compliance of local garment factories, international outsourcing companies and brands with local government influence.[78] Consequently, the 'Accord on Fire and Building Safety in Bangladesh' ('The Accord') was established by Western retailers in 2013 with the aim to establish a fire and building safety program in Bangladesh for 5 years.[79] The Accord is funded by over 190 signatory brands from Australia, Europe, the USA and Canada,[80] and has since been renewed for an additional 3 years, ending in May 2021.[81] To date, the Accord has been signed by 193 international brands and companies and is considered a historical step, given it has established a binding agreement aimed at preventing disasters in the Bangladesh RMG

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72 Claeson (n 58) 19.

73 Ibid 26.

74 Ibid.

75 Barry Bearak, 'Lives Held Cheap in Bangladesh', *The New York Times* (online, 15 April 2001) <http://www.nytimes.com/2001/04/15/world/lives-held-cheap-in-bangladesh-sweatshops.html>.

76 Claeson (n 58) 26.

77 Ruma Paul, 'Blast in Bangladesh Garment Factory Kills 10, Investigation Underway', *US News* (online, 3 July 2017) <https://www.usnews.com/news/world/articles/2017-07-03/at-least-nine-people-killed-in-bangladesh-factory-blast>.

78 Al Bhadily (n 57) 165.

79 'About the Accord', *Accord on Fire and Building Safety in Bangladesh* (Web Page, 2018) <http://bangladeshaccord.org/about/>.

80 Al Bhadily (n 57) 165.

81 '2018 Accord on Fire and Building Safety in Bangladesh' (International Agreement, May 2018) <https://bangladesh.wpengine.com/wp-content/uploads/2020/11/2018-Accord.pdf>.

industry.[82] The introduction of the Accord illustrates that international intervention is necessary to address the failure of domestic laws to protect RMG workers. This makes a strong case for a viable Australian Anti-Slavery law that is able to effectively protect workers.

Nevertheless, there are some concerns in relation to the Accord. Firstly, the Accord primarily deals with fire safety concerns and does not address wider issues experienced by RMG workers such as exploitation, child labour and human rights abuse.[83] Furthermore, not all retailers and brands that outsource to Bangladesh are signatories of the Accord, thus rendering many workers unprotected.[84] Moreover, subcontractors to RMG factories that on-supply to signatory retailers are unlikely to be covered by the Accord.[85] On this point, the Fashion Transparency Index, which coincided with the 6th anniversary of the Rana Plaza collapse, stated that '[u]nfortunately, factory fires and accidents, poor working conditions, dangerous pollution and exploitation of garment workers remains rampant 6 years after Rana Plaza.'[86]

2 *Child Labour*

Child labour is a significant global concern that requires a collective solution, especially given the number of children employed around the world. An international estimate suggests that over 218 million children were employed in 2016.[87] More than 152 million of this total amount were in underage labour and over 73 million children were involved in hazardous work.[88] Child labour remains an ongoing concern in Bangladesh, with estimates of the number of children in the workforce revealing a grim picture. A survey conducted by the Bangladesh Bureau of Statistics ('BBS') on child labour for 2002-2003 showed that there were 7.9 million child labourers in Bangladesh.[89] In 2016, Quattri and Watkins revealed that two-thirds of the children

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82 'Signatories to the 2018 Accord', *IndustrialALL Global Union* (Web Page, 10 September 2018) <http://www.industriall-union.org/signatories-to-the-2018-accord>.

83 Al Bhadily (n 57) 167.

84 Ibid 166.

85 Ibid 167.

86 Fashion Revolution (n 33) 9.

87 International Labour Office (n 1) 11.

88 Ibid.

89 Bangladesh Bureau of Statistics, *Report on National Child Labour Survey in Bangladesh* (Report, October 2003) 49.

working in the Bangladesh garment industry were girls who worked an average 64 hours per week.[90] Some of these girls were as young as 6 years old.[91]

There are many contributing factors to Bangladesh's child labour problem, including poverty and the absence of government intervention. However, it is beyond the scope of this paper to discuss the economic aspects of the Bangladesh government's policy to reduce and eliminate child labour. Nevertheless, there remains a monitory role that the Bangladesh government ought to adopt to enforce legislation and prevent child labour. In 2016, there were only 267 inspectors available to inspect the factories that employ over 38 million workers.[92] This resulted in only 45 child labour violations being recorded.[93] Arguably, the under-resourcing of Bangladesh's labour inspectorate has compromised both the enforcement of legislation, health and safety compliance of RMG factories and the timely identification of child labour violations.

Clearly, the ability of the government to address the child labour issue in Bangladesh is limited by the government's lack of available resources. This limitation may have been exacerbated by the government's reluctance to compromise the industry's attractiveness as the cheapest RMG producer. Unsurprisingly, Bangladesh has not ratified the ILO Convention 138 on the minimum working age.[94]

It should be noted that the ILO established a target to eliminate child labour by 2025 and forced labour by 2030.[95] While there is no doubt the ILO has contributed significantly in coordinating states' efforts to reduce child labour, one might question whether this target is achievable within such a short period of time. This is reinforced by the fact that previous ILO targets have been missed, including the ILO's target to eliminate the worst forms of child labour by 2016.[96]

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90 Maria Quattri and Kevin Watkins, *Child Labour and Education: A Survey of Slum Settlements in Dhaka* (Research Report Findings, December 2016) 26.

91 Ibid.

92 'Bangladesh: Minimal Advancement', *United States Department of Labour* (Web Page, 2016) <https://www.dol.gov/agencies/ilab/resources/reports/child-labor/bangladesh>.

93 Ibid.

94 Quattri and Watkins (n 90) 27.

95 International Labour Organization, *Ending Child Labour, Forced Labour and Human Trafficking in Global Supply Chains* (Report, 2019) 1.

96 International Labour Organization, *Ending Child Labour by 2025: A Review of Policies and Programmes* (Report, 13 November 2017) 10.

Arguably, a more effective means of addressing child labour is the introduction of Australian anti-slavery legislation that imposes mandatory reporting.

3 *Low-Cost Factor and Worker Exploitation*

The aforementioned discussion indicates that low-cost production underpins the attractiveness of the RMG industry and is thus the core driver behind most of the RMG worker exploitation cases. In order to effectively comprehend the extent of this factor, it must be examined from the perspective of suppliers, outsourcing companies and the Bangladesh government.

(a) *Supplier Perspective*

There are over 7,000 RMG factories supplying textiles in Bangladesh.[97] Some of these factories are formal and registered by the relevant authorities and are thus accessible by labour inspectors.[98] Conversely, there are others that are informal, smaller factories employing fewer workers who are engaged in subcontracting work from formal factories.[99] This latter group of factories are often unregistered and not subject to relevant authorities' monitoring processes and inspections.[100] However, to a certain degree, both formal and informal factories have a similar work environment that encourages worker exploitation.[101]

The RMG sector in Bangladesh has experienced low technological development and thus relies on a level of labour intensity, predominantly including unskilled workers.[102] As discussed above, there are other RMG industry expenses beyond supplier control that cannot be reduced such as electricity, gas, machinery, rent and materials costs.[103] Labour, which amounts to 7 per cent of total production costs, remains the only flexible cost that can be significantly reduced.[104]

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97 Farhana and Syduzzaman (n 56) 21.

98 Labowitz and Baumann-Pauly (n 56) 4.

99 Ibid.

100 Ibid 16.

101 Ibid 5.

102 Aharif As-Saber et al, *Bangladesh RMG Roadmap Targeting US$50 Billion Export by 2021* (Report, 15 January 2016) 114.

103 Labowitz and Baumann-Pauly (n 56) 24.

104 Deloitte Access Economics (n 13) 14.

As indicated above, the Bangladesh labour cost is lower than other garment producers.[105] It has been described by Crane as 'value trap slavery':

> where primary industries that have become uncompetitive because of low market prices and high costs with existing technologies might perceive the necessity of coerced labour brought as close as possible to zero cost to survive.[106]

Slavery flourishes where high labour intensity and lower profit margins exist.[107] A low socio-economic environment is another factor that facilitates the practice of slavery, and can take different forms including unemployment, poverty and limited education.[108] 60 years ago, CS Lewis reflected on the characteristics of slavery, stating:

> We have on the one hand a desperate need; hunger, sickness, and the dread of war. We have, on the other, the conception of something that might meet it: Omnicompetent global technocracy. Are not these the ideal opportunity for enslavement? This is how it has entered before; a desperate need (real or apparent) in the one party, a power (real or apparent) to relieve it, in the other. In the ancient world individuals have sold themselves as slaves, in order to eat.[109]

Obtaining a low profit margin of 2 per cent from RMG factories or even less in the case of subcontractors, would make it unfeasible to demand decent wages, given that the majority of profits have been absorbed by foreign brands and retailers. This ideology was confirmed by Emdadul Islam, an owner and director of the Babylon Group, which employs more than 10,000 workers and supplies garments to well-known brands such as Tesco and River Island.[110] Islam stated:

> When companies do business with suppliers like us they should be able to understand the right kind of price for the articles they buy...Sometimes they seem to be void of any sense of that.

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105 Ibid.

106 Crane (n 15) 54.

107 Ibid.

108 Ibid.

109 CS Lewis, 'Willing Slaves of the Welfare State Is Progress Possible?', *The Observer* (United Kingdom, 20 July 1958).

110 Simon Parry, 'The True Cost of Your Cheap Clothes: Slave Wages for Bangladesh Factory Workers', *Post Magazine* (online, 11 June 2016) <http://www.scmp.com/magazines/post-magazine/article/1970431/true-cost-your-cheap-clothes-slave-wages-bangladesh-factory>.

> They don't give a damn if it is a rational price or not. They say, 'I can get it cheaper next door so you should be even cheaper.' When you talk about your cost or margins they say, 'This is something I don't deal with. I have my target.' When you raise ethical social issues, it is a one-sided conversation.[111]

(b) *Outsourcing Companies' Perspectives*

In an era of globalisation, it has become a familiar practice that companies, especially those from developed nations, are reliant on goods and services produced in countries where there are low labour standards, exploitation, human rights abuse and unsafe work environments. Furthermore, outsourcing brands and fashion companies are driven by low-cost textiles. As noted above, this is a significant inducement for retailers and brands to source from Bangladesh and might explain why many well-known retail brands such as Gap, H&M, Zara, Tommy Hilfiger and Calvin Klein produce their products in Bangladesh.[112]

Arguably, fashion brands are driven by low prices without consideration of the social and economic ramifications on suppliers and their workers. It is the authors' opinion that this needs to be revised in order to address the unintended consequences caused by greed — in the generation of huge profits which come at the expense of worker exploitation. For example, in 2016, Target Australia sold school uniform polo shirts made in Bangladesh for only AUD2.[113] This sparked intense debate as to how retailers could sell at such low prices without compromising worker entitlements.[114] For instance, a t-shirt made in Bangladesh and sold in Germany for 29 euros will return the Bangladesh workers 0.6 per cent of the retail price, while 12.5 per cent represents the brand's profit.[115] Retailers receive 42.6 per cent of the profit margin.[116]

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111 Ibid.

112 Adam Pasick, 'H&M and Zara Sign a Worker Safety Deal in Bangladesh: Will Gap Dare to Hold Out?', *QUARTZ* (online, 14 May 2013) <https://qz.com/84112/hm-zara-sign-a-worker-safety-deal-in-bangladesh-will-the-gap-dare-to-remain-a-hold-out/>.

113 Eryk Bagshaw, 'Target and Kmart Sell $2 School Uniforms, But at What Cost?', *The Sydney Morning Herald* (online, 16 January 2016) <http://www.smh.com.au/national/education/target-and-kmart-sell-2-school-uniforms-but-at-what-cost-20160112-gm4n1y.html>.

114 Ibid.

115 World Economic Forum (n 67) 25.

116 Ibid 25.

Arguably, the provision of just and fair wages for RMG workers is unlikely to result in a significant reduction in retailer profits. This was demonstrated in the 2017 Deloitte Access Economics study, which examined Australia's RMG supply chain and provided an estimate of the living wage of supply chain factory workers.[117] The study found that only 4 per cent of the price of a garment sold in Australia goes to the supply chain workers who make them.[118] However, in order for these workers to receive a living wage, it would cost retailers less than 1 per cent of the cost price.[119]

On this point, Nazma Akter, a former child factory worker and founder of the 37,000-member Awaj Foundation which defends labour rights in Bangladesh, stated:

> H&M, Primark, Asda, Tesco, M&S - they come here many of the brands buy direct through their own offices in Dhaka but may also employ third parties such as Top Grade because Bangladesh is cheap and they get cheap labour. It is not fair. Humans cannot be so cheap. There needs to be a balance - you cannot say you are trying to improve working conditions and help workers out on one hand when on the other hand you are not giving a fair price.[120]

(c) *Bangladesh Government Perspective*

Governments around the world are focused on encouraging investment. Some countries, like Serbia, provide lower labour costs as well as financial benefits to induce companies to establish their businesses there.[121] As an example, investors in Serbia are able to purchase land for reduced prices and on occasion, without cost.[122] Investors are also exempted from paying Value Added Tax ('VAT') on purchases such as construction materials, transportation, energy and fuel costs.[123]

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117 Deloitte Access Economics (n 13).

118 Ibid 4.

119 Ibid 4.

120 Parry (n 110) 5.

121 'Country Profile: Serbia', *Clean Clothes Campaign* (Fact Sheet, 2017) 4 <https://cleanclothes.org/livingwage/europe/factsheets/serbia/view>.

122 Ibid.

123 Ibid.

Low-cost production, as noted above, has been perceived by brands and fashion companies as a significant factor attracting them to outsource to Bangladesh, thus differentiating Bangladesh from other RMG competitors. For example, Bangladesh textile products are cheaper than the nearest geographical competitor, Cambodia, by up to 15 per cent.[124] Nevertheless, the RMG sector plays a vital role in the Bangladesh economy and constitutes over 80 per cent of total exports.[125] Ultimately, the growth and development of this sector has been achieved through low-cost labour. However, this accomplishment comes at the expense of worker rights and entitlements, including underpayment, exploitation, abuse and exposure to hazards such as unsafe workplaces and fire accidents.

It is argued that the Bangladesh government could play a convincing role in addressing worker exploitation if it enacts legislation to protect worker rights and entitlements, in addition to taking all necessary steps to enforce such entitlements. However, it is beyond the scope of the paper to examine this issue. Nevertheless, by increasing industry standards such as fair wages, improved working conditions and the provision of a healthy and safe environment, Bangladesh could lose its attractiveness as a low-cost RMG producer.[126] The shift might encourage brands and companies who outsource their products to Bangladesh to relocate to other low-cost producers such as Cambodia or Vietnam. Ultimately, this could explain the Bangladesh government's reluctance to increase the minimum wage.

Additional steps have been taken by the Bangladesh government to maintain its attractiveness to foreign brands. For example, the government has introduced measures to silence any disquiet by advocates for improved RMG worker rights and has established a special police force called the industrial police, to suppress RMG worker protests. The role of the industrial police is to ensure the safety and security of industries, and to uphold the rule of law for owners and workers.[127] The police are permitted take all necessary measures to prevent labour unrest in industrial areas and bring criminals to justice.[128]

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124 Chan Thul (n 69).

125 The World Bank (n 51) 7.

126 Berg, Berlemann and Hedrich (n 59) 5.

127 'About Us', *Industrial Police Bangladesh* <https://www.police.gov.bd/en/industrial_police>.

128 Ibid.

Political connections and corruption are additional factors that deter the government from addressing RMG worker concerns. For example, more than 30 RMG factory owners or their relatives are members of the Bangladeshi parliament.[129] Arguably, the Bangladesh government attempts to deny RMG workers' union representation in order to further silence and intimidate workers and critics on workers' rights issues. This is supported by the fact that less than 1 per cent of factories have recognised unions.[130] In addition, workers are often threatened and harassed for holding union membership and factory owners pay political leaders and thugs to keep unions away from their factories so that workers are not further encouraged to demand fair payment and better working conditions.[131] There are also allegations that union leaders have been imprisoned, or in some cases, killed.[132] For example, Aminul Islam, the former president of the Bangladesh Garments and Industry Workers' Federation and the main voice for worker rights in Bangladesh was abducted, tortured and killed in early April 2012.[133]

VI THE SOLUTION?

Notwithstanding the human costs to labourers in the form of exploitation, human rights abuse and the use of child labour, the aforementioned factors explain why suppliers, fashion brands and the Bangladesh Government have limited interest in paying fair wages and addressing worker concerns. These factors might also explain the demand for legislative intervention to force outsourcing brands and retailers to adhere to their corporate social responsibility of protecting human rights throughout their supply chains. This applies particularly in circumstances where both suppliers and the government are unable, or unwilling, to alleviate the suffering of workers.

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129 Claeson (n 58).

130 'Four Years after Rana Plaza: Steps in the Right Direction but a Lot Remains to be Done', *Clean Clothes Campaign* (Web Page, 26 April 2017) <https://cleanclothes.org/news/2017/04/21/four-years-after-rana-plaza>.

131 Björn Skorpen Claeson, *Our Voices, Our Safety: Bangladeshi Garment Workers Speak Out* (Report, December 2015) 21.

132 Ibid 21.

133 Claeson (n 58).

A *Addressing Modern Slavery in Supply Chains: Australia's Approach*

The introduction of legislation aimed at addressing modern slavery has become popular in many developed countries. The lack of action in addressing human rights abuses in underdeveloped countries where the abuse occurs (i.e. Bangladesh), underpins the utility of these statutory provisions to protect exploited workers. Accordingly, this paper will now proceed to analyse section 16 of the Australian Act.

B *Section 16 of the Australian Act*

Section 16 of the Australian Act requires reporting entities that earn an annual consolidated revenue of at least AUD100 million and are either an Australian or Commonwealth company who operates in Australia, to publish an annual slavery statement. The statement must include the following information:

1) the organisation's structure, operations and supply chains;
2) potential modern slavery risks in those operations and supply chains;
3) actions the entity has taken to assess and address the risks identified; and
4) how the entity assesses the effectiveness of those actions.[134]

Undoubtedly, section 16 of the Australian Act is a significant step towards acknowledging the common abuses occurring within supply chains. Moreover, the provision provides a measure likely to ameliorate the prevalence of supply chain slavery. Nevertheless, there are concerns regarding the effectiveness of section 16. For instance, entities must meet an annual income threshold of AUD100 million to be required to publish a slavery statement.[135] The obligation thus fails to capture companies earning less than the threshold and the provision does not impose any penalties for non-compliant companies. This lack of enforceability effectively leaves it at the discretion of companies to address the issue of supply chain abuse. Due to outsourcing companies often being driven by low-cost production, they are unlikely to fulfil this intended legislative objective and purpose. It follows, therefore, that the Bangladesh government and RMG factories' goal to maintain competitive labour costs to attract international outsourcing companies contributes to worker exploitation.

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134 *Australian Act* (n 7) ss 16(b)–(e).

135 Ibid s 16.

C *The Effectiveness of Section 16*

In addition to the concerns discussed above, there are other geo-political factors which suggest Australia needs to consider a different approach to addressing the issue of modern slavery in supply chains. These reasons will be enumerated below.

1 *Australia's Involvement with Slavery*

Internationally, Australia's dependence on modern slavery is perceived as low risk. This was demonstrated by the 2018 Global Slavery Index, which indicated Australia was one of few countries to have taken robust steps towards combatting modern slavery.[136] Nevertheless, approximately 25 million people who experience modern slavery around the world reside in the Asia-Pacific region alone, constituting 62 per cent of the total number of enslaved people globally.[137] The prevalence of slavery in this region is attributable to the high number of low-skilled workers involved in various industries that produce for global supply chains such as the food, garment and technology industries.[138] The top 4 Asia-Pacific countries with people working in slave-like conditions are: India (7,989,000 people), China (3,864,000 people), Pakistan (3,186,000 people) and Bangladesh (592,000 people).[139] Other countries with large numbers of enslaved people in the region are: Thailand (610,000 people), Cambodia (261,000 people), Malaysia (212,000 people) and Indonesia (1,220,000 people).[140] Garment imports to G20 countries are worth USD127.7 billion, thus making it the second industry at risk of modern slavery.[141]

Australia is exposed to a two-way slavery risk. Firstly, the country is geographically located in a region with a high proportion of unskilled workers, thus encouraging some Australian businesses to employ Asia-Pacific workers in slave-like conditions.[142] Recently, this was

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136 *Global Slavery Index 2018* (n 2) 3.

137 Ibid 87.

138 Ibid 7.

139 Ibid 88.

140 Ibid.

141 Ibid iv.

142 Senate Education and Employment Committee References Committee, *A National Disgrace: The Exploitation of Temporary Migrant Workers* (Report, 17 March 2016); 'Slaving Away: The Dirty Secrets behind Australia's Fresh Food' *The Australian Broadcasting Corporation* (Transcript, 4 May 2015) <http://www.abc.net.au/4corners/stories/2015/05/04/4227055.htm>; Laurie Berg and Bassina Farbenblum,

evident in the Australian hospitality, construction and services industries.[143] Secondly, many Australian company supplies are produced in the Asia-Pacific region, thus increasing the likelihood that the involved workers are exploited. Given these slavery risks, it is imperative to provide an effective measure that contributes towards reducing or eliminating the existence of slavery in this region. Influential countries in the Asia-Pacific region, like Australia, ought to take a leading role in combatting slavery so that others are encouraged to follow suit.

2 *The Impact of Section 16*

The impact of section 16 must be examined with reference to the difference the provision is likely to make for exploited Bangladeshi RMG workers and, more generally, for the 66 per cent of the world's enslaved people living in the Asia-Pacific region; the same region where several of Australia's products for consumption originate from. In addressing this issue, the operation of section 54 of the UK Act is appropriate to examine, given its similarity to the Australian provision and the fact that sufficient data has been collected regarding its effectiveness since its enactment in 2015. The only difference between the two acts is that the Australian Act does not impose mandatory reporting.

To date, the British experience has revealed that not all companies submit their statements when due.[144] In relation to the companies that did comply, the majority of the submitted statements did not meet the requirements of the UK Act.[145] It was identified that only 9 out of the 75 companies publishing statements met the minimum legal requirements and addressed all 6 criteria suggested in the UK Act.[146] According to Ergon Associates, 35 per cent of the submitted modern slavery statements did not outline the companies' risk assessment process,

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Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey (Research Report, 21 November 2017) 3.

143 Ibid.

144 'UK Modern Slavery Act: Analysis of Early Company Statements, New Guidance Available' *Business and Human Rights Resource Centre* (Web Page, March 2016) <https://business-humanrights.org/en/uk-modern-slavery-act-analysis-of-early-company-statements-new-guidance-available>

145 Ibid.

146 Ibid. Note that *UK Act* (n 6) s 54(5) suggests companies include the following information in relation to slavery in their statement: the organisation's structure, its business and its supply chains; its policies in relation to slavery and human trafficking; its due diligence processes; its risk assessment and associated processes; its monitoring and measurement processes; and the training available to staff.

as mandated by the UK legislation.[147] Furthermore, two-thirds of the statements did not identify priority risks in supply chains, countries or business areas.[148] Lastly, over 90 per cent of the statements poorly addressed the issue of contractor relationships; a matter that is crucial to risk management given that workers are less visible to outsourcing companies.[149] A failure to address this key issue may inadvertently facilitate an environment where human rights abuse is even more common.

Moreover, a survey conducted by the Ethical Trading Initiative and Hult International Business School involving 71 leading brands, retailers and companies, stated that '77% of companies believe there is a likelihood of modern slavery occurring in their supply chains.'[150] These concerns suggest that some companies do not appreciate the significance of section 54 of the UK Act and have not taken appropriate steps to address supply chain slavery.[151] The lack of penalty enforcement might explain why this non-compliant behaviour has gone unaddressed.

The Central District Court of California encountered the issue of legislative compliance and disclosure in *Barber v Nestlé USA, Inc*[152] *('Nestlé')*. In this case, the plaintiffs alleged that Nestl*é* breached the California Act by failing to disclose information on forced labour in its supply chains which provide ingredients for use in cat food products.[153] Ultimately, the court dismissed the allegation on the grounds of the so-called 'Safe Harbour Doctrine', stating that 'the Legislature has permitted certain conduct or considered a situation and concluded that no action should lie.'[154] Consequently, Nestl*é* was only obliged to meet the disclosure requirements of the California Act.[155]

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147 Ibid.

148 'Reporting on Modern Slavery: The Current State of Disclosure', *Ergon Associates* (Web Page, May 2016) 1 <http://ergonassociates.net/wp-content/uploads/2017/06/Reporting-on-Modern-Slavery2-May-2016.pdf?x74739>.

149 Ibid 3.

150 Quintin Lake et al, *Corporate Leadership on Modern Slavery: How Have Companies Responded to the UK Modern Slavery Act One Year On?* (Summary Report, November 2016) 8.

151 Business and Human Rights Resource Centre (n 30).

152 154 F. Supp. 3d 954 (Cal, 2015).

153 Ibid 957.

154 Ibid 958.

155 Ibid 959.

Against this background, there appears to be no specific requirement for companies to demonstrate they have taken steps to eliminate or prevent slavery in supply chains.[156] Nevertheless, given the UK Act was based on the California Act, the *Nestlé* decision might have implications for the UK Act,[157] which in turn, could impact section 16 of the Australian Act. It is argued that companies that fail to release statements or release them without adequately complying with the requirements of modern slavery legislation, might experience consumer backlash through a boycott of their products. This, in turn, might encourage companies to address human rights abuse in supply chains, especially given the introduction of certain initiatives that enable consumers to monitor a company's compliance with modern slavery legislation. These initiatives include the 'Modern Slavery Registry', the USA project 'KnowTheChain' and the 'Fashion Revolution', which was established following the Rana Plaza collapse with the aim to improve workers' rights and conditions in the fashion industry.[158]

A consumer boycott of Western brands who outsource to Bangladesh occurred during 2013, in the aftermath of the Rana Plaza factory collapse which killed over 1000 workers and injured hundreds more.[159] Using the boycott as leverage, consumers endeavoured to ensure that companies would provide safe environments for textile workers.[160] In response, some fashion brands established the Accord, which aimed to ensure that the health and safety of Bangladeshi RMG workers was improved.[161] However, a reliance on consumers' potential threat to brand value is rarely an effective strategy, even if it might encourage companies to address human rights abuse in supply chains. Firstly, not all consumers are concerned about human rights abuse in supply chains, despite the aftermath of the Rana Plaza collapse implying otherwise. Arguably, the reaction of consumers following this incident was partly due to the number of

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156 Business and Human Rights Resource Centre (n 144).

157 Joanne Keillor and Oliver Elgie, 'Californian Slavery in Supply Chain Judgment Provides Case Study for UK' *Lexology* (Brief, 8 March 2016) <https://www.lexology.com/library/detail.aspx?g=5a202ba1-0704-41ec-9ca0-c295e8ffa9fd>.

158 'Modern Slavery Registry', *Business & Human Rights Resource Centre* (Web Page) <https://www.modernslaveryregistry.org/>; 'Know The Chain', *KnowTheChain* (Web Page, 2019) <https://knowthechain.org/>; Fashion Revolution (n 33).

159 Elizabeth Paton, 'After Factory Disaster, Bangladesh Made Big Safety Strides. Are the Bad Days Coming Back?', *The New York Times* (online, 1 March 2020) <https://www.nytimes.com/2020/03/01/world/asia/rana-plaza-bangladesh-garment-industry.html>.

160 Al Bhadily (n 57) 165.

161 Ibid 165.

casualties caused by this industrial disaster. Secondly, it is argued that consumers who are concerned about human rights abuse in supply chains might be unable to identify exactly which companies have been shamed for failing to comply with requirements. Usefully, the Australian Act provides for a public list of reporting entities and a government run register of statements, which is not available under the UK Act.[162] Lastly, a reliance on consumer action would shift the responsibility of observing and addressing human rights abuse from the outsourcing companies to consumers, which should not be the case.

Furthermore, section 16 of the Australian Act does not comply with the 3 pillars of the UNGPs:

1) States' existing obligations to respect, protect and fulfil human rights and fundamental freedoms;
2) The role of business enterprises as specialized organs of society performing specialized functions, required to comply with all applicable laws and to respect human rights;
3) The need for rights and obligations to be matched to appropriate and effective remedies when breached.[163]

It should be noted that these principles are applicable to all states and businesses regardless of their structure, sector, location, size and ownership.[164] Guiding Principle 17 requires businesses to undertake human rights due diligence to identify human rights abuses and take appropriate steps to prevent and address these abuses.[165] This includes preventing and eliminating modern slavery.[166]

VII THE ALTERNATIVE?

In evaluating the best alternative to section 16 of the Australian Act, the objective of eliminating or reducing slavery in supply chains needs to be at the forefront. Although section 16 of the Australian Act is a step towards the protection of supply chain workers, it is not an

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162 Amy Sinclair and Justine Nolan, 'Modern Slavery Laws in Australia: Steps in the Right Direction?' (2020) 5 *Business and Human Rights Journal* 165; See also *Australia Act* (n 7) s 16A.

163 *Guiding Principles on Business and Human Rights: Implementing the United Nations 'Protect, Respect and Remedy' Framework* (United Nations Doc HR/PUB/11/04, 2011) 1.

164 Ibid.

165 Ibid 17.

166 Australian Lawyers for Human Rights (n 30).

appropriate mechanism to protect workers when compared to alternate legislation in other jurisdictions. Essentially, the effectiveness of section 16 is limited by its threshold, lack of mandatory reporting enforcement and provision of ineffective remedies for affected supply chain workers.

Under the Australian Act, the threshold requirement for company reporting is AUD100 million, compared to the NSW Act threshold of AUD50 million and the UK Act threshold of AUD66 million.[167] Arguably, reducing the Australian Act threshold to AUD50 million to mirror the NSW Act would extend coverage of businesses significantly and result in increased levels of worker protection.[168]

The enforcement of mandatory reporting is another characteristic likely to improve the effectiveness of section 16 of the Australian Act. Although the Australian Act requires businesses to report on supply chain slavery concerns, there is no penalty imposed for failing to do so.[169] In contrast, the NSW Act imposes financial penalties where an organisation has failed to prepare a modern slavery statement,[170] when the statement has not been made public[171] and in circumstances where the statement includes false or misleading information.[172] Under the NSW Act, these failures would attract financial penalties of up to AUD1.1 million.[173] Whilst these penalties may not be a significant deterrent for multi-million dollar companies, it remains a commendable step.

Another credible measure introduced by the NSW Act and not present in the Australian Act is the establishment of an Anti-Slavery Commissioner.[174] This independent body promotes public awareness of slavery concerns and provides advice on steps that should be taken to eliminate and monitor risks of modern slavery in supply chains.[175] It is argued that the Australian Act

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167 *UK Act* (n 6) s 54.

168 *NSW Act* (n 6) s 24(1)(b).

169 See *Australian Act* (n 7) s 16.

170 Ibid s 24(2).

171 Ibid s 24(6).

172 Ibid s 24(7).

173 Ibid ss 24(2), (6), (7).

174 Ibid s 6.

175 Ibid s 9.

should include a similar provision that imposes a duty on companies to ensure that actions are taken to reduce or eliminate slavery within its supply chains. [176] Such a provision would should also provide an avenue for exploited workers to pursue justice and remedies where necessary.[177]

In addition to the merits of the NSW Act identified above, consideration should be given to the French legislation approved on 23 March 2017 by the French Constitutional Council.[178] This legislation introduced a corporate duty of vigilance or corporate duty of care (French law) in article 1, which reads as follows:

> Establish and implement a diligence plan which should state the measures taken to identify and prevent the occurrence of human rights and environmental risks resulting from their activities, the activities of companies they control and the activities of sub-contractors and suppliers on whom they have a significant influence.[179]

The effectiveness of the French law when compared to the Australian Act is outlined below. Firstly, the French law effectively addresses concerns faced by supply chain workers through the inclusion of other areas that are not present in the Australian Act, as discussed below. The protective coverage of the legislation is thus widened to include human rights, health, safety and environmental protection.[180] This is an important characteristic of the French law, considering the possibility of supply chain workers experiencing threats in a variety of different forms, as evidenced by the Rana Plaza collapse.

Secondly, the French law does not limit its application to parent companies, subsidiaries and suppliers like the Australian Act does, but rather, extends its coverage to include sub-contractors.[181] This suggests the French law aims to protect as many supply chain workers as

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176 Business and Human Rights Resource Centre (n 30).

177 Ibid

178 *Corporate Duty of Vigilance Law* (France) (n 5) art 2.

179 Ibid art 1.

180 Herbel Consulting, 'France's Loi De Vigilance, Global Compact UK Modern Slavery Meeting' (Power Point Presentation, 12 September 2017) <https://www.business-humanrights.org/sites/default/files/documents/Herbel%20Consulting_Presentation%20Global%20Compact%20UK_20170912-1.pdf>.

181 Ibid 4.

possible. Moreover, the enforceability mechanism contained in the French law is much more effective than the Australian Act in curtailing modern slavery and other human rights abuse present in supply chains. Under the French law, companies that fail to provide plans and measures to address slavery and other abuse are afforded 3 months to comply.[182] Upon expiration of the 3-month period, non-compliant companies are vulnerable to penalisation by a court.[183]

Thirdly, Article 2 of the French law entitles parties affected by any non-compliance to take legal action for compensation and liability for damages.[184] In these instances, the burden of proof rests with victims who need to prove the company is at fault, and that a link exists between the fault and subsequent damage endured.[185] The first case to be commenced under the French law was initiated by 6 NGOs in 2019 against a French energy company called 'Total'.[186] The basis of the case was that Total failed to meet its environmental and human rights obligations in Uganda and Tanzania.[187] On January 30, 2020 the French High Court of Justice decided it was not within its jurisdiction to hear the case, which must be brought before a commercial court.[188] Nevertheless, as the outcome of this case indicates, there are many challenges that the French law might encounter. This might include practicality of the legislation in terms of how French authorities and courts can verify a company's actions towards addressing slavery concerns, especially those occurring in different jurisdictions. Whilst the utility of this law is yet to be determined, it is expected that this reform is a step toward eradicating the persistence of supply chain slavery.

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182 'French Corporate Duty of Vigilance Law - Frequently Asked Questions', *European Coalition for Corporate Justice* (Web Page, 2016) 4 <http://corporatejustice.org/documents/publications/french-corporate-duty-of-vigilance-law-faq.pdf>.

183 Ibid

184 Ibid.

185 Ibid.

186 See *Friends of the Earth et al. v. Total*, Naterre High Court, 30 January 2020 <https://climate-laws.org/geographies/france/litigation_cases/friends-of-the-earth-et-al-v-total>.

187 Ibid.

188 Ibid.

VIII CONCLUSION

This paper examined the difficult issue of modern slavery in the RMG industry, with particular focus on supply chain enslavement. Western society has become increasingly reliant on low-cost products primarily produced in Asia and evidence demonstrates that there is little sign of decline in this respect.[189] Unfortunately, the elevated demand for RMG has highlighted the mistreatment and exploitation of RMG labour workers, including children, who remain poorly remunerated, subject to human rights abuse and at significant risk of exposure to unsafe work environments.

In particular, Bangladesh RMG workers experience an elevated risk of mistreatment as a result of the combined actions of suppliers, outsourcing companies and the Bangladesh government. By continually depressing labour costs, suppliers have contributed to worker exploitation, as have outsourcing companies, who remain driven by low Bangladeshi prices at the expense of fair remuneration. Further, to maintain Bangladesh's attractiveness as a low-cost RMG producer to foreign companies, the government has failed to adequately protect worker rights and mandate safe working conditions, thus contributing to extremely high slavery levels and an elevated risk of exposure to workplace injury or death. The Rana Plaza collapse is a recent, sobering example of this concern. The Bangladesh RMG industry is relevant to Australia as it remains a prominent source of outsourcing for Australian companies due to its lower wage costs than comparable jurisdictions.

Notwithstanding international activism through the implementation of human rights instruments and protocols, the introduction of legislation by developed countries aiming to address modern slavery and protect exploited workers has become popular. This is especially in circumstances where the workers' country of origin has not actively addressed modern slavery. As a result, countries such as the United States, Brazil, the Netherlands and the United Kingdom have introduced anti-slavery legislation. Typically, these legislative instruments impose due diligence obligations on companies to address modern slavery or require that they publicly disclose their efforts to combat modern slavery. The Australian Act includes legislative provisions that align with the UK Act, which itself is based upon the California Act.

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189 'Why the World Needs Sweatshops', *North Eastern University Economics Society* (Web Page, 19 October 2016) <https://web.northeastern.edu/econsociety/why-the-world-needs-sweatshops/>.

The utility of such development is by no means certain. Notwithstanding the tangible benefit of the Australian Act, which requires disclosure of commercial operations in supply chains, its lack of enforceability in the event of non-disclosure remains a significant disadvantage to the Australian approach to modern slavery.

Moreover, Australia is geographically compromised given the temptation to employ Asia-Pacific workers locally in substandard, slave-like environments and the fact that many Australian company supplies are sourced from the Asia-Pacific region, where worker exploitation is most likely to occur.[190] A more robust alternative to the Australian Act is to have legislation that is modelled upon French law. The French legislation encompasses a duty of vigilance or corporate duty of care to combat slavery. Usefully, it incorporates human rights, health, safety and environmental protection with a wider legislative reach than the UK legislation which provided the model for the Australian Act.[191] Moreover, the French Act's extension of the legislative provisions to sub-contractors of parent companies provides enhanced protection to supply chain workers, which is not currently present in the Australian legislation. The French legislation also provides more forceful penalties for non-compliance.[192] More investigation and research on the impact of supply chain slavery from an Australian perspective is, however, needed to further advance protection of often exploited and marginalised workers, who sadly remain dispensable in a modern society fixated on low-cost consumer goods production.

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190 *Global Slavery Index 2018* (n 2) 3.

191 *Corporate Duty of Vigilance Law* (France) (n 5).

192 Ibid art 2.

BOOK REVIEW

A REVIEW OF 'BLACKOUT: HOW IS ENERGY-RICH AUSTRALIA RUNNING OUT OF ELECTRICITY?'

MONIQUE EESON*

Title:	*Blackout: How is Energy-Rich Australia Running Out of Electricity?*
Author:	Matthew Warren
Publisher:	Affirm Press
Format:	Paperback/304 pages
ISBN:	9781925870176
Retail Price:	$29.00

I AUTHORS' BACKGROUND

Matthew Warren is a journalist and economist who has worked in the energy sector for more than 15 years. In that time, he has been involved with a number of industry organisations, including the Australian Energy Council, the Energy Supply Association of Australia and the Clean Energy Council. Warren has also been a lobbyist for both mining companies and renewable energy companies; thus, he has been on both sides of the debate.

II INTRODUCTION

Blackout: How is Energy-Rich Australia Running Out of Electricity?[1] was published in 2019 and discusses the National Energy Market ('NEM') in Australia's Eastern States. Warren gives a well-rounded insight into the NEM by combining topical issues often discussed in the media with thorough, scientific explanations of key electricity concepts.

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* Monique Eeson is a Bachelor of Laws student at Curtin University.

1 Matthew Warren, *Blackout: How is Energy-Rich Australia Running Out of Electricity?* (Affirm Press, 2019).

III CHAPTER SUMMARIES

The book is made up of 10 chapters that strike a good balance between theory and application.

Chapter One lays a strong foundation by introducing the concept of electricity and where it comes from. Chapter Two delves straight into the topical issue of climate change and how it has affected electricity in Australia. Chapter Three provides a thorough insight into the electricity crisis in Australia, and is supported by Chapter Four which explains how the electricity grid works. Chapters Five through Eight collectively discuss the role renewable energy plays in Australia. Chapter Five begins by giving an in-depth but approachable description of what renewables are, and is followed by Chapter Six, which discusses the lack of firm power as a major hurdle for all forms of renewable energy. Chapter Seven focuses on the prevalence of rooftop solar in Australia and why it is so common. To finish off Warren's discussion of renewables, he gives his thoughts on whether renewable grids will ever be reliable. The final two chapters conclude the book in a practical and well-rounded way by discussing what consumers can do in their daily lives to tackle the issues the electricity sector faces, and what Australia's energy future holds.

Overall, the book is structured very logically, incorporating technical discussions, where appropriate, and includes examples, practical comments and humour to keep audiences engaged.

A *Setting the Scene*

The Introduction and Chapter One naturally begin the book by introducing the concept of electricity and where it comes from. On its face, this may appear to be a mundane and mechanical concept but, in a series of rhetorical questions and relatable answers, Warren is successful in illustrating society's dependence on the mysterious flow of electrons that is electricity. The Introduction sets the scope of the book by introducing the NEM; the unified electricity grid that spans Queensland, New South Wales, Victoria, South Australia and Tasmania. From here, it quickly becomes apparent that the book's focus is the NEM and the issues it faces.

Another important aspect of the beginning of the book is the introduction to the relationship between politics and the electricity sector. Warren's analysis of this relationship is balanced and factual as he objectively explains the significance of the various policies and initiatives

from both sides of politics that have contributed to the state of the NEM. The Introduction is highly effective as it gives the perfect amount of context to the reader to enjoy the rest of the book.

In Chapter One, Warren takes a journey through history to explain how our understanding of electricity has evolved. He provides a comprehensive insight into the development of electricity, from its discovery to the creation of batteries, its commoditisation and the wonders brought about by the new technological millennium. Throughout each section of the chapter, Warren explains important concepts like watts and the storage of electricity in plain English.

Chapter Two turns to discuss how climate change has impacted electricity in Australia by discussing the intricate relationships that exist between science, politics and business. Warren begins by explaining the science behind climate change before examining policies like the Kyoto Protocol, and Australia's response to recent droughts. He then draws readers' attention to the business of electricity to illustrate the balance businesses must strike between making a profit for shareholders and the maintaining their social licence with regard to climate change.

Now with a sufficient level of base knowledge, Chapter Three addresses the causes of the 'electricity crisis'. This crisis is a result of the NEM's transition from traditional energy sources, like coal-fired power stations, to renewable, clean energy such as hydroelectricity, solar panels, wind farms and the increased use of batteries. The chapter illustrates why this transition is difficult and describes a series of causes, including reactive policies, a lack of bi-partisan support and the rapid increase of renewable sources. To demonstrate the severity of the issues, Warren dedicates time to discussion of the infamous 2016 South Australian blackout, which occurred as a result of the poor integration of renewables to the NEM.

Chapter Four shifts back to a theoretical perspective and explains how the electricity grid that forms the NEM works. This chapter is relatively technical compared to the rest of the book as it discusses how electricity is currently sold on the Market - a topic which is the subject of potential law reform efforts; the structural issues that face the Market, like building enough interconnectors; balancing supply and demand; and increasing reliability to avoid events like the South Australian blackout. Warren makes it clear in this chapter that he considers there is room in the NEM for certain forms of renewable energy, especially those that are becoming increasingly competitive in price as their cost of production falls.

B *Renewable Energy*

Chapter Five details how different renewable energy sources work. Warren uses each section in the chapter to explain the mechanics of solar photovoltaic, wind, hydroelectricity, wave and tidal, bioenergy and geothermal technologies. Each section gives an overview of what the form of energy is, its advantages and disadvantages, and its utility for the NEM. This chapter is very valuable as it provides a foundation for the chapters that follow.

Chapter Six deals solely with the concept of firm power – that is, power that can be turned on and off as required. Because of this, it is crucial to any consideration of renewable energy, which is typically only available intermittently. Warren explains the lack of firm power is therefore one of the greatest challenges facing the integration of renewable energy. It is clear why Warren devotes a whole chapter to describing this practical aspect of renewable energy. In a similar fashion to the Chapter Five, Warren divides Chapter Six into the forms of renewable energy to discuss each in the context of firm power, and to give practical examples of how each source is overcoming this issue.

Chapter Seven contains an extensive discussion of rooftop solar power. In this insightful section, Warren provides a history of solar panels in Australia by discussing the government policies that drove the rapid uptake of panels, and the market for the hardware that was created as a result.

Chapter Eight focuses on the increasingly topical, and often divisive, issue of whether renewable grids can ever be reliable. Warren's key message in this chapter is that significant advances have been made for the upscale and reliability of renewable energy, but it is clear these are not enough to replace the National Energy Market's use of diesel generators and other similar technologies. Warren provides examples of the advances that have been made in this area, including the King Island Renewable Energy Integration Project and "Solar City" in Alice Springs.

C *Reaching a Conclusion*

Chapter Nine ponders the oft asked question: what can consumers do? Given electricity is a commodity that is consumed, Warren discusses the growing role of consumers as we become 'more active players in the grid'. Warren discusses key suggestions, including reducing demand, prioritising energy efficient options for appliances like hot-water systems, installing

smart meters to track electricity use, and actively engaging in the energy market to help create more competitive markets. These suggestions, and others included in the chapter, are relatable and practical examples that readers can implement, and therefore are incredibly insightful.

Chapter Ten concludes the book by discussing the future of electricity in Australia. Again, Warren addresses the issue of politics and argues that policy needs to be determined by science and lessons learned from the past, not by political ideologies. He reiterates the need for a plan for the future of the NEM which involves the cooperation of both government bodies and the private sector.

IV ANALYSIS

In the book's preface, Warren highlights the inaccessibility of the public debate regarding climate change and energy for everyday people. He notes that because energy is a topical and political issue, it is often challenging for lay people to find impartial information from which to form their own opinion. It appears he keeps these factors at the forefront of his mind throughout, to the great satisfaction of readers, to provide a balanced and approachable overview of a polarising debate.

Warren has a diverse background in the energy sector, as noted above, including involvement with organisations with opposing interests. Having worked for both the New South Wales Minerals Council, lobbying for the mining industry, as well as for the Clean Energy Council as a lobbyist for renewables, he has the knowledge and experience to provide a holistic view on this highly complex and controversial subject. A point that illustrates Warren's impartiality is the limited role politics plays in the perspectives presented in the book. While Warren explains the importance of politics in the industry, he provides a balanced view when discussing concepts that have been hijacked by politics and gives impartial and supported information readers can use to shape their own understandings.

One of the most notable aspects of the book is the language and tone Warren employs. His use of plain language, frequent headings and concise sentences allows him to distil complex electricity concepts and issues into simple ideas. Further, Warren's use of humour or relatable examples to convey an idea that would otherwise be mundane makes his writing both engaging and interesting. These techniques make it easier for a reader with little background knowledge of the topic to engage on a deeper level with the complicated information traversed in the book.

The intended audience of the book appears to be people with a limited understanding of electricity or the National Energy Market, as it includes a detailed introduction to important industry concepts. The book is unlikely to deliver new insights for someone who already has an in-depth understanding of the relevant market, however, it does provide a succinct summary that may be of use to this audience.

There are no in text citations or footnotes throughout the book, which makes it is difficult to find the sources of specific pieces of information. However, the bibliography is extensive and includes authoritative sources like key government reports, journal articles and other reports from industry bodies. While in text citations or footnotes are helpful, especially to further explore specific events or policies, their absence does not inhibit the utility of the book.

V CONCLUSION

In short, *Blackout: How is Energy-Rich Australia Running Out of Electricity* is balanced, informative and accessible. The complexities of the electricity market and renewable energy are broken down and explained with reference to clear science and a host of other supporting evidence. This book is recommended for anyone who wants to understand, or strengthen their understanding of, the National Energy Market or electricity more broadly.

CASE NOTES

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION v KING (2020) 94 ALR 293

RENEE CORREYA*

I INTRODUCTION

Australian Securities and Investments Commission v King ('*ASIC v King*')[1] is a landmark decision that clarified the meaning of the term 'officer' as defined in section 9 of the *Corporations Act 2001* (Cth) ('the Act'). The High Court confirmed that an officer includes any person who has the capacity to significantly affect a corporation's financial standing, regardless of whether that person holds or occupies a named office within the corporation.[2] The decision is set to have significant implications in the corporate landscape as it expands the scope of persons who may be subject to the statutory duties of an officer. It sends a strong message to Australian corporate groups in particular, that persons of influence cannot avoid liability for their actions by deliberately evading a formal designation of their responsibilities.[3] In light of the recent concerns raised in the *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*,[4] *ASIC v King* provides much needed clarification and imposes greater individual responsibility for corporate misconduct.

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1 (2020) 376 ALR 1 ('*ASIC v King*').

2 Ibid 42 [185].

3 Ibid 14 [46].

4 See generally *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, 1 February 2019).

II FACTS

Following the collapse of MFS Ltd, the Australian Securities and Investment Commission ('ASIC') commenced proceedings against Mr King, an executive director and the company's Chief Executive Officer. It was alleged Mr King had breached his duties as an 'officer of a responsible entity' under section 601FD of the Act in connection with his involvement in the misuse of corporate funds.[5] The misconduct involved several subsidiaries within the MFS Group.

MFSIM was the responsible entity of the Premium Income Fund ('PIF'), the largest managed investment scheme in the MFS Group. MFSIM entered into a $200 million loan facility to be used for the purposes of PIF only. However, in late 2007, MFSIM drew down funds from the loan agreement and used it to pay the debts of another, unrelated, subsidiary in the MFS Group.[6] The payment was made without any agreement, consideration, security or promise to repay, exposing PIF to the risk the money would not be restored.[7]

There was evidence Mr King had encouraged, authorised and approved this disbursement of funds by MFSIM, knowing that no benefit or consideration would pass to PIF.[8] Although Mr King did not occupy a recognised position within MFSIM, he acted as its 'overall boss' and assumed 'overall responsibility' for the company, including through the exertion of considerable influence over MFSIM's executive director, Mr White.[9] On this basis, ASIC argued that Mr King had the capacity to significantly affect the financial standing of MFSIM and was therefore liable as an 'officer' of the corporation pursuant to para (b)(ii) of the definition within the Act.[10]

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5 *ASIC v King* (n 1) 31 [125].

6 Ibid 4 [4].

7 Ibid 4 [7].

8 Ibid 7 [15].

9 Ibid 6 [14].

10 Ibid 5 [10].

III DECISION OF THE COURT OF APPEAL

The Queensland Court of Appeal overturned the decision of Douglas J at first instance, concluding Mr King was not liable as an officer of MFSIM. In reaching its decision, the Court adopted a narrow interpretive approach by seeking to confine para (b)(ii) to the ordinary meaning of an officer, that being 'a person who acts in a named office of a corporation in the sense of a recognised position with rights and duties attached to it'.[11] On this basis, the Court held Mr King lacked the requisite capacity to affect MFSIM because any capacity he had did not derive from his occupation of an office within the company.[12] The Court noted its concern that a 'literal' construction could lead to persons unrelated to the management of a corporation being saddled with the duties imposed on statutory officers.[13] ASIC appealed this decision to the High Court, arguing this was the incorrect construction when the text, history and purpose of para (b)(ii) are considered.

IV DECISION OF THE HIGH COURT

The High Court unanimously upheld ASIC's appeal, finding that Mr King was an officer of MFSIM and clarifying that para (b)(ii) of the definition of an 'officer' is not limited to individuals who hold or occupy a named office.[14] Rather, the definition extends to any person who has the capacity to significantly affect a corporation's financial standing.[15] The following section discusses the key features of the decision.

A *Textual Considerations*

The High Court conducted an extensive textual analysis in which it rejected the Court of Appeal's narrow construction of para (b)(ii) and preferred a broader reading of the text that was consistent with its legislative context, history and purpose.[16] The High Court placed

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11 *King & Others v Australian Securities and Investments Commission* [2018] QCA 352, 229 [969].

12 Ibid 72 [246].

13 Ibid 72 [247].

14 *ASIC v King* (n 1) 42 [185].

15 Ibid 42 [186].

16 Ibid 10 [29].

particular emphasis on the textual differences in the definitions of an officer.[17] Kiefel CJ, Gageler and Keane JJ highlighted the contrasting language of paras (a) and (b), concluding that para (a) captures individuals who hold a named office, while para (b) is intended to capture those who do not.[18] Nettle and Gordon JJ concurred on this point, stating that para (b) is essentially 'functional in character' — its concern being with the *quality* of a person's actions or capacity, rather than a person's formal designated position.[19]

When determining whether an individual will fall within para (b)(ii) of the definition, the Court held that the determinative factor is the extent to which the person is involved in the management of the corporation.[20] It stated that factors relevant to this inquiry are the role played by the person, what the person did or did not do within that role, and the relationship between his or her actions and the financial standing of the corporation.[21] The Court acknowledged the fluid nature of this issue and confirmed that it is a question of fact and degree, which will vary depending on the size, structure and circumstances of the company in question.[22]

In relation to Mr King's circumstances, the minority argued that the Court of Appeal took too narrow a view of Mr King's role by focussing purely on his acts and omissions within MFSIM.[23] The High Court drew attention to Mr King's overall responsibility of the MFS Group, his regular intervention in the business of MFSIM and his exercise of control over decisions regarding the allocation of MFSIM resources.[24] This evidence supported the conclusion that Mr King had significant capacity to affect MFSIM's financial standing.

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17 Ibid 9, 19.

18 Ibid 9 [24].

19 Ibid 22 [88].

20 Ibid 12 [40].

21 Ibid 23 [91].

22 Ibid 23 [92].

23 Ibid 19 [73].

24 Ibid.

B *Legislative History and Purpose*

In line with the principles of statutory interpretation, the majority noted that the legislative context, history and purpose of the Act follow the same direction as considerations of text.[25] Importantly, their Honours stated that the purpose of the Act — to protect shareholders and creditors — is best achieved through a broad interpretation of the definition.[26] Specific reference was made to corporate groups, with their Honours stating that a narrow construction would lead to the 'extraordinary' situation in which CEOs of parent companies are able to control and adversely affect the financial affairs of subsidiary companies, 'untrammelled by the duties that attach to officers of those companies'.[27]

C *Application to Third Parties*

Though not directly relevant to the issue on appeal, the High Court commented on the possibility of extending para (b)(ii) definition of an officer to third parties, including lenders, consultants and advisors.[28] Kiefel CJ, Gageler and Keane JJ left the question open, stating that the applicability of the definition will depend on the nature and extent of a counterparty's control over a corporation's decision-making qua management.[29] In the case of advisors and consultants, the majority distinguished between those who merely provide advice and those who are involved in the management of the corporation, with only the latter falling within the definition of an officer.[30]

V IMPLICATIONS

The High Court's decision in *ASIC v King* brings much needed clarity to the definition of an officer for the purposes of the *Corporations Act 2001* (Cth). Importantly, it confirms the potential for managerial responsibility to extend to individuals outside of the boardroom who direct and control significant aspects of a corporation's business despite lacking a formal

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25 Ibid 10 [29].

26 Ibid 14 [46].

27 Ibid.

28 Ibid 13 [42], 24 [96].

29 Ibid 13 [41].

30 Ibid 13 [42].

position.[31] In its recent discussion paper 'Corporate Criminal Responsibility', the Australian Law Reform Commission discussed the 'accountability gap' in relation to senior managers of large corporations.[32] It is argued *ASIC v King* contributes positively to this law reform agenda as it promotes greater individual liability for corporate misconduct.[33]

The decision is of great significance for Australian corporate groups. The High Court made it clear that in determining whether an individual is an officer, emphasis is placed on the individual's 'overall position of influence' rather than on acts or omissions in relation to a specific company.[34] According to ASIC Commissioner John Price, this 'substance-over-form approach' sends a clear signal to anyone running a company, in name or effect, that they should be responsible and held accountable for their actions'.[35] In light of the High Court's decision, Australian corporations should review their internal governance structures to ensure that all boundaries of responsibility are clearly articulated to minimise liability.

The most controversial aspect of the decision was arguably the minority's comments in relation to the extension of para (b)(ii) to include parties external to a corporation. Their rejection of the argument that this would be an unwarranted expansion of the definition sends a clear message that the High Court is taking a strict approach to individual liability for corporate misconduct.[36] As a consequence, external parties such as advisors and consultants are placed at an increased risk, particularly those involved in the management of financially distressed corporations.[37]

VI CONCLUSION

ASIC v King constitutes a landmark decision for Australian corporations. It clarifies that the definition of an officer in section 9(b)(ii) of the Act is to be interpreted literally, encompassing

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31 Australian Law Reform Commission, *Final Report: Corporate Criminal Responsibility* (Report No 136, April 2020) 396.

32 Ibid 419.

33 Ibid 396.

34 *ASIC v King* (n 1) 19 [73].

35 Australian Securities and Investments Commission, 'High Court of Australia Rules in Favour of ASIC in Finding Group CEO Was an 'Officer' of Subsidiary' (Media Release 20-060MR, 11 March 2020).

36 *ASIC v King* (n 1) 24 [96].

37 Ibid.

anyone with the capacity to significantly affect a corporation's financial standing. On one hand, it may be argued that the increased exposure to liability continues the erosion of the corporate veil within corporate groups, thus exposing Australian corporations to unprecedented legal liability. Conversely, it may also be said that the case represents a welcome extension of the statutory duties imposed on company officers in an era where corporate misconduct is a significant issue.

CFMMEU v PERSONNEL CONTRACTING: THE EMPLOYEE/INDEPENDENT CONTRACTOR DICHOTOMY

RENEE CORREYA*

I INTRODUCTION

The dichotomy between the modern employee and independent contractor is a topical issue in the employment and industrial landscapes. Currently, the law approaches the question with reference to a common law multi-factor test, which assesses the 'totality of the employment relationship' by having regard to a number of relevant indicia.[1] However, *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* ('*CFMMEU v Personnel*')[2] is an important case that highlights the tensions in the application of this approach to new and novel forms of labour, such as trilateral and multilateral working relationships.[3]

CFMMEU v Personnel involved a trilateral labour hire relationship between Mr McCourt, a labour hire agency titled Personnel Contracting Pty Ltd ('Personnel'), and a building company titled Hanssen Pty Ltd ('Hanssen'). The Construction, Forestry, Maritime, Mining and Energy Union ('CFMMEU') commenced proceedings on behalf of Mr McCourt, claiming that he was entitled to be paid as a casual employee under the relevant modern award, rather than as an independent contractor. On appeal, the Full Court of the Federal Court considered itself bound by the decision of the Western Australian Industrial Appeal Court in *Personnel Contracting Pty Ltd v Construction, Forestry, Maritime, Mining and Energy Union*[4] ('*Personnel v CFMMEU*') and thus concluded that Mr McCourt was an independent contractor of

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1 *Stevens v Brodribb Sawmilling Company Pty Ltd* (1986) 160 CLR 16, 29 (Mason J).

2 [2020] FCAFC 122 ('*CFMMEU v Personnel*').

3 Ibid [80].

4 [2004] WASCA 312 ('*Personnel v CFMMEU*').

Personnel.[5] However, the Court expressed its disagreement with this outcome and made a number of critical comments that raise some important questions about the viability of the multi-factorial test and its application to multilateral working relationships.[6]

II FACTS

Mr McCourt, a 22-year-old backpacker, entered into a labour hire contract with Personnel and was subsequently assigned to work as a general labourer for Hanssen.[7] The three parties entered into an 'Odco-style arrangement' whereby no contract existed between Mr McCourt and the 'requirer' of labour, Hanssen.[8] Rather, a contractual relationship existed between Mr McCourt and the labour hire agency, Personnel, and between Personnel and Hansen.[9] This type of trilateral arrangement derives its name from *Odco Pty Ltd v Building Workers Industrial Union of Australia,*[10] the first decision to consider the interaction between trilateral working relationships and the employee/independent contractor dichotomy. Since the decision was handed down, the 'Odco labour hire arrangement' has been widely used in the labour hire industry.[11]

The contract between Mr McCourt and Personnel expressly defined Mr McCourt as a 'self-employed contractor' and contained a warranty to this effect.[12] Mr McCourt was entitled to reject offers of work and was not required to wear a uniform. Notwithstanding these factors, the majority of Mr McCourt's circumstances favoured a finding of an employment relationship.[13] He was required to work regular hours as set by Hanssen and received a non-negotiable hourly rate of pay. When working on-site, Mr McCourt was subject to the direction and supervision of Hanssen and was unable to delegate his work to a third party. While the labour hire contract did not contain an exclusivity clause, Mr McCourt worked approximately

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5 *CFMMEU v Personnel* (n 2) [132].

6 Ibid [72], [185].

7 Ibid [2].

8 Ibid [5].

9 Ibid.

10 [1989] FCA 483.

11 *CFMMEU v Personnel* (n 2) [66].

12 Ibid [55].

13 Ibid [31].

50 hours a week, such that it was not feasible for him to have another job.[14] Additionally, the nature of Mr McCourt's work was low-skilled labour, and all tools and equipment were supplied by Hanssen with the exception of work boots, a hard-hat and a 'hi-vis' shirt.[15]

III PROCEDURAL HISTORY

On behalf of Mr McCourt, CFMMEU brought proceedings against Personnel and Hanssen, claiming an order for compensation and penalties on the basis that Mr McCourt was a causal employee and hence entitled to a greater hourly pay rate in accordance with the *Building and Construction General On-Site Award 2010.*[16] The critical question before the primary judge and on appeal was whether Mr McCourt was a casual employee of Personnel or an independent contractor retained by Personnel and supplied to Hanssen.[17]

At first instance, O'Callaghan J held that Mr McCourt was an independent contractor.[18] Notwithstanding the numerous factors indicating an employment relationship, O'Callaghan J took a contract-centred focus, placing decisive weight on the labour hire agreement between Personnel and Mr McCourt as a 'tie breaker' in characterising their relationship.[19] His Honour stated that the contractual terms and conditions were 'a clear statement' of the parties' intent.[20] The CFMMEU appealed this decision to the Full Federal Court.

IV DECISION

In a unanimous decision, the Full Federal Court, consisting of Allsop CJ, Jagot and Lee JJ, dismissed the appeal and upheld the decision at first instance. The Full Court's finding was

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14 Ibid [60].

15 Ibid.

16 Ibid [4].

17 Ibid [3].

18 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806 [181].

19 *CFMMEU v Personnel* (n 2) [116].

20 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806 [178].

largely based on constraints of legal authority deriving from *Personnel v CFMMEU*, rather than on the factual circumstances present before it.[21]

Personnel v CFMMEU was a materially identical case that was decided in 2004 and involved Personnel entering into an Odco labour hire arrangement with two workers in the same position as Mr McCourt.[22] The West Australian Industrial Appeals Court upheld the validity of the arrangement, concluding that the workers were independent contractors.[23] Allsop CJ, Jagot and Lee JJ were reluctant to overturn this decision, placing crucial importance on the public policy of comity.[24] Lee J stated that a departure from the case would create an inconsistency in the way the law applies to Odco-style arrangements, particularly for labour hire companies who have operated on the basis that this arrangement 'has a valid and legitimate foundation within the law'.[25]

This was arguably the most controversial aspect of the decision, as illustrated by the judges' frustration with the outcome it created in Mr McCourt's circumstances. Lee J stated that Mr McCourt's classification as an independent contractor was 'less than intuitively sound', while Allsop CJ held that if unconstrained by authority, a finding of causal employment would have been favoured.[26] His Honour emphasised that Mr McCourt had no 'aspect of business', no expressed desire to act in any capacity other than as a labourer, merely sought remuneration for deployment and worked under the direction and control of Hanssen.[27] Accordingly, the Court took a critical view of the current state of the law, noting the ambiguity and inconsistency produced by the multi-factorial assessment and the 'tensions' in its application to new and novel forms of labour, such as labour hire arrangements and digital platforms.[28] The remainder of this section discusses these key tensions.

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21 Ibid [31], [185].

22 Ibid [185].

23 *Personnel v CFMMEU* (n 4) [41].

24 *CFMMEU v Personnel* (n 2) [125]–[132].

25 Ibid [129].

26 Ibid [31], [185].

27 Ibid [31].

28 Ibid [76], [80].

A *Application of Control*

Lee J took the view that the control indicium of the multi-factor test is 'not particularly helpful' in characterising multilateral arrangements.[29] At first instance, O'Callaghan J concluded that the control indicia weighed against a finding of employment because it was ultimately the 'requirer' of labour, Hanssen, who directed and controlled Mr McCourt's work rather than Personnel.[30] On appeal, CFMMEU counter-argued that regardless of which party exercised control, it was still control 'in the relevant sense' and hence was an indication of an employment relationship.[31] The Full Court dismissed both arguments, noting that the whole purpose of a labour hire arrangement is to separate the provider and requirer of labour, and hence the search for control is placed at a 'fundamental tension' and yields a neutral result.[32]

B *Business on Own Account*

The Full Court concluded that O'Callaghan J gave insufficient weight to the fact that Mr McCourt was not conducting a business or trade on his own account.[33] Lee J labelled it a 'surprising result' to ascribe the label of independent contractor to a 22-year-old backpacker who turns up to a worksite to 'sweep floors and take out the bins'.[34] Nevertheless, his Honour declined to give this indicium central focus, arguing that it must be 'assessed in light of the whole picture'.[35]

C *Contractual Terms*

A particularly contentious issue was the weight to be placed on the parties' contractual terms. The Full Court expressed strong criticism of the primary judge's use of the parties' contract as a 'tie breaker' when all other indicia were evenly balanced.[36] Lee J highlighted the potential

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29 Ibid [167].

30 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2019] FCA 1806 [140].

31 *CFMMEU v Personnel* (n 2) [165].

32 Ibid [87].

33 Ibid [181].

34 Ibid.

35 Ibid [96] (emphasis omitted).

36 Ibid [116].

for 'contractual obfuscation' in multilateral relationships, making specific reference to commercially dominant parties who, like Personnel, are in a position to dictate the terms of a contract on a take-it-or-leave-it basis and thus perpetuate their own narrative, which may not reflect the true nature of the working relationship.[37] Accordingly, the Full Court concluded that the contractual terms between Personnel and Mr McCourt should not be given decisive importance.[38] This decision represents a departure from the traditional 'contract-centred' focus of the characterisation inquiry and aligns itself with the more recent authorities of *Fair Work Ombudsman v Quest*[39] and *Jamsek v ZG Operations Australia Pty Ltd*,[40] where the relationship between the parties was determined on the circumstances as a whole, contrary to the relevant contractual stipulations.

V COMMENTARY

While *CFMMEU v Personnel Contracting* did not set new precedent, the Full Court's critical comments on the multi-factorial test and its application to multilateral arrangements is a strong indication that this area of law is being called into question and may soon be the subject of statutory reform.

The Full Court's deviation from the traditional 'contract-centred' focus indicates modern courts are taking an increasingly substance-over-form approach to the characterisation inquiry.[41] The decision should be viewed alongside *Jamsek v ZG Operations Australia Pty Ltd*,[42] which was handed down just one day prior. In that case, the Federal Court concluded that two truck drivers engaged as independent contractors for 35 years were in fact employees.[43] When viewed cumulatively, the cases serve as an important reminder for labour hire companies to ensure that the terms and conditions of their contracts truly reflect the nature of their relationships. Lee J went one step further and suggested the increased focus on intuition

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37 Ibid [117].

38 Ibid.

39 (2015) 228 FCR 346.

40 [2020] FCAFC 1934.

41 *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* [2020] FCAFC 122 [99].

42 [2020] FCAFC 1934.

43 Ibid.

and practical reality means that the 'days of the Odco system may be numbered'.[44] This comment serves as a warning that law reform may be on the horizon and that Odco-style arrangements may no longer be tolerated as a legitimate basis to engage independent contractors.[45]

The Court also raised concerns about the rigid binary that courts are forced to apply in the characterisation inquiry. [46] Lee J stated that 'the prevalence of trilateral relationships, the evolution of digital platforms and the increasing diversity in worker relationships has evolved in a way that the traditional [employee/independent contractor] dichotomy may not necessarily comprehend or easily accommodate'.[47] These comments add to growing societal concerns that Australia's employment law does not easily accommodate the on-demand workforce, including the 'gig-economy', labour hire arrangements and out-sourced workers.[48] Lee J's reference to the United Kingdom's 'tripartite system of classification' invites the suggestion that similar law reform is needed in Australia to cater for our evolving employment and industrial relations landscape.[49] Overall, *CFMMEU v Personnel* is therefore an important case that brings to light a number of underlying issues in Australia's employment law system, particularly in relation to new and novel forms of labour.

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44 *CFMMEU v Personnel* (n 2) [188].

45 See, eg, State of Victoria, *Report of the Inquiry into the Victorian On-Demand Workforce* (Final Report, 12 June 2020).

46 *CFMMEU v Personnel* (n 2) [72].

47 Ibid.

48 Ibid; See also Anna Patty, 'A "Third Way": The Controversial Push for a New Type of Worker', *Sydney Morning Herald* (online, 16 February 2019) <https://www.smh.com.au/business/workplace/a-third-way-the-controversial-push-for-a-new-type-of-worker-20190212-p50x7a.html>.

49 *CFMMEU v Personnel* (n 2) [72].

AUSTRALIAN COMPETITION AND CONSUMER COMMISSION v PACIFIC NATIONAL PTY LTD [2020] FCAFC 77

AIDEE VARAN*

I INTRODUCTION

On 6 May 2020, the Full Court of the Federal Court of Australia dismissed an appeal from the Australian Competition and Consumer Commission ('ACCC') in respect of its case against Pacific National.[1] This matter was heard before Middleton, Perram and O'Bryan JJ. The ACCC alleged that Pacific National's proposed acquisition would contravene section 50 of the *Competition and Consumer Act 2010* (Cth) *('CCA')*.[2] This provision relevantly provides that a corporation must not acquire shares in the capital of a body corporate or acquire any assets of a person if that acquisition would have the effect, or be likely to have the effect, of substantially lessening competition ('SLC') in any market within Australia.[3] The case focuses on and confirms the standard of proof which is to be applied to the term 'likely', pursuant to section 50 of the *CCA*, as well as other provisions of a similar scope under the *CCA*.[4] The case of *Australian Competition and Consumer Commission v Pacific National Pty Ltd* [2020] FCFC 77 (*'Pacific National Appeal*') is significant as it gives entities seeking to engage in a merger or acquisition greater guidance as to the standard their conduct will be held to in relation to competition concerns.[5]

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1 *Australian Competition and Consumer Commission v Pacific National Pty Ltd* [2020] FCAFC 77 *('Pacific National Appeal').*

2 Ibid [275]; *Competition and Consumer Act 2010* (Cth) s 50 (*'CCA'*).

3 Ibid.

4 *Pacific National Appeal* (n 1) [203].

5 Ibid.

II PROCEDURAL HISTORY

A *Background*

Pacific National Appeal centred around the sale of the Acacia Ridge Terminal ('Terminal') from Aurizon to Pacific National, which was agreed on in July 2017.[6] The Terminal was a multi-user rail terminal used to transfer freight from the standard-gauge interstate rail network to Queensland's narrow-gauge rail network.[7] Pacific National was a major user of the Terminal and the largest provider of rail line haul services in Australia by revenue and volume of freight transported.[8]

Under the business sale agreement ('Agreement') between Pacific National and Aurizon, completion on the sale of the Terminal was conditional on, inter alia, the parties receiving competition law approval.[9] The Agreement specifically stipulated that this could be obtained through receiving informal clearance from the ACCC. This would confirm that, in the ACCC's opinion, the proposed acquisition would not contravene section 50 of the *CCA*.[10] Alternatively, the Agreement provided that approval could be obtained through receiving authorisation from the Australian Competition Tribunal or through a declaration from the Federal Court that the proposed acquisition would not breach section 50 of the *CCA*.[11] The respondent pursued the informal clearance avenue, which remains the most common option in this arena.[12]

The informal clearance investigation took place around July 2018. The ACCC ultimately refused to grant clearance, objecting to Aurizon and Pacific National's planned transaction.[13] As the proposed acquisition involved a vertical arrangement, because the two parties operated at different functional levels, the ACCC was concerned with the linking of previously separated

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6 Ibid [1].

7 Ibid.

8 Ibid.

9 Ibid [2].

10 Ibid. ACCC, *Informal Merger Review Process Guidelines* (September 2013) [1.8] ('*Merger Guidelines 2013*').

11 *Pacific National Appeal* (n 1) [2].

12 *Merger Guidelines 2013* (n 10); Arlen Duke, 'Corones' Competition Law in Australia' (Thomson Reuters, 7th ed, 2018) 478 [8.370].

13 *Pacific National Appeal* (n 1) [3].

functions towards the same ownership and control.[14] Specifically, there was concern that if the acquisition went ahead Pacific National would discriminate against third parties seeking to use the Terminal, which would raise barriers to entry in the interstate rail linehaul services market.[15]

The ACCC subsequently commenced proceedings against Pacific National in the Federal Court of Australia, contending that the proposed acquisition of the Terminal would contravene section 50 of the *CCA*.[16]

B *First Instance*

On 15 May 2019, Beach J delivered his judgment in *Australian Competition and Consumer Commission v Pacific National Pty Limited (No 2)* [2019] FCA 669 (*'Pacific National No 2'*).[17]

The ACCC contended that Pacific National's acquisition of the Terminal would be likely to SLC in either a single market comprising the supply of rail linehaul services for the transport of intermodal freight over long distance on the North-South and East-West, or alternatively in separate markets for the North-South and East-West corridors.[18] The ACCC asserted that this would ultimately deter new entrants who would be in competition with Pacific National from providing linehaul services in these markets, thus violating section 50 of the *CCA*.[19]

During the trial, Pacific National proffered a behavioural undertaking to the Court (which essentially is a promise regarding future conduct), that they would not engage in discriminatory conduct against their competitors when providing access to the Terminal. This was intended to address the ACCC's anti-competitive concerns arising from the proposed vertical arrangement.[20] His Honour conceded that in the absence of the undertaking, Pacific National

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14 Ibid; Duke (n 13) 435 [8.10]; *ACCC, Merger Guidelines* (November, 2008) [5.18]-[5.31].

15 *Pacific National Appeal* (n 1) [131].

16 *Australian Competition and Consumer Commission v Pacific National Pty Ltd (No 2)* [2019] FCA 669 ('*Pacific National No 2*'); Australian Competition and Consumer Commission, 'Federal Court Dismisses ACCC Appeal on PN Aurizon Case' (Media Release, 91/20, 6 May 2020) ('*91/20 Media Release*').

17 Ibid.

18 Ibid [414].

19 Ibid.

20 *CCA* (n 2) s 87B; *Pacific National No 2* (n 17) [49].

may have the ability to dictate the terms on which access is granted, including price.[21] His Honour noted that without the undertaking, 'on balance and not without some hesitation', he would have accepted the ACCC's case.[22] However, upon accepting the undertaking, Beach J found that this would remove the threat of discrimination and thus any assumed anti-competitive harm stemming from the acquisition.[23] Therefore, his Honour ultimately rejected the ACCC's challenge to Pacific National's acquisition of the Terminal.[24]

C *On Appeal*

On 26 June 2019, the ACCC lodged a notice of appeal against Beach J's decision, although this was subsequently amended on 26 November 2019. The appeal was heard by the Full Court of the Federal Court from 17 February to 20 February 2020.[25]

The ACCC challenged the trial judge's acceptance of and reliance on Pacific National's undertaking in rejecting their case at first instance, arguing his Honour did not have the power to accept the undertaking in assessing whether the proposed acquisition of the Terminal would contravene section 50 of the *CCA*.[26] That is, the ACCC asserted that the power to accept an undertaking is enlivened only once a contravention of section 50 of the *CCA* occurs, in lieu of granting injunctive relief as a remedy for that breach.[27]

In the alternative, the ACCC submitted that even if the trial judge did have the power to accept the undertaking, he erred in concluding that it would be effective in preventing Pacific National from engaging in anti-competitive conduct when operating the Terminal. Specifically, they claimed the undertaking was not formulated with the necessary precision to be capable of being readily obeyed and enforced.[28]

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21 *Pacific National No 2* (n 17) [831], [924].

22 Ibid.

23 *Pacific National No2* (n 17) [1612].

24 Ibid [1611].

25 *Pacific National Appeal* (n 1).

26 Ibid [6], [290].

27 Ibid [7]; *Thomson Australian Holdings Pty Ltd v Trade Practices Commission* (1981) 148 CLR 150, 165.

28 *Pacific National Appeal* (n 1) [291].

III ISSUES

One of the fundamental issues the Full Court was tasked with determining was what standard of proof is to be applied to the term 'likely' within the meaning of section 50 of the *CCA* when making predictions about future facts and circumstances.[29] Interpretation of this term has continuously proven to be contentious over the years.[30] In the instant case, interpretation of this term was critical to be able to accurately address the ACCC's claim that the proposed sale of the Terminal would contravene section 50 of the *CCA.*[31]

The controversy is whether the term 'likely' merely refers to 'more probable than not' or whether a higher standard is to be applied, such as a 'real commercial likelihood'.[32] In the case of *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union,*[33] the following was explained:

> The word 'likely' is one which has various shades of meaning. It may mean 'probable' in the sense of 'more probable than not' – 'more than a fifty per cent chance'. It may mean 'material risk' as seen by a reasonable man 'such as might happen'. It may mean 'some possibility' – more than a remote or bare chance. Or, it may mean that the conduct engaged in is inherently of such a character that it would ordinarily cause the effect specified.[34]

In *Trade Practices Commission v Ansett Transport Industries (Operations) Pty Ltd,*[35] Justice Northrop held that the term 'likely' meant 'more probable than not'.[36] Subsequently, however, in *Australian Gas Light Company v Australian Competition and Consumer Commission (No 3),*[37] Justice French held that the word 'likely' requires a demonstration that there is 'real

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29 Ibid [105].

30 *ACCC v Metcash Trading Ltd* [2011] 282 ALR 463 [146].

31 *Pacific National Appeal* (n 1).

32 *Tillmanns Butcheries Pty Ltd v Australasian Meat Industry Employees' Union* (1979) 42 FLR 331.

33 (1979) 42 FLR 331.

34 Ibid 399.

35 (1978) 32 FLR 305.

36 Ibid 344-6.

37 (2003) 137 FCR 317 (*'AGL v ACCC'*).

chance or probability' that the merger would have an anti-competitive effect.[38] More recent lines of authority have followed this standard.[39]

Although the term 'likely' has previously been considered by the Full Federal Court, the case of *Pacific National Appeal* represents the first time that the Court was specifically tasked with determining the meaning of the term.[40]

IV DECISION

The majority of the Court confirmed that in the context of section 50 of the *CCA* (and the *CCA* more generally), the meaning of the term 'likely' goes beyond its ordinary meaning and instead refers to 'a real chance or possibility' or a 'real commercial likelihood'.[41] Middleton and O'Bryan JJ stated that had the word been being considered by the Court for the first time, they would have been inclined to adopt the meaning 'more probable than not', following its ordinary meaning. However, their Honours held that there was no reason to overturn what had become an accepted meaning over time.[42] Therefore, upholding a recent line of authority, *Pacific National Appeal* affirms that for a proposed merger or acquisition to be deemed anti-competitive, a speculative impact on competition will not be enough for a violation of section 50 of the *CCA* to occur.[43] As their Honours found that the proposed acquisition did not raise any more than a mere speculative possibility of new entrants being deterred from entering the rail linehaul market, they concluded that it would not be likely to have the effect of SLC in any market. Accordingly, they dismissed the ACC's appeal.[44]

Furthermore, the Court disagreed with the approach of the trial judge, clarifying that a Court cannot take the effect of an undertaking into account when determining whether a proposed acquisition would contravene section 50 of the *CCA*.[45] However, the majority held that as the

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38 Ibid [343].

39 See, eg, *Seven Network Ltd v News Ltd* (2009) 182 FCR 160; *Vodafone Hutchinson Australia Pty Ltd v Australian Competition and Consumer Commission* [2020] FCA 117.

40 *Pacific National Appeal* (n 1) [220].

41 *Pacific National No 2* (n 17) [1275]; *Pacific National Appeal* (n 1) [400].

42 *Pacific National Appeal* (n 1) [244].

43 *AGL v ACCC* (n 37) [343].

44 *Pacific National No 2* (n 17) [1388]; *Pacific National Appeal* (n 1) [184].

45 *Pacific National Appeal* (n 1) [367].

trial judge had found that the acquisition would contravene section 50 of the *CCA* in the absence of an undertaking, his Honour did have the power to accept it in lieu of granting injunctive relief under section 80 of the *CCA*, although his Honour did not expressly refer to that power.[46]

In dissent, Perram J found that the trial judge did not have the power to accept the undertaking at all, agreeing with the ACCC's claim.[47] His Honour agreed, in line with that found by the majority, that although the term 'would' in section 50 of the *CCA* is forward looking in nature, it is nevertheless conceptually anterior to the remedy which flows from the assessment it contemplates.[48] However, his Honour specified that on the evidence before the trial judge, there was no likelihood of a new entrant and therefore, the acquisition of the Terminal was not likely to SLC in the relevant market.[49] The correct conclusion therefore should have been that the acquisition was not a threatened contravention of section 50 of the *CCA*.[50] Therefore, the trial judge did not have the power to grant injunctive relief and thus, accept any undertaking in lieu of that, disagreeing with the majority.[51]

Further, Perram J did not find it necessary to come to a conclusion on the meaning of the term 'likely' pursuant to section 50 of the *CCA* in this case.[52] This was because even on the ACCC's claim that 'likely' means a 'real commercial likelihood', there was insufficient evidence before the trial judge to satisfy this standard.[53]

Ultimately, the appeal was dismissed. It is worth noting that the ACCC has stated it intends to challenge the Full Court's decision before the High Court, meaning that this area may continue to further develop in the near future.[54]

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46 Ibid.

47 *Pacific National Appeal* (n 1) [419], [426].

48 *Pacific National Appeal* (n 1) [420].

49 Ibid [386]

50 Ibid

51 Ibid [387].

52 Ibid [401].

53 Ibid.

54 Australian Competition and Consumer Commission, 'ACCC Applies to the High Court for Special Leave to Appeal Pacific National Merger Decision' (Media Release, 132/20, 26 June 2020).

V SIGNIFICANCE

As described by the ACCC Chairman, Rod Simons, this outcome reflects the great difficulty in applying the SLC provisions of the *CCA*.[55] Nonetheless, the Court's decision in *Pacific National Appeal* is significant as it clarifies the standard of proof to be attributed to the term 'likely' in the context of section 50 and other provisions of the *CCA*.[56]

Confirmation that a higher standard will be attributed to the term 'likely' can be viewed as beneficial as it provides for an appropriate balance between two competing interests. Mergers and acquisitions will not always have anti-competitive effects and can often be pro-competitive, for example, in making an entity a more efficient or stronger competitor in the market.[57] On the other hand, mergers and acquisitions do have potential to facilitate unilateral or coordinated effects in the market, which can be harmful for competition and ultimately, consumers.[58] In light of this, it is both valuable and appropriate to maintain a standard which allows for a prohibition on mergers and acquisitions that pose a real commercial likelihood of inhibiting competition in the market, but does not serve to capture any and every proposed merger and acquisition, allowing for the continuation of the benefits mergers and acquisitions can bring to society.[59]

Although the case may be viewed as a 'loss' for the ACCC, *Pacific National Appeal* provides helpful guidelines for interpreting the merger and acquisitions provisions within the *CCA*, clarifying that there will be careful consideration and scrutiny before an entity will be deemed to have violated the *CCA*.[60]

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55 *Media Release* (n 17); Robert Walker et al, 'Full Federal Court Dismisses ACCC Appeal Against Pacific National Rail Merger Rail Merger Ruling', *Allens* (Web Page, 12 May 2020) <https://www.allens.com.au/insights-news/insights/2020/05/full-federal-court-dismisses-accc-appeal-against-pacific-national-rail-merger-ruling/>.

56 *Pacific National Appeal* (n 1).

57 Duke (n 13) 434 [8.10].

58 Ibid.

59 Ibid.

60 *Pacific National Appeal* (n 1).

GREIG v COMMISSIONER OF TAXATION [2020] FCAFC 25

AIDEE VARAN*

I INTRODUCTION

The case of *Greig v Commissioner of Taxation* [2020] FCAFC 25 (*'Greig v CoT'*) was handed down in the Full Court of the Federal Court on 2 March 2020.[1] The matter was heard before Kenny, Derrington and Steward JJ. The case centred around, inter alia, whether the appellant should have been allowed deductions for specific losses under section 8-1 of the *Income Tax Assessment Act 1997* (Cth) ('*ITAA97*').[2] Determining this turned on the contentious issue of whether the appellant's acquisition of shares in a company were made in a 'business operation' or 'commercial transaction' within the principle established in *Federal Commissioner of Taxation v Myer Emporium Ltd* (1987) 163 CLR 199.[3] *Greig v CoT* serves as a reminder that drawing the distinction between what constitutes 'revenue' on the one hand and 'capital' on the other remains difficult and will largely vary on a case by case basis.

II PROCEDURAL HISTORY

A *Background*

The taxpayer, Andrew Carlyle Greig, was a senior executive in a group of companies.[4] He would strategically acquire stocks in entities that he believed would be targets of subsequent

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1 *Greig v Commissioner of Taxation* [2020] FCAFC 25 (*'Greig v CoT'*).

2 Ibid [33]; *Income Tax Assessment Act 1997* (Cth) (*'ITAA97'*).

3 *Federal Commissioner of Taxation v Myer Emporium Ltd* (1987) 163 CLR 199 (*'Myer Emporium'*).

4 *Greig v Comissioner of Taxation* [2018] FCA 1084 [7] (*'Greig v CoT No 1'*) [7].

takeovers, with the intention of disposing these shares once they had increased in value to make a short-term profit.[5] This approach was known as the 'Profit Target Strategy'.[6]

Believing that Nexus Energy Limited ('Nexus'), an Australian Stock Exchange listed oil and gas company, would be a suitable takeover target in line with the Profit Target Strategy, the taxpayer made 64 separate acquisitions of shares in Nexus – investing a total of $11,851,762 in the company.[7] However, these shares were subsequently compulsorily transferred and cancelled by the voluntary administration of Nexus and the taxpayer resultantly incurred a loss of $11,851,762.[8] The taxpayer then spent $507,198 in legal fees in relation to litigation arising out of Nexus' administration, challenging the compulsory acquisition in June 2014.[9] In total, the taxpayer suffered a loss of $12,358,960.[10]

Following this, on 12 April 2016, the taxpayer requested a private ruling in relation to the deductibility of the share losses.[11] On 24 May 2016, the Commissioner of Taxation ('Commissioner') issued a private ruling stating that the losses were not deductible under section 8-1 of the *ITAA97*.[12]

Relevantly, section 8-1 of the *ITAA97* provides that:

> (1) You can deduct from your assessable income any loss or outgoing to the extent that:
>
> (a) it is incurred in gaining or producing your assessable income; or
> (b) it is necessarily incurred in carrying on a *business for the purpose of gaining or producing your assessable income.
>
> ...
>
> (2) However, you cannot deduct a loss or outgoing under this section to the extent that:

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5 *Greig v CoT* (n 1) [10], [41].

6 *Greig v CoT No 1* (n 4) [25].

7 Ibid [39].

8 Ibid [85], [87].

9 Ibid [2], [13], [88].

10 Ibid [104].

11 Ibid [90].

12 Ibid.

(a) it is a loss or outgoing of capital, or of a capital nature; or
(b) it is a loss or outgoing of a private or domestic nature; or
(c) it is incurred in relation to gaining or producing your *exempt income or your *non-assessable non-exempt income; or
(d) a provision of this Act prevents you from deducting it.
...

The taxpayer then lodged his income tax return for the income year ending 30 June 2015, consistent with the private ruling.[13] When the Commissioner subsequently issued a notice of assessment on 23 June 2016, the taxpayer objected to it on 20 October 2016 – claiming that the amount was excessive on the basis that he was entitled to claim deductions for both the share losses and the associated legal fees under section 8-1 of the *ITAA97*.[14] The Commissioner disallowed this objection in full on 9 May 2017.[15]

Pursuant to s 14ZZ of the *Taxation Administration Act 1953* (Cth) (which allows for the review of the Commissioner's taxation objection decisions), the taxpayer appealed the Commissioner's decision to the Federal Court of Australia.[16]

B *First Instance*

On 20 July 2018, Thawley J delivered his judgement in *Greig v CoT of Taxation* [2018] FCA 1084 ('*Greig v CoT No 1*').[17] The crux of the case was whether the $12,358,960 was deductible under section 8-1 of the *ITAA97*.[18] Although both parties accepted that the *Myer* principle applied to the matter at hand, they disagreed on how it applied to the facts.[19] Relevantly, the *Myer* principle specifies that where a transaction (albeit 'isolated' or 'unusual or extraordinary') which generates a profit is not an activity in a taxpayer's 'ordinary course of business' but is still commercial in nature and entered into for the purpose of making a profit,

13 Ibid [91].

14 Ibid [92].

15 Ibid.

16 Ibid [93].

17 Ibid.

18 Ibid.

19 Ibid [3]-[5]; *Myer Emporium* (n 3).

that transaction can still be assessable as ordinary income (or income 'according to ordinary concepts').[20]

1 *Taxpayer's Argument*

The taxpayer submitted that the total amount of $12,358,960 was deductible under section 8-1 of the *ITAA97* for either of one of two reasons.[21]

Firstly, the taxpayer submitted that the share losses and legal fees were 'incurred in gaining or producing' assessable income, making the amount deductible under section 8-1(1)(a) of the *ITAA97*.[22] The taxpayer contended that the total amount was revenue in nature as it was incurred in a 'business operation' or 'commercial transaction' and entered into at the time for the purpose of making a profit, thereby attracting the operation of the *Myer* principle.[23] To support this, the taxpayer presented a large volume of evidence concerning the activities that he undertook to pursue the Profit Target Strategy.[24] This included the fact that he regularly reviewed relevant research and analyst reports, attended ongoing meetings with the Nexus CEO and Managing Director, increased his stake to become a substantial shareholder in Nexus to exert influence over takeover negotiations, received direct offers from third parties who sought to acquire Nexus and incurred significant legal fees in defending the value of the shares.[25]

Secondly, the taxpayer contended that the amount of $12,358,960 constituted losses or outgoings that were 'necessarily incurred in carrying on a business', within the meaning of

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20 Myer Emporium (n 3) 209; *Westfield Limited v Commissioner of Taxation* (1991) 28 FRC 333 [31]; Charlie Taylor and Rob Rankin, 'The Myer Case and the Taxation of Gains in 1988' (1988) 11 *Sydney Law Review* 619, 621; *ITAA92* (n 2) s 6-5(1); *Scott v Commissioner of Taxation NSW* (1995) 35 SR (NSW) 215, 219 (Jordan CJ).

21 *Greig No 1* (n 5) [3].

22 Ibid; *ITAA97* (n 2) s 8-1(1)(a).

23 *Greig No 1* (n 5) [3].

24 Ibid [138].

25 Ibid [41].

section 8-1(1)(b) of the *ITAA97*.[26] The claimed business was the business of 'dealing' in the shares of Nexus for profit.[27]

In relation to both of these claims, the taxpayer also submitted that the amounts should not be prevented from being deductible under section 8-1(2)(a) of the *ITAA97* as they were not losses or outgoings of capital or of a capital nature.[28] Capital expenditure relates to fixed assets anticipated to be productive assets for a long period of time, whereas revenue expenditure refers to costs which are related to specific revenue transactions or operating periods.[29] Revenue falls within the ambit of section 8-1, whereas capital expenditure is excluded from it.[30]

2 *Commissioner's Argument*

Conversely, the Commissioner argued that the $12,358,960 was not deductible. That meaning that the losses sustained by the taxpayer did not fall within the ambit of section 8-1(1)(a) on the basis of the reasoning in *Myer* principle because the relevant transactions which gave rise to them were not incurred in a 'business operation' or 'commercial transaction' and the necessary profit-making purpose or intention was absent, based on the presented evidence.[31]

Further to this, the Commissioner submitted that the circumstances did not support the proposition that the taxpayer carried on a business of 'dealing' in Nexus shares capable of engaging section 8-1(1)(b) of the *ITAA97*.[32]

The Commissioner further contended that even if the losses did fall within the scope of section 8-1, they were on capital account. Therefore, the appropriate course of action would have been to deal with them under the capital gains regime.[33]

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26 Ibid [3]; *ITAA97* (n 2) s 8-1(1)(b).

27 Ibid [14].

28 Ibid [4].

29 *ITAA97* (n 2) s 8-1(1)–(2).

30 Ibid.

31 *Greig v CoT No1* (n 5) [5].

32 Ibid.

33 Ibid.

3 *Findings*

Thawley J found that the taxpayer did have the requisite profit-making intention or purpose required by the *Myer* principle, as his plan was to sell the shares to make a short-term profit rather than to hold them as long-term investments and receive dividends over time.[34] The fact that it took a longer time to realise the profit, and that no profit was ultimately made, did not impact on the taxpayer's original and ongoing profit-making intention.[35] However, his Honour was not satisfied that the taxpayer's activities amounted to a 'business operation' or 'commercial transaction' such as to bring them within the operation of the *Myer* principle.[36] His Honour specified that the taxpayer had not lead sufficient evidence that his actions were any different to that of a regular investor who would purchase shares with the intention of deriving dividends or hoping that the share price would increase.[37] In the absence of any evidence to the contrary, the purchase of an investment by a private investor does not, in and of itself, have the quality of being a 'business operation' or 'commercial transaction.[38] Therefore, the taxpayer's share losses and associated legal fees were not deductible under section 8-1(1)(a) of the *ITAA97*.[39]

In relation to deductibility under section 8-1(1)(b), his Honour also rejected the proposition that the taxpayer had been carrying on a business of 'dealing' in Nexus shares for profit.[40] This was because the taxpayer had not tendered any contemporaneous documentation demonstrating that the Nexus shares were held on revenue account in a business of 'dealing' in Nexus shares, in the way one would ordinarily expect if such a business had been carried out.[41]

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34 Ibid [137], [151], [159], [172].

35 Ibid [172]–[173].

36 Ibid [137], [144], [186].

37 Ibid [136]–[137].

38 Ibid [133].

39 Ibid.

40 Ibid [170], [183],

41 Ibid [186].

His Honour further found that the acquisition of the shares was a private investment and capital in nature and therefore precluded from deduction by section 8-1(2) of the *ITAA97*.[42]

The taxpayer subsequently appealed Thawley J's decision to the Full Court of the Federal Court.[43]

C *On Appeal*

The Full Court of the Federal Court was tasked with re-assessing whether the *Myer* principle was satisfied on the facts, requiring re-consideration the issue as to whether the taxpayer had acquired the Nexus shares in a 'business operation or 'commercial transaction' (as it was already accepted that the requisite profit-making purpose was present).[44] This largely turned to whether the taxpayer, in acquiring the shares in Nexus, acted as a 'business person' would.[45] If this were the case, the losses incurred would be on revenue account, meaning that the taxpayer would be allowed to claim them as deductions for the income year ending 30 June 2015.[46]

III JUDGMENT

By majority, the Court reversed Thawley J's decision, finding that the losses incurred by the taxpayer were, in fact, on revenue account. Therefore, the taxpayer was entitled to a deduction for them under section 8-1 of the *ITAA97*.[47]

In concluding that the taxpayer's transaction constituted a 'business operation' or 'commercial transaction' supporting the outcome that the loss was on revenue account, the Court relied on a significant body of evidence which demonstrated that the taxpayer had acted in a way that a 'business person' would.[48] The Court summarised this as follows:

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42 Ibid [139], [181].

43 *Greig v CoT* (n 1).

44 Ibid [24] (Kenny J).

45 Ibid [31].

46 Ibid.

47 Ibid [253].

48 Ibid [248].

> He engaged professional help; he researched and monitored the value of his shares; he used his own business knowledge as a managing director to acquire more shares; he pursued a plan to exploit the unrealised value of the Crux asset; and he took steps to defend the value of his investment in court. His activities, I find, were entirely commercial and business-like. The evidence demonstrates "system and organization" in relation to the acquisition of Nexus shares, to borrow the language of Bowen C.J. and Franki J. in *Ferguson.* His share trading was not a hobby; it was not a pastime; it was not private gambling or gaming. And it was more than a "mere" realisation of an asset. I find it constituted a business dealing that would engage the principle in *Myer Emporium*.[49]

Satisfied in this regard, the Court accepted the taxpayer's claim that the total amount of $12,358,960 was deductible pursuant to section 8-1 of the *ITAA97*.[50]

The Court did clarify that merely buying an asset with the hope of making a profit is not enough to activate the *Myer* principle and thus to allow the relevant deductions.[51] This profit-making intention or purpose is required in combination with the transaction amounting to a 'business operation or commercial transaction'.[52] As the Court accepted that the taxpayer had purchased the shares with the intention of making a profit upon selling them, as well as the fact that the transaction amounted to a 'business operation or commercial transaction', the principle was satisfied.[53]

A *Minority Judgement*

In dissent, Derrington J concluded that the shares were not acquired as part of a business operation or commercial transaction as the appellant's intended strategy did not include undertaking any activities to cause the value of the shares to increase in value.[54] Rather, the strategy was nothing more than a private investment in shares that he merely anticipated would

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49 Ibid.

50 Ibid [253].

51 Ibid [33].

52 Ibid [248].

53 Ibid.

54 Ibid [164]–[183].

increase in value, independent of any action.[55] Accordingly, His Honour ordered that the appeal should be dismissed and that the appellant pay the respondent's costs.[56]

IV COMMENTARY

The case of *Greig v CoT* reinstates the *Myer* principle established by the High Court in 1987, clarifying that an amount may be deductible under section 8-1 of the *ITAA97* where a profit-making intention is present and the transaction is associated with a 'business operation' or 'commercial transaction' that is on revenue account.[57] Consequently, this necessitates that for the amount to be deductible the activities in question must amount to the sort of activities that a 'business person' or someone common to the trade would engage in, as was the case here.[58]

Interestingly, in the Australian Taxation Office's *Decision Impact Statement,* it was clarified that the Commissioner does not believe that the Full Court's decision will disrupt his understanding of the factors which will be relevant in determining whether the *Myer* principle has been satisfied and, more specifically, where an acquisition of shares is made in carrying out a 'business operation' or 'commercial transaction'.[59] It was also specified that the majority's decision was not inconsistent with guidance previously provided in *Taxation Rulings* 92/3 and 92/4.[60] This highlights that the outcome in taxation cases such as *Greig v CoT* will be heavily influenced by the unique facts and circumstances at hand.[61]

Finally, *Greig v CoT* demonstrates that, although the Capital Gains Tax regime has certainly made drawing distinctions between capital and revenue less contentious, it has not eliminated

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55 Ibid.

56 Ibid [185].

57 Ibid; *Myer Emporium* (n 3) 4365.

58 Ibid.

59 Australian Taxation Office, 'Decision Impact Statement: Greig v Comissioner of Taxation' (Decision Impact Statement, 8 July 2020) <https://www.ato.gov.au/law/view/document?DocID=LIT/ICD/NSD1427of2018/00001>.

60 Ibid; Australian Taxation Office, *Income Tax: Whether Profits on Isolated Transactions are Income* (TR 92/3, 30 July 1992); Australian Taxation Office, *Income Tax: Whether Losses on Isolated Transactions are Deductible* (TR 92/4, 30 July 1992).

61 *Greig v CoT* (n 1) [27].

the issue in its entirety.[62] Determining this will heavily depend on the facts and circumstances of any given case.[63]

[62] Cameron Blackwood et al, 'Reinstating the Myer Principle', *Herbert Smith Freehills* (online, 4 March 2020).

[63] Ibid.

BHP BILLITON LTD v COMMISSIONER OF TAXATION [2020] HCA 5

NATHAN WHITE*

I INTRODUCTION

BHP Billiton Ltd v Commissioner of Taxation concerned an appeal to the High Court of Australia regarding the Commissioner's attribution of foreign "tainted sales income" to BHP Billiton Ltd ('Ltd'), an Australian resident taxpayer, under the controlled foreign company provisions in pt X of the *Income Tax Assessment Act 1936* (Cth) ('the *ITAA36*').[1] The income in question had been derived by BHP Billiton Marketing AG ('BMAG'), a Swiss company which was 58 per cent indirectly owned by Ltd and 42 per cent indirectly owned by BHP Billiton Plc ('Plc'),[2] from the sale of commodities it had purchased from Plc's Australian entities.[3] Notably, Ltd and Plc operated pursuant to a dual-listed company arrangement under which they were required to act 'as if they were a single unified economic entity'.[4] The issue in the case was essentially whether Plc's Australian entities were associates of BMAG within the meaning of s 318 of the *ITAA36*,[5] as it was on this basis that the Commissioner attributed the tainted sales income to Ltd and included it in its assessable income.[6] In a unanimous judgment, the Court ruled that the Australian entities were associates of BMAG within the meaning of s 318, on the basis that they "sufficiently influenced" BMAG.[7] The decision is notable as, being unanimous, it provides persuasive and binding authority as to the meaning of

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1 [2020] HCA 5 ('*BHP v FCT*').

2 Ibid [3].

3 Ibid [3]–[4].

4 Ibid [3], [10].

5 Ibid [4], [29].

6 Ibid.

7 Ibid [6], [48]–[49].

"sufficiently influenced" under s 318(6)(b) of the *ITAA36*. It also serves as a useful example of the operation of pt X of the *ITAA36* in practice.

II FACTS

In the relevant income years, Ltd and Plc were part of a dual-listed company arrangement pursuant to a 'DLC Structure Sharing Agreement' ('the Agreement').[8] Under this arrangement, the two companies agreed to implement, manage and operate their combined businesses and affairs in accordance with the terms of the agreement.[9] The crux of the arrangement was such that the management structure and businesses of Ltd and Plc were run in tandem through uniform boards of directors and executive management,[10] the two companies operating as if they were a single unified economic entity.[11] These common directors were required to have regard to the interests of the shareholders of one company when acting for the other, an arrangement which was expressly allowed for by the Constitution of Ltd and the Articles of Association of Plc.[12] Accordingly, the directors of Ltd and Plc could choose to act in a certain manner purely because it was in the interests of the other's shareholders.[13] Clause 3.3 of the Agreement required Ltd and Plc to pay matching dividends.[14] Special voting arrangements under the Agreement were such that shareholders of Plc and Ltd could affect decisions in the other, through the casting of parallel votes.[15] In the event of any conflict, the companies were to do their best to resolve the issue in conformity with the Agreement.[16]

BMAG was a marketing company incorporated in Switzerland.[17] It maintained a trading and marketing hub in Singapore, purchasing commodities from Ltd's Australian subsidiaries and

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8 Ibid [8].

9 Ibid.

10 Ibid [9]–[10].

11 Ibid [10].

12 Ibid [11].

13 Ibid.

14 Ibid [16].

15 Ibid [17]–[18].

16 Ibid [14].

17 Ibid [3].

Plc's Australian entities to sell on to the export market.[18] In the relevant income years, it was 100 per cent indirectly owned by Ltd and Plc; Ltd indirectly owning 58 per cent and Plc 42 per cent.[19] Thus, BMAG was in essence part of the single unified economic entity of Ltd and Plc, as evidenced by Ltd and Plc issuing "Group Level Documents" including a "Marketing Risk Management Standard" that applied to BMAG.[20]

The Commissioner issued amended assessments to Ltd for the 2006 to 2010 income years. These included in Ltd's assessable income, under pt X of the *ITAA36*, tainted sales income of BMAG derived from the sale of commodities it had purchased from Plc's Australian entities (on the basis that those entities were associates of BMAG). Ltd objected to these amendments, but the Commissioner disallowed their objection.[21]

III PROCEDURAL HISTORY

A *Administrative Appeals Tribunal*

In response to his denial of their objection, Ltd applied to the Administrative Appeals Tribunal ('AAT') for review of the Commissioner's decision pursuant to pt IVC of the *Taxation Administration Act 1953* (Cth).[22] Their application was heard by Logan J in his capacity as a Deputy President of the AAT.

His Honour rejected the Commissioner's submissions that due to Ltd and Plc's DLC Arrangement, the two companies were sufficiently influenced by each other, and furthermore that by reason of their shareholding and the DLC Arrangement, that they sufficiently influenced BMAG. Rather, his Honour concluded that BMAG only followed the wishes or directions of Ltd or Plc when it believed it was in its interests to do so. Consequently, it was his Honour's view that Plc's Australian entities were not associates of BMAG within the meaning of s 318 of the *ITAA36*, and therefore that the Commissioner's attribution of the proceeds from BMAG's sale of commodities it had purchased from Plc into Ltd's assessable income was in

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18 Ibid [20].

19 Ibid [3], [20].

20 Ibid [20].

21 Ibid [21].

22 Ibid [21]; *MWYS and Commissioner of Taxation* [2017] AATA 3037.

error. Accordingly, Logan J concluded the amended assessments were excessive and set aside the Commissioner's decision – ordering instead that Ltd's objections to them be allowed in full.[23]

B *The Federal Court*

In response to Logan J's decision, the Commissioner appealed to the Full Court of the Federal Court of Australia.[24] The matter was heard by Allsop CJ and Thawley and Davies JJ. Allsop CJ and Thawley J allowed the appeal;[25] Davies J dissented.[26]

Allsop CJ agreed with the reasons of Thawley J,[27] observing that the meaning of "sufficiently influenced" in s 318 of the *ITAA36* should be interpreted as wide enough to 'include circumstances of mutually advantageous decision-making by parties as equals acting in accordance with the direction, instructions and wishes of each other for the common economic goal of operating a single economic entity'.[28]

Thawley J found that the substance of Ltd and Plc's DLC Structure Sharing Arrangement, including the clause that the two companies had to pay matching dividends under it, supported the conclusion that Ltd and Plc sufficiently influenced and were associates of each other.[29] His Honour also found that the Tribunal erred in finding that BMAG was not sufficiently influenced by Plc's Australian entities.[30]

In dissent, Davies J held that acting with a common aim or mutuality of interest was not the same as acting in accordance with the directions, instructions or wishes of another entity. Accordingly, in her Honour's view, the fact that BMAG exercised independent judgment about its own best interests and acted accordingly when carrying out its functions meant that it was

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23 *BHP v FCT* (n 1) [21]; *MWYS and Commissioner of Taxation* [2017] AATA 3037 [42], [56], [57]-[59].

24 *Commissioner of Taxation v BHP Billiton Ltd* (2019) 263 FCR 334.

25 Ibid [2] (Allsop CJ), [174] (Thawley J).

26 Ibid [47] (Davies J).

27 Ibid [2].

28 Ibid [15] (Thawley J agreeing at [175]).

29 Ibid [163].

30 Ibid [173].

not 'sufficiently influenced' by Plc within the meaning of s 318(6)(b) of the *ITAA36* and hence not an associate of its Australian entities.[31]

Ltd then appealed against the decision of the Full Federal Court to the High Court of Australia.

IV ISSUE ON APPEAL

As identified above, the legal issue on appeal was whether Plc's Australian entities were associates of BMAG within the meaning of s 318 of the *ITAA36*.[32] To contextualise the issue and thus provide further insight into the Court's judgment, it is helpful to also briefly discuss the operation of the controlled foreign company rules in pt X of the *ITAA36*.

Introduced in 1991, pt X was intended to prevent Australian resident taxpayers from deferring or avoiding tax on foreign-sourced income by interposing entities in low-tax jurisdictions between themselves and the source of the income.[33] In broad terms, it applies to Australian resident tax payers who have a sufficiently substantial interest in a controlled foreign company ('CFC'); attributing specified income of the CFC to that Australian resident taxpayer for Australian tax purposes.[34] One type of attributable income is tainted sales income.[35] Under s 447(1)(a)(ii) (A) of the *ITAA36*, tainted sales income includes income derived from the sale of goods by a CFC where 'the seller of the goods to the [CFC] was an associate of the [CFC] and a Part X Australian resident'.

On appeal, it was not disputed that BMAG was a CFC of Ltd or that Ltd was an attributable taxpayer of BMAG for the purposes of pt X; Ltd indirectly owning 58 per cent of it.[36] Nor was it disputed that income BMAG derived from selling commodities purchased from Ltd's Australian subsidiaries was tainted sales income that could be attributed to Ltd for Australian tax purposes.[37] Rather, Ltd disputed that the proceeds derived by BMAG from selling

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31 Ibid [38].

32 *BHP v FCT* (n 1) [4], [29].

33 Ibid [1]; *Taxation Laws Amendment (Foreign Income) Act 1990* (Cth).

34 *BHP v FCT* (n 1) [2]. See also *ITAA36* pt X.

35 *ITAA36* pt X div 7.

36 *BHP v FCT* (n 1) [3], [27].

37 Ibid [4].

commodities purchased from Plc's Australian entities could be attributed to them, on the basis that s 447(1)(a)(ii)(A) of the *ITAA36* did not apply to the facts.[38]

Relevantly, section 318 of the *ITAA36* sets out "associates" for the purposes of pt X.[39] Under s 318(2) of the *ITAA36*, companies are said to be associates of other entities in a number of situations, including where they are sufficiently influenced by the other entity.[40] Pursuant to s 318(6)(b), a company is sufficiently influenced by an entity or entities if:

> [T]he company, or its directors, are accustomed or under an obligation (whether formal or informal), or might reasonably be expected, to act in accordance with the directions, instructions or wishes of the entity or entities (whether those directions, instructions or wishes are, or might reasonably be expected to be, communicated directly or through interposed companies, partnerships or trusts).[41]

Therefore, it is clear that the principal issue for the High Court to determine was whether BMAG was an associate of Plc's Australian entities within the meaning of s 318. This required consideration of whether it was sufficiently influenced by those entities within the meaning of s 318(6)(b) of the *ITAA36*.

V JUDGMENT

As mentioned, the High Court issued a unanimous judgment. Sitting on the case were Kiefel CJ and Gageler, Keane, Gordon and Edelman JJ.

The Court began by identifying and contextualising the issue at hand, outlining the operation of pt X and determining that in light of the statutory context the key question was 'whether Plc's Australian entities, the sellers of the commodities to BMAG, were "associates" of BMAG for the purposes of s 318(2)'.[42]

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38 Ibid.

39 Ibid [31]; *ITAA36* s 318.

40 Ibid [5].

41 *ITAA36* s 318(6)(b).

42 *BHP v FCT* (n 1) [4].

Having done so, they moved to discuss s 318 of the *ITAA36*, observing the provision 'identifies when two (or more) entities have a relationship or are in some way connected such that one entity is an "associate" of another'.[43] Identifying that s 318(2) of the *ITAA36* deals specifically with the associates of companies, their Honours observed that the fact it addresses companies is important to its construction.[44] As the Commissioner's argument was that Plc's Australian entities were associates of BMAG for the 'three independently sufficient reasons' that Plc was sufficiently influenced by Ltd; Ltd was sufficiently influenced by Plc; and BMAG was sufficiently influenced by both Ltd and Plc,[45] the Court then considered the proper construction of the definition of "sufficiently influenced" under s 318(6)(b) of the *ITAA36*.

In their opinion, that definition 'comprises a range of activities and influence'.[46] Namely, where a company or its directors:

(a) is accustomed (referring to past action);

(b) is under an obligation, whether formal or informal (referring to a present obligation); or,

(c) might reasonably be expected (referring to future action)

to act in accordance with the directions, instructions or wishes of another entity or entities.[47] The Court stressed that any of these three situations 'is independently sufficient to attract the conclusion that a company or its directors are "sufficiently influenced" by the other entity or entities'.[48] They then proceeded to outline their construction of s 318(6)(b) according to statutory interpretation principles, making the following observations.

(i) Section 318(6)(b) concerns the position of a company *and* its directors. It directs attention to three time periods, as identified in (a) to (c) above; the past, the present and the future. It must then be asked whether the facts of a particular case are sufficient

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43 Ibid [30].

44 Ibid [31].

45 Ibid [6].

46 Ibid [35].

47 Ibid [35].

48 Ibid.

to 'underpin a finding that [a] company (or its directors) has acted, is acting, or might reasonably be expected to act, in accordance with the directions, instructions or wishes of the other entity'.[49]

(ii) This means that, while not necessarily required, a legal liability to act on the directions of another entity is enough to make it an associate of a company. Conversely, the fact that a company's actions coincidentally coincide with the directions, instructions or wishes of another entity is not sufficient. Nor will another entity sufficiently influence a company if the company is 'purely acting in its own interests in a way that happens to align with the wishes of another'.[50]

(iii) Nothing in s 318(6)(b) specifies how many or what types of acts must be done by a company or its directors in accordance with the directions, instructions or wishes of another entity. Determining whether an act has, is or might reasonably be expected to be done in accordance with those directions, instructions or wishes is a factual inquiry about how and why those directions, instructions or wishes have, are or may reasonably be expected to be followed.[51]

(iv) The phrase "in accordance with" does not import or require elements of causation into s 318(6)(b). To make this conclusion would be to ignore that the provision applies where a company "might reasonably be expected" to act in accordance with another entity's directions, instructions or wishes. Of course, the existence of such a causal link may well mean that a company is sufficiently influenced by another entity. But if the facts support some other basis to conclude that an act was done, or is expected to be done, by the company or its directors in accordance with the directions, instructions or wishes of another entity, this will be enough to conclude the company is sufficiently influenced by that entity.[52]

(v) There is nothing in s 318(6)(b)'s text or context to support, as Ltd submitted, that "sufficiently influenced" should be read as requiring the influencing entity to have

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49 Ibid [36].

50 Ibid [37].

51 Ibid [38].

52 Ibid [39].

> effective control of the other. The provision is concerned with *influence*, not control.[53] This is shown by the structure of s 318(6), para (b) dealing with sufficient influence and para (c) with majority voting interests. This is such that, in the Court's view, the provision draws a stark distinction between the two concepts. Thus, while an entity having a "majority voting interest" in a company within the meaning of s 318(6)(c) may also mean that it sufficiently influences that company, an entity may still exercise sufficient influence under s 318(6)(b) without the effective control conveyed by such an interest.[54] That this is the case is reinforced by the fact that s 318(6)(b) provides that sufficient influence can be exercised over a company by it or its directors acting in accordance with another entity's "wishes". Wishes are not directions or instructions, but desires. This is inconsistent with the notion of control, which is exercised through commands.[55]

The Court also rejected Ltd's submission that s 318(6)(b) of the *ITAA36* should be constructed in accordance with the decision of the Supreme Court of New South Wales' decision in *Buzzle Operations Pty Ltd v Apple Computer Australia Pty Ltd*.[56] This was because that case concerned provisions in the *Corporations Act 2001* (Cth) regarding shadow directors. Or, in the Court's words, 'provisions in a different statute, using different language and directed to a different purpose'.[57] Thus, in light of the purpose of pt X of the *ITAA36* ('to identify entities whose income should be brought to tax because of their connection to other entities'),[58] s 318(6)(b) of the *ITAA36* has a broader scope than the shadow director provisions and should be interpreted differently.[59]

Ultimately, the Court concluded that on the facts Ltd and Plc were associates of each other under s 318 of the *ITAA36*. This was because by acting pursuant to the DLC Structure Sharing Agreement, which provided that Ltd and Plc should operate as "combined businesses" and a

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53 Ibid [40].

54 Ibid [41].

55 Ibid [42].

56 (2011) 81 NSWLR 47.

57 *BHP v FCT* (n 1) [43].

58 Ibid.

59 Ibid.

"single unified economic entity" with common directors and executive management, the two companies sufficiently influenced each other within the meaning of s 318(6)(b) of the *ITAA36*. That is, the companies (or their directors) might reasonably be expected to act in accordance with the directions, instructions or wishes of the other. Moreover, to fail to act in accordance with the directions of the other company would be contrary to the terms of the Agreement. Thus, it could also be said that the companies were accustomed, or under an obligation, to act in accordance with the directions, instructions or wishes of the other.[60]

In so deciding, the Court rejected Ltd's argument that the fact the two companies acted in such a manner pursuant to a contract precluded finding they sufficiently influenced each other. Observing that if this were the case, 'any company would be able to place itself outside the reach of the statute (of being "sufficiently influenced" by another company) by forming a contract to govern their relationship'.[61] The Court also noted that where there *is* a contract governing the relationship between two entities, the terms must be considered to determine whether they support 'a reasonable expectation of one party acting "in accordance with the directions, instructions or wishes" of the other'.[62]

In relation to BMAG, the Court found that the company was sufficiently influenced by – and thus an associate of – both Ltd and Plc. The basis for this finding was the companies' shareholding in BMAG; the DLC arrangements; and the issuing of Group Level Documents by Ltd and Plc which applied to BMAG.[63] That is, in the relevant income years BMAG was 100 per cent indirectly owned by Ltd and Plc. Pursuant to the DLC arrangements and the governing principles of that arrangement, BMAG was required to be operated as part of their single unified economic entity. It was under these arrangements that BMAG purchased commodities from Ltd's Australian subsidiaries and Plc's Australian entities and then sold them on to the export market, complying with the Group Level Documents issued by Plc and

60 Ibid [44]–[46].

61 Ibid [47].

62 Ibid.

63 Ibid [48].

Ltd. Thus, in the Court's view, 'no conclusion other than that Ltd and Plc sufficiently influenced BMAG was open'.[64]

Accordingly, the Court ordered that the appeal be dismissed with costs.[65]

VI COMMENTARY

As should be apparent, this case is notable as it serves to clarify the meaning of "sufficiently influenced" in s 318(6)(b) of the *ITAA36*. That is, the Court unanimously rejected importing a requirement into the provision that a company need be "controlled" by another entity in order to be sufficiently influenced by it.[66] Rather, while an entity having effective control of a company will likely mean it also sufficiently influences it, sufficient influence may also exist in other circumstances.[67] Whether this is the case is a question of fact.[68] Thus, the Court's decision provides guidance on when a company may be deemed to be an associate of another entity for the purposes of pt X of the *ITAA36*. Accordingly, it is likely to be useful to practitioners in advising clients regarding whether their arrangements might come within reach of the CFC rules, particularly where they are operating under a similar dual-listed company arrangement.

The Australian Taxation Office ('ATO') has issued a decision impact statement welcoming the High Court's decision.[69] It was stated that as a result of the decision and a transfer pricing settlement with the ATO, 'Australians can have full confidence that BHP, as one of Australia's largest companies, is paying full tax on its profits from the sale of Australian commodities.'[70] In the ATO's view, the precedent set by the case provides clear guidance that will assist in

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64 Ibid [49].

65 Ibid [50].

66 Ibid [7], [40].

67 Ibid [41].

68 Ibid [7].

69 'High Court Confirms BHP Billiton Group Members are 'Associates' for Tax Purposes', *Australian Taxation Office* (Web Page, 11 March 2020) <https://www.ato.gov.au/Media-centre/Media-releases/High-Court-confirms-BHP-Billiton-Group-members-are--associates--for-tax-purposes/#:~:text=The%20decision%20in%20BHP%20Billiton,as%20those%20acquired%20from%20Australian>.

70 Ibid.

ensuring multinational corporations operating through complex structures pay the correct amount of tax in Australia.[71]

The decision is also likely to have broader relevance for Australian tax law, as the definition of associate in s 318 of the *ITAA36* is the same as that used under other taxation rules.[72]

VII CONCLUSION

While its exact significance remains to be seen, the High Court's decision being so recent, it is clear that this case will operate as persuasive authority as to the meaning of "sufficiently influenced" under s 318(6)(b) of the *ITAA36* and thus when a company may be deemed to be an associate of another entity for taxation purposes. Moreover, the decision provides some educational insight into the practical operation of the CFC rules under pt X of the *ITAA36*.

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71 Ibid.

72 See, eg, *Income Tax Assessment Act 1997* (Cth) s 995-1 (definition of 'associate'). Note that this applies to various regimes, for example the thin capitalisation and withholding tax rules.

LOVE v COMMONWEALTH; THOMS v COMMONWEALTH [2020] HCA 3

NATHAN WHITE*

I INTRODUCTION

On 11 February 2020, the High Court of Australia handed down its decision in *Love v Commonwealth; Thoms v Commonwealth*.[1] The two special cases were concerned with whether the plaintiffs, both of whom were noncitizens born outside Australia who held foreign citizenship but identified as members of Aboriginal Australian groups and who had lived in Australia for the majority of their lives,[2] could be treated as 'aliens' within the meaning of s 51(xix) of the *Australian Constitution*[3] ('the aliens power'). This was relevant in order to determine whether the plaintiffs could be validly deported under the *Migration Act*,[4] which was enacted under s 51(xix) of the *Constitution*,[5] upon the cancellation of their visas.[6] This question had never before been addressed by an Australian court.[7] By a 4:3 majority, the Court held that as an Aboriginal Australian understood according to the tripartite test laid down by Brennan J in *Mabo v Queensland [No 2]*,[8] Mr Thoms (being a recognised member of the Gunggari

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1 [2020] HCA 3 ('*Love v Commonwealth; Thoms v Commonwealth*').

2 Ibid [2]-[3] (Kiefel CJ).

3 Relevantly, this empowers the Commonwealth to make laws 'for the peace, order and good government of the Commonwealth with respect to … naturalisation and aliens'.

4 *Migration Act 1958* (Cth) ('*Migration Act*').

5 See, eg, *Love v Commonwealth; Thoms v Commonwealth* (n 1) [3] (Kiefel CJ), citing *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 443 [156] (Gummow and Hayne JJ) and *Pochi v Macphee* (1982) 151 CLR 101.

6 See, eg, *Love v Commonwealth; Thoms v Commonwealth* (n 1) [4] (Kiefel CJ), [112] (Gageler J), [241] (Nettle J), [293] (Gordon J).

7 Ibid [294] (Gordon J).

8 (1992) 175 CLR 1, 70.

People)[9] was not an alien within the meaning of s 51(xix) of the *Constitution*.[10] Due to a perception of insufficient proof upon the agreed facts,[11] the majority was unable to reach a decision in Mr Love's case and the matter was referred to the Federal Court for the issue of his Aboriginality to be determined.[12] Nonetheless, the majority judgments are united in making the more general principle quite clear: that non-citizen Aboriginal Australians are not 'aliens' within the meaning of s 51(xix) of the *Constitution* and are thus beyond the reach of the aliens power.[13] This note will summarise and discuss the case, in order that the reasoning underlying the decision can be understood. Moreover, the decision's implications will also be considered.

II FACTS

A *Mr Love*

Daniel Alexander Love was born in the Independent State of Papua New Guinea ('PNG') on 25 June 1979. He was granted PNG citizenship at birth by virtue of s 66(1) of the *Constitution of the Independent State of Papua New Guinea*. After some travel back and forth between PNG and Australia, at the age of five Mr Love took up permanent residency in Australia with his family. Upon returning from a visit to PNG between February and October 1985, he has resided in Australia ever since.[14] Mr Love — unlike other members of his family — never applied for Australian citizenship.[15]

Through his paternal great-grandparents, who were descended in significant part from Aboriginal people living in Queensland immediately prior to European settlement, Mr Love

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9 See, eg, *Love v Commonwealth; Thoms v Commonwealth* (n 1) [3] (Kiefel CJ), [229] (Nettle J).

10 Order of Bell, Nettle, Gordon and Edelman JJ in *Thoms v Commonwealth* (High Court of Australia, B64/2018, 11 February 2020).

11 *Love v Commonwealth; Thoms v Commonwealth* (n 1) [81] (Bell J), [287]-[288] (Nettle J).

12 Order of Bell, Nettle, Gordon and Edelman JJ in *Love v Commonwealth* (High Court of Australia, B43/2018, 11 February 2020). See also *Love v Commonwealth; Thoms v Commonwealth* (n 1) 100 [288] (Nettle J).

13 *Love v Commonwealth; Thoms v Commonwealth* (n 1) [74], [81] (Bell J), [284] (Nettle J), [296], [333], [357], [389] (Gordon J), [398], [447] (Edelman J).

14 These facts are repeated in varying levels of detail throughout the judgments. See, eg, *Love v Commonwealth; Thoms v Commonwealth* (n 1) [222] (Nettle J).

15 Ibid [226].

identifies as a descendant of the Kamilaroi tribe and is recognised as such by one Kamilaroi elder.[16]

On 25 May 2018, Mr Love was sentenced to 12 months imprisonment for the offence of assault occasioning bodily harm contrary to s 339 of the *Criminal Code* (Qld).[17] Consequently, on 6 August 2018 a delegate of the Minister for Home Affairs cancelled Mr Love's permanent residency visa pursuant to s 501(3A)[18] of the *Migration Act*. Consequently, Mr Love became an unlawful non-citizen liable to be removed from Australia,[19] and on 10 August 2018 was placed in immigration detention. However, on 27 September 2018 a delegate of the Minister for Home Affairs revoked the decision to cancel Mr Love's visa under s 501CA(4) of the *Migration Act* and he was released from detention.[20]

B *Mr Thoms*

Brendan Craig Thoms was born in New Zealand on 16 October 1988, becoming a citizen of New Zealand at birth pursuant to s 6(1)(a) of the *Citizenship Act 1977* (NZ). He first travelled to Australia on 19 December 1988 on a special category visa and has resided permanently in Australia since 23 November 1994. Although eligible to acquire Australian citizenship at birth under s 10B of the then current *Australian Citizenship Act 1948* (Cth), Mr Thoms did not do so and never took any subsequent steps to acquire Australian citizenship.[21]

Through his maternal lineage,[22] Mr Thoms identifies as a member of the Gunggari People (an Aboriginal Australian group) and is accepted as such by other Gunggari People.[23] He (along

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16 Ibid [79] (Bell J), 70 [223] (Nettle J), [386] (Gordon J).

17 Ibid [153].

18 This requires the Minister to cancel a person's visa if satisfied they do not pass a character test. A person cannot pass this test if they have a substantial criminal record, which is defined to include a sentence of 12 months' imprisonment or more: see *Migration Act* ss 501(6)(a), 501(7)(c).

19 See, eg, *Love v Commonwealth; Thoms v Commonwealth* (n 1) [2] (Kiefel CJ), [154] (Keane J), [239] (Nettle J).

20 Ibid [153]-[154] (Keane J), [228] (Nettle J).

21 Ibid [229] (Nettle J).

22 Ibid [230] (Nettle J).

23 Ibid [3] (Kiefel CJ), [229] (Nettle J).

with other members of his family) is also a common law holder of native title rights belonging to the Gunggari People, recognised by determinations made by the Federal Court.[24]

On 17 September 2018, Mr Thoms was sentenced to 18 months imprisonment for the offence of assault occasioning bodily harm (domestic violence) contrary to s 339(1) of the *Criminal Code* (Qld).[25] On 27 September 2018 his visa was cancelled pursuant to s 501(3A) of the *Migration Act*. Resultantly, he became an unlawful non-citizen liable to be removed from Australia,[26] and upon commencing court ordered parole on 28 September 2018 was taken into immigration detention – where he remained at the time the High Court's decision was handed down.[27]

III LEGAL ISSUE

The question of law stated for the opinion of the Full Court in both special cases was whether each plaintiff was an 'alien' within the meaning of s 51(xix) of the *Australian Constitution*.[28]

However, several of the sitting Justices framed the legal issue for determination differently.

For instance, Kiefel CJ expressed her disapproval of the question as posed above, stating it was 'apt to mislead as to the role of this Court'.[29] Instead, her Honour preferred the following terminology: 'whether it is open to the Commonwealth Parliament to treat persons having the characteristics of the plaintiffs as non-citizens for the purposes of the *Migration Act*.'[30] Alternatively, Bell J stated that '[t]he issue in these special cases is whether, as the plaintiffs assert, Aboriginal Australians are persons who cannot possibly answer the description of "aliens" in the ordinary understanding of the word.'[31] Moreover, Gordon J stated 'the specific question before the Court'[32] was 'whether Aboriginal Australians, born overseas, without the

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24 Ibid [3] (Kiefel CJ), 51 [158] (Keane J), [229] (Nettle J).

25 Ibid [235] (Nettle J).

26 Ibid [2] (Kiefel CJ), [154] (Keane J), [239] (Nettle J).

27 Ibid.

28 Ibid [4] (Kiefel CJ), [78] (Bell J), [145] (Keane J).

29 Ibid [4].

30 Ibid.

31 Ibid [51].

32 Ibid [294].

statutory status of Australian citizenship and owing foreign allegiance, are aliens within the meaning of s 51(xix).'[33]

IV ARGUMENTS

The essence of the plaintiffs' argument was that due to their unique connection to traditional land and waters, Aboriginal Australians (understood according to the tripartite test expressed by Brennan J in *Mabo v Queensland [No 2]*)[34] could not fall within the meaning of the constitutional term 'alien' in s 51(xix) of the *Constitution*.[35]

The Commonwealth rejected the existence of this exception, submitting instead that 'alien' in s 51(xix) of the *Constitution* had come to be synonymous with 'non-citizen', and that as the plaintiffs had not acquired Australian citizenship it was open for them to be treated as aliens.[36] Furthermore, the Commonwealth argued that the fact the plaintiffs had been born overseas and held foreign citizenship (and thus owed allegiance to a foreign power) was another reason permitting their categorisation as aliens within the meaning of s 51(xix) of the *Constitution*.[37]

V JUDGMENT

As mentioned above, the majority was made up of four Justices, the minority three. Each of the seven sitting Justices delivered a separate judgment.

Notably, all seven Justices acknowledged a general limitation to the aliens power,[38] as stated by Gibbs CJ in *Pochi v Macphee* ('*Pochi*'):[39] that 'the Parliament cannot, simply by giving its

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33 Ibid.

34 (1992) 175 CLR 1, 70.

35 *Love v Commonwealth; Thoms v* Commonwealth (n 1) [21] (Kiefel CJ), [52] (Bell J), [184] (Keane J), [242] (Nettle J), [299] (Gordon J).

36 Ibid [53] (Bell J).

37 Ibid [54]-[55] (Bell J).

38 Ibid [7] (Kiefel CJ), [50]-[51] (Bell J), [87] (Gageler J), [168] (Keane J), [236] (Nettle J), [310] (Gordon J), [394] (Edelman J).

39 (1982) 151 CLR 101 ('*Pochi*').

own definition of 'alien', expand the power under s 51(xix) to include persons who could not possibly answer the description of 'aliens' in the ordinary understanding of the word.'[40]

A *Majority Judgments*

The majority was made up of Bell, Nettle, Gordon and Edelman JJ. Their Honours' reasoning differed,[41] but in essence their general conclusions were the same – that Aboriginal Australians are not aliens within the meaning of s 51(xix) of the *Consitution*.[42]

1 *Bell J*

As stated above, Bell J conceptualised the issue in the special cases as whether Aboriginal Australians could not possibly answer the description of 'aliens' in the ordinary understanding of the word.[43]

Her Honour then reviewed the authorities regarding the scope of the aliens power,[44] concluding that the Commonwealth Parliament has power to define the circumstances in which a person will be treated as an alien, subject to the limitation recognised by Gibbs CJ in *Pochi*.[45] This limitation, her Honour found, 'allows of the possibility that a person may not hold Australian citizenship and yet not be an alien'.[46] Her Honour also noted that the fact the plaintiffs held foreign citizenship, or owed allegiance to a foreign power, was not determinative of the question of their alienage.[47] Moreover, her Honour opined that changes in national and international circumstances may affect the application of terms such as 'foreign' and 'alien'.[48]

On this basis, her Honour proceeded to note the incongruity of the common law's recognition of the unique connection between Aboriginal Australians and their traditional lands on the one

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40 Ibid 109.

41 *Love v Commonwealth; Thoms v Commonwealth* (n 1) [81] (Bell J).

42 Ibid [74] (Bell J), [284] (Nettle J), [333] (Gordon J), [398] (Edelman J).

43 Ibid 16 [51].

44 Ibid.

45 Ibid [64].

46 Ibid.

47 Ibid [66].

48 Ibid [69].

hand withholding that they could be described as 'alien' within the ordinary meaning of that word on the other.[49] Furthermore, that considering contemporary international understanding, it was not offensive 'to recognise the cultural and spiritual … connection between indigenous peoples and their traditional lands',[50] and in light of that recognition to hold that Australia's exercise of sovereign power 'does not extend to the exclusion of [Aboriginal Australians] from the Australian community'.[51]

Her Honour was, however, clear in explaining that this conclusion did not deny Australia's general sovereign power to decide whether to admit aliens to the community or to remove those aliens it no longer wished to remain.[52] Rather, it was stressed that 'the position of Aboriginal Australians … is sui generis',[53] such that the power granted by s 51(xix) of the *Constitution* does not extend to treating an Aboriginal Australian as an alien because 'despite the circumstance of birth in another country, an Aboriginal Australian cannot be said to belong to another place'.[54]

Having so determined the question of law in the special cases, her Honour then turned to the questions of fact, that is, whether each plaintiff was an Aboriginal Australian.[55] Her Honour endorsed the use of the tripartite test from *Mabo v Queensland [No 2]*[56] in determining this issue.[57] Under the test, membership of an Aboriginal group requires biological descent and recognition of a person's membership of the group with which they identify by a person with traditional authority among that group.[58] In light of the facts set out above, her Honour held

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49 Ibid [71].

50 Ibid [73].

51 Ibid.

52 Ibid [74].

53 Ibid.

54 Ibid. Note that the concept of 'belonging' as being the antonym of alienage was addressed by Edelman J and will be explored in the discussion of his judgment below.

55 *Love v Commonwealth; Thoms v Commonwealth* (n 1) [75].

56 (1992) 175 CLR 1, 70 (Brennan J).

57 *Love v Commonwealth; Thoms v Commonwealth* (n 1) [79].

58 Ibid [76], citing *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 70 (Brennan J).

that both Mr Thoms and Mr Love were Aboriginal Australians, and therefore – on the basis of her findings regarding the question of law – not within reach of the aliens power.

Notably, Bell J concluded her judgment with the following statement which, in the writer's opinion, neatly encapsulates the key takeaway from the special cases:

> I am authorised by the other members of the majority to say that although we express our reasoning differently, we agree that Aboriginal Australians (understood according to the tripartite test in Mabo [No 2]) are not within the reach of the "aliens" power conferred by s 51(xix) of the Constitution.[59]

2 *Nettle J*

Nettle J also restated the issue for consideration in the special cases, expressing it in the more precise terms of:

> [W]hether it is within the legislative competence of the Parliament under s 51(xix) of the Constitution to treat either plaintiff as an "unlawful non-citizen" (within the meaning of s 14(1) of the Migration Act), and thus to detain and possibly to deport him under ss 189, 196 and 200 of the Migration Act.[60]

His Honour then conceptualised the plaintiffs' argument as being that Aboriginal Australians are so essentially 'Australian' according to the ordinary meaning of that concept (due to their history of habitation in Australia, long prior to and continuously from European settlement, such that they have a consequent spiritual and cultural connection to land and waters in Australia) that they cannot possibly answer the description of an 'alien' in the ordinary meaning of that term.[61]

His Honour then proceeded to discuss the concept of alienage (including the notions of permanent and local allegiance) and its limitations, making the following notable observations.

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59 Ibid [81].

60 Ibid [241].

61 Ibid [242].

1) That the essence of 'alienage' in ordinary understanding is the 'want of a permanent allegiance to and protection by the sovereign of the Commonwealth'.[62]
2) However, that determining the current ambit of the ordinary meaning of alien cannot be a mechanical exercise of identifying necessary and sufficient conditions from pre-Federation decisions and statutes. Rather, it requires analysis of circumstances in light of historical developments, including in customary international law.[63]
3) That the aliens power cannot generally be limited or required to be exercised with reference to racial characteristics.[64]
4) That, generally speaking, alienage has nothing to do with a person's experiences or feelings of connection to the Australian community, territory or polity (or absence of such a connection to another sovereign nation).[65]
5) Rather, his Honour found that whether a person falls outside the ordinary meaning of an alien depends on their 'possession of characteristics which so connect [them] to the sovereign as to necessarily give rise to reciprocal obligations of protection and allegiance.'[66]

His Honour then proceeded to determine whether Aboriginal Australians were capable of categorisation as aliens within the ordinary meaning of the word. The essence of his Honour's findings were as follows:

1) The classification of an Aboriginal Australian as an alien is at odds with the growing legal recognition of Aboriginal peoples as the original inhabitants of Australia.[67]
2) Thus, it was necessary to determine, in light of the principles regarding the concept of alienage, whether the nature of an Aboriginal person's relationship to the Australian polity was such that they could be categorised as an alien within the ordinary meaning of the word.[68]

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62 Ibid [249].

63 Ibid [253].

64 Ibid [256], citing *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 366 [40] (Gaudron J).

65 Ibid [257]-[258].

66 Ibid [260].

67 Ibid [263].

68 Ibid.

3) Aboriginal societies – and their connection and entitlement to traditional lands and waters possessed under traditional laws and customs – have in truth always been recognised by the Australian common law.[69] At law, such societies continue to exist 'so long as their members are "continuously united in their acknowledgment of laws and observance of customs" deriving from before the Crown's acquisition of sovereignty'.[70]
4) A person cannot be a member of such a society unless they are resident in Australia, biologically descended from its members, and accepted by other members of that society wielding traditional authority according to their traditional laws and customs.[71]
5) Such membership is a status recognised by both the common law and traditional laws and customs,[72] and inconsistent with alienage.[73] This is because it would be illogical that, immediately before Federation, the common law acknowledged the authority of elders to determine membership of such societies while simultaneously subjecting members of that society to the liability of deportation.[74]
6) Such a permanent exclusion from the territory of Australia 'would have abrogated the common law's acknowledgment of traditional laws and prevented the observance of traditional laws and customs'.[75] Thus, to categorise Aboriginal Australians as aliens would have been to recognise that the Crown could tear Aboriginal societies asunder, 'which would have been the very antithesis of the common law's recognition of that society's laws and customs as a foundation for rights and interests enforced under Australian law'.[76]
7) Consistently with its recognition of Aboriginal societies and their laws and customs, the common law must have always comprehended that the Crown owed a unique

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69 Ibid [268]-[269], discussing *Mabo v Queensland [No 2]* (1972) 175 CLR 1 and citing *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 445 [49] (Gleeson CJ, Gummow and Hayne JJ).

70 Ibid [270], quoting *Sampi v Western Australia* (2010) 266 ALR 537, 560 [77] (North and Mansfield JJ).

71 Ibid [271]. Note that this is essentially his Honour's restatement of Brennan J's tripartite test. See *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 70.

72 Ibid.

73 Ibid [272].

74 Ibid.

75 Ibid.

76 Ibid [272].

obligation of permanent protection to those societies and its members,[77] with a reciprocal but renounceable allegiance owed by those members to the Crown.[78]

8) The extent of that unique obligation includes not casting a resident non-citizen who is a member of an Aboriginal society (and recognised as such pursuant to laws and customs continuously observed since before the Crown's acquisition of sovereignty) out of Australia as if they were an alien.[79]
9) As such, in his Honour's view, to classify an Aboriginal Australian (understood according to the tripartite test) as an alien 'is to treat as an "alien" a person who is incapable of answering that description in the ordinary sense of the word'.[80]

Thus, his Honour found that to impose the liabilities of alienage on a duly recognised member of an Aboriginal society is beyond the legislative competence of the Commonwealth Parliament.[81] Consequently, to treat an Aboriginal Australian as an unlawful non-citizen is beyond the Commonwealth's legislative competence, and thus his Honour held that s 14(1) of the *Migration Act* must be read down accordingly.[82]

Having so answered the legal issue, Nettle J then turned to the circumstances of the special cases. His Honour found that on the facts, Mr Thoms was a member of an Aboriginal society (or an Aboriginal Australian according to the tripartite test). Accordingly, his Honour could not answer the description of an alien in the ordinary sense of the word and could not be treated as an unlawful non-citizen under s 14(1) of the *Migration Act*. However, in Mr Love's case, his Honour found it would be necessary for the Federal Court to find the relevant facts and determine the matter according to law.[83]

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77 Ibid [272].

78 Ibid [279].

79 Ibid [280].

80 Ibid [284].

81 Ibid.

82 Ibid [285].

83 Ibid [288].

3 *Gordon J*

Gordon J's judgment began with, and was effectively predicated upon, the following statement:

> The fundamental premise from which the decision in *Mabo v Queensland [No 2]* proceeds – the deeper truth – is that the Indigenous peoples of Australia are the first peoples of this country, and the connection between the Indigenous peoples of Australia and the land and waters that now make up the territory of Australia was not severed or extinguished by European "settlement".[84]

This connection, her Honour opined, is persisting and spiritual or metaphysical and determined according to Indigenous laws and customs.[85] Her Honour also endorsed the use of the tripartite test in determining a person's aboriginality,[86] and made clear from the outset her belief that both plaintiffs were Aboriginal Australians under that test.[87]

Gordon J made sure to stress that the legal issue in the special cases – expressed by her Honour as 'whether Aboriginal Australians, born overseas, without the statutory status of Australian citizenship and owing foreign allegiance, are aliens within the meaning of s 51(xix)'[88] – was a *constitutional*, not statutory, question.[89]

In this light, her Honour explained it is important not to use statutory or other expressions like "Australian citizens", "subjects" or "nationals" as antonyms to the constitutional term 'aliens'.[90] Moreover, 'the constitutional term "aliens" conveys otherness, being an "outsider", foreignness'.[91] As such, it does not apply to Aboriginal Australians – because as the original inhabitants of Australia, Aboriginal Australians are not "outsiders" to Australia.[92]

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84 Ibid [289] (citations omitted).

85 Ibid [290].

86 Ibid [291], [366]-[372].

87 Ibid [292].

88 Ibid [294].

89 Ibid [295].

90 Ibid.

91 Ibid [296].

92 Ibid.

After these statements of principle, Gordon J explained her underlying reasoning.

Her Honour began by considering the meaning of "aliens" under s 51(xix) of the *Constitution*. Referring to authorities on the topic, she rejected the Commonwealth's submission that "non-citizen" is synonymous with "alien",[93] stating that 'non-citizenship does not equate, in all cases, with alienage … the synonymy of [the concepts] in *most* cases should not distract attention from the fact that the overlap is less than complete'.[94] That is, the statutory concept of "citizenship" cannot control the meaning of the constitutional concept of "aliens" – as this would essentially enable the Commonwealth Parliament to recite itself onto power.[95] Moreover, her Honour also found that foreign allegiance or the circumstance of having been born overseas is not necessarily determinative of alienage.[96] Rather, alienage is anchored in the concept of belonging to another,[97] or "otherness",[98] such that an alien is someone who is "unconnected" or "foreign" to Australia with a lack of relationship to the country.[99] Therefore, in Her Honour's view, whether the plaintiffs were aliens was 'fundamentally a question of otherness'.[100]

Then turning to explain her decision regarding the non-alienage of Aboriginal Australians, her Honour echoed Bell J;[101] stating 'Aboriginal Australians occupy a unique or *sui generis* position in this country, such that they are not aliens'.[102] As recognised descendants of the first peoples and original inhabitants of Australia, Aboriginal Australians are not outsiders or foreigners.[103] Nothing since European settlement or Federation has displaced their unique position.[104] That is, European assertion of sovereignty did not sever Aboriginal Australians'

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93 Ibid [300].

94 Ibid [304].

95 Ibid [305].

96 Ibid [313]-[316].

97 Ibid [301].

98 Ibid [302].

99 Ibid.

100 Ibid [333].

101 Ibid [74] (Bell J).

102 Ibid [333].

103 Ibid [335].

104 Ibid.

connection with country.[105] Neither did Federation or the *Constitution*.[106] Moreover, the Constitutional Convention Debates made clear that the essence of the aliens power was intended to be the exclusion of foreigners based on "otherness",[107] and did not contemplate that 'Aboriginal Australians – peoples who came from the land and waters that now make up Australia – would be within that power'.[108] Furthermore, Aboriginal Australians have a unique connection to the land and waters of Australia, recognised by Australian law.[109] One incident of this recognition is native title rights; in Her Honour's view, 'that Aboriginal Australians are not "aliens" within the meaning of that constitutional term in s 51(xix) is another".[110] That is, as Australia's sovereignty is exercised over territory to which it is recognised Aboriginal Australians are uniquely connected,[111] that connection 'cannot be dismissed as irrelevant to membership of the present polity of the Commonwealth of Australia, a polity established on the same land and waters'.[112] Thus, in her Honour's view Aboriginal Australians were – and are – part of the 'people of Australia' mentioned in the *Constitution*.[113] Therefore, they cannot be treated as "aliens" to the Australian polity.[114] In a statement that in the writer's view neatly summarises her position regarding the non-alienage of Aboriginal Australians, her Honour opined:

> It is a connection to this country that means that Aboriginal Australians are not foreigners within the constitutional concept of alien under s 51(xix). And it is a connection which means that even if an Aboriginal Australian's birth is not registered and as a result no citizenship is recorded, or an Aboriginal Australian is born overseas without obtaining Australian

105 Ibid [337].

106 Ibid [342].

107 Ibid [343].

108 Ibid [344].

109 Ibid [349].

110 Ibid [364].

111 Ibid [335].

112 Ibid [349].

113 Ibid [355].

114 Ibid [357].

> citizenship, they are not susceptible to legislation made pursuant to the aliens power or detention and deportation under such legislation.[115]

Satisfied on the facts that Mr Love and Mr Thoms met the tripartite test and were Aboriginal Australians, her Honour consequently held that both were not "aliens" within the meaning of s 51(xix) – notwithstanding their failure to obtain the statutory status of Australian citizenship.[116] Thus, she concluded that neither plaintiff was within reach of the aliens power, and that ss 189 and 198 of the *Migration Act* should consequently be read down so as not to apply to them.[117]

4 *Edelman J*

Edelman J began by discussing the essential meaning of "alien", noting that at Federation the term was basically formulated along racial lines,[118] such that 'members of the Asiatic or Indian races were considered to be aliens on arrival in Australia, even if they were also British citizens.'[119] However, notwithstanding the way they were treated, Aboriginal Australians were not considered to be aliens – they had ties and connections to land that were understood as marking them as belonging to Australia and therefore its political community.[120]

His Honour remarked that since Federation, High Court jurisprudence evolved such that in determining whether a person was an alien, it was generally asked whether they were a citizen of the Australian polity.[121] This gave the Commonwealth the ability to shape membership of, and alienage from, the Australian polity by defining the requirements of citizenship.[122] However, his Honour stressed that the "essential meaning" of "aliens" in s 51(xix), a constitutional term, should not be confused with its common application.[123] Furthermore, that it is an error of principle to define alienage as depending upon statutory requirements for

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115 Ibid [374].

116 Ibid [387]-[389].

117 Ibid [390].

118 Ibid [404].

119 Ibid [392].

120 Ibid.

121 Ibid [393].

122 Ibid.

123 Ibid [394].

citizenship.[124] That is, much like the other members of the majority, his Honour held that the statutory concept of citizenship is not an antonym to the constitutional concept of being an alien.[125] He also noted that to tie the meaning of alien to whatever criteria the Commonwealth happens to select for citizenship would contradict the well-established principle that Parliament cannot deem persons to be aliens if they could not possibly fall within the ordinary understanding of that term.[126] Rather, in his Honour's view, the antonym of an alien to the Australian body politic is a "belonger" to that political community, such than an alien is a foreigner to it.[127] As the *Constitution* is 'not merely a jumble of letters capable of being given entirely new essential content at different times like alphabet soup', that essential meaning is fixed beyond legislative control.[128]

His Honour then further discussed the historical application of s 51(xix) of the *Constitution*, reiterating that the exclusion of Aboriginal people from the race but not aliens power at Federation demonstrated that 'Aboriginal people simply did not fall within the application of "alien", a foreigner to the political community'.[129] Moreover, the exclusion of other races but not Aboriginal Australians under the *Naturalisation Act 1903* (Cth) indicated 'there was no exception because [Aboriginal Australians] were members of the political community, albeit with fewer rights than others in the community'.[130] Furthermore, significant legislative and judicial developments since Federation have been premised upon recognition of Aboriginal community in Australia.[131]

In his Honour's view, Aboriginal people are inseparably tied to the land of Australia and thus to the Australian polity, with 'metaphysical bonds that are far stronger than those forged by the happenstance of birth on Australian land or the nationality of parentage',[132] these being two

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124 Ibid.

125 Ibid.

126 Ibid.

127 Ibid [394], [410].

128 Ibid [399].

129 Ibid [410].

130 Ibid [412].

131 Ibid [450].

132 Ibid [396].

traditional factors demonstrating 'belonging'. This powerful spiritual and cultural connection to land, that Aboriginal Australians have had for tens of thousands of years,[133] forms an underlying basis for membership of Australia's political community independent of citizenship.[134] Notably, in his Honour's view, even the loss of native title rights or the effluxion of Aboriginal societies would not extinguish the fundamental truth of that underlying connection,[135] which forms part of Aboriginal Australians' identities whether citizens or non-citizens.[136] This connection is an underlying fundamental truth that cannot be altered or deemed not to exist by legislation.[137] As such, due to this unalterable and fundamental metaphysical connection, Aboriginal Australians belong to Australia and are essential members of its political community.[138] Recognising that connection but denying Aboriginal Australians their special membership of the Australian political community would, in his Honour's view, 'be a hopeless and inherent contradiction'.[139] Consequently, Aboriginal Australians are beyond the reach of the aliens power — their fundamental spiritual and cultural sense of belonging to Australia constituting them as members of the political community.[140] Edelman J also rejected the Commonwealth's warnings against reading the aliens power so as not to apply to non-citizen Aboriginal Australians as outlandish and absurd.[141]

While his Honour approved of the use of the tripartite test, he observed it is not set in stone as the only measure for determining Aboriginality for the purposes of the aliens power (as in his view the 'general' sense of Aboriginal identity necessary to constitute membership of the Australian political community is not dependent on membership of a particular sub-group).[142] Upon acceptance that both plaintiffs were Aboriginal Australians,[143] his Honour held that they

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133 Ibid [451].

134 Ibid [450], [466].

135 Ibid [451].

136 Ibid [391], [451].

137 Ibid [451].

138 Ibid [398].

139 Ibid [454].

140 Ibid [391].

141 Ibid [455]-[457].

142 Ibid [458].

143 Ibid [458]-[465].

were consequently beyond the reach of the aliens power and therefore that 'insofar as the Migration Act purports to apply to Aboriginal people of Australia, such as Mr Love and Mr Thoms, as aliens, it must be disapplied'.[144]

B *Minority Judgments*

The minority consisted of Kiefel CJ and Gageler and Keane JJ.

Much like the majority judgments, the reasoning of the minority differed, but ultimately all three Justices refused to recognise that non-citizen Aboriginal Australians were beyond the reach of the aliens power in s 51(xix) of the *Constitution*.[145]

1 *Kiefel CJ*

In the Chief Justice's view, deciding whether individuals having the characteristics of the plaintiffs are aliens was not for the High Court to determine, as it would 'involve matters of values and policy … [and] usurp the role of the Parliament'.[146] Rather, as identified above, her Honour preferred to dispose of the special cases by ascertaining 'whether it is open to the Commonwealth Parliament to treat persons having the characteristics of the plaintiffs as non-citizens for the purposes of the *Migration Act*'.[147] Furthermore, despite acknowledging the limitation on the aliens power identified in *Pochi*,[148] her Honour stated that '[i]t is now regarded as settled that it is for the Parliament, relying on s 51(xix), to create and define the concept of Australian citizenship and its antonym, alienage'.[149]

Observing that the *Australian Citizenship Act 2007* (Cth) concerns an important and fundamental power given to the Commonwealth Parliament for the governance of Australia (that is, the determination of who is to be a member of the Australian body politic and who is to be an alien to it), her Honour reasoned that denying that power is a serious matter.[150] After

144 Ibid [398].

145 Ibid [47] (Kiefel CJ), [141] (Gageler J), [219]-[220] (Keane J).

146 Ibid [4].

147 Ibid.

148 Ibid [7].

149 Ibid [5].

150 Ibid [14].

reviewing the authorities, and noting that 'a long connection with Australia and its community' is not enough to deprive a person of statutorily mandated alienage,[151] the Chief Justice assessed that the plaintiffs (as non-citizens born outside Australia with citizenship of foreign countries) were not part of the Australian body politic, and that the Commonwealth Parliament consequently had the power to treat them as aliens under s 51(xix) – subject to consideration of the effect of their Aboriginality.[152]

Turning to consider that effect, her Honour rejected the plaintiff's submission that the common law recognition of native title had acknowledged a special connection between Aboriginal Australians and the entirety of Australia such that they cannot be described as aliens within the meaning of s 51(xix) of the *Constitution*. Rather, as recognition of native title is restricted to the particular land and waters associated with the traditional laws and customs of a specific Aboriginal group,[153] 'the common law has never recognised … that Aboriginal persons as a whole comprise a singular society or group … or that the connection spoken of extends beyond the traditional land of the groups in question'.[154] That is, the connection to land acknowledged by the common law cannot be to the entire Australian territory; as this would be inconsistent with the concept of native title.[155] Moreover, her Honour stated that arguing the connection recognised for the purposes of native title claims could be used to answer constitutional questions about the relationship between an Aboriginal group and the Australian body politic was wrong as a matter of law and logic.[156] Furthermore, while accepting the common law may recognise that members of an Aboriginal group feel a sense of "belonging" to their traditional lands, her Honour stressed that this is not the same kind of "belonging" relevant to alienage in a constitutional sense.[157] Ultimately, her Honour found that the common law does not recognise traditional Aboriginal laws and customs, but only native title – and that that recognition cannot be said to extend to acknowledging that traditional laws and customs have force or effect in

151 Ibid [17].

152 Ibid [19].

153 Ibid [30].

154 Ibid [22].

155 Ibid [30].

156 Ibid [31].

157 Ibid [32].

Australian law.[158] To do so, and accept the plaintiff's argument that membership of an Aboriginal group according to traditional laws and customs may be determinative of a person's legal status in relation to the Australian polity, was in her Honour's view to attribute sovereignty to Aboriginal groups;[159] the kind of sovereignty clearly rejected by *Mabo [No 2]*.[160]

Ultimately, Kiefel CJ disposed of the special cases by stating that: 'in each of the proceedings I would answer … as follows: the plaintiff does not have the status of an Australian citizen according to legislation validly enacted under s 51(xix) of the Constitution. Accordingly each plaintiff is an alien within the meaning of s 51(xix)'.[161]

2 *Gageler J*

Gageler J noted that, as a constitutional head of power, s 51(xix) of the *Constitution* 'takes its place within "an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances"'.[162] In this light, his Honour adopted the meaning of "alien" given by Gaudron J in *Nolan v Minister for Immigration and Ethnic Affairs*.[163] The essence of this is that an alien is a person who does not belong to the body politic.[164] Thus, where membership of the body politic depends on citizenship, alien status corresponds with non-citizenship.[165] Therefore, in his Honour's view, "non-citizen" is synonymous with "alien".[166]

His Honour then proceeded to consider the plaintiff's submissions, noting their argument that a person's membership of an Indigenous society would render them a non-alien came perilously close to an assertion of Aboriginal and Torres Strait Islander sovereignty (due to the

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158 Ibid [37].

159 Ibid.

160 Ibid [25].

161 Ibid [47].

162 Ibid [86], citing A*ustralian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 81.

163 (1988) 165 CLR 178, 189; *Love v Commonwealth; Thoms v Commonwealth* (n 1) [93].

164 Ibid.

165 Ibid.

166 *Love v Commonwealth; Thoms v Commonwealth* (n 1) [98].

role of Aboriginal elders in determining that membership);[167] a notion which Australian courts have continuously rejected.[168] He further opined that accepting this argument would introduce a race-based distinction into the *Constitution*, something to which his Honour objected as a matter of principle, 'irrespective of how benign the particular distinction contended for might seem'.[169]

Ultimately, though acknowledging the disadvantaged position of Aboriginal Australians was the unique responsibility of the Australian body politic,[170] and stating he found the plaintiffs' argument morally and emotionally engaging,[171] his Honour was unable to accept it in any of its variations[172] – stating there was 'no basis for extrapolating from common law recognition of a cultural or spiritual connection with land and waters within the territory of the Commonwealth to arrive at constitutionally mandated membership of or connection with the political community of the Commonwealth.'[173] That is, the recognition provided for in *Mabo [No 2]* cannot act as a constitutional limitation on the Commonwealth's legislative power under any conventional process of constitutional interpretation or implication.[174] His Honour was also opposed to accepting the plaintiffs' case for apparent policy reasons, such as that to do so would afford Aboriginal groups 'a constitutional capacity greater than that conferred on any State Parliament',[175] and moreover that this would inject an element of indeterminacy into the legal status of alienage, something which Australia's interests as a nation state demand be clear and consistent.[176]

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167 Ibid [125].

168 Ibid [102].

169 Ibid [133].

170 Ibid [121].

171 Ibid [128].

172 Ibid [127].

173 Ibid [128].

174 Ibid.

175 Ibid [137].

176 Ibid [138].

In the end, Gageler J dispensed with the special cases as follows:

> I would answer the principal question for determination in each special case to the following effect: by reason of not having the status of an Australian citizen according to criteria of general application prescribed by legislation validly enacted under s 51(xix) of the Constitution, the plaintiff is an alien within the meaning of that provision.[177]

3 *Keane J*

Much like the other members of the minority, the essence of Keane J's judgment was that by reason of their failure to obtain Australian citizenship, the plaintiffs could be treated as aliens under s 51(xix). That is, he expressly rejected the plaintiffs' argument that as Aboriginal Australians they were beyond the scope of the aliens power, and stated that due to their lack of citizenship they could be classified as aliens in the same manner as any other resident born abroad who does not apply for citizenship;[178] "alien" having become synonymous with "non-citizen".[179]

In rejecting the plaintiffs' contention regarding the special position of Aboriginal Australians, his Honour observed that there was no support in the text or structure of the *Constitution* for the idea that there exists a special class of people who, as a result of biological descent and self-identification as members of a particular ethnic group, enjoy a constitutionally privileged relationship with the Australian body politic.[180] He also stated his opinion that the 1967 amendments to the *Constitution* had put Aboriginal Australians on the same footing as other Australians, such that 'Aboriginal people were no longer singled out by the Constitution itself as persons who stand separately and apart from the other people of the Commonwealth'.[181] His Honour was also opposed to using race as a basis for distinguishing the application of laws to the people of the Commonwealth, as this would offend against the principle that justice should be administered equally to all.[182]

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177 Ibid [141].

178 Ibid [146]-[147].

179 Ibid [164].

180 Ibid [178].

181 Ibid [180].

182 Ibid [181].

Moreover, his Honour suggested that the plaintiffs had confused Aboriginal Australians' spiritual and cultural connection with Australia's land and waters with the political and legal connection to the Australian body politic necessary to not be considered an alien.[183] He also rejected the submission that because Mr Thoms was a native title holder, the Court should prefer a construction of 'alien' which does not include an Aboriginal Australian with a recognised claim to native title; stating this confused rights of property with rights of citizenship.[184] Furthermore, much like Kiefel CJ, his Honour stressed that the recognition of native title by the common law does not entail recognition of an Aboriginal community's traditional laws.[185] As a result, 'Aboriginal laws and customs do not operate to displace, impair or alter the ordinary operation of the laws made by the Parliament'.[186] His Honour also rejected the notion that all Aboriginal Australians have a common customary connection with the continent of Australia, stating this was difficult to reconcile with the fact that a successful native title claim involves the exclusion of all others, including other Aboriginal persons, from the claimed land and waters.[187]

Keane J also rejected the submission that Aboriginal Australians, as a result of the Crown owing them an obligation of permanent protection, owe permanent allegiance to the Crown in right of Australia, stating it had no support in authority.[188] Additionally, his Honour expressed the sentiment that this notion was suffused with rank paternalism, such that to accept it would be to acknowledge limitations on the freedom of Aboriginal persons to pursue their destiny as individuals.[189] Limiting the autonomy of persons of Aboriginal descent in this manner would be inconsistent with the fundamental notion of equality before the law.[190]

His Honour was also opposed to the plaintiff's argument that the tripartite test could be used to determine a person's Aboriginality and hence their alienage, as in his view this would cause

183 Ibid [213].

184 Ibid [211]-[212].

185 Ibid [202], [205].

186 Ibid [209].

187 Ibid [207].

188 Ibid [214]-[215].

189 Ibid [217].

190 Ibid [217].

uncertainty (due to the differing choices or views of individuals) and resultant conceptual and practical difficulties.[191] Moreover, he considered that accepting this argument would mean recognising that members of Aboriginal groups (in deciding whether to recognise someone as a member of their community) had the authority to make decisions binding the Commonwealth, thus attributing political sovereignty to them.[192] This would be an error, as the authorities make clear that recognising that Aboriginal groups have political sovereignty is impermissible.[193]

Accordingly, after his rejection of their arguments, his Honour concluded that both plaintiffs were "aliens" within the meaning of s 51(xix).[194]

VI ANALYSIS

While it is difficult to anticipate the case's exact practical significance, given that it is such a recent decision and in light of the fact that there were seven individual judgments, there is no denying that the High Court's determination in this matter was momentous.

As a result of the majority's judgments, non-citizen Aboriginal Australians have been recognised as being beyond the scope of the aliens power in s 51(xix) of the *Constitution*;[195] creating a category of constitutional non-citizen non-aliens immune from the possibility of deportation or permanent exclusion from Australia. Moreover, the decision marks a clear turning away from defining Aboriginal Australians according to outdated notions of 'race' to the more sensitive and accurate conception of such people as descendants of Australia's first inhabitants who possess a unique metaphysical connection to Australian lands and waters.

The decision is also likely to be of significant interest to native title holders and legal practitioners in this field, as the majority's extensive discussion of the tripartite test in relation to the specific circumstances of Mr Love and Mr Thoms serves to demonstrate when it is likely a court will legally recognise a person's Aboriginality.[196] However, it should be noted that due

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191 Ibid [196].

192 Ibid [197].

193 Ibid [199]-[205].

194 Ibid [219]-[220].

195 Ibid [81].

196 Cindy Cameronne and Wyn Diong, ''Aliens', Indigenous Australians and the Constitution: Examining Love v Commonwealth', *Thomson Reuters' Legal Insight* (Web Page, 3 March 2020)

to the majority's inability to agree in Mr Love's case, the decision contemplates that individual plaintiffs may not be able to satisfy the tripartite test in practice due to difficulties of proof.

Principles of constitutional interpretation, both generally and specifically in relation to the aliens power, were also confirmed by the Court. For instance, and as mentioned above, all seven Justices stated their agreement with the principle that the Commonwealth Parliament cannot treat as an alien someone who is incapable of satisfying the ordinary meaning of that term.[197] This is a reflection of the general principle that the validity of laws enacted under the heads of power in s 51 of the *Constitution* cannot depend on the opinion of the law-maker. To cite Fullagar J's famous dicta from *Australian Communist Party v Commonwealth*,[198] as did Gageler and Gordon JJ,[199] '[a] power to make laws with respect to lighthouses does not authorise the making of a law with respect to anything which is, in the opinion of the law-maker, a lighthouse'.[200]

VII CONCLUSION

Love v Commonwealth; Thoms v Commonwealth was a landmark constitutional decision, resulting in the recognition of the unique position of Aboriginal Australians (understood according to the tripartite test expressed by Brennan J in *Mabo v Queensland [No 2]*) relative to the body politic of the Commonwealth of Australia, to the effect that such persons are legally incapable of falling within the ordinary meaning of "aliens" in s 51(xix) of the *Constitution* notwithstanding whether they have attained the statutory status of Australian citizenship. The effect of this is that they are beyond the reach of any legislation which purports to treat them as such. Moreover, the case confirmed limitations on the aliens power and s 51 heads of power generally and affirmed the utility of the tripartite test.

The ruling was undeniably contentious, as evidenced by the significant discussion and controversy it has generated across many different fields – from legal practitioners and

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<https://insight.thomsonreuters.com.au/legal/posts/aliens-indigenous-australians-and-the-constitution-experts-discuss-love-v-commonwealth>.

197 *Love v Commonwealth; Thoms v Commonwealth* (n 1) [7] (Kiefel CJ), [50]-[51] (Bell J), [87] (Gageler J), [168] (Keane J), [236] (Nettle J), [310] (Gordon J), [394] (Edelman J).

198 (1951) 83 CLR 1.

199 *Love v Commonwealth; Thoms v Commonwealth* (n 1) [86] (Gageler J), [329], [330] (Gordon J).

200 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 258.

academics to politicians and social commentators. For instance, Home Affairs Minister Peter Dutton referred to the Court's decision as 'a very bad thing' that would be exploited by lawyers and could have 'significant repercussions'.[201] Furthermore, the Commonwealth Attorney-General Christian Porter has stated that he will seek a permissible legislative solution to enable the deportation of individuals in the position of Mr Love and Mr Thoms;[202] in other words, non-citizens identifying as Aboriginal Australians. In the writer's view, the case also served to highlight divisions on the current bench of the High Court, as evidenced by the comparative conservatism of Kiefel CJ's judgment with the progressive nature of Edelman J's reasoning.

Ultimately, whether or not it is abrogated by legislation or overturned in future, in the writer's opinion the decision's acknowledgment of Aboriginal Australians' unique or *sui generis* position such that they are incapable of being treated as aliens to the Australian polity represents a favourable step towards greater legal recognition of Aboriginal and Torres Strait Islander Peoples as the first inhabitants of this country.

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201 Evan Young, 'A Very Bad Thing': Peter Dutton Slams High Court's Aboriginal "Aliens" Ruling', *SBS News* (online, 13 February 2020) <https://www.sbs.com.au/news/a-very-bad-thing-peter-dutton-slams-high-court-s-aboriginal-aliens-ruling>.

202 See, eg, Paul Karp and Calla Wahlquist, 'Coalition Seeks to Sidestep High Court Ruling that Aboriginal Non-Citizens Can't Be Deported', *The Guardian Australia* (online, 12 February 2020) <https://www.theguardian.com/australia-news/2020/feb/12/coalition-seeks-to-sidestep-high-court-ruling-that-aboriginal-non-citizens-cant-be-deported>.

UBER BV v FEDERAL COMMISSIONER OF TAXATION [2017] FCR 462

STEPHANIE YII*

I INTRODUCTION

Through websites and mobile phone applications, ridesharing services match passengers with drivers of private vehicles. Some popular examples include Uber, Lyft and Ola Cabs. Following the rise in the popularity of ridesharing services, the Australian Taxation Office ('ATO') ruled that drivers providing ridesharing services must register and pay for Goods and Services Tax ('GST'), regardless of their turnover.[1] The general rule is that an enterprise with a turnover of less than $75,000 does not need to register for GST. An exception to this rule is provided under section 144-5(1) of the *A New Tax System (Goods and Services Tax) Act 1999* (Cth) ('*GST Act*'), which states that a person carrying on an enterprise is required to be registered for GST purposes if in the carrying on of their enterprise they supply 'taxi travel', regardless of their turnover. 'Taxi travel' is defined under section 195-1 of the *GST Act* to mean 'travel that involves transporting passengers, by taxi or limousine, for fares'. The ATO considered that the services provided by UberX drivers fell within this definition and therefore required the drivers to register for GST purposes.

The case of *Uber BV v Federal Commissioner of Taxation* [2017] FCR 462 ('*Uber BV*') was brought to the Federal Court of Australia by the applicant.[2] Uber disagreed with the ATO's position that the Uber platform fell within the exception provided under section 144-5 of the *GST Act* and sought a declaration from the Court that the services provided by UberX drivers did not constitute 'taxi travel' under the *GST Act*. The issue to be determined by Griffiths J was

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1 Australian Taxation Office, 'Ride-sourcing', *The Sharing Economy and Tax* (Web Page, 12 June 2019) <https://www.ato.gov.au/general/the-sharing-economy-and-tax/ride-sourcing/>.

2 *Uber BV v Federal Commissioner of Taxation* [2017] FCR 462 ('*Uber BV*').

whether UberX drivers, in providing UberX services to passengers, were supplying 'taxi travel' as defined in the *GST Act*.[3]

II FACTS

Uber services are provided through two smartphone applications known as the 'Uber app' and the 'Uber Partner app', which links passengers to drivers.[4] Features of the service include the driver's fees for using the Uber Partner application calculated in accordance to a Service Fee Schedule,[5] the use of the driver's personal vehicle to provide the services,[6] no requirement for drivers to hold a hire car or taxi operator's licence,[7] the requirement for riders to be registered with Uber before making bookings,[8] and the rider's trip cost calculated with reference to both the time taken for and the distance covered in the ride.[9] Additionally, drivers cannot do any of the following: wait at taxi ranks or specific locations, accept hails from persons on the street or kerbside, drive in designated bus or transit lanes unless legally permitted to do so, operate a taximeter or provide a count of the ongoing cost of the ride, display a schedule of fares in the car, accept or organise any pre-booked rides, provide Uber services to persons other than registered Uber riders, wear a uniform, nor display any signs identifying the vehicle as a taxi or limousine, or its association with Uber.[10]

III APPLICANT'S SUBMISSIONS

The applicant made three submissions. Firstly, as to the statutory construction of div 144 of the *GST Act*,[11] secondly, that UberX services are not 'taxi travel' by taxi as defined under the *GST*

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3 Ibid 465 [1].

4 Ibid [5].

5 Ibid 467 [9].

6 Ibid [11].

7 Ibid.

8 Ibid.

9 Ibid.

10 Ibid 468 [12].

11 Ibid 469.

Act,[12] and thirdly, that UberX services are not 'taxi travel' by limousine as defined under the *GST Act*.[13]

A *Statutory Construction of Div 144 of the GST Act*

1 *Applicant's Submissions*

The applicant submitted that by reason of the statutory construction of div 144 of the *GST Act*, the registration exception under section 144-5 of the *GST Act* did not apply to UberX drivers.[14] The applicant submitted that the legislature 'intended to create a specific exception to a specific circumstance or industry, namely the taxi industry'.[15] In support of its submission, the applicant stated that this was evident in the statutory context created by the provisions, the first being section 144-1 of the *GST Act*,[16] which states that '[t]axi operators are required to be registered, regardless of turnover', and the second that div 144 of the *GST Act* did not directly deal with other forms of point to point transportation apart from taxi or limousine services.[17] Taken together, the applicant submitted that this provided the statutory context that indicated that 'the provisions were intended to create an exception for a specific industry', being the taxi industry.[18]

Building upon this, the applicant submitted that in determining whether the exception should apply to UberX services,[19] the relevant question to ask was whether the expression ought to be construed in a manner that extends it to 'some new state of affairs to which it might arguably extend'.[20] In light of the statutory context, the applicant contended that div 144 of the *GST Act* was not to be construed in a manner that extended it beyond those in the taxi industry.[21]

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12 Ibid 472.

13 Ibid 474.

14 Ibid 469.

15 Ibid [23].

16 Ibid [19].

17 Ibid.

18 Ibid [22].

19 Ibid [21].

20 *Hore v Albury Radio Taxis Co-operative Society Ltd* (2005) 56 NSWLR 210, [43].

21 *Uber BV* (n 2) 469 [23].

From this, the applicant submitted that the statutory context suggested that the words 'taxi' and 'limousine' as defined in 'taxi travel' should carry a trade or non-legal technical meaning, or in the alternative, an ordinary meaning that would appropriately achieve the 'statutory object of carving out a specific existing industry from the operation of an otherwise universally applicable general… rule'.[22] In order to determine the meaning of 'taxi', the applicant emphasised the use of the disjunctive in the phrase 'taxi or limousine', which suggested that they were intended to have two different meanings.[23] The applicant submitted that if 'taxi' was to be defined broadly to mean any vehicle hireable by the public, the word 'limousine' would be obsolete.[24] Therefore, the meaning of 'taxi' should be founded upon and should reflect the regulatory meaning of 'taxi' in State and Territory legislation.[25] The applicant submitted that this should include certain characteristics, such as signage and lighting indicating that the vehicle is a taxi, the use of uniforms, the inability to refuse a hire unless in certain circumstances, displaying prescribed information such as fares and a taximeter, and the tendering of cash or use of an approved payment method at the end of the ride.[26]

2 *The Commissioner's Submissions*

The Commissioner submitted that it was incorrect to divide the definition of 'taxi travel' into separate elements and to seek to apply the meanings of 'taxi' and 'limousine' from regulatory concepts 'divorced from the statutory context in which they appear'.[27] The Commissioner submitted that the definitions should be construed as a composite phrase – the result of this is that the inclusion of both references to two different but related types of transport suggests that the legislature intended to capture a 'category of transport' which involved the transportation of passengers in a vehicle from point to point for a fare.[28]

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22 Ibid 470 [24].

23 Ibid [26]

24 Ibid.

25 Ibid 470, 480-1.

26 Ibid 470 [29].

27 Ibid 476 [53].

28 Ibid.

B *UberX Services Are Not 'Taxi Travel' by Taxi*

1 *Applicant's Submissions*

In its second submission, the applicant distinguished between UberX services and taxi services to advance the proposition that UberX services is not travel that involves transporting passengers by taxi within the meaning of 'taxi travel'.[29] Firstly, vehicles driven by UberX drivers are private vehicles and subsequently are not fixed with signage, lighting, or a taximeter.[30] Secondly, UberX drivers can only accept bookings from registered UberX riders and are not obliged to accept ride requests, hold taxi licences or authorisations, nor wear uniforms.[31] Thirdly, UberX drivers cannot accept street or kerbside hails, nor can they wait at dedicated taxi ranks or drive in bus or transit lanes.[32] Fourthly, taxi fares are regulated by State and Territory law, whereas UberX services are calculated in a different manner.[33] Lastly, services must have a taximeter displayed in the vehicle which continuously calculates the fare payable, whereas UberX riders are provided with an estimated cost of the ride prior to booking.[34]

In support of its submission, the applicants sought to rely on expert evidence provided by Dr Abelson. In summary, the evidence related to the ordinary meaning of the word 'taxi' and 'limousine' and proposed that the word 'taxi' was not a catch-all term consisting of all point to point transport for a fare, but rather was premised on the regulatory concepts of 'taxi' in Australia, as discussed above.[35]

2 *The Commissioner's Submissions*

Relying on dictionary definitions, the Commissioner submitted that the meaning of 'taxi' was a vehicle that was hired by the public which transported them from point to point for a fare that

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29 Ibid 472.

30 Ibid [31].

31 Ibid.

32 Ibid.

33 Ibid.

34 Ibid.

35 Ibid [33].

is often, but not always, calculated with reference to a taximeter.[36] The Commissioner contended that it was incorrect for the applicant to rely on State and Territory regulations to determine the meaning of 'taxi', as the requirements imposed by each jurisdiction were inconsistent with one another.[37]

C *UberX Services Are Not 'Taxi Travel' by Limousine*

1 *Applicant's Submissions*

In its last submission, the applicant submitted that UberX services did not fall within the definition of 'taxi travel' involving transportation of passengers by limousine.[38] Quoting *Dreamtech International Pty Ltd v Federal Commissioner of Taxation* (2010) 187 FCR 352,[39] the applicant submitted that 'limousine' should bear its ordinary meaning as Parliament did not define the word, insinuating that it was intended to take on its ordinary meaning.[40]

The applicant proposed that a 'limousine' in its ordinary meaning had at least the following features.[41] Firstly, a large, luxury hire car or a special occasion vehicle. Secondly, a prestige or luxurious quality of service aligned with the marketing of limousine services. Thirdly, the ability for the customer to choose the type or category of vehicle booking. Fourthly, a fixed fare decided in advance, or a substantial minimum fare. Fifthly, the pre-booking of a limousine service was a regulatory requirement or an operational standard. Sixthly, a significantly more expensive fare compared to taxi or UberX services. Lastly, that limousines are purchased and maintained primarily for commercial use. From this, the applicant listed differences between limousine services and UberX services to contend that UberX services is not 'taxi travel' by limousine.[42] Firstly, UberX services are generally provided with ordinary vehicles owned by the driver and UberX riders have no options as to the model of the vehicle. Secondly, UberX is not marketed as a luxury service and the fees are generally less expensive than limousine

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36 Ibid 476 [55].

37 Ibid 477 [57].

38 Ibid 474.

39 (2010) 187 FCR 352, 358 [26].

40 *Uber BV* (n 2) 474 [40]–[41].

41 Ibid [42].

42 Ibid [43].

and taxi services. Lastly, the fare for the trip is calculated with reference to both the time and distance and are not paid for in advance nor can rides be booked for in advance.

2 *The Commissioner's Submissions*

As to the meaning of 'limousine', the Commissioner submitted that it was a private vehicle that was available to be hired by the public which transported them from point to point for a fare.[43] This fare was not calculated by reference to a taximeter.[44] Additionally, a limousine is generally not available to be hired immediately and must be pre-booked. The Commissioner further submitted that the Court should not accept the applicant's submission that a limousine was confined to 'luxury vehicles' as this would lead to the unwanted result of taxi and limousines which were not luxury vehicles avoiding the need to register for GST.[45]

In support of the Commissioner's latter submission, the Commissioner relied on the Explanatory Memorandum to the Bill that introduced div 144 of the *GST Act*.[46] This provided that the requirement for registration regardless of turnover was introduced to avoid the undesirable issue of registered and unregistered drivers, consequently allowing unregistered taxi drivers to charge GST, yet having no obligation to remit it. The Commissioner submitted that this implied that Parliament intended to 'ensure that all persons who supplied 'taxi travel' were subject to GST to ensure an equal tax impact on passengers', meaning that the phrase 'taxi travel', and its elements, should be construed broadly.[47]

IV JUDGMENT

The matter was heard by Griffiths J in the Federal Court of Australia. The Court adopted a broad and non-technical interpretation of div 144 of the *GST Act* to find that UberX services constituted 'taxi travel' under the *GST Act*.[48] The Court dismissed the applicant's application

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43 Ibid 477 [59].

44 Ibid.

45 Ibid [60].

46 Ibid 478 [61].

47 Ibid [62].

48 Ibid 499 [144].

and ordered that a declaration was to be made to the effect that UberX services constituted 'taxi travel' under the *GST Act*.[49]

A *Ruling on Evidence*

In its submissions, the applicant sought to rely on expert evidence provided by Dr Abelson relating to the ordinary meaning of the words 'taxi' and 'limousine' in 'taxi travel'.[50] Griffiths J firstly discussed the admissibility of expert evidence in determining the meaning of words. His Honour relied on *Lansell House Pty Ltd v Federal Commissioner of Taxation* (2010) 76 ATR 19 to uphold the principle that expert evidence is not admissible when it is submitted for the purposes of interpreting the ordinary meaning of a word, however, may be admissible where the word is used in a trade or technical sense that differs to its ordinary meaning.[51] Further elaboration and exceptions were drawn from *Pepsi Seven-Up Bottlers Perth Pty Ltd v Federal Commissioner of Taxation* (1995) 62 FCR 289.[52] Applying these principles, his Honour concluded that the expert reports were not admissible because the word 'taxi' and 'limousine' did not have a specialised or trade meaning.[53] Griffiths J considered that in the context of Div 144 of the *GST Act*, both words held their ordinary meanings.

B *Statutory Construction of Div 144 of the GST Act*

In determining the statutory construction of div 144 of the *GST Act*, Griffiths J firstly acknowledged the duty of the Court to give the words of the provision the meaning that the legislature intended them to have.[54] His Honour relied on the principles laid down in *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, to note that the 'context of the words, the consequences of a literal or grammatical construction… [and] the purpose of

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49 Ibid.

50 Ibid 472 [33].

51 Ibid 487 [104], quoting *Lansell House Pty Ltd v Federal Commissioner of Taxation* (2010) 76 ATR 19, [129].

52 *Uber BV* (n 2) 487 [105], quoting *Pepsi Seven-Up Bottlers Perth Pty Ltd v Federal Commissioner of Taxation* (1995) 62 FCR 289, 298.

53 *Uber BV* (n 2) 490-1 [111]-[115].

54 Ibid 492 [119], quoting *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78].

the statute' may require that the words of the provision are to be interpreted in a manner that does not correspond to its literal or grammatical meaning.[55]

In discussing the context of div 144 of the *GST Act*, Griffiths J agreed with the Commissioner's submission that the Explanatory Memorandum to the Bill which introduced the provision was a relevant consideration to the context.[56] The introduction of the exception to combat the issue of registered and unregistered taxi operators meant that GST was to be paid by all drivers, regardless of their turnover rate.[57] From this, his Honour supported the Commissioner's submission that 'taxi travel' should be construed broadly.[58] In support of this construction, his Honour adopted the approach in *Saga Holidays Ltd v Federal Commissioner of* Taxation (2006) 156 FCR 256,[59] which stated that the nature, policy and legislative context of the *GST Act* was intended to capture a wide variety of transactions, which insinuated that the Court was to construe the provisions in a 'practical and common sense way and that, generally speaking, it should avoid interpretations which are unduly technical or overly meticulous and literal'.[60]

In rejecting the Commissioner's submission, Griffiths J considered that the words 'taxi' and 'limousine' in the definition of 'taxi travel' was not a composite phrase.[61] This was because the definition expressly differentiated between both types of vehicles. Although the phrase was not deemed to be a composite phrase, his Honour endorsed the Commissioner's submission that words in a composite phrase should not be divided into separate elements divorced from their statutory context.[62]

Additionally, Griffiths J expressed caution against the Commissioner's use of dictionary meanings in submitting the meaning of 'taxi' in its submissions.[63] Endorsing Gordon J's observations in *Sea Shepherd Australia Ltd v Federal Commissioner of Taxation* (2013) 212

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55 Ibid.

56 *Uber BV* (n 2) 493 [122].

57 Ibid.

58 Ibid [123].

59 (2006) 156 FCR 256.

60 Ibid 273 [70].

61 *Uber BV* (n 2) 495 [132].

62 Ibid 494 [131], quoting *Sea Shepherd Australia Ltd v Federal Commissioner of Taxation* (2013) 212 FCR 252, 261.

63 *Uber BV* (n 2) 496 [133].

FCR 252, his Honour highlighted how statutory construction cannot be limited to merely reading off definitions from a dictionary, but rather should seek to ascertain the purpose or object of the statute.[64] Although reference can be made to dictionary meaning, it should not be used in substitute of judicial determination.[65]

In light of the above principles, Griffiths J concluded that the words in the definition of 'taxi travel' should be given their ordinary meanings, as opposed to a trade or specialised meaning.[66] His Honour accepted the Commissioner's submission that 'taxi' should be given its ordinary meaning, being a vehicle that was hired by the public which transported them from point to point for a fare that is often, but not always, calculated with reference to a taximeter.[67] Consequently, the applicant's submission that the meaning of 'taxi' was influenced by State and Territory regulatory concepts of taxi was rejected on the grounds that there was no basis for suggesting that Parliament had intended such an effect.[68]

Griffiths J held that 'limousine' should be given its ordinary meaning, being a private luxurious motor vehicle that was available to be hired by the public which transported them from point to point for a fare.[69] His Honour rejected the Commissioner's submission that the meaning of 'limousine' should not be confined to luxury vehicles, expressing the view that Parliament included the phrase 'or limousine' in the definition of 'taxi travel' to indicate that a limousine differed to a taxi in the supply of transport for a fare.[70] His Honour did not consider these differences to be what the applicant had submitted, but rather was founded on its fundamental difference being the usage of a luxury car.[71]

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64 Ibid, quoting *Sea Shepherd Australia Ltd v Federal Commissioner of Taxation* (2013) 212 FCR 252, 262.

65 *Uber BV* (n 2) 496 [134].

66 Ibid [135].

67 Ibid.

68 Ibid 498 [141].

69 Ibid 497 [136].

70 Ibid [137].

71 Ibid.

In conclusion, his Honour found that the discussed principles promoted a broad construction of div 144 of the *GST Act*, therefore supporting a finding that the word 'taxi' was broad enough to encompass the services provided by UberX.[72]

V COMMENT

Ultimately, this decision directly impacts upon drivers using UberX and other similar ridesharing services, who will now have to register for the GST, apply for an Australian Business Number, lodge business activity statements, and know how to issue tax invoices.[73] Notably, this decision may also impact other industries – the construction principles adopted by Griffiths J may be used to support a finding that a general approach should be adopted in other industries regulated by particular regimes.

Additionally, this decision raised the idea that there were possible inconsistencies between the *GST Act* and the *Fringe Benefits Tax Assessment Act 1986* (Cth) ('*FBT*'). This is because the *FBT* provides employers with an exemption for taxi travel in certain circumstances,[74] and following the decision, there was no clear position as to whether the references to 'taxi travel' in the *FBT* were consistent with that decided by *Uber BV*. As a preliminary response, the ATO released a discussion paper in which it adopted the meaning of 'taxi' as held in the judgment of *Uber BV*.[75] The ATO later clarified that the exemptions provided under the *FBT* applied to both ridesharing services and those supplied by licenced taxi travel.[76]

VI CONCLUSION

The case of *Uber BV* is a further example of a court adopting a broad and non-technical approach in construing the application of the *GST Act* to transactions.[77] This approach demonstrates that a word need not always be construed in its trade or technical meaning, and

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72 Ibid 499 [144].

73 Australian Taxation Office, 'Ride-sourcing', *The Sharing Economy and Tax* (Web Page, 12 June 2019) <https://www.ato.gov.au/general/the-sharing-economy-and-tax/ride-sourcing/>.

74 *Fringe Benefits Tax Assessment Act 1986* (Cth) s 58Z.

75 Australian Taxation Officer, 'Fringe Benefits Tax – Definition of Taxi' (Discussion Paper No TDP 2017/2, 27 September 2017).

76 Australian Taxation Officer, 'Taxi Travel Expenses Exemption', *Fringe Benefits Tax* (Web Page, 24 June 2020) <https://www.ato.gov.au/General/Fringe-benefits-tax-(FBT)/FBT-exemptions-and-concessions/Taxi-travel-expenses-exemption/>.

77 See *Uber BV* (n 2) 493 [125].

this is especially relevant where the word is one in common usage and is intended to be easily understood by a layperson. Evidently, this case stresses the importance of keeping the statutory context and objectives of the statute as forefront considerations when undertaking statutory interpretation. Lastly, this judgment serves as an important reminder to legal practitioners that expert evidence submitted in ascertaining the ordinary meaning of words will not be admitted unless provided for in the exceptions that are well-established in common law. This decision is one that has not only caused major changes in the ridesharing industry, but has also provided some valuable and guiding principles as to statutory construction.

STOCKTON v COMMISSIONER OF TAXATION [2019] FCA 1679

STEPHANIE YII*

I INTRODUCTION

The case of *Stockton v Commissioner of Taxation* [2019] FCA 1679 ('*Stockton*') involves a taxation residency issue.[1] In this case, the applicant is Rebekah Stockton and the respondent is the Commissioner of Taxation. The legal issue to be determined by Logan J was whether the applicant was, for the purposes of income tax law, a resident of Australia.[2] This required a determination as to whether the applicant was a 'resident' within the definition of section 6(1) of the *Income Tax Assessment Act 1936* (Cth) ('*ITAA*').

II FACTS

The following facts were relevant in assessing whether the applicant was a resident for the purposes of income tax law.

A *Background*

The applicant was an 18-year-old American who flew from the USA to Australia on a working holiday visa.[3] Stockton came to Australia on 1 September 2016 and returned to the USA on 23 June 2017, totalling to a period of 10 months.[4] The applicant stayed within the period granted by her visa and did not seek an extension of it.[5]

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1 [2019] FCA 1679 ('*Stockton*').

2 Ibid [2].

3 Ibid [1].

4 Ibid.

5 Ibid [8].

The Commissioner of Taxation performed his assessment of Stockton's income tax for the year ending 30 June 2017 on the basis that she was not a resident for the purposes of income tax law.[6] The assessment on Stockton's taxable income of $15,494.00 was assessed with tax payable of $4,008.65.[7] Although Stockton objected to this assessment, the Commissioner maintained his original position.[8] This matter was then appealed to the Federal Court of Australia and decided by Logan J.

B *Applicant's Life in the USA*

Prior to coming to Australia, Stockton stayed with her parents and her younger siblings in their family home in Florida.[9] Within this home, Stockton had her own room where she had left clothing and personal items, all of which were retained for her while she was absent on her working holiday visa.[10] After returning to the USA, the applicant returned to her room in the family home in Florida, where she stayed until she commenced her tertiary education in Oregon.[11] The applicant does not have any relatives who resides or have resided in Australia.[12]

C *Applicant's Self-description as to Residency Status*

Stockton had no prior connection to Australia and considered the trip to be a 'gap year adventure between high school and college'.[13] Upon her arrival in Australia, Stockton declared on her incoming passenger card that she was a 'visitor or temporary entrant' and that her country of residence was the USA.[14] Upon departing Australia, Stockton made the same

6 Ibid [3].

7 Ibid.

8 Ibid.

9 Ibid [5].

10 Ibid [7].

11 Ibid.

12 Ibid [5].

13 Ibid [8].

14 Ibid [9].

declarations on her respective outgoing passenger card.[15] Additionally, Stockton declared that she was a 'non-resident' on her employment-related Australian tax file number declaration.[16]

D *Employment and Accommodation in Australia*

While in Australia, the applicant lived in several cities, being Brisbane, Gold Coast, Canberra, Sydney and Melbourne.[17] She stayed mainly in youth hostels and housing booked through 'AirBnB'.[18] During her stay, Stockton worked in two different places: firstly as an assistant at an aged care facility in Brisbane from 1 October 2016 to 25 December 2016, and secondly as a receptionist at a dental clinic in Melbourne from 13 February 2016 to 27 May 2017.[19] Based on these facts, Stockton was employed for 7 out of the 10 months that she stayed in Australia for.

III JUDGMENT

Logan J dismissed the applicant's appeal. His Honour found that applicant was not an Australian 'resident' within the definition of s 6(1) of the *ITAA* during the 2017 income year.[20] The following paragraphs set out the key features of the judgment in relation to the facts.

A *Definition of 'Resident'*

Stockton alleged that she was an Australian resident within the meaning of s 6(1) of the *ITAA*, which provides that:

> (a) a person, other than a company, who resides in Australia and includes a person:
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> …
>
> (ii) who has actually been in Australia, continuously or intermittently, during more than one half of the year of income, unless the Commissioner is satisfied that the person's usual place

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15 Ibid.

16 Ibid [12].

17 Ibid [10].

18 Ibid [14].

19 Ibid [11].

20 Ibid [45].

> of abode is outside Australia and that the person does not intend to take up residence in Australia; …

Logan J acknowledged that the definition of a 'resident' is one of a 'means and includes' variety, meaning that the definition applied to those who fall within the meaning provided in section 6(1)(a) of the *ITAA* and also to those who may or may not fall within that meaning, but fall within the inclusionary sub-paragraphs.[21] The question to be determined was whether Stockton was a 'resident' within the meaning of s 6(1)(a) of the *ITAA*, and if not, whether she fell within the inclusionary provision.

B *'Resides in Australia'*

Section 6(1)(a) of the *ITAA* provides that a 'resident' is a person who 'resides' in Australia. Logan J firstly acknowledged the longstanding case law principles as to the ordinary meaning of 'reside', quoting Lord Chancellor in *Levene v Commissioners of Inland Revenue[1928] AC 217,* that its ordinary meaning is 'to dwell permanently or for a considerable time, to have one's settled or usual abode, to live in or at a particular place'.[22] His Honour made further reference to *Hafza v Director-General of Social Security* (1985) 6 FCR 444,[23] which is a case frequently cited with approval in taxation law matters, that 'residence of a place in which a person is not physically present depends upon an intention to return and to continue to treat that place as a "home"'.[24] Lastly, his Honour noted that it was possible for a person to be a 'resident' of Australia even if they were principally residing elsewhere.[25] Therefore, for taxation purposes, it was possible for Stockton to be considered a 'resident' of both the USA and Australia. From these cases, his Honour considered that the nature, duration and quality of the applicant's physical presence as well as the applicant's intention were relevant factors in determining whether and where the applicant was a 'resident'.[26]

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21 Ibid [18].

22 Ibid [21], quoting *Levene v Commissioners of Inland Revenue* [1928] AC 217, 222.

23 (1985) 6 FCR 444.

24 Ibid 449–450.

25 *Stockton* (n 1) [23], citing *Gregory v Deputy Federal Commissioner of Taxation* (1937) 57 CLR 774, 777.

26 *Stockton* (n 1) [23].

Logan J firstly examined the relationship between a person's intention as to residence and its relationships with physical presence, and highlighted how this could yield 'mixed signals', particularly when a person has more than one residence.[27] His Honour quoted Derrington J in *Harding v Commissioner of Taxation (2018) 108 ATR 137* at paragraph 42 that 'there needs to be consideration of the connecting factors or the continuity of association between the person and the particular location'.[28] Factors which indicate a presence in the community and support residency despite physical absence includes things such as 'a home, a family unit, possessions, relationships with people and institutions'.[29]

Logan J firstly had regard to the overall circumstances of the case – his Honour described Stockton as an 'unsettled itinerant' who had formed friendships in some cities that she stayed in, however never had any plans to live or work at a particular place for a particular length of time.[30] The 10 months that Stockton stayed in Australia for was not a pre-determined length of time, but rather was determined by chance that she wanted to continue her favourable life and work experience in Australia.[31] His Honour concluded that the only relevant intention that Stockton had as to her period of stay was to remain in Australia for no longer than what her visa permitted and to return to the USA where her family and college studies were awaiting for her.[32] Therefore, a 'continuity of association' between Stockton and Australia was not sufficiently established. The lack of intention to reside in Australia was further reinforced when considering the applicant's self-description as to her residency status on the incoming and outgoing passenger cards and on the Australian tax file number declaration form.[33]

The fact that Stockton lived in various youth hostels and homes booked through 'AirBnB' was not a decisive factor in finding that she was not a resident. Counsel for the applicant submitted that it was possible for a person to be a 'resident' even if they have only resided in hotels.[34] Logan J agreed, citing case law that provided that it was possible for a person to be resident

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27 Ibid [24].

28 Ibid [25], quoting *Harding v Commissioner of Taxation* (2018) 108 ATR 137, [42].

29 Ibid.

30 *Stockton* (n 1) [31].

31 Ibid [35].

32 Ibid.

33 Ibid [29], [31].

34 Ibid [33].

even if they habitually lived in hotels, on a yacht, or on other places of abode.[35] However, his Honour found that this principle was not applicable to Stockton. His Honour stated that in such cases where a person was found to be a resident despite not living in a particular home, an 'element of habit as to residence… has been discernible with the type of accommodation being but a matter of individual choice and convenience'.[36] In the applicant's case, however, the only habit in choice of accommodation was of 'opportunism' settling at any place, and not just at any one locale.[37] His Honour concluded that the applicant's association with Australia was only 'ever casual'.[38]

For the reasons set out above, Logan J held that Stockton was not an Australian 'resident' within the ordinary meaning in s 6(1)(a) *ITAA*.[39]

C *Commissioner's State of Satisfaction*

The sub-inclusionary paragraph in section 6(1)(a)(ii) of the *ITAA* means that Stockton can be considered a resident even if she did not fit within the ordinary meaning of a 'resident' in section 6(1)(a) of the *ITAA*. This definition of a 'resident' is two-fold; firstly, it involves the identification of whether a person has been in Australia for more than one half of the year of income, and secondly, it provides an exception as to whether the Commissioner is satisfied as to the matters provided for in the provision.[40] Although Stockton was present in Australia for more than half the year of income, the Commissioner was satisfied that her usual place of abode was outside of Australia, being the USA, meaning that she did not fall within the sub-inclusionary paragraphs.[41] Thus, the second grounds of the applicant's objection challenges the inapplicability of section 6(1)(a)(ii) of the *ITAA* to her, being the Commissioner's state of satisfaction.[42]

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35 Ibid [27], quoting *Koitaki Para Rubber Estates Ltd v Federal Commissioner of Taxation* (1941) 64 CLR 241, 249.

36 *Stockton* (n 1) [33].

37 Ibid [34].

38 Ibid.

39 Ibid [37].

40 Ibid [39].

41 Ibid [38].

42 Ibid.

His Honour began by discussing that the second part of the provision was commonly referred to as a 'carve out' – an exception that is 'dependent upon a state of satisfaction by the Commissioner'.[43] As such, it does not create an obligation on the Commissioner to fulfil an administrative or procedural step, but rather it reserves to the Commissioner 'a function which forms part of the criteria for residence'.[44] In reference to case law precedent, Logan J stated that where taxation liability criteria is dependent upon the state of the Commissioner's satisfaction, it is not examinable in the judicial courts unless an identifiable error on part of the Commissioner being satisfied was made.[45] In cases of such error, a court should conclude on whether or not the Commissioner should have been satisfied with reference to all the material before the court.[46]

The Commissioner's satisfaction of the 'carve-out' exception was based on an assimilation of an erroneous and overly narrow conception of the meaning 'place of abode' to the meaning of 'home'.[47] Therefore, it was open for Logan J to determine whether the Commissioner ought to be satisfied based on the material before the Court. His Honour firstly discussed the applicant's place of abode in the USA – prior to coming to Australia, Stockton lived in the USA for her whole life and returned to the USA to live and study.[48] When living in Australia, the applicant intentionally and permissively retained her room and all of her belongings in her family home, which was telling against any subjective intention on the applicant that she was departing from the USA to reside in Australia.[49] This was further re-emphasised when the applicant undertook further studies in the USA. His Honour concluded that each of these factors were aligned with the finding that Stockton's usual place of abode was in the USA.[50] Although the Commissioner had adopted an erroneous, narrow conception of the meaning of 'usual place of abode', Logan

43 Ibid [39].

44 Ibid, quoting *Harding v Commissioner of Taxation* (2019) 365 ALR 286, [20].

45 *Stockton* (n 1) [40], citing *Avon Downs Pty Ltd v Federal Commissioner of Taxation* (1941) 78 CLR 353, 360 and *Kolotex Hosiery (Australia) Pty Ltd v Commissioner of Taxation* (1975) 132 CLR 535, 568.

46 *Kolotex Hosiery (Australia) Pty Ltd v Commissioner of Taxation* (1975) 132 CLR 535, 568.

47 *Stockton* (n 1) [41].

48 Ibid [44].

49 Ibid.

50 Ibid.

J reached the conclusion that the Commissioner ought to have been satisfied that Stockton did not fall within the meaning of a 'resident' as provided for in the provision.[51]

IV COMMENT

The case of *Stockton* is one in many recent taxation cases involving residency issues. The judgment handed down in the present matter contrasts to that decided in *Addy v Commissioner of Taxation* [2019] FCA 1768 ('*Addy*'),[52] where Logan J found that the British applicant was an Australian resident for tax purposes. In *Addy*, the taxpayer was considered a 'resident' because the facts showed that she was settled in her home in Sydney – she had no itinerant patterns, and used her home for employment-related, living and social purposes.[53] The differences in these cases illustrate how the outcome of taxation residency issues depend highly on the circumstances of each case.

V CONCLUSION

The decision reached in *Stockton* demonstrates how the definition of a 'resident' is construed by its ordinary meaning. In determining whether a person is a 'resident', intention and an element of habit as to residence are important factors and must be considered with connecting factors that a person has established with the place, such as their relationships with people and institutions. Lastly, this case upholds existing case law principles that taxation liability criteria dependent on a Commissioner's state of satisfaction is not examinable by a court unless there has been an error on part of the Commissioner in reaching that satisfaction. This case builds upon an existing body of case law concerning taxation residency issues and serves as a reminder to working holiday taxpayers as to the factors that must be established in order to reap the benefits associated with residency in Australia.

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51 Ibid.

52 [2019] FCA 1768.

53 Ibid.

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