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FOREWORD

PART I: REFEREED ARTICLES

PART II: COMMENTARIES

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Canberra Law Review

FOREWORD

Welcome to the 2014 edition of the Canberra Law Review. First I should acknowledge the efforts of the student editors, Belinda Chapman and Catherine van der Winden, who assisted in the publication of this edition. Both have contributed commentaries to this edition, Belinda on the new information privacy legislation in the Australian Capital Territory and Catherine on potential future directions for sexual harassment legislation reform.

When we began planning of this edition in late 2013, the ACT government has just proposed its same sex marriage legislation. At that time we invited comments on the legislation and the legal issues associated with its implementation. Dr Scott Guy and Dr Peter McManus both responded promptly. Sadly (at least for the editors), the Federal Government and the High Court responded quicker than the editorial cycle could handle. It is now a matter of record that the High Court declared the *Marriage Equality (Same Sex) Act* 2013 invalid on constitutional grounds in a 6-0 joint judgement[*]. The ACT government's failure has not deterred further potential bills, with both the Australian Labor Party and the Liberal Democrat senator David Leyonhjelm seeking to introduce private member bills into the federal parliament. The two papers in this edition were developed prior to the decision, however they address issues in relation to Federal/State legislation primacy and provide analysis on how future bills could be drafted and what practical issues such bills will need to address.

The Canberra Law Review is pleased to publish the results of Dr Bede Harris' survey into the Australian public's perceptions on constitutional reform. Covering a wide range of topics the survey explores what Dr Harris refers to as the Australian peoples' 'well-founded disillusionment with the political system and their ill-founded fear of constitutional change'.

Andrew Corney has submitted a case review on the use of social media in unfair dismissals. A matter of particular relevance in Canberra, where it seems that not a week went by in 2014 without a public servant or a professional rugby league player be dismissed on the basis of their social media comments. Additionally, Dr John Gilchrist completes his trilogy of papers on the prerogative rights of the Commonwealth under the Copyright At 1968 and Dr Tony Meacham has commented on traditional constitutions and contemporary migration issues.

Finally we close with two book reviews. Bruce Arnold draws our attention to a fascinating period of Australian history in 'Superfluous People' and Dr Wendy Bonython reviews Richards and Louise's *Medical Law and Ethics* in 'Guiding the Gods in White Coats'.

Rob MacLean
Editor

[*] http://www.austlii.edu.au/au/cases/cth/HCA/2013/55.html

RIGHTS VESTING UNDER PART VII OF THE COPYRIGHT ACT 1968 AND THEIR INTERRELATIONSHIP WITH THE PREROGATIVE RIGHT OF THE CROWN IN THE NATURE OF COPYRIGHT

DR JOHN GILCHRIST *

ABSTRACT

This article is a sequel to the two articles published in the last issue of the Canberra Law Review (2012) 11(2) on the prerogative right of the Crown in the nature of copyright.

Although the Copyright Act 1968 (Cth) has affected the nature of the Crown's prerogative right to print and publish certain works in Australia, the Copyright Act 1968 itself provides statutory rights in works made or first published by the Commonwealth or a State which are akin to the prerogative right and which arise under sections 176-179 of Part VII of the Act. These provisions deal with the vesting in the Commonwealth or a State of rights in original literary, dramatic, musical and artistic works as well as sound recordings and cinematograph films. This article considers the scope of Part VII and its relationship to other Parts of the Copyright Act and focuses the remainder of the discussion on the interrelationship between the prerogative and statutory rights, which has hitherto not been the subject of detailed analysis.

I GENERAL SCOPE OF PART VII OF THE COPYRIGHT ACT 1968

Part VII of the *Copyright Act 1968* (Cth) provides for the vesting in the Commonwealth or a State of copyright in all the subject matter protected by the Act with the exception of published editions of works and television and sound broadcasts. The nature of the rights in literary, dramatic, musical and artistic works is set out in section 31 of the Act. This section and most other sections of Part III of the Act apply to copyright subsisting by virtue of Part VII in works, by virtue of sub-section 182(1) of the Act. The rights in copyright in works include the right to reproduce the work in a material form, to publish the work, to perform the work, other than an artistic work, in public, and to communicate the work to the public. In the case of literary, dramatic and musical works the Act also gives to the copyright owner the

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right to make an adaptation of the work. This includes, inter alia, the right to make a translation of the work.

The nature of copyright in sound recordings and cinematograph films is set out in sections 85 and 86 of the Act. These sections as well as most other provisions of Part IV of the Act apply to copyright subsisting by virtue of Part VII in these subject matter, by virtue of sub-section 182(2) of the Act. The sections give to the owner of copyright in sound recordings and cinematograph films the right to copy the subject matter and in addition, in the case of a sound recording, to play it in public and to communicate the recording to the public, and in the case of a film, to show it in public, and to communicate the film to the public.[1]

As a matter of statutory interpretation it would appear arguable that adopting the maxim *expressio unius est exclusio alterius* copyright subsisting in both published editions of works and television and sound broadcasts could not vest in the Commonwealth or a State, unless the copyright was assigned by the original copyright owner. The basis of this view is that Part VII would appear to represent a complete code in respect of the protection of Crown works and the omission of the two subject-matter in Part VII indicates that it was the legislature's intention that the Crown should not be the original owner of such rights. Furthermore, the owners of copyright in broadcasts and published editions of works are clearly specified by ss 99 and 100 of the Act and do not expressly include the Commonwealth or a State.

The consequences of such an interpretation are at least in one respect significant. Both the Commonwealth and the States, through Government Printing Offices and through online websites, are engaged in the publishing and public communicating of government produced or commissioned works and the adoption of a restrictive view would place the Commonwealth and the States in an anomalous position in respect of other publishers and communicators which are entitled to the protection against the facsimile reproduction of editions of published works that section 88 affords. The Commonwealth or State as publisher would have no means of preventing another publisher photographically reproducing a Commonwealth or State published work where copyright in the work as such has expired or does not exist. One example would be the reproduction of an early government document such as a report. The implications in respect of broadcasting are not, as far as policy implications are concerned, as significant, because except in rare cases such as the provision of sound broadcasts to Norfolk Island, neither the Commonwealth nor the States have been directly engaged in broadcasting. The Commonwealth has, though, established two bodies corporate to carry out sound and television broadcasting services but both are specified as owners of copyright in their broadcasts by virtue of ss 91 and 99 of the Act.[2]

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1 'Communicate' means make available online or electronically transmit (whether over a path, or a combination of paths, provided by a material substance or otherwise) a work or other subject matter, including a performance or live performance within the meaning of this Act: refer s.10 of the Act.

2 The Australian Broadcasting Corporation is established under the *Australian Broadcasting Corporation Act 1983*. This body superceded the Australian Broadcasting Commission, which had been established under Part III of the *Broadcasting Act 1942*, on 1 July 1983. The provisions establishing the Special Broadcasting Service as a body corporate were originally contained in Part IIIA of the *Broadcasting Act 1942* but the corporation was subsequently restructured under the *Special Broadcasting Service Act 1991*.

While the restrictive view of Crown rights has been strengthened with the insertion in the 1980 Amendments to the *Copyright Act* of a further provision relating to Crown works (s 182A), it is clear from a reading of the Act as a whole that Part VII is not a complete code. For example, s 182 of the Act applies many of the provisions of Part III and IV of the Act to copyright subsisting by virtue of Part VII in the subject matter described in that Part. The section reads:

> 182 (1) Part III (other than the provisions of that Part relating to the subsistence, duration or ownership of copyright) applies in relation to copyright subsisting by virtue of this Part in a literary, dramatic, musical or artistic work in like manner as it applies in relation to copyright subsisting in such a work by virtue of that Part.
>
> (2) Part IV (other than the provisions of that Part relating to the subsistence, duration or ownership of copyright) applies in relation to copyright subsisting by virtue of this Part in a sound recording or cinematograph film in like manner as it applies in relation to copyright subsisting in such a recording or film by virtue of that Part.

It should be emphasized that the phrase in sub-section 182(2) 'other than the provisions of that Part relating to ...ownership of copyright' applies only in relation to copyright subsisting by virtue of Part VII in sound recordings and cinematograph films and does not in itself imply that the ownership provisions in Part IV cannot otherwise apply to the Commonwealth or the States. Section 7 in Part 1 of the Act provides 'subject to Part VII, this Act binds the Crown...' which indicates that all the provisions of the Act apply to the Crown subject to the specific provisions of Part VII and suggests, at least, that the Crown in right of the Commonwealth and Crown in right of a State[3] as publishers may own rights under section 100 of the Act in published editions of works. Although the provisions in Parts III and IV relating to ownership of copyright in original works and subject matter other than works are subject to Part VII and X, there is no provision in Parts VII and X which provides or implies that the Commonwealth or a State cannot have such rights. Sections 176(1) and 178(1) of Part VII also contemplate reference to Parts III and IV of the Act to determine whether copyright subsists in a work or sound recording or cinematograph film and reference to the provisions of these Parts is essential in determining the nature of the rights in copyright subsisting under Part VII.

The provisions of Part VII relating to the subsistence, duration and ownership of rights followed a recommendation of the Copyright Law Review Committee (the Spicer Committee) which proposed the enactment of a provision similar to section 39 of the United Kingdom *Copyright Act 1956* which also did not mention specifically Crown rights in broadcasts and published editions of works.[4] It is arguable that the special provisions dealing

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3 Refer to the definition of the word 'Crown' in sub-section 10(1) of the *Copyright Act* 1968.

4 No reason is expressed in the Second Reading speech on the Copyright Bill 1956, its Explanatory Memorandum, the debates on the Bill or in the Standing Committee consideration of it, for the lack of express mention of the subject matter. United Kingdom. *Parliamentary Debates (Hansard)* 5th Series, House of Commons, Vol. 553 (London, 1956) 715-723 2R, 723ff (553 H.C. Deb.715-723 2R, 723ff); *Commons Papers 1955-1956*, Vol. 6 (London, 1956) 1-28, 343ff; *Sessional Papers, House of Lords*, 1955-1956, Vol. I, (London, 1956) 511 (Expl. Mem.).

with copyright in works produced by the Commonwealth or a State are necessary merely because they contain, for practical and policy reasons,[5] periods of protection which differ from those normally provided in the Act and establish criteria for the vesting of rights in the Commonwealth or State in circumstances which are wider in scope than otherwise would be the case under Parts III and IV. The period of protection for sound recordings and films is 50 years from the year of first publication under Part VII, rather than 70 years under Part IV, and the period of protection for works under Part III is 70 years from the year of first publication in contrast to the period of protection for Crown works under Part VII, which is 50 years from the year of first publication.

The proper interpretation of the Act is not clear, and the question has not been judicially considered. It is nevertheless suggested, bearing in mind the caution with which courts apply the maxim *expressio unius est exclusio alterius*,[6] that the failure to specifically provide for the protection of published editions of works and for broadcasts in Part VII does not in itself preclude the Commonwealth or a State owning rights in published editions or broadcasts. In the writer's view the Commonwealth or a State is entitled to rights in published editions of works under s 100 of the Act. The subsistence of copyright in published editions under s 92 of the Act is not subject to any overriding provisions dealing with the Crown and nothing in Part VII is expressly inconsistent with giving effect to the broad terms of s 100. That section provides, 'subject to Parts VII and X, the publisher of an edition of a work or works is the owner of any copyright subsisting in the edition by virtue of this Part.'[7] The word 'publisher' in s 100 is not qualified in any way and should be read as including the Commonwealth or State as a publisher of works. It should be pointed out, however, that as neither the Commonwealth nor the State is a 'qualified person' within the meaning of s 92(1)(b) of the

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5 Paragraph 598 of the Whitford Committee Report states, 'the justification for special Crown copyright was sa*id* to be that, because of the large number of servants employed by the Crown, it would be impracticable to keep track of individual authors. This difficulty, it was said was enhanced by the fact that, in the production of copyright works, notably reports and so on, much material is worked on by a number of Crown servants. It is for this reason too that the term of Crown copyright is fixed in the case of published literary, dramatic and musical works at 50 years only from the date of first publication, or in the case of artistic works generally 50 years only from the date of first making, irrespective of the life of the author.' United Kingdom. *Report of the Committee to consider the Law on Copyright and Designs* Cmnd. 6732 (London, 1977) 151. The shorter period of protection for published works also reflects the recognition that the Government does not require the same period of protection as an individual to secure an adequate return for its investment in works, and that that investment is ultimately borne by the taxpayer. It is also arguable that a shorter period of protection is justified on the basis of those public interest considerations in the dissemination of such Government produced material. The period of protection is derived from that period originally provided in section 18 of the *Copyright Act* 1911 for Crown works. No reasons were provided in the Report of the Committee of the House of Commons, which caused section 18 to be inserted in the Act, or in its published proceedings, for arriving at this period. (*Report from Standing Committee A on the Copyright Bill with the Proceedings of the Committee* (London, 1911) 36 in *Sessional Papers, House of Commons*, 1911, Vol. VI, (London, 1911) 725,736. The provision was not the subject of any Parliamentary debate.

6 *State of Tasmania v Commonwealth of Australia and State of Victoria* (1904) 1 CLR. 329, 343, *Houssein v Under Secretary, Department of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88, 94. DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (7th ed.) (LexisNexis Butterworths, Sydney, 2011) 141-144 at 142.

7 As mentioned earlier in this Article, although the provision is expressed to be subject to Part VII and X, there is no provision in either Part which suggests or implies that the Commonwealth or a State cannot have such rights.

Act, the Crown could only acquire copyright under s 92 in editions first published in Australia, or other countries to which that provision of the Act extends.[8] It is noteworthy that in respect of this general question, there is clear evidence that in practice the Commonwealth has sought and obtained remuneration from other publishers for permission to use a typographical arrangement.[9]

Nevertheless s 91 of the Act clearly specifies the persons and bodies which may own copyright in broadcasts under the Act - namely the Australian Broadcasting Corporation, the Special Broadcasting Service, or the holder of a licence or a class licence under the *Broadcasting Services Act 1992* and does not specifically include the Commonwealth or a State. Section 99 simply provides that the ownership vests in the maker of a broadcast, and broadcast is defined in s 10 to mean 'a communication to the public delivered by a broadcasting service within the meaning of the *Broadcasting Services Act 1992*'. While there are seven categories of broadcasting services, including national broadcasting services and community broadcasting services, under the *Broadcasting Services Act*, that Act does not, when read in conjunction with ss 99 and 91 of the *Copyright Act*, expressly extend to enable the Commonwealth or a State to own such rights in so far as either body may directly engage in broadcasting.[10] Proceedings of the Commonwealth Parliament are required to be broadcast under the *Parliamentary Proceedings Broadcasting Act 1946* by the Australian Broadcasting Corporation and not the Commonwealth.[11]

Part VII extends the ambit of the provisions of the Act dealing with subsistence of copyright. Sections 176(1) and 178(1) have this effect. These sections provide:

> 176 (1) Where, apart from this section, copyright would not subsist in an original literary, dramatic, musical or artistic work made by, or under the direction or control of, the Commonwealth or a State, copyright subsists in the work by virtue of this sub-section.

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8 Section 84 defines 'qualified person' in Part IV as (a) an Australian citizen or a person (other than a body corporate) resident in Australia; or (b) a body corporate incorporated under a law of the Commonwealth or of a State. Although s 2C of the Commonwealth *Acts Interpretation Act 1901* provides that in any Act, 'person' includes a body politic or corporate as well as an individual, the wording of s 84 and paragraph(a) in particular as well as the context of Part IV and the Act as a whole suggests an intention to restrict the meaning of the word 'person' in the definition to natural persons and thus to exclude bodies politic from the definition of 'qualified person'. Refer generally K Lindgren,WA Rothnie and JC Lahore, *Copyright and Designs* (Sydney, Butterworths, 2004) vol 1 looseleaf [12,140].

9 For example, the publicly available document 'Licensing Private Publication of Commonwealth Legislation Etc.' approved by the Commonwealth Government on 15 December 1982, included a requirement for agreement with the Australian Government Publishing Service where private publishers intended to publish facsimile reproductions of the official version of Commonwealth legislation. The Australian Government Publishing Service imposed a charge which had been approved by its responsible Minister, assessed at 20% of the retail price of the publication, multiplied by the number of copies and adjusted to the number of pages, with an upper limit of 3000 copies beyond which no extra payment was required.

10 The *Broadcasting Services Act 1992* does not specify the 'Commonwealth' or a 'State' holding the licences referred to under that Act and the Act is expressed to bind the Crown in all capacities (s 9).

11 *Parliamentary Proceedings Broadcasting Act 1946* (Cth), s 4.

> 178 (1) Where, apart from this section, copyright would not subsist in a sound recording or cinematograph film made by, or under the direction or control of, the Commonwealth or a State, copyright subsists in the recording or film by virtue of this sub-section.

The question whether copyright subsists in an original work is determined by the requirements of s 32 of the Act. Under that section, copyright subsists in an original unpublished work the author of which was a qualified person at the time when the work was made, or if the making of the work extended over a period, was a qualified person for a substantial part of that period, and in an original published work if the first publication of the work took place in Australia, or if the author of the work was a qualified person when the work was first published, or if the author died before that time, was a qualified person immediately before his or her death. A 'qualified person' is defined in that section to mean an Australian citizen or a person resident in Australia.[12] The Copyright (International Protection) Regulations extend the operation of the Act and the provisions dealing with subsistence of copyright in particular to works published in certain specified countries or works made by citizens or residents of those countries.[13] Those countries are parties to the major multilateral copyright treaties listed in reg 4 and principally - the Berne Convention for the Protection of Literary and Artistic Works, the WIPO Copyright Treaty, the Rome Convention and the Universal Copyright Convention.

The effect of s 176(1) is that copyright would still subsist in an original work made by, or under the direction or control of, the Commonwealth or a State although the author of the work did not satisfy the mentioned requirements for protection under the Act. Thus, for example, where a work is made by a resident of a country that is not a party to a treaty specified in the Copyright (International Protection) Regulations, and would not otherwise qualify for protection, and the work was made under the direction or control of the Commonwealth, copyright would still subsist in Australia under the Act by virtue of sub-section 176(1).

Section 178(1) is similar in effect. The principles applying to the subsistence of copyright in sound recordings and cinematograph films, as well as other subject matter dealt with in Part IV are set out in ss 89 to 92 of Division 3 of that Part. The operation of these provisions of the Act also extends by virtue of the Copyright (International Protection) Regulations to such subject matter made or first published in countries that are party to the relevant major copyright treaties specified in reg 4 or made by citizens or residents of those countries.[14] It is sufficient to say that s 178(1) similarly extends the subsistence of copyright to films or sound recordings which would not otherwise be protected under the Act.

The major provisions dealing with the vesting of copyright in the Commonwealth or State are ss 176(2) and 178(2), and s 177 of the Act. Those provisions in numerical order read as follows:

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12 Section 32(4) of the *Copyright Act 1968*.
13 Regulation 4 of the Copyright (International Protection) Regulations.
14 *Ibid.* Qualified by regs 5-7.

> 176 (2) The Commonwealth or a State is, subject to this Part and to Part X, the owner of the copyright in an original literary, dramatic, musical or artistic work made by, or under the direction or control of, the Commonwealth or the State, as the case may be.
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> 177 Subject to this Part and to Part X, the Commonwealth or a State is the owner of the copyright in an original literary, dramatic, musical or artistic work first published in Australia if first published by, or under the direction or control of, the Commonwealth or the State, as the case may be.
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> 178 (2) The Commonwealth or a State is, subject to this Part and to Part X, the owner of the copyright in a sound recording or cinematograph film made by, or under the direction or control of, the Commonwealth or the State, as the case may be.

The phrase 'by, or under the direction or control of, the Commonwealth or the State', which appears in the above provisions and the other sub-sections of ss 176 and 178 is not defined in the *Copyright Act 1968.*

A *Meaning of 'By, Or Under the Direction or Control'*

In *Linter Group Ltd (in liq) v Price Waterhouse*[15] Justice Harper of the Supreme Court of Victoria held that a transcript of judicial proceedings produced pursuant to the judge's direction under the *Evidence Act 1958* (Vic) had been produced under the direction of the State for the purposes of s 176 of the *Copyright Act*:

> As I understand it, it is common ground that the State of Victoria is the owner of the copyright in such transcript as is produced following a direction made pursuant to s.130 of the Evidence Act 1958. That section empowers a person acting judicially to direct, in circumstances that apply to this litigation, that any evidence to be given in the proceeding be transcribed in any manner that the judicial officer directs. Every person who thereafter transcribes the evidence shall, in doing so, be under the direction of the Court: s.134. That position obtains here. By s.176 of the Copyright Act 1968, the ownership of the copyright in an original literary work produced under the direction of a State shall inure to that State. As one of the three arms of government of the State of Victoria, the Supreme Court is, for the purposes of this provision, the State.[16]

Another relevant case—involving the equivalent phrase in the British *Copyright Act 1911*—was *British Broadcasting Co v Wireless League Gazette Publishing Co*.[17] In that case, the plaintiff company produced a publication called the Radio Times which contained advance daily programmes for the ensuing week. The defendant selected and copied numerous items from one of the plaintiff's publications in the Wireless League Gazette. Astbury J held that the plaintiff's publication was a compilation in which copyright subsisted but that it was not a work 'prepared or published by or under the direction or control of His Majesty or the

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15 [2000] VSC 90 (20 March 2000) <http://www.austlii.edu.au//cgi-bin/disp.pl/au/cases/vic/VSC/2000/90.html?query=Linter%20Group>.

16 *Ibid*, para 7.

17 [1926] Ch 433.

Postmaster-General' within the meaning of s 18 of the *Copyright Act 1911*. Copyright in the compilation of the programmes therefore belonged to the plaintiff and not the Crown.

The plaintiff was required under its broadcasting licence and a supplementary agreement to 'transmit efficiently' every day a programme of broadcast matter to the reasonable satisfaction of the Postmaster-General who had the power to revoke the licence if the programme included improper matter. Astbury J stated that the plaintiff was a licensed corporation entitled, so long as it complied with the licence, to carry on its broadcasting service for profit and to acquire and hold assets to effect that service. He concluded 'so long as they are allowed to carry on their broadcasting business for their own profit… the property in the Radio Times, including the programmes, brought into existence for the purposes of that business, is their own'.[18] Astbury J did not explore the proper construction of the phrase 'direction or control' although it is clear from the case that the production of a publication by the plaintiff was not the object of the licensing power exercised by the Postmaster-General which was directed towards the censorship of improper matter from broadcast programmes. Merely to specify the form of the programme did not constitute a direction to prepare it or to control the manner in which it was prepared.

In *Land Transport Safety Authority of New Zealand v Glogau*[19] a local statute required taxi drivers to keep log books of driving hours in a form approved by the Secretary for Transport. The Crown claimed copyright in the log books under s 52(1) of the *Copyright Act 1962* (NZ), the equivalent provision to s 176 of the Australian Act. The New Zealand Court of Appeal held that there was no Crown copyright in the log books even though there was de facto direction as to their contents and control over their form and content, because the Crown could not under statute or contract require a driver to produce the log books.

These cases therefore are of limited assistance in interpreting the words 'direction' and 'control'.

Copinger and Skone James have suggested that the phrase 'direction or control' in an equivalent United Kingdom provision is a much wider expression than 'contract of service' and that copyright in works which have been commissioned by the Crown may still vest in the Crown under that section.[20] Lindgren, Rothnie and Lahore have expressed the view that the author may be an independent contractor and a work may still be made 'by, or under the direction or control of' the Commonwealth or a State.[21] Ricketson and Creswell consider that the phrase 'is not confined to works made by authors who are employed by the Commonwealth or a State pursuant to a contract of service… but appears wide enough to cover works made for the Commonwealth or a State by independent contractors. However it is likely that, in such circumstances, the production of such works will need to be the

18 *Ibid*, 444.

19 [1999] 1 NZLR 261.

20 EP Skone-James, JF Mummery and JE Rayner-James, *Copinger and Skone James on Copyright* 12th ed, (Sweet and Maxwell, London, 1980) 846-848 and Kevin Garnett, Gillian Davies and Gwilym Harbottle, *Copinger and Skone James on Copyright*, 15th ed, (London, Sweet and Maxwell, 2005) Vol 1, 588.

21 K Lindgren,WA Rothnie and JC Lahore, *Copyright and Designs* (Sydney, Butterworths, 2004) vol 1 looseleaf [20,190].

principal object of the exercise of government direction or control, and not merely an incidental or peripheral consequence of some generalized government licensing or monitoring power'.[22] The Australian Copyright Law Review Committee in its report on *Crown Copyright* stated 'while the term clearly includes works created by government employees in the course of their duties, its exact scope is uncertain. It may include commissioned works and the works of volunteers supervised by government'.[23]

While the purposive approach to statutory interpretation guides the construction of all Commonwealth enactments, there is no clear guidance from the context of the Act itself, or its extrinsic materials and case law to assist in ascertaining the meaning of the provision. The provision should be construed according to the ordinary and natural meaning of the words.[24]

A more helpful case is the Federal Court of Australia decision in *Copyright Agency Limited v New South Wales*.[25] That case concerned certain dealings by the State of New South Wales with survey plans prepared by surveyors who were members of the Copyright Agency Limited, a collecting society for the purposes of the *Copyright Act 1968*. The State argued that the copyright in survey plans deposited for registration in pursuance of statutory land holding regimes within the State was vested in the State pursuant to s 176 or s 177 of the Act. Alternatively, it argued that it was authorized to do certain acts in relation to the survey plans otherwise than in pursuance of the Crown use provision which would attract a claim for remuneration from copyright owners in respect of those acts. The State copied and scanned the plans and incorporated them into a database for statutory as well as administrative reasons. It charged the public access and copying fees for the plans, whether electronically or over the counter.

In the majority judgment, Emmett J, with whom Lindgren J agreed, examined the meaning of the phrase 'by, or under the direction or control of the' Crown. He stated:

> 122. … "*By*" is concerned with those circumstances where a servant or agent of the Crown brings the work into existence for and on behalf of the Crown. "*Direction*" and "*control*" are not concerned with the situation where the work is made **by** the Crown but with situations where the person making the work is subject to either the direction or control of the Crown as to how the work is to be made. In the copyright context, that may mean how the work is to be expressed in a material form.
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> 123 **Direction** might mean order or command, or management or control (Macquarie Dictionary Online). Direction might also mean instructing how to proceed or act, authoritative guidance or instruction, or keeping in right order management or administration (Oxford English Dictionary Online).

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22 S Ricketson and C Creswell, *The Law of Intellectual Property*, (LBC Thomson Reuters Sydney, 2002-) Vol 2, looseleaf [14.180].

23 Australia. Copyright Law Review Committee, *Crown Copyright* (2005) 67, para 5.15.

24 Refer ss 15AA, 15AB *Acts Interpretation Act 1901* (Cth); DC Pearce & RS Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7th ed, 2011) 36-40.

25 [2007] FCAFC 80 (5 June 2007) <http://www.austlii.edu.au//cgi-bin/disp.pl/au/cases/cth/FCAFC/2007/80.html>.

> 124 **Control** might mean the act or power of controlling, regulation, domination or command (Macquarie Dictionary Online). Control might also mean the fact of controlling or of checking and directing action, the function or power of directing and regulating, domination, command, sway: *Shorter Oxford English Dictionary* (5th ed, Oxford University 2002).
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> 125 Thus, when the provisions refer to a work being made **under the direction or control of** the Crown, in contrast to being made **by** the Crown, the provisions must involve the concept of the Crown bringing about the making of the work. It does not extend to the Crown laying down how a work is to be made, if a citizen chooses to make a work, without having any obligation to do so.
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> 126 The question is whether the Crown is in a position to determine whether or not a work will be made, rather than simply determining that, if it is to be made at all, it will be made in a particular way or in accordance with particular specifications. The phrase "*under the direction or control*" does not include a factual situation where the Crown is able, *de facto*, to exercise direction or control because an approval or licence that is sought would not be forthcoming unless the Crown's requirements for such approval or licence are satisfied. The phrase may not extend much, if at all, beyond commission, employment and analogous situations. It may merely concentrate ownership in the Crown to avoid the need to identify particular authors, employees or contracting parties.
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> 127 The Parliament did not intend that the Crown would gain copyright, or share in copyright, simply as a side effect of a person obtaining a statutory or other regulatory approval or licence from the Crown.[26]

In this view of the phrase 'by, or under the direction or control' of the 'Crown, works of Crown servants and agents are made 'by' the Crown. It would also be consistent with this view that works made by the holder of a public or statutory office who normally exercise independent powers and functions would also be works made 'by' the Crown since, in Emmett J's view, the words 'direction or control' are not concerned with the situation where the work is made by the Crown but are concerned with the situation where the person making of the work is subject to either the direction or control of the Crown.

Emmett J made it clear that where a work is made 'under the direction or control of the Crown' the Crown must bring about the making of the work. The meaning of the phrase would not extend to the factual situation where the Crown is able *de facto* to exercise direction or control because an approval or licence would not be forthcoming unless Crown requirements are satisfied. In the majority judgment of the Full Federal Court delivered by Emmett J the phrase 'may not extend much, if at all, beyond commission, employment and analogous situations'.[27] While the Full Court of the Federal Court held on the facts that there 'a surveyor must be taken to have licensed and authorized the doing of the very acts that the surveyor was intending should be done as a consequence of the lodgement of the Relevant

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26 [2007] FCAFC 80 (5 June 2007) <http://www.austlii.edu.au//cgi-bin/disp.pl/au/cases/cth/FCAFC/2007/80.html>.

27 [2007] FCAFC 80 (5 June 2007) <http://www.austlii.edu.au//cgi-bin/disp.pl/au/cases/cth/FCAFC/2007/80.html> para 126.

Plan for registration'[28] that is, there was an implied licence for the State to do everything that, under the statutory and regulatory framework that governed registered plans,[29] the State is obliged to do with, or in relation to, registered plans, the Court did not consider that any of the registered plans were made under the direction or control of the State within the meaning of s 176(2) of the *Copyright Act 1968* (Cth).

Accordingly, the phrase 'by, or under the direction or control of the Crown' in the majority view would encompass works of Crown servants, agents, public office holders, and commissioned works and would extend to other works of independent contractors where the Crown's contract has brought about the making of the work. It would seem consistent with this view that works of independent contractors must either be the central object of the Crown's direction (a commissioned work) or be contemplated by the parties as necessarily arising from that direction. This is consistent with a wider meaning of 'direction' beyond 'control'. Of course, a relationship of independent contractor is often governed by a written contract and ownership of copyright in works or other subject matter produced under a commission, or other form of independent contract, can be the subject of an express agreement between the parties, by virtue of s 179 of the *Copyright Act 1968*.

B *Vesting Of Copyright by First Publication*

One of the major provisions dealing with the vesting of copyright in the Commonwealth or State, s 177, raises other questions of interpretation and policy. It vests in the Commonwealth or a State the copyright in works first published in Australia or in a country to which the Act extends if first published by, or under the direction or control of, the Commonwealth or the State to the extinguishment of the rights of any person who claims the copyright in the unpublished work. This appears to be the position even though s 29(6) of the Act provides that in determining whether a work has been published for the purposes of any provision of the Act, any unauthorized publication (that is, without the licence of the copyright owner) shall be disregarded.[30] That is, that section implies that s 177 should vest copyright in the

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28 [2007] FCAFC 80 (5 June 2007) <http://www.austlii.edu.au//cgi-bin/disp.pl/au/cases/cth/FCAFC/2007/80.html> paras 156, 155.

29 On appeal from the Full Federal Court, the High Court of Australia rejected the implication of a licence: 'a licence will only be implied when there is a necessity to do so. As stated by McHugh and Gummow JJ in *Byrne v Australian Airlines Ltd*, 'This notion of 'necessity' has been crucial in the modern cases in which the courts have implied for the first time a new term as a matter of law.' Such necessity does not arise in the circumstances that the statutory licence scheme excepts the State from infringement, but does so on condition that terms for use are agreed or determined by the Tribunal (s 183(1) and s 183(5)). The Tribunal is experienced in determining what is fair as between a copyright owner and a user. It is possible, as ventured in the submissions by CAL, that some uses, such as the making of a "back-up" copy of the survey plans after registration, will not attract any remuneration: *Copyright Agency Ltd v New South Wales* [2008] HCA 35 <http://www.austlii.edu.au/au/cases/cth/HCA/2008/35.html> paras 92, 93.

30 Sub-sections 29(6) and 29(7) provide:
(6) In determining, for the purposes of any provision of this Act-
(a) whether a work or other subject-matter has been published;
(b) whether a publication of a work or other subject-matter was the first publication of the work or other subject-matter; or

Commonwealth or State only where the publication is with the consent of the author. Nevertheless, s 7 of the Act provides that the provisions of the Act bind the Crown subject to the provisions of Part VII and it would therefore appear that s 177 is paramount in its operation over and above the requirements of s 29(6).

According to the United Kingdom Committee to consider the Law on Copyright and Designs (the Whitford Committee), the then equivalent United Kingdom provision dealing with the automatic vesting of rights in the Crown on first publication 'is said to be necessary in order to safeguard the right of the Crown to publish, for example, evidence given to committees and commissions and the findings of such bodies'.[31] Section 177 has substantial consequences and indeed on its face appears to be a law with respect to the acquisition of property without provision for just terms as required by s 51(xxxi) of the Commonwealth Constitution. But the general provision in the Act dealing with ownership of copyright in works (s 35) is subject to the provisions of Parts VII and X and it is difficult to characterize s 177 as a law dealing with the acquisition of property because the Act itself creates that property and itself determines in whom that property vests. It should be pointed out that under the Act there is no automatic continuation of a copyright subsisting in an unpublished work on the publication of that work. Those requirements of s 32 of the Act described earlier in this Article must be met for copyright to subsist in a published work from the time of its first publication. The effect of s 177 is however, tantamount to a law with respect to the acquisition of property within the meaning of s 51(xxxi). As the Whitford Committee commented on the question of safeguarding the right of the Crown to publish material such as evidence given to committees,

> It is understandable that it may indeed be desirable to safeguard this right; but we do not see that a right arising because of publication safeguards a right to publish. Further it seems indefensible to provide such a safeguard by a provision enabling the Crown to override an independent copyright in works independently produced.[32]

In Australia, the Copyright Law Review Committee in its *Crown Copyright* report recommended the repeal of s 177 for similar reasons.[33]

(c) whether a work or other subject-matter was published or otherwise dealt with in the life-time of a person,
any unauthorized publication or the doing of any other unauthorized act shall be disregarded.
(7) Subject to section 52, a publication or other act shall, for the purposes of the last preceding sub-section, be taken to have been unauthorized if, but only if-
(a)copyright subsisted in the work or other subject-matter and the act concerned was done otherwise than by, or with the licence of, the owner of the copyright; or
(b) copyright did not subsist in the work or other subject-matter and the act concerned was done otherwise than by, or with the licence of-
(i) the author or, in the case of a sound recording, cinematograph film or edition of a work, the maker or publisher, as the case may be; or
(ii) persons lawfully claiming under the author, maker or publisher.

31 United Kingdom. *Report of the Committee to consider the Law on Copyright and Designs* Cmnd. 6732, (London, 1977) 151 (para. 599).

32 *Ibid.*

33 Australia. Copyright Law Review Committee, *Crown Copyright*, Canberra 2005, xxi, 76-78 128.

The fundamental question surrounding the operation of s177 is whether s 29(6) of the *Copyright Act* has the effect of restricting the operation of s 177 to circumstances only where the publication is with the consent of the author? This narrow interpretation would deny s 177 of much of its force.

There are conflicting views on this issue. Monotti argues[34] that s 177 should be read in this way because the s 29(6) does not appear to be subject to Part VII and yet s 29(8) specifically mentions that nothing in either of the two preceding subsections (including s 29(6)) affects any provisions of Part IX (dealing with moral rights). Further, she argues that s 177 should be read down to avoid the constitutional limitation on acquisition of property other than on just terms,[35] the two provisions are not inconsistent if first publication arises only after the author's consent has been obtained, and that other provisions of the Act specifically provide that they are subject to Part VII.

Nonetheless, s 7 of the Act provides that the provisions of the Act bind the Crown subject to the provisions of Part VII and accordingly suggests that s 177 is paramount in its operation over and above the requirements of s 29(6). Section 177 deals with the ownership of works on first publication by the Commonwealth or a State. The general provision in the Act dealing with ownership of copyright in works (s 35) is expressed to be subject to Parts VII and Part X.

Be that as it may, s 29(6) could be read harmoniously with s 177 if the word authorized in s 29(6) was read as 'authorized by the Act'.

The narrow view was accepted in *Copyright Agency Limited v New South Wales*[36] although the Federal Court of Australia held in that case that the Crown did not 'first publish' (within the meaning of s 177 of the *Copyright Act 1968*) the survey plans registered with it by making the plans available to the public and to local government and authorities.

Emmett J stated in that case:

> 131 Under s 183(8), an act done under s 183(1) does not constitute publication of a work. Thus, if the making available of a work to the public by the State is done under s 183, it does not constitute publication. *A fortiori*, it is not first publication. On the other hand, if such making available by the State is not done under s 183(1), and there is no

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34 A Monotti, 'Nature and basis of Crown copyright in official publications' (1992) 14 *European Intellectual Property Review* 305, 314.

35 Although s177 may appear on its face to be a law with respect to the acquisition of property without provision for just terms as required by s 51(xxxi) of the *Australian Constitution*, it is difficult to characterize s 177 as a law dealing with the acquisition of property because the *Copyright Act 1968* itself creates that property and itself determines in whom that property vests. The High Court of Australia has taken the view that to the extent that a law passed under the copyright power, s 51(xviii) of the *Constitution*, conferring rights on authors and other originators of copyright material is concerned with the adjustment of competing rights or obligations of other persons, that impact is unlikely to be characterised as a law with respect to the acquisition of property for the purposes of s 51: refer *Nintendo Company Limited v Centronics Systems Pty Limited* (1994) 181 CLR 134, 160-161; [1994] HCA 27 per Mason CJ, Brennan, Deane, Toohey, Gaudron, and Mc Hugh JJ at [38 - 39].

36 [2007] FCAFC 80 (5 June 2007) <http://www.austlii.edu.au//cgi-bin/disp.pl/au/cases/cth/FCAFC/2007/80.html?query=C>.

> other licence taken to have been granted to the State to make a work available, it would follow that those acts of the State would be an unauthorised publication and, accordingly, under s 29(6) must be disregarded in determining whether the work has been published and whether the publication was the first publication of the work.[37]

Emmett J held on the facts that the survey plans had previously been published and that by the lodgement of the plans, a surveyor must have been taken to have licensed and authorized the Crown to make available to the public, copy and do any other acts required by the Crown's statutory and regulatory planning regime. Copyright in the plans remained with the surveyor. While the case recognised this notion of implied licence in dealings with government it did not explore arguments for the wider interpretation of s 177 above. The Court did not have to decide whether s 177 effected an acquisition of property otherwise than on just terms within the meaning of s 51(xxxi) of the *Commonwealth Constitution*.

Section 177 applies only in relation to hitherto unpublished works and the Commonwealth or a State must, in order to avoid infringement of copyright by publishing previously published works, either seek the permission of the copyright owner or rely upon s 183 of the Act if the publication is for 'the services of the Commonwealth or the State'. That section provides a statutory defence to infringement but obliges the Commonwealth or a State to notify the copyright owner of the publication and to come to agreement on terms with the copyright owner, or in default of agreement, as fixed by the Copyright Tribunal.[38]

II WHAT CONSTITUTES THE CROWN UNDER PART VII OF THE COPYRIGHT ACT 1968

In relation to the way in which ss 176-178 in Division 1 of Part VII of the *Copyright Act 1968* operate, the Copyright Law Review Committee in its *Crown Copyright* report expressed concern about the 'uncertainty'[39] created as to who is the Crown and in whom copyright will vest.

The Committee listed three possible interpretations of the word 'Commonwealth' referred to in the sections.[40] One was that the Commonwealth was referred to as a legal person and includes agents or emanations of the Commonwealth. The second was that an entity that is included as the Commonwealth within the 'shield of the Crown' test would own copyright itself under ss 176-178. The third was that copyright vests in the Commonwealth as a legal person but is exercisable by the relevant authority. This third interpretation adopts the first view but accepts that, for administrative purposes, copyright is exercisable by the arm of government to which it relates.

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37 [2007] FCAFC 80 (5 June 2007) <http://www.austlii.edu.au//cgi-bin/disp.pl/au/cases/cth/FCAFC/2007/80.html?query=C>.

38 Sub-sections 183(4) and 183(5) of the Act.

39 Australia. Copyright Law Review Committee, *Crown Copyright*, Canberra 2005, 6, 8, 74, 113.

40 *Ibid* 74–75.

In 2007 a paper produced by the Parliamentary Library of the Victorian Parliament examined the meaning of the term 'State' and concluded that Crown copyright was applicable to all three arms of government, including the Victorian Parliament and its administrative departments.[41] It based its view on s 15 of the *Constitution Act 1975* (Vic) which refers to the legislative power as part of the State of Victoria.

Section 10(1), the interpretation section of the *Copyright Act 1968*, provides:

> ***the Crown*** includes the Crown in right of a State, the Crown in right of the Northern Territory and the Crown in right of Norfolk Island and also includes the Administration of a Territory other than the Northern Territory or Norfolk Island.
>
> ***the Commonwealth*** includes the Administration of a Territory.

Sections 176-178 in Division 1 of Part VII of the *Copyright Act 1968,* dealing with the vesting of copyright, refer to 'the Commonwealth or a State'. They are collectively referred to in the heading and most of the subheadings of Part VII of the Act as 'the Crown'.

A *The Scope of 'the Commonwealth or a State'*

In most practical respects when we think of the Commonwealth or the State, we think of the governments of the Commonwealth or the States or, more precisely, the executive governments of these juristic persons. In essence, the executive governments comprise the departments of government and bodies within Ministerial portfolios which are responsible to Ministers who in turn are responsible to Parliament and are appointed by the sovereign's representative to administer policy portfolios. These executive governments are formally described as the Crown in right of the Commonwealth or in right of the State respectively.

However, unlike the headings, the sections in Part VII generally use the term 'the Commonwealth or a State' and not 'the Crown'. There are some exceptions. In Division 1 of Part VII, s 182A refers to 'any prerogative right or privilege of the Crown' that are expressly preserved by the *Copyright Act 1968* in s 8A(1). In Division 2 of Part VII, which is headed 'Use of Copyright Material for the Crown', s 183(2) uses the expression 'the Government of the Commonwealth'.[42] In the same Division, ss 183A-183C use the terms 'government' and 'government copies'. However, s 182B defines 'government' to mean 'the Commonwealth or a State' for the purposes of that Division. 'State' is defined in s 10(3)(n) of the *Copyright Act 1968* as modified by the *ACT Self-Government (Consequential Provisions) Regulations*[43] to include the Australian Capital Territory, the Northern Territory and Norfolk Island.

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41 Victoria. Economic Development and Infrastructure Committee, Parliament of Victoria, *Inquiry into Improving Access to Victorian Public Sector Information and Data: Discussion Paper (July 2008)* 21.

42 In s 183(2) the reference to 'Government of the Commonwealth' making agreements with the 'Government of some other country' would appear in its context to relate only to the executive government of the Commonwealth, despite the later (1998) insertion of the definition of 'government' in s 182B.

43 Statutory Rules 1989 No 392 (Cth).

The use of 'the Commonwealth or a State' suggests that the 'Commonwealth' or the 'State' is not confined to the Crown in right of the Commonwealth, or the Crown in right of the State, that is, the executive government of the Commonwealth or a State. Neither the Commonwealth nor a State is defined in the *Copyright Act 1968*. Section 17(a) of the *Acts Interpretation Act 1901* (Cth) defines the Commonwealth to mean the Commonwealth of Australia, which is the body politic of Australia.[44] That body politic established by the *Commonwealth of Australia Constitution Act 1900* (Imp)[45] is divided under that Constitution into three broad arms—the executive, legislative and judicial—which comprise the essential functions of government. Section 6 of the *Commonwealth of Australia Constitution* defines 'the Commonwealth' to mean 'the Commonwealth of Australia as established under this Act'.[46] The view that the use of the term 'the Commonwealth or State' refers to the three arms of government in either case is supported in *Linter Group Ltd (in liq) v Price Waterhouse*[47] in which Justice Harper of the Supreme Court of Victoria expressed the view that the Supreme Court 'as one of the three arms of government of the State of Victoria' is, for the purposes of s 176 of the *Copyright Act 1968*, the State.

1 *The Broad Test – 'Organisations or Institutions of Government'*

In *Deputy Federal Commissioner of Taxation v State Bank of NSW*[48] it was argued by the State Bank of New South Wales that it was the State of New South Wales and was thus not subject to a law of the Commonwealth imposing a tax on its property in contravention of s 114 of the *Constitution*. The High Court of Australia rejected arguments that the State Bank must show it is the Crown 'in right of the State' or that it is entitled to the privileges or immunities of the State that is, 'within the shield of the Crown' in respect of the application of the taxing statute. The Full Bench of the High Court stated:

> 19. The plaintiff submits … that the question is to be determined by asking whether the State Bank is entitled to "the privileges and immunities of the Crown" in accordance with the approach adopted in Townsville Hospitals Board v. Townsville City Council. Again, this submission has little to commend it. The "shield of the Crown" doctrine has evolved as a means of ascertaining whether an agency or instrumentality "represents" the Crown for the purpose of determining whether that agency or instrumentality is bound by a statute enacted by the legislature. … The question which arises here is not to be answered by reference to a doctrine which has evolved with the object of answering questions of a different kind. The question here "depends upon the meaning and operation of an unalterable constitutional

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44 Section 17(a) of the *Acts Interpretation Act 1901*: *Australia* or *the Commonwealth* means the Commonwealth of Australia and, when used in a geographical sense, includes the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands, but does not include any other external Territory.

45 63 & 64 Vict, c 12, s 9.

46 Section 6 of the *Commonwealth of Australia Constitution Act 1900* (Imp): *'The States'* shall mean such of the colonies of New South Wales, New Zealand, Queensland, Tasmania, Victoria, Western Australia, and South Australia, including the northern territory of South Australia, as for the time being are parts of the Commonwealth, and such colonies or territories as may be admitted into or established by the Commonwealth as States; and each of such parts of the Commonwealth shall be called a *State.*

47 [2000] VSC 90 (20 March 2000) <http://www.austlii.edu.au//cgi-bin/disp.pl/au/cases/vic/VSC/2000/90.html?query=Linter%20Group>.

48 [1992] HCA 6; <http://www.austlii.edu.au/au/cases/cth/HCA/1992/6.html>; (1992) 174 CLR 219.

> provision which the intention of the legislature cannot affect" *Bank of NSW v The Commonwealth* (1948) 76 CLR per Dixon J at p 359.
>
> 20. Once it is accepted that the Constitution refers to the Commonwealth and the States as organizations or institutions of government in accordance with the conceptions of ordinary life, it must follow that these references are wide enough to denote a corporation which is an agency or instrumentality of the Commonwealth or a State as the case may be. The activities of government are carried on not only through the departments of government but also through corporations which are agencies or instrumentalities of government. Such activities have, since the nineteenth century, included the supply on commercial terms of certain types of goods and services by government owned and controlled instrumentalities with independent corporate personalities.[49]

The concept of the Commonwealth or a State 'as organizations or institutions of government in accordance with the conceptions of ordinary life' is wider than the concept of what constitutes a part of the executive government of the Commonwealth or a State. As the majority of the High Court in *Austral Pacific Group v Airservices Australia* stated:

> 10. … Airservices was established as a body corporate by s 7 of the Airservices Act to perform such functions as the provision of facilities to permit safe aircraft navigation within Australian-administered airspace (s 8(1)(a)). This and other provisions of the statute indicate that Airservices is a Commonwealth agency or instrumentality which is included in the term "the Commonwealth" in s 75(iii) of the *Constitution*.
>
> …
>
> 14. Airservices is a body corporate which, while it is charged with the performance of what may be classed as governmental functions, is not part of the executive government of the Commonwealth. Airservices is sued by Austral Pacific as the Commonwealth within the meaning of s 75(iii) of the *Constitution* but it does not necessarily follow that Airservices attracts the preferences, immunities and exceptions enjoyed by the executive government in respect of State laws and identified with the *Cigamatic* doctrine.[50]

While it is relatively easy to identify the legislative and judicial arms of the Commonwealth as falling within the meaning of the 'Commonwealth' under s 75(iii) of the Constitution, it may be seen from these cases that determining the precise scope of the 'Commonwealth' within the meaning of the *Constitution* is not so clear-cut. The views expressed by the High Court of Australia on the scope of s 75(iii) of the *Constitution* suggest that what constitutes the 'Commonwealth' clearly extends beyond those bodies which constitute the executive government.[51]

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49 Ibid paras 19-20 (joint judgement of Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

50 [2000] HCA 39; 203 CLR 136, paras 10, 14 per Gleeson CJ, Gummow and Hayne JJ.

51 This wider view extends to 'the State'–refer *SGH Ltd v Commissioner of Taxation* [2002] HCA 18; 210 CLR 51; 188 ALR 241; 76 ALJR 780 (1 May 2002) para 13. 'Against the background of these other provisions of the Constitution, it is evident that references in s 114 to the Commonwealth and a State are not to be understood narrowly. Reinforcement for that view comes from other provisions of the

In *Australian Securities and Investments Commission v Edensor Nominees*, the Full Bench of the High Court of Australia held that the Commission (ASIC) was an agency or instrumentality of the Commonwealth[52] and thus answers the description of 'the Commonwealth' in s 75(iii) of the *Constitution*. This is one of more than 60 Commonwealth agencies presently subject to the *Public Governance, Performance and Accountability Act 2013 (Cth)* and the *Public Service Act 1999 (Cth).*

There are few court decisions that directly address the question of what constitutes the Commonwealth or a State for the purposes of the *Copyright Act 1968.*

All judges of the Full Court of the Federal Court of Australia in *Re Australasian Performing Right Association Ltd; Re Australian Broadcasting Commission* were of the view that the primary task in determining whether a public corporation is an emanation or instrumentality of the Commonwealth for the purposes of the *Copyright Act 1968*, is to determine the intention of the legislature which appears from the statute under which the body is established.[53] In the absence of an express provision on the question, matters to be considered,

> … include the question whether the corporation fulfills a governmental or non-governmental function; the capacity of the Government to control its activities; financial autonomy; the right of appointment and dismissal of the members of the body and of its staff by the Government; whether it has duties to furnish information or accounts to the Government; and its power over assets in its ownership or control.[54]

2 The Narrower Test – 'Shield of the Crown'

The Full Court of the Federal Court took the view that the Australian Broadcasting Commission did not fall within the word 'Commonwealth' nor was it an agency or instrumentality of the Commonwealth for the purposes of s 183 of the *Copyright Act 1968*. In reaching that conclusion, the Full Court examined those matters in relation to the *Broadcasting and Television Act 1942* (Cth) the most important of which was the degree of legal control exercisable by the Minister or Government over the body in question. In reaching their conclusion, however, the judges of the Full Court considered both cases dealing with whether bodies fell within the scope of the 'Commonwealth' under s 75(iii) of the *Constitution*, such as *Inglis v Commonwealth Trading Bank of Australia*,[55] and whether they were an instrumentality or agent of the Crown in right of the Commonwealth or State, that is, is entitled to exercise the privileges and immunities of the Crown, including

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Constitution and, in particular, s 75. It was in the context of s 75 and its provisions for the original jurisdiction of this Court, that Dixon J referred to the Constitution going "directly to the conceptions of ordinary life" and said that: "From beginning to end [the Constitution] treats the Commonwealth and the States as organizations or institutions of government possessing distinct individualities. Formally they may not be juristic persons, but they are conceived as politically organized bodies having mutual legal relations and amenable to the jurisdiction of courts upon which the responsibility of enforcing the Constitution rests." (per Gleeson CJ, Gaudron, McHugh and Hayne JJ).

52 [2001] HCA 1, para 39.

53 Refer (1982) 45 ALR 153 at 158, 167.

54 (1982) 45 ALR 153 at 158, per Bowen CJ and Franki J.

55 [1969] HCA 44; (1969) 119 CLR 334.

Townsville Hospitals Board v City of Townsville.[56] While both questions are determined by statutory interpretation based on similar tests, the latter is a narrower question than the former.

The interpretative tests were also applied in *Allied Mills Industries v Trade Practices Commission*[57] where the Federal Court held the Trade Practices Commission was an emanation or agency of the Crown in right of the Commonwealth and thus fell within the meaning of the 'Commonwealth' for the purposes of s 183 of the *Copyright Act 1968*.[58]

Sheppard J in that case examined the purposes and objects of the *Trade Practices Act 1974* (Cth) and the power of ministerial control over the Commission set out in s 29 of the Act in reaching the view that the Commission was an emanation or agency of the Crown. He stated:

> 121. Section 183 of the *Copyright Act* provides that the copyright in a work is not infringed by the Commonwealth or a State, or by a person authorized in writing by the Commonwealth or a State, doing any acts comprised in the copyright if the acts are done for the services of the Commonwealth or State. As a matter of precaution the Commission obtained an authority from the Commonwealth to use the various documents. But I have held that the Commission is an agency or emanation of the Crown. The authority was not therefore necessary. I am satisfied that the use to which the Commission has put the documents or to which it will put them in the future has been or will be for the services of the Commonwealth.[59]

The difficulty in the narrower 'shield of the Crown' test is that courts have recognised that it may be possible for an agency or instrumentality to be endowed with the attributes of the Crown for one purpose but not for others or that the legislature could explicitly endow a private corporation carrying on business for private purposes with the privileges and immunities of the Crown and yet that corporation would not answer the description of the 'State' or 'Commonwealth' for constitutional purposes.

Commonwealth and State enactments establishing bodies corporate do not usually include any express provision endowing the attributes of the Crown either in respect of some or all of the functions of the particular body. The few examples in the Commonwealth sphere where statutory reference is made to the privileges and immunities of the Crown in fact only negate the attributes of the Crown.[60] There are no Commonwealth enactments that contain a specific provision giving a corporation the character of an emanation or agency of the Commonwealth or a State for the purposes of the *Copyright Act 1968*. In a direct sense, the tests of statutory

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56 (1982) 42 ALR 319 (HC).

57 *Allied Mills Industries Pty Ltd v Trade Practices Commission (No 1)* [1981] FCA 11; (1981) 55 FLR 125.

58 Per Sheppard J, paras 32, 34, 121.

59 Sheppard J stated at para 34. 'Since reserving my decision my attention has been drawn to the joint judgment of Deane and Fisher JJ. in *Thomson Publications (Australia) Pty. Ltd. v Trade Practices Commission* (1979) 40 FLR 257. They reached the conclusion that the Commission was "plainly an instrumentality or agent of the Crown in right of the Commonwealth" (1979) 40 FLR, at p 275. Their decision in that respect is, of course, binding on me'.

60 Examples are s 8 of the *Christmas Island Agreement Act 1958* (Cth), s 8 of the *Snowy Hydro Corporatisation Act 1997* (Cth) and s 6 of the *Housing Loans Insurance Corporation (Transfer of Assets and Abolition) Act 1996* (Cth).

intention whether a body is entitled to be considered the 'Commonwealth' or 'State' for the purposes of the *Copyright Act 1968* have been used to determine the scope of the executive government of the Commonwealth or State and the legal person of the 'Commonwealth' or the 'State'. While there is some lack of clarity in the case law on the question, it is submitted the better view in law is that the terms the 'Commonwealth' or the 'State' comprise the legal persons identified in the *Australian Constitution* 'as organizations or institutions of government in accordance with the conceptions of ordinary life', that is, comprising the three elements of governance identified in the *Constitution* exercising legislative, executive and judicial power.[61]

III INTERRELATIONSHIP BETWEEN CROWN COPYRIGHT AND THE PREROGATIVE RIGHT

The significance to the present discussion of the scope of the terms 'Commonwealth' and 'State' is particularly apparent when considering the interrelationship between Crown copyright and the prerogative right.

The prerogative right of the Crown in the nature of copyright is the oldest basis of Crown ownership of works. This right extends to the printing and publication in Australia of various works of state. These works include Acts of Parliament, proclamations, orders in council and instruments made under an Act of Parliament such as regulations and ordinances. Judgments of the Crown's judicial officers also arguably fall within the right.

The prerogative right is a common law right and is derived from the prerogative right in the nature of copyright held by the British Crown which dates back in time to the early development of printing. As a consequence of the reception of English law into the Australian colonies, the prerogative right has been inherited by the Crown in right of the colonies before federation and by the Crown in right of the several States and the Commonwealth of Australia upon federation. The right is exercisable by the executive government of the Commonwealth and the several States.[62]

Bills and Acts of State and federal Parliaments, written judgments of State and federal judges and other legal works covered by the prerogative would normally satisfy the requirements of protection as original literary works under the *Copyright Act*. In the case of Bills and Acts of Parliament, there would normally be a number of joint authors but they would in almost all cases be draftsmen employed by the Commonwealth or State acting within the scope of their employment and copyright in these works would therefore vest in the Commonwealth or State under sub-section 176(2) of the Act. Private Member Bills are also normally drafted

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61 The Copyright Law Review Committee in its *Crown Copyright* report at 6-7 stated that the scope of what is meant by the Crown is somewhat uncertain and outlined arguments for both the broader view that it encompassed the legislative, executive and judicial arms (an inclusive view) or the narrower view that it refers only the executive arm of government. It did not express a concluded view on the question: Australia. Copyright Law Review Committee, *Crown Copyright*, Canberra 2005, 6,7 [paras 2.04-2.06].

62 *Attorney-General for New South Wales v Butterworth and Company* (1938) 38 SR (NSW) 195.

with the assistance of staff or draftsmen employed by the Commonwealth or State[63] although in odd cases the responsible Member of Parliament may draft a Bill and in this situation copyright would vest in the author of the document personally. The Member would not in his capacity as a Member of Parliament be an employee or agent of the executive government or of the Parliament, since he is merely a representative in the Parliament and copyright would not therefore vest in the Commonwealth or State. It should be pointed out that the enactment of a Bill does not except in the most minor way, alter the form of the literary work which receives protection under the *Copyright Act*.

A written judgment produced by a judge of a State or federal court would also fulfil the requirements of an original literary work and be protected under the Act. Although the author of a judgment is a judge, Lahore suggests the owner of copyright is the Crown.[64] It is, however, difficult to characterize a judgment as having been produced 'by, or under the direction or control of, the Commonwealth or the State' unless the wider meaning of 'Commonwealth' or 'State' previously described is adopted by a court. If the terms were construed as merely referring to the executive government, that is, the Crown in right of the Commonwealth or in right of the State, it could not be said that a State or federal judge in writing a judgment is acting under the direction or control of the Crown since there is no contract of service and such a notion is clearly contrary to the independent position of the judiciary.

Formal court orders would also be the subject of copyright vesting in the Commonwealth or State. The position with respect to oral judgments, however, is that copyright would vest in the reporter (usually the Commonwealth or State)[65] subject to any contribution or review by a judge to the report which may have the effect of vesting copyright in the report jointly between the Commonwealth or State and the reporter.

The marrying of copyright and the prerogative right is achieved by section 8A of the *Copyright Act*. Sub-section (1) of that section provides:

> Subject to sub-section (2), this Act does not affect any prerogative right or privilege of the Crown.

The provision is ambiguous. It may imply only that the prerogative right has been preserved and that copyright co-exists with the prerogative right. It may also imply that copyright cannot subsist in any works which are subject to the prerogative of the Crown. A comparative

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63 JA Pettifer et al (eds), *House of Representatives Practice* (AGPS, Canberra, 1981) 522; BC Wright and PE Fowler (eds), *House of Representatives Practice* (Department of the House of Representatives Canberra 2012) 582.

64 Refer James Lahore, *Intellectual Property Law in Australia: Copyright* (Butterworths, Sydney, 1977) 100 and K Lindgren,WA Rothnie and JC Lahore, *Copyright and Designs* (Sydney, Butterworths, 2004) vol 1 looseleaf [20,230, 20,235].

65 Refer Walter v Lane [1900] AC 539 and G Sawer 'Copyright in Reports of Legal Proceedings' 27 *ALJ* 82, 84-86. As to edited reports refer James Lahore, *Intellectual Property Law in Australia: Copyright* (Butterworths, Sydney, 1977) 100 and K Lindgren,WA Rothnie and JC Lahore, *Copyright and Designs* (Sydney, Butterworths, 2004) vol 1 looseleaf [20,230, 20,235].

analysis of the rights, though, suggests an interpretation of the provision which a court is likely to adopt.[66]

The nature of the prerogative right to print and publish certain works is not consistent with those statutory rights subsisting under the *Copyright Act* in original literary works. For instance, the prerogative right is merely restricted to the printing and publication of certain works, whereas the rights in original literary works under the *Copyright Act* include the right to reproduce the work in a material form, to publish the work, to perform the work in public, to communicate the work to the public and to make an adaptation of a work. Only in a very limited sense could the right to print and publish include the right to make an adaptation of a work, that is, merely with respect to the right to print and publish a translation of a work. The definition of adaptation in the *Copyright Act* however is much wider in scope.[67]

It is an infringement of copyright to do or authorize the doing of an act comprised in the copyright in relation to a substantial part or more of a work, although the Act provides certain statutory defences to infringement which enable limited dealings with a copyright work without infringement of copyright. There is no authority for the proposition that the Crown's prerogative right in a work may be infringed by a substantial reproduction of such a work, or that, apart from the effect of s 8A(2) the specified lawful uses which would otherwise be an infringement do not infringe the prerogative right. Indeed it has already been suggested[68] that the making of one or up to a few copies of the prerogative work would not be an infringement of the right of printing and this in itself goes beyond the extent of legal copying permitted under most defences to infringement in the Act.

The question of ownership of rights also leads to inconsistency. If, for example, a State Government first publishes a judgment produced by a judge of a State court when exercising federal jurisdiction or a publisher publishes such a judgment under the direction or control of the State then copyright would vest in the State under s 177 of the Act, but the prerogative right to print and publish the judgment would vest in the Crown in right of the Commonwealth. Such a situation could occur under existing publishing arrangements in Western Australia and Tasmania for the publication of judgments. In particular the Law Reporting Advisory Board in Western Australia which advises that State's Attorney-General[69] is an emanation of the executive government of the State and therefore must be

66 In *Butterworth's* case Long Innes C J. in Eq. declined to express an opinion on the question whether Crown copyright subsisted in statutes in which the Crown has a prerogative right, although counsel for the informant in the case argued that the statutory and common law rights existed concurrently. Long Innes C J. did, however, express the view that if the Crown had no prerogative right over the Acts of Parliament in question, the informant would have been entitled to succeed on the *Copyright Act*, that is, that a copyright existing under section 18 of the Act in the Acts of Parliament of New South Wales would vest in the Crown in right of the State of New South Wales. Refer (1938) 38 S.R. (NSW) 195, 258-259.

67 See s 10(1) of the Act.

68 Refer Dr John Gilchrist 'Origins and Scope of the Prerogative Right to Print and Publish Certain Works in England (2012) 11(2) *Canb LR* 4, 17-18.

69 The Western Australia Reports are published by Butterworths Pty Ltd for the Law Reporting Advisory Board of Western Australia established under the *Law Reporting Act 1981*. The Reports would be published under the direction of the State within the meaning of section 177 of the Act.

regarded as part of the State under the Act. Similarly both State Supreme Court Libraries, which must also be regarded as part of the irrespective States, publish certain judgments of their Supreme Courts.[70]

The civil remedies available to the Crown for infringement of both rights are nevertheless similar. Indeed the *Copyright Act* to a large extent represents a codification of the principal legal and equitable remedies available to the Crown for infringement of the common law right, namely the equitable relief of an injunction (the normal remedy) and an account[71] or the legal remedy of damages. There are, however, some differences of detail. For instance, a final injunction in respect of a published prerogative right work would, of course, be enforceable in perpetuity since the right so exists although such an injunction in respect of a published Crown copyright work will only be enforceable for a period of 50 years from the year of first publication. Under s 116 of the Act, the Crown as copyright owner is also entitled in respect of any infringing copy, or plate used or intended to be used for making infringing copies, to the rights and remedies by way of an action for conversion or detention, to which he would have been entitled if he were the owner of the infringing copy or plate.[72] This right extends beyond a court's inherent equitable jurisdiction to order delivery up of infringing copies and plates for the purpose of destruction,[73] not only because it enables possession of the copies and plates by the copyright owner but also because it provides a further basis for a claim of

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70 The Supreme Court Libraries of the States of Tasmania and Western Australia publish unreported judgments within the meaning of the word publish (s 29) in the *Copyright Act*. In Western Australia the Supreme Court Library provides a subscription service (PLEAS) under which persons and organisations can, upon payment of a fee, receive copies of all judgments of Western Australian courts. It also provides a catchwords alerting service for all unreported judgements from the Supreme and District Courts, which alerts practitioners to judgements which they can then request by document delivery, or view via website. Those websites contain 'Conditions of Use' which state that copyright in the material vests in the State of Western Australia. From 1996 Supreme and from 1999 District Court decisions have been made available online through AustLII. AustLII states in respect of Supreme Court decisions that the copyright is owned by the 'Crown in right of the State of Western Australia'.
The Council of Law Reporting for Tasmania has authorized the data base of full text decisions of the Supreme Court from 1985 to be made available online through AustLII. AustLII states that the 'data is owned by the State of Tasmania'. 1929-1985 unreported judgements are made available by the Supreme Court Library to requesters through the Library's catchwords index. There are a few exceptions to the post 1985 AustLII dissemination involving issues of de-identification of minors and victims of crime which, once processed, are made available by the Supreme Court to requesters through the Library's catchwords index: refer Tasmania. Supreme Court of Tasmania <http://www.supremecourt.tas.gov.au/libraries/supreme_court_library>. It would appear that at least many unreported judgments have been published in the copyright sense by the Supreme Court since those judgments have been widely distributed and available to subscribers for many years. Both Tasmanian and the Western Australian Supreme Court judgments described would be published by a State within the meaning of section 177 of the *Copyright Act 1968*. The Tasmanian State Reports are published by the Law Book Company for the Council of Law Reporting in Tasmania which was originally established by prerogative Order-in-Council (Council of Law Reporting Order 1978, No. 82 of 1978) and is now established as a body corporate by the *Council of Law Reporting Act 1990* (Tas). The Council would be regarded as an emanation of the State for the purposes of the *Copyright Act 1968*.

71 Refer generally K Lindgren,WA Rothnie and JC Lahore, *Copyright and Designs* (Sydney, Butterworths, 2004) vol 1 looseleaf [36,025-36,370].

72 Section 116(2) of the Act provides that in the case of innocent infringers, the plaintiff is not entitled to relief by way of damages or other pecuniary remedy, other than costs.

73 Refer K Lindgren,WA Rothnie and JC Lahore, *Copyright and Designs* (Sydney, Butterworths, 2004) vol 1 looseleaf [36,370].

damages over and above those remedies for infringement. Apart from these differences, it should be also pointed out that the Act creates offences for certain commercial dealings with works which provide another and a practically important means of relief for the Crown,[74] unavailable at common law.

Although the similarities between the statutory and common law rights are apparent, those inconsistencies mentioned suggest that if the prerogative right was not affected by the *Copyright Act* the statutory and common law rights could not co-exist. The incorporation of s 8A(2) in the Act in the 1980 Amendments to the *Copyright Act* does not suggest a contrary view.

It is thus suggested that as a matter of statutory interpretation the clause '... this Act does not affect any prerogative right or privilege of the Crown' implies that the prerogative is unaffected by the statutory right and that statutes, judgments and other legal works are not the subject of rights provided by the *Copyright Act* which pertain to their protection as literary works. That is, such protection may subsist in Bills but not subsist in Acts of Parliament although as related works they are substantially the same literary work. In the case of judgments copyright protection should never arise. There is, however, no reason that copyright in a published edition of a statute or judgment should not co-exist with the common law right and that the Commonwealth or a State as well as private publishers of such works should be able to prevent the unauthorised reproduction of the typographical arrangement of those works, by means that include a photographic process, by virtue of rights subsisting in the published edition of the works under s 100 of the Act. The co-existence of this statutory right does not lead to any interference in the exercise of the common law right since a private publisher could not acquire a copyright in an edition of a legal work which merely reproduces the published edition of the State or Commonwealth produced legal work assuming the private publisher published the work without the permission of the Crown. This would be the case regardless of whether the Commonwealth or State was entitled to copyright in the published edition of its works under s 100 of the Act.

One other aspect of the co-existence of these rights is that the copyright in published editions of the prerogative legal works owned by the Crown, for example the Crown in right of the Dominion of Canada,[75] would, regardless of the question of the enforcement of the prerogative right in Australia, be enforceable in Australia by virtue of the operation of the

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74 Refer ss 132AC – s 132AM of the Act.

75 Refer Dr John Gilchrist 'The Extent to which the Prerogative right of the Crown to Print and Publish Certain Works Exists in Australia' (2012) 11(2) *Canb LR* 32, 48. I stated at page 48 that 'it is arguable therefore, though the subject of some doubt, that the prerogative right of the Crown in right of the United Kingdom to print and publish the Commonwealth of Australia *Constitution Act 1900* and other statutes of the British Parliament is enforceable in Australia. That statement should be qualified by the words 'until the coming into force of Parts I-III of the *Copyright Designs and Patents Act 1988 (1 August 1989)'*. Section 164 of the *Copyright Designs and Patents Act 1988* replaced all prerogative rights in Acts of Parliament with a copyright which subsists for 50 years after the year Royal Assent was given. This copyright is enforceable in Australia. The UK Crown owns copyright in published editions of works it publishes under that Act and would also be entitled to copyright in the published edition of UK Acts of Parliament, in Australia.

Copyright (International Protection) Regulations.[76] As with published edition rights vesting in the Commonwealth and a State, these rights exist only in respect of published editions of works produced after 1 May 1969.

[76] Refer regs 4 and 8 of the Copyright (International Protection) Regulations.

MORE SAY ON PAY! SHAREHOLDER RIGHTS AND REMEDIES IN RESPECT OF EXCESSIVE DIRECTOR REMUNERATION

NATALIA WUTH *

ABSTRACT

Since the financial crisis,[1] the issues surrounding executive remuneration appear to have become more complex. There have been suggestions that the structures of pay and short-term incentive payments induced directors to pursue risky and short-term strategies. The sentiment that this contributed to the collapse of a number of companies in Australia and abroad is not unqualified.[2]Increased shareholder activism and regulatory scrutiny also reflects the public's wariness of this recent corporate behaviour. Shareholders demand that the structure of director remuneration is intended to increase management's incentives to act in their long-term interests, and not to their detriment.[3]

As companies are generally managed under the direction of the board,[4] shareholders have little power at general meetings to prevent the movement of the remuneration report in favour of directors.[5] This is particularly the case in light of the large aggregate number of institutional investors and fund managers who rarely engage in board management issues and their voting preferences are often carried (and therefore influenced) by the vote of the chair.[6] This ownership structure adversely affects fragmented

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1 While the term, 'global financial crisis', has been widely adopted by Australian commentators, the economic crisis primarily impacted the economies of the developed western markets of the United Kingdom, United States of America and Europe. Other major markets like Australia, Asia and Africa maintained generally their market positions.

2 Maurice Greenberg, 'Regulation of Executive Compensation in Financial Services' (Working Paper, Council on Foreign Relations, 2010) 2.

3 Maurice Greenberg, 'Regulation of Executive Compensation in Financial Services' (Working Paper, Council on Foreign Relations, 2010) 4.

4 *Corporations Act 2001* (Cth) s 198A.

5 This is unless, more than 50 percent of the members present at the meeting, either in person, or by proxies (if allowed by the constitution) vote against the remuneration report.

6 See, Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Better Shareholders – Better Company: Shareholder Engagement and Participation in Australia* (2008).

shareholders who own small parcels of shares to play an influencing role (if any) in the management of companies to which they invest.[7] *As a result of the blatant disregard to minority views, shareholder activism has also become an increasingly common feature of the corporate landscape.*[8]

In June 2011, following much criticism and objection of large corporate businesses (and their profit driven corporate agenda),[9] *the Australian Government made a number of legislative amendments in an effort to improve director accountability, reduce conflict of interest and increase transparency of director and executive remuneration for the benefit of shareholders.*[10] *It is argued that these reforms do not, from a practical perspective, 'strengthen' the position of shareholders in respect of director remuneration.*[11] *Further, the writer holds a number of concerns in respect of the disclosure obligations particularly as they relate to the establishment of a remuneration committee by the company and the inherent conflict of interest these requirements create.*

There is no doubt that the deliberate conduct of directors to pay low dividends or, in some instances, no dividends and to instead, grant themselves exorbitant increases in incentive payments out of profits that could be otherwise paid as dividends to shareholders is likely to be oppressive.[12] *Unfortunately though, the remedial relief available to*

There is, however, some indication of increasing engagement by institutional investors but they continue to remain largely passive investors.

7 James Mayanja, 'The Proper Role of Shareholders in the Decision Making Processes of Modern Large Public Companies' (2009) 24(1) *Australian Journal of Corporate Law* 9, 18. See also John Farrar, *Corporate Governance: Theories Principles and Practice* (Oxford University Press, 3rd ed, 2008) 51.

8 John McCombe, *Centre for Corporate Law and Securities Regulation Shareholder Meetings: Key Issues and Developments* (9 November 2004) University of Melbourne – Centre for Corporate Law and Securities Regulation <http://cclsr.law.unimelb.edu.au/go/centre-activities/research/research-reports-and-research-papers/>. Jinghui Liu and Dennis Taylor, 'Legitimacy and Corporate Governance Determinants of Executives' Remuneration Disclosures' (2008) 8(1) *Corporate Governance* 59, 62.

9 See, eg, Australian Institute of Company Directors, Submission to the Australian Government – The Treasury, Exposure Draft Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Bill 2011 (Cth), 27 January 2011, 1.

10 Explanatory Memorandum, Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Bill 2011 (Cth) 3. See generally *Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Act 2011* (Cth) which came into effect on 27 June 2011.

11 For example, the current law already empowers members with at least 5 per cent of the voting power or at least 100 members entitled to vote at a general meeting, who vote against the remuneration report to cause a board spill and to call a general meeting within two months. While procedurally it may be easier for shareholders to cause a spill, the institutional shareholders who make up the majority of the voting power would, for the reasons set out in this paper, simply be inclined to re-elect the board in order to maintain their the status quo.

12 See *Re Waitikiri Links Ltd* (1989) 4 NZCLC 64, 922; *Sanford v Sanford Courier Service Pty Ltd* (1987) 5 ACLC 394; *Shamsallah Holdings Pty Ltd* v *CBD Refrigeration and Air-conditioning Services Pty Ltd* [2001] WASC 8.

shareholders is limited.[13] Moreover, the paucity of shareholder litigation to enforce director duties is reflective of the costly and inherently arduous nature of this process.[14] Despite the deficiency of legislative ground, there may, however, be opportunity for minority shareholders to make their mark by utilising non-legal means or alternative dispute resolution processes.[15]

I INTRODUCTION

Excessive remuneration is a major concern for shareholders and is argued to be indicative of inadequate transparency and accountability of management.[16] It leads to unwarranted costs on companies and adversely affects present and future shareholders. The evidence suggests that incentive pay is being manipulated by executives possibly at shareholder expense.[17] The purpose of this paper is to critically examine the rights and the range of remedies available to shareholders in view of excessive director remuneration. A discussion of the responsibility of the board for management of the company in accordance with statutory and common law director duties and their impact (if any) on the setting of remuneration will be conducted. Given the widespread activism of shareholders in response to the blatant disregard to minority views on remuneration, the Australian Government recognised an urgent need to assume responsibility. An examination of the 'strengthened' role of shareholders at general meetings of publicly listed companies following the enactment of reforms will also be carried out. Unfortunately, however, given the inability of minority shareholders to make substantive changes to the structures of remuneration, it is argued that these reforms do not appear to provide shareholders with more say on pay. It appears that directors in Australia have used their powers for self-benefit given the limited rights available to shareholders to restrain. Consideration of the remedies available to shareholders against directors who pursue remuneration in place of the company and investor interest will also be conducted. The corporate sentiment that full and frank disclosure on remuneration is burdensome has been

13 While shareholders have a range of statutory remedies available, their pursuant is inherently restrictive given the cost involved in commencing and progressing any such claim through the courts. Theoretically, however, shareholders could commence a statutory derivative action on behalf of the company for wrongs done by the company or make an application to the court claiming that the conduct of a company's affairs is oppressive.

14 See *Corporations Act 2001* (Cth) ss 236-242. The law allows for a statutory derivative action to be brought (or proceedings may be intervened in) by those listed in section 236 who have been granted leave by a court to bring the action or intervene under section 237. Further, ss 232-234 details when a shareholder can apply to the court for a remedy for oppression. Only a member of the company or a person from the Australian Securities Investment Commission can apply for a remedy under section 232.

15 See John Farrar and Laurence Boulle, 'Minority Shareholder Remedies – Shifting Dispute Resolution Paradigms' (2001) 13(2) *Bond Law Review* 272.

16 John Orr, 'Constraining Fat Cats in Corporate Cathedrals: Neo-Liberalism, Corporate Law and Unreasonable Remuneration of Directors' (2002) 6 *Southern Cross University Law Review* 204, 210.

17 See Companies and Securities Advisory Committee, *Reform of the Law Governing Corporate Financial Transactions*, Report (1991). Just over a decade ago, the Report highlighted and referred to evidence arising out of the corporate collapse of a number of publicly listed companies that their directors abused their position of trust by predominately granting financial benefits that were clearly prejudicial to the interests of the company and its members.

described as an excuse.[18] It is imperative that shareholders and investors are supplied with full and clear particulars of any and all proposed remuneration structure or any change to that structure and its association with the projected company performance in order to make informed decisions. This paper will also evaluate and critique the current regulatory framework, which serves to assist companies in disclosing and determining issues of remuneration. Lastly, key recommendations in favour of good corporate governance will be provided to assist in the maintenance of socially responsible and accountable directors in performing their duties.

II FACTORS THAT GIVE RISE TO CONCERNS ON EXECUTIVE REMUNERATION

The alignment of remuneration of executive officers with the company's performance has been the single most important and controversial executive pay issue for shareholders in Australia. This is particularly concerning where director remuneration and short term incentive payments are increasing, thereby creating further company expense and payments of dividends have been denied. Perhaps more worrying is the decrease in share price of the company when a proposal to increase remuneration has been provided. The common sentiment is that there fails to be a connection between the high levels of pay that executives receive and their performance in a company.

Executive remuneration is a complex product of very different perspectives and philosophical approaches. There are several factors that give rise to remuneration issues. The perception that the remuneration of directors is excessive stems from the perspectives of shareholders, the capital market, investors and society more broadly. The different forces at work include the environment in which companies operate, inadequate controls in large organisations, limited views from large institutional investors that the remuneration of directors is too high and possibly the lack of personal stake of directors in the business. This, coupled with the different forces at work and the often subjective assessment of what might be considered 'excessive' contribute to the difficulty of this issue. Notwithstanding, past trends and specific pay outcomes have appeared inconsistent with an appropriately remunerated labour market and possibly weakened company performance.[19]

The directors of a company perform a 'distinct and powerful role with their actions having pervasive effect throughout the company they run'.[20] Accordingly, it is often perceived that the acquisition of the top talent to deliver results comes at a cost and when considered in view of a multi billion dollar profit generating company, this cost is quite insignificant. While directors are often selected based on their reputation and their past performance, their

[18] Damion Kitney, 'Executive Pay Reforms 'Too Onerous', Say Critics', The Australian (online), 4 January 2011 <http://www.theaustralian.com.au/business/executive-pay-reforms-too-onerous-say-critics/story-e6frg8zx-1225981271212>. See also Chartered Secretaries Australia, Submission No 58 to the Productivity Commission, *Executive Remuneration in Australia*, 29 May 2009, 7.

[19] See Productivity Commission, *Executive Remuneration in Australia*, Inquiry Report (2010).

[20] See Productivity Commission, *Executive Remuneration in Australia*, Inquiry Report (2010) ch 4, 84 [4.1].

'personal goals and perspectives need not always translate into decisions and actions that align with the interest of the company and ultimately shareholders'.[21]

An effective corporate governance framework is important in ensuring that there are adequate controls in place to ensure accountability to shareholders and the broader community. This is particularly important when dealing with performance based incentive schemes which for example, align director remuneration to the share price or payment of dividend. This practice is inherently dangerous as it focuses directors on the market price of the company to achieve their short term performance of the company. However, the volatility in the market price of shares is very much attributed to external factors and little to do with the performance of directors. Those factors, particularly involve the different perspectives and sentiments by shareholders, the capital market, investors and society more broadly. The rapid decline of One.Tel is a clear example of where market-linked remuneration measurement has coincided with poor governance.[22]

The recent global financial crisis has had a significant impact on shareholders in Australia[23] and also left a number of regulatory issues in its wake. The growth of investor dissatisfaction had been brewing even before the crisis given the direct lack of correlation between pay and performance.[24] Directors are still being excessively incentivised in circumstances, which may not be warranted, and at the expense of the company and its shareholders.[25] The community concern and sentiment on this issue has more recently described the greed of directors as 'unjustified, unfair, immoral, and obscene'.[26] More telling is the fact that the disclosure documents (which alone carry concern) of publicly listed companies confirm a continuing upward trajectory in liquid assets and incentive based payments.[27] The link between these

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[21] Ibid.

[22] David Knott, 'Corporate Governance – Principles, Promotion and Practice, (lecture delivered at the Monash Governance Research Unit, 16 July 2002).

[23] In some cases, retirees have been forced back into the work force having been faced with significant decline in dividends (that is, if any) and even further reduction in total share value (which traditionally stood as the nest egg for many). See Michael Legg and Louisa Travers, 'Oppression and winding up remedies after the GFC' (2011) 29(2) *Company and Securities Law Journal* 101. See also Ruth Williams and Vanessa Burrow, 'Black Tuesday wipes off $100 billion', *The Age* (online), 23 January 2008 <http://www.theage.com.au/news/national/black-tuesday-hits-hard/2008/01/22/1200764265886.html>.

[24] John Farrar, 'The Global Financial Crisis and the Governance of Financial Institutions' (2010) 24 *Australian Journal of Corporate Law* 227, 239.

[25] See, eg, Sarah O'Carroll, 'Lucky for Some: CEO Pay Doubles in Decade' (online), 5 September 2011 <http://www.news.com.au/business/worklife/rise-in-salaries-and-bonuses-of-top-100-ceos-outpace-shareholder-returns/story-e6frfm9r-1226129458482>. The Chief Executive Officer of the Commonwealth Bank of Australia, Mr Ralph Norris' total remuneration doubled in three years to 2010 with shareholder returning increasing by a slight 1.8 percent over the three year period.

[26] Gary Banks, 'The Productivity Commission's executive pay inquiry: An update on the issues' (Speech delivered at the FINSIA Forum on Executive Remuneration: New Rules and Regulation, Sydney, 3 - 4 June 2009) <http://www.pc.gov.au/speeches/cs20090603>.

[27] See Australian Council of Superannuation Investors, 'CEO Pay in the top 100 companies: 2010' (Research Paper, Australian Council of Superannuation Investors, September 2011). In 2011, the Australian Council of Superannuation Investors published a comprehensive research paper of the CEO pay in Australia's largest 100 listed companied. The research paper highlighted that, over the past decade, a significant increase of 131 per cent in fixed pay and 190 per cent in bonus payments towards

significant increases in remuneration and shareholder return remains conspicuously absent.[28] These ingrained remuneration practices of corporations have been a long term concern for many and the law had been slow to evolve in line with corporate expectations or practices.[29] Following the crisis and increased activism of shareholders and community, the Australian Government partially responded to this perceived abuse by introducing further regulation to the framework regarding remuneration. These changes, which were brought about in haste, largely affect the remuneration disclosure requirements leaving the central issue of shareholder engagement on the back burner. Their rights remain limited and practically unchanged.

The response in the United States of America (US) to the regulation of executive pay by shareholders has also been controversial. Shareholder activists in the US have also long complained that these practices are unwarranted as they fail to demonstrate a causal link to pay and performance. Recently, the US President, in support of genuine and widespread populist outrage, highly criticised multimillion dollar bonuses being paid to executives of financial institutions despite them being indebted to the federal Treasury.[30] Since the financial crisis, investor litigation has also risen in the USc,[31] however, the success of shareholders to hold directors in the US liable for excessive remuneration has also proven to be complicated. The difficulty rests in the fact that full disclosure of proposed executive remuneration is made and that unless the contract is not approved in good faith, the transaction is likely to receive the protection of the business judgment rule.[32] This argument is also likely to apply in Australia – unless, of course, substantial reform is made.[33]

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the average salary of a chief executive officer. Unfortunately, however, the return on equity has not been the same and, in fact, in some instance has decreased.

28 Business Council of Australia, 'Executive Remuneration' (Position Paper, Business Council of Australia, June 2004) 1.

29 Beth Nosworthy, 'Fiduciary Obligations: Is the Shareholder an Appropriate Beneficiary?' (2010) 24(3) *Australian Journal of Corporate Law* 282, 303.

30 Stephen Bainbridge, *Corporate Governance after the Financial Crisis* (Oxford University Press, 2012) 122.

31 John Farrar, 'The Global Financial Crisis and the Governance of Financial Institutions' (2010) 24 *Australian Journal of Corporate Law* 227, 241.

32 Stephen Bainbridge, *Corporate Governance after the Financial Crisis* (Oxford University Press, 2012) 122.

33 See *ASIC v Rich* (2009) 75 ACSR 1, 627 [7253] where Austin J noted that while there is no 'bright line' business judgment rule at general law, the matters referred to in *Howard Smith Ltd v Ampol Petroleum Ltd* [1974] AC 821, 832 (Privy Council) and *Harlowe's Nominees Pty Ltd v Woodside (Lakes Entrance) Oil Co NL* (1968) 121 CLR 483, 493 (Barwick CJ, McTiernan and Kitto JJ) form part of the assessment of whether a director has breached their general law duty to act in the best interests of the company. See Matthew Hooper, 'The Business Judgment Rule: ASIC v Rich and the Reasonable-Rational Divide' (2010) 28 *Company and Securities Law Journal* 423, 427.

III ROLE OF BOARD AND DIRECTORS' DUTIES IN SETTING REMUNERATION

The role of the board carries a pivotal role in determining and ensuring that the setting of the level of director remuneration is in the best interests of the company and its shareholders. While the responsibility is ultimately on the shareholders to elect the most suitable board candidates to represent their interests, the board also plays an important role in endorsing candidates and managing director performance and remuneration. When making such decisions, directors are under certain fiduciary obligations.

A *Role of Board*

The responsibility for determining the remuneration arrangements for directors and other key management personnel (KMP) of public companies rests with the boards of those companies. Specifically, the *Corporations Act 2001* (Cth) (*Corporations Act*) provides that:

> [t]he business of a company is to be managed by or under the direction of the directors.[34]

This statutory power was reaffirmed by Rogers CJ in the recent decision of *AWA v Daniels*:[35]

> [t]he Board of a large public corporation cannot manage the corporation's day to day business. This function must be left to the corporation's executives... the directors rely on management to manage the corporation…

Further, the Australian Securities Exchange (ASX) Corporate Governance Council offers its support of this position by suggesting through its *Corporate Governance Principles and Recommendations* that, amongst other things, the board will be responsible for:[36]

> overseeing the company...[and] providing input into and final approval of management's development of corporate strategy and performance objectives... [including] remuneration...

Clearly, this responsibility is exclusive and shareholders are essentially precluded from interfering in management. Directors can act against the wishes of shareholders as they are

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34 *Corporations Act 2001* (Cth) ss 198A(1)-(2). Directors may exercise all powers unless the *Corporations Act* or the company's constitution requires it to be by way of general meeting. Particularly in large publicly listed companies, remuneration committees have been established to assist in the determination of director and executive remuneration. See Zoher Adenwala, 'Directors' Generous Remuneration: to be or not to be paid?' (1991) 3(1) *Bond Law Review* 25, 27 which indicates that, 'overly-generous remuneration is obviously prejudicial to the interests of shareholders and may be harmful to employees and also to creditors where a company is insolvent or in danger of becoming so'.

35 (1992) 10 ACLC 933, 1013 (Rogers CJ). See Paul Redmond, 'The Reform of Directors' Duties' (1991) 15(1) *University of New South Wales Law Journal* 86, 107.

36 Australian Securities Exchange, *Corporate Governance Principles and Recommendations* (2nd ed) r 1.1.

generally restrained from involving themselves in the management of the company.[37] The position is, however, complicated by the fact that the board remains appointed by and accountable to shareholders.[38]

B *Director Duties*

A director's responsibility to manage the affairs of a company is far-reaching but is not without burden. The law recognises that those who entrust their property or affairs to others is at risk of suffering loss by the other person's wrongdoing.[39] In granting directors these extensive powers 'comes the opportunity for fraud and mismanagement. The shareholders of companies are often especially vulnerable, because they are frequently passive investors who do not follow the company's progress on a day-to day basis. Their vulnerability is all the more acute if they are numerous and not organised'.[40]

C *Statutory Duties*

The law interjects, by way of the *Corporations Act*, to impose several statutory duties on directors. In making decisions, directors *must*:

(a) act with due care, diligence and for a proper purpose;[41]
(b) act in good faith in the best interests of the company;[42]
(c) not improperly use their position to gain an advantage for themselves or someone else or cause detriment to the corporation.[43]

As indicated by the use of the word *must*, these obligations cannot be departed from. While these duties are owed to the company, they extend to the determination of remuneration arrangements. If a court is satisfied that a director has failed to uphold his or her duty, a civil penalty may be imposed[44] as well as a disqualification order disqualifying a director from

37 See *Automatic Self-Cleansing Filter Syndicate Company v Cunninghame* [1906] 2 Ch 34. See also Roberta Karmel, 'Independent Directors, the Independent Corporate Board: A Means to What End?' (1984) 52 *George Washington Law Review* 534, 535 which suggests that the decisions of directors, which bind the company, do not solely affect shareholders but also other constituencies.

38 *Corporations Act 2001* (Cth) s 198A(2) which provides that the directors may exercise all the powers of the company except any powers that the *Corporations Act* or the company's constitution (if any) requires the company to exercise in general meeting.

39 Harold Ford, Robert Austin and Ian Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 12th ed, 2005) at [8.010].

40 Harold Ford, Robert Austin and Ian Ramsay, *Ford's Principles of Corporations Law* (LexisNexis Butterworths, 12th ed, 2005) at [8.010].

41 *Corporations Act 2001* (Cth) ss 180(1)-(2). See *Mills v Mills* (1938) 60 CLR 150, 185. See also *Commonwealth Bank of Australia v Friedrich* (1991) 9 ACLC 945; *Daniels v Anderson* (1995) 13 ACLC 614; *ASIC v Rich* (2003) 44 ACSR 341.

42 *Corporations Act 2001* (Cth) s 181(1).

43 *Corporations Act 2001* (Cth) s 182(1).

44 *Corporations Act 2001* (Cth) ss 181(2), 182(2), 1317E.

managing corporations for a period the court considers appropriate.[45] Further, criminal sanctions may also be imposed on directors should they recklessly or intentionally fail to act in good faith, misuse their position or any information at the detriment of the company or its shareholders.[46] Their enforcement is argued to assist in maintaining director accountability.

D *Fiduciary Duties*

In addition to the statutory duties, directors are formally recognised as having a fiduciary relationship with the company.[47] Directors have a duty to act *bona fide* in the best interests of the company as a whole.[48] They cannot put themselves into situations where a personal interest may conflict with the interests of the company.[49] It requires a director to exercise his or her power on behalf of another by pledging him or herself to act in the best interests of the other.[50] They are considered 'fiduciary agents, and a power conferred upon them cannot be exercised in order to obtain some private advantage or for any purpose foreign to the power'.[51] No matter how complex the company or group of companies, directors are required to carry out their responsibilities bona fide and not for their own self-interest.[52] These fiduciary duties are strict and will apply 'even where the fiduciary acts in such a way as to benefit the company, and in so doing also personally obtains some benefit, which will be treated as belonging to the corporation'.[53] However, the beneficiary of these obligations is the company and not individual shareholders.[54] Notwithstanding, the fiduciary accountability is also said to arise between shareholders.

The law has considered that the fiduciary responsibility is not closed but that is extends to shareholders and possibly creditors and other interested parties. The NSW Court of Appeal in *Brunninghausen v Glavanics*[55] considered that certain factual circumstances may give rise to

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45 *Corporations Act 2001* (Cth) s 206C(1). Depending on the severity of the breach, the civil penalty provisions of the *Corporations Act* entitle a Court to also make a pecuniary penalty order, compensation order and order an injunction to restrain further conduct of the director: ss 1317G, 1317H, 1324 respectively. See also *Re HIH Insurance Ltd and HIH Casualty and General Insurance Ltd ASIC v Adler* (2002) 41 ACSR 72 where Santow J held that Rodney Adler and other directors had breached many of their statutory director duties and ordered the disqualification of Adler from managing companies for the next 20 years.

46 *Corporations Act 2001* (Cth) s 184(1).

47 See *Mills v Mills* (1938) 60 CLR 150.

48 See also Robert Flannigan, 'Fiduciary Duties of Shareholders and Directors' (2004) *Journal of Business Law* 277, 288.

49 *Aberdeen Railway Company v Blaikie Bros* (1854) 1 Macq 461, 471.

50 *Norberg v Wynrib* [1992] 2 SCR 226, 272.

51 See *Mills v Mills* (1938) 60 CLR 150, 185.

52 Julian Svehla, 'Director's fiduciary duties' (2006) 27 *Australian Bar Review* 192, 195.

53 Roman Tomasic, Stephen Bottomley and Rob McQueen, *Corporations Law in Australia* (Federation Press, 2nd ed, 2002) 318. See also *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134.

54 Patrick Parkinson, 'Fiduciary Obligations' in P Parkinson (ed), *The Principles of Equity* (LawBook Company, 2nd ed, 2003) 341. See *Percival v Wright* [1902] 2 Ch 421 which supports the proposition that no general fiduciary duty is owed to individual shareholders. See also *Furs Ltd v Tomkies* (1936) 54 CLR 583, 592; *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134.

55 (1999) 46 NSWCA 538.

a fiduciary duty between a director and shareholder.[56] This is particularly given that shareholders elect or appoint directors to manage the company for the benefit of themselves and its members.[57] Where directors preferred their personal interests to the joint interests of shareholders it was suggested that this is the very conduct, which would be proscribed by the fiduciary duty.[58] This position has accelerated more recently again by the NSW Court of Appeal in *Crawley v Short*.[59] In that case, Handley JA stated that without providing an exhaustive list, that there will be a variety of situations where a shareholder or director / shareholder holds a special position where he or she may owe duties to another shareholder.[60] Further, the findings of Judd J in the unreported decision of the Victorian Supreme Court in *Jones v Jones*[61] reaffirmed the position that directors are under an obligation not to take advantage of their position to obtain a commercial advantage over a shareholder.[62] Interestingly, in certain circumstances, directors may owe fiduciary duties to shareholders.

Conflicts may arise between directors and shareholders over issues relating to the appropriate level of remuneration.[63] Mostly where incentive payments to directors have been gross and unwarranted in light of dwindling returns (if any). It is possible that by increasing a director's salary unnecessarily, that the company has an undue expense. Accordingly, the argument, by analogy, that acting in the best interests of the company should require a director to act in the best interests of a particular shareholder or a group of shareholders in respect of setting remuneration, should succeed.[64] The recognition that a fiduciary obligation should operate as 'a pragmatic communal response to the corrosive mischief of opportunism' is a necessary part of maintaining true director accountability.[65] The recognition by the courts of the value in extending directors' fiduciary obligations to shareholders in certain circumstances should heighten the concern of directors in their behaviours when setting or accepting significant

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56 *Brunninghausen v Glavanics* (1999) 46 NSWLR 538, 550 (Handley JA) which asserted that although a director's fiduciary duties are formally recognised as being owed to the company that this general principle, 'should not preclude the recognition of a fiduciary duty to shareholders in relation to dealings in their shares where this would not compete with any duty owed to the company'. This proposition was supported by *Crawley v Short* [2009] NSWCA 410 (16 December 2009) [99] – [122] (Young JA). The position that fiduciary duties of directors could also apply to others including shareholders was also considered in *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 68 (Gibbs J).

57 *Brunninghausen v Glavanics* (1999) 46 NSWLR 538, 557 (Handley JA). See also *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134, 147 - 155.

58 *Brunninghausen v Glavanics* (1999) 46 NSWLR 538, 559. (Handley JA)

59 [2009] NSWCA 410 (16 December 2009).

60 *Crawley v Short* [2009] NSWCA 410 (16 December 2009) which stated that directors are require to act bona fide in the best interests of the company and that no different duty was owed to a shareholder.

61 [2009] VSC 292 (23 July 2009).

62 *Jones v Jones* [2009] VSC 292 (23 July 2009) [40] (Judd J).

63 A conflict could be said to arise where the company is incentivizing its directors in circumstances, which are not warranted, and at the expense of the company and its shareholders. It is suggested that directors and shareholders should be viewed as separate stakeholders and holding separate interests.

64 William Hood, 'Shareholders Rights Without Obligations' (paper presented at the Saskatchewan Legal Education Society Incorporated Seminar, Saskatchewan, April 1998) 8.

65 Beth Nosworthy, 'Fiduciary obligations: Is the Shareholder an Appropriate Beneficiary?' (2010) 24(3) *Australian Journal of Corporate Law* 282, 304. See also Robert Flannigan, 'The Core Nature of Fiduciary Accountability' (2009) *New Zealand Law Review* 375, 376.

(and perhaps unjustified) increases in incentive based payments. The extension of these obligations to shareholders would 'permit the law to enforce the fiduciary duties with far greater vigour and accuracy than previously'.[66] Moreover, the development of the law to have appropriate regard to shareholder interests would also assist in the prevailing of good corporate governance practices.[67] A variety of remedies are available in circumstances where a director breaches a fiduciary duty.[68] However, the director and shareholder relationship is not straightforward. Even if shareholders are unsuccessful in their pursuit against directors for breach of a fiduciary duty, they may seek relief against a company's unfair remuneration practices by applying other remedies discussed in detail below.

III LIMITED ROLE OF SHAREHOLDERS TO NEGOTIATE DIRECTORS' REMUNERATION

Given the board is primarily responsible for the management of a company's affairs, shareholder participation in corporate decision making is limited.[69] As owners of equity in a company, shareholders 'have a legitimate interest in how corporate funds are expended, including through the remuneration arrangements for directors and other senior corporate officers'.[70] The need to increase shareholder engagement has been recognised for some time by the community and more recently by the Australian Government.[71] Unfortunately, however, shareholders do not have adequate rights in which to change decisions of the board on matters regarding remuneration.

A *Shareholder Rights to Vary Composition of the Board*

Under ss 201G and 203D,[72] shareholders are empowered with the right to appoint and remove directors. These powers are central to the shareholders' capacity to influence the composition of the board. If shareholders are dissatisfied, they have a right to put resolutions at a general meeting to remove a director before the expiration of his / her period in office.[73]

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66 Lynden Griggs, 'The Role of the Board of Directors in Public Corporations' (1994) 11 *Australian Bar Review* 214, 221.

67 Justice Alex Chernov, 'The Role of Corporate Governance Practices in the Development of Legal Principles Relating to Directors' in Ian Ramsay (eds), *Corporate Governance and the Duties of Company Directors* (The Centre for Corporate Law and Securities Regulation, 1997) 33, 41.

68 *Corporations Act 2001* (Cth) Part 9.4B. In respect to those members aggrieved, claims relating to an account of profits, injunctive relief as well as the reign of the civil penalty provisions may be imposed. There are four types of civil penalty orders that can be made pursuant to Part 9.4B and include a declaration of contravention, pecuniary penalty, disqualification order, as well as possible criminal penalties. See also *Pacifica Shipping Company Ltd v Anderson* [1986] 2 NZLR 328.

69 Unfortunately, shareholders do not have adequate rights in which to manage the structure of remuneration payments to directors and their executives.

70 Corporations and Markets Advisory Committee, Australian Government, *Executive Remuneration* (2011) 51.

71 Recent reforms were made to the *Corporations Act* by virtue of the *Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Act 2011* (Cth).

72 *Corporations Act 2001* (Cth).

73 *Corporations Act 2001* (Cth) s 203D. See also *Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Act 2011* (Cth) s 250BD. Reforms were made to proxy voting

To bring this resolution to the general meeting at least 5 per cent of the votes or by at least 100 shareholders is required.[74] This resolution can be made regardless of any provision in the company's constitution to the contrary. However, the inherent difficulty for minority shareholders is to then obtain the approval of the majority to actually remove the director by ordinary resolution. This is because the agreement of more than 50 per cent of the members present at the meeting, either in person, or by proxies, is needed to pass an ordinary resolution. It is, of course, unlikely that the majority will vote in favour of this resolution as they, firstly, did not call for the resolution. Secondly, the majority is likely to be comprised of institutional investors who rarely attend general meetings and participate, by necessity, by sending in their proxy vote to be directed by the chair of the meeting.[75]

B *Shareholder Rights to Amend Structures of Remuneration*

Publicly listed companies must prepare a remuneration report[76] to be put at the general meeting and a resolution to the shareholders that the report be adopted.[77] As part of this process, the chairperson must allow a reasonable opportunity for the members as a *whole* to ask questions about, or make comments on, the management of a company or the remuneration report.[78] The intention of this provision is clear so as not to allow each and every shareholder to ask questions but to allow shareholders *collectively* to raise questions.[79] There is, however, no obligation on the chair to substantively respond (if at all) to any of the questions asked.[80] There are no legal implications in the chair avoiding answering questions by 'taking it on notice'. This practice is becoming much more prevalent particularly in large publicly listed companies.

C *Shareholder Rights on Termination Payments*

On 24 November 2009, the provisions of the *Corporations Act* were amended to tighten the restrictions on excessive termination payments made to company executives.[81] The reforms occurred as a direct result of heightened community concern regarding director

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which disentitles any person who is appointed as a proxy to exercise any undirected proxies on a resolution connected with the remuneration of KMP if they themselves are, or are closely related to a member of the KMP. This prohibition, however, does not apply if the person is the chairperson and their appointment as proxy expressly authorizes them to vote on matters of KMP remuneration.

74 *Corporations Act 2001* (Cth) s 249N. The shareholders must however provide the company with notice of a resolution at least two months before the general meeting by virtue of s 249O.

75 Geof Stapledon et al, *Research Report - Proxy Voting in Australia's Largest Companies* (Centre for Corporate Law and Securities Regulation, 2000) 30. While corporate investors may rely on the advice of their proxy voters (i.e. the chairperson), it is suggested that even '…if an institutional investor did in fact seek advice as part of a "tick a box" approach to voting, this would appear to be tokenistic…'. See James Spigelman CJ AC, 'Institutional Shareholders and Corporate Governance' (2010) 28 *Company and Securities Law Journal* 235, 240.

76 *Corporations Act 2001* (Cth) s 300A.

77 *Coporations Act 2001* (Cth) s 250R(2).

78 *Corporations Act 2001* (Cth) ss 250S(1), 250SA.

79 Explanatory Memorandum, Company Law Review Bill 1998 (Cth) [10.78].

80 When difficult questions are raised particularly in relation to the remuneration report, the chairperson could simply provide a hollow response by taking the question on notice.

81 See *Corporations Amendment (Improving Accountability on Termination Payments) Act 2009* (Cth).

remuneration.[82] Prior to the amendments, the legislative framework entitled directors to receive up to seven times a director's total annual remuneration package before shareholder approval was required. Reforms to these entitlements were, frankly, long awaited. The new laws require a resolution to be passed at a general meeting by shareholders in circumstances where termination benefits for company directors and executives exceed one year's average base salary.[83] In these circumstances, full details of any termination benefit payable to the directors must be disclosed in the notice of the general meeting that is to consider the resolution.[84] The penalty provisions have also been strengthened sixfold so that if the company fails to obtain approval of any benefits paid in excess of the threshold, penalties of up to $19,800 for individuals (previously, $2,750) and $99,000 for companies (previously $16,500) could be imposed.[85] Directors could also be exposed to criminal liability of up to six months imprisonment.[86] The significant increase to the penalty provisions no doubt reflects the attitudes of shareholders and community sentiment on this issue.[87] While unfortunately these provisions do not act retrospectively,[88] they will have significant implications for future remuneration arrangements.

D *Two-Strike Director Re-election*

On 1 July 2011, further reforms were made to the rules that govern approving director remuneration. These new laws were introduced in an attempt to 'strengthen' shareholder involvement in remuneration setting.[89] They are again reflective of the increase in shareholder action on this issue. Shareholders now have a recognised opportunity to engage in a 'two-strike' director re-election process by which the:[90]

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82 Explanatory Memorandum, Corporations Amendment (Improving Accountability on Termination Payments) Bill 2009 (Cth) 7.

83 *Corporations Act 2001* (Cth) ss 200B(1), 200E(1). The reforms now also prohibit retirees (or an associate of the retiree) from participating in the vote and it must be taken at a general meeting pursuant to s 200E(2A).

84 *Corporations Act 2001* (Cth) s 200E(2).

85 *Corporations Amendment (Improving Accountability on Termination Payments) Act 2009* (Cth) sch 3 (table items 35, 36 and 37).

86 *Corporations Act 2001* (Cth) s 200D(2).

87 See Comparatively, the Business Secretary of the Department for Business Innovation and Skills in the United Kingdom has published a formal consultation document which proposes that shareholders take a binding vote on a company's future remuneration policy and on termination payments for directors of more than one year's base salary. These new consultations follow extensive discussions and serve to assist the UK Government to formalise its regulation of executive remuneration.
See, Department of Business Innovation and Skills, *New Consultation on Enhanced Shareholder Voting Rights* (14 March 2012) Department of Business Innovation and Skills <http://www.wired-gov.net/wg/wg-wlabel-dti.nsf/wfArticle?ReadForm&unid=6BDCE49FAAC5DFA5802579C10034C5E8>.

88 The reforms to termination payments only apply to agreements entered into and renewed or extended after 24 November 2009. See Explanatory Memorandum, Corporations Amendment (Improving Accountability of Termination Payments) Bill 2009 (Cth) [9].

89 See *Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Act 2011* (Cth).

90 *Corporations Act 2001* (Cth) ss 250U-250Y.

(a) first strike occurs if 25 per cent or more of the votes cast in respect of a resolution to adopt a company's remuneration report are opposed to the resolution. The next remuneration report of the company must then explain whether shareholders' concerns have been addressed and how they have been, or if they have not been addressed why they have not been;[91] and

(b) second strike occurs if 25 per cent or more of the votes cast in respect of a resolution to adopt a company's second remuneration report are opposed to the resolution. If the second strike occurs, shareholders at the meeting will vote on whether the company directors should stand for re-election.[92]

If the spill resolution is passed then a general meeting (known as the spill meeting) must be held within 90 days[93] at which shareholders will vote on the re-election of all directors except the managing director.[94] Provision is made to ensure that a minimum of three directors (the managing director and two others) remain after a spill meeting.[95] There is still an opportunity for shareholders to vote against all other candidates being appointed. For example, if more than 50 per cent of votes are against the appointment of each of the candidates, there is a possibility that the company could be left with only one director, being the managing director.

Public companies are required by the *Corporations Act* to have at least three directors.[96] Accordingly, the candidates who received the highest number of votes in favour of their election will be deemed to be elected until the following general meeting.[97] So, if there are two vacancies to fill (to have a minimum of three directors) and there were three candidates receiving 50 per cent, 40 per cent and 30 per cent of the votes in favour of their election, the candidates who received the two highest percentages would be appointed.[98] While shareholders may indicate that they do not want particular individuals as directors, the *Corporations Act* deems some of those individuals to be elected, at least until the following general meeting. Accordingly, shareholders may be stuck with someone that they did not want managing the company for up to a year. The alternative is to propose some suitable candidates shareholders consider could be appointed to office. To do this they could request

91 *Corporations Act 2001* (Cth) s 250U(a).
92 *Corporations Act 2001* (Cth) s 250V(1).
93 *Corporations Act 2001* (Cth) s 250W(2).
94 *Corporations Act 2001* (Cth) s 250V(1).
95 *Corporations Act 2001* (Cth) s 250X(1). By way of note, the requirement for a minimum of three directors may also be an issue for entities regulated by the Australian Prudential Regulation Authority (APRA). This is because generally APRA regulated entities have to have a minimum of five directors at all times pursuant to APRA's Prudential Standard 510.
96 *Corporations Act 2001* (Cth) s 201A(2).
97 *Corporations Act 2001* (Cth) s 250X.
98 *Corporations Act 2001* (Cth) s 250X(3).

access to a company's register of members[99] and run a campaign in an attempt to persuade other shareholders to vote in favour of those nominees at the spill meeting.[100]

As to whether these reforms have, from a practical perspective, improved the position for minority shareholders is questionable. The two-strike rule does not appear to afford shareholders any additional rights that they did not already hold. For example, if 25 per cent of members who voted against the remuneration report wish to frustrate a board by way of a spill, they are already entitled to call a general meeting within two months.[101] Of course, the difficulty for the minority is to then persuade the remaining 75 per cent (or, at the very least 50 per cent) of eligible members, to vote in favour of the resolution to remove a director. Given that directors and institutional shareholders generally hold the majority voting power, the minority members may be facing an uphill battle.

Interestingly, since these reforms shareholders have demonstrated their willingness to vote down the remuneration report where remuneration has increased far in excess of share price gains or returns.[102] There has been noted criticism[103] of the heightened reaction shown in company meetings following the introduction of the two-strike rule so much so that it has been suggested that the legislation may be 'watered down'.[104] A number of listed companies now face the prospect of a spill resolution.[105] For example, 74 per cent of the votes cast on the resolution by Globe International Limited to increase director remuneration were against the resolution.[106] Also, Crown Limited received approximately 55 per cent of votes against the remuneration report.[107] In response, Mr James Packer the Executive Chairman of Crown Limited is reported to have told shareholders that if they vote against the remuneration report in the 2012 general meeting (which would trigger a board spill) that he 'will use [his] votes [as a 46 per cent shareholder] to ensure all directors are voted back in immediately'.[108] The

99 *Corporations Act 2001* (Cth) s 173.

100 Practically however, institutional shareholders rather than retail shareholders would ordinarily undertake this.

101 *Corporations Act 2001* (Cth) s 249D. The current law already empowers members with at least 5 per cent of the voting power or at least 100 members entitled to vote at a general meeting, who vote against the remuneration report to cause a board spill and to call a general meeting within two months.

102 Adele Ferguson, 'Let the games begin now the two-strikes rule opens boards to challenge over pay', *Sydney Morning Herald* (online), 17 October 2011 <http://www.smh.com.au/business/let-the-games-begin-now-the-twostrikes-rule-opens-boards-to-challenge-over-pay-20111016-1lrim.html>.

103 No doubt by directors of public companies.

104 Robert Baxt AO, 'The Corporate Law Scene in 2012 – Trouble for Directors, Greater Power to the Regulator, even more Legislation and Regulation and much more Litigation' (2012) 40(1) *Australian Business Law Review* 49, 50.

105 James Frost, 'Sevior backs executive two-strikes pay rule', *The Australian* (online), 29 October 2011 <http://www.theaustralian.com.au/business/companies/sevior-backs-executive-two-strikes-pay-rule/story-fn91v9q3-1226179957662>.

106 Globe International Limited, *Results of 2011 AGM – Globe International Limited* (26 October 2011) Globe International Limited <http://www.globecorporate.com/files/announcements/AGM%20RESULTS%202011.pdf>.

107 James Frost, 'Sevior backs executive two-strikes pay rule', *The Australian* (online), 29 October 2011 <http://www.theaustralian.com.au/business/companies/sevior-backs-executive-two-strikes-pay-rule/story-fn91v9q3-1226179957662>.

108 Lucy Battersby, 'Packer threat on board spill', *Sydney Morning Herald* (online), 28 October 2011 <http://www.smh.com.au/business/packer-threat-on-board-spill-20111027-1mm3j.html>.

discouraging and perhaps somewhat 'arrogant'[109] comments made by Mr Packer reflect the incongruities of the two-strike rule, essentially neutralising the teeth in the reform and any shareholder backlash.[110]

The operation of the two-strike rule is simply intended to provide a 'clearer' signal of shareholders' view to directors on the remuneration report and nothing more.[111] Although it does place additional pressures on directors to avoid the process of a spill meeting as this leads to unnecessary costs and further time required to be spent resolving, essentially, administrative matters. Notwithstanding the progress made by way of regulatory reform, the rights of shareholders on the issue of remuneration remain non-binding. While it may be procedurally easier for shareholders to convey their dissatisfaction, the large constituent of institutional investors, will seek to maintain the status quo.

IV REMUNERATION FRAMEWORK

The current disclosure framework governing remuneration operates in a piecemeal fashion.[112] A compromise has been reached between the rule-making body and those interested parties or stakeholders to ensure that director remuneration addresses four primary activities: remuneration practice, remuneration disclosure, engagement on remuneration and voting.[113] While failure to comply with the disclosure obligations mandated by the legislative framework may attract penalties, deficiencies in remuneration practice have proven otherwise.

A *Legislative Requirements*

The *Corporations Act* prescribes the disclosure of the information required to be included in a company's remuneration report provided to shareholders. Recent amendments to the *Corporations Act* removed the requirement to disclose the five highest paid executives in addition to a company's KMP.[114] Companies are now required to disclose in the

109 Lucy Battersby, 'Packer threat on board spill', *Sydney Morning Herald* (online), 28 October 2011 <http://www.smh.com.au/business/packer-threat-on-board-spill-20111027-1mm3j.html>.

110 Claire MacMillan, 'Impact of Regulatory Reforms on Executive Remuneration in Australia – AGMs in 2011' (2011) 64(2) *Keeping Good Companies* 100, 102.

111 Explanatory Memorandum, Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Bill 2011 (Cth) [1.14].

112 For example, the legislation and regulatory provisions requires certain outcomes while regulatory bodies such as the Australian Securities Investment Commission, Australian Prudential Regulation Authority enforce others. Also, the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations* and Australian Stock Exchange Listing Rules set codes on best practice for publicly listed companies.

113 Kym Sheehan, 'The Regulatory Framework for Executive Remuneration in Australia' (2009) 31 *Sydney Law Review* 273, 279.

114 See *Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Act 2011* (Cth). It was suggested that this approach to reporting created practical problems, as 'the five highest paid group and company executives are also likely to be KMP. In contrast, small companies may have fewer than five KMP. This makes the disclosure requirements quite onerous to apply': Explanatory Memorandum, Corporations Amendment (Improving Accountability on Director and Executive Remuneration) Bill 2011 (Cth) [8.116].

remuneration report for each KMP,[115] in a separate and clearly identified section of the report, specific information on the remuneration including all monetary and non-monetary benefits.[116] While it is fair to say that unlimited disclosure would be counteractive, the remuneration report should provide appropriate disclosure to shareholders, in an easily understandable format, with information they need to know on the quantum and components of remuneration in comparison with the performance of the company[117] and its policies.[118] Failure to comply with the legislative requirements is an offence and the penalty provisions of the *Corporations Act* will apply.[119]

Further, provision is now also made for disclosure in the remuneration report of any remuneration consultant who makes a recommendation to the KMP.[120] It is suggested that the use of these 'experts' have played a significant driver in the unreasonable advancement of director remuneration.[121] In providing their recommendations of salary benchmarks, these consultants are unlikely to be independent given that they, themselves, are remunerated by the company. The process heightens concern of bias (or, at its very least, a reasonable apprehension of bias). It has also been suggested that the egregious excess is justified through the creation of remuneration committees as the price of leadership.[122] However, one need look no further than the failure of many large publicly listed companies such as One.Tel and HIH Insurance where the directors excessively remunerated long before and immediately prior to their corporate collapse.[123] As to whether remuneration committees truly ensure commensurate remuneration with performance is doubtful.

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115 See Australian Accounting Standards Board, *Related Party Disclosures* – AASB124 (3 August 2010) Australian Accounting Standards Board <http://www.aasb.gov.au/admin/file/content102/c3/AASB124_12-05_ERDRjun10_07-09.pdf> which defines a KMP to mean those persons having authority and responsibility for planning, directing and controlling the activities of the entity, directly or indirectly, including any director (whether executive or otherwise) of that entity.

116 *Corporations Act 2001* (Cth) s 300A(1). Specifically, s 300A now requires specific disclosure, for each key management personnel including details of the remuneration that was granted to the person at some previous time (whether conditional or unconditional) and is paid in the current year, remuneration that is granted to that person in the current financial year and paid in that same year and any conditional or unconditional remuneration entitlements, payment of which is deferred to some future period. See also Corporations and Markets Advisory Committee, Australian Government, *Executive Remuneration* (2011) 11. See *Corporations Act 2001* (Cth) s 296(1) which mandates that all financial reports of publicly listed companies comply with the Australian Accounting Standards.

117 This should include shareholder returns.

118 Corporations and Markets Advisory Committee, Australian Government, *Executive Remuneration* (2010) 48.

119 See also Ben Butler, 'Companies failing on pay: ASIC', *The Age* (online), 1 March 2012 <http://www.theage.com.au/business/companies-failing-on-pay-asic-20120229-1u3aw.html>.

120 *Corporations Act 2001* (Cth) s 300A(1)(h). See also Explanatory Memorandum (Replacement), Corporations Amendment (Improving Accountability on Director and Executive Remuneration Bill 2011 (Cth) which suggests that these amendments were aimed at increasing the transparency for shareholders and accountability relating to the use of remuneration consultants.

121 It could also be argued that the creation of a remuneration committee shows weakness in dealing with directors' remuneration.

122 Adrian Davies, *The Globalisation of Corporate Governance – The Challenge of Clashing Cultures* (Gower Publishing Limited, 2011) 6.

123 Jennifer Hill and Charles Yablon, 'Corporate Governance and Executive Remuneration: Rediscovering Managerial Positional Conflict' (2002) 25(2) *University of New South Wales Law Journal* 294, 308 who

B *Compliance with ASX Listing Rules*

These rules are more prescriptive as they govern the admission of entities to listing on the stock exchange and deal with the requirements for listing and quotation, market information, trading and settlement and general supervisory matters.[124] Further, if companies wish to raise capital, their structure and operations must comply with the Listing Rules.[125] Non-compliance with these rules may lead to enforcement against listed entities and their associates pursuant to the *Corporations Act*.[126] Further, a breach of the Listing Rules may also result in the imposition of pecuniary sanctions against the company.[127] To protect investors,[128] and to address the potential of conflicts of interest associated with the operation of remuneration committees providing advice to their boards, the ASX recently amended its Listing Rules to mandate that any remuneration committee must be comprised solely of non-executive directors.[129] There are however a number of factors which potentially limit the effectiveness of the independence of a non-executive director particularly in this respect. Firstly, it has been suggested that the independence of a non-executive director is often frustrated by the incentives of a financially performing company.[130] Secondly, non-executives directors rely on and are *effectively* controlled by their directors in respect of decisions affecting the management of the company.[131] This position was advanced by the non-executive directors in

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notes that in 'September 2000, it was revealed in One.Tel's annual report that the joint CEOs, Jodee Rich and Brad Keeling, had received cash bonuses of A$6.9 million each on top of their annual salaries of A$560,000'. See John Farrar, 'Corporate Governance and the Judges' (2003) 15(1) *Bond Law Review* 65, 74.

124 Australian Securities Exchange, *Listing Rules* (at 22 March 2012) *Introduction* 1. See also Productivity Commission, *Inquiry Report into Executive Remuneration in Australia* (4 January 2010) 130.

125 Australian Securities Exchange, *Benefits of Listing* (2012) Australian Securities Exchange <http://www.asx.com.au/professionals/benefits-of-listing.htm>. In order for companies to be listed on the stock exchange they are required to enter into contractually binding agreements with the ASX to comply with its Listing Rules.

126 *Corporations Act 2001* (Cth) ss 674, 1101B. See Alice Klettner, Thomas Clarke and Michael Adams, 'Corporate Governance Reform: An Empirical Study of the Changing Roles and Responsibilities of Australian Boards and Directors' (2010) 24(2) *Australian Journal of Corporate Law* 148, 163.

127 *Corporations Act 2001* (Cth) s 674. See also Nicholas Lew and Ian Ramsay, *Corporate Law Reform and Delisting in Australia* (Centre for Corporate Law and Securities Regulation, 2006) 7.

128 Productivity Commission, *Inquiry Report into Executive Remuneration in Australia* (4 January 2010) 130.

129 Australian Securities Exchange, *Important Information for ASX Listed Entities – Listing Rule Amendments* (13 August 2010) Australian Securities Exchange <http://www.asx.com.au/resources/newsletters/companies_update/archive/CompaniesUpdate_20100813_0710_HTML.htm>.

130 Grit Tungler, 'The Anglo-American Board of Directors and the German Supervisory Board – Marionettes in a Puppet Theatre of Corporate Governance or Efficient Controlling Devices?' (2000) 12(2) *Bond Law Review* 230, 249. See also Elizabeth Shi, 'Board Structure and Board Composition in Australia and Germany: A Comparison in the Context of Corporate Governance' (2007) 4 *Macquarie Journal of Business Law* 197, 207.

131 For examples of non-executive directors who took a 'passive' role in the management of the affairs of a company and who were held liable to have breached their duty of care, skill and diligence see *Statewide Tobacco Services Ltd v Morley* (1990) 8 ACLC 827; *AWA Ltd v Daniels* (1992) 10 ACLC 933.

Daniels v Anderson[132] who argued that they had relied on, and were in fact entitled to rely, on the advice of their executive directors.[133]

C *Compliance with Codes of Practice*

The ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations* provides a principle-based framework for companies on best practice in respect of remuneration.[134] Compliance with codes from organisations (like the ASX) who claim *expertise* has been argued to assist shareholders in their consideration in deciding whether to invest or vote.[135] However, monitoring compliance with these codes by directors and executives is inherently difficult and does not, in reality, mean that shareholders are protected.[136] While this Code has some regulatory force, there is no mandate for companies to comply with the *Corporate Governance Principles and Recommendations*.[137] However, the ASX Listing Rules obliges listed companies to indicate whether they have followed the recommendations as set by the ASX Corporate Governance Council 'and if they have not, provide a public examination (the "if not, why not" rule)'.[138] However, strictly speaking failure to follow the recommendations does not directly result in penalties but possibly reputational damage.

Consistent with the *Corporations Act* and to remunerate 'fairly and responsibly', the ASX Corporate Governance Council also recommends the establishment of a remuneration committee.[139] The purpose of such a committee is to establish appropriate remuneration policies which are designed in such a way that 'motivates senior executives to pursue the long-term growth' and profit maximisation.[140] The objects are clear. Any such policy should be primarily focussed on achieving corporate objectives, possibly at shareholder expense. Further, given that the committee are employed and remunerated by the company, an inherent

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132 (1995) 13 ACLC 614.

133 *Daniels v Anderson* (1995) 13 ACLC 614. This position was also advanced by non-executive directors in the case of the failed HIH Insurance. See John Douglas Maltas, 'The Demise of HIH: What part Did Failed Corporate Governance Policies Play?' (Working Paper, Curtin University of Technology, July 2005) 52.

134 Australian Securities Exchange, *Corporate Governance Council Principles and Recommendations* (2012) Australian Securities Exchange <http://www.asx.com.au/governance/corporate-governance.htm>. The Australian Securities Exchange Corporate Governance Council was formed in August 2002 and has recently issued its first revision of the Council's corporate governance Principles and Recommendations since they were issued in 2003.

135 David Seidl, 'Standard Setting and Following in Corporate Governance: An Observation-Theoretical Study of the Effectiveness of Governance Codes' (2007) 14(5) *Organization* 705, 709.

136 See Ross Grantham, 'Corporate Governance Codes in Australia and New Zealand: Propriety and Prosperity' (2004) 23(1) *University of Queensland Law Journal* 218, 220 which suggests that 'the central problem identified by the codes is how to monitor more effectively senior management and thereby make them accountable where their actions are motivated by self-interest rather than corporate interest'.

137 Productivity Commission, *Inquiry Report into Executive Remuneration in Australia* (4 January 2010) 135.

138 Productivity Commission, *Inquiry Report into Executive Remuneration in Australia* (4 January 2010) 135. See Australian Securities Exchange, *Listing Rules* (at 22 March 2012) r 4.10.3.

139 Australian Securities Exchange, *Corporate Governance Principles and Recommendations* (2nd ed) r 8.1.

140 Australian Securities Exchange, *Corporate Governance Principles and Recommendations* (2nd ed) r 8.1.

conflict of interest arises. In this way, it is difficult to see how the remuneration committee maintains their impartiality.[141]

IV SHAREHOLDER REMEDIES

The behaviour of opportunist directors who unjustly enrich themselves, (usually with the acceptance of the passive majority) has been considered sufficient to amount to conduct that is oppressive, prejudicial and even discriminatory, in some respects. In some cases the excess is unjustified and previous attempts to prevent the passing on of this plunder by directors to later generations have simply failed.[142] The public outrage accompanying the bonuses paid to the joint managing directors of, for example One.Tel, despite the company's position being in financial ruin, is a clear testament of this.[143] Traditionally, the remedies for different forms of oppressive conduct have resulted in the winding up the company or a buy-out of the minority's shares – often by the majority or the company.[144] In an attempt to control these problematic incentive payments, shareholders may seek relief by way of litigation for a director's breach of their duties.

A *Statutory Derivative Action*

The introduction of the statutory derivative action enables an individual shareholder to bring an action on behalf of the company for wrongs done by the company.[145] In order for an applicant to proceed with this representative action,[146] leave of the Court must first be obtained.[147] The issue of standing must be determined before a derivative claim for breach of a director duty owed to the company, such as a claim for excessive remuneration or improper payment of dividends, can be brought.[148] The action would continue to apply even if

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141 See David Ablen, 'Remunerating 'Fairly and Responsibly' – The Principle of Good Corporate Governance and Best Practice Recommendations of the ASX Corporate Governance Council' (2003) 25(4) *Sydney Law Review* 555. Further, as employees regulating proposed incentive payments there is a risk that they may have personal relationships with their controllers, which may influence their outcomes. See Charles Yablon, 'Overcompensating: The Corporate Lawyer and Executive Pay' (1992) 92(7) *Columbia Law Review* 1867, 1873.

142 Adrian Davies, *The Globalisation of Corporate Governance – The Challenge of Clashing Cultures* (Gower Publishing Limited, 2011) 5.

143 Paul Barry, *Rich Kids: How the Murdochs and Packers Lost $950m in One.Tel* (Bantam Books, 2002) 210, 364.

144 John Farrar and Laurence Boulle, 'Minority Shareholder Remedies – Shifting Dispute Resolution Paradigms' (2001) 13 *Bond Law Review* 272.

145 *Corporations Act 2001* (Cth) s 236(1).

146 Melissa Hofmann, 'The Statutory Derivative Action in Australia: An Empirical Review of its Use and Effectiveness in Australia in Comparison to the United States, Canada and Singapore' (2004) *Corporate Governance eJournal* 1.

147 *Corporations Act 2001* (Cth) s 237. The applicant must satisfy the Court on a number of grounds including that it is unlikely that the company will commence the proceeding, the applicant is acting in good faith, it is in the best interests of the company, that there is a serious question to be tried and the requisite notice was given to the company at least fourteen days prior to the making of the application.

148 *Corporations Act 2001* (Cth) s 237. The statutory derivative action may only be brought (or proceedings may be intervened in) by those persons listed in s 236 who have been granted leave by a court to bring the action or intervene under s 237. See also Geoffrey Egert, Colin Anderson and Scott Kiel-Chisholm, 'The Application of the Statutory Derivative Action in Pt 2F.1A of the *Corporations Act* to companies in

shareholders ratified the conduct of directors.[149] Ratification will not protect a director from breach of duty where the conduct is oppressive,[150] or it involved a misappropriation of the company's resources,[151] or represented a fraud of power.[152] The derivative action must be brought in the company's name and it is the company that is the ultimate beneficiary of any successful outcome.[153] It is often that the litigation costs associated in simply determining the question of standing to bring a case, which is prohibitive and reflective of the infrequent use of this action.[154]

B *Oppression Remedy*

Alternatively, a shareholder may make an application to the court for a remedy[155] where the conduct of a company's affairs, a proposed act or a resolution or proposed resolution is oppressive to, or unfairly prejudicial, towards shareholders.[156] The oppressive conduct must not only be prejudicial to or discriminatory towards the applicant but unfairly so.[157] The courts have indicated that conduct of failing or refusing to pay a dividend when the profits of the company warranted such payment could constitute oppression or unfairness.[158] In

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liquidation under Ch 5: Well oiled machine or is Pt 2F.1A in need of a tune up?' (2011) 25 *Australian Journal of Corporate Law* 318, 321 – 324.

149 See *Corporations Act 2001* (Cth) s 239(1) which relevantly provides that even if members of a company ratify or approve conduct the ratification or approval, does not prevent a person from brining or intervening in proceedings with leave under section 237 or from applying for leave under that section.

150 *Ngurli Ltd v McCann* (1953) 90 CLR 425, 438-440; *Hogg v Cramphorn* [1966] 3 All ER 420, 428 (Buckley J). *Corporations Act 2001* (Cth) s 232.

151 *Hurley v BGH Nominees Pty Ltd* [1982] 31 SASR 250 (Waiters J); *Re George Newman and Company* [1895] 1 Ch 674, 685-686 (Lindley LJ).

152 *Ngurli Ltd v McCann* (1953) 90 CLR 425, 438. See also Jason Harris, Anil Hargovan and Janet Austin, 'Shareholder primacy revisited: Does the public interest have any role in statutory duties?' (2008) 26 *Company and Securities Law Journal* 355, 364.

153 *Corporations Act 2001* (Cth) s 241(1) lists the possible orders that a court may make which includes interim orders, an order directing the company, or an officer of the company, to do, or not to do any act, appoint an independent person to investigate and report to the Court on the financial affairs of the company, the facts or circumstances which gave rise to the cause of action the subject of the proceeding or costs incurred in the proceedings.

154 Vanessa Mitchell, 'Has the Tyranny of the Majority Become Further Entrenched?' (2002) 20(2) *Company and Securities Law Journal* 74, 81.

155 These are listed in *Corporations Act 2001* (Cth) s 233(1) and are not expressed to be exhaustive. See, Alison Laundy, 'Oppression remedies are still potent 'weapons of choice'' (2006) *Keeping Good Companies* 292, 294.

156 *Corporations Act 2001* (Cth) s 232 and s 234. The applicant must prove that the conduct in question was either oppressive or unfairly prejudicial. There is no requirement to demonstrate both: *Re Norvabron Pty Ltd* (1987) 5 ACLC 184, 212 (Derrington J).

157 See *Re Norvabron Pty Ltd* (1987) 5 ACLC 184, 212 (Derrington J). The test of 'unfairness' was considered in *Wayde v NSW Rugby League Ltd* [1985] 180 CLR 459, 472 – 473 (Brennan J) and held that 'section 320 requires proof of oppression or proof of unfairness: proof of mere prejudice to or discrimination against a member is insufficient to attract the court's jurisdiction to intervene'. See also *Morgan v 45 Flers Avenue Pty Ltd* (1986) 10 ACLR 692, 704 (Young J) who stated that the test is 'whether [the] conduct which is so unfair that reasonable directors who consider the matter who not have thought the decision fair...[or as] whether objectively in the eyes of a commercial bystander, there has been unfairness, namely conduct that is so unfair that unreasonable directors who consider the matter would not have thought the decision fair'.

158 *Roberts v Walter Developments Pty Ltd* (1997) 15 ACLC 882, 907 (Wheeler J) stated that 'a mere failure to pay dividends, even where they are able to be paid, does not constitute oppression or unfairness but is

Shamsallah Holdings Pty Ltd v CBD Refrigeration and Airconditioning Services Pty Ltd,[159] the applicant brought proceedings under the oppression remedy on the basis that the directors of the respondent company had, amongst other things, paid themselves excessively, restricted the payment of dividends and retained cash resources that were surplus to the operating needs of the company.[160] Owen J held that it was *oppressive* for the directors not to review the dividend policy of the company in the light of changing and improving circumstances, particularly when the directors were taking steps to ensure that they were adequately remunerated over the same period of time and that review led to significant increases.[161] From the steady development of the statutory oppression provisions and their application through the common law, courts will also consider conduct that may be lawful but may constitute oppression.[162] It is the results of their actions (and not motives) that are considered by the courts.[163] The lawful acts of directors in granting themselves exorbitant director fees has also been held to be oppressive.[164] While some minority shareholders may consider this a victory, caution must be exercised when considering an application for oppression given the uncertainty of the interpretation of this statutory provision.[165]

C *Shareholder Litigation*

More recently, minority shareholders have become more boisterous in attempting to enforce their rights as investors and to seek relief from the courts where a director's conduct is blatantly prejudicial. The utility of shareholder litigation is, however, difficult to support given the limited actual return to shareholders. While shareholder litigation plays an important role in effective corporate governance,[166] there are a number of prohibitions to shareholders contemplating litigation against directors in this way. For example, in a statutory derivative action, the following acts as serious disincentives:

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capable of being oppressive in some circumstances'. See also *Re Bagot Well Pastoral Company* (1993) 11 ACLC 1, [12]. Cf *Foody v Horewood* (2003) VSC 347 which indicates that directors are not acting oppressively towards shareholders if the company is storing up undistributed profits to strengthen the company's capital position.

159 (2001) 19 ACLC 517. Owen J held that a dividend policy restricting dividends to 50 percent of the net profits, even though the company's cash position improved significantly (four times in value) and the remuneration of directors was characterised as oppressive conduct.

160 The Western Australian Supreme Court in *Shamsallah Holdings Pty Ltd v CBD Refrigeration and Airconditioning Services Pty Ltd* (2001) 19 ACLC 517 accepted the applicant's arguments that the payments were excessive and questioned whether, in the context of the directors' remuneration, the level of salaries paid was justifiable.

161 *Shamsallah Holdings Pty Ltd v CBD Refrigeration and Airconditioning Services Pty Ltd* (2001) 19 ACLC 517, [55]-[56].

162 *Campbell v Backoffice Investments Pty Ltd* (2009) 238 CLR 304, [72]. See also Michael Legg and Louisa Travers, 'Oppression and Winding Up Remedies after the GFC' (2011) 29(2) *Company and Securities Law Journal* 101, 104.

163 *Roberts v Walter Developments Pty Ltd* (1992) 10 ACLC 804; *Sanford v Sanford Courier Service Pty Ltd* (1987) 5 ACLC 394.

164 *Sanford v Sanford Courier Service Pty Ltd* (1987) 5 ACLC 394, 457 – 458.

165 The developing position of the courts must be juxtaposed by decision of *Morgan v 45 Flers Avenue Pty Ltd* (1986) 10 ACLR 692. Young J held that low levels of dividend payments and high but commercially reasonable level of director fees and bonuses was not oppressive.

166 Ian Ramsay and Benjamin Saunders, *Litigation by Shareholders and Directors: An Empirical Study of the Statutory Derivative Action* (Centre for Corporate Law and Securities Regulation, 2006) 6.

(i) definite cost and time of litigation;
(ii) if successful any recovery accrues to the company and not the plaintiff shareholder;[167]
(iii) plaintiff shareholders may also be prohibited from using company funds to meet the arduous costs associated with the commencing such legal proceedings;[168] and
(iv) shareholders may not be able to correctly assess whether remuneration is excessive.

There is no doubt that the statutory derivative action is a useful deterrent in punishing directors for a breach of their duties[169] and managing managerial misconduct and dishonesty.[170] However, given the substantial costs inherently linked to the pursuit of these actions, it is uncertain as to whether they truly form an effective remedy for minority shareholders. The crescendo of excessive director remuneration is a clear indication that the remedies available to shareholder have largely failed.

D *Alternative Dispute Resolution as a Possible Shareholder Remedy*

The competence of director's duties in ensuring that they commit to their fiduciary duties is contingent upon the certainty and ease of enforcement.[171] Alternative dispute resolution (ADR) processes such as mediation, arbitration and expert determination may also serve to assist aggrieved shareholders as a remedy and an alternative to litigation.[172] While not binding, these alternative processes have long been an alternative to litigation, and has certain advantages, especially as a form of resolution of commercial disputes.[173] However, its effectiveness may be diminished where a public regulator, like ASIC, will take action despite

167 Ian Ramsay, 'Corporate Governance, Shareholder Litigation and the Prospects for a Statutory Derivative Action' (1992) 15(1) *University of New South Wales Law Journal* 149, 150. See also *Metyor Inc v Queensland Electronic Switching Pty Ltd* [2003] 1 Qd R 186 where McPherson J stated that '[t]here may be cases in which it will plainly not be in the best interests of a corporation considered as a trading entity to engage in litigation that is likely to result in much harm and little or no evident benefit to the company…'.

168 This may only be really plausible if a statutory derivative action is brought given that the action is commenced on behalf of the company.

169 John Coffee and Donald Schwartz, 'The Survival of the Derivative Suit: An Evaluation and a Proposal for Legislative Reform' (1981) 81(2) *Columbia Law Review* 261, 302-9.

170 Oliver Schreiner, 'The Shareholder's Derivative Action – A Comparative Study of Procedures' (1979) 96 *South African Law Journal* 203, 211. See also Ian Ramsay and Benjamin Saunders, *Litigation by Shareholders and Directors: An Empirical Study of the Statutory Derivative Action* (Centre for Corporate Law and Securities Regulation, 2006) 7.

171 Jim Corkery and Bruce Welling, *Principles of Corporate Law* (Scribblers Publishing, 2008) 317. It is interesting, however, that the issue of remuneration is considered as the final principle. Whether this was a veiled attempt to cover remuneration or simply an administrative matter.

172 See John Farrar and Laurence Boulle, 'Minority Shareholder Remedies - Shifting Dispute Resolution Paradigms' (2001) 13(2) *Bond Law Review* 272.

173 Murray Gleeson, 'The State of the Judicature' (Speech delivered at the 35th Australian Legal Convention, Sydney, 22 – 25 March 2007).

ADR by minority shareholders.[174] The shared approach by ASIC to investigations and prosecutions also assists in promoting general deterrence as those intimately involved in the development of remuneration schemes, are brought to the public eye. It also serves as a reminder that directors could also be the subject of future investigations and litigation if they do not consider the best interests of the company and small investors in the forefront. So too are the rights of shareholders to approach the media in an attempt to bring a company's or a director's reputation into disrepute.

V IMPROVED CORPORATE SETTING OF REMUNERATION

The provisions of the *Corporations Act* affords shareholders a number of remedies, however, their enforcement are inherently linked to the desirable components of good corporate governance. Minority shareholders are often stifled by their dispersed shareholding, which acts as a significant barrier in enforcing corporate standards. Without legitimate rights it is difficult for shareholders to ensure that boards adequately represent their interests.[175] Accordingly, and in favour of good corporate governance, the following is recommended.

A *A Binding Vote on Remuneration for Shareholders*

At the heart of minority oppression, is the fact that the views of minority shareholders are being ousted by the voting power of the large scale of institutional investors. Accordingly, to ensure that shareholder rights are reasserted, a binding vote should be imposed in circumstances where excessive remuneration is not aligned with returns.[176]

B *Clear Remuneration Practices which Link Pay and Performance*

In respect of remuneration setting, the current governance framework has simply failed to rein in excessive remuneration practices.[177] To maintain director accountability, it follows that more prescriptive regulation is required by way of statutory caps on remuneration. If such a restriction were imposed, the plan should incorporate a sweeping ban on all performance-based pay regardless of structure and include a prohibition on severance

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174 From a practical perspective, the alternative dispute resolution process may not be appropriate if, for example, ASIC intends on taking action against the directors for breaches of *Corporations Act 2001* (Cth) s 180. ASIC's litigation is dictated by its need to ensure that higher public interest regulatory objectives are achieved. Given the large scale public pressure by minority shareholders, it is possible that ASIC could declare that it be in the public interest to conduct an investigation into the conduct of directors and publicly lift the veil on those involved on breaches of their duties.

175 Winifred Murray, 'Notes and Current Developments – the Role of Company Boards: Are they to Blame for Excessive Executive Remuneration?' (2009) 23(2) *Australian Journal of Corporate Law* 178, 183.

176 Comparatively, the Business Secretary of the Department for Business Innovation and Skills in the United Kingdom (UK) has published a formal consultation document which proposes that shareholders take a binding vote on a company's future remuneration policy and on termination payments for directors of more than one year's base salary. These new consultations follow extensive discussions and serve to assist the UK Government to formalise its regulation of executive remuneration.

177 Andrew Murray, Submission to the Productivity Commission, *Inquiry into the Regulation of Director and Executive Remuneration in Australia*, (May 2009) 2.

packages.[178] A tougher response to regulation is needed to ensure that director and shareholder interests are aligned. Further, a direct correlation between any increases in corporate performance and remuneration, and shareholder returns should be evidenced prior to any proposal for increase.[179]

C *Simple to Understand Remuneration Reports*

It is clear that the current administratively burdensome legislative regime has not assisted shareholders. Clear and transparent information, which accurately reflects and justifies the level of executive remuneration in line with shareholder returns is needed. In its recent Report on remuneration,[180] the Productivity Commissioner correctly indicated that the 'usefulness of remuneration reports is diminished by their length, detail and complexity, as well as by boiler-plating and some crucial omissions'.[181] Disclosure of incentive payments should be in plain simple English. So too should be the reporting of remuneration actually realised by directors and executives.[182] There have been many cases where, for example, 'disclosure of benefits that were not payments, but which had a value that could not be ascertained at the time of disclosure'.[183] Shareholders need to be informed of the true level of all proposed payments in a way that they can understand to make informed decisions.

VI CONCLUSION

To date, legislatures in Australia and abroad have been largely unsuccessful in being able to adequately control excessive executive remuneration practices. This is surprising given the increased activism of shareholders and regulatory concern to strengthen shareholder participation to achieve more fair corporate practices. Despite this, the regulation of shareholder engagement remains minimal even following the marks of the financial crisis. While boards remain primarily and exclusively responsible for the management of a company's affairs, directors, like others, are not free from temptation. In an effort to protect vulnerable shareholders the law has responded by imposing a number of statutory duties on

178 Stephen Bainbridge, *Corporate Governance after the Financial Crisis* (Oxford University Press, 2012) 124.

179 See Corporations and Markets Advisory Committee, Australian Government, *Executive Remuneration* (2011) 9.

180 Productivity Commission, *Inquiry Report into Executive Remuneration in Australia* (19 December 2009) 241.

181 Productivity Commission, *Inquiry Report into Executive Remuneration in Australia* (19 December 2009) 241.

182 Productivity Commission, *Inquiry Report into Executive Remuneration in Australia* (19 December 2009) 241.

183 Colin Fenwick and Kym Sheehan, 'Share-Based Remuneration and Termination Payments to Company Directors: What are the Rules?' (2008) 26 *Company and Securities Law Journal* 71, 87. See also Boral Limited, *Notice of Meeting* (17 September 2004) Boral Limited, 4-5 (resolution 6 and the accompanying explanatory notes) <http://www.boral.com.au/Images/common/pdfs/2004_Notice_of_Meeting.pdf> where Boral Limited stated that '[t]he amounts of the termination payments provided in Mr Pearse's new contract are significantly less than the prescribed multiple. However, the Board has received legal advice that the payments do not technically fall within any of the categories of exception set out in the *Corporations Act*'.

directors, which they owe concurrently with the common law fiduciary duty.[184] As shareholders are primarily affected by decisions relating to the affairs of companies in which they invest, they equally should have a say in the way its affairs are conducted.[185] Unfortunately however, shareholders rights are effectively limited. The recent introduction of the two-strike rule now also formally permits shareholders to cause a board spill requiring the re-election of directors. While no binding vote has been afforded, it will assist in paving the path to more effective communication with shareholders to ensure that incentive payments and returns are aligned.

Unfortunately, however, it remains that in settling remuneration arrangements, the role of shareholder participation has not been improved. The primary ground for complaint is that the conduct of directors in granting themselves unwarranted increases to their remuneration (in circumstances where pay is grossly unmatched to performance) has been described as oppressive, prejudicial and simply contrary to the interests of the members as a whole.[186] However, these remedies need to be pursued through the courts. Paradoxically, there are certain advantages in shareholders seeking reprieve through the use of non-legal means such as mediation as an alternative to litigation. However, mediation may not always be an effective remedy. The growing acceptance that rewards may be unequal with shareholder returns should be stunted. Particularly given that the opportunity of wealth creation and self-enrichment is generally at the expense of the company and its shareholders.

184 *Permanent Building Society v Wheeler* (1994) 11 WAR 187, 218, 235–7 (Ipp J).

185 Ross Grantham, 'The Doctrinal Basis of the Rights of Company Shareholders' (1998) 57(3) *Cambridge Law Journal* 554, 566.

186 *Corporations Act 2001* (Cth) s 232(1)(d). See also *Sanford v Sanford Courier Services Pty Ltd* (1987) 5 ACLC 394, 399.

THE CONSTITUTIONALITY OF THE MARRIAGE EQUALITY ACT 2013 (ACT) AND THE SAME-SEX BILL 2012 (NSW): A COMPARATIVE ANALYSIS

DR SCOTT GUY *

I INTRODUCTION

Attention has been recently focused on the issue of marriage equality for same-sex couples with the enactment in the Australian Capital Territory of the *Marriage Equality Act 2013* (ACT) (*Marriage Equality Act)* and the drafting of the Same-Sex Marriage Bill 2013 (NSW) (Same-Sex Bill) in the state of New South Wales previous to this enactment. A Commonwealth challenge to the constitutional validity of the *Marriage Equality Act* in the High Court of Australia appears imminent.[1] It thus appears timely to consider the constitutionality of both the Same-Sex Marriage Bill and the *Marriage Equality Act*. As will be shown, the constitutional validity of both instruments turn upon their consistency with the federal *Marriage Act 1961* (Cth) (*Marriage Act)* under s 109 of the *Australian Constitution* (in relation to the *Marriage Equality Act*) and under s 28 of the *Australian Capital Territory (Self-Government) Act* 1988 (ACT) (the *Self-Government Act)* (in relation to the Same-Sex Bill). It is suggested that Same Sex Bill creates or constitutes a fundamentally different status of 'marriage' for same-sex couples - that is the 'same-sex marriage' and thereby avoids inconsistency with the Commonwealth *Marriage Act*.[2] Hence it is argued, if enacted into law, the Same-Sex Bill would survive constitutional challenge. On the other hand, the *Marriage Equality Act* seeks to accord precisely the same status of 'marriage' to same-sex couples as afforded *exclusively* to heterosexual couples under the federal *Marriage Act*. As will be shown, s 51(xxi) of the *Australian Constitution* purports to 'cover the field' in relation to the attainment of the status of 'marriage' and because the Australian Capital Territory seeks to intervene and regulate this status in regard to same-sex couples, it is highly likely that the *Marriage Equality Act* will be held to be inconsistent with the federal *Marriage Act* and will thus be invalid. In its present form, then, it is most probable that the ACT *Marriage Equality Act* will be struck down as constitutionally invalid.

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1 *Christopher Knaus and Lisa* Cox 'Commonwealth to Challenge Same-Sex Marriage Laws Hearing in the High Court', *The Canberra Times*, 25 October, 2013.

2 *Marriage Act 1961* (Cth).

After considering the constitutional validity of the New South Wales Same-Sex Marriage Bill and ACT *Marriage Equality Act* the paper will then canvass developments in marriage equality for same-sex couples in Canada and the United States. As will be shown, recognition has been accorded to same-sex couples seeking marriage equality through the judiciary as opposed to the legislature. As a consequence, judicial activism has achieved a great deal where the legislatures in Canada and the United States have failed. It is suggested that these developments have implications for Australia. If one of the States of Australia can realise genuine marriage equality for same-sex couples, s 117 of the *Australian Constitution* may provide room to manoeuvre for the High Court to secure uniform recognition of marriage equality to same-sex couples throughout Australia.

II THE CONSTITUTIONALITY OF THE NEW SOUTH WALES BILL 2013 (NSW)

This section will consider the constitutional validity of the Same –Sex Bill[3] if were enacted into law. The first question that needs to be considered here is whether it is within the power of the federal parliament to make laws with respect to same-sex marriages - in particular so as to include or exclude same-sex marriage marriages from the federal *Marriage Act*.[4] It will be suggested that the answer to this question lies in the positive. The following section will then consider whether the Same-Sex Marriage Bill is inconsistent with the federal *Marriage Act* for the purposes of s 109 of the *Australian Constitution*.[5]

The federal parliament has power to make legislation on only certain subjects. Section 51(xxi) of the *Australian Constitution* confers power on the federal parliament to make laws 'with respect to marriage'.[6]

At the time of Federation, marriage in the law of England and the Australian colonies meant only marriage between one woman and one man. It was 'the voluntary union for life of one woman and one man, to the exclusion of all others.'[7] There can be little doubt that, as at Federation, the word marriage did not, as a matter of ordinary meaning, encompass a union between two men or two women. The question is whether the power of federal parliament with respect to marriage extends, today, to the enactment of legislation with respect to such a union.

The basic task in interpreting the *Australian Constitution* is to determine the meaning of the words used in the document; it is not to determine the intention of those who drafted, approved or voted for the *Australian Constitution*, though the words meant or intended to mean.[8] In determining the meaning of the words used, some judges of the High Court have

3 Same-Sex Bill 2013 (NSW).
4 *Marriage Act 1961* (Cth).
5 *Australian Constitution* s 109.
6 Ibid s 51(xxi).
7 *Hyde v Hyde* (1866) LR 1 P & D 130 [133].
8 *Tasmania v Commonwealth* (1904) 1 CLR 329 at 338-40; *Engineers' Case* (1920) 28 CLR 129 [148]; *New South Wales c Commonwealth (Work Choices*) (2006) 229 CLR 1 [120]-[121].

considered that the present day meaning is the one which is applicable regardless of whether that meaning might be different from the meaning that the words bore at the time of Federation.[9] However, that view does not represent the accepted doctrine of the Court. Rather, the starting point is that the words of the *Australian Constitution* are given their ordinary and natural meaning which they bore at the time of Federation.[10] Nevertheless, it is well accepted that words or expressions have a different contemporary operation from the one they would have at Federation.[11] There are two principle ways in which academics have considered that this may be so.

Jeffrey Goldsworthy, in particular, distinguishes between the 'connotation' and the 'denotation' of the words of the constitutional text. Goldsworthy argues that this 'connotation/denotation' distinction can operate to produce a quire progressive constitutional interpretive method.[12] This distinction has been embraced by the High Court when McHugh J in *Re Wakim;Ex parte McNally:*[13]

> …where the interpretation of individual words and phrases in the Constitution is in issue, the current doctrine of the Court draws a distinction between connotation and denotation or, in other words, between meaning and application.[14]

This connotation/denotation distinction has been drawn in the following terms:

> The words of the Constitution are to be read in that natural sense they bore in the circumstances of their enactment by their Imperial Parliament in 1900. That meaning remains…The connotation of the words employed in the Constitution does not change, even though changing events and attitudes may in some circumstances extend the denotation or reach of those words.[15]

Specifically, to define the connotation of a word, the High Court must identify 'the set of attributes to which the word referred in 1900 when the Constitution was enacted,'[16] According to Jeffrey Goldsworthy, it is a search for the 'original intended meaning' of the constitutional words which depends, in turn, on the evidence of the founder's intentions which in 1900 was readily available to their intended audience.[17] As Dan Meagher outlines, 'in this respect, discovering what the framers' intended, objectively or otherwise, is the

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9 *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 [171] per Deane J; *Grain Pool (WA) v Commonwealth* (2000) 202 CLR 479 [512] per Kirby J.

10 *Attorney-General (NSW); ex rel Tooth & Co Ltd v Brewery Employees' Union (NSW) (Union Label Case)* (1908) 6 CLR 469 [501]; *Amalgamated Society of Engineers v Adelaide Steamship Co. (Engineers' Case)* (1920) 28 CLR 129 [148]; *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 [421]-[425]; *Eastman v The Queen* (2000) 203 CLR 1 [137]-[141].

11 *Singh v Commonwealth* (2004) 222 CLR 322 [159]-[160].

12 Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1, 33.

13 (1999) 198 CLR 511 [555].

14 Ibid.

15 *King v Jones* (1972) 128 CLR 221 [229] per Barwick CJ.

16 Gim del Villar *Connotation and Denotation* in Tony Blackshield, Michael Coper and Geroge Winterton (eds) *The Oxford Companion to the High Court of Australia*. Oxford: Oxford University Press, 2001, 15.

17 Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review*, 1, 33.

crucial step in defining the connotation of the constitutional word or phrase.'[18] The connotation, then, is the unchanging inherent or intrinsic meaning of the constitutional word. However, scope for application of the essential meaning may widen or contract depending on the changing conditions of society to which it applies. According to Brock and Meagher, using this connotation/denotation distinction, the marriage power had a fixed meaning at Federation and it would be unlikely that the power would now accommodate same-sex marriages:

> Thus the Court would likely find that the connotation of the constitutional term "marriage" in 1900 formal, monogamous and heterosexual unions. And if this interpretive technique is something more than a mere linguistic device, then it is difficult to argue that heterosexuality was not an essential or core element of "marriage" in 1900.[19]

Yet, despite this view, it is suggested that there are a number of implications of this connotation/denotation distinction for the marriage power in s 51(xxi) of the *Australian Constitution* and other federal heads of power as well which suggest that the limits of s 51(xxi) are still evolving and may, indeed, still accommodate same-sex unions.

Firstly, the power in s 51(xxii) of the *Australian Constitution* to make laws with respect 'to divorce and matrimonial causes' permitted laws conferring on courts the power to direct a settlement of a deserting husband's property in favour of his wife, though that was not known at Federation.[20] Secondly, the cases recognise that some words in the *Australian Constitution* did not have a fixed meaning at Federation, but described a concept that was evolving or uncertain at that time. In that case, the meaning of the word can encompass growth and developments since Federation.[21]

There is no decision of the High Court, nor any statement of a judge of the High Court which answers the question whether the power with respect to marriage extends to same-sex marriage. However, consistent with the principles stated above, many of the statements concerning the marriage power which have been made by judges of the High Court recognise the prospect of developments in the scope of the term 'marriage' since Federation.[22]

In the 1998 case *Attorney-General (NSW) ex rel Tooth & Co Ltd v Brewery Employees' Union of NSW*,[23] in the context of considering the power with respect to 'trade marks', Justice Higgins declared that:

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18 Dan Meagher 'Guided by Voices?- Constitutional Interpretation on the Gleeson Court' (2002) *Deakin Law Review*, 14 at 20.

19 M Brock and D Meagher 'The Legal Recognition of Same-Sex Unions in Australia: a constitutional Analysis' (2011) 22 *Public Law* 265, 270.

20 *Lansell v Lansell* (1964) 110 CLR 353.

21 *Victoria v Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 [482]; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 203 CLR 82 [34]; *Grain Pools (WA) v Commonwealth* (2000) 202 CLR 479 [22].

22 See *Attorney-General (Cth) v Kevin and Jennife*r (2003) 172 FLR 300 (FamCA FC) [88] –[100].

23 *Attorney-General (NSW) ex rel Tooth & Co Ltd v Brewery Employees' Union of NSW* [1908] 6 CLR 469.

> Under the power to make laws with respect to "marriage", I should say that the Parliament could prescribe what unions are to be regarded as marriages. Under the power to make laws with respect to parental rights, I should day that it could define what those rights are to be. Under the power to make laws with respect to parental rights, I should say that it could define what those rights are to be. Under the power to make laws with respect to "promissory notes", I should say that it could increase the class of documents which in 1900 where known as promissory notes. Under the power to make laws with respect to trade marks, I cannot see why Parliament, cannot, at least, being into the class of trade marks printed trade names and the "getup" of goods – right in the nature of trademarks, things which were treated on the same principles as trade marks, but not hitherto called "marks" in current language.[24]

However, this was not because Parliament could define anything it liked as a 'marriage', or a 'trade mark'. As Justice Higgins said, the Parliament could not define a spade as a trade mark, and then legislate with respect to spades. Rather:

> We are to ascertain the meaning of "trade marks" as in 1900. But having ascertained that meaning, we have then to find the extent of the power to deal with the subject of trade marks….The usage in 1900 gives us the central type; it does not give us the circumference of the power.[25]

In the 1980s case *Re F; ex parte F*[26] it was declared:

> Obviously the Parliament cannot extend the ambit of its own legislative powers by purporting to give to "marriage" an even wider meaning that that which the words bear in its constitutional context. Nor can the Parliament manufacture legislative power by the device of deeming something that is not a marriage to be one.

Similarly, in *Cormick v Salmon:*[27]

> The scope of the marriage power conferred by s 51(xxi) of the Constitution is to be determined by reference to what falls within the conception of marriage in the Constitution, not by reference to what the Parliament deems it to be, or to be within, that conception.

In 1962 in *Attorney-General (Vic) v Commonwealth*[28] citing the reasons referred to by Higgins J above, the Court said:

> It has been suggested that the Constitution speaks of marriage only in form recognised by English law in 1900. The word, it is said, is to be read as defined by the famous phrase of Lord Penzance in *Hyde v Hyde* "the voluntary union for life of one man and one woman, to the exclusion of all others"; and that therefore the legislative power does not extend to marriages that differ essentially from the monogamous marriage of Christianity. That seems to me an unwarranted limitation…I express no view on whether, theoretically, it would be within the power of Federal Parliament to make polygamy lawful in Australia. That question has absolutely no reality. But for some purposes, including the legitimacy of children, and

24 (1908) 6 CLR 469 [610].
25 (1908) 6 CLR 469 [614].
26 [1986] 161 CLR 376 [389].
27 (1984) 156 CLR 170 [182].
28 (1962) 107 CLR 529 [576]-[577].

> rights of succession, our law does recognise polygamous or potentially polygamous marriages contracted in countries where such marriages are lawful by persons domiciled there…If, instead of leaving the resolution of such matters to the principles of comity and private international law, the Commonwealth Parliament were to legislate expressly for the recognition by Australian courts of such unions when lawful by domiciliary law, such an enactment would, I should think, be within its power. And a law dealing with the tribal marriages of Aboriginal inhabitants of Australia, might also, I would think, be within power.

In 1991 in *R v L:*[29]

> The power of the Commonwealth Parliament to legislate with respect to marriage…is predicated on the existence of marriage as a recognisable (although not immutable) institution. Just how far any attempt to define or redefine, in an abstract way, the rights and obligation of the parties to a marriage may involve a departure from that recognisable institution, and hence travel outside constitutional power, is a question of no small dimension.

Finally, in 1999, in *Re Wakim; Ex parte McNally:*[30]

> In 1901 "marriage" was seen as meaning a voluntary union for life between one man and one woman to the exclusion of all others. If that level of abstraction were now accepted, it would deny the Parliament of the Commonwealth the power to legislate for same se marriages, although arguably marriage now means, or in the near future may mean, a voluntary union for life between two people to the exclusion of others.

To be sure there are statements of the High Court judges which have emphasised the inherent limitations in the concept of 'marriage'. Thus, in 1962, in *Attorney-General (Vic) v Commonwealth:*[31]

> The term marriage only outlines the power granted by par (xxi) of s 51; it does not particularise its contents, but nothing diverse in kind from what is connoted by the term marriage falls within the scope of the power. …The term marriage bears its own limitations and Parliament cannot enlarge its meaning. In the context -the Constitution – the term "marriage" should receive its full grammatical and ordinary sense; plainly in his context, it means only monogamous marriage.

Similarly, in 1986 in *Re F; Ex parte F* Brennan J said:

> "Marriage" as a subject of legislative power embraces those relationships which the law (leaving aside statutes enacted in the purported exercise of power) recognises as the relationships which subsist between husband, wife and the children of the marriage. Statutes enacted in purported exercise of the power cannot extend the scope of the power: only those relationships which are already embraced within the subject are amenable to regulation by a law enacted in the exercise of the power.[32]

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29 (1991) 174 CLR 379 [404].
30 (1999) 198 CLR 511[45].
31 (1962) 107 CLR 529 [549].
32 *Re F; Ex parte F* (1986) 161 CLR 376 [399].

However, it is suggested that we should not think that such statements should be read as denying the prospect that federal legislation, supported by the marriage power, may alter the process by which people can be married, or the class of persons who may enter into marriage with each other.

As will be seen, such a limitation would be entirely contrary to the history of marriage as a legal institution up to the time of Federation. Rather these statements emphasise, as Higgins J did over one hundred years ago, that there *is a limit to how far such changes may go before the result is to take the relationship beyond that which may properly be recognised as 'marriage'.*

Nevertheless, that does not answer the question here, namely whether that limit is exceeded by legislation with respect to same-sex marriages. It should be noted that in *Attorney-General (Vic) v Commonwealth,*[33] McTiernan and Windeyer JJ disagreed as to whether laws concerning polygamous marriage would go beyond the concept of 'marriage' in the *Australian Constitution*. It is not necessary to resolve that issue for the purposes of this paper.

III MARRIAGE PRIOR TO FEDERATION

The subject of the history of marriage is vast. It is not necessary to canvass all of it here. At the time of Federation, it had undergone and was still subject to significant legislative changes.[34]

For many hundreds of years, marriage in England was regulated entirely by non-statutory law. Under ecclesiastical law, applicable in Europe from the late 12th century, marriage required nothing more than the consent of the parties.[35] Marriages, indeed, were commonly celebrated at the church door, in the presence of a priest, and followed by a religious service. But private marriages, in the absence of priests and witnesses, were also recognised. In *R v Mills*[36] half of an evenly divided court held that it was a requirement of the English common law that the marriage might be celebrated in the presence of an episcopally ordained priest by reason of ancient-Anglo Saxon law. This involved a misreading of history which it has been suggested was wilful and calculated to end the rise of informal marriages.[37]

The age of consent was fixed by the common law as at 12 years for girls; 14 for boys. A want of consent could be shown in a previous marriage with another spouse and impotence at the time of the marriage. Parties were within the 'prohibited degrees of consanguinity' if they

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33 (1962) 107 CLR 529.

34 Sir Garfield Barwick, 'The Commonwealth Marriage Act 1961', (1961-2) 3 *Melbourne University Law Review*, 277; *In the Marriage of W and T* (1998) 146 FLR 323; Bates 'The History of Marriage and Modern Law' (2000) 74 *Australian Law Journal* 844; Baker, *An Introduction to English Legal History* (Oxford University Press, 4th ed, 2005) Ch 28.

35 See Geoffrey Lindell, 'Constitutional Issues Regarding Same-Sex Marriage: a Comparative Survey', (2008) 30 *Sydney Law Review* 27, 28.

36 (1844) 8 ER 844.

37 *In the Marriage of W and T* (1998) 147 FLR 323 [336]; Baker, *An Introduction to English Legal History* (Oxford University Press, 4th ed, 2005) 483.

were of a blood relationship or were of a relationship by marriage or 'carnal connection'. These prohibited degrees were placed on statutory footing in 1540.[38]

The requirement of two adult witnesses and the presence of a priest was introduced into Western Europe by the Tametsi Decree of the Council of Trent (1545-63).[39] The Council of Trent was an ecumenical council of the Catholic Church. But, being after the reformation this did not apply in England, and the ancient ecclesiastical law continued to apply there for another two hundred years. This was subject to a short period where an *Act Touching Marriages and the Registering Thereof* and also the *Touching Births and Burials* 1653 required the marriage to take place before a JP; but this was repealed during the Restoration.

In 1753 *Lord Hardwicke's Act* (*An Act for the Better Preventing of Clandestine Marriage* 1753 (Eng) 26 Geo II, c 33 significantly reformed the law of marriage in England. The publication of 'banns' (a public announcement in the parish church of an impending marriage); purchase of licence; the securing of parental consent for persons under 21 getting marriage; the presence of at least two witnesses and a minister; the solemnisation of the marriage in a church or chapel; and the recording of the marriage in a public register, were all essential requirements.[40]

Legislative reforms continued in England thereafter. In 1823 *Lord Hardwick's Act* was repealed and replaced and at the same time *bona fide* marriages were protected against invalidity caused by unwitting failure to comply with the law.[41]In 1835 marriages made within the prohibited degrees were void.[42] In 1836 marriage in a register office or registered building, was introduced as an alternative to marriage in a church or chapel.[43] *Lord Hardwick's Act* and other reforms mentioned in the previous paragraph were not expressed to apply outside of England.

They did not apply to established colonies here in Australia. The common law continued to regulate marriages in the colonies[44] until the colonies enacted their own marriage legislation over the course of the nineteenth century. In the colony of New South Wales, the first major legislation in relation to marriage was in 1873.[45]

Among other things, there was a difference of approach between the colonial marriage legislation and English marriage legislation as to the validity of a marriage between a person and a brother or sister of their deceased spouse. The marriage legislation of the Australian colonies of South Australia, Victoria, Tasmania, New South Wales, Queensland and Western

38 *Marriage Act* 1540 (Eng) 32 Henry VIII, c 38.
39 Geoffrey Lindell, 'Constitutional Issues Regarding Same-Sex Marriage: a Comparative Survey', (2008) 30 *Sydney Law Review* 27, 28.
40 *In the Marriage of W and T* (1998) 147 FLR 323 [338]; Baker, *An Introduction to English Legal History* (Oxford University Press, 4th ed, 2005) 485.
41 Marriage Act 1823 (Eng) 4 Geo IV c 76.
42 *Lord Lyndhurst's Act* 1835 (Eng) 5 & 6 Will IV, c 54.
43 *Marriage Act* 1836 (Eng) 6 & 7 Will, IV, c 84.
44 *R v Maloney* (1836) 1 Legge 74; Catterall v Catterrall (1847) 1 Rob ecc 580 [582].
45 *Matrimonial Causes Act 1873*.

Australia countenanced such marriages but English legislation did not.[46] The position in England was not changed until such time after Federation.[47]

Among the Australian colonies, there were also differences of approach, for instance, to marriages within the prohibited degrees. In the older colonies, the English legislation of 1835, which made marriages within the prohibited degrees void, did not apply; but it became part of the law of South Australia upon its establishment, and was expressly adopted in Western Australia.[48]

At the same time as various changes were taking place between to the people who might enter marriage, and the process by which they did so, so changes took place as to the manner in which they might terminate marriage: The common law permitted a right to escape marriage – conferring freedom to remarry – only if there was a want of capacity to intermarry or a want of consent

By the end of the eighteen century the ecclesiastical courts in England had developed a jurisdiction to licence spouses to live apart, though not to marry, in case of marital misconduct, such as adultery, cruelty, sodomy and heresy or if there was fear of future injury. Further, by the end of seventeenth century, it was possible to obtain a private Act of Parliament dissolving a marriage and permitting remarriage in cases of adultery. In 1857 Court of Divorce and Matrimonial Causes was established in England, from which an order for divorce could be obtained on the grounds of adultery.[49]

In the Australian colonies prior to introduction of similar legislation, a party could obtain divorce by private Act. However, jurisdiction to grant an order for divorce was on the basis of adultery was soon after 1857 reposed in Supreme Courts of colonies by colonial legislation.[50]

IV THE AUSTRALASIAN CONVENTION DEBATES

However, the approach to divorce in the colonies was by no means identical. Indeed, during the 1890s Australasian Convention Debates about the marriage power, debate was dominated by concern from South Australian about the more liberal divorce laws of New South Wales and Victoria.[51] In addition to these legislative developments forms of marriage quite different from the Christian tradition, were well known at the time of Federation. As a matter of ordinary language at the time, they were perfectly capable of being described as 'marriages', even if not recognised as 'valid' marriages. In particular, by the time of Federation, there had been cases of polygamous marriages had come before the courts, in which they were without

46 John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 608-9.

47 *Deceased Wife Sister's Marriage Act,* 1907 (UK) 7 Edw VII, c 47; *Deceased Brother's Widow's Marriage Act* 1921 (UK) 11 & 12 Geo V, c 24.

48 *Imperial Acts Adopting Act* 1844 (WA), 7 Vic, No 13.

49 *Matrimonial Causes Act* 1857 (Eng) 20 & 21 Vict, c 85.

50 In New South Wales the legislation was enacted in 1870: the *Matrimonial Causes Act* 1873. It was formally repealed in 1978.

51 Australasian Convention Debates, 1891, Sydney Convention, 1077 ff.

difficulty being described as 'marriages' (though not valid and sometimes said to be 'falsely called marriages'.[52]

Among the many changes to the legal concept of marriage up to Federation there is no suggestion of marriage between partners of the same sex. Furthermore, the ordinary meaning of the word 'marriage' would not have encompassed the suggestion of marriage between partners of the same sex. Moreover, it impossible to say that the opposite sex of the partners was not an essential feature of the term at Federation. If that is so, adopting a connotation-denotation analysis, a same-sex union would not be within the denotation of the term 'marriage' in the context of the present day.[53]

V MARRIAGE POWER AND SAME-SEX MARRIAGES

However, it is suggested that the marriage power is broad enough today to encompass the concept of same-sex marriage, having regard to the principle that a word with a fixed meaning at the time of Federation, may come to encompass later developments.[54]

First, prior to and even at the time of Federation, marriage was not a static fixed and immutable concept.[55] It had been subject to significant changes throughout history of England and Australia, some in the years not very distant from Federation. It remained the subject of legislative intervention and difference among the colonies and between colonies and England.[56]

Secondly, history reveals that marriage is a legislative construct and that it is inherent amenable or susceptible to legislative change. By the time of Federation, what had once been an ecclesiastical concept, had been adopted in the common law, and then subjected to considerable legislative interference.

Thirdly in addition to being a legal construct it was a social one. In that light it had been changed in response to changing social circumstances. Thus in the early period 'to reduce the chances of exposure to deadly sin through sexual waywardness, the Church maximised the number of ways in which a lawful union could be contracted.'[57] Much later, a reason for the

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52 *Hyde v Hyde* (1866) LR 1 P&D 130*; R v Byrne* (1876) 6 SCR (NSW) 302 T 305; *Harvey v Farnie* (1880) 6 PD 35 at 43; *Re Bethel* (1887) 38 CH D 220.

53 This is certainly what Jeffrey Goldsworthy would believe; Jeffrey Goldsworthy 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1.

54 Aileen Kavanagh 'The Idea of a Living Constitution' (2003) 16 *Canadian Journal of Law and Jurisprudence,* 55, 78; Michael Kirby 'Constitutional Interpretation and Original Intent' (2000) *Melbourne University Law Review*, 24; Michael Kirby 'Judicial Activism? A Riposte to the Counter – Reformation' (2004) 24 *Australian Bar Review,* 219; Greg Craven *The Crises of Constitutional Literalism* in HP Lee and G Winterton (eds) *Australian Constitutional Perspectives* (Law Book Co, 1992).

55 Parliament of Australia, Mary Anne Neilsen 'Same-Sex Marriage', Law and Bills Digest Section, 10 February 2012.

56 See the discussion above.

57 *In the Marriage of W and T* (1998) 146 FLR 323 [334].

establishment of the Court for Divorce and Matrimonial Causes was to avoid the need for a private Act in order to procure a divorce.[58]

Fourthly it seems clear that the contemporary meaning of marriage is wide enough to encompass same-sexual unions: the use of the word to encompass such unions 'does not stretch it beyond the meaning which it may today reasonably bear.'[59]

Fifthly, as a matter of principle, the words of the *Australian Constitution* are to be interpreted broadly. As Dixon J said:

> …it is a constitution we are interpreting, 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.[60]

Finally, as outlined above, it is settled law that the Commonwealth cannot define the constitutional meaning of marriage through legislation.[61] In *Re F; Ex parte F*[62] Mason and Deane JJ held that:

> Obviously the Parliament cannot extend the ambit of its own legislative powers by purporting to give to "Marriage" an even wider meaning than that which the word bears in its constitutional context. Nor can the Parliament manufacture legislative power by the device of deeming something that is not a marriage to be one or by constructing a superficial connection between the operation of a law and a marriage which examination discloses to be but contrived and illusory.

In this regard, as has been stressed, the High Court has never been called upon to define 'marriage' for the purposes of the marriage power although there have been occasions where the High Court has made observations and given opinions about this power.[63] Nevertheless, some High Court *dicta* indicate that the constitutional meaning of 'marriage' in s 51(xxi) of the *Australian Constitution* is confined to the definition found in *Hyde v Hyde*[64] that is a monogamous, heterosexual union for life. There are also more liberal views that suggest that the label 'marriage' could apply to an extended range of circumstances prescribed by Parliament.[65] In *The Queen v L* Brennan J said:

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58 Baker, *An Introduction to English Legal History* (Oxford University Press, 4th ed, 2005) 496.

59 See generally Neil MacCormick 'Argumentation and Critique in Law' (1993) 6 *Ratio Juris*, 16

60 *Australian National Airlines v Commonwealth* (1945) 71 CLR 29 [81].

61 A. Lynch, G Williams, and B Tegger (Gilbert and Tobin Centre for Public Law) Submission to the Senate Legal Standing Committee on Legal and Constitutional Affairs, Inquiry into the Marriage Equality Amendment Bill 2009, 2.

62 (1986) 161 CLR 376 [389].

63 J Norberry Marriage Legislation Amendment Bill, 2004, *Bills Digest*, No 155 of 2003-04, 2.

64 (1866) LR 1 P & D 130.

65 The Bills Digest to the Marriage Legislation Amendment Bill 2004 sets out a range of examples: J Norberry Marriage Legislation Amendment Bill, 2004, *Bills Digest*, No 155 of 2003-04, 6-7.

> In *Hyde v Hyde* Lord Penzance defined marriage as "voluntary union of for life of one man and one woman, to the exclusion of all others", and that definition has been followed in this country and by this Court.[66]

And in *Fisher v Fisher*, Brennan J stated that:

> Although the nature and incidents of a legal institution would ordinarily be susceptible to change by legislation, constitutional interpretation of the marriage power would be an exercise in hopeless circularity in the Parliament could itself define the nature and incidents of marriage by laws enacted in purported pursuance of the power.
>
> The nature and incidents of the legal institution which the Constitution recognises as marriage…are ascertained not by reference to laws enacted un purported pursuance of the power but by reference to the customs of our society, especially when they are reflected in the common law, which show the content of the power as it was conferred.[67]

On the other hand, as early as 1908 in *Attorney-General for NSW v Brewery Employees Union of New South Wales*[68] Higgins J declared 'Under the power to make laws with respect to marriage, I should say that the Parliament could prescribe what unions are to be regarded as marriages.'[69]

In 1962, in *Attorney-General (Vic) v Commonwealth* ('the *Marriage Act Case*') McTiernan J and Windeyer J appear to have taken opposing views about whether marriage is limited to monogamous marriages.[70] And more recently McHugh J has stated that:

> The level of abstraction for some terms of the Constitution is, however, much harder to identify than that of those set out above. Thus in 1901 "marriage" was seen as meaning a voluntary union of life between one woman and one man to the exclusion of all others. If that level of abstraction were now accepted, it would deny the Parliament of the Commonwealth the power to legislate for same-sex marriages, although arguably marriage now means, or in the future may mean, a voluntary union for life between two people to the exclusion of others.[71]

As Professor Williams and others have argued, this last opinion raises squarely the possible division of opinion on the High Court over the likely interpretation of the 'marriage power'.[72] Is the power fixed to its 1900 meaning or is it able to evolve or adapt in line with changed events and times? It is suggested an evolving interpretive approach to the marriage power could produce an outcome of validity for the Same-Sex Marriage Bill. This is described by Brock and Meagher in the following manner:

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66 (1991) 174 CLR 379 at 392.
67 (1986) 161 CLR 376 at 456.
68 (1908) 6 CLR 469 [610].
69 Ibid.
70 See 1962 107 CLR 529 at 549 per McTiernan J & [576]-[577] per Windeyer J.
71 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 [553].
72 A. Lynch, G Williams, and B Tegger (Gilbert and Tobin Centre for Public Law) Submission to the Senate Legal Standing Committee on Legal and Constitutional Affairs, Inquiry into the Marriage Equality Amendment Bill 2009, 2.

> …constitutional validity is a possibility if the High Court were to apply a different, though orthodox, interpretive technique. It involves recognising that the subject matter of the power is "marriage" as a *legal* institution, one that before 1900 was the subject of gradual, but significant change by the statutes of the United Kingdom and the Australian colonies as the earlier analysis demonstrates. In this regard, "marriage" is one of a number of legal terms and institutions that become constitutional provisions in 1900. Importantly, these legal terms of art were products of pre-federation common law and statute and their content – consistent with the common law tradition – was still developing (and contested) to varying degrees at the time of federation. Considering this history, is it not reasonable to assume that the framers understood that the legal institution of "marriage" would likely develop further after federation and provided a constitutional mechanism to accommodate this? In other words, to consider that the essential meaning of constitutional terms such as "marriage" was frozen in 1900 would betray the pre-federation history, the common law tradition, and maybe even the intention of the framers?[73]

In a submission to the Senate Committee Inquiry into the Marriage Equality Amendment Bill 2009, Associate Professor Andrew Lynch, Professor George Williams, and Ben Teeger, of the Gilbert and Tobin Centre of Public Law discuss this issue and the likelihood of the High Court providing a wide definition of 'marriage':

> On balance, it cannot be said with any great confidence that the High Court at the present time is likely to find the Commonwealth possesses legislative power to permit same-sex unions under section 51(xxi). Indeed, the most likely conclusion is that the meaning which is currently employed by the *Marriage Act* (between a man and a woman), represents the full extent of the Commonwealth's power. That is, the Commonwealth lacks the power to include same sex unions within the present meaning of "marriage".[74]

However, in September 2010, Professor Williams came down on the side of an expansive interpretation, based on the view that 'the meaning of the *Australian Constitution* must evolve with changes in society'. He concluded that:

> There can be no answer to this dilemma until a federal same-sex marriage law is tested in the High Court. My view is that a majority would lean to the latter view, thereby allowing the federal parliament to provide for same-sex marriage.[75]

Viewed in this light it is thus considered tentatively that the Federal Parliament has power with respect to same-sex marriages because they do fall within the marriage power in s51(xxi) of the *Australian Constitution*. Accordingly, the Commonwealth could amend the *Marriage Act* so as to bring it within the terms of same-sex marriages. Equally it can - as it has done - deliberately exclude same-sex unions from 'marriage'.

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73 M.Brock and D. Meagher 'The Legal Recognition of Same-Sex Unions in Australia: A Constitutional Analysis' (2011) 22 *Public Law Review*, 269, 270.

74 A Lynch, G Williams, and B Tegger (Gilbert and Tobin Centre for Public Law) Submission to the Senate Legal Standing Committee on Legal and Constitutional Affairs, Inquiry into the Marriage Equality Amendment Bill 2009, 3.

75 George Williams 'Could the States legalese Same-Sex Marriage', *Sydney Morning Herald*, 28 September 2010.

Focus now shifts to the validity or constitutionality of provisions of the *Marriage Act*.

VI VALIDITY OF PROVISIONS OF THE MARRIAGE ACT 1961 (CTH)

Now that it has been established that the parliament has power to pass legislation with respect to same-sex marriages, it needs to be established that the definition of 'marriage' in the *Marriage Act* (particular in relation to ss 5, 46(1) and 88EA) is constitutionally valid.

Section 5 defines the marriage to mean 'the union of a man and a woman to the exclusion of all others, voluntarily entered to in life.' This is consistent with the orthodox understanding of marriage at the time of Federation. There is no doubt that regulation of marriages of this kind is within the marriage power.

This provision means that same-sex couples cannot be married under the *Marriage Act*. Section 46 provides that where a marriage is solemnised by an authorised celebrant, who is not a minister of religion the authorised celebrant must say the following words:

> Marriage according to the law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.

It is certainly within the marriage power to prescribe the form of ceremony necessary to solemnise a marriage.

To complement ss 46 and 88EA of the *Marriage Act* expressly precludes the recognition of foreign same-sex unions as marriages under the *Marriage Act*. The recognition or non-recognition of foreign marriages is plainly within the marriage power. While recognition of foreign same-sex couples as marriages is within the marriage power, it is, nevertheless, open to Parliament to legislate so that such unions are not so recognised.

Accordingly, then, the provisions of the *Marriage Act* with respect to the definition of marriage is thus constitutionally valid. Focus now shifts to the potential constitutionality of the New South Wales Same-Sex Marriage Bill.

VII THE CONSTITUTIONAL VALIDITY OF THE SAME-SEX MARRIAGE BILL 2013 (NSW)

It is suggested that an Act in the form of the Same-Sex Marriage Bill would *prima facie* be within the legislative power of the parliament of New South Wales to enact.

Subject to only two caveats the legislative power of the parliament of New South Wales is plenary.[76] The parliament of New South Wales has plenary legislative power 'to make laws for the peace, welfare and good government of all whatsoever.'[77] So subject to the *Australian*

[76] *Australian Constitution Act* 1850 (Imp) s 14; *Constitution Act* 1855 s 1; *Australia Act* 1986 (Cth) s 2 (2); *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1 [10].

[77] Constitution Act 1902 (NSW) s 5.

Constitution, and any express or implied restrictions on state power arising from that source, the state parliament of New South Wales enjoy general legislative power to make laws for the 'peace, welfare and good government' of that state.[78] The meaning of the phrase 'peace, order and good government' was considered in *Union Steamship Co of Australia Pty Ltd v King.*[79] In that case, the New South Wales Compensation Court made an order under s 46 of the *Workers' Compensation Act* 1926 (NSW) awarding King, an employee of the Union Steamship on a ship registered in New South Wales, compensation for boilermakers' deafness. Union Steamship challenged the award on two grounds in the High Court: that s 46 was not a valid law for the peace, order and good government of New South Wales, and that the provisions of the state law were inconsistent with the *Seamen's Compensation Act* 1911 (Cth), thus rendering the state law invalid to the extent of its inconsistency by virtue of s 109 of the *Australian Constitution*.

The High Court rejected the application, confirming that phrase 'peace, welfare and good government' in s 5 of the *Constitution Act* 1902 (NSW) is a *plenary* power. The word 'plenary' means 'not subject to limitations of exceptions'. In their unanimous judgment, the Court, after a review of the authorities, said:

> These decisions and statements of high authority demonstrate that, within the limits of the grant, a power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament itself. That is, the words "for the peace, order and good government" are not words of limitation. They did not confer on the courts of a colony, just as they do not confer on the courts of a State, jurisdiction to strike down legislation on the grounds that, in the opinion of a court, the legislation does not promote or secure the peace, order and good government of the colony. Just as the courts of the United Kingdom cannot invalidate laws made by the Parliament of the United Kingdom on the ground that they do not secure the welfare and public interest, so the exercise of legislative power conferred on the Parliament of New South Wales is not susceptible to judicial review on that score. Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law…is another question which we need not explore.[80]

The High Court based its interpretation of the phrase 'peace, order and good government' on the doctrine of parliamentary supremacy (sometimes referred to as *parliamentary sovereignty*). The Colonies – the predecessors of the States – received their legislative power from the Imperial Parliament at Westminster, which was traditionally regarded as enjoying plenary power. The measure of Imperial parliamentary power was described by the eminent 19th century constitutional scholar, A V Dicey as 'the right to make or unmake any law what soever.'[81] As Dawson explained in his dissenting judgment in *Kable v DPP*[82] in a joint judgment (with whom Brennan CJ, and McHugh J agreed on this point):

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78 *Constitution Act* 1902 (NSW) s 5; see also in a Queensland context *Constitution Act* 1867 (Qld) s 2.
79 (1988) 166 CLR 1.
80 *Union Steamship Co of Australia Pty Ltd v King (*1988) 166 CLR 1 [10].
81 AV Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan London, 1959) 11.
82 (1996) 189 CLR 51 [71]-[72].

> The New South Wales Parliament derives its legislative power from s 5 of the *Constitution Act* 1902 which provides that "the legislature shall, subject to the provisions of the *Commonwealth of Australian Constitution Act*, have power to legislate for the peace, welfare and good government of New South Wales in all cases whatsoever…" It is unnecessary at this point to trace the history which lies behind this provision because it is firmly established that its words confer a plenary power "and it was so recognised, even in an era when emphasis was given to the character of colonial legislatures as subordinate law-making bodies." That was clear before the passage of the *Australia Acts* but it is put beyond question by s 2 of those Acts. The legislative power of the New South Wales legislature is no less than the legislative power of the Parliament of the United Kingdom within the scope of the grant of its power. As s 5 of the *Constitution Act* 1902 itself recognises, the power is subject to the *Commonwealth of Australia Constitution Act* 1900 (Imp). Section 106 of the Commonwealth Constitution makes it clear that that the Constitution of each State is subject to the Commonwealth Constitution, and under s 5 of the *Australia Acts* the powers of the States do not extend to legislation affecting the Commonwealth Constitution, the *Commonwealth of Australia Constitution Act*, the *Statute of Westminster* 1931 (Imp) or the *Australia Acts* themselves. And under s 6 of the *Australia Acts* the States are bound to observe any manner and form requirements for laws respecting the Constitution, powers or procedures of their Parliaments. In addition, the words "peace, welfare and good government of New South Wales" may be the source of whatever territorial restrictions upon the State's legislative powers are made necessary by the federal structure.[83]

Thus, the Parliament of New South Wales is not limited to certain specified subject matters - or *placita* - as the Federal Parliament is. In considering whether an Act in the form of the Same-Sex Marriage Bill would be within the legislative power of New South Wales, there is thus no occasion to ask whether same-sex marriage falls within an enumerated head of power, as is the case in federal legislative enactments.

VIII COMMON LAW CONSTITUTIONALISM

Additionally, the legislative power of the parliament of New South Wales is not limited by the common law. It is well established that legislation prevails over common law. There have been suggestions, however, that common law rights are so fundamental that they are not amenable to parliamentary modification (that is, so-called 'common law constitutionalism').[84] The suggestion has been rejected in England[85] and by various judges in Australia.[86] The suggestion has not been the subject of a definitive statement by the High Court, but the reason given by the High Court for rejecting the contention that there was a

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83 *Kable v. DPP (NSW)* (1996) 189 CLR 51 at 71-3 per Dawson J (with whom Brennan CJ and McHugh J agreed on this point).

84 T R S Allan,'Common Law Constitutionalism: Freedom of Speech*'* in J Beetson and Y Cripps (eds) *Freedom of Expression and Freedom of Speech* (Oxford University Press, 2000); Paul Craig, 'Competing Models of Judicial Review', (1999) *Public Law* 428; Jeffrey Jowell 'The Relationship Between the Individual and the State' in Jeffrey Jowell and Dawn Oliver (eds), *The Changing Constitution* (Oxford University Press, 1994).

85 *Pickin v British Railways Board* (1974) AC 765 [782]-[783].

86 *Building & Construction Employees & Buliders' Labourers Federation (NSW) v Minister for Industrial Relations (NSW)* (1986) 7 NSWLR 372 [385]-[386].

common law right which limited state legislative power to providing just compensation for the compulsory acquisition of property gives no encouragement for the suggestion.[87] It is thus immaterial that the common law definition of marriage does not extend to same-sex unions.

A *Legislative Power Must Have Some Connection with the Territory Of NSW*

The first caveat to the plenary legislative power of the Parliament of New South Wales is that, to be valid, legislation must have some connection, albeit only a remote one, with the geographical territory of New South Wales.[88] That would be satisfied here by reason of the fact that the Same-Sex Marriage Bill is limited to marriages that are solemnised in New South Wales.

B *Section 92 of the Constitution: Interstate Trade and Commerce Must Be Absolutely Free and Implied Freedoms*

The second caveat is that the *Australian Constitution* both expressly (s 92 of the *Australian Constitution* which prohibits state laws that interfere with the absolute freedom of interstate trade, commerce and intercourse)[89] and impliedly (see the implied freedom of communication which prohibits state laws that burden freedom of political communication).[90]

It is suggested that these express and implied limitations confines the legislative powers of the New South Wales Parliament in significant respects. However, there is no such express or implied limitation, which is relevant in this case with respect to same-sex marriages. In particular, no express or implied limitation can be drawn from the conferral of power with respect to marriage upon the federal parliament by s 51(xxi) of the *Australian Constitution*. Unlike the power expressed in s 52 of the *Australian Constitution*,[91] the marriage power is *no*t expressed to be exclusive or independent of the legislative power of the states.

The legislative power of the Commonwealth with respect to marriage is thus *concurrent* with the legislative powers of the parliaments of the state. In other words, both the Commonwealth and the states can legislative on the topic of marriage subject to s 109 of the *Australian Constitution* (that is, to the extent that state laws are consistent with Commonwealth laws with respect to the marriage power).[92] Accordingly, to the extent that federal legislative power extends to same-sex marriage, this does not withdraw legislative power with respect to that subject matter (on same-sex marriages) from the New South Wales Parliament.

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87 *Durham Holdings Pty Ltd v State of New South Wales* (2001) 205 CLR 399.

88 *Union Steamship Co of Australia Ltd v King* (1986) 166 CLR 1 [14]; *Port MacDonnell Professional Fishermen's Association Inc v South Australia* (1989) 168 CLR 340 [370]-[371].

89 *Cole v Whitfield* (1988) 165 CLR 360.

90 *Australian Capital Television v Commonwealth* (1992) 177 CLR 106; *Nationwide News v Wills* (1992) 177 CLR 1.

91 Section 52 of the *Australian Constitution* confers exclusive power on the Commonwealth with respect to Commonwealth places.

92 See below for further discussion on this issue of inconsistency between the Commonwealth *Marriage Act* and the Same-Sex Marriage Bill 2013 (Cth).

Conversely, to the extent that federal legislative power does not extend to same-sex marriage, that says nothing about the scope of the legislative power of the New South Wales Parliament (on same-sex marriages). This is because, as noted above, the power of New South Wales Parliament is plenary. Thus, the power of the New South Wales Parliament is unconnected or not associated with the scope of legislative powers conferred on the federal Parliament.[93]

IX IS THE NEW SOUTH WALES SAME-SEX MARRIAGE BILL INCONSISTENT WITH THE FEDERAL MARRIAGE ACT?

The real issue is thus nor *prima facie* validity. It is whether an Act in the form of the Same-Sex Marriage Bill would be invalid by reason of inconsistency with the federal *Marriage Act* pursuant to s 109 of the *Australian Constitution*? Section 109 provides that where a law of the state is inconsistent with a law of the Commonwealth, the latter should prevail, and the former shall, to the extent of the inconsistency, be invalid.[94]

There are many cases which elaborate on the operation of this provision. In *Dickson v The Queen*[95] the High Court summarised the basic position as follows:

> The statement of principle respecting s 109 of the Constitution which had been made by Dixon J in *Victoria v. Commonwealth* was taken up in the joint reasons of the whole Court in *Telstra Corporation Ltd v Worthing* as follows:
>
> In *Victoria v Commonwealth* Dixon J stated two propositions which are presently material. The first was: When a State law, if valid, would alter, impair or detract from, the operation of the law of the Commonwealth Parliament, than, to that extent, it is invalid.

The second, which followed immediately in the same passage, was:

> Moreover, if it appears from the terms, the nature or the subject matter of a federal enactment that it was intended as a complete statement of the law governing a particular matter or set of rights and duties, then for a State to regulate or apply to the same matter or relation is regarded as a detraction form the full operation of the Commonwealth law and so as inconsistent.
>
> The second proposition may apply in a given case where the first does not yet, contrary to the approach taken to the Court of Appeal, if the first proposition applies, then s 109 of the Constitution operates even if, and without the occasion to consider whether, the second proposition applies.[96]

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93 There is no basis in precedent or principle to suggest that, if the federal marriage power does not extend to same sex marriage, the scope of the power of the Parliament of New South Wales is similarly restricted.

94 Peter Hanks, *Constitutional L*aw (Butterworths, 1993), 267; Peter Hanks 'Inconsistent Commonwealth and State Laws: Centralising Government Power in the Australian Federation', (1986) 16 *Federal Law Review* 107.

95 (2010) 241 CLR 491 [13]-[14].

96 *Dickson v The Queen* (2010) 241 CLR 491 [13]-[14].

It should be noted that the first proposition is associated with the term 'direct inconsistency'[97] and the second with the expressions 'covering the field' and 'indirect inconsistency'.

The description 'direct inconsistency' is apt to include situations where a:

(a) Commonwealth law compels that which a State law prohibits or prohibits that which a state law compels or permits.[98]

(b) Commonwealth law confers a right, the exercise of which is ether totally or partially prevented by a state law.[99]

(c) Commonwealth law confers either expressly or impliedly a permission or liberty which is ether totally or partially prevented by a state law.[100]

(d) Commonwealth law confers an immunity from a liability imposed by a state law.[101]

In these circumstances, there is a 'direct textual collision' between federal and state law.[102]

The associated descriptions of 'covering the field' or 'indirect inconsistency'[103] are apt to include situations where the federal legislation indicates an intention 'to express… completely, exhaustively or exclusively, what shall be the law, governing the conduct or matter to which its intention is directed.'[104] That does not depend on the subjective intention of any person, such as the Minister who introduced the relevant Bill. Rather, it is a question of determining the objective intention manifested by the legislation.[105] That is a question of construction of the federal legislation.[106]

The necessary objective intention may be manifested by express terms; thus, there may be a provision in the federal legislation to the effect that it is or is not intended to exclude the operation of laws of the states, on the same subject matter.[107] However, it may also be

97 'Direct Inconsistency' means that s 109 is only activated where it is impossible to obey the Commonwealth and State law at the same time. In other words, inconsistency only activates where there is a 'textual collision' between the two enactments.

98 *R v Licensing Court of Brisbane; Ex parte Daniel* (1920) 28 CLR 23 [29].

99 *Clyde Engineering Co Ltd v Cowburn* (1926) 37 CLR 466 [478].

100 *Colvin v Bradley Bros Pty Ltd* (1943) 68 CLR 151 [160]; *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253 [258].

101 *Botany Municipal Council v Federal Airports Authority* (1992) 175 CLR 453 [464]-[465].

102 *Blackley v Devondale Cream (Vic) Pty Ltd* (1968) 117 CLR 253 [258].

103 *Ex parte McLean* (1930) 42 CLR 475.

104 *Ex Parte McLean* (1930) 43 CLR 472 a [483].

105 *Dickson v The Queen* (2010) 241 CLR 491 [31-2].

106 *Momcilovic v The Queen* (2011) 245 CLR 1[111].

107 *R v Credit Tribunal; Ex parte General Motors Acceptance Corporation* (1976) 137 CLR 545 at 562-4; John Holland Pty Ltd v Victorian WorkCover Authority (2009) 239 CLR 518; Momcilovic v The Queen (2011) 245 CLR 1.

manifested absent express words, by implication.[108] In such cases as Gummow J observed in *Momcilovic v The Queen:*[109]

> …the essential notion is that, upon its true construction, the federal law contains an implicit negative provision that nothing other than what the federal law provides upon a particular subject matter is to be the subject of federal legislation; a State law which impairs or detracts from that negative proposition will enliven s 109.

Matters such as the level of detail with which the federal legislation regulates the conduct or matter, and the fact that the object of the federal legislation would be frustrated if the conduct or matter were subject to further state regulation, may be indicative of the necessary implication. Especially in cases resting upon an implication of exclusivity, 'there can be little doubt that indirect inconsistency involves 'more subtle… contrariety' than any 'textual' or 'direct collision' between the provisions of a Commonwealth law and a State law.'[110]

In *Clyde Engineering v Cowburn*[111] Isaacs J outlined the test for determining whether two laws might be inconsistent in this 'indirect' sense. The test essentially posed three questions:

1. What field or subject matter does the Commonwealth law deal with or purport to regulate?
2. Was the Commonwealth law intended to cover the field and to regulate that subject matter completely and exhaustively? Was the Commonwealth law intended as *the law* (and not merely *a law*) on that subject matter?
3. Does that state law attempt to regulate some part of that subject matter or to enter on the field covered by the Commonwealth law?

According to this test, it is then necessary to identity with precision what is the 'particular subject matter' that is said to be *exclusively regulated by the federal legislation* - or which the topic upon which the Commonwealth seeks to 'cover the field'. For it is only if the state law intrudes upon this same subject matter will the state law then held to be invalid (because of the inconsistency).[112]

It may, the, be helpful to conceive of the inconsistency of which s 109 of the *Australian Constitution* speaks of in terms of 'direct' and 'indirect' inconsistency.

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108 *R v Credit Tribunal; Ex Parte General Motors Acceptance Corporation* (1976) 137 CLR 545 [562]-[564].

109 (2011) 245 CLR 1 [244].

110 *Jemena Asset Management (3) Pty Ltd v Coinvest Ltd* (2011) 244 CLR 508 [40].

111 (1926) 37 CLR 466 at 489.

112 *Momcilovic v The Queen* (2011) 245 CLR 1 at [261].The Court in *Jemena Asset Management (3) Pty Ltd v. Coinvest* (2011) 244 CLR 508 at [42] said: 'It is not surprising that different tests of inconsistency directed to the same end are interrelated and in any one case more than one test may be applied in order to establish inconsistency for the purposes of s 109. All tests for inconsistency which have been applied by this Court for the purpose of s 109 are tests for discerning whether a "real conflict" exists between a Commonwealth and State law.' Further in Momcilovic v. The Queen (2011) 245 CLR 1 at [245] Gummow and Hayne JJ urged caution in speaking of different 'classes' or 'species' of inconsistency. As Justice Gummow points out: 'Such usage tends to obscure the task always at hand in cases where reliance is placed on s 109, namely to apply the provision only after analysis of the particular laws in question to discern their true construction'.

A *The Potential Inconsistencies*

The Same-Sex Marriage Bill provides:

(a) a process by which same-sex marriage marriages may be solemnised by authorised celebrants,[113] certain offences connected with that process[114] and a process for persons to become authorised celebrants.[115]
(b) a process by which same-sex marriages may dissolved or declared to be nullities[116]
(c) a process by which the Supreme Court of New South Wales may make orders for financial adjustment and maintenance of persons formerly in same-sex marriages[117] under laws of other jurisdictions;[118] and
(d) for various miscellaneous matters.[119]

Aside from (d), each of these topics has parallels in federal legislation. In considering the potential inconsistencies, I shall consider each of these topics respectively.

B *Solemnisation of Same Sex Marriages*

The provisions in the Same-Sex Marriage Bill for solemnising marriages, the associated offences and the process to become celebrants have equivalent provisions in the federal *Marriage Act.* The issue here is whether these provisions extend beyond being parallel provisions and becoming 'inconsistent' provisions. For the purposes of determining whether there is inconsistency, the relevant provisions in the federal *Marriage Act* are found in Division 2 of Part 4. More specifically, s 40 of the *Marriage Act* provides that the Division applies to, and in relation to all, marriages solemnised, or intended to be solemnised, in Australia. Further, s 41 declares that the marriage shall be solemnised by 'an authorised celebrant'. Section 5 defines this to mean a Minister of Religion registered under, a State or Territory officer authorised under or a marriage celebrant registered under Div 1 of Pt 4 of the *Marriage Act.*

Sections 45 and 46 of the *Marriage Act* provides for the form of the ceremony and certain words that must be spoken by the parties and the authorised celebrants except where the marriage is solemnised by a minister of religion; in the case of a religious ceremony, the form and the ceremony recognised as sufficient in the relevant religion, are sufficient. Where a marriage is solemnised by an authorised celebrant, who is not a minister of religion, it is sufficient for each party to say the words to the following effect:

113 Same-Sex Marriage Bill 2013 (NSW) pt 2, divs 1-4.
114 Ibid pt 2 div 5.
115 Ibid pt 7.
116 Ibid pt 3.
117 Ibid pt 4.
118 Ibid pt 6.
119 Ibid pt 8.

> I call upon the persons here present to witness that I, A.B., take thee C.D. to be my lawful wedded wife" or "I call upon the persons here present to witness I, C.D., take thee A.B. to be my lawful wedded husband

More seriously for the purposes of 'inconsistency', s 46(1) of the *Marriage Act* provides that where a marriage is solemnised by an authorised celebrant who is not a minister of religion, the authorised celebrant must say the words to the following effect:

> Marriage according to the law in Australia, is the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.

It should be noted that s 48 of the *Marriage Act* reiterates that marriage which does not followed the process outlined above is not a valid marriage for the purposes div 2 of pt 4 of the *Marriage Act.*

It should be noted that when first enacted the *Marriage Act* comprised no definition of 'marriage'. By amendments made in 2004[120] the following definition was inserted into s 5 of the *Marriage Act*:

> In this Act, unless the contrary intention appears, "marriage" means the union of a man and a woman to the exclusion of all others, voluntarily entered into for life.

Furthermore, along with this provision, a new provision, s 88AE, was inserted into the Part VA of the *Marriage Act* concerned with the recognition of unions solemnised in foreign countries. It provides that:

> A union solemnised in a foreign country between:
>
> (a) a man and another man; or
> (b) a woman and another woman;
>
> must not be recognised as a marriage in Australia,

A new subsection (4) inserted into s 88B provides that 'marriage' throughout pt VA has the meaning given in s 5(1) – the 'definitions' section.

Meanwhile, s 6 of the *Marriage Act*[121] provides that:

> This Act shall not be taken to exclude the operation of a law of the State or of a Territory, insofar as that law relates to the registration of marriages, but a marriage solemnised after the commencement of this Act, is not invalid by reason of a failure to comply with the requirements of such a law.

Section 7 of the *Marriage Act* relevantly provides that:

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120 *Marriage Amendment Act 2004* (Cth), sch 1, cl 1.

121 As enacted, s 6 referred also to law of a state or territory, 'making special provision for the welfare of aboriginal natives of Australia or other persons, in so far as that law makes provision for or in relation to requiring the consent of an officer or authority of the State or Territory to the marriage of any person who has attained the age of twenty-one years.' That reference was removed when s 6 was repealed and substituted by s 4 of the *Marriage Amendment Act* 1976 (Cth).

> …before the date fixed under subsection 2(2) of this Act, this Act does not affect the validity or invalidity of a marriage that took place before the date so fixed.

Subsection 2(2) provided for the commencement of the key operative provisions of the *Marriage Act* on a date to be fixed by Proclamation. The date fixed was 1 September 1963.[122]

C *Inconsistency*

It appears that none of the express provisions that have been outlined above manifests any *direct inconsistency* with the Same-Sex Marriage Bill. There is nothing in the *Marriage Act* that expressly prohibits the creation of a status under New South Wales legislation of persons whose union has been solemnised as 'same-sex marriage' or the establishment of a process for conferral of that status. It is important to note, however, that this contention is predicated on the assumption that 'same-sex marriage' is of a *different or independent status* to that of 'marriage' under the *Marriage Act*. If this assumption is indeed correct, it is suggested that nothing in the *Marriage Act* expressly prohibits people from engaging in the conduct contemplated by the Same-Sex Marriage Bill as deemed necessary for that process.

It should be pointed out that if same-sex marriage is *not* of a different status, then solemnising a same-sex marriage under an Act in the form of the Same-Sex Marriage Bill may be a purported solemnisation of a marriage where there is a legal impediment to that marriage under the *Marriage Act*. In that case, conduct envisaged under the Same-Sex Marriage Bill may be expressly prohibited by s 100 of the *Marriage Act* where para (d) of this section makes it an *offence* to solemnise a marriage where there is a reason to believe that there is *a legal impediment to the marriage*. Thus, there is *direct inconsistency or textual collision* between the *Marriage Act* and the Same-Sex Marriage Bill and the latter legislation would be invalidated to the extent of the inconsistency by virtue of s 109 of the *Australian Constitution*. However, it is nevertheless suggested that marriage and same-sex marriage are two fundamentally different statuses (for the purposes of this paper) and the issue of inconsistency does not therefore arise. In this respect, nothing in the *Marriage Act* expressly compels or permits conduct which is prohibited by the Same-Sex Marriage Bill.

In particular, in their express terms, the 2004 amendments are not inconsistent with the Same-Sex Marriage Bill. As already outlined, the amendments provided for the insertion of a definition of 'marriage' into *the Marriage Act*, expressed to apply only in the *Marriage Act*, and an associated prohibition on the recognition as marriages of foreign unions between persons of the same sex. In this manner, neither of these amendments explicitly prohibited the introduction of an Act which sought to bring into existence *a new status*; namely, that of the 'same-sex marriage'.

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122 See *Commonwealth Government Gazette* 1963 p. 1977.

D *Inconsistency and the Offence Provisions*

If focus is shifted to the 'offence' provisions of the Same-Sex Marriage Bill, none of the offence provisions in the Same Sex Marriage Bill criminalises conduct which is expressly permitted by the *Marriage Act*, or able to be characterised as impliedly permitted by the *Marriage Act.* Nevertheless, having said this, there would still conceivably be some overlap between the offences of the two pieces of legislation. For example, s 94(i) of the *Marriage Act* provides that: 'a person who is married shall not go through a form or ceremony of marriage with any person.' Here, if the expression 'form or ceremony of marriage' were broad enough to encompass a form or ceremony described in the Same-Sex Marriage Bill, that offence might cover the same ground as s 19(1) of the Same Sex Marriage Bill. However, the penalty for each offence is identical and, in the event that there is some inconsistency on this point, it would mean at most that the federal offence is the only one available in cases of overlap. It would not result in invalidity of the state offence provision or of any other part of the Same-Sex Marriage Bill.[123]

If there is any potential inconsistency that does invalidate the terms of the Same-Sex Marriage Bill, It would thus need to be found through implication from the express terms of the *Marriage Act.* Another way of putting this is to say that the *Marriage Act* can implicitly be construed as prohibiting something which inheres in the Same-Sex Marriage Bill concerning the solemnisation of same-sex marriages. If that is not established then it is clear that the provisions relating to the authorisation of celebrants is not tainted by any inconsistency vis-a-vis the *Marriage Act.*

E *Inconsistency and Implications from the Marriage Act*

Potentially, it could be argued that there is an implication deriving from the *Marriage Act* that the Act seeks to exclusively regulate subject matter falling under it and that the Same-Sex Marriage Bill seeks to impermissibly regulate the same subject matter. In other words, the *Marriage Act* seeks to 'cover the field' in relation to the subject matter which it purports to regulate and that any state intrusion into this area of regulation constitutes 'indirect inconsistency'.[124] The question needs to be asked: What precisely is the nature of the subject matter which the Commonwealth seeks to regulate?

By the time of Federation, marriage was a recognised legal relationship, between one man and one woman and this conferred a particular *status* on the parties. This was explained in some detail in *Hyde v Hyde*:

> Marriage has been well said to be something more than a contract, either religious or civil – to be an institution. It creates mutual rights and obligations, as all contracts do, but beyond that

123 The particular State offences would simply not apply in cases of overlap with the federal offence, but its operation in other cases, and other provisions of the Same-Sex Marriage Bill, could plainly be severed from that invalid operation; see generally *Interpretation Act* 1987 (NSW) s 3; *Victoria v Commonwealth (Industrial Relations Act Case) (*1996) 187 CLR 416 [502]-[503]; *Momcilovic v The Queen (*2011) 245 CLR 1 [223]-[224].

124 *Clyde Engineering v Cowburn* (1926) 37 CLR 466 [489].

> it confers a status. The position or status of "husband" and "wife" is a recognised one throughout Christendom: the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite lights upon their offspring. What, then, is the nature of this institution as understood in Christendom? Its incidents vary in different countries, but what are its essential elements and invariable features? If it be of common acceptance and existence, it must have needs (however varied in different countries in its minor incidents) have some pervading identity and universal basis. I conceive that marriage, as understood in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others.

The Court in *Niboyet v Niboyet* acknowledged the notion of *status* was a well-accepted one and defined it as 'the legal position of the individual in or with regard to the result of the community.'[125] Further, in the *Ampthill Peerage Case* the Court described the concept of 'status' as 'the condition of belonging to a class in society to which the law ascribes peculiar rights and duties, capacities and incapacities.'[126] Finally, *status* has defined as 'a condition attached by law to a person which confers or affects or limits a legal capacity or exercising some power that under other circumstances he could not or could exercise without restriction.'[127]

The proposition that marriage *confers a particular status* on the parties is again well established.[128] Moreover, in confirming this entrenched notion of *status*, Quick and Garran in 1901 described the marriage power in *placita* s 51(xxi) of the *Australian Constitution* in the following terms:

> Marriage is a relationship originating in contract, but it is something more than a contract. It is what is technically called a status, involving a complex bundle of rights, privileges, obligations and responsibilities, which are determined and annexed to it by law independent of contract.[129]

As the two esteemed academics noted in 1901, various rights and obligations are 'annexed' to the status of marriage by other parts of the law. Put simply, various legislative and common law doctrines attach to married persons so as to confer rights and (conversely) impose obligations on the parties.

It is significant that neither *Lord Hardwicke's Act* in the United Kingdom nor Australian colonial legislation sought to define marriage or to attach a status to marriage incidents different from that which was recognised at common law. Rather Australian colonial legislation took as its premise the extant and well-recognised status of marriage at common law. What the colonies did do, however, was to regulate the process by which the status of marriage was attained and who could, indeed, be married. Nevertheless, insofar as the latter

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125 *Niboyet v Niboyet* (1878) 4 PD 1 at 11 (CA).
126 *Ampthill Peerage Case* (1977) AC 547 [577].
127 *Daniel v Daniel* (1906) 4 CLR 563 [566].
128 *Shanks v Shanks* (1942) 65 CLR 334 [336]; *Ford v Ford* (1947) 73 CLR 524 [531]; *Powell v Powell* (1948) 77 CLR 521 [524]; *R v L* (1991) 174 CLR 379 [392].
129 John Quick, Robert Garran *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 608.

was concerned, it was well settled in colonial legislation that marriage could only be entered into by one man and one woman.

F *The Subject of Regulation Was the Existing Status of Marriage, Not To Create a New Status of Marriage*

This fundamental approach was adopted by the states after federation. Different marriage legislation applied in different state; but in all cases, *the subject of regulation was the existing status of marriage.* Precisely the same approach was adopted in the federal *Marriage Act*. This federal statute contained no definition of 'marriage' and, indeed, efforts to insert such a definition during the passage of the Marriage Bill were resisted.[130] The *Marriage Act* - and its earlier state counterparts - sought to regulate the existing status of marriage and not to create a new status for the institution of marriage. In other words, the *Marriage Act* conceptualised the status of 'marriage' as existing entirely independent or 'outside' of the legislative enactment.[131]

This contention that the *Marriage Act* did not seek to create a new status for marriage is confirmed by the presence of s 7 of the *Marriage Act* which preserves the validity of marriages entered into prior to the commencement of the *Marriage Act* in 1961 under state legislation. This provision demonstrates quite clearly that the objective of the *Marriage Act* was to preserve the existing status of marriage - not to constitute a new status for the institution of marriage – one that was different from the common law and Australian colonial and, subsequently, state legislation.[132]

Consequently, for the purposes of s 109 of the *Australian Constitution* and the 'covering the field' test, if one was to nominate 'field' with which the *Marriage Act* is concerned to regulate, it would be the *regulation of attainment of the existing status of marriage*. Put simply, the *Marriage Act* purports to regulate the attainment of the status of marriage to the exclusion of state legislation. Garfield Barwick's *Second Reading Speech* makes it clear that the object of the *Marriage Act* was to eliminate the various state regimes and replace them with a single federal code.[133] Provisions of the *Marriage Act* itself also suggest that the *Act* sought to regulate exclusively (to the exclusion of the states) the *attainment of the status of marriage*. For example, the expression provision in s 6 that the *Marriage Act* shall not be taken to exclude the operation of state law, on only specified topics, suggests that, *otherwise*, it does exclude their operation. Further, the preservation by s 7 of the validity of marriages that took place before the commencement of the operative provisions of the *Marriage Act*

130 Commonwealth, *Parliamentary Debates*, Senate, 18 April 1961, 542-555 (unknown).

131 Geoffrey Lindell, Constitutional Issues Regarding Same-Sex Marriage: a Comparative Survey, (2008) 30 *Sydney Law Review* 27, 29.

132 John Quick, Robert Garran *The Annotated Constitution of the Australian Commonwealth* (Angus and Robertson, 1901) 608.

133 Commonwealth, *Parliamentary Debates*, House of Representatives, 19 May 1960, 1961-2 (Garfield Barwick); see also Barwick 'The Commonwealth *Marriage Act* 1961', (1961-2), 3 *Melbourne University Law Review*, 277.

(under state marriage legislation) implies that the validity of marriages under state marriage legislation is now affected by those provisions of the *Marriage Act* after their commencement. Among them is s 48 of the *Marriage Act* which provides that a marriage solemnised otherwise than according to div 2 of pt 4 (that is, including under state legislation) is not a valid marriage.

Accordingly, what this suggests, then, is that any state legislation which seeks to regulate the attainment of marriage is invalid. That was certainly the case for state marriage legislation which pre-dated the federal *Marriage Act*. Had such legislation not been repealed,[134] it would have been invalid by virtue of the operation of s 109 of the *Australian Constitution*. So, too, for instance, new state legislation which purported to permit persons in 'prohibited relationships' to be married. In those cases, it would be plain that the state legislation was seeking to regulate attainment of the same status as is now exclusively regulated by the *Marriage Act*.

The issue for this paper is whether an Act in the form of a Same-Sex Marriage Bill would do so. That depends on whether it is properly regarded as an attempt to regulate the attainment of the status of marriage, in particular by permitting same-sex couples to attain that status or whether it creates a new status that is different from marriage. If the former is the case, then the New South Wales Bill would be inconsistent with the *Marriage Act*; if the latter is the case, then the New South Wales Bill would not be inconsistent with the *Marriage Act.*

Certainly, the form of ceremony one enters for undertaking a same-sex marriage is similar in form to a ceremony when undertaking marriage under the *Marriage Act.* Secondly, the rights and obligations attaching to person entering same-sex marriages are also similar to those attaching to persons entering marriages under the *Marriage Act.* Notwithstanding these points, it is the contention of this paper that the Same-Sex Marriage Bill creates and seeks to regulate attainment of a status very different from that of marriage.

First, the status of the Same-Sex Marriage Bill is described as being a 'same-sex' marriage; not a 'marriage'. Like expressions as '*de facto* marriage'[135] and 'common law marriage'[136] have been used in the past to describe a status different from '*de jure* marriage', so too is the expression 'same-sex marriage' in the Same-Sex Marriage Bill. As these examples demonstrate, the mere use of the word 'marriage' in no way suggests that the status is the same. To the contrary, it is the preceding words (that, **de facto** marriage; common law marriage etc) that serve to distinguish the status of the relevant relationships from 'marriage' *per se*. In essence, the Same-Sex Marriage Bill does not purport to regulate the same status as the *Marriage Act*. By its terms, it constitutes and regulate a different status. That is so

134 From the commencement of operation of the *Marriage Act*, the various state legislation was repealed.

135 *Boshell v Boshell* (1972) 1 NSWLR 52 [58]; *Ferris v Winslade (*1998) 22 Fam LR 725 [29]; *De Sales v Ingrilli* (2002) 212 CLR 338 [8]; *R v Rose* [2010] 1 Qd 87 [24].

136 *Thwaites v Ryan* (1984) VR 65 [94]. This use of the expression 'common law marriage' is different from the use of that expression to mean 'a marriage valid at common law'; see In the Marriage of W and T (1998) 146 FLR 323 [338]-[339].

whether the status is described as a 'civil union' or 'same-sex marriage'. Crucially, it is not described as a 'marriage'.

Secondly, the status the subject of the Same Sex Marriage Bill may be attained only by persons of the same sex. The status of marriage – regulated by the *Marriage Act* – cannot now be, and has not in the past been, a status which can be attained by same-sex couples. That is made clear by the 2004 amendments. The different in qualifying features or criteria suggests a fundamentally different status.

Thirdly, while the Parliament of New South Wales may choose to attach the same rights, privileges, obligations and responsibilities to marriage (under the *Marriage Act*), and same-sex marriage (under an Act in the form of the Same-Sex Marriage Bill), it need not be so. Indeed, the Same-Sex Marriage Bill does not in general specify what rights and obligations attach to persons who have entered into same-sex marriage. As outlined above, rights and obligations are a characteristic and constitutive of the concept of *status.*

While, superficially, one may expect the New South Wales legislation will treat indifferently persons who are married and those who have entered into same-sex marriages, this lack of differential treatment does not necessarily indicate identity of status. That this is the case is demonstrated by the fact that for some years, various state legislative enactments have drawn no, or almost no, distinction between couples who are married and unmarried couples who have lived together in a domestic relationship for a sufficient period of time. [137]

Fourthly, while marriage (under the *Marriage Act*) would necessarily be treated as such by the legislation of each of the states and federal legislation, the parliaments of the states other than the New South Wales and federal Parliament would not be compelled to afford to couples who had entered same-sex marriages (under an Act in the form of the Same-Sex Marriage Bill) the same rights as couples who were married. While the Parliament of New South Wales may legislate to provide that there is equality of treatment under New South Wales legislation of couples who have entered marriages and couples who have entered same-sex marriages, it could not compel such equality of treatment under the legislation of other states and the federal Parliament. They could provide that references in their legislation to 'marriages' mean only 'marriage under the *Marriage Act'*.

In short, then, same-sex marriage under an Act in the form of the Same-Sex Marriage Bill would be a status different from marriage and that the Act would not be an invalid attempt to regulate the same status as that regulated by the *Marriage Act.*

X THE MARRIAGE EQUALITY ACT 2013 (ACT)

Focus now shifts to the constitutionality of the *Marriage Equality Act*. It is suggested that the *Marriage Equality Act* is of a fundamentally different nature then the Same-Sex Marriage Bill since it accords the same status of marriage to same-sex unions as to when one man and

137 See, for example the distribution of property under the *Family Law Act 1975* (Cth) where the parties dissolve their de facto relationship: ss 79 ff.

one woman seeks to attain the status of marriage. It is for this precise reason it is argued that the *Marriage Equality Act* will be found to be inconsistent with the Same-Sex Marriage Bill.

A *The Territories Power: Section 122 of the Constitution*

Pursuant to s 122 of the *Australian Constitution*, the federal Parliament has power to make laws for the government of any territory. That legislative power is not limited to certain specified subject matters. It is in this sense plenary.[138]

Pursuant to s 122 of the *Australian Constitution*, the Commonwealth enacted the *Self-Government Act*. Section 80 of the *Self-Government Act* establishes a Legislative Assembly for the Act. Section 22 confers power on the Legislative Assembly to make laws for the peace order, and good government of the ACT. Subject to certain exceptions which are not relevant here, the legislative power of the Legislative Assembly is as ample as the legislative powers of the Parliaments of the other states.[139]

Accordingly there is no doubt that *prima facie* the Legislative Assembly for the ACT has power to enact a law in the form of the *Marriage Equality Act*. As with the New South Wales Same-Sex Bill the real question is that of inconsistency with federal legislation, in particular the federal *Marriage Act*.

As outlined above, the issue of inconsistency between state and federal legislation is usually governed by s 109 of the *Australian Constitution.* The question of inconsistency between the *Marriage Equality Act* and federal *Marriage Act* is not governed by s 109 of the *Australian Constitution*, rather it is governed by s 28 of the *Self-Government Act.* It provides that:

> (i) A provision of enactment has no effect to the extent that it is inconsistent with a law defined by subsection (2) but such a provision shall be taken to be consistent with such a law to the extent that it is capable of operating concurrently with the law"
>
> (2) In this section "law", means :
>
> …..a law in force in the Territory (other than an enactment or a subordinate law).'

The word 'enactment' is defined in s 3 to mean a law made by the Legislative Assembly for the ACT. An Act of the federal Parliament in force in the ACT, such as the *Marriage Act*, would come within the definition of 'law'.

The effect of s 28 the *Self-Government Act* is that a provision of an Act of the Legislative Assembly, such as an Act in the form of the *Marriage Equality Act*, has no effect to the extent that it is inconsistent with an Act of the federal Parliament and that is taken to be so to the extent that the two Acts are not 'capable of operating concurrently'. While the provision

138 *Teori Tau v Commonwealth* (1969) 119 CLR 563 [570].

139 *R v Toohey; Ex Parte Northern Land Council* (1981) 151 CLR 170 [279]; *Capital Duplicators Pty Ltd v Australian Capital Territory* (1992) 177 CLR 248 [281]-[282].

of the *Marriage Equality Act* is not invalid, it is ineffective whilst the federal *Marriage Act* exists.[140]

It has been said that because of the reference to ACT legislation being 'capable of operating concurrently' with federal legislation, the test of inconsistency for the purposes of s 28 of the the *Self-Government Act* is narrower than that applicable to s 109 of the *Australian Constitution*.[141] In particular, it has been said that, it essentially encompasses the notion of 'direct' inconsistency rather than the much broader notion of 'indirect' or 'cover the field' inconsistency.[142] In other words 'indirect' – 'cover the field' - inconsistency test is inapplicable to s 28 of the *Self-Government Act*.[143]

Nevertheless, the High Court has more recently cautioned against differing treatment of different 'species' of inconsistency.[144] In truth, 'indirect' or 'covering the field' inconsistency rests upon recognition of a particular subject matter by another law. If that is so, any attempted regulation of that subject matter by state or territory legislation is inconsistent with that prohibition. In that case, the laws are not capable of operating concurrently.[145]

The position might have been different if s 28 of the *Self-Government Act* that federal legislation is not to be construed as impliedly excluding the concurrent operation of Acts of the Australian Capital Territory Legislative Assembly.[146] Thus, a provision in a federal Act permitting concurrent operation of state or territory laws is effective to deny an implication that the federal Act exclusively regulates a particular field.[147]

However, s 28 of the *Self-Government Act* does not seem to us to be such a provision. It provides only that Australian Capital Territory legislation shall be taken to be inconsistent with federal legislation if the ACT legislation is capable of operating concurrently with the federal legislation. It says nothing about whether a *particular* federal Act should be construed as permitting such concurrent operation. Further, it does not say that all federal Acts should be construed as doing so.

For this reason, while the position is arguable, it is contended here that it is not likely that Australian Capital Territory legislation could be successfully defended from attack, on the ground that it is inconsistent with a federal Act, on the basis of 'direct' or 'indirect' inconsistency. Thus, it is not likely that Australian Capital Territory *Marriage Equality Act* could be held to be effective, pursuant to s 28 of the *Self-Government Act*, in circumstances where a State Act in the same form would be held invalid for inconsistency with a federal Act.

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140 *Re Governor, Gouldburn Correctional Centre; Ex parte Eastman* (1999) 200 CLR 322 [75].
141 *Northern Territory v GPAO* (1999) 196 CLR 553 [60].
142 *Wylkian Pty Ltd v ACT Government* [2000] ACTSC 97[57].
143 *Northern Territory v GPAO* (1999) 196 CLR 553 [60]; Wylkian Pty Ltd v ACT Government (2000) ACTSC 97 [57].
144 Mark Leeming, *Resolving Conflict of Laws* (Federation Press, 2011) chs 4-5.
145 *Clyde Engineering v Cowburn* (1926) 37 CLR 466 [489].
146 Peter Hanks *Constitutional Law*, Sydney: Butterworths, 1993, 269.
147 *Dickson v The Queen* (2010) 241 CLR 491 [34]; *Momcilovic v The Queen* (2011) 245 CLR 1 [244], [261].

B *Inconsistency with the Marriage Act*

As was established above, the federal *Marriage Act* regulates exclusively *the attainment by persons of the existing status of marriage*. In light of the principles described above, the *Marriage Equality Act* has, indeed, precisely sought to regulate the attainment by persons of *that status* and thus would be entering a field over which the Commonwealth purports to regulate *exclusively* and thus the ACT legislation would be held to be ineffective (insofar as it is inconsistent with the federal *Marriage Act).*[148]

Unlike the New South Wales Same-Sex Marriage Bill, which seeks to create and regulate a status *different from marriage*, namely same-sex marriages, it is considered that the Australian Capital Territory *Marriage Equality Act* seeks to regulate the *existing status of marriage*. It does in express terms by repeatedly using words such as 'marry' and 'marriage'. Like the federal *Marriage Act*, and the historical marriage legislation, the ACT legislation focuses upon the existing status of marriage. Yet, as has been demonstrated, the *Marriage Act* does not permit concurrent regulation of the attainment of that status since it purports to 'cover the field' over this precise subject matter. In those circumstances, the *Marriage Equality Act*, would be ineffective to the extent that it sought to do so, pursuant to s 28 of the *Self-Government Act.* In effect, that would render the whole of pt 2 of the *Marriage Equality Act* ineffective.

Once the provisions of the *Marriage Equality Act* concerning the attainment of the status of marriage were ineffective, it would follow that the remaining provisions, which are all essentially ancillary to the provisions of pt 2, would also be ineffective. Thus, the provisions of the *Marriage Equality Act* would be wholly without effect.

XI ARE THERE CONSTITUTIONAL PROTECTIONS – A COMPARATIVE ANALYSIS?

To further evaluate the likelihood of whether Australia will achieve marriage equality in relation to same-sex couples it is perhaps worth considering the position in other jurisdictions- particularly in the United States and Canada. What is interesting is that in these jurisdictions, genuine marriage equality (similar to the position in the Australian Capital Territory in Australia) has been achieved not positively through legislation, but rather, 'negatively' via the mechanism of judicial review of the constitutionality of 'conventional' marriage legislation in these jurisdictions. As the discussion below illustrates, instead of invalidating the (then) existing marriage legislation for violating the 'equal protection' amendment[149] of the US Constitution or section 15 of the Canadian Charter of Rights and Freedoms (the 'equality' provision), the judiciary in both jurisdictions re-worked the relevant marriage legislation so as to accommodate same-sex unions. This piece of judicial activism

148 *Ex Parte McLean* (1930) 43 CLR 472 at 483.

149 See, for example, the Fourteenth Amendment of the US Constitution and its counterparts in the various State Constitutions of the US; see also section 15 (1) of the Canadian Charter of Rights and Freedoms (1982).

has been controversial[150] and is unlikely to occur in the Austrian context since the Australian Constitution has no equivalent 'equal protection' or 'due process' clauses.[151] Nevertheless, s 117 of the *Australian Constitution* does provide for equality of treatment of the States,[152] and if an Act in form of the New South Wales Bill is enacted and validated by the High Court, there would certainly be room for same-sex couples in the other States to seek an action under s 117 of the *Australian Constitution* challenging their unequal status vis-a vis the position of same-sex couples in New South Wales.

The constitutional recognition of same-sex marriage in the United States has not been uniform depending upon the State jurisdiction in which traditional marriage legislation has been constitutionally challenged. There have been several States where the State Supreme Court Courts have upheld challenges to marriage legislation on the basis of *State* (as opposed to federal) constitutional guarantees of equality. In these decisions the Courts have creatively re-worded existing marriage legislation to embrace same-sex marriages. As outlined below, the judgment in *Goodridge* is one such decision.[153] There are several significant State Court decisions where this has occurred.[154] Nevertheless, there have been instances in even the more progressive States, such as the States of California, where the Courts have sought to prevent recognition of marriage for same-sex couples and where they have failed to uphold challenges to existing (heterosexual) marriage legislation[155]. Nevertheless, in *Martinez v County of Monroe,*[156] the Appeals Court established on February 1, 2008, that a same-sex marriage performed in another jurisdiction must be recognised by the State of New York. It was, indeed, the first US Court to require such recognition.

There, Patricia Martinez, an employee of Monroe Community College, in Monroe County New York, married her same-sex partner in Ontario Canada. She then applied for health benefits based on her marriage and was denied. The Appeals Court held that because the State of New York had always recognised out-of-state marriages of different sex couples, it must provide the same recognition for same-sex couples.

As a consequence, the State of New York was in the somewhat paradoxical situation whereby it recognised same-sex marriages elsewhere while, at the same time, not allowing same-sex marriages to be constituted within its own jurisdiction. The opinion written by Justice Erin Peradotto indicated that:

> For well over a century New York has recognised marriages solemnised outside of new York unless they fall into two categories of exception: (i)marriage, the recognition of which is

150 Cass Sunstein, *Designing Democracy: What Constitutions Do* (Oxford University Press, 2001).

151 However, s 117 provides that a resident in one State shall not be discriminated against another state.

152 See *Street v Queensland Bar Association* (1989) 168 CLR 461; Nigel O'Neil, 'Constitutional Human Rights in Australia' (1987) 17 *Federal Law Review* 85, 87.

153 *Goodridge v Department of Public Health* 798 NE 2d 941 (2003).

154 Hawaii: *Baehr v Lewin* 852 P 2d 44 (1983); Vermont: *Baker v State* 744 A 2d 864 (1999); Massachusetts: *Goodridge v Department of Public Health* 798 NE 2d 941 (2003) and *In Re Opinions of the Justices to the Senate* 802 NE 2d 565 (2004). See also Graham Gee 'Same-Sex Marriage in Massachusetts: A Judicial Interplay Between Federal and State Courts', (2004) *Public Law*, 252.

155 In California, the Court of Appeal has declined to recognise same sex marriage: *In re Marriage Cases* 49 Cal Reptr 3d 675 (2006).

156 50 A.D. 3d. 189 (2008).

> prohibited by the positive law of New York and; (ii)marriages involving incest or polygamy, both of which fall within the prohibitions of natural law. Absent any New York statute expressly clearly the Legislature's intent to regulate within this State marriages of its domiciliaries solemnised abroad, there is no positive law in this jurisdiction to prohibit recognition of a marriage that would have been invalid if solemnised in New York…The legislature has not enacted legislation to prohibit the recognition of same-sex marriages validly entered outside of New York, and we thus conclude that the positive law exception to the general rule of foreign marriage recognition is not applicable in this case.[157]

It is suggested that s 117 of the *Australian Constitution* has a similar operation insofar as it provides that a resident must not be burdened or disabled from doing something which he or she is capable of doing in another state. Theoretically, if same-sex couples were able to undertake a 'same-sex marriage' in the state of New South Wales they must not be precluded from achieving this status in, for example, Queensland. This potentially places the validity of Queensland's *Civil Partnership's Act* 2011 (Qld) in doubt since it is of a different and lower status to 'same-sex' marriage. Moreover, if legislation similar to the ACT's *Marriage Equality Act* were enacted by one of the states and subsequently validated by the High Court, s 117 of the *Australia Constitution* would then operate to achieve similar recognition in the other states, thereby placing any 'same-sex' legislation in doubt since it is again suggested to be of a different and lower status to 'marriage' per se.

What is significant about the United States and Canadian situations is that these developments have been achieved judicially and not via Congress. In particular, the Supreme Court of Massachusetts not only invalidated the laws which excluded genuine marriage equality in 2003 but also decided subsequently in 2004, in an advisory opinion, that a law which would have made provision for civil unions between persons of the same sex would have violated the 'equal protection' guarantee, even though the partners to such a union would have enjoyed the same rights and duties as partners to a traditional marriage. The essential flaw in such a law was thought to be the failure of the law to label the civil union as 'marriages'.

It is also worth mentioning in this connection that the leading Canadian decision which upheld the recognition of marriage equality for same-sex couples in that country, did so by reference to the guarantee of equality contained in s 15(1) of the *Canadian Charter of Rights and Freedoms* (1982). This was decided by the Ontario Court of Appeal in *Halpern v Canada (Attorney-General*) in 2003.[158] The law in that case was held to be invalid for not recognising the efficacy of marriage for same-sex couples as it discriminated between those and marriages between persons of the opposite sex. This was in spite of the argument that the laws prohibited men and women doing the same thing, namely marrying persons of the same sex. Yet, although it is true that the failure to recognise marriages for same-sex couples does prohibit both men and women doing the same thing, namely marrying persons of the same sex, this contention ignores the discriminatory effect of such a prohibition on the sexual orientation of homosexual persons. Further, the argument was rejected essentially because it

157 50 A.D. 3d. 189 at 193 (2008).
158 (2003) 225 DLR (4th) 529.

perpetuates a view that same-sex couples are less capable or worthy of recognition or value as human beings, to use the language used by the Ontario Court of Appeal.[159]

Courts in several other Provinces followed this judgment. After the Canadian Supreme Court upheld the ability of the Dominion Parliament to recognise marriage equality for same-sex couples in an advisory opinion in *Reference re Same-Sex Marriage*[160] that Parliament subsequently passed legislation to give effect to such recognition.[161]

The argument proposed in *Halpern* was precisely the same type of contention that was considered and rejected by the United States Supreme Court when it invalidated laws prohibiting persons of different races marrying one another in *Loving v Virginia.*[162] The laws there were rejected on policy grounds that they were designed to keep races apart and predicated on views of racial superiority.

If the laws here were rejected on a 'racial superiority' basis the question this raises is whether there can ever be a legitimate reason for the differential treatment of marriage; that is, whether there can ever be a valid reason for having two kinds of marriage: 'same-sex' marriage and (heterosexual) 'marriage' per se. The Ontario Court of Appeal in *Halpern* found that it is not enough to show that historically and according to religious beliefs that marriage was limited to opposite sex relationships; nor was it enough to assert that marriage was 'heterosexual' because 'it just is' because this was though to amount to circular reasoning.[163] In a similar manner, the Massachusetts Supreme Judicial Court expressed the view that 'it is circular reasoning, not analysis, to maintain that marriage must remain a heterosexual institution because that it is what it historically has been.'[164]

There were several arguments advanced by the Massachusetts Department of Public Health in *Goodridge* to justify the non-recognition of same-sex marriages- all of which were rebutted. Firstly, the Attorney-General argued that such laws provided a favourable setting for the procreation of children. The Court countered this submission by replying that partners to a valid marriage were not required to show a capacity to procreate before or after the marriage was solemnised.[165] Further, it was not inconceivable for same-sex partners to rely on modern technology as well as adoption laws to allow same-sex couples to have children.

Secondly it was argued that laws do not recognise the efficacy of marriage equality for same-sex couples to ensure an optimal setting for child-rearing. [166] This was rejected because the argument refuses to acknowledge the changing and diverse composition of modern American families and associated changes in adoption and legitimacy. In this context, the Court held

159 *Halpern* (2003) 225 DLR (4th)529 at 554-562 applying the test *in Law v Canada (Minister of Employment and Immigration)* 1999 1 SCR 497 at 525.
160 (2004) 246 DLR (4th) 193.
161 Civil Marriage Act (2005) (Can).
162 388 US 1 (1967).
163 *Halpern* (2003) 225 DLR (4th) 529 at 553.
164 *Goodridge v Department of Public Health* 798 NE 2d 941 (2003) at 961.
165 *Goodridge* 798 NE 2d 941 at 961 -2. Nevertheless, impotence can be a ground for nullifying a marriage at the election of a disaffected party at 961.
166 *Goodridge 7*98 NE 2d 941 at 961, 963.

that the State of Massachusetts failed to show that an increase in the number of same-sex couples will produce a converse decline in birth rates.

The Court also dealt with a range of other issues: issues pertaining to uniformity of laws insofar as several other States also do not recognise same-sex marriage;[167] the assertion that it would destabilise the institution of marriage;[168] and that it could be assumed that same-sex couples are far more independent than married couples and thus less dependent on the state for social assistance.[169]

This raises the issue of how did the Court in *Goodridge* deal with the existing marriage legislation after it was found to have infringed upon the 'equal protection' constitutional guarantee in the Massachusetts State Constitution. One option would have been to invalidate the whole of the legislation dealing with marriage. Instead, the Massachusetts Judicial Supreme Judicial Court engaged in judicial creativity by redefining the definition of marriage to mean the 'voluntary union of two persons as spouses to the exclusion of all others' but suspended the effect of its judicial declaration for 180 days to permit the legislature to take such action as it deemed appropriate in light of the opinion of the Court.[170]

The Court in *Halpern* followed the same course by extending the definition of marriage to mean the 'voluntary union of spouses of two persons to the exclusion of all other others'. However, the Court in Halpern did not see the need to suspend its declaration under which the definition of marriage was declared invalid to the extent that it referred to a 'union between one man and one woman'. The definition was reformulated so as to read 'a voluntary union for life of two persons to the exclusion of all others'. That remedy was best thought to facilitate equality as required by s 15 of the *Canadian Charter of Rights and Freedoms* while also ensuring a degree of certainty in relation to the status of marriage.[171]

It is interesting that developments in the recognition of same-sex marriages have come from the judiciary, as opposed to Congress/Parliament in America and Canada. In a more practical or pragmatic sense, there have been academic warnings that premature judicial (as opposed to legislative) recognition of same-sex marriages will provoke reaction against both the sexual equality movement, as well as activist judiciaries. As Cass Sunstein has observed:

> An immediate judicial vindication of the principle could well jeopardise important interests. It could galvanise opposition. It could weaken the antidiscrimination movement itself. It could provoke more hostility to and even violence against gays and lesbians. It could jeopardise the authority of the judiciary. It could well produce calls for constitutional amendment to overturn the [United States] Supreme Court's decision. At a minimum, courts should generally use their discretion over their dockets in order to limit the nature and timing of relevant intrusions into the political process. Courts should also be reluctant to vindicate even

167 *Goodridge* 798 NE 2d 941 at 967.
168 *Goodridge* 798 NE 2d 941 at 965.
169 *Goodridge* 798 NE 2d 941 at 964.
170 *Goodridge* 798 NE 2d 941 at 968-970.
171 *Halpern* (2003) 225 DLR (4th) 529 at 560-61.

> good principles when the vindication would clearly compromise other important principles, including ultimately the principles themselves.[172]

The perhaps suggests that the Australian courts should be cautious in their recognition of marriage equality for same-sex couples in Australia.

XII CONCLUSION

This paper has focused on the issue of marriage equality for same-sex couples with the enactment in the Australian Capital Territory of the *Marriage Equality Act* and the drafting of the Same-Sex Marriage Bill. At the time of writing, a Commonwealth challenge to the constitutional validity of the *Marriage Equality Act* in the High Court of Australia appears imminent.[173] The paper has thus sought to consider the constitutionality of both the Same-Sex Marriage Bill and *the Marriage Equality Act*). As has been shown, the constitutional validity of both instruments turn upon their consistency with the federal *Marriage Act* under s 109 of the *Australian Constitution* (in relation to the *Marriage Equality Act*) and under s 28 of the *Self-Government Act* (in relation to the Same-Sex Bill). It was suggested that Same Sex Marriage Bill creates or constitutes a fundamentally different status of 'marriage' for same-sex couples - that is the 'same-sex marriage' and it is for this reason that it may avoid inconsistency with the Commonwealth *Marriage Act*. Hence it was argued, if enacted into law, the Same-Sex Marriage Bill would most likely survive constitutional challenge. On the other hand, the *Marriage Equality Act* has sought to accord precisely the same status of 'marriage' to same-sex couples as afforded *exclusively* to heterosexual couples under the federal *Marriage Act*. And it is here that the *Marriage Equality Act* most probably will be rendered constitutionally invalid. As has be shown, s 51(xxi) of the *Australian Constitution* purports to 'cover the field' in relation to the attainment of the status of 'marriage' and because the Australian Capital Territory seeks to intervene and regulate this status in regard to same-sex couples, it is highly likely that the *Marriage Equality Act* will be held to be inconsistent with the federal *Marriage Act* and will thus be invalid.

The paper then canvassed developments in marriage equality for same-sex couples in Canada and the United States. As was shown, recognition has been accorded to same-sex couples seeking marriage equality through the judiciary as opposed to the legislature. As a consequence, judicial activism has achieved a great deal where the legislatures in Canada and the United States have singularly failed to do so. It was suggested that these developments have implications for Australia. For if one of the States of Australia can realise genuine

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172 Cass Sunstein, *Designing Democracy: What Constitutions Do* (Oxford University Press, 2001), 206.

173 Christopher Knaus and Lisa Cox 'Commonwealth to Challenge Same-Sex Marriage Laws Hearing in the High Court', *The Canberra Times*, October 25, 2013.

marriage equality for same-sex couples, s 117 of the *Australian Constitution* may provide room to manoeuvre for the High Court to secure uniform recognition of marriage equality to same-sex couples throughout Australia.

THE MARRIAGE EQUALITY (SAME SEX) ACT 2013

DR PETER MCMANUS*

ABSTRACT

This article discusses the Marriage Equality (Same Sex) Act 2013 (ACT). *Unlike other commentators who consider the constitutionality of the legislation, this paper looks at the implications for its practical operation. It begins by examining earlier statutes, noting their principal sections and detailing their subsequent evolution into the Marriage Equality Bill 2013 and, finally, the Marriage Equality (Same Sex) Act 2013 (ACT). The structure and content of this Act is examined in detail with an emphasis on its actual operation. The paper concludes with a brief consideration of some important issues yet to be resolved, namely recognition of decrees throughout Australia, the hearing of divorces and other family law matters in a non-specialist court, and how new initiatives are to be implemented and funded in the court*

I INTRODUCTION

The recent introduction of the *Marriage Equality Bill 2013* (the *MEB*) into the Legislative Assembly for the Australian Capital Territory (the ACT) is perhaps best viewed as the continuation of an ideal formally recognising 2 people, regardless of sex, as attracting the same rights and obligations as a married couple in the ACT. This was stated by the Attorney-General in the Explanatory Statement for the *Civil Unions Bill 2006*[1], later passed as the *Civil Unions Act 2006* (the *CUA 2006*). Notwithstanding the rocky path of that legislation – it was ultimately disallowed by the Governor-General under s122 of the *Constitution* - the ideal has remained alive through the more successful *Civil Partnerships Act 2008*[2] (the *CPA 2008*) and its ambitious replacement, the *MEB*. That has now been amended and passed by the

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1 Explanatory Statement, *Civil Unions Bill 2006*, 28.03.2006, http://www.legislation.act.gov.au/, 1

2 Explanatory Statement, *Civil Partnerships Act 2008*, 12.12.2006, http://www.legislation.act.gov.au, 2 The difference between the date of the Act and the Explanatory Statement is a delay in reaching agreement with the federal Attorney-General on aspects of the *Civil Partnerships Bill 2006*.

Legislative Assembly as the *Marriage Equality (Same Sex) Marriage Act 2013* (the *ACT Marriage Act*).

As it did in 2006, the federal Government moved to have the new legislation, including the amendments, withdrawn. When that course was rejected by the ACT Government, the Commonwealth of Australia, as the plaintiff, elected to commence proceedings in the High Court of Australia to have the *Act* declared invalid or, in the alternative, void. Proceedings were instituted on 23rd October, and directions have been made for the future conduct of the matter. At this time it is set for hearing on 3rd and 4th December.

It is trite to say that the issue of same sex marriage enjoys wide publicity and public debate, both in Australia and overseas. Its central theme of fairness ensures that proponents have an easily transmissible message to make their point, but strongly partisan views are commonly held on all sides of the debate. At the same time, it has attracted a following by constitutional lawyers whose views about the likely result of any proceedings are regularly sought by a media anxious to satisfy its audience. It is to be expected, then, that public interest will remain high until the validity of the *ACT Marriage Act* is determined in the High Court. If that decision upholds the legislation, attention will turn to its day to day implementation, and the possible problems that might occur. It is those issues that are the focus of this paper.

II FROM THE CIVIL UNIONS BILL 2006 TO THE CIVIL PARTNERSHIPS ACT 2008

A useful approach to understanding the *ACT Marriage Act* can be gained by considering its forerunners.

The *Civil Unions Bill* was quite a short instrument for the significant changes it proposed. It would allow 2 people who chose not to marry or would not be entitled to marry 'to enter into a legally recognised relationship that is to be treated under territory law in the same way as marriage.'[3] This would be called a civil union and, under clause 5(1), the couple might enter into it 'regardless of their sex'. Under clause 5(2), it would be treated 'for all purposes under territory law in the same way as a marriage.' In short, a civil union would stand as a new legal entity beside a marriage entered into under the federal *Marriage Act 1961* (the *Marriage Act*)

There were restrictions. A person could not be under 16[4], married or already in a civil union[5], or in a prohibited relationship[6]. In addition, there were requirements as to notice[7], but once

3 Preamble, 4

4 Clause 6 Under clause 10(1), consent was required. The decision to allow parties under 18 to enter into a civil union was quite different from the *Marriage Act* which required that at least one party was an adult. It was justified on the basis that to deny it to a parties already living as a couple was discriminatory – see n2, 3.

5 Clause 7

these were met, the couple could enter into a civil union by making a declaration to this effect in the presence of an authorised celebrant and 1 witness[8]. The resemblance of this ceremony to that under the *Marriage Act*, including provisions for registration of the civil union and its use of authorised celebrants appointed under that *Act* was marked. The Commonwealth indicated that it would move to disallow the legislation if it provided for the creation of a relationship rather than registering or recognising it. Further, it must not require ceremonial confirmation of the relationship.[9] Among other changes were: one of the parties had to be usually resident in the ACT[10], both parties must be adults[11], and the ACT would need to establish its own system of celebrants in place of the marriage celebrants under the *Marriage Act*.

Unable to reach agreement with the Commonwealth, the ACT Government passed the Bill on 11th May, 2006. The Governor-General disallowed the *CUA 2006* on 13th June, 2006.

On 12th December, 2006, the *Civil Partnerships Bill 2006* was introduced into the Legislative Assembly. There were some concessions to previous demands by the Commonwealth for changes to the *Civil Unions Bill* but most were minor. For instance, the concept of a civil union was abandoned and replaced by a civil partnership[12] and the ACT would establish a new form of celebrant called a civil partnership notary.[13] In most respects, the new Bill did not address the substance of the Commonwealth's complaints against the previous legislation. All the offending provisions remained. The principal change to the concept of the civil union was, however, more than just a change of name. Although it was defined as 'a legally recognised relationship that…may be entered into by any 2 people, regardless of their sex'[14] – identical to the definition in the *CUA 2006* – there were links to 3 other pieces of ACT legislation. These were the *Domestic Relationships Act 1994* (the *DRA*), the *Legislation Act 2001*, and the *Human Rights Act 2004*.

The purpose of the *DRA*, which does not apply to a legal marriage,[15] is substantially to deal with those financial matters arising out of a personal relationship (called a domestic relationship[16]) between 2 people who are at least 16 years old[17], including incidental relief. For present purposes it may be described as a jurisdiction that would now generally fall under the *Family Law Act 1975* (the FLA) and be dealt with in the federal courts. The *Legislation Act* is a general statute that allows dictionary changes affecting a number of statutes to be made at one stroke. In this case, s169(3) defines a domestic partnership to include a marriage, a civil union and a civil partnership. The *Human Rights Act*, in sections 8 and 28, enshrines a

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6 Clause 8
7 Clause 9
8 Clause 11(3)
9 n2, 1
10 n2, 1
11 n2, 1
12 Clause 6(1)
13 Part 3, clauses 16 - 20
14 Clause 6(1)
15 s3(1)(b)
16 s169(3), *Legislation Act 2001*
17 s3, *DRA*

commitment to equality and freedom from discrimination. Taken together, the changes to the *DRA* would remove inconsistencies with the *Civil Partnerships Bill* and the change to s169(3) would strengthen an argument that a civil/domestic partnership was not unlike a marriage. It could then be argued that the *Civil Partnerships Bill* provided strong support to the relevant provisions of the *Human Rights Act*.[18]

The Commonwealth informed the Attorney-General that its previous objections to the Bill remained unchanged and that it would move for disallowance should it be passed. Matters remained unresolved at that point until the conclusion of the 2007 election. There seems to have been optimism that the Bill would not be opposed by the incoming federal Government,[19] but that that proved not to be the case. As a result, amendments were made to satisfy the demands of the Commonwealth and the Bill was passed into law as the *CPA 2008*. The *CPA 2008* was subsequently amended before being repealed and its provisions moved to become Part 4A of the *DRA*.

III MARRIAGE EQUALITY BILL 2013

On 19th September, 2013, the *MEB* was introduced into the Legislative Assembly. This was against a background of increased legislative interest in same sex marriage throughout Australia. Bills had been introduced in federal Parliament and all States.[20] Only the Northern Territory, which had no Bill, and Queensland, where the provisions of the *Civil Partnerships Act 2011* were amended to permit only the registration of a relationship,[21] were different. In addition to the various Bills, a number of reports examined the issue of the legislative power to deal with same sex marriage, notably *Same-sex Marriages in New South Wales*,[22] and *The Legal Issues Relating to Same-Sex Marriage* in Tasmania.[23] It was, then, not surprising that the ACT Government would make a further attempt to test the validity of the arguments that had been advanced when the *CUA 2006* was disallowed.

The *MEB* was remarkable for a number of reasons. First, the concept of a civil union or civil partnership was gone. The Attorney-General in the opening line of his Explanatory Statement made it clear that parties would be entering into a marriage.[24] Second, in adopting this model,

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18 As the Attorney-General argued in the Supplementary Explanatory Statement for the *Civil Partnerships Bill*, 09.05.2008 – see http://www.legislation.act.gov.au/, 8

19 n18, 3

20 *Marriage Equality Amendment Bill 2012* (Commonwealth); *Marriage Equality Bill 2012* (NSW); *Marriage Equality Bill 2012* (Victoria); *Marriage Equality Bill 2012* (South Australia); *Marriage Equality Bill 2012* (Western Australia), and *Same-Sex Marriage Bill 2012* (Tasmania). Only the Tasmanian Bill was introduced by the Government and it was subsequently defeated in the Legislative Council. On 22nd October, 2013 the Legislative Council in Tasmania voted not to debate further the proposed legislation – S Smiley, *Upper House MPs reject bid to revive debate on same-sex marriage*, http://www.abc.net.au/news/2013-10-29/tasmanian-upper-house-rejects-bid-to-revive-debate/5056032 The Bill in the federal Parliament lapsed on its dissolution. All other Bills are private Members' Bills.

21 *Civil Partnerships & Other Legislation Amendment Act 2012*

22 Report 47 of the Standing Committee on Social Issues, 26.07.2013

23 Tasmania Law Reform Institute, Research Paper No 3, October, 2013

24 Explanatory Statement, *Marriage Equality Bill 2013*, 19.09.2013, http://www.legislation.act.gov.au/, 1

the ACT was disputing the argument of the Commonwealth that s51(xxi) of the *Constitution* set out the entire ambit of the marriage power and this was restricted to the definition in the *Marriage Act*. Third, the argument based on s8 of the *Human Rights Act* and its appeal to non-discrimination was broadened and given an added depth of sophistication based on Articles in the *International Covenant on Civil and Political Rights*. It was further supported by a selection of Australian cases from the Human Rights Committee of the United Nations before closing with the point that '(t)here is clearly an emerging trend towards full and equal recognition of same-sex relationships.'[25] Fourth, the *MEB* showed the benefit that could come from the earlier rejection of legislation. Instead of indifferently crafted Bills that concentrated on the civil union/partnership concept at the expense of detail, the *MEB* was detailed, and it demonstrated the polish of a carefully considered draft.

In particular, the *MEB* did not so much attempt to compete with the existing federal legislation as to become complementary to it. It adopted, in Part 4, many of the provisions in the *FLA* about the dissolution of marriage, frequently in similar or identical wording. The draft even took the opportunity in Clause 21(b) to adopt an unusual point about the solemnising of marriages that had arisen previously in the similar, but differently worded, s41 of the *Marriage Act*.[26] The *MEB* included a provision at Clause 7(2) to the effect that a prohibited relationship included a relationship traced through, or to, a person who is or was an adopted child, and, at Clause 7(3) that, once adopted, a child is taken to remain the child of the adopting person or persons, even if the adoption order is annulled, cancelled or discharged or no longer effective for any reason. These clauses were similar to ss23B(3) and 23B(5) of the *Marriage Act*. Provisions about adopted children had not appeared in the *CUA 2006* and *CPA 2008*, possibly out of concern that there might be an extra-territorial element that could cause difficulties. The *MEB* dealt this possibility by omitting a clause similar to s23B(6) of the *Marriage Act*. The *MEB*, as appears below, was replaced by the *ACT Marriage Act* some weeks after its introduction. Because the 2 instruments are almost identical save for a number of minor amendments in wording – but, perhaps, not in their effect - they will be discussed in the following section.

IV ACT MARRIAGE ACT

When debate on the *MEB* returned to the Legislative Assembly on 22nd October, 2013 the Attorney-General presented a list of 25 amendments. This included renaming the Bill to the *Marriage Equality (Same Sex) Bill 2013*. There seems to have been some concern that further amendments might be made in the time leading up to the hearing in the High Court. The Chief Minister has indicated that this would not be the case.[27] The *Act* was subsequently passed by the Legislative Assembly and notified on 4th November.

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25 n24, 2 - 3

26 See *W v T* [1998] FLC 92-808.

27 L Cox & P Jean, *Same-sex marriage laws won't be amended by ACT Government*, ACT News, 30.10.2013, http://www.canberratimes.com.au/act-news/same-sex-marriage-laws-wont-be-amended-by-

The principal amendments consisted of:

> A change to the preamble by adding, as part of the purpose of the *MEB*, the words "allowing for marriage between 2 adults of the same sex".
>
> The addition, in the title of the *MEB*, after "equality" the words "(Same Sex)" and wherever appearing;
>
> Deleting the words "a person" or "the person" as the case might be and substituting the words "Two people of the same sex" or "each person" respectively as the case may be and wherever appearing.

It can be seen from this that the range of the amendments was slight. The effect might not be. In each case the alterations confer on the individual amendment a narrowing of the original wording. It becomes more precise and one is able to argue that in s6, for example, a marriage may mean a same sex relationship or the marriage referred to in the *Marriage Act*. Marriage becomes a matter of definition of which heterosexual marriage is only one form. The Attorney-General said as much when presenting the *MEB*. In his Explanatory Statement of 19th September, he said that the Bill:

> …will allow couples who cannot marry under the Commonwealth *Marriage Act 1961* because of the way marriage is defined under that Act.[28]

V THE STRUCTURE OF THE ACT MARRIAGE ACT

The *ACT Marriage Act* consists of 52 sections, a further 3 sections as transitional provisions, a schedule, dictionary, and end notes. Part 2 of the Act contains the principal jurisdictional grounds.

Section 6(a) provides that Part 2 applies

> in relation to all marriages between 2 adults of the same sex that are not marriages within the meaning of the *Marriage Act 1961* (Cwlth) solemnised, or intended to be solemnised, in the ACT.

It does not apply to de facto couples or to heterosexual couples who could marry under the *Marriage Act* but choose not to do so because of personal views about traditional marriage or intrusion by the government into their lives. What is the position with those who are trans or transgender or intersex?[29]

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act-government-20131030-2wfgv.html The article is interesting for the light it throws on divisions among the pro same sex marriage supporters.

28 Explanatory Statement, *Marriage Equality Bill 2013*, 19.09.2013, http://www.legislation.act.gov.au/, 1

29 A trans or transgender is someone who identifies as a gender that is different from the sex assigned to them at birth – *Australian Government Guidelines on the Recognition of Sex and Gender*, Attorney-General's Department, Canberra, July, 2013, 12 An intersex person may have the biological attributes of

This was considered in the Report, *Same-sex Marriages in New South Wales.*[30] It noted that an intersex person could marry under the *Marriage Act* if their sex could be conclusively determined so that the marriage was between a man and a woman. If it could not, that person was unable to marry under the Act.[31] It is submitted that, in an appropriate case, the definition in s6(a) would apply to such a person. Trans and transgender persons were a different matter and there was concern in the Standing Committee that a law including such persons might lead to 'substantial challenges in constitutional law.'[32]

Section 7 sets out the requirements for eligibility to marry. There must be 2 people of the same sex,[33] each of whom is an adult,[34] and neither person must be legally married.[35] In addition, each person cannot marry the other under the *Marriage Act* because it is not a marriage within the meaning of that *Act*[36] or be within a prohibited relationship.[37] Under section 9, written notice of intention to marry must be given to the authorised celebrant by whom the marriage is to be solemnised. The notice can be given up to 18 months before the date of marriage but not less than 1 month before that date.[38] The notice must be accompanied by a statutory declaration from each person stating that: the person wishes to marry the other person; that the person making the declaration is not married, or in a civil union or civil partnership, and that he or she and the other person believe that they do not have a prohibited relationship.[39]

In addition to the statutory declaration, each person must produce to the authorised celebrant evidence of their ages. That may be, under s10(1), a person's birth certificate, or the person's citizenship certificate, or the person's current passport, or, in the absence of any of these, a statutory declaration by the person that it is impracticable[40] to provide one of those documents, and to the best of the person's knowledge and belief, and as accurately as the person has been able to find out, when and where the person was born.[41] Although this is generally similar to s42 of the *Marriage Act*, s42(1)(b)(ii) requires a person to give the authorised celebrant a statutory declaration made by the person 'or a parent of the party stating that, for reasons stated in the declaration, it is impracticable to obtain' a certificate or extract.

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both sexes or lack some of the biological attributes considered necessary to be defined as one sex or the other – see *Guidelines* above, 11.

30 n22, 98-99

31 n22, 98, para 7.27

32 n22, 99, para 7.30

33 s7(1)

34 s7(1)(a)

35 s7(1)(b) This would include a marriage under this *Act* and the *Marriage Act*.

36 s7(1)(c)

37 s7(1)(d) This includes relationships traced through or to a person who is or was an adopted child.

38 s9(2)

39 s9(3)

40 This does not mean 'not practical', it means 'impossible' - *Guidelines on the Marriage Act 1961 for Marriage Celebrants*, Attorney-General's Department, February, 2012, para 4.1.5, 35 and citing the *Concise Oxford Dictionary*. It is submitted that this meaning would be followed under the *ACT Marriage Act*.

41 s10(1)(d)

It is submitted that it would not generally be possible to satisfy the authorised celebrant by simply declaring that it was impracticable to provide one of the required documents. That s10(1)(d)(i) requires more than the person's belief, and the authorised celebrant must form the view, is clear from s11(b). It states that the authorised celebrant must not solemnise the marriage if he or she believes on reasonable grounds that a notice of intention to marry or a statutory declaration accompanying it 'contains a false statement or error, or is defective.'[42]

It would be prudent to set out in the declaration the steps taken to obtain the information, including the names and addresses of those contacted and the dates, and the information that each provided, and the likelihood of other sources to provide the missing information. Where evidence by a parent is available, it should be obtained in a separate statutory declaration.

Under s12, and provided that all matters are in order, a marriage may be solemnised on any day, at any time, and in any place in the ACT. Prior to the ceremony, the authorised celebrant must recite a statement, called a 'monitum' about his or her authority to perform the ceremony, and the nature of the relationship of marriage under the *ACT Marriage Act*.[43] This is similar to the requirement in s46(1) of the *Marriage Act*. There is a legal obligation under this *Act* to recite the monitum, and a like obligation is placed on authorised celebrants pursuant to s14 of the *ACT Marriage Act*. In *Guidelines on the Marriage Act 1961 for Marriage Celebrants,*[44] celebrants are advised that the safest course is to use only the prescribed words as there is then no doubt that the obligations of the *Act* have been met. It is submitted that the same advice should be followed in ceremonies under the *ACT Marriage Act*.[45] A failure to observe the correct procedure may mean that the marriage was not solemnised in accordance with Part 2 and is void.[46]

Part 3 of the *Act* deals with void marriages. Under s21, a marriage is void if: either party did not meet the eligibility criteria in s7;[47] the marriage was solemnised other than in accordance with Part 2[48], or either party did not freely enter into the marriage because of fraud or duress[49], a party was mistaken about the identity of the other party or the nature of the ceremony[50], or a party was mentally incapable of understanding the nature and effect of the marriage.[51] A marriage is not void only because: a requirement of s9 was not complied with, or the person to whom the parties gave notice under s9, or who solemnised the marriage, was not an authorised celebrant if either party believed that, at the relevant time, that person was

42 s11(b)
43 s14
44 n40
45 n40, 55-56 The *Guidelines* usefully discusses departures from the strict wording of the monitum and reference should be made to these.
46 s21(1)(b)
47 s21(1(a)
48 s21(1)(b)
49 s21(1)(c)(i)
50 s21(1)(c)(ii)
51 s21(1)(c)(iii)

an authorised celebrant.[52] Once again, the provisions in s21 are similar to s23B of the *Marriage Act*, although that *Act* is more detailed.

Part 4 of the *ACT Marriage Act* deals with ending marriages under the *Act*. The family lawyer will feel most at home in this Part because of its close resemblance to the relevant provisions in the *FLA*. For example, s23 provides for a dissolution order, a decree of nullity, and declarations about the validity of a marriage under the *ACT Marriage Act*, all of which are to be found in the *FLA*. The following table of similarities may be helpful:

- meaning of separation (s22, s49 *FLA*);
- certificate of counselling – under 2 year marriage (s24, s44(1B) *FLA*);
- the ground for dissolution (s25, s48(1) *FLA*);
- resumption of cohabitation (s26, s50 *FLA*);
- nullity must be based on ground that marriage is void (s27, s51 *FLA*);
- dissolution not to be granted if nullity is before the court (s28, s52 *FLA*);
- when dissolution order takes effect (s29, s55 *FLA*);
- rescission of an order if parties reconcile (s30, s57 *FLA*);
- rescission for miscarriage of justice (s31, s58 *FLA*), and
- remarriage after dissolution (s32, s59 *FLA*)

Generally, the case law that has developed in the Family Court of Australia would, it is submitted, be applicable. Despite some differences in wording, the various provisions mentioned above are not greatly dissimilar and could be used in the hearing matters under Part 4.

Authorised celebrants are dealt with in Part 5, which contains sections 34 to 39. The registrar-general is an authorised celebrant under s34. All other celebrants are, strictly, registered celebrants, but they are also referred to as authorised celebrants. Sections 35 to 39, which chiefly deal with registration and cancellation apply to them. The *Marriage Regulations 1963* apply to authorised celebrants who are permitted to celebrate marriages pursuant to the *Marriage Act*. Commonwealth-registered marriage celebrants, or, as they are usually known, marriage celebrants, are generally similar to registered celebrants under the *ACT Marriage Act*. Briefly, the *Marriage Act* and the *Marriage Regulations* impose a broad, but strict, code of standards on marriage celebrants. There is, for example, a Code of Practice,[53] an obligation to undertake professional development activities as required,[54] and a complaints resolution

52 s21(2)
53 r37L, *Marriage Regulations*; The Code is Schedule 1A of the *Marriage Regulations*.
54 s39G(b), *Marriage Act*, r37, *Marriage Regulations*

procedure.[55] Regulation 37G sets out a high standard of qualifications for applicants. None of this is required by the *ACT Marriage Act*.

Part 6, which consists only of s40, provides for the recognition of certain marriages solemnised in other jurisdictions. It states that a regulation may provide that a same sex relationship under the law of another jurisdiction (a corresponding law) is a marriage under the *ACT Marriage Act* for the purposes of territory law. However, the regulation must not do so unless it is between adults of the same sex and satisfies the requirements of s7.

Parts 7 to 10 and 20 contain machinery provisions.

VI SOME OBSERVATIONS ON THE ACT MARRIAGE ACT

There are several issues about the *ACT Marriage Act* that do not directly arise out of the analysis in this paper, but they are worth discussing because they concern the implementation of the Act. The first is the risk of varying laws about same sex marriage if the High Court finds that the *Marriage Act* does not establish 'a single and indivisible concept of marriage for the law of Australia.'[56] The second refers to the devolution of power to the Supreme Court of the ACT so that it can deal with the matters in sections 23 to 26 of the *ACT Marriage Act*. This is an issue of resources and funding. Related to this point, and assuming that the *Act* is upheld, is whether it is desirable to have non-specialist court, however constituted, sitting in what is recognised as a specialist jurisdiction.

A *The Risk of Varying Laws throughout Australia*

A weakness in a State or Territory law is that its jurisdiction in same sex marriages stops at its borders. This could be managed if there was a pattern of laws conferring mutual recognition on the same sex laws of other States and Territories. From this it might be assumed that the problem is one of having a uniform law upon which all are agreed. It is not. The problem is that other States and Territories could withdraw from the agreement, either wholly or in part, at any time. The recent substantial alteration of the law in Queensland, and mentioned above in Part 3, illustrates the point.

Although there are various draft Bills on same sex marriage,[57] they are not fully alike, except, perhaps, in their object. The *Marriage Equality Bill 2013 (NSW)* has served as a model for the ACT law but they are not identical. Unless there is agreement between the States and Territories on a uniform law there may be a number of different same sex marriage laws enacted throughout Australia. This may lead to uncertainty in the determination of rights and obligations, and piecemeal introduction of such laws may make it difficult to achieve recognition throughout Australia in a uniform way.

55 r37Q – r37Z, *Marriage Regulations*
56 para 17 of the Writ of Summons.
57 See n20.

The risk is more than theoretical. In his Explanatory Statement on the *MEB*, the Attorney-General stated that the Bill

> …reflects the Territory's established and comprehensive policies on relationship law by including the latest thinking around marriage equality.[58]

Although these comments acknowledged the contribution that draft same sex laws in other Australian jurisdictions made to the ACT legislation, the reference to 'the latest thinking around marriage equality' suggests a constantly changing view of relationship law. What does the phrase mean, and how does one tell what is the 'latest thinking'? The experience in family law suggests that there have been more than a few examples of novel thinking that did not last. This is not to say that relationship law is, or should be, unchanging, but care needs to be taken with claims of 'best practice'.

B *Hearings Pursuant to the ACT Marriage Act*

Sections 23 to 26 in Part 4 deal with various proceedings before the Supreme Court of the ACT (the Supreme Court). Of these, sections 23 and 25 are likely to entail most demand on court resources. This is at a time when delays before the Supreme Court have been a concern for some years.[59] The legislation is silent on how this work is to be done. In the Family Court of Australia (the Family Court) and the Federal Circuit Court of Australia, applications for a divorce order are usually heard by a registrar unless they are contested. They are then heard before a judge of the Family Court. Applications for nullity and declarations as to validity, which are also not heard by registrars, are heard by judges of the Family Court.

At this time, no decision on the allocation of the work has been announced and none may be likely until after the High Court determines the Commonwealth's Writ of Summons. The point to be made is that there is a cost, both in time and for the provision of judicial or quasi-judicial services that will be need to be considered.

If the *ACT Marriage Act* is held valid by the High Court, and the Commonwealth does not move to overturn the decision under s122 of the *Constitution*, it would mean the hearing of matters under Part 4 by judicial officers who are not specialists in family law. Since the *FLA* was introduced in 1975, the transfer of jurisdiction in family law in Australia has been to the Commonwealth. Although the Family Court has been the subject of at least 3 parliamentary inquiries and numerous other limited inquiries since it was introduced, little interest has been apparent in dismantling it or the Federal Circuit Court of Australia, which now handles most family law matters, and reverting to a non-specialised court. It is submitted that it is

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58 n24,1

59 See, for example, P McLintock, *Extra judges in 'blitz' to clear courts*, ABC News, 16.12.2011 and available at http://www.abc.net.au/news/2011-12-16/act-supreme-court-blitz/3734364 and C Knaus, *Call for action on legal case backlog*, Canberra Times, 29.07.2013 and available at http://www.canberratimes.com.au/act-news/call-for-action-on-legal-case-backlog-20130728-2qt4m.html#ixzz2jQdDR28B

undesirable for matters arising under the *ACT Marriage Act* to be heard other than in specialist courts, and appropriate arrangements should be made with the various States and Territories for this. It remains to be seen whether the Commonwealth, which to date has been reluctant to embrace same sex marriages, would participate.

VII CONCLUSION

The *ACT Marriage Act* sets out to provide a detailed statute for same sex marriages and incidental matters. The Act is a considerable improvement on earlier legislation. In particular, it is tightly drawn with the intention of defeating challenge in the High Court. There is some argument whether the legislation is as detailed as it could be, but that seems to be a question of judgment.

SECULAR CONSTITUTIONS AND MIGRATION: CHALLENGES TO THE STATUS QUO

DR TONY MEACHAM*

ABSTRACT

Many people migrate to Australia and other parts of the world for many reasons. Modern secular democracies such as ours, the United States, Canada, India and most of Europe hold the promise to potential migrants of freedom of religious practice and speech.

In an increasingly pluralistic world, many states are finding it difficult to interpret their own constitutional provisions to accommodate increasing numbers of migrants, whose numbers are now such that their voices are being heard in their requests for accommodation where once a strong majority religious view held sway and was the only voice heard in the development of public policy.

This paper will explore the new world, particularly in Europe and North America, where migration policies have encouraged, not only new citizens, but new ways of thinking that challenge the long standing status quo. Should secular constitutions, often written long ago in a much different context, change to accommodate the new plurality, or are these constitutions flexible enough to do so already? Are the new diaspora now an agent for change?

Many people migrate to Australia and other parts of the world for many reasons. Modern secular democracies such as ours, the United States, Canada, India and most of Europe hold the promise to potential migrants of freedom of religious practice and speech. In an increasingly pluralistic world, many states are finding it difficult to interpret their own constitutional provisions to accommodate increasing numbers of migrants, whose numbers are now such that their voices are being heard in their requests for accommodation where once a strong majority religious view held sway and was the only voice heard in the development of public policy.

This paper will explore the new world, particularly in Europe and North America, where migration policies have encouraged, not only new citizens, but new ways of thinking that challenge the long standing status quo. Should secular constitutions, often written long ago in a much different context, change to accommodate the new plurality, or are these constitutions flexible enough to do so already? Are the new diaspora now an agent for change?

The American model of a strict separation of church and state is gradually being seen as not being the only viable model for a secular state. Given the absence of an inflexible paradigm, many models have evolved in the last century or so that have met local needs. Pratap Bhanu Mehta,[1] an Indian academic, once suggested in respect of the Indian understanding of the secular state that 'secularism, like cricket and democracy, is a quintessentially Indian game that just happens to have been invented elsewhere.'

Many countries have adapted secularism in a form that, as Mehta suggests, becomes suited to local circumstances and political realities. A number of countries have recently been contesting constitutional cases to determine the contemporary understanding of the role of religion in the public sphere. These 'soft' secular constitutional provisions are actually the true secular states. Although each is different in structure, a common feature is an accommodation of religion in the public sphere, and a recognition of religious diversity.

Many people who have migrated have often sought to escape religious persecution, or at least some form of acknowledgement that they have as much right as anyone in their new community to believe in and practice their religion as those who came before.

However described, the necessity for such rights to be carefully provided for in a constitution was explained by United States President William Taft, when he said[2]

> No honest clear-headed man, however great a lover of popular Government, can deny that the unbridled expression of the majority of a community converted hastily into law or action would sometimes make a government tyrannical or cruel. Constitutions are checks upon the hasty action of the majority. They are the self-imposed restraints of a whole people upon a majority of them to secure sober action and a respect for the rights of the minority …

Such rights are therefore not provided for lightly and are by necessity and prudence incorporated into a modern constitution after much deliberation. On the necessity for fundamental and specifically articulated rights in a constitution, S.K. Sharma observed that:[3]

> The insertion of Fundamental Rights in the forefront of the Constitution coupled with an express prohibition against legislative interference with these rights and the provision of constitutional sanction for the enforcement of such prohibition by means of judicial review is a clear and emphatic indication that these rights are to be paramount to ordinary State-made laws.

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1 Pratap Bhanu Mehta, 'Hinduism and Self Rule', in Larry Diamond, Marc F. Plattner and Philip J. Costopoulos (eds), *World Religions and Democracy* (JHU Press, 2005), 64.

2 Message to the United States Congress on August 15, 1910.

3 S.K. Sharma, *Privacy Law: A Comparative Study* (Atlantic Publishers & Dist, 1994), 60.

Similarly the United States Supreme Court, Jackson J in *West Virginia State Board of Education v Barnett* argued that:[4]

> The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials. … One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly and other Fundamental Rights may not be submitted to vote: they depend on the outcome of no elections.

The need for specifically addressed fundamental rights is necessary in many jurisdictions. Such provisions in constitutions limit the power of powerful private groups that may represent any proportion of the population, and attempt to reduce the possibility of representatives of such groups to pursue their own interests rather than those of the general population. Such provisions, whilst often working against majoritarian interests, are democratic in that they ensure that broad public interests are preserved.[5]

However to have any value specific rights must be capable of being enforced when invoked. As a self-styled sceptic put it, '[l]ike everything else in human society, constitutional rights do not enforce themselves. … someone has to be given the power to overrule even the government. In those Western democracies that have written constitutions, this job falls upon the judges of the law courts.'[6]

Ultimate courts such as Supreme Courts in India and the USA or High Courts such as in Australia are often the final arbiter of what rights may claimed and enforced. As was noted by Michael J Perry, [7] '[i]n the period since the end of World War II, a growing number of democracies have empowered their judiciaries to enforce constitutional norms, many of the most important of which are human rights norms that, as articulated, serve principally to limit the power of government'. This could almost be the classic clash between the irresistible force and the immovable object, on which Puja Kapai and Anne S Y Cheung observed:[8]

> When the liberty to freely express oneself is at odds with another's right to freedom of religion, we are confronted with the classic dilemma of choosing between two equally fundamental, constitutionally and internationally protected rights. The contours of the said two rights however, are far from clear. Whilst freedom of expression is not an absolute right, its limits are controversial. Equally, while it is undisputed that freedom of religion is an internationally protected human right

4 319 US 624 (1943), 638.

5 Cass R. Sunstein, 'Constitutions and Democracies: an epilogue', in Jon Elster and Rune Slagstad, *Constitutionalism and Democracy* (Cambridge University Press, 1988), 327-328.

6 A. Alan Borovoy, *When Freedoms Collide: The Case for Our Civil Liberties* (Lester & Orpen Dennys ,1988) 200.

7 Michael J Perry, 'Protecting Human Rights in a Democracy: What Role for the Courts?' (2003) 28 *Wake Forest Law Review* 635, 636.

8 Puja Kapai and Anne S Y Cheung, 'Hanging in a Balance: Freedom of Expression and Religion' (2009) 15 *Buffalo Human Rights Law Review* 41, 41.

> enshrined in various international instruments, there is no comprehensive international treaty which addresses as its subject the content and extent of the right of freedom of religion …

So, where does the state determine the limits where a religious freedom right is claimed and accepted? The state may apply limits that are intended to be of general benefit to the community. The Supreme Court of Canada illustrated this in 1985 in *R. v Big M Drug Mart*

> Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free.[9]

The ultimate courts have the role in a secular democracy as protectors of religious freedoms, and to keep at bay the extreme views by presenting balanced interpretations of constitutional issues.

Despite some anomalies, constitutionalism aims to consider the personal rights of those identified as a distinct minority or diverse population from the majority of their society, as well as considering the rights of that majority. Without diversity it is unnecessary to consider constraints within the constitution to protect that diversity. The difference to be considered is that of the individual citizen and the 'collectivity or ruling majority'.[10]

Often constitutional law will examine matters arising from clashes between the nature of national identity and values as articulated in a national constitution (often set long ago and rarely amended), and often in contrast with the ideals and values of a modern diversified society. Many modern constitutional law cases derive from communities which feel their constitutions do not adequately represent their values. As Michel Rosenfeld notes,[11]

> [t]he clash between constitutional identity and other relevant identities, such as, national, ethnic, religious, or cultural identity, is made inevitable by the confrontation between contemporary constitutionalism's inherent pluralism, and tradition. … in a country with a strong constitutional commitment to religious pluralism, constitutional identity must not only be distinct from any religious identity, but also stand as a barrier against national identity becoming subservient to the fundamental tenets of any religion.

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9 *R. v Big M Drug Mart* [1985] 1 SCR 295, 336-337 (Chief Justice Brian Dickson for the court).

10 Michel Rosenfeld, 'Modern Constitutionalism as Interplay between Identity and Diversity', in Michel Rosenfeld (Ed.), *Constitutionalism, Identity, Difference, and Legitimacy: Theoretical Perspectives* (Duke University Press, 1994) 3, 3-5.

11 Michel Rosenfeld, 'Law and the Postmodern Mind: The Identity of the Constitutional Subject' (1995) 16 *Cardozo Law Review* 1049.

Rosenfeld points out that a working constitutional order must have at its base a predominant identity, where constitutional protection is usually accorded to the predominant identity, noting that 'constitutional identity emerges as complex, fragmented, partial and incomplete. In the context of a living constitution, moreover, constitutional identity is the product of a dynamic process'.

The highest courts of many countries with modern secular constitutions are often being asked in recent years to review their underlying ideals regarding religious freedom in their constitutions, and whether contemporary views remain consistent with previous thinking, as well as whether they accord with modern concepts of constitutionalism, and in the context of religious freedom, secularism. They are considering issues that have not been raised in the past, such as religious clothing in the public sphere in France, and the role of an increasingly assertive religious presence in politics in India and the United States. The nature of changing demographics in many societies due to migration or other changes means that this is increasingly more difficult. Ultimate courts must consider anew matters of religious freedom in newer contexts, considering the application of constitutional principles to novel circumstances. The courts often find it difficult to consider the demands of a modern plurality of religious views in the public sphere where 'church' and 'state' collide.

Partha Chatterjee asked the question 'What are the characteristics of the secular state?' and offered in response that 'three principles are usually mentioned in the liberal-democratic doctrine on this subject.'[12] These he says are liberty (where the state permits the practice of any religion), equality (where the state will not favour one religion over another), and neutrality (which requires the state not to prefer the religious to the non-religious). These elements appear in different degrees in the various models that are often considered.

[12] Partha Chatterjee, 'Secularism and Tolerance', in Rajeev Bhargava (ed.), *Secularism and its Critics* (Oxford University Press, 1998), 358.

A SURVEY OF VOTER ATTITUDES TO CONSTITUTIONAL REFORM

BEDE HARRIS *

ABSTRACT

It is usually thought that, at best, the Australian public has little interest in constitutional reform or, at worst, is profoundly suspicious of it. A key reason for voter reluctance to countenance reform is the poor state of civics education in Australia, which has the consequence that voters are, understandably, fearful of changing what they do not understand. Previous opinion polls that have been conducted on constitutional reform have been of limited value in that they have focused on single issues and have not provided respondents with sufficient background information to enable them properly to evaluate what they are being asked. This article analyses the results of a representative survey of Australian voters in which respondents were given detailed background information explaining various constitutional reforms. The survey also differs from others in that it sought respondents' views on a wide range of reforms - relating to knowledge of the Constitution and experience of civics education, the electoral system, a Bill of Rights, the independence of the Speaker of the House of Representatives, ministerial accountability and an Australian republic. Its results indicate that, when fully informed, more voters are likely to support constitutional reform than has previously been thought. The article also discusses how best such reforms for which there is widespread support can be achieved.

I INTRODUCTION

It is usually thought that, at best, the Australian public has little interest in constitutional reform or, at worst, is profoundly suspicious of it. Of 44 constitutional reform referenda held since 1901, only eight have met with success. Yet no survey

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has been conducted to determine voter attitudes to comprehensive constitutional reform - that is, reform touching upon multiple issues. Such surveys as have been conducted have focussed on single issues. Furthermore, because of the poor state of civics education in Australia, voters are, understandably, fearful of changing what they do not understand, and this means that such surveys as have been conducted have almost inevitably produced results indicated negative public perceptions of constitutional reform. This article analyses the results of a survey which was different to others in that respondents were questioned in relation to a wide range of reforms and questions were prefaced by detailed background information.[1]

Part II of this article explains the rationale for the survey and its methodology. Part III discusses responses to the issues canvassed in the survey. Part IV concludes with a discussion of how best those of the reforms which the survey indicates have broad public support could be achieved.

II RATIONALE AND METHODOLOGY

What do Australians think about constitutional reform? An answer which is all of flippant, accurate and depressing is 'Not much'. Indeed, a leading constitutional lawyer famously described Australia as a 'frozen continent' in so far as constitutional change is concerned.[2]

Yet to say that the failure of Australia to embark on constitutional reform is due solely to voter disinterest is to tell only part of the story. It is certainly true that, there is little that excites the passions of Australians in relation to systemic reform of our governmental institutions. However it would be a mistake to think that this disengagement is caused only - or even chiefly - by apathy. I would argue that the truth is far more disturbing - that there is in fact widespread underlying public dissatisfaction with how the political system works, but that apathy in relation to doing something about it stems from a profound lack of knowledge about how the Constitution operates, which in turn makes people fearful of changing it. Who would interfere in the operations of a machine which one knew performed an important function but which one did not understand the workings of, and which could cause catastrophic consequences if mishandled? In other words, what on the face of it appears to be apathy conceals a belief that because constitutional matters are so difficult to understand, and the consequences of an error potentially so egregious, there is no point in even contemplating change - and so no-one does.

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1 I wish to thank the Faculty of Business of Charles Sturt University for the Research Compact Grant which enabled me to commission the survey, and to Professor John Gammack of Zayed University for his advice on statistics and data analysis.

2 Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, Melbourne, 1967) 208.

But worse even than this is the fact that politicians - and here principally one is talking of politicians from the two major blocs of the Coalition and Labor - deliberately exploit this fear of the unknown in order to maintain a *status quo* which serves their own interests. One does not need to be a promoter of conspiracy theories to come to this conclusion. The public record is full of instances in which politicians either misrepresent or simply lie about constitutional matters in order to discourage the public from entertaining changes which they (the politicians) do not want. Two examples serve to illustrate this:

The Howard government repeatedly stated that it would not offer an apology in Parliament to Indigenous Australians, because to do that would be to expose the Commonwealth to legal claims for compensation. This was nonsense – the law of parliamentary privilege, gives absolute legal immunity to anything said during the course of Parliamentary proceedings. An apology in Parliament simply could not have had the effect of making the government liable to pay compensation.

Similarly, when the Rudd government established a committee to hold public consultations on the question of whether Australia should have a Bill of Rights, the terms of reference included a restriction that options canvassed by the committee 'should preserve the sovereignty of the Parliament' – which in the language of constitutional law meant that the committee should not suggest options which gave the courts the power to invalidate laws or government actions which infringed a Bill of Rights. Anyone reading this clause without the benefit of knowing the Constitution would assume that the committee was being barred from proposing a model that would confer a new power on the courts. Yet the Commonwealth Parliament is not 'sovereign', in that sense, and never has been. From the moment the Constitution came into force the courts have had the power to invalidate laws passed by Parliament – including laws which infringe the four rights that the Constitution protects expressly, as well as others that it has subsequently been held to protect impliedly. The mandate given to the committee was misleading, because it suggested that the relationship between Parliament and the courts was different from what it actually is.

In light of the above, general public reluctance to engage in debate on constitutional reform ought to be recognised for what it is: wariness about becoming involved in matters that are seen to be arcane, coupled with fear that change will have adverse consequences which, in combination, result in a reflexive conservatism when presented with proposals for constitutional amendment.

But it would be wrong to think that lack of engagement in constitutional debate means that voters are satisfied with the way government functions in Australia. Indeed, quite the reverse is true. Public opinion polls and public commentary both reflect an

increasing dissatisfaction with the political process.[3] Both the major political blocs are perceived as relentlessly negative - as stated by L'Estrange, former Secretary to the Department of Foreign Affairs and Trade,[4]

> [Young Australians] see aspects of our political system as pandering to special interests, too much grandstanding, too focused on the lowest common denominator rather than on good decisions effectively implemented. They blame the process, and have little regard for the quality of people in it, for the governance in parliament.

Yet despite the undoubted disillusionment with our governmental institutions, people fail to appreciate that it is only by changing those institutions that government can be improved. As was stated by Stephen Sherlock, Director of the Centre for Democratic Institutions at the Australian National University[5]

> People are very reluctant to engage in big ideas. We just want to make sure the trains run on time, and so on. There's a real absence of dialogue about the power and effectiveness of our institutions. We take them for granted.

This, then, is the critical problem - how to get voters to make the connection between their well-founded disillusionment with the political system and their ill-founded fear of constitutional change, because only by changing the rules of the game will we be able to change how it is played. The reason the political system operates with less efficiency, less justice and attracts a calibre of politician far lower than it could do is because of flaws in the system - it is not a question of bad luck. Therefore, only reform of the system will improve the results it delivers. It follows that education is key to achieving constitutional reform and also that only if voters are presented with information which disabuses them of the misconceptions they hold, can their true attitude to constitutional reform be gauged. This then was the rationale for the survey - to determine what the *fully informed* attitudes of Australians to constitutional reform are - in other words, what their attitudes are once the effect of proposed reforms have been explained. For this reason, many of the questions were prefaced by an explanation of what constitutional terms mean and what the implications of the proposed reforms.

The survey was conducted on the researcher's behalf by a research panel organisation, Online Research Unit (ORU) during the period December 2013 - January 2014. The survey consisted of 24 questions, designed to ascertain the views of respondents in six main topics: experience of civics education and knowledge of the Constitution, the electoral system, a Bill of Rights, independence of the Speaker of the House of

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3 See Leonore Taylor, 'Voter enthusiasm now well and truly curbed', *The Sydney Morning Herald* (Sydney), 3 November 2012, 11; Leonore Taylor, 'Party leaders have eyes only for the polls', *The Sydney Morning Herald* (Sydney), 14 April 2012, 17; Paul Kelly 'Leaders lost in struggle over policy' *The Australian* (Sydney), 4 June 2011, 11 and Ross Peake 'Attitude adjustment: We're losing trust in government' *Canberra Times* (Canberra), 27 September 2011, 1.

4 Rowan Callick, 'Civic pride a lost cause', *The Australian* (Sydney), 24 June 2013, 9.

5 Ibid.

Representatives, parliamentary scrutiny of the executive and whether Australia should become a republic. Although self-selecting in the sense that their populations volunteer to participate in surveys, research panels have the advantage in that they avoid the biases inherent in telephone and internet surveys, which are restricted to respondents who have access to those modes of communication.[6] Respondent selection by ORU was randomised from a panel conforming in age, gender and geographic location to the target population of enrolled voters. The results were based on 616 completed surveys which, as a sample relative to the overall voting population, delivers a 95 per cent confidence level with a 4 per cent margin of error.

III SURVEY RESULTS

A *Knowledge of the Constitution and Experience of Civics Education*

Before investigating public attitudes to constitutional reform, it was important to ascertain how much respondents knew about the Constitution, and what their experience of civics education had been. The first three questions in the survey focussed on this area. The results were as follows:

1. To your knowledge, does the Commonwealth of Australia have a written Constitution?

Yes	87%
No	13%

2. Australia does have a Constitution, called the Commonwealth of Australia Constitution Act. Were you taught about how Australia's Constitution works:

In primary school	11%
In high School	20%

[6] See the discussion of the validity of research panels in Katherine Anderson, *The validity of online proprietary panels for social and marketing research* (Master of Business thesis, University of South Australia, 2012) 220 who concludes that empirical studies indicate that widely recruited panels with broad appeal give results which are sufficiently representative for use in social science research < http://ura.unisa.edu.au/R/?func=dbin-jump-full&object_id=61490 >.

In both primary and high school	18%
Never	51%

3. Do you think that school students should be taught more about our Constitution?

Yes	95%
No	5%

First, so far as knowledge that we have a Constitution is concerned, the survey presents a positive picture - that fact that 87 per cent of people were aware of the existence of the Commonwealth Constitution compares favourably with what previous surveys have revealed: that 54 per cent of respondents knew Australia had a Constitution in 1987 and 67 per cent did in 1992.[7]

However, knowledge of the bare fact of the existence of the Constitution does not mean that respondents knew about its contents - as we shall see later in the discussion of constitutional protection of human rights, 64 per cent of respondents were unaware that the Commonwealth Constitution contains provisions allowing the courts to invalidate legislation which unduly impairs certain rights.

This comes as no surprise when one considers the responses to the survey question about exposure to education about the Constitution - 51 per cent of respondents never having received such education at any level of schooling. Yet there is clearly an overwhelming desire for more education on the Constitution, with 95 per cent of respondents believing this to be necessary for school students.

The fact that over half of the respondents report not having received education about the Constitution is hardly surprising. Many respondents would not have had the benefit of civics education simply because the first concerted effort by the Commonwealth government to promote civics education occurred only in 1997 with the publication of a civics and citizenship curriculum, *Discovering Democracy*. Although *Discovering Democracy* was excellent in so far as it described how the Constitution worked, what it lacked was a critical approach - one which would encourage students to evaluate how our institutions work and to equip them with the

[7] For a report of the results of these earlier surveys see Denis Muller 'Most want Constitution changed once they work out what it is', *Sydney Morning Herald* (Sydney), 3 July 1992, 6.

skills to enable them to debate how they might be improved. The Constitution was presented as representing the final culmination of an historical process, with a sub-text that it is the best that it could be.

The entire Australian school curriculum is currently in the process of being reformed.[8] One hopes that the new national curriculum will contain an element of critical analysis, in the absence of which we risk producing a generation which will certainly be better informed than previous ones about how the Constitution works, but who will still be infected with an unwarranted belief that it is the best possible.

B *The Electoral System*

Just about the only occasion on which the ordinary person has an opportunity to participate in the political process is when they cast their vote at elections. Therefore the extent to which the electoral system accurately reflects the views of the electorate might be thought to be of paramount importance to its design. In reality, however, this is far from the case.

Because the electoral system for the House of Representatives is based on single-member electorates, election results are inevitably distorted, because whether a party wins seats in Parliament depends not simply on how many votes it obtains but, far more importantly, on how those votes are geographically distributed. This means that parties which have significant but widely distributed support from voters nationwide will not be able to obtain representation in Parliament. The fact that there is only one seat per electorate also means that politics becomes dominated by two parties. The overall effect is that there is no proportionality - indeed there is often gross disproportionality - between the number of first preference votes a party receives and the number of seats it wins. The unfair nature of the electoral system is illustrated by the following table which contains results from two federal elections in the recent past:

Year	Party	Nationwide % of first preference votes	% of House of Representatives seats
1990	Labor	39.4%	52.7%
	Coalition	43.4%	46.7%
1998	Labor	40.1%	45.2%
	Coalition	39.1%	54%

[8] The project is being undertaken by the Australian Curriculum, Assessment and Reporting Authority (ACARA). The curriculum can be downloaded from the Australian curriculum site at Australian Curriculum, Assessment and Reporting Authority, *The Australian Curriculum*, < http://www.australiancurriculum.edu.au/ > .

What is striking about these results is that clearly the 'wrong' party won both elections, in that the victor (that is, the party which obtained a majority in the House of Representatives) was less popular in terms of nationwide share of the vote than the vanquished. Furthermore, this is by no means a rare occurrence: Governments also came to power with fewer votes than were won by the opposition in 1954, 1961, 1969 and 1987.

The electoral system is particularly unfair to minor parties: In 1990 the 11.4 per cent of first preference votes (which indicate which party the voters truly wanted to represent them) won by the Australian Democrats yielded not one seat for the party – yet by contrast, the 8.4 per cent of first preference votes cast for the Nationals won them 9.5 per cent of the seats, and that was simply because of where those voters were located. In 2004 and 2007 the Greens won over 7 per cent of the vote but achieved no representation in the House, and when they won one seat in the House 2010, that was after winning 11.7 per cent of first preference votes nationwide. The result of this is that the major parties have won an astonishing 99.1 per cent of all House of Representatives seats held in the 26 elections since 1949.

Yet the disproportionate nature of our electoral system is not fully understood by voters, as the results of this next survey question indicate:

4. Under our current electoral system, when elections are held for the Commonwealth Parliament, do parties get seats in proportion to their percentage share of the national first preference vote?

Yes	33%
No	43%
Don't know	25%

The fact that 33 per cent of voters think that we have a proportional system perhaps reflects a belief that the electoral system could not be so unfair as to deny parties representation in proportion to their vote. The fact that an additional 25 per cent of respondents do not know whether the electoral system is proportionate or not and that only a minority of voters – 43 per cent - know that our system is not proportional, is indicative of the general lack of knowledge about the most fundamental aspects of our constitutional system.

What then is the attitude of voters to reform of the electoral system? Once made aware of the fact that the electoral system is *not* proportionate, a large majority of respondents were of the view that the system should ensure proportionality, as shown by the results of the second survey question on this issue:

5. Do you think that the electoral system *should* ensure that parties are allocated seats in Parliament in proportion to their percentage share of the votes they receive throughout Australia?

Yes	75%
No	25%

The results to this question indicate that an overwhelming majority of respondents were of the view that we should have an electoral system which ensures that voters' sentiments are accurately represented. The next question is, which electoral system would voters be likely to support? There several types of electoral systems, and a great many variants within each type, but broadly speaking electoral systems can be divided into four classes:

The first of these consists of single-member electorate systems - such as that currently used for the House of Representatives - where the country is divided into single-member electorates. As already demonstrated, such systems yield highly disproportionate results which do not accurately reflect the strength of parties among voters. As we have also seen they can also lead to a party winning a majority of seats with a minority of votes. However, they have the advantage that voters have an identifiable local representative.

The next type of system is known as the 'pure list' system, an example of which is provided by Israel. In this system there are no geographic electorates at all. Parties nominate lists of candidates in order of preference, and if a party obtains 20 per cent of the votes nationwide, the first 20 per cent of its candidates are elected. The advantage of such a system is that it is highly proportional. A disadvantage is that since there are no geographic electorates, voters have no identifiable MP who could be said to represent them. They also have the disadvantage that because of their control over the ordering of the lists, it is the parties rather than the voters, who control the identity of the MPs.

The third system, called Mixed Member Proportional, or MMP, examples of which operate in New Zealand and Germany, combines elements of the single-member electorate system and the pure list system. Under MMP half the seats in Parliament are elected from lists provided by parties and half from single-member electorates. The final composition of the legislature must, by law, reflect the proportion of the *list vote* that each party obtained. Therefore, once the results of the electorate seats are known, the seat allocations of each party are 'topped up' from their ordered lists (passing over any candidate who appeared on the list but who succeeded in gaining election in an electorate) so that their total number of seats reflects the percentage of the list vote they obtained. The system delivers a highly proportional result, and also provides voters with a local member. A drawback of the system is that the MPs who

are drawn from the party lists owe their place in Parliament to a decision by the party rather than the judgement of the voters.

The fourth type of electoral system is known as the Single Transferrable Vote (STV) system.[9] It has an enormous number of variants, but a common feature of all of them is that the country is divided into multi-member electorates. STV is already used in Australia, in elections for the Tasmanian lower house and the ACT legislature (in the latter two jurisdictions it is often referred to as the 'Hare-Clarke system'). [10] STV is also used for elections for the upper houses of all State Parliaments (except for Tasmania). It is also used in many other countries - an example being in elections for the lower house of the Irish Parliament (Dail Eireann). Under STV, the country is divided into a number of large electorates, each returning more than one member (usually three to seven). Parties may nominate as many candidates for each electorate as there are seats to be filled. Voters receive a ballot paper on which all the parties' candidates are listed. Voters indicate their preferences for individual candidates. The advantage of STV is that although it does not give as proportional a result as does MMP, the fact that it has multi-member electorates makes it far more representative than single-member electorate systems. Furthermore, the greater the number of seats in each electorate, the more proportionate the outcome so, for example, in a seven-member electorate, a party could win one of the seats with just over 12.5 per cent of the vote. Another advantage is that all members of the legislature are identifiable with a specific electorate, so voters have members who directly represent their locality. Furthermore, and uniquely among electoral systems, STV puts voters in the position where they can determine the fates of the various candidates put up by the *same party*, which puts voters in a far better position vis-à-vis party machines than either single-member electorate systems or systems involving party lists.

The survey sought to determine which electoral system respondents would be most willing to find support in a context where they could not be expected not know about the intricacies of various electoral systems. This it did by asking them to rank three objectives of a voting system in order of importance to them. The following were the results:

9 For an explanation of how STV works which is both amusing and very clear see the video at Tasmanian Electoral Commission, *Hare-Clark Explained* (2013), < http://www.tec.tas.gov.au/StateElection/index.html >.

10 The name combines those of Thomas Hare, who first devised the STV system in 1857, and Andrew Inglis Clark who persuaded Tasmania to adopt it in 1896.

6. Rank the following objectives of an electoral system *in order of importance* to you:

	1st	2nd	3rd
Fairness in accurately representing which political party voters support	42%	41%	17%
Producing a government formed by only one party	12%	18%	70%
Giving voters a local representative to whom they can take their concerns	46%	41%	12%

This question was of particular significance because it required voters to weigh the importance of objectives which conflict with each other in the sense that different electoral systems serve these objectives to a greater or lesser extent. Therefore, the electoral system which would be most likely to find favour is that which best serves the two objectives which received the highest priority from respondents - giving voters an identifiable local representative, and ensuring fairness of representation.

As indicated by the discussion of electoral systems above, although the single-member electorate system produces identifiable local representatives, it performs very poorly in serving the objective of fair representation. Pure list systems give the reverse result: they are highly proportional, but none of the MPs represent any particular locality. The MMP system gives a proportional result, and half the MPs represent electorates, but half do not. Although, because it is based entirely on geographical electorates, STV provides a level of representation which is somewhat less than that provided by MMP, it is still far more representative than the single-member electorate system, and becomes increasingly representative as the number of members per electorate is increased. Furthermore, as STV has no list MPs it has the advantage over MMP that the identity of all MPs is subject to approval by the voters, who can even express differing preferences for candidates from the same party. In addition, voters have identifiable MPs representing their electorate to whom they can take their concerns. In light of this, it is reasonable to conclude that STV would be most likely to find favour with voters if a referendum was to be held on changing the electoral system.

As indicated above only 12 per cent of voters ranked the ability of an electoral system to produce single-party government as being of primary importance - indeed it was ranked 3rd in importance by the vast majority (70 per cent) of respondents. Nevertheless, one can anticipate that fear of governmental instability would be the major focus of those opposing electoral reform. The next two questions directly

confronted respondents with the issue of coalition government. The first was as follows:

7. Which of these statements most closely reflects your view of governments formed by coalitions between political parties:

They are always unstable	15%
They are sometimes unstable	56%
They are usually stable	27%
They are always stable	2%

In other words, 71 per cent of respondents thought that coalition governments were always or sometimes unstable, while 29 per cent thought they were usually or always stable. The next question was prefaced by information designed to focus the attention of respondents on the link between proportional representation and coalition government:

8. Under the current electoral system for the House of Representatives, MPs are elected in single-member electorates. A single party usually gets enough seats to form government, but parties do not get representation in proportion to their support nationwide. This can even lead to a government coming to power with fewer votes nationwide than were received by the opposition. By contrast, under a proportional representation system, parties always get seats in proportion to their share of the national vote. Governments are usually formed by a coalition of parties which, in combination, will always represent a majority of voters. In light of the above, which of these systems do you prefer:

The current electoral system	42%
Proportional representation	58%

What is to be made of all these results in combination? First, they show that an overwhelming majority of respondents support the concept of proportional representation - in answering question five, 75 per cent of respondents indicated that the number of seats a party wins in Parliament should be proportionate to its share of its nationwide vote. After then being asked in question seven to express their opinion of coalitions (which elicited concerns about governmental stability on the part of 71

per cent of respondents) and subsequently being asked in question eight to express a preference between the current electoral system and proportional representation, proportional representation gained the support of 58 per cent of respondents. In other words, even after confronting the issue of coalition government and the concerns about stability that it raises, a clear majority of respondents still favoured the adoption of proportional representation.

It is nevertheless significant that support for proportional representation dropped from 75 per cent (question five) to 58 per cent (question eight), as it reinforces the likelihood that is this that supporters of the *status quo* would focus on if change was mooted. It would therefore be of great importance to address fears of coalitions leading to governmental instability in the minds of voters before a referendum on electoral reform was held.

There is a wealth of research from other countries which indicates that there is no causative link between proportional representation and governmental instability. In the most comprehensive study, a tabulated ranking of countries listing their electoral systems and durability of governments indicated that whereas some countries (for example, the United Kingdom and Jamaica) using disproportionate single-member constituency systems produce long-lived governments, other countries using the same system (such as India and Papua-New Guinea) are afflicted with severe governmental instability. Conversely, while some countries using proportional representation (such as Italy and Israel) are prone to instability, others (such as Switzerland and Austria) have governments that are more stable and change less frequently than those in the United Kingdom.[11] Another telling statistic is that since its foundation in 1949, the Federal Republic of Germany, which uses proportional representation has had 18 elections, almost exactly the same number as the 17 elections held in the same period in the United Kingdom, which uses the non-proportional, single-member electorate system. In other words, the data emphatically indicates that there is no causative relationship between proportional electoral systems and governmental instability.

Our current electoral system is manifestly unfair, and in the absence of any electable alternatives serves the interest of the Labor-Coalition duopoly, rather than providing a true democracy. The results of the survey indicate that there is widespread support for a reform of the electoral system.

[11] David Farrell, *Electoral Systems – A Comparative Introduction* (Palgrave Macmillan, New York, 2001) 194-6.

C *A Bill Of Rights*

The first question relating to a Bill of Rights was designed to ascertain respondents' attitudes to the idea of 'rights' - that is, as fundamental freedoms which are superior to laws enacted by Parliament:

9. Which of these general statements of principle most closely accords with your views:

A Parliament elected by voters should have the power to enact laws that limit or remove any individual rights and freedoms	19%
There are certain fundamental individual rights and freedoms which a Parliament elected by the voters should not be able to unreasonably limit or remove.	81%

This result indicates very strong support for the essential concept underlying a Bill of Rights - that the individual has certain entitlements which ought to be respected, even in the face of the democratic will. The importance of the fact that an over whelming majority of respondents answered as they did cannot be overstated, because it constitutes a recognition of a belief that are (or should be) limits to democracy, which is a critical aspect of the argument that a Constitution should have a Bill of Rights. Respondents obviously recognise that individual rights cannot be left to the mercy of the government - even one that is democratically elected. As Geoffrey Robinson pithily states[12]

> [democratic governance] has never meant that parliament can do anything it likes just because MPs happen to have been elected, or that governments can do anything because they are backed by a majority of elected MPs.

The next question asked respondents to identify which of among three remedies for a breach of rights they thought would be most effective in bringing the breach to an end.

[12] Geoffrey Robertson, *The Statute of Liberty: How Australians Can Take Back Their Rights* (Random House, Sydney, 2009) 21.

10. If a person's rights are being infringed by the government, which of these courses of action do you think is most likely to quickly bring a halt to the infringement:

Lobbying Parliament or a candidate when the next general election occurs	14%
Seeking an order from the courts	66%
Petitioning the government	20%

These results indicate a recognition that, as Geoffrey Robertson states,[13] the availability of judicial review as a mechanism for the vindication of rights

> …means justice for people whose particular plight would ever be noticed by Parliament, or prove interesting enough to be raised by newspapers or a constituency MP. Far from undermining democracy by shifting power to unelected judges, it shifts power back to unelected citizens: democracy from its inception has relied on judges ('unelected' precisely so they can be independent of party politics) to protect the rights of citizens against governments that abuse power.

The next question was designed to discover what respondents knew of the current level of rights protection in the Commonwealth Constitution:

11. To your knowledge does the Commonwealth Constitution currently protect any fundamental human rights by empowering the courts to invalidate laws which unreasonably limit them?

Yes	36%
No	13%
Don't know	51%

Two things about these results are noteworthy: First, only 36 per cent of respondents were aware of the fact that we do have constitutionally-embedded rights, while a majority (64 per cent) either thought that the Constitution does not contain such rights or were unsure. This is perhaps unsurprising, given that, as we have seen in answer to the very first question in the survey, a majority of respondents said they had never been taught about the Constitution. However, the second and more significant

[13] Ibid 8.

implication of the results is that the existence of that 64 per cent means that a large proportion of Australians think that the inclusion in our Constitution of a full Bill of Rights would mean the conferral of a new power on the judiciary whereas the courts have, since the coming into force of the Constitution, had the power to invalidate laws which infringed upon such rights as it protects.

The next question began by disclosing to respondents the fact that the Constitution protects some rights - in other words, revealed to those who were unaware of it that the courts already have the power to invalidate laws which infringe certain rights. Then, in light of that information, respondents were asked whether they thought that the Constitution should protect the full range of rights which Australia has agreed to uphold by signing international human rights documents:

> 12. Currently the Constitution gives express protection to five rights: freedom of religion, freedom of inter-State commerce and movement, fair compensation when property is acquired by the Commonwealth, jury trials under certain Commonwealth laws and non-discrimination on grounds of residence in a different State. The Constitution also already empowers the courts to invalidate legislation and government action which unreasonably limits these rights. Should the existing rights-protection by the Constitution be expanded so as to include a Bill of Rights which protects the full range of fundamental human rights that are protected by documents such as the Universal Declaration on Human Rights, which Australia has undertaken to uphold internationally?
>
> | | |
> |---|---|
> | Yes | 59% |
> | No | 14% |
> | Not sure | 28% |

The fact that 59 per cent of respondents supported the idea of comprehensive protection of rights is significant, in that it indicates a clear majority in favour of such a reform. However it is also noteworthy that this is significantly less than the 81 per cent of respondents who, in answer to question 1, agreed that there are certain rights that should be protected against derogation by Parliament. This difference is difficult to explain.

One explanation is that while the results to question nine indicate that respondents are supportive of the concept of constitutional rights in the abstract, the fact that the results to question 11 indicate that most respondents did not know that the Constitution protects certain rights by empowering the courts to invalidate legislation which infringes them could mean that they believe that the amendment of the Constitution to protect the full range of rights would confer a novel power on the

judiciary which is clearly not true. Yet this explanation is not very satisfactory, because question 12 was prefaced by a statement which explained that the Constitution already protects certain rights.

Another explanation might be that people consider that protection of the rather eclectic set of rights in the Constitution is all we need and that that is why only 59 per cent of respondents wanted to see an expansion of rights. Yet, as we shall see, when respondents were asked in the next question whether they wanted specific rights included, large majorities (often in excess of 90 per cent) supported the inclusion in the Constitution of many rights which are not currently protected. It is also encouraging that in answering question 10, 66 per cent of respondents agreed that seeking an order from a court is the most effective way of obtaining redress for an abuse of human rights, and this therefore gives grounds for confidence that a negative campaign focusing on this issue would be able to be countered.

The next question asked voters to consider what rights should be included if protection for the full range of rights was included in the Constitution. The rights listed in this question are those found in documents such as the *Universal Declaration of Human Rights* and in the *Canadian Charter of rights and Freedoms* and in the Bill of Rights contained in the South African Constitution, both of which closely follow the *Universal Declaration.*

13. If the Constitution had a full Bill of Rights, which of the following would you include (indicate Yes / No for each) the right

not to be subject to arbitrary arrest (arrest without reasonable suspicion of having committed a crime)	82%
not to be subject to arbitrary search	66%
to be informed of reasons for arrest	95%
to contact a lawyer upon arrest	94%
not to be discriminated against on grounds of race	94%
not to be discriminated against on grounds of gender	95%
not to be discriminated against on grounds of religion	91%

not to be discriminated against on grounds of sexual orientation	90%
not to be discriminated against on grounds of disability	94%
to a fair trial by an independent judiciary	98%
to life	90%
not to be subject to torture or to inhumane treatment	95%
to vote	92%
to stand for election to public office	87%
to privacy	93%
to fair compensation when property is compulsorily acquired	95%
to freedom of association	82%
to freedom of expression	93%
to freedom of religion	90%
to freedom of movement	91%

0

These results indicate that there is a general recognition that if a broader Bill of Rights was included in the Constitution, it should include the range of rights that have come to be accepted as universal in the post-World War II era. The results also indicate very high levels of support – in most cases from over 90 per cent of respondents - for most of those rights, although the lower levels of support for the rights not to be subject to arbitrary arrest or search is an odd anomaly given their importance.

Clearly there is still educative work to be done to explain to voters that effective vindication of rights depends upon the power of the courts to invalidate laws which infringe them, and also that such a power already exists in our Constitution, albeit in relation only to a handful of rights, and that therefore the inclusion of a full range of rights would increase the circumstances in which the courts could grant a remedy to complainants, but would not confer a new function on the courts.

D *An Independent Speaker*

One might think that question time, where MPs have the opportunity to ask questions of ministers relating to their areas of responsibility, would provide a means of holding the government to account. Debate in both houses of Parliament is conducted according to Standing Orders which are administered by the Speaker in the case of the House of Representatives. Unfortunately, there is no rule that *compels* ministers to answer questions, and Speakers do not compel them to do so either. Also unfortunately, and unlike in the United Kingdom, we do not have a truly independent Speaker. The Speaker is elected by a simple majority of the House – which therefore means, they are elected by the government of the day, and governments – both Coalition and Labor - have used their majorities in the House to elect control the office which is supposed to control them: During the 1996 election, John Howard promised he would ensure a 'completely independent Speaker', yet within two years of coming to power the government forced Speaker Halveston to step down after becoming frustrated at his impartiality in enforcing discipline on both Coalition and Labor MPs.[14] Labor too has used the speakership as a political football: In 2011 the then government pressured Speaker Jenkins into resigning in order to gain an additional vote on the floor of the House, and installed Peter Slipper as Speaker. Matters did not improve after the Coalition government came to power in 2013, and Bronwyn Bishop was elected Speaker. Bishop's continued to attend Liberal party room meetings – in contrast to the previous Speaker, Anna Burke. In 2014 Labor moved a motion of no confidence in the Speaker, pointing to the fact that all of the 98 members of the House whom she had ejected from the chamber were from the Opposition.[15] The motion was defeated because the Speaker had the support of the government majority in the House, but the fact that the event occurred indicates the extent to which the office as it exists in Australia is a far cry from the UK, where a Speaker relinquishes ties to his or her party, does not sit as a member of his or her caucus, and is expected to be completely neutral in his or her treatment of MPs. It is therefore not surprising that ministers can evade questions posed to them at question time, because the Speaker, elected by their party, will certainly not force them to do so.

A solution to the issue was proposed by Kevin Rozzoli who served as Speaker of the New South Wales Legislative assembly for seven years.[16] Although writing about reform of the New South Wales Parliament, his proposal would be equally applicable to the Commonwealth Parliament: He proposed that once chosen by a secret ballot of MPs, the Speaker would then become a 'member at large', serving a notional

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14 Gerard Henderson, 'PM's backflip on Speaker reform' (*The Courier Mail*, Brisbane), 9 March 1998.

15 Steven Scott, ''Worst Speaker in history' survives no-confidence vote by Opposition', (*The Courier Mail*, Brisbane), 28 March 2014, 11.

16 Kevin Rozzoli, *Gavel to Gavel - An insider's view of Parliament* (UNSW Press, 2006, Sydney, 2006) 194-201.

electorate until retirement, while his or her actual electorate seat would automatically be filled by a nominee of the party for which the Speaker had stood, who would then contest the seat in the usual way at the next election. This scheme would ensure that the Speaker was immediately elevated above party politics, without depriving his or her former constituents of political representation. The other critical aspect of Rozzoli's recommendation was that a Speaker should be able to be removed only by a two-thirds majority of Parliament - which in practical terms would mean only with the concurrence of both government and opposition.

The results of the survey questions relating to the lack of independence of the Speaker, and the fact that ministers cannot be compelled to answer questions raised important concerns in the minds of survey respondents:

14. Currently the Speaker of the House of Representatives, whose role it is to control debates and the behaviour MPs, is elected and dismissed by a simple majority of MPs. This means that the party which is in government effectively controls who will be Speaker. Requiring a larger majority would mean that support of more than one party was needed to appoint or dismiss the Speaker. Which of the following methods do you think should be used to elect and dismiss the Speaker:

The current system - by a simple majority of MPs.	40%
We should have a new system which requires that a 2/3 majority of MPs should elect the Speaker.	60%

15. Should Ministers be required to answer questions in Parliament?

Yes	96%
No	4%

16. Should a refusal by a Minister to answer questions in Parliament be treated as an instance of misbehaviour by the Minister, and be subject to a penalty?

Yes	78%
No	22%

The very substantial majorities believing that minister should be compelled to answers questions and should face sanctions if they do not no doubt reflect the general disenchantment felt by Australians in relation to the political process in general and the evasiveness of politicians in particular.

E *Ministerial Accountability*

The power of parliamentary committees to question ministers holds out – at least in theory – more promise as a mechanism for ensuring accountability of the government. However the usefulness of a committee being able to secure the attendance of witnesses (including ministers), to compel them to give answers to questions and to produce documents depends entirely on the committee having sanctions at its disposal when witnesses are recalcitrant. According to Harry Evans, who served as Clerk of the Senate for 21 years, the Senate has the power to issue a summons to compel witnesses to appear before its committees and to produce documents,[17] although usual practice is for an invitation to be sent to the person to attend, and for them to attend voluntarily.[18]

Yet ministers not uncommonly refuse to attend committees, and also instruct public servants not to attend and / or not to answer particular questions.[19] Perhaps the most striking recent example of this in 2014 was when Minister for Migration, Scott Morrison, refused to answer when asked by a Senate committee asked how many asylum-seeker boats had been intercepted in Australian territorial waters. The minister also refused to provide the committee with documents it requested. But this type of conduct is by no means rare: A number of examples from the past decade include John Howard's refusal to allow political advisors employed in his office and in that of the then defence minister Peter Reith, to appear at the inquiry into the Children Overboard affair,[20] the prohibition against a defence force officer appearing before the inquiry into what knowledge ADF personnel had of torture of Iraqi prisoners at Abu Ghreib,[21] and the prohibition against public servants appearing before the inquiry into the AWB scandal.[22]

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17 Harry Evans (ed), *Odgers' Australian Senate Practice* (Department of the Senate, 11th ed, Canberra, 2004) 30, 57 and 377.

18 Ibid 378.

19 Ibid.

20 Tony Harris, 'The Buck Stops Over There', *Australian Financial Review* (Sydney), 19 March 2002, 62 and Patrick Walters, 'A fearless public servant', *The Australian* (Sydney), 17 August 2004, 4.

21 Alexandra Kirk, ABC Television, *The World Today*, 1 June 2004 (Tanya Nolan) < http://www.abc.net.au/worldtoday/content/2004/s1120461.htm >.

22 See Samantha Maiden, 'Gag in Senate illegal, clerk warns', *The Australian* (Sydney), 12 April 2006, 4; and Ross Peake, 'Cover-up claim as officials gagged', *Canberra Times* (Canberra), 14 February 2006, 2.

This is not how people expect the system to work. The results obtained to the next two survey questions on ministerial responsibility were as follows:

17. Parliamentary Committees scrutinise legislation, conduct public inquiries on matters referred to them by Parliament as a whole and hold the government to account by asking questions of Ministers and public servants. In your view, should Ministers and public servants be obliged to answer questions put to them by parliamentary committees?

Yes	96%
No	4%

18. Should Ministers who fail to answer questions put by parliamentary committees, or who instruct public servants not to do so, face penalties?

Yes	89%
No	11%

Clearly there is an enormous gap between how respondents want parliamentary government to work, and how it works in practice.

Although the question of whether a refusal to answer questions put by a parliamentary committee amounts to contempt has never been litigated in relation to the Commonwealth Parliament, it is very likely that a court would find that to be the case. The precedent for this is provided by a case which arose in relation to the Legislative Council of the New South Wales Parliament, which had suspended a government minister for refusing to provide documents requested by a parliamentary committee. In *Egan v Willis*,[23] the High Court held that under the common law, the Legislative Council enjoyed such privileges as were reasonably necessary to enable it to discharge its functions as a legislative chamber operating as part of a system of responsible government. These privileges included the power to compel a minister to produce documents requested by the chamber. The court therefore found that the Legislative Council had the power to demand that the Treasurer produce the documents, and to suspend him from the chamber when he refused to do so.

[23] (1998) 195 CLR 424.

So if, as seems very likely, a minister could be punished for contempt if he or she refused to answer questions put by a committee, why do ministers continue to engage in such conduct? It is here that legal and political considerations become intertwined. First one needs to note that although a minister who refused to answer questions put by a committee could colloquially be said to be 'in contempt of the committee', the correct legal position is that he or she would be in contempt of the house that established the committee, and it is only the house as a whole, not the committee (and still less any individual Senator whose question was not answered) who could bring contempt proceedings. The practical implication of this is that whether proceedings are brought depends upon whichever party controls the house voting to do that – and unfortunately, neither of the two major blocs, Labor and Coalition, see it as being in their long-term interests to punish each other's ministers.

This was starkly revealed in 2002, when the Senate was holding an inquiry into the Children Overboard affair. Peter Reith, who had been Defence Minister at the time the events occurred, refused to give evidence before the Senate committee, and the cabinet also ordered that his staffers not comply with the committee's requests to attend. At the time, the Coalition lacked a majority in the Senate, which meant that Labor, in conjunction with the minor parties, had sufficient numbers in the Senate to compel attendance, and could have used their majority in the Senate to initiate contempt proceedings if the committee met with recalcitrance. If the legality of that had been contested, the matter could have been tested in the courts and, based on the precedent of *Egan v Willis*, Reith would have been found to have been in contempt. The reason that this did not occur was that despite the fact that the Australian Democrats and Greens supported such a step, Labor refrained from using its Senate votes to exercise the contempt powers. [24] This demonstrates the political cynicism that afflicts what is the two-party system in Australia: As a party which might come to power in the future, Labor was unwilling to establish the precedent that ministers, advisors and public servants should be compellable witnesses before legislative committees.[25]

> There is clearly a need to enhance the power of parliamentary committees to hold governments to account. Any reform of the Constitution must put the power of committees to secure the attendance of witnesses and the imposition of penalties in

[24] See for example the failure of the Labor-controlled committee inquiring into the children overboard affair to summons political advisors who had been serving in the offices of the Prime Minister and the Minister of Defence – Megan Saunders, 'Truth is out there, somewhere', *The Australian* (Sydney), 25 October 2002, 12.

[25] For discussion of this political dimension of this issue see Laurie Oakes, 'Hypocritical oath', *The Bulletin* (Sydney), 13 March 2002, 17; Margo Kingston, 'Labor backdown opens black hole of accountability', *Sydney Morning Herald On-line* (Sydney), 1 August 2002, < http://www.smh.com.au/articles/2002/07/31/1027926912621.html >; Sarah Stephen, 'Refugee drownings: Labor sabotages inquiry', *Green Left Weekly*, 11 September 2002 < https://www.greenleft.org.au/node/26737 > and Margo Kingston, 'Labor's latest travesty', *Sydney Morning Herald On-line* (Sydney), 23 October 2002, < http://www.smh.com.au/articles/2002/10/23/1034561546910.html >.

> cases of non-cooperation on a legal, rather than a political, foundation. The Constitution should explicitly mention parliamentary committees, should state that any member of a committee has the right to subpoena witnesses and require them to answer questions and present documents. It should provide that individual committee members should be able to initiate contempt proceedings against recalcitrant witnesses in the courts, which should have the power to impose penalties. This would reverse the power imbalance that exists between legislature and executive, and would make government truly responsible to the legislature.

Of course it may on occasion be true, that a question put to a minister or public servant by a parliamentary committee would, if answered, reveal information that should not be made public. One can think of any number of circumstances in which the revelation of military, intelligence, diplomatic or economic information could cause damage to the national interest. How should the legal system balance scrutiny of the government by Parliament against the need for the government to keep certain matters confidential?

The key issue is how to distinguish between public interest immunity claims which are genuine and those which are motivated simply out of a desire on the part of the government not to reveal information which it finds politically embarrassing. To take the example of Scott Morrison's refusal to provide information about refugee boat arrivals to the Senate, what objective basis was there for claiming that the number of boats that have arrived is something which it is not in the public interest to disclose? Certainly none was disclosed. This is because under current practice, when ministers claim public interest as the ground for refusing to provide information requested by parliamentary committees, the claim is accepted at face value - and there is no instance of a house of Parliament challenging such a claim.

Clearly some apolitical process is needed to determine whether claims of public interest immunity are well-founded. The current situation, which leaves the executive branch of government free to claim to public interest immunity without challenge, is unacceptable.

I would argue that this could satisfactorily be achieved by the application of the doctrine of public interest immunity, which is already acknowledged by the law of parliamentary privilege as a valid exception to the general principle that the executive must provide information requested by the legislature.[26] The doctrine was applied in *Egan v Chadwick*,[27] in which the New South Wales Court of Appeal held that the obligation of the executive arm of government to produce documents might, depending on the circumstances, be qualified by considerations of public interest immunity - in other words, that there were circumstances where the interest of cabinet

[26] Evans, above n 17, 464.
[27] (1999) 46 NSWLR 563.

confidentiality might outweigh Parliament's right to scrutinise the government. In determining what exceptions to the power of a chamber there might be, the court applied a test of what was reasonably necessary for a legislative chamber to discharge its role within a system of responsible government. Thus the court held that the operation of responsible government requires a balancing of interests: Although responsible government requires parliamentary scrutiny of the executive, the executive cannot discharge its role under the system without the freedom to deliberate on policy matters in private.

Why then has there never been a challenge by a house of the Commonwealth Parliament to a claim of immunity by the executive? Surely, given the precedent set in the context of a State Parliament in *Egan v Chadwick*, there would be a high probability that a court facing the same question arising at Commonwealth level would apply the same test? The reason for this is the same which applies where ministers refuse to answer questions – it is in the interest of neither of the major political blocs to go to court to challenge the misuse of the public interest defence, as both the Coalition and Labor in opposition know that they will find the claim useful once back in office.

As an example of a system where a legislature has power to subpoena members of the executive, and to seek the assistance of the courts in cases of non-compliance, we can turn to the United States where, despite not having a parliamentary government system such as we do, committees of Congress enjoy far greater oversight powers over cabinet ministers than does the Australian Parliament. In *United States v Nixon* [28] the Supreme Court held that the executive cannot be compelled to give information if the possibility that communications would be subject to disclosure would impair the confidentiality and candour of policy deliberations within the executive.[29] However, the court expressly affirmed that the executive's mere claim of privilege (the equivalent of public interest immunity in Australia) is not determinative – any case involving such a claim will be decided by the courts,[30] balancing the competing demands of the interest to be served by disclosing the information against the executive's claims to confidentiality.[31] In *Nixon* the court held that claims of executive privilege will be particularly strong in relation to information relating to foreign affairs, diplomacy and national security,[32] but even in a case where a claim of privilege is based on state secrets, the executive must satisfy the court that such an issue is involved, if necessary by providing evidence to the court *in camera*.[33] The

28 418 US 683 (1974).
29 Ibid 705 and 708.
30 Ibid 703.
31 Ibid 711-12. See also *Senate Select Committee on Presidential Campaign Activities v Nixon* 498 F.2d 725 (D.C. Cir 1974) and *United States v A T & T* 521 F.2d 384 (D.C. Cir 1976) and 567 F. 2d 121 (D.C. Cir 1977).
32 418 US 683 (1974) 710-11.
33 *United States v Nixon* 418 US 683 (1974) at 713-14. See also *United States v Burr* 25 Fed. Cas. 187 (1807) 190-92 and *United States v Jolliff* 584 F. Supp 229 (1981). The most recent instance

Supreme Court re-stated these rules on executive privilege in *Nixon v Administrator of General Services*,[34] in which it held that there was no general undifferentiated right to executive privilege,[35] and that a claim of privilege would succeed only where the executive could show that disclosure would significantly impair the executive branch's ability to achieve its constitutional function.[36] This line of cases thus demonstrates that the concept of executive privilege exists, but also that it is by no means a trump that will defeat any congressional request for information.

It should not however be thought that, because the courts have the ultimate role in deciding inter-branch disputes, contests between the legislature and the executive are frequently the subject of litigation in the United States. The legislature generally obtains the information it seeks, simply because of the executive pays a political price of appearing to have something to hide in instances where it claims executive privilege.[37] In most cases, the two branches reach a political compromise,[38] and it is a quite normal feature of the political process in the United States for members of the executive, including members of the cabinet, to appear voluntarily before public hearings of congressional committees,[39] or for information to be provided in a confidential briefing to members of a committee.[40] Disputes are thus almost always settled by negotiation between Congress and the administration.[41] The fact that the judicial branch is the ultimate determiner of the degree to which the executive is accountable has not led to the courts being confronted with policy questions that they are incapable of deciding without becoming involved in party-political disputes. It is a matter of supreme irony that the legislative branch in the United States has far greater power than is the case under the system of responsible government we have in Australia, which supposedly subjects the executive to legislative control.

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of an *in camera* evaluation of the validity of a claim of executive privilege was in 1990, when Federal District Court Judge Greene privately viewed the personal diaries of former President Ronald Reagan, the release of which had been sought by former National Security Advisor, John Poindexter, when he was tried for offences committed as part of the Iran-Contra affair. Having reviewed the diaries, Judge Greene held that they added nothing of substance to evidence already before the court, and upheld the claim of executive privilege – see Mark Rozell, *Executive Privilege: The Dilemma of Secrecy and Democratic Accountability* (Baltimore, Johns Hopkins Press, 1994) 127-30.

34 433 US 425 (1977).

35 Ibid 446-47.

36 Ibid 443.

37 On the political ramifications of claims of executive privilege see Louis Fisher, 'Congressional Access to Information: Using Legislative Will and Leverage', 52 (2002) *Duke Law Journal* 323.

38 Ibid 325.

39 Ibid 394-401. Although an incumbent President has never been summonsed to appear before a congressional committee, President Ford agreed to do so voluntarily to answer questions relating to his pardoning of former President Nixon - see Rozell, above n 33, 90.

40 Ibid 150.

41 William Marshall, *The Limits on Congress's Authority to Investigate the President*, (2004) *University of Illinois Law Review* 781, 806-08.

The idea of the courts determining such cases, rather than the executive being judge in its own cause, found favour with respondents to the survey, as demonstrated by the responses obtained to the final question relating to responsible government:

> 19. If a Minister says that they or public servants working for them should not answer questions put by a parliamentary committee because the answer might disclose matters which it is in the public interest to keep confidential (such as internal government deliberations or information relating to national security), then which of the following should happen:
>
> | | |
> |---|---|
> | The Minister's statement should be accepted without question | 15% |
> | The courts should consider whether the Minister's claim is valid, in a closed (non-public) hearing if necessary. | 85% |

The outcome of the balancing process undertaken by the courts would depend upon the facts of each case, however one would expect that cases involving foreign affairs and national security would be ones in which a high degree of deference would be shown to the executive once it proves its claim – perhaps at *in camera* proceedings before the parliamentary committee seeking information. Similarly, discussions between members of the cabinet, and documents which were genuinely related to cabinet proceedings,[42] would also be likely to remain immune from legislative inquiry. A court adjudicating upon such issues might find that the leading of evidence or the production of documents is wholly covered by executive privilege, or it might allow a parliamentary committee to receive the evidence subject to conditions – for example that the evidence be presented *in camera*[43] and only before the members of the committee unassisted by parliamentary staff, with prohibitions on the recording of the evidence, as happens in the United States. The key point is that public interest

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42 Confidentiality would thus not apply to a document merely because it had been physically present during a cabinet meeting – for an example of trolley-loads of documents being wheeled into cabinet meetings simply in order for it to be said that they were 'cabinet documents' see Greg Roberts, 'To hell with the critics' *The Australian* (Sydney), 26 August 2006, 23.

43 A procedure which is already recognized as being available to committees – see Evans, above n 17, 379. A similar procedure (colloquially named the 'crown jewels' procedure) operates in the United Kingdom, where members of parliamentary committees are permitted to view documents which are of diplomatic, military or commercial sensitivity, subject to negotiated restrictions on publication. For a discussion of this see the First Report of the Liaison Committee of the House of Commons, HC 323, 1996-97, *The Work of Select Committees*, < http://www.publications.parliament.uk/pa/cm199697/cmselect/cmliaisn/323i/lc0104.htm >.

immunity should not be conceived of as a trump to be waved in the face of parliament or the courts and permitting the executive to avoid scrutiny. The fundamental principle which should underlie the doctrine of ministerial accountability to Parliament is that for the system to operate effectively, ministers cannot be the final arbiters of what information they should or should not disclose to the Parliament to which they are responsible.

F *An Australian Republic*

Despite being the least important change that could be made to the Constitution – in the sense that it would be of purely symbolic value, and would affect the operation of the Constitution neither for better nor for worse – the question of whether Australia should become a republic has gained more public attention than the other, far more significant, reforms which were the subject of this survey. Nevertheless, symbols have their own importance, and in that regard, a change to a republic would be significant.

Many countries in the international Commonwealth have become republics with scarcely a ripple of concern on the part of their inhabitants. This is unsurprising, because the substitution of a President as head of state in place of the monarch is easy to achieve and can be done in such a way as to have no practical effect on how the Constitution operates.

The reason why the issue has become so controversial in Australia is that lack of knowledge among voters about how the current Constitution works has resulted in a key impediment to reform in this area being the fear that a President might use his or her powers in breach of the conventions which currently control the exercise of powers by the Governor-General.

This raises the question of why we have conventions. Why operate a system where the law says one thing while a convention, which everyone regards as binding, says something completely different – indeed, can say something complete *opposite* to what the law says? Why not change the Constitution so that the law accords with reality – in other words, so that the unenforceable conventions are turned into enforceable law? Part of the problem is that many people have an almost mystical reverence for the conventions, believing that their content is uncertain, and that they are therefore incapable of being expressed as legal rules (or 'codified') in the Constitution. An alternative – and inconsistent argument – is if they were put into law they would 'lose their flexibility', and that the Governor-General would not be able to respond to constitutional crises. Neither of these arguments stands up to scrutiny: If the conventions are sufficiently certain to be capable of comprehension and operation, they are capable of being written down as law. If there are any that are uncertain then surely, given the importance of the Constitution, an effort should be

made to clarify them, so that they can be expressed with certainty? As to the argument relating to flexibility, if the conventions were codified, they would be no more prone to failing to address an unexpected situation than any other rule in a Constitution. That risk is present whenever statute law is drafted. It should not stand as a deterrent to converting these important constitutional practices into law.

Therefore, irrespective of whether we remain a monarchy, benefit would be derived from codification. Contrary to the views of those opposed to codification, it is by no means difficult, nor is it very unusual. Several Commonwealth countries, including some that have maintained the office of Governor-General,[44] and others that have become republics with a figurehead President exercising the powers formerly exercised by a Governor-General,[45] have codified the reserve powers.

Codification was one of the issues put to respondents to the survey, and the result was a significant majority in favour of codification:

> 20 The Governor-General represents the Queen in Australia and is appointed and dismissed by the Queen acting on the advice of the Prime Minister of the day. The Governor General's powers are stated very broadly in the Constitution, and most are left to informal rules, called 'conventions'. These rules are not enforceable by the courts - they rely wholly on the political consequences which would occur if they were breached. Do you think that these powers, and the conditions under which they are exercised, should be expressly included as legally enforceable rules in the Constitution?
>
> | | |
> |---|---|
> | Yes | 64% |
> | No | 36% |

Cleary the idea of codification, and the fact that it would make fundamental rules of the Constitution both certain and enforceable, found favour with respondents.

So far as a republic is concerned, opinion is evenly divided:

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44 See, for example, the *Constitution of Barbados* 1966, Arts 61, 65, and 66; the *Constitution of Bahamas* 1973, Arts 73, 74 and 66; the *Constitution of Grenada* 1973, Arts 52 and 58; and the *Constitution of Jamaica* 1962, Arts 64, 70 and 71.

45 See, for example, the *Constitution of Dominica* 1978, Arts 59, 60 and 63; the *Constitution of Malta* 1964, Arts 76, 79, 80 and 81 and the *Constitution of Mauritius* 1968, Arts 57, 59 and 60.

21. Do you think Australia should become a republic - that is, with a President, - appointed or elected by Australians - exercising the powers which are currently exercised by the Governor-General on behalf of the Queen?

Yes	52%
No	48%

There is therefore certainly no great pressure for a move to a republic. Indeed, support for a republic has declined over the past decade. Possible causes for this shift in popular opinion are disinterest in the issue following the defeat of the republic referendum in 1999 and an increase in support for the monarchy following the marriage of Prince William and the birth of his heir. It would therefore be true to say that despite the fact that the republic issue has been the one most commonly discussed over the last 20 years, it is the one least likely to succeed at referendum.

More divisive among respondents was the question of how a President should be chosen, assuming Australia did indeed become a republic. The responses obtained to that question were as follows:

22. If Australia was to become a republic, which of these methods should be used to choose the President:

Election by the voters	73%
Appointment by the Prime Minister	5%
Election by Parliament	16%
Some other method	6%

These results are consistent with a number of surveys done over the past two decades, which have shown that voters would have an overwhelming preference for a popularly elected President were Australia to become a republic.[46]

The key objection advanced by those who are opposed to direct election of a President is that because the holder of that office would have been directly elected, they might come to believe that they had a popular mandate equal to that of the Prime

[46] See John Warhurst 'The Trajectory of the Australian Republic Debate', *Papers on Parliament No. 51*, June 2009 < http://www.aph.gov.au/About_Parliament/Senate/Research_and_Education/pops/pop51/warhurst > who cites opinion polls which show that 80% of respondents favoured a directly-elected President if Australia was to become a republic.

Minister, and that this in turn might tempt the President to misuse the powers of the office contrary to the conventions to which the Governor-General is subject. This was of concern to a majority of respondents to the survey:

> 23. Some people are concerned that if the voters directly elected a President, the President might be tempted to use the fact that they were elected by the people to use the powers of the office contrary to the non-legal rules (conventions) which apply to the office. Is that a concern for you?
>
> | | |
> |---|---|
> | Yes | 56% |
> | No | 44% |

However, this concern is groundless: If we had a directly elected President, the Constitution could have a provision put in it to the effect that the President is subject to the same conventions as was the Governor-General. If the concern still was that, because conventions are not laws and are therefore not enforceable by the courts, the president might break them, the obvious solution would be to codify the conventions. When this proposal was put to respondents, an overwhelming majority were of the view that codification would resolve the issue:

> 24. If you are concerned that a directly-elected President might use his or her powers contrary to convention, would your concerns be met if these conventions were changed into legally-enforceable provisions in the Constitution?
>
> | | |
> |---|---|
> | Yes | 71% |
> | No | 29% |

This result is consistent with that obtained to question 20 – indeed, the proportion of respondents in favour of codification rose from 64 per cent in Question 20 to 71 per cent in Question 24, which indicates that the benefits of codification become all the more apparent when considered in the light of having an elected President.

The results to this part of the survey indicate that respondents have more enthusiasm for codification of the conventions which regulate the powers of the Governor-General than they have for a change to a republic. This is gratifying, because codification is by far the more important reform. It is also notable that, as has been demonstrated by many surveys in the past, Australians are wedded to the idea of an elected presidency should we one day become a republic, and that codification is seen as a particularly beneficial in those circumstances.

IV ACHIEVING CONSTITUTIONAL REFORM

There is no doubt that the Commonwealth Constitution is in dire need of fundamental reform. The level of interest displayed by respondents to the various constitutional reform issues canvassed in the survey, and the key negative arguments that will need to be countered, are as follows:

Issue	**Level of interest as revealed by survey**	**Benefits**	**Key issues to be overcome**
Proportional representation	High	Fairness to voters. Labor / Coalition stranglehold over politics broken.	Apprehension about coalition government - rebuttable by referring to empirical data from other countries which use proportional representation.
Full Bill of Rights	High	Individual rights given constitutional protection. Congruence with international human rights conventions Australia has signed.	Apprehension about role of the courts - rebuttable by referring to the fact that the courts have had the power to invalidate legislation for breach of constitutional rights since inception of Constitution in 1901.
Speaker elected and dismissed by 2/3 majority of Parliament, and serves until retirement.	High	Independence of Speaker leading to fair treatment of MPs from all political parties.	None of significance - representation of voters in Speaker's electorate could be ensured by having the Speaker's seat filled by an MP from the same party, with subsequent elections carried on in the normal way.

Ministers able to be compelled to answer questions by any member of a parliamentary committee and subject to sanction if they do not. Exemptions determined by the courts.	Very high	Responsible government would operate as it is supposed to.	None of significance - but major parties will oppose this measure because it would enormously enhance scrutiny of government.
An Australian republic.	Very low	Of purely symbolic importance.	Misrepresentation by monarchists of relationship between Queen and Governor-General - ie false argument that we already have an Australian 'head of state'. Fear that an elected President might interfere in government, contrary to convention.
Codification of conventions regulating powers of the Governor-General.	High	Clarification of role of Governor-General. Likely to increase support for a republic if voters were sure that an elected President would be bound to follow enforceable rules of law.	Argument that conventions give flexibility to the Constitution and / or are impossible to state precisely - rebuttable by referring to reforms in other Commonwealth countries.

A critical lesson to be learned from the survey is that the Australian public is not as averse to constitutional reform as has commonly been assumed - provided that sufficient background information is given to respondents to enable them to understand what they are being asked. This means that any campaign by those seeking constitutional reform must start with a significant period of public education well before the calling of a referendum.

There is no doubt that there would be dogged opposition to putting a referendum to the public, particularly from the major parties, because it is they who have most to lose from the most important constitutional reforms discussed in this article - those which would make Parliament more representative, government more constrained by a Bill of Rights, and ministers more subject to parliamentary oversight. In light of the relative lack of interest of the public in constitutional matters, how best can the groundswell of support which will be needed to pressure Parliament to call a referendum be mustered? Or, to put it another way, in circumstances where the poor standard of civics education means that voters are not easily inspired to take an interest in the Constitution, what strategy is most likely to engender mass public support for reform?

In an ideal world, reform of the Constitution would take place in one fell swoop, and voters would be presented with a set of amendments addressing all aspects of the Constitution which need to be reformed. However, given that such an approach might prove too much for voters to digest all at once, an alternate avenue would be to identify a single reform that has the capacity pave the way for all the others. In my view, that reform would be the adoption of proportional representation. The stranglehold that two main blocs, Labor and Coalition, have over politics in Australia is the chief impediment to reform. Therefore anything that breaks that stranglehold and gives other parties representation in Parliament enhances the likelihood of further, comprehensive reform. Proportional representation would make Australian politics fluid, and would force the larger parties (or what is left of them after they break into their component parts) to make concessions to smaller parties in order to form government. Wider constitutional reform could be among those concessions.

A movement advocating change to proportional representation would have the advantage that its case could be based squarely on the concept of fairness, and an appeal to the Australian sense of a 'fair go'. Success in political campaigns relies as much upon emotional factors as it does on technical arguments, and in drawing public attention to the unfairness of the current electoral system, where the effect of a person's vote is almost wholly determined by where they live, opponents of change will be put on the defensive. This is the issue around which community action groups should coalesce and initiate a campaign for change. There is no doubt that the major political parties would bitterly oppose such a change - but that is perhaps the best demonstration to the community of how worthy it would be.

UNFAIR DISMISSAL RELATING TO THE USE OF SOCIAL MEDIA – AN ANALYSIS OF CASE HISTORY

ANDREW CORNEY*

ABSTRACT

Social media is playing an increasing part in society and in a person's life. Employment contracts are a personal form of agreement that govern a large part of a person's life. Naturally, these two parts of a person's life often intersect and not always for the better.

This paper seeks to highlight the nature of social media and employment contracts, provide analysis of recent case history involving social media and unfair dismissal through specific issues such as privacy and freedom of communication

I INTRODUCTION

'The special feature of an employment relationship is that it is a personal relationship between employer and employee'.[1]

When a personal relationship comes to an end, there can be a lack of clarity regarding the reasons for the end of the relationship. Studies of marriage breakdowns (another type of personal relationship) have consistently found that communication breakdowns and incompatibility are the two major causes affecting the marriage relationship.[2] In employment relationships, there can be similar communication breakdowns; in particular regarding lack of communicating in relation to changes in policy or the existence of policy itself.[3] There can also be incompatibility where the employer and employee appear to have divergent views on company direction,

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1 Sappideen et al, *Macken's Law of Employment* (Thomson Reuters, 7th ed, 2011), 27 [2.130]. Patrick Parkinson, *Australian Family Law in Context Commentary and Materials* (Thomson Reuters 4th ed 2009), 48 [2.70].

3 *Akmeemana v Murray* [2009] NSWSC 979 [53]-[54].

leading to the publication of statements that are detrimental to the company.[4] In these circumstances, the mutual trust and confidence between employer and employee is vital for the employment relationship to continue. However, the implied term of mutual trust and confidence in employment contracts recognised by the Federal Court of Australia[5] has been recently overturned by The High Court.[6]

A *Social Media*

The use of social media in Australia is increasing[7] with key applications such as Facebook and Twitter enabling people to stay in touch more easily, discuss and debate issues online as well as share their personal experiences through media such as photos and videos.[8] Inevitably, individuals in social groups discuss or share issues from the workplace. The discussion or items shared can, depending upon who else shares this information, have a detrimental effect on the employer or other employees.[9] In traditional forms of socialising, first hand interaction can occur in places such as the pub, but the audience in relation to first hand interaction is more limited than with social media. A 'chat' on Facebook may be seen by some as being similar to a 'pub conversation' but Facebook, as online media, can give 'the conversation a wider audience than a "pub conversation"'.[10] Social media enables non-journalists to do 'the things that only journalists used to do: witnessing, reporting, capturing, writing' and disseminating.[11]

B *Employee Use of Social Media*

While social media provides an easier method for non-journalists to communicate with a broader range of people, it also provides an easier means for employers or other employees to view this information. Where an employee is publishing information to the detriment of their employer, an employer may then take disciplinary action, which may result in the dismissal of the employee. When an employee is dismissed from employment, it can often lead to a claim of unfair dismissal under the *Fair Work Act 2009* (Cth).[12] This can come as a surprise to the

4 *Dover-Ray v Real Insurance Pty Ltd* [2010] FWA 8544 [4]; *Banerji v Bowles* [2013] FCCA 1052 [18].

5 *Barker v Commonwealth Bank of Australia* [2012] FCA 942, [330]; See also Joellen Riley, 'Siblings But Not Twins: Making Sense of "Mutual Trust" and "Good Faith" In Employment Contracts' (2012) 36(2) *Melbourne University Law Review* 521.

6 *Commonwealth Bank of Australia v Barker* [2014] HCA 32.

7 Marketing.com.au, *Australian Social Media Statistics 2012 vs 2013* (22 August 2013) Marketing.com.au <http://marketing.com.au/australian-social-media-statistics-2012-vs-2013/>.

8 B Fitzgerald et al, *Internet and E-Commerce Law* (Thomson Reuters, 2011) 39 [1.250].

9 See the case analysis in chapter four.

10 *Linfox Australia Pty Ltd v Stutsel* [2012] FWAFB 7097 [26].

11 John Kelly, *Red Kayaks and Hidden Gold: the rise, challenges and value of citizen journalism* (2009) 1 <https://reutersinstitute.politics.ox.ac.uk/fileadmin/documents/Publications/Red_Kayaks___Hidden_Gold.pdf>.

12 *Fair Work Act 2009* (Cth) pt 3-2.

employee that their personal expression, authored on their own private time, can lead to end of their employment relationship.[13]

C *This paper*

The following chapters address the nature of social media and employment contracts, an analysis of recent case history and then considering specific issues such as privacy and freedom of communication.

The chapters on privacy and freedom of communication are based on an examination of Australian statute and case law. They aim to articulate relevant principles and key jurisprudence that is likely to be considered by courts and tribunals in dealing with disputes about the employment relationship and social media. They are also based on discussion in professional literature and the mass media.

The latter is important because social media related employment disputes in Australia are new.[14] We do not have a comprehensive and coherent body of case law and extensive scholarly commentary. As work by figures such as Joellen Riley notes, there is considerable disagreement about particular issues.[15]

This paper may be useful, because it explores matters that are likely to be important as more employees embrace social media as their own publishers, as employers become more aware of their employees' online activities and the effect this can have on their business. Furthermore, whether existing legal principles or precedents are suitable for dealing with disagreements in a world where, through social media, people want both greater privacy and freedom of communication.

D *Structure*

The structure of this paper is as follows.

This chapter has set-out the aim of the paper, provided an overview of the approach and noted the literature base.

E *Chapter Two – Social Media*

This chapter will explain what social media is in general terms and the key online sites where an individual may publish information. Furthermore, social media will be examined with respect to how it is used, why it is different from traditional media and what does its future hold.

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13 See *Banerji v Bowles* [2013] FCCA 1052 in chapter four.

14 See *Linfox Australia Pty Ltd v Stutsel* [2012] FWAFB 7097 [20]-[21].

15 See Joellen Riley, 'Uneasy or Accommodating Bedfellows? Common Law and Statute in Employment Regulation' (Research Paper No. 13/82, *Sydney University*, 25 September 2013).

F *Chapter Three – Employment Contracts in Australia*

Changes in the last 20 years have seen a concentration of the law around employment contracts within the federal sphere of control,[16] culminating in the *Fair Work Act 2009*.[17] Chapter three explains how implied terms within employment contracts may impact on decisions to dismiss employees. The aspects of employment contracts relating to unfair dismissal and the implied term of mutual trust and confidence will be examined specifically.

G *Chapter Four – Analysis of Unfair Dismissal Cases Involving Social Media*

In chapter four, an analysis of cases relating to unfair dismissal, where the use of social media has been a part of the grounds in the dismissal demonstrates similarities and differences between judicial treatments. To assist in this process, three common key points of analysis, the use of social media, privacy issues and freedom of expression, will be used to assist the process.

H *Chapter Five – Privacy*

Chapter five will discuss the importance of privacy, particularly in relation to employment, with reference to the case analysis of chapter four. The United Kingdom (UK) and the United States of America (USA) approaches to employment privacy will be compared.

I *Chapter Six – Freedom of Expression*

Chapter six will examine freedom of expression, particularly freedom of political expression, and how it relates to employment by reference to the cases highlighted in chapter four. A comparison with the UK and USA will be conducted.

J *Chapter Seven - Conclusion*

This chapter contains the conclusion in relation to unfair dismissal cases in Australia where social media was a factor in the dismissal.

16 Sappideen et al, above n 1, 2 [1.20].
17 *Fair Work Act 2009* (Cth).

II SOCIAL MEDIA

A *What is Social Media?*

Social media has been described as 'the online media used for social networking, especially sites which facilitate emailing, blogging, etc'.[18] Social media is also 'mobile and web-based ... via which individuals and communities share, co-create, discuss, and modify user-generated content'.[19] The key element in social media is that individuals interact with each other to form electronic communities in a similar dynamic as communities which have traditionally been formed by individuals around a pub, community centre or religious building on a 'face to face', i.e. physical, basis.

Facebook, Twitter, Instagram and blogging tools are all social media. Facebook is a tool whose aim is to 'give people the power to share and make the world more open and connected'.[20] Each Facebook account 'has a "wall", where members can post thoughts as well as discussion that allow organised, long-lasting conversations amongst many members'.[21] Twitter is a 'real-time information network that connects you to the latest stories, ideas, opinions and news about what you find interesting'[22] where individuals can follow what other people are saying as well as let their own followers know what they are saying. Tumblr is a tool which lets individuals share music, photos, videos quotes with their followers; it is not dissimilar to Twitter.[23] Instagram is a 'fun and quirky way to share your life with friends through a series of pictures'[24] and has similarities to Tumblr. Pinterest[25] is also a blog. Blogging is where an individual posts comment to a site for which they manage the access. One internet site which helps individuals set up a blog is 'Blog.com'.[26] Blogging sites attract less interest than Facebook or Twitter.[27] Since the advent of social media, many people have been interested in measuring users' attitudes towards privacy. [28]

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18 Susan Butler (Ed), *Macquarie Concise Dictionary* (Macquarie Dictionary Publishers, 5th ed, 2010) 1192.

19 Jan H. Kietzmann et al, 'Social media? Get serious! Understanding the functional building blocks of social media' (2011) 54 *Business Horizons* 241.

20 Facebook, <https://www.facebook.com/facebook>.

21 David Kirkpatrick, *The Facebook Effect* (Simon & Schuster Paperbacks, 1st ed, 2011) 3.

22 Twitter, *About* <https://twitter.com/about>.

23 Tumblr <http://www.tumblr.com/about>.

24 Instagram, *FAQ* <http://instagram.com/about/faq/#>.

25 Pinterest, *Pinterest* <https://www.pinterest.com/>.

26 Blog.com, *What's your story?* <http://blog.com/features/>.

27 socialmedia today, *101 Vital Social Media and Digital Marketing Statistics* (6 August 2013) <http://socialmediatoday.com/tompick/1647801/101-vital-social-media-and-digital-marketing-statistics-rest-2013>.

28 Danah boyd and Eszter Hargittai, *Facebook privacy settings: Who cares?* (2 August 2010) 15(8) First Monday <http://firstmonday.org/ojs/index.php/fm/article/view/3086/2589>.

B *How is social media used?*

Social media enables people to 'create, access and contribute in a variety of forms, including text communications, photos, videos and sound recordings'.[29] Social media, in the past five years, has dramatically increased the number of people who can publish positive and negative stories about a company or other organisation.[30] Social media enables non-journalists to do 'the things that only journalists used to do: witnessing, reporting, capturing, writing' and disseminating.[31] Facebook 'turns individuals into the authority'[32] over who gets to publish their information. 'The advent of the internet and social media has seen the rise of "citizen journalists"'.[33] Though it is always possible that the 'citizen journalist' is deliberately spreading misinformation, as reported recently in Iran.[34] Ethical and philosophical principles may be the differentiating factor between journalists and 'citizen journalists in the digital era.[35]

A key aspect of social media is that 'social media is built for two-way conversation'.[36] This means that a 'chat' on Facebook can be seen as 'a pub conversation' but Facebook as online media can give 'the conversation a wider audience than a "pub conversation"'.[37]

C *How is Social Media used in Australia?*

Within Australian the number of households connected to the internet has risen from 47% in 1999 to 79% in 2011.[38] Comparatively, in 2007-08 there were 87% of businesses in Australia connected to the internet whereas, in 2013, almost all business with greater than 200 people are connected to the internet.[39] This represents a vast

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29 Fitzgerald et al, above n 8, 39 [1.250].

30 Nichole Kelly, *How to Measure Social Media* (QUE Publishing, 1st ed, 2012) 57.

31 John Kelly, above n 11 1.

32 Kirkpatrick, above n 21, 15.

33 Patrick Keyzer, 'Who Should Speak for the Courts and How? The Courts and the Media Today' in Patrick Keyzer, Jane Johnston and Mark Pearson (eds), *The Courts and the Media* (Halstead Press, 2007) 7.

34 Evgeny Morozov, *Iran: Downside to the "Twitter Revolution"* (2009) 13 <http://www.evgenymorozov.com/morozov_twitter_dissent.pdf>.

35 David Domingo and Ari Heinonen, 'Weblogs and Journalism A Typology to Explore the Blurring Boundaries' (2008) 29 *Nordicom* 3, 13.

36 Nichole Kelly, above n 30, 16.

37 *Linfox Australia Pty Ltd v Stutsel* [2012] FWAFB 7097 [26].

38 Department of Broadband, Communications and the Digital Economy, *Australia's Digital Economy: Future Directions* (Commonwealth of Australia, 2009) 5 – Chart 1; Australian Bureau of Statistics, '*8146.0 - Household Use of Information Technology, Australia, 2010-11*' (15 December 2011) <http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/8146.02010-11?OpenDocument>.

39 Department of Broadband, Communications and the Digital Economy, *Australia's Digital Economy: Future Directions* (Commonwealth of Australia, 2009) 5 – Chart 2; Australian Bureau of Statistics, '*8129.0 - Business Use of Information Technology, 2011-12*' (22 August 2013)

potential for business to move a substantial part of their business onto the internet. The Australian Government wants Australia, by 2020, to be among the world's leading digital economies.[40] With respect to sales of goods or services online, Australia is in the top five countries worldwide, with approximately one-half to one-third of all businesses conducting at least part of their business online.[41]

In Australia, Facebook and YouTube have become the favourite social media sites.[42] There has been approximately a 14 per cent increase in social media usage from July 2012 to July 2013.[43] With the growing ease of usage even some more conservative professions, such as the legal profession, are engaging with social media. For example, in 2009, the first approval of Twitter to communicate information from a trial was made.[44] In the ACT, the Supreme Court has allowed substituted service by posting notice on a respondent's Facebook profile.[45]

D *Why is Social Media Different than Traditional Media?*

There are many examples of instances where the impact of social media has been felt more quickly and more extensively than more traditional means of communication. On 6 July 2009, a YouTube posting was made, which highlighted a musician's guitar being broken while being transported by an airline. In relation to this particular posting, 'within three days it had been watched half a million times; by mid-August it had reached five million'.[46] The article noted that this type of posting has the potential to 'kill a product or damage a company's share price'.[47]

What differentiates social media from previous types of media, such as newspapers or television, is that it is the non-professional, the individual at home, who can publish this material. When Oscar Morales started his anti FARC[48] Facebook page, 4000

<http://www.abs.gov.au/ausstats/abs@.nsf/Products/17515D80D0A58BEDCA257BCE001231EF?opendocument>.

40 Department of Broadband, Communications and the Digital Economy, *#au20 National Digital Economy Strategy* (Commonwealth of Australia, 2011) 2.

41 OECD iLibrary, *OECD Science, Technology and Industry Scoreboard 2011* <http://www.oecd-ilibrary.org/sites/sti_scoreboard-2011-en/06/10/index.html;jsessionid=v04de9q27yt1.delta?contentType=&itemId=/content/chapter/sti_scoreboard-2011-64-en&containerItemId=/content/serial/20725345&accessItemIds=/content/book/sti_scoreboard-2011-en&mimeType=text/html>.

42 David Cowling, *Social Media Statistics Australia – August 2013* (1 September 2013) <http://www.socialmedianews.com.au/social-media-statistics-australia-august-2013/>.

43 Marketing.com.au, *Australian Social Media Statistics 2012 vs 2013* (22 August 2013) <http://marketing.com.au/australian-social-media-statistics-2012-vs-2013/>.

44 *Roadshow Films Pty Ltd v iiNet Limited* (No. 3) [2010] FCA 24, 24.

45 *MKM Capital Pty Ltd v Corbo and Poyser* (unreported, Supreme Court of the Australian Capital Territory, Harper M, 12 December 2008).

46 Tim Webber, 'Why companies watch your every Facebook, YouTube, Twitter move' (3 October 2010) *BBC* (online) <http://www.bbc.co.uk/news/business-11450923>.

47 Ibid.

48 Revolutionary Armed Forces of Columbia - The Free Dictionary <http://www.thefreedictionary.com/FARC>.

users[49] had joined within one day. This indicates how quickly one individual can grow a social media site on an idea,[50] without using traditional media or journalists. Similarly, in Australia, certain issues have particularly resonated with other social media users and allowed the issue to take on a life of its own, such as when Jane Burney posted negative comments on Cole's Facebook site regarding their discounted milk price.[51] There is a view that social networking based activism can lead to the easy option of clicking 'like' for a protest group, feeling good and moving onto the next article.[52] In this sense, interested readers might be more appropriately termed 'slactivists' rather than 'activists'.[53]

On Facebook, 'many users willingly fill out extensive details about their career, relationships, interests and personal history'[54] and provide opinions, photographs, videos and other content. Authoring online is very different from traditional media, such as newspapers, where it is the journalist who determines the content and where an editor (potentially advised by a legal practitioner) acts as gatekeeper in dealing with issues of defamation, ethno-religious vilification, national security and trade practices. While comments in traditional media can be detrimental, the 'citizen journalist', who is not held back by a legal team or editors, combined with the speed and coverage of social media can make negative comments posted in social media more detrimental to a company's product than traditional media.[55]

A recent poll, conducted by legal firm DLA Piper,[56] suggested that people felt social media sites should be treated more casually than formally published writing. While 69 per cent of respondents felt special legal guidelines were required for social media outlets, the number was lower where the poll respondent was younger.

E *What is the Future of Social Media?*

There is evidence that 'digital technologies provide the entry points for young activists to explore democratic alternatives'.[57] 'One can find Facebook-fuelled activism and protest in every country and community where the service has caught

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49 Andrew Williams, *Oscar Morales: "How I used Facebook to protest against FARC"* (8 February 2010) <http://metro.co.uk/2010/02/08/oscar-morales-how-i-used-facebook-to-protest-against-farc-85760/>.

50 Kirkpatrick, above n 21, 3.

51 Kate Legge, 'Power to the People' (1 September 2012) *The Australian* <http://www.theaustralian.com.au/news/features/power-to-the-people/story-e6frg8h6-1226458943177#>.

52 Anne Li, 'Is this Activism?' (21 November 2013) *North by Northwestern* (online) <http://www.northbynorthwestern.com/story/is-this-activism/>.

53 Ibid.

54 Kirkpatrick, above n 21, 201.

55 Nichole Kelly, above n 30, 57.

56 DLA Piper, *Shifting Landscapes – The Online Challenge to Traditional Business Models* (DLA Piper 2011) 7.

57 Frank Edwards, Philip N Howard and Mary Joyce, 'Digital Activism & Non-Violent Conflict' Digital Activism Research Project (November 2013) <http://digital-activism.org/download/1270/> 7.

on'.[58] Chief Justice Judge of Britain stated that, 'using Twitter', to explain what is going on in the courts is fundamental to the principle of open justice.[59] A University of California paper, titled 'Fostering Political Engagement: A Study of Online Social Networking Groups and Offline Participation', found that 'membership in online political groups via the Facebook platform encourages offline political participation'.[60] The future of social media may also hold a replacement for pub conversation for those too poor to go out.[61] However, as noted above, 'slacktivism', may not lead to a very deep discussion.

The creator of LinkedIn, Reid Hoffman, 'believed that social networking was likely to divide into two categories – personal and business'.[62] Mark Zuckerberg, the creator of Facebook appeared to have a different view, stating 'the days of you having a different image for your work friends or co-workers and for the other people you know are probably coming to an end pretty quickly'.[63] The freedom of information regime in Australia enables anonymous requests to be made, as a name is not a requirement for a request,[64] though a recent report has recommended this capability be removed.[65] This capability indicates that some internet users prefer not to use any specific online identity. This can be the case where data breaches lead to a 'decline in trust of the personal data ecosystem'.[66] A lack of trust will not encourage individuals to use one identity.

F *Dangers of Facebook*

There is a view that 'the law does not distinguish between old and new media'.[67] In this sense, the speed of publication and reach of social media may present some difficulties to individual authors who do not have the ethical and legal training of professional journalists. However, it has been argued that the internet is 'merely the

58 Kirkpatrick, above n 21, 6.

59 Patrick Keyzer, 'Who Should Speak for the Courts and How? The Courts and the Media Today' in Patrick Keyzer, Jane Johnston and Mark Pearson (eds), *The Courts and the Media* (Halstead Press, 2007) 6.

60 Jessica T Feezell, Meredith Conroy and Mario Guerrero, *Facebook is... Fostering Political Engagement: A Study of Online Social Networking Groups and Offline Participation* (August 2009) <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1451456> 13 cited in David Kirkpatrick, *The Facebook Effect* (Simon & Schuster Paperbacks, 1st ed, 2011) 292-293.

61 David Butler, *Twitter is the new beer pub* (30 November 2008) Examiner <http://www.examiner.com/article/twitter-is-the-new-beer-pub>.

62 Kirkpatrick, above n 21, 72.

63 Ibid 199.

64 *Freedom of Information Act 1982* (Cth) s 15(2).

65 Allan Hawke, Australian Government, *Review of the Freedom of Information Act 1982 and Australian Information Commissioner Act 2010*, 1 July 2013 9.

66 World Economic Forum, *Rethinking Personal Data: Strengthening Trust* (May 2012), 9 <http://www3.weforum.org/docs/WEF_IT_RethinkingPersonalData_Report_2012.pdf>.

67 Prue Innes, 'Suppression Orders: The More Things Change, the More they Stay the Same' in Patrick Keyzer, Jane Johnston and Mark Pearson (eds), *The Courts and the Media* (Halstead Press, 2007) 82.

latest of many technologies that had enhanced the speed of information'.[68] In the USA, a 2009 poll 'found that 35 per cent of companies had rejected applicants because of the information they found on social networks'[69] but higher figures have been reported from other sources.[70] James Grimmel noted the tension between the desire for reliable control over one's information and the desire for social interaction.[71]

In one example, an employee asked his boss for a day off to attend an unexpected family matter but instead attended a party. A picture of the employee at the party, in a tutu, was posted on Facebook. The office became aware of the employee's deception at this point.[72] It is likely that it was not the employee's expectation, when he asked their boss for the day off, that the real reason for the request would become apparent on Facebook. This is not to suggest that these events did not happen before social media, but it is social media that provides the rapid dissemination of personal news to others such that 'by the time the mainstream media pick up a story, it has likely already been written about extensively online'.[73]

Jon Favreau, former speechwriter to the President of the USA, was 'publicly embarrassed when a blog published a photo that showed him at a party with his hands on a life-sized cardboard cutout of Hilary Clinton'.[74] President Obama stated to school children that they should be careful about what they put on Facebook and YouTube as mistakes you make while young might be used against you later on.[75] Information stored in electronic form and placed on social media sites is significantly more accessible than information kept in non-electronic form within your house or office. While Facebook has privacy controls, 'only about 25 per cent of Facebook users use these controls … many of them finding them maddeningly difficult to use'.[76]

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68 *Lewis v King* [2004] EWCA Civ 1329 [31] cited in Patrick George, *Defamation Law in Australia* (LexisNexis Butterworths, 2nd ed, 2012) 53 [2.23].

69 Kirkpatrick, above n 21, 204-205.

70 Mary Lorenz, *Nearly Half of Employers Use Social Networking Sites to Screen Job Candidates* (20 August 2009) <http://thehiringsite.careerbuilder.com/2009/08/20/nearly-half-of-employers-use-social-networking-sites-to-screen-job-candidates/>; Kashmir Holl, *What Prospective Employers Hope To See In Your Facebook Account: Creativity, Well-Roundedness, & "Chastity"* <http://www.forbes.com/sites/kashmirhill/2011/10/03/what-prospective-employers-hope-to-see-in-your-facebook-account-creativity-well-roundedness-chastity/>.

71 Kirkpatrick, above n 21, 212.

72 Ibid 204.

73 Daniel J Solove, 'The Slow Demise of Defamation and the Privacy Torts' (11 October 2010) *Huffington Post* (online) <http://www.huffingtonpost.com/daniel-j-solove/the-slow-demise-of-defama_b_758570.html>.

74 Kirkpatrick, above n 21, 204.

75 Ibid 205.

76 Ibid 208.

G *Social Media and Privacy*

The world we live in now is 'a world where almost everything about your business is public information. Not only that, the world is now hyperconnected in a way that makes discoverability and conversation about you a trivial exercise'.[77] However, despite the 'hyperconnections', privacy is still important, as noted by users of the photo sharing tool Instagram, who 'have pointed out, their privacy, or the perception of it, is more important than any service'.[78] However, as noted above, the usage of key social media tools is growing despite perceived privacy concerns.

Facebook claims that an individual's privacy is maintained by using controls within Facebook to 'authoritatively determine who you would, and would not, like to see your information'.[79] Facebook considers that 'if you have doubts about who you are communicating with online, your privacy is at risk'.[80]. Even if people do have doubts, people are still 'exposing the intimate minutiae of their lives on sites like Facebook and Twitter'.[81] The only way a person may ensure complete privacy online is for the person to remove their material from the online environment.[82] Another way of handling 'sensitive' information is illustrated by Chuck Hagel, a consultant at Deloitte Consulting, who stated that he would note he had two daughters on Facebook but not criticise them on Facebook.[83] Mr Hagel's opinion demonstrates the view that the best way to maintain your privacy on Facebook is to not post the information on Facebook.

To maintain privacy on social media a person could post anonymously or use a fictitious identity. Mark Zuckerberg, the designer of Facebook, opposed users having more than one profile or identity, such as where an individual could have a work profile and a social profile.[84] However, privacy issues typically arise on Facebook 'when the comfortable compartments into which people have segregated various aspects of their lives start to intersect'.[85] It has been reported that Facebook itself assess that 8.7 per cent of its users were not real.[86]

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77 Stephen Collins, *The conversation has rules* (21 April 2009) The Drum, <http://www.abc.net.au/unleashed/30632.html>.

78 Bronwen Clune, *Instagram purchase reopens web's privacy dilemma* (11 April 2012) The Drum, <http://www.abc.net.au/unleashed/bronwen-clune-3943764.html>.

79 Kirkpatrick above n 21, 13.

80 Ibid.

81 Daniel J Solove, 'Introduction: Privacy Self Management and the Consent Dilemma' (2013) 126 *Harvard Law Review* 1880, 1895.

82 Sherry D Sanders, 'Privacy is Dead: The Birth of Social Media Background Checks' (12 March 2012) 39 *Southern University Law Review* 243, 265.

83 Kirkpatrick, above n 21, 203.

84 Ibid 199.

85 Ibid 200.

86 Mark Sweney, 'Facebook quarterly report reveals 83m profiles are fake' (3 August 2012) *The Guardian* (online) <http://www.theguardian.com/technology/2012/aug/02/facebook-83m-profiles-bogus-fake>.

With the proliferation of tracking technology,[87] a person may not want to use one identity or their own identity. Almost all choices made by an online user can be tracked, whereas articles or advertisements that a reader looks at in traditional media, like newspapers, or whether that person sees the messaging on a billboard is more difficult to determine.[88] An individual's understanding of the ease in which they might be tracked might also encourage them to use different identities.

One ethical issue that arises in social media is whether the mainstream media should publish 'photographs taken from a person's Facebook page, or comments that a person has made, supposedly to friends, on tribute pages on Facebook or Twitter.[89] Additionally, in this situation copyright issues arise, depending upon whether the material has been published more than 70 years ago (from an Australian point of view). Once it is published, 'Facebook the company will always be able to see our data'.[90] This may be of particular concern to those individuals who want complete control over their data. Regardless of whether a person is using new or old forms of media, 'with the freedom to publish comes the responsibility not to abuse it by, among other things, unwarranted invasion of individual's privacy'.[91] However, privacy law in Australia is not strong, with three recent enquiries into privacy law recommending 'the enactment of a statutory cause of action' for serious privacy breaches.[92] This will be discussed in chapter five.

III EMPLOYMENT CONTRACTS IN AUSTRALIA

This chapter explains the definition of an employee, the nature of an employment contract and the implications of that contract. Further analysis will examine the *Fair Work Act*[93] (FWA) and the protections it affords employees.

A *What is an Employee?*

There is no statutory definition of 'employment' to help distinguish between independent contractors and employees.[94] The definition of an 'employee' has been

87 Solove, above n 81, 1880.
88 Nichole Kelly, above n 30, 4-5.
89 Roger Patching, 'The News of the World Scandal and the Australian Privacy Debate' in Patrick Keyzer, Jane Johnston and Mark Pearson (eds), *The Courts and the Media* (Halstead Press, 2007) 130.
90 Kirkpatrick, above n 21, 324.
91 Roger Patching, 'The News of the World Scandal and the Australian Privacy Debate' in Patrick Keyzer, Jane Johnston and Mark Pearson (eds), *The Courts and the Media* (Halstead Press, 2007) 131.
92 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Issues Paper No 43 (2013) 40 [6].
93 *Fair Work Act 2009* (Cth).
94 Andrew Stewart, *Stewart's Guide to Employment Law*, (The Federation Press, 3rd ed, 2011) 47.

contentious in Australia with various tests applied. In *Hollis v Vabu Pty Ltd*[95] *(Vabu)* the High Court determined that a range of factors should be taken into consideration to determine whether a worker was an employee or independent contractor.

B *Why Is This an Issue for Employers?*

The English courts developed a principle of vicarious liability under common law where an employer was only responsible for acts done by their employees, not independent contractors.[96] The High Court confirmed that this same concept exists in Australia where an accident involving a recent repair to a fridge was found to be the independent contractor's liability and not that of the owner/employer of the business where the fridge was situated.[97] Generally, an employer is liable for the actions of their employees but not independent contractors.[98] In the world of social media, the identity of the author of a communication can be difficult to determine.[99] For employers trying to protect their reputation, it is vital that they are able to establish whether a person commenting adversely in relation to their business is, in fact, an employee of the business.[100] It is important for an employer to be able to establish this linkage if they wish to be able to determine who might be legally liable and, therefore, the relative merits of legal action. In making these decisions about legal liability it is important for the employer to determine if the person making the adverse comments is an employee or an independent contractor.

C *What are Employment Contracts?*

The employment relationship is a special one of trust and confidence.[101] In fact, without trust and confidence there is no contract of employment.[102]An employment contract is a specific type of 'contract of employment between an employer and an employee'.[103] An employment contract is where 'the general principles of the law of contract apply in considering the respective rights and obligations of employee and employer under a contract of service'.[104]

Under common law, a valid contract requires certain requirements to be met[105] similar to other forms of contract. To ensure a valid contract has been constituted, the parties must be clear as to the certainty in meaning of the language used so that, if necessary,

95 *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21 [19].
96 Stewart, above n 94, 44.
97 *Sweeney v Boylan Nominees Pty Ltd* (2006) 226 CLR 161.
98 *Hollis v Vabu Pty Ltd (t/as Crisis Couriers)* (2001) 207 CLR 21 [94].
99 George, above n 68, 228 [13.3].
100 See *Dover-Ray v Real Insurance Pty Ltd* [2010] FWA 8544 in Chapter 4.
101 Sappideen et al, above n 1, 28.
102 *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2007] NSWSC 104 [127].
103 *Oxford Australian Law Dictionary* (Oxford University Press, 1st ed, 2010) 211.
104 *Consolidated Press Ltd v Thompson* (1952) 52 SR (NSW) 75 (Street CJ).
105 Stewart, above n 94, 81.

the contractual intention can be attributed by a court to the parties.[106] However, as noted below, courts can imply terms to make a contract functional, such as ensuring an employee is paid a reasonable sum of money.[107]

D *Express & Implied Terms*

Have the essential terms required to make the contract commercially workable been met?[108] The contract may not include all the terms in writing, with some terms agreed orally, such as a promise regarding redundancy payments[109] or expecting to report to a higher level manager.[110] Express terms will be interpreted by a court in the manner that a reasonable person would interpret them.[111] With respect to employment contracts, the court has determined that, in looking at the employee/employer relationship, the whole picture should be considered.[112] Express terms, no matter how clear and unambiguous in a contract, must give way to statutory requirements.[113]

An implied term is a term that can be implied into a contract, rather than appearing expressly. The implication can be driven by the law, where the implication does not depend upon the actual intention of the parties, or by fact, custom or circumstance, where the implication is based upon the actual circumstances of the parties.[114]

Any implied terms can be 'excluded by the express terms of the contract or it may be excluded because it would operate inconsistently with the express terms of the contract'.[115] The court has considered that a breach of an implied term is inconsistent with an employer's express power of termination as a written term in a contract.[116] The breach must also be a serious breach as 'it is only a serious breach that could give rise to a breach of the implied term'.[117]

E *The Implied Term of Mutual Trust & Confidence*

In 'straightforward contractual terms there is ample authority for the implication of a term in a contract of employment that the employer will not, without reasonable cause, conduct itself in a manner likely to damage or destroy the relationship of confidence and trust between the parties as employer and employee'.[118]

106 *G Scammell & Nephew Ltd v Ouston* [1941] AC 251; [1941] 1 All ER 1.
107 *Midya v Sagrani* (1999) NSWCA 187 [4].
108 *Trollope & Colls Ltd v Atomic Power Constructions Ltd* [1963] 1 WLR 333.
109 *McRae v Watson Wyatt Australia Pty Ltd* [2008] FMCA 1568 [32].
110 *Bruce v AWB* (2000) FCA 594 [10].
111 *Toll v Alphapharm* (2004) HCA 52, [40].
112 *Hollis v Vabu* (2001) 207 CLR 21 [24].
113 *Zafiriou v Saint-Gobain Administration Pty Ltd* [2013] VSC 377 [234].
114 *Luxor (Eastbourne) Ltd v Cooper* [1941] AC 108, 137 (Lord Wright).
115 *Barker v Commonwealth Bank of Australia* [2012] FCA 942 [329].
116 Ibid [330].
117 Ibid [331].
118 *Thomson v Orica Australia Pty Ltd* [2002] FCA 939 [141].

Where an employee has their employment terminated unlawfully, then the employer 'by its treatment of the' employee 'leading up to the unlawful termination of' their 'employment, breached an implied duty of mutual trust and confidence'.[119] Australian courts have found that to impose changes that would be against 'the purposes of the contract of employment' would be unfair on the employee and breach an implied term regarding acting unfairly and capriciously towards employees.[120]

Certain courts have determined that an implied term exists but, unless 'the breach has constituted a repudiation of the contract', the employee will not be able to claim damages.[121] Breach of an implied term is not applicable at termination or beyond but only leading up to termination, such as an employer's conduct in an investigation leading up to termination.[122]

Until recently Australian courts stated that they 'cannot say that the existence of such an implied term is not arguable'.[123] The High Court had suggested an implied term existed but was not required to rule on it.[124] However, The High Court has recently ruled that the implied term of mutual trust and confidence cannot be implied into all employment contracts.[125]

F *Advantages for Employees*

An employer cannot 'single out an employee without reasonable and proper cause'[126] and not allow them access to benefits available to others. In one particular case, one particular employee was offered a new contract on inferior terms than those offered to other employees in the same circumstances.[127]

An employer must ensure that if they modify policy, which relates to the employment contracts of their employees, then the changes must be agreed as per standard contract law.[128]

G *Advantages for Employers*

Where an employer expects trust and protection of confidence from an employee, and either trust or confidence is broken by the employee, then the employer will have an

119 *Burazin v The Blacktown City Guardian* [1996] IRCA 371.
120 *Akmeemana v Murray* [2009] NSWSC 979; BC200908870 [53].
121 *Cameron v Asciano Services Pty Ltd* [2011] VSC 36 [67].
122 *Russell v The Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2007] NSWSC 104 [138].
123 *Heptonstall v Gaskin and Ors (No 2)* [2005] NSWSC 30 [23]; See also Riley, 'Siblings But Not Twins: Making Sense of "Mutual Trust" and "Good Faith" In Employment Contracts', above 5 14 522.
124 *Koehler v Cerebos (Aust) Ltd* (2005) 222 CLR 44, 54-55.
125 *Commonwealth Bank of Australia v Barker* [2014] HCA 32.
126 *Transco Plc v O'Brien* [2002] EWCA Civ 379 [10].
127 Ibid [18].
128 *Akmeemana v Murray* [2009] NSWSC 979.

easier time satisfying the requirements of unfair dismissal laws. Some examples of dismissal include: where an employee at a brewery does not follow a responsible drinking policy and is dismissed;[129] a factory work trading abuse with another employee[130] or a truck driver excessively speeding.[131] The aspect of mutual trust places responsibility into the hands of the employee as well

An employee has a duty not to compete with their employer.[132] Competition by the employee would clearly impact on trust within the work environment. An employer must be able to trust their employees to not sell firm secrets, or set up alternate, competing businesses.[133] Employees are required to cooperate with their employer[134] as part of their employment contracts

In chapter four, I will be discussing social media cases that have resulted in an employee's dismissal. In modern dismissal cases there are a number of factors that must be considered before a dismissal can be legally upheld.

H *Unfair Dismissal*

The *Fair Work Act 2009* (Cth)'s (FWA) objective is to establish a framework for dealing with unfair dismissal that balances the needs of the business and the needs of employees.[135] The FWA also seeks to provide remedies, where a dismissal is unfair, with an emphasis on reinstatement.[136] The FWA seeks to ensure there is a 'fair go all round'[137]. The FWA notes that this phrase emanates from the *Re Loty*[138] case. To be protected from unfair dismissal, a person must be a national system employee who has completed a minimum period of employment[139] and is covered by either a modern award, an enterprise agreement or, alternatively, the employee's earnings are less than the high income threshold.[140]

There are four criteria that the Fair Work Commission (FWC) use to determine whether a person has been unfairly dismissed.[141] Firstly, has the person's employment with their employer been terminated on the employer's initiative?[142] Secondly, was the dismissal harsh, unjust or unreasonable?[143] Thirdly, if a business is a 'Small Business', and the Minister has created a Small Business Fair Dismissal Code, [144] has the dismissal been consistent with that code?[145] Fourthly, was the dismissal a case of a

129 *Button v J Boag and Son Brewing Pty Ltd* [2010] FWA 148.
130 *Petru Ghirocian v J Blackwood & Sons Ltd t/as Total Fasteners - re Termination of employment* [2009] AIRC 979.
131 *Glenn Gervasoni v Rand Transport* (1986) Pty Ltd [2009] FWA 1269.
132 *Hivac Ltd v Park Royal Scientific Instruments Ltd* [1946] ch.169.
133 *Hospital Products Ltd v United States Surgical Corporation* [1984] HCA 64.
134 *Secretary of State for Employment v ASLEF (No 2)* [1972] 2 QB 455 (CA).
135 *Fair Work Act 2009* (Cth) s 381(1)(a).
136 Ibid s 381(1)(c).
137 Ibid s 381(2).
138 R*e Loty and Holloway v Australian Workers' Union* [1971] AR (NSW) 95.
139 *Fair Work Act 2009* (Cth) s 382(a).
140 Ibid s 382(b).

genuine redundancy?[146] The onus is on the employer to establish there was a need for a genuine redundancy.[147]

I *Harsh, Unjust or Unreasonable*

There are several conditions that the Fair Work Commission must take into account in determining whether a dismissal was harsh, unjust or unreasonable.[148] Firstly, was there a valid reason for the dismissal related to the person's capacity or conduct?[149] If so, was the person notified of the reason[150] and given the opportunity to respond?[151] The reason cannot be 'capricious, fanciful, spiteful or prejudiced'[152] with the ultimate decision being 'sound, defensible or well-founded'.[153]

To be summarily dismissed, an employee's conduct must be sufficiently serious to justify dismissal.[154] Where conduct involves a breach of company policy then the employer must be able to establish that the policy existed, was reasonable and the employee was aware of its contents.[155] It does not matter if the conduct is occurring outside of the workplace as long as there is a demonstrated impact on the workplace.[156] It is also relevant to consider the relationship between the size of the employer's enterprise and the procedures followed in effecting the dismissal[157], together with any other matters that the Fair Work Commission considers relevant.[158]

In this type of case, other factors that are likely to be considered are, firstly, whether there was an unreasonable refusal to allow the employee dismissed to have a support person present.[159] However, there is not a positive duty on the part of the employer to offer an employee a support person.[160] Secondly, if the dismissal was due to the employee's unsatisfactory performance.[161] Thirdly, whether the absence of dedicated

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141 Ibid s 385.
142 Ibid s 386(1)(a); *Mohazub v Dick Smith Electronics Pty Ltd (no 2)* (1995) 62 IR 200, 205.
143 *Fair Work Act 2009* (Cth) s 386(1)(b).
144 Ibid s 388(1).
145 Ibid s 386(1)(c).
146 Ibid s 386(1)(d).
147 *Kenefick v Australian Submarine Corporation Pty Ltd (no 2)* (1996) 65 IR 366, 370.
148 *Fair Work Act 2009* (Cth) s387.
149 Ibid s 387(a).
150 Ibid s 387(b).
151 Ibid s 387(c).
152 *Selvachandran v Peteron Plastics Pty Ltd* (1995) 62 IR 371, 373.
153 *Annetta v Ansett Australia Ltd* (2000) 98 IR 233, [10].
154 *Byrne v Australian Airlines* (1995) 185 CLR 410, 465-466.
155 *Bostik (Australia) Pty Ltd v Georgevski (No 1)* (1992) 36 FCR 20.
156 *Hussein v Westpac Banking Corporation* (1995) 59 IR 103.
157 *Fair Work Act 2009* (Cth) s 387(f).
158 Ibid s 387(h).
159 Ibid s 387(d).
160 Explanatory Memorandum, Fair Work Bill 2009 (Cth) [1542].
161 *Fair Work Act 2009* (Cth) s 387(e).

human resource management specialist in the enterprise would be likely to impact on the procedures followed in the dismissal.[162]

J *Conclusion*

Within Australia, The High Court has found that the implied term of mutual trust and confidence cannot be implied into all employment contracts.[163] Fortunately, case analysis indicates that mutual trust and confidence has not been a major factor in unfair dismissal cases involving social media. However, it may be that mutual trust and confidence in an employment contract is at the core of the behaviour necessary to continue the personal relationship that is the employment relationship. Phillipa Weeks argued that the easiest way to establish mutual trust and confidence as a term in an employment law contract is 'to prescribe a statutory solution'.[164] This may now be the only way to establish mutual trust and confidence as a term in an employment law contract.

IV ANALYSIS OF UNFAIR DISMISSAL CASES INVOLVING SOCIAL MEDIA

A *Overview*

Australian courts and tribunals have recently ruled on a number of unfair dismissal applications where there has been a link between the use of social media and alleged unfair dismissal. Chapter three noted that, when determining if a dismissal has been unfair, the courts must consider if a dismissal has occurred[165] and if so, whether it was 'harsh, unjust or unreasonable'.[166] There are several key aspects of each case that will assist in understanding the role social media played in the dismissal. Firstly, one of the key aspects is the use the employee made of social media, whether the employer had a social media policy and the manner in which employees are informed the policy exists. Secondly, whether the privacy of the employee or others has been an issue in the case. Lastly, to what degree has the employer sought to curtail the employee's freedom of expression through dismissal.

B *Stutsel v Linfox Pty Ltd [2011] FWA 8444*

An employee of Linfox Australia was dismissed for posting comments on his Facebook page which were alleged to be racially discriminatory against one manager

162 Ibid s 387(g).
163 *Commonwealth Bank of Australia v Barker* [2014] HCA 32.
164 Phillipa Weeks 'Employment Law – a Test of Coherence Between Statute and Common Law' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press 2005) 194 cited in Riley, 'Uneasy or accommodating bedfellows? Common law and statute in employment regulation', above n 25 21.
165 *Fair Work Act 2009* (Cth) s 386(1)(a).
166 Ibid s 387.

and sexually discriminatory against another.[167] Fair Work Australia considered whether comments on the employee's Facebook page constituted a valid reason to terminate an employee and, if so, whether the manner of dismissal was harsh, unjust or unreasonable.[168]

1 *Use of Social Media*

The employer argued that the induction training that the applicant participated in[169] provided policy guidance on not harassing, or discriminating against, other employees.[170] The Commissioner of Fair Work Australia remarked that, 'In the current electronic age, this is not sufficient and many large companies have published detailed social media policies and taken pains to acquaint their employees with those policies'.[171]

2 *Privacy Settings*

The Commissioner noted that 'The Applicant's Facebook page was not a web blog, intended to be on public display. It was not a public forum'.[172] This would not appear to be technically correct as some web blogs, like WordPress, provide privacy settings to restrict who can view your blog[173] whereas Facebook enables options for group pages to be open to anyone.[174] The tribunal accepted that the applicant was not aware of his Facebook privacy settings and the fact that 'comments posted on his page could only be viewed by himself and those persons he had accepted as Facebook friends.[175] The Commissioner's view in this instance appears at odds with other rulings where the prevailing view was that information online would be disseminated, regardless of privacy settings or posted out of hours.[176]

3 *Freedom of Expression*

The applicant had about 170 friends on Facebook of which many were Linfox employees.[177] The Commissioner stated that the remarks, which were alleged as racially discriminatory, were 'expression of his private views ... within his right to free speech'.[178] The Commissioner found that the applicant did not make the sexually offending comments about another employee, as these were made by the applicant

167 *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 [38], [71].
168 Ibid [89].
169 Ibid [29].
170 Ibid [28].
171 Ibid [87].
172 Ibid [79].
173 Workpress.com, *Support* < http://en.support.wordpress.com/settings/privacy-settings/>.
174 Facebook, *Groups* <https://www.facebook.com/about/groups>.
175 *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 [78].
176 *Dover-Ray v Real Insurance Pty Ltd* [2010] FWA 8544 [51]; *O'Keefe v Williams Muir's Pty Ltd* [2011] FWA 5311 [43].
177 *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 [77].
178 Ibid [79].

friends on Facebook.[179] The Commissioner explained that the postings had 'the favour of a conversation in a pub or cafe, although conducted in an electronic format'.[180] The Commissioner determined that it was not clear who the offensive comments on the Facebook page were about, especially if the viewer was not familiar with Linfox.[181]

The Commissioner highlights the differentiation in treatment between the applicant, whose employment was terminated, and the employees who made the sexually offensive comments on the applicant's Facebook page where no action taken against them.[182] Under the FWA the tribunal can take into account 'other factors'[183] such as 'the comparative treatment of other employees in a like position'.[184] This implies an employer cannot unfairly dismiss one person for expressing their opinions on Facebook while taking no action against others in similar circumstances.

It is important to note that some of the discussion pertained to union activities[185] and this type of discussion is protected by law[186] as lawful participation in an industrial association.[187]

4 *Summary*

The commissioner drew attention to a comment by the applicant on his Facebook page that said '"Law of Probability - The probability of being watched is directly proportional to the stupidity of your act." Here is wisdom.'[188] This may also be a reference to the fact that on the internet it might be much harder to remain unseen, as noted by Barack Obama in chapter two.[189]

The Commissioner ruled the applicant be reinstated as the dismissal had been 'harsh, unjust and unreasonable'.[190] The full bench of the Fair Work Commission upheld the decision of the Commissioner upon appeal.[191] The key issues, confirmed on appeal, were that 'when the statements and comments posted on the Facebook page were objectively considered in their proper context they were not of such a serious or extreme nature as would justify dismissal for serious misconduct'.[192] In upholding the

179 Ibid [83].
180 Ibid [81].
181 Ibid [81].
182 Ibid [93].
183 *Fair Work Act 2009* (Cth) s 387(h).
184 *Alkememade v Serco Gas Services (Vic) Pty Ltd* [1999] AIRC 45 (21 January 1999) [6] cited in Sappideen, et al, above n 1, 454 [12.190].
185 *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 [82].
186 *Fair Work Act 2009* (Cth) s 346.
187 Ibid s 347.
188 *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 [95].
189 Kirkpatrick, above n 21, 205.
190 *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 [100].
191 *Linfox Australia Pty Ltd v Stutsel* [2012] FWAFB 7097 [43].
192 Ibid [35].

original decision,[193] the full bench had particular regard to 'nature of the comments made, the limited understanding of the employee as to the privacy of Facebook communications'.[194]

C *Dover-Ray v Real Insurance Pty Ltd [2010] FWA 8544*

The applicant was dismissed, in part, for publishing information on MySpace that had the potential to damage the reputation of Real Insurance, their employer.[195] The entry on a MySpace page included 'alongside a photograph of herself and her name'.[196]

1 *Use of Social Media*

The commissioner felt that even if the blog entries were limited to the applicant's friends then 'it could reasonably be expected that a document of such controversy would be circulated within the workplace'.[197]

2 *Privacy Settings*

The blog set up by the applicant was 'publicly accessible through a Google search'.[198] The applicant provided contradictory evidence as to whether the blog entry was intended to be private or public.[199] The Commissioner stated that the issue is not 'whether the blog intended to be public or not' but that the applicant's MySpace account 'friends" included other employees of Real'.[200] The tribunal considered that it was enough that the applicant's friends included other employees of the employer despite not naming the employer.[201] This would appear to be a different view from the Commissioner than the latter case of *Stutsel v Linfox*.[202]

3 *Freedom of Expression*

The Commissioner noted that the applicant did not remove the blog entry (as an expression of contrition after a heat of the moment) when requested to by the defendant,[203] though this could have been due to the applicant's 'purported belief that the site was available only to her "friends"'.[204] The applicant believed this was the

193 *Fair Work Act 2009* (Cth) s 347.
194 *Linfox Australia Pty Ltd v Stutsel* [2012] FWAFB 7097 [43].
195 *Dover-Ray v Real Insurance Pty Ltd* [2010] FWA 8544 [4].
196 Ibid [22].
197 Ibid [51].
198 Ibid [50].
199 Ibid [50].
200 Ibid [51].
201 Ibid [53].
202 *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 [78].
203 *Dover-Ray v Real Insurance Pty Ltd* [2010] FWA 8544 [57].
204 Ibid [60].

best way to advise others, who may be in similar situations, of the applicant's plight.[205]

The comments on the blog were the applicant's opinions[206] and 'an attack on the integrity of the management of Real'.[207] The Commissioner discounted the applicant's argument that the blog entry could have been from any point in their life and that therefore it was not possible to confirm who the applicant was addressing.[208]

4 *Summary*

The Commissioner concluded that 'on balance, the termination of Ms Dover-Ray's employment was not harsh, unjust or unreasonable'[209] and, amongst other reasons, the publishing of the offending blog entry and refusing to modify or delete it was a valid reason for termination.[210] The Commissioner stated that they did not need to consider a valid reason for termination test relating to any relationship damage to the 'mutual trust and confidence between the employer and employee and to act with good faith towards her employer'[211]

D *O'Keefe v Williams Muir's Pty Ltd [2011] FWA 5311*

The applicant was dismissed for serious misconduct relating to posting threatening comments on their Facebook page.[212] The respondent took the applicants comments on Facebook as their resignation from the company.[213]

1 *Use of Social Media*

Reference was made to the employer's 'employee handbook' about the appropriate way to interact with employees.[214] There appeared to be no specific social media policy but the Deputy President of Fair Work Australia considered 'common sense would dictate that one could not write and therefore publish insulting and threatening comments about another employee in the manner in which this occurred'.[215] The employee had signed an acknowledgment that he had read the employee handbook.[216] The case is distinguished from the *Stutsel v Linfox* case, where the absence of a social media policy allowed the applicant to make a successful claim for unfair dismissal.[217]

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205 Ibid [50].
206 Ibid [58].
207 Ibid [54].
208 Ibid [52].
209 Ibid [110].
210 Ibid [79].
211 Ibid [61].
212 *O'Keefe v Williams Muir's Pty Ltd* [2011] FWA 5311 [6]-[7], [9].
213 Ibid [17].
214 Ibid [39]-[41].
215 Ibid [42].
216 Ibid [57].
217 *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 [87].

2 *Privacy Settings*

The applicant indicated that he had set his Facebook privacy settings to the 'maximum', to only enable a select group of seventy friends to view his comments.[218] While his employer was not mentioned by name on the site, there were about 11 co-workers who were the applicant's friends.[219] However, the respondent alleged that the applicant advised that the target of the comments was the operations manager of the respondent firm[220] and this was confirmed in the applicant's own evidence.[221] The applicant stated that the comments were not intended to be seen by the operations manager.[222] The Deputy President considered that the applicant would be aware that other co-workers could see the comments and the threatening comments would get to the operations manager[223] and 'it would be difficult to accept that the applicant was unaware of the consequences of his actions'.[224]

3 *Freedom of Expression*

The fact that the comments were posted out of hours was found, by the Deputy President, to make no material difference.[225] The case is similar to *Dover-Ray v Real Insurance Pty Ltd*[226] with both cases reflecting a different view as to the legal status of privacy settings online than was the case in *Stutsel v Linfox*.[227]

4 *Summary*

The Deputy President considered the applicant's Facebook entry as threatening towards another employee. This constituted a serious breach of conduct and therefore was a valid reason for termination.[228] The Deputy President noted that the 'separation between home and work is now less pronounced than it once used to be'.[229] This perhaps echoed Mark Zuckerberg's thoughts about a single identity back in chapter three.

The application was dismissed.[230]

218 *O'Keefe v Williams Muir's Pty Ltd* [2011] FWA 5311 [16].
219 Ibid [16].
220 Ibid [8].
221 Ibid [48], [53].
222 Ibid [35].
223 Ibid [38].
224 Ibid [39].
225 Ibid [43].
226 Dover-Ray v Real Insurance Pty Ltd [2010] FWA 8544 [51]
227 *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 [78].
228 *O'Keefe v Williams Muir's Pty Ltd* [2011] FWA 5311 [51].
229 Ibid [43].
230 Ibid [59].

E *Fitzgerald v Dianna Smith [2010] FWA 7358*

The applicant was dismissed for alleged misconduct, which, in part, was due to comments posted on the applicant's Facebook page.[231] This case briefly covers whether comments on Facebook might have damaged the employer and the impact of personal friends who are also clients of the employer.

1 *Use of Social Media*

The applicant posted a message on her Facebook page which stated 'Xmas "bonus" alongside a job warning, followed by no holiday pay!!! Whoooooo! The Hairdressing Industry rocks man!!! AWSOME!!! [sic]'.[232] The comment was removed by the applicant within a month of being posted.[233] This message would appear to be of a less serious nature than those posted in the other cases referenced above.

The respondent submitted that the applicant 'misrepresented the employer with her comments on Facebook'.[234] The Commissioner pointed out that what was once discussed over coffee with friends is now posted on websites.[235] This comment echoes the pub comment in *Stutsel v Linfox*.[236]

2 *Privacy Settings*

The applicant only posted her comment to her Facebook friends.[237] Even if other people had seen the comments they 'could not have known which hairdresser it specifically referred to'.[238] Despite the restriction to only friends, the respondent became aware of the comments via a third party.[239] Posting on websites which 'can be seen by an uncontrollable number of people is no longer a private matter but a public comment'.[240] The Commissioner did consider the postings could affect the respondents 'trust and confidence' in the applicant but the respondent did not act immediately on this and therefore in this case 'trust and confidence' was not a factor.[241]

231 *Fitzgerald v Dianna Smith* [2010] FWA 7358 [3].
232 Ibid [21].
233 Ibid [21].
234 Ibid [35].
235 Ibid [50].
236 *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 [81].
237 *Fitzgerald v Dianna Smith* [2010] FWA 7358 [21].
238 Ibid [31].
239 Ibid [49].
240 Ibid [50].
241 Ibid [57].

3 *Freedom of Expression*

The applicant submitted she was only communicating with her friends on Facebook.[242] The Commissioner stated that the comments did not affect either the hair industry or, due to the lack of identification, the particular salon.[243] While the Commissioner did consider the comments silly,[244] the Commissioner made the point that some of the friends on Facebook who were clients of the respondent were personal friends.[245] The Commissioner was perhaps making the point that, in this sense, the postings were akin to a conversation by friends over coffee or at the pub.

4 *Summary*

The Commissioner stated 'It is well accepted that behaviour outside working hours may have an impact on employment 'to the extent that it can be said to breach an express term of [an employee's] contract of employment'[246]. 'It would be foolish of employees to think they may say as they wish on their Facebook page with total immunity from any consequences'.[247] However, the Commissioner did not consider the 'comments on the Facebook page in these circumstances provide a valid reason for dismissal'.[248]

F *Mayberry v Kijani Investments Pty Ltd ATF The Dawe Investments Trust Subway Wallsend [2011] FWA 3496*.

A fellow employee had posted a photo on Facebook depicting the applicant making use of work materials inappropriately at their place of work.[249] It was alleged that the work materials had been stolen and therefore this constituted serious misconduct[250] though the tribunal found this claim was not made out.[251]

1 *Use of Social Media*

The respondent claimed that the photo had damaged her business, though the photo had not been posted on Facebook by the applicant.[252] The Commissioner found no

242 Ibid [31].
243 Ibid [54].
244 Ibid [56].
245 Ibid [55].
246 *Rose v Telstra Corporation Ltd* (1998) 45 AILR 3-966 cited in *Fitzgerald v Dianna Smith* [2010] FWA 7358 [51].
247 *Fitzgerald v Dianna Smith* [2010] FWA 7358 [52].
248 Ibid [66].
249 *Mayberry v Kijani Investments Pty Ltd ATF The Dawe Investments Trust Subway Wallsend* [2011] FWA 3496 [17].
250 Ibid [36].
251 Ibid [40].
252 Ibid [41].

direct evidence to indicate there had been damage to the business.[253] The respondent had received the photo anonymously.[254]

2 *Privacy Settings*

Privacy did not appear to be an issue in the case other than supporting the contention above that material online will find a way to others not initially privy to it.[255] This is a similar view to *Fitzgerald v Dianna Smith*[256] where material online would not be kept private.

3 *Freedom of Expression*

There were no direct freedom of expression issues.

4 *Summary*

The case highlights how social media items from a person's 'private life' can be used in their employment space, especially where the material is directly connected. The applicant was successful in seeking compensation for unfair dismissal.[257]

G *Banerji v Bowles [2013] FCCA 1052*

The applicant sought an injunction against a review of possible breach of the Australian Public Service (APS) Code of Conduct.[258] One of the reasons given for the breach was that the applicant had breached APS values and the Department of Immigration and Citizenship's (the department) policies by posting comments on twitter.[259] The other reason did not relate to social media use.[260] The applicant was a public servant employed as a Public Services Officer.[261]

1 *Use of Social Media*

While the breach of the APS code of conduct does not mention social media, the department determined the conduct in using social media 'demonstrated a failure to behave with honesty and integrity in the course of her APS employment and in a way

253 Ibid [42].
254 Ibid [36].
255 *Dover-Ray v Real Insurance Pty Ltd* [2010] FWA 8544 [51].
256 *Fitzgerald v Dianna Smith* [2010] FWA 7358 [50].
257 *Mayberry v Kijani Investments Pty Ltd ATF The Dawe Investments Trust Subway Wallsend* [2011] FWA 3496 [88].
258 *Banerji v Bowles* [2013] FCCA 1052 [28].
259 Ibid [36].
260 Ibid [36].
261 Ibid [16].

that upholds the APS values and the integrity and good reputation of the APS'.[262] The applicant used Twitter to make regular social comment in relation to her employer.[263]

The department had also published the 'Guidelines on Use of Social Media by DIAC Employees'[264] which the applicant was bound by. The guidelines were reinforced by a factsheet highlighting that it was inappropriate to make unofficial public comment on government or other political party policy or criticise the department such that it disrupted the workplace.[265] This case is distinct from *Stutsel v Linfox*[266] where specific social media guidelines were not provided.

2 *Privacy Settings*

The applicant used an anonymous alias 'LaLegale'.[267] It would appear from the case that the identity of 'LaLegale' was not at issue. The applicant did not attempt to make her comments private as she believed she had a right to express her political opinions.[268]

The applicant contended that the department had been engaged in 'covert surveillance of an employee's social media account'.[269] There is particular legislation regarding covert surveillance but the applicant did not make out an issue which the court could address.[270]

3 *Freedom of Expression*

The applicant expressed her views on Twitter to deride and criticise the government, ministers, opposition members and employees of her department.[271] The applicant alleged that none of the comments sent through Twitter were directed at individuals on a personal basis.[272]

The applicant contended that 'her right of political expression is a constitutionally protected right which operates, in any event and without restriction'.[273] The applicant asked the court to declare that '*any finding of a breach of the APS Code of Conduct for expressing a political opinion contravenes the implied constitutional freedom of political communication*'[274] and that such implied freedom is not curtailed by

262 Ibid [36].
263 Ibid [18].
264 Ibid [78].
265 Ibid [79].
266 *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 [89].
267 Ibid [18].
268 Ibid [3].
269 Ibid [45].
270 Ibid [45].
271 Ibid [18].
272 Ibid [49].
273 Ibid [3].
274 Ibid [39].

legislative or executive power.[275] The applicant submitted that the department intended to terminate her employment contract for expressing political views on Twitter.[276] The applicant also alleged that the allegation of breaching the APS code of conduct was retaliation for using Twitter.[277]

The applicant appeared to be confused as to her employer was. The applicant stated that she is effectively an employee of the people of Australia but the Judge clearly states the legal reality is that she is an employee of the department.[278]

In essence, the Court stated that the applicant felt, despite the APS code of conduct, departmental social media guidelines and fact sheet, that the applicant had a constitutional right to make political comment.[279] The Court notes that the High Court of Australia has stated the right to political expression is not unfettered or unbridled.[280] Furthermore, that if there was such a right, as the applicant contends, it would not enable someone to breach their employment contract.[281] The Court referred to the judgment of Crennan and Kiefel JJ in *Attorney-General for South Australia v Corporation of the City of Adelaide*[282], in which it was found that the right asserted by the applicant is not a personal right but one that acts to restrict legislative power 'to support the constitutional imperative of the maintenance of representative government'.[283] The Court also noted that in the same case Heydon J stated[284] that Australia did not have a legal artefact providing for the express right of freedom of expression as in the United States of America and Germany.[285]

The court determined that there is no unfettered right to political expression, as asserted by the applicant.[286]

4 *Summary*

This case is important in highlighting an employee's right, in a private capacity, to write whatever they like on social media, is not unfettered.[287] The applicant alleged a 'loss of trust and confidence the employer'[288] but did not purse this avenue in court. The unresolved issue from this case is under what circumstances is the right of an

275 Ibid [39].
276 Ibid [53].
277 Ibid [43].
278 Ibid [55]-[56].
279 Ibid [98].
280 Ibid [102].
281 Ibid [102].
282 *Attorney-General for South Australia v Corporation of the City of Adelaide* [2013] HCA 3 [166].
283 *Banerji v Bowles* [2013] FCCA 1052 [102].
284 *Attorney-General for South Australia v Corporation of the City of Adelaide* [2013] HCA 3 [151]-[152].
285 *Banerji v Bowles* [2013] FCCA 1052 [103].
286 Ibid [102].
287 Ibid [104].
288 Ibid [47].

employee, particularly an APS employee, to political expression, greater than the terms and conditions of their employment. This will be explored in chapter six.

H *Conclusion*

There would appear to be a lack of consistency between the cases explored above in relation to the relative importance of privacy settings when individuals are commenting online. The latter case of *Stutsel v Linfox* indicates that if the employee believes they have set their privacy settings so that only a limited number of friends can view the content, even if the settings are not actually at maximum privacy, that this will be looked upon favourably in any unfair dismissal case. The rationale is that it is really just a modern way of having a pub or café conversation amongst friends. However, earlier cases indicated that once comments are placed online, irrespective of privacy settings, that it was the nature of the content that was more important with the underlying assumption that it would not remain private. Chapter five will explore the relation between privacy, social media and unfair dismissal in more detail.

The *Banerji v Bowles* case highlights the conflict between the implied constitutional right of freedom of political expression and terms of a contract of employment, specifically the implied term of mutual trust and confidence between employer and employee. Chapter six will examine the implied right of freedom of political expression and highlight where, in terms of an employment contract, an employee will be able to express their views without facing dismissal.

V PRIVACY

A *What is Privacy?*

Privacy is a form of protection of person and property where property can include the intangible as well as the tangible.[289] Privacy is a broad concept and 'is an important element of the fundamental freedoms of individuals which underpin their ability to form and maintain meaningful and satisfying relationships with others'.[290] In identifying the link between a breach of privacy as a breach of private affairs, rather than public affairs, Gleeson CJ stated 'There is no bright line which can be drawn between what is private and what is not'.[291] Internationally, privacy is protected as a human right by the *International Covenant on Civil and Political Rights* which states

289 S Warren, L Brandeis. '*The Right to Privacy*' (1890) 4 *Harvard Law Review* 193, 193.

290 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Issues Paper No 43 (2013) 14.

291 *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 [41]-[42].

'no one shall be subjected to arbitrary or unlawful interference with his privacy'[292]. However, in Australia there is no general right to privacy under law.[293]

At a federal level, privacy is enshrined in legislation which specifically seeks to preserve information privacy[294], seeks to consider privacy when considering the statutory release of information[295] or the right to sexual privacy.[296] At a state or territory level there is privacy protection provided by Human Rights legislation in Victoria[297] and the Australian Capital Territory.[298]

While not exactly the same as privacy, the law of confidence, which has its roots in equity, also can protect, at least to some extent, an individual's privacy. The equitable doctrine of confidence provides a cause of action to 'protect valuable information from misuse and exploitation by others'.[299] In *Coco v A N Clark*[300] the court set out three elements to demonstrate a breach of confidence. These elements are that the information must have the necessary quality of confidence about it, must clearly have been imparted in confidence and that there has been no unauthorised use of that information.[301]

B *Key Aspects of Privacy Law in the UK and US*

The United Kingdom passed the legislation[302] which enshrined privacy rights contained within the *European Convention on Human Rights*[303] as domestic law. As part of this legislation, courts or tribunals within the United Kingdom must take into account judgments by the European Human Rights Tribunal in cases with a connection to a right protected by the Convention.[304] However, 'the House of Lords held that English law does not recognise any general principle of "invasion of privacy"'.[305] In *Campbell v MGM*[306] the House of Lords recognised a cause of action

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292 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17.
293 Fitzgerald, above n 8 911 [10.160].
294 *Privacy Act 1988* (Cth) Preamble.
295 *Freedom of Information Act 1982* (Cth) s 47F.
296 *Human Rights (Sexual Conduct) Act 1994* (Cth) s 4.
297 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 13(a).
298 *Human Rights Act 2004* (ACT) s 12(a).
299 SJ Barkenhall Thomas, V J Vann, *Equity* (LexisNexis Butterworths, 2nd, 2011) 202 [8.1].
300 *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41.
301 Ibid 47.
302 *Human Rights Act 1998* (UK).
303 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 8.
304 *Human Rights Act 1998* (UK) s (2)(1)(a).
305 *Wainright v Home Office* [2003] UKHL 53 [30] in Mark Warby and Nicole Moreham (eds) *Tugendhat and Christie The Law of Privacy and the Media* (Oxford University Press, 2nd ed, 2011) 37 [1.92].
306 *Campbell v MGN Ltd* [2004] UKHL 2 AC 457.

for misuse of personal information as a better name for, what was formerly called, a breach of confidence.[307]

In *A v B*[308] the court provided guidelines for future privacy cases, suggesting that protection of privacy will be provided by the action for breach of confidence rather than any requirement for the specific development of a tort of breach of privacy.[309] Furthermore, the circumstances of the parties' relationship are important in determining 'whether a duty of confidence does exist which courts can protect'.[310] However, a pessimistic view is that the 'pragmatic extension of the law of confidence will be inadequate to protect privacy as a result of the inherent limitations of the action'.[311] Individuals do have the right to provide information to one person but protect that information being published to others. This was the case in *Douglas v Hello! Ltd*[312] where wedding photographs were provided to a magazine company but no others, with guests asked not to provide any photos to other magazine companies.

In the United States of America (US), privacy is protected 'by means of a patchwork quilt made up of common law, federal legislation, the US Constitution, state law, and certain state constitutions'.[313] This can lead to gaps in the protection of privacy and 'the US Constitution with its supporting body of jurisprudence does not provide adequate privacy protection, especially in light of continuing technological development'.[314] However, there is an argument that there is a constitutional right to privacy. The courts have 'held that the constitutionally protected "zone of privacy" not only protected an individual's "independence in making certain kinds of important decisions" but also encompassed the "individual interest in avoiding disclosure of personal matters"'.[315]

Matthew Lindquist drew a parallel between expectations of privacy in relation to material held in a brief case compared with information held in the virtual world.[316] However, Lindquist believes that the statutory framework for protection of online privacy is poor,[317] with change to privacy law a low political priority.[318] Paul Ohm

307 Ibid [14].
308 *A v B* [2002] EWCA Civ 337.
309 Ibid [11(vi)].
310 Ibid [11(ix)].
311 Basil Markesinis et al, 'Concerns and Ideas About the Developing English Law of Privacy (And How Knowledge of Foreign Law Might Be of Help)' (2004) 52 *American Journal of Comparative Law* 133, 145.
312 *Douglas v Hello! Ltd* [2005] EWCA Civ 595 [257].
313 Avner Levin, Mary Jo Nicholson 'Privacy Law in the United States, the EU and Canada: The Allure of the Middle Ground' (2005) 2:2 *University of Ottawa Law and Technology Journal* 357, 360.
314 Ibid 367.
315 Deya Bhattacharya *Law of Tort Right of Privacy: Constitutional Issues and Judicial Responses in USA and India, Particularly in Cyber Age* 10 < http://ssrn.com/abstract=1440665>.
316 Matthew Sundquist 'Online Privacy Protection: Protecting Privacy, the Social Contract, and the Rule of Law in the Virtual World' (2012) 25 *Regent University Law Review* 153, 166.
317 Ibid 167-168.
318 Ibid 169.

stated that every US privacy statue and regulation embraces the assumption that anonymization protects privacy[319] but without 'robust anonymization' there is an imbalance in privacy laws.[320] Where the US Government is accused of breaching privacy, courts must balance the importance of government interests against those of the person whose privacy rights are being breached.[321]

It would appear that the United Kingdom offers better privacy protection than the US, although neither possesses a complete cause of action for breach of privacy.

C *Do Individuals Require Privacy?*

The Office of the Privacy Commissioner found, through studies, that privacy is 'an issue of increasing resonance with the community'.[322] People should be protected from intrusions into their private lives which are uninvited and unwanted.[323]. An information technology (IT) 'heavyweight', Scott McNealy, once famously said, 'you have zero privacy anyway', in relation to consumer privacy.[324] This, perhaps, highlights how the IT industry views the protection of a consumer's privacy. In a similar vein, Michael Froomkin wrote, 'the rapid deployment of privacy-destroying technologies by governments and businesses threatens to make informational privacy obsolete'.[325]

Have people's views changed since Brandeis wrote, that of the need for privacy protection there can 'be no doubt'?[326] Rauhofer argues that people use risk management to trade off information about themselves for other assets, for example, a person may trade off his or her privacy in exchange for increased national security.[327] The real issue, is perhaps one of competing rights.

D *Balance of Rights*

The Australian Law Reform Commission (ALRC) has noted that 'privacy of an individual is not an absolute value which necessarily takes precedence over other

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319 Paul Ohm 'Broken Promises of Privacy Responding to the Surprising Failure of Anonymization' (2010) 57 *UCLA Law Review* 1701, 1740.

320 Ibid.

321 Willow Jacobson and Shannon Tufts 'To Post or Not to Post: Employee Rights and Social Media' (paper presented at American Political Science Association Annual Conference, Seattle WA, 1-4 September 2011,) 7-8.

322 M Hummerston, 'Emerging Issues in Privacy' (Paper presented at SOCAP Swinburne Consumer Affairs Course, Melbourne, 2 October 2007) 2.

323 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice Privacy*, Report No 108 (2008) vol 1, 2535 [74.117].

324 Polly Sprenger, *Wired Sun on Privacy: "Get Over It"* (21 January 1999) WIRED <http://www.wired.com/politics/law/news/1999/01/17538>.

325 Michael Froomkin, 'The Death of Privacy?'52 *Stanford Law Review* 1461, 1461.

326 Warren, above n 289, 196.

327 Judith Rauhofer 'Privacy is dead, get over it! Information privacy and the dream of a risk-free society' (2008) 17:3 *Information & Communications Technology Law* 185, 186.

values of public interest'.[328] The ALRC stated that some of these values are 'freedom of speech, including the freedom of the media and freedom of artistic and creative expression'.[329] Markisinis notes that 'it is obviously often the business of the law to sort out clashes between competing values and interests'[330]. However, Lindsay, in his case note on *ABC v Lenah Game Meats* (*Lenah*), [331] viewed that the 'paramount legal mechanism for balancing interests or rights, such as privacy and freedom of expression, is a bill of rights'[332] which would still require a court to interpret such a bill. Gummow and Hayne JJ in *Lenah* stated that, in US law, protection of privacy may violate the first amendment regarding freedom of speech[333] and US law favours free speech, and therefore privacy gives way.[334] Another balancing act in the US is between security and privacy, where a balance must be struck between absolute security (where nothing is private) and absolute liberty (where the individual is free to choose what is or is not private).[335] Arguably, social media users may have already determined the balance, tipping it towards expression rather than privacy, due to factors such as 'lack of self-control, false belief that we are immune from harm, or a desire for immediate gratification'.[336]

E *Privacy in Social Media*

An individual posting comments on a social networking site is not protected by privacy legislation in Australia.[337] Where information has been posted by an organisation, the *Privacy Act*[338] can apply if the organisation is based in Australia.[339] However, successful legal action has been taken on other grounds, such as

328 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Issues Paper No 43 (2013) 14.

329 Ibid.

330 Markesinis et al, above n 311, 156.

331 *ABC v Lenah Game Meats* (2001) 208 CLR 199.

332 David Lindsay *Casenote: Protection of Privacy under the General Law Following ABC v Lenah Game Meats Pty Ltd: Where to Now?* [2002] Australasian Legal Information Institute <http://www2.austlii.edu.au/~graham/CyberLRes/2002/1/ >.

333 *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 [118].

334 Ibid [119].

335 J Waldron, 'Security and Liberty: The Image of Balance' (2003) 11(2) *The Journal of Political Philosophy* 191.

336 Alessandro Acquisti, Privacy in Electronic Commerce and the Economics of Immediate Gratification, in EC'04: Proceedings of the 5th ACM Conference on Electronic Commerce 21, 24 (2004) cited in Matthew Sundquist 'Online Privacy Protection: Protecting Privacy, the Social Contract, and the Rule of Law in the Virtual World' (2012) 25 *Regent University Law Review* 153, 162-163.

337 Office of the Australian Information Commissioner, Australian Government, *Do I have rights under the Privacy Act when I use social networking sites?* <http://www.oaic.gov.au/privacy/privacy-topics/internet-communications-and-other-technologies/do-i-have-rights-under-the-privacy-act-when-i-use-social-networking-sites>.

338 *Privacy Act 1988* (Cth) schs 1.

339 Office of the Australian Information Commissioner, Australian Government, *Do I have rights under the Privacy Act when I use social networking sites?* <http://www.oaic.gov.au/privacy/privacy-topics/internet-communications-and-other-technologies/do-i-have-rights-under-the-privacy-act-when-i-use-social-networking-sites>.

defamation, against organisations based outside Australia.[340] If an organisation, which has a presence in Australia, 'collects and stores this information from your page to use',[341] then depending upon the size of that organisation, it may be required to meet the Australian Privacy Principles.[342]

In 1890, Brandeis wrote that, 'numerous mechanical devices threaten to make good the prediction that "what is whispered in the closet shall be proclaimed from the house-tops"'[343]. These thoughts seem to forecast the rise of 'citizen journalists'[344] through the internet and social media.[345] This is echoed in the *Dover Ray* case where, despite privacy protections, a social media comment 'could reasonably be expected … [to] be circulated within the workplace'.[346] There is an argument that online background checks have the propensity to kill privacy, as people's private lives are made available through social media.[347]

F *Privacy in Relation to Employment Law*

Employers and employees are both bound by a duty of confidence regarding private information.[348] 'The implied term of mutual trust and confidence might, in exceptional cases, provide some protection.[349] There is 'no authority according an employee a right of privacy in relation to activities or conduct at the workplace'[350] under common law. However, there are statutory protections in relation to workplace surveillance by employers which are 'generally left to State or Territory laws, which validly apply to national system employers.'[351] Outside of the work environment, in what is the employee's private life, there are the normal protections which any citizen enjoys against invasion of information privacy; see the current Australian Privacy Principles in the *Privacy Act 1988*.[352] However, the Australian Privacy Commissioner specifically warns that information on social networking sites is public and, therefore,

340 *Gutnick v Dow Jones & Company Inc* [2001] VSC 305 [6].

341 Office of the Australian Information Commissioner, Australian Government, *Are organisations allowed to use the personal information I post on social networking sites?* <http://www.oaic.gov.au/privacy/privacy-topics/internet-communications-and-other-technologies/are-organisations-allowed-to-use-the-personal-information-i-post-on-social-networking-sites>.

342 *Privacy Act 1988* (Cth) sch 1.

343 Warren, above n 289, 195.

344 See Chapter Two.

345 Patrick Keyzer, 'Who Should Speak for the Courts and How? The Courts and the Media Today' in Patrick Keyzer, Jane Johnston and Mark Pearson (eds), *The Courts and the Media* (Halstead Press, 2007) 7.

346 *Dover-Ray v Real Insurance Pty Ltd* [2010] FWA 8544 [51].

347 Sherry D Sanders, 'Privacy is Dead: The Birth of Social Media Background Checks' (12 March 2012) 39 *Southern University Law Review* 243, 243-244.

348 *Prout v British Gas* [1992] FSR 478 cited in Stewart, above n 94 251 [13.24].

349 *RDF Media Group plc v Clements* [2008] IRLR 207, [118], [125], [132] cited in Sappideen et al, above n 1, 207 5.780.

350 Sappideen et al, above n 1, 207 [5.780].

351 *Fair Work Act 2009* (Cth) s 27(2)(m) cited in Stewart, above n 94, 253 13.27.

352 *Privacy Act 1988* (Cth) sch 1.

'potential employers could look at your page and perhaps base their decisions on what they see there'.[353] It may be the individual's expression has voided their privacy.

In the cases outlined in chapter four, the courts do not raise the privacy of the employee's incriminating social media material as an issue. In one case, the applicant raises their concern over the 'covert surveillance of an employee's social media account'.[354] However, this was not pursued by the applicant, possibly due to the apparent contradiction between the applicant wishing to express herself while restricting certain individuals from her expression. Is there a need to protect an employee's personal space from surveillance by their employer?

G *Can Future Privacy Law in Australia Protect Employee's Private Lives?*

The Australian Legal Reform Commission (ALRC) has published an issues paper '*Serious Invasion of Privacy in the Digital Era*' to begin the consultation process for its enquiry regarding the introduction, among other terms of reference, of a statutory cause of action for serious invasions of privacy.[355] Some of the areas of concern relating to employment are, for example, where employers are using social media to view prospective employees prior to employment and requesting employees to provide access to their social media accounts.[356] The report asks question in relation to the introduction of a statutory cause of action for serious invasions of privacy, such as, what would be the requisite threshold level for 'seriousness'.[357] While the High Court, in the *Lenah* case, indicated that a tort of privacy might be available, [358] a suitable case has not come forward at High Court level for this development to occur. It seems more likely, with social media breaches of privacy, that defamation proceedings will take place in preference to arguments about the development of a new cause of action, as in the *Dow Jones and Company Inc v Gutnick*[359] case.

A number of the cases analysed in chapter four concern material that an employee places onto his or her private Facebook page. While it can be argued that conversations within this page are akin to a chat at the pub amongst friends, how many friends are required before it is no longer a private conversation. In the UK case *Smith v Trafford Housing Trust*,[360] the court recognised that the applicant's Facebook

353 Office of the Australian Information Commissioner, Australian Government, *Are organisations allowed to use the personal information I post on social networking sites?* <http://www.oaic.gov.au/privacy/privacy-topics/internet-communications-and-other-technologies/are-organisations-allowed-to-use-the-personal-information-i-post-on-social-networking-sites>.

354 *Banerji v Bowles* [2013] FCCA 1052 [45].

355 Australian Law Reform Commission, *Serious Invasions of Privacy in the Digital Era*, Issues Paper No 43 (2013).

356 Ibid 51-52.

357 Ibid 16, 18-19.

358 *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 [107]-[108].

359 *Dow Jones and Company Inc v Gutnick* (2002) 210 CLR 575.

360 *Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch).

page 'was not purely private, in the sense of being available only to his invitees'[361] in that friends of friends could view it. However, In *Lenah*, Chief Justice Gleeson stated that 'I would regard images and sounds of private activities, recorded by the methods employed in the present case, as confidential'.[362] However, whether material on a private area of Facebook would be considered confidential, and whether legislation would provide injunctive relief against this material being used in the termination of employment is difficult to determine.

The cases in chapter four, with one exception, are unlikely to have had any different outcomes, even with stronger privacy laws in Australia. The only exception is in the case of *O'Keefe v Williams Muir's Pty Ltd*, where the privacy settings were in place and, therefore, the termination of the employee on the basis of information published in their private Facebook account is likely to have been considered harsh, unjust or unreasonable.

H *Conclusion*

The legal theorist Hart espouses the separation of law and morals[363]. Such a separation would indicate that privacy law is not about 'sorting through the moral priorities of the community'. A different view is that privacy is about the protection of rights where 'society's legal order must impose moral duties and obligations on all persons in its territory and it must embody a reasonable consultation hierarchy which will protect human rights'.[364] In *Grosse v Purvis*[365] the decision by the court was not to protect the guilty or misguided, but to protect an innocent person from the violation of their privacy.

Internationally, the balance of rights, rather than the absence of rights, seems to be the most important issue. The US leans heavily toward freedom of expression as the more important right than the right to privacy. The status of freedom of expression in Australia is discussed in Chapter six. The UK acknowledges that both privacy and expression need to be balanced. Callinan J highlighted that in developing privacy law, it is for is for the Australian Parliament to 'to draw the borders between confidentiality and disclosure.*[366]* It is, perhaps, more likely the case that development of privacy law within Australia will be by the Australian Parliament.

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361 Ibid [76].
362 *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 [39].
363 HLA Hart, 'Positivism and the Separation of Law and Morals' (1958) 71(4) *Harvard Law Review* 601.
364 John Rawls, 'The Law of Peoples' in M.D.A. Freeman (ed), *Introduction to Jurisprudence* (Thomson Reuters, 8th ed, 2008) 652.
365 *Grosse v Purvis* [2003] QDC 151.
366 *ABC v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 [275].

VI FREEDOM OF EXPRESSION

A *What is the Right to Freedom of Expression?*

The right to freedom of opinion and expression is contained in article 19 of the International Covenant on Civil and Political Rights (ICCPR).[367] However, there may be restrictions placed on this right where necessary in 'respect of the rights or reputations of others' and 'protection of national security or of public order, or of public health or morals'.[368] This convention came into force in Australia on 13 November 1980.[369] Australia does not recognise the ICCPR in domestic law[370] and, consequently, it is of most use as a persuasive source of argument in cases where legislation is ambiguous.[371]

Freedom of expression can be seen to encompass written and oral communication, including pictorial representation.[372] 'The right of freedom of expression protects people's freedom to communicate in public'.[373] The protection of freedom of expression can be viewed as one of the most significant features of a liberal democracy.[374] Under the common law in Australia 'everybody is free to do anything, subject only to the provisions of the law' where free speech is an assumption with established exceptions such as defamation.[375] The ICCPR also contains the right of an individual to protection of reputation.[376] There is a balance between 'society's interest in freedom of speech and the free exchange of information and ideas … and … an individual's interest in maintaining his or her reputation in society free from unwarranted slur or damage'.[377]

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367 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

368 Ibid art 19(3).

369 Department of Foreign Affairs and Trade, International, Australian Government, *Covenant on Civil and Political Rights* <http://www.info.dfat.gov.au/Info/Treaties/treaties.nsf/AllDocIDs/8B8C6AF11AFB4971CA256B6E0075FE1E>.

370 *Dietrich v The Queen* (1992) 177 CLR 292 [17] (Mason CJ and McHugh J).

371 *Minister of State for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 [26] (Mason CJ and Deane J).

372 Neil F Douglas, 'Freedom of Expression under the Australia Constitution' (1993) 16(2) *University of New South Wales Law Journal* 315, 315; *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 19(2).

373 Joseph Raz, 'Free Expression and Personal Identification' (1991) 2 *Oxford Journal of Legal Studies* 303, 303.

374 Raymond Wacks, *Understanding Jurisprudence, An Introduction to Legal Theory* (Oxford University Press 3rd ed 2012) 254 [10.6].

375 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564-5.

376 *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 17(1).

377 *Dow Jones and Company Inc v Gutnick* (2002) 210 CLR 575 [23].

B *Is this right recognised in Australia?*

While the 'drafters of the Commonwealth Constitution did include several provisions in the constitution which resemble rights there are 'different views as to how many of these rights-protective limitations there are in the Constitution.[378] Of these provisions which resemble rights, there is 'no provision guaranteeing freedom of expression'.[379] However, the High Court has identified that the *Constitution* contains implied rights such as 'implied in the Constitution, as an instrument of Federal Government, that neither the Commonwealth nor a State legislature is at liberty to direct its legislation toward the destruction of the normal activities of the Commonwealth or States'.[380] The High Court has overwhelmingly found that there was no implied right of freedom of communication in the *Constitution*.[381]

In 1992 the decisions in the cases *Australian Capital Television Pty Ltd v Commonwealth (No 2)*[382] (ACTV) and *Nationwide News Pty Ltd v Wills*[383] (*Nationwide*) were handed down by the High Court. In ACTV, the High Court determined that there was an implied right of political communication in relation to a law designed to limit political broadcasts. The court explained that 'Freedom of communication as an indispensable element in representative government'[384] at least 'in relation to public affairs and political discussion'.[385] In *Nationwide,* the High Court invalidated a law which prohibited criticism of the Industrial Relations Commission and therefore comment on public affairs rather than political comment.[386] In a similar ruling to ACTV, the High Court found in *Nationwide* that, 'to sustain a representative democracy embodying the principles prescribed by the Constitution, freedom of public discussion of political and economic matters is essential'.[387]

C *Are there limits on the implied freedom of political communication?*

This freedom is 'not absolute', and in *Lange v Australian Broadcasting Corporation*[388] (Lange), defamation proceedings were brought against a national

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378 Jennifer Clarke, Patrick Keyzer, James Stellios, *Hanks Australian Constitutional Law* (LexisNexis Butterworths, 8th ed, 2009) 1159 [10.1.5].

379 Neil F Douglas, 'Freedom of Expression under the Australia Constitution' (1993) 16(2) *University of New South Wales Law Journal* 315, 319.

380 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31.

381 *Miller v TCN Nine Pty Ltd* (1986) 161 CLR 556 [11] (Gibbs CJ), [28] (Mason J), [33] (Brennan J), [13] (Deane J), [21] (Dawson J).

382 *Australian Capital Television Pty Ltd v Commonwealth* (No 2) (1977) 177 CLR 106.

383 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

384 *Australian Capital Television Pty Ltd v Commonwealth* (No 2) (1977) 177 CLR 106, [37] (Mason CJ).

385 Ibid [38] (Mason CJ).

386 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 [2]-[3], [27] (Mason CJ).

387 Ibid [18] (Brennan J).

388 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

broadcaster. This broadcaster defended itself on the basis of 'freedom of political communication'. To resolve this matter, a test was developed.[389] The test was used to determine whether the contested law was compatible with the maintenance of the Constitution and that the law was reasonably appropriate and adapted to that end.[390]. The test was modified by the majority of the High Court in *Coleman v Power*[391] to read:

First, does the law effectively burden freedom of communication about government or political matters either in its terms, operation or effect? Second, if the law effectively burdens that freedom, is the law reasonably appropriate and adapted to serve a legitimate end in a manner which is compatible with the maintenance of the constitutionally prescribed system of representative government.[392]

Freedom of political communication is not complete legal freedom to say whatever is wished and, as noted above, even in respect of political expression there are complexities. The freedom of communication of political and public affairs is an implied right with respect to the legislation that prevents representative democracy rather than a general freedom.

D *What freedom of expression rights do the UK recognise?*

In the UK 'a right to free speech (or expression) was not generally recognized by the common law'.[393] As noted in chapter five, the United Kingdom passed Human Rights legislation in 1998.[394] This legislation, as well as enshrining privacy rights, also enshrined freedom of expression rights contained within the *European Convention on Human Rights*[395] as domestic law. There is scope under the Convention to restrict freedom of expression 'subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society'.[396] Therefore, in the UK, freedom of expression is not an absolute right.

It appears that the courts tend to give greater protection to political expression as opposed to celebrity gossip.[397] In this sense the courts in the UK mirror those in the United States of America and Australia. *Mosley v News Group Newspapers Ltd*[398] involved a newspaper releasing intimate sexual encounters regarding the applicant.

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389 Patrick Keyzer, *Principles of Australian Constitutional Law* (LexisNexis Butterworths 3rd ed, 2010) 304 [18.14].

390 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

391 *Coleman v Power* (2004) 220 CLR 1.

392 Ibid [74] (McHugh J), [196] Gummow and Hayne JJ), [210] (Kirby J).

393 Eric Barendt, 'Freedom of Expression in the United Kingdom Under the Human Rights Act 1998' (2009) 84(3) *Indiana Law Journal* 851, 851.

394 *Human Rights Act 1998* (UK).

395 *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) art 10.

396 Ibid art 10(2).

397 Eric Barendt, 'Freedom of Expression in the United Kingdom Under the Human Rights Act 1998' (2009) 84(3) *Indiana Law Journal* 851, 857.

398 *Mosley v News Group Newspapers Ltd* [2008] EWHC 1777 (QB).

While the court found in favour of the applicant, the court stressed that this did not imply that 'serious investigative journalism into crime or wrongdoing, where the public interest is more genuinely engaged' would be inhibited.[399] The UK would appear to have greater rights in relation to freedom of expression than Australia.

E *What freedom of expression rights do the US recognise?*

The US has various rights enshrined in its constitution. The first amendment to the US Constitution provides for certain freedoms, such as 'freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances'.[400] The US Supreme Court devised a test to determine exactly what falls within the notion of freedom of speech. This test involves looking at whether an 'intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.[401] This is a broader test than applied in Australia, where freedom of communication is not as broad. However, freedom of speech is not an absolute right in the US, with incitement to legal action and obscenity able to be banned by the government.[402] As with Australia, interpretation of the law falls to the courts, with judges a key element in protecting free speech.[403]

To highlight the importance of freedom of expression in the US, compared to the right to privacy, recent cases have decided in favour freedom of expression over privacy. One case, in particular, involved a law to restrict pharmaceutical data information from public display without the patients consent. Drug manufacturers believed the law restricted freedom of expression and the court agreed that liberty was more important than privacy.[404]

F *What is the right to Freedom of Political Expression in relation to Social Media?*

In Australia the *Dow Jones and Company Inc v Gutnick*[405] case highlights the different jurisdictional issues with publishing on social media as opposed to traditional media, such as print media. The respondent in this case had originally taken action against the applicant for defamation through an online journal. Despite the base of operations for the applicant being located in the US, the respondent was

399 Ibid [234].
400 *United States Constitution* amend I.
401 Spence v California 418 US 405, 410-11 cited in Ira P Robbins 'What is the Meaning of "Like"? The First Amendment Implications of Social-Media Expression' (2013) 7(1) *Federal Courts Law Review* 128, 134.
402 Ira P Robbins 'What is the Meaning of "Like"? The First Amendment Implications of Social-Media Expression' (2013) 7(1) *Federal Courts Law Review* 128, 135
403 Robert M O'Neil, 'Freedom of Expression and Public Affairs in Australia and the United States: Does a Written Bill Rights Really Matter?' (1994) 22 *Federal Law Review* 1, 6.
404 *Sorrell v IMS Health* 564 US 1 (2011) 1.
405 *Dow Jones and Company Inc v Gutnick* (2002) 210 CLR 575.

able to convince the court that his base of operations was Australia. The advantage for the respondent in doing so was that Australia has greater restrictions on freedom of expression in relation to defamation. This case demonstrates that jurisdiction shopping may be easier in cases involving social media rather than traditional media. Therefore, the medium that social media uses is important in the outcome of legal action.

The Office of the Australian Information Commissioner provides advice on what a person can do if there is a posting on a social media site that they do not like. The Commissioner states that 'You can also contact the social networking site and ask them to remove the information. Most social networking sites have a grievance procedure in place, and are interested in keeping their sites friendly and their users happy'.[406] Outside of a defamation action and freedom of expression with respect to politics, the action recommended by the Commissioner is, arguably, the best an Australian citizen can hope for. Both the UK and US, as highlighted above, offer a higher level of protection.

In chapter two, it was noted that Facebook was being used to assist in creating web pages of political expression such as the anti FARC Facebook site. In *Bland v Roberts*[407] a US court held that 'liking a candidate on Facebook does not constitute protected speech', which meant the employee could be fired for such an action, as the expression was not protected by the US first amendment.[408] However, there have also been cases in the US where Courts have ruled to the contrary.[409] Courts in the US have appeared to struggle with new media types being used for communication. This difficulty has included cable television through to compact discs.[410] This highlights that the medium used will present legal issues and content cannot always be treated as medium neutral.

In Australia, a fundamental question is whether social media is like a chat at the pub amongst friends or does it enable each user to be their own publisher and therefore provide a greater and/or easier reach for 'ordinary people'. A recent government report noted that some submissions such as

Telstra and News Limited contended that the online environment, with its relatively low barriers to entry compared to traditional media, has created a vast diversity of

406 Office of the Australian Information Commissioner, Australian Government, *What can I do if someone posts information about me on a social networking site that I want removed?* <http://www.oaic.gov.au/privacy/privacy-topics/internet-communications-and-other-technologies/what-can-i-do-if-someone-posts-information-about-me-on-a-social-networking-site-that-i-want-removed>.

407 *Bland v Roberts* 857 F. Supp. 2d 599 (E.D. Va. 2012).

408 Ira P Robbins 'What is the Meaning of "Like"? The First Amendment Implications of Social-Media Expression' (2013) 7(1) *Federal Courts Law Review* 128, 129-130.

409 Ibid 130.

410 Robert M O'Neil, 'Freedom of Expression and Public Affairs in Australia and the United States: Does a Written Bill Rights Really Matter?' (1994) 22 *Federal Law Review* 1, 10.

voices, removing all justification for any ongoing regulation of media ownership other than general competition law.[411]

To counter this, the paper suggested that diversity could change and also that people were still getting their news 'from the same news gathering organisations'.[412] It may not be clear to what extent social media is a sole source of information, or an additional source of information, but people do use social media, as noted in chapter two.

G *How does the implied right of political expression apply to unfair dismissal cases and is social media increasing the incidence?*

In the US, the Supreme Court has developed a test in relation to the speech of those in public employment, where the employee is protected if the employee speaks as a private individual on a matter of public concern and the speech outweighs the government's interest in promoting the efficiency of public services.[413] One of the key factors in weighing a private citizen's speech with the role of a government employee is whether the person, who is the target of the employee's speech, has a relationship where the 'personal loyalty and confidence necessary to the proper functioning' is involved.[414] This echoes the implied term of 'mutual trust and confidence' in Australian employment contracts raised in chapter three, though the trust applies to the employer at a firm rather than just at a personal level. There were other factors raised in the case, such as 'whether the speech interferes with maintaining discipline and harmony in the workplace',[415] 'does the speech interfere with the employee's "daily duties" in the workplace'[416] or the 'normal operations of the workplace'[417] which form the 'state's administrative efficiency interest'.[418]

In Australia there does not appear to be a judicial test to balance freedom of expression, or even freedom of political communication, with employment. In the *Banerji* case, raised in chapter three, the court had determined that the implied right to political communication is not unfettered and, even if it were, it would not entitle

411 Australian Government, *Convergence Review*, March 2012, 5.

412 Ibid 6.

413 Ira P Robbins 'What is the Meaning of "Like"? The First Amendment Implications of Social-Media Expression' (2013) 7(1) *Federal Courts Law Review* 128, 139.

414 *Pickering v Board of Examiners* 391 US 570 (1968) cited in Ira P Robbins 'What is the Meaning of "Like"? The First Amendment Implications of Social-Media Expression' (2013) 7(1) *Federal Courts Law Review* 128, 139.

415 Ibid.

416 *Pickering v Board of Examiners* 391 US 572-573 (1968) cited in Ira P Robbins 'What is the Meaning of "Like"? The First Amendment Implications of Social-Media Expression' (2013) 7(1) *Federal Courts Law Review* 128, 139.

417 *Pickering v Board of Examiners* 391 US 573 (1968) cited in Ira P Robbins 'What is the Meaning of "Like"? The First Amendment Implications of Social-Media Expression' (2013) 7(1) *Federal Courts Law Review* 128, 139.

418 *Rankin v McPherson* 483 US 378, 388 (1987) cited in Ira P Robbins 'What is the Meaning of "Like"? The First Amendment Implications of Social-Media Expression' (2013) 7(1) *Federal Courts Law Review* 128, 139.

someone to breach their employment contract. There would also appear to be no issue with whether the comments were made anonymously and what effect anonymity would have. At issue is not what others think of the comments but that the comments were made in breach of the employment contract.

In the UK case *Smith v Trafford Housing Trust*,[419] the applicant was demoted with a consequential pay reduction for gross misconduct in posting two comments on his Facebook page disagreeing with gay marriage.[420] The applicant did identify his place of work on Facebook[421] though the judge did state a person would know his Facebook page contained personal rather than work comments.[422] The core issue in the case was whether the comments on his Facebook page were seen as work related. The judge found that they were not.[423] The Judge in this case determined that the applicant's Facebook page was a virtual meeting room where friends could catch up by choice.[424] This case seems to support both the private life of a person and their right to freedom of expression. It would appear unlikely, from the case analysis in chapter four, that an Australian court or tribunal would have viewed the use of Facebook the same way.

H *Conclusion*

The US exhibits a strong affinity for freedom of expression, though there are still limits, and is not an absolute right. The UK has enacted European rights into their domestic law so that the right to expression is much stronger. Australia has a weaker version of the right to freedom of expression through the implied right to political communication. However, in all cases there must still be a balance with other rights such as privacy or protection of reputation.

Australia may be playing 'catch-up' in relation to the right of expression and either a UK or US-style right would have assisted in the *Banerji* and *Dover-Ray* cases. In the short term, the US test for freedom of speech by public servants would appear to be a readily adaptable test for the Australian environment. Justice Brandeis in the US stated, 'if there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence'.[425]

419 *Smith v Trafford Housing Trust* [2012] EWHC 3221 (Ch).
420 Ibid [1], [4]-[5].
421 Ibid [31].
422 Ibid [57].
423 Ibid [72]-[75].
424 Ibid [76].
425 *Whitney v California* 274 US 357, 378 (1927).

VII CONCLUSION

The use of social media is increasing in Australia, both within business and personal lives. While there is some debate as to whether people will separate their business and private online identities, information is significantly more accessible when it is held electronically. In this sense, irrespective of whether a person has, and uses, either their personal or business identity to publish material on a social media site, the material has the potential to reach an audience substantially larger than what may have been intended. A number of the cases analysed support this contention.

Social media users often try to achieve a balance between protecting the privacy of their information while, at the same time, wanting to use that information in social interaction. While more effective restrictions can occur in a 'pub conversation' the ramifications of information being held electronically is greater both from a distribution and perpetuity sense when online, as reflected in the case analysis.

Social media related employment disputes in Australia are relatively new. Employers are likely to become more aware over time that material published by their employees, in relation to employment issues, might have a detrimental impact on the employer's business. In effect, by publishing this information, the employee may harm the mutual trust and confidence of the employment relationship. As in any personal relationship, such an injury is likely to mark the end of that relationship. The cases analysed to date do not necessarily indicate a coherent approach to unfair dismissal action in Australia, with little reference made by the Courts to mutual trust and confidence as a significant factor leading up to the dismissal decision.

In similar cases, the US appears to weigh the right to freedom of expression more highly than the privacy of an individual. The UK has enacted European rights into their domestic law which include rights to both privacy and freedom of expression, which seems to provide a relatively balanced approach. In Australia there is no general right of privacy and only a limited right of freedom of expression within the more general right to freedom of political expression. The UK model seems to provide quite a balanced approach to managing individual rights of privacy and freedom of expression and, in my opinion, this model could be usefully adopted into Australian law.

Australian unfair dismissal cases seem to be decided less on the basis of privacy or even freedom of expression issues, despite people apparently wanting both greater privacy and freedom of expression, and more determined solely in relation to the interpretation of the employment contract. In this sense, the implied term of mutual trust and confidence may play a greater role in these types of decisions in the future. However, it seems likely that for this to occur, statutory change would be required to

ensure that mutual trust and confidence is included as an implied term in employment contracts.

Australia could adopt the test used in the USA to determine if a public servant exercising free speech should face disciplinary action. However, in light of the *Banerji* case, I would argue that it is not just the trust and confidence aspects of the personal relationship between the employee and their direct manager that is important, but also the mutual trust and confidence between the employee and their department or the government as a whole. In the *Banerji* case, the applicant had made derogatory comments about the government as a whole and, in particular, the policies of the department in which she worked. It is clear that such comments have the potential to damage the employment relationship between the employee and the government as a whole, rather than just with the employee's individual manager, through a reduction in trust and confidence.

While stronger protection of privacy or the right to expression may help to determine 'who's right or wrong' in relation to an argument, employees would be well advised to keep in mind the underlying relationship with their employer. From a practical perspective, one factor may actually be more important than freedom of speech or privacy; that is, as stated by the judge in the *Stutsel v Linfox*, the '"Law of Probability - The probability of being watched is directly proportional to the stupidity of your act." Here is wisdom.'[426] In my view, there will be less cases of unfair dismissal relating to social media if employees start to take responsibility for their own actions in this domain and have a realistic awareness of the effect that their actions on social media can have on the relationship with their employer.

In conclusion, by including mutual trust and confidence as a statutory implied term in employment contracts, adopting the US test regarding public servants expressing political views and also legislatively adopting the UK model for the inclusion of privacy and freedom of expression considerations in Australian law should help provide a more consistent basis in unfair dismissal cases involving social media.

426 *Stutsel v Linfox Australia Pty Ltd* [2011] FWA 8444 [95].

A FUNDAMENTAL RIGHT TO THE PROTECTION OF YOUR PERSONAL INFORMATION THAT IS COLLECTED BY GOVERNMENTS: REVIEW OF THE NEW INFORMATION PRIVACY ACT 2014 (ACT)

BELINDA CHAPMAN*

ABSTRACT

Privacy is an emerging and important area of law. Never has it been as important as it is now for the Australian community to have confidence that the information their governments collect is being adequately used and protected. This is largely due to the advanced ability for people to access information, which has resulted in a heightened risk for information to spread widely, and at a speed not envisaged even five years ago. With recent privacy breaches, such as the inadvertent release of the personal information of approximately 10,000 detainees on the Commonwealth's Department of Immigration and Border Protection's website[1] the protection and use of personal information is a critical consideration for all governments. This article will examine the recently passed Information Privacy Act 2014 (ACT) by the ACT Legislative Assembly and will compare the Information Privacy Act 2014 (ACT) with the Privacy and Data Protection Bill 2014 (Vic)[2] recently tabled in Victoria which brings together privacy and law enforcement data security legislation. This article will compare governmental reports handed down in Victoria and the ACT, which addressed similar issues of data security and protection and made similar recommendations.

I INTRODUCTION

Privacy law has received attention in recent years and community views should not be underestimated. It is natural to be curious about the personal information of others and unfortunately this can result in the release of personal information through means such as inadvertent release; breaches on part of government officials or information security systems that are vulnerable to external attacks. In an age where the media is making profits from sources such as the very high profile WikiLeaks[3] it is not

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1 KPMG, *Management initiated review, Privacy breach – Data management, Abridged Report, Department of Immigration and Border Protection* (2014) <http://www.immi.gov.au/pub-res/Documents/reviews/kpmg-data-breach-abridged-report.pdf 4.

2 Privacy Data and Protection Bill 2014 (Vic).

3 WikiLeaks (2014) https://wikileaks.org/.

surprising that there has been a shift in an individual's attitude. This point was made by Simon Davies in a recent paper[4]

> …increased awareness of the importance of accountability, transparency and the rule of law with regard to both the activities of security agencies and the value of privacy. This shift - in many parts of the world - has empowered civil society, created a resurgence of interest in legal protections and sensitised media to key issues that have hitherto escaped public scrutiny at any substantial level.[5]

In Australia we are starting to see changes reflected in law arising from the 2008 Australian Law Reform Commission (ALRC) Report.[6] The Report extensively reviewed privacy laws across the Commonwealth as well as other jurisdictions and made recommendations. One of the key messages to come out of the consultation which informed the Report was that '…Australians do care about privacy, and they want a simple, workable system that provides effective solutions and protections.'[7]

The Commonwealth Government is implementing the recommendations in tranches and this year the Australian Privacy Principles (APPs) were enacted.[8] The APPs are a single set of privacy principles which have replaced the Commonwealth National Privacy Principles (NPPs) and the Information Privacy Principles (IPPs).[9] The APPs were drafted to:

> …reflect the information lifecycle – from openness and transparency in personal information handling practices, collection, notification and through to disclosure, quality and security, to access and correction.[10]

The drafters took note of the message to have a workable system and the APPs were drafted to '…simplify privacy obligations and reduce confusion and duplication.'[11]

The ACT Government and the Commonwealth have a longstanding relationship in relation to IPP compliance. The passing of the *Information Privacy Act 2014* (ACT) sees the introduction of a set of independent privacy principles, which were envisaged 20 years ago. This article will firstly review contemporary community expectations with regards to the protection of personal information. Secondly, the article will briefly analyse privacy protection in the national context. Thirdly, the article will

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4 Simon Davies, The Privacy Surgeon, *A Crisis of Accountability, A global analysis of the impact of the Snowdon revelations* (2014) 5.

5 Ibid.

6 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* Report No 108 (2008).

7 Australian Law Reform Commission, *Privacy Law and* Practice (2012) http://www.alrc.gov.au/inquiries/privacy.

8 *Privacy Act 1988 (*Cth) Schedule 1.

9 Timothy Pilgrim, 'Privacy Reform — Act Three' (Speech delivered at the iappANZ 'Privacy Unbound' summit, Sydney, 25 November 2013) <http://www.oaic.gov.au/news-and-events/speeches/privacy-speeches/privacy-reform-act-three>.

10 Ibid.

11 Ibid.

review the relationship between the ACT Government and the Commonwealth and review the *Information Privacy Act 2014* (ACT) and its implementation.

The article will then review the findings from the Victorian Auditor-General's Report *Maintaining the Integrity and Confidentiality of Personal Information*[12] and the ACT Auditor-General's Office Performance Audit Report *Whole of Government Information and Communication Technology Security Management and Services*[13] as well as a Report by Allan Hawke, *Governing the City State, One ACT Government – One ACT Public Service'*[14] which addressed similar themes. The article will conclude with a view on whether the ACT Government missed an opportunity by not considering a similar regime to the one the Victorian Government are pursuing.

II OAIC SURVEY OF COMMUNITY EXPECTATIONS: HOW IMPORTANT IS PRIVACY?

In recent years the soon to be abolished Office of the Australian Information Commissioner (OAIC) has played a role in the oversight of Commonwealth information policy. Part of that role is to conduct regular surveys and inquiries and report to the Australian Government. In 2013 the OAIC released a Report, *Community Attitudes to Privacy Survey.*[15] The Report set out to capture '…Australians' changing awareness and opinions about privacy, as well as their expectations in relation to the handling of their personal information.'[16] The Report made findings on other privacy issues such as privacy in the cyber world.[17]

One of the key findings was that almost half of our population view online services as the biggest risk to their privacy.[18] Sixteen per cent were concerned about data security and the Report also found that a quarter have concerns with identity theft/fraud.[19] The results may also diminish the view that young people accept the risks and enjoy sharing their personal information online on sites such as Facebook because the results indicate that 60 per cent of young Australians have concerns with privacy risks associated with their personal information and online services.[20] The

12 Victorian Auditor-General, Maintaining the Integrity and Confidentiality of Personal Information, Report No 2009-10.8 (2009).

13 ACT Auditor-General's Office Performance Audit Report, *Whole-of-Government Information and Communication Technology Security Management and Services,* Report No 2/21012 (2012).

14 Allan Hawke, Governing the City State, One ACT Government – One ACT Public Service, ACTPS Review Final Report (2011) < http://www.cmd.act.gov.au/__data/assets/pdf_file/0011/224975/Governing_the_City_State.pdf>.

15 Office of the Australian Information Commissioner, *Community Attitudes to Privacy Survey, Research Report* (2013) < http://www.oaic.gov.au/images/documents/privacy/privacy-resources/privacy-reports/Final_report_for_WEB.pdf>.

16 Ibid 3.

17 Ibid.

18 Ibid.

19 Ibid.

20 Ibid.

Report also found that 33 per cent of our population have issues '…with the way their personal information was handled in the previous year.'[21] This figure may grow because there has been increases in privacy complaints and a large increase in data breach notifications.[22]

The results also indicate that 82 per cent of Australians are now aware of Federal privacy laws compared with 69 per cent in 2007[23] and 69 per cent of Australians trust the government more with their personal information than private entities.[24] While the figure of 69 per cent is reasonable, one can conclude from the overall results that Australians are aware of their privacy rights and have concerns about the way their information is handled, particularly because Australians are increasingly interacting with governments online.

III THE NATIONAL CONTEXT

The Northern Territory has an independent statutory body administered by the *Information Act 2002* (NT) and Queensland and New South Wales also have Information Commissioners.[25] Tasmania has an Ombudsman with powers to investigate privacy complaints[26] and in South Australia privacy protection is administered by way of compliance for government agencies with a set of administrative instructions through a Privacy Committee.[27] Western Australia has an Information Commissioner[28] and various privacy principles are provided for in the Western Australia freedom of information laws.[29] It appears that all jurisdictions cover the protection of privacy adequately, some better than others and I will analyse Victoria alongside the ACT as both jurisdictions are in the midst of privacy reform.

IV ACT GOVERNMENT AND THE PRIVACY ACT 1988

In 1994 the Commonwealth enacted laws through section 23 of the *Australian Capital Territory Government Service (Consequential Provisions) Act 1994* (Cth) which provided for the Information Privacy Principles (IPPs) in the *Privacy Act 1988* (Cth)

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21 Ibid.

22 Office of the Australian Information Commissioner, *Annual Report 2012-13* (2013) 4 <http://www.oaic.gov.au/images/documents/about-us/corporate-information/annual-reports/Annual-report-2012-13/Complete_pdf_AR_2012-13.pdf> There was a 10.2% increase in privacy complaints and a 33% increase in data breach notifications for the 2012-13 financial year. Note, this is not taking the Commonwealth Ombudsman's complaints into account.

23 Office of the Australian Information Commissioner, *Annual Report 2012-13* (2013) 4 <http://www.oaic.gov.au/images/documents/about-us/corporate-information/annual-reports/Annual-report-2012-13/Complete_pdf_AR_2012-13.pdf> 4.

24 Ibid 5.

25 *Privacy and Personal Information Protection Act 1998* (NSW); *Right to Information Act 2009* (Qld) and *Information Privacy Act 2009* (Qld).

26 *Personal Information and Protection Act 2004* (Tas).

27 Government of South Australia State Records, *Recording Government, Privacy Committee of South Australia* (2014) http://www.archives.sa.gov.au/privacy/committee.html.

28 *Freedom of Information Act 1992* (WA) ss 55-64.

29 *Freedom of Information Act 1992* (WA).

to apply to ACT Government agencies. When the amendments were drafted the application of the IPPs were not intended to be a long term solution. The Bill described the arrangement as '…on an interim basis until an ACT enactment provides otherwise, the application of the Information Privacy Principles in the Privacy Act to ACT public sector agencies.'[30]

With the extensive promotion of privacy law in the Commonwealth context, it is not surprising that the ACT has taken the opportunity to enact its own stand-alone Act. The Attorney-General, Simon Corbell MLA, acknowledged the ALRC Report's[31] key recommendations and the enactment of the Commonwealth's *Privacy Amendment (Enhancing Privacy Protection) Act 2012* (Cth), which were designed to implement the first tranche of recommendations made in the Report.[32]

As noted previously, the APPs replaced the IPPs and NPPs and were not drafted in a way to apply to ACT Government agencies. It is unclear whether this was an oversight or was intended at the time of drafting because of the *Australian Capital Territory Government Service (Consequential Provisions) Act 1994* (ACT), ACT Government agencies would continue to adhere to the IPPs from 12 March 2014.[33]

A *Overview of the Information Privacy Act 2014 (Act)*

The *Information Privacy Act 2014* (ACT) was drafted in accordance with commitments the ACT Government took to the 2008[34] and 2012 ACT Legislative Assembly elections, and its intention is said to be connected to s 12 of the *Human Rights Act 2004* (ACT) whereby everyone has a right to privacy protection and that their information will not be interfered with in an unlawful manner.[35] This is said to be based on Article 7 of the United Nations International Covenant on Civil and Political Rights.[36] However, the *Information Privacy Act 2014* (ACT) does expressly mention it in the objects.[37] The supplementary explanatory memorandum explained human rights protection and the connection to Article 7 of the United Nations International Covenant on Civil and Political Rights:

30 Explanatory Memorandum, Australian Capital Territory Government Service (Consequential Provisions) Bill 1994 (Cth) 3.

31 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice* Report No 108 (2008).

32 Explanatory Memorandum, Information Privacy Bill 2014 (ACT) 2.

33 *Australian Capital Territory Government Service (Consequential Provisions) Act 1994* (ACT) s 23.

34 http://treasury.act.gov.au/documents/Summary%20of%20Election%20Commitments%20(17%20Oct).pdf 9. The ACT Government committed funding to develop a Privacy Act.

35 Revised Explanatory Memorandum, Information Privacy Bill (ACT) 3.3.

36 Ibid.

37 *Information Privacy Act* 2014 s 7. Section 2A(h) of the *Privacy Act 1988* (Cth) sets this out in its objects.

> …Bill supports and enhances the right to privacy by ensuring that there is a clear framework setting out how ACT public sector agencies collect, use, disclose and otherwise manage personal information.'[38]

The *Information Privacy Act 2014* (ACT) is well drafted and clearly sets out how the ACT Government must collect, use and disclose and manage personal Information.[39] The 'Territory privacy principles' (TPPs)[40] mirror the APPs as set out in Schedule 1 of the *Privacy Act 1988* (Cth).[41] The ACT Attorney-General said that as a result of the passing of the privacy laws personal privacy will be better protected and like the APPs stated the passing of the *Information Privacy Act 2014* (ACT) '…promotes the protection of individual privacy by regulating the handling and management of personal information by ACT public sector agencies.'[42] A media statement released by the Attorney-General provided the following insight:

> …technological changes have led to a shift in community perceptions of privacy, people are more willing to share personal information but are also increasingly interested in how their information is handled and managed.[43]

B *Implementation at a Time of Uncertainty in the Commonwealth Context*

Part 5 of the *Information Privacy Act 2014* (ACT) allows for the appointment of an 'Information privacy commissioner'.[44] The appointment of a privacy commissioner is similar to the *Australian Information Commissioner Act 2010* (Cth)[45] regime but allows for 7 year appointments[46] and has the flexibility for arrangements to be made for the appointment of a privacy commissioner of another jurisdiction to exercise the functions.[47] There has been no official announcement about an appointment of an 'Information privacy commissioner'[48] and the issue was raised in the debate of 3 June 2014 by opposition leader Mr Jeremy Hanson MLA, Shadow Attorney-General. The Shadow Attorney-General expressed concerns about the services that have been

38 Revised Explanatory Memorandum, Information Privacy Bill (ACT) 2.
39 *Information Privacy Act 2014* (ACT).
40 Ibid Schedule 1.
41 *Privacy Act 1988* (Cth) Schedule 1, Australian Privacy Principles.
42 Simon Corbell MLA, Attorney-General, 'New privacy law to protect personal information' (Media Release, 3 June 2014) http://www.cmd.act.gov.au/open_government/inform/act_government_media_releases/corbell/2014/new-privacy-law-to-protect-personal-information.
43 Ibid
44 *Information Privacy Act 2014* (ACT) s 26.
45 *Australian Information Commissioner Act 2010* (Cth) s 15.
46 *Information Privacy Act 2014* (ACT) s 27(1).
47 Ibid s 28.
48 Ibid s 26.

provided by the Commonwealth in this regard and how the abolishment of the OAIC may impact on the ACT budget.[49]

During the Assembly debate Mr Shane Rattenbury MLA stated that government officials from the Justice and community Safety Directorate (JACS) had assured Mr Rattenbury MLA that officials have '…spoken to the Privacy Commissioner and he has assured them that there is no impairment of his capacity to provide privacy services to the ACT.'[50]

V REVIEWS CONDUCTED IN THE ACT AND VICTORIA

When the *Information Privacy Act 2014* (ACT) is compared with the recent Privacy and Data Protection Bill 2014 tabled by the Victorian Government,[51] it appears that the ACT Government may have missed an opportunity to expand the scope of reform if they had considered reports provided to them: *Whole-of government Information and Communication Technology Security Management Services*,[52] and *Governing the City State – One ACT Government – One Public Service*. Both reports highlight issues which may have justified the existence a privacy and data protection commissioner in the ACT. An interesting comparison is observed with the recent privacy reform in both jurisdictions. The primary difference between the two is that the Victorian Privacy and Data Protection Bill seeks to implement important recommendations made by the Victorian Auditor-General.[53] The recommendations the Victorian Government is implementing include the establishment of merged body to have an oversight of privacy and data protection which will enforce the adoption of a 'the whole-of-government information security policies and standards.'[54] The Commissioner for Privacy and Data Protection[55] will also oversee the '…implementation of information security policies and standards and compliance with reporting compliance.'[56]

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49 ACT, *Parliamentary Debates*, Legislative Assembly, 3 June 2014, 1639 (Jeremy Hanson MLA, Shadow Attorney-General) <http://www.hansard.act.gov.au/hansard/2014/week06/1639.htm>.

50 ACT, *Parliamentary Debates*, Legislative Assembly, 3 June 2014, 1639 (Shane Rattenbury MLA) <http://www.hansard.act.gov.au/hansard/2014/week06/1639.htm>.

51 Privacy and Data Protection Bill 2014 (Vic).

52 ACT Auditor-General's Office Performance Audit Report, *Whole-of-Government Information and Communication Technology Security Management and Services*, Report No 2/21012 (2012).

53 Victorian Auditor-General, *Maintaining the Integrity and Confidentiality of Personal Information*, Report No 2009-10.8 (2009).

54 Ibid x.

55 Privacy and Data Protection Bill 2014 (Vic) s 95.

56 Ibid.

A *ACT Auditor-General's Report*

Pursuant to s 17(5) of the *Audit-General Act 1996* (ACT), in 2012 the ACT Auditor-General's Office handed down a Performance Audit Report *Whole of Government Information Technology Security Management and Services.* The Report examined security management and services of whole-of-government information and communication technology.[57] The main objective of the audit was to examine whether '…administrative structures and processes for whole-of-government ICT policies and procedures are well defined, managed and communicated.'[58] The Report outlined the importance of protective security policies because it ensures that information is handed by the right people, and that access is granted at the right time and location and this is said to be an important aspect of '…an organisation's overall management system, based on business risk.'[59]

When the Report was handed down there was a set of guidelines named *Protective Security Policy and Guidelines* which was delivered through a committee named ACT Security in Government Committee (ACTSIGC). The leading agency was JACS and this Directorate administered the *Protective Security Policy and Guidelines* and were the leaders in the promotion of protection and security of the ACT government's information and assets.[60] The Report highlighted that it was not known how well understood the *Protective Security Policy and Guidelines* were and whether there were adequate checks and balances in place that would ensure agencies are complying. This could, in part, be addressed if whole-of-government- administrative structures and processes were better defined and readily available.'[61] It should be noted that the standards issued in the guidelines were not mandatory when this Report was released.[62]

The Report highlighted that of the ACT Government's 1,025 information management systems only five per cent had a system security plan and 2.4 per cent '…had a threat and risk assessment'.[63] It is not known whether these figures have improved since 2012 but at the time there was recognition of the adoption of 33 mandatory requirements for the Guidelines.[64]

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57 ACT Auditor-General's Office Performance Audit Report, *Whole-of-Government Information and Communication Technology Security Management and Services*, Report No 2/21012 (2012) 1.1 3.

58 Ibid 1.11 4.

59 Ibid 1.3 3.

60 Justice and Community Safety: ACT Government, *Protective security* (2012) http://www.justice.act.gov.au/page/view/439/title/protective-security.

61 ACT Auditor-General's Office Performance Audit Report, *Whole-of-Government Information and Communication Technology Security Management and Services*, Report No 2/21012 (2012) 5.

62 Ibid.

63 Ibid 6.

64 Ibid 7.

At the time of the Report the responsibilities for ICT security management and services and information were spread across various agencies:

- Treasury Directorate administered the *Territory Records Act 2002* (ACT), the Shared Services Division and Shared Services ICT Security Section provided information and communication technology for the ACT public service.
- Justice and Community Safety Directorate – managed the Security and Emergency Management Branch (SEMB).
- All directorates and agencies administered policies and staff compliance for ICT.[65]

The Report made two main recommendations. The first was for the Shared Services Division of JACS to improve the management of whole-of-government security practices by way of making a formal arrangement of the relationship of the Security and Emergency Management Branches, and the Shared Services ICT Security Section.[66] The other part of the first recommendation was:

> …clarifying and documenting the roles and responsibilities of an ACT Government IT Security Adviser, the ACT Security in Government Committee and directorate Agency Security Advisers and their supporting communication processes.[67]

This was given a high priority by the Auditor-General.

The second recommendation provided for improvements in whole-of government security management practices, which included risk management. The Report recommended that this could be done by the establishment of procedures for compliance and reporting and surveys, the completion of a review of the *Protective Security Policy and Guidelines* to clarify the Commonwealth's mandatory requirements, and the inclusion of international standards.[68] At the time of the drafting of the Report, pursuant to s 18 of the *Auditor-General Act 1996* (ACT) a final draft was provided to the relevant agencies. Both the Director-General of JACS and under Treasurer (Shared Services) agreed to these recommendations. The Report stated:

> On 23 May 2012 the Security and Emergency Management Senior Officials Group accepted revised terms of reference for the ACT Security in Government Committee, following a review by the ACT Security in Government Committee. These revised terms of reference will include the role of "reviewing and updating the ACT Protective Security Policy and Guidelines" and a requirement to "provide an annual report to the Security and

65 Ibid 17-18.
66 Ibid 1.18 10.
67 Ibid.
68 Ibid 11.

> Emergency Management Senior Officials Group on agencies" compliance with the Protective Security Policy and Guidelines.

The ACT Government's online Protective Security page covers the ACT *Protective Security Policy and Guidelines* and it should be noted that it was last published on 7 May 2012 and it is not known how well this has been updated since.

In the Report JACS also acknowledged the recommendation concerning risk plans and compliance with information security obligations and guidance.[69] JACS agreed that it is an issue and advised that JACS would '…add to its risk management plan the risk of not keeping information security policy and procedures current.'[70]

B *Governing the State: One ACT Government – One ACT Public Service*

In 2010 then Chief Minister, Mr Jon Stanhope MLA announced a review of the ACT public service. The review was conducted by Allan Hawke and handed down 2011. The aim '…was to ensure the configuration of the ACT public sector remains appropriate for meeting the Government's needs and delivering its future agenda.'[71] One of the recommendations was to establish a Chief Information Officer (CIO) and the CIO would be based in the proposed Chief Minister's Department.[72] The role would oversee a whole-of-government policy for issues such as information communications technology, strategic information, freedom of information, record keeping and storage and access. It would also '…build a pool of business analysts and project management resources for ready deployment across the service for information and communications technology and business improvement projects.'[73]

Similar to the findings in the Auditor-General's Report, Hawke found that responsibilities for knowledge management governance was across various agencies and that the responsibilities should be centralised and administered by the CIO.[74] Given the size of the ACT compared with other larger jurisdictions, it would be a better use of resources to have one body that is responsible for:

> the strategic program for gathering, storing and sharing ACTPS data. It would be responsible for the end to end continuum of government information including the Territory Records Act, the FOI Act and other legislation relating

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69 Ibid 11.

70 Ibid 12.

71 Allan Hawke, *Governing the City State, One ACT Government – One ACT Public Service, ACTPS Review Final Report* (2011) <http://www.cmd.act.gov.au/__data/assets/pdf_file/0011/224975/Governing_the_City_State.pdf>. Opening letter.

72 http://www.cmd.act.gov.au/open_government/what_is_open_government/about_the_gio. It should be noted that the ACT Government established the Government Information Office (GIO) and not the CIO as recommended in the Hawke Report.

73 Ibid 8.

74 Ibid 93.

> to record keeping by the ACTPS, the proactive release of government material, whole of government information management and ICT governance, policy, information architecture, strategic planning, and web 2.0 technologies.[75]

One deliverable under the Report was for the implementation of a knowledge management framework and a foundation of this was in an ICT strategic plan.[76] Following this recommendation, instead of establishing a CIO, the ACT Government established the Government Information Office (GIO). The role of the GIO is to '… provide across-government advice and coordination on ICT issues and release of government information.'[77] It is based in the Chief Minster, Treasury and Economic Development Directorate and works with ICT areas across the ACT Government.[78] It is not known why the ACT Government did not implement Hawke's recommendation 22 in full.[79] However, the ACT Government is proactive in their approach to innovation with technology[80] with initiatives such as the Strategic Plan for ICT 2011-15 which outlines a direction and objectives with ICT investment government on information security.[81]

VI AUDITOR-GENERAL REPORT VICTORIA 2009

Pursuant to s 16AB of the *Audit Act 1994* (Vic), the Victorian Auditor-General handed down a Report *Maintaining the Integrity and Confidentiality of Personal Information.* This Report focused on personal information and '…how it is stored, processed and communicated by the public sector. It evaluates whether its confidentiality and integrity has been maintained.'[82] The Report had a similar focus to the *Whole-of-Government Information and Communication Technology Security Management and Services* [83] and acknowledged the importance of the maintenance of confidentiality and that those who require the information are granted access, and that

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75 Ibid.

76 Ibid 94.

77 Government Information Office, ACT Government, *About Us* (2014) <http://gio.act.gov.au/about/>.

78 ACT Government, Open Government, *About the GOI* (2012) http://www.cmd.act.gov.au/open_government/what_is_open_government/about_the_gio.

79 Allan Hawke, *Governing the City State, One ACT Government – One ACT Public Service, ACTPS Review Final Report* (2011) < http://www.cmd.act.gov.au/__data/assets/pdf_file/0011/224975/Governing_the_City_State.pdf> 8.

80 ACT Government, *The Strategic Plan for ICT 2011-15* (2012) http://www.cmd.act.gov.ay/_data/assests/pdf_file/0011/247826/The_Strategic_Plan_for_ICT_2011-15.pdf.

81 Ibid.

82 Victorian Auditor-General, *Maintaining the Integrity and Confidentiality of Personal Information*, Report No 2009-10.8 (2009) vii.

83 ACT Auditor-General's Office Performance Audit Report, *Whole-of-Government Information and Communication Technology Security Management and Services*, Report No 2/2012 (2012).

secure storage of personal information is maintained so '…that information provided is not later corrupted or lost, either intentionally or inadvertently.'[84]

The Auditor-General examined three departments and concluded that '…the ability to penetrate databases, the consistency in our findings and the lack of effective oversight and coordination of information security practices strongly indicate that this phenomenon is widespread.'[85] This is similar to findings in the ACT and the Report found that this problems was largely due to the '…security policy, standards and guidance for the sector are incomplete and too narrowly focused on ICT security.'[86]

The Auditor-General found that departments were not meeting their responsibilities in the context of maintenance and development of whole-of-government information security guides, and standards to improve culture and the provision of support and advice on developments in information security.[87] An interesting comparison with the ACT is that the risk management frameworks in both jurisdictions were considered not ideal. The Victorian Report found that '…greater guidance across the sector is needed. Risks cannot be managed where an agency is not aware of them, or does not understand their significance.'[88]

Whilst is cannot be determined how well the ACT Government have implemented the recommendations made in the 2012 Report, the Victorian Government have addressed many of the issues highlighted by way of the introduction of the Privacy and Data Protection Bill 2014 (Vic), which will ensure that the Victorian Government administers the personal information it collects in a consistent and secure manner.[89]

VII VICTORIAN PRIVACY DATA AND PROTECTION BILL 2014

The Victorian Attorney-General, Robert Clark MP released a press statement and explained that the intent of the Privacy and Data Protection Bill is to merge the roles of the Commissioner for Law Enforcement Data Security, and the Privacy Commissioner so there will be one body with oversight of data protection and privacy. The Attorney-General hopes that this approach will '…strengthen the protection of individuals' private information held by the Victorian public sector.'[90]

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84 Victorian Auditor-General, *Maintaining the Integrity and Confidentiality of Personal Information*, Report No 2009-10.8 (2009) vii.

85 Ibid.

86 Ibid viii.

87 Ibid viii.

88 Ibid ix.

89 Robert Clark MP, Attorney-General, 'New framework for privacy and data protection and information sharing (Media Release, 12 June 2014) http://www.robertclark.net/news/new-framework-for-privacy-and-data-protection-and-information-sharing/.

90 Ibid.

The IPPs contained in the Privacy and Data Protection Bill largely mirror the Commonwealth APPs for the 'Fair Handling of Personal Information, on which the Commonwealth Government's private sector privacy legislation was also based originally.'[91] This will result in the Victorian IPPs coming more into in line with Commonwealth reforms. The order of the IPPs are somewhat different to the APPs. An illustration of this can be found by comparing APP 1,[92] with IPP 5 whereby the requirement for a privacy policy is set out in a separate principle, however, it is not as prescriptive as APP 1 which sets out obligations to handle personal information in a transparent way, and the requirements for a privacy policy.[93] The mandatory requirement for a privacy policy is an important aspect of privacy law so that the community can have a clear understanding of what its government is doing with a person's personal information and what a person is entitled to under law with respect to the handling and protection of their personal information as well as access to their personal information.

It is not known why the Victorian Government did not align the IPPs more closely to the Commonwealth APPs and as was done in the ACT, however, they generally cover the same themes to promote an open and transparent collection, use and disclosure of personal information throughout its lifecycle.

An important aspect of the Privacy and Data Protection Bill is contained in Part 4 – Protective Data Security. It provides discretion for the Commissioner for Privacy and Data Protection to issue a protective data security framework, the issue of data security standards and protective data security plans.[94] The issues raised in the Report[95] have been drafted into a legislative framework and the Commissioner for Privacy and Data Protection will have responsibilities for issuing protective security standards. The role of the office will also be to assist agencies to develop consistent plans. In a positive move by the Victorian Government, the Privacy and Data Protection Bill sets out mandatory compliance with the protective data security standards[96] and two years after the implementation of the protective data security standards agencies must have security risk assessments and a protective data security plan implemented, to ensure that the standards are applicable to that particular agency.[97] Another important aspect of the Privacy and Data Protection Bill is found in s 89 which sets out the risk and compliance issues that were raised in the Auditors-General reports in both the ACT and Victoria. There is also a requirement for the

91 Explanatory Memorandum, Privacy and Data Protect Bill 2014 (VIC) 2.
92 *Privacy Act 1988* (Cth) Schedule 1 APP 1.1.
93 Ibid.
94 Explanatory Memorandum, Privacy and Data Protect Bill 2014 (VIC) Part 4.
95 Victorian Auditor-General, *Maintaining the Integrity and Confidentiality of Personal Information*, Report No 2009-10.8 (2009).
96 Privacy and Data Protect Bill 2014 (VIC) s 88.
97 Ibid s 89.

protective data security plans to be reviewed every two years and reported to the Commissioner for Privacy and Data Protection.[98]

Overall, the Privacy and Data Protection Bill is an improvement on part of the Victorian Government because it brings together privacy laws with information security to adequately protect personal information. The Victorian Government is ahead of other Australian jurisdictions and it will be interesting to watch the progression of the Privacy and Data Protection Bill through Parliament.

VIII CHANGING THE ICT ENVIRONMENT IN THE ACT

In the recent 2014-15 ACT budget, the ACT Government announced that it is '…capitalising on opportunities in digital technology with initiatives that will transform the way individuals and businesses interact with the government and the world.'[99] The ACT Government intends to invest almost $85 million in digital technology[100] and this will include initiatives such as:

- automated accounts payable systems;
- replacement of the revenue collection system;
- an automated accounts payable system;
- a new court management system which will include infrastructure to allow for the filing of documents electronically;
- a system to allow for electronic tendering; and
- investment in the ACT Governments open data platform which will include making datasets more accessible.[101]

The Act Government are also planning to invest in the following:

- a combined private and public cloud service which will reduce data storage costs;
- improvements to the payroll and Human Resources systems;
- ACT public servants will be provided with IT self-help tools that are said to be an improvement on what they have; and
- a feasibility study to identify options for the digitisation of the records of the ACT Public Service.[102]

The distribution of the IT self-help tools is a positive move and there is sound investment in ICT infrastructure. However, as has been illustrated throughout this article, the ACT Government could have invested money in reviewing all the ICT services across the ACT Public Service and could have revisited Hawke's

98 Ibid 89(4).

99 C Capitalising on a Digital Technology – Digital Canberra < http://apps.treasury.act.gov.au/__data/assets/pdf_file/0020/601706/Digital-Canberra.pdf>.

100 Ibid.

101 Ibid.

102 Ibid.

recommendation to combine various services across all directorates that involve the collection, protection, storage and use of information into one body.

IX CONCLUSION

It appears the ACT Government has missed an opportunity to centralise information policy, information privacy law and data protection when they drafted the *Information Privacy Act 2014* (ACT) and perhaps it was another oversight when the recent 2014-15 budget was handed down. The ACT Government is heading in a positive direction with ICT data security initiatives and the passing of the *Information Privacy Act 2014* (ACT) but the co-ordination and centralisation of privacy and data protection security remains an issue. As a result of sound initiatives as outlined in this article it appears that the ACT Government may have basis for establishing an office with an independent Privacy and Data Protection Commissioner or the role of the GIO could be enhanced to include the information security functions as well. This would greatly improve the collection, storage and use of personal information across the ACT Public Service and address many issues raised in the Hawke and ACT Auditor-General's Reports, and the ACT would not have to rely on the Commonwealth for assistance.

COMBATTING SEXUAL HARRASSMENT IN THE WORKPLACE: POLICY Vs LEGISLATIVE REFORM

CATHERINE VAN DER WINDEN*

ABSTRACT

Sexual harassment in the workplace has been prohibited since the implementation of the Sex Discrimination Act 1984 (Cth) (the SDA). Over the years the legislation has been amended time and time again as a result of parliamentary review and judicial decision-making. However sexual harassment still remains a prevalent issue in Australian workplaces, with just over one in five people in Australia in 2012 experiencing sexual harassment, as defined in the SDA.[1] As the SDA nears its 30th anniversary, it is timely to consider the history and evolution of the sexual harassment laws in Australia spanning the last three decades and analyse its effectiveness in deterring sexual harassment and providing sufficient recourse for victims. In recent cases, such as Ewin v Vergara in 2014, we have witnessed the amount of damages awarded to victims growing exponentially to six-figure sums, which may indicate the courts' rising recognition of the significance of the issue. This paper will consider the widening interpretation of the SDA by the courts, such as the expanding definition of the 'workplace', and ultimately consider whether the current legislative framework is sufficient to combat the prevalence of sexual harassment in the modern employment sphere, or whether future reform lies within policy.[2]

I SEXUAL HARASSMENT IN AUSTRALIA: AN OVERVIEW OF THE ISSUES

Despite thirty years of legislation proscribing sexual harassment, as at 2014 it remains widespread in Australian workplaces.[3] This phenomenon is claimed to still exist

1 Australian Human Rights Commission, *Working Without Fear: Results of the 2012 Sexual Harassment National Telephone Survey* (2012) 1 ('*Working Without Fear Report*').

2 This paper coincides with the Australian Government's consideration of proposals to include a general prohibition against sexual harassment in *any* area of public life, not merely employment and education, and a greater consideration of a consolidation of federal discrimination laws.

3 Paula McDonald et al, 'Developing a Framework of Effective Protection and Response Strategies in Workplace Sexual Harassment', *Asia Pacific Journal of Human Resources* (May

because people are unaware of their rights under the legislation and, further, because victims are afraid of further victimisation should they come forward. It was noted earlier in 2014 that 'only 18 per cent of women who have been sexually harassed will bring any form of formal complaint'.[4] Another reason cited is the fear that complainants won't be believed or will be deemed a 'trouble-maker' for raising the complaint.[5]

A general lack of understanding of individual rights was said to be a contributing factor, with a 2008 survey revealing that approximately one in five women had experienced conduct amounting to sexual harassment under the law, despite expressly stated that they did not understand it to be so.[6] Further recent research into the prevalence of sexual harassment has found that many people who experience sexual harassment identify that the conduct 'is not right', however cannot identify what about sexual harassment that is wrong, or that the conduct is unlawful.[7]

In general terms, the SDA expressly prohibits unwelcome sexual conduct in a 'workplace' that a reasonable person would anticipate would offend, humiliate or intimidate the person harassed.[8] While the subjective consideration of what is deemed 'unwelcome' and the often misunderstood concept of the 'reasonable person' allow for a broad interpretation of the law due to its ambiguity, this may also be a contributing factor to the lack of understanding. The major concern is that to redefine and narrow the scope of the legislation would lead to the restriction of its application, therefore running the risk of 'blind spots' that are not covered. It is my view that there is little to be gained from re-writing the legislation; the better solutions lies within workplace policy and social reform. Legislation works to prohibit areas of clear-cut right and wrong. Tortious acts such as discrimination have a subjective element that calls into play the need for social change, rather than legislative. Social awareness is the key to aid a predominately social issue. This paper will attempt to demonstrate the above issues through an examination of the current framework, its societal understanding and judicial application.

2014) < http://www.readcube.com/articles/10.1111%2F1744-7941.12046?r3_referer=wol&show_checkout=1>.

4 Madeleine Morris, Interview with Jemma Ewin (Australian Broadcasting Corporation, 14 August 2014) <http://www.abc.net.au/7.30/content/2014/s4067437.htm>.

5 Ibid.

6 Australian Human Rights Commission, *Sexual Harassment: Serious Business – Results of the 2008 Sexual Harassment National Telephone Survey* (2008) v ('*Sexual Harassment: Serious Business Report')*.

7 Australian Human Rights Commission, 'Sexual Harassment: Know Where the Line Is' (Media Release, 21 May 2014) <https://www.humanrights.gov.au/news/media-releases/sexual-harassment-know-where-line>.

8 *Sex Discrimination Act 1984* (Cth) s 28A.

II HISTORY OF AUSTRALIA'S FRAMEWORK

The SDA came into force in 1984, to give effect to Australia's obligations under the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[9] The Act's main objectives are to aid in the elimination of discrimination on the grounds of sex, sexual orientation, marital or relationship status or pregnancy as well as to eliminate, so far as possible, discrimination involving sexual harassment in the workplace, educational institutions and in other areas of public activity.[10]

In order to understand the significance of the SDA, it is necessary to provide an overview of CEDAW. CEDAW was adopted by the United Nations General Assembly in 1979, opening for signature in that year and entering into force on 3 September 1981. Often described as an 'international bill of rights for women',[11] CEDAW is predominately a human rights treaty for the purpose of equality; however it's focal point is in the elimination of gender inequality against women. Article 3 commits signatories to take 'all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men'.[12] Article 11 relates specifically to achieving these objectives within the employment sphere.

Australia because a signatory to CEDAW on 17 July 1980 and ratified the Convention on 28 July 1983, with the SDA subsequently coming into force on 1 August 1984. The Australian Human Rights Commission (then the Human Rights and Equal Opportunity Commission) were given the responsibility of administering and overseeing the SDA. In keeping with the requirements under CEDAW, Australia regularly sends representatives to the international committee and, as will be discussed further in the paper, prepares independent reviews into the effectiveness of the measures taken to give effect to the treaty.

A *Function of the Sexual Harassment Provisions of the Sex Discrimination Act 1984 (Cth)*

Sexual harassment is considered a form of 'discrimination' under the SDA and is covered in Division 3 of the Act. This section of the paper will provide an overview of the general provisions of the Act relating to sexual harassment, however it is

9 *Sex Discrimination Act 1984* (Cth) s 3(a).
10 *Sex Discrimination Act 1984* (Cth) s 3(b) and s 3(c).
11 United Nations Entity for Gender Equality and the Empowerment of Women, *Convention on the Elimination of All Forms of Discrimination Against Women* <http://www.un.org/womenwatch/daw/cedaw/>.
12 *Convention on the Elimination of All Forms of Discrimination Against Women*, New York City, A/RES/34/180 (entered into force signed 18 December 1979) art 11.

important to add the caveat that the provisions are broad, non-exhaustive, and require judicial interpretation in their application, therefore this section aids as a mere overview of the technical aspects of the law.

Section 28A of the SDA provides that a person sexually harasses another person if that person makes unwelcome sexual advances, or an unwelcome request for sexual favours, or engages in other unwelcome conduct of a sexual nature in relation to the person harassed, 'in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated'.[13] Circumstances such as sex, age, gender identity, religious beliefs and the relationship between the person harassed and the person engaging in the conduct are taken into account.[14]

While courts have recognised that sexual harassment is a form of sex 'discrimination' against women, the SDA applies to both women and men. This is made clear in the objects of the SDA at section 3(b) which states that the object is eliminate discrimination against 'persons'. However, tying sexual harassment to the notion of discrimination against women in particular was outlined in the case of *Aldridge v Booth*, in which Spender J noted that:

> ...when a woman is subjected to sexual harassment ...she is subjected to that conduct because she is a woman, and a male employee would not be so harassed: the discrimination is on the basis of sex. The woman employee would not have been subjected to the advance, request or conduct but for the fact that she was a woman.[15]

Under section 28B of the SDA, sexual harassment by an employer of an employee (or person seeking to become an employee) is made unlawful, as is sexual harassment by an employee of a *fellow* employee (or person seeking employment) with the same employer.[16] This extends to a commission agent or a contract worker reciprocally,[17] a partner in a partnership,[18] as well as a 'workplace participant'.[19] Geographically, section 28B defines workplace as 'a place at which a workplace participant works or otherwise carries out functions in connection with being a workplace.[20]

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13 *Sex Discrimination Act 1984* (Cth) s 28A.

14 *Sex Discrimination Act 1984* (Cth) s 28A(1A); Further, the common law has found that the conduct in question need not be 'persistent', conduct that results in sexual harassment may be a single occurrence; see *Hall v Sheiban* (1989) 20 FCR 217.

15 *Aldridge v Booth* (1988) 80 ALR 1, 16-17 (Spender J).

16 *Sex Discrimination Act 1984*(Cth) s 28B(1) and s 28B(2).

17 *Sex Discrimination Act 1984* (Cth) s 28B(3) and s 28B(4).

18 *Sex Discrimination Act 1984* (Cth) s 28B(5).

19 *Sex Discrimination Act 1984* (Cth) s 28B(6); 'workplace participant' is further defined as any of the following: an employer of an employee; a commission agent or contract worker; a partner in a partnership: *Sex Discrimination Act 1984* (Cth) s 28B(7)(a), s 28B(7)(b) and s 28B(7)(c).

20 *Sex Discrimination Act 1984* (Cth) s 28B(7).

Arguably one of the most important aspects of the test for sexual harassment is the requirement that the conduct be 'unwelcome'. This requirement is a subjective consideration, based on the recipient's perception and experience of the conduct.[21] In contrast, the requirement that the conduct be 'offensive, humiliating or intimidating' is objective and is based on the reasonable person standard.[22]

It is important to note that the sexual harassment provisions in the SDA only prohibit sexual harassment within particular spheres of public activity, such as work, educational institutions, the provision of goods, services, facilities and accommodation, dealings with land, clubs and the administration of Commonwealth laws and programs.[23] While this paper focuses on how the SDA affects those in the employment sphere, it is important to be aware of the additional coverage of the Act.

The SDA provides for the appointment of a Sex Discrimination Commissioner,[24] whose role is to oversee the operation of the Act. The current Commissioner, Elizabeth Broderick, was appointed in 2007 and has played a pivotal role in assessing the breadth of the issue in Australian workplaces and assessing how best to ensure Australians are aware of their rights.

B *Corresponding State and Territory Laws*

While each state and territory in Australia has enacted its own discrimination laws, the definition of what constitutes 'sexual harassment' varies among the jurisdictions. The Australian Capital Territory, New South Wales, South Australia, Victoria and Tasmania define the term similarly with that of the SDA,[25] however the Western Australia and the Northern Territory acts differ.

The Western Australian *Equal Opportunity Act 1984* makes sexual harassment unlawful, however requires that the person harassed be disadvantaged in any way connected with their employment as a result of their rejection of the person harassing, or has reasonable grounds for believing that a rejection of an advance would result in such a disadvantage.[26]

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21 Australian Human Rights Commission, *Sexual Harassment (A Code in Practice) – What is Sexual Harassment?* (2004) 1.1 <https://www.humanrights.gov.au/publications/sexual-harassment-code-practice-what-sexual-harassment>

22 Ibid.

23 Respectively, *Sex Discrimination Act 1984* (Cth) s 28B to 28E; s 28F; s 28G to 28H; s 28J; s 28K; and s 28L.

24 *Sex Discrimination Act 1984* (Cth) s 96.

25 *Discrimination Act 1991* (ACT) s 81(1); *Anti-Discrimination Act 1977* (NSW) s 22A; *Equal Opportunity Act 1984* (SA) s 87(9); *Anti-Discrimination Act 1998* (Tas)s 17(3); *Equal Opportunity Act* (Vic) s 92(1).

26 *Equal Opportunity Act 1984* (WA) s 24(3)(a) and s 24(3)(b); as will be discussed below, this requirement was removed from the Commonwealth Act following a 1992 review.

The Northern Territory *Anti-Discrimination Act 1996* actually extends the federal definition, by requiring that the person harassing either has the intention of offending, humiliating or intimidating *or* the reasonable person would foresee that the person harassed would feel that way.[27] The Act further includes the 'detriment' for rejection provision in line with the Western Australian Act as noted above.

While state and territory discrimination legislation existed prior to the enactment of the SDA – the earliest being the *Sex Discrimination Act* 1975 in South Australia - sexual harassment was not expressly defined until the commencement of the SDA.[28]

III VICARIOUS LIABILITY OF AN EMPLOYER

As with other workplace legislative provisions, there is scope for an employer of an employee who is sexually harassed to be held vicariously liable under the SDA. As an overview, an employer will be held vicariously liable *unless* the employer can demonstrate that they 'took all reasonable steps' to prevent the doing of the act.[29]

This is demonstrated in the case of *Lee v Smith* [2007] FMCA 59, in which an employer (in this case the Commonwealth of Australia as represented by the Department of Defence) was held vicariously liable for the rape of a civilian administrator at a Cairns naval base. In that case, Ms Lee was subjected to sexual harassment by Mr Smith over a period of time in the workplace; however the rape occurred at Mr Smith's house following an after-work dinner party.[30] The Federal Magistrate found that 'the rape was a culmination of the earlier incidents of sexual harassment directly in the workplace'.[31] The Department of Defence was found vicariously liable as they had not taken all reasonable steps to prevent the doing of the act. In this instance, pornographic images were located in the workplace. Interestingly, in that case, the Court considered whether the rape would not have occurred had Ms Lee been given training in sexual harassment. This will be discussed further below when considering policy implementation.

IV THE EVOLUTION OF THE SEX DISCRIMINATION ACT 1984 (CTH)

Since the enactment of the SDA, sexual harassment in the workplace has been one of the most common complaints received by the Commission.[32] This section will provide an overview of the 1992 House of Representatives Standing Committee

27 *Anti-Discrimination Act 1996* (NT) s22(2)(e).
28 Anna Chapman and Gail Mason, 'Defining Sexual Harassment: A History of the Commonwealth Legislation and its Critiques' (2003) 31 *Federal Law Review* 195, 199.
29 *Sex Discrimination Act 1984* (Cth) s 106(2).
30 *Lee v Smith* [2007] FMCA 59.
31 Ibid.
32 Australian Human Rights Commission, *Sexual Harassment* <https://www.humanrights.gov.au/our-work/sex-discrimination/guides/sexual-harassment>.

report that provided the basis for the 1992 reforms, as well as the 2008 enquiry by the Senate Standing Committee leading to the 2011 amendments. A consideration of the evolution of the Act is important in analysing its current applicability.

A *The 1992 Inquiry*

The first inquiry into the progress of the SDA began in 1989 by the House of Representatives Standing Committee, with the report published in 1992.[33] The report stated that, during 1990 and 1991 complaints of sexual harassment had increased by over 100%, resulting in sexual harassment being the largest complaint dealt with under the SDA.[34]

The Committee noted that previous campaigns on sexual harassment 'had focussed on informing women of their rights'.[35] However, they were 'impressed' by a Victorian Federal Clerks Union Branch campaign aimed at men to raise awareness of the effects of sexual harassment, noting the loss of self-esteem and reduction of productivity suffered by women who had experienced sexual harassment.[36] The note preceded Recommendation 40 of the report, that certain trade union and employer organisations in conjunction with the Human Rights and Equal Opportunity Commission (the HREOC) run 'ongoing campaigns amongst men to raise their awareness of the effects of sexual harassment'.[37]

The 1992 report further recognised that unwanted sexual advances were serious offences in their own right, causing significant harm in the public sphere and workplace. In light of this, the report recommended the removal of the requirement that a complainant demonstrate disadvantage, as was required under sections 28(3) and 29(2) of the SDA at that time.

The report resulted in the *Sex Discrimination and other Legislation Amendment Act 1992* which repealed the existing definition of sexual harassment found under section 28 of the SDA and inserted a new definition under section 28A. Further, sections 28B and 28L were introduced to expand the field of operation of the sexual harassment provisions, to include students, partners of a partnership and include the 'workplace participant' as we now find under the section 28B.[38]

B *The 2008 Inquiry*

In a 2008 Senate Standing Committee on Legal and Constitutional Affairs inquiry, overwhelming submissions to the report claimed that the sexual harassment

33 House of Representatives Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Half Way to Equal: Report of the Inquiry into Equal Opportunity and Equal Status for Women in Australia* (1992) ('*Halfway to Equal Report*').
34 Ibid, 266.
35 Ibid [63].
36 Ibid [63].
37 Ibid, Recommendation 40.
38 *Sex Discrimination and Other Legislation Amendment Act 1992* (Cth).

provisions of the SDA were 'deficient in several respects' and overly restrictive.[39] In response, bold recommendations were made to widen that application of the SDA and focus on funding and implementing positive duties on public organisations and employers to eliminate sexual harassment.[40]

A recommendation was made to insert the word 'possibility' into the definition of sexual harassment to provide that sexual harassment occurs if a reasonable person would have anticipated the *possibility* that the person harassed would be offended, humiliated or intimidated.[41] This amendment was brought in by the *Sex and Age Discrimination Legislation Act 2011*.[42]

Further, the 2008 Committee recommended that the SDA be amended to protect employees from sexual harassment 'by customers, clients and other persons with whom they came into contact, in connection with their employment.'[43] The Committee also raised a concern for protection of volunteer workers,[44] who were not protected under the Commonwealth legislation.[45]

Prior to 2011, some occurrences of sexual harassment were not unlawful as, under section 28B(6) of the SDA, it was a requirement that the harassment occur by one workplace participant of another workplace participant at a place that is a workplace of *both* of the workplace participants.[46] This requirement was amended to read 'workplace of either or both' by the *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth).[47]

The *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013* proposed to amend the list of circumstances in section 28A(1A)(a) to be taken into account as part of the test for sexual harassment. The Bill proposed replacing 'marital status' and 'sexual preference' with 'marital or relationship status' and 'sexual orientation', and inserting 'gender identity' and 'intersex status' as further circumstances to be taken into account. The Bill stated that the amendment

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39 The Senate, Standing Committee on Legal and Constitutional Affairs, The Parliament of Australia, *Effectiveness of the Sex Discrimination Act 1984 in Eliminating Discrimination and Promoting Gender Equality* (2008) 58 [5.50] ('*Effectiveness of the Sex Discrimination Act 1984 Report*').

40 Ibid 104 [11.102].

41 Ibid [11.43].

42 *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth) s 53.

43 Ibid, Recommendation 18, XV.

44 Ibid, 28.

45 However may be under the definition of 'workplace participant' in state and territory anti-discrimination legislation; Uniting Justice Australia, *Comments to the Attorney-General's Department on the Consolidation of Commonwealth Anti-Discrimination Laws* (2011) 4 [2.4].

46 As noted at [73] in *Vergara v Ewin* [2014] FCAFC 100.

47 *Sex and Age Discrimination Legislation Amendment Act 2011* (Cth).

'recognises that a person's gender identity or intersex status may increase their vulnerability to sexual harassment'.[48]

Reviewing the history of the key amendments to the SDA, reveals that the both the definition of sexual harassment and the scope of the application have broadened significantly since the Act's commencement.

C *Independent Reporting*

As noted earlier in the paper, in accordance with CEDAW, Australia is required to prepare independent reports into the status and effectiveness of Australia's domestic enabling legislation. This is generally undertaken by the Australian Human Rights Commission as well as non-governmental interested groups.

In 2010, the Australian Human Rights Commission released an independent report titled 'Australia's Implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)'.[49] The report was submitted to the Committee of the Convention for the purpose of outlining both the achievements and failures of Australia's attempts to give effect to the Convention. The report recognised that the 'proliferation of new technologies – such as mobile phones and social networking websites – is creating new mediums where sexual harassment can occur'.[50]

A further 'Inquiry in the effectiveness of the Sex Discrimination Act Collaborative Submission from leading women's organisations and women's equality specialists' claimed that, despite many compliance mechanisms in the workplace since the implementation of the SDA, sexual harassment is a continuing problem and processes are 'failing to serve as a sufficient deterrent.'[51]

V CASE LAW

Court decisions have played a pivotal role in interpreting – and, more importantly broadening – the application of the sexual harassment provisions of the SDA. The following section of the paper will outline key cases involving sexual harassment in the workplace, exploring the vicarious liability of employers and the widened scope of the 'workplace'.

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48 *Sex Discrimination Amendment (Sexual Orientation, Gender Identity and Intersex Status) Bill 2013*, Item 46.

49 Australian Human Rights Commission, *Australia's Implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* (2010).

50 Ibid, 21.

51 Inquiry in the effectiveness of the Sex Discrimination Act Collaborative Submission from leading women's organisations and women's equality specialists, 34.

The first Australian case to consider sexual harassment was the case of *O'Callaghan v Loder* in 1983, which was heard almost concurrently with the implementation of the SDA.[52] In that case, Mr Loder, the then New South Wales Commissioner of Main Roads, was accused of sexual harassment by an employee lift operator, Ms O'Callaghan. The claim was brought against Mr Loder under the then *Anti-Discrimination Act 1977* (NSW), which contained 'sex discrimination' provisions. Ms O'Callaghan's case failed at the final hearing, as the Court found that there was a requirement that the complainant prove that the harassing employer was aware that his or her behaviour was unwelcome.[53] The Court found that Ms O'Callaghan had failed to satisfy this requirement. This case had an important effect on the implementation of the SDA and the final hearing occurred concurrently with the introduction of the *Sex Discrimination Bill 1983* (Cth).

A *Fraser-Kirk v David Jones*

Arguably one of the more infamous cases in Australian history regarding sexual harassment allegations was the case of *Fraser-Kirk v David Jones Limited* [2010].[54] Ms Fraser-Kirk alleged unwelcome sexual advances by the former Director and CEO of David Jones.. The alleged conduct included sexual comments and inappropriate touching occurring at work functions, and sexually explicit text messages. Ms Fraser-Kirk further alleged that senior management were aware of the conduct towards herself and other employees and, instead of responding to her concerns raised, deliberately placed her in situations where the conduct could occur. Ms Fraser-Kirk accordingly claimed vicarious liability on the part of David Jones.

While it is arguable that this case gained public attention due to the $37 million dollar amount claimed in damages by Ms Fraser-Kirk and, further, the public status of the Defendant, there were significant issues raised that roused public interest. The case demonstrated the real possibility of vicarious liability claims where an employer fails to take reasonable steps to prevent or deal effectively with sexual harassment (as well as other forms of discrimination).[55]Despite the media attention and lengthy court process, the matter was eventually resolved out of court with Ms Fraser-Kirk accepting a settlement sum of approximately $850,000.[56]

B *Extending the 'Workplace'*

In a 2005 case *South Pacific Resort Hotels Pty Ltd v Trainor*, the Full Court of the Federal Court of Brisbane (on appeal) confirmed that the conduct of a hotel worker

52 *O'Callaghan v Loder* (1983) NSWLR 89.
53 *O'Callaghan v Loder* (1984) EOC 92-023.
54 *Fraser-Kirk v David Jones Limited* [2010] FCA 1060.
55 'Equal Time', Newsletter of the Anti-Discrimination Board of NSW (No 81, Autumn 2011), 5.
56 'Frasker-Kirk v David jones: Is Your Business Protected From Sexual Harassment Claims? (Eastern Commercial Lawyers, 22May 2011) <http://www.eclawyers.com.au/newslist/kristy-fraser-kirk-v-david-jones-have-you-implemented-policies-and-procedures-concerning-sexual-harr>.

constituted sexual harassment under section 28B, despite the conduct occurring after hours.[57] The case involved island hotel workers, residing at accommodation provided by the employer, at which no visitors were permitted to enter. A co-worker entered a colleague's bedroom uninvited on two occasions, while both employees were off-duty. The co-worker, Mr Anderson, entered Ms Trainor's room on the first occasion and began making sexual comments towards her and, on the second occasion, Ms Trainor woke to find Mr Anderson lying beside her in her bed. The Court rendered Mr Anderson's conduct unlawful under section 28B of the SDA, despite the conduct occurring while both employees were off-duty, as it was found that there was a sufficient nexus between the conduct and the employment, noting that the second incident occurred following a staff function at which Mr Anderson consumed alcohol.[58] The Full Court held that the sexual harassment took place because of their common employment and subsequent accommodation and that it could not be said that the common employment was 'unrelated or merely incidental to the sexual harassment of one by the other'.[59] The employer was held vicariously liable under section 106(1) of the SDA, with Keiffel J noting that 'no narrow approach to the operation of s 106(1) is warranted'.[60] Ms Trainor was awarded $5,000 in general damages and $7,500 in past and future economic loss.

Further in the case of *Cross v Hughes* in 2006, an office administrator, Ms Cross, travelled to Sydney with her employer, Mr Hughes, under the impression that he had given that the trip was for business. During the course of the trip (as well as prior incidences during her employment), Mr Hughes made sexually suggestive comments and suggested to her that she and the employer attend a live sex show. He had also arranged for himself and Ms Cross to share a single hotel suite with two bedrooms. Ms Cross refused the suggestions, however Mr Hughes continued to make unwelcome sexual advances over the course of the weekend and further entered Ms Cross's bedroom uninvited, only leaving when she made it clear that she would not have intercourse with him.[61] The case was heard in the Federal Magistrates Court and the proceedings were undefended. Lindsay J concluded that, 'the weekend in Sydney was, in truth, unrelated to any business activities by the first respondent. The weekend was planned and implemented to provide him with an opportunity to seduce the applicant.'[62] The Court found that Mr Hughes had unlawfully sexually harassed Ms Cross contrary to section 28A and 28B of the SDA and Mr Hughes and the employer, found to be vicariously liable under section 106(1), were ordered to pay to Ms Cross the amount of $11,822 in damages, $3,822 of which were for economic loss.

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57 [2005] FCAFC 130.
58 *South Pacific Resort Hotels Pty Ltd v Trainor* [2005] FCAFC 130 [70].
59 *South Pacific Resort Hotels Pty Ltd v Trainor* [2005] FCAFC 130; citing *Leslie v Graham* [2002] FCA 32.
60 *South Pacific Resort Hotels Pty Ltd v Trainor* [2005] FCAFC 130 [70].
61 *Cross v Hughes* (2006) 233 ALR 108.
62 *Cross v Hughes* (2006) 233 ALR 108 [27].

C *Ewin v Vergara*

More recently, a high profile case heard in the Federal Court of Australia awarded a record damages award of approximately $476,000 to a woman found to have been sexually harassed under section 28B of the SDA. More importantly, the Federal Court extended the scope of the 'workplace'. In *Ewin v Vergara* (No. 3)[2013] FCA 1311, an accountant (Ms Ewin) claimed that she had been sexually harassed by a fellow accountant (Mr Vergara) who was hired by an external labour hire firm with Ms Ewin's employer, Living and Leisure Australia Limited (LLA).

Ms Ewin alleged that Mr Vergara had sexually harassed her for a month, culminating into four occasions spanning over four days in early 2009, in the form of sexually explicit comments as well as physical acts. The Court held that three of the four acts constituted sexual harassment under the SDA, as they were found to be unwelcome conduct of a sexual nature in circumstances in which a reasonable person, having regard to all of the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated.[63]

The key issues in this case were that Mr Vergara was a contractor rather than an employee of LLA and, further, the conduct occurred not only in the office of Living and Leisure, but also a hotel and a taxi. Ms Ewin brought action against Mr Vergara, as well as her employer and Mr Vergara's employer, however both of the claims against the employers were settled by way of mediation and therefore the case against them was not brought before the Court.

Mr Vergara challenged the allegations, on the grounds that he was not an 'employee' as defined in the SDA. Further, he claimed that the hotel and taxi did not constitute the 'workplace' and therefore was not covered by the scope of the SDA. However, Ms Ewin brought the claim under section 26B(6) of the SDA, which makes it unlawful for a 'workplace participant' to sexually harass another 'workplace participant' at a place which is a workplace for either or both people.[64] It was not contended that Mr Vergara was a 'workplace participant' and it was noted at the trial that Mr Vergara fell under the definition of 'contractor' as defined in section 4(1) of the SDA.[65]

Mr Vergara contested the argument that the hotel and taxi constituted 'workplace' under section 28B(6). The Court noted that 'workplace' was defined under section 28B(7) to be a 'place at which a workplace participant works or otherwise carries out functions in connection with being a workplace participant'.[66] This issue was considered in an earlier hearing of the matter and, in response, Justice Bromberg held at [43]:

63 *Ewin v Vergara* (No. 3) [2013] FCA 1311.
64 *Sex Discrimination Act 1984* (Cth) s 28B(6).
65 As noted at paragraph 8 of the decision in *Vergara v Ewin* [2014] FCAFC 100.
66 *Vergara v Ewin* [2014] FCAFC 100 paragraph 74; *Sex Discrimination Act 1984* (Cth) s 28B(7).

> What makes a workplace animate are the people who work in it and the relations between them. The object of eliminating sexual harassment in the workplace is thus to be understood as directed at the elimination of sexual harassment from the work based relationships and the workplace environment of persons who work together for or in a common enterprise, or in other words a common workforce.[67]

While the appellate court agreed with the court in the first instance that the hotel was considered a 'workplace' under section 28B(6), they differed in their reasoning, finding that it is not an issue of the construction of the word 'workplace', but an issue of the parties carrying out a function 'in connection with' their being workplace participants.[68] The appellate court concluded that the parties moving from the workplace to the hotel was not to continue their relationship, but a continuation of Mr Vergara's unwanted sexual advances that commenced at the workplace.[69] This reasoning was also applied in relation to conduct that occurred while travelling in a taxi between the workplace and the office of a client of LLA. Therefore the street, hotel and taxi were all found to be classified as the 'workplace' and hence the provisions of the SDA were applied accordingly.

This case upheld the objectives of the SDA, with the Court finding that 'the objective of the eliminating sexual harassment in the workplace would be significantly undermined if associated common areas such as entrances, lifts, corridors, kitchens and toilets were construed as falling beyond the geographical scope intended by s 28B(6).'[70]

VI COURT ORDERED DAMAGES: THE COURT'S SHIFT TO SIX-FIGURE AWARDS

Raising a claim of sexual harassment under the SDA is a civil matter - much like an allegation of negligence - therefore the remedy available to a claimant against a person found guilty of sexual harassment is an award of monetary damages. However, in a relatively short period of time, court ordered damages for victims of sexual harassment have increased exponentially, from an average of $20,000 for 'non-economic loss' a decade ago to over $100,000 in recent years.[71]

To date, there is no clear ratio as to the assessment of damages under the SDA. This may be because the law is relatively new in context, or perhaps that it is difficult to quantify damages for discrimination.

In the case of *Hall v Sheiban*, Lockhart J stated:

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67 *Ewin v Vergara (No 3)*[2013] FCA 1311 at 43.
68 *Vergara v Ewin* [2014] FCAFC 100 paragraph 124.
69 *Vergara v Ewin* [2014] FCAFC 100 paragraph 128.
70 *Ewin v Vergara (No 3)*[2013] FCA 1311 [43].
71 Nick Toscano, 'Sexual Harassment Damages Payouts Soar', *Sydney Morning Herald* (online) 14 August 2014<http://www.smh.com.au/national/sexual-harassment-damages-payouts-soar-20140813-103k8j.html>.

> As anti-discrimination, including sex discrimination, legislation and case law with respect to it is still at an early stage of development in Australia, it is difficult and would be unwise to prescribe an inflexible measure of damage in cases of this kind and, in particular, to do so exclusively by reference to common law tests in branches of the law that are not the same, though analogous in varying degrees, with anti-discrimination law. Although in my view it cannot be stated that in all claims for loss or damage under the Act the measure of damages is the same as the general principles respecting measure of damages in tort, it is the closest analogy that I can find and one that would in most foreseeable cases be a sensible and sound test. I would not, however, shut the door to some case arising which calls for a different approach.[72]

While the recourse of monetary damages for a victim of sexual harassment has stayed static over the years since the enactment of the SDA, the amount awarded by a court has risen significantly in the past ten years. This is evidenced most significantly in the case of *Ewin v* Vergara and may be evident of the Court's growing awareness of the significant impact that the conduct may have of a victim's future, both mentally and economically.

In the case of *Richardson v Oracle* in 2014, the Federal Court of Australia raised the monetary damages from $18,000 in the first instance, to $130,000 on appeal. Kenny J stated that the $18,000 was 'manifestly inadequate' and awarded the higher amount stating that it was reflective of 'prevailing community standards'.[73] He further stated that community standards now 'accord a higher value to pain and suffering and loss of enjoyment of life than before.'[74]

VII ANALYSIS OF THE CURRENT SEXUAL HARASSMENT PROVISIONS OF THE SDA: ARE THEY EFFECTIVE?

The wider use of technology such as email, mobile phones and social networking has increased the likelihood of incidences of sexual harassment in the workplace, as well as the potential for the vicarious liability of the employer.[75] With the recent 30th anniversary of the SDA, there has been public concern that the Act does not capture the scope of sexual harassment in contemporary times and, as such, requires review. This section of the paper considers current opinions of the federal sexual harassment laws and their perceived success, as well as policy considerations and recommendations for further reform.

In 2008, Australian Sex Discrimination Commissioner Elizabeth Broderick undertook a listening tour of Australia and found that approximately one in five respondents had

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72 *Hall v Sheiban* (1989) 20 FCR 217, 239 (Lockhart J).
73 *Richardson v Oracle Australia Pty* Ltd[2014] FCAFC 82 at [81].
74 *Richardson v Oracle Australia Pty* Ltd[2014] FCAFC 82 at [96].
75 Australian Human Rights Commission, 'Sexual Harassment, <https://www.humanrights.gov.au/our-work/sex-discrimination/guides/sexual-harassment>.

experienced sexual harassment according to the provisions of the SDA, however the respondents were unaware that the conduct was unlawful.[76] This finding makes it apparent that there is an alarming lack of understanding across Australia as to what, in fact, constitutes sexual harassment.

The survey results lead to the questions whether the onus should be on employers to educate their staff of the law and for employers to ensure that there is sufficient policy in place to encourage compliance. This is a view strongly expressed by Commissioner Broderick, who, in the foreword to the report of the listening tour, stated:

> Employers need to ensure that their employees have a solid understanding of what sexual harassment is. This involves comprehensive training on the types of behaviours that may amount to sexual harassment. Employers need to create a workplace where people feel supported to make complaints.[77]

A follow-up telephone survey was conducted in 2012 and, once again, results revealed that one in five people over the age of 15 experienced sexual harassment in the workplace in the previous five years.[78]

A *Policy Considerations*

As with many other legislative instruments that affect the working sphere, there is an assumption (and at times, a requirement) that a workplace should implement policy in order to ensure compliance with their legal responsibilities.[79] This is also the case with the sexual harassment provisions under the SDA and an employer's failure to implement sufficient policy has often led to a finding of vicarious liability in cases of sexual harassment under section 28A.

The requirement to implement a compliance mechanism is a common condition found in mediation and arbitration settlements where employer vicarious liability has been found. Interestingly, cases involving the vicarious liability of an employer for an employee's sexual harassment contain a majority of the judicial consideration of the issue of due diligence and compliance.[80] However, there has been no definitive rule for the level of compliance required as the courts have tended to decide vicarious liability on a case-by-case basis.

In case law to date, it is well settled that a 'paper policy' is insufficient to meet the 'all reasonable steps' requirement under the SDA. Sexual harassment cases have tended to follow the rule set out by Justice Goldberg in the case of *ACCC v Australian Safeway Stores Pty Ltd & Ors* (1998) (also known as the 'Tip Top Case'), that:

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76 *Sexual Harassment: Serious Business Report*, above n 6.
77 *Sexual Harassment: Serious Business*, above n 6.
78 *Working Without Fear Report*, above n 1, v.
79 Christine Parker and Olivia Conolly, 'Is there a Duty to Implement a Corporate Compliance System in Australian Law?' *Australian Business Law Review* (Vol 30, 2002) 273.
80 Ibid 287.

> One needs to look at the compliance program in two respects. Firstly one must ask whether there was a substantial compliance program in place which was actively implemented by [the defendant]… Secondly, one must ask whether the implementation of the compliance program was successful.[81]

Succinctly, this means that where there is a paper policy in place, it will not prove sufficient to show that an employer has taken all reasonable steps; however, a consideration of the terms of the policy coupled with whether it was effectively implemented may be factors that a Court will consider in determining vicarious liability.[82]

In the recent case of *Richardson v Oracle*, the employer (Oracle) had in place an online sexual harassment training course, requiring employees to complete the course every two years. When considering whether this was sufficient to find that Oracle had taken 'all reasonable steps' to prevent the sexual harassment of one employee of another, Buchanan J stated that (with respect to workplace policy):

> In my view, advice in clear terms that sexual harassment is against the law, and identification of the source of the relevant legal standard, is a significant additional element to bring to the attention of employees in addition to a statement that sexual harassment is against company policy, no matter how firmly the consequences for breach of company policy might be stated.[83]

B *Positive Duties*

One of the key issues with the SDA is that it is not a 'proactive' piece of legislation, as it requires a victim of discrimination or harassment to make a complaint in order to bring about action.[84] This is so across the majority of anti-discrimination laws in Australia; they are similar to civil common law rights as they are enforceable by the victim, not by a prosecutor or other agency. An issue raised in Commissioner Broderick's 2008 report was that, as at that time, the number of people reporting incidences of sexual harassment had *decreased* from 32% in 2003 to 16%.[85] This finding supports the view that while there may be several options open to a victim in order to voice their grievances, many are not seen as viable options due to fears such as further victimisation.[86] This gives rise to the possibility of implementing positive duties on employers and external bodies, to step in where clear cases of sexual harassment are evident, but where the victim is afraid to report the conduct.

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81 *ACCC v Australian Safeway Stores Pty Ltd & Ors* (1998) ATPR 41-562.

82 Parker and Conolly, above n 80, 287.

83 *Richardson v Oracle Corporation Australia Pty Limited* [2013] FCA 102 at [163].

84 Caroline Brentnall, 'Women: Their Rights in Australia Over the Past 40 Years (1972 – 2012)' <11http://www.fitzroylegal.org.au/cb_pages/files/Women_Their%20rights%20in%20Australia%20over%20the%20past%2040%20Years.pdf>.

85 *Sexual Harassment: Serious Business Report*, above n 6.

86 Paula McDonald and Sara Charlesworth, 'Settlement Outcomes in Sexual Harassment Complaints' (2013) 24 *Australian Dispute Resolution Journal*, 260.

Employees, notably in larger organisations, may seek redress for grievances internally through their workplace prior to approaching external bodies. However, as noted by Paula McDonald and Sara Charlesworth in a 2013 report, 'there is clear empirical evidence that employees often perceive these procedures as adversarial, delayed, risky in terms of isolation or victimisation from the workgroup, and likely to be met with inaction.'[87]

This aspect has come under significant scrutiny in recent reports; with recommendation arising that there should be a positive duty placed on employers as well as greater powers provided the Sex Discrimination Commissioner under the SDA, to enable the Commissioner to initiate workplace investigations without the requirement for an individual complaint.[88]

However, this proposal has been countered with the concern that positive duties imposed on public and/or private sector employers to eliminate sex discrimination and sexual harassment 'would place unnecessary regulatory burden on duty holders and might not achieve their aims.'[89]

C *Legislative Reform*

As we have seen throughout this paper, the provisions of the SDA relating to sexual harassment have been amended time and time again, to incorporate (as well as on occasion overcome) interpretation by the courts and public enquiry. In a paper released by academics of the University of Sydney over a decade ago, that outlined the history and critique of the sexual harassment provisions of the SDA, it was noted that 'the drafting of the "perfect" definition of sexual harassment is endless',[90] and that each change brought about positive and negative interpretations. The author supports the view that each time legislatures attempt to amend the legislation and refine the definition of sexual harassment, they 'run the risk of trivialising or excluding experiences that do not fit the new model'.[91]

Given the current call for uniform discrimination laws in the form of a single piece of legislation, there is speculation as to the effectiveness of further amendments to the SDA. In a critical review of the SDA in 2009, Beth Gaze, Associate Professor of the University of Melbourne, stated that 'more than cosmetic reform is necessary'; however cosmetic change is what we have witnessed to date, with the reworking of similar provisions as noted

87 Ibid.

88 Australian Human Rights Commission, *Australia's Implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)* (2010) 22.

89 Attorney-General's Department, Parliament of Australia, *Consolidation of Commonwealth Anti-Discrimination Laws:* Discussion *Paper* (2011) 18 [64].

90 Chapman and Mason, above n 28, 223.

91 Chapman and Mason, above n 28, 223.

VIII WHAT LIES AHEAD FOR SEXUAL HARASSMENT LAWS IN AUSTRALIA?

As this paper has attempted to demonstrate, more than legislative reform is required in order to combat the alarming prevalence of sexual harassment in Australian workplaces. Further, the courts' tendency to widen the application of the sexual harassment provisions of the SDA, as well as the increasing amount of damages awarded to victims, is evidence of the judicial system's awareness of the severity of the issue and the need to permit unfettered operation of the law. The decision in *Vergara v Ewin* (on appeal) provides authority for the rationale that, for the purposes of sexual harassment under the SDA, a workplace can extend beyond the immediate setting of the office or place of business. In theory, the 'workplace' could include public transport, a public park or a private residence, so long as there is a sufficient nexus to the parties' employment.[92] However in determining what is and is not considered the workplace will require an analysis of the chain of events leading to the parties being in that particular location.[93]

Stringent workplace policy must play a vital role in ensuring that employers lessen their risk of being found vicariously liable for incidences of sexual harassment, however what more can be done to deter offenders? As research suggests, a number of people still do not understand sexual harassment as defined under the SDA. This indicates that education by way of policy reform may play a more vital role in deterring incidences of sexual harassment, with the law simply aiding as an avenue for which a victim can find recourse.

The results of the 2012 telephone survey suggest a need for workplace prevention strategies and ongoing employee education about sexual harassment in the workplace and avenues for redress.[94] In looking to the future, the report states that it is evident from the findings of the survey, that:

> Real and meaningful change resulting in workplaces that are safe and free from harassment requires more than legislative change. It also requires leadership and a genuine commitment from government, unions and all sectors of the Australian workforce to put an end to sexual harassment and ensure the safety and security of all employees while at work.[95]

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92 Janine Young et al, 'Full Federal Court Adopts a Broad Approach to the Concept of a "Workplace" Under Anti-Discrimination Legislation', (Corrs Chambers Westgarth, 16 September 2014) <http://www.corrs.com.au/publications/corrs-in-brief/full-federal-court-adopts-a-broad-approach-to-the-concept-of-a-workplace/>.

93 Michael Byrnes, 'Workplace' Clarified By Sexual Harassment Case' (2014) 52(1) *Law Society Journal* 48, 49.

94 *Working Without Fear Report*, above n 1, 6.

95 *Working Without Fear Report*, above n 1, 5.

IX CONCLUSION

The objective determination of what constitutes sexual harassment makes it, by nature, a challenging area to legislate. Coupling this with the rapid changes in communications technology, has resulted in a widening of the scope of the 'workplace' has led to an array of relevant case law, with outcomes determined on a case-by-case basis. The amendments to the SDA since its implementation in 1984 reflect responses to judicial decision-making, however the courts have continued to broaden the scope of the SDA.

The recent review into the treatment of women in the defence force in 2014 has, in the Writer's opinion, demonstrated that workplace policy can play the key role in effective deterrence of sexual harassment. The current consideration of a shift from the SDA to a uniform discrimination act is a positive step, however it is ultimately through education and policy improvements that we will see the greatest improvements. The SDA has created a strong platform under which claims may be brought, however the SDA can only act as a deterrent, once policy and education have fallen short and the judicial system must step in.

SUPERFLOUS PEOPLE

BRUCE ARNOLD *

The Baby Farmers by Annie Cossins is one of those rare works of legal history that is simultaneously engaging for specialist and non-specialist readers alike.[96] It provides an elegant and deeply researched account of a series of inquiries into the disappearance, death and assumed murder of babies in 1890s Sydney. In doing so it provides insights about identity registration, about social welfare and about the regulation of fertility. It is a work that is of value for readers with an interest in evidence law and for first year law or justice studies students who are seeking a historical and emotional dimension to black letter rules. Its publication comes at a time when the number of adoptions in Australia has continued to decline (a mere 339 in 2013/13),[97] we've seen conviction of elite athlete Keli Lane for the presumed murder of a newborn,[98] and the welfare system is being wound back.

In 1892 workmen fixing the plumbing at a Macdonaldtown property occupied by the Makin family discovered the first of 13 corpses of babies. Further corpses were discovered in the yards of other houses the Makins had briefly occupied before engaging in the 'midnight flit' to evade creditors and parents who had placed infants in their care.

The Makins were in the business of baby farming, i.e. taking care of inconvenient babies ... infants whose existence could not be acknowledged because of the stigma of illegitimacy or who could not be cared for by working mothers without a support network. Some farmers depended on one-off or ongoing payments from parents for their own livelihood. Patent medicines such as the opium-based Godfrey's Cordial assisted some farmers to take care of the infants for good through an overdose or through silencing cries as the babies starved to death, allowing farmers such as the Makins to take more infants into care and thereby keep paying the rent or putting food on the table for their own children. Inadequacies in forensics, high infant mortality among all children, inadequate regulation of midwives and weak reporting

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96 Annie Cossins, *The Baby Farmers: A Chilling Tale of Missing Babies, Shameful Secrets and Murder in 19th Century Australia* (Allen & Unwin, 2013)

97 Australian Institute of Health and Welfare, *Adoptions Australia 2012-13* (Australian Institute of Health and Welfare, 2013) 14

98 *Lane v R* [2013] NSWCCA 317

mechanisms meant lucky farmers could evade penalties such as a death sentence for infanticide and five years imprisonment for abandoning an infant.[99]

Rather than leaving a trail of anonymous corpses by the roadside the Makins resorted to unauthorised home burial. That resulted in a coronial inquest and sensational trial that saw an appeal to the Privy Council, John Makin being hung for murder and wife Sarah Makin, as the beneficiary of gendered justice, being sentenced to life imprisonment.[100]

Cossin argues persuasively, on the basis of extensive archival research, that we should see their activity in a social and personal context. Both appear to have been suffering from late stage syphilis. Both had experienced and engaged in domestic violence, with Sarah for example reportedly being seen to 'knock her own blind mother down with a chair'. As became evident through disagreements during the trial, the Makins were not a happy family. In the great depression of the 1890s – less remembered but as painful as that of the 1930s – life was tough for people on the margins of society in Sydney. The Makins were unexceptional in depending on payments for caring, often with no questions asked by parents who relied on pseudonymity and an unspoken expectation that the carer would permanently deal with an inconvenience.

Cossins challenges contemporary preconceptions by noting that women who killed babies were the largest group of people in late 19th Century NSW who committed murder and that although newborn infants were less than three percent of the population their murder occurred at fifty-five times the rate of murder of adults. As the latest adoption figures illustrate, we do things differently now and there is no need to resort to Godfrey's Cordial or serial infanticide for profit.

99 *Criminal Law Amendment Act 1883* (NSW). For studies of antecedents see Margaret Arnot, 'Infant death, child care and the state: the baby-farming scandal and the first infant life protection legislation of 1872' (1994) 9(2) *Continuity and Change* 271; Daniel Grey, 'More Ignorant and Stupid Than Wilfully Cruel: Homicide Trials and Baby-Farming in England and Wales in the Wake of the Children Act' (2009) 3(2) *Crimes & Misdemeanours: Deviance and the Law in Historical Perspective* 60; and Anne-Marie Kilday, *A History of Infanticide in Britain, c. 1600 to the Present* (Palgrave Macmillan, 2013)

100 *R v Makin and Wife* (1893) 14 NSWR 1. See also *Makin v Attorney-General for New South Wales* [1894] AC 57

GUIDING THE GODS IN WHITE COATS

WENDY BONYTHON *

Medical Law and Ethics[1] by Richards and Louise offers a welcome introduction for health services students to questions about Australian health law and ethics.

The authors aim to fill the gap between standard medical texts and legal texts. Rather than covering the field, they 'want to begin conversations' and to equip future doctors with tools for reasoning about ethical and legal problems. Their rationale is that it would be artificial to draw a sharp line between medical law and medical ethics in a world where the medical profession necessarily enjoys a substantial degree of self-regulation, where the courts and legislatures grapple with the appropriate legal response to questions that have contested ethical and legal dimensions, and where despite the best of intentions things sometimes go seriously wrong.

The book centres on a series of engaging and realistic scenarios that are unpacked through identification and discussion of legal and ethical questions. A particular strength, for which the authors are to be commended, is recognition of the realities of medical practice, for example the difficulties some students and novice practitioners will face in dealing with tiredness, under resourced institutions and imperfect supervisors or gatekeepers. Other strengths are the currency of the legal citation (with material from late 2012) and the clarity of the exposition.

After an introduction (which includes a cogent discussion of biomedical ethics and Australian law) the book examines the rights and duties of the medical student. The third chapter explores the rights and duties of the doctor, in particular professional standards and doctor-patient relationships. The following chapter considers the rights abnd duties of the patient, including a perceptive examination of law and ethics regarding the treatment of children and dilemmas regarding the non-compliant adult patient. Chapter 5 deals with consent to medical treatment, with scenarios and analysis that will be of value to students of tort and human rights law rather than merely people seeking a medical qualification. That is complemented by chapters 7 and 8 on end of life and start of life decisions. The discussion in those chapters and in the final chapter on organ donation would enliven study by law students in jurisprudence or lawyers & professional responsibility units. Chapter 6 provides a

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1 Bernadette Richards and Jennie Louise, *Medical Law and Ethics: A Problem Based Approach* (LexisNexis Butterworths, 2014)

crisp introduction to questions about confidentiality and the patchwork of information privacy law in Australia.

Who should read the book? At 342 pages it is worth consideration by law students, by future medical practitioners and by other people working in health services. That is firstly because the authors provide a clear introduction to issues that are wider than those faced by the future general practitioner. Secondly, it offers non-medical readers an insight into how practitioners – and health sector regulators – construe their roles, rights and responsibilities.

The book is an accessible introduction, rather than an in-depth and comprehensive study. For some readers its greatest value will be as a primer for more detailed and authoritative guides such as the 816 page *The Patient and the Practitioner.*[2]

[2] Sonia Allan and Meredith Blake, *The Patient & the Practitioner: Health Law and Ethics in Australia* (LexisNexis Butterworths, 2014)