Volume 27 Number 2
June 2005

the sydney law review

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Dishonesty and Unconscionable Conduct in Commercial Life — Some Reflections on Accessory Liability and Knowing Receipt†

ROBERT WALKER*

I never had the privilege of meeting John Lehane. I knew him only from his published work, that is his books, articles and judgments. They leave the reader in no doubt as to the depth of his scholarship and the clarity and freshness of his language. In the last few days many of you who knew him have told me of his outstanding human qualities — his warmth, his humour and his generosity of spirit. It is a great honour for me to give this lecture dedicated to his memory.

I am conscious that the title of this lecture covers a wide field. Moreover it is a field which has in recent years been addressed extracurially by some very distinguished judges, including Sir Anthony Mason,1 Lord Millett2 and Lord Nicholls,3 as well as by a legion of distinguished academic lawyers.4 I am not confident of adding anything very significant to this body of learning.

However, the fact is that the treasury of authority keeps getting fuller (without any obvious devaluation of the currency of judicial decision-making). I have in mind (without reference to other parts of the common law world) the recent English decisions in Akindele5 and Twinsectra,6 the decisions of the Court of Appeal of New South Wales in Beach Petroleum7 and Evans v European Bank8

* The Hon Lord Walker of Gestingthorpe, Lord of Appeal in Ordinary, United Kingdom Parliament, House of Lords.
1 Anthony Mason, ‘The Place of Equity and Equitable Remedies in the Contemporary Common Law World’ (1994) 110 LQR 238.
4 In addition to material referred to in other footnotes I gratefully acknowledge indebtedness to Charles Mitchell’s contribution ‘Assistance’ in Peter Birks & Anna Pretto (eds), Breach of Trust (2002).
5 Bank of Credit and Commerce International (Overseas) Ltd v Akindele [2001] Ch 437 (hereafter Akindele).
6 Twinsectra Ltd v Yardley [2002] 2 AC 164 (hereafter Twinsectra).
7 Beach Petroleum NL v Kennedy (1999) 48 NSWLR 1 (hereafter Beach Petroleum).
and (especially so far as it touches on the general topic of what is unconscionable) the decision of the High Court of Australia in Roxborough. Some of these cases raise the issue whether unconscionable conduct should be seen as the essential principle underlying receipt-based liability, as well as other occasions for equitable intervention in commercial transactions; and whether the word ‘unconscionable’, which is not much heard in ordinary conversation, is an appropriate legal touchstone. I shall say something about these and other recent cases, although I am well aware that some recent decisions in this jurisdiction (especially, perhaps, Roxborough) may be an area in which angels fear to tread.

So I want to devote most of my time to the way in which the principles of knowing receipt and dishonest assistance have developed and are applied today in commercial cases, both in England and (so far as I can presume to comment on them) in Australia. But I will begin, if I may, with an old case which has nothing to do with commercial life. It is a vignette of family life and family conflict in middle-class mid-Victorian England.

A testator had settled his residuary estate on his four children. Two of the settled shares had been released from the will trust before the story begins and we are concerned with the settled shares of two of the testator’s daughters, Ann and Susan. Both were married: Susan, as it happens, to her cousin, who (following the deaths of his co-trustees) was sole trustee of the will trust. Unfortunately the two brothers-in-law did not get on at all well. Ann’s husband (who was, as most of you will have guessed, Mr Barnes) sued Susan’s husband (Mr Addy) for breach of trust. The proceedings were compromised, and it was proposed that Mr Barnes should be appointed in place of Mr Addy as sole trustee of the settled share of Ann and her six children (this was before the enactment of statutory restrictions on the appointment of a sole individual trustee). Mr Addy’s solicitor (Mr Duffield) advised him against this course, because of the risk of misapplication by a sole trustee. But Mr Addy insisted and Mr Duffield carried out his instructions to prepare a deed of appointment. Mr Barnes’s solicitor (Mr Preston) saw it as his professional duty to write to Ann tactfully expressing his concern, and he did so, but he received an icily polite brush-off. So Mr Preston approved the draft deed, and the appointment was completed. On 31 March 1857 a holding of government stock representing Ann’s settled share was transferred to Mr Barnes. On the very next day he sold the stock and, in flagrant breach of trust, used the proceeds in his business. Within a year he was bankrupt.

So there were two breaches of trust: an ill-advised but non-fraudulent appointment by Mr Addy and a deliberate fraudulent misapplication by Mr Barnes. But it was Mr Addy, Mr Duffield and Mr Preston whom Ann’s six children sued for breach of trust. Mr Addy was held liable, but the solicitors were dismissed from the suit, and in 1874 their exoneration was confirmed by the Court of Appeal in

9 Roxborough v Rothmans of Pall Mall Australia Ltd (2001) 208 CLR 516 (hereafter Roxborough).
10 Barnes v Addy (1874) LR 9 Ch App 244 (hereafter Barnes v Addy).
Chancery. That was the context in which the presiding judge, Lord Selborne LC, made his famous statement:

…strangers are not to be made constructive trustees merely because they act as the agents of trustees in transactions within their legal powers, transactions, perhaps of which a Court of Equity may disapprove, unless those agents receive and become chargeable with some part of the trust property, or unless they assist with knowledge in a dishonest and fraudulent design on the part of the trustees.¹¹

For more than a century this statement has been repeatedly cited and analysed throughout the common law world almost as if it were a statutory text. Indeed Professor Charles Harpum has, by reference to this very passage, identified one of what he sees as three serious judicial shortcomings in this area.¹² I will quote all three:

(i) a willingness to apply authorities on one ground of liability to another that was conceptually discrete;
(ii) a preference for applying as if they were statutory provisions judicial dicta that were conditioned by the factual context in which they were made; and
(iii) an obsessive concern with what might be described as the mens rea necessary for liability without sufficient consideration of the actus reus.

I have gone into the facts of Barnes v Addy in a little detail because Lord Selborne’s much-cited observation is the foundation of the modern law, and the factual context of the case helps to explain why Lord Selborne did not find it necessary to explore various complexities which have since arisen. It was a case of an express trust and the two solicitor defendants knew enough about trusts to be concerned (absolutely correctly, as events turned out) about the risk involved in the appointment of a sole trustee. So far as the case turned on receipt by Mr Duffield (Mr Addy’s solicitor, who deducted a modest sum for a share of the costs of the earlier litigation) he was perfectly well aware that it was trust money, but he was acting in a ministerial capacity. The only real issue was whether the solicitors’ professional concerns about the general risk of appointing a sole trustee, without any particular apprehension of dishonesty on the part of Mr Barnes, made them liable as accessories.

Most of the other cases that I want to discuss were not concerned with express trusts, but with breaches of fiduciary duty by company directors and their associates. The notion that a company director owes fiduciary duties to the company was already familiar by the time of Barnes v Addy.¹³ But in England it was for some reason only in the second half of the 20th century that the full implications of a breach of these duties were subjected to close examination.

¹¹ Barnes v Addy, id at 251–252.
¹³ See, for example, Re Forest of Dean Coalmining Company (1878) 10 Ch D 450; Flitcroft’s Case (1882) 21 Ch D 519 at 535 and Re Lands Allotment Company [1894] 1 Ch 616 at 631, all of which treat the proposition as commonplace.
I do not propose to attempt any detailed chronological survey of the development of the case law in either England or Australia. I want to concentrate on general principles, including in particular (at the risk of my being treated as having an ‘obsessive concern’) the mental element which has to be proved in these cases, and the degree to which the notion of unconscionable conduct is a principled and useful tool in determining either receipt-based or fault-based liability. I want to suggest that judges have tended to keep asking themselves the question ‘What sort of knowledge?’ — a tendency exemplified by the five-fold Baden test — and have not so regularly asked themselves the question ‘knowledge of what?’. In Barnes v Addy the solicitors acting for Mr Addy and Mr Barnes knew perfectly well what a breach of trust was. A company director may have (or may plausibly claim to have) a much less clear understanding of what is a breach of fiduciary duty, and the same may be true of bank officials and even, regrettably, accountants and lawyers. That is especially true if a breach consists, not of infringement of a specific statutory duty (such as the prohibition on a company giving financial assistance for the purchase of its own shares) but in the exercise of directors’ powers of control for an improper purpose.

This point was very well put by Dixon J (as he then was) as long ago as 1938 in the well-known case of Mills v Mills:

When the law makes the object, view or purpose of a man, or of a body of men, the test of the validity of their acts, it necessarily opens up the possibility of an almost infinite analysis of the fears and desires, proximate and remote, which, in truth, form the compound motives usually animating human conduct. But logically possible as such an analysis may seem, it would be impracticable to adopt it as a means of determining the validity of the resolutions arrived at by a body of directors, resolutions which otherwise are ostensibly within their powers. The application of the general equitable principle to the acts of directors managing the affairs of a company cannot be as nice as it is in the case of a trustee exercising a special power of appointment.

To put much the same point less elegantly and more bluntly, a trustee of an express family trust who steals trust money must assuredly know that he is doing something seriously wrong. A director who is also controlling shareholder of a company may need a lot of persuasion that he is not fully entitled to feather his own nest at the expense of ‘his’ company. Indeed he may find himself serving a custodial sentence before he begins to believe it. That may be what Lord Nicholls had in mind when he said, in Royal Brunei Airlines v Tan that the standard of what constitutes honest conduct is not subjective, and honesty is not an optional scale, with higher or lower values according to the moral standards of each individual. But the need for the court to take a realistic view of the exigencies of commercial life, and to be slow to extend fiduciary obligations to commercial

15 Mills v Mills (1938) 60 CLR 150 at 185.
relationships, is a recurrent theme throughout the cases: warnings were given, for instance, by the majority of the High Court in the Hospital Products\textsuperscript{17} case, and by the Privy Council (on appeal from New Zealand) in Goldcorp.\textsuperscript{18}

Although I am not going to trace the development of the law case by case, it may be useful to have a look at two cases decided in the early 1970s — one in England and one in New South Wales — as snapshots of where the law had got to at that time. Karak Rubber,\textsuperscript{19} decided in the English Chancery Division in 1971, was concerned with a company which was almost a natural victim of fraud: like the company in the earlier Selangor case,\textsuperscript{20} it had a stock exchange listing and cash in the bank but no business, as its plantations in Asia had been sold. By what now seems a fairly simple and old-fashioned fraud, four adventurers used the company’s money to enable them to gain control of the company and misappropriate what was left of its funds — apparently a fairly modest amount. The only contested claim was against the company’s bank for what was then termed knowing assistance.

Brightman J, following the judge in Selangor, applied to the bank officials’ conduct a test of constructive knowledge, and by that test, found the bank liable as a constructive trustee (as well as being in breach of its contractual duty to its customer). He reasoned as follows:

If, as seems to be established by the cases, an objective test of “knowledge” is rightly applied in the context of the first category of constructive trusteeship [authorities omitted] I do not myself see any particular logic in denying it a similar role in the context of the second category of constructive trusteeship.\textsuperscript{21}

I fear that this incurs at least two of Professor Harpum’s strictures. There was a very good reason to make the distinction, as was later pointed out, separately but more or less simultaneously, by Professor Birks in an article\textsuperscript{22} and by Millett J (as he then was) in Agip.\textsuperscript{23}

In 1975 Selangor and Karak Rubber were considered, among many other authorities, by the High Court of Australia on appeal from the Court of Appeal of New South Wales\textsuperscript{24} in Consul Development v DPC Estates.\textsuperscript{25} The facts are probably well known to most of you. In barest outline Mr Walton, a solicitor, carried out property development through his company, DPC. Mr Grey was a director and manager of DPC. Mr Clowes, Mr Walton’s articled clerk, also

\textsuperscript{17} Hospital Products Ltd v United States Surgical Corporation (1984) 156 CLR 41 at 149.
\textsuperscript{18} Re Goldcorp Exchange Ltd [1995] 1 AC 74 at 98.
\textsuperscript{19} Karak Rubber Co Ltd v Burden (No 2) [1972] 1 WLR 602 (hereafter Karak Rubber).
\textsuperscript{20} Selangor United Rubber Estates v Craddock (No 5) [1968] 1 WLR 1555 (hereafter Selangor).
\textsuperscript{21} Karak Rubber, above n19 at 639.
\textsuperscript{22} Peter Birks, ‘Misdirected Funds: Restitution from the Recipient’ [1989] LMCLQ 296 at 323.
\textsuperscript{23} Agip (Africa) Ltd v Jackson [1990] Ch 265 (hereafter Agip).
\textsuperscript{24} DPC Estates Pty Ltd v Greyand Consul Development Pty Ltd [1974] 1 NSWLR 443 (hereafter DPC).
\textsuperscript{25} Consul Development Pty Ltd v DPC Estates Pty Ltd (1975) 132 CLR 373 (hereafter Consul Development).
engaged in property development through a family company, Consul. Mr Grey made redevelopment opportunities available to Consul, telling Mr Clowes that DPC had insufficient resources to take them up itself. Mr Grey was rewarded with a share of Consul’s development profits. DPC’s claim against Consul failed at first instance but the Court of Appeal allowed its appeal, Jacobs P dissenting. In the High Court the principal issue was whether Consul’s constructive knowledge, if established, was a sufficient basis for liability. McTiernan J dissenting, held that it was; Gibbs J did not, on his view of the facts, find it necessary to express a concluded view; but Barwick CJ (who concurred in the views of Stephen J) and Stephen J held that it was not enough to establish what he called ‘that species of constructive notice which serves to expose a party to liability because of negligence in failing to make enquiry’.26 Earlier he had quoted from the dissenting judgment of Jacobs P below27 that where the defendant has not received trust property:

...something more is required, and that something more appears to me to be the actual knowledge of the fraudulent or dishonest design, so that the person concerned can truly be described as a participant in that fraudulent dishonest activity.28

Stephens J was prepared to go a bit farther:

If a defendant knows of facts which themselves would, to a reasonable man, tell of fraud or breach of trust the case may well be different, as it clearly will be if the defendant has consciously refrained from enquiry for fear lest he learn of fraud.29

In England the Chancery Division caught up fourteen years later, with the judgment of Millett J in Agip. The judgment gives a vivid account of how the subsidiary of an Italian oil giant, drilling for oil in Tunis, was systematically defrauded of millions of dollars by its chief accountant, and how the money was laundered through a series of companies, registered in England but run by Isle of Man accountants (who were the defendants in the proceedings), before its final distribution by a French company ostensibly carrying on a jewellery business. Millett J’s judgment also contains a penetrating analysis of the law, covering proprietary as well as personal claims. For present purposes the crucial passage comes immediately after a reference to the dissenting judgment of Jacobs P in DPC:

The authorities at first instance are in some disarray on the question whether constructive notice is sufficient to sustain liability under this head. In the Baden case Peter Gibson J accepted a concession by counsel that constructive notice is sufficient and that on this point there is no distinction between cases of “knowing receipt” and “knowing assistance”. This question was not argued before me but I

26 Id at 412.
27 DPC, above n24 at 459.
28 Id at 410.
29 Consul Development, above n25 at 412.
am unable to agree. [Reference omitted.] In my view the concession was wrong and should not have been made. The basis of liability in the two types of cases is quite different; there is no reason why the degree of knowledge required should be the same, and good reason why it should not. Tracing claims and cases of “knowing receipt” are both concerned with rights of priority in relation to property taken by a legal owner for his own benefit; cases of “knowing assistance” are concerned with the furtherance of fraud.30

A little later in the judgment he said, ‘The true distinction is between honesty and dishonesty. It is essentially a jury question.’31

There is also a valuable passage about what the accountants had to know to found liability. Company minutes signed by one of the accountants suggested that they had been told that the purpose of the money-laundering manoeuvres was to evade Tunisian exchange control. Millett J said:

it is no answer for a man charged with having knowingly assisted in a fraudulent and dishonest scheme to say that he thought that it was “only” a breach of exchange control or “only” a case of tax evasion. It is not necessary that he should have been aware of the precise nature of the fraud or even of the identity of its victim. A man who consciously assists others by making arrangements which he knows are calculated to conceal what is happening from a third party, takes the risk that they are part of a fraud practised on that party.32

Other English judges have however taken a more cautious view on this point.33

This problem can perhaps be posed, in much broader and vaguer terms, as whether you can properly be said to know something unless you can put the right label on it. In Moliere’s Le Bourgeois Gentilhomme Monsieur Jourdain was aware that he did not normally speak in rhyme, but it came as a revelation to him that he spoke in prose. It is a problem which occurs, in different forms, in many other fields of law. To digress with an example from English law, in an action for personal injuries the limitation period runs from a date fixed by the claimant’s knowledge of various facts, including the fact that the injury is significant (within the meaning of a rather complex definition).34 The statute does not in terms require the claimant to know the medical classification of the injury (or that it was caused by negligence). But it is striking how often (on a preliminary issue concerned with limitation) a claimant readily accepts that he or she was well aware of having a serious problem, but did not consider suing until eventually medical diagnosis gave the problem a name — whether it is clinical depression, or post traumatic stress disorder, or dyslexia, or some other disabling condition. A claimant may be held to be statute-barred even though he did not know the right medical label for

30 Agip, above n23 at 292–293.
31 Ibid.
32 Id at 295.
34 See Limitation Act 1980 (UK) s11 and s14.
his trouble. And a defendant may be held to have had enough knowledge to be liable even though he had never heard of the legal label ‘breach of fiduciary obligation.’

I have already referred to the five-fold Baden test of knowledge. It will be well known to almost all of you, but I had better set it out. It occurs in a judgment delivered in 1983 by Peter Gibson J after a year-long trial arising out of the notorious IOS investment scandal in the 1960s. The judgment is very long and was not reported (except in one specialist series) until 1992. Since it has had (to say the least) a mixed reception it is fair to point out that Peter Gibson J was recording a submission of counsel, and he himself expressed reservations about it. The classification is as follows:

(i) actual knowledge; (ii) wilfully shutting one’s eyes to the obvious; (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make; (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man; (v) knowledge of circumstances which would put an honest and reasonable man on inquiry.

As I have said, this classification has had a mixed reception in several jurisdictions. It has been called ‘unhelpful’ and ‘unrememberable’ in New Zealand. In England it has led to warnings against over refinement and over-elaboration, but it has also been attacked from the other flank as not necessarily comprehensive. In Australia Finn J, writing extracurially, has described it as ‘technical to the point of the artificial and the arcane’. Lord Nicholls might be thought to have administered the coup de grace, so far as accessory liability is concerned, in Royal Brunei:

“knowingly” is better avoided as a defining ingredient of the principle, and in the context of this principle the Baden scale of knowledge is best forgotten.

But in Akindele Nourse LJ expressed the view that it was ‘often helpful’ in ‘knowing assistance’ cases.

The judgment of Lord Nicholls in Royal Brunei is very well known and I shall resist the temptation to cite long passages from it. His conclusions are clear, ‘…that dishonesty is a necessary ingredient of accessory liability. It is also a sufficient ingredient.’

35 Baden, above n14.
37 Baden, above n14 at 575–576.
38 Both in Nimmo v Westpac Banking Corp [1993] NZLR 218 at 228 (Blanchard J).
39 Agip, above n23 at 293 (Millet J).
41 Agip (Africa) Ltd v Jackson [1991] Ch 547 at 567.
43 Royal Brunei, above n16 at 392.
44 Akindele, above n5 at 455.
45 Id at 392.
I read the judgment as impliedly, if not expressly, approving Millett J’s observation in Agip,\(^{46}\) that whether a defendant should be held liable for dishonest assistance is ‘essentially a jury question’.\(^{47}\)

The prime characteristic of a jury question is the form in which it has to be answered. However imponderable the question, the answer must be short and unambiguous and never has to be backed up by reasons. The abolition of the civil jury, in all but a handful of special cases, has put heavy extra burdens of reasoned decision-making onto the shoulders of trial judges. It is one of the virtues of Lord Nicholls’ judgment in Royal Brunei that (once the discussion of the authorities is over) it is expressed in terms which a jury could be expected to understand. Hard experience in criminal trials shows that there are limits to the degree of refinement with which a jury can sensibly be directed on matters of intention.\(^{48}\)

There is one point on Royal Brunei which I find puzzling, and which seems to have attracted little attention. Mr Tan, who brought about the misappropriation of the airline’s money, was the managing director and principal shareholder of a company called Borneo Leisure Travel. That company was, under a formal written agreement, an express trustee of the money which it collected as agent for the airline. The Court of Appeal of Brunei held (allowing the defendant’s appeal) that dishonesty on the part of Borneo Leisure Travel had not been established. Lord Nicholls stated the issue as, whether the breach of trust which is a prerequisite to accessory liability must itself be a dishonest and fraudulent breach of trust by the trustee.\(^{49}\) (and the Privy Council held that that was not necessary).\(^{50}\) But at the end of the judgment Lord Nicholls accepted that Mr Tan was the directing mind of Borneo Leisure Travel, and that it must also be treated as having acted dishonestly. So it was hardly necessary to decide the issue in the terms in which he posed it.

The issue of corporate mens rea seems to have led to some interesting discussion in Australia as to whether a claimant can ‘aggregate’ knowledge in the minds of different individuals who were officers or senior employees of a company. In Krakowski the majority of the High Court of Australia stated that: A division of function among officers of a corporation responsible for different aspects of the one transaction does not relieve the corporation from responsibility determined by reference to the knowledge possessed by each of them.\(^{51}\) The Court of Appeal of Victoria has since expressed differing views about how far that goes.\(^{52}\) The issue has also arisen in New Zealand, in extraordinary circumstances involving the responsibility of government officials and advisers.\(^{53}\)

\(^{46}\) Nicholls LJ referred at 388 to Millett J’s judgment in Agip, above n23 at 293.

\(^{47}\) I am not aware of any pithy definition of this expression, but it goes back at latest to Bell v Kennedy (1868) LR 1 Sc & Div 307 at 324, a case on domicile.

\(^{48}\) See R v Woollin [1999] 1 AC 82.

\(^{49}\) Royal Brunei, above n16 at 384.

\(^{50}\) Id at 392.


\(^{52}\) Macquarie Bank Ltd v Sixty-Fourth Throne Pty Ltd [1998] 3 VR 133.

\(^{53}\) Equiticorp Industries Group Ltd v R (No 47) [1998] 2 NZLR 481.
The most recent English case on knowing assistance is *Twinsectra*. The facts were unusual. Mr Yardley, an adventurous businessman, had two solicitors. His regular solicitor was Mr Leach but he also had a sort of ad hoc solicitor, Mr Sims, who acted because Mr Leach was unwilling to give a personal undertaking to be liable to the proposed lender, Twinsectra, for a loan of £1 million. Mr Sims gave this undertaking and also a second undertaking to retain the £1 million until it was applied in the acquisition of (unspecified) property. The second undertaking, vague though it was, was held to have created a trust, and Mr Leach knew of it. Mr Sims, in breach of his second undertaking, passed the money to Mr Leach who dispersed it on his client’s instructions, and partly not in the acquisition of property. Mr Sims was insolvent and not worth suing.

The trial judge (Carnwath J) found that Mr Leach had not been dishonest although he had ‘shut his eyes’ to the implications of the second undertaking. The Court of Appeal treated these conclusions as contradictory and gave judgment against the solicitor. The majority of the House of Lords thought that the judge’s findings (although imperfectly expressed) were not contradictory, and restored his decision.

Lord Hoffmann said that the principles in *Royal Brunei*:

… require more than a knowledge of the facts which make the conduct wrongful. They require a dishonest state of mind, that is to say, consciousness that one is transgressing ordinary standards of honest behaviour.54

He also said ‘I do not suggest that one cannot be dishonest without a full appreciation of the legal analysis of the transaction.’55

The rest of the House (which did not include Lord Nicholls) took much the same view, except for Lord Millett, whose attitude was sterner. He said:

There was no need to impute knowledge to Mr Leach, for there was no relevant fact of which he was unaware .... Yet from the very first moment that he received the money he treated it as held to Mr Yardley’s order and at Mr Yardley’s free disposition. He did not shut his eyes to the facts, but to “the implications”, that is to say the impropriety of putting the money at Mr Yardley’s disposal. His explanation was that this was Mr Sims’ problem, not his.

Mr Leach knew that Twinsectra had entrusted the money to Mr Sims with only limited authority to dispose of it; that Twinsectra trusted Mr Sims to ensure that the money was not used except for the acquisition of property; that Mr Sims had betrayed the confidence placed in him by paying the money to him (Mr Leach) without seeing to its further application; and that by putting it at Mr Yardley’s free disposal he took the risk that the money would be applied for an unauthorised purpose and place Mr Sims in breach of his undertaking .... In my opinion this is enough to make Mr Leach civilly liable as an accessory.56

54 *Twinsectra*, above n6 at 170.
55 Id at 171.
56 Id at 203–204, paras 141–144.
Or as Stephen J put it more concisely in *Consul Development*, the defendant’s liability arose from his ‘failure to recognise fraud when he saw it.’57

I must confess that I am doubtful whether the law as stated in *Royal Brunei* is clearer after *Twinsectra*. Perhaps the time has come to curtail the discussion and just pose the jury question. In a recent case in the English Court of Appeal, Aldous LJ said that whether the defendant was dishonest:

...may not be an easy question to answer, but it is the sort of question that judges and juries throughout the country answer every day without needing to analyse large numbers of authorities.58

In similar vein Lord Hoffmann, sitting in the Hong Kong Court of Final Appeal, warned against the concept of the hypothetical decent honest man:

The danger is that because honest people also tend to behave reasonably, considerately and so forth, there may be a temptation to treat shortcomings in these respects as a failure to comply with the necessary objective standard. It seems to me much safer, at least in the context of an allegation of fraud, to concentrate on the actual defendants and simply ask whether they have been dishonest. Judges and juries seldom have any conceptual difficulty in knowing what is meant by dishonesty.59

There has also been a warning in the Court of Appeal of New South Wales, in *Beach Petroleum*, of the danger of equating imprudent or unreasonable conduct with dishonest conduct.

Now I come to *Akindele*. It was argued both as a case of dishonest (or as Nourse LJ preferred to call it, knowing) assistance and as a case of knowing receipt. The latter ground is the important one. The facts were that Chief Akindele, a wealthy Nigerian businessman, had in 1985 paid $10 million to ICIC Overseas, a company associated with BCCI. He did so under a written agreement, the ostensible effect of which was that he bought 250,000 shares in BCCI Overseas at $40 per share, and ICIC Overseas agreed to repurchase them at a price which gave the defendant a return of 15 per cent per annum (compound) on his money. In the meantime the shares were not to be transferred to him. In 1988 ICIC Overseas paid the defendant about $16.7 million under a so-called divestiture agreement. The individuals controlling the BCCI Group entered into these agreements for the purposes of fraud, in an attempt to mislead their auditors. The defendant was not interested in acquiring BCCI Overseas shares. His original, honest intention was to earn an exceptionally high return on his money. By 1988 he had come to have suspicions about the probity of the BCCI Group’s management but the conclusion of the trial judge, Carnwath J was that he had no knowledge of the underlying frauds within the BCCI Group, either in general or in relation to the arrangements with him.

57 *Consul Development*, above n25 at 411.
58 *Mortgage Express Ltd v Newman & Co* [2001] PNLR 86 at 100.
59 *Aktieselskabet Dansk Skibsfinansiering v Brothers* [2001] 2 BCLC 324 at 334.
The issues at trial were whether the 1985 agreement was a sham (it was not) and whether the defendant was liable as a constructive trustee under the head of dishonest assistance or knowing receipt. Carnwath J held that dishonesty was an essential ingredient under either head, and on his findings of fact he found that the claim failed. In the Court of Appeal the only issue was as to knowing receipt of the defendant’s gain of about $6.7 million.

Nourse LJ (with whom Ward and Sedley LJJ agreed) reviewed the English authorities and a small number of Commonwealth authorities. He concluded (especially by reference to Belmont Finance Corporation Ltd v Williams Furniture Ltd No 2 [1980] 1 All ER 393 at 405 and Re Montagu [1987] Ch 264 at 273) that the only significance of categorising the defendant’s knowledge was to determine whether his conscience was affected. He proceeded,

But, if that is the purpose, there is no need for categorisation. All that is necessary is that the recipient’s state of knowledge should be such as to make it unconscionable for him to retain the benefit of the receipt.

For these reasons I have come to the view that, just as there is now a single test of dishonesty for knowing assistance, so ought there to be a single test of knowledge for knowing receipt. The recipient’s state of knowledge must be such as to make it unconscionable for him to retain the benefit of the receipt.

On the trial judge’s findings, the conduct of the Chief in taking $16.7 million under the divestiture agreement had not been unconscionable, because he neither knew nor ought to have known of the fraud, and the claim had been rightly dismissed. Akindele has, unsurprisingly, caused a good deal of controversy. I am reminded of what Kirby J said about Breen in his dissenting judgment in Pilmer:

The comments have ranged from the condemnatory, through the disappointed, to the resigned and accepting, rising to praise and ending just short of unalloyed pleasure. When a judicial decision produces such a wide range of responses, it is fair to assume that the law does not speak with total clarity or that its content is uncontested.

Lord Nicholls had presciently anticipated the difficulties in Royal Brunei:

Mention, finally, must be made of the suggestion that the test for liability is that of unconscionable conduct. Unconscionable is a word of immediate appeal to an equity lawyer. Equity is rooted historically in the concept of the Lord Chancellor, as the keeper of the Royal Conscience, concerning himself with conduct which was contrary to good conscience. It must be recognised, however, that unconscionable is not a word in everyday use by non-lawyers. If it is to be used in this context, and if it is to be the touchstone for liability as an accessory, it is essential to be clear on what, in this context, unconscionable means. If unconscionable means no more than dishonesty, then dishonesty is the preferable

60 Belmont Finance Corporation Ltd v Williams Furniture Ltd No 2 [1980] 1 All ER 393 at 405.
62 Akindele, above n 5 at 455.
63 Breen v Williams (1994) 35 NSWLR 522.
label. If unconscionable means something different, it must be said that it is not clear what that something different is. Either way, therefore, the term is better avoided in this context.65

Others have made the same point, including Professor Birks:

“Unconscionable” gives no guidance. At one extreme it is unconscionable not to repay what you were not intended to receive. At the other extreme, it is unconscionable to be dishonest. “Unconscionable,” indicating unanalysed disapprobation, thus embraces every position in the controversy. If we look at what the court did, rather than at the word in which it summed up the test which it intended to apply, we can see that Chief Akindele held onto his money as a result of a factual inquiry resembling an inquiry into constructive notice: he neither knew nor ought to have known of the improprieties going on inside BCCI. In this inquiry “unconscionable” seems no more than a fifth wheel on the coach.66

In New Zealand, Tipping J has said of unconscionability, that he would prefer ‘the herald of equity to be wearing more distinctive clothing.’67

At this point may I take stock? The end of this lecture is now in sight, or at any rate not too far over the horizon. I have not yet mentioned restitution or unjust enrichment. Nor have I made more than the merest mention of the important decision of the High Court in Roxborough.68 I fear that I would be imposing too much on the patience of this distinguished audience if I were to embark on any lengthy discussion of these difficult and controversial matters. But having got as far as noticing the criticisms of the vagueness of the ‘unconscionable’ test in Akindele, and having read with great interest and admiration all the judgments in Roxborough, I feel that I would be failing in my duty if I did not, with proper diffidence, say something.

Perhaps I can put it like this. The notion that equity will grant relief in respect of conduct which is against conscience resonates through centuries of legal history. It resonates particularly, I have no doubt, in New South Wales. There are probably many reasons for this, but they must include the particular importance which Australians attach to straightforwardness and fair play. They are reflected in the fact that the administration of equity was separated from the administration of the common law, in your courts, until a time within living memory. They are also reflected in the reference in your Commonwealth Trade Practices Act69 to ‘conduct that is unconscionable within the meaning of the unwritten law from time to time of the States and Territories.’

65 Royal Brunei, above n16 at 392.
66 Birks & Pretto (eds), above n4 at 226; see also Andrew Burrows, The Law of Restitution (2nd ed, 2002) at 201.
68 Roxborough, above n9.
But as the majority of the High Court said in Garcia:

We acknowledge that the statement that enforcement of the transaction would be ‘unconscionable’ is to characterise the result rather than to identify the reasoning that leads to the application of that description.70

The same (or a similar) point was put forcibly, 20 years ago, by Deane J in Muschinski:

Under the law of this country — as, I venture to think, under the present law of England — proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion, subjective views about which party “ought to win” and “the formless void of individual moral opinion”. [References omitted.]71

So there is no doubt that equity is alive and well in New South Wales, and it is a thoroughly principled system of equity, not a general liberty for the court to decide cases as it thinks fair. The principles are to be found in that remarkable work of scholarship which still, I am glad to see, bears the names Meagher, Gummow and Lehane.72 It is just as well that cases are not decided on the court’s general perception of what is fair, since it is striking how the cases throw up facts on which both lawyers and laymen may have very different views as to what would be a fair result. That may be true of Roxborough and it is certainly true of Foskett v McKeown,73 an interesting and important decision of the House of Lords which I must leave aside today.

The principle or doctrine of unjust enrichment also forms part of the law of Australia. That has been clear (at least) since 1987 when in Pavey & Matthews74 the High Court exorcised the ghost of implied contract75 and recognised unjust enrichment as a ‘unifying legal concept’. In 1988 the High Court unanimously expressed the view that ‘contemporary legal principles of restitution or unjust enrichment can be equated with seminal equitable notions of good conscience.’76

And in David Securities77 the High Court gave relief for money paid under a mistake of law, since the doctrine of unjust enrichment made meaningless the distinction between mistake of fact and mistake of law. The House of Lords caught up on this point six years later.78

In the High Court cases which I have just referred to there is a ready recognition of a degree of kinship between restitutionary and equitable doctrine. The same recognition can be found in some of the old cases which restitution lawyers regard

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71 Muschinski v Dodds (1985) 160 CLR 583 at 615.
73 Foskett v McKeown [2001] 1 AC 102.
74 Pavey & Matthews Pty Ltd v Paul (1987) 162 CLR 221.
75 Roxborough, above n9 at 578 (Kirby J).
76 Australia and New Zealand Banking Group Ltd v Westpac Banking Corporation (1988) 164 CLR 662 at 673; see also Baltic Shipping Co v Dillon (1993) 176 CLR 344 at 359 (Mason CJ).
78 Kleinwort Benson Ltd v Lincoln City Council [1999] 2 AC 349 (hereafter Lincoln).
as seminal, including Moses v Macferlan\textsuperscript{79} (which Gummow J discussed at some length in Roxborough\textsuperscript{81}) and Kelly v Solari.\textsuperscript{80} But I sense that there is in this jurisdiction a fairly strong inclination, eloquently expressed by Gummow J in Roxborough\textsuperscript{81} and by Finn J in an article quoted by Gummow J.\textsuperscript{82} to maintain established equitable principles and to be cautious of what His Honour\textsuperscript{83} calls ‘any all-embracing theory of restitutionary rights and remedies founded upon a notion of unjust enrichment.’

I have to say that I share this inclination. It is partly, no doubt, a matter of one’s upbringing and experience in the law, and perhaps to some extent a generational thing, like the way one feels about mobile phones. When I was a law student restitution barely existed as an academic subject in England. The first edition of Goff and Jones lay several years in the future. By training and by temperament, I prefer bottom-up to top-down legal reasoning.

But the fact is that in England the last 15 years have seen some very important changes in this area of the law. Four decisions of the House of Lords have led the way. In Lipkin Gorman\textsuperscript{84} the House recognised the defence of change of position. In Westdeutsche\textsuperscript{85} it departed from its venerable but obscure decision in Sinclair v Brougham.\textsuperscript{86} In the Lincoln case\textsuperscript{87} it caught up with the High Court of Australia as regards mistake of law. And in Foskett v McKeown\textsuperscript{88} the House expressed the view, not necessary to the decision, that there should in future be a unified theory of tracing, without any need to find an antecedent fiduciary relationship before applying equitable principles.

It is hard to know where we will be going next. But I would venture to predict that the problem of ‘knowing receipt’ highlighted by Akindele will not be satisfactorily resolved in England unless we address the potential ambiguities of describing conduct as unconscientious, or unconscionable.

To seek to retain property to which the recipient has no proper title may itself be regarded as unconscientious. That thought was expressed by Lord Greene MR in the well-known case of Re Diplock, which was concerned with a defective testamentary trust for charitable or benevolent purposes:

And as regards the conscience of the defendant upon which in this as in other jurisdictions equity is said to act, it is prima facie at least a sufficient circumstance that the defendant, as events have proved, has received some share of the estate to which he was not entitled.\textsuperscript{89}

\textsuperscript{79} Moses v Macferlan (1760) 2 Burr 1005 at 1008–1012.
\textsuperscript{80} Kelly v Solari (1841) 9 M & W 54 at 58.
\textsuperscript{81} Roxborough, above n9 at 543.
\textsuperscript{82} Paul Finn, ‘Equitable Doctrines and Discretion in Remedies’ in William Cornish, Restitution Past, Present and Future (1998) at 251, 252.
\textsuperscript{83} Roxborough, above n9 at 544.
\textsuperscript{84} Lipkin Gorman v Karpnale Ltd [1991] 1 AC 548.
\textsuperscript{85} Westdeutsche Landesbank Girozentrale v Islington LBC [1996] AC 669.
\textsuperscript{86} Sinclair v Brougham [1914] AC 398.
\textsuperscript{87} Lincoln, above n80.
\textsuperscript{88} Foskett v McKeown, above n75.
\textsuperscript{89} Re Diplock [1948] Ch 465 at 503.
Another similar passage in Lord Greene’s judgment was recently cited in the Court of Appeal of New South Wales in *Evans v European Bank Ltd*, a case of enormous interest which time prevents me from discussing. These statements by Lord Greene have echoes of key passages in *Moses v Macferlan* and *Kelly v Solari*. They also find an echo, if I have read the judgments correctly, in the emphasis placed in *Roxburgh*, both by the majority and by Gummow J in his separate concurred judgment, on unjust or unconscientious retention of property to which the recipient has no title. It is not necessarily unconscientious to receive another’s property by mistake or accident, but it is unconscientious to hold on to it when you know the facts. The disapprobation implied in characterising conduct as unconscionable, however ‘unanalysed’ and imprecise, suggests a fault-based (rather than a receipt-based) liability. Where does that leave an innocent recipient of misapplied trust money who uses it to pay off his overdraft? There is no proprietary remedy against him, and it would be unfair to make him liable as a constructive trustee. But he has not, in the technical sense, changed his position by paying off his overdraft; his net assets have been swollen by the receipt.

The most satisfactory approach to resolving these very real difficulties is to my mind put forward in the article by Lord Nicholls, published in 1998, which I have already mentioned. The configuration of personal liability which Lord Nicholls proposes, in the barest outline, is to recognise fiduciary liability for dishonest assistance (or accessory liability) as a fault-based liability founded in dishonesty; fiduciary liability for knowing receipt as a similar fault-based liability requiring actual guilty knowledge; and the personal liability of an innocent or negligent recipient as receipt-based and strict, subject to the defence of change of position. The third of these categories would not make the second redundant, since the defence of change of position is not available to a defendant who is held liable as if he were a trustee (and who is also, therefore, liable to pay compound interest and to account for any profit). At least one judicial voice has been raised in Australia in favour of this way forward. But it is not yet established law, or anywhere close to it, in any jurisdiction. There is still plenty of room for debate.

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90 *Evans*, above n8 at para 14g.
91 See Birks & Presto (eds); Burrows, above n68.
92 This point is discussed in an article by Ross Grantham, ‘Restitutionary Recovery Ex Æquo Et Bono’ [2002] SJLS 388 at 398.
93 Nicholls, above n3.
94 *Koorooinang Nominees Pty Ltd v Australia and New Zealand Banking Group Ltd* [1998] 3 VR 16 (Hansen J).
Australian Anti-Vilification Law: A Discussion of the Public/Private Divide and the Work Relations Context

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Anti-vilification legislation exists in most Australian jurisdictions.1 Broadly, this legislation prohibits public acts of vilification, verbal abuse and hatred, on a range of grounds including race and religion. Some statutes contain civil proscriptions and processes alone,2 whilst other Acts additionally establish criminal offences.3 The criminal proscriptions usually require an additional element — that the perpetrator has threatened, or has incited others to threaten physical harm to a person or their property.

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** Kathleen Kelly is an LLB/BSc student employed as a research assistant on this project. The authors thank the anonymous referees for their very insightful comments about the paper. The manuscript for this article was completed in May 2004.

1 In this article anti-vilification legislation refers to the following statutory provisions: Racial Discrimination Act 1975 (Cth) Part IIA (racial hatred) (hereafter RDA); Anti-Discrimination Act 1977 (NSW) Part 2 Division 3A (racial vilification), Part 3A Division 5 (transgender vilification), Part 4C Division 4 (homosexuality vilification), Part 4F (HIV/AIDS vilification) (hereafter ADA (NSW)); Racial and Religious Tolerance Act 2001 (Vic) (racial and religious vilification) (hereafter R&RT Act); Anti-Discrimination Act 1991 (Qld) s124A (racial and religious vilification); Discrimination Act 1991 (ACT) Part 6 (racial vilification); Racial Vilification Act 1996 (SA) s4 (racial vilification).

2 See, for example, RDA; Anti-Discrimination Act 1998 (Tas). The Western Australian jurisdiction covers racial harassment in employment, education and accommodation: Equal Opportunity Act 1984 (WA), Part 3, Division 3A.

3 See, for example, ADA (NSW) s20D (serious racial vilification), s38T (serious transgender vilification), s49ZTA (serious homosexual vilification), s49ZXC (serious HIV/AIDS vilification); R&RT Act Part 4 (serious racial or religious vilification); Anti-Discrimination Act 1991 (Qld) s131A (serious racial or religious vilification). Note that Western Australian legislation creates criminal offences for intending or likely to racially harass or incite racial hatred, and possessing material for dissemination or display for such purposes: Criminal Code Amendment (Racial Vilification) Act 2004 (WA). These provisions are under review: Equal Opportunity Commission and Office of Multicultural Interests (WA), Racial and Religious Vilification Consultation Paper (2004).
All Australian statutes are based on a separation of public and private. In drafting each Act the relevant parliament has constituted a line, or several different lines at various points, between a public sphere (regulated by the legislation) and a private realm of life (not touched by the legislation). A central way in which the various statutes map a public/private divide is by requiring that the vilifying act have the character of being public behaviour.\(^4\) The technical approaches adopted in the statutes to achieve this separation between public and private vary. All State legislation, apart from the Victorian Act, requires that in order to be unlawful, the vilifying conduct must be a ‘public act’.\(^5\) The Commonwealth legislation requires that in order to be unlawful, the vilifying act must take place ‘otherwise than in private’.\(^6\)

The latest addition to the raft of anti-vilification statutes in Australia — the Racial and Religious Tolerance Act 2001 (Vic) (\textit{R&RT Act}) — contains a novel approach to constituting a public/private line of vilifying behaviour. The statute defines the prohibited conduct negatively by reference to the parties’ desire for the conduct to be seen or heard only by themselves, and their reasonable expectation of this. In effect, vilifying conduct will not contravene the statute’s proscription where the perpetrator subjectively intends it to be seen or heard only by the immediate parties, unless an objective reading of the circumstances implies that a reasonable person would have known that the conduct would, or may, be overheard or seen by others.\(^7\) On its face this new Victorian articulation presents quite a different public/private divide to that appearing in anti-vilification legislation elsewhere in Australia. Most obviously, it uses neither the word public, nor the word private, in its articulation of its scope. Rather, it is about objective intention and reasonableness.

These different statutory constructions delineating a public/private line have not been the subject of close analysis. This article conducts such an examination of the New South Wales and Commonwealth jurisdictions, and the new Victorian jurisdiction. The focus of the investigation is on the adjudications in the different jurisdictions.\(^8\) The New South Wales and Commonwealth jurisdictions have received the most adjudicative scrutiny and for this reason they have been chosen for analysis here. The new \textit{R&RT Act}, with its unique approach to separating a private sphere of conduct beyond the reach of the legislative prohibition, provides an interesting contrast to the more developed jurisdictions of New South Wales and the Commonwealth.

\(^4\) Another way in which a public/private line is drawn in the legislation is through the exemption of publication in the public interest. See, for example, ADA s18D(b), (c); ADA (NSW) s20C(2)(c), s38S(2)(c), s49ZT(2)(c), s49ZXB(2)(c); \textit{R&RT Act} (Vic) s11.

\(^5\) See, for example, ADA (NSW) and the definitions of public act in s20B, s38R, s49ZS, s49ZXA; Anti-Discrimination Act 1991 (Qld) and the definition of public act in s4A; \textit{Anti-Discrimination Act} 1998 (Tas) and the definition of public act in s3; Discrimination Act 1991 (ACT) and the definition of public act in s65; Racial Vilification Act 1996 (SA) and the definition of public act in s3.

\(^6\) ADA s18C.

\(^7\) \textit{R&RT Act} s12.
The focus of the examination in this article is on the context of workplaces and work relations. Anti-vilification legislation has not conventionally been seen as an important source of employment legal obligation. Indeed, longer standing anti-discrimination legislation such as the Racial Discrimination Act 1975 (Cth) (RDA) and the Sex Discrimination Act 1984 (Cth) have only relatively recently come to be seen as part of labour or workplace law. There are, however, reasons to think that anti-vilification legislation may grow as a significant source of employment obligation. With concepts like hostile work environment, racial harassment, bullying and victimisation increasingly entering everyday understandings of workplace obligations, employees may be more prepared to identify and name workplace wrongs against them. In addition, it appears that racial and religious tension in Australia has increased over recent years, and it might be expected that such conflict will be played out across society broadly, including workplaces. Interestingly, there are interconnections between the applicability of anti-vilification legislation to the workplace context and the growing interest in worker privacy, which has become an issue of policy concern.

8 The focus of our examination on adjudications is necessarily limited as most complaints are dealt with through a process of confidential conciliation and do not proceed to an adjudication. In all jurisdictions complaints are usually initially dealt with through a confidential process of conciliation. It is only where conciliation has not resolved the complaint, or in other certain limited circumstances, that the case proceeds to adjudication. On average, 14 per cent of complaints each year lodged under the RDA racial hatred provisions have been referred to adjudication: Luke McNamara, Regulating Racism: Racial Vilification Laws in Australia (2002) at 66. Around nine per cent of racial vilification complaints lodged under the ADA (NSW) are referred to adjudication: at 161.

9 The percentage of complaints lodged under the federal racial hatred provisions that relate to employment contexts have varied over the years. In 1999–2000 it was 10 per cent, whilst in 2000–2001 it was 19 per cent. The two main areas of complaint under the RDA have consistently been the media, and disputes between residential neighbours. See McNamara, above n8 at 63 (Figure 3); Brad Jessup, ‘Five Years On: A Critical Evaluation of the Racial Hatred Act 1995’ (2001) 6 Deakin LR 91 at 97 (Table 3); Ray Jureidini, ‘Origins and Initial Outcomes of the Racial Hatred Act 1995’ (1997) 5 People and Place 30 at 37 (Table 1). The information available regarding the ADA (NSW) racial vilification provisions suggests that complaints in the employment context are negligible. See McNamara, above n8 at 153–154. We were not able to locate this type of information in relation to other areas of vilification under the ADA (NSW).


what is seen as invasive employer practices such as surveillance and monitoring of employees’ communications and actions, the applicability of anti-vilification legislation to employee conduct does raise related questions concerning an employee’s expectation of privacy at work, and perhaps more directly, the degree to which employers are entitled to monitor employee conduct in order to avoid vicarious liability under anti-vilification legislation.13

We conclude in the final section of this article that the line between public and private in workplaces and work relations is left largely unarticulated, both in the different statutes themselves, and in the case decisions interpreting them. Moreover, we argue that the new approach in the Victorian civil provisions has some advantages over the older approaches of New South Wales and the Commonwealth. Although at first glance the new Victorian provisions appear more ambiguous than the more familiar formulations of the public/private line found elsewhere in Australia, upon investigation the Victorian provisions probably offer more certainty generally on where the line between public and private will be drawn, and specifically more certainty for both employees and employers regarding their legal obligations in this area.

The public/private divides in the New South Wales and Commonwealth jurisdictions are examined first. The analysis explores and draws out questions relevant to the workplace context. Following this, the article turns to focus on the new Victorian R&RT Act. The final part of the article draws out some issues that arise in comparing these different jurisdictions.

1. The New South Wales and Commonwealth Legislative Frameworks

A. The Legislative Frameworks Regarding Prohibited Conduct

New South Wales was the first jurisdiction in Australia to enact anti-vilification statutory provisions. In 1989 the Anti-Discrimination Act 1977 (NSW) was amended to insert racial vilification provisions.14 Since then, the Act has been amended on successive occasions to insert vilification provisions relating to homosexuality (1993), HIV/AIDS status (1994) and transgender status (1996).15 The civil prohibition is expressed as follows:

13 In this article we look simply at whether anti-vilification legislation as it currently stands applies in the work relations context, and the strengths and weaknesses of different legislative formulae in that context. We leave for a later day the normative question of whether anti-vilification legislation ought to apply broadly across all conduct in the paid labour market. Our initial view is that it ought, in the same way that sexual harassment and discrimination proscriptions apply across workplaces.

14 Racial vilification was added in 1989 by the Anti-Discrimination (Racial Vilification) Amendment Act 1989 (NSW). On the history of this enactment, see McNamara, above n8 at 121–130. In 1994 the ADA (NSW) definition of ‘race’ (in s4) was amended to include ethno-religious origin or descent: Anti-Discrimination (Amendment) Act 1994 (Cth). The objective of this amendment was to clarify coverage of ethno-religious groups such as Jewish people, Muslims and Sikhs: John Hannaford, Attorney-General, New South Wales, Legislative Council, Parliamentary Debates (Hansard), 4 May 1994 at 1827–1828.
(1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race [homosexuality, HIV/AIDS status, transgender status] of the person or members of the group.\(^{16}\)

The key phrase is ‘public act’. This is explained further as including:

(a) any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material, and

(b) any conduct (not being a form of communication referred to in paragraph (a)) observable by the public, including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia, and

(c) the distribution or dissemination of any matter to the public with knowledge that the matter promotes or expresses hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race [homosexuality, HIV/AIDS status, transgender status] of the person or members of the group.\(^{17}\)

The \textit{ADA} (NSW) contains a number of exemptions to these civil prohibitions on vilification. Conduct that is exempted includes fair reporting of a public act of vilification, communications which attract absolute privilege, and acts done reasonably and in good faith for academic, artistic, scientific or research purposes, or any other purpose in the public interest, including discussion about any matter or act.\(^{18}\) In addition to this civil wrong, the \textit{ADA} (NSW) prescribes offences of

\(^{15}\) Homosexual vilification was added in 1993 by the \textit{Anti-Discrimination (Homosexual Vilification) Amendment Act} 1993 (NSW); HIV/AIDS vilification was added in 1994 by the \textit{Anti-Discrimination (Amendment) Act} 1994 (NSW); transgender vilification was added in 1996 by the \textit{Transgender (Anti-Discrimination and Other Acts Amendment) Act} 1996 (NSW). The 1993, 1994 and 1996 anti-vilification provisions were all modeled on the original racial vilification legislative rules.

\(^{16}\) \textit{ADA} (NSW) s20C (racial vilification). In relation to vilification on other grounds, see s38S (transgender vilification); s49ZT (homosexuality vilification); s49ZXB (HIV/AIDS vilification).

\(^{17}\) \textit{ADA} (NSW) s20B (racial vilification). In relation to vilification on other grounds, see s38R (transgender vilification); s49ZS (homosexuality vilification); s49ZXA (HIV/AIDS vilification). The second reading speech contains little explanation of this concept of ‘public act’, other than that it ‘does not include private communications or other conduct in private’: Attorney–General John Dowd, New South Wales, Legislative Assembly, \textit{Parliamentary Debates (Hansard)}, 4 May 1989 at 7489.

\(^{18}\) \textit{ADA} (NSW) s20C(2) (racial vilification), s49ZT(2) (homosexuality vilification), s49ZXB(2) (HIV/AIDS vilification), s38S(2) (transgender vilification). On the exemptions in s20C(2), see McNamara, above n8 at 187–194.
serious vilification on the different grounds. The requirement of “public act” applies in relation to these criminal offences.

In October 1995 the RDA was amended by the Racial Hatred Act 1995 (Cth). This statute inserted a new part into the RDA – Part IIA. The central substantive provision in Part IIA is s18C:

(1) It is unlawful for a person to do an act, otherwise than in private, if:

(a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and

(b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

The public/private divide in s18C(1) is drawn by the necessity that the act be ‘otherwise than in private’. Section 18C(2) and (3) provide further specification in relation to this concept:

(2) For the purposes of subsection (1), an act is taken not to be done in private if it:

(a) causes words, sounds, images or writing to be communicated to the public; or

(b) is done in a public place; or

(c) is done in the sight or hearing of people who are in a public place.

(3) In this section:

‘public place’ includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

Section 18D contains an exemption to this prohibition on racial hatred in relation to conduct done reasonably and in good faith as part of an artistic work, in the course of any genuine academic, artistic or scientific discussion, or any other genuine purpose in the public interest. The exemption extends to cover a fair comment on any event or matter of public interest. This provision is potentially very broad, and for this reason has been heavily criticised by commentators.

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19 ADA (NSW) s20D (offence of serious racial vilification), s49ZTA (offence of serious homosexual vilification), s49ZXC (offence of serious HIV/AIDS vilification), s38T (offence of serious transgender vilification). There have to date been no prosecutions of these criminal offences.

20 The New South Wales Law Reform Commission has recommended that the offence of serious vilification be removed from the ADA (NSW) and relocated to the criminal law: New South Wales Law Reform Commission, Review of the Anti-Discrimination Act 1977 (NSW), Report No 92 (1999) at 536–537.

Notably, the *RDA* does not contain a criminal offence relating to racial hatred. Although provisions establishing a criminal offence initially appeared in the original Bill, they were removed during parliamentary debate in the Senate in order to ensure the passage of the Bill.²²

Both the *ADA* (NSW) test of ‘public act’ and the Commonwealth concept of ‘otherwise than in private’ are tied to a concept of ‘the public’. Put simply, the *ADA* (NSW) covers conduct that is a communication to ‘the public’, is observable by ‘the public’, or is the distribution of material to ‘the public’ with knowledge that the material is vilifying. The *RDA* covers conduct that causes material to be communicated to ‘the public’, or is done in a ‘public place’, or is done within sight or hearing of people who are in a ‘public place’. ‘[P]ublic place’ is defined in terms of a place to which ‘the public’ have access, as of right or by invitation. The concept of ‘the public’ then is of central importance in understanding the scope of both statutes’ proscription of racial hatred and vilification. Notably, ‘public’ is not defined in either Act. It is an ambiguous concept, and, as will be explored below, it fails to draw a clear line in the workplace and work relations context between public acts caught under the two statutes, and non-remediable private acts.

**B. The Legislative Framework Regarding Employer Civil Liability**

There are a number of different ways in which businesses face potential civil liability in relation to contraventions of these racial hatred and vilification provisions in the *ADA* (NSW) and the *RDA* by their employees and contractors.²³ These provisions are similar to the mechanisms in anti-discrimination legislation that render employers liable in relation to conduct such as sexual harassment, or sex or disability discrimination in their workplaces.

Employers and principals face potential vicarious liability. Notably the *ADA* (NSW) vicarious liability provision was inserted into the Act relatively recently, in 1994.²⁴ Under the *ADA* (NSW) vicarious liability is linked to the issue of whether the employer or principal authorised the conduct in question. Section 53(1) of the Act provides that:

*An act done by a person as the agent or employee of the person’s principal or employer which if done by the principal or employer would be a contravention of this Act is taken to have been done by the principal or employer also unless the principal or employer did not, either before or after the doing of the act, authorise the agent or employee, either expressly or by implication, to do the act.*

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²³ Employers and principals are potentially liable under the *ADA* (NSW) criminal offences of serious vilification as person who themselves committed the criminal offence. Vicarious liability does not arise in relation to these criminal offences, although employers and principals may be liable by reason of their complicity in a contravention of the criminal law by an employee (or other person).

²⁴ *Anti-Discrimination (Amendment) Act* 1994 (NSW).
The section provides that liability is joint and several. There is an exemption for the principal or employer where this person ‘took all reasonable steps to prevent the agent or employee from contravening the Act’. These vicarious liability provisions apply in relation to employees engaged under contracts of employment, independent contractors engaged under contracts for service, employees working under agency arrangements and agents remunerated by commission.

The RDA provision on vicarious liability is relatively straightforward. It provides that ‘if an employee or agent of a person does an act in connection with his or her duties as an employee or agent, and the act would be unlawful under this Part if it were done by the person, [then] this Act applies in relation to the person [employer or principal] as if the person had also done the act.’ There is an exemption where it is established that the employing entity ‘took all reasonable steps to prevent the employee or agent from doing the act’. Notably, the word ‘employee’ is defined to include a person working under a contract for services, that is, an independent contractor.

In addition to vicarious liability, under the New South Wales statute an employer or principal might be liable as an accessory for aiding and abetting a contravention of the statute. There is no equivalent provision in the RDA in relation to racial hatred. Finally, an employer may itself, himself or herself, be directly liable as the person who engaged in the unlawful racial hatred or vilification.

2. Adjudications Under the New South Wales and Commonwealth Jurisdictions

This section of the article draws out some main themes in the decisions under the legislative provisions of importance in thinking about the workplace and work relations context. The question of whether the legislative formulae are definitive of the conduct covered under the two statutes is examined first. This is followed by an examination of how adjudicators approach cases involving workplace contexts, with some broad principles extracted from the case decisions. These include the necessity of having a third party present, and the meaning of ‘the public’.

A. Legislative Definitions and Definitiveness

It is clear from the face of the legislation that the definition of ‘public act’ in the ADA (NSW) is non-exhaustive. Turning to the federal legislation, it is also clear from the face of the RDA that the definition of ‘public place’ in s18C(3) is similarly

25 *ADA (NSW)* s53(2).
26 *ADA (NSW)* s53(3).
28 *RDA* s18E(1).
29 *RDA* s18E(2).
30 *RDA* s3(1). Note that ‘agent’ is not defined in s3(1).
31 *ADA (NSW)* s52: ‘It is unlawful for a person to cause, instruct, induce, aid or permit another person to do an act that is unlawful by reason of a provision of this Act.’
non-exhaustive. But is s18C(2) (with (3)) definitive of the meaning of ‘otherwise than in private’ in s18C(1)? Several decisions indicate, either explicitly or implicitly, that s18C(2) (with (3)) is not an exhaustive statement of what constitutes conduct done ‘otherwise than in private’ for the purpose of s18C(1).33 Not only is it not an exhaustive statement, but it appears that the circumstances referred to in each of subsections (a), (b) and (c) of s18C(2) may not necessarily satisfy the test of ‘otherwise than in private’ in s18C(1).34

In Korczak v Commonwealth the HREOC Hearing Commissioner stated that:

Section 18C(2) indicates circumstances where certain conduct may be taken to occur ‘otherwise than in private’. However, the section is not exhaustive, it simply indicates some examples of cases which may fall within the definition and it does not exclude other circumstances which a person may argue fall within the meaning of ‘otherwise than in private’.35

The Commissioner drew support for this reading of s18C(2) from two main sources. First, he expressed the view that the racial hatred provisions must be construed in the context of the rest of the RDA, and especially the s9 broad prohibition on racial discrimination in ‘public life’.36 Since the RDA must be read as a whole, ‘otherwise than in private’ in s18C(1) must be reconciled with the broad concept of ‘public life’ in s9, and this suggests that the concept of ‘otherwise than in private’ will be broader than the specified circumstances of s18C(2) (and (3)). Secondly, the Commissioner construed ‘otherwise than in private’ in light of the broad coverage of public activities and matters in art 4 of the International Convention on the Elimination of all Forms of Racial Discrimination (CERD), which the Commissioner noted provided the basis for the enactment of the federal racial hatred provisions.37

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32 ‘Public act’ is defined to ‘include’ certain behaviour only. See ADA (NSW) ss20B, 38R, 49ZS, 49ZXA.
34 See in particular McLeod, above n33.
35 See Korczak, above n33 at subheading 8.3.
36 Section 9(1) refers to any act that impairs the recognition on an equal footing of any human right or fundamental freedom “in the political, economic, social, cultural or any other field of public life.” The Commissioner also drew on Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination (hereafter CERD); Korczak, above n33 at subheading 8.3. Note that it is reported that the adjudicator in Fardig, above n33 stated that ‘if the meeting [the act] occurred in the sphere of public life, the meeting [the act] occurred “otherwise than in private”’ under s18C(1): Human Rights and Equal Opportunity Commission Annual Report 1998–1999 (1999) at 54.
38 Korczak, above n33 under subheading 8.3. Australia ratified CERD in September 1975, with a reservation to art 4(a). Article 4(a) imposes an obligation on state parties to criminalise racial hatred: Akmeemana & Jones, above n21 at 131.
**McLeod v Power** is an important case on this question of the definitiveness of s18C(2).\(^{39}\) The Federal Magistrate expressed agreement with the view in the passage from *Korczak* quoted above and said that ‘the various matters set out in sub section (2) are examples that may fall within the definition but are not in themselves definitive’ of the meaning of ‘otherwise than in private’.\(^{40}\) Although in this case the respondent’s behaviour clearly occurred in a ‘public place’ under s18C(2)(b), the Federal Magistrate held that the conduct did not take place ‘otherwise than in private’ under s18C(1). Ultimately for this adjudicator, it was ‘the circumstances and the quality of the act concerned’ that determined whether the act was done ‘otherwise than in private’ under s18C(1).\(^{41}\) The adjudicator explained that the ‘quality of the statement’ refers to whether the conversation ‘was intended to be a private conversation or heard by a more general audience or was one likely to be heard by a larger audience.’\(^{42}\) The conversation in question here was a racial comment made by the respondent to a prison officer as she walked away from the prison, having been refused entry as a visitor. The officer had followed the respondent to ensure she left the prison grounds. The Magistrate concluded that the interaction in this case was intended by the visitor to be a ‘private exchange’ between herself and the officer. In other words, ‘[her] invective was directed to the … [officer] alone.’\(^{43}\) She wasn’t in any sense ‘playing to the grandstand’, as the adjudicator described it.\(^{44}\) The adjudicator said:

> A private conversation does not become a public one merely because it takes place in a public street or in a place to which members of the public have a right to admission or access. Again, whether or not an act occurs “otherwise than in private” depends on the context of the situation and must be interpreted from the overall intention of the legislature in enacting Part IIA of the [*RDA*](#). That purpose was to prohibit and provide a civil remedy for behaviour based on racial hatred and to prevent persons being threatened because of their particular racial, colour, national or ethnic origins.\(^{45}\)

The decision records clearly the adjudicator’s view of Parliamentary intention — ‘the legislation intends to protect private conversations from the reach of the [*RDA*].’\(^{46}\) The message in this decision, and in *Korczuk*, is that s18C(2)(a), (b) and (c) do not provide a definitive test of what is done ‘otherwise than in private’ for the purposes of s18C(1). Moreover, *McLeod* suggests that there is a field of genuinely private conversation that is beyond the reach of the *RDA* racial hatred provisions, even where it occurs in a public place.\(^{47}\) The second reading speech


\(^{40}\) Id at 47.

\(^{41}\) Id at 47–48.

\(^{42}\) Id at 39.

\(^{43}\) Id at 47.

\(^{44}\) Id at 42.

\(^{45}\) Id at 47.

\(^{46}\) This view is supported by the case of *Gibbs v Wanganeen* (2001) 162 FLR 333 at 337–338 (Driver FM) (hereafter *Gibbs*). In contrast to *McLeod*, above n33 though, this view does not appear to have shaped the finding in *Gibbs*. 

\(^{47}\) Id at 47.
and explanatory memorandum for the Bill provides some support for this view. Notably, the second reading speech states that ‘[t]he law has no application to private conversations.’ The text around this statement unfortunately does not elucidate this point.\textsuperscript{48} The Explanatory Memorandum states that ‘[t]he Bill does not apply to statements made during a private conversation or within the confines of a private home.’\textsuperscript{49}

Support for the interpretation of s18C(2) as non-definitive of the s18C(1) ‘otherwise than in private’ test is provided by two further cases. In these cases, acts that initially appear to have taken place in private have been characterised by adjudicators as being done ‘otherwise than in private’ under the \textit{RDA} s18C(1) where the initial private act triggers conduct that takes place in the public realm. For example, it has been determined that giving an interview to a newspaper reporter, quotes from which were later published in two daily newspapers, was an act done ‘otherwise than in private’ by the interviewee (a parliamentarian). Even though the interview took place in the parliamentarian’s office, it was held that the interviewee ‘deliberately and intentionally engaged in conduct, the natural consequence of which was the publication of his words’ in a newspaper.\textsuperscript{50} Similarly, the act of writing a play that was subsequently performed by the Melbourne Theatre Company was an act ‘done otherwise than in private’ by the writer, because the act of writing the play, although it occurred in private, was ‘inseparable’ from the (public) act of performance.\textsuperscript{51} These cases illustrate an approach to interpreting ‘otherwise than in private’ in s18C(1) that either travels outside s18C(2) (notably (a)), or that takes a non-technical and broad approach to interpreting s18C(2).


\textsuperscript{49} Explanatory Memorandum accompanying the Racial Hatred Bill 1994 (Cth) at 1.

\textsuperscript{50} McGlade \textit{v} Lightfoot (2002) 124 FCR 106 at 116 (Carr J). Making statements (which were subsequently published in a newspaper) during an interview with a reporter in a cafe was held to have been done otherwise than in private: Feghaly \textit{v} Oldfield (Human Rights and Equal Opportunity Commission, Inquiry Commissioner Beech, 19 April 2000) (digest at (2000) EOC 93–090). See also Walsh \textit{v} Hanson (Human Rights and Equal Opportunity Commission, Nader QC, 2 March 2000). Although in Walsh \textit{v} Hanson the requirement of ‘otherwise than in private’ was not specifically discussed, it seems that the parties assumed this criteria was satisfied. A New South Wales case also suggests that an act done in a setting that may appear at first glance to be private can be caught under the legislation as having a sufficiently public character to be a ‘public act’. In Patten \textit{v} New South Wales [1997] EOTrib(NSW) 90–91 of 1995 (Judicial Member Biddulph, Members Alt & McDonald, 21 January 1997) (hereafter Patten), a police officer used a racially derogatory word to another officer as they traveled in a patrol car. The comment was determined to be a ‘public act’ under the \textit{ADA} (NSW), as a three person ABC television crew sat in the back of the patrol car, filming the officers as part of a documentary. The police officers were aware that they were being filmed at the time of the comment.

B. The General Approach of Adjudicators to Work Contexts

The case decisions dealing with racial hatred and vilification in workplaces and work contexts can be categorised into two broad groupings. The first set comprises more straightforward, and perhaps typical, workplace conflicts where one employee vilifies another employee in a common workplace such as an office environment, a workshop or factory. The second set of cases deals with less usual work environments, such as prisons and the police force, where the issue might be alleged vilification involving prison officers, prisoners, police officers, suspects or members of the public. These two types of cases are examined in turn.

(i) Employee-Employee Conduct

There are no reported decisions under the ADA (NSW) vilification provisions dealing with more straightforward workplace contexts where one employee vilifies another employee in the workplace of both of them.\(^{52}\) There are however many cases argued as direct discrimination that include behaviour that appears from the decision to involve conduct potentially amounting to vilification.\(^{53}\) This choice by complainants to pursue redress on the basis of discrimination rather than vilification, seems likely to reflect a number of matters, including the ‘public act’ requirement of the vilification provisions and the lower threshold under the direct discrimination provisions as being less favourable treatment compared to the vilification requirement of inciting hatred, serious contempt, or severe ridicule. The choice to pursue these issues as discrimination might also reflect the Anti-Discrimination Board’s interpretation that the legislation requires the complainant to establish that a person other than the complainant overheard or saw the vilifying conduct.\(^{54}\) At this point it can be noted that it may be very difficult for a complainant to establish the presence of another person in the work relations context. Co-workers may understandably be reluctant to come forward to support the complainant’s case of vicarious liability against their employer, and it may be difficult to identify other people, such as clients or members of the general public who saw or heard the conduct.

In contrast, there have been a number of cases of employee to employee vilification brought under the RDA provisions, and these provide some indication of the scope of the federal legislation regarding work issues. In some of these cases adjudicators have stated explicitly that vilification that takes place in a workplace setting will ordinarily qualify as an act done ‘otherwise than in private’ under

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\(^{52}\) Unfortunately, as the annual reports of the Anti-Discrimination Board of NSW do not reveal the area of vilification complaints, it is not possible to ascertain whether vilification complaints in employment are lodged (or settled). See Anti-Discrimination Board of NSW, Annual Report 2003–2004 at 12; Anti-Discrimination Board of NSW, Annual Report 2002–2003: Handling Complaints at 4.


\(^{54}\) New South Wales Law Reform Commission, above n20 at 536. This issue is discussed below. See n72 and accompanying text.
s18C(1). In other cases adjudicators appear to have assumed that the workplace act occurred ‘otherwise than in private’. These views of adjudicators clearly overlap with the point discussed above, that adjudicators have not construed s18C(2) and (3) as definitive of the meaning of ‘otherwise than in private’ in s18C(1). Notably, the view that work contexts are generally covered by the racial hatred provisions under the RDA accords broadly with the anticipated scenarios on which the vicarious liability provisions in Part IIA have been enacted – first that racial hatred will occur between workers in a workplace, and secondly that employers will be liable in certain circumstances.

The clearest explicit statement that conduct that takes place in workplaces is done ‘otherwise than in private’ is contained in Korczak. The workplace in question in this case comprised an open plan office space, with people at workstations with chest height partitions. The complainant alleged that he had been harassed and verbally abused by his co-workers. The conduct here was determined to be acts done ‘otherwise than in private’. The broad approach of the adjudicator to the meaning of ‘otherwise than in private’ in s18C(1) has been discussed above. In effect, the adjudicator drew on the breadth of ‘public life’ in s9 of the RDA and the scope of article 4 of the CERD to conclude that ‘the context of the RDA utilises a broad concept of what constitutes a field of “public life”. Public life includes employment situations. In these circumstances, comments made in the workplace fall within the sphere of “public life” and so constitute conduct done ‘otherwise than in private’ under s18C(1). The adjudicator in Jacobs v Fardig took a similar approach in indicating that the context of employment constituted ‘public life’ under s9 and this was sufficient to bring behaviour in the workplace context within the scope of ‘otherwise than in private’.

55 Korczak, above n33; Fardig, above n33.
57 Korczak, above n33.
58 The complaint was however dismissed as HREOC was not satisfied that the conduct that was alleged to be vilifying was ‘done because of the race’ or national origin of the complainant, as required under s18C(1)(b) of the RDA. In other words, the complainant did not establish the necessary causal link between the acts of vilification, and his race or national origin.
59 Korczak, above n33 at subheading 8.3.
60 See also Fardig, above n33. This case involved a statement made by one shire councillor during a council Strategy and Planning Workshop attended by councillors and members of the Council’s senior management. In a preliminary finding, the HREOC Inquiry Commissioner held that even though the workshop had features that suggested it was not a public gathering — it was held at 5.30pm in the Council chambers and there were no members of the public present — making this comment was found to be an act which occurred ‘otherwise than in private’ under the RDA. This view of the Commissioner was largely formed by reading the application of s18C(1) as congruent with the application of the s9 discrimination provision. In examining the concept of ‘public life’ in s9, the Commissioner ‘stated that public life included employment situations as well as participation in government on any level’: Human Rights and Equal Opportunity Commission, above n36 at 54.
An example of a decision in which the adjudicator assumed that the workplace conduct in question took place ‘otherwise than in private’ under s18C(1) is provided in *Hearne v Kelvin Dennis and South Pacific Tyres Pty Ltd.*  

In this case, the complainant tyre fitter alleged that he had been subjected to a series of racial comments directed at him by the Assistant Manager of the workshop. In the HREOC decision it appears that it was assumed that had this conduct taken place, it would have satisfied the test of ‘otherwise than in private’ for the purposes of s18C(1). In another case a trainee insurance clerk alleged that she had been vilified by a co-worker. From the decision it appears that the Federal Magistrate assumed that had the conduct occurred, such behaviour would constitute acts done ‘otherwise than in private’ under s18C(1). In *Rugema* the HREOC Commissioner determined that Rugema had been subjected to racial abuse by his supervisor (another employee of the company), and that the respondent was vicariously liable for these actions of the supervisor. Rugema worked in the respondent’s factory. Initially he was a machine operator. It appears that the Commissioner assumed that the actions in this workplace occurred ‘otherwise than in private’. Unfortunately the reasoning leading to this conclusion does not appear in the decision. It is an interesting case because it seems likely that the conduct in the workplace here would not satisfy the criteria in s18C(2). A factory would be unlikely to be a ‘public place’, as members of the public are generally discouraged or forbidden to enter premises such as factories due to health and safety concerns such as noise and dangerous machinery. Given the noise levels that often exist in factories, it also seems unlikely that the racial abuse was heard, or could be heard, by members of the public outside the factory, under either s18C(2)(a) or (c).

In *Horman v Distribution Group Ltd* the adjudicator provided a broad conclusion as to how the work context of the case satisfied the ‘otherwise than in private’ test of s18C(1). Horman was an employee of the respondent in its automotive spare parts business. Horman’s work involved processing telephone orders for spare parts from clients. It appears from the decision that the business comprised a warehouse with a showroom (or retail outlet) attached. In her complaint Horman alleged several wrongs including sexual harassment and discrimination on a range of grounds. In addition, she alleged incidents of racial hatred directed at her by other employees of her employer. In relation to the complaint of racial hatred, the Federal Magistrate concluded that ‘the respondent used offensive and derogatory terms directed to the applicant and others in the

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61 *Hearne*, above n56.
62 Ibid. The complaint was dismissed, on the ground that the complainant failed to establish as an evidential matter that the alleged acts of racial hatred took place.
63 *Charan*, above n56. In this case the adjudicator was not satisfied that the acts that allegedly amounted to racial hatred took place.
64 *Reguma*, above n10. Rugema also successfully claimed racial discrimination in employment under s15 of the *RDA*.  
65 *Horman v Distribution Group Ltd* [2001] FMCA 52 (Raphael FM, 27 July 2001) (hereafter *Horman*). See also [2002] FCA 219 (Emmett J, 22 February 2002) where an application to appeal was refused. The decision records that the complainant worked as a ‘spare parts interpreter’.
presence of the applicant in a public place or in the sight or hearing of people in a public place in breach of section 18C*. Unfortunately the decision does not provide any further explanation of this finding. Presumably the retail outlet would be a ‘public place’ under s18C(2)(b) and (c). Possibly though the entire premises constituted a ‘public place’, as it appears from the evidence recorded in the decision that clients came into the area where Horman’s desk was located. This analysis assumes that clients constitute ‘the public’, an issue discussed further below.

(ii) Unusual Work Settings

In cases involving more unusual work settings and circumstances — such as prisons and the police force — adjudicators under both the RDA and the ADA (NSW) have not adopted the approach that conduct that takes place in the context of paid work will generally be caught under the legislation as being sufficiently public. Indeed, in one case under the RDA the adjudicator explicitly disavowed any view that the fact that an act took place in a work setting (in that case a prison) meant that it took place ‘otherwise than in private’ under s18C(1). The example that the adjudicator gave was the work setting of a personal care attendant carrying out his or her duties in the client’s home. According to the adjudicator, ordinarily conduct in such a setting would not be covered by s18C(1) of the federal Act.

The adjudicators in less usual work cases generally engage in a closer analysis of the applicability of s18C(2)(a), (b) and (c), and (3) of the RDA, and s20B(a), (b) and (c) etc in the ADA (NSW). This frequently comes down to an investigation of the presence, or absence, of ‘the public’ in the vicinity of the incident. An example of this closer investigation of the legislation is provided in the case of Gibbs, which concerned an allegedly vilifying statement made by a prisoner to a prison officer. The case was brought under the RDA racial hatred provisions. The incident took place in F Division, which was a part of the prison to which members of the public did not have access. Another prison officer, but no members of the public, heard the conversation. Implicitly this was seen as insufficient to come within s18C(2)(a). Driver FM concluded that the prison gatehouse was a ‘public place’ under s18C(2)(b) (because the public had a direct right of access to it), as was the visits centre (because the public was invited there, if they passed a security clearance). However, F Division was not such a ‘public place’ ‘because there is no express or implied invitation for the public to enter it unescorted’. As discussed above, the adjudicator took the view that to come within s18C(2)(c), it would need

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66 Horman, id at 60.
67 Gibbs, above n47 at 337 (Driver FM).
69 Gibbs, above n47.
70 Id at 337.
to be shown that there was a third party in a public place who was within ‘earshot’ of the statement.\textsuperscript{71} Here, any third parties in the visits centre and the gatehouse were not within earshot of the conduct that took place in F Division (as these are in separate buildings). In addition, the incident took place at a time when any visitors to the prison were likely to have already left the prison. On this basis the statement made by the prisoner did not occur ‘otherwise than in private’ under s18C(1).

\textbf{C. The Presence of Third Parties}

In its report on the \textit{ADA} (NSW), the New South Wales Law Reform Commission drew attention to an important difference between the New South Wales provisions and the \textit{RDA}. This difference is potentially of considerable importance to the workplace and work relations context. Although noting that it is unclear whether the words ‘observable by the public’ in the definition of ‘public act’ require that the conduct was actually observable by members of the public who were present, or only that the conduct was capable of being observed by members of the public had they been present, the report nonetheless concludes that the \textit{ADA} (NSW) does not cover situations where only the target and vilifier are present.\textsuperscript{72} The Anti-Discrimination Board (NSW)\textsuperscript{73} is reported to take the view that at least one member of the public must be present for the conduct to be ‘observable by the public’.\textsuperscript{74} This view is in keeping with the concept of vilification as being about inciting third parties to hate the target’s group. As incitement requires the presence of an audience, at least one person, of a different racial group to the complainant, must have seen or heard the vilifying act.\textsuperscript{75}

In contrast, the Law Reform Commission report notes that the \textit{RDA} does not require that someone other than the vilifier and target be present.\textsuperscript{76} This renders

\begin{itemize}
\item \textsuperscript{71} Ibid.
\item \textsuperscript{72} New South Wales Law Reform Commission, above n20 at 536. This conclusion appears to be borne out in the cases, where third parties were present. See, \textit{Patten}, above n50; \textit{Russell}, above n68; \textit{Anderson v Thompson} [2001] NSWADT 11 (Judicial Member Ireland, Members Clayton & Lau, 5 February 2001) (hereafter \textit{Anderson}). Note that in \textit{R v Marinkovic} (1996) EOC 92–841, it appears that the adjudicator assumed, quite reasonably, that the incidents were overheard or seen by third parties. See also Sharyn Ch’ang, ‘Legislating Against Racism: Racial Vilification Laws in New South Wales’ in Sandra Coliver (ed), Kevin Boyle & Frances D’Souza (contributing eds), \textit{Striking a Balance: Hate Speech, Freedom of Expression and Non-discrimination} (1992) 87 at 93–95.
\item \textsuperscript{73} The Anti-Discrimination Board is the State body with the task of receiving complaints under the \textit{ADA} (NSW) and attempting to resolve them by a process of conciliation.
\item \textsuperscript{74} New South Wales Law Reform Commission, above n20 at 536. In its submission to the Commission’s inquiry the Board identified this aspect of the provisions as problematic and suggested an alternative approach of focussing on the offence caused to the victim as well as the potential for incitement.
\item \textsuperscript{75} The concept of vilification as incitement is clearly articulated in the substantive prohibition on inciting hatred in \textit{ADA} (NSW) s20C(1) (racial vilification); s38S(1) (transgender vilification); s49ZT(1) (homosexuality vilification); s49ZXB(1) (HIV/AIDS vilification). On whether incitement must be actual or potential, see Simon Rice, ‘Racial Vilification: The Missing Words’ (1995) 20 Alt LJ 304.
\item \textsuperscript{76} New South Wales Law Reform Commission, above n20 at 539.
\end{itemize}
the scope of the RDA legislative provisions significantly broader than the ADA (NSW) vilification provisions on this issue. The concept of vilification underlying the racial hatred provisions in the RDA is less about inciting third parties to hatred, and more about causing insult or offence to a reasonable member of the vilified group.  

Even so, the RDA does contain a public/private line by requiring that the conduct take place ‘otherwise than in private’. Although the first part of the statutory articulation of the public/private line relates to matters ‘communicated to the public’ (s18C(2)(a)), clearly the test of whether the conduct was ‘done in a public place’ (s18C(2)(b)) does not require that a third person actually hear or see the act, or even be within sight or hearing of the act. Indeed the presence (or absence) of a third party is irrelevant as the concept of ‘public place’ is defined by reference to whether the public have access to it, not whether they are present in it. 

Case decisions indicate that the third articulation of the test, whether the act was ‘done in the sight or hearing of people who are in a public place’ (s18C(2)(c)) requires not that a third person who was in a public place actually see or hear the conduct, only that their physical proximity was such that a third party could see it or hear it, had they been paying attention to what was going on around them. In the case of Gibbs the adjudicator referred to the need only for a third party to be within ‘earshot’ to satisfy s18C(2)(c). In McMahon v Bowman, the Federal Magistrate determined that the test in s18C(2)(c) would be satisfied where, as here, the allegedly vilifying words were ‘spoken in such a way that they were capable of being heard by some person in the street [a “public place”] if that person was attending to what was taking place.’ In this case, although there were three people on the street at the time of the incident, there was no evidence that any of them actually heard what was said.

This discussion of whether the legislation requires the presence of a third party must be supplemented by recalling the decision in McLeod, discussed above.

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78 Given that the RDA does not require an element of incitement in its prohibited conduct, there is no logical reason to require that the conduct take place in public. Private conduct that causes offence or insult to the (reasonable) member of the vilified group should logically be caught under the RDAs prohibition on racial hatred. This tension has been noted by several commentators; see Akmeemana and Jones, above n21 169; McNamara, above n8 at 51.

79 This seems the preferable interpretation. Had federal Parliament intended to require that a third party in a public place actually see or hear the conduct, it would be expected that the legislation would have been more clearly worded, such as ‘(c) is seen or heard by people who are in a public place’.

80 Gibbs, above n47 at 337.

81 McMahon v Bowman [2000] FMCA 3 (Raphael FM, 13 October 2000) at 26. In coming to this view, the Federal Magistrate drew on a line of English and New Zealand authorities regarding offensive behaviour to the effect that a requirement that something is done within sight of a person does not require that the person did see it, only that they could see it; R v James Webb (1848) 2 C&K 933; Purves v Inglis (1915) 34 NZLR 1051. The reasoning in McMahon v Bowman was discussed in Chambers v Darley [2002] FMCA 3 (Baumann FM, 20 December 2001). In this case the adjudicator confirmed that a backyard is not a ‘public place’.

82 McLeod, above n33.
This case is of importance as the tenor of the reasoning revealed in the determination suggests that the RDA provisions require that the respondent’s behaviour contain the element of incitement. Notably though such a view is not supported by other decisions under the federal provisions.

D. Meaning of ‘the public’

A key concept in both the ADA (NSW) test of ‘public act’ and the RDA concepts in s18C(2) and (3), is ‘the public’.83 The New South Wales Law Reform Commission has discussed the problematic character of this test of ‘the public’, as it appears in the ADA (NSW).84 In the opinion of the Commission, this wording fails to provide a clear dividing line between the ‘public acts’ that are covered by the legislation, and unremediable private acts. The example the Commission gives of a situation which is neither clearly public nor private is ‘where vilifying statements are made at a private function in the presence of a large number of people’.85 Unfortunately the Commission does not articulate what it means by a ‘private function’, that is, the characteristics of the function that make it ‘private’. Presumably, a ‘private function’ would be one at which attendance was by invitation only, whether or not it takes place in a private space such as a home, or a more public space such as a conference centre or function rooms at a reception centre.

The meaning of the statutory concepts of ‘the public’ in the ADA (NSW) and RDA may be an important issue in complaints relating to work contexts. This question appears of particular relevance in unusual work circumstances under the ADA (NSW) and the RDA, as in these situations adjudicators have not adopted a general approach that workplaces and work contexts are usually covered by the legislation. Clearly members of the general public (the world at large), who happen upon the incident as passers by will constitute ‘the public’.86 But what of a more

83 The RDA also explicitly relies on a concept of ‘private’ in the test of ‘otherwise than in private’. The meaning of the concept of privacy in Australia is notoriously difficult to pin down. See generally Foord, above n12.
84 New South Wales Law Reform Commission, above n20 at 535–543.
85 Id at 536.
86 Two cases brought under the racial vilification provisions in the ADA (NSW) involved conduct and comments by police officers during the course of questioning and arresting potential suspects on Sydney streets. This behaviour was overheard and seen by people passing by, and in both cases it was found that the officers’ conduct constituted ‘public act[s]’ within the meaning of the legislation. Patten, above n50; Russell, above n68. The latter case was appealed, but the ‘public act’ conclusion was not affected: Estate of Russell [2001], above n68; Estate of Russell (2002), above n68. Another case brought under the ADA (NSW) provisions involved a local councillor in relation to comments he made at two council events. On the first occasion the councillor spoke out loudly during a public event held at the council chambers, at which many members of the local community were present. The second incident occurred during a council meeting when there were approximately 30 people watching the proceedings from the public gallery. It was found that both sets of comments constituted ‘public acts’ by the councillor: Wagga Wagga Aboriginal Action Group v Eldridge (1995) EOC 92–701. In these three cases the presence of members of the general community who witnessed the conduct rendered each incident of allegedly vilifying behaviour a ‘public act’, as a ‘communication to the public’ under s20B(a) of the ADA (NSW).
limited audience? Are other workers of the same employer ‘the public’ within the meaning of these legislative provisions? In several cases (under the *RDA*) adjudicators appear to have assumed that they are. Can visitors to the employer’s premises, such as courier drivers and delivery dispatchers, constitute ‘the public’? Are clients ‘the public’? The case decisions under the *ADA* (NSW) and *RDA* provide some guidance, but not definitive answers to these questions.

The case of *Gibbs* is useful in understanding who may count as ‘the public’. In this decision, about the alleged vilification of a prison guard by a prisoner, the adjudicator assumed that members of the general public who were visitors to the prison were ‘the public’. The adjudicator expressed a clear view that other correctional services staff and prisoners were not ‘the public’ for the purposes of the test of communication to the public in *RDA* s18C(2)(a). This case is potentially very important in the workplace context as suggesting that Co-workers and perhaps clients will not constitute ‘the public’.

In non-work cases, relatively select or defined groups of people have been found to constitute ‘the public’. In three New South Wales cases that dealt with conflicts between neighbours in blocks of flats, ‘the public’ under the *ADA* (NSW) was constituted in a narrower manner — as residents and their guests in each block of flats.

In addition, in a New South Wales case it appears to have been assumed that the publication of a newspaper article in a language other than English was still a ‘public act’ under the *ADA* (NSW), even though the article had a relatively closed readership — people who read Greek. Another relatively closed group of people

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87 Korczak, above n33 (digest at (2000) EOC 93–056); Fardig, above n33; Rugema, above n10; Hearne, above n56; Charan, above n56.
88 Gibbs, above n47.
89 Id at 337.
90 *Beling v Stapels* provides some interesting preliminary analysis of this issue under the *RDA*. It was alleged in this complaint that the respondent vilified the complainant, whilst both were in the complainant’s home, and that this was overheard by a tradesperson who happened to be working in the complainant’s home at that time. In hearing an application for an extension of time the Federal Magistrate formed the view that these circumstances may fall within s18C(2)(a) as being a communication to the public. He noted that the *RDA* does not define how many people are needed in order to constitute ‘the public’ for these purposes. In his view, this situation presented an arguable case, and one that ought to be explored at a hearing of the complaint. Unfortunately this case did not proceed to a hearing. *Beling v Stapels* [2001] FMCA 135 (Melnis FM, 10 December 2001).
91 Anderson, above n72; *R v Marinkovic*, above n72; *Burns v Dye* [2002] NSWADT 32 (Judicial Member Briton, Members Silva & Toltz, 12 March 2003).
satisfied the requirement of ‘the public’ in Miller v Wertheim, a decision under the RDA racial hatred provisions.93 This case involved a speech that was made during the Annual General Meeting of the New South Wales Jewish Board of Deputies.94 The speech was given by the retiring president of the Board, and the complainant took the view that it vilified the Orthodox Jewish community, of which she was a member. The Full Federal Court assumed that the giving of this speech was an act done ‘otherwise than in private’ under s18C(1) by the outgoing president.95 Presumably the only attendees at the Annual General Meeting were members of the NSW Jewish Board of Deputies. This decision of the Full Federal Court lends support to an argument that clients, visitors to the workplace, and even co-workers can constitute “the public” for the purposes of both the RDA and the ADA (NSW) anti-vilification provisions.

The model of ‘the public’ is of course not unique to the ADA (NSW) and RDA statutory schemes. It is a concept that is found in other areas of Australian law, notably corporations law96 and copyright law.97 One particular case worth discussing here involves copyright law. The applicant claimed that the respondent had breached its copyright in a musical work by performing the work ‘in public’, without its consent.98 The respondent bank had played a video to 11 of its

94 A primary function of the Board is to act as a representative body of the Jewish community in New South Wales.
95 Although the speech was later reported in a newspaper — the Australian Jewish News — this was not seen as relevant to the question of whether the retiring president had contravened the racial hatred provisions. In the result the case failed. The Full Court took the view that the causal nexus between the allegedly vilifying behaviour, and race or ethnic origin, was not established. In short, it could not be established that the objectionable parts of the speech were acts done ‘because of the race or ethnic origin’ of the members of the Orthodox community criticized by the outgoing president: Miller v Wertheim [2002], above n93 at [13].
96 The main way in which the concept appears in the corporations law is the question of whether an issue of securities was a prohibited offer or invitation to the public, or any section of the public, whether selected as clients or not. See, for example, Corporations Act 2001 (Cth) s82. It is clear that relatively defined groups of offerees can constitute the public or a section of the public under this legal rule. Specifically, the offerees do not necessarily need to be strangers, either to the offeror, or to each other, to constitute the public or a section of it. Where there is some antecedent relationship between the offeror and the group of offerees, or some connection between the offerees as a group and the offer made to them, the issue of whether the group of offerees satisfies the test of a section of the public will be determined by consideration of a number of indicia, including the number of offerees (although there is no set minimum number), the type of relationship that exists between the offeror and the group of offerees and the type of characteristic that connects the offerees themselves. See Corporate Affairs Commission (SA) v Australian Central Credit Union (1985) 157 CLR 201 at 208–9 (Mason ACJ, Wilson, Deane & Dawson JJ) (on the Companies Code (South Australia) s169, s5(4)).
97 Copyright law gives the copyright owner the exclusive right to perform the work ‘in public’. See Copyright Act 1968 (Cth) s31(1)(a)(iii).
employees as part of a training session. The applicant’s music had been incorporated as part of the soundtrack for the video. Although the video was played at one of the bank’s branches, the television monitor was not visible or audible to anyone other than these 11 employees. The applicant copyright owner was successful in the Federal Court in seeking declaratory relief against the bank. After an extensive analysis of law and policy in several jurisdictions, Gummow J concluded that a ‘performance will be “in public” if it is not “in private”: 99 To distinguish between these two antithetical states, it is important to investigate the nature of the audience for the performance. Was the audience ‘bound together by a domestic or private tie or by an aspect of their public life? Their “public life” would include their presence at their place of employment for the supply of a performance to assist the commercial purposes of their employer.’100 This case indicates that a communication to a relatively small group of employees can be a communication ‘in public’, at least under copyright law. Obviously the reasoning in this case is not directly applicable to an examination of the meaning of a communication to ‘the public’ in the ADA (NSW) and RDA anti-vilification provisions. How the word ‘public’ is used in different statutory schemes is clearly crucial. As Gummow J noted, the claim before him was specifically whether the musical work had been performed ‘in public’, not whether it had been performed before ‘members of the public’, or ‘the general public’.101 Nonetheless, and bearing these limitations in mind, the reasoning in the case does provide some support for an argument that a communication to employees and co-workers may be a communication to ‘the public’ under anti-vilification law.

E. Conclusions (New South Wales and the Commonwealth)

It is clear that the case decisions in the New South Wales and Commonwealth jurisdictions have, to date, only partially mapped out each statute’s public/private line. Much remains to be explored regarding how these provisions apply in the workplace and work relations context. The cases tell us that the various legislative formulae in the ADA (NSW) and the RDA are not definitive of the conduct covered by the civil prohibitions. Adjudicators retain much discretion in determining the meaning of ‘public act’ and ‘otherwise than in private’. An example of this discretion is provided in McLeod where the adjudicator suggested that truly private conversations, even where they occur in a public place, may not be caught by the RDA’s proscription.102 We know in addition that in employee-employee vilification claims under the RDA, a general principle has developed in the decisions to the effect that work behaviour will generally be covered by the Act. In other types of work contexts, under both the RDA and the ADA (NSW), an approach of paying close attention to the wording of the relevant legislation has emerged.

99 Id at 74.
100 Ibid.
101 Ibid.
102 McLeod, above n33.
Under the ADA (NSW) there may be a need for the complainant to show that a third party (a person potentially incited) was present, whereas under the RDA there is clearly no such need. This New South Wales requirement may impose a difficult evidential burden for complainants alleging vilification in a work context. An issue of considerable uncertainty is the meaning of ‘the public’, and specifically who might constitute ‘the public’ in a workplace context. The questions raised above regarding the potential of co-workers, contractors and clients to constitute the public remain open. They are of particular importance in the New South Wales jurisdiction where there has been no parallel development in case decisions of the general view emerging under the RDA that work relations (at least in an employee-employee sense) are usually covered by the statutory civil prohibitions.

3. The Victorian Jurisdiction

This article turns to examine the new Victorian jurisdiction regarding racial vilification and religious vilification. The legislative provisions setting out the prohibited behaviour, and potential employer liability, are examined first. Next, the article turns to analyse parliamentary material in an attempt to better understand the Victorian provisions. This material leaves a large number of questions unanswered. Some implications for the workplace and work relations context are explored in the final section under this subheading.

To date, there have been only two decisions handed down under the R&RT Act. Although neither of them discusses the public/private line drawn in the Victorian Act, the first decision is worth briefly noting as it provides a sense of how the legislation might be interpreted by adjudicators. In this case the adjudicator made substantial use of the objects and purpose clauses, preamble, second reading speech and explanatory memorandum for the R&RT Act. The content and scope of this material is discussed below. Also of interest was the caution sounded by the tribunal that Victorian adjudicators should not be too ready to use cases from other Australian anti-vilification jurisdictions. The tribunal reminds us that ‘[t]he legislation in these other jurisdictions is significantly and, sometimes, entirely different from the R&RT Act.’

103 The two cases are: Judeh v Jewish National Fund of Australia Inc [2003] VCAT 1254 (Deputy President McKenzie, 13 March 2003) (hereafter Judeh) (concerning an advertisement placed in The Australian Jewish News newspaper) and Islamic Council of Victoria Inc v Catch the Fire Ministries Inc [2003] VCAT 1753 (Vice President Higgins, 21 October 2003) and the subsequent decision in Islamic Council of Victoria v Catch the Fire Ministries Inc (Final) [2004] VCAT 2510 (Vice President Higgins, 22 December 2004) (concerning statements made during a seminar, in a newsletter and in an article published on the Internet). An earlier complaint, alleging that a website (which was not password protected) vilified Muslims, was settled. See Adam Morton, ‘Oldfield Website Vilifies Muslims’ The Weekend Australian 17 August 2003. The website was hosted by an ISP located in New South Wales, thereby raising the extra-territorial character of the R&RT Act provisions. See Mark Tamhane, ‘David Oldfield Sued Over Terrorism Website’ (16 August, 2003) ABC Online: <www.abc.net.au/am/content/2003/s925911.htm> (13 May 2004).

104 Judeh, above n103. This case was a successful application to dismiss the complaint under s75 of the Victorian Civil and Administrative Tribunal Act 1998 (Cth) as being frivolous, vexatious, misconceived, lacking in substance or an abuse of process.

105 Judeh, above n103 at 36.
A. The Legislative Framework Regarding Prohibited Conduct

Legislation to deal with racial vilification had been on and off the political agenda in Victoria for more than 10 years before the current R&RT Act was enacted.\footnote{R&RT Act commenced on 1 January 2002. For an overview of the R&RT Act, see Anna Chapman, ‘New Vilification Laws and Victorian and Queensland Work Relationships’ (2002) 15 AJLL 277.} The Act was preceded by considerable public consultation, and its passage through parliament was marked by heated discussion and media coverage. The contentious character of this enactment appears to be reflected in many aspects of the Act, including its title, lengthy preamble of four paragraphs, objects clause and clause setting out the Act’s purposes.\footnote{R&RT Act s1 (Purposes of the Act), s4 (Objects of the Act).}

The preamble positions racial and religious vilification as antipathetic to the values of a democratic society. These values include not only ‘freedom of expression’, but ‘[t]he right of all citizens to participate equally in society’.\footnote{R&RT Act, Preamble, paragraph 1.} Vilification is undemocratic, according to the preamble, because it undermines people’s ability to ‘contribute to, or fully participate in, all social, political, economic and cultural aspects of society as equals’.\footnote{R&RT Act, Preamble, paragraph 3.} The first matter listed in the Act’s objects clause is ‘to promote the full and equal participation of every person’ in Victoria.\footnote{R&RT Act s4(1)(a).} This emphasis on the value of full and equal participation in society will be an important principle for use in interpreting the legislative provisions.\footnote{Section 35(a) of the Interpretation of Legislation Act 1984 (Vic) requires that adjudicators prefer an interpretation of Victorian legislation that promotes the purpose or object underlying the Act. The purposes and objects of the R&RT Act were discussed in Judeh, above n103 at 28–33.}

An interpretation of the legislation that furthers the objects of the Act — the full and equal participation in market work of all people, regardless of their race or religion — should be preferred over an interpretation that does not.

The central civil provision in the Victorian R&RT Act that delineates the prohibited conduct provides that:

A person must not, on the ground of the race [or religious belief or activity] of another person or class of persons, engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.\footnote{R&RT Act s7(1) (racial vilification). In relation to religious vilification, see s8. Note that ‘race’ and ‘religious belief or activity’ are defined in s3 of the R&RT Act. Race is defined to include all races, ethnicities, descents and national origins. Religious belief or activity means holding (or not holding) a lawful religious belief, or engaging (or not engaging) in lawful religious activity.}

The R&RT Act contains a note to the effect that ‘engage in conduct’ includes the use of the Internet or email to publish or transmit messages.\footnote{R&RT Act ss7, 8.} The Act provides explicitly that the respondent’s motive or intention is irrelevant to the question of
whether the conduct contravened the Act. 114 In addition, a single act may constitute a contravention of the statute, and the act may occur inside or outside Victoria. 115

Like other Australian anti-vilification statutes, the R&RT Act articulates a public/private understanding of its scope of legal regulation. It does this primarily by way of an exemption in s12 that a respondent may establish to exonerate it from liability. Section 12 of the RRTA is headed ‘[e]xceptions — private conduct’ and provides that:

(1) A person does not contravene section 7 or 8 if the person establishes that the person engaged in the conduct in circumstances that may reasonably be taken to indicate that the parties to the conduct desire it to be heard or seen only by themselves.

(2) Sub-section (1) does not apply in relation to conduct in any circumstances in which the parties to the conduct ought reasonably to expect that it may be heard or seen by someone else.

As discussed in the introduction, this drafting of the public/private divide is quite unlike the wording used in other Australian anti-vilification statutes, and specifically the ADA (NSW) and the RDA. In contrast to these two jurisdictions, the line between the public and the private in the R&RT Act is not about the idea of ‘the public’, or a ‘public place’, as such. Rather, s12 is about whether the circumstances (or factual matrix) indicate that the parties to the conduct intended that it be heard or seen only by themselves, and whether they ought to have realised that it might be overheard or seen by someone else. 116

It is useful at this stage to note two points about the wording of s12. First, the concept of reasonableness defines both strands of the test in s12. The second reading speech and the Explanatory Memorandum confirm that this imports an objective test. 117 Secondly, the s12 provision is worded as an exemption, which means that the onus will be on the respondent to establish its application. Accordingly, conduct that contravenes s7 or s8 of the Act will be within the scope of the Act’s civil prohibition, unless the respondent is able to establish that the s12 exemption applies. Under other Australian anti-vilification legislation the onus is generally on the complainant to establish that the conduct took place in the public realm of the Act’s application.

114 R&RT Act s9(1).
115 R&RT Act s7(2). The extraterritorial character of this provision was apparent in the application brought against Mr David Oldfield, MLC, discussed above n103.
116 Some ambiguity attaches to the phrase ‘parties to the conduct’ in s12(1). Does this concept mean the perpetrator or perpetrators of the conduct, or does it include the person or persons being vilified? It would seem that the first interpretation makes more sense. Not only are there problems in conflating the desire of the perpetrator with the desire of the victim in this respect, but it may be that during an act of vilification the victim is in no mental state to form a desire about wanting to be seen or overheard by others. Presumably they just want the incident to stop.
In a similar manner to the *ADA* (NSW) and *RDA* vilification provisions, the *R&RT Act* contains a provision that operates by way of exemption where the respondent is able to establish that the conduct was engaged in ‘reasonably and in good faith’:

(a) in the performance, exhibition or distribution of an artistic work; or
(b) in the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for-
   (i) any genuine academic, artistic, religious or scientific purpose; or
   (ii) any purpose that is in the public interest; or
(c) In making or publishing a fair and accurate report of any event or matter of public interest.\(^{118}\)

Like the *ADA* (NSW), the *R&RT Act* prescribes criminal offences of serious racial vilification and serious religious vilification.\(^{119}\) These offences relate broadly to the intentional incitement of physical harm to a person or their property.\(^{120}\) Notably, the s11 exception for private conduct is not applicable in relation to these offences.\(^{121}\) This means in effect that these criminal provisions apply in relation to all interactions across the whole of Victoria, including all workplaces and work relations situations.

### B. The Legislative Framework Regarding Employer Civil Liability

Employers face potential liability in relation to the civil proscriptions in several different ways.\(^{122}\) This liability mirrors an employer’s liability for acts of unlawful discrimination, and sexual harassment under the *Equal Opportunity Act 1995* (Vic).

Employers and principals are potentially vicariously liable for the civil wrongs of racial vilification and religious vilification committed by their workers in the course of their engagement. Section 17 of the *R&RT Act* provides that if a worker in the course of their employment or while acting as an agent contravenes the civil provisions in the *R&RT Act*, both the worker and the employer are liable, and a complaint may be lodged against either or both of them. Section 18 provides that an employer is not vicariously liable if the employer can establish, on the balance of probabilities, that it took reasonable precautions to prevent the worker contravening the vilification provisions. The words ‘employee’ and ‘employer’ under the *R&RT Act* are defined to have the same meaning as under the *Equal Opportunity Act 1995* (Vic).\(^{123}\) The *Equal Opportunity Act 1995* (Vic) defines

\(^{118}\) *R&RT Act* s11 (‘Exceptions – public conduct’).

\(^{119}\) *R&RT Act* s24 (serious racial vilification), s25 (serious religious vilification).

\(^{120}\) See further, Chapman, above n106 at 284–285.

\(^{121}\) Nor is the s11 exception applicable.

\(^{122}\) Employers and principals are potentially liable under the criminal offences of serious racial vilification and serious religious vilification as person who themselves committed the criminal offence. Company directors, executive officers, managers and others may additionally be liable as ‘officers’ of a body corporate that is guilty of an offence: *R&RT Act* s27. Vicarious liability does not arise in relation to these criminal offences, although employers and principals may be liable by reason of their complicity in a contravention of the criminal law by an employee or other person.

\(^{123}\) *R&RT Act* s3.
‘employee’ to include employees under a contract of service (a contract of employment), a person engaged under the Public Sector Management and Employment Act 1998 (Vic), an independent contractor (engaged under a contract for services), but not an unpaid worker or volunteer. The definition of ‘employer’ is defined in an equivalent manner.

In addition to vicarious liability, a business may face accessory liability where the employing entity has requested, instructed, induced, encouraged or assisted another person to contravene the Act. The R&RT Act provides joint and several liability on this basis. Notably, the exemption of reasonable precautions in s18 applies in relation to accessory liability. Finally, an employer may itself, himself or herself, be directly liable as the person who engaged in the racial vilification or religious vilification.

C. Parliamentary Material

The wording of s12 of the R&RT Act can be traced to a discussion paper and model bill released by the Victorian Office of Multicultural Affairs in December 2000. The discussion paper canvassed three different possible approaches to drawing a public/private line in the Bill’s civil operation. The first was to identify the scope of the Act’s application by reference to ‘public places’. This concept was not however explained further, beyond the provision of a few examples including ‘assaulting a person in the street because of the victim’s race, applying abusive graffiti on property or making intimidating phone calls’. These last two examples, and especially the last scenario, are odd as they do not have an obvious public character about them. The second approach canvassed in the discussion paper was to not draw a distinction between public and private, by in effect covering all situations. The third option, identified as ‘vilification where there is possible observation by a third party’, discussed delineating the Act’s application by reference to situations where ‘the parties ought reasonably to have expected that the communication would be seen or heard by someone else.’ Notably, this last approach is most closely aligned to the enacted s12(2). The discussion paper contains the following explanation:

This option is not intended to capture private conversation or acts of vilification performed in private, if it is unlikely the conversation or act would be heard or observed by a third party. As a result, vilification occurring on private property

125 Ibid.
126 R&RT Act ss15, 16.
128 Id at 13.
129 Ibid. Examples of offensive comments on the radio and distributing hate propaganda were also given.
130 Ibid.
could be unlawful, if it could reasonably be expected the act would be heard or observed by a third party.\textsuperscript{131}

The example the discussion paper gives of this option is where ‘a person places a sign containing offensive comments or symbols in the front garden of their private residence and the sign is visible from the street, a complaint may be lodged against that person by a neighbour or passer-by who witnessed the communication.’\textsuperscript{132} Apart from providing this fairly obvious example, the discussion paper provided no further analysis of the meaning of this third approach.

The model bill attached to the discussion paper provided a clause that had substantially identical wording to the enacted s12 of the R&RT Act. The only substantive alteration was to add words, before the Bill was introduced into Parliament, clarifying that the onus of proof lay on the respondent to establish the exemption of private conduct.\textsuperscript{133}

The Bill was introduced into the Legislative Assembly on 16 May 2001 and second read by the Premier a day later. In his second reading speech the Premier discussed the public/private understanding underlying the Act’s civil provisions as follows:

An exception also exists for private conversations or behaviour, which occurs in circumstances that indicate, objectively, that the parties did not intend to be seen or heard by anyone else.

For example, a private conversation in a private home will be taken not to have been intended to be heard by anyone else and will escape liability. The erection of an offensive sign in the front yard of a private home, which can clearly be viewed by any person passing by, however, is a different matter.\textsuperscript{134}

The Explanatory Memorandum accompanying the Bill explains the effect of clause 12 in very similar language as that used in the second reading speech. The Explanatory Memorandum provides that:

Clause 12 provides an exception for private conduct. Conduct or a conversation occurring in circumstances in which the parties can be taken to have intended it to be seen or heard only be themselves, and no-one else, will escape liability. The intention of the parties is determined objectively, taking into consideration of all [sic] the circumstances in which the conduct or conversation took place.\textsuperscript{135}

\textsuperscript{131} Ibid.
\textsuperscript{132} Id at 14. Note that this example was given by Premier Bracks in the second reading speech on the Bill. Premier Stephen Bracks, above n117 at 1286.
\textsuperscript{133} The four words added were ‘the person establishes that’. The clause in the Model Bill was Clause 9.
\textsuperscript{134} Premier Stephen Bracks, above n117. As noted above, this second example was cited in the earlier discussion paper. The subsequent second reading speech in the Legislative Council was in identical terms. See Monica Gould, Victoria, Legislative Council, \textit{Parliamentary Debates (Hansard)}, 7 June 2001 at 1216.
The parliamentary debate on clause 12 of the Bill was characterised by much uncertainty over the meaning of the provisions.\textsuperscript{136} In particular, an issue that received considerable attention was whether speech or conduct that takes place in a home would be caught by the Bill’s civil provisions.\textsuperscript{137} The scenario of a private residence was discussed more than any other. The applicability of clause 12 to work relations and workplaces was not discussed at all.\textsuperscript{138} Some parliamentarians were justifiably critical of the example given in the Premier’s second reading speech of a ‘private conversation in a private home’ as being outside the scope of the \textit{R&RT Act} civil proscription.\textsuperscript{139} Depending on what the Premier meant by the phrase ‘private conversation’, this example would seem to present an oversimplification. For example, if the conversation was shouted in such a way as to be clearly audible to neighbours, and people passing by on the street, this would be likely to attract s12(2), and so render the conduct outside the s12 exception. Whether the windows and doors in the house were open or closed would also presumably be relevant to an inquiry under s12(2). So too would the type of housing arrangement in question — is it dense inner city housing or a free standing house on a large block of land? Suffice to say, the Premier’s brief example in his second reading speech is an oversimplification of the complex factual and legal inquiry required under s12.

There is a further piece of information on the genesis of the s12 provision that is absent from the discussion paper and model bill, parliamentary debate and the Explanatory Memorandum. It is the similarity between s12 of the \textit{R&RT Act} and concepts articulated in the \textit{Surveillance Devices Act 1999 (Vic)}.\textsuperscript{140} That Act regulates the installation and use of listening and optical surveillance devices, and

\textsuperscript{135} Explanatory Memorandum accompanying the Racial and Religious Tolerance Bill 2001 (Vic). Note that this was the ‘circulation print’: <http://www.dms.dpc.vic.gov.au/archive/Autumn_2001/hills/>. A second explanatory memorandum appeared when the Bill went to the Legislative Council, but the explanation of clause 12 was identical to that in the original EM. This explanation of clause 12 was repeated, virtually word for word, and including the grammatical error, in the Scrutiny of Acts and Regulations Committee report on the Bill. Scrutiny of Acts and Regulations Committee, \textit{Alert Digest No 6 of 2001} (2001) Victorian Parliament: <http://www.parliament.vic.gov.au/sarc/2001alerts/01alt6.htm> (20 November 2003).


\textsuperscript{137} See, for example, Furletti, id at 1406; Nicholas Kotsiras, Victoria, Legislative Assembly, \textit{Parliamentary Debates (Hansard)}, 5 June 2001 at 1630; Powell, id at 1420–1421; Bowden, id at 1499; Kaye Darveniza, Victoria, Legislative Council, \textit{Parliamentary Debates (Hansard)}, 13 June 2001 at 1413.

\textsuperscript{138} There was more discussion of the well-established concept of an employer’s vicarious liability, than the whole discussion on clause 12.

\textsuperscript{139} See, for example, Kotsiras, above n137 at 1630.

\textsuperscript{140} And prior to that the \textit{Listening Devices Act 1969 (Vic)}. 
tracking devices. It contains a public/private line in prohibiting surveillance of ‘private conversations’ and ‘private activity’ without consent. ‘Private conversation’ is defined to mean:

a conversation carried on in circumstances that may reasonably be taken to indicate that the parties to it desire it to be heard only by themselves, but does not include a conversation made in any circumstances in which the parties to it ought reasonably to expect that it may be overheard by someone else.

‘Private activity’ is defined similarly. The Explanatory Memorandum for the 1999 Bill is informative regarding the potential scope of these surveillance provisions in the workplace context. It states:

Circumstances in which the parties to an activity ought reasonably expect that they might be observed by someone else include:

• activities in places accessible to the public;
• activities in those parts of workplaces accessible to other employees or invitees of that workplace; and
• activities of persons illegally present on premises.

Circumstances in which the parties to an activity may reasonably expect that they may not be observed by someone else include:

• activities in toilet cubicles and shower areas;
• activities in change rooms; and
• activities in those parts of workplaces where the parties to the activity may exclude others from observing the activity, such as in an office with covered windows.

Although the meaning of ‘private conversation’ and ‘private activity’ has not been explored by adjudicators, this articulation of different workplace circumstances in the Explanatory Memorandum may prove useful in interpreting s12 of the R&RT Act.

D. Workplaces and Work Relations

It is clear that the parliament, and the Equal Opportunity Commission Victoria, believe that the R&RT Act applies generally in the workplace context. The discussion paper released in 2000 records the government’s intention to outlaw vilification in the workplace. The publication of Employer Guidelines on the

141 Surveillance Devices Act 1999 (Vic) s6, s7.
142 Id at s3 definition of ‘private conversation’.
143 Id at s3 definition of ‘private activity’. Note however that the definition of private activity is defined as to not include conduct that takes place outside a building.
144 Explanatory Memorandum accompanying the Surveillance Devices Bill 1999 (Vic) at 1–2.
Act evidences the Commission’s view on this matter. Moreover, the vicarious liability provisions in relation to the civil prohibition on vilification also indicate a clear parliamentary intention that the civil provisions apply to work relations. Finally, the emphasis in the preamble and objects clause on free and equal participation in all aspects of society, including in the economy, supports the view that the legislation applies in Victorian workplaces.146

The Commission’s Employer Guidelines provide some examples of behaviour that the guidelines state ‘may’ be covered by the civil provisions in the R&RT Act. The list includes:

• writing racist graffiti in public places or in a workplace;
• displaying racist posters or stickers in a public place or in a workplace;
• racist or religious vilifying abuse in a public place or in a workplace;
• offensive racist comments in a publication including Internet, email and workplace intranet and email.147

This extract does provide a useful list of potentially unlawful conduct in the work relations context. Before turning to examine each of these examples, two points should be made about the Commission’s Guidelines. First, the use in this list of the concept of ‘public place’ in distinction to a workplace is both unnecessary and unfortunate. The R&RT Act itself does not contain a concept of a ‘public place’, and it is hard to see that its use in this publication brings clarity in understanding the scope of the Act’s prohibitions. Secondly, although the Guidelines contain a brief mention of the principles in s12, nowhere in the eight page document is there a discussion of the meaning of this provision, and how it might apply in a workplace context. Perhaps such a discussion was considered to be too technical for inclusion in a document of this type, which is essentially about encouraging and assisting employers to meet their broad obligations regarding vicarious liability.148 Nonetheless, some explanation of s12 is surely justified in a publication such as this.

To turn then to examine each of the listed examples. It seems unlikely that the first two examples — racist graffiti and racist posters and stickers in a workplace — would fall within the exception in s12 of the Act. This is because a person writing the graffiti or affixing a sticker or poster on premises should reasonably expect that the graffiti etc might be seen by other people, such as co-workers and visitors to the workplace (s12(2)). Indeed, attracting the attention of other people would seem to be a primary reason for using graffiti, stickers and posters. This

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146 Section 4(2) records that it is the intention of parliament that the provisions of the R&RT Act are interpreted so as to further the objects of the Act.
148 Notably there is a relatively lengthy, and no doubt useful, discussion of the vicarious liability provisions in the Act, and how employers might go about satisfying their legal obligations in this respect.
analysis of the applicability of s12 would hold regardless of where the graffiti, sticker or poster was placed — on a filing cabinet in an open plan office space, on the wall in an office, or even inside an employee’s locker.

In contrast, and depending on all the circumstances of the conduct, the last two examples may fall within the s12 exemption. If the ‘vilifying abuse’ occurred, for example, in hushed tones behind a closed office door, or on an internal telephone call between co-workers, then the effect of s12 might well be to exclude the vilifying behaviour from a finding of unlawfulness. The circumstances of a closed office door and quiet voice may reasonably be taken to indicate that the speaker and listener desire the conversation to be heard only by themselves (s12(1)), and it might be that it cannot be said under s12(2) that they ought reasonably to have expected that they may be overheard. This interpretation is broadly consistent with the explanation regarding the similar wording of the Surveillance Devices Act 1999 (Vic) contained in the Explanatory Memorandum.

Turning to the last example, a publication of ‘offensive racist comments’ on the World Wide Web would seem clearly to be outside the exception in s12. Whether such comments over an email system or a workplace intranet system would fall within s12 would depend on the specific circumstances in question. Is the content of messages through email and intranet systems in that workplace monitored on a regular basis, and do the employees know this? If the employer does carry out regular monitoring, and the employees have been informed of this practice, then the conduct will not be exonerated under s12, because under s12(2) the parties ought reasonably to expect that their messages may be seen by someone else — a member of the employer’s information technology staff.

4. **Comparing the New South Wales, Commonwealth and Victorian Jurisdictions**

It is clear that examining the applicability of the Victorian R&RT Act to workplace conduct requires quite a different approach to an investigation of potential workplace vilification under the *ADA* (NSW) and *RDA* provisions. An analysis under the *R&RT Act* poses a different set of questions to those that must be addressed in investigating the applicability of the *ADA* (NSW) and the *RDA*. Importantly, the jurisdictions utilise different legal ideas. The key concepts in s12 of the *R&RT Act* are objective intention and reasonableness. By contrast, central terms in the *ADA* (NSW) and *RDA* are public and private. These latter concepts of public and private remain largely undeveloped in anti-vilification law. Although they appear in other areas of Australian law, these other fields have not produced a body of jurisprudence on public and private that can be easily adapted to inform anti-vilification law.

Reasonableness and objectivity, like public and private, are open textured legal concepts, and they can be interpreted in ways that are deeply problematic. Many scholars have convincingly shown how the liberal legal values of reasonableness and objectivity have been applied by adjudicators across many areas of law —
including for example sexual harassment law and criminal law — in ways that maintain dominant gendered hierarchies. A recent article on Australian anti-discrimination law unpacks the ways in which the concept of reasonableness in the definition of indirect discrimination has been applied by some adjudicators in ways that undermine the effectiveness of the legal scheme to bring about change in social power relations. Whilst not wanting to disregard these concerns, the role of reasonableness and objectivity in s12 is relatively limited. These concepts are used to ascertain the parties’ objective intention to keep their conduct to themselves, and in relation to whether the parties ought to have known that their conduct might by overheard or seen by someone else. In this sense reasonableness and objectivity are used in a relatively contained manner. Notably, they are not used (at least in s12) to assess the seriousness of the respondent’s conduct, in terms of whether it constitutes racial hatred, or is merely disrespectful. This limited use of reasonableness and objectivity render their use in s12 less problematic than their use in other areas of Australian law, such as sexual harassment law, and in the concept of indirect discrimination. For these reasons reasonableness and objectivity in s12 seem to offer advantages over the concepts of public and private in the ADA (NSW) and the RDA.

A further notable difference between the Victorian R&RT Act and the ADA (NSW) and RDA provisions lies in the issue of onus of proof. Under the Victorian Act, respondents bear the onus of establishing that their actions lay outside the scope of the legislation as being private, whereas under the NSW statute and the RDA, complainants bear the onus of proof that the conduct fell within the scope of the legislation, because it was sufficiently public. In this sense, the R&RT Act starts from a position that vilifying conduct is covered by the legislation, and leaves it to the respondent to displace this assumption on the basis of evidence. This may in practice tend to favour a finding that the respondent’s conduct is covered by the legislation, and in this way contribute to the breadth of the Victorian prohibitions, relative to the NSW and federal schemes.

A further possible advantage of the R&RT Act approach over the tests adopted in the ADA (NSW) and the RDA, is that the line between prohibited public conduct

151 Reasonableness is used elsewhere in the RDA to assess the seriousness of the respondent’s conduct. See, for example, RDA s18C. On the use of reasonableness in s18C, see Chapman, above n77.
152 In sexual harassment law, reasonableness is used in the inquiry of whether a reasonable person would have anticipated that the complainant would be offended, humiliated or intimidated by the respondent’s sexual conduct. See, for example, Sex Discrimination Act 1984 (Cth) s28A(1). In indirect discrimination, reasonableness is used to assess whether the allegedly discriminatory requirement or practice imposed by the respondent was not reasonable. See, for example, Equal Opportunity Act 1995 (Vic) s9(1)(a).
and unremediable private conduct in the Victorian Act is more malleable than is the line under the *ADA* (NSW) and *RDA*. This is an advantage in the workplace context as it permits employers to bring more certainty to the question of potential liability. Under s12(2) an employer could displace any objective expectation of privacy in, for example, the use by employees of telephones, email and Internet systems. An employer could do this simply by informing employees of a new management practice of regularly monitoring phone calls, emails etc. Similarly, an employer could formulate an open door policy where employees were asked to refrain from closing their office doors. This would mean that employees ought reasonably to know that any conduct on their part might be heard or seen by someone else (s12(2)). Such employer initiatives might widen the potential liability of employees, and so increase the potential vicarious liability of employers, although vicarious liability may be offset by the employer being able to argue that through these initiatives it took reasonable precautions to prevent the vilifying behaviour from occurring.\(^{153}\)

The obverse also applies. Theoretically employers could create a (reasonable) expectation of privacy under s12(2) by informing employees that phone calls, emails etc are strictly private and will not be monitored. There are of course good reasons why an employer may not wish to do this. It seems that many employers do monitor email and Internet use and give a range of reasons to justify this practice — protection of their property, to monitor work performance, and to further compliance with the employer’s vicarious liability to take reasonable steps to ensure that the workplace is free of discriminatory and vilifying conduct.\(^{154}\) Given these reasons, it seems most likely that employers will decrease the reasonable expectation of privacy under s12(2), rather than increase the reasonable expectation of privacy under s12(2).

For these reasons reasonableness and objectivity under the *R&RT Act* may provide a better basis for anti-vilification legislation than is provided by the concepts of public and private used in the *ADA* (NSW) and *RDA*. We are not alone in coming to this view. As has been discussed, the New South Wales Law Reform Commission viewed the concept of ‘the public’ used in the *ADA* (NSW) anti-vilification provisions as ambiguous.\(^{155}\) The Commission recommended that the references to ‘the public’ in the New South Wales Act be deleted, and replaced with a test that asks whether the communication ‘is intended or likely to be received by someone other than a member of the group being vilified.’\(^{156}\) Interestingly, an enactment along these lines would position the public/private line in the *ADA* (NSW) closer to the Victorian *R&RT Act* approach. Were a New South Wales Bill drafted to introduce this change, it seems likely that it would contain an explicit reference to reasonableness, in the sense of whether the communication was reasonably intended and/or reasonably likely to be received by a third party.

\(^{153}\) *R&RT Act* s18.

\(^{154}\) Victorian Law Reform Commission, above n12.

\(^{155}\) New South Wales Law Reform Commission, above n20 at 540.

\(^{156}\) Id at 540–541. This recommendation would retain the focus in the *ADA* (NSW) on vilification as being about incitement, which in the opinion of the Commission was appropriate.
5. Conclusions

This article has examined the separation of public and private in the anti-vilification provisions in the *Anti-Discrimination Act 1977* (NSW), the federal *Racial Discrimination Act 1975* (Cth) and the new *Racial and Religious Tolerance Act 2001* (Vic). It was seen that key aspects of the separation are left largely unarticulated, both in the legislative provisions, and in the case decisions decided under them. The NSW Act and the Racial Discrimination Act rely on concepts of ‘public act’, ‘otherwise than in private’, ‘public place’ and ‘the public’. The legislative definitions of these terms, where provided, have been interpreted to be inclusive only, and, much discretion lies with adjudicators to determine whether the conduct in question was covered by the legislation. The cases have not provided clear guidelines on what these concepts of public and private mean, either generally or in relation to the workplace context. In particular, it is uncertain whether co-workers, clients and other visitors to a workplace will constitute ‘the public’ for these purposes.

Rather than using ideas of public and private, the new and unique *R&RT Act* relies on concepts of objectivity and reasonableness. Although these concepts can be fraught, in this context their use appears to be less so. The Victorian formulation appears to have a number of advantages over the older and more familiar concepts articulated in the *ADA (NSW)* and *RDA*. Notably, the Victorian approach brings the potential for more certainty in the scope of legal obligations faced by both employees and employers as the expectation of privacy is malleable. Moreover, objectivity and reasonableness are themselves more certain concepts in Australian jurisprudence than are the ideas of public and private. Most immediately they have a strong history in anti-discrimination law. For these reasons, the new and unique Victorian provisions appear to be an improvement on the older public/private formulations of anti-vilification law, seen in the NSW statute and the federal Act.
The New Right of Communication in Australia†
ANDREW CHRISTIE* AND ELOISE DIAS**

1. Introduction
The difficulties posed to copyright law by the Internet and global digital networks have rarely been understated. The ability to make unlimited numbers of copies, virtually instantaneously, without perceptible degradation in quality, and the capacity to transmit these copies to locations around the world, virtually simultaneously, has caused significant disruption to traditional markets for copyright industries, especially the music industry.1 Thus, it has been said that copyright is at a crossroads: it must adapt to the increasing demand for legitimate online access to protected works and yet it must do so in a way that preserves the rights of the copyright owner.2

This situation reflects a perpetual policy pendulum: on the one hand, a copyright system should create incentives for the production of intellectual works; on the other hand, it should not unduly stifle the widespread dissemination of such works, especially for educational and a variety of other uses. As a recent report

† The authors gratefully acknowledge the research assistance of Jonathan Campton and Stuart D’Aloisio in relation to earlier research on which part of the article draws, the contributions of Emma Caine, and the helpful comments of Kimberlee Weatherall and the anonymous referees. The authors gratefully acknowledge funding from the Australian Research Council that supported the research on which the article is based. The first author also gratefully acknowledges the support of the Australian-American Fulbright Commission, which appointed him a Fulbright Senior Scholar in 2001 to undertake research which contributed to this article. Some preliminary findings from this research were presented at the 10th Annual Conference on International Intellectual Property Law and Policy, Fordham University, New York on 5 April 2002.

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from the World Intellectual Property Organization (‘WIPO’) on ‘Intellectual Property and the Internet’ has emphasised, it is essential that legal rules are set and applied appropriately — and arguably, uniformly — to ensure that digital technology does not undermine these basic tenets of copyright.³

On 20 December 1996, at the WIPO Diplomatic Conference in Geneva, over 130 countries adopted by consensus two new Protocols to the Berne Convention for the Protection of Literary and Artistic Works (‘Berne Convention’),⁴ both of which aim to offer responses to the challenges of digital technology, particularly the Internet.⁵ One such response, contained in both the WIPO Copyright Treaty (‘WCT’)⁶ and the WIPO Performances and Phonograms Treaty (‘WPPT’),⁷ was the granting to authors of an exclusive right to authorise the communication of their works over the Internet and other digital networks.⁸ This was seen as necessary to enable authors to adequately control on-demand transmissions of their works or other subject matter. Article 8 of the WCT states that:

 Authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

In trying to bridge the two major proposals that emerged from the negotiations — one based on the right of distribution and one based on a more general right of communication to the public — this so-called ‘umbrella solution’⁹ was drafted in broad, neutral terms. The model was intended to encompass the relevant acts of digital transmission that were seen to require protection whilst giving member states sufficient freedom to choose which rights they would use to protect those acts under national law.¹⁰

Australia implemented the provisions of the WCT by enacting the Copyright Amendment (Digital Agenda) Act 2000 (‘Digital Agenda Act’).¹¹ This enactment

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⁸ The relevant provision is Article 8 in the WCT, and Article 10 in the WPPT.
⁹ See below, Part 2B.
¹⁰ It was stated in the WIPO Diplomatic Conference that Contracting Parties are free to implement the obligation to grant an exclusive right to authorise such ‘making available to the public’ also through the application of a right other than the right to communication to the public or through the combination of different rights. By the ‘other’ right, it was apparent that the right of distribution was meant, but ‘other’ right might also be a specific new right, such as that of making available to the public as provided for in Articles 10, 14 of the WPPT.
¹¹ Copyright Amendment (Digital Agenda) Act 2000 (Cth).
amended the *Copyright Act 1968* (‘*Copyright Act*’)\(^{12}\) in numerous ways, including by introducing, for owners of copyright in literary, dramatic, musical and artistic works, a new exclusive right ‘to communicate the work to the public’.\(^{13}\) The amending legislation contained a moderately detailed definition of ‘communicate’.\(^{14}\)

Commentators have rightly observed that, by leaving the detail of the interpretation of the *WCT* Article 8 right to national regulation, member states did not realise the prospect of achieving greater uniformity of copyright law, but rather, deferred debate as to what a valid interpretation should entail.\(^{15}\) Consequently, doubt now surrounds the true implications of Article 8 for copyright law. National discrepancies in implementation have also arisen as a consequence. There is therefore an urgent need for clarification: for legislators, courts and for interest groups such as copyright owners, users and intermediaries.

This paper seeks to provide that clarification. In particular, it offers a conceptualisation of Article 8, and in so doing attempts to resolve the following questions and sub-questions. *What* exactly does Article 8 mandate: does it grant a ‘primary’ or a ‘secondary’ right; does it embody one right or two separate rights? *When* and *where* do ‘making available’ and ‘communication’ of a work occur? These questions are discussed and answered in Part 3 of the article.

This paper also seeks to understand the manner in which Australia has implemented Article 8 in its domestic copyright legislation. Part 4 of the article provides answers to the above questions as they apply under the *Copyright Act*. It also seeks to determine the extent to which the Australian provisions operate extraterritorially (this being a matter on which Article 8 is silent).

The questions explored here are not of mere abstract or theoretical importance. Rather, they have meaningful consequences in today’s globalised, digital age in which the online dissemination of works is rapidly overtaking analogue transmission. Consideration of these issues may help to resolve problems of liability and damage, as well as choice of law dilemmas — the latter being particularly problematic in a world where territorial borders are increasingly rendered meaningless. Moreover, conceptualising the ‘what’, ‘when’ and ‘where’ of digital dissemination rights makes it possible to consider, critically, the functioning of those rights and thereby assess whether they meet (and are able to meet) the needs of stakeholders within the international copyright system.

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12 *Copyright Act 1968* (Cth).
13 *Copyright Act 1968* (Cth) at ss31(1)(a)(vi) and 31(1)(b)(iii). The same exclusive right was also introduced for sound recordings, cinematograph films, television broadcasts and sound broadcasts: ss85(1)(c), 86(c) and 87(c).
14 *Copyright Act 1968* (Cth) at s10.
2. Background to WCT Article 8

A. Communication Rights under the Berne Convention

Article 8 of the WCT performed two key roles. Firstly, it filled perceived ‘gaps’ in the Berne Convention and, secondly, it functioned as a compromise — what Ficsor has called an ‘umbrella solution’.16 — between competing national models.

Since its formation in 1886, the Berne Convention has periodically been adapted to meet shifting needs in response to technological developments.17 Communication rights have existed in the Berne Convention since 1925, but in their original form were designed to control classic ‘broadcasting’ situations.18 The Berne Convention does not provide for a general right of communication to the public but rather grants certain communication rights to specific subject matters.19 Article 11 grants to authors of dramatic, dramatico-musical and musical works the exclusive right of authorising the communication to the public of the performance of their works; Article 11ter grants authors of literary works the same right in respect of recitations of their works; Article 14bis(1) grants both these rights to the owner of copyright in a cinematograph work; and Article 14(1)(ii) grants to authors of literary or artistic works the right of communication to the public by wire of a cinematographic adaptation of their work. In contrast, the right of broadcasting to the public (itself a form of communication, but by wire) extends to all categories of literary and artistic works (which includes dramatic, musical and cinematographic works): Article 11bis(1)(i). Similarly, the exclusive right of communication to the public by wire or by rebroadcasting is granted to authors of all works in Article 11bis(1)(ii).

18 The provisions in the Berne Convention pertinent to the right of public performance concern performance of works in the presence of the public or, at least, at a place open to the public: see Articles 11(1)(i), 11ter(1)(i), 14(1)(i), 14bis(1). They are not, therefore, relevant directly to the digital networked environment and do not extend to communication to the public either by wire or broadcasting: see Ficsor, The Law of Copyright and the Internet, above n16 at 155.
19 As far as neighbouring rights are concerned, the Rome Convention protects performers only in respect of broadcasting and the communication to the public, without their consent, of their performance, except where the performance used in the broadcasting or the public communication is itself already a broadcast performance or is made from a fixation (Article 7). As regards a phonogram published for commercial purposes, the performers or producers of the phonogram have a right to a single equitable remuneration for its broadcast or any communication to the public (Article 12). Broadcasters enjoy a right in respect of rebroadcasting of their broadcasts and in respect of communication to the public of television broadcasts (Article 13). The TRIPS Agreement does not contain any specific provisions on the right of communication to the public as far as authors and phonogram producers are concerned. Performers have a right to prevent broadcasting by wireless means and the communication to the public of live performances (Article 14(1)). Broadcasting organisations enjoy a right to prohibit the re-broadcasting of wireless means of broadcasts as well as the communication to the public of television broadcasts (Article 14(3)).
The Berne Convention therefore fragments communication rights along two lines: first, along the lines of subject matter, and second, along the lines of technology or mode of communication. For example, Article 11 concerns dramatic and musical works; Article 14 concerns cinematographic works; and Article 11ter concerns literary works, while distinctions are made between broadcasting, communication by wire or by rebroadcasting, and communication by loudspeaker. The gaps left by this fragmentation would need to be filled in order to provide copyright owners with the right to control digital transmissions of their works. In particular, perhaps the most important gap or uncertainty perceived to exist in the Berne Convention scheme was whether any of the communication rights provided in the Berne Convention covered transmissions of works to third parties ‘on-demand’ — as epitomises Internet transmissions.

The first part of Article 8 eliminated the subject matter gaps:

Without prejudice to the provision of Articles 11(1)(ii), 11bis(1)(i) and (ii), 14(1)(ii) and 14bis(1) of the Berne Convention, authors of literary and artistic works shall enjoy the exclusive right of authorising any communication to the public of their works, by wire or wireless means …

As a result, authors of all literary and artistic works now enjoy the right of communication to the public.

The second part of Article 8 states expressly that a ‘making available’ right is included within this general right of communication to the public:

… including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them.

It is this development that is most important, for the rights in the Berne Convention had never mentioned that ‘making a work available’ — as opposed to actively transmitting it to the public at large — constituted a communication to the public. The expression ‘making available …’, appearing in the Berne

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21 See, for example, Article 11bis(1)(i) (authors of literary and artistic works are granted the exclusive right of authorising the broadcasting of their works or the communication thereof).
22 See, for example, Article 11bis(1)(ii) (authors of literary or artistic works are granted the exclusive right of communication to the public by wire); Article 14(1)(ii) (authors of literary or artistic works that are adapted or reproduced as cinematographic works are granted the exclusive right of communication to the public by wire of the adaptation or reproduction).
23 See, for example, Article 11bis(1)(ii) (authors of literary or artistic works are granted the exclusive right of rebroadcasting of the broadcast of the work).
24 See, for example, Article 11bis(1)(iii).
Convention’s definition of publication since the Brussels revision of 1948, was limited to only one of the possible ways of making available, namely making available (analogue) copies of works.\textsuperscript{26} Even the more general use of the term, introduced at the 1967 Stockholm revision conference, referred only to the first publication of a work for the purposes of determining the duration of protection.

B. The ‘Umbrella’ Solution of Article 8

Until the introduction of Article 8 in the WCT, therefore, international treaty law and most national laws did not deal with the mere act of making a work accessible (by electronic or other means) to the public.\textsuperscript{27} Point-to-point transmissions would amount to a restricted act if the process involved reproduction or distribution of copies (for example), but there was considerable doubt as to whether the traditional rights granted by most copyright laws would cover the mere act of offering the work to the public for access. This gap in international and national legislation had to be filled.

Of course, there was considerable debate among the member states of WIPO as to how this should be accomplished. The US delegation submitted draft treaty language calling for digital transmissions to be treated as distributions of copies to the public, in line with the approach recommended in the US White Paper.\textsuperscript{28} In contrast, the EU delegation called for digital transmissions to be regulated under the rubric of the right to control communications of protected works to the public.\textsuperscript{29} They perceived a strong similarity between digital transmissions and the broadcast transmissions that Europeans had long regulated as communications to the public. The disagreement was a symptom of the broader discord between US and European copyright law — the differences in legal approaches and in the specific legal characterisation of the acts involved.\textsuperscript{30} US law contained no exclusive right to communicate works to the public, while the laws of most other countries (including many EU member states) contained no exclusive distribution right.\textsuperscript{31}

As Ficsor, then Assistant Director General of WIPO and Secretary to the Diplomatic Conference on Certain Copyright and Neighbouring Rights Questions, has explained, the ‘umbrella solution’ found in Article 8 had, as its main objective, the elimination of these obstacles.\textsuperscript{32} Interestingly, there was a consensus that it


\textsuperscript{27} Hugenholtz, above n1 at 89. Compare Spanish Copyright Act, Article 20§2(h) Law on Intellectual Property, no 22, of 11 November 1987, as amended on 7 July 1992.


would not be appropriate to propose a completely new right to protect digital transmissions of works or other subject matter. Such a solution would not be easy; not only because of the usual difficulties in reaching agreement at the international level on a new right, but also because any legal proposal would involve established practices which would invariably differ from state to state.\(^33\) Rather, it was seemingly accepted that a traditional right (be it distribution, performance, communication) ought to apply, albeit in a somewhat adapted form, due to the gaps in the *Berne Convention* which would require alteration to existing concepts and rules, and possibly even new norms.

The ‘umbrella solution’, whilst certainly no panacea, resolved the difficult question in favour of *domestic resolution*, whereby that which was considered paramount was not the *legal characterisation*, but rather the *acts* which should be covered by appropriate rights. The final provision ‘encompassed any and all such rights’ and ‘took into account a given status of communication and distribution technologies’.\(^34\) Thus, *Berne Convention* members would be free to determine whether rights such as reproduction, public performance, communication to the public, or distribution, or any combination of such rights, should come into play in specific cases.\(^35\)

The key point here is that no further clarification is given in Article 8 as to what exactly constitutes the ‘making available’ of a work, except that it at least covers the situation where a member of the public individually accesses a work from a time and place chosen by them. The only act expressly carved out of the exclusive right is the ‘mere provision of physical facilities for enabling or making a communication’\(^36\) in order to protect such facilitating intermediaries as Internet service providers (‘ISPs’). Thus, in reaching a much-needed compromise on the wording of Article 8, member states left a broad discretion to domestic legislatures to decide and define the meaning of ‘making available’ and ‘communication’ to the public. The need to understand how countries have chosen to approach Article 8 is therefore more apparent and urgent than ever. Part 4 of the article seeks to do just that in respect of Australia.

### 3. Conceptualising WCT Article 8

#### A. What Sort of Right?

In order to start framing Article 8 conceptually we must first consider the provision itself. This entails two preliminary questions, which are largely ones of interpretation.

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35 Ibid.
36 The Agreed Statement to Article 8 provides that this does not in itself amount to communication of the work. Most states have incorporated a similar protection for Internet service providers (‘ISPs’); see, for example, United States (17 USC §512), Australia (*Copyright Act* 1968 (Cth) s39B), Canada (*Copyright Act*, RSC 1985, c 42, para 2.4(1)(b)).
The first question is whether Article 8 embodies an exclusive primary right at all. This question arises because of the literal wording of the provision, which on a plain reading grants an ‘exclusive right of authorizing any communication …’.

[Empasis added.] Thus, it could be argued that Article 8 creates a secondary ‘authorisation right’ rather than a primary exclusive right. That is, it could be seen to bestow on the copyright owner the right to ‘approve, countenance or sanction’ such a communication (to use the typical common law conceptualisation of such rights).

It is submitted, however, that this would be an incorrect and invalid interpretation. Firstly, it would be illogical to grant such a secondary right in the absence of the grant of a primary right, that is, in the absence of an exclusive right to make a communication to the public. For there to be infringement by authorisation, the defendant must expressly or impliedly authorise the doing of an act by a third person which infringes copyright, and the person said to be authorised must commit an infringement by doing the act itself (or threaten to commit such an infringing act).37 It would be illogical (not to mention unjust) if the authorised person did not infringe copyright and yet the authoriser did.

Secondly, one should be careful not to give undue emphasis to the word ‘authorisation’ in Article 8. As Gendreau notes, if one looks at the other rights in the WCT, they are all framed as ‘authorisations’ to do something and, indeed, this turn of phrase is also found in the Berne Convention: rights are typically phrased as rights to authorise some act (being the main right).38 Thus, it would be incorrect to interpret Article 8 as granting the right of authorising communication, however logical this may seem on a literal reading.39

The second question is whether Article 8 embodies one right or two separate rights. That is: does Article 8 grant (i) a right of communication or (ii) a right of making available? On a plain reading of the provision, the right of communication includes, but is not limited to, the making available of the work for online demand.40 This conforms to the literal wording of the provision (‘including …’) but also stems from its preparatory background. The Records from the Diplomatic Conference note that:

[o]ne of the main objectives of the second part of Article [8] is to make it clear that interactive on-demand acts of communication [that is, making available] are

39 The Canadian Copyright Board made this mistake, it is submitted, in finding that its interpretation of the communication by telecommunication right under the Canadian Copyright Act corresponded with Article 8 of the WCT: see Re Statement or Royalties to be Collected for the Performance or the Communication by Telecommunication of Musical or Dramatico-Musical Works (Tariff 22 — Transmission of Musical Works to Subscribers Via a Telecommunications Service not Covered under Tariff Nos 16 or 17) (Phase 1: Legal Issues) 1 CPR (4th) 417.
within the scope of the provision. This is done by confirming that the relevant acts of communication include cases where members of the public have access to the works from different places and at different times.\textsuperscript{41} [Emphasis added.]

Indeed, it was noted that ‘the “making available” part of the provision, could fall within a fair interpretation of the right of communication in the existing provisions of the Berne Convention’ (although given the possibility of other interpretations, the need for harmonisation and the avoidance of discrepancies was seen to demand clarification).\textsuperscript{42} Furthermore, the preparatory documents also state that ‘[i]f at any point, [a] stored work is made available to the public, such making available constitutes a further act of communication which requires authorization.’\textsuperscript{43}

Therefore, it is concluded that the right of making available is a subset of the broader exclusive right of communication. That broader right embraces other acts of communication to the public; including, in particular, the acts of communication recognised by the Berne Convention — for example, communication by broadcasting or other wireless means, and communication by loudspeaker or other analogous instrument. This conceptualisation of the WCT Article 8 communication right is illustrated in Figure 1.

\textsuperscript{40} The WCT must be distinguished from the WPPT in this respect. The WPPT separates the ‘right of communication of performances’ from the ‘right of making available to the public originals or copies of performances’. Article 10 provides that performers shall enjoy the exclusive right of authorising the making available to the public of their performances fixed in phonograms, and Article 14 provides the same right to producers of phonograms in respect of their phonograms. Article 15, on the other hand, provides the right of equitable remuneration for broadcasting and communication to the public for both performers and producers of phonograms. However, the difference between the two treaties seems to have arisen from the different exceptions member countries were willing to have for the broadcasting of performances, as illustrated in the Agreed Statement accompanying Article 15: ‘It is understood that Article 15 does not represent a complete resolution of the level of rights of broadcasting and communication to the public that should be enjoyed by performers and phonogram producers in the digital age. Delegations were unable to achieve consensus on differing proposals for aspects of exclusivity to be provided in certain circumstances or for rights to be provided without the possibility of reservations, and have therefore left the issue to future resolution.’ See Ficsor, The Law of Copyright and the Internet, above n16 at 629. Also see Ficsor, ‘Towards a Global Solution’, above n30 at 135. It is submitted here that it would be both misleading and incorrect to use the WPPT to resolve interpretative questions in the WCT — and vice-versa — and they are not compared or contrasted here for this reason.

\textsuperscript{41} Notes on Article 10, WIPO CRNR/DC/4, [10.11]. The EU delegation, whose suggested drafting was the genesis of Article 8, also stated that it was not intended to create a new right but rather was attempting to bring the acts of making available to the public in the electronic system within the coverage of existing rights. ‘The completion of the act of communication would not require that actual transmission take place, the mere making available of the work ... is sufficient’: see Ficsor, The Law of Copyright and the Internet, above n16 at 240. [Emphasis added.]

\textsuperscript{42} Id at [10.13].

\textsuperscript{43} Id at [10.14].
We note that this outcome is not just logical, it is arguably desirable. From a policy standpoint, the existence of only one broad right is attractive. The alternative — the multiplication of rights — is a potentially problematic path down which to proceed, because it risks multiplying the royalties due for one particular action and may call for complicated allocations of joint and several liability among different actors. Furthermore, as alluded to by Gendreau, there is the risk of the dissection of the copyright transaction becoming too artificial. Having only one broad right may also be appropriate in terms of coping with future technological developments. A flexible, technologically neutral right can be extended to include acts that can not be foreseen at present.

B. When Does a Communication Occur?

The next question for consideration in pursuing a conceptualisation of Article 8 is when does the ‘making available’ of a work occur? In considering this question, it is helpful to use the transmission of data over the Internet as a paradigm.

In order for a transmission of data to take place over the Internet, several events take place, which can be represented on the continuum shown in Figure 2. The circles in Figure 2 depict, in simple terms, the different acts by which a work is

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44 Gendreau, above n38 at 356. This is especially apparent in the context of digital transmissions where uploading and downloading can take place within nanoseconds, such that the splitting of the continuum into separate but related acts with separate concomitant ‘rights’ risks becoming arbitrary and confusing.


46 There is, of course, the separate question of when does any other act of communication (for example, communication to the public by loudspeaker) occur? The answer to that question depends on the particular act of communication in issue, and is beyond the scope of the article.
uploaded from a computer that is not publicly accessible (hereafter Uploading Computer) to a server that is publicly accessible via the Internet (hereafter Internet Server), and then is subsequently downloaded via the Internet and received at another computer (hereafter Downloading Computer). These acts take place at different points in time, as illustrated by the time-line continuum along the bottom of Figure 2. Logically, it seems clear that the act of transmission via the Internet begins at a point in time no earlier than point 1, being when the digital signal comprising of the transmission is emitted by the Internet Server (hereafter the time of Emission). Likewise, it also seems clear that the act of transmission ends at a point in time no later than point 3, being when the digital signal comprising of the transmission is received at the Downloading Computer (hereafter the time of Reception).

Figure 2: Time continuum of an Internet transmission

We recognise that the paradigm used herein is a substantial simplification of the complex and varied means by which a transmission over the Internet actually occurs. Nevertheless, we believe this paradigm is sufficiently representative of the realities as to be valid. In most, if not all, cases the means by which any particular Internet transmission might actually differ from this paradigm are not of such substance as to make the conclusions we reach inapplicable.

It is possible, of course, that the Uploading Computer is the same machine as the Internet Server. This is the situation in the case of peer-to-peer ‘file sharing’, when a user designates certain files on his or her computer’s hard drive to be available for access and downloading by other users of the peer-to-peer network.

This diagram in no way seeks to gauge the real time over which a transmission may take place or the (potentially almost infinite) routes it may take to reach its destination. It is recognised that, in practice, the work being downloaded will be split into a number of components, and the individual components will be sent by different routes to the Downloading Computer. What happens upon receipt of these components at the Downloading Computer will vary, depending on the technology being used. In some situations — such as, for example, ‘streaming’ — what is received arguably is not a complete embodiment of the unitary work. Also, it is possible that an individual transmission may not reach the Downloading Computer.

For clarity, it is explained here that point 2 is a point in time in between point 1 and point 3, namely a time after the digital signal comprising the transmission is emitted and before it is received.
Which of the above specific acts, if any, constitutes the act of ‘making available’ for the purposes of Article 8 of the \textit{WCT}? One possibility is that a work is ‘made available’ to the public when it first becomes accessible by an individual member of the public, namely when it is received by the Internet server — that is, at time point 0. Another possibility, however, is that a work is only truly ‘made available’ when, in response to a request for download made by a member of the public, the Internet server \textit{emits} the work as a digital signal — that is, at time point 1. Yet another possibility is that a work should be considered to have been ‘made available’ at the time when the member of the public subsequently \textit{receives} that signal — that is, at time point 3.\footnote{This latter interpretation parallels the so-called ‘Bogsch theory’ of direct broadcasting by satellite, which proposes that the right of broadcasting to the public by wireless diffusion (as provided by Article 11bis of the \textit{Berne Convention}), is exercised when and where a member of the public receives the broadcast. The Bogsch theory, as it came to be known, was put forward by then Director General of WIPO, Dr Arpad Bogsch, at the WIPO/UNESCO Group of Experts on Copyright Aspects of Direct Broadcasting by Satellite in 1985. The traditional position in relation to satellite communications was that the act of broadcasting occurs in the country from which the signal emanates (the emission theory). This theory appealed largely to pragmatic concerns, especially those of conflicts of law which could be easily resolved if the country of emission was the focal point. The position which applies under the European Council Directive of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (93/83/EEC) by virtue of Article 2 is representative of this approach. At the 1985 meeting, Bogsch advanced the alternative view that in a DBS broadcast, the communication takes place in all countries which are covered by the footprint of the satellite. The person responsible for the sending of the broadcast must therefore comply with the law of each footprint country, although there would be flexibility for a \textit{de minimis} situation where the footprint ‘bled’ into only part of the country. For further discussion see Ficsor, \textit{The Law of Copyright and the Internet}, above n16 at 172–178.} A still further possibility is to not confine the scope of the making available act to any particular point on the continuum at all. Under this last conceptualisation, ‘making available’ can occur at each and every point in the continuum.

From first principles, we have seen that the ‘making available’ right is a subset of the broader communication right granted in \textit{WCT} Article 8. On such a reading of Article 8, the act of communication, \textit{in the form of making available}, is complete by merely making a work available for on-demand transmission. Viewed in this way, the act of making available occurs when the work is made available in such a way that members of the public may access these works from a place and at a time individually chosen by them. This corresponds most clearly and closely with point 0 on the continuum. At this point, any member from the public can access the work from the server at any time they choose. Article 8 states no requirement that the member of the public actually request the work, that the work actually be emitted to the member of the public, or that the member of the public actually receive the work, before the work can be considered ‘made available’ to the public. Nor does a plain reading of Article 8 support the contention that making available is coterminous with all the stages of transmission.
Adopting the subset view of the \textit{WCT} Article 8 communication right, it follows that the act of making available occurs at point 0 in time. Also, although the issue does not need to be decided in this discussion, it would seem that the other types of communication encompassed by Article 8 occur at a point in time later than the point in time of a making available. Depending on the particular type of communication in issue, the point in time of the occurrence of the act of a communication other than making available is point 1, 2 or 3. This conceptualisation of the \textit{WCT} Article 8 rights is illustrated in Figure 3.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure3.png}
\caption{‘Making Available’ and ‘Communication’ in an Internet transmission}
\end{figure}

\textbf{C. Where Does a Communication Take Place?}

The question of where does a making available take place is harder to answer than when does it occur.\textsuperscript{52} There is nothing in the wording of Article 8 which gives any indication of how we should conceive of the locus of the act of either communication generally or making available in particular. One must, therefore, reason from first principles. Three possibilities suggest themselves as to where a making available occurs: (i) it occurs in the location where the uploading computer is situated; (ii) it occurs in the location where the Internet server is situated; and (iii) it occurs in the location where the downloading computer is situated.

\textsuperscript{52} As with the issue of when does a communication occur, the issue of where does a communication occur involves two separate questions: (i) where does a making available occur, and (ii) where does any other act of communication (for example, communication to the public by loudspeaker) occur? The answer to the second question depends, again, on the particular act of communication in issue; and, again, it is beyond the scope of this paper.
The first possibility (the location of the uploading computer) is superficially attractive, because it focuses on the primary actor — that is, the person who is responsible for making the work available. Upon reflection, however, it will be seen that this possibility is flawed. As a matter of logic, the place of the making available should be connected with the time of making available, because it is only once the act has occurred that seeking a location for it becomes necessary (and, indeed, possible). At the commencement of the upload of a work, there is no making available. Making available only occurs once the work is received at the Internet server. Because receipt at the Internet computer is separate in time from the commencement of upload, the location of the uploading computer is not connected in time with the act of making available. It follows, therefore, that the location of the uploading computer should not be considered determinative of the where the making available occurs.

The second possibility (the location of the Internet server) looks a very likely candidate, because it clearly connects the time of the making available with the place of making available. Upon reflection, however, this possibility should also be considered flawed. As a matter of logic, the place of the making available should be connected not just with the time of making available, but also with the concept of making available. As the words of Article 8 indicate, the act of making available is one of enabling members of the public to access the work ‘from a place ... chosen by them’. The place where this occurs is not the place where the uploading computer is located; rather, it is the place from where the member of the public may access the work. Thus, the true location of the act of making available is the location of the downloading computer (this being the third possibility described above). This possibility connects the place, time and concept of making available.

To this point, when discussing transmission on the Internet we have described only a single download. The reality is, of course, that there may be (and usually are) multiple downloads, in the sense of downloads to more than one recipient. Put another way, when a work is made available online it is made accessible to numerous people — namely, all the people able to access the Internet server (which, in the case of an Internet server that is publicly accessible, is all the people capable of connecting to the web). It follows, therefore, that there is not just one location at which the making available occurs. Rather, there are multiple locations — being the locations of each and every individual capable of accessing the Internet server.

At first blush such a conclusion might appear ridiculous, because it effectively makes the location of making available everywhere in the world. On reflection, however, it will be seen that it is not ridiculous. The very nature of the act of making a work available online, involving as it does an omnipresence of the work, compels this result.

53 Ginsburg recognises that these words of Article 8 provide support for ‘the argument favouring localization in the country(ies) of receipt’: Ginsburg, above n25 at 236. However, Ginsburg also argues that support for a contrary view is found in the purported goal of the WCT to facilitate ‘the implementation of authors’ ... rights in networked commerce’: id at 237.
4. Implementing WCT Article 8 in Australia

The discussion in Part 2B showed that the drafters of WCT Article 8 intended the provision to be capable of different interpretations, and hence different implementations, at the level of the national legislature. One state may define making available as a subset right of the broader communication right. Another state may wish to define making available as coterminous with communication. A further alternative still is for a state to rely on other, pre-existing, rights to encompass making available and communication, thereby avoiding having to define either. The next part of this paper discusses the particular approach that Australia has adopted to implement WCT Article 8.

A. What Sort of Right?

The enactment of Digital Agenda Act was motivated by, and was a response to, the pressures exerted by digital technology and the online environment, and was a major step towards aligning Australia’s copyright laws with the obligations prescribed in the WIPO treaties. The ‘centrepiece’ of the Act, which came into effect on 4 March 2001, was undoubtedly the technology-neutral ‘right to communicate the work to the public’. This broad right filled a number of gaps in Australian copyright law as there was some doubt as to whether the traditional communication rights, of broadcast and (cable) diffusion, could extend to uploading for ‘on-demand’ access by the public. The new communication right thus replaced both the broadcasting right, which was limited to the act of wireless telegraphy, and the cable diffusion right, which applied only in relation to works and excluded other forms of subject matter, and is clearly separate from the right of public performance.

Unlike the wording of WCT Article 8, the wording of the Australian legislation leaves no doubt that the right to communicate is a primary exclusive right of the copyright owner, separate from the exclusive right of authorisation. Thus, the copyright owner is given both the right to communicate the work and the right to authorise another person to communicate the work.

Section 10 of the Copyright Act defines ‘communicate’ in the following manner:

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 … [Emphasis added.]

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54 Revised Explanatory Memorandum accompanying the Copyright Amendment (Digital Agenda) Bill 2000 (Cth) at 4.
55 Ian Campbell, Commonwealth, Senate, Parliamentary Debates (Hansard) 14 August 2000 at 16246.
56 See Copyright Act ss31(1)(a)(iv) and 31(1)(b)(iii). For the equivalent right in relation to sound recordings, cinematograph films, television broadcasts and sound broadcasts, see ss85(1)(c), 86(c) and 87(c). The right does not extend to published editions of works.
57 Fitzpatrick, above n15 at 223.
58 See Copyright Act ss31(1)(a)(iii).
59 Copyright Act ss31(1)(a)(vii), in relation to literary, dramatic and musical works.
The notable features of this definition are that the right of communication is defined exclusively (by virtue of the word ‘means’), and that the right comprises two sub-rights (by virtue of the conjunctive ‘or’). Adopting standard means of legislative interpretation, it follows that the act of communication can occur in only one of two ways: as a making available online, and as an electronic transmission. It also follows that these two acts are conceptually different. That is to say, a making available online is different from an electronic transmission.

There are, therefore, two exclusive rights of communication provided to copyright owners under Australian law: (i) the right to make a work available online (hereafter the making available right), and (ii) the right to electronically transmit a work (hereafter the electronic transmission right). This understanding of the new communication right is depicted in Figure 4.

Figure 4: Communication rights under Australian law

B. When Does a Communication Occur?

Drawing on the analysis of WCT Article 8, on which the Australian communication right is based, it seems clear that the act of making available online occurs at point 0 in time. That is to say, a work is made available online once it has been uploaded to the Internet server from which the public may access it.

The matter is not so straightforward, however, in relation to the act of electronic transmission. Although it seems incontrovertible that a transmission cannot occur at least until there is an emission, it is not clear if more is required. In particular, it is not clear whether there needs to be a reception of that emission for an act to constitute a transmission. To put the issue in the form of a question: can there be an electronic transmission to the public without any evidence that the public actually received the transmission?

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60 Copyright Act s10.
There are arguments both for and against a reception being a necessary part of a transmission. An argument for a reception being a necessary part of a transmission is that this seems to be the ordinary meaning of the word. For example, the definitions of ‘transmit’ in The Oxford Dictionary of English include the following: ‘cause (something) to pass on from one person or place to another: knowledge is transmitted from teacher to pupil’. [Emphasis added.]

Under that definition, the concept of ‘transmit’ involves a recipient, and the use of the preposition ‘to’ in the definition implies that the concept requires a reception by the recipient. It must be noted, however, that there are other definitions of the word ‘transmit’ which do not imply the need for reception. For example, another definition of ‘transmit’ in The Oxford Dictionary of English is: ‘broadcast or send out (an electrical signal or a radio or television programme): the programme was transmitted on 7 October’. [Emphasis added.]

Under this definition, the concept of ‘transmit’ is one of sending something towards a recipient, not sending it to a recipient. Given that ‘transmit’ appears in the phrase ‘electronically transmit’, and the context is one of a broadcast-style of exclusive right, there are solid grounds for preferring the latter definition to the former definition.

Another, more legal, argument against reception being a necessary part of a transmission is based on the interpretation given to the earlier communication rights that the electronic transmission right replaced. Prior to the amendments introduced by the Digital Agenda Act, the Australian copyright legislation provided two communication rights: the right ‘to broadcast the work’ and the right ‘to cause the work to be transmitted to subscribers to a diffusion service’. Although there was no judicial decision definitively determining the issue in Australia, it seems to have been generally accepted that evidence of actual reception was not required to establish that either of these exclusive rights had been exercised. Rather, it was sufficient to show that the work had been sent on the way to potential receivers of it.

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61 Catherine Soanes & Angus Stevenson (eds), The Oxford Dictionary of English (2003). See also the Merriam-Webster Online dictionary: <http://www.merriamwebster.com> (8 May 2005), which includes the following definition of ‘transmit’: ‘to send or convey from one person or place to another’.

62 Ibid. See also the Merriam-Webster Online dictionary which provides this other definition of ‘transmit’: ‘to send out (a signal) either by radio waves or over a wire’.

63 See, for example, Copyright Act 1968 (Cth) ss31(1)(a)(iv) and (v).

64 See, for example, James Lahore & Warwick Rothnie, Copyright and Designs (2003) Service 61, Volume 1 at [34,035]. Support for this view can be found in the fact that the Act defined the word ‘broadcast’ to mean ‘transmit by wireless telegraphy to the public’, and defined ‘wireless telegraphy’ to mean ‘the emitting or receiving, otherwise than over a path that is provided by a material substance, of electromagnetic energy’. [Emphasis added.] The phrase ‘emitting or receiving’ in the definition of wireless telegraphy could be taken as indicating that either emission or reception will suffice — that is, that reception is not required for an act to amount to a broadcast.
The electronic transmission right was intended by the legislature to be a technologically neutral version of the former rights of broadcasting and transmitting to subscribers to a diffusion service. Given that the weight of opinion was in favour of reception not being a necessary element of either act, the better view seems to be that reception is not a necessary element in the act of electronic transmission. Under that view, a work is electronically transmitted once it is emitted from the Internet server — that is, at point 1 in time.

Figure 5 illustrates the above conceptualisations of when a making available online and an electronic transmission occur in the context of a transmission over the Internet.

Figure 5: Internet transmission under Australian law

C. Who Makes the Communication?

Importantly, the amendments implementing WCT Article 8 in Australian copyright law contain a provision dealing with the issue of who makes a communication. According to Copyright Act s22(6):

For the purposes of this Act, a communication other than a broadcast is taken to have been made by the person responsible for determining the content of the communication.

65 Support for this view can be found in the dicta of Carnwarth J in the UK High Court decision Film Investors Overseas SA v The Home Video Channel Limited [1997] EMLR 347. Having noted that the s6 definition of ‘broadcast’ includes the phrase ‘is capable of being lawfully received by members of the public’, the court concluded that ‘it is clear from these definitions that … [a]ctual reception of the transmission by viewers is not an essential part of “broadcasting”:’ id at 351. The relevance of this decision is that the previous Australian copyright provisions concerning broadcasting were based on, and were similar to, the UK provisions being interpreted in this case.
The question that arises is who is ‘the person responsible for determining the content of the communication’? The Explanatory Memorandum accompanying the amendments indicated that the provision aimed to exclude carriers and ISPs from being directly liable for communicating material to the public via their networks, in the situation where they do not generate the online content that is transmitted or made available.66 This information is helpful, in that it tells us who does not make the communication (namely, one who merely provides the means by which the communication is effected). Unfortunately, however, it does not tell us who does make the communication.

Two possibilities suggest themselves in the context of Internet communication being considered in this article: the person who downloads the work from the Internet server, and the person who uploads the work to the Internet server. The first possibility is superficially attractive, because it focuses on the actor who makes the transmission take effect (the downloader requests the work to be downloaded). Thus, it can be said that the downloader determines what will be the content of any particular transmission, by electing for that transmission, and not some other transmission, to occur.

There is, however, a flaw with the reasoning that it is the downloader who determines the content of a communication. The flaw is that it does not apply to a communication that is a ‘making available’ (as distinct from an electronic transmission). In the case of an act of making available, the downloader is not an actor. This is because a making available occurs in the absence of an actual download. The only relevant actor is the uploader. In the case of a making available, therefore, it must be the uploader (the second possibility identified above) who determines the content of the making available.

Although it would not be totally illogical to do so, there does not seem to be any good policy reason why the legislature would wish to make different people responsible for the two different types of communication (that is, for a making available on the one hand, and an electronic transmission on the other hand), when they are both parts of the same general act — namely communication to the public. That is to say, there seems no good reason why it is the uploader who is deemed to make the communication in the case of a work being made available online, but it is the downloader who is deemed to make the communication when the same work is subsequently transmitted. Rather, it seems clear that it should be the same person in both instances — namely, the uploader. To the extent to which the legislative intent can be discerned, this conclusion is consistent with it.57

D. Where Does a Communication Take Place?

The conclusion reached in respect of who makes a communication does not, unfortunately, provide assistance with divining where a making available online or electronic transmission can be said to take place. The determination of that issue depends on reasoning from first principles, combined with the indirect assistance provided by the legislation.

66 Revised Explanatory Memorandum, above n54 at 10.
It was argued from first principles in Part 3C that the better conceptualisation of the WCT Article 8 making available right is that it is exercised in the location where a member of the public may access the work – that is, at the location of each and every individual capable of accessing the Internet server. Given that the Australian communication right is an express implementation of Article 8, it is strongly arguable that the same principle applies to the issue of where the Australian making available right occurs. Furthermore, there is indirect support for this view in a decision of Australia’s highest court.\textsuperscript{68} Accordingly, the authors are of the opinion that the act of making available online, as provided in the Australian legislation, takes place at the location of the users who may access the work.

As with the consideration of where a making available takes place, the consideration of where an electronic transmission occurs should, as a matter of logic, be connected with both the time of act and the concept of the act. It was argued in Part 4B that a transmission should be considered to occur at the time when the emission (that is, commencement of download) takes place. The concept of a transmission is the sending of a work on its way towards a recipient; the concept does not require a reception of the work by a recipient. Therefore, the place where the transmission occurs is not the place of reception; rather, it is the place of emission. That place is the location of the Internet server from which the download is effected.

\textbf{E. Extraterritoriality and the Communication Right}

The nature of electronic communication is such that it is just as likely to occur across national boundaries as it is within those boundaries. This raises the issue of the extent to which the new Australian communication right has an extraterritorial effect. In considering that issue, two particular legislative provisions must be borne in mind.

The first provision is the definition of ‘to the public’, introduced into the Copyright Act by the amending legislation that contained the new communication

\textsuperscript{67} For example, see Nick Bolkus, Commonwealth, Senate, \textit{Parliamentary Debates (Hansard)} 17 August 2000 at 16580: ‘Typically, the person responsible for determining the content of copyright material online would be a \textit{website proprietor}, not a carrier or Internet Service Provider. Under the amendments, therefore, carriers and Internet Service Providers will not be directly liable for communicating material to the public if they are not responsible for determining the content of the material.’ [Emphasis added.] Similarly, see Explanatory Memorandum accompanying the Copyright Amendments (Digital Agenda) Bill 2000 at 10, which states that ‘It is proposed that the person who is responsible for determining the content of a communication to the public is the \textit{person who directly exercises the right over that activity}.’ This would mean that [ISPs] who are not responsible for determining the content of the transmission would not be directly liable for those transmissions’. [Emphasis added.]

\textsuperscript{68} See Dow Jones v Gutnick (2002) 210 CLR 575; (2002) 194 ALR 433, a case in which the High Court held that, for choice of law purposes, the tort of defamation could be seen to occur where the defamatory material was received by an audience. In that case, the defamatory material was uploaded to an Internet server in the US. The High Court held that the material was received in Victoria, where the plaintiff’s reputation was strongest, because it could be (and, indeed, had been) downloaded to computers in Victoria.
right. Section 10 of the Copyright Act provides that ‘to the public means to the public within or outside Australia’. When applied to the exclusive right of ‘communication to the public’, this definition produces an outward extraterritorial effect that is new to Australian copyright law. In particular, as was noted in the material explaining the amendments introducing the communication right:

The inclusion of such a definition would mean that Australian copyright owners could control the communication from Australia of their material directed to overseas audiences.69

Before the amendments, the Copyright Act did not provide copyright owners with the exclusive right to control transmissions that originated from Australia but that were intended only for reception by a public outside Australia. After the amendments, the maker of the communication is required to obtain the licence of the Australian owner of copyright in the material being transmitted, regardless of whether the material is communicated to a public within or outside Australia.

However, the extraterritorial effect of this definition is not absolute. For there to be an infringement of Australian copyright law, the alleged infringing act must be sufficiently connected to Australia. This requirement is provided by s36(1) of the Act, which states:

the copyright in a literary, dramatic, musical or artistic work is infringed by a person who, not being the owner of the copyright, and without the licence of the owner of the copyright, does in Australia, or authorizes the doing in Australia of, any act comprised in the copyright.70 [Emphasis added.]

With the above principles in mind, we turn to consider eight scenarios that may help bring into relief the precise nature of the exclusive rights of making available and electronic transmission as provided in the Australian copyright legislation. Before doing so, however, it must be noted that the following analysis is about whether or not the communication right has been exercised; it is not about whether or not the communication right has been infringed. An analysis of the latter issue requires facts in addition to those set out in the eight scenarios.71 Put another way, a conclusion that the communication right has been exercised does not mean necessarily that the communication right has been infringed.
(i) **Scenario 1**

In Scenario 1, a content provider uploads a work onto an Internet server in Australia. The work is available for access by users in Australia (whether or not individuals outside Australia can also access the work). There is, however, no evidence that the work has been downloaded by anyone (whether in Australia or otherwise).

In relation to the making available right, it is clear that an unauthorised making available has occurred under Australian copyright law. The authors’ preferred view is that the act of making available occurs in the place where the work is accessible by the public — which, in this Scenario, is Australia. Thus, the work has been made available online to the public in Australia.

The position is different, however, in relation to the electronic transmission right. In the absence of any evidence of a download of the work, it cannot be said that the work has been transmitted to the public. Transmission requires, at the very least, an emission (even if not a reception).

Thus, in Scenario 1, there is an exercise of the communication right under Australian copyright law, but only by virtue of there being a making available online.

(ii) **Scenario 2**

Scenario 2 is the same as Scenario 1, except that there is evidence of a download of the work by an individual in Australia.

As with Scenario 1, and for the same reason, the act of making available online has occurred under Australian law.

The act of electronic transmission of the work has also occurred. There has been an emission (download) of the work, and so it may be said that the work has been electronically transmitted to the public in Australia. Further, this transmission has been ‘done’ in Australia (as required by s36) because, in the authors’ view, the act of electronic transmission occurs where the emission takes place. The emission takes place at the location of the Internet server from which the work is emitted — which, in this Scenario, is Australia.

Thus, in Scenario 2, there has been a communication of the work under Australian law, by virtue of there being both a making available online of the work and an electronic transmission of the work.

(iii) **Scenario 3**

Scenario 3 is the same as Scenario 1, except that the work is available for download only in foreign countries (that is, it is not available for download in Australia).

At first blush it might seem as though the making available right has been exercised in Australia, because the work is available to the public in a foreign country and the s10 definition of ‘to the public’ includes the public outside Australia. Such an interpretation is wrong, however, because it fails to take into account the requirement, set out in s36 of the Act, that an infringement occurs by the *doing in Australia* of an act comprised in the copyright of a work. Although the
work has been made available to the public for the purposes of the Australian legislation, the act of making available has not been done in Australia. Under the assumption that the act of making available occurs in the location in which the work is accessible by the public, the making available in this Scenario occurs outside Australia. Thus, there is no making available in Australia.

In relation to the electronic transmission right, however, there is no exercise of that right because there is no evidence of emission (that is, download).

Thus, the outcome in Scenario 3 is that there is no exercise of the communication right under Australian law.

(iv) Scenario 4
Scenario 4 is the same as Scenario 3, except that there is evidence of a download of the work by an individual outside Australia.

As with Scenario 3, and for the same reason, the act of making available online has not occurred under Australian law.

Interestingly, however, the act of electronic transmission of the work has occurred. The work has been emitted to a member of the public overseas. Because of the s10 definition of ‘to the public’, the transmission to a member of the public outside Australia constitutes transmission to the public for the purposes of the Australian legislation. Further, the act of emission has occurred in Australia (since this is where the Internet server is located), and so it may be said that the electronic transmission has been ‘done’ in Australia.

Thus, the outcome in Scenario 4 is that there is an exercise of the communication right under Australian copyright law, but only by virtue of there being an electronic transmission of the work.

(v) Scenario 5
Scenario 5 is essentially the reverse of the situation in Scenario 1. A content provider uploads a work onto an Internet server in a foreign country. The work is available for access by users in that foreign country (and/or other foreign countries) but not by users in Australia. There is no evidence of downloading of the work by anyone.

As with Scenario 3, and for the same reason, the act of making available online has not occurred under Australian law. Although the work has been made accessible to the public for the purposes of the Australian legislation (by virtue of the s10 definition of ‘to the public’), the act of making available has not been ‘done’ in Australia (as required by s36).

As with Scenario 1, in the absence of any evidence of a download of the work, it cannot be said that the work has been electronically transmitted to the public. This is because transmission requires, at the very least, an emission.

The outcome in Scenario 5 is that there is no exercise of the communication right under Australian law.
(vi) Scenario 6

Scenario 6 is the same as Scenario 5, except that there is evidence of a download of the work by an individual in the foreign country.

As with Scenario 5, and for the same reason, the act of making available online has not occurred under Australian law.

There is no exercise of the electronic transmission right under Australian copyright law. Although there has been a transmission to the public for the purposes of the legislation (by virtue of the s10 definition), the act of transmission has not been ‘done’ in Australia (as required by s36) because the emission took place in the foreign country.

Thus, the outcome in Scenario 6 is that there is no exercise of the communication right under Australian law.

(vii) Scenario 7

Scenario 7 is the same as Scenario 5, except that the work is available for download in Australia.

The authors consider that the act of making available has occurred under Australian copyright law. In the authors’ view, the act of making available takes place in the locations where the work is accessible by the public — which, in this Scenario, includes Australia. Thus, the work has been made available online to the public in Australia. This is despite the fact that the Internet server from which the work is made available is located outside Australia.

As with Scenario 1, and for the same reason, there is no act of electronically transmitting the work to the public.

The outcome of Scenario 7 is that there is an exercise of the communication right under Australian copyright law, but only by virtue of there being a making available online.

(viii) Scenario 8

Scenario 8 is the same as Scenario 7, except that there is evidence of a download of the work by an individual in Australia.

As with Scenario 7, and for the same reason, the act of making available online has occurred under Australian law.

The act of electronic transmission, however, has not occurred under Australian law. As with Scenario 6, although there has been a transmission to the public for the purposes of the legislation, the act of transmission has not been ‘done’ in Australia because the emission took place in the foreign country.

5. Conclusion

In this paper, we have explored the possible interpretations of the communication right embodied in Article 8 of the WCT. We have also considered the implementation of that right in the Australian copyright legislation, and in particular its extraterritorial effect.
We have shown that, from first principles, the making available right is a sub-
set of a broader right of communication provided by way of the ‘umbrella solution’
that is Article 8 of the WCT. We have reasoned that the act of making available is
complete by merely making a work available for on-demand transmission. Viewed
in this way, the act of making available occurs when the work is made available in
such a way that members of the public may access the work from a place and at a
time individually chosen by them. For there to be an exercise of the making
available right, it is not necessary that the work actually be downloaded; it is
sufficient that the work could be downloaded by a member of the public.

It follows that the act of making available occurs at the time when a work is
uploaded to a publicly accessible computer. It also follows that the place at which
a making available occurs should be considered to be the location from which
members of the public may access the work — which means, in practice, the
locations of each and every individual capable of accessing the Internet server onto
which the work has been uploaded.

The Australian copyright legislation has implemented the WCT Article 8 right
of communication to the public by way of two separate rights — a right of making
available online, and a right of electronic transmission. The right of making
available online, like the making available right in WCT Article 8 from which it is
derived, occurs when a work has been uploaded to an Internet server from which
the public may access it. In contrast, the right of electronic transmission occurs
when it is emitted from the Internet server — that is, at the commencement of an
act of downloading.

The authors consider that the place where an act of making available under the
Australian legislation occurs is the same as the place where an act of making
available under WCT Article 8 occurs — namely, the locations of each and every
individual capable of accessing the Internet server onto which the work has been
uploaded. In contrast, the place where an act of electronic transmission occurs is
the place where the act of emission of the work occurs — namely, the location of
the Internet server from which the work may be downloaded.

When these conceptualisations of the Australian communication right are
applied in the context of the legislation, it is seen that the right has an
extraterritorial effect. This extraterritorial effect is both outward and inward. The
outward extraterritorial effect is that the communication right is exercised by the
uploading of a work to an Internet server in Australia that is not accessible by the
Australian public, so long as the work is accessible by the public in a foreign
country and is in fact accessed (downloaded) by a member of the public in that
foreign country (Scenario 4). The inward extraterritorial effect is that the
communication right is exercised by the uploading of a work to an Internet server
located in a foreign country, so long as the work is accessible by the Australian
public (Scenarios 7 and 8). It will be appreciated that this extraterritorial effect of

The authors wish to reiterate that this paper considers only those rights contained in Article 8 of
the WCT. The arguments contained in this paper in no way pertain to the WPPT. See above n40.
the Australian communication right is significant. In particular, the communication right will be exercised in a number of situations in which the factual connection with Australia is slight.

Looked at another way, there are only a limited number of situations concerning Internet transmission of copyright works in which the Australian communication right will not be exercised. One situation is where the Internet server is located in Australia, but is not accessible by members of the Australian public and there is no evidence that it has been accessed by anyone (Scenario 3). Another situation is where the Internet server is located outside Australia and is not accessible by members of the Australian public (Scenarios 5 and 6).

Such situations will be rare, if they occur at all. More likely than not, such situations will never occur. If that proposition is correct, then the Australian communication right has total extraterritorial effect. Such an outcome no doubt has significant policy ramifications for Australian copyright law in the future.

73 If there is evidence that the Internet server has been accessed by members of the public, the right of electronic transmission will have been exercised even though the public is located outside Australia (Scenario 4).
Contracts to Leave Property by Will and Family Provision after Barns v Barns (2003) 196 ALR 65 — Orthodoxy or Aberration?

ROSALIND CROUCHER*

1. Introduction — Contracts and Family Provision

In 1941 and 1972 the Privy Council heard appeals from New Zealand and New South Wales respectively, both coming to opposite conclusions as to the relationship between a contract to leave property by will and the property (‘estate’) that was available under what is now known collectively as ‘family provision’ legislation. In Dillon v Public Trustee of New Zealand in 1941,1 the Judicial Committee decided that property the subject of such a contract was available to meet an order under such legislation; in Schaefer v Schuhmann in 1972,2 it decided that it was not. In Barns v Barns in 2003,3 the High Court of Australia decided to reject Schaefer and to follow Dillon.

A contract to leave property by will may, for example, be in the form of a promise to leave specific property by will,4 or a promise to leave the residue of the estate by will.5 The contract may also be in the form of ‘mutual wills’, where two people agree to make provisions by will binding upon each other.6 The idea behind such contracts is to provide certainty: to bind the contracting parties to deal with property in a particular way. The peculiar aspect of such arrangements is that the expression of the contract involves a will. In this manner inter vivos transactions overlap with postmortem plans. The problem is the extent to which contract law

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1 [1941] AC 294 (hereafter Dillon).
4 As, for example, in Synge v Synge [1894] 1 QB 466; Re Edwards [1958] Ch 168.
5 As, for example, in Palmer v Bank of New South Wales [1973] 2 NSWLR 244.
6 For example, Birmingham v Renfrew [1937] 57 CLR 666 (hereafter Birmingham v Renfrew); Bigg v Queensland Trustees Ltd [1990] 2 Qd R 11; Osborne v Osborne [2001] VSCA 228.
and wills law intersect — and particularly the extent of the reach of family provision legislation.

Family provision legislation in the form we now know it was first introduced in New Zealand in 1900.7 It was designed for widows and dependent children who had been omitted from the wills of their husbands and fathers in neglect of the moral obligation of the latter towards their families.8 It empowered a court to override a will, and later the distribution on intestacy, where defined eligible persons were left without adequate provision for proper maintenance, education or advancement in life.9 Once introduced in New Zealand, it was copied in all the Australian jurisdictions, the United Kingdom and some of the Canadian provinces.10

Provision could only be made out of the estate of the deceased — property owned beneficially by the relevant person as at the date of his or her death. One key issue in the jurisprudence that emerged in relation to the legislation was avoidance. To what extent could, or should, a testator be permitted to avoid the operation of the legislation by dispositions of property: by the disposition of property outright; or through a range of transactions, some of which were ‘will-like’ and others which involved some kind of contractual obligation undertaken. The answers to these questions involved questions of interpretation and questions of public policy. It has been ‘the subject of considerable controversy’.11 It was an

7 For a full analysis of the introduction of this legislation see Rosalind Atherton, ‘New Zealand’s Testator’s Family Maintenance Act of 1900 — the Stouts, the Women’s Movement and Political Compromise’ (1990) 7 Otago LR 202.
9 The legislation uses slightly differing wording: see Atherton, Family Provision, id at 130. Despite the differences in wording, uniformity of interpretation has been encouraged: Coates v National Trustees Executors and Agency Co Ltd (1956) 95 CLR 494 at 507 (Dixon CJ).
10 For general descriptions of the Australian family provision legislation, see John De Groot & Bruce Nickel, Family Provision in Australia & New Zealand (1993); Anthony Dickey, Family Provision after Death (1992) and Rosalind Atherton & Prue Vines, Succession — Families, Property and Death (2nd ed, 2003) (hereafter Atherton & Vines) at ch 15; and for the UK provisions, see Richard Oughton & Edward Griffin (eds), Tyler’s Family Provision (3rd ed, 1997) (hereafter Tyler’s Family Provision).
issue, said Gleeson CJ in *Barns*, ‘which has divided judicial opinion from the earliest days of such legislation’.12

As Gleeson CJ observed, there were two solutions that have been applied:

One possible solution is to conclude that the obligation undertaken by the testator is to be given effect in the same way as any other obligation binding on the estate, and that the subject property is not part of the estate available to meet an order for provision under the Act. Another possible solution is to treat an obligation to make a will in a certain form as subject to the operation of the statute.13

These solutions reflect different ways of viewing family provision legislation. And, in so doing, they reveal different ideas as to how the law should ‘manage’ issues of property within families: to what extent should notions of ‘family property’ be embodied in the law, as seen for instance in jurisdictions which include ideas of ‘community property’ on marriage and ‘forced heirship’ on death;14 or should property within families be left to be managed through the law of separate property, embodying ideas of freedom of contract and freedom of property? It is an area not without tension; but that is precisely because there are philosophical ideas with respect to the operation of property concepts within families that are fundamentally at odds with each other. How much should be governed by law; and how much should be left to the individual to decide (which meant, historically, the husband and father)? Any vagueness in statement of principle, or discretionary areas of the law — particularly statute — is wide open for an expression of such divergent views.

This article will explore first the divergence expressed judicially in *Dillon* and *Schaefer*, then examples of attempts to amend the legislation in the light of prevailing judicial opinion, followed by a consideration of *Barns v Barns* itself. The final section of the article analyses the decision in *Barns* in terms of its impact upon existing law and in the context of the broader framework of family provision law. Here the decision is considered under the rubric ‘aberration or orthodoxy’, located within an analysis of what was the purpose of family provision legislation and the extent to which this is, or could, be expressed in the legislation through judicial interpretation or legislative reform.

2. **The Law before Barns v Barns**

It is instructive to examine how the ‘solutions’ with respect to contracts to make testamentary dispositions and family provision legislation noted by Gleeson CJ were expressed in the cases and attempts at legislative amendment that set the jurisprudential framework for *Barns*.
A. **Dillon v Public Trustee of New Zealand** [1941] AC 294

*Dillon* was a decision on the perceived public policy of the legislation. It concerned an agreement entered into by Henry Dillon with his children after the death of his first wife. It made arrangements for the succession to the family farm. Henry married again. His will devised the farm as agreed in the contract and left the residue of his estate on trust for his widow, Amy. Amy applied under the New Zealand legislation applicable at that time, the *Family Protection Act* 1908. She asserted that her husband’s will did not make adequate provision for her proper maintenance and support. Henry’s children argued that the court had no power to vary the provisions of the will where they were simply giving effect to the contract. The majority of the Court of Appeal agreed with the latter submission, holding that the court had no jurisdiction to make an order under the Act that would cut down what the testator had left his children in fulfilment of a contract made for valuable consideration. The Judicial Committee disagreed.

Viscount Simon LC, delivering the judgment of the Judicial Committee, said that it was ‘plainly the case’ that a transfer to his children outright would have been effective to remove the property from the jurisdiction of the court under the legislation. When the property was left to them *by will*, however, the position was otherwise, as in the instant case. ‘There can be no dispute or doubt’, he said, ‘that the lands left to the children form part of the testator’s estate’:

...[t]hese devisees are not creditors of the estate. They are beneficiaries under the will. There is nothing in the nature of a debt owing to the children from the testator’s estate.

Assuming that all that was promised was the making of the will in a particular way, Henry had done what he had promised: he had made the devise in the will. Moreover, Viscount Simon continued, the contract could not oust the jurisdiction of the court and there was nothing in the Act that restricted the court’s power ‘to redistribute the estate in cases where the provisions in the will are a fulfilment of a contract entered into’.

Where such contracts were effective, the problem is that property was moved out of the estate for the purposes of an order under the Act. This was identified by Myers CJ for the majority of the Court of Appeal. It was precisely the point objected to by the dissenting judge in the Court of Appeal, Smith J, and by the Judicial Committee, on the basis that it flew in the face of the policy of the Act. This was expressed by the Judicial Committee in saying that:

The manifest purpose of the Family Protection Act … is to secure, on grounds of public policy, that a man who dies, leaving an estate which he distributes by will, shall not be permitted to leave widow and children inadequately provided for, if the court in its discretion thinks that the distribution of the estate should be altered.

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15 *Dillon*, above n1 at 302–303 referring to the judgment of Myers CJ & Ostler J.
16 Id at 302.
17 Id at 303.
18 Id at 303.
in their favour, even though the testator wishes by his will to bestow benefits on others, and even though he has framed his will as he contracted to do.\footnote{19 Id at 303–304.}

The key aspects of the Judicial Committee’s decision were the interpretation of the Act, and also the intersection between probate and equity. They were not clearly defined. On the one hand, there was the effect of the contract to leave property by will: was the promisee in the position of a creditor, or a beneficiary? That is, did the person take by virtue of the pre-existing obligation, or through the will? On the other hand, there was the question of the impact of such a contract in the context of legislation like the Family Protection Act — and it was only then that questions of the interpretation of the Act and public policy arose. It can be argued that the effect of the contract was being driven by the second question. As noted in the leading United Kingdom text on the subject, \textit{Tyler’s Family Provision}, Dillon was ‘badly received academically’.\footnote{20 \textit{Tyler’s Family Provision}, above n10 at 314.}

\section*{B. \textit{Schaefer v Schuhmann} [1972] AC 572}

\textit{Schaefer v Schuhmann}, a case which originated in New South Wales, concerned a ‘housekeeper contract’. The testator, Edward Seery, a widower with seven children, made a codicil to his will in June 1966 in which he gave his house and contents to his housekeeper, Elizabeth Schaefer, if she should still be employed by him in this capacity at the time of his death. He asked her to read out the codicil (after she had been working for him for about a month). He then paid her no further wages. Seery died in November 1966. The other beneficiaries in the will were his children. Edward’s adult daughters made a family provision claim in New South Wales against the estate. Street J at first instance based his decision on \textit{Dillon’s case} and held that three of the four daughters were entitled to provision. He directed that this provision should fall mainly on the house. There were two principal questions considered in the appeal: was the contract regarding the house enforceable; and, if so, did the court have jurisdiction to make an order affecting the house. The Judicial Committee overturned \textit{Dillon}. It held that there was an enforceable contract and that because of it the court did not have jurisdiction to make an order affecting the house.\footnote{21 See the analysis of the decision in Ian Hardingham, ‘\textit{Schaefer v Schuhmann}: Promisee v Dependant’ (1971) 10 \textit{UWALR} 115; W Anthony Lee, ‘Wills – Contract to Leave Property by Will – Jurisdiction to Make TFM Order Interfering with Benefit’ (1972) 46 \textit{ALJ} 191; W Anthony Lee, ‘Contracts to Make Wills’ (1971) 87 \textit{LQR} 358; W Anthony Lee, ‘Note’ (1972) 88 \textit{LQR} 320; Ross Sundberg, ‘The Problem in \textit{Schaefer v Schuhmann} – A Simple Answer?’ (1975) 49 \textit{ALJ} 223.}

Schaefer took not as beneficiary, but through the contract.

One particular decision that the Judicial Committee found helpful was the decision of the Court of Appeal in Tasmania, \textit{In re Richardson’s Estate},\footnote{22 (1934) 29 \textit{Tas LR} 149 (hereafter \textit{Richardson’s Estate}).} not
apparently cited in *Dillon’s case*. *Richardson’s* case concerned mutual wills and their interaction with the Tasmanian family provision legislation of the time. The deceased and his de facto wife made mutual wills, effectively excluding the deceased’s lawful wife and daughter from his estate. The gist of the decision was that the rights of the promisee under such arrangements ‘arise contractually and exist independently of the will’.

And, if it was thought appropriate to override such contracts, this was not a matter for the courts, but for the legislature.

While the majority opinion was in favour of the contract approach, Lord Simon of Glaisdale expressed a strong dissenting opinion about what he saw as the policy of the legislation:

> The legislative intention cannot… be in doubt: it was to prevent family dependants being thrown on the world with inadequate provision, when the person on whom they were dependent dies possessed of sufficient estate to provide for or contribute towards their maintenance. This was the ‘mischief’ for which the statute was providing a remedy; and the courts should endeavour so to construe the statute as to advance the remedy and abate the mischief…

The divergence between the majority and the dissentient captures the contrasting views about the purpose, and therefore the approach to construction, of the legislation. For the majority the line between inter vivos transactions and wills was clear: while there may be an overlap (in the case of contracts to make wills in particular ways), the effect was distinct and separate. The purpose of the legislation, while beneficent, was not unduly intrusive upon the estate, and particularly upon the arrangement of matters inter vivos. For Lord Simon, the dissentient, the ‘mischief’ to which the legislation was directed meant something entirely different and warranted just such an intrusion. It was a sharp divide.

C. Attempts to Amend the Legislation

In the years preceding the decision in *Dillon*, it had been the understanding of those working with the legislation that it did not apply to transactions that were effective as inter vivos transactions. The attempts to reform the legislation with respect to its property reach were accordingly founded on that premise. In New South Wales in the 1920s, for example, it had been proposed, unsuccessfully, to attach gifts made within one year of the deceased’s death. This amendment was prompted, it seems, by several letters to the Attorney General concerning the ease of evading the provisions of the Act by gifts made shortly before death. In the 1930s the matter was given passing consideration again in New South Wales, once more apparently prompted by specific correspondence arguing that by inter vivos

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23 Id at 155 (Nicholls CJ).
24 [1972] AC 572 at 592 (Cross LJ for the Judicial Committee).
25 Schaefer v Schuhmann, above n2 at 596F (Simon LJ).
26 The details of the particular Bills and the proposal for their introduction are found in the papers of the Department of the Attorney General and of Justice held in the State Archives of NSW, Special Bundles – Promulgation and Amendment of the Testator’s Family Maintenance and Guardianship of Infants Act 1916, AO 5/7782, Bundle 1.
27 There are several examples of correspondence to this effect: ibid.
dispositions ‘the whole object and intention of the Act is defeated and a widow and children can be left penniless’: 28 Juxtaposed to such a view was a consideration of testamentary freedom: that where the testator had made gifts or settlements prior to death there was probably a good reason for it.29 This was a view entirely consistent with the logic of testamentary freedom. Neither of these measures went further.

The reach of family provision legislation in the United Kingdom was considered by the Law Commission in the 1970s. 30 As noted in Tyler’s Family Provision, the Law Commission accepted Schaefer v Schuhmann as representing the law, but ‘sought to mitigate some of the worst abuses to which the decision potentially gave rise’.31 The Commission opted for a power to review any contract to make a will if it was made with an intention to defeat a family provision application. Further, a contract for ‘no valuable consideration’ was rebuttably presumed to be made with an intention to defeat a family provision application.32

In Australia, the question of significantly extending the reach of the legislation with respect to property had to wait until the amending legislation of the Family Provision Act 1982 (NSW) and the inclusion of ‘notional estate’ provisions. New South Wales is still the only jurisdiction in Australia to include such wide-ranging provisions.33 Between the 1930s and this legislation there was the Dillon decision and then Schaefer v Schuhmann. The former, in many respects, was regarded as an aberration; the latter restored orthodoxy.

The central problem that was at the heart of the issue in Dillon and Schaefer and informs, for example, the juxtaposed viewpoints expressed in discussion about proposed amendments to the legislation, was the place of family provision legislation in the context of inheritance. What was the policy of such legislation? More particularly, what ideas of ‘family property’ should, or should not, be embodied in the law, and how? Running through such questions is also the preliminary consideration of exactly what family provision legislation was meant to be — what was its purpose — and, if this is out of step with present expectations, how should it be altered to achieve that. Not all of this could be managed or resolved through the courts; it needed legislation as well.

28 F Eric McElhone to the Attorney General, 15 February 1933, Department of the Attorney General and of Justice, Special Bundles – Conveyancing, Trustee and Probate (Amendment) Bill 1938 (1921–1938).
29 Opinion of the Registrar of Probates, Minute, Department of Attorney General and Justice, 26 May 1933, ibid.
31 Tyler’s Family Provision, above n10 at 315.
32 For a consideration of the provisions, see id at 315–320.
33 Queensland is the only other Australian jurisdiction that specifically includes inter vivos transactions, and then only donatio[nes mortis causa, which are included as property for family provision purposes in Succession Act 1981 (Qld) s41(12). However the proposed uniform model bill includes notional estate provisions based on those in New South Wales: Queensland Law Reform Commission, National Committee for Uniform Succession Laws, Family Provision, Supplementary Report to the Standing Committee of Attorneys General Report No 58 (2004).
The problem, at its simplest, is separating out what family provision is from what it should be — and allocating responsibility for the ‘is’ and the ‘should’ bits of this problem. In Schaefer v Schuhmann, Lord Cross of Chelsea for the Judicial Committee captured this in the following remarks with respect to contracts to leave property by will:

The question whether contracts made by a testator not with a view to excluding the jurisdiction of the court under the Act but in the normal course of arranging his affairs in his lifetime should be liable to be wholly or partially set aside by the court under legislation of this character is a question of social policy upon which different people may reasonably take different views.... If and so far as it is thought desirable that the courts of any country should have power to interfere with testamentary dispositions made in pursuance of bona fide contracts to make them, it is, their Lordships think, better that such a power should be given by legislation deliberately framed with that end in view rather than by the placing of a construction on legislation couched in the form of that under consideration in this case which results in such astonishing anomalies, as flow from the decision in Dillon v Public Trustee of New Zealand.34

In its restoration of the dividing line between the inter vivos effect of contracts that concern wills and the property available to meet a family provision order, the decision in Schaefer underlined the need for legislative solutions. Finding a statutory anti-avoidance strategy, therefore, was one of the principal goals in the work of the New South Wales Law Reform Commission in the 1970s that led to the Family Provision Act 1982, and, in particular, the provisions in that Act concerning ‘notional estate’. Under these provisions the Court may designate property as notional estate where it is subject to a range of ‘prescribed transactions’.35 In formulating these provisions, the Commission considered comparative examples of ‘claw-back’ provisions, such as those in the Inheritance (Provision for Family and Dependants) Act 1975 (UK), the ‘augmented estate’ provisions of the Uniform Probate Code (US), the ‘forced share’ provisions in some US jurisdictions, which may be elected against the will, as well as the provisions in relation to matrimonial assets in the Family Law Act 1975 (Cth).36

One type of transaction caught by the notional estate provisions is a contract that provides for a disposition out of the deceased’s estate. The key issue in such situations is the question of consideration. Where the transaction involves a contract and ‘valuable consideration, although not full valuable consideration, in money or money’s worth’ is given, the transaction is ‘deemed to be entered into and to take effect at the time the contract is entered into’.37 So, if a contract is considered as being of ‘full valuable consideration’ then the relevant date is the date of the contract. Where this occurred more than three years before the death of the relevant person then the property affected by the contract is not subject to an

34 Schaefer v Schuhmann, above n2 at 592.
37 Family Provision Act 1982 (NSW) s22(6).
order under the Act. If the transaction fell within this period, then additional questions must be considered, such as intention to limit provision for eligible applicants.

Some leading commentators at the time the notional estate provisions were being proposed were strongly opposed to them. Professor Roy Woodman of the Faculty of Law, University of Sydney, was approached specifically for comment by the Attorney-General. He singled out freedom of contract as being eroded by the notional estate proposals. He referred to Schaefer v Schuhmann, and stated that ‘there is no reason whatever to upset a contract validly entered into by the deceased in his lifetime.’ The work on the Act was being managed in the Law Reform Commission by Denis Gressier. He provided a written response to the Attorney with respect to Professor Woodman’s comments. He found Woodman’s view reflective of ‘a somewhat emotional commitment to individualistic rights of disposition, without any underlying analysis of objectives’:

Again, it begs the question of how to achieve fairness in the operation of an agreed (given we have had T.F.M. legislation since 1916) legal rule that some interference with people’s discretionary rights is socially and morally justifiable.

The point, as he saw it, was this: ‘[i]t surely depends on what social objectives one is trying to achieve.’ What the juxtaposition of Woodman’s comments and Gressier’s response captures is precisely the tension that surrounds the subject, and the fundamental question about the role of family provision legislation.

At the time of the debate about reforming the legislation in New South Wales in the 1970s it was clear to those working with it that the old legislation reflected too much of the individual and not enough of the social, in terms of objectives, hence the need to reform it by amending legislation. The tension was to be resolved towards the social by extending the definition of eligible applicants and by extending the property that could be affected by an order under the Act.

What about the jurisdictions without notional estate provisions? In the absence of such provisions, the issues that could arise were whether there was any room in

39 Family Provision Act 1982 (NSW) s23(b).
40 The Attorney–General’s letters to Professor Woodman, Hutley J & RP Meagher (whom he also approached) are in Special Bundle of Papers – ‘Family Provision’, 83/8585, held in the archives of the Attorney–General’s office.
41 Woodman’s response is contained in the Special Bundle of Papers – ‘Family Provision’, id. Pages 2–3 of Woodman’s response deal with the notional estate provisions.
42 Later appointed as a Master in Equity in the Supreme Court.
44 Woodman’s response, above n41 at 7.
45 Ibid.
the doctrine stated in Schaefer to intrude upon or overturn a contract that had an effect on the estate of a deceased person in the family provision context. A further issue was whether Schaefer did, in fact, get it right. As to the first issue, in the passage in the speech of Lord Cross cited above, there are dicta that leave open the possibility of interfering with a contract where, for example, it was made not as a bona fide exercise ‘in the normal course of affairs’, but rather ‘with a view to excluding the jurisdiction of the court’. His Lordship however made it clear that he considered such matters the province of ‘legislation deliberately framed’ rather than straining the construction of the legislation. So he recognised the problem, but deferred it to the legislature, rather than the courts.

In Barns v Barns (2003) 196 ALR 65 the High Court decided that it did not need legislative amendment to intrude upon a contract to make a will in a particular way through the vehicle of family provision legislation. It held that it could do so as a matter of construction of the legislation. The decision considered the South Australian legislation in which there were no provisions such as those in New South Wales. It faced the validity, or not, of the reasoning and the decision in Schaefer. And it turned the tables on that decision in holding that the property the subject of a contract to leave property by will (in this case expressed in a mutual wills agreement) was subject to family provision legislation. In doing so, Barns v Barns has challenged us to consider a range of family provision questions further: in particular, what is family provision all about — if questions of construction and public policy are framed by purposive interpretations, then this is a most fundamental issue. This, ultimately, is the subject of this article: identifying the tensions and embracing them as necessary for a proper understanding of the landscape for any amendment to the law.


A. The facts

Lyle Barns died in August 1998. He was survived by his wife Alice and two children: their son Malcolm and their adopted daughter Kathryn and her two children. Lyle and Alice were farmers. By his will dated 2 May 1996, Lyle appointed his son Malcolm executor and left the whole of his estate to Alice, making no provision for either of their children. The same day that he executed the will, Lyle, Alice and Malcolm also executed a deed. This referred to an agreement between them whereby Lyle would make the will he did and that Alice would make her will in an agreed form (both of which were attached as schedules to the deed). Alice’s will was to similar effect — leaving her whole estate to her husband if he survived her — with the addition of a substitutional gift to Malcolm. The deed also stated that the wills would not be changed unless the other parties consented in writing.

46 See text at n34 above.
47 See judgment of Callinan J at 133. The deed is set out in Barns v Barns [2001] SASC 187.
The wills were mutual wills: they were made pursuant to a contract as to the provisions each would make on their death and that the wills would not be revoked.\footnote{For a consideration of mutual wills see, for example, the following and other articles cited therein: JDB Mitchell, ‘Some Aspects of Mutual Wills’ (1951) 14 Mod LR 136; R Burgess, ‘A Fresh Look at Mutual Wills’ (1970) 34 The Conveyancer 230; L Sheridan, ‘The Floating Trust: Mutual Wills’ (1977) 15 Adel LR 211; Timothy Youdan, ‘The Mutual Wills Doctrine’ (1979) 29 University of Toronto Law Journal 590; Charles Rickett, ‘A Rare Case of Mutual Wills and its Implications’ (1982) 8 Adel LR 178; Charles Rickett, ‘Mutual Wills and the Law of Restitution’ (1989) 105 LQR 534; Charles Rickett, ‘Extending Equity’s Reach through the Mutual Wills Doctrine?’ (1991) 54 Mod LR 581; AHR Brierley, ‘Mutual Wills – Blackpool Illuminations’ (1995) 58 Mod LR 95; Ken Mackie, ‘Recent Developments in the Law Relating to Mutual Wills’ (1998) 5 Aust Property LJ 95.} The deed recited that they would act to ensure that property owned at their death would devolve in accordance with the agreed wills: Malcolm had worked on the family farm his whole working life. Kathryn had been married and divorced and bankrupted after an unsuccessful business venture with her husband. At some stage her parents made some financial provision for her. In their wills they wanted to ensure that the farm went to Malcolm and to prevent an attack on their estates being made by Kathryn. Lyle agreed that all property owned by him at his death would devolve in accordance with the agreed will; Alice agreed similarly with respect to all property owned by her at her death.

Malcolm obtained a grant of probate of the will of his father in January 1999. The estate had a net value at this time of $A1.8 million. Kathryn applied in March for provision out of the estate of her father under the \textit{Inheritance (Family Provision) Act} 1972 (SA).\footnote{As a child of the deceased under s6(c) pursuant to the effect of s9(1) of the \textit{Adoption Act} 1988 (SA).} She also sought a declaration that the deed was void and of no effect against her application. The Supreme Court of South Australia dismissed Kathryn’s claim.\footnote{Barns v Barns (2001) 80 SASR 331.}

The issues concerned both the question of construction of the legislation: what amounted to ‘the estate’ of a deceased person available to meet an order for family provision; and the effect of mutual wills in the context of family provision legislation. The first question was whether the ‘estate’ as a matter of statutory interpretation included property that was affected by a contract, including a mutual wills contract. If the property were regarded as being the subject of a legally effective disposition or, for example, caught by a constructive trust, it would not form part of the estate. So, did (or should) ‘estate’ in a family provision context mean something else? The second question was consequential upon the first: if the ‘estate’ did not include property affected by a contract, could such a contract be avoided on the basis of public policy — as a doctrine operating independently of the statute itself and as a matter of general overriding doctrine?\footnote{The merits of Kathryn’s claim for provision out of the estate were never considered in the South Australian proceedings as the decision of the court as to the effect of the mutual wills agreement headed this off: \textit{Barns v Barns} (2001) 80 SASR 331.} A third question was the width of the exception suggested by Lord Cross in \textit{Schaefer}, with respect to ‘bona fide’ contracts.\footnote{See text at n34 above.}
B. The Majority Judgment

(i) The Construction of ‘Estate’

It was held by the majority of the High Court\(^53\) that the definition of ‘estate’ in the South Australian legislation included the property that was affected by the mutual wills contract. It did so as a matter of construction. Gleeson CJ, with whom the other majority judges agreed, summarised this as follows:

> Ultimately, it is the meaning and effect of the Act that must determine the outcome. Whether the question is approached on a purely textual basis, or by reference to a purposive construction, the result appears to me to be the same. … [T]here is no justification for a conclusion that the deceased left no estate out of which provision could be made for the appellant if a court saw fit.\(^54\)

The reasons for this conclusion were the nature of the contract itself; and/or because of the meaning of ‘estate’.

(a) Nature of the Contract

Gleeson CJ considered that the contract was performed through the making of the will.\(^55\) Any rights gained through the will made in pursuance of the deed were such ‘that they were always liable to be affected by the potential operation of the Act’.\(^56\) On this analysis, the promise was to make a will in a particular form, not to remove the property from the operation of the Act altogether:

> The effect of the legislation could have been avoided by a disposition inter vivos so that the deceased died with no estate; that is inherent in the scheme of the legislation. But the effect of the legislative restriction on freedom of testamentary disposition cannot be avoided by a promise to make a certain disposition.\(^57\)

This was a particular construction of the nature of the contract in question. In this respect the judgment echoed that of Viscount Simon in *Dillon’s case*: that the substance of the contract was to make the will, and no more,\(^58\) so that the promisee of the contract took as beneficiary under the will.

(b) Meaning of ‘Estate’

‘The manifest purpose of the Act’, according to the Chief Justice in *Barns v Barns*,\(^59\) was ‘the making of provision for the maintenance of members of a family who are found to be in need of such maintenance when the family tie has been broken by death’.\(^60\) Hence:

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\(^{53}\) Gleeson CJ, Gummow, Hayne & Kirby JJ; Callinan J dissenting.

\(^{54}\) *Barns*, above n 3 at 32.

\(^{55}\) *Barns*, above n 3 at 32.

\(^{56}\) Ibid.

\(^{57}\) Ibid.

\(^{58}\) See above text at n 16; *Dillon*, above n 1 at 303.

\(^{59}\) *Barns*, above n 3 at 34.

\(^{60}\) Jordan CJ in *In re Jacob Morris (Deceased)* (1943) 43 SR (NSW) 352 in a passage adopted on appeal to the High Court – *Lieberman v Morris* (1944) 69 CLR 69 at 78 (Latham CJ).
construction of the Act that permits a testator to nullify its operation by agreeing in advance to dispose of his or her estate in a certain fashion tends to defeat the purpose of the legislation. Such a construction is not required by the language of the Act.\(^{61}\)

Gummow and Hayne JJ also referred to the policy of the legislation as affecting its construction: the legislation was to be considered remedial in character and was therefore to be construed so as "to give the most complete remedy which its phraseology permitted",\(^{62}\) and the court should not be alert in placing a restricted construction upon the terms of such a law. And so,

\[\text{nothing in law or in the policy of the Inheritance Act appears in support of a reading down of s 7(1) thereof to deny the appellant's claim on the basis, contrary to the fact, that there is no subject matter of the deceased's estate. To read down in this way the scope of the estate would be to travel along a path of reasoning in the opposite direction to that to which this Court pointed 70 years ago in }\]

\[\text{Holmes [v Permanent Trustee Company of NSW (1932) 47 CLR 113]. It would facilitate the stultification of the object of the Inheritance Act by a simple expedient whereby testators covenanted not to revoke a particular will and died having observed that negative covenant.}\(^{63}\)

There was therefore no ground to read down the ordinary meaning of the phrase 'the estate of the deceased'.

Kirby J echoed this approach. He stated that 'the starting point for resolving the respective rights and obligations of the parties in the present appeals is an ascertainment of the true operation of the Act':

\[\text{Private contractual arrangements, otherwise valid and binding between the parties and their successors, must, once valid legislation impinges on the conduct of parties, be understood and applied subject to the operation of that legislation, construed so as to achieve its purposes as expressed in the chosen language.}\(^{64}\)

In applying this approach to 'the proper construction of the law', Kirby J agreed with Gleeson CJ that the rights obtained by the widow 'were always liable to be affected by the potential operation of the Act':

\[\text{The mutual promises of the deceased and the second respondent to make a specified testamentary disposition, however otherwise enforceable according to the unwritten law, were subject to the potential impact of the restriction on testamentary disposition for which the Act provided. Only this construction gives effect to the purpose of the Act according to its terms.}\(^{65}\)

So, the Court could 'reach' the property the subject of the contract even without statutory changes like those in New South Wales in the case of contracts to leave

\(^{61}\text{Barns, above n3 at 34.}\)
\(^{62}\text{Id at 44.}\)
\(^{63}\text{Id at 68.}\)
\(^{64}\text{Id at 127.}\)
\(^{65}\text{Id at 129.}\)
property by will. While Mrs Barns (as the survivor) would be restrained from departing from her promise, which would attract equitable intervention as in *Birmingham v Renfrew*, the ‘estate’ of Mr Barns (as this was interpreted in this decision) was liable to a family provision application. This was all based upon a conclusion or assumption as to the purpose or policy of the legislation, to which I will return later.

(ii) *Public Policy*

A separate argument by Kathryn, in addition to the width of the meaning of ‘estate’ in the legislation, was that the deed was void as being contrary to public policy. In the High Court, as the majority had held in Kathryn’s favour on the first issue, namely that the Deed did not remove the assets affected from the estate, it was unnecessary to consider separately the public policy argument. Several judges commented in dicta nonetheless. Gleeson CJ referred to ‘the general principle of public policy’ considered in *Lieberman v Morris*. In this case, the High Court held that a covenant by a potential claimant (a widow, as she would be at the relevant time) not to make a claim under family provision legislation was ineffective. It was considered that such a covenant could not deprive a court of the discretionary jurisdiction conferred upon it under the legislation. Gleeson CJ considered that the ‘legislative purpose’ did not extend beyond dealing with a deceased’s estate. Having found that the property the subject of the contract was part of the estate, there was no need to go further:

A construction of the Act that permits a testator to nullify its operation by agreeing in advance to dispose of his or her estate in a certain fashion tends to defeat the purpose of the legislation. Such a construction is not required by the language of the Act.

(iii) *The Exception in Schaefer?*

A subsidiary argument was based upon a qualification in the majority advice in *Schaefer v Schuhmann* by Lord Cross, in which his Lordship was referring to the effect of ‘bona fide contracts’ to make wills in a particular way. Given that the conclusion of the Privy Council in *Schaefer* was that property affected by a contract that bound the testator to a particular scheme of disposition could not be caught by the legislation, the only way out of the scheme of that decision was to hang it upon the hint of an exception mooted by Lord Cross, that where the transaction was not in some way ‘bona fide’ or in the ‘normal course of arranging his [or her] affairs’ there may be a ground for a challenge. At first instance Burley J agreed, holding that the deed was a contract made ‘with a view to excluding the jurisdiction of the court under the Act’ of the kind referred to in *Schaefer* by Lord

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66 *Birmingham v Renfrew*, above n6.
67 (1944) 69 CLR 69. *Barns*, above n3 at 34 (Gleeson CJ), citing (1944) 69 CLR 69 at 78 (Latham CJ adopting a passage of Jordan CJ in *In re Jacob Morris (Deceased)* (1943) 43 SR (NSW) 352).
68 *Barns*, above n3 at 34. See also Gummow & Hayne JJ at 59 and 60.
69 *Schaefer v Schuhmann*, above n2 at 592. See above text at n34.
70 *Barns*, above n47 especially at 44.
Cross. The Full Court of the Supreme Court of South Australia, however, held that it needed legislative change to achieve the claw-back of property affected by contracts of the kind in question.\textsuperscript{71}

In considering the possible exception suggested by Lord Cross, Gleeson CJ commented in \textit{Barns} that ‘the meaning of the expression “bona fide” in this context is a little obscure’.\textsuperscript{72} He remarked that a person could embark in good faith as well as bad, to enter a binding contract to make a certain form of testamentary disposition — and the disposition itself was not necessarily an indicator of bad faith.\textsuperscript{73} He could see good faith reasons for the kinds of transaction involved in the instant case, even if one of the reasons was precisely to make it impossible for an applicant to claim under family provision legislation.

\textbf{C. The Dissent}

Callinan J considered that to upset the agreement was a matter for legislative intervention because it involved overturning ‘longstanding understandings with respect to the effect of mutual wills and their invulnerability to testator’s family maintenance legislation’.\textsuperscript{74} This was a judgment that reflected strongly the prior orthodoxy as represented, in particular, by \textit{Schaefer v Schuhmann}.

While Callinan J recognised that ‘considerations of social and legal policy are involved’ in the particular litigation,\textsuperscript{75} ‘[p]arties should be held to their contracts’:\textsuperscript{76}

The courts should be concerned to enforce lawful contracts. There is no reason why mutual wills should be singled out as being unacceptably subversive of legislation for the protection of a deceased’s family whilst gifts and other dispositions inter vivos should not. A person knowingly accepting a benefit with a burden attaching to it should ordinarily bear that burden, even absent an express assumption of any obligation. There should not be any unnecessary intrusions upon the freedom of disposition of property by testators.\textsuperscript{77}

It was not that Callinan J considered that inter vivos contracts were entirely immune from interference in the interests of family members under family provision legislation, but rather that should this be the intention of the legislature it needed to be expressly stated.\textsuperscript{78}

\textbf{4. Aberration or Orthodoxy?}

On one level, the decision in \textit{Barns v Barns} gives a clear interpretation of the ‘estate’ covered by family provision legislation in the future — at least in those jurisdictions without notional estate. Moreover, as a decision of the High Court it

\textsuperscript{71} (2001) SASR 331 at 1 (Prior J), 125 (Lander J) & 130 (Wicks J).

\textsuperscript{72} \textit{Barns}, above n3 at 39.

\textsuperscript{73} Ibid.

\textsuperscript{74} Id at 132.

\textsuperscript{75} \textit{Barns}, above n3 at 140.

\textsuperscript{76} Ibid.

\textsuperscript{77} Ibid.

\textsuperscript{78} Id, especially at 161, 171.
creates a new orthodoxy, that the ‘estate’ of a deceased person includes, for the purposes of legislation like the *Inheritance (Family Provision) Act 1972* (SA), property that is the subject of a contract to leave it by will in a particular manner. For those who have made mutual wills upon the understanding of the law prior to the decision, it will require a revision of estate plans. As Charles Rowland noted\(^79\) mutual wills have been made on the previous understanding of the law since the decision in *Schaefer v Schuhmann* in 1972. Often such arrangements have been made with the purpose of avoiding family provision in the sense that it might derail a carefully planned strategy for succession to property in a family context. Such arrangements will need to be revisited and the clients advised accordingly, if the family estate plans are to be effective as desired.

In New South Wales, the position is somewhat different. The introduction of the notional estate provisions brought to the forefront the distinction of ‘estate versus notional estate’ that had been implicit in the decisions on the legislation prior to the introduction of the *Family Provision Act 1982* (NSW). It made explicit in the legislation that ‘estate’ and ‘notional estate’ were different. Things subject to contracts (like mutual wills) were not within the definition of ‘estate’. To bring such property within the legislation required now the application of the complex procedures and definitions of ‘notional estate’. This requires a particular kind of transaction, an absence of relevant consideration, a defined time frame in which the transaction took effect and a range of other matters to be considered before property can be designated as notional estate and made the subject of an order for family provision under the Act.

Firstly, the transaction needs to be identified as a ‘prescribed transaction’.\(^80\) This involves an act or omission as a result of which property ‘becomes held by another person’ or property ‘becomes subject to a trust’;\(^81\) and the absence of ‘full valuable consideration in money or money’s worth’ for the relevant act or omission.\(^82\) Secondly, if the transaction involves a contract ‘providing for a disposition of property out of the person’s estate’, which would include a contract of the kind under consideration, then the transaction is deemed to be a transaction involving a relevant act or omission.\(^83\) As for the requirement of consideration, it is further provided that where a prescribed transaction involves any kind of contract, and valuable consideration, although not full valuable consideration, in money or money’s worth is given for becoming a party to the contract, the transaction shall, for the purposes of this Act, be deemed to be entered into and to take effect at the time the contract is entered into.\(^84\) In the context of contracts to leave property by will, if there is considered to be no valuable consideration in money or money’s worth for the contract, then the transaction is deemed to be


\(^80\) *Family Provision Act 1982* (NSW) s22(1).

\(^81\) Id at s22(1)(a).

\(^82\) Id at s22(1)(b).

\(^83\) Id at s22(4)(f).

\(^84\) Id at s22(6).
entered into immediately before, and to take effect on, the death of the relevant person.85

Once the date is determined for the coming into effect of the contract, other provisions must be considered. There is a sliding scale of additional considerations depending on this dating. Where the transaction is deemed to take effect on death, the court may proceed to consider whether to designate the property or not.86 If, however, the transaction is dated at an earlier time, then other questions must be considered before the court may consider designating the property or not. If the transaction is deemed to take effect within three years before the death of the deceased, then the court must consider whether the transaction was entered into ‘with the intention, wholly or in part, of denying or limiting, wholly or in part, provision for the maintenance, education or advancement in life of that or any other eligible person out of the deceased person’s estate or otherwise’. Where the transaction took effect within the period of one year before death, the question is whether the transaction was entered into ‘at a time when the deceased person had a moral obligation to make adequate provision, by will or otherwise, for the proper maintenance, education and advancement in life of that or any other eligible person which was substantially greater than any moral obligation of the deceased person to enter into the prescribed transaction’.87

For New South Wales, therefore, the legislation makes clear that a contract to make a will is not covered within a general construction of the term ‘estate’, but must be considered as part of the non-estate, ‘notional’ estate provisions.

With respect to other jurisdictions in Australia, Barns v Barns has suggested that ‘estate’ by itself may be pushed into what, in New South Wales, is now notional estate territory — at least where the relevant transaction involves a contract to leave property by will. If the property is still in the testator’s name, notwithstanding that it may be affected by a contract to leave it in a particular way, and notwithstanding any argument about trusts that may arise in result, the property is part of the ‘estate’ for family provision purposes in jurisdictions outside New South Wales. Hence the only area of argument in New South Wales is whether there is any room left for the public policy argument used in the alternative in Barns. Probably not, as issues of intention to evade the Act are captured in the various elements of the deeming provisions concerning notional estate.88

While Barns overturned what had been accepted as orthodoxy, clearly since Schaefer v Schuhmann, it was sympathetic with, for example, the High Court’s decision in Easterbrook v Young.89 In this case, the court gave an expansive interpretation to the expression ‘final distribution’ of the estate for the purposes of considering whether an application for an extension of time to apply under the legislation should be permitted. It was expansive in the sense that it did not use

85 Id at s22(5). If the contract specifies another event for the transferring of property, then that date is the relevant date.
86 Id at s23(b)(iii) – subject to the matters set out in ss26–28.
87 Id at s23(b)(i)-(ii).
88 Ibid.
89 (1977) 136 CLR 308.
normal trust principles, namely to hold that an estate had been ‘distributed’ once
the personal representative had completed the administration of the estate and was
now holding as trustee; but rather that the estate would only be finally ‘distributed’
when it left the hands of the personal representative in a physical sense, namely
that there is no remaining title of any kind in the personal representative.90

Where a person is intent on arranging his or her property in a settled way,
following Barns, the only way of achieving it — in those jurisdictions that do not
have notional estate — is by way of outright disposition inter vivos. Even then
there is the remnant of the public policy argument contained within Schaefer, that
if the transaction were intended to evade the Act then it might be challengeable; as
well as the application of public policy in Barns itself, which in turn had relied on
another High Court decision in Lierberman v Morris.91

While Barns v Barns is authoritative with respect to the meaning of ‘estate’,
the decision leaves some tantalising points for further consideration. One issue is
the interface between probate and equity — a point of jurisdictional collision at
times over the centuries. Another is whether ‘they got it right’ with respect to the
purpose of the Act: what was the mischief at which family provision was aimed?
What was its purpose? This helps to explain the particular shape of the legislation
then and now: when it was introduced, and why certain issues keep arising in the
cases that consider it. A third issue is what such a case prompts us to consider in
relation to the purpose of family provision today.

(i) Interface between Probate and Equity

The probate and equity effects of a contract to leave property by will are entirely
different. In mutual wills, while there is a contract that involves wills, to say that
the contract is performed by the making of the will by Lyle, and his dying with the
will unrevoked, is somewhat artificial. The whole point of mutual wills
transactions is to tie the property. The will is only incidental to this. When the will
itself is revoked (in breach of the contract), equity can give effect to the
obligations, notwithstanding that, as a matter of probate law, the last will must be
admitted to probate.92 If the survivor changed his or her will, the obligations
remained. This is the probate effect of the transaction. The equity effect is quite
distinct. It was described in Birmingham v Renfrew, a case in which a married
couple, Grace and Joseph, had made mutual wills, as follows: when Grace died
without having revoked her will (ie, she had performed her part of the contract),
Joseph, the survivor, was affected by a trust to give effect to their agreement.
Dixon J described it is a ‘floating obligation, suspended, so to speak, during the
lifetime of the survivor’ which then descended on the assets at the death of the

90 The New South Wales legislation was subsequently amended specifically to reflect this: Family
Provision Act 1982 s6(5). De Groot & Nickel argued that the Queensland provision, which uses
‘normal estate distribution principles’, is to be preferred: De Groot & Nickel, above n10 at 411.
91 (1944) 69 CLR 69.
92 Dufour v Pereira (1769) 1 Dick 419; 21 ER 332. See the fuller note of this case, which began
the doctrine of mutual wills in English law: Francis Hargrave, Jurisconsulti Exercitationes (1811)
vol 2, 100–108 at 104, 105.
survivor to ‘crystallize into a trust’. As Dixon J remarked in *Birmingham v Renfrew*, ‘the doctrines of equity attach the obligation to the property’: ‘[t]he effect is that the survivor becomes a constructive trustee and the terms of the trust are those of the will which he undertook would be his last will’. The property in the estate of the first to die was affected by that trust: it was not unfettered from obligation.

A mutual wills agreement is about settling the property amongst the family members in an agreed way. The will is merely an element in achieving this: ‘the will operates as the performance of the contract, not as bounty’, commented Nicholls CJ in *Re Richardson’s Estate* in 1935. It is about achieving a certainty with respect to family property that is not otherwise achievable through the law of separate property. To say that Lyle Barns had done what he had contracted to do (through making the will), the approach of Clark J in *Re Richardson’s Estate*, and, according to Gleeson CJ in *Barns*, ‘the better argument’, might, however, be said to miss the larger point of mutual wills transactions. They may indeed involve an element of avoidance of family provision claims, but why can’t they be characterised as (and perhaps more) ‘in the ordinary course’ of ordering property within a family?

Gleeson CJ acknowledged the ‘anomaly’ that if the testator had broken his promise, there may have been a liability in damages to the other contracting party. If the promise was to leave the whole estate, the measure of damages would have been the value of the estate. Should the contracting party be worse off simply because the testator, like Lyle, had performed his contract rather than if he had broken it? The nature of the particular obligation, and therefore equity’s response to it, may nonetheless be affected by what the parties have agreed. As commented by Gummow and Hayne JJ in *Barns*, ‘[u]ndoubtedly the terms of the particular extra-testamentary obligation are vital to its legal character and operation’. Either the contract could itself be construed as subject to the possibility of redistribution of the estate under family provision legislation, or the legislation itself, within its own terms, could be construed as including property the subject of the contract in the ‘estate’ available under it.

In *Barns* the decision was that, as the wills left the whole estate, and as the contract was to leave ‘the residuary estate’ to the survivor, it was only such estate as remained after the satisfaction of, inter alia, claims under family provision legislation. Even where one specified expressly to the contrary, it seems that

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93 *Birmingham v Renfrew*, above n6 at 689. See *Barns*, above n3 at 85 (Gummow & Hayne JJ).
94 Id at 683.
95 *Richardson’s Estate*, above n22 at 155. This reasoning was that adopted by the Privy Council in *Schaefer v Schuhmann*, above n2.
96 Id at 157–160.
97 *Barns*, above n3 at 21.
98 Cross LJ, above n24.
99 *Barns*, above n3 at 21.
100 Ibid.
101 Id at 69. See Rickett (1991), above n48 with respect to the remedial application of equitable doctrine in this context.
‘estate’ would be defined, post Barns, as including any property the subject of a contract to leave property by will, whether mutual or otherwise. ‘Ultimately’, said the Chief Justice, ‘it is the meaning and effect of the Act that must determine the outcome’. Which leads, then, to the question of ‘the meaning and effect’, or the purpose, of the Act.

(ii) The Purpose of the Legislation?
There are various statements as to ‘the purpose’ of the legislation. It is certainly ‘remedial’, but is it:

…to prevent family dependants being thrown on the world with inadequate provision, when the person on whom they were dependent dies possessed of sufficient estate to provide for or contribute towards their maintenance[?]102

Is it ‘to assure to the family of a deceased person adequate provision out of [the deceased ‘s] estate’? Or is its purpose actually something other than this?

Family provision legislation is not, as its name suggests, family provision legislation. It was cast as family maintenance legislation within strict confines. And it was cast from the perspective of the testator. It did not impose a restriction upon testamentary freedom, except in a broad, minimally corrective sense. The original model for the legislation did restrict testamentary freedom, by proposing the reintroduction of the ‘fixed shares’ regime of pre-18th century England that applied with respect to personal property and that still applied in Scotland.103 It was the brainchild of Sir Robert Stout, Premier and later Chief Justice of New Zealand.104 Its purpose was ‘to prevent a husband from willing the whole of his property to persons other than his wife’.105

Stout introduced several bills that were designed to compel a man to leave a certain proportion of his estate to his widow and children. As a Scotsman, he was familiar with the civil law principle of fixed shares which applied in Scotland and he sought to introduce it into New Zealand. When Lord Simon in Schaefer v Schuhmann expressed his dissenting opinion, he was also speaking as a Scotsman, familiar with a natural intrusion, or limitation, upon testamentary powers in favour of the wife and ‘bairns’. But Stout’s model did not succeed. It was only the non-directive, discretionary model, with limited powers of adjustment that succeeded.106 And it has provided the template for all family provision legislation since.

102 Schaefer v Schuhmann, above n2 at 596 (Simon LJ) cited in Barns v Barns at 2 (Gleeson CJ).
103 See Atherton (1990), above n7. It was the Scottish model that was in the mind of its progenitor, Robert Stout.
104 The details of this and the specific sequence of the Bills leading up to the 1900 Act are given fully in Atherton, ibid.
105 ‘Sir Robert Stout before the Women’, newscutting with no source, in ‘The Election of 1893 – Newspaper Clippings’, vol 1, Alexander Turnbull Library, Wellington, New Zealand. Stout was campaigning in the 1893 general election. He was addressing a crowd of 700–800 women – women having just been granted the suffrage that same year – Electoral Act 1893. See Atherton, ibid.
106 Ibid.
The discretionary form of the successful Testator’s Family Maintenance Act was deliberately cast not as an invasion upon testamentary freedom. As the mover of the first of the discretionary forms of bills, Robert McNab, stated in his second reading speech, he did not propose ‘to take away from any person any right of disposal of any part of his property’, rather he ‘only sought to provide for the maintenance of the wife and family’. They were no longer ‘Limitation to the Power of Disposition by Will’ Bills, but ‘Testator’s Family Maintenance’ Bills that led to the passage of the Testator’s Family Maintenance Act 1900.

Family provision legislation conceptually was only a modest qualification on testamentary freedom. It was meant to complement it, not to replace it. This limited approach, cast from the perspective of the particular testator, was seen in the debates that accompanied the introduction of the legislation in its earliest form; in the development and continuing relevance of the ‘moral duty’ approach to the assessment of claims; in decisions that mapped out, for example, the ‘range of foresight’ expected in assessing claims; the casting of provisions in terms of needs for maintenance; and the insistence on not re-writing the will.

So when Lord Simon gave voice to the same philosophical concerns, embodied in Stout’s endeavours, in his dissenting opinion in Schaefer v Schuhmann, he was speaking about what the law should be, rather than what family provision legislation was. And, in doing so, he misconstrued the ‘mischief’ at which the statute was aimed — as expressed in Anglo-Australian (and New Zealand) law.

In a situation like Barns v Barns, the testator, his wife and son, had carefully crafted a ‘family property’ solution for their family. Testamentary freedom, as it found expression particularly in the 18th and 19th centuries in England, was justified on the basis of the powers of discrimination amongst family members, that it was ‘an instrument of authority, confided to individuals, for the encouragement of virtue and the repression of vice in the bosom of their families’. The power of testation was seen both as an aspect of individual fulfilment and anchored in ideas of private property, and an instrument of social control. It was seen both as an incentive to industry and the accumulation of

107 1900 New Zealand Parliamentary Debates, vol 111 at 504.
108 See in particular my arguments in Atherton (1999), above n8.
109 See Atherton (1990), above n7.
110 See Atherton (1999), above n8.
111 Coates v National Trustees Executors and Agency Co Ltd (1956) 95 CLR 494, which held that the facts and circumstances to be considered in the evaluation of the claim of applicants were those facts at the date of the deceased’s death, taking into account those matters within the range of reasonable foresight of the deceased. Conceptually this reiterated the connection between testamentary freedom and testator’s family maintenance.
112 See, for example, Pontifical Society for the Propagation of the Faith v Scales (1961–62) 107 CLR 1 at 19 (Dixon CJ). This was based on both the importance of testamentary freedom and a complementary respect for privacy in family matters: see, for example, Plimmer v Plimmer (1906) 9 NZGLR 10 at 21 (Edwards J).
113 Schaefer v Schuhmann, above n2 at 595.
wealth,115 and as preferable to a system of fixed inheritance rights, which were represented as a disincentive to heirs to work and would therefore reduce the total wealth of a nation.116 So the contractual arrangement in *Barns* can be seen, in many respects, as the careful exercise of testamentary powers that was the assumed premise (and justification) for the very freedom of testation itself.

Testamentary freedom operated within a family context, as serving a particular function, but it was to be exercised within a framework of moral responsibility. In *Banks v Goodfellow* in 1870,117 Cockburn CJ summarised the intellectual tradition contained in this doctrine of ‘testamentary freedom’ as follows:

> The law of every civilised people concedes to the owner of property the right of determining by his last will, either in whole or in part, to whom the effects which he leaves behind him shall pass. Yet it is clear that, though the law leaves to the owner of property absolute freedom in this ultimate disposal of that of which he is enabled to dispose, a moral responsibility of no ordinary importance attaches to the exercise of the right thus given... The English law leaves everything to the unfettered discretion of the testator, on the assumption that, though in some instances, caprice or passion, or the power of new ties, or artful contrivance, or sinister influence, may lead to the neglect of claims that ought to be attended to, yet, the instincts, affections, and common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case, than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of the general law...118

That ‘moral responsibility of no ordinary importance’ inherent in the power of testation was to provide for the maintenance, education and advancement in life of children: ‘to enable them to start with a fair chance of achieving by their own exertions a successful life’;119 to ‘encourage virtue’ and to ‘repress vice’ in the testator's family.120 Freedom, in this context with respect to the power to control postmortem the distribution of property through wills, was not therefore to exist in the abstract. Philosophically the freedom was located in a framework of moral responsibility, duty and obligation. Viewed in this light, one might argue that Lyle Barns did indeed behave as the (just and wise husband and father)121 that both testamentary freedom and testator’s family maintenance legislation expected of him.

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115 Henry Sidgwick, ‘Inheritance’ in *The Elements of Politics* (1897); Josiah Wedgwood, *The Economics of Inheritance* (1939) at 200–201.
116 Wedgwood, above n91 at 194; Harold J Laski, *A Grammar of Politics* (1925) at 528; Hugh Dalton, ‘Effects of the Non-fiscal Law’ in *Some Aspects of the Inequality of Incomes in Modern Communities* (1929) especially s4 at 301.
117 (1870) 5 LR QB 549.
118 Id at 563–565.
120 Bentham, above n114.
121 *Bosch v Perpetual Trustee Co Ltd* [1938] AC 438 at 478–479 (Romer LJ), citing with approval the analysis in *Re Allen* [1922] NZLR 218 at 220 (Salmond J); and *Re Allardice; Allardice v Allardice* (1910) 29 NZLR 959 at 972–973 (Edwards J).
Testator’s family maintenance or family provision legislation reflected the same values. In this way the moral duty approach that defined the jurisdiction can be seen as a natural continuity with the ideas and rationale of property developed in England over several centuries. The court was placed in the testator’s position, but in a more objective role than the individual testator. The major difference between the function of testamentary freedom and the court’s discretion under family provision legislation was that the court was limited in what it could do: it could only make an order on the basis of what was necessary for ‘proper maintenance, education or advancement in life’ (or similar formulae); it was not an ‘at large’ jurisdiction. The remedial powers were thus framed within a model of dependence on the testator, not simply redoing the testamentary equation. They were also framed on the basis of preserving testamentary freedom, so that applicants who desired provision had to come to the court to establish their case: there was no introduction (or re-introduction) of a fixed shares regime. Theirs was the right to apply; not a right to provision. This was acknowledged by the Privy Council in Dillon v Public Trustee of New Zealand,122 in saying that:

[t]heir Lordships cannot regard it as a correct exposition of [the Family Protection Act 1908 (NZ)] to say that it imposes on a husband the obligation to make adequate testamentary provision for the maintenance and support of his wife. The statute does not impose any duty to frame a will in a particular way, and the testator did not fail to observe any statutory obligation by making his will as he did. What the statute does is to confer on the court a discretionary jurisdiction to override what would otherwise be the operation of a will by ordering that additional provision should be made for certain relations of the testator’s estate, notwithstanding the provisions which the will actually contains. If the testator does not make adequate provision in his will for his wife, husband or children, he does not thereby offend against any legal duty imposed by the statute. His will-making power remains unrestricted, but the statute in such a case authorises the court to interpose and carve out of his estate what amounts to adequate provision for these relations if they are not sufficiently provided for.123

That there are divergent views of the legislation and the role it can play — even its purpose and policy — is a reflection of the elasticity within it. The purpose of the legislation as seen by the members of the majority in Barns is, therefore, both aberrant and orthodox. It can be seen as ‘aberrant’ with respect to the purpose of those who drove the introduction of the legislation — or most of them. But it is also ‘orthodox’ in the sense that many have seen in the legislation the potential for a much bigger role. If, indeed, it is thought appropriate for legislation to have such a wide, and more invasive, role in the testamentary domain, then this should guide legislative reform.

(iii) The Purpose of Family Provision Legislation Today
While family provision legislation began as a modest intrusion upon testamentary freedom, it has been subject to great pressure for expansion, both through the

123 Id at 301.
interpretation of the legislation, particularly in relation to adult children, and through specific legislative amendment. Indeed, *Barns v Barns* itself may be considered an example of this. The fact of expansion of operation is not in itself problematic, provided that there is (ideally) a consistent logic for doing so, or at least recognising what the perhaps divergent logical pathways mean in terms of the development from the initial jurisprudential logic of the jurisdiction. This is where facing squarely the notion of the role and purpose of family provision legislation is of fundamental importance to any change. To take one example, the categories of eligible applicant have been extended significantly in all jurisdictions, but without a consistent logic being expressed.

My own work for the Victorian Law Reform Advisory Council in 1994 traversed a range of possibilities, predicated upon the differing roles that could be seen as appropriate for the legislation, and argued for a consistency of approach.124 The questions I posed in my Report for the Victorian Law Reform Advisory Council captured the range of questions as follows:

If moral obligation is the keystone, to what extent does the legislation fulfil it? Is it true to the jurisprudential framework or not? If not, where is it lacking? Should the gaps, if any, be filled? Has it gone too far? Why should adults have claims on their parents? Such questions will affect the drafting of conditions of eligibility; it will affect the criteria for the award of orders under the Act. For example, should eligibility be defined in terms of ‘moral obligation’ rather than by lists or by categories which are not necessarily coincident with moral obligation, such as dependency (although this may assume moral obligation at least to the extent that relationships of dependency may give rise to it)? This would arguably be truer to the philosophy of testamentary freedom but would hugely increase discretion and for that reason may be unworkable. Should the court have jurisdiction not only to assess a breach of moral duty but also fully to rectify it? Should questions of conduct take over the litigation — where moral duty becomes the mechanism of the jurisdiction surely this must be the case. But then what is the value of testamentary freedom? Would this go too far into the testator’s armchair?125

Once the underlying logic of the role that such legislation should play was identified, then reform could be undertaken on a consistent basis and a template generated for justifying future amendments. For example, if moral obligation were seen as the core principle, then a wider role for family provision could be crafted. If the idea of maintaining dependants or relieving needs was identified as the relevant function, however, then a narrower role for the legislation could be found. The Victorian legislature opted for moral obligation as the guiding principle: it rejected a list based approach and went for the one category approach: ‘those for

124 When there were proposals for law reform being considered with respect to family provision. It was presented in 1994 and later published in a series of ‘Expert Reports’ by the Council as *Expert Report 1: Family Provision* (1997). See generally Chapter 2 and the summary of recommendations in Chapter 6. The Expert Report was provided to the New Zealand Law Commission when undertaking its work in relation to the New Zealand Act.

125 *Family Provision*, above n124 at 2.241. See also the summary recommendations in Chapter 6.
whom the deceased had responsibility to make provision’. The recommendations of the National Committee for Uniform Succession Laws in Australia includes this concept in addition to a limited list, including spouse and non-adult children.126

Family provision legislation today is in a muddle. It jumbles up its original logic and dilutes the logic of testamentary freedom. Succession law as a whole, moreover, is straining under conflicting pressures. On the one hand, testamentary freedom is being extended through the introduction of ‘dispensing powers’ in all jurisdictions in Australia to overcome deficiencies in compliance with wills formalities;127 and by powers of rectification of wills to get closer to what the testator really wants to happen with his or her property on death. This represents in succession law a jumble of individualism and family property – with neither articulated fully and well. The individual is given precedence through an expansion of the operation of testamentary instruments into what was formerly an impenetrable domain of informal and highly technical invalidity. Further, if the testator’s intention is not wonderfully clear there is an increasing role for powers of rectification to correct, or fathom, the testator’s real intention.128

And yet, on the other side of the scales of succession law, sits family provision legislation; and this is increasingly expanding. Its role is being pushed to recognise more claimants; to grab, or claw back, more property; to override a testator’s wish to limit provision for, or exclude, particular family members in favour of others, or for other reasons — all of which represents an overriding of the individual testator’s judgment with respect to the property of his or her particular family. There is a real clash between ‘individual’ and ‘family’ in the directions of succession law: it is expressed philosophically through conflicting narratives on the purpose of, for instance, family provision legislation; it is expressed practically through legislation which expands powers to intrude upon testamentary territory for entirely opposite reasons.

In the family provision domain the National Committee for Uniform Succession Laws proposed, in its model Family Provision Bill 2004,129 that the court should be given powers to reach property that is not included in, or has been distributed from, the estate of a deceased person. It included the orthodox conceptualisation of property in and out of an estate as embodied in Schaefer v Schuhmann, in that it expressly provided for contracts disposing of property out of the relevant person’s estate.130

127 For a consideration of the varying provisions see Atherton & Vines, above n10 at 8.13ff.
128 Wills Act 1968 (ACT) s12A(1); Wills, Probate and Administration Act 1898 (NSW) s29A; Wills Act 1936 (SA) s25A; Wills Act 1992 (Tas), s47; Wills Act 1997 (Vic), s31; Wills Act 2000 (NT), s31; Succession Act 1981 (Qld), s31. For a consideration of the varying provisions see Atherton & Vines, above n10 at 10.13ff.
129 Family Provision Bill 2004, above n33, included as Appendix 2 to Queensland Law Reform Commission, above n126.
130 Id at clause 27(2) f).
Barns v Barns demonstrates that the tension contained in the legislation continues. It creates a new orthodoxy in terms of the definition of ‘estate’ with significant ramifications for possibly many well-laid estate plans since Schaefer v Schuhmann. It is a timely reminder of the need to push ahead for reform of family provision legislation — and on an agreed national basis as urged by the Standing Committee of Attorneys-General and put into effect through the Uniform Succession Project.\textsuperscript{131} It will also require a revision of the property provisions of the Bill prepared as part of that project. To date this project has led to recommendations for following the concept of an expanded reach of the legislation with respect to property as included in the New South Wales provisions. But, in Barns v Barns, the ground rules for the interpretation of ‘estate’ in the legislation (apart from New South Wales) has changed.

And so, post Barns v Barns in Australia, and more generally, it is timely for law reformers across common law jurisdictions to confront the place of family provision in its wider context: namely separate property or family property; and its relationship to provisions on dissolution of marriage. Only then will the aberrations and the orthodoxies concerning contracts to leave property by will and family provision be unjumbled.

Interest on Lawyers’ Trust Accounts
REID MORTENSEN*

1. Introduction

In 1963, around £79 million was held in solicitors’ trust accounts in New South Wales, Queensland and Victoria.1 None of that earned interest. At the time, banking regulations prohibited the crediting of interest to ‘current accounts’2 — bank accounts characterised by frequent deposits and withdrawals, the latter usually by cheque. In offering solicitors trust account facilities, the banks therefore got sizable sums by interest free loan: ‘all the cream off the cake’.3 That was to change in the 1960s as the Law Institute of Victoria pioneered a scheme for getting banks indirectly to credit interest to trust account deposits and to direct that money to fidelity funds and, later, to legal aid. Interest on Lawyers’ Trust Fund Accounts (IOLTA) schemes then spread to other parts of Australia, and were later exported to New Zealand (NZ), Zimbabwe, South Africa, Canada and the United States (US).4 Slowly refined and expanded, Australian IOLTA schemes are now entrenched in the funding base for legal aid and the legal profession infrastructure. They now add well over $30 million every year to the budgets of the nation’s legal aid commissions.5

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I thank Gino Dal Pont and Linda Haller for comments on an earlier draft of this article.
2 For instance, savings accounts (which earned interest) could not be operated by cheque: Banking (Savings Bank) Regulations 1960 (Cth) r7. The rule was repealed with the deregulation of banking in 1984: Banking (Savings Bank) Regulations (Amendment) 1984 (Cth) s5.
3 Allan Holding, Victoria, Legislative Assembly, Parliamentary Debates (Hansard), 1 December 1963 at 2332.
5 See below Table 5.
IOLTA schemes evidently help the public good, so far as that is promoted by the work of the legal profession. However, despite the genesis of IOLTA schemes in Australia, they have, apart from Adrian Evans’ pioneering work on the Victorian IOLTA arrangements, received no scholarly attention. In this article, I therefore explore and evaluate the structure, role and ethics of the present IOLTA schemes in Australia and, agreeing with Evans, conclude that they are, so far as public standards are concerned, structured unethically. I add, however, that the moral character of IOLTA schemes can be salvaged, if they are reformed. In this article, the means by which IOLTA is acquired by public agencies are therefore outlined (Part 2). Then, the different programs that are funded by IOLTA are discussed, with particular focus on legal aid (Part 3). This enables an analysis of the public ethics of IOLTA schemes, which is helped to a significant extent by the literature and adjudication on IOLTA that has emerged in the US and the Scottish case of Brown v Inland Revenue Commissioners. I nevertheless take the judicial reasoning in these cases as exemplifying and guiding moral reflection on the structure of IOLTA schemes, rather than giving them legal direction (Part 4). The discussion of the public ethics of these schemes then informs conclusions on the best form that restructured IOLTA schemes would take (Part 5).

2. **Method of Collection**

   **A. Solicitors’ Trust Accounts**

   The basic resources of any IOLTA scheme are, of course, solicitors’ trust accounts. Any money received by solicitors on another person’s behalf is held under trust, and must (with only the most limited exceptions) be deposited in a general trust account held separately from the solicitors’ office account. The handling of any

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7 [1965] AC 244 (hereafter *Brown*).

8 *Re Batho* (1868) 1 QSCR 196; *In re Hallet’s Estate; Knatchbull v Hallet* (1879) 13 Ch D 696 at 702–703; *Stamore v Campbell & Co* [1892] 1 QB 314 at 316; *Plunkett v Barclays Bank Limited* [1936] 2 KB 107 at 117; *In re a Solicitor* [1952] Ch 328; *Re Jones* (1953) 16 ABC 169; *Adams v Bank of New South Wales* [1984] 1 NSWLR 285 at 290, 300–301; *Target Holdings Ltd v Redfern* [1996] 1 AC 421 at 435–436; *Jalmoon Pty Ltd (in liq) v Bow* [1997] 2 Qd 62 at 72; *Twinsectra Limited v Yardley* [2002] 2 AC 164 at 168.

9 *Legal Practitioners Act* 1970 (ACT) ss90–91; *Legal Profession Act* 1987 (NSW) s61; *Legal Practitioners Act* 1974 (NT) ss55–57; *Trust Accounts Act* 1973 (Qld) s7(1); *Legal Practitioners Act* 1981 (SA) s31; *Legal Profession Act* 1993 (Tas) s101; *Legal Practice Act* 1996 (Vic) ss173–174; *Legal Practitioners Act* 1893 (WA) s34 (The *Legal Profession, Legal Practitioners and Legal Practice Acts* are hereafter *LPA*).
money in the trust account is then tightly regulated by statute, which effectively provides that the money ‘should only be paid out to the persons to whom [it] belonged, or as they directed’. Significantly, this is money that the solicitors hold only as trustees for others — ‘clients’. The solicitors themselves do not own the money beneficially, and it is not available for the firm’s use.

The credit balance of the trust account thus represents a corpus of mixed trust money held for different clients under different trusts, and the Acts directing its management therefore provide statutory exceptions to the normal equitable principle that money held under different trusts cannot be mingled in the one bank account. If instructions to do so are given, the solicitors can place the client’s money in a savings account, separate from the trust and any other accounts, where it can earn that client interest. In the Australian Capital Territory (ACT) and NSW and under the proposed Model Laws on a National Legal Profession, this is called ‘controlled money’.

The fact that trust account deposits are not, while in trust, a resource for the firm does not mean that they have no potential value for the solicitors. A common reason why solicitors ask for clients to deposit money in trust is in anticipation of professional fees — ‘costs’ — that the client will be billed for later, and outlays that will be incurred when carrying out the client’s legal business. There are often strict controls on the payment of costs and outlays from money in trust, but it is plainly convenient to have the client’s money for outlays at hand when it is needed. Further, money deposited in trust in anticipation of costs gives the solicitors assurance that, when rendered, bills can be paid, and helps to reduce the firm’s exposure to bad debtors. A nodding acquaintance with the disciplinary cases on unauthorised remissions of trust money for the payment of bills suggests that it is not uncommon for large amounts, held on account of costs and outlays, to be kept in the trust account for long periods.

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10 In re A Practitioner of the Supreme Court [1941] SASR 48 at 51.
11 The term ‘clients’ includes any beneficiaries for whom solicitors hold money, whether or not they have contractually retained the solicitors to conduct legal business for them.
13 Lupton v White (1808) 15 Ves 432; 33 ER 817; Lunham v Blundell (1857) 27 LJ Ch 179; Re Todd (1910) 10 SR (NSW) 490. See Johns v Law Society of New South Wales [1982] 2 NSWLR 1 at 24.
14 LPA 1970 (ACT) s92; LPA 1987 (NSW) s61(9); LPA 1974 (NT) s58; Trust Accounts Act 1973 (Qld) s8(2); LPA 1981 (SA) s31(2); LPA 1993 (Tas) s101(5); LPA 1996 (Vic) s174(2); LPA 1893 (WA) s34.
16 Legal Profession Regulation 2002 (NSW) r78; Trust Accounts Act 1973 (Qld) s8(1)(c); Trust Account Practice Rules 1998 (Vic) r31(1)(b); LPA 1893 (WA) s34A. For procedures in other states, see Gino Dal Pont, Law of Costs (2003) at 91–94.
B. IOLTA Schemes in Australia: Basic Organisation

All states\textsuperscript{17} in Australia have two IOLTA schemes. As will be seen soon, the ‘statutory deposits’ schemes have interest raised on client money under a two-trust structure, and the ‘residual balances’ schemes have interest raised under a single-trust structure. The details even within each kind of scheme differ between states, and there is no current plan to harmonise them. The Model Laws for a National Legal Profession, prepared at the direction of the Standing Committee of Attorneys-General, contemplate uniformity in the detail of regulations about solicitors’ trust account management,\textsuperscript{19} and also assume that each state will have separate statutory deposits and residual balances IOLTA schemes.\textsuperscript{20} However, even under the Model Laws the states can make their own regulations about how much in trust accounts is to be placed under an IOLTA scheme, who is to regulate it, and how the money is to be used.\textsuperscript{21} Indeed, the peculiarity of the IOLTA arrangements in each state, and their relationship to the funding of public programs, were among the impediments to centralising the regulation of the legal profession in Australia in a single federal agency.\textsuperscript{22} While IOLTA was probably not a significant consideration in finally reaching agreement on the form that a National Legal Profession would take, the Attorneys have preferred to pursue national legal practice by agreeing to uniform standards that are to be adopted by each state.\textsuperscript{23} Accordingly, IOLTA schemes remain a state concern, with their existing binary organisation unchallenged. When adopted in each state, the Model Laws will require a relocation of the legal substructure of IOLTA from the existing

\begin{itemize}
  \item \textsuperscript{17} For example, ACT: Robb v Law Society of the Australian Capital Territory (1996) 72 FCR 225.
  \item \textsuperscript{18} When used generically, the term ‘states’ includes the ACT and the Northern Territory (NT).
  \item \textsuperscript{19} Standing Committee of Attorneys-General, above n 15 at 66–89 (ss701–745).
  \item \textsuperscript{20} Id at 86–87 (s741).
  \item \textsuperscript{21} Ibid.
  \item \textsuperscript{22} Law Council of Australia, Submission to the Standing Committee of Attorneys-General – Towards National Practice (2001) at 12.
  \item \textsuperscript{23} State, Territory and Commonwealth Attorneys-General, Historic Agreement on National Legal Profession, Communique (7 August 2003).
\end{itemize}
legislation to the Model Laws themselves. Queensland is the first to do this: the Legal Profession Act 2004 promising simpler procedures and closer government controls of IOLTA.24

C. Interest on Statutory Deposits

The original means by which interest on trust account deposits was acquired for public programs in Australia was the requirement that solicitors set aside defined portions of trust money, which they lodged in designated savings accounts separate to their own trust account. Terminology has differed from state to state,25 but in this article the separate accounts are called ‘statutory deposit accounts’ (SDAs) in which the solicitors lodge amounts of trust money called ‘statutory deposits’. The sidling of money from the trust account into a savings account to earn interest for anyone (including the client) is in normal conditions illegal, unless the solicitors have specific written authority from the client to do that. This abnormal payment of trust money to an SDA is therefore directed by the governing Act.26

The SDAs are either held by the local law society,27 a statutory trustee corporation on which the law society is represented,28 a professional regulator29 or, under the new Queensland rules, the government itself30 — any of which (in this role) I will refer to as the ‘IOLTA Trustee’. In NSW and Victoria, the IOLTA Trustee is expressly stated to hold the statutory deposit on trust for the lodging solicitors,31 and elsewhere the trust relationship is implicit in its designation and duties.32 The client money therefore seems to be held under at least two strata of trusts: the IOLTA Trustee holding the statutory deposit (as trust capital) for the solicitors but the interest on that deposit (as trust income) for other purposes, and the solicitors holding that amount, albeit in mixed funds, for clients. Lodging the statutory deposit with the IOLTA Trustee effectively turns the trust between the

24 LPA 2004 (Qld) ss202–211.
26 LPA 1970 (ACT) ss123(1)–(3); LPA 1987 (NSW) s64(1); LPA 1974 (NT) ss80(1)–(3); Trust Accounts Act 1973 (Qld) s8(1)(b); LPA 1995 (Qld) s51(2); LPA 2004 (Qld) s205; Legal Profession Regulation 2004 (Qld) s81; LPA 1981 (SA) ss3(1); LPA 1993 (Tas) s102(1); LPA 1996 (Vic) ss179(1), 180(1); Legal Contribution Trust Act 1967 (WA) s11(2). See also Boone, above n4 at 543–544.
27 LPA 1970 (ACT) ss123(1)–(3), 127(1); LPA 1987 (NSW) s65(1)(a); LPA 1995 (Qld) s51(7); LPA 1981 (SA) ss5(1), 53(1).
28 LPA 1974 (NT) ss79A(4), 80(1)–(3) (the Legal Practitioners’ Trust Committee); LPA 1993 (Tas) ss96(1)(a), 98(1) (the Solicitors’ Trust); Legal Contribution Trust Act 1967 (WA) ss4, 6(1)(a), 11(2) (the Legal Contribution Trust).
29 LPA 1996 (Vic) s181(1)(a) (the Legal Practice Board).
30 LPA 2004 (Qld) s208(2); Legal Profession Regulation 2004 (Qld) s4.
31 LPA 1987 (NSW) s65(1)(a); LPA 1996 (Vic) s181(1)(a).
32 ‘Trust’ is used in LPA 1974 (NT) ss79A(4), 80(1)–(3); LPA 1993 (Tas) ss96(1)(a), 98(1); Legal Contribution Trust Act 1967 (WA) ss4, 6(1)(a), 11(2). See also LPA 2004 (Qld) s208(5).
solicitors and client, so far as the money kept in the SDA is concerned, into a sub-trust. Given that the statutory deposit is of mixed trust money held for a range of clients, it would be difficult to establish a trust relationship directly between the IOLTA Trustee and the client. Furthermore, it is likely that the head trust and the sub-trust are of different character. Even though the lodging solicitors retain effective control over the statutory deposit by being able to recall it on demand, the IOLTA Trustee usually has some responsibility to invest the money pooled in an SDA. It therefore has more active responsibilities in relation to the trust capital than do the solicitors, who must only move money at the client’s behest and would normally be only bare trustees.

The statutory deposits scheme was first proposed in 1963 by the Law Institute of Victoria to offset a potential depletion of the Solicitors’ Guarantee Fund after a series of major defalcations, and legislation gave it effect in Victoria in 1964. The other states followed over the next decade, but with broader funding purposes, and especially legal aid, in mind. After two years of volleying between the state government and the Queensland Law Society over control of solicitors’ trust accounts, Queensland adopted the Victorian scheme in 1965 as a means of funding legal aid without having to commit consolidated revenue. NSW and Western Australia (WA) adopted the scheme in 1967, South Australia (SA) in 1969, and Tasmania in 1970. The scheme was brought into the ACT in 1970, and the NT in 1974.

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34 *LPA* 1970 (ACT) s124(1); *LPA* 1987 (NSW) s65(1)(b); *LPA* 1974 (NT) s81(1); *LPA* 1996 (Vic) s181(1)(b); *Legal Contribution Trust Act* 1967 (WA) s12(1). Compare *LPA* 1981 (SA) s54(9); *LPA* 1993 (Tas) s103(1).

35 *LPA* 1970 (ACT) ss128(1), (4); *LPA* 1987 (NSW) ss65(3), 69B(2)(b); *LPA* 1974 (NT) ss79D, 84A(1), (4)–(5); *LPA* 1995 (Qld) ss51(b)–(9); *LPA* 1981 (SA) ss56(1)–(6); *LPA* 1993 (Tas) ss99(1), (2)(b); *Legal Contribution Trust Act* 1967 (WA) ss13, 14(2)–(6).


37 *Target Holdings Ltd v Redferns (a firm)* [1996] 1 AC 421 at 436 (Browne-Wilkinson LJ).


39 Gregory, above n1 at 173–176; *Legal Assistance Act* 1965 (Qld) s10(2).


41 *Legal Practitioners Act Amendment Act* 1969 (SA) s8.

42 *LPA* 1970 (Tas) s4.

43 *Legal Practitioners Ordinance* 1970 (ACT) s93; *Legal Practitioners Ordinance* 1974 (NT) s80. The *Legal Practitioners Ordinance* 1969 (ACT) would have introduced the scheme in the ACT a year earlier. However, this Ordinance was disallowed by the Senate, which objected to its provision for a divided legal profession in the Territory: Commonwealth of Australia, Senate, *Parliamentary Debates (Hansard)*, 22 May 1969 at 1493–1519.
The calculation of the amounts that solicitors must keep in an SDA is undoubtedly the most bewildering aspect of this scheme. Its basic assumption is that, despite the cash flows in and out of the trust account, the balance generally never drops below a given amount: the ‘hard core’ of the trust account. The ‘core’ is deemed to be a base amount that solicitors are to lodge in the SDA, and which usually must be adjusted every financial period. In all cases, the calculation is made by reference to the total amount (barring amounts of controlled money) held by the solicitors in trust for clients. Accordingly, the calculation is based on the total amount that the solicitors hold in the trust account together with any amount they might already have in an SDA. It is the lowest balance of this trust money in a given financial period that governs the amount to be paid into the SDA. And, solicitors usually need not lodge the statutory deposit where the lowest amount held in trust, along with the amount kept in the SDA, has not reached a prescribed threshold. These range from $500 to $15,000. The original Victorian scheme began with a requirement to lodge one-third of the lowest balance. However, both the desire to maximise revenue, and the need to maintain dollar returns on IOLTA against the 1990s drop in interest rates, have driven moves to increase the holdings in SDAs. As a result, the proportions of trust balances to be lodged as statutory deposits have risen steadily, bringing the statutory deposit away from the trust account’s ‘core’.

As mentioned, controlled money held exclusively for one client is not counted when calculating the statutory deposit. The interest it earns is already, on the client’s direction, dedicated to the client’s private use. The SA Act also discounts money received by solicitors for mortgage financing, even when that money is held in the trust account. A general overview of the different methods of calculating statutory deposits across Australia is given in Table 1.

45 If, as is common, the solicitors have more than one general trust account, then the aggregate balance of all trust accounts held by the firm enters the calculation: *LPA* 1970 (ACT) s122(5); *LPA* 1974 (NT) s79(5); *LPA* 1995 (Qld) s51(2); *Legal Profession Regulation* 2004 (Qld) s7; *LPA* 1981 (SA) s53(3); *Legal Contribution Trust Act* 1967 (WA) s11(2).
46 *LPA* 1970 (ACT) ss123(1)–(2); *Legal Profession Regulation* 2002 (NSW) r130(4); *LPA* 1974 (NT) ss80(1)–(2); *LPA* 1995 (Qld) s51(13); *Legal Profession Regulation* 2004 (Qld) s8(5); *LPA* 1981 (SA) s53(4)(b); *LPA* 1993 (Tas) s102(5); *LPA* 1996 (Vic) s179(2); *Legal Contribution Trust Act* 1967 (WA) s11(3).
47 *Legal Profession Practice (Amendment) Act* 1964 (Vic) s6.
49 *LPA* 1970 (ACT) s122(8); *LPA* 1987 (NSW) s64(3)(a); *LPA* 1974 (NT) s79(8); *LPA* 1995 (Qld) s51(2)(a); *Legal Profession Regulation* 2004 (Qld) s5(2); *LPA* 1981 (SA) s53(3); *LPA* 1996 (Vic) ss179(5), 180(3); *Legal Contribution Trust Act* 1967 (WA) s4. Compare *LPA* 1993 (Tas) s101(5).
50 *LPA* 1981 (SA) s5(1).
Low cash levels in the trust account usually allow adjustments to be made to the base statutory deposit. Under the WA and Queensland rules, even with nothing left in the trust account, these adjustments need not be made. Where, because some trust money is in the SDA, the trust account balance itself is not sufficient to make client payments, solicitors can overdraw the trust account up to an amount equal to the statutory deposit. 51 Banks do mistakenly dishonour cheques, and a trust account cheque that bounces is a trigger for an investigation of the law firm. 52 Even with the option of overrawing the trust account, the safer approach is therefore first to liquefy the trust account with money from the SDA. 53 However, in WA, overdrawing the trust account is the only lawful means by which solicitors can make payments when the account’s balance is running down. 54 In all other states, the governing Acts allow lesser amounts to be held in the SDA if, when approaching the adjustment date, the balance of the solicitors’ trust account would not allow the statutory deposit to be paid in full, or when, through the financial period, client payments cannot be made without overdraining the trust account. 55 The allowable adjustments to the statutory deposit are set out in Table 2.

51 Legal Contribution Regulations 1968 (WA) rr7–8; Trust Accounts Act 1973 (Qld) s27(2); “The Legal Assistance Act of 1965” – Practitioners’ Trust Account Deposits’ (1968) 42 Law Inst J 436. Victoria’s Law Institute Journal also served as the professional magazine for the Queensland Law Society at this time. Compare Legal Profession Regulation 2004 (Qld) s9(4)(a).

52 Legal Profession Regulation 2002 (NSW) r132; Queensland Law Society Rule 1987 (Qld) r92; LPA 1996 (Vic) s189.


54 Notice must also be given to the Legal Contribution Trust (the WA IOLTA Trustee) of an overdraining: Legal Contribution Regulations 1968 (WA) rr7–8. It would be expected that solicitors’ compliance with that protocol should, at an early stage, preclude an investigation that might otherwise follow from an erroneous dishonouring of the trust account cheque.

55 In almost all cases, once the conditions for holding a lesser sum are met, the statutory deposit may be maintained at that lower amount for the rest of the financial period. Under the old Queensland rules, the solicitors must replenish the SDA once total trust moneys held have again stabilised at a point above the previous year’s lowest level, for instance when for 30 consecutive days, two-thirds of the combined trust and SDA balance is at least equal to the base statutory deposit: LPA 1995 (Qld) s51(5); Legal Profession Regulation 2004 (Qld) s9(3).
### Table 1: Base Statutory Deposit

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Formula — Statutory Deposit</th>
<th>Financial Period</th>
<th>Adjustment Date</th>
<th>Threshold</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACT: LPA 1970</td>
<td>2/3 (lowest aggregate trust account balance in previous financial period + amount held in SDA on that day): ss122(2), 123(2)-(3)</td>
<td>1 April–31 March preceding adjustment date: s86</td>
<td>30 June: ss123(2)-(3)</td>
<td>$3000: ss123(1)-(2)</td>
</tr>
<tr>
<td>NSW: Legal Profession Regulation 2002</td>
<td>Lowest aggregate trust account balance in previous financial period + amount held in SDA on that day: r130(1)</td>
<td>1 April–31 March preceding adjustment date: r129(2)</td>
<td>20 banking days after 1 April: r131(1)</td>
<td>$10000: r130(4)</td>
</tr>
<tr>
<td>NT: LPA 1974</td>
<td>½ (lowest aggregate trust account balance in previous financial period + amount held in SDA on that day): ss79(2), 80(2)-(3)</td>
<td>1 July–30 June preceding adjustment date: s53</td>
<td>30 September: ss80(2)-(3)</td>
<td>$3000: ss80(1)-(2)</td>
</tr>
<tr>
<td>Qld: Legal Profession Regulation 2004&lt;sup&gt;a&lt;/sup&gt;</td>
<td>2/3 (lowest aggregate trust account balance in previous financial period + amount held in SDA on that day): s8(2)</td>
<td>1 January–31 December preceding adjustment date: s8(2)</td>
<td>21 January: s10</td>
<td>$3000: s8(5)</td>
</tr>
<tr>
<td>SA: LPA 1981</td>
<td>Lowest aggregate trust account balance in previous financial period + amount held in SDA on that day: s53(1a)</td>
<td>Two six months periods: 1 December-31 May and 1 June-30 November: s53(1)</td>
<td>14 June and 14 December: s53(1)</td>
<td>$1000: s53(4)(b)</td>
</tr>
<tr>
<td>Tas: LPA 1993</td>
<td>2/3 (lowest aggregate trust account balance in previous financial period + amount held in SDA on last day of financial period): s94, 102(1)</td>
<td>Four three months periods every year, ending on 31 March, 30 June, 30 September and 31 December: s102(1)</td>
<td>21 days after the end of the financial period</td>
<td>$15000: s102(5)</td>
</tr>
<tr>
<td>Vic: LPA 1996</td>
<td>72% (lowest aggregate trust account balance in current or previous financial period + amount held in SDA on that day): ss179(3), 180(1)</td>
<td>1 November–31 October: s3</td>
<td>7 November: s179(2) — but for first deposit only.</td>
<td>First deposit: $4166.67; s179(2). Subsequent deposits: nil.</td>
</tr>
<tr>
<td>WA: Legal Contribution Trust Act 1967, Legal Contribution Trust Regulations 1968</td>
<td>65% (lowest aggregate trust account balance in current or previous financial period + amount held in SDA on that day): s11(2), r3</td>
<td>Two six months periods: 1 July–31 December and 1 January–30 June: s4</td>
<td>No adjustment date specified.</td>
<td>$500: s11(3)</td>
</tr>
</tbody>
</table>

<sup>a</sup> The old Queensland rules found in the LPA 1995 (Qld) s51 held until 30 June 2004.
Table 2: Adjusted Statutory Deposit*

<table>
<thead>
<tr>
<th>Formula</th>
<th>When Adjustment Allowed</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACT: LPA 1970</td>
<td>Amount approved by Law Society: s126(1)</td>
</tr>
<tr>
<td>NSW: Legal Profession Regulation 2002</td>
<td>EITHER: lowest aggregate trust account balance in 15 banking days from a withdrawal from the SDA + amount held in SDA on that day; OR amount approved by Law Society: r130(3), (6)</td>
</tr>
<tr>
<td>NT: LPA 1974</td>
<td>Amount approved by Trust Committee: s83(1)</td>
</tr>
<tr>
<td>Qld: Legal Profession Regulation 2004</td>
<td>Lesser amount allowed, but no formula: s9</td>
</tr>
<tr>
<td>SA: LPA 1981</td>
<td>Lesser amount allowed, but no formula. Auditor must give an opinion as to whether the amount withheld or withdrawn from the SDA was the minimum necessary to meet client commitments: ss53(4a), (9), (10)</td>
</tr>
<tr>
<td>Tas: LPA 1993</td>
<td>2/3 (lowest aggregate trust account balance in financial period + amount held in SDA on last day of financial period): s94, 102(1)</td>
</tr>
<tr>
<td>Vic: LPA 1996</td>
<td>72% (lowest aggregate trust account balance in current or previous financial period + amount held in SDA on that day): s180(1)</td>
</tr>
<tr>
<td>WA</td>
<td>No variation permitted</td>
</tr>
</tbody>
</table>

* The old Queensland rules set out in the *LPA* 1995 (Qld) s51 held until 30 June 2004, and required the adjusted amount to be 2/3 (lowest aggregate trust account balance in previous 30 days + amount held in SDA on that day). Table 2 only states the usual position when an adjustment is made. It does not exhaust all variations possible in any given state, and does not include details of adjustments to be made when a firm cannot lodge the statutory amount on the adjustment date. For an inability to lodge a deposit on the adjustment date, see *LPA* 1970 (ACT) s125; *Legal Profession Regulation* 2002 (NSW) r130(2); *LPA* 1974 (NT) s82; *LPA* 1995 (Qld) s51(5); *LPA* 1981 (SA) s53(4)(a).
The statutory deposits schemes are largely self-regulated. IOLTA Trustees generally have few rights or obligations in relation to the pooled amounts held in the SDAs. Money held in the SDAs is repayable to lodging solicitors on demand, and whether the solicitors are withdrawing money from an SDA in accordance with the terms of the governing Act is, at least until they are audited, a question which is for the solicitors themselves to judge. Accordingly, the only practical obligation on the IOLTA Trustee, which is otherwise under a duty to invest the money held in its SDAs, is to ensure that each SDA has a sufficient cash balance to allow solicitors to make legitimate withdrawals from the account when an adjustment to the statutory deposit is required. For solicitors, nevertheless, the management of the responsibility to keep the statutory deposit at the prescribed amount can be difficult. The requirements of the governing Acts or regulators are complicated, and at times involve either impracticalities, unnecessary nitpicking, or vagaries. While most law societies provide solicitors with information on how to deal with statutory deposits, only the NSW Law Society provides its members with an accessible electronic calculator that determines the statutory deposit for them.

To a small extent, the problems of interpretation associated with these schemes stem from the drafters’ reluctance to use algebra in the legislation — leading to linguistic convolutions. However, the root cause of the complexity of the statutory deposits schemes remains the tension between government’s and the profession’s interest in maximising the capital held in interest-generating SDAs and the solicitors’ convenience in being able to make payments for client business. As will be explained in greater depth in Part 4, the money in the SDAs remains client property, and so solicitors’ access as agents and trustees for the client has effectively been given priority. But, except in WA, this comes at the administrative cost of ensuring that a correctly calculated adjustment is made and, again, as much as possible is left in the SDA.


57 See, for example, the accounting quibbles in ‘Solicitor’s Deposit with the Law Institute’ (1977) 51 Law Inst J 7; Boone, above n4 at 544.


The solicitors’ management of their statutory deposit obligations is independently reviewed in all states when the management of the trust account is audited or inspected. In some states, a breach of the terms of the governing Acts technically exposes the solicitors to criminal sanctions. Furthermore, there is potential civil liability. In SA, failure to maintain the statutory deposit at the prescribed level for the correct periods makes the solicitors liable to reimburse the SDA, with interest, to compensate for any losses the IOLTA Trustee might have suffered as a consequence of the solicitors’ failure to maintain the correct deposit. Although there is no statutory power to recover unpaid statutory deposits in the other states, the IOLTA Trustee may be able to invoke its general duty to take possession of its entrusted property, as a means of recovering either statutory deposits that remain unpaid or interest on late payments. However, the only documented evidence of IOLTA Trustees taking an active role in trying to recover statutory deposits is in reported law society threats of discipline against non-complying solicitors, and discipline exercised for failing to obtain audit certification that statutory deposit obligations have been satisfied. Some states, such as Victoria, appear to have no sanctions for failure to comply with statutory deposits obligations.

D. Interest on Residual Balances: Westpac Funds

A more direct means of acquiring IOLT A for public use is by payment of any interest earned on solicitors’ trust accounts to the IOLTA Trustee. Although the ban on crediting interest to current accounts was lifted with the deregulation of banking in 1984, the practice of not crediting interest to solicitors’ trust accounts has generally remained unchanged. However, in all states but SA, the law society, a professional regulator or government can make an arrangement with banks and


61 LPA 1974 (NT) ss138A; LPA 1995 (Qld) ss54(1), 55; LPA 1981 (SA) ss58(4)(b); Legal Contribution Trust Act 1967 (WA) ss11(5), 54.

62 LPA 1981 (SA) ss58(8), (11).

63 Grove v Price (1858) 26 Beav 103 at 104; 53 ER 836 at 836; Westmoreland v Holland (1871) 23 LT 797; Re Pilling: Ex parte Ogle (1873) 8 Ch App 711 at 717; Field v Field [1894] 1 Ch 425 at 429.


65 Banking (Savings Banks) Regulation (Amendment) 1984 (Cth) r5. See LPA 1970 (ACT) s74; LPA 1987 (NSW) ss4(5); LPA 1974 (NT) ss5(2)(a)(i); LPA 1996 (Vic) s137; LPA 1893 (WA) ss28A(1).
other financial institutions by which amounts are calculated as if they were interest earned on the residual balances of solicitors’ trust accounts. Those amounts are then paid to an IOLTA Trustee.\textsuperscript{66} The remitted money goes into the Trustee’s public funds,\textsuperscript{67} and so adds to the capital from which it earns income for public programs.

This scheme originated in 1979 in a proposal of the Law Institute of Victoria (hereafter ‘the Institute’) to its state government that interest be paid on the balances of money held in solicitors’ trust accounts that had not been lodged with an SDA. The Institute’s position was that, if interest were to accrue on these balances and be remitted to the Solicitors’ Guarantee Fund (the then IOLTA Trustee), another $12 million would be available for legal aid in Victoria and the statutory deposits scheme would become redundant.\textsuperscript{68} That was soon diluted. To a joint Institute and government committee chaired by Solicitor-General Daryl Dawson, the Australian Banking Association was said to have objected to the Institute’s original plan on the ground that the accrual of interest on trust accounts would ‘be unhistorical, immoral and … impossible to calculate’.\textsuperscript{69} The profession itself recognised that, once interest was credited to trust accounts, it would have to be paid to the clients. Accordingly, the banks’ position in refusing to pay interest on trust accounts was accepted. However, a fiction was adopted by which banks would make ex gratia payments, calculated by reference to trust account balances, to the Guarantee Fund.\textsuperscript{70} The first bank to make these payments was Westpac, and the money is still called ‘Westpac funds’ (regardless of its source) in some legal circles.\textsuperscript{71} As the banks’ payments were made voluntarily, this calculation was made on the basis of rates well below those applicable to the SDAs. Therefore, if revenue was to be maximised, the statutory deposits scheme had to be retained. The Institute, nevertheless, progressively negotiated higher relative rates\textsuperscript{72} until, in 1993, its bargaining power was strengthened by a prohibition on banks offering trust account facilities to solicitors unless the banks had agreed to make these payments to the Guarantee Fund.\textsuperscript{73} In 1996, the Institute’s role in this scheme was given to the Legal Practice Board. Westpac funds were soon paid throughout the

\begin{footnotes}
\item[66] LPA 1970 (ACT) s129(1); LPA 1987 (NSW) s69E(1); Law Society Public Purposes Trust Act 1988 (NT) s3(1); Queensland Law Society Act 1952 (Qld) s36C(b); LPA 2004 (Qld) s202(b); LPA 1993 (Tas) s104(1); LPA 1996 (Vic) ss176(1)–(2), Law Society Public Purposes Trust Act 1985 (WA) s3(1).
\item[67] LPA 1970 (ACT) s129(2); LPA 1987 (NSW) ss69B(2)(b), 69E(2); Law Society Public Purposes Trust Act 1988 (NT) s3(2); Queensland Law Society Act 1952 (Qld) s36C(b); LPA 1993 (Tas) s105; LPA 1996 (Vic) s176(3); Law Society Public Purposes Trust Act 1985 (WA) s3(2).
\item[68] ‘Interest Sought for Trust Accounts’ (1979) 53 Law Inst J 403.
\item[70] Cornall, id at 13; ‘Bank Interest on Trust Accounts is Benefit for All’ (1983) 57 Law Inst J 248.
\item[71] Evan Walker, Victoria, Legislative Council, Parliamentary Debates (Hansard), 14 June 1983 at 2737.
\item[72] Evans, Principle and Pragmatism, above n6 at 132, 136; ‘Interest on Trust Accounts’ (1986) 60 Law Inst J 519.
\item[73] Evans, Principle and Pragmatism, above n6 at 136; Cornall, above n69 at 13; Legal Profession Practice (Guarantee Fund) Act 1993 (Vic) s7.
\end{footnotes}
country,\textsuperscript{74} and legislation validating this came in the ACT in 1983,\textsuperscript{75} in Queensland and WA in 1985,\textsuperscript{76} in the NT in 1988,\textsuperscript{77} and in Tasmania in 1990.\textsuperscript{78} Although banks began to remit payments based on residual balances of trust accounts to the NSW Law Society in 1983, validating legislation was not passed until 1998.\textsuperscript{79}

The SA scheme is slightly different. In 1978, the State Attorney-General, Peter Duncan, proposed that solicitors be limited to holding their trust accounts at government-approved banks that would credit interest to them, but also remit the interest to a regulator to help fund legal aid. There were objections within the profession that this would limit practitioners’ freedom to choose their banks. It was also claimed that the personal sweeteners that banks offered to attract solicitors’ business (which would not be available without solicitors’ ability to choose a bank) reduced the overheads of legal practice and, so, the cost of professional representation.\textsuperscript{80} The proposal was only abandoned temporarily, and was implemented in full in 1985.\textsuperscript{81} In SA, the remission of interest earned on residual balances does not therefore depend on the law society striking an agreement with the banks. The \textit{Legal Practitioners Act} puts a direct obligation on the banks to pay the SA Law Society interest accruing on the balances left in solicitors’ trust accounts, and those accounts must be held at government-approved banks or financial institutions.\textsuperscript{82}

\textbf{E. Efficiency and Effectiveness: A Sketch}

IOLTA schemes do not create value, or make client money more productive. This claim has been made in American litigation on IOLTA schemes,\textsuperscript{83} but is inaccurate economics. IOLTA schemes redistribute the income earned on client money. If client money is banked, but in a trust account that is credited no interest, it is as

\begin{itemize}
  \item \textsuperscript{74} See, for example, comments in Neil Bell, Northern Territory Legislative Assembly, \textit{Parliamentary Debates (Hansard)}, 25 May 1988 at 3356; Gregory Crafter, South Australia, House of Assembly, \textit{Parliamentary Debates (Hansard)}, 14 February 1985 at 2548.
  \item \textsuperscript{75} \textit{Legal Practitioners (Amendment) Ordinance (No 2) 1983 (ACT) s5}.
  \item \textsuperscript{76} \textit{Queensland Law Society Act Amendment Act 1985 (Qld) s28; Law Society Public Purposes Trust Act 1985 (WA) s2 (sch)}.
  \item \textsuperscript{77} \textit{Law Society Public Purposes Trust Act 1988 (NT) s2 (sch)}.
  \item \textsuperscript{78} \textit{Legal Practitioners Amendment Act 1990 (Tas) s5}.
  \item \textsuperscript{80} ‘Trust Fund Changes Opposed’ [1978] \textit{Law Society Bulletin 1}; Gregory Crafter, above n74 at 2548; id at 20 February 1985 at 2707.
  \item \textsuperscript{81} \textit{Legal Practitioners Act Amendment Act 1985 (SA) s11}.
  \item \textsuperscript{82} \textit{LPA 1981 (SA) s57A(1)}.
\end{itemize}
generally productive as if in an interest-bearing savings account. That productivity is wholly represented by the bank’s profit-margin on re-lending, which is higher than it is for deposits in savings accounts to the extent that the bank does not incur interest costs to the depositors.\textsuperscript{84} The IOLTA scheme therefore does not create value from ‘sterile’ money in the trust account.\textsuperscript{85} Rather, it shifts value from the banks’ shareholders to the public programs designated by the scheme.\textsuperscript{86} Thus, the banking policy and the nature of the scheme raise the question of where the value earned on trust account deposits is to fall; a question of distributive justice that bears further consideration when the moral claims that should — but do not — coordinate the structure of IOLTA schemes are considered later.

The earlier outline of IOLTA in Australia plainly suggests that administrative costs would be reduced if statutory deposits schemes were discontinued, and bank payments to IOLTA Trustees made by reference to total trust account deposits. The NZ and various US IOLTA schemes adopt this pattern – the latter only differ in the extent to which law firms are compelled to participate in them. An alternative is the Canadian scheme of having the banks credit interest to an amount equivalent to the statutory deposit, but that is retained in the trust account without a separate deposit being made in the SDA.\textsuperscript{87} In Australia, either approach would save solicitors having to calculate statutory deposits, constantly monitor overall trust account balances and pay money into and withdraw it from the SDA, alongside the additional audit costs incurred to review compliance. However, the simplification of IOLTA in Australia is unlikely while the ability of each scheme to redistribute the wealth generated by trust account deposits differs so markedly. Even a cursory glance at Table 3 suggests that residual balances schemes actually raise more than twice the amounts that statutory deposits schemes can, and have enhanced IOLTA significantly. However, with a deregulated banking sector, government probably has the ability to disgorge a greater share of the value earned on trust account deposits under the statutory deposits scheme than it can through a residual balances scheme. Information available on SDA balances and rates of return is poor, and on the residual balances schemes it is worse. But enough is available to indicate that in recent years SDAs have earned up to 5 per cent in interest and the invested funds from SDAs even more.\textsuperscript{88} Although calculated on larger amounts of

\textsuperscript{84} See Brown, above n7 at 257 (Lord Reid).
\textsuperscript{85} Compare Anderson, above n33 at 744–745; Phillips, above n83 at 181 (Breyer J).
\textsuperscript{86} Dulong, above n4 at 123; Heller & Krier, above n83 at 1020. ‘In practice, IOLTA took from the banks and gave to the poor’: Paulsen, above n83 at 48 (Kidd J).
\textsuperscript{87} Law Practitioners Act 1982 (NZ) ss91A–91N; Boone, above n4 at 546–547; Brent Salmons, ‘IOLTAs: Good Work or Good Riddance’ (1998) 11 Georgetown Journal of Legal Ethics 259 at 262–263.
trust capital, the rates of return to public programs under the residual balances schemes are probably much lower. First, the payments are usually still made ex gratia, even if some states have strengthened the incentives for banks to participate in the residual deposits schemes by banning solicitors from holding trust accounts with non-participating banks. Secondly, at best, the banks are only likely to calculate the payments to be made to IOLTA Trustees at rates applicable to current accounts. Since deregulation, banks have responded to competition and demand by crediting interest to some brands of current account, but at rates well below those applied to savings accounts. The notional rates applied to trust accounts are unlikely to be above those applied to current accounts. Thirdly, the SDAs represent pools of money that dwarf the separate balances of trust accounts on which residual balances calculations are made. The higher balances made possible by pooling also mean that higher interest rates are applied to SDAs, with more effective redistribution of value from the banks to public programs. The rational economic decision, for governments and professions trying to maximise IOLTA returns, is therefore to maintain the more effective statutory deposits schemes.

However, the self-regulation of the statutory deposits scheme means that its costs, in time and effort, are largely borne by private practitioners. Its complexity, requiring adjustments, adds to that cost, and creates some incentive for avoiding the obligation to lodge a statutory deposit altogether. The thresholds listed in Table 1 give an opportunity to do that. So long as the total amount held in the trust account and the SDA is below the threshold on at least one day in the financial period, there is no need to lodge a statutory deposit. That can be (and in practice is) arranged, where the solicitors make a concerted effort to secure investment authorities for all money held in trust so that, for at least one day, almost all trust money becomes controlled money and is disregarded when calculating whether to lodge a statutory deposit. While, superficially, that practice might seem devious, it will be seen that it is actually more compatible with the solicitors’ basic duty to act in clients’ interests. In any case, there is a strong argument for enhancing solicitors’ willingness to lodge client money in separate savings accounts where it can earn more for the client, and it would be preferable that they practised this routinely.

89 Principle and Pragmatism, above n6 at 132; Heller & Krier, above n83 at 1019–1020.
90 See 4B.
Table 3: Australian IOLTA Income (in $’000s), 2000–2003

<table>
<thead>
<tr>
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</thead>
<tbody>
<tr>
<td></td>
<td>Statutory Deposits*</td>
<td>Residual</td>
<td>Total</td>
<td>Statutory Deposits*</td>
<td>Residual</td>
<td>Total</td>
</tr>
<tr>
<td>ACTa (%)</td>
<td>325 (31.9)</td>
<td>693 (68.1)</td>
<td>1 018 (100)</td>
<td>276 (26.8)</td>
<td>752 (73.2)</td>
<td>1 028 (100)</td>
</tr>
<tr>
<td>NSWb (%)</td>
<td>11 683 (32.7)</td>
<td>24 023 (67.3)</td>
<td>35 706 (100)</td>
<td>10 867 (30.9)</td>
<td>24 346 (69.1)</td>
<td>35 213 (100)</td>
</tr>
<tr>
<td>NTc (%)</td>
<td>4 809 (26.6)</td>
<td>13 243 (73.4)</td>
<td>18 052 (100)</td>
<td>3 894 (24.4)</td>
<td>12 067 (75.6)</td>
<td>15 961 (100)</td>
</tr>
<tr>
<td>Qldd (%)</td>
<td>1 334 (43.9)</td>
<td>1 706 (56.1)</td>
<td>3 040 (100)</td>
<td>1 104 (37.8)</td>
<td>1 814 (62.2)</td>
<td>2 918 (100)</td>
</tr>
<tr>
<td>SAe (%)</td>
<td>659 (41.7)</td>
<td>921 (58.3)</td>
<td>1 580 (100)</td>
<td>666 (42.8)</td>
<td>889 (57.2)</td>
<td>1 555 (100)</td>
</tr>
<tr>
<td>Tasf (%)</td>
<td>10 475 (33.6)</td>
<td>20 727 (66.4)</td>
<td>31 202 (100)</td>
<td>9 699 (33.3)</td>
<td>19 466 (66.7)</td>
<td>29 165 (100)</td>
</tr>
<tr>
<td>Vicg (%)</td>
<td>853 (36.8)</td>
<td>1 465 (63.2)</td>
<td>2 318 (100)</td>
<td>959 (39.1)</td>
<td>1 496 (60.9)</td>
<td>2 455 (100)</td>
</tr>
<tr>
<td>Total Australia (%)</td>
<td>30 354 (32.6)</td>
<td>67 171 (67.4)</td>
<td>93 071 (100)</td>
<td>27 411 (31.0)</td>
<td>60 940 (69.0)</td>
<td>88 351 (100)</td>
</tr>
</tbody>
</table>

3. **Public Programs**

**A. Allocations**

IOLTA funds a range of programs, although all are related in one way or another to the practice or administration of law. In all states, priority is given to the IOLTA Trustee’s costs of administering the scheme. After that, legal aid and the fidelity funds — administrative arrangements for reimbursing those who lose money as a result of a solicitor’s defalcation — remain the major recipients of IOLTA. As has been seen, the Law Institute of Victoria originally developed the statutory deposits scheme to secure finance for the Solicitors’ Guarantee Fund, which was at risk of depletion, and a potential inability to meet claims, as a result of defalcations by a number of Victorian firms in the early 1960s. In the next state to introduce the scheme, Queensland, IOLTA was largely seen as a means of supporting legal aid, and at no cost to the government. Indeed, the Queensland Law Society paid legislated portions of interest on SDAs directly to the Legal Assistance Fund, without government’s mediation of the payments.

There is also a range of public programs that can receive distributions, including: community legal centres; university and community legal education; practical legal training programs; continuing legal education for practitioners; law reform; legal research; promotion of access to justice; legal profession regulation; law society objections in admission proceedings; investigations into practitioners’ conduct and disciplinary proceedings; maintenance of law libraries; and publication of legal works. The older legislation set defined portions of income from IOLTA funds that were to be directed to one end or another. More recently, the IOLTA Trustee is nominally given some discretion as to how much money is to be directed to any given program, but this is usually subject to government dictation and control. In the NT, the IOLTA Trustees decide how to allocate distributions without any necessary reference to government.

Table 4 summarises the legally directed distribution of IOLTA after administrative costs are met, with the proportions specified where the governing Act does so.

---

91 LPA 1970 (ACT) s128(4)(j); LPA 1987 (NSW) s69F(1)(d); LPA 1974 (NT) s84A(5); LPA 1995 (Qld) s51(9)(a); Queensland Law Society Act 1952 (Qld) s36E(a); LPA 2004 (Qld) s209; LPA 1981 (SA) s56(4); LPA 1993 (Tas) s99(1); LPA 1996 (Vic) ss374(2)(a)(i), 376(2); Legal Contribution Trust Act 1967 (WA) s14(2)(a).


93 Dawson, above n38 at 17.

94 Gregory, above n1 at 173–176; Legal Assistance Act 1965 (Qld) s10(5). This position changes under the LPA 2004 (Qld) s209.

95 LPA 1974 (NT) s84A; LPA 1995 (Qld) s51(9); Queensland Law Society Act 1952 (Qld) s36E; LPA 1981 (SA) s56(5); LPA 1993 (Tas) s99(2); Legal Contribution Trust Act 1967 (WA) s14(3).

96 LPA 1970 (ACT) s123(4); LPA 1987 (NSW) s69f(1); LPA 2004 (Qld) ss209–210; LPA 1996 (Vic) ss372–387. Compare Queensland Law Society Act 1952 (Qld) s36E(b)(iii); LPA 1981 (SA) s56(6); Legal Contribution Trust Act 1967 (WA) s14(3).
### Table 4: Allocations of IOLTA Revenue *

<table>
<thead>
<tr>
<th>State</th>
<th>Legal Aid</th>
<th>Fidelity Fund</th>
<th>Regulation &amp; Discipline</th>
<th>Legal Education</th>
<th>CLE</th>
<th>PLT</th>
<th>Law Reform</th>
<th>Legal Research</th>
<th>Legal Publishing</th>
<th>Access to Justice</th>
<th>Supreme Court Library</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACT: LPA 1970 s128(4)</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>X</td>
<td>X</td>
<td>✓</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>NSW: LPA 1987 ss69G, 69I</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>X</td>
<td>X</td>
<td>✓</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>NT - Statutory Deposits: LPA 1974 s84A</td>
<td>✓</td>
<td>100%, but discretion to apply to other programs if fund &gt; $250,000</td>
<td>X</td>
<td>✓</td>
<td>X</td>
<td>X</td>
<td>✓</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>NT - Residual Balances: Law Society Public Purposes Act 1988</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Qld - Statutory Deposits (to 2004): LPA 1995 s51(9)</td>
<td>50% + surplus above fidelity fund allocation</td>
<td>Up to an amount that will maintain fund at $5 million</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Qld - Residual Balances (to 2004): Queensland Law Society Act 1952 s36E</td>
<td>75%</td>
<td>X</td>
<td>10%</td>
<td>5%</td>
<td>10%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Qld (from 2004): LPA 2004 s209</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>SA - Statutory Deposits: LPA 1981 ss56(5)-(6)</td>
<td>62.5% + surplus above fidelity fund allocation</td>
<td>The lower of 37.5% or an amount that will maintain the fund at $7500 per practitioner</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>SA - Residual Balances: LPA 1981 s57A(2)</td>
<td>50%</td>
<td>40%</td>
<td>10%</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tas: LPA 1993 s9(2)</td>
<td>X</td>
<td>100%</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td></td>
</tr>
<tr>
<td>Vic: LPA 1996 ss372-387</td>
<td>Up to 30%</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td>Up to 15%</td>
<td>✓</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>WA - Statutory Deposits: Legal Contribution Trust Act 1967 ss14(2)-(3)</td>
<td>At least 50% of surplus above fidelity fund contribution</td>
<td>Up to an amount that will maintain fund at $100,000</td>
<td>X</td>
<td>✓</td>
<td>X</td>
<td>X</td>
<td>✓</td>
<td>✓</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>WA - Residual Balances: Law Society Public Purposes Trust Act 1985 s5</td>
<td>X</td>
<td>X</td>
<td>X</td>
<td>✓</td>
<td>X</td>
<td>X</td>
<td>✓</td>
<td>✓</td>
<td>✓</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* For instance, after the costs of administering the schemes are met. The repealed Queensland rules are provided as the information in Tables 3 and 5 relates to money raised under the schemes they governed. ✓ = A potential funding program, but in discretionary amounts. X = Unable to receive IOLTA money in that state.
All of these programs, especially legal aid, benefit lawyers, even if others also benefit, and it will inevitably be debatable as to whether that translates into a program that serves the public good, or a private interest. However, I make no attempt to nominate any program as more deserving of IOLTA than another. Evans’ work has revealed serious ethical problems with some law societies’ management of IOLTA money, including ‘round robin’ allocations to programs that, in turn, allocate money to the law society, and piggy-backing law society administration on a fidelity fund or regulatory administration that is IOLTA-resourced. It also appears that IOLTA money could have helped buy downtown real estate as an investment for the profession. These need further investigation, but my focus is on shortcomings that are prior to the ethics of allocation. Further analysis of IOLTA allocations is therefore limited to legal aid, to show how dependent governments and professions have become on IOLTA for a program of benefit to both the public and lawyers.

B. Legal Aid

Although the importance of IOLTA to the funding of legal aid in Australia has occasionally been downplayed, Table 5 shows that around 10 per cent of all legal aid funding nationally comes from IOLTA. Once account is taken of the limited application of federal legal aid funding to federal matters, it can be seen that IOLTA provides between 15 and 20 per cent of funds for legal aid in state matters, which include most criminal defence work and a range of civil claims in areas like child protection, domestic violence, workers compensation, anti-discrimination and consumer protection. IOLTA is therefore a significant support for legal aid services, although its importance does differ from state to state. In Tasmania, legal aid cannot receive anything from the IOLTA schemes. In the NT it can receive money from the statutory deposits scheme but has received nothing in the last three financial years, and in WA the most that the law society directed to legal aid in that time is around $150000. At the other extreme, Queensland, true to its original plan for the statutory deposits scheme, is the most reliant on IOLTA for legal aid funding. Since 1996, IOLTA schemes have sometimes provided more than 20 per cent of the total Queensland legal aid budget and close to 40 per cent of the budget that can be used for state matters.

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98 Compare Peter Patmore, Tasmania, House of Assembly, Parliamentary Debates (Hansard), 27 November 1990 at 5504; Doug Lowe, Tasmania, Legislative Council, Parliamentary Debates (Hansard), 6 December 1990 at 4409.


Those states that distribute IOLTA to legal aid use it both to extend the budgets of the legal aid commissions and reduce the appropriation from the states’ consolidated revenue for legal aid programs. In the NT and Tasmania (in 2001 and 2002), two jurisdictions in which IOLTA either cannot be, or is not, allocated to legal aid, per capita funding of legal aid is above the national average (as shown by comparing the amounts given to legal aid as a share of the national allocation to the proportion of the national population in the jurisdiction). However, this is largely because of disproportionate federal funding. The budgets for non-federal matters are well below the national average. Unlike the other states, Tasmania does not provide legal aid for any non-federal, civil law matters (apart from child protection and de facto couple claims). In WA, where the IOLTA Trustee does not allocate significant amounts to legal aid, per capita legal aid funding is less than the national average. More than in any other state, legal aid in WA depends on state government appropriations. Three states that deploy IOLTA for legal aid are around or above the national average in the proportion of legal aid budgets that can be used in non-federal matters. NSW (in 2002 and 2003), SA (in 2001 and 2002) and Queensland have per capita legal aid funding above the national average. Victoria has a lower than average share of the national allocation to legal aid, and this may be attributable to its smaller proportionate distribution of IOLTA to legal aid programs. Queensland again shows best how IOLTA can be used both to extend the provision of legal aid but to reduce the burden this places on taxpayers. Its per capita funding of legal aid is slightly above the national average. However, this is due entirely to a more marked commitment of IOLTA, as the state government appropriation to legal aid is amongst the lowest proportionate commitments made in Australia.

But, whatever effect IOLTA schemes might have on legal aid budgets and state appropriations, they are now ensconced in the funding structure of legal aid. In 1998, federal legal aid funds (which mainly support family law work) were cut by just over $20 million nationally, causing great consternation in the legal aid sector, the legal profession and the Family Court. The consequential rise in the number of unrepresented litigants in the Family Court led its Chief Justice, Alistair Nicholson, to claim that the reduction in government funding had caused a crisis in family law, and the Law Council of Australia shared this view. Accordingly, a loss of IOLTA revenue, now more than $30 million annually, would have a major detrimental effect on legal aid services in the states that are more dependent on it, with cuts in assistance for state matters of lesser funding priority the most likely consequence. Given the Dietrich obligations to provide a fair trial in criminal cases the funding from non-federal sources must give priority to criminal defence work, this raises the possibility of an increase in unrepresented litigants in most civil matters that can currently receive legal aid.

Table 5: Legal Aid Funding Sources (in $'00s), 2000–2003

<table>
<thead>
<tr>
<th></th>
<th>ACT\textsuperscript{b}</th>
<th>NSW\textsuperscript{c}</th>
<th>NT\textsuperscript{d}</th>
<th>Qld\textsuperscript{e}</th>
<th>SA\textsuperscript{f}</th>
<th>Tas\textsuperscript{g}</th>
<th>Vic\textsuperscript{h}</th>
<th>WA\textsuperscript{i}</th>
<th>Australia</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>% National Population\textsuperscript{j}</strong></td>
<td>1.7</td>
<td>33.9</td>
<td>1.0</td>
<td>18.7</td>
<td>7.8</td>
<td>2.4</td>
<td>24.8</td>
<td>9.8</td>
<td>100</td>
</tr>
<tr>
<td><strong>2000–2001</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>IOLTA (%)</td>
<td>599 (9.8)</td>
<td>13 674 (13.9)</td>
<td>0 (0)</td>
<td>12 098 (20.8)</td>
<td>1785 (7.3)</td>
<td>0 (0)</td>
<td>5800 (8.2)</td>
<td>151 (0.6)</td>
<td>34 107 (11.5)</td>
</tr>
<tr>
<td>Other Non-Federal (%)</td>
<td>5520 (90.2)</td>
<td>51 720 (52.4)</td>
<td>2428 (49.1)</td>
<td>22 508 (38.8)</td>
<td>13 175 (53.6)</td>
<td>3459 (42.3)</td>
<td>37 134 (52.4)</td>
<td>14 847 (60.9)</td>
<td>145 716 (49.3)</td>
</tr>
<tr>
<td>Federal (%)</td>
<td>33 301 (33.7)</td>
<td>2512 (50.9)</td>
<td>23 458 (40.4)</td>
<td>9588 (39.1)</td>
<td>4727 (57.7)</td>
<td>27 870 (39.4)</td>
<td>9371 (38.5)</td>
<td>115 902 (39.2)</td>
<td></td>
</tr>
<tr>
<td>Total (%)</td>
<td>6119 (100)</td>
<td>98 695 (100)</td>
<td>4940 (100)</td>
<td>58 064 (100)</td>
<td>24 548 (100)</td>
<td>8186 (100)</td>
<td>70 804 (100)</td>
<td>24 369 (100)</td>
<td>295 725 (100)</td>
</tr>
<tr>
<td><strong>% National Allocation</strong></td>
<td>2.1</td>
<td>33.4</td>
<td>1.7</td>
<td>19.6</td>
<td>8.3</td>
<td>2.8</td>
<td>23.9</td>
<td>8.2</td>
<td>100</td>
</tr>
<tr>
<td><strong>2001–2002</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>IOLTA (%)</td>
<td>637 (9.6)</td>
<td>13 839 (12.2)</td>
<td>0 (0)</td>
<td>11 042 (17.9)</td>
<td>1449 (5.7)</td>
<td>0 (0)</td>
<td>6555 (8.7)</td>
<td>0 (0)</td>
<td>33 522 (10.3)</td>
</tr>
<tr>
<td>Other Non-Federal (%)</td>
<td>5977 (90.4)</td>
<td>62 894 (55.6)</td>
<td>2834 (48.6)</td>
<td>24 906 (40.5)</td>
<td>13 779 (53.9)</td>
<td>3161 (33.4)</td>
<td>41 148 (54.3)</td>
<td>15 708 (59.7)</td>
<td>165 317 (51.0)</td>
</tr>
<tr>
<td>Federal (%)</td>
<td>36 337 (32.1)</td>
<td>3002 (51.4)</td>
<td>25 606 (41.6)</td>
<td>10 318 (40.4)</td>
<td>6298 (66.6)</td>
<td>28 074 (37.0)</td>
<td>10 616 (40.3)</td>
<td>125 341 (38.7)</td>
<td></td>
</tr>
<tr>
<td>Total (%)</td>
<td>6614 (100)</td>
<td>113 070 (100)</td>
<td>5836 (100)</td>
<td>61 554 (100)</td>
<td>25 546 (100)</td>
<td>9459 (100)</td>
<td>75 777 (100)</td>
<td>26 324 (100)</td>
<td>324 180 (100)</td>
</tr>
<tr>
<td><strong>% National Allocation</strong></td>
<td>2.0</td>
<td>34.9</td>
<td>1.8</td>
<td>19.0</td>
<td>7.9</td>
<td>2.9</td>
<td>23.4</td>
<td>8.1</td>
<td>100</td>
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</table>
### Table 5: Legal Aid Funding Sources (in S’000s), 2000–2003* cont.

<table>
<thead>
<tr>
<th></th>
<th>ACT&lt;sup&gt;b&lt;/sup&gt;</th>
<th>NSW&lt;sup&gt;c&lt;/sup&gt;</th>
<th>NT&lt;sup&gt;d&lt;/sup&gt;</th>
<th>Qld&lt;sup&gt;e&lt;/sup&gt;</th>
<th>SA&lt;sup&gt;f&lt;/sup&gt;</th>
<th>Tas&lt;sup&gt;g&lt;/sup&gt;</th>
<th>Vic&lt;sup&gt;h&lt;/sup&gt;</th>
<th>WA&lt;sup&gt;i&lt;/sup&gt;</th>
<th>Australia</th>
</tr>
</thead>
<tbody>
<tr>
<td>% National Population&lt;sup&gt;j&lt;/sup&gt;</td>
<td>1.7</td>
<td>33.9</td>
<td>1.0</td>
<td>18.7</td>
<td>7.8</td>
<td>2.4</td>
<td>24.8</td>
<td>9.8</td>
<td>100</td>
</tr>
<tr>
<td>2002–2003 IOLTA (%)</td>
<td>586 (8.1)</td>
<td>15,965 (12.6)</td>
<td>0 (0)</td>
<td>15,255 (20.7)</td>
<td>2279 (8.6)</td>
<td>0 (0)</td>
<td>7630 (9.6)</td>
<td>0 (0)</td>
<td>41,715 (11.7)</td>
</tr>
<tr>
<td>Other Non-Federal (%)</td>
<td>6659 (91.9)&lt;sup&gt;4&lt;/sup&gt;</td>
<td>72,043 (56.7)</td>
<td>2941 (54.7)</td>
<td>30,750 (41.8)</td>
<td>13,194 (50.1)</td>
<td>3476 (45.8)</td>
<td>44,249 (55.5)</td>
<td>17,564 (61.2)</td>
<td>190,876 (53.7)</td>
</tr>
<tr>
<td>Federal (%)</td>
<td>38,956 (30.7)</td>
<td>2436 (45.3)</td>
<td>27,547 (37.5)</td>
<td>10,884 (41.3)</td>
<td>4109 (54.2)</td>
<td>27,893 (34.9)</td>
<td>11,146 (38.8)</td>
<td>122,971 (34.6)</td>
<td></td>
</tr>
<tr>
<td>Total (%)</td>
<td>72,45 (100)</td>
<td>126,964 (100)</td>
<td>5377 (100)</td>
<td>73,552 (100)</td>
<td>26,357 (100)</td>
<td>75,815 (100)</td>
<td>79,772 (100)</td>
<td>28,710 (100)</td>
<td>355,562 (100)</td>
</tr>
<tr>
<td>% National Allocation</td>
<td>2.0</td>
<td>35.7</td>
<td>1.5</td>
<td>20.7</td>
<td>7.4</td>
<td>2.1</td>
<td>22.4</td>
<td>8.1</td>
<td>100</td>
</tr>
</tbody>
</table>

4. The Ethics of IOLTA

The legal validity of Australian IOLTA schemes is not debatable. Since 1998, when the NSW Parliament finally passed a validating Act for the state’s residual balances scheme, IOLTA in Australia has rested on a comprehensive platform of state legislation. It will remain that way if the Model Laws on a National Legal Profession are implemented. As such, it does not have to meet any constitutional requirements that compensation be provided to those who might have property ‘taken’ by government — unlike federal legislation that must give ‘just terms’ or any US legislation that must (under the ‘takings clause’) provide ‘just compensation’ when ‘private property’ is ‘taken for public use’. 

A constitutionally directed compensation requirement might well be useful. It forces government to satisfy itself that the economic benefits of the scheme outweigh its costs, and makes it easier to justify the scheme as being for the public benefit. However, the Australian people have voted not to extend the ‘just terms’ requirements of the federal Constitution to the states. As a consequence, IOLTA schemes are not in Australia subject to the overarching ‘takings’ requirements that they are in the US, where there have been repeated takings clause challenges to the validity of IOLTA schemes since they were introduced in 1981.

This is not to say that the IOLTA schemes, though legal, are ethical. To a significant extent, an account of the public ethics of IOLTA schemes is helped by the judicial reasoning that identifies where, if the schemes had not been introduced, the revenue earned on trust account deposits would fall. In this sense, then, the courts also model the public ethics that should shape the schemes, but which in Australia have been ignored completely.

A. Interest as Client Property

A traditional analysis of the trusts implicated in IOLTA schemes suggests that, were it not for the Acts that redistribute value earned on trust account deposits, any interest that a bank was prepared to credit to a trust account would belong to the clients. No parliamentarian who has contributed to the debates about IOLTA has expressed any doubt that a trust account deposit being used to earn revenue for public programs was client money, and the structure of the legislative schemes that have resulted both assumes, and reinforces, the character of the capital as trust

105 Commonwealth of Australia Constitution Act 1900 (Imp) s51(xxxi).
106 The Constitution of the United States, Fifth Amendment.
107 Heller & Krier, above n83 at 1001.
110 This borrows the idea of a supreme court as an exemplar of public reason: see John Rawls, Political Liberalism (1993) at 236–237; compare Evans, Principle and Pragmatism, above n6 at 152–153.
money held for clients. The clients have complete control over the money held for them in the trust account.\(^{111}\) It is only to be moved as the clients direct in instructions given before or after the money is lodged in trust. And, while the statutory deposits schemes take the money out of solicitors’ immediate possession, solicitors, and so their clients, keep ultimate control, as the money lodged in an SDA must be repaid to them on demand without prior questioning.\(^{112}\)

It is much rarer in the IOLTA debates to find parliamentarians prepared to recognise that interest earned on clients’ deposits, no matter how much, is client property.\(^{113}\) This is nevertheless the interest’s inevitable moral and legal character. Struggling to explain the nature of intangible property like bank interest, the courts have often appealed to physical analogues — ‘interest shall follow the principal, as the shadow the body’.\(^{114}\) Although the physical analogue has been criticised,\(^{115}\) it does accurately portray the dependence of interest on the bank deposits. ‘Money’ in the bank is itself a metaphor, representing the agreed extent of the bank’s indebtedness to the depositor. The amount of interest represents an agreed increase in that indebtedness arising from the time the bank takes to repay the amounts that the depositor has lent. While, for many purposes, the law usefully segregates this indebtedness into ‘capital’ and ‘income’, these remain mere subsets of the one relationship of debt between bank and customer. To this extent, US judges have been the most technically accurate when they speak of interest as an ‘increment’ to the bank’s existing indebtedness.\(^{116}\) It is nonsensical to present the interest — as has happened in parliamentary debates about IOLTA — as money earned on deposits, but independent of any prior indebtedness and without a creditor, awaiting appropriation from the State of Nature by government or profession.\(^{117}\)

The House of Lords’ decision in Brown\(^ {118}\) strongly confirms this analysis. The structure of the banking arrangements in Brown was similar to that of the statutory deposits scheme but with the redistribution made directly to the lawyer. A Scottish

\(^{111}\) With only the potential qualification that the money may possibly be withheld if subject to a solicitor’s lien for unpaid work: see Dal Pont, above n16 at 870–874.

\(^{112}\) LPA 1970 (ACT) s124(1); LPA 1987 (NSW) s65(1)(b); LPA 1974 (NT) s81(1); LPA 1996 (Vic) s181(1)(b); Legal Contribution Trust Act 1967 (WA) s12(1). Compare LPA 1981 (SA) s54(9); LPA 1993 (Tas) s103(1).

\(^{113}\) For explicit recognition, see, for example, Eric Lloyd, Queensland, Legislative Assembly, Parliamentary Debates (Hansard), 2 December 1964 at 2029, 2030; Lawrence Springborg, Queensland, Legislative Assembly, Parliamentary Debates (Hansard), 26 November 2004 at 5243–5244; Patmore, above n98 at 5434, 5436, 5504; Anthony Fletcher, Tasmania, Legislative Council, Parliamentary Debates (Hansard), 6 December 1990 at 4414.

\(^{114}\) Beckfield v Tobin (1749) 1 Ves Sen 308 at 310; 27 ER 1049 at 1051 (Hardwicke LJ); Phillips, above n83 at 165. Kitto J used a similar ‘tree’ and ‘fruit’ analogue in Shepherd v Federal Commissioner of Taxation (1965) 113 CLR 385 at 396.

\(^{115}\) Phillips, above n83 at 181–182 (Breyer J).

\(^{116}\) Bordy v Smith 34 NW 2d 331 (1948), 334 (Wenke J); University of South Carolina v Elliott 149 SE 2d 433 (1966), 434 (Bussey J); State Highway Commission v Spainhower 504 SW 2d 121 (1973), 126 (Higgins J); State, ex rel Board of County Commissioners of Bernalillo County v Montoya 575 P 2d 605 (1978), 607 (McManus CJ).

\(^{117}\) See, for example, Percy Smith, Queensland, Legislative Assembly, Parliamentary Debates (Hansard), 2 December 1964 at 2029.

\(^{118}\) Brown, above n7.
solicitor — whose firm was also involved in a range of commercial activities — received large amounts from business clients into his client current account. Individually large receipts would be invested separately in savings accounts, but others were thought too small to be likely to earn net interest for the client, once transaction costs (like bank charges and administrative expenses) were deducted. However, when the client account approached a balance of £10000, the solicitor would withdraw £5000 and lodge it in a savings account. The interest earned there was paid to the solicitor’s own office account, and he treated it as his own. This was the origin of his dispute with the Inland Revenue Commissioners, for if the interest was the solicitor’s, he was entitled to some tax relief. The practice was common amongst Scottish solicitors, and endorsed by the Scottish Law Society.

The Lords unanimously regarded the interest earned as the property of the clients from whom money in the client account had been received.119 Little analysis was undertaken to reach that conclusion — Lord Donovan was the most loquacious in saying that ‘none of the interest is his income at all, but that of his clients to whom the capital, upon which the interest was paid, belongs’.120 Lord Reid recognised that the solicitor’s pooling arrangements alone made it possible for these client deposits to earn any interest, ‘[b]ut that does not appear to me to make any difference in law’.121 The Lords also agreed that this was not affected by the difficulties that the solicitor might have had in apportioning interest between clients,122 the fact that other Scottish solicitors commonly did the same thing,123 or that the law society had endorsed the practice.124

A similar conclusion was reached in Phillips,125 the first takings clause challenge to IOLTA that was considered by the US Supreme Court. It held by a 5:4 majority126 that the interest earned on accounts maintained under the Texas IOLTA scheme was the ‘private property’ of attorneys’ clients for the purposes of the takings clause. The court left the questions whether there was a ‘taking’, and whether Texas gave ‘just compensation’, to be considered on remand, although a federal appeals court did eventually strike the scheme down.127 This characterisation of the interest was certainly settled by the time, in Brown v Legal

119 Id at 257 (Reid LJ), 260, 261–262 (Evershed LJ), 263, 264 (Guest LJ), 266–267 (Upjohn LJ), 268 (Donovan LJ). A unanimous Court of Session had already reached the same conclusion: Brown v Inland Revenue Commissioners 1963 SC 331 at 337 (President Clyde LJ), 338 (Guthrie LJ). Compare Paulsen, above n83 at 44–45 (Kidd J).

120 Brown, above n7 at 268.

121 Id at 257.

122 Id at 257 (Reid LJ), 261 (Evershed LJ), 266 (Upjohn LJ).

123 Id at 257–258 (Reid LJ), 260 (Evershed LJ), 263 (Guest LJ), 266 (Upjohn LJ).

124 Id at 258 (Reid LJ), 261–262 (Evershed LJ), 264 (Guest LJ), 267 (Upjohn LJ), 268 (Donovan LJ).

125 Above n83.

126 Rehnquist CJ, O’Connor, Scalia, Kennedy & Thomas JJ; Souter, Stevens, Ginsburg & Breyer JJ dissenting.

127 524 US 156 (1998), 172. On remand, the Texas scheme was initially upheld: Washington Legal Foundation, above n130. However, this was overruled by the Fifth Circuit Court of Appeals, which held the scheme invalid on the ground that just compensation had not been given: Washington Legal Foundation [No 2], above n109.
Foundation of Washington, the Supreme Court held that the Washington IOLTA scheme survived a takings clause analysis. Following Phillips, the whole court accepted that the interest was clients’ private property and that, through the IOLTA scheme, the state did ‘take’ it. However, a 5:4 majority ruled that the clients had incurred no loss and, so, should receive no compensation under the takings clause.

The refusal of Australian parliaments to concede anything to the clients’ moral claims over the management of IOLTA schemes therefore brings the schemes’ ethical structure into serious question. When the statutory deposits scheme was being debated in the NSW Parliament, the government appealed to Brown as providing the ‘objective’ moral basis to the scheme. The Attorney-General presented Lord Upjohn as stating, as he did, that the solicitor’s use of the interest on pooled client money in the savings account was ‘an entirely innocent and commonsense practice’. The Attorney-General omitted, however, Lord Upjohn’s next sentence in Brown: ‘[b]ut this interest belongs collectively to the clients and not to the solicitor’. Already selectively quoted, Brown was then said to support the idea that the scheme was not using other people’s money for public programs, despite its ratio that the interest belonged to the clients. ‘The only organization or individual to lose anything by reason of this legislation will be the bankers’. The clients’ moral claims to the interest have therefore not only been ignored, the general law claims that they would have to the interest were misrepresented. This is in the sharpest contrast to Brown’s effect in the United Kingdom (UK), where strict procedures for solicitors to return interest on client money were introduced, and are still maintained. The UK professions set scales indicating when given amounts to be held for different periods have to be invested for the client’s benefit.

129 Id at 1422–1423.
130 Souter, O’Connor, Stevens, Ginsburg & Breyer JJ; Rehnquist CJ, Scalia, Kennedy & Thomas JJ dissenting.
131 Kenneth McCaw, New South Wales, Legislative Assembly, Parliamentary Debates (Hansard), 15 March 1967 at 4290.
132 Id at 4291; Arthur Bridges, New South Wales, Legislative Council, Parliamentary Debates (Hansard), 15 March 1967 at 4218, quoting Brown, above n7 at 267.
133 Brown, above n7 at 267.
134 McCaw, above n131 at 4291.
135 Ibid.
136 Though, in all probability, innocently. The speeches in both the Legislative Assembly and the Legislative Council were similar, with the same parts of Brown quoted. This suggests that the Ministers were relying on common briefing papers in their presentation of the effect of Brown.
Even if the amount that is earned on any single client’s trust account deposit is barely discernible, the clients have a moral claim on the management of the interest increment to the deposits they have made.\textsuperscript{138} It is only the convenience of the arrangement that leads to the suggestion, effectively made when IOLTA schemes have been introduced, that clients have a moral claim over the management of their capital, but not over its income\textsuperscript{139} — as if the interest exists independently of the deposit on which it was calculated. However, despite the clients’ moral claims, Australian IOLTA schemes direct that interest to public programs, often, in the place of returning to clients the interest that could be earned by them and, almost always, without clients’ knowledge. Furthermore, as will be seen, in some states the spending of that money remains secret, with IOLTA Trustees unwilling to account for it publicly.

\subsection*{B. Investing Duties}

The redistribution of IOLTA from clients is often justified by the claim that, individually, the deposits held in trust accounts could not earn net interest for the client, once transaction costs are taken into account.\textsuperscript{140} Even if taken as a part of pooled money (whether in an SDA or the trust account’s residual balance) that earns interest, the interest apportioned to an individual client would be infinitesimal or, if measurable, would still be less than the costs of apportionment. The suggestion that apportionment between clients is that costly is, with modern information technology, indefensible,\textsuperscript{141} but even on the brave assumption that it is, the argument also depends on trust account deposits being of small amounts held for short periods. That further assumption is commonly made,\textsuperscript{142} but bears little relationship to actual practice in Australia where, first of all, there is still no clear professional duty on solicitors to invest money that is capable of earning net interest for clients and, secondly, there is evidence that investable amounts could be commonly held in the trust account.

\textsuperscript{138} Compare DeLaine, above n4 at 193.
\textsuperscript{139} Dan Chern, ‘Why Mandatory IOLTAs Should Be Eliminated’ (1997) 4 Texas Wesleyan LR 123 at 140–141.
\textsuperscript{141} On this point, see Solicitors Guarantee Fund, above n6 at 252; J David Breemer, ‘IOLTA in the New Millennium: Slowly Sinking Under the Weight of the Takings Clause’ (2000) 23 Hawaii LR 221 at 245–246; Imperial, above n99 at 264; Salmons, above n87 at 265; Norman Mannix, New South Wales, Legislative Assembly, Parliamentary Debates (Hansard), 15 March 1967 at 4299; Fletcher, above n13 at 4414; Haddon Storey, Victoria, Legislative Council, Parliamentary Debates (Hansard), 14 June 1983 at 2737; Brown, above n7 at 257 (Reid LJ), 261 (Evershed LJ), 266 (Upjohn LJ).
\textsuperscript{142} See, for example, McCaw, above n131 at 4291; Peter Delamothe, Queensland, Legislative Assembly, Parliamentary Debates (Hansard), 2 December 1964 at 2016; Wilcox, above n44 at 1993.
In practice, Australian solicitors often arrange for any sizable amount entrusted by a client to be deposited as controlled money in a separate savings account and, for the most part, recommend to the client that that be done. However, professional rule-makers, including courts and tribunals, are yet to articulate a solicitor’s duty to recommend this. The Queensland Law Society tried to secure the discipline of a solicitor who failed to invest amounts between $4800 and $17000 held in the trust account, but the charges were dismissed once they met the tribunal’s inability to determine the time by which a deposit in a controlled money account should have been made. Under the current rules of conduct, it would be difficult to sustain a charge of failing to advise investment. This is a marked contrast to other jurisdictions, which demand a deeper level of ethical engagement of lawyers to secure private financial returns to clients.

In NZ, the introduction in 1991 of a single IOLTA scheme, by which banks would credit interest to trust accounts but pay it to the IOLTA Trustee, was coupled with a legislated duty to ensure that, wherever possible, client money is placed in a controlled money account. The Law Practitioners Act provides:

It shall be the duty of a solicitor to ensure that, wherever practicable, all money held on behalf of a person by that solicitor earns interest for the benefit of that person, unless –

(a) That person instructs otherwise; or
(b) It is not reasonable or practicable (whether because of the smallness of the amount, the shortness of the period for which the solicitor is to hold the money, or for any other reason) for the solicitor to invest the money, at the direction of that person, so that interest is payable on it for the benefit of that person.

British and American lawyers also have responsibilities to lodge client money in controlled money accounts whenever possible. For the UK that means that there is no diversion of IOLTA to public programs whatsoever, but in the United States this duty is built into the structure of most IOLTA schemes. For example, under the Washington scheme considered in Brown v Legal Foundation of Washington, an attorney was not to deposit investable amounts in an IOLTA account. So long as the rule was followed, money in an IOLTA account, by definition, could not have earned net interest if invested. Accordingly, the reason why the Supreme Court found that, despite a ‘taking’ of private property, the takings clause did not require compensation to be paid to the client, was that there was no loss to the client by

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143 Trust, above n6 at 78.
145 Law Practitioners Amendment Act 1991 (NZ) s4; Law Practitioners Amendment Act 1982 (NZ) ss91A–91N.
146 Law Practitioners Amendment Act 1991 (NZ) s3; Law Practitioners Amendment Act 1982 (NZ) s89A.
147 Solicitors Accounts Rules 1998 (Eng) r24; Solicitors Accounts Regulations 1998 (UK) r15; Solicitors (Scotland) Accounts etc Rules 2001 (UK) r11; Boone, above n4 at 541; Dulong, above n4 at 95; Salmons, above n87 at 261–262.
148 Above n128.
lodging the client’s money in an IOLTA account. If investable amounts were
deposited in an IOLTA account, the client’s remedy was against the attorney for
breaking the rules of the scheme. That did not invalidate the scheme itself.

Not only is this not required of Australian solicitors, the evidence of
disciplinary cases suggests that, especially if money is entrusted on account of
potential costs and outlays, investable amounts are routinely kept in the trust
account. Further, in their reasons for decision, judges and tribunal members pass
over this practice without remark, confirming sub silentio both that the general
practice of lodging investable amounts in a controlled money account is not yet an
enforceable duty, and how common it is not to invest when that is convenient for
the solicitors. Without this duty as a threshold for money passing into IOLTA
schemes, it is doubtful that any Australian IOLTA scheme would survive anything
akin to a takings clause analysis. But then, it would not have to. What is certain is
that, although it could never be quantified, interest that could be returned to clients
is being redistributed to public programs without their knowledge.

C. Client Choice

Even if solicitors were to sift investable amounts from the trust account, IOLTA
schemes would still not rest on an acceptable ethical foundation, as a duty to advise
lodgment in a controlled money account does not address the basic problem that
clients have — at the very least — moral claims over interest that is only capable
of being earned on pooled aggregations of trust account deposits. This, of course,
was the central point of Brown, which confirms that, without the IOLTA statutes,
clients would have a prior legal claim to this interest. That basic claim must be
given effect before IOLTA schemes in Australia can be ethically justified, and the
surest means of recognising the strength of that claim is allowing client choice.

American commentators, fearing possible invalidation of IOLTA schemes
under the takings clause, have consistently suggested that reinforcing client choice
is the best option for salvaging IOLTA in the US. Any moral objection to the
redistribution of value to public programs immediately dissolves once the client,
informed of the use that can be made of his money through IOLTA schemes,
consents to that use. However, any accommodation of client choice is lacking
completely in all Australian IOLTA schemes. It would be exceptional to find
solicitors who, when asking for money to be kept in trust, advise clients that it will
not earn them interest, or that, when pooled with other money in the trust account,
it will earn interest that helps to fund programs like legal aid and the maintenance
of a fidelity fund. There is, despite increasing mandatory disclosure requirements
on solicitors, no duty to give this advice. And, in times when even small
personal cheque accounts are credited interest, it could not be inferred from

149 Id at 1419–1420.
150 Id at 1414–1415.
151 See above n17.
152 Anderson, above n33 at 746–749; Breemer, above n141 at 244; Goldstein, above n140 at 1287,
1296; Salmons, above n87 at 271–273; Smith, above n117 at 1004–1005.
153 For example, see Dal Pont, above n16 at 26–33.
'custom' that clients would be conscious that trust account deposits would not attract interest for them, let alone be aware that the interest that was being credited (actually and notionally) to trust account deposits was being used for public programs. A similar issue was considered in Brown, where the solicitor claimed that his clients had agreed that he keep the interest on the savings account as they had impliedly agreed to the custom of Scottish solicitors to take it as a fee for the time and trouble involved in handling client money. The House of Lords disagreed that it was ‘customary’, although admitting that it was common. Implicit in Brown is the suggestion that, even if there were in Scotland a custom that this money could be treated as business receipts, it would not be sufficient to meet the standards of consent required before a solicitor could profit from the use of clients’ money.

Advice to clients that interest is not earned for them in the trust account, but that government arrangements lead to its earning revenue for public programs, would allow the inference that, if money is entrusted to solicitors in these conditions, the clients have consented to the redistribution of value to those programs. Of course, if that consent is to be real then clients must retain the right to direct that their money be placed in controlled money accounts even if, given transaction costs and the small interest credited, that means they invest at a personal loss. David Luban objects that this is just ‘a spite right’, a miserly refusal to allow public use of the money at the client’s own cost. And so it is. However, given the irrationality of that choice, few would make it. This is also a legal right that clients already have. If, having been advised that depositing money in a controlled money account will, after transaction costs are incurred, be unprofitable, the client still directs that money be invested, the solicitor must follow the client’s instructions. And, recognising that the client is, in this context, exercising a proprietary right in money being requested by the solicitor, the solicitor’s moral and legal duty is to give effect to the preference of the owner — no matter how irrational or niggardly it is, or how needy or meritorious others might be. The difference is that, at present, the client would generally make that choice without being advised how, if the money were deposited in the trust account, the income earned on it is going to be used.

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154 Brown, above n7 at 257–258 (Reid LJ), 260 (Evershed LJ), 263 (Guest LJ), 266 (Upjohn LJ).
155 As Lord Upjohn said: ‘... he cannot without his clients’ agreement, make indirect charges by way of retaining interest on the investment of his clients’ money. It avails him not to say that he retains such interest either in lieu of or in reduction of such charges or in addition thereto because of the extra time and trouble in which he may be involved in handling his clients’ affairs. But the client may agree to allow his adviser to retain such interest provided that the true legal position is explained to him and he fully understands it. Such an agreement may be expressed or may be implied from the course of dealing between the client and his adviser but can, in my view, only be implied where, at all events, it can be shown that the client knew of his rights and by his course of conduct agreed or assented to their waiver and substitution of this practice’: id at 265–266.
156 It is doubtful that informed consent requires detailed statement of the programs for which the interest is used: compare Breemer, above n141 at 245–246.
157 Luban, above n140 at 231.
158 See Immanuel Kant, Kant’s Political Writings (1970) at 70–71.
D. Representation and Accountability

Two questions of accountability arise under some Australian IOLTA schemes: the identity of the IOLTA Trustee, and its willingness to disclose how it manages its trust. Having established that IOLTA schemes raise questions of distributive justice between clients, bank shareholders and the various beneficiaries of the schemes’ programs, it remains to be asked why, in seven Australian jurisdictions, government continues to place the responsibility for effecting the redistribution onto private institutions — a law society, or a statutory trustee on which it is represented. This is regrettable, as (especially given the size of the allocation to legal aid) lawyers are direct beneficiaries of most IOLTA programs and the law society, whatever regulatory roles it may have, is principally the representative of lawyers. There is an appearance of interest. In some cases, the law society’s ostensible interest has no underlying reality as its role is mechanical, with allocations being directed by the governing Act or government. Still, as has been seen, there is evidence that some law societies’ real self-interest has directed how they have allocated IOLTA. But it is not merely to contradict claims that IOLTA is a solicitors’ ‘fringe benefit scheme’ that it is suggested that the government should be the IOLTA Trustee. It is the only institution that represents all citizens who could conceivably have a claim on IOLTA, including clients, and the only institution that can properly act as an agent of distributive justice. The Victorian Legal Practice Board was the first IOLTA Trustee to be independent of a law society, and it is only under the new Queensland rules that a state government has, for the first time, become an IOLTA Trustee.

The conflation of private and public roles in law societies or statutory trustees may also explain why, in some states, the IOLTA Trustee’s accounting for its management of IOLTA schemes remains unacceptably poor. There are no reports of residual trust account balances, and few of interest rates and SDA balances. The terms of residual balances schemes, which are after all arrangements made over a notional bank indebtedness to clients, are not available to clients or the general public. The ACT, NSW, SA and Victorian IOLTA Trustees do fully report the revenue raised, and the amount of allocations. In other cases, though, IOLTA scheme accounts are retained privately but made available on request. Under the old Queensland rules, the statutory deposits scheme earnings can only be estimated by reconstructing a range of accounts under the assumption that the governing Acts had been followed. It is evident that some law societies, while

159 Above n27.
160 Above n28.
161 Above nn96–97.
162 For example, Lloyd, above n113 at 2030–2031.
163 Patmore, above n98 at 5434, 5436.
164 LPA 1996 (Vic) s181(1)(a).
165 LPA 2004 (Qld) s208(2).
166 See above Part 2E.
prepared to publish IOLTA accounts to solicitor-members, are occasionally uncertain whether the accounts can be disclosed to the public. The confusion is understandable, given that a public role is being carried by a private organisation, but again supports the view that it is best not to place the management of IOLTA schemes with law societies if the actual nature of the trust they hold is not readily appreciated.

5. Restoring Trust to IOLTA

From the early twentieth century, government and law societies have taken admirable steps to buttress the trust created when solicitors hold client money, regulating closely how client interests, client control of the money and solicitors’ accountability are to be respected and managed. Nevertheless, government and law societies have themselves refused to respect those demands when they (in statutory deposits schemes) hold client money or (in residual deposits schemes) take advantage of it. Worse, they have often done so knowing that a moral trust is being violated. All Australian IOLTA schemes are bereft of safeguards to promote clients’ knowledge and control of government and law society use of their money, and consent to this use. Some, perhaps reflecting an embarrassment about IOLTA schemes, fail to provide any accounting for it. Against this moral trust, the interests of the states, the professions, other beneficiaries of IOLTA programs and the banks are consistently given priority over those of the banks’ creditors — whose deposits make it all possible.

The reasons are obvious. IOLTA revenue, now over $110 million annually, is vital for significant public programs. As the account of legal aid funding shows, its immediate loss would be catastrophic for the administration of justice in some states. Effectively, it is an important expropriation for public use. Still, it is an expropriation without a taxing or appropriation statute, or even notice to those who have the greatest moral claim to the money, and so fails to meet the most basic public standards for raising public revenue.

Government and professions are now IOLTA-dependent, and so are being asked to accommodate clients’ moral claims from a position of actually conflicting interests and duties. Undoubtedly, the straightforward response to the unethical structure of IOLTA would be to return any interest earned on trust account deposits to clients — apportionments between clients can now be easily made. But the extent of government interest in IOLTA makes this unlikely.

However, an ethical structure for IOLTA can be developed if this moral trust is reinforced by an explicit, enforceable duty on solicitors to recommend to clients that investable amounts be lodged in controlled money accounts; and to advise clients that money held in the trust account will not earn them interest, but will help

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168 See Table 3 note c.
169 See Solicitors Guarantee Fund, above n6 at 251–252, 319–320, 394–395; Principle and Pragmatism, above n6 at 153, 157; Trust, above n6 at 78.
170 Principle and Pragmatism, above n6 at 153; Whose Money, above n6 at 224–225.
171 Springborg, above n113 at 5244.
earn funds for public programs. The practice of entrusting the management of IOLTA to law societies and statutory trustee corporations also requires serious reconsideration. The recent assumption by the Queensland Government of the role of the state’s IOLTA Trustee is therefore a more promising development: having a better appearance; improving public accountability; setting distributive justice on its proper institutional foundation; and showing more honestly that IOLTA is a public expropriation.

Evans believes that, given changes in banking practice, trust account deposits are a declining source of capital for the earning of revenue and that, for pragmatic and ethical reasons, government and professions should be weaning themselves from their reliance on IOLTA.172 This is more imperative in the larger states, where legal aid commissions rely so significantly on allocations from IOLTA schemes. Any change to the ethical structure of IOLTA that improves both client knowledge of the schemes and choice over the destination of client money will also reduce returns made to public programs. This may also mean that IOLTA returns are reduced to a point at which the cumbersome but more effective statutory deposits schemes lose their comparative advantage over residual balances schemes, and can either be abandoned completely or substituted with the Canadian scheme.173 However, a government and professional interest in (what is morally) client income can, with ethical integrity, be preserved, although the present extent of that interest should be reduced. It is merely expecting of government and the guardians of the law the same standards that they expect of others.

172 Solicitors Guarantee Fund, above n6 at 200.
173 See above n87.
Review Essay

HLA Hart, Julius Stone and the Struggle for the Soul of Law†
THE HON JUSTICE MICHAEL KIRBY AC CMG*

1. Two Notable Lives

Books on the lives of judges and other lawyers are comparatively few — for the obvious reason that those who succeed in the law usually lead dull lives. The practice of law extracts a cost. It tends to impose a limitation on publishable extracurricular activities that would otherwise add spice to a life, so as to make it worth reading about. If this is so of the actors who take part in the dramas of courtrooms, how much truer it is of scholars who spend their lives in classrooms, teaching often ungrateful students and snatching moments to write down their analysis of the underlying foundations of law and obedience to law. Such people will usually be viewed as poor prospects for an interesting life story. If we want to read their theories, we can go directly to their writings, without troubling ourselves about their personal circumstances.

Yet, in the past decade, two books have been written on notable legal philosophers. Nicola Lacey’s new biography of Herbert Hart1 complements Leonie Star’s 1992 work Julius Stone — An Intellectual Life.2 Professor Lacey’s recent study is a more substantial one. It is more than half again as long and more intensive in the description of the inner life of the subject. However, for Australians, Julius Stone is probably regarded as having enjoyed a greater impact. He lived and worked amongst us for most of his professional life. Hart visited Australia but once, in 1971. Yet both of them continue to be, for Australians, leading expositors of the principles of legal philosophy. They seem somehow larger than life.

† Derived from an address at a seminar on legal biography, Australian National University, Canberra, 17 December 2004. This review essay is part of a longer work that will be published later.
* Justice of the High Court of Australia.
1 Nicola Lacey, A Life of HLA Hart — The Nightmare and the Noble Dream (2004).
The new biography of Hart confronts us with an insight into the rivalry between these two very different scholars. Nicola Lacey helps us to see the similarities and differences in their views, which, in turn, grew out of the contrasting stories of their external and internal lives.

Inspired by Lacey’s eminently readable account of Hart’s life, I want to collect some of the similarities and differences between Hart and Stone. By any account, each was an important writer and thinker in the field of jurisprudence, especially for English-speaking people. The core of Hart’s professional work was performed as Professor of Jurisprudence in the Oxford Law Faculty — a post he held from 1953 until 1969. Julius Stone, after a controversial start, served as Challis Professor of Jurisprudence and International Law at the University of Sydney from 1941 to 1972. Both of them held academic and other appointments before and after these central assignments in distinguished universities on the opposite sides of the world. Stone, for instance, after finishing at Sydney University was quickly welcomed into the newly established Law School at the University of New South Wales. It was to prove a safe haven, in many ways more welcoming and congenial than the Sydney Law School had been for him. But it was around their primary professional appointments that both scholars built a great deal of national and international activity in teaching and writing about jurisprudence. Both were to play important parts in the development of an understanding about the law, and not only within the legal profession.

2. Study in Similarities

The similarities between Stone and Hart are not difficult to find. Each was born into a family of Jewish immigrants who had settled in England in the nineteenth century before the **Aliens Immigration Act 1905** (UK) placed restrictions upon such immigration. Stone’s family had fled intensified anti-semitism in Lithuania. Hart’s family derived from East Prussia, in what is now part of Poland. When, years later, Hart was confronted by a boastful matron who said that her forebears were robber barons from the border country of England, Hart gently responded, that his forebears were ‘robber tailors in the East End’.  

Stone’s father was a cabinet-maker who had settled in Leeds where he brought up his large family that included the gifted Julius. Hart’s father was also ‘in trade’. Sim Hart, given like his son to periods of deep introspection and depression, was a furrier. He was to end his life in suicide.

3 Lacey, above n1 at 13.
From their earliest days, the two young Jewish boys, each born in 1907, were to taste anti-semitism. During the Great War, a mob of anti-German locals gathered outside Stone’s family business, threatening damage and mayhem. Stone’s father confronted them, bravely pointing out that he had sons fighting for the King in France and promising to kill them if they touched his property, even if he were to hang for it. The mob retreated. These events in Leeds left a bitter memory and a scar on Stone’s psyche. Hart, whose family were rather better off, was to taste serious racial discrimination later in his life, when perhaps he could cope with it more readily.

Both boys won scholarships that helped them to advance their education and to lift them out of the economic and social circumstances into which they were born. Hart received more encouragement in his education from his family. One suspects that Julius continued to advance only through the power of his considerable will and a frenetic energy that was to continue all his days.

Both Hart and Stone went up to Oxford where their dazzling intellectual gifts were quickly recognised. Stone was soon attracted to the lectures in international law given by JL Brierley, who enlivened the young man’s interest in the potential of the League of Nations to protect ethnic minorities, a matter naturally close to Stone’s interest. The banishment of Jews from various parts of Europe, which was to herald even worse events in the 1930s, engaged Stone’s concern. It led to the first string to his bow, namely his deep interest in international law. If Hart was to develop a second string, it lay in the fields of civil liberties and causation in the law. Hart’s engagement with the unresolvable philosophical quandary of causation was to produce (with his friend Tony Honoré) the masterpiece *Causation in the Law*[^4] — a book often cited by courts in all parts of the world when they are confronted with vexed problems of this kind.[^5]

Whereas Hart welcomed his absorption into the Brahmin world of Oxford of the 1930s, Stone was more critical of that environment. Each of them had an outsider’s scepticism about the self-satisfaction and unquestioning privilege of the Oxonian outlook; but Stone was to do more about it. Pursuing his interests in international law, he took up a Rockefeller Fellowship to further his studies in that discipline at Harvard University. There he came under the eye of Professor Manley O Hudson. Stone had by now determined to follow the life of a legal academic. Hart stayed in England and, being more Anglophile, was more quickly absorbed. For a time he pursued quite a successful career as junior counsel at the Chancery Bar in London. However, it was a career that left him unsatisfied. He yearned for a return to Oxford and to scholarship in the field of jurisprudence.

At Harvard, Stone fell under the spell of the sociology school of jurisprudence. That school had been cultivated at Harvard by Dean Roscoe Pound, who held successive appointments there between 1913 and 1937. Karl Llewellyn and Jerome Frank were other contributors to the Harvard commitment to viewing law

as a social discipline. They rejected the purely analytical approach of the legal positivism and verbal analysis taught at the English universities. For a restless, critical outsider, like Stone, Harvard must have seemed a breath of fresh air. It afforded an injection of legal realism at a critical phase in Stone’s intellectual development, that Hart was to miss. Years later, in 1956–57, in the ‘jurisprudence year’ of the Harvard Law School, Stone and Hart were to come together to teach their separate classes to the fortunate Harvard students. Stone was in the mainstream of the jurisprudential theories of the Harvard School. He fitted naturally into that place, where he had once, still in his twenties, almost received appointment as Dean. Hart was less comfortable and attracted smaller classes. But he received greater accolades and was honoured by the invitation to deliver the OW Holmes Lectures — a privilege that was thought to engender envy in the ambitious Stone.

In striking out on their careers, both Stone and Hart suffered burdens of discrimination because of their Jewish ethnicity. In Stone’s case, it was immediate and powerful. It is now known that his numerous attempts to secure academic appointments were frustrated, despite his brilliant scholarly achievements on both sides of the Atlantic, by referee reports that cautioned about his Jewish background and attitudes and his Zionist inclinations. Because Hart was more ambivalent about his Jewish origins, and unattracted by Zionism, he suffered less in this respect. However, in Nicola Lacey’s book there is one instance that shows the prejudice that ran deep and may have been replicated in unknown ways during Hart’s career.

After serving many years within New College at Oxford University, Hart applied to be elected principal of Hertford College. By this stage (1971) he had a beautiful house in Oxford where, with his wife Jennifer, he had raised their children. He did not want to move to the principal’s lodgings within Hertford College and raised this issue only to be assured that it would not create a difficulty. Later he was told that the College constitution obliged the principal to live within the College, residing outside ‘only in cases of emergency’. On this footing, Hart, with a little encouragement, withdrew.

Years later, when the Chancellor of Oxford University, the former Prime Minister Harold Macmillan, was sitting next to Hart at a College feast, they fell into talk about Macmillan’s role as Visitor to Hertford College. Macmillan disclosed that he had only experienced one problem. It concerned a proposal to appoint a lawyer as principal of the College, who was a Jew. Macmillan said that the appointing committee had not realised this fact and was concerned that it would not look good to turn down ‘a perfectly reputable man because he was a Jew’. Yet ‘luckily’ they discovered the requirement of the College constitution that the principal should live in the lodgings. So they used this as the excuse to turn the candidate away, without mentioning his religion.

Little did Macmillan know that Hart was the person of whom he was speaking. Hart did not embarrass Macmillan by revealing the truth. He said later, on telling

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6 Lacey, above n1 at 313.
the story, that it would have been too painful to have done so. Hypocrisy triumphed. In this as in other things, Hart was to regret his silence and to regard it as wrong. One can be absolutely sure that Julius Stone would not have kept the secret to himself. But then, Macmillan would have never raised the issue with Stone for whom Jewishness was a central, and never private, aspect of his being.

Both Hart and Stone felt themselves strangers in the law schools to whose chairs they were appointed. Hart, who had turned his back on the practice of law which he regarded as restricting, never truly viewed himself as a teacher of law. For Hart, his discipline was philosophy, with particular attention to legal applications. Stone was not particularly happy in the environment of the Sydney Law School. His arrival had been tumultuous. Unable to secure appointment to academic positions in Britain or North America, because of the offending references, Stone had ultimately accepted a Chair at the University of Auckland, in New Zealand. It was from there, in 1951, that he was recruited to the Challis Chair in Sydney. His appointment was attacked in the press and in the Sydney University Senate. It became a public controversy. There were many who urged that the post should be filled by an Australian, specifically an ex-serviceman or someone who had done his patriotic duty.

Stone’s Jewishness was repeatedly raised, as if it were a disqualification for the appointment. Supporters in Sydney sprang to his defence. One hinted obliquely that Stone had performed work for the security service in New Zealand, of importance to the war effort there. Stone immediately let it be known that this was false. He refused to compromise. For him, the motion for recision of his appointment was pure anti-semitism. In the end, the recision was not carried. Stone took up the post. But from the beginning, his welcome at the Sydney Law School was less than warm. Even in the 1950s, when I was there as a student, he was housed in tiny quarters with his loyal secretary Zena Sachs and his surrounding group of scholars — a kind of intellectual Siberia with few connections with the teachers of the common law. Substantially, Stone was an alien in the Sydney Law School. His subjects jurisprudence and international law were viewed as separate and distinct — not quite legal subjects.

To some extent, Hart suffered a similar fate; but in his case it was of his own choosing. Hart was intensely irritated by the excessive deference shown by legal scholars in Britain to the judiciary and practising legal profession. He refused to sprinkle his essays, referring to recent judicial decisions, with the usual phase of ‘with great respect’. For him, ideas were either supportable or insupportable. He felt that there was no need to show the forced deference exhibited to the judiciary in those days.

Both Stone and Hart recognised that a point was reached where law ran out. Each understood that, ultimately, law was a social construct, with a vital function to perform in society. Obedience to the law could not be explained solely from within the law’s own paradigm. Whereas Hart sought to find explanations for most of law’s binding force within the structure of primary and secondary rules, Stone emphasised the need to look beyond law’s rules to social forces to explain the ultimate principles and the fact of obedience and the limits to which those considerations could be pushed.
Both Stone and Hart were greatly influential with their students. Each of them had a gift and predilection to choosing particular students and encouraging them in their studies. Hart did so, to a very large extent, as examiner for many postgraduate degrees. Stone selected students whom he regarded as especially talented. He then engaged them in his own prolific writings. This is how I came to know Julius Stone.

In my late years at the Sydney University Law School, Stone was heavily involved in the rewriting of his monumental work *Province and Function.*7 The three successor volumes, which were to be published in the 1960s, required extensive new work. Stone engaged me to analyse a vast mass of written material provided by his colleague Ilmar Tammelo, with translations from the original Russian, on the then current Soviet view of the Marxist theory of the withering away of the State. I clearly remember sitting in Stone’s study at his home on the north shore of Sydney, where, under a reproduction of Rembrandt’s masterpiece *de Staalmeesters,* we laboured over our differences. In the end, my valiant efforts were rewarded with a single sentence acknowledgment in the preface to one of the new volumes.8

At the time, I viewed it as an unequal reward for heroic labour. However, as I look back, I can see that my true reward was working closely with this dynamic and energetic intellectual. Then, it seemed as if I was part of Stone’s slave labour. Now, I can see that he was doing me a big favour. It was not so clear at the time. But Stone’s choice of his students and the rewards he offered us have left insights that last our lives. So it was also with Hart’s students. Interestingly, however, as recounted by Professor Lacey, Hart’s students tended to have more than profound respect for their master. Hart somehow won deep personal affection. He was a more spontaneous, excited man. He was constantly sharing the wonder of experience and of thoughts and legal analysis. With Stone, one always felt that there was a rush of time. Time was precious. Stone could spare us only so much. Respect rather than affection was the feeling that I believe most of Stone’s students felt towards him.

Both Stone and Hart were to have an impact on the society in which they worked that went far beyond that normal to a philosopher or professor of jurisprudence. In Hart’s case, the impact could probably be seen most clearly in the exchange of opinions with Lord Devlin over the role of law in upholding public morality.9 In Stone’s case, his influence on public dialogue was wide and longstanding. Often as a boy and young man I listened to him broadcast ‘News Commentary’, just before the national news on the Australian Broadcasting

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9 The debate between Hart and Devlin is described in Lacey, above n1 at 6–7 and 256–261. Hart’s lectures on ‘Law and Morals’ followed closely the argument in his *Law, Liberty and Morality* (1963). Hart also had famous debates with Professors Lon Fuller and Hans Kelsen, described in Lacey, above n1 at 197–202 and 252–253.
Commission. Stone was a prolific writer in the popular media. He frequently contributed to discussion about international law and the United Nations. But for the appointment of Sir Percy Spender to fill a seat available to Australia on the International Court of Justice, Stone might well have received the appointment to that august judicial body. Such was not to be. Stone and Hart were public intellectuals. Each was engaged with his society. Each contributed to the world of ideas beyond the academic cloisters.

Both Stone and Hart were blessed with loving wives and talented children. Mrs Reca Stone was a fiercely loyal companion to Julius. She shared the triumphs and the disappointments. Their highly talented children have continued to play a role in Australian society and beyond. Members of the family have gone on to contribute to the law. Of course, they saw Stone as a loving father and grandfather. They would have seen the softer elements of his personality. Perhaps another book needs to be written to supplement Leonie Star’s biography on the public life of Stone. It would be a book that told more of his inner-workings. These are displayed, warts and all, in Nicola Lacey’s book on Hart. In some senses, Lacey’s is a psychological study. But it does reveal more of Hart’s inner-being — and especially in his relationship with his highly talented wife, Jennifer. The occasional tensions and difficulties in their relationship are disclosed, in a way that is not identified in the case of Stone. One gets a feeling that Stone’s home life was tranquil and private — a refuge of loyal support that he did not always enjoy in his professional life. But both Hart and Stone had a considerable support system that is essential to a public figure, whoever they may be.

Jennifer Hart has written her own biography. It gives her own story, in a way that Reca Stone never did or would have done. We get comparatively few insights into the Stone family life from Leonie Star’s book. It is not coincidental that throughout that book Julius Stone is described by his biographer as ‘Stone’ whereas throughout the book on HLA Hart, he is described as ‘Herbert’. Stone was reputed to have had a special empathy for migrant students studying law at the Sydney Law School. But because this was not my minority, it was not a side of Julius Stone that I ever saw. To the Anglo-Celtic majority, Julius was impressive, talented, energetic — but always the professor; always a little remote. Never once, that I recall, did he mention in lectures the subject of homosexuality.

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10 Including his daughter-in-law, Margaret Stone, now a judge of the Federal Court of Australia and his grand-daughter Adrienne Stone, now a faculty member of the Australian National University.
12 Compare Julius Stone, ‘Propensity Evidence in Trials of Unnatural Offences’ (1941) 15 *ALJ* 131. Nowhere in this article does Stone question or criticise the statutory ‘unnatural offences’. In this respect, he was a child of the Book of *Leviticus*. See ibid at Ch 18, 22, 20 and 23.
3. Study in Contrasts

So the similarities of Hart and Stone were profound, but so were the differences. It is now necessary to mention some of the chief of these.

Gustav Mahler once said ‘I am thrice homeless, as a native of Bohemia in Austria, as an Austrian among Germans and as a Jew throughout all the world. Everywhere an intruder, never welcomed’.13 Whilst Hart and Stone shared a double exclusion — their Jewishness and comparatively modest social origins — Hart, like Mahler, added a third layer. It is brought out with great sympathy and sensitivity in Nicola Lacey’s biography.

Hart came to accept himself as basically homosexual. In 1937, at the time of his appointment to his first substantive academic post in New College, Oxford, he confided to his friend Christopher Cox: ‘I am or have been a suppressed homosexual (I see you wince) and would become more so (I mean more homosexual and less suppressed) in Oxford’.14 As with his Jewishness, Hart was conflicted about his homoerotic feelings. He was also acutely conscious of the social prejudices about homosexuality, and especially at his time of reaching sexual maturity.

It was a painful journey for Hart to come to terms with this aspect of his nature, assuming that he ever fully did. His sexual orientation did not mean that he loved his wife, Jennifer, any the less. On the contrary, in every realm except the physical, their personalities complemented each other. But he told her, quite candidly, from the start, that hers was ‘the only woman’s body I’ve ever loved’. The only one from which he had ‘any physical pleasure’. As Lacey puts it, the revelation, in a letter, illuminated ‘the stunted nature of Herbert’s emotional life and his ambivalent sexual feelings’. Almost certainly it had led to bullying at school and teasing during Hart’s early years at Oxford.

Marriage, and a physical sexual life with Jennifer was not impossible for Hart. So, in the manner of many in those times, he proceeded to marry her and to father their children. He attempted self-analysis about both his diminishing interest in sex and his feeling emotionally closed.15 He confided his anxieties in letters and in his diaries from which Lacey quotes extensively.

As a human story, it is tragic to read the suffering and denial evident in the quoted passages. Physical expression of Hart’s sexual identity is mentioned or hinted at. But it is not developed and appears less significant than the frustration of deprivation and constant pretence. However, one very good thing came out of this denial and for it a wider world of ideas must be thankful. The events must be placed in their historical context.

In Britain, a committee under Sir John Wolfenden embarked upon the inquiry that led to the recommendation of substantial changes in the criminal laws against

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14 Lacey, above n1 at 61.
15 Lacey, above n1 at 111.
adult consensual homosexual acts. This proposal was published in September 1957. In 1959, Lord Devlin gave the Maccabean Lecture in Jurisprudence to the British Academy. He used the occasion to attack the general principle of the Wolfenden Report. According to Devlin, social morality was a seamless web. Once the law withdrew from the support of a distinctively Christian morality, the result would be a breakdown in the British social order. Thus, society had the right to punish with criminal sanctions private immorality that caused indignation or disgust to the majority.

Patrick Devlin’s views were anathema to Hart’s liberal principles and to his own most private feelings. In response, in July 1959, he gave the talk ‘Immorality and Treason’ on BBC radio. It was later published in The Listener. Hart drew upon the principle of John Stuart Mill that the only justification for invoking the coercive power of the state — especially in criminal law — was the necessity of preventing harm to others. Hart did not publicly associate himself with the homosexual law reform campaign that was established to support the Wolfenden proposals. Doing so was not only contrary to his British dedication to understatement, avoidance of public reference to sexual matters and sense of privacy but also to his professional sense of uninvolvment. At the time it would have been a difficult step for a man to take who, at the very least, was bisexual, whilst maintaining his own peace of mind and personal relationships. In those bad old days homosexual people usually liked to deceive themselves that ‘nobody knows’ whereas, of course, everyone actually did know or suspected the truth and many gossiped about it, as they did of Hart.

Nevertheless, driven by events and his own deep feelings, Hart began giving a number of lectures on the differences between himself and Devlin. They attracted large audiences. They took Hart into profound questions concerning the limits of democratic law-making and the ways in which those limits could be spelt out, respected and maintained. These were ideas he was later to express in his most famous work, The Concept of Law. But for the public in Britain, it was his work as a gentle, reasoned advocate of reform of the law on homosexual conduct that had the larger impact.

Hart gave reason and dignity to the cause which Wolfenden had advanced on pragmatic grounds. He gave a principled basis for supporting the reforms that eventually made their ways into the statute books in England in the Sexual Offences Act 1967 (UK). It seems unlikely that the passage of such significant changes in the criminal law would have had so easy and swift a course in England, in the face of powerful conservative opposition, had it not been for the strong intellectual engagement of Herbert Hart. Of course, he spoke from his own feelings. But he

16 Home Office, United Kingdom, Royal Commission into Homosexual Offences and Prostitution (1957).
17 Patrick Devlin, Maccabean Lecture noted in Lacey, above n1 at 221.
18 HLA Hart, ‘Immorality and Treason’ The Listener (30 July 1959) at 162.
19 Lacey describes this above n1 at 221. She says that Hart was in later life to regret not publicly associating himself with the cause of homosexual law reform, as several of his colleagues did.
presented his views in the language of philosophy and reason. As the opinions of a married man with three children, they doubtless assumed the respectability of apparently total neutrality. As it happened, the stated opinions were fully consistent with Hart’s general views on liberty and the role of law. Hart’s world view had a unity. But his opinions had an edge to them and this gave them a rare conviction and sense of urgency which struck a chord in the British public mind.

An English reviewer, Thomas Nagel,21 after reading Nicola Lacey’s book, has questioned why Hart did not destroy his diaries before he died. He suggests that everyone has a private world and that the book on Hart has ‘defects of taste’, presumably the revelation of Hart’s struggle with his sexuality. I could not disagree more. It is this insight into a central occupation of Hart’s mind that reveals his struggle and brings mind and man to life. Fairly clearly, by the end of his life, Hart perceived that his personal struggle was shared with millions and that generations would come — including amongst lawyers — who would value his contributions to enlightenment and wonder at the nightmare that society had so unjustly inflicted on him and so many others.

We are given few, if any, similar insights into the most private thoughts of Julius Stone in Star’s biography. Never in all my dealings with him did Stone ever intrude the slightest reference to his personal or sexual life. So far as we know, Stone kept no telltale diaries to reveal to a later generation intimate personal thoughts of this character. His marriage to Reca was revealed in public as close, mutually supportive, loyal and traditional. No windows are opened by Star, or anyone else, into the private persona of Julius Stone.

The closest that Stone came to a passion of the heart, was his fierce loyalty to the State of Israel. For Stone, this was a cause touching his emotions. His feelings grew out of his own experiences of anti-semitism, his witness to Jewish people’s sufferings in the Holocaust and his belief that the creation of a homeland for the Jewish people was both timely and necessary. It led some of his colleagues to express fear even to discuss Israel with him. However, in a letter in August 1967, Stone asserted that his writings demonstrated not bias towards Israel but bias towards justice. For justice, he was unwilling to suppress a ‘passion’.22 Zionism was to split the small Jewish community in Australia during the Second World War and thereafter. Some Australian Jews, such as Sir Isaac Isaacs, past Justice and Chief Justice of the High Court and Governor-General, were opposed to Zionism. Stone was appalled. He wrote an open letter to Isaacs which later grew into an extended essay *Stand Up and be Counted!*23

Upon these matters, and Zionism generally, Hart was much closer to the views of Isaacs. He was ambivalent about his Jewishness and sceptical concerning the creation of a new state in the middle of the Arab world. Upon this matter, he felt and thought more as an Englishman than as an English Jew. When, eventually, in

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22 Star, above n2 at 189.
later years, he travelled to Israel for the first time to give a lecture, he was tackled by one of his hosts on why he had not come earlier. For Hart, this presented a difficult question to answer without causing offence.

During the visit to Israel, Hart was invited to attend a meeting at the Palestinian University of Bir Zeit. Several of the western scholars present, but not the Israelis, accepted the invitation. Hart did not.24 He did not want to upset his hosts. As with his reaction to Harold Macmillan, this portrayed Hart not so much as a Jewish scholar, or man of principle, as manifesting the attitudes of an English gentleman. There would be little doubt that Stone would have felt aggrieved and angry about Hart’s neglect of Israel and his failure to rally to its cause. Amongst gay men and lesbians, there are similar controversies. Some regard the issue as a wholly private one. Others reject that notion and insist that wrongs and stigmatisation will never disappear until all who are affected nail their colours to the new mast and reveal reality as it is. For Julius Stone, Zionism was undoubtedly an affair of the heart. For his ‘rival’, the closest he came to such a public motivation was on the deeply personal and still secret issue of his homosexuality.

A big change came over Stone’s career with his effective banishment to the Antipodes. Of course, he maintained his links with scholars in Britain and North America. But his daily work for most of his life in Sydney, before the advent of fast and cheap transportation, meant that inevitably he was cut off to some extent from the intellectual mainstream of his discipline. Hart, on the contrary, was at the centre of it, in Oxford. Moreover, he was there at a time in legal developments when the writings of the leading scholars at Oxford, like the writings of the leading judges in the English courts, had a profound and continuing influence in all parts of the Commonwealth of Nations and in the United States.

If today HLA Hart is cited frequently in United States judicial opinions and scholarly texts, it is probably because of the fact that Hart remained at a global hub of intellectual endeavour. Stone, to a large extent, was sidelined. Yet it was the great fortune of Australia and New Zealand that Stone came to this part of the world. In a sense, he brought with him the school of jurisprudence that Roscoe Pound had built at Harvard.

Indeed, Stone was a vital antidote to the established school of legal positivism that had taken root in Australia and whose finest expression occurred in the commitment of Chief Justice Sir Owen Dixon to the resolution of great disputes by ‘strict and complete legalism’.

24 Lacey, above n1 at 345–346.

Stone’s leeways for choice were not totally open-ended. He did not support the tyranny of judicial whim. He was a strong proponent of the rule of law. It would be a misstatement of his theory of law to suggest that he favoured unbounded judicial creativity. However, his central contribution was to teach that some creativity was inescapable, inevitable and desirable.

It is impossible to understand the creative period of the High Court of Australia in the 1990s, when Sir Anthony Mason was Chief Justice, without an awareness of the powerful impact of Stone’s teaching on at least three members of the High Court of Australia at that time — Mason, Deane and Gaudron.

If, for the time being, there has been something of a return to the commitment to ‘doctrine’ of earlier times, it seems unlikely, in the long run, that Stone’s message will not prevail in Australia. It is an accurate description of the way judges, especially in final courts, exchange private thoughts about issues of legal policy and principle. The most that Stone taught was that judges should be honest and transparent in their exposure of the considerations of legal policy and principle, as well as the legal authorities, that influence their decisions. They should be aware of the way such considerations influence their approaches to ambiguous expressions in the Constitution, contested legislation and disputed principles of the common law. The furtherance of these ideas will remain Stone’s great achievement in the Antipodes. If he, rather than Hart, has had the greater impact amongst us, it is, perhaps, because we had the greater need for his instruction.

There were differences between Hart and Stone in their attitudes to the world and its ways. Hart absorbed more closely the techniques and habits of English expression. To some extent he seemed, consciously or unconsciously, to play the role of the absent-minded English professor. He was more urbane, witty, less intense and less apparently driven than Stone. He was given to understatement, where Stone would often err on the side of overkill. Famously, Stone’s writings are full of the most copious footnotes in which he details the sources of his ideas with total honesty. This is done, not only from a personal sense of truthfulness, but to provide the reader who is interested with material that can back up his propositions and expand knowledge on the particular point, if that is desired. Hart’s writings, by way of contrast, are briefer, more discursive and less given to references and citations.

The understatement of Hart’s writings was the product of his disdain for the sociology of jurisprudence that Stone had learned from Roscoe Pound and others at Harvard. If jurisprudence is an analytical discourse involving the examination of rules, by verbal techniques designed to reduce propositions to their absolute core and essence, the manner of writing apt to that view will inevitably differ from that appropriate to one who sees the complexities of law as a social discipline, serving various societal functions. Thus, the different modes of writing that Stone and Hart exhibit is partially the result of the different schools of jurisprudence to which they respectively belonged.
Hart was squarely placed in the English analytical school of verbal discourse and analysis. Stone crossed over. He was aware of that school and, where necessary, could perform legal analysis as well as the next.26 Like Hart, Stone was most comfortable in the legal speculations of jurisprudence. He simply used different tools. They took him to a wider ambit of source materials. They led to writing that was at once more diffuse and less sharp; more detailed and sometimes less precise. But for those of Stone’s school, declarations are not necessarily convincing, even when the writer is as distinguished a mind as Herbert Hart. Stone was an encyclopaedist. In his writings he gathered all the most important views. He was more diffident in pressing his own and this has been suggested as a reason why his writings have less impact now than those who developed their own schools of thinking.

Stone loved honours. In his lifetime, he was honoured by society and the academy. Hart, on the other hand, was ambivalent about such things. He often displayed a republican attitude to the symbols and trappings of worldly success. The disdain that he felt for the excessive deference amongst English academics to the judiciary flowed into his attitude to civil honours. He was critical of his friend Isaiah Berlin for accepting a knighthood.

Hart’s views were put to the test in the 1960s when he was informed of the intended offer of a knighthood. He declined on the basis that ‘such honours should be given in recognition of public service as distinct from academic merit or scholarship’. He said he was not qualified for the honour. If a similar honour had come in Julius Stone’s direction (as it well might in those days), I do not believe that he would have declined. There was greater insecurity in Stone’s personality in such matters than was the case with Herbert Hart.

Both Stone and Hart were appointed Queen’s Counsel and both enjoyed that professional honour. Whereas in England the appointments of academics were not unknown, in Australia small world provincialism intruded. The President of the New South Wales Bar, when told that the government was considering such an appointment for Stone, responded that doing so would devalue the appointment as a mark of professional success. This was a remarkable response given that the comment was made by one of Stone’s finest pupils, R P Meagher QC. Stone was sensitive to the issue. However, the State Premier of the day (Mr N K Wran QC), also a pupil and admirer of Stone, was insistent. The postnominals were added. When, at a celebration, Stone met one of his pupils who had also taken silk at the same time, he exclaimed ‘Oh, a real silk’.27

By the account of Lacey’s biography, Hart was a gentler, kinder and less abrasive personality than Stone could be. His devotion to his students, particularly those undertaking doctoral studies and preparing for academic life, was legendary. Stone, on the other hand, was more distant, at least if my experience is any guide. He perceived, quite clearly, the privilege and advantage that he extended to

27 Star, above n2 at 258.
selected students by entering into intellectual dialogue with him them. In my experience, he never became personal or warm. His relationship with his pupils was that of the pedagogue and it did not much change with passing time.

Stone was hypersensitive. Certainly, he suffered many wrongs in his life. He was not a person simply to accept these. This, and a great self-confidence in his knowledge of the law and society, made him more direct and sharp in expression than was common in the somewhat Anglicised Australia of his lifetime. Hart, on the other hand, adapted to English habits which teach kindness in public exchanges (sometimes accompanied by hypocrisy and gossip behind the back). Living with Herbert Hart as teacher and mentor would have been an easier journey than living with Julius Stone. On one occasion, Hart unintentionally caused affront to Stone. He said that in Stone, English jurisprudence had at last found its Pound. Stone took this as a suggestion that he had copied his work from Pound and objected to the statement. But even Stone’s sympathetic biographer acknowledges that Hart had simply meant that Stone had managed to bring an understanding of sociological jurisprudence to the English scene.28

Although in earlier years, as ‘rivals’, Hart and Stone had shared a fragile relationship, in later times their association became less strained. When Hart came to Australia and New Zealand and met Stone in Sydney, he found him ‘thinner, nicer, less egocentric’.29 Whether Julius Stone modified his assessment of Hart is unrecorded.

4. Conclusions

By the test of citations in judicial and scholarly writings, Hart’s sparser texts outperform today those of Stone in continuing influence. The latter died, after a long struggle with lung cancer which he faced with outstanding fortitude, on 3 September 1985. Hart had a longer life, but the last years were full of gloom, melancholy, depression and self-criticism. In his eighties, Hart was subjected to electroconvulsive therapy, a treatment available for the disorders of depression at that time. He was confined for a short period to a mental hospital. Yet on his discharge he continued to write essays for the New York Review of Books, the last of them published in 1986. Hart was discouraged by his fading intellectual life but, in his last year, his emotional connections with his children were the source of most of his joys.

Hart was ultimately wheelchair bound, enveloped by the melancholy beauty of the late music of Schubert and Beethoven. He died in his sleep on 19 December 1992.

The passing of two such scholars would normally be privately mourned but go largely unremarked. Yet now we have Nicola Lacey’s outstanding book on the life of HLA Hart. For Australians, it provides a good companion to the earlier, briefer story by Leonie Star on the life of Julius Stone.

28 Star, above n2 at 159.
29 Lacey, above n1 at 136.
Although the perceptions that each of these highly individualistic writers had of law and its theories and operation were different, each knew, and taught, that a point is reached where law, as rules, runs out. The value of recording the lives of these men is that the subject of their fascinations is not one for lawyers only. Law is the essential lifeblood of a modern democracy. How it is found; what it means; how its ambiguities are resolved; why we obey it; when we should disobey it and with consequences — these are issues for citizens, not just lawyers, still less philosophers.

The world of the common law was lucky to find at the same moment two young Englishmen, of Jewish descent, who thought and wrote and argued on these subjects, sometimes with each other. They were both outsiders. Perhaps that gave them a capacity to stand beyond the circle and to look at the law derived from England more critically and without needless deference. These were precious qualities that they brought to their writings. If the clarity and comparative simplicity of Hart’s writing style ensures that his work endures with a continued impact throughout the world of our legal system, this is partly because he stayed in the northern hemisphere and partly because of the continuing fascination of analytical and linguistic jurisprudence wherever English law is taught and practised. For Australians, Stone was more important because he provided a precious alchemy that would enable us, after a long silence, to break the spell of the declaratory theory of the judicial function and to look for a better theory.

Each scholar was to some extent an alien to the common law. Yet each knew it well, with all of its foibles. Each could teach their theories from that viewpoint. Fortunate was Australia that Julius Stone devoted most of his professional life of writing and teaching in our midst. Fortunate is the whole common law world that Nicola Lacey has now written her tender, affectionate, insightful description of the personal and intellectual life of Herbert Hart.

Three centuries ago John Arbuthnot declared that biography was ‘one of the new terrors of death’. On this account Hart and Stone had no need for fear. They knew that, in all ages, ideas are the most enduring forces for change in the world. Stone and Hart. Hart and Stone. Each utilised to the full their great natural gifts of intelligence, perception and analysis. Whether they know it or not, every common lawyer is richer for the work of such scholars. Now we can seek to know both of them from the books that describe their lives and work. We can see the similarities. We can see the differences.
1. Introduction

The Medical Research and Compensation Foundation (MRCF/the Foundation) was set up by James Hardie Industries Limited (JHIL) in February 2001, supposedly with ‘sufficient funds to meet all legitimate compensation claims anticipated from people injured by asbestos products that were manufactured in the past by two former subsidiaries of JHIL.’¹ In October 2003, the Foundation revealed that it faced a significant shortfall in funds² such that in its present financial position it would be unable to meet claims beyond the first half of 2007.³ In February 2004, David Jackson QC was commissioned to inquire into and report upon the following terms of reference:

1. the current financial position of the Medical Research and Compensation Foundation (“the MRCF”), and whether it is likely to meet its future asbestos related liabilities in the medium to long term;
2. the circumstances in which MRCF was separated from the James Hardie Group and whether this may have resulted in or contributed to a possible insufficiency of assets to meet its future asbestos related liabilities;
3. the circumstances in which any corporate reconstruction or asset transfers occurred within or in relation to the James Hardie Group prior to the separation of MRCF from the James Hardie Group to the extent that this may have affected the ability of MRCF to meet its current and future asbestos related liabilities; and;
4. the adequacy of current arrangements available to MRCF under the Corporations Act to assist MRCF to manage its liabilities, and whether reform is desirable to those arrangements to assist MRCF to manage its obligations to current and future claimants.⁴

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The aim of this article is to consider what impact the availability of limited liability in corporate groups may have had on the ability of MRCF, and that of companies in analogous circumstances, to manage their liabilities, to examine the responses of the Commission and interested parties to the fourth term of reference, and to consider the implications this has for the continued existence of limited liability in its current form.

The circumstances of the separation of the asbestos-related liabilities from the rest of the James Hardie Group have raised important questions about continued community acceptance of a legal doctrine which suspends the natural consequences of tort law in favour of companies and their shareholders to the detriment of involuntary tort creditors. While a more detailed response from the Commission to the fourth term of reference was somewhat pre-empted by the decision of the James Hardie Group to voluntarily fund the future asbestos liabilities of its former subsidiaries, the inquiry has brought to light fundamental inadequacies of our corporate law providing the opportunity to examine and address these deficiencies.

The first part of this article will look at the background and events leading up to the Inquiry in order to place the Inquiry in its corporate and historical context. The second part will examine the consequences of applying the principle of limited liability to corporate groups and whether the principle is justified in its application to corporate groups, particularly when a subsidiary of the group faces claims in respect of persons killed or physically injured as a result of its negligent acts.

2. Inquiry into the MRCF

A. Background

(i) From Subsidiaries to Trust Fund

The dangers of inhaling asbestos fibres were first documented in 1907. The James Hardie Group was actively involved in the manufacture, distribution and the mining of asbestos. Three companies in particular were involved in these businesses and formed the subject of the Inquiry. JHIL (later ABN 60), originally an importer of asbestos products, first began manufacturing asbestos products in 1916. In 1937 JHIL formed James Hardie & Coy Pty Ltd (Coy), a wholly owned subsidiary set up to carry out the manufacturing branch of the business, later known as Amaca Pty Ltd (Amaca). The third company, Amaba Pty Ltd (Amaba),

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6 Report at 12.
7 John Sheahan SC, Senior Counsel Assisting, ‘Submissions in reply dated 26 July 2004’, Special Commission of Inquiry into the Medical Research and Compensation Fund, s5 at para 10.
8 Id at paras 41–67.
9 Montague Murray, Commission on Compensation of Industrial Diseases (1907).
another wholly owned subsidiary, was born of a joint venture to produce brake linings and friction products in 1963. In 1978, it acquired both shares in the venture and later became known as James Hardie Brakes Pty Ltd, then Jsekarb Pty Ltd (Jsekarb) and finally, Amaba. Amaca and Amaba have been held liable in relation to numerous asbestos-related claims and many such claims will also arise in the future.

The first reported claim for compensation for respiratory illness by an employee of James Hardie was in the matter of Jones v James Hardie and Co Pty Ltd (1939) WCR (NSW) 129. The James Hardie Group ceased manufacturing asbestos in 1987. As the Group’s focus shifted to the United States market, there was a growing concern to separate the asbestos liabilities from the rest of the Group so they would not hinder the Group’s ability to obtain capital or funding there. After selling off Amaba’s business to interests outside the Group in 1987 and transferring Amaca’s operating businesses away from the former asbestos subsidiary to James Hardie Australia Pty Limited (JHA) (a new operating company) during the period 1995–98, the Group decided that the strategy most likely to succeed in effectively quarantining its asbestos liabilities was a trust. Under this structure, Coy and Jsekarb would continue to meet asbestos-related claims via their existing assets and ownership would pass from JHIL to a new, unrelated company in the form of a trust.

To this end, the MRCF, a company limited by guarantee, was set up in February 2001 taking over Coy and Jsekarb and assuming responsibility for the management of their asbestos-related liabilities. In addition, JHIL quarantined any potential asbestos-related liabilities of its own by making payments to Coy and Jsekarb in exchange for which JHIL was to be indemnified against any future asbestos-related liabilities. JHIL CEO Mr Peter MacDonald said that, with starting assets of $293 million, the establishment of the MRCF:

provides certainty for people with a legitimate claim against the former James Hardie companies which manufactured asbestos products...its establishment has effectively resolved James Hardie’s asbestos liability and this will allow management to focus entirely on growing the company for the benefit of all shareholders.

Fundamental to this claim was the ‘Best Estimate’ of current liabilities as $286m contained in the Trowbridge Deloitte report of February 2001. Later that year, Trowbridge was commissioned to carry out an updated report on the future

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11 Report, above n3 at 17–18.
12 Report, above n3 at 8.
14 Report, above n3 at 18.
15 Report, above n3 at 14 and 159–162.
16 Report, above n3 at 25.
17 Report, above n3 at 28.
18 James Hardie Media Release, above n1.
19 Report, above n3 at 9.
asbestos liabilities of the Foundation. Its report valued Amaca’s asbestos-related disease liabilities at $574.3 million — a substantial increase on the previous estimate. Trowbridge attributed the discrepancy to the fact that JHIL had not provided it with all available information, allegedly having withheld its claims data for the 9 months to December 2000. Later reports saw the estimates of potential liabilities only escalate and estimates available at the time of the inquiry clearly indicated that the Foundation would be unable to meet its future asbestos-related liabilities in the medium or long term. 

(ii) From Australia to the Netherlands

In October 2001, the head office of James Hardie moved from Australia to the Netherlands ‘to position the Group for further international growth and to improve the after-tax returns to shareholders.’ This was carried out under a Scheme of Arrangement whereby a new Dutch company, James Hardie Industries NV (JHI NV) became the Group’s holding company. JHIL became a wholly owned subsidiary of JHI NV and shareholders in JHIL became shareholders in JHI NV. The majority of shares which JHI NV held in JHIL were partly-paid shares on which JHIL could call for up to approximately $1.9 billion at any time, when necessary.

During the process of approval, Justice Santow of the Supreme Court of NSW was particularly concerned about the impact of the move upon JHIL’s ability to meet its future asbestos liabilities. In response to his query, he was assured that JHIL’s ability to call on the partly-paid shares would ensure that liability was met. However, Justice Santow was not informed that the directors of JHIL had already been notified of the significant shortfall in funding which the Foundation faced; he was not made aware of the ‘put option’ which had been put in place via a Deed of Covenant and Indemnity so that Amaca, at any time, could be required to buy out all the issued shares in JHIL for nominal consideration; nor was he told of the intention, if it existed at that stage, to cancel the partly-paid shares.

In 2003, JHIL, then known as ABN 60, was also completely removed from the Group by way of another foundation established to acquire the shares in ABN 60 and use its funds to finance payment to Amaca and Amaba under the Deed of Covenant and Indemnity.

B. Possible Causes of Action Assisting the MRCF

Various parties to the inquiry raised the question of whether the conduct of the directors of the various companies involved in the above restructuring gave rise to

20 Report, above n3 at 30.
21 Ibid.
22 Report, above n3 at 31 and 7.
23 Report, above n3 at 33.
25 Report, above n3 at 11.
26 Report, above n3 at 34–35.
27 Report, above n3 at 36.
causes of action under Australian corporations legislation. In particular, it was alleged that the directors of Coy breached their duty to act in good faith for the best interests of the company as a whole by paying improper dividends and excessive management fees; in transferring Coy’s operating assets and core business; and in charging JHA less-than-market rentals for the various properties it leased from Coy.

Also challenged were the use of deficient actuarial advice in setting up the MRCF; the misleading media release following the MRCF’s establishment; the lack of disclosure during the Supreme Court proceedings concerning the Scheme of Arrangement; and the legality of the Deed of Covenant, Indemnity and Access.

These causes of action were argued in the hope that they might eventually secure further monies for the MRCF or that they would lead to the setting aside of the separation of JHIL, Coy and Jsekarb. However, the Commission found that most of the actions considered would be unlikely to succeed and others with some prospect of success would be unlikely to result in damages being awarded to the MRCF and could well be barred by the Deed of Covenant and Indemnity. In addition, many successful causes of action would be dependent on the defendant’s ability to pay which, in the case of natural persons or of ABN 60, would be very limited. Furthermore, judgments in favour of MRCF might even not be enforceable insofar as they would apply to entities outside Australia.

Under the present Corporations Act 2001 (Cth) (hereafter Corporations Act), the MRCF is doomed to insolvency by 2007. Consequently, the threat of negative publicity and the dark cloud of unresolved, potential liabilities have compelled the Hardie parent, JHI NV, to make undertakings to the effect that it will fund all future asbestos-related compensation claims. However, notwithstanding Hardie’s willingness to compensate victims in this case, the Commissioner was of the opinion that ‘the circumstances that have been considered by this inquiry suggest there are significant deficiencies in Australian corporate law.’ In particular, there is concern that ‘under the current Corporations Act, there is the potential for other companies to attempt to divest themselves of liability by hiding behind the corporate veil’.

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28 See, for example, Amaca Pty Limited and Amabu Pty Limited; Unions and Asbestos Support Groups; Counsel Assisting. Submission to the Inquiry of the Medical Research Compensation Foundation, MRCF (Investments) Pty Limited.
29 Report, above n3 at 100, 111 and 123.
30 Report, above n3 at 553.
31 Report, above n3 at 553.
33 Report, above n3 at 7.
In response to the Jackson Inquiry and the restructuring of the James Hardie Group, there have been calls to amend the Corporations Act by ‘lifting’ the corporate veil on companies that strip assets from subsidiaries or move offshore to avoid liability. While there are many economic arguments in favour of the separate entity principle and the related doctrine of limited liability, public sentiment suggests that allowing further exceptions to be made to the principle of limited liability in corporate groups may be timely and appropriate.

3. Rethinking Limited Liability in Corporate Groups

Does the law make adequate provision for a company which cannot meet claims against it arising from its tortious conduct, to obtain indemnity or contribution in respect of those liabilities from a parent company, or for those liabilities to be reduced by permitting claimants to make claims directly against the parent?

A. The Raison d’Être of Limited Liability

(i) The Unforeseen Consequences of Salomon

It is now well established that a corporation is a legal entity entirely separate from its members, officers and directors. The implications of the separate legal entity doctrine were realised by the House of Lords in Salomon v Salomon and Co Ltd although perhaps not the full implications since, at that time, corporate groups remained uncommon. The significance of Salomon’s case lies in its recognition of the separate entity principle and of the principle that the debts of a corporation are not the debts of its members, officers or directors. As a consequence, a company’s liability is effectively limited so that its creditors may look only to the assets of the company itself and not to those of its members or controllers. Part of the justification for the decision of the House of Lords lies in the argument that the creditors who traded with Salomon and Co Ltd ‘only had themselves to blame’ since they freely chose to trade with what they knew to be a company, the liability of which was limited to its own assets. The theory behind this is that creditors are more efficient in evaluating and bearing particular risks since they can raise their prices to reflect the risk or seek security.

37 Rob Hulls, Attorney–General Victoria, Id at 8.
38 Catherine Walter, ‘Directors Can Shape Regulation or Get Hemmed In’ Australian Financial Review (28 September 2004) at 63. Walter suggests that the question of the preservation of limited liability is becoming the domain not only of judges and legislators but of the community.
39 Issue that parties to the Commission were invited to consider: Law Council of Australia, ‘Submissions in reply dated 14 July 2004’, Special Commission of Inquiry into the Medical Research and Compensation Fund at 4.
40 [1897] AC 22 (hereafter Salomon).
41 While corporate groups have existed in England since 1867: In re Barned’s Banking Company [1867] Ch 105 and in the United States since 1889: Act of April 4, 1888, Ch 269, § 1, 1888 N J Laws 385–386, even by 1977, corporate groups were seen as ‘a relatively modern concept’. The Albazero [1977] AC 744 at 807 (Roskill LJ); see also Walker v Wimborne (1976) 137 CLR 1 at [6] (Mason J).
42 Salomon, above n40 at 51 (MacNaghten LJ).
43 Id at 53.
The separate entity principle has since been applied strictly in Australia in cases involving corporate groups. As a result, both single corporate entities and corporate groups have benefited from limited liability, the application of limited liability to the latter resulting in multiple layers of protection in what some commentators have described as an accidental and unjustified extension of the doctrine ‘without any adequate reasoning in terms of principle and policy other than a dogmatic application of Salomon itself’. In Briggs v James Hardie & Co Pty Ltd, Rogers AJA notes that adherence to the principle in Salomon in the context of corporate groups tended to ignore commercial reality despite legislative recognition that a group of companies could be treated as a single unit.

In the United States, Blumberg explained that limited liability was established at a time when corporate groups were relatively unheard of and only the ultimate investors were protected by the principle. No recognition or analysis of the very different questions involved in applying principles of limited liability to single corporate entities to protect individual investors and those concerning its application to corporate groups was entered into by the courts, so that the rule’s extension appears to have been ‘an historical accident’, which merits re-examination in its application to corporate groups.

(ii) Justifications of Limited Liability

Various policy arguments exist in justification of the principle of limited liability as ‘beneficial to the trade and industry of the country and essential to the prosperity of the nation as a whole’. Many of these arguments are based on the behaviour typical of the hypothetical individual investor, taking account of, for example, the positive effects of limited liability on: the incentives for investment, diversification of portfolios and efficient operation of security markets. Often these justifications fail to consider the very different circumstances involved when the hypothetical shareholder is not an individual investor, but the parent company of a wholly owned subsidiary, as JHIL was to Coy and Jsekarb.

In large corporations there is typically a separation of ownership and control so that the many investors in a company cannot be expected to oversee all the business activities undertaken. Limited liability protects shareholders, who cannot be personally involved in monitoring and controlling the type and amount of exposure to risk, from losing all their assets. The parent-subsidiary relationship, however, typically involves only (or principally) one corporate investor who also acts in a managerial role, controlling business and policy direction, determining the company budget and undertaking, or strongly influencing, decision-making.

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45 See Industrial Equity Limited v Blackburn (1977) 137 CLR 567.
48 Blumberg, above n46 at 605.
49 Id at 605, 610–611.
processes.\textsuperscript{52} The parent company, therefore, is usually aware, informed and in control of the risks undertaken by the subsidiary and in a good position to avoid unnecessary risk. Nonetheless, limited liability does remain a strong source of encouragement in corporate groups for the risk-taking necessary to pursue large-scale, high-risk projects.

As the sole shareholder a parent of a wholly-owned subsidiary cannot claim that limited liability is necessary to encourage wide distribution of shares.\textsuperscript{53} Nor, according to Murphy, is it necessary to encourage diversified investment portfolios to reduce investor risk since investors have the possibility of diversification at the holding company level.\textsuperscript{54}

Another argument in support of limited liability is the idea that it enhances the ready transferability and uniform pricing of shares. Again, the significance of this argument is diminished where there is a single parent company shareholder since there is no market for shares in the subsidiary.\textsuperscript{55}

Limited liability is also said to avoid the costs of litigation and bankruptcy associated with bringing an action against thousands of shareholders to enforce shareholder liability. Again, this argument is equally inapplicable where creditors are able to sue the parent company directly.\textsuperscript{56} One area where the principle is equally applicable to corporate groups is in the avoidance of the cost of contracting around liability although Murphy raises the point that this argument assumes that limited liability is the desired negotiated outcome.\textsuperscript{57}

While certain commentators advocate the reintroduction of a system of pro rata unlimited liability,\textsuperscript{58} the ability of investors to evade a pro rata regime, the problems of extraterritorial enforcement\textsuperscript{59} and the opposition which such reforms would face mean a qualified version of the limited liability principle might be a better and more achievable solution. If limited liability is to be retained, however, corporate Australia must be re-educated as to its original purpose and accept that limited liability is a privilege carrying social responsibilities, not an inherent corporate right.\textsuperscript{60}

\textbf{B. The Boundaries of Limited Liability}

The purpose of incorporation and the privilege of limited liability was intended to encourage and promote exploration, manufacturing and trading activities which were to the benefit of the commercial community and the nation, but which it

\textsuperscript{52} Blumberg, above n46 at 623.
\textsuperscript{53} Id at 624.
\textsuperscript{54} Murphy, above n51 at 252.
\textsuperscript{55} Id at 251; Blumberg, above n46 at 624.
\textsuperscript{56} Blumberg, above n46 at 624; Murphy, above n51 at 252.
\textsuperscript{57} Murphy, above n51 at 252.
\textsuperscript{58} Henry Hansmaan & Reinier Kraakman, ‘Toward Unlimited Shareholder Liability for Corporate Torts’ (1991) 100 *Yale LJ* 1879.
\textsuperscript{60} Farrar, above n46 at 161.
would have been too risky to carry on without some limit being placed on the liability of the participants.61

(i) Abuse of Privilege

The idea that limited liability is a privilege accorded upon incorporation dates back to the 17th century when companies were incorporated by Royal Charter and were seen almost as another arm of the government.62 Tax incentives and the ease with which companies may now be incorporated has meant that, in the past 30 years, incorporation has proliferated in Australia,63 while the idea that incorporation is a privilege carrying social responsibilities to the community declined, at least until its recent revival with ‘CSR’ (corporate social responsibility) and triple-bottom-line reporting.

The actions of the James Hardie Group in its attempt to use the corporate form to quarantine its asbestos liabilities has revived the issue of whether corporations abuse the privilege of limited liability, making it an issue of concern not only for the legal and business communities but for the wider community. With Hardie’s board being described as ‘one of the worst identifiable examples of the problems resulting from lack of corporate social responsibility’,64 directors have good reason to heed the warning that they ignore their social and community responsibilities at their peril since, according to Catherine Walter, ‘the limited liability company, however fundamental to an entrepreneurial economy, is not a natural creature. It is a legislative construct that can be legislated away if we are careless of its benefits and responsibilities.’65

While limited liability encourages economically desirable high-risk projects, the reality is that it is a method of shifting risk and when risk results in loss, that loss must inevitably fall somewhere.66 This raises the question of the extent to which corporations should be permitted to shift risk and who ought to bear that risk: tort victims, the corporate group or society itself?67

As seen in the case of James Hardie, limited liability enables corporate groups to structure themselves so the group and its various levels of shareholders are insulated from loss, instead shifting the risk onto involuntary creditors such as tort victims. Corporate groups should not be allowed to manipulate capital boundaries in order to avoid potential legal liability.68 Commentators regard, and indeed the community has come to perceive, such conduct as an abuse of the corporate form and of the privilege of limited liability since it allows parent companies to avoid liability for injuries from dangerous products merely by forming a subsidiary to

63 Rogers, above n61 at 137.
65 Walter, above n38.
66 Murphy, above n51 at 250–251.
produce and distribute them, otherwise known as hiding behind the corporate veil. Courts, on the other hand, while not necessarily approving of the result, have long accepted such conduct as the logical outcome of the strict application of the separate entity principle, to which they rarely make exception.

(ii) Limitations: Piercing the Corporate Veil

In certain circumstances, courts have been prepared to pierce the corporate veil, holding parent companies liable for the debts of their subsidiaries. These include cases of fraud or improper conduct, such as where a company is established to avoid an existing legal obligation, as well as cases where a relationship of agency is established between a company and its controller. In the context of corporate groups, English courts have been prepared to pierce the corporate veil in cases where a group of related companies was in fact being run as a partnership. However, Australian courts have taken a much stricter approach to the application of separate legal personality in corporate groups, demonstrating a persistent reluctance to pierce the corporate veil be it for the benefit of the parent company or of creditors with a limited exception in negligence cases where it could be inferred that the parent owed a direct duty of care to the plaintiff creditor — better interpreted as a direct result of tort law rather than an exception to corporations law.

The case law on piercing the corporate veil is largely unhelpful in predicting whether it might assist tort creditors of the James Hardie Group since, there is no common, unifying principle, which underlies the occasional decision of the courts to pierce the corporate veil. Although an ad hoc explanation may be offered by a court which so decides, there is no principled approach to be derived from the authorities.

This, combined with the fact that what little guidance is given by the courts is stated in terms far too broad to be of great use to future litigants, means attempts to pursue actions against a parent company on the basis that the court might decide to pierce the corporate veil would face enormous uncertainty and unpredictable litigation costs. Furthermore, empirical studies in both Australia and the United States have demonstrated that courts pierce the veil less often in torts cases than

69 Ann Heitland, ‘Survival of Products Liability Claims in Asset Acquisitions’ (1979) 34 Bus Law 489 at 498. See also Farrar, above n46; Blumberg, above n46.
70 See for example, Briggs v James Hardie & Co Pty Ltd (1989) 16 NSWLR 549; Craig v Lake Asbestos of Quebec Ltd 843 F 2d 145 3rd Cir (1988) at 149. In Adams v Cape Industries Plc [1990] Ch 433, the court found that it was a legitimate use of the corporate form to use a subsidiary to insulate the remainder of the group from tort liability at 537.
72 Smith Stone and Knight Ltd v Birmingham Corp (1939) 161 LT 371; Hotel Terrigal Pty Ltd v Latec Investments (No. 2) [1969] 1 NSWLR 676.
74 Industrial Equity v Blackburn (1977) 137 CLR 567; Qintex Australasia Finance Ltd v Schroders Australia Ltd (1990) 3 ACSR 267; Briggs v James Hardie, above n70.
76 Briggs v James Hardie, above n70 at 567 (Rogers AJA).
in contract cases and a piercing decision is more likely when the entity behind the
veil is an individual rather than another corporation, despite the above analysis
which suggests courts ought to be more willing to pierce the veil in respect of
parent companies in corporate groups.

There are, of course, statutory restrictions on limited liability, such as s588V of
the Corporations Act, which can expose holding companies to liability for the
debts of their subsidiaries if the subsidiary incurs a debt while insolvent or
becomes insolvent upon incurring the debt. It is unclear whether a negligence
action brought against a company would be considered a debt for the purposes of
s588V. Given that liability is usually not characterised as an intentional debt, nor
is it of a quantifiable amount, it is arguable that it would not satisfy s588V.79 Even
presuming the contrary, the insolvency provisions would be of little use in the
circumstances of substantial long-tail liabilities where many of the victims
concerned are future, unascertained tort creditors.80 Indeed, this problem is
particularly severe in the case of asbestos liabilities, where, as a result of long
latency periods, many future tort victims have not yet been diagnosed or even
contracted the asbestos-related disease.81

C. Reining in Limited Liability

(i) Solutions Proposed

Parties to the commission put forward various recommendations for law reform
measures to deal with the shortfall in funding of the MRCF and the broader issue
of limited liability in corporate groups. Solutions proposed ranged from general
legislative provisions that would make parent companies liable for the debts of a
subsidiary,82 advocated by the Australian Plaintiff Lawyers Association (APLA),
to specific legislation proposed by the Unions and Asbestos Support Groups,
effectively piercing Hardie’s corporate veil, but without advocating a radical and
across the board change to entrenched legal doctrines of limited liability.83 While
the MRCF supported APLA’s recommendation, it preferred a more cautious
recommendation of limited special-purpose legislation due to fears that the
passage of general legislative reform on limited liability would be contentious and
therefore likely to suffer delays (or, indeed, ultimate failure).84

77 David Noakes & Ian Ramsay, ‘Piercing the Corporate Veil in Australia’ (2001) 19 CSLJ 250
at 263, 265.
78 Thompson, above n44 at 1038. No cases held members of a public company liable for the
company’s debts.
79 For a definition of what amounts to a debt, see Ogden’s Ltd v Weinberg (1906) 95 LT 567 (Lord
Davey), followed in Hamilton v Wright (1980) 5 ACLR 391 at 394; Hassein v Good (1990) 1
ACSR 710 at 718; Hawkins v Bank of China (1992) 7 ACSR 349 at 356—357.
80 Report, above n3 at 571–72. Long-tail liabilities are those liabilities which arise many years
after the events or transactions which give rise to them.
81 Law Council of Australia, above n39 at 5, 3.
82 Australian Plaintiff Lawyers Association, ‘Submissions in chief dated April 2004’, Special
Commission of Inquiry into the MRCF at 18–19.
83 Unions and Asbestos Support Groups, ‘Submissions in chief dated 14 July 2004’, Special
Commission of Inquiry into the MRCF at 137.
84 MRCF, ‘Submissions in chief dated 14 July’ Special Commission of Inquiry into the MRCF at
695.
The MRCF also submitted that principles similar to the US doctrine of undercapitalisation should be adopted in Australian law. This doctrine would hold parent companies liable for the debts of their undercapitalised subsidiaries on the grounds that undercapitalisation is a form of misleading creditors. In the US jurisdictions, the existence of a duty to adequately capitalise the corporation is said to depend on the court’s willingness to recognise a public policy obligation to adequately capitalise the corporation ‘as the “price” for limited liability’.85

The most detailed examination of potential reforms to limited liability was undertaken by Counsel Assisting who recommended that the Corporations Act be amended in order to restrict the application of the principle of limited liability in relation to actions for damages for personal injury or death caused by a company which is part of a corporate group.86 This way only the investors in the ultimate holding company would be protected by limited liability. Counsel Assisting also recommended that the reform ought to be made retrospective so that it would apply to corporations that no longer form part of the group to which the company in question belongs.87 This type of reform would distinguish between the different positions of tort victims and contract creditors, something Australian corporate law has failed to do thus far.88 Indeed, Hansmaan and Kraakman argue that shareholder liability should be viewed as a problem of tort law and not as a problem of corporate law.89

In contrast, the Law Council of Australia did not recommend reforms to the principle of limited liability and submitted that a response by the Commonwealth to permit ‘lifting the corporate veil’ was inappropriate in the circumstances.90 Certainly, any indiscriminate reform to the principle of limited liability within corporate groups was rejected by the Corporate and Markets Advisory Committee (CAMAC) that submitted relevant chapters from its 2000 Report on corporate groups to the Inquiry.91 Among the objections were arguments that such reforms would put Australia out of step with overseas jurisdictions; discourage investment; weaken the central economic foundation of all the other group companies; and increase litigation, all having directly or indirectly detrimental effects on the economy.92 Also in opposition to such reform were the arguments that the

85 Henry Ballantine, Corporations (Rev ed, 1946) at 302—03, quoted in Jonathan Landers, ‘A Unified Approach to Parent, Subsidiary and Affiliate Questions in Bankruptcy’ (1976) 42 UChLR 589 at 593. See also Minton v Cavaney 56 C 2d 576, 364 P 2d 473, 15 Cal Rptr 641 (1961). For US cases which have discussed the duty to capitalise the corporation adequately, see Carlesino v Schwebel 197 P 2d 167 at 174 (1984); Costello v Fazio, 256 F 2d 903 (9th Cir 1958); International Tel & Tel Corp v Holton, 247 F 2d 178 4th Cir (1957); Automotriz del Golfo v Resnick 306 P 2d 6 (1957); In re Lumber Inc, 124 F Supp 302 (D Ore 1954); Re First National Bank of Arthur, Illinois 23 F Supp 255 at 257 (1938).
86 John Sheahan SC, Senior Counsel Assisting, ‘Submissions in Chief dated 5 July 2004’, Commission of Inquiry into the MRCF, s5, para 27.
87 Id at para 28.
88 Hansmann & Kraakman, above n58 at 1925.
89 Id at 1881.
92 Id at 43–44.
common law can accommodate the interests of individual justice and that the interests and profiles of different group companies often differ significantly.\textsuperscript{93} The Committee did, however, endorse specific ‘see through’ liability legislation, which would ‘lift the corporate veil’ and impose direct liability on holding or other group companies where considered ‘necessary in the public interest’.\textsuperscript{94}

(ii) In Support of Reform

To say that restricting limited liability would put Australia out of step with overseas jurisdictions is perhaps an oversimplification. While there may be no blanket exceptions from limited liability in corporate groups, other jurisdictions have significant safeguards in place to mitigate the effects of limited liability on creditors. Examples include the United States and European Union requirements for minimum capital and the US doctrine of ‘successor liability’ as well as the New Zealand and Irish provisions allowing courts the discretion to make contribution and pooling orders in the case of related companies.\textsuperscript{95}

In response to the economic arguments that the principle of limited liability stimulates investment and that its reform would commercially weaken the economic foundation of the other group companies, Counsel Assisting considered that they overlooked the economic inefficiencies created by the principle due to poor risk allocation for torts and the special case of involuntary tort victims who have suffered personal injury or death.\textsuperscript{96} If reforms were to discourage shareholder investment, this would only affect firms that, under current tort law, impose net costs on society.\textsuperscript{97} Public sentiment would seem to suggest that the community is not prepared to see innocent tort victims go uncompensated on the basis that their suffering will somehow eventually be recompensed by the ultimate trickling down of society-wide economic benefits from corporate success.

In addition, Counsel Assisting argued that where an entire corporate group was forced into liquidation because its subsidiaries caused widespread injury, the negative effects would be attributable to the tortious injuries caused rather than the liquidation. As for the negative effects on the economy, these would presumably be minimised by the safe and profitable businesses of the group continuing under new ownership.\textsuperscript{98} Furthermore, it is difficult to see how the protection and survival of a company which has profited from an activity causing widespread injury to others can be justified on an economic basis considering that a substantial proportion of the economic burden of those injuries is likely to ultimately fall on the taxpayer.\textsuperscript{99}

Finally, when the source of the objections to the reining in of limited liability is made up of major corporations, commercial lawyers, and the Australian Institute

\begin{itemize}
\item \textsuperscript{93} Id at 44.
\item \textsuperscript{94} Id at 120.
\item \textsuperscript{96} Sheahan, above n86 at para 21.
\item \textsuperscript{97} Hansmaan & Kraakman, above n58 at 1933.
\item \textsuperscript{98} Id at 421–422.
\item \textsuperscript{99} Id at 422.
\end{itemize}
of Company Directors, it is hardly surprising that they oppose change to the existing principles of tort liability for parent companies in corporate groups especially where the common law’s so-called accommodation of the interests of individual justice has tended to favour corporations over their creditors, piercing the corporate veil to confer a benefit more frequently on the company than on its creditors.

4. Conclusion

While, to some, wholesale reform to the application of the principle of limited liability to corporate groups may be desirable, in light of the detailed arguments against this action contained in the CAMAC report and other difficulties highlighted above, any attempt at legislative reform in this area would be likely to be extremely difficult and subject to a great deal of opposition. However, the problem faced by current and unascertained future creditors of the MRCF is of a far narrower scope. It requires neither the abolition of the principle of limited liability generally nor its abolition in relation to tort liability. Rather, the problem relates to the narrower category of tortious claims where the damage suffered is death or physical injury, circumstances which could arguably fall under the ‘public interest’ exception outlined by CAMAC.

It is surely time to reconsider the principle in *Salomon* and recognise that, unlike the trade creditors in that case who ‘only had themselves to blame’, tort victims have no choice in the selection of the corporation that causes them harm. With public disapproval likely to weigh heavily in cases where parent companies fail to meet the obligations of an insolvent subsidiary to claimants having suffered death or injury, there is good reason to reform the *Corporations Act* so as to restrict the application of the limited liability principle to members of the ultimate holding company in these specific circumstances.

In answer to Lord Chancellor Thurlow’s question, ‘did you ever expect a corporation to have a conscience, when it has no soul to be damned and no body to be kicked?’, society today may well respond with an indignant, ‘yes’. There is no doubt that in exchange for the great privilege conferred upon corporate groups, which allows them to structure themselves in such a way that they may cause death and injury while avoiding liability, we should demand nothing less than socially responsible behaviour, failing which, such privilege ought to be legislated away.

100 CASAC Report, above n91 at 122.
101 These categories of participants were the authors of the submissions considered by CAMAC in its Final Report. Noakes & Ramsay, above n77 at 266–267.
102 MRCF, above n84 at 708.
103 CASAC Report, above n91 at 120.
104 *Salomon*, above n40 at 53 (MacNaghten LJ).
105 *Briggs v James Hardie*, above n70 at 863.
106 Report, above n3 at 572–573.
James Hardie Group Just Prior to Scheme of Arrangement of 19 October 2001

James Hardie Industries Ltd
(now ABN 60 Pty Ltd)

James Hardie Industries NV
(formerly BCI Netherlands Holdings BV)

Non-core assets and liabilities

James Hardie NV

Operating Businesses

James Hardie Group Post Scheme of Arrangement of 19 October 2001

Subscription for partly paid shares

James Hardie NV

James Hardie Industries Ltd
(now ABN 60 Pty Ltd)

Non-core assets and liabilities

Operating Businesses
‘Never Say Never’: Al-Kateb v Godwin

JULIET CURTIN*

1. Introduction

Amongst Western nations, Australia stands alone as the only country that pursues a policy of mandatory administrative detention of all ‘unlawful non-citizens’.1 The Migration Act 1958 (Cth) provides that ‘unlawful non-citizens’, that is, those who have come to Australia without permission, will remain in detention until the occurrence of either one of three events — release from detention upon the grant of a visa, deportation, or removal from Australia at their own request or upon the rejection of their attempts to secure a visa.2 While the elaborate system of review in place for protection visa applications has precipitated notoriously long and uncertain periods of detention, in the usual case the period of detention is finite and may always be brought to an end by the alien requesting his or her removal.3 However, in some instances, the means envisaged by the Migration Act are unavailable to bring a failed asylum seeker’s detention to an end and there is no prospect of removal from Australia in the reasonably foreseeable future. The issue before the High Court in Al-Kateb v Godwin4 was whether, in such cases, the Migration Act authorises indefinite detention or requires their release and if the former, whether the provision for indefinite administrative detention infringes the vesting of the judicial power of the Commonwealth exclusively in Chapter III courts of the Constitution.5

The Full Federal Court addressed the same issue in Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri.6 In that case, the Court found a temporal limitation on detention as a matter of statutory construction such that a detainee must be released when the purpose of removal is frustrated.7 Al-Kateb

* BA(Hons) LLB(Hons). The author wishes to thank Mary Crock for her guidance and support in the creation of this case note. Any errors are the author’s own.

2 Section 196(1). Unlawful non-citizens are detained under s189 of the Migration Act.
3 As noted in Chu Kheng Lim v Minister for Immigration (1992) 176 CLR 1 at 34 (hereafter Lim) (Brennan, Deane & Dawson J). It should of course be acknowledged that, as the Human Rights Committee observed in A v Australia, UNHRC Communication No 560/1993, (3 April 1997) the capacity to request one’s removal offers no consolation to a refugee whose presence in detention and very status as a refugee is marked by their incapacity to return to their home for risk of persecution.
5 Commonwealth of Australia Constitution Act (Imp) ss71–80 (hereafter ‘the Constitution’).
7 Id at 88.
therefore presented an opportunity for the High Court to either affirm or effectively overturn the *Al Masri* decision. In reaching its decision in *Al Masri*, the Full Federal Court referred to authorities from other common law countries where superior courts, when called upon to finally determine analogous situations, read into the applicable legislation an implied limitation upon the executive power to detain.\(^8\) In each of these decisions, the court was desirous to fetter what would otherwise be an executive power of unlimited detention. Each decision was also buttressed by the weight of international law, specifically its protection of personal liberty as a fundamental freedom and the associated freedom from arbitrary detention.\(^9\) However, according to a majority of the High Court in *Al-Kateb*, constituted by McHugh, Hayne, Callinan and Heydon JJ, there is no place for consideration of either international law or the jurisprudence of other domestic jurisdictions as there is no ambiguity in the *Migration Act*. The legislation clearly and lawfully provides for the appellant’s indefinite detention until his removal from the country.\(^10\) It was therefore not an issue of statutory construction but rather of the constitutional validity of the legislation. The case saw the High Court divided 4:3, the majority taking a strict legalistic approach to the legislation and the minority (Gleeson CJ, Gummow and Kirby JJ) a purposive approach defensive of individual liberty and consistent with the principles of international human rights law.\(^11\)

### 2. The Facts

The appellant, Al-Kateb, was a stateless Palestinian.\(^12\) He arrived in Australia without a visa and was placed in immigration detention. His application for a protection visa was refused, a decision that was upheld by the Refugee Review

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\(^8\) In the United Kingdom: *R v Governor of Durham Prison; Ex parte Hardial Singh* [1984] 1 WLR 704; [1984] 1 All ER 983; in the United States: *Zadvydas v Davis* 533 US 678 (2001); and in Hong Kong: *Tan Te Lam v Superintendent of Tai A Chau Detention Centre* [1997] AC 97.


\(^10\) *Al-Kateb*, above n4 at [33] (McHugh J).

\(^11\) Only Kirby J made a point of complying with the norms of international human rights law, however the norms in question are protective of the right which all three minority justices sought to protect – the right to personal liberty. The common law has a strong presumption in favour of personal liberty. See, for example, *Whittaker v The King* (1928) 41 CLR 230 at 248; *Trobridge v Hardy* (1955) 94 CLR 147 at 152; *Watson v Marshall and Cade* (1971) 124 CLR 621 at 632; *Williams v The Queen* (1986) 161 CLR 278 at 292; *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 532; *McGarry v The Queen* (2001) 207 CLR 121 at 140–142.

\(^12\) Meaning that he is ‘not considered as a national by any State under the operation of its law’: Article 1 of *The Stateless Persons Convention* (New York, 28 September 1954; entered into force in Australia on 13 March 1974: [1974],*Australian Treaty Series* No 20). The appellant was born and resided long term in Kuwait but was not eligible for Kuwait citizenship or permanent residence.
Tribunal, and his appeal to the Federal Court was unsuccessful. Al-Kateb asked to be removed from Australia but the Government was unsuccessful in making these arrangements. He then sought from the Federal Court a writ in the nature of habeas corpus and a writ in the nature of mandamus requiring compliance with s198 of the Migration Act. Selway J dismissed the application. Al-Kateb then sought prerogative relief against two officers of the Department of Immigration and Multicultural and Indigenous Affairs and the Minister; namely, a declaration that his detention was unlawful, a writ of mandamus directing his removal, and a writ in the nature of habeas corpus. This was dismissed by von Doussa J although his Honour found that ‘the evidence does establish that removal from Australia is not reasonably practicable at the present time as there is no real likelihood or prospect of removal in the reasonably foreseeable future’. The appeal against this decision was removed to the High Court under s40 of the Judiciary Act 1903 (Cth) at the request of the Commonwealth Attorney-General.

3. The Proceedings

The appellant’s case was heard alongside Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs and Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji. The Attorney-General intervened in Al-Kateb and Al-Khafaji while the Human Rights and Equal Opportunity Commission (HREOC) intervened in all three proceedings by way of written submissions. The appellant’s argument was that a proper construction of the Act, as directed by authorities such as Koon Wing Lau v Calwell and Chu Kheng Lim v Minister for Immigration, mandated his detention for the purpose of removal, which must take place as soon as reasonably practicable, only so long as removal is a practical possibility. If removal is not a practical possibility, his detention must come to an end until such time as his removal becomes reasonably practicable. Conversely, the respondents contended

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13 The Tribunal affirmed the decision not to grant the visa on the basis that Australia did not owe Mr Al-Kateb protection obligations. The definition of ‘refugee’ in Article 1 of The Convention Relating to the Status of Refugees (Geneva, 28 July 1951), as amended by the Protocol relating to the Status of Refugees (New York, 31 January 1967) does not include a stateless person in the position of Mr Al-Kateb.
14 This section requires removal as soon as reasonably practicable.
16 SHDB v Goodwin & Ors [2003] FCA 30 at [9].
18 (2004) 208 ALR 201. Mr Al-Khafaji had been found to be a genuine refugee from Iraq but his application was ultimately declined because of s36(3) Migration Act (by the operation of this section his stop-over in Syria where he could have sought asylum prevents him from gaining protection in Australia). However, the government had been unsuccessful in arranging his removal to Syria so that, as with Al-Kateb, there was no real likelihood or prospect of removal in the reasonably foreseeable future.
19 As recounted by Gleeson CJ in Al-Kateb, above n4 at [14].
20 (1949) 80 CLR 533.
21 Lim, above n3.
that the *Migration Act* provides for the appellant’s detention until his removal and that removal should take place as soon as reasonably practicable. The purpose of removal does not cease to exist merely because its fulfillment is not practicable in the foreseeable future.\(^{22}\)

The appellant’s argument was based on a reading of ss196 and 198 of the *Migration Act*. Section 196(1) provides that an unlawful non-citizen detained under the ‘arrest’ provisions of s189 must be kept in immigration detention until (relevantly) he or she is removed from Australia under s198. The relevant subsections of s198 provide that:

1. An officer must remove as soon as reasonably practicable an unlawful non-citizen who asks the Minister, in writing, to be so removed.

... (6) An officer must remove as soon as reasonably practicable an unlawful non-citizen if:

1. the non-citizen is a detainee; and
2. the non-citizen made a valid application for a substantive visa that can be granted when the applicant is in the migration zone; and
3. ... (i) the grant of the visa has been refused and the application has been finally determined;
4. ... and
5. the non-citizen has not made another valid application ...

The appellant argued that there is an ambiguity in the legislation in that it does not provide, in express terms, for any direction when neither removal nor the grant of a visa is possible.\(^{23}\) According to the appellant, the use of this word ‘until’ in subs196(1) creates an ambiguity as it contemplates an end to the purposes of the subsection. Similarly, s198, with its use of the words ‘must remove as soon as reasonably practicable’, also assumes that removal is possible. The ambiguity in the legislation is that this assumption is not made explicit, nor are contingencies provided for great delay or frustrated purpose. Given this ambiguity, principles of statutory construction are enlivened to direct an interpretation protective of personal liberty\(^{24}\) commensurate with Australia’s international obligations.\(^{25}\)

It was also submitted by the appellant that a purposive approach should be taken in interpreting the legislation, the purposes of the *Migration Act* being that

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\(^{22}\) See *Behrooz & Ors v Secretary DIMIA & Ors, SHDB v Godwin & Ors, MIMIA v Al Khafaji* [2003] HCA Transcript of Argument (12 November 2003).

\(^{23}\) For the appellant’s argument see *Behrooz & Ors v Secretary DIMIA & Ors, SHDB v Godwin & Ors, MIMIA v Al Khafaji* [2003] HCA Transcript of Argument (12 November 2003) and [2003] HCA Transcript of Argument (13 November 2003).


\(^{25}\) See *Polites v Cth* (1945) 70 CLR 60.
of processing and removal. If there comes a time where the prospect of removal is so remote that the detention cannot fairly be described as for that purpose, the purpose of removal is eliminated, in effect, as a factual matter. If the executive holds an unlawful non-citizen for a purpose other than that authorised by the Migration Act then the detention exceeds the Migration Act. Conversely, the respondents argued that so long as the Minister holds the purpose of removal, and so long as genuine attempts are being made to achieve that purpose, the detention is lawful.

The appellant also mounted a constitutional argument, submitting that his continued detention would be constitutionally invalid on two bases. Firstly, indefinite administrative detention exceeds the constitutional limits of the aliens power, the High Court’s decision in Lim being authority for the proposition that the aliens power vested in the Executive by the Constitution authorises detention for the purposes of processing and removal only. Secondly, unlimited detention at the hands of the Executive encroaches upon the judicial power of Chapter III courts. As HREOC contended in its written submissions, the constitutional immunity from detention by a non-judicial Commonwealth authority permits detention only to the extent to that which is reasonably necessary to enable the assessment of status, removal or deportation. That which is ‘reasonably necessary’ must be determined not merely by reference to the purpose of detention but also by an examination of the effects and consequences of detention. If there is no real likelihood of removal in the reasonably foreseeable future then detention will not be reasonably necessary to achieve removal.

In response to these arguments, the respondents submitted that it is within the aliens power for the Executive to determine which aliens are allowed to enter Australia, whether they will be removed from Australia and to prevent them from becoming members of the Australian community in the interim. Furthermore, the character of detention is determined by its purpose.

4. The High Court Decision

With the exception of Heydon J, who agreed with the reasons given by Hayne J, each judge delivered a separate judgment. A further notable characteristic of the decision is the battle fiercely waged between McHugh and Kirby JJ in their judgments. Attention was given in both the majority and dissenting judgments to two principal questions, albeit in radically different measure. Firstly, whether the legislation required the appellant’s continued detention, and secondly, if continued detention was required under the Migration Act, whether this impinges upon the judicial powers of the Chapter III Courts.

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27 Ibid.
28 Lim, above n3 at 55 (Gaudron J); Kruger v The Commonwealth (1997) 190 CLR 1 at 109 (Gaudron J); and 162 (Gummow J).
29 Heydon J did reserve his decision as to whether s196 ought to be interpreted in a manner consistent with treaties to which Australia is a party but have not been incorporated into domestic law. Al-Kateb, above n4 at [303].
A. A Question of Statutory Construction

According to the majority judges, the language of s196 of the Migration Act did not yield the interpretation asserted by the appellant. As McHugh J stated, ‘[T]he words of the three sections are too clear to read them as being subject to a purposive limitation or an intention not to affect fundamental rights’. 30 The legislation requires detention until removal, deportation, or the grant of a visa. 31 As such, there was no place for consideration of international law or foreign jurisprudence. Their Honours rejected the submission that the phrase ‘as soon as reasonably practicable’ in s198 defined a period beyond which continued detention is unlawful. Rather, the phrase dictates the employment of all reasonable means to remove an unlawful non-citizen. 32 Only when removal becomes reasonably practicable does a temporal limitation engage. 33 A strictly literal approach was taken in relation to the purpose of the Migration Act. It could not be said that the purpose of removal is frustrated simply because it is not likely in the foreseeable future. As Hayne J stated, no likelihood or prospect of removal in the reasonably foreseeable future, does not mean removal will never occur:

Whether and when it occurs depends largely, if not entirely, upon not only the course of events in the Middle East (his preferred destination being Gaza) but also upon the willingness of other countries to receive stateless Palestinians. 34

Conversely, the minority justices were of the view that the unlikelihood of removal in the foreseeable future drew attention to an ambiguity in s196 which could be resolved by a process of statutory construction. 35 As Gleeson CJ observed, the Migration Act ‘does not in terms provide for a person to be kept in administrative detention permanently, or indefinitely’. 36 The period of detention under s196 hinges upon the purpose of removal under s198, a purpose which could not be fulfilled. In their Honours’ opinion, this frustrated purpose brought before the Court a choice between suspension of detention or indefinite detention. 37 Their Honours were unwilling to find the latter for:

[the possibility that a person, regardless of personal circumstances… can be subjected to indefinite, and perhaps permanent, administrative detention is not one to be dealt with by implication.38

Instead, the minority justices appealed to the well-established principle of statutory construction, which works to preserve fundamental freedoms such as the common law right to liberty and security of the person. 39 That is, courts do not

30 Al-Kateb, above n4 at [33].
31 Id at [35] (McHugh J).
32 Id at [295] (Callinan J).
33 Id at [251] (Hayne J), [34] (McHugh J).
34 Id at [230].
35 Id at [144] (Kirby J), [95] (Gummow J) & [3] (Gleeson CJ).
36 Id at [14].
37 Id at [22] (Gleeson CJ).
38 Id at [21] (Gleeson CJ).
39 This approach was also taken by the Full Federal Court in Al Masri, above n6 at 75–79.
impute to the legislature an intention to abrogate or curtail fundamental rights and freedoms unless such an intention is manifested by unmistakable and unambiguous language. Had the Parliament intended that, contrary to the fundamental freedom of personal liberty, outside the operation of criminal law and without reference to the particular circumstances and characteristics of an individual, detention ought continue, this severe curtailment of personal liberty would have been spelt out. The absence of an express provision to this effect therefore guided their Honours’ conclusion that the *Migration Act* required the appellant’s release. It is notable that even though an interpretation commensurate with the common law presumption in favour of personal liberty was reasonably open as a matter of statutory construction (as demonstrated by the minority judges), the majority judges privileged an interpretation that flowed against the presumption.

The minority judges accepted the appellant’s submission that the legislation has a purposive limitation, drawn from the terms of the *Migration Act* and the decisions of the High Court in *Lim* and *Calwell*. *Calwell* involved, inter alia, a constitutional challenge of s7 of the *War-time Refugees Removal Act 1949* (Cth), which provided for the detention of the plaintiffs pending their deportation, on the basis that it permitted unlimited imprisonment. The High Court upheld the validity of the legislation on the basis that it did not create or purport to create a power to keep a deportee in custody for an unlimited period. As Latham CJ stated:

> The power to hold him in custody is only a power to do so pending deportation … If it were shown that detention was not being used for these purposes the detention would be unauthorized and a writ of habeas corpus would provide an immediate remedy.

According to Gummow J, a purposive interpretation gives effect to a traditional reluctance, as evidenced in *Calwell*, of construing legislation such that the executive power to detain in custody is unlimited in time. This is because the primary purpose of the appellant’s detention, which must be objectively ascertained, was to facilitate his removal and this purpose mandates temporal

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40 This principle has recently been affirmed in the cases of *Coco v The Queen*, above n24 and *Plaintiff S157/2002*, above n24 at 492. However, it was endorsed by the High Court as early as 1908 by O’Connor J in *Potter v Minahan*, above n24 at 304, his Honour there citing a passage from the fourth edition of *Maxwell on Statutes*: ‘[i]t is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness’.

41 *Al-Kateb*, above n4 at [22] (Gleeson CJ), [98] (Gummow J) & [193] (Kirby J).

42 Id at [22] (Gleeson CJ) & [117] (Gummow J).

43 Section 7(1)(a) provided that a deportee may, pending his deportation and until he is place on board a vessel for deportation from Australia, be kept in such custody as the Minister or an officer directs.

44 *Calwell*, above n20 at 556 (Latham CJ).

45 Ibid.

46 Id at [117].
limits. If removal is unlikely to occur, s198 no longer retains a present purpose of facilitating removal and to that extent the operation of s198 is spent. Consequently, the temporal imperative imposed by the word ‘until’ in s196(1) loses a necessary assumption for its continued operation — that being that s198 is in operation to provide for removal under that section.

B. Testing the Bounds of the Aliens Power

Having found that the legislation provided for the appellant’s indefinite detention, the principal issue for the majority was whether such a law was constitutionally valid. This called for an assessment of the aliens power and its limitations as construed by the High Court in Lim. In that case, the first mandatory detention provisions in the Migration Act were constitutionally challenged by Cambodian nationals detained under the Migration Act. The High Court found that the legislative power conferred by s51(xix) of the Constitution with respect to ‘aliens’ encompasses the conferral upon the Executive of a limited authority to detain an alien in custody for the purposes of expulsion or deportation. Brennan, Deane and Dawson JJ held that the provisions would be valid laws:

… if the detention which they require and authorise is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered.

On the other hand, if the detention which those sections require and authorise is not so limited, the authority which they purportedly confer upon the Executive cannot properly be seen as an incident of the executive powers to exclude, admit and deport an alien. In that event, they will be of a punitive nature and contravene Ch. III’s insistence that the judicial power of the Commonwealth be vested exclusively in the courts. [Emphasis added.]

In the light of Lim, the majority asked whether the constitutional validity of the legislation was dependent upon the purpose of removal being achievable in the foreseeable future. McHugh J stated that if the power to detain aliens for the purpose of deportation was merely an incidental power then detention would be constitutionally invalid if removal was incapable of fulfillment in the foreseeable future. However, his Honour emphatically stated that the power to detain aliens is ‘not a power incidental to the s51(xix) head of power. It is a law with respect to the subject matter of that power.’ McHugh J therefore found that even where removal is not foreseeable the detention of the alien remains a law with respect to the s51(xix) power. Similarly, Hayne J stated that the aliens power should not be

47 Al-Kateb, above n4 at [17] (Gleeson CJ), [88] (Gummow J) & [167] (Kirby J). Kirby J also noted that a purposive approach accommodates compliance with international human rights law.
48 Id at [121] (Gummow J).
49 Introduced by the Migration Amendment Act 1992 (Cth).
50 Under what was then s54R of the Migration Act ‘[a] court is not to order the release from custody of a designated person’.
51 Lim, above n3 at 33 (Brennan, Deane & Dawson JJ).
52 Al-Kateb, above n4 at [42].
53 Id at [43].
confined in the manner implicit in Lim, but rather permits the Executive to exclude aliens from the Australian community — by prevention of entry, removal from Australia, and by segregation from the community by detention in the meantime.\textsuperscript{54} Whilst indefinite detention was then a permissible use of the aliens power, could the legislation, in purporting to authorise indefinite detention, be characterised as punitive, and as such constitute an encroachment upon the judicial power preserved for Chapter III Courts? According to the majority, this characterisation was avoided by virtue of the purpose of the detention. As long as the purpose of the detention is to facilitate the alien’s deportation or to prevent the alien from entering Australia or the community, the detention is non-punitive.\textsuperscript{55} As Hayne J explained, the mere length of detention does not transform its character from non-punitive to punitive, as the purpose of exclusion from the Australian community remains the same.\textsuperscript{56} To this end, the dissenting opinion of Judge Learned Hand in United States v Shaughnessy\textsuperscript{57} was considered apposite:

An alien, who comes to our shores and the ship which bears him, take the chance that he may not be allowed to land. If that chance turns against them, both know, or, if they do not, they are charged with knowledge, that, since the alien cannot land, he must find an asylum elsewhere; or, like the Flying Dutchman, forever sail the seas. When at his urgence we do let him go ashore — pendente lite so to say — we may give him whatever harborage we choose, until he finds shelter elsewhere if he can.\textsuperscript{57}

Gummow and Kirby JJ also addressed the question of constitutional validity. In their Honours’ opinion, indefinite administrative detention by the Executive will breach the constitutional separation of powers doctrine once the detention is no longer for the objective purpose of facilitating removal. The existence of this purpose cannot be regarded as a matter purely for the opinion of the executive government\textsuperscript{58} as this would be contrary to the principle laid down in Australian Communist Party v The Commonwealth\textsuperscript{59} that the validity of a law or an act of the Executive does not hinge upon the assertion or opinion of the Parliament as to its validity.\textsuperscript{60} Their Honours also disagreed with the proposition that there can be laws for the segregation of aliens via detention, outside the operation of the criminal law and for a purpose unconnected with the entry, investigation, admission or deportation of aliens.\textsuperscript{61} Kirby J opined that this conclusion was supported by an interpretation of the Constitution, read as far as possible to be commensurate with international law, particularly international human rights law.\textsuperscript{62}

\textsuperscript{54} Id at [255] (Hayne J).
\textsuperscript{55} Id at [45] (McHugh J).
\textsuperscript{56} Id at [266]–[268] (Hayne J), Callinan J at [290].
\textsuperscript{57} 195 F 2d 964 at 971 (2nd Cir 1952). Cited by Hayne J: id at [269].
\textsuperscript{58} Al-Kateb, above n4 at [140] (Gummow J) & [155] (Kirby J).
\textsuperscript{59} (1951) 83 CLR 1.
\textsuperscript{60} Al-Kateb, above n4 at [140] (Gummow J).
\textsuperscript{61} Id at [140] (Gummow J).
\textsuperscript{62} Id at [169]–[191] (Kirby J). This argument was not addressed by either Gleeson CJ or Gummow J.
5. Analysis

The approach of the majority is true to the trends that have been identified by Mary Crock as shaping the jurisprudence on refugee law. The reasoning is literal and reactive. Their Honours exhibit a blinkered approach to the text of the legislation, keeping out of view relevant principles of international law and the approaches of other common law courts. The decision is alarming on a number of levels. First, it stands as a further example of the current High Court’s insular disregard for the principles of international law — their Honours’ disinclination to engage with international and regional jurisprudence being all the more pronounced given the degree of concurrence on the issue of indefinite administrative detention outside of Australia. This disregard for the influence of international law leaves Australia with a program of detention which is in blatant violation of international human rights law. Second, the majority judges’ re-reading of Lim and their analysis of punitive and non-punitive detention has serious implications for the right implicit in Chapter III to be free from detention except pursuant to an exercise of judicial power. Finally, the majority judges’ decision represents the privileging of the statutory text, interpreted according to an inferred parliamentary intention, over the fundamental common law presumption in favour of the protection of liberty.

A. The Role of International Law and the Place of Foreign Jurisprudence

A marked characteristic of the majority and minority judgments (with the notable yet unsurprising exception of Kirby J’s reasoning) is a focus on the domestic text, both of the Migration Act and the Constitution, and an inattention to the wider context of the appellant’s situation and of the Act itself — that being the norms and principles of international human rights law. It has been observed that ‘[i]t is in the most politically charged refugee cases that the trend towards juridical introspection is most marked.’ The reasoning of the Court is testimony to this observation. The seeming irrelevance of international law and comparable foreign jurisprudence is particularly telling given the radically different treatment of the same issue in Al Masri. In that case, considerable attention was given to comparable foreign jurisprudence. In particular, the Full Federal Court found support for their construction of the Act from the ‘Hardial Singh’ principles. These arose from the judgment of Woolf LJ in R v Governor of Durham Prison; Ex parte Hardial Singh, in which his Lordship found that the power to detain pending deportation or removal is limited to a period which is reasonably necessary for that purpose and must cease should that purpose be frustrated. Reference was also

63 These trends are identified as the pragmatic, reactive approach taken by the courts, the narrow textual focus of many of the decisions, the lack of attention paid to broad norms of international law, and the (belated) intrusion of international jurisprudence into the judicial discourse on refugees. Mary Crock, ‘Judging Refugees: The Clash of Power and Institutions in the Development of Australian Refugee Law’ (2004) 26 Syd LR 51 at 61.
64 As recognised in Lim, above n3 at 28–29.
65 Id at 65.
67 Id at 706.
made to a judgment of the Supreme Court of the United States in *Zadvydas v Davis*\(^{68}\) in which it was found that detention of aliens pending removal or deportation was limited to that which was reasonably necessary to secure removal and that the power would not authorise detention should removal not be reasonably foreseeable.\(^{69}\)

The Court found that these authorities, and their subsequent endorsement by other courts revealed that ‘the implication of limitations on the statutory power of detention is orthodox’.\(^{70}\) Regard was also had to Australia’s obligations under international law. The finding that the indefinite detention of a non-citizen would be to arbitrarily detain within the meaning of Article 9(1) of the ICCPR ‘fortified’ the Court’s conclusion that s196(1) should be read subject to an implied limitation.\(^{71}\) Only Kirby J saw a similar application for this jurisprudence in *Al-Kateb*.\(^{72}\) In the opinion of his Honour, the common law authorities cited above demonstrate a resistance on behalf of the judges of the common law to the possibility of an unlimited executive power to deprive people of their liberty and a corresponding inclination ‘to treat unlimited executive detention as incompatible with contemporary notions of the rule of law’.\(^{73}\)

Kirby J was also of the opinion that the conclusion of the minority was supported by the Constitution as read in the light of norms of international law.\(^{74}\) Whilst acknowledging that this interpretive principle is not yet in vogue with a majority of the High Court, his Honour expressed the view that as the understanding of the Constitution evolves this principle will inevitably gain currency.\(^{75}\)

[W]ith every respect to those of a contrary view, opinions that seek to cut off contemporary Australian law (including constitutional law) from the persuasive force of international law are doomed to fail.\(^{76}\)

Kirby J’s reasoning did not resonate with McHugh J. The rule of construction established in *Polites v The Commonwealth*,\(^{77}\) directing conformity with international law so far as the language of a statute permits was, in his Honour’s view, ‘based on a fiction’.\(^{78}\) His Honour stated that ‘the rationale for the rule that

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\(^{68}\) 533 US 678 (2001).

\(^{69}\) Id at 689.

\(^{70}\) *Al Masri*, above n6 at 87.

\(^{71}\) Id at 92.

\(^{72}\) Both Gleeson CJ, at [3], and Gummow J, at [118], noted that their findings were commensurate with the conclusions in these judgments but found no use for them outside this observation.

\(^{73}\) *Al-Kateb*, above n4 at 161 (Kirby J).

\(^{74}\) Id at [150].

\(^{75}\) *Al-Kateb*, above n4 at [169]. His Honour is the only member of the current High Court to have embraced international law as an interpretive guide to the Constitution in the face of an ambiguity. See, for example, *Newcrest Mining (WA) Ltd v Commonwealth* (1997) 190 CLR 513 at 657–658; *Kartinyeri v Commonwealth of Australia* (1998) 195 CLR 337 at 417–718.

\(^{76}\) Id at [190] (Kirby J).

\(^{77}\) *Polites*, above n25 at 68–69, 77, 80–81.

\(^{78}\) *Al-Kateb*, above n4 at [63].
a statute contains an implication that it should be construed to conform with international law bears no relationship to the reality of the modern legislative process. In his Honour’s view, it is not for the judiciary to read rights into the constitution by drawing on international instruments that are not a part of this country, and any argument to the contrary must be regarded as ‘heretical’.

This, despite the fact, as Kirby J quipped, that his Honour had been instrumental in cases in which ‘rights’ have indeed been read into the Constitution. It is not for courts, stated McHugh J, ‘exercising federal jurisdiction, to determine whether the course taken by Parliament is unjust or contrary to human rights.’

B. The International Implications of Indefinite Detention

Such judicial pronouncements will leave asylum seekers deeply concerned for, as Crock has noted, Australia has become increasingly blatant in its disregard for the norms of international human rights law. If the judiciary sees no role to play in checking the Parliament’s abuse of human rights, who will? This disregard for human rights law is nowhere more evident than in our policy of mandatory detention. The detention of asylum seekers beyond that which is necessary for preliminary administrative purposes has been condemned by the UNHCR. Even before the spectre of indefinite detention materialised, Australia’s policy of mandatory detention was widely recognised as breaching international human rights standards. As HREOC argued in its written submissions in Al-Kateb, the United Nations Human Rights Committee has considered detention under s196 of the Act on four separate occasions and in each instance has held aspects of that detention to be arbitrary contrary to Article 9(1) of the ICCPR. In Van Alphen v The Netherlands, the Committee held that arbitrariness is not to be equated with

79 Id at [65]. This view was previously intimated in his Honour’s dissenting opinion in Minister of Immigration and Ethnic Affairs v Teoh (1995) 183 CLR 273 at 316–317 and more recently in his majority judgment in Re Minister for Immigration and Multicultural Affairs; ex parte Lam (2003) 214 CLR 1.

80 Al-Ketab, above n4 at [73].

81 Id at [63].

82 Id at [180].


84 Al-Kateb, above n4 at [74].


87 Unsurprisingly, the UN’s scrutiny of immigration detention in Australia has been scathing. See Justice Bhagwati, Regional Adviser for Asia and the Pacific to the UN High Commissioner for Human Rights, Human Rights and Immigration Detention in Australia (31 July 2002).


89 UNHRC Communication No. 305/1988, (15 August 1990) at [5.8].
‘against the law’ but rather, ‘must be interpreted broadly to include elements of inappropriateness, injustice and lack of predictability.’ Similarly, in *A v Australia*, the Committee stated that detention will be arbitrary ‘if it is not necessary in all the circumstances of the case’.90 On the basis of these communications it is clear that detention for the ‘purpose’ of removal where there is no prospect of removal in the reasonably foreseeable future is arbitrary in the sense intended by Article 9(1). Accordingly, s196 should be read so far as possible not to authorise such indefinite detention.91

However, considerations of international human rights law were deemed irrelevant by the majority due to the perceived absence of any ambiguity in the legislation, and unnecessary by Gleeson CJ and Gummow J as the issue of construction could be neatly resolved without them. Hayne J did pause to consider Australia’s obligations under international law. However, his Honour was ‘doubtful’ that mandatory detention contravenes Article 9 as it is in accordance with a lawful procedure and its lawfulness may be tested in a court.92 This statement was offered despite the Committee’s finding in *A v Australia* that the *Migration Act* prevents real judicial review and makes no provision for the possibility of release, thereby violating Article 9(4):

> court review of the lawfulness of detention under article 9, paragraph 4, which must include the possibility of ordering release, is not limited to mere compliance of the detention with domestic law… By stipulating that the court must have the power to order release “if the detention is not lawful,” article 9, paragraph 4, requires that the court be empowered to order release, if the detention is incompatible with the requirements in article 9, paragraph 1, or in other provisions of the Covenant.93 [Emphasis added].

The Court’s decision therefore leaves Australia in breach of its obligations under the ICCPR. What is disturbing about the decision is not just the fact of this breach but also the complete unwillingness on the part of the Court (again, with the exception of Kirby J) to engage with the principles of international human rights law in circumstances which so clearly brought them into play.

C. One Small Step for Refugee Law, One Giant Leap for the Executive?

Finally, it must be asked to what extent the sanctioning of an unlimited executive power to detain unlawful non-citizens exceeds the Executive’s limited authority to detain as found by the High Court in *Lim*? In their joint judgment, Brennan, Deane and Dawson JJ found that an authority to detain aliens for the purpose of removal or processing is one of a few ‘exceptional cases’ of detention permitted outside the ‘exclusively judicial function of adjudging and punishing criminal guilt’, but that

90 *A v Australia*, above n3 at [9.2].
92 *Al-Kateb*, above n4 at [238].
93 *A v Australia*, above n3 at [9.5].
this authority is limited to that which is ‘reasonably capable of being seen as necessary’ for the purposes of deportation or the processing of claims.94 Similarly, Gaudron J stated that a law which is ‘not appropriate and adapted to regulating entry or facilitating departure as and when required’ is not a valid law under s51(xix) of the Constitution.95 This limitation was endorsed by McHugh J who found that a law authorising detention of an alien for the purpose of deportation or processing an entry permit might be invalid if it went beyond what was reasonably necessary to effect that purpose because it would infringe the provisions of Chapter III of the Constitution.96 Lim therefore directs attention to the purpose of the legislation, and in limiting the power of detention to that which is reasonably necessary, recalls that the Constitution’s concern is with substance and not mere form.97 Possession of a non-punitive purpose is not enough to escape constitutional invalidity.98 Indeed, as Gummow J observed in his dissenting opinion, the focus on whether detention can be called punitive or non-punitive is misconceived, as:

there is often no clear line between purely punitive and purely non-punitive detention. Once it is accepted that many forms of detention involve some non-punitive purpose, it follows that a punitive/non-punitive distinction cannot be the basis upon which the Ch III limitations respecting administrative detention are enlivened…. As Blackstone noted…. “[t]he confinement of the person, in any wise, is an imprisonment” and one which, subject to certain exceptions, is usually only permissible if consequent upon some form of judicial process.

Yet, in allowing indefinite detention so long as the Executive has the purpose of removal, the majority has privileged form over substance. Witness this exchange between counsel for the respondent and McHugh J during the appeal:

**McHugh J:** Ultimately, you have to go so far as to contend that, in a particular case, you may be able to keep a person in immigration detention for the rest of that person’s life, so long as you have the purpose of preventing the person moving into the Australian community and for the purpose of deporting the person.

**MR BENNETT:** Yes, that is one of the legitimate purposes and the purpose of deporting which, as I say, is a purpose as to which, by necessity, one can never say never. [Emphasis added].99

According to the majority’s view, the subjective possession of a legitimate non-punitive purpose is sufficient to bring indefinite detention within the rubric of those exceptional cases outlined in *Lim* which permit detention without judicial due process, regardless of the fact that it is undeniably punitive in effect. The

94 *Lim*, above n3 at 33.
95 Id at 57.
96 Id at 65–66.
97 Id at 27 (Brennan, Deane & Dawson JJ).
potential ramifications of allowing the Executive to be the final arbiter of when the deprivation of liberty ceases to be for a non-punitive purpose are frightening. As Gummow J stated in his dissent:

The continued viability of the purpose of deportation or expulsion cannot be treated by the legislature as a matter purely for the opinion of the executive government. The reason is that it cannot be for the executive government to determine the placing from time to time of that boundary line which marks off a category of deprivation of liberty from the reach of Ch III. 100

Furthermore, even if it were accepted that indefinite detention can be characterised as non-punitive due to the Executive’s fervent belief in the possibility of removal, detention for a purpose which has been declared to be well nigh impossible seems far from satisfying the requirement in Lim that it be ‘reasonably capable of being seen as necessary’ for that purpose.

6. Conclusion

The Al-Kateb decision is a study in ruthless literalism and exhibits a parochial disinclination to engage with international law. The result as a whole represents a victory of form over substance, text over context. Its implications are dramatic on a number of levels. In terms of the majority’s sanctioning of the Executive’s power to detain indefinitely, the High Court has embarked upon a trajectory fundamentally opposed to the course which is being followed by both the US Supreme Court and the British House of Lords. 101 In the particular context of administrative detention the decision of the majority leaves the Australian system of mandatory detention even further out of step with human rights law and international jurisprudence. Following the Al-Kateb decision, the Minister for Immigration and Multicultural and Indigenous Affairs granted both Mr Al-Kateb and Mr Al Khafaji bridging visas, in the exercise of her discretion, thereby granting them respite from the High Court’s effective life sentence. 102 Subsequent to this exercise of discretion the Howard Government has announced the creation of a new temporary visa, the ‘Removal Pending Bridging Visa’, which would enable the release of asylum seekers in long-term detention who, as with the appellant in this case, have been refused refugee status but are unable to return to their country of origin. 103 Whilst this is comparatively good news for stateless asylum seekers, the majority judges’ expansive treatment of the aliens power, their

100 Al-Kateb, above n4 at [140].
103 However, the visa will be granted only on the proviso that the asylum seeker undertakes to fully cooperate with the Government for his or her removal from Australia once it becomes practicable. Senator Amanda Vanstone, ‘Broader Powers for Immigration Minister to Manage Long Term Detainees and Removals’, Media Release, 23 March 2005: <www.minister.immi.gov.au/media_releases/media05/v05046.htm>.
formalistic understanding of punitive and non-punitive purposes, their privileging of a Government-friendly construction of the statute over the fundamental common law presumption in favour of the protection of liberty, and their ultimate sanctioning of an executive power to detain indefinitely means that the decision carries constitutional and interpretive implications which extend well beyond the immediate context of stateless asylum seekers. In his judgment, Kirby J intimated that the line of reasoning adopted by the majority would one day come to be regarded with 'a mixture of curiosity, and embarrassment'. Let us hope that Kirby J's optimist prophecy is fulfilled, and that this 'tragic' outcome will be understood merely as an aberrational slip from the courts' traditionally jealous protection of their judicial function, not as the thin end of the wedge for unlimited executive power.

104 Id at [190] (Kirby J).
105 Id at [31] (McHugh J).
**Books**


In Chapter 1 of *Sexuality Repositioned*, Loraine Gelsthorpe explains the genesis of the book:

> Despite the advent of new knowledge about sexuality, … we do not routinely or habitually reflect on the interface of social and legal dimensions of sexuality. Rather, the law is periodically reviewed in response to some crisis or campaign. The idea for this book thus came from awareness that it is important to explore some of the social and moral censures and contours that shape and mark the boundaries of sexuality (p4).

The result is a heterogeneous collection of works, dealing with issues topical at a global level regardless of the fact that many contributions make specific references to the British social and legal context. Although more than one essay falls on the far ‘socio’ end of the socio-legal continuum, Gelsthorpe’s introduction suggests possible implications for law and policy of even the least legally-oriented discussions.

Jeffrey Weeks opens the collection with an introductory essay in Chapter 2. Weeks begins by drawing out the implications for contemporary thinking on sexuality of two crucial and interlocked developments in society and culture: the still ongoing sexual revolution which began in the early twentieth century, and the realisation that sexuality is socially constructed (pp19–23). These two developments, Weeks argues, have enabled our understanding of sexualities as multiple, culturally relative and hierarchically organised; as interacting with the construction of gender differences; and as organising forms of subjectivity which provide a basis for (increasingly global) political mobilisation — both by those who claim a particular sexual identity and their opponents (pp23–28). Weeks goes on to argue that in order to answer the moral and political questions relating to what sexualities should be tolerated, accepted, supported, etc we need to reach beyond the mere recognition of sexual diversity and draw on values such as those codified in human rights discourse, as well as those emerging as a result of everyday practices of intimacy (pp29–35).

The themes of Chapter 3 are largely analogous to those of Week’s contribution (but Chapter 3 also suggests a dizziness-inducing range of new directions for research on sexuality: pp48–54). Its author, Ken Plummer, draws attention to the ways of thinking about sexuality that have been made possible by the ‘emergence of new critical sexuality theories’ (p43). He also draws a connection between activists’ practices (part of Week’s ‘sexual revolution’) and the work of academics responsible for theorising sexuality as socially constructed (pp44–47). Finally, he addresses the issue of how to approach the political questions that have emerged
in the wake of the recognition of the fact of sexual diversity (pp58–60). Plummer’s concern is that, in finding answers to these questions, we avoid ‘the limiting constraints’ of ‘the seeds of fundamentalism’ that underlie even relativist and critical thinking (p60). However, it is unclear if he means that we should move beyond all forms of foundational belief, or rather only beyond the core of traditionalist foundational belief which may inform even positions which on their face are not, and do not conceive of themselves as, traditionalist.

Chapter 4, by Lynne Segal, is a critique of intellectual and research agendas that reduce sexuality to biological processes. Her essay highlights how the 1960s sexual liberation movement and the sexual politics that followed it led to new understandings of sexuality and gender (pp68–69). Segal then explains how oblivious of these understandings — whereby sexuality is always culturally mediated — the increasingly popular discipline of evolutionary psychology is (pp72–77). Similarly, it is by sidelining these understandings of sexuality and insisting ‘that sex is nothing more than a medical function’ (p78) that corporate-sponsored academic research into sexual dysfunctions becomes viable, leading not only to the discovery of treatments for the dysfunction (Viagra), but also to the prior production of its very object of inquiry — the sexual dysfunctions itself (pp78–81).

In her Chapter on sexuality in workplace relations, Linda McDowell underscores the expansion of the definition of sexuality from ‘sexual acts per se to include representations, everyday interactions and social regulations as well as ideas of fantasy and desire’ (p87). After arguing that sexuality, thus intended, saturates workplace relationships, customer-worker interactions and consumer-product dynamics (pp87–94), McDowell elaborates on these ideas in greater detail. For example, she explores the different ways in which different bodies and interactions are sexualised by hegemonic discourses, resulting in marginalizing women and working-class men in, respectively, top-end and bottom-end service work (pp94–102).

In Chapter 6 Craig Lind takes recent developments in English case and statutory law on same-sex relationship recognition (pp110–115) as an opportunity to engage in a theoretical and political discussion about the pros and cons of lesbians’ and gay mens’ gaining admission to same-sex marriage and other forms of family regulation. Lind usefully clarifies and elaborates on the different positions that feminist, liberal, conservative and radical commentators have taken on the question of same-sex marriage (pp115–124). Eventually he argues that same-sex relationship recognition on a basis of equality with heterosexuals will result in disciplining same-sex desire, and in marginalising non-couple-based domestic arrangements (pp125–126). Lind concludes that, after such recognition, family law will remain inequitable, albeit less so than before; and that a substitute for same-sex sexuality will have to be found as a basis for challenging those inequities (p126).

Chapter 7, by Zoë-Jane Playdon, concentrates on the legal system (pp135–136), medical knowledge and practice (pp138–143), and education (pp143–145) as the central institutional and discursive sites in which the disempowerment of
lesbians, gay men and trans people has historically occurred (pp133–134). While underscoring the specific modes that this disempowerment has taken with regard to each of the marginal sexual identities she considers, Playdon usefully elaborates on the similarities in their respective experiences of subordination.

From Chapter 8 — Martin Johnson’s critical review of contemporary investigations into human sexuality (understood narrowly as ‘that part of our behaviour … and underlying mental processes … concerned with the erotic’: p155) — one learns just how far biology is from establishing a genetic or biological basis to account for sexual variation. Not only do we lack valid measures of sexuality (p163, p178), but also there is no indication that genes are determinative of sexuality (p161, p169), as every influence they may have is mediated by complex environmental processes and developmental dynamics (p162, p179). Johnson’s contribution goes a long way towards challenging simplistic ‘gay gene’ claims, as well as, indirectly, the claims of evolutionary psychology that Segal directly confronts in Chapter 4.

Inter-sexuality (the discursive category through which the discipline of biology ‘reads’ hermaphroditic states) is the subject of Pak-Lee Chau and Jonathan Erring’s discussion in Chapter 9. The authors highlight both how current medical approaches favour non-intervention on healthy inter-sex babies (pp194–198) and how the law has proved reluctant to depart from a rigidly binary understanding of sex (pp198–204). They propose that the legal system abolish maleness and femaleness as legal categories and embrace the idea of a sexual continuum (pp205–207). But Chau and Erring’s essay unwittingly illustrates how resistant culture is to a genuine acceptance of the notion of a sexual continuum. In particular, language appears to fail the authors in the task of providing a non-evaluative account of the aetiology of inter-sex states (pp189–194). For example, as they explain, inter-sex states may occur when ‘normal genes are translocated to the wrong chromosome’ (p190, emphasis added).

Chapter 10 provides an overview of qualitative research into adolescent and infantile sexuality. Its author, Julie Jessop, makes the points that childhood sexuality is culturally taboo and hence under-researched (p215), and misunderstood to the extent that it is read (for example in psychoanalysis) through lenses appropriate to adult sexuality (p219). This misunderstanding, for example, leads to adult censure of children’s sensual activities, which in turn affects the mode through which these activities influence children’s future sexual development (p219). Jessop notes that research into adolescent sexuality has often followed a ‘male biased paradigm’ (p219), focusing on individual rather than relational understandings of sexual development (pp219–220). She also draws attention to recent research revealing how adolescent understandings of sexuality tend to vary across gender and class lines (pp221–223). Finally, Jessop refers to studies highlighting the limited opportunities for educating adolescents on sexuality (pp226–229).

In Chapter 11, Roger Ingham argues that a model of psychological research into young people and sexual health which focuses on power dynamics and social discourses (pp241–244) is more effective for the purpose of promoting sexual
health than traditional individual-based models (pp240–241) which fail ‘to address the wider contexts that lead to conditions of vulnerability’ (p244). Ingham illustrates this point by reference to a number of studies into young people’s sexual health that, by adopting a context-oriented rather than an individual-based model, provide a clear basis for policy-making (pp244–253).

Chapter 12, by Belinda Brooks-Gordon and Andrew Bainham, is distinctly ‘legal’. It is a critique of the Sexual Offences Act 2003 (UK), on the basis of principles proper to a classically liberal conception of the criminal law. The authors are prepared to make exceptional concessions to deviations from such principles, for example as regards the requirement of mens rea in the context of rape (pp273–274). However, they argue that the specific offences the Act has introduced with regard to, for example, child-sex, prostitution, and sex in public lavatories run afoul of the principles of mental culpability (pp268–275) and/or the harm principle in indefensible ways (pp284–289). They partly account for this by discussing the context of the Act’s genesis (pp278–281), as well as the broader climate of moral panic preceding the introduction of the Act (pp261–263). While a valuable contribution, Brooks-Gordon and Bainham’s discussion might have been strengthened by a more rigorous examination of the harm principle (the authors fail to clarify what conception of harm they adopt, falling back on the generic opposition between morality and harm: p286).

Andrew Webber’s essay engages in a queer reading of three European movies about gay sexuality in prison in Chapter 13. This contribution may initially look like one of the farthest removed from the preoccupations of lawyers, but it actually raises interesting philosophical questions about law and legal regulation. These include ones about the ‘violence’ inherent in law’s universalism (intended as the generality of legal rules and of the classificatory systems they create: p313), the double bind which non-conformity confronts as a result of the demands that legal regulation makes of it (either living as an outlaw or accepting domestication and compromise: p302, p307), and the inherently compromised character of the workings of law (p313).

Michael Freeman devotes Chapter 14 to the sexual abuse of children. Freeman assesses three theories on the aetiology of abuse (abuse as a pathology, as triggered by socio-environmental factors, and as resulting from the cultural objectification of children), crediting feminist theorising for locating the main cause of sexual abuse in the ways in which male sexuality is constructed (pp321–327). He also criticises the currently preferred way of dealing with abuse, the ‘family-support’ model, on the ground that it ends up prioritising the welfare of the family over that of the child (pp327–329). Although Freeman dedicates a section to identifying what sexual abuse is (pp318–320), my impression is that, if his essay is representative of current academic discussions on sexual abuse, the category needs clarification. In particular, I was struck by the lack of congruity between accepting the plausible feminist point that male sexuality, culturally centred on domination, is the source of sexual abuse and Freeman’s apparent acceptance that all sexual activity with children is abuse. For, if adult heterosexual or gay male sex can be non-exploitative to the extent that the subjectivity of the males involved genuinely
fails to conform with hegemonic versions of masculinity, referring to all adult-child sexual activities as abuse is plausible only if we counter-intuitively assume that such failure to conform is an impossibility in the context of such activities. Making this point does not necessarily rule out that there may be reasons to discourage even non-abusive adult-child sex, but it suggests that it is unhelpful to categorise all forms of erotic activities with children as abuse.

David Pearl’s doctrinal contribution in Chapter 15 also concerns the issue of sexual abuse, and more broadly that of adult misconduct harmful to children. The Department of Education maintains two lists of people prevented from working with children in either education or social work. When one’s name is entered in the list, there is a right to appeal before the Care Standards Tribunal, which makes a decision based on whether the person was guilty of misconduct and, if so, whether she is unsuitable to work with children (pp339–340). Pearl discusses the standard of proof applicable in these cases (pp343–344).

The next Chapter, by Kerry Petersen, is the only one that deals with Australian law. Petersen argues that the current system of regulation of adolescent consensual sexual activity (based on the prohibition of penetrative sex below the age of consent, tempered by the operation of certain defences: pp358–363) is out of step with the realities of adolescent sexual life (pp366–367). Although Petersen argues that delaying sexual activity is in the interest of adolescents (p367), she points out that educational measures are appropriate to encourage such delay (pp368–369). Petersen puts forward an original proposal that the principles governing consent to medical treatment (whereby sufficiently mature children are attributed with decisional autonomy: p354, p357) and refusal of treatment (whereby even mature minors’ autonomy is restricted in cases of serious danger: pp355–356) could be usefully extended respectively to adolescent consensual sex (p364, p370) and less than fully consensual sex not amounting to rape or assault (p353, p370).

Joanna Phoenix’s essay in Chapter 17 is an insightful critique of policies constituting youth prostitution as a problem of child abuse (pp374–375). Phoenix argues that this move obscures the structural conditions that make entering prostitution conceivable and even attractive for young people (p375), that it increases stigma against and punishment of young people perceived to voluntarily enter prostitution (pp376, 385), and that it leads to inappropriately dealing with youth prostitution by transferring to it measures devised in the different context of children abused within families (pp381–382). Phoenix also locates this move within a broader trend towards increasing both young people’s dependency on families and their blameworthiness for non-law-abiding behaviour (pp387–391).

The final chapter, by Belinda Brooks-Gordon, Charlotte Bilby and Tracey Kenworththby, is a systematic review of research into sexual offender psychological treatment programs (pp401–411), partly with a view to informing policy-making (pp396–399, p416). The authors conclude that the effectiveness of such programs remains contested (pp411–412, p414) but that the studies provide insight into facilitators and barriers to treatment (pp412–413).
While the contributions to *Sexuality Repositioned* tend to be of a high standard and thought provoking, the collection as a whole struck me as not hanging so well together as previous books by the Cambridge Socio-Legal Group (ie *What is a Parent?* and *Children and Their Families: Contact, Rights and Welfare*). But ‘sexuality’, as many of the Chapters remind us, is such a polysemic category, that arguably the book’s title does nothing to justify in the reader an expectation of thematic unity (other than in a lose sense) among the different essays.

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Fiona Cownie’s purposes in undertaking this study of the ‘lived experience’ of English legal academics were first to enrich an understanding of the ‘culture’ (beliefs, values and customs) of academic law and legal education, and second to contribute to an understanding of the professional identities (that is, ‘who they are’) of legal academics.

She interviewed 54 full time academics, of different levels of status and experience at both ‘old’ and ‘new’ universities (33 from the former and 21 from the latter), in cities of various sizes (pp17–19).

This book is unquestionably an important contribution to the literature on legal education. As Cownie notes, it is striking that in an environment focused upon intellectual inquiry, there is very little research about those who inhabit that environment, and how they constitute and relate to their environment (pp1–4). Many of her findings are interesting (including a fascinating discussion of academic dress culture and codes (pp186–196), some perhaps not one would have predicted (for example, that half of the academics she interviewed incorporate feminist materials, and used a feminist approach, in their teaching: pp61 and 198), and others are alarming (for example, that ‘almost all the respondents were clear that being an intellectual is not a necessary quality to be a successful academic lawyer’: p70 — although most interviewees recognised the best research in law was carried out by peers who were intellectuals).

Cownie’s main findings include that law is becoming increasingly ‘academic’ in the sense of being more integrated into the academy and affected by intellectual currents sweeping through the academy, rather than being so concerned with the legal profession that it lacks a substantial academic character (pp75–78). According to Cownie, this is reflected in the status given to research as more important and fulfilling than teaching or administration — a finding which concerned us somewhat for what it indicated about the conception of legal education in England (as to which, more later). Nevertheless, in their teaching, law academics do not regard their role as preparing students for legal practice; rather their aim in teaching was to ‘teach students to think.’ She also suggests that English legal academics are becoming substantially less focused on black letter doctrinal analysis of the law: law is a ‘discipline in transition’ — away from ‘traditional doctrinal analysis towards a more contextual, interdisciplinary approach’ (p197). But while the legal academy is increasingly socio-legal, Cownie observes that ‘law is not yet strongly interdisciplinary’ (p198), because few law academics worked with experts in other disciplines, and tended to use research from other disciplines without significant involvement in those disciplines. Interestingly, law academics were also found to have little contact with the legal profession.
Even though the scope of this study is limited to English academics, there is much in the book which will be of interest to many Australian legal academics. While Cownie claims that her study reflects a culturally-specific experience which is limited to England (p25), many of her findings resonated with our own experiences, and we suspect that other Australian legal academics will have similar reactions to the book. One example is the way in which ‘administration’ is perceived by English legal academics as ‘a necessary evil, whose burdens are unevenly distributed among academic staff, because some people are very good at getting out of it’ (p202). We note, in passing, that, as seems to be the practice in Australian universities, leadership and management roles are referred to pejoratively as ‘administration’, about which Cownie seems almost as negative as many of her subjects. Incidentally, for those who are interested in getting out of ‘administrative tasks’ but who lack effective strategies for doing so, this book provides a list (pp144–146) that has been road-tested by (mainly male) English law academics.

Cownie observes that law academics joined the academy because they wanted to be part of academia, were proud to be academics, and placed considerable importance on core academic values. What they most valued about academic life was the freedom to organise their working lives — yet most also confessed to feeling the strain of working in a system changing rapidly in the face of the ‘massification’, ‘managerialism’ and ‘corporatism’ sweeping across the higher education sector.

Of immediate interest to Australian law academics will be Cownie’s analysis of the effects of the Research Assessment Exercise (RAE) on the academic culture, so that research-active law academics are publishing fewer textbooks, and more refereed articles and scholarly monographs. Yet Cownie reports that few law academics viewed the RAE favourably: most doubted the credibility of the exercise, and suggested that the RAE has resulted in the publication of more poor quality research. At the same time, Cownie suggests that the RAE has increased the value of research in the academy (p202), and has increased the rate at which the discipline of law has moved ‘away from the legal profession … towards the centre of the academy’ (p201).

The book also discusses gender, race, class and sexuality in the construction of academic identities, and their impact on the culture of academic law (see particularly ch 8) — although the size of Cownie’s sample precluded much by way of empirical data on issues of race and sexuality. Half of the academics interviewed said that their class background influenced their research interests or their desire to be involved in education. The interviews provided further evidence of the discomfort of women with many aspects of the legal academy, and the relatively high level of awareness of the way in which women’s experience of working in universities differs from men’s.

Although Legal Academics is an interesting and entertaining read, we have three main concerns with it. The first is perhaps the most serious, given the nature of the study. The book provides much descriptive material, particularly in frequent and extensive quotes from Cownie’s interviews with academics. Much of this is of
undoubted prurient interest to an academic reader. But, although the opening chapter of the book promises much in its rich outline of the themes of the book, from the second chapter onwards the painstaking detail in the description of the ‘lived experience of academics’ was not matched by the level of critical analysis of that experience. The material these interviews generated would have permitted, indeed should have warranted, a close, theoretically grounded and insightful analysis of the nature of legal academic life. The low level of theoretical analysis suggests that this book will probably be of greatest interest to those who can relate directly to what it describes — undermining its likely policy impact and transnational interest.

Second, in our opinion Cownie overstates the infiltration of socio-legal studies in legal academia and in legal education. While she observes that engagement is often rather limited (for example, pp56–57), her definition of socio-legal studies is a very broad one (see pp50–51, 57–58 and 63–65). Whenever an academic described an approach to teaching, or some aspect of legal research, as other than purely black letter, Cownie categorises this approach as socio-legal, even though often what is claimed as socio-legal does not fall within the definitions of that term to which she refers at page 51 of the book (see eg, pp63–5). Consequently, her evaluation of the extent to which legal academics are engaged in socio-legal approaches both to research and education seems to us unrealistic and overly generous.

Third, while Cownie reports that teaching was important to the academics she interviewed, that they gained genuine satisfaction from helping students to learn, and that being a ‘good teacher’ was an important part of their identify (pp121–132 and 201–202), the book highlights, and seems uncritically to endorse, an impoverished conception of legal education, which reports an equation between engaging ‘performance’ by a teacher and good teaching, particularly in the context of lecturing (pp123, 124 and p202). Cownie uncritically reports that her subjects unanimously agreed that lecturing could be characterised as performance (p124), and that only ‘a small minority’ thought there were dangers in ‘getting too carried away with the idea of performance, at the expense of content’ (p126). This, to us, appears to ignore the clear trajectory of research on student learning and its consequences for law teaching,1 certainly flies in the face of what we do know about good teaching,2 and appears to be inconsistent with Cownie’s own previous work on the ‘scholarship of teaching’.3

Cownie’s observation of the increasing academic orientation of law enables her to conclude the book (p205) optimistically, albeit controversially:

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The data I have gathered about legal academics suggests they have strong attachments to core parts of their academic identity, which are focused on their discipline — on researching and teaching law as part of an independent community of scholars which is still concerned with “speaking the truth to power”. These strong attachments make it much more likely that they will be able to resist, or undermine, policy changes which threaten these core values.

While there might be scepticism about some of Cownie’s observations and the conclusions drawn from her data, which might suggest that this level of optimism is misplaced, this conclusion is an admirable rallying cry for Australian academics faced with structural change and pressures mirroring those confronting Cownie’s interviewees in this interesting and important book.

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