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# Deep Anxieties: Australia and the International Legal Order

HILARY CHARLESWORTH,† MADELAINE CHIAM,‡ DEVIKA HOVELL,§ GEORGE WILLIAMS

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1. Introduction

The increasing internationalisation of many aspects of Australian life, from environmental hazards to terrorist threats to securities regulation, has given new prominence to the relationship between international law and the Australian legal system. It has also been accompanied by a rise in anxiety about the international legal order. International law has become a charged and politicised field in Australia and is a regular subject of debate in the popular press. There is a fear that international law undermines Australian sovereignty or the capacity to govern ourselves as we choose. Anxiety is also fuelled by a perception (akin to a form of legal xenophobia) that international law is an intrusion from ‘outside’ into our self-contained and carefully bounded legal system. Both concerns are reflected in contemporary debates about international law such as that over whether Australia should participate in the International Criminal Court.

Australian judges who have recognised the relevance of international law to our legal system have even faced stern criticism. For example, Chief Justice Murray Gleeson of the High Court was upbraided for discussing international law at an International Bar Association conference.1 In his speech, Chief Justice Gleeson had catalogued the various means through which international human rights law affects Australian law.2 These remarks were characterised as being ‘[l]ike some rich kid discovering the Church of Scientology’. The Chief Justice was also described as being ‘on some evangelical road to discovering the wonders of international law’.3

Some view international law as a source of progressive values at odds with the conservatism of Australian law. To some extent this is correct, especially in the area of human rights. Since the Human Rights Act 1998 (UK) was enacted, Australia has been alone among western nations in not having any form of a bill of rights. As a result, Australian judges have sometimes turned to international human rights law as a source of principles and ideas in the development of the common law and in the interpretation of statutes. It is often forgotten, however, that international law can also be a source of conservative values. For example, international law accords broad immunities to serving state officials for some intentional criminal acts.4

The perception of international law as a source of un-Australian, fanciful and chaotic norms is connected to the politics of Australian fundamentalism — the

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2 Id at 4.
3 Janet Albrechtson, ‘Justices Leave the Door Wide Open to Killers’ The Australian (4 December 2002): <http://www.theaustralian.news.com.au/printpage/0,5942,5608786,00.html> (7 July 2003). A similar attitude was evident in the judgment of Justice Scalia of the United States Supreme Court in Atkins v Virginia 536 US 304 (2002), where he described his colleague Justice Stevens’s reference to the critical views of the ‘world community’ on the death penalty for mentally disabled offenders as deserving a ‘Prize for the Court’s most feeble effort to fabricate “national consensus”’.
4 Case Concerning the Arrest Warrant of 11 April 2000 (Congo v Belgium) [2002] ICJ Rep 121.
‘shrinking society’ described by Ghassan Hage. Hage argues that Australia is a worrying, defensive society — in which anxieties about our own individual positions are projected onto the nation. Nationalism has thus become characterised by a focus on the politics of preserving our borders from outsiders. Hage traces the culture of worrying to the limited way that hope and social opportunities are distributed in Australia. ‘The defensive society … suffers from a scarcity of hope and creates citizens who see threats everywhere’, he writes. ‘It generates worrying citizens and a paranoid nationalism.’ One important feature of any type of fundamentalism is the way it immunises itself against any critical voices from outside. The suspicion about the effect that international law might have on the Australian legal system can be seen in this context as a rejection of an outsider voice.

It is important to scrutinise carefully the influence of international law upon any domestic legal system. International legal principles have no intrinsic superiority to national legal norms. The anxiety prompted by the prospect of using international law in Australia, however, has generated exaggerated and simplistic understandings about the international legal system. In this article, we sketch a map of the interaction between the Australian legal system and international law. This is part of a larger project that will include an empirical study describing and analysing the domestic/international law interface in Australia.

Our focus in this article is upon how the three arms of government in Australia at the federal level, the executive, the legislature and the judiciary, have responded to the international legal system. We chart the approach of each of these institutions and the areas in which anxieties about international law typically arise. We first outline existing scholarship on the relationship between international and Australian law. We then consider Australia’s constitutional relationship with international law. The sections that follow examine the respective roles of the executive, legislature and judiciary in relation to international law. This allows a more comprehensive understanding of the context in which international law intersects with the Australian legal order.

2. The Literature

Australia does not have a long tradition of scholarly analysis of the relationship between international and Australian law. Indeed, with a few notable exceptions, the field was largely ignored until the mid-1980s, when a series of judicial

6 Id at 47.
7 Id at 3.
8 Id at 77.
9 The website for the project ‘International Law and the Australian Legal System’ can be found at: <http://www.ilals.unsw.edu.au>.
10 DP O’Connell (ed), International Law in Australia (1965); Charles Alexandrowicz, ‘International Law in the Municipal Sphere According to Australian Decisions’ (1964) 13 International and Comparative Law Quarterly 78.
decisions ignited policy debate on the extent to which international law was shaping the Australian legal system. Interest in the area spurred a series of government, industry and academic reports, as well as academic treatises. The sudden outpouring of material on the subject was rather inaccurate in suggesting that the interaction between domestic and international law was a new, and even radical, phenomenon.

Much of the scholarship in this area ultimately concerns whether international law should be viewed as an ‘attack’ on the traditional pillars of Australia’s legal system. Writers have tended to examine relatively few themes. These include:

1. **Incorporation or transformation**: In large part, the literature focuses on the use of international law by Australian courts. The courts have been both criticised for overstepping the boundaries delineated by the separation of powers doctrine, and lauded for ‘judicial ingenuity in fashioning approaches to particular issues where domestic law and international law interact’. Although monism/dualism and incorporation/transformation are common models applied to describe a domestic legal system’s relationship with international law, certain authors have noted that these are inadequate descriptors to reflect the Australian legal system’s treatment of international law. Many regard the position as more nuanced, and have contributed a more sophisticated understanding of the judiciary’s approach to international law.

2. **Effect on the federal balance**: A focus of attention following the High Court’s decisions in *Koowarta* and the *Tasmanian Dams Case* was the implications of

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the Court's broad interpretation of Commonwealth power over 'external affairs' under s51(xxix) of the Constitution for the distribution of power between the Commonwealth and the states. Opeskin and Rothwell's edited book, *International Law and Australian Federalism*, included argument by several authors that state government participation in the treaty-making and treaty-implementation processes was vital for effective governance. Authors discussed the 'threat' posed by the external affairs power to federalism, and the potential for the Commonwealth to use its legislative power to enter into areas traditionally under state control.

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19 Shearer, above n17 at 61.

20 See discussion at section 6(B)(i).

21 Donaghue, above n17; Mitchell, above n17.

22 See, for example, Crawford & Edeson, above n17; Shearer, above n17; Donaghue, above n17; Cranwell, above n17.

23 Anne Twomey, ‘International Law and the Executive’ in Opeskin & Rothwell, above n15 at 82; Twomey, above n23 at 69; Brian Galligan & Ben Rimmer, ‘The Political Dimensions of International Law in Australia’ in Opeskin & Rothwell, above n15 at 306.

24 Galligan & Rimmer, ibid.
3. **Limited role of Parliament in treaty-making process:** Another theme in the literature is the limited role of Parliament in the treaty-making process. The overriding power of the executive in this area is criticised on the basis that it undermines the separation of powers between executive and legislature and the Australian system of representative government. Some authors consider that the 1996 reforms that give Parliament a greater role in this process did not go far enough, and that further reform is required, although the proposed nature of that reform has not been addressed in detail.

The first two themes have been developed almost exclusively based on decisions of the judiciary. This may be largely due to the fact that judges provide a formal statement of reasons when determining the extent to which international legal principles affect Australia’s legal order. However, the literature’s focus on the judicial role has led to a lopsided emphasis on the judiciary compared to that of the executive and legislature. Activity by the executive, in contrast to the judiciary, usually occurs out of the public eye and legislative action, while often giving rise to strong debate, is far less frequent. Nevertheless, activity by these limbs of government is certainly no less significant.

### 3. The Constitutional Framework

The Australian Constitution says little about international law. The key sections that envisage some form of intersection with the international legal order are s51(xxix), which grants the federal Parliament the power to enact legislation with respect to ‘external affairs’, and s75(i) which vests the High Court with original jurisdiction in relation to ‘matters arising under a treaty’. The Constitution makes no reference to three crucial issues: the method of Australia’s entry into binding legal relationships on the international stage; the legal effect of international law within the domestic legal system; and the responsibility for enforcement of such obligations at the domestic level.

The debates of the 1890s Constitutional Conventions reveal that there was greater reference to the relationship between international law and the Australian legal system in the initial drafts of the Constitution. The most important provision in this respect was clause 7 of the Commonwealth Bill 1891. This became covering clause 5 in the Commonwealth of Australia Constitution Act 1900 (Imp) which contains the Australian Constitution. Covering clause 5 is the source of binding legal obligations under Australian law, providing that ‘[the

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26 See text below at n108 and following.
27 Twomey, above n23; Crawford, above n25.
Constitution] and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth’. This clause was drafted initially to include treaties as a source of law in the Australian legal order, providing that ‘[t]he Constitution established by this Act, and all laws made by the Parliament of the Commonwealth in pursuance of the powers conferred by the Constitution, and all treaties made by the Commonwealth, shall, according to their tenor, be binding on the courts, judges, and people of every State’ [Emphasis added].

The initial clause 7 was modelled on Article VI of the Constitution of the United States, which provides that ‘[t]his Constitution and the laws made in pursuance thereof, and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land’. The United States Supreme Court has interpreted this provision to mean that treaties form part of United States law by a process of automatic incorporation and must ‘be regarded in courts of justice as equivalent to an act of the legislature’.29 However, treaties that require action by Congress, such as the appropriation of funds, are not considered ‘self-executing’ and do not automatically become part of domestic law.30

The corresponding clause 7 of the Commonwealth Bill 1891 was amended to remove the reference to treaties on the suggestion of the Legislative Council of New South Wales at the Sydney Convention in 1897. The reason for the removal was explained by the Premier of New South Wales, George Reid:

This is an expression which would be more in place in the United States Constitution, where treaties are dealt with by the President and the senate, than in the constitution of a colony within an empire. The treaties made by her Majesty are not binding as laws on the people of the United Kingdom, and there is no penalty for disobeying them. Legislation is sometimes passed to give effect to treaties, but the treaties themselves are not laws, and indeed nations sometimes find them inconvenient, as they neglect them very seriously without involving any important legal consequences.31

A similar amendment was made to the external affairs power in s51(xxix), which originally contained a power to legislate as to ‘external affairs and treaties’ [Emphasis added]. The words ‘and treaties’ was struck out at the Melbourne Convention in 1898, apparently lest they be construed as involving a claim on the part of Australia to a power to enter into treaties.32 The amendment was insisted upon by Sir Edmund Barton on the basis of the need for consistency with the amendment to initial clause 7 deleting treaties as a source of Australian law.33

31 Official Record of the Debates of the Australasian Federal Convention (Sydney, 1897) at 240.

Mr Glynn of South Australia expressed his disagreement with the policy behind the striking out of the reference to treaties, and requested an opportunity to reconsider the matter.
The decision not to define the relationship with international law in the Australian Constitution therefore appears to have been based on two considerations. First, at the date of Federation, the Imperial government had exclusive control over Australia’s foreign relations. The drafters were concerned not to include any provision that might suggest that Australia was entitled to enter into treaties on its own behalf.\(^{34}\) The second consideration was a concern with the nature of international law. The debates in the Constitutional Conventions reflect a perception that international law was not law, but rather a discretionary set of norms that states could neglect at will.\(^{35}\) On the basis that there was then no effective enforcement regime operating in the international arena, it was seen as illogical to accord direct effect to international obligations in the domestic legal system.

Against this backdrop, it is unclear why the reference to treaties was retained in section 75(i), which gives the High Court original jurisdiction in all matters ‘[a]rising under any treaty’. Patrick Glynn, a delegate to the 1897–1898 Convention from South Australia, objected to the subsection because judicial decisions upon treaties ‘might abrogate the Imperial law or polity upon the question at issue’.\(^{36}\) However, other Members of the Convention, including Reid, argued for the retention of the subsection because treaties that specifically concern Australia might one day be entered into or that ‘[s]ome day hereafter it may be within the scope of the Commonwealth to deal with matters of this kind’.\(^{37}\) It is unclear why the same logic was not applied in relation to provisions relating to incorporation of treaties into Australian law, or subsequent implementation of treaties, without which it could be argued judicial consideration of treaties would not be possible.

Indeed, the prophecy that Australia might one day enter into treaties was fulfilled. While the treaty-making power was for some years after Federation regarded as possessed by the Imperial Crown, this royal prerogative became subsumed over time under the general executive power of the Commonwealth in s61 of the Constitution.\(^{38}\) Moreover, the power of the legislature has been interpreted broadly to extend to implementation of rights and obligations contained in treaties ratified by Australia. On the other hand, the High Court’s power in s75(i) has been utilised rarely, and construed narrowly.\(^{39}\)

The modest view taken of the significance of international law in the 1890s of course fails to capture the changed nature of the international legal order since that time. International law has been transformed from an ‘inter-state law of peaceful co-existence’\(^{40}\) into a law that transcends individual state boundaries to affect domestic affairs and individuals. The globalisation process has brought with it increased co-operation among states in the regulation of economics and trade,

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\(^{34}\) John Quick & Robert Garran, above n32 at 770.
\(^{35}\) See text accompanying n31.
\(^{36}\) Official Record of the Debates of the Australasian Federal Convention, above n31 at 320.
\(^{37}\) Ibid.
\(^{38}\) \textit{R v Burgess; ex parte Henry} (1936) 55 CLR 608.
\(^{39}\) \textit{Re East & Ors; ex parte Nguyen} (1998) 196 CLR 354.
human rights, the environment, communications, education, science, transport and so on. The lack of provision in the Australian Constitution means that the Australian legal system is able to accommodate such changes, although the manner in which it should do so is not specified. The development of mechanisms to accommodate developments in international law has been left to the executive, legislature and judiciary.

4. The Executive and International Law

Australia’s constitutional structure assigns the executive a central role in determining the extent to which international law affects the domestic legal system. The powers of the executive are not defined but vested by s61 of the Constitution in the Queen, and are exercisable by the Governor-General as her representative. Nevertheless, it is clear that the executive power grants to the executive an exclusive power to assume international obligations. The executive also has the capacity to determine the manner in which international obligations are implemented domestically.

A. Assumption of International Obligations

The executive power to assume particular international obligations has political ramifications, but it is subject to no legislative or constitutional limits. Executive control in relation to international obligations is maintained through the procedural mechanisms for assuming international obligations. The drafting and negotiation of treaties, for example, is directed by the executive. The Department of Foreign Affairs and Trade (DFAT) describes the process in relation to multilateral conventions as follows:

Decisions about the negotiation of multilateral conventions, including determination of objectives, negotiating positions, the parameters within which the Australian delegation can operate … are taken at Ministerial level, and in many cases, by Cabinet.

The ratification of multilateral treaties and bilateral treaties, if necessary, must have the approval of the Federal Executive Council, which is made up of all Ministers and parliamentary Secretaries. Since the introduction of the reforms to Australia’s treaty-making process in 1996, ratification has also become contingent on fulfilment of the parliamentary scrutiny procedures. These procedures enable Parliament to scrutinise proposed treaties in detail, but do not

41 See Burgess, above at 644 (Latham CJ).
45 See text at n110 and following.
46 Department of Foreign Affairs and Trade, above n43 at para 79. See also section 5 for discussion of this procedure.
legally constrain the executive in its decisions as to whether or not to ratify a treaty.

A corollary to the executive’s power to enter into treaties is the power to withdraw from them, subject only to the specific terms of a treaty and to general international law.\textsuperscript{47} DFAT’s public documentation on treaty-making notes that the government “retains the right to remove itself from treaty obligations if it judges that the treaty no longer serves Australia’s national and international interests”.\textsuperscript{48} Any decision to withdraw from a treaty must be approved by Executive Council and follow the parliamentary tabling procedures. Australia has rarely taken the step of withdrawing from a treaty. One example is Australia’s withdrawal from membership of the United Nations Industrial Development Organisation (UNIDO) in 1996. The grounds for the withdrawal were that:

UNIDO’s activities were not considered to make a substantial contribution to Australia’s priority development objectives; [and] … Funding obligations did not represent value-for-money or an appropriate contribution to Australia’s aid objectives.\textsuperscript{49}

The assumption of international obligations has varied according to a particular government’s policies, some being more anxiety-prone than others. Australia first began conducting international affairs independently of the United Kingdom with the advent of World War II. The upheaval of the war, and the important role played by HV Evatt in the creation of the United Nations, ensured an active international role for Australia during this period.\textsuperscript{50} The Coalition governments of 1949–1972 had different domestic political imperatives, and faced different international pressures, to their Labor predecessor. The focus of the governments was therefore on external issues such as security and defence.\textsuperscript{51} The Whitlam Labor government from 1972–1975 transformed the nature of Australia’s engagement with international law through its concentration on issues such as apartheid, labour rights, refugees and human rights.\textsuperscript{52} The Coalition governments that followed maintained this momentum by, among other things, committing Australia to the two major international human rights conventions.\textsuperscript{53} Subsequent Australian Labor governments largely maintained this level of engagement with international law.

\textsuperscript{48} Department of Foreign Affairs and Trade, above n42.
\textsuperscript{50} Id at 106–189.
\textsuperscript{51} See Dominique De Stoop, ‘Australia’s Approach to International Treaties on Human Rights’ (1970–73) Australian Year Book of International Law 27; Joseph Camilleri, ‘Foreign Policy’ in Allan Patience & Brian Head (eds), From Whitlam to Fraser: Reform and Reaction in Australian Politics (1979) at 251; see also Crawford, above n25 at 327.
The present Coalition government has retreated from a high level of engagement with international law, displaying particular ambivalence about the international human rights system. This retreat is illustrated by the government’s decision in 2000 to undertake a ‘whole of government review of the operation of the United Nations treaty committee system as it affects Australia’. The review was prompted by what the government considered the ‘blatantly political and partisan approach’ taken by the UN Committee on the Elimination of Racial Discrimination towards Australia’s report under the related Convention, resulting in ‘a polemical attack on the Government’s indigenous policies’. The government did not release terms of reference for the review, nor did the review involve any public or non-government consultation.

No official report from the review was released to the public. Instead, the results of the review were advised simply through a media release. The release noted the need to ‘ensure adequate recognition of the primary role of democratically elected governments’ and signalled the government’s resolve to ‘adopt a more robust and strategic approach to Australia’s interaction with the treaty committee system’. This approach included the creation of two interdepartmental committees to review Australia’s ongoing interaction with the UN human rights treaty committee system, and the government’s decision not to sign the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women. Chris Sidoti, former Australian Human Rights Commissioner, noted in relation to the substance of the review that:

[T]here has not been a single issue on which Australia received criticism from a treaty committee that has not previously been subject the subject of criticism by the Australian Human Rights Commission and by human rights groups within Australia.

Without the report of the review, it is impossible to fully assess the government’s conclusions. The circumstances of the review, however, highlight the anxieties prompted by invocations of international law. It is striking that a review on an issue of considerable public interest was conducted in secret, contrary to the

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56 Ibid.
59 Ibid.
60 Ibid.
61 Ibid.
62 Evidence to Joint Standing Committee on Foreign Affairs, Defence and Trade, Parliament of Australia (Canberra, 22 March 2001) at 537.
government’s expressed concern for transparency and accountability within the treaty-making process. The review has also left Australia in an uncertain position with respect to its international human rights obligations. Australia remains officially committed to upholding human rights at an international level, but it is hesitant to transform that commitment into domestic law.

Other examples of international law anxiety include the panic that occurred within the government party room in the lead up to Australia’s ratification of the Statute of the International Criminal Court (ICC). The Foreign Minister and the Attorney-General were long-time supporters of the ICC, and ratification of the statute was said to have been approved by Cabinet three times. Nonetheless, when the time for ratification was looming, some Coalition members voiced strenuous objections to taking such action. Bronwyn Bishop, a Coalition backbencher, for example, maintained that ‘at the end of the day, we have to ensure that we protect our people against political or malicious interpretations of international arrangements into which we enter with good will. It is fundamental to us as a sovereign nation…’ Australia ultimately ratified the Statute on the understanding that ‘the decision to ratify does not compromise Australia’s sovereignty’.

The notion of protecting Australian sovereignty from international law also seemed to underpin the Australian Government’s 2002 vote against the adoption of an Optional Protocol to the Torture Convention. The Minister for Foreign Affairs stated that the Protocol was rejected because ‘UN officials should seek the agreement of the federal, [and] … the state governments, to have access to our prisons, not just get off the plane … and walk into the prison.’ This statement is not an accurate account of the effect of the Protocol, which requires that notice be given to a government before a visit is made to any place of detention. It also does not explain Australia’s decision to reject the very existence of the Protocol as Australia could simply have chosen not to become party to it. This attempt to preserve Australian sovereignty is a high watermark in Australian unease about accepting international obligations.

66 Prime Minister of Australia, ‘International Criminal Court’ (Media Release, 20 June 2002). A copy of Australia’s Declaration upon ratification of the ICC Statute ‘reaffirms the primacy of its criminal jurisdiction’ and is appended to this media release.
68 CNN.com, above n67.
69 Optional Protocol, above n67 at Art 13.
Australian anxiety about the international order does not extend to all categories of international law however. The government acknowledges the inevitability of globalisation and explicitly embraces some of its consequences. The government is particularly enthusiastic about trade liberalisation and the potential benefits for Australia of engaging in the global trading regime. The Foreign Minister has identified trade liberalisation as the main benefit of globalisation, and has described Australia’s commitment to the World Trade Organisation as ‘unswerving’. This commitment is particularly evident in the government’s regular use of the WTO dispute settlement system, and in its willingness to enforce those decisions domestically. The government also considers strong bilateral trading relationships to be in Australia’s national interest. It recently concluded a Free Trade Agreement with Singapore and is optimistic about the likely outcome of negotiations for a Free Trade Agreement with the United States.

B. Implementation of International Obligations

The executive possesses a range of options in its interpretation of Australia’s international obligations and in determining the manner in which those obligations are to be implemented domestically. Domestic implementation can occur, inter alia, through the introduction of specific implementing legislation (which may be passed as a result of executive control of Parliament, or at least the House of Representatives); through reliance on existing Commonwealth or state legislation, including the power to make regulations; or, where a treaty imposes obligations only on the government, implementation can occur through administrative measures made under the executive power. It should be noted that the

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70 See, for example, Daryl Williams, ‘International Law and Responsible Engagement’ (paper presented at the meeting of The Australian and New Zealand Society of International Law Canberra, 26 and 28–29 June 2000); Alexander Downer, ‘Globalisation or Globaphobia: Does Australia have a choice?’ (speech delivered at the National Press Club, Canberra 1 December 1997).

71 Downer, ibid.


73 As at 1 September 2003, Australia has been complainant in six disputes before the WTO, seven as a respondent and has participated in a further 19 cases as a third party. Statistics on Australia’s participation are available at: <http://www.dfat.gov.au/trade/negotiations/wto_disputes.html#oz>.


77 See Bill Campbell, ‘The Implementation of Treaties in Australia’ in Opeskin & Rothwell, above n15 at 132 and following.
executive’s willingness to enter into international treaties is not necessarily matched by an interest in fully implementing treaty obligations. For example, Australia is a party to the six major United Nations human rights treaties and yet has failed to implement many of their provisions.\(^{78}\) For this reason, Australia can be described as ‘Janus-faced’ with respect to particular treaties: the international face smiles and accepts obligations, while the domestic-turned face frowns and refrains from giving them legal force.\(^{79}\)

The Attorney–General’s Department is the administrative institution responsible for determining whether existing legislation is sufficient, or new legislation is necessary, to give effect to a treaty.\(^{80}\) Where international obligations are best implemented through reforms to state legislation, the Commonwealth government must choose either to engage the states in co-operative implementation or to use the external affairs power under s51(xxix) of the Constitution to impose the relevant changes on the states.\(^{81}\) Current Commonwealth government practice is to prefer implementation through co-operation with the states over reliance on s51(xxix).\(^{82}\) Indeed, very few treaties to which Australia is a party have been implemented through legislation based solely on the external affairs power.\(^{83}\)

The executive’s flexibility in this area means that domestic implementation of Australia’s international obligations is subject to the political priorities of the day and to the anxiety generated by international law. This has led to inconsistencies in Australia’s approach to its international obligations. Take, for example, the different government reactions to decisions of UN committees empowered to hear individual complaints about rights violations in Australia. In the Toonen case,\(^{84}\) the United Nations Human Rights Committee found that Tasmania’s anti-sodomy laws violated privacy rights protected under the International Covenant on Civil and Political Rights (ICCPR) and, accordingly, that Australia was in breach of its international obligations. Faced with Tasmania’s refusal to amend the offending provisions of its law, the then Commonwealth (Labor) government passed legislation designed to give effect to the Committee’s view.\(^{85}\)

In contrast, the succeeding Commonwealth (Coalition) government responded to the next major decision of the Human Rights Committee\(^{86}\) by simply rejecting

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\(^{79}\) Ibid.

\(^{80}\) Department of Foreign Affairs and Trade, Signed Sealed and Delivered, above n43 at para 92.

\(^{81}\) For a discussion of the uses and limits of the external affairs power, See, for example, George Winterton, ‘Limits to the Use of the “Treaty Power”’ in Alston & Chiam (eds), above n15 at 29.


\(^{83}\) Campbell, above n77 at 150.


\(^{85}\) Human Rights (Sexual Conduct) Act 1994 (Cth).

the Committee’s finding that Australia’s immigration detention policies violated the ICCPR. The Attorney–General said that the Committee ‘provides views and opinions and it is up to the countries to decide whether they agree with those views and how to respond to them’. The government has recently reiterated this position. In response to a decision of the Committee on the Elimination of Racial Discrimination, a spokesperson for the Attorney–General said,

The Government is confident that Australia’s domestic processes, which found no racial discrimination in this case, are second to none in this world. The Government notes that the committee is not a court and its views are not binding …. The Government’s serious concerns regarding the quality and standards applied by UN complaint bodies are a matter of public record. In the absence of real reform of the UN treaty body system, those concerns remain.

Notwithstanding these inconsistencies of approach, Commonwealth governments of different political views were united in their negative reaction to a judicial decision that gave international obligations domestic force, even without prior legislative implementation. In Teoh, the High Court held that international conventions that are not incorporated into Australian law can give rise to a legitimate expectation that, in making administrative decisions, the government will act in a manner consistent with its international obligations. This decision gave rise to a vision of international law functioning without restraint within Australia and it provoked considerable political anxiety. The executives of both the Labor and subsequent Coalition governments attempted to repudiate the effect of the Teoh judgment by issuing Executive Statements in order to clarify the position of international law within Australia. Both governments also subsequently attempted to introduce legislation to nullify the impact of Teoh. Underlying this position was a desire to control more directly the reception of international human rights law into the Australian legal system. For example, the Bill introduced by the Coalition government to undo Teoh was presented as fulfilling an aspect of the 1996 Coalition Law and Justice Policy which stated:

Australian laws, whether relating to human rights or other areas, should first and foremost be made by Australians, for Australians …. [W]hen Australian laws are to be changed, Australians and the Australian political process should be at the beginning of the process, not at the end.

89 Reported in Ashleigh Wilson, ‘Canberra to Defy UN on “Nigger” Sign’, The Australian (24 April 2003).
90 Teoh, above n11. See also text at n142 and following.
92 See text at n170.
While the High Court was recently critical of Teoh, in a case in which its ruling was not under direct consideration,94 the doctrine remains part of Australian law. Courts and tribunals have continued to apply the legitimate expectation test without apparent difficulty.95

5. The Legislature and International Law

The debates leading up to Federation indicate that the Australian colonies were not considered to have international legal personality separate to that of the British government.96 The role of the Australian Parliament in relation to international law or treaties was not a topic that attracted much attention either during the debates or for the two decades that followed. The formal recognition of Australia’s international personality, through the Balfour Declaration (1926) and the Statute of Westminster (1931), failed to excite much parliamentary interest. Indeed, the Commonwealth Parliament delayed domestic adoption of the Statute of Westminster until 1942, 11 years after it had been adopted by the British Parliament.97

During this period, relations between members of the Commonwealth were governed by the doctrine of inter-se.98 As a consequence, many of the inter-dominion agreements negotiated during this period only applied to Australia with the approval of Parliament.99 The Agreement between the United Kingdom, Australia and New Zealand for the Administration of Nauru, for example, provided in Article XV that: ‘The Agreement shall come into force on its ratification by the Parliaments of the three countries.’100 The Australian Parliament retained a role in approving all treaties before ratification, at least where domestic implementing legislation was required, until the late 1970s, when the practice fell into decline.101

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98 The doctrine of inter-se held that Britain and its dominions had a special relationship that was not international nor governed by international law, but rather was constitutional in character. See D P O’Connell, International Law (2nd ed, 1970) at 350.
99 Twomey, above n96 at 19.
101 Twomey, above n96 at 19.
also included approval for the treaty. The practice was to ratify the treaty once legislation had passed, but before it entered into force.102

In 1961, Prime Minister Menzies had announced a commitment to table in both Houses of Parliament the text of treaties Australia had signed but not yet ratified or to which Australia contemplated accession.103 Except for urgent cases, treaties were to be tabled at least 12 sitting days before proposed ratification or accession. The aim of this measure was to keep Parliament informed about treaty matters. The executive maintained this practice until the late 1970s, when treaties began to be tabled in bulk after periods of about six months.104 Bulk tabling meant that many of the tabled treaties had already been ratified and that Australia had assumed new, and sometimes significant, international obligations without any parliamentary scrutiny. The late 1970s also saw the demise of the practice of putting the necessary implementing legislation in place before the executive took binding treaty action.105 The combined effect of these changes was to deny Parliament a meaningful role in scrutinising treaties and in debating implementing legislation.106

Increasing dissatisfaction with Parliament’s desultory role in the treaty-making process, in particular the perception that reduced Parliamentary involvement produced a ‘democratic deficit’,107 led to a 1995 Senate inquiry into the treaty-making power and the external affairs power.108 Many of the recommendations from the inquiry were implemented by the new Coalition government in its 1996 reforms to the treaty-making process. The Senate inquiry had recommended that the reforms be introduced by legislation,109 but they were ultimately introduced by resolution.

The reforms had five aspects:

• The tabling in Parliament of all treaty actions proposed by the Government in Parliament for at least 15 sitting days before binding action is taken. Treaty actions which the Minister for Foreign Affairs certifies to be particularly urgent or sensitive, involving significant commercial, strategic or foreign policy interests, are exempted from this requirement;

• The preparation of a National Interest Analysis (NIA) for each treaty, outlining

102 Ibid. Some examples of Commonwealth legislation approving the ratification of treaties include the Air Navigation Act 1920 (Cth) s3A, the Crimes (Biological Weapons) Act 1976 (Cth) s7 and the Racial Discrimination Act 1975 (Cth) s7.
103 Robert Menzies, Prime Minister and Minister for External Affairs, Commonwealth, House of Representatives, Parliamentary Debates (Hansard), 10 May 1961 at 1693.
104 Senate Legal and Constitutional References Committee, above n12 at 96–102.
105 See for example id at 104–105, 126–129 at chapter 14.
106 See id at chapter 7.
108 Senate Legal and Constitutional References Committee, above n12 at para 0.1.
109 See id Recommendations 8, 9 and 10 at 266–268.
information including the obligations contained in the treaty and the benefits for Australia of entering into the treaty;

• The establishment of the parliamentary Joint Standing Committee on Treaties (JSCOT);

• The establishment of the Treaties Council comprising the Prime Minister, Premiers and Chief Ministers; and

• The establishment on the internet of the Australian Treaties Library.110

In August 2002, the Minister for Foreign Affairs announced refinements to the tabling process. Treaties of major political, economic or social significance are now tabled for 20 sitting days, while other treaties continue to be tabled for 15 sitting days.111

The 1996 reforms have had a significant impact on treaty-making in Australia. The executive has largely maintained its commitment to the tabling time frames. A 1999 government review of the treaty-making reforms concluded that the ‘balance currently struck in determining the length of the tabling period is adequate and appropriate’.112 The NIAs have evolved into far more useful documents than they were initially, although the need for yet more improvement has been acknowledged.113 Despite the creation of a template for the style and content of the NIAs, for example, their quality still varies depending on the department responsible for drafting them.

The Treaties Council has met only once to date, to discuss international instruments including the World Trade Organisation Agreement on Government Procurement and the Draft Declaration on the Rights of Indigenous Peoples.114 It is not clear why the Treaties Council has not been more active, particularly as adequate and timely consultation with the states remains one of the sensitive areas in Australian treaty-making practice.115 It is possible that this record reflects an overlap, and confusion, between the role of the Treaties Council and that of the Commonwealth/State and Territory Standing Committee on Treaties. The Standing Committee consists of senior Commonwealth and State and Territory officers who meet twice a year.116 It is mandated to identify treaties and other international instruments of sensitivity and importance to the states and to follow those instruments through the negotiation and implementation process, including by referring treaties to the Treaties Council where appropriate.117

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110 Minister for Foreign Affairs and Attorney–General, above n107.
113 Id at 3.
116 See generally Department of Prime Minister and Cabinet, Principles and Procedures, above n82.
117 Ibid.
Committee process appears to be working well,\textsuperscript{118} and it may be that the Committee has felt able to conduct its role adequately without reference to the Treaties Council. It is also possible, however, that the logistics of maintaining the Standing Committee have been easier because its bureaucrat members are free from the demands of time and politics faced by the members of the Treaties Council.

\textbf{A. The Joint Standing Committee on Treaties}

The parliamentary institution of JSCOT has been the most influential of all of the 1996 reforms. The 1999 government review described the JSCOT process as having been ‘very effective’.\textsuperscript{119} Before the creation of JSCOT, treaties could be referred to existing Senate Standing Committees, but attempts to do so usually failed for political reasons.\textsuperscript{120} An important part of the 1996 reforms, therefore, was the introduction of a parliamentary committee concerned exclusively with scrutinising treaties. Under its resolution of appointment, JSCOT is empowered to inquire into and report upon:

1. matters arising from treaties and related National Interest Analyses and proposed treaty actions presented or deemed to be presented to Parliament;
2. any question relating to a treaty or other international instrument, whether or not negotiated to completion, referred to the committee by:
   (a) either House of the Parliament; or
   (b) a Minister; and
   (c) such other matters as may be referred to the committee by the Minister for Foreign Affairs and on such conditions as the Minister may prescribe.\textsuperscript{121}

The JSCOT process works in tandem with the tabling of treaties in Parliament. JSCOT must review treaties within the defined 15 or 20 day sitting day period for the treaties, although extensions are possible in exceptional circumstances.\textsuperscript{122} The review process generally involves an examination of the accompanying NIA, public submissions and a public hearing on the treaty. Those called on to address the Committee at public hearings usually include representatives from relevant government departments, relevant non-government and other private organisations and any other individuals whom the Committee deems appropriate. At the end of the process, JSCOT issues a report containing its recommendations as to whether and in what circumstances the treaty should be ratified.

JSCOT had issued 53 reports as at 1 September 2003. The usual practice is for a single report to include reviews of a number of treaties, normally all the treaties tabled at a particular time. In line with its powers, however, JSCOT has also produced a number of single issue reports. These reports have concerned matters

\begin{itemize}
\item \textsuperscript{118} Joint Standing Committee on Treaties, \textit{Report 24}, above n115 at 47.
\item \textsuperscript{119} Commonwealth, \textit{Review of the Treaty-Making Process}, above n63 at 2.
\item \textsuperscript{120} Twomey, above n96 at 26.
\item \textsuperscript{121} The Committee’s resolution of appointment is reproduced in its reports.
\item \textsuperscript{122} Commonwealth, \textit{Review of the Treaty-Making Process}, above n63.
\end{itemize}
of particular economic, social, cultural or political significance and include reports on the Statute of the International Criminal Court, the Multilateral Agreement on Investment (MAI), the World Trade Organisation, Australia’s extradition policy and the Kyoto Protocol to the Climate Change Convention.

In general, JSCOT has recommended the taking of binding treaty action by the executive. Its practice of preferring consensus outcomes to majority/dissenting reports means it would be unusual for the Committee to make a strong finding against the government. It also makes displays of political partisanship within the Committee extremely rare. The Committee seems to take a politic approach to its reports and is more likely to make recommendations that will be adopted by government than take a strong stance that may be ignored.

It is clear, however, that the Committee does not consider itself simply to be a rubber stamp for executive action. The tenor of JSCOT reports suggests a committee confident of its position and influence within government and one unafraid of criticising government where appropriate. The Committee found fault, for example, with the ‘inadequate’ consultation that Treasury conducted in relation to the MAI. The Committee criticised Treasury’s role with respect to the MAI, ‘not to accuse it of wrong doing but to draw attention to how excessive zeal for a cause in which it believes can sometimes blind an organisation’. The Committee has been similarly critical in relation to less controversial treaties. In its 34th report, the Committee explicitly disapproved the manner in which it was informed of the amendments to the Convention on International Trade in Endangered Species, which automatically come into force for parties. The Committee expressed dissatisfaction with the quality and the timing of the information presented to it by Environment Australia, commenting that, ‘In view

128 But see the dissenting/minority reports of Democrat Senator Andrew Bartlett in Joint Standing Committee on Treaties, Parliament of Australia, Four Nuclear Safeguards Treaties Tabled in August 2001 (Canberra: The Committee 2002) at 26 and Joint Standing Committee on Treaties, Parliament of Australia, The Timor Sea Treaty (Canberra: The Committee 2002) at 47.
129 But see, Joint Standing Committee on Treaties, Extradition – A Review of Australia’s Law and Policy, above n126, where the Committee expresses dissatisfaction with the default ‘no evidence’ model in relation to requests for extradition from Australia and recommends that the Australian Law Reform Commission conduct an inquiry into the question.
130 Joint Standing Committee on Treaties, Multilateral Agreement on Investment, above n124 at 140.
131 Id at 142.
of this neglect, it is harder to feel confident about the way in which Environment Australia represents Australia’s interests in international fora.\textsuperscript{132} The seriousness with which the Committee regards its role is also evident in its concern that automatic entry into force provisions ‘operate in a manner that is plainly contrary to the intentions of the reformed treaty making process’.\textsuperscript{133}

The Coalition government’s attitude towards JSCOT has been generally enthusiastic, although it is slow to respond to JSCOT recommendations. It is not unusual for responses to JSCOT reports to be issued up to a year after the recommendations were made. The government is also aware of the potential implications of ignoring JSCOT recommendations. The Minister for Foreign Affairs has stated that ‘any government would need to think very carefully of the political consequences before it ignored a unanimous JSCOT recommendation’.\textsuperscript{134} It is difficult to assess the accuracy of this statement, however, as the recommendations of JSCOT and the intentions of the executive have so far appeared to coincide. The executive has been able consistently to act in line with JSCOT recommendations, or at least not directly contrary to them. The impact of an executive failure to follow the recommendations of JSCOT is difficult to predict.

The Coalition government has expressed satisfaction in regard to the 1996 reforms as part of the ‘ongoing process to facilitate parliamentary scrutiny of the treaty-making process and public accountability’.\textsuperscript{135} Yet there has been no independent and systematic review of JSCOT, or of the 1996 reforms more generally. This has led to almost unquestioning acceptance of the success of the reforms at improving transparency and accountability within Australia’s treaty-making process. It is true that the reforms have both enhanced Parliament’s role in scrutinising international treaty action and facilitated much greater public access to information about treaty-making. However, the extent to which these improvements have actually enhanced transparency and accountability of the executive has yet to be clearly established.

One analysis of the JSCOT process, in relation to Australia’s multilateral economic diplomacy, agreed that it adds an important layer to the management of international law within Australia.\textsuperscript{136} It also concluded, however, that:

For all the committee’s activism, and for all its unusual non-partisanship, the JSCOT initiative has been unable to alter substantially the way in which Australia’s foreign economic policy has been made …. [W]e conclude that the

\textsuperscript{132} Joint Standing Committee on Treaties, Parliament of Australia, \textit{Two Treaties Tabled on 6 June 2000} (Canberra: The Committee 2000) at 10.

\textsuperscript{133} Id at 12.

\textsuperscript{134} Minister for Foreign Affairs, ‘Treaties and Community Debate: Towards Informed Consent’, (speech delivered at the Launch of the Australian Treaties Database, Canberra, 20 August 2002).


main role of JSCOT in the realm of trade diplomacy has been as a tool of political management, a means by which the executive can channel protest, deflect opposition, and in essence legitimize its own policy preferences.\textsuperscript{137}

The JSCOT process may have thus become a mechanism through which public anxieties about Australia’s relationship with international law are reduced. It does not, however, seem to have had a similar effect on executive anxieties about international law. For example, the federal Coalition government signed fewer treaties in the period between 1997 and 2002 than its predecessor Labor government had signed in a similar period.\textsuperscript{138} Despite the enhanced transparency of the treaty-making process under JSCOT, therefore, it seems that the executive has retained its dominant role in Australia’s relationship with international law.

B. Implementing Legislation

If the executive has determined that complying with Australia’s international obligations requires the passage of specific implementing legislation, Parliament has an important role in determining the form and content of that legislation. The power of federal Parliament includes, in s51(xxix) of the Constitution, the capacity to pass laws with respect to ‘external affairs’. This power has been interpreted broadly by the High Court to enable the Commonwealth to pass laws that implement any obligation that the federal executive assumes under an international treaty or convention.\textsuperscript{139} The proliferation of treaties and conventions at the international level has made this power useful to the Commonwealth in a range of areas including industrial relations,\textsuperscript{140} human rights\textsuperscript{141} and the environment.\textsuperscript{142} Even apart from its treaty implementation aspect, members of the High Court have suggested that the external affairs power allows the Commonwealth to legislate for the criminalisation of certain offences, such as piracy, arising under international law that are recognised as being part of the ‘universal jurisdiction’ of all nations.\textsuperscript{143} It is also arguable that the power enables the Commonwealth to legislate to implement international customary law in so far as it binds Australia.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{137} Id at 10.
\item \textsuperscript{138} Using a crude comparison, the federal Labor government signed 361 treaties between 1990 and 1995. The current Coalition government signed 304 treaties between 1997 and 2002.
\item \textsuperscript{139} \textit{Tasmanian Dam Case}, above n11.
\item \textsuperscript{140} See, for example, the provisions dealing with parental leave in Division 5 of Part VIA of the \textit{Workplace Relations Act} 1996 (Cth). They give effect to Australia’s obligations under the Workers with Family Responsibilities Convention 1981 and the Workers with Family Responsibilities Recommendation 1981.
\item \textsuperscript{141} See, for example, the \textit{Racial Discrimination Act} 1975 (Cth) (implements the International Convention on the Elimination of All Forms of Racial Discrimination) the \textit{Sex Discrimination Act} 1984 (Cth) (implements Convention on the Elimination of All Forms of Discrimination Against Women) and the \textit{Disability Discrimination Act} 1992 (Cth) (implements International Labour Organisation Convention 111 — Discrimination (Employment and Occupation) Convention, the International Covenant on Civil and Political Rights 1966 and the International Covenant on Economic, Social and Cultural Rights 1966).
\item \textsuperscript{142} See, for example, the \textit{World Heritage Properties Conservation Act} 1983 (Cth) which gives effect to the \textit{Convention for the Protection of the World Cultural and Natural Heritage}.
\item \textsuperscript{143} Polyukhovich v Commonwealth (War Crimes Act Case) (1991) 172 CLR 501 (Brennan and Toohey JJ).
\end{itemize}
\end{footnotesize}
While the High Court has not made a finding to this effect, customary law, like treaties and conventions to which Australia is a party, also imposes binding obligations under international law.

Notwithstanding its power under s51(xxix), however, the legislature’s level of influence over the implementation of international obligations, through scrutiny and debate processes, has depended largely on the will of the executive. While Parliament does not itself draft the legislation, it exercises considerable control over the terms of that legislation through the debate and amendment process. The government’s stated position with respect to the timing of implementing legislation is as follows:

[T]he normal practice is to require that [the legislation] be passed before seeking Executive Council approval to enter the treaty. This is because subsequent parliamentary passage of the necessary legislation cannot be presumed, entailing a risk that Australia could find itself legally bound by an international obligation which it could not fulfil.144

This position is in line with executive and parliamentary practice until the late 1970s, when bulk tabling meant that many treaties were ratified before they were tabled. It is unclear how closely the government currently adheres to this process. The passage of the legislation implementing Australia’s obligations under the Rome Statute on the International Criminal Court (ICC Statute), for example, did occur before ratification, but only just. On 25 June 2002, the House of Representatives had to debate 353 pages of implementing legislation in three hours because the government had committed to ratifying the ICC Statute by the date it came into force, 1 July 2002.145

Evidence on this issue from the National Interest Analyses is equivocal. In some cases, the implementation sections of an NIA identify the relevant bill and describe how it will implement the terms of the particular treaty. The NIA for the International Convention for the Suppression of the Financing of Terrorism, for example, states that the Convention will be implemented by the Suppression of the Financing of Terrorism Bill 2002 (Cth) and describes the amendments to the Criminal Code Act 1995 (Cth) effected by this Bill.146 In contrast, the NIA for the Agreement to Promote Compliance with International Conservation and Management Measures by Fishing Vessels on the High Seas notes that a number of obligations under the Agreement will require new legislation and identifies the nature of the necessary amendments to the Fisheries Administration Act 1991 (Cth).147 It does not identify a bill through which the proposed amendments will

144 Department of Foreign Affairs and Trade, Australia and International Treaty-Making, above n42.
145 Kevin Rudd, Commonwealth, House of Representatives, Parliamentary Debates (Hansard), 25 June 2002 at 4334.
be made, raising the possibility that the amendments may not have passed by the
time the Agreement is ratified.

JSCOT has recently raised concerns that legislation implementing treaties is
being introduced or passed before JSCOT has completed its inquiries into the
relevant treaties. In its report into the Singapore–Australia Free Trade
Agreement,148 JSCOT noted a DFAT comment that ‘it is not unusual for relevant
legislation to be introduced to the Parliament before JSCOT has completed its
review of a proposed treaty action.’149 The members of JSCOT were critical of this
approach, stating that such action ‘is not conducive to the proper functioning of the
Committee’s process’.150

The inconsistencies in practice in relation to parliamentary scrutiny and
implementing legislation leave Parliament with an uncertain role. Despite
Parliament’s formal powers of scrutiny, both through treaty tabling and JSCOT, it
is open to the executive to ignore the recommendations of JSCOT and the
parliamentary process in general. If the executive also consistently fails to put
implementing legislation in place before taking binding treaty action, or if it
introduces implementing legislation before JSCOT has completed its inquiries, the
impact of any parliamentary scrutiny is undermined.

6. The Judiciary and International Law

The Australian judiciary’s approach to international law manifests a range of
anxieties, some implicit and some articulated. They include the preservation of the
separation of powers through maintaining the distinctiveness of the judicial from
the political sphere; the fear of opening the floodgates to litigation; the sense that
the use of international norms will cause instability in the Australian legal system;
and the idea that international law is essentially un-Australian.

The following principles are generally accepted:

1. Treaties ratified by Australia have no direct effect in Australian law, unless
given effect to by an Act of Parliament. A limited exception is that individuals
are entitled to a ‘legitimate expectation’ that Commonwealth decision-makers
will take account of international treaties ratified by Australia but not
implemented by legislation when a decision is made that affects their private
rights.

2. Customary international law and treaties reflecting customary international
law are a source for the development of the common law.

3. In the interpretation of legislation:

(a) Courts favour a construction that accords with Australia’s international
obligations, as set out in customary international law and treaties ratified by
Australia prior to the enactment of the legislation. No regard is had to

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148 Singapore–Australia Free Trade Agreement, above n75.
149 Joint Standing Committee on Treaties, Parliament of Australia, Treaties Tabled 4 March 2003
150 Id at 55.
treaties ratified subsequent to the entry into force of the legislation unless
the legislation was enacted in contemplation of Australia’s ratification of
that treaty. Courts refer to international law to confirm the meaning of a
statutory provision, to construe general words, or to resolve ambiguity or
uncertainty.

(b) Courts will not impute to the legislature an intention to abrogate or curtail
fundamental rights or freedoms (including those set out in international
law) unless such an intention is manifested by unmistakable and
unambiguous language.

The extent to which international law may be used in interpretation of the
Australian Constitution remains the subject of debate.

A. Treaties Have No Direct Effect

In the absence of any constitutional provision or legislative statement by the
Australian Parliament, the common law regulates the effect of treaties in
domestic law. It is a well-established principle of Australian law that the provisions
of an international treaty to which Australia is a party do not form part of
Australian law unless those provisions have been validly incorporated into
typical law by statute.

Earlier case law shows that this principle was not formulated as clearly and
directly as more recent decisions suggest. It appears to leave open the possibility
that there were some treaties that could operate domestically without
parliamentary sanction. Indeed, writing in 1984, James Crawford and Bill Edeson tentatively concluded that ‘treaties should be regarded as directly
applicable in national law except where their terms would, if enforced, affect the
private rights of persons within the national territory, or necessitate a change in

151 With the exception of Acts Interpretation Act 1901 (Cth) s15AB, discussed below n227.
152 Teoh, above n11 at 287 (Mason CJ and Deane J, Gaudron J concurring).
153 Burgess, above n38 at 644 (Latham CJ); Chow Hung Ching v The King (1948) 77 CLR 449 at
478 (Dixon J); Bradley v The Commonwealth (1973) 128 CLR 557 at 582 (Barwick CJ and
Gibbs J); Simsek v Macphee (Minister for Immigration and Ethnic Affairs) (1982) 148 CLR 636
at 641–642 (Stephen J); Tasmanian Wilderness Society v Fraser (1982) 153 CLR 270 at 274
(Mason J); Kioa v West (1985) 159 CLR 550 at 570–571 (Gibbs CJ); Mabo v Queensland (No 2)
(1992) 175 CLR 1 at 55 (Brennan J, Mason CJ and McHugh J concurring), 79 (Deane and
Gaudron JJ); Chu Kheng Lim v Commonwealth (Minister for Immigration, Local Government
and Ethnic Affairs) (1992) 176 CLR 1 at 74 (McHugh J); Dietrich v R (1992) 177 CLR 292 at
305 (Mason CJ and McHugh J), 359–60 (Toohey J); Coe v Commonwealth (1993) 118 ALR 193
at 200–201 (Mason CJ); Teoh, above n1 at 287 (Mason CJ and Deane J, Gaudron J concurring),
370 (Toohey J), 384 (McHugh J); Kruger v Commonwealth (1997) 146 ALR 126 at 161
(Dawson J); Bertran v Vanstone (2000) 173 ALR 63 at 104 (Kenny J).

154 See, for example, Chow Hung Ching, id at 478 (Dixon J); Simsek, above n153 at 641 (Stephen
J); Koowarta, above n11 at 193 (Gibbs CJ), 224 (Mason J); Mabo, above n153 at 55 (Brennan
J; Mason CJ and McHugh J concurring), 79 (Deane and Gaudron JJ); Coe v Commonwealth
existing legislation (including the imposition of extra charges), or a change in the common law.155

The distinction referred to between treaties affecting private rights and other treaties was drawn from the 1879 English decision of *The Parlement Belge*,156 but was carried through into Australian law in only a few judgments. Indeed, while certain Australian decisions reflect a potentially narrower principle applicable to treaties which affect ‘private rights’ or ‘individual rights and duties’,157 it is clear from cases such as *Bradley v Commonwealth*,158 which discussed Australia’s obligations under the United Nations Charter and Security Council resolutions, and cases such as *Bertran v Vanstone*,159 which concerned Australia’s obligations under an extradition treaty vis-à-vis Mexico, that the principle requiring legislative implementation is no longer confined to treaties related to individual rights and duties, and is fairly comprehensive in its application to all treaties. The only recognised exceptions derive from historic prerogative exceptions such as treaties of peace and war or recognition of a foreign State or government.160

As Stephen Donaghue notes, later shorthand formulations of the rule have tended to obscure the existence of exceptions by implying that no treaties directly apply, resulting in what he describes as an ill-considered extension of the rule to all treaties.161 Nevertheless, the principle denying the direct application of treaties to Australian law has now been repeated so often in Australian judgments that it can be regarded as settled. This broader rule is apparently based upon the separation of powers doctrine, a rationale also relied upon in the English cases. The position was explained in *AG for Canada v AG for Ontario*162 as follows:

> Within the British Empire, there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law. If the national executive, the government of the day, decide to incur the obligations of a treaty which involve alteration of law they have to run the risk of obtaining the assent of Parliament to the necessary statute or statutes. To make themselves as secure as possible they will often in such cases before final ratification seek to obtain from Parliament an expression of approval. But it has never been suggested, and it is not the law, that such an expression of approval operates as law, or that in law it precludes the assenting Parliament, or any subsequent Parliament from refusing to give its sanction to any legislative proposals that may subsequently be brought before it.

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155 Crawford and Edeson, above n17 at 134.
156 *The Parlement Belge* (1879) 4 PD 129.
157 See, for example, *Chow Hung Ching*, above n153 at 478 (Dixon J); *Simsek*, above n153 at 641 (Stephen J); *Koonwarta*, above n11 at 193 (Gibbs CJ), 224 (Mason J); *Maho*, above n153 at 55 (Brennan J; Mason CJ and McHugh J concurring), 79 (Deane and Gaudron JJ); *Coe*, above n154 at 193 (Mason CJ).
158 *Bradley*, above n153.
159 *Bertran*, above n153.
160 *Chow Hung Ching*, above n153 at 479 (Dixon J).
161 Donaghue, above n17 at 216.
162 [1937] AC 326.
In *Simsek v MacPhee*, Stephen J of the Australian High Court expressly relied upon the separation of powers as the basis for extending the principle:

> [The] authorities are not confined to the case of treaties which seek to impose obligations upon individuals; they rest upon a broader proposition. The reason of the matter is to be found in the fact that in our constitutional system treaties are matters for the Executive, involving the exercise of prerogative power, whereas it is for Parliament, and not for the Executive to make or alter municipal law.

*Minister for Immigration v Teoh* modified the general principle that treaties entered into by Australia have no effect in domestic law (such as through the creation of new legal obligations) unless implemented by statute. A majority of the High Court held that Commonwealth decision-makers, when making decisions affecting private rights, may need to take account of international treaties and conventions ratified by Australia but not implemented by legislation.

*Teoh* challenges the traditional separation between states and individuals in the international community, which sees states as the only actors on the international plane. In his dissenting judgment, McHugh J relied on this traditional conception of the international community, which he expressed as follows:

> In international law, conventions are agreements between States .... The ratification of a treaty is not a statement to the national community. It is, by its very nature, a statement to the international community. The people of Australia may note the commitments of Australia in international law; but, by ratifying the Convention, the Executive government does not give undertakings to its citizens or residents. The undertakings in the Convention are given to the other parties to the Convention. How, when or where those undertakings will be given force in Australia is a matter for the federal Parliament. This is a basic consequence of the fact that conventions do not have the force of law within Australia.

Mason CJ and Deane J, on the other hand, rejected this traditional view;

> [R]atification by Australia of an international convention is not to be dismissed as a merely platitudinous or ineffectual act, particularly when the instrument evidences internationally accepted standards to be applied by courts and administrative authorities in dealing with basic human rights affecting the family and children. Rather, ratification of a convention is a positive statement by the executive government of this country to the world and to the Australian people that the executive government and its agencies will act in accordance with the Convention.

Successive governments have attempted to disarm the *Teoh* approach by making formal executive statements to limit its effect. However, doubt has been
expressed about the effectiveness of these statements. Legislative attempts to overcome the decision at the federal level have not been successful.

It may be, however, that the current High Court will overrule Teoh. The decision, although not directly under consideration, was the subject of critical discussion in the High Court’s decision in *Re Minister for Immigration and Multicultural Affairs; ex parte Lam*. McHugh and Gummow JJ expressed concern with the apparent breach of the divide between the three branches of government:

Basic questions of the interaction between the three branches of government are involved. One consideration is that, under the Constitution (s 61), the task of the Executive is to execute and maintain statute law which confers discretionary powers upon the Executive. It is not for the judicial branch to add to or vary the content of those powers by taking a particular view of the conduct by the Executive of external affairs. Rather, it is for the judicial branch to declare and enforce the limits of the power conferred by statute upon administrative decision-makers, but not, by reference to the conduct of external affairs, to supplement the criteria for the exercise of that power.

Callinan J also considered that *Teoh* distorted the separation of powers inherent in the Australian legal system, but for different reasons. He found that, in giving the international convention the effect that it did, the Court in *Teoh* ‘elevate[d] the Executive above the parliament’. An additional concern was that *Teoh* did not require knowledge of the convention by the individual affected by the decision:

> [I]f a doctrine of “legitimate expectation” is to remain part of Australian law, it would be better if it were applied only in cases in which there is an actual expectation, or that at the very least a reasonable inference is available that had a party turned his or her mind consciously to the matter in circumstances only in which that person was likely to have done so, he or she would reasonably have believed and expected that certain procedures would be followed.

Hayne J also suggested that *Teoh* might need to be re-examined.

168 See text at n90 and following.
171 *Lam*, above n94 at 6.
172 Id at 102.
173 Id at 147.
174 Id at 145.
175 Id at 122.
B. Customary International Law and Australian Law

The development of international custom is a far less visible or tangible process than treaty law. Customary international law is formed when there is uniform and consistent state practice across a wide range of states and where there is evidence that this practice is maintained out of a sense of legal obligation. Custom usually takes a number of years to crystallise into law and there can be dispute about the customary status of particular rules. Even when particular customary laws are clear, questions may remain about their scope and precise applicability. Nevertheless, the nature of customary international law may make it, in certain respects, more appropriately adapted to incorporation into the Australian legal system. Unlike treaty law, the binding nature of customary international law does not derive from executive action, but rather from the collective action of states making up the international community. Accordingly, the separation of powers objection to the direct incorporation of treaty obligations does not arise in the same way in the case of customary international law. Perhaps for this reason, courts have exhibited less reluctance to recognize principles of customary international law without the need for statutory implementation.

(i) Incorporation or Transformation?

Under English law, the debate has focused, not on the question whether international law can be incorporated into domestic law by the courts, but on the manner of this incorporation (specifically, whether international law is automatically part, or merely a source, of the common law). We see in this debate the contest between the ‘incorporation’ and ‘transformation’ approaches. According to the former approach, the rules of international law are incorporated into domestic law automatically and considered to be part of the domestic law unless they are in conflict with an Act of Parliament. According to the latter approach, the rules of international law are not to be considered as part of domestic law except in so far as they have been adopted and made part of domestic law by the decisions of the courts, or by Act of Parliament. The significance of the differing approaches becomes clear in the event of a change in the rules of international law. Whereas, under the incorporation approach, domestic law will automatically change to incorporate changes in international law, automatic change will not occur under the transformation approach, and domestic courts would be bound by precedent to apply those rules of international law which had been accepted and adopted in the past.

Blackstone’s Commentaries state that ‘the law of nations (whenever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land’. This ‘incorporation’ approach held sway during the 18th and for a large part of the 19th centuries, but is said to have been qualified by the decision in R v Keyn. In this decision, Cockburn CJ held:

For writers on international law, however valuable their labours may be in elucidating and ascertaining the principles and rules of law, cannot make the law. To be binding, the law must have received the assent of the nations who are to be bound by it... Nor, in my opinion, would the clearest proof of unanimous assent on the part of other nations be sufficient to authorise the tribunals of this country to apply, without an Act of Parliament, what would practically amount to a new law. In so doing, we should be unjustifiably usurping the province of the legislature... The assent of nations is doubtless sufficient to give the power of parliamentary legislation in a matter otherwise within the sphere of international law; but it would be powerless to confer without such legislation a jurisdiction beyond and unknown to the law, such as that now insisted on, a jurisdiction over foreigners in foreign ships on a portion of the high seas.180

While some authors consider this case to be authority for the principle that rules of international law can only be incorporated into domestic law by legislation, later authority suggests that the judgment deals only with the degree of proof required before a rule of customary international law will be received into English law by the courts.181 Indeed, English cases have wavered between the incorporation and transformation approaches since the decision in R v Keyn.182

(ii) Customary International Law in Australian Law

In Chow Hung Ching v The King,183 Latham CJ rather cryptically stated that '[international] law is not as such part of the law of Australia …, but a universally recognized principle of international law would be applied by our courts'.184 In the same case, Starke J endorsed the statement of the Judicial Committee in Chung Chi Cheung v The King185 that '[t]he Courts acknowledge the existence of a body of rules which nations accept amongst themselves. On any judicial issue they seek to ascertain what the relevant rule is, and, having found it, they will treat it as

178 William Blackstone, Commentaries on the Laws of England (15th ed, 1809) vol 4 at 66–67. This view was based on the idea that 'such rules must necessarily result from those principles of natural justice, in which all the learned of every nation agree … in the construction of which there is also no judge to resort to, but the law of nature and reason, being the only one in which all the contracting parties are equally conversant, and to which they are equally subject'.

179 R v Keyn (1876) 2 Ex D 63.

180 Id at 202–203.

181 For example, in West Rand Central Gold Mining Co Ltd v R [1905] 2 KB 391, Lord Alverstone CJ delivering the judgment of the Judicial Committee held that international law will not be applied unless it can be shown ‘that the particular proposition put forward has been recognised and acted upon by our own country or that it is of such an age and has been so widely and generally accepted, that it can hardly be supposed that any civilised state would repudiate it.’ See also JH Rayner Ltd (Mincing Lane) v Department of Trade and Industry [1990] 2 AC 418 at 512–513 (Lord Oliver).

182 See, for example, Chung Chi Cheung v The King (1939) AC 160 at 167, 168; R v Secretary for the Home Department; ex parte Thakrar [1974] 1 QB 684; Thai-Europe Tapioca Service v Government of Pakistan [1975] 1 WLR 1485; Trendtex, above n177 at 553–554; R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 3) [1999] 2 All ER 97.

183 Chow Hung Ching, above n153 at 449.

184 Id at 462.

185 Chung Chi Cheung, above n182 at 167–168.
incorporated into the domestic law, so far as it is not inconsistent with rules enacted by statutes or finally declared by their tribunals.\(^{186}\)

The most influential judgment in the case, which articulates the view reflected most often in subsequent cases, was that of Dixon J. Quoting the celebrated international lawyer, Brierly, Dixon J held that ‘international law is not a part, but is one of the sources, of English law’.\(^{187}\) His Honour’s view has been referred to in a number of decisions,\(^{188}\) including *Mabo (No 2)* in which Brennan J made the much-quoted statement:

> The common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.\(^{189}\)

Brennan J was careful to qualify this with a warning that the Court was not, however, ‘free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency’.\(^{190}\)

These broad statements of principle have been the subject of detailed consideration in only two cases: the High Court’s decision in *Dietrich v The Queen*\(^{191}\) and the decision of the Full Federal Court in *Nulyarimma v Thompson*.\(^{192}\) These decisions exhibit the judicial caution that often marks discussion of the impact of international law upon the domestic legal system.

In *Dietrich*, the applicant sought recognition of a common law right to legal representation at public expense. The Court was referred to the ICCPR, which provides that those facing criminal charges are entitled ‘to have legal assistance assigned to [them], in any case where the interests of justice so require, and without payment by [them] in any such case if [they do] not have sufficient means to pay for it’.\(^{193}\) The applicant acknowledged that the ICCPR had not been implemented into domestic law, but argued for the development of the common law in conformity with conventions ratified by Australia.

The reasoning of Mason CJ and McHugh J hinged on the question whether the applicant was asking the Court to resolve an uncertainty or ambiguity in the

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\(^{186}\) *Chow Hung Ching*, above n153 at 470–471

\(^{187}\) Id at 477.


\(^{189}\) *Mabo (No 2)* (1992) 175 CLR 1 at 42 (Brennan J, Mason CJ and McHugh J agreeing).

\(^{190}\) Id at 43.

\(^{191}\) *Dietrich*, above n153.


\(^{193}\) *International Covenant on Civil and Political Rights*, above n53, art 14(3)(d).
common law, or whether the Court was being asked to declare the existence of a right which had not previously been recognised. They considered that the right sought by the accused fell within the latter category such that recognition of the right ‘would be to declare that a right which has hitherto never been recognised should now be taken to exist’. 194 Similarly, Dawson J (who expressed some hesitation at extending the use of international law from statutes to the common law) held that, even if the principle could be extended to the common law, it could only be used to resolve ambiguities or uncertainties, and not to effect a fundamental change. 195

The decision of Brennan J also found that the common law had not previously recognised the right to counsel at public expense. 196 His decision focused in some detail on the capacity of courts to develop the common law to correspond with the contemporary values of society. Brennan J acknowledged there were constraints on this power, referring once again to ‘the skeleton of principle which gives the body of our law its shape and internal consistency’. 197 He stated:

Where a common law rule requires some expansion or modification in order to operate more fairly or efficiently, this Court will modify the rule provided no injustice is done thereby. … And, in … exceptional cases where a rule of the common law produces a manifest injustice, this Court will change the rule so as to avoid perpetuating the injustice. 198

Brennan J acknowledged that the ICCPR was a concrete indication of contemporary values and recognised it to be ‘a legitimate influence on the development of the common law’, 199 even though it had not been implemented into Australian domestic law. However, he was concerned that recognition of the right in question, which he identified as the right to legal aid, would see the courts crossing ‘the Rubicon that divides the judicial and the legislative powers’. 200 In this case, he considered that the remedy did not lie with the courts, but with the legislature and the executive who bore the responsibility of allocating and applying public resources.

Toohey J also referred to the use of international instruments in the development of the common law. He acknowledged that, where the common law is unclear, an international instrument could be used by the court as a guide to that law. Moreover, he recognised that certain English authority tended to support an argument that a court may, perhaps must, consider the implications of an international instrument where there is a lacuna in the domestic law. 201 However, in his view, the ICCPR did not support the recognition of an absolute right to counsel. 202

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194 Dietrich, above n153 at 306.
195 Id at 348–349.
196 Id at 318–319.
197 Id at 320.
198 Id at 319.
199 Id at 321.
200 Id at 320.
201 Id at 360.
202 Id at 360–361.
Ultimately, the Court relied on the existing common law right to a fair trial, and found that lack of legal representation may, depending on the circumstances of the case, mean that an accused is unable to receive, or did not receive a fair trial. The members of the High Court who considered the issue were unanimous in their decision not to recognise an extension of the common law by reference to international law to incorporate an absolute right to counsel. However, the articulation of the principle underlying their respective decisions not to recognise such a right varied. Toohey J thought that customary international law could be used to address lacunae in the common law, as well as ambiguities. Brennan J held that the common law could be expanded or even modified to correspond to contemporary values reflected in customary international law, however, he recognised limits based on separation of powers and policy grounds. Mason CJ, McHugh J and Dawson J expressed the narrowest approach, finding that customary international law could only be used to address ambiguities or uncertainties in the common law.

In Teoh, Mason CJ, writing with Deane J, defined the principle further. Their Honours recognised that international conventions declaring ‘universal fundamental rights’\(^{203}\) could be used as a legitimate guide in developing the common law, though judicial development of the common law in this way ‘must not be seen as a backdoor means of importing an unincorporated convention into Australian law’.\(^{204}\) Mason CJ and Deane J noted:

> Much will depend upon the nature of the relevant provision, the extent to which it has been accepted by the international community, the purpose which it is intended to serve and its relationship to the existing principles of our domestic law.\(^{205}\)

In Nulyarimma v Thompson\(^{206}\), the Full Federal Court was provided with the opportunity to consider the principle further. In Nulyarimma, the Court was asked to consider whether the prohibition of genocide, a peremptory norm of customary international law, formed part of the law of Australia. Wilcox J was reluctant to make a general statement covering all the diverse rules of international customary law. He held that domestic courts were ultimately faced with a policy issue in deciding whether or not to recognise and enforce a rule of (customary) international law. He distinguished between principles of civil law, and principles of criminal law, and held that in the latter case, the policy issue should be resolved by declining, in the absence of legislation, to enforce the international norm.\(^{207}\) He acknowledged that he was unable to point to much authority for his conclusion.\(^{208}\)

Whitlam J concurred with Wilcox J in holding that the crime of genocide is not an offence under the common law of Australia. He disposed of the question on two

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\(^{203}\) *Teoh*, above n11 at 287–288 (Mason CJ and Deane J).

\(^{204}\) Ibid.

\(^{205}\) Ibid.

\(^{206}\) *Nulyarimma*, above n192.

\(^{207}\) Id at 164.

\(^{208}\) Ibid.
grounds. First, he dealt with the issue of universal jurisdiction, a principle of international law not yet the subject of universal acceptance, which recognises that all states are entitled to exercise jurisdiction in respect of a certain category of crimes (including genocide) which may be regarded as so heinous that they are an attack on the international legal order as a whole. Citing the High Court’s decision in *Polyukhovich v Commonwealth*210 Whitlam J appeared to adopt the view expressed by Brennan J in the latter case that ‘a statutory vesting of the jurisdiction would be essential to its exercise by an Australian court’.211 In other words, his Honour did not regard international legal principles relating to jurisdiction to be automatically incorporated into domestic law. Secondly, he relied on s1.1 of the *Criminal Code* (Cth), which abolished common law offences under Commonwealth law. He held that, since the date of the entry into force of that provision, ‘genocide cannot be recognised as a common law offence under Commonwealth law’.212

The dissenting decision of Merkel J reflects the most thorough exploration of the issue in the case law to date. He formulated the position as follows:

1. A recognised prerequisite of the adoption in municipal law of customary international law is that the doctrine of public international law has attained the position of general acceptance by or assent of the community of nations ‘as a rule of international conduct, evidenced by international treaties and conventions, authoritative textbooks, practice and judicial decisions’….

2. The rule must not only be established to be one which has general acceptance but the court must also consider whether the rule is to be treated as having been adopted or ‘received into, and so become a source of English law’….

3. A rule will adopted or received into, and so a source of, domestic law if it is ‘not inconsistent with rules enacted by statutes or finally declared by [the courts]’….

4. A rule of customary international law is to be adopted and received unless it is determined to be inconsistent with, and therefore ‘conflicts’ with domestic law in the sense explained above. In such circumstances no effect can be given to it without legislation to change the law by the enactment of the rule of customary international law as law.213

The approach of Merkel J to the integration of customary international law differed from that of his judicial colleagues in that his Honour’s approach relied neither on broad judicial consideration of policy (as Wilcox J did) nor on the narrow requirement for express parliamentary approval of the relevant principle (as Whitlam J did). His Honour recognised customary international law as a source of the common law, to be incorporated in the absence of conflicting domestic law.

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210 *Polyukhovich*, above n143.
211 *Nulyarimma*, above n192 at 171.
212 Id at 172.
213 Id at 190.
While his Honour preferred the transformation approach to the incorporation approach, he recognised that, in practical terms, the distinction between the approaches did not have great significance. Indeed, if, as stated by Brennan J in *Theophanous v Herald and Weekly Times Ltd*., it is accepted that the common law is amenable to development by judicial decision to correspond with the contemporary values of society, subject to the Constitution and statutes, it follows that changes in international legal principles could be reflected in development of the common law. Once a rule of international law is accepted as part of domestic law there would be no great difficulty in recognising, and therefore accepting, a change in that rule provided that the change was established by evidence and was not inconsistent with legislation, the common law or public policy.\(^{215}\)

The inconsistent approaches to customary international law represented in the Federal Court’s judgment in *Nulyarimma* continue to be reflected in the case law. In *Western Australia v Ward*, Callinan J of the High Court held that ‘[t]here is no requirement for the common law to develop in accordance with international law’. He objected to:

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\text{[t]he proposition that international law – itself often vague and conflicting – demands that the common law of Australia be moulded in a particular way, apparently without regard for precedent, the conditions in this country, or the fact that governments and individuals may have reasonably relied on the law as it stands is unacceptable}.\]

By contrast, in *Dow Jones v Gutnick*, Kirby J held that any development of the common law to address legal issues arising in the ‘digital millennium’ (in this case, the publication of defamatory matter on the Internet) should be consistent with relevant principles in the ICCPR.\(^ {219}\)

## C. International Law as an Aid to Interpretation of Statutes

There are two principles of statutory construction that invite reference to international legal principles by the judiciary. The first encourages the construction of legislation to accord with Australia’s international obligations. The second invokes a presumption against legislative intention to abrogate or curtail fundamental rights and freedoms.

(i) **Construction in Accordance with International Obligations**

A standard principle of statutory construction is that, in the case of ambiguity in a statute, the courts should favour a construction that accords with international law. The extent to which the courts should favour a construction that accords with international law has been the subject of conflicting views. In particular, debate remains on:

\(^{214}\) *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 at 142–143.
\(^{215}\) *Nulyarimma*, above n192 at 184 (Merkel J).
\(^{216}\) *Western Australia v Ward* (2002) 191 ALR 1.
\(^{217}\) Id at 958.
\(^{218}\) *Dow Jones v Gutnick* (2002) 194 ALR 433.
\(^{219}\) Id at 116.
(i) the nature of legislation to which the principle applies;
(ii) the principles of international law to which the courts may refer; and
(iii) the level of uncertainty required before courts can have recourse to international law.

(ii) Nature of Legislation

While certain judges appear to extend the principle of interpretation to statutes in general, other judges articulate the principle in limited terms to apply merely to legislation enacted pursuant to, or in contemplation of the assumption of international obligations under a treaty or international convention. Mason J articulated the narrowest conception of the principle in *Yager v R*:

> There is no basis on which the provisions of an international convention can control or influence the meaning of words or expressions used in a statute, unless it appears that the statute was intended to give effect to the convention, in which event it is legitimate to resort to the convention to resolve an ambiguity in the statute.\(^\text{220}\)

Notwithstanding Justice Mason’s formulation, the principle has been applied on numerous occasions to interpret statutes that do not purport to implement Australia’s international obligations. In *Zachariassen v Commonwealth*,\(^\text{221}\) the High Court relied on the principle to interpret the *Customs Act 1901* (Cth) in light of a principle of international commerce that all merchants had a right of departure. In *Polites v Commonwealth*,\(^\text{222}\) the Court applied the principle to consider whether the *National Security Act 1939* (Cth) could be interpreted to comply with the international legal principle that aliens cannot be compelled to serve in the military forces of a foreign State in which they happen to be. Neither of these Acts purported to give effect to Australia’s obligations under international law. In *Teoh*, Mason CJ himself, writing with Deane J, rejected a conception of the principle that was limited to ‘legislation … enacted after, or in contemplation of, entry into, or ratification of, the relevant international instrument’ in favour of a version which extended to statutes in general.\(^\text{223}\) Conversely, Gleeson CJ in *Plaintiff S157/2002 v Commonwealth* merely contemplated its application to ‘legislation … enacted pursuant to, or in contemplation of, the assumption of international obligations under a treaty or international convention’.\(^\text{224}\)

(iii) Relevant Principles of International Law

At its broadest, the interpretative principle entitles courts to have reference to ‘established rules of international law’\(^\text{225}\) to assist with the interpretation of a

\(^{220}\) *Yager v R* (1977) 139 CLR 28 at 43–44.

\(^{221}\) *Zachariassen v Commonwealth*, (1917) 24 CLR 166.

\(^{222}\) *Polites v Commonwealth* (1945) 70 CLR 60.

\(^{223}\) *Teoh*, above n11 at 287 (Mason CJ and Deane J).


\(^{225}\) *Zachariassen*, above n221; *Polites*, above n222; *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298; *Teoh*, above n11 at 273; *Kruger v Commonwealth* (1997) 190 CLR 1.
statute, including within the ambit of interpretative material both treaties to which Australia is a party and customary international law. However, in some cases, judicial statements of the principle merely invite reference to ‘international obligations under a treaty or international convention to which Australia is a party’. At its narrowest, the principle permits reference to ‘any treaty or other international agreement that is referred to in the [legislation being interpreted]’.

When one considers that the principle is based on a presumption that the Parliament does not intend to violate obligations by which it is bound under international law, it would follow that the principle should apply regardless of whether such binding obligations are found in treaties to which Australia is a party or in customary international law. Indeed, most statements of the principle permit reference to both sources.

Nevertheless, there are two possible limitations on the sources of international law to which the Court may refer. In Kruger v Commonwealth, Dawson J stated that the presumption would not arise where the obligation arose under a treaty which entered into force after the legislation was enacted. However, this statement cannot be given broad application without risking inconsistency with previous and subsequent case law. Other cases have held that, where a statute is enacted in contemplation of international obligations to be assumed by Australia through subsequent ratification of a treaty, it is permissible to refer to the Convention to which the statute is intended to give effect.

The second limitation was referred to in the judgment of Gleeson CJ, McHugh and Gummow JJ in AMS v AIF. In that case, their Honours, while acknowledging the principle of statutory construction, held that it did not apply in relation to the international instruments referred to in that case because they were ‘as to some of their provisions, aspirational rather than normative and, overall, reveal but do not resolve the conflicting interests which, as a matter of municipal law, attend a case such as the present’. This alludes to a further possible limitation on the sources of international law to which courts may refer, involving courts in a precarious assessment as to whether the relevant treaty imposes direct obligations on States parties, or is merely expressed in terms of aspiration.

226 Plaintiff S157/2002, above n224 at 34 (Gleeson CJ); X v Minister for Immigration and Multicultural Affairs, (2002) 116 FCR 319 at 319 (Gray, O’Loughlin and Moore JJ); Magno, id at 304 (Gummow J).
227 Acts Interpretation Act 1901 (Cth) s15AB.
228 Zachariassen, above n221 at 166; Polites, above n222 at 60; Magno, above n225 at 298; Teoh, above n11 at 273; Kruger, above n225 at 1.
229 Kruger, above n225.
230 Magno, above n225 at 304 (Gummow J); D & R Henderson Pty Ltd v Collector of Customs for the State of NSW (1974) 48 ALJR 132 at 135; Barry R Liggins Pty Ltd v Comptroller-General of Customs (1991) 31 FCR 112 at 120.
232 Id at 180.
Level of Uncertainty

The interpretative principle is most often articulated as being applicable in the case of ambiguity or uncertainty in a statute. However, some cases reflect a broad construction of ambiguity, approving application of the principle to limit the scope of general words and to favour a construction in conformity with international law ‘as far as the language [of the statute] permits’. In *Minister of Foreign Affairs v Magno*, Gummow J noted that, in cases where the international obligation is referred to in the statute, consideration may be given to it, ‘not only to determine provisions which are ambiguous or obscure, but for the wider purposes spelled out in subsection 15AB(1)’. In *Northern Territory v GPAO*, Kirby J proposed a similar distinction between general legislation and legislation purporting to implement Australia’s obligations, holding that, in the latter case, the ambiguous concept is not to be applied in a narrow sense. In such a case, ‘this Court should construe any ambiguity in the Act arising in the text of the amended law in favour of the construction which would uphold international law and ensure Australia’s conformity with it’.

In *Teoh*, Mason CJ and Deane J discussed the possible construction of the principle, and rejected a narrow conception of ambiguity. Their Honours did not appear to confine the broad approach to the circumstance where the treaty was referred to in the Act:

If the language of the legislation is susceptible of a construction which is consistent with the terms of the international instrument and the obligations which it imposes on Australia, then that construction should prevail.

This broad approach to ambiguity was referred to and applied by Dawson J in *Kruger v Commonwealth*, although his Honour did not indicate which approach should be favoured in future case law. In *Western Australia v Ward*, Callinan J

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233 Zachariassen, above n221 at 166; Polites, above n222 at 60; Chu Kheng Lim, above n153 at 1; Magno, above n225 at 298; Teoh, above n11 at 273; Kruger, above n225 at 1; Rocklea Spinning Mills Pty Ltd v Anti-Dumping Authority & Fraser (1995) 56 FCR 406; Applicant A v Minister for Immigration and Ethnic Affairs (1997) 142 ALR 331; Durham Holdings Pty Ltd v State of New South Wales (2001) 205 CLR 399; *Northern Territory of Australia v GPAO* (1999) 196 CLR 553; X, above n226 at 319; Plaintiff S157/2002, above n224 at 24.

234 Polites, above n222 at 60, 81 (Williams J).


236 Magno, above n225 at 304.

237 At its broadest, this would enable courts ‘to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act’. *Acts Interpretation Act* 1901 (Cth) s15AB.

238 *Northern Territory of Australia v GPAO*, above n233.

239 Id at 642.

240 Teoh, above n11 at 287.

241 *Kruger v Commonwealth*. 
rejected the broad approach, stating that, ‘where legislation is not genuinely ambiguous, there is no warrant for adopting an artificial presumption as the basis for, in effect, rewriting it’.242

(v) Presumption Against Abrogation of Fundamental Rights and Freedoms

There is a connected, but distinct, presumption that courts will not impute to the legislature an intention to abrogate or curtail fundamental rights or freedoms unless such an intention is clearly manifested by unmistakable and unambiguous language.243 General words will rarely be sufficient for that purpose. Courts look for a clear indication that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.244 Traditionally, this presumption was directed to the protection of common law rights.245 However, a number of recent cases have extended the presumption to the protection of fundamental human rights,246 and it is likely that courts will have regard to international human rights norms when applying this presumption in future.

D. Constitutional Interpretation

The High Court commonly refers to a range of extrinsic material, such as the debates at which the Constitution was drafted, in its interpretation of the Constitution. However, Kirby J is the only current member of the High Court to have made general reference to international norms. He has developed a distinctive ‘interpretive principle’ in relation to international law.247 In Newcrest Mining (WA) Ltd v Commonwealth, Justice Kirby argued:

242 Ward, above n216 at 273

243 Potter v Minahan (1908) 7 CLR 277, 304 (O’Connor J); Ex parte Walsh and Johnson: In re Yates (1925) 37 CLR 36 at 93 (Isaacs J); Sorby v The Commonwealth (1983) 152 CLR 281, 289–290 (Gibbs CJ); 309, 311 (Mason, Wilson and Dawson JJ); Re Bolton: ex parte Bean (1987) 162 CLR 514, 523; Balog v Independent Commission Against Corruption (1990) 169 CLR 625, 635–636; Bropho v Western Australia (1990) 171 CLR 1, 17–18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); Corporate Affairs Commission (NSW) v Yuill (1991) 172 CLR 319, 322 (Brennan J), 331 (Dawson J), 338 (Gaudron J), 348 (McHugh J); Chu Kheng Lim, above n153 at 12 (Mason CJ); Wentworth v New South Wales Bar Association (1992) 176 CLR 239 (Deane, Dawson, Toohey and Gaudron JJ); Coco v The Queen (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ), 446 (Deane and Dawson JJ); Kruger, above n225 at 1, 407 (Gaudron J); Kartinyeri v Commonwealth of Australia (1998) 195 CLR 337, 417–718 (Kirby J); Durham Holdings, above n233 at 399 (Kirby J); Plaintiff S157/2002, above n224 at 34 (Gleeson CJ); Al Masri, above n235 [82-132]; B and B, above n235 [357].

244 Coco, id at 437 (Mason CJ, Brennan, Gaudron and McHugh JJ); Plaintiff S157/2002, above n224 at 34 (Gleeson CJ); Al Masri, above n235 [118].

245 For example, the right to trial by jury (Tassell v Hayes (1987) 163 CLR 34, 41, 50), the right to personal liberty (Re Bolton, above n243 at 523), legal professional privilege (Baker v Campbell (1983) 153 CLR 52 at 96–97, 104, 116–117, 123 and Yuill, above n243 at 322, 331, 338, 348–349).

246 Magno, above n225 at 298 (Einfeld J); Kruger, above n225 at 1, note 407 (Gaudron J); Kartinyeri, above n243 at 417–718 (Kirby J); Plaintiff S157/2002, above n224 at 34 (Gleeson CJ); Al Masri, above n235 [86].

247 Kirby, above n17 at 121–124.
International law is a legitimate and important influence on the development of the common law and constitutional law, especially when international law declares the existence of universal and fundamental rights. To the full extent that its text permits, Australia’s Constitution, as the fundamental law of government in this country, accommodates itself to international law, including in so far as that law expresses basic rights. The reason for this is that the Constitution not only speaks to the people of Australia who made it and accept it for their governance. It also speaks to the international community as the basic law of the Australian nation which is a member of that community.\(^{248}\)

Kirby J then applied this approach to support his conclusion that s51(xxxi) of the Constitution, which requires that the Commonwealth provide ‘just terms’ in any acquisition of property, applies to laws passed by the Commonwealth for the territories under s122. Though other judges reached the same conclusion, Kirby J was alone in relying on international law. More recently, he has suggested that international law may assist in clarifying what will amount to ‘just terms’ in relation to a particular Commonwealth acquisition.\(^{249}\)

Kirby J also applied his interpretative principle in his dissent in *Kartinyeri v Commonwealth*.\(^{250}\) He referred to the prohibition in international law of ‘detrimental distinctions on the basis of race’.\(^{251}\) He applied this principle to underpin his conclusion that the Commonwealth Parliament’s races power ‘does not extend to the enactment of laws detrimental to, or discriminatory against, the people of any race (including the Aboriginal race) by reference to their race’.\(^{252}\) Kirby J justified his approach by noting that the High Court had already allowed the use of international law in the resolution of ambiguity in the common law or a statute. He argued that use of an international law interpretative principle:

> does not involve the spectre, portrayed by some submissions in these proceedings, of mechanically applying international treaties, made by the Executive Government of the Commonwealth, and perhaps unincorporated, to distort the meaning of the Constitution. It does not authorise the creation of ambiguities by reference to international law where none exist. It is not a means for remaking the Constitution without the “irksome” involvement of the people required by s128.\(^{253}\)

Kirby J also defined the circumstances when reference might be had to international law principles:

There is no doubt that, if the constitutional provision is clear and if a law is clearly within power, no rule of international law, and no treaty (including one to which Australia is a party) may override the Constitution or any law validly made under


\(^{249}\) *Commonwealth of Australia v State of Western Australia* (1999) 196 CLR 392 at 461.

\(^{250}\) *Kartinyeri*, above n243.

\(^{251}\) Id at 418.

\(^{252}\) Ibid.

\(^{253}\) Id at 417–418.
it. But that is not the question here …. Where there is ambiguity, there is a strong presumption that the Constitution, adopted and accepted by the people of Australia for their government, is not intended to violate fundamental human rights and human dignity …. In the contemporary context it is appropriate to measure the prohibition by having regard to international law as it expresses universal and basic rights.254

In Kartinyeri, the Human Rights and Equal Opportunity Commission, intervening in the proceedings, relied on Justice Kirby’s interpretative principle and contended that the Court should adopt it as a canon of constitutional interpretation.255 Gummow and Hayne JJ, while accepting that international law principles have a role to play in statutory interpretation,256 considered those principles, at least in the context of limiting legislative power, to be inappropriate for use in constitutional interpretation. In their view, the use of international law in Kartinyeri would have involved a sleight of hand as it would have meant applying ‘a rule for the construction of legislation passed in the exercise of the legislative power to limit the content of the legislative power itself’.257 Gummow and Hayne JJ placed heavy reliance on the unanimous view expressed in Polites v Commonwealth258 that Commonwealth legislative power cannot be read down to bring it into conformity with principles of international law. Similarly, in AMS v AIF259 Gleeson CJ, McHugh and Gummow JJ observed that ‘reliance … upon several international instruments to which this country is a party did not advance [the] arguments … As to the Constitution, its provisions are not to be construed as subject to an implication said to be derived from international law.’ Callinan J in Western Australia v Ward has most strongly rejected the approach of Kirby J and the premise that the Constitution speaks not only to the Australian people but also to the international community. His anxiety appears based on a legal nationalism, wary of the un-Australian character of international law:

The provisions of the Constitution are not to be read in conformity with international law. It is an anachronistic error to believe that the Constitution, which was drafted and adopted by the people of the colonies well before international bodies such as the United Nations came into existence, should be regarded as speaking to the international community. The Constitution is our fundamental law, not a collection of principles amounting to the rights of man, to be read and approved by people and institutions elsewhere. The approbation of nations does not give our Constitution any force, nor does its absence deny it effect. Such a consideration should, therefore, have no part to play in interpreting our basic law.260

254 Id at 418.
255 Id at 384.
256 Ibid.
257 Id at 386.
258 Polites, above n222 at 69 (Latham CJ), 74 (Rich J), 75 (Starke J), 78 (Dixon J), 79 (McTiernan J), 82–83 (Williams J). The notion in Polites v Commonwealth that the Commonwealth Parliament can pass laws that are inconsistent with international law was emphatically re-affirmed by the High Court in Horta v Commonwealth (1994) 181 CLR 183.
259 AMS v AIF, above n231 at 180.
260 Ward, above n216 at 275.
7. **Conclusion**

The interaction of international law and the Australian domestic legal system is a major issue in the twenty-first century. On the one hand, international law is regarded as a type of universal safety net for a national legal system. On the other hand, international law is regularly depicted as a source of chaotic and capricious norms that are at odds with those of Australian law. For this reason, it can create considerable anxiety.

Both images of international law are caricatures and wrongly attribute it to a fixed character. International law contains many gaps. Because it is the product of negotiation between actors of diverse social and cultural identities, international law tends to be conservative and aimed at the preservation of the status quo. At the same time, however, it can highlight shortcomings in national legal systems.

The drafters of the Australian Constitution had considered some aspects of international law but left their resolution to the executive, legislature and judiciary. Over the past century, the three arms of Australian government have developed a range of positions with respect to international law. For example, the executive branch has had a shifting attitude towards international legal norms. It has become sceptical about the applicability of international human rights law to Australia, yet it has been prepared to embrace its commitments under international trade law. Some members of the legislature echo the executive’s suspicion of aspects of international law, arguing that international law infringes Australian ‘sovereignty’. Still others demonstrate a keen desire to embrace international law, often in an attempt to buttress Australian law against perceived weaknesses. Members of the judiciary hold sharply contrasting views on international law; and these lead in turn to the creation of considerable uncertainty on the position of international law within the Australian legal system. Adding further complexity to this picture are the Australian states, whose attitude towards international law is tempered, to varying degrees, by their concern to preserve the ‘federal balance’. The relationship of Australian law to international law is not static. It responds to pressures including those produced by the globalisation process and the domestic debate that surrounds international law and international and domestic institutions.

The negative view of international law has been particularly influential over the past decade. It was a feature of Pauline Hanson’s political platform\(^\text{261}\) and has now become part of mainstream Australian politics. The apprehension about international law seems an aspect of larger anxieties about threats to Australia from outside. As Ghassan Hage argues, the disquiet may be read as a sign of a worrying citizenry in a society in which hope is severely rationed.\(^\text{262}\)

A flawed assumption in Australian debates about the role of international law is that taking international law seriously will import foreign and undemocratic norms into our legal system. A more fruitful analysis may be to understand the

\(^{261}\) Pauline Hanson, Commonwealth, House of Representatives, *Parliamentary Debates (Hansard)*, 10 September 1996 at 3860.

\(^{262}\) Hage, above n5 at 3.
As Karen Knop has pointed out, ‘[j]ust as we know that translation from one language to another requires more than literalness, we must recognize the creativity, and therefore the uncertainty, involved in domestic interpretation [of international law].’\(^{264}\) In other words, the outcome of the translation of international law may not always be the same in different legal cultures: ‘translation owes fidelity to the other language and text but requires the assertion of one’s own as well.’\(^{265}\) Such an approach to international law understands it, not as a threatening discourse from outside the Australian legal system, but one that connects us to the rest of world.

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\(^{264}\) Id at 506.

\(^{265}\) Ibid.
Taming Complexity in Australian Income Tax

RICHARD KREVER*

1. Simplicity and Complexity in Australian Income Tax

‘Simplification’ has been the mantra of tax reformers and tax deformers since the late 1950s and has frequently been cited as a rationale for tax changes in the closing years of the twentieth century and the opening years of the twenty-first. The near universal agreement by tax critics that simplicity is an object of tax reform is not mirrored by universal agreement as to what simplicity entails. For some, simplicity means a tax system that is easy and inexpensive to comply with. For others, it means simple and easy to understand language in the tax legislation. And for others still, simplicity means simple in its effect, with a comprehensive law containing a minimal number of distinctions and exceptions so all arrangements or transactions with similar economic effects will receive the same tax treatment.1

Measured against almost any test of simplicity, the Australian income tax law fails abysmally. While the costs of tax administration incurred by government are not high by international standards,2 study after study shows the tax system imposes higher compliance costs on taxpayers than virtually all other income tax systems3


* Professor of Law, Deakin University, Melbourne. Many of the ideas in this article derive from a paper presented by the author at a taxation symposium organised by the University of Potsdam, Germany in 1999, although its resemblance to that paper has faded significantly as a result of more than three years of revision. Richard Haigh, Michael Kobetsky and Justice Hill provided much welcomed criticism of that original manuscript, available in Hans-Georg Petersen & Patrick Gallagher (eds), Tax and Transfer Reform in Australia and Germany (2000) chapter 5, ‘Simplicity and Complexity in Australian Income Tax’.


and taxpayers almost universally believe the law to be complex.\(^4\) The legislation may well be both the largest in the world in terms of sheer volume\(^5\) and among the most difficult to read and comprehend.\(^6\) Almost certainly, more irrational distinctions based on inappropriate criteria exist in the Australian law than in any other nation’s tax legislation with the result that minute changes in the legal form of a transaction can lead to dramatically different tax consequences.

In the mid-1980s, a government review of the Australian taxation system noted that ‘piecemeal improvements have been made to the system over the years but the point has now been reached where fundamental reforms — rather than further running repairs — are called for.’\(^7\) By the start of the 21st Century, both the size and complexity of Australian income tax law had grown out of control. The legislation had expanded to many thousands of pages and it continues to grow at an exponential rate\(^8\) — plotted on a graph, the growth curve reveals that if the trend continues, within a few years Australia will be the first nation in the world to boast an infinite number of pages in its income tax law!

This paper explores the phenomenon of complexity in the Australian income tax. The next part of the paper considers the causes of complexity, reviewing the possible contributions of the parties most closely connected to the tax system — the judges who interpret the legislation, the tax advisers who work with it, the drafters who write it, the Treasury that designs it, and the legislature that enacts it as law.

The paper concludes that all parties must bear some blame for the complexity but prime responsibility falls on the legislature on two counts. First, the legislature has failed to eliminate the irrational distinctions in the law to which most complexity can be traced and, second, it has added new layers of complexity by using the tax system as a spending tool to distort market and social behaviour.

The commercial transactions to which income tax is applied are among the most complex arrangements possible and it is inevitable that an income tax will acquire some of the characteristics of the transactions to which it applies. But if an absolutely ‘simple’ income tax in all the senses that word is used cannot be realised, simplification or the taming of the complexity of the current system is well within the realm of the achievable. The third part of the paper considers the two most recent proposals for simplification reform, redrafting the tax law in ‘plain English’ and the adoption of a new tax law based on a ‘tax value method’ in

\(^5\) While it is far larger than the legislation of most of Australia’s main trading partners, it admittedly exceeds the US law in length only because much of the detail of US law appears in regulations rather than the legislation.
\(^6\) Preliminary results from a study carried out by Mike Walpole and others indicate that readers found the post-1997 drafting style easier to understand (working papers available from m.walpole@unsw.edu.au). The first drafts in the new style dealt with relatively simple areas of law. A far more complex style has been used for more recent amendments.
\(^7\) Treasury, Reform of the Australian Tax System: Draft White Paper (Canberra: AGPS, 1985) at 1.
\(^8\) Since 1997 there has been two separate income tax Acts in place. However, since 1999 there has been virtually no new legislation related to the migration of measures from the old law to the new one; the rate of growth continues to expand nevertheless.
preference to conventional notions of gross income and deductions. It then outlines a very brief proposed prospectus for taming complexity. The paper suggests that in the context of current Australian political reality, the preferable model for reducing complexity in tax law is one based on incremental simplification.

2. What has Caused Australian Income Tax Law to be So Complex?

Income taxation in Australia pre-dates the nation itself. Several of the separate colonies levied income taxes\(^9\) and these taxes remained in place after federation in 1900 when the colonies-transformed-to-states were granted the constitutional power to share the income tax base with the newly formed Commonwealth government. Commonwealth income tax was adopted in 1915, allegedly as a war time finance measure, but no doubt partly in response to calls by the rural sector for income taxation of profiteering manufacturers. Those calls were loudest in the west, articulated most often by the disgruntled farmers who supported secession from the new nation. The adoption of Commonwealth income taxation conveniently deflated one of the platforms for the separatist movement.

The Commonwealth tax operated concurrently, if not in parallel, with state income taxes. Different tax bases imposed high compliance costs on taxpayers and led to costly administrative inefficiencies. An attempt in 1922 to harmonise taxes with a new Commonwealth Act and state Acts was a failure. A second attempt leading to the adoption of a new Commonwealth Act and harmonised state Acts in 1936 was somewhat more successful, though these were falling out of synchronisation by the advent of the Second World War. War finance needs prompted the Commonwealth government to usurp the income tax field by raising Commonwealth taxes to the point where taxpayers could not pay both the state and Commonwealth taxes, while promising transfer payments to any state that relinquished its state income tax. This move withstood a number of constitutional challenges and since the mid-1940s only the Commonwealth has levied income tax.

For several decades the Act doubled in size every seven years but the pace of change has increased significantly in the past three decades, as has the complexity of the law. The 1936 Act remains in place today, albeit many times its original size, and operates alongside a 1997 Act, with separate laws applying to particular tax issues such as tax administration and the taxation of fringe benefits.

Blame for complexity in the income tax has been attributed to many parties. The alleged miscreants and their possible roles in weaving the web of complexity in the income tax are reviewed below.

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A. The Judiciary

Blaming the judges for the complex state of the Australian income tax has long been a favourite pastime of Australian commentators. The practice certainly peaked in the 1970s and early 1980s when it seemed to many (with some justification) that the High Court’s regular endorsement of blatant and artificial avoidance schemes played a central role in the near disintegration of the income tax system. But to this day, judges remain a popular target to blame for the troubles of the tax system.

The judiciary are commonly blamed in particular for three practices: misappropriation of doctrine by using concepts from other categories of law to solve income tax issues, misapplication of precedent by relying almost reverentially on judgments of UK courts, and abdication of judicial responsibility through reliance on principles of strict literalism. There is some merit to all these criticisms.

(i) Fallacy of the Transplanted Category

Australian common law, like that of all English-speaking jurisdictions, is based on the doctrine of precedent. Fairness is thought to derive from consistency, and consistency, in turn, is thought to flow from the application of the most appropriate precedent to the facts at hand. The challenge is to find the most appropriate precedent and it is here that Australian judges have failed, falling into the trap referred to as the ‘fallacy of the transplanted category’. The fallacy of the transplanted category is the application in one area of law — tax law in this case — of doctrines and precedents deriving from another area of law, yielding results that are clearly inappropriate in terms of the policy objectives underlying the recipient body of law.

Misapplying precedents that seek to achieve entirely different policy objectives is a failing of which Australian judges appear to be guilty with remarkable regularity. To decide which gains constitute assessable income for purposes of the income tax law, Australian courts have turned to trust law precedents that distinguish income gains, payable to life beneficiaries, from capital gains, payable to a remainder beneficiary of a trust. These doctrines were developed to decide between competing claims by income and capital beneficiaries to realised gains, not to characterise the gains as appropriate or otherwise to bear a particular tax

11 The term is attributable to Neil Brooks in his outstanding study of the role of judicial decision-making in creating tax law complexity, ‘The Role of the Judges’ in Graeme Cooper, Tax Avoidance and the Rule of Law (1997) at 122.
levy. To decide whether the transferor or transferee has derived shifted income, courts have turned to property law doctrines on the effectiveness of equitable assignments, doctrines that have nothing to do with economic command of resources and ability to pay tax. To distinguish ‘employees’ from independent contractors for tax purposes, courts regularly turn to tort or industrial law precedents, though the policy rational for distinguishing between employees and independent contractors for, say, vicarious liability purposes bears no relationship to that for imposing withholding tax collections on one category of income earners and self-assessment taxpayer lodgement of taxes on another. To determine the meaning of business ‘goodwill’ for the purpose of applying a tax concession, courts draw on a range of precedents including partnership and contract law doctrines used to evaluate the reasonableness of restraint of trade covenants, an issue that enjoys no correspondence with the subsidy of retirement savings of small businesspersons, the apparent objective of the goodwill tax measure. Examples can be found in all areas of tax law.

The impact of transplanted categories on the complexity of Australian law has been enormous. Without doubt, the transplant that has caused the most complexity is the application of trust law indicia to define income for income tax purposes. The courts seized upon the indicia of income gains for trust law purposes — income gains were gains that were periodic, gains that were anticipated and deliberately pursued by the recipient, receipts that were applied to common living expenses, benefits that comprised cash or assets readily convertible to cash, and so forth — and excluded from the definition of income in the income tax law a vast range of common gains such as discounts on debt, premiums on leases, non-convertible benefits, payments for non-competition covenants, gains from cancellation of debt, and gains realised on the disposal of investment assets.

The judicial concept of income — euphemistically labelled ‘income according to ordinary concepts’ by the courts — was not only far too narrow to sustain a viable income tax base but was inherently uncertain, being based on shifting indicia such as taxpayer’s subjective intent with regard to transactions and

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13 See, for example, *Norman v FCT* (1963) 109 CLR 9, where the High Court concluded it was not possible to shift liability for tax on dividends by assigning the right to dividends to a spouse, *Shepherd v FCT* (1965) 113 CLR 385 where the same court said it was possible to shift tax liability on royalties by assigning that right, and *FCT v Everett* (1980) 143 CLR 440 where the High Court said it was possible to assign income from a professional partnership to a spouse.

14 See, for example, *World Book (Australia) Pty Ltd v FCT* (1992) 23 ATR 412, placing considerable reliance on *Stevens v Brodribb Sawmilling Co Pty Ltd* (1986) 160 CLR 16.

15 See, for example, *FCT v Murry* (1998) 39 ATR 129, drawing upon *Geraghty v Minter* (1979) 142 CLR 177.

16 The term derives from a description of Jordan CJ in *Scott v Commissioner of Taxation* (NSW) (1935) 35 SR (NSW) 215; 3 ATD 142, interpreting the meaning of ‘income’ for the purpose of a State income tax law. His phrase achieved universal acceptance by the courts and in 1997 a variation was inserted in the income tax law, which now refers to judicial concept income as ‘ordinary income’ (see *Income Tax Assessment Act* 1997 66-5).
investments.\textsuperscript{17} Over the decades, the indistinct boundaries between the judicial concept of income gains on the one hand and other gains on the other, along with the equally indistincts on the outgoing side, have been at the heart of virtually all major tax avoidance schemes and the cause of most tax litigation.

There can be little doubt that the courts’ adoption of transplanted doctrines such as the concept of income was thus a root cause of tax complexity. But to blame judges or a handful of transplanted doctrines for ongoing complexity requires a very blinkered view of causation. The judicial doctrines that led to such complexity could have been easily reversed by the legislature simply by substituting more rational statutory definitions if judicial definitions turned out to be inappropriate for tax purposes. Thus, for example, if the judicial concept of income had been identified as a source of complexity, the judicial notion of ‘ordinary’ income could have been displaced by a statutory definition akin to profits in the accounting sense (presuming that any definition of income in an economic sense, including unrealised accrued gains, was a political impossibility).

Focusing on the legacy of transplanted doctrines also shifts attention from the causes of this method of interpreting law. Courts turned to doctrines familiar from other areas of law not only because this was the common law tradition but, importantly, because the legislature adopted provisions that incorporated undefined concepts. Indeed, it could be argued with some force that the legislature deliberately invited the use of transplanted doctrines by the courts. Consider the situation when parliament made tax rules for ‘employees’ without providing a definition of employee in the tax law. Is it likely the legislation would have expected the courts to devise a definition consistent with unarticulated tax law principles when it knew there was a large body of cases available to the courts on the meaning of employee in industrial law and tort law (the former dealing with entitlements to industrial benefits and the latter dealing with the imposition of vicarious liability on employers)?\textsuperscript{18}

Similarly, by using the term ‘income’ with no clarifying definition, could the legislature have expected the courts would adopt a concept of income akin to the accounting notion of realised gains or the economic concept of accrued gains when comprehensive judicial doctrines on the meaning of a much narrower income concept were available in trust law? When parliament inserted a measure in the law that provided concessional treatment of gains realised on the sale of small business goodwill (half the gain was exempt from taxation),\textsuperscript{19} while offering no guidance

\textsuperscript{17} One of the leading judicial precedents on the role of intent in characterising income is \textit{FCT v Whitfords Beach Pty Ltd} (1982) 150 CLR 355. Not long before it sold some property it had owned for years, the taxpayer in that case changed its intent and manner of dealing with the property. The High Court said the property should be valued at the time the taxpayer’s intention changed, with the gain measured from original cost to the change of intent value being a non-taxable capital gain and the gain from value at the time of intent change to sale being an income gain.

\textsuperscript{18} Neil Brooks argues that the courts should have independently examined the reason for the use of the term and developed a meaning appropriate for tax law. See Brooks, above n11.

\textsuperscript{19} [Former] \textit{Income Tax Assessment Act} 1997 s118-250.
on which goodwill qualified and no indication in the exemption section of the object or purpose of the exemption, did it leave courts with any basis for interpretation apart from transplanted doctrines? When parliament moved the concession for goodwill to another measure, again without providing a definition, could it have expected courts to abandon the transplanted doctrines they had adopted to define the term?\(^{20}\)

In the absence of any source of empirical data, we can only speculate as to whether silence by the legislature genuinely amounted to before-the-fact endorsement of the transplanted concepts it left the judiciary to adopt. It is possible, and perhaps even probable, that had the legislature articulated the boundaries of key concepts more clearly, the result may have largely replicated the judicial interpretations in many respects. For example, in the second decade of this century, when the first Commonwealth income tax was adopted, few beyond a small handful of public finance scholars would have understood why income for tax purposes should in theory include unrealised gains and losses.\(^{21}\) To the extent the judicial concept of income was restricted to \textit{realised} gains, it almost certainly would have paralleled the intention of the legislature with respect to the undefined term ‘income’. It is possibly also the case that the legislature would have considered windfall gains on assets that unexpectedly increased in value to be outside the income concept and here, too, the judicial concept may have accurately reflected the concept the legislature had in mind when it used the undefined term ‘income’.

While the basic qualities of judicial concept income may have been intended by the legislature, the government of the day was unlikely to have appreciated the full consequences of leaving definition of the tax base to the courts. For example, the legislature is unlikely to have understood that the judicial concept of income would exclude many ordinary investment gains derived outside the course of regular business. Similarly, the legislature most probably did not expect the judicial concept of income to be so narrow that it would allow taxpayers to easily convert employment income or business income to non-assessable capital gains by presenting it as, say, negative covenant payments or payments for the sale of contractual rights.

Almost every tax concept that derives from an inappropriate transplanted doctrine led to avoidance opportunities and the development of schemes and arrangements to exploit the limits of the transplanted concepts. Each time, the legislature responded to the avoidance with complicated anti-avoidance measures.

\(^{20}\) Goodwill now qualifies for the small business ‘active asset’ concessions in Division 152 Income Tax Assessment Act 1997 (see s152-40(b)).

\(^{21}\) Public finance scholars have long argued, based on the work of Simons and Haig, that the decision to realise or not realise appreciated gains or losses was a matter of taxpayer portfolio choice and for equity and efficiency reasons, unrealised appreciation and depreciation should be recognised for tax purposes in theory, though they generally concede a full accrual regime applying to all unrealised gains and losses might be impossible to achieve in practice. See Henry Simons, \textit{Personal Income Taxation: the Definition of Income as a Problem of Fiscal Policy} (1938) at 49, and also Robert Haig, ‘The Concept of Income: Economic and Legal Aspects’ in Robert Haig (ed), \textit{The Federal Income Tax} (1921).
In the first instance, thus, it is tempting to lay blame for the resulting complexity at the feet of the judges whose doctrines led to the opportunities for avoidance. But an equally logical approach would be to blame the legislature that provided implied invitation to the judiciary to continue to rely on transplanted concepts inappropriate for tax law. In defence of the legislature, in turn, it can be said that without the benefit of hindsight, it is not improbable that the legislature would likely have adopted definitions similar to judicial notions had it chosen to legislate definitions initially. Ultimately, perhaps the blame lies neither with the judiciary nor the legislatures of the time, but with later legislatures that compounded the initial defects in the law first by failing to reverse the initial distinctions when the consequences of transplanted doctrines were revealed and second by later accepting those distinctions and building them into the subsequent statutory framework.

(ii) Colonial Cringe

Although Australia became notionally independent almost 100 years ago, for most of its history the UK-based Privy Council was Australia’s final court of appeal and the Australian common law legal system derives entirely from UK law. One key feature of Australian legal jurisprudence is what has been called the ‘colonial cringe’ factor, a term that signifies the historical preference for ‘mother country’ judgments. To this day, many courts cite UK precedents as readily as Australian ones. The reliance on UK judgments in tax cases is somewhat bizarre given the radically different statutory regime.

The UK income tax law is a schedular law whose ‘schedules’ and subcategories known as ‘cases’ have no legislative counterpart in the Australian global income tax legislation. In fact, Australian legislators deliberately shunned not only the form of the UK legislation, but also its terminology when drafting the first Australian income tax laws. This attempt to start afresh proved to be in vain, however, as Australian judges interpreted the Australian law by applying UK precedents, quite often from relatively low level courts, interpreting completely different terms. Thus, for example, if an English court found that a particular type of payment was not an emolument from office as required by UK income tax law (whether or not it constituted income in a broader economic sense), an Australian judge would likely conclude the gain fell outside the boundaries of the judicial concept of income applied in the Australian legislation.

The subservience of Australian courts to inappropriate English precedents is quite striking, particularly in the period prior to 1980, by which time Australian judicial income tax concepts were largely settled. Rarely did Australian judges point out that a precedent based on an entirely different statutory construct might not be appropriate in Australia and when one did, almost inevitably this view was

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22 For example, the Australian judicial characterisation of fines as non-deductible quasi-personal expenses (even for a corporation) is based on two first instance English cases, IRC v Warnes & Co [1919] 2 KB 444 and IRC v von Glehn & Co Ltd [1920] 2 KB 553. See, for example, Madad Pty Ltd v FCT (1984) 15 ATR 1118 and Mayne Nickless Ltd v FCT (1984) 84 ATC 4458.
universally rejected by commentators and other courts. Only in relatively recent times have Australian courts dismissed English decisions as inappropriate and often these cases have involved rejection of base-broadening anti-avoidance doctrines developed by UK courts. 23 The shift of tax jurisprudence from state Supreme Courts to the Federal Court has accelerated this process as Federal Court judges have distanced their jurisprudence from UK precedents, 24 but of course the earlier Australian precedents they cite in preference to UK cases were themselves often derived directly from UK decisions.

By narrowing the judicial concept of income, colonial cringe decisions contributed to the fragmentation of the income tax base. Once again, however, the real complexity arises not so much from the initial formulation of a narrow and fragmented income tax base, but rather from the legislative response to the original decisions. Sometimes the legislature reversed the effect of colonial cringe cases with narrow statutory inclusion measures. But often, remarkably, the legislature showed the same deference to English courts as the Australian judiciary, and actually legislated to insert perverse English base-narrowing decisions into the statute, ignoring the fact the UK legislature had subsequently overturned the decisions explicitly by legislation.

A classic example of this behaviour is the characterisation of so-called ‘negative covenant’ remuneration paid for an employee’s or service provider’s undertaking not to compete with the employer or service user. When UK courts decided this type of gain fell outside the narrow schedular remuneration rules in that country, 25 Australian courts concluded the gains must fall outside the Australian judicial concept of ‘ordinary’ income. The lone voice of a High Court judge questioning the basis for this approach was generally ignored 26 and UK doctrine helped define a key concept in Australian law.

The Commonwealth Parliament made no change to provisions affecting remuneration to overcome the decision. Many years later when legislation was introduced to bring retirement payments into the tax base, the legislation contained an explicit exemption for negative covenant payments. 27 A few years later, when

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23 In the 1980s, the UK judiciary shifted ground significantly and developed general anti-avoidance doctrines known as the fiscal nullity doctrines (see WT Ramsay Ltd v IRC [1982] AC 300). Australian courts said the new UK approach had no application in Australia, a position finally confirmed by the High Court in FCT v John (1987) 19 ATR 150; 82 ATC 4713. There have, however, been instances in recent times outside the anti-avoidance field where Australian doctrines are diverging from UK precedents. See, for example, Steele v DCT (1999) 197 CLR 459, 41 ATR 125 where the approach taken by the Privy Council in Wharf Properties Ltd v Commissioners of Inland Revenue of Hong Kong (1997) 97 ATC 4225 was distinguished.

24 See, for example, the joint judgment of Bowen CJ, Lockhart & Gummow JJ in All States Frozen Foods Pty Ltd v FCT (1990) 20 ATR 1874.

25 See Higgs v Olivier [1951] 1 Ch 899 in which an English actor was paid in part for his appearance in a film and in part for his agreement not to produce films for other studios that might compete with the film.

26 Kitto J in Dickenson v FCT (1958) 98 CLR 460; 7 AITR 257 at 280.

27 Definition of ‘eligible termination payment’ in Income Tax Assessment Act 1936 s27A(1).
a comprehensive fringe benefits tax was adopted, the fringe benefits rules also included an explicit exemption for negative covenant payments. In both instances, the legislature accepted the judicial characterisation of these gains as ‘capital’ gains outside the income concept. When the gains were finally brought into the tax base, they were not identified as a type of income but rather were deemed to be capital gains, assessable under the capital gains rules, first by means of complex artificial deeming provisions and later through an equally artificial ‘capital gains event’.

Rather than articulate clear boundaries to concepts such as income, the legislature responded to unacceptable colonial cringe decisions with piecemeal, ad hoc measures intended to overturn particular judgments, and sometimes, as has been seen, by first endorsing the decisions. Instead of broadening the tax base, the inclusion measures, when they came, often had the effect of narrowing it. By spelling out in great detail situations in which gains constituted income assessable under Australian law, the sections implied, to the judiciary at least, that amounts slipping outside the literal boundaries of the new provisions were not to be treated as assessable income. Time and again a decision would trigger a narrow inclusion measure which in turn would be misapplied by the courts to tighten the base further, then prompting another round of limited inclusion measures and so fuelling a vicious cycle.

(iii) Strict Literalism

The debate between those advocating purposive interpretation and those who support literalist interpretation of tax law is not confined to Australia; long before the Duke of Westminster sought to avoid tax on income used to pay his gardener, English courts and their counterparts throughout the English-speaking world debated the proper mode of statutory interpretation. On one side of the debate was the purposive school, whose adherents argued that to determine the tax consequences of a transaction courts should look through its superficial legal form to its underlying economic substance. On the other side was the literalist school, whose members argued courts should respect the legal form of an arrangement and

28 Definition of ‘fringe benefit’ in Fringe Benefit Tax Assessment Act 1997 s136(1).
30 The phenomenon is well illustrated by the adoption of Income Tax Assessment Act 1936 s26(a), enacted in response to the UK House of Lords decision in Jones v Leeming [1930] AC 415; [1930] All ER 584. When the Australian courts read down the measure in a manner that threatened to constrict the tax base significantly, the short and simple measure was expanded (and renumbered as s25A) to include several pages of subsections, each aiming at one or more judicial precedents that had narrowed the scope of the original measure.
31 Inland Revenue Commissioners v Duke of Westminster [1936] AC 1. While neither the first nor the most significant avoidance case relying in part on strict literalism for the avoidance to be effective, the Duke of Westminster rose quickly to prominence as the authority for literalism and the statement of Lord Tomlin (at 19): ‘Every man is entitled if he can to order his affairs so as that the tax attaching under the appropriate Acts is less than it otherwise would be’ remains one of the most cited passages in Australia from UK tax cases.
look no further. This school argued that looking beyond legal form amounted to an inappropriate usurpation of legislative function by courts.32

In the eyes of many, the apogee of the literalist school in Australia was reached in the late 1970s and early 1980s under the tutelage of Sir Garfield Barwick, Chief Justice of the High Court. During the period of Sir Garfield’s leadership, the High Court condoned a range of tax minimisation arrangements including income splitting devices, transactions to strip company profits free of tax, transfer pricing schemes to shift profits to low tax jurisdictions, schemes to convert otherwise taxable income into exempt foreign-source income, and many more. Some speculated that the apparent consistent judicial endorsement of tax avoidance was ideologically motivated, reflecting the preference of the Chief Justice for individuals over the state or personal wealth over public accumulation.33 Others strongly dispute this view,34 but it must be conceded that often the Chief Justice’s opinions contain thinly veiled admiration for the clever way in which taxpayers had manipulated inconsistencies in the tax law to further a tax avoidance scheme.35

There is no doubting the nexus between literalist interpretation and complex tax legislation. To begin with, the legislative drafters, wary of judicial dismemberment of their work, strive to cover every possibility and include every eventuality in provisions, with unwieldy, complex legislation the inevitable outcome.36 Then, when literalist interpretation does lead to avoidance, the drafters’ response is inevitably, but understandably, excessive, adding new complexities to the proven ineffective older complexity. But while there may be a


35 A representative example may be found in FCT v Westraders Pty Ltd (1980) 144 CLR 55. The Chief Justice, with whom all judges but one concurred, began his judgment in favour of the taxpayer with the observation that, ‘the facts of this case disclose an ingenious use of the provisions of sections 36 and 36A of the Income Tax Assessment Act 1936’.

36 The controlled foreign corporation (CFC) rules using 130 pages to cover what should be a fairly simple concept provides a fine example of such legislation.
direct cause and effect relationship between literalist interpretation and complex legislation, both may merely be symptoms of a deeper, and more pervasive, complexity in the tax system.

It is quite true that avoidance schemes relying on a sympathetic literalist hearing are premised on the hope that a court will accept the superficial form of a transaction and not seek to ascertain its true economic nature. But does it necessarily follow that a court which looks through the transaction to its underlying substance is necessarily protecting the legislative intent?

The issue is somewhat complicated by the judges’ distinction between legal substance and economic substance. This difference is well illustrated by a more recent scheme of the early 1990s in which a bank recast a standard credit foncier loan agreement as an annuity to take advantage of the deferred recognition of income available to holders of annuity contracts. Historically, annuities were blended payment loans to life insurance companies where the return contained a mortality bet, with payments on life annuities based on the investor’s expected life rather than a pre-determined payment period. Because the actual period of payments was not known at the start of the repayment period, the conventional formula for calculating the interest and principal repayment portion of each payment could not be used. The tax law allowed taxpayers to recover the amount invested as repayments of principal on an equal basis over the expected life of the loan based on mortality tables, effectively deferring recognition of some of the interest component from the early years of the annuity to the latter years for significant tax savings.

When financial institutions began to offer fixed term ‘annuities’, the government continued to allow taxpayers to use the annuity principal recovery rules even though the rationale for the special treatment no longer applied. Not surprisingly, aggressive taxpayers sought to recast ordinary loans as annuities so they could defer recognition of the interest they derived through the loan now called an annuity. The leading case involved a large bank loan to a state government institution which had agreed to the rebadging of a standard loan agreement on the promise that it would enjoy a share of the tax savings by way of lower interest charges. At trial level, the presiding judge applied a purposive approach to characterising the transaction and treated the payments received by the taxpayer as payments received on a loan, concluding the transaction was simply a loan rebadged on paper as an annuity. The appeal court, however, accepted the form of the transaction, respecting the title of the document.

Did the former judge protect the legislative intent behind the law more than the latter judges? Arguably not. While there is no difference in terms of economic substance between a credit foncier loan and a fixed-term annuity, there is a

37 That is, a blended payment loan such as a standard home mortgage loan in which principal is repaid along with interest over the life of a loan.
38 ANZ Savings Bank Ltd v FCT (1992) 24 ATR 201; 92 ATC 4630 (Jenkinson J).
difference in terms of ‘legal’ substance. The common law phrases the obligations and rights of the parties to the two different types of contracts in different terms and draws upon legal concepts from very different historical sources to describe the legal relationships between the parties to each type of transaction. Although the net economic effect of the arrangements may be identical — they both constitute an obligation to repay over time by means of regular equal payments the principal deposited and a return for the use of capital — the so-called legal substance of the two arrangements is conceptually quite different. The appeal court in the bank loan/annuity case simply respected the legal substance of the transaction.

By employing appropriate language, a lender can with relative ease draft a contract offering the same economic benefits as either an annuity or a credit foncier loan. A rational lender, aware that distinctions rooted in century old English judicial concepts had been accepted and codified into tax law by the Australian Parliament and aware that dramatically different tax consequences could turn on the distinctions, would be foolish not to structure a loan in the tax-preferred legal form. In the absence of any policy basis for the incorporation into tax law of an economically irrelevant legal distinction, it would be difficult indeed to claim judges were amiss in characterising a transaction by reference to superficial legal form rather than underlying economic substance.40

To assert that in most cases of strict literalism the courts are simply allowing taxpayers to exercise a choice to which the legislature had explicitly or implicitly acceded is to ignore, however, the many instances in which courts have frustrated the logic of an income tax, if not the strict words of the law. A leading and recent example is the High Court’s treatment of a reimbursed expense. An income tax should tax net gains, not gross receipts, and accordingly, the legislation allows deductions for expenses incurred to derive gross income. If a taxpayer subsequently is reimbursed the cost of a previously deducted expense, the deduction should be reversed and the most obvious way to do this is to include the reimbursement in assessable income. It is obvious to both tax policy experts and lay persons that this approach is consistent with the logic of the income tax and it is not surprising that outside Australia there are courts that have readily endorsed this principle.

When the issue was presented to the High Court as a matter of principle, however, the High Court recoiled. The judicial (ordinary) concept of income is based not on logic, the Court reasoned, but on a long line of cases setting out criteria based on the characteristics of a receipt and a perceived nexus with income-producing activity. The Court very deliberately rejected the proposition that its view of income should in any way be influenced by the clear logic of the income tax.41 Even the minority that found the reimbursement was judicial

40 Subsequent to the *ANZ Savings Bank* case the legislature finally acted, pulling commercial annuities of the sort encountered in that case out of the annuity rules and treating them instead as ordinary blended payment loans for tax purposes — these annuities are defined as ‘ineligible’ annuities in *Income Tax Assessment Act* 1936 s159GP(1) and then taken out of the annuity treatment by *Income Tax Assessment Act* 1936 s27H(4).

41 *FCT v Rowe* (1997) 187 CLR 266.
concept income rejected a place in Australian tax jurisprudence for the logic of a recoupment principle, instead finding the reimbursement constituted ‘ordinary’ (that is, judicial concept) income because it enjoyed a nexus with the taxpayer’s services to his employer.

It is thus possible to excuse many, if not all, exercises in strict literalism as a rational reaction to legislative ambiguity or choice.\textsuperscript{42} To this extent, it is difficult to blame the courts for the complexity to which they react. At the same time, however, there is a long line of cases in which the courts have directly contributed to tax complexity, originally by slavish adoption of inappropriate transplanted doctrines and UK precedents, and continuing with blind adherence to traditional doctrines that appear to undermine the logic of the income tax.\textsuperscript{43}

B. The Advisers

Tax accountants and lawyers are commonly blamed for many of the ills of the tax system, and in particular its complexity. The flood of cases annually heard in the tax tribunals and courts, and the aggressive marketing of tax minimisation investments, are seen by many as evidence of the fact that tax advisers are behind most avoidance activities in Australia and thus responsible for the complexity to which the legislative reaction inevitably leads.

There is no doubt that Australian tax advisers devote considerable effort to devising tax minimisation schemes on behalf of their clients. While neither taxpayers nor their advisers are as blatant and brash in their pursuit of tax minimisation as they were in the heyday of tax avoidance in the late 1970s and early 1980s, when avoidance and evasion were estimated to cost Australia billions of dollars in lost revenue,\textsuperscript{44} the level of aggressive tax planning and scheme marketing seems to have abated only slightly since.

In the heyday of scheme marketing, critics sometimes argued that tax advisers who devised avoidance schemes were failing in their social and professional responsibility. In a well-publicised exchange between tax lawyer Mark Leibler and legal academic Dr Yuri Grbich, Mr Leibler argued that quite to the contrary, this

\begin{itemize}
\item \textsuperscript{43} Interestingly, s15AA of the Acts Interpretation Act 1901 (Cth), inserted into the Act at the height of the 1970s/early 1980s tax avoidance era, has had virtually no effect on judicial doctrines. The section reads, ‘In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object’.
\item \textsuperscript{44} One commentator placed the cost at $10 billion — see Yuri Grbich, ‘Problems of Tax Avoidance in Australia’ in John Head (ed), Taxation Issues of the 1980s (Sydney: Australian Tax Research Foundation, 1983) at 413. Selected statistics illustrating the magnitude of the problem may be found in Richard Krever, ‘Tax Reform in Australia: Base Broadening Down Under’ [1986] 34 Can Tax J 346 at 352.
\end{itemize}
behaviour was entirely consistent with the duty of a lawyer. It was the responsibility of the legislature drafting tax law to prevent avoidance, he argued, not the lawyer whose social responsibility was fulfilled by acting on behalf of the client.

While critics of tax lawyers may be tempted to dismiss Mr Leibler’s views as a rationalisation for the role of tax advisers in the world of tax minimisation, a closer look at the tax avoidance cases reveals the logic of his position. The common feature of every so-called tax avoidance case is the exploitation of a legal distinction that has no counterpart in a neutral and equitable benchmark income tax. For example, a large number of cases in the 1970s involved taxpayers seeking to recharacterise private companies so they fell within the definition of a public company. This was done because the tax law sought to impose annually two levels of tax on profits derived through private companies while allowing investors in public companies to defer the second level of tax indefinitely. There was, however, no sharp sustainable distinction between the two types of company explicable by reference to some underlying tax policy.

In other cases, taxpayers sought to extract company profits by way of a sale of shares in a company rather than directly as dividends, since gains on the sale of shares were completely exempt from tax while dividends were fully taxed, a differential treatment with no tax policy basis. When the tax law made a distinction between gains on shares sold less than a year after acquisition (which were fully taxed) and those made on shares sold a year or more after acquisition (which were completely tax exempt), taxpayers owning both types of shares in a company would arrange for the company to modify its constitution so all value was shifted from recently acquired shares to the ones held for more than a year. When the tax legislation imposed full tax on domestic source interest and exempted interest derived offshore provided it was subject to nominal tax even in a tax haven, taxpayers devised paper transactions to shift the source of income from domestic banks that actually guaranteed the debt to notional deposits offshore. When the tax law imposed high tax on income diverted to a child via a trust established directly by the child’s parent, parents would arrange for a friend or accountant to establish the trust and then deposit an amount in the already established trust. When the tax law required upfront recognition of the interest component of a blended payment loan but allowed deferred recognition of gain if

46 It was assumed that the bias to retention in public companies would be offset somewhat by demands for distributions by investors, particularly institutional investors.
47 At one end of the scale there was a distinction — one type of public company was a company listed on a public stock exchange. However, the definition of public companies extended to a range of privately held entities as well.
48 The leading case, Slutzkin v FCT (1977) 7 ATR 166 became a catchword for various tax avoidance schemes.
49 FCT v Peabody (1994) 181 CLR 359.
51 Truesdale v FCT (1970) 120 CLR 353.
the loan was structured as an annuity, taxpayers opted to call their loans annuities. Examples are legion.

Inconsistent rules in income tax offer taxpayers choices and it is not surprising that taxpayers faced with an initial choice would choose a form of transaction offering the lowest tax burden. It is similarly not unexpected that taxpayers finding themselves on a heavily taxed side of a distinction would ask their advisers to devise schemes that moved the form of their investment or the legal nature of the transaction into a less heavily taxed arrangement. An adviser who did so by dishonestly portraying a transaction as something other than what it was — signing off a tax return indicating a company was a trust or vice-versa — would clearly be in breach of ethical and moral professional standards (not to omit committing fraud). But is the tax adviser who redrafts the constituent documents for an entity to convert it from a company to a trust or rephrases a loan agreement to convert it to an annuity seeking to frustrate deliberately the intention of the income tax law?

In the many cases in which tax minimisation schemes were successful, advisers had successfully converted or recharacterised transactions from a legal perspective. To suggest this action was contrary to the intention of the income tax law would require an assumption that rational tax policy was built on the underlying economic substance of a transaction rather than its legal form and it was thus somehow an abuse of legal manipulation to disguise one type of economic substance as another legal form.

This argument is impossible to sustain in almost every instance of tax minimisation. The difference between a company and trust is only one of legal form — properly drafted, any trust agreement can replicate the commercial structure of a company and vice-versa. The only difference between a withdrawal of company profits by way of direct dividends and by way of a capital gain with the purchaser declaring the dividend to fund the purchase is an intervening legal contract with no ultimately different economic effect. The only difference between a sale 364 days after acquisition and one 366 days after is an arbitrary legal one. The only difference between domestic source income and offshore income is the legal source — the economic income itself is identical in both cases. The list goes on and on.

In not one of the tax minimisation schemes developed or implemented by tax advisers was there a rational underlying economic basis for the distinction in the tax law that prompted the schemes in the first place. It may well be true that in each case the tax advisers took a transaction, entity or arrangement that legally appeared to fall on one side of the line and transmogrified it so that it legally fell on the other, but it is difficult to find any case in which the underlying economic substance of the transaction changed one way or the other. In other words, the tax consequences depended not on the substance of the transactions but their superficial legal form. There is no basis for blaming the tax advisers for their role in minimisation if the legislature decides to erect a tax system built upon the fragile facade of legal forms and taxpayers engage tax advisers to minimise their taxes by manipulating legal

52 ANZ Savings Bank Ltd v FCT (1992) 24 ATR 201. See discussion, above n38.
forms. It would be naive at best to think a tax law based on legal distinctions with little or no underlying substance would not invite taxpayers to recast the form of transactions, and it is fanciful to think tax advisers assisting taxpayers to cross such artificial thresholds are the persons ultimately responsible for tax avoidance. The culprit is the legislature that introduced the thresholds, not the taxpayers who seek to cross them or the tax advisers whose job it is to assist taxpayers to achieve economic benefits.

C. The Drafters

Of all the parties who contribute to the development of tax law in Australia, the legislative drafters appear to be the most difficult to paint as primary culprits. True, they are responsible for turning out the complexity inherent in the legislation. But the drafters are mere servants of the revenue officials who provide drafting instructions and to blame the drafters for faithfully implementing the directions handed to them at first glance seems to be an instance of blaming the messenger. Closer examination, and in particular recent changes in Australian tax drafting techniques, however, suggests there may be some basis for criticising the drafters.

Until the late 1990s, Australian law, including tax law, followed the British drafting tradition of single sentence sections, without regard to the number of subsections, paragraphs, subparagraphs, sub-subparagraphs and sub-sub-subparagraphs that might be contained within a section and without regard to the number of exceptions and provisos that led to double, triple or even more negatives in a section. With provisions covering many pages, it is not surprising that the law is little better than unreadable gibberish at times.53 It is probable that many tax judges quietly share the view expressed by Hill J in a recent case: ‘While it is for the courts to endeavour, where possible, to give effect to the legislative purpose, it should not be expected that the courts will construe legislation to make up for drafting deficiencies which revel in obscurity.’54

In the latter half of the 1990s the Australian Taxation Office embarked upon a major project to redraft parts of the income tax law in simpler, ‘plain English’.55

53 A leading international expert reviewing the Australian experience at an international conference in 1990 described the quality of Australian tax drafting as ‘abysmal’—see Ferrers, ‘Towards Making Our Tax Law Understandable’ (1990) 2 The CCH Journal of Australian Taxation 98 at 98, quoting Canadian law professor Brian Arnold. A classic example later cited by a tax simplification team as an example of the problem is former paragraph 82KTJ(4)(b) of the Income Tax Assessment Act 1936: ‘a car is a predecessor of a second car if a third car is predecessor of a second car and the first-mentioned car is a predecessor of the third car (including a case where the first-mentioned car is a predecessor of the third car by another application or applications of this paragraph).’ Various courts have been direct in their criticism of the drafting—Hill J of the Federal Court noted one section on which he was asked to rule had been drafted ‘with such obscurity that even those used to interpreting the utterances of the Delphic oracle might falter in seeking to elicit a sensible meaning from its terms’: FCT v Cooling (1990) 90 ATC 4472 at 4488. The unintelligibility of the law and the potential for improvement through redrafting was set out convincingly in Christopher Balmford, ‘Redrafting the Income Tax Assessment Act 1936 in Clear Language’ (1991) 2 Rev LJ 1.

54 Consolidated Press Holdings v FCT (1998) 98 ATC 5009 at 5018.

55 The project is described in detail in section 3A, below.
As is explained in more detail below in section 3A, when well less than half the law had been redrafted the project was subsumed into a review of business taxation and it was never officially revived when that finished. Still, since 1997 all new tax legislation is supposed to have been drafted using ‘plain English’ construction to simplify the law. The law nevertheless has grown in complexity. One undeniable factor is bad drafting. Notwithstanding the lofty goals of the plain English simplification project, the drafters continue to turn out measures with constructions and meanings that are counter-intuitive to the point of obscurity. It often appears as though their object is to deliberately mystify by means of intricately designed mazes erected as barriers to prevent all but those who designed the measures from understanding them.

A nice illustration of the problem is concessional provisions adopted in 1999 to halve the tax levied on most types of capital gains. With a disregard bordering on disdain for the principal of plain English drafting, the designers of the new concessions tortured the English language into constructions that defy any logic and displaced ordinary meanings with completely counter-intuitive terms and constructions. The capital gains concessions revolve around a concept known as a ‘discount capital gain’. In ordinary usage, the adjective ‘discount’ means a figure that is reduced from a non-discounted figure — a discount price, for example, is less than the ordinary retail price. But in the capital gains tax legislation, ‘discount’ is given a meaning precisely the opposite of its ordinary meaning. A discount capital gain is the full amount of a capital gain that may potentially be discounted if qualifying tests are satisfied.

In section 3A below, the question whether changes in drafting technique alone can simplify tax law is considered. Even if it cannot (the discussion below suggests that is the case), it need not complicate it. But this observation appears to have escaped the attention of Australian tax law drafters who fail to see a problem with the use of convoluted provisions and artificial definitions so that the statutory meaning of words is sometimes completely the opposite of ordinary usage.

D. The Treasury

Commonwealth income taxation has been in effect in Australia for close to nine decades and it is probably a fairly safe generalisation to assert that Treasury officials will rarely encounter genuinely new tax issues or propose truly new policy initiatives. There are, of course, exceptions to the rule — in the mid-1980s Australia moved from a classical company and shareholder income tax system to an imputation system, shifted fringe benefits taxation from employees to employers and, following the dismantling of foreign exchange controls, adopted a comprehensive foreign tax credit system, followed after a few years by the adoption of four attribution regimes to prevent offshore deferral through companies and trusts. By and large, however, Treasury has enjoyed several decades in which it should have been in the position of refining tax laws rather than

designing de novo ones (apart from devising the inevitable tax expenditures demanded by governments from both sides of the political spectrum).

Treasury’s refining responsibilities have largely been responsive in nature, often dealing with loopholes caused by undesirable judicial decisions traceable to one or more of the problems of doctrine misappropriation, precedent misapplication, or policy-defeating strict literalism. In virtually every case, the government’s response was the wrong one and a legitimate question to ask is to what extent should Treasury bear responsibility for bad laws. On the one hand, Treasury can rightly say it is merely responsible for carrying out the policy of the government of the day. At the same time, however, in its capacity as adviser to the government, Treasury has a responsibility to protect the integrity of the revenue system and accommodate the wishes of the government of the day in a manner that establishes and reinforces that integrity rather than undermining it.

There are three possible explanations for inadequate or inappropriate recommendations in response to emerging tax problems. One is that Treasury did not actually understand the fundamental tax principles that should have been guiding its advice. If Treasury understood basic timing recognition rules, would Australia have ended up with 36 amortisation regimes for capital expenses when one would have sufficed? A second possibility is that Treasury understood the principles but opted for recommendations of ad hoc inclusion, exclusion or shifted timing rules as the easy solution to immediate problems. To use the amortisation example again, once the pattern of ad hoc add-ons had started, was it not expeditious to simply add more in preference to revisiting the basic rules? And the third possibility is that Treasury understood the principles, framed its proposals in appropriate structural terms and its advice was repeatedly rejected by governments which suggested ad hoc solutions in preference to the approaches recommended by Treasury.

The first possibility is not out of the question. Treasuries overseas often establish permanent tax policy divisions to retain and nurture tax policy expertise. By way of contrast, the Australian Treasury tends to rotate its personnel through its functional divisions, inhibiting, if not preventing, the development of mature tax policy expertise, not to mention the facility to build and pass on institutional wisdom. Also, until very recently, Treasury had little or no genuine technical tax expertise. Its personnel may have had some exposure to general public finance theory, but unlike many of its counterparts abroad, it had no tax lawyers or accountants on staff and thus had little or no idea how transactions might be structured in the real world. It had to rely on advice from the Australian Taxation Office on how best to implement its recommendations and almost without fail the ATO officers who provided the advice had no expertise in tax policy principles.

The third possibility is also conceivable, though highly unlikely. Governments are interested in outcomes, not the details of the legislation used to achieve those outcomes. To be sure, Treasury was often advising governments whose political or

57 The background to this phenomenon is discussed below in section 3B(i).
ideological agenda quite definitely rejected comprehensive reform of the sort truly needed to solve the problems to which the government was forced to respond. However, within this constraint Treasury could have rigorously pursued options that would minimise the damage caused by the fractured tax base. If Treasury had consistently devised responses in structural terms — carving exceptions out of a broader base rather than adding or taking away from a narrower one — governments would most likely have accepted Treasury’s advice so long as their immediate tax programs were achieved.

The second possibility emerges as the most likely explanation, albeit facilitated in many instances by an inadequate understanding of policy principles. There has of late been some recognition of the technical shortcomings of Treasury and the failure of Tax Office advisers to appreciate the broader policy principles. The government moved to address these two issues in 2002 by moving the legislative design branch of the ATO into the Treasury. It is too soon to say whether the changes will ultimately result in a shift towards policy-based recommendations for legislative design. For the moment, ad hoc responses remain the norm.

E. The Legislature

A fair assessment of the legislature’s contributions to the complexity of Australian income taxation requires dissection of the legislature’s role into two components, the first being the response of the legislature to judicial decisions or tax schemes that threatened the revenue or integrity of the income tax system and the second being the legislature’s predilection for using tax laws as a tool of economic and political intervention.

(i) Responding to the Judiciary

At first glance, a review of complexity resulting from inappropriate or piecemeal legislative responses to judicial decisions that open holes in the revenue base might suggest that the legislature is a wrongly accused party. In each case the government was informed by revenue officials or Treasury officers of a problem and it reacted through amending legislation. The laws in question were reviewed and designed by Treasury and drafted by parliamentary counsel based on detailed drafting instructions provided by the Australian Taxation Office. If the resulting tax law was overly complex because Treasury recommended a piecemeal ineffective response rather than a comprehensive structural response, is the legislature, which necessarily relied on the persons preparing the law, a legitimate target for blame?

The answer in many cases is an unequivocal yes. It is quite true that time and again Treasury handed the government ad hoc and piecemeal responses rather than better formulated structural solutions. But it is also the case that Treasury deliberately failed to push the government for comprehensive solutions because it recognised that the government’s apparent complacency with respect to the underlying problems often masked an ideological commitment to retention of the underlying structural flaws or concern over electoral risks inherent in three-year terms of office.
The phenomenon is well illustrated by the Coalition Government’s reaction to an era of unprecedented avoidance and evasion in the late 1970s and early 1980s when aggressive tax planners devised a multitude of avoidance schemes that exploited the judicial distinction between income and capital gains. The government knew full well that broadening the income tax base to include capital gains as defined by the courts was the only effective response to the schemes (and could potentially significantly reduce the complexity of the tax law). But it directed Treasury to devise narrow responses to particularly costly schemes, a policy that led to what is undoubtedly some of the longest, most difficult to understand, and most complex anti-avoidance provisions in the law. It would appear the government of the day had a strong ideological commitment to a narrow tax base falling excessively on labour income, being interested in neither equity nor efficiency as benchmarks for the income tax base. It seemed that the government’s immediate objective was to retain the exemption for many or most types of gains realised by wealthy individuals. It was also strongly committed to retaining an exemption for capital gains derived by corporate taxpayers.

Faced with such ideological intransigence, Treasury could only advise the government on narrow measures targeted at the most costly and abusive schemes. The deliberate rejection by the conservative Fraser government under Treasurer John Howard (1975–1982) of reforms that might involve base-broadening directed at high wealth individuals and corporations exploiting the judicial income-capital dichotomy is but one of many examples of governments quite deliberately choosing complexity over simpler, but politically objectionable, systematic solutions.

(ii) Using Tax Law to Achieve Social and Political Objectives

Australian governments’ deliberate proactive intervention in the economy through tax legislation is another prime reason for complexity in the income tax system. Notwithstanding the rhetoric from all sides of the political spectrum that in theory Australia favours a market economy as the vehicle for optimal distribution of economic resources, in practice governments of all shades appear to have little faith in the ability of the unassisted market to deliver optimal economic and employment growth. To correct perceived market failures or in the belief or hope that they are better than the unfettered market at picking winners, governments regularly intervene in the market with a range of subsidy programs to alter the allocation of investment and consumption. Added to the economic aims of subsidies is the inevitable objective of seeking friends and winning votes in marginal seats through corporate and individual welfare handouts.

Increasingly, Australian governments have relied on tax expenditures in preference to direct expenditures to carry out their subsidy programs. Tax expenditures are indirect spending programs that deliver benefits by way of

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58 Capital Gains Taxes, Treasury Taxation Paper No 10, reprint of a Treasury submission to the Taxation Review Committee (Asprey Committee) (Canberra: AGPS, 1974) at 4. Treasury advised that ‘dispensing with the distinction between income and capital profits’ would further the goal of income tax simplicity.
remissions of tax that would otherwise be payable in the absence of concessional subsidy measures. They are accounted for in an annual tax expenditure budget but because they do not require annual appropriation bills as do direct expenditures, handouts through the tax system are far less transparent and far more immune from public scrutiny than direct expenditures. This is seen as their most positive feature by governments and the beneficiaries of tax-based subsidies since often the recipients of tax expenditures adopt public positions opposing increased government spending or subsidy programs.

Since the early 1970s when Stanley Surrey penned *Pathways to Tax Reform*, western governments have acknowledged the inefficiencies and inequities inherent in tax expenditures and have equally acknowledged the benefits of direct expenditures. But recent Australian governments have favoured the income tax law as a convenient spending vehicle and the tax expenditures embedded in the *Income Tax Act* now far outweigh the actual income tax measures in terms of number of provisions, if not yet in monetary effect. Tax expenditures are growing annually and now equal one-fifth of total income tax collected, accounting for one-eighth of total government expenditures.

Australian taxpayers receive tax subsidies for investments ranging from Australian films to vineyards, and for activities ranging from research and development, through the provision of on-site child care for workers, to water conservation. Accelerated cost recovery measures for many categories of assets seek to divert investment away from some sectors and to others. Generous valuation rules subsidise the provision of automobiles in remuneration packages. A full portfolio of subsidies is provided to small business owners (or at least to those who sell out of successful small businesses). Subsidies are provided for a number of different types of savings, particularly retirement savings. The list goes on and on.

Using, or more accurately, misusing, the income tax law as a spending vehicle is undoubtedly one of the largest sources of complexity in the legislation. It has proved impossible to deliberately distort investment or consumption behaviour by lowering the tax burden on preferred activities and not invite abuse. Tax law never specifies the intended recipients of concessions; at best it seeks to define the types of transactions or investments that will qualify for tax expenditures. However tightly the boundaries of desired activities and assets are defined, it is inevitable that they will be breached by well advised taxpayers recharacterising transactions and investments to qualify for the subsidies. This activity, in turn, will lead to complex anti-avoidance measures intended to protect the integrity of the original subsidy scheme. The new legislation will lead to further planning which will lead to further legislation, and the cycle will continue for many years until either the concession is abandoned or is buried within dozens of complex anti-avoidance provisions.

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The grim picture just painted is in fact a best case scenario. In many cases tax expenditures are adopted with no attempt to define or delineate the activities or investments that will enjoy concessional treatment. The leading example is the tax subsidy for capital gains. To encourage investment in riskier though potentially more rewarding assets, the government provided a number of preferences for capital gains when it finally included judicial concept capital gains in the tax base, but never inserted a definition of the gains that should qualify for the concessions.

The consequences of subsidies for ill-defined beneficiaries with no articulated or apparent policy objectives behind the subsidies are illustrated well with the small business concessions.

(iii) Small Business — A Case Study

Without doubt, no sector of the Australian economy enjoys more subsidies through the tax law than the small business sector. While there is little or no empirical evidence to support the case for subsidising the small business sector, there are obvious political gains to be made from support for the sector and over the years a wide range of tax subsidies has been adopted for small business. Among other things, small business or owners of small business may qualify for:

• exemptions from the goods and services tax (if the business turnover is below a GST registration threshold) so their customers only bear GST to the level of the business’ inputs;
• eligibility to use simpler cash-basis accounting for GST purposes (if the business turnover is below a GST accounting threshold);
• longer filing periods for GST and optional calculations on notional turnover;
• upfront deductions of certain amortisable pre-paid expenses;
• an exemption from income tax on gains realised on the disposal of small business assets held for 15 years or longer;
• an exemption from income tax for 50 per cent of gains on the disposal of small business assets;
• an exemption from income tax for 100 per cent of gains on the disposal of small businesses where the proceeds are applied to retirement savings purposes; and
• deferral of income tax where proceeds of disposal of a small business asset are reinvested in a new small business asset.

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61 Initially, three concessions were adopted: indexation of the cost base, averaging of the gains, and negative gearing whereby interest expenses incurred to derive gains are immediately deductible while recognition of the resulting gain is deferred until realisation. The first two benefits have recently been replaced with a flat 50 per cent exemption for gains realised by individuals on assets held for a year or more prior to disposal.


In 2001, the government adopted new tax concessions for small business, presented as a ‘Simplified Tax System’. The ‘simplification’ measures provide a new optional depreciation regime for qualifying small businesses (with two concurrent mandatory depreciation systems for particular categories of assets), new cash basis accounting rules for qualifying small businesses, and new trading stock accounting rules, again for qualifying small businesses. The legislation suggests that in usual circumstances the rules will simplify the calculation of taxable income and reduce compliance costs for qualifying taxpayers.

This assumption is questionable. Since the tax rules adopted differ substantially from accounting rules, many small businesses that use the new tax rules will have greatly increased accounting costs as financial accountants maintain multiple (and different) depreciation schedules for tax purposes in addition to the ordinary accounting depreciation schedules and establish different trading stock accounts for accounting and tax purposes. Those who want to use the concession exempting them from stock valuations would be well advised to first carry out a stocktake to confirm that their closing stock on hand falls below the threshold for which stock valuation is necessary. Turnover will have to be rigorously reviewed to ensure the qualifying turnover threshold for access to the concession rules generally is not breached, and relationships with associated businesses must be monitored to ensure all required turnovers are included in turnover calculations. After all this, many small business taxpayers will calculate taxable income regularly first using the ordinary rules and then using the Simplified Tax System rules to see which yields the best tax result for them in any given income year. In short, the ‘Simplified Tax System’ adds a new set of tax rules onto the existing rules and for many taxpayers will require double the work, an odd understanding of tax ‘simplification’.

The Simplified Tax System rules illustrate well how tax concessions, even those allegedly adopted to simplify tax compliance, inevitably led to more complication in the law itself, as well as its application. The legislation itself adopts a peculiar structure for allegedly simple law — only after several dozen pages describing the concessions does a reader finally reach the provisions that explain whether any of the preceding pages have any relevance for a given taxpayer — that is, whether the taxpayer qualifies for the concessions. Eligibility turns on a variation of business turnover called ‘STS turnover’, subject to a cap on the value of depreciable assets owned by the business. It was expected that to avoid the caps and qualify for the generous accelerated depreciation that the rules allow, taxpayers would split investments or activities between different entities and comprehensive rules consolidating turnover of affiliates were adopted to prevent this. This in turn required comprehensive definitions of affiliated and related entities. The net result is that the anti-avoidance measures in the Simplified Tax System measures account for a good percentage of the law as drafted. Despite the pretentious title, the Simplified Tax System concessions provide yet another example of how providing subsidies through tax expenditures is an inevitable recipe for complexity in tax law.

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3. **Paths to Simplification**

While there may be little agreement among the various players in the tax game as to who is to blame for complexity in the income tax or, for that matter, exactly what simplicity entails, there is near universal agreement that ‘simpler’ law of some sort is needed. In the late 1990s two new models for tax simplification were unveiled to the Australian community — the first a proposal to rewrite the entire law in ‘plain English’ and the second a grandiose plan to rewrite the law upon a new foundation, labelled the ‘tax value method’, substituting for the framework principles that had guided the income tax system for the past eight and a half decades.

The idea of wholesale replacement of the current law with a new one was not new. It was a path strongly advocated in the early 1990s by Sir Harry Gibbs, former Chief Justice of the High Court, who predicted the first approach, simplification by way of redrafting, would fail: ‘[The Act’s] complexities cannot be removed simply by rewriting the existing provisions in plainer language.… Real reform would require not a rewriting of the present law, but a completely new Act; that is, a new approach is necessary, and to put the existing provisions into new words would not by itself be enough.’

The plain English redraft proposal was strongly supported by the Australian Taxation Office as the solution to complexity and when work on that proposal stalled, the tax value method proposal was enthusiastically supported by both the Australian Taxation Office and the Treasury as the preferable model for tax simplification. The former was initially strongly resisted by tax advisers but later accepted by most when they realised the changes to the law with which they regularly worked were at best superficial. The latter proposals were rejected almost entirely by the business community and tax advisers.

The first failed model provides a useful insight into the inadequacy of reforms based on superficial change while the latter illustrates well how not to pursue simplification in a world of tax Realpolitik. An analysis of both sets of proposals is useful to set the stage for a more realistic simplification program.

### A. Plain English as the Key to Simplification?

Simplification through drafting alone was first proposed in 1990, by the then Treasurer, Paul Keating, who appointed a joint Treasury and Australian Taxation Office task force to investigate the idea. The simplification team concluded that there was little to be gained by rewriting the law until tax policy was simplified. This advice was politically unpalatable to the government and the project’s consultative paper was never released.
The simplification through drafting project was revived in 1993 following the release of a parliamentary committee report that implied simplification could be achieved by means of drafting changes alone.\(^7^0\) This advice, complementing the government’s ‘no policy change’ agenda, was welcomed by the Treasurer, who announced a major simplification project to redraft the income tax law into ‘plain English’.\(^7^1\) The goal of simplification was to replace the layers of obscurity and uncertainty in the law with simple, clear and unambiguous provisions.\(^7^2\)

The re-draft project, accorded the grand title of the ‘Tax Law Improvement Project’ and commonly referred to in somewhat redundant terminology as the ‘TLIP project’, commenced with a comprehensive review of communications and writing theory before applying the theory to drafting. The result of this effort was a truly revolutionary new style for writing legislation. Traditionalists were at first shocked at the radical new format of early TLIP drafts.\(^7^3\) The new law was not only written in plain English style, but incorporated guides to the structure of the law, notes with illustrations of the application of sections, and cross-references to other sections that might override or modify the application of the section at hand. It even contained diagrams and flow charts to assist readers in working their way through the law.\(^7^4\)

For the most part, provisions were drafted in ordinary sentences and almost all the illogical constraints of traditional drafting were abandoned. Also assisting with the readability of the new style was the adoption of a new bifurcated section numbering system with the first half of the number identifying the Division in which a section was located. Since each Division dealt with a discrete topic, the subject matter of a section could be identified just by its number. Divisions and sections were well spaced out with unallocated numbers held in reserve to avoid the problems encountered in the predecessor legislation trying to squeeze new sections between existing provisions.\(^7^5\)


\(^7^1\) See ‘The Tax Law Improvement Project: Mission Impossible?’ (1994) 28 *Taxation in Australia* 484.


\(^7^5\) The *Income Tax Assessment Act* 1936 became an alpha-numeric maze with more letters added each time a section was inserted between existing sections. Thus, ss159GZZZBA to 159GZZZBI were found between ss159GZZZA and ss159GZZZB, and so on through the maze of new provisions as whole divisions and new parts of the law were inserted between ss159 and ss160.
The government opted for a progressive implementation of the re-written law, despite widespread resistance by the tax profession which called for completion of the rewrite and implementation as a ‘big bang’ project. The idea was that the plain English version of the law would gradually replace the existing tax Act, the *Income Tax Assessment Act* 1936 (first enacted in 1936 and amended continually since then) as provisions were added to the new Act and repealed in the old one. An initial tranche of the new law was enacted in 1997 (as the *Income Tax Assessment Act* 1997) and a second tranche was added to the 1997 law in 1998. Parallel with this process, new divisions were appended at the end of the 1936 Act as plain English ‘schedules’, to be inserted into the new law when the appropriate framework was completed.

A superficial look at the 1997 Act supported to some extent those critics who blamed the drafters for the complexity in the old tax law. It appeared the new plain English law was easier to read and comprehend than its predecessor (though a number of commentators noted that the improvement was not terribly obvious in many cases). The improvement led many to conclude initially that the obscurity of the law was the prime culprit behind its complexity, thereby implicating the original drafters. However, when taxpayers and tax advisers sat down to work with the new law, they quickly discovered none of the complexity had dissipated. Indeed, by unveiling many of the inconsistencies, anomalies, overlaps and lacunae in the law, the plain English redraft exposed the real causes of much of the former law’s complexity, namely its wholly irrational and inconsistent policy base. And somewhat ironically, the diversion of drafting resources to the TLIP project was alleged by some to have led to an increase in problems with other tax law drafted by ‘business-as-usual’ teams outside the project.

The limitations of the project are perhaps best illustrated through one of the first areas tackled by the simplification team, the redraft of depreciation and amortisation rules, and one of the last areas addressed before the project was sidelined, the capital gains rules.

(i) _Depreciation and Amortisation_

The judicial reliance on trust law doctrines that played such a key role in the development of the income concept was paralleled by similar reliance on trust law doctrines to distinguish revenue expenses and capital expenses. The former were charged against the interests of income beneficiaries to a trust while the latter were charged against the interests of capital beneficiaries. The initial income tax law adopted this judicial distinction and provided an immediate deduction for revenue expenses while denying any recognition of capital outgoings unless they qualified for deduction under an amortisation regime.
Only one amortisation regime was included in the original Act, a depreciation regime for expenses incurred to acquire ‘plant and equipment’. These words were subsequently interpreted to mean only machinery, tools, and similar assets so expenses for many types of wasting assets including intangible property and buildings were excluded from the amortisation regime. As a result, expenses incurred to acquire other long-life assets were not recognised for tax purposes. As might be expected, taxpayers went to great lengths to portray otherwise excluded types of assets as plant and equipment.78

This regime based on judicial characterisation created a sharp distinction between revenue expenses, always deductible regardless of the length of the benefit to which they related, and capital expenses, never recognised for tax purposes unless they fell into the statutory amortisation regime. Expenses excluded from recognition were once known as ‘nothings’ as they were treated as nothing for tax purposes and later were labelled ‘black hole’ expenses since they fell into an income tax black hole.

Over the decades taxpayers lobbied for expansion of the depreciation regime to cover the wide range of wasting assets used in business. More often than not the legislature acceded to the requests. However, rather than recognise depreciation as an appropriate policy response to the acquisition of wasting assets generally, the legislative designers treated each recognition of a capital expense as a tax concession, adopting separate recognition rules every time another lobby group convinced the government of the day that their specific expenditure should be depreciable.79

The plain English redraft of the income tax law in 1997 somewhat consolidated the many depreciation and amortisation rules in the law into half a dozen different places. It did not change the rules — it merely redrafted them into ‘simpler’ English. The foundation of the new draft was a set of ‘common rules’80 that, given the range of different treatments accorded wasting tangible and intangible assets, actually applied in few, if any, cases. The remainder of the provisions set out the actual depreciation rules, all exceptions to the common rules.

While the absurdity of multiple amortisation regimes (they number more than 30) was difficult to perceive when they were scattered throughout the legislation, when the multiple regimes were brought together into a more limited number of places, their complexity was readily visible to any observer. Each regime contained different fundamental definitions, different valuation rules, different balancing rules on disposal of depreciated property, and different depreciation formulae. Not only were there different regimes for different types of wasting

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78 In one celebrated case, the owners of a building used to dye textiles characterised the entire building as equipment in a successful attempt to depreciate the entire structure: the floor was presented as dying pits, the walls as retaining devices to prevent dispersal of potentially toxic materials, and the ceiling as a ventilation system. See *Wangarratta Woollen Mills Ltd v FCT* (1969) 119 CLR 1; 1 ATR 329.

79 As noted below, for buildings alone there were multiple regimes for the mining industry, timber industry, hotel and motel industry, and more.

property, but within each category there were different regimes for subcategories of assets. Depending on the use to which they were put, income-earning buildings might, for example, be depreciated under a regime for mining industry buildings, a regime for timber industry buildings, a regime for hotels and motels, a regime for commercial buildings and residential rental buildings, and so forth.

The inconsistencies, overlap and lacunae revealed by the 1997 partial consolidation of depreciation and amortisation rules led to almost immediate pressure for reform. In particular, the many categories of ‘black hole’ expenses omitted from the depreciation rules featured prominently in submissions to a review of business taxation established by the government in the late 1990s.81

The 1997 plain English rules on depreciation were amended many times in the three years following their adoption. Finally, in 2001 the government indirectly conceded that the so-called simplified rules were not working and scrapped the lot, replacing them with a new plain English depreciation and amortisation regime. The new rules provided some further consolidation and provided new, and separate, amortisation rules for a limited number of black hole expenses. They did not, however, address any of the fundamental flaws or shortcomings with the depreciation and amortisation regime. They merely added new provisions to the old, dealing with a handful of identified omissions rather than providing a sound general conceptual framework for amortisation of wasting expenditures. Plain English rules translating unsound and incoherent rules to a new format failed completely to address the underlying problems.

(ii) Capital Gains

The limitations of redrafting were even more evident in the case of the capital gains rules. The initial judicial distinction between income gains and capital gains, with only the latter subject to tax, was clearly incompatible with a modern income tax system. But rather than modify the definition of income to displace the judicial distinction between taxable income and non-taxable capital gains, the legislature adopted the judicial distinction as the basis for legislative response and embarked on several decades of ad hoc and piecemeal inclusion measures — each directed at a particular type of gain82 — to overcome the limitations of the judicial distinction.

The policy proved a failure, as the boundaries for each inclusion provision were easy to circumvent. In 1985 the legislature tried a different approach, relying

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81 The Review of Business Taxation or ‘Ralph Review’ — see section 3B below.
82 For example, Income Tax Assessment Act 1936 s26AB included premiums payable in respect of a lease in assessable income while s26BB included small shallow premiums payable in respect of a debt in assessable income. No general provisions applied to large premiums, though they might constitute judicial concept income in some cases. If the debt was redeemed within a year of issue, the gain might have been assessable under Income Tax Assessment Act 1936 s26AAA. Alternatively, if the acquisition and redemption was part of a profit-making scheme or if the debt had been acquired with the purpose of resale at a profit, the gain might have been assessable under Income Tax Assessment Act 1936 s25A.
on a broader inclusion measure. The legislative solution was built around a single provision aimed at one common type of capital gain, the gain realised on the sale of investment assets. The rule treated the difference between the cost of acquisition of an asset (inflation adjusted in some cases) and the proceeds realised on disposal of the asset as a capital gain. Complex deeming provisions were then added to bring the vast range of other types of capital gains within this rule. These supplementary measures deemed taxpayers in receipt of other types of ‘capital gains’ to have acquired property and then to have immediately disposed of the property. They also provided for deemed costs of acquisition and deemed proceeds of disposal in respect of the deemed acquisition and disposal of property. It surprised no one when the courts declined to apply the provisions as originally drafted, declaring they were virtually meaningless.83

The 1997 plain English rewrite substituted a series of ‘capital events’ for the deeming on top of deemings aimed at different types of capital gains. As drafting proceeded, the drafters discovered they needed increasing numbers of events to catch all the different transactions and arrangements that might give rise to a capital gain in the judicial sense. By the time the redrafted capital gains measures were enacted into law, they contained 36 separate capital gains events, since expanded to 40 events. The measures were without doubt easy to read. Taken on their own, each of the events was comprehensible. When read together with the remainder of the legislation they created a complicated web of overlaps and distinctions. A gain might be assessable as ordinary income under the judicial tests, as statutory income under a specific inclusion provision, and again as a capital gain under one or more capital gain event. Reconciliation provisions were needed where more than one section applied to a gain in one tax year and timing provisions were needed where different assessment provisions would cause the same gain to be recognised in more than one tax year. The final result was certainly no better than its predecessor and may have been worse.84

(iii) The Legacy of Plain English
The plain English simplification project showed that poor drafting had made the tax law difficult to understand. Abandoning archaic language and rigid drafting in favour of simpler language, clearer explanation and flexible presentation led to shorter sections (in some cases replacement measures were only half the size of the original sections) and law that was far easier to understand. It was hoped that better drafting would be one lasting legacy of the project but more recent versions of

83 Mason CJ described one section as ‘obscure, if not bewildering’ in Hepples v FCT 91 ATC 4808 at 4810; Spender J described the capital gains provisions as ‘nightmare provisions’ in Cooling v FCT 89 ATC 4731 at 4741. The confusion over the measures is quite evident in the High Court’s decision in Hepples v FCT 91 ATC 4808 where the judges agreed the provisions they were examining applied to some asset involved in the case, but couldn’t agree which asset the legislation was supposed to cover.

plain English draft raise serious doubts as to whether logical drafting will continue. Perhaps the most important contribution of the simplification project was to expose the fact that drafting complexity was not the cause of tax complexity. Bad drafting may have made the sections difficult to understand, but it could not obfuscate the underlying principles of the law if there were none. The new law appeared on its face to be easier to read compared with the original legislation, but, as one critic put it, without major policy changes the project could accomplish little more than “easier to read gibberish”. 85

The government never explicitly conceded the validity of the growing chorus of criticism for its redraft project, but by the time the second tranche of plain English legislation had been released it was obvious to everyone that clearer language was not bringing clearer tax law. In mid-1998, when only one-third of the law had been replaced with plain English text, the government quietly shelved the simplification project in the context of appointing a Review of Business Taxation. 86 The redraft simplification project has never been formally revived. New legislation subsequently inserted in the 1997 Act has followed the general style of the ‘plain English’ draft but any rhetoric that suggests plain English drafting might yield simpler legislation has been abandoned. And, as noted in section 2C, above, so, too, has any commitment to genuine plain English with the move to defining terms for tax purposes to mean other than, or even opposite to, their ordinary English meaning.

B. Tax Value Method as a Panacea for Complexity?

Australia’s second large-scale proposal for tax simplification, the tax value proposal, derived from a Coalition Government’s tax reform election manifesto released in June 1998. A key element of the manifesto was a promise to establish a business-oriented review of business taxation in Australia. The Review of Business Taxation (known as the Ralph Review after its chair, businessman John Ralph) was appointed soon after the Coalition’s re-election later in 1998 and was asked to report in the first quarter of 1999. By early 1999 it was clear the reporting deadline could not be met and John Ralph sought an extension to mid-year. In return, he offered to have his review prepare draft legislation to implement any key recommendations of the project so they could be enacted more quickly if the government accepted the review’s recommendations.

The draft legislation released with the final report of the Ralph Review 87 did not merely contain amendments to implement the review’s recommendations. Rather, it provided a blueprint for a complete redraft of the income tax Act, one that would replace all the conventional rules for measuring taxable income with a dramatically different formula. Ralph, speaking as chair of the business tax review, promised that the new law would be the key to tax simplification, a position

86 See below, text at section 3B.
subsequently echoed by many proponents of the new law in the Treasury and Australian Taxation Office.

The proposed new rules were based on what became known as the tax value method. Under the tax value rules, a taxpayer would have recognised annual gains and losses by recording all economic flows received and paid (in cash or in kind) and computing changes in the value of assets owned by a taxpayer at the end of the year. Thus, for example, rather than denying taxpayers an immediate deduction for the acquisition of a capital asset, as the current law now does, the proposed law would have allowed an upfront deduction matched by an offsetting inclusion of the increased asset value of the property acquired (from zero before the acquisition to its market value when acquired).

There is no doubt that the proposed rules would yield a much more accurate measurement of true economic income were they to be applied consistently to all changes in value of taxpayer’s assets. This is not what the Ralph Review proposed. Rather, it proposed to apply the existing depreciation rules to mandate presumptive changes in value of depreciable assets, the existing optional closing valuation rules to determine changes in value of trading stock, the existing amortisation rules for discounted debt instruments to measure gains and losses over time for debt assets and liabilities, and the existing realisation basis for virtually all other assets by deeming the closing value of the assets on hand to be equal to their cost. In other words, the tax value method would have incorporated all the existing rules for different types of assets and retained all the ambiguous and uncertain asset boundaries (trading stock vs. depreciable property vs. financial assets vs. other capital assets, etc.) of existing law. Stripped of the new foundation provisions, the emperor’s new suit looked much the same as the current one.

Equally significantly, the review proposed to retain all existing tax expenditures and concessions within the new structure if the tax value basis for calculating taxable income were adopted. It also proposed to incorporate into the tax value method approach a slew of new concessions promised by the government such as the subsequently adopted concessional regime for capital gains.

Whatever the potential of the tax value method for simplifying tax law, the benefits would have instantly dissipated once it incorporated all current concessions, in particular concessions such as the capital gains concession based on indeterminate judicial notions. A not insignificant part of the complexity in the existing tax law is attributable to the anti-avoidance provisions directed at schemes to exploit the concessional treatment of undefined capital gains and the same would surely have occurred with a tax value method tax law that incorporated a similar concession.

Given the loud and virtually unanimous opposition to the tax value method proposals from the profession and a cross-section of other interested persons including a number of influential tax academics, the lengthy demise of the tax value proposals was perhaps surprising. The explanation probably lies in the political sphere — the government of the day had made a range of promises to
obtain opposition support in the Senate for its most significant tax concessions and it had to keep alive the illusion of future reforms for some period after its initial concessions were enacted. It allowed the tax value method proposal to pass gracefully, sending it to a quasi-independent ‘Board of Taxation’ for lengthy analysis while funding ongoing revisions of the tax value method drafts for almost two years. The tax value method’s official death was announced in mid-2002, following release of the Board’s final report on the proposal.88

There are two clear lessons to be learned from the tax value method episode. The first is that simplification based on wholesale change of tax laws and tax principles is doomed to failure. Grand plans will inevitably be derailed by a combination of vested interests and taxpayers’ fears of transitional and implementation costs. The second is that incremental change, a far more realistic option, will only untangle complexity if it recognises and addresses the root causes of that complexity. The causes can never be eliminated — judges will continue to rely on inappropriate transposed categories to interpret tax law, tax advisers will continue to press the boundaries in the law, and legislatures will continue to use the tax Act as a vehicle for subsidies. In short, the causes of complexity will always be with us. But while the causes will never disappear, they can be tamed.

C. An Alternative Program for Simplification

Where does an achievable path to simplification start? The review of the causes of complexity in section 2 of this paper may yield some practical steps that can be taken to achieve genuine simplification in a manner acceptable to the political masters of the legislation.

(i) Simple Solutions to Simple Problems: Addressing Structural Flaws

Many of the problems the tax value method purported to address had been long recognised and in terms of both their origin and nature were relatively simple. The tax value method solution to those problems was wholesale replacement of current tax concepts with a new system for measuring net gains. But comprehensive solutions to the key problems that yield much of the complexity in current law can be achieved in an incremental fashion by making relatively minor changes to both the income and deduction sides of the current net taxable income equation.

The process may be illustrated with the example of capital expenses. As noted earlier, there are several problems with the present Australian law relating to capital expenses.89 The first is that the distinction between current expenses (those consumed within the year of acquisition) and capital expenses (those yielding a longer lasting benefit) is based not on actual analysis of the benefit or asset acquired. Instead, it is based on transplanted judicial criteria that sometimes yield

88 The Board of Taxation, Evaluation of the Tax Value Method: A Report to the Treasurer and Minister for Revenue and Assistant Treasurer (Canberra: Info Access, 2002).
89 See above, section 3B(i).
appropriate characterisations and often do not. In some cases, the judicial tests permit taxpayers to deduct currently capital expenses yielding long term intangible benefits. More significantly, they often characterise as capital expenses whose benefit expires almost immediately. These will never be recognised for tax purposes if they do not fall into one of the very limited group of deduction rules for 'capital’ expenses with no lasting benefit.\(^90\)

The second problem with the current law is its inability to accommodate many outlays for long-term wasting benefits. The ad hoc and unprincipled depreciation rules in the current legislation add significant complexity to the tax law but fail to cover the field. Taxpayers often discover none of the depreciation provisions apply to their expenditures for wasting long term benefits and the outlays fall into a black hole for tax purposes.

The tax value method proposals sought to address both these problems by measuring cash flows and the value of benefits acquired with expenditures instead of characterising the expenditures. A capital expenditure that yields a long term benefit of quantifiable value would be recognised by means of a deduction for the outlay offset by the inclusion of the value of the benefit acquired. Taxable income would be reduced each year as the benefit declined in value.

There are two crucial differences between the tax value method proposals and current law. The first is the test used to distinguish capital and current expenditures. The tax value method proposals used an objective test to identify a capital expense — did the expense result in the acquisition of a benefit with recognisable value lasting beyond the end of the tax year? The judicial tests used in the current tax law are based on a range of factors, largely derived from trust law precedents originally used to identify the class of beneficiary that should bear costs incurred by a trust in respect of assets for the remainder beneficiaries. From a policy perspective, therefore, the initial problem with current law is a definitional one — the definition of capital expenses includes some outgoings that should be deductible immediately and excludes some outgoings that should be recognised in a future year or years, as the assets they yield waste or when there is a disposal of those assets.

Rather than rewrite the entire *Income Tax Assessment Law* to correct indirectly the definition of a capital expense, a new statutory definition can be substituted that makes it clear a capital expense is one which yields an asset or benefit with a quantifiable life extending past the end of the income year. Such a definition would mean that expenses whose benefit expired almost immediately would be

\(^90\) A leading example is *Broken Hill Theatres v FCT* (1952) 85 CLR 423 in which a theatre owner incurred legal fees opposing a licence application by a potential competitor. While there was no known long term benefit from the expenditure (other persons remained free to apply for licences) the High Court characterised the expenditure as a capital outlay because it related to the taxpayer’s business ‘structure’ rather than its business ‘process’. Because the true value benefit may expire immediately and no asset is acquired, the expense can neither be depreciated nor recognised as a capital loss. Expenditures of this sort are commonly treated as currently deductible expenses in other jurisdictions.
deductible when the outgoings were incurred. At the same time, it would prevent the misclassification as revenue expenses outgoings that yield long-term benefits.

The second key difference between the tax value method and current law is that the underlying accounting formula in the former provided recognition for all expenses incurred to acquire wasting assets while the limited depreciation regime in the latter combines with the structural rigidity of the capital gains rules to banish many types of capital expenses to legislative lacunae, never to be recognised for tax purposes.

If an appropriate statutory definition of capital expenses were adopted to substitute for the current judicial definition, the current capital allowance rules could easily be supplemented with a final catch-all rule that allows taxpayers to amortise the cost of all wasting assets or benefits not falling into other capital allowance schedules over their effective lives.

A simple start such as signalling to the courts an appropriate test to distinguish capital and revenue expenses and correcting a gap in the law will open the door to many opportunities for further (and incremental) simplification. Once a rational definition of capital expenses is adopted, and a simple supplementary rule to guarantee comprehensive recognition of those outgoings and to eliminate black hole expenses is inserted in the legislation, the complex infrastructure of provisions on top of provisions aimed at overcoming the problems caused by the current judicial distinction between revenue and capital expenses can gradually be dismantled.

Relatively simple changes can establish a sound structural base for long term simplification. The same process can be applied to almost all the structural problems that give rise to complexity in the income tax law.

(ii) Simple Solutions to Simple Problems: Refining Technical Features of Tax Law with Purposive Definitions

The structural problem arising from the current definitions of capital and revenue expenses derives largely from inappropriate judicial tests used to distinguish the two types of expenses, tests transplanted from another area of law (a separate but related problem is the inadequate amortisation regime in the legislation). Transplanted definitions also cause serious problems with the operation of technical measures in the income tax law. This type of measure is purely a creature of statute and there is no reason why the legislation establishing technical rules cannot define central terms in a manner consistent with the objective of the rules.

The process can be illustrated with the term ‘employee’ which, as noted earlier, has been defined by the courts for tax purposes using precedents drawn from other areas of law. Tax law distinguishes between employees and independent contractors to determine whether the person should be subject to withholding tax based on gross income (employees) or be responsible for lodging provisional returns and tax payments based on estimated net income (independent contractors).
Currently, the judicial definition of employee for tax purposes derives from industrial law and tort law, particularly the latter. A key test in the current tort law definition is the extent to which an ‘employer’ controls the day-to-day activities of an employee. This test is clearly relevant to whether vicarious liability should be imposed on an impugned employer for negligence of an alleged employee — if the labourer worked under the direction or supervision of a principal, the principal should be able to minimise the risk of negligence and should be held accountable when there is negligence. If the labourer works independently, responsible for an output without direct supervision over how that output is generated, the principal cannot effectively minimise the risk of negligence by the labourer. If vicarious liability is imposed on employers for the actions of employees, it is logical to treat this latter labourer as an independent contractor and not an employee for tort law purposes.

Any overlap between the tests used in tort law to identify employees and the reason employees are categorised as a separate type of taxpayer for income tax purposes is at best the result of happy coincidence. For tax purposes, the test for identifying an employee should be based on the level of expenses incurred by the person and the possibility of those being passed on to the principal if tax is based on gross income. If a person incurs high costs in deriving income, a withholding tax on gross income will be unfair until the final reconciliation at the end of the year so designation as an independent contract would be appropriate, while if a person is able to require the ‘employer’ to bear the costs associated with his or her labour, designation as an employee would be most sensible from a tax administration perspective. Replacement of inappropriate tort law tests based on level of supervision and independence of a person with a statutory definition for tax purposes that sets out the objective of the definition and provides more appropriate tests could ameliorate significantly the problems currently encountered as a result of using the transplanted definition.

Simplifying tax law in terms of definitions can thus take dual tracks. First, where terms currently used are subject to continuing pressure (as evidenced, for example, by continuing litigation), purposive statutory definitions can be employed, at the same time that resulting redundant specific anti-avoidance rules are cleared out. Second, when new tax rules are adopted, they can be accompanied by purposive definitions. These can be combined with a policy of setting out the purpose of new measures so it made obvious that it would not be appropriate to adopt transplanted definitions intended for different purposes in other areas of law.

(iii) Taming Tax Expenditures

It was noted earlier that the uncertain borders delineating tax concessions usually result in unintended exploitation by taxpayers not engaged in activities or making investments of the sort the concession was intended to promote. Because the purpose of the concession is rarely spelled out in law, administrators and courts
have no guidance as to what should or should not qualify for concessional treatment. Most often, initial concession measures are followed by a range of increasingly complex anti-avoidance rules intended to better focus the concession.

Rather than attack the problem after the fact, tax expenditures can be designed initially to operate effectively and simply without ambiguous borders if concessional regimes are defined in terms of their objectives, with a clear indication that eligibility for concessional treatment is to be based on underlying economic substance rather than legal form. If concessions were defined in terms of their purpose, courts would be directed to look at economic outcomes and not legal forms and the task of determining whether any particular arrangement, whatever its legal form, satisfies the objective of the concession would be simplified.

Some attempt has been made in the post-business tax review era to pay lip-service to the idea of including purposive guides in tax concessions. For example, the small business concessions introduced in 2001 have as a stated goal, among other things, the lowering of taxes for small businesses. This is the first time that a tax expenditure explicitly concedes that a primary purpose of the concession is to reduce taxes for the constituency at which the concession was aimed. However, the legislation gives no hint as to why taxes are to be lowered for this particular group instead of others. Rather than identify the intended beneficiaries in terms of an object to the concession, the legislation attempts to confine its application through the use of a complex qualification threshold based on average turnover and value of depreciable assets owned by the business (qualifying businesses must be below both thresholds). These tests are augmented by tracing rules and grouping rules intended to prevent large businesses from reorganising parts into smaller and apparently separate qualifying small businesses. The result is several pages of complex legislation yielding substantial compliance burdens legitimate for many small businesses seeking the benefit of the concession and a technical roadmap for non-qualifying businesses wishing to rearrange in order to qualify for them.

Plausible grounds for the small business concession can be posited. For example, because of economies of scale when dealing with financial institutions and the costs of complying with securities laws when raising public funds, small business often faces a significantly higher cost of capital than large business. Where funding is crucial to business operations and expansion, as is the case in capital intensive activities such as manufacturing, primary production, and mineral extraction, small business is prejudiced compared to its larger business counterparts. Lower taxes would provide small business relying on retained earnings as a source of capital with less expensive funds. However, if the purpose of the lower tax rate were to reduce the cost of capital for deserving small business,

92 Section 328-50(1) Income Tax Assessment Act 1997 states: 'The main object of this Division is to offer eligible small businesses the choice of a new platform to deal with their tax. The platform is designed to benefit those businesses in one or more of these ways: reducing their tax'.

it is unlikely that the concession would be designed to apply equally to, say, small manufacturers with significant capital needs and small independent consultants with little or no capital needs.

The current test for eligible small business, based on turnover below a threshold and depreciable asset holdings below a threshold, is unlikely to be an effective indicator of eligibility if the concession is intended to achieve rational economic objectives such as lowering the cost of capital for businesses at a relative disadvantage in obtaining lower cost capital. Alternative tests based on rational criteria such as operational (as opposed to passive) asset holdings are more likely to complement genuine economic goals, if there are any that explain the concession.

The clearest roadmap for tax administrators and adjudicators would be one that sets out the purpose of the concession and explicitly identifies the type of taxpayer for which it is intended, with the identification being framed in terms of relevant economic criteria such as indicia of business size that are directly tied in the legislation to the identified object of the concession. Thus, for example, if turnover were to be used as one test for qualifying businesses, it should be made clear that low-margin businesses with high turnover may still qualify while high margin businesses with lower turnovers may not.

To be sure, reforms to existing concessions that involved identification of the purpose of the concessions would alter the tax base. Consider, for example, the capital gains concession introduced in 1999 (a 50 per cent exemption from tax for realised capital gains). The rationale for the concession was never articulated and apart from its obvious effect — to reduce the tax burden for highest income individuals who are able to realise much if not most of their income as capital gains — it is difficult to posit a convincing purpose for the concession. However, subsidiary sources including political speeches suggest a rationale may be to promote capital investment in industrial, commercial or primary production enterprises. If this explanation were adopted for the moment and the concession redrafted as one designed to achieve this end, some types of gains currently said to have a capital character would lose their concessional treatment. Losers might include gains on the sale of personal art collections and on the sale of personal-use real estate such as summer homes.

Of course, the government could easily extend the capital gains concession to these and other gains if it concluded investments in assets yielding these gains should be encouraged. But setting out the concession in these terms — drafting a purpose for the concession and identifying what type of income, in the generic sense, should qualify for the concession — would put a stop to most schemes and arrangements to recast judicial concept income as concessionally taxed capital gains. By reclaiming from the judiciary the power to determine which gains should be fully taxed and which gains may be concessionally taxed, the legislature will provide a path to simpler tax law, tax administration, and tax compliance. The importance of this shift in political terms, too, cannot be understated. Traditionally, commentators have defined legitimate taxation in terms of the government’s onus
to specify when income is included in the tax base.\textsuperscript{93} Similar standards should be imposed on concessions providing relief from full taxation to establish the legitimacy of the concessions and to reinforce the legitimacy of the rules that impose full taxation on comparable economic income derived by those unable to access concessions. In the absence of specificity on the concession side, there is a serious danger that the tax law will be perceived as little more than a collection of unfair and illegitimate ad hoc inclusion and concession measures.

\textbf{4. Summary}

The causes of complexity in the Australian income tax are varied. Taxpayers and tax authorities have long recognised the law is in need of simplification. During the past decade there have been two ineffective or unsuccessful attempts at simplification of the tax law, first by redrafting the law in plain English without addressing structural issues and second by the proposed wholesale replacement of the legislation and its current concepts with a new foundation that incorporated most of the causes of complexity in the current law. In the meantime, the law continues to grow in size and complexity. It is time to consider new paths to simplification, learning from the causes of complexity and past attempts at simplification. Simple amendments to address structural flaws, purposive definitions and better-designed tax expenditures are useful starting points for such an exercise.

\textsuperscript{93} A recent enunciation of this view is that of Hill J: ‘It is, in my view, important in a democracy that the government be required to legislate with precision if it is to impose a liability upon its subjects’ in Justice Graham Hill, ‘A Judicial Perspective on Tax Law Reform’ (1998) 78 ALJ 685 at 689.
Implementation of the Rome Statute for the International Criminal Court: A Quiet Revolution in Australian Law

GILLIAN TRIGGS*

One of the intractable problems of contemporary international law lies in the implementation of treaties in the domestic laws and practices of ratifying States. A welcome, though possibly unexpected, outcome of the successful negotiation of the Rome Statute1 has been the determination of States Parties — including South Africa,2 the United Kingdom,3 Germany4 and Australia5 — to enact legislation to enable their courts to assert the primary jurisdiction over the international crimes. The International Criminal Court (ICC) was inaugurated in March 2002 and its 18 judges have now been elected, seven of them women. The achievement of a permanent court to try international crimes has, nonetheless, overshadowed the fact that the Court has, at best, a secondary role in prosecuting for genocide, war crimes and crimes against humanity.

In order to ensure the primacy of Australian jurisdiction to prosecute for international crimes, and thereby to enable ratification of the Rome Statute, the Australian government introduced the International Criminal Court Act 2002 (Cth) (ICC Act) and the International Criminal Court (Consequential Amendments) Act 2002 (Cth) (Consequential Amendments Act), (the ICC Acts). The novelty and scope of this legislation has had a deep impact on Australian criminal law by amending the Criminal Code Act 1995 (Cth) so that prosecutions can be made for international crimes.6 The ICC Act establishes procedures to

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3 International Criminal Court Act 2001 (UK).

4 Act to Introduce the German Code of Crimes Against International Law (CCAIL); for a description in English of the legislation see George Hirsch, ‘Germany’s Code of Crimes Against International Law’ (2003) 19(9) IELR.

5 International Criminal Court Act 2002 (Cth) and the International Criminal Court (Consequential Amendments) Act 2002 (Cth) (hereinafter Consequential Amendments Act). Note that New Zealand, Canada, France, the Netherlands, Norway, Slovenia and Switzerland have also introduced similar legislation.

6 The Consequential Amendments Act is described as ‘an Act to amend the Criminal Code Act 1995 and certain other acts’.
enable compliance by Australia with requests for assistance from the ICC and for the enforcement of sentences. The *Consequential Amendments Act* is the vehicle for creating offences that are the ‘equivalent’⁷ of the crimes of genocide, crimes against humanity and war crimes set out in the Rome Statute. Through these mechanisms, Australia retains the right and power to prosecute persons rather than surrendering them for trial by the ICC itself. The need to give effect to the primacy of Australian jurisdiction over crimes against humanity, genocide and war crimes has thus been the stimulant for a ‘quiet revolution’ in substantive and procedural criminal laws.

While the Rome Statute has encouraged the enforcement of international criminal laws in domestic law by nations that had been reluctant to do so in the past it has, in effect, ‘ousted’ the jurisdiction of the new court. It may be expected that most State Parties will, like Australia, be keen to assert their primary jurisdiction to prosecute.

This paper considers the following aspects of Australia’s implementation of the Rome Statute in its national laws:

1. Inauguration of the International Criminal Court;
2. The ‘principle of complementarity’;
3. Australia’s terms of ratification of the Rome Statute;
4. Implementation of treaties in Australian law;
5. Australian laws enabling prosecutions of war crimes prior to the *ICC Acts*;
6. The *Consequential Amendments Act* and its impact on Australian criminal law;
7. The *ICC Act* and procedural issues.

### 1. Inauguration of the International Criminal Court

The concept of an international criminal court has its contemporary roots in the Hague Peace Conference of 1907.⁸ In 1948, the United Nations General Assembly invited the International Law Commission to study the desirability and possibility of establishing an international judicial organ for the trial of persons charged with the specific crime of genocide.⁹ Some of the most influential stimulants for the creation of an international criminal court were the Nuremberg and Tokyo trials and the famous dicta: ‘Crimes against international law are committed by men not abstract entities.’¹⁰

The judges of the Nuremberg Tribunal recognised that individuals have a duty to comply with international criminal law; a duty that goes beyond the obligations

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⁹ General Assembly Resolution 260 of 9 December 1948; Article 6 provides that persons charged with genocide ‘shall be tried by … such international penal tribunal as may have jurisdiction’.

of national citizenship. Effective implementation of this principle in national laws has, however, proved to be difficult. National war crimes trials and the use of domestic laws to prosecute those accused of war crimes have been of mixed success. The Australian Commonwealth prosecutions under the *War Crimes Act* 1945 against Polyukhovich, Wagner and Berezowsky were, for example, unsuccessful, primarily because the trials were dependent upon evidence that was over 50 years old. The Security Council was, by contrast, successful in establishing two ad hoc war crimes tribunals in response to the civil wars in Rwanda and former Yugoslavia. Each of these tribunals is growing in experience and esteem and has significantly advanced legal jurisprudence relating to war crimes including rape, crimes against humanity and genocide. The Hague and Rwanda courts are, however, limited to their specific civil conflicts.

These two tribunals, the recently established Special Court for Sierra Leone, and alternative approaches through truth and reconciliation commissions in South Africa, strengthened international resolve to create a permanent international criminal court that would be available for all future conflicts, independently of Security Council authorisation. Moreover, a permanent and impartial tribunal, created by treaty, could avoid the stigma of ‘victor’s justice’ and apply international criminal laws and procedures in a transparent and impartial manner.

Shortly after the creation of the United Nations ad hoc Tribunal at the Hague, the International Law Commission completed its draft statute for a permanent international criminal court. Under the authority of the General Assembly, a Preparatory Committee for the establishment of the ICC completed the draft statute. A UN Diplomatic Conference was then established in Rome between 15 and 17 July 1998 to finalise and adopt the convention.

With more than the necessary 60 ratifications, the Rome Statute came into force, with effect from 1 July 2002. By April 2003, there were 89 Parties including the United Kingdom and France and many nations from the Asia Pacific region. It was a close run thing whether Australia would ratify the Rome Statute in time to enable Australia to join other States Parties in the inaugural Assembly of State Parties with the capacity to nominate judges and prosecutors for the ICC. The Australian government made the decision at the 11th hour to consolidate its leadership role in negotiating the Rome Statute by enacting the *ICC Acts* and depositing its instrument of ratification.

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13 See, for example, *Prosecutor v Jean-Paul Akayesu*, International Tribunal for Rwanda, ICTR-96-4-T, September 1998.
14 The Special Court for Sierra Leone is a mixed ‘semi-international’ tribunal, sitting 140 kms away from the capital to minimise instability or fear likely to be stimulated by the hearings. On 10 March 2003, it indicted seven accused of war crimes, crimes against humanity and other serious violations of international humanitarian law.
Many nations have remained outside the Rome Statute. China has, notably, made no commitment to the Statute at all. Significant failures to ratify include the United States and Russia, which have signed but not ratified the Rome Statute. Indeed, the United States, in an unprecedented act, has notified the United Nation’s depositary that it will not proceed to ratify the treaty. In a letter to the Secretary General, the United States declared that it does not intend to become a party to the Rome Statute and that ‘accordingly, the United States has no legal obligation arising from its signature on December 31, 2000’. Article 18 of the Vienna Convention on the Law of Treaties 1969 requires a State that has signed but not ratified a treaty to refrain from acts that would defeat its object and purpose. It is likely, however, that, once the intent of the signatory not to ratify is notified to the depositary, the obligation not to prejudice the treaty is terminated. As no State has previously made such a statement, it remains uncertain how an international tribunal would respond to any complaint that the US has acted in a way that threatens the viability of the Rome Statute.

One reason for the failure of some States to ratify lies with the fear of politically motivated prosecutions. Another lies with the scope of the jurisdiction of the ICC. A troubling feature of the Rome Statute for some States is that a national of a country that has not ratified can be brought before the Court if the offences were committed in the territory of a State that is a party to the treaty. It is therefore possible, as the United States argues, that its military officers could be subject to the jurisdiction of the ICC, even though the United States is not a party to the Rome Statute. This aspect of jurisdiction of the ICC is not, however, surprising because, whether or not a State has ratified the Rome Statute, it could also have what is loosely termed a ‘universal jurisdiction’ to prosecute non-nationals for certain crimes that have been committed extraterritorially. A universal jurisdiction can be founded on customary international law or, more often and with greater clarity, on a treaty power or obligation and includes piracy, war crimes, genocide, apartheid, drug-trafficking, hijacking, torture, attacks upon diplomats and hostage taking. Moreover, States that have not signed or ratified the Rome Statute may make a declaration ad hoc permitting the ICC to prosecute in relation to a crime committed on its territory or by one of its nationals. It would be possible, for example, for Iraq to take advantage of this provision to enable prosecutions against United States military officers for activities during the conflict in and subsequent occupation of Iraq. As the United Kingdom and Australia are parties to the Rome Statute, their nationals are also subject to the jurisdiction of the ICC if a prosecution were to be initiated against them for acts committed in relation to this conflict.

18 Rome Statute, above n1, Article 12.
The election of 18 judges is now complete, with 10 judges elected for List A, being candidates with competence in criminal law and 8 judges for list B, being those with competence in relevant areas of international law. The Assembly of States Parties has met twice and Mr Ocampo of Argentina was elected Prosecutor of the ICC on 21 April 2003. A representative of the Netherlands has been appointed as the focal point for the establishment of an international criminal bar. The Assembly has also established a special working group on the Crime of Aggression, the only major area of jurisdiction of the ICC that remains to be agreed. In short, plans for the new court are well underway.

2. **The ‘Principle of Complementarity’**

It was a non-negotiable position of most States at the Rome conference that the ICC could assert its jurisdiction over international crimes only if the State, or States that also have jurisdiction over those crimes, are unable or unwilling genuinely to do so. The so-called ‘principle of complementarity’ means that any

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19 United Nations Convention on the Law of the Sea, opened for signature 10 December 1982, 1833 UNTS 3, Articles 100–107 (entered into force 16 November 1994); Hague Convention for the Suppression of Unlawful Seizure of Aircraft, opened for signature 16 December 1970, 860 UNTS 105, Article 4 (entered into force 14 October 1971); International Convention on the Prevention and Punishment of the Crime of Apartheid, opened for signature 30 November 1973, 1015 UNTS 243, Articles IV–V (entered into force 18 July 1976); Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment, opened for signature 10 December 1984, 1465 UNTS 85, Article 5(2) (entered into force 26 June 1987); International Convention Against the Taking of Hostages, opened for signature 17 December 1979, 1316 UNTS 205, Article 5 (entered into force 3 June 1983); United Nations Convention Against the Illicit Traffic in Narcotic Drugs, opened for signature 20 December 1988, 1696 UNTS 449, Article 4(2)(b) (entered into force 11 November 1990). It remains unclear which of the treaty provisions for universal jurisdiction now reflect customary international law. The right of a State to assert a universal jurisdiction in principle does not, however, meet the central need to gain custody of the accused. Belgian legislation of 16 June 1993, ‘Concerning the Punishment of Grave Breaches of the International Geneva Conventions of 12 August 1949 and Protocols I and II of 8 June 1977’ has been the basis for several arrest warrants issued in absentia against those alleged to have committed international crimes. A warrant issued against Congo’s Minister of Foreign Affairs prompted an application by Congo to the International Court of Justice in the Arrest Warrant case: 41 ILM 536 (2002). While the majority of the Court determined the validity of the warrant on the basis of the immunity enjoyed by ministers of foreign affairs under customary international law, the joint separate opinion of Higgins, Kooijmans and Buergenthal JJ considers in some depth the question whether the ‘inaccurately termed’ universal jurisdiction justifies the issue of an arrest warrant where the accused is not within the territory of the prosecuting State. They conclude that a universal jurisdiction for certain international crimes ‘is clearly not regarded as unlawful’ (at [46]), and agree with the authors of Oppenheim’s International Law (9th ed, 1992) at 998 that ‘there are clear indications pointing to the gradual evolution of a significant principle of international law to that effect’ (at [52]). As to whether the presence of the accused in the territory of the prosecuting State is a precondition for universal jurisdiction, these judges agree that the issue of a warrant in absentia does not violate any rule of international law.

20 Rome Statute, above n1, Article 12(3).


22 Rome Statute, above n1, Article 17.
State with jurisdiction over an alleged international crime has the primary right to exercise that jurisdiction. Article 17 of the Rome Statute provides that a case will be inadmissible before the ICC if it:

(a) … is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution;

(b) … has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute …

Article 17 effectively reserves the primary power to prosecute war crimes, crimes against humanity and genocide to the State with jurisdiction over those crimes under the usual principles of international law. The provision has facilitated ratification of the Rome Statute by those States which had strongly resisted the possibility that the ICC could assert jurisdiction over an accused prior to any genuine trial by national courts. The principle of complementarity has thus proved to be the key to success in establishing the world’s first international criminal court but, paradoxically, it has also stimulated States to pass legislation for national trials, thereby to deny any role to the ICC.

3. **Australia's Ratification of the Rome Statute**

While the extensive public debate in Australia had focused upon the international consequences of ratifying the Rome Statute, the debate generally did not consider the domestic implications of ratification created by passing the *ICC Acts*. The Joint Standing Committee on Treaties (JSCOT) had, however, considered many submissions arguing that, where Australia had jurisdiction, the principle of complementarity should operate to protect the primacy of its courts. JSCOT agreed with such concerns and recommended to the government that it should declare that:

- It is Australia’s right to exercise its jurisdictional primacy with respect to crimes within the jurisdiction of the ICC, and
- Australia further declares that it interprets the crimes listed in Articles 6 to 8 [genocide, war crimes and crimes against humanity] of the Statute of the International Criminal Court strictly as defined in the *International Criminal Court (Consequential Amendments) Bill.*[^23]

In formulating its recommendation, JSCOT was careful to use the word ‘declare’ rather than, for example, ‘reserves’. This was for good reason. The Rome Statute includes a ‘transitional provision’ or ‘opt-out’ clause under Article 124. A State may declare for a period of 7 years after the Rome Statute comes into force that it does not accept the jurisdiction of the ICC with respect to crimes referred to in Article 8 (dealing with war crimes) if the crime is alleged to have been committed before the date of entry into force of the Statute for that State.

[^23]: JSCOT, above n8 at xvii–xviii.
committed by its nationals or on its territory. With the single exception of this transitional clause, the Rome Statute prohibits reservations to the treaty. Any statement by Australia regarding its understanding of the nature of the legal obligations under the Rome Statute could not therefore constitute a formal reservation, prompting the question — what is the legal status of a declaration or understanding at international law?

At international law, a reservation is intended to ‘exclude or to modify the legal effect of certain provisions of the treaty in their application to that State’. Fitzmaurice observed, however, that a reservation does not include ‘mere statements as to how the State concerned proposes to implement the treaty or declarations of understanding and interpretation, unless these imply a variation of the substantive terms or effect of the treaty’.

It is common for States to append an ‘interpretive declaration’ when ratifying treaties apparently with the intention of avoiding any implication that they have made a legally effective reservation or in order to avoid meeting specific requirements for a reservation required under a treaty. In the event of a dispute, the legal status of an interpretive declaration can prove to be critical to determining whether the relevant tribunal or court has the capacity to assert jurisdiction. The European Court of Human Rights (ECHR) in *Belilos v Switzerland* considered the question whether an interpretive declaration was in law a reservation. On concluding that one of the Swiss ‘interpretive declarations’ was an invalid reservation, the ECHR observed that: ‘In order to establish the legal character of … a declaration, one must look behind the title given to it and seek to determine the substantive content’.

On this basis, if a declaration is substantively a reservation it will be treated accordingly. If a declaration does not have the legal status of a reservation or if it fails to satisfy criteria for a reservation under a particular treaty, it will not have any legal effect. The willingness of the ECHR to give to a declaration the legal effect of a reservation where this is its real effect, suggests that States opposed to a declaration that is at risk of being interpreted as a reservation should take the precaution of objecting to it.

24 Rome Statute, above n1, Article 120.
26 Yearbook of the International Law Commission (1950 vol 11) General Conditions of Formal Validity at 110. The legal effect of reservations was first considered by the International Court of Justice in the context of reservations to the Genocide Convention 1948. Clearly, reservations are not permitted if, as is the case with the ICC, there is a provision to the contrary. However, the Court advised that reservations are acceptable in principle if they are compatible with the object and purpose of the treaty under consideration: Reservations to the Convention on Genocide Case (Advisory Opinion) [1951] ICJ Rep 15 (hereinafter Genocide Reservation Case). The test of compatibility was subsequently adopted by the Vienna Convention on the Law of Treaties 1969. A reservation can be rejected by other parties, in which case there is no contractual relation between them.
28 Id at 87.
Aside from the question of legal status of a declaration, tolerance by the UN depository of interpretive declarations in State practice has proved to be an important strategy to encourage nations to ratify multilateral agreements. Indeed, States with federal constitutions such as Australia, often append some form of understanding to their instruments of ratification in order to protect themselves from any implication of breach where the federal body is unable to ensure compliance by constituent entities. An interpretive declaration can also assuage domestic concerns about the impact of the treaty and can be an effective technique to clarify the legal position for parties. Australia’s ratification of the ICCPR in 1980 was, for example, accompanied by numerous reservations and declarations that have since been withdrawn. Declarations can thus be useful in facilitating the development of confidence in multilateral agreements, often having the effect of encouraging a full commitment some years later.

In summary, declarations occupy a legal ‘no mans land’. They have no legal effect whatsoever in international law, yet they are frequently employed by ratifying States.

Consistent with its practice and to meet community concerns, Australia added a qualification to its acceptance of the compulsory jurisdiction of the International Court of Justice. Australia’s ratification of the Rome Statute is accompanied by a declaration in which the following points are made:

• Australia ‘notes’ that a case is not admissible before the ICC if it is being investigated or prosecuted by a State;
• Australia affirms the primacy of its criminal jurisdiction in relation to crimes within the jurisdiction of the ICC;
• no person will be surrendered to the Court by Australia until it has had a full opportunity to investigate or prosecute any alleged crimes;
• no person can be arrested on a warrant issued by the ICC or surrendered to the Court by Australia without the consent of the Attorney General; and
• Genocide, Crimes against Humanity and War Crimes will be interpreted and applied ‘in a way that accords with the way they are implemented in Australian domestic law’.

Australia’s declaration is likely to be interpreted by an international tribunal to be a declaration, rather than a reservation and, as such, adds nothing to the nature and extent of Australia’s legal commitment to the obligations set out in the Rome Statute. It does, however, provide a level of comfort to those concerned about diminutions of Australian sovereignty that could be implied by the treaty. The declaration has had the positive effect of enabling ratification while at the same

31 Several submissions were made to JSCOT to the effect that Australian sovereignty would be at risk if the Rome Statute were to be ratified.
time providing a ‘belts and braces’ assurance that Australia has primacy of
jurisdiction in relation to crimes also coming within the jurisdiction of the ICC. It
was also of significance politically that the declaration should confirm that the
Attorney-General must first consent before an accused person can be surrendered
to the ICC, a point that is discussed below.

The question whether a declaration is, as a matter of international law, a
reservation will be one for the relevant international tribunal. Were Australia to
purport to rely on its declaration in relation to a matter before the ICC, it will be
for the ICC to determine for itself whether the declaration is in legal effect a
reservation. If the Australian declaration were to be judged by the ICC to
constitute a qualification of the legal obligations under the Rome Statute, it will be
a reservation prohibited by Article 120. If the declaration becomes ineffective for
this reason, it is likely to be severed so that the ‘contractual’ relations among the
States Parties to the Rome Statute remain effective.

Most declarations on ratification of the Rome Statute amount to an attempt to
repeat its terms or to qualify the obligations by explanation or expansion rather
than to limit the obligations imposed. Of the 89 States that have ratified the Rome
Statute, 27 have lodged declarations setting out their understanding of its
application. Typical declarations relate to technical and language issues, are
uncontroversial and do not challenge the legal commitment. Others, such as the
declaration by Egypt, stress the importance of the Rome Statute being interpreted
in conformity with the general principles and fundamental rights that are
universally recognised. Similarly, the United Kingdom understands the term
‘established framework of international law’ in Articles 8(2) (b) and (e) of the
Rome Statute to include customary international law as established by State
practice and opinio juris. Israel, on its signature only, as it has yet to ratify, stresses
the dangers of politicisation of the ICC. France considers that the ICC cannot
preclude the exercise of self-defence at international law and seeks to protect its
right to the possible use of nuclear weapons. France excludes ‘ordinary’ crimes,
including terrorism and also excludes military targets and collateral damage. By
contrast, New Zealand was concerned to ensure that Article 8 was not limited to
conventional weapons, so that it should include nuclear weapons.

No other State Party to the Rome Statute has attempted to restrict its ratification
of the Rome Statute in any manner similar to that of Australia; that is, to define the
exact meaning of each offence, so that war crimes, crimes against humanity and
genocide apply in domestic law only if they conform to the Australian legislation.
While Australia’s declaration appears to be unique in State practice, there is a
developing jurisprudence on the validity of reservations to human rights
instruments as distinct from treaties dealing with other subjects. The evolving
principle is that certain human rights treaties, presumably including the Rome
Statute, may not be the subject of any reservation. The United Nations Human

32 Genocide Reservation Case, above n26.
33 For the text of all current declarations, see <http://untreaty.un.org>.
Rights Committee in its General Comments of 1994 on reservations to the International Covenant on Civil and Political Rights 1966 considered that:

... provisions in the Covenant that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations. Accordingly, a State may not reserve the right to engage in slavery, to torture, to subject a person to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion nor presume a person guilty unless he proves his innocence ... 34

The significance of the views of the Human Rights Committee has prompted the International Law Commission to consider the validity of reservations to human rights treaties and a Report on the issue has been prepared. 35 Any reservations (in the guise of a declaration) to the Rome Statute will, in any event, be invalid in light of the general prohibition on reservations to this treaty.

As the ICC Acts replicate in large part the Elements of Crimes 36 describing the offences created by the Rome Statute, Australia’s declaration appears to be little more than a statement of the obvious. If, however, Australian courts choose to interpret and apply domestic law in a way that is jurisprudentially different from that of the ICC as its judges interpret the law, it becomes possible that Australia could be in breach of its obligations under the Rome Statute. It is more likely, however, that national courts will make every effort to ensure that they apply the law within internationally accepted interpretations. 37 The far greater likelihood, in any event, is that Australia will try its own nationals and any offences that take place on its territory. If so, Australia’s declaration will not be relied upon in practice.

4. Implementation of International Treaties in Australian Law

It has been axiomatic in Australian law that a treaty to which it is a party has no direct application in domestic law in the absence of implementing legislation. 38 The High Court decision in Teoh’s Case, while a significant development of jurisprudence on the role of international law in domestic law, requires only that

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37 This appears to be the legislative intention of the ICC Acts, as indicated by the Explanatory Memoranda accompanying the Consequential Amendments Act and the ICC Act, eg: “it has been necessary to define some of the crimes by reference to standards set in the relevant international instruments”; ‘the ICC crimes are defined in the draft text of the Elements of Crime’.
administrators should take account of treaty obligations, but are not bound by them. More recently, the High Court in *Teoh* suggests that this differently constituted High Court is cautious about the role of treaties that have yet to be enacted in Australian law. A court may, nonetheless, look to a treaty in the event of ambiguity of implementing legislation or as an influence on the development of the common law. The Commonwealth has chosen not to introduce legislation to permit the direct implementation of most of the human rights treaties to which Australia is a party. With the signal exceptions of the Conventions on Race Discrimination and Sex Discrimination, other human rights treaties are merely appended to the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) as the benchmark for human rights standards when the Commission carries out its statutory duties.

In conformity with Australia’s processes for treaty ratification, JSCOT reviewed the Rome Statute and implementing legislation and considered their impact on Australian sovereignty, the legal system, current international obligations and the defence forces. It recommended that Australia should ratify the Rome Statute on the basis that the *Consequential Amendments Act* should not affect the primacy of Australia’s right to exercise jurisdiction. JSCOT particularly recommended that the crime of rape in the *Consequential Amendments Act* be harmonised with the approach taken by the *Elements of Crimes*. JSCOT also recommended that it be made clear how offences arising between 1957, when the *Geneva Conventions Act* came into force, and July 2002, when the Rome Statute came into force, were to be covered with respect to crimes under Part 11 of the *Geneva Conventions Act*.

39 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 (hereinafter *Teoh’s Case*).

40 *Minister for Immigration and Multicultural Affairs v Ex Parte Hieu Trung Lam* (2003) 195 ALR 502. Hayne J, for example, argues that *Teoh* ‘poses more questions than it answers’ (at [121]).

41 *Polites v Commonwealth* (1945) 70 CLR 60; *Nationwide News v Wills* (1992) 177 CLR 1 at 43 (Brennan J). Note also the influence of international human rights law on the common law: see Brennan J in *Mabo v State of Queensland* (No 2) (1992) 175 CLR 1 at 42 where he argued that Australia’s accession to the Optional Protocol to the International Covenant on Civil and Political Rights ‘brings to bear on the common law the powerful influence of the Covenant and the international standards it imports’.


43 Convention on the Elimination of all Forms of Discrimination Against Women, 18 December 1979; implemented by the *Sex Discrimination Act* 1984 (Cth).

The external affairs power provides a wide licence to the Commonwealth when enacting laws to give effect to treaty obligations. While some doubts were expressed to JSCOT about the possible inconsistency of the ICC Acts with judicial independence, JSCOT concluded that it is unlikely that the implementing legislation would fail for want of constitutional validity.

5. Australian Laws for Prosecution of War Crimes Prior to the ICC Acts

The offences adopted by the ICC Acts replace or supplement many Commonwealth laws for the prosecution of war crimes and similar offences that existed prior to implementation of the Rome Statute. The existence of such laws by no means indicates the extent of their enforcement. Indeed, Australian practice suggests that war crimes prosecutions have ultimately depended upon political will. Over the last 58 years, since the end of the Second World War, Australia had passed various acts that might potentially have been employed to prosecute such crimes. Apart from the war crimes prosecuted shortly after 1945, any subsequent trials have proved to be too little too late to enable conviction. The following legislation has been in place for many decades but has failed either to prompt prosecutions or to gain convictions:

- **Genocide Convention Act 1949.** The Federal Court in *Nulyarimma v Thompson* confirmed that genocide did not exist as a crime under Australian law, despite Australia’s ratification of the Genocide Convention 1948 and enactment of the Genocide Convention Act.

- **The War Crimes Amendment Act 1988** applies only to a slither of time during WWII — between 1 September 1939 and 8 May 1945 and then only to the war in Europe, excluding any application to the Pacific or elsewhere. The War Crimes Amendment Act is unusual in that, unlike the United Kingdom or Canadian war crimes legislation, it did not create crimes of genocide, war crimes or crimes against humanity. Rather, the legislation defined ‘war crimes’ by reference to ‘serious crimes’ that were ‘ordinary’ crimes under Australian criminal law. Prosecutions thus depended upon proof of murder, manslaughter, aiding and abetting and conspiracy. Primarily for lack of credible or available evidence, each of the three prosecutions brought under this legislation failed.

Emphasis on domestic criminal law by the War Crimes Amendment Act did not, quite aside from the procedural difficulties, meet the legal or moral dimensions of war crimes, genocide or crimes against humanity.

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45 See, for example, *Polyukhovich v Commonwealth* (1991) 172 CLR 501 (hereinafter *Polyukhovich Case*), especially Mason CJ at 528.

46 JSCOT recommended that the Consequential Amendments Act should not limit the jurisdiction of the Australian courts with respect to crimes under Part 11 of the *Geneva Conventions Act* 1957.

47 See discussion in Triggs, above n11.

48 See discussion of genocide in Section 6(A) of this article.

The Geneva Conventions Act 1957 applies to crimes that are grave breaches of the four Geneva Conventions of 1949. While this legislation has been available for war crimes prosecutions over the last decades, no attempt has been made to prosecute for alleged offences, probably because there has been little interest in prosecuting acts arising after 1957.

The Defence Force Discipline Act 1982 applies to members of the Defence Forces and is very occasionally employed in relation to acts that might constitute war crimes.\(^{50}\)

The Crimes (Torture Act) 1988 extends Australian jurisdiction to extraterritorial acts and, while not as yet the basis for any prosecutions, has a wide potential.

International War Crimes Tribunals Act 1995 relates only to the UN Security Council ad hoc tribunals and is not effective beyond the specific mandates of these bodies.

50 A recent inquiry conducted into allegations that an Australian officer serving in East Timor had committed a war crime found that the allegations were not substantiated on the evidence.


52 12 August 1949, 7 UNTS 5; (Additional Protocols 8 June 1977, 16 ILM 1391).

53 Above n36. The Preparatory Commission met in New York, 13–31 March and 12–30 June 2000 to finalise the draft pursuant to Article 9. It reported to States Parties on 2 November 2000. The Elements of Crimes have since been adopted by the required two-thirds majority of the members of the Assembly of States Parties.

54 Id at 5.
Those responsible for drafting Australia’s ICC Acts concluded that the best way to ensure that Australia retains its ‘primacy’ to prosecute international crimes was to create new offences in Australian law that are ‘equivalent’ to the crimes listed in the Rome Statute.55 With some exceptions, the Australian Government chose, uniquely, to adopt the technique and approach of the Preparatory Commission. The legal benchmarks for the Consequential Amendments Act were thus provided by the Elements of Crimes that has largely been adopted as substantive additions to Australian criminal laws. The Consequential Amendments Act amends the Criminal Code Act 1995 by creating a new Division 268 in the Schedule to that legislation adding 124 new sections on ‘Genocide, Crimes Against Humanity, War Crimes and Crimes Against the Administration of Justice of the International Criminal Court’.

Certain of the offences create entirely new crimes, such as genocide and crimes against humanity. Others were already part of Australian law, such as war crimes, though these have typically been expanded and modified. It is to the scope and detail of these offences that we now turn.

A. Genocide

The Consequential Amendments Act lists five forms of genocide as offences now subject to prosecution under the amended Criminal Code Act 1995. With effect from 1 July 2002, genocide is for the first time an offence under Australian law, despite Australia’s ratification of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide on 8 July 1949, nearly 53 years earlier.56 Indeed, it was something of a surprise to many that the Full Court of the Federal Court concluded in Nulyarimma v Thompson57 that genocide was not an offence under Australian law.58 While the Genocide Convention Act 1949 (Cth) had approved ratification by Australia of the Genocide Convention, it did not specifically implement its terms. Rather, it merely scheduled the Convention to the legislation. It has been the position of successive Australian governments that domestic criminal laws relating to murder and manslaughter were sufficient to enable Australia to meet its obligations under the Genocide Convention were it to decide to prosecute for genocide. A similar reliance upon known and predictable national criminal laws was made in the War Crimes Amendment Act 1988.59

Wilcox and Whitlam JJ, for the majority in Nulyarimma, accepted that genocide was a customary norm of international law attracting universal jurisdiction, being a peremptory norm from which there could be no derogation. Genocide was, in short, recognised as a jus cogens obligation upon all States; an obligation that existed before and independently of the Genocide Convention.60

55 Explanatory Memorandum, above n7.
56 In force, 12 January 1951.
57 (1999) 165 ALR 621 (hereinafter Nulyarimma).
58 Members of the Aboriginal community had alleged that certain ministers had committed genocide by extinguishing native title on amending the Native Title Act and by failing to proceed with World Heritage listing of the lands of the Arabunna people.
59 See discussion of the amendments by Triggs, above n11 at 127.
Despite the elevated status of the crime of genocide in international law, the majority of the Federal Court adopted the approach taken by the House of Lords in *R v Bow Street Metropolitan Stipendiary Magistrate; Ex Parte Pinochet* (No 3)\(^{61}\) that there could be no jurisdiction over an international crime, whether created by treaty or customary law, unless legislation had been implemented to apply the crime in domestic law.\(^{62}\) The limited nature of the *Genocide Convention Act* confirmed Wilcox and Whitlam JJ in their support for contemporary and comparative jurisprudence that, in the absence of implementing legislation, the crime of genocide was not available in Australian law.\(^{63}\)

There is, however, another approach; one that is consonant with the early understanding of common law courts regarding the relationship between international and domestic laws.\(^{64}\) The Federal Court might have concluded that, as genocide is a *jus cogens* crime attracting universal jurisdiction, it could be incorporated or recognised by the court as part of Australian common law.\(^{65}\) Neither member of the majority in *Nulyarimma* was willing, however, to endorse the contentions of the appellants that, under Australian law, customary norms of international law can be incorporated into the common law without the need for prior legislation.\(^{66}\)

The historical failure by Australian judges to analyse the relationship between international law and national law has left jurisprudence uncertain, imposing a chilling effect on the pursuit of international legal rights through the Australian courts. The *Consequential Amendments Act*, while not resolving the problem of

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\(^{61}\) [1999] 3 WLR 827 (hereinafter *Pinochet*).

\(^{62}\) It had been necessary in *Pinochet* for the UK to pass the *Criminal Justice Act* 1988 applicable after 29 September 1988, giving effect to the Torture Convention, before its courts could assert jurisdiction over the crime of torture, even though torture was recognised as a crime attracting universal jurisdiction at international law.

\(^{63}\) *Teoh’s Case*, above n39; *Krager v Commonwealth*, above n38; *Dietrich v The Queen*, above n38.

\(^{64}\) Lord Talbot was reported to have declared the opinion that ‘… the law of nations in its full extent was part of the law of England, … that the law of nations was to be collected from the practice of different nations and the authority of writers’: *Buvot v Barbuit* (1736) 3 Burr 1481.

\(^{65}\) See, for example, the judgment of Millet LJ in *Pinochet*, above n61.

\(^{66}\) Detailed consideration of the possibility of direct incorporation of a *jus cogens* or customary rule in Australian law fell to the minority judge in *Nulyarimma*. Merkel J took the opportunity presented by the appellants to embark upon one of the most extensive examinations of the role of customary law in domestic law that has ever been undertaken by an Australian judge. He observed that the English, Canadian and probably also New Zealand judicial authorities favoured the incorporation approach to the adoption of an established rule of international law, provided that there was no contrary statute or common law. On examining the Australian case law, he argued that the ‘common law adoption’ approach is dominant over the incorporation or legislative adoption approaches. Where a crime such as genocide attracts universal jurisdiction, Merkel J concluded, it may become part of the common law of Australia by direct incorporation. However, this analysis represents a minority view among the Australian judiciary at present.
giving effect to customary international laws in domestic law, has provided the least equivocal statutory means of ensuring that genocide may now be prosecuted before national courts.

The *Consequential Amendments Act* adopts the Elements of Crimes as they relate to genocide and defines five offences of genocide by:

- Killing
- Causing serious bodily or mental harm, including torture, rape, sexual violence or inhuman or degrading treatment
- Inflicting conditions of life calculated to bring about physical destruction, including depriving people of essential resources such as food or medical services, or systematic expulsion from homes
- Imposing measures intended to prevent births
- Forcibly transferring children to a different national, ethnical, racial or religious group.  

Drawing upon the Genocide Convention, each variation of the offence of genocide has two fundamental requirements in common. It must be demonstrated that the perpetrator ‘intends to destroy, in whole or in part’. In addition to the act itself, each of the genocide offences must be against the ‘person or persons belonging to a particular national, ethnical, racial or religious group’.

In addition to these two common requirements, specific elements of each offence of genocide are added. The crime of forcibly transferring children, for example, requires that the person transferred is under the age of 18 years and includes circumstances in which the perpetrator is reckless as to whether the person is in fact under this age. The phrase ‘forcibly transfers’ is also further defined to include a threat of force or coercion caused by an abuse of power or by ‘taking advantage of a coercive environment’. The offence of genocide, committed by deliberately inflicting conditions of life calculated to bring about physical destruction, requires an additional *mens rea* element of intending that the ‘conditions of life’ should bring about the physical destruction of the group, in whole or in part.

While the *Consequential Amendments Act* generally mirrors the Elements of Crimes, it fails to adopt them in an important respect. The condition that ‘the conduct took place in the context of a manifest pattern of similar conduct directed against that [targeted] group or was conduct that could itself effect such destruction’ is omitted from each of the forms of genocide adopted by the *Criminal Code Act*. As a practical matter, it may prove easier for an Australian court to convict for genocide in the absence of this element.  

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67 Subdivision B of Division 268.
recognised substantive content at international law, it is arguable that a State may not assert jurisdiction over acts that would not fully constitute genocide either at customary law or under the Rome Statute. No explanation is given for this omission in the Explanatory Memorandum. Belying its name, the Explanatory Memorandum simply notes that the legislation usually defines each crime by reference to the relevant international instrument.69

In these and other respects, the States Parties which were responsible for drafting the Elements of Crimes have developed the law of genocide significantly, certainly well beyond the substantive content of the offence under the Genocide Convention and of the jurisprudence developed more recently by the United Nations ad hoc tribunals for Rwanda and the former Yugoslavia.70 The Consequential Amendments Act takes Australian law into almost completely uncharted territory in the sense that there is little international judicial experience in applying the offence of genocide and none in Australian common law. It is thus for the courts to develop the substantive content of genocide on a case-by-case basis.

B. Crimes Against Humanity
The category of crimes against humanity has had a limited place in Australian law as a defence only. The amendments of 1988 to the War Crimes Act 1945 permit a defence to a war crime if the conduct ‘was permitted by the laws, customs and usages of war’ and did not constitute a ‘crime against humanity’ at the time the conduct occurred. The concept of a crime against humanity is not defined by the War Crimes Act and was specifically rejected as a norm of customary international law by Brennan J in the Polyukhovich Case.71 The uncertainty of the status of a crime against humanity in international law, and the consequential lack of content for domestic law purposes, has been overcome by the adoption of the Elements of Crimes in the Consequential Amendments Act.72

The Consequential Amendments Act mirrors the crimes against humanity identified in Article 7 of the Rome Statute. Each of the elements of the 16 forms of crime against humanity is set out, with the actus rea followed by the mens rea. A crime against humanity may not be committed in isolation or by an individual. Evidence of a link between the perpetrator and a State or organisational policy must be established. It is also necessary to demonstrate that:

• the acts have been committed as part of a widespread and systematic attack against a civilian population, in the sense that the perpetrator intended to further the attack;
• the crimes are a result of the policy of a State or organisation to commit the attack; and
• the perpetrator knew the act was, or intended the act to be, part of a larger attack on a civilian population, though not necessarily a military attack.

70 See, for example, the Akayesu Case, Rwanda Tribunal, above n13.
71 Above n45.
72 Subdivision B.
Acts that can become crimes against humanity are murder, extermination, enslavement, deportation, imprisonment or other severe deprivation of physical liberty, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, sexual violence, persecution, enforced disappearance of persons, apartheid and other inhumane acts which cause great suffering or serious injury to mental or physical health. Each of these offences has been developed in detail in the Elements of Crimes, which, in turn, are largely reflected in the Consequential Amendments Act.73

The inclusion of rape within the concept of crimes against humanity builds upon the jurisprudence recently developed by the ad hoc tribunal for Rwanda74 and has been adopted by the Consequential Amendments Act. It is notable, however, that the Australian legislation did not advance so far as the Elements of Crimes in adopting a definition of rape that includes cases where a victim has been forced to penetrate another person. It remains, nonetheless, of great import for Australian law that it now recognises rape as a crime against humanity. Moreover, the Consequential Amendments Act makes a significant contribution to domestic law by listing those circumstances in which a person will not be taken to have consented. For example, a person who submits to the act because of psychological oppression or abuse of power or because they are unlawfully detained will not have validly consented for the purposes of a crime against humanity. It might be expected that, over time, Australian laws on rape will be influenced by any jurisprudence that evolves in application of these new international principles.

The Consequential Amendments Act may also prove to have wide and possibly unexpected implications for the enforcement of treaty obligations such as those dealing with sexual slavery and trafficking in women and children. Section 268.10 creates enslavement as a crime against humanity and includes trafficking in persons. Where a perpetrator exercises powers of ownership over persons and the conduct is committed knowingly as part of a widespread or systematic attack against a civilian population, enslavement will have been committed. Included in the rights of ownership is the exercise of power arising from a debt or contract; a situation that frequently forms the basis for cases of trafficking documented in Australia.75 A growing concern for trafficking in the region and into Australia is indicated by Australia’s acceptance in December 2002 of the Protocol on Trafficking in Persons, Especially Woman and Children of 2000 (Palermo Trafficking Protocol).76

73 A definition of a crime against humanity is inserted into the Dictionary of the Code and provides that it means an offence under Subdivision C of Division 268 of the Code. There are certain drafting differences between the Elements of Crimes and the Consequential Amendments Act that may be relatively minor or, conversely, that could prove to have significant practical implications. Specific elements are, for example, supplemented or ignored by the legislation. Others are conflated or expanded.
74 Prosecutor v Jean-Paul Akayesu, above n13.
76 On 11 December 2002 Australia accepted, though the Protocol is not yet in force.
The Council of Jurists for the Asia Pacific Forum on National Human Rights Institutions has recently reported on trafficking in persons in the region.\(^7\) Data evidencing systematic trafficking from India, Thailand and Nepal is mounting. It may prove possible in the future to demonstrate that the trade is so widespread and tolerated by State officials as to constitute an ‘attack against a civilian population’ for the purpose of the legislation. Similarly, sexual slavery includes a threat to cause a person’s deportation, a further and oft reported example of how the Consequential Amendments Act could be applied in the future.\(^7\) The Elements of Crimes may in this respect come to have a deterrent influence in the region and globally.

Aside from relatively minor variations in drafting between the Elements of Crimes and the Consequential Amendments Act,\(^7\) there are other potential risks in adopting a definition of a crime against humanity that is markedly different from that which has been developed at customary or treaty law. A notable example of divergence of the Consequential Amendments Act from the treaty-based approach to an international crime concerns the offence of torture. The Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment requires that the perpetrator inflicted ‘severe physical or mental pain or suffering’ for a specified purpose. Neither the Rome Statute nor the Elements of Crimes adopts this requirement for the purposes of a crime against humanity. In conformity with these instruments, the Consequential Amendments Act, in section 268.13, does not require a specific purpose. The curious result is that the new crime of torture as a crime against humanity varies in an important respect from the definition of torture in the Crimes (Torture) Act 1988 implementing Australia’s obligations under the Torture Convention. Unlike the Consequential Amendments Act, the Crimes (Torture) Act requires proof of a specific purpose.

While McCormack argues that the definition of torture adopted under the leadership of the Rome Statute is a ‘liberated approach’ to the definition of a crime against humanity,\(^8\) it remains problematic that a universal jurisdiction should be asserted by Australia over an act that does not conform to the international customary law and treaty rule. To drop the requirement that there be a ‘specific purpose’ in relation to the crime against humanity may make a successful prosecution easier. It could, however, render conviction vulnerable to the charge


\(^8\) The recent newspaper report of the findings by the NSW Deputy Coroner on the death in detention of a trafficked woman, Phuongtong Simaplee, provides an example of the potential for application of the Consequential Amendments Act: ‘Coroner in call for action on sex slaves’ The Australian (25 April 2003).

\(^9\) Note, for example, section 268.21(1) and (2) regarding the forced disappearance of persons. The Consequential Amendments Act creates two offences that are a single offence under the Elements of Crimes, but that in any event constitute participation in the commission of an offence under the Rome Statute.

\(^8\) McCormack, above n68 at 11. Sections 268.25 and 268.73 of the Consequential Amendments Act dealing with the war crime of torture, both in international and non-international conflicts, continue to require this specific purpose.
that Australian law is more stringent against a perpetrator than is recognised by international law regarding jurisdictional reach.

The Consequential Amendments Act will doubtless attract further analysis. These few examples cited serve, nonetheless, to illustrate the scope and potential impact of the new provisions on Australian criminal law.

C. War Crimes

The Rome Statute lists four categories of war crimes as follows:81

• Grave breaches of the Geneva Conventions of 12 August 1949;
• Other serious violations of the laws and customs applicable in international armed conflict;
• Serious violations of Article 3 common to the four Geneva Conventions committed in a non-international armed conflict against persons taking no active part in hostilities;
• Other serious violations of the laws and customs of war in a non-international armed conflict.

The Consequential Amendments Act retains these four categories in Subdivisions D, E, F and G and adopts their legal content as defined by the Elements of Crimes.82 Many of these crimes already existed under Australian law by virtue of Part 2 of the Geneva Conventions Act 1957. The Consequential Amendments Act repeals Part 2 and adopts the war crimes that had been created by that part. In this way, the implementing legislation lists crimes that were largely known, though rarely enforced, in Australian law.83 It also, and significantly, remains possible to prosecute for offences that are grave breaches arising between 1957 and July 2002.

(i) Subdivision D: Grave Breaches of the Geneva Conventions and Protocol 1

The Consequential Amendments Act lists 11 war crimes that mirror the pre-existing ‘grave breaches’ of the Geneva Conventions and of Protocol 1 to which Australia is a party. These offences were war crimes under Australian law, whether they were committed in or outside Australia, under Part 2 of the Geneva Conventions Act 1957.84 In order to preserve these offences, the Consequential Amendments Act both repeals Part 2 of the Geneva Conventions Act and then ‘re-enacts’ them as subdivision D.

The war crimes apply exclusively to ‘protected persons’ under the 1949 Geneva Conventions85 and must have been committed in the context of an international armed conflict. Offences include wilful killing, torture to obtain information or a confession, inhumane treatment, biological experiments, wilfully

81 Rome Statute, above n1, Article 8(2).
82 Note the exception Article 8(2)(b)(xx) dealing with ‘employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous or unnecessary suffering’.
83 Division D, Consequential Amendments Act.
84 Explanatory Memorandum, above n7 at 6.
causing great physical or mental suffering, destruction and appropriation of
property, compelling a protected person to serve in hostile forces, denying a
protected person a fair trial, unlawful deportation or transfer, unlawful
confinement of a protected person and taking hostages.

The Preparatory Commission for the ICC recommended that all these war
crimes should be interpreted within the established framework of the international
law of armed conflict. It is not entirely clear whether Australia intends to
conform to international law in these respects. The Declaration accompanying
Australia’s ratification of the Rome Statute provides that war crimes, crimes
against humanity and genocide are to ‘be interpreted and applied in a way which
accords with the way they are implemented in Australian domestic law’. If there
were to be any divergence between the ‘established framework’ of international
law of armed conflict and implementation in Australia, it becomes possible that
Australia will have breached international law by asserting a jurisdiction that is
beyond that which is recognised by the international community. It is probable,
nonetheless and as suggested above, that Australian courts will harmonise
international and domestic laws where any significant variations emerge.

(ii) Subdivision E: Serious Violations in an International Armed Conflict

Certain acts are war crimes even where they do not amount to ‘grave breaches’ of
the Geneva Conventions. Where the act is a serious violation of customary
international law and was committed in an international armed conflict, it may fall
within the 26 war crimes listed by the Consequential Amendments Act. Part 2 of
the Geneva Conventions Act 1957 covered many of these offences, thus the
implementing act does not create offences that are new to Australian law.
Examples of current interest include attacking a person after the perpetrator had
led that person to believe they were entitled to protection; pillaging or taking
property for personal use; severely humiliating, degrading or otherwise violating
a person or the bodies of the dead; and sexual violence. The offence of rape for the
purposes of a war crime under this subdivision includes the wide actus reus and
mens rea developed in the Elements of Crimes.

(iii) Subdivision F: Common Article 3 of the Geneva Conventions in a Non-
international Armed Conflict

Common Article 3 of the Geneva Conventions creates war crimes that are
committed during a non-international armed conflict against a person who is not
taking an active part in the hostilities. Included in this category of offence are
persons who are ‘hors de combat’, civilians and medical and religious personnel.
As part of the mental element, the perpetrator must know the facts that establish
that the person is not taking part in hostilities. The Consequential Amendments Act

85 ‘Protected persons’ are defined by Article 4 of the 1949 Geneva Convention relating to Civilians
as those who ‘find themselves … in the hands of a Party to the conflict or Occupying Power of
which they are not nationals’.
86 Elements of Crimes, above n36 at 18, in reference to Article 8.
87 Subdivision E.
lists six war crimes that arise in a non-international armed context, including sentencing or executing a person without a fair trial and taking a person hostage to compel a government, organisation, person or group to act or refrain from acting. Australian jurisprudence remains to be developed in relation to most of these offences.

(iv) **Subdivision G: Serious Violations in a Non-international Armed Conflict**

War crimes can also arise where there are serious violations of the laws and customs applicable in a non-international armed conflict. Subdivision G of the *Consequential Amendments Act* mirrors the war crimes set out in the Rome Statute Article 8(2)(e) that arise in internal armed conflicts where they are not covered by common Article 3. The Second Protocol to the Geneva Conventions of 1949, to which Australia is a party, describes these offences.88 The offences include ordering that no survivors be taken, subjecting a person to mutilation or medical or scientific experiments that are not medically justified and directing an attack against protected objects.

(v) **Subdivision H: Grave Breaches of Protocol I**

The Rome Statute omitted to create war crimes in relation to grave breaches of the Protocol I to the Geneva Conventions,89 possibly because many States have yet to ratify this treaty. Australia is, however, a party to this Protocol and grave breaches of it were already crimes in Australian law under the *Geneva Conventions Act*. These offences have now been included under subdivision H of the *Consequential Amendments Act*. Where an act is committed against a person who is in the power of, or detained by, the enemy as a result of an international armed conflict, it may constitute one of seven war crimes. They are broadly crimes of ‘medical procedure’ that are breaches of Protocol 1 and are not covered elsewhere in the legislation. These war crimes are: the ‘removal of blood, tissue or organs for transportation’; ‘attacks against works and installations containing dangerous forces resulting in excessive loss of life’, such as a dam; ‘injury to civilians or damage to civilian objects’; ‘attacking undefended places or demilitarised zones’; ‘unjustifiable delay in repatriation’; ‘apartheid’; and, directing an attack against a recognised historical monument, work of art or place of worship.

In summary, most of the war crimes, as distinct from genocide and crimes against humanity, enacted by the *Consequential Amendments Act* existed under prior Australian law. While courts have had little experience in applying these offences, Australian criminal law relating to war crimes has not been significantly changed by the implementing legislation.

**D. Responsibility of Commanders and Other Superiors**

It will often be the case that the persons who committed the war crime are not those who ought ultimately to be criminally responsible for the act. The Rome Statute adopts the principle of command responsibility. Article 28 includes within the

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jurisdiction of the ICC the acts of a military commander who will be responsible for crimes against humanity, war crimes and genocide ‘committed by forces under his or her effective command and control’. The commander must either:

- know or should have known that the forces were committing or were about to commit the crime; and
- fail to take all necessary and reasonable measures within his or her power to prevent the acts or to report the matter to the competent authorities.\(^90\)

Similar provisions apply to superiors who are not commanders where people under their authority and control commit international crimes.\(^91\)

The *Consequential Amendments Act* adopts the doctrine of command responsibility by ensuring that such commanders and superiors do not escape punishment where they did not directly commit the offence but failed to take steps to ensure the crimes were investigated and the perpetrators prosecuted.\(^92\) The implementing legislation supplements Article 28 of the Rome Statute by including recklessness in the mental element of liability for commanders. Superiors can also be responsible if they ‘consciously disregarded information that clearly indicated that the subordinates were committing or about to commit such offences’.\(^93\)

### E. Superior Orders and Other Defences

Implementation of the Rome Statute in Australian law has stimulated another revision of the law relating to the defence of superior orders. Under section 16 of the *War Crimes Act*, superior orders are not a defence to war crimes, although they can be taken into account for the purposes of sentencing. Subject to this provision, section 17(1) provides that a defence will be admitted if the act was:

(a) permitted by the laws, customs and usages of war; and,

(b) was not under international law a crime against humanity.

Superior orders can be a defence to a war crime, but not to a crime against humanity. An act will also be justified by the laws, customs and usages of war if it was ‘justified by the exigencies and necessities of the conduct of war’.\(^94\)

The Rome Statute recognises several grounds for excluding criminal responsibility, including mental disease or defect, intoxication, self-defence or the defence of certain property, mistake of fact and duress.\(^95\) Article 33 deals specifically with the defences of superior orders and prescription of law by providing that they will not relieve a person of responsibility unless the person was bound to obey orders of the government or of a superior, did not know the order

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90 Article 28(a).
91 Article 28(b).
92 Section 268.115.
93 Section 268.115(3)(a).
94 Section 17(3), *War Crimes Act*.
95 Articles 31 and 32.
was unlawful and the order was not manifestly unlawful. Orders to commit
genocide or crimes against humanity will always be manifestly unlawful.96

Under Australian law, and as a matter of statutory interpretation, it is presumed
that existing defences to criminal prosecutions will continue to apply unless there
is clear evidence to the contrary.97 It is to be expected therefore that the defences
of mental illness, intoxication, duress, mistake of fact and self-defence will apply
in the usual way before domestic courts. The Consequential Amendments Act
replicates the Rome Statute by adopting the limited defence of obedience to
superior orders in the commission of a war crime and rejecting the defence of
superior orders in relation to crimes against humanity or genocide.98 The law
introduced by the Consequential Amendments Act is that, contrary to the War
Crimes Act, a defence of superior orders will be allowed, provided that the accused
was bound to obey the order, that he or she did not know the order was unlawful
and that it was not manifestly unlawful. The Explanatory Memorandum makes no
mention of this variation, though it may be hazarded that the reason lies in the
perceived need to mirror the defences that would otherwise be available before the
ICC, were it to assert jurisdiction. An accused would be likely to prefer
prosecution for war crimes under the ICC Act, rather than under the
uncompromising position under the War Crimes Act. As a matter of principle,
however, it seems to be a retrograde step to permit the defence of superior orders
under Australian law other than as a relevant consideration on sentencing.

F. Crimes Against the Administration of the Justice of the International
Criminal Court

The ICC Acts also create a series of new Australian crimes relating to the
administration of justice by the ICC. Under the Rome Statute, parties are bound to
enact laws to criminalise offences against the ICC itself.99 The Consequential
Amendments Act creates numerous crimes including perjury, falsifying evidence,
destroying or concealing evidence, deceiving witnesses, corrupting witnesses or
interpreters, threatening witnesses or interpreters, preventing witnesses or
interpreters, preventing the production of things in evidence, reprisals against
witnesses and court officials, perverting the course of justice and receipt of a
corrupting benefit.100 Australian courts will doubtless resort to established
principles of common law to interpret and apply these new offences.

The Consequential Amendments Act not only creates new offences against the
administration of justice but also permits Australian courts to exercise a
jurisdiction extraterritorially where the perpetrator is an Australian citizen.101 As
a general practice, Australian criminal laws do not apply extraterritorially and

96 Article 34.
97 McCormack, above n68 at 21.
98 Section 268.116. The defendant bears the evidential burden of establishing the elements of this
defence: subsection 13.3(3).
99 Article 70(4)(a), Rome Statute.
100 Subdivision J — Crimes Against the Administration of the Justice of the International Criminal
Court.
courts will typically interpret such laws to apply only within territorial jurisdiction.\(^\text{102}\) There is, however, a growth in the exercise of jurisdiction over Australian citizens and residents where the acts occur outside the territorial jurisdiction. Examples include the *Crimes (Foreign Incursions and Recruitment) Act* 1978 (Cth), *Whaling Act* (Cth) and *Crimes (Sexual Offences Overseas) Act* (Cth). It was necessary for the universal implementation of the Rome Statute that the *Consequential Amendments Act* should have a wide geographic scope. As Australia has jurisdiction over its nationals wherever they may be and a universal jurisdiction over war crimes, crimes against humanity and genocide, there will be no violation of established customary international law.

G. Attorney-General’s Consent to Prosecution for International Crimes

While the *Consequential Amendments Act* may have significantly added to and amended Australian criminal law, any trial for international crimes is subject to a major pre-condition. No proceeding may be brought under the amended *Criminal Code Act* without the Attorney-General’s written consent and offences must be prosecuted in his name.\(^\text{103}\) Subject to the jurisdiction of the High Court through the prerogative writ provisions in section 75 of the Constitution, a decision by the Attorney-General to give or to refuse consent to prosecute: ‘... is final, must not be challenged, appealed against, reviewed, quashed or called in question; and is not subject to prohibition, mandamus, injunction, declaration or certiorari’.\(^\text{104}\)

The notion of a ‘decision’ to refuse is defined to include any condition or restriction or any variation of the decision.\(^\text{105}\) In order to ensure that a person may be arrested without delay, the *Consequential Amendments Act* provides that they may be arrested, charged and remanded in custody or released on bail before the Attorney-General has given his consent.

In these ways, the implementing legislation makes it clear, not only that Australia has primacy of jurisdiction, but also that any decision to allow a prosecution will lie exclusively with the unimpeachable ‘political’ judgment of the Attorney-General. While it is highly improbable that an Attorney-General would permit prosecutions against members of his own government or officers of the defence forces, it becomes possible, for example, for any subsequent government to prosecute those who were responsible for any war crimes that might have been committed in the recent conflict in Iraq.

While these provisions appear to be valid under the Constitution, it remains open to the judgment of the ICC itself whether a State party ‘is unwilling or unable genuinely to carry out the investigation or prosecution’ under Article 17 of the

\(^{101}\) Section 268.117 provides that sections 15.3 and 15.4 of the *Criminal Code Act*, extending geographical jurisdiction of the legislation, apply to genocide, crimes against humanity and war crimes and also to crimes against the administration of the justice of the ICC.


\(^{103}\) Section 268.121.

\(^{104}\) Section 268.122(1).

\(^{105}\) Section 268.122(2).
Rome Statute. If a State were to be unwilling or unable to do so, the ICC may assert a secondary jurisdiction over the offences. As is discussed below, however, the ICC may not be able to obtain physical control of the alleged perpetrator for a trial because, if they are present in Australia, the Attorney-General could refuse to surrender the accused under the new International Criminal Court Act 2002 (ICC Act). This legislation is discussed below.


It has been observed that the Consequential Amendments Act sets out the elements of each new offence created by the Rome Statute. By contrast, the ICC Act deals with the more practical aspects of Australia’s working relationship with the ICC by facilitating compliance with Australia’s obligations under the Rome Statute. Parties are required ‘to cooperate fully with the Court in its investigation and prosecution of crimes within the jurisdiction of the Court’. The ICC Act has 189 sections setting out detailed procedures for all the aspects of Australia’s compliance with requests from the ICC, including those for the:

- Arrest or provisional arrest of a person and the surrender of a person to the International Criminal Court;
- Identification and location of a person or items;
- Taking or producing evidence, including expert reports;
- Questioning any person being investigated or prosecuted;
- Service of documents;
- Facilitating people to appear voluntarily before the International Criminal Court;
- Temporary transfer of prisoners to the International Criminal Court;
- Examination of places or sites;
- Execution of searches and seizures;
- Provision of records and documents;
- Protection of victims or witnesses;
- Preservation of evidence; and
- Assistance with the forfeiture of property related to crimes within the jurisdiction of the International Criminal Court.

The ICC Act affirms the primacy of Australia’s right to exercise its jurisdiction over crimes within the jurisdiction of the ICC. No person can be arrested or surrendered at the request of the ICC without a certificate signed by the Attorney-General that it is appropriate to do so. The Attorney-General has an ‘absolute discretion’ whether to provide such a certificate; a discretion that can be reviewed only by reference to prerogative remedies within constitutional limits. The ICC Act provides various factors the Attorney-General must take into account when deciding on competing requests for surrender of an accused person.

106 Article 86.
107 Article 87.
108 Section 3(2), ICC Act.
109 Section 22.
The discretion is not, as a matter of international law, entirely absolute. If the Attorney were to refuse a request for cooperation, and if the ICC were to find that this refusal is contrary to the Rome Statute, the ICC has the power to refer the matter to the Assembly of States Parties or to the Security Council. The ICC Act recognises this possibility by requiring the Attorney-General to take it into account when deciding how to respond to a request for cooperation. These provisions might be tested by a hypothetical question. If, for example, a member of the Australian armed forces were to be the subject of a request for surrender from the ICC in relation to offences committed during the recent conflict in Iraq, Australia could refuse the request on the ground that any trial would be conducted before Australian courts under the principle of complementarity. If, however, no genuine efforts were made to try the perpetrator in Australia, the ICC could assert its secondary jurisdiction and again request surrender. A failure by Australia to cooperate with the ICC in these circumstances would be in breach of Australia’s obligations under the Rome Statute. The ICC could then exercise its power to refer the issue to the Assembly of States Parties or to the Security Council itself. The ICC has, in this sense, a capacity to seek support for its actions both through its membership and the United Nations. While a failure to cooperate with the ICC by Australia would be in breach of the Rome Statute it would not, however, conflict with the ICC Act because the discretion of the Attorney-General is stated to be ‘absolute’ in Australian law.

8. Conclusions

The ICC was born some months before the conflict in and occupation of Iraq. The continuing need for a permanent international criminal court thus needs little demonstration in contemporary foreign relations. Establishment of the ICC has, however, had an unexpected impact on the domestic laws of ratifying States. Already, 11 or so Parties have enacted legislation to ensure that they are able to assert their primary right to prosecute for war crimes, crimes against humanity and genocide. The ICC may prosecute international crimes only once it is clear that a State is unwilling or unable to conduct a trial. The recent cautious practice of the Office of the Prosecutor for the ICC confirms the secondary role that the tribunal is likely to play.

For its part, Australia has given direct legislative effect to its obligations under the Rome Statute. The ICC Acts constitute a ‘quiet revolution’ in Australian law and practice for two reasons. First, the enactment of legislation to give effect to treaty obligations, especially in relation to human rights, is not the norm in

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110 Rome Statute, above n1, Article 87(7).
111 Section 15.
112 Article 86.
Australian practice. Earlier legislation dealing with war crimes had been piecemeal and restricted. War crimes trials were confined to offences arising from the Second World War in Europe and, arising over 50 years after, rendered the prosecution evidence unreliable. No prosecutions of offences had been initiated under the *Geneva Conventions Act* 1958 in relation to war crimes committed after 1945. Against this background, full implementation of the Rome Statute as part of Australian law marks a unique commitment to prosecuting international crimes in its national courts and to cooperating with the ICC. Were a case such as *Nulyarimma* to come before the courts again, it would not be stymied by the argument that genocide is no longer an offence under Australian law. By comparison with the offences created by the *ICC Acts*, the Human Rights and Equal Opportunity Commission, confined to a persuasive and educative role in giving effect to the human rights treaties to which Australia is a party, is significantly weaker.

Secondly, the *Consequential Amendments Act* radically amends Australian criminal laws by granting jurisdiction to courts over acts of genocide and crimes against humanity where they occur after 1 July 2002. In these respects, prosecutions will now be possible, with the authority of the Attorney-General, over serious international crimes that had not previously existed under Australian law. In so far, however, as the *ICC Acts* apply to war crimes already covered by the *Geneva Conventions Act*, the legislation merely restate existing law. The *ICC Acts* amend Australian laws by permitting the defence of superior orders to war crimes and by creating a series of new crimes relating to the administration of justice by the ICC.

Complex questions concerning the jurisdiction of the ICC and interpretation of the substantive crimes developed by the Parties in the *Elements of Crimes* are likely to arise in the future. Most States in the international legal community of 191 nations have remained outside the Rome Statute. ‘Rogue’ States, as currently identified, are typically not parties; Iraq being an obvious example. For non-parties, the development of offences not earlier recognised at customary international law, but now part of the *Elements of Crimes*, may pose problems. Divergent practices and jurisprudence may emerge as States adopt differing means of giving effect to their obligations under the Rome Statute. These and other legal questions will doubtless provide much grist for the international lawyers’ mill. Moreover, as Australian lawyers are not generally familiar with international criminal law, or with the evolving jurisprudence of the ad hoc tribunals for Rwanda and Former Yugoslavia on genocide, crimes against humanity and war crimes, a resurgence of interest in these aspects of international law might be expected. For the present, Australia’s leadership role in negotiating, ratifying and enacting the Rome Statute provide it with the tools to prosecute those accused of international crimes. It remains to be seen whether the political will, represented by the power of the Attorney-General, will exist to authorise prosecution.

114 See, in particular, the *Human Rights and Equal Opportunity Commission Act* 1986 (Cth) and the human rights treaties scheduled to it.
Skin-deep: Proof and Inferences of Racial Discrimination in Employment

JONATHON HUNYOR*

1. Introduction

If we know that racism exists, why is it so hard to prove? In the first three years of complaints under the Racial Discrimination Act 1975 (Cth) being heard by the Federal Court and the Federal Magistrates Court, 1 15 cases were substantively litigated and only three were successful.2 All three involved claims of racial vilification. While it is difficult to make much of such a small sample and there may be a number of possible explanations for the results, the figures serve as a reminder of the well recognised difficulties faced by complainants seeking to prove racial discrimination.3

This article examines the ‘problem of proof’ facing complainants in racial discrimination matters, with a focus on employment cases in which particular

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1 The Human Rights Legislation Amendment Act No 1 1999 (Cth) commenced 13 April 2000. Prior to this time, complaints were heard at first instance by the Human Rights and Equal Opportunity Commission.


difficulties arise. Section Two outlines the nature of this problem which, it is suggested, stems from some of the complex features of racial discrimination and the peculiarities of the employment context in which the personal features of an applicant are inevitably decisive in employment or promotion decisions. Section Three then examines the approach taken to allegations of racial discrimination in selected Australian and English decisions and also considers the circumstances in which courts and tribunals have held that inferences of racial discrimination may be drawn. It is suggested that the cases considered below demonstrate a failure to adequately grasp the nature of racial discrimination, which has resulted in an approach being adopted which contributes to the problems faced by complainants.

In Section Four the article suggests how the issue might better be addressed within the prevailing legal framework. It also makes suggestions as to how the law may develop, most particularly by requiring a respondent employer to carry an evidential burden to provide an explanation for an impugned decision. While the article seeks to encourage a more effective basis for agitating issues of racial discrimination, the limitations of complaint-based discrimination law as a tool for addressing problems of racial discrimination and disadvantage are also acknowledged.

The precise definitions of ‘racial discrimination’ differ across the Australian and English jurisdictions considered. Basic definitions can however, be used for the purposes of cross-jurisdictional analysis. ‘Racial discrimination’ is used to describe discrimination on the basis of race, colour, descent or national or ethnic origin. Direct racial discrimination can be most conveniently defined as ‘less favourable treatment based on race’. Indirect racial discrimination can be defined as occurring in circumstances where an apparently neutral requirement or condition is imposed, with which persons of a particular race are less able to comply, resulting in their less favourable treatment. Such a requirement or condition must, however, be unreasonable having regard to the circumstances of the case.

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4 While I have chosen this narrow scope for the present article, I acknowledge the significant critiques of anti-discrimination and ‘equality’ paradigms as a means of dealing with racism and racial discrimination. See, for example, Alan Freeman, ‘Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine’ (at 29–45) and Derrick Bell Jr, ‘Racial Realism’ (at 302–312) in Kimberlé Crenshaw, Neil Gotanda, Garry Peller & Kendall Thomas (eds), Critical Race Theory: The Key Writings That Formed the Movement (1995).

5 See, for example, s9(1) of the Racial Discrimination Act 1975 (Cth) (hereinafter RDA).

6 Section 9(1) of the RDA provides a more detailed proscription: ‘It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom...’.

7 See, for example, s9(1A) of the RDA.
2. The Invisibility of Racial Discrimination in Employment

In Australian jurisdictions, as in England, it is now settled that a complainant need not prove that a respondent had a motive or intention to discriminate. Courts have therefore accepted that racial discrimination can operate unconsciously. However, some degree of causal connection between the impugned act and the race of a complainant must be shown. There have been a variety of differing formulations of the appropriate test. These have included requiring a complainant to prove that the ‘true basis’ or ‘true ground’ of a decision was race, or that race was ‘a factor’ in the relevant decision of a respondent.

However, proving the ‘true basis’ of an impugned act will often pose difficulties for complainants in discrimination cases. A respondent, Thornton observes, ‘is likely to have a monopoly on knowledge in that it invariably controls all information essential to the complainant’s case.’ In the absence of a clear statement of bias or expression of a discriminatory intention, there may be no direct evidence to support an allegation of discrimination and a complainant may have to attempt to rely upon inferences from the surrounding circumstances — often expressed in terms such as ‘there could be no other reason for the decision other than my race’. In cases involving employment, complainants face particular difficulties.

Discrimination, in the sense of differentiating between applicants, is fundamental to the process of recruitment and promotion in employment. Features that are personal to the candidate will obviously form the basis for such differentiation. It is inevitable that, in making distinctions between candidates, employers will be influenced by a range of preconceptions, prejudices, and stereotypes that are inextricably linked to, amongst other things, race. What makes

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9 The decision of Kiefel J in Creek v Cairns Post Pty Ltd [2001] FCA 1007 at [19]–[28] provides a summary of many of the attempts that have been made to define the exact nature of the causal link required to prove racial discrimination. See also Weinberg J’s decision in Macedonian Teachers’ Association of Victoria Inc v Human Rights and Equal Opportunity Commission (1998) 1 FCR 8 at 33 in which his Honour suggests that the relevant requirement under s9(1) of the RDA is for a ‘sufficient connection’, rather than a ‘causal nexus’.


11 As Einfeld J remarked in Bennett v Everitt (1988) EOC 77,261 at 77,271: ‘... many discrimination cases (other than sexual harassment) have to be proved by comparatively weak circumstantial evidence, without direct or perhaps any witnesses and based only on an intuition or a deeply held if correct belief that there has been discrimination.’
a candidate ‘likely to fit in’ or a ‘good team player’? What makes them appear ‘impressive’? What is a ‘good communicator’? What do ‘the clients want’? All these sorts of considerations are unavoidably cultural and likely to be influenced by the bias and prejudice of even a well-meaning decision-maker.

Consequently, beyond the direct and obvious forms of racism of the ‘we don’t employ Visigoths’ variety, operates a more complex level of prejudice and assumptions that result in racial disadvantage and may manifest systemic racism. There are a number of ways in which this bias operates. An employer from one racial group may, for example, incorrectly interpret certain behaviour from another racial group as indicating qualities or characteristics (such as confidence, arrogance, dishonesty) based on racial norms. Alternatively, the qualities seen as necessary for a job or desirable from the perspective of the employer may be skewed towards a cultural norm or carry a cultural and/or racial bias.12

The manifestation of this sort of racial bias and prejudice can be on a conscious level (‘Visigoths just aren’t team players’) and/or it can be on a subconscious level, whereby assumptions are made about a person’s ability or qualities based on culturally biased criteria (such that the Visigoth applicant ‘just didn’t seem like a team player’). While the conscious is easy to recognise, the difficulty for a complainant will generally be proof — employers are not always going to give expression to such bias and, in the absence of some expression of bias, the employer is the only one who is aware that such considerations formed a basis for the decision. The unconscious is, of course, harder to identify and still harder to prove.

Thornton suggests that employment complaints are notoriously difficult and the burden of proof on a complainant is ‘virtually insuperable’ because the alleged racism ‘quickly becomes interwoven with bona fide considerations of merit, including formal qualifications, experience, workplace practices and relations with one’s peers’.13 She argues:

The social and organisational choices that are designed to maintain homogeneity are rationalised as being conducive to workplace harmony and efficient managerialism. Despite contemporary rhetorical phrases such as ‘managing diversity’, bureaucratic structures, hierarchies and norms operate to disguise the organisational and institutional antipathy towards ‘otherness’. The concept of merit — a central value in determining the ‘best person for the job’ — conveys a veneer of neutrality because of its assumptions of genuine job-relatedness but, in fact, is capable of disguising racism (as well as sexism, homophobia, etc.).14

I argue that the cases reviewed below demonstrate a failure by Australian courts and tribunals to acknowledge this ‘veneer of neutrality’, which has resulted in

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12 It is not suggested that every cultural bias will result in a racial bias — but there is an obvious connection between the two. For further analysis of the nature, manifestations and significance of unconscious racial discrimination, see Charles Lawrence III, ‘The Id, the Ego and Equal Protection Reckoning with Unconscious Racism’ in Crenshaw et al, above n4 at 235–256.
13 Thornton, above n3 at 90.
14 Thornton, above n3 at 91–92.
them being unable to look beneath it. Courts have only rarely acknowledged the complexity of racial discrimination and the position of significant disadvantage facing applicants bringing complaints of discrimination. Indeed, some cases have suggested greater concern about the position and reputation of the respondent, having been accused of the ‘serious matter’ of racial discrimination. Even where the disadvantage faced by a complainant has been recognised, this has not necessarily resulted in the development of principles which might be applied to such cases so as to redress that disadvantage.15

3. Peeling Back the Veneer and the Problems of Proof

The burden of proof in all discrimination cases lies with the complainant, other than where a defence or exemption is relied upon by a respondent. The standard of proof is the civil standard — the balance of probabilities, for which a decision-maker must reach ‘reasonable satisfaction’ that the case has been proved.16 The difficulty faced by complainants in producing direct evidence to support their case makes inferences to be drawn from the surrounding circumstances all the more important for a complainant. Australian courts and tribunals have, however, been reluctant to draw inferences of racism or racial discrimination, despite acknowledging its often systemic nature.

A. The Australian Approach: Early Cases on Inferences

The standard of evidence required to meet the ‘reasonable satisfaction’ of a decision-maker in civil cases will vary according to the nature of the case. The principle was stated by Dixon J in Briginshaw as follows:

[R]easonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters, ‘reasonable satisfaction’ should not be produced by inexact proofs, indefinite testimony, or indirect inferences.17

It should be noted that this is not to suggest a higher standard of proof will be required in particular cases, as Dixon J was careful to point out.18 It may be appropriate to refer to a higher standard of evidence, or evidence of a higher probative value, required by a decision-maker to reach the requisite degree of

15 For an American perspective, see Linda Greene, ‘Race in the Twenty-First Century: Equality Through Law?’ in Crenshaw et al, above n4 at 292–301. She argues that formalistic and ‘hypertechnical’ reasoning in a series of important decisions in the United States Supreme Court significantly limited the scope for racial inequalities to be redressed through the formal legal system.
16 Briginshaw v Briginshaw (1938) 60 CLR 336 (hereinafter Briginshaw).
17 Briginshaw, above n16 at 362.
18 Id at 361.
satisfaction, depending upon the circumstances of the case and such factors as his Honour lists. I would suggest that the proper approach to the Briginshaw principle is to apply it in all cases such that the matters referred to in Dixon J’s statement (the nature and consequences of the facts to be proved etc) are taken into account in determining whether or not the evidence is sufficient to enable a decision-maker to reach a state of reasonable satisfaction.19

The courts have generally regarded allegations of racial discrimination as being of such seriousness that they require a higher standard of evidence, as contemplated by Dixon J’s statement, to enable a decision-maker to reach a state of ‘reasonable satisfaction’.20 As will be seen in the cases below, the perhaps ironic result of this is that the courts have made it harder for those who claim to have been the subject of this wrong to prove it. In particular, reliance by a complainant on inferences of discrimination has been all but impossible.

In Department of Health v Arumugam21 the Victorian Supreme Court considered an allegation of racial discrimination in the appointment of a senior medical position. There was no direct evidence of discrimination. The complainant, of Southern Indian racial origin, relied substantially on his claim to be the best qualified person for the job and the inference that race could be the only reason for him not being appointed.

Fullagar J, having referred to Briginshaw, noted the seriousness of an allegation:

that two prominent and highly qualified medical men, in government positions of trust and responsibility, and engaged in the task of selecting the best man for a very important job … deliberately rejected the best man and appointed a person known to them to be a far less suitable man, and did that substantially, if not entirely, on the ground that the better qualified professional man belonged to a particular race of human beings.22

In such circumstances, his Honour held that an allegation of racial discrimination was a serious matter, ‘not lightly to be inferred’.23

His Honour might equally have reflected on the serious consequence for the ‘highly qualified medical man’ in the form of the complainant if he had, indeed, been subjected to racial discrimination. Rather than acknowledge the situation of disadvantage facing the complainant, his Honour’s approach may serve to compound it — it suggests that the privileged position enjoyed by a respondent

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19 This approach was recently advocated by the Appeal Panel of the NSW Administrative Decisions Tribunal in Dutt v Central Coast Area Health Service [2003] NSWADTAP 3 at [12]–[18].
20 The issue is not exclusive to the area of racial discrimination: it is equally relevant to sex and disability discrimination. See, for example, Font v Paspaley Pearls [2002] FMCA 142 at [127], where Raphael FM applied the ‘more onerous “Briginshaw” test’ to an allegation of sexual harassment.
22 Id at 331.
23 Ibid.
should make a decision-maker slower to make a finding of discrimination, lest their reputation be damaged. In any event, Fullagar J was satisfied that alternative explanations were available for the decision, one being that someone more ‘articulate and aggressive’ was required in the position.

Fullagar J also rejected, as a matter of principle, that an inference could be drawn from a failure by an employer to explain adequately a decision:

If all that is proved, by inference or otherwise, in the absence of explanation, is less than all the elements of proof required for the complaint to succeed, neither a total absence of explanation nor a non-acceptance of an explanation can by itself provide an element of proof required. It can enable already available inferences to be drawn against dishonest explainers with greater certainty, but that is all.24

There are a number of important features of the decision that should be noted. The first is that Fullagar J’s comments about the seriousness of racial discrimination are in the context of conscious discrimination. It does not appear that it was, in fact, argued for the complainant that there had been a ‘deliberate’ rejection of his application on the ground that he ‘belonged to a particular race of human beings’. However, as his Honour was of the view that the Equal Opportunity Act 1984 (Vic) required that discrimination be conscious, the allegation was necessarily treated as one of conscious discrimination.25 The Equal Opportunity Act 1995 (Vic) now provides that motive is irrelevant in determining discrimination.26 As noted above, this is now also the established position in other Australian jurisdictions.

It should also be noted that there is no consideration in the judgment of whether or not the criteria upon which the impugned decision was found to have been based (including that he be ‘articulate’ and ‘aggressive’) or the conclusions of the respondent as to the complainant’s ability to meet those criteria (that he was not articulate and aggressive) might have been culturally and/or racially loaded and therefore biased against the complainant. It is unclear whether or not such matters were argued before Fullagar J, but, having formed the view that the Equal Opportunity Act only made intentional discrimination unlawful, his Honour had no reason to consider that issue.

Fullagar J’s statement, suggesting that the failure by an employer to explain a decision cannot, of itself, give rise to an inference of discrimination, has been criticised by Beth Gaze, who suggests that such an approach requires the complainant to carry the entire evidentiary burden and consequently makes the prohibition of direct discrimination ‘close to unenforceable’.27 This criticism was noted by Smith J in State of Victoria & Others v McKenna28 who sought to suggest that the approach taken by Fullagar J would not have the effect suggested by Gaze. Smith J stated:

24 Id at 330.
25 Id at 327.
27 Gaze, above n3 at 733.
28 (2000) EOC 74,249 at 74,261 (a sex discrimination case).
… a given fact to be considered in considering all the evidence is the race or gender of the complainant which is to be compared with the race or gender of the other persons involved. Another relevant fact would be the existence of racism or sexism in the community. His Honour in fact referred to the presence in the community of the phenomenon of racism, a phenomenon that is known to affect decision making by people… Bearing these points in mind, it might be properly argued, for example, having regard to the existence of racism in the community, that where a choice was made between two individuals, one of whom was black and one of whom was white, and the white (or the black) person was selected, a number of possible inferences arise for consideration, one of them being that race was a factor in the choice because of the existence of racism and the fact that a choice was made between people of different races. An analysis of the full facts of the case may reveal that that inference should not be drawn. Arumugam was such a case; for while the complainant had better qualifications he was ‘less articulate and less aggressive’ and for that reason less suitable. An innocent explanation existed and was accepted. But if, after an analysis of the proven facts, the initial inference of racial discrimination remains open and the innocent explanations offered are rejected, it is not clear to me why the inference should not normally be drawn, even though there is no additional positive evidence to support the drawing of the inference [Emphasis added.]29

This does not, however, properly address the problem identified by Gaze. It assumes that the respondent will be called upon to provide an explanation, but Fullagar J’s statement in Arumugam indicates that their failure to do so cannot be the basis for an inference being drawn against them. Such an approach enables a respondent to sit silent in the knowledge that the complainant is carrying the whole of the evidential burden, while at the same time the knowledge of the basis for the decision, which may disclose conscious or unconscious discrimination, may lie with them alone.

Fullagar J’s approach was adopted by the Supreme Court of Western Australia in KLK Investments Pty Ltd v Riley (No 1)30 in which the complainant, an Aboriginal man, claimed that he was asked to leave a pub following an altercation (for which he also claimed he was not to blame). The complainant alleged racial discrimination, noting that the other person in the altercation was not asked to leave the hotel while his wife and companions, who had not been involved in the altercation, were asked to leave. The manager who had evicted the complainant was not called by the respondent to give evidence. However, a letter was tendered in which the manager explained that the reason the complainant was evicted was that he was ‘known as a troublemaker’. Initially, the Western Australian Equal Opportunity Tribunal upheld the complaint, stating:

It is necessary to examine the evidence with a view to determining what factors influenced [the manager’s] decision to evict. The Tribunal finds it difficult to accept that the hotel manager would ordinarily have evicted people associated with a drinker who was involved in an altercation. This leads the Tribunal to

29 Id at 74,262.
conclude as a matter of inference from the available facts proved by other
evidence, that the complainant was perceived as one of a group of Aboriginal
people. Thus, the complainant was treated less favourably than a white drinker
would have been treated in such circumstances because he was perceived as
belonging to an Aboriginal group, which might cause trouble.... This view of the
matter is reinforced by the fact that [the other person involved in the altercation]
was not evicted from the premises even though the manager had no means from
her own observation of determining which of the two persons involved in the
altercation was at fault. The Tribunal finds support for this conclusion in the terms
of the letter written by [the manager]... and in the fact that she was not called as
a witness by the respondent.\footnote{Quoted in \textit{KLK Investments}, above n30 at 79,667.}

On appeal, however, the Court found that the factual findings of the Tribunal were
not able to ground an inference of racial discrimination. Anderson J held that such
an inference could only be drawn in circumstances ‘such as to fairly raise in an
unsuspicious mind the inference of racial discrimination as the probable
explanation for the different treatment’\footnote{Id at 79,668.} His Honour stated that the rule in \textit{Jones v Dunkel}\footnote{(1959) 101 CLR 298 (hereinafter \textit{Jones v Dunkel}).} went ‘no further than that inferences that are otherwise available in the
evidence’ may be drawn ‘more confidently’ in the absence of an explanation from
a witness who might be expected to have been called by a party.\footnote{Ibid.} Anderson J
concluded:

Serious consequences can follow for a person or corporation held to have
infringed the Act. Proof that the complainant is a person of Aboriginal descent,
and that he and his drinking companions were told to leave the hotel after he had
been involved in a physical encounter with a non-Aboriginal patron just before
closing time, and that the non-Aboriginal patron was not also evicted, is not of
itself evidence of discrimination on the ground of race. To hold that publicans
against whom only those facts are proved must give evidence in explanation or
contradiction of a charge of racial discrimination would, in my respectful opinion,
effectively reverse the onus of proof.\footnote{Ibid.}

As predicted by Gaze in her critique of \textit{Arumugam}, the approach taken by
Anderson J leaves a complainant carrying the whole of the evidential burden.\footnote{Gaze, above n3 at 733.} While his Honour’s statement of the rule in \textit{Jones v Dunkel} is correct, it is arguable
that the Tribunal did no more than apply \textit{Jones v Dunkel} in ‘finding support’ for its
conclusions from the failure of the respondent to call evidence from the manager.
Furthermore, to place an evidentiary burden upon the respondent to provide an
explanation for his conduct, as the Tribunal did at first instance, is not to
‘effectively reverse the onus of proof’. Shifting some of the evidential burden, so
as to require a respondent to adduce evidence on an issue to avoid an adverse
inference being drawn against them, does not alter the requirement that a complainant satisfy a court or tribunal that discrimination is made out. It does, however, go some way to addressing the difficulties faced by complainants in effectively challenging decisions which they believe to be discriminatory.

The elusive nature of proof of systemic discrimination was acknowledged by the Human Rights and Equal Opportunity Commission (hereinafter HREOC) in *Murray v Forward & Merit Protection Review Agency*. In that case, Ms Murray, an Aboriginal woman, had applied for a position with her employer and had been the unanimous choice of the Selection Committee. When the position was not filled, the complainant made a complaint via the internal grievance process. It was the manner in which her grievance was handled that formed the basis complaint to the HREDC. In particular, she was not satisfied with the outcome of the process (she did not get the job) and the fact that she did not have the opportunity to challenge derogatory comments concerning her literacy skills that had been made and recorded in connection with her application.

The complainant claimed that the director of the review agency, Ms Forward, demonstrated racial bias in handling her complaint. It was alleged that Ms Forward was aggressive and patronising during the interview, and lacked sympathy and understanding. The complainant further alleged that Ms Forward had demonstrated racial bias by uncritically accepting the criticisms that had been made regarding the complainant’s literacy in connection with her application. The Commissioner noted that the last of these complaints was supported by the fact that Ms Forward’s recommendation arising out of the grievance process included a reference to the provision of training opportunities to improve the competitive edge of the applicant in pursuing any future promotion opportunities — suggesting that Ms Forward had accepted the criticism of the complainant’s literacy.

The Commissioner identified the problem faced by the complainant in making out her complaint, but concluded that there was simply not enough evidence to establish that there had been discrimination:

> Counsel for the complainant argued that I can draw the inference that Ms Forward was motivated by racism from her ready acceptance of Mr Gallagher’s derogatory assessment, coupled with [an unsubstantiated allegation of dishonesty]. He argued that the only inference to be drawn from such ready acceptance of illiteracy was of racist motivation based on the stereotype of Aboriginality that accepted weakness in this area. Ms Forward was unconsciously reacting to stereotypes because otherwise she would not have assumed that Mr Gallagher was right.

I have not found the resolution of this issue an easy one. Counsel acknowledges that to accept his submission on behalf of the complainant I must exclude all other inferences that might reasonably be open. I am sensitive to the possible presence of systemic racism, when persons in a bureaucratic context can unconsciously be guided by racist assumptions that may underlie the system. But in such a case there must be some evidence of the system and the latent or patent racist attitudes

37 [1993] HREOCA 21 (hereinafter *Murray v Forward*).
that infect it. Here there is no such evidence. Consequently there is no evidence
to establish the weight to be accorded to the alleged stereotype.\textsuperscript{38}

The importance of requiring an explanation from a respondent, and subjecting it to
careful scrutiny, is that it may at least provide some evidence of ‘the system and
the latent or patent attitudes that infect it’. Of course, in \textit{Murray v Forward}, it did
not do so (which may simply be a reflection of the absence of discrimination in that
particular matter). By way of contrast, however, is the decision in \textit{Oyekanmi v National Forge Operations Pty Ltd}.\textsuperscript{39} In that case the complainant, an engineer of
Nigerian national origin, complained of having been discriminated against in the
decision, amongst other things, to terminate his employment. The respondent
employer argued that there were objective (and non-racial) bases for his dismissal.

The complainant gave evidence, not disputed by the respondent, that in an
interview with the respondent he was asked by one of the panel members whether
he foresaw a racial problem working in a company that was ‘all white’.\textsuperscript{40} Evidence
was also given to the Victorian Equal Opportunity Board by the chairman of the
company that it was crucial for the complainant to have ‘credibility’ with company
staff. This included an ability to ‘strike up a working relationship’, ‘sell his ideas’
and be ‘accepted’.\textsuperscript{41}

The Board found that this requirement of credibility stemmed from a
consciousness of the complainant’s race and a perception that the workforce might
be racist and might not accept him. In making this finding, the Board rejected the
apparently objective nature of these criteria, finding that they were not imposed
upon other employees and had not formed part of the complainant’s written terms
of employment. The decisions made by the respondent concerning the
complainant’s employment were found to be based on this consciousness of the
complainant’s race and, accordingly, the complaint was upheld.\textsuperscript{42} This rare
success for a complainant arguably demonstrates the importance of requiring an
explanation from an employer and subjecting those reasons to careful scrutiny,
conscious of the nature of racial discrimination and the dynamics of the
employment context.

\textbf{B. The English Approach}

An early line of English cases suggested a greater willingness to draw inferences
of racial discrimination and require a respondent to explain their conduct. In
\textit{Oxford v Department of Health and Social Security},\textsuperscript{43} a sex discrimination case,
the complainant argued that the respondent should carry the onus of proof as the
complainant could not know all the facts surrounding the decision not to employ
them. The Employment Tribunal rejected that argument, finding that the formal

\begin{itemize}
\item \textsuperscript{38} Id at 4.
\item \textsuperscript{39} (1996) EOC 78,893 (hereinafter \textit{Oyekanmi}).
\item \textsuperscript{40} Id at 78,894.
\item \textsuperscript{41} Id at 78,897.
\item \textsuperscript{42} Ibid.
\item \textsuperscript{43} [1977] ICR 884 (hereinafter \textit{Oxford v DHSS}).
\end{itemize}
burden of proof lay upon the applicant. However, the Tribunal was of the view that in the course of the case the ‘evidential burden may easily shift to the respondent’. The Tribunal approved of the approach taken by the tribunal below, which had stated:

At the conclusion of the [complainant’s] case, we were inclined to reject his claim on the basis that no case against the [employers] had been established. Nevertheless, bearing in mind the difficulties the [complainant] faced, we decided to hear from the [employers] and to give the [complainant] every opportunity to examine their witnesses and question them on matters he considered relevant.

The Tribunal further added that while the burden of proof lies on the applicant, ‘it would only be in exceptional or frivolous cases that it would be right for the industrial tribunal to find at the end of the applicant’s case that there was no case to answer and that it was not necessary to hear what the respondent had to say about it.’

In *Chattopadhyay v Headmaster of Holloway School* the Employment Appeals Tribunal noted the difficulties faced by a complainant bringing an action of racial discrimination and, citing the decision in *Oxford*, stated:

It is for this reason that the law has been established that if an applicant shows that he has been treated less favourably than others in circumstances which are consistent with that treatment being based on racial grounds, the industrial tribunal should draw an inference that such treatment was on racial grounds, unless the respondent can satisfy the industrial tribunal that there is an innocent explanation …

The Court of Appeal approved of this approach in *West Midlands Passenger Transport Executive v Jaquan Singh*. More recently, however, the House of Lords has backed away from this proposition in *Glasgow City Council v Zafar*, holding that a court ‘may’ make an inference, rather than ‘should’. However, the Court in *Zafar* adopted the following approach from the decision of Neill LJ in *King v Great Britain-China Centre*, which still suggests a willingness to require a respondent’s explanation once a complainant has met a very low evidentiary threshold:

… a finding of discrimination and a finding of a difference in race will often point to the possibility of racial discrimination. In such cases the tribunal will look to the employer for an explanation. If no explanation is then put forward or if the tribunal considers the explanation to be inadequate or unsatisfactory it will be

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44 Id at 886.
45 Ibid.
46 Id at 887.
48 Id at 137 (Browne-Wilkinson J).
49 [1988] 1 WLR 730 at 734–735 (hereinafter *West Midlands Transport v Singh*).
50 [1998] 2 All ER 953 (hereinafter *Zafar*).
legitimate for the tribunal to infer that the discrimination was on racial grounds. This is not a matter of law but as May L.J. put it in *North West Thames Regional Health Authority v Noone* ([1988] ICR 813 at 822), ‘almost common sense’… It is unnecessary and unhelpful to introduce the concept of a shifting evidential burden of proof. At the conclusion of all the evidence the tribunal should make findings as to the primary facts and draw such inferences as they consider proper from those facts. They should then reach a conclusion on the balance of probabilities, bearing in mind the difficulties which face a person who complains of unlawful discrimination and the fact that it is for the complainant to prove his or her case.52

The English courts have also considered the extent to which statistics might be used to demonstrate systemic discrimination and overcome some of the difficulties faced by complainants. In *West Midlands Transport v Singh* the Court of Appeal stated:

Statistical evidence may establish a discernible pattern in the treatment of a particular group: if that pattern demonstrates a regular failure of members of the group to obtain promotion to particular jobs and to under-representation in such jobs, it may give rise to an inference of discrimination against the group…. The suitability of candidates can rarely be measured objectively; often subjective judgments will be made. If there is evidence of a high percentage rate of failure to achieve promotion at particular levels by members of a particular racial group, this may indicate that the real reason for refusal is a conscious or unconscious racial attitude which involves stereotyped assumptions about members of that group.53

Conversely, the courts have allowed employers to give evidence that:

persons holding responsible positions include both white and non-white as demonstrating that they have a policy of non-discrimination and as providing evidence from which [a tribunal] could decide in a particular case that the particular applicant had not been discriminated against.54

C. The Australian Approach: Recent Cases

The more recent of these English cases were adopted in part by the Federal Court in *Sharma v Legal Aid Queensland*,55 and, in the same matter on appeal, by the Full Federal Court in *Sharma v Legal Aid (Qld)*.56 The case concerned allegations by a solicitor of Indian national origin that he had experienced racial discrimination on a number of occasions during his employment with the respondent, in particular in relation to the selection process for the positions of solicitor-in-charge at the Mackay office and senior solicitor at the Mt Isa office. In

52 Id at 528–529. See also Zafar, above n51 at 958.
54 Id at 735.
56 [2002] FCAFC 196 (hereinafter *Sharma*).
the case of the Mackay position, Mr Sharma claimed that he fulfilled the selection
criteria and was the highest scoring candidate for the position, but was nevertheless
not offered the position. In relation to the Mt Isa position, he was not rated as
highly as the other candidate, but complained about his treatment by the interview
panel and that he was not given the same latitude in preparing answers to
questions.

The applicant sought to draw inferences to support his claims from the small
number of people employed by the organisation coming from non-English
speaking backgrounds, particularly at the level of professional staff. He also
sought to rely on the fact that no solicitor-in-charge of any of the respondent’s
offices was from a non-English speaking background.

At first instance, Kiefel J accepted that statistical evidence ‘may be able to
convey something about the likelihood of people not being advanced because of
factors such as race or gender.’ She cited with apparent approval *West Midlands
Transport v Singh*, but noted that ultimately it is ‘a question of fact in each case’.
In the present case, all that could be said was that ‘a small number of the workforce
of the respondent comes from non-English speaking backgrounds’.

Ultimately Kiefel J found that there was no evidence of racial discrimination
and that the decision had been made on the basis of an evaluation of the selection
criteria. Her Honour’s conclusion is not surprising given the facts as set out in the
case. Of interest, however, is one matter that did cause her Honour ‘concern’.
This was a reference by a member of the selection panel to the capacity of an
applicant to be ‘the public face of the CEO and the organisation’ in Mackay.
The evidence given on behalf of the respondent was that ‘public face’ referred not to
physical characteristics, but to the functions that a person would be undertaking
and their broader responsibility in the community. This explanation was accepted
by Kiefel J. However, her Honour made the following comment:

> The use of the words ‘the public face [of the respondent]’ to describe the aspect
of the role in question has caused me concern. It is possible that it could refer to
a need for someone to have physical characteristics which are different from those
shared by the applicant’s race. It is possible that underlying it is a view that
someone of the applicant’s racial background and appearance did not fit that
picture. My concerns cannot be elevated, at an evidentiary level, beyond
possibilities … there is no other aspect of the evidence which supports any view
of their approach as including race as a factor.

While this touches upon the issue of apparently neutral, but possibly racially-
based, selection criteria, it does so only in a superficial way. The potential for
racial bias in the notion of the ‘public face’ of an organisation surely goes beyond
the issue of the ‘physical characteristics’ that this may suggest (such as the
requirement to be ‘articulate’, as was the case in *Arumugam*). As noted above,

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57 *Sharma v Legal Aid Queensland*, above n55 at [60].
58 Id at [40].
59 Id at [37].
60 Id at [40].
cultural assumptions and prejudices that can lead to racial discrimination in employment are not skin-deep. It would be unfortunate if courts were only conscious of such matters when expressions such as ‘public face’ were used, and more so if only the superficial connotations of such expressions were considered relevant to the issue of discrimination.

On appeal, the Full Court upheld the decision of Kiefel J and made the following comment which, although citing with apparent approval the English authorities discussed above, suggests that the Australian courts at the federal level will remain circumspect when it comes to drawing inferences:

It is for the applicant who complains of racial discrimination to make out his or her case on the balance of probabilities. It may be accepted that it is unusual to find direct evidence of racial discrimination and the outcome of a case will usually depend on what inferences it is proper to draw from the primary facts found: Glasgow City Council v Zafar [1998] 2 All ER 953, 958. There may be cases in which the motivation is subconscious. There may be cases in which the proper inference to be drawn from the evidence is that, whether or not the employer realised it at the time or not, race was the reason it acted as it did: Nagarajan v London Regional Transport [1999] 3 WLR 425, 433. It was common ground at first instance that the standard of proof for breaches of the RDA is the higher standard referred to in Briginshaw v Briginshaw (1938) 60 CLR 336, 361–362. Racial discrimination is a serious matter, which is not lightly to be inferred: Department of Health v Arumugam [1988] VR 319, 331. No contrary argument was put on the hearing of the appeal, apart from the comment that there is no binding authority on this Court that Briginshaw should be applied in cases of this nature.

In a case depending on circumstantial evidence, it is well established that the trier of fact must consider ‘the weight which is to be given to the united force of all the circumstances put together’. One should not put a piece of circumstantial evidence out of consideration merely because an inference does not arise from it alone: Chamberlain v The Queen [No.2] (1983–1984) 153 CLR 521 at 535. It is the cumulative effect of the circumstances which is important, provided, of course, that the circumstances relied upon are established as facts.61

Despite the apparent acceptance of the ‘higher standard’ in Briginshaw in the decisions in Sharma, there is authority to support the proposition that not every case in which discrimination is alleged will involve issues of importance and gravity such as to attract the higher standard of evidence contemplated by that test. Indeed, it is arguable that Sharma, in which it was not necessary to find that there was conscious discrimination, was a case in which the higher standard was not appropriate.

The Full Federal Court in State of Victoria v Macedonian Teachers Association of Victoria62 considered a complaint in relation to a directive issued by the Victorian government that all Victorian government departments and agencies

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61 Sharma, above n56 at [40].
should thereafter ‘refer for the time being to the language that is spoken by people living in the Former Yugoslav Republic of Macedonia, or originating from it, as Macedonian (Slavonic)’. This was alleged to impair the recognition, enjoyment or exercise of a number of human rights and fundamental freedoms, and thereby constitute racial discrimination.

The Court cited the decision of Deane, Dawson and Gaudron JJ in G v H in which it was noted that ‘due regard must be had to the nature of the issue involved because not every case involves issues of importance and gravity in the Briginshaw sense.’ In G v H, a case involving the paternity of a child, the High Court held that the higher standard of evidence contemplated by Briginshaw was not required. As to the allegations in the Macedonian Teachers Case before them, the Full Court stated:

In this case the complainants did not make, and did not need to make, any ‘serious allegations’ against the respondent, and they submitted to the Commission that it should confine itself in its determination to an examination of the effect of the directive given by the respondent in the terms of s 9 of the Act without considering the motives of the government.

In the present case it is not necessary to make a finding of ‘deliberate’ discrimination against one section of the community in order to favour another section, and the probity of the Victorian government is not in issue. The mere finding that a government has contravened a provision of an anti-discrimination statute without considering the circumstances in which the contravention occurred is not, in our view, sufficient to attract the Briginshaw test. We disagree with his Honour’s conclusion that the absence of intention to discriminate does not significantly diminish the gravity of any such finding. As the first respondent submits, there are many examples of governments being held to have discriminated unlawfully against individuals or groups of individuals without resort to the principle in Briginshaw: They referred to the case of Bacon v Victoria (unreported, Supreme Court of Victoria, Beach J, 7 November 1997) where the issue was whether the education policy of the Victorian government was discriminatory. Beach J held that it was, but his Honour did not invoke the Briginshaw principle. That case was similar, in principle, to this one. No issue of fraud or impro priety was raised or needed to be determined. [Emphasis added.]  

The apparent conflict between these federal authorities was considered in a recent decision by the New South Wales Administrative Decisions Tribunal in Dutt v Central Coast Area Health Service. The Tribunal preferred the view taken in the Macedonian Teachers Case, and held that a finding that a government agency and its staff have contravened a provision of an anti-discrimination statute was not ‘so grave’ as to attract the higher standard of evidence contemplated by the Briginshaw test. The Tribunal stated:

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63 (1994) 181 CLR 387 at 399.
64 Macedonian Teachers Case, above n62 at 50.
65 Id at 50–51.
The allegations made by Dr Dutt are of two sorts. All but one are allegations of unlawful discrimination in the absence of any explicit reference to Dr Dutt’s race. For those allegations Dr Dutt relies on inference to show that his race was a reason for the conduct. The various instances of conduct, if found to have occurred, were the conduct of a range or people, all officers of [the respondent] and all performing their ordinary duties. A finding that that conduct was unlawful discrimination is not in our view so grave as to warrant a reliance on the Briginshaw standard of evidence. Such a finding would be well short of a finding of criminal conduct, and it would cause no reasonably foreseeable adverse consequence to the people concerned. The observation made in [the Macedonian Teachers Case] would be made in similar terms for the [respondent] and the parties to the conduct in this matter: a finding that a government agency and its staff have contravened a provision of an anti-discrimination statute is not, in our view, sufficient to attract the Briginshaw test.67

On appeal, the first instance decision was affirmed.68 However, the Appeal Panel stated, correctly in my view, that the proper approach to the Briginshaw principle is to apply it universally. The matters referred to in Dixon J’s statement in Briginshaw (the nature and consequences of the facts to be proved etc) should therefore be taken into account in all cases to determine whether or not the evidence is sufficient to enable a decision-maker to reach a state of reasonable satisfaction.69

4. **A Way Forward?**

A greater acknowledgement by courts and tribunals of the subtleties and complexities of racial discrimination may enable some of the difficulties faced by complainants to be addressed. It is clear, for example, that complainants are likely to benefit from an approach which does not necessarily regard a finding of racial discrimination as being ‘so grave’ as to attract the higher standard of evidence contemplated by the Briginshaw principle, an approach adopted by the Full Federal Court in the Macedonian Teachers Case and the New South Wales Administrative Decisions Tribunal in Dutt. In particular, such an approach may increase the ability of a complainant to rely on inferences to satisfy the burden of proof.

This is not to suggest that racial discrimination is not serious (nor possibly very serious), but by attaching less opprobrium to a finding of discrimination, particularly in circumstances in which discrimination takes place without an intent to discriminate, courts may be better able to acknowledge and tackle systemic and underlying racial prejudice.70 The fact is that ‘good people’ (such as the ‘highly

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67 Dutt, above n66 at [56].
68 Dutt v Central Coast Area Health Service [2003] NSWADTAP 3.
69 Id at [12]–[18].
70 It does not follow from an approach under which findings of discrimination are seen as ‘less grave’ that, in the event of a successful claim, damages should be reduced. The courts have approached this aspect of the Briginshaw principle as being concerned primarily with the seriousness of the finding for a respondent and found that the phenomenon of racial discrimination, and its impact upon people’s lives, should not be regarded as any less serious as a result.
qualified medical men’ in *Arumugam*) may make decisions which are influenced by racial bias. Furthermore, it should be recognised there is nothing ‘inherently unlikely’ about racism or racial discrimination, such that under the *Briginshaw* principle a higher standard of evidence should be required to make out such a claim. As I have argued above, factors such as race are an inevitable influence on decisions which require a differentiation of candidates based on their personal attributes.

Acknowledging these facts may allow for a more honest and workable approach to complaints of racial discrimination, and would be preferable to stern judicial pronouncements about the seriousness of racial discrimination which ultimately only add to the difficulties faced by complainants in proving their case.

Recognising also that the true basis for a decision, which may manifest conscious or reflect unconscious discrimination, is peculiarly within the knowledge of an employer, an evidential burden should rest on a respondent employer to provide an explanation for that decision. In the absence of such an explanation, and in the event that there is no reasonable explanation for the failure by that party to call such evidence, it is suggested that the approach taken in the English cases following *Oxford v DHSS* be adopted and an inference of discrimination should be drawn. In cases where there is already evidence supporting a finding of discrimination, this may amount to no more than an application of the rule in *Jones v Dunkel*. However, the ‘monopoly on knowledge’ enjoyed by the respondent in discrimination cases justifies the application of the principle in any case where a low ‘case to answer’ hurdle is cleared. To require an explanation from a respondent for an impugned decision will not, it is suggested, place an unduly great burden upon them. It also does not amount to a reversal of the onus of proof. To the extent that this extends the principle in *Jones v Dunkel*, such a development may, however, require legislative initiative.

As a further step towards a more satisfactory approach to racial discrimination cases, courts and tribunals should also be encouraged to scrutinise carefully the reasons proffered by respondents for their decisions, being sensitive to the systemic bias (both conscious and unconscious) which may underlie them. It must be acknowledged that exposing what lies beneath the opaque language of ‘merit’ is unlikely to be an easy task. However, the prospect of indirect discrimination occurring by virtue of the disparate impact of the apparently neutral requirements of a position, would seem to be one approach to the issue which is yet to be explored in the case law.

In all of the cases considered above, it appears that only direct racial discrimination was argued. Both in cases where overt racism was alleged and in cases in which prejudice, conscious or unconscious, was alleged to have operated, the issue was framed as one of less favourable treatment based on a person’s race. It would seem that none of the cases sought to tackle the issue of whether or not the apparently neutral qualities seen as necessary for a job may be skewed towards a cultural norm or carry a cultural and/or racial bias such that persons from a particular racial group are less likely to be able to satisfy those criteria. If such qualities or criteria can be shown to be unreasonable, this would constitute indirect
discrimination. This is another way in which applicants, or tribunals acting in an inquisitorial mode, may seek to more effectively attack workplace discrimination.

The apparent reasonableness of a requirement or condition will limit the circumstances in which indirect discrimination can be shown. Courts should, however, be slow to find that requirements with a discriminatory impact are ‘reasonable’, consistent with the principle that when construing legislation designed to protect human rights, courts have a special responsibility to take into account the purposes and objects of the legislation (to eliminate racial discrimination) and, accordingly, should construe exemptions and provisions restricting rights narrowly.\(^{71}\) Nevertheless, it needs to be acknowledged that one of the significant limitations in the ability of discrimination laws to achieve substantive equality in employment (and elsewhere) is that it does not address the societal disadvantage faced by particular racial or ethnic groups, which results in persons from those groups having a lesser ability to meet selection criteria relating, for example, to English literacy.\(^{72}\) There is, in effect, a societal ‘selection process’ which operates to perpetuate disparities in opportunity and outcome between racial groups and which falls beyond the scope of anti-discrimination legislation.

The courts have also flagged the use of statistics as one way in which complainants may attempt to expose systemic bias. Here, however, complainants are likely to face difficulties in collecting and using such evidence. Even with a co-operative respondent, the provisions of the *Privacy Act 1988* (Cth) may present barriers to such an undertaking, although this would not prevent such information being obtained by subpoena once proceedings have commenced.\(^{73}\) It is also likely that statistics will need to be comprehensive and compelling to be useful. The decision of Kiefel J in *Sharma* illustrates that in cases involving relatively small organisations, statistics may prove little. On the other hand, where larger organisations are involved, even if a complainant is able to collect statistics, the task of doing so will be an onerous one.


72 This disadvantage is most acute in the case of Aboriginal and Torres Strait Islander people, where basic social indicators in relation to education, health and housing reflect profound historical and ongoing disadvantage. See, for example, Aboriginal and Torres Strait Islander Social Justice Commissioner, ‘Indigenous disadvantage as historically derived’ in *Social Justice Report 2000* <http://www.humanrights.gov.au/social_justice/sj_report/index.html>. It is beyond the scope of the article to examine more broadly the limitations of anti-discrimination legislation in combating racial discrimination. For further discussion see: Race Discrimination Commissioner, *The Racial Discrimination Act 1975: A Review* (Canberra: AGPS: 1995); Thornton, above n10, chapter VI; and Freeman and Bell, above n4.

73 An exemption to the *Privacy Act 1988* (Cth) is applicable where the disclosure of information is required or authorised under law: Information Privacy Principle 11(1)(d) (*Privacy Act 1988* (Cth) s14) and National Privacy Principle 2.1(g) (*Privacy Act 1988* (Cth) Sch3, c112).
5. Conclusion

I have argued that the approach taken by some Australian courts to the drawing of inferences in racial discrimination cases is unnecessarily restrictive and creates further obstacles for complainants. An approach that shifts some of the evidentiary weight onto employers reflects appropriately the context in which such cases are brought, and may result in the difficult issues of systemic racial bias being more thoroughly scrutinised.

This will not, however, end the significant difficulties faced by complainants. As Thornton observes, the language of ‘merit’ with which impugned employment decisions will be explained, is still likely to mask racial bias where it exists.74 Indeed it can be noted that in all of the Australian employment cases discussed above, the employer did, in fact, provide an explanation for its decision and, with the exception of Oyekanmi, that explanation was accepted by the court/tribunal.75 Of course, the purpose of suggesting a different approach to this issue is not to chalk up more ‘wins’ for complainants, but rather to try to find a more satisfactory basis for such matters to be more robustly tried. The decision of the Tribunal in Oyekanmi in favour of the complainant arguably illustrates the benefits of the suggested approach.

While it remains the case that the formal complaint-based legal process can only ever play a limited role in addressing issues of racial inequality, we should seek to make the most of what tools we have and seek to peel back the ‘veneer of neutrality’ covering decisions made in the field of employment.

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74 Thornton, above n14.
75 The Tribunal in Dutt did make a partial finding in favour of the complainant in relation to an incident, but otherwise dismissed the complaint. Dutt, above n65 at [104]–[105]. It should be noted that while the history of failed cases highlights some of the problems faced, I am not suggesting that in those cases there was discrimination that simply could not be proved. Such a suggestion is not available on the facts as they appear in those decisions.
Remunerating ‘Fairly and Responsibly’

The ‘Principles of Good Corporate Governance and Best Practice Recommendations’ of the ASX Corporate Governance Council

DAVID ABLEN*

1. Introduction

The ASX Corporate Governance Council1 released its guidelines for best practice in March 2003. The Principles of Good Corporate Governance and Best Practice Recommendations are a significant development for corporate governance practices in Australia.2 In particular are the recommendations concerning directors’ and executives’ remuneration. Following a number of corporate collapses and failures in Australia over the last few years, widespread criticism has emerged over the pay-setting practices of various companies, which often provided for excessive payments at the expense of shareholders’ wealth. As a consequence, directors’ and executives’ remuneration has become a primary focus in the corporate governance debate in Australia. Fundamental to good corporate governance, according to the Council, is the principle that companies remunerate ‘fairly and responsibly’.

In this paper, we examine the Council’s statement of best practice in the context of remuneration. With its objective to develop a set of guidelines that meet international standards, we assess these guidelines’ effectiveness in requiring companies to remunerate ‘fairly and responsibly’. Similarly, in view of the Council’s support for transparency, we highlight the importance of its full disclosure regime to securing openness and accountability in the overall remuneration process.

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1 The ASX Corporate Governance Council was formed in August 2002 for the purpose of developing a framework for best practice that would apply to listed companies in Australia.
2 As the ASX Corporate Governance Council Chairperson, Karen Hamilton, stated: ‘[t]his is a great step forward for governance practices in Australia...’ ASX Corporate Governance Council, Principles of Good Corporate Governance and Best Practice in Australia, Media Release (31 March 2003).
2. The Principles of Good Corporate Governance and Best Practice Recommendations

The ASX Corporate Governance Council specifically identified 10 essential principles ‘that [it] believes underlie good corporate governance’. According to the Council, a company should:

1. Lay solid foundations for management and oversight;
2. Structure the board to add value;
3. Promote ethical and responsible decision-making;
4. Safeguard integrity in financial reporting;
5. Make timely and balanced disclosure;
6. Respect the rights of shareholders;
7. Recognise and manage risk;
8. Encourage enhanced performance;
9. Remunerate fairly and responsibly;
10. Recognise the legitimate interest of stakeholders.

Based on these principles, 28 separate recommendations serve as key guidelines for corporate best practice. As non-binding recommendations, they allow listed entities to adopt only those they consider appropriate to their particular circumstances. Given this flexibility, it may be argued that the recommendations themselves lack teeth. But at the same time, the disclosure of corporate governance practices under ASX Listing Rule 4.10.3, favour an ‘if not, why not?’ approach to compliance. While a company has the flexibility not to adopt any of the Council’s recommendations, this flexibility is tempered by the requirement to explain why.

3 ASX Corporate Governance Council, Principles of Good Corporate Governance and Best Practice Recommendations (Sydney: Australian Stock Exchange, 2003) at 3 (hereinafter ASX Report).
4 ASX Listing Rule 4.10.3 was amended on 1 January 2003. Following its amendment, companies must report the extent to which they have adopted the ASX Corporate Governance Council’s recommendations. If they have not adopted the recommendations companies must then identify those recommendations and provide reasons for not complying with them.
5 This system of disclosure is similar to that adopted in the UK under the Cadbury Code of Best Practice. The Cadbury Committee was set up to report on corporate governance practices, primarily on the control and reporting functions of boards and the role of auditors. In its December 1992 report, it recommended that UK listed companies state in their annual report whether the company had complied with the Code and identify and give reasons for any areas of non-compliance. Following this recommendation, the London Stock Exchange amended its listing rules to require UK listed companies to comply accordingly. See Alice Belchier, ‘Regulation by the Market: the Case of the Cadbury Code and Compliance Statement’ [1995] JBL 321.
6 ASX Report, above n3 at 5.
3. Principle 9 — Remunerate Fairly and Responsibly

Examining the proposals for remuneration under this principle involves two issues. First, how should companies remunerate ‘fairly and responsibly’? This is reflected in the five main recommendations of the Council. Accordingly, achieving best practice involves the need to:

9.1 Provide disclosure in relation to the company’s remuneration policies to enable investors to understand (i) the costs and benefits of those principles and (ii) the link between remuneration paid to directors and key executives and corporate performance;

9.2.1 Establish a remuneration committee;

9.2.2 Clearly distinguish the structure of non-executive directors’ remuneration from that of executives;

9.2.3 Ensure that payment of equity-based executive remuneration is made in accordance with thresholds set in plans approved by shareholders; and

9.2.4 Provide the information indicated in Guide to reporting on Principle 9.

Following these recommendations, the second issue focuses on their effectiveness. That is, how well do these recommendations ensure that companies remunerate ‘fairly and responsibly’?

A Company’s remuneration practices may be defined in relation to both their process and outcome. ‘Process’ involves how remuneration is determined while the ‘outcome’ is the result of this process. The idea of ‘fair and responsible’ remuneration closely looks at these two key stages. It essentially aims for an objective remuneration process which is critical to establishing remuneration amounts that are sufficient and reasonable. As the Council suggests, this principle is driven by two key remuneration policies that companies need to adopt. Fundamentally, these policies should be adequately directed to attracting and retaining talented and motivated individuals who can successfully manage the company.7 According to the Greenbury Committee in the UK,8 companies should avoid paying more than is necessary for this purpose.9 In addition, the remuneration policies of the company should clearly define the relationship between performance and remuneration.10 This represents efforts to align the interests of managers and shareholders by linking pay to performance.

These two policies, articulated by the Council, form the basis upon which the remuneration process and outcome should be influenced. With this in mind, the Council gives support to the idea of ‘full disclosure’ that is consistent with the

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7 Id at 51.
8 The Greenbury Committee was formed in January 1995 to identify good practice in determining directors’ remuneration and prepare a Code of Best Practice for UK public companies. It released a report in July 1995 outlining its recommendations. These were subsequently incorporated into the listing rules of the London Stock Exchange.
10 ASX Report, above n3 at 51.
recommendation of the Greenbury Report. This provides for a greater level of transparency, enabling shareholders to effectively assess the extent to which the process and outcome of remuneration conform to the remuneration policies of the company. Full disclosure more importantly underlies the overriding principles of accountability and openness with respect to directors’ and executives’ remuneration. However the nature of disclosure in this context gives emphasis not only to content but also to its form. That is, disclosure that yields informative value.

4. Process

The determination of remuneration is a critical stage where a company would initially be expected to fulfill any requirement to remunerate ‘fairly and responsibly’. But the entire process must ultimately reside in the company’s remuneration policies that serve to guide its actions and decisions. The remuneration policies suggested by the Council highlight the major issues concerning executive remuneration, in particular, the concept of pay-for-performance, which provides an objective measure of ‘reasonable’ remuneration. The disclosure of these policies, as supported by Recommendation 9.1, proves significant in two ways. First, it articulates the means by which the remuneration process is directed. Second, it allows those involved in the process to be accountable for their decisions. In this regard, disclosure serves as a regulatory technique as argued by Hill. Shareholders, as a result, will therefore be in a better position to determine whether any departure from the companies’ policies has occurred.

A. Remuneration Committees

Determining remuneration is an imperfect process on its own. Notwithstanding a company’s remuneration policies, it is not immune from potential conflicts of interest. In line with the recommendations of the Greenbury Report, the ASX Council recommended (R9.2) the establishment of a remuneration committee by

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11 Greenbury Report, above n9. Hill argues that the ‘full disclosure’ proposal of the Greenbury Committee was a radical departure from the traditional disclosure requirements in England and Australia, which it viewed as manifestly inadequate: Jennifer Hill, “What Reward Have Ye?” Disclosure of Director and Executive Remuneration in Australia’ (1996) 14 C&SLJ 232 at 244.


14 Hill, above n11 at 237.

15 Greenbury Report, above n9 at paras 4.3–4.7. The Report recommended that Boards of Directors set up remuneration committees of Non-Executive Directors as a means to avoid potential conflicts of interest, among other purposes.
the board. While many companies in Australia already have in place remuneration committees that advise on remuneration issues, this initiative represents a positive development in safeguarding the remuneration process. Earlier on, the importance of adopting effective remuneration policies to adequately direct the pay-setting process was recognised. With a remuneration committee, comprised of a majority of independent directors, the task of formulating such policies will be objectively enhanced. As a consequence, the structure of executive remuneration packages by remuneration committees may allow for greater emphasis in linking rewards to corporate and individual performance. As Ramsay suggests, remuneration committees may therefore reduce the inconsistencies in the pay-for-performance relationship.

Despite the merits of remuneration committees, they are nonetheless subject to their own limitations. Although they are a clear procedural improvement, they are by no means a complete answer to perceived problems in the area of director and executive compensation. Hill indicates that non-executive directors may be less impartial than the remuneration committee model would seem to presume: ‘Non-executive directors [may] be constrained by loyalty to other board members and may even have an indirect conflict of interest if they are executive officers of comparable companies.’ Yablon argues that remuneration committee members may also have a personal relationship with the CEO. In essence, remuneration committees are part of the remuneration process that is vulnerable to what Crystal refers to as the ‘ratcheting effect’. Here, it is said that the corporate compensation system, once it gets set in motion, generates higher and higher levels of executive compensation as each participant in the process acts in accordance with his or her own self-interest.

While remuneration committees may add benefit to the overall process, this alone does not provide sole comfort that companies are remunerating ‘fairly and

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17 In a study that examined the views and attitudes of individual shareholders on agency costs and disclosure issues in relation to executive remuneration in Australia, the use of remuneration committees was strongly supported by the respondents. Id at 364–365.

18 In its commentary and guidance, the Council recommended that the remuneration committee should:
   • consist of a minimum of three members, the majority being independent directors; and
   • be chaired by an independent director: ASX Report, above n3 at 54.

19 Id at 54–55.


21 Hill, above n11 at 235.

22 Ibid. See also Joshua A Kreinberg, ‘Reaching Beyond Performance Compensation in Attempts to Own the Corporate Executive’ (1996) 45 Duke LJ 138 at 161–162.


25 Ibid.
responsibly’ at the initial stage. What is needed to ‘counterbalance [any] imperfections’26 is informed and active shareholder oversight of the process by which compensation decisions are made.27 This naturally relies on disclosure. Pursuant to Recommendation 9.5, the Council notes that companies should disclose the names of remuneration committee members and their attendance at meetings of the committee.28 Furthermore, it requires that the charter of the remuneration committee or a summary of the role, rights, responsibilities and their membership requirements, be made publicly available.29 Finally, in efforts to allow for active participation in the process, Recommendation 9.4 indicates that shareholders approve the thresholds on which the payment of equity-based executive remuneration is made. In this regard, shareholders, as equity participants, are able to ensure that the equity-based remuneration of executives conforms to the pay-for-performance policy approach.

5. Outcome

Whether companies remunerate ‘fairly and responsibly’ is a matter that can equally be assessed by the outcome of the remuneration process. Outcome, for this purpose, essentially refers to the directors’ and executives’ actual remuneration amounts or payments. In this case, the most appropriate means of determining if these outcomes are sufficient and reasonable is through its disclosure. Disclosure itself provides valuable insight into the remuneration policies themselves. It similarly permits shareholders to judge whether the remuneration amounts adequately mirror these policies. But the ability to convey meaningful information that matters most to shareholders depends on the extent of its disclosure.

Pressure for increased disclosure has intensified, particularly after the recent experience of high profile corporate collapses in Australia, coincident with existing concerns over the level of executive remuneration. The Council’s support for a ‘full disclosure’ regime highlights efforts to respond to these calls for more disclosure. However, as noted earlier, quantity is no substitute for quality. Fundamentally, whether or not the Council’s recommendations are conducive to an effective disclosure environment will in turn affect shareholders’ evaluation of outcomes relative to processes. According to Hill, ‘[a]dequate disclosure is widely recognised as the linchpin in effective regulation of director and executive remuneration and good corporate governance practices.’30

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26 Hill, above n11 at 235.
27 Yablon, above n23 at 1889.
28 ASX Report, above n3 at 56–57.
29 Id at 57.
30 Hill, above n11 at 232.
A. Content of Disclosure

(i) Directors and Executives

Under Recommendation 9.1, the Council clearly defines the individual(s) for whom the disclosure of remuneration applies. A distinction is made between directors and (non-director) executives. This enables consistent reporting and enhances the value of remuneration information to investors. Identifying executives as non-directors allows more scope in determining and assessing those individuals who make important management decisions. Nonetheless, the Council makes reference to the five highest-paid executives. Depending on the size of a company, the limitation to five executives may restrict the ability of shareholders to properly evaluate both individual and company performance. Clyne argues that this may result in the disclosure of some and not all executives’ remuneration. Disclosing a limited range of key decision-makers may ignore the fact that other executives, outside the five highest-paid, are integral to a company’s performance as a going concern.

(ii) Remuneration amounts

In the spirit of ‘full disclosure’, the Council recommends (R9.1) the disclosure of all elements of remuneration, both monetary and non-monetary. This falls under the same tradition as the disclosure requirements pursuant to s300A of the CL. However, the Council’s recommendations are more advanced as they outline in detail the elements of remuneration. This includes salary, fees, non-cash benefits, bonuses, superannuation contributions, shares and options granted, as well as sign-on payments.

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31 This is in contrast to s300A(c) of the Corporations Law 2001 (Cth) (‘CL’), where the disclosure of emoluments relates to each ‘director’ and each of the five named ‘officers’ of the company. By definition, the term ‘officer’ under s9 of the CL, includes director. No guidance however is available in the Corporations Law as to whether directors and officers, for the purpose of s300A, should be treated as mutually exclusive. This affects the consistency and quality of disclosure.


33 Ibid. In its recommendation, the ASX Corporate Governance Council agreed as a matter of priority to examine the need for additional disclosure, including for a wider range of executives: ASX Report, above n3 at 53.

34 ASX Report, above n3 at 52. The Greenbury Report similarly gave full support to the delineation of all elements of the remuneration package: Greenbury Report, above n9 at paras 5.8–5.12.

35 The failure of s300A(1)(c) to clarify what the ‘elements of emoluments’ constitute highlights the lack of certainty in the provision which undermines its efficacy. See Michael Quinn, ‘The Unchangeables — Director and Executive Remuneration Disclosure in Australia’ (1999) 10 AJCL 89 at 104.

36 These are articulated in ‘Box 9.1: Disclosure of remuneration policy and procedures’, which provide guidance to Recommendation 9.1 of the report.
The disclosure of all elements of directors’ and executives’ remuneration allows for a greater level of transparency, which underpins the quest for an adequate disclosure regime for executive and director remuneration.\(^\text{37}\) Not only does it represent information that shareholders have ‘a legitimate interest in knowing’,\(^\text{38}\) but it reinforces disclosure as a means of controlling agency conflicts. As Brooks et al argue, ‘[a]n adequate disclosure regime provides a mechanism for shareholders to judge the degree of divergence in managers’ and shareholders’ interest.’\(^\text{39}\) It does this by allowing shareholders and investors to evaluate the extent to which remuneration is performance-related, unlike experiences in the past, where executives in Australia have been offered generous payments despite a company’s poor performance.\(^\text{40}\) This rather tenuous link between pay and performance among Australian companies is similarly supported by empirical evidence.\(^\text{41}\)

**B. Form of Disclosure**

**(i) Standardisation**

The form of disclosure can be just as important as the information itself. As Blair and Ramsay argue, ‘[e]ffective disclosure should simplify and standardise the presentation of information to make it more comprehensible.’\(^\text{42}\) Although the ASX Council supports the disclosure of the individual elements of remuneration, it makes no effort to suggest how best to present that information. It seems peculiar that the recommendations of the Council go so far as to advocate a philosophy of full disclosure, yet it neglects to address an issue as fundamental as the form in which that full disclosure should exist. In the US\(^\text{43}\) and UK,\(^\text{44}\) for instance, a detailed tabular presentation of each element of executives’ and directors’ remuneration is required. A tabular format provides clear and accurate information, enabling shareholders to conduct an efficient comparative analysis.\(^\text{45}\) In the absence of any guidelines similar to that of the US and UK, the disclosure

\(^{37}\) Brooks et al, above n16 at 366. In contrast to the approach of the Council, the disclosure of executive remuneration under Australian accounting standards, AASB 1017 and AASB 1034, is based on an aggregate amount. This fig-leaf approach to disclosure lays open the possibilities to self-dealing and abuse which are symptomatic of the classic agency problem.

\(^{38}\) Hill, above n11 at 241.

\(^{39}\) Brooks et al, above n16 at 366. See also Hill, id at 237.

\(^{40}\) The payment of $13.2 million to George Trumbell, former CEO of AMP Ltd, was one of the largest severance payments in Australian commercial history. This was despite the disastrous takeover of GIO Insurance Ltd that led to his departure. See Kristen Svoboda, ‘Corporate Governance Issues Arising from the AMP–GIO Takeover’ (2000) 18 CS&SLJ 395. In another case, a $2.5 million payment was made to the retiring CEO of Pacific Dunlop who presided over the company during a period when net profit had fallen by 45 per cent: Margot Saville, ‘Executives Parting is Sweet Sorrow’ *Sydney Morning Herald* (20 October 2001) at 49.

\(^{41}\) See Defina et al, above n13.

\(^{42}\) Blair & Ramsay (1994) in Hill, above n11 at 243–244.

\(^{43}\) Regulation S-K of the SEC’s rules. Regulation S-K is included as part 229 in the Code of Federal Regulations and applies to public-traded companies that are registered with the SEC.

\(^{44}\) London Stock Exchange Rule 12.42.

\(^{45}\) Hill, above n11 at 246.
of directors’ and executives’ remuneration, under the Council’s recommendations, may lack comparative value. This in turn will undermine the consistency in reporting and therefore the quality of the disclosure.

(ii) Valuation

Each element of remuneration should be disclosed according to an objective valuation measure. This relates particularly to bonuses, profit-shares, shares issued and options granted. The Council favours the valuation of bonuses and profit shares on an accrual basis, regardless of payment date, therefore providing an objective and timely measure. This accounts for the fact that bonuses may not necessarily be paid when they are due. As such, shareholders may not be as surprised if an executive, for example, receives a large bonus amount that can be simultaneously identified with a bonus that was awarded in the past.

In relation to share-based remuneration, the Council recommends that the value of shares and options be disclosed according to an established and recognised method of valuation. In this respect, the proposal offers companies the flexibility in valuing the shares and options of their directors and executives. On the other hand, offering companies a choice of valuation methods may ultimately affect the consistency in reporting across companies. This not only harms the comparative value of the information disclosed — it also undermines an adequate disclosure regime. There should essentially be a uniform method of valuation for shares and options that will better assist shareholders in utilising the information more efficiently for comparative purposes. The Australian Accounting Standards Board has released an Exposure Draft that aims to bring the issue of remuneration in line with international standards including the valuation of options. An international exposure draft dealing with share-based remuneration is similarly being reviewed. In either case, the recommendations of the Council concerning share-based remuneration will need to be revised, to achieve consistency, once an accounting standard has been implemented.

46 It is interesting to note that there is no requirement to disclose the value of options under Australia’s current disclosure regime.
47 Exposure Draft (ED) 106 was issued in May 2002. It proposes to significantly increase the disclosures of directors’ and executives’ remuneration.
48 The objective of this second exposure draft if it becomes an international standard is to ensure that an entity recognises all share-based payment transactions in its financial statements, measured at fair value, so as to provide high quality, transparent and comparable information to users of financial statements. See International Accounting Standard Board, Exposure Draft 2: Share-Based Payment (2002) at 16 (hereinafter ED 2).
49 The International Accounting Standards Board (IASB) is presently considering the comments received on ED 2. It plans to finalise this process by the end of 2003. Assuming this is achieved, an International Financial Reporting Standard (IFRS) will be effective for periods beginning on or after 1 January 2004. There is support for the adoption by Australia of International Accounting Standards by 2005, particularly for the next phase of CLERP 9. If this occurs, it will naturally affect the outcome of Australia’s ED 106.
(iii) Disclosure in Annual Report

In another related matter, the Council indicates that the disclosure of the information based on its recommendations should be included in the corporate governance section of a company’s annual report. Given that this particular section of the annual report is not audited, it may similarly influence the quality of information disclosed. However, the extent of this is not definite.

C. Timing of Disclosure

(i) Annual and continuous disclosure

Any effective disclosure regime must pay regard to the issue of timing. This will undoubtedly have a significant influence on its quality. The disclosure of the Council’s recommendations on best practice in companies’ annual reports represents historical information. Given that these reports may not necessarily account for any changes made to remuneration agreements, the quality of the disclosure may be limited. With this in mind however the continuous disclosure requirements of the ASX may operate to improve the issue of timeliness in relation to the Council’s proposals. According to the Council, employment agreements, or obligations under those agreements, may trigger a continuous disclosure obligation under ASX Listing Rule 3.1. Incidentally, any disclosure to the market should include a summary of the main elements and terms of the agreement.

The continuous disclosure obligations in this case are a significant development toward an effective disclosure regime. They contribute to an environment of openness in the remuneration process and its outcomes. Shorten argues that the nature of the process and the structure of remuneration packages suffer from certain instabilities. Applying the Council’s recommendations to continuous disclosure requirements serves to enhance the quality of disclosure in terms of its timeliness and relevance. Here the adjustment of remuneration contracts reflects practical and commercial realities that may not be captured in the annual reports. Timely disclosure also operates to ‘eliminate surprise’, as the

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50 The Council have stated that the disclosure requirements of its recommendations applies to the company’s first financial year commencing after 1 January 2003: ASX Report, above n3 at 6.
51 ASX Report, above n3 at 5 and 53. ASX Listing Rule 3.1 states that ‘[w]hen an entity is or becomes aware of any information concerning it that a reasonable person would expect to have a material effect on the price or value of the entity’s securities, the entity must immediately tell ASX that information.’ Listing Rule 3.1A provides exceptions to this requirement that focus on the nature of the information, for example, if the information is an incomplete proposal or negotiation or a trade secret.
52 Ibid.
53 Kohler notes that the continuous disclosure rules ‘[a]re the most significant aspect of the remuneration disclosure section of the principles of good corporate governance’: Alan Kohler, ‘New Rules for Chief Executive Pay’ Australian Financial Review (1 April 2003) at 1 and 6.
54 Richard L Shorten, ‘An Overview of the Revolt Against Executive Compensation’ (1992) 45 Rutgers LR 121 at 141. He adds for instance that ‘[i]ncentive plans can be modified and reformulated until they lose almost all sensitivity to long-term performance’ (at 140).
Council suggests.\textsuperscript{55} Disclosing entitlements at the time they are agreed, for instance, may reduce shareholder concerns about executive payments.\textsuperscript{56}

The continuous disclosure process can also limit the quality of disclosure. First, it may influence shareholders to adopt a short-term view of pay versus performance. While agreements may change, this should not detract from the long-term performance objectives of the company. Second, companies may only satisfy the minimum disclosure that is required to inform the market, potentially omitting other relevant information. Finally, there is still the thorny issue of whether particular information concerning executive remuneration will be sensitive enough to have a ‘material effect’ on the company’s share price that forms the basis of the continuous disclosure rules under Listing Rule 4.10.3.

\textbf{D. Policy Issues}

The Council’s philosophy of full disclosure has operated to increase the level of transparency in the remuneration process. As Quinn remarks, ‘[d]isclosure allows a more accurate appraisal of board performance by giving shareholders as much information as possible about remuneration and remuneration policies.’\textsuperscript{57} But while privacy arguments may be raised against the disclosure of all elements of directors’ and executives’ remuneration, for example, public considerations far outweigh the privacy considerations.\textsuperscript{58} Among these public considerations, the most important is the prevention of self-dealing and conflict of interest.\textsuperscript{59} Nonetheless, apart from allowing shareholders to monitor their behaviour, the disclosure of directors’ and executives’ remuneration, including its individual components, involves information that shareholders have a legitimate interest in knowing.\textsuperscript{60}

Although the proposals, by their nature, are only guidelines, the full disclosure approach ensures that companies are both accountable and open with their remuneration processes. This remains the case whether companies adopt the proposals or not. If not, shareholders must be informed of why a company has departed from the Council’s benchmark for best practice. Allowing for transparency, in this regard, is consistent with a major policy approach of the Council — maintaining investor, as well as public, confidence.\textsuperscript{61}

\begin{footnotes}
\item[55] \textit{ASX Report}, above n3 at 53.
\item[56] Ibid.
\item[57] Quinn, above n35 at 92.
\item[58] Ibid.
\item[59] According to Hill, ‘it is well accepted that director and executive remuneration is one of the classic areas in company law where the interests of management and shareholders may diverge and conflict’: above n11 at 237.
\item[60] Id at 241.
\item[61] \textit{ASX Report}, above n3 in \textit{Foreword}.  
\end{footnotes}
6. Conclusion

The recommendations of the ASX Corporate Governance Council in relation to remuneration are indeed a significant development for corporate governance practices in Australia. Allowing shareholders and investors to view the remuneration process and its outcomes through a wider lens of disclosure enhances the correlation between pay and performance. The Council’s key recommendations, such as remuneration committees and the complete disclosure of remuneration components, adequately provide for companies to remunerate ‘fairly and responsibly’. Moreover, they represent an approach that is consistent with international standards of best practice. However, issues such as those concerning the form of disclosure indicate the extent to which the recommendations do not provide a complete solution to the inherent problems of executive remuneration. They do, on the other hand, signal an improvement. Increased transparency has contributed to a more accountable and open pay-setting process. Nonetheless, the landscape of corporate governance in this area is still evolving in Australia, and while a positive step forward has been made with the release of the Council’s ASX Report, we can only hope that the next step is in the same direction.