

volume 40 number 2

june 2018

the sydney law review

articles

- Australia's National Registration and Accreditation Scheme for Health Practitioners: A National Approach to Polycentric Regulation?
– *Belinda Bennett, Terry Carney, Mary Chiarella, Merrilyn Walton, Patrick Kelly, Claudette Satchell and Fleur Beaupert* 159
- Temporary Migrant Labour and Unpaid Work in Australia
– *Joanna Howe, Andrew Stewart and Rosemary Owens* 183
- Australia's Position on Investor–State Dispute Settlement: Fruit of a Poisonous Tree or a Few Rotten Apples?
– *Kyle Dylan Dickson-Smith and Bryan Mercurio* 213
- Illegal Phoenix Activity: Practical Ways to Improve the Recovery of Tax
– *Helen Anderson* 255
- The "Australian Position" Concerning Criminal Complicity: Principle, Policy or Politics?
– *Andrew Dyer* 289

EDITORIAL BOARD

Elisa Arcioni (Editor)

Celeste Black (Editor)

Fady Aoun

Emily Crawford

John Eldridge

Jamie Glister

Emily Hammond

Sheelagh McCracken

Tanya Mitchell

Michael Sevel

Cameron Stewart

Book Review Editor: John Eldridge

Before the High Court Editor: Emily Hammond

Publishing Manager: Cate Stewart

Editing Assistant: Brendan Hord

Correspondence should be addressed to:

Sydney Law Review

Law Publishing Unit

Sydney Law School

Building F10, Eastern Avenue

UNIVERSITY OF SYDNEY NSW 2006

AUSTRALIA

Email: sydneylawreview@sydney.edu.au

Website and submissions: <https://sydney.edu.au/law/our-research/publications/sydney-law-review.html>

For subscriptions outside North America: <http://sydney.edu.au/sup/>

For subscriptions in North America, contact Gaunt: info@gaunt.com

The *Sydney Law Review* is a refereed journal.

© 2018 Sydney Law Review and authors.

ISSN 0082–0512 (PRINT)

ISSN 1444–9528 (ONLINE)

Australia's National Registration and Accreditation Scheme for Health Practitioners: A National Approach to Polycentric Regulation?

**Belinda Bennett,* Terry Carney,† Mary Chiarella,‡
Merrilyn Walton,§ Patrick Kelly,¶ Claudette Satchell#
and Fleur Beaupert****

Abstract

This article analyses the National Registration and Accreditation Scheme ('NRAS') for Australian health practitioners that commenced in July 2010. The article argues that the Scheme represents not only an interesting case study in the development of a national approach to regulation within a federal legal system, but also an example of polycentric regulation given the complex and multilayered nature of health practitioner regulation in Australia. The article analyses the NRAS within the broader regulatory context for health practitioner regulation and the administration of public regulation more generally, and explores the challenges posed by polycentric regulation within a federal system.

* Professor of Health Law and New Technologies, Queensland University of Technology, Brisbane, Queensland, Australia.

† Emeritus Professor, University of Sydney Law School, NSW, Australia.

‡ Professor of Nursing, University of Sydney Nursing School, NSW, Australia.

§ Professor of Medical Education, University of Sydney, School of Public Health, NSW, Australia.

¶ Associate Professor, Biostatistics, University of Sydney, School of Public Health, NSW, Australia.

PhD; University of Sydney Nursing School, NSW, Australia.

** PhD; Independent Researcher, Sydney, Australia.

EM Chiarella, M Walton, B Bennett, T Carney and PJ Kelly received an Australian Research Council Linkage Grant (LP110200075) in partnership with the Australian Health Practitioner Regulation Agency ('AHPRA') and the Health Professional Councils Authority ('HPCA') to compare the complaints and notification system under the national system and in New South Wales ('NSW'). Claudette Satchell was the project manager for the grant and in receipt of salary from this grant. We would like to thank Richard Johnstone for his helpful comments on an earlier version of this article and Anthony Lark for his research assistance. We also gratefully acknowledge the helpful comments and suggestions from our partner organisations and from the anonymous reviewers.

Competing interests: Mary Chiarella is a former member of the AHPRA-affiliated Nursing and Midwifery Board of Australia. Merrilyn Walton is a former member of the AHPRA Management Committee and was the founding Commissioner for the Health Care Complaints Commission in NSW (1994–2000). Belinda Bennett is a member of the AHPRA-affiliated Medical Board of Australia and a former member of the NSW Medical Board and the HPCA-affiliated Medical Council of NSW. The views expressed in this article are the personal views of the authors and should not be taken as representing the views of any of the organisations with which the authors have been or are affiliated.

I Introduction

On 1 July 2010, a new national model for registration and accreditation of Australian health practitioners began operation. The National Registration and Accreditation Scheme ('NRAS') was developed with the agreement of all the state and territory Ministers for Health. The NRAS initially encompassed 10 health professions¹ — with an additional four professions included in the Scheme since 2012 and a fifth soon to join.² National Boards were established for each regulated profession, and the Scheme is governed by new legislation: the *Health Practitioner Regulation National Law* ('*National Law*'), contained in the *Health Practitioner Regulation National Law Act 2009* (Qld). The *National Law* was initially introduced in, and adopted by, the Queensland Parliament. It was then adopted, in some cases with amendments,³ in each Australian state and territory under an applied laws approach or, in the case of Western Australia ('WA'), through the enactment of mirror legislation.⁴

The development of a national approach to registration and accreditation of health practitioners in Australia represents an interesting case study in the development of a national approach to regulation within a federal legal system. However, the Scheme is also situated within a broader regulatory context for both health practitioner regulation and the administration of public regulation more generally. Considered in this context, the Scheme can be seen as an example of 'polycentric' regulation, where the regulatory landscape is populated by an increasingly complex array of regulatory bodies, agencies and objectives.

This article analyses the national regulation of health practitioners in Australia in terms of the move towards a national system of regulation and the polycentric setting of that system. Part II addresses the polycentric nature of health

¹ The professions are chiropractic, dental, medicine, nursing and midwifery, optometry, osteopathy, pharmacy, physiotherapy, podiatry, and psychology: AHPRA, *About the National Scheme* (27 August 2015) <www.ahpra.gov.au/About-AHPRA/What-We-Do/FAQ.aspx>. For an overview of the NRAS see Fiona McDonald, 'Regulation of Health Professionals' in Ben White, Fiona McDonald and Lindy Willmott (eds), *Health Law in Australia* (Thomson Reuters, 2nd ed, 2014) 611, 620.

² Aboriginal and Torres Strait Islander health practice, medical radiation practice, occupational therapy, and Chinese medicine. Health Ministers have also decided to include paramedics in the NRAS and to establish a Paramedicine Board of Australia: COAG Health Council, *Communique: 24 March 2017* <<http://www.coaghealthcouncil.gov.au/Announcements/Meeting-Communiques1>>.

³ See McDonald, above n 1, 620; Gabrielle Wolf, 'Sticking Up for Victoria? Victoria's Legislative Council Inquires into the Performance of the Australian Health Practitioner Regulation Agency' (2014) 40(3) *Monash University Law Review* 890, 898–9. For discussion of the introduction of the *National Law* see generally Louise Morauta, 'Implementing a COAG Reform Using the National Law Model: Australia's National Registration and Accreditation Scheme for Health Practitioners' (2011) 70(1) *Australian Journal of Public Administration* 75.

⁴ *Health Practitioner Regulation (Adoption of National Law) Act 2009* (NSW); *Health Practitioner Regulation National Law (ACT) Act 2010* (ACT); *Health Practitioner Regulation National Law (South Australia) Act 2010* (SA); *Health Practitioner Regulation National Law (Tasmania) Act 2010* (Tas); *Health Practitioner Regulation National Law (Victoria) Act 2009* (Vic); *Health Practitioner Regulation (National Uniform Legislation) Act* (NT). Western Australia joined the National Scheme in October 2010: *Health Practitioner Regulation National Law (WA) Act 2010* (WA) s 4. For discussion see Wolf, *ibid*, 899; Morauta, *ibid*; Senate, Finance and Public Administration References Committee, *The Administration of Health Practitioner Registration by the Australian Health Practitioner Regulation Agency (AHPRA)* (2011) 120.

practitioner regulation in Australia. Part III provides the background to the Scheme from the original recommendations of the Australian Government's Productivity Commission in 2005, through to the simplification of legislation governing health practitioner regulation in Australia with the enactment of the *National Law*. Part IV discusses: the national approach to legislation through use of an applied laws approach; the impact of the retention of a co-regulatory approach in New South Wales ('NSW') and its introduction in Queensland; and the potential for regulatory innovation under both the previous state-based approach to regulation and under the new national approach. Part V revisits polycentric regulation by examining its implications for regulators, governments and the public.

II Polycentric Regulation

The regulation of health professionals was traditionally referred to as 'the privilege of self-regulation'.⁵ In discussing this, Cruess, Johnston and Cruess observed that

members are governed by codes of ethics and profess a commitment to competence, integrity and morality, altruism, and the promotion of the public good within their domain. These commitments form the basis of a social contract between a profession and society, which in return grants the profession a monopoly over the use of its knowledge base, the right to considerable autonomy in practice and the privilege of self-regulation. Professions and their members are accountable to those served and to society.⁶

However, there has been ongoing debate as to whether professions should self-regulate, set their own standards and determine who is admitted and who must leave.⁷ For example, there is concern that self-regulation can create monopolies and limit market competition — although such observations raise the question as to whether there ought to be a 'market' in the provision of health care services.⁸ This debate began to gain momentum in recent decades with concerns expressed from a health workforce perspective about the controls imposed through professional self-regulation. In a 2002 publication by the Eastern Mediterranean Regional Office of the World Health Organization, it was observed that

[t]he term 'professional regulation' is often misunderstood and interpreted as the imposition of bureaucratic, rule-bound requirements which constrain the activities of the profession concerned and serve to maintain the isolation and

⁵ Sylvia R Cruess, Sharon Johnston and Richard L Cruess, 'Profession: A Working Definition for Medical Educators' (2004) 16(1) *Teaching and Learning in Medicine: an International Journal* 74, 74.

⁶ Ibid 74.

⁷ Richard J Baron, 'Professional Self-regulation in a Changing World: Old Problems Need New Approaches' (2015) 313(18) *Journal of the American Medical Association* 1807, doi:10.1001/jama.2015.4060. The meaning of professionalism has also been considered in other professions, including the legal profession: see, eg, Jim Varro and Paul Perell (Working Group on Professionalism) 'Elements of Professionalism' (Paper presented at the Chief Justice of Ontario's Advisory Committee on Professionalism Third Colloquium on the Legal Profession, Faculty of Law, University of Ottawa, 25 October 2004) <www.lsuc.on.ca/advisory-committee-professionalism/>.

⁸ Krystian Seibert, 'Time is Right to Break Monopoly of Regulators' (2006) *On Line Opinion* <<http://www.onlineopinion.com.au/view.asp?article=4304>>.

separateness of the professional from the person for whom they care. Nothing could be further from the truth.⁹

Any analysis of the structure and development of Australian health practitioner regulation must consider the broader role of the historic regulatory environment in shaping the evolution of professional regulation.¹⁰ Regulation of health practitioners in many countries is transitioning away from self-regulatory models dominated by members of the regulated profession. The decline of professional autonomy is increasingly being balanced by systems of ‘networked governance’,¹¹ of public, private, professional and non-governmental bodies that exert influence over the conduct of health professionals and services.¹² Complaints and disciplinary processes form one regulatory strategy in this potentially horizontally networked space,¹³ which Trubek et al identify in the health arena as being populated by a growing plurality of players internationally:

In the effort to respond to ... deficits in health care governance, reformers have made changes that increase the pluralism of the system. These include different roles for government at all levels, a plethora of private organizations to produce and monitor standards, and the new tools for consumer/patient input. The emphasis is on tools such as economic incentives, statistical analysis, and comparative ratings, rather than on administrative controls that allow a closer relationship between enactment and implementation. There is also a shift from hierarchy to organizational networks.¹⁴

Regulatory developments in Australia have matched these international trends. We argue that the multiplicity of professional organisations and regulatory agencies involved in health practitioner regulation in Australia can be described as one of ‘polycentric regulation’.¹⁵ In this context, regulation and complaints handling

⁹ World Health Organization (‘WHO’) Regional Office for the Eastern Mediterranean and Regional Office (‘EMRO’) for Europe, ‘Nursing and Midwifery: A Guide to Professional Regulation’ (EMRO Technical Series No 27, WHO, 2002) 11 <<http://www.who.int/iris/handle/10665/119665>>.

¹⁰ For a review of the international literature on health complaints systems, see Fleur Beaupert et al, ‘Regulating Healthcare Complaints: A Literature Review’ (2014) 27(6) *International Journal of Health Care Quality Assurance* 505.

¹¹ Scott Burris, Peter Drahos and Clifford Shearing, ‘Nodal Governance’ (2005) 30 *Australian Journal of Legal Philosophy* 30, 38.

¹² For discussion, see Stephanie D Short and Fiona McDonald (eds), *Health Workforce Governance: Improved Access, Good Regulatory Practice, Safer Patients* (Ashgate, 2012); Mark Davies, *Medical Self-Regulation: Crisis and Change* (Ashgate, 2007).

¹³ Varun Gauri, ‘Redressing Grievances and Complaints Regarding Basic Service Delivery’ (2013) 41 *World Development* 109.

¹⁴ Louise G Trubek et al, ‘Health Care and New Governance: The Quest for Effective Regulation’ (2008) 2(1) *Regulation & Governance* 1, 3.

¹⁵ Julia Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’ (2008) 2(2) *Regulation & Governance* 137, 140. Black draws a distinction between ‘decentred regulation’ and ‘polycentric regulation’:

‘Decentered regulation’ draws attention away from the state — it denies that there is necessarily a central role for the state in regulation and seeks to draw attention from it; ‘polycentric regulation’ is a term which acts more positively to draw attention to the multiple sites in which regulation occurs at sub-national, national and transnational levels.

See also Judith Healy and Merrilyn Walton, ‘Health Ombudsmen in Polycentric Regulatory Fields: England, New Zealand, and Australia’ (2016) 75(4) *Australian Journal of Public Administration* 492.

for health practitioners are but a subset of the overall health governance mechanisms.¹⁶ As Chiarella and White point out,

[g]overnments already play a significant role in regulation of health professionals: through remuneration systems, both industrial and commercial; through legislation that grants access to the use of therapeutic drugs and devices; through admitting and visiting rights to hospitals and other health care facilities; and through processes such as routine adverse incident reporting, and also investigations and recommendations from Commissions of Inquiry.¹⁷

In recent decades, Australia and other countries have been debating the conceptualisation and operationalisation of regulatory powers. Regulatory theories of ‘responsive regulation’,¹⁸ ‘right-touch’ regulation,¹⁹ and ‘risk regulation’,²⁰ have influenced these debates, with each providing a theoretical framework for part of the regulatory task.

A traditional view of regulation includes a ‘command and control’ measure by government through the use of legal rules backed by criminal or other sanctions, presupposing the State’s use of a unilateral approach to control conduct effectively.²¹ Regulation by government or public agencies can also be construed as ‘deliberate state influence’ via actions designed to guide business and social activities.²²

The concept of responsive regulation developed by Ayres and Braithwaite, in contrast to the traditional command and control paradigm, uses a ‘hierarchy of regulatory strategies of varying degrees of interventionism’,²³ operating under the umbrella of the State.²⁴ They argue that an appropriate response to improper or unlawful conduct must take into account individual circumstances and an attempt to secure compliance by persuasion, rather than punishment.²⁵ In refining their model of responsive regulation, Ayres and Braithwaite developed a pyramid of regulatory strategies with ‘regulatory methods arranged along a continuum of coerciveness’.²⁶

¹⁶ Elke Jakubowski and Richard B Saltman (eds), ‘The Changing National Role in Health System Governance’ (Observatory Studies Series No 29, European Observatory on Health Systems and Health Policies, 2013) <http://www.euro.who.int/_data/assets/pdf_file/0006/187206/e96845.pdf?ua=1>.

¹⁷ Mary Chiarella and Jill White, ‘Which Tail Wags Which Dog? Exploring the Interface between Professional Regulation and Professional Education’ (2013) 33(11) *Nurse Education Today* 1274, 1274.

¹⁸ Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (Oxford University Press, 1992). For a review and assessment, see Christine Parker, ‘Twenty Years of Responsive Regulation: An Appreciation and Appraisal’ (2013) 7(1) *Regulation & Governance* 2.

¹⁹ Popular in the allied health services literature, the term reprises notions of ‘proportionate’ and ‘responsive’ regulation. The term was first coined by the UK Council for Healthcare Regulatory Excellence (‘CHRE’) in its report ‘Right-touch Regulation’ (August 2010). For a review, see Douglas Bilton and Harry Cayton, ‘Finding the Right Touch: Extending the Right-touch Regulation Approach to the Accreditation of Voluntary Registers’ (2013) 41(1) *British Journal of Guidance & Counselling* 14.

²⁰ Malcolm K Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* (Brookings Institution Press, 2000).

²¹ Julia Black, *Critical Reflections on Regulation* (Centre for Analysis of Risk and Regulation, London School of Economics, 2002) 2.

²² Robert Baldwin, Martin Cave and Martin Lodge, *Understanding Regulation: Theory, Strategy, and Practice* (Oxford University Press, 2nd ed, 2012) 23.

²³ Ayres and Braithwaite, above n 18, 6.

²⁴ Peter Grabosky, ‘Beyond Responsive Regulation: The Expanding Role of Non-State Actors in the Regulatory Process’ (2013) 7(1) *Regulation & Governance* 114.

²⁵ Ayres and Braithwaite, above n 18, ch 2.

²⁶ Arie Freiberg, *The Tools of Regulation* (Federation Press, 2010) 97.

Healy further expanded this model for the health care context, by introducing the idea of networked escalation of pressure on the regulated.²⁷ Responsive regulation addresses the interaction between regulators and those regulated, with decisions about regulatory action conceptualised ‘responsively’ within a pyramid of possible regulatory actions and interventions. Ayres and Braithwaite use the term ‘tripartism’ to broaden the perspective of responsive regulation from a binary regulator/regulated approach to include a third party in the regulatory process.²⁸ It has been argued that ‘[t]he use of patients’ complaints for regulatory purposes can be considered as a form of tripartism in which the services learn from their users.’²⁹

The theory of ‘right-touch’ regulation focuses on the philosophy underpinning regulation, one that is ‘based on a proper evaluation of risk, is proportionate and outcome-focussed; [and] creates a framework in which professionalism can flourish and organisations can be excellent’.³⁰ Quantification and qualification of risk are important elements of right-touch regulation; without an evaluation of risk ‘it is impossible to judge whether regulatory action is necessary or whether other means of managing issues are better used.’³¹ ‘Risk-based regulation’ focuses on the nature of harms, identification of risk, and the best means of controlling it.³² Thus, a close relationship exists between risk and regulation. As Freiberg points out,

[u]nder modern risk management approaches, rather than regarding regulation as a series of ad hoc and episodic responses to harms as they occur, risk assessment and management are regarded as the central organising principles underpinning regulatory strategy.³³

Right-touch regulation and risk-based regulation are regulatory approaches designed to inform regulatory priorities by ensuring regulatory authority is guided by an evaluation of the risks that is proportionate. While responsive regulation, right-touch regulation, and risk-based regulation focus on the *ways* regulators regulate, the concept of polycentric regulation³⁴ focuses on the *regulatory setting*, the impact of complexity on the regulatory tasks and the challenge complexity poses for regulatory legitimacy.³⁵

²⁷ Judith Healy, *Improving Health Care Safety and Quality: Reluctant Regulators* (Ashgate, 2011) 5.

²⁸ Ayres and Braithwaite, above n 18, 56–7.

²⁹ Renée Bouwman et al, ‘Patients’ Perspectives on the Role of Their Complaints in the Regulatory Process’ (2016) 19(2) *Health Expectations* 483, 485.

³⁰ CHRE, above 19, 8.

³¹ *Ibid* 10.

³² Sparrow, above n 20; Malcolm K Sparrow, *The Character of Harms: Operational Challenges in Control* (Cambridge University Press, 2008).

³³ Freiberg, above n 26, 12.

³⁴ The concept of polycentric regulation describes an approach to, or characteristic of, complex regulatory systems. The concept is to be distinguished from the application of the term to describe complex *disputes* or problems that render them less amenable to traditional forms of adjudication and more responsive to alternative dispute resolution: see, eg, Carrie Menkel-Meadow, ‘Alternative and Appropriate Dispute Resolution in Context: Formal, Informal, and Semiformal Legal Processes’ in Peter T Coleman, Morton Deutsch and Eric C Marcus (eds), *The Handbook of Conflict Resolution: Theory and Practice* (Wiley, 3rd ed, 2015) ch 50.

³⁵ Black, above n 15.

In Australia, in addition to health practitioner regulation and complaints, professional education plays a role,³⁶ as do bodies that accredit professional education,³⁷ governing boards of hospitals and health services,³⁸ and the Australian Commission on Safety and Quality in Health Care.³⁹ Most health complaints entities ('HCEs') in Australia are broadly comparable to the Patients' Ombudsman systems utilised in European countries,⁴⁰ and form an integral part of Australia's regulation of the health care sector.⁴¹ Indeed, Healy and Walton argue that '[t]he establishment of statutory ombudsmen and other authorities as independent avenues of appeal has made government health departments and professional boards more accountable for responding to complaints about their services and members.'⁴² This wide range of players in health regulation was commented on by Trubek et al:

Regulatory pluralism is one of health care's most striking features ... This includes institutional pluralism or the proliferation of special purpose institutions of all kinds that operate in one way or another as sources of regulatory ordering: organized medical staffs, institutional review boards, medical disciplinary boards, state licensing boards, accrediting bodies, professional associations, standards-making organizations, and health care research organizations, to name just a few.⁴³

While this plethora of regulatory bodies can be seen as a strength, the reality is much more challenging. Healy and Walton note that this diffusion of responsibility within polycentric regulatory systems brings new challenges, 'because no one entity is responsible'.⁴⁴ Furthermore, Black has noted that polycentric forms of regulation

are marked by fragmentation, complexity and interdependence between actors, in which state and non-state actors are both regulators and regulated,

³⁶ Chiarella and White, above n 17.

³⁷ Under the NRAS, accreditation authorities play an important role in the current regulatory framework for regulated health professions: see *National Law* pt 6.

³⁸ Marie M Bismark and David M Studdert, 'Governance of Quality of Care: A Qualitative Study of Health Service Boards in Victoria, Australia' (2014) 23(6) *BMJ Quality & Safety* 474; Marie M Bismark, Simon J Walter and David M Studdert, 'The Role of Boards in Clinical Governance: Activities and Attitudes among Members of Public Health Service Boards in Victoria' (2013) 37(5) *Australian Health Review* 682.

³⁹ This existing agency was made permanent and given expanded advisory responsibilities (akin to the UK Care Quality Commission) under the 2011 health coordination and performance initiatives of the Rudd/Gillard Government: Gianluca Veronesi et al, 'Governance, Transparency and Alignment in the Council of Australian Governments (COAG) 2011 National Health Reform Agreement' (2014) 38(3) *Australian Health Review* 288.

⁴⁰ Lars Fallberg and Stephen Mackenney, 'Patient Ombudsmen in Seven European Countries: An Effective Way to Implement Patients' Rights?' (2003) 10(4) *European Journal of Health Law* 343.

⁴¹ The HCEs are: Health Services Commissioner (within the ACT Human Rights Commission); Health Care Complaints Commission (NSW); Health and Community Services Complaints Commission (NT); Office of the Health Ombudsman (Qld); Health and Community Services Complaints Commissioner (SA); Health Complaints Commissioner (Tas); Health Complaints Commissioner (Vic) and Mental Health Complaints Commissioner (Vic); Health and Disability Services Complaints Office (WA): see AHPRA, *Other Health Complaint Organisations* (9 January 2018) <<http://www.ahpra.gov.au/Notifications/Further-Information/Health-complaints-organisations.aspx>>.

⁴² Healy and Walton, above n 15, 503.

⁴³ Trubek et al, above n 14, 2–3.

⁴⁴ Healy and Walton, above n 15, 503.

and their boundaries are marked by the issues or problems which they are concerned with, rather than necessarily by a common solution.⁴⁵

Grabosky observed a common feature of polycentric regulation is that the State no longer holds a monopoly over regulation, raising the importance of ‘orchestration’ of the roles played by the various State and non-State actors.⁴⁶

Though we argue that the regulatory framework for registration and accreditation of health practitioners in Australia is an example of polycentric regulation, we recognise the influence that the constitutional division of powers as well as historic practices have played. In the remaining parts of this article we explain why this is the case.

III Background to the National Scheme

In 2005, Australia’s Productivity Commission recommended a new national scheme for registration of health practitioners, with the terms of reference including:

to undertake a research study to examine issues impacting on the health workforce including the supply of, and demand for, health workforce professionals, and propose solutions to ensure the continued delivery of quality health care over the next 10 years.⁴⁷

The Commission noted Australia’s health workforce shortages,⁴⁸ and the ‘complex and interdependent’ health workforce arrangements.⁴⁹ It recommended a national approach to health practitioner registration, with a single national cross-profession registration board, supported by professional panels ‘to advise on specific requirements, monitor codes of practice and take disciplinary action’.⁵⁰

The Productivity Commission report also recommended uniform national standards for registration within a health profession.⁵¹ The option of multiple national profession-specific registration boards was seen by the Commission as having advantages such as: national standards; national registration; facilitation of the adoption and revision of national registration standards; administrative efficiencies, reduced compliance burden and easier compilation of data; and opportunity to give greater weight to the public interest.⁵² However, the Commission thought there were even greater benefits to a single national cross-profession registration board, including ‘efficiencies in liaising with other bodies’, greater administrative efficiencies, and ‘reinforcement of a whole of workforce approach to improving efficiency and effectiveness of service delivery’.⁵³

⁴⁵ Black, above n 15, 137.

⁴⁶ Grabosky, above n 24, 115.

⁴⁷ Productivity Commission (Cth), *Australia’s Health Workforce*, (Research Report, 2005) iv.

⁴⁸ *Ibid* xv.

⁴⁹ *Ibid* xix.

⁵⁰ *Ibid* xxv.

⁵¹ *Ibid* 140.

⁵² *Ibid* 141–2.

⁵³ *Ibid* 142.

The Commission's proposed single national registration board reflected the public interest and the minimisation of domination by profession-specific membership:

In the Commission's view, membership of the new national registration board must be constituted to reflect the broader public interest, rather than directly represent particular stakeholders. Thus, while the new board will require an appropriate mix of people with the necessary qualifications and experience to guide its work, members should be appointed in their own right, through a transparent appointment process, rather than as representatives of particular organisations. The board should include at least one member with appropriate consumer knowledge and expertise, reflecting the principal purpose of registration.⁵⁴

When the NRAS was introduced in Australia in 2010, the model implemented did not adopt the Productivity Commission's recommendation for a single, national, cross-profession board. Instead, 10 new national, profession-specific Boards, comprising both practitioner members and community members, were established, with a further four new National Boards established for the professions that later joined the scheme in 2012 (Table 1 below).

Table 1: National Boards

Aboriginal and Torres Strait Islander Health Practice (2012)	Aboriginal and Torres Strait Islander Health Practice Board of Australia
Chinese Medicine (2012)	Chinese Medicine Board of Australia
Chiropractic (2010)	Chiropractic Board of Australia
Dental (2010)	Dental Board of Australia
Medical Radiation Practice (2012)	Medical Radiation Practice Board of Australia
Medicine (2010)	Medical Board of Australia
Nursing and Midwifery (2010)	Nursing and Midwifery Board of Australia
Occupational Therapy (2012)	Occupational Therapy Board of Australia
Optometry (2010)	Optometry Board of Australia
Osteopathy (2010)	Osteopathy Board of Australia
Pharmacy (2010)	Pharmacy Board of Australia
Physiotherapy (2010)	Physiotherapy Board of Australia
Podiatry (2010)	Podiatry Board of Australia
Psychology (2010)	Psychology Board of Australia

In 2015, the Council of Australian Governments ('COAG') Health Council, comprising federal, state and territory health ministers, agreed to move towards

⁵⁴ Ibid 144.

regulation of paramedics within the NRAS.⁵⁵ In 2016, a Senate Committee report recommended that paramedics be registered and accredited nationally and that a paramedic Board be established as part of the Scheme.⁵⁶ The reasons stated by the Senate Committee included the complexity of the tasks performed by paramedics, the other professions that are already regulated in the National Scheme, and the desirability of nationally consistent professional standards for paramedics.⁵⁷ However, broader debates remain about the role of professional regulation and registration and the inclusion of other professions.⁵⁸ These debates are not unique to Australia, with similar debates in the United Kingdom ('UK') over the inclusion of a number of other professions into professional registration schemes, including dance movement therapists, hearing aid dispensers, complementary and alternative medicine practitioners, psychologists, counsellors and psychotherapists, and social workers.⁵⁹ In the UK, voluntary registers have been introduced as an alternative to formal statutory regulation,⁶⁰ and the option of developing voluntary registers in Australia for self-regulated professions was raised in the Independent Review of the NRAS.⁶¹

The NRAS covers both registration and accreditation. The National Boards register health practitioners and establish registration standards.⁶² The *National Law* also establishes an accreditation system for assessment of programs of study offered by education providers, assessment of overseas programs of study or examination, and assessment of qualifications for overseas-trained health practitioners.⁶³ The broad objectives of the Scheme are set out in s 3(2) of the *National Law* and demonstrate the range of priorities encompassed:

The objectives of the national registration and accreditation scheme are:

- (a) to provide for the protection of the public by ensuring that only health practitioners who are suitably trained and qualified to practise in a competent and ethical manner are registered; and
- (b) to facilitate workforce mobility across Australia by reducing the administrative burden for health practitioners wishing to move between participating jurisdictions or to practise in more than one participating jurisdiction; and

⁵⁵ COAG Health Council, *Communique: 6 November 2015* <<https://www.coaghealthcouncil.gov.au/Announcements/Meeting-Communiques1>>. See also Senate Legal and Constitutional Affairs References Committee, Parliament of Australia, *Establishment of a National Registration System for Australian Paramedics to Improve and Ensure Patient and Community Safety* (2016) 3; COAG Health Council, above n 2.

⁵⁶ Senate Legal and Constitutional Affairs References Committee, above n 55.

⁵⁷ *Ibid* ch 4.

⁵⁸ For discussion, see Australian Health Ministers' Advisory Council, *Independent Review of the National Registration and Accreditation Scheme for Health Professions*, (Final Report, 2014) 24–7 <www.coaghealthcouncil.gov.au/Projects/Independent-Review-of-NRAS-finalised>. See also Jonathan Lee Wardle et al, 'Is Health Practitioner Regulation Keeping Pace with the Changing Practitioner and Health-Care Landscape? An Australian Perspective' (2016) 4 *Frontiers in Public Health* <<http://journal.frontiersin.org/article/10.3389/fpubh.2016.00091/full>>.

⁵⁹ Health and Care Professions Council, *The Making of a Multi-Professional Regulator: The Health and Care Professions Council 2001–15* (Research Report, 2015) 23–7 <<http://www.hpc-uk.org/assets/documents/10004DAETheMakingofaMulti-professionalregulator-TheHCPC2001-2015.pdf>>.

⁶⁰ *Ibid* 28; Australian Health Ministers' Advisory Council, above n 58, 26.

⁶¹ Australian Health Ministers' Advisory Council, above n 58.

⁶² *National Law* s 35.

⁶³ *Ibid* pt 6.

- (c) to facilitate the provision of high quality education and training of health practitioners; and
- (d) to facilitate the rigorous and responsive assessment of overseas-trained health practitioners; and
- (e) to facilitate access to services provided by health practitioners in accordance with the public interest; and
- (f) to enable the continuous development of a flexible, responsive and sustainable Australian health workforce and to enable innovation in the education of, and service delivery by, health practitioners.

The *National Law* also created a new agency, the Australian Health Practitioner Regulation Agency ('AHPRA'), to administer the NRAS. Importantly, although profession-specific Boards were retained in the Scheme, AHPRA is a cross-profession agency that works with all 14 boards. As discussed above, the NRAS is a COAG initiative established using an 'applied law' model of state and territory (not Commonwealth) laws, rather than the more usual avenue of 'model' legislation to serve as a basis for 'uniform' legislation. Each state and territory adopts and applies the *National Law* as a law of that jurisdiction. This enables the NRAS (and National Boards and AHPRA) to operate nationally within and across every participating state and territory in Australia in order to achieve national regulation under the constitutional framework of Australia's federal legal system.⁶⁴ However, the use of an applied laws approach, rather than the adoption of uniform laws, does leave scope for individual jurisdictions to enact variations on the *National Law*. This has happened in the case of mandatory reporting of practitioners, with WA and Queensland both enacting variations to these provisions in the *National Law*.⁶⁵

Although NSW joined the National Scheme in relation to registration and accreditation, the State retained its long-established co-regulatory approach to complaints about health practitioners. Changes included NSW's former health practitioner boards becoming health professional councils, with the Health Professional Councils Authority supporting the work of the Councils in NSW.⁶⁶ Thus, in NSW, while AHPRA and the new National Boards manage the registration of NSW health practitioners, complaints are managed jointly by the Councils with the Health Care Complaints Commission under NSW-specific provisions to the *National Law*.⁶⁷ Queensland is also a co-regulatory jurisdiction under the *National Law*, with the establishment of the Office of the Health Ombudsman in 2014.⁶⁸

⁶⁴ Western Australia did not use an applied laws approach and instead adopted mirror legislation: see above n 4.

⁶⁵ *Health Practitioner Regulation National Law* (Queensland) s 141(5); *Health Practitioner Regulation National Law* (WA) s 141(4)(d). These provisions, which are not identical, specify certain exceptions from the mandatory reporting requirements for a practitioner who is treating another practitioner who would otherwise be the subject of a mandatory notification: see Wolf, above n 3, 915–16. There are, however, moves towards addressing this inconsistency, with Health Ministers deciding to explore a nationally consistent approach to mandatory reporting: COAG Health Council, *Communique: 4 August 2017* <<http://www.coaghealthcouncil.gov.au/Announcements/Meeting-Communique1>>.

⁶⁶ Health Professional Councils Authority ('HPCA'), *Welcome to the Health Professional Councils Authority* <www.hpca.nsw.gov.au>.

⁶⁷ *Health Practitioner Regulation (Adoption of National Law) Act 2009* (NSW) s 6.

⁶⁸ *Health Ombudsman Act 2013* (Qld); *Health Practitioner Regulation National Law* (Queensland) s 5 (definition of 'co-regulatory jurisdiction').

Moving to a national approach to registration and accreditation was a significant undertaking. Australia has a large and diverse health workforce. The 2016/17 AHPRA Annual Report reports that there were 678 938 registered health practitioners in Australia,⁶⁹ with the size of the professions ranging from 386 629 nurses and midwives,⁷⁰ and 111 166 medical practitioners,⁷¹ to 608 Aboriginal and Torres Strait Islander health practitioners,⁷² and 4860 Chinese medicine practitioners.⁷³ In addition, the number of regulatory bodies at state and territory level prior to the introduction of the NRAS made the task of consolidation into a national scheme a complex one. Data for over 550 000 registered health practitioners, with more than a million registration records from 37 databases transitioned to the new National Scheme.⁷⁴ The state-based and territory-based nature of professional regulation prior to 2010 meant that each state and territory had their own regulatory schemes, as constitutional powers relating to health remain predominantly with the states and territories.⁷⁵ Prior to the commencement of the NRAS on 1 July 2010, an extensive and complex set of regulatory legislation for health practitioners existed at state and territory level. Although there was a 12-month lead-in to the implementation of the Scheme, the state-based and territory-based staff moved to working in the national system overnight.⁷⁶ Prior to 1 July 2010, more than 50 pieces of legislation governed the registration of health practitioners throughout Australia (Table 2 below). That number was even greater prior to the Australian Capital Territory ('ACT'), the Northern Territory ('NT') and Victoria each introducing single statutes to govern the registration of health practitioners within their respective jurisdictions.⁷⁷

Of the Acts listed in Table 2, only the Health Practitioners Act (NT), the Pharmacists Registration Act 2001 (Tas) (now the Pharmacy Control Act 2001 (Tas)) and the Pharmacists Registration Act 2001 (Qld) (now the Pharmacy Business Ownership Act 2001 (Qld)) remain current, although with amendments. Most of the remaining statutes in Table 2 were repealed as a consequence of the adoption of the National Law in each jurisdiction, although a few were repealed separately. The repeal or amendment of these statutes decommissioned state and territory health practitioner boards (Table 3) in all states except NSW, where the previous boards became professional Councils under new regulatory arrangements as part of the National Scheme.⁷⁸

⁶⁹ AHPRA, *AHPRA Annual Report 2016/17* (2017) summary.

⁷⁰ *Ibid* 22.

⁷¹ *Ibid* 19.

⁷² *Ibid* 15.

⁷³ *Ibid* 16.

⁷⁴ Legal and Social Issues Legislation Committee, Legislative Council, Parliament of Victoria, *Inquiry into the Performance of the Australian Health Practitioner Regulation Agency*, (Report No 2, 2014) 41.

⁷⁵ McDonald, above n 1, 614–15.

⁷⁶ Legal and Social Issues Legislation Committee (Vic), above n 74, 41–2; AHPRA, *Annual Report 2009/10* (2010) 9–11.

⁷⁷ *Health Professionals Act 2004* (ACT); *Health Practitioners Act* (NT); *Health Professions Registration Act 2005* (Vic).

⁷⁸ See above nn 66–7.

Table 2: State and territory legislation regulating health practitioner registration prior to 1 July 2010.⁷⁹

ACT	<i>Health Professionals Act 2004</i>
NSW	<i>Chiropractors Act 2001; Dental Practice Act 2001; Dental Technicians Registration Act 1975; Medical Practice Act 1992; Nurses and Midwives Act 1991; Optical Dispensers Act 1963; Optometrists Act 2002; Osteopaths Act 2001; Pharmacy Practice Act 2006; Physiotherapists Act 2001; Podiatrists Act 2003; Psychologists Act 2001</i>
NT	<i>Health Practitioners Act</i>
Queensland	<i>Chiropractors Registration Act 2001; Dental Practitioners Registration Act 2001; Dental Technicians Registration Act 2001; Medical Practitioners Registration Act 2001; Medical Radiation Technologists Registration Act 2001; Nursing Act 1992; Occupational Therapists Registration Act 2001; Optometrists Registration Act 2001; Osteopaths Registration Act 2001; Pharmacists Registration Act 2001; Physiotherapists Registration Act 2001; Podiatrists Registration Act 2001; Psychologists Registration Act 2001; Speech Pathologists Registration Act 2001</i>
South Australia ('SA')	<i>Chiropractic and Osteopathy Practice Act 2005; Dental Practice Act 2001; Medical Practice Act 2004; Nursing and Midwifery Practice Act 2008; Occupational Therapy Practice Act 2005; Optometry Practice Act 2007; Pharmacy Practice Act 2007; Physiotherapy Practice Act 2005; Podiatry Practice Act 2005; Psychological Practices Act 1973</i>
Tasmania	<i>Chiropractors and Osteopaths Registration Act 1997; Dental Practitioners Registration Act 2001; Dental Prosthetists Registration Act 1996; Medical Practitioners Registration Act 1996; Medical Radiation Science Professionals Registration Act 2000; Nursing Act 1995; Optometrists Registration Act 1994; Pharmacists Registration Act 2001; Physiotherapists Registration Act 1999; Podiatrists Registration Act 1995; Psychologists Registration Act 2000</i>
Victoria	<i>Health Professions Registration Act 2005</i>
WA	<i>Chiropractors Act 2005; Dental Act 1939; Dental Prosthetists Act 1985; Medical Practitioners Act 2008; Medical Radiation Technologists Act 2006; Nurses and Midwives Act 2006; Occupational Therapists Act 2005; Optometrists Act 2005; Osteopaths Act 2005; Pharmacy Act 1964; Physiotherapists Act 2005; Podiatrists Act 2005; Psychologists Act 2005</i>

⁷⁹ Table adapted and updated from Meg Wallace, *Health Care and the Law* (Lawbook, 3rd ed, 2001) 418–20.

Table 3: State and Territory Health Practitioner Boards⁸⁰

ACT	Chiropractors and Osteopaths Board of the ACT; ACT Dental Board; ACT Dental Technicians and Dental Prosthetics Board; ACT Medical Board; ACT Medical Radiation Scientists Board; ACT Nursing and Midwifery Board; ACT Pharmacy Board; ACT Optometrists Board; ACT Physiotherapists Board; ACT Podiatrists Board; ACT Psychologists Board
NSW	Chiropractors Registration Board; Dental Board; Dental Technicians Registration Board; NSW Medical Board; Nurses and Midwives Board; Optical Dispensers Licensing Board; Optometrists Registration Board; Osteopaths Registration Board; Pharmacy Board of NSW; Physiotherapists Registration Board; Podiatrists Registration Board; Psychologists Registration Board
NT	Aboriginal Health Workers Board of the NT; Chiropractors and Osteopaths Board of the NT; Dental Board of the NT; Medical Board of the NT; Nursing and Midwifery Board of the NT; Occupational Therapists Board of the NT; Optometrists Board of the NT; Pharmacy Board of NT; Physiotherapists Board of the NT; Psychologists Registration Board of the NT
Queensland	Chiropractors Board of Queensland; Dental Board of Queensland; Dental Technicians Board of Queensland; Medical Board of Queensland; Medical Radiation Technologists Board of Queensland; Queensland Nursing Council; Occupational Therapists Board of Queensland; Osteopaths Board of Queensland; Optometrists Board of Queensland; Pharmacists Board of Queensland; Physiotherapists Board of Queensland; Podiatrists Board of Queensland; Psychologists Board of Queensland; Speech Pathologists Board of Queensland
SA	Chiropractic and Osteopathy Board of SA; Dental Board of SA; Medical Board of SA; Nursing and Midwifery Board of SA; Occupational Therapy Board of SA; SA Optical Dispensers Registration Committee; Optometry Board of SA; Pharmacy Board of SA; Physiotherapy Board of SA; Podiatry Board of SA; South Australian Psychological Board
Tasmania	Chiropractors and Osteopaths Registration Board of Tasmania; Dental Board of Tasmania; Dental Prosthetists Registration Board; Medical Council of Tasmania; Medical Radiation Science Professionals Registration Board Tasmania; Nursing Board of Tasmania; Optometrists Registration Board; Pharmacy Board of Tasmania; Physiotherapists Registration Board of Tasmania; Podiatrists Registration Board; Psychologists Registration Board of Tasmania

⁸⁰ Table adapted and revised from Productivity Commission (Cth), above n 47, 359–60.

Victoria	Chinese Medicine Registration Board of Victoria; Chiropractors Registration Board of Victoria; Dental Practice Board of Victoria; Medical Practitioners Board of Victoria; Medical Radiation Practitioners Board of Victoria; Nurses Board of Victoria; Optometrists Registration Board of Victoria; Osteopaths Registration Board of Victoria; Pharmacy Board of Victoria; Physiotherapists Registration Board of Victoria; Podiatrists Registration Board of Victoria; Psychologists Registration Board of Victoria
WA	Chiropractors Registration Board of WA; Dental Board of WA; Dental Prosthetists Advisory Committee; Medical Board of WA; Nurses and Midwives Board of WA; Occupational Therapists Registration Board of WA; Optical Dispensers Licensing; Optometrists Registration Board of WA; Osteopaths Registration Board of WA; Pharmaceutical Council of WA; Physiotherapists Registration Board of WA; Podiatrists Registration Board of WA; Psychologists Registration Board of WA

While the regulatory frameworks prior to 2010 were profession-specific, they were not uniform across jurisdictions, meaning that health practitioners working in more than one jurisdiction could be subject to different regulatory requirements.⁸¹ Despite improvements, including the introduction of mutual recognition laws in Australia to facilitate interstate recognition of qualifications,⁸² state-based and territory-based regulation remained fragmented. This meant a lack of uniformity between the state-based and territory-based Acts governing each profession, and a barrier to interstate workforce movement with practitioners needing to apply for separate registration in each state and territory in which they wished to practise.⁸³

The NRAS developed against a backdrop of increasing external scrutiny, with profession-led regulation no longer in step with contemporary expectations by governments and the community for greater accountability of regulators.⁸⁴ Within Australia and overseas, the dominance of a profession-led system shifted as lay membership became a common feature of regulatory bodies.⁸⁵ In NSW, boards

⁸¹ Productivity Commission (Cth), above n 47, 136–7; Anne-Louise Carlton, ‘National Models for Regulation of the Health Professions’ (2005) 23(2) *Law in Context* 21, 25.

⁸² *Mutual Recognition Act 1992* (Cth); *Mutual Recognition (Australian Capital Territory) Act 1992* (ACT); *Mutual Recognition (New South Wales) Act 1992* (NSW); *Mutual Recognition (Northern Territory) Act* (NT); *Mutual Recognition (Queensland) Act 1992* (Qld); *Mutual Recognition (South Australia) Act 1993* (SA); *Mutual Recognition (Tasmania) Act 1993* (Tas); *Mutual Recognition (Victoria) Act 1998* (Vic); *Mutual Recognition (Western Australia) Act 2010* (WA). See Wallace, above n 79, 420.

⁸³ Productivity Commission (Cth), above n 47, 135–8. For discussion of the work of the Productivity Commission more generally see Helen Silver, ‘Getting the Best Out of Federalism — The Role of the Productivity Commission and the Limits of National Approaches’ (2010) 69(3) *Australian Journal of Public Administration* 326; Lyria Bennett Moses, Nicola Gollan and Kieran Tranter, ‘The Productivity Commission: A Different Engine for Law Reform?’ (2015) 24(4) *Griffith Law Review* 657.

⁸⁴ Davies, above n 12.

⁸⁵ For discussion of lay membership in the UK, see *ibid* ch 14. Lay membership was also a feature of the former state and territory boards: see eg, *Nurses and Midwives Act 1991* (NSW) s 9(2)(k); *Health Professions Registration Act 2005* (Vic) s 120(2)(c); *Dental Practice Act 2001* (SA) s 6(1)(d). It is also a feature of the NSW Councils: see HPCA, above n 66. Although the *National Law* currently

voluntarily moved away from self-regulation towards a shared or co-regulatory protective approach,⁸⁶ with the NSW Department of Health's independent Complaints Unit first established in 1984. The Complaints Unit was transformed into an independent regulatory agency in 1993 with the establishment of the Health Care Complaints Commission.⁸⁷ This was the beginning of co-regulation in Australia.⁸⁸

A key feature of co-regulation is the move away from the traditional profession-led approach to regulation. Established in legislation, co-regulation 'obliges the medical board to share the execution of medical disciplinary processes with a "lay" body known [in NSW] as the Health Care Complaints Commission'.⁸⁹ Co-regulation thus represents a major conceptual shift. As discussed above, membership of profession-based boards now includes lay or community members. In addition to sharing disciplinary decisions, co-regulation seeks to provide an additional layer of external oversight, representing a significant departure from traditional peer-review and professional autonomy.⁹⁰

In Australia, since 1984 HCEs⁹¹ have emerged as a primary place for patients and their families to make complaints about their health care.⁹² Most complainants want some action taken to address problems relating to treatment by a health service or professional,⁹³ which is why HCEs are designed to encompass a far wider range of concerns and remedies than litigation.⁹⁴ The operation of HCEs is essentially based on one of three models. One model that applies in most states and territories focuses on complaint resolution services, including conciliation or mediation processes as a primary method of resolving a complaint;⁹⁵ referrals may also be made to more appropriate professional regulation or other bodies.⁹⁶ Serious complaints about health facilities or services can be investigated, but if the serious matter

requires that the position of Chair of a National Board be held by a practitioner member (*National Law* s 33(9)), Health Ministers have agreed to reforms of the *National Law*, including proposed amendments that would allow the position of Chair of a National Board to be held by a community member or a practitioner member of the Board: COAG Health Council, above n 2.

⁸⁶ For discussion of co-regulation as a regulatory model in NSW, see David Thomas, 'The Co-Regulation of Medical Discipline: Challenging Medical Peer Review' (2004) 11(3) *Journal of Law and Medicine* 382.

⁸⁷ *Health Care Complaints Commission Act 1993* (NSW).

⁸⁸ For discussion of the co-regulatory approach in NSW see Thomas, above n 86.

⁸⁹ *Ibid* 383.

⁹⁰ *Ibid*.

⁹¹ 'Health complaints entity' is defined in the *National Law* as 'an entity — (a) that is established by or under an Act of a participating jurisdiction; and (b) whose functions include conciliating, investigating and resolving complaints made against health service providers and investigating failures in the health system': *National Law* s 5 (definitions).

⁹² Merrilyn Walton et al, 'Health Complaint Commissions in Australia: Time for a National Approach to Data Collection' (2012) 11(1) *Australian Review of Public Affairs* 1.

⁹³ David Thomas, 'Walking through Minefields: Health Complaints Commissions in Australia' (2003–2004) 1 *The Australian Health Consumer* 12; Walton et al, *ibid*.

⁹⁴ Marie M Bismark et al, 'Remedies Sought and Obtained in Healthcare Complaints' (2011) 20(9) *BMJ Quality & Safety* 806.

⁹⁵ Kim Forrester, 'Nursing Issues: "I Want You to Listen to My Side of This": Is There a Role for Mediation Early in the Health Care Complaints Process?' (2011) 18(4) *Journal of Law and Medicine* 701, 702; Joanna Manning, 'Access to Justice for New Zealand Health Consumers' (2010) 18(1) *Journal of Law and Medicine* 178.

⁹⁶ McDonald, above n 1, 651.

concerns a health practitioner, it will be referred to AHPRA and the relevant practitioner board. Although only NSW and Queensland are formally co-regulatory jurisdictions under the *National Law*,⁹⁷ the role of HCEs is nonetheless an important aspect of practitioner regulation in all states and territories, with the *National Law* requiring both HCEs and National Boards to notify each other of complaints they received about health practitioners.⁹⁸ A second model — the co-regulatory model as it exists in NSW — has all these functions plus investigative and prosecutorial powers independent from AHPRA and the professional Councils in NSW. The third model is that operating in Queensland and is a mix of the other two models. In Queensland, the Health Ombudsman receives all complaints about health practitioners in Queensland⁹⁹ and manages complaints that may amount to professional misconduct or that may be grounds for suspension or cancellation of a practitioner's registration.¹⁰⁰

IV A National Approach?

The move to a National Scheme for health practitioner regulation is part of broader efforts in Australia to develop harmonised regulatory approaches to overcome practical challenges posed by multiple jurisdictions within a federal system. While state-based and territory-based regulation is diverse, 'Australia is a federation with a long history of cooperation'.¹⁰¹ Accordingly, although the move to a national system is a significant achievement, it sits with the broader federal trends of cooperation and harmonised regulatory solutions. The harmonisation of occupational health and safety laws is another example of this trend.¹⁰² Attempts to develop a *National Law* approach to regulation of the legal profession have proven less successful,¹⁰³ although some harmonisation had been achieved through implementation at state and territory level of model laws.¹⁰⁴ New South Wales and Victoria decided to continue the reform process within their jurisdictions and have enacted a Uniform Law that establishes a common approach to legal services across the two states.¹⁰⁵

⁹⁷ *Health Practitioner Regulation (Adoption of National Law) Act 2009* (NSW); *Health Practitioner Regulation National Law* (Qld).

⁹⁸ *National Law* s 150.

⁹⁹ *Health Ombudsman Act 2013* (Qld) s 25(a).

¹⁰⁰ *Ibid* s 91(1).

¹⁰¹ Cheryl Saunders, 'Collaborative Federalism' (2002) 61(2) *Australian Journal of Public Administration* 69, 69.

¹⁰² Richard Johnstone, 'Harmonising Occupational Health and Safety Regulation in Australia: The First Report of the National OHS Review' (2008) 1 *Journal of Applied Law and Policy* 35; Eric Windholz, 'The Evolution of Australia's Harmonised OHS Laws: Questions for Today and Tomorrow' (2011) 39(6) *Australian Business Law Review* 434.

¹⁰³ Reid Mortensen, 'Australia: The Twain (and Only the Twain) Meet — The Demise of the Legal Profession National Law' (2013) 16(1) *Legal Ethics* 219.

¹⁰⁴ *Ibid* 219.

¹⁰⁵ Law Society of NSW, *Legal Profession Uniform Law* <<https://www.lawsociety.com.au/practising-law-in-NSW/rules-and-legislation/legal-profession-uniform-law>>. NSW and Victoria have both enacted legislation for the application of the Legal Profession Uniform Law in their jurisdictions: *Legal Profession Uniform Law Application Act 2014* (NSW); *Legal Profession Uniform Law Application Act 2014* (Vic).

Achieving harmonised, consistent or uniform legal or regulatory approaches is challenging within federal legal systems. Given that health is largely regulated at the state and territory level for constitutional reasons,¹⁰⁶ it is not surprising there are jurisdictional differences. A federal system gives rise to a number of possible approaches to achieve nationally consistent regulation. These include: the development of reciprocal schemes in which jurisdictions recognise a status conferred by another jurisdiction, as is the case in mutual recognition laws; the adoption of mirror legislation in each jurisdiction, although the uniformity of the laws introduced through such an approach tends to weaken over time; the applied laws model; agreement on policy by the various jurisdictions with separately drafted laws; complementary schemes of Commonwealth and state/territory legislation; the establishment of joint federal/state bodies; or referral of powers to the Commonwealth.¹⁰⁷ In the case of the new NRAS for health practitioners, a national law or ‘applied laws’ approach was used.¹⁰⁸

The governance arrangements for the NRAS are complex, with the regulatory landscape now comprising a new national agency (AHPRA) (under the management of the Agency Management Committee), which supports National Boards and state/territory or regional boards. Other actors include accreditation bodies for each profession, and HCEs.¹⁰⁹ The complexity of the new system represents a challenge for AHPRA’s engagement with the public and the regulated professions. A 2014 Victorian Parliamentary Committee review of the NRAS concluded that

[d]espite the consolidation of numerous State and Territory health profession boards and administrations into one National Registration and Accreditation Scheme, the scheme managed by AHPRA remains a large and complex bureaucracy with potential confusion over lines of responsibility and accountability.¹¹⁰

Additional complexities arise because NSW and Queensland have opted out of the Scheme for complaint handling with separate processes and legislation governing the handling of complaints in each of those jurisdictions. The result of this is that Australia does not have a uniform national system for complaints about health practitioners.¹¹¹ On the other hand, with the adoption of the *National Law*, uniform laws now operate across the country for registration and accreditation of the 14 regulated professions, along with new requirements for criminal history checks,¹¹² requirements for mandatory reporting by practitioners (although these are not uniform),¹¹³ and a national, publicly available register.¹¹⁴ The national collection of data through the NRAS also enables an evidence-based approach to regulation of

¹⁰⁶ McDonald, above n 1, 614–15.

¹⁰⁷ Brian Opeskin, ‘The Architecture of Public Health Law Reform: Harmonisation of Law in a Federal System’ (1998) 22(2) *Melbourne University Law Review* 337, 349–52.

¹⁰⁸ Morauta, above n 3, 76.

¹⁰⁹ See Legal and Social Issues Legislation Committee (Vic), above n 74, 15–21.

¹¹⁰ *Ibid* 26 (finding 2.4). For further discussion of the report see Wolf, above n 3.

¹¹¹ Legal and Social Issues Legislation Committee (Vic), above n 74, 90.

¹¹² *National Law* ss 79, 135. *Ibid* 89–90.

¹¹³ *National Law* ss 140–143. Queensland and WA have both enacted variations to these provisions in the *National Law*. However, as discussed above (n 65), there are moves towards a nationally consistent approach to mandatory reporting.

¹¹⁴ *Ibid* s 222.

health practitioners¹¹⁵ and more accurate calculation and tracking processes for the regulated health workforce.¹¹⁶

The new *National Law* was introduced and passed initially in Queensland and then adopted, with amendments in some jurisdictions, by the rest of Australia.¹¹⁷ As Morauta notes, there are significant advantages with this approach, as it provides for greater national consistency than other approaches and the law can be drafted centrally:

The main policy advantage of the national law model over the mirror legislation model is greater national consistency. Subject to the decisions of parliaments, every jurisdiction adopts the law passed in the lead jurisdiction in exactly the same form.

Another advantage of the model is that the national law is centrally drafted under the auspices of the APCC [Australasian Parliamentary Council Committee] on the basis of instructions issued jointly by all jurisdictions. In the case of the NRAS project a single dedicated drafter was provided by APCC and funded from the project budget. This relieved individual jurisdictions of a major drafting task since it is the role of the APCC to clear the national law in a form acceptable in a technical sense to all parliaments. With large and complex legislation this is a significant efficiency. The *Health Practitioner Regulation National Law Act 2009* ran to over 300 pages.¹¹⁸

The *National Law* approach ‘requires a degree of national consensus which other legislative models do not’,¹¹⁹ as the proposed law must be passed by the Parliament in each state and territory. Morauta notes that the *National Law* approach

places a heavy burden on governments and their ministers in the development phase to achieve detailed national agreement. There is nowhere for anyone to hide: full agreement has to be reached. The national law requires a major effort in the development phase and close attention from ministers to succeed.¹²⁰

However, while the applied laws model is the most efficient way of introducing a common national approach, it is no guarantee against *subsequent* fragmentation. Paradoxically, while public law scholars rate Australia as having ‘one of the most centralized federations in the world’,¹²¹ on an overall index of the degree

¹¹⁵ Marie M Bismark et al, ‘A Step Towards Evidence-based Regulation of Health Practitioners’ (2015) 39(4) *Australian Health Review* 483.

¹¹⁶ Australian Government Department of Health, *Health Workforce Data* (21 January 2017) <http://www.health.gov.au/internet/main/publishing.nsf/Content/health_workforce_data>.

¹¹⁷ McDonald, above n 1, 620. As mentioned previously, WA enacted mirror legislation rather than adopting an applied laws model: see text accompanying above n 4.

¹¹⁸ Morauta, above n 3, 76.

¹¹⁹ *Ibid* 77.

¹²⁰ *Ibid* 82. This can present challenges, though, as individual jurisdictions have less autonomy in a *National Law* approach than they did under the previous state-based and territory-based regulation. In its inquiry into AHPRA, a Victorian Legislative Council report found that ‘The Victorian Minister for Health has less control over the registration and regulation of Victorian health practitioners than existed prior to the commencement of the National Scheme in 2010’: Legal and Social Issues Legislation Committee (Vic), above n 74, 31 (finding 2.5). For discussion of this report see Wolf, above n 3, 908–9. For discussion of the governance arrangements in the NRAS see, Fiona Pacey et al, ‘National Health Workforce Regulation: Contextualising the Australian Scheme’ (2017) 22(1) *International Journal of Health Governance* 5.

¹²¹ Cheryl Saunders and Michelle Foster, ‘The Australian Federation: A Story of the Centralization of Power’ in Daniel Halberstam and Mathias Reimann (eds), *Federalism and Legal Unification* (Springer, 2014) 87, 102.

of uniformity across the whole legal system, Australia is placed quite low.¹²² Comparative studies have found that the options for promoting harmonisation of so-called ‘private law’ areas such as health tend to be rather bare (and more prone to be shaped by political or cultural considerations), leaving more weight to be carried by measures such as intergovernmental coordination or civil society agency lobbying.¹²³ So the governance challenge of preserving a harmonised national scheme of health practitioner regulation and complaints management in health will be an ongoing one. The focus for state and territory ministers remains on the management of complaint/notifications. NSW is the jurisdiction with the largest number of health practitioners, and a well-established co-regulatory system for managing complaints.¹²⁴ Queensland amended its processes for handling of complaints about health practitioners, when it created the Office of the Health Ombudsman to be a co-regulator in conjunction with AHPRA.¹²⁵

A long-recognised feature of federalism is the potential for states to act as ‘laboratories’ for testing new ideas and approaches.¹²⁶ The NSW co-regulatory scheme is one such example; another was the introduction by medical practitioners’ boards of programs to address impaired¹²⁷ or poorly performing practitioners,¹²⁸ in Victoria and NSW. Yet one cannot presume that regulatory innovation is the sole preserve of state-based and territory-based regulation. In a review of health care quality in Australia, a recent Organisation for Economic Co-operation and Development (‘OECD’) report commented favourably on the development of the NRAS and associated innovations:

Australia’s move from a state-based to a national system, linked to annual CPD [continuing professional development] requirements, now makes it a leader in the OECD in the regulation of health professionals. It is also an example of what can be achieved when the federal and state and territory governments work collaboratively. Another innovation worthy of praise is an online register of practising and cancelled health practitioners. Employers and consumers can use it to check a health professional’s registration status.¹²⁹

¹²² Australia ranked 14 out of 19 countries in a recent study, not far above Canada in (ranked 16), the USA (ranked 18) and the EU (ranked last): Daniel Halberstam and Mathias Reimann, ‘Federalism and Legal Unification: Comparing Methods, Results, and Explanations across 20 Systems’ in Daniel Halberstam and Mathias Reimann (eds), *Federalism and Legal Unification* (Springer, 2014) 3, 33.

¹²³ *Ibid* 31–2.

¹²⁴ *Health Practitioner Regulation National Law Act* (NSW).

¹²⁵ Kim Forrester, ‘Nursing Issues: A New Beginning for Health Complaints in Queensland: The *Health Ombudsman Act 2013* (Qld)’ (2013) 21(2) *Journal of Law and Medicine* 273.

¹²⁶ Shannon K McGovern, ‘A New Model for States as Laboratories for Reform: How Federalism Informs Education Policy’ (2011) 86(5) *New York University Law Review* 1519, 1549. ‘At their best, federal systems constitute a “natural laboratory”, in which different policy or service delivery approaches can be observed in action, providing the opportunity for learning about what works and what does not’: Gary Banks and Lawrence McDonald, ‘Benchmarking and Australia’s Report on Government Services’ in Alan Fenna and Felix Knüpling (eds), *Benchmarking in Federal Systems: Roundtable Proceedings* (Productivity Commission, 2012) 199, 201.

¹²⁷ Naham (Jack) Warhaft, ‘The Victorian Doctors Health Program: The First Three Years’ (2004) 181(7) *Medical Journal of Australia* 376.

¹²⁸ Alison Reid, ‘To Discipline or Not to Discipline? Managing Poorly Performing Doctors’ (2005) 23(2) *Law in Context* 91.

¹²⁹ OECD, *OECD Reviews of Health Care Quality: Australia 2015: Raising Standards* (15 November 2015) 61 <<http://www.oecd.org/australia/oecd-reviews-of-health-care-quality-australia-2015-9789264233836-en.htm>> referred to in AHPRA, *Annual Report 2015/16* (2016) 7.

Clearly there is the potential for regulatory innovations to arise within either system.

V Polycentricity of Australian Health Practitioner Regulation

The transition from the state and territory system to the new national system can be seen as simply a *continuation* of the polycentric nature of Australian regulation of health practitioners. With the exception of the health practitioner registration boards, many regulatory actors (state-based and territory-based HCEs, professional colleges, health departments, hospital accreditation requirements) have not changed. It could be argued that the introduction of the NRAS brought little change apart from the *locality* of the regulation. Yet such a conclusion would fail to appreciate the scale of the regulatory change brought about by the introduction of the Scheme.

First, by bringing the 14 regulated professions into a common scheme, each National Board for each profession has become a regulatory actor vis-à-vis each of the other National Boards. This shared regulatory enterprise can be seen in the development of cross-profession registration standards,¹³⁰ and the development and implementation of regulatory principles to govern the work of AHPRA and the National Boards.¹³¹ Previous state and territory, profession-specific legislation governing practitioner boards facilitated independence from other practitioner boards within their jurisdiction — a situation very different from the national scheme under the umbrella of AHPRA or in NSW under the umbrella of HPCA.

Second, the introduction of the NRAS moved the locality of regulation of health practitioners from practitioner boards at the state and territory level to new National Boards. Yet some National Boards established state or regional committees of the National Board,¹³² meaning that even within the NRAS, the regulation by the National Boards may have a local presence.

Third, the National Scheme is a product of the agreement of State and Territory Health Ministers. From the outset, the Scheme has been shaped by the decisions of State Ministers. This shaping is evident in the decision by Queensland and WA to vary the application of mandatory notification laws,¹³³ the decision by NSW not to join the provisions of the *National Law* for the handling of complaints about health practitioners,¹³⁴ and more recently, by Queensland with the establishment of the Office of the Health Ombudsman.¹³⁵ These decisions highlight the multilayered nature of regulation of the *National Law* within Australia's federal legal system and the continued relevance of individual jurisdictions in the shaping of the NRAS.

¹³⁰ See, eg, the English language skills registration standard and the criminal history registration standard: AHPRA, *Annual Report 2014/15* (2015) app 3. See also AHPRA, *Registration Standards* (30 October 2015) <<http://www.ahpra.gov.au/Registration/Registration-Standards.aspx>>.

¹³¹ AHPRA, *Annual Report 2014/15*, *ibid* 8. See also AHPRA, *Regulatory Principles for the National Scheme* (23 November 2015) <<http://www.ahpra.gov.au/About-AHPRA/Regulatory-principles.aspx>>.

¹³² Legal and Social Issues Legislation Committee (Vic), above n 74, 18.

¹³³ See above n 65.

¹³⁴ See above n 67.

¹³⁵ See above n 68.

Fourth, the regulation of health practitioners, irrespective of regulatory or co-regulatory systems must be situated within broader developments about regulatory governance. While the regulation of health practitioners is itself polycentric, it too sits within broader regulatory frameworks that provide oversight to the administration of regulatory functions by regulatory agencies. Internationally, the governance arrangements to support good regulation by regulators,¹³⁶ and the mechanisms whereby regulators can achieve the right balance between competing regulatory priorities¹³⁷ have attracted attention in recent years. These trends have also been evident in Australia, with the Australian Government's *Guide to Regulation* setting out 10 principles for Australian Government policymakers, aimed at reducing the burdens of regulation.¹³⁸ In the context of health practitioner regulation, AHPRA and the National Boards have a set of regulatory principles to guide their work,¹³⁹ which includes a risk-based approach to regulation.¹⁴⁰

Fifth, government oversight also constitutes a major feature of the regulatory landscape in this area in Australia. The high-profile nature of health care within the Australian political landscape means that governments may feel the need for a more hands-on form of oversight beyond that of governance frameworks for regulators. Thus, although the NRAS is only eight years old, there have been a number of reviews of the Scheme and its operation, including the required review,¹⁴¹ as well as inquiries on specific issues such as the registration of international medical graduates,¹⁴² and the handling of complaints under the *National Law*.¹⁴³

Each of the elements outlined above adds a new set of regulatory actors to be considered as part of the regulatory task, and/or extra layers of complexity. This is not necessarily a criticism of the polycentricity of the system. It does mean that regulators need to remain attuned to the orchestration¹⁴⁴ and other demands this complexity makes upon them in terms of their engagement with their various constituencies: different levels of government, the regulated professions, other regulatory actors such as HCEs, and the general public. This goes back to the introduction of the article and Part I and the nature of the regulatory task for regulators in terms of identifying their regulatory priorities and strategies, and in communicating them effectively to the public and the professions they serve.

¹³⁶ OECD, *The Governance of Regulators: OECD Best Practice Principles for Regulatory Policy* (OECD Publishing, 2014).

¹³⁷ See, eg, Sparrow, above n 20; Sparrow, above n 32; CHRE, above n 19.

¹³⁸ Australian Government, *The Australian Government Guide to Regulation* (2014) 2 <<https://www.pmc.gov.au/resource-centre/regulation/australian-government-guide-regulation>>.

¹³⁹ AHPRA, *Annual Report 2014/15*, above n 130, 8.

¹⁴⁰ *Ibid.*

¹⁴¹ Australian Health Ministers' Advisory Council, above n 58.

¹⁴² House of Representatives Standing Committee on Health and Ageing, Parliament of Australia, *Lost in the Labyrinth: Report on the Inquiry into Registration Processes and Support for Overseas Trained Doctors* (2012).

¹⁴³ Senate Community Affairs References Committee, Parliament of Australia, *Medical Complaints Process in Australia* (2016).

¹⁴⁴ Grabosky, above n 24, 115.

VI Conclusion

The regulatory system for health practitioners in Australia is complex and multilayered. Much of the complexity arises from the wide array of institutional actors within the NRAS, within the health system (HCEs, co-regulatory bodies, health departments, professional organisations), and within the system of public regulation more generally. The introduction of the NRAS has simplified the regulatory landscape for health practitioners by moving from state-based and territory-based regulation to national registration standards overseen by National Boards. Yet at the same time as State- and Territory-based regulators have largely been replaced by the Scheme, new regulatory actors have entered with the establishment of National Boards, AHPRA, HPCA in NSW, and the Health Ombudsman in Queensland.

Australian regulation of health practitioners can be characterised as a form of polycentric regulation. Of note is that this polycentric regulation has developed within a federal legal system that itself adds layers of polycentricity to the system. As the NRAS continues to mature, the ways in which regulators, governments and the public navigate this complex landscape will continue to provide new insights into Australia's regulation of health practitioners and polycentric regulation within a federal system.

Temporary Migrant Labour and Unpaid Work in Australia

Joanna Howe,* Andrew Stewart[†] and Rosemary Owens[‡]

Abstract

Increasing attention is being given to the exploitation of temporary migrant workers in Australia, especially in relation to wage underpayments and ‘cash-back scams’ where visa holders are coerced into returning a portion of their wage to their employer. However, very little focus has been given to the incidence of unpaid work performed by temporary migrants. This article examines how previous forms of regulation affecting visas for working holiday makers and international students actively encouraged the performance of unpaid work by allowing unpaid work to count towards either permanent residency or an extension of a visa holder’s temporary stay. The article also assesses the current regulation of temporary migrant workers and the likelihood that it creates incentives for this cohort to perform unpaid work. We argue that this likelihood largely stems from the employer-driven nature of Australia’s temporary and permanent migration program, and the ability for visa holders to achieve a favourable migration outcome through the performance of paid work, for which unpaid work is often a gateway.

I Introduction

Australia’s migration program has been transformed in recent years through an increasing focus on providing temporary and permanent migration pathways linked to the performance of work.¹ The main temporary labour migration pathway (the Temporary Skill Shortage subclass 482 visa) and the main permanent labour migration pathways (the subclass 186 and subclass 189 visas) require the performance of work, with either employer sponsorship or work for an Australian employer given priority in the selection criteria for entry.² Other visas that are primarily for a non-

* Associate Professor, Adelaide Law School, University of Adelaide, Australia. This article draws on research undertaken for a project on ‘Work Experience: Labour Law at the Intersection of Work and Education’ (Discovery Project DP150104516), for which we gratefully acknowledge the support of the Australian Research Council. We also thank Irene Nikoloudakis for her research assistance, and the anonymous referees for their helpful comments and suggestions.

[†] John Bray Professor of Law, Adelaide Law School, University of Adelaide, Australia.

[‡] Emerita Professor of Law, Adelaide Law School, University of Adelaide, Australia.

¹ For an overview of recent changes, see Laurie Berg, *Migrant Rights at Work: Law’s Precariousness at the Intersection of Immigration and Labour* (Routledge, 2015); Joo-Cheong Tham and Iain Campbell, ‘Temporary Migrant Labour in Australia: The 457 Visa Scheme and Challenges for Labour Regulation’ (Working Paper No 50, Centre for Employment and Labour Relations Law, The University of Melbourne, March 2011); Joanna Howe, ‘The *Migration Legislation Amendment (Worker Protection) Act 2008*: Long Overdue Reform, but Have Migrant Workers Been Sold Short?’ (2010) 23(4) *Australian Journal of Labour Law* 251.

² These various visa subclasses are created by the provisions in sch 2 of the *Migration Regulations 1994* (Cth).

work purpose, such as visas for international students (subclass 500 visa) and working holiday makers (subclass 417 visa and subclass 462 visa), allow the performance of work and provide ample scope to do so.³ Increasingly, these visas are providing opportunities to transition to other visa categories which allow for a longer stay in Australia for the purpose of work. In short, ‘work’ has become fundamental to the purpose and orientation of the regulatory framework governing Australia’s approach to migration.

It is timely, then, to consider whether this preoccupation with ‘work’ includes labour that is unremunerated. Unpaid work can take many different forms. Quite apart from labour performed within households or family businesses, a great deal of ‘voluntary’ work is done to benefit, for example, schools, charities, sporting clubs or churches.⁴ But there has also been a significant increase in the incidence of unpaid ‘work experience’, undertaken with the intention of improving the employability of students or job-seekers. Such arrangements may involve ‘placements’ as part of education or training courses, or be offered to the long-term unemployed as part of ‘active labour market’ programs. They may be ‘internships’ or ‘job trials’ established by businesses to offer a taste of what work is like in a particular profession, or to test out applicants. Or they may simply be initiated by job-seekers themselves, in order to gain contacts or improve a resume. But, in whichever of these forms, unpaid work experience poses a challenge for regulators, especially in ensuring that it involves decent working conditions and does not have adverse economic or social consequences. Even when freely chosen, such arrangements have the potential to undermine both labour standards and social mobility.⁵

In Australia, the Office of the Fair Work Ombudsman (‘FWO’), the agency responsible for enforcing the main labour statute, the *Fair Work Act 2009* (Cth) (‘*Fair Work Act*’), has taken a strong interest in this issue. In 2013, the FWO released a research report on the nature and prevalence of unpaid work experience.⁶ Since then, in accordance with the recommendations made in that report, it has worked with stakeholders to develop a new range of educative materials that help individuals and organisations understand the circumstances in which it is lawful or unlawful to work without pay to gain experience.⁷ The legal position in this regard is outlined in the next section of the article. For now, it suffices to note that — again in accordance with the *2013 Report* — the FWO has been very active in pursuing employers for

³ Ibid.

⁴ For a useful (if now somewhat outdated) overview of the legal issues posed by voluntary work, see Jill Murray, ‘The Legal Regulation of Volunteer Work’ in Christopher Arup et al (eds), *Labour Law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Federation Press, 2006) 696.

⁵ See Rosemary Owens and Andrew Stewart, ‘Regulating for Decent Work Experience: Meeting the Challenge of the Rise of the Intern’ (2016) 155(4) *International Labour Review* 679. As to the prevalence of such arrangements in Australia, see Damian Oliver et al, ‘Unpaid Work Experience in Australia: Prevalence, Nature and Impact’ (Department of Employment, Australian Government, December 2016).

⁶ Andrew Stewart and Rosemary Owens, ‘Experience or Exploitation? The Nature, Prevalence and Regulation of Unpaid Work Experience, Internships and Trial Periods in Australia’ (Report for the FWO, January 2013) (‘*2013 Report*’).

⁷ See FWO, *Unpaid Work* <www.fairwork.gov.au/pay/unpaid-work>.

what it regards as unlawful forms of exploitation.⁸ This has included instituting a series of proceedings in which businesses have been fined for breaching the *Fair Work Act* by not paying, or underpaying, trainees or interns who were performing productive work.⁹ It has also taken action against employers who insisted on treating an initial period of work as unpaid ‘training’, but who, in reality, have hired employees.¹⁰

It is generally accepted that periods of work experience can be a useful and important part of the transition from education to employment. But when poorly designed or misused, they may not merely ‘fail to provide the first step towards decent and stable work’, but ‘trap young people in a vicious cycle of precarious employment and insecurity’.¹¹ This is a danger to which the International Labour Organization is alert. It has warned, for example, of the risk of internships becoming simply a ‘disguised form of employment’, without any of the benefits of real on-the-job training.¹² In general terms, it is young people who are most likely to be engaged in internships or other forms of work experience. But as the *2013 Report* for the FWO noted,

migrant workers, especially international students and those on temporary working visas, are also especially vulnerable to unpaid work, because they often have the additional urgency of seeking to maximise the possibility of securing access to permanent residency.¹³

This article examines the way in which the treatment of unpaid work by Australia’s migration law and policy has evolved in recent years. Until recently, the performance of unpaid work by temporary migrant workers, whether by international students or working holiday makers, was not just officially permitted, but actively encouraged. At a formal level, that has now largely changed. This is because of a growing understanding of the exploitative potential of unpaid work when it is enabled by migration regulation as the basis for securing a migration outcome for the visa holder. Despite this important recognition, these past regulatory practices permitting unpaid work have significance today, both in terms of creating a culture of tolerance for unpaid work among temporary migrants as a gateway to paid employment and contributing to embedding the dominant position of the employer in the design of Australia’s regulation of temporary migration. In the final

⁸ See, eg, FWO, ‘Internships & Unpaid Work — Update’ (Media Release, 12 August 2014) <<https://www.fairwork.gov.au/about-us/news-and-media-releases/2014-media-releases/august-2014/20140812-interns-unpaid-work-update>>.

⁹ See, eg, *Fair Work Ombudsman v Devine Marine Group Pty Ltd* [2014] FCA 1365 (12 December 2014); *Fair Work Ombudsman v Crocmedia Pty Ltd* [2015] FCCA 140 (29 January 2015); *Fair Work Ombudsman v Aldred* [2016] FCCA 220 (10 February 2016); *Fair Work Ombudsman v AIMG BQ Pty Ltd* [2016] FCCA 1024 (31 May 2016).

¹⁰ See, eg, *Workplace Ombudsman v Golden Maple Pty Ltd* (2009) 186 IR 211; *Fair Work Ombudsman v Bosen Pty Ltd* [2011] VMC 81 (21 April 2011).

¹¹ Kari P Hadjivassiliou et al, ‘Study on a Comprehensive Overview on Traineeship Arrangements in Member States: Final Synthesis Report’ (Final Synthesis Report, European Union, 2012) 24. As to the characterisation of internships as a precarious form of work, see Guy Standing, *The Precariat: The New Dangerous Class* (Bloomsbury, revised ed, 2011) 16, 76–7; Ross Perlin, *Intern Nation: How to Earn Nothing and Learn Little in the Brave New Economy* (Verso, revised ed, 2012) 36–41, 197–202.

¹² International Labour Organization, *Internships: Head Start or Labour Trap?* (22 August 2012) <www.ilo.org/global/about-the-ilo/newsroom/features/WCMS_187693/lang--en/index.htm>.

¹³ *2013 Report*, above n 6, xiii.

part of the article, we demonstrate that there still remain other unofficial inducements for temporary migrant workers to perform unpaid work. We highlight the problematic decision to introduce a new Temporary Skill Shortage visa that, rather disturbingly, establishes a requirement of ‘work experience’ in order to apply for the visa, without clarifying whether this be paid or unpaid. This recent reform also reflects the employer-driven nature of Australia’s temporary and permanent migration program and the ability for visa holders to achieve a favourable migration outcome through the performance of work.

II Unpaid Work and Labour Standards

Some forms of labour regulation are framed to apply to both paid and unpaid work. The ‘model’ work health and safety statutes that now apply in most Australian jurisdictions, for example, create obligations that apply in relation to any worker engaged, influenced or directed by a person conducting a business or undertaking.¹⁴ The term ‘worker’ is defined to mean a person carrying out work ‘in any capacity’, including as a ‘trainee’, a ‘student gaining work experience’, or a ‘volunteer’.¹⁵ The same definitions are used in the anti-bullying provisions in pt 6-4B of the *Fair Work Act*, though workers can only obtain relief if the business or undertaking in question is ‘constitutionally covered’. Outside the federal public sector and the Territories, this requires the ‘person’ running the business to be a trading, financial or foreign corporation.¹⁶ Some state and territory anti-discrimination laws are also drafted so as to prohibit conduct that affects unpaid workers.¹⁷

For the most part, however, labour standards are applicable only to those working as employees. This is the case, for example, in relation to most of the rights and protections created by the *Fair Work Act*, including the minimum conditions stipulated by the National Employment Standards, modern awards and national minimum wage orders.¹⁸ In the absence of a statutory definition, whether a person

¹⁴ See, eg, the primary duty of care established by s 19(1) of the *Work Health and Safety Act 2011* (Cth), *Work Health and Safety Act 2011* (NSW), *Work Health and Safety Act 2011* (Qld), *Work Health and Safety Act 2012* (SA), *Work Health and Safety Act 2012* (Tas), *Work Health and Safety Act 2011* (ACT) and *Work Health and Safety (National Uniform Legislation) Act 2011* (NT). The term ‘business or undertaking’ is not defined, but s 5(1)(b) (definition of ‘person conducting a business or undertaking’) makes it clear that it need not be conducted for profit or gain.

¹⁵ See, eg, *ibid* s 7(1)(f)–(h). See further Richard Johnstone and Michael Tooma, *Work Health & Safety Regulation in Australia: The Model Act* (Federation Press, 2012) 50–4. Note, however, that a group of volunteers working together for the same community purpose, but not employing anyone else, is not covered by the model Acts, since under s 5(7)–(8) of the *Work Health and Safety Act 2011* (Cth), this does not count as a business or undertaking: see, eg, *Re McDonald* (2016) 258 IR 99.

¹⁶ *Fair Work Act* ss 789FC(1), 789FD(3). See, eg, *Re Cowie* [2016] FWC 7886 (21 November 2016) (umpire volunteering for Rowing Victoria Inc unable to seek an anti-bullying order, as the association was not a trading or financial corporation). In Queensland, workers excluded from the federal jurisdiction can now seek anti-bullying orders from the Queensland Industrial Relations Commission: see *Industrial Relations Act 2016* (Qld) ch 7 and the definition of ‘employee’ for this purpose in s 8(2)(b) (definition of ‘employee’).

¹⁷ See *Anti-Discrimination Act 1991* (Qld) sch (definition of ‘work’); *Equal Opportunity Act 1984* (SA) s 5(1) (definition of ‘employment’); *Discrimination Act 1991* (ACT) s 2 and Dictionary (definition of ‘employment’).

¹⁸ *Fair Work Act* pts 2-2, 2-3, 2-6. The same applies in relation to the coverage of enterprise agreements (pt 2-4) and protection against unfair dismissal (pt 3-2). To be covered by these provisions, an

is working as an ‘employee’ is determined by reference to the common law understanding of that term.¹⁹ As the High Court of Australia made clear in *Ermogenous v Greek Orthodox Community of SA Inc*,²⁰ the common law requires two separate conditions to be satisfied. The first is that the person agree to perform work pursuant to a *contract*, the second that the contract be characterised as one of *employment* (as opposed to, for instance, a commercial contract for services).²¹

In practice, it is the first of these requirements that may be difficult for some unpaid workers to satisfy. The main problem here is not, as might be supposed, the need to show some form of consideration. It is now well established that an employment contract may be supported by a promise to ‘remunerate’ a worker other than by paying wages: for example, by providing board and lodging.²² In principle, there is no reason why an agreement to provide training or work experience could not be good consideration for a promise to attend and perform work.²³ Rather, the problem is likely to be a lack of ‘mutuality’ of obligation,²⁴ or (more particularly) a lack of intention to create legal relations.

In relation to this last point, Gaudron, McHugh, Hayne and Callinan JJ noted in *Ermogenous* that the burden lies on the party seeking to establish the existence of a contract to adduce evidence of the necessary intention.²⁵ But their Honours also stressed the need to adopt an *objective* perspective in ascertaining that intention. It is not a question of searching for each party’s ‘uncommunicated subjective motives or intentions’.²⁶ Rather, it is a matter of considering what ‘would objectively be conveyed by what was said or done, having regard to the circumstances in which those statements and actions happened’.²⁷ Where workers can be seen to be volunteering their services in support of a particular cause or organisation, it may be

employee must also generally be working for a ‘national system employer’. As a result of the mix of constitutional powers and state referrals used to support the *Fair Work Act*, all private sector (non-government) employers fall within this category. The exception is in Western Australia, where sole traders, partnerships and certain corporations are not covered: see Andrew Stewart et al, *Creighton and Stewart’s Labour Law* (Federation Press, 6th ed, 2016) ch 6.

¹⁹ *C v Commonwealth* (2015) 234 FCR 81, 87 [34] (the Court); *Cai v Do Rozario* (2011) 215 IR 235 (Fair Work Australia).

²⁰ (2002) 209 CLR 95 (*‘Ermogenous’*).

²¹ In *Ermogenous*, the High Court dealt with the first of these questions, finding that the worker concerned (an archbishop) was engaged under a contract. It remitted the question of whether that contract was one of employment to the South Australian Supreme Court, which subsequently found in the affirmative: *Greek Orthodox Community of SA Inc v Ermogenous* [2002] SASC 384 (26 November 2002). As to the tendency of some courts or tribunals to conflate or confuse the two requirements, see Murray, above n 4, 713.

²² See, eg, *Cudgegong Soaring Pty Ltd v Harris* (1996) 13 NSWCCR 92 (1 May 1996).

²³ See, eg, *Edmonds v Lawson* [2000] QB 501, 514–15 [23]–[25].

²⁴ See, eg, *Dietrich v Dare* (1980) 30 ALR 407, concerning a short job trial where the worker was under no obligation to present for work.

²⁵ (2002) 209 CLR 95, 106 [26] (Gaudron, McHugh, Hayne and Callinan JJ). A stark (if somewhat contentious) example of this proposition is provided by the finding in *Prajapati v Narshima Tradings Pty Ltd* [2016] FCCA 2798 (2 November 2016). A woman who alleged she had been coerced by her husband into working at his brother’s restaurant could not establish that she was an employee and, hence, entitled to wages, without leading evidence as to any dealings with the brother from which an intention to contract could be inferred.

²⁶ *Ermogenous* (2002) 209 CLR 95, 106 [25] (Gaudron, McHugh, Hayne and Callinan JJ).

²⁷ *Ibid* 105–6 [25] (Gaudron, McHugh, Hayne and Callinan JJ) (citations omitted). See also *Nield v Mathieson* [2014] FCAFC 74 (19 June 2014) 9 [42].

relatively easy to infer an absence of intention to contract, even if they receive an ‘honorarium’ or reimbursement for certain expenses.²⁸ But in the case of work experience that is undertaken for non-altruistic reasons, the matter can be more difficult to resolve. Over the years, different views have been taken of such arrangements.²⁹ There have certainly been instances in which courts or tribunals have found an absence of any intention to create legal relations.³⁰ But in other cases, employment contracts *have* been found to exist, especially in relation to arrangements of longer duration.³¹

There is one type of work experience that cannot be treated as involving an employment relationship, at least under the *Fair Work Act*. Sections 13, 15, 30C and 30M each provide that a person is not to be treated as an employee if they are ‘on a vocational placement’. This is defined in s 12 to mean an unpaid placement undertaken as a requirement of an education or training course and authorised under a federal, state or territory law or administrative arrangement. The drafting of this exception is not as clear as it might be.³² But it ensures, for instance, that the *Fair Work Act* will not apply to periods of unpaid work experience undertaken for the purpose of a university or TAFE course, or a statutorily recognised program of training required to enter a profession.³³ The *Social Security Act 1991* (Cth) also has provisions (such as ss 544B(8) and 631C) that exempt certain ‘approved programmes’ of work from the operation of the *Fair Work Act*. These may apply, for example, to the ‘internships’ arranged for jobseekers under the Turnbull Government’s PaTH (Prepare-Trial-Hire) Programme, which commenced in April 2017.³⁴

Of course, the very fact that such exceptions are considered necessary might be thought to strengthen the view that work experience arrangements not covered by the exceptions should be regarded as falling within the scope of the *Fair Work Act*, especially when regard is had to the objects of the statute. One possible approach then, as the *2013 Report* for the FWO argued, is to assume that if a person is performing productive work for an organisation, under an arrangement whereby they will either gain experience or be considered for an ongoing job, they are doing so under an employment contract — unless there is clear evidence to the contrary, or

²⁸ See, eg, *Andreevski v Western Institute Student Union Inc* (1994) 58 IR 195 (student magazine editor); *Teen Ranch Pty Ltd v Brown* (1995) 87 IR 308 (support worker at a church-run holiday camp for teenagers); *Grinholz v Football Federation Victoria Inc* [2016] FWC 7976 (4 November 2016) (junior soccer team coach).

²⁹ For a survey of the pre-2013 case law, see *2013 Report*, above n 6, ch 6.

³⁰ See, eg, *Pacesetter Homes Pty Ltd v Australian Builders Labourers Federated Union of Workers (WA Branch)* (1994) 57 IR 449; *Frattini v Mission Imports* [2000] SAIRComm 20 (16 May 2000).

³¹ See, eg, *Nominal Insurer v Cleanthous* [1987] NTSC 51 (11 August 1987); *Cossich v G Rossetto & Co Pty Ltd* [2001] SAIRC 37 (26 October 2001).

³² See *2013 Report*, above n 6, 75–82. See also Craig Cameron, ‘The Vulnerable Worker? A Labor Law Challenge for WIL and Work Experience’ (2013) 14(3) *Asia-Pacific Journal of Cooperative Education* 135, canvassing options for reform to the exception.

³³ See, eg, *Upton v Geraldton Resource Centre* [2013] FWC 7827 (11 October 2013). Cf *Fair Work Ombudsman v Devine Marine Group Pty Ltd* [2014] FCA 1365 (12 December 2014) 28 [105], where the ‘training course’ that two Fijian workers were supposedly completing in Australia was not in any way ‘authorised’, it did not require a ‘placement’, and the workers were in any event paid for their work, albeit at below-award rates.

³⁴ See Jobactive, *Young People Prepared for Trial and Hire*, Australian Government <<https://jobactive.gov.au/path>>; *Social Security Legislation Amendment (Youth Jobs Path: Prepare, Trial, Hire) Act 2017* (Cth), amending *Social Security Act 1991* (Cth).

the vocational placement exception applies.³⁵ This is effectively the stance that the FWO has come to adopt. It has made it clear that it will pursue any employer who appears to be ‘systematically or strategically exploiting unpaid work experience as a form of free labour’.³⁶ In the cases referred to in the introduction,³⁷ the FWO has persuaded courts to find that unpaid or underpaid trainees or interns were employees entitled to award wages. While in three of those cases the existence of an employment contract was not contested, it is notable that the judges concerned endorsed the approach taken in the FWO’s *2013 Report* and emphasised that ‘[p]rofiting from “volunteers” is not acceptable conduct’.³⁸

III Visa Pathways and the Regulation of Unpaid Work

A International Students

International students, by virtue of their status as students, are a particular subset of migrants in Australia who are more likely than others to be exposed to the types of unpaid work that are the subject of this article. Similar to their local counterparts, international students often seek out employment opportunities related to their field of study in order to improve their employability. What is dissimilar, however, is the desire of many international students for a migration outcome, in the form of either another temporary visa with work rights or a permanent residency visa.³⁹ International students may enter Australia on a variety of different visas according to their enrolments and course of study. There are currently eight different visa subclasses for international students wishing to study in Australia.⁴⁰ In this section, two issues relating to the performance of unpaid work by international students are examined. The first involves the situation between 2005 and 2010 when there were incentives for international students enrolled in certain trades courses to complete a substantial amount of work experience in order to gain permanent residency. There was no requirement that this work experience be paid and, accordingly, during this period many international students worked without remuneration. It is important to understand the problematic nature of this historical approach to regulating the ability of international students to engage in unpaid work in the labour market. Policymakers and law enforcement officers face a continuing challenge in ensuring this set of temporary migrant workers, who have been identified as highly susceptible to

³⁵ *2013 Report*, above n 6, 148–9, 249–51.

³⁶ FWO, above n 7.

³⁷ See above n 9.

³⁸ *Fair Work Ombudsman v Crocmedia Pty Ltd* [2015] FCCA 140 (29 January 2015) 14 [45]. See also: at 3–4 [7]–[9]; *Fair Work Ombudsman v Aldred* [2016] FCCA 220 (10 February 2016) 7–10 [23]; *Fair Work Ombudsman v AIMG BQ Pty Ltd* [2016] FCCA 1024 (31 May 2016) 19 [69]–[70], 33–4 [119]–[120].

³⁹ See generally, Alexander Reilly, ‘Protecting Vulnerable Migrant Workers: The Case of International Students’ (2012) 25(3) *Australian Journal of Labour Law* 181.

⁴⁰ These visa categories are largely for: English language intensive courses for overseas students (‘ELICOS’); schools; vocational education and training (‘VET’); higher education; postgraduate research and non-award: Department of Immigration and Border Protection, Australian Government, *Annual Report 2014–15* (Commonwealth of Australia, 2015) 69.

exploitation, does not engage in exploitative work.⁴¹ The second issue examined is the nature of visa condition 8105, which restricts the amount of hours an international student can work during semester.⁴² There are questions as to how the condition is enforced and whether it precludes the performance of unpaid work in excess of the fortnightly work hours requirement.

1 *Policy and Practice 2000–2010*

A key shift in Australia's immigration policy occurred at the turn of the 21st century with the explicit connection of migration outcomes to study in Australia. In 2000, the Migration Occupations in Demand List ('MODL') was created 'to help industry and states and territories to obtain the skilled migrants they need'.⁴³ This was followed by a key speech by the Federal Minister for Immigration and Multicultural Affairs in 2001, announcing that international students who were successful in key skill areas would be seen as 'ideal migrants' and the Government would pursue a policy of encouraging such students to migrate to Australia.⁴⁴ The main initiative outlined in this speech was the ability to make permanent residency visa applications without leaving Australia, in order to attract more international students to complete courses in areas of domestic skill shortage. Prior to this, all applications by international students for permanent residency had to be made offshore. The change officially established the education–migration nexus.

The effects of this strategic shift began to be felt in the mid-2000s. Certain trade occupations were listed on the MODL in order to encourage more permanent residency applications and alleviate skill shortages. Cooking, for example, was first listed on the MODL in May 2005, following an announcement of the need to add more trade occupations to the MODL in order to make the skilled migration program more attractive to applicants.⁴⁵ This produced a disproportionate number of international students enrolled in commercial cookery and also hairdressing courses, as it was calculated that completion of these two courses would offer a sure path to permanent residency.⁴⁶ The resulting 'international student crisis' is a story that is well known and it is not our intention to retell it here.⁴⁷ However, what has been

⁴¹ Alexander Reilly et al, 'International Students and the Fair Work Ombudsman' (Report, FWO, March 2017); FWO, 'New Strategy to Raise International Students' Awareness of Workplace Rights' (Media Release, 25 September 2017); Open Letter from Natalie James (FWO), *Open Letter to International Students* (September 2017).

⁴² *Migration Regulations 1994* (Cth) sch 8; Department of Home Affairs, Australian Government, 'Student Visa Conditions' <<https://www.homeaffairs.gov.au/trav/stud/more/visa-conditions/visa-conditions-students>>.

⁴³ Philip Ruddock, 'Minister Announces Innovative New "Contingency Reserve"' (Media Release, MPS 64/99, 29 April 1999).

⁴⁴ Philip Ruddock, 'The Economic Impact of Immigration' (Speech delivered at the Economic Impact of Immigration Seminar, Canberra, 1 March 2001) <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F48T36%22>>.

⁴⁵ Amanda Vanstone, '2005–06 Migration (Non-Humanitarian) Program' (Media Release, VPS 052/20045, 14 April 2005).

⁴⁶ For numbers of how many international students were enrolled in commercial cookery and hairdressing courses, see the statistics cited in Bob Birrell, Ernest Healy and Bob Kinnaird, 'Cooks Galore and Hairdressers Aplenty' (2007) 15(1) *People and Place* 30, 30.

⁴⁷ See, eg, Peter Mares, 'From Queue to Pool: Skilled Migration Gets a Makeover', *Inside Story* (online), 10 February 2010 <<http://insidestory.org.au/from-queue-to-pool-skilled-migration-gets-a-makeover>>;

largely absent in post-mortems of this period is the role that the regulatory framework around the education–work–migration nexus played in fostering the proliferation of unpaid work by international students.

It was the case (and, indeed, still is today) that before an international student in certain trades courses applied for permanent residency, they needed a skills assessment by the Trades Recognition Authority ('TRA'). In 2005, the TRA was a subset of the Federal Department of Employment, Education and Workplace Relations and was charged with assessing skills for a number of trade and associate professional occupations, as specified in instruments made under the *Migration Regulations 1994* (Cth).⁴⁸ At the start of 2005, the TRA announced that it was introducing a mandatory 900 hours of work experience component in order to pass the skills assessment, to come into effect on 1 July 2005.⁴⁹ This was introduced after feedback from employers and industry stakeholders that international student graduates of trade courses were not sufficiently employable.⁵⁰ The TRA did not require the 900 hours of work experience be paid: unpaid work sufficed. The 900 hours had to involve 'relevant and directly related work experience' and all claims of work experience needed to be accompanied by 'documentary evidence capable of verification'.⁵¹

The TRA's 2005 reform created a direct connection between the performance of unpaid work and a migration pathway to permanent residency. A TRA skills assessment showing 900 hours of unpaid work experience gave prospective migrants half the points required for a permanent residency visa. Two unintended consequences ensued. First, the new requirement led to fraudulent education providers selling a package of a vocational training course and sham work references to provide 'evidence' of the necessary hours of work experience.⁵² In many cases, international students not only did not receive remuneration for this work, they paid

Bob Birrell and Ernest Healy, 'The February 2010 Reforms and the International Student Industry' (2010) 18(1) *People and Place* 65; Bob Birrell and Bronwen Perry, 'Immigration Policy Change and the International Student Industry' (2009) 17(2) *People and Place* 64; Bruce Baird, 'Stronger, Simpler, Smarter ESOS: Supporting International Students: Review of the *Education Services for Overseas Students (ESOS) Act 2000*' (Final Report, Australian Education International, February 2010); Senate Education, Employment and Workplace Relations References Committee, Parliament of Australia, *Welfare of International Students* (2009); Michael Knight, *Strategic Review of the Student Visa Program 2011 Report* (Report, Australian Government, 30 June 2011) ('*Knight Review*').

⁴⁸ As of December 2011, the TRA functions transferred to the Federal Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education.

⁴⁹ TRA, '900 Hours Requirement FAQs Fact Sheet' (Fact Sheet, Australian Government, 2005) (copy on file with authors).

⁵⁰ *Ibid* 14.

⁵¹ *Ibid*.

⁵² Elisabeth Wynhausen, 'We'll Say You Did the Hours', *The Australian* (Sydney), 26 July 2008; Nick O'Malley, 'So "Painful and Expensive" to Call Australia Home', *The Sydney Morning Herald* (online), 15 July 2009 <<http://www.smh.com.au/national/so-painful-and-expensive-to-call-australia-home-20090714-dk5g.html>>; Vanda Carson, 'Students Caught in Rorts for Residency', *The Daily Telegraph* (online), 13 August 2012 <<http://www.dailytelegraph.com.au/students-caught-in-rorts-for-residency/news-story/41811d411256db7e95269869bafb3b7e>>; Vanda Carson, 'Foreign Students Use Fake Work References from Indian Restaurant', *The Courier-Mail* (online), 20 February 2015 <<http://www.couriermail.com.au/news/queensland/foreign-students-use-fake-work-references-from-indian-restaurant/news-story/5d1b3f7f4e9176b14537a1aa3011b52e>>.

for the opportunity to work and, in some cases, they did no work at all.⁵³ These scams were uncovered by a series of investigations by the Commonwealth Department of Immigration, which, after 2008, began rejecting permanent residency applications on the basis that a ‘bogus document’ had been provided.⁵⁴ Although many international students appealed the rejection of their applications by the Migration Review Tribunal (‘MRT’), it was difficult for these to be overturned. Courts emphasised that if an international student submitted a sham document to the TRA as evidence of completed work experience, then the resulting skills assessment could not be used to award points to meet relevant visa requirements.⁵⁵

The second unintended consequence of the introduction by the TRA of the 900 work hours requirement in 2005 was that it required international students to find a job related to their course of study and created a strong incentive for them to accept unpaid work or severely underpaid work.⁵⁶ Given the large numbers of international students enrolled in hairdressing and cooking courses, this led to an oversupply of labour in these two industries, which greatly increased the likelihood that work secured in these industries would be unpaid.⁵⁷ The availability of international students and their strong desire to secure a migration outcome reduced the incentive for employers to hire paid staff in these occupations.

The TRA’s 2005 directive allowing unpaid work experience to suffice for skills assessment purposes created a number of difficulties, of which the case of Mr Sunpreet Singh provides a useful illustration.⁵⁸ This case involved the review of a decision by the Minister’s delegate to refuse to grant Mr Singh’s permanent residency visa on the basis that his work reference was a bogus document. Mr Singh had completed an Advanced Diploma of Hospitality Management at Carrick Institute of Education between September 2006 and September 2008. He claimed to have undertaken work experience at the Copper Tiffin restaurant and received a favourable TRA skills assessment dated 27 June 2008.⁵⁹ Although the TRA had accepted his work and educational references and provided him with a skills assessment, the Minister’s delegate wrote to Mr Singh asking for additional information regarding his work experience. Mr Singh provided a copy of the reference from Copper Tiffin that stated the applicant had completed over 900 hours of work experience and underwent training, both in an unpaid capacity. On 19 April

⁵³ Nick O’Malley, Heath Gilmore and Erik Jensen, ‘Foreign Students Exploited as Slaves’, *The Sydney Morning Herald* (online), 15 July 2009 <<https://www.smh.com.au/national/foreign-students-exploited-as-slaves-20090714-dk52.html>>. See also Birrell, Healy and Kinnaird, above n 46, 40.

⁵⁴ Under the *Migration Act 1958* (Cth) s 103, it is an offence to provide a ‘bogus document’ (defined in s 5(1)).

⁵⁵ See, eg, *Nanre v Minister for Immigration and Border Protection* (2015) 292 FLR 215; *SZQSD v Minister for Immigration* [2012] FMCA 433 (31 May 2012).

⁵⁶ See Nick O’Malley, Heath Gilmore and Erik Jensen, ‘Foreign Students “Slave Trade”’, *The Sydney Morning Herald* (online), 15 July 2009 <<http://www.smh.com.au/national/foreign-students-slave-trade-20090714-dk6d.html>>.

⁵⁷ See, eg, *1412564* [2015] MRTA 359 (6 March 2015) 3 [12]; *1407388* [2015] MRTA 336 (10 March 2015) 5 [23]. Both these cases involved applicants who were applying for the 485 visa and submitted that they had performed a period of unpaid work for restaurants in the hospitality industry, but never managed to secure paid work because they said it was extremely difficult to get a job in the industry.

⁵⁸ *I210024* (Unreported, Migration Review Tribunal, Bruce MacCarthy, 13 October 2013).

⁵⁹ *Ibid* [8].

2012, the Minister's delegate refused to accept this unpaid work experience as satisfying the work requirement needed to obtain a permanent residency visa, on the basis that there was a 'legal requirement' in NSW that 'people undertaking work experience must be paid'.⁶⁰ The nature and source of this requirement were not explained.⁶¹ The Minister's delegate concluded that 'the reference from Copper Tiffin provided to TRA in support of the application for a skills assessment contained information of a false or misleading nature'.⁶² During the applicant's appeal of this decision, the MRT conducted its own investigations as to the status of unpaid work experience, to which the Department of Immigration responded in the following manner:

Using the benefit of hindsight and feedback from the MRT, our position is labour law breaches do not render a work reference false or misleading. Irrespective of this, it appears that applicants can in some circumstances conduct unpaid work experience legitimately.⁶³

This admission by the Department confirmed that unpaid work experience was permitted as part of the TRA skills assessment regime, although the Department failed to address how this interacted with the supposed requirement under NSW law that work experience be paid. The Tribunal concluded that merely because Mr Singh's work for Copper Tiffin was unpaid did not mean his reference was false. It is quite remarkable that it took the applicant appealing the decision of the Minister's delegate to confirm the legality of unpaid work experience for the purposes of a TRA skills assessment, given that the completion of 900 work experience hours irrespective of remuneration had been official TRA policy since 2005.

The MRT then turned its attention to the question of whether Mr Singh had actually worked for Copper Tiffin for 900 hours on an unpaid basis or whether the reference itself was a sham. The Tribunal questioned Mr Singh at length and he was able to satisfy it of his 'sound knowledge of Indian cooking of the kind referred to in the work reference' and observed that '[h]is answers regarding the location of the restaurant in the way he travelled to and from that restaurant from both his place of study and his residence were given in a confident manner without hesitation'.⁶⁴ The Tribunal counterbalanced this against its own internet research, which was inconsistent with the applicant's testimony regarding the restaurant's opening hours and liquor licence, although it accepted that because the restaurant had since closed down it was unable to ascertain the truth of the matter. The Tribunal also referred to the numerous applications for TRA skills assessments by international students claiming to have worked for Copper Tiffin, but concluded that '[t]he mere fact that there have been many such references purporting to have been issued by Copper Tiffin management does not necessarily mean that the applicant's reference is not

⁶⁰ Ibid [10].

⁶¹ The NSW Industrial Relations Commission has, in the past, suggested that trainees in that State under the age of 18 cannot be expected to work without payment, since this would breach the *Industrial Relations (Child Employment) Act 2006* (NSW): *Child Employment Principles Case 2007* (2007) 163 IR 41, 111 [283]. But it is far from clear that this view is correct: see Andrew Stewart, 'Making the Working World Work Better for Kids' (Report, NSW Commission for Children and Young People, December 2008) 32. It would not, in any event, apply to adult trainees.

⁶² *1210024* (Unreported, Migration Review Tribunal, Bruce MacCarthy, 13 October 2013) [10].

⁶³ Ibid [13].

⁶⁴ Ibid [15].

genuine'.⁶⁵ This led the MRT to decide that Mr Singh did meet the criteria for a permanent residency visa as his work reference, despite referring to unpaid work, was not a bogus document.

Mr Singh's case reflects both the confusion within the Department of Immigration as to the legal status of unpaid work experience at the time, and the evidential difficulties facing international students who sought to rely on unpaid work experience to support their permanent residency visa applications. In Mr Singh's case, he was able to rely on family support, with his brother providing a statutory declaration attesting to his unpaid work experience at the restaurant and financial assistance to engage an immigration specialist to pursue his appeal.⁶⁶ Other international students in a similar situation may not be so fortunate.

Another case involving a work reference from Copper Tiffin also attests to the difficulties international students had in proving their completion of the 900 work hours requirement. In this case, the Minister's delegate asked for evidence additional to the work reference to prove the applicant's work experience at Copper Tiffin, but he was unable to provide it as the restaurant had closed down and he had been unable to contact the owner to get a new letter confirming his training period and the number of hours trained.⁶⁷ Although the completion of paid work is usually accompanied by payslips,⁶⁸ there is no requirement upon employers to complete these records for unpaid work if there is no employment relationship between the parties.⁶⁹ The Tribunal considered that the applicant's oral evidence pointed to his employment at Copper Tiffin, as he was a 'credible and candid witness' who provided detailed knowledge of the tasks and duties he performed and was frank in his evidence that '80 per cent of his role related to dishwashing with some cleaning and the remainder was assisting the chef in vegetable preparation'.⁷⁰ Nevertheless, it concluded that the reference was a bogus document and rejected his application for permanent residency. In judicial review proceedings, the Federal Circuit Court of Australia held there was jurisdictional error in the Tribunal's decision, since there was no explanation for this conclusion.⁷¹ The applicant's evidence in this case also highlights the distinct possibility that the TRA's work experience requirement tended to result in more 'work' than 'training' or 'experience', with the performance of menial, repetitive and routine tasks as the norm, rather than the exception.

There was also a lack of clarity as to whether TRA's 900 work hours requirement, where it was completed on an unpaid basis, needed to comply with visa condition 8105.⁷² This condition presently prevents international students from

⁶⁵ Ibid [17].

⁶⁶ For example, his brother also provided financial support so that Singh could open his own fast food business: ibid [15].

⁶⁷ *Singh v Minister for Immigration* [2015] FCCA 1939 (22 July 2015) 5 [16].

⁶⁸ This is indeed a statutory requirement for national system employers, under s 536 of the *Fair Work Act*.

⁶⁹ Another case that highlights the evidential challenges in establishing a period of unpaid work in support of a visa application is *1207637* [2015] MRTA 490 (27 March 2015) 6 [26]. See also *Ali v Minister for Immigration* [2015] FCCA 3204 (21 December 2015) 5–7 [24], citing Migration Review Tribunal Reasons, 7 November 2014 [105].

⁷⁰ As quoted in *Singh v Minister for Immigration* [2015] FCCA 1939 (22 July 2015) 7–8 [26].

⁷¹ *Singh v Minister for Immigration* [2015] FCCA 1939 (22 July 2015) 8 [27].

⁷² Contained in *Migration Regulations 1994* (Cth) sch 8.

working over 40 hours per fortnight, although between 2005 and 2008 it required that international students work no more than 20 hours per week.⁷³ The TRA's own factsheet on the subject did not address this definitively, instead directing to the Department of Immigration questions regarding whether an applicant's visa arrangements allowed the meeting of the work experience requirement.⁷⁴ The case of *Bhatia v Minister for Immigration & Border Protection*⁷⁵ reflects the uncertainty over this issue, with the decisions of both the Minister's delegate and the MRT to refuse Mr Bhatia's permanent residency visa application being overturned on appeal by the Federal Circuit Court.

The case involved Mr Bhatia, an international student who was employed as a commis chef at a Crowne Plaza hotel for a minimum of 20 hours per week from April to September 2007. At this time he also worked on an unpaid basis as a casual chef at the Ascot Motor Inn for between 16 and 20 hours per week, with a view to completing his 900 work hours requirement as part of the TRA skills assessment process. At issue in this case was whether his unpaid work for the Ascot Motor Inn fell within the definition of work in the *Migration Regulations 1994* (Cth). Under reg 1.103, the meaning of 'work' is 'an activity which is usually remunerated'. If Mr Bhatia's unpaid work for the Ascot Motor Inn came within this definition, then the combination of his work for the Crowne Plaza hotel and the Ascot Motor Inn would render him in breach of condition 8105 in his international student visa, which limited his performance of work to 20 hours per week. At first instance, the MRT concluded that Mr Bhatia's employment with the Crowne Plaza could *not* be counted towards the points test for permanent residency, as during this period he was in breach of visa condition 8105. It took the view that working as a chef is an activity which is 'usually remunerated'. This determination led to the Minister's delegate and the MRT refusing to allocate points for Mr Bhatia's paid employment at the Crowne Plaza. They believed it to have been performed in breach of visa condition 8105 as it was done simultaneously with his unpaid work at the Ascot Motor Inn. This determination relied upon reg 2.27C, which stipulates that in order for 'a period of employment' to be counted for the points test, it must have been done in compliance with the terms of the visa. Thus, Mr Bhatia was unable to reach the 120 points threshold required for permanent residency as neither his unpaid work or paid work were counted by the Minister's delegate and MRT.

This decision was overturned on appeal. According to Judge Driver, the original decision meant that Mr Bhatia suffered

a *double detriment* by relying upon his unpaid work at the Ascot Motor Inn. Not only was that work not counted because it was unpaid, but he was also taken (because of that work considered in combination with his paid employment) to have breached condition 8105 on his student visa and thus the whole of his paid employment over the period when his course of education was in session was not counted.⁷⁶

⁷³ The substance and application of visa condition 8105 is examined more fully below.

⁷⁴ TRA, above n 49.

⁷⁵ [2015] FCCA 409 (20 March 2015) ('*Bhatia*').

⁷⁶ *Ibid* 6–7 [18] (emphasis added).

The interpretation of unpaid work as being incapable of constituting employment was, as Judge Driver noted, pivotal to the MRT's reasoning.⁷⁷ In considering whether a particular activity constitutes work as defined by reg 1.103, his Honour said that regard must be had 'to the actual circumstances surrounding the activity', including the motivation of the parties.⁷⁸ The appeal decision found that while it can be generally accepted that the work of a chef is usually remunerated, the circumstances in which the work is undertaken may have a bearing upon whether it would be likely to be paid work in that specific circumstance. Judge Driver accepted Mr Bhatia's statutory declaration that his work at the Ascot Motor Inn was on a volunteer basis, with a view to meeting the TRA work experience requirement of 900 hours. His Honour used the administrative law remedies of certiorari to quash the MRT's decision, and mandamus to require the MRT to re-determine the application before it according to law.

This decision in *Bhatia*, like that in the other cases mentioned above, highlights the difficulty that international students had in relying on a period of unpaid work to meet the criteria for a permanent residency visa, despite it being permitted by the TRA's own policy at the time. The interpretation of visa condition 8105 and its application to international students continue to be live issues, with inadvertent or mistaken breaches of the condition resulting in visa cancellations.⁷⁹ In recent decisions, where the student was in minor breach of the provision by working a few additional hours each fortnight in breach of visa condition 8105,⁸⁰ or where dismissal was threatened if the student failed to work additional hours,⁸¹ the MRT has ordered visa cancellation.

2 Policy and Practice from 2010

The TRA announced that it would no longer automatically accept unpaid work experience to be used for the 900 hours trade experience hours needed to obtain a skills assessment. Part F of the new Migration Assessment Policy defined 'employment' as 'a set of specialised, practical, theoretical and technical skills in a workplace, undertaken on behalf of a company, organisation or individual, including self-employment, for the primary purpose of remuneration and subject to relevant workplace laws'.⁸² The policy confirmed that employment does not include institution-based workplace training⁸³ and that unpaid work could only be accepted as employment in limited circumstances.⁸⁴ The policy required that if unpaid work

⁷⁷ Ibid 8 [23].

⁷⁸ Ibid 4 [10], citing *Xu v Minister for Immigration* [2007] FMCA 285 (26 March 2007) 10 [21] and *Tikoisua v Minister for Immigration and Multicultural Affairs* [2001] FCA 1347 (20 September 2001) 4 [11].

⁷⁹ See, eg, *Tsang v Minister for Immigration* [2015] FCCA 31 (30 January 2015); *Singh v Minister for Immigration* [2013] FCCA 1547 (9 October 2013); *Arora v Minister for Immigration* [2014] FCCA 2091 (9 September 2014). See also *1421269* [2015] MRTA 843 (3 June 2015), a case involving the mistaken breach by a spouse of an international student of visa condition 8104, which performs a similar function to condition 8105 in limiting work hours for spouses.

⁸⁰ *Kaur v Minister for Immigration and Citizenship* (2012) 266 FLR 102.

⁸¹ *1414768* [2014] MRTA 2497 (14 October 2014).

⁸² TRA, *Migration Assessment Policy* (2008) pt F (Definitions).

⁸³ Ibid [24.10.2].

⁸⁴ Ibid [24.10.3].

was being used to support an international student's application for a TRA skills assessment, there needed to be evidence differentiating it from training requirements and explaining why the applicant was working in an unpaid capacity.⁸⁵

This development, although significant, was ultimately overtaken by the reform of the regulatory framework for international student visas initiated by Senator Chris Evans as Minister for Immigration. The 900 work hours requirement was replaced by a substantially more comprehensive assessment of the employability of international graduates in trade or associate professional occupations. The TRA developed a Job Ready Program, which was just one of the reforms that responded to a constellation of issues arising from the aforementioned 'international students crisis'.⁸⁶ The *Migration Amendment Regulations (No 15) 2009* (Cth) required that certain visa applicants have their skills assessed after 1 January 2010 to apply for a visa. In effect, this required them to complete the Job Ready Program.

The Job Ready Program, which remains in place today, replaced the employer's attestation of the applicant's skills via a work reference confirming 900 hours of work, with a four-stage employment-based skills assessment program. The first stage of this process requires the applicant to complete a provisional skills assessment where evidence of 360 hours of 'any employment, work experience and/or vocational placement undertaken in an Australian workplace' must be provided.⁸⁷ The second stage requires the applicant to complete 12 months of full-time work under the supervision of a qualified Australian tradesperson working within the nominated occupation and who is formally registered with TRA. The third stage involves a job ready workplace assessment carried out by a TRA staff member after the applicant has conducted 863 hours of paid employment over a minimum of six months. The process culminates in the fourth stage, a job ready final assessment upon completion of 1725 hours of paid employment over a 12-month period. This has increased the applicant's fees for a skills assessment for the purpose of obtaining an independent skilled migration visa, from \$300 prior to the introduction of the Job Ready Program, to between \$2950 and \$5250 at the time of writing. These fees reflect the significantly greater resources outlaid by the TRA in establishing and implementing this new skills assessment process.

In stage two, it is clear from the TRA's policy that the 1725 hours of work must not be on an unpaid basis, as pay slips must be provided to confirm the employer's payment of award wages for the applicant's work.⁸⁸ In its original iteration, stage one was silent on this question and, thus, allowed the possibility of unpaid work counting towards an applicant obtaining a provisional skills assessment. However, this has since been amended to make clear that only paid work

⁸⁵ Ibid [24.10.4].

⁸⁶ See Chris Evans, 'Migration Program Gives Priority to Those with Skills Most Needed' (Media Release, 17 December 2008).

⁸⁷ Department of Education and Training, Australian Government, 'Job Ready Program Participant Guidelines' (January 2015) 42.

⁸⁸ Ibid 23.

can be counted.⁸⁹ This change reduces the incentive for international students to perform unpaid work.

It appears that the introduction of the ‘paid employment’ requirement in the Job Ready Program was not so much motivated by concerns over the exploitation of international students engaged in unpaid work. It was more about the mismatch between the skills claimed for the purposes of migration and the long-term occupational aspirations of these former international students, which meant that the permanent residency visa was not meeting its policy objective of alleviating domestic skill shortages. It was believed that a more robust skills assessment process, requiring a solid period of paid work in the applicant’s nominated occupation, would be more likely to produce permanent migrants willing to work in that occupation. The Minister for Immigration stated that ‘many of those’ seeking to migrate to Australia strategically chose to do so using an occupation on the MODL, but with no intention of ever working in that occupation.⁹⁰ On another occasion, the Minister commented that ‘[the points test] did not solve the shortage ... if we were bringing people who said they were cooks and hairdressers but were not prepared to work as cooks or hairdressers, we were not solving the problem’.⁹¹ This concern was echoed by the national industry association, Restaurant and Catering Australia, which identified the failure of many international students graduating in cooking to enter the industry on an ongoing basis.⁹² Nonetheless, despite the motivation for the Job Ready Program’s introduction being less about addressing exploitative unpaid work arrangements, it is clear that the establishment of a more robust process has been largely positive. It has vastly reduced the number of international students applying for a TRA skills assessment and increased the integrity of the skills assessment program overall.⁹³

The preceding analysis only refers to international students enrolled in trades courses and, therefore, requiring a skills assessment by the TRA in order to obtain permanent residency. However, there are many thematic similarities to international students enrolled in the non-VET sector. Informal work experience is increasingly seen as a de facto requirement to secure a job, for instance. As the International Labour Organization has stated, ‘[w]ork experience is highly valued by firms and so

⁸⁹ The TRA has amended its guidelines to make it clear that the 360 work hours requirement in stage one can only be satisfied by paid employment that complies with the *Fair Work Act* or through a vocational placement with a registered training organisation as part of an Australian qualification. This decision has been made ‘due to the difficulties of differentiating between work experience, as observation, and work experience where applicants gain practical experience of the tasks and duties of their occupation, as required by the [Provisional Skills Assessment]’: Emails from Deborah Verco (Department of Education and Training) to Joanna Howe, 20 April 2016, 5 April 2017 (copy on file with the authors).

⁹⁰ Chris Evans, ‘Changes to the 2008–09 Skilled Migration Program’ (Ministerial Statement, 17 December 2008) 4.

⁹¹ Commonwealth, *Parliamentary Debates*, Senate, Legal and Constitutional Affairs Legislation Committee, 9 February 2010, 52.

⁹² Restaurant and Catering Australia, Submission No 50 to Joint Standing Committee on Migration, Parliament of Australia, *Inquiry into Eligibility Requirements and Monitoring, Enforcement and Reporting Arrangements for Temporary Business Visas*, 16 February 2007, 19.

⁹³ See Department of Industry, Innovation, Climate Change, Science, Research and Tertiary Education and the Department of Immigration and Citizenship, Australian Government, ‘Post Implementation Review of the Job Ready Program’ (Policy document, July 2013) (copy on file with the authors).

the lack of such experience constitutes a major obstacle for first-time jobseekers.⁹⁴ This is a situation that is exacerbated for international students who rely on informal work experience to secure employment, which is a key pathway to either a Temporary Work (Skilled) visa for four years (subclass 457 visa) or permanent residency through the Employer Nomination Scheme (subclass 186 visa). A report commissioned by the FWO has recently found that over 60% of the international students who completed a survey of their working arrangements had engaged in unpaid work for over one week, while over 30% had done so for between one and six months.⁹⁵ The frequency of unpaid work amongst international students was also confirmed by the *National Temporary Migrant Work Survey*, with 42% of respondents reporting that they had been asked to do a period of unpaid work as ‘training’.⁹⁶ Clearly, the tying of migration outcomes to employer sponsorship has the potential to act as an additional incentive for international students to engage in unpaid work experience in order to secure a job.

A recent example is *Fair Work Ombudsman v Aldred*,⁹⁷ one of the cases in which the FWO took action over exploitative work experience arrangements. This case involved a communications business systematically using interns to perform work that would or could otherwise be performed by paid employees. Here the business advertised unpaid traineeship positions to which two employees were appointed as a ‘graphic design intern’ and a ‘multi media intern’. One of the interns, who was recruited by the employer and eventually moved into an independent contracting arrangement, was an international student who negotiated with the employer to fraudulently alter her pay slips to better suit her visa aspirations.⁹⁸ Similarly, in *Fair Work Ombudsman v AIMG BQ Pty Ltd*⁹⁹ it was held to be unlawful for a media company to require an international student to complete an unpaid ‘internship’ of 180 hours of productive work over a period of four months before it started paying her wages. In this case, the international student’s duties ranged from administration and office cleaning to event organising and magazine editing. As none of this work was a formal part of her tertiary studies, it needed to be remunerated in accordance with the *Fair Work Act*. Judge Altobelli stated that ‘the Court will not countenance attempts to disguise employment relationships as unpaid internships and thus deny employees their required minimum entitlements’.¹⁰⁰ In yet another case involving international students and unpaid work, the FWO brought legal proceedings against a take-away outlet in regional Australia alleging unlawful use of an ‘internship’ program to exploit three international students from a private college in Korea.¹⁰¹ In this case an ‘Internship Agreement’ between the students’

⁹⁴ International Labour Organization, ‘Global Employment Trends for Youth 2013: A Generation at Risk’ (2013) 64.

⁹⁵ Reilly et al, above n 41, 45–6.

⁹⁶ Laurie Berg and Bassina Farberblum, ‘Wage Theft in Australia: Findings of the National Temporary Migrant Work Survey’ (Report, November 2017) (*‘National Temporary Migrant Work Survey’*).

⁹⁷ [2016] FCCA 220 (10 February 2016).

⁹⁸ *Ibid* 7 [22].

⁹⁹ [2016] FCCA 1024 (31 May 2016).

¹⁰⁰ *Ibid* 34 [124].

¹⁰¹ *Fair Work Ombudsman v Kjo Pty Ltd* [2017] FCCA 3160 (20 December 2017). See also FWO, ‘Take-Away Food Outlet Allegedly Used “Internship” Program to Exploit Young Korean Workers’ (Media Release, 4 June 2016).

college and the employer encouraged international students to travel to Australia for work experience. Each of the three students in this case were either not paid or substantially underpaid for the productive work completed during the internship.¹⁰²

It seems unlikely that the pressures encouraging international students into unpaid work will subside. The tightened regulation of the education–migration nexus for students from a trades background will no doubt assist in reducing the incidence of unpaid work. But, on the whole, Australia’s migration pathway for international students encourages them to find an employer willing to sponsor them for a subclass 457 visa or for permanent residency. As unpaid work is often perceived to be a gateway to paid work, these pathways create an opportunity for unscrupulous employers to exploit international students’ desire for a migration outcome by requiring the completion of a substantial period of unpaid work prior to obtaining paid work. Further, with the continued growth of the international student visa program,¹⁰³ and the changing profile of source countries for international students,¹⁰⁴ it seems clear that many students embark on study in Australia with the hope of obtaining a migration outcome. Many of these students are coming from countries with very different quality of living and labour market standards and high wage differentials when compared with Australia. Therefore, it seems likely that many would be seeking an opportunity to work and remain in Australia.

B Working Holiday Makers

There is no doubt that there is an increased vulnerability for temporary migrants engaged in work in regional Australia, evinced through the establishment of a dedicated FWO Regional Services Team, which often works in conjunction with its Overseas Workers Team established in 2012. A key visa pathway that funnels temporary migrants into working in regional Australia is the Working Holiday Maker program. The program includes the Working Holiday (subclass 417) and Work and Holiday (subclass 462) visas.¹⁰⁵ It is intended to be a cultural exchange program, with the performance of work incidental to that central purpose. Indeed, the Department of Home Affairs states that ‘[w]ork in Australia must not be the main purpose of the visa holder’s visit.’¹⁰⁶ Both the 417 and 462 visas allow work for the full 12 months of the visa, with the sole restriction on the work rights of a visa holder being that they

¹⁰² *Fair Work Ombudsman v Kjo Pty Ltd* [2017] FCCA 3160 (20 December 2017) 7–8 [27]–[34].

¹⁰³ The student visa program is experiencing growth across all sectors. Total student visa grants in 2016–17 increased by 10.1% (343 035 grants) compared with the 2015–16 financial year, when 310 845 visas were granted: Department of Immigration and Border Protection, Australian Government, *Annual Report 2016–17* (Commonwealth of Australia, 2017) 254; Department of Immigration and Border Protection, Australian Government, *Annual Report 2015–16* (Commonwealth of Australia, 2016) 62.

¹⁰⁴ China remained the largest citizenship country for student visa grants, followed by India, then Brazil, Nepal and South Korea. Of all student visas granted, 48.6% were granted to citizens of these five countries. Students from China made up 23.4% of student visa grants in 2016–17: Department of Immigration and Border Protection, Australian Government, *Student Visa and Temporary Graduate Visa Programme Bi-Annual Report* (30 June 2017) 34.

¹⁰⁵ Department of Home Affairs, Australian Government, ‘What is the Working Holiday Maker Program?’ <<https://www.homeaffairs.gov.au/lega/lega/form/immi-faqs/what-is-the-working-holiday-maker-program>>.

¹⁰⁶ *Ibid.*

cannot work for the same employer for more than six months.¹⁰⁷ On 1 November 2005, a 417 visa holder who had carried out 88 days of ‘specified work’ in regional Australia became eligible to apply for a second year extension on their visa.¹⁰⁸ ‘Specified work’ includes agriculture, mining and construction.¹⁰⁹ In 2013–14 approximately one-in-four 417 visa holders acquired a year’s extension on their visa.¹¹⁰

In response to growing concerns surrounding the role of the 88-day work period as a driver of non-compliance with Australian workplace law, the Federal Government announced in May 2015 that unpaid work would no longer count towards enabling a second year extension on the Working Holiday visa. This decision was made by the then Assistant Minister for Immigration and Border Protection, Senator Cash, following the airing of an investigation by journalists into the working conditions of working holiday makers.¹¹¹ The decision was made on the basis that permitting unpaid work to be used in an application for an extension created ‘a perverse incentive for visa holders to agree to less than acceptable conditions in order to secure another visa’.¹¹² Senator Cash informed the Australian Parliament during a Senate Estimates hearing:

In relation to some of the integrity measures, Senator Carr, we also announced that, going forward, in terms of being able to apply for the second year on your working holiday visa, the department as an integrity measure will only now accept payslips. *Four Corners* suggested that documentation such as an employer reference was accepted by the department. Ensuring that the only document that will now be accepted by the department is a payslip is also a step in terms of the additional integrity measures we are putting in place.¹¹³

This reform attempted to grapple with a conundrum created by the previous policy: that although work paid at below-award rates would clearly breach workplace laws, the same work — if completely unremunerated — sufficed for a visa extension. An inquiry conducted by the FWO into the Working Holiday program found that prior to this reform, one-third of visa holders had used a period of unpaid work to gain a second year extension on their 417 visa.¹¹⁴ This report also found that almost half of these visa holders would not have engaged in either paid or unpaid work if they had not needed to complete 88 days of specified work in

¹⁰⁷ *Migration Regulations 1994* (Cth) regs 417.611, 462.611 (by operation of mandatory visa condition 8547).

¹⁰⁸ *Ibid* reg 417.211.

¹⁰⁹ See further Department of Immigration and Border Protection, Australian Government, ‘Working Holiday Maker Visa Programme Report’ (31 December 2014) 4.

¹¹⁰ *Ibid*.

¹¹¹ Commonwealth, *Parliamentary Debates*, Senate, Legal and Constitutional Affairs Legislation Committee, 26 May 2015, 103. See also Australian Broadcasting Corporation, ‘Slaying Away: The Dirty Secrets behind Australia’s Fresh Food’, *Four Corners*, 4 May 2015 (Caro Meldrum Hana) <<http://www.abc.net.au/4corners/stories/2015/05/04/4227055.htm>>.

¹¹² Michaelia Cash, Assistant Minister for Immigration, cited in Alex Harmon, ‘Labour Hire Reform Required: The Shocking Truth’, *Byte* (online), 6 May 2015 <www.thebyte.com.au/labour-hire-reform-required-the-shocking-truth>.

¹¹³ Commonwealth, *Parliamentary Debates*, Senate, Legal and Constitutional Affairs Legislation Committee, 26 May 2015, 103.

¹¹⁴ FWO, ‘Inquiry into the Wages and Conditions of People Working under the 417 Working Holiday Visa Program’ (Australian Government, October 2016) 29.

regional Australia.¹¹⁵ This illustrates the role of migration-related incentives in influencing the work behaviour of visa holders.

Nonetheless, unpaid work is still allowed on the 417 visa. Michaelia Cash has stated that:

In recognition of the many legitimate and worthwhile agencies that employ volunteer workers to deliver valuable community services, working holiday visa holders will still be able to perform volunteer work should they wish to do so. The work will simply not count towards eligibility for a second visa.¹¹⁶

Willing Workers on Organic Farms ('WWOOF'), an international organisation that operated in 70 countries and places 'volunteers'¹¹⁷ on farms, has criticised this development, arguing that it will cripple many small- and medium-sized family farms who are heavily reliant upon unpaid workers.¹¹⁸ WWOOF has proposed a 'volunteer pay slip' to assist the Department of Immigration in counting this work towards a second year extension on the visa.¹¹⁹ This proposal seeks to create a way of proving a visa holder's period of work in a regional location for 88 days doing 'specified work', given that proof of unpaid work often presents an evidentiary challenge.¹²⁰ However, WWOOF's recommendation to develop paperwork protocols proving that the period of unpaid work was genuine does not address the core problem relating to the integrity of the Working Holiday visa program, which was the original motivation for Senator Cash's reform establishing the ineligibility of unpaid work. Further, although the 'WWOOFing' model is aimed to provide interested individuals with regional experience in biodynamics or organic farming, it does have the capacity to result in productive work that should be remunerated. WWOOF hosts pay an annual fee to be registered with the organisation, but there is no comprehensive auditing or monitoring program of standards, with WWOOF hosts only losing their registered status if an investigation occurs following a complaint by an individual. WWOOF Australia reported to the FWO that it was not aware of endemic exploitation or non-compliance with the *Fair Work Act* among its hosts. But given that it only has six staff in its Australian office and does not have an effective oversight system of hosts, it is unlikely that the organisation has the capacity to conclusively determine this.¹²¹

¹¹⁵ *Ibid.*

¹¹⁶ Michaelia Cash, Assistant Minister for Immigration and Border Protection, 'Strengthening Integrity in Working Holiday Visa Programme' (Press Release, 1 May 2015).

¹¹⁷ While conventionally a 'volunteer' may be thought of as someone who is undertaking work on an altruistic basis for a non-profit organisation rather than a commercial operation, there is no clarity around this concept under Australian law: see Murray, above n 4.

¹¹⁸ Letter from WWOOF to Peter Dutton, 17 October 2015, 2 <www.aph.gov.au/Parliamentary_Business/Committees/Senate/Education_and_Employment/temporary_work_visa/Additional_Documents>. The letter was provided at the public hearing in Melbourne, 20 November 2015, to the inquiry of the Senate Standing Committees on Education and Employment into The Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders.

¹¹⁹ WWOOF, 'Volunteering for Second Working Holiday Visa Extensions' (Issues Paper) (2015, copy on file with authors). See further Karla Arnall, 'Albany Flower Grower Says Changes to Working Holiday Visa System Will Spell the End of Business', *ABC News* (online), 13 May 2015 <<http://www.abc.net.au/local/stories/2015/05/13/4235042.htm>>.

¹²⁰ See, eg, 1505583 (Migration) [2016] AATA 3041 (8 January 2016).

¹²¹ FWO, above n 114, 1.

In sum, despite its official purpose as a cultural exchange program, the Working Holiday Maker visa is increasingly being used for the purpose of work. This is reflected in the increasing number of source countries for visa applicants,¹²² and the increasing liberalisation of work conditions under the visa.¹²³ It is also used as a gateway to other visas, allowing the visa holder to remain in Australia for a longer period of time. The decision to prevent unpaid work being counted towards a second year visa extension reflects concerns around the exploitation of Working Holiday visa holders in the labour market. These visa holders are more susceptible to completing a period of unpaid work than comparable local workers because of their desire to achieve a migration outcome. This exposes a key regulatory challenge that occurs when migration policies are used to incentivise temporary migrants into particular types of work. It becomes easier for employers to induce visa holders into unpaid work that goes beyond volunteering and involves productive work that should be remunerated under Australian law because of the likely existence of an employment relationship.

C 457 Visa Holders

Unlike visas for international students and working holiday makers, the 457 visa, introduced in 1996, is a dedicated, temporary skilled migration pathway.¹²⁴ On its face, the regulatory framework for the 457 visa does not permit unpaid work. Holders of the 457 visa are required to be paid equivalent wages and conditions to local workers performing the same work in the same geographic locality.¹²⁵ They must also be remunerated above the Temporary Income Skilled Migration Threshold, which is currently set at \$53 900.¹²⁶ Despite these requirements, it is not unknown for 457 visa holders to be engaged in unpaid work as part of their overall employment relationship with their employer–sponsor. Two aspects of the 457 visa’s regulatory design make temporary migrant workers on the 457 visa more susceptible to unpaid work. First, the employer’s dual role of employer and sponsor renders the visa holder more likely to acquiesce to an employer’s request to perform additional unpaid work because their right to remain in Australia is tied to their employer’s continuing sponsorship.¹²⁷ Second, the mixed migration motivations of 457 visa holders (similar to many

¹²² Notably, the top three source countries of working holiday makers applying for a second year on the Working Holiday Maker visa are the United Kingdom, Taiwan and South Korea: Department of Home Affairs, Australian Government, *Working Holiday Maker Visa Program Report* (Report, 31 December 2017) 7.

¹²³ For example, the most recent reform package to the Working Holiday visa allows visa holders to work for 12 months for the same employer in two different regions: Joint Explanatory Memorandum, Income Tax Rates Amendment (Working Holiday Maker Reform) Bill 2016 (Cth), Treasury Laws Amendment (Working Holiday Maker Reform) Bill 2016 (Cth), Superannuation (Departing Australia Superannuation Payments Tax) Amendment Bill 2016 (Cth), Passenger Movement Charge Amendment Bill 2016 (Cth) 63.

¹²⁴ Howe, above n 1.

¹²⁵ *Migration Regulations 1994* (Cth) reg 2.72(10)(c).

¹²⁶ The threshold is a legislative instrument that provides the minimum amount of annual income to be paid to a subclass 457 visa holder: *Migration Regulations 1994* (Cth) reg 2.72(10)(cc).

¹²⁷ On the demand-driven nature of the 457 visa, see Joanna Howe, ‘Contesting the Demand-Driven Orthodoxy: An Assessment of the Australian Regulation of Temporary Labour Migration’ in Joanna Howe and Rosemary Owens (eds), *Temporary Labour Migration in the Global Era: The Regulatory Challenges* (Hart Publishing, 2016) 131.

temporary migrant workers) mean that despite their status as temporary workers, for many, their overriding and long-term desire is to secure permanent residency in Australia. This results in them being more willing to accept unpaid work in order to gain employer sponsorship for permanent residency.¹²⁸ Research into temporary migrant workers' behavioural traits supports this analysis, as it indicates visa holders are more likely to be compliant to employer requests around work.¹²⁹

Two cases are illustrative of the capacity of the regulatory design of the 457 visa to produce a tendency for both unpaid and underpaid work. One case concerned Ms Virata, a worker from the Philippines who was employed by Comfort Inn Country Plaza Halls Gap on a 457 visa.¹³⁰ She worked for the hotel for a little over a year before the hotel terminated her employment via email, while she was in the Philippines. The Fair Work Commission made a finding of unfair dismissal and awarded her substantial compensation.¹³¹ In its decision, the Commission noted the 'exploitative' nature of the employment relationship, given that Ms Virata and her de facto partner were required to split her salary between the two of them.¹³² This provided a way for the employer to circumvent the Temporary Income Skilled Migration Threshold by nominally agreeing to pay the required amount for the primary 457 visa holder, but then in practice paying well below it because of the wage splitting between the primary visa holder and her partner. Ms Virata also alleged that she regularly worked 12 to 16 hours per day, despite being remunerated for a 40 hour work week,¹³³ and that she felt that she was forced 'to submit, obey and follow everything' if she wanted to keep her job.¹³⁴ This case exemplifies the tendency of 457 visa holders to perform unpaid work because of their additional reliance on their employer to sponsor them on the 457 visa.

The second case concerns a 457 visa holder who was sponsored for permanent residency by his employer. The employer required him to perform additional unskilled tasks and work considerable amounts of overtime, as a car driver for his friends and to work on his farm. He was directed not to record these extra hours and was not paid for these additional duties. The employee was dismissed after he made a complaint to his employer about this unpaid work. The Fair Work Commission made a finding of unfair dismissal and awarded the employee substantial damages, commenting on the vulnerable position of the employee:

As a sponsored 457 visa worker, the Applicant was in a position where it is apparent that he was vulnerable to exploitation by virtue of his strong desire

¹²⁸ Barbara Deegan, 'Visa Subclass 457 Integrity Review' (Final Report, Department of Immigration and Citizenship, Australian Government, October 2008) 50–51 ('*Deegan Review*').

¹²⁹ See, eg, Chris F Wright and Andreea Constantin, Submission No 23 to Education and Employment References Committee, Senate Standing Committees on Employment and Education, Parliament of Australia, *Inquiry into the Impact of Australia's Temporary Work Visa Programs on the Australian Labour Market and on the Temporary Work Visa Holders*, 1 May 2015.

¹³⁰ *Virata v NSW Motel Management Services Pty Ltd* [2015] FWC 7932 (24 November 2015).

¹³¹ *Ibid.*

¹³² *Ibid* 1 [4].

¹³³ *Ibid* 1–2 [4]–[5].

¹³⁴ Susie O'Brien, 'Worker on 457 Visa Alleges She Was "Enslaved", Paid \$3 an Hour at Grampians Hotel', *Herald Sun* (online), 19 July 2015 <<http://www.heraldsun.com.au/news/law-order/worker-on-457-visa-alleges-she-was-enslaved-paid-3-an-hour-at-grampians-hotel/news-story/7f69c522c5121a1bb060965d2b2c68b8>>.

to remain in Australia and the need to maintain sponsorship to do so. The apparent actions of the Respondent to exploit the Applicants vulnerability by compelling him to work unpaid overtime; as well as likely failing to pay his superannuation entitlements and making substantial deductions from his wages is disgraceful. To then terminate the Applicant's employment when he has taken a stand against these unreasonable actions is appalling.¹³⁵

This case illustrates the possibility that a 457 visa holder will perform unpaid work for their sponsor in order to secure continuing sponsorship on the 457 visa and also to obtain permanent residency.

IV Employer-Driven Migration and Unpaid Work

Australia's regulatory approach to managing migration has undergone radical transformation from the 1990s to the present day. Although Australia was initially founded upon a culture of permanent migration, built upon ideas of nation-building and citizenship,¹³⁶ temporary labour migration has now become the norm, with an emphasis on labour migration predicated on an economic rationale, rather than family reunion and humanitarian needs.¹³⁷ The significance of this normative transformation is that Australia's migration regulation now incentivises visa holders to work. Each of the main visa categories reward visa holders who have worked in Australia and who have obtained employer sponsorship. The subclass 189 visa for permanent residency allows a period of paid employment to provide points for this visa, although unpaid work does not count in the calculation of the points test.¹³⁸ In addition, employer sponsorship is a direct route to permanent residency via the Employer Nomination Scheme (subclass 186 visa). Thus, both the main entry pathways to permanent residency reward applicants for a past period of paid employment in Australia or for establishing an employment relationship with an Australian employer. In the temporary program, the only temporary visa with a pathway to permanent residency and the temporary work visa with the longest term and capacity for renewal is the subclass 457 visa, which was replaced by the Temporary Skill Shortage subclass 482 visa in 2018, as discussed below.¹³⁹ This visa requires the performance of paid work sponsored by an employer. Other visa categories such as visas for working holiday makers, international students and graduates all afford an opportunity to work in Australia and often provide a path to a longer stay in Australia via another visa. With the advent of 'two-step' or even 'multi-step migration', a direct link between temporary migration through to permanent residency has been created

¹³⁵ *Farzday v Monochromatic Engineering Pty Ltd* [2015] FWC 7216 (20 October 2015) 11 [64].

¹³⁶ Mary E Crock, 'Contract or Compact: Skilled Migration and the Dictates of Politics and Ideology' (2002) 16(1) *Georgetown Immigration Law Journal* 133.

¹³⁷ The Department of Immigration's planning levels for 2016–17 for permanent migration to Australia reflect this shift, with two-thirds of the places (123 567) offered to skilled stream places and the remaining third (60 041) allocated to family stream, special eligibility stream and child places: Department of Immigration and Border Protection, *Annual Report 2016–17*, above n 103, 31.

¹³⁸ Department of Home Affairs, Australian Government, 'Skilled Independent Visa (Subclass 189) (Points-tested) Stream' <<https://www.homeaffairs.gov.au/trav/visa-1/189->>.

¹³⁹ Department of Home Affairs, Australian Government, 'Abolition and Replacement of the 457 Visa — Government Reforms to Employer Sponsored Skilled Migration Visas' (April 2017) <<https://www.homeaffairs.gov.au/trav/work/457-abolition-replacement>>.

for skilled occupations.¹⁴⁰ Increasingly visa holders are transitioning through a number of visa pathways in order to secure their ultimate goal of permanent residency.¹⁴¹

With migration outcomes increasingly linked to the performance of paid work, perhaps perversely this approach has the effect of encouraging visa holders to perform unpaid work. As this part will demonstrate, unpaid work is often perceived to be a gateway to paid work. Justice Einfeld recognised this in *Dib v Minister for Immigration and Multicultural Affairs*,¹⁴² when stating that, ‘the primary motive in *Kim* for performing the activity, as in *Braun*, was commercial — the gaining of work experience or the chance to demonstrate skills in the hope of obtaining paid employment’.¹⁴³ This point was also noted, more recently, in a case concerning an international student who worked in the kitchen for nine months on an unpaid basis for a Sydney waterfront seafood restaurant and transitioned to paid employment for the restaurant after that. The Tribunal noted that it would have been unlikely for the international student to have gained paid employment with the restaurant without a period of work experience.¹⁴⁴ The *Deegan Review* into the 457 visa also noted the strong motivation of many temporary visa holders for permanent residency and how this may induce them to accept all manner of work in order to secure employer sponsorship:

The link between the sponsoring employer and access to permanent residency has been raised during consultations as a key driver for Subclass 457 visa holders to continue to work for a sponsor despite being subjected to underpayment of wages, substandard working and living conditions (including unsafe workplaces) and other breaches of the sponsor’s obligations. *A visa holder may be so desperate to access a streamlined pathway to permanent residency, not otherwise available, that he or she will be compliant in such treatment.*¹⁴⁵

This tendency for visa holders to be propelled into unpaid work in order to secure a migration outcome was noted in the Part III above. For both international students in trade occupations and working holiday makers, migration regulations were created which provided a direct pathway between the performance of unpaid work and the achievement of a migration outcome. Although recent reforms to both visa programs have decoupled the two, there is still scope within Australia’s migration law to induce the performance of unpaid work by visa holders. This is primarily because of the deference Australia’s migration law and policy gives to employers in determining the composition of Australia’s migrant intake. The

¹⁴⁰ See, eg, Lesleyanne Hawthorne, ‘How Valuable is “Two-Step Migration”? Labour Market Outcomes for International Student Migrants to Australia’ (2010) 19(1) *Asian and Pacific Migration Journal* 5.

¹⁴¹ This is a phenomenon Birrell and Healy have called ‘visa churn’: Bob Birrell and Ernest Healy, ‘Immigration Overshoot’ (Research Report, Centre for Population and Urban Research, Monash University, November 2012) <<http://tapri.org.au/wp-content/uploads/2016/02/birrell-and-healy-overshoot-2012.pdf>>.

¹⁴² (1998) 82 FCR 489.

¹⁴³ *Ibid* 495, referring to *Kim v Witton* (1995) 59 FCR 258 and *Braun v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 33 FCR 152.

¹⁴⁴ 1207637 [2015] MRTA 490 (27 March 2015) 7 [32].

¹⁴⁵ Barbara Deegan, ‘Visa Subclass 457 Integrity Review: Integrity / Exploitation’ (Issues Paper No 3, Department of Immigration and Citizenship, Australian Government, September 2008) 26 (emphasis added).

centrality of employer sponsorship in the 457 visa's design, and the move to employer sponsorship both as part of the TRA's Job Ready Program and as part of the central pathway to permanent residency (the Employer Nomination Scheme), mean there is still likely to be a strong incentive for visa holders to perform unpaid work.

This has become even more pronounced with the announcement in April 2017 of a new Temporary Skill Shortage ('TSS') subclass 482 visa, which requires applicants to have two years of relevant work experience in their nominated occupation.¹⁴⁶ This reform is likely to have the greatest impact on onshore applicants for the TSS visa, with international students and working holiday makers constituting two-thirds of onshore 457 visa recipients. This new work experience requirement is not limited to remunerated work and includes unpaid work experience that meets Australian workplace laws.¹⁴⁷ According to a government official the requirement is to be flexibly applied and can, for example, take into account the internship year for students studying a medical degree, or teaching and research experience gained by PhD students during the course of their studies.¹⁴⁸ It is likely this reform will place even more pressure on international students and working holiday makers to find work relating to an occupation eligible for sponsorship under the TSS visa during the course of their studies or holiday in Australia. In the absence of being able to find paid work, it is possible they will be induced into unpaid work. Unpaid work provides temporary migrants with an opportunity to demonstrate skills in the hope of obtaining paid employment in their nominated occupation. As Birrell has observed of the TSS reforms,

it is very likely that immigration agents and some employers will respond to the desperation of overseas students seeking the 'relevant experience' by coming up with intern or other employment arrangements which purport to meet the requirement.¹⁴⁹

Additionally, the focus of Australia's migration framework on employer sponsorship also constrains the choices of visa holders in the labour market. Their choice of whom to work for is inevitably constrained by the limited selection of employers willing to engage a temporary migrant worker or to undertake the additional obligation of employer sponsorship. Berg acknowledges the pivotal role of society and governments in perpetuating inequality or vulnerability, drawing upon Butler's work to show that precariousness is often created through dependence on another:¹⁵⁰

¹⁴⁶ Department of Home Affairs, Australian Government, 'Temporary Skill Shortage Visa (Subclass 482)' <<https://www.homeaffairs.gov.au/trav/visa-1/482->>.

¹⁴⁷ Email from Helen Innes (Department of Jobs and Small Business) to Joanna Howe, 15 May 2018 (copy on file with the authors).

¹⁴⁸ Department of Home Affairs, Australian Government, 'Temporary Skill Shortage Visa: Skills, Qualifications, Employment Background,' (15 May 2018) <<https://www.homeaffairs.gov.au/trav/visa-1/482-?modal=/visas/supporting/Pages/482/skills-qualifications-employment-background.aspx>>.

¹⁴⁹ Bob Birrell, 'The Coalition's 457 Visa Reset: Tougher than You Think' (Research Report, Australian Population Research Institute, August 2017) 12.

¹⁵⁰ Berg, above n 1, 40–1.

Precariousness implies living socially, that is, the fact that one's life is always in some sense in the hands of the other. It implies exposure both to those we know and to those we do not know; a dependency on people we know or know not at all.¹⁵¹

Thus, the regulatory design of Australia's temporary and permanent labour migration pathways preferences the needs and wishes of employers, rendering visa holders heavily reliant upon employer support to achieve their desired migration outcome. In this context, many visa holders who wish to secure a longer period of stay in Australia and/or permanent residency are more likely to choose unpaid work in the hope that it will secure the goodwill of an employer. This creates the possibility of exploitation. As long as employer sponsorship is the dominant entry pathway to Australia in both the temporary and permanent migration programs, visa holders will be more likely to remain in employment relationships marked by pronounced dependency. It is for these reasons that we suggest below a number of regulatory reforms, giving less preference to employers, to each of the three main visa categories requiring or permitting temporary migrant work in Australia.

One proposal is to reduce the hold of a particular employer over visa holders on temporary visas — such as the defunct 457 visa or the new TSS visa — that require the performance of work. The *Deegan Review* proposed that in determining eligibility for permanent residency, more weight should be given to the length of time a visa holder has worked for *any* Australian employer, rather than the willingness of one employer-sponsor.¹⁵² Another set of proposals, advanced by Mares in his book *Not Quite Australian*, is to reduce the vulnerability of temporary migrant workers by reducing the time in which they are dependent on employer sponsorship. He proposes that any employer who wants to employ a 457 visa holder for more than two years should be required to sponsor that temporary migrant for permanent residence.¹⁵³ He also advocates that all temporary migrants who have lawfully worked and lived in Australia for a continuous period of eight years should receive an automatic right to apply for permanent residency without employer sponsorship.¹⁵⁴ Underlying each of Mares' proposals is a desire to ameliorate the precarious position of temporary migrant workers, which he argues is best addressed through providing visa holders with the opportunity to become permanent residents independent of an employer-sponsor.

For Working Holiday visa holders, there is a need for reforms to reduce their reliance on employers in order to gain a visa extension. One approach is to abolish the possibility of a visa extension altogether. Mares proposes reducing the potential for unscrupulous employers to entice migrant workers into exploitative (and often unpaid or severely underpaid) work in order to receive a migration outcome. He recommends that the option of a second year visa extension for Working Holiday visa holders be abolished because it 'creates a choke point that gives unconscionable power to employers in the workplace'.¹⁵⁵ The abolition of this option is also

¹⁵¹ Judith Butler, *Frames of War: When is Life Grievable?* (Verso, 2009) 14.

¹⁵² *Deegan Review*, above n 128, 51. See also Berg, above n 1, 144.

¹⁵³ Peter Mares, *Not Quite Australian: How Temporary Migration is Changing the Nation* (Text Publishing, 2016) 297.

¹⁵⁴ *Ibid* 294.

¹⁵⁵ *Ibid* 299.

canvassed in a report on the Australian horticulture industry, which found that the opportunity for a visa extension after the completion of an 88-day period of paid work is likely to result in exploitation.¹⁵⁶ This is a point supported by the FWO's 417 visa inquiry, which found this regulation has created a 'cultural mindset amongst many employers wherein the engagement of 417 visa holders is considered a licence to determine the status, conditions and remuneration levels of workers (regardless of duties or hours) without reference to Australian workplace laws'.¹⁵⁷ Nonetheless, abolition of the visa extension is unlikely to occur in the near future, given the horticulture industry's reliance on Working Holiday visas for low skilled labour during harvest.¹⁵⁸ However, consideration should also be given to proposals that: reduce the employer's power to sign off on a visa holder's completion of the 88-day period; provide Working Holiday visa holders with more information about paid work vacancies; and incentivise compliant employment practices. These would help reduce the incidence of exploitative unpaid work being used as a gateway to paid work that can count towards the visa extension.¹⁵⁹

This article has shown how international students are particularly vulnerable to performing unpaid work in the hope of finding paid work that will allow them to stay in Australia. One way of reducing their vulnerability is to reconsider the viability of visa condition 8105, which restricts the work hours of international students. This visa condition frames the manner in which international students engage in the labour market during their studies, by restricting the hours in which international students can engage in paid work on the basis that the central purpose of the visa is for study. This makes it difficult for international students to find employers willing to employ them to work within this limitation. International students, therefore, have a much more limited labour market than that available to local students. Further, the ability of international students to complain about exploitation at work is constrained. Their reliance on paid work to cover tuition expenses and living costs can result in unscrupulous employers coercing international students to breach the work hours limit and using this as leverage to ensure compliance. Additionally, as the possibility of further stay is closely linked to employer sponsorship and previous work experience, this makes the need to secure paid work far more compelling. These factors can make it more likely that international students will accept exploitative work and be unwilling to draw attention to it or publicly access legal remedies to rectify it.

Mares suggests that the 40 hours fortnightly limit for international students be abolished because 'it gives employers too much leverage over student workers'.¹⁶⁰ In the current political climate this proposal seems unlikely to be politically pragmatic or achievable.¹⁶¹ Nevertheless, his other recommendations,

¹⁵⁶ Joanna Howe et al, 'Sustainable Solutions: The Future of Labour Supply in the Australian Vegetable Industry' (Report, Horticulture Innovation Australia, 2017).

¹⁵⁷ FWO, above n 114, 33.

¹⁵⁸ Howe et al, above n 156; Haydn Valle, Niki Millist and David Galeano, 'Labour Force Survey' (Research Report, Department of Agriculture and Water Resources, Australian Government, 18 May 2017) 6.

¹⁵⁹ These proposals are expanded further in Howe et al, above n 156, ch 5.

¹⁶⁰ Mares, above n 153, 300.

¹⁶¹ Ibid 300.

coupled with Deegan's proposal and the analysis of an increasing number of other scholars critiquing Australia's temporary migration pathways that permit the performance of work,¹⁶² suggest that there does need to be a reconsideration of the role of employer-sponsored work in producing the achievement of a migration outcome. As Howe has written in her critique of the demand-driven orthodoxy that underpins the 457 visa programme:

This [suggestion of limits on employer demand] is not to diminish the importance of employer demand as one aspect of the regulatory framework for determining the composition of Australia's temporary migrant worker programme. However, the Australian government has both the capacity and obligation to ensure that employer requests for 457 visas are met with stronger scrutiny and accountability.¹⁶³

The need for greater oversight of the way in which employers *access* temporary migrant labour should extend to the manner in which these workers are *treated* in the labour market. There should be less capacity for employers to use temporary and permanent residency as incentives to compel certain behavioural traits (such as compliance) and greater productivity (including the performance of unpaid work) from visa holders than would be acceptable in the local workforce.

V Conclusion

Unpaid work, when not undertaken out of an altruistic desire to benefit someone else or to further a particular cause, is problematic for a number of reasons. It may breach employment standards, such as those imposed by the *Fair Work Act*, to the extent that it is performed under what can be characterised as a contract of employment. The fact that the worker concerned may have 'chosen' to accept no money should not matter for this purpose, given that the legislation is meant to have a protective effect. If a worker cannot lawfully consent to be paid less than the minimum wage set for a particular job, why should it be lawful to agree to work for nothing? And the concern is simply heightened if the worker is vulnerable to being manipulated or coerced into accepting work without pay because they are desperate to break into a competitive job market, or to gain a right of permanent residence, or both.

In this article, we have considered the way the performance of unpaid work is regulated under various visa pathways and the evolution of this regulation over time. We have argued that this evolution has been informed by a growing awareness of the exploitative nature of visa regulations allowing unpaid work to count towards a migration outcome. As this article has shown, the vulnerability of many temporary migrant workers is exacerbated by regulatory practices in the past, which have led to the development of a culture of tolerance for unpaid work by temporary migrants within an employer-driven system. Even though the regulations pertaining to unpaid work have changed, the effects of this culture are ongoing and, thus, deeper and more pervasive than are often understood to be the case. The Australian Government

¹⁶² Berg, above n 1; Iain Campbell and Joo-Cheong Tham, 'Labour Market Deregulation and Temporary Migrant Labour Schemes: An Analysis of the 457 Visa Program' (2013) 26(3) *Australian Journal of Labour Law* 239; Joanna Howe, 'Is the Net Cast Too Wide? An Assessment of Whether the Regulatory Design of the 457 Visa Meets Australia's Skill Needs' (2013) 41(3) *Federal Law Review* 443.

¹⁶³ Howe, above n 127, 147.

must take responsibility for developing a migration law and policy framework that does not lead visa holders into unpaid work in order to secure the approval of an employer who will then acquiesce to signing off on an application for another temporary or permanent visa allowing further stay. Australia's regulatory framework still places too much weight on employers in determining the composition of Australia's migration intake. While there are undoubtedly labour market benefits to an employer-driven migration program,¹⁶⁴ the Australian Government has a responsibility to ensure that temporary and permanent labour migration visas do not increase visa holders' precarity in the labour market by creating the conditions in which exploitative, illegal and illegitimate forms of unpaid work are allowed to proliferate.

¹⁶⁴ See, eg, *ibid.*

Australia's Position on Investor–State Dispute Settlement: Fruit of a Poisonous Tree or a Few Rotten Apples?

Kyle Dylan Dickson-Smith* and Bryan Mercurio†

Abstract

This article critically analyses the methodology and substantive basis of Australia's initial rejection of, and subsequent ambivalence towards, investor–State dispute settlement ('ISDS') mechanisms contained in international investment agreements. The analysis focuses on the Australian Government Trade Policy Statement of 2011, as well as the 2010 and 2015 reports of the Australian Productivity Commission that largely informed the conclusions of the Trade Policy Statement. The article reveals that Australia's analysis was incomplete and lacking meaningful discourse on the general concerns and benefits of ISDS in light of Australia's regional relationships and the global political economy. Consequently, an adequate debate on the virtues of ISDS has yet to take place in Australia. In the absence of a clear and consistent investment policy, this article provides guidance for Australia's future policy, such as threshold criteria for the inclusion of ISDS and a model investment treaty. With the European Union and United States expressing dissatisfaction with the present system of ISDS, this article is timely and has broad relevance.

I Introduction

Australia is a lucky country run mainly by second-rate people who share its luck.¹

The 'lucky country' phrase entered, and remained, in the Australian vernacular as a term of endearment, depicting Australia as a country rich in natural resources and prosperity, geographically distant from global problems and, therefore, a great place to migrate or invest. Yet, unknown to most, Horne's depiction of Australia as the 'lucky country' was actually describing a political-legal system largely guided by

* International Lawyer and Counsel. The authors are grateful for the thoughtful advice provided by Lori Blahey and appreciate the constructive comments of the anonymous reviewers. The authors welcome any comments and can be reached at info@kyledickson-smith.com. The views expressed (along with any errors) herein are exclusively the authors' own.

† Professor, Associate Dean (Research) and Vice-Chancellor's Outstanding Fellow of the Faculty of Law, The Chinese University of Hong Kong, Hong Kong.

¹ Donald Horne, *The Lucky Country: Australia in the Sixties* (Penguin Books, 1964) 209.

luck, rather than guided by proactive governance that capitalises on Australia's underlying economic and legal advantages.²

Much has changed in the political-legal system and in Australia more generally since 1964, but this article addresses whether Australia has returned to 'second rate' governance whereby economic prosperity is the result not of foresight and planning, but of luck. This certainly appears to be the case behind the Australian Government's curious policy on international investment and, in particular, investor-State dispute settlement ('ISDS'). A common feature of international investment agreements,³ ISDS is a mechanism that allows nationals of a party to an investment agreement to take direct legal action against the counterparty host State for breaches of that agreement. If successful, the host State could be liable for monetary damages payable directly to the investor.

Until 2011, Australia included ISDS in almost all of its investment agreements as a matter of course, with little discussion or debate. One notable exception is the *Australia-United States Free Trade Agreement* ('AUSFTA'),⁴ which excluded ISDS at the request of Australia.⁵ This exclusion by the conservative Howard Government perhaps planted the seed for the later left-leaning Gillard Government's Trade Policy Statement, which, inter alia, ostensibly declared that ISDS would no longer be included in Australian investment agreements.⁶ In so doing, Australia became one of the few countries to reject ISDS in its investment agreements. Other states such as Ecuador, Bolivia, Venezuela and later Indonesia and South Africa clearly set out their bases for rejecting ISDS.⁷ However, Australia's rejection was not accompanied by detailed or clear rationale. Instead, the Trade Policy Statement left unstated whether the rejection was based on specific institutional or systemic concerns, or simply as part of a general apprehension with the international investment regime. Since 2011, Australia's position on ISDS has again shifted, multiple times.

Australia included ISDS in all of its 21 bilateral investment treaties ('BITs') and most free trade agreements ('FTAs') entered into between 1988-2005 (over the Hawke and Keating Labor Governments and Howard Liberal Government), before

² See Michael J Enright and Richard Petty, *Australia's Competitiveness: From Lucky Country to Competitive Country* (Wiley, 2016) xi; Victoria Mason, 'Strangers within in the "Lucky Country": Arab-Australians after September 11' (2004) 24(1) *Comparative Studies of South Asia, Africa and the Middle East* 233, 240.

³ The term 'investment agreements' encompasses both standalone bilateral investment treaties and free trade agreements that contain a comprehensive chapter on investment.

⁴ *Australia-United States Free Trade Agreement*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005) ('AUSFTA').

⁵ See Jacob Varghese, 'Australia-US Free Trade Agreement: Overview of Potential Legal Issues' (Research Note, Parliamentary Library (Cth), 10 February 2004) Analysis & Policy Observation <<http://apo.org.au/system/files/8381/apo-nid8381-3276.pdf>>.

⁶ See Department of Foreign Affairs and Trade ('DFAT'), Australian Government, 'Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity' (Policy Statement, DFAT, April 2011) 14 <<https://goo.gl/KLzjaX>>.

⁷ See generally William B McElhiney III, 'Responding to the Threat of Withdrawal: On the Importance of Emphasizing the Interests of States, Investors, and the Transnational Investment System in Bringing Resolution to Questions Surrounding the Future of Investments with States Denouncing the *ICSID Convention*' (2014) 49(3) *Texas International Law Journal* 601, 602.

being omitted by the Gillard Labor Government in FTAs with New Zealand (2010)⁸ and Malaysia (2012).⁹ The Abbott Liberal-led Government then included ISDS in trade agreements with Korea (2014),¹⁰ the Association of South East Asian Nations ('ASEAN') (2014)¹¹ and China (2015),¹² but not in the FTA with Japan (2014).¹³ The recent Government's 'case-by-case approach'¹⁴ could very well be reasoned and rationalised, but such repeated shifts do beg the question whether Australia has been guided by any overarching theoretical principles or whether these shifts are simply the result of a schizophrenic policy from successive governments. What is clear is that a case-by-case approach without any underlying guiding principles inevitably leads to confusion and uncertainty in any subsequent negotiations.

The objective of this article is to critically analyse the basis for Australia's rejection of, and subsequent ambivalence towards, ISDS in the context of its regional relationships and the global political economy. The Australian Productivity Commission reports in 2010 and 2015 largely influenced and informed the conclusions of the Trade Policy Statement.¹⁵ However, even a cursory evaluation of the Trade Policy Statement, as well as those reports, reveals incomplete analysis of the general (global) concerns and a summary dismissal of the benefits (both in general terms and to Australian investors) of ISDS. Consequently, an adequate debate as to the merits of ISDS has yet to take place by the Australian Government.

The topic of this article is apt in light of the most recent developments in Europe and the United States ('US') questioning the merits of ISDS.¹⁶ Further, the

⁸ *Exchange of Letters Constituting an Agreement between the Government of Australia and the Government of New Zealand to Amend Annex G of the Australia New Zealand Closer Economic Relations Trade Agreement (ANZCERTA)*, signed 16 June 2010, [2011] ATS 42 (entered into force 1 September 2011).

⁹ *Malaysia–Australia Free Trade Agreement*, signed 22 May 2012, [2013] ATS 4 (entered into force 1 January 2013).

¹⁰ *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea*, signed 8 April 2014, [2014] ATS 43 (entered into force 12 December 2014).

¹¹ *First Protocol to Amend the Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area*, signed 26 August 2014, [2015] ATS 14 (entered into force 1 October 2015).

¹² *Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China*, signed 17 June 2015, [2015] ATS 15 (entered into force 20 December 2015).

¹³ *Agreement between Australia and Japan for an Economic Partnership*, signed 8 July 2014, [2015] ATS 2 (entered into force 15 January 2015).

¹⁴ Liberal Party of Australia, 'The Coalition's Policy for Trade' (Policy, Liberal Party of Australia, September 2013).

¹⁵ Productivity Commission, Australian Government, 'Bilateral and Regional Trade Agreements' (Research Report, November 2010) <<http://www.pc.gov.au/inquiries/completed/trade-agreements/report/trade-agreements-report.pdf>> ('2010 Productivity Commission Report'); Productivity Commission, Australian Government, 'Trade & Assistance Review 2013–14' (Report, 24 June 2015) <<https://www.pc.gov.au/research/ongoing/trade-assistance/2013-14/trade-assistance-review-2013-14.pdf>> ('2015 Productivity Commission Review'). The Productivity Commission, which represents itself as independent from government agencies, is government-funded and its inquiries are determined by the Government. The Commission operates under the *Productivity Commission Act 1998* (Cth) and has the power to summons witnesses. Commissioners are appointed by the Governor-General for fixed periods. See Productivity Commission, *How We Operate* <<http://www.pc.gov.au/about/operate>>.

¹⁶ The EU has proposed major reforms to ISDS: see European Commission, 'A Future Multilateral Investment Court' (Press Release, 13 December 2016) <http://europa.eu/rapid/press-release_MEMO-16-4350_en.htm>. For a detailed analysis of proposed investment court system in the Canada–European Union Trade Agreement ('CETA') and the proposed Transatlantic Trade and Investment Partnership ('TTIP') between the EU and US, see Kyle Dylan Dickson-Smith, 'Does the

effects of the June 2016 ‘Brexit’ vote (in favour of the United Kingdom withdrawal from the European Union (‘EU’)) have, inter alia, prompted discussions as to a potential FTA between Australia and the United Kingdom.¹⁷ In addition, an Australian Senate Committee inquiry pertaining to the ratification and implementation of the recently signed *Comprehensive and Progressive Agreement for Trans-Pacific Partnership* (‘TPP-11’), which includes 10 other partner countries, remains ongoing.¹⁸ Accordingly, this discussion may well shape Australia’s approach in other ongoing negotiations, such as with Indonesia, India and the China-led Regional Comprehensive Economic Partnership.¹⁹

This article is divided into four parts: Part I briefly describes the nature and purpose of ISDS before reviewing its criticisms and benefits. This part addresses the question as to whether states predominantly include ISDS in investment agreements to attract investment, protect their investors overseas or as a response to the greater competitive pressure within the global political economy. Part II outlines Australia’s historical approaches to ISDS, with reference to the aforementioned 2010 and 2015 Productivity Commission reports. This is contextualised against regional (historical and anticipated) trends of ISDS practice. Part III provides a critical analysis of the basis for Australia’s ISDS policy and also discusses the implications in light of Australia’s competitiveness and involvement in the regional economic community. The Part concludes that it is not in Australia’s interest to reject ISDS unless and until a rational basis to do so emerges. Finally, Part IV provides a series of practical reform measures which address both substantive and procedural protections, and further suggests rational guidelines for future policymaking. It contrasts these suggested reforms with those adopted by other states and economies, and specifically draws on existing proposals in the *Transatlantic Trade and Investment Partnership* (‘TTIP’) negotiations between the US and the EU, as well as the recently signed *Comprehensive Economic and Trade Agreement* (‘CETA’) between the EU and Canada.²⁰

European Union Have New Clothes?: Understanding the EU’s New Investment Treaty Model’ (2016) 17(5) *Journal of World Investment & Trade* 773. For its part, the US is considering pulling back from ISDS in the renegotiation of the *North American Free Trade Agreement between Canada, the United States and Mexico*: signed 17 December 1988 (entered into force 1 January 1994) (‘NAFTA’). See ‘USTR Considering ISDS Proposal That Would Require NAFTA Countries to Opt In’, *World Trade Online* (online), 19 August 2017 <<https://insidetrade.com/daily-news/sources-ustr-considering-isds-proposal-would-require-nafta-countries-opt>>.

¹⁷ See Paul Karp, ‘Australia to Seal Early Trade Deal with Britain after Brexit, Says Turnbull’, *The Guardian* (online), 5 September 2016 <<https://www.theguardian.com/australia-news/2016/sep/05/australia-to-seal-early-trade-deal-with-britain-after-brexit-predicts-turnbull>>.

¹⁸ *Comprehensive and Progressive Agreement for Trans-Pacific Partnership*, signed 8 March 2018, [2018] ATNIF 1 (not yet in force) (‘TPP-11’). The other parties to this agreement are Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, Peru, New Zealand, Singapore and Vietnam. See Senate Standing Committee on Foreign Affairs Defence and Trade, Parliament of Australia, *Proposed Comprehensive and Progressive Agreement for Trans-Pacific Partnership* <https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Foreign_Affairs_Defence_and_Trade/TPP-11>. See also <<http://dfat.gov.au/trade/agreements/not-yet-in-force/tpp-11/Pages/trans-pacific-partnership-agreement-tpp.aspx>>.

¹⁹ See generally DFAT, *Regional Comprehensive Economic Partnership* <<http://dfat.gov.au/trade/agreements/rcep/Pages/regional-comprehensive-economic-partnership.aspx>>.

²⁰ *EU–Canada Comprehensive Economic and Trade Agreement*, signed 30 October 2016 (entered into force 21 September 2017) art 8.27(4) (‘CETA’).

The article concludes with a call for a consistent and principled, but flexible, policy that encapsulates both Australia's immediate investment needs and long-term prospects within the international investment regime. It is argued that such a policy, complemented with a model BIT,²¹ will facilitate efficiency and predictability throughout the treaty negotiation and implementation process.

II The Nature of Investment Agreements and Investor-State Dispute Settlement Mechanisms

Before analysing how the Australian Government and the Productivity Commission evaluated the implications of ISDS, it is necessary to first briefly discuss the general purpose and utility of ISDS within the context of the international investment regime. It is also relevant to survey some of the general (global) concerns of ISDS, both to provide context and to assist in the assessment of whether the Australian Government and Productivity Commission's analyses were conducted meaningfully, fairly and comprehensively.

A *The Utility of Investment Agreements and ISDS*

Countries typically enter into investment treaties for one or more of three reasons: (1) to protect the investments of nationals in the territory of the counterparty; (2) to stimulate inbound foreign direct investment ('FDI'); and, more generally, (3) to facilitate investment liberalisation. In regards to the third reason, liberalisation involves the removal of restrictions or barriers to entry of foreign companies into host countries, such as opening up the financial structure of a country to market forces, and removing governmental control. Often, it is easier and more politically palatable to liberalise investment (and trade) through an international agreement, rather than unilaterally.²² Among other factors, one of the general macroeconomic advantages of investment agreements is enhanced competition and consequential improved dynamic efficiency.²³

ISDS provisions are designed to facilitate the objective of the underlying investment agreement to encourage investment flows by providing procedural recourse for the enforcement of substantive investor protections. ISDS, complemented with protections against discriminatory or unfair government measures, provides a direct mechanism to protect such investments without

²¹ Such a model of template agreements is commonly utilised by states throughout their negotiations. Examples include the US Model BIT (2012), Canada's FIPA (2014), India's Model BIT (2016) and China's Model BIT (2012). See generally Chester Brown, *Commentaries on Selected Model Investment Treaties* (Oxford University Press, 2013).

²² See Rafael Leal-Arcas, *International Trade and Investment Law: Multilateral, Regional and Bilateral Governance* (Edward Elgar, 2010) 30–8, 69–86; Beth V Yarbrough and Robert M Yarbrough, *Cooperation and Governance in International Trade* (Princeton University Press, 1992) 55–61.

²³ See Jürgen Kurtz, 'Australia's Rejection of Investor-State Arbitration: Causation, Omission and Implication' (2012) 27(1) *ICSID Review* 65, 75, citing Joseph E Stiglitz, 'Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities' (2007) 23(3) *American University International Law Review* 451, 548.

governmental action or consent by the investor's home State. Viewed from this perspective, ISDS removes a specific behind-the-border barrier for foreign investors; namely, ineffective judicial or administrative decision-making in the host State.

While the underlying purpose of an investment policy is to reduce behind-the-border barriers in order to attract the flow of capital into a signatory's territory, it remains debatable whether ISDS actually increases FDI flows and empirical evidence is equivocal on this point.²⁴ This lack of precision is not surprising given how difficult it is to isolate the direct effects on FDI of investment agreements and ISDS from other factors that influence investment, such as improvements in technology, a general expansion in trade, inflation, currency fluctuation, economic growth or a range of other domestic developments.

Another reason why states utilise ISDS is based on the global political economy and the competitive 'contagion' effect created by bilateral arrangements.²⁵ Simply stated, the increase of bilateral and regional FTAs is purported to create a self-reinforcing, or contagious, process that compels other states to follow and increase the standards of protections in investment agreements in order to remain competitive and attract FDI.²⁶

The question for this discussion is whether Australia's policy towards investment protection, particularly for ISDS, considered these overall factors and concerns. In other words, has Australia considered the literature and broader debate when formulating its investment policy? While it is beyond the scope of this article to compare the advantages of arbitration with local judicial processes,²⁷ given Australia's rejection of ISDS in 2011 it is worth reviewing the criticisms of the system before proceeding.

B *General Criticisms of the ISDS System*

The ISDS discussion exists along several lines of debate, which could perhaps be placed on a scale of the greatest potential ramifications to the least. The first line is whether agreements with ISDS equally distribute benefits to all states and facilitate a fair global governance system. The second line is whether the underlying agreement should grant any procedural rights to investors in ISDS. The third addresses the scope of substantive protections subject to ISDS. The fourth, and more

²⁴ See Shiro Patrick Armstrong and Luke R Nottage, 'The Impact of Investment Treaties and ISDS Provisions on Foreign Direct Investment: A Baseline Econometric Analysis' (Legal Studies Research Paper No 16/74, Sydney Law School, University of Sydney, August 2016) 15; Axel Berger et al, 'Do Trade and Investment Agreements Lead to More FDI? Accounting for Key Provisions Inside the Black Box' (Working Paper, World Trade Organization ('WTO'), 15 December 2009) <http://www.wto.org/english/res_e/reser_e/ersd201013_e.htm>. See generally Jeffrey Bergstrand and Peter Egger, 'What Determines BITs?' (2013) 90(1) *Journal of International Economics* 107.

²⁵ See Eric Neumayer, Peter Nunnenkamp and Martin Roy, 'Are Stricter Investment Rules Contagious? Host Country Competition for Foreign Direct Investment through International Agreements' (2016) 152(1) *Review of World Economics* 177.

²⁶ *Ibid* 178, 204.

²⁷ For an example of more comprehensive discussion on this point, see Leon E Trakman, 'Choosing Domestic Courts over Investor-State Arbitration: Australia's Repudiation of the Status Quo' (2012) 35(3) *University of New South Wales Law Journal* 979, 984.

nuanced debate, is based on the forum — whether ISDS procedural rights should be granted through arbitration or domestic courts, or whether investment agreements should provide the investor with a choice of forum. These various lines of debate are interrelated and collectively considered when states decide whether to include or exclude ISDS, to cover greater or fewer key investor protections, and to provide for ISDS with arbitration in addition to, or in lieu of, local court proceedings.

Most criticisms of ISDS relate to legitimacy. As it is beyond the scope of this article to analyse each of these in any depth, these criticisms have been reproduced in the Appendix to this article, with a description as to whether these have been considered by the Australian Government. However, an overall description of the general criticisms can be synthesised as follows:

1. Treaty interpretations by tribunals are often conflicting and the system does not allow for appeals.
2. ISDS unduly restricts states from exercising their traditional sovereign right to protect health, environment and culture, and thus leads to regulatory chill and effectively removes the democratic political process of public/parliamentary debate.
3. ISDS provides asymmetrical procedural rights to investors (but not states), giving exclusive standing to corporations, and creates unique legal norms in favour of multinational enterprises that is fragmented from, and thus left ‘unchecked’ by, other international legal norms, such as international human rights, Indigenous rights,²⁸ environmental law and (to a lesser extent) trade law.²⁹ These issues are compounded by agreements and tribunals refusing to grant standing to interested and affected parties or the right of audience through *amicus curiae* submissions.³⁰

²⁸ This has been raised in the context of the Lago Agrio Indigenous people in relation to the dispute between the Chevron Corporation and Ecuador: see Megan S Chapman, ‘Seeking Justice in *Lago Agrio* and Beyond: An Argument for Joint Responsibility of Host States and Foreign Investors before the Regional Human Rights Systems’ (2010) 18(1) *Human Rights Brief* 6.

²⁹ For example, the interrelated and divergent ‘sugar/HFCS war’ investment and trade determinations, involving the WTO cases of *Mexico — Taxes on Soft Drinks* (Appellate Body Report, WTO Doc WT/DS308/AB/R (6 March 2006)), and the *NAFTA* disputes of *Archer Daniels Co v Mexico* (Award, ICSID Arbitration Tribunal, Case No ARB (AF)/04/05, 21 November 2007); *Corn Products International Inc v Mexico* (Award, ICSID Arbitration Tribunal, Case No ARB (AF)/04/01, 15 January 2008) and *Gami Investments Inc v Mexico* (Final Award, UNCITRAL Arbitration Tribunal, 15 November 2004).

³⁰ See generally V S Vadi, ‘When Cultures Collide: Foreign Direct Investment, Natural Resources and Indigenous Heritage in International Investment Law’ (2011) 42(3) *Columbia Human Rights Law Review* 797; S Schadendorf, ‘Human Rights Arguments in *Amicus Curiae* Submissions: Analysis of ICSID and *NAFTA* Investor-State Arbitrations’ (2013) 10(1) *Transnational Dispute Management* 1.

4. Substantive investor protections,³¹ exceptions³² and arbitral interpretations³³ are in large part skewed by Western (namely European and American) traditions, without being ‘contextualised’ for the legal regimes of developing states.

Once again, the key question for this article is the extent to which the Australian Government, in its blanket rejection of ISDS in 2011, relied on any of this general discourse and whether it disproportionately attributed excess or little weight to these factors. The remaining sections will evaluate, with this framework in mind, the basis for Australia’s decision with respect to investment agreements and, specifically, ISDS.

III Australia’s Historical and Evolving Position on ISDS

The implications of the inclusion/exclusion of ISDS for Australia is best understood from the perspective of appreciating the nation’s political economy, its current and potential position with respect to FDI flows and its treaty practice.³⁴

A *The Nature of Australia’s Investment Flows*

Australia has, for some time, relied on FDI in order to maintain and increase its standard of living. In the words of Australia’s first Minister for Investment:

Since the First Fleet, Australia has been a country unashamedly reliant on foreign investment ... As a big and sparsely populated continent with a thin domestic capital market ... our reliance continues today.³⁵

The benefits of FDI to a host State are numerous, and include the provision of capital for economic growth, the creation of employment opportunities, and the increase of productivity and scale of competition between domestic industries, which in turn improves consumer choice.³⁶ Australia has historically required FDI to employ and expand its population which, in turn, perpetuate further economic growth.³⁷ Over the period of 1979–2007 (before the Global Financial Crisis), the level of FDI in

³¹ For example, ‘Investment arbitrators will rely on their comprehension of the laws of developed countries in determining the “reasonable” or “legitimate” expectations of foreign investors’: Trakman, above n 27, 1004.

³² See, eg, the series of arbitration cases filed against Argentina stemming from the 2001 financial crisis. Those cases determined that art XI of the US–Argentina BIT was not a *lex specialis* that departed from the customary international law exclusion State conduct, by the defence of necessity. It has been stated that arbitrators ‘will imbed the defense of necessity under *customary international law* that allegedly systemically disadvantages developing countries and their investors’: *ibid* 1003 (emphasis added). See also: at 1003 n 105.

³³ See M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (Cambridge University Press, 2015) 37.

³⁴ For background, see Jürgen Kurtz and Luke Nottage, ‘Investment Treaty Arbitration “Down Under”: Policy and Politics in Australia’ (2015) 30(2) *ICSID Review* 465.

³⁵ Andrew Robb, ‘Australia: A Land of Investment and Opportunity’ (Speech delivered at the Credit Suisse Asian Investment Conference, Hong Kong, 27 March 2014), quoted in David Uren, *Takeover: Foreign Investment and the Australia Psyche* (Black, 2015) 7.

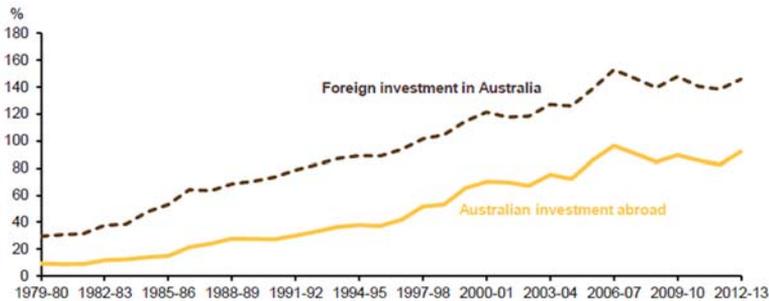
³⁶ See Peter Enderwick, ‘Attracting “Desirable” FDI: Theory and Evidence’ (2005) 14(2) *Transnational Corporations* 93.

³⁷ See Uren, above n 35, 65.

Australia rose from around 15% of Gross Domestic Product (‘GDP’) to more than 35% (see Figure 1, below).³⁸ In that same period, the level of Australian FDI abroad rose from less than 5% of GDP to 34.4%.³⁹

Notably, the rate of investment between Australia and Asia has more than doubled (in both directions) in the last 10 years.⁴⁰ This trend is most noticeable in regards to China. Based on the accumulated volume of FDI between 2005 and 2015, Australia was China’s second largest destination of investment (following the US), totalling US\$87.2 billion in 2016 alone.⁴¹ China is now Australia’s largest trading partner and FDI flows have grown significantly in the last decade.⁴² However, by international standards, Australia’s level of FDI inflow is not particularly high, accounting for less than 40% of its GDP.⁴³ Australia could, thus, benefit from further Chinese investment. In terms of Australian FDI, Australia directs more FDI to China, in proportion to many other countries, with significant room for further growth.⁴⁴

Figure 1: Australian Foreign Investment: Inward and abroad as a percentage of GDP, 1979–80 to 2012–13⁴⁵



³⁸ DFAT, ‘Australia’s Foreign Investment — Historical Overview’ (Report, DFAT, September 2014) <<https://dfat.gov.au/about-us/publications/Documents/australias-foreign-investment-historical-overview.pdf>>.

³⁹ Ibid 1.

⁴⁰ Ibid. See also generally, Thomas Boak, ‘Auditing the Australia-China Relationship: A Cross Country Study of Bilateral Relations with China’ (Report, UTS Australia-China Relations Institute, October 2015) 16 <<https://goo.gl/Ze5joE>>. Australia Bureau Statistics, ‘International Investment Position, Australia: Supplementary Statistics, 2017’ (10 May 2018) <<http://www.abs.gov.au/ausstats/abs@.nsf/mf/5352.0>>.

⁴¹ See DFAT, ‘International Investment Australia 2016’ (Report, DFAT, October 2017) 14 <<https://dfat.gov.au/about-us/publications/documents/international-investment-australia.pdf>>. See also KPMG and University of Sydney, ‘Demystifying Chinese Investment in Australia’ (Report, KPMG, May 2017) 5 <<https://assets.kpmg.com/content/dam/kpmg/pdf/2016/04/demystifying-chinese-investment-in-australia-april-2016.pdf>>.

⁴² DFAT, above n 41, 7, 9–10, 14–15, 18, 23, 27, 51–2. See also Leon Trakman, ‘Investor State Arbitration: Evaluating Australia’s Evolving Position’ (2014) 15(1–2) *Journal of World Investment & Trade* 152, 181; Boak, above n 40, 7.

⁴³ See Treasury, Australian Government, ‘Foreign Investment into Australia: Treasury Working Paper’ (Treasury Working Paper, Treasury, Australian Government, January 2016) 6 <https://static.treasury.gov.au/uploads/sites/1/2017/06/TWP_201601_Foreign_Investment.pdf>.

⁴⁴ See Boak, above n 40, 16.

⁴⁵ DFAT, above n 38, 1.

B *Australia's Position on ISDS Before and After the Trade Policy Statement of 2011*

Australian investment agreements that omit ISDS are the exception, rather than the norm. Historically, the practice has been to include ISDS and this has been the case for all of Australia's 21 BITs and all but a select few of its FTAs.⁴⁶ Australian trade agreements that exclude ISDS are the Investment Chapter (added in 2011) to Australia's (first) FTA with New Zealand (1982),⁴⁷ the *AUSFTA* (2004),⁴⁸ and FTAs with Malaysia (2012),⁴⁹ Japan (2014),⁵⁰ and the *AANZFTA* (2014, only in relation to the obligations between Australia and New Zealand).⁵¹

Despite a fairly consistent adoption of ISDS, the Government began vocalising concern over ISDS in 2002, when the centre-left Labor Party in opposition successfully campaigned against including ISDS in the *AUSFTA*.⁵² After coming into power in 2007, however, the Labor Party quietly acceded to ISDS in the FTAs signed with Chile (2008)⁵³ and ASEAN (2009).⁵⁴ After expressing 'serious reservations' about ISDS in March 2010, the release in 2011 of the Trade Policy Statement firmly staked out the Government's position:

In the past, Australian Governments have sought the inclusion of investor–State dispute resolution procedures in trade agreements with developing countries at the behest of Australian businesses. The Gillard Government will discontinue this practice.⁵⁵

The Trade Policy Statement was largely based on the *2010 Productivity Commission Report*,⁵⁶ the recommendations of an independent statutory and

⁴⁶ This calculation excludes other less comprehensive trade and investment related agreements, such as the *Canada–Australia Trade and Economic Cooperation Arrangement* (signed and entered into force 10 November 1995); *Energy Charter Treaty*, signed 17 December 1994 (entered into force 16 April 1998); *Agreement between the Government of Australia and the Government of Fiji on Trade and Economic Relations*, signed 11 March 1999 (entered into force 15 December 1999); *Agreement on Trade and Commercial Relations between the Government of Australia and the Government of Papua New Guinea*, (signed and entered into force 1 February 1977).

⁴⁷ *Australia–New Zealand Closer Economic Relations Trade Agreement*, signed 14 December 1982, [1983] ATS 2 (entered into force 1 January 1983) ('ANZCERTA'); *Protocol on Investment to the New Zealand–Australia Closer Economic Relations Trade Agreement*, signed 1 February 2011, [2013] ATS 10 (entered into force 1 March 2013).

⁴⁸ *AUSFTA*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005).

⁴⁹ *Malaysia–Australia Free Trade Agreement*, signed 22 May 2012, [2013] ATS 4 (entered into force 1 January 2013). That exclusion of ISDS, however, is not material since the *AANZFTA* includes ISDS between Australia and Malaysia: *Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area*, signed 27 February 2009, [2010] ATS 1 (entered into force 1 January 2010) ('AANZFTA').

⁵⁰ *Agreement between Australia and Japan for an Economic Partnership*, signed 8 July 2014, [2015] ATS 2 (entered into force 15 January 2015).

⁵¹ *AANZFTA*, signed 27 February 2009, [2010] ATS 1 (entered into force 1 January 2010).

⁵² See generally Kurtz and Nottage, above n 34, 473.

⁵³ *Australia–Chile Free Trade Agreement*, signed 30 July 2008, [2009] ATS 6 (entered into force 6 March 2009).

⁵⁴ *Agreement Establishing the ASEAN–Australia–New Zealand Free Trade Area*, signed 27 February 2009, [2010] ATS 1 (entered into force 1 January 2010).

⁵⁵ DFAT, above n 6, 14.

⁵⁶ See *2010 Productivity Commission Report*, above n 15. Indeed, the Trade Policy Statement acknowledged that the *2010 Productivity Commission Report* 'has been closely considered in the preparation of this review' and that the Government's new policy positions 'are highly consistent with' the recommendations of that report: at 16.

advisory body. The Commission's mandate is to provide the Australian Government with independent and economically rigorous advice,⁵⁷ and historically, it has been both rigorous and objective in its evaluation of the Australian policymaking process.

As such, the 2011 Trade Policy Statement's rejection of ISDS signified a material departure from Australia's longstanding practice. The position of the Australian Government shifted again just two years later as the newly elected Liberal-led Coalition Government reverted to the previous position of including ISDS on a 'case-by-case basis'.⁵⁸ In line with the Coalition's 'pragmatic approach to trade negotiations',⁵⁹ ISDS was included in the 2014 FTAs with Korea ('KAFTA')⁶⁰ and China ('ChAFTA'),⁶¹ but not with Japan.

A few months later, in June 2015, the *2015 Productivity Commission Review* was released, expressing continued opposition to the negotiation and inclusion of ISDS clauses in investment agreements.⁶² Shortly thereafter, Australia and the other 11 parties finalised the text of the *Trans-Pacific Partnership* (signed in February 2016),⁶³ and subsequently the *TPP-11* (signed in March 2018),⁶⁴ both of which contain ISDS as expected. In addition, Australia continues to negotiate the Regional Comprehensive Economic Partnership and other bilateral agreements that are also likely to include ISDS. The willingness to include ISDS more often than not suggests that the Coalition Government and Opposition Labor Party are both more pro-ISDS than the stated policy from 2011 would suggest. Left unaddressed, however, is whether a coherent policy exists with clear aims, objectives and parameters as to when and under what circumstances ISDS is acceptable or unacceptable.

C *Is There a Discernible Rationale to Include or Omit ISDS?*

Despite the Australian Government's foregoing proclamations against ISDS, it is difficult to discern an underlying rationale for Australia's policy on ISDS. This section analyses whether a historical correlation exists between the inclusion of ISDS and the perceived quality of the foreign State's legal and judicial system, or similarly, with the host State's GDP or real and anticipated FDI flows between the counterparty. One would expect that the utility of adopting an ISDS provision

⁵⁷ See *Productivity Commission Act 1998* (Cth) ss 6–8, 11.

⁵⁸ Liberal Party of Australia, above n 14.

⁵⁹ *Ibid* 4.

⁶⁰ *Free Trade Agreement between the Government of Australia and the Government of the Republic of Korea*, signed 8 April 2014, [2014] ATS 43 (entered into force 12 December 2014).

⁶¹ *Free Trade Agreement between the Government of Australia and the Government of the People's Republic of China*, signed 17 June 2015, [2015] ATS 15 (entered into force 20 December 2015).

⁶² *2015 Productivity Commission Review*, above n 15, 77–82.

⁶³ *Trans-Pacific Partnership Agreement*, Australia–Brunei Darussalam–Canada–Chile–Japan–Malaysia–Mexico–New Zealand–Peru–Singapore–United States–Vietnam, signed 4 February 2016, [2016] ATNIF 2 (not yet in force). See Office of the US Trade Representative, 'Trans-Pacific Partnership Ministers' Statement' (Ministers' Statement, Office of the US Trade Representative, 4 February 2016) <<https://ustr.gov/about-us/policy-offices/press-office/press-releases/2016/February/TPP-Ministers-Statement>>. According to a 'side agreement', ISDS does not apply between Australia and New Zealand: Letter from Todd McClay to Andrew Robb, 4 February 2016; Letter from Andrew Robb to Todd McClay, 4 February 2016 <<http://tpp.mfat.govt.nz/assets/docs/side-letters/New%20Zealand-Australia%20Side%20Letter%20Relationship%20between%20TPP%20and%20Other%20Agreements.pdf>>.

⁶⁴ *TPP-11*, signed 8 March 2018, [2018] ATNIF 1 (not yet in force).

between two developed countries would be more nuanced, relative to those between a developed and a less-developed State. Similarly, there would appear to be less potential for Australian investors to use ISDS against a State where there is only a small amount of outbound investment, relative to states with greater FDI outflow (that is both historical FDI flows and potential FDI).

1 *Host Legal System*

Historically, one can perhaps find a correlation between ISDS and the counterparty's developmental state and legal system, such that Australian agreements negotiated with less-developed countries include ISDS. Upon further exploration, however, the strength of the correlation weakens. Australia has generally excluded ISDS with developed countries, such as New Zealand, the US and Japan. However, it also excluded ISDS with Malaysia. At the same time, Australia has included ISDS with Singapore (2003), Thailand (2005), Chile (2008), the *AANZFTA* (2009) and Korea (2014). Countries such as Korea, Chile and Singapore have what would be generally described as developed legal systems, on par with, if not more advanced than, one or more of the countries with which ISDS has been excluded.⁶⁵ It does not, therefore, appear that the state of a country's legal system is a determining factor in whether Australia seeks to include or exclude ISDS.

2 *Host State GDP*

The same contradictions appear in relation to a country's overall wealth. Again, Korea, Chile and Singapore are high-income countries. On the other hand, Thailand's economic development level is equivalent to Malaysia, yet those two countries are treated differently. Moreover, both are members of ASEAN, an agreement in which Australia includes ISDS. The point being, it is clear that level of economic development and GDP does not appear relevant to the decision to include or exclude ISDS.⁶⁶

3 *FDI Flows between Counterparties*

Looking more closely at the statistics, there does not even appear to be a clear pattern or trend in relation to FDI flows and the inclusion of ISDS. It would appear, however, that Australia includes ISDS provisions in agreements where it is a net FDI-exporter and seeks to exclude such provisions in treaties where it is a net FDI-importer.⁶⁷ But, even here, the practice is inconsistent. Australia is a net FDI-exporter (or at least was at the time the relevant agreement was entered into) in relation to Chile and Thailand. However, it is a net FDI-importer in relation to

⁶⁵ For rule of law indicators, see World Bank, *Databank: Worldwide Governance Indicators* <<http://databank.worldbank.org/data/reports.aspx?source=worldwide-governance-indicators>>.

⁶⁶ See World Bank, *Data Catalogue: World Development Indicators* <<http://data.worldbank.org/data-catalog/world-development-indicators>>.

⁶⁷ *Ibid.*

Singapore, Korea, China and most ASEAN countries,⁶⁸ yet all of the relevant agreements with these countries include ISDS. This correlation is also imperfect where ISDS has not been included in an agreement. For instance, Australia is a net exporter of FDI with the US and New Zealand (again, at the time the relevant agreement was entered into), and a net importer of FDI from Malaysia and Japan — yet no ISDS is included in any of these treaties.⁶⁹

Parts IV and V of this article will address whether these factors have been, or should be, utilised as official threshold criteria to invoke ISDS and to determine when ISDS should be included and/or placed on the negotiating table.

IV A Critique of Australia's Analysis of ISDS

This Part analyses both the findings and basis of the 2010 and 2015 Productivity Commission reports and the Trade Policy Statement, focusing on the particular framing of the international investment legal regime. This Part also demonstrates that many of the general issues surrounding ISDS, such as those described in Part I, were not addressed and analysed by the Productivity Commission or by the Australian Government in the formulation of its policy. Overall, we find the combined analysis of the Productivity Commission and the Trade Policy Statement to be incomplete and beset with internal contradictions. A summary of our findings is contained in the Appendix to this article.

A *Why the Productivity Commission Rejected Investment Agreements and ISDS*

The Productivity Commission's basis for rejecting the use of ISDS can be described as: (i) part of its principal approach in rejecting investment agreements; (ii) a specific rejection of the ISDS mechanism; or (iii) both (i) and (ii). Unfortunately, the Commission's reasoning blurs the issues and leaves the dividing line between (i) and (ii) unclear. In any event, the Productivity Commission's rejection of ISDS developed from the following premises:⁷⁰

1. Bilateral trade and investment initiatives should not take precedence over multilateral and unilateral arrangements;
2. Foreign investors should not be provided greater rights over local investors;
3. Australia should not be exposed to regulatory chill;
4. There is no clear evidence that ISDS significantly increases inbound FDI or otherwise benefits Australia;⁷¹
5. There is no overall benefit to utilising ISDS; specifically, Australia's outbound investors do not and need not rely on the protections offered

⁶⁸ See Australian Bureau of Statistics, *5352.0 — International Investment Position, Australia: Supplementary Statistics, 2015* (9 May 2017) <<http://www.abs.gov.au/AUSSTATS/abs@.nsf/DetailsPage/5352.02015?OpenDocument>>, table 2; table 5; DFAT, above n 41, 51–4; United Nations Conference on Trade and Development ('UNCTAD'), *Bilateral FDI Statistics* (April 2014) <<http://unctad.org/en/Pages/DIAE/FDI%20Statistics/FDI-Statistics-Bilateral.aspx>>.

⁶⁹ Ibid.

⁷⁰ See *2010 Productivity Commission Report*, above n 15, 271–4.

⁷¹ Ibid 269.

by ISDS as alternatives such as insurance and access to local courts provide ample protection; and

6. There are inherent problems associated with the ISDS system, such as the large size and costs of investor claims, the latitude and inconsistency of investment tribunal determinations, the lack of rigorous rules governing the conduct of arbitration, the absence of an appeals process, the threat of ‘institutional biases and conflicts of interest’, and a lack of transparency.⁷²

The Gillard Government’s 2011 Trade Policy Statement literally followed all the recommendations of the Productivity Commission when announcing it would no longer seek to include ISDS provisions in any future treaties.⁷³ The Government’s principal concerns stated in that document were: (1) conferring greater rights to foreign investors; and (2) the onset of regulatory chill.⁷⁴ The Trade Policy Statement similarly established generalised ‘disciplines’ to guide the contours of Australia’s future trade policy, including a statement that bilateral and regional agreements must always give way to the multilateral regime.⁷⁵

Before we address each of the Productivity Commission’s six premises listed above, it is useful to first turn to our general concerns as to the Commission’s methodology.

1 *General Concerns with the Methodology*

The Productivity Commission did not fully analyse or investigate any of the perceived criticisms. Instead, it relied on a few select reports and cases. Given the overall conclusion that ‘[e]xperience in other countries demonstrates that there are considerable policy and financial risks arising from ISDS provisions’, the lack of breadth, depth and rigor in analysis is striking.⁷⁶ While the Productivity Commission acknowledged that some of the problems associated with ISDS can be ameliorated through the design of the relevant provisions, it nevertheless concluded that significant risks would remain — again without sufficient analysis or identifying exactly what risks, in its opinion, would remain.⁷⁷ If it had, of course, there would at least have been a benchmark on which further analysis could have been undertaken.

Curiously, while the Productivity Commission reports provide detailed analysis of traditional trade issues, the examination of investment issues and barriers is much more simplistic, shallow and cursory. Given the Government’s reliance on the *2010 Productivity Commission Report* for a wholesale shift in policy, the brevity and selectiveness of the 2010 Report is rather surprising.

While it is unnecessary to review all of the Productivity Commission’s methodological faults, it is useful to provide a few examples.

⁷² *Ibid* 272.

⁷³ See DFAT, above n 6, 18–9.

⁷⁴ *Ibid* 14.

⁷⁵ *Ibid* 9.

⁷⁶ *Ibid*. See also Trakman, above n 27, 993.

⁷⁷ See *2010 Productivity Commission Report*, above n 15, 276–7.

(a) *Conflation of Trade and Investment Issues*

Simply stated, the Productivity Commission does not seem to have a reasonable understanding of the field of investment as distinct from trade. Indeed, the Commission's asymmetrical focus on trade ramifications appears to have conflated the effects of regulatory barriers on investment and trade. For example, where the Commission selectively focuses on the liberalisation of border restrictions on capital (ie screening processes), it concludes that the direct economic impact of Australian investment and services provisions in FTAs 'to date have been modest'.⁷⁸ The cross-contaminating of results between investment and trade is problematic. Unlike in trade (and particularly trade in goods), the critical barriers of FDI are not as readily quantifiable as they seldom take the form of border measures (such as tariffs). Most investment restrictions take the form of behind-the-border regulatory interventions (such as discriminatory or arbitrary regulatory process). Yet, the Productivity Commission is rather disengaged with assessing the likelihood and economic impact of these behind-the-border barriers.

(b) *Lack of Analytical Depth*

Another serious concern is the Productivity Commission's failure to engage in any meaningful analysis of the investment jurisprudence or of Australia's treaty practice. Instead, the Commission mostly applied generic data to Australia's situation. One such example is the superficial reliance on data published by the United Nations Conference on Trade and Development ('UNCTAD'), which provides little indication of Australia's investment dynamic within the Asia-Pacific region.⁷⁹ Worse still, instead of engaging with or even citing case law, the Commission report relied on the selective citations from a single secondary source, which is again UNCTAD.⁸⁰ Such basic errors in research raise serious doubts about the quality of the report and the extent to which it was relied on to influence and shape policy.

(c) *Failure Adequately to Engage with the Benefits of ISDS*

While the Commission readily accepts the criticisms of ISDS, it appears almost hostile to the benefits of ISDS. For example, it is often stated in the literature that ISDS is an accepted and preferred method to combat blatantly protectionist or discriminatory acts by host States.⁸¹ However, the Commission dismisses this claim almost out of hand. With only a cursory review of a few studies, the Commission concluded that there is 'evidence that, in practice, host governments are not

⁷⁸ Ibid 161. For commentary, see Kurtz, above n 23, 73.

⁷⁹ See *2010 Productivity Commission Report*, above n 15, 268–9, 273–4; *2015 Productivity Commission Review*, above n 15, 77, 78. For commentary, see Kurtz and Nottage, above n 34, 472.

⁸⁰ See, eg, *2010 Productivity Commission Report*, above n 15, 265.

⁸¹ See Steffen Hindelang and Markus Krajewski, 'Towards a More Comprehensive Approach to International Investment Law' in Steffen Hindelang and Markus Krajewski (eds), *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified* (Oxford University Press, 2016) 1, 9; John Veroneau, *We Still Need Investor-State Dispute Settlement* (May 2015) Cato Unbound <<https://www.cato-unbound.org/2015/05/13/john-k-veroneau/we-still-need-investor-state-dispute-settlement>>.

systematically biased against foreign investors'.⁸² Kurtz and Nottage question the rigour of the Commission in this regard by stating: 'In effect, the Commission, by relying on a handful of studies, has concluded that there is no risk of protectionism whatsoever at play in the formation of host State policy towards foreign investment.'⁸³

The Commission's position is an obvious overstatement and, more fundamentally, a sweepingly broad statement to make on the basis of incomplete and selective research.

(d) *Failure to Consider the Circumstances of Current and Potential Treaty Counterparties*

Yet another concern is that the Productivity Commission did not consider whether the decision to include or exclude ISDS should be based on the particular treaty partner's circumstances, including forecasted investment flow or domestic legal protections available to investors. Such a comparative analysis could constitute a basis adequately to assess the utility of ISDS, particularly in the case where, as stated above, there does not appear to be any correlation between some of these circumstances and Australia's practice of including or excluding ISDS.

Generally, the *2010 Productivity Commission Report* and the *2015 Productivity Commission Review* fail to engage with the basis or reasoning to justify Australia's use of ISDS in past treaties. The Trade Policy Statement appears to have disregarded pertinent information such as inward and outward trends and expected forecasts into the future. In this regard, it is not only a matter of attempting to provide protections for outbound Australian investors, but also recognising that throughout Asia and other parts of the world traditional recipient states of investment are increasingly becoming outward investors and, as such, those states are likely to be seeking assurance for their investors. Again, one would expect that the Australian Government would have considered such trends, and attempted to determine the impact and implications of its policy shift on the direction of inbound FDI. This is particularly important as Australia is becoming increasingly dependent and economically tied to Asia, a region where almost all nations are accelerating the adoption of ISDS.

2 *Australia's Reasons for Rejecting ISDS*

This section provides a deeper analysis of the basis relied on by the Productivity Commission and Australian Government for rejecting ISDS.

(a) *Multilateralism and Unilateralism over Regionalism and Bilateralism*

The Trade Policy Statement stated that '[m]ultilateral agreements offer the largest benefits ... [while] [r]egional and bilateral agreements must not weaken the multilateral system — they must be genuinely liberalising, eliminating or

⁸² *2010 Productivity Commission Report*, above n 15, 269.

⁸³ Kurtz and Nottage, above n 34, 471.

substantially reducing barriers to trade'.⁸⁴ Similarly, the Trade Policy Statement supported unilateral (domestic) reform for the purpose of attracting foreign investment.⁸⁵ Both the Productivity Commission and Trade Policy Statement advised against using the 'bargaining chip' approach to seeking investor protections from counterparties,⁸⁶ with the Government even eloquently stating: 'Using domestic reform as a bargaining chip in negotiations is akin to an athlete refusing to get fit for an event unless and until other competitors also agree to get fit.'⁸⁷

In eschewing bilateralism and regionalism in favour of multilateralism, the Australian Government failed to appreciate the practical realities of establishing a global agreement.⁸⁸ The international investment regime has naturally and gradually evolved through a network of BITs and regional agreements and previous attempts to codify these efforts into a multilateral treaty have failed. Most recently, the Organisation for Economic Co-operation and Development ('OECD') failed in the 1990s in an attempt to negotiate a multilateral agreement on investment due to disagreements on particular substantive and procedural standards.⁸⁹ Perhaps at that time such a multilateral regime was premature and the attempt over-ambitious.⁹⁰ But even today, as traditional FDI importers become exporters, it would be difficult to achieve consensus on a multilateral treaty model. Differences in standards, both substantive and procedural, are common among domestic regimes and an attempt to establish a global standard may not be desirable. Thus, bilateral and regional agreements offer a more practical link to multilateralism allowing for a dynamic and naturally evolving process, rather than being forced by a top-down approach.

Another relevant consideration omitted from the Australian Government's analysis is the ability of investment treaties to allow states to 'tap into' a treaty network that provides better substantive standards of protection through the 'most favoured nation' ('MFN') clause.⁹¹ For example, as a result of Australia securing an

⁸⁴ DFAT, above n 6, 9.

⁸⁵ See *ibid* 7.

⁸⁶ *Ibid*. This is encompassed in the Trade Policy Statement principle of 'unilateralism'. Recently, the Productivity Commission rejected as 'very high risk' a strategy of using ISDS as a 'bargaining chip', see *2015 Productivity Commission Review*, above n 15, 79.

⁸⁷ DFAT, above n 6, 7.

⁸⁸ It should be stated that it is difficult to delineate throughout the Trade Policy Statement and both the 2010 and 2015 reports of the Productivity Commission whether multilateralism is advocated solely for trade matters, or more generally for trade and investment.

⁸⁹ Razeen Sappideen and Ling Ling He, 'Investor-State Arbitration: The Roadmap from the Multilateral Agreement on Investment to the Trans-Pacific Partnership Agreement' (2012) 40(2) *Federal Law Review* 207, 209; OECD, Negotiating Group on the Multilateral Agreement on Investment ('MAI'), *The Multilateral Agreement on Investment: Draft Consolidated Text*, DAFFE/MAI(98)7/REV1 (22 April 1998) <<http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf>>; OECD, Negotiating Group on the MAI, *The Multilateral Agreement on Investment: Commentary to the Consolidated Text*, DAFFE/MAI(98)8/REV1 (22 April 2018) <<http://www1.oecd.org/daf/mai/pdf/ng/ng988r1e.pdf>>; OECD, Negotiating Group on the MAI, *Selected Issues on Dispute Settlement (Note by the Chairman)* DAFFE/MAI(98)12 (13 March 1998) 5 <<http://www1.oecd.org/daf/mai/pdf/ng/ng9812e.pdf>>.

⁹⁰ See Bryan Schwartz, 'The DOHA Round and Investment: Lessons from Chapter 11 of *NAFTA*' (2003) 3 *Asper Review of International Business and Trade Law* 1; Katia Tieleman, 'The Failure of the Multilateral Agreement on Investment (MAI) and the Absence of a Global Public Policy Network' (Case Study, UN Vision Project on Global Public Policy Networks, 2000) 18 n 7 <<http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.627.7992&rep=rep1&type=pdf>>.

⁹¹ However some MFN clauses are conditioned only to operate prospectively and, as such, may only offer better investor protections as Australia's counterparties enter into new investment agreements.

MFN investment guarantee in the *ChAFTA*, it may now ‘capitalise’ on any better terms China subsequently offers to third party investors.⁹² These benefits are automatic, without the need to incur transaction costs in renegotiating the original treaty. The use of an MFN clause in the *ChAFTA* could be especially beneficial in light of the strong network of economies that China is currently negotiating agreements with, namely the US and the EU. Given the negotiating power of these two economies, it is likely that these agreements will contain more substantial investment protections than those contained in the *ChAFTA*. Where ISDS does not exist in treaties, Australian investors will not be able to make use of MFN and other clauses adequately to protect and enforce their rights.

Until a multilateral system eventuates, there are two other tangible benefits for Australia to continue engaging with the bilateral and regional process. First, Australia can use competing templates of investment agreements to develop best practices (of legal norms and procedural rules) to advance the specific needs and priorities of Australia. Second, Australia is better positioned to shape the ISDS mechanism according to its concerns as a crafter, drafter and mere participant as the system evolves, rather than after having entirely exited that system.

(b) *Conferring Greater Rights on Foreign Investors*

That foreign investors have greater rights than any other local investor is one of the major premises of the Australian Government’s approach for rejecting ISDS.⁹³ But in adopting this approach, it reinterpreted (or misinterpreted) the national treatment principle to argue against ISDS, with the Trade Policy Statement stating:

The Gillard Government supports the principle of national treatment — that foreign and domestic businesses are treated equally under the law. However, the Government does not support provisions that would confer greater legal rights on foreign businesses than those available to domestic businesses.⁹⁴

The national treatment principle is a norm permeating the *acquis* of both investment⁹⁵ and trade law,⁹⁶ and providing for equal competitive opportunity

⁹² *ChAFTA*, signed 17 June 2015, [2015] ATS 15 (entered into force 20 December 2015) art 9.4. See also *KAFTA*, signed 8 April 2014, [2014] ATS 43 (entered into force 12 December 2014) art 11.4.

⁹³ This approach was derived from the 2010 and 2015 reports from the Productivity Commission. See *2010 Productivity Commission Report*, above n 15; *2015 Productivity Commission Review*, above n 15.

⁹⁴ DFAT, above n 6, 14.

⁹⁵ See *Feldman v Mexico* (Award, ICSID Arbitration Tribunal, Case No ARB(AF)/99/1, 16 December 2002) reported in (2003) 18(2) *ICSID Review* 488, 555 [169], 561 [183]; *SD Myers Inc v Canada* (Partial Award, UNCITRAL Arbitration Tribunal, 13 November 2000) reported in (2003) 15(1) *World Trade and Arbitration Materials* 184, 228–9 [193]–[195].

⁹⁶ See Appellate Body Report, *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc WT/DS58/AB/RW, AB-1998-4 (22 October 2001) [108]–[109]; Panel Report, *Japan — Taxes on Alcoholic Beverages*, WTO Doc WT/DS8/R, WT/DS10/R, WT/DS11/R (11 July 1996, unadopted) [5.138]. The WTO provides relatively limited protections for investors, offering incomplete protections in the *TRIMS Agreement* and for so-called Mode 3 of services sectors and certain violations (such as, national treatment commitments), yet these protections are general in nature and, unlike ISDS, the WTO does not provide direct remedies to investors: *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1868 UNTS 186 (entered into force 1 January 1995) annex 1A (*‘Agreement on Trade-Related Investment Measures’* (*‘TRIMS Agreement’*)). For more on the WTO, see Simon Lester, Bryan Mercurio and Arwel Davies, *World Trade Law* (Hart Publishing, 3rd ed, 2018).

between foreign and domestic firms. In the investment context, it means that a foreign investor should not be treated *less* favourably as compared to the local investor.⁹⁷ Given that such substantive rights take a different form to the laws of the host State, the national treatment principle is designed as a common benchmark to facilitate equality between foreign and local investors.

Curiously, the Trade Policy Statement and Productivity Commission reports claim that ISDS effectively requires the host State to provide the foreign investor positive discrimination in their favour, and receive substantive rights over-and-above that of a domestic investor.⁹⁸ Consequently, the Productivity Commission (relying solely on one academic submission) concluded that ISDS can thereby disadvantage the opportunities of domestic investors, as compared to those of foreign investors.⁹⁹ As such, the Productivity Commission quoted the submission of Aisbett and Bonnitca stating that ‘productivity may fall as a result of the investment agreement as efficient domestic producers are displaced by less efficient but better politically-insured foreign firms’.¹⁰⁰

The weight of evidence (including by Nobel Laureate Joseph Stiglitz)¹⁰¹, however, sees the guarantee of national treatment as a tool to improve competition in the host State market by allowing the most efficient and innovative investor to operate in the host State’s market. The Australian position is therefore based on a flawed premise: such obligations are equally designed to remove any discrimination *against* the foreign investor, not as a guarantee to discriminate *in favour of* that investor.

(c) *The Hypothesis of Regulatory Chill*

Both reports of the Productivity Commission and the Trade Policy Statement claim that ISDS places undue restrictions on governments regulating in the public interest.¹⁰² This claim was principally based on Australia’s exposure to potential ISDS claims,¹⁰³ especially the then pending *Philip Morris* case (challenging legislation on plain packaging of tobacco products), and particularly on Australia’s mounting costs to defend that claim.¹⁰⁴

⁹⁷ For an analysis of the differing contexts of national treatment, see Todd J Weiler, ‘Treatment No Less Favorable Provisions within the Context of International Investment Law: “Kindly Please Check Your International Trade Law Conceptions at the Door”’ (2014) 12(1) *Santa Clara Journal of International Law* 77, 92, 95. It should be noted that there remains some debate as to whether such standards provide for the ‘best treatment’ or merely equality of opportunity. See Andrew Newcombe and Luis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* (Kluwer Law International, 2009) § 4.26.

⁹⁸ *2010 Productivity Commission Report*, above n 15, 272, 274; DFAT, above n 6, 14.

⁹⁹ *2010 Productivity Commission Report*, above n 15, 272, 274. The Productivity Commission relied on Emma Aisbett and Jonathan Bonnitca, Submission No 45 to Productivity Commission, Australian Government, *Review of Bilateral and Regional Trade Agreements* (10 April 2010).

¹⁰⁰ *2010 Productivity Commission Report*, above n 15, 272, quoting Aisbett and Bonnitca, above n 99, 4.

¹⁰¹ See Stiglitz, above n 23, 548 (arguing, however, that BITs ‘should be narrowly focused on the issue of discrimination’).

¹⁰² See *2010 Productivity Commission Report*, above n 15, 271, 274; DFAT, above n 6, 14.

¹⁰³ See *2015 Productivity Commission Review*, above n 15, 77–8.

¹⁰⁴ See *ibid* 78, 163; DFAT, above n 6, 14.

Australia's investment policy should not be disproportionately based on how many claims it has or may face and, similarly, how many claims Australian investors have or will make. At best, whether Australia faces claims or Australian investors use the system to litigate against other states should be considered equally with other guiding criteria. That being the case, as to the Productivity Commission's apprehension regarding potential exposure to ISDS cases, it is interesting to note that '[o]ver 90 percent of the nearly 2,400 BITs in force have operated without a single investor claim of a treaty breach' and that while '[t]he number of disputes filed in the past 10 years has increased', the increase 'has been proportional to the rise in outward foreign capital stock'.¹⁰⁵ The *Philip Morris* claim was the first known claim against Australia, while Australian investors have enforced their rights using ISDS in at least four cases.¹⁰⁶

The Productivity Commission inference that investment agreements can lead to regulatory chill is likewise not based in evidence. On the contrary, the Commission made no attempt to provide any supporting studies or evidentiary basis to determine whether the concern is more apparent than real. Had the Commission researched the literature, it would have found that studies canvassing a broad range of cases have not found any evidence of regulatory chill.¹⁰⁷

More controversially, an argument could even be made that 'regulatory chill' is not to be feared and that some 'chill' could even be prudent for Australia's regulatory framework, and thus a benefit to all Australian nationals.¹⁰⁸ Australia benefits from its embrace of international investment standards such as fairness and a reasonable expectation of a predictable investment environment in that these standards prevent sudden reversals of (politically-based) policies that expose all investors to harm.¹⁰⁹ Accordingly, in certain circumstances, international legal protections may be seen to reinforce democratic values of investors (local and foreign) and the general public, rather than undermine them.

¹⁰⁵ Scott Miller and Gregory N Hicks, *Investor-State Dispute Settlement: A Reality Check* (Center for Strategic & International Studies, 2015) v.

¹⁰⁶ *White Industries Australia Ltd v Republic of India* (Final award, UNCITRAL Arbitration Tribunal, IIC 529 (2011), 30 November 2011); *Tethyan Copper Co Pty Ltd v Islamic Republic of Pakistan* (ICSID Arbitration Tribunal, Case No ARB/12/1); *Churchill Mining and Planet Mining Pty Ltd v Republic of Indonesia* (Award, ICSID Arbitration Tribunal, Case No ARB/12/40 and 12/14, 6 December 2016); *Kingsgate Consolidated Ltd v The Kingdom of Thailand* (UNCITRAL Arbitration Tribunal). At the time of writing the *Tethyan Copper* and *Kingsgate* arbitrations were pending.

¹⁰⁷ See European Federation for Investment Law and Arbitration ('EFILA'), 'A Response to the Criticism against ISDS' (Report, EFILA, 17 May 2015) 26–30 <http://efila.org/wp-content/uploads/2015/05/EFILA_in_response_to_the_criticism_of_ISDS_final_draft.pdf>; Christine Côté, *A Chilling Effect? The Impact of International Investment Agreements on National Regulatory Autonomy in the Areas of Health, Safety and the Environment* (PhD Thesis, The London School of Economics and Political Science, 2014) <<http://etheses.lse.ac.uk/897/>>; Julie Soloway, 'NAFTA's Chapter 11: Investment Protection, Integration and the Public Interest' (2003) 9(2) *IRPP Choices* 1, 19.

¹⁰⁸ See Luke R Nottage, 'The Rise and Possible Fall of Investor-State Arbitration in Asia: A Skeptic's View of Australia's "Gillard Government Trade Policy Statement"' (Legal Studies Research Paper No 11/32, Sydney Law School, University of Sydney, June 2011) 13.

¹⁰⁹ Indeed, Associate Commissioner Stoler stated in his dissent: 'there is reason to believe that a little bit of "regulatory chill" might be a good thing, even in Australia': *2010 Productivity Commission Report*, above n 15, 321.

Indeed, even if the prospect of regulatory chill is potentially real, our underlying concern and criticism of the Australian Government remains — its position was not premised on a thorough assessment of the relevant literature or contextualised in any way.

(d) *The Finding that ISDS Does Not Attract FDI*

The *2010 Productivity Commission Report* stated that ‘committing to ISDS provisions does not influence foreign investment flows into a country’¹¹⁰ and maintained this position in the 2015 report.¹¹¹ Such a position is problematic for a host of reasons. It is true that recent econometric studies as to a causal relationship between investment treaties and an increase in inbound foreign investment have yielded conflicting results.¹¹² However, we have noted above the difficulty is isolating the effects of investment agreements and ISDS on FDI flows from other potential economic factors. There is also a real risk that as additional investment agreements are entered into and standards continue to rise that trade and investment may be incrementally diverted away from countries which lack the full suite of expected protections.¹¹³

Notwithstanding these issues, the main issue with the Productivity Commission reports is again that instead of fully engaging with this complex literature, the Commission rather surprisingly considered only one study (that was in itself more than 10 years old and inconclusive) for its sweeping conclusion that ISDS does not lead to increased foreign investment.¹¹⁴ As such, while the econometric evidence relating to FDI flows and investment agreements with ISDS remains mixed and based on aggregate worldwide FDI, the Productivity Commission ought to have identified these shortcomings and thus qualified the conclusion of the reports on this basis.¹¹⁵

To be fair, the *2015 Productivity Commission Review* does begin to address the empirical data on the destination of inbound and outbound FDI.¹¹⁶ Somewhat strangely, however, the Commission concluded that since FDI flows in the largest quantities to developed states that have ISDS provisions, ISDS provisions are not necessary in order to foster further flows. In similar circular reasoning, the Commission essentially concluded in regards to outbound FDI to less-developed countries that since these countries represent a small proportion of Australia’s total

¹¹⁰ *2010 Productivity Commission Report*, above n 15, 269.

¹¹¹ See *2015 Productivity Commission Review*, above n 15, 80–2.

¹¹² See Kurtz and Nottage, above n 34, 470–71. For a comprehensive overview of the principal empirical studies, see Jason Webb Yackee, ‘Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence’ (2010) 51(2) *Virginia Journal of International Law* 396, 405–14.

¹¹³ See Armstrong and Nottage, above n 24, 12.

¹¹⁴ The Commission relied on the World Bank’s *World Business Environment Survey* (2000).

¹¹⁵ Of note, the *2010 Productivity Commission Report* notes the steep growth in outward investment by domestic companies in the resources sector, but fails to consider the impact of excluding ISDS protections on these investors’ operating risks: above n 15, 33. Incidentally, following the publication of the *2015 Productivity Commission Review*, an econometric study found a positive and significant correlation between investment agreements with ISDS provisions and FDI outflows from OECD countries over the period 1985–2014. See Armstrong and Nottage, above n 24.

¹¹⁶ See *2015 Productivity Commission Review*, above n 15, 81.

outbound FDI, ISDS does not appear materially to contribute to outward investment.¹¹⁷ Interestingly, the Commission reported but failed to engage with the statistics showing that despite the small proportion of outbound FDI with treaty partners adopting ISDS, the percentage has doubled over the past 10 years — perhaps as a result of the large number of investment agreements negotiated since the 1990s.¹¹⁸

There are additional errors with the Productivity Commission's 2015 analysis. First, its analysis is limited to a sample of two states (Singapore and Hong Kong), on the basis that those are in the 'top ten source and destination' jurisdictions.¹¹⁹ Second, the timeframe chosen (namely, 2003–13) is somewhat arbitrary. For example, the Australia–Hong Kong BIT entered into force in 1993 and it is likely that any influence to FDI that ISDS would have been concentrated throughout the 1990s.¹²⁰ The Productivity Commission makes the same error in measuring FDI for a series of aggregated 'Other ISDS' states where again most of those investment treaties date from the 1990s.¹²¹

Second, the Productivity Commission fails to appreciate that the success or failure of ISDS need not be solely measured by FDI statistics. One example of unmeasurable benefits is the ability to provide investors with a reasonable degree of comfort (of stability and predictability), which can influence the decision to invest in a particular jurisdiction. Another related example is the promotion of the tighter integration of industrial supply chains throughout North America as a result of the *NAFTA*.¹²²

The Productivity Commission's failure to appreciate important, but less obvious, factors is not only reflected in the Commission's analysis of FDI statistics, but also in its subsequent conclusion that, on the basis that only three Australian investors have commenced ISDS proceedings, there is an 'apparent lack of evidence regarding the effects' of ISDS.¹²³ A representation of three investors initiating legal action does not necessarily indicate that other investors are not relying on ISDS provisions to guide their decision to invest and/or not utilising this enforcement mechanism in negotiations with the host State.

The *2015 Productivity Commission Review* concluded that a detailed impact assessment that quantifies the national economic impact and distributional effects, as well as the costs and benefits of, inter alia, ISDS ought to be 'comprehensively analyse[d] ... well before' signing a particular investment agreement.¹²⁴ While it is certainly prudent for a nation to carry out feasibility studies before entering into an agreement, the Productivity Commission has set an unreasonable, and even impossibly high, standard. Andrew Stoler, a dissenting member of the *2010*

¹¹⁷ Ibid.

¹¹⁸ Namely from 3.4% in 2003 to 6.4% in 2013: *ibid.*

¹¹⁹ Ibid.

¹²⁰ See Armstrong and Nottage, above n 24, 6: '[S]ome studies have found that the impact of BITs has become smaller over time.'

¹²¹ *2015 Productivity Commission Review*, above n 15, 81.

¹²² See Wharton School, University of Pennsylvania, *NAFTA's Impact on the US Economy: What Are the Facts?* (6 September 2016) <<http://knowledge.wharton.upenn.edu/article/naftas-impact-u-s-economy-facts/>>.

¹²³ *2015 Productivity Commission Review*, above n 15, 81–2.

¹²⁴ Ibid 82.

Productivity Commission Report bluntly states that if governments ‘don’t have the tools to make those kind of measurements, it’s not exactly fair game to insist that you have to make those measurements before you decide whether the agreement is a good one or not’.¹²⁵

(e) *Cursory Treatment of the Benefits of ISDS*

The Productivity Commission determined, both in 2010 and 2015, that since there were no apparent market failures requiring rectification, there was no overall benefit of utilising ISDS.¹²⁶ Yet, the Commission’s analysis of the potential benefits arising from ISDS was less detailed when compared to the analysis of the costs of implementing ISDS (even though incomplete and including several disconcerting assumptions). The Commission did not mention any literature or provide real world examples of ISDS being used directly or even indirectly to enforce treaty protections, nor did it concede that ISDS may, in some instances, provide more complete investor protection than the alternatives it sets out. This is unfortunate and, again, gives the impression that the 2010 and 2015 reports not only lack rigour, but are inherently biased.

(i) The Absence of ‘Systemic Bias’ against Foreign Investors

At its core, the analysis and conclusions of the 2010 and 2015 reports of the Productivity Commission on the utility and purpose of ISDS result from an erroneous assumption: that foreign investors do not ‘face systematic biases against them’ compared to local investors.¹²⁷ The assumption was based not on a study of the rich literature on this point, but on two studies (both based on the same survey) published in the mid-2000s.¹²⁸ Of greater significance is the fact that these studies solely focus on the Southeast Asia region and are, thus, of limited relevance to Australian investment flows. Further, these findings contradict various recent studies that more concretely demonstrate the concerns of foreign investors operating in such countries as China,¹²⁹ Vietnam¹³⁰ and Indonesia.¹³¹ In short, reports of unfair and discriminatory treatment against foreign investors is not only well-known, but also commonplace.

¹²⁵ Australian Broadcasting Corporation (‘ABC’), ‘Interview: Andrew Stoler’, *Lateline*, 29 June 2015 <<http://www.abc.net.au/lateline/content/2015/s4264128.htm>>.

¹²⁶ See *2010 Productivity Commission Report*, above n 15, 269–70; *2015 Productivity Commission Review*, above n 15, 61.

¹²⁷ *2010 Productivity Commission Report*, above n 15, 269 (citations omitted).

¹²⁸ *Ibid.*

¹²⁹ See Vivienne Bath, ‘The Quandary for Chinese Regulators: Controlling the Flow of Investment into and out of China’ in Vivienne Bath and Luke Nottage (eds), *Foreign Investment and Dispute Resolution Law and Practice in Asia* (Routledge, 2011) 68.

¹³⁰ See Hop Dang, ‘Legal issues in Vietnam’s FDI Law: Protections under Domestic Law, Bilateral Investment Treaties and Sovereign Guarantees’ in Vivienne Bath and Luke Nottage (eds), *Foreign Investment and Dispute Resolution Law and Practice in Asia* (Routledge, 2011) 225.

¹³¹ See Simon Butt, ‘Foreign Investment in Indonesia: The Problem of Legal Uncertainty’ in Vivienne Bath and Luke Nottage (eds), *Foreign Investment and Dispute Resolution Law and Practice in Asia* (Routledge, 2011) 112.

Consequently, the statement that there is ‘evidence that, in practice, host governments are not systematically biased against foreign investors’¹³² is not only sweepingly broad, but does not logically support the Productivity Commission’s conclusion that ISDS does not offer foreign investors any comfort or protection against discriminatory or unfair interventions. Instead, the Commission largely reduced its analysis to the question of whether there was any measurable economic market failure that could be overcome by ISDS.

(ii) The Lack of Industry Feedback

Again rather peculiarly, the *2010 Productivity Commission Report* justified its position by stating that it received no feedback from Australian businesses or industry associations as to the value of ISDS protections.¹³³ While the lack of input was indeed an oversight by the business and legal community, it may be too far a step to conclude that a lack of submissions to a broad enquiry on trade and investment agreements indicates a lack of interest in or support of ISDS. Indeed, the more likely inference is that stakeholders were not attuned to the Commission’s project as the vast majority of the 2010 report focused on trade rather than investment and that smaller investors may have less knowledge of the benefits of ISDS and fewer resources to dedicate to making submissions to government committees. Indeed, the Commission’s conclusion is even inconsistent with the Trade Policy Statement’s claim that ‘[i]n the past, Australian governments have sought the inclusion of [ISDS] in trade agreements with developing countries at the behest of Australian business.’¹³⁴

More importantly, in making its conclusion the Commission unduly dismissed the factual record that demonstrates the value of ISDS to Australian industries. Indeed, Australian foreign investors have availed themselves of the benefits of ISDS in claims against India, Indonesia and Pakistan.¹³⁵ Other investors have, no doubt, used the presence of ISDS in an investment treaty to successfully resolve disputes before they reach binding arbitration.

(iii) The Asymmetrical Cost-Benefit Analysis

Underlying the Productivity Commission’s flawed analysis is an asymmetrical cost-benefit calculation. For example, the costs incurred (by the Australian Government) are not counterbalanced by both: (i) the benefits from inbound investors into Australia; and (ii) the benefits to Australia’s outbound capital.¹³⁶ Unlike foreign traders, investors are exposed to the inherent immobility of FDI, with long-term projects, and high up-front (sunk) capital costs, with minimal or no alternative use value. Such limiting factors were not considered by the Australian Government or the Productivity Commission. The Australian Government simply

¹³² *2010 Productivity Commission Report*, above n 15, 269.

¹³³ See *ibid* 270.

¹³⁴ DFAT, above n 6, 14.

¹³⁵ *italaw*, *Newly Posted Awards, Decisions & Materials* (22 February 2018) <<https://www.italaw.com/>>.

¹³⁶ See generally Kurtz and Nottage, above n 34.

minimised and dismissed Australian investor risks,¹³⁷ and, in so doing, effectively placed a burden on Australian investors to take into account the associated economic, political and legal risks, while removing its responsibility to protect its investors.

In addition, the Productivity Commission, and subsequently the Australian Government, failed to recognise or engage with the possibility that a withdrawal from ISDS may tempt foreign investors to relocate productive operations (that are beneficial to Australian industries and consumers) away from Australia in order to obtain enhanced treaty benefits elsewhere (through legitimate investment agreement planning). Similarly, the Productivity Commission and Government also failed to address whether the withdrawal from ISDS might incentivise savvy Australian investors to structure investments through intermediary countries with existing investment treaties containing ISDS provisions rather than risk being deemed an ‘Australian investor’ and losing the opportunity to fully enforce treaty rights.

(iv) Exaggerated Benefits of Substitutes of ISDS

The Commission inadequately identified and evaluated alternative strategies to protect Australian foreign investors. The suggested alternatives for foreign investors — namely recourse to domestic courts, obtaining political risk insurance and using investment contracts to mitigate risk— are problematic in both their methodology and outcome. Each is briefly addressed in turn.

Court Processes

Past statements of the Australian Government and the two Productivity Commission reports did not fully analyse whether domestic courts provide effective recourse for Australian foreign investors, as well as whether there is a net benefit in permitting investors to choose between initiating domestic court actions as an alternative to ISDS. Rather, the Productivity Commission conceived that the most practical option was to resort to domestic courts. Logically, the fact that the Trade Policy Statement and Productivity Commission make a case against utilising ISDS does not, in itself, infer that domestic courts should be preferred. Simply stated, the Australian Government failed to consider the ramifications for Australian foreign investors of relying on domestic courts. Table 1 (below) provides a brief comparison of the benefits and criticisms of arbitration as compared to domestic courts.

¹³⁷ ‘If Australian businesses are concerned about sovereign risk in Australian trading partner countries, they will need to make their own assessments about whether they want to commit to investing in those countries’: DFAT, above n 6, 14.

Table 1: General benefits and criticisms of ISDS arbitration, compared to domestic court process¹³⁸

Benefits of Domestic Court Actions	Benefits of ISDS Arbitration
Domestic courts are bound by established forum procedures and predictable rules of evidence.	Flexible process.
Courts usually have safeguards to correct errors in law and any curtailment of procedural rights, through appeal procedures.	Ability to apply to domestic court (for non-ICSID cases) ¹³⁹ to have an award set aside for procedural safeguards (departure of established process and failure to provide adequate reasons for award). Annulment proceedings are an extraordinary process and more limited in scope than appeal to a domestic court.
Inconsistency of international arbitration awards. National law ought to govern the rights of foreign investors.	Relative to the various laws of various host states, the applicable law (the terms of the investment agreement) in ISDS is uniform and predictable.
Domestic courts ought to decide cases involving foreign investors according to domestic law, and incorporate international investment laws into that domestic law. It is a traditional characteristic of sovereignty.	Allowing domestic courts to determine investment disputes according to domestic law, and incorporating international investment laws into that domestic law, would result in inconsistent determinations between states and would likely be subject to determinations that provide greater deference to the host State.
Domestic laws are considered, including public interest concerns, and are more likely to be applied consistently. Arguably, host States are more likely than ISDS tribunals to apply a public interest defence with greater deference to the host State.	Domestic laws are not irrelevant and are considered, depending on the nature of the claim (eg an umbrella clause) or the express provision of the investment agreement (referring to domestic law).
A domestic court of the State that is party to an investment treaty is the appropriate forum to resolve an investment dispute.	Where the actions or omissions of the domestic court of the State that is party to an investment treaty is the subject of a dispute, that domestic court is not the appropriate forum to resolve an investment dispute.

¹³⁸ See also Trakman, above n 42, 166–73.

¹³⁹ International Centre for Settlement of Investment Disputes ('ICSID').

Investment Contracts and Political Risk Insurance

Resort by the Productivity Commission and the Australian Government to investment contracts (with dispute resolution clauses) may sound like a simple and attractive alternative, but, in practice, may not be viable.¹⁴⁰ First, such a contract would likely be subject to the law of the host State (despite attempts to ‘contract out’)¹⁴¹ and, in the absence of an agreement with ISDS, investors would remain vulnerable to arbitrary or discriminatory application of the law.

Second, the Productivity Commission’s analysis of political risk insurance is incomplete. The *2010 Productivity Commission Report* solely focused on the availability of political risks insurance against expropriation, but failed to look at the practical reality.¹⁴² In practice, such coverage is often short-term, limited and only available up to a certain monetary amount. Importantly, political risk insurance against expropriation does not typically cover other forms of illegitimate government interference commonly protected by other international investment norms, such as ‘fair and equitable treatment’. In recent years, investors have relied on the ‘fair and equitable treatment’ obligation more frequently and successfully than other breaches, such as expropriation.¹⁴³ Similarly, political risk insurance policies¹⁴⁴ may be easier and more cost effective to procure where there is an investment agreement between the investor’s home State and the host State. In this regard, Gordon states: ‘Risk assessments under many [political risk insurance] programs often look at the existence of BITs or other agreements’.¹⁴⁵ As such, political risk insurance is unlikely to be an adequate substitute for a treaty containing ISDS.¹⁴⁶ Dissenting Commissioner Stoler bluntly stated that the argument for the possibility to obtain political risk insurance as a substitute for treaty-based investor protections ‘is analogous to arguing against the need for a fire department because homeowners can buy property insurance’.¹⁴⁷

Overall, while the Productivity Commission provided some sensible strategies analysing the value of the investment treaty regime (such as the impact

¹⁴⁰ Even the Productivity Commission conceded that such a strategy ‘is more feasible for large businesses’: *2010 Productivity Commission Report*, above n 15, 270.

¹⁴¹ Namely, the law of host State may be invoked under conflict of laws rules. As such, the law may not be desirable or provide effective protection and/or enforcement mechanisms.

¹⁴² *2010 Productivity Commission Report*, above n 15, 270.

¹⁴³ See UNCTAD, *Breaches of IIA Provisions Alleged and Found*, Investment Policy Hub <<http://investmentpolicyhub.unctad.org/ISDS/FilterByBreaches>>. These statistics, however, do not necessarily reflect the availability of other obligations (as that varies between each agreement), as well as merits of the cases on which success is judged (as that varies between each claim).

¹⁴⁴ Such policies in the market include ‘Confiscation Expropriation Nationalisation’ (‘CEN’), which protect the investor where the loss results directly from defined political and social perils, and ‘Contract Frustration and Contract Repudiation’, which are broader than CEN policies and can provide some cover in respect of the commercial or credit risk of States and their entities where default may be caused by simple economic mismanagement.

¹⁴⁵ Kathryn Gordon, ‘Investment Guarantees and Political Risk Insurance: Institutions, Incentives and Development’ [2008] *OECD Investment Policy Perspectives* 91, 107.

¹⁴⁶ See Luke Nottage, ‘The “Anti-ISDS Bill” before the Senate: What Future for Investor-State Arbitration in Australia?’ (Legal Studies Research Paper No 14/76, Sydney Law School, University of Sydney, August 2014) 5.

¹⁴⁷ *2010 Productivity Commission Report*, above n 15, 320.

assessment prescribed in the 2015 review),¹⁴⁸ the Commission overestimated the risks of ISDS, while significantly underestimating both its general and specific benefits. The Commission also too casually posed alternatives to ISDS that, in practice, pale in comparison to ISDS and fall well short of providing security and predictability to investors.¹⁴⁹

B Overall Impact of the Australian Government's ISDS Position: Avoiding the Most Important Issue

In the absence of a transparent investment policy, we can only surmise whether and, if so, to what extent the temporary mining boom, the *Philip Morris* claim against Australia, serious institutional concerns about ISDS or a general apprehension with bilateral and regional trade arrangements played a role in the Australian Government's 2011 Trade Policy Statement. What is clear, however, is that the Government failed to isolate these concerns from one another and, as a result, failed to engage in a meaningful debate regarding the merits of ISDS.

A broad policy statement that is fundamentally based on protecting sovereign interests and ignores the merits of ISDS can have various practical flow-on effects. These effects differ in scope, ranging from impacts on the development of Australia's industries, to Australia's position in the global political economy and the broader international investment regime. This section also makes the case that, like any other comparative advantage, Australia ought to utilise its respected, first-rate domestic legal system to obtain reciprocal benefits throughout bilateral agreements. Yet, we propose that this should only be utilised once some threshold criteria (such as current and anticipated FDI flows with the counterparty, its GDP and/or the status of its legal system) have been met.

Given Australia's position in the global political economy, an outright blanket rejection of ISDS founded on inadequate discourse, incomplete analysis and specious methodology could have unintended consequences. One such potential consequence, or ripple effect, will be Australia's loss of influence in improving the functioning of the integrated investment treaty system. Removing itself outright from the pervasive international system will deny Australia the opportunity to revise or improve the legal norms. For a country of its size, Australia has had considerable influence in the direction of certain treaty language, in particular for ensuring treaties contain safeguards for non-discriminatory public welfare measures taken by the State.¹⁵⁰ Withdrawing from the regime would mean Australia would no longer be able to craft and shape treaty language — in the process, of course, Australia's influence in this domain would wane considerably.

Similarly, removing itself from the regime may affect Australia's competitiveness as future investment agreements increase standards and potentially

¹⁴⁸ Further, the *2010 Productivity Commission Report* commences its analysis with a sensible method of testing the value of investment decisions, by stating that such assessments 'first need to establish whether there is market failure or other economic concern that provisions in [investment agreements] could effectively address': *ibid* 257.

¹⁴⁹ For a similar conclusion, see Nottage, above n 108.

¹⁵⁰ See, eg, *Agreement to Amend the Singapore–Australia Free Trade Agreement*, signed 13 October 2016, [2017] ATS 26 (entered into force 1 December 2017) art 22 ('SAFTA').

make signatory countries more attractive investment destinations. This is particularly important at the present time when large regional treaties are being negotiated and as China's 'Belt and Road' Initiative searches for large-scale investment initiatives.¹⁵¹ Australia, with its investors, is a player in these developments, and it would seem prudent to be a crafter and drafter of investment norms, rather than enter the stage late without any power to influence the development of the norms.

Australia's position in the Trade Policy Statement is clear — ISDS should not be used as a bargaining chip to obtain favourable concessions — and appears to be based on the notion of protecting sovereignty. However, again, it ignores the reality of the dynamics of the negotiation process. Trade and investment negotiations, or in fact any international negotiation, involve a reduction of sovereignty in some sense as the parties agree to an obligation ostensibly in return for an overall benefit. In the context of the investment legal regime, states agree to limit their discretion in the treatment of foreign investors, in consideration for certain benefits and concessions and (in no small part) to attract capital. A blanket refusal to use the 'ISDS card' not only removes a large degree of flexibility from the negotiators, but also denies Australia's ability to use its comparative advantage as leverage throughout the negotiations, which, in this case, is a more advanced domestic legal system. That is, if Australia has the benefit of an advanced domestic court system, surely it should realise that advantage throughout treaty negotiations, just as it would for any other of its industrial advantages (such as beef and agricultural production). This is not even a theoretical point, with evidence that Australia did just this in the *TPP* negotiations by using its anti-ISDS reservation as a bargaining chip against the US's desire to extend the length of test data protection for biologic pharmaceuticals.¹⁵² Taking away this potential to bargain and achieve a more tailored and potentially more appropriate agreement seems not to be in Australia's interests.

To date, the Australian Government's position and debate has revolved around the specifics of ISDS and avoiding the most important issue: the lack of applicable guidelines in Australia to form the basis of a prudent treaty strategy. ISDS and other concessions are only one component of the larger agreement, but, in reality, any provision (including ISDS) should only be entered into where there is a net perceived long-term benefit to Australian industries and investors, consumers, and the overall national economy.¹⁵³ While ISDS appears to facilitate these goals by providing the right to enforce the underlying treaty obligations, Australia should have criteria that it applies before considering whether to place ISDS (or any concession or issue) on the negotiating table.

¹⁵¹ See National Development and Reform Commission, Ministry of Foreign Affairs and Ministry of Commerce of the People's Republic of China, 'Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road' (Policy, National Development and Reform Commission, 28 March 2015) <http://en.ndrc.gov.cn/newsrelease/201503/t20150330_669367.html>.

¹⁵² See Gareth Hutchens, 'An Economic Analysis of the TPP? Don't Hold Your Breath', *The Sydney Morning Herald* (online), 6 October 2015 <<http://www.smh.com.au/federal-politics/political-news/an-economic-analysis-of-the-tpp-dont-hold-your-breath-20151006-gk2fic.html>>; Remy Davison, 'Ratifying the TPP May Be Tough, but Australia Needs it', *The Conversation* (online), 7 October 2015 <<https://theconversation.com/ratifying-the-tpp-may-be-tough-but-australia-needs-it-48663>>.

¹⁵³ See Bryan Mercurio, 'Should Australia Continue Negotiating Bilateral Free Trade Agreements?: A Practical Analysis' (2004) 27(3) *University of New South Wales Law Journal* 667, 701.

V Suggested Reform of Australia's Investment Policy

This Part explores whether a principled, but flexible, investment and ISDS policy can be formulated with specific regard to Australia's interests and taking account of the regional and global political economy. It will specifically address whether the concerns of the Productivity Commission and the 'case-by-case' approach as applied by the current Government can be reconciled.

We propose two components to a consistent ISDS policy: (1) a principled threshold to determine when ISDS will be on the negotiating table (such as net FDI flows and legal protections and enforcement mechanisms available for outbound investors); and (2) a template or model BIT (with ISDS provisions and substantive investment obligations) that should be considered throughout the treaty negotiations if the ISDS threshold is met. Before advancing this proposal, we address the content of the model BIT, and suggest provisions that respond to the abovementioned concerns of the Productivity Commission.

A Suggested Reform Measures ('ISDS+'): Exploring Novel Incentives

Australia would be prudent to consider adopting reform measures that have recently been included in investment treaties and model BITs elsewhere. Again, it is more than a little curious that the 2010 and 2015 Productivity Commission reports failed to consider the new models of investment protections, but based their analysis on outdated practices from antiquated treaties. By ignoring recent treaties, the Commission failed to cover the substantial reforms and departures from investment treaty practice of the 1980s–2000s. Some of the more important trends in treaty drafting, which we refer to as 'ISDS+', are outlined below.

1 Protection to Regulate for Public Interest

ISDS provisions can be drafted to address apparent concerns of 'regulatory chill', and there is of course no magic formula in doing so. Such concerns can be addressed in a variety of ways. The treaty can expressly provide for the protection of the State's legitimate public interests, such as public health and morals, culture, natural resources and the environment. One example of what has become a common provision in relation to expropriation, comes from the *AUSFTA* and reads:

Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment, do not constitute indirect expropriations.¹⁵⁴

In conjunction with a narrowing of obligations as seen above, treaties can include a general exception clause that further protects measures 'necessary' to

¹⁵⁴ *AUSFTA* signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005) annex 11-B(4)(b). See also *United States–Korea Free Trade Agreement*, signed 30 June 2007 (entered into force 15 March 2012) annex 11-B(3)(b) ('*KORUS-FTA*'); EU–Singapore Comprehensive Free Trade Agreement, in negotiation, annex 9-A; *SAFTA*, signed 13 October 2016, [2017] ATS 26 (entered into force 1 December 2017) annex 8-A(3)(b).

safeguard public interests such as health, environment, morals and culture. Such clauses are modelled after the general exceptions of the World Trade Organisation's ('WTO') *General Agreement on Tariffs and Trade* ('GATT') (art XX)¹⁵⁵ or *General Agreement on Trade in Services* ('GATS') (art XIV)¹⁵⁶ and generally provide:

Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures: (a) necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; (b) necessary to protect human, animal or plant life or health; or (c) relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.¹⁵⁷

States have also created other public policy regulatory space along various planes, including vertical arrangements such as industry-sector carve-outs (ie natural resources, tobacco, mining industry, etc)¹⁵⁸ or for various types of measures, such as taxation.¹⁵⁹ Another possibility is to utilise a hybrid approach that provides carve-outs pertaining to a particular substantive obligation, such as national treatment or MFN.

Such exceptions could also utilise and adopt the 'legitimate regulatory distinction' test¹⁶⁰ applied in the WTO under art 2.1 of the *Technical Barriers to Trade Agreement*.¹⁶¹ Under this analysis, a violation of, say, the national treatment

¹⁵⁵ See *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1867 UNTS 190 (entered into force 1 January 1995) annex 1A ('*General Agreement on Tariffs and Trade 1994*' ('GATT')) art XX. For further discussion on the utility of GATT art XX-type exceptions in investment agreements, see Dickson-Smith, above n 16.

¹⁵⁶ See *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1869 UNTS 183 (entered into force 1 January 1995) annex 1B ('*General Agreement on Trade in Services*' ('GATS')) art XIV.

¹⁵⁷ *Agreement between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments*, signed 9 September 2012 (entered into force 1 October 2014) art 33(2). While the wording varies between agreements, such a clause appears in an increasing number of agreements including the following: *ChAFTA*, signed 17 June 2015, [2015] ATS 15 (entered into force 20 December 2015) art 9.8; *KAFTA* signed 8 April 2014, [2014] ATS 43 (entered into force 12 December 2014) art 22.1(3); *Treaty between the Government of the United States of America and the Government of [Country] Concerning the Encouragement and Reciprocal Protection of Investment*, 2012, art 6 ('*US Model BIT*'). For commentary, see Simon Lester and Bryan Mercurio, 'Safeguarding Policy Space in Investment Agreements', Institute of International Economic Law, Georgetown Law Centre, *IIEL Issue Brief* 12/2017.

¹⁵⁸ *SAFTA*, signed 13 October 2016, [2017] ATS 26 (entered into force 1 December 2017) ch 8 art 22; *ChAFTA*, signed 17 June 2015, [2015] ATS 15 (entered into force 20 December 2015) art 29.5.

¹⁵⁹ This indeed would appeal to Australia's taxing practices for mining companies: see Luke Nottage, 'Throwing the Baby Out with the Bathwater: Australia's New Policy on Treaty-Based Investor-State Arbitration and its Impact in Asia' (2013) 37(2) *Asia Studies Review* 253, 263.

¹⁶⁰ The adverse effects on imported products in the form of reduced competitive opportunities is not discriminatory as long as those effects stem exclusively from a legitimate regulatory distinction. See Appellate Body Report, *United States — Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc WT/DS406/AB/R, AB-2012-1 (4 April 2012) [182].

¹⁶¹ *Marrakesh Agreement Establishing the World Trade Organization*, opened for signature 15 April 1994, 1868 UNTS 120 (entered into force 1 January 1995) annex 1A ('*Agreement on Technical Barriers to Trade*' ('TBT Agreement')). Article 2.1 of the *TBT Agreement* is specific to national treatment and MFN treatment, rather than a general horizontal exception.

obligation is permitted so long as the respondent State can demonstrate that there is a rational nexus between the detrimental treatment and the policy objective of the measure. A similar approach has been applied in the investment context in *Pope & Talbot v Canada* and *Feldman v Mexico*¹⁶² and *Bilcon v Canada* tribunals.¹⁶³

The recently negotiated *TPP*, even if it will not come into force, remains indicative of drafting trends. In this regard, the *TPP* is perhaps the gold standard (from the perspective of the degree of state sovereignty retained) for its attempt to exempt ‘public interest’ regulation and ‘to protect legitimate government regulation in the areas of health and the environment’.¹⁶⁴ For example, the *TPP* contains a novel, if controversial, type of the vertical carve-out whereby states defending an ISDS claim brought by a tobacco company can unilaterally preclude such a claim by invoking the ‘denial of benefits’ clause. While such clauses appear to be more effective for states than the general policy exceptions, a blanket tobacco company preclusion is potentially problematic as it may itself lead to abuse and, given that the State can raise the defence after the filing of a claim, such clauses raise serious due process concerns.

Another innovation along these lines is included in the *ChAFTA*, which allows for a joint state interpretation of a public welfare regulatory measure. Under that process, once an allegation as to a public welfare regulation is raised, the respondent State may issue a ‘public welfare notice’ specifying why the measure falls within the exception (also drafted similar to the *GATT* art XX exceptions).¹⁶⁵ The proceedings are then suspended for the treaty parties (ie China and Australia) to determine whether the alleged measure falls with the exception.¹⁶⁶ Such a determination by the treaty parties is binding on the tribunal.¹⁶⁷

The semantics of each individually crafted clause is beyond the scope of this article; the point here is simply that exceptions and limitations to obligations exist and are readily drafted into modern investment treaties. These provisions seek to safeguard the sovereign’s inherent regulatory powers (to regulate for health, safety, morals and general welfare) with the overall goal of encouraging investment. Throughout the treaty negotiation process, Australia may ‘ratchet’ up or down such regulatory protections as it sees fit and depending on the particular counterparty’s

¹⁶² *Pope & Talbot Inc v Canada* (Award, Lord Dervaird, Benjamin J Greenberg and Murray J Belman, 10 April 2001) reported in [2001] IIC 193, 228–9 [78]–[79]. See also *Feldman v Mexico* (Award, ICSID Arbitration Tribunal, Case No ARB(AF)/99/1, 16 December 2002) reported in (2003) 18(2) *ICSID Review* 488, 560–62 [181]–[184].

¹⁶³ *Clayton v Canada* (Award, Permanent Court of Arbitration, Case No 2009-04, 17 March 2015) reported in [2015] IIC 688, 912 [723]–[725] (the majority of the tribunal applied a similar approach for national treatment protection under *NAFTA* art 1102).

¹⁶⁴ Daniel Hurst, ‘Australia and the Trans-Pacific Partnership: What We Do and Don’t Know’, *The Guardian* (online), 6 October 2015 <<http://www.theguardian.com/business/2015/oct/06/australia-and-the-trans-pacific-partnership-what-we-do-and-dont-know>> (citations omitted).

¹⁶⁵ The *ChAFTA* provides that ‘[m]easures of a Party that are non-discriminatory and for the legitimate public welfare objectives of public health, safety, the environment, public morals or public order shall not be the subject of a claim’: *ChAFTA*, signed 17 June 2015, [2015] ATS 15 (entered into force 20 December 2015) art 9.11.4.

¹⁶⁶ *Ibid* art 9.11.5–6.

¹⁶⁷ *Ibid* art 9.18.3. If the treaty parties are unable to make a determination throughout the 90-day consultation period, the determination reverts to the investor-state tribunal.

circumstances. A complementary reform option is to maintain a broader membership of potential tribunal panellists (perhaps through a prescribed list of candidates) with expertise in not only international investment and/or trade law, but also public health, environmental and human rights law.¹⁶⁸ Similarly, the appointed tribunal could be encouraged (or required) to rely on consultants with this expertise for assistance and guidance (depending on the nature of the dispute). In addition, it could be mandatory that those arbitrators nominated by the parties have demonstrated a minimum understanding and experience in applying the *Vienna Convention on the Law of Treaties* in a consistent manner.¹⁶⁹ Such proposals have yet to be developed throughout the international investment regime. In fact, even the EU's recent Investment Court proposal contained in the *CETA*¹⁷⁰ falls short of this level of specificity, but does specify that the judges appointed have a requisite degree of competence, including 'demonstrated expertise in public international law'.¹⁷¹

It would be prudent for the Australian Government to consider such options as further safeguards of legitimate and non-discriminatory public policy. They are current, relevant and advanced by some measure over the provisions existing in older investment treaties.

2 Preventing Abusive Practices

A general concern surrounding ISDS is that it exposes a State to 'abusive' foreign investors, who could commence premature and pernicious claims or create opportunistic claims through restructuring of multinational corporations and treaty shopping. Here again, the Productivity Commission and the Australian Government collectively failed adequately to consider that treaties may be drafted in such a manner to carefully circumscribe ISDS access through measures such as:¹⁷²

- Prescribing the definition of 'investor' to restrict the range of investors who qualify for protection under the treaty;
- Conditioning the commencement of an ISDS claim on a requirement that the investor exhaust local remedies (ie domestic courts or administrative tribunals of the host State). This condition may prescribe time limits (time-caps) in order to prevent abusive delays by the host State;

¹⁶⁸ See Thomas Faunce, 'Australia's Embrace of Investor-State Dispute Settlement: A Challenge to the Social Contract Ideal?' (2015) 69(5) *Australian Journal of International Affairs* 595, 607.

¹⁶⁹ *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980). The nomination of arbitrators could first be vetted by the Secretary-General on this basis prior to the appointment. On interpreting investment agreements consistent with the Convention, see Andrew D Mitchell and Tania Voon, 'PTAs and Public International Law' in Simon Lester and Bryan Mercurio (eds), *Bilateral and Regional Trade Agreements: Commentary and Analysis* (Cambridge University Press, 2009) 114, 116–8.

¹⁷⁰ For a detailed analysis of the structure and effect of the Investment Court System in the *CETA* and proposed in the *TTIP*, see Dickson-Smith, above n 16, 794–809.

¹⁷¹ *CETA*, signed 30 October 2016 (entered into force 21 September 2017) art 8.27(4); Transatlantic Trade and Investment Partnership: Trade in Services, Investment and E-Commerce: Chapter II — Investment, European Commission proposal dated 12 November 2015 arts 16–17 <http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf> ('*EU TTIP Proposal November 2015*').

¹⁷² To clarify, the Productivity Commission did indeed suggest that a treaty could be drafted to refine definitions, however, the question raised is whether the Commission did so adequately with respect to this particular enquiry: see, eg, *2010 Productivity Commission Report*, above n 15, 274–5.

- Including denial of benefits provisions (such as those in *NAFTA* and *CAFTA*)¹⁷³, or bolstering the existing traditional provisions (as has been done in the *TPP-11*);¹⁷⁴
- Including a specific summary procedure for claims alleged to be manifestly without merit (such as those in the *CETA* and proposed by the EU in the *TTIP*);¹⁷⁵
- Including provisions to allow states to bring counterclaims against the foreign investor that initiated the claim, before the same tribunal;¹⁷⁶
- Including a prescribed cap on the scope of substantive protections (such as fair and equitable treatment or MFN treatment), where there are concerns that certain international standards risk exposing the state to a standard greater than the domestic law.¹⁷⁷

3 General Procedural Controls

Similar controls can be made to address the concerns of excessive procedural rights granted to foreign investors, and to address transparency concerns by states and the general public, such as:

- Prescribing ISDS provisions that mandate a negotiation and conciliation process as a condition to commencing investor–State arbitration. These may prescribe time limits with the ability of the parties to certify, on consent, that mediation has failed (in order to avoid undue delays).¹⁷⁸
- Providing robust protections that appropriately balance transparency of proceedings, and preserving confidential information of the disputing parties.¹⁷⁹
- Streamlining procedures that customarily create procedural bottlenecks, such as establishing standing panels to promptly determine arbitrator

¹⁷³ *NAFTA*, signed 17 December 1988 (entered into force 1 January 1994) art 1113; *Central America Free Trade Agreement*, signed 5 August 2004 (entered into force 1 January 2009) art 10.12 ('*CAFTA*').

¹⁷⁴ See *TPP-11*, signed 8 March 2018, [2018] ATNIF 1 (not yet in force) art 9.15.

¹⁷⁵ See *CETA*, signed 30 October 2016 (entered into force 21 September 2017) art 8.18(3); *EU TTIP Proposal November 2015*, above n 171, ch II s 3 arts 16–17.

¹⁷⁶ This practice is unique, and controversial (especially as to the scope of such claims and jurisdiction of the tribunal). See *Metal-Tech Ltd v Uzbekistan* (Award, ICSID Arbitration Tribunal, Case No ARB/10/3, 4 October 2013) reported in (2014) 26(1) *World Trade and Arbitration Materials* 37; *Al-Warraq v Indonesia* (Final Award, UNCITRAL Arbitration Tribunal, 15 December 2014) reported in [2014] IIC 718; *Perenco Ecuador Ltd v Ecuador* (Interim Decision, ICSID Arbitration Tribunal, Case No ARB/08/6, 11 August 2015).

¹⁷⁷ Again, these clarifications of standards may be sector-specific, rather than general: see Nottage, above n 108, 19–20.

¹⁷⁸ Further, the benefits of gaining better procedural rights through a third-party treaty and an MFN clause (resulting from *Maffezini v Spain* (Award, ICSID Arbitration Tribunal, Case No ARB/97/7, 13 November 2000)) mean that issues can be expressly foreclosed. This is the approach recently taken in the *ChAFTA*, signed 17 June 2015, [2015] ATS 15 (entered into force 20 December 2015) art 9.4(2).

¹⁷⁹ Arguably, however, this is not as much a concern as it once was, and tribunals are developing a practice that creates an adequate balance, through the detailed redaction procedures for sensitive information and closed-circuit hearings: see generally Trakman, above n 27.

challenges.¹⁸⁰ Similarly, standing panels could be established to consistently interpret the institutional rules (the *ICSID Convention*,¹⁸¹ *ICSID Arbitration Rules*,¹⁸² and *UNCITRAL Arbitration Rules*¹⁸³) in order to address concerns as to their inconsistent application.

4 Review Procedures for Legal Interpretations

While the *ICSID Convention*¹⁸⁴ maintains safeguards for parties regarding the conduct of the arbitration,¹⁸⁵ no practice exists to review awards for legal errors. The incorporation of an appeals process in the *ICSID Convention* has been considered but abandoned not only during the initial negotiations, but also at several stages thereafter.¹⁸⁶ That said, recent concerns as to the consistency of legal interpretations, which were not anticipated in 1965 when the Convention was signed, have caused the international community to reconsider the feasibility of an appellate mechanism. This mechanism became a central issue in the EU preceding the signing of *CETA* and throughout the *TTIP* negotiations.¹⁸⁷

An appellate mechanism may be prescribed either within the underlying bilateral or regional agreement or perhaps through an independent multilateral agreement (similar in application to the *ICSID Convention*). Some recent treaties do provide a mechanism for states to establish such a body, such as the *CETA*,¹⁸⁸

¹⁸⁰ See, eg, the procedure proposed by the EU in the *TTIP*, whereby a challenge is determined by the ‘President’ of the tribunal: Transatlantic Trade and Investment Partnership: Trade in Services, Investment and E-Commerce, European Union proposal dated 31 July 2015, s 3 art 11(2)–(4) (*‘EU TTIP Proposal July 2015’*).

¹⁸¹ See *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966) (*‘ICSID Convention’*).

¹⁸² See ICSID, *Rules of Procedure for Arbitration Proceedings* (adopted 10 April 2006) (*‘ICSID Arbitration Rules’*).

¹⁸³ See United Nations Commission on International Trade Law (*‘UNCITRAL’*), *UNCITRAL Arbitration Rules* (adopted 6 December 2010).

¹⁸⁴ See *ICSID Convention* opened for signature 18 March 1965, 575 UNTS 159 (entered into force 14 October 1966).

¹⁸⁵ Such as those relating to fundamental procedural issues, such as a serious departure from a fundamental established process. See *ibid* art 52(b), (d)–(e). Article V of the *New York Convention* provides for similar grounds on which an award may be refused to be recognised by a signatory court: *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, signed 10 June 1958 (entered into force 7 June 1959) (*‘New York Convention’*).

¹⁸⁶ See ‘Summary Records of the Fifth Session’ [1953] I *Yearbook of the International Law Commission* 1, 46; ICSID Secretariat, ‘Possible Improvements of the Framework for ICSID Arbitration’ (Discussion Paper, ICSID, 22 October 2004) [14]–[16], annex <<https://icsid.worldbank.org/en/Documents/resources/Possible%20Improvements%20of%20the%20Framework%20of%20ICSID%20Arbitration.pdf>>.

¹⁸⁷ European Commission, ‘Online Public Consultation on Investment Protection and Investor-to-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)’ (Report, European Commission, 13 January 2015) <http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf>.

¹⁸⁸ See *CETA*, signed 30 October 2016 (entered into force 21 September 2017) art 8.28.

US–Chile FTA (2003),¹⁸⁹ *CAFTA–DR* (2004),¹⁹⁰ and *KAFTA*,¹⁹¹ as well as other US agreements,¹⁹² though the parties have yet to constitute such a body.

B Exploring a Model Treaty with Guiding Threshold Criteria

While Australia’s ‘case-by-case’ treaty policy appears to be pragmatic and flexible, uncertainty remains as to Australia’s expectations throughout treaty negotiations. A predictable and objective approach promotes efficiency and manages expectations of the counterparty, as well as the concerns of the public and statutory bodies designed to review the effects of the agreements before their implementation (such as the Joint Standing Committee on Treaties).

1 *Threshold Criteria*

Predetermined criteria that trigger when ISDS should be included in an agreement may consist of the net (current and predicted) FDI flows with the counterparty, as well as the legal protections an Australian foreign investor may expect in the host State. For example, we would expect the Australian Government to be encouraging the adoption of ISDS in agreements where Australia is a net-exporter of FDI with the counterparty (and/or has a promising potential to be a net-exporter, taking into account the current and projected GDP of the counterparty). The standard of the legal system in the counterparty would likewise be relevant to the decision of whether to include ISDS, with Australia likely to seek the inclusion of ISDS when dealing with a counterparty with an undeveloped or rudimentary legal system. Yet, for practical reasons, this criterion need not rise to the level of specificity that the *2015 Productivity Commission Review* proclaimed. It may involve, for example, simply calculating whether Australian investors will be provided marginal procedural rights over-and-above a domestic court, as compared to the similar marginal procedural rights provided to an investor of a counterparty (adjusted by the anticipated investment volume and net investment flows).

2 *Purpose of a Model BIT*

The purpose of a model BIT is to establish at the outset a coherent principled investment strategy that has ideally been vetted by the general citizenry and leaves less scope for a State to have treaty terms dictated by the counterparty. Thus, a model BIT is an offensive (rather than defensive) strategy consisting of ‘best practices’ of investment provisions. A complementary model BIT can address and circumscribe the particular concerns of the State, such as the scope of ‘investor’ and ‘investment’,

¹⁸⁹ See *United States–Chile Free Trade Agreement*, signed 6 June 2003 (entered into force 1 January 2004) annex 10-H.

¹⁹⁰ See *Dominican Republic–Central America Free Trade Agreement*, signed 5 August 2004 (entered into force 1 January 2009) annex 10-F.

¹⁹¹ See *KAFTA*, signed 8 April 2014, [2014] ATS 43 (entered into force 12 December 2014) arts 11.22(3), 11.23(1).

¹⁹² See *KORUS–FTA*, signed 30 June 2007 (entered into force 15 March 2012) art 11.20(1), annex 11-D; *United States–Panama Trade Promotion Agreement*, signed 28 June 2007 (entered into force 31 October 2012) art 10.20(10), annex 10-D.

and the relative and absolute standards of treatment to be conferred to foreign investors while balancing domestic interests, such as health, environment, morals and culture, and those other 'ISDS+' provisions described above. A model BIT thereby not only reduces transaction costs in the negotiating process, but also become a useful tool for tribunals to reference when interpreting a particular treaty provision.

At present more than 50 countries (including the US, Canada and China) have drafted model BITs.¹⁹³ Indeed, Canada's model BIT (FIPA) successfully shaped its investment agreements with nine African states,¹⁹⁴ and China's model BIT has been flexibly applied in its agreements with Canada,¹⁹⁵ Japan and Korea. Australia should follow these countries in drafting a template that meets its needs and effectively balances protections with State and public interests in order to make negotiations easier, tribunal interpretations more predictable and the ISDS system more credible and transparent to the public at large.

VI Conclusion

Two years after the announcement of the Trade Policy Statement, Australia's recently elected Liberal Government retreated from a blanket policy of excluding ISDS, both through its own policy statements and in practice. This leaves the current political-legal environment unclear. While the current Australian Government has not rejected the Trade Policy Statement — indicating instead that ISDS will be considered on a (seemingly unguided) case-by-case basis — the 2010 and 2015 recommendations of the Productivity Commission linger and remain the official investment strategy and policy advice for the Executive Government. Consequently, uncertainty abounds in Australia's approach to future treaties. Australia's current policy is one of mixed messages, such that it is difficult to delineate the rationale for advocating multilateral over bilateral arrangements — especially where both negotiating processes rely on the same method of trading concessions in order to reach a mutually agreeable result. Those mixed messages, as well as its overtly cautious reaction to the *Philip Morris* claim, makes any issues raised as to the legitimacy of the ISDS system unsustainable. This is further aggravated by the Government's inconsistent treaty practice in, for instance, treaties with Japan, Korea and China.

Putting aside the various misconceptions and inconsistencies detailed throughout this article, the debate on Australia's ISDS policy has yet to be clearly delineated — neither a blanket rejection of ISDS (Trade Policy Statement and Productivity Commission's approach) nor a pure case-by-case basis without

¹⁹³ See UNCTAD, 'World Investment Report 2015: Reforming International Investment Governance' (Report, 2015) 108–10 <<http://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1245>>.

¹⁹⁴ See Rainbow Willard and Sarah Morreau, 'The Canadian Model BIT — A Step in the Right Direction for Canadian Investment in Africa?' on *Kluwer Arbitration Blog* (18 July 2015) <<http://kluwerarbitrationblog.com/blog/2015/07/18/the-canadian-model-bit-a-step-in-the-right-direction-for-canadian-investment-in-africa/>>.

¹⁹⁵ See Trakman, above n 42, 161; Catherine H Gibson, 'Canada, China, and the Anti-BIT' on *Kluwer Arbitration Blog* (9 April 2015) <<http://kluwerarbitrationblog.com/blog/2015/04/09/canada-china-and-the-anti-bit/>>.

established parameters is sustainable. Instead, we recommend a logically consistent ISDS policy that clearly establishes: (1) when ISDS can be placed on the negotiating table; and (2) an appropriate type of the ISDS mechanism.

Flexibility can still be achieved with the adoption of threshold criteria, such as the counterparties legal system. Such a policy can also be moulded to address concerns such as regulatory chill and regulatory policy space. This approach can be achieved in a flexible, yet principled, manner through the use of the model BIT.

The failure to make clear and to consistently take advantage of its comparative advantage and other priorities effectively underutilises Australia's inherent advantages and threatens the country to succumb to what Donald Horne's described in *The Lucky Country*.¹⁹⁶ Horne went on to state that Australia 'lives on other people's ideas, and, although its ordinary people are adaptable, most of its leaders (in all fields) so lack curiosity about the events that surround them that they are often taken by surprise'.¹⁹⁷ It is easy to declare that Australia has, since the 1960s, adapted to generate international competitive industries and, in so doing, facilitated economic growth that, in turn, increased investment capital to allow Australian companies to invest overseas.

What is not easy, however, is to calculate how much of Australia's position on agreements and ISDS has been undermined by the economic nationalism that has permeated politics since the 1960s. Retreating from the regional and bilateral system to give way to the multilateral regime (as the Trade Policy Statement and Productivity Commission espouse) is one thing (however unfeasible). Rejecting with it the ISDS system based on ideological grounds to, in effect, return to a Calvo Doctrine¹⁹⁸ path of domesticating investment disputes, is another. Doing so without adequate debate, with insufficient analysis and based on questionable premises, is an entirely different matter.

¹⁹⁶ See quote accompanying above n 1.

¹⁹⁷ Horne, above n 1, 209.

¹⁹⁸ See Patrick Juillard, 'Calvo Doctrine' in *Max Planck Encyclopedia of Public International Law* (at January 2007).

Appendix: Concordance of General Concerns, Australia’s Approach and Suggested Reform Measures

Global concern as to ISDS	Australian understanding (through Trade Policy Statement and 2010 and 2015 Productivity Commission reports)	Suggested solution (effected through treaty text or by the incorporation of procedural rules)	Current examples of solution
Investment agreements (with ISDS) do not encourage FDI flows.	Addressed, but engagement with aggregated data was inadequate and focused on trade flows.	Commission econometric report that specifically addresses: (1) the correlation with respect to investment agreements with ISDS; and (2) Australia’s investment environment.	Economic study performed by Armstrong, Kurtz, and Nottage. ¹⁹⁹
No protections are provided to Australian outbound investors.	Raised as a concern, but summarily dismissed as a real issue.	Obtain better data that ascertains the nature of outbound investors, and practical benefits.	EU Public Consultation process in 2015. ²⁰⁰
Asymmetrical nature of ISDS; states cannot sue foreign corporations.	Raised, but solution not addressed.	<ul style="list-style-type: none"> • There are provisions under the <i>ICSID Convention</i> that have been interpreted to allow for counterclaims. • In any event, should states be able to bring claims against investors? 	<i>ICSID Convention</i> art 46. ²⁰¹

¹⁹⁹ See Armstrong and Nottage, above n 24.

²⁰⁰ See European Commission, above n 187.

²⁰¹ This provision has been interpreted in *Metal-Tech Ltd v Uzbekistan* (Award, ICSID Arbitration Tribunal, Case No ARB/10/3, 4 October 2013) reported in (2014) 26(1) *World Trade and Arbitration Materials* 37; *Al-Warraq v Indonesia* (Final Award, UNCITRAL Arbitration Tribunal, 15 December 2014) reported in [2014] IIC 718; *Perenco Ecuador v Ecuador* (Interim Decision, ICSID Arbitration Tribunal, Case No ARB/08/6, 11 August 2015).

Global concern as to ISDS	Australian understanding (through Trade Policy Statement and 2010 and 2015 Productivity Commission reports)	Suggested solution (effected through treaty text or by the incorporation of procedural rules)	Current examples of solution
Policy encroachment (Regulatory chill).	Raised, but solution not addressed.	<ul style="list-style-type: none"> • There is no empirical evidence of regulatory chill. • Drafting solution similar to <i>GATT</i> art XX. 	<i>TPP</i> , <i>CETA</i> , <i>KAFTA</i> art 11.5; <i>KORUS-FTA</i> art 2.1; Argentina–NZ BIT art 5.3; US Model 2012, <i>TTIP</i> (EU’s draft text) ²⁰²
Inconsistent tribunal interpretations and decisions.	Raised in passing, but without analysis or suggested reform.	<ul style="list-style-type: none"> • Establish a review court, or a tribunal with fixed members. • Also adopt mechanism for the joint interpretation of treaty provisions. Further, such treaties provide for a revision timeline to update and clarify. 	<i>CAFTA</i> ; <i>KORUS-FTA</i> and <i>KAFTA</i> (Joint Committee); <i>NAFTA</i> (Free Trade Commission). ²⁰³ US Model BIT 2012; <i>TTIP</i> (EU’s draft text)
Excessive scope for investor claims.	Not considered.	Limit types of claims (through the definition of ‘investment’) or types of regulatory action (excluding taxation measures from expropriation).	<i>NAFTA</i> art 1108, Japan–Switzerland BIT (2009); Germany Model BIT (2005); UK–Barbados BIT (1993).

²⁰² See *EU TTIP Proposal July 2015*, above n 180, ch 1 art 1-1(1), which preserves the rights of states to regulate for measures necessary to achieve legitimate policy objectives, for public health, safety, environment and public morals and cultural diversity.

²⁰³ See, eg, *NAFTA*, signed 17 December 1988 (entered into force 1 January 1994) ch 11. The FTC, in July 2001 delivered an interpretation relating to the international law standard of treatment under art 1105. See NAFTA Free Trade Commission, ‘North American Free Trade Agreement: Notes of Interpretation of Certain Chapter 11 Provisions’ (31 July 2001) <http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp>.

Forum shopping available to foreign investor.	Not considered.	<ul style="list-style-type: none"> • Provide for a State to invoke a denial of benefits clause for abusive claims; a requirement to exhaust local remedies, and MFN exclusions relating to obtaining better ISDS rights.²⁰⁴ • Fee-shifting rules (especially for frivolous claims). 	<i>TTIP</i> (EU's draft text); Indian Model BIT; Southern African Development Community ('SADC') Model BIT.
Global sustainable development.	Not considered.	<ul style="list-style-type: none"> • Provide an obligation of corporate sustainable development. • Alternatively, carry out Trade Sustainability Impact Assessment prior to negotiations: see Korea–EU FTA.²⁰⁵ 	US Model BIT 2012; <i>AUSFTA</i> art 19.4.
Conflicts of interest of arbitrators.	Raised in passing, but without analysis.	Mandate the disclosure of relationships between the parties.	<i>TTIP</i> (EU's draft text).

²⁰⁴ Following *Maffezini v Spain* (Award, ICSID Arbitration Tribunal, Case No ARB/97/7, 13 November 2000).

²⁰⁵ See European Commission, Trade, 'Trade Sustainability Impact Assessment of the EU–Korea FTA: Draft Final Report — (Phase 3)' (Report, European Commission, June 2008) <http://trade.ec.europa.eu/doclib/docs/2008/december/tradoc_141660.pdf>; Colin Kirkpatrick et al, 'The Trade Sustainability Impact Assessment (SIA) on the Comprehensive Economic and Trade Agreement (*CETA*) between the EU and Canada: Final Report' (Report, European Commission, June 2011) <<http://mpira.ub.uni-muenchen.de/28812/>>.

Global concern as to ISDS	Australian understanding (through Trade Policy Statement and 2010 and 2015 Productivity Commission reports)	Suggested solution (effected through treaty text or by the incorporation of procedural rules)	Current examples of solution
Transparency and confidentiality of proceedings.	Not considered.	<ul style="list-style-type: none"> • Provide more prescribed third party intervener rights and <i>amicus curiae</i> submissions. • Greater disclosure, but with provision for redactions or safeguards. 	<i>KAFTA</i> art 11.21; <i>TPP</i> ; <i>TTIP</i> (EU's draft text). ²⁰⁶
Expense of proceedings for the State.	Raised in passing, but without analysis.	Authorise greater arbitrator control, such as capping costs.	
Length of proceedings.	Raised in passing, but without analysis.	<ul style="list-style-type: none"> • Time limits for proceedings. • Fee-shifting rules (especially for frivolous claims). 	<i>TTIP</i> (EU's draft text) (for appeals).

²⁰⁶ *EU TTIP Proposal November 2015*, above n 171, ch II s 3 art 23 may be invoked by any natural or legal person which can establish a direct and present interest in the result of the dispute. Also, the intervener's interest is limited to 'supporting, in whole or in part, the award sought by one of the disputing parties'. The draft *TTIP* also incorporates the recent *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, opened for signature 17 March 2015 (entered into force 18 October 2017).

Illegal Phoenix Activity: Practical Ways to Improve the Recovery of Tax

Helen Anderson*

Abstract

Illegal phoenix activity generally involves closing one debt-laden company and continuing its business through another company minus those debts. Its propensity to cause losses of federal revenue has recently been highlighted by the Australian Government Treasury announcement of a suite of measures to combat it. However, there is already an extensive array of legislative and administrative tools that are available against illegal phoenixing. This article considers both the existing and proposed measures and makes some practical suggestions to improve the recovery of tax. However, solutions are not found exclusively in tax law and its administration. Since illegal phoenix activity is facilitated by the creation and demise of companies and their controllers are regulated by the *Corporations Act 2001* (Cth), suggestions are made regarding corporate law and its administration by the Australian Securities and Investments Commission.

I Introduction

The ability of the Australian Taxation Office ('ATO') and state revenue offices to collect taxation is inevitably impacted by the form of the entity that owes the obligation.¹ This article² takes a slice of those entities — Australian registered companies — and considers how deliberately contrived corporate insolvency affects tax-debt recovery. In particular, it concentrates upon illegal phoenix activity as a device to out-manoeuvre the ATO's attempts to recover tax from micro and small companies. Illegal phoenix activity has recently been the focus of policy announcements by the Minister of Revenue.³ The most significant proposals made

* Professor, Melbourne Law School, University of Melbourne, Victoria, Australia. The research reported in this article was funded by the Australian Research Council: DP140102277, 'Phoenix Activity: Regulating Fraudulent Use of the Corporate Form' (Chief Investigators: Helen Anderson, Ann O'Connell, Ian Ramsay, Michelle Welsh).

¹ For statistics as to the different kinds of taxpayer entities that exist, see ATO, *Statistics* (11 January 2018) <<https://www.ato.gov.au/About-ATO/Research-and-statistics/In-detail/Taxation-statistics/Taxation-statistics-2014-15/?page=3#Statistics>>.

² Some of the suggestions contained in this article are derived from Helen Anderson et al, *Phoenix Activity: Recommendations on Detection, Disruption and Enforcement* (Research Report, Centre for Corporate Law and Securities Regulation, The University of Melbourne, February 2017) ('*Phoenix Recommendations Report*').

³ Kelly O'Dwyer (Minister for Revenue and Financial Services), 'A Comprehensive Package of Reforms to Address Illegal Phoenixing' (Media Release, 12 September 2017).

in the Australian Government Treasury ('Treasury') 2017 *Combating Illegal Phoenixing* consultation paper⁴ will be critiqued in this article.

In its simplest form, illegal phoenix activity involves the directors of one company deliberately closing it down and transferring its business to another company, either newly formed or already in existence. The aim is to avoid the business having to pay its debts, as they remain quarantined in, and unrecoverable from, the insolvent company. An employer operating their business as a sole trader, or through a partnership or trust, will be personally liable for these amounts even if the business cannot afford it, because 'the business' is not a separate legal entity. Some debts even survive the individual's bankruptcy.⁵ On the other hand, a company, as a separate legal entity, can be liquidated or simply deregistered. The ATO's Commissioner of Taxation is a non-priority unsecured creditor in any liquidation, and is likely to suffer significant losses.⁶ This creates a temptation for company controllers to accrue these corporate tax debts and then to allow the company to fail when the ATO tries to bring it to account.

Several recent scandals⁷ involving illegal phoenix activity have heightened the need for action. At present, enforcement actions may be frustrated by a debt-laden company removing its genuine directors and appointing a 'man of straw' prior to a regulator taking action, with the new appointment backdated by a number of years. An example of this occurred in 2016, when the homeless client of an accounting firm was allegedly registered, without his knowledge or consent, as a director of a number of companies with outstanding ATO debts. He was then issued director penalty notices ('DPN') by the ATO, making him personally liable for the company's unremitted taxes. In some instances, the accounting firm had backdated the directorship up to five years.⁸

Where the company's assets are insufficient to meet the claims of revenue authorities as unsecured creditors, other measures need to be found. Actions against

⁴ Australian Government, Treasury, *Combating Illegal Phoenixing*, September 2017.

⁵ *Bankruptcy Act 1966* (Cth) s 82. Penalties and fines, for example, are not provable (and are, thus, not extinguished) in bankruptcy, nor are various study support debts owed to the Government.

⁶ The 2016–17 collation of external administrator data shows that unpaid taxes occur in 85.5% of insolvencies (ie, in 14.5% of insolvencies, there are no unpaid taxes): Australian Securities and Investments Commission, *Report 558 Insolvency Statistics: External Administrators' Reports (July 2016 to June 2017)* (2017) 50 (table 39) ('ASIC Report 558'). ASIC provides no separate data on illegal phoenix activity so this figure relates to corporate insolvencies as a whole.

⁷ See the Plutus allegations discussed in Neil Chenoweth and David Marin-Guzman, 'ATO Tax Fraud: Behind a \$191m Gen Y Crime Wave', *Australian Financial Review* (online), 3 July 2017 <<http://www.afr.com/news/policy/tax/ato-tax-fraud-behind-a-191m-gen-y-crime-wave-20170630-gx1xjg>>. See also the series of allegations against Philip Whiteman: Dan Oakes and Sam Clark, 'Staggering Number of Alleged Crimes in Massive Tax Scam', *ABC News* (online), 16 June 2017 <<http://www.abc.net.au/news/2017-06-15/documents-lay-bare-staggering-number-of-alleged-crimes-in-scam/8620756>>; Dan Oakes and Sam Clark, 'Melbourne Man Identified in Multi-Million Dollar Tax Evasion Investigation Still in Business', *ABC News* (online), 7 February 2017 <<http://www.abc.net.au/news/2017-02-06/melbourne-man-linked-to-tax-avoidance-still-in-business/8244850>>.

⁸ Dan Oakes and Sam Clark, 'Melbourne Man Linked to Alleged Tax Evasion Scheme Previously Accused of Ripping Off Investors' *ABC News* (online), 17 October 2016 <<http://www.abc.net.au/news/2016-10-17/unwitting-clients-signed-up-as-directors-to-failing-businesses/7939622>>; ABC, 'Unwitting Clients Signed up as Directors to Failing Businesses', *7.30 Report*, 17 October 2016 (Dan Oakes) <<http://www.abc.net.au/7.30/unwitting-clients-signed-up-as-directors-to/7940908>>.

third parties, including holding companies,⁹ are limited, so if recovery is to be obtained, an alternative means can be actions against the company's directors, officers or advisors, either via primary liability or as an accessory to the company's liability for non-payment. However, enforcement actions alone are not enough; measures to prevent, disrupt and deter illegal phoenix activity are also needed to protect tax revenue.

There are no provisions in either company law or taxation law that expressly address illegal phoenix activity; what makes the phoenix activity illegal is a breach of some other provision that can be utilised against that behaviour. These mechanisms have not been entirely successful for reasons that this article will explain,¹⁰ and this article proposes some ways in which these can be improved. In addition, because phoenix activity is essentially a process governed by corporate law — liquidating or abandoning one company and transferring the company's business to another company — this article suggests that some of the means of addressing tax losses caused by illegal phoenix activity can be found in corporate law, either as it presently exists or as it might be amended. This article also argues that improvements to the administrative arrangements involving the registration of companies and the appointment of their directors can have benefits for the ATO and state revenue authorities.

Part II provides the background to illegal phoenix activity and the ATO's ongoing concern about it. Part III looks at existing tax mechanisms available to tackle illegal phoenix activity and what might be done to improve them. These include administrative remedies like the imposition of a DPN, as well as possible criminal accessory liability under both the *Taxation Administration Act 1953* (Cth) ('TAA') and the *Crimes (Taxation Offences) Act 1980* (Cth) ('CTOA'). Suggestions for improvements, such as extending 'single touch payroll', are also considered here, and take into account the Treasury Laws Amendment (2018 Measures No 4) Bill 2018 ('TLA 2018 Super Measures Bill'), which, at the time of writing, was being considered by the Senate Economics Legislation Committee. Part IV sketches the range of existing corporate law actions available to creditors such as revenue authorities, before suggesting what might be done to expand them. However, in the interests of length and coherence, the article does not explore the possibilities of corporate third-party liability.¹¹ Part V concludes that improvements to existing tax and corporate legislation, as well as administrative reforms to processes controlled by the Australian Securities and Investments Commission ('ASIC') and the ATO,

⁹ See Jason Harris and Anil Hargovan, 'Corporate Groups: The Intersection between Corporate and Tax Law — *Commissioner of Taxation v BHP Billiton Finance Ltd*' (2010) 32(4) *Sydney Law Review* 723 and references cited therein. The Commissioner's appeal to the High Court to pierce the veil on intragroup financing arrangements was dismissed: *Commissioner of Taxation v BHP Billiton Ltd* (2011) 244 CLR 325. There is limited recovery for group payroll tax obligations under various state revenue laws. In addition, s 588V of the *Corporations Act 2001* (Cth) ('*Corporations Act*') imposes liability on a holding company for the insolvent trading of its subsidiary in specified circumstances. These will not be considered further in this article.

¹⁰ See further Colin Anderson, Jennifer Dickfos and Catherine Brown, 'The Australian Taxation Office — What Role Does it Play in Anti-Phoenix Activity?' (2016) 24(2) *Insolvency Law Journal* 127.

¹¹ These include provisions adapted from chain-of-responsibility laws, security-of-payments laws, holding company liability, workplace health and safety law, 'person conducting a business or undertaking' and the *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth).

could significantly improve tax collections currently adversely affected by illegal phoenix activity.

II Background

It is not illegal for a company to fail owing unpaid debts. In the absence of wrongdoing of some kind,¹² the company's directors and officers should not be penalised when this happens. Detection and enforcement action against company directors and officers is difficult because it is the often well-disguised wrongdoing that attracts personal liability, not the externally visible evidence of corporate failure. As a result, where non-payment of tax is the directors' intention, it is much simpler for the company to properly incur the liability, then liquidate and transfer their business elsewhere, rather than devising a scheme to avoid incurring a tax liability that might stray into tax avoidance. These tax-related liabilities include the company's income tax, goods and services tax ('GST'), unremitted Pay-As-You-Go (Withholding) ('PAYG(W)') deductions, and unpaid superannuation ('super') obligations. This is the realm of illegal phoenix activity, where, as the ATO description states, 'a new company is created to continue the business of a company that has been deliberately liquidated to avoid paying its debts, including taxes, [unsecured] creditors and employee entitlements'.¹³

Clearly, this is not an option for a large company, which would suffer too much reputational damage if it were liquidated and replaced by a resurrected or 'phoenix' version of itself. However, it is certainly an option for a micro or small company, where one or more successor companies are used to maintain the business. Often the company's controlling individual and their contacts are the essence of the business. The liquidation of the actual proprietary limited company that owns the business and the creation of its replacement may go unnoticed by customers and suppliers, and even by employees in some cases. Illegal phoenix activity can also take place within corporate groups where the subsidiary of a large company is placed into liquidation. The group may be arranged in such a way that one company accrues tax liabilities (for example, a labour hire entity accruing PAYG(W) and super liabilities) and is then liquidated with its functions taken over by another company in the group. Again, this process can be repeated multiple times, deliberately to avoid payment of federal and state revenue obligations. In a similar way, supply chains can be used so that a small, dispensable company employs the workers and accrues the various liabilities, quarantining from liability the large company at the end of the

¹² This is most likely to be a breach of directors' duties, discussed below in Part IVA(3).

¹³ ATO, *Illegal Phoenix Activity* (16 March 2018) <<https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Illegal-phoenix-activity/>>. Each agency within the Inter-Agency Phoenix Forum has a slightly different definition, depending on which of their own areas are impinged upon. See ATO, *Inter-Agency Phoenix Forum* (25 September 2014) <<https://www.ato.gov.au/General/The-fight-against-tax-crime/In-detail/Inter-Agency-Phoenix-Forum/Inter-Agency-Phoenix-Forum/>>. Here, the ATO description is narrower: 'We define fraudulent phoenix activity as the evasion of tax and or superannuation guarantee liabilities through the deliberate, systematic and sometimes cyclic liquidation of related corporate trading entities.'

chain that benefits from their labour.¹⁴ Another scenario involves a business being transferred to a new company with the old company simply abandoned by its management without being liquidated,¹⁵ and eventually deregistered by ASIC.¹⁶

This is not to imply that the corporate form is the sole means of avoiding what is essentially a sole trader business from paying its tax obligations. Individuals operating outside of the corporate context can engage in personal asset protection strategies — putting assets into the name of a spouse or a family trust, for instance. However, the process may nonetheless leave the individual a bankrupt with all the stigma, practical difficulties and disruption to credit-worthiness that bankruptcy entails.¹⁷ Much of this unpleasantness is avoided by those conducting their business through a company.

The ATO enjoys privileges as a creditor from its status as a regulator, such as enhanced access to information including investigative powers, criminal sanctions that deter non-compliance, and a range of specific mechanisms.¹⁸ In each case, the ATO has the financial resources to use these powers that other unsecured creditors may not have. On the other hand, it suffers from some particular disadvantages, including a complex taxpaying population, an inability to refuse to deal with known recalcitrant taxpayers, a frequent lack of knowledge of what is owing and by whom,¹⁹ its position as a deliberate target of illegal phoenix activity, and its requirement to act as a model litigant.²⁰

¹⁴ See, eg, Tess Hardy and John Howe, ‘Chain Reaction: A Strategic Approach to Addressing Employment Noncompliance in Complex Supply Chains’ (2015) 57(4) *Journal of Industrial Relations* 563.

¹⁵ *Corporations Act* s 601AB.

¹⁶ Note that under *Corporations Act* s 601AH(5), a deregistered company can be reinstated to pay debts, but some companies are abandoned because they lack sufficient assets to make the appointment of a liquidator financially viable. In such cases, it is unlikely that reinstatement will be a productive exercise.

¹⁷ See Australian Financial Security Authority, *What Are the Consequences of Bankruptcy?* (2016) <<https://www.afsa.gov.au/insolvency/i-cant-pay-my-debts/what-are-consequences-bankruptcy>>. An undischarged bankrupt is automatically disqualified from managing a company: *Corporations Act* s 206B(3).

¹⁸ These include departure prohibition orders under the TAA pt IVA; garnishee orders, where the Commissioner of Taxation can require that monies payable to, or held on behalf of, a person with a tax debt (eg by banks and other financial institutions) be paid to the ATO under TAA sch 1 s 260-5. See, eg, *Bruton Holdings Pty Ltd (in liq) v Federal Commissioner of Taxation* (2009) 239 CLR 346; *Federal Commissioner of Taxation v Park* (2012) 205 FCR 1. Also available are freezing orders (Mareva injunctions) under *Federal Court Rules 2011* (Cth) r 7.32; and *Pay As You Go Withholding Non-compliance Tax Act 2012* (Cth) s 3, which imposes tax per TAA sch 1 sub-div 18D on directors and their associates claiming PAYG(W) credits on amounts that were not remitted to the ATO. Other employees can claim these amounts notwithstanding non-remittance. The ATO’s powers are detailed in ATO, *Practice Statement Law Administration: Enforcement Measures Used for the Collection and Recovery of Tax-Related Liabilities and Other Amounts*, PS LA 2011/18, 3 July 2014, annexure F <<http://law.ato.gov.au/atolaw/view.htm?Docid=PSR/PS201118/NAT/ATO/00001>>. See also Anderson, Dickfos and Brown, above n 10, and references cited therein; Sylvia Villios, ‘Tax Collection, Recovery and Enforcement Issues for Insolvent Entities’ (2016) 31(3) *Australian Tax Forum* 425.

¹⁹ See further David Morrison, ‘Floundering around the Phoenix: Is it Possible to Use Court Proceedings Effectively?’ (2015) 23(3) *Insolvency Law Journal* 143.

²⁰ ATO, *Practice Statement Law Administration: Conduct of ATO Litigation and Engagement of ATO Dispute Resolution*, PS LA 2009/9, 19 December 2013. See also Australian Government, Attorney-General, *Legal Services Directions 2017* (Cth), app B.

The extent to which illegal phoenix activity impacts upon tax collection is not known, but estimates of the cost of lost tax revenue are high. In November 2009, Treasury released its *Action against Fraudulent Phoenix Activity: Proposals Paper*,²¹ which estimated that to be \$600 million — although the paper did not state the method of calculation of this figure. In 2012, PricewaterhouseCoopers estimated that illegal phoenix activity costs the Australian economy up to \$3.19 billion per year.²² A 2017 paper released by the Federal Government concluded that ‘the incidence of illegal phoenix company activity, and the subsequent costs to the FEG [Fair Entitlements Guarantee] scheme, is increasing’.²³ Therefore, despite a lack of precision about the cost of illegal phoenix activity to tax revenues, it is clear from these estimates and the ATO’s commitment to the Inter-Agency Phoenix Forum²⁴ and Phoenix Taskforce²⁵ that the losses are sufficiently concerning to look at ways to address the damage caused by illegal phoenix activity. The next part of this article will look at the existing tax mechanisms available and what might be done to improve them.

III Existing Tax Mechanisms and Ways to Improve Them

As noted above, the ATO has a number of ways in which it may recover unpaid taxes,²⁶ and these cover circumstances much broader than illegal phoenix activity. This discussion will concentrate on those most relevant to recovery from individuals involved in illegal phoenix activity and make suggestions for their reform. The provisions contained in the TLA 2018 Super Measures Bill will be considered only to the extent that they are pertinent to this discussion.

A Director Penalty Notice Regime

1 Reform the DPN Regime to Address Illegal Phoenix Activity

Employers, incorporated or not, are obliged to remit PAYG(W) to the ATO at periodic intervals, having withheld these taxation amounts from the pay-packets of their employees.²⁷ They are also obliged to remit super to their employees’ nominated funds, failing which the employer becomes liable for the super guarantee charge.²⁸ In exchange for giving up priority creditor status for these and certain other

²¹ Australian Government, Treasury, *Action against Fraudulent Phoenix Activity: Proposals Paper*, 2009, 5 [2] (‘2009 Phoenix Proposals Paper’).

²² PricewaterhouseCoopers for the Fair Work Ombudsman, *Phoenix Activity: Sizing the Problem and Matching Solutions* (June 2012) 2.

²³ Australian Government, Treasury and Department of Employment, *Reforms to Address the Corporate Misuse of the Fair Entitlements Guarantee Scheme: Consultation Paper* (May 2017) 5.

²⁴ ATO, *Inter-Agency Phoenix Forum*, above n 13.

²⁵ ATO, *Phoenix Taskforce* (4 May 2018) <<https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Illegal-phoenix-activity/Phoenix-Taskforce/?=redirected>>.

²⁶ See above n 18.

²⁷ TAA sch 1 s 6-5(2).

²⁸ *Superannuation Guarantee (Administration) Act 1992* (Cth) pt 3.

unpaid taxes,²⁹ the director penalty regime was introduced in 1993.³⁰ Currently, the TAA sets out the director's duty to 'cause the company to comply with its obligation' to remit the PAYG(W) and super.³¹ Directors become liable for a penalty through the issuance of a DPN if they do not cause the company to make these payments or liquidate it or place it into voluntary administration ('VA') within 21 days.³² The regime's conditions are stringent³³ and its defences are very narrowly articulated³⁴ and strictly construed.³⁵ Directors caught by the DPN regime cannot be granted relief for breach of duty.³⁶ However, they can completely avoid personal liability by placing the company into external administration within the time specified, no questions asked, no matter what their motivation in doing so.

From a policy perspective, the DPN regime appears to capture either the non-compliant company or its director. While in neither case is there an absolute obligation to pay, the regime is aimed at ensuring that accruing corporate PAYG(W) tax debts and super debts are dealt with promptly. This is an appropriate approach where the intention of the law is to remind directors not to let tax liabilities mount up through inadvertence.³⁷ It appears to assume that directors otherwise want to save

²⁹ Insolvency (Tax Priorities) Legislation Amendment Bill 1993 (Second Reading): Commonwealth, *Parliamentary Debates*, House of Representatives, 27 May 1993, 1124–5 (George Gear, Assistant Treasurer). See further Helen Anderson, 'Directors' Liability for Unpaid Employee Entitlements: Suggestions for Reform Based on their Liabilities for Unremitted Taxes', (2008) 30(3) *Sydney Law Review* 470, 480–1.

³⁰ The legislation introducing the DPN regime was the *Insolvency (Tax Priorities) Legislation Amendment Act 1993* (Cth), with the relevant provisions then located in div 8 (ss 222AFA–222AMB) and div 9 (ss 222ANA–222AQD) of pt VI of the *Income Tax Assessment Act 1936* (Cth). In 2010, the laws were moved to the TAA sch 1 div 269. Originally, the obligation only applied to unremitted PAYG(W); unremitted super was added in 2012: *Tax Laws Amendment (2012 Measures No 2) Act 2012* (Cth), sch 1 pt 3.

³¹ TAA sch 1 div 269–15. In addition to known amounts of unremitted taxes, estimates are also included: TAA sch 1 div 268. The TLA 2018 Super Measures Bill, sch 5 pt 2 has proposed amendments to tighten the estimates process. Directors will face 'lockdown' DPN liability where an estimate has been required because of a failure to lodge a super guarantee charge statement: TLA 2018 Super Measures Bill sch 5 pt 2 ss 9–11, which proposes to amend TAA sch 1, s 269–30.

³² TAA sch 1 s 269–20. Voluntary administration aims to save the company or its business to maximise the returns to creditors: *Corporations Act* s 435A.

³³ Note also the strict procedural underpinnings of div 269. For example, notice is taken to be given when the Deputy Commissioner of Taxation posts it: TAA sch 1 s 269–25(4). As a result of this, the risk that the notice is lost in the post is on the director: *Roche v Deputy Commissioner of Taxation* [2015] WASCA 196 (24 September 2015).

³⁴ For example, the director must prove that they took all reasonable steps to ensure compliance or to wind up the company, or that there were no reasonable steps that could be taken: TAA sch 1 s 269–35(2)(a). See *Deputy Commissioner of Taxation v Saunig* (2002) 55 NSWLR 722, 730–31 [28]; *Roche v Deputy Commissioner of Taxation* [2015] WASCA 196 (24 September 2015). See further Sylvia Villios, 'Director Penalty Notices — Promoting a Culture of Good Corporate Governance and of Successful Corporate Rescue Post Insolvency,' (2016) 25(1) *Revenue Law Journal* Article 2, 10–11.

³⁵ It still applies to directors who have retired: *Deputy Commissioner of Taxation v Power* (2012) 273 FLR 35, 364 [51]. See further Matthew Broderick, 'Company Directors: Federal Taxation Liabilities and Obligations When Nearing Insolvency — Part 1' (2009) 38(1) *Australian Tax Review* 7, 12.

³⁶ TAA sch 1 s 269–35(5) disallows courts from granting relief under s 1318 of the *Corporations Act* for a breach of the DPN provisions.

³⁷ The stated aim of the DPN legislation was to 'ensure solvency problems are confronted earlier and the escalation of debts will be prevented': Second Reading Speech to the Insolvency (Tax Priorities) Legislation Amendment Bill 1993: Commonwealth, *Parliamentary Debates*, House of Representatives, 27 May 1993, 1125 (George Gear, Assistant Treasurer).

their companies. Yet it fails to deal with those who accrue liabilities and then intentionally liquidate their companies to avoid paying them. Incorporating a new company is well worth the effort when many thousands of dollars of company tax liabilities can be avoided. Given the present undemanding incorporation regime in Australia,³⁸ the only inconvenience for the director is a fee of \$479.³⁹ As a strict liability provision, the DPN regime saves the court or the ATO having to establish fault. However, in doing so, it fails to achieve deterrence of misconduct or punishment of those who use the corporate form deliberately to avoid corporate taxation liabilities.

In many instances, amounts of unremitted PAYG(W) and super were neither paid nor reported, so in 2012, laws amended the DPN regime to create 'lockdown' DPNs.⁴⁰ If the amount owing is not reported, the director loses their right to use the external administration 'escape route' that is available for reported obligations under 'standard' DPNs. In other words, provided the ATO becomes aware of the amount owing from some means *other than* reporting by the employer and then sends the DPN, the directors must pay the company's PAYG(W) and super obligations and cannot avoid these by placing the company into external administration.⁴¹

Nonetheless, a scheme to accumulate (and report) tax and super debts via a series of companies that are then promptly liquidated escapes the DPN regime. The *2017 Combatting Illegal Phoenixing* consultation paper proposal that the ATO should be empowered to commence immediate recovery action against designated 'High Risk Phoenix Offenders' ('HRPOs')⁴² following the issuance of a DPN is, therefore, likely to be only partly successful because it is still based on the ability to issue a DPN. The director of a company placed into liquidation or VA prior to the receipt of the DPN does not appear to be caught.

To overcome the deficiencies with the DPN as a mechanism against illegal phoenix activity, one would need to look at the actual behaviour of the directors and whether they had failed to act properly. A focus on behaviour would obviate the need for the generous external administration 'escape clause', yet would allow flexibility through the court's ability to grant relief for breach of duty if appropriate. This is certainly achievable. In the UK, officers of a company may be liable under a personal liability notice ('PLN') where the company has failed to remit employees' Pay As You Earn ('PAYE') deductions and national insurance contributions ('NIC').⁴³ Unlike the Australian DPN, the UK PLN can only be issued where 'the failure appears to the [Inland Revenue] to be attributable to fraud or neglect on the

³⁸ ASIC, *Steps to Register a Company* (10 May 2018) <<http://asic.gov.au/for-business/starting-a-company/how-to-start-a-company/>>.

³⁹ ASIC, *Forms: 201 Application for Registration as an Australian Company* (8 February 2018) <<http://asic.gov.au/regulatory-resources/forms/forms-folder/201-application-for-registration-as-australian-company/>>.

⁴⁰ *Tax Laws Amendment (2012 Measures No 2) Act 2012* (Cth) sch 1 pt 1 div 3, which amended TAA sch 1 s 269-30(2) table items 1 and 2. See further Helen Anderson, 'The Proposed Deterrence of Phoenix Activity: An Opportunity Lost?' (2012) 34(3) *Sydney Law Review* 411, 416–18.

⁴¹ TAA sch 1 s 269-30 (2).

⁴² *2017 Combatting Illegal Phoenixing*, above n 4, 30. For the two-step process to become an HRPO, see further 25–6.

⁴³ *Social Security Administration Act 1992* (UK) s 121C.

part of one or more individuals who, at the time of the fraud or neglect, were officers of the body corporate (“culpable officers”).⁴⁴ The UK Government website states:

It is important that HMRC acts to protect directors of genuinely failed businesses and those who are regarded to have taken all reasonable steps to prevent or minimise the company Income Tax PAYE and NIC liabilities from the scope of this legislation. Therefore before a Personal Liability Notice is authorised a thorough enquiry will always be undertaken by trained specialist officers to establish the specific facts and circumstances behind the company failure to pay. They will establish whether there is sufficient evidence for HMRC to prove ‘on the balance of probabilities’ that the failure to pay was attributable to fraudulent intent or negligent conduct. ...

A case may ... be judged to involve more serious neglect where ‘culpable officers’ have been associated with previous liquidated companies or other companies that have demonstrated a failure to comply with the statutory requirements of the Income Tax PAYE and NIC legislations.⁴⁵

The Australian Government should consider whether the DPN regime might be altered to follow the UK example. The present DPN misses the deliberate, calculating phoenixer who reports liabilities and then ensures a prompt liquidation. However, it captures the overwhelmed business person who has simply failed to remit company taxes as required or to appoint a liquidator. While this may result in fewer DPNs, the UK approach would provide a more effective weapon against illegal phoenix activity. It is also worth looking at the extension of the DPN regime to cover GST and state taxes such as payroll tax. These will now be considered.

2 *Expand the DPN Regime to the Goods and Services Tax*

One of the issues contained in the *2017 Combatting Illegal Phoenixing* consultation paper was that directors should be made liable for their company’s GST liabilities through the director penalty regime.⁴⁶ This is a worthwhile suggestion and it was also a recommendation of Treasury’s *2009 Phoenix Proposals Paper*.⁴⁷ One of the concerns is that GST is not payable until the sale of the finished item has taken place, but that input tax credits can be claimed prior to that time. This is a particular concern in the building and construction industry, where the ATO estimated that it had

⁴⁴ Ibid s 121C(1)(b).

⁴⁵ United Kingdom (‘UK’), HM Revenue and Customs, *National Insurance Manual* (15 June 2017), NIM12206 Class 1: Personal Liability Notices: Considering Issue of a PLN <<https://www.gov.uk/hmrc-internal-manuals/national-insurance-manual/nim12206>>.

⁴⁶ *2017 Combatting Illegal Phoenixing*, above n 4, 19.

⁴⁷ *2009 Phoenix Proposals Paper*, above n 21, 14–15 [4.2.2]. This was also a recommendation of the Senate committee inquiry into insolvency in the building and construction industry: Senate Economics References Committee, Parliament of Australia, *‘I Just Want to be Paid’: Insolvency in the Australian Construction Industry* (2015) 119 [7.47] recommendation 19 (‘*SERC Construction Insolvency Report*’).

‘written off \$10.8 billion over the last 10 years’⁴⁸ in unrecovered GST from about 30 000 entities.⁴⁹

However, the Australian Government Inspector-General of Taxation recommended against the inclusion of the GST in the DPN regime on the basis that:

it would effectively elevate the ... Government’s standing against employees and other creditors. Such an outcome is contrary to the Government adoption of the recommendations of the 1988 Harmer Report which supported the removal of Commonwealth priority in relation to tax ...⁵⁰

Including the GST in the DPN does not elevate the Government’s standing against employees and other creditors. Employees remain statutory priority creditors in a liquidation, with payment of their entitlements *from the company’s assets* ranking behind secured creditors and the costs of the administration. The DPN regime imposes liability for unremitted PAYG(W) and super on the directors — an additional and separate source of payment. The most that adding GST to the DPN regime would do is to increase the amount payable by the director.⁵¹ In the event that a larger DPN liability drove the director into personal bankruptcy, it could adversely affect employees. This is because although employee entitlements are priority payments under the company’s liquidation, there is no such express statutory priority regime when PAYG(W) and super amounts are recovered from the bankruptcy of a company director under mechanisms such as a DPN.⁵² While this could be addressed with specific amendments to the bankruptcy priorities, it would be a radical departure from the status quo.

3 *Expand the DPN Regime to Cover State Taxes*

States should consider the introduction of a DPN provision for state tax liabilities.⁵³ In New South Wales (‘NSW’), Revenue NSW (formerly the Office of State Revenue) may issue a compliance notice, like a DPN, to a director in respect of unremitted payroll taxes.⁵⁴ As with a DPN, liability is avoided where the company is placed into VA or liquidation within 21 days.⁵⁵ Western Australia has somewhat different provisions, imposing joint and several liability for taxes where there has

⁴⁸ See ATO, *Inter-Agency Phoenix Forum Minutes — 12 November 2013* (14 October 2015), item 7 <<https://www.ato.gov.au/General/The-fight-against-tax-crime/In-detail/Inter-Agency-Phoenix-Forum/Inter-Agency-Phoenix-Forum-minutes---12-November-2013/>>.

⁴⁹ For an example of the Commissioner’s ability to overcome a sham structure designed to defraud the Commissioner of GST revenue, see *Sunraysia Harvesting Contractors Pty Ltd (Trustee) v Commissioner of Taxation* (2017) 105 ATR 907.

⁵⁰ Australian Government, Inspector-General of Taxation, *Debt Collection: A Report to the Assistant Treasurer* (July 2015) (‘*IGT Debt Collection Report*’) [4.52].

⁵¹ *Phoenix Recommendations Report*, above n 2, 73.

⁵² The priority payment regime of the *Bankruptcy Act 1966* (Cth) s 109(1)(e) and (g) refers to employees ‘of the bankrupt’. Otherwise, debts rank equally and are paid proportionately if there is an insufficiency of assets: s 108. See further Anderson, Dickfos and Brown, above n 10, 135.

⁵³ For example, at the end of the 2015–16 financial year, the Victorian State Revenue Office was owed \$204 581 322 in unpaid taxes: State Revenue Office Victoria, *Analysis of Debt*, Annual Review 2015–16 <<http://annualreview1516.sro.vic.gov.au/content/analysis-debt>>.

⁵⁴ *Taxation Administration Act 1996* (NSW) pt 7 div 2. The Australian Capital Territory and the Northern Territory have similar provisions: *Taxation Administration Act 1999* (ACT) s 56B; *Taxation Administration Act* (NT) s 61.

⁵⁵ *Taxation Administration Act 1996* (NSW) s 47B(3).

been ‘insolvent trading’, subject to the usual scope to avoid liability with VA or liquidation within 21 days.⁵⁶ It is unclear why director penalties for unremitted company taxes have not been more widely adopted by other states. In evaluating the usefulness of DPN equivalents for state taxes, all states should look at introducing a ‘lockdown’ set of provisions and at whether some element of fault could be incorporated into the provisions, as discussed above.

The foregoing has considered a number of improvements that could be made to the DPN regime. However, by definition, only directors are included,⁵⁷ not other company officers and not any advisors as accessories.⁵⁸ Reaching beyond directors is considered in the next section.

B *Accessory Liability*

It is important to ensure that those who devise or implement schemes to deliberately exploit the separateness of companies to avoid obligations are deterred from doing so. This is so, whether these people are directors of small companies, and thus the indirect financial beneficiaries of the behaviour, or advisors who charge a fee. This section now considers the accessory liability provisions under tax law and their shortcomings.

1 *Options against Company Directors and Officers*

There are a number of criminal provisions available against accessories to tax avoidance schemes engaged in by corporate taxpayers. The one most appropriate to the current discussion is the *CTOA*, which was introduced following ‘Bottom of the Harbour’ tax evasion in the 1970s.⁵⁹ It imposes criminal sanctions where a person enters into an arrangement with the intention of securing that a company will be unable to pay income tax or a range of other taxes including the super guarantee charge.⁶⁰ The penalties are 10 years’ imprisonment or 1000 penalty units or both. However, the Act’s provisions do not appear to be used in the context of deliberate liquidations to avoid tax debts,⁶¹ possibly because it is considered too difficult to

⁵⁶ *Taxation Administration Act 2003* (WA) s 67.

⁵⁷ *TAA* sch 1 s 269-15 imposes liability on ‘directors (within the meaning of the *Corporations Act 2001*)’ — ie, in accordance with s 9 of the *Corporations Act*, which only covers formally appointed, shadow and de facto directors.

⁵⁸ Note, however, PAYG(W) non-compliance tax, above n 18.

⁵⁹ See Peter Grabosky, *Wayward Governance: Illegality and its Control in the Public Sector* (Australian Studies in Law, Crime and Justice, Australian Institute of Criminology, 1989) ch 9.

⁶⁰ *CTOA* ss 5, 17. See also Lidia Xynas, ‘Tax Planning, Avoidance and Evasion in Australia 1970-2010: The Regulatory Responses and Taxpayer Compliance’ (2011) 20(1) *Revenue Law Journal* Article 2.

⁶¹ The ATO has revealed that ‘[i]nvestigators executed six search warrants on the Gold Coast and in Victoria in respect to *Crimes (Taxation Offences) Act 1980* offences pertaining to super and alleged phoenix offences.’: ATO, *Archived Serious Tax Crime Investigation Results* (22 Jan 2018) <<https://www.ato.gov.au/general/the-fight-against-tax-crime/news-and-results/latest-serious-tax-crime-investigation-results/archived-serious-tax-crime-investigation-results/>>. There is no other information available from the ATO on *CTOA* prosecutions. The Commonwealth Director of Public Prosecutions (‘CDPP’) prosecution statistics do not list the *CTOA* as a piece of legislation under

establish the required intent element to the criminal standard. Liquidation can have many apparent explanations.

The general anti-avoidance rule⁶² does not assist, because it deals with the company obtaining a ‘tax benefit’,⁶³ avoiding a tax liability being incurred, not the non-payment of a liability properly incurred. Fraud provisions, such as conspiracy to defraud the Commonwealth,⁶⁴ are available, but require more than simply proof of the company’s failure to remit taxes.⁶⁵ An alternative that the Government could consider is the reintroduction of the ‘failure to remit’ offence, which was removed in 2000.⁶⁶ Such an offence, coupled with s 8Y of the *TAA* (making directors liable for the tax offences of their company) and s 21B of the *Crimes Act 1914* (Cth) (allowing the court to order reparation), would effectively punish deliberate liquidation and redress the damage at the same time. It is an appealing idea because of its ability to deprive the wrongdoer of the benefit of their behaviour, and it could be used where the company is in liquidation, despite the existence of the parallel DPN regime.⁶⁷ However, like all criminal provisions, it suffers from the basic requirements of proving the criminal offence beyond reasonable doubt and in accordance with criminal rules of evidence, although as far as the accessory liability goes under s 8Y, the onus of proof is on the defendant to prove that he or she was not ‘concerned in’ or did not ‘take part in’ the management of the company.⁶⁸

2 Options against Advisors

Given the complexity of tax laws, it makes sense from an enforcement perspective to target those who devise complicated ways to avoid tax, on the basis that many directors would lack the tax knowledge or ability to come up with these sorts of arrangements themselves. Treasury’s *2009 Phoenix Proposals Paper* canvassed the option of revising the promoter penalty regime⁶⁹ to discourage those designing and advocating tax schemes to exploit the corporate form.⁷⁰ Extending penalties to advisors assisting phoenix operators, via an extension of the promoter penalty provisions, was one of the suggestions of the *2017 Combatting Illegal Phoenixing* consultation paper.⁷¹

In simple terms, the current promoter penalty regime contains a prohibition against those who promote ‘tax exploitation schemes’.⁷² The idea is to stop advisors

which prosecutions have been brought: CDPP, *Prosecution Statistics* <<https://www.cdpp.gov.au/statistics/prosecution-statistics>>.

⁶² *Income Tax Assessment Act 1936* (Cth) s 177D(1).

⁶³ *Ibid* s 177C.

⁶⁴ *Criminal Code Act 1995* (Cth) sch 1 (‘*Criminal Code*’) s 135.4(3).

⁶⁵ See, eg, *R v Iannelli* (2003) 56 NSWLR 247. Fraud was established in *R v Walters* [2002] NSWCCA 291 (25 July 2002), a case involving 10 successor companies defaulting on \$7.3 million of group tax liabilities.

⁶⁶ *2009 Phoenix Proposals Paper*, above n 21, 16–18 [4.2.5].

⁶⁷ *Gould v Federal Commissioner of Taxation* (1998) 147 FLR 173.

⁶⁸ *TAA* s 8Y(3). For a discussion of the reverse onus, see, eg, *Buist v Federal Commissioner of Taxation; Ex parte Buist* (1988) 90 FLR 72, 74–5.

⁶⁹ *TAA* sch 1 div 290.

⁷⁰ *2009 Phoenix Proposals Paper*, above n 21, 9 [3.1.2], 15 [4.2.3].

⁷¹ *2017 Combatting Illegal Phoenixing*, above n 4, 17.

⁷² *TAA* sch 1 div 290.

actively marketing and encouraging⁷³ companies, among others, to structure their arrangements in schemes that exploit tax laws in order to reduce the amount of a tax-related liability.⁷⁴ Again, these schemes reduce or eliminate the company's liability to pay tax — the incurring of the tax debt. However, as with the general anti-avoidance rule,⁷⁵ these provisions are not effective where tax debts are avoided through liquidation, because the company's tax liability is unaffected. The company has simply failed to pay what it properly owes. Moreover, the provisions do not extend to those who simply advise about the scheme.⁷⁶ Treasury's 2009 suggestion was that the provision, which presently imposes a civil penalty on these advisors, could be adapted to address phoenix activity.⁷⁷ However, if the provision were to be adapted to cover the deliberate liquidation scenario, there is a risk that a narrowly drawn liability provision would be too difficult to establish as 'tax exploitation scheme'⁷⁸ or else overextend to take in legitimate liquidations if more moderate language were adopted. Advisors who tell their clients that they should liquidate companies facing insolvency should not be penalised.⁷⁹

Advisors, however, might be caught under the *CTOA*. Liability is imposed under s 6(1) for being an accessory to an arrangement or transaction,⁸⁰ 'knowing or believing' that the arrangement is being entered into by the other person with the intention of securing the prohibited avoidance of payment of tax debts.⁸¹ The *CTOA* also speaks about 'future income tax'.⁸² Yet there do not appear to be cases against advisors brought under this provision⁸³ and it is telling that neither Treasury's 2009 *Phoenix Proposals Paper* nor its 2017 *Combatting Illegal Phoenixing* consultation paper mention the *CTOA* provisions in seeking to address advisor liability. Section 5 of the *CTOA* requires the main perpetrator to have the intention of securing that the company will be unable to pay the income tax. However, under s 6 the accessory does not need that purpose, only the knowledge or belief that the other person has it. This makes the *CTOA* accessory provisions much more suitable for use against advisors who are knowingly involved in illegal phoenix activity for the purpose of not paying tax.

The foregoing discussion has highlighted some under-utilised tax provisions that can be used to bring enforcement actions and how some of them could be enhanced. The next section examines some procedural improvements that could be made to significantly reduce the ATO's later reliance on enforcement actions.

⁷³ Promoter is defined in *TAA* sch 1 s 290-60.

⁷⁴ According to *TAA* sch 1 s 290-65(1), a tax exploitation scheme occurs when it was entered into for 'the sole or dominant purpose of that entity or another entity getting a scheme benefit from the scheme' and 'it is not reasonably arguable that the scheme benefit is available at law'.

⁷⁵ See above n 62 and accompanying text.

⁷⁶ *TAA* sch 1 s 290-60(2).

⁷⁷ *Ibid* s 290-50(3).

⁷⁸ *Ibid* s 290-65. See also above n 74 and accompanying text.

⁷⁹ *Phoenix Recommendations Report*, above n 2, 128.

⁸⁰ The usual accessory liability words are used: 'directly or indirectly, aids, abets, counsels or procures another person ... or is, in any way, by act or omission, directly or indirectly concerned in, or party to, the entry by another person ... into an arrangement or transaction': *CTOA* s 6(1).

⁸¹ *Ibid* s 5.

⁸² *Ibid* s 5(2)(a).

⁸³ See above n 61 and accompanying text.

C Other Suggestions

1 Single Touch Payroll

The Government's 'single touch payroll' ('STP') regime could reduce the incentive to engage in illegal phoenix activity by taking away much of its benefit. Initially, STP was mooted as a mechanism whereby employers would pay both their employees and related PAYG(W) remittances and super contributions at the same time. However, the Government amended the STP proposal and it now only covers the reporting of tax and super obligations.⁸⁴

This alteration was in response to concerns from business about the cash flow implications⁸⁵ of having to pay the taxes at an earlier time than is presently the case. While wages are generally paid fortnightly, PAYG(W) and super are usually only remitted monthly or quarterly depending on the size of the business and the terms of the super fund trust deed. The objection raised shows the extent to which businesses rely on employee-related sums — 'their money' until it is legally payable — to finance their businesses, and the Government's response shows its reluctance to interfere with this practice. The legitimate cash flow concerns of small business have recently been acknowledged by the Australian Small Business and Family Enterprise Ombudsman.⁸⁶

At present, the STP reporting obligation is only compulsory for employers with 20 or more employees. However, the TLA 2018 Super Measures Bill proposes to make it compulsory for all employers.⁸⁷ This is sensible given that micro and small businesses employing less than 20 employees make up 97.4% of Australian businesses.⁸⁸ However, the onus remains on the ATO to detect non-payment and then send the DPN. In 2012, automatic DPNs were mooted, but rejected.⁸⁹ In the event that the expansion of the STP as proposed by the TLA 2018 Super Measures Bill is passed into law, the ATO will need to ensure adequate resourcing to deal with

⁸⁴ *Phoenix Recommendations Report*, above n 2, 77.

⁸⁵ Michael Masterman, 'CAANZ Latest to Criticise ATO's Single Touch Payroll', *Accountants Daily* (online), 17 March 2015 <<http://www.accountantsdaily.com.au/latest-news/17-news/8069-caanz-latest-to-criticise-ato-s-single-touch-payroll>>, quoting Michael Croker, head of tax at Chartered Accountants Australia and New Zealand ('CAANZ'):

Nobody disputes that PAYG tax and super is an employee entitlement and must be paid, the sooner the better. But this is an area where a desirable policy objective needs to take into account the fact that many [small- and medium-sized enterprises] struggle with cash flow. It takes more than 50 days on average for small business accounts to be paid and many are in a weak negotiation position with key clients.

See also Michael Croker, Submission to ATO, *Single Touch Payroll Discussion Paper* (12 March 2015) 10–13.

⁸⁶ See Australian Small Business and Family Enterprise Ombudsman, *Payment Times and Practices Inquiry* (April 2017) <<http://asbfeo.gov.au/inquiries/payment-times-and-practices>>.

⁸⁷ TLA 2018 Super Measures Bill, sch 3.

⁸⁸ Australian Small Business and Family Enterprise Ombudsman, *Small Business Counts: Small Business in the Australian Economy* (2016), 8 [2.1.1] table 1.

⁸⁹ Tax Laws Amendment (2011 Measures No 8) Bill 2011 (Cth) sch 3; Kai Swoboda and Xenia Stathopoulos (Department of Parliamentary Services), *Tax Laws Amendment (2011 Measures No 8) Bill 2011 [and] Pay As You Go Withholding Non-compliance Tax Bill 2011* (Bills Digest No 78 of 2011–12, 21 November 2011) 11.

the volume of DPNs that will be required. The ATO's submission to the Senate Economics References Committee inquiry into super guarantee non-compliance in 2017 noted that '[s]ome 97 per cent of reports of unpaid super made to the ATO were against small business employers and this same group accounted for around 98 per cent of the liability raised by the ATO.'⁹⁰

Even so, STP as a reporting-only mechanism undermines the effectiveness of 'lockdown' DPNs, which can only be used against those who fail to report their tax liability, via STP or otherwise. As noted above, once the directors of a company that has reported its liabilities, but failed to pay them, receive their 'standard' DPNs, they have 21 days to shed this liability by placing the company into external administration. In other words, if liabilities are reported, the ATO has more information, but fewer means of recovery. If liabilities are not reported, the ATO has less information and more means of recovery. This dilemma could be overcome by reverting to the original conception of STP; namely, simultaneous reporting and payment.

2 Security Bonds

The ability of the Commissioner of Taxation to obtain security from a taxpayer was reformed in 2010.⁹¹ A bond may be sought for any existing or future tax liability, including PAYG(W) and the super guarantee charge,⁹² if the Commissioner considers that the taxpayer intends to carry on an enterprise for a limited time only, or if it is otherwise appropriate.⁹³ Various types of security are provided for, including payments of money and other securities.⁹⁴ Failure to pay the security, following receipt of a written notice from the Commissioner,⁹⁵ is an offence punishable by a fine.⁹⁶ However, the punishment is relatively modest at 100 penalty units for an individual (currently \$21 000) and 500 penalty units for a company (currently \$105 000). The TLA 2018 Super Measures Bill proposes increasing these penalties to include imprisonment for failure to comply with a security deposit payment order, issued by the Federal Court of Australia on the application of the Commissioner.⁹⁷

The difficulty with any penalty levied on companies in the phoenix context is that the very act of phoenixing — closing one company down and opening another

⁹⁰ Quoted in Senate Economics References Committee, Parliament of Australia, *Superbad — Wage Theft and Non-compliance with the Superannuation Guarantee* (May 2017) [5.90].

⁹¹ TAA sch 1 sub-div 255-D, inserted by *Tax Laws Amendment (Transfer of Provisions) Act 2010* (Cth) ('*Tax Laws Amendment (Transfer of Provisions) Act*') sch 1 s 9. Prior to this amendment, s 213 of the *Income Tax Assessment Act 1936* (Cth) allowed the Commissioner to ask for a security bond or deposit for income tax liabilities. Subdivision 255-D expanded on this existing power in a number of important respects: see Morag Donaldson (Department of Parliamentary Services), *Tax Laws Amendment (Transfer of Provisions) Bill 2010* (Bills Digest No 153 of 2009–10, 26 May 2010) 6–8. See further Matthew Broderick, 'Legislative Change to Director Penalty Notices and Security for Tax Payments' (2011) 40(1) *Australian Tax Review* 60, 63–4.

⁹² TAA sch 1 s 250-100(2).

⁹³ Ibid sch 1 s 255-100(1).

⁹⁴ Ibid sch 1 s 255-100(2).

⁹⁵ Ibid sch 1 s 255-105.

⁹⁶ Ibid sch 1 s 255-110.

⁹⁷ TLA 2018 Super Measures Bill sch 5 pt 3 s 15.

— has the happy side-effect (for the company's directors) of avoiding payment by the company of the penalty, the security bond and the taxes that the ATO was trying to protect in the first place. This situation is unchanged by the proposed provisions of the TLA 2018 Super Measures Bill where the entity has a defence against criminal liability where it is not capable of complying with the order, for reasons such as insolvency.⁹⁸

Prior to the company closing down, it continues to trade, accruing tax debts right up until the time the ATO's security bond penalty action goes to court. This might suggest that the law should be reformed to require the company to cease trading immediately upon failure to pay the security bond. However, this could adversely affect the company's employees, customers and suppliers. Another response could be to tighten the security bond mechanism so that there is a meaningful penalty imposed on the directors and managers of companies who cause the company's failure and non-payment of the security bond and penalty, and who then liquidate the company. However, this has the potential to catch those 'innocent' individuals in charge of a financially troubled company that lacks the ability to pay the security bond or the penalty. The proper action for such people is to liquidate the company promptly. They face personal liability for insolvent trading otherwise.⁹⁹ Liquidating the company cannot, therefore, also be the trigger for a personal punishment.

The *2017 Combatting Illegal Phoenixing* consultation paper sought feedback on including security bonds in the existing garnishee power.¹⁰⁰ That is certainly an option worth considering. Another approach here would be not to target the failing company, but rather to target the creation of a new company. Because the ATO is such a significant creditor affected by illegal phoenix activity, consideration should be given to allowing the ATO to grant an Australian Business Number ('ABN')¹⁰¹ conditionally by requiring payment of a bond or the provision of security over an asset owned by the director. The ATO's ABN refusal powers are considered further in the next section.

3 Refusal of an ABN

One problem for the ATO is it currently lacks the power to deny an ABN to a company, as it may to an individual where they do not believe the individual is carrying on an enterprise.¹⁰² Even if the ATO has grave suspicions about the individuals controlling a company, it must still grant that company an ABN, and this is so whether those individuals are running one or 100 companies. This deficiency must be addressed if the ATO is to have meaningful tools against serial phoenix operators. In addition, the 'fit and proper person' test for the issue of an ABN, raised

⁹⁸ Explanatory Memorandum, TLA 2018 Super Measures Bill, [5.58]–[5.59].

⁹⁹ *Corporations Act* s 588G(2). Criminal penalties are also available for offences under s 588G(3).

¹⁰⁰ *2017 Combatting Illegal Phoenixing*, above n 4, 20.

¹⁰¹ The importance of ABNs is explained at Australian Government, Business, *Register for an Australian Business Number (ABN)* (15 March 2018) <<https://www.business.gov.au/info/plan-and-start/start-your-business/business-and-company-registration/register-for-an-australian-business-number-abn>>.

¹⁰² See Australian Business Register, *ABN Entitlement* (17 April 2018) <<https://abr.gov.au/For-Business,-Super-funds---Charities/Applying-for-an-ABN/ABN-entitlement/>>.

for consideration in Treasury's *Black Economy Taskforce* consultation paper,¹⁰³ is worth investigating. To implement these measures, it is essential to have access to reliable information from ASIC to establish a person's good faith. Suggestions to improve the quality of the information held by ASIC are outlined below in Part IV.

4 *Credit Agencies to Make Information Public*

Where directors of companies are seeking financing to run their businesses, potential lenders, via the services of a credit reporting agency, would benefit from seeing information about prior tax defaults by companies with which those people have previously been associated. If credit reporting agencies could include this sort of information in their advice to prospective lenders and trade creditors, illegal phoenix activity could be more easily detected. While the ATO can use external debt collection agencies to pursue unpaid taxes,¹⁰⁴ it has not been able to register tax defaults with credit reporting agencies, as a bank or trade creditor might.

In January 2018, the Australian Government released draft provisions of a legislative instrument to allow for limited disclosure of tax-debt information.¹⁰⁵ The measure would initially apply only to businesses with ABNs and tax debt of more than \$10 000 that is at least 90 days overdue, where the business has not engaged with the ATO regarding the debt, appealed the liability nor objected to the release of the information.¹⁰⁶ However, as currently drafted, the ATO may only release tax-debt information for the purpose of allowing credit bureaus to assess the credit worthiness of the defaulting entity.¹⁰⁷ This limitation has the capacity to encourage illegal phoenix activity, because the entity's liquidation will deprive the ATO of the power to release that tax-debt information. A re-drafting of the provision to allow the ATO to reveal information for the purpose of assessing the credit worthiness of that entity and any present and future entities controlled by the defaulting entity's directors and officers would be very useful in deterring illegal phoenix activity.

5 *Director Disqualification Initiated by the ATO*

The only penalty that results from a DPN is the payment of the company's tax — effectively quarantining a director divested of personal assets from the effect of the DPN. To deter more effectively the improper conduct that leads to the DPN being issued, consideration should be given to exacting a separate punishment upon the director personally.¹⁰⁸ This could be done by allowing the ATO to seek a court order for their disqualification.¹⁰⁹ Currently, the ATO can refer the director to ASIC to

¹⁰³ Australian Government, Treasury, *Black Economy Taskforce Consultation Paper* (August 2017) [4].

¹⁰⁴ Note the discussion of this issue in the *IGT Debt Collection Report*, above n 50, ch 5.

¹⁰⁵ Exposure Draft, Treasury Laws Amendment (Tax Transparency) Bill 2018: Transparency of Taxation Debts.

¹⁰⁶ *Ibid* s 355-72; Exposure Draft, Tax Debt Information Disclosure Declaration 2018, s 7.

¹⁰⁷ Exposure Draft, Treasury Laws Amendment (Tax Transparency) Bill 2018 s 355-72(1)(d).

¹⁰⁸ The punitive nature of disqualifications was acknowledged in *Murdaca v ASIC* (2009) 178 FCR 119, 143-4 [101]; *Visnic v ASIC* (2007) 231 CLR 381, 385 [11], 388 [26]; *Rich v ASIC* (2004) 220 CLR 129, 151-5 [47]-[50].

¹⁰⁹ The Australian Consumer and Competition Commission ('ACCC') has the power to seek disqualification of directors: *Competition and Consumer Act 2010* (Cth) s 86E. See further Tom Middleton, 'Banning, Disqualification and Licensing Powers: ACCC, Australian Prudential

bring a disqualification action, discussed below,¹¹⁰ but a useful message, and more reliable outcome,¹¹¹ could be obtained by bringing this matter ‘in-house’.¹¹² Disqualification would also remove the director from managing other companies that might default on their tax obligations. Sensibly, the definition of ‘director’ in the DPN laws picks up the *Corporations Act* definition, which covers properly appointed directors as well as those acting as directors or ‘calling the shots’.¹¹³ This means that an elderly relative, for example, could be appointed director of the company, but that the person who truly runs the company will still be caught, presuming that the ATO is able to detect who that person is.

The grounds upon which disqualification is sought could be based on the ATO’s the DPN itself. Division 269 imposes a duty on directors to ensure that the company meets various taxation obligations or promptly enters liquidation or VA. A new subsection could be inserted into s 269-20 empowering the ATO to seek a disqualification order against a director in the event that they breach this duty. To ensure that only directors involved in improper behaviour were caught by the provision, an additional requirement could be that the court believed that it was just and equitable to disqualify the director.

6 Other Suggestions from Treasury to the Minister for Revenue

The 2017 *Combatting Illegal Phoenixing* consultation paper mooted a number of other ideas to tackle illegal phoenix activity, which raise some concerns.

(a) A Specific Phoenix Offence

The Minister suggested a specific phoenix offence ‘to better enable regulators to take decisive action against those who engage in this illegal activity’.¹¹⁴ There are two ways to accomplish this: by proscribing ‘phoenix activity’ as defined; or by

Regulation Authority (‘APRA’), ASIC and the ATO — Regulatory Overlap, Penalty Privilege and Law Reform’ (2015) 33(8) *Company and Securities Law Journal* 555, 556.

¹¹⁰ See below Part IVA(1).

¹¹¹ Detailed statistics about ATO referrals to ASIC regarding possible disqualification are unavailable. However, ASIC has revealed that in 2013–14, in its disqualification program ‘with a particular focus on phoenix activity’, it disqualified 60 company directors: ASIC, Submission No 32 to Senate Economics References Committee, *Inquiry into Corporate Tax Avoidance and Minimisation*, February 2015, 19 [103]. In contrast, while remembering that not all DPNs are issued in circumstances involving illegal phoenix activity, the *IGT Debt Collection Report* noted that in 2013–14, there were 1572 DPNs issued where the company became insolvent following the issue of the DPN: above n 50, [4.43], table 4.2.

¹¹² In fact, external administrators often refer tax-related breaches by directors straight to the ATO. Between 1 July 2016 and 30 June 2017, there were 105 such referrals: ASIC Report 558, above n 6, 35–6 (table 29).

¹¹³ *Corporations Act* s 9 includes in the definition of director those who act as directors (de facto directors) and those in accordance with whose instructions or wishes the board is accustomed to act (shadow directors).

¹¹⁴ O’Dwyer, above n 3. See also the earlier attempt of the Australian Labor Party: the Fair Work Amendment (Protecting Australian Workers) Bill 2016. The Bill was introduced into the Senate on 15 March 2016, but lapsed with the proroguing of Parliament before the July 2016 Federal Election. The difficulties with the Bill’s attempt to proscribe illegal phoenix activity were considered in Helen Anderson, ‘Corporate Insolvency: Labor’s Policy to Deal with Phoenix Activity Affecting Employees’ (2016) 34(4) *Company and Securities Law Journal* 316.

proscribing specific actions directly. Either way is unlikely to be successful. The first would require the phoenix definition to be able to differentiate legitimate and improper behaviour.¹¹⁵ A broad proscription based on describing the circumstances of the sham ‘business rescue’ may pick up legitimate VAs,¹¹⁶ which allow time for an administrator to try to save the company.¹¹⁷ Where the rescue is unsuccessful, but a company controlled by the failed company’s directors buys its assets, the directors might find themselves liable under a provision that penalises this sort of behaviour.

A limited definition, on the other hand, is an easily negotiated roadmap to avoidance. For example, one research paper defined phoenix activities as:

[...] those where an incorporated entity either:

1. fails and is unable to pay its debts and/or;
2. acts in a manner which intentionally denies unsecured creditors equal access to the entity’s assets in order to meet unpaid debts; and
3. within 12 months another business commences which may use some or all of the assets of the former business, and is controlled by parties related to either the management or directors of the previous entity.¹¹⁸

Apart from the difficulty of proving this intention, the use of the word ‘commences’ is problematic. In some instances of phoenix activity, the company to which the business activities of the failed company are transferred is already in existence at the time of the demise of the first. It could also be done within a corporate group where one company owns the assets, and contracts for their use by the operating or labour hire company, which incurs the tax and other debts. The assetless operating or labour hire company is then liquidated, and the process is repeated. In some phoenixing, no assets are transferred at all, because the business is a service provider.

Any phoenix liability provision that attempts to penalise directors acting improperly around the time of liquidation will also fail to address phoenix activity through the abandonment of a company that remains dormant until it is eventually deregistered by ASIC. Unless a creditor seeks to have the company wound up, no liquidation will take place and the company is eventually removed from the register of companies by ASIC where its controllers have failed to pay annual fees and return paperwork.¹¹⁹ Abandonment without liquidation is likely to happen in very small companies where the creditors are unwilling to spend money on a liquidator to chase possibly non-existent corporate assets. Because assetless companies may hide illegal phoenix activity,¹²⁰ it is likely that the businesses of abandoned companies are often phoenixed. These companies are discussed further below.¹²¹

¹¹⁵ See Helen Anderson et al, ‘Illegal Phoenix Activity: Is a “Phoenix Prohibition” the Solution?’ (2017) 35(3) *Company and Securities Law Journal* 184.

¹¹⁶ *Corporations Act* pt 5.3A.

¹¹⁷ *Ibid* s 435A.

¹¹⁸ Australian Securities Commission, *Project One: Phoenix Activities and Insolvent Trading — Public Version* (Research Paper 95/01, 13 May 1996) 39.

¹¹⁹ *Corporations Act* s 601AB(1), (1A) respectively.

¹²⁰ This is one of the reasons for the Assetless Administration Fund: ASIC, *Regulatory Guide 109: Assetless Administration Fund: Funding Criteria and Guidelines* (November 2012) [109.6]–[109.7].

¹²¹ See below Part IVB(3).

The second way of creating a specific phoenix offence is to target the company's specific actions, and this was the method suggested by the 2017 *Combating Illegal Phoenixing* consultation paper. It proposed that a new provision be inserted into the *Corporations Act* 'to specifically prohibit the transfer of property from Company A to Company B if the main purpose of the transfer was to prevent, hinder or delay the process of that property becoming available for division among the first company's creditors'.¹²² Feedback was also sought on what additional remedies might be useful,¹²³ including whether certain existing provisions should be designated as 'phoenix offences' for the purpose of a more severe regime for HRPOs.¹²⁴

Clearly, the proposed phoenix offence only captures phoenixing involving the transfer of property, with the deficiencies already noted. As the 2017 consultation paper acknowledges,¹²⁵ illegal phoenix activity is already a breach of directors' duties,¹²⁶ examined further below, and these duties capture all improper phoenix behaviour, involving asset transfers or not. Section 588FE(5) of the *Corporations Act* already allows a liquidator to claw back asset transfers where 'the company became a party to the transaction for the purpose, or for purposes including the purpose, of defeating, delaying, or interfering with, the rights of any or all of its creditors on a winding up of the company'.¹²⁷ This has two advantages over the proposed provision: it does not require the creditor-defeating purpose to be the main purpose; and it allows the liquidator to look back at transactions in the previous 10 years. The only stipulation relevant here is that it must also be 'an insolvent transaction'.¹²⁸ Therefore, asset transfers made deliberately within the 10 years prior to a company's insolvency to render the company unable to pay its creditors are already subject to considerable recovery powers in the hands of liquidators.

In addition, uncommercial asset transfers are already actionable as one of a number of voidable transactions¹²⁹ and as a form of insolvent trading.¹³⁰ Both the directors' duties and insolvent trading provisions have a number of advantages over the proposed offence. These provisions are civil penalty breaches. On the application of ASIC, the court may order disqualification or penalties payable to the Government. The court may also make compensation orders against directors. With respect to the final order, action can be taken by both the liquidator, in the name of the company, and by ASIC. In the event of particularly egregious behaviour, ASIC

¹²² 2017 *Combating Illegal Phoenixing*, above n 4, 8–9.

¹²³ *Ibid* 11.

¹²⁴ *Ibid* 23.

¹²⁵ *Ibid* 8.

¹²⁶ *Corporations Act* ss 180–83.

¹²⁷ This provision and its antecedents were discussed recently in *Ashala Model Agency Pty Ltd (in liq) v Featherstone* [2017] 2 Qd R 1; *Featherstone v Ashala Model Agency Pty Ltd (in liq)* [2017] QCA 260 (3 November 2017).

¹²⁸ Section 588FC defines an insolvent transaction as one that is entered into when the company is insolvent or one where the company becomes insolvent wholly or partly because of entering into the transaction.

¹²⁹ *Corporations Act* pt 5.7B div 2. Uncommercial transactions, as defined by s 588FB, may be set aside on the application of a liquidator under s 588FE(3).

¹³⁰ This is the combined effect of *Corporations Act* ss 588FB and 588G(1A).

also has the option of bringing criminal action with respect to both directors' duties and insolvent trading breaches.¹³¹

A further concern over the proposed phoenix offence is that it is based on proving an intention — 'the main purpose' — to a criminal standard, even with the transfer's relationship to the imminent insolvency being 'reasonably ... inferred from all the circumstances'.¹³² The proposed provision is reminiscent of s 596AB of the *Corporations Act*, the criminal provision relating to entering into transactions with the intention of preventing or significantly reducing the recovery of employee entitlements. This section has never been used.

(b) *High Risk Phoenix Operator ('HRPO') Regime*

To ensure that the most stringent provisions are only applicable to those at highest risk of illegal phoenix activity, the *2017 Combatting Illegal Phoenixing* consultation paper suggested a separate suite of measures only applicable to those deemed HRPOs.¹³³ However, the proposed mechanism for such a designation appears quite cumbersome, requiring the identification of a 'Higher Risk Entity' as a prerequisite to the Commissioner declaring a person to be an HRPO.¹³⁴ Because adverse consequences follow, a person affected would be entitled to apply to the Administrative Appeals Tribunal for a review of the decision. The proposed consequences are a 'cab rank' liquidator appointment,¹³⁵ the removal of the 21-day 'grace period' after a DPN is issued, and the ability of the ATO to retain certain refunds.¹³⁶

It is questionable whether the benefits of the proposed HRPO procedure will outweigh the administrative burden. In particular, the DPN proposal is problematic. It will impose liability on HRPO directors for any reported, but unpaid, PAYG(W), super and GST. The issue of the DPN then becomes a formality, rather than allowing the director time to get the company's affairs into order by seeking liquidation. If the liabilities were both unreported and unpaid, the 21-day period is lost anyway as a 'lockdown' DPN. The stated rationale is that the new regime takes away the 21 days that the HRPO would use to shift their personal assets,¹³⁷ but it is suggested that more thought needs to be given to the behavioural profile here.

The somewhat naive HRPO caught by the proposal both reports liabilities and keeps personal assets until sent a DPN. However, a more likely profile is a determined HRPO that makes themselves DPN-proof by ensuring that they have little, if anything, in their own name throughout their time as a director. They probably do not report liabilities, so that the ATO does not know what is owing. In any event, they do not fear a lockdown DPN, since the only penalty is payment of the company's taxes — from money they do not have. This makes a further DPN-related

¹³¹ Ibid ss 184, 588G(3) respectively.

¹³² *2017 Combatting Illegal Phoenixing*, above n 4, 9.

¹³³ Ibid part two.

¹³⁴ Ibid 24.

¹³⁵ See below Part IIIC(6)(c).

¹³⁶ *2017 Combatting Illegal Phoenixing*, above n 4, 30–31.

¹³⁷ Ibid 30.

punishment, such as an ATO-initiated disqualification,¹³⁸ a more effective measure than the proposed removal of the 21-day grace period.

(c) *Liquidator Interventions*

Another suggestion in the *2017 Combatting Illegal Phoenixing* consultation paper was that there would be ‘cab rank’ system for appointing liquidators¹³⁹ for those companies controlled by HRPOs.¹⁴⁰ The ‘cab rank’ proposal follows a similar recommendation by the Productivity Commission in 2015 in relation to small, streamlined liquidations.¹⁴¹ The worthy intention is to ensure that ‘friendly’ liquidators, chosen by the company’s fraudulent directors, are not appointed so that they can collude with them to deny creditors a proper return. However, the idea is nonetheless problematic. Given that many phoenix liquidations involve few or no assets — that being the very point of the phoenixing — those liquidators ‘on the cab rank’ need assurance that they will be paid. The *Corporations Act* makes it clear that liquidators are not obliged to do work for which they will not be paid, apart from their statutory reporting obligations.¹⁴²

In the event that the Government adopts a ‘cab rank’ system, guaranteed funding will need to be provided. The 2017 consultation paper suggested that the panels could be funded ‘via a component of the industry levy on corporations’.¹⁴³ There is no industry levy on corporations, only an industry levy on ‘regulated entities’ including liquidators.¹⁴⁴ This levy is claimed to have ‘significant benefits including ... improving equity, as only those entities that are regulated by ASIC and create need for regulation will bear its costs, rather than ordinary Australian taxpayers’.¹⁴⁵ If the 2017 consultation paper is referring to this levy, it would be substantially unfair to liquidators, requiring them to contribute as an administrative expense of their business to a levy that pays for them, or some other liquidator, to conduct an assigned liquidation.

It would also be unfair if liquidators assigned from the cab rank were forced to rely upon the present Assetless Administration Fund, depending as it does upon a liquidator investigating and making a case for funding, which may be refused.¹⁴⁶ A much better source of funding would be from a small increase on the cost of incorporation or the lodgement of a company’s documents to ASIC annually.

An alternative to liquidators on a cab rank panel mooted by the *2017 Combatting Illegal Phoenixing* consultation paper is the creation of a government

¹³⁸ See above n 111 and accompanying text.

¹³⁹ *2017 Combatting Illegal Phoenixing*, above n 4, 28.

¹⁴⁰ See above Part IIIC(6)(b).

¹⁴¹ Productivity Commission, *Business Set-up, Transfer and Closure*, Report No 75 (2015) 408–9 recommendation 15.1: ‘Liquidators for [streamlined liquidations] would be drawn from a panel of providers selected by tender to ASIC. Panel membership would be for a period of up to five years, with ASIC able to conduct tenders at regular intervals to ensure that demand can be met.’

¹⁴² *Corporations Act* s 545.

¹⁴³ *2017 Combatting Illegal Phoenixing*, above n 4, 28.

¹⁴⁴ *ASIC Supervisory Cost Recovery Levy Act 2017* (Cth).

¹⁴⁵ See Kelly O’Dwyer (Minister for Revenue and Financial Services), ‘ASIC Industry Funding Model Passed into Law’ (Media Release, 15 June 2017).

¹⁴⁶ ASIC, *Regulatory Guide 109*, above n 120 [109.5]–[109.8].

liquidator to deal with small- and medium-sized enterprise liquidations. This idea is worth investigating further. A government-funded liquidator can achieve economies of scale and access government-held information more easily. In addition, it would solve the funding dilemma, which should be by way of allocation from consolidated revenue. There are considerable benefits that could be achieved. A more efficient system for conducting liquidations of small- and medium-sized enterprises could provide better detection, enforcement and, therefore, deterrence of illegal phoenix activity. This could result in the collection of more tax revenue, improved payment of super, less reliance on the Fair Entitlements Guarantee and a fairer, more competitive market bringing economic benefits across society.

This Part has examined a variety of improvements or new initiatives that could assist the ATO to deter and disrupt illegal phoenix activity, or to recover from wrongdoers if it occurs. The next Part serves as a reminder that ASIC, as the corporate regulator, and the *Corporations Act*, as the principal governing statute, can also play a significant role in the recovery of tax debts and the punishment of corporate misbehaviour.

IV Existing Corporate Law Mechanisms and Ways to Improve Them

A Actions Available under the Corporations Act

Depending on the provision involved, there is scope under the *Corporations Act* for ASIC, the company's liquidator or the ATO directly to seek a range of remedies or to implement preventative measures. The liquidator may be funded by the ATO, which is a well-resourced and motivated creditor, to pursue company controllers and others to recover unremitted taxes and other debts. Some of these provisions will now be considered.

1 Disqualification

ASIC may seek an order from a court to disqualify a director or may do so administratively itself. In both cases, the grounds include being involved in two or more failed companies in the past seven years, with the court disqualification limited to 20 years and ASIC disqualification to five years.¹⁴⁷ The former depends upon the company's management being 'wholly or partly responsible for the corporation failing'¹⁴⁸ and the latter upon ASIC receiving an adverse liquidator's report. In both cases, the disqualification must be justified. In addition, ASIC may seek a court order for a director's disqualification for breach of a civil penalty provision.¹⁴⁹ These include breaches of directors' duties and insolvent trading, both of which are noted below.

¹⁴⁷ *Corporations Act* ss 206D, 206F respectively.

¹⁴⁸ *Ibid* s 206D(1)(b)(i).

¹⁴⁹ *Ibid* s 206C. Note also *Australian Securities Commission v Forem-Freeway Enterprises Pty Ltd*, where the director engaged in phoenix-like behaviour and was disqualified for 12 years under s 1317EA(3)(a) of the *Corporations Act*: (1999) 30 ACSR 339, 351.

An example of an ASIC disqualification involving tax debts is *Re Grossman*.¹⁵⁰ The Administrative Appeals Tribunal affirmed ASIC's exercise of its administrative power to disqualify Mr Grossman from managing corporations for five years. He had been a director of three failed companies within a seven-year period, and each had failed to pay their taxation liabilities. Another successful collaboration between ASIC and the ATO in 2017 is the disqualification of Steven Soong, which involved three companies failing to remit over \$1.2 million in taxation liabilities.¹⁵¹

The advantage of ASIC's disqualification powers is that there is no need to prove any illegality nor the non-remittance of specific debts, as would be the case with the ATO disqualification power recommended above in Part IIIC(5) of this article. However, what is needed for ASIC-initiated disqualification to be effective in relation to tax defaults is an efficient system of referrals and responsive action by ASIC.¹⁵²

2 *Winding Up, Recovering Voidable Transactions and Insolvent Trading*

The ATO can seek the winding up of a company where illegal phoenix activity is suspected based on the past history of the enterprise. For example, in *Deputy Commissioner of Taxation v Casualife Furniture International Pty Ltd*,¹⁵³ the Court ordered the winding up under s 462(1)(k) of the two solvent companies in the group, the latest in a string of companies run by the Guss family. The order was made on the basis that it was just and equitable to do so. The pattern of behaviour of incurring tax and other debts, transferring assets to a new company and then liquidating the debt-laden company, had been occurring for 20 years.¹⁵⁴

The ATO can also seek the winding up of a company already in VA¹⁵⁵ where, for example, the votes of the some creditors in support of a deed of company administration are tainted by payments from the fraudulent director.¹⁵⁶ However, as noted above, one of the defining features of illegal phoenix activity is the readiness of company controllers to place their company into liquidation, after stripping its assets or overloading it with tax debts, so the ATO's ability to wind-up these companies will not assist it to recover taxes in many cases.

¹⁵⁰ [2011] AATA 6 (12 January 2011).

¹⁵¹ See ASIC, 'Former Director Disqualified from Managing Companies' (Media Release, 17-309MR, 12 September 2017) <<http://asic.gov.au/about-asic/media-centre/find-a-media-release/2017-releases/17-309mr-former-director-disqualified-from-managing-companies/>>.

¹⁵² For a discussion about the number of referrals currently made, see above n 111 and accompanying text.

¹⁵³ (2004) 9 VR 549.

¹⁵⁴ For a detailed discussion of *Deputy Commissioner of Taxation (Cth) v Casualife Furniture International Pty Ltd* (2004) 9 VR 549, see Anne Matthew, 'The Conundrum of Phoenix Activity: Is Further Reform Necessary?' (2015) 23(3) *Insolvency Law Journal* 116, 127–8.

¹⁵⁵ *Corporations Act* s 447A(2).

¹⁵⁶ *Deputy Commissioner of Taxation v Woodings* (1995) 13 WAR 189.

Part 5.7B of the *Corporations Act* empowers the liquidator to recover voidable transactions¹⁵⁷ in a variety of situations, subject to defences.¹⁵⁸ These were noted above in the context of the suggested new phoenix offence to target asset transfers. In addition, at the suit of the liquidator, the court can also order equitable compensation for breach of directors' fiduciary duty in the phoenix context.¹⁵⁹

3 Breaches of Directors' Duties

In addition to fiduciary duties and common law duties, the *Corporations Act* imposes a range of duties upon directors and officers, and, in some cases, even on employees.¹⁶⁰ Those duties are: the duty of care and diligence;¹⁶¹ the duties to exercise powers and discharge duties in good faith in the best interests of the corporation and for a proper purpose;¹⁶² the duties to not use position or information improperly to gain an advantage for oneself or someone else, or to cause detriment to the company;¹⁶³ and the duty to prevent insolvent trading by the company.¹⁶⁴ For example, the misuse of position to make a personal gain or to benefit another entity at the time of insolvency in phoenix circumstances is clearly within the scope of s 182 of the *Corporations Act*. ASIC can also bring both civil penalty¹⁶⁵ and criminal action¹⁶⁶ against the company's directors in relation to an uncommercial transaction as a form of insolvent trading.¹⁶⁷ Accessories¹⁶⁸ may also be liable, both for the improper purposes and the two misuse of position breaches,¹⁶⁹ as well as criminal breaches.¹⁷⁰

However, since civil penalties were introduced for breaches of directors' duties in 1993, there has only been one civil penalty application brought by ASIC for breach of directors' duties in the context of phoenix activity.¹⁷¹ To put this in perspective, in 2016–17 alone, external administrators reported to ASIC that they suspected 340 criminal breaches of the directors' duties¹⁷² and 1160 civil breaches

¹⁵⁷ The court may order, inter alia, payment of an amount of money or the transfer of property: *Corporations Act* ss 588FF(1)(a), (b) respectively.

¹⁵⁸ Ibid s 588FG.

¹⁵⁹ *HWY Rent Pty Ltd v HWY Rentals (in liq) (No 2)* [2014] FCA 449 (8 May 2014) [6].

¹⁶⁰ *Corporations Act* ss 182–3.

¹⁶¹ Ibid s 180.

¹⁶² Ibid s 181.

¹⁶³ Ibid ss 182–3.

¹⁶⁴ Ibid s 588G(2).

¹⁶⁵ Ibid s 131J.

¹⁶⁶ Ibid s 588G(3).

¹⁶⁷ Ibid s 588G(1A) deems the uncommercial transaction to be the incurring of a debt for the purpose of the insolvent trading action.

¹⁶⁸ Ibid s 79.

¹⁶⁹ Ibid ss 181(2), 182(2), 183(2).

¹⁷⁰ *Criminal Code* pt 2.4.

¹⁷¹ *ASIC v Somerville* (2009) 77 NSWLR 110; *ASIC v Somerville (No 2)* [2009] NSWSC 998 (24 September 2009). See further Helen Anderson and Linda Haller, 'Phoenix Activity and the Liability of the Advisor' (2014) 34(3) *Sydney Law Review* 471, 483–6.

¹⁷² ASIC Report 558, above n 6, 37 (table 30). This figure includes 117 suspected criminal breaches of the directors' duty to prevent insolvent trading: *Corporations Act* s 588G(3). See also above n 171.

of the s 182 duty.¹⁷³ While the wrongdoing reported by external administrators covers circumstances beyond phoenix activity, and these are only suspected rather than proven breaches, these figures suggest that ASIC is not bringing actions for breach of directors' duties in the phoenix context. This concern is now addressed.

4 *Widen Enforcement of Corporations Act Provisions*

Effective enforcement not only requires appropriate tools to bring actions; they also need to be in the hands of a funded, motivated party.¹⁷⁴ Given the ATO's exposure to the adverse consequences of illegal phoenix activity, it might seem that new laws should be placed in the *TAA*. However, another approach is to allow the ATO to bring actions under the *Corporations Act*. This could be done by broadening the parties who have a right to seek a remedy for a civil penalty breach under Part 9.4B. Such an expansion is not without precedent: under pt 9.4B s 1317GA(2)(c), the client of a financial services licensee may apply to the court for the refund of a fee claimed by the licensee in breach of s 962P, a civil penalty provision. Allowing a regulator such as the ATO to bring civil remedy actions, such as an action for insolvent trading (as discussed above), would send a powerful message of deterrence, aligning money, motivation and legal means.

Just as the ATO practices considered in Part III of this article could be enhanced, so can those of ASIC. Those ASIC practices with the capacity to deter and disrupt illegal phoenix activity, or enhance recovery of tax revenue, are now examined.

B *Enhanced Prevention and Disruption Measures*

1 *Implement Director Identification Number*

The Government announced that its Illegal Phoenixing Package 'reforms will include the introduction of a Director Identification Number (DIN)' that 'will interface with other government agencies and databases to allow regulators to map the relationships between individuals and entities and individuals and other people'.¹⁷⁵ This reform¹⁷⁶ — the issue of a unique identification number after proof of identity has been provided — has been widely supported.¹⁷⁷ It is an important step

¹⁷³ ASIC Report 558, above n 6, 38 (table 31). In addition, external administrators reported that they suspected 3818 breaches of s 180, 2087 breaches of s 181, 338 breaches of s 183, and 4878 breaches of ss 588G(1)–(2): at 38 (table 31).

¹⁷⁴ Anderson, Dickfos and Brown, above n 10, 137–8.

¹⁷⁵ O'Dwyer, above n 3.

¹⁷⁶ Note that this idea has been around for some years: Helen Anderson, 'An Ounce of Prevention: Practical Ways to Hinder Phoenix Activity' (2013) 25(3) *Australian Insolvency Journal* 16.

¹⁷⁷ Productivity Commission, above n 141, 429 recommendation 15.6. Note that the Productivity Commission also endorsed the DIN in its report, *Workplace Relations Framework*, Report No 76 (2015) vol 1, 48; vol 2, 915, 938. A DIN was also supported by the Senate Economics References Committee's inquiry into insolvency in the construction industry: *SERC Construction Insolvency Report*, above n 47, 188 [12.38] recommendation 36 (DIN), 188 [12.39] recommendation 37 (proof of identity). Recommendation 38 called for the *Australian Securities and Investments Commission Act 2001* (Cth) to be amended to require ASIC to verify company information: 188 [12.40].

towards overcoming the difficulties in detecting illegal phoenix activity and bringing enforcement action against it. At present, the registration of an Australian company simply requires the name, address, and date and place of birth of each proposed officeholder.¹⁷⁸ ASIC's current form¹⁷⁹ does not ask for the prior corporate history of its proposed directors, and no supporting evidence about the identity of the proposed directors is required. Nor does ASIC independently verify the information provided to it. Those repeatedly engaging in illegal phoenix activity might try to conceal their later directorships under the guise of a fictitious character, or their own name misspelt or a false date of birth.¹⁸⁰

In order to implement the proposal, directors of existing companies should be required to quote their DIN at the time of companies' annual reviews or annual returns, and therefore it should only take one annual cycle for ASIC's systems to obtain director identity information for both new and existing companies. Where an existing trading company is purchased, the DIN would be required to be stated on the 'notification of change to directors' form.¹⁸¹

A DIN should also be searchable by the public via ASIC's online registers and should reveal present and past directorships. Requiring directors to use their DINs in their dealings with creditors, as the ABN is currently used, would enable creditors to conduct their own self-protection inquiries prior to dealing with companies. This transparency should act as a serious deterrent to directors hoping to conceal their illegal phoenix activity through the formation of a new company. It could alert the ATO to potential wrongdoing where an elderly person with no assessable income (ATO-held information) is the director of numerous companies (ASIC-held information). The wider sharing of information between these agencies is discussed further below.¹⁸²

2 *Review the Incorporation Process and the Legitimacy of Shelf Companies*

The incorporation process can be useful in detecting the creation of companies being set up to engage in illegal phoenix activity. The DIN, used as part of this, would provide significantly more information to ASIC than the present paper form does. An online application system, completed by the applicant, is the most efficient. In the UK, for example, the Secretary of State has been required to provide a streamlined incorporations process that can be completed online on a single occasion.¹⁸³ Directors with existing and previous directorships would cite their DIN and the online form would pre-populate with those details. First-timer directors would have little to complete after giving their DIN.

¹⁷⁸ *Corporations Act* s 117(2).

¹⁷⁹ ASIC, *Form 201: Application for Registration as an Australian Company* (8 February 2018); *Corporations Act* s 117(4).

¹⁸⁰ See *SERC Construction Insolvency Report*, above n 47, 187 [12.31].

¹⁸¹ ASIC, *Form 490: Notification of Change to Directors of a Registered Body* (9 May 2018); *Corporations Act* s 601CV(1)(c).

¹⁸² Below Part IVC(1).

¹⁸³ *Small Business, Enterprise and Employment Act 2015* (UK) s 15

The aim here is to equip ASIC with information about this person, allowing the regulator to take appropriate action, which may include placing them on a watch. An equally important aim is to alert the would-be director to the fact that ASIC has this information at its fingertips. They, and their previous corporate histories, are not invisible. Directors would be required to supply any missing information, and if this is false, they may be prosecuted.¹⁸⁴ All of this director and incorporation information would add to the intelligence that ASIC could share with other government agencies.

At present, to register a company, prospective directors must either complete Form 201 and mail it to ASIC with appropriate payment, or must transact through a business service provider who uses software to deal directly with ASIC.¹⁸⁵ This may involve the purchase of an aged ‘shelf’ company that the business service provider has already registered. In the past, when incorporation involved weeks of delay while forms were being processed, it made sense to be able to acquire an existing company immediately. However, those days have passed, as a company can now be created online within an hour. While the use of shelf companies remains popular with professionals setting up business structures on behalf of clients, it is not unreasonable to require prospective directors to complete the online incorporation form themselves, given the heavy reliance that the Government, through MyGov and other online portals, places on electronic interactions between businesses and their controllers.

The legitimacy of shelf companies is also questionable and this is something the Government should review.¹⁸⁶ In particular, aged shelf companies may make it more difficult for regulators to use data analytics to identify companies that are or may be engaged in illegal phoenix activity. If a short incorporation age is used as one of the parameters for searching regulator databases for ‘at risk’ companies, aged shelf companies may not be captured by the search. The use of shelf companies of varying ages may create the impression that each company that fails is an established, independent company that has failed due to unforeseen circumstances, rather than part of a deliberate pattern of fraudulent behaviour.

3 *Limit Backdating of Directorships and Abandoned Companies*

At present, the change of directorship form is free to lodge within one month, with a \$78 fee for up to one month late, and a \$323 fee for more than one month late. These are costs worth incurring to avoid a DPN or liability as a director under the *Corporations Act*.

¹⁸⁴ *Corporations Act* s 1308(2), sch 3 item 335.

¹⁸⁵ See ASIC, above n 39.

¹⁸⁶ See Australian Resident Director and Corporate Services, *Australian Pre-Registered Company* (2018) <<https://www.ardcs.com.au/corporate-services/australian-shelf-company/>>. This site states that the advantages of buying a pre-registered company, instead of a newly incorporated company, include increased business partner confidence, access to restricted services, improved credit options, being favourable for immigration purposes, and contract tendering eligibility. Each appears to be built on a deception that the business is already established. The site states that:

Older shelf companies give confidence to potential business partners or clients who feel more comfortable dealing with an established company. ARD Corporate Services shelf companies are able to be provided to you with additional services such as existing ABN (Australian Business Number), TFN (Tax File Number) and in some cases, an already opened bank account.

The *2017 Combatting Illegal Phoenixing* consultation paper suggested that there be a rebuttable presumption against resignations lodged more than 28 days late, such that a director would still be liable for misconduct until the time of lodgement.¹⁸⁷ However, rather than a rebuttable presumption, the Government should consider whether the director should simply be liable for all misconduct predating the lodging of the change of directorship form, rather than the date of the purported resignation on the form itself. This would be a significant motivator towards ensuring that the form is lodged. It would not amount to an onerous compliance burden, particularly if the notification could be lodged online instantaneously by the director using their DIN.

If the director is liable for all of their pre-lodgement conduct, the measure requires no independent enforcement either administratively or via court action. The director is simply liable for whatever substantive breach is involved, and it is incumbent on ASIC or the liquidator to bring appropriate enforcement and recovery action. A sole director should ensure that if their involvement with the company is at an end and no other person is willing to be its director, the company should be placed into liquidation.

Disallowing the resignation of a sole director until another was appointed, as a way of avoiding liability for misconduct, was the 2017 consultation paper's suggestion to deal with abandoned companies.¹⁸⁸ However, this suggestion misses the point. Abandoning a company to conceal misconduct would constitute a breach of directors' duty to act with care, for example, because a reasonable director, acting with care and diligence, would not do so.¹⁸⁹ The director abandoning the company cannot escape liability by resigning as part of that abandonment.

Nonetheless, two significant issues here are volume and enforcement. Although ASIC does not publish statistics on the number of companies deregistered after being abandoned, there appears to be about 37 600 companies deregistered by ASIC each year for failure to return forms and pay fees.¹⁹⁰ This is nearly five times the number of companies liquidated. The intent of the Government's suggestion is that by deeming the resignation to be ineffective, the director remains accountable as a director. However, this measure does nothing towards ensuring that the affairs of those abandoned, deregistered companies are investigated or that action will be brought against those directors.

Making it an administrative offence to abandon a company might be a better option, but, again, there is the issue of enforcement. As part of the deregistration process, ASIC can send a penalty notice to the last known address of the last registered director or directors. Whether the penalty is paid is another matter entirely. A much more effective deterrent could be a 'black mark' against the person, via their DIN, such that they cannot become the director of any further company without

¹⁸⁷ *2017 Combatting Illegal Phoenixing*, above n 4, 13.

¹⁸⁸ *Ibid* 13.

¹⁸⁹ *Corporations Act* s 180(1). Note that as a company approaches insolvency, the interests of creditors become the interests of the company for the purpose of a breach of duty under s 181: *Kinsela v Russell Kinsela Pty Ltd (in liq)* (1986) 4 NSWLR 722.

¹⁹⁰ Email from Adrian Brown (Senior Executive Leader, Insolvency Practitioners, ASIC) to the author, 18 March 2016 (copy on file with the author).

some specified consequences attaching. As a practical matter, it should be noted here that being a good citizen and voluntarily winding up a company involves extensive paperwork, liquidator costs and the payment to ASIC of a fee.¹⁹¹ Abandoning the company means ASIC removes the company with no costs and no repercussions. It is, therefore, perhaps not surprising that so many companies are abandoned.

C *Enhanced Information Sharing*

1 *Improve Information Sharing between ASIC and the ATO*

The *2017 Combatting Illegal Phoenixing* consultation paper recommended the creation of a single phone phoenix hotline.¹⁹² This is an excellent initiative for the gathering of information.¹⁹³ However, what is most important is that information, once gathered, is shared between regulators. In 2017, the Federal Parliament amended the *Australian Securities and Investments Commission Act 2001* (Cth) to allow ASIC to share confidential or protected information with the Commissioner of Taxation.¹⁹⁴ The amendment was in line with a recommendation of the 2015 Senate Economic References Committee *Construction Insolvency Report*, that ‘consideration be given to amending confidentiality requirements in statutory frameworks of agencies participating in the Phoenix Taskforce to permit dissemination of relevant information to the ATO’.¹⁹⁵ The ATO’s latest annual report indicates that under Phoenix Taskforce provisions, ASIC made eight requests to the ATO for information, and the ATO initiated 16 disclosures of information to ASIC.¹⁹⁶ This seems a modest amount, given the estimates about the size of the phoenix problem noted above.¹⁹⁷

However, it is also vital that *non*-confidential information is shared more systematically. A great deal of information about companies and their controllers is gathered by ASIC and is either available from its website without charge or may be purchased. The ATO would benefit enormously from freer and more timely flows of this information.¹⁹⁸ Some specific examples are now considered.

¹⁹¹ See ASIC, *Winding Up a Solvent Company* (15 October 2014) <<http://asic.gov.au/for-business/closing-your-company/deregistration/winding-up-a-solvent-company/>>. Only companies with assets of less than \$1000 may deregister voluntarily, but this also involves paperwork and the payment of a small fee: ASIC, *Closing Your Company* (15 October 2014) <<http://asic.gov.au/for-business/closing-your-company/>>.

¹⁹² *2017 Combatting Illegal Phoenixing*, above n 4, 7.

¹⁹³ See further Helen Anderson, ‘Sunlight as the Disinfectant for Phoenix Activity’ (2016) 34(4) *Company and Securities Law Journal* 257.

¹⁹⁴ *Treasury Laws Amendment (2017 Measures No 1) Act 2017* (Cth) sch 2, which inserted s 127(2A)(g) into the *Australian Securities and Investments Commission Act 2001* (Cth).

¹⁹⁵ *SERC Construction Insolvency Report*, above n 47, 82 [5.84] recommendation 12.

¹⁹⁶ ATO, *Annual Report 2016–17*, 233.

¹⁹⁷ See above n 21 and accompanying text.

¹⁹⁸ See further Anderson, Dickfos and Brown, above n 10, 137, questioning the ATO’s role in phoenix enforcement.

2 *ATO Should Seek ASIC Information about 'Associates' before Issuing ABNs*

ABNs are issued by the Australian Business Register, whose custodian is the ATO. An application by those seeking an ABN for their company requires 'associate details', including the name, date of birth, position held and tax file number of all Australian resident directors.¹⁹⁹ At present, the ATO does consult with ASIC regarding ABN applications, but only to check the validity of the Australian Company Number. It does not check whether any associates of the company are disqualified directors or what other companies those associates own or control. This is an oversight that should be addressed.

3 *ASIC Should Advise ATO about Unpaid Super*

In addition to complaints from employees,²⁰⁰ super non-compliance is detected and reported to the ATO through third-party referrals. The ATO submission to the Senate Economics References Committee inquiry into the non-payment of the superannuation guarantee noted that in 2015–16, the Fair Work Ombudsman made 2405 referrals, with 73 from super funds, 651 community referrals, 70 internal ATO referrals and 57 from 'other' sources.²⁰¹ There was no figure given for referrals from ASIC.

This is not because ASIC is unaware of unpaid super. External administrator reports to ASIC at the conclusion of an insolvency appointment include broad band estimates of unremitted super in each administration.²⁰² In 2016–17, ASIC's collation of these reports showed that there was unpaid super in 3155, or 40.6% of reports.²⁰³ There were 18 external administrator reports where over \$1 000 000 of super was lost; 164 reports of unpaid super between \$250 001 and \$1 000 000; and 412 between \$100 001 and \$250 000.²⁰⁴ These figures alone represent that at the very least, there was over \$100 million of unpaid super. They do not take into account the 2561 companies where there was between \$1 and \$100 000 owing. This is not de-identified statistical information: liquidators, receivers or administrators have looked into the affairs of these companies enough to know that these amounts have not been remitted for their employees, and ASIC knows the names of these companies.

The Senate Economic References Committee recommended that the ATO and ASIC review data sharing so that information on insolvency cases are referred

¹⁹⁹ Australian Business Register, *Associates' Details* (13 April 2018) <<https://abr.gov.au/For-Business,-Super-funds---Charities/Applying-for-an-ABN/What-you-need-for-your-ABN-application/Associates-details/>>.

²⁰⁰ These are known as employee notifications.

²⁰¹ ATO, Submission No 6 to Senate Economics References Committee, *Inquiry into the Impact of the Non-Payment of the Superannuation Guarantee*, 23 January 2017, 10. Similar numbers of referrals were made in 2014–15: 2103, 33, 431, 50 and 50 respectively.

²⁰² This reporting is done in compliance with ASIC, *Regulatory Guide 16: External Administrators: Reporting and Lodging* (July 2008). See further above n 6 and accompanying text.

²⁰³ ASIC Report 558, above n 6, 46 (table 37).

²⁰⁴ *Ibid.*

by ASIC to the ATO.²⁰⁵ It is not clear why such communication is not already taking place given the legislative power to share this information exists.²⁰⁶ It might be too late for the ATO to issue a ‘standard’ DPN where the amount of the liability has been reported, but not paid to the ATO. However, the ATO still has the capacity to issue a ‘lockdown’ with respect to *unreported* withholding and super liabilities, which are *not* avoided by external administration. Therefore ASIC, unaware of whether a super liability has or has not been reported to the ATO, should report *all* unpaid super information from external administration reporting to the ATO to allow ‘lockdown’ DPNs to be issued where appropriate and to augment the ATO’s risk profile data collection. The external administrator information may or may not relate to illegal phoenix activity, but that is irrelevant: a lockdown DPN does not require any such illegality.

V Conclusion

This article has sought to canvas some practical ways to improve the recovery of taxation revenue, currently lost to the Australian Government as a result of illegal phoenix activity. The difficulty with recovering tax debts where the corporate taxpayer is insolvent is that company failure — with a consequent loss to unsecured creditors — is a legitimate and, indeed, inevitable outcome of allowing businesses to operate as companies. Attacking the improper behaviour of the company’s controllers, where the company, rather than those individuals, is the taxpayer, largely confounds the ATO.

Some of the deficiencies in taxation law and its administration were addressed here. These included suggestions for improvements to the DPN regime, the leading tool against illegal phoenix activity. The ATO was also encouraged to make use of the existing ‘bottom of the harbour’-inspired *CTOA* provisions that appear highly useful against the wrongdoing of both directors and advisors. This article has also suggested administrative improvements, including: the expansion of the single touch payroll initiative; the ATO being empowered to seek director disqualification; and the ATO being permitted to deny an ABN or issue it conditionally upon payment of a security deposit where serial phoenix operators were involved. The DIN, if introduced as promised, should make these improvements even more effective.

Significantly, this article has recommended that corporate laws, existing or improved, be utilised against tax losses. This is logical given that the source of the ATO’s difficulties largely stems from the corporate law principle that a company is a legal entity separate from its directors and shareholders who have no obligation for the company’s debts. Many corporate law provisions are presently adequate to punish all of the improper behaviour that constitutes illegal phoenix activity, as well as to recover assets improperly transferred. However, the continued existence of illegal phoenix activity and the comparative rarity with which ASIC brings actions means that changes are required. These include: allowing the ATO to bring civil penalty actions; improving information exchanges between ASIC and the ATO in

²⁰⁵ Senate Economic References Committee, above n 90, 20 [7.26] (recommendation 26).

²⁰⁶ ASIC, *Regulatory Guide 16*, above n 202, [16.18].

relevant areas; improving incorporation processes; attaching consequences to the abandonment of companies; and limiting the backdating of directorships. Some of these suggestions or related ideas are contained in Treasury's *2017 Combatting Illegal Phoenixing* consultation paper. It is to be hoped that the momentum generated by Treasury's paper continues and that legislative and administrative changes follow.

The “Australian Position” Concerning Criminal Complicity: Principle, Policy or Politics?

Andrew Dyer*

Abstract

This article examines the differences that have recently emerged between the United Kingdom Supreme Court and the High Court of Australia concerning the law of criminal complicity. It contends that, if we are accurately to analyse the decisions of those Courts in, respectively, *R v Jogee* [2017] AC 387 and *Miller v The Queen* (2016) 259 CLR 380, we must acknowledge the extra-legal considerations that influenced these highly-respected tribunals. To criticise what Justice Keane has called ‘the Australian position’ is to reveal a partial truth. Certainly, that position is questionable. Indeed, here it is argued that the ‘change of normative position’ justification for the extended joint criminal enterprise doctrine does not withstand critical scrutiny. Nevertheless, the divergent results in *Jogee* and *Miller* probably owe more to public opinion, politics and widely-held judicial views about when an ultimate court of appeal is entitled to reverse an established common law rule, than they do to any fundamental differences between London and Canberra concerning principle and/or policy.

I Introduction

On 18 February 2016, a joint sitting of the United Kingdom (‘UK’) Supreme Court and the Privy Council in *R v Jogee*¹ unanimously held that the ‘parasitic accessory liability’² doctrine (‘PAL’) no longer forms part of English law. Lords Hughes and Toulson, writing for the Court, concluded that

there is no doubt that the Privy Council laid down a new principle in *Chan Wing-Siu* when it held that if two people set out to commit an offence (crime A), and in the course of it one of them commits another offence (crime B), the second person is guilty as an accessory to crime B if he foresaw it as a possibility, but did not necessarily intend it.³

This principle, their Lordships continued, was unjustified: it made the common law more severe⁴ — on the basis of ‘an incomplete, and in some respects erroneous,

* Colin Phegan Lecturer, University of Sydney Law School, Sydney, Australia; Deputy Director Sydney Institute of Criminology.

¹ [2017] AC 387 (‘*Jogee*’).

² *Ibid* 396 [2].

³ *Ibid* 412 [62] citing *Chan Wing-Siu v The Queen* [1985] AC 168 (‘*Chan Wing-Siu*’).

⁴ *Ibid* 414 [74].

reading of the previous case law, coupled with generalised and questionable policy arguments'.⁵

In light of these conclusions, it was hardly surprising that the High Court of Australia was soon asked to reconsider what is known in New South Wales ('NSW') and South Australia ('SA')⁶ as the doctrine of extended joint criminal enterprise ('EJCE'). But, contrary to some commentators' hopes,⁷ on 24 August 2016, their Honours, with Gageler J dissenting, held in *Miller v The Queen*⁸ that 'the principle of extended joint criminal enterprise liability stated in *McAuliffe* should remain part of the common law of Australia'.⁹

Two questions immediately come to mind. What is the explanation for the differences that have emerged between these highly-respected tribunals? And, more starkly, which Court was right?

Commentators so far have focused more on the second of these questions than the first.¹⁰ The suggestion appears to be that, once it is determined which Court was correct in principle, the reasons for the different decisions are either obvious (the other court simply was wrong) or unimportant. But, in this article, I argue that it *is* important to understand why divergent outcomes were reached — and that, if we are to do so, it is not enough merely to contend that the Court with which we disagree failed properly to understand the relevant precedents, or deployed suspect reasoning concerning moral culpability. That is, while I agree with those commentators who have criticised the 'Australian position',¹¹ I also believe that, if we are to establish the truth about *Jogee* and *Miller*, we must look beyond the respective Courts' actual decisions and acknowledge the extra-legal factors that influenced both judgments. In short, the answer to the puzzle of how two such distinguished judicial panels could reach such diametrically opposed conclusions seems to lie more in public opinion and politics than it does in law.

⁵ Ibid 415 [79]. For commentary on *Jogee*, see David Ormerod and Karl Laird, 'Jogee: Not the End of a Legal Saga but the Start of One?' [2016] (8) *Criminal Law Review* 539.

⁶ Following the Victorian Parliament's recent decision to place the law of complicity largely on a statutory footing, SA and NSW are the only two Australian jurisdictions in which the common law of complicity applies. For the Victorian position, which was reintroduced after the delivery of the Weinberg Report, but which, to an extent, departs from its recommendations, see *Crimes Act 1958* (Vic) ss 323–324C. See also Justice Mark Weinberg, Victorian Department of Justice and Judicial College of Victoria, 'Simplification of Jury Directions Project: A Report to the Jury Directions Advisory Group' (Report, Government of Victoria, August 2012) 17–102 [2.1]–[2.306].

⁷ See, eg, Stephen Odgers, 'McAuliffe Revisited Again' (2016) 40(2) *Criminal Law Journal* 55; Sarah Pitney, 'Undoing a "Wrong Turn": The Implications of *R v Jogee*; *Ruddock v The Queen* for the Doctrine of Extended Joint Criminal Enterprise in Australia' (2016) 40(2) *Criminal Law Journal* 110, 115.

⁸ (2016) 259 CLR 380 ('*Miller*').

⁹ Ibid 388 [2]. In *HKSAR v Chan Kam Shing* (2016) 19 HKCFAR 640, the Hong Kong Court of Final Appeal ('HKCFA') came to the same conclusion as the High Court. While my focus is on English and Australian law, the HKCFA's unanimous decision not to follow *Jogee* might well have been influenced by the types of factors that appear to have influenced the *Miller* plurality.

¹⁰ See, eg, Beatrice Krebs, 'Accessory Liability: Persisting in Error' (2017) 76(1) *Cambridge Law Journal* 7; Stephen Odgers, 'The High Court, the Common Law and Conceptions of Justice' (2016) 40(5) *Criminal Law Journal* 243; A P Simester, 'Accessory Liability and Common Unlawful Purposes' (2017) 133 (January) *Law Quarterly Review* 73.

¹¹ *Miller* (2016) 259 CLR 380, 426 [137], 429–30 [147]–[148] (Keane J).

The article is structured as follows. In Part II, I discuss the Australian common law position concerning accessorial liability, the ‘plain vanilla’¹² doctrine of joint criminal enterprise (‘JCE’), and EJCE. One of my aims is to show that, while, properly viewed, accessorial liability and JCE have the same doctrinal basis as one another, the same cannot accurately be said of accessorial liability and EJCE.

If EJCE is to be justified, this might be on the basis of the ‘change of normative position’ rationale advanced by Simester¹³ and adopted by the High Court plurality both in *Clayton v The Queen*¹⁴ and in *Miller*.¹⁵ Certainly, it cannot be justified in the manner suggested by Keane J in *Miller*;¹⁶ namely, that with EJCE, the other participants have authorised the actual perpetrator to commit the further crime. The very example that his Honour uses to support this analysis¹⁷ shows it to be misconceived: the defendant in *Gillard v The Queen*¹⁸ did not give authority to Preston to kill; rather, he was Preston’s ‘thick and simple’¹⁹ ‘errand boy.’²⁰

In Part III of the article, however, I contend that Simester’s change of normative position justification is fallacious. Contrary to his claim, the person who continues in a criminal enterprise despite his/her foresight that during that enterprise a co-offender might commit murder,²¹ is not sufficiently culpable to warrant being convicted of that offence if it results. In so arguing, I do not contend that the EJCE murderer’s culpability is glaringly lower than that of all other offenders convicted of murder in SA and NSW.²² Such reasoning ignores the constructive murder rule’s continued existence in both of those states²³ and, partly for that reason, is no more persuasive than the similarly commonly deployed argument that ‘[t]he common law has developed ordinarily to insist that justice requires that a primary party become criminally liable only by acting with intention.’²⁴ Rather, my position is that a person’s agreement with another/others to commit a foundational crime is not as

¹² *Brown v The State (Trinidad and Tobago)* [2003] UKPC 10 (29 January 2003) [13].

¹³ A P Simester, ‘The Mental Element in Complicity’ (2006) 122 (October) *Law Quarterly Review* 578, 598–601; see also A P Simester et al, *Simester and Sullivan’s Criminal Law: Theory and Doctrine* (Hart Publishing, 6th ed, 2016) 248–50; Jeremy Horder and David Hughes, ‘Joint Criminal Ventures and Murder: The Prospects for Law Reform’ (2009) 20(3) *Kings Law Journal* 379, 398–9; Laura Stockdale, ‘The Tyranny of Small Differences: Culpability Gulf between Subjective and Objective Tests for Extended Joint Criminal Enterprise in Australia’ (2016) 90(1) *Australian Law Journal* 44, 49.

¹⁴ (2006) 81 ALJR 439, 444 [20] (‘*Clayton*’).

¹⁵ (2016) 259 CLR 380, 398 [34].

¹⁶ *Ibid* 426 [136], 427–8 [139], [141]–[144].

¹⁷ *Ibid* 429 [147].

¹⁸ (2003) 219 CLR 1 (‘*Gillard*’).

¹⁹ *Ibid* 7 [3].

²⁰ *Ibid*.

²¹ EJCE applies to all crimes, not just to murder; however, in most of the leading cases the doctrine was used to fix liability for that crime, and it is regarding murder that it is most controversial. Accordingly, this article is mainly concerned with that offence.

²² *Cf Miller* (2016) 259 CLR 380, 419 [111]–[112] (Gageler J).

²³ *Crimes Act 1900* (NSW) s 18(1)(a); *Criminal Law Consolidation Act 1935* (SA) s 12A.

²⁴ *Miller* (2016) 259 CLR 380, 419 [113] (Gageler J). His Honour conceded that, ‘in the case of manslaughter special considerations apply’. But the common law has accepted the sufficiency of objective fault for many other crimes, too. Indeed, as a NSW textbook observes, the presumption in favour of a subjective mental element where a statutory offence is silent concerning mens rea, arising from *He Kaw Teh v The Queen* (1985) 157 CLR 523, has only rarely remained unrebuted: David Brown et al, *Criminal Laws: Materials and Commentary on Criminal Law and Process of New South Wales* (Federation Press, 6th ed, 2015) 203–4.

relevant as Simester thinks it is to his/her culpability *regarding a death* that a co-offender causes once the enterprise has been embarked upon. Similar reasoning to Simester's has been used to justify the constructive murder rule, too.²⁵ However, as Krebs notes, it is 'descriptive in nature, rather than explanatory'²⁶: it is really no more than an after-the-fact rationalisation of the practice of enhancing the punishment of the dangerous with the aim, real or pretended, of achieving general deterrence.

In Part IV of the article, I argue that, even though the *Jogee* approach is more normatively desirable than the *Miller* one, it is, to an extent, understandable why the plurality in the latter case acted as it did. That EJCE was not as 'highly controversial'²⁷ in SA and NSW as PAL had become in the UK was one factor obstructing the type of change that some commentators were urging upon the Court.

Accordingly, we ought to be both more and less critical of courts' decisions in controversial cases such as this. We should be more critical in the sense that, when assessing judicial reasoning, we should consider not merely the reasoning itself, but rather all of the factors that influenced the court to decide the case as it did (including the social context in which the relevant case was decided). We should acknowledge, that is, that the courts are political actors. We ought to be less critical in the limited sense that we should acknowledge the pressure that courts face to avoid creating any perception that they are political. The courts are necessarily mindful of their reputation.²⁸ It is easy enough for judges to use creative reasoning where this produces an outcome that is consistent with public opinion;²⁹ but when judicial decisions try to lead society, claims of judicial activism tend to follow.

This is not to say that their Honours in *Miller* should have decided that case as they did. Ultimately, it is hard to justify the Court's retention of this unjust common law doctrine.³⁰ Rather, it is to recognise that the High Court was in a difficult position. And it is to suggest that we might have a better chance of influencing future decisions in cases such as *Miller* if we address all of the factors that judges take into account when deciding them.

In Part V of the article, I conclude that, for as long as EJCE (and the constructive murder rule) remains part of the law in NSW and SA, the law will

²⁵ Guyora Binder, 'The Culpability of Felony Murder' (2008) 83(3) *Notre Dame Law Review* 965, 1036, 1045.

²⁶ Beatrice Krebs, 'Joint Criminal Enterprise' (2010) 73(4) *Modern Law Review* 578, 599.

²⁷ *Jogee* [2017] AC 387, 416 [81].

²⁸ See, eg, *Fardon v A-G (Qld)* (2004) 223 CLR 575, 593 [23] (Gleeson CJ).

²⁹ See, eg, Andrew Dyer, '(Grossly) Disproportionate Sentences: Can Charters of Rights Make a Difference?' (2017) 43(1) *Monash University Law Review* 195, 212–13.

³⁰ Certainly, judges must usually not intervene when an established common law rule has been challenged, lest they create a perception that they are legislating: Chief Justice John Doyle, 'Do Judges Make Policy? Should They?' (1998) 57(1) *Australian Journal of Public Administration* 89, 94. But would such a perception have been created had *Miller* been decided differently? Public opinion had not set itself against EJCE, but there were no strident calls for it to be retained either. Moreover, there is force in Kirby J's contention in *Clayton* (2006) 81 ALJR 439, 461 [119] that EJCE had, recently, been expressed by judges and could 'therefore be re-expressed by them', and in Gageler J's related claim in *Miller* (2016) 259 CLR 380, 423 [126] that EJCE's excision would not have had far-reaching consequences such as to make it proper for the Court to leave the matter to Parliament: cf text accompanying below nn 168–9.

remain unfair and unprincipled. But it is likely to remain for some time yet. Parliament has shown no great appetite for reforming the law in this area,³¹ and the High Court has now twice³² upheld the *McAuliffe* principle.³³ Unless public opinion becomes as strongly hostile to EJCE as UK opinion apparently was to PAL in the years immediately before *Jogee*, it is difficult to imagine either Parliament or the courts changing their approach.

II Complicity Liability at Common Law in Australia and its Doctrinal Basis

A Accessorial Liability, JCE and EJCE

The Australian common law position is that there are three ways in which a person can be complicit in another person's criminal conduct.

First, a person can be convicted as an accessory to another person's crime. It is no longer necessary to maintain the old common law distinction³⁴ between accessories before the fact (those who aided, abetted, counselled or procured the principal to commit an offence but were absent from the scene of the crime) and principals in the second degree (those who provided such aid etc and were present when the crime was committed). Whether present or absent from the scene, the person who intentionally assists or encourages (or procures)³⁵ an offence — which he/she can only do if, at the time of giving the assistance or encouragement, he/she knows of the principal's intention to perform the relevant conduct with the requisite mens rea — can be convicted of it.³⁶ Whether the person is in fact convicted, however, depends on whether the Crown is able first to prove the principal's guilt.³⁷ In other words, accessorial liability is derivative, not primary.

Second, a person can be convicted on the basis of the JCE doctrine of an offence that another person has actually perpetrated.³⁸ Such liability attaches when the Crown proves that: (i) the accused and another or others expressly or tacitly

³¹ As noted by the *Miller* plurality, neither the SA nor the NSW Parliament has chosen to override the *McAuliffe* principle: (2016) 259 CLR 380, 401 [42]. In the UK before *Jogee*, there was similar parliamentary passivity: see, eg, William Wilson and David Ormerod, 'Simply Harsh to Fairly Simple: Joint Enterprise Reform' [2015] (1) *Criminal Law Review* 3, 26–7; Matthew Dyson, 'The Future of Joint-Up Thinking: Living in a Post-Accessory Liability World' (2015) 79(3) *Journal of Criminal Law* 181, 193–4. But in the traditionally liberal state of Victoria, Parliament has recently acted: see above n 6.

³² *Clayton* (2006) 81 ALJR 439; *Miller* (2016) 259 CLR 380. See also *Gillard* (2003) 219 CLR 1, 36–7 [113]–[119] (Hayne J) and 15 [31] (Gummow J).

³³ *McAuliffe v The Queen* (1995) 183 CLR 108, 117–18 ('*McAuliffe*').

³⁴ This distinction is referred to in *Osland v The Queen* (1998) 197 CLR 316, 341–2 [71] (McHugh J) ('*Osland*').

³⁵ *A-G's Reference (No 1 of 1975)* [1975] QB 773, 779–80 ('*Attorney-General's Reference*').

³⁶ *Giorgianni v The Queen* (1985) 156 CLR 473, 503–8; *Stokes v The Queen* (1990) 51 A Crim R 25, 37–9.

³⁷ *Likiardopoulos v The Queen* (2012) 247 CLR 265, 276–7 [27] ('*Likiardopoulos*'); *Osland* (1998) 197 CLR 316, 341–2 [71].

³⁸ *Osland* (1998) 197 CLR 316, 342–3 [72] (McHugh J); *McAuliffe* (1995) 183 CLR 108, 113–4; *Miller* (2016) 259 CLR 380, 388 [4].

agreed to commit a crime;³⁹ (ii) one or more of the parties to the agreement, in accordance with that agreement, performed all of the acts necessary for the commission of the crime;⁴⁰ (iii) the accused participated in the joint enterprise;⁴¹ and (iv) at the time of entering the agreement, the accused had the requisite mental state for the relevant offence⁴² (where this is so, the state of mind ‘continues unless the accused withdraws from the agreement’⁴³).

In *Osland*, McHugh J seemed additionally to require the Crown to prove that the accused was present when the actual perpetrator performed the relevant act(s).⁴⁴ But it does not appear that there is such a requirement. In *Likiardopoulos*, the High Court held, at the very least, that it is unnecessary for a JCE passive participant to have been present throughout the *whole* of a fatal assault.⁴⁵ There is, moreover, a significant amount of intermediate appellate court authority for the proposition that such a participant need not have been present at all while the conduct was being performed.⁴⁶

Further, since *Osland*⁴⁷ it has been clear that JCE liability is not derivative, but primary. That is, to secure the conviction of an offender on this basis, the Crown need not first prove the actual perpetrator’s guilt of the crime that the parties have agreed to commit. Rather, the actual perpetrator’s acts are attributed to the other parties to the agreement.⁴⁸ Provided that such parties individually had the requisite mens rea, and can successfully raise no defence, they will be guilty of the relevant offence.⁴⁹

Third, as has already been noted, a person can be convicted of an offence that: (i) he/she did not actually perpetrate; and (ii) was different from that which was the object of a JCE to which he/she was a party. In *Johns v The Queen*, the plurality upheld⁵⁰ Street CJ’s statement in the Court below that

an accessory before the fact bears, as does a principal in the second degree, a criminal liability for an act which was within the contemplation of both himself and the principal in the first degree as an act which might be done in the course of carrying out the primary criminal intention — an act contemplated as a possible incident of the originally planned particular venture.⁵¹

³⁹ *McAuliffe* (1995) 183 CLR 108, 114.

⁴⁰ *Osland* (1998) 197 CLR 316, 342–3 [72] (McHugh J), quoting with approval *R v Lowery* [No 2] [1972] VR 560, 560; *McEwan v The Queen* (2013) 41 VR 330, 337 [32] (*McEwan*’).

⁴¹ *Huynh v The Queen* (2013) 87 ALJR 434, 439 [22], 442 [37]–[38]; *Tangye v The Queen* (1997) 92 A Crim R 545, 556–7.

⁴² *McEwan* (2013) 41 VR 330, 337 [32].

⁴³ *Ibid* 337 [35].

⁴⁴ *Osland* (1998) 197 CLR 316, 342 [72], 343 [73], 344 [75], 345 [78]; cf 350 [93].

⁴⁵ (2012) 247 CLR 265, 274 [21].

⁴⁶ See, eg, *Dickson v The Queen* (2017) 94 NSWLR 476, 489–90 [47]; *Youkhana v The Queen* (2015) 249 A Crim R 424, 427 [13]–[15]; *Sever v The Queen* [2010] NSWCCA 135 (25 June 2010) 36 [146].

⁴⁷ (1998) 197 CLR 316.

⁴⁸ *Ibid* 350 [93] (McHugh J).

⁴⁹ *Ibid*.

⁵⁰ (1980) 143 CLR 108, 130–1 (*Johns*’).

⁵¹ *R v Johns* [1978] 1 NSWLR 282, 290.

That remains the law — although Street CJ’s references to accessory liability should now be ignored. In both *McAuliffe*⁵² and *Miller*,⁵³ the High Court substituted for such language the language of JCE: a person will be liable for a crime other than that which he/she and his/her co-offenders agreed to if the participants jointly contemplated that crime as a possible incident of the execution of their agreement. But, whatever is this principle’s precise content⁵⁴ — and the better view is that, despite referring to joint contemplation, *Johns* in fact required the Crown to prove that the passive participant foresaw the further offence and assented to its commission if the occasion arose⁵⁵ — it is seemingly never used.⁵⁶ This is because of the Court’s acceptance in *McAuliffe*⁵⁷ that the party who does not assent to the further crime’s commission will still be liable for it if he/she individually foresaw that another participant in the enterprise might commit it — and, despite that foresight, continued to participate in the venture (EJCE liability). In cases involving the commission of a crime other than that which was the object of a JCE, it makes no sense for the Crown to rely on the *Johns* joint foresight/assent principle instead of the less stringent *McAuliffe* individual foresight standard.

B *The Doctrinal Basis of Accessorial Liability, JCE and EJCE*

1 *Accessorial Liability and JCE*

In England, it has long been debated whether accessory liability and EJCE have a different doctrinal basis.⁵⁸ I believe that they must; but before I explain this view, it is necessary to compare accessory liability with ‘plain vanilla’ JCE. Properly viewed, are accessory liability and JCE separate forms of liability, and do they have a different rationale from one another?

Certainly, there are differences between accessory liability and JCE. First, although the Crown will usually be able to proceed against an offender, alternatively, as an accessory and on the basis of JCE, there are some cases where, despite there being no agreement between the offenders — and therefore no JCE liability — accessory liability will be established.⁵⁹ An example is *Attorney-General’s Reference*,⁶⁰ where the English Court of Appeal held that a defendant who

⁵² *McAuliffe* (1995) 183 CLR 108, 115.

⁵³ *Miller* (2016) 259 CLR 380, 388 [4].

⁵⁴ Compare *Jogee* [2017] AC 387, 407–8 [43]–[44] with *Miller* (2016) 259 CLR 380, 393 [21].

⁵⁵ *Johns* (1980) 143 CLR 108, 131–2. See also Editorial, ‘*McAuliffe* Revisited’ (2004) 28(1) *Criminal Law Journal* 5, 6; Stephen J Odgers, ‘Criminal Cases in the High Court of Australia: *McAuliffe* and *McAuliffe*’ (1996) 20(1) *Criminal Law Journal* 43, 45.

⁵⁶ As foreseen by Stephen Gray, ‘I Didn’t Know, I Wasn’t There: Common Purpose and the Liability of Accessories to Crime’ (1999) 23(3) *Criminal Law Journal* 201, 205, 213.

⁵⁷ *McAuliffe* (1995) 183 CLR 108, 117–8.

⁵⁸ Compare, for example, John C Smith, ‘Criminal Liability of Accessories: Law and Law Reform’ (1997) 113 (July) *Law Quarterly Review* 453, 461–2 with Simester, ‘The Mental Element in Complicity’, above n 13, 592–5.

⁵⁹ Accordingly, in a case where the alleged accessory is claimed to have intentionally assisted the principal, the Crown need not prove that the principal knew of the assistance: *R v Lam* (2008) 185 A Crim R 453, 477 [89] citing with approval *R v Lam* (2005) 159 A Crim R 448, 472 [76]. The position is different, however, concerning encouragement: *R v Stringer* [2012] QB 160, 171–2 [49].

⁶⁰ [1975] QB 773.

surreptitiously laced another person's drinks with spirits could be convicted as an accessory to that person's resulting offence of driving with a blood alcohol concentration above the prescribed limit. 'Aiding and abetting almost inevitably involves a situation in which the secondary party and the main offender are together at some stage discussing the plans which they may be making in respect of the alleged offence,' Lord Widgery CJ observed, but it is unnecessary that there be such a 'meeting of minds'.⁶¹

Are there cases where JCE liability arises, but accessorial liability does not? Odgers appears to answer this question in the negative.⁶²

Jogee ... demonstrated that joint enterprise liability may be seen as simply a subset of [accessorial liability] ... After all, where A has agreed with B that crime X should be committed, A has plainly intended to encourage B to commit that crime.

Simester, however, has recently offered a different view. While conceding that 'the practical gap between "plain vanilla" joint enterprises and abetment is small,' he points to the case where, rather than there being only offenders A and B, a person has joined a 'large group whose plans are already formed and where [the actual perpetrator] ... is unaware of ... [that person's] actions'.⁶³ Here, the person might have given the actual perpetrator no assistance. Certainly, there has been no encouragement.⁶⁴ But the problem with this example seems to be that the person has not agreed with the actual perpetrator to commit the crime. As in *Attorney-General's Reference*, the actual perpetrator was oblivious to the person's conduct. Moreover, to anticipate the discussion in the next paragraph, that the person has provided no assistance or encouragement to the actual perpetrator seems to mean that he/she has not *participated* in any JCE with him/her.

Second, it has been said that, whereas with accessorial liability the Crown must prove assistance, encouragement or procuring, in the case of JCE it must prove that the accused 'participated in the criminal act of another'.⁶⁵ In reality, however, this is not a way in which accessorial and JCE liability differ from one another. It is true that, as noted above, the Crown must prove that the accused participated in the JCE. But J C Smith was surely right to observe that the only way in which a person can participate in another person's crime is by assisting or encouraging him/her.⁶⁶ Indeed, consistently with this view, the NSW Court of Criminal Appeal ('NSWCCA') in *Tangye v The Queen* insisted that:

A person participates in [a] joint criminal enterprise either by committing the agreed crime itself or simply by being present ... when the crime is committed, and (with knowledge that the crime is to be or is being committed), by intentionally assisting or encouraging another participant in the joint criminal enterprise to commit that crime.⁶⁷

⁶¹ Ibid 779.

⁶² Odgers, above n 7, 58.

⁶³ Simester, above n 10, 77.

⁶⁴ See above n 59.

⁶⁵ *R v Stewart* [1995] 3 All ER 159, 165 (Hobhouse LJ) ('*Stewart*').

⁶⁶ Smith, above n 58, 462.

⁶⁷ (1997) 92 A Crim R 545, 557.

Of course, this passage suggests that another way in which JCE and accessorial liability can be differentiated from one another is that presence is required for the former. However, as we have seen, this is seemingly not so. Nevertheless, as also noted above, there is one more thing distinguishing these two types of liability: whereas the accessory's liability is derivative, JCE offenders are principals in the first degree.

Do the differences between JCE and accessorial liability demonstrate that they have a different doctrinal basis from one another and are supported by different rationales? I do not think so.

To deal with the second difference first, conspicuously absent from McHugh J's analysis in *Osland* is any principled justification for the primary nature of JCE. In other words, it is not as though anything in the nature of the doctrine compelled the High Court to hold that the actual perpetrator's acts are attributed to those who agreed with him/her to commit the relevant offence. Instead, the law's fictitious⁶⁸ insistence that the actual perpetrator's acts count as those of all members of the relevant enterprise appears to be based purely on pragmatic considerations. If the liability of passive JCE participants depended on that of the actual perpetrator, the door would be opened to 'scandalously unmeritorious acquittals'.⁶⁹ To use one example, the offender who agreed with a mentally ill person to commit a crime could not be held liable for that crime if the co-offender actually perpetrated it at a time when he/she was within the *M'Naghten* rules.⁷⁰ It is better for the law to state that:

Once the parties have agreed to do the acts which constitute the actus reus of the offence ... the criminal liability of each ... depend[s] upon the existence or non-existence of mens rea or upon their having a lawful justification for the acts, not upon the criminal liability of the actual perpetrator.⁷¹

The same concern underlies Lord Hobhouse's claim that JCE is a 'different principle'⁷² from accessorial liability. Writing extra-judicially, his Lordship said:

[I]f the state of mind of D is criminally more serious than that of A, the question arises whether D should be convicted of the crime corresponding to his own state of mind or should only be convicted of the lesser crime corresponding to A's state of mind. This forces the law to choose whether to recognize the agency principle or to ... convict only upon the complicity principle as an accessory.⁷³

Lord Hobhouse denies that there is any 'artificiality' in the law's attribution of another's acts to the person who, by agreeing that such acts be done, explicitly or implicitly authorised their performance.⁷⁴ But, as I have just argued, to treat a person as though he/she performed conduct that he/she has in fact not performed is

⁶⁸ Sir John Smith, 'Joint Enterprise and Secondary Liability' (1999) 50(2) *Northern Ireland Legal Quarterly* 153, 157–8.

⁶⁹ David Lanham, 'Primary and Derivative Criminal Liability: An Australian Perspective' [2000] (September) *Criminal Law Review* 707, 707.

⁷⁰ *Matusевич v The Queen* (1977) 137 CLR 633.

⁷¹ *Osland* (1998) 197 CLR 316, 350 [93].

⁷² *Stewart* [1995] 3 All ER 159, 165.

⁷³ Lord Hobhouse, 'Agency and the Criminal Law' in Francis D Rose (ed) *Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds* (LLP, 2000) 39, 47.

⁷⁴ *Ibid* 46.

obviously both artificial and fictitious.⁷⁵ What has really happened is that this offender has intentionally encouraged or assisted the actual perpetrator to commit a crime. In short, it might be convenient to hold that JCE liability is primary; but this should not obscure the fact that we hold the JCE offender liable for the same reasons as we do the accessory.⁷⁶

Unfortunately, in *IL*⁷⁷ only Bell and Nettle JJ were willing squarely to acknowledge that, as with accessorial liability, '[t]he object of the [JCE] doctrine is to fix with complicity for the crime committed by the perpetrator those persons who encouraged, aided or assisted him.'⁷⁸

In *IL*, the appellant participated in a JCE to manufacture a large commercial quantity of methylamphetamine. During this enterprise, she and her co-offender boiled mixtures of raw methylamphetamine and an inflammable solvent, acetone, for the purpose of extracting impurities from the drug.⁷⁹ The co-offender was killed as a result of a fire in the suburban bathroom in which this evaporation process was being conducted. The Crown identified the act causing death as the lighting of a ring burner in the bathroom.⁸⁰ But it could not prove that the appellant performed that act.⁸¹ Nevertheless, it charged IL not only with the drugs offence, but also with murder or, alternatively, manslaughter.

The Crown's murder case was based on JCE and the constructive murder rule. It followed from *Osland*, it contended, that the actual perpetrator's act of lighting the ring burner was attributed to IL. Accordingly, so it was said, her act caused the death of another person (her co-offender) and she could be convicted of murder because such an act was performed during her or an accomplice's commission of an offence punishable by 25 years' imprisonment (the drugs offence).⁸²

The NSWCCA unanimously accepted that a jury would be entitled to convict IL of murder,⁸³ but a High Court majority disagreed. This was not because it was persuaded by the appellant's arguments, which essentially amounted to an attack on the constructive murder rule (it was argued that, for IL to be guilty of murder, the Crown had to prove that she foresaw the possibility that death would result from the

⁷⁵ Three High Court Justices have recently denied that 'the notion of attribution of an act ... involve[s] a fiction that the act was undertaken by the [passive participant(s)]: *IL v The Queen* (2017) 91 ALJR 764, 776 [36] (Kiefel CJ, Keane and Edelman JJ) ('*IL*'). Rather, the act is merely treated for legal purposes as having been performed by the passive participant(s): at 773 [26], 776 [36]. This distinction is excessively subtle. Because the law proceeds as though the passive participant performed an act (in *IL*, lighting a ring burner) that he/she did not perform, it does uphold a fiction.

⁷⁶ David Ormerod and Karl Laird, *Smith and Hogan's Criminal Law* (Oxford University Press, 14th ed, 2015) 260; *Jogee* [2017] AC 387, 415 [76]; *R v Mendez* [2011] QB 876, 882 [17].

⁷⁷ (2017) 91 ALJR 764.

⁷⁸ *Ibid* 783 [73], quoting *Johns* (1980) 143 CLR 108, 125.

⁷⁹ *IL* (2017) 91 ALJR 764, 778 [50].

⁸⁰ *Ibid* 779 [52].

⁸¹ *Ibid*.

⁸² *Ibid* 768 [4].

⁸³ *IL v The Queen* [2016] NSWCCA 51 (8 April 2016).

drug manufacturing enterprise).⁸⁴ Rather, during an extraordinary hearing, four of their Honours⁸⁵ surprised both parties by advancing their own arguments concerning why the prosecution could not succeed.

It is submitted that the argument that ultimately appealed to Bell and Nettle JJ is the correct one. As noted above, their Honours emphasised JCE's object. That object is not to facilitate prosecutions such as that attempted in *IL* where, because the actual perpetrator killed only himself, there was nothing even resembling a murder in which *IL* was complicit. It is to allow for the conviction of those who intentionally assist or encourage another person to commit a crime.⁸⁶ Certainly, their Honours implied, there are unusual cases such as *Osland* where the actual perpetrator has committed no *crime*, but where JCE liability nevertheless arises.⁸⁷ But in those cases the perpetrator *has* performed the actus reus of an offence.⁸⁸ As I have argued, because the passive participant (a) has agreed with him/her to do so; (b) possesses the requisite mens rea; and (c) has no defence available to him/her, it would be unjust if he/she were acquitted.

The other majority Justices also appear to have been concerned about the prospect of *IL* being convicted of murder even though she had merely participated in an act of *self-killing*. But the reasoning that their Honours used to avoid such an outcome is dubious and contrived. Chief Justice Kiefel, Keane and Edelman JJ considered that *Osland* required them to hold that the act of lighting the ring burner was, for legal purposes, *IL's* act.⁸⁹ But their Honours held that '[t]he offences of murder and manslaughter in s 18 of the *Crimes Act* 1900 (NSW) require that one person kill another person.'⁹⁰ Because *IL* was a self-killer's accomplice, their Honours continued, s 18 was not engaged.⁹¹ As Gageler and Gordon JJ pointed out in their respective dissenting judgments,⁹² one problem with this reasoning is that, if it is accepted that the act causing death is to be treated as *IL's*, there was a killing of another. *IL's* act had caused the deceased's death. Accordingly, it would surely have been better for Kiefel CJ, Keane and Edelman JJ to accept, as Bell and Nettle JJ essentially did, that no JCE liability for either murder or manslaughter could arise here, because — unlike Mrs *Osland* — *IL* had not participated in the actus reus of those offences. In so doing, their Honours would have explicitly acknowledged what they tend implicitly to recognise through their deployment of suspect reasoning to ensure that *IL's* appeal succeeded. As with accessorial liability, JCE's proper function is merely to allow for the conviction of those who intentionally assist or

⁸⁴ For an analysis of *IL's* arguments, see Andrew Dyer, '*IL v The Queen*: Joint Criminal Enterprise and the Constructive Murder Rule: Is This Where Their "Logic Leads You"?' (2017) 39(2) *Sydney Law Review* 245.

⁸⁵ Kiefel CJ, Bell, Nettle and Edelman JJ: Transcript of Proceedings, *IL v The Queen* [2017] HCA Trans 65 (4 April 2017).

⁸⁶ *IL* (2017) 91 ALJR 764, 782 [66].

⁸⁷ *Ibid* 783–4 [74].

⁸⁸ *Ibid* 781–5 [65]–[77].

⁸⁹ *Ibid* 768 [2], 773 [26], 774 [29].

⁹⁰ *Ibid* 768 [1].

⁹¹ *Ibid* 773 [23], [25].

⁹² *Ibid* 794 [121] (Gageler J), 798 [154] (Gordon J).

encourage another to (a) commit a crime, or (in unusual cases such as *Osland*) (b) perform an actus reus.⁹³

We must now deal with the other difference between JCE and accessory liability; namely, that agreement is not co-extensive with intentional encouragement, assistance or procuring. Certainly, a small number of offenders can be prosecuted as accessories, but not on the basis of JCE. But this does not mean that these two forms of liability have a different rationale or doctrinal basis from one another. To repeat: viewed properly, JCE and accessory liability's shared aim is to convict those who are complicit in another person's crime (or, failing that, actus reus). Accessory liability merely appears to achieve this objective more perfectly than does JCE.

2 Accessorial Liability and EJCE

By contrast, for so long as it remains part of the law, EJCE liability has a different doctrinal basis from accessory liability. An indication that this is so is that both the actus reus and mens rea requirements differ significantly as between these two types of liability.⁹⁴ Concerning the actus reus, the EJCE offender need not provide any assistance or encouragement to the actual perpetrator to commit the further offence. It is enough that he/she agreed with that person to commit the foundational crime. Concerning the mens rea, there is no need for the passive participant to intend that the further crime be committed if the occasion arises.⁹⁵ As stated above, it is enough that he/she foresaw that offence's commission as a possible⁹⁶ incident of the joint criminal venture. So, while *Smith and Hogan* denies that there are doctrinal (or normative) differences between PAL (and thus EJCE) and accessory principles, it also states: 'Any doctrinal differences that now seem to separate joint enterprise from basic secondary liability are the result of judicial development of the former.'⁹⁷ I agree; except I would omit the word 'Any' from the above quotation and substitute 'The', and I would also delete the words 'seem to'. I do not think that it can be denied that there *are* doctrinal differences between EJCE and accessory liability. But that is a different thing entirely from supporting the jurisprudential developments that mandate this conclusion.

If a person can be convicted of a crime even though he/she provided no intentional assistance or encouragement to the actual perpetrator, it must be

⁹³ The Australian courts have not yet determined whether liability arises where a person is merely an accessory to an actus reus: *Likiardopoulos* (2012) 247 CLR 265, 276–7 [27]. But it is hard to believe that, if ever the matter arises for decision, they will prevent the prosecution of an accused who intentionally assisted/procured an actus reus, but did not agree with the actual perpetrator that it be performed. Certainly, the English courts have accepted that a procurer of an actus reus can be convicted: *R v Millward* [1994] Crim LR 527; *R v Wheelhouse* [1994] Crim LR 756; *R v Pickford* [1995] QB 203, 213; *DPP v K* [1997] 1 Cr App R 36, 44–5. This development has surely been prompted by the same concern as underlay *Osland*: the desire to ensure that culpable passive participants are convicted even though the actual perpetrator, for some reason special to him/herself, is acquitted: see, eg, *DPP v K* [1997] 1 Cr App R 36, 45.

⁹⁴ Simester, 'The Mental Element in Complicity', above n 13, 593–5.

⁹⁵ Cf *Jogee* [2017] AC 387, 418 [92]–[95].

⁹⁶ The *Miller* plurality held that the accused must foresee more than a 'fanciful'/'negligible' possibility of the further crime's commission: (2016) 259 CLR 380, 401–2 [43]–[44].

⁹⁷ Ormerod and Laird, above n 76, 260.

explained why this is. In *Miller*, Keane J provided an explanation that seems clearly wrong.⁹⁸ I have referred above to Lord Hobhouse's view that, once two or more persons agree to commit a crime, the actual perpetrator acts with the other participants' authorisation and as their agent. It is for this reason that, according to this theory, his/her acts are the acts of all parties to the agreement. In *Miller*, Keane J applied a similar theory to EJCE:

Where parties commit to a joint criminal enterprise, each participant becomes, by reason of that commitment, both the principal and the agent of the other participants: for the purposes of that enterprise they are partners in crime. Each participant also necessarily authorises those acts which he or she foresees as possible incidents of carrying out the enterprise in which he or she has agreed, and continues, to participate.⁹⁹

Later in his judgment, his Honour returned to this theme:

[W]here a joint criminal enterprise is in the nature of a business activity on the part of the participants, as was the case in *Gillard* ... it is not sound policy to minimise the criminal responsibility of those who organise crime, and in so doing create the foreseen risk of an incidental crime, merely because they are able to engage others as their agents for that purpose.¹⁰⁰

A number of things can be said about this reasoning. First, as suggested above, the agency justification is problematic enough concerning JCE; it is singularly inapt to explain EJCE liability. *Smith and Hogan's* criticisms¹⁰¹ of Lord Hobhouse's reasoning are cogent. Certainly, the contract killer can, without any artificiality, be described as the agent of those who hire him/her. But it is inaccurate to describe in such terms the dominant individual who is driven to the scene of a murder by a weak-willed and unintelligent person, who then waits in the car while the dominant offender perpetrates the killing.¹⁰² Where the weak-willed offender did not even agree with the actual perpetrator that murder be committed, but merely foresaw that crime as a possible incident of the armed robbery that they had agreed to commit,¹⁰³ it is surely an even greater abuse of language to say that, when the actual perpetrator did proceed to commit the further offence, he/she was acting as the passive participant's agent.

Second, it follows from what I have just said that the appellant in *Gillard* certainly did not authorise the actual perpetrator to commit murder, or 'engage [him] ... as [his] agent ... for that purpose'.¹⁰⁴ It is strange that Keane J should use that case to exemplify his point.

Third, and relatedly, Keane J's reasoning *does* not come to grips with the seemingly unanimous disfavour with which commentators have regarded Sir Robin Cooke's well-known contention in *Chan Wing-Siu* that the

⁹⁸ Cf Justice Margaret Beazley, 'Extended Joint Criminal Enterprise in the Wake of *Jogee* and *Miller*' (Speech delivered at the NSW Office of the DPP, 7 March 2017) 24 [91]; but see also 12–13 [45]–[46].

⁹⁹ (2016) 259 CLR 380, 427 [139].

¹⁰⁰ *Ibid* 429 [147].

¹⁰¹ Ormerod and Laird, above n 76, 260.

¹⁰² Those were the facts of *Gillard* (2003) 219 CLR 1.

¹⁰³ In *Gillard*, it was held to be open to the jury so to find: *ibid* 11–12 [19], 14 [25] (Gleeson CJ and Callinan J), 30–1 [85]–[87] (Kirby J).

¹⁰⁴ (2016) 259 CLR 380, 429 [147].

principle whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend ... turns on contemplation or, putting the same idea in other words, authorisation, which may be express but is more usually implied.¹⁰⁵

As J C Smith said as long ago as 1990, “contemplation” is not the same thing as “authorisation”. One may contemplate that something will be done by another without authorising him to do it.¹⁰⁶ Justice Keane’s denial that Sir Robin ‘equate[d] contemplation with authorisation’¹⁰⁷ is baffling, as is his Honour’s insistence that his Lordship was really arguing that ‘participation in the commission of a crime, with foresight of the risk of the incidental crime, establishes authorisation of the incidental crime’.¹⁰⁸ Is Keane J saying that the law, by a fiction, deems the EJCE offender to have authorised what in fact he/she has not authorised?¹⁰⁹ Perhaps so, because his Honour proceeds to hold that such a person can be held to have *intended* the killing that he/she has foreseen;¹¹⁰ and such an approach is surely entirely fictitious.¹¹¹

If the actual perpetrator cannot properly be regarded as the EJCE offender’s agent, or as acting with his/her authority, how else might EJCE be justified? Simester has advanced the most influential such justification.¹¹² For him, the person who, for example, sells a jemmy foreseeing that the buyer might use it to commit a burglary should not be convicted of burglary if it results.¹¹³ Rather, to be liable as an accessory, one should be proved to have known when providing the relevant assistance or encouragement, of the principal’s intention to commit the particular crime. While the jemmy-seller deserves ‘moral reproof’,¹¹⁴ to criminalise his/her conduct would be to interfere impermissibly with citizens’ liberty to pursue their own activities.¹¹⁵ But, Simester thinks, the same considerations are inapplicable when a JCE participant is held liable for a crime that he/she foresaw might result from the enterprise. Such criminalisation does not cause individuals to ‘sacrifice valuable ways of life’;¹¹⁶ it simply requires them not to become involved in criminal enterprises. Moreover, such offenders are sufficiently culpable to be convicted of murder where they have foreseen that crime’s possible commission and it has resulted.¹¹⁷ We have seen that Simester regards as culpable the person who provides assistance to a principal — through otherwise innocent conduct such as selling a jemmy — while suspecting that he/she intends to commit an offence. The same is of course true of the individual who continues with a criminal enterprise despite his/her

¹⁰⁵ [1985] AC 168, 175.

¹⁰⁶ J C Smith, ‘*R v Wakely*’ [1990] (February) *Criminal Law Review* 119, 121. See also, eg, K J M Smith, *A Modern Treatise on the Law of Criminal Complicity* (Clarendon Press, 1991) 220; Simon Bronitt and Bernadette McSherry, *Principles of Criminal Law* (Lawbook Co, 4th ed, 2017) 441 [7.135].

¹⁰⁷ (2016) 259 CLR 380, 428 [142].

¹⁰⁸ *Ibid.*

¹⁰⁹ Odgers, above n 10, 244.

¹¹⁰ (2016) 259 CLR 380, 428 [143].

¹¹¹ Cf Gageler J’s reasoning at *ibid* 419 [110].

¹¹² *Clayton* (2006) 81 ALJR 439, 444 [20]; *Miller* (2016) 259 CLR 380, 398 [34].

¹¹³ Simester, ‘The Mental Element in Complicity’, above n 13, 589–91.

¹¹⁴ *Ibid* 591.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid* 600.

¹¹⁷ *Ibid* 598–601.

suspicion that a co-offender will commit murder. But, for Simester, it is not this latter person's foresight that makes him/her blameworthy enough justifiably to be labelled a murderer. Indeed, he implies elsewhere that such a person exhibits enough culpability to be convicted of murder despite 'only'¹¹⁸ foreseeing the possibility of its commission. Rather, it is the offender's entry into a criminal agreement that makes the difference:

Through entering into a joint enterprise, S changes her normative position. She becomes, by her deliberate choice, a participant in a group action to commit a crime. Moreover, her new status has moral significance: she associates herself with the conduct of the other members of the group in a way that the mere aider and abettor, who remains an independent character throughout the episode, does not.¹¹⁹

That is, for Simester, what makes it fair to hold the EJCE offender liable for murder even though he/she has merely foreseen the possibility of that offence's commission, is that he/she has joined a group 'that has set itself against the law and order of society at large'.¹²⁰ By agreeing to commit a burglary, for instance, the person has 'passed over [a] ... moral threshold'¹²¹ and can be held liable for any consequences — including any intentional killings — that he/she foresaw as possible incidents of the enterprise. The question, however, is whether Simester is right. If not, the justification for EJCE that the High Court has twice endorsed disappears; and there is seemingly nothing to replace it.

III Is the EJCE Offender Sufficiently Culpable?

Before discussing the merits of Simester's theory, I must deal with one commonly deployed, but, by itself, inadequate, argument for the view that the EJCE offender is insufficiently culpable to be convicted of murder. In *Miller*, Gageler J referred to two related criticisms of EJCE. '[M]aking the criminal liability of the secondary party turn on foresight when the criminal liability of a principal party turns on intention,' his Honour observed, 'creates an anomaly'.¹²² In turn, this anomaly 'highlights the disconnection between criminal liability and moral culpability'.¹²³ McNamara makes essentially the same point,¹²⁴ but notes that EJCE's mental element is also inconsistent with the mens rea for both JCE and accessory liability.¹²⁵ According to this argument, then, to demonstrate that the EJCE offender is not culpable enough justifiably to be convicted of murder is as easy as showing that: (i) a principal can be convicted of murder only if the Crown can prove that he/she either *intended* to kill or cause grievous bodily harm¹²⁶ or foresaw the

¹¹⁸ Simester et al, *Simester and Sullivan's Criminal Law*, above n 13, 249.

¹¹⁹ Simester, 'The Mental Element in Complicity', above n 13, 598–9.

¹²⁰ *Ibid* 600.

¹²¹ Krebs, above n 26, 598.

¹²² *Miller* (2016) 259 CLR 380, 419 [111].

¹²³ *Ibid* 419 [112].

¹²⁴ Luke McNamara, 'A Judicial Contribution to Over-Criminalisation?: Extended Joint Criminal Enterprise Liability for Murder' (2014) 38(2) *Criminal Law Journal* 104, 111.

¹²⁵ *Ibid* 113.

¹²⁶ *Crimes Act 1900* (NSW) s 18(1)(a); *R v Crabbe* (1985) 156 CLR 464, 467–8 ('*Crabbe*').

probability that his/her conduct would result in death (in NSW)¹²⁷ or death or grievous bodily harm (in SA)¹²⁸; and (ii) accessorial or JCE liability only attaches if the Crown can prove that the accused, respectively, *intentionally* assisted or encouraged the principal, or *agreed* to commit the crime.

The first problem here is that a principal offender's murder liability does not always 'turn on [proof of] intention' or the high degree of recklessness just mentioned. The constructive murder rule's continued existence in NSW and SA¹²⁹ is fatal to such a claim. Accordingly, once we acknowledge that a person can be convicted of murder if it is proved that he/she killed someone, however unintentionally, during (etc) his/her commission of a serious offence,¹³⁰ we can no longer plausibly contend that the EJCE offender is subject to an anomalously low *mens rea* standard when compared with those convicted of murder as principals.

Second, and more importantly, this reasoning overlooks Simester's change of normative position justification for EJCE. As stated above, Simester's point is that the EJCE offender is culpable enough to be convicted of murder not because of, but despite, his/her mere foresight of the possibility of the further crime. Simply to compare the foresight of probability threshold for reckless murder — and the intention/agreement requirements for accessorial liability and JCE — with the lower foresight of possibility EJCE standard, is to miss that point.¹³¹ What instead must be dealt with is Simester's claim — accepted twice by a High Court majority — that the EJCE offender's agreement with another/others to commit the foundational offence is of crucial relevance to his/her culpability regarding a foreseen death that results from that enterprise. Only if that claim fails can we use any anomalies that exist in the law of murder to support a contention that the *McAuliffe* principle catches those who lack the requisite culpability.

In my view, Simester's claim does fail. To explain this view, I will consider the constructive murder rule.¹³²

¹²⁷ *Royall v The Queen* (1991) 172 CLR 378, 395 (Mason CJ), 405 (Brennan J), 415–7 (Deane and Dawson JJ), 430–1 (Toohey and Gaudron JJ), 455 (McHugh J).

¹²⁸ *Crabbe* (1985) 156 CLR 464, 468–9.

¹²⁹ *Crimes Act 1900* (NSW) s 18(1)(a); *Criminal Law Consolidation Act 1935* (SA) s 12A.

¹³⁰ For a list of qualifying offences in NSW, see New South Wales Law Reform Commission, *Complicity*, Report No 129 (2010) app C. There are also many qualifying offences in SA — although, there, the act causing death must additionally have been an intentional act of violence: *Criminal Law Consolidation Act 1935* (SA) s 12A.

¹³¹ McNamara does note that the *Clayton* majority (endorsing Simester) said that, whereas 'liability as an aider and abettor is grounded in the secondary party's contribution to another's crime ... in joint enterprise cases, the wrong lies in the mutual embarkation on a crime': (2006) 81 ALJR 439, 444 [20]. But his response is simply that, concerning EJCE, '[t]he crime mutually embarked upon was a different lesser crime': McNamara, above n 124, 114. Simester does not argue, however, that the EJCE offender has embarked upon the further crime. As noted above, he instead argues that such an offender is blameworthy enough to be convicted of murder because of his/her embarkation on the *foundational offence* with foresight of that further crime.

¹³² Commentators have noted the resemblance between EJCE and the constructive murder rule: see, eg, Sanford H Kadish, 'Reckless Complicity' (1997) 87(2) *Journal of Criminal Law and Criminology* 369, 376.

Interestingly, Binder has sought to justify this rule with reasoning that resembles Simester's concerning EJCE.¹³³ The State may, Binder thinks, hold a person liable for murder even though he/she did not foresee that the relevant conduct might result in death, if two conditions are satisfied. First, the person's conduct must have created a foreseeable risk of death.¹³⁴ Second, the offender must have engaged in this objectively dangerous conduct for a felonious purpose that is independent of injury to the deceased.¹³⁵ In other words, consistently with Simester's argument concerning EJCE, a lower mens rea threshold is said to be justified for constructive murder, because the offender's embarkation on a foundational offence such as robbery has 'changed the normative meaning' of the resulting homicide, 'aggravat[ing] the wrong of causing harm negligently'.¹³⁶

One problem with the change of normative position reasoning concerns the EJCE accused who has agreed to commit a relatively trivial foundational offence, such as larceny, with foresight that a hot-tempered co-offender might commit murder during the enterprise.¹³⁷ Has there really been a change of normative position here, justifying the imposition of murder liability on the person if his/her co-offender proceeds to commit that offence? It is immaterial that it is rare for a person to be convicted of murder because of EJCE where the foundational offence is not particularly serious. What is relevant is that, for Simester, a person's normative position changes as soon as he/she agrees to commit a crime, however trivial it is. What is also relevant is that the position is different concerning the constructive murder rule. We have seen that Binder thinks that it is only an independent *felonious* purpose that changes the normative meaning of a negligent killing. Similarly, in SA and NSW, it is only when an unintentional killing has occurred during (etc) the commission of a crime punishable by, respectively, 10 and 25 years' imprisonment,¹³⁸ that that killing is, or can be,¹³⁹ murder. It is unclear why the constructive murderer must engage in more serious criminality than the EJCE offender before his/her normative position changes.

Another problem concerns the type of offender contemplated by Lanham.¹⁴⁰ Lanham's hypothetical offender knows and approves of B's plan to commit an armed robbery. He/she also realises that B might commit murder during the robbery. He/she nevertheless assists B by, without B's knowledge, 'causing a bomb scare which occupies the attention of a large number of local police officers'.¹⁴¹ B does commit murder during the armed robbery. Is the offender who has assisted him/her really less culpable regarding the relevant killing than is the party to an agreement to commit theft who continues with such an enterprise despite foreseeing murder?

¹³³ Guyora Binder, *Felony Murder* (Stanford University Press, 2012) chs 1–4.

¹³⁴ *Ibid* 9.

¹³⁵ *Ibid*.

¹³⁶ Binder, above n 25, 1036.

¹³⁷ Robert Hayes and F L Feld, 'Is the Test for Extended Common Purpose Over-Extended?' (2009) 4(2) *University of New England Law Journal* 17, 17–18, 20–1.

¹³⁸ *Criminal Law Consolidation Act 1935* (SA) s 12A (other than abortion); *Crimes Act 1900* (NSW) s 18(1)(a).

¹³⁹ See above n 130.

¹⁴⁰ David Lanham, 'Johns v The Queen' (1980) 12(3) *Melbourne University Law Review* 425, 426.

¹⁴¹ *Ibid*.

Because there has been no agreement between the two offenders to commit armed robbery, Simester would say ‘yes’. But this does not seem right.¹⁴²

A final point is this. We have seen that the constructive murderer crosses the moral threshold at a different point from where the EJCE murderer crosses it. He/she must commit a serious offence before he/she can be held liable for an unintended killing; it is enough that the EJCE offender agrees to do something criminal. But this is not the only relevant difference between the constructive murder rule and EJCE. It is also noteworthy that, concerning the former, Binder contends that the offender can justifiably be held liable for killings that were merely reasonably foreseeable. This can be contrasted with Simester’s insistence that a JCE participant can only be convicted of murder when he/she has actually foreseen its possible commission.¹⁴³ This is puzzling. Why does a person’s embarkation on a crime sometimes mean that he/she is culpable enough only to be held liable for foreseen consequences, but on other occasions mean that he/she is sufficiently blameworthy to be held liable for foreseeable consequences?

Consistently with Ashworth’s position, ‘[n]o good reason’¹⁴⁴ has been given to support the view that individuals should be held liable for murder where a killing is the unintended consequence of their intentional or knowing criminal conduct. Indeed, this becomes apparent when we consider Binder’s and Simester’s reasons for supporting the rules that they do. Binder simply argues that the constructive murderer’s bad motives are what counts.¹⁴⁵ Such a person imposes a foreseeable risk of death for a far from worthwhile end.¹⁴⁶ But if, for example, the racially-motivated offender who kills unintentionally, is to be convicted of manslaughter, why do other malign motives ‘change the normative meaning’¹⁴⁷ of an offender’s conduct sufficiently so as to justify his/her being labelled a murderer? Simester, by contrast, focuses more on the dangerousness of criminal groups.¹⁴⁸ ‘Criminal associations’, he says,

tend to encourage and escalate criminality. They present a threat to public safety that ordinary criminal prohibitions, addressed to individual actors, do not entirely address. ... A group is a form of society, and a group constituted by a joint unlawful enterprise is a form of society that has set itself against the law and order of society at large.¹⁴⁹

This passage is important for two reasons. First, those who form criminal agreements might be more dangerous than those who engage in criminal conduct by themselves; but that is irrelevant to their culpability regarding unintended harms that flow from their wrongdoing. Second, however, concerns about the dangerousness of criminal groups certainly do underlie EJCE (just as concerns about selfish risk-

¹⁴² For similar views, see Krebs, above n 26, 599; Simon Gardner, ‘Case Comment: Joint Enterprise’ (1998) 114 (April) *Law Quarterly Review* 202, 205.

¹⁴³ Simester, ‘The Mental Element in Complicity’, above n 13, 599.

¹⁴⁴ Andrew Ashworth, ‘A Change of Normative Position: Determining the Contours of Culpability in Criminal Law’ (2008) 11(2) *New Criminal Law Review* 232, 255.

¹⁴⁵ Binder, above n 25, 1036.

¹⁴⁶ Binder, above n 133, 9–11.

¹⁴⁷ Binder, above n 25, 1036.

¹⁴⁸ Though similar reasoning does also feature in Binder’s account: Binder, above n 133, 75–7.

¹⁴⁹ Simester, ‘The Mental Element in Complicity’, above n 13, 599–600 (citations omitted).

creation might well explain the constructive murder rule where it exists¹⁵⁰). In this connection, there is, for example, Lord Hutton's recognition in *R v Powell* of 'the need to give effective protection to the public against criminals operating in gangs'.¹⁵¹ Might the change of normative position reasoning really be no more than a rationalisation of the law's response to such policy concerns? The problems identified above indicate that this is so. In other words, it seems that the EJCE murderer's normative position is said to change at a different point from where the constructive murderer's does, simply because that is consistent with what the law actually says. Likewise, the insistence that objective fault regarding the killing is enough for constructive murder, but not for EJCE murder, seems to owe more to an attempt to justify the existing rules than it does to principle. It is true that, both at common law¹⁵² and under many statutory formulations of the constructive murder rule,¹⁵³ even objective fault is unnecessary before a person can be convicted of 'felony murder'. But usually where a person kills in the course or furtherance of committing a serious offence, the conduct causing the death will be objectively dangerous.¹⁵⁴ There is also Stephen J's famous statement in *R v Serne*¹⁵⁵ that felonious conduct *should* have to be 'likely in itself to cause death' before it can found a murder conviction. Certainly, of course, the law says that the EJCE offender must have foreseen the possibility of murder before he/she can be convicted of that offence.

If a person's commitment to a foundational offence is not as relevant as Simester and Binder think it is to his/her culpability regarding a resulting unintentional killing, what follows? The answer is that we are left with anomalously low mens rea standards for those alleged to be guilty of murder on the basis of EJCE and¹⁵⁶/or the constructive murder rule. That is, once we dispense with the change of normative position justification for both EJCE and the constructive murder rule, the argument from anomaly can be used to support the view that persons convicted of murder on either basis are insufficiently culpable to be convicted of that offence.

It is true that there have been some recent statements that all such offenders are sufficiently blameworthy to be convicted of murder. Bindon, for example, argues that an offender such as the appellant in *Ryan v The Queen*,¹⁵⁷ though he/she might neither have intended to kill or inflict grievous bodily harm nor have foreseen any risk of death, possesses the requisite culpability because he/she has 'brought about a situation of critical danger or violence'.¹⁵⁸ But this analysis rather seems to overlook the uproar that followed the House of Lords' ill-advised decision in

¹⁵⁰ See, eg, *R v Jarman* [1946] KB 74, 80.

¹⁵¹ [1999] 1 AC 1, 25 ('*Powell*').

¹⁵² *R v van Beelen* (1973) 4 SASR 353, 403; *R v Ryan* [1966] VR 553, 563–4.

¹⁵³ See, eg, *Crimes Act 1900* (NSW) s 18(1)(a).

¹⁵⁴ See, eg, *Ryan v The Queen* (1967) 121 CLR 205.

¹⁵⁵ (1887) 16 Cox CC 311, 313.

¹⁵⁶ See, eg, *R v Sharah* (1992) 30 NSWLR 292.

¹⁵⁷ (1967) 121 CLR 205.

¹⁵⁸ Prue Bindon, 'The Case for Felony Murder' (2006) 9(2) *Flinders Journal of Law Reform* 149, 180. See also David Crump, 'Reconsidering the Felony Murder Rule in Light of Modern Criticisms: Doesn't the Conclusion Depend upon the Particular Rule at Issue?' (2009) 32(3) *Harvard Journal of Law and Public Policy* 1155, 1165–1170, 1174–5.

DPP v Smith.¹⁵⁹ Was Dixon CJ mistaken in *Parker v The Queen* when he declared *DPP v Smith*'s objective standard to be 'misconceived and wrong'?¹⁶⁰ Bindon would apparently say 'yes'. Indeed, she would seemingly have it that a person is culpable enough to be convicted of murder even if his/her conduct involved no objective danger; a mere act of violence would be enough.¹⁶¹

If we take *Parker* seriously, then so we must the High Court's reasoning in *R v Crabbe*.¹⁶² There it was observed that the person who performs conduct knowing that death or grievous bodily harm will probably result has a state of mind that is 'comparable with' an intention to cause the relevant consequence.¹⁶³ But the Court also held that the same is not true of the person who merely foresees that death or grievous bodily harm *might* flow from his/her actions.¹⁶⁴ Provided that we first accept that an accused's agreement to commit a foundational offence increases his/her culpability concerning a foreseen murder no more than does any other reprehensible motive for creating risk, it follows inexorably from this reasoning that persons caught by the *McAuliffe* principle, too, lack the requisite culpability.

IV How Can *Miller* be Explained?

If *McAuliffe* does not withstand critical scrutiny, why did the *Miller* plurality uphold it? Of course, it might simply be that their Honours, however erroneously, agree strongly with *McAuliffe* and would in no circumstances have overruled it. But a close reading of the plurality's decision, and a consideration both of the social context in which *Miller* was decided and widely-held judicial views about when an ultimate court of appeal may depart from an established common law rule, makes me believe that their Honours refused to abandon *McAuliffe* mainly because there was insufficient public support for such abandonment. Judges will rarely reverse or depart from settled law unless it seems clear that they are acting consistently with community values.¹⁶⁵ This was so in the case of *Jogee*. The same would not have been true in *Miller*.

¹⁵⁹ [1961] AC 290. Concerning this furore, see, eg, Lord Irvine, 'Intention, Recklessness and Moral Blameworthiness: Reflections on the English and Australian Law of Criminal Culpability' (2001) 23(1) *Sydney Law Review* 5, 7–10.

¹⁶⁰ (1963) 111 CLR 610, 633.

¹⁶¹ A further problem with requiring subjective fault, Bindon thinks, is that some who are intuitively murderers — for example, the appellant in *R v Moloney* [1985] AC 905 — cannot be proved actually to have realised that their conduct carried a risk of causing death: Bindon, above n 158, 169. But Bindon's intuitions are not as universal as she thinks. Contrary perhaps to what she implies, Mr Moloney was ultimately not convicted of murder; rather, the House of Lords substituted a manslaughter conviction. On remission, the Court of Appeal ordered his immediate release from custody. He had been imprisoned for 3½ years: Glanville Williams, 'The Mens Rea for Murder: Leave it Alone' (1989) 105 (July) *Law Quarterly Review* 387, 396.

¹⁶² (1985) 156 CLR 464.

¹⁶³ *Ibid* 469.

¹⁶⁴ *Ibid*.

¹⁶⁵ As Chief Justice J J Doyle, observes, two exceptions are probably *Mabo v Queensland [No 2]* (1992) 175 CLR 1 and *Dietrich v The Queen* (1992) 177 CLR 292 ('*Dietrich*'): 'Judicial Law Making — Is Honesty the Best Policy?' (1995) 17 *Adelaide Law Review* 161, 197–9. But both decisions were highly controversial (see, eg, Justice Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2004) 10(4) *Otago Law Review* 493, 510), and since Sir Anthony Mason's retirement as Chief Justice in 1995, the High Court has been far less willing to risk causing such controversy: see, eg,

At this point, I must make it clear what I am, and am not, arguing. I am not seeking to prove that *Miller* would have been decided differently had social conditions been the same in SA and NSW as they were in the UK when *Jogee* was decided. Like any counterfactual, any such claim is insusceptible of formal proof. Neither am I even arguing that, in my opinion, *Miller* would certainly have turned out differently if EJCE had been as publicly controversial as PAL became. While many senior judges have indicated that a court may not override an established common law doctrine unless such action would be accepted by the public,¹⁶⁶ some have also stated that, even if judges are satisfied that the community supports (or would be indifferent to)¹⁶⁷ change, they must proceed cautiously.¹⁶⁸ As Doyle CJ has suggested, it might be better for judges to leave the relevant matter to Parliament if the decision would have ‘unpredictable’ or ‘far reaching’ consequences, or where ‘the subject matter clearly calls for investigations which the Court cannot make’.¹⁶⁹

What I am arguing is that, in my view, the Court probably would have abandoned *McAuliffe* if public opinion had been as hostile to it as UK opinion was to *Chan Wing-Siu*. I base myself not only on the judicial and extra-judicial statements¹⁷⁰ just noted, but also on similar remarks made by one member of the *Miller* plurality, Bell J, in a lecture that her Honour delivered about ten months before that case was decided. Crucially, Bell J also considered the *McAuliffe* principle. Her Honour’s remarks indicate that she conceived of the main issue in *Miller* as being not *McAuliffe*’s correctness, but whether it was appropriate for the Court to intervene.

‘Judges,’ her Honour stressed, ‘are concerned with how the law is applied in actual cases.’¹⁷¹ This, she was inclined to see as a strength of the common law method.¹⁷² Why? Her Honour’s answer was essentially that this method allows the courts to ensure that just results are reached,¹⁷³ at least in some instances — even if

Chief Justice Murray Gleeson, ‘Judicial Legitimacy’ (2000) 20(1) *Australian Bar Review* 4; Fiona Wheeler and John Williams, “‘Restrained Activism’ in the High Court of Australia” in Brice Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (Oxford University Press, 2007) 19, 57–8.

¹⁶⁶ Lord Devlin, ‘Judges and Lawmakers’ (1976) 39(1) *Modern Law Review* 1, 8–10; Lord Bingham, ‘The Judge as Lawmaker: An English Perspective’ in Lord Bingham, *The Business of Judging: Selected Essays and Speeches* (Oxford University Press, 2000) 25, 31, quoting Lord Reid, ‘The Judge as Law Maker’ (1972) 12 *Journal of Society of Public Teachers of Law* 22, 23; Lord Dyson, ‘Are the Judges Too Powerful?’ (Speech delivered at the Bentham Association, London, 12 March 2014); *Dietrich* (1992) 177 CLR 292, 319–20 (Brennan J); Justice Michael McHugh, ‘The Law-Making Function of the Judicial Process — Part II’ (1988) 62(2) *Australian Law Journal* 116, 122; Sir Anthony Mason, ‘Future Directions in Australian Law’ (1987) 13(3) *Monash University Law Review* 149, 158–9. Of course, despite these statements, Sir Anthony Mason and some of his colleagues were occasionally willing to intervene where they lacked clear community support, but this seems not to be true of the current High Court: see above n 165.

¹⁶⁷ Lord Devlin, above n 166, 9–10.

¹⁶⁸ *Jaensch v Coffey* (1984) 155 CLR 549, 599–600 (Deane J); Justice Michael McHugh, ‘The Judicial Method’ (1999) 73(1) *Australian Law Journal* 37, 48.

¹⁶⁹ Chief Justice Doyle, above n 165, 207. Cf n 30, however.

¹⁷⁰ Above nn 166–9.

¹⁷¹ Justice Virginia Bell, ‘Keeping the Criminal Law in “Serviceable Condition”: A Task for the Courts or the Parliament?’ (2016) 27(3) *Current Issues in Criminal Justice* 335, 342.

¹⁷² *Ibid.*

¹⁷³ *Ibid* 339.

some judicial ‘creativity’¹⁷⁴ is necessary before this can occur. Justice Bell used *R v Mullen*¹⁷⁵ to illustrate her point. That case, which was decided three years after *Woolmington v DPP*,¹⁷⁶ concerned the burden of proof in a criminal trial. To escape liability for murder, did *Mr Mullen* have to prove that the killing was ‘authorised or justified or excused by law’ within the meaning of s 291 of the Queensland *Criminal Code*? Or was the *Crown* required to prove that he did not kill the deceased accidentally? As Bell J noted, in *Mullen*, Dixon J observed that the Code’s text supported the former view.¹⁷⁷ Moreover, s 291 had widely been considered to operate in this way.¹⁷⁸ But Dixon J nonetheless

concluded that [the] *Criminal Code* ... did not necessarily imply a principle that the burden was on the prisoner to prove accident ... [V]alues that had come to be fundamental over the course of the last century [were thus] read into the Griffith Code.¹⁷⁹

So, according to Bell J, courts will sometimes even use questionable reasoning to achieve the ‘right’ result. But it is important to understand when her Honour believes they are entitled to do so. In the above quotation, Bell J hints at this too, and she makes the point explicitly shortly afterwards. Referring to Brennan J’s remarks in *Dietrich*¹⁸⁰ about when judges may change a common law rule, Bell J said that his Honour ‘had in mind’ circumstances where such action accords with the ‘relatively permanent values of the Australian community’.¹⁸¹

That is, for Bell J, the courts may modify the law only where this is consistent with community values. And before they will do so, they will check — insofar as this is possible — that what they perceive to be the ‘relatively permanent’ values of ... society¹⁸² really do have this status.¹⁸³ As her Honour later suggests,¹⁸⁴ to take a more expansive approach would be to invite claims of ‘judicial activism’; it would risk undermining the courts’ reputation for impartiality.¹⁸⁵

It is interesting to view *Jogee* and *Miller* in light of these remarks. As the Supreme Court noted in the former case, PAL was ‘highly controversial’¹⁸⁶ in the UK; indeed, it was so controversial that the Court had ‘set up an appeal’, using ‘*Jogee* and *Ruddock* as vehicles for that task’.¹⁸⁷ In the years following the formation in 2010 of the campaigning group ‘Joint Enterprise Not Guilty by Association’

¹⁷⁴ Ibid 340.

¹⁷⁵ (1938) 59 CLR 124 (*Mullen*).

¹⁷⁶ [1935] AC 462.

¹⁷⁷ (1938) 59 CLR 124, 136.

¹⁷⁸ Ibid.

¹⁷⁹ Bell, above n 171, 340.

¹⁸⁰ (1992) 177 CLR 292, 319.

¹⁸¹ Bell, above n 171, 340.

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ See text accompanying below nn 221–2. See also, eg, Chief Justice Doyle, above n 30, 94.

¹⁸⁵ The courts are arguably being no less ‘activist’ when they change the law in a manner that is consistent with community values; however, the press and public are less likely to perceive activism when they agree with a decision: see, eg, McHugh, above n 168, 42–3.

¹⁸⁶ *Jogee* [2017] AC 387, 416 [81].

¹⁸⁷ Sir Richard Buxton, ‘*Jogee*: Upheaval in Secondary Liability for Murder’ [2016] (5) *Criminal Law Review* 324, 327. For a persuasive response to some of Sir Richard’s other claims, see Matthew Dyson, ‘Letter to the Editor’ [2016] (9) *Criminal Law Review* 638.

(‘JENGBA’),¹⁸⁸ public concern about ‘joint enterprise’ appears to have increased significantly. In early 2012, the House of Commons Justice Select Committee requested data concerning how regularly the Crown was using PAL.¹⁸⁹ By the end of 2014, it was calling for an ‘urgent review of the law of joint enterprise in murder cases’.¹⁹⁰ Concerns were raised both before the Committee¹⁹¹ and in the press¹⁹² about the disproportionate number of mixed-race, black and working-class defendants who were being convicted because of PAL. There were press reports focused on cases, such as Jordan Cunliffe’s, in which PAL was alleged to have caused substantial injustice.¹⁹³ Claims were made that it was a ‘lazy law’ that cast the net too widely.¹⁹⁴ The media gave attention to research that exposed the extremely widespread use of PAL.¹⁹⁵

On 6 July 2014, ‘Common’, a television drama written by Jimmy McGovern, aired on BBC One.¹⁹⁶ It did not portray PAL favourably.¹⁹⁷ The following night, ‘Guilty by Association’, was broadcast — also on BBC One.¹⁹⁸ Dr Sally Halsall and her daughter, Charlotte Henry, featured in this programme. They argued that Dr Halsall’s son and Charlotte’s brother, Alex Henry, had unjustly been convicted of murder as a parasitic accessory.¹⁹⁹ Alex himself claimed in the press that he had not foreseen that the principal offender might commit murder.²⁰⁰ Other defendants

¹⁸⁸ For JENGBA’s website, see JENGBA, *JENGBA – Joint Enterprise: Not Guilty by Association* <<http://www.jointenterprise.co/>>.

¹⁸⁹ House of Commons Justice Committee, *Joint Enterprise*, Paper No 11, Session 2010–12 (2012) 10–11 [16]–[19], [25].

¹⁹⁰ House of Commons Justice Committee, *Joint Enterprise: Follow-Up*, Paper No 4, Session 2014–15 (2014) 20 [47].

¹⁹¹ *Ibid* 12 [24].

¹⁹² See, eg, Emeka Egbuonu, ‘Joint Enterprise Law Criminalises Young, Black Men. It Urgently Needs Reform’, *The Guardian* (online), 22 September 2015 <https://www.theguardian.com/society/2015/sep/22/joint-enterprise-criminalise-young-people-reform-guilt-association?CMP=share_btn_tw>.

¹⁹³ See, eg, Tom Whitehead, ‘Garry Newlove Killer to Have Murder Conviction Reviewed amid Concern Over Joint Enterprise Role’, *The Telegraph* (online), 29 December 2014 <<https://www.telegraph.co.uk/news/uknews/law-and-order/11316174/Garry-Newlove-killer-to-have-murder-conviction-reviewed-amid-concern-over-joint-enterprise-role.html>>.

¹⁹⁴ ‘Is Joint Enterprise a “Lazy Law”?’ , *BBC* (online), 24 April 2013 <<http://www.bbc.com/news/uk-15299605>>.

¹⁹⁵ Clive Coleman, ‘“Joint Enterprise” Prosecution Figures Released’, *BBC* (online), 1 April 2014 <<http://www.bbc.com/news/uk-26721796>> citing research in Maeve McClenaghan, Melanie McFadyean and Rachel Stevenson, ‘Joint Enterprise: An Investigation into the Legal Doctrine of Joint Enterprise in Criminal Convictions’ (Report, The Bureau of Investigative Journalism, April 2014).

¹⁹⁶ ‘Common: Jimmy McGovern Takes on “Group” Crime Rule’, *BBC* (online), 6 July 2014 <<http://www.bbc.com/news/uk-england-28148073>>.

¹⁹⁷ *Ibid*.

¹⁹⁸ Camilla Horrox, ‘Alex Henry Family Condemn Joint Enterprise Law in BBC Documentary’, *Getwest London* (online), 8 July 2014 <<http://www.getwestlondon.co.uk/news/local-news/alex-henry-family-condemn-joint-7392330>>.

¹⁹⁹ *Ibid*.

²⁰⁰ Alex Henry, ‘I Might Have Been Naive, but that Doesn’t Make Me a Murderer’, *Mirror* (online), 27 October 2014 <<http://www.mirror.co.uk/news/uk-news/joint-enterprise-law-my-brother-4520061>>.

claimed that they had suffered miscarriages of justice.²⁰¹ Alex Henry's sister and mother continued to campaign articulately against PAL.²⁰²

Of course, when the Supreme Court was abandoning PAL, it helped that it could point to a legal justification. The careful doctrinal argument in *Jogee* has rightly been praised. But would this argument, however persuasive it is, have caused their Lordships to change the law had they not been satisfied that PAL was widely perceived to be causing injustice? Judges' reluctance to reverse a settled common law rule,²⁰³ and their related concern to secure legal certainty,²⁰⁴ causes me to doubt this. Indeed, certainty is not the only relevant consideration. Questions of legitimacy also arise.²⁰⁵ As McHugh J has said:

An important limitation on judicial law-making arises from the need for the judge's view to be accepted by the community ... If a change in the common law would be rejected by the community, it should not be made, however much the judge thinks that the change is in the community's interest.²⁰⁶

Had PAL not been as obviously controversial as it was, might their Lordships have feared such community rejection? Might this have caused them to exercise restraint? Justice Bell's extra-judicial remarks about *McAuliffe*, which I deal with below,²⁰⁷ fortify my belief that this is a real possibility.

In SA and NSW before *Miller*, there was nothing approaching the sort of opposition to EJCE that there was in the UK to PAL before *Jogee*. There were no press articles condemning EJCE. There were no documentaries or television dramas. Parliamentarians had not expressed concerns. And there were no widely-ventilated claims of injustice in particular cases. The *Miller* plurality made explicit reference to this last fact:

Of course, were the law stated in *McAuliffe* to have led to injustice, any disruption occasioned by departing from it would not provide a good reason not to do so. However, here, as in *Clayton*, the submissions are in abstract

²⁰¹ See, eg, Lena Comer, 'Joint Enterprise: The Legal Doctrine Which Critics Say has Caused Hundreds of Miscarriages of Justice', *Independent* (online), 15 December 2014 <<http://www.independent.co.uk/news/uk/crime/joint-enterprise-the-legal-doctrine-which-critics-say-has-caused-hundreds-of-miscarriages-of-justice-9926939.html?origin=internalSearch>>.

²⁰² See, eg, Ben Rossington, 'Joint Enterprise Law: 'My Brother Was Wrong to Throw Punches but He Didn't Murder Anyone'', *Mirror* (online), 27 October 2014 <<http://www.mirror.co.uk/news/uk-news/joint-enterprise-law-my-brother-4520061>>.

²⁰³ Sir Anthony Mason, 'Legislative and Judicial Law-Making: Can We Locate an Identifiable Boundary?' (2003) 24(1) *Adelaide Law Review* 15, 26. See also *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438.

²⁰⁴ *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234; *Dietrich* (1992) 177 CLR 292, 320 (Brennan J); Lord Reid, above n 166, 23; B V Harris, 'Final Appellate Courts Overruling Their Own "Wrong" Precedents: The Ongoing Search for Principle' (2002) 118 (July) *Law Quarterly Review* 408, 413–4; J W Harris, 'Towards Principles of Overruling — When Should a Final Court of Appeal Second Guess?' (1990) 10(2) *Oxford Journal of Legal Studies* 135, 157–161.

²⁰⁵ Justice J D Heydon, 'Limits to the Powers of Ultimate Appellate Courts' (2006) 122 (July) *Law Quarterly Review* 399, 405; Chief Justice Gleeson, above n 165, 7; Chief Justice A M Gleeson, 'Individualised Justice — The Holy Grail' (1995) 69(6) *Australian Law Journal* 421, 432; Justice Ronald Sackville, 'Courts and Social Change' (2005) 33(3) *Federal Law Review* 373, 382.

²⁰⁶ McHugh, above n 166, 122.

²⁰⁷ See text accompanying below nn 221–30.

form and do not identify decided cases in which it can be seen that extended joint criminal enterprise liability has occasioned injustice.²⁰⁸

Indeed, a careful reading of the plurality's reasons strengthens the conclusion that it was probably the absence in SA and NSW of community opposition to EJCE — and not their Honours' unreserved support for the doctrine — that caused the case to be decided as it was.

It is noteworthy that, in the passage just set out, their Honours' focus is categorically not on whether EJCE is justified in an abstract sense. It is instead on whether that doctrine, principled or not, has caused practical injustice. This is reminiscent of Lord Steyn's observation in *R v G* that '[t]he surest test of a new legal rule is not whether it satisfies a team of logicians but how it performs in the real world.'²⁰⁹ Because EJCE had performed adequately — that is, because, unlike in the UK, there had been no vociferous campaign against it — there was no need to risk causing the 'inconvenience'²¹⁰ that might well flow from its abandonment. But would their Honours have been more receptive to the idea of dispensing with *McAuliffe* if the appellants — as the UK campaigners had purported to do — had identified 'decided cases' in which EJCE 'occasioned injustice'? The suggestion in the above passage is that they would have.

Certainly, as I have noted, their Honours did, elsewhere in their judgment, endorse Simester's principled defence of EJCE. But they did so in a manner that inspires less than complete confidence that they would have taken the same approach had they been faced with the kinds of pressures that confronted the Supreme Court in *Jogee*. So, after acknowledging the disagreement between J C Smith and Simester concerning the doctrinal basis of JCE and EJCE, and after noting that the *Clayton* majority accepted the latter's views, their Honours said:

Acknowledgement of the sui generis nature of the secondary liability that arises from participation in a joint criminal enterprise may be thought to resolve at least some of the anomalies that are suggested to arise from allowing foresight of the possible commission of the incidental offence by a co-venturer as a sufficient mental element of liability.²¹¹

High Court Justices sometimes refer disapprovingly to those who use the passive voice,²¹² so why did five of them use it here? Was it to create some distance between their Honours and what they were saying? Certainly, the *Miller* endorsement of Simester's views seems more muted than the *Clayton* one.²¹³

Furthermore, their Honours did approve J C Smith's early view,²¹⁴ which he later doubted,²¹⁵ that the person who continues to participate in a criminal enterprise despite his/her foresight that another participant might commit murder, is

²⁰⁸ *Miller* (2016) 259 CLR 380, 400 [39] (citations omitted).

²⁰⁹ [2004] 1 AC 1034, 1063 [57].

²¹⁰ *Miller* (2016) 259 CLR 380, 400 [39].

²¹¹ *Ibid* 398 [34].

²¹² *Gypsy Jokers Motorcycle Club Inc v The Commissioner of Police* (2008) 234 CLR 532, 559 [35].

²¹³ The *Clayton* majority expressed the confident view that Simester had 'demonstrate[d]' that accessory and JCE liability have different bases: (2006) 81 ALJR 439, 444 [20].

²¹⁴ Smith, '*R v Wakely*', above n 106, 121.

²¹⁵ Smith, above n 58, 464–5.

sufficiently culpable to be convicted of that offence. But, again, it is perhaps instructive to consider how their Honours chose to express such approval:

It is not self-evident ... that the policy of the law should be against the imposition of liability for murder in such a case. Certainly, [the person's] moral culpability is not less than that of the secondary party in a case such as *Johns*.²¹⁶

Plainly, it is not 'self-evident' that the accused should avoid murder liability in such a case. If it were, the *McAuliffe* principle would not have been created in the first place. But that is a different thing entirely from giving unqualified support to that principle. Concerning *Johns*, their Honours were not saying that the *McAuliffe* offender is as culpable as the individual who has been proved to have 'conditional[ly] inten[ded] that the incidental offence be committed'.²¹⁷ Rather, they were contending that the person with individual foresight of the possibility of a further crime has acted in just as blameworthy a fashion as he/she would have had he/she and his/her co-offender jointly foreseen the commission of that offence and yet continued with the foundational enterprise.²¹⁸ To say this is different from arguing that foresight — whether joint or individual — is undoubtedly enough for murder liability to be justified.

In short, their Honours' point was seemingly that there is room for argument about whether all of those convicted of murder due to *McAuliffe* are culpable enough justifiably to be convicted of that offence. As much is demonstrated, their Honours suggested, by the existence of some distinguished academic support for EJCE. Accordingly, what reason would there be to cause the 'disruption' that would flow from *McAuliffe*'s abandonment — unless EJCE had been shown, or at least had widely been perceived, to have 'occasioned injustice'?²¹⁹ Indeed, disruption would not be the only adverse consequence that such a decision would cause. Courts that act on their own perceptions of what justice requires — as opposed to altering the law only in accordance with the community's 'reasonably permanent values' — tend quickly to suffer reputational damage.²²⁰

Justice Bell's remarks about the *McAuliffe* principle, in the lecture to which I have referred, support the analysis just presented. Her Honour said:

Contrary to the more extreme views as to the rapaciousness of the judiciary, there are areas of the general part of the criminal law in which the High Court has stayed its hand. Many commentators consider that the principles of extended joint criminal enterprise stated by the High Court in *McAuliffe* ... impose liability too widely. The Court has declined to reconsider *McAuliffe* ... Kirby J would have ... confined the liability of the secondary participant. His Honour set out cogent reasons in favour of that view.²²¹

²¹⁶ *Miller* (2016) 259 CLR 380, 399 [38].

²¹⁷ *Ibid* 394 [21].

²¹⁸ Such participants, it was said, 'must be *taken* to have authorised or assented to ... [the further crime's] commission even if it is their preference that it be avoided': *ibid* 399 [37] (emphasis added).

²¹⁹ *Ibid* 400 [39] (citations omitted).

²²⁰ In *Miller*, there was not only a risk that the Court would be criticised for being self-aggrandising if it overruled *McAuliffe*. As Gageler J suggested, their Honours might well also have found 'troubling' the 'prospect of criticism of a court system which could proceed on an erroneous view of the common law for more than 20 years': *ibid* 424 [127]–[128].

²²¹ Bell, above n 171, 342.

What is noteworthy here is Bell J's evident anxiety that the High Court not be perceived to be 'rapacious'. Justice Bell is aware, her Honour tells us, that there are those who consider the Court to have arrogated to itself powers that are properly exercised only by the other branches of government. But her Honour dismisses these as 'extreme' views — and she can cite a case, *Clayton*, that she thinks illustrates her point.²²² In other words, however 'cogent' the reasons for abandoning EJCE might have been, it was also important for their Honours to avoid acquiring a reputation for taking it upon themselves to act legislatively or for whimsically departing from the Court's precedents. By rejecting the appellant's argument, the Court could say, as Bell J did of the *Clayton* majority, that it had 'stayed its hand' in the interests of democracy.

Indeed, a democratic sensitivity is evident in her Honour's final remarks about EJCE. After referring to the NSW Law Reform Commission's 2010 recommendation²²³ that the doctrine's mental element be made more stringent, Bell J said:

It is almost five years since the Commission's Report was published and no action has been taken on this or the other recommendations in it. Some would say this argues for the Court to be less timorous and that it should have agreed to revisit *McAuliffe* given legislative lethargy when it comes to the orderly reform of the criminal law. Presumably democrats would say that the legislature's silence connotes acceptance of the law as the Court has stated it.²²⁴

As her Honour implies here, the Court in *Miller* had a choice. On one hand, it could have overturned *McAuliffe*. Certainly, an argument against its doing so was that, if Parliament had wished to alter or dispense with EJCE, it had had many opportunities so to act, but had availed itself of none of them. But such arguments are not always successful. In *R v G*,²²⁵ for example, the House of Lords had not been persuaded by such considerations²²⁶ to uphold the *R v Caldwell*²²⁷ rule that an accused would be 'reckless' within the meaning of s 1(1) of the *Criminal Damage Act 1971* (UK) if he/she could be proved merely to have created an obvious risk that property would be destroyed or damaged without advertent at all, at the time of the relevant conduct, to the possibility of there being such a risk.²²⁸ On the other hand, the Court could have upheld *McAuliffe*. In taking this approach, the plurality used very similar reasoning to that suggested by Bell J in the above quotation:

In the decade since *Clayton* ... [t]he New South Wales Law Reform Commission undertook a review of the law of complicity. ... The Parliament of New South Wales has to date not chosen to act on the Commission's recommendations. The Parliament of South Australia has also not chosen to reform the law as stated in *McAuliffe*.

²²² Whether the plurality in that case was exercising any restraint is questionable: see, eg, *Clayton* (2006) 81 ALJR 439, 443 [19]. See also above n 213.

²²³ New South Wales Law Reform Commission, above n 130, 129 [4.235], 135 [4.265]–[4.267].

²²⁴ Bell, above n 171, 342.

²²⁵ [2004] 1 AC 1034.

²²⁶ There, the Crown had submitted that this was one reason why the House should not overrule *Caldwell*: *ibid* 1055 [30].

²²⁷ [1982] AC 341, 353–4.

²²⁸ The *Caldwell* majority additionally held that inadvertent recklessness was a sufficient mens rea for the more serious s 1(2) offence: *ibid* 354–5.

In light of this history, it is not appropriate for this Court to now decide to abandon extended joint criminal enterprise liability ...²²⁹

Why did the plurality take this latter course, when, as *R v G* shows, it did not have to do so? It is submitted that, as argued above, public opinion in NSW and SA was not sufficiently hostile to EJCE for the Justices to be satisfied that that doctrine should be abandoned. If their Honours had considered that there existed a widespread community perception that EJCE operated unjustly — if they had thought, that is, that the problems raised by the appellants were less ‘abstract’ — it is quite possible that they would not have observed so scrupulously the requirements of democratic principle. Certainly, Bell J’s extra-judicial remarks indicate that her Honour was far from persuaded of *McAuliffe*’s justifiability. To ‘stay ... [one’s] hand’ in the face of ‘cogent’ criticisms is not to support. And as I have argued, the plurality’s reasoning, upon close inspection, is redolent not of unconditional curial approval but, rather, of judicial restraint.

Further, the reasoning in *R v G* is illuminating. Their Lordships took into account a number of considerations when deciding to overturn *Caldwell*.²³⁰ Most significantly, their Lordships found that, contrary to the majority’s decision in that earlier case, Parliament, when it enacted the *Criminal Damage Act*, had plainly intended to provide that a person would only be ‘reckless’ for the purposes of the s 1 offences if he/she had actually realised that his/her conduct might cause the relevant consequence(s).²³¹ But Lord Bingham held that even this obvious misinterpretation was not determinative of the appeal. If this mistake had ‘offended no principle and given rise to no injustice’, his Lordship thought, ‘strong grounds’ would have existed for not intervening.²³² It was only because the error was ‘offensive to principle and [was] apt to cause injustice’, that the need to correct it was ‘compelling’.²³³ In truth, however, it was not decisive that the rule was apt to operate unjustly. What instead appears to have persuaded the Court to overrule *Caldwell* was that, in *R v G*, their Lordships had before them a case where the relevant principle had been demonstrated to cause such unfairness. How had this been demonstrated? Lords Bingham and Steyn placed great emphasis here on its being ‘evident’ that the trial judge’s *Caldwell* direction had ‘offended the jury’s sense of fairness’.²³⁴ For Lord Bingham, ‘[t]he sense of fairness of 12 representative citizens sitting as a jury ... is the bedrock on which the administration of criminal justice in this country is built. A law which runs counter to that sense must cause concern.’²³⁵

Again, if there had been such evidence of community unease about EJCE, the High Court might well have considered parliamentary inactivity to be no obstacle to the overruling of *McAuliffe*.

²²⁹ *Miller* (2016) 259 CLR 380, 401 [42]–[43].

²³⁰ [2004] 1 AC 1034, 1055–6 [31]–[35] (Lord Bingham), 1058–9 [45] (Lord Steyn).

²³¹ *Ibid* 1054 [29] (Lord Bingham), 1060 [50] (Lord Steyn).

²³² *Ibid* 1056 [35] (Lord Bingham).

²³³ *Ibid*.

²³⁴ *Ibid* 1055 [33]; see also 1063 [57] (Lord Steyn).

²³⁵ *Ibid* 1056 [35] (Lord Bingham).

V Conclusion

Upon her Honour's retirement from the NSW Supreme Court, Bell J said of her new role as a High Court Justice:

The prospect of my new role has had an unsettling effect on me which is hard to understand since, as early as my days at the Redfern Legal Centre, I had no difficulty in perceiving the errors of principle made by the High Court and in seeing how readily they could be corrected.²³⁶

While her Honour was delivering a joke, there is nevertheless an insight here. That insight is relevant to the argument that I have made in this article.

As I have sought to demonstrate, the High Court in *McAuliffe* did make an 'error of principle'. The JCE participant who foresees, without necessarily agreeing to, the commission of murder should not be convicted of that offence if it results. Certainly, the change of normative position reasoning that has been used to support EJCE (and the constructive murder rule) does accurately *describe* what John Gardner has called 'the law's own moral outlook'.²³⁷ But it does not *justify* that outlook. Moreover, if, as I think, accessorial liability and the basic JCE doctrine have the same doctrinal foundation as one another — the purpose of both being to hold liable only those who intentionally assist or encourage another person to perform criminal conduct — it is difficult to see why a JCE participant should be liable for a *further* crime, committed by a co-participant, unless he/she has intentionally assisted or encouraged him/her to perform the relevant acts. The *Jogee* insistence that such a person can only be held liable for the further crime if he/she intended that it be committed should the occasion arise, is therefore more normatively desirable than the *McAuliffe* position — whatever pragmatic considerations²³⁸ and policy concerns²³⁹ might have tempted courts away from accepting such logic.

Once an error of principle is made, however, it is not 'readily corrected'. There is perhaps a tendency among commentators merely to point to courts' mistakes, as though all that it will take for those courts to correct those mistakes is a strong dose of reason. Justice Bell suggests that, before becoming a judge, she was inclined to think that cases were decided purely on the basis of such rational legal and moral argumentation. But the reality is that, because the courts are concerned to maintain their legitimacy, they must consider in such cases not only matters of principle, but also how the public and press will respond to any decision to reverse a line of precedents. I have argued here that such concerns probably influenced in no small way the plurality's decision in *Miller*. The same seems true of *Jogee*.

²³⁶ Justice Virginia Bell, 'Farewell Ceremony for the Honourable Justice Virginia Bell Upon the Occasion of Her Retirement as a Judge of the Supreme Court of New South Wales' (Speech Delivered at the Supreme Court of New South Wales, 19 December 2008) <http://www.supremecourt.justice.nsw.gov.au/Documents/Publications/Speeches/Pre-2015%20Speeches/Assorted%20-%20A%20to%20K/bell_speeches.pdf>.

²³⁷ John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press, 2007) 246.

²³⁸ The difficulty of proving such 'conditional intent' is one commonly cited reason for adopting a less stringent mens rea for passive participants to JCEs that result in further crimes: *Miller* (2016) 259 CLR 380, 398–9 [36] citing *Powell* [1999] 1 AC 1, 14.

²³⁹ See text accompanying above nn 150–51.

This is certainly not to defend *Miller*. That decision leaves undisturbed a rule that sacrifices fairness to accused persons for the illusion of community protection. It does so even though their Honours must have known that neither the NSW nor the SA Parliament is at all likely to intervene in this area in the foreseeable future. Of course, the High Court's reputation must be maintained. Relatedly, it is understandable that their Honours wish to do their work as unobtrusively as possible: while it is important that justice is seen to be done, it is also important that the workings of the justice system are *not* seen, or remarked upon, too frequently. If the UK press's response to *Jogee* is any indication, the Australian press would certainly have noticed a decision to abandon EJCE. But might not the Court's apparent fear of being perceived as 'rapacious' have been at least slightly exaggerated?²⁴⁰ And, given the injustice that EJCE can produce (as demonstrated by the UK justice system's experience with PAL²⁴¹), might it not have been worth using some of the Court's 'reputational capital'²⁴² to correct the *McAuliffe* error before a litigant is able to satisfy a court that he/she has suffered less 'abstract' injustice than was brought to their Honours' attention in *Miller*?

Nevertheless, if we are accurately to analyse that case, we must recognise that it probably amounts more to a statement about the circumstances in which the plurality Justices are willing to overturn established common law rules, than it does about whether they support *McAuliffe*. If we do recognise that courts are reluctant to change even unjust common law rules unless there is clear public support for their doing so, we will also maximise our chances in the future of developing arguments that persuade them to take a less cautious approach in important cases such as *Miller*.

²⁴⁰ To return to McHugh J's statement (see text accompanying above n 206), even though there was no campaign against EJCE, was there any evidence that the community would reject a decision to abandon it? See also above n 30.

²⁴¹ See text accompanying above nn 186–202; Ben Crewe et al, 'Joint Enterprise: The Implications of an Unfair and Unclear Law' [2015] (4) *Criminal Law Review* 252.

²⁴² Shai Dothan, *Reputation and Judicial Tactics: A Theory of National and International Courts* (Cambridge University Press, 2015) 2.