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# *Non-State Policing, Legal Pluralism and the Mundane Governance of “Crime”*

Amanda Porter\*

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## *Abstract*

Faced with the problem of rising incarceration rates, there has been an emerging discourse in recent years about the need to decolonise justice for Indigenous Australians. While much has been written on the need to embrace initiatives that reflect the Indigenous collective right to self-determination and self-governance, there has been little grounded examination of the everyday politics surrounding these processes. For example, what does self-determination look like in the criminal justice context? What forms of non-State governance constitute self-governance? What activities are considered ‘harmful’, ‘unsafe’ and ‘criminal’ behaviour within local settings, and who ultimately gets to decide what constitutes a ‘crime’? To examine these and related issues, this article presents the findings of an empirical study on Indigenous night patrols: locally-run justice initiatives with formal agendas that focus on improving safety within Aboriginal and Torres Strait Islander communities. This article examines the historic development and contemporary operation of this relatively neglected form of non-State policing. It argues for a greater appreciation of both the diversity and complexity of non-State governance structures in contemporary Australia, as well as how they might contribute to better understandings of self-determination and legal pluralism in the criminal justice context.

## **I Introduction**

Policing is a political activity. This is especially true with respect to the policing of Aboriginal and Torres Strait Islander communities, where the State police represent gatekeepers of the criminal justice system — one of the most enduring and deeply entrenched legacies of British colonisation. This is true also where the routine activities of the State police occur in the absence of a formal treaty with Indigenous Australians, notwithstanding the legally pluralistic nature of contemporary Australian society.<sup>1</sup> Unlike comparable Commonwealth colonies, Australia was not

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<sup>1</sup> Indigenous legal systems have been operating in Australia for 40 000 years and continue to operate in many locations across Australia, coexisting alongside the mainstream Australian legal system. While, in some cases, knowledge of local laws and customs has weakened or ruptured due to forced removal from country and family, the operation of local legal systems remains an integral part of

settled by formal cession, but under the doctrine of terra nullius — a doctrine that has been acknowledged by the High Court of Australia, the highest court of the non-Indigenous legal system, as a legal fiction.<sup>2</sup> These contradictions and unresolved tensions in Australia's history have consequences that go to the core of politics surrounding the everyday policing of Indigenous Australian communities.

The history of colonial policing in Australia is now well documented, mapping out regimes that have largely consisted of efforts to contain, suppress and even attempt genocide upon Aboriginal and Torres Strait Islander peoples.<sup>3</sup> In addition to frontier violence and paternalistic violence present in colonial forms of policing, neo-colonial violence continues today through expansions in police powers of arrest, over-surveillance, harassment, heavy-handed policing, under-policing of domestic and family violence, deaths in custody, and so on, as documented in various national reports.<sup>4</sup> Over 25 years after the publication of the *Royal Commission into Aboriginal Deaths in Custody*, rates of incarceration for Indigenous Australians continue to rise<sup>5</sup> and deaths continue to occur in circumstances that are

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everyday life in Aboriginal and Torres Strait Islander communities. See generally Australian Law Reform Commission ('ALRC'), *The Recognition of Aboriginal Customary Laws*, Report No 31 (1986); Law Reform Commission of Western Australia ('WA'), *Aboriginal Customary Laws: The Interaction of Western Australian Law with Aboriginal Law and Culture*, Final Report, Project No 94 (2006). Importantly, however, processes of nation (re)building, language revival and Indigenous resurgence are taking place across Aboriginal Australia: see generally DE Smith, 'Researching Australian Indigenous Governance: A Methodological and Conceptual Framework' (Working Paper No 29/2005, Centre for Aboriginal Economic Policy Research, October 2005); Janet Hunt et al (eds), *Contested Governance: Culture, Power and Institutions in Indigenous Australia* (ANU Press, 2008); Michael Dodson and Lisa Strelein, 'Australia's Nation Building: Renegotiating the Relationship between Indigenous Peoples and the State' (2001) 24(3) *University of New South Wales Law Journal* 826; Larissa Behrendt, Miriam Jorgensen and Alison Vivian, *Rebuilding Australia's First Nations* (Federation Press, forthcoming); Alison Vivian et al (2017) 'Indigenous Self-Government in the Australian Federation' 20 *Australian Indigenous Law Review* 215; Alexander Reilly, 'A Constitutional Framework for Indigenous Governance' (2006) 28(3) *Sydney Law Review* 403. Notwithstanding the reality of Aboriginal sovereignty, currently the Australian legal system affords recognition to the operation of Indigenous laws in extremely narrow circumstances; namely, in the context of native title, as a mitigating factor in sentencing and with respect to Torres Strait Islander traditional adoption: see generally *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

<sup>2</sup> *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

<sup>3</sup> See, eg, Mark Finnane, *Police and Government: Histories of Policing in Australia* (Oxford University Press, 1994); Jonathan Richards, *The Secret War: A True History Of Queensland's Native Police* (University of Queensland Press, 2008); Henry Reynolds, *Frontier: Aborigines, Settlers and Land* (Allen & Unwin, 1987); A Dirk Moses (ed), *Genocide and Settler Society: Frontier Violence and Stolen Indigenous Children in Australian History* (Berghahn Books, 2004); Amanda Nettlebeck and Robert Foster, *In the Name of the Law: William Willshire and the Policing of the Australian Frontier* (Wakefield Press, 2007); Chris Cunneen, *Conflict, Politics and Crime: Aboriginal Communities and the Police* (Allen & Unwin, 2001); Harry Blagg, *Crime, Aboriginality and the Decolonisation of Justice* (Hawkins Press, 2008).

<sup>4</sup> Commonwealth, Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991); Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (Australian Government Publishing Service, 1991); Boni Robertson, *The Aboriginal and Torres Strait Islander Women's Task Force on Violence Report* (Department of Aboriginal and Torres Strait Islander Policy and Development (Qld), 1999).

<sup>5</sup> Research from the ALRC and NSW Bureau of Crime Statistics and Research suggests that the rate of Indigenous imprisonment is rising: see, eg, ALRC, *Pathways to Justice — Inquiry into the Incarceration Rate of Aboriginal and Torres Strait Islander Peoples*, Report No 133 (2018); Margaret White and Mick Gooda, *Report of the Royal Commission into the Protection and Detention of Children in the Northern Territory* (2017); Australian Institute of Health and Welfare, *Family,*

otherwise preventable.<sup>6</sup> The publication of a recent suite of inquiries and royal commissions into Indigenous incarceration and detention following the exposure of the mistreatment of Aboriginal young people in Don Dale Youth Correction Centre in the Northern Territory ('NT') highlights the ongoing nature of these human rights concerns in the present.<sup>7</sup>

This provides the backdrop to much academic discourse on the need to decolonise justice for Indigenous Australians. But while much has been written on the need to decolonise the justice system,<sup>8</sup> there has been little empirical examination of the everyday politics and mundane practices surrounding these processes. Critics have warned against the mere substitution of Aboriginal people for non-Aboriginal people — simply 'adding Aboriginal people and stirring'.<sup>9</sup> This would amount to

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*Domestic and Sexual Violence in Australia* (2018). See generally Don Weatherburn, *Arresting Incarceration: Pathways out of Indigenous Imprisonment* (AIATSIS Press, 2014); Chris Cunneen et al, *Penal Culture and Hyperincarceration: The Revival of the Prison* (Ashgate, 2013); Chris Cunneen, 'Punishment: Two Decades of Penal Expansionism and Its Effects on Indigenous Imprisonment' (2011) 15(1) *Australian Indigenous Law Review* 8; Julie Stubbs, 'Indigenous Women in Australian Criminal Justice: Over-represented but Rarely Acknowledged' (2011) 15(1) *Australian Indigenous Law Review* 47; Rob White, 'Indigenous Young People and Hyperincarceration in Australia' (2015) 15(3) *Youth Justice* 256. In addition to rising incarceration rates, Indigenous Australians are over-represented as victims of crime. Although it is acknowledged that domestic and family violence are under-reported to the police, research data suggests that Indigenous women are 30 times more likely to be hospitalised for assault than non-Indigenous women in Australia: see, eg, Chris Cunneen, 'Criminalisation and Policing in Indigenous Communities' in Larissa Behrendt, Chris Cunneen and Terri Libesman, *Indigenous Legal Relations* (Oxford University Press, 2009). Space precludes a thorough discussion of this issue, but see Paul Memmott et al, *Violence in Aboriginal Communities* (Department of Attorney-General (Cth), 2001); Chris Cunneen, 'Policing and Aboriginal Communities: Is the Concept of Over-Policing Useful?' in Chris Cunneen (ed), *Aboriginal Perspectives on Criminal Justice* (Sydney Institute of Criminology, University of Sydney Law School, 1992) 76; Australian Institute of Criminology, 'Indigenous Victims of Violence', Crime Facts Info No 79 (Australian Institute of Criminology, July 2004).

<sup>6</sup> Recent examples of preventable deaths in custody in circumstances involving police brutality include: the death of Ms Dhu, a 22-year old Yamatji woman who died after her pleas for medical attention were not taken seriously by frontline personnel (see Amanda Porter, 'The Price of Law and Order Politics: Re-examining the *Fines, Penalties and Infringement Notices Enforcement Amendment Act 2012* (WA)' (2015) 8(16) *Indigenous Law Bulletin* 28); the death of Rebecca Lyn Maher, a Wiradjuri woman who died in police custody after being detained for being intoxicated in a public place (Calla Wahlquist, 'Indigenous Woman Died in Police Custody after Notification Service Not Used', *The Guardian* (online, Australian ed), 16 August 2016); the death of Mr Langdon under the Northern Territory's ('NT') 'paperless arrest' laws (see *Inquest into the Death of Perry Jabanangka Langdon* [2015] NTMC 016 (14 August 2015)); the death of a Palm Islander man from injuries sustained while in police custody (see Christine Clements, *Inquest into the Death of Mulrunji* (Unreported, Queensland Coroner's Court, Christine Clements, 27 September 2006)); and the death of an Aboriginal boy who impaled himself on a fence during a police pursuit in Redfern (see Chris Cunneen, 'Aboriginal Deaths in Custody: A Continuing Systematic Abuse' (2006) 33(4) *Current Issues in Criminology* 37).

<sup>7</sup> ABC, 'Australia's Shame', *Four Corners*, 25 July 2016 (Caro Meldrum-Hanna); ALRC, above n 5.

<sup>8</sup> See generally Chris Cunneen and Juan Tauri, *Indigenous Criminology* (Policy Press, 2017); Blagg, above n 3; Cunneen, above n 3; Larissa Behrendt, Chris Cunneen and Terri Libesman, *Indigenous Legal Issues* (Oxford University Press, 2009); Elena Marchetti and Janet Ransley, 'Applying the Critical Lens to Judicial Officers and Legal Practitioners involved in Sentencing Indigenous Offenders: Will Anyone or Anything Do?' (2014) 37(1) *University of New South Wales Law Journal* 1; Juan Tauri, 'Family Group Conferencing: A Case-Study of the Indigenisation of New Zealand's Justice System' (1998) 10(2) *Current Issues in Criminal Justice* 168.

<sup>9</sup> Tauri, above n 8; Marchetti and Ransley, above n 8; Chris Cunneen, 'Community Conferencing and the Fiction of Indigenous Control' (1997) 30(3) *Australian and New Zealand Journal of Criminology*

simply the ‘indigenisation’ of the mainstream legal system.<sup>10</sup> Yet very little attention has been given to what autonomous justice initiatives or self-determination might involve in practical terms in the criminal justice context. For example, what does self-determination look like in the criminal justice context? What activities are considered ‘harmful’ and ‘criminal’ within local settings? Who ‘polices’ these activities and who ultimately decides what constitutes a ‘crime’? What forms of non-state governance constitute ‘self-governance’?

This article examines these and related questions with reference to the everyday practices and operations of non-State policing in New South Wales (‘NSW’), Australia. Non-State policing is a term I use to refer collectively to encompass a broad range of community safety and alternative policing initiatives including: night patrols, streetbeats, granny patrols, men’s patrols, foot patrols, community patrols and other community justice initiatives aimed at reducing harm and maximising safety.<sup>11</sup> In this article, non-State policing serves as a lens through which to observe political struggle and contestation between grassroots movements in Aboriginal communities and their relations with various arms of formal or non-Indigenous governance in Australia, notably the State police.

As will become clear in this article, not only are these questions muddled in practice, but in many instances they are posed here in a way that does not necessarily reflect the concerns of night patrol workers in the study reported here. For example, many study participants were convinced that night patrols could only work if they are ‘owned’ by the local community, focusing on local relationships and knowledge, while the question of some universal principle of self-determination was normally left unstated. Some patrols, though wholly Indigenous-controlled and managed, drew sharp criticism for neglecting other marginalised groups within the local community. Despite the fact that the police and patrols adopt vastly different approaches to the ‘policing’ of crime and safety, this was rarely the source of major conflict for either service.

At the outset I would like to clarify that night patrols do not represent or simply equate to self-determination in practice — far from it. Throughout this article, my objective is to emphasise the complexity of these processes and to show that, on the ground, processes of decolonisation appear as much more subtle, ambiguous, changeable and inconsistent than is implied by the broader analytic binary of ‘self-

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292; Jo Kamira, ‘Indigenous Participation in Policing’ in Mike Enders and Benoît Dupont (eds) *Policing the Lucky Country* (Hawkins Press, 2001) 70; Leanne Weber, ‘Contemporary Comment: Bridges or Band-aids? Another Death in Custody Reveals Fatal Flaws in the Aboriginal Liaison Officer Concept’ (2007) 19(2) *Current Issues in Criminal Justice* 235, 237; Paul Havemann, ‘The Indigenization of Social Control in Canada’ in Bradford W Morse and Gordon R Woodman (eds), *Indigenous Law and the State* (Foris Publications, 1988) 71; H W Finkler, ‘The Political Framework of Aboriginal Criminal Justice in Northern Canada’ (1990) 5 *Law and Anthropology* 113.

<sup>10</sup> The term ‘indigenisation’ has been defined variously as ‘the involvement of indigenous peoples and organisations in the delivery of existing socio-legal services and programs’ (Finkler, above n 9, 113) and elsewhere as ‘the recruitment of indigenous people to enforce the laws of the colonial power’: Havemann, above n 8, 72. Tauri uses a broader definition of indigenisation that includes ‘cultural sensitisation’ of the justice system as well as service delivery institutions: Tauri, above n 8, 169.

<sup>11</sup> A variety of terms are used to describe night patrols and non-state forms of policing, reflecting the localised nature of community justice initiatives.

determination versus indigenisation’, ‘autonomous versus co-opted’, ‘bridges versus band-aids’— as sometimes appears within the literature.

## II Background: Indigenous Self-Determination as a Right and a Concept

Australia is a legally pluralistic nation, with multiple legal systems and overlapping jurisdictions. Aboriginal Australia is made up of over 250 nations, each with its unique culture, language, history, laws and customs. Aboriginal legal systems continue to operate in many locations across Australia, coexisting simultaneously with the mainstream Australian legal system (including local, state, territorial, federal and international jurisdictions). Indigenous law or lore is a fact of life for Indigenous communities and nations around Australia and is a significant influence in the lives of many Aboriginal and Torres Strait Islander peoples.<sup>12</sup>

Notwithstanding this fact, the Australian and Aboriginal legal systems operate with little or no legal recognition of one another. There has been limited formal recognition of Indigenous sovereignty by Australian governments. An example of limited recognition is native title legislation, whereby the Australian Government recognises, in certain instances where a claim is successfully proved, certain proprietary rights (namely, rights to ‘native title’) that include the right to fish, hunt and practice customary laws.<sup>13</sup> Conversely, there have been few instances of recognition of the sovereignty of the Australian governments by Aboriginal nations and legal systems. Recent examples of contestation between the Australian and Aboriginal nations include: legal disputes and conflict between non-Indigenous authorities and the Sovereign Yidindji Government;<sup>14</sup> the Aboriginal Tent Embassy since 1972; the Yirrkala Bark Petitions; the use of Aboriginal passports by Aboriginal activists; and the ‘Invasion Day’ celebrations. Indigenous peoples’ collective right to self-determination and self-government has its genesis in the unextinguished Indigenous sovereignty to Aboriginal nations or ‘country’.

The right to self-determination is a collective right of Indigenous peoples, communities and nations to freely determine their political status and their economic, social and cultural destiny. The right to self-govern underpins the normative framework of Indigenous peoples’ rights in international law and politics and is enshrined in key sources of international law; specifically, in art 1 of the *International Covenant on Civil and Political Rights* (‘ICCPR’)<sup>15</sup> and in art 1 of the *Covenant on Economic, Social and Cultural Rights* (‘ICESCR’),<sup>16</sup> both of which were adopted by the General Assembly in 1966. More recently, the collective right

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<sup>12</sup> Law Reform Commission of Western Australia, *Aboriginal Customary Laws*, Discussion Paper Project 94 (2005). The discussion paper quotes this vivid description: ‘Aboriginal law is the table, the solid structure underneath. Whitefella law is like the tablecloth that covers the table, so you can’t see it, but the table is still there.’: at 51.

<sup>13</sup> *Native Title Act 1993* (Cth).

<sup>14</sup> Saffron Howden, ‘Murrumu Walubara Yidindji Renounces Citizenship to Reclaim Australia’, *The Sydney Morning Herald* (online), 2 November 2015 <<http://www.smh.com.au/nsw/murrumu-walubara-yidindji-renounces-citizenship-to-reclaim-australia-20151102-gkok6g.html>>.

<sup>15</sup> Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

<sup>16</sup> Opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976).

to self-determination forms the normative backbone of the *United Nations Declaration on the Rights of Indigenous Peoples* ('UNDRIP'), adopted by the General Assembly in 2007.<sup>17</sup>

At least in principle, the concept of self-determination seems simple enough. Yet beyond these broad statements of international law, the term 'self-determination' remains imprecise or 'invidiously vague'.<sup>18</sup> Overly romanticised by idealists and readily dismissed by conservatives, discussions about self-determination tend to take place at a level of abstraction which is often unproductive for local communities. Because of the high level of generality and state-centered focus, discussions about self-determination tend to pay too much attention to the relationships between Aboriginal communities and the State and tend to neglect the relationships between Aboriginal peoples, communities and nations.<sup>19</sup>

The endorsement of the principle of self-determination by successive Australian federal governments has a chequered past. Although both the ICCPR and ICESCR were signed and ratified by the Australian Government, the articles specifically relating to self-determination have not been implemented in Australian domestic law. Australian domestic politics in the 1970s was predicated on a 'self-determination policy', aimed at replacing paternalistic surveillance and control with a more respectful and egalitarian relationship between Indigenous and non-Indigenous Australians. In 1972, the Whitlam Government adopted a formal self-determination policy, reflected in the enactment of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) and the *Aboriginal Councils and Associations Act 1976* (Cth). The formal policy continued under the Hawke Government, with attempts at fostering self-determination reflected in the enactment of the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) and attempts to negotiate a treaty ('the Barunga Statement') in 1988. The Turnbull Government distanced itself from the term 'self-determination', stating preference for (former Liberal Prime Minister) Tony Abbott's hand-selected 'Individual Advisory Council'. Current federal policies include the Indigenous Advancement Strategy;<sup>20</sup> the 'Close the Gap' national targets;<sup>21</sup> and support for a referendum to recognise Indigenous Australians within the *Australian Constitution*.<sup>22</sup>

<sup>17</sup> GA Res 61/295, UN GAOR, 61<sup>st</sup> sess, 107<sup>th</sup> plen mtg, Supp No 49, UN Doc/A/RES/61/295, annex. Several articles are relevant here, in particular, arts 3–5. The Australian Government initially refused to sign the *UNDRIP* in 2007 (alongside New Zealand, Canada and the United States), but reversed its position in 2009.

<sup>18</sup> Megan Davis, 'Aboriginal Women: The Right to Self-Determination' (2012) 16(1) *Australian Indigenous Law Reporter* 78, 79.

<sup>19</sup> There are many examples of Indigenous governance structures at regional and federal levels, most notably the Murdi Paaki Regional Assembly (created in 1997) and the National Congress of Australia's First Peoples (created in 2010). However, the focus of this article concerns justice initiatives at the local community level.

<sup>20</sup> Department of the Prime Minister and Cabinet (Cth), *Indigenous Advancement Strategy* <<http://www.dPMC.gov.au/indigenous-affairs/indigenous-advancement-strategy>>.

<sup>21</sup> Department of the Prime Minister and Cabinet (Cth), *Closing the Gap: Prime Minister's Report 2018* (2018) <<https://closingthegap.pmc.gov.au/>>.

<sup>22</sup> Department of the Prime Minister and Cabinet, *Referendum Council's Fifth meeting* (2016) <<https://www.dPMC.gov.au/resource-centre/indigenous-affairs/referendum-council-communique-9-august-2016>>.

Australian federal policy can hence be characterised, in general terms, as being focused more on the rolling out of government strategies and programs in an attempt to deliver self-determination to Indigenous Australian communities than in nurturing and supporting local visions of governance. In the words of Davis:

The adoption of a policy of self-determination for Indigenous peoples by the Commonwealth [G]overnment meant that the developing norm of self-determination became state-centric — focused on the state — and less attention was paid to how the right to self-determination should be managed internally within Indigenous groups themselves, especially in regards to Aboriginal women, gender equality and violence.<sup>23</sup>

For many years, Indigenous scholars and activists have repeated the vital importance of this right as an explicit goal and as integral to the future prospects for all Aboriginal and Torres Strait Island peoples, communities and nations.<sup>24</sup> Rarely, however, is ‘self-determination’ examined with reference to everyday practices of policing.<sup>25</sup> This is perhaps due, at least in part, to the influence of previous policing scholarship, which both reflected a preoccupation with the State police and defined ‘policing’ narrowly as involving social regulation combined with the use or threat of coercive force.<sup>26</sup> It is now readily acknowledged, however, that ‘policing’ extends beyond the activities of the State police.<sup>27</sup>

### III Non-State Policing

There is a significant body of international literature on the rise of non-State policing and security.<sup>28</sup> However, very little information exists on Indigenous forms of self-

<sup>23</sup> Davis, above n 18, 80.

<sup>24</sup> Kevin Gilbert, *Because a White Man'll Never Do It* (Angus & Robertson, 1973); Aileen Moreton-Robinson, *Sovereign Subjects: Indigenous Sovereignty Matters* (Allen & Unwin, 2007); Megan Davis and Marcia Langton (eds), *It's Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform* (Melbourne University Press, 2016); Irene Watson, *Aboriginal Peoples, Colonialism and International Law* (Routledge, 2015); Nicole Watson, ‘The Northern Territory Emergency Response: The More Things Change, the More They Stay the Same’ (2011) 48(4) *Alberta Law Review* 905; Michael Dodson, ‘The End in the Beginning: Re(de)fining Aboriginality’ (Wentworth Lecture, Australian Institute of Aboriginal and Torres Strait Islander Studies, 30 June 1994) <<https://aiatsis.gov.au/publications/presentations/end-beginning-redefining-aboriginality>>; Gary Foley, Andrew Schaap and Edwina Howell (eds), *The Aboriginal Tent Embassy: Sovereignty, Black Power, Land Rights and the State* (Routledge, 2013); Michael Mansell, ‘Towards Aboriginal Sovereignty: Aboriginal Provisional Government’ (1994) 13(1) *Social Alternatives* 16; Daryle Rigney and Steve Hemming, ‘“Is Closing the Gap” Enough? Ngarrindjeri Ontologies, Reconciliation and Caring for Country’ (2014) 46(5) *Educational Philosophy and Theory* 536; Larissa Behrendt, *Achieving Social Justice: Indigenous Rights and Australia's Future* (Federation Press, 2003).

<sup>25</sup> There are two important exceptions: Blagg, above n 3, ch 9; Cunneen, above n 3, ch 8.

<sup>26</sup> See especially Carl B Klockars, *The Idea of the Police* (SAGE Publications, 1985).

<sup>27</sup> See, eg, Les Johnston, *The Rebirth of Private Policing* (Routledge, 1992); Lucia Zedner, *Security* (Routledge, 2009); Robert Reiner, *The Politics of the Police* (Oxford University Press, 4<sup>th</sup> ed, 2010); Jean-Paul Brodeur, *The Policing Web* (Oxford University Press, 2010); Adam Crawford, *The Local Governance of Crime: Appeals to Community and Partnerships* (Oxford University Press, 1997); Alison Wakefield, *Selling Security: The Private Policing of Public Space* (Willan, 2003); Ian Loader and Neil Walker, *Civilizing Security* (Cambridge University Press, 2007).

<sup>28</sup> Community policing initiatives have been given considerable attention within many national jurisdictions such as Canada (see Pamela Leach, ‘Citizen Policing as Civic Activism: An International Inquiry’ (2003) 31(3) *International Journal of the Sociology of Law* 267; Mike King,

policing. The work of Aboriginal night patrols first came to the attention of legal researchers during consultations for the Australian Law Reform Commission's report on *The Recognition of Aboriginal Customary Laws*, which was initiated in 1977. The Final Report contains one of the first, albeit very brief, written references to Aboriginal self-policing initiatives and related activities of schemes operating in several remote communities in South Australia and the NT in the 1970s.<sup>29</sup> The first academic paper on the subject of night patrols was written by Langton, who saw their potential for providing an effective alternative to State intervention in the early 1990s.<sup>30</sup> Langton's research suggested that the everyday activities of patrols extend beyond western concepts of 'policing' to provide a much more encompassing cultural service for Indigenous Australian communities.<sup>31</sup>

The earliest patrols to be documented in archival and secondary (written) accounts include: the 'Security Men' patrol at Roper River (NT); the 'ten man committee' in Roebourne, Western Australia ('WA'); the 'Community Council' at Yirrkala (NT); the 'Julalikari Council Patrol' in Tennant Creek (NT); the 'Redfern Patrol' (NSW); and the 'Yuendumu Women's Night Patrol' (NT).<sup>32</sup> These patrols were informal responses to the specific needs of the local communities in which they operated. Many of these patrols were staffed by Elders, community leaders and other respected community members who set up a patrol in response to a perceived need within the local area. It is a common misconception that the earliest night patrols existed solely within remote communities of WA and the NT — examples of early self-policing initiatives exist equally in urban and rural locations. In addition to the self-policing initiative that existed in Redfern in the early 1980s, while completing fieldwork I heard of similar initiatives in NSW including the Bourke Women's Night Patrol (circa 1991–97), the Brewarrina Granny Patrol (circa 1990–2011) and the Walgett Night Patrol (circa 1995–present).

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'Policing and Public Order Issues in Canada (1997) 8(1) *Policing and Society* 47; Tonio Sadik, 'Native Policing in Canada' in K Hazelhurst (ed) *Perceptions of Justice: Issues in Indigenous Community and Empowerment* (1995); Don Clairmont, 'Community Policing in Aboriginal Communities in Canada' in Mahesh K Nalla and Graeme R Newman (eds) *Community Policing in Indigenous Communities* (CRC Press, 2013); South Africa (see Mike Brogden and Clifford Shearing, *Policing for a New South Africa* (Routledge, 1993); Anne-Marie Singh, *Policing and Crime Control in Post-Apartheid South Africa* (Ashgate, 2008); Clifford Shearing and Jan Froestad, 'Nodal Governance and the Zwelethemba Model' in Hannah Quirk, Toby Seddon and Graham Smith, *Regulation and Criminal Justice* (Cambridge University Press, 2010) 103; Bill Dixon and Lisa-Marie Johns, *Gangs, Pagad and the State: Vigilantism and Revenge Violence in the Western Cape* (Centre for the Study of Violence and Reconciliation, 2001)); and Kenya (Mathieu Deflem, 'Law Enforcement in British Colonial Africa: A Comparative Analysis of Imperial Policing in Nyasaland, the Gold Coast, and Kenya' (1994) 17(1) *Police Studies* 45; Mutuma Ruteere and Marie-Emmanuelle Pommerolle, 'Democratizing Security or Decentralizing Repression? The Ambiguities of Community Policing in Kenya' (2003) 102(409) *African Affairs* 587).

<sup>29</sup> ALRC, above n 1, [858]–[866].

<sup>30</sup> Marcia Langton, 'The Wentworth Lecture — Aborigines and Policing: Aboriginal Solutions from Northern Territory Communities' (1992) *Australian Aboriginal Studies* 2; Marcia Langton et al, 'Too Much Sorry Business', Submission of the Northern Territory Aboriginal Issues Unit to Commissioner Elliott Johnston, *Royal Commission into Aboriginal Deaths in Custody*, July 1990.

<sup>31</sup> Langton, 'The Wentworth Lecture', above n 30.

<sup>32</sup> This is the conclusion I have drawn after reviewing secondary texts. It is likely that earlier forms of localised community policing existed well before this, however further research is needed to document the rich and varied history of these initiatives.

According to Langton, the most important skills that patrol workers had were fluency in local Aboriginal languages, cultural knowledge and verbal persuasion.<sup>33</sup> Sources suggest that the earliest patrols developed in an ad hoc way that was responsive to the local environments in which they formed, and as such there was a large degree of diversity among initiatives.<sup>34</sup> In some instances, local patrols developed in response to a perceived deficiency of the existing State police service — for example, the Yuendumu Women’s Night Patrol (NT), which was set up by female Elders in response to the inadequacy of services available to address substance-related issues. In other instances, patrols were set up in response to perceived harassment and over-surveillance by the existing State policing service. While in other instances, as Higgins notes, night patrols developed ‘quite simply, because there was nothing else’.<sup>35</sup>

Given this diversity, this article uses ‘non-State policing’ collectively to encompass a wide variety of localised safety initiatives including night patrols, streetbeats and other locally-run initiatives with formal agendas that focus on keeping young people safe and preventing contact between Aboriginal and Torres Strait Islander people and the State police. The core features of non-State policing include: independence from State police; a consensual basis of operations; and a connection to the local Indigenous community. Non-State policing initiatives currently exist in a diverse range of urban, rural and remote settings across Australian jurisdictions. A national review of night patrols conducted by Blagg in 2003 found that there were in excess of 130 night patrols operating at the time, with two-thirds of these located in remote parts of WA and the NT.<sup>36</sup>

As begins to emerge already in this analysis, there is an enormous degree of diversity among the functions, objectives, composition and style of each unique service. Despite this variation, broad unity can be seen at the level of key functions, which in NSW included maximising safety, mentoring, and preventing harmful behaviour. One of the core activities of patrols is their attempt to act as a safety net for young people who ‘fall through the cracks of the system’ — in particular, homeless youth, young mothers and youth who are in and out of juvenile detention centres. Another key activity is attempting to minimise conflict and confrontation between the State police and Aboriginal communities. Aboriginal Patrols hence attempt to counter the negative impacts of the criminal justice system for Indigenous young people and to manage relations between the State police and the community.

At least in theory, night patrols are connected in some way to the local Aboriginal community within which they operate. In practice, night patrols operate with varying levels of community input or involvement from the Aboriginal community (for example, they might be organised by an Aboriginal corporation, by a men’s group or women’s groups, or they may function with the oversight of the

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<sup>33</sup> Langton, above n 30.

<sup>34</sup> Ibid; ALRC, above n 1; Anne Mosey, *Taking Control of the Grog* (1999) 19(3) *Artlink* 47.

<sup>35</sup> David Higgins, *Best Practice for Community Night Patrols and Warden Schemes: A Report to the Office of Aboriginal Development* (Office of Aboriginal Development (NT), 1997).

<sup>36</sup> Harry Blagg, *An Overview of Night Patrol Services in Australia* (Department of Justice and Attorney-General (Cth), 2003); Harry Blagg and Giulietta Valuri, ‘Self-policing and Community Safety: The Work of Aboriginal Community Patrols in Australia’ (2004) 15(3) *Current Issues in Criminal Justice* 205.

local Aboriginal Working Party). Similarly, patrols operate independently of — and, not infrequently, in some degree of conflict with — the State police. This does not mean that the relations between patrols and the State police are essentially acrimonious, although this is sometimes the case. Indeed, most patrols relied on the State police to intervene in instances of violent crime (domestic violence, assault) and many patrols had positive relationships with the State police. In some cases, senior police officers were present on the management committees of local patrol initiatives. That said, a key part of the agenda of local night patrols is to minimise contact between community members and the State police. As this implies, night patrols do not fall neatly into either the governmental or autonomous reform efforts, and occupy what scholars have termed ‘third’ or ‘hybrid’ spaces.<sup>37</sup> These theorisations aside, very little information exists on the development and contemporary operation of night patrols and other forms of non-State policing in Australia.

## IV Methodology

To begin to redress this oversight, a qualitative study was conducted on the everyday operations and politics of night patrols, streetbeats and non-State policing in NSW, Australia. The study examined the nature of their everyday operations (at service and managerial levels) and the nature of relations between the patrol and various entities (clients, the Indigenous community, the non-Indigenous community, the local State police, funding bodies and so on). To this end, the overarching objective of the study was to uncover the agency of ‘bottom-up’ justice initiatives including the many unsung heroes involved in their everyday operation such as Elders and community members.

The purpose of the study was to gain insights into the everyday operation and politics of Aboriginal Patrols. I did not attempt to provide an evaluation of the patrols or consider whether or not, according to some fixed performance criteria, they ‘work’. I was more interested in the mundane details in order to demonstrate the variety and complexity of alternative governance structures in their local context. In doing so, a related aim of this research was to document the oral testimonies of those involved in the everyday operation of patrols and to paint a more in-depth picture of patrols. In this way, I was interested in adopting a sociological approach to the everyday operation of non-State policing initiatives and their ‘mundane governance’<sup>38</sup> of crime and safety.

Three primary case studies were carried out in Redfern/Waterloo (inner-city areas of Sydney, NSW), Bourke (a small town in far-western NSW) and Dubbo (a provincial city in mid-western NSW). In terms of research methods, the study consisted of: field observations (sitting in on patrol operations during operation hours and observing the patrol activities and interactions), interviews (83 were audio-recorded and some were not recorded); and informal discussions (including individual and group discussions). During field observations, I would usually sit

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<sup>37</sup> Blagg, above n 3; Cunneen, above n 3.

<sup>38</sup> I adopt the term ‘mundane governance’ in line with its usage by sociologists as everyday modes of regulation and social control. See especially Steve Woolgar and Daniel Neyland, *Mundane Governance: Ontology and Accountability* (Oxford University Press, 2013).

behind the driver, though after half a year on the Redfern Streetbeat I ended up working as a volunteer (in an unofficial capacity) and thus sat in the passenger seat from this time onwards. My purpose during the ‘sit ins’ was primarily to observe, though I took detailed notes as discretely as possible. The other purpose was to converse with patrol workers and young people using the service. The study was supplemented by archival searches of documents, reports, photos and related materials. The study has been informed by original fieldwork conducted on several other sites in NSW: Grafton (October 2010, December 2011); Ballina (October 2011); Brewarrina (November 2011); Daceyville (August–September 2011); Kempsey (May 2011); and Newcastle (January 2012).

Due primarily to ease of access, I spent proportionately more time in urban centres relative to the rural and remote patrols. Specifically, as a Sydney-based researcher, I was able to observe the Redfern Streetbeat operations regularly each Saturday and Sunday night from 9pm–3am (and sometimes later). The fieldwork in Redfern formally started on 11 February 2011 and continued to 28 June 2013 (with a three-month period away from October–December 2012 during which time I was completing a residency). At that time, the Redfern Streetbeat was operating from Thursday to Saturday nights, from the hours of 9pm–3am in summer and 10pm–3am in winter. Fieldwork in Dubbo and Bourke was carried out between 1 August 2011 and 12 December 2011 (totalling five visits of 1–2 weeks duration in each town). At that time, the Dubbo Safe Aboriginal Youth Patrol operated Wednesday–Saturday (7–10pm), and during my visits I went on patrol every patrol night. The Bourke Safe Aboriginal Youth Program operated from Thursday to Saturday (6–11pm), and I was similarly able to observe all patrol operations and related youth activities during my visits.

Interviews were conducted with patrol personnel (including drivers, workers, volunteers, management, administrative staff) who worked for the patrol in each of the case study sites. Interviews were also conducted with staff from funding bodies, local police (at all levels including Sergeant, Detective Inspector, Head of Police Command, Aboriginal Liaison Officers), with local government councillors, with representatives of local businesses, with teachers at the local school (Aboriginal Education Officers) and with members of the general community (both Indigenous and non-Indigenous).

The study raises important ethical considerations that deserve more thorough treatment than is possible here.<sup>39</sup> Ethics approval for this research project was granted by the Human Research Ethics Committee of the University of Sydney (‘HREC’) and the NSW Aboriginal Health and Medical Research Council Ethics Committee (‘AHMREC’).<sup>40</sup> Throughout the course of this research project, however, my ethical obligations as a researcher extended above and beyond the conventional paradigm of ‘human research ethics’ to include a range of ongoing personal or moral responsibilities as a researcher. I was conscious of my position as a researcher (including the power and privilege this position necessarily entails) and how this

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<sup>39</sup> For a more detailed account of the ethical considerations arising out of this study, see Amanda Porter, *Decolonising Juvenile Justice: Aboriginal Night Patrols, Streetbeats and Safety* (PhD Thesis, University of Sydney Law School, 2014) ch 3.

<sup>40</sup> HREC approval: Protocol No 13165; AHMREC approval: December 2010.

affected my interactions with research participants, the importance of reciprocity and partnerships with community organisations (in this case, local patrol initiatives). I had an awareness of the ethics around my own relative privilege especially in relation to the patrol's 'client group', which included Indigenous young people.

The study resulted in multiple findings, the scope of which lie beyond this article. For the purposes of this article, Part V sketches out three key findings that are relevant for discussions of legal pluralism and the meaning of self-determination in the criminal justice context.

## **V Findings: Non-State Policing, Self-determination and Legal Pluralism**

### **A *Diverse Local Histories of Community Safety Initiatives***

The first and seemingly most significant finding of the study related to the rich and diverse local histories of non-State policing initiatives, which were much more complex and typically formed part of a longer local history than I anticipated. I was particularly struck by the vibrant local histories and the breadth of initiatives currently in operation. In Sydney, for example, there are two night patrols: Redfern Streetbeat and the Daceyville Boomerang Bus. There are also several safety initiatives, such as Clean Slate Without Prejudice, an initiative run by Tribal Warrior Aboriginal Corporation in partnership with the Redfern Local Police Area Command aimed at improving relationships between young people and the State police. In Bourke, I had originally come to town with the intention of learning about the Bourke Community Assistance Patrol ('the Bourke CAP'), but quickly learnt that it was part of a significantly longer history including the Bedford Bus, the Active Neighbourhood Watch, the Aboriginal Women's Night Patrol (also known as *Ngapri Nalli* or 'my mother') and the Bourke Safe Aboriginal Youth Patrol.<sup>41</sup> The function and form of the patrol changes over time in response to local needs and priorities. In the case of Bourke, this local vision for community justice continues today and forms part of a larger community vision for justice as seen more recently with the justice reinvestment strategy: the Bourke Maranguka Justice Reinvestment Project.<sup>42</sup> As begins to emerge, the picture of night patrols is one of variability and complexity.

### **B *Governance Structure and Community Control***

A second and equally significant finding related to governance structure and the significance of community control as repeated in interviews and discussions. When asked 'what are the essential ingredients of a successfully run night patrol?', the term 'community' (in the sense of the local Aboriginal community), was the single most common response by patrol workers, residents, and management staff. Those who

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<sup>41</sup> See the Appendix for further information about night patrol initiatives in Bourke.

<sup>42</sup> Just Reinvest NSW, *Justice Reinvestment in Bourke* <<http://www.justreinvest.org.au/justice-reinvestment-in-bourke/>>. See also the Appendix to this article.

mentioned the term usually mentioned it at the beginning and placed emphasis (via repetition or stress) on its central importance in the everyday functioning of the patrol:

Has to be community owned. Has to be community people on it. Has to retain control by the community. I think they're the three strongest points. Honestly, community, community, community. If a non-Aboriginal person walks into town and says: 'I've got this fantastic idea people, this is what we're gonna do'. It's not gonna get off the ground.<sup>43</sup>

It's around the governance model, it's gotta be a strong governance model. Again, be driven by the community for the community and I'm a big believer in that. ... Keep the government bureaucrats out of the road as they only muddy the waters. Community driven, local employment strategy, community stakeholders that take ownership and leadership by the CAP patrollers because they get looked upon and the peers look to them as they've got a job and 'hey that could be me'. ... But it's more around the model, the home-grown grassroots model where we're in control but [also] having good governance. Home-grown, community driven... And being culturally appropriate.<sup>44</sup>

In interviews with residents, there was acknowledgement of the 'home-grown' patrol models, an attribute which was, for many, perceived as 'the' underlying factor affecting everyday patrol operations. These points bring out not just the importance of having 'an Aboriginal design' or 'Aboriginal personnel', but of being built on understandings and relationship that are culturally, historically and locally specific to the local Aboriginal community. All of this translated into cultural authority, legitimacy and belonging in a very local sense. When I spoke with patrol staff of the Redfern Streetbeat — the longest running patrol service of all three case studies — and asked what they perceived to be the key to this sustainability over time, chief among the reasons offered was that of 'community engagement'. The importance of this was emphasised by the current manager of the Redfern Streetbeat, who viewed the partnership with a local Aboriginal corporation as an integral part of the service:

[I] think it's important that the bus, because we work predominantly with Aboriginal young people, to be closely associated with an Aboriginal organisation. ... And I just think, you know, that's the way it should be, [it's] that link to the community. Danny [CEO of the Aboriginal Resource Centre in Redfern] sees all these kids' parents, they come in to get sporting grants. *That link is important, it gives credibility and.... No, credibility is not the word. It just. It gives the bus a place in the Aboriginal community. It's not just out there.*<sup>45</sup>

Creating a nexus with the local Aboriginal community would thus appear critical to what is understood to be self-determination — at least in terms of the kinds of everyday relations touched on by local patrol initiatives. However, this should not be thought of as a once-and-for-all process, as if once established the 'self-determining' status of a given patrol exists eternally or universally.

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<sup>43</sup> Patrol worker #3, Dubbo.

<sup>44</sup> Patrol manager #2, Bourke.

<sup>45</sup> Patrol worker #5, Redfern Streetbeat (my emphasis).

As could be anticipated, the governance structure of a local patrol is unlikely to be the same from one community to another, to such an extent that the very term ‘night patrol’ seemed inadequate in capturing the diversity of these highly disparate justice initiatives. So, for example, the governance structure of the Bourke CAP consisted of over a dozen patrol staff (all Indigenous and from Bourke, with the exception of one non-Indigenous patrol worker), a Patrol Manager (Indigenous) and a Steering Committee (consisting of Indigenous and non-Indigenous residents). Bourke residents who were regularly in attendance at Steering Committee meetings included: Aboriginal community member; Elders; the Chair of the Bourke Aboriginal Community Working Party; state (NSW) police officers; the Chair of the Darling Police Command; members of the local government council (Bourke Shire Council); local business owners, teachers, the town Mayor, TAFE (Technical and Further Education) NSW representatives, teachers and residents.

The Bourke CAP meetings were different to governmental or inter-agency meetings, which patrol management staff are contractually required to attend (for example, under funding requirements). The meetings were the initiative of, and operated according to, conditions set by the patrol management staff, with attendees participating of their personal capacity and typically in the capacity of ‘concerned local residents’. The fact the government representatives present at these meetings were Bourke residents was important and allowed patrol management to counter the power structure in which government–community relations habitually occur. The Steering Committee meetings, in particular, allowed patrol and management staff to present findings and manage problems that arose with the objectives of transparency, accountability and whole-of-community involvement. The purpose of Steering Committee meetings was to create a platform for the transfer of information about everyday patrol operations, as well as providing a culturally appropriate way for non-Indigenous community members to offer suggestions, to air grievances and provide feedback on the running of the service. Night patrols similarly reflected a varied spectrum of Indigenous control and ownership. Whereas the Bourke Women’s Night Patrol was run on a voluntary basis by Elders and senior Indigenous women (with the provision of in-kind support from the local council), the Redfern Streetbeat was managed by a team of Indigenous and non-Indigenous staff members, including paid staff and volunteers.

Another common issue related to the balancing of competing expectations on issues relating to the service and management of the local night patrols. As could be imagined, the everyday management of patrol services involved mundane, routine disputes regarding local patrol activities and operations. These disputes might concern: the management of relations with non-Indigenous entities (for example, the State police and funding bodies); issues concerning logistics (for example, the appropriate place for the van to be parked, the appropriate venue for meetings); managing competing community expectations, desired hours of operation, training, uniforms, changes in personnel, and handover practices; staff and personality conflicts; managing competing expectations; funding disputes; processes related to the banning of badly behaved individuals from the service (also known as ‘ousting’); and the inclusiveness of the service. In managing competing community expectations, research participants highlighted the importance of transparency, communication, integrity and good governance. Indigenous research participants

were at pains to emphasise that the issue of how the conflict was dealt with was often more important than the conflict itself:

But this is a constant process you had to deal with. So there would be family feuds in the community and sometimes we would receive complaints. Things like ‘Uncle wouldn’t pick me up because of this family’. But *it was how we dealt with this that mattered. Our priority was youth, not certain families — but if that is there, or even if that perception is there, it has to be dealt with.* Sometimes this would be by talking with the young fella one on one. But it would be led by example also and [by] making sure we did see all kids.<sup>46</sup>

Compounding the issue of competing expectations was the tendency for any solution that fell short of solving *all* the problems of a local community to be accused of ‘not getting to the nitty gritty’ or dismissed as a ‘band-aid solution’. The expression ‘band-aid solution’ was used commonly in conversations and was particularly current in rural settings. While such views were not universally held, the mere presence of such perceptions is reflective of deeper issues of cynicism and community self-esteem. Some residents felt that term created an air of cynicism that was itself inhibitive of social change. The band-aid label was perceived by a number of participants to be part of the problem itself.

Patrol workers and management staff were cognisant of the ambitious nature of their work and the expectations placed on their role:

If I could remember my work plan for the first month, it was ah — get the [Bourke] CAP started up again, solve law and order ah, cure cancer — you know what I mean? [laughter] You know, I drove myself into the ground! I worked so hard because I was so chuffed to get the job I thought, I’ve got to ... [Our role involved] Trying to build people up to these expectations and to talk those other people’s expectations down, do you know what I mean? Because people have really unrealistic expectations about what can be achieved and then they crack the shits when they can’t be done and that’s the thing. *People don’t want it just to work a bit, they want it to be the cure for cancer.*<sup>47</sup>

Given the high level of expectations placed on the performance of a local patrol — specifically, in ‘fixing’ poverty, ‘solving’ homelessness or ‘reconciling’ police–community relations — it is perhaps unsurprising that patrol workers described experiencing a sense of ‘burn out’ or the need to ‘step down’ from positions of management and leadership. The issue of burn out was often compounded by difficulties in securing predictable and ongoing funding.

### C *Everyday Governance of ‘Crime’ and Safety*

A third finding, which is important in relation to the meaning of self-determination in the justice context, relates to the everyday governance of ‘crime’ and safety. At least in theory, patrols and the State police share common goals and there are multiple advantages for both parties to work together. For the State police, advantages include: assistance in managing difficult situations and individuals; and

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<sup>46</sup> Patrol worker #5, Bourke CAP (my emphasis).

<sup>47</sup> Patrol manager #2, Bourke CAP (my emphasis).

the potential to open up channels of communication for broader issues facing Aboriginal communities generally. For the local patrol, advantages include: the ability to have police 'on-call' as back-up support for serious crimes; access to secure premises to store the patrol vehicle and equipment; and the potential to open communication channels with the State police. For both parties, there is the potential of decreasing high arrest and incarceration rates of Indigenous peoples and improving relations between the police and Aboriginal communities.

Generally speaking, improved relations between communities and the police have the potential to decrease the trust gap that currently exists between Indigenous peoples, communities and the State police. Both State police officers and patrol workers seemed to recognise advantages of working in unison and acknowledged, to varying degrees, the complementary nature of their work. Patrol workers said: 'we're taking a load off their [the police] work too',<sup>48</sup> 'we're just doing them a favour',<sup>49</sup> and 'if they wanted to work with us, they would get a lot more'.<sup>50</sup> These sentiments were echoed in interviews with police officers, who regularly acknowledged the cultural appropriateness of the service, some of whom stated: 'it's a two-way street',<sup>51</sup> '[they are] stopping things before police intervention is necessary',<sup>52</sup> '[patrols are] an alternative to the police going around'<sup>53</sup> and 'they make our job easier'.<sup>54</sup> In some interviews, the very fact of attempting to foster good relations and build bridges between the two entities was seen as a positive step and an achievement in and of itself:

I've gotta say that one of the things in particular about the CAP [Community Assistance Patrol] that I thought was successful was the fact that the police volunteered to work with the CAP members and also support the patrols. So we had a good relationship generally ... I made a request that the CAP drivers come into the police station and talk to the police as an overt way of ensuring that we maintained a system because the police look after the radios for them, and that was an opportunity for the police, if they were in the position to do so, to talk with them see how they've gone again, exchanging the any significant issues that may be arising around town and also um, you know, it's a two-way street in terms of the people from the CAP maybe raising issues of concern in the community that type of thing.<sup>55</sup>

Look, like anything it fluctuated depending on those involved, but I was certainly keen to foster a positive relationship there, and that's part of the key to the success of these type of programs. You're gonna have varying levels of attitudes and past conflict between individuals, but generally it was very good, I thought, and the police recognised the importance of maintaining that, of fostering good relationships.<sup>56</sup>

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<sup>48</sup> Patrol manager #2, Bourke.

<sup>49</sup> Patrol worker #5, Redfern.

<sup>50</sup> Patrol worker #1, Grafton.

<sup>51</sup> Police officer #3, Bourke.

<sup>52</sup> Police officer #2, Bourke.

<sup>53</sup> Police officer #1, Dubbo.

<sup>54</sup> Police officer #2, Lismore.

<sup>55</sup> Police officer #3, Bourke.

<sup>56</sup> Police officer #2, Lismore.

These discourses provide an important counter-narrative to the otherwise fairly bleak analyses within the literature on policing and Indigenous peoples. In completing my fieldwork, I was able to witness some first-hand attempts by both sides to work together. In Redfern, patrollers notified police immediately after a serious incident involving a dispute between two young people and were able to manage the scenario while awaiting police arrival at the scene. Later, they provided witness testimony to the police and attended specifically to the needs of both of the two young boys involved, including facilitating access to a counsellor.

Despite such examples of convergence, inevitably complications arise in practice. As one research participant succinctly described: 'it's a love/hate relationship'.<sup>57</sup> Recalling the historical and contemporary dimensions of the relationships between communities and the police, as described at the outset of this article, this hardly seems surprising. The broader dimensions of these neo-colonial power dynamics were a great source of ongoing conflict and confrontation between communities and the police across all case study sites.

In addition to these broader power dynamics, the tensions between patrols and the State police at other times played out due to the different philosophies or approaches to 'policing'. Whereas the State police have legal powers to arrest, detain and move; night patrols operate on a consensual basis and can only persuade young people to cooperate. Whereas police officers are primarily concerned with maintaining order and enforcing the law; night patrols are concerned with ensuring the safety and wellbeing of Indigenous young people. Whereas police officers retain somewhat of a distance from 'the public(s)' they police, night patrol officers are on a first-name basis with many of 'the client group'. Generally speaking, patrol officers were more likely to 'turn a blind eye' to minor social transgressions such as drinking, offensive language, and recreational drug use. While the idea of turning a blind eye to crime might seem surprising to some, it is in many ways no different to the police officers' powers of discretion with respect to the enforcement of the criminal law. Patrol officers were simply using their judgement to make a decision regarding the most pragmatic course of action with regards to the circumstances and the young person's safety and wellbeing.

An interesting example of conflicting views of 'crime' — and one which arose frequently in the field — related to the policing and governance of breaches of 'curfew'. It was very common for Indigenous young people to have restrictions placed on their movement in terms of both place and time. The breach of (court-imposed) curfew is an offence under the *Bail Act 1978* (NSW). However, many patrol workers saw the imposition of curfew as an infringement of civil liberties. Social justice advocates and human rights agencies have equally raised concerns over excessive curfew checks and the excessive restrictions that curfews impose on Indigenous young people.<sup>58</sup> Criminological research equally confirms the fact that a

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<sup>57</sup> Patrol worker #3, Dubbo Gordon Centre Night Patrol.

<sup>58</sup> Vicki Sentas and Camilla Pandolfini, *Policing Young People in NSW: A Study of the Suspect Targeting Management Plan* (Youth Justice Coalition, 2017) <<https://www.piac.asn.au/wp-content/uploads/2017/10/17.10.25-YJC-STMP-Report.pdf>>; Chris Cunneen, Rob White and Kelly Richards, *Juvenile Justice: Youth and Crime in Australia* (Oxford University Press, 5<sup>th</sup> ed, 2015);

disproportionate number of Indigenous young people have curfews imposed when compared to non-Indigenous young people.<sup>59</sup> From the perspective of police officers, some police officers expressed frustration over the ‘softly softly’ approach taken by patrol workers. Other police officers didn’t appreciate patrol workers ‘treading on their toes’. In the words of one officer, speaking in a personal capacity: ‘Police get frustrated a bit ... One of the cops here, his attitude is that they’re [police officers] not social workers, they’re not there to develop communities; their role is to stop crime.’<sup>60</sup>

Differing perspectives to what constitutes ‘crime’ and how to best ‘police’ or manage these scenarios hence constituted a common source of contestation and political struggle between police officers and patrol workers.

The everyday policing of curfews raises significant issues about justice, morality and fairness in law enforcement. However, this example equally raises questions for the meaning of ‘self-determination’ in the criminal justice context. How do patrol officers and police officers decide what is ‘harmful’ or ‘criminal’? And who ultimately gets to decide?

These simple questions provoke complex, confusing and no doubt passionate debate. To further complicate matters, however, there were also instances in which these contrasting approaches and philosophies to ‘crime’ and safety were able to be implemented in ways that were mutually beneficial to all parties. For example, patrol workers were sometimes called in to assist where police intervention had failed to achieve the desired outcome. As one patrol worker recounts:

Sometimes you intervene with relationship issues, you know. You’d have the young ones fighting with their girlfriend and boyfriend, and you’d do some of that stuff. Or there was one incident in Marrickville, friends called me up and said ‘Rebecca — can you come over and pick such and such up, her and her boyfriend are fighting, she won’t listen to anyone, all the police are here’. So I get there and I pull over and I said I won’t be long I’m going to get such and such — the kids knew her, they knew what was going on. So I get there and she’s standing there and the boy’s standing there. He [the boyfriend] said ‘She won’t go Aunt she won’t go’. So I had to turn around and I said, ‘Hey such and such — let’s go’, you know, ‘You’re all drinking, you’ve all had too much to drink, let’s leave your boyfriend here you can come back in the morning’. And as you know when people are drunk it’s just they go ‘no, no’, but she eventually came. And the police were there and in the end they said you know ‘Thanks because she wasn’t listening to us’.<sup>61</sup>

In this example, the patrol worker was able to use a combination of verbal persuasion, communication skills, and her relative cultural authority to gain a beneficial outcome for all. At times patrol workers were able to persuade or convince a young person to leave a public space by virtue of their communication skills, or by way of a pre-existing social relationship with the client. In some situations, patrol workers were able to use cultural authority — such as his or her Aboriginality or

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Julie Stubbs, ‘Re-examining Bail and Remand for Young People in NSW’ (2010) 43(3) *Australian and New Zealand Journal of Criminology* 485.

<sup>59</sup> Cunneen, White and Richards, above n 58; Stubbs, above n 58.

<sup>60</sup> Anonymous Police Officer (my emphasis).

<sup>61</sup> Patrol worker #2 (referred to as ‘Rebecca’, not her real name), Redfern Streetbeat (my emphasis).

position as a respected community member — to persuade a regular to follow instructions.

There were many other such examples of conflict, contestation and cooperation. The above examples might seem banal and in many ways unremarkable. Yet they raise important questions for contemporary understandings of ‘policing’ and ‘self-determination’ in the criminal justice context.

## VI Conclusion: Reimagining ‘Policing’

This article has examined the meanings of ‘self-determination’ and ‘legal pluralism’ at a local level, as illustrated by the everyday operation of non-State policing initiatives in NSW. It considered the significance of the local histories of these initiatives, the variety of services in some locations, the importance of community-control and local design, and how these initiatives at times served as a site of political struggle and contestation between the patrol and state entities, notably the State police. Irrespective of the complexity of these findings, several discrete conclusions emerge. First, non-State policing varies considerably from town to town, both in terms of historical development and contemporary operation, to such an extent that it is practically impossible and of questionable utility to conceptualise or theorise Aboriginal patrols as if they were a uniform phenomenon. When the view from the ground is of such diverse initiatives, where one may involve a grassroots initiative and the other a government program, the value of abstract, universal discussion is severely compromised.

Second and relatedly, Indigenous governance must also be understood in situ, in the context of locally-specific practices and preferences. This study hence affirms the growing evidence from the national and international literature on the importance of community control and ‘cultural match’.<sup>62</sup> Indeed, it is both impractical and dangerous to look for some abstract set of rules or singular understanding about ‘self-governance’. Self-governance, in this way, is something that the local Indigenous community or nation works out pragmatically in relation to local concerns and issues rather than being a matter of abstract definitions or authenticity. It appeared in many, disputed and varied guises: in everyday decision-making about funding; relations with the State police; whether to sign a Memorandum of Understanding; a focus (or not) specifically on Indigenous young people. Rolling all these and many other concrete practices into an abstract ball and assigning or denying the overall status of ‘self-governance’ or ‘indigenisation’ to a specific patrol is probably arbitrary and analytically problematic. It is also not necessarily something patrol workers value, given they consistently emphasised the importance of ‘community control’ and ‘community ownership’ above all else. Of greater importance were the processes and procedures by which the initiative was created, whether these operated with the backing of local Indigenous forms of Indigenous governance and authority and, ultimately, whether the service prevented Indigenous young people from spending a night in police custody or on the streets.

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<sup>62</sup> Miriam Jorgensen (ed), *Rebuilding Native Nations: Strategies for Governance and Development* (University of Arizona Press, 2007).

Third and finally, in the context of the mundane everyday operations of non-State policing, the politics of decolonisation emerge not as something abstractly unified, but as something always locally thought out, contested, compromised, always changing and often inconsistent or contradictory. It is instructive at this point to recall the work of scholars who have outlined the necessity of seeing colonisation and decolonisation as continuing social, political and cultural processes.<sup>63</sup> To understand community safety initiatives and contexts, the importance of local histories, and especially of local voices, within the context of ongoing battles for justice are paramount.

The experience of non-State policing in NSW demonstrates not only the questionable utility of binaries such as ‘indigenisation versus autonomy’; but raises broader questions about the ways in which knowledge is produced about Aboriginal communities, both by governments and within academia. The inclusion of local perspectives and examples of localised community justice mechanisms adds meaning, depth and context to current debates about self-determination and legal pluralism in the criminal justice context.

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<sup>63</sup> Australian Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) (*‘Stolen Children Report’*); M Dodson and D E Smith, ‘Governance for Sustainable Development: Strategic Issues and Principles for Indigenous Australian Communities’ (Discussion Paper No 250, Centre for Aboriginal Economic Policy Research, Australian National University, 2003); Dodson and Strelein, above n 1; Cunneen, above n 3.

## Appendix: Night Patrols in Bourke, NSW

1. *The Bedford Bus* (circa 1991–93): The Bedford Bus was a non-Aboriginal policing initiative started by a non-Aboriginal police officer, Mr Studsel, working in his personal capacity. The idea came out of police frustrations with public order offences and alcohol-fuelled violence at a notorious local pub, ‘The Oxford’ (since closed down). Mr Studsel saw an old school bus from the local high school on sale and, seeing an opportunity, encouraged the local police command to deploy a drop-off bus as part of their duties on Thursday–Saturday nights, dropping off people at their houses after closing hours while on duty. Although short-lived and bearing no direct connection to the later initiatives of the Aboriginal community, the Bedford Bus was perceived by locals as operating independently of the State police. Members of the Bourke Aboriginal Community Working Party (‘BACWP’) discussed how the initiative influenced their ideas about alternative policing.
2. *The Active Neighbourhood Watch* (circa 1995): A later example of alternative policing was the Active Neighbourhood Watch scheme from around the mid-1990s. This initiative was run exclusively by non-Aboriginal residents who used their own private vehicles to patrol streets and take kids to a safe place and was motivated by law and order issues, rather than the general safety of community members. The scheme was highly contentious, with interviews revealing a fairly polarised spectrum of opinions regarding this informal patrol. Described by one non-Aboriginal resident as, ‘the most holistic in terms of community ownership’, it was described by a local Elder as ‘a vigilante group’. A number of Aboriginal interviewees disapproved of the removal of Aboriginal young people in these circumstances and many raised concerns about the cultural inappropriateness of the service. While the Active Neighbourhood Watch Patrol was relatively short-lived, it provided the impetus for the formation of the Aboriginal Women’s Night Patrol.
3. *Aboriginal Women’s Night Patrol* (circa 1995–97): Also known by locals as *Ngapri Nalli* (‘my mother’), the patrol ran in an ad hoc manner in the mid-1990s. According to the patrol workers, the impetus for the patrol was born out of the need to reclaim control of the youth safety issues in light of the earlier Active Neighbourhood Watch scheme. The Women’s Patrol was an Aboriginal operated and managed scheme — it was run exclusively by respected Aboriginal women and Elders (two of whom, Aunty June ‘Nitty’ Smith and Aunty Nora ‘Waggy’ Smith, continued to work on the Bourke CAP, a later iteration), and was motivated primarily by the interests and concerns of Aboriginal women regarding youth safety in Bourke. The women worked on a voluntary basis, however the Aboriginal and Torres Strait Islander Commission (‘ATSIC’) provided funding for a 12-seater bus and covered petrol and maintenance costs. The bus, which had ‘*Ngadri & Gundooos*’ (‘we care for kids’) written on the side, was highly visible around town, though staff had no uniform. Due to the voluntary nature of the initiative, there were no set hours or days of operation. According to interviews with patrol workers, the bus would run in accordance with perceived need. One resident stated that there was ‘a lovely cultural thing about it — it didn’t matter who the Granny was’. The patrol did not ever

officially terminate its service, though concerns from the broader community about irregularity of the service provided the impetus for the development of a more holistic and elaborate patrol model.

4. *Bourke Community Assistance Patrol ('CAP') (2002–07)*: The Bourke CAP (known locally as 'the CAP') was an Aboriginal initiative developed tin several meetings of the BACWP. Minutes from the first formal meeting of the CAP on Tuesday 16 December 2003 indicate that twelve participants were in attendance and the initial objectives were two-fold: to look out for young people walking the streets late at night and to provide meaningful employment opportunities to local Indigenous people. As recorded in one of the minutes, 'the program aims to give the trainees an opportunity to gain further opportunities, including drivers' licenses for car and bus and security licensing. The CAP monitored the presence of young people on the streets at night, sometimes returning them to their homes, at other times helping 'young people work out alternative things to do'. Patrol operations typically consisted of one driver, one person in the passenger seat, and two others patrolling on foot. All patrol workers were members of the local Aboriginal community with one exception, a non-Indigenous patrol worker 'of colour' (a point which was often emphasised in interviews). Communication occurred between the bus and on-foot patrollers via a two-way radio. Patrol workers wore a uniform of a polo-shirt with the CAP logo (an echidna, an animal of cultural significance for the Ngemba people), which was designed by one of the patrol workers. The workload was seasonally adjusted, with patrol operations finishing earlier in winter months. The activities of CAP workers and volunteers were overseen by the CAP Coordinator, who compiled a roster and completed statistics, bi-annual reports and wrote applications for funding. There was also a Steering Committee, which oversaw more general managerial and governance issues. This consisted of representatives of: the local police, TAFE, the NSW Department of Community Services, ATSIIC, the NSW Department of Justice and Attorney-General, and members of the Bourke Shire Council. Meeting minutes from this period indicate there was considerable ambiguity as to the role and responsibilities of the patrol. In March 2004, employment for workers shifted from working on a purely voluntary basis to receiving a wage component as part of the Community Development Employment Program ('CDEP').<sup>64</sup> During this time the patrol functioned from 6pm–midnight Tuesdays and Wednesdays and from 5pm–midnight Thursdays to Saturdays. The governance arrangements of the patrol were formalised when in 2005 when the BACWP signed two 'Shared Responsibility Agreements' with the Federal and NSW governments. These documents were known officially as the Bourke 'Community Assistance Patrol' and 'Making the Town Safer' Shared Responsibility Agreements. In total, the CAP patrol ran intermittently from December 2002 until sometime in 2007. The CAP temporarily ceased in the months of (May 2004, June 2005, October 2005) due to disruptions in funding and management issues.

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<sup>64</sup> CDEP was established in 1977 under the Hawke Federal Government. It aimed to replace income support with locally-based employment or volunteer projects for Indigenous persons living in rural and remote areas. By decision of the Howard Federal Government, the scheme ended in 2007.

5. *Bourke Safe Aboriginal Youth ('SAY') Patrol* (circa 2008–present): The SAY Patrol, a separate entity to the CAP, commenced in 2008. The patrol currently operates Thursday–Saturday. At around 6pm, one Aboriginal patrol worker drives around town in a 12-seater bus with 'Safe Aboriginal Youth: an initiative of the Department of Justice and Attorney General' displayed on the side of the van. The worker drives around the streets of Bourke, recruiting Aboriginal young people from the streets, local parks, levy banks, from Alice Edwards Village, North Bourke and other outlying areas. Typically three or four busloads of young people aged around 5–15 years are escorted to the Bourke Police Citizens Youth Club ('PCYC') to participate in activities and are provided with a warm meal. From 10 pm onwards, the patrol worker gives the young people a lift home, starting with the youngest and finishing with the teenagers. A new bus was provided by the NSW Department of Justice and Attorney-General, and funding (\$48 000 per year) is currently provided by the PCYC, a non-Aboriginal organisation. Two of the SAY patrol workers had previously worked as drivers on the earlier CAP model. The SAY patrol is currently operated by an Aboriginal staff and management (consisting of one manager, youth worker coordinator, youth activity officer, youth case manager), though it relies heavily on the assistance of a number of Aboriginal and non-Aboriginal volunteers who work as activity officers at the centre. Interviews with Aboriginal residents in Bourke revealed mixed responses as to the perceived autonomy of the initiative.
6. *Maranguka Justice Reinvestment Project* (2013–present): The Maranguka project is a whole-of-community strategy currently being trialled in Bourke, on the western plains in New South Wales. It is a community-led initiative that builds on previous safety initiatives and involves a collective impact framework bringing together a range of government and non-state entities to work on a common agenda. It is a coordinated strategy, building on previous safety initiatives, to support vulnerable families and young people through community-led teams working in partnership with existing service providers, in order to 'together ... build a new accountability framework which wouldn't let our kids slip through'.<sup>65</sup> The overarching goal of the project is to decrease the rate of contact of Aboriginal young people with the criminal justice system, adult incarceration and youth detention in Bourke. While the Maranguka project is currently in the process of being evaluated, preliminary feedback provides strong indication of the benefits of whole-of-community approaches to justice that include relationship building, networking, sharing information, reducing silos in service delivery, improving processes and improving community safety. Emerging data suggests the initiative has seen a significant improvement in community safety, including: a 72% reduction in youth traffic offences, an 18% reduction in major offences reported and a 39% reduction in the number of people proceeded against for drug offences.<sup>66</sup>

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<sup>65</sup> Alistair Ferguson, Executive Director of Maranguka, quoted in Just Reinvest NSW, above n 42.

<sup>66</sup> Mick Gooda, 'Don't Let the "Inquiry Mentality" See Life Get Worse after the Royal Commission', *The Guardian* (online), 8 November 2018) <<https://www.theguardian.com/commentisfree/2018/nov/08/dont-let-inquiry-mentality-see-life-get-worse-in-the-nt-after-the-royal-commission>>.



# *The Liability of Australian Online Intermediaries*

Kylie Pappalardo<sup>†</sup> and Nicolas Suzor<sup>\*</sup>

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## *Abstract*

This article provides a comprehensive review of the current state of Australian online intermediary liability law across different doctrines. Different aspects of Australian law employ a range of tests for determining when an actor will be liable for the actions of a third party. So far, these tests have primarily been developed in cases brought under the laws of defamation, racial vilification, misleading and deceptive conduct, contempt of court, and copyright. In this article, we look across these bodies of law to highlight common features and doctrinal differences. We show that the basis on which third party intermediaries are liable for the actions of individuals online is confusing and, viewed as a whole, largely incoherent. We show how the main limiting devices of liability across all of these schemes — intention, passivity, and knowledge — are ineffective in articulating a clear distinction for circumstances in which intermediaries will not be held liable. The result is a great deal of uncertainty. We argue that intermediary liability law should develop by focusing on the concept of responsibility, and that existing principles in tort jurisprudence can help to guide and unify the different standards for liability.

## **I Introduction**

Online intermediary liability law in Australia is a mess. Internet intermediaries, including telecommunications providers, internet service providers (‘ISPs’), content hosts, search engines, social media platforms, and e-commerce and payment providers all play a major role in enabling (and restricting) the information that people can see and post online.<sup>1</sup> The legal bases on which intermediaries are liable for the actions of individuals online is confusing and, viewed as a whole, largely incoherent. As the internet has grown up, courts and legislatures around the world have struggled to extend the reach of territorial laws to adequately deal with online communications and interactions. As pressure has mounted to find a way to enforce local laws to deal with specific emerging tensions, the legal response has been haphazard. In Australia, liability under separate doctrines has developed out of their particular bodies of common law jurisprudence in almost complete

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<sup>1</sup> Organisation for Economic Co-operation and Development (‘OECD’), *The Economic and Social Role of Internet Intermediaries* (OECD, 2010) <<https://www.oecd.org/internet/ieconomy/44949023.pdf>>.

isolation. The result is a great deal of uncertainty; the rules and standards for third-party liability in copyright differ from those in defamation, in other torts, in contract, and in civil content regulation and criminalised speech. Courts, legislatures, lobbyists, and civil society groups are struggling to articulate a coherent basis upon which intermediaries should be required to act to enforce the law against their users in a way that is effective, fair, and does not chill investment in online services. This is an increasingly heated and important debate, but the possibility of reaching any broad consensus remains elusive.

The pressure to find a way to enforce local laws to deal with specific emerging tensions is reflected across a number of separate ongoing legal debates in Australia. The High Court of Australia's decision in *Roadshow Films Pty Ltd v iiNet Ltd*<sup>2</sup> that iiNet, an ISP, was not liable for copyright infringement by users of its service has led successive governments to respond with a confusing range of policy options. This has included first mooted a substantial legislative reversal of the decision,<sup>3</sup> then a failed attempt to require ISPs to negotiate with rightsholders in the shadow of a threat to introduce more burdensome regulation,<sup>4</sup> and new laws requiring ISPs to block access to websites that infringe copyright in certain circumstances.<sup>5</sup> In defamation law, first instance courts are struggling to articulate the appropriate reach of defamation law beyond website operators and on to search engines.<sup>6</sup> In 2014, the Australian Law Reform Commission ('ALRC') recommended the introduction of a civil action for serious breaches of privacy,<sup>7</sup> which it suggested should probably also apply to intermediaries who fail to remove private information from their networks after they have been notified of a serious invasion of privacy.<sup>8</sup> A separate 2011 report by the ALRC into content regulation recommended that internet intermediaries ought to be required to block or remove 'prohibited' content available on or through their networks.<sup>9</sup> This recommendation follows a failed attempt from 2008 through 2012 to empower the Australian Communications and Media Authority to designate prohibited content to which ISPs must block access.<sup>10</sup>

<sup>2</sup> (2012) 248 CLR 42 ('*Roadshow v iiNet*').

<sup>3</sup> Attorney-General's Department and Department of Communications, 'Online Copyright Infringement' (Discussion Paper, Australian Government, July 2014). <<http://apo.org.au/system/files/40630/apo-nid40630-71931.pdf>>.

<sup>4</sup> Malcolm Turnbull (Minister for Communications (Cth)) and George Brandis (Attorney-General & Minister for the Arts (Cth)), 'Collaboration to Tackle Online Copyright Infringement' (Joint Press Release, 10 December 2014) <<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F3552555%22>>.

<sup>5</sup> *Copyright Act 1968* (Cth) s 115A ('*Copyright Act*').

<sup>6</sup> See, eg, *Trkulja v Google LLC* (No 5) [2012] VSC 533 (12 November 2012); *Trkulja v Yahoo! Inc LLC* [2012] VSC 88 (15 March 2012); *Duffy v Google Inc* [2011] SADC 178 (15 November 2011); *Rana v Google Australia Pty Ltd* [2013] FCA 60 (7 February 2013); *Bleyer v Google Inc* (2014) 88 NSWLR 670 ('*Bleyer v Google*'); *Rana v Google Inc* [2016] FCA 461 (6 May 2016); *Rana v Google Inc* (No 2) (2017) 347 ALR 663.

<sup>7</sup> ALRC, *Serious Invasions of Privacy in the Digital Era*, Report No 123 (2014).

<sup>8</sup> *Ibid* 207–208.

<sup>9</sup> ALRC, *Classification — Content Regulation and Convergent Media*, Report No 118 (2012).

<sup>10</sup> James Duffy, 'Toothless Tiger, Sleeping Dragon: Implied Freedoms, Internet Filters and the Growing Culture of Internet Censorship in Australia' (2009) 16(2) *eLaw Journal: Murdoch University Electronic Journal of Law* 91; Derek E Bambauer, 'Filtering in Oz: Australia's Foray into Internet Censorship' (2009) 31(2) *University of Pennsylvania Journal of International Law* 493; Brian Simpson, 'New Labor, New Censorship? Politics, Religion and Internet Filtering in Australia' (2008) 17(3) *Information & Communications Technology Law* 167.

The Australian Government has also created the role of ‘eSafety Commissioner’,<sup>11</sup> with the power to request that large social network sites remove ‘cyberbullying’ content targeted at Australian children.<sup>12</sup> The eSafety Commissioner’s remit has recently been extended beyond children to include identifying and removing illegal online content and tackling image-based abuse.<sup>13</sup> A 2017 review considered how federal law may require intermediaries to remove sexual images posted without the consent of the subject<sup>14</sup> — a phenomenon colloquially known as ‘revenge porn’.<sup>15</sup> This is an issue that the Australian Government is still determining how to resolve.<sup>16</sup>

None of these initiatives express a coherent or consistent articulation of when, exactly, an online intermediary will be liable for the actions of their users. There are conflicting authorities both within and between separate bodies of law that impose different standards of responsibility on online intermediaries. Courts are struggling to adapt the law to apply to new technological contexts in a way that adequately balances competing interests from within the confines of existing doctrines. The legislative process is alternately heated and stalled; policymakers too are struggling to articulate balances that are acceptable to all stakeholders.

In this article, we provide an overview of the current state of Australian intermediary liability law, and argue that a greater focus on responsibility can help to guide and unify the different standards for liability. In Part II, we explain the struggle to regulate the internet, the competing tensions, and the growing pressure for intermediaries to take a more active role in upholding the law and enforcing social norms. In Part III, we provide a comprehensive review of online intermediary liability case law in Australia. We show that there is a common struggle to articulate the boundaries of intermediary liability law within and among different doctrines. This struggle is manifesting in a body of case law that relies on apparent intent and actual or imputed knowledge of wrongdoing to found liability in ways that distort the historical bounds of liability in each doctrine. In Part IV, we examine the main devices that delineate the scope of intermediary liability across different doctrines: the classification of ‘active’ versus ‘passive’ actors; the role of intent; and the role of knowledge. These concepts, we argue, are ineffective in clearly articulating the circumstances in which intermediaries will not be held liable. Accordingly, they fail to provide intermediaries with legal certainty or adequate guidance for acceptable conduct. We conclude by suggesting that intermediary liability law should develop by focusing on the concept of responsibility to ground liability.

Existing, long-established principles in tort jurisprudence have long helped courts to work through and articulate the boundaries of liability. The legal inquiry that looks to the role that intermediaries play in the wrongful acts of others is not

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<sup>11</sup> See Australian Government, *About the Office*, Office of the eSafety Commissioner <<https://www.esafety.gov.au/about-the-office/role-of-the-office>>.

<sup>12</sup> *Enhancing Online Safety for Children Act 2015* (Cth) s 29.

<sup>13</sup> *Enhancing Online Safety for Children Amendment Act 2017* (Cth).

<sup>14</sup> Department of Communications and the Arts, *Civil Penalties Regime for Non-Consensual Sharing of Intimate Images: Discussion Paper* <<https://www.communications.gov.au/have-your-say/civil-penalty-regime-non-consensual-sharing-intimate-images>>.

<sup>15</sup> Nicolas Suzor, Bryony Seignior and Jennifer Singleton, ‘Non-Consensual Porn and the Responsibilities of Online Intermediaries’ (2017) 40(3) *Melbourne University Law Review* 1057.

<sup>16</sup> Department of Communications and the Arts, above n 14.

unique to online regulation, or to defamation, content regulation or copyright law. In tort law, too, courts occasionally look beyond immediate injurers to background actors ‘whose carelessness is alleged to have set the stage for the injury’.<sup>17</sup> The task of distinguishing actors who are liable for wrongdoing from those who are not goes to the heart of tort law and theory.<sup>18</sup> In imposing liability for causing harm, tort law ‘is only secondarily about who pays; the primary focus is on how people are allowed to treat each other’.<sup>19</sup>

Tort law has largely dealt with the issue of secondary liability by closely examining the actual role that the secondary actor has played in causing the relevant harm. While courts engaged in this inquiry have used different terms over the years, including ‘proximity’, ‘closeness’ and ‘directness’, the question is fundamentally the same: was the intermediary’s conduct *causally significant* in bringing about the harm suffered by the plaintiff?<sup>20</sup> The principles that have emerged from this jurisprudence focus on the imposition of negative duties (that is, duties *not* to harm) and the reluctance to impose affirmative duties to proactively protect another from harm caused by a third party (except in discrete circumstances).<sup>21</sup> It is only where the intermediary has played a causally significant role in establishing the circumstances that are likely to lead directly to the harm that the intermediary will be held responsible. These established principles, we suggest, are likely to be more effective at identifying when an intermediary will have a responsibility to act than the more common distinctions based on intention, passivity, or knowledge. We suspect that it might be possible for these existing principles of responsibility to inform the development of different areas of online intermediary liability law without wholesale doctrinal shifts, but we leave this work for a future article.

## II The Regulatory Trade-Offs

Understanding the context in which intermediary liability law is developing helps to explain why Australian courts and legislatures are having such difficulties balancing the competing interests in any systematic or cohesive way. The internet has radically changed the way people communicate and interact. Technological developments have drastically reduced the costs of creating content and publishing it to a large audience. The rise of blogs, discussion forums, and social media has enabled and

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<sup>17</sup> John C P Goldberg and Benjamin C Zipursky, ‘Tort Law and Responsibility’ in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford University Press, 2014) 17, 23.

<sup>18</sup> Cane, for example, has stated that tort law is ‘best understood as a set of rules and principles of interpersonal responsibility for harm’: Peter Cane, ‘Tort Law as Regulation’ (2002) 31(4) *Common Law World Review* 305, 306, 310. See also Peter Cane, *The Anatomy of Tort Law* (Hart Publishing, 1997) 1, 27.

<sup>19</sup> Arthur Ripstein, ‘The Division of Responsibility and the Law of Tort’ (2004) 72(5) *Fordham Law Review* 1811, 1843. See also at 1813, 1820, 1829.

<sup>20</sup> H L A Hart and Tony Honoré, *Causation in the Law* (Oxford University Press, 2<sup>nd</sup> ed, 1985) 114; David Hamer, ‘“Factual Causation” and “Scope of Liability”: What’s the Difference?’ (2014) 77(2) *Modern Law Review* 155, 180–1; Jane Stapleton, ‘Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences’ (2001) 54(3) *Vanderbilt Law Review* 941, 961; Richard A Epstein, ‘A Theory of Strict Liability’ (1973) 2(1) *Journal of Legal Studies* 151, 179, 190–1.

<sup>21</sup> Frank E Denton, ‘The Case against a Duty to Rescue’ (1991) 4(1) *Canadian Journal of Law and Jurisprudence* 101, 109. See also John C P Goldberg and Benjamin C Zipursky, *Torts* (Oxford University Press, 2010) 118–19.

empowered individuals to communicate directly with others all around the world.<sup>22</sup> Through effective search engines and social sharing, the content that individuals post also becomes visible and discoverable to a potentially massive audience, sometimes far beyond the intended reach of the primary author.

The democratisation of speech is something to celebrate. The booms in user-generated content and user innovation are a massive step forward in free speech<sup>23</sup> and in economic productivity.<sup>24</sup> When *Time* magazine named ‘You’, the user, as its ‘Person of the Year’ in 2006, it celebrated a revolution signified by an ‘explosion of productivity and innovation’ that brought ‘millions of minds that would otherwise have drowned in obscurity ... into the global intellectual economy’.<sup>25</sup> Shirky’s book ‘*Here Comes Everybody*’<sup>26</sup> captures the sense of optimism that this revolution may liberate and empower amateurs everywhere to participate in the creation and distribution of media. This phenomenon is seen as a revolution in democracy itself, removing the power to control discourse and influence thought, culture and politics from the hands of a small number of global corporations and redistributing it to ordinary internet users the world over.<sup>27</sup>

At the same time, however, the disintermediation of speech makes legitimate, democratic regulation by states much more difficult. By facilitating direct sharing between users, the internet largely bypasses the gatekeepers of the mass media era: the publishers, broadcasters, and producers who have been the traditional targets of regulation.<sup>28</sup> Laws concerning content standards, *sub judice* contempt of court, and incitement to crime, for example, have all historically been overwhelmingly applied against print publishers and broadcasters, rather than individuals. In the online environment, by contrast, new intermediaries — content hosts, search engines and ISPs — often do not know about or determine the content they carry. Individuals are responsible for what they post, but regulating the behaviour of individuals online is extremely difficult. The global nature of online networks, the potential anonymity of speakers, the lack of editorial control, and the sheer volume of communications makes it difficult to enforce the law in direct legal actions against wrongdoers.

Across the breadth of regulatory debates over internet regulation, there is a common set of difficult and politically contested regulatory trade-offs. There are fundamental conflicts between the efficiency of enforcement mechanisms, the liberty of private actors, the need for certainty in order to encourage investment and

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<sup>22</sup> Axel Bruns, *Blogs, Wikipedia, Second Life, and Beyond: From Production to Producership* (Peter Lang, 2008).

<sup>23</sup> Neil Weinstock Netanel, ‘Copyright and a Democratic Civil Society’ (1996) 106(2) *Yale Law Journal* 283; Eugene Volokh, ‘Cheap Speech and What It Will Do’ (1995) 104(7) *Yale Law Journal* 1805.

<sup>24</sup> Eric von Hippel, *Democratizing Innovation* (MIT Press, 2005).

<sup>25</sup> Lev Grossman, ‘You — Yes, You — Are TIME’s Person of the Year’, *Time* (online), 25 December 2006 <<http://content.time.com/time/magazine/article/0,9171,1570810,00.html>>.

<sup>26</sup> Clay Shirky, *Here Comes Everybody: The Power of Organizing without Organizations* (Allen Lane, 2008).

<sup>27</sup> Molly Land, ‘Toward an International Law of the Internet’ (2013) 54(2) *Harvard International Law Journal* 393, 410–12.

<sup>28</sup> Netanel, above n 23.

innovation, and the rights of individuals.<sup>29</sup> On the efficiency side, online intermediaries are the ‘cheapest cost avoiders’.<sup>30</sup> Generally speaking, primary defendants are often too hard to reach — they are too numerous to be worth suing individually, or too poor, or unidentifiable behind layers of anonymity, or simply outside of the jurisdiction. For all of these reasons, online intermediaries make attractive targets for liability; they are the focal points of the internet, with real power to influence how people communicate and access information.<sup>31</sup>

For the telecommunications industry, intermediary liability is about both freedom and certainty. Online intermediaries are hesitant to take on the responsibility to police the behaviour of users, and reluctant to bear the cost of doing so. In part, their arguments in favour of freedom and certainty rest heavily on the need to encourage investment in innovative new technologies — technologies that disrupt or at least unsettle the continued operation of other industries.<sup>32</sup> Particularly in the United States (‘US’), these arguments also emphasise the speech interests of intermediaries themselves — the freedom to write code and design media infrastructure without the overt interference of the state or third-party claimants.

As for the ‘public interest’, the issues are extremely complex. The basic principles of the rule of law require that our laws are enforced in a manner that is regular, transparent, equally and proportionately applied, and fair.<sup>33</sup> In order to ensure that justice is carried out with due process, our constitutional system requires that the law is enforced by an independent judiciary.<sup>34</sup> But delegating some responsibility for upholding the law and social standards to online intermediaries seems to be the only reasonable prospect we have for enforcing them. The scale of internet content to be regulated means that intermediaries are necessarily being asked to make decisions about the legality of millions of pieces of content, in order to assess the risk that they may be liable if they do not take action to moderate, remove, or block each one. This can be problematic, since online intermediaries may

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<sup>29</sup> See Julie E Cohen, *Configuring the Networked Self: Law, Code, and the Play of Everyday* (Yale University Press, 2012).

<sup>30</sup> See, eg, Guido Calabresi, ‘Some Thoughts on Risk Distribution and the Law of Torts’ (1961) 70(4) *Yale Law Journal* 499; Harold Demsetz, ‘When Does the Rule of Liability Matter?’ (1972) 1(1) *Journal of Legal Studies* 13; Guido Calabresi and Jon T Hirschoff, ‘Toward a Test for Strict Liability in Torts’ (1972) 81(6) *Yale Law Journal* 1055. On the application of ‘cheapest cost avoider’ efficiency considerations to Australian intermediary liability law, see Megan Richardson, ‘Before the High Court: Why Policy Matters: *Google Inc v Australian Competition and Consumer Commission*’ (2012) 34(3) *Sydney Law Review* 587, 593; cf Robert Burrell and Kimberlee Weatherall, ‘Before the High Court: Providing Services to Copyright Infringers: *Roadshow Films Pty Ltd v iiNet Ltd*’ (2011) 33(4) *Sydney Law Review* 801, 829–30.

<sup>31</sup> Uta Kohl, ‘Google: The Rise and Rise of Online Intermediaries in the Governance of the Internet and Beyond (Part 2)’ (2013) 21(2) *International Journal of Law and Information Technology* 187; Jack Goldsmith and Tim Wu, *Who Controls the Internet? Illusions of a Borderless World* (Oxford University Press, 2006).

<sup>32</sup> *Amici Curiae*, ‘Brief of *Amici Curiae* Sixty Intellectual Property and Technology Law Professors and the United States Public Policy Committee of the Association for Computing Machinery in Support of Respondents’, *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd*, Writ of Certiorari to the United States Court of Appeals 9<sup>th</sup> Cir, No 04-480, 8 November 2014; Jessica Reyman, *The Rhetoric of Intellectual Property: Copyright Law and the Regulation of Digital Culture* (Routledge, 2010) 75–6.

<sup>33</sup> Lon L Fuller, *The Morality of Law* (Yale University Press, 2<sup>nd</sup> ed, 1969) 157–8.

<sup>34</sup> *Australian Constitution* ch 3.

well be unable effectively to make complex judgment calls about the lawfulness of their users' conduct.<sup>35</sup> Ultimately, this creates a difficult procedural trade-off between the efficacy of the legal system and the safeguards it provides.

The question of intermediary liability raises difficult issues of substantive conflicts between rights. The normative vision that has dominated for most of the life of the commercial internet prioritises liberty, private autonomy, innovation, market-based regulation, and limited restrictions on speech.<sup>36</sup> Increasingly, however, the emphasis that has been placed on freedom of speech is controversial. The basic principle that animates much of US intermediary liability law is that intermediaries should not be liable for content posted by others, and certainly not in a way that would require them to proactively monitor content. Concerns about this approach continue to grow rapidly. Controversies over the responsibility of intermediaries to monitor content and respond to complaints are continuously erupting, particularly around the flash points of hate speech, misogyny, bullying, fake news, and invasions of privacy. There is an increasingly powerful push by both governments and civil society groups to ensure that the social environments that we inhabit online reflect certain norms of acceptable conduct. This manifests as a real desire for networked spaces that are safe and free from harassment, discrimination, and commentary that encourages or reinforces harmful behaviour. At its core, this is a fierce political contest around competing visions of how shared social spaces should look and feel.<sup>37</sup> Out of this conflict, there is an emerging but fundamental unease with the perception that online intermediaries are not responsive enough to the need to create real expectations around acceptable behaviour.<sup>38</sup> Pressure is mounting on private organisations to do more to uphold the rights of individuals (particularly minorities) on their networks by developing positive practices and technical features that limit harmful behaviour.<sup>39</sup>

All of these concerns, taken together, mean that online intermediary liability is hotly contested and extremely messy. There is a great deal of pressure on intermediaries from multiple sources to help enforce the law and uphold social norms.

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<sup>35</sup> Nicolas Suzor and Brian Fitzgerald, 'The Legitimacy of Graduated Response Schemes in Copyright Law' (2011) 34(1) *University of New South Wales Law Journal* 1; Marvin Ammori, 'The "New" New York Times: Free Speech Lawyering in the Age of Google and Twitter' (2014) 127(8) *Harvard Law Review* 2259, 2276–7.

<sup>36</sup> See Nicolas Suzor, 'The Role of the Rule of Law in Virtual Communities' (2010) 25 *Berkeley Technology Law Journal* 1817.

<sup>37</sup> Abigail Levin, *The Cost of Free Speech: Pornography, Hate Speech and Their Challenge to Liberalism* (Palgrave Macmillan, 2010).

<sup>38</sup> See, eg, Danielle Keats Citron and Helen Norton, 'Intermediaries and Hate Speech: Fostering Digital Citizenship for Our Information Age' (2011) 91(4) *Boston University Law Review* 1435; James Banks, 'European Regulation of Cross-Border Hate Speech in Cyberspace: The Limits of Legislation' (2011) 19 *European Journal of Crime, Criminal Law and Criminal Justice* 1.

<sup>39</sup> See, eg, Citron and Norton, above n 38, 1457; L Belli, P De Filippi, N Zingales (eds), *Recommendations on Terms of Service and Human Rights*, 10<sup>th</sup> Internet Governance Forum, Outcome Document No 1 (Dynamic Coalition on Platform Responsibility, November 2015) <<https://www.intgovforum.org/cms/documents/igf-meeting/igf-2016/830-dcpr-2015-output-document-1/file>>; Association for Progressive Communications, *Internet Rights Charter* (November 2006) <<https://www.apc.org/node/5677>>; OECD, *The Role of Internet Intermediaries in Advancing Public Policy Objectives* (OECD, 2011) <<http://www.oecd.org/sti/ieconomy/theroleofinternetintermediariesinadvancingpublicpolicyobjectives.htm>>.

### III Liability: Active Intermediaries and Recalcitrant Wrongdoers

In this Part, we provide an overview of Australian law as it currently stands, before turning in Part IV to examine the conceptual and practical issues with the current laws, and the immediate future of law reform in Australia. Australian law incorporates a range of distinct tests for determining when an actor will be liable for the actions of a third party. The law has evolved differently in cases concerning defamation, racial vilification, misleading and deceptive conduct, contempt of court, and copyright. These bodies of law are conceptually different and derive from different historical contexts, and the courts have generally applied them in isolation. The particular fault elements upon which liability is based are all different and cannot easily be compared at a detailed level. In some of these doctrines, like copyright, there is a separate head of liability for secondary liability as distinguished from the underlying wrongful act; in others, the actions of intermediaries operating on behalf of another are assessed under the same tests of primary liability. It is useful, however, to take a broad view, and look at the common ways that the courts are struggling to deal with very similar issues under the weight of very different doctrinal traditions. This process of abstraction necessarily involves ‘throwing away detail, getting rid of particulars’, but with the intent to ‘produce the concepts we use to make explanatory generalizations, or that we analogize with across cases’.<sup>40</sup>

The easy cases are those most closely analogous to that of a mass media publisher who exercises editorial control over the content of communications. Where the intermediary moderates or selects the material to be published, courts have been able to draw a clear analogy with, for example, newspaper editors, and are able to find wrongdoing relatively easily. Under both defamation law and consumer protection law, for example, where the intermediary exercises some level of judgment and editorial control, courts have variously explained that the intermediary ‘accepts responsibility’<sup>41</sup> or ‘consents to the publication’<sup>42</sup>. This is a version of the ‘Good Samaritan’ problem, where intermediaries who voluntarily take on some responsibility to moderate have a greater legal risk of exposure than those who do not exercise any editorial control.<sup>43</sup>

The law is much more complicated where online intermediaries do not directly exercise a large degree of editorial control. The common law as it has developed in Australia has not yet developed a clear theory to determine when an intermediary who creates a technology or system that enables wrongful behaviour will be liable. One of the basic organising principles of our legal system is that there is usually no liability without fault. With few exceptions,<sup>44</sup> the common law does

<sup>40</sup> Kieran Healy, ‘Fuck Nuance’ (2017) 35(2) *Sociological Theory* 118, 121.

<sup>41</sup> *Visscher v Maritime Union of Australia (No 6)* [2014] NSWSC 350 (31 March 2014) [18], [29]–[30] (Beech–Jones J); *Australian Competition and Consumer Commission v Allergy Pathway Pty Ltd (No 2)* (2011) 192 FCR 34, 42 [33] (Finkelstein J) (‘ACCC v Allergy Pathway (No 2)’).

<sup>42</sup> *Trkulja v Google (No 5)* [2012] VSC 533 (12 November 2012) [31] (Beach J).

<sup>43</sup> See Paul Ehrlich, ‘Communications Decency Act § 230’ (2002) 17(1) *Berkeley Technology Law Journal* 401.

<sup>44</sup> The first main exception at common law is where there is a non-delegable duty and a special relationship of control between the defendant and the third party, such as that between: parents and

not impose obligations on institutions or individuals to protect the rights of another against harm caused by third parties. This notion is most commonly expressed in the rule that there is no general duty to rescue.<sup>45</sup> This general rule reflects a fundamental liberal commitment to autonomy:<sup>46</sup> individuals are free to act as they choose, so long as those actions do not harm others.<sup>47</sup> As Denton has noted, '[c]ourts have consistently held that the common law of private obligations does not impose affirmative duties simply on the basis of one party's need and another's capacity to fulfill that need'.<sup>48</sup> The common law emphasises personal responsibility; to require a person to help another simply because they have the capacity to do so would unhinge the law from its underlying objectives of promoting personal responsibility for one's actions and deterring reckless or unreasonable behaviour.<sup>49</sup> If the defendant is not personally responsible for causing the harm, then from this perspective, the threat of liability cannot act as an effective deterrent for wrongful behaviour.<sup>50</sup> Thus, under the common law — and according to responsibility theory — a person will generally only be responsible for a harmful outcome where his or her actions caused the harm (causation) and where that person might have acted to avoid the harm, but did not (fault).<sup>51</sup> As Mason J has stated, the notion of fault within the law can act as a 'control device' to ensure that the burden to repair is proportional to the defendant's responsible role in the occurrence of harm.<sup>52</sup>

These general principles, however, conflict with another basic principle: that for every wrong, the law provides a remedy.<sup>53</sup> In cases brought against online intermediaries here and overseas, courts are often presented with a meritorious claim without a clear remedy, and face the difficult task of determining whether to extend the existing law to require intermediaries to take action to protect plaintiffs' rights. In two recent cases, *Google Inc v Australian Competition and Consumer*

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children (*Smith v Leurs* (1945) 70 CLR 256); school authorities and pupils (*Commonwealth v Introvigne* (1982) 150 CLR 258); and prison wardens and prisoners (*Home Office v Dorset Yacht Co Ltd* [1970] AC 1004). The second main common law exception applies where the defendant has had some role in creating the risk from which the plaintiff needs rescuing: see G H L Fridman, 'Non-Vicarious Liability for the Acts of Others' (1997) *Tort Law Review* 102, 115, discussing *Smith v Littlewoods Organisation Ltd* [1987] AC 241, 279–81 (Lord Goff).

<sup>45</sup> Denton, above n 21, 101, 104. See also Les Haberfield, 'Lowns v Wood and the Duty to Rescue' (1998) *Tort Law Review* 56, 59, 65; *Dorset Yacht Co Ltd v Home Office* [1970] AC 1004, 1027 (Lord Reid); Goldberg and Zipursky, above n 21, 118–19.

<sup>46</sup> Ernest J Weinrib, 'The Case for a Duty to Rescue' (1980) 90(2) *Yale Law Journal* 247, 279. See also Stapleton, above n 20, 949.

<sup>47</sup> John Locke, *Two Treatises of Government* (Cambridge University Press, 1988) 106–9; John Stuart Mill, *On Liberty* (Oxford University Press, 1998) 117–36.

<sup>48</sup> Denton, above n 21, 101. See also Goldberg and Zipursky, above n 21, 118–19.

<sup>49</sup> Jane Stapleton, 'Duty of Care: Peripheral Parties and Alternative Opportunities for Deterrence' (1995) 111(2) *Law Quarterly Review* 301, 312, 317. See also Denton, above n 21, 124.

<sup>50</sup> Stapleton, above n 49, 305, 310–12, 317.

<sup>51</sup> Stephen R Perry, 'The Moral Foundations of Tort Law' (1992) 77(2) *Iowa Law Review* 449, 513; Goldberg and Zipursky, above n 17, 20–1; Emmanuel Voyiakis, 'Rights, Social Justice and Responsibility in the Law of Tort' (2012) 35(2) *University of New South Wales Law Journal* 449, 458; Denton, above n 21, 127; Peter Cane, 'Justice and Justifications for Tort Liability' (1982) 2(1) *Oxford Journal of Legal Studies* 30, 53–4.

<sup>52</sup> Justice Keith Mason, 'Fault, causation and responsibility: Is tort law just an instrument of corrective justice?' (2000) 19 *Australian Bar Review* 201, 207–8.

<sup>53</sup> See the maxim '*ubi jus ibi remedium*': Herbert Broom, *Selection of Legal Maxims, Classified and Illustrated* (William S Hein & Company, 1845) 80 [91].

*Commission*<sup>54</sup> and *Roadshow v iiNet*,<sup>55</sup> the High Court of Australia rejected the extension of existing doctrine to impose liability for large, general-purpose intermediaries.<sup>56</sup> Despite these two High Court decisions, the issues remain far from conclusively settled. The overall state of Australian intermediary liability law is still one of confusion, both within and across doctrines. As we will see below, across different fact scenarios in consumer protection, defamation, racial vilification, contempt of court and copyright cases, mere knowledge of the content can lead to an inference that a third-party publisher adopts or endorses its continual publication and is responsible for the harm that results. In fact, online intermediary liability has progressively expanded over the years as plaintiffs have sought to link an intermediary's *capacity* to do something about wrongdoing with a normative proposition that they therefore *ought* to do something. Particularly in copyright, rightsholders have raised purely economic arguments about the inefficiencies inherent in online enforcement, and have sought to instil a sense of moral urgency around the protection of copyright goods that implicates everyone in their enforcement mission.<sup>57</sup> Across copyright and other areas, online intermediary liability has expanded in a largely unprincipled way. We argue that as courts and legislatures have attempted to bring 'bad actors' within the reach of liability,<sup>58</sup> they have unwittingly eroded the important connection between liability and responsibility.

## A Consumer Protection Law

In *Google v ACCC*,<sup>59</sup> the High Court held that Google was not liable when it created a system to enable third parties to create advertisements that were reproduced on Google's search results pages. The High Court was clear in finding that Google did not 'endorse' advertisements submitted by third parties and published on its own web pages, on the basis that the content of the material was wholly determined by the advertiser and published automatically by Google.<sup>60</sup> Google 'did not itself engage in misleading or deceptive conduct, or *endorse or adopt* the representations which it displayed on behalf of advertisers'.<sup>61</sup> Liability for misleading and deceptive conduct is strict, but requires actual wrongful conduct on the part of the defendant that is likely to mislead or deceive — there is no separate secondary head of liability. Whether Google knew that the content was misleading was irrelevant.<sup>62</sup> On its face, the High Court's ruling is quite strong: even though Google was likely to know that

<sup>54</sup> (2013) 249 CLR 435 ('*Google v ACCC*').

<sup>55</sup> (2012) 248 CLR 42.

<sup>56</sup> Burrell and Weatherall, above n 30, 829–30.

<sup>57</sup> Julie E Cohen, 'Pervasively Distributed Copyright Enforcement' (2006) 95 *Georgetown Law Journal* 1.

<sup>58</sup> See, eg, *Universal Music Australia Pty Ltd v Sharman License Holdings Ltd* (2005) 222 FCR 465 ('*Sharman*').

<sup>59</sup> (2013) 249 CLR 435.

<sup>60</sup> *Ibid* 459 [68] (French CJ, Crennan and Kiefel JJ).

<sup>61</sup> *Ibid* 460 [73] (French CJ, Crennan and Kiefel JJ) (emphasis added). Justice Hayne agreed, but warned that there can be no general rule that would immunise publishers 'unless they endorsed or adopted the content': at 472 [115]. See also Heydon J: 'if a person repeats what someone else has said accurately, and does not adopt it, there is nothing misleading in that person's conduct': at 491 [162].

<sup>62</sup> *Ibid* 459 [68] (French CJ, Crennan and Kiefel JJ).

the material was likely to mislead or deceive,<sup>63</sup> it was not responsible for advertisements created by others.<sup>64</sup>

The decision in *Google v ACCC* must be contrasted with the earlier Federal Court of Australia decision in *ACCC v Allergy Pathway (No 2)*,<sup>65</sup> where the respondents were found to have breached their undertaking not to engage in misleading and deceptive conduct<sup>66</sup> when they failed to remove comments posted by third parties on their Facebook page.<sup>67</sup> Allergy Pathway was liable for contempt of court on the basis that it knew about the comments and failed to remove them. The Federal Court relied specifically on defamation precedent<sup>68</sup> in coming to the conclusion that Allergy Pathway had ‘accepted responsibility for the publications when it knew of the publications and decided not to remove them’.<sup>69</sup>

Importantly, *Google v ACCC* was pleaded in a narrow way that alleged Google itself had made the misleading representations — not that it had misled the public by publishing false claims. An alternative approach in similar circumstances could have seen the ACCC allege that Google’s conduct as a whole in developing its Adwords system and publishing third-party content was likely to mislead or deceive consumers.<sup>70</sup> This broader argument could conceivably justify the imposition of liability on Google ‘for the economic harms produced by its industrial activities, centred on devising and operating systems used for trading information’.<sup>71</sup> It is an argument to which at least some members of the High Court were apparently sympathetic,<sup>72</sup> and it is possible that a differently pleaded case on similar facts could well turn out differently in the future.<sup>73</sup>

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<sup>63</sup> At first instance, the judge would have found that in some instances Google was likely to have actual or constructive knowledge that the advertisements in question were using competitors’ brands: *Australian Competition and Consumer Commission v Trading Post Australia Pty Ltd* (2011) 197 FCR 498, 555 [256]–[257] (Nicholas J). However, intention is not a relevant element of an action for misleading or deceptive conduct: *Google v ACCC* (2013) 249 CLR 435, 466–7 [97]–[98] (Hayne J).

<sup>64</sup> Importantly, however, the High Court’s decision does not foreclose the possibility of intermediaries being liable as accessories, nor does it necessarily prevent future development of the terms ‘adopt’ and ‘endorse’ on the facts in intermediary cases in the future: see Radhika Withana, ‘Neither Adopt nor Endorse: Liability for Misleading and Deceptive Conduct for Publication of Statements by Intermediaries or Conduits’ (2013) 21(3) *Australian Journal of Competition and Consumer Law* 152. (2011) 192 FCR 34.

<sup>65</sup> The undertaking was given in the context of litigation brought by the ACCC: *ACCC v Allergy Pathway (No 2)* (2011) 192 FCR 34, 37 [5] (Finkelstein J).

<sup>66</sup> Note that the respondents were also found to have breached the undertakings through material that they themselves had posted: *ACCC v Allergy Pathway (No 2)* (2011) 192 FCR 34, 42 [33] (Finkelstein J).

<sup>67</sup> *Ibid* 40 [24] (Finkelstein J).

<sup>68</sup> *Ibid* 42 [32]–[33] (Finkelstein J).

<sup>69</sup> Google Adwords is a pay-per-click advertising platform that enables advertisers to bid on keywords to display advertisements alongside Google’s search results. While there is some review of keywords and advertisements, advertisers are generally able to select keywords of their own choice, as well as selecting the factors that are used to limit the target audience to whom advertisements will be displayed.

<sup>70</sup> Richardson, above n 30, 594.

<sup>71</sup> *Google v ACCC* (2013) 249 CLR 435, 472 [117] (Hayne J). See also Seb Tonkin, ‘*Google Inc v Australian Competition and Consumer Commission*’ (2013) 34(1) *Adelaide Law Review* 203, 205–7.

<sup>72</sup> Amanda Scardamaglia, ‘Misleading and Deceptive Conduct and the Internet: Lessons and Loopholes in *Google Inc v Australian Competition and Consumer Commission*’ (2013) 35(11) *European Intellectual Property Review* 700, 706. See also Peter Leonard, ‘Internet Intermediary Liability:

## B Defamation

In defamation, the word ‘publish’ extends liability to online intermediaries who fail to remove defamatory material posted by others.<sup>74</sup> Internet hosts that exercise some degree of control over the content they disseminate will be liable in the same way that newspaper publishers<sup>75</sup> or broadcasters<sup>76</sup> who carry content created by others are liable. For others with a less active role, like the operators of discussion forums who provide the facilities for others to post comments, liability will accrue as a subordinate publisher once they know that the content they carry is likely to be defamatory.<sup>77</sup> By contrast, it is generally understood that an ISP who merely provides a telecommunications service over which others can publish and access defamatory material is not likely to be liable for ‘publishing’ that content.<sup>78</sup>

In recent cases, however, courts have had much greater difficulty applying these principles to online intermediaries who are remote from the primary act of publication, but have more than a purely facilitative role in making material available. For search engines and others who link to defamatory material, the limits to liability in defamation can be drawn from the combination of two notionally distinct principles. The first is the threshold question that an intermediary could not properly be said to ‘publish’ the content, and the second is the defence of innocent dissemination, which applies where a secondary or subordinate publisher does not have actual or constructive knowledge of the content of defamatory material. Because the defence of innocent dissemination will not apply after the content is explicitly drawn to the attention of the intermediary by a complaint, in many cases, the most crucial limiting factor is the question of whether an intermediary has actually published the content in the first place.<sup>79</sup>

The core issue in difficult suits brought against online intermediaries turns on this elusive distinction between active publishing and passive facilitation. In one case, Yahoo!7 conceded that it had ‘published’ an article because at least one person had read the article, hosted on a third-party website, by following a link presented through the Yahoo!7 search engine.<sup>80</sup> This case may be an outlier; there is emerging authority in the United Kingdom (‘UK’)<sup>81</sup> and Canada,<sup>82</sup> which suggests that more needs to be

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A Landmark Decision by the High Court of Australia in *Google Inc v ACCC* (2013) 15(9) *Internet Law Bulletin* 158.

<sup>74</sup> *Byrne v Deane* [1937] 1 KB 818, 837.

<sup>75</sup> See *Wheeler v Federal Capital Press of Australia Ltd* (1984) Aust Torts Reports ¶80-640.

<sup>76</sup> *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574, 589–90, 596.

<sup>77</sup> No Australian court has specifically considered this point in detail, but see *Oriental Press Group Ltd v Feaworks Solutions Ltd* (2013) 16 HKFAR 366. See also *Godfrey v Demon Internet Ltd* [2003] 3 WLR 1020, 1026–8 (Morland J). Under the defence of innocent dissemination, liability accrues from the point at which the intermediary acquires knowledge of defamatory material: see David Rolph, ‘Publication, Innocent Dissemination and the Internet after *Dow Jones & Co Inc v Gutnick*’ (2010) 33(2) *University of New South Wales Law Journal* 562, 573–5.

<sup>78</sup> See *Bunt v Tilley* [2007] 1 WLR 1243, 1250–2 [25]–[36].

<sup>79</sup> *Oriental Press Group Ltd v Feaworks Solutions Ltd* (2013) 16 HKFAR 366.

<sup>80</sup> *Trkulja v Yahoo! Inc LLC* [2012] VSC 88 (15 March 2012) [6]–[7] (Kaye J).

<sup>81</sup> See, eg, *Metropolitan International Schools Ltd v Designtecnica Corp* [2011] 1 WLR 1743 (‘*Metropolitan International Schools Ltd*’); *Tamiz v Google Inc* [2012] EWHC 449.

<sup>82</sup> A majority of the Canadian Supreme Court found that ‘[m]aking reference to the existence and/or location of content by hyperlink or otherwise, without more, is not publication of that content’:

done to ‘publish’ a defamatory imputation.<sup>83</sup> But where the line should be drawn is not clear. The established law is that what might otherwise be a purely passive role in facilitating publication becomes an act of publication by omission if the secondary actor has ‘consented to, or approved of, or adopted, or promoted, or in some way ratified, the continued presence of that statement ... in other words ... [if there is] an acceptance by the defendant of a responsibility for the continued publication of that statement’.<sup>84</sup> So, for example, in a recent Australian case, the defamatory imputation was found to have been endorsed by the defendant when it used the words ‘read more’ to imply that the content to which it linked was a true account.<sup>85</sup>

These cases become even more difficult when, as in the case of search engines, an intermediary presents a preview or ‘snippet’ of the content of third-party sites. For example, in 2015 Google was found liable in the Supreme Court of South Australia for publishing defamatory material when its search engine presented links accompanied by an extract of text that carried defamatory imputations.<sup>86</sup> It was also liable in 2012 when its image search results arranged images from third-party pages in a way that gave rise to a defamatory imputation.<sup>87</sup> In a case brought more recently on very similar facts, the Victorian Court of Appeal noted that Google’s search results may have amounted to a subordinate publication of potentially defamatory content, but the case was not pleaded in that way.<sup>88</sup>

The concept of publication is a relatively poor mechanism to delineate responsibility. The general principle in defamation law is that nearly everybody involved in the chain of publication is potentially responsible as a publisher. A conduit — an ISP, for example — that is ‘passive’ and ‘merely facilitates’ communications between users of its system is not likely to be liable for defamation. But the law on the distinction between ‘active’ publishing and ‘conduct that amounts only to the merely passive facilitation of disseminating defamatory matter’ is still not well developed.<sup>89</sup> Apart from ISPs, it is unclear what types of online intermediaries may be beyond the scope of defamation law. Liability probably does not extend to people who help design or host website infrastructure but have no substantive involvement with the content.<sup>90</sup> Some Australian and UK courts have

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*Crookes v Newton* [2011] 3 SCR 269, 291–292 [24] (Binnie, LeBel, Abella, Charron, Rothstein and Cromwell JJ). Note, however, that this was a narrow majority. Two members of the Court held that linking to defamatory content in a way that indicates agreement, adoption, or endorsement of that content may be sufficient to ground liability: at 293–4 [48] (McLachlin CJC and Fish J). Justice Deschamps would have found that linking directly to defamatory material would amount to publication: at 319 [111]–[112].

<sup>83</sup> Kim Gould, ‘Hyperlinking and Defamatory Publication: A Question of “Trying to Fit a Square Archaic Peg into the Hexagonal Hole of Modernity”?’ (2012) 36(2) *Australian Bar Review* 137.

<sup>84</sup> *Urbanchich v Drummoynne Municipal Council* (1991) Australian Torts Reports ¶81-127 [7] (Hunt J).

<sup>85</sup> *Visscher v Maritime Union of Australia (No 6)* [2014] NSWSC 350 (31 March 2014) [30] (Beech-Jones J). His Honour found that the defendant’s description of the link ‘amounted to, at the very least, an adoption or promotion of the content’ of the linked article.

<sup>86</sup> *Duffy v Google Inc* (2015) 125 SASR 437. Upheld on appeal in *Google Inc v Duffy* (2017) 129 SASR 304.

<sup>87</sup> *Trkulja v Google (No 5)* [2012] VSC 533 (12 November 2012).

<sup>88</sup> *Google Inc v Trkulja* (2016) 342 ALR 504, 590 [349], 591–2 [357].

<sup>89</sup> Rolph, above n 77, 580. See also Joachim Dietrich, ‘Clarifying the Meaning of “Publication” of Defamatory Matter in the Age of the Internet’ (2013) 18(2) *Media and Arts Law Review* 88.

<sup>90</sup> In the West Australian Supreme Court, Kenneth Martin J dismissed a defamation action against an individual who ‘assisted in creating the infrastructure which allowed this material to be displayed to

doubted whether search engines can be liable for the outputs of automated systems designed to identify third-party content that matches search terms entered by the user,<sup>91</sup> but the recent decisions of the Victorian Court of Appeal<sup>92</sup> and the South Australian Supreme Court<sup>93</sup> explicitly reject this proposition at least from the time the search engine is put on notice of the defamatory content.

### C *Vilification*

Like defamation, intermediaries who provide a forum for third-party content can be liable under the *Racial Discrimination Act 1975* (Cth) when those comments amount to vilification. Section 18C of the Act makes it unlawful to ‘do an act’<sup>94</sup> that is reasonably likely to ‘offend, insult, humiliate or intimidate’ a person or group where that act is motivated by ‘race, colour or national or ethnic origin’. In the two decisions that have considered the provision in the context of an online forum,<sup>95</sup> courts have come to somewhat conflicting conclusions as to when a secondary actor will be liable for providing the facilities for another to make vilifying comments. The uncertainty lies primarily in the intentional element of the provision. As in defamation, courts agree that providing the facilities to enable others to post comments and failing to remove them is sufficient to constitute an ‘act’ of publication of the substance of those comments, at least once the operator has knowledge of the comments.<sup>96</sup> The difficulty lies in determining whether a failure to remove comments is done ‘because of the race, colour or national or ethnic origin’ of the person or group. In *Silberberg*, Gyles J found that there was insufficient evidence to draw that conclusion — the first respondent’s failure to remove the offensive comments was ‘just as easily explained by inattention or lack of diligence’.<sup>97</sup> In *Clarke*, by contrast, Barker J held that where the respondent ‘actively solicits and moderates contributions from readers’, the ‘offence will be given as much by the respondent in publishing the offensive comment as by the original author in writing it’.<sup>98</sup> The Court in *Clarke* was able to infer that one of the reasons for the news website’s decision to publish the offensive comments was because of

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the public’ and was apparently put on notice of defamatory content on the site: *Douglas v McLernon* (No 3) [2016] WASC 319 (22 June 2016) [33]. At [41] his Honour said:

I remain to be persuaded ... [that a party may be liable for] providing assistance in tort (or the encouraging, counselling or facilitating of the tort) on the basis of involvement, simply because the person does not, as it is here contended, then act to ‘pull the plug’ on a website, or act to terminate the capacity of someone to use an acquired website.

<sup>91</sup> See, eg, *Bleyer v Google* (2014) 88 NSWLR 670; *Metropolitan International Schools Ltd* [2011] 1 WLR 1743.

<sup>92</sup> *Google v Trkulja* (2016) 342 ALR 504, 590–1 [352] (Ashley, Ferguson and McLeish JJA).

<sup>93</sup> *Duffy v Google Inc* (2015) 125 SASR 437, 495–6 [204]–[205] (Blue J); *Google Inc v Duffy* (2017) 129 SASR 304, 344–5 [140], 350–1 [151], 358 [178] (Kourakis CJ), 450–1 [536] (Peek J).

<sup>94</sup> The reference to ‘an act’, in this case, specifically includes an omission: see *Racial Discrimination Act 1975* (Cth) s 3(3): ‘refusing or failing to do an act shall be deemed to be the doing of an act and a reference to an act includes a reference to such a refusal or failure’.

<sup>95</sup> *Silberberg v Builders Collective of Australia Inc* (2007) 164 FCR 475 (‘*Silberberg*’); *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389 (‘*Clarke*’).

<sup>96</sup> *Silberberg* (2007) 164 FCR 475, 485 (Gyles J); *Clarke* (2012) 201 FCR 389, 412 [110] (Barker J).

<sup>97</sup> *Silberberg* (2007) 164 FCR 475, 486 [35].

<sup>98</sup> *Clarke* (2012) 201 FCR 389, 412 [110].

their racial connotations.<sup>99</sup> Apart from emphasis placed on the act of moderation in *Clarke*, there is no easy way to reconcile these two authorities.

## D Copyright

Under copyright, intermediary liability arises when an actor ‘authorises’ the infringing conduct of another.<sup>100</sup> Unfortunately, there is little clear guidance as to the limits of authorisation liability. For online intermediaries, the difficult question is whether the developer of software that facilitates infringement or the operator of a service that hosts or indexes internet content will be taken to have authorised any resulting infringements. The limiting principle was articulated in relation to mass media in *Nationwide News Pty Ltd v Copyright Agency Limited*; namely, that ‘a person does not authorise an infringement merely because he or she knows that another person might infringe the copyright and takes no step to prevent the infringement’.<sup>101</sup>

This principle has always been hard to apply in practice. The accepted legal meaning of ‘authorise’ is ‘sanction, approve, countenance’.<sup>102</sup> The case law explains that ‘authorise’ is broader than ‘grant or purport to grant the right to do the infringing act’,<sup>103</sup> but narrower than the broadest dictionary definition of ‘countenance’.<sup>104</sup> There is a wide range between those two points and, unsurprisingly, there is therefore considerable uncertainty in Australian copyright law as to the precise meaning of ‘authorisation’.<sup>105</sup> A central authority is *UNSW v Moorhouse*,<sup>106</sup> where the university was liable when the photocopiers it provided in a library were used to infringe copyright. Different members of the High Court emphasised different reasons for this conclusion: UNSW was liable either on the basis that it had tacitly invited infringement<sup>107</sup> or because it had some degree of control over the technology that facilitates infringement in addition to knowledge that infringement was likely.<sup>108</sup>

The relatively few cases on authorisation liability in the digital age do not clearly establish the bounds of the doctrine. In *Cooper v Universal Music Australia Pty Ltd*,<sup>109</sup> the operator of a website was liable for creating a system that allowed users to post hyperlinks to other websites hosting infringing MP3s for download.

<sup>99</sup> ‘The act of publishing a comment which is objectively offensive because of race in such circumstances will give offence because of race as much as the public circulation of such a comment by the original author might have done.’: *ibid* 422 [199] (Barker J).

<sup>100</sup> *Copyright Act* ss 36(1), 101(1).

<sup>101</sup> (1996) 65 FCR 399,422 (Sackville J, Jenkinson and Burchett JJ agreeing).

<sup>102</sup> *University of New South Wales v Moorhouse* (1975) 133 CLR 1, 12 (Gibbs J), 20 (Jacobs J, McTiernan ACJ agreeing) (‘*UNSW v Moorhouse*’).

<sup>103</sup> *Roadshow Films Pty Ltd v iiNet Ltd* (2012) 248 CLR 42, 84–5 [126]–[127] (Gummow and Hayne JJ).

<sup>104</sup> *Ibid* 68–9 [68] (French CJ, Crennan and Kiefel JJ); 84 [125] (Gummow and Hayne JJ).

<sup>105</sup> Rebecca Giblin, ‘The Uncertainties, Baby: Hidden Perils of Australia’s Authorisation Law’ (2009) 20(3) *Australian Intellectual Property Journal* 148, 153; David Lindsay, ‘ISP Liability for End-User Copyright Infringements: The High Court Decision in *Roadshow Films v iiNet*’ (2012) 62(4) *Telecommunication Journal of Australia* 53.1, 53.16, 53.18–53.19 <<https://researchbank.swinburne.edu.au/file/20224d22-d68f-44ad-a5ae-706faadda866/1/PDF%20%28Published%20version%29.pdf>>.

<sup>106</sup> (1975) 133 CLR 1.

<sup>107</sup> *Ibid* 21 (Jacobs J, McTiernan ACJ agreeing).

<sup>108</sup> *Ibid* 13 (Gibbs J).

<sup>109</sup> (2006) 156 FCR 380 (‘*Cooper*’).

Justice Branson found that Cooper was liable in part because he could have chosen not to create and maintain the website.<sup>110</sup> Cooper's liability ultimately rested on the finding that he had 'deliberately designed the website to facilitate infringing downloading'.<sup>111</sup> Cooper's ISP, which provided practically free hosting for Cooper's website in exchange for advertising, was also liable for failing to take down Cooper's website despite knowing that it was facilitating infringement.<sup>112</sup> In *Sharman*,<sup>113</sup> the operators of the Kazaa peer-to-peer file sharing network had less control over the decisions of users to share infringing files. The control that it did have was the ability to design the software differently, including developing warnings for users and interfering with searches for content that was possibly infringing. *Sharman* was held liable for the infringements of their users essentially on the basis that it knew that infringement was prevalent on the system,<sup>114</sup> it took active steps to encourage infringement,<sup>115</sup> and it failed to do anything to limit infringement.<sup>116</sup>

Most recently, in *Roadshow v iiNet*, the High Court refused to extend liability to an ISP that the Court found had no obligation to take action to restrict copyright infringement by its subscribers.<sup>117</sup> Unlike *Sharman* and Cooper, iiNet did nothing to encourage infringement in the way that it provided general purpose internet access services to its subscribers.<sup>118</sup> Neither did iiNet have any real advance control over what its users did online — iiNet did not control the BitTorrent peer-to-peer file sharing system at issue in the case and could not monitor how it was used.<sup>119</sup> Much of the High Court's decision therefore focused on iiNet's level of knowledge about infringements after the fact. The High Court ultimately found that the notices that alleged that iiNet's users had infringed did not provide sufficiently specific knowledge of individual infringement to found liability.<sup>120</sup> It is nonetheless possible that iiNet could have been liable if the quality of allegations made against its users by rightsholders was better. That is to say, the High Court left the way open for future cases to potentially base liability primarily on knowledge and some ability to mitigate the harm, even without the fault elements of encouragement or control.

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<sup>110</sup> Ibid 723. A similar finding was reached in the recent case of *Pokémon Company International Inc v Redbubble Ltd*, where Redbubble was liable for authorising copyright infringement (committed when users sold products via the Redbubble website that featured unlicensed images of Pokémon characters) in part because it had designed and operated the website that allowed these sales: (2017) 351 ALR 676, 709–10 [58] (Pagone J) (*Pokémon v Redbubble*).

<sup>111</sup> *Cooper* (2006) 156 FCR 380, 411–2 [148]–[149] (Kenny J, French J agreeing). See also at 390 [43] (Branson J, French J agreeing).

<sup>112</sup> Ibid 392 [62]–[65] (Branson J, French J agreeing); 413 [158] (Kenny J, French J agreeing).

<sup>113</sup> (2005) 222 FCR 465.

<sup>114</sup> Infringing file sharing was 'a major, even the predominant, use of the Kazaa system': ibid 560 [404] (Wilcox J).

<sup>115</sup> Ibid 560–1 [405]–[406] (Wilcox J).

<sup>116</sup> Ibid 561 [411] (Wilcox J).

<sup>117</sup> (2012) 248 CLR 42, 71 [77] (French CJ, Crennan and Kiefel JJ), 89 [143] (Gummow and Hayne JJ).

<sup>118</sup> Justices Gummow and Hayne noted that 'iiNet had no intention or desire to see any primary infringement of the appellants' copyrights': ibid 80–1 [112].

<sup>119</sup> See, eg, *Roadshow v iiNet* (2012) 248 CLR 42, 67–8 [65] (French CJ, Crennan and Kiefel JJ).

<sup>120</sup> The High Court emphasised that the notices provided by AFACT were insufficiently reliable to justify potential action by iiNet to suspend or ban subscribers: ibid 58 [34], 70 [74]–[75], 71 [78] (French CJ, Crennan and Kiefel JJ); 74 [92], 75 [96], 88 [138] and 90 [146] (Gummow and Hayne JJ).

## IV Limiting Devices and Their Flaws

Despite doctrinal differences, the liability of online intermediaries often appears to turn on the degree to which the intermediary is seen by the Court to be an active participant in the wrong. The courts adopt complex factual tests based on analogies to the historical application of each doctrine in the mass media era. Because each doctrine evolved distinctly, each includes a different test upon which liability is based. Each doctrine, however, requires some active behaviour on the part of the intermediary to found liability. In cases where an intermediary is found to be liable, it is invariably viewed as an active wrongdoer. The textual tests are often expressed as an overarching factor — often a single word, like ‘authorise’, or ‘publish’ — purportedly to distinguish between those intermediaries that actively participate in the wrong from those that merely provide the infrastructure that facilitates it.

Purely passive intermediaries are never liable. The electricity provider can be thought of as the limit case here: the power it provides is a necessary, but not sufficient, factor in any harm that occurs over a telecommunications network.<sup>121</sup> In the context of online communications, the law allows for the possibility that passive intermediaries who merely facilitate communications by others, but are otherwise too remote from the harm, will not be found liable. When an intermediary is liable for the acts of its users, it is invariably because some volitional act is seen as sufficiently proximate to the wrongful act of the third party. The great difficulty here, however, is that it is hard to know when an intermediary will be considered to be truly ‘passive’ — or in other language, to do more than ‘merely’ provide the facilities or infrastructure over which others can communicate.

### *A Intent and the Act of Designing or Operating the System: Active and Passive Actors and the Problem of Timeframe Selection*

One of the major problems with online intermediary liability law is that the active versus passive distinction is inherently indeterminate. The line between an active participant and a passive facilitator can often depend upon their knowledge (actual or imputed) of wrongful acts and the window of time during which their activity is evaluated. Narrow time periods focus attention on singular acts that are proximate to the harm; broad time periods enable the trier of fact to consider the influence of more remote actions in the past.<sup>122</sup> So an intermediary that provides necessary facilities may not be an active participant in the wrongdoer’s actions when viewed through a narrow timeframe, but on a longer timeframe, a court may find that the decision to create and operate the facilities was causally relevant.<sup>123</sup> This is a feature

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<sup>121</sup> Similarly, in tort, not all preconditions to harm will be sufficient to ground liability. A condition may be necessary for the occasion of harm, but not sufficient to cause that harm. It may not, in other words, be causally significant. See Richard W Wright, ‘The Grounds and Extent of Legal Responsibility’ (2003) 40(4) *San Diego Law Review* 1425, 1494; Jane Stapleton, ‘Choosing What We Mean by “Causation” in the Law’ (2008) 73(2) *Missouri Law Review* 433, 471–4; Hart and Honoré, above n 20, 106; Hamer, above n 20, 170–1.

<sup>122</sup> Tanzil Chowdhury, ‘Time Frames and Legal Indeterminacy’ (2017) 30(1) *Canadian Journal of Law & Jurisprudence* 57, 67.

<sup>123</sup> See also Goldberg and Zipursky, above n 21, 108–9.

of legal decision-making long recognised by the American legal realists<sup>124</sup> and critical legal scholars,<sup>125</sup> who highlighted the importance of the selection of relevant facts in legal adjudication. Much more recently, Chowdhury has shown that the indeterminacy of timeframe selection is logically prior to many critiques of indeterminacy and, in doing so, rescues timeframe indeterminacy from the more overstated claims of legal uncertainty that arose out of critical legal scholar critiques.<sup>126</sup>

In online intermediary liability cases, the active/passive distinction comes under most stress in the cases where an otherwise passive intermediary is apparently seen by the court as in some way morally culpable for the wrong. Faced with a meritorious plaintiff and an intermediary who presents either the most efficient or only practical means of reducing or redressing the harm, there is strong pressure for courts to adapt the common law to find an effective remedy.<sup>127</sup> This can be seen most explicitly in *MGM Studios v Grokster*, where the US Supreme Court articulated a new head of liability for ‘inducing’ copyright infringement after characterising the actions of Grokster — a company that created peer-to-peer file sharing client software — as ‘purposeful, culpable expression and conduct’.<sup>128</sup> Grokster is an excellent example of a business built explicitly on the legal protection apparently offered by the older Supreme Court decision of *Sony v Universal*, which has operated for 30 years to shield the developers of general purpose technology with ‘substantial noninfringing uses’.<sup>129</sup> *Sony v Universal*, (also known as the ‘Sony Betamax Case’), is a well-known example of where the decision to design and sell a system that facilitates copyright infringement was found to be too far removed from the wrongful acts of its users. When Grokster learnt from the copyright liability of Napster<sup>130</sup> and designed a replacement file sharing service that was compliant with the *Sony* rule, the US Supreme Court reacted and readjusted the law to take into account intent at the time of designing the system.<sup>131</sup> In doing this, the court shifted intermediary copyright liability away from its traditional torts-based approaches.<sup>132</sup>

<sup>124</sup> Jerome Frank, ‘What Courts Do in Fact - Part One’ (1931) 26(6) *Illinois Law Review* 645.

<sup>125</sup> Mark Kelman, ‘Interpretive Construction in the Substantive Criminal Law’ (1980) 33(4) *Stanford Law Review* 591, 593–4; Kevät Nousiainen, ‘Time of Law — Time of Experience’ in Jes Bjarup and Mogens Blegvad (eds), *Time, Law, and Society: Proceedings of a Nordic Symposium Held May 1994 at Sandbjerg Gods, Denmark* (Franz Steiner Verlag, 1995) 23.

<sup>126</sup> Chowdhury, above n 122, 69.

<sup>127</sup> For discussion on the way that the common law adapts theories of responsibility to changing social needs, see generally Mary Arden, *Common Law and Modern Society: Keeping Pace with Change* (Oxford University Press, 2015) 82–98.

<sup>128</sup> *MGM Studios Inc v Grokster Ltd*, 545 US 913, 937 (the Court) (2005).

<sup>129</sup> *Sony Corp of America v Universal City Studios Inc*, 464 US 417, 442 (the Court) (1983).

<sup>130</sup> Napster was originally founded in 1999 as a free online peer-to-peer file sharing service that enabled users to share MP3 audio files of recorded music. It was found liable for contributory infringement and vicarious infringement of the plaintiffs’ copyrights under the *Digital Millennium Copyright Act 17 USC* (‘DMCA’): *A&M Records Inc v Napster Inc*, 239 F 3d 1004 (9<sup>th</sup> cir, 2001).

<sup>131</sup> See Jane C Ginsburg, ‘Separating the Sony Sheep from the Grokster Goats: Reckoning the Future Business Plans of Copyright-Dependent Technology Entrepreneurs’ (2008) 50(2) *Arizona Law Review* 577.

<sup>132</sup> The US has historically grounded intermediary liability for copyright infringement in tort law concepts of vicarious liability and contributory infringement based upon principles of joint tortfeasorship: Cohen et al, *Copyright in a Global Information Economy* (Aspen Publishers, 3<sup>rd</sup> ed, 2010) 476.

Copyright law has not historically been concerned with intent — it is a statutory tort of strict liability.<sup>133</sup> Copyright law cares about whether there has been infringement — it is focused on *results*. There is no liability, for example, for intending to infringe or attempting to infringe.<sup>134</sup> It is not clear why intermediary liability should be any different. Arguably, the more relevant question is whether the intermediary actually caused or contributed to third-party infringement. This is an assessment of fault, which does not depend on the defendant's intent.<sup>135</sup>

In other cases, courts have found other ways to adapt the common law without such a major rearticulation. The most difficult cases in recent years deal with those intermediaries that are more removed from the primary wrong. In these cases, liability turns on whether the decision to create or operate a system that enables another actor to commit a wrong is itself a causally responsible act.<sup>136</sup> As illustrated by the cases discussed below, we believe that this difficulty in determining whether choices made in designing a system are causally relevant is a major contributing factor to the uncertainty that has developed in online intermediary liability law. Stated simply, not every precondition to the occurrence of harm will be causally relevant to that result, such that legal liability ought to follow.<sup>137</sup> In any given case, there will be a range of factors that preceded the harm and led to it in some way. This is what the 'but for' test for causation-in-fact in tort law tells us. The 'but for' test asks whether the harm would have occurred but for a particular condition, and so helps courts to identify each and all of the conditions that together led to the resulting harm.<sup>138</sup> Yet not all 'but for' conditions will attract further legal scrutiny or liability. For an intermediary to be potentially liable for facilitating third-party wrongdoing, its contribution to the risk of harm should be more than a 'but for' condition — it should be *causally significant*.<sup>139</sup> In these situations, the most difficult question to resolve is: what is a relevant contribution to the risk of harm?

The difficulty with the active/passive binary is particularly visible in relation to ISPs. These online intermediaries are some of the most removed from the content of communications. The 'end-to-end' design principle, upon which internet architecture is largely based, stipulates that the pipes over which communications

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<sup>133</sup> We note that intent features in actions for the circumvention of technological protection measures; for example, the *Copyright Act* s 116AO provides that a copyright owner may bring an action against a person who manufactures or imports into Australia a circumvention device with the intention of providing it to another person. Intent appears in some of the criminal provisions inserted into the *Copyright Act* by the *Copyright Amendment Act 2006* (Cth). For example, s132AD(1) of the *Copyright Act* makes it an indictable offence to make an infringing copy of a work or other subject matter with the intention of selling it, letting it for hire, or obtaining a commercial advantage or profit from it. See also *Copyright Amendment Act 2006* (Cth) ss 132AF–132AJ, 132AL.

<sup>134</sup> Note that the calculation of damages for copyright infringement may take into account intentional infringement: *Copyright Act* s 115(4).

<sup>135</sup> For more on the difference between intent and fault in tort law, see Peter Cane, 'Mens Rea in Tort Law' (2000) 20(4) *Oxford Journal of Legal Studies* 533; Avihay Dorfman and Assaf Jacob, 'Copyright as Tort' (2011) 12(1) *Theoretical Inquiries in Law* 59.

<sup>136</sup> Goldberg and Zipursky call this a 'proximate causal link': Goldberg and Zipursky, above n 21, 103–4.

<sup>137</sup> See, eg, Wright, above n 121, 1494; Stapleton, above n 121, 471–4; Hart and Honoré, above n 20, 106; Hamer, above n 20, 170–1.

<sup>138</sup> Amanda Stickley, *Australian Torts Law* (LexisNexis Butterworths, 4<sup>th</sup> ed, 2016) 296–304.

<sup>139</sup> Hart and Honoré, above n 20, 114; Hamer, above n 20, 180–1; Stapleton, above n 20, 961; Epstein, above n 20, 179, 190–1.

flow should be agnostic about the content they carry. The applications at the end-points of communications are responsible for the functionality and features of different services. In this (somewhat simplified) view, the ISPs that operate the pipes are neutral providers of infrastructure (in broad strokes, this is the principle of ‘network neutrality’: ISPs should not discriminate between users or content).<sup>140</sup>

The ISP is as close to a ‘passive’ actor as is imaginable in the class of online intermediaries. But the law does not clearly exclude the possibility that ISPs could be liable for the content they carry on behalf of the users of their infrastructure. In copyright, the ‘mere conduit’ exceptions in ss 39B and 112E of the *Copyright Act* explicitly provide that:

A person [...] who provides facilities for making, or facilitating the making of, a communication is not taken to have authorised any infringement of copyright [...] merely because another person uses the facilities so provided to do something the right to do which is included in the copyright.

These explicit limitations appear clear, but provide little guidance for curtailing liability in practice.<sup>141</sup> They have never been successfully invoked because they only apply in situations where the common law test for authorisation liability will never be made out. As soon as a ‘mere conduit’ is alleged either to take a positive step or to fail to act to restrain infringement, it is no longer ‘merely’ passive and the protection of ss 39B and 112E no longer apply. The High Court in *Roadshow v iiNet* held that these provisions offer protection ‘where none is required’<sup>142</sup> and ‘seems to have been enacted from an abundance of caution’.<sup>143</sup> The *Roadshow v iiNet* case itself is a neat illustration of the futility of the active/passive binary. iiNet was precisely the type of actor that ‘merely’ provides facilities, but the question of liability ultimately came down to the level of knowledge that the ISP had about infringement on its network. The litigation process was an expensive exercise in determining whether the knowledge that iiNet obtained from the notices it was sent was sufficient to transform it from a passive conduit that merely facilitates infringement to an active contributor to the wrong.

A broad timeframe can enable courts to find that moral culpability at an earlier time is causally sufficient to the harm that results at a later date. When courts have found liability in these cases, it is generally rooted in a finding that in designing

<sup>140</sup> See generally Tim Wu, ‘Network Neutrality, Broadband Discrimination’ (2003) 2 *Journal on Telecommunications & High Technology Law* 141. We acknowledge that the concept and principle of network neutrality is hotly contested and by no means settled.

<sup>141</sup> The distinction between ‘passive’ and ‘active’ service providers also exists in European law: *Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in particular Electronic Commerce, in the Internal Market* [2000] OJ L 178/1, recital 42 (‘*E-Commerce Directive*’). A ‘safe harbour’ is the general term used for exceptions of liability that apply to online service providers, and includes both clear exclusions of liability (as in the *Copyright Act* ss 39B and 112E) and more complicated schemes that provide immunity from damages awards in exchange for following certain requirements (as in the notice-and-takedown scheme in the *Copyright Act* s 116AG). The ability of a service provider to rely on the safe harbours is left to be determined by national courts according to questions of knowledge and control: see Graeme B Dinwoodie, ‘A Comparative Analysis of the Secondary Liability of Online Service Providers’ in Graeme B Dinwoodie (ed), *Secondary Liability of Internet Service Providers* (Springer, 2017) 1, 36–8.

<sup>142</sup> (2012) 248 CLR 42, 55–6 [26] (French CJ, Crennan and Kiefel JJ).

<sup>143</sup> Ibid 81 [113] (Gummow and Hayne JJ).

the general purpose system, the intermediary had actively encouraged or solicited exactly the kind of harmful conduct complained of. In these cases, the act for which an intermediary is liable is the temporally less proximate act of designing and operating a system that enables harm to occur. So, for example, in cases where an intermediary has sought to defend itself on the basis that its system operates automatically and neutrally, courts have come to different conclusions about the relevance of automation. Justice Eady's early defamation decision in *Bunt v Tilley* in the UK stands for the principle that a 'passive medium of communication, such as an ISP'<sup>144</sup> is not a 'publisher' of content for the purposes of defamation law. Justice Eady has developed this line of reasoning to apply to search engines who create an automated system that, by matching search terms with content hosted elsewhere on the web, merely facilitates a communication that is initiated by other parties.<sup>145</sup> This reasoning, however, leaves open the possibility that an actor who 'knowingly permits another to communicate information which is defamatory'<sup>146</sup> may be liable if there were some opportunity to prevent the publication.

In Australia, single judges in preliminary or interlocutory hearings have adopted similar reasoning and expressed doubt about the liability of search engines in defamation law.<sup>147</sup> In *ACCC v Google*, a case under consumer protection law, the High Court accepted the proposition that Google was merely passing on content created by others when it automatically displayed sponsored links in response to user search terms.<sup>148</sup> The High Court used the same language of 'endorsing' and 'adopting' content created by others as is used in defamation cases.<sup>149</sup> In the most recent search engine defamation cases, by contrast, courts have appeared to accept that a passive actor that merely facilitates communication will not be liable, but have rejected the argument that an automated system that produces responses to search terms can be passive. In these more fully developed defamation cases, courts have concluded that the lack of human input in presenting information does not itself exclude potential liability, rejecting Google's claim that the automated operation of its search engine made it a purely 'passive' actor.<sup>150</sup> The South Australian Supreme Court in *Duffy v Google* explicitly rejected the suggestion that Google's automated service made it a passive actor:

Google played an active role in generating the paragraphs and communicating them to the user. The mere fact that the words are programmed to be generated because they appear on third party webpages makes no difference to the physical element. It makes no difference to the physical element whether a person directly composes the words in question or programs a machine which does so as a result of the program.<sup>151</sup>

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<sup>144</sup> *Bunt v Tilley* [2007] 1 WLR 1243, 1252 [37].

<sup>145</sup> *Metropolitan International Schools* [2011] 1 WLR 1743, 1757 [51] (Eady J).

<sup>146</sup> *Bunt v Tilley* [2007] 1 WLR 1243, 1249 [21].

<sup>147</sup> *Bleyer v Google* (2014) 88 NSWLR 670, 686 [85] (McCallum J); *Duffy v Google Inc* [2011] SADC 178 (15 November 2011) [30] (Millstead J).

<sup>148</sup> *ACCC v Google* (2013) 249 CLR 435.

<sup>149</sup> *Ibid* 460 [73] (French CJ, Crennan and Kiefel JJ); 472 [115] (Hayne J); 490–1 [162] (Heydon J).

<sup>150</sup> See *Google v Trkulja* (2016) 342 ALR 504, 590–1 [352] (Ashley, Ferguson and McLeish JJA); *Duffy v Google Inc* (2015) 125 SASR 437, 495–6 [204]–[205] (Blue J); *Google Inc v Duffy* (2017) 129 SASR 304, 344–5 [140], 351–2 [155], 358 [178], 369 [221] (Kourakis CJ).

<sup>151</sup> *Duffy v Google Inc* (2015) 125 SASR 437, 495–6 [204] (Blue J). Upheld on appeal, see especially *Google Inc v Duffy* (2017) 129 SASR 304, 465–7 [595]–[596] (Hinton J).

Likewise, Beach J in the first *Trkulja v Google* case rejected the suggestion that Google was a passive intermediary on the basis that search engines, unlike ISPs, produce material as a result of their operation.<sup>152</sup> The Victorian Court of Appeal in the later *Trkulja* case reached the same conclusion, on the basis that Google ‘holds itself out as providing a means of navigating the web’, a role that is not passive and ‘does more than merely facilitating contact between A and B’.<sup>153</sup>

In copyright actions, Australian courts have used broad timeframes to focus on the culpability of an actor at the stage at which an automated service is developed or deployed. So in *Cooper*, for example, it was clear that Mr Cooper had ‘deliberately designed the website to facilitate infringing downloading’.<sup>154</sup> In *Sharman*, the developers of the Kazaa network knew that it would be used predominantly to illicitly share infringing files, and failed to design its system to prevent or inhibit infringement.<sup>155</sup> These defendants were accordingly liable for choices made at the time of designing the system, despite having no control over users at the time actual infringement took place. In *Pokémon v Redbubble*,<sup>156</sup> the defendants had designed and operated a system that allowed images to be uploaded by users and searched for by potential customers. The Federal Court of Australia held that infringements ‘were embedded in the system which was created for, and adopted by, Redbubble’.<sup>157</sup>

These different decisions show some of the difficulties in determining whether an actor plays a passive or an active role. When courts attempt to distinguish between active and passive actors, they sometimes appear to be using intent, either actual or inferred, to determine whether the act of designing the system was morally wrongful (or at least causally relevant). As Chowdhury explains the problem, the selection of narrow or broad timeframes ‘provide new content for legal norms and undermine ostensibly rule like forms to produce standards’.<sup>158</sup> We see this clearly in intermediary liability cases, where the seemingly bright line textual rule that a passive intermediary is not liable can become a normative evaluation of whether the intermediary is somehow responsible for the wrongful acts of another (and therefore more than ‘merely’ passive). The major difficulty that this presents is that intermediaries that appear to be performing similar functions face quite disparate consequences. Where a court must choose to focus either on the initial positive act of designing a system or the later passive act of merely facilitating an isolated instance of harm, there is at least a great deal of uncertainty in the doctrine. This problem becomes worse when the evaluation of whether an intermediary was ‘passive’ or ‘active’ depends on moral culpability at the time of designing the system.

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<sup>152</sup> *Trkulja v Google (No 5)* [2012] VSC 533 (12 November 2012) [28]–[31] (Beach J).

<sup>153</sup> *Google v Trkulja* (2016) 342 ALR 504, 590–1 [352] (Ashley, Ferguson and McLeish JJA).

<sup>154</sup> *Cooper* (2006) 156 FCR 380, 411–2 [148]–[149] (Kenny J, French J agreeing). See also Branson J (French J agreeing) describing Mr Cooper’s ‘deliberate choice ... to establish his website in a way which allowed the automatic addition of hyperlinks’: at 390 [43].

<sup>155</sup> *Sharman* (2005) 222 FCR 465, 562 [414] (Wilcox J). Note that the Court also found that Sharman had encouraged copyright infringement: 560 [405]–[406] (Wilcox J).

<sup>156</sup> (2017) 351 ALR 676, 709–10 [58] (Pagone J).

<sup>157</sup> *Ibid* 714 [67] (Pagone J).

<sup>158</sup> Chowdhury, above n 122, 73.

Intent is not an element of most of the causes of action that apply to intermediaries; liability requires some volitional act, but not intent to cause the harm. In defamation law, for instance, the relevant intent is the intent to publish, not the intent to defame.<sup>159</sup> This makes sense when dealing with primary publishers, where it can be presumed that the publisher knows the content of their publication.<sup>160</sup> It becomes more problematic, however, when the same reasoning is extended to intermediaries. Recently, in *Google v Duffy*,<sup>161</sup> the Supreme Court of South Australia comfortably found that Google was a publisher and possessed the relevant intent to publish,<sup>162</sup> notwithstanding that the publications at issue were search results and associated ‘snippets’ for websites, automatically generated by an algorithm applied to the user’s search query.<sup>163</sup> Chief Justice Kourakis stated that ‘[t]he absence of human involvement in the creation of the abstract or snippet upon a user’s search cannot detract from Google’s intention to publish, in the sense of making readable, the results of its searches.’<sup>164</sup> This is at odds with the decision in *ACCC v Google*,<sup>165</sup> where Google had designed a system that would publish misleading advertisements at the behest of its users, but was not found to endorse the content and therefore was not liable. Setting aside doctrinal differences for a moment, one of the key differentiating factors between these cases is the use of a narrow timeframe in *ACCC v Google* (Google ‘automatically’ passed on sponsored links) and a broad timeframe in the *Trkulja* and *Duffy* defamation cases (Google intended to publish whatever snippets its algorithms matched) and the *Pokémon v Redbubble* case (RedBubble chose to design a system to carry on a business with an ‘inherent risk of infringement’).<sup>166</sup> The uncertainty here is made greater when the moral culpability of the online intermediary at the time that the system was designed informs the court’s selection of a broad or narrow timeframe — the result can be effectively to read intention as an element of secondary liability where it does not otherwise exist.<sup>167</sup>

## **B Liability by Omission: The Failure to Act and the Problem with Knowledge**

Where an online intermediary has no actual or implied intent to cause harm or benefit from wrongful acts (and therefore no moral culpability at the time the network was designed), the other limiting device deployed by courts is closely linked to knowledge. A passive facilitator can be transformed into an active wrongdoer once they know of the harm but fail to respond appropriately. In these cases, it is the later

<sup>159</sup> *Byrne v Deane* [1937] 1 KB 818, 837 (Greene LJ); *Google Inc v Duffy* (2017) 129 SASR 304, 334 [92] (Kourakis CJ), 460–1 [581], 466–7 [596] (Hinton J).

<sup>160</sup> *Google Inc v Duffy* (2017) 129 SASR 304, 334 [93] (Kourakis CJ).

<sup>161</sup> (2017) 129 SASR 304.

<sup>162</sup> *Ibid* 352 [156] (Kourakis CJ), 460–1 [581], 466–7 [596] (Hinton J).

<sup>163</sup> The Court rejected Google’s argument that it could not have intended to publish any snippet ‘when there are over 60 trillion constantly changing webpages and over 100 billion searches a month’: *Google Inc v Duffy* (2017) 129 SASR 304, 351 [153] (Kourakis CJ).

<sup>164</sup> *Ibid* 350–1 [151].

<sup>165</sup> (2013) 249 CLR 435.

<sup>166</sup> (2017) 351 ALR 676, 714 [67] (Pagone J).

<sup>167</sup> Scholars have also warned that rules like the one developed in *Grokster* do not capture intermediaries with an intent to facilitate infringement, but rather intermediaries with ‘carelessly advertised evidence of intent’: see Kent Schoen, ‘*Metro-Goldwyn-Mayer v Grokster*: Unpredictability in Digital Copyright Law’ (2006) 5(1) *Northwestern Journal of Technology and Intellectual Property* 156, 156.

omission to remove the material or stop the unlawful conduct that is the causally relevant volitional act that grounds liability.

Liability in these types of cases arises in one of two ways. The first is through editorial control. Where an online intermediary actively moderates content on their site, they are often taken to have assumed the responsibility for content and are accordingly liable. This is the most straightforward application of intermediary liability. Unless there is some statutory immunity, it is usually the case that principles of liability applied to broadcast and print media transfer relatively easily to online intermediaries who exercise direct editorial control over, and therefore assume responsibility for, posts made by others.

The second way that online intermediaries gain knowledge that triggers liability is when the existence of content is drawn to their attention — usually by the plaintiff. In defamation, a mere facilitator becomes liable upon gaining knowledge of defamatory content.<sup>168</sup> Up until the intermediary has notice of the defamatory material, they are able to rely on the defence of innocent dissemination and sometimes, on the argument that they have not published the material at all. Once the intermediary has knowledge and some ability to prevent or limit the harm, it will accrue liability if it does not act within a reasonable period.<sup>169</sup> In copyright too, a similar principle holds, and courts have found liability for authorisation where the intermediary knew of infringement but turned a ‘blind eye’.<sup>170</sup> In *Cooper*, the ISP E-Talk provided hosting for Cooper’s website, and was liable because it knew of infringement by users with whom it had only very remote relationships and had not ‘declined to provide’ hosting to Cooper.<sup>171</sup> E-Talk was found not to be a passive provider of hosting services and bandwidth — it knowingly benefited from the harm and did not decline to continue to provide the services. In *ACCC v Allergy Pathway (No 2)*,<sup>172</sup> a contempt of court decision, the owner of a Facebook page was responsible for testimonials posted by third parties on the page because it knew about the posts and decided not to remove them. The Court found that the company had ‘caused them to continue to be published from the time it became aware of their existence’.<sup>173</sup> In the search engine defamation cases, even where a search engine is thought to be a passive actor, it becomes liable once the plaintiff brings the defamatory material to the knowledge of the company.

Whether an intermediary is a merely ‘passive’ facilitator or an active participant in the wrong ultimately often rests on some level of knowledge. Knowledge that harm is likely can transform the creator of a technological system

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<sup>168</sup> *Emmens v Pottle* (1885) 16 QBD 354; *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 547.

<sup>169</sup> *Duffy v Google Inc* (2015) 125 SASR 437, 496 [207] (Blue J); *Trkulja v Google (No 5)* [2012] VSC 533 (12 November 2012) [30]–[31] (Beach J); *Google v Trkulja* (2016) 342 ALR 504, 591 [353], 591–2 [357] (Ashley, Ferguson and McLeish JJA).

<sup>170</sup> *Australasian Performing Right Association Ltd v Jain* (1990) 26 FCR 53, 61 (Sheppard, Foster and Hill JJ); *Australasian Performing Right Association Ltd v Metro on George Pty Ltd* (2004) 61 IPR 575, 589 (Bennett J).

<sup>171</sup> *Cooper* (2006) 156 FCR 380, 413 [155] (Kenny J, French J agreeing). See also at 392 [64] (Branson J, French J agreeing). Note that E-Talk had also benefited from the high traffic to Mr Cooper’s website, which was attributable to the links to infringing files on the site.

<sup>172</sup> (2011) 192 FCR 34.

<sup>173</sup> *Ibid* 42 [33] (Finkelstein J).

into an active participant in the ensuing wrongs when the system is used by third parties. Where knowledge is imputed based on a practice of editorial oversight, the intermediary is taken to have accepted responsibility for the harms caused by others. Where specific knowledge of harmful content is brought to the attention of the intermediary, on the other hand, their passive facilitation before knowledge can become an active failure afterwards to act to remove the content or otherwise limit the harm.

Importantly, knowledge is also usually sufficient to destroy the defences and limited immunities that protect intermediaries. The *Broadcasting Services Act 1992* (Cth) sch 5 cl 91 grants immunity to intermediaries from State and Territory laws that would subject them to civil or criminal liability for cases where they are not aware of the nature of the content or would be expected to proactively monitor their services. The exception disappears once the provider has knowledge, which means that like the *Copyright Act* ss 39B and 112E in copyright law, it almost never has any work to do.<sup>174</sup> The innocent dissemination defence in defamation likewise only applies up until the point that the intermediary is put on notice about the defamatory content.<sup>175</sup> Knowledge also plays a role in the copyright safe harbours,<sup>176</sup> where search and hosting intermediaries<sup>177</sup> are obligated to take action once they become aware of infringing content or circumstances that indicate infringement is likely.<sup>178</sup> This test too has been extended in the US, where the *Digital Millennium Copyright Act*<sup>179</sup> safe harbours are more regularly invoked, to include ‘red flags’. These red flags negate the protection of the safe harbour in circumstances where an intermediary is aware of facts or circumstances from which infringement is apparent and does not act expeditiously to remove or disable access to the infringing material.<sup>180</sup> Courts in the US have, however, been reluctant to extend the ‘red flag’ test, and have so far limited it to only destroy the safe harbour where an intermediary has constructive knowledge of specific and identifiable acts of infringement.<sup>181</sup>

The danger with making knowledge central to liability is that the ambiguity that exists within the traditional fault elements of each doctrine may sometimes effectively be replaced with the simpler proposition that knowledge of unlawful

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<sup>174</sup> See Peter Leonard, ‘Safe Harbors in Choppy Waters-Building a Sensible Approach to Liability of Internet Intermediaries in Australia’ (2010) 3(2) *Journal of International Media & Entertainment Law* 221; cf Brian Fitzgerald and Cheryl Foong, ‘Suppression Orders after *Fairfax v Ibrahim*: Implications for Internet Communications’ (2013) 37(2) *Australian Bar Review* 175, discussing a limited role for the BSA safe harbour in; *Fairfax Digital Australia & New Zealand Pty Ltd v Ibrahim* (2012) 83 NSWLR 52.

<sup>175</sup> Rolph, above n 77.

<sup>176</sup> See also above n 141.

<sup>177</sup> Note that only a small proportion of Australian intermediaries are able to rely on the copyright safe harbour in s 116AG, which currently only applies to carriage service providers.

<sup>178</sup> *Copyright Act* s 116AH(1).

<sup>179</sup> 17 USC.

<sup>180</sup> *Ibid* §§ 512(c)–(d).

<sup>181</sup> Both the 2<sup>nd</sup> and 9<sup>th</sup> circuit US Courts of Appeals have indicated that the difference between actual and constructive knowledge turns on whether the provider subjectively knew of specific infringement, and the red flag provision turns on whether the provider was aware of facts that would have made the specific infringement objectively obvious to a reasonable person: *Viacom International Inc v YouTube Inc*, 676 F 3d 19 (2<sup>nd</sup> Cir, 2012); *UMG Recordings Inc v Shelter Capital Partners LLC*, 718 F 3d 1006 (9<sup>th</sup> Cir, 2013). See also *Capitol Records LLC v Vimeo LLC*, No 14-1048 (2<sup>nd</sup> Cir, 2016).

content or behaviour, coupled with some ability to limit its impact, is sufficient to found liability. The big challenge, across all of these cases, is that knowledge, without a clearly defined concept of fault, actually does little to ground liability.<sup>182</sup> Courts are struggling to differentiate between secondary actors that merely provide a general purpose system that happens to be used for wrongful purposes, and those that create a system that actively solicits wrongful conduct. An intermediary's knowledge of wrongdoing has only a minimal relationship to the question of whether its technology, service or actions actually cause or contribute to the wrong.<sup>183</sup> Actual or constructive knowledge is being used to try to separate out 'bad actors', but this does not easily fit within the doctrinal history of each of the causes of action.<sup>184</sup> Nor does it fit generally with the overarching assumption of our legal system that liability only follows fault.<sup>185</sup> Certainly, but for the intermediary's actions, no harm would be suffered. This is true in the broad sense of the 'but for' test in common law, which, as noted above, throws up all the relevant conditions that can be said to be 'causes-in-fact' of the harm.<sup>186</sup> Thus, it is possible to argue that without access to the internet, service or platform, the user would not have been able to post the content that has infringed copyright, defamed another, or otherwise caused harm. But merely providing the facilities is said not to be enough to ground liability. Something more is always required, but the way in which the case law is developing makes it very difficult to identify what exactly that means.

What the courts seem to be doing in these cases is confusing or converging the assessment of whether an intermediary *ought* to act in response to the risk of harm with the standard of care that might be expected of the intermediary once that duty to act is established. Under general tort law principles, after a duty is established, courts ask: 'What is the standard of care that a reasonable person in the defendant's position would exercise in the circumstances?' This question sets a benchmark against which to determine whether the defendant's conduct falls short.<sup>187</sup> The standard of care exhibited by a reasonable person will take into account any special skills or knowledge that a person in the defendant's position would have.<sup>188</sup> Across a range of intermediary liability cases, by contrast, instead of treating

<sup>182</sup> Joachim Dietrich, 'Authorisation as Accessorial Liability: The Overlooked Role of Knowledge' (2014) 24(3) *Australian Intellectual Property Journal* 146.

<sup>183</sup> Rebecca Giblin-Chen, 'On Sony, Streamcast, and Smoking Guns' (2007) 29(6) *European Intellectual Property Review* 215, 224; Cane, above n 135; Avihay Dorfman and Assaf Jacob, 'Copyright as Tort' (2011) 12(1) *Theoretical Inquiries in Law* 59.

<sup>184</sup> See, eg, Kylie Pappalardo, 'Duty and Control in Intermediary Copyright Liability: An Australian Perspective' (2014) 4(1) *IP Theory* 9 <<http://www.repository.law.indiana.edu/ipt/vol4/iss1/2>>.

<sup>185</sup> Perry, above n 51, 513; Goldberg and Zipursky, above n 17, 21; Cane, above n 51, 53–4; Bernard Weiner, *Judgements of Responsibility: A Foundation for a Theory of Social Conduct* (Guilford Press, 1995) 7–8.

<sup>186</sup> *Chappel v Hart* (1998) 195 CLR 232, 283–4 (Hayne J); *March v E & M H Stramare Pty Ltd* (1991) 171 CLR 506, 532 (Deane J); Wright, above n 121, 1494; Stapleton, above n 121; Hart and Honoré, above n 20, 106, 114; Hamer, above n 20, 170–1; Stapleton, above n 20, 961; Epstein, above n 20, 190–1.

<sup>187</sup> This is also the reason why intent or motive is generally irrelevant to tort law. What matters is not the state of mind of the defendant, but whether the defendant fails to reach a certain standard of conduct. See Cane, *Anatomy of Tort Law*, above n 18, 35–6.

<sup>188</sup> See *Imbree v McNeilly* (2008) 236 CLR 510, 532–3 [69]; *Heydon v NRMA Ltd* (2000) 51 NSWLR 1, 117; Amanda Stickley, *Australian Torts Law* (Lexis Nexis Butterworths, 3<sup>rd</sup> ed, 2013) 226, 228–9; *Roe v Minister of Health* [1954] 2 QB 66; *H v Royal Alexandra Hospital for Children* (1990)

knowledge as a factor that informs the *standard* of care in these cases, the courts are treating knowledge (or allegations of harm) as a factor that informs the imposition of a duty, like reasonable foreseeability. This is a lot of work for the concept of knowledge to do, and creates a great deal of uncertainty around the extent of liability when intermediaries create systems that enable others to post content or communicate. As Goldberg and Zipursky argue,

when intervening wrongful conduct by actors other than the defendant is part of what the defendant is being asked to take care against, or when the injury at issue is not a physical harm, foreseeability often will be *insufficient* to ground a duty of care.<sup>189</sup>

Knowledge is a poor limiting device in intermediary liability law. Whether an intermediary has sufficient knowledge of potential harms to be liable is often very difficult to ascertain. Where knowledge is imputed at the design stage on the basis that the system is likely to be used to cause harm, the court must come to some determination of what degree of harm, or likelihood of harm, is sufficient.<sup>190</sup> Meanwhile, when courts infer knowledge from editorial control, they create a disincentive for intermediaries to moderate content that ultimately encourages, rather than limits, risky behaviour. When knowledge is provided on notice, it is often imputed upon the plaintiff's *assertion* of wrongdoing and nothing more.<sup>191</sup> 'Knowledge', in a substantive sense, requires more than mere awareness of potentially problematic content — it requires intermediaries to make a judgment about whether the material falls within the ambit of the relevant law. At the time that an intermediary is put on notice, it is usually only through an allegation of harm, and it is sometimes difficult for an intermediary to evaluate whether a claim is likely to be made out. In defamation, for example, this may require an evaluation of whether evidence of the truth of an imputation can be gathered; in copyright, the existence of a fair dealing defence or a licence<sup>192</sup> can be a difficult question of fact and law. If the notice relates to the transitory communications of users, an intermediary may have no ability to evaluate whether the past conduct is actually wrongful.<sup>193</sup>

All of this means that it will often be difficult for an online intermediary to be sure whether a particular alleged wrong really does infringe copyright, defame a person, or vilify a group. These are extremely difficult assessments to make, especially given the presence of legal exceptions in some areas (such as fair dealing exceptions to copyright infringement, and the truth and honest opinion defences in defamation) and the context-specific nature of harmful conduct in other areas.

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Aust Tort Reports ¶81-000; Donal Nolan, 'Varying the Standard of Care in Negligence' (2013) 72(3) *Cambridge Law Journal* 651, 656.

<sup>189</sup> Goldberg and Zipursky, above n 21, 81 (emphasis in original).

<sup>190</sup> See, eg, *Universal Music Australia Pty Ltd v Cooper* (2005) 150 FCR 1, 20–1 [84] (Tamberlin J); *Cooper* (2006) 156 FCR 380, 412 [149] (Kenny J, French J agreeing); *Sharman* (2005) 22 FCR 465, 510–12 [181]–[194] (Wilcox J).

<sup>191</sup> See, eg, *Pokémon v Redbubble* (2017) 351 ALR 676, 703–4 [54] (Pagone J).

<sup>192</sup> See, eg, *Viacom International Inc v YouTube Inc*, 676 F 3d 19 (2<sup>nd</sup> Cir, 2012), where some of the allegations of infringement turned out to be authorised. See further Zahavah Levine, Chief Counsel YouTube, *Broadcast Yourself* (8 March 2010) YouTube: Official Blog <<https://youtube.googleblog.com/2010/03/broadcast-yourself.html>>.

<sup>193</sup> In some cases, like transitory communications, an intermediary has no way of evaluating an allegation of infringement: see Suzor and Fitzgerald, above n 35.

Intermediaries have expressed significant concern about the difficulty of regulating content in these context-specific environments.<sup>194</sup> There is also good reason to worry about the effects of conditioning liability on knowledge from the perspective of freedom of expression and access to information.<sup>195</sup> The *Manila Principles on Intermediary Liability* is a joint civil society statement on best practices, informed particularly by freedom of expression and privacy rights under international law.<sup>196</sup> The Principles try to set out a guide for intermediary liability law that does not require intermediaries to proactively monitor content or to substantially evaluate the validity of allegations that third-party content is harmful. The experience from copyright notice and takedown schemes over the last two decades shows that the quality of notices is a serious concern; even among sophisticated senders, notices of alleged infringement can be flawed,<sup>197</sup> and error rates are much higher among actors who send only a small number of notices.<sup>198</sup> The core concern for freedom of expression is that, faced with potential liability if they make a mistake, intermediaries are likely to systematically err on the side of caution, which may impose substantial burdens on legitimate speech.<sup>199</sup>

The most serious problem at the core of the recent hard cases of intermediary liability is that they are not really about fault of the intermediary. Cases against intermediaries who are clearly morally culpable are generally straightforward (at least if they are present in the jurisdiction). As plaintiffs continue to look for remedies against online intermediaries that are more removed from the act of wrongdoing, like search engines and ISPs, the question of liability becomes much more difficult. Many of these cases demonstrate that courts are rapidly approaching, and sometimes exceeding, the historical limits of conventional legal rules. In providing effective remedies for the harms that plaintiffs suffer, courts have had to twist secondary liability principles beyond the point at which they are useful in providing a standard of acceptable conduct.<sup>200</sup> Particularly as these doctrines extend to consider online intermediaries who merely provide a general purpose system to facilitate communication, liability becomes an increasingly blunt instrument. In these cases, the intermediary is often merely a focal point at which regulation can be effective. The ultimate target whose behaviour regulation attempts to change or

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<sup>194</sup> Ammori, above n 35.

<sup>195</sup> David Kaye, *Report of the Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression*, UNHRC, 33<sup>rd</sup> sess, Agenda Item 3, A/HRC/32/38 (11 May 2016).

<sup>196</sup> *Manila Principles on Intermediary Liability*, <<https://www.manilaprinciples.org/>>.

<sup>197</sup> Daniel Seng, 'The State of the Discordant Union: An Empirical Analysis of DMCA Takedown Notices' (2014) 18(3) *Virginia Journal of Law and Technology* 369; Daniel Kiat Boon Seng, "'Who Watches the Watchmen?'" An Empirical Analysis of Errors in DMCA Takedown Notices' (SSRN Scholarly Paper ID 2563202, Social Science Research Network, 23 January 2015) <<http://papers.ssrn.com/abstract=2563202>>; Jennifer M Urban and Laura Quilter, 'Efficient Process or 'Chilling Effects'? Takedown Notices under Section 512 of the *Digital Millennium Copyright Act*' (2006) 22(4) *Santa Clara Computer and High Technology Law Journal* 621.

<sup>198</sup> Jennifer M Urban, Joe Karaganis and Brianna Schofield, 'Notice and Takedown in Everyday Practice' (SSRN Scholarly Paper ID 2755628, Social Science Research Network, 29 March 2016) <<http://papers.ssrn.com/abstract=2755628>>.

<sup>199</sup> Catalina Botero Marino, Special Rapporteur for Freedom of Expression, 'Freedom of Expression and the Internet' (Inter-American Commission on Human Rights, 31 December 2013) 47–8 <[http://www.oas.org/en/iachr/expression/docs/reports/2014\\_04\\_08\\_internet\\_eng%20web.pdf](http://www.oas.org/en/iachr/expression/docs/reports/2014_04_08_internet_eng%20web.pdf)>.

<sup>200</sup> Ryan J Turner, 'Internet Defamation Law and Publication by Omission: A Multi-Jurisdictional Analysis' (2014) 37(1) *University of New South Wales Law Journal* 34.

contain is not the intermediary, but the end user. In this context, the High Court's decisions in both *Roadshow v iiNet*<sup>201</sup> and *Google v ACCC*<sup>202</sup> could indicate a trend back towards a more traditional, fault-based approach to liability. Importantly, however, both cases are constrained to their facts. In both cases, the High Court left open the possibility that something more — more knowledge, more endorsement, more *something* — could be sufficient to found liability.

## V Conclusion

This article has explored the principles by which online intermediaries are held liable for third-party actions across a range of legal areas: defamation, vilification, copyright and content regulation. Modern intermediary liability law is not simply an admonishment against consciously helping others to commit legal wrongs; it is an expectation that, in appropriate circumstances, intermediaries will proactively prevent wrongdoing by others, sometimes by designing systems that seek to prevent wrongful behaviour. In many of the legal areas canvassed in this article, courts and legislators ask intermediaries such as ISPs, search engines, website hosts, and technology developers to take some responsibility for the acts of users that occur over their networks and services.

These questions are fundamentally about responsibility. However, the ways in which legal rules and principles have developed to ascribe responsibility to online intermediaries have not always been clear or coherent. In many ways, the push for greater online enforcement and intermediary regulation has not been based on responsibility at all, but has been about capacity — the *capacity* to do something when faced with knowledge that harm may otherwise result. We argue that much of the uncertainty at the heart of online intermediary liability law stems from the merger and confusion of concepts of capacity and responsibility. Our current laws lack clear mechanisms for disentangling these concepts and distinguishing those intermediaries that are closely involved in their users' wrongful acts from those that are not.

Many of the areas of intermediary liability covered here have their origins in tort law. Responsibility theory in tort law tells us that a person will be responsible for a harmful outcome where his or her actions caused or contributed to the harm (causation) and where harm was the foreseeable result of those actions such that the person might have acted to avoid the harm, but did not (fault).<sup>203</sup> This is more than liability based on knowledge of wrongdoing and a failure to act. It requires more active involvement than that — normally, a clear and direct contribution to the resulting wrong. Our review of intermediary liability law across different doctrines reveals that often, in asking whether intermediaries are liable, courts have been asking what intermediaries can do to prevent harm. But, in most cases, courts have not been closely examining the intermediary's causal role in the wrong to determine

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<sup>201</sup> (2012) 248 CLR 42.

<sup>202</sup> (2013) 249 CLR 435.

<sup>203</sup> Perry, above n 51, 513; Goldberg and Zipursky, above n 17, 21; Cane, above n 51, 53–4; Voyiakis, above n 51, 458; Denton, above n 21, 127.

whether the intermediary indeed ought to be held responsible. The result is that our law has sometimes been ascribing liability without first establishing fault.

We suggest that prioritising the role of causal responsibility in the evaluation of online intermediary liability is likely to improve the certainty of the law and provide a better guide for the behaviour of the actors it regulates. The result of this analysis is that online intermediaries ought not be held liable where they have not materially contributed to the harm. Knowledge of wrongdoing, on its own (imputed or actual), should not be sufficient to make an intermediary into a causally relevant actor where their contributions to wrongdoing are necessary but not sufficient. Importantly, under responsibility theory, causal responsibility is a threshold question. The duty that arises from causal responsibility is the duty to take reasonable steps to minimise the risk that an intermediary has created — it is not a strict duty to prevent harm. Breach of this duty then requires careful assessment; the practical implication is that courts should more carefully and explicitly assess the reasonableness of the actions taken by causally relevant intermediaries in order to assess fault.

This conclusion is likely to leave some plaintiffs without an effective remedy, and this is problematic. The core tension underlying the expansion of intermediary liability in recent decades is the tension between the principle that there is no right without a remedy and the principle that there is no liability without fault. Courts around the world are struggling, like Australian courts, to identify when an online intermediary who is not morally responsible for a wrong should nevertheless be expected to do something to prevent it. These are complex policy questions, and courts are not equipped within the confines of existing doctrine to adequately deal with them. The unfortunate result has been to stretch the conventional principles of fault — either by finding that intermediaries ought to have known when they designed a system that it would inevitably be used for harm, or that their inaction after they are aware of harm is wrongful. As we have shown, however, these tests are fragile and unpredictable — they provide a poor way to delineate between intermediaries who are morally responsible and those who are not. These issues, we think, would be much better dealt with through an explicitly political process in the generation of new *sui generis* regulatory schemes that set out what society expects of particular intermediaries — rather than stretching the bounds of liability beyond principles of fault.

# Adolescent Family Violence: What is the Role for Legal Responses?

Heather Douglas\* and Tamara Walsh†

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## Abstract

Domestic and family violence has received close attention in Australia recently. However, most of the legal, policy and research interest has focused on the protection of women and their children from violent male partners. Adolescent family violence has remained largely underexplored. In this article, we consider the role of the legal system in responding to adolescent family violence. Drawing on focus groups conducted with lawyers and other service providers, we examine the role of legal interventions in improving outcomes for victims, perpetrators and other family members. We identify the need for greater resourcing and a more nuanced response to this form of violence.

## I Introduction

Domestic and family violence has received close attention in Australia in the last five years.<sup>1</sup> However, most of the legal, policy and research interest in domestic violence has focused on the protection of women and their children from violent male partners.<sup>2</sup> Adolescent family violence has remained ‘hidden’ and underexplored.<sup>3</sup>

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<sup>1</sup> Victoria, Royal Commission into Family Violence, *Summary and Recommendations* (2016) (‘*Royal Commission Summary*’); Special Taskforce on Domestic and Family Violence in Queensland, *Not Now, Not Ever: Putting an End to Domestic and Family Violence in Queensland* (28 February 2015) <<https://www.communities.qld.gov.au/resources/gateway/campaigns/end-violence/about/special-taskforce/dfv-report-vol-one.pdf>>.

<sup>2</sup> Council of Australian Governments, *The National Plan to Reduce Violence against Women and their Children 2010–2022* (November 2016) <<https://www.dss.gov.au/women/programs-services/reducing-violence/the-national-plan-to-reduce-violence-against-women-and-their-children-2010-2022>>.

<sup>3</sup> Barbara Cottrell and Peter Monk, ‘Adolescent-to-Parent Abuse: A Qualitative Overview of Common Themes’ (2004) 25(8) *Journal of Family Issues* 1072, 1075; Michel Stewart, Ailsa Burns and Rosemary Leonard, ‘Dark Side of the Mothering Role: Abuse of Mothers by Adolescent and Adult Children’ (2007) 56(3–4) *Sex Roles* 183, 183–4; Jo Howard and Naomi Rottem, ‘It All Starts at Home: Male Adolescent Violence to Mothers’ (Research Report, Inner South Community Health Service and Child Abuse Research Australia, Monash University, 2008); Rachel Condry and

Adolescent family violence occurs when an older child, generally post-pubescent, perpetrates violent acts upon their parents, siblings or other members of their household.<sup>4</sup> While adolescent family violence can involve both verbal and physical aggression,<sup>5</sup> most of the existing literature tends to focus on acts of physical violence, particularly physical assault.<sup>6</sup>

In this article, we consider the role of the legal system in responding to adolescent family violence. We explore the role of legal interventions in ending the violence, ensuring the safety of the victim, repairing the family dynamic and encouraging, as far as possible and appropriate, the perpetrator to take responsibility and be accountable for the violence. To date there has been limited research undertaken in Australia about the way in which legal interventions may be used to respond to adolescent family violence.<sup>7</sup>

Across Australian federal, state and territory jurisdictions, there are a number of potential legal responses to adolescent family violence. Family law orders, civil protection orders, policing and criminal justice interventions, and innovative justice responses such as conferencing may be relevant and useful in the context of adolescent family violence. We consider the way in which legal processes are being used in this context, by drawing on research involving five focus groups with legal and social service providers in Brisbane, Queensland ('the Brisbane study'). We asked focus group participants to outline the role of legal responses and of various agencies (such as Queensland Police, the Queensland Department of Child Safety and community services) in addressing adolescent family violence. We also asked participants to reflect on which systems or agencies they viewed as best equipped to respond to the issues, and to identify beneficial changes to legal responses, as well as suggestions for innovative justice solutions.

Definitions of 'adolescent' vary between studies, with some including children as young as 10 years and as old as 21 years.<sup>8</sup> In this study, we define an

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Caroline Miles, 'Adolescent to Parent Violence: Framing and Mapping a Hidden Problem' (2014) 14(3) *Criminology & Criminal Justice* 257.

<sup>4</sup> See, eg, Gregory Routt and Lily Anderson, 'Adolescent Violence towards Parents' (2011) 20(1) *Journal of Aggression, Maltreatment and Trauma* 1, 2; Peter C Kratochowski, 'Youth Violence Directed towards Significant Others' (1985) 8(2) *Journal of Adolescence* 145, 146.

<sup>5</sup> Linda S Pagani et al, 'Risk Factor Models for Adolescent Verbal and Physical Aggression towards Mothers' (2004) 28(6) *International Journal of Behavioral Development* 528.

<sup>6</sup> Routt and Anderson, above n 4, 2.

<sup>7</sup> Karla Elliott et al, *Investigating Adolescent Family Violence: Background, Research and Directions* (Context Report, Monash University, 2017); Kathleen Daly and Heather Nancarrow, 'Restorative Justice and Youth Violence towards Parents' in James Ptacek (ed), *Restorative Justice and Violence against Women* (Oxford University Press, 2009) 150; Kathleen Daly and Danielle Wade, 'Gender and Adolescent-to-Parent Violence: A Systematic Analysis of Typical and Atypical Cases' in Amanda Holt (ed) *Working with Adolescent Violence and Abuse towards Parents Approaches and Contexts for Intervention* (Routledge, 2016) 148.

<sup>8</sup> Ashleigh Haw, *Parenting over Violence: Understanding and Empowering Mothers Affected by Adolescent Violence in the Home* (Report, The Patricia Giles Centre, 2010) 6; Jo Howard, *Adolescent Violence in the Home: Mapping the Australian and International Service System* (Report launched at the No to Violence 2012 Australasian Conference on Responses to Men's Domestic and Family Violence, No To Violence Male Family Violence Prevention Association, 2012); Mary McKenna and Rosalie O'Connor, 'Walking on Eggshells ... Child and Adolescent Violence in the Family' (Information Booklet, Relationships Australia (SA), Flinders University, Southern Junction Community Services, 2012).

adolescent as a child aged between 10 and 17 years of age, as this is the age range for criminal responsibility for children in Queensland, where the study reported in this article took place.<sup>9</sup> In Queensland, the *Domestic and Family Violence Protection Act 2012* (Qld) defines domestic violence as behaviour that is physically, sexually, emotionally, psychologically or economically abusive or is threatening; or coercive or ‘in any other way controls or dominates’ the person causing them to fear for their ‘wellbeing or that of someone else’.<sup>10</sup> The *Family Law Act 1975* (Cth) includes a similar definition.<sup>11</sup> Howard and Rottem defined adolescent family violence in a similar way:

an abuse of power perpetrated by adolescents against their parents, carers and/or other relatives, including siblings. It occurs when an adolescent attempts physically or psychologically to dominate, coerce and control others in their family.<sup>12</sup>

We begin with an overview of the literature on adolescent family violence, and available legal responses in Queensland, before turning to the Brisbane study and its findings.

## II What the Literature Tells Us

Historically, adolescent family violence has been neglected in studies of domestic and family violence.<sup>13</sup> Miles and Condry refer to it as a ‘silent problem’.<sup>14</sup> However, research into adolescent family violence has been of increasing interest in Australia and overseas.<sup>15</sup> There are two key strands in this growing body of research: research that explores the perceptions of service workers, perpetrators and victims about the nature and experience of adolescent family violence;<sup>16</sup> and research that focuses on the appropriateness and effectiveness of special restorative justice programs developed for perpetrators and victims of adolescent family violence.<sup>17</sup>

<sup>9</sup> *Criminal Code Act 1899* (Qld) sch 1 (‘*Criminal Code* (Qld)’) s 29.

<sup>10</sup> *Domestic and Family Violence Protection Act 2012* (Qld) s 8 (‘*DFVP Act* (Qld)’).

<sup>11</sup> *Family Law Act 1975* (Cth) s 4AB (‘*FL Act* (Cth)’).

<sup>12</sup> Howard and Rottem, above n 3, 10. See also Jo Howard, ‘Adolescent Violence in the Home: The Missing Link in Family Violence Prevention and Response’ (Stakeholder Paper No 11, Australian Domestic and Family Violence Clearinghouse, University of New South Wales, 2011) 2.

<sup>13</sup> Jeffrey A Walsh and Jessie L Krienert, ‘Child-Parent Violence: An Empirical Analysis of Offender, Victim, and Event Characteristics in a National Sample of Reported Incidents’ (2007) 22(7) *Journal of Family Violence* 563.

<sup>14</sup> Caroline Miles and Rachel Condry, ‘Responding to Adolescent to Parent Violence: Challenges for Policy and Practice’ (2015) 55(6) *British Journal of Criminology* 1076, 1076.

<sup>15</sup> See, eg, Elliott et al, above n 7; Daly and Wade, above n 7; Amanda Holt, ‘Adolescent-to-Parent Abuse as a Form of “Domestic Violence”: A Conceptual Review’ (2016) 17(5) *Trauma, Violence & Abuse* 490; Melanie Simmons et al, ‘Sixty Years of Child-to-Parent Abuse Research: What We Know and Where to Go’ (2018) 38 *Aggression and Violent Behavior* 31; Jo Howard and Lisa Abbott, ‘The Last Resort: Pathways to Justice’ (Report, Peninsula Health, Victoria Legal Aid and City of Greater Dandenong Youth Services, 2013).

<sup>16</sup> Haw, above n 8 (reporting on interviews with service providers and mothers); Howard and Abbott, above n 15 (reporting on interviews with parents and adolescents); Amanda Holt and Simon Retford, ‘Practitioner Accounts of Responding to Parent Abuse — A Case Study in Ad Hoc Delivery, Perverse Outcomes and a Policy Silence’ (2013) 18(3) *Child and Family Social Work* 365 (reporting on interviews with practitioners).

<sup>17</sup> See, eg, Victoria, Royal Commission into Family Violence, *Report and Recommendations* (2016) vol IV, 162 (‘*Royal Commission Report*’). See also Daly and Nancarrow, above n 7, 156–69.

Adolescent family violence is a gendered phenomenon: the majority of perpetrators are boys and young men, and the majority of victims are women. The most common relationship between victim and perpetrator is mother–son.<sup>18</sup> A recent study examined 1892 cases of adolescent violence reported to Metropolitan Police in the United Kingdom in 2009–10.<sup>19</sup> In that sample, 87% of perpetrators were male, 77% of victims were female and 66% of cases involved a mother–son relationship.<sup>20</sup> In their United States based study of a large cross-national sample of reported offenders (n=17 957), Walsh and Krienert identified that white biological mothers over 40 years old were most likely to be the victims of their 14–17 year old sons in reported cases of adolescent family violence.<sup>21</sup> In many reported cases of adolescent family violence, the victim-mother is the sole parent.<sup>22</sup> There also appear to be gender-based differences in the way adolescent violence is perpetrated. Haw reports that ‘female perpetrators were described as engaging in emotional/psychological abuse more frequently than males, whereas physical abuse, verbal abuse, financial abuse, property damage, and control/intimidation were said to be more commonly perpetrated by males than females’.<sup>23</sup> Generally, a range of behaviours is associated with adolescent family violence including physical and psychological abuse, financial abuse, property damage and intimidation.<sup>24</sup>

‘Sibling violence’ or ‘sibling abuse’ is also under-researched, although it is generally observed to be very common, and perhaps the most prevalent form of family violence.<sup>25</sup> Sibling violence is less gendered than child-to-parent adolescent family violence,<sup>26</sup> but adolescents are the most common perpetrator group in terms of age.<sup>27</sup> Despite the fact that physical injuries inflicted can be severe, sibling abuse tends to be ignored by social scientists.<sup>28</sup> Researchers have cautioned against

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<sup>18</sup> Daly and Wade, above n 7, 149.

<sup>19</sup> Condry and Miles, above n 3.

<sup>20</sup> Ibid 272. See also Jun Sung Hong et al, ‘The Social Ecology of Adolescent-Initiated Parent Abuse: A Review of the Literature’ (2012) 43(3) *Child Psychiatry & Human Development* 431, 433.

<sup>21</sup> Walsh and Krienert, above n 13, 567. See also Megan Williams, Keith Tuffin and Patricia Niland, ‘“It’s Like He Just Goes Off, BOOM!”: Mothers and Grandmothers Make Sense of Child-to-Parent Violence’ (2017) 22(2) *Child and Family Social Work* 597, 598.

<sup>22</sup> Haw, above n 8, 7; *Royal Commission Report*, above n 17, vol IV, 152.

<sup>23</sup> Haw, above n 8, 6.

<sup>24</sup> Ibid.

<sup>25</sup> Courtney McDonald and Katherine Martinez, ‘Parental and Others’ Responses to Physical Sibling Violence: A Descriptive Analysis of Victims’ Retrospective Accounts’ (2016) 31(3) *Journal of Family Violence* 401, 401–2; Roxanne Khan and Paul Rogers, ‘The Normalization of Sibling Violence: Does Gender and Personal Experience of Violence Influence Perceptions of Physical Assault against Siblings?’ (2015) 30(3) *Journal of Interpersonal Violence* 437, 438–9; Jessie L Krienert and Jeffrey A Walsh, ‘My Brother’s Keeper: A Contemporary Examination of Reported Sibling Violence Using National Level Data, 2000–2005’ (2011) 26(5) *Journal of Family Violence* 331, 331; Shelley Eriksen and Vickie Jensen, ‘A Push or a Punch: Distinguishing the Severity of Sibling Violence’ (2009) 24(1) *Journal of Interpersonal Violence* 183, 183–4 (‘Eriksen and Jensen 2009’); Shelley Eriksen and Vickie Jensen, ‘All in the Family? Family Environment Factors in Sibling Violence’ (2006) 21(8) *Journal of Family Violence* 497, 497.

<sup>26</sup> McDonald and Martinez, above n 25, 402; Khan and Rogers, above n 25, 438; Eriksen and Jensen 2009, above n 25, 187.

<sup>27</sup> Khan and Rogers, above n 25, 438–9.

<sup>28</sup> Kristi L Hoffman and John N Edwards, ‘An Integrated Theoretical Model of Sibling Violence and Abuse’ (2004) 19(3) *Journal of Family Violence* 185, 185, see also 195; McDonald and Martinez, above n 25, 402; Krienert and Walsh, above n 25, 333; Eriksen and Jensen 2009, above n 25, 185.

normalising and minimising sibling violence, as it can be associated with later violent behaviour, particularly in intimate relationships.<sup>29</sup>

Statistics in Australia suggest that the problem of adolescent family violence may be increasing, and/or families are becoming more likely to report such violence. For example, Victoria Police statistics show there was a 9% increase in family violence reports where the perpetrator was under 18 years of age between 2006 and 2012.<sup>30</sup> Victoria Police also informed the Victorian Royal Commission into Family Violence in 2015 that between the years 2010 and 2015, reported family violence incidents where the perpetrator was under 19 years grew from 4516 to 7397 incidents.<sup>31</sup> While the issue is identified as an important one, some have suggested that the number of adolescents who are violent towards their family members is overall relatively low compared to adult intimate partner violence ('IPV'). Holt reports that between only 6.5% and 10.8% of young people have hit their parents on at least one occasion in the past one to three years.<sup>32</sup> Notably, these figures are based on self-reports.<sup>33</sup> It is generally acknowledged that adolescent family violence is substantially under-reported, so actual prevalence rates are unknown.<sup>34</sup>

Researchers have recognised many similarities between adolescent family violence and IPV. For example, both of these types of violence may involve the use of tactics of power and control.<sup>35</sup> Like violent abusers in the context of IPV, adolescent perpetrators of family violence have often witnessed domestic and family violence<sup>36</sup> and, in one study, many of the victim-mothers had also experienced IPV from a partner or former partner.<sup>37</sup> These two types of violence are also similar in that victims may be reluctant to report the violence to police or to other service providers, resulting in the victim experiencing isolation and lacking support.<sup>38</sup> Services for those experiencing IPV often focus on supporting the victim to safely separate or remain independent of the perpetrator, but for many victims of IPV their

<sup>29</sup> Krienert and Walsh, above n 25, 335; Eriksen and Jensen 2009, above n 25, 184; Hoffman and Edwards, above n 28, 186.

<sup>30</sup> Elliot et al, above n 7.

<sup>31</sup> *Royal Commission Report*, above n 17, vol IV, 150.

<sup>32</sup> Holt, above n 15, 490. See also Condry and Miles above n 3, 270. O'Hara and colleagues report a prevalence rate of between 5% and 22% of the population: Karey L O'Hara et al, 'Adolescent-to-Parent Violence: Translating Research into Effective Practice' (2017) 2(3) *Adolescent Research Review* 181, 184.

<sup>33</sup> See also Miles and Condry, above n 14, 1078.

<sup>34</sup> Caroline Miles and Rachel Condry, 'Adolescent to Parent Violence: The Police Response to Parents Reporting Violence from their Children' (2016) 26(7) *Policing and Society* 804, 806; Routt and Anderson, above n 4, 2–3; Michel Edenborough et al, 'Living in the Red Zone: The Experience of Child-to-Mother Violence' (2008) 13(4) *Child and Family Social Work* 464, 464–5.

<sup>35</sup> Daly and Nancarrow, above n 7, 153; Jo Howard, 'Adolescent Violence in the Home: How is it Different to Adult Family Violence?' *Australian Institute of Family Studies: News & Discussion* (online), 8 December 2015 <<https://aifs.gov.au/cfca/2015/12/08/adolescent-violence-home-how-it-different-adult-family-violence>>.

<sup>36</sup> Mary McKenna, Rosalie O'Connor and Jussey Verco, 'Exposing the Dark Side of Parenting: A Report of Parents' Experiences of Child and Adolescent Family Violence' (Report, The Regional Alliance Addressing Child and Adolescent Violence in the Home (SA), 2010) 5 <[http://www.flinders.edu.au/ehl/fms/humanities\\_files/pdf/Exposing%20the%20Dark%20Side%20of%20Parenting.pdf](http://www.flinders.edu.au/ehl/fms/humanities_files/pdf/Exposing%20the%20Dark%20Side%20of%20Parenting.pdf)>; Howard, above n 35.

<sup>37</sup> Howard, above n 35.

<sup>38</sup> Howard and Abbott, above n 15; Routt and Anderson, above n 4, 10.

aspiration is safety rather than separation. Similarly, for many families where there is adolescent family violence, victims want the violence to stop and the family to be reconnected, rather than for the perpetrator to be removed.<sup>39</sup>

There are also a number of important differences between adolescent family violence and IPV. While perpetrators of IPV are often much more physically, socially and financially well-resourced than their victim, this is often not the case in the context of adolescent family violence.<sup>40</sup> The issue of responsibility must also be understood differently for these two forms of violence. While adult perpetrators of IPV are usually fully responsible for their violence and have the capacity to live independently, adolescent perpetrators may not have the developmental capacity to understand their behaviour and they may rely on their victim for nurturing, guidance and support.<sup>41</sup>

There is a developing literature around ‘intergenerational’ violence focusing on the relationship between IPV perpetrated by fathers and adolescent family violence perpetrated by their sons.<sup>42</sup> However, research has also identified the correlation between mental health problems<sup>43</sup> and drug and alcohol problems<sup>44</sup> and adolescent family violence, similar to studies about IPV.<sup>45</sup>

Further, research emerging from the child disability sector indicates that aggressive behaviour is particularly prevalent among children with cognitive and developmental disabilities.<sup>46</sup> Brosnan and Healy note that children with intellectual disabilities and autism spectrum disorders are at particular risk for the development of ‘challenging behaviour’ and that this may result in the victimisation of family members and carers.<sup>47</sup> While aggressive behaviour among such children may be ‘learned’, it can also be triggered by environmental and physiological factors, or there may be some desired outcome such as gaining attention or avoiding an unpleasant situation.<sup>48</sup> In such situations, Holt argues that the ‘psychologisation of

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<sup>39</sup> Haw, above n 8, 118.

<sup>40</sup> Laurel Downey, ‘Adolescent Violence: A Systematic and Feminist Perspective’ (1997) 18(2) *Australian and New Zealand Journal of Family Therapy* 70, 77; Daly and Nancarrow, above n 7, 153.

<sup>41</sup> Domestic Violence Resource Centre Victoria (‘DVRCV’), ‘A Coordinated Response to Adolescent Violence in the Home’ on *DVRCV Blog* (9 November 2010) <<http://www.dvrcv.org.au/knowledge-centre/our-blog/coordinated-response-adolescent-violence-home>>.

<sup>42</sup> Simmons et al, above n 15, 38.

<sup>43</sup> Tom D Kennedy et al, ‘The Clinical and Adaptive Features of Young Offenders with Histories of Child–Parent Violence’ (2010) 25(5) *Journal of Family Violence* 509, 517–18.

<sup>44</sup> Daniel Pelletier and Sylvain Coutu, ‘Substance Abuse and Family Violence in Adolescents’ (1992) 40(2) *Canada’s Mental Health* 6; Sarah Galvani, ‘Responding to Child-to-Parent Violence: The Experiences of Family Support Group Providers’ (2017) 22(1) *Journal of Substance Use* 71, 73.

<sup>45</sup> Deborah Loxton et al, ‘Intimate Partner Violence Adversely Impacts Health over 16 Years and Across Generations: A Longitudinal Cohort Study’ (2017) 12(6) *PLoS ONE* <<https://doi.org/10.1371/journal.pone.0178138>>.

<sup>46</sup> Julie Brosnan and Olive Healy, ‘A Review of Behavioral Interventions for the Treatment of Aggression in Individuals with Developmental Disabilities’ (2011) 32(2) *Research in Developmental Disabilities* 437, 438; Declan Coogan, ‘Responding to Child-to-Parent Violence: Innovative Practices in Child and Adolescent Mental Health’ (2014) 39(2) *Health and Social Work* e1, e7.

<sup>47</sup> Brosnan and Healy, above n 46, 438–9.

<sup>48</sup> *Ibid* 439.

the child as perpetrator<sup>49</sup> does not accurately reflect the family dynamic, or the circumstances of the household. A failure to understand the reasons behind the child's behaviour may discourage disclosure of the violence by parents, and/or result in inappropriate interventions.<sup>50</sup>

Research has identified a number of barriers to seeking help for victims of adolescent family violence. The reluctance to report to police has already been mentioned. Victims of adolescent family violence who are parents often express concern about the long term consequences associated with a criminal record if they report the violence to the police.<sup>51</sup> Parents of children with disabilities report feelings of embarrassment, and fear the removal of their child by child protection services if they disclose the violence.<sup>52</sup> In some studies, victim-mothers express shame and guilt about the violence and blame themselves for it.<sup>53</sup> Indeed, some service providers share this view, blaming victims for the violence that has occurred as a result of either 'permissive parenting styles' or being 'too strict' with their children.<sup>54</sup> This has been referred to as 'blurring of boundaries of responsibility and blame'.<sup>55</sup>

A lack of services aimed at supporting families dealing with adolescent family violence has been identified in many studies.<sup>56</sup> The problem of siloed services — also recognised in the context of IPV — has been noted.<sup>57</sup> There is little connection between child protection services, mental health services, disability services, drug and alcohol support and legal responses. Victims report that there is a lack of information about available services<sup>58</sup> and also that services, where they are available, are not well equipped to help.<sup>59</sup>

### III Legal Responses to Adolescent Family Violence in Queensland

Adolescent family violence is not recognised or conceptualised as a distinct type of offending behaviour under Queensland law or legal processes. Potential legal responses available to address adolescent family violence and deal with perpetrators range from criminalisation to child protection intervention. However, perpetrators must be dealt with under general provisions — there are no laws or legal responses specifically tailored to address the problem.

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<sup>49</sup> Amanda Holt, "'The Terrorist in My Home": Teenagers' Violence towards Parents — Constructions of Parent Experiences in Public Online Message Boards' (2011) 16(4) *Child and Family Social Work* 454, 454.

<sup>50</sup> Coogan, above n 46, e7.

<sup>51</sup> Howard and Abbott, above n 15; Daly and Wade, above n 7, 151.

<sup>52</sup> Coogan above n 46, e8.

<sup>53</sup> Haw, above n 8, 7–8; Routt and Anderson, above n 4, 10–11; Coogan above n 46, e6–e7.

<sup>54</sup> Haw, above n 8, 80; Julie Selwyn and Sarah Meakings, 'Adolescent-to-Parent Violence in Adoptive Families' (2016) 46(5) *The British Journal of Social Work* 1224, 1226–7; Simmons et al, above n 15, 37.

<sup>55</sup> Condry and Miles, above n 3, 270.

<sup>56</sup> McKenna, O'Connor and Verco, above n 36, 14.

<sup>57</sup> Ibid 13. Howard and Abbott have identified the lack of policy framework to streamline responses: above n 15, 59.

<sup>58</sup> Cottrell and Monk, above n 3, 1089.

<sup>59</sup> *Royal Commission Report*, above n 17, vol IV, 157.

Children who perpetrate violent acts against members of their family can be charged with assault under s 246 of the Queensland *Criminal Code* (Qld), although children aged under 10 years are not criminally responsible for any act they engage in, and children aged under 14 years are not criminally responsible for an act unless it can be proved that at the time of doing the act, they had the capacity to know that they should not do the act.<sup>60</sup> Under the *Youth Justice Act 1992* (Qld), police officers are required to consider alternatives to proceeding against a child for an offence, such as taking no action, administering a caution, or referring the child to a restorative justice process.<sup>61</sup> It is likely that, in most instances of adolescent family violence, police would pursue one of these alternatives.<sup>62</sup>

The Queensland Police Service's *Operational Procedures Manual* provides some guidance to police officers in situations of family violence where a child is the respondent.<sup>63</sup> In circumstances where a police officer believes there is a risk of ongoing or further violence, the officer is instructed to prepare and serve a 'Police Protection Notice' on the respondent, which can include 'cool-down', 'no-contact' or 'ouster' conditions.<sup>64</sup> These conditions may have the effect of excluding the child from the family home for a period of time and, in such circumstances, officers are instructed to arrange, and transport the child to, 'temporary accommodation'.<sup>65</sup>

Notably, domestic violence orders cannot be issued against children in Queensland unless an intimate personal relationship or an informal care relationship exists between the child and the person named in the application,<sup>66</sup> so it is not open to a parent to apply for a domestic violence order against their child, or for a police officer to apply for an order on their behalf. Children can be named on domestic violence orders, but only as protected persons, not as respondents.<sup>67</sup>

The only other Queensland-specific agency that may have a legal obligation to respond in situations of adolescent family violence is the Department of Child Safety ('Child Safety'). The *Child Protection Act 1999* (Qld) states that one of the Chief Executive's functions is to provide 'services to families to protect their

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<sup>60</sup> *Criminal Code* (Qld) s 29.

<sup>61</sup> *Youth Justice Act 1992* (Qld) s 11 — unless it is a serious offence (s 11(7)) as defined in s 8. As to restorative justice processes for young people in Queensland, see Anna Stewart et al, 'Youth Justice Conferencing and Indigenous Over-Representation in the Queensland Juvenile Justice System: A Micro-Simulation Case Study' (2008) 4(4) *Journal of Experimental Criminology* 357; Hennessey Hayes and Kathleen Daly, 'Conferencing and Re-Offending in Queensland' (2004) 37(2) *Australian and New Zealand Journal of Criminology* 167.

<sup>62</sup> Although, the Queensland Family and Child Commission has recently reported high levels of criminalisation of children living in residential units for violent acts perpetrated within their placements: *The Criminalisation of Children Living in Out-of-Home Care in Queensland* (Queensland Family and Child Commission, 2018) 5.

<sup>63</sup> Queensland Police, *Operational Procedures Manual: Chapter 9 – Domestic Violence* (Issue 66, 28 September 2018), 60 [9.13.1] <<https://www.police.qld.gov.au/corporatedocs/OperationalPolicies/opm.htm>>.

<sup>64</sup> *Ibid* 31–2 [9.8.1].

<sup>65</sup> *Ibid* 68 [9.15.2].

<sup>66</sup> *DFVP Act (Qld)* s 22. An 'informal care relationship' exists between two people 'if one of them is or was dependent upon the other person ... for help in an activity of daily living': s 20(1). However, the legislation specifically states that '[a]n informal care relationship does not exist between a child and a parent of a child': s 20(2).

<sup>67</sup> *Ibid* s 24(1).

children if a risk of harm has been identified', however the 'harm' contemplated by the Act is harm to a child rather than a parent or carer.<sup>68</sup> Where violence is being perpetrated by a child towards a parent, Child Safety is only required to intervene where the child has suffered, or is at an unacceptable risk of suffering, significant harm, and the child 'does not have a parent able and willing to protect them from that harm'.<sup>69</sup>

In circumstances where the parents of an adolescent child have separated, parents may dispute where an adolescent child should live and parental contact arrangements with the adolescent child. Under the *FL Act* (Cth), the Family Court and Federal Circuit Court of Australia ('the family courts') may refer parties and their children to family counselling,<sup>70</sup> and may make a variety of orders including requiring no contact or supervised contact with a parent or counselling for the parties or children of the relationship.<sup>71</sup>

#### IV The Brisbane Study

In order to explore the role of the legal system as a response to adolescent family violence, we undertook five focus groups with legal and social service providers that assist: women with domestic and family violence; families experiencing adolescent family violence; and adolescents. Participants were invited on the basis that they could comment on the efficacy of a diverse range of legal interventions aimed at responding to adolescent family violence. These interventions included family law orders, civil protection orders, child protection intervention, policing, criminalisation and conferencing. We sent invitations to services inviting them to participate in the focus groups via email, including an information sheet about the project. Potential focus group participants were asked to contact us if they wished to take part in the focus groups and they were advised of the details of the focus groups. Each focus group ran for approximately 60 minutes. The focus groups were audio-recorded and transcribed. The transcripts were then manually coded by both authors separately to identify themes using Miles and Huberman's methods and then cross-checked for consistency.<sup>72</sup>

Overall, 26 participants from several services took part in the five focus groups. Thirteen of the participants worked as lawyers and 13 worked in other roles including counselling and social work. We ensured confidentiality of the participants' names and employers. References to comments made in the focus groups are identified in this article by a number given to the focus group and page number of the transcript (for example, 'FG1, 7'). The use of focus groups was an appropriate methodology for this research because we sought to gain a better

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<sup>68</sup> *Child Protection Act 1999* (Qld) ss 7(1) (chief executive's functions), 9 (definition of harm).

<sup>69</sup> *Ibid* ss 10 (child in need of protection), 14 (substantiation of alleged harm).

<sup>70</sup> *FL Act* (Cth) s 13C.

<sup>71</sup> *Ibid* pt VII ('Children'). See generally Jodie Lodge and Michael Alexander, *Views of Adolescents in Separated Families: A Study of Adolescents' Experiences After the 2006 Reforms to the Family Law System* (Australian Institute of Family Studies, 2010).

<sup>72</sup> Matthew B Miles and A Michael Huberman, *Qualitative Data Analysis: An Expanded Sourcebook* (SAGE, 1994), 55–8, 252–3. This research received ethical approval from the University of Queensland Human Research Ethics Sub-Committee (approval number 2017000964).

understanding of the appropriateness of existing legal responses to adolescent family violence in Queensland. By moderating a discussion with those service providers who already work in this field, we were able to gain insight into how the law is responding to adolescent family violence and how it can better respond in the future. At the outset, it is important to concede the limitations of this approach. The findings reported here are based on accounts of lawyers and social workers who work in Brisbane, Queensland. Their reflections on adolescent family violence represent the views of only a small group of people<sup>73</sup> who have had adolescent family violence reported to them. However, the incidents reported in the focus groups are likely to be the ‘tip of the iceberg’,<sup>74</sup> and this initial study provides valuable information that may inform future research.

### A *The Abuse and its Context*

While participants identified boys as the main perpetrators of abuse, others pointed out that girls can ‘make their mother’s life very difficult’ abusing them emotionally or financially, often through credit card fraud.<sup>75</sup> Participants in the focus groups identified a range of abusive behaviours from quite serious incidents, such as burning down the house, to less serious matters including an adolescent in a residential care placement ‘flicking a tea towel’ at a case worker.<sup>76</sup> One participant, who was a lawyer, reported that he had represented adolescents who have ‘bitten family members. Sometimes they’ve bitten police officers. Sometimes they’ve bitten, punched, kicked, assaulted family members and police officers and health workers’.<sup>77</sup>

In line with the literature, participants identified several key explanations for, or drivers of, adolescent family violence. One significant explanation was that the adolescent had a mental health issue or a cognitive disability or a dual diagnosis. Workers said that sometimes the ‘disability or the mental illness explains everything’<sup>78</sup> and that mental illness or disability is ‘a recurring theme’.<sup>79</sup> In the context of young people with mental health issues, participants recognised that the violence may be particularly serious, and they identified incidents including a young person ‘putting RATSACK in cereal and things’,<sup>80</sup> another who ‘hacked the family dog to pieces’<sup>81</sup> and another ‘killing his father’.<sup>82</sup>

Cognitive or developmental disabilities, as an explanation for violence, were identified by a number of participants. Several workers pointed out that a parent may have been able to cope with their child when they were younger, but once they

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<sup>73</sup> Robert Dingwall, ‘Accounts, Interviews and Observations’ in Gale Miller and Robert Dingwall (eds), *Context and Method in Qualitative Research* (SAGE, 1997) 51, 52, 54.

<sup>74</sup> McKenna, O’Connor and Verco, above n 36, 13.

<sup>75</sup> FG5, 16.

<sup>76</sup> FG2, 2.

<sup>77</sup> FG5, 4.

<sup>78</sup> FG5, 37.

<sup>79</sup> FG5, 3.

<sup>80</sup> FG5, 10.

<sup>81</sup> *Ibid.*

<sup>82</sup> FG5, 36.

reached puberty the violence became impossible to manage: ‘the young person might have an intellectual impairment or be on the autism spectrum and the parent might have limited ways of dealing with that’.<sup>83</sup> Several workers referred to cases where a disability was only formally recognised once ‘things get bad and an assault [is] committed’.<sup>84</sup>

Another common explanation offered by participants was that the young person had been exposed to IPV or other forms of family violence at home.<sup>85</sup> Workers said that ‘often there’s quite a long history of witnessed violence’<sup>86</sup> and

children ... that have been part of a domestic violence experience [have] all sorts of trauma from the day they were born and on and if that’s gone unchecked and not supported that anger, frustration and all that type of thing is very much a part of ... what they’re challenged with ...<sup>87</sup>

Other participants said that the father ‘used’ the adolescent to indirectly perpetrate intimate partner abuse on his former partner (the adolescent’s mother). Therefore, some adolescent family violence was identified as an extension of intimate partner abuse:

[they] had finally separated, and they had three children together ... He was using his interactions with the children as the way to continue to abuse her. He would call the children up, or drive to ... outside her house, and call the children out to the car ... They’d spend approximately five to 10 minutes with him at the car, and then they’d come in and immediately commit an act of violence against her or [their grandmother], who was living with them.<sup>88</sup>

A final group identified adolescents with complex histories who were involved with child protection authorities: ‘a lot of our stuff relates to alleged assaults on carers in residential care’.<sup>89</sup> Necessarily, children living in residential care homes or who are under the supervision of child protection authorities have been identified as being in need of state care as a result of a history of neglect or abuse, or because they have no family member willing or able to care for them.<sup>90</sup>

## **B** *Reporting Abuse to Authorities*

Overwhelmingly, participants said that parents were reluctant to report violence perpetrated by their adolescent child to a formal authority such as child protection or the police. Workers said that ‘parents are very reluctant ... I mean they’re broken people by the time they reach the point of telephoning the police’<sup>91</sup> and ‘so many women have not received help for — when they’ve called for help — for police —

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<sup>83</sup> FG2, 5.

<sup>84</sup> FG2, 25.

<sup>85</sup> See also Stewart, Burns and Leonard, above n 3, 189.

<sup>86</sup> FG4, 7.

<sup>87</sup> Ibid.

<sup>88</sup> FG1, 3.

<sup>89</sup> FG4, 20.

<sup>90</sup> See *Child Protection Act 1999* (Qld) s 5B(d).

<sup>91</sup> FG5, 8.

for their partner. So they're even more unlikely to call police for their child'.<sup>92</sup> One worker observed:

She wasn't going to report it to police, and she didn't. She was just hopeless, and she was just ready to take the abuse. I think that's another thing that I see, is the women will often say, I can push a violent partner out, and push — invoke legal processes to get rid of that person. When it comes to my child, I'll just take the physical abuse, if that's what I have to do.<sup>93</sup>

Reasons for not reporting or delaying reporting differed depending on the context. Cavallaro's research has shown that people from culturally and linguistically diverse backgrounds may have limited understanding or knowledge about policing and legal systems in Australia, contributing to a fear of the ramifications of reporting IPV.<sup>94</sup> Consistent with that research, a participant in our study commented that

those [who] have recently migrated or recently arrived to Australia, there's a lot of fear about the systems ... particularly because of their own traumatic background if that was the reason why they left their country of origin — with police and also with Child Safety and their involvement. They have a lot of fear about the family separating and the shame that will come with it about them not holding the family together, being labelled or singled [out] as ... not competent — a bad mother.<sup>95</sup>

Similarly, as other research has shown,<sup>96</sup> Aboriginal and Torres Strait Islander people may be reluctant to report adolescent family violence to child protection services because of fear that their children will be removed from their care, or to report it to police, because of fear of arrest. A worker told us:

Aboriginal people and communities — like that's been a huge issue, is the fear — like growing up with fear of police — systematic racism as well they're faced with. So they don't feel comfortable utilising any of the services. So I think — so that's a huge issue in addressing that. I feel too like it's different with our people — like if the police did come they would lock that kid up ... they don't want to see their kid being locked up or taken away because it's like the same layer of trauma again from colonisation ...<sup>97</sup>

In most cases, participants said that formally reporting an adolescent's behaviour was a last resort. In cases involving disability, such as autism spectrum disorders, attention deficit hyperactivity disorder and mental health issues, several participants told us that the parents had been able to access support from their doctor (general practitioner), and had managed their child's behaviour, when s/he was young. However, at puberty, the child's aggression escalated, and it was at that stage

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<sup>92</sup> FG5, 10.

<sup>93</sup> FG1, 23.

<sup>94</sup> Lisa Cavallaro, *'I Lived in Fear because I Knew Nothing': Barriers to the Justice System Faced by CALD Women Experiencing Family Violence* (Report, InTouch Multicultural Centre against Family Violence and Victoria Law Foundation, 2010) 19–20 <<http://www.intouch.org.au/wp-content/uploads/2016/01/Legal-Barriers-Report.pdf>>.

<sup>95</sup> FG4, 25.

<sup>96</sup> Judicial Council on Cultural Diversity, *The Path to Justice: Aboriginal and Torres Strait Islander Women's Experience of the Courts* (Report, 2016) <[http://jccd.org.au/wp-content/uploads/2016/04/JCCD\\_Consultation\\_Report\\_-\\_Aboriginal\\_and\\_Torres\\_Strait\\_Islander\\_Women.pdf](http://jccd.org.au/wp-content/uploads/2016/04/JCCD_Consultation_Report_-_Aboriginal_and_Torres_Strait_Islander_Women.pdf)>.

<sup>97</sup> FG4, 27.

that parents became desperate and child protection authorities sometimes became involved.<sup>98</sup> Participants pointed to the long history that usually preceded formal engagement with child protection services and criminal justice in cases of adolescent family violence:

I can see from the files that you get — the mental health files or the [Disability] files — ... that this kind of thing's been going on for a long time and then finally... they've done something and the families have reached the absolute end of their tether and this person ends up before the Mental Health Court or before one of the superior courts ... these family members have been — particularly mothers ... have been subjected to violence ... for quite some time.<sup>99</sup>

Workers reported that, at this point, parents were often so desperate that they were considering relinquishing their child. One said that

usually Child Safety is involved because — in the ones we've seen — the parents have asked for help and it might be to the point of actually almost wanting to relinquish the child into the care of Child Safety for whatever reason, not knowing what else to do.<sup>100</sup>

Similarly, for parents who have previously experienced violence from an intimate partner and now experience violence from their adolescent child, there was a reluctance to report the violence until a point of crisis was reached. As one worker commented, 'I think a lot of the time, the only time that we hear about it is where there are younger siblings, and parents are really worried about their other children'.<sup>101</sup>

### C *Legal Responses and Their Shortcomings*

Given the complex array of issues that might underlie a young person's use of violence, workers were cautious about the value of engaging a legal response. One worker said that 'the legal system is a harsh hammer to deal with what often are social welfare and/or relationship breakdown issues'.<sup>102</sup> Others identified system gaps that appear to affect legal responses to adolescents: 'They're not able to access the [DFVP] Act and also Child Safety are not very interested in hearing about it. Police are not very interested either. So women have felt quite unsupported and don't know where to go with that'.<sup>103</sup> As one worker stated,

there just seems to be a huge gap there. Child Safety hasn't got the resources — hasn't — can't deal with them. The families can't deal with them. Protection orders have no effect because they don't really have the capacity to ... The foster carers don't want them. A lot of the — the 24-hour care won't take them depending on — if their behaviours are challenging behaviours and they're a bit too challenging.<sup>104</sup>

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<sup>98</sup> FG2, 8; FG5, 3.

<sup>99</sup> FG5, 15.

<sup>100</sup> FG5, 8.

<sup>101</sup> FG1, 39.

<sup>102</sup> FG2, 2.

<sup>103</sup> FG4, 2.

<sup>104</sup> FG5, 31.

According to one participant, parents ‘are literally being told this is your family issue to manage and nobody’s going to step in’.<sup>105</sup>

We asked participants to comment on the relevance and limitations of a range of legal responses in the context of adolescent family violence. They discussed several legal responses (including family law and domestic violence protection orders), as well as the potential for innovative justice responses.<sup>106</sup>

## 1 *Family Law*

The family courts can make orders about children’s living arrangements and parental contact arrangements up until the age of 18 years, and children can have a say in these arrangements. Depending on the age and emotional maturity of the children, their views can be very important in determining the orders and there is recognition that older children tend to ‘vote with their feet’.<sup>107</sup>

When we asked focus group participants whether an order made under the *FL Act* (Cth) might be helpful in managing adolescent family violence, one worker noted that, once children reach 14 or 15 years, the family courts ‘wash their hands and they basically say well, they’re old enough to make those decisions. They’re old enough to look for their own supports’.<sup>108</sup> For those participants that worked with the *FL Act* (Cth), generally their view was that family court orders had limited usefulness for parents in protecting them from their adolescent’s abusive behaviour. Indeed, some participants suggested that family court orders can, in some cases, exacerbate adolescent family violence.

When there are disputes between parents about children’s contact arrangements, the *FL Act* (Cth) states that the Court must make contact arrangements that are in the best interests of the child.<sup>109</sup> In determining best interests, family violence is a relevant consideration.<sup>110</sup> One worker suggested that there might be some occasions where, to avoid future adolescent family violence, the family courts need to refuse contact between the violent partner and children. Focus group participants identified a number of situations where contact was ordered between a child and a violent parent contributing to adolescent family violence:

I have a mum at the moment who is having to manage quite escalating violent behaviour because she has shared custody [on a ‘week about’ basis, alternating one full week with each parent]. So it takes about three or four days for the behaviour to change after having that week with a violent partner that their Order says has to actually remain in place.<sup>111</sup>

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<sup>105</sup> FG4, 3.

<sup>106</sup> Daly coined the term ‘innovative justice responses’: Kathleen Daly, *Conventional and Innovative Justice Responses to Sexual Violence* (Australian Centre for the Study of Sexual Assault, Issues Paper No 11, September 2011) 1.

<sup>107</sup> Judy Cashmore and Patrick Parkinson, ‘Children’s Participation in Family Law Disputes: The Views of Children, Parents, Lawyers and Counsellors’ (2009) 82 *Family Matters* 1, 16; *FL Act* (Cth) s 60CD.

<sup>108</sup> FG4, 10.

<sup>109</sup> *FL Act* (Cth) s 60CA.

<sup>110</sup> *Ibid* s 60CG.

<sup>111</sup> FG4, 11.

[Where] a teenager ... has to share time with both parents and it's very stressful and the relationship the child has with their father is quite a fearful one and yet back home with mum who's a — generally a more secure attachment ... that's when they express their emotions, because they are safer in that relationship. So it's often mum that gets the brunt of the stress that's within the relationships.<sup>112</sup>

Participants reported that shared care arrangements ordered by the family courts sometimes placed a parent in the position that they were pushing their children to spend time with another parent, potentially exacerbating adolescent family violence. One participant said that

[o]ften the young people feel that mum is not protecting them because she's having to go along with the family court orders and say well sorry, you have to go because we're being ordered to do this and — so yeah, the young people are resentful and angry that mum is not able to keep them safe...<sup>113</sup>

One participant suggested that mothers, who were themselves victims of family violence, were blamed for their adolescent child's violence when it was a violent father who had modelled the behaviour: 'There's a real concern about how the courts — the family courts will deal with parents who can't control their violent child, as if it's the problem of the mother who has been a victim of violence'.<sup>114</sup>

Having said this, in one of the focus groups, the workers noted the benefits of the family court mediation requirements. Section 60I of the *FL Act* (Cth) requires families to attend 'family dispute resolution' before applying for a parenting order. To the extent that this legislated for a non-adversarial, and potentially non-legal, option to deal with complex family issues, the workers supported it. One participant said:

I mean, you know, nothing works perfectly in the Family Court either, but it's still our best example of a state system intervening in a private situation [and] trying to adjust to how do people connect to the system and what could we do earlier on to make them — or give them tools to work it out.<sup>115</sup>

## 2 *Domestic and Family Violence Protection Orders*

Currently it is not possible under the *DFVP Act (Qld)* for a parent to apply for a protection order ('DVO') against their child who is under 18 years of age.<sup>116</sup> However, it is possible for a magistrate to include conditions on the DVO to protect a child of the 'aggrieved' (the person seeking protection).<sup>117</sup> Therefore, it is possible for the magistrate to make an order that the respondent must not have contact with a child. Some participants thought this would be helpful in some cases. A participant provided an example where a DVO naming adolescent children as protected persons was helpful in a case where the father had used the children to continue to perpetrate

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<sup>112</sup> FG4, 14.

<sup>113</sup> FG4, 11.

<sup>114</sup> FG1, 39.

<sup>115</sup> FG2, 14.

<sup>116</sup> *DFVP Act (Qld)* s 22.

<sup>117</sup> *Ibid* s 24.

abuse upon his ex-partner.<sup>118</sup> However, any order made under the *FL Act (Cth)* will override a DVO to the extent of any inconsistency. Some workers identified that, as a result, magistrates were reluctant to name children as protected under DVOs:

[Magistrates] don't want to step on toes — the Family Court — they are often very reluctant to put in conditions that directly involve that contact between dad and the kids, which means it's really hard for mum to then regulate ... a lot of the time even if [the DVO] says 'no contact' it'll say 'with the exception of contact with the children [under the family law order]'.<sup>119</sup>

There was some discussion in the focus groups about the usefulness of reducing the age of respondents for DVOs so that parents could apply for protection orders against their adolescent children. There was some very qualified support for this approach from a small number of participants. For example, one explained that

there would definitely would need to be some management around it. But I think especially when you've got an adolescent who's 16 or 17 years old and ... mum has experienced really severe violence ... from their very adult built children and even being able to get something, even just with a good behaviour condition to be able to manage that a little bit better in the home — I think something like that in some circumstances could be at least ... emotionally a little bit of a support.<sup>120</sup>

However, generally participants were unsupportive of expanding DVOs to cover adolescent family violence. Some participants suggested that without support services this type of response remains unhelpful, especially if the order includes conditions that the adolescent not return to the family home. For example, one participant commented that

without anything else in place, it is a waste of time, I would suggest to you. The other thing you've got to think about is if a child can't go home, where are they going to go? So if you're going to put these sorts of orders out, then you're going to have to have some sort of mechanism for being able to house and home these young people. ... I would absolutely not support it because I actually think it's not addressing the issue, it's not actually going to change the behaviour of the young person.<sup>121</sup>

Another participant was concerned that expanding the coverage of DVOs would effectively criminalise the child when the order was breached, and families would be unwilling to enforce the orders.<sup>122</sup> This was a particular concern in circumstances where adolescents have a mental health issue or cognitive disability:

They don't have capacity and so they don't understand they can't go to the house and [the orders will] be breached. The parents are beside themselves because they know [the young person doesn't] understand ... They still are violent when they go to the house and so the police get called. [The orders] get breached. The parents don't want their kids in gaol and — the worst case I saw was when the child went to — well, he was 17 I think — went to gaol.<sup>123</sup>

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<sup>118</sup> FG1, 6–7.

<sup>119</sup> FG4, 16.

<sup>120</sup> FG4, 2.

<sup>121</sup> FG2, 31.

<sup>122</sup> FG5, 22.

<sup>123</sup> FG5, 4.

One participant suggested that it might be possible to deal with an adolescent's breach of a DVO through developing an alternative response. This worker suggested that if there was a breach, there could be

referral to a support service to help with the management or even a link in with the services that do provide behaviour change programs or something like that. So it could be something where it wasn't necessarily straight down that criminal path. But it was — if there is a DVO with good behaviour and then there's a breach, maybe that is a link in with community to assist with that behaviour change model or something like that.<sup>124</sup>

### 3 *Child Protection*

A participant said that 'in a perfect world, Child Safety could be called and they'd come up with great therapeutic interventions, and support the mum through this difficult time'.<sup>125</sup> However, most of the participants expressed frustration with the limited support provided by Child Safety to parents of adolescents who acted violently towards them. Similar to the approach under the *FL Act* (Cth), s 5A of the *Child Protection Act 1999* (Qld) states that the 'safety, wellbeing and best interests of a child are paramount'. The Act provides that 'if a child does not have a parent who is able and willing to protect the child, the State is responsible for protecting the child'.<sup>126</sup> Some focus group participants suggested that if a parent was seeking help and yet was assessed as willing and able to care for the child, Child Safety would be reluctant to intervene. A participant pointed out: 'It's the willing and ableness. So the parent's ... able to protect the child. They're not able to protect the child from the law. So I think it's a different assessment'.<sup>127</sup> Similarly, a participant said that 'what Child Safety is often looking for is a parent willing and able and if mum's that person a lot of the onus and responsibility for that older sibling's behaviour will still go on to mum by Child Safety'.<sup>128</sup> Again, participants recognised the particular issues faced by parents of adolescents with disabilities:

[T]here's a huge gap there where you're dealing with violence within the family and the perpetrators are young people who have disabilities. There's no support that I can see other than the parents really saying I can no longer look after this child and ... they're so reluctant to do that — they don't want to do it. It's the last thing they want.<sup>129</sup>

Other workers in the focus groups also emphasised that in order to access support from Child Safety, some mothers relinquish their children 'out of absolute desperation ... and it's the only time Child Safety will step up'.<sup>130</sup> Some participants provided examples of parents who had sought support and, in desperation, had tried to relinquish their child to Child Safety:

[T]he child had been very violent from a very young age. [The mother] wanted to know how she could ... relinquish the child ... they'd engaged with a

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<sup>124</sup> FG4, 4.

<sup>125</sup> FG1, 41.

<sup>126</sup> *Child Protection Act 1999* (Qld) s 5B(d).

<sup>127</sup> FG5, 6.

<sup>128</sup> FG4, 24.

<sup>129</sup> FG5, 31.

<sup>130</sup> FG4, 23.

myriad of services. Child Safety had said, well, you don't have a choice. You have to look after her, otherwise she's going to end up a prostitute on the street. She was 12.<sup>131</sup>

When [mothers] talk about wanting to give the children to Child Safety, they — all the ones that I have spoken to, have been told that — well, they basically get a lecture about how that's a — it's a criminal offence to abandon your children, and things like that. So, they're kind of — they have it flipped back on them, that it's your responsibility.<sup>132</sup>

One focus group participant reported that her client, a mother whose 15-year-old daughter had severely injured her, had contacted Child Safety seeking support and Child Safety told her: 'as her mother you are responsible for her wellbeing so this is [the mother's] responsibility as the mum to manage her behaviour. This was a mum who was absolutely terrified of being at home with her child because of those circumstances'.<sup>133</sup>

Other participants pointed to the reluctance of Child Safety services to engage with adolescent children, especially if the child had not come to the attention of the Department when he or she was younger:

[I]t's always tricky, I think, especially if you've got a child that doesn't come to the attention of Child Safety when they're little. I mean Child Safety is not that interested in anybody over about 12 or 13, so if you're starting to look for help or need help then, I think it's quite difficult ...<sup>134</sup>

Several participants identified that when adolescent children ultimately committed criminal offences and came to the attention of Youth Justice that would still not attract support from Child Safety.<sup>135</sup> A worker said: 'It seems to be that Child Safety, if it's becoming a juvenile justice issue, then it's a juvenile justice issue, and vice versa, so I don't think they're working very well together, even though they're under the same umbrella in a sense'.<sup>136</sup> One worker thought that Youth Justice engagement might help sometimes:

[O]nce they sort of get to 14, 15 and they're entering into a time of coming out of Child Safety's auspice and they probably don't want to know about it. So they're sort of putting the ball back in the parents' court and the parents don't have a lot to do. But if the child commits other crimes then they can often end up in Youth Justice which can mitigate things.<sup>137</sup>

One focus group participant suggested that

it would be nice if it was Child Safety [could] maybe come in, talk to the child, work out a bit of an agreement between Mum and child about the behaviour moving forward. Basically say — give — let the child know that there is the option for Mum to say, if you're — if she doesn't feel safe in the home, that she can decide later on for you to move into residential care or some other

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<sup>131</sup> FG1, 17.

<sup>132</sup> FG1, 28.

<sup>133</sup> FG4, 5.

<sup>134</sup> FG2, 8.

<sup>135</sup> Department of Child Safety, Youth and Women (Qld), *Youth Justice* <<https://www.csyw.qld.gov.au/youth-justice>>. Note that Child Safety is the Queensland State Government's child protection authority.

<sup>136</sup> FG3, 9; also FG4, 5.

<sup>137</sup> FG4, 6.

kind of thing, without it looking like the mum's abandoning the child ... you are still able to go to school, we can still have contact, but you're not in my home terrorising me and your younger siblings every day.<sup>138</sup>

Some of the participants mentioned a new program managed by Child Safety called 'Family and Child Connect'.<sup>139</sup> This service was developed as a result of a recent inquiry into child protection in Queensland<sup>140</sup> and aims to provide help to families facing challenges in circumstances where their children are at risk of entering or re-entering the child protection system. A worker commented on the dearth of resources available under the program and to the issue that adolescents could choose whether or not to engage with Family and Child Connect services.<sup>141</sup> Several participants suggested that 'we should take family support out of child protection where it currently sits, because it's not just about child protection, it's about a whole range of bigger things than that and have it as a separate sort of entity'<sup>142</sup> and, similarly, that an organisation separate to Child Safety is needed that is 'confidential, non-judgmental, parents can come with any issue and it can be kind of parents and kids'.<sup>143</sup>

Notably, when child disability was discussed, participants emphasised the importance of appropriate early intervention services. There is extensive literature demonstrating the effectiveness of family therapy and psychodynamic approaches that target children's aggression and violence in the home.<sup>144</sup> Yet, the workers said that families struggled to access the services they needed from the disability sector, and that Child Safety and Disability Services<sup>145</sup> did not work together to ensure the family was able to access appropriate services so that the child could safely remain in the home.

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<sup>138</sup> FG1, 37.

<sup>139</sup> Queensland Government, *Family and Child Connect* (9 June 2017) <<https://www.qld.gov.au/community/caring-child/family-child-connect>>. A senior Child Safety officer is based at each Family and Child Connect to assist with identifying and responding to those concerns that may require intervention by Child Safety. Family and Child Connect leads a local alliance of government and non-government services within the community to ensure that vulnerable families receive the right mix of services at the right time.

<sup>140</sup> Queensland, Queensland Child Protection Commission of Inquiry, *Taking Responsibility: A Roadmap for Queensland Child Protection* (2013) 137–8.

<sup>141</sup> FG4, 21.

<sup>142</sup> FG2, 16.

<sup>143</sup> FG2, 19.

<sup>144</sup> Coogan, above n 46, c4; Johnny L Matson, and Jina Jang, 'Treating Aggression in Persons with Autism Spectrum Disorders: A Review' (2014) 35(12) *Research in Developmental Disabilities* 3386. See also Marni Sheehan, 'Adolescent Violence — Strategies, Outcomes and Dilemmas in Working with Young People and their Families' (1997) 18(2) *Australian and New Zealand Journal of Family Therapy* 80, 82–3; George H S Singer, Brandy L Ethridge and Sandra I Aldana, 'Primary and Secondary Effects of Parenting and Stress Management Interventions for Parents of Children with Developmental Disabilities: A Meta-Analysis' (2007) 13(4) *Mental Retardation Developmental Disability Research Review* 357, 358, 366.

<sup>145</sup> Queensland Government, *Specialist Disability Services* <<https://www.qld.gov.au/disability/adults/getting-help/specialist-disability-services>>.

#### 4 *Police and Criminalisation*

As observed earlier, focus group participants emphasised the reluctance of most parents to call the police in relation to concerns about adolescent behaviour. However, participants said that sometimes parents did ultimately call police for help. In one case, a worker reported that a client had been assaulted by her 16-year-old son and called the police for help. The worker reported that her client had to convince the 000 emergency operator to send a police officer:

[The mother said] ‘Can you please come around because I’m terrified for my life?’ The officer on the other line actually argued the semantics of well, if it’s — if he’s under 18 it’s not DV — you know, maybe it’s something else. She went ‘I don’t care what you call it. Please just send somebody around because I’m terrified.’ She actually had to have a five minute argument with the 000 operator around the semantics of whether it was DV or wasn’t DV.<sup>146</sup>

When the police do get involved and respond to adolescent family violence, workers claimed that the response was sometimes unexpectedly punitive. A participant reported on a situation where a mother with an intellectual disability had a 14-year-old son who had damaged property in the home and abused younger siblings. The mother reported the matter to the police and her son was charged with criminal offences. Stringent bail conditions resulted in the mother not having contact with her son for over a year.<sup>147</sup> Others pointed out that it was easy for people with intellectual disabilities to get stuck in the criminal justice process as there was no referral pathway out of the criminal justice system for them.<sup>148</sup> A worker said that

from what I’ve seen is that they just — it’s like pulling teeth to get [Disability Services] to do [anything] ... professionals can write as many reports as they want under the sun to say this is what that person needs and yet the money just doesn’t — is not provided to them to provide them with ... support ... and respite and supervision, housing, accommodation and then also just — and giving [people with intellectual disabilities] support so they can live lives of value ... that they’re not just sitting at home with four walls in a locked room, actually getting ... them connected with their community and life.<sup>149</sup>

For adolescents in the care of Child Safety and living in residential care, a residential care worker’s call to the police is often an automatic reaction that results in a particularly punitive criminal justice response. A participant explained that

it’s often a worker’s inability to make appropriate decisions, and because they sometimes lack training, that’s their fall back, ‘we’ll just call the police’. But it’s also sometimes the [residential care service’s] individual policies and procedures as well ...<sup>150</sup>

Another participant identified that there was sometimes ‘a lack of an emotional connection’ between the carers and the young person, and this explained how the police came to be involved: ‘Like if ... that was your mother, they wouldn’t

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<sup>146</sup> FG4, 19.

<sup>147</sup> FG1, 14.

<sup>148</sup> FG2, 21.

<sup>149</sup> FG2, 24.

<sup>150</sup> FG3, 5.

be so quick to call the police or press charges and stuff like that.<sup>151</sup> Participants suggested that improved training for residential care workers might help them to develop ways of de-escalating behaviours without needing to call the police. A participant also suggested that protocols could be developed to ensure that there was greater clarity and consistency around when it was appropriate for residential care workers to call police.

Participants identified several examples where the police and criminal justice response seemed to be unreasonably punitive. For example, workers referred to police being called by residential care workers when adolescents had broken crockery and they had been charged with wilful damage<sup>152</sup> or taken food from the fridge for a picnic and been charged with theft.<sup>153</sup> Participants reported:

I heard one the other day where the policeman called the ambulance [when ... a young person who tried to break the windows ... had glass that cut themselves. Then even though the ambulance was called, ... [the young person was] then charged with breaking the window by the police as a way to try and discourage them from self-harming in the future ...<sup>154</sup>

They took the food out of the fridge for a picnic down at the park, and they got charged with theft or something like that. One of them moved a microwave into their room and got charged with theft as well.<sup>155</sup>

Unsurprisingly perhaps, a participant suggested that criminalisation did not operate as a disincentive for some young people in residential care because they found residential care homes to be very oppressive. He said young people

preferred [juvenile detention] over their residential [care home], like the fact that they knew people in [juvenile detention] and they can do what they want to without the restrictions that aren't as bad. A lot of carers are the old 'don't swear' or 'don't turn up the music'. 'Don't do this'. Then there's the same thing, like some of the [residential care centres] have bars on the windows. It's like basically going to the same place, except you don't have all these limitations ... If you found connections there, you have workers that you really get along with well, or you liked the structure, then yes, maybe. If you thought it was pretty terrible, then you're probably going to be scared of it and you won't want to go back to it.<sup>156</sup>

While in some cases a criminal charge had led a young person to the services they needed, generally participants reported that they worked with authorities and families to have charges withdrawn or reduced wherever possible. A view that seemed to be shared by many of the participants was that: 'prosecuting people of itself doesn't necessarily drive change or drive long term change, especially if you go back to a space and a way of doing things and a way of living, that is exactly the same as before'.<sup>157</sup>

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<sup>151</sup> FG3, 10.

<sup>152</sup> FG2, 29.

<sup>153</sup> FG3, 10.

<sup>154</sup> FG3, 4; also FG2, 29.

<sup>155</sup> FG3, 10.

<sup>156</sup> FG3, 9.

<sup>157</sup> FG2, 3.

## 5 *Innovative Justice Responses*

Daly has distinguished conventional justice responses from what she refers to as ‘innovative justice responses’.<sup>158</sup> While conventional justice responses seek to develop better ways to gather evidence and prosecute cases, and better support for victims, ‘innovative justice responses are a variety of newer practices that seek to address victims’ “justice needs”, including an acknowledgment of wrongdoing and mechanisms of redress or repair’.<sup>159</sup> Most of the participants in this study agreed that innovative justice responses might provide an opportunity ‘to consider what the drivers are [for the adolescent family violence] and that [would] inform our response and look at responses beyond just the legal system’.<sup>160</sup>

Youth Justice conferencing is a form of innovative justice available in Queensland. In circumstances where a young person has committed a crime and admits to the offence, the young person can be referred to a Youth Justice conference instead of going to court.<sup>161</sup> Some focus group participants identified the creative potential of the agreements that can be made in Youth Justice conferences,<sup>162</sup> observing they could be ‘transformative and powerful’.<sup>163</sup> One participant, who was a lawyer, commented: ‘I personally didn’t have a bad experience through conferencing. I found them to be quite a good experience and a lot of the time, particularly with first time offenders, it really is a very powerful experience for them’.<sup>164</sup> However, another participant, who works primarily with children in the care of Child Safety, argued there should be limits on using the mediation process: ‘I would argue, though, that for those small issues, that really shouldn’t even be going to a full process. It’s a pretty demeaning process for a young person to have to go to a conference and say I’m sorry for doing — taking some food to a park’.<sup>165</sup> This participant continued:

[M]aybe you could have a couple of stages of it, one for the more serious [incidents] and one for the less immediate things. Because then — I don’t know, if it’s just the less immediate thing, you could just have the main people around, but if it’s more serious, then you could probably have everyone who needed to be there.<sup>166</sup>

Another participant identified that it was important for the Child Safety to be responsible for their role as the ‘parental body’ noting that the Child Safety officer should be present at conferences.<sup>167</sup> While one focus group participant observed she had had largely positive experiences with conferencing, she had not been involved in Youth Justice conferencing where the victim was a family member and so she was

<sup>158</sup> Daly, above n 106.

<sup>159</sup> *Ibid* 1.

<sup>160</sup> FG2, 2.

<sup>161</sup> Queensland Government, ‘Restorative Justice Conferences’ (2018) <<https://www.qld.gov.au/law/sentencing-prisons-and-probation/young-offenders-and-the-justice-system/youth-justice-community-programs-and-services/restorative-justice-conferences>>.

<sup>162</sup> FG5, 23.

<sup>163</sup> FG5, 15.

<sup>164</sup> FG5, 24.

<sup>165</sup> FG3, 13.

<sup>166</sup> FG3, 14.

<sup>167</sup> FG3, 15.

not sure if conferences would need to be managed differently in those circumstances. She said:

I was reflecting on — the idea of conferencing these types of issues with family violence, I don't know how well that would work, particularly if there's domestic violence and the children are witnessing that — like — I don't know. I think a lot of conferencing comes from the perspective that everybody knows what the norm is and a lot of these kids have never seen what you and I know as a normal family dynamic.<sup>168</sup>

Similarly, some participants expressed concern about mediation based on their experiences with mediations in the family courts:

We have really big problems with mediation and with victims of violence, where that power and control dynamic continues to play out, where the mediators aren't skilled enough at actually dealing with the dynamics of violence and identifying that. So, it just perpetuates. I guess I'd be worried about that continuing, and I guess what the outcomes — the hopeful outcome would be, of engaging in that system.<sup>169</sup>

Another participant said that while mediation may be an option in cases of adolescent family violence, they would need skilled mediators who 'understood the dynamics' and there should be 'options for accountability' for young people.<sup>170</sup>

Some participants considered that counselling was useful in some cases and had produced positive outcomes, despite being consented to only because the alternative was criminal justice involvement:

I work with a young boy that ... was ordered to engage in counselling because of behaviour that he did to his sibling — so violent behaviour towards his sibling ... the police told him that he needed to engage in counselling. He did that for a period of six months — like ordered. Then he decided to continue with counselling because he actually saw some benefit in it.<sup>171</sup>

Several participants commented positively on the ReNew program.<sup>172</sup> This is a program in Queensland that works with young people together with mothers who have experienced domestic violence. The program focuses on overcoming the trauma of domestic violence. One participant pointed to the value of the program, but noted that attendance was voluntary and this was sometimes an issue:

The problem is that the children are refusing to go, and [mum] can't drag them kicking and screaming ... they're physically big enough that if — when they say no, they — there's nothing she can do ... The program is designed to work with children who are still continuing to have time with the other party.<sup>173</sup>

When asked whether attendance at ReNew could possibly be mandated, workers were generally supportive. One worker noted that, if mandated to attend, at least the person would be exposed to relevant concepts.<sup>174</sup> Another worker emphasised the

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<sup>168</sup> FG5, 34.

<sup>169</sup> FG1, 48.

<sup>170</sup> FG1, 50.

<sup>171</sup> FG4, 31.

<sup>172</sup> See Carinity, *ReNew Program* (2018) <<https://www.carinity.org.au/our-services/youth-families/domestic-family-violence/renew-program/>>.

<sup>173</sup> FG1, 7.

<sup>174</sup> FG4, 28.

link between violence as a child to violent behaviour as an adult, noting there is a five-year window between 15–20 years where there was the possibility of behaviour change:

If there was an element of mandate at the beginning to say you're entering into waters that aren't okay anymore so we are going to mandate you to get into a group that looks at this at least, we stop being wishy-washy and stop having levels of inculcation where we start to stand against it in a five year — and we know that within five-year periods things can be so ingrained — we're up against 15 years of undoing it.<sup>175</sup>

Others pointed out the importance of having both parents on board with counselling and other programs, with one worker identifying a situation where a violent father had obstructed his children's attendance at counselling: 'we tried to connect [the children] to [a counselling service], and ... they went for one to two sessions, and then the father became aware, and told them not to go anymore'.<sup>176</sup> Similarly, another participant pointed to the need for parents to be part of the process, even though they are sometimes reluctant:

[W]e've got to get everybody on board ... I see [parents] who don't want anything to do with [the service] and due to ... persistence, give her a couple of months and we're 180 degrees, they're actually ringing her and they're actually saying, that was fantastic, that hint you gave me the other day, I put that into place and gosh, didn't that make a difference. Because it's about breaking cycles of habit, isn't it?<sup>177</sup>

This worker also commented: 'I think we have to try and break through that cycle as well, of people having to be a bit responsible for what goes on ... around them and participation and negotiation and talking about restoring relationships is actually what will make the difference'.<sup>178</sup> Given that violent fathers had, in some cases, modelled the violent behaviour that was now being played out by the adolescent child, one worker commented that fathers

also need to have some level of responsibility where they are also told hey, you know what? You're also part of this. You're contributing to this. You need to do something — instead of just the focus being on these two ... mum and their children or child trying to make it work. But then there's this other ...<sup>179</sup>

One participant explained that in responding to adolescent family violence they would often try to broker a family therapist to work with the family, noting that law seems 'to sort of problematise the child and as most people know ... that's not really necessarily where the problem started'.<sup>180</sup> In many cases where there is adolescent family violence, the adolescent is traumatised. This was identified by another participant who said:

[I]f there were programs that were set up ... for non-voluntary children, and I think they could be ... because the key issue is assisting them to actually deal

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<sup>175</sup> FG4, 32.

<sup>176</sup> FG1, 7.

<sup>177</sup> FG2, 14.

<sup>178</sup> FG2, 38.

<sup>179</sup> FG4, 33.

<sup>180</sup> FG2, 4.

with what's causing the violence, not just the violence itself ... it needs to be dealing with the trauma that they've experienced, and how their brains have been wired in that particular period of their life, to think of — to go into fight and flight, and immediately then move to violence. That takes a long time to undo, and there needs to be lots of therapy work.<sup>181</sup>

Similarly, a participant emphasised the importance of building healthy conflict resolution and communication skills between parents and their adolescent children as part of the way forward.

Some of the participants had creative ideas for innovative justice responses. For example, a participant talked about the possibilities for Aboriginal and Torres Strait Islander youth in her community and suggested:

I think we do have to go back to culture — I went home and there was a lot of issues with the adolescent kids. So I started a dance group and all those kids changed. They stopped breaking stuff — like all ... the issues ... We took them back to culture and that's — I feel that's what we need for our kids in this community. But there's a gap there.<sup>182</sup>

Another participant observed that innovative justice responses were what most parents want, even where their children have carried out quite serious crimes:

[T]hey are positive for the diversionary stuff. I mean, they want the least amount of damage to their ... child so they're supportive of all the diversionary stuff — the conferencing, the mediations — all that sort of stuff and if it's able to be resolved that way most of the time [and] parents are on board'.<sup>183</sup>

## V Discussion and Recommendations

On the whole, the participants in the Brisbane study identified that current legal options provide an insufficient, and sometimes inappropriate, range of options for responding to adolescent family violence. In general, they do little to end the violence, ensure victims' safety, support parents to manage the aggressive behaviour of children with disabilities, repair family dynamics or to encourage perpetrator accountability for the violence. As one of the participants said, the issue of adolescent family violence 'is ripe for some more nuanced approaches'.<sup>184</sup>

The call for more innovative and creative justice solutions to deal with adolescent family violence was made by participants regardless of the underlying cause of the violence identified. As one participant said, 'parents need the choice. I think they need to be able to have options to choose from. If it's remaining with a child who is violent, or them being charged with criminal offences, it's just not acceptable. They need more options'.<sup>185</sup>

In some cases, appropriate family law orders that limit children's contact with an abusive parent, and DVOs that name the children as protected, may go some way to ensuring that adolescent children's time and contact with violent parents is

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<sup>181</sup> FG1, 31.

<sup>182</sup> FG4, 27.

<sup>183</sup> FG5, 13.

<sup>184</sup> FG2, 28.

<sup>185</sup> FG1, 37.

minimised and safely conducted. This might help adolescent children to feel safe and provide them with an opportunity to recover from the trauma of witnessing family violence. In turn, this may help to reduce violence in some families. On this point, focus group participants emphasised the need to continue to educate judges, magistrates and lawyers on the traumatic effects of violence on children and its implications into adulthood.<sup>186</sup> For many years, workers in domestic and family violence services have identified the need for an integrated response model.<sup>187</sup> Such a model ensures that the experience for people who engage with multiple systems is improved because systems work together. As the participants in this study suggest, the various legal and other responses that might respond to adolescent family violence do not necessarily ‘talk’ or connect to each other. As one participant observed, ‘when it comes to adolescents, Child Safety, domestic violence legislation and family court legislation aren’t talking to each other’.<sup>188</sup> One could add the criminal justice process, and Disability Services, to that list.

In the criminal law context, Youth Justice conferencing appears to be helpful in some cases. However, some focus group participants suggested that the requirement for young people to apologise was sometimes not appropriate. There was a suggestion that perhaps a two-tiered system of conferencing could be developed with the current model being used for serious matters, while a less formal model could be developed to deal with less serious matters, at least where they have arisen within residential care units.

Most focus group participants identified that criminal justice interventions were far from ideal and that appropriate family interventions and support should be provided long before criminal intervention is needed. However, safety, primarily of mothers and younger siblings, was identified as a real concern in many cases. While participants identified the need for police to take calls about adolescent family violence seriously and to respond in a timely way in order to provide safety to those at risk, there was recognition that police needed real alternatives to laying criminal charges.<sup>189</sup> Similarly, participants recommended that workers in residential care units should be trained in how to de-escalate conflicts and minimise the need to engage criminal justice responses in cases involving minor matters. Parents of children with disabilities need proactive referrals to support services that provide realistic advice on minimising and dealing with aggression, and respite.

For most participants, new alternatives built on counselling, mediation and conferencing type models and restorative justice principles offered the most hopeful prospects. While there have been some programs developed to respond to adolescent family violence, many have not been evaluated as yet. In particular, Selwyn and Meakings point out that interventions for children who have been maltreated or traumatised have not been evaluated.<sup>190</sup> While programs such as the ReNew

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<sup>186</sup> Kelly Richards, ‘Children’s Exposure to Domestic Violence in Australia’ (2011) 419 *Trends and Issues in Crime and Criminal Justice* 1.

<sup>187</sup> Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence — A National Legal Response*, Report No 114 (2010) 44–5 (recommendations 29-1–29-5).

<sup>188</sup> FG4, 30.

<sup>189</sup> Similar findings were also made by Miles and Condry: above n 34, 819–20.

<sup>190</sup> Selwyn and Meakings, above n 54, 1237.

program, which relies on voluntary attendance, were identified as particularly encouraging, some focus group participants believed that sometimes mandatory attendance by an adolescent may be necessary to help them heal and shift their thinking. Others also identified the importance of including other members of the family in any restorative process. Where violent fathers had modelled violent behaviour, it was important not to blame the mother or hold her responsible for the adolescent's behaviour. Where the circumstances were not consistent with a 'cycle-of-violence' paradigm, appropriate behavioural interventions within a family therapy context were considered ideal.<sup>191</sup>

Particular concerns were identified regarding the lack of options for responding to adolescent family violence where the adolescent has a mental illness or disability, especially the unavailability of options to divert such adolescents away from the criminal justice system. Notably, there was no mention in the focus groups of police officers referring families to restorative justice programs, or issuing 'Police Protection Notices', despite the fact that both options are, technically, available to them.<sup>192</sup>

In 2010, Victoria's Domestic Violence Resource Centre ('DVRCV') reported that there were no Australian programs that addressed adolescent family violence.<sup>193</sup> DVRCV reported that the 'Step Up' program, developed in the US, might be an option.<sup>194</sup> 'Step Up' is a parent-adolescent program that uses the Youth Justice diversionary approach to engage adolescents, and mandates both parents and the adolescents to attend. It is influenced by men's behavioural change approaches to family violence.<sup>195</sup> Since 2010 some Step Up programs now run in Australia,<sup>196</sup> but clearly, in Queensland at least, the available options do not meet the demand.

## VI Conclusion

Similar to other studies,<sup>197</sup> the participants in the Brisbane study identified the variety of 'pathways' to adolescent family violence, including a history of family violence and trauma, mental health issues and child disability. In each case, the pathway needs to be identified so that the response is tailored to the needs of the adolescent and their family or carers. Focus group participants suggested that legal responses may sometimes be helpful and, occasionally, necessary. More research with families who are experiencing adolescent family violence is needed so that the most appropriate responses can be developed and implemented. However, most participants in the Brisbane study suggested that responses that developed from restorative justice principles held the most promise. Overwhelmingly, and regardless of the context, focus groups participants identified that there was insufficient

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<sup>191</sup> See Coogan, above n 46, e3.

<sup>192</sup> See above n 61 and accompanying text; above n 64 and accompanying text.

<sup>193</sup> DVRCV, above n 41.

<sup>194</sup> For discussion on this program, see Routt and Anderson, above n 4, 4–5.

<sup>195</sup> DVRCV, above n 41.

<sup>196</sup> See, eg. Child and Family Services Ballarat, *Step Up Ballarat* (2017) <<https://cfs.org.au/programs-services/step-up-ballarat/>>; 'MATTERS' program in Melbourne: Sheehan, above n 144; 'ReNew' program: Carinity, above n 172.

<sup>197</sup> Cottrell and Monk, above n 3.

resourcing of responses to adolescent family violence that appropriately addressed the behaviours and family context. We conclude with a participant's comment that sums up the general view expressed by study participants:

You've got this window of time where you can make that difference and the amount of times I've spoken to people, both victims and perpetrators, [who] have said: 'Well, nobody actually gave a damn about me until I was 18, but now everything I do I can be charged for' — you know, there's that point of — you know, it's literally a birthday is enough time to take you from being a child to an adult with all those consequences. I think having that window of time where you can actually say these behaviours aren't okay — we need to work on them, but we will have the supports in place to help you get there — is really crucial to getting them over that hump without ... just waking up one morning and being an adult.<sup>198</sup>

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<sup>198</sup> FG4, 37.

# *Contracts against Public Policy: Contracts for Meretricious Sexual Services*

Angus Macauley\*

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## *Abstract*

The law has historically held that contracts for the provision of meretricious sexual services — providing sexual services for reward — are contrary to public policy and are therefore void and unenforceable. In *Ashton v Pratt* (No 2) [2012] NSWSC 3 (16 January 2012), Brereton J held that this was still the position in 2012. However, this article posits that Brereton J’s holding was arguably incorrect, being premised upon: (a) a misapplication of the principles to be applied in determining whether a contract is contrary to public policy, and whether public policy requires that contract be unenforceable; and (b) an incorrect appreciation as to the present dictates of public policy in this area. Seismic changes to the legislative and social landscape in New South Wales (‘NSW’), particularly over the past 30 years, have heralded a substantial departure from the 18<sup>th</sup> and 19<sup>th</sup> century position as to the relative immorality of providing sexual services for reward. As such, at least in some contexts, and at least in NSW, greater social harm now arises from maintaining the historical prohibition on the enforceability of such contracts, as opposed to permitting such contracts to be curially enforced.

## **I Introduction**

In *Ashton v Pratt* (No 2),<sup>1</sup> Ms Ashton brought a claim against the estate of the late Mr Richard Pratt, the successful businessman and chairman (until his death) of packaging and logistics giant Visy Industries. Ms Ashton’s claim revolved around a central allegation that in November 2003, in consideration for her not returning to the escort industry but providing services (non-exclusively) to Mr Pratt as his mistress, Mr Pratt orally promised to Ms Ashton to: (a) settle \$2.5 million on trust for each of her two sons; (b) pay her an annual allowance of \$500 000; (c) pay her an annual allowance of up to \$36 000 for the purposes of rent or, alternatively, buy her a house in the eastern suburbs of Sydney; and (d) pay her \$30 000 annually for expenses, particularly travel expenses. Subsequent to these oral promises, Mr Pratt did pay to Ms Ashton not insubstantial sums of money, and partly purchased for her a car and other items. However, the promises alleged by Ms Ashton largely went unfulfilled.

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<sup>1</sup> [2012] NSWSC 3 (16 January 2012) (*Ashton* (No 2)).

Upon Mr Pratt's death in April 2009, he had not settled any money on trust for Ms Ashton's children, nor had he paid anything to Ms Ashton after early 2005.

At first instance, Brereton J held that Mr Pratt had made the above promises to Ms Ashton in November 2003.<sup>2</sup> Notwithstanding, his Honour dismissed Ms Ashton's claims. His Honour's primary reason for rejecting Ms Ashton's claim for breach of contract was that the parties had not, by their conduct, intended to give rise to legal relations.<sup>3</sup> However, Brereton J also held in obiter dicta that had any legally binding contract come into existence, such a contract, being one for the provision of meretricious sexual services, would have been contrary to public policy and, therefore, illegal and unenforceable.<sup>4</sup> This holding equally defeated (among other reasons) Ms Ashton's claim in estoppel, as that doctrine did not afford a means for circumventing the dictates of public policy.<sup>5</sup>

On appeal, Brereton J's orders were upheld.<sup>6</sup> Relevantly, the New South Wales ('NSW') Court of Appeal deliberately refrained from commenting on the holding that any contract between Ms Ashton and Mr Pratt on the terms alleged was contrary to public policy and unenforceable.<sup>7</sup> This reflected the fact that Mr Pratt's representatives did not place any reliance on appeal on Brereton J's holding in this regard, consistent with the approach taken at trial (where Mr Pratt's representatives did not plead that any contract was unenforceable for being contrary to public policy, nor was any such submission advanced by Mr Pratt's representatives, notwithstanding that Brereton J drew the matter to the parties' attention and invited submissions on the issue).<sup>8</sup>

Despite historical precedent in support of the conclusion reached by Brereton J, it is contended that his Honour's obiter dicta remarks as to the unenforceability of contracts for meretricious sexual services were arguably incorrect. Whatever may have been the position historically, in the 21<sup>st</sup> century, public policy does not appear to demand that contracts for the provision of sexual services for reward be ineluctably held to be unenforceable. This is true at least in NSW, and potentially is the same in other states and territories in Australia with a similar legislative landscape relating to prostitution and the operation of brothels (namely, the Australian Capital Territory ('ACT'), Queensland and Victoria).

This article posits that in *Ashton (No 2)*, Brereton J's conclusion was premised upon: (a) a misapplication of the principles that determine whether the enforcement of a contract is contrary to public policy, and when public policy can legitimately subordinate private rights in the name of the public interest; and (b) an incorrect determination, in the present day, and in light of the changes to the

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<sup>2</sup> Ibid [28], [87].

<sup>3</sup> Ibid [36], [88].

<sup>4</sup> Ibid [52].

<sup>5</sup> Ibid [58].

<sup>6</sup> *Ashton v Pratt* (2015) 88 NSWLR 281 (Bathurst CJ, McColl and Meagher JJA).

<sup>7</sup> Ibid 317 [218].

<sup>8</sup> *Ashton (No 2)* [2012] NSWSC 3 (16 January 2012) [37]. Evidently, the counsel appearing for the estate of Mr Pratt (Mr R Richter QC, Mr N J Clelland SC and Mr M S Henry at first instance and Mr M S Henry SC and Ms J L Roy on appeal) did not think that the head of public policy historically denouncing as unenforceable contracts for the provision of meretricious sexual services still prevailed.

legislative and social landscape that had occurred over the past 30 years, that public policy in NSW still demanded that contracts for the provision of sexual services for reward be held unenforceable. When these matters are accounted for, real doubt is cast over the conclusion reached by Brereton J.

Indeed, contrary to the conclusion arrived at by Brereton J, and at least in NSW, it is argued in this article that contracts for meretricious sexual services are not innately contrary to public policy. As such, courts in NSW should enforce and grant relief in respect of those contracts, at least so far as actions are brought on them by the service provider for breach of contract or to recover remuneration (and other benefits promised) for sexual services rendered. This position may also prevail in the ACT, Queensland and Victoria. However, it is beyond the scope of this article to examine closely each of these jurisdictions and their legal frameworks concerning the commercial supply of sexual services, which varies and includes, in some states, licensing regimes,<sup>9</sup> a point that may affect the reasoning that applies to the position as it exists in NSW.<sup>10</sup> Accordingly, this article focuses on the position in NSW, with only passing reference made to these other states.

Whether public policy prevents the enforceability of such contracts beyond the above circumstances is less clear, and is an issue further explored below. However, at a minimum, it is draconian to maintain the historical prohibition on the enforceability of such contracts in response to a suit brought by the service provider for breach of contract for services rendered. Maintaining the prohibition in such circumstances condones the exploitation of such persons and is a disproportionate and unjust response to any perceived immorality associated with the provision of sexual services for reward. As such, in light of the current legislative and social landscape in NSW, the maintenance of the historical prohibition sees greater social harm done than arises from a limited recognition of the enforceability of such a contract.

This article is divided into the following sections. Part II of this article traverses the law concerning the meaning of ‘public policy’, how that policy is to be ascertained, and the circumstances that need to exist so as to justify public policy rendering unenforceable an otherwise lawful contract. Part III then analyses the historical head of public policy regarding contracts that promote sexual immorality, either directly (for example, contracts for the provision of meretricious sexual services or prostitution) or indirectly (for example, contracts facilitating prostitution). Part IV examines the reasoning in *Ashton (No 2)* in light of the matters raised in Parts II and III. Part V concludes the article.

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<sup>9</sup> See, eg. *Sex Work Act 1994 (Vic)* pt 3.

<sup>10</sup> For instance, the effect of such a regime may mean that only contracts involving a licensed sex worker can be curially enforced. This author expresses no view about this matter, the resolution of which is beyond the scope of this article.

## II Contracts Contrary to Public Policy

### A *The Notion of Public Policy and the Striking Down of Contracts as Contrary to Public Policy*

The notion of ‘public policy’ is inherently a mutable concept. As Dixon J stated in *Stevens v Keogh*, what is contrary to public policy is something that varies ‘according to the state and development of society and conditions of life in a community’.<sup>11</sup> The most comprehensive explication of the concept is that offered by Jordan CJ in *Re Morris (deceased)*,<sup>12</sup> which has been judicially endorsed on numerous subsequent occasions.<sup>13</sup> In *Re Morris*, Jordan CJ came to consider the notion of ‘public policy’ in considering the validity of a deed by which a widower had, prior to marriage, purportedly promised not to make any claim on the deceased’s estate pursuant to the *Testator’s Family Maintenance and Guardianship of Infants Act 1916* (NSW). While that context required discerning the policy of the statute under consideration and, in particular, whether the powers of the Court to make orders for the proper maintenance of another out of a deceased’s estate could be ousted by a private agreement, Jordan CJ’s remarks about the notion of ‘public policy’ are nonetheless applicable to the present context, notwithstanding the different task under assessment in this article. On the topic of ‘public policy’, Jordan CJ stated:

the phrase ‘public policy’ appears to mean *the ideas which for the time being prevail in a community as to the conditions necessary to ensure its welfare*; so that anything is treated as against public policy if it is generally regarded as injurious to the public interest. ‘The ‘public policy’ which a court is entitled to apply as a test of validity to a contract is in relation to some definite and governing principle which the community as a whole has already adopted either formally by law or tacitly by its general course of corporate life, and which the courts of the country can therefore recognise and enforce. The court is not a legislator: it cannot initiate the principle; it can only state or formulate it if it already exists’: *Wilkinson v Osborne* [(1915) 21 CLR 89, 97]. ... *Public policy is not, however, fixed and stable. From generation to generation ideas change as to what is necessary or injurious, so that ‘public policy is a variable thing. It must fluctuate with the circumstances of the time’ ... New heads of public policy come into being, and old heads undergo modification. ... As a general rule, it*

<sup>11</sup> (1946) 72 CLR 1, 28.

<sup>12</sup> (1943) 43 SR (NSW) 352 (*‘Re Morris’*).

<sup>13</sup> See *Seidler v Schallhofer* [1982] 2 NSWLR 80, 87–8 (Hope JA) (*‘Seidler’*), which usefully collects a number of other older authorities on the same point, including *Rodriguez v Speyer Brothers* [1919] AC 59, 79 (Viscount Haldane) and *Evanturel v Evanturel* (1874) LR 6 PC 1, 29 (Sir Colville); *A v Hayden (No 2)* (1984) 156 CLR 532, 558 (Mason J) (*‘Hayden (No 2)’*); *R v Young* (1999) 46 NSWLR 681, 700 [95]–[96] (Spigelman CJ); *Taylor v Burgess* (2002) 29 Fam LR 167, 172 [19] (Barrett J); *AG Australia Holdings Ltd v Burton* (2002) 58 NSWLR 464, 492–3 [90]–[92] (Campbell J); *Richards v Kadian* (2005) 64 NSWLR 204, 223–4 [80] (Beazley JA, Hodgson JA and Stein AJA agreeing); *Australian Securities and Investments Commission v Mercorella (No 3)* (2006) 58 ACSR 40, 57–8 [98] (Mansfield J); *Moyes v J & L Developments Pty Ltd (No 2)* [2007] SASC 261 (11 July 2007) [40] (Debelle J). See also *Maxim Nordenfelt Guns & Ammunition Co Ltd v Nordenfelt* [1893] 1 Ch 630, 661 (Bowen LJ) (*‘Nordenfelt’*); *Andrews v Parker* [1973] Qd R 93, 102–4 (Stable J) (*‘Andrews’*).

*may be said that any type of contract is treated as opposed to public policy if the practical result of enforcing a contract of that type would generally be regarded as injurious to the public interest: Fender v St John-Mildmay* [[1938] AC 1, 13–14, 18].<sup>14</sup>

In applying notions of public policy to decide the enforceability of a contract, a court should only elect to refuse to enforce a contract on such a ground in the clearest of circumstances. As Mason J stated in *Hayden (No 2)*:

The refusal of the courts to enforce contracts on grounds of public policy is a striking illustration of *the subordination of private right to public interest*. The problem is one of formulating with any degree of precision the criteria or the circumstances which will justify a court in refusing to enforce a contract on the ground that there is a countervailing public interest amounting to public policy. *The difficulties in ascertaining the existence and strength of an identifiable public interest to which the courts should give effect by refusing to enforce a contract are so formidable as to require that they 'should use extreme reserve in holding such a contract to be void as against public policy, and only do so when the contract is incontestably and on any view inimical to the public interest'*, to use the words of Asquith LJ in *Monkland v Jack Barclay Ltd* [[1951] 2 KB 252, 265 ('Monkland')].<sup>15</sup>

The principle espoused by Asquith LJ in *Monkland* (cited by Mason J in *Hayden (No 2)*), and the extreme caution in approaching the question of what public policy demands, has been affirmed subsequently.<sup>16</sup> Indeed, the invocation of 'public policy' in order to invalidate the enforceability of a contract has not escaped judicial criticism. In *Richardson v Mellish*, Burrough J described reliance upon notions of public policy as 'a very unruly horse ... [that] may lead you from the sound law'.<sup>17</sup> In *Nordenfelt*, Lord Watson stated that '[a] series of decisions based upon grounds of public policy, however eminent the judges by whom they were delivered, cannot possess the same binding authority as decisions which deal with and formulate principles which are purely legal'.<sup>18</sup> Equally in *Janson v Driefontein Consolidated Mines Ltd*, Lord Halsbury LC stated that the expression 'against public policy' was not one that explained itself.<sup>19</sup>

The above remarks have not ousted judicial invocation of the notion of public policy in deciding the enforceability of a contract. Nonetheless, such remarks add to

<sup>14</sup> *Re Morris* (1943) 43 SR (NSW) 352, 355–6 (emphasis added) (citations omitted).

<sup>15</sup> (1984) 156 CLR 532, 559 (emphasis added). As noted by Lord Mansfield in *Holman v Johnson* (1775) 1 Cowp 341, 343; 98 ER 1120, 1121, it is in the interests of society, and not for the defendant's sake, that the law refuses to enforce an immoral or illegal contract.

<sup>16</sup> *Edgley Mutual & General Investment Services Pty Ltd v Eeklo Pty Ltd* (1988) 13 ACLR 179, 181 (Rogers CJ Comm D) ('*Edgley*'); *AG Australia Holdings Ltd v Burton* (2002) 58 NSWLR 464, 493 [92] (Campbell J); *Clairs Keeley (a firm) v Treacy* (2003) 28 WAR 139, 154–5 [73]–[77] (Templeman J, Parker, Wheeler and Pullin JJ agreeing); *Richards v Kadian* (2005) 64 NSWLR 204, 223–4 [80] (Beazley JA, Hodgson JA and Stein AJA agreeing); *Maxcon Constructions Pty Ltd v Vadasz (No 2)* (2017) 127 SASR 193, 216 [80] (Blue J, Lovell and Hinton JJ agreeing). See also *Nelson v Nelson* (1995) 184 CLR 538, 595–6 (Toohey J).

<sup>17</sup> (1824) 2 Bing 229, 252; 130 ER 294, 303.

<sup>18</sup> [1894] AC 535, 553.

<sup>19</sup> [1902] AC 484, 491.

the caution that a court should adopt in resorting to notions of public policy to determine the enforceability of a contract and, relatedly, in applying automatically, without assessment or consideration, previous decisions holding that certain contracts are contrary to public policy.

Indeed, in any assessment of whether a contract is contrary to public policy, due regard must also be had to the countervailing and long-established public policy that contracts freely entered into by consenting adults should be enforced.<sup>20</sup> While the sanctity of contract is not at the zenith it enjoyed in the 19<sup>th</sup> century,<sup>21</sup> it is still undeniably an important facet of the common law and lies at the heart of modern commerce.<sup>22</sup> Likewise, there is a well-recognised public policy of ‘preventing injustice ... [by] the enrichment of one party at the expense of [another]’.<sup>23</sup> As such, in invoking public policy to deny the enforceability of a contract, such a conclusion must reflect a balance between the public interest in refusing enforcement and the public interest in holding persons to their bargains and preventing the enrichment of one party at the expense of another. As Diplock LJ stated in *Hardy v Motor Insurers’ Bureau*:

courts will not enforce a right which would otherwise be enforceable if the right arises out of an act committed by the person asserting that right ... which is regarded by the court as sufficiently anti-social to justify the court’s refusing to enforce that right ...

The court’s refusal to assert a right, even against the person who has committed the anti-social act, will depend not only on the nature of the anti-social act but also on the nature of the right asserted. *The court has to weigh the gravity of the anti-social act and the extent to which it will be encouraged by enforcing the right sought to be asserted against the social harm which will be caused if the right is not enforced.*<sup>24</sup>

That dictum was cited with approval by Needham J in *Nichols v Nichols*,<sup>25</sup> as well as by Stable J in *Andrews*,<sup>26</sup> both being cases about whether potentially immoral contracts, pertaining to and regulating existing states of extramarital cohabitation, were enforceable.

Before leaving this topic, it should be noted that the invalidation of a contract by a court on the grounds of public policy is but one part of the broader defence of illegality. This article does not seek to rationalise the array of authorities regarding what it means for a contract to be characterised as illegal,<sup>27</sup> and the consequences of

<sup>20</sup> See, eg, *Printing and Numerical Registering Co v Sampson* (1875) LR 19 Eq 462, 465 (Sir Jessel MR); *Cattanach v Melchior* (2003) 215 CLR 1, 86 [235] (Hayne J).

<sup>21</sup> *Sidameneo (No 456) Pty Ltd v Alexander* [2011] NSWCA 418 (21 December 2011) [86] (Young JA, Beazley and Basten JJA agreeing).

<sup>22</sup> *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, 275 [297] (Allsop CJ, Besanko and Middleton JJ agreeing).

<sup>23</sup> *Nelson v Nelson* (1995) 184 CLR 538, 597 (Toohey J).

<sup>24</sup> [1964] 2 QB 745, 767–8 (emphasis added) (*‘Hardy’*).

<sup>25</sup> (1986) 4 BPR 97262, 9245 (*‘Nichols’*).

<sup>26</sup> [1973] Qd R 93, 106. Diplock LJ’s dictum in *Hardy* [1964] 2 QB 745, 767–8 has also been cited with approval in *Gollan v Nugent* (1988) 166 CLR 18, 34–5 (Brennan J) and *Kavurma v Karakurt* (Unreported, Supreme Court of New South Wales, Santow J, 7 November 1994) 20.

<sup>27</sup> See, eg, *Yango Pastoral Co Pty Ltd v First Chicago Australia Ltd* (1978) 139 CLR 410, 413 (Gibbs ACJ); *Equiscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 513 [23] (French CJ, Crennan and

that conclusion. Given the ways in which a defence of illegality can arise, the law pertaining to the area is complex, with courts having historically struggled to identify a unifying rubric as to when a defence of illegality should be made out.<sup>28</sup> However, it is to be appreciated that in this article, the invalidation of the contracts under consideration is not because such contracts (either their formation, performance or otherwise) are expressly or impliedly contrary to statutory prohibitions or the public policy embodied in such provisions. Instead, such contracts are said to be contrary to a freestanding concept of public policy linked to notions of morality. As such, most of the authorities pertaining to the defence of illegality are not of direct assistance, since they concern the construction of statutory provisions and the attendant determination of whether the enforcement of the contract under scrutiny (or the grant of relief in respect of that contract) is consistent with those statutory provisions.

Nevertheless, it should be noted that two central themes have emerged from the recent jurisprudence on the defence of illegality and tie in with what has already been set out above. The first theme is the need for coherence in the law.<sup>29</sup> As Lord Toulson SCJ expressed the matter in the recent decision of *Patel v Mirza* (following earlier authority of the High Court of Australia): ‘the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand’.<sup>30</sup> As such, and in the field of public policy under consideration in this article, it is necessary for the dictates of any head of public policy to keep pace with legislative developments, so as to maintain coherence in the law. This point will be revisited throughout the article in analysing whether legislative developments have impliedly effaced (in whole or in part) the historical prohibition against the enforcement of contracts for the provision of sexual services for reward. The second theme is the notion of proportionality. This, again, has already been touched upon above in discussing Diplock LJ’s dictum in *Hardy*.<sup>31</sup> It will also be revisited throughout the article in analysing the correctness of a blanket ban on enforcing (or granting relief in respect of) contracts concerning the provision of sexual services for reward.

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Kiefel JJ); *Patel v Mirza* [2017] AC 467, 474 [3] (Lord Toulson SCJ, with whom Lady Hale DP and Lords Kerr, Wilson and Hodge SCJ agreed).

<sup>28</sup> *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215, 231–2 (Kirby J); *Patel v Mirza* [2017] AC 467, 474–6 [3]–[8] (Lord Toulson SCJ, with whom Lady Hale DP and Lords Kerr, Wilson and Hodge SCJ agreed); A Burrows, ‘Illegality as a Defence in Contract’ in S Degeling, J Edelman and J Goudkamp (eds), *Contract in Commercial Law* (Thomson Reuters, 2016) 435.

<sup>29</sup> See the recent decisions of *Miller v Miller* (2011) 242 CLR 446, 454 [15] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 513 [23] (French CJ, Crennan and Kiefel JJ); *Gnych v Polish Club Ltd* (2015) 255 CLR 414, 434 [72] (Gageler J). See also *Nelson v Nelson* (1995) 184 CLR 538, 611 (McHugh J); *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215, 229–230 (McHugh and Gummow JJ).

<sup>30</sup> *Patel v Mirza* [2017] AC 467, 499 [99] (with whom Lady Hale DP and Lords Kerr, Wilson and Hodge SCJ agreed).

<sup>31</sup> [1964] 2 QB 745, 767–8 and quote accompanying above n 24. In addition to that dictum, see also *Nelson v Nelson* (1995) 184 CLR 538, 612–13 (McHugh J); *Fitzgerald v F J Leonhardt Pty Ltd* (1997) 189 CLR 215, 230 (McHugh and Gummow JJ), 250–1 (Kirby J); *Patel v Mirza* [2017] AC 467, 504–5 [120] (Lord Toulson SCJ, with whom Lady Hale DP and Lords Kerr, Wilson and Hodge SCJ agreed).

## B *Determining What Public Policy Requires*

In light of the mutable nature of public policy, care must be taken in automatically applying previous decisions declaring certain contracts as being contrary to public policy. This is particularly so when regard is had to the extent to which what is considered contrary to public policy has changed over time, a point illustrated by the following four matters concerned with related areas of morality.

First, separation deeds between husband and wife were once regarded as contrary to public policy, however this is no longer the case.<sup>32</sup> In *Besant v Wood*, Jessel MR stated that historically it was supposed that a civilised country could no longer exist if the courts enforced separation deeds. However, as Jessel MR stated in that decision, judicial opinion changed ‘and people began to think that after all it might be better and more beneficial for married people to avoid in many cases the expense and the scandal of suits of divorce by settling their differences quietly by the aid of friends out of Court’.<sup>33</sup> Likewise, in the United Kingdom (‘UK’) Supreme Court decision of *Granatino v Redmacher*, the plurality stated: ‘the old rule that agreements providing for future separation are contrary to public policy is obsolete and should be swept away’.<sup>34</sup>

In Australia, the existence of pt VIIIA of the *Family Law Act 1975* (Cth), concerning the making of financial agreements pertaining to the circumstances in which a marriage breaks down, and pt VIIIAB div 4 of the *Family Law Act 1975* (Cth) in relation to financial agreements between de facto couples, is the strongest evidence that this head of public policy no longer exists. Adopting the principle of coherence espoused in High Court authorities, this head of public policy can no longer stand in light of such statutory provisions, to say nothing about earlier authorities holding as much, as cited above.

Second, contracts between unmarried persons to cohabit were historically treated as unenforceable, being contrary to public policy by promoting immorality.<sup>35</sup> Thus, in *Fender v St John-Mildmay*, Lord Wright stated: ‘The law will not enforce an immoral promise, such as a promise between a man and woman to live together without being married’.<sup>36</sup> However, such a head of public policy has withered and disappeared. Statutes now provide that unmarried persons may enter into a domestic relationship agreement or termination agreement, which is enforceable in accordance with the law of contract.<sup>37</sup> As Mahoney JA stated in *Wallace v Stanford*: ‘There was a time when the law did not recognise cohabitation; it saw cohabitation

<sup>32</sup> *Re Morris* (1943) 43 SR (NSW) 352, 356 (Jordan CJ).

<sup>33</sup> (1879) 12 Ch D 605, 620.

<sup>34</sup> [2011] 1 AC 534, 558 [52] (Lord Phillips P, Lord Hope DP, and Lords Rodger, Walker, Brown, Collins and Kerr SCJJ). See also at 574 [125] (Lord Mance SCJ); *Mohamed v Mohamed* (2012) 47 Fam LR 683, 693 [50] (Harrison AsJ).

<sup>35</sup> *Benyon v Nettlefold* (1850) 3 Mac & G 94; 42 ER 196; *Ayerst v Jenkins* (1873) LR 16 Eq 275.

<sup>36</sup> [1938] AC 1, 42.

<sup>37</sup> See *Family Law Act 1975* (Cth) pt VIIIAB div 4; *Domestic Relationship Act 1994* (ACT) pt 4; *Property (Relationships) Act 1984* (NSW) ss 45–46; *De Facto Relationships Act 1991* (NT) ss 44–5; *Property Law Act 1974* (Qld) s 270; *Domestic Partners Property Act 1996* (SA) pt 2; *Relationships Act 2006* (Tas) pt 6; *Relationships Act 2008* (Vic) ss 35A–36; *Family Court Act 1997* (WA) pt 5A div 3.

as involving illegality or irregularity and refused to provide for the incidents of it. This is no longer the law'.<sup>38</sup> Equally, the editors of *Chitty on Contracts* state: 'Extramarital cohabitation is obviously an area where values change and the older authorities clearly reflect a marriage morality which is out of tune with contemporary mores'.<sup>39</sup>

Third, the enforceability of marriage brokerage contracts has wavered over time. Until the 18<sup>th</sup> century, a contract by which a person procured the marriage of another in return for consideration was enforceable at law.<sup>40</sup> However, equity developed to prevent the enforcement of these contracts. Thus, a contract by which a marriage bureau undertook to make efforts to find a spouse for a client was held in *Hermann v Charlesworth* to be invalid because it involved 'the introduction of the consideration of a money payment into that which should be free from any such taint'.<sup>41</sup>

However, the continuing validity of this principle must be doubted. Atiyah stated in 1995 in *An Introduction to the Law of Contract*: 'it is hard to see what is wrong with [these contracts] in modern times'.<sup>42</sup> That passage is cited with approval in *Chitty on Contracts*.<sup>43</sup> Equally, Peel in *Treitel on the Law of Contract* states: 'The harmful tendencies of such contracts seem to be no greater than those of contracts between "computer dating" agencies and their clients; and it has not been suggested that such contracts are contrary to public policy'.<sup>44</sup> Indeed, today's society not only has dating agencies for unmarried people, there are agencies promoting and arranging extramarital affairs (for example, Ashley Madison). To suggest that the contracts between the clients of those agencies and the agencies themselves are unenforceable would be a highly surprising proposition, and incongruent with the present-day commercial world (noting that the provision of such services is perfectly legal and the common law's longstanding policy of upholding contracts freely entered into).<sup>45</sup>

<sup>38</sup> (1995) 37 NSWLR 1, 7 (citations omitted). See also *Ashton (No 2)* [2012] NSWSC 3 (16 January 2012) [42]. This followed the doubts about the unenforceability of agreements to cohabit expressed in *Seidler* [1982] 2 NSWLR 80, 99 (Hutley JA, with whom Hope and Reynolds JJA agreed); *Re Field and the Conveyancing Act* [1968] 1 NSWLR 210, 214 (Street J).

<sup>39</sup> H Beale et al (eds), *Chitty on Contracts* (Sweet & Maxwell, 33<sup>rd</sup> ed, 2018) vol 1, 1302 [16-099]. See also R A Buckley, *Illegality and Public Policy* (Sweet & Maxwell, 4<sup>th</sup> ed, 2017) 105–6 [6.22]; I J Hardingham, 'The Non-Marital Partner as Contractual Licensee' (1980) 12(3) *Melbourne University Law Review* 356, 368, quoting *Marvin v Marvin*, 18 Cal 3d 660, 683–4 (1976) ('*Marvin*'); S H Hosseini, *Restrictions on Contractual Liberty: A Comparative Study of Islamic (Shi'a) Jurisprudence and Anglo-Australian Common Law, with some References to the Civil Code of Iran* (PhD Thesis, University of New South Wales, 1997) 259–61 [6.53]–[6.56]; J L Dwyer, 'Immoral Contracts' (1977) 93(3) *Law Quarterly Review* 386.

<sup>40</sup> See, eg, *Goldsmith v Bruning* (1700) 1 Eq Ca Abr 89; 21 ER 901.

<sup>41</sup> [1905] 2 KB 123, 130.

<sup>42</sup> P S Atiyah, *An Introduction to the Law of Contract* (Oxford University Press, 5<sup>th</sup> ed, 1995) 323.

<sup>43</sup> Beale et al (eds), above n 39, 1304 [16-102].

<sup>44</sup> E Peel, *Treitel on the Law of Contract* (Sweet & Maxwell, 14<sup>th</sup> ed, 2015) 553–4 [11-042]. See also Buckley, above n 39, 104–5 [6.19]–[6.20].

<sup>45</sup> Although noted is the possible argument raised by Buckley that the principle in *Hermann v Charlesworth* [1905] 2 KB 123 may be distinguishable from application to modern dating agencies on the basis that such agencies arrange introductions to friendships and associations as opposed to marriage: Buckley, above n 39, 105 [6.20]. However, Buckley opines that the preferable argument is that *Hermann v Charlesworth* does not reflect contemporary public policy.

Fourth, contracts prejudicial to the status of marriage have historically been held to be contrary to public policy and unenforceable. However, as the authors of the Australian edition of *Cheshire and Fifoot's Law of Contract* state, the passage of the *Family Law Act 1975* (Cth) (introducing no-fault divorce) and s 111A of the *Marriage Act 1961* (Cth) (abolishing the action of breach of promise to marry) reflect a shift in public opinion that 'raises the question of whether this head of public policy should be considered moribund and extinct'.<sup>46</sup>

In addition to the above, and on the topic of social vices or immoral conduct, gambling contracts were, historically, unenforceable.<sup>47</sup> Nowadays, gambling is not illegal. It is, instead, regulated,<sup>48</sup> and while unlawful gambling contracts are unenforceable, lawful gambling contracts are enforceable.<sup>49</sup> While this change in the law has occurred not because of curial intervention, the change in legislative backdrop undeniably reflects an evolution and relaxation in social mores and contemporary values throughout the 20<sup>th</sup> century and into the 21<sup>st</sup> century. It is evidence of the change that has occurred in society as to what is, and is no longer, considered to be contrary to the welfare of the state.

Discovering at any given moment the status of any public policy may not be an easy task. This does not, however, absolve the courts from undertaking the task. As Sir Percy Winfield wrote in his 1928 article in the *Harvard Law Review*:

the better view seems to be that the difficulty of discovering what public policy is at any given moment certainly does not absolve the bench from the duty of doing so. The judges are bound to take notice of it and of the changes which it undergoes, and it is immaterial that the question may be one of ethics rather than of law. The basis for their decision is 'the opinions of men of the world, as distinguished from opinions based on legal learning'. Of course it is not to be expected that men of the world are to be subpoenaed as expert witnesses in the trial of every action raising a question of public policy. It is the judges themselves, assisted by the bar, who here represent the highest common factor of public sentiment and intelligence.<sup>50</sup>

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<sup>46</sup> N C Seddon and R A Bigwood, *Cheshire and Fifoot's Law of Contract* (LexisNexis, 11<sup>th</sup> Australian ed, 2017) 1014 [18.26] (citations omitted). See also J W Carter, *Contract Law in Australia* (LexisNexis, 7<sup>th</sup> ed, 2018) 568 [25.33].

<sup>47</sup> See *Gaming Act 1892* (Imp) c 9, s 1; *Gaming and Betting Act 1912* (NSW) s 16.

<sup>48</sup> See, eg, in the ACT: *Unlawful Gambling Act 2009* (ACT); *Casino Control Act 2006* (ACT); in NSW: *Unlawful Gambling Act 1998* (NSW); *Totalizator Act 1997* (NSW); *Casino Control Act 1992* (NSW); in the Northern Territory: *Gaming Control Act 2005* (NT); *Unlawful Betting Act 1989* (NT); in Queensland: *Casino Control Act 1982* (Qld); *Wagering Act 1998* (Qld); in South Australia: *Casino Act 1997* (SA); *Lottery and Gaming Act 1936* (SA); in Tasmania: *Gaming Control Act 1993* (Tas); *TT-Line Gaming Act 1993* (Tas); in Victoria: *Casino Control Act 1991* (Vic); *Gambling Regulation Act 2003* (Vic); in Western Australia: *Betting Control Act 1954* (WA); *Casino Control Act 1984* (WA).

<sup>49</sup> See, eg, in the ACT: *Unlawful Gambling Act 2009* (ACT) s 47; *Casino Control Act 2006* (ACT) s 116; in NSW: *Unlawful Gambling Act 1998* (NSW) s 56; *Casino Control Act 1992* (NSW) s 4(4); *Totalizator Act 1997* (NSW) s 8; in the Northern Territory: *Unlawful Betting Act 1989* (NT) s 4; in Queensland: *Casino Control Act 1982* (Qld) s 117; in South Australia: *Lottery and Gaming Act 1936* (SA) s 50; in Tasmania: *Gaming Control Act 1993* (Tas) s 8.

<sup>50</sup> P H Winfield, 'Public Policy in the English Common Law' (1928) 42(1) *Harvard Law Review* 76, 97 (citations omitted).

In *Seidler*, Hope JA set out the sources a judge can have regard to in order to inform himself or herself as to the current status of public policy, which includes: (a) statutes, both of the Commonwealth and the State Parliaments; (b) other decisions of judges; and (c) publicly available information, including Law Reform Commission reports (and the like), statements in Parliaments, literature, and publications in newspapers.<sup>51</sup> In *Hickin v Carroll (No 2)*, Kunc J included treaties and international agreements as material able to be drawn upon in order to determine the present status of a head of public policy, although such sources were said to be of lesser influence than legislative and common law developments.<sup>52</sup>

The determination as to the content of public policy is to be made at the time the court<sup>53</sup> is asked to enforce the contract.<sup>54</sup> That is to occur using the above sources and materials. Importantly, the term ‘public policy’ is not to be equated with the court being invested with a roving commission to declare contracts bad as being against idiosyncratic precepts of what is expedient for, or what would be beneficial or conducive to, the welfare of the state.<sup>55</sup>

### III Contracts Promoting Sexual ‘Immorality’

The law has, historically, held unenforceable contracts that promote sexual ‘immorality’ either directly or indirectly.<sup>56</sup> This distinction between direct and indirect promotion of sexual immorality will be used to divide the discussion in this Part — setting aside the difficulty of defining sexual ‘immorality’, which is addressed further below in Part IIID.

#### A Contracts Indirectly Promoting Sexual Immorality

Dealing with those cases concerning the indirect promotion of sexual immorality, the seminal case is *Pearce v Brooks*, where the plaintiff knowingly hired a brougham (a horse-drawn carriage) to a prostitute for the use by her professionally — to meet and provide services to clients in the brougham.<sup>57</sup> A suit to recover the hire fees was refused. Chief Baron Pollock stated: ‘any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied’.<sup>58</sup> Chief Baron Pollock held that no distinction could be drawn between an illegal and immoral purpose. There are other similar historical cases:

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<sup>51</sup> [1982] 2 NSWLR 80, 89–90.

<sup>52</sup> [2014] NSWSC 1059 (6 August 2014) [119].

<sup>53</sup> In *Coral Leisure Group Ltd v Barnett* [1981] ICR 503, 507, Browne-Wilkinson J (Messrs Clement-Jones and Hughes agreeing) stated that changes to public policy were to be undertaken by either the Parliament or the higher courts, as opposed to statutory tribunals.

<sup>54</sup> *Bondi Beach Astra Retirement Village Pty Ltd v Gora* (2011) 82 NSWLR 665, 745 [359] (Campbell JA, Giles and Whealy JJA agreeing).

<sup>55</sup> *Janson v Driefontein Consolidated Mines Ltd* [1902] AC 484, 491 (Lord Halsbury LC); *Wilkinson v Osborne* (1915) 21 CLR 89, 96 (Isaacs J); *Giles v Thompson* [1993] 3 All ER 321, 335 (Steyn LJ).

<sup>56</sup> Peel, above n 44, 554–5 [11-043]–[11-044].

<sup>57</sup> (1866) LR 1 Ex 213.

<sup>58</sup> *Ibid* 217.

- (i) In *Girardy v Richardson*, a landlord let a room knowing it would be used for prostitution.<sup>59</sup> An action for the rent was refused by Lord Kenyon: ‘the contract upon which it was attempted to be sustained was *contra bonos mores* [against good morals] and therefore could not support an action’.<sup>60</sup>
- (ii) In *Bowry v Bennett*, a vendor was refused relief in a suit for the price of clothes supplied to a prostitute to enable her to perform her trade, with the seller expecting to receive his price from the profit resulting from that trade.<sup>61</sup>
- (iii) In *Appleton v Campbell*, Abbott CJ stated: ‘[i]f a person lets a lodging to a woman, to enable her to consort with the other sex, and for the purposes of prostitution, he cannot recover for the lodging so supplied. ... [I]f this place was used for immoral purposes, the plaintiff cannot recover’.<sup>62</sup>
- (iv) In *Smith v White*, a lessor sued for outstanding rent payable by a brothel operator.<sup>63</sup> Vice-Chancellor Kindersley stated, in refusing the action, that ‘it appears to me that this claim arises just as much out of the immoral contract, and is just as much affected by the taint of immorality as a claim for rent’.<sup>64</sup>
- (v) In *Upfill v Wright*, the plaintiff let a flat to a woman whom he knew was the mistress of a man and therein assumed that the rent would come through her being a kept woman.<sup>65</sup> Justice Darling, in refusing the claim for rent, stated that the flat was let to the defendant for the purposes of enabling her to receive the visits of the man whose mistress she was and to commit fornication with him there.<sup>66</sup> Justice Darling reasoned that since fornication was clearly a sin and immoral (and still an offence in ecclesiastical courts),<sup>67</sup> and the landlord had participated in this illegal or immoral act, no action for the rent could lie. Justice Bucknill concurred in a separate judgment.<sup>68</sup>

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<sup>59</sup> (1793) 1 Esp 13; 170 ER 265.

<sup>60</sup> *Ibid* 13; 265.

<sup>61</sup> (1808) 1 Camp 348; 170 ER 981. Although compare to that case the decision in *Lloyd v Johnson* (1798) 1 Bos & Pul 340; 126 ER 939, where the plaintiff sued to recover from the defendant amounts owed for washing done for the defendant. The items washed by the plaintiff included dresses used by the defendant to allure men to sleep with her and nightcaps for her clients. Notwithstanding the ‘immoral’ use to which some of the items had been put, the claim for unpaid washing was upheld. Buller J remarked: ‘This unfortunate woman must have clean linen, and it is impossible for the Court to take into consideration which of these articles were used by the Defendant to an improper purpose and which were not’.

<sup>62</sup> (1826) 2 C & P 347, 347–8; 172 ER 157, 157.

<sup>63</sup> (1866) LR 1 Eq 626.

<sup>64</sup> *Ibid* 630–1.

<sup>65</sup> [1911] 1 KB 506.

<sup>66</sup> *Ibid* 510.

<sup>67</sup> *Ibid* 511.

<sup>68</sup> *Ibid* 512–3.

## B *The Present Day Status of the Law Pertaining to Contracts Indirectly Promoting Sexual Immorality*

Each of the cases referred to in Part IIIA above cannot be considered good law today, at least not in NSW. This is because the public policy in those cases is outdated. Analysing the types of sources referred to in *Seidler*, this conclusion is supported and illustrated by the following three points.

First, since 1995 brothels have been legal in NSW. This was facilitated by the passage of the *Disorderly Houses Amendment Act 1995* (NSW). This Act inserted s 580C into the *Crimes Act 1900* (NSW),<sup>69</sup> which abolished the common law offence of keeping a common bawdy house or brothel.<sup>70</sup> Equally, the Act amended s 15 of the *Summary Offences Act 1988* (NSW),<sup>71</sup> to make it no longer an offence for owners and managers of brothels to live off the earnings of an employed prostitute.

However, critically, the *Disorderly Houses Amendment Act 1995* (NSW) amended the *Disorderly Houses Act 1943* (NSW)<sup>72</sup> to permit the operation of brothels, as well as inserting ss 16 and 17 which pertain to regulating the operation of brothels. In particular, s 16 provides that a declaration under s 3 of the *Restricted Premises Act 1943* (NSW) can no longer be made solely on the basis that a premise is a brothel. Likewise, s 17 permits local councils to make applications to the NSW Land and Environment Court to compel an owner/occupier of a brothel to cease operating a brothel, but such an application can only be brought if the local council has received sufficient complaints from residents and it is of the opinion the brothel should cease for one or more reasons set out in the Act, which do not include the fact that the premises is a brothel.

Accordingly, post-1995, the operation of a brothel<sup>73</sup> has been legal and regulated in NSW. The same position, incidentally, also prevails in the ACT,<sup>74</sup> Queensland<sup>75</sup> and Victoria.<sup>76</sup> As such, despite the decisions in *Girardy v Richardson*,

<sup>69</sup> *Disorderly Houses Amendment Act 1995* (NSW) sch 2 item 2.1.

<sup>70</sup> In *Sibuse Pty Ltd v Shaw*, McHugh JA accepted that while no person in living memory had been charged with the common law offence of keeping a bawdy house (a brothel), legislative enactments to that date had not abolished the offence: (1988) 13 NSWLR 98, 122. See also *R v Rahme* (1993) 70 A Crim R 357.

<sup>71</sup> *Disorderly Houses Amendment Act 1995* (NSW) sch 2 item 2.3.

<sup>72</sup> Now known as the *Restricted Premises Act 1943* (NSW).

<sup>73</sup> Defined in the *Restricted Premises Act 1943* (NSW) as premises used for prostitution: *ibid* s 2.

<sup>74</sup> Section 18 of the *Sex Work Act 1992* (ACT) proscribes the operation of a brothel other than from a 'prescribed location'. Regulation 2 of the *Sex Work Regulation 2018* (ACT) stipulates the division of Fyshwick in the Central Canberra district and the division of Mitchell in the Gungahlin district as prescribed locations.

<sup>75</sup> Part 3 of the *Prostitution Act 1999* (Qld) establishes a licensing system for the operation of brothels. Part 5 of the Act allows for unlicensed brothels and brothels operated in a manner contrary to the *Planning Act 2016* (Qld) to be declared as 'prohibited brothels'. Part 6 of the *Prostitution Act 1999* (Qld) sets out offences in relation to operating a licensed brothel. Operating an unlicensed brothel is still an offence: see *Criminal Code Act 1899* (Qld) sch 1 ss 229K(2), (3A), which proscribe a person having an interest in premises knowingly used for the purposes of prostitution by two or more prostitutes, except for an interest in premises in relation to a licensed brothel.

<sup>76</sup> Part 4 of the *Sex Work Act 1994* (Vic) provides for a licensing system in respect of brothels. This Act operates in tandem with the *Planning and Environment Act 1987* (Vic). Like in NSW, the operation of brothels is largely a planning issue.

*Appleton v Campbell, Smith v White* and *Upfill v Wright*, a landlord has been successful in NSW in suing to recover outstanding rent owed by a lessee of a premises knowingly being used for the purposes of prostitution.<sup>77</sup> Equally, consistent with brothels now being regulated businesses, the NSW Land and Environment Court hears and determines applications to permit a premise to be used as a brothel (as well as applications to prohibit the ongoing use of premises for such a purpose).<sup>78</sup>

Second, the criminalisation and regulation of prostitution and solicitation in NSW has also relaxed over recent years. The act of prostitution in NSW is not, per se, illegal — although certain public acts of prostitution are illegal, namely, engaging in sexual activity for money in, or within view from, a school, church, hospital or public place, or within view from a dwelling.<sup>79</sup> Nor is solicitation, either of or by a prostitute, illegal in NSW, except in certain areas; namely, within a ‘road or road related area’ that is ‘near or within view from a dwelling, school, church or hospital’, or actually within a ‘school, church or hospital’.<sup>80</sup> Likewise, only certain premises cannot be used for acts of prostitution,<sup>81</sup> although premises cannot be advertised as being used, or available for use, for the purposes of prostitution.<sup>82</sup>

Importantly, the current text of ss 19 and 19A of the *Summary Offences Act 1988* (NSW), which prohibits solicitation in certain public places in NSW, is a relaxation of what appeared in s 28 of the *Summary Offences Act 1970* (NSW), which proscribed a person from soliciting another, for the purposes of prostitution, in or near any public place. The *Summary Offences Act 1970* (NSW) was replaced by the *Prostitution Act 1979* (NSW), with s 8A of that latter Act in a similar form to s 19 of the *Summary Offences Act 1988* (NSW).<sup>83</sup> Likewise, abolished from the statute books is the crime committed by a ‘reputed prostitute’ of being present at premises habitually used for prostitution or solicitation.<sup>84</sup> Similarly, and as noted above, the common law offence of keeping a common bawdy house or brothel has also been abolished.<sup>85</sup> All these matters reflect a relaxation in the law and by society in relation to the commercial supply of sexual services.

<sup>77</sup> *Pike v Mangrove District Services Pty Ltd* [2000] NSWSC 914 (15 September 2000) (Bergin J).

<sup>78</sup> See, eg, *Yang v Blacktown City Council* [2005] NSWLEC 282 (19 May 2005); *City of Sydney Council v De Cue Pty Ltd* [2006] NSWLEC 763 (6 December 2006); *Alphatex Australia v Hills Shire Council (No 2)* [2009] NSWLEC 1126 (29 April 2009).

<sup>79</sup> *Summary Offences Act 1988* (NSW) s 20.

<sup>80</sup> *Ibid* ss 19–19A. The position is slightly stricter in the ACT, Queensland and Victoria, which proscribes solicitation in public places: *Sex Work Act 1992* (ACT) s 19; *Prostitution Act 1999* (Qld) s 73; *Sex Work Act 1994* (Vic) ss 12–13.

<sup>81</sup> *Summary Offences Act 1988* (NSW) s 17 (namely, any premises held out as being available: (a) for the provision of massage, sauna baths, steam baths or facilities for physical exercise, or (b) for the taking of photographs, or (c) as a photographic studio).

<sup>82</sup> *Summary Offences Act 1988* (NSW) s 18. Advertisements for employment as a prostitute are also illegal: *Summary Offences Act 1988* (NSW) s 18A. This, however, does not prohibit a prostitute advertising his or her services.

<sup>83</sup> Although, at the time the *Prostitution Act 1979* (NSW) was originally enacted, it contained no prohibition on soliciting in public places. Section 8A was inserted pursuant to the *Prostitution (Amendment) Act 1983* (NSW) sch 1 items 2–3. It, therefore, must be conceded that the direction of reform has not been unidirectional over the past 40 years; however, the overwhelmingly trend has been one of relaxation of prohibitions.

<sup>84</sup> *Summary Offences Act 1970* (NSW) s 29.

<sup>85</sup> See above nn 69–70 and accompanying text.

Third, the judicial receptiveness of the stringent policy that underpinned each of the historical cases set out in Part IIIA has waned, as demonstrated below:

- (i) In *Armhouse Lee Ltd v Chappell*, the defendants were engaged in the business of renting and operating telephone sex lines at premium rates.<sup>86</sup> The defendants entered into a contract with the plaintiff for the latter to advertise the former's telephone sex lines. The defendants began to fail to pay the plaintiff, prompting the plaintiff to bring an action to recover the money owed to it by the defendants. The Court of Appeal of England and Wales dismissed the argument that the contract was not enforceable because it was contrary to public morality. Lord Justice Brown held that there was no generally accepted moral code that condemned these telephone sex lines; rather, on the contrary, society appeared not merely to have accepted their existence, but to have placed them under the express control of an independent body.
- (ii) In *Barac v Farnell*, the plaintiff, who was a receptionist at a brothel, brought a claim for workers' compensation.<sup>87</sup> The Court considered whether the receptionist was aiding or abetting persons to commit either the statutory or common law offence of keeping a brothel (which illegality was said to have impugned her contract of employment and, therefore, her entitlement to workers' compensation) or whether her contract of employment was tainted by the immorality of her employer's line of work (and therefore equally denied her a right to worker's compensation). Justice Beaumont held that 'if there is a rule of public policy to be applied in this area, it should be used to defeat claims made by the principals in the affair, rather than claims made against the principals'.<sup>88</sup> It is submitted the position is even clearer in the present day given that brothels are now legal in NSW.
- (iii) Similarly, in *Phillipa v Carmel*, a claim by a prostitute against the brothel owner for unfair dismissal was not held to be barred by the suggested immorality of the employment.<sup>89</sup>
- (iv) In *Westpac Banking Corporation v Bower*, the plaintiff had lent funds to the defendant to allow the purchase of two properties that the defendant intended to operate as a brothel.<sup>90</sup> At the relevant time, brothels were illegal in the ACT. There was a default by the defendant and Westpac sought to enforce its mortgage and obtain possession. The defendant resisted on the basis that the contract of borrowing was illegal — the money knowingly having been lent to

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<sup>86</sup> (Unreported, Court of Appeal, Brown, Aldous and Schiemann LJJ, 23 July 1996).

<sup>87</sup> (1994) 53 FCR 193.

<sup>88</sup> *Ibid* 207. Justices Higgins and Carr gave separate judgments, both holding that neither statute nor public policy rendered the receptionist's contract of employment illegal.

<sup>89</sup> [1996] IRCA 451 (10 September 1996).

<sup>90</sup> [1996] ACTSC 21 (4 April 1996).

further ‘immoral’ purposes. Master Connolly rejected this argument and, citing both *Hayden (No 2)* and *Barac v Farnell*, stated:

I do not see how justice would be done if a party to a commercial loan agreement is able to simply refuse to repay the loan by pleading that they themselves engaged in unlawful or immoral conduct. A prospective purchaser of a high performance motor vehicle could well enquire of its ability to travel in excess of 110 kph on the motorway, and yet they surely could not defeat a claim for the balance of the purchase price by pleading illegality.<sup>91</sup>

In these circumstances, the historical cases holding contracts that indirectly promote sexual immorality on grounds of public policy no longer have legal weight in NSW. Given the progression over the past 30 years, it is difficult to conceive, at least in NSW, of any case where public policy could legitimately be invoked to strike down a contract that indirectly promoted ‘sexual immorality’ or ‘immorality’ (putting aside the difficulty in defining such expressions). Only in those cases where the contract concerned the commission of a criminal offence would there be a justification for not enforcing that contract and, in those circumstances, the striking down of the contract would not be pursuant to the notion of ‘public policy’ as discussed in this article.<sup>92</sup>

### C *Contracts Directly Promoting Sexual Immorality*

This then turns attention to cases dealing with the unenforceability, on public policy grounds, of contracts that directly promote sexual immorality. In *Treitel on the Law of Contract*, Peel states that the law now draws a distinction between contracts that have ‘purely meretricious purposes and those which are intended to regulate stable extra-marital relationships’,<sup>93</sup> with the former unenforceable, but the latter not. This statement reflects, as has been noted above, the established effacement of the perceived immorality of extramarital cohabitation and relationships, a change that has not been recognised as having occurred with respect to contracts for meretricious sexual services.

The above passage from *Treitel on the Law of Contracts* was quoted with approval by Young J in *Markulin v Drew*.<sup>94</sup> It is apposite to begin discussion about the historical unenforceability of contracts for meretricious sexual services with this case, as it is one of the few cases that has directly considered the point, and not merely stated as much in passing.

In *Markulin*, decided in 1993, Young J interpreted the distinction that *Treitel on the Law of Contracts* was making as:

<sup>91</sup> Ibid [14]. The analogy adopted by Master Connolly may not have been entirely apposite; however, the conclusion was certainly correct.

<sup>92</sup> To give an example, a contract whereby a person (a pimp), outside the operation of a brothel, retained another to provide sexual services to third parties, with the former party taking a portion of the earnings of the latter. An action by the pimp for his or her share of the prostitute’s earnings would rightly not be countenanced by a court in NSW in light of s 15(1) of the *Summary Offences Act 1988* (NSW), which prohibits a person (not operating a brothel) living off the earnings of a prostitute.

<sup>93</sup> Peel, above n 44, 554 [11-043].

<sup>94</sup> (1993) DFC ¶95-140, 76,723 (*‘Markulin’*), quoting *Treitel on the Law of Contracts* (8<sup>th</sup> ed).

between a man and woman who are sharing a life together though not married including sexual relations ... and a man and a woman who are living independent lives but the man is rewarding the woman for sexual services which she provides from time to time.<sup>95</sup>

In determining the meaning of 'meretricious', his Honour drew a distinction between: (a) contracts of cohabitation; (b) a contract by a man with a woman to provide occasional sexual services; and (c) an agreement with a 'common prostitute'.<sup>96</sup>

Justice Young held that 'meretricious' probably meant not a contract with a prostitute, but rather a contract treating a woman as if she were a prostitute.<sup>97</sup> By comparison, Young J stated:

Cases such as *Bainham v Manning* (1691) 23 ER 756 suggest that while relief would not be given to a man against a bond he had given to a common strumpet or prostitute, equity would not countenance a transaction whereby a man had given a bond to a housekeeper to secure a sum of money to her if she provided 'secret services', presumably attending on her master for sex if required.<sup>98</sup>

The correctness of this statement is returned to below in discussing further the case of *Bainham v Manning*, among others. On one view, it appears Young J was suggesting that the law may grant certain relief in respect of a contract with a prostitute, but not in respect of a contract with meretricious purposes, which contention is equally returned to below.

Ultimately, in *Markulin* Young J held that the contract in that case (where the plaintiff was to receive \$40 000 per year for visiting the deceased four times a year and telephoning him) was a contract with purely meretricious purposes and, therefore, unenforceable: the sum of money involved and the scant services admitted to be provided indicated that sex was contemplated as part of the services to be rendered, and not as an optional extra.<sup>99</sup>

The validity of the distinction drawn by Young J between a contract to provide meretricious sexual services and a contract with a 'common prostitute' is highly questionable for two reasons. First, it is unclear what is the difference between a contract of prostitution and a contract to treat a person as if he or she were a prostitute. Related is the difficulty in identifying the dividing line between a person fitting the characterisation of a 'common strumpet or prostitute' (whatever that expression exactly means) and a person who merely provides meretricious sexual services. Second, the relevance of the distinction is also unclear. The authorities do not bear out an accepted principle that contracts of prostitution are (or ever were) enforceable or that courts might assist prostitutes, in contradistinction to others, in recovering or retaining their remuneration (or gifts) in certain circumstances.

On this latter point, there are historical references to distinctions being drawn between prostitutes and mistresses (discussed in the sub-paragraphs below), but it is not a distinction that has, on the whole, been embraced, explained or rationalised.

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<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid 76,723–76,724.

What appears from the cases below is that there was, at least in the 17<sup>th</sup> and 18<sup>th</sup> centuries, a general aversion to ‘common prostitutes, strumpets or harlots’ (the terminology used in the cases) retaining property given to them (even voluntarily), as opposed to property or money voluntarily given to a mistress. The law appeared to reason that the former women preyed on men, thereby warranting the granting of relief, even in relation to property voluntarily conveyed to such persons, as opposed to property voluntarily conveyed to mistresses (notwithstanding any taint of immorality). Thus:

- (i) In the decision of *Bainham v Manning*, which was cited by Young J in *Markulin*, the headnote reads: ‘Bond to a housekeeper for secret services. Equity will not relieve: otherwise if the bond was given to a common strumpet’.<sup>100</sup> The brief summary of the judgment refers to the decision of *Matthew v Hanbury*,<sup>101</sup> and states that in that case ‘there relieved against such a bond, because the woman appeared to have been a common strumpet, and by her insinuation prevailed upon the old man’.<sup>102</sup> This summary of *Bainham v Manning* should be compared to that appearing in *Markulin*,<sup>103</sup> where Young J appears to have reversed the ratio decidendi of the case.
- (ii) Consistently, in *Whaley v Norton & Al*, a voluntary bond was given to a mistress, with Trevor MR stating: ‘But if it had been charged in the bill, that the defendant was a common strumpet, and she commonly dealt and practised after that sort, and used to draw in young gentlemen, in such case ... the Court should relieve’.<sup>104</sup>
- (iii) However, in *Hill v Spencer*, a common prostitute was successful in resisting an action to recover a bond that the plaintiff’s deceased brother had voluntarily given to her.<sup>105</sup> Lord Camden stated that given there was no evidence of fraud, and the bond was given voluntarily (and not for consideration), there was no room for equity to intervene, notwithstanding the defendant’s status as a ‘common prostitute’.<sup>106</sup> The previous cases that had determined against securities given to common prostitutes went upon the circumstances of the securities being given previous to the cohabitation; a consideration which being *turpis* in its nature, the Court has relieved against them.<sup>107</sup>

However, as noted above, the distinction between ‘common prostitutes, strumpets or harlots’, and other persons who engaged in sexual intercourse outside of marriage, does not appear to have continued through the 19<sup>th</sup> and 20<sup>th</sup> centuries and into the 21<sup>st</sup> century. For instance, in the 1910 decision of *Upfill v Wright*,

<sup>100</sup> (1691) 2 Vern 242; 23 ER 756.

<sup>101</sup> (1690) 2 Vern 187; 23 ER 723 (where the woman was a ‘common harlot’).

<sup>102</sup> *Bainham v Manning* (1691) 2 Vern 242, 242; 23 ER 756, 756.

<sup>103</sup> *Markulin* (1993) DFC ¶95-140, 76,723.

<sup>104</sup> (1687) 1 Vern 483, 484; 23 ER 608, 608 (citations omitted).

<sup>105</sup> (1767) Amb 641; 27 ER 416.

<sup>106</sup> *Ibid* 643; 416–17.

<sup>107</sup> *Ibid* (emphasis altered) (citations omitted).

Darling J stated that it made no difference whether the defendant was a common prostitute or a mistress: ‘the house is let to her for the purpose of committing the sin of fornication ... [which] is sinful and immoral’.<sup>108</sup>

Curious, and by contrast to the above, is what Barton wrote in a case note in the *Law Quarterly Review* on the decision of *Tanner v Tanner* (a case concerning cohabitation between unmarried persons and the keeping of a mistress):<sup>109</sup>

It is characteristic that the majority of the old canonists allowed the prostitute an action for her remuneration. They allowed it on the ground that she might follow an immoral profession, but that since she did follow it, it was not immoral for her to take fees.<sup>110</sup>

No authority is cited in support of this statement. The above cases would appear to be against such a proposition as representing any state of the civil law.<sup>111</sup> Moreover, if Barton’s statement did, in fact, represent the law historically, it is a view that has not subsisted.

Moving on from the decision of *Markulin*, the unenforceability of a contract for meretricious sexual services was also discussed by Hope JA in the 1982 decision of *Seidler* — a case where the point did not rise for direct consideration:

Going then to the area of sexual morality, there is no doubt that a contract to provide meretricious sexual services is and has long been regarded as contrary to public policy and illegal. The Supreme Court of California, in a decision which has had far reaching consequences in the United States, has held that this is as far as the law goes in this regard: *Marvin v Marvin* (1976) 18 Cal 3d 660; 134 Cal Rptr 815. However the present agreement did not involve meretricious sexual services, but a sexual relationship as part only of a wider relationship.<sup>112</sup>

Justice of Appeal Hope did not define what was meant by ‘meretricious sexual services’, and did not employ the same distinction as was later adopted by Young J in *Markulin* between such contracts and those with a ‘common prostitute’. The only decision cited in support was the Supreme Court of California decision in *Marvin*.<sup>113</sup> That case concerned a contract between non-marital partners as to how they were to split the assets they had acquired during their relationship on its dissolution. Judge Tobriner stated:

In summary, we base our opinion on the principle that adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights. *Of course, they cannot lawfully contract to pay for the performance of sexual services, for such a contract is, in essence, an agreement for prostitution and unlawful for that reason.*

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<sup>108</sup> [1911] 1 KB 506, 510.

<sup>109</sup> [1975] 1 WLR 1346.

<sup>110</sup> J L Barton, ‘Notes’ (1976) 92(2) *Law Quarterly Review* 168, 170.

<sup>111</sup> As opposed to canon law, which may (although doubtful) have provided otherwise, but this is beyond the scope of this article.

<sup>112</sup> [1982] 2 NSWLR 80, 88–9.

<sup>113</sup> 18 Cal 3d 660 (1976).

As we have explained, the nonenforceability of agreements expressly providing for meretricious conduct rested upon the fact that such conduct, as the word suggests, pertained to and encompassed prostitution.<sup>114</sup>

Caution, however, must be adopted in placing too much reliance on the decision of *Marvin* in an Australian context. In understanding that decision, it must be appreciated that in California, unlike in NSW, the act of prostitution is illegal. At the time of *Marvin*, s 647(b) of the *California Penal Code* (1971) prohibited (as it still does) a person from not only soliciting a prostitute, but also engaging in any act of prostitution. This context is relevant to understanding the dictum in *Marvin* regarding why a person cannot lawfully contract to pay for the performance of sexual services. It is expressly forbidden by statute.

These points aside, the historical position as to the unenforceability of contracts for the provision of meretricious sexual services on the grounds of public policy has never been doubted.<sup>115</sup> Of course, as demonstrated above, few cases have needed (or raised the opportunity) to address the point directly. The facts of *Markulin* raised the issue; however, as revealed above, Young J's reasoning is not free from confusion, and that decision is 25 years old and pre-dates a number of important legislative and social changes in NSW, particularly the decriminalisation of brothels. Other cases have stated the principle, but either not part of the strict ratio decidendi of the case (for example, Hope JA in *Seidler*, which decision is even older than *Markulin*) or citing authority regarding the indirect promotion of sexual immorality, the continuing worth of which authorities has been addressed above. Nevertheless, the principle is historically entrenched. The question is whether it is still justified and maintainable.

## **D    *The Present Day Status of the Law Pertaining to Contracts Directly Promoting Sexual Immorality***

Notwithstanding the weight of the above authorities, and the duration of the historical prohibition, it is contended that the position is different today, at least in NSW.<sup>116</sup> In light of both changes to the legislative landscape and social mores, it is submitted that it is no longer correct to state absolutely that contracts for meretricious sexual services are contrary to public policy in NSW and are, therefore, unenforceable. This is for a number of reasons.

First, as already stated above, the act of prostitution is legal in NSW, as compared to California (whose law governed the decision in *Marvin*), with the criminalisation of prostitution having relaxed over time as noted above. Operating a brothel in NSW is currently legal and the decriminalisation of such an activity can

<sup>114</sup> Ibid 674, 683 (Wright CJ, McComb, Mosk, Sullivan and Richardson JJ concurring) (emphasis added).

<sup>115</sup> In addition to those cases cited above are: *Coral Leisure Group Ltd v Barnett* [1981] 1CR 503, 506 (Browne-Wilkinson J, Messrs Clement-Jones and Hughes agreeing); *Hagenfelds v Saffron* (Unreported, Supreme Court of New South Wales, Powell J, 26 March 1986).

<sup>116</sup> Perhaps in the ACT, Queensland and Victoria too. However, as has been noted at the outset, it is beyond the scope of this article to examine each of those jurisdictions in a satisfactory manner so as to be able to state the same position prevails with the same confidence as is contended with respect to NSW.

only be seen as a tacit acceptance by society of the provision of sexual services for reward. Accordingly, in striving for coherence in the law, it seems difficult to justify maintaining the historical prohibition on the enforcement of contracts for the provision of meretricious sexual services. For instance, given the regulated nature of brothels in NSW, it would be surprising if the owner or operator of a lawful establishment could not sue a customer for unpaid sexual services rendered. If such an action were permitted, being one for the recovery of fees for sexual services, it is difficult to see why the law would deny the same action brought directly by a service provider (for example, a sex worker).

It is to be appreciated at this juncture that the contention proffered in this article is not merely that because prostitution is legal, courts should enforce such contracts. The law does not merely render void or unenforceable only those contracts that expressly or impliedly violate a statutory provision or rule of the common law. For instance, the law on restraint of trade — though voiding only unreasonable restraints — stands in contrast. Instead, the argument is more nuanced. It proceeds on the basis that public policy in this area must take account of legislative developments concerning the commercial provision of sexual services. Those developments are such that the law would be discordant in permitting, for instance, the lawful operation of brothels, yet the wholesale denial of the right of a sex worker to sue for sexual services rendered. This is particularly so in light of the limited and restrained role that a freestanding notion of public policy has to play in the enforceability of contracts. The argument is also premised on the notion of proportionality, which does not appear to justify a blanket prohibition on the enforcement of contracts for the provision of meretricious sexual services (or denying relief in respect of such contracts).

Second, as highlighted above, many of the old heads of public policy, many of which concerned immorality, have withered and fallen away. The same has happened to the old case law concerning contracts that indirectly promoted sexual immorality, which are no longer good law, at least in NSW. Society has dramatically changed since the 18<sup>th</sup> and 19<sup>th</sup> centuries in which the public policy denouncing contracts for meretricious sexual services was formulated and cemented. Many practices that were considered unparalleled vices and intolerable in those times are now mainstream and regulated. Along with prostitution and the operation of brothels is, for example, gambling, which is now prolific. To borrow the language of Stable J in the 1973 decision of *Andrews* (which language only rings truer in 2018): what was regarded as a ‘pious horror’ when decisions such as *Pearce v Brooke* were decided would ‘today hardly draw a raised eyebrow or a gentle “tut-tut”’.<sup>117</sup> Indeed:

[the] cases discussing what was then by community standards sexual immorality appear to have been decided in the days when for the sake of decency the legs of tables wore drapes, and women (if they simply had to do it) never referred to men’s legs as such, but called them their ‘understandings’.<sup>118</sup>

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<sup>117</sup> [1973] Qd R 93, 104.

<sup>118</sup> *Ibid* 102. See also Stable J’s comments as to changing social attitudes at 104:

George Bernard Shaw’s Eliza Doolittle (circa 1912) thought the suggestion that she have a bath in private with her clothes off was indecent, so she hung a towel over the bathroom mirror. One

Third, society has experienced a dramatic sexual revolution, particularly in the last 30 years, but also over the entirety of the 20<sup>th</sup> century.<sup>119</sup> This has largely effaced the former bright line between moral and immoral sexual practices. As Browne-Wilkinson V-C recognised in 1988 in the decision of *Stephens v Avery*, while in 1915 there was a code of sexual mores accepted by the overwhelming majority of society, in 1988 there was no such general code.<sup>120</sup> The position is even more pronounced in 2018, some 30 years after *Stephens v Avery* was decided.

Thus, extramarital cohabitation and sexual intercourse is perfectly legal and nowadays widespread and socially accepted. In England, the law has long departed from permitting, in ecclesiastical courts, prosecutions for the ‘deadly sin’ of ‘fornication’.<sup>121</sup> The aforementioned practices, previously seen as immoral (along with divorce), no longer carry such stigma. As Lord Browne-Wilkinson stated in *Barclays Bank plc v O’Brien*: ‘Now that unmarried cohabitation, whether heterosexual or homosexual, is widespread in our society, the law should recognise this’.<sup>122</sup> The same ethos must be adopted in relation to commercial providers of sexual services. It is a prevalent industry and practice that, as at almost 15 years ago, was generating estimated annual revenue Australia-wide of approximately \$1.8bn.<sup>123</sup>

The sexual revolution that has occurred over the 20<sup>th</sup> century is evidenced no higher than the volte-face that has transpired in relation to society’s perception of (and hostility towards) homosexuality. In *Blackstone’s Commentaries on the Laws of England*, homosexuality was referred to as ‘*peccatum illud horribile, inter christianos non nominandum*’: that horrible crime not to be named among Christians.<sup>124</sup> Blackstone said that the very mention of the crime (it being ‘the infamous crime against nature’) was a disgrace to human nature and that it was a crime of ‘deeper malignity’ than rape.<sup>125</sup> This hostility persisted into the 20<sup>th</sup> century, with statutes criminalising homosexual conduct.<sup>126</sup> However, those provisions have now been repealed, with NSW repealing ss 79 and 80 of the *Crimes Act 1900* (NSW) (criminalising the ‘abominable crime of buggery’) in 1984 pursuant to the *Crimes*

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wonders what she would have thought and said to a suggestion that she wear in public one of today’s minuscule and socially accepted bikinis, held miraculously in place apparently with the aid of providence, and, possibly, glue.

<sup>119</sup> On this point, see Hosseini, above n 39, 256–8 [6.48]–[6.51]; Frank Bongiorno, ‘Sexuality: An Australian Historian’s Perspective’ (2013) 54 *Australian Humanities Review* 21; Frank Bongiorno, *The Sex Lives of Australians: A History* (Black Inc, 2012).

<sup>120</sup> [1988] Ch 449, 453.

<sup>121</sup> *Statute of Circumspete Agatis 1285*, 13 Edw 1, c 1. See also *Upfill v Wright* [1911] 1 KB 506, 510–11. The criminal jurisdiction of ecclesiastical courts was abolished by the *Ecclesiastical Jurisdiction Measure 1963* (UK) s 69. See also N Cox, ‘The Influence of the Common Law and the Decline of the Ecclesiastical Courts of the Church of England’ (2001–2) 3(1) *Rutgers Journal of Law and Religion* 1. [1994] 1 AC 180, 198.

<sup>123</sup> See Mary Sullivan, *What Happens When Prostitution Becomes Work? An Update on Legalisation of Prostitution in Australia* (2005) Coalition against Trafficking in Women Australia, 5–6 <<https://www.catwa.org.au/wp-content/uploads/2016/10/What-happens-when-prostitution-becomes-work.pdf>>.

<sup>124</sup> W Morrison (ed), *Blackstone’s Commentaries on the Laws of England* (Cavendish Publishing, 2001) vol 4, 168.

<sup>125</sup> *Ibid.*

<sup>126</sup> *Offences against the Person Act 1861* (Imp) ss 61–2; *Crimes Act 1900* ss 79–80. Both of these Acts criminalised the ‘abominable Crime of Buggery’.

(Amendment) Act 1984 (NSW).<sup>127</sup> Further, it is now generally illegal to discriminate on the grounds of homosexuality<sup>128</sup> and same-sex marriage has attained legal status.<sup>129</sup>

Fourth, it is to be noted that s 20 of the *Restricted Premises Act 1943* (NSW) states:

The enactment of the *Disorderly Houses Amendment Act 1995* should not be taken to indicate that Parliament endorses or encourages the practice of prostitution, which often involves the exploitation and sexual abuse of vulnerable women in our society.

On one view, that provision stands against any modification of the historical prohibition (on public policy grounds) against the enforceability of contracts for the provision of meretricious sexual services. However, the better view is this is not correct. Rather, the provision can be accommodated within the thesis posited in this article. Whilst expressly stating that Parliament does not endorse or encourage prostitution, the provision can also legitimately be seen as a recognition by Parliament as to the potential exploitation of persons involved in prostitution, a concern for those persons' welfare, and a desire to eliminate such exploitation (and hence why it is still a crime in NSW to encourage or lead a person into prostitution).<sup>130</sup>

In this light, maintenance by the courts of a blanket refusal to enforce contracts for meretricious sexual services only serves to compound this potential exploitation as recognised in s 20 of the *Restricted Premises Act 1943* (NSW). To borrow the language of Diplock LJ in *Hardy* set out above,<sup>131</sup> greater social harm is caused by refusing to enforce (for instance) an action by a sex worker for services rendered than from recognising the enforceability of such contracts. Indeed, in the present legal and social environment, it would be callous by any standard to refuse a sex worker's claim for unpaid fees for sexual services rendered. Any such refusal by the courts would be to condone unabashed exploitation of such persons, some of whom, as noted by s 20 of the *Restricted Premises Act 1943* (NSW), may already be the subject of exploitation.

Fifth, while some academics, such as Buckley (although writing from a UK perspective), confidently assert that the law would not entertain enforcing a contract for the provision of sexual services for reward,<sup>132</sup> this view is not universal. The authors of the 11<sup>th</sup> Australian edition of *Cheshire and Fifoot's Law of Contract* doubt the ongoing existence of the head of public policy denouncing contracts involving sexual immorality, stating that it is 'based on old decisions that now appear

<sup>127</sup> A position that has been replicated in all other States.

<sup>128</sup> *Anti-Discrimination Act 1977* (NSW) pt 4C; *Sex Discrimination Act 1984* (Cth) s 5A. There are exceptions or exemptions: see respectively *Anti-Discrimination Act 1977* (NSW) pt 6; *Sex Discrimination Act 1984* (Cth) pt II div 4. It is noted, however, that at the time of this article going to print, the Australian Parliament is considering the *Discrimination Free Schools Bill 2018* (Cth), which (broadly speaking) seeks to remove the ability of an educational institution established for religious purposes to discriminate against an employee, contract worker or student on the grounds of sexual orientation.

<sup>129</sup> *Marriage Amendment (Definition and Religious Freedoms) Act 2017* (Cth).

<sup>130</sup> *Crimes Act 1900* (NSW) ss 91A–91B; *Summary Offences Act 1988* (NSW) s 15A.

<sup>131</sup> See above n 24 and accompanying quote.

<sup>132</sup> Buckley, above n 39, 107 [6.24].

anachronistic'.<sup>133</sup> Equally, Burrows has written in passing: 'I have long found it surprising, for example, that the courts should ever in this context [illegality as a defence to contract] be concerned with what is described as "sexual immorality" unless criminal offences are being committed'.<sup>134</sup> That remark has much to commend it in light of the foregoing.

Further, recognising, at least in limited circumstances, the enforceability of contracts for meretricious sexual services would not be entirely unheralded. Since 2002, the Federal Republic of Germany has permitted a prostitute (and only a prostitute) to maintain an action for unpaid fees.<sup>135</sup> That step has not instigated a moral decline in that State or ushered in social catastrophe. Indeed, practical realities (including the likely embarrassment of suffering a public suit in relation to unpaid fees for sexual services rendered) will undoubtedly keep suits on meretricious contracts to a minimum. It will, however, ensure that persons who have provided valuable and lawful consideration (sexual services for reward) are not shut out from recovering from a promisee after providing said services.

In Germany the step advocated for in this article was taken by the German Parliament,<sup>136</sup> being necessary given it is a civil law country. However, parliamentary intervention is not necessary to achieve the same outcome in NSW. The current prohibition on enforcing contracts for meretricious sexual services is a judicially imposed one, predicated upon a doctrine conceived and enforced by the courts. The modification of the historical position only represents the application of existing legal doctrine, the acceptance of prevailing contemporary standards and mores, and the rejection of 'moral myopia', to borrow the language of Rogers CJ in *Comm Div in Edgley*.<sup>137</sup>

Sixth, to modify this inflexible head of public policy would bring greater clarity to the law. It is presently convoluted, with artificial distinctions being drawn between:

- (i) Contracts that regulate existing immorality and those that promote immorality, with the former enforceable but the latter not;<sup>138</sup>
- (ii) On the one hand, a contract to provide occasional sexual services and, on the other hand, an agreement with a 'common strumpet or prostitute' (and noting what is said above about the unsatisfactory nature of this distinction and what it imports);<sup>139</sup> and

<sup>133</sup> Seddon and Bigwood, above n 46, 1014 [18.27] (citations omitted).

<sup>134</sup> Burrows, above n 28, 456.

<sup>135</sup> *Gesetz zur Regelung der Rechtsverhältnisse der Prostituierten* [Act for the Regulation of the Legal Relations of Prostitutes] (Germany) 27 December 2001, BGBl, 2002, 3983, art 1. See also T Crofts, 'Prostitution Law Reform' (2002) 27(4) *Alternative Law Journal* 184, 185.

<sup>136</sup> Also noted is New Zealand, where s 7 of the *Illegal Contracts Act 1970* (NZ) would appear, at least textually, capable of permitting a court to award relief on an action on a contract concerning the provision of sexual services for reward. However, arguably against this interpretation is B Coote, 'Validation under the Illegal Contracts Act' in J W Carter and J Ren (eds), *Coote on the New Zealand Contract Statutes* (Thomson Reuters, 2017) 28, 35.

<sup>137</sup> (1988) 13 *ACLR* 179, 181.

<sup>138</sup> See Peel, above n 44, 554–5 [11-043]–[11-044].

<sup>139</sup> *Markulin* (1993) DFC ¶95-140, 76,723.

- (iii) Contracts for meretricious sexual services as opposed to contracts involving ‘a sexual relationship as part ... of a wider relationship that included cohabitation and aspects of mutual support’.<sup>140</sup>

Each of these distinctions has arisen as the law has attempted to process the changes to contemporary mores that has left almost all of the heads of public policy concerned with immorality by the wayside. This piecemeal approach has left the head of public policy denouncing (without exception) contracts for the provision of meretricious sexual services a lone survivor and jurisprudentially difficult to sustain, in light of the fact that: (a) many of the authorities that historically underpinned the prohibition are no longer good law (for example, all of the cases concerning the indirect promotion of sexual immorality); and (b) the developments in related areas of the law (for example, the law concerning extramarital cohabitation) have left opaque (if not impervious) the meaning of the word ‘immoral’ in this area.

For the above reasons, at least in NSW, public policy no longer supports the conclusion that contracts for the provision of meretricious sexual services (or contracts of prostitution, if there is any difference) are necessarily void or unenforceable. It cannot be said that all such contracts are ‘incontestably and on any view inimical to the public interest’, to borrow the language of Asquith LJ in *Monkland*, as endorsed by Mason J in *Hayden (No 2)*.<sup>141</sup> Nor does such conduct meet the high threshold of what constitutes ‘immorality’ according to legal standards, as that term was explained in *Orloff v Los Angeles Turf Club*, namely,

that which is hostile to the welfare of the general public and contrary to good morals. Immorality ... includes conduct inconsistent with rectitude, or indicative of corruption, indecency, depravity, dissoluteness; or as wilful, flagrant, or shameless conduct showing moral indifference to the opinions of respectable members of the community, and as an inconsiderate attitude toward good order and the public welfare.<sup>142</sup>

Moreover, holding such contracts as necessarily unenforceable or void does not cohere with the other aspects of the law pertaining to the regulation of the provision of sexual services for reward. Even if the commercial provision of sexual services still carries with it some stigma of immorality, it cannot be said that the gravity of the act of providing sexual services for reward, and any encouragement of that practice that may arise from enforcing contracts for meretricious sexual services, always outweighs the social harm caused by refusing to enforce such contracts.<sup>143</sup> At least in respect of actions brought by the service provider for his or her remuneration for having provided the requested sexual services, public policy weighs in favour of granting relief.

In reaching the above conclusion, I leave open the possibility that public policy may vary between the several states of the Commonwealth. It may be thought strange that such an outcome is possible, given the existence of a single common

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<sup>140</sup> See *Ashton (No 2)* [2012] NSWSC 3 (16 January 2012) [49].

<sup>141</sup> (1984) 156 CLR 532, 559.

<sup>142</sup> 36 Cal 2d 734, 740 (1951) (citations omitted).

<sup>143</sup> See above n 24 and accompanying quote.

law throughout Australia.<sup>144</sup> However, no incongruity exists between these two propositions. The same common law principles are applied in each state to determine the status and content of public policy in that state. Any divergence in the dictates of public policy between the states reflects the federalist nature of Australian government, with due regard being paid (as it should) to the differing aspects of each state's legislative landscape and social fabric.

It remains unresolved how far the above conclusion regarding public policy in NSW extends and whether all actions concerning a contract for the provision of sexual services for reward can be maintained. It is contended that, on the basis of the foregoing, in NSW the following is the state of public policy with respect to actions on contracts for the provision of sexual services for reward:

- (i) An action by a service provider to recover his or her remuneration for services rendered, or to sue for breach of contract — at least where, again, services have been rendered — should be allowed. To refuse such a cause of action is to condone the exploitation of the service provider, who will have found himself or herself having provided such services for no reward, contrary to the bargain struck;
- (ii) In such an action by the service provider, it would prima facie not appear fair to deny the recipient an entitlement to plead or claim a breach of contract in defence — although this point is subject to the considerations that appear below in (iii). There is a reasonable argument to be made that a recipient of the services should be able, in such an action by the service provider, to defray any liability by raising a countervailing claim for breach of contract; and
- (iii) Beyond this, greater difficulty arises. For instance, public policy may well refuse to permit a person to sue a service provider for breach of contract to provide sexual services. Obviously specific performance could not be sought of such a contract. However, questions remain whether a person should, for instance, be able to sue a service provider for failing to provide the requested services, or failing to provide them to a requisite standard. Unlike more common commercial contracts, the provision of sexual services for reward raises considerations pertaining to personal autonomy in relation to the most intimate of interactions. There are, therefore, cogent reasons against permitting a person to sue a service provider for failing to provide the requested services, or failing to provide them to a requisite standard. The satisfactory resolution of these matters will most likely need to occur on a case-by-case basis, with the court undertaking a delicate and considered balance of all relevant factors.

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<sup>144</sup> *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563; *Farah Constructions Pty Ltd v Say-Dee Ltd* (2007) 230 CLR 89, 152 [135].

#### IV Analysis of the Reasoning in *Ashton (No 2)*

In light of the above analysis, it is now appropriate to turn to the decision of *Ashton (No 2)*. Before dissecting the reasoning, it is to be noted again that in *Ashton (No 2)* the defendant did not plead, nor make any submission, that the agreement was unenforceable because it was contrary to public policy.<sup>145</sup> Accordingly, in writing his judgment, Brereton J did not have the advantage of detailed submissions on the topic of whether contracts for meretricious sexual services were still unenforceable.

In relation to the issue of immorality and public policy, His Honour's judgment commenced by acknowledging the traditional head of public policy treating as void and illegal contracts promoting sexual immorality and/or prejudicial to the status of marriage.<sup>146</sup> Cited in the judgment were the decisions of *Girardy v Richardson*, *Pearce v Brooks* and *Uphill v Wright* for the historical position as to contracts promoting sexual immorality.<sup>147</sup> As noted above, each of those cases (concerning contracts indirectly promoting sexual immorality) could not be considered good law today in NSW.

Following this, the judgment discussed the case law surrounding the historical prohibition on extramarital cohabitation and found that public policy surrounding these contracts had waned with changing social mores.<sup>148</sup> This is undoubtedly correct, for the reasons given above.

From this proposition, Brereton J then considered the decisions of *Marvin*,<sup>149</sup> *Seidler*,<sup>150</sup> *Nichols*,<sup>151</sup> and *Markulin*<sup>152</sup> with part of what Young J said in *Markulin* endorsed.<sup>153</sup> Except for *Nichols*, each of the previous cases has been discussed above. *Nichols* was not a case about a contract directly (or indirectly) promoting sexual immorality. Instead, it was a case about extramarital cohabitation, and a claim by a plaintiff to an interest in a property owned by the defendant (his mistress) to which he had contributed financially. Justice Needham in that case rejected the defendant's argument that any agreement or right asserted by the plaintiff was one for, or which came about from, 'immoral purposes',<sup>154</sup> which should have prevented relief being granted. Accordingly, the direct application of this case to the question at hand in *Ashton (No 2)* was limited, given it concerned extramarital cohabitation and not the provision of sexual services for reward — although relevant, as noted above, was the fact that Needham J endorsed the balancing test set out in Diplock LJ's judgment in *Hardy*.

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<sup>145</sup> *Ashton (No 2)* [2012] NSWSC 3 (16 January 2012) [37].

<sup>146</sup> *Ibid* [38].

<sup>147</sup> *Ibid*.

<sup>148</sup> *Ibid* [39]–[44], [48].

<sup>149</sup> 18 Cal 3d 660 (1976).

<sup>150</sup> [1982] 2 NSWLR 80.

<sup>151</sup> (1986) 4 BPR 97262, 9245.

<sup>152</sup> (1993) DFC ¶95-140.

<sup>153</sup> *Ashton (No 2)* [2012] NSWSC 3 (16 January 2012) [45]–[47], [50]–[51].

<sup>154</sup> Presumably referencing the fact that it promoted/concerned extramarital cohabitation and provided for the maintenance of the defendant as the plaintiff's mistress.

In light of the foregoing, Brereton J stated in *Ashton (No 2)* that there were two notable features deriving from the analysed cases that prevented a contract from being unenforceable on the ground of immorality:<sup>155</sup> (a) the contract did not bring about a state of extramarital cohabitation, but made provision for one that already existed — being a distinction recognised in *Fender v St John-Mildmay*,<sup>156</sup> *Andrews*,<sup>157</sup> and *Seidler*.<sup>158, 159</sup> and (b) the contract did not involve meretricious sexual services, ‘but a sexual relationship as part only of a wider relationship that included cohabitation and aspects of mutual support’.<sup>160</sup>

The judgment concluded that because no case had stood contrary to the proposition that contracts for the provision of meretricious sexual services were unenforceable, that position still prevailed. This was despite acknowledging that ‘social mores’ had continued to change since when the decisions premising that proposition had been handed down.<sup>161</sup>

As is to be appreciated from the above, and from the foregoing analysis set out in this article, the judgment did not include:

- (i) An analysis of the changes in the legislative landscape since the decisions in *Seidler* and *Markulin* and, in particular, the change effected by the enactment of the *Disorderly Houses Amendment Act 1995* (NSW) (see above). Nor was there a thorough examination of the changes in social mores since the decisions of *Seidler* and *Markulin*;
- (ii) An examination of other sources informative of the current state of public policy, including authoritative legal textbooks. For instance, the view expressed in the 11<sup>th</sup> Australian edition of *Cheshire and Fifoot’s Law of Contract* as to the ongoing existence of the head of public policy denouncing contracts involving sexual immorality (it is ‘based on old decisions that now appear anachronistic’) was equally present in the 9<sup>th</sup> edition, which was available when *Ashton (No 2)* was decided;<sup>162</sup>
- (iii) An inquiry, despite citing *Nichols* and *Andrews*, as to whether the gravity of the ‘anti-social’ act of providing sexual services for reward (and enforcing the contract) was outweighed by the social harm that would be caused if relief was refused. No examination was undertaken as to whether it would be more harmful to refuse to enforce contracts for meretricious sexual services in light of the

<sup>155</sup> *Ashton (No 2)* [2012] NSWSC 3 (16 January 2012) [49].

<sup>156</sup> [1938] AC 1, 42, 49 (Lord Wright).

<sup>157</sup> [1973] Qd R 93, 101–2 (Stable J).

<sup>158</sup> [1982] 2 NSWLR 80, 87, 89–90 (Hope JA), 95 (Reynolds JA).

<sup>159</sup> This distinction is nowadays without significance given that contracts concerning or providing for extramarital cohabitation are no longer contrary to public policy or unenforceable, as outlined above: see, eg, above nn 35–9 and accompanying text.

<sup>160</sup> *Ashton (No 2)* [2012] NSWSC 3 (16 January 2012) [49].

<sup>161</sup> *Ibid* [50].

<sup>162</sup> N C Seddon and M P Ellinghaus, *Cheshire and Fifoot’s Law of Contract* (LexisNexis, 9<sup>th</sup> Australian ed, 2008) 926 [18.27] (citations omitted).

recognition by Parliament (codified in s 20 of the *Restricted Premises Act 1943* (NSW)) that prostitution often involves the exploitation of vulnerable women and that the refusal of any relief would compound such exploitation; and

- (iv) An undertaking of the cautious process espoused by Mason J in *Hayden (No 2)*, or an acknowledgement of the high threshold imposed by Asquith LJ's dictum in *Monkland* (as cited with approval by Mason J in *Hayden (No 2)*) as to when public policy can be resorted to in order to render a contract unenforceable.

When regard is had to these matters, it is contended that Brereton J arguably ought not have refused Ms Ashton's claim on the basis that contracts for meretricious sexual services are contrary to public policy and unenforceable.

Finally, it is to be noted that Boddice J in *Leighton Contractors Pty Ltd v O'Carrigan* followed the conclusion reached by Brereton J in *Ashton (No 2)*.<sup>163</sup> That case concerned property said to have been promised to the fourth defendant by the first defendant in return for the former providing to the latter sexual services. Justice Boddice held in that case that no agreement had come into existence and in obiter dictum stated in passing (in a single paragraph) that even if the alleged agreement had been proved, its enforcement would be contrary to public policy — citing Brereton J in *Ashton (No 2)*.<sup>164</sup> Given Boddice J's prior reasoning, the passing nature of the reference to *Ashton (No 2)* is readily understandable, as is the fact that Boddice J did not grapple with any of the points raised in this article, which, therefore, renders the decision of limited assistance.

However, before leaving this point, and while noting that this article has focused on the position in NSW, it is worth mentioning that in Queensland not only are brothels legal, Parliament has decreed that lawfully employed sex workers are not to be discriminated against because of their chosen employment.<sup>165</sup> That point would appear to be relevant in assessing whether, in that State, public policy still demands, or allows, a wholesale prohibition on the enforceability of contracts for the provision of meretricious sexual services.

## V Conclusion

It is contended that, at least in NSW in 2018, it is incorrect to state that contracts for meretricious sexual services are necessarily contrary to public policy and unenforceable. When proper regard is had both to the limited role that public policy occupies in judicial decision-making, and to the contemporary dictates of that head of public policy, as informed by the present-day legislative and social landscape, it is difficult to justify a blanket prohibition on the enforcement of all contracts

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<sup>163</sup> [2016] QSC 223 (30 September 2016) [161].

<sup>164</sup> *Ibid.*

<sup>165</sup> *Anti-Discrimination Act 1991* (Qld) s 7(l). This provision prohibits discrimination on the basis of the attribute of 'lawful sexual activity', which is defined in the Dictionary to the Act as: 'a person's status as a lawfully employed sex worker, whether or not self-employed'. See also, incidentally, in the ACT, the *Discrimination Act 1991* (ACT) s 7(1)(q), which includes 'profession, trade, occupation or calling' as a potential ground of discrimination.

concerning the provision of sexual services for reward. The act of providing sexual services for reward is no longer so morally repugnant that to permit, in any circumstances, the enforcement of such contracts will necessarily do substantial injury to society. Rather, at least so far as an action is brought by a service provider for services rendered, greater social harm arises from refusing to grant relief in respect of such a contract than from granting relief.

# *Before the High Court*

## *Australian Securities and Investments Commission v Kobelt: Evaluating Statutory Unconscionability in the Cultural Context of an Indigenous Community*

**Sharmin Tania\* and Rachel Yates†**

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### *Abstract*

The concept of ‘unconscionable dealing’ in statutory consumer protection provisions, such as s 12CB of the *Australian Securities and Investments Commission Act 2001* (Cth), has been the subject of extensive consideration in the Federal Court of Australia and the superior courts of the states. The evaluative approach taken by the courts is emerging as a principled approach in its own right, although informed by equity’s jurisdiction. The upcoming appeal in *Australian Securities and Investments Commission v Kobelt* provides the High Court of Australia with the opportunity to further articulate the application of the evaluative approach to be undertaken by Australian courts. The factual matrix provides a unique impetus for the High Court to do so, involving the intersection of national financial services laws with the cultural norms and practices of the residents of the Anangu Pitjantjatjara Yankunytjatjara Lands in South Australia when purchasing daily necessities from a remote general store. This column argues that the Full Court of the Federal Court erred in its use of the cultural norms and practices of the Anangu community to conclude that conduct, which would otherwise be unconscionable dealing, is not so. The High Court is expected to elucidate the correct application of the evaluative process in assessing statutory unconscionability where the cultural norms and practices of the consumer differ from that of the broader Australian community.

## **I Introduction**

The introduction of statutory prohibitions on unconscionability in commercial transactions has seen a rise in unconscionable dealing claims being framed as statutory contraventions, rather than under the general law.<sup>1</sup> In connection with the

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<sup>1</sup> The statutory unconscionable conduct schemes have their origins in s 52A of the *Trade Practices Act 1974* (Cth), introduced by the *Trade Practices Revision Act 1986* (Cth) s 22: *Attorney-General (NSW) v World Best Holdings Ltd* (2005) 63 NSWLR 557, 565 [18] (Spigelman CJ) (‘*World Best Holdings*’). Similar provisions can now be found in s 21 of the *Australian Consumer Law*

supply of financial services, s 12CB(1) of the *Australian Securities and Investments Commission Act 2001* (Cth) ('ASIC Act') prohibits a person from engaging in conduct 'that is, in all the circumstances, unconscionable'. The meaning of the term 'unconscionable' is not defined for the purposes of s 12CB(1). The courts have interpreted the section as being informed by the concept of unconscionability in equity.<sup>2</sup> However, s 12CB(1) is expressly not limited by the 'unwritten law'<sup>3</sup> and the statutory provisions are considered to permit a broader concept.<sup>4</sup> Section 12CC(1) incorporates a non-exhaustive list of factors that the court may consider when assessing if conduct is unconscionable. These factors 'assist in setting a framework for the values that lie behind'<sup>5</sup> the commercial conscience in s 12CB — values primarily drawn from equity, but including the concept of 'good faith' in contract law.<sup>6</sup>

The principles giving rise to the jurisdiction of equity to relieve against unconscionable dealing are well established and have been articulated by the High Court of Australia most recently in *Thorne v Kennedy* as follows:

A conclusion of unconscionable conduct requires the innocent party to be subject to a special disadvantage 'which seriously affects the ability of the innocent party to make a judgment as to [the innocent party's] own best interests'. The other party must also unconscientiously take advantage of that special disadvantage. This has been variously described as requiring 'victimisation', 'unconscientious conduct', or 'exploitation'. Before there can be a finding of unconscientious taking of advantage, it is also generally necessary that the other party knew or ought to have known of the existence and effect of the special disadvantage.<sup>7</sup>

The relevant factors that may weigh in evaluating whether conduct under consideration in a particular case is unconscionable in equity 'cannot be comprehensively catalogued'.<sup>8</sup> The reason is that every case is dependent on its circumstances. In *Thorne*, the High Court highlighted the 'evaluative nature of the judgment involved in determining whether the vitiating factors have been established'.<sup>9</sup>

Previous cases before the High Court have either not given the Court the opportunity to articulate the evaluative approach required for the application of the

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(*Competition and Consumer Act 2010* (Cth) sch 2) and in state legislation, such as s 62B of the *Retail Leases Act 1994* (NSW).

<sup>2</sup> See, eg, *Paciocco v Australia and New Zealand Banking Group Ltd* (2015) 236 FCR 199, 271 [283] (Allsop CJ) (Besanko and Middleton JJ agreeing) ('*Paciocco FCAFC*'). The provisions have been interpreted consistently: see, eg, *Ipstar Australia Pty Ltd v APS Satellite Pty Ltd* (2018) 329 FLR 149, 184–7 [181]–[199] (Bathurst CJ) ('*Ipstar*').

<sup>3</sup> *ASIC Act 2001* (Cth) s 12CB(4)(a).

<sup>4</sup> *World Best Holdings* (2015) 63 NSWLR 557, 566 [21] (Spigelman CJ); *Australian Securities and Investments Commission v National Exchange Pty Ltd* (2005) 148 FCR 132, 140 [30].

<sup>5</sup> *Paciocco FCAFC* (2015) 236 FCR 199, 272 [285] (Allsop CJ).

<sup>6</sup> *Ibid.*

<sup>7</sup> *Thorne v Kennedy* (2017) 91 ALJR 1260, 1272 [38] (citations omitted) (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ) ('*Thorne*').

<sup>8</sup> *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 214 CLR 51, 81 [68] (Kirby J) ('*ACCC v Berbatis*').

<sup>9</sup> (2017) 91 ALJR 1260, 1273 [43] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

statutory prohibition fully, or the High Court has declined to hear the argument.<sup>10</sup> However, it appears from the High Court of Australia’s decision in *Paciocco HCA* that the High Court agrees with the evaluative approach described by Allsop CJ of the Federal Court of Australia for assessing statutory unconscionability.<sup>11</sup>

Chief Justice Allsop stated in *Paciocco FCAFC* that the judicial technique to be applied by the court entails a close examination of ‘the complete attendant facts and rational justification’ and assessment and characterisation of the impugned conduct ‘against the standard of business conscience’.<sup>12</sup> Inherent in that standard are the ‘values and norms that Parliament must be taken to have considered relevant to the assessment of unconscionability’.<sup>13</sup> The relevant factors to be identified and considered against that statutory standard include, but are not limited to, the considerations set out in s 12CC(1) of the *ASIC Act*.<sup>14</sup> Crucially, none of the considerations should be examined in isolation, and the presence or absence of one or more of the relevant factors is not determinative.<sup>15</sup>

The application of this evaluative framework is at the heart of the appeal in *Australian Securities and Investments Commission v Kobelt*.<sup>16</sup>

## II Facts and Litigation History

For approximately 30 years, Mr Lindsay Kobelt operated ‘Nobbys Mintabie General Store’ (‘Nobbys’) in Mintabie, located in the Anangu Pitjantjara Yankunytjatjara Lands (‘APY Lands’) in South Australia.<sup>17</sup> A significant part of Nobbys’ business was the sale of second-hand cars, although it also sold groceries and other items.<sup>18</sup> In 2008, Mr Kobelt commenced providing ‘book-up’ to Nobbys’ Anangu customers and book-up became the only form of credit available to the Anangu customers.<sup>19</sup>

Under his book-up system, customers wanting to access credit had to provide Mr Kobelt with the debit card linked to their account into which their wages or Centrelink payments were paid and the personal identification number (‘PIN’) for

<sup>10</sup> See, eg *ACCC v Berbatis* (2003) 214 CLR 51; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392 (‘*Kakavas*’) (both concerning s 51AA of the *Trade Practices Act 1974* (Cth), a statutory prohibition on conduct that ‘is unconscionable within the meaning of the unwritten law’). In *Paciocco v Australia and New Zealand Banking Group Ltd*, the parties agreed the content of the statutory norm, so the Court was not called upon to consider it: (2016) 258 CLR 525, 584 [180] (Gageler J) (‘*Paciocco HCA*’). The High Court has previously declined a special leave application from the Full Court of the Federal Court in *Australian Competition and Consumer Commission v Lux Distributors Pty Ltd* [2013] FCAFC 90 (15 August 2013) (‘*ACCC v Lux*’); *Lux Distributors Pty Ltd v Australian Competition and Consumer Commission* [2014] HCA51 55 (12 March 2014).

<sup>11</sup> (2016) 258 CLR 525, 584–7 [180]–[189] (Gageler J), 620 [294] (Keane J). See also *Commonwealth Bank of Australia v Kojic* (2016) 249 FCR 421, 434 [55] (Allsop CJ).

<sup>12</sup> (2015) FCR 199, 276 [306].

<sup>13</sup> *Ibid* 266 [262].

<sup>14</sup> See also *Ipstar* (2018) 329 FLR 149, 203 [270] (Leeming JA).

<sup>15</sup> See also *Australian Securities and Investments Commission v Westpac Banking Corporation (No 2)* (2018) 357 ALR 240, 322 [2177] (Beach J) (‘*ASIC v Westpac*’).

<sup>16</sup> High Court of Australia, Case No A32/2018 (‘*Kobelt HCA*’).

<sup>17</sup> *Australian Securities and Investment Commission v Kobelt* [2016] FCA 1327 (9 November 2016) (White J) 3 [1], 6 [19], (‘*Kobelt*’).

<sup>18</sup> *Ibid* 7 [24], 17–18 [74].

<sup>19</sup> *Ibid* 3 [2], 9 [34].

their card as a form of security.<sup>20</sup> Customers were asked to provide details of the income and Centrelink amounts and when they were paid.<sup>21</sup> Mr Kobelt agreed informally with customers that he would take all of the money in their account from time to time, but that he would allow them to access some of the amount he had taken, usually around 50%.<sup>22</sup> Typically, he retained possession of the card and PIN until the customer paid their debt.<sup>23</sup> Mr Kobelt, or his son, made withdrawals from customers' accounts at times that precluded customers having the practical opportunity to access money in their account before Mr Kobelt did.<sup>24</sup> The total amount Mr Kobelt withdrew from customers' accounts was described as 'substantial'.<sup>25</sup>

Usually, customers were only able to access the amounts of money that Mr Kobelt permitted by returning to Nobbys to purchase goods, access cash, or through a system of 'purchase orders' to other stores.<sup>26</sup> Generally, Mr Kobelt did not permit customers to have access to the full amount he had permitted at any one time, but would curtail that amount, saying he wanted 'to ensure that his customers did not spend all their money at once'.<sup>27</sup> The recordkeeping for Nobbys' book-up system was 'rudimentary', with it being difficult to identify the state of the customers' account at any given time.<sup>28</sup>

In 2014, ASIC commenced proceedings against Mr Kobelt in the Federal Court of Australia alleging, inter alia, that since at least 1 June 2008, Mr Kobelt had engaged in unconscionable conduct in contravention of s 12CB of the *ASIC Act* in operating his book-up system.<sup>29</sup> ASIC brought its case at trial on the basis that Mr Kobelt's conduct in relation to 117 customers constituted a system of conduct or pattern of behaviour within the meaning of s 12CB(4) of the *ASIC Act*.<sup>30</sup>

The primary judge found that Mr Kobelt had contravened s 12CB.<sup>31</sup> The Full Federal Court overturned this decision on appeal.<sup>32</sup> The joint judgment of Besanko and Gilmour JJ emphasised the customers' voluntary entry into and understanding of the book-up system and lack of predation by Mr Kobelt to arrive at the conclusion that the conduct was not 'unconscionable' within the meaning of s 12CB(1).<sup>33</sup> Justice Wigney agreed with their Honours' reasons, but delivered his own judgment

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<sup>20</sup> Ibid 7 [28].

<sup>21</sup> Ibid 8 [30].

<sup>22</sup> Ibid 8 [31], 15 [59]–[60]. The primary judge found that if a customer placed a limit on the amount that Mr Kobelt could take from his or her account, Mr Kobelt would generally, but not always, comply with that limit.

<sup>23</sup> Ibid 7–8 [29].

<sup>24</sup> Ibid 12 [46]–[47].

<sup>25</sup> The primary judge noted that in a 29-month period, Mr Kobelt withdrew \$984 147.90 from the accounts of 85 customers: *Australian Securities and Investments Commission v Kobelt* [2017] FCA 387 (13 April 2017) 5 [19].

<sup>26</sup> *ASIC v Kobelt* [2016] FCA 1327 (9 November 2016) 8 [31] (White J).

<sup>27</sup> Ibid 14 [56] (White J).

<sup>28</sup> Ibid 16–17 [69]–[70], 17–18 [74].

<sup>29</sup> Ibid 4 [4].

<sup>30</sup> Ibid 4 [5].

<sup>31</sup> Ibid 142 [624].

<sup>32</sup> *Kobelt v Australian Securities and Investments Commission* (2018) 352 ALR 689, 739 [287] (Besanko and Gilmour JJ), 760 [392] (Wigney J) ('*Kobelt v ASIC*').

<sup>33</sup> Ibid 735–40 [261]–[269].

emphasising the weight to be given to the historical and cultural context in which the book-up system operated when determining the conscionability of Mr Kobelt's conduct.<sup>34</sup>

ASIC was granted special leave to appeal to the High Court on giving an undertaking not to seek its costs.<sup>35</sup>

### III Questions to be Addressed on Appeal

Three legal questions are likely to be addressed by the High Court on ASIC's submissions:

- (a) Should the voluntary entry of a customer into a transaction exclude or outweigh the relevance of the vulnerability of the customer?
- (b) Can an absence of subjective bad faith or dishonesty on the part of the supplier preclude a finding of unconscionability?
- (c) Can the historical and cultural norms and practices of the customer be used so as to justify conduct as conscionable that would otherwise be unconscionable?<sup>36</sup>

As our discussion of these three questions below will show, *Kobelt HCA* provides the High Court with an opportunity to illuminate the correct application of the evaluative process by weighing all the interconnected circumstances against a norm of commercial conscience to arrive at a logical conclusion on the unconscionability of the impugned conduct.

### IV Relevance and Weight of Customer Characteristics and Supplier State of Mind

In our view, ASIC's submissions in the appeal highlight errors in the Full Federal Court's consideration of factors associated with customers' characteristics and suppliers' conduct. On the first issue in the appeal, the Full Federal Court gave insufficient consideration to the vulnerability of the Anangu customers by giving undue weight to their voluntariness in entering into, and their understanding of, the book-up system.<sup>37</sup>

#### A Vulnerability and Voluntariness

The plurality in *Thorne* observed that the word 'voluntary' is a variable expression that takes its 'colour from the particular context and purpose in which [it is] used'.<sup>38</sup> Although a person may be perfectly competent to understand and intend to do something, there can still be a question as to how their intention to enter into the

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<sup>34</sup> Ibid 741 [296].

<sup>35</sup> *Australian Securities and Investments Commission v Kobelt* [2018] HCA Trans 153 (17 August 2018).

<sup>36</sup> ASIC, 'Appellant's Submissions with Redacted Attachments', Submission in *ASIC v Kobelt*, Case No A32/2018, 5 October 2018, 1 [2] ('*ASIC Submissions*').

<sup>37</sup> *ASIC Submissions*, above n 36, 6 [22]–[23].

<sup>38</sup> *Thorne* (2017) 91 ALJR 1260, 1282 [91] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ), quoting *Tofilau v The Queen* (2007) 231 CLR 396, 417 [49].

transaction was produced.<sup>39</sup> According to the plurality, ‘[t]he question whether a person’s act is “free” requires consideration of the extent to which the person was constrained in assessing alternatives and deciding between them.’<sup>40</sup> That is, voluntariness should not be considered in isolation from vulnerability, rather it should be considered in the context of vulnerability.

The interconnectedness of voluntariness and vulnerability is exemplified by the circumstances of *Kobelt*. Most of Nobbys’ Anangu customers were residents of Mimili and Indulkana, two remote aboriginal communities in South Australia.<sup>41</sup> There were no mainstream financial or credit facilities in those communities and, crucially, even if there were, the mainstream credit facilities would have been unsuitable to Anangu customers, since they did not have assets to offer as security for a loan. The voluntary nature of their entry into the book-up arrangement should therefore be considered in the context of the lack of alternative financial services.

Vulnerability is also an important contextual consideration, as it compromises the ability to ‘perceive, judge and protect’ one’s own interest.<sup>42</sup> An element of unconscionable conduct as illuminated by Mason J in *Commercial Bank of Australia Ltd v Amadio* is that the innocent party’s ability to make a judgement as to his or her own best interest is seriously affected by the special disadvantage.<sup>43</sup> Accordingly, the Anangu customers’ voluntary entry into the book-up arrangement with Mr Kobelt needs to be considered in the context of their low level of financial literacy;<sup>44</sup> limited assets, income, and economic opportunities;<sup>45</sup> and lack of access to mainstream banking facilities.<sup>46</sup> The voluntary nature of the transaction should not deprive them of protection against exploitation by those in a stronger position, a principle that goes to the root of the doctrine of unconscionability.<sup>47</sup>

Further, the two equitable doctrines of undue influence and unconscionable dealing must be distinguished with regard to the place of voluntariness of the innocent party. Undue influence relates to situations in which ‘the will of the innocent party is not independent and voluntary because it is overborne’.<sup>48</sup> Undue influence has been described as arising where a person is not a ‘free agent’ due to the influence over the mind by the ‘deliberate contrivance’ of another.<sup>49</sup> Justice Gordon opined in *Thorne* that ‘establishing a special disadvantage ... for the

<sup>39</sup> *Thorne* (2017) 91 ALJR 1260, 1282 [91] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ), citing *Huguenin v Baseley* (1807) 14 Ves June 273, 300; *Bridgewater v Leahy* (1998) 194 CLR 457, 491 [118].

<sup>40</sup> *Thorne* (2017) 91 ALJR 1260, 1270 [32] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

<sup>41</sup> *Kobelt v ASIC* (2018) 352 ALR 689, 702–3 [70].

<sup>42</sup> *ASIC Submissions*, above n 36, 11 [33].

<sup>43</sup> (1983) 151 CLR 447, 462 (Mason J) (*‘Amadio’*). This point has been cited in *Thorne* (2017) 91 ALJR 1260, 1279 [74]; *ASIC v Westpac* (2018) 357 ALR 240, 330 [2219] (Beach J).

<sup>44</sup> *Kobelt v ASIC* (2018) 352 ALR 689, 702 [68], 704 [81] (Besanko and Gilmour JJ).

<sup>45</sup> *Ibid* 702 [68], 703 [73] (Besanko and Gilmour JJ).

<sup>46</sup> *Ibid* 703 [71] (Besanko and Gilmour JJ).

<sup>47</sup> *Paciocco FCAFC* (2015) 236 FCR 199, 271 [282] (Allsop CJ), citing *Amadio* (1983) 151 CLR 447, especially 461–2, 474–5; *Blomley v Ryan* (1956) 99 CLR 362, especially 405 (Fullagar J), 415, 428–9 (Kitto J); *Louth v Diprose* (1992) 175 CLR 621, 627 (Brennan J), 637 (Deane J), 650 (Toohey J); *Bridgewater v Leahy* (1998) 194 CLR 457, 485–6 [100]; *Kakavas* (2013) 250 CLR 392, 393–5.

<sup>48</sup> *Amadio* (1983) 151 CLR 447, 461 (Mason J), quoted in *Thorne* (2017) 91 ALJR 1260, 1272 [40] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ), 1285 [115] (Gordon J).

<sup>49</sup> *Johnson v Buttress* (1936) 56 CLR 113, 134 (Dixon J); *Hall v Hall* (1968) LR 1 P&D 481, 482, cited in *Thorne* (2017) 91 ALJR 1260, 1270 [31].

purposes of unconscionable conduct does not require asking whether the weaker party lacked the capacity to exercise independent judgment'.<sup>50</sup> Statutory unconscionability is connected with the doctrine of unconscionable dealing, not undue influence. Hence, in unconscionability the exercise of the voluntary will of the innocent party can be the result of the disadvantageous position in which that party is placed and of the other party taking advantage of that position.<sup>51</sup>

The relevant factors identified in the *ASIC Act* must also be considered, in particular, the inequality of the bargaining position between the supplier and the consumer (s 12CC(1)(a)) and the customers' understanding of the documents relating to the supply of the financial services (s 12CC(1)(c)). In relation to s 12CC(1)(c), 'understanding' should not be a 'bright line' test. For example, in *Kobelt*, the primary judge considered the understanding of Nobbys' customers as falling short of an informed understanding because of the rudimentary style of recordkeeping.<sup>52</sup>

## **B Predation and Exploitation**

A second issue in the appeal arises from the Full Federal Court overruling the finding of the primary judge that Mr Kobelt engaged in predation and exploitation. This aspect of the appeal raises a significant question of legal principle: whether an absence of subjective bad faith or dishonesty precludes a finding of unconscionability.<sup>53</sup> In our view, the Full Federal Court erred in holding that dishonesty, fraudulence and bad faith are essential requirements for a finding of unconscionability.

The primary judge found that Mr Kobelt was engaged in predation and exploitation of his Anangu customers by tying the customers to Nobbys and maintaining a continuing dependence by customers on Nobbys;<sup>54</sup> and by having access to and withdrawing the whole funds available in customers' accounts.<sup>55</sup> While the Full Federal Court agreed with these facts, it concluded that Nobby's customers' understanding of the book-up arrangement, their voluntary entry to the system, and overall advantages of the system trumped any finding of predation and exploitation.<sup>56</sup> This reasoning appears to give too much weight to the factual findings of voluntariness and the advantages to the customers, and does not take into account other factual findings of the primary judge. These other factual findings include the undisturbed finding that the tying of customers to Nobbys was not required for the protection of Mr Kobelt's commercial interests,<sup>57</sup> and the example of predation given by the primary judge, being an occasion in which Mr Kobelt was able to draw

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<sup>50</sup> *Thorne* (2017) 91 ALJR 1260, 1283 [94] (Gordon J) citing *Amadio* (1983) 151 CLR 447, 461.

<sup>51</sup> *Amadio* (1983) 151 CLR 447, 461; also cited in *Thorne* (2017) 91 ALJR 1260, 1272 [40], *ASIC Submissions*, above n 36, 10–11 [32].

<sup>52</sup> *ASIC v Kobelt* [2016] FCA 1327 (9 November 2016) 126 [541]–[546] (White J).

<sup>53</sup> *ASIC Submissions*, above n 36, 1 [2].

<sup>54</sup> *ASIC v Kobelt* [2016] FCA 1327 (9 November 2016) 125 [538], 138 [606], [620] 141 (White J).

<sup>55</sup> *Ibid* 12 [46], 128 [556], 139 [606].

<sup>56</sup> *Kobelt v ASIC* (2018) 352 ALR 689, 735–6 [267]–[268] (Besanko and Gilmour JJ).

<sup>57</sup> *ASIC v Kobelt* [2016] FCA 1327 (9 November 2016) 140 [616] (White J).

more money than authorised from customers' accounts held with a particular bank because of a temporary 'glitch' in its systems.<sup>58</sup>

As a result of overruling the primary judge's factual findings, Bensanko and Gilmour JJ found that there was no predatory conduct or exploitation to balance against the customers' voluntary entry into, understanding of, and receipt of advantages from the book-up arrangements. Justice Wigney agreed with this finding and found there was no breach of trust, and therefore no unconscionability, in Mr Kobelt's requirement that customers relinquish their debit card and PIN.<sup>59</sup> Justice Wigney found Mr Kobelt 'exercised a degree of good faith, did not exert any undue influence and was neither fraudulent nor dishonest'.<sup>60</sup>

We argue that the Full Federal Court erred in holding that dishonesty, fraudulence and bad faith are essential requirements for predation and exploitation. Predation and exploitation, as they refer to the taking advantage of customers' vulnerability, are an essential element of unconscionable dealing in general principles of equity.<sup>61</sup> In *Thorne*, the plurality explained 'victimisation' or 'exploitation' as means of describing the requirement in equity's jurisdiction that the stronger party must unconscientiously take advantage of the special disadvantage of the weaker party.<sup>62</sup> The only subjective element that their Honours said was generally necessary was that 'the other party knew or ought to have known of the existence and effect of the special disadvantage'.<sup>63</sup> In *Bridgewater v Leahy*, Gaudron, Gummow and Kirby JJ accepted that 'victimisation ... can consist either of the active extortion of a benefit or *the passive acceptance of a benefit in unconscionable circumstances*'.<sup>64</sup> In *Amadio*, Deane J found no suggestion of 'dishonesty or moral obliquity in the dealings between Mr and Mrs Amadio and the bank'.<sup>65</sup> At general law, unconscionable dealing is a species of equitable fraud, and actual deceit or fraud is unnecessary.<sup>66</sup>

In the statutory context, there are two avenues through which a subjective element has emerged. The first is through s 12CC(1)(l), which provides that one of the factors the court may have regard to is, *inter alia*, 'the extent to which the supplier and service recipient acted in good faith'. 'Good faith' has been described as a 'much mooted' concept.<sup>67</sup> There have been various judicial attempts to describe the parameters of its meaning.<sup>68</sup> Carter and Peden maintain that good faith 'is not a fixed

<sup>58</sup> *Ibid* 21 [97], 139 [609].

<sup>59</sup> *Kobelt v ASIC* (2018) 352 ALR 689, 750 [348] (Wigney J).

<sup>60</sup> *Ibid* 756 [373].

<sup>61</sup> *ASIC Submissions*, above n 36, 15 [41].

<sup>62</sup> *Thorne* (2017) 91 ALJR 1260, 1272 [38] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ). See also at 1285 [114] (Gordon J).

<sup>63</sup> *Thorne* (2017) 91 ALJR 1260, 1272 [38] (Kiefel CJ, Bell, Gageler, Keane and Edelman JJ).

<sup>64</sup> *Bridgewater v Leahy* (1998) 194 CLR 457, 479 [76] (emphasis in original), quoting *Hart v O'Connor* [1985] AC 1000, 1024. See also *Wu v Ling* [2016] NSWCA 322 (24 November 2016) [14] (Leeming JA).

<sup>65</sup> *Amadio* (1983) 151 CLR 447, 478.

<sup>66</sup> *Blomley v Ryan* (1956) 99 CLR 362, 385 (McTiernan J); *Kavvas* (2013) 250 CLR 392, 400–01 [17].

<sup>67</sup> Jenny Buchan and Gehan Gunasekara 'Administrative Law Parallels with Private Law Concepts: Unconscionable Conduct, Good Faith and Fairness in Franchise Relationships' (2015) 36(2) *Adelaide Law Review* 541, 542.

<sup>68</sup> See eg, *Paciocco FCAFC* (2015) 236 FCR 199, 273 [288] (Allsop CJ).

concept',<sup>69</sup> and is dependent on the context in which it is employed.<sup>70</sup> What is apparent is that good faith should not be applied so as to subsume the statutory concept of unconscionability and it is only one of the circumstances to be weighed by the court.<sup>71</sup>

Second, the fact that the Australian courts have sought to equate the statutory concept of unconscionability with the test of a 'high level of moral obloquy' also arguably imports a subjective element.<sup>72</sup> The submissions of Mr Kobelt before the High Court endorse this test to argue for a 'very high bar' to prove statutory unconscionability'.<sup>73</sup>

The substitution of 'moral obloquy' for the words of the statute has been criticised previously, as it would 'import into unconscionability a necessary conception of dishonesty'.<sup>74</sup> Such a substitution is inconsistent with the equitable jurisdiction in which the courts have denied the need for 'immoral or dishonest motives' on the part of the party alleged to act unconscionably.<sup>75</sup>

However, predation, exploitation and dishonesty continue to be referred to by the Full Federal Court as alternative descriptors of the meaning of unconscionability, not merely as factors relevant to the circumstantial matrix.<sup>76</sup> Most recently, the Full Federal Court stated:

To behave unconscionably should be seen, as part of its essential conception, as serious, often involving dishonesty, predation, exploitation, sharp practice, unfairness of a significant order, a lack of good faith, or the exercise of economic power in a way worthy of criticism.<sup>77</sup>

<sup>69</sup> J W Carter and Elizabeth Peden, 'Good Faith in Australian Contract Law' (2003) 19(2) *Journal of Contract Law* 155, 157. On the meaning, interpretation and implication of good faith in contract, see generally J W Carter and Wayne Courtney, 'Good Faith in Contracts: Is There an Implied Promise to Act Honestly?' (2016) 75(3) *Cambridge Law Journal* 608; J W Carter and Andrew Stewart, 'Interpretation, Good Faith and the "True Meaning" of Contracts: The Royal Botanic Decision' (2002) 18(2) *Journal of Contract Law* 182.

<sup>70</sup> J W Carter and Elizabeth Peden, 'Good Faith in Australian Contract Law' (March–May 2003) 17(1) *Commercial Law Quarterly* 15, 19–20.

<sup>71</sup> See generally Bryan Horrigan, 'Unconscionability Breaks New Ground — Avoiding and Litigating Unfair Client Conduct after the ACCC Test Cases and Financial Services Reforms' (2002) 7 *Deakin Law Review* 73, 85–6.

<sup>72</sup> See, eg, *World Best Holdings* (2005) 63 NSWLR 557, 583–4 [119]–[122] (Spigelman CJ).

<sup>73</sup> Lindsay Kobelt, 'Respondent's Submission', Submission in *ASIC v Kobelt*, Case No A32/2018, 2 November 2018, 17 [62].

<sup>74</sup> *Paciocco FCAFC* (2015) 236 FCR 199, 266 [262] (Allsop CJ). See also *Australian Securities and Investment Commission v Wealth & Risk Management Pty Ltd (No 2)* (2018) 124 ACSR 351, 373 [116] (Moshinsky J).

<sup>75</sup> *Wu v Ling* [2016] NSWCA 322 (24 November 2016) [8] (Leeming JA). See also *Johnson v Smith* [2010] NSWCA 306 (17 November 2010) [5], [98]–[102]; *Paciocco FCAFC* (2015) FCR 199, 276 [305] (Allsop CJ); *Blomley v Ryan* (1956) 99 CLR 362, 385 (McTiernan J); *Kakavas* (2013) 250 CLR 392, 400–401 [17].

<sup>76</sup> See, eg, *Unique International College Pty Ltd v Australian Competition and Consumer Commission* [2018] FCAFC 155 (19 September 2018) 48–9 [155] ('*Unique v ACCC*'); *Kojic v Commonwealth Bank of Australia* (2016) 249 FCR 421, 437 [60] (Allsop CJ); *Paciocco FCAFC* (2015) 236 FCR 199, 283 [347] (Allsop CJ).

<sup>77</sup> *Unique v ACCC* [2018] FCAFC 155 (19 September 2018) 48 [155].

If such subjective elements are taken as compendious preconditions, this would result in the statutory concept of unconscionability being more restricted in its application than the equitable concept of unconscionable dealing. This seems contrary to the broader statutory concept envisaged by parliament and the courts.<sup>78</sup>

## V The Statutory Norm of Unconscionability and Cultural Norms and Practices

The third issue before the High Court is whether the Full Federal Court has made an unprecedented misuse of historical and cultural norms and practices to excuse what would otherwise be unconscionable conduct,<sup>79</sup> paving the way for formulating ‘multiple Australian consciences’ depending upon the recipient of the conduct.<sup>80</sup> This question is central to the statutory standard of unconscionability in this case. The cultural and historical factors form an aspect of the legal reasoning of the primary judge and plurality,<sup>81</sup> while being central to the legal reasoning of Wigney J of the Full Federal Court.<sup>82</sup> Justice Wigney applied the cultural norms and practices of the Anangu to alter the statutory yardstick of commercial conscience. This is exemplified in his Honour’s statement that ‘[w]hat the wider Australian society and its culture and institutions might regard as disadvantageous and unfair might be regarded by an Anangu person as in fact advantageous and reasonable.’<sup>83</sup>

The Full Federal Court’s approach should be rejected by the High Court because it leads to the potential for inversion of a finding of unconscionable conduct to conscionable conduct due to the presence of particular cultural norms and practices of the customer. The Full Federal Court’s use of the cultural norms and practices of the Anangu community is erroneous and misplaced for two reasons. First, the Full Federal Court created a lower standard of business conscience to assess the unconscionability of a conduct as it applies to the Anangu community and thereby created uncertainty as to the standard of acceptable conduct. Second, the Full Federal Court did not take into account the historical and structural factors in the context of which the cultural norms and practices, and the book-up system itself, evolved.

### A Lowering the Standard of Business Conscience

Section 12CB has, at its core, a ‘normative standard of conscience’<sup>84</sup> against which claims of statutory unconscionability must be tested.<sup>85</sup> That normative standard is

<sup>78</sup> See above n 4.

<sup>79</sup> *ASIC Submissions*, above n 36, 1 [2(c)].

<sup>80</sup> *Ibid* 20 [52].

<sup>81</sup> *ASIC v Kobelt* [2016] FCA 1327 (9 November 2016) 139 [611], 141[619], [620] (White J); *Kobelt v ASIC* (2018) 352 ALR 689, 732 [244], 733 [257(3)], 735 [262] (Besanko and Gilmour JJ), *Kobelt v ASIC* (2018) 352 ALR 689, 746–7 [328]–[332]; 749–57 [345]–[378] (Wigney J).

<sup>82</sup> *Ibid* 747 [329] (Wigney J).

<sup>84</sup> *ACCC v Lux* [2013] FCAFC 90 (15 August 2013) [23] (Allsop CJ).

<sup>85</sup> *Ibid*. See further, Rachel Yates and Sharmin Tania, ‘The Place of Cultural Values, Norms and Practices: Assessing Unconscionability in Commercial Transactions’ (2019) 45(1) *Monash University Law Review* (forthcoming).

one set by the Australian Parliament and is permeated with the recognised societal and community values and expectations that ‘consumers will be dealt with honestly, fairly and without deception or unfair pressure. These considerations are central to the evaluation of the facts by reference to the operative norm of required conscionable conduct’.<sup>86</sup>

The values and norms incorporated within that statutory standard ‘are those that Parliament has considered, or must be taken to have considered, as relevant’.<sup>87</sup> The norms and values relevant to the concept of statutory unconscionability include: the norms and values in the law, especially equity; the guidance that can be drawn from the factors in s 12CC; and ‘modern social and commercial legal values identified by Australian Parliaments and courts’.<sup>88</sup> This notion of a consistent ‘yardstick’<sup>89</sup> of commercial behaviour or ‘base norm’<sup>90</sup> is important in ensuring that the statutory prohibitions on unconscionable conduct can be applied in a principled manner, not driven by ‘idiosyncratic’ determinations in each case.<sup>91</sup>

The context of the statutory prohibition is consumer protection in the provision of financial services. It is a prohibition that applies and has been applied by the courts, across a range of circumstances, from a remote store supplying basic necessities to its retail customers, to a major bank engaged in bank bill trading.<sup>92</sup> In each circumstance, Parliament has determined that the same statutory norm of conduct should apply. If Parliament wished to permit ‘multiple Australian consciences’ in the statutory norm, it could and should have prescribed this to be the case.

Both the plurality and Wigney J appeared to be of the view that the alteration of the commercial norm of conscience was required to ensure the equality of Mr Kobelt’s customers. However, it is not consistent with Australia’s singular system of law for s 12CB to be applied in a manner to give rise to multiple norms of conduct dependent on the cultural and societal values of the customers subject to the impugned conduct.<sup>93</sup> This is particularly so when the result is not to achieve substantive equality, but to alter conduct that would be ‘extraordinary’ to ‘broader Australian society’ to one that is within commercial conscience.<sup>94</sup>

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<sup>86</sup> *ACCC v Lux* [2013] FCAFC 90 (15 August 2013) [23] (Allsop CJ).

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid* 274–5 [296].

<sup>89</sup> *A v BI* (No 2) (2012) 271 FLR 122, 188 [324] (Edelman J).

<sup>90</sup> *Ibid.*

<sup>91</sup> *Ipstar* (2018) 329 FLR 149, 187 [196]–[197] (Bathurst CJ); *Muschinski v Dodds* (1985) 160 CLR 583, 616 (Deane J).

<sup>92</sup> See, eg, *ASIC v Westpac* (2018) 357 ALR 240. The breadth of application of s 12CB has been extended recently, pursuant to the *Treasury Laws Amendment (Australian Consumer Law Review) Act 2018* (Cth) s 3 and sch 2 cl 1, which removes the exemption from the application of s 12CB to conduct directed to a ‘listed public company’.

<sup>93</sup> See Australian Law Reform Commission, *Recognition of Aboriginal Customary Law*, Report No 31 (1986) [58], [62].

<sup>94</sup> The proposal of ‘equality before the law’ has been raised in counter-argument to proposals to recognise Aboriginal customary laws: see *ibid* [128]. The *Racial Discrimination Act 1975* (Cth) and its state and territory counterparts aim to achieve ‘substantive equality’: see *Western Australia v Ward* (2002) 213 CLR 1, 103 [115] (Gleeson CJ, Gaudron, Gummow and Hayne JJ).

## B *Historical and Structural Factors*

The plurality and Wigney J developed an alternative norm of commercial conduct, specific to the Anangu, based on expert evidence of the cultural norms and practices of remote Indigenous communities. In particular, the evidence concerned ‘boom and bust expenditure’,<sup>95</sup> ‘demand sharing’<sup>96</sup> and the ‘personalisation of financial transactions’.<sup>97</sup> The Full Federal Court used this evidence to reason that the Anangu required protection from themselves and Mr Kobelt’s book-up system provided this protection.

This approach to assessment of cultural norms and practices of an Indigenous community is particularly troubling when the historical and structural factors in which the book-up system arose are taken into consideration. The historical factors of colonial exploitation from the late 1770s and the government protectionist policies and laws in the 19<sup>th</sup> and 20<sup>th</sup> century gradually deprived members of Indigenous communities of control of their finances.<sup>98</sup> Structural factors such as lack of financial literacy and lack of access to affordable financial services served to exclude Indigenous communities from participating in financial management.<sup>99</sup> These historical and structural factors facilitated the evolution of the book-up practice.<sup>100</sup>

The full extent of these structural factors may not have been in evidence before the Federal Court. However, there was evidence before the Court that book-up developed and was used in remote communities, where there was an absence of alternative financial services and that there was ‘incommensurability’ to varying degrees between the Anangu’s ‘economic’ values and those of the market economy.<sup>101</sup> Rather than considering these factors as giving rise to vulnerability, Wigney J considered these structural factors to conclude that Mr Kobelt’s conduct was not unconscionable because his book-up system provided them with these essential financial services.<sup>102</sup> Further, as identified in ASIC’s submissions, the Full

<sup>95</sup> *Kobelt v ASIC* (2018) 352 ALR 689, 735 [262] (Besanko and Gilmour JJ), 742 [303], 751 [349]–[350] (Wigney J).

<sup>96</sup> *Ibid* 732 [244], 735 [262] (Besanko and Gilmour JJ), 742 [304], 751 [349], 751–2 [352] (Wigney J).

<sup>97</sup> *Ibid* 747 [330], 752 [354], 756 [372] (Wigney J).

<sup>98</sup> These protection Acts include *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld); *Aboriginals Preservation and Protection Act 1939* (Qld); *Aborigines’ and Torres Strait Islanders’ Affairs Act 1965* (Qld); *Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act 1934* (Qld); *Aborigines Protection Act 1909* (NSW); *Apprentices Act 1901* (NSW); *Aborigines Protection (Amendment) Act 1936* (NSW); *The Aborigines Protection Act 1886* (WA); *Aboriginals Ordinance 1918* (Cth); *Aboriginals Ordinance 1933* (Cth); *Aborigines Act 1911* (SA); *Aboriginal Protection Act 1869* (Vic); *Aborigines Welfare Ordinance 1954* (Cth). See generally, Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Unfinished Business: Indigenous Stolen Wages* (2006); Judy Atkinson, *Trauma Trails, Recreating Song Lines: The Transgenerational Effects of Trauma in Indigenous Australia* (Spinifex Press, 2002); Rosalind Kidd, *Trustees on Trial: Recovering the Stolen Wages* (Aboriginal Studies Press, 2006).

<sup>99</sup> See generally Parliamentary Joint Committee on Corporations and Financial Services, Parliament of Australia, *Money Matters in the Bush: Inquiry into the Level of Banking and Financial Services in Rural, Regional and Remote Areas of Australia* (2004).

<sup>100</sup> Nathan Boyle, ‘Book Up: Current Regulation and Options for Reform’ (2016) 8(22) *Indigenous Law Bulletin* 3, 3.

<sup>101</sup> *Kobelt v ASIC* (2018) 352 ALR 689, 746–7 [328] (Wigney J).

<sup>102</sup> *Ibid* 756 [372]–[373].

Federal Court appeared to incorrectly apply a historical standard of community expectations as to book-up to justify contemporary conduct.<sup>103</sup>

Contrary to the approach taken by the Full Federal Court, the cultural practices of remote Indigenous communities should be considered alongside the circumstances of lack of education and financial literacy to give context to the vulnerability and voluntariness of Mr Kobelt's customers. These circumstances should then be evaluated against the statutory norm of unconscionability, which has at its root 'the protection of the vulnerable from exploitation by the strong'.<sup>104</sup> As stated by Allsop CJ, the evaluation and assessment of unconscionability includes

the protection of those whose vulnerability as to the protection of their own interests places them in a position that calls for a just legal system to respond for their protection, especially from those who would victimise, predate or take advantage; a recognition that inequality of bargaining power can ... be used in a way that is contrary to fair dealing or conscience ...<sup>105</sup>

## VI Conclusion

*Kobelt* provides the ideal opportunity for the High Court to confront and articulate how the evaluative approach to statutory prohibitions on unconscionable conduct should be applied to remote Indigenous customers. We have argued that the High Court should endorse the evaluative process articulated by Allsop CJ in *Paciocco FCAFC*. In so doing, the Court should confirm that the statutory norm of conscience in s 12CB should be consistent across all commercial conduct. This will ensure that all in the Australian community are subject to the same 'yardstick' of conscience. Of course, whether that normative standard of conscience is crossed should depend on its application to the precise circumstances of the case. However, the cultural norms and practices of Indigenous customers should not be used to excuse what would otherwise be unconscionable conduct.

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<sup>103</sup> *ASIC Submissions*, above n 36, 19 [50].

<sup>104</sup> *Paciocco FCAFC* (2015) 236 FCR 199, 271 (Allsop CJ).

<sup>105</sup> *Ibid* 274 [296], quoted in *Director of Consumer Affairs Victoria v Gibson (No 3)* [2017] FCA 1148 (28 September 2017) 25 [76] (Mortimer J). See also *Paciocco FCAFC* (2015) 236 FCR 199, 266–7 [263], 268 [270], 270 [279], 271 [282] (Allsop CJ).





## **CORRIGENDUM**

**Date issued:** 30 November 2018

**Change to:** Volume 40 Number 3 September 2018 issue since the original version was published, due to a typographical error.

**Article:** Thomas Crofts, ‘Prosecuting Child Offenders: Factors Relevant to Rebutting the Presumption of *Doli Incapax*’ (2018) 40(3) *Sydney Law Review* 339.

**Page 341:** For the sentence on page 341 accompanying n 14, deletion of ‘criminal code act’ so that the sentence reads:

The rebuttable presumption of *doli incapax* for children aged 10 but not yet 14 remains a common law presumption in New South Wales (‘NSW’), South Australia and Victoria despite a 1997 recommendation that the presumption should be retained and placed on a statutory footing in all Australian jurisdictions.<sup>14</sup>

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<sup>14</sup> Australian Law Reform Commission and Human Rights and Equal Opportunities Commission, above n 6, [18.20].

